Orientation-Based Persecution as Grounds for Refugee Status: Policy Implications and Recommendations

Julia Blanche Meister
ORIENTATION-BASED PERSECUTION AS GROUNDS FOR REFUGEE STATUS: POLICY IMPLICATIONS AND RECOMMENDATIONS

JULIA BLANCHE MEISTER*

INTRODUCTION

In July 1993, Marcelo Tenorio, a Brazilian national, was granted political asylum based solely on the persecution his sexual orientation invited.¹ Ruling in Tenorio's case, Immigration Judge Philip Leadbetter explained, "[a]nti gay groups appear to be prevalent in Brazilian society and continue to commit violence against homosexuals, with little official investigation and

---


¹ See In re Tenorio, No. A72 093 558 (EOIR Immigr. Court July 26, 1993). Marcelo Tenorio, age 30, fled his native Brazil after a gang of youths brutalized him outside a gay bar because of his sexual orientation and threatened to kill him if they ever saw him again. Although Brazil (particularly Rio de Janeiro) has a reputation for "acceptance" of homosexual lifestyles, Tenorio’s star witness, anthropologist Luis Mott, testified that he personally has documented 1,200 slayings of homosexuals and transvestites in Brazil during the past 13 years. Further, Mott attested, the police seldom investigate these slayings, and the perpetrators of crimes against gays generally receive light sentences. See Gay Brazilian Claims Persecution — Wins U.S. Asylum, S.F. CHRON., July 29, 1993, at A19; Gay’s Request for Asylum based on Sex Persecution: Brazilian Talks of Dangers of Going Back Home, S.F. CHRON., May 20, 1993, at A13. See also Stuart Grider, Comment, Sexual Orientation as Grounds for Asylum in the United States, 35 HARV. INT’L L.J. 213 (1994) (discussing the Tenorio decision).

One year after Marcelo Tenorio received political asylum on the grounds of his sexual orientation, a San Francisco Asylum Officer granted asylum to "Jose Garcia" (pseudonym), a Mexican man who endured persecution due to his sexual orientation. "Garcia" stated: "As a gay man in Mexico, life was made intolerable for me... I had no one to turn to." Gay Man Who Cited Abuse in Mexico is Granted Asylum, N.Y. TIMES, March 26, 1994. This marked the first time an officer at this level granted asylum on the basis of sexual orientation. REFUGEE REPORTS, Mar. 31, 1994, at 13.
few criminal charges being brought against the perpetrators." Judge Leadbetter's ruling in the Tenorio case is noteworthy for two reasons: first, because it acknowledges that violence against homosexuals is ignored and perhaps supported by governmental officials in foreign countries, and second, because it creates the possibility that other aliens will apply for and receive asylum based solely on their orientation-based persecution, thus potentially increasing the number of asylum applicants in an already overburdened system.3

This Article will argue that, as Judge Leadbetter properly realized, homosexuals are members of a "social group" for purposes of refugee law. Because the Immigration and Naturalization Service (INS) has appealed Judge Leadbetter's decision, Tenorio's safety could be short-lived.4 Thus, this Article will suggest an appropriate policy response to the growing reports of violence against homosexuals in other countries which have been presented by non-governmental organizations (NGOs) and the international press. In so doing, it will explore the United States' legal and ethical obligations to grant asylum to those who satisfactorily prove a "well founded fear of persecution." Moreover, in the context of orientation-based persecution,5 this Article's policy recommendations will acknowledge the inherent conflict between "compassion and control," the INS' recently articulated twin goals for asylum reform.6

I. THE LAW OF ASYLUM SEEKING

The rights and status of asylum seekers are governed by two documents: the 1951 Convention on the Status of Refugees, and the 1967 Protocol on the Status of Refugees. Both documents were negotiated by the United Nations (UN) and are adminis-

---

4. See Grider, supra note 1, at 213.
5. I use the term "orientation-based persecution" to encompass all governmentally initiated, supported or ignored acts of persecution which are directed at an individual due to his or her actual or perceived homosexuality.
6. See Asylum Seekers Flooding U.S. - System Unable to Cope with Huge Claims, ARIZONA REPUBLIC, Apr. 25, 1993, at A26. Reacting to the news that one of the suspects in the World Trade Center bombing entered the United States by requesting asylum, Congress began hearings on proposals for reducing the number of refugees waiting for their claims to be processed. Gregg A. Beyer, Director of Asylum at the Immigration and Naturalization Service, admitted that his organization "lacks both compassion and control," and emphasized the need to "balance" the two goals during asylum reform. Id.
tered today by the UN's High Commissioner for Refugees (UNHCR). The 1951 Convention limited protection to those affected by World War II. Later, the 1967 Protocol incorporated the 1951 Convention, and also extended protection to asylum seekers outside the World War II context. The United States was not a signatory of the 1951 Convention, but it did consent to several of the 1951 Convention's terms when it signed the 1967 Protocol in 1969.

The 1967 Protocol defines a refugee as any person, who, owing to a 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. Although several elements of the refugee definition have been the subject of interpretive debate, this Article is limited to interpretations of "social group," and, specifically, to whether the social group category includes individuals with real or perceived homosexual orientation who are persecuted. Further, this Article will discuss only those instances of persecution which homosexuals suffer solely on account of their membership in a social

---

9. There exists a complex body of law in which the United States Board of Immigration Appeals and the Federal Courts have attempted to clarify the meaning of terms such as "persecution" and "political opinion." See, e.g., I.N.S. v. Elias-Zacarias, 112 S. Ct. 812 (1992); M.A. v. I.N.S., 899 F.2d 304 (4th Cir. 1990); Hernandez-Ortiz v. I.N.S., 777 F.2d 509 (9th Cir. 1985); Bolanos-Hernandez v. I.N.S., 767 F.2d 1277 (9th Cir. 1984); Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988); Matter of Maldonado-Cruz, No. A27 549 626 (BIA Jan. 21, 1988).
10. (Orientation-based) "persecution" can take three forms:
First, the "most obvious" form of persecution is the "abuse of human rights by organs of the state, such as the police or the military." Such actors are known as "agents of persecution." JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 125 (1991). Second, the abuse of human rights by actors connected with the government, such as "thugs" or party members acting in concert with those in power, is clearly persecutory. Id. at 126. Third, persecution may arise through "the failure or the inability of a government effectively to protect the basic human rights of its populace." Id. at 127.
group, not persecution that might be endured on account of political opinions about homosexual issues.\textsuperscript{11}

Congress has not defined the meaning of "social group"; rather, it has simply codified existing international obligations into domestic law. The definitional language of the 1967 Protocol was enacted without change into the United States Code through the Refugee Act of 1980.\textsuperscript{12} The Refugee Act charges the Attorney General of the United States with establishing procedures to determine asylum status, and directs the observance of the Immigration and Nationality Act's criteria for determining eligibility.\textsuperscript{13}

Persons who are found eligible as refugees and asylees are entitled to "non-refoulement," whereby the United States may not return them to the country where they face persecution.\textsuperscript{14} In addition to the critical entitlement of non-refoulement, refugees receive other important entitlements, which include religious freedom,\textsuperscript{15} exemption from exceptional measures taken against nationals of the refugee's country of origin,\textsuperscript{16} acquisition of

\textsuperscript{11} The Ninth Circuit Court of Appeals has established that, in that circuit, members of a group with common characteristics who resist governmental abuse of their group may satisfy the "political opinion" category of the statute, even when their "social group" claim is not successfully offered. See Lazo-Majano v. I.N.S., 813 F.2d 1432 (9th Cir. 1987). In Lazo-Majano, the petitioner was a Salvadoran woman who fled her country after she was repeatedly raped by her employer, a low-ranking Salvadoran military official. When she appealed from the BIA's denial of her asylum application, the Ninth Circuit reversed, stating:

[p]ersecution is stamped on every page of this record... if the situation is seen in its social context, [the employer] is asserting the political opinion that a man has a right to dominate and he has persecuted [the petitioner] to force her to accept this opinion without rebellion... [she] was not permitted... to hold an opinion to the contrary. When by flight, she asserted one, she became exposed to persecution for her assertion. Persecution threatened her because of her political opinion.

\textit{Id.} at 1434-35.


\textsuperscript{13} \textit{Id.} An alien admitted to the United States pursuant to sec. 207 is called a "refugee." An alien who is admitted to the United States pursuant to a finding that he or she meets the refugee definition in § 101(a)(42) is called an "asylee."


\textsuperscript{15} \textit{Id.} at art. 4.

\textsuperscript{16} \textit{Id.} at art. 8.
moveable and immovable property,\textsuperscript{17} protection of intellectual property rights,\textsuperscript{18} free association,\textsuperscript{19} access to national courts,\textsuperscript{20} the right to work,\textsuperscript{21} equal access to rationed supplies,\textsuperscript{22} equal access to housing,\textsuperscript{23} public relief,\textsuperscript{24} social security,\textsuperscript{25} freedom of movement,\textsuperscript{26} free transfer of assets,\textsuperscript{27} recognition of marriage,\textsuperscript{28} and protection from expulsion.\textsuperscript{29}

\section*{II. Administrative and Judicial Proceedings}

The regulations which implement section 208 of the INA provide three procedures whereby an applicant may request asylum. The application process begins either when an alien voluntarily surrenders to the Immigration and Naturalization Service (INS), or when he or she is arrested after entering the United States illegally. If the applicant voluntarily surrenders at a land border or port of entry, and if exclusion and deportation proceedings have not yet begun against the applicant, he or she may first apply for asylum protection with an INS District Director.\textsuperscript{30} If this initial attempt is unsuccessful, an applicant may resubmit his or her application to an Immigration Judge in subsequent exclusion or deportation proceedings.\textsuperscript{31} In the alternative, if exclusion or deportation proceedings have begun before the applicant requests asylum for the first time, he or she may submit the first request directly to an Immigration Judge.\textsuperscript{32}

Decisions of an Immigration Judge regarding deportation\textsuperscript{33} are subject to administrative review by the Board of Immigration

\begin{enumerate}
\item \textsuperscript{17} Id. at art. 13.
\item \textsuperscript{18} Id. at art. 14.
\item \textsuperscript{19} Id. at art. 15.
\item \textsuperscript{20} Id. at art. 16.
\item \textsuperscript{21} Id. at arts. 17-19.
\item \textsuperscript{22} Id. at art. 20.
\item \textsuperscript{23} Id. at art. 21.
\item \textsuperscript{24} Id. at art. 23.
\item \textsuperscript{25} Id. at art. 24.
\item \textsuperscript{26} Id. at art. 26.
\item \textsuperscript{27} Id. at art. 30.
\item \textsuperscript{28} Id. at art. 12.
\item \textsuperscript{29} Id. at art. 32.
\item \textsuperscript{30} 8 C.F.R. § 208.2(A) (1994).
\item \textsuperscript{31} Id., §§ 208.2(B), 208.18
\item \textsuperscript{32} Id., § 208.2(B).
\item \textsuperscript{33} Deportation proceedings are initiated against aliens who have entered the United States to determine whether they should be expelled from the country. The term "entry" means "any coming of an alien into the U.S. from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." 8 U.S.C. § 1101(a)(13) (1988). The term is furthermore defined as:
Appeals34 ("BIA") and judicial review in the courts of appeals.35 Decisions regarding exclusion36 are subject to administrative review by the BIA and to judicial review through habeas corpus petition to a district court.37 From the federal courts, an unsuccessful party may petition the United States Supreme Court for a writ of certiorari. When an applicant using any of these methods is successful, he or she is eligible to apply for permanent residence in the United States after one year elapses.38

III. VIOLENCE AGAINST HOMOSEXUALS: "BREAKING THE SILENCE"

In February 1994, Amnesty International, a prominent NGO, published "Breaking the Silence,"39 a report documenting incidents of orientation-based violence in various countries. This report and numerous others40 demonstrate that orientation-based persecution is a frequent and serious form of persecution which can and does instill a "well founded fear" in the hearts of many foreign nationals. Orientation-based persecution takes many forms, Amnesty International reveals, ranging from "subtle discrimination and everyday hostility by agents of government to outright imprisonment, torture, and execution."41 These accounts foreshadow an increased number of asylum claims which, like Marcelo Tenorio's, can be brought only under the "membership in a particular social group" category.

Buttressing Amnesty's point, a recent country-by-country survey of lesbian and gay liberation and oppression provides a shocking look at the magnitude of orientation-based persecution.42 That survey reported that of 178 countries studied, only 6

1. A crossing into the territorial limits of the U.S., i.e., physical presence;
2. An inspection and admission by an immigration officer; or
3. Actual and intentional evasion of inspection at the nearest inspection point; coupled with
4. Freedom from restraint.

34. 8 C.F.R. § 3.1(b) (1994).
36. Exclusion proceedings are initiated against aliens who seek entry and admission into the United States at its borders. An excludable alien is not considered to have entered the U.S. KURZBAN, supra note 33, at 21.
40. See infra notes 41-54 and accompanying text.
41. See AMNESTY INTERNATIONAL, supra note 39, at 11.
have enacted laws which protect gay men and lesbians from discrimination by the government and private citizens. In 74 of those 178 countries, homosexual behavior is illegal. In some countries where homosexuality is illegal, homosexual acts are punishable by prison sentences and even the death penalty. Even where homosexuals are not legally subject to execution, though, their lives may be nonetheless threatened. In India, where homosexual acts are outlawed, there are reports of raids by the police in Bombay, where persons are arrested for no other reason than that they “look like” homosexuals.\textsuperscript{43} The Indonesian embassy reports that in that country “there is no mentioning of homosexuals, lesbians, or heterosexuals concerning Indonesian legislation,” yet the embassy acknowledges police raids and police violence against homosexual men.\textsuperscript{44}

From a legal perspective, homosexuals fare the worst in Islamic countries and in Africa.\textsuperscript{45} In Iran, the government is quite forthcoming about the danger homosexuals face under its legal system. Its embassy stated that “[h]omosexuality in Iran, treated according to the Islamic law, is a sin in the eyes of God and a crime for society. In Islam, generally, homosexuality is among the worst possible sins you can imagine.”\textsuperscript{46} In accordance with this official condemnation of homosexuals, the Islamic penal code provides that homosexuality is punishable by “whipping, chopping off hands and feet, and stoning.”\textsuperscript{47} Further, that code gives a judge considerable latitude with respect to alternative punishments, and it is considered dangerous to defend an accused homosexual in Iran.\textsuperscript{48}

The publication of “Breaking the Silence” marks a significant change in the acknowledgement of orientation-based persecution. Although homosexuals were among the groups persecuted by the Nazis during World War II, and thus are arguably among those groups the original Convention sought to protect, refugee law has not to date protected homosexuals as it has other persecuted groups.\textsuperscript{49} Despite its role as a prominent, grassroots international human rights organization, even Amnesty International itself has not devoted significant attention to orien-

\textsuperscript{43} \textit{Id.} at 290.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.} at 250-51.
\textsuperscript{46} \textit{Id.} at 291.
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} at 292.
\textsuperscript{49} \textit{See} \textit{Amnesty International, supra} note 39, at 8.
tation-based persecution until recently. Amnesty began to acknowledge certain forms of homophobic persecution in 1979, when it acknowledged those imprisoned for homosexual acts as "prisoners of conscience," and later, in 1982, Amnesty specifically condemned the forcible medical treatment endured by prisoners to "change" their sexual orientation.\(^5\) Now, it has joined with the international press to reveal countless incidents of governmentally sponsored or ignored violence against gays.

Recently the international press has reported that in Peru, the government itself has openly sponsored persecution of gays, even those who hold high office. In 1993, Carlos Hiqueras, a 31-year member of the Peruvian foreign service and former ambassador to Cuba and Yugoslavia, was abruptly fired along with 117 other diplomats when President Alberto Fujimori purged his government of those with "questionable ethics."\(^5\) By contrast, in 1991, the "Black Hand," a Colombian outlaw group with a plan to eradicate elements of society that it opposes, shot to death at least 40 people, among them known homosexuals.\(^5\)

Not only has orientation-based persecution received considerable coverage by the international press and Amnesty International, the mistreatment of homosexual persons has also been acknowledged recently by the UN itself. In 1993 the International Lesbian and Gay Association (ILGA) was granted the right to consult and lobby the U.N. Economic and Social Council (ECOSOC).\(^5\) As the problem of violence against homosexuals emerges as a legitimate international concern, what also emerges is the need to include homosexuals among those persons who may seek refuge from their horror through the asylum system.\(^5\)

\(^{50}\) Id. at 5.

\(^{51}\) Opposition Says Peru Moving Toward Dictatorship, DALLAS MORNING NEWS, Jan. 24, 1993.

\(^{52}\) "Black Hand" Kills 12 in Campaign Against Social Ills, REUTER, Nov. 25, 1991.

\(^{53}\) Larry King Live (CNN Television Broadcast, Oct. 13, 1993), available in Lexis News Library, CNN File. Julie Dorf, ILGA's Executive Director, explains the benefits of ECOSOC status:

[T]he Economic and Social Council is the main human rights arm of the United Nations, and ILGA has consultative status, along with 3,000 other non-governmental organizations - actually the lowest-level status - and has the right to present its opinions about various human rights issues.

\(^{54}\) Id.

\(^{54}\) Amnesty concludes its report on orientation-based persecution with a recommendation to "review and revise (or repeal where necessary) all barriers, whether in law or administrative practice, to persons seeking political asylum on the basis of persecution based upon sexual identity." AMNESTY INTERNATIONAL, supra note 39, at 43.
There are few sources of guidance for courts to use in determining which groups should be recognized by the United States under the “social group” category. As commentators have recognized, “[t]he legislative history behind the phrase ‘membership in a particular social group’ is uninformative.” The drafters of the Convention originally did not include “particular social group” as one of the categories of people eligible for refugee status. It appears that the category was added as an afterthought at the urging of the Swedish delegate. The Convention seemingly added “social group” to the categories as a “safety net” for asylum seekers who should qualify for refugee status but fail to fall neatly into one of the enumerated categories.

As noted above, the UNHCR administers the Convention’s provisions. Its Handbook on Procedures and Criteria for Determining Refugee Status (Handbook), which offers guidelines for interpreting the categories in the refugee definition, advises the following with respect to “social group”:

A ‘particular social group’ normally comprises persons of similar background, habits, or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e., race, religion, or nationality. ... 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. . . . Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.60

A. The Ninth Circuit

The leading United States case discussing the “social group” category is Sanchez-Trujillo v. I.N.S.61 In that case, two aliens from El Salvador petitioned for review of the BIA’s order denying their request for relief from deportation. They claimed that they were entitled to asylum and prohibition of deportation because they feared persecution as members of a particular social group which consisted 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.”62

Struggling to discern the contours of the “social group” category, the Sanchez-Trujillo court set forth a four-part test to determine whether the petitioners had established eligibility for relief premised on their membership in a social group. First, the court asked, is the class of people identified by the petitioners cognizable as a “particular social group” under the immigration statutes? Second, do the petitioners establish that they themselves qualified as members of that group? Third, has the purported social group in fact been targeted for persecution on account of the characteristics of the group members? Finally, are “special circumstances” present which warrant the regard of “mere membership” in that social group as constituting per se eligibility for asylum or prohibition of deportation?63

Considering its “threshold question,” whether the class of young, urban, working class males satisfied the refugee definition, the court looked to the term “particular social group,” which appeared in the 1967 Protocol. It then turned to the

61. 801 F.2d 1571 (9th Cir. 1986).
62. Id. at 1573.
63. Id. at 1574-75.
Handbook, and noted the warning that "'mere membership in a social group will not normally be enough to substantiate a claim to refugee status,' absent the existence of 'special circumstances.'"64 The court next examined the statutory language and concluded that while "the 'social group' category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion, . . . the scope of the term cannot be without some outer limit."65

Attempting to define this outer limit, the Sanchez-Trujillo court individually examined the words "particular" and "social group." Because the word "group" is modified by the words "particular" and "social," the court decided, a "collection of people closely affiliated with each other, who are actuated by some common impulse or interest" is implied.66 It then emphasized that "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."67 The court suggested that a prototypical example of a "'particular social group' would be the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people."68

Ultimately, the Sanchez-Trujillo court held that such an all-encompassing grouping as the petitioners identify simply is not that type of cohesive, homogeneous group to which we believe the term 'particular social group' was intended to apply. . . To hold otherwise would be tantamount to extending refugee status to every alien displaced by conditions of unrest or violence in his or her home country.69

64. Id. at 1576 (quoting Handbook, supra note 60, ¶ 79).
65. Id. (emphasis added).
66. Id.
67. Id.
68. Id. Ironically, in a later case, Estrada-Poladas v. I.N.S., 924 F.2d 916 (9th Cir. 1991), the Ninth Circuit rejected an asylum applicant's claim that persecution based on her membership in a certain family could satisfy the "social group" category. The court specifically rejected the very notion it advanced in Sanchez-Trujillo (the family as a prototypical example of a social group), holding: [The petitioner] cites no case that extends the concept of persecution of a social group to the persecution of a family, and we hold it does not. If Congress had intended to grant refugee status on account of 'family membership,' it would have said so." Id. at 918-19.
69. 801 F.2d at 1577.
The Sanchez-Trujillo decision, then, in attempting to define the outer limits of the "social group" category, requires that applicants claiming persecution due to their membership in such a group emphasize the group's cohesiveness and the characteristics that are common to their particular group.

B. The Board of Immigration Appeals

The BIA has given a different, and therefore precedentially confusing, meaning of "social group." Its most thorough analysis of the meaning of "social group" appears in Matter of Acosta. 70 Acosta, a Salvadoran man, claimed that he feared persecution in his country based on his membership in a social group comprised of taxi drivers and persons engaged in the transportation industry in El Salvador. Acosta belonged to a group known as COTAXI, one of five taxi cooperatives in the city of San Salvador and one of many such cooperatives throughout the country. He presented evidence to the BIA that anti-government guerrillas had subjected him and other members of COTAXI to physical violence and death threats. 71

Evaluating Acosta's "social group" claim, the BIA first applied a purely linguistic analysis, and decided that the term could encompass people who endure persecution because they have a "certain relation, or having a certain degree of similarity to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins, education, family background, or perhaps economic activity." 72 Next, like the Sanchez-Trujillo court, the BIA turned to the Handbook's language, and emphasized that "social group" status frequently appears in combination with persecution on other grounds such as race, religion, or nationality. 73

Finally, the BIA applied the doctrine of ejusdem generis - "of the same kind" - to deduce the meaning of "social group." The doctrine of ejusdem generis holds that "general words used in an enumeration with specific words should be construed in a manner consistent with the specific words." 74 In Acosta, the BIA determined that since the other categories for which asylum can be granted describe persecution "aimed at an immutable characteristic," persecution on account of membership in a particular

71. Id. at 216-17.
72. Id. at 232-33 (quoting G. Goodwin-Gill, The Refugee in International Law 30 (1983)).
73. Id.
74. Id.
social group means “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic.” 75 Ultimately, the BIA held that because the characteristics of the group in which Acosta claimed membership were not immutable, he had “not shown that the conduct he feared was ‘persecution on account of a membership in a social group,’ ” and his claim necessarily failed. 76

Acosta’s inability to demonstrate the immutability of his characteristics directly resulted in the BIA’s rejection of his social group claim. As a result, Acosta’s “immutability” requirement is the necessary core of a social group claim before the BIA. In that case, the BIA defined an immutable characteristic as one which

*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. Only when this is the case does the fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing persecution “on account of membership in a particular social group” in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.” 77

Within months after the Acosta decision was entered, the BIA again applied its own “social group” test. In *Matter of Sanchez and Escobar*, 78 the two applicants claimed membership in a social group “comprised of young (18 to 30 years of age), urban, working class males of military age who have not served in the military or otherwise affirmatively demonstrated their support for the government of El Salvador.” 79 Their appeal from an Immigration Judge’s refusal to withhold their deportation failed, because they had not established that the persecution they endured was attributable to their membership in that social group. Explaining its perception of the “social group” requirements, the BIA stated:

75. *Id.* (emphasis in original).
76. *Id.*
77. *Id.* at 233-34 (emphasis added).
79. *Id.* at 285.
[i]t is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk. In the context of the asylum and withholding provisions related to 'membership in a particular social group' under the (Refugee) Act, there must be a showing that the claimed persecution is on account of the group's identifying characteristics. This the respondents have not shown.\(^{60}\)

The decision in Matter of Sanchez and Escobar was appealed to the Ninth Circuit, which, in Sanchez-Trujillo, affirmed the BIA’s decision, but replaced the BIA’s “immutable characteristic” standard with its own four-part test to justify the outcome.\(^{81}\)

Acosta’s immutability requirement, which will be difficult for some asylum applicants to meet, is the current standard for the “sexual orientation” category at the BIA level. Although Acosta itself was a non-binding decision, on June 16, 1994, United States Attorney General Janet Reno designated a case that applied the immutability standard to an orientation-based persecution claim as binding precedent for the BIA.\(^2\)

Again, the Ninth Circuit’s emphasis upon the cognizability of a particular social group in Sanchez-Trujillo differs from the BIA’s emphasis upon the characteristics of any given group, producing precedential confusion. While the Sanchez-Trujillo court’s four-part test tests the validity of the group itself, Acosta and Matter of Sanchez and Escobar stress the characteristics which lead to the group’s persecution. The inconsistency of these two tests leads to a crucial question for victims of orientation-based persecution: which criteria can they satisfy, if any?\(^{83}\)

---

80. Id. at 285-86 (emphasis added).

81. 801 F.2d 1571 (9th Cir. 1986); see supra notes 61-69 and accompanying text.

82. See Membership in a “Social Group” as Grounds for Asylum, REFUGEE REPORTS, June 30, 1994, at 13.

In Matter of Toboso-Alfonso, Interim Dec. No. 3222 (BIA 1990), a case that the BIA initially did not designate as precedential, a gay Cuban man received asylum based on his sexual orientation when the government ordered him to leave the country or be jailed, and to “register” his sexual orientation with the authorities. Upholding the Immigration Judge’s decision, the BIA noted the failure of the INS to challenge the finding that homosexuality is an “immutable” characteristic. Further, Toboso-Alfonso successfully alleged that his registration as a homosexual by the Cuban government was also an immutable characteristic.

83. Courts outside the Ninth Circuit have stressed different factors in determining whether an individual is a member of a particular social group, but they have failed to establish a formal test. See Ellen Vagelos, Comment, The Social Group That Dare Not Speak Its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status?, 17 FORDHAM INT’L L.J. 229, 251 & n.180 (1993). See, e.g., Gomez v. I.N.S., 947 F.2d 660 (2nd Cir.
V. ORIENTATION-BASED PERSECUTION CLAIMS: IMPLICATIONS OF THE SANCHEZ-TRUJILLO AND ACOSTA ANALYSES

As Part II of this Article explains, an alien who is denied asylum may appeal to the BIA and to the federal court system. Given the discrepancy between the BIA’s interpretation of “social group” and that of the Ninth Circuit, an alien must carefully characterize the evidence which supports his or her claim of asylum. Ninth Circuit asylum applicants who claim orientation-based persecution must satisfy Sanchez-Trujillo’s four-part “group identity” test. Applied to such applicants, the test requires that the petitioners firmly establish that homosexuals (or perceived homosexuals, whether the perception is accurate or not), are “homogeneous” and “closely affiliated,” with a “common impulse or interest.”

While actual and perceived homosexuals do indeed possess a “common impulse or interest,” namely, the actual or perceived desire to engage in sexual conduct with members of their own sex, there are consequences to the statement that homosexuals are a homogeneous group. Such an assertion is not only inaccurate, but also perpetuates stereotypes about homosexual persons. To satisfy the Sanchez-Trujillo test and ultimately receive asylum based on his or her membership in a particular social group, a homosexual applicant may effectively have to renounce his or her individuality, and thereby succumb to the factfinder’s preconceived notions about the general characteristics of homosexuals. These preconceptions, unfortunately, could quite possibly disfavor homosexuals as a group because of their stereotypical, rather than individual, traits.

In addition to the surrender of his or her individuality, a victim of orientation-based persecution also must prove “close affiliat(ion)” with other members of the “social group.” While

1991) (finding the persecutor’s perception of the social group important as to determining whether a particular social group exists).
84. The Ninth Circuit is the only circuit which has devised a specific test for “membership in a particular social group.”
85. 801 F.2d 1571 (9th Cir. 1986).
86. “Homosexual” is defined as “of or characterized by sexual inclination toward those of the same sex.” WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 871 (2d. ed. 1983).
87. In fact, many advocates for homosexuals insist:
[T]here is no general model that applies to the effective organization of same-sex lovers throughout the world. . . . There is no such thing as the lesbian or the gay man. Same-sex lifestyles differ from place to place and from time to time, each with its own advantages and disadvantages.
THIRD PINK BOOK, supra note 42, at 18.
this may be uncomplicated for an applicant who can prove his or her membership in a well-known gay rights group analogous to the United States' "Act Up" and "Queer Nation" organizations (which membership might better support an applicant's claim of persecution based on political opinion rather than on membership in a particular social group), the "close affiliation" requirement is problematic for applicants who, like Marcelo Tenorio, are simply targeted for abuse because they are perceived as homosexual by their appearance or behavior.

The Ninth Circuit suggests a strict interpretation of its "close affiliation" requirement, offering the family as a "prototypical example of a particular social group."88 Explaining why a court could readily recognize the immediate members of a certain family as a "particular social group," the Sanchez-Trujillo court reasoned that the family is "a focus of fundamental affiliational concerns and common interests for most people."89 Importantly, the court admitted the inadequacy of its own test, stating that while a family could be recognized as a "particular social group" because it is a "small, readily identifiable group," larger groups with common characteristics, "even if they are at a greater risk of persecution than a family," could not be likewise considered.90 The Ninth Circuit has been criticized for this statement, which apparently subordinates less-easily identified groups to easily recognizable groups, even when the former groups suffer more serious persecution.91

Homosexuals are one of those groups which are at great risk of persecution, yet cannot satisfy the Ninth Circuit's test because of their numerosity. The size of the gay population in the United States and in international communities is, like the immutability issue, undecided even today. Whatever the size of the gay popu-

88. Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1576 (9th Cir. 1986). But see Estrada-Posadas v. I.N.S., 924 F.2d 916 (9th Cir. 1991) (rejecting an asylum applicant's claim that membership in a certain family constitutes "membership in a particular social group.").
89. Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1576 (9th Cir. 1986).
90. Id., citing Hernandez-Ortiz v. I.N.S., 777 F.2d 509 (9th Cir. 1985) (emphasis added).
91. See, e.g., Vagelos, supra note 83, at 250-51: Although the court in Sanchez-Trujillo stressed voluntary association as the cornerstone of its analysis, some commentators argue that immutability was an underlying factor in the court's decision. This argument relies on the fact that the court offered a family as an example of a particular social group and that, generally, membership in a family is involuntary. Furthermore, the purported social group in Sanchez-Trujillo was defined in terms of age, sex, and class; such characteristics are not easily subject to manipulation by members of the purported social group.
lation in this country or in others, the number of hate crimes against gays nonetheless establishes that the size of the group which suffers orientation-based persecution is nowhere near as small as the number of people in an immediate family. Proving membership in a particular social group, as Sanchez-Trujillo requires, is therefore a formidable, and, in many cases, an impossible task for actual and perceived homosexuals.

Just as the Ninth Circuit's four-part test presents an insurmountable hurdle for many who withstand orientation-based persecution, so too is the BIA's "immutable characteristics" approach an awkward fit for this type of "social group" claim. That his or her identifying characteristics are "immutable," which is the indispensable foundation of a BIA "social group" claim, is difficult for a homosexual to prove, given the current scientific debate over whether homosexuality is innate (or fixed early in life) or a matter of choice.

If a factfinder is convinced that homosexuality could be merely a lifestyle of choice, and not one of biological destiny, Acosta's language may be especially damaging to an asylum applicant claiming persecution based on his or her membership in a social group comprised of homosexuals. In that decision, the BIA specifically noted that Acosta's characteristics—employment as a taxi driver in San Salvador and refusal to participate in guerrilla-sponsored work stoppages—were not immutable. It stated:

[T]he members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages. It may be unfortunate that the respondent either would have had to change his means of earning a living or cooperate with the guerrillas in order to

92. See Amnesty International, supra note 39 (compilation of instances of orientation-based persecution).

93. This Article addresses actual as well as perceived, or "imputed" sexual orientation because persecution occurs on both grounds. The author acknowledges that obtaining refugee status on the grounds of "imputed political opinion" is difficult given the Supreme Court's holding in I.N.S. v. Elias-Zacarias, 112 S. Ct. 813 (1992). In that case, Justice Scalia wrote for the majority that persecution on account of political opinion must be on account of the victim's political opinion, not the persecutor's. However, this Article concerns persecution based on membership in a social group is comprised of actual or perceived homosexuals. This form of persecution can be meaningfully distinguished from persecution based on political opinion, because social groups emphasize membership in a class or assembly of persons, while political opinion focuses on an individual's beliefs.

avoid their threats... because the respondent’s membership in the group of taxi drivers was something he had the power to change, so that he was able by his own actions to avoid the persecution of the guerrillas, he has not shown that the conduct he feared was “persecution on account of membership in a particular social group” within our construction of the act.95

Strangely, when suggesting that Acosta should have either quit his job or cooperated with the guerrillas, the BIA did not specifically determine that his mutable characteristics were among a list of characteristics that are never “so fundamental to his identity or conscience that (they) ought not be required to be changed.” Unfortunately, there has been no case in which the BIA has offered a “laundry list” of characteristics that are, while not immutable, too integral to an applicant’s identity to require their surrender.96 Assuming arguendo that homosexuality is a lifestyle choice rather than a purely genetic trait, it is uncertain whether the BIA would consistently regard a person’s sexual orientation as a characteristic so “fundamental” that it ought not to be “changed.” Would the BIA regard asking a person to abandon his or her sexuality as merely “unfortunate?” Would the BIA require Marcelo Tenorio to refrain from socializing with other members of the gay community at bars and other public meeting places in order to avoid persecution? Without some explicit statement on homosexuals as a social group from a higher authority, it is impossible to predict the BIA’s outcome on the issue of whether sexual orientation is fundamental.97

As the above analyses show, if victims of orientation-based persecution seek relief from their terror through asylum claims before the BIA and the Ninth Circuit, they are likely to fail. When these unsuccessful claimants are deported, the United States violates the principle of “non-refoulement,” which is the

96. In Acosta, the BIA did not explain from what precedent or doctrine its notion of “fundamental” characteristics derived.
97. In Tenorio, Judge Leadbetter acknowledged the Ninth Circuit’s “voluntariness” requirement, but his decision appears to turn on the “immutable” nature of sexual orientation. It reads, in part:

There exists a voluntary associational relationship among the members (of the homosexual social group), and a common characteristic that is fundamental to their identity as a member of the social group. Sexual orientation is arguably an immutable characteristic, and one which an asylum applicant should not be compelled to change. Thus, homosexuals are considered to be members of a particular social group.

very essence of refugee law. Thus, if the United States is to fulfill its international commitment, changes must be implemented to accommodate such victims.

One commentator, Daniel Compton, has suggested that the necessary change would be a modification of the first factor in Sanchez-Trujillo's four-part test. He would emphasize external cognizability factors rather than internal ones, and use the fourth factor - the "special circumstances" element - as a limiting principle. To eliminate "weak social group claims," Compton suggests, a court should determine, as the Handbook recommends, whether "special circumstances" exist which allow recognition of a claim on the basis of social group membership alone. Despite his optimism that more emphasis on the fourth prong of the Sanchez-Trujillo test will produce a better result, however, Compton admits that "[e]xactly what is meant by 'special circumstances' is not stated in the Handbook, nor is its meaning clarified by the courts that have cited it." Ultimately, Compton offers some examples of what courts should view as "special circumstances": a historical pattern of the group, a recent shift in the balance of power making the group vulnerable to a new regime, or a situation that simply "shocks the conscience of a decisionmaker."

Although such a modification of Sanchez-Trujillo might produce a desirable effect in the Ninth Circuit, this precedent would not bind the BIA outside the Ninth Circuit, nor would it bind other federal circuits (the Fifth and Eleventh Circuits, for example) which must decide numerous asylum appeals.

Not only would the Ninth Circuit's willingness to broaden its interpretation of the parameters of "particular social group" be of limited authoritative benefit, it would also suffer from the same lack of guidance it exhibited in Sanchez-Trujillo if the court attempted to use the fourth prong as a "weed-out" factor. Neither the courts of appeals nor the BIA currently have sufficient guidance to effectively apply the Refugee Act to social

98. Refugee Convention, supra note 14, at art. 33.
99. Compton, supra note 55, at 930. Though Compton views Sanchez-Trujillo as opening up the door to asylum applicants claiming persecution on account of social group membership, I would characterize the decision differently. A more appropriate title for a comment on Sanchez-Trujillo might be: "Asylum for Persecuted Social Groups: The Ninth Circuit Slams the Door on Some Groups with its Four-Part Test."
100. Id. at 923.
101. Id.
102. Id.
103. Id.
group claims based on sexual orientation. As noted earlier, courts routinely give great weight to the Handbook, which advises that social groups are usually a collection of "persons of similar background, habits, or social status."\textsuperscript{104} However, as Compton correctly realizes, the Handbook's instructions regarding social group membership are terribly vague — it provides no examples of groups which might be construed as "particular social groups."

Likewise, the Refugee Act itself, which the BIA and the federal courts are bound to uphold, offers no interpretive guidance — it is simply a "blank check" adaptation of international obligations into the United States Code. The troubling effect of Congress' failure to define the terms contained in the Refugee Act may be acutely observed in \textit{Estrada-Posadas v. I.N.S.}\textsuperscript{105} There, the court relied on Congress' silence about the contours of "particular social group" to refuse the applicant's "family as a social group" claim, stating, "[I]f Congress had intended to grant refugee status on account of 'family membership,' it would have said so."\textsuperscript{106} Does this not also mean that if Congress had intended to grant refugee status on account of orientation-based persecution, it would have said so?

\section*{VI. A "Classes of Persons" Analysis}

Whether Congress intended to grant refugee status to a "social group" comprised of homosexuals might be determined by whether homosexuals were among the classes of persons the Refugee Act intended to protect from persecution. Justice Sandra Day O'Connor, in her dissent from the Court's opinion in \textit{Bray v. Alexandria Women's Clinic},\textsuperscript{107} has offered a method for determining which classes of persons a civil rights statute was intended to protect. This method can be applied by analogy to the Refugee Act to show that homosexuals were indeed among the classes of persons intended for protection by the Act.

In \textit{Bray}, the respondents, abortion clinics and supporting organizations, sued to enjoin the petitioners, an association of individuals who plan antiabortion demonstrations, from demonstrating at clinics in the Washington, D.C. area. The District Court held that the petitioners were liable under section 1985(3), the civil rights statute prohibiting conspiracies to deprive "any person or classes of persons of the equal protection of the laws, or of equal protection and immunities under the

\begin{itemize}
\item \textsuperscript{104} \textit{HANDBOOK}, supra note 60, \textsuperscript{1} 77.
\item \textsuperscript{105} 924 F.2d 916 (9th Cir. 1990).
\item \textsuperscript{106} \textit{Id.} at 918-19.
\item \textsuperscript{107} 113 S. Ct. 753 (1993).
\end{itemize}
laws.” The Circuit Court of Appeals affirmed the District Court’s holding, which enjoined the petitioners from trespassing on, or obstructing access to specified clinics and ordered the payment of attorneys’ fees pursuant to 42 U.S.C. section 1988.

The majority of the United States Supreme Court held that section 1985(3) does not create a federal cause of action against persons who demonstrate at abortion clinics. Delivering the Court’s opinion, Justice Scalia determined that the respondents had not shown, as precedent requires:

1. that ‘some racial, or perhaps otherwise class-based invidiously discriminatory animus [lay] behind the conspirators’ action,’ and
2. that the conspiracy ‘aimed at interfering with rights’ that are ‘protected against private, as well as official encroachment.’

Rejecting the notion of women who seek abortions as the “class” targeted for discrimination, Justice Scalia stated:

Whatever may be the precise meaning of a ‘class’ for purposes of [the] speculative extension of § 1985(3) beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. Otherwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3) simply by defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with. . . . The class cannot be defined simply as the group of victims of the tortious action.

Justice O’Connor, more willing to extend the statute’s protection beyond racial situations, countered Justice Scalia in her dissent (in which Justice Blackmun joined), declaring: “[The] respondents’ injuries and petitioners’ activities fall squarely within the ambit of this statute.” Advocating a more flexible construction of the statute, Justice O’Connor noted that

[Although the immediate purpose of § 1985(3) was to combat animosity against blacks and their supporters, the language of the Act, like that of many Reconstruction statutes, is more expansive than the historical context that inspired it. [The statute] speaks in general terms. . . .

110. Id. at 759 (alterations in original) (citations omitted).
111. Id. at 799 (O’Connor, J., dissenting).
112. Id. (citation omitted).
She further supported her position that section 1985(3) ought to extend to non-racial discrimination with the Act's legislative history:

[The Act encoded] Congress' condemnation of private action against individuals on account of their group affiliation. Perhaps the clearest expression of this intent is found in the statement of Senator Edmunds, who managed the bill on the floor of the Senate, when he explained to his colleagues that Congress did not 'undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud... [but, if] it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, of because he was a Methodist, or a Vermonter... then, this section could reach it.'

Justice O'Connor compared the anti-abortion conspiracy in Bray to the Klan conspiracies which motivated the passage of section 1985(3), explaining that both "intended to hinder a particular group in the exercise of their legal rights because of their membership in a specific class."

After establishing that "classes of persons" ought to be read more generously than it was by the Bray majority, Justice O'Connor refuted the majority's concern that "classes of persons" would apply to all "victims of tortious action." Referring to her dissent in Carpenters v. Scott, wherein the majority refused to extend section 1985(3) to conspiracies motivated by economic or commercial animus, Justice O'Connor identified the women seeking the clinics' services as not "simply the victims of tortious action," but rather, as a group that is singled out, "clearly identifiable—by virtue of their affiliation and activities—before any tortious action occurs."

Justice O'Connor's declaration that "clearly identifiable" groups who are singled out for discrimination "before any tortious action occurs" led to her explanation of what comprises a "class of persons" for purposes of the Act. At the very least, she offered, such classes ought to "encompass those classifications that we have determined merit a heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment."

113. Id. at 800, citing Cong. Globe, 42d Cong., 1st Sess. (1871) (alterations in original).
114. Id. at 801.
116. Bray, 113 S. Ct. at 801 (emphasis added).
117. Id.
At this point, because homosexuals, unlike women, are not a "protected class" for purposes of Equal Protection review, it might be claimed that the analogy between section 1985(3) and the Refugee Act is no longer a useful one. However, Justice O'Connor's mention of groups which receive heightened Equal Protection review is merely offered as a mandatory minimum, and thus, the flexibility of section 1985(3) now becomes significant. She explains the critical difference between the Equal Protection Clause, which states that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and section 1985(3), which prohibits states from "depriving...any person or classes of persons of the equal protection of the laws." "Den[ial]," Justice O'Connor reveals, connotes a withholding of something not yet afforded, while "depriv[ation]" indicates a seizure of something already bestowed by the State.\footnote{118}

This distinction between denial and deprivation, coupled with the flexible nature of section 1985(3), provides a helpful clue to whether the Refugee Act was intended to protect homosexuals who are persecuted on account of their membership in a particular social group. As noted above, the 1951 Convention sought to protect individuals who were persecuted during World War II and therefore homosexuals were indeed one of the social groups intended for protection.\footnote{119} Further, the flexible nature of the social group category, like the "classes of persons" language in section 1985(3), requires a reading even beyond the historical context in which the Refugee Act was passed. In fact, the legislative history of the Convention mirrors that of the statute at issue in Bray. As noted earlier, the Swedish delegate to the Convention insisted that persecution directed at refugees in social groups ought to be addressed;\footnote{120} likewise, Senator Edmunds contended that section 1985(3) should reach deprivation of equal protection that is motivated by the deprived's membership in a particular group.\footnote{121} Clearly, the Convention (and subsequently, the Refugee Act) sought to protect individuals whose persecutors deprived them of a basic human existence. I suggest that the "social group" category warrants the elastic analysis that is also appropriate for section 1985(3)'s "classes of persons."

\footnote{118}{Id.}
\footnote{119}{See supra note 49 and accompanying text.}
\footnote{120}{See supra note 57.}
\footnote{121}{See supra note 116.}
VII. Social Group Jurisprudence in Non-U.S. Courts

As discussed above, Acosta's "immutability" requirement, as set forth and applied by the BIA, is an unbeatable barrier for persons who claim persecution on account of their membership in a particular social group comprised of homosexuals. The Canadian Supreme Court has, unfortunately, embraced the immutability requirement so that homosexuals can not qualify under the "social group" category in that country, either.122

In Canada (Attorney-General) v. Ward,123 the Canadian Supreme Court evaluated the claim of a former member of the Irish National Liberation Army (INLA), a paramilitary terrorist organization in Northern Ireland, who had been forced to guard hostages when the organization ordered them executed. Opposing the execution of his prisoners, Ward allowed them to escape. As a result, the organization court-martialed him and sentenced him to death. He fled from Northern Ireland to Canada, where he applied for asylum and was rejected by the Minister of Employment and Immigration. After a series of lower-level appeals, Ward reached the Supreme Court, where he claimed that he was a refugee according to the 1951 Convention on the Status of Refugees because of his membership in a particular social group (past members of the INLA) and his political opinion that the prisoners ought not to be killed.124

Although Ward's "political opinion" claim for refugee status was accepted by the Supreme Court, that body explicitly rejected his "social group" claim. Citing the Acosta criteria, which derives from the application of ejusdem generis, the court affirmed its own "social group" approach:

In finding that [Acosta's] co-operative did not constitute "a particular social group," the board defined this term in a manner that reflects classic discrimination analysis ... "By construing persecution on account of membership in a social group in this manner, we preserve the concept that

---

122. One Canadian administrative tribunal has granted political asylum on the grounds of orientation-based persecution. In Re: Inaudi, I.R.B. No. T 91-04459 (Apr. 9, 1992), the Convention Refugee Determination Division (the "CRDD") of the Canadian Immigration and Refugee Board (the "IRB") determined that an Argentinean man was entitled to asylum based on the continuous and abusive treatment he suffered at the hands of the Argentinean authorities. As an IRB decision, however, this ruling has very little precedential value.

For a thorough analysis of Inaudi and a comparison of asylum procedures in the United States and Canada, see Vagelos, supra note 83.


124. Id.
refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution." 125

Canada's justification for this restrictive approach to social group jurisprudence echoes Acosta's as well: "Canada's obligation to offer a haven to those fleeing their homelands is not unlimited." 126 Further, Ward demonstrates Canada's refusal to bear the refugee burden alone: "Canada should not overstep its role in the international sphere by having its responsibility engaged whenever any group is targeted." 127 Like the United States and all Convention obligors, Canada requires guidance to utilize the "social group" category effectively. In dicta that resembles the BIA's inept description of "fundamental" characteristics, the Ward court stated: "[S]urely there are some groups, the affiliation in which is not so important to the individual that it would be more appropriate to have the person dissociate him- or herself from it before Canada's responsibility should be engaged." 128 Despite its certainty that these groups "surely" must exist, however, the Canadian Supreme Court, like the BIA, was not able to precisely articulate what these groups might be.

VIII. RECOMMENDATION

Estrada-Posadas, Sanchez-Trujillo, Acosta, and Ward confirm that the courts require specific direction to assist their adjudication of "social group" claims. A modification of the Sanchez-Trujillo test, even if it were adopted by all the circuits and the BIA, would not assure any greater adherence to any specific policy than the original test. I suggest that the UNHCR must amend the Handbook in order to ensure an efficient and accurate evaluation of social group claims. Host countries must do this to honor their international commitment to "non-refoulement" and to respond to the widespread instances of orientation-based persecution in international communities. Because judicial bodies in the United States and in various other host countries129 consult the Handbook to evaluate refugee law concepts,130 the UNHCR

125. Id. at 32 (quoting Matter of Acosta, 19 I. & N. Dec. 211, 234 (BIA 1985)).
126. Id. at 33.
127. Id.
128. Id. at 33.
129. A "host country" is a country which is in an economic and political state that enables its government to grant asylum to individuals pursuant to its international obligations.
130. See Ananeh-Firempong v. I.N.S., 766 F.2d 621 (1st Cir. 1985) (describing the Handbook's importance in asylum cases).
should clarify its criteria by specifically naming sexual orientation as an example of a social group.  

The restrictive approaches to social group recognition which appear in Sanchez-Trujillo and Matter of Acosta reflect the Ninth Circuit’s and the BIA’s concern that the United States alone cannot accommodate every asylum applicant who demonstrates a well-founded fear of persecution. The Ninth Circuit and the BIA correctly realize that there must be a limit to grants of asylum by the United States. This recognition should not mean, however, that courts should deny valid “social group” claims; rather, it mandates that host countries must cooperate in order to satisfy their common international commitment to victims of orientation-based persecution.

The author acknowledges that because host countries undertake great financial responsibilities as they grant refugee status, they must establish a maximum number of refugees. However, as countries establish these limits, they may not violate the principle of “non-refoulement.” Leon F. Bouvier examines the need for “outer limits” in U.S. refugee policy with particularity, discussing the impact of immigration on the underclass and the labor market, economic growth, cultural adaptation, and population growth. To ease this impact, Bouvier recommends that refugee numbers ought to be limited to 50,000 per year. He defends against the concepts of “open borders” and increased immigration into the United States:

131. In the event that an amendment to the Handbook is not immediately possible, some alternative statement should be made by the UNHCR’s High Commissioner, who directs her recommendations to all Convention obligors. This statement could take the form of an Executive Committee Recommendation similar to the one made for accepting women who flee gender-based persecution, or as a policy recommendation made in the High Commissioner’s report to the ECOSOC or to the International Commission of Jurists. A modification of the Handbook is the preferred alternative because of its quasi-authoritative status among factfinders who make asylum decisions.

132. See Sanchez-Trujillo v. I.N.S., 801 F.2d 1571 (9th Cir. 1986).
133. See supra notes 14-29 and accompanying text.
134. See supra note 14.
136. Id. at 59-141.
137. Id. at 200. Bouvier’s recommendation that the United States impose limits of 50,000 refugees and 450,000 total immigrants are based on estimated population growth in the United States (assuming that the overall fertility rate is reduced to 1.8). These recommendations, Bouvier states, are consistent with the Hesburgh Commission. Select Commission on Immigration and Refugee
First, unskilled immigrants compete directly and indirectly with disadvantaged American workers for jobs, making it harder to solve the problems of the (domestic) underclass.

Second, the availability of many unskilled immigrants encourages low-wage and low-tech industries to expand, when the United States should be developing a high-tech economy to compete in the global marketplace... To avoid a labor market nightmare of workers not qualified for the jobs that are available, the United States should increase its investment in education and training its citizens and reduce admissions of immigrant workers.

Third, while it is true that earlier immigrants did eventually adapt to American society, adaptation occurred only after considerable hostility between the new immigrants and the resident population.

Fourth, despite claims to the contrary, the (United States) population is growing, more rapidly than any other advanced nation.

Even as he observes the necessity for outer limits, however, Bouvier identifies the need to reject economic refugees, who do not fear persecution but simply desire to improve their standard of living through a manipulation of refugee law, as most compelling. Prioritizing those asylum applicants who genuinely fear persecution, he affirms that "[r]efugees should qualify under the UN definition of that term. That is to say that they must be political refugees with documented proof that their lives would be in danger if they returned to their homeland."

As Bouvier, the BIA, and the Ninth Circuit correctly warn, the United States cannot absorb the world's refugees on its own. Consequently, I propose an amendment to the Handbook itself, rather than a modification of the Ninth Circuit or the BIA's crite-

**Notes:**

138. Bouvier, supra note 135, at 60.

139. Id. at 200 (emphasis in original).
ria, or even a statutory amendment. The Handbook is an appropriate site for this amendment because it guides not only the United States, but also other host countries which grapple with their obligations to the world’s refugees.

IX. THE PROPOSED AMENDMENT

Currently, the Handbook specifies that the term “particular social group” refers to “persons of similar background, habits, or social status.” On its face, this description appears to include actual or perceived homosexuals, who have, at least, similar backgrounds (records of victimization), habits (desire for and, in some cases, participation in same-sex relations) and social status (targets of persecution in countries which outlaw, seek to “change,” or otherwise punish homosexuals). Further, the Handbook’s judgment that “[m]embership of such a particular social group may be at the root of persecution because . . . the very existence of the social group itself is held to be an obstacle to the government’s policies” could certainly embrace victims of orientation-based persecution, particularly in countries where “social cleansing” goals lead the government to persecute homosexuals.

Despite its language, which seems to suggest recognition of groups like homosexuals as social groups, the Handbook is currently not specific enough to overcome the courts’ anxiety about exceeding the “outer limits” of asylum grants. Therefore, the following should be added to the Handbook:

79(a). To honor the obligation of non-refoulement, the “particular social group” category should be liberally construed to include all classes of persecuted persons who demonstrate a well-founded fear of persecution based on their membership in a certain group, but cannot attribute their persecution to their race, religion, nationality, or political opinion.

79(b) Such classes include, but are not limited to families, actual or perceived homosexuals, members of particular class or caste systems, voluntary associations, and gender

140. An amendment to the Handbook could be achieved by presenting a position paper for consideration by the UNHCR’s Executive Committee and High Commissioner.

141. HANDBOOK, supra note 60, ¶ 77.

142. Id., ¶ 79.

143. See supra note 52.
SEXUAL ORIENTATION AND REFUGEE STATUS

These groups' characteristics shall be regarded, like race, religion, nationality, and political opinion, as immutable or so fundamental that they ought not to be surrendered to avoid persecution. The absence of any particular class of persons from this list of classes shall not be interpreted as an exclusion thereof.

X. MORAL OBLIGATIONS OF HOST COUNTRIES: BEYOND THE TREATY

Although the Protocol's "non-refoulement" provision clearly mandates that countries not return refugees to countries where they have a well-founded fear of persecution, these countries are also bound by the ethical ideal that originally led the Convention and later the Protocol to protect persecuted persons. Andrew Shacknove predicates this ideal upon the following "conception":

a) a bond of trust, loyalty, protection, and assistance between the citizen and the state constitutes the normal basis of society;
b) in the case of the refugee, this bond has been severed;
c) persecution and alienage are always the physical manifestations of this severed bond; and
d) these manifestations are the necessary and sufficient conditions for determining refugeehood.  

Shacknove asserts that this conception, because it "posits the existence of a normal, minimal relation of rights and duties between the citizen and the state, the negation of which endangers refugees," is a moral claim.

Shacknove charges that the international community's response to its moral calling has been "clumsy." He attributes this moral default to, among other factors, sovereign states' reluctance "in assuming the burdens of material relief, asylum, and resettlement." Like Bouvier, Shacknove worries that a "floodgates" approach to refugee issues would "financially exhaust relief programs," but he additionally supports the establishment of "outer limits" through a reminder that "an

144. For a discussion of why courts should specifically recognize categories in addition to homosexuals as social groups, see JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 162-69 (1991).
146. Id.
147. Id. at 276.
148. Id.
149. See supra notes 136-40.
150. Shacknove, supra note 148, at 276.
overly inclusive conception (of the refugee definition) is also morally suspect and will . . . impugn the credibility of the refugee's privileged position among host populations, whose support is crucial for the viability of international assistance programs.”151

Shacknove’s ultimate recommendation, a new definition of “refugee,” is overinclusive. That definition includes “persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible.”152 Yet, Shacknove’s discussion of the minimal social bond which underpins refugee status is important to this discussion.153 Quoting Hobbes, Shacknove declares that

the sine qua non of the political commonwealth is to defend the citizen ‘from the invasion of foreigners and the injuries of one another’ . . . To be minimally legitimate, and tolerable, the Commonwealth must reduce the citizen’s vulnerability to others, all others . . . The sovereign must, at least, protect the citizen from foreign invasion and the ‘injuries of one another,’ which include civil war, genocide, terrorism, torture, and kidnapping, whether perpetrated by state agents or others.154

As Part IV of this Article discusses,155 the currently reported homophobia-induced incidents of persecution are in fact the “injuries of one another” from which Shacknove argues governments must protect their citizens. When governments disregard or fail to protect their citizens from such injuries, then, a “negation” of those “normal, minimal rights and duties” occurs, thus triggering the victims’ right to refugee status.

Modern refugee law commentators have specifically recognized the United States’ moral commitment to granting asylum when applicants targeted for persecution show that their governments have failed to protect them. As Laura J. Deitrich explains,

[T]he United States is morally committed to grant asylum, in accordance with our laws, to individuals who demonstrate a well-founded fear of persecution in their own country because of race, religion, nationality, membership in a

151. Id. Shacknove contends that refugees, because they receive “entitlements” from their host countries, are in a “privileged position” among persons facing disaster.
152. Id. at 277.
153. Id. at 277.
154. Id. at 278-79 (quoting THOMAS HOBBES, LEVIAITHAN 142 (Bobbs-Merrill Co. 1958)) (emphasis added).
155. See supra notes 40-54.
particular social group, or political opinion. America's openness to refugees - people fleeing from persecution in other parts of the world - is one of this nation's most cherished traditions, and it has been enshrined in our national law.\textsuperscript{156}

Mark Gibney demonstrates this "moral commitment" by identifying the moral obligations contained in the amended Refugee Act.\textsuperscript{157} According to Gibney, the Refugee Act\textsuperscript{158} "intended to make humanitarian concerns, rather than political [ones], paramount."\textsuperscript{159} He astutely observes that the Refugee Act itself is "replete with language and standards that can best be described as 'moral.'"\textsuperscript{160} More importantly, he realizes, moral imperatives are found not only in the Act's preamble, but also in its substantive sections.\textsuperscript{161}

After describing the moral foundation which underlies the letter of the law in the Refugee Act, Gibney identifies the need for the federal judiciary to implement the Act's humanitarian objectives. Tracing the judiciary's past record of "passivity" and "great reluctance to address immigration or refugee issues (for fear of interfering) with 'political' issues," he concludes that "without judicial participation, moral or ethical concerns may not receive a hearing."\textsuperscript{162}

---


\textsuperscript{158} See supra note 12.

\textsuperscript{159} Gibney, supra note 157, at 591.

\textsuperscript{160} \textit{Id.} at 588. Gibney points to the Refugee Act's "Purpose" section, which reads in relevant part:

The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands. I.N.A. § 101(a), 8 U.S.C. § 1521 note (1988).

Further, he notes that the same section states:

[T]he objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States.


\textsuperscript{161} Gibney, supra note 157, at 589. As an example, Gibney notes that the number of refugees admitted into the United States per year may be increased beyond the prescribed number "if this larger number can be justified by humanitarian concerns or is otherwise in the national interest." I.N.A. § 207(b), 8 U.S.C. § 1157(a)(1) (1988).

\textsuperscript{162} Gibney, supra note 157, at 600. Indeed, Gibney explains, "[T]he involvement of the courts with this (humanitarian) aspect of the Refugee Act, which goes to the very heart of the Act itself, might well prompt the political branches to pay more attention than the 'lip service' attention to humanitarian concerns heretofore given." \textit{Id.} at 601.
Gibney’s suggestion that the judiciary will make a difference in fulfilling the Refugee Act’s moral imperatives is correct. Judge Vela of the Southern District of Texas honored both the letter and the spirit of the Refugee Act in a 1982 case where he insisted that federal prison officials inform aliens of their right to apply for political asylum before initiating their deportation. Identifying, as Gibney and Deitrich have, the moral command of the Refugee Act, Judge Vela concluded:

Providing refuge to those facing persecution in their homeland... goes to the very heart of the principles and moral precepts upon which this country and its Constitution were founded. To let these same principles go unprotected would amount to nothing less than a sacrilege.

Judge Leadbetter’s compassionate response to Marcelo Tenorio’s suffering further demonstrates the important role which judges can play in accomplishing the moral purposes of the Refugee Act. Yet until judges who preside over asylum cases receive definitive guidance about the social group category, the “shunning of moral or humanitarian concerns” will truly, as Gibney warns, “retard this country’s moral advancement.”

XI. THEOLOGICAL IMPLICATIONS

Violence against homosexuals is often justified as a “punishment” for a crime against state or religious morality. Appropriate vehicles to discourage such violence are not limited to governmental policies, but even can exist in the pastoral policies of the very religions which condemn homosexual behavior.

The Roman Catholic Church is among those religious groups which unequivocally condemn homosexual behavior. The Bible excludes homosexuals from the “Chosen People” and names as sinners those who engage in homosexual acts.


164. 537 F. Supp. at 587.
165. See supra note 1.
166. Gibney, supra note 157, at 601.
167. See supra note 46.
168. 18 Leviticus 22 (New Jerusalem Bible). See also 20 Leviticus 13 (New Jerusalem Bible).
169. 1 Timothy 10 (New Jerusalem Bible).
Yet, despite this absolute condemnation of homosexual acts (which appears in every official document published by the Catholic Church on the subject of homosexuality,\textsuperscript{170}) Pope John Paul II has issued a letter which specifically and expressly condemns the very type of orientation-based persecution suffered by asylum applicants like Marcelo Tenorio.

In his 1986 "Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons," Pope John Paul II stated:

It is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the Church's pastors whenever it occurs. It reveals a kind of disregard for others which endangers the most fundamental principles of a healthy society. The intrinsic dignity of each person must always be respected in word, in action and in law.\textsuperscript{171}

Host countries, I suggest, can learn from the Roman Catholic Church's official denunciation of orientation-based persecution and, through compassionate asylum policy, can respect the "intrinsic dignity of each person," "in word, in action and in law."

\textbf{XII. CONCLUSION}

Orientation-based persecution is a genuine and growing threat to homosexuals in numerous countries. There exists a mandate in refugee law's philosophical underpinnings as well as a framework in its governing treaties for the protection of the victims of this form of persecution; however, no single host country can, or should undertake this burden on its own.


\textsuperscript{171} Sacred Congregation for the Doctrine of the Faith, \textit{Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons} (1986), in Melton, \textit{supra} note 170, 1 ¶ 10.
This Article's proposed amendment to the widely consulted, UN-administered *Handbook* will confirm that all Protocol obligors must provide refuge to victims of orientation-based persecution. Importantly, the amendment's incorporation of international approaches to the "social group" category assures that the *Handbook*’s recommendations will easily adapt to existing social group jurisprudence. In addition to satisfying jurisprudential concerns, because it encourages cooperation among host countries, the proposed amendment complements, rather than frustrates, the United States INS’ recently stated goals for asylum reform. When consistently and proportionally shared among host countries, recognition of orientation-based mistreatment as a valid form of persecution does in fact comply with the ideals of increased compassion and control.