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DEFINING THE SOCIAL GROUP IN ASYLUM PROCEEDINGS: THE EXPANSION OF THE SOCIAL GROUP TO INCLUDE A BROADER CLASS OF REFUGEES

*Peter C. Godfrey**

INTRODUCTION

In Africa, the Middle East and Southeast Asia, women are subjected to genital mutilation, while bride-burning is not uncommon in India.¹ In Central America, homosexuals may be legally imprisoned and are often beaten, whereas in China, they may be subjected to electroshock therapy.² Remarkably, however, individuals who are persecuted as a result of gender or sexual orientation may not have standing to assert a successful asylum claim, while persons persecuted merely because they espouse a certain political opinion could successfully allege such a claim.

To be granted asylum, a petitioner must be persecuted or have a well-founded fear of persecution on account of any one of five factors: "race, religion, nationality, membership in a *particular social group*, or political opinion."³ Recently, several U.S. courts have narrowly construed the definition of "particular social group" in asylum proceedings and left many persecuted individuals without

* Brooklyn Law School Class of 1996. The author wishes to thank Brooklyn Law School Professors Maryellen Fullerton and Jeffrey W. Stempel and Stephen Smith, Brooklyn Law School Class of 1994, for their valuable assistance in the preparation of this Note.

¹ Jill Lawrence, *Gender Persecution New Reason for Asylum*, L.A. TIMES, Mar. 27, 1994, at 14.

² Doris Sue Wong, *More Gays Seeking U.S. Asylum*, BOSTON GLOBE, Nov. 7, 1992, at 13.

³ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1988) (emphasis added).

hope to allege a successful asylum claim. Because there is no statutory definition of "particular social group" and courts have inconsistently interpreted the term, it is difficult to ascertain the limits on social groups that are recognizable under asylum law.

Individuals who fear persecution based on gender or sexual orientation are among the groups encompassing broad demographic divisions of society that have frequently tested the boundaries of the "particular social group" category.⁴ Because persecution on account of gender and sexual orientation are not independently recognized as grounds for asylum, aliens seeking to escape such persecution must fit their claims into one of the five recognized categories.⁵ The "particular social group" is the only one of these five categories into which these claims can possibly fit.

Although inclusion in the "social group" category of asylum eligibility is the only way that those individuals persecuted because of gender or sexual orientation may allege a successful asylum claim, many courts have refused to recognize such individuals as members of coherent social groups. Instead, these courts have reasoned that members of broadly based groups often manifest characteristics, such as a "plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings," which render them too diverse a group to be recognized under asylum law.⁶

This Note examines various judicial interpretations of the term "particular social group" and identifies the characteristics that are indicative of the presence of such a group. By applying these interpretations to gender and sexual orientation-based groups, this Note argues that many individuals, who are persecuted on account of their membership in a group, are not eligible for asylum merely

⁴ Many issues that arise in considering the asylum claims of social groups based on gender and sexual orientation are unrelated. These two social groups are considered together in this Note only because they share the characteristic of encompassing a large group of people.

⁵ The five recognized categories are race, religion, nationality, membership in a particular social group and political opinion. 8 U.S.C. § 1101(a)(42)(A).

⁶ See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576-77 (9th Cir. 1986) (discussing the application of the term "particular social group" to a class of young, working class, urban males of military age).

because the group is deemed to be too broad to be considered a particular social group under asylum law. Finally, this Note concludes that the breadth of a social group is not a proper consideration for determining whether a particular social group is cognizable under asylum law.

I. BACKGROUND

A. Statutory Eligibility for Asylum on the Basis of Membership in a "Particular Social Group"

To be statutorily eligible for asylum in the United States under the Refugee Act of 1980⁷ ("Refugee Act"), an alien must show he or she is a "refugee" as defined in the Immigration and Naturalization Act⁸ ("INA"). Under the INA, a refugee is a person outside the country of his or her nationality, who is "unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of *persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*"⁹

⁷ Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C. and 22 U.S.C.).

⁸ A "refugee" is defined as:

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

8 U.S.C. § 1101 (a)(42)(A).

⁹ *Id.* (emphasis added).

Even if an alien qualifies as a "refugee," the U.S. Attorney General retains the authority to deny asylum claims, and discretionary factors must weigh in favor of the alien. The U.S. asylum program deals only with aliens who are within the borders of the United States; its provisions do not apply extraterritorially. *See Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993) (holding that

Present U.S. asylum law follows the U.N. 1951 Convention Relating to Refugees Claims¹⁰ ("Convention") and the 1967 Protocol Relating to the Status of Refugees¹¹ ("Protocol"). The Convention defined the term "refugee" and this definition was adopted by the United States and more than one hundred other signatory countries¹² in the Protocol.¹³ The United States signed the Protocol in 1968, however, U.S. asylum law did not comply with the Protocol until Congress passed the Refugee Act of 1980.¹⁴

B. Defining the Social Group Under U.S. Jurisprudence

Because the Refugee Act does not define "particular social group," one must look to case law as the primary authority on the term's meaning. Conceptually, the "particular social group" category provides a statutory framework whereby those persecuted on account of a broadly based characteristic, such as gender or sexual orientation, could foreseeably succeed in asserting an asylum

§ 243(h) does not apply extraterritorially).

¹⁰ See Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Convention].

¹¹ Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.T.S. 6223, 606 U.N.T.S. 8791 [hereinafter Protocol].

¹² Pierre Bertrand, *An Operational Approach to International Refugee Protection*, 26 CORNELL INT'L L.J. 495, 497 (1994) (stating that 114 countries have ratified either the Protocol or the Convention); M.J. BOWMAN & D.H. HARRIS, *MULTILATERAL TREATIES: INDEX AND CURRENT STATUS* 125 (8th Cum. Supp. 1991).

¹³ The Protocol adopted the Convention's definition of refugee, however, it eliminated its restriction that the events of persecution had to have been performed before January 1, 1951 and that the departure no longer needed to be as a result of such events. Protocol, *supra* note 11, art. 1(2).

¹⁴ When the Protocol was ratified in 1968, Congress did not make any changes in immigration statutes; instead, it relied on the attorney general's discretion under INA § 243(h). In 1980, Congress revised INA § 208 to include the Protocol definition of refugee and thus created the modern statutory availability for asylum. DAVID A. MARTIN, *NEW ISSUES IN IMMIGRATION LAW* 79 (1987).

claim.¹⁵ Many U.S. courts, however, have been reluctant to construe the category so liberally.

Several defining characteristics emerge from an analysis of the decisions that interpret the term "particular social group." Although the interpretations are not completely consistent with one another, collectively they offer several characteristics that indicate the presence of a recognizable social group. Some interpretations may be considered expansive because they allow for the possibility that members of large groups may be granted asylum. Other narrower interpretations, however, impose restrictions which exclude broadly based groups. Although all characteristics that are indicative of a social group restrict the size of the allowable group, some make it nearly impossible to recognize broadly based groups as statutorily permissible social groups.

1. Expansion Interpretations of the Particular Social Group

Two interpretations of the term "particular social group" include characteristics applicable to broadly based groups. First, a social group must be comprised of individuals who have a "common immutable characteristic."¹⁶ Second, members of a social group normally have similar "background, habits or social status."¹⁷

a. Common, Immutable Characteristics

In *In re Acosta*¹⁸, the Board of Immigration Appeals ("BIA") broadly interpreted "persecution on account of membership in a

¹⁵ See 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 in favor of recognizing women as a particular social group).

¹⁶ *In re Acosta*, 19 I. & N. Dec. 211, 234 (BIA 1985); see also *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir.1985); *In re Vigil*, I. & N. Interim Dec. 3050 (1988); *In re Fuentes*, I. & N. Interim Dec. 3065 (1988).

¹⁷ Office of the U.N. High Comm'r For Refugees, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (Geneva, 1980) at 19, para. 77 [hereinafter HANDBOOK].

¹⁸ 19 I. & N. Dec. at 234.

particular social group” to mean

persecution that is directed toward an individual who is a member of a group of persons all of whom share a *common, immutable characteristic*. The shared characteristic might be an innate one such as *sex*, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.¹⁹

Acosta based his claim for asylum on persecution that he suffered due to his membership in alleged social groups,²⁰ namely “COTAXI drivers²¹ and persons engaged in the transportation industry of El Salvador.”²² In denying Acosta’s asylum claim, the BIA determined that the characteristics that defined his group were not “immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages.”²³

¹⁹ *Id.* at 234 (emphases added); *see also* Saleh v. INS, 962 F.2d 234, 240 (2d Cir. 1992); *Ananeh-Firempong*, 766 F.2d at 621, 626; *Vigil*, I. & N. Interim Dec. at 3050; *Fuentes*, I. & N. Interim Dec. at 3065.

²⁰ Acosta also sought asylum on account of his political opinion. This claim was also rejected by the BIA. *Acosta*, 19 I. & N. Dec. at 211, 234.

²¹ Acosta was a founder and manager of a taxi driver cooperative in El Salvador called COTAXI. COTAXI members were threatened by what they believed to be antigovernment guerrillas who had targeted small businesses in the transportation industry for work stoppages, in hopes of damaging El Salvador’s economy. COTAXI’s board of directors refused to comply with the requests because its members wished to keep working, and as a result COTAXI received threats of retaliation which resulted in the seizing and burning of five taxis and the death of five COTAXI drivers. After he was assaulted and received three threatening notes, Acosta fled El Salvador because he feared for his life. *Id.* at 229.

²² *Id.* at 235.

²³ *Id.* at 234.

The immutable characteristic test set forth by the BIA in *Acosta* [hereinafter “Acosta test”] imposes no significant limits on the breadth of the allowable social group. Further, the BIA cites sex as a typical characteristic that could define a social group.²⁴ Thus, *Acosta* recognizes the existence of social groups defined by broadly based characteristics which may include those defined by the gender or sexual orientation of their members.

b. Similar Background Habits or Social Status

A second characteristic of a particular social group is that “members have *similar background, habits or social status*”²⁵ [hereinafter “Handbook test”]. The flexibility of this definition allows the social group category to frequently overlap with other grounds of persecution.²⁶ This characteristic, originally defined in the *Handbook on Procedures and Criteria for determining the Status of Refugees* [hereinafter “Handbook”],²⁷ has generally been considered authoritative.²⁸

In *Ananeh-Firempong v. INS*²⁹, the First Circuit coupled the Handbook test with the Acosta test to develop its definition of a particular social group.³⁰ *Ananeh-Firempong*, a Ghanaian woman

²⁴ *Id.*

²⁵ HANDBOOK, *supra* note 17, at 19, para. 77 (emphasis added).

²⁶ HANDBOOK, *supra* note 17, at 19, para. 77.

²⁷ HANDBOOK, *supra* note 17. The *Handbook*, a publication of the Office of the U.N. High Commissioners for Refugees, was intended as a practical guide signatories to the Protocol and the Convention, concerned with the determination of refugee status. HANDBOOK, *supra* note 17, at 1.

²⁸ See, e.g., *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985); *Zavala-Bonilla v. INS*, 730 F.2d 562, 567 (9th Cir. 1984). But see *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (stating that although the *Handbook* is authoritative, it provides little guidance in construing the meaning of “particular social group”).

²⁹ 766 F.2d at 621, 626.

³⁰ A “[p]articular 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

seeking asylum, alleged that she suffered persecution on account of her membership in three social groups: (1) people associated with the former government; (2) members of the Ashanti tribe; and (3) professionals, businesspeople and the highly educated.³¹ Although the court did not specify the social group to which she belonged, it regarded her situation as persecution on account of membership in a particular social group.³² The court stated that the facts brought Ananeh-Firempong "squarely within the *Handbook* definition" of social group and that the characteristics that made her eligible for asylum were "essentially beyond the [Ananeh-Firempong's] power to change."³³

The Handbook test, like the Acosta test, does not limit the breadth of the recognizable group because it is possible that a group of any size could have the same background, habits, or social status.

2. *Judicial Interpretations Narrowing the Social Group*

Several characteristics of a recognizable particular social group limit the term to narrowly defined groups. Although none of the narrower interpretations expressly limit the size of the allowable groups, all pose difficulties for aliens who seek asylum based on persecution due to their membership in such large groups.

Three interpretations of particular social group can be viewed as posing such difficulties. In *Sanchez-Trujillo v. INS*,³⁴ the Ninth Circuit imposed two requirements on the classification of a social group. First, the court held that there must be a close affiliation between the members, and second, it held that there must be a voluntary associational relationship among the members.³⁵ A third requirement that courts sometimes impose in deciding if a

existence of the social group as such, is held to be an obstacle to the Government's policies.

Id. at 626 (citing HANDBOOK at 19, paras. 77-78 (emphasis added by the court)).

³¹ *Id.* at 623.

³² *Id.* at 626.

³³ *Id.* at 626.

³⁴ 801 F.2d 1571, 1576 (9th Cir. 1986).

³⁵ *Id.*

particular social group is recognizable is that there be a characteristic that distinguishes the group members in the eyes of the persecutor.³⁶

a. *Sanchez-Trujillo Interpretation*

In *Sanchez-Trujillo*, the Ninth Circuit held that a class of young, urban, working-class, politically neutral El Salvadorian males of military age did not qualify as a particular social group for the purpose of qualifying as refugees.³⁷ The court stated that such a group "may be so broad and encompass so many variables that to recognize any person who might conceivably establish that he was a member of this class is entitled to asylum would render the definition of 'refugee' meaningless."³⁸ Consequently, the court offered the following interpretation of "particular social group":

The statutory words "particular" and "social" which modify "group," . . . indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase "particular social group" implies a *collection of 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.³⁹

Thus, the *Sanchez-Trujillo* court offers two characteristics that define the term "particular social group." First, a social group must be a cohesive, homogeneous group of people, closely affiliated with each other, who are united by some common impulse or interest.⁴⁰ Second, there should be a voluntary associational relationship among the purported members, which imparts some common

³⁶ See *infra* note 52 and accompanying text.

³⁷ *Sanchez-Trujillo*, 801 F.2d at 1576.

³⁸ *Id.* at 1577 (quoting the decision of the immigration judge).

³⁹ *Id.* at 1576 (emphases added).

⁴⁰ *Id.*

characteristic that is fundamental to their identity as members of that discrete social group.⁴¹ Both of these characteristics impede the recognition of social groups that are defined by broad characteristics.⁴²

"The stringent requirement of a "close affiliation" between members effectively limits the application of the term "particular social group" to small groups. Broadly based groups, such as those defined by gender or sexual orientation, cannot realistically be considered closely affiliated because their members naturally have different lifestyles, varying interests, diverse cultures and contrary political leanings.⁴³ Because broad groups manifest these common characteristics, they cannot be "actuated by a common impulse or interest[s]"⁴⁴ and would not be considered social groups under the *Sanchez-Trujillo* interpretation of the term. Consistent with this interpretation, courts that have imposed the requirement of a close affiliation between members have indicated that characteristics, like gender, are insufficient to be the unifying factor in a social group.⁴⁵

The second requirement of the *Sanchez-Trujillo* interpretation,

⁴¹ *Id.*

⁴² The *Sanchez-Trujillo* interpretation of particular social group severely limits the breadth of the allowable group. The Ninth Circuit based its limitations, in large part, on the inclusion of the word "particular" within the phrase "particular social group." The court reasoned that the word is an indication of an intent to limit the scope of the allowable social group. *See Sanchez-Trujillo*, 801 F.2d at 1576. *But see* T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of Refugee*, 92 COLUM. L. REV. 923, 925 (1992) (stating that the word "particular" is necessitated by the grammatical construction of the sentence and if the word was omitted, the words of the statute would only protect those persecuted on account of "membership in the class of people consisting of all those who are members of any social group").

⁴³ *Sanchez-Trujillo*, 801 F.2d at 1575 (holding that a class of young, working class, urban males is not a recognizable social group). *But see* Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L. L.J. 605, 612 (1994) (arguing that a close affiliative relationship exists among homosexuals).

⁴⁴ *Sanchez-Trujillo*, 801 F.2d at 1576.

⁴⁵ *See, e.g.,* Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991); *Sanchez-Trujillo*, 801 F.2d at 1574-77.

the presence of a voluntary, associational relationship that imparts a common characteristic fundamental to the group members' identity limits the scope of the term to small groups. In an attempt to illustrate the types of groups deserving recognition as "particular social groups," the Ninth Circuit held that the term should apply to "cohesive, homogeneous groups,"⁴⁶ and that a family is a "prototypical example of a 'particular social group'" while a "statistical group of males taller than six feet would not constitute a 'particular social group' . . . even if individuals with such characteristics could be shown to be at greater risk of persecution than the general population."⁴⁷

Scholars have criticized the *Sanchez-Trujillo* definition of particular social group,⁴⁸ suggesting that the definition itself is flawed and self-defeating because the voluntary associational relationship requirement is at odds with the court's statement that a "family" is a prototypical example of a social group.⁴⁹ One possible explanation for this ambiguity is that in a typical familial relationship—as opposed to a mere biological relationship—members voluntarily choose to associate with one another. Such willful association can be seen as imparting the characteristic fundamental to the family members identity. Thus, it is not the involuntary characteristic of a biological relationship among members of a family that makes it a prototypical social group, but the conscious choice to associate with other family members. Nevertheless, this ambiguity leaves the court's intent open to speculation.

Scholars have also argued that the requirement of a voluntary associational relationship contradicts the *Acosta* "immutable

⁴⁶ *Sanchez-Trujillo*, 801 F.2d at 1577.

⁴⁷ *Id.* at 1576.

⁴⁸ See, e.g., Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in Particular Social Group*, 26 CORNELL INT'L. L.J. 505, 555 (1994); Goldberg, *supra* note 43, at 612; Parish, *supra* note 42, at 923; Neal, *supra* note 15, at 225; Daniel Compton, *Recent Development: Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar*, 62 WASH. L. REV. 913 (1987).

⁴⁹ See Fullerton, *supra* note 48, at 556; Parish, *supra* note 42, at 942.

characteristic” requirement.⁵⁰ *Acosta* imparts some element of involuntariness by requiring that there is an inability to disassociate oneself from the group. However, it is clear that the *Sanchez-Trujillo* court did not intend the voluntary associational relationship requirement to be a rejection of the “immutable characteristic” requirement of *Acosta*.⁵¹ The requirement that the voluntary associational relationship be “fundamental” to the group member’s identity seems to be an attempt by the court to embrace this requirement of an immutable characteristic. Thus, this voluntary associational relationship requirement can be interpreted consistently with *Acosta* if it refers to a common characteristic, fundamental to a group member’s identity, that arises from the desire to associate with other group members.

Although the *Sanchez-Trujillo* court’s interpretation is somewhat open to speculation, it offers two characteristics that define the term “particular social group.” First, it must be a cohesive, homogeneous group of people, closely affiliated with each other, who are actuated by some common impulse or interest. Second, there should be a voluntary associational relationship among the members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group. Both of these characteristics can pose difficulties for recognition of broadly based social groups.

b. Distinguishing Characteristic

Several courts have applied an additional restriction to the definition of particular social group, holding that the group must possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor or the outside world in general.⁵² While this principle does not, on its face, act to

⁵⁰ Parish, *supra* note 42, at 942.

⁵¹ *Sanchez-Trujillo*, 801 F.2d at 1576 (citing *Acosta* requirement with approval).

⁵² Saleh v. INS, 962 F.2d 234, 240 (2d Cir. 1992); Gomez v. INS, 947 F.2d 660 (2d Cir. 1991); De Valle v. INS, 901 F.2d 787, 793 (9th Cir. 1990); cf. Vides-Vides v. INS, 783 F.2d 1463, 1467 (9th Cir. 1986); Zepeda-Melendez v. INS, 741 F.2d 285, 290 (9th Cir. 1984); Chavez v. INS, 723 F.2d 1431, 1434

narrow the size of a recognizable social group, its further qualifications have limited the recognizable distinguishing characteristics. Generally, "[p]ossession of a broadly based characteristic such as youth and gender will not by itself endow individuals with membership in a particular social group."⁵³ Where broadly based characteristics are insufficient to define a social group, the distinguishing characteristic requirement acts to narrow the scope of the recognizable social group.

3. *Conclusions About the Definition of Particular Social Group Under U.S. Jurisprudence*

The foregoing decisions define five characteristics that U.S. courts have found relevant when interpreting the term "particular social group." It should be noted, however, that as case law in this area has developed, courts have not consistently relied on all of the characteristics set forth in previous decisions. The weight that should be given to each characteristic is also unclear.

First, a particular social group must be based on some immutable characteristic that is either beyond the alien's power to change or so fundamental to the individual's identity that he or she ought not to be required to change it.⁵⁴ Second, a particular social group, "normally comprises persons of similar background, habits or social status."⁵⁵ These two characteristics may apply to a group of almost any size, however, the remaining characteristics have been imposed to limit the scope of the recognizable group to one that is relatively small.

Third, "a particular social group" implies a cohesive, homogeneous group, whose members are closely affiliated with each other and actuated by some common impulse or interest.⁵⁶ Fourth, there should be a voluntary associational relationship among the

(9th Cir. 1984).

⁵³ *Saleh*, 962 F.2d at 240; *Gomez*, 947 F.2d at 664; see *Sanchez-Trujillo*, 801 F.2d at 1574-77 (denying asylum to "young urban males").

⁵⁴ *In re Acosta*, 19 I. & N. Dec. 211, 234 (BIA 1985); see also *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

⁵⁵ HANDBOOK, *supra* note 17, at 19, para. 77.

⁵⁶ *Sanchez-Trujillo*, 801 F.2d at 1576.

purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.⁵⁷ Finally, the group members should possess some narrowly defined, fundamental common characteristic which serves to distinguish them in the eyes of a persecutor or in the eyes of the outside world in general.⁵⁸

II. EXTENSION OF THE "PARTICULAR SOCIAL GROUP" TO INCLUDE GENDER-BASED GROUPS

A. *The Present State of the Law*

To date, courts applying U.S. asylum law have never granted asylum to anyone persecuted on account of gender by recognizing him or her as a member of a particular social group.⁵⁹ Most of the arguments in favor of including those who suffer gender-based persecution as members of a recognizable social group, a group possibly eligible for asylum, have centered around the persecution of women.

⁵⁷ *Id.*

⁵⁸ See *Saleh v. INS*, 962 F.2d 234, 240 (2d Cir. 1992); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *De Valle v. INS*, 901 F.2d 787, 793 (9th Cir. 1990); *Ananeh-Firempong*, 766 F.2d at 623.

⁵⁹ See Karen Bower, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173 (1993); Ninette Kelley, *Report on the International Consultation on Refugee Women, Geneva, 15-19 November 1988, with Particular Reference to Protection Problems*, 1 INT'L J. REFUGEE L. 233, 235 (1989).

In some cases, however, men and women who have been persecuted in gender-specific ways have been granted asylum by basing their claims on one of the more traditional theories of asylum law. For example, in *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987), the Ninth Circuit granted asylum to a Salvadorian woman, who had been subjected to repeated rapes and been accused of subversive activities, based on the persecution that she received due to her political opinion. In a recent case, U.S. Immigration Judge Kendall Warren granted a woman asylum on "humanitarian grounds" because her daughters would be subjected to a genital mutilating operation had they been sent to Nigeria. *Nigerian National Wins Fight to Halt Deportation: Daughters Faced Genital Mutilation*, HOUSTON CHRON., Mar. 24, 1994, at A-11.

In many countries, women are subject to persecution which is inflicted upon them merely because of their gender. For example, in many parts of the world, women are subjected to sexual assault,⁶⁰ forced prostitution and genital mutilation.⁶¹ In the United States, many immigration judges and federal courts have narrowly construed the term "particular social group," providing no ground for asylum for women who are persecuted due only to their gender. The courts primarily object to granting asylum to gender-based groups because the breadth of the group.⁶²

B. Applying U.S. Jurisprudence to a "Particular Social Group" of Aliens Persecuted on Account of Gender

Under U.S. asylum jurisprudence, as exemplified in the five aforementioned characteristics that are indicative of the presence of a recognizable social group, it is difficult for a gender-based group to be considered a "particular social group." Although the *Acosta* and *Handbook* interpretations support the inclusion of gender-based groups, the *Sanchez-Trujillo* requirements and the distinguishing characteristic requirement pose formidable barriers that, if applied, make it nearly impossible to recognize gender as the defining characteristic of a particular social group.

First, gender-based groups are clear examples of groups defined by an immutable characteristic, as required in the *Acosta* definition of the particular social group.⁶³ Gender is an immutable characteristic that is generally beyond an individual's power to change. Further, *Acosta* names "sex" as an example of a common

⁶⁰ Deborah Sontag, *Rape Raised as an Immigration Issue*, S.D. UNION-TRIB., Sept. 27, 1993, at A-8.

⁶¹ Mark Waller, *Women: Female Circumcision Report Outrages Refugee Conference*, INTER PRESS SERVICE, Oct. 8, 1993 (referring to an operation common in Somalia whereby the clitoris is removed from young women).

⁶² The factors that limit the breadth of the allowable social group are the *Sanchez-Trujillo* requirements of a close affiliation and a voluntary associational relationship, and the requirement of the distinguishing characteristic.

⁶³ JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 162-63 (1991) (referring to both gender-based and sexual orientation-based groups as particular social groups that satisfy the *Acosta*, immutable characteristic definition).

characteristic that could constitute a particular social group.⁶⁴ Some courts have considered this requirement paramount and have found social groups present where an immutable characteristic is present without considering any other characteristics.⁶⁵ Such interpretations would provide asylum to people who are persecuted simply because of their sex.

Second, a gender-based group might be "comprised of persons of similar background, habits, or social status."⁶⁶ For example, it is possible that a country may afford an inferior social status to all women or that background might be construed broadly enough to include Islamic women in Iran.⁶⁷ Although gender-based claims satisfy the immutable characteristic definition of particular social group and could foreseeably satisfy the *Handbook* requirements for such classification, the other principles mentioned above⁶⁸ further limit the application of the term.

The *Sanchez-Trujillo* and distinguishing characteristic requirements limit the size of recognizable "social groups," placing groups defined by gender outside the reach of U.S. asylum law. A gender-based "particular social group" fails to satisfy the third principle that the group be cohesive and homogeneous, with members who are *closely affiliated* with each other, and actuated by some common impulse or interest.⁶⁹ It is very unlikely that a close affiliation between members exists in a social group defined only by gender. Fourth, the possibility that voluntary associational relationships exist among the purported members is similarly unlikely.⁷⁰

Fifth, it is difficult for gender-based group members to possess a fundamental characteristic in common, which distinguishes group

⁶⁴ *In re Acosta*, 19 I. & N. Dec. 211, 231 (BIA 1985).

⁶⁵ *See, e.g., Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (recognizing that a woman who alleges persecution in Iran simply because she is a woman, is a member of a recognizable social group, but not granting asylum because there was no persecution).

⁶⁶ HANDBOOK, *supra* note 17, at 19, para. 77.

⁶⁷ *See, e.g., Fatin*, 12 F.3d at 1233; *see Neal, supra* note 15, at 207.

⁶⁸ *See discussion supra* pp. 264-270.

⁶⁹ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

⁷⁰ *Id.*

members in the eyes of their persecutors or in the eyes of the outside world⁷¹ because courts have referred specifically to "gender" as an example of a characteristic that is too broad to be the distinguishing characteristic in a social group.⁷² Thus, interpretations of the term "particular social group" that the breadth of the term are the principal objections to the awarding of asylum to gender-based groups.

C. Results in Gender-Based Persecution Cases

U.S. courts have consistently decided that the term "particular social group" should not be extended to include groups of aliens persecuted on account of gender. This conclusion is generally based on an objection to the size of the group. Federal courts in *Sanchez-Trujillo* and *In re Vigil* held that certain male gender-based groups do not constitute particular social groups under asylum statutes. Although recent scholarly work and debate on the subject has concerned gender-based social groups comprised of women, there are few cases that directly address the issue of whether a group of women can constitute a "particular social group." The following two cases are indicative of the way the issue is handled by the courts.

In *Fatin v. INS*,⁷³ the Third Circuit based its analysis primarily on *Acosta*, ignoring both the *Sanchez-Trujillo* characteristics and the distinguishing feature characteristics. The Third Circuit stated that Fatin was a member of a recognizable social group because *Acosta* "specifically mentioned 'sex' as an innate characteristic that could link the members of a 'particular social group,'" and Fatin "suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman."⁷⁴

⁷¹ See, e.g., *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *De Valle v. INS*, 901 F.2d 787, 793 (9th Cir. 1990).

⁷² See, e.g., *Gomez*, 947 F.2d at 664.

⁷³ 12 F.3d 1233 (3d Cir. 1993).

⁷⁴ *Id.* at 1237. The court went on to deny Fatin's asylum claims reasoning that Fatin had "not shown that she would suffer or that she has a well founded fear of suffering 'persecution' based solely on her gender." *Id.*

Contrarily, in *Gomez v INS*,⁷⁵ the Second Circuit rejected a woman's claim for asylum, basing its decision in large part on the *Sanchez-Trujillo* and distinguishing characteristic requirements.⁷⁶ Gomez was an El Salvadorian woman who based her claim for asylum on a fear of persecution because of her membership in the social group of "women previously raped by the guerrillas."⁷⁷ The Second Circuit denied Gomez's asylum claim, noting that although women who have been repeatedly and systematically brutalized by attackers can have a well-founded fear of persecution, Gomez failed to "demonstrate that the guerrillas are inclined or will seek to harm her based on her association with a particular social group or on account of any other ground enumerated in the Act."⁷⁸ The court also expressly stated that youth and gender are characteristics that are not sufficient to satisfy the common distinguishing characteristic requirement of a "particular social group."⁷⁹ *Gomez* is indicative of the objections to recognizing gender as a social group encountered when applying the *Sanchez-Trujillo* and distinguishing characteristic requirements.

III. EXTENSION OF THE "PARTICULAR SOCIAL GROUP" TO INCLUDE SEXUAL ORIENTATION-BASED GROUPS

A. *The Present State of the Law*

Homosexuals⁸⁰ who claimed persecution on account of membership in a particular social group have had better results than those seeking asylum with gender-based claims. In many countries,

⁷⁵ 947 F.2d 660 (2d Cir. 1991).

⁷⁶ *Id.* at 664.

⁷⁷ *Id.* at 663. Carmen Gomez sought asylum claiming that she had been raped and beaten by guerrillas. *Cf.* Campos-Guardado v. INS, 809 F.2d 285, 288-90 (5th Cir. 1987) (denying the petition for asylum of another El Salvadorian woman who had been raped by guerrillas).

⁷⁸ *Gomez*, 947 F.2d at 663.

⁷⁹ *Id.* at 664.

⁸⁰ The same arguments that apply to homosexuals can also be applied to bisexual men and women.

homosexuals are singled out for persecution due to their sexual orientation. For example, China attempts to treat homosexuals with electroshock therapy,⁸¹ while in Iran, homosexuals are executed, and in Nicaragua, homosexuals are subjected to a three-year jail term if they "promote, propagandize or practice" homosexuality in a "scandalous manner."⁸² A recent report indicated that there are at least two dozen claims for asylum based on persecution due to membership in a social group defined by sexual orientation pending.⁸³ One such claim is from a Nicaraguan man who fears imprisonment following his country's recent outlawing of homosexuality; another is from an Iranian man who claims that homosexuals in Iran have been decapitated under the Ayatollahs.⁸⁴

At least as long as President Bill Clinton remains in office, these claims are likely to be successful. A recent order, signed by U.S. Attorney General Janet Reno, has instructed U.S. immigration boards to recognize sexual orientation-based social groups.

B. Historical Perspective on Homosexuals and Asylum

Historically, rather than offering a possible ground for an asylum claim, an alien's admission that he or she was homosexual was considered a potential ground for exclusion.⁸⁵ In *Boutilier v. INS*, the Supreme Court determined that homosexuals have "psychopathic personalities" and thus, "homosexuals and other sex perverts" should be ineligible for any lawful immigration to the

⁸¹ Wong, *supra* note 2, at 13.

⁸² David Tuller, *Political Asylum for Gays? America's Sexual Refugees*, NATION, Apr. 19, 1993, at 520.

⁸³ Elaine Korry, *National Public Radio Show: All Things Considered* (Aug. 28, 1993) (transcript available on LEXIS); see also David Tuller, *Immigration Rules on Persecution: Gay Foreigners Try a New Way to Stay*, S.F. CHRON., Sept. 27, 1993, at A1 (stating that on September 29, 1992, there were already at least one dozen such cases in existence).

⁸⁴ Charles Fenyvesi, *Washington Whispers*, U.S. NEWS & WORLD REP., June 28, 1993, at 18.

⁸⁵ *Boutilier v. INS*, 387 U.S. 118 (1967); *In re Longstaff*, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984). But see *Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983) (granting a homosexual asylum).

United States.⁸⁶ However, the Immigration Act of 1990⁸⁷ revised the statutory grounds for exclusion and removed any possibility of such exclusion based on sexual orientation. Thus, the possibility of asylum for a member of a persecuted social group comprised of homosexuals is a recent development in U.S. asylum law and very few courts have considered the issue.

C. U.S. Jurisprudence and the Exclusion of Homosexuals as a "Particular Social Group"

Although U.S. asylum jurisprudence yields a result that is more favorable to homosexuals than women, an analysis of the five characteristics that define the social group⁸⁸ reveals a similar result to that reached on gender-based persecution: sexual orientation-based groups may be too broad to be considered particular social groups under an analysis that defers to the *Sanchez-Trujillo* and distinguishing characteristic requirements.

First, the *Acosta* immutable characteristic definition favors extending the particular social group to those who fear persecution based on homosexuality,⁸⁹ because like gender, homosexuality is generally considered to be an immutable characteristic that is beyond the alien's power to change or it is so fundamental to the individual's identity that it ought not to be required to change.⁹⁰

Second, the *Handbook* "similar background, habits or social status," requirement could, under certain circumstances, support recognizing sexual orientation-based groups as "particular social

⁸⁶ *Boutilier*, 397 U.S. at 118-22.

⁸⁷ Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067 (1990) (Congress repealed, 8 U.S.C. § 1182(a)(4) (1988)).

⁸⁸ See discussion *supra* pp. 269-70.

⁸⁹ See *supra* note 54 and accompanying text.

⁹⁰ *In re Tenorio*, No. A72 093 588, slip op. at 14 (July 26, 1993). Although one could argue that being a homosexual is a matter of choice, for the purposes of this Note, the author assumes that homosexuality is an innate and immutable characteristic that is beyond the homosexual's power to change. See A. BELL, *SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN* 186-87 (1981); FRANCIS B. MCMAHON & JUDITH W. MCMAHON, *PSYCHOLOGY: THE HYBRID SCIENCE* 476-79 (5th ed. 1986).

groups.”⁹¹ Homosexuals may acquire a unique social status and suffer persecution on account of that status. Consequently, courts have held that individuals who are persecuted because of their status as homosexuals may be awarded asylum based on membership in a persecuted social group.⁹²

Characteristics that limit the breadth of the term “particular social group” may apply more favorably to sexual orientation-based groups than to gender-based groups, however, the ultimate conclusion is the same. As with a gender-based group, the greatest obstacle to extending the “particular social group” to homosexuals is the size of the group. The third characteristic that the group must be considered a “cohesive, homogeneous group, closely affiliated with each other, who are actuated by some common impulse or interest”⁹³ may preclude homosexuals from succeeding in claims for asylum based on membership in a particular social group because it is impossible for members of such an expansive group to be closely affiliated with each other. Homosexuals, as a group, cannot be said to be any more closely affiliated than heterosexuals because they represent a large cross-section of society, having nothing more in common than sexual orientation.

Fourth, in contradistinction to the result in gender-based asylum claims, there may possibly be a voluntary associational relationship among some homosexuals which imparts some common characteristic that is fundamental to their identity as members of that discrete social group.⁹⁴ Homosexual relationships are voluntary associational relationships and in many cases, homosexuals voluntarily “deny their [sexual] identity and avoid association with others as a matter of self-preservation.”⁹⁵

Fifth, the distinguishing characteristic requirement would also support the classification of homosexuals as a social group. Homosexuals may possess a fundamental characteristic in common which may serve to distinguish them in the eyes of a persecutor or

⁹¹ *Tenorio*, slip op. at 13.

⁹² See, e.g., *In re Toboso*, No. A23 220 644 (Feb. 3, 1986), *aff'd*, No. A23 220 644 (BIA Mar. 12, 1990).

⁹³ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1577 (9th Cir. 1986).

⁹⁴ *Id.*

⁹⁵ *Goldberg*, *supra* note 43, at 612.

the outside world in general.⁹⁶ However, if broadly based characteristics such as gender and youth are insufficient for drawing such a distinction,⁹⁷ it is likely that the broadly based characteristic of sexual orientation will likewise be insufficient. As with gender-based groups, the greatest problem with the classification of homosexuals as members of a "particular social group," is the breadth of the group. With the exception of the requirement of a "closely affiliated group," and the general rejection of large groups, U.S. jurisprudence arguably favors the extension of the term "particular social group" to include groups of homosexuals.

D. Results in Sexual Orientation-Based Persecution Cases

Some homosexuals seeking asylum due to persecution on account of membership in a particular social group have obtained favorable results despite failing to satisfy the exclusionary *Sanchez-Trujillo* requirement of a close affiliative relationship or the requirement of a narrowly defined distinguishing characteristic.

Marcelo Tenorio, a homosexual originally from Brazil, was among the first people to be granted asylum on account of his persecution for being homosexual.⁹⁸ The San Francisco Immigration Court considered all of the five characteristics noted above with the exception of the requirement that the group be "closely affiliated."⁹⁹ The court ultimately based its decision on a Canadian court's interpretation of "particular social group."¹⁰⁰ The *Tenorio* court's determination that homosexuals qualify as a "particular

⁹⁶ *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *De Valle v. INS*, 901 F.2d 787, 793 (9th Cir. 1990); *In re Tenorio*, No. A72 093 588 (July 26, 1993).

⁹⁷ *Gomez*, 947 F.2d at 664.

⁹⁸ *Tenorio*, slip op. at 14; see also *In re Toboso*, No. A23 220 644 (Feb. 3, 1986), *aff'd*, No. A23 220 644 (BIA Mar. 12, 1990) (withholding deportation of homosexual on basis of membership in particular social group).

⁹⁹ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

¹⁰⁰ The Canadian court held that a homosexual persecuted because of his homosexuality could be considered a Convention refugee within the Immigration Act of Canada (same definition of "refugee" as the Immigration Act of 1990) because homosexuality is an immutable characteristic and even if it were a voluntary condition, it is so fundamental to a person's identity that he or she ought not be compelled to change it.

social group" is sound with respect to the issues that the court confronts; however, the decision is problematic because there is no explanation of how the decision can be reconciled with the requirement that the group be closely affiliated.

The same flaw can be found in previous decisions granting asylum to homosexuals. In *In re Toboso*,¹⁰¹ an immigration court and the BIA relied primarily on the liberal *Acosta* interpretation of social group, requiring only that the persecution be on account of an immutable characteristic. The *Toboso* court did not inquire into the *Sanchez-Trujillo* close affiliation and voluntary associational relationship requirements or the distinguishing characteristic requirement.¹⁰²

E. Conclusions About U.S. Jurisprudence

In applying the five characteristics that define the particular social group to the groups comprised by gender and sexual orientation, it is evident that the *Sanchez-Trujillo* requirements and the distinguishing characteristic requirement may prevent members of broadly based groups from successfully asserting asylum claims. However, not all courts have applied these limiting requirements in determining whether a particular group is recognizable under U.S. asylum law.

Two distinct lines of analyses have developed in U.S. courts. Some courts, most notably the Ninth and Second Circuits have rigidly applied both the *Sanchez-Trujillo* requirements of a close affiliation and a voluntary associational relationship and also applied the narrowly defined, distinguishing characteristic requirement. These courts have not recognized the existence of a social group when confronted with groups defined by broadly based characteristic such as gender.¹⁰³ Other courts, most notably the Third Circuit, have applied only the *Acosta* immutable characteristic requirement or the *Handbook* similar background, habits or

¹⁰¹ *In re Toboso*, No. A23 220 644 (Feb. 3, 1986), *aff'd*, No. A23 220 644 (BIA Mar. 12, 1992).

¹⁰² *Toboso*, No. A23 220 644, slip op. at 4-5.

¹⁰³ See, e.g., *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *Sanchez-Trujillo*, 801 F.2d at 1571, 1576.

social status requirement and have recognized the existence of broadly defined social groups.¹⁰⁴

IV. EXPANDING THE "PARTICULAR SOCIAL GROUP" TO INCLUDE A BROADER CLASS OF REFUGEES

Group size is perhaps the greatest obstacle to extension of the "particular social group" to include those who fear persecution on account of membership in a broadly based group such as gender or sexual orientation.¹⁰⁵ The limitation on group size emanates from the restrictive *Sanchez-Trujillo* requirements and the distinguishing characteristic requirement. Upon consideration of the reasons for these requirements, it becomes evident that they are unwarranted.

A. "Opening the Floodgates"

The concern with allowing an expansive interpretation of the particular social group is that it will "open the floodgates" to vast demographic divisions of people in oppressed countries throughout the world in contradiction to the United States's restrictive asylum refugee policies.¹⁰⁶ Because the fear of persecution "need not be based on an individual's own personal experience . . ." but, rather, may stem from the persecution of others who are similarly situated,¹⁰⁷ this concern is compounded.

Thus, courts may fear that if immigration statutes are so broadly construed as to provide asylum in such instances, any individual persecuted on account of gender or sexual orientation may successfully allege an asylum claim based merely on membership in his or her respective social group. Such a construction could be used to circumvent the narrow selection process used to determine who is a bona fide "refugee" and who is simply dissatisfied with

¹⁰⁴ See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1237 (3d Cir. 1993) (relying only on the immutable characteristic test).

¹⁰⁵ See discussion *supra* p. 266.

¹⁰⁶ Bower, *supra* note 59, at 175; see also *Gomez*, 947 F.2d at 664-65; *Sanchez-Trujillo*, 801 F.2d at 1576-77.

¹⁰⁷ Immigration and Nationality Act § 101(a)(42)(A); see also HANDBOOK, *supra* note 17, at 13, para. 43.

the social or economic conditions in his or her country of origin. This sentiment was echoed in *Sanchez-Trujillo*, where the court stated that a particular "social group" comprised of "young, urban, working-class males of military age," who had maintained political neutrality, "may be so broad and encompass so many variables that to recognize any person who might conceivably establish that he was a member of this class is entitled to asylum . . . would render the definition of 'refugee' meaningless."¹⁰⁸

B. *Why Class Size is not a Proper Judicial Concern*

There are many compelling reasons why the possible size of the recognizable social group should not be of judicial concern in asylum claims.

1. *Ejusdem Generis*

Under the *ejusdem generis* principle of statutory interpretation,¹⁰⁹ because the other specific categories listed in the Refugee Act, namely, race, nationality, religion and political opinion, all refer to very broadly defined groups, so should the general category of social group.¹¹⁰ If the term, "particular social group," is construed consistently with the other terms in the refugee definition, the extension to groups such as those based on gender or sexual orientation, is a natural and correct interpretation of the term.

In *In re Acosta*, the BIA was guided by the *ejusdem generis* principle and

observed that [since] each of the four specific grounds concerned an immutable characteristic that individuals are

¹⁰⁸ *Sanchez-Trujillo*, 801 F.2d at 1577.

¹⁰⁹ *Ejusdem generis*, is a canon of statutory construction that literally means "of the same kind, class or nature." BLACK'S LAW DICTIONARY 517 (6th ed. 1990). "Where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." *Id.*

¹¹⁰ HATHAWAY, *supra* note 63, at 163.

“unable by their own actions, or as a matter of conscience should not be required” to change, the Board established a similar “immutable characteristic” test to guide interpretation of the particular social group category.¹¹¹

Although they have also been the subject of some criticism,¹¹² canons of statutory interpretation are generally recognized as informative in determining legislative intent and the meaning of statutory words.¹¹³ Of primary importance when applying the *ejusdem generis* canon is that it cannot be used to restrict a general term to an overly narrow interpretation.¹¹⁴ Because application of *ejusdem generis* would not restrict the term “particular social group,” but rather give it the same broad impact and scope as the other terms in the statute, the application of the canon is proper and the interpretation fostered by such construction is statutorily sound.

2. Concern Is Not Warranted

The concerns voiced by the *Sanchez-Trujillo* court and echoed by others is unwarranted. There is no evidence that allowing groups, such as those defined by gender or sexual orientation, to satisfy the particular social group definition, will lead to an overwhelming influx of aliens seeking asylum on such grounds.¹¹⁵ Three factors support the assertion that the concern about “opening the floodgates” is not warranted. First, the number of asylum claims, based on gender or sexual orientation in other signatory countries¹¹⁶ that recognize these social groups for the purpose of

¹¹¹ Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 649 (1994) (citing *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)).

¹¹² See, e.g., W. ESKRIDGE & P. FRICKEY, *LEGISLATION AND STATUTORY INTERPRETATION: CASES AND MATERIALS* 639 (1988).

¹¹³ *United States v. Powell*, 423 U.S. 87 (1975) (recognizing that *ejusdem generis* will be applied unless its application would defeat legislative intent).

¹¹⁴ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision & the Rules or Canons About How Canons are Construed*, 3 VAND. L. REV 395, 401-06 (1950).

¹¹⁵ Neal, *supra* note 15, at 225.

¹¹⁶ *Supra* note 4.

granting asylum,¹¹⁷ is relatively small compared to the total number of claims for asylum in those countries.¹¹⁸ Consequently, it is unreasonable to expect a different result if the United States were to recognize these groups.

Second, although the fear of persecution does not have to be based on an individual's own personal experience and it may also stem from fear derived from the persecution of others who are similarly situated, the requirement of real fear still exists.¹¹⁹ Generally, mere membership in a persecuted group is not, in itself, sufficient to recognize a well-founded fear.¹²⁰ Thus, not every member of a group that is persecuted will be eligible for asylum, and granting asylum to a member of a persecuted social group is not tantamount to granting asylum to every member of that group who seeks asylum.

For example, in *Tenorio*, an expert witness named Dr. Mott, who testified on Tenorio's behalf about the atrocities that homosexuals are subjected to in Brazil, was a homosexual who resided in Brazil.¹²¹ Although Dr. Mott was a member of the same social group of homosexuals upon which Tenorio successfully asserted his asylum claim, he would not have been granted asylum if he applied because he stated that due to his "social status," he did not fear persecution.¹²²

Third, although a broadly based characteristic can be the common defining factor of a social group, as a practical point, only subgroups are usually eligible for asylum. A broadly based characteristic may be only one of several common characteristics that defines a group, but the size of the group is necessarily limited

¹¹⁷ See, e.g., *In re Inaudi*, File No. T91 04459 (Immigration & Refugee Board, Canada, Apr. 9, 1992).

¹¹⁸ There is no indication, in countries that have granted asylum to social groups persecuted on account of gender or sexual orientation, that immigration courts have been overwhelmed by asylum seekers from such groups. Cf., Goldberg, *supra* note 43, at 622 (discussing isolated cases of Canadian courts granting asylum to homosexuals).

¹¹⁹ 8 U.S.C. § 1101(a)(42)(A).

¹²⁰ Compton, *supra* note 48, at 915; see, e.g., *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1574 (9th Cir. 1986).

¹²¹ *In re Tenorio*, No. A72 093 588, slip op. at 8-11 (July 26, 1993).

¹²² *Id.*

by the application of additional defining characteristics. For example, a broadly based social group defined by gender will be limited by other qualities such as a country or geographic area of origin, race, color, or any other descriptive characteristic.¹²³ The application of these defining terms limit the potentially enormous social group defined by gender, all human beings of the same sex, to the smaller subgroup of men or women in a particular country or area affected by the specific circumstances.

3. Comparative Law

Because the United States has joined more than one hundred nations in becoming a party to the Convention, and thus, in adopting the Convention definition of refugee, interpretation by other signatories is helpful in defining "refugee" in the United States.¹²⁴ Courts in several other signatory countries have developed the definition of the term "particular social group," as that term applies in the Convention definition of "refugee." The foreign courts have construed the term more liberally than U.S. courts and have granted asylum to large groups, including both gender and sexual-orientation-based groups. For example, Canadian courts have recognized both "Trinidadian women subject to wife abuse"¹²⁵ and homosexual men¹²⁶ as "particular social groups." German courts have suggested that women, who have based their claims for asylum on membership in the particular social group of women who marry men of a lower caste and the group of women active in women's civil rights organizations, do comprise a particular social group.¹²⁷ Thus, comparative law supports extending the particular social group to include those who fear persecution based on broad

¹²³ See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993).

¹²⁴ See generally Fullerton, *supra* note 48, at 505.

¹²⁵ Fullerton, *supra* note 48, at 537-38 (citing to *Minister of Employment and Immigration v. Meyers*, A-44-92, Nov. 5, 1992).

¹²⁶ See *In re Tenorio*, A72 093 558, slip op. at 14 (July 26, 1993) (citing to CRDD T-91-04459, April 9, 1992).

¹²⁷ Fullerton, *supra* note 48, at 29 (citing to judgment of Jan. 4, 1985, No. AN 1269-XII/79, *Verwaltungsgericht Ansbach* (Ansbach Administrative Court)).

characteristics, such as gender and sexual orientation.¹²⁸ American jurisprudence should be informed by the interpretations offered by other courts construing the term.

4. *Purpose of the Statute*

The refusal to classify either “women” or “homosexuals” as a particular social group defeats the purpose of protection embodied in asylum law because it results in the denial of the claims of applicants who face real risks of harm upon return to their countries of origin.¹²⁹

Although legislative history on the intended scope of the term “particular social group,” both in its original formulation in the Protocol and in its subsequent adoption by the United States in the Convention and the Refugee Act, is limited, the few statements that are available are consistent with broad interpretation of the term that is necessary to extend its application to those who are persecuted on account of gender or sexual orientation. The Convention’s definition of “refugee”¹³⁰ was intended to be broad, in order to include all persons who were victims of international human rights violations.¹³¹ Membership in a particular social group as a ground for asylum was introduced as “a last minute

¹²⁸ *E.g.*, *Tenorio*, slip op. at 14 (relying on a decision of the Immigration and Refugee Board of Canada, CRDD T91-14495, April 9, 1992, in determining that a homosexual should be granted asylum); *see* Goldberg, *supra* note 43, at 622.

¹²⁹ Bower, *supra* note 59, at 201.

¹³⁰ [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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 . . . is unable or, owing to such fear, is unwilling to return to it.

Convention, *supra* note 10, at Art.1(A)(2).

The Convention also limited the application of the term to events that had taken place before January 1, 1951. Convention, *supra* note 10, at Art.1(A)(2).

¹³¹ Arthur Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 42 n.16 (1983).

amendment" to the Convention's definition of "refugee" without any significant discussion that would aid in interpretation of the term.¹³² Because no contrary intent was expressed, the particular social group category should be interpreted consistently with the general intent of the statute and should apply to broadly based groups. "Once a person is subjected to a measure of such gravity that we consider it 'persecution,' that person is 'persecuted' in the sense of the Convention, irrespective of how many others are subjected to the same or similar measures."¹³³

Through the Refugee Act, Congress intended to give "statutory meaning to our national commitment to human rights and humanitarian concerns."¹³⁴ The term "particular social group" was intended to offer protection to those whose human rights were violated and who were not included under any other classification of the refugee provision.¹³⁵ U.S. courts have viewed it as a "flexible concept designed to protect aggregations of humanity which otherwise might not be protected from persecution under the refugee definition."¹³⁶ Thus, legislative history supports extending the term "particular social group" to those who are persecuted on account of broadly based characteristics.

B. The Real Problem

Another argument against broadly interpreting the term "particular social group" is that the granting of asylum to an individual woman or homosexual in a country where violence against such groups is common ignores the real problem: there is

¹³² HATHAWAY, *supra* note 63, at 157.

¹³³ A. GRAHL-MADSEN, *THE REFUGEE IN INTERNATIONAL LAW* 213 (1966) (quoted in Felicite Stairs & Lori Pope, *No Place Like Home: Assaulted Migrant Women's Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds*, 6 J.L. & SOC. POL'Y 148, 171 (1990)).

¹³⁴ Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. and 22 U.S.C. (1982)).

¹³⁵ See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); see also S. REP. NO. 256, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S.C.C.A.N. 141.

¹³⁶ See Helton, *supra* note 132, at 39; see also *Sanchez-Trujillo*, 801 F.2d at 1576.

a severe human rights violation, which is condoned in the country allowing the persecution. Thus, where an alien is persecuted on account of his or her membership in a "social group," and the alleged "persecution" is based on a longstanding and generally accepted practice or value in the country from which the person is seeking asylum, relief is better directed toward correcting the situation in the persecuting country.

Although it may be equally important from a humanitarian perspective to direct relief toward the cause of the problem, this realization should not preclude aiding those who have already suffered from the effect of the problem.

C. The Force of Moral Arguments

"Americans have traditionally expressed great pride in their nation's openness and hospitality to immigrants and refugees."¹³⁷ Basic moral tenets, common to most Americans, must be considered in guiding judicial interpretation of the "particular social group" under asylum law. Principles such as "equal moral worth" and the "duty to avoid depriving others of life and liberty"¹³⁸ are traditional American values that support extending the social group to include those persecuted on account of gender or sexual orientation.

The competing moral argument is, of course, that the United States owes a duty to its own citizens. If it is unduly burdensome on the United States to accept refugees, who might drain the economy by making use of government entitlements and competing with citizens for employment, the United States has an obligation to limit the number of aliens granted refugee status.

Thus, from a moral perspective, defining U.S. immigration policy requires a balancing of the interests of the United States with the interests of the potential asylee. The interest of preventing the

¹³⁷ John A. Scanlon & O.T. Kent, *The Force of Moral Arguments for a Just Immigration Policy in a Hobbesian Universe: The Contemporary American Example*, in OPEN BORDERS? CLOSED SOCIETIES? 61, 82-83 (Mark Gibney ed., 1988).

¹³⁸ Andrew E. Shacknove, *American Duties to Refugees*, in OPEN BORDERS? CLOSED SOCIETIES? 131, 138 (Mark Gibney ed., 1988).

slight economic burden on American citizens pales in comparison to the interest of protecting the lives of those who are persecuted on account of membership in a particular social group.¹³⁹

CONCLUSION

U.S. courts have inconsistently construed the term "particular social group" as it applies in asylum law. One of the greatest obstacles to many asylum claims that are based on persecution on account of membership in a social group is that groups defined by broadly based characteristics are frequently not recognized by U.S. courts. Gender and sexual orientation based groups are clear examples of such groups. Upon consideration of the principles of statutory interpretation, the lack of evidence that the recognition of broadly based groups will lead to a substantial increase in the number of aliens seeking asylum, comparative law, legislative intent and moral considerations, it is evident that the breadth of a social group is not a proper consideration in determining whether the group is cognizable under asylum law.

¹³⁹ Peter Singer & Renata Singer, *The Ethics of Refugee Policy*, in OPEN BORDERS? CLOSED SOCIETIES? 121, 122 (Mark Gibney ed., 1988). The approach favored by the Singers is "the principle of equal consideration of interests."