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The Social Group That Dare Not Speak Its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status? Comment on Re: Inaudi

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Abstract

Recently, a Canadian administrative tribunal recognized homosexuals as a particular social group. In April 1992, the Convention Refugee Determination Division (the "CRDD") of the Canadian Immigration and Refugee Board (the "Canadian IRB") granted refugee status to an Argentine man who was persecuted in Argentina because of his homosexuality.The Canadian IRB held in Re: Inaudi that homosexuals constitute a particular social group for the purpose of satisfying the definition of "refugee." Re: Inaudi is similar to the two U.S. administrative decisions in that Re: Inaudi does not have precedential value. This Comment argues that U.S. courts and administrative agencies should rely on Re: Inaudi to hold that homosexuals constitute a particular social group. Part I sets forth the origin of the social group category in U.S. and Canadian immigration law. Part I also examines how the phrase "membership in a particular social group" has been interpreted and applied in Canada and the United States. Furthermore, Part I discusses the U.S. government's treatment of homosexuals. Part II sets forth the facts and holding of the Canadian IRB's decision in Re: Inaudi. Part III argues that Re: Inaudi provides a thorough analysis of why homosexuals constitute a particular social group, integrating into its decision the various factors that the U.S. has applied in determining what constitutes a particular social group in general. Because Re: Inaudi provides a thorough, detailed and sound analysis of what constitutes a particular social group in general, and why homosexuals, in particular, form a particular social group, U.S. courts and administrative agencies should rely on Re: Inaudi to extend their definition of a particular social group to include homosexuals. This Comment concludes that, in the future, the U.S. BIA and the U.S. federal courts should recognize homosexuals as a particular social group for the purposes of satisfying the definition of "refugee."

THE SOCIAL GROUP THAT DARE NOT SPEAK ITS NAME: SHOULD HOMOSEXUALS CONSTITUTE A PARTICULAR SOCIAL GROUP FOR PURPOSES OF OBTAINING REFUGEE STATUS? COMMENT ON *RE: INAUDI*

INTRODUCTION

Aliens qualify for political asylum in the United States and Canada if they are persecuted or have a well-founded fear of persecution in their countries of origin because of their race, religion, nationality, political opinion, or membership in a particular social group.[1] These individuals satisfy the definition of "refugee," a statutory term adopted by the United States and Canada as well as other countries.[2] Many aliens have sought refugee status by claiming persecution on account of their "membership in a particular social group" ("particular social group").[3]

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1. *See* 8 U.S.C. § 1101(a)(42)(A)(1988); Immigration Act, R.S.C. 1985 (4th Supp.), c. 28, s. 2(1); *see also* Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 268, 268 n.1 [hereinafter Protocol].

2. *Compare* 8 U.S.C. § 1101(a)(42)(A) (1988) *with* Immigration Act, R.S.C. 1985 (4th Supp.), c.28, s. 2(1). Under 8 U.S.C. § 1101(a)(42)(A) (1988), a "refugee" is

> 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 . . . .

Id. According to Canadian law, a "Convention refugee" means any person who

> by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country.

Immigration Act, R.S.C. 1985 (4th Supp.), c. 28, s. 2(1); *see also* 1951 Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 151 [hereinafter 1951 Convention] (listing other countries, including Norway, Belgium, Luxembourg, Australia, and the United Kingdom, that adopted similar definitions of "refugee").

3. *See, e.g.*, Saleh v. United States Dep't of Justice, 962 F.2d 234, 240 (2d Cir. 1992) (reviewing claim that indigent Yemeni Moslems and Yemeni Moslems living abroad form "particular social groups"); Gomez v. INS, 947 F.2d 660 (2d Cir. 1991) (considering claim that women previously raped and attacked by guerrillas form "particular social group"); Arriaga-Barrientos v. United States INS, 937 F.2d 411, 414 (9th Cir. 1991)

Homosexuals have sought relief from persecution by claiming to be members of a particular social group. Courts in Europe and Australia have addressed such claims.[4] Furthermore, the Netherlands, Germany, and Australia have recognized that homosexuals constitute a particular social group.[5] In the United States, two administrative decisions, an unpublished opinion by

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(considering claim that former servicemen in Guatamalan military constitute "particular social group"); Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) (determining whether young, urban, working-class El Salvadoran males of military age not in military form "particular social group"); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985) (considering claim that family unit is "particular social group"); In re Chang, Interim Dec. No. 3107 at 12 (BIA 1989) (deciding whether Chinese citizens who desire large families are "particular social group"); In re Vigil, 19 I. & N. Dec. 572, 574-78 (BIA 1988) (determining whether Salvadoran draft-age males not in army form "particular social group"); In re Acosta, 19 I. & N. Dec. 211, 232-34 (BIA 1985) (considering whether El Salvadoran taxi driver's cooperative is "particular social group"); Re: Shahabaldin, (Mar. 2, 1987) No. V85-6161 at 6 (I.A.B.) (reviewing claim that certain group of Iranian women constitute "particular social group"); Re: Zubieta, (Oct. 31, 1979) No. 79-1034 at 2-6 (I.A.B.) (dealing with whether trade unionists are members of "particular social group").

4. *See Case Abstracts*, 1 INT'L J. REFUGEE L. 242, 246 (1989) (summarizing case before Holland's Afdeling Rechtspraak van de Raad van State, Judicial Division of the Council of State). The Netherlands ruled that homosexuals are members of a particular social group for purposes of satisfying the definition of refugee. *Id.* In this case, the Judicial Division of the Council of State denied a homosexual Polish national refugee status, but stated that persecution on account of membership in a particular social group can include persecution on account of sexual disposition. *Id.* at 246-47. The German Federal Administrative Court also noted that homosexuals may constitute a particular social group. *See Cases and Comments*, 1 INT'L J. REFUGEE L. 101, 110 (1989) (summarizing 1988 case in Federal Republic of Germany). Although the German court did not reach the issue concerning whether homosexuals are "a particular social group," it stated that "homosexuality can be considered as an attribute that could be ground for asylum, if it is an irreversible personal characteristic." *Id.* Furthermore, the United Kingdom has addressed similar claims by homosexuals. *See Cases and Comments*, 2 INT'L J. REFUGEE L. 647, 657-59 (1990) (summarizing Regina v. Sec. of State for Home Dep't. (1989) (United Kingdom)). In Regina, the Secretary of State denied refugee status to a Cypriot who claimed he was persecuted for being an active homosexual. The Secretary of State stated that "homosexuals per se could not constitute a particular social group within the meaning of the 1951 Convention." *Id.* at 657-58. The appellate court, however, held that it was unnecessary to decide whether homosexuals per se constituted a social group because Cyprus only discriminated against homosexual conduct, not status. *Id.*

5. *See supra* note 4 (describing German and Dutch cases recognizing homosexuals as particular social group); *see also Australia Takes in Gay Refugees*, BAY AREA REP., Apr. 16, 1992 (stating that gay couple from China was granted refugee status in Australia because they were persecuted in China on account of their sexual orientation); *Gay Couple Escapes Mainland Repression*, SOUTH CHINA MORNING POST, Oct. 25, 1992 (reporting on migration of homosexuals from China to United States and Australia for asylum); David Tuller, *Gay Foreigners Try New Way to Stay*, S.F. CHRON., Sept. 29, 1992, at A1, A8 (stating officials in Germany, Netherlands, and Australia have granted asylum to gay

the Board of Immigration Appeals ("BIA"), and an Immigration Judge decision, have addressed the issue and recognized homosexuals as a particular social group.[6] In the United States, however, Immigration Judge decisions and unpublished BIA opinions do not have precedential value.[7]

Recently, a Canadian administrative tribunal recognized homosexuals as a particular social group.[8] In April 1992, the Convention Refugee Determination Division (the "CRDD") of the Canadian Immigration and Refugee Board (the "Canadian IRB") granted refugee status to an Argentine man who was persecuted in Argentina because of his homosexuality.[9] The Canadian IRB held in *Re: Inaudi* that homosexuals constitute a particular social group for the purpose of satisfying the definition of "refugee."[10] *Re: Inaudi* is similar to the two U.S. administrative decisions in that *Re: Inaudi* does not have precedential value.[11]

This Comment argues that U.S. courts and administrative agencies should rely on *Re: Inaudi* to hold that homosexuals constitute a particular social group.[12] Part I sets forth the origin of

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men); Doris Sue Wong, *More Gays Seeking US Asylum*, BOSTON GLOBE, Nov. 7, 1992, at 13 (stating that homosexuals have been granted asylum in Finland and Sweden).

6. *See* In re Toboso, No. A23 220 644 (BIA Mar. 12, 1990) (holding that homosexuals constitute particular social group) (on file with the *Fordham International Law Journal*); In re Tenorio, No. A72 093 558 (Immigration Judge, July 26, 1993) (on file with the *Fordham International Law Journal*); *see also* James Brooke, *In Live-and-Let-Live Land, Gay People Are Slain*, N.Y. TIMES, Aug. 12, 1993, at A4 (discussing *In re Tenorio*).

7. *See* 8 C.F.R. § 3.1(g) (1993) (stating that only selected decisions designated by BIA serve as precedents); Matter of Ruis, 18 I. & N. Dec. 320, 321 n.1 (BIA 1982) (stating that Immigration Judge's reliance on unpublished BIA decisions were not controlling because unpublished BIA decisions did not have precedential value); In re Lok, 18 I. & N. Dec. 101, 107 (BIA 1981) (distinguishing between precedent setting BIA decisions and unreported BIA decisions); *accord* In re Medrano, Interim Dec. No. 3138 (BIA 1991); Leah F. Chanin, SPECIALIZED LEGAL RESEARCH § 8.6.3 (1992) (stating that BIA decisions published as precedent bind INS nationwide in cases involving similar issues). Theoretically even unpublished opinions are applicable to Board's deliberations but these unpublished opinions are useful only to those who are affected by them or who know of them. *Id.*; *see also* C.F.R. §§ 3.12-3.40 (describing Immigration Judge proceedings and not indicating that Immigration Judge decisions have precedential value).

8. *See* Re: Inaudi, (Apr. 9, 1992) No. T91-04459 at 5-6 (I.R.B.) (recognizing homosexuals as particular social group).

9. Re: Inaudi, I.R.B. No. T91-04459 (Apr. 9, 1992).

10. *Id.* at 5-6.

11. Because the CRDD is the only body that determines refugee claims, its decisions are not binding on anybody else. The decision by the CRDD panel that decided *Re: Inaudi*, however, is persuasive authority for other panels of the CRDD.

12. *See* Clyde H. Farnsworth, *Argentine Homosexual Gets Refugee Status in Canada*, N.Y. TIMES, Jan. 14, 1992, at A10 (stating that Rebecca Cook, law professor at University

the social group category in U.S. and Canadian immigration law. Part I also examines how the phrase "membership in a particular social group" has been interpreted and applied in Canada and the United States. Furthermore, Part I discusses the U.S. government's treatment of homosexuals. Part II sets forth the facts and holding of the Canadian IRB's decision in *Re: Inaudi*. Part III argues that *Re: Inaudi* provides a thorough analysis of why homosexuals constitute a particular social group, integrating into its decision the various factors that the U.S. has applied in determining what constitutes a particular social group in general. Because *Re: Inaudi* provides a thorough, detailed and sound analysis of what constitutes a particular social group in general, and why homosexuals, in particular, form a particular social group, U.S courts and administrative agencies should rely on *Re: Inaudi* to extend their definition of a particular social group to include homosexuals. This Comment concludes that, in the future, the U.S. BIA and the U.S. federal courts should recognize homosexuals as a particular social group for the purposes of satisfying the definition of "refugee."

I. *THE ORIGIN, INTERPRETATION, AND APPLICATION OF THE PHRASE "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP" IN CANADA AND THE UNITED STATES*

The United States and Canada have adopted essentially the same definition of "refugee."[13] As a result, Canadian and U.S. administrative agencies and courts confront the same task of interpreting the scope of the phrase "membership in a particular social group."[14] Both countries, consequently, have established interpretive standards.[15]

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of Toronto, considers *Re: Inaudi* important precedent and expects *Re: Inaudi* to effect refugee cases in United States); David Tuller & Dan Levy, *Gay Rights on a Worldwide Front*, S.F. CHRON., Aug. 24, 1992, at A1, A6 (stating that decision in *Re: Inaudi* could pressure U.S. immigration officials to decide same way).

13. *See supra* note 2 (setting forth definitions of refugee pursuant to U.S. and Canadian law).

14. *See supra* note 3 (providing examples of decisions by U.S. and Canadian administrative agencies and courts interpreting "membership in a particular social group").

15. *Id.*

A. *Emergence of the Definition of "refugee"*

The United States Refugee Act of 1980 (the "Refugee Act of 1980")[16] and the Canadian Immigration Act of 1985[17] adopted the definition of the term "refugee" contained in two United Nations treaties.[18] U.S. Congressional debates[19] and case law[20] and Canadian law[21] indicate both countries' intent to adopt the definition of "refugee" established in the 1951 Convention Relating to the Status of Refugees (the "1951 Convention")[22] and the 1967 Protocol Relating to the Status of Refugees (the "Protocol").[23] The Protocol adopted the definition of "refugee" set forth in the 1951 Convention, but did not include the 1951 Convention's time and geographical restrictions.[24]

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16. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C. (1988)) (amending INA).

17. Immigration Act, R.S.C. 1985 (4th Supp.), c. 28, s. 2(1).

18. *See* 1951 Convention, *supra* note 2; Protocol, *supra* note 1, art. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 270. The United States rafified the Protocol on October 4, 1968. 114 CONG.REC. 29,607 (1968).

19. *See, e.g,* 126 CONG. REC. 3,756 (96th Cong., 2d Sess. 1980). The legislature stated that "[t]he new definition makes our law conform to the United Nations Convention and Protocol . . . ." *Id.* at 3,757; *accord* 125 CONG. REC. 35,813-26 (1979).

20. INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987). The Court stated, "[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]." *Id.*; *see* David T. Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee,* 92 COLUM. L. REV. 923, 924-26 (1992) (arguing that Congress intended Refugee Act of 1980 to conform to international law).

21. *See* Immigration Act, R.S.C. 1985 (4th Supp.), c. 28, s. 2(1).

22. 1951 Convention, *supra* note 2, 19 U.S.T. at 6261, 189 U.N.T.S. at 152. The 1951 Convention is the primary legal instrument establishing the international system of refugee protection. *Id.* The 1951 Convention applied the term refugee to any person who

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

Id.

23. Protocol, *supra* note 1, art. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268. The Protocol is the United Nations treaty modifying the definition of refugee provided by the 1951 Convention. *Id.*

24. *See* Protocol, *supra* note 1, art.1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268 (incorporating, with two exceptions, Article 1(A)(2) of the 1951 Convention, *supra* note 2, art. 1, 19 U.S.T. at 6261, 189 U.N.T.S. at 152). Article 1 of the Protocol states

To qualify as a refugee pursuant to the 1951 Convention and the Protocol, aliens must demonstrate three things.[25] First, they must seek relief from outside their country of origin.[26] Second, aliens seeking asylum in the United States must either be persecuted or have a well-founded fear of persecution in their country of origin.[27] Aliens seeking asylum in Canada must have a well-founded fear of persecution.[28] Third, they must be persecuted or fear persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion.[29] Individuals qualify for asylum in the United States or Canada if they satisfy this definition of "refugee."[30]

The social group category was created by the 1951 Convention.[31] While neither the 1951 Convention nor the Protocol defined the phrase "membership in a particular social group,"[32]

> For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the 1951 Convention as if the words "As a result of events occurring before 1 January 1951 and . . . " and the words ". . . as a result of such events", in article 1(A)(2) were omitted.

Id.

25. *See* Protocol *supra* note 1, art.1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268; 1951 Convention *supra* note 2, art. 1, 19 U.S.T. at 6261, 189 U.N.T.S. at 152.

26. *See* 8 U.S.C. § 1101(a)(42)(A)(1988); Immigration Act, R.S.C. 1985 (4th Supp.), c. 28, s. 2(1).

27. *See* 8 U.S.C. § 1101(a)(42)(A) (1988).

28. Immigration Act, R.S.C. 1985 (4th Supp.), c. 28, s. 2(1).

29. *See* 8 U.S.C. § 1101(a)(42)(A)(1988); Immigration Act, R.S.C. 1985 (4th Supp.), c. 28, s. 2(1).

30. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); Immigration Act, R.S.C. 1985 (4th Supp.), c. 28, s. 2(1). In the United States, relief pursuant to the definition of refugee is sought through asylum, 8 U.S.C. § 1158 (1988 & Supp. IV 1992), withholding of deportation, 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992), and refugee status, 8 U.S.C. § 1157 (1988 & Supp. IV 1992). These separate avenues of relief mandate different procedural requirements, subject applicants to varying standards of proof of persecution, and offer different benefits. *See, e.g.*, 8 C.F.R. §§ 207-208 (1993); *see* BASIC LAW MANUAL: ASYLUM, (1991) (providing thorough explanation of procedural requirements, different standards of proof and different benefits offered under each avenue of relief).

To qualify for asylum, withholding of deportation or refugee status, an alien must first satisfy the definition of "refugee." *See* 8 U.S.C. § 1158(a) (1988) (stating that alien must satisfy definition of refugee to qualify for asylum status); INS v. Cardoza-Fonseca, 480 U.S. 421, 440-41 (1987) (stating that applicant for withholding of deportation must satisfy definition of refugee); 8 U.S.C. § 1157(c)(4) (1988) (stating that refugee status will be denied if definition of refugee is not met).

31. *See* 1951 Convention *supra* note 2, art. 1, 19 U.S.T. at 6261, 189 U.N.T.S. at 152.

32. *See* 1951 Convention, *supra* note 2, 19 U.S.T. 6259, 189 U.N.T.S. 150 (providing no definition of particular social group); *see also* Sanchez-Trujillo v. INS, 801 F.2d

the Office of the United Nations High Commissioner for Refugees (the "UNHCR"), an agency authorized by the Protocol to coordinate compliance with its provisions,[33] defined the phrase in the *Handbook of Procedures and Criteria for Determining Refugee Status* (the "*Handbook*").[34] The *Handbook*, which provides guidance for interpreting all of the Protocol's provisions, states that a particular social group normally is comprised of persons of similar background, habits, or social status.[35] Although the *Handbook's* definition has been criticized as too vague and uninformative,[36] the U.S. Supreme Court recognized the *Handbook* as a source of significant guidance in construing the Protocol's provisions.[37] Some U.S. and Canadian courts and administrative agencies have cited the *Handbook* in their analyses of the phrase "membership in a particular social group."[38]

B. *Canadian Interpretation of a Particular Social Group*

1. Application Process

In Canada, persecuted aliens are eligible for protection if

1571, 1575 (9th Cir. 1986) (stating that legislative history of definition of refugee is generally uninformative); Parish, *supra* note 20, at 925-26 (stating that neither Congress nor Protocol nor 1951 Convention clarified definition of term "refugee").

33. *See* Protocol, *supra* note 1, art. 2, 19 U.S.T. at 6226, 606 U.N.T.S. at 270 (stating that state members of Protocol shall cooperate with United Nations High Commissioner for Refugees in its duty to supervise application of Protocol).

34. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter HANDBOOK]. The HANDBOOK states that 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." *Id.* ¶ 77.

35. *Id.* ¶ 77.

36. *See* Immigration and Naturalization Service v. Elias-Zacarias, 112 S. Ct. 812 (1992) (failing to abide by or even refer to HANDBOOK in asylum decision); Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1576 (9th Cir. 1986) (stating that HANDBOOK provides little assistance in arriving at workable definition of "particular social group"); In re Tenorio, A72 093 558 at 13 (Immigration Judge 1993) (stating that HANDBOOK provides little guidance for construing meaning of "particular social group").

37. INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) (finding that "HANDBOOK provides significant guidance in construing the Protocol, to which Congress sought to conform"); *see* Zavala-Bonilla v. INS, 730 F.2d 562, 567 n.7 (9th Cir. 1984) (acknowledging HANDBOOK as source of guidance in applying Refugee Act).

38. *See, e.g.*, Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985) (relying on HANDBOOK in decision); Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) (employing HANDBOOK in analysis); Re: Inaudi, (Apr. 9, 1992) No. T91-04459 at 4-5 (I.R.B.) (citing HANDBOOK); Re: Requena-Cruz, (Apr. 8, 1986) No. T83-10559 (I.A.B.) (citing HANDBOOK).

they satisfy the definition of "refugee" set forth in the 1951 Convention as modified by the Protocol.[39] An alien who satisfies this statutory definition is considered a "Convention refugee" and may obtain permanent residence in Canada.[40] A new application process was implemented in February, 1993.[41]

At the time *Re: Inaudi* was decided, however, an alien seeking refugee status first notified an Immigration Officer of an interest in applying for refugee status.[42] Subsequently, an Adjudicator and a member of the CRDD determined whether the claimant was eligible to make a refugee claim and if so, whether the claimant had a credible basis to a refugee claim.[43] If found to be eligible and to have a credible basis, the claimant was sent to the CRDD for a "full hearing."[44] In the full hearing, the CRDD determined whether or not the claimant met the definition of "refugee."[45] If denied the claim, an applicant could appeal to the Federal Court.[46]

Since February, 1993, Bill C-86[47] has replaced the process discussed above. Now the Immigration Officer determines whether the claimant is eligible to make a refugee claim. If eligible, then the claimant is referred to the CRDD for a full hearing.[48] Again, if the CRDD denies an application for refugee status, the claimant can appeal a denial to the Federal Court.[49]

2. Canada's Definition of a Particular Social Group

Canadian courts have recently set forth specific criteria to consider in determining what constitutes a particular social group.[50] Although Canada's administrative agencies have also addressed claims by aliens alleging membership in a particular

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39. Immigration Act, R.S.C. 1985 (4th Supp.), c. 28, s. 2(1). *See supra* notes 25-30 and accompanying text (describing three requirements in definition of "refugee").

40. Immigration Act R.S.C., 1985, c. I-2 s. 46.14(1).

41. *See* Immigration Act, S.C. 1992, c. 49.

42. Section 44 of the Immigration Act R.S.C., 1985, c. I-2.

43. Immigration Act R.S.C., 1985, c. I-2 . 46 as rep. by S.C. 1992 c. 49, s. 34.

44. Immigration Act R.S.C., 1985, c. I-2, s. 46.02(2).

45. Section 69.1 of the Immigration Act R.S.C., 1985, c. I-2 s. 69.1.

46. Immigration Act R.S.C., 1985, c. I-2 s. 82.1.

47. Immigration Act, S.C. 1992, c. 49.

48. Immigration Act, S.C. 1992, c. 49, s. 37.

49. Immigration Act, S.C. 1992, c. 49, s. 82.1.

50. *See* Ting Ting Cheung v. M.E.I., (Apr. 1, 1993), No. A-785-91 (F.C.A.), Mahoney, Stone, & Linden JJ.A.; Ward v. A.G. Canada (June 30, 1993) No. 21937 (S.C.C.), La Forest, L'heureux-Dube, Gonthier, Stevenson, Iacobucci JJ.A.

social group,[51] Canadian administrative authorities have not established specific guidelines for determining what constitutes a particular social group.[52]

a. Canadian Courts

In *Ting Ting Cheung v. The Minister of Employment and Immigration*,[53] the Federal Court of Canada[54] held that women who have more than one child and are therefore threatened with sterilization under China's one child policy, constitute a particular social group.[55] The court focused on three distinct factors in determining a particular social group.[56] First, the court stated that these women comprise a group sharing similar social status and holding similar interests not held by their government.[57] Second, these women have certain basic characteristics in common.[58] Finally, these women are united or identified by a purpose that is so fundamental to their human dignity that they should not be required to change.[59] According to the court, interference with a woman's reproductive liberty is a basic right "ranking high in our scale of values."[60]

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51. *See, e.g.*, Re: Requena-Cruz, (Apr. 8, 1986) No. T83-10559 at 5 (I.A.B.); Re: Shahabaldin, (Mar. 2, 1987) No. V85-6161 (I.A.B.); Re: Incirciyan, (Aug. 10, 1987) No. M87-1541X and M87-1248 (I.A.B.); Re: Zubieta, (Oct. 31, 1979) No. 79-1034 and 79-1034A (I.A.B.); Re: Roberto Cruz, (June 26, 1986) No. V83-6807 (I.A.B.).

52. Carolyn P. Blum, *Refugee Status based on Membership in a Particular Social Group: A North American Perspective, in* ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS 81, 95-99 (Geoffrey Coll & Jacqueline Bhabha, ed. 1992).

53. Ting Ting Cheung v. M.E.I. (Apr. 1, 1993) No. A-785-91 (F.C.A.), Mahoney, Stone, & Linden, JJ.A.

54. The structure of the Canadian courts reflects a division between federal and provincial courts. J.R. MALLORY, THE STRUCTURE OF CANADIAN GOVERNMENT 289-98 (1971). The federal courts include different tiers. *Id.* at 292-95. The Supreme Court of Canada is a "general Court of Appeal for Canada" which exercises general appellate jurisdiction in civil and criminal cases and also renders advisory opinions on certain issues. *Id.* at 292. The Federal Court of Canada consists of two divisions, a Trial Division and an Appeal Division. *Id.* at 293-94. There are also several federal special courts or boards which are designated by statute as courts of record, and territorial courts. *Id.* at 295. The provincial courts are divided into three classes depending on the method of appointment and tenure of their judges. *Id.* at 295-98. There are provincial superior courts, county courts, and provincial inferior courts. *Id.*

55. *Ting Ting Cheung*, (Apr. 1, 1993) No. A-785-91 at 7-8 (F.C.A.).

56. *Id.* at 7.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

More recently, in *Ward v. The Attorney General*,[61] the Supreme Court of Canada rendered a decision further analyzing the definition of a particular social group.[62] In *Ward*, the Court decided that a certain terrorist organization did not constitute a particular social group.[63] The Court considered possible definitions of a particular social group.[64] The first of these definitions would recognize any alliance of individuals with a common objective.[65] The second category narrowed the definition by certain "limiting mechanism[s]."[66] And the third category excluded from the first broad category immoral individuals, including terrorists and criminals.[67] The Court dismissed the first category as too broad.[68] In addition, the Court stated that the third possible definition of a particular social group would render redundant the explicit exclusionary provisions in the Immigration Act.[69] The Court, however, adopted the second definition of a particular social group.[70]

The Court's definition of a particular social group recognized certain restrictions inherent in the definition of a refugee.[71] First, a claimant must be persecuted to be considered a member of a particular social group.[72] Second, the enumeration of other grounds for refugee status excludes certain groups from falling within the particular social group category.[73] Third, the court pointed to the underlying themes that are the basis for refugee protection, defense of human rights and anti-discrimination, and concluded that Canada should not overstep its role in the international sphere by recognizing as refugees any group that is targeted for persecution and by offering a haven for all

61. Ward, Patrick Francis v. A.G. Canada (S.C.C., no. 21937) La Forest, L'Heureux-Dube, Gonthier, Stevenson, Iacobucci (Stevenson took no part in judgment) June 30, 1993.

62. *Id.* at 61-62.

63. *Id.* at 38-62.

64. *Id.* at 38-60.

65. *Id.* at 41-47.

66. *Id.* at 41, 45-55.

67. *Id.* at 55-60.

68. *Id.* at 44.

69. *Id.* at 56.

70. *Id.* at 44-55.

71. *Id.*

72. *Id.*

73. *Id.*

suffering individuals.[74]

Finally, drawing a distinction between that which one is and that which one does,[75] the Court relied on *Cheung* to articulate the scope of a particular social group: (i) groups defined by an innate or unchangeable characteristic; (ii) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to not associate; and (iii) groups associated by a former voluntary status, unalterable due to its historical permanence.[76] Providing examples of groups within each category, the Court stated that individuals persecuted on the basis of sexual orientation would fall within the first group and therefore constitute a particular social group.[77]

In a case unrelated to a refugee claim, the Federal Court Trial Division also addressed the group status of homosexuals.[78] In *Veysey v. Commissioner of the Correctional Service of Canada*,[79] the applicant alleged that his rights under the Charter of Rights and

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74. *Id.* at 54.

75. *Id.* The 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. Perhaps the most simplified way to draw the distinction is by opposing that which one *is* against that which one *does* at a particular time.

Id. As an example, the court cited the facts of *Matter of Acosta*, a U.S. BIA decision in which the claimant argued that he was a member of a particular social group made up of members of a taxi driver cooperative. *Id.* The court in *Ward* stated

> [a]ssuming no issues of political opinion or the right to earn some basic living are involved, the claimant was targeted for what he was *doing* and not for what he *was* in an immutable or fundamental way.

Id.

76. *Id.* at 54-55.

77. *Id.* at 55. The court stated that

> [t]he first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

Id.

78. *See* Veysey v. Comm'r of the Correctional Serv. of Canada (1990), 1 F.C. 321 (FCTD) (holding that homosexuality is analogous to other characteristics that form social groups, including religion, nationality, and ethnicity); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 163-64 (1991) (stating that basis for treating sexual orientation as characteristic capable of defining social group was established in *Veysey*).

79. *Veysey* (1990), 1 F.C. 321 (FCTD).

Freedoms (the "Charter"),[80] a Canadian statute, were violated.[81] Section 15 of the Charter prohibits discrimination against groups defined by race, national or ethnic origin, color, age, religion, sex, and mental or physical disability.[82] The applicant successfully argued that a prison policy failing to extend conjugal visitation rights to homosexual partners discriminated against homosexuals and, therefore, violated Section 15 of the Charter.[83]

The court held that homosexuality is analogous to the enumerated characteristics set forth in the Charter and, therefore, is protected by the Charter.[84] The court noted that race, national or ethnic origin, color, and age are immutable characteristics.[85] Further, the court stated that religion can only be changed with difficulty, and sex and mental or physical disability can be changed with even greater difficulty.[86] The court determined that sexual orientation is at least as immutable as one of the other prohibited grounds of discrimination within the Charter.[87] Additionally, the court stated that, like other groups that suffer discrimination, homosexuals are stigmatized and victimized.[88]

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80. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

81. *See Veysey* (1990), 1 F.C. 321, 323-25 (FCTD) (citing Charter). Mr. Veysey was an inmate at a prison and applied to participate in the Private Family Visiting Program at the Institution with Mr. Leslie Beu, his homosexual partner. *Id.* at 323-24. The institution refused Mr. Veysey's application, claiming that the visiting policy did not extend to common-law partners of the same sex. *Id.* at 324. Mr. Veysey argued that he was denied a benefit on the basis of his sexual orientation and that such a denial was a violation of his rights under the Canadian Charter of Rights and Freedoms. *Id.* at 324-25.

82. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

83. *Veysey* (1990), 1 F.C. 321, 323-25 (FCTD).

84. *Id.* at 329. The court stated that

> [m]ost of the grounds enumerated in section 15 of the Charter as prohibited grounds of discrimination connote the attribute of immutability, such as race, national or ethnic origin, colour, age. One's religion may be changed but with some difficulty; sex and mental or physical disability, with even greater difficulty. Presumably, sexual orientation would fit within one of these levels of immutability.

Id.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* Concluding that the applicant's rights had been violated, the court noted that

> [a]nother characteristic common to the enumerated grounds [of the Charter]

b. Canadian Administrative Agencies

Canadian administrative agencies, the IRB and Immigration Appeals Board ("IAB"), have recognized several particular social groups.[89] In the past, homosexuals have made claims to the IRB and the IAB of persecution on account of membership in a particular social group.[90] These claims were dismissed as lacking credibility.[91] The IAB, which preceded the IRB, however, has stated that the social group category must be interpreted broadly.[92]

In *Re: Fernandez-Ortigoza*,[93] the IAB ruled that the applicant's family ties, his affiliation with a political student group, and his status as a "returnee," one who had left the country for a considerable period of time and then returned, constituted membership in a particular social group.[94] In addition, the IRB and IAB

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is that the individuals or groups involved have been victimized and stigmatized throughout history because of prejudice, mostly based on fear or ignorance, as most prejudices are. This characteristic would also clearly apply to sexual orientation, or more precisely to those who have deviated from accepted sexual norms, at least in the eyes of the majority.

Id.

89. *See, e.g.*, Re: Shahabaldin, (Mar. 2, 1987) No. V85-6161 (I.A.B.) (determining that Iranian woman, who testified that many of her family members had suffered persecution because of family's reputation as anti-Khomeni, was member of "particular social group" made up of her immediate family members); Re: Incirciyan, (Aug. 10, 1987) No. M87-1541X and M87-1248 (I.A.B.) (stating that applicants are members of "particular social group" made up of single women living in Moslem country without protection of male relative); Re: Zubieta, (Oct. 31, 1979) No. 79-1034 and 79-1034(a) (I.A.B.) (holding that worker's general trade union formed "particular social group"); Re: Roberto Cruz, (June 26, 1986) No. V83-6807 (I.A.B.) (holding that Salvadoran men targeted by guerrillas and military constitute "particular social group").

90. *See* Clyde H. Farnsworth, *Argentine Homosexual Gets Refugee Status in Canada*, N.Y. TIMES, Jan. 14, 1992, at A10 (quoting lawyer for alien-applicant in *Re: Inaudi*, (Apr. 9, 1992) No. T91-04459 (I.R.B.)).

91. *Id.*

92. Re: Requena-Cruz, (Apr. 8, 1986) No. T83-10559 at 5 (I.A.B.) (stating that social group must be given broad and liberal interpretation in order to protect groups or individuals who do not necessarily have political, religious or racial ties at root of their persecution).

93. Re: Fernandez-Ortigoza, (Jan. 26, 1987) No. V83-6704 (I.A.B.).

94. *Id.* at 2-8. In *Re: Fernandez-Ortigoza*, police in Guatemala assaulted Mr. Ortigoza for his membership in a student organization that participated in anti-government activities. *Id.* at 2. In addition, Mr. Ortigoza's cousin had been active in an anti-government union in Guatemala and was currently publicizing in Canada, Guatemala's human rights violations. *Id.* at 4-6. As a result of threats by police, Mr. Ortigoza left the country and came to Canada. *Id.* at 6. An expert testified that Mr. Ortigoza's lengthy absence from Guatemala and his having a relative active in anti-government activities would raise authorities' suspicions of Mr. Ortigoza should he return to Guatemala. *Id.*

have sanctioned particular social groups including families,[95] women,[96] trade unions,[97] and Salvadoran men victimized by the military and guerrillas.[98] Although several groups have been recognized, the administrative tribunals have shown concern over the size of these groups.[99] For example, in *Re: Dos Santos Vieira*[100] the IAB refused to recognize the agricultural working class of Portugal as a particular social group.[101]

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at 4-5. The court did not distinguish between the three groups, but it has been argued that, in light of Canadian precedent, each of the groups with which the applicant was affiliated constitutes a social group within the definition of "refugee." Blum, *supra* note 52, at 95.

95. Re: Shahabaldin, (Mar. 2, 1987) No. V85-6161 at 6 (I.A.B.) (determining that Iranian woman, who testified that many of her family members had suffered persecution because of family's reputation as anti-Khomeni, was member of particular social group made up of her immediate family members); Re: Requena-Cruz, (Apr. 8, 1986) No. T83-10559 at 3 (I.A.B.) (holding that family constitutes social group within definition of Convention refugee); *see* Re: Barra Velasquez, (Apr. 29, 1981) No. V80-6300 at 3 (I.A.B.) (holding that harassment suffered as result of membership in close-knit extended family constituted persecution).

96. *See, e.g.*, Re: Incirciyan, (Aug. 10, 1987) No. M87-1541X and M87-1248 at 1 (I.A.B.) (stating that applicants are members of particular social group made up of single women living in Moslem country without protection of male relative); Blum, *supra* note 52, at 93-99 (giving additional examples of particular social groups recognized by Canadian courts and immigration agencies); *see also* Clyde H. Farnsworth, *Anti-Woman Bias May Bring Asylum*, N.Y. TIMES, Feb. 2, 1993, at A8. The Canadian Government granted a Saudi woman, who held unconventional views on the status of women in Saudi Arabia, permission to remain in Canada to avoid possibility of grave danger if she returned to Saudi Arabia. *Id.* The I.R.B. has issued guidelines for gender-related persecution that include women who can prove that their countries fail to provide protection from sexual abuse, domestic violence, genital mutilation, and other torture. *Id.* Canadian officials also stated that they could address the issue by classifying women protesting sex-based persecution as a particular social group. *Id.*

97. *See, e.g.*, Re: Zubieta, (Oct. 31, 1979) No. 79-1034 and 79-1034A at 6 (I.A.B.) (holding that applicant incontestably belonged of particular social group).

98. *See, e.g.*, Re: Roberto Cruz, (June 26, 1986) No. V83-6807 at 4 (I.A.B.) (holding that applicant's evidence of death of brother, disappearance of father, pressure to join guerrillas or army and general climate of uncertainty and danger in which youth of El Salvador live, was sufficient to support his claim that he belonged to particular social group).

99. Re: Dos Santos Vieira, (June 11, 1976) No. 87-9098X at 2, 5 (I.A.B.) (finding large size of purported social group significant in rejecting claim of "agricultural working class of Portugal"). *See* Blum, *supra* note 52, at 98 (finding that IAB seems motivated in its interpretation by questions of size).

100. Re: Dos Santos Vieira (June 11, 1976) No. 87-9098X (I.A.B.).

101. *Id.* at 2. In *Re: Dos Santos Vieira*, the applicant lived in a small village in Portugal where, he claimed, economic conditions were very poor. *Id.* Significant to the IAB's rejection of applicant's claim as the fact that applicant's alleged social group consisted of "all of rural Portuguese society." *Id.* at 4.

C. *U.S. Interpretation of a Particular Social Group*

In the United States, the Refugee Act of 1980 defines "refugee."[102] Congress delegated its power to enforce the Refugee Act of 1980 to the Attorney General.[103] The Attorney General enforces this law via the Immigration and Naturalization Service ("INS")[104] and the Board of Immigration Appeals ("BIA").[105]

1. Application Process

Pursuant to the Refugee Act of 1980, an alien must satisfy the definition of "refugee" to be eligible either for asylum, withholding of deportation, or refugee status.[106] Typically, an Immigration Judge[107] of the INS evaluates whether an applicant has established that she is a refugee.[108] Decisions by Immigration Judges are not binding on any other Immigration Judge or on any higher authority.[109]

Decisions by Immigration Judges can be appealed to the BIA, an administrative review board established by the Attorney General.[110] Published BIA decisions serve as precedent.[111] BIA decisions, however, are subject to review by the U.S. Courts of Appeals.[112] The circuit courts must defer to the BIA's interpretation of the definition of "refugee"[113] as long as the BIA's inter-

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102. Refugee Act of 1980 § 201(a), Pub. L. No. 96-212, 94 Stat. at 102. The Refugee Act was enacted to enforce the Protocol's terms. *See* Parish, *supra* note 20, at 924 n.8 (explaining necessity of legislation to guarantee U.S. compliance with Protocol).

103. 8 U.S.C. § 1105(a)(4) (1988).

104. 8 C.F.R. § 2.1 (1993).

105. 8 C.F.R. § 3.0 (1993).

106. *See supra* note 30 (indicating sources for further inquiry into differences in various avenues of relief, and demonstrating that alien must satisfy definition of "refugee" to receive protection under any avenue of relief).

107. 8 C.F.R. § 3.10 (1993).

108. *See* 8 C.F.R. §§ 208.4, 208.13-208.14 (1993) (stating that applications for asylum are to be filed with Immigration Judge during exclusionary or deportation proceedings or after completion of exclusionary or deportation proceedings).

109. *See* 8 C.F.R. §§ 3.12-3.40. This section, which describes Immigration Judge proceedings, does not indicate that Immigration Judge decisions have precedential value.

110. 8 C.F.R § 3.1(a)(1) (1993).

111. 8 C.F.R. § 3.1(g) (1993).

112. *See, e.g.*, Blanco-Comarribas v. INS, 830 F.2d 1039 (9th Cir. 1987) (reviewing BIA order denying asylum); Ramirez Rivas v. INS, 899 F.2d 864 (9th Cir. 1990) (reviewing BIA order denying asylum).

113. *See, e.g.*, 8 U.S.C. § 1105a(a)(4) (stating that administrative holding must be upheld if reasonable); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (stating that courts must respect BIA's interpretation of phrase "well-founded fear" within definition of ref-

pretation is reasonable.[114]

2. The United States' Definition of a Particular Social Group

The Refugee Act of 1980 defined "refugee."[115] A concrete definition of the phrase "particular social group," however, was not provided by the 1951 Convention, the Protocol, or Congress.[116] Therefore, the terms of the Refugee Act were left for the Attorney General and the judiciary to interpret.[117] As a result, the BIA and the U.S. federal courts have articulated definitions of the scope of the social group category.[118]

a. U.S. Administrative Decisions

The only BIA case to establish a standard for determining whether an applicant for asylum is a member of a particular social group is *In re Acosta*.[119] In *In re Acosta*, the BIA held that a group qualifies as a particular social group if its members possess a common immutable characteristic.[120] According to the BIA, an immutable characteristic includes a trait impossible to

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ugee); In re Lok, 18 I. & N. Dec. 101, 107 (BIA 1981) (stating that pursuant to 8 U.S.C. 1105a(a)(4), appellate courts' scope of review is limited); *see also* Parish, *supra* note 20, at 937-39 (providing thorough explanation of degree of deference to BIA required by courts).

114. *See* INS v. Elias-Zacarias, 112 S.Ct. 812 (1992). The Court stated that "the BIA's determination that [the claimant] was not eligible for asylum must be upheld if 'supported by reasonable, substantial, and probative evidence on the record considered as a whole'." *Id.* at 815 (citing 8 U.S.C. 1105a(a)(4)).

115. Refugee Act of 1980 § 201(a), Pub. L. No. 96-212, 94 Stat. 102 (1980). *See supra* note 2 (setting forth statutory definition of "refugee").

116. *See supra* note 32 (discussing that "particular social group" was not specifically defined).

117. *See supra* notes 106-14 and accompanying text (setting out application process and BIA and federal courts' authority to address application for refugee status).

118. *See, e.g.*, Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) (setting out four-prong test for satisfying requirements of "particular social group"); Matter of Acosta, 19 I. & N. Dec. 211, 232 (BIA 1985) (articulating standard to be followed by BIA); Parish, *supra* note 20, at 923 (presenting model for particular social group); Arthur C. Helton, *Persecution on Account of Membership in a Social Group As a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39 (1983) (proposing liberal interpretation of "particular social group").

119. *See* 19 I. & N. Dec. 211, 232-35 (BIA 1985); Parish, *supra* note 20, at 936 (stating that only *Acosta* provides significant guidance in interpreting "social group" and providing thorough analysis of case).

120. 19 I. & N. Dec. 211; *see* Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 740, 770-74 (1989) (providing thorough analysis of *Acosta*); *accord* Parish, *supra* note 20, at 936-37; Blum, *supra* note 52, at 83-84.

change or a trait that, as a matter of conscience, should not be required to be changed.[121]

In *In re Acosta*, respondent was a co-founder of COTAXI, a cooperative organization of taxi drivers in El Salvador.[122] COTAXI was allegedly the target of anti-government guerrillas.[123] When COTAXI refused to comply with the guerrillas' demands, guerrillas allegedly seized and burned a number of COTAXI taxis and assaulted and killed several COTAXI drivers.[124] Respondent allegedly was assaulted and received three threatening notes.[125] Because he feared for his life, respondent left El Salvador and illegally entered the United States.[126] Respondent requested asylum and based his claim of persecution on his membership in a particular social group made up of COTAXI members.[127]

The BIA denied respondent's request for asylum.[128] The BIA held that neither the respondent's membership in COTAXI nor his refusal to participate in guerrilla terrorism constituted immutable characteristics.[129] The BIA noted that respondent easily could have changed jobs to avoid persecution.[130] The BIA stated that its standard for determining if a group is a particular social group (i.e. requiring a group to share an immutable char-

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121. 19 I. & N. Dec. 211 at 233.

122. *Id.* at 216.

123. *Id.*

124. *Id.* at 216-17.

125. *Id.* at 217. The Immigration Judge found respondent's testimony insufficient to prove that he received death threats and was assaulted. *Id.* at 218.

126. *Id.* at 217.

127. *Id.* at 232.

128. *Id.* at 232-34. The BIA concluded that

> 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'.

Id.

129. *Id.* at 234. The BIA stated that

> [t]he characteristics defining the group of which the respondent was a member and subjecting that group to punishment were being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages. Neither of these characteristics is immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages.

Id.

130. *Id.*

acteristic) should be applied on a case-by-case basis.[131] In this case, respondent's membership in COTAXI was neither an innate trait, such as sex, race, or family, nor a shared past experience, such as former military leadership or land ownership, that would be sufficiently immutable to form a particular social group.[132]

The doctrine of *ejusdem generis* was a critical factor in the BIA's analysis of the definition of a particular social group.[133] *Ejusdem generis* literally means "of the same kind."[134] Pursuant to this doctrine, where a statute lists categories that explicitly limit the statute's scope and each category is described by words with a specific meaning, general words that follow are to be construed as narrowly as those categories specifically listed.[135] For example, the definition of "refugee" enumerates factors on which persecution can be based including race, nationality, religion, and political opinion.[136] These limiting categories are followed by the more general phrase, "membership in a particular social group."[137] According to the doctrine of *ejusdem generis*, the phrase "membership in a particular social group" should be construed as narrowly as the preceding categories.[138]

The BIA stated that the other four statutory premises for persecution provided in the Protocol (race, religion, nationality, and political opinion) are immutable characteristics because they cannot be changed or are so fundamental to one's identity that they should not be required to be changed.[139] Consequently, the social group category must require the same ele-

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131. *Id.* at 233.

132. *Id.* The BIA did not elaborate on what kinds of group characteristics would form a "particular social group." Blum, *supra* note 52, at 84 (stating that BIA did not elaborate on kinds of group characteristics implicated in "particular social group" category); *accord* Graves, *supra* note 120, at 773.

133. 19 I. & N. Dec. at 233. The BIA also cited scholarly interpretations. *Id.* (citing A. GRAHL-MADSEN, 1 THE STATUS OF REFUGEES IN INTERNATIONAL LAW (1966) and G. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW (1983)). The BIA also cited the definition of the social group category provided by the HANDBOOK. *Id.* The BIA, however, fails to expound on the significance of these sources in its analysis and formation of a standard to be applied to the social group category. *Id.*

134. 19 I. & N. Dec. at 233.

135. *Id.*; *see* 2A NORMAN SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.18, at 200 (5th ed. 1992) (setting out doctrine of *ejusdem generis*).

136. 19 I. & N. Dec. at 233.

137. *Id.*

138. *Id.*

139. *Id.*

ment of immutability to be consistent with the other categories.[140] In this case, neither respondent's membership in COTAXI nor his refusal to participate in guerilla terrorism was considered immutable.[141]

b. Federal Court Decisions

Circuit courts have relied on precedent, the *Handbook*, and statutory language defining "refugee," in their analysis of the phrase "membership in a particular social group."[142] Relying on these factors, courts have defined a particular social group by its members' voluntary association, shared immutable characteristics, or the persecutor's perception of the members of the group.[143] The U.S. Court of Appeals for the Ninth Circuit, however, is the only U.S. court that has established a test for determining what constitutes a particular social group for the purposes of satisfying the definition of "refugee."[144]

In *Sanchez-Trujillo v. INS*,[145] the Ninth Circuit established a four-prong test for determining whether petitioners were eligible for asylum because of their membership in a particular social group.[146] The first prong of the test, and the threshold question that courts must decide, is whether the class of people identified

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140. *Id.*

141. *Id.* at 234.

142. *See, e.g.*, Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) (citing statutory language and precedent as factors in its decision); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985) (citing HANDBOOK, *supra* note 34, in its decision).

143. *See* Gomez v. INS, 947 F.2d 660 (2d Cir. 1991) (emphasizing persecutor's perception); Sanchez-Trujillo v. INS, 801 F.2d 1571 (emphasizing voluntary association); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985) (emphasizing immutability).

144. *See Sanchez-Trujillo*, 801 F.2d at 1574-75 (setting out four prong test to determine "particular social group"); Parish, *supra* note 20, at 940 (stating that Ninth Circuit is only circuit to have developed its own test for cognizability of alleged particular social group). Parish also provides an analysis of *Sanchez-Trujillo*. *Id.* The Ninth Circuit, which includes California, Washington, Oregon, Montana, Idaho, Arizona, and Nevada, hears the largest percentage of asylum and deportation cases. Lisa Stansky, *Counsel Rate Ninth Circuit Almost Paradise for Aliens*, REC., Feb. 1, 1991, at 1 (quoting statistics compiled by Administrative Office of U.S. Courts that in 1989-90, Ninth Circuit handled 68 appeals involving immigration offenses, more than twice as many as Fifth Circuit, next highest with 32 cases).

145. 801 F.2d 1571 (9th Cir. 1986).

146. *Id.* The test entails four questions: (1) is the class of people cognizable as a particular social group under the immigration statutes; (2) have the petitioners established that they qualify as members of the group; (3) has the purported social group in fact been targeted for persecution on account of the characteristics of the group members; (4) are "special circumstances" present to warrant the court in regarding mere

by the petitioners is a cognizable social group under the Refugee Act.[147] The remainder of the test inquires into whether an applicant qualifies as a member of the purported cognizable group, whether the purported social group was actually targeted for persecution, and whether there were special circumstances present to regard mere membership in that social group as sufficient for asylum.[148] Voluntary association, homogeneity, and close affiliation among members were most important to the court's analysis in defining a cognizable social group.[149]

Petitioners in *Sanchez-Trujillo* alleged that they were members of a particular social group made up of young, urban, working-class males of military age who had maintained political neutrality and who were targeted for persecution by the government of El Salvador.[150] The court held that petitioners' purported social group was too broad, even if the group faced a greater risk of persecution than the general population.[151] Therefore, the Ninth Circuit, applying the first prong of its test, denied petitioners' application for asylum because petitioners failed to prove their membership in a cognizable social group.[152]

The Ninth Circuit stated that the social group category applies to groups that are persecuted for reasons other than race, religion, nationality, or political opinion.[153] The court, however, was concerned with the category's lack of outer limits.[154] In interpreting the confines of a particular social group, the Ninth Circuit dismissed the *Handbook's* definition of a "particular social group" as vague and unhelpful and dismissed the legislative history of the definition of the term "refugee" as uninformative.[155] Instead, the court focused on the statutory language of the Refu-

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membership in that social group as constituting per se eligibility for asylum or prohibition of deportation. *Id.* at 1574-75.

147. *Id.* at 1575.

148. *Id.* at 1574-75.

149. *Id.* at 1576.

150. *Id.* at 1573. Petitioners testified that the National Guard had killed other young males and that one of the petitioners was attacked by government officials and interrogated by the National Guard. Matter of Sanchez and Escobar, 19 I. & N. Dec. 276, 280-81 (BIA 1985).

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

152. *Id.*

153. *Id.* at 1576.

154. *Id.*

155. *Id.* at 1575-76; *see supra* note 34 (providing HANDBOOK definition of "particular social group").

gee Act and on judicial precedent in defining the phrase.[156]

The Ninth Circuit examined the phrase, "membership in a particular social group."[157] The court stated that the words "particular" and "social" modify the word "group," and, therefore, the statute precludes the phrase from encompassing every loosely distinguished segment of a population.[158] Judge Beezer, writing for the court, found that the phrase instead implies a group of individuals voluntarily associated and marked by a common characteristic fundamental to their identity.[159] In this manner, the court restricted an otherwise limitless category.[160]

In defining a particular social group, the *Sanchez-Trujillo* court also relied on precedent.[161] Prior cases held that major segments of an embattled nation's population are not a social group even if they face the risk of persecution.[162] Such persons lack the cohesiveness and homogeneity inherent in the definition of a particular social group.[163] The Ninth Circuit warned against an interpretation that would extend refugee status to every alien displaced by general conditions of unrest in his home country.[164]

Judge Beezer stated that the immediate members of a family form a prototypical example of a particular social group.[165] The Ninth Circuit found that a family is a "focus of fundamental af-

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

157. *Id.*

158. *Id.*

159. *Id.* The court stated that

> 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.

Id.

160. *Id.*

161. *Id.* at 1576-77.

162. *Id.* at 1577 (citing Lopez v. INS, 775 F.2d 1015, 1017 (9th Cir. 1985); Chavez v. INS, 723 F.2d 1431, 1434 (9th Cir. 1984)).

163. *Id.* at 1577.

164. *Id.*

165. *Id.* at 1576 (finding "the family being a focus of fundamental affiliational concerns and common interests for most people"). *But see* Estrada-Posadas v. INS, 924 F.2d 916 (9th Cir. 1991) (holding that concept of persecution of social group does not extend to persecution of family); De Valle v. INS, 901 F.2d 787, 793 (9th Cir. 1990) (holding that asylum claim based on membership in group made up of family members of military deserters from Salvadoran army failed to satisfy first prong of *Sanchez* test).

filiational concerns" and emphasized that families are small and their members are easily identifiable.[166] The court then contrasted a "family" with a social group made up of males taller than six feet.[167] The court found that this group was an "all-encompassing group" to which the court did not believe the term was intended to apply.[168] Petitioners' class was likened to the group made up of males taller than six feet.[169] The court concluded that to hold that young, urban, working class males of military age who had maintained political neutrality satisfied the definition of a particular social group would render the definition of "refugee" meaningless.[170] Therefore, petitioners failed to meet the first prong of the Ninth Circuit's test because the class of people identified by the petitioners was not cognizable as a particular social group.[171]

Commentators have criticized the Ninth Circuit's decision.[172] 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.[173] This argument relies on the fact that the court offered a family as an example of a particular social group[174] and that, generally, membership in a family is involun-

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

167. *Id.*

168. *Id.* at 1577. The court rejected the purported particular social group argument because its members fall within a "sweeping demographic division and naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings." *Id.* The court further stated that "major segments of the population of an embattled nation, even though undoubtedly at risk from general political violence will rarely constitute a distinct 'social group'." *Id.* (citing Lopez v. INS, 775 F.2d 1015, 1017 (9th Cir. 1985); Chavez v. INS, 723 F.2d 1431, 1434 (9th Cir. 1984); *see* De Valle v. INS, 901 F.2d 787, 793 (9th Cir. 1990) (drawing analogy to alleged social group in *Sanchez*, and claiming that families of deserters, like young urban males, are also diverse, fragmented segment of population).

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

170. *Id.* at 1577.

171. *Id.* at 1574-75.

172. *See* Graves, *supra* note 120, at 740 (describing analysis in *Sanchez* as internally confused); *accord* Blum, *supra* note 52, at 86-87; Parish, *supra* note 20, at 942-43.

173. Blum, *supra* note 52, at 86-87; *accord* Parish, note 20, at 942-43 (stating that only way to reconcile *Sanchez-Trujillo's* emphasis on voluntary association with *Acosta's* requirement of immutability is to read *Sanchez-Trujillo* as "referring to groups defined by a voluntary relationship which existed in the past").

174. *Sanchez-Trujillo*, 801 F.2d at 1571, 1576.

tary.[175] 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.[176] The court in *Sanchez-Trujillo*, however, neither addressed this fact nor cited to the BIA's holding in *In re Acosta*, which required immutability in defining a particular social group.[177] In addition, the only group that has been recognized as a particular social group by the Ninth Circuit since *Sanchez-Trujillo* is one made up of individuals who faced persecution in El Salvador for retrieving the corpses of murder victims.[178] The group's members shared an immutable characteristic: they had all participated in an activity that occurred in the past.[179]

Other circuit courts have stressed different factors in determining whether an individual is a member of a particular social group.[180] These circuits, however, have failed to establish a formal test.[181] In *Ananeh-Firempong v. INS*,[182] the U.S. Court of Ap-

175. Blum, *supra* note 52, at 86; *accord* Graves, *supra* note 120, at 781 (stating that family blatantly fails to meet criteria set forth by court).

176. Blum, *supra* note 52, at 86.

177. *Id.* at 87. *See* Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); *accord* Parish, *supra* note 20, at 942-43 (stating that requirement of voluntary association cannot be read literally or else it will directly contradict *Acosta*'s immutability requirement). According to Parish, *Sanchez-Trujillo* actually intended to define groups by a voluntary relationship which existed in the past. *Id.* This type of relationship would connote immutability. *Id.*

178. Valle-Zometa v. INS, No. 88-7174, 1990 U.S. App. LEXIS 21167, at *19 (9th Cir. Dec. 5, 1990).

179. *Id.*; *see* Parish, *supra* note 20, at 943 (citing *Valle-Zometa* as proof that *Sanchez-Trujillo* recognized BIA's requirement of immutability by defining particular social group as one marked by voluntary relationship that existed in past). This factor, combined with the fact that the courts must respect BIA decisions, support the claim that the Ninth Circuit did in fact give weight to immutability as an element in determining what constitutes a particular social group. *Id.* at 942-43.

180. *See, e.g.*, Gomez v. INS, 947 F.2d 660 (2d Cir. 1991) (finding persecutor's perception of group important to determining whether particular social group exists); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985) (finding HANDBOOK and BIA precedent important).

181. *See* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575 n.6 (9th Cir. 1986). The court stated that "[w]hatever the merits of the First Circuit's decision under the circumstances of that case, the decision provides no guidance as to the outer limits of the 'social group' category." *Id.*; *see* Parish, *supra* note 20, at 939-40 (stating that First Circuit failed to explain how it arrived at its decision and neglected to resolve which potential social groups it recognized); Graves, *supra* note 120, at 774 (using *Ananeh-Firempong* as example of court's failure to define particular social group). Some circuit courts fail to explain why the applicant's claim of membership in a particular social group fails. *E.g.*, Adebisi v. INS, 952 F.2d 910, 913 (5th Cir. 1992) (declining to address whether

peals for the First Circuit relied on the *Handbook's* language and the holding in *In re Acosta* to hold that petitioner's membership in her family, her tribal affiliation, her social class, and her political views amounted to membership in a particular social group.[183] Consistent with *In re Acosta*, the First Circuit emphasized that petitioner was persecuted because of characteristics that were beyond her power to change.[184] Furthermore, the court followed the *Handbook* in determining that individuals included in these categories were of similar background, habits, or social status.[185]

Similarly, the U.S. Court of Appeals for the Second Circuit, in *Gomez v. INS*,[186] declined to articulate a formal test for interpreting the phrase "membership in a particular social group."[187] The *Gomez* court stated, however, that a particular social group can be composed of individuals who possess a shared fundamental characteristic that distinguishes them in the eyes of either a persecutor or in the eyes of the outside world.[188] Petitioner, a Salvadoran woman, was raped five times by guerrillas during her youth.[189] The court rejected her claim that she was a member of a particular social group consisting of women who were previously raped and attacked by guerrillas.[190] The court stated that gender and youth were the only characteristics common to her

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applicant's family is social group); Alvarez-Flores v. INS, 909 F.2d 1, 7-8 (1st Cir. 1990) (declining to expound on BIA's refusal to recognize former campesino cheesemakers in El Salvador as a particular social group).

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

183. *Id.* In *Ananeh-Firempong*, there was a coup in Ghana while the petitioner, a citizen of Ghana, was studying in the United States. *Id.* at 622-23. Consequently, the new government persecuted those associated with the former government, members of the Ashanti tribe, professionals, business people, and highly educated people. *Id.* at 623. Petitioner's family fell within all of these categories. *Id.* The government placed petitioner's parents under house arrest, seized her family's bank account, interrupted her family's telephone service, prevented her family from sending letters, and beat her nephew. *Id.*

184. *Id.* at 626.

185. *Id.*

186. Gomez v. INS, 947 F.2d 660 (2d Cir. 1991).

187. *Id.*; *see* Parish, *supra* note 20, at 940 (stating that Second Circuit in *Gomez* eliminated claim without establishing positive definition).

188. *Gomez*, 947 F.2d at 664. *But see* Blum, *supra* note 52, at 90 (stating that court in *Gomez* recognizes importance of persecutor's perceptions but fails to apply them in determining whether petitioner was member of particular social group).

189. *Gomez*, 947 F.2d at 662.

190. *Id.* at 663-64.

purported particular social group.[191] Therefore, further brutalization was unlikely because the group lacked any characteristic that persecutors could identify and single out.[192]

In *Saleh v. United States Department of Justice*,[193] the Second Circuit again implied that a persecutor's perception is an important factor in shaping a particular social group.[194] Here, the court implied that a particular social group might be evidenced by laws enacted to persecute that group.[195] The court, citing *Gomez*, denied petitioner's application for asylum noting that neither of the two groups set forth by the petitioner was legally singled out by the group's government.[196] Furthermore, the court stated that neither of the two groups set forth by the petitioner possessed sufficiently specific traits to be considered recognizable and distinct.[197]

D. *Homosexuals' Group Status in the United States*

The U.S. government's treatment of homosexuals is a significant factor in analyzing the recognition of homosexuals as a particular social group. In the United States, the executive and legislative branches have recognized homosexuals as a distinct group.[198] Furthermore, federal judges have considered homosexuality an immutable characteristic.[199] Additionally, an un-

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191. *Id.* at 664.

192. *Id.* The court stated that

> [l]ike the traits which distinguish the other four enumerated categories—race, religion, nationality and political opinion—the attributes of a particular social group must be recognizable and discrete.

Id.

193. Saleh v. United States Dep't of Justice, 962 F.2d 234 (2d Cir. 1992).

194. *Id.* at 240; *see* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 n.7 (9th Cir. 1986) (recognizing significance of persecutor's perception in determining definition of particular social group).

195. *Saleh*, 962 F.2d at 240.

196. *Id.*

197. *Id.* The court stated that "both groups possess[ed] broadly-based characteristics similar to 'youth and gender' that we held insufficient to identify a particular social group in *Gomez*." *Id.*

198. *See* 32 C.F.R. § 41, app. A, pt. 1, § H.1.a, b. (1993) (banning homosexuals from military); Immigration and Nationality Act of 1952 § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1988) (categorically excluding homosexuals from immigration) (repealed 1990).

199. *See* Jantz v. Muci, 759 F. Supp. 1543 at 1546-51 (D. Kan. 1991) (finding that homosexuality is immutable and therefore homosexuals are suspect class for purposes of equal protection claim), *rev'd on other grounds*, 976 F.2d 623 (10th Cir.); *accord* High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375 (9th Cir. 1990)

published BIA decision and an Immigration Judge's decision recognize homosexuals as a particular social group.[200]

1. Treatment of Homosexuals as a Group by the Federal Government

The federal government historically has treated homosexuals as a distinct group.[201] Immigration law and military procedure reflect government policies that have, in the past, treated homosexuals as a group.[202] In addition, Congress recently passed legislation regarding bias-related crimes,[203] which treats homosexuals as a group.[204]

Until 1990, Congress categorically prohibited homosexuals from entering the United States as immigrants.[205] The Immigration and Nationality Act ("INA") denied any alien "afflicted with psychopathic personality" entry into the United States.[206] In *Boutilier v. INS*,[207] the Supreme Court held that the INA could legally exclude homosexuals because homosexuals had psychopathic personalities.[208] This exclusionary policy changed when

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(Canby, J., dissenting) (arguing that homosexuality is immutable and therefore homosexuals deserve classification as suspect class); Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (Norris, J., concurring) (arguing that homosexuality is immutable).

200. *See* In re Toboso, No. A23 220 644 (BIA 1990) (on file at *Fordham International Law Journal*).

201. *See* Immigration and Nationality Act of 1952, § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1988) (categorically excluding homosexuals from immigration) (repealed 1990); Enlisted Administrative Separations, 32 C.F.R. § 41, app. A, pt. 1, § H.1.a. (1992) (banning homosexuals from military).

202. Immigration and Nationality Act of 1952, § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1988) (categorically excluding homosexuals from immigration) (repealed in 1990); Enlisted Administrative Separations, 32 C.F.R. § 41, app. A, pt. 1, § H.1.a. (1992) (banning homosexuals from military).

203. *See* Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (to be codified at 28 U.S.C. § 534).

204. *Id.*

205. Immigration and Nationality Act of 1952, § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1988) (repealed 1990). *See* Samuel M. Silvers, *The Exclusion and Expulsion of Homosexual Aliens*, 15 COLUM. HUM. RTS. L. REV., 295 (1984) (providing thorough analysis of past exclusionary policy towards homosexuals).

206. 8 U.S.C. § 1182(a)(4) (1992). The Immigration and Nationality Act denied entry into the United States to aliens "afflicted with psychopathic personality, or sexual deviation." *Id.*

207. 387 U.S. 118 (1967).

208. *Boutilier*, 387 U.S. at 120 (holding that section excluding aliens "afflicted with psychopathic personality" was intended by Congress to exclude homosexuals).

this section of the INA was repealed in 1990.[209]

Although President Clinton and the U.S. Pentagon recently agreed to relax the policy banning discrimination against homosexuals in the military,[210] the Department of Defense ("DOD") regulations, until now, mandated that homosexuals be prohibited from entering any branch of the military.[211] These regulations explicitly required the dishonorable discharge of service persons who married a person of the same sex, stated that they are a homosexual, or engaged in or solicited consensual bodily contact with members of the same sex for sexual purposes.[212] In addition, until recently, the military induction form contained questions about sexual orientation.[213] The DOD still believes that homosexuals in the military jeopardize discipline, morale, and public acceptability.[214]

Furthermore, Congress addressed homosexuals as a group

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209. *See* Immigration and Nationality Act of 1952, § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1988) (repealed 1990).

210. *See* Thomas L. Friedman, *President Admits Revised Policy Isn't Perfect*, N.Y. TIMES, July 20, 1993, at A1, A16 (setting forth the Pentagon's new policy guidelines on homosexuals in the military); Thomas L. Friedman, *Accord is Reached on Military Rules for Gay Soldiers*, N.Y. TIMES, July 17, 1993, at A1.

211. 32 C.F.R. Pt. 41, App. A, pt. 1(H)(1)(a) (1993). This regulation lists homosexuality as a reason for "separation." *Id.* The definition of the term "separation" includes discharge, release from active duty, and release from custody and control of the armed forces. 32 C.F.R. § 41.6 (1993). The regulation states that

> [h]omosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct . . . seriously impairs the accomplishment of the military mission. . . . Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts. . . .

32 C.F.R. Pt. 41, App. A, pt. 1(H)(1)(a), (b)(1) (1993); *see* Janine M. Dascenzo and Neal A. May, *Cleaning Out the Pentagon's Closet: An Overview of the Defense Department's Anti-Gay Policy*, 23 U. TOL. L. REV. 433 (1992); NAN D. HUNTER ET. AL., THE RIGHTS OF LESBIANS AND GAY MEN 35-37 (1992) (discussing military policy toward homosexuals); Judith Hicks Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685 (1992) (providing thorough description of military's policy of excluding homosexuals from service).

212. *See* 32 C.F.R. Pt. 41, App. A, pt.1(H) (1993).

213. *See* Gwen Ifill, *Clinton Accepts Delay in Lifting Military Gay Ban*, N.Y. TIMES, Jan. 30, 1993, at A1.

214. 32 C.F.R. Pt. 41, App. A, pt. 1(H)(1)(a) (1993). This regulation states that

> [t]he presence of [homosexual] members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the

when it passed the Hate Crime Statistics Act.[215] This act requires the collection and publication of data about crimes that manifest evidence of prejudice on account of "certain group characteristics" including race, religion, sexual orientation, or ethnicity.[216]

2. Homosexuality as an Immutable Characteristic

If homosexuals possess a characteristic that the U.S. government accepts as immutable, they can be considered a particular social group.[217] In the United States, homosexuals classified as a distinct group on the basis of their sexual orientation or their status as homosexuals can be distinguished from homosexuals characterized on the basis of homosexual conduct.[218] When ho-

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Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

Id.

See HUNTER, ET. AL., *supra* note 211, at 35 (discussing fact that Department of Defense bases its exclusionary practices on argument that homosexuality is incompatible with military service); Eric Schmitt, *Calm Analysis Dominates Panel Hearing on Gay Ban*, N.Y. TIMES, Apr. 1, 1993, at A1 (reporting that experts warn that "the bond that troops start to establish in basic training would break under the strain of heterosexual and homosexual soldiers sharing foxholes, barracks and close quarters aboard ship"); Eric Schmitt, *Months After Order on Gay Ban, Military is Still Resisting Clinton*, N.Y. TIMES, Mar. 21, 1993, at A1, A18 (citing five-officer Army team study warning that lifting ban on homosexuals would damage recruiting to point that "the country may be forced to consider abandoning the all-volunteer force and returning to conscription"); Eric Schmitt, *Military Cites Wide Range of Reasons for Its Gay Ban*, N.Y. TIMES, Jan. 27, 1993, at A1 (stating that military worried that lift of ban on homosexuals would jeopardize morale and discipline, recruiting, cohesiveness among combat troops, personal privacy and even increase the spread of Aids); Eric Schmitt, *Joint Chiefs Fighting Clinton Plan to Allow Homosexuals in Military*, N.Y TIMES, Jan. 23, 1993, at A1 (stating that Joint Chiefs of Staff oppose repealing ban on homosexuals in military because they believe the repeal "would wreck morale, undermine recruiting, force devoutly religious service members to resign and increase the risk of AIDS for heterosexual troops").

215. *See* Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (to be codified at 28 U.S.C. § 534); *see also* Joseph M. Fernandez, Recent Development, *Bringing Hate Crime Into Focus - The Hate Crime Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261 (1991) (providing extensive overview of Act).

216. Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (to be codified at 28 U.S.C. § 534). Under this act, "Sexual orientation" is defined as consensual homosexuality or heterosexuality. *Id.* In addition, the Act states that "[n]othing in this section creates a cause of action or a right to bring an action, including an action based on discrimination due to sexual orientation. *Id.*

217. *See* Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985) (requiring immutability).

218. *See* Jantz v. Muci, 759 F. Supp. 1543, 1546 (D. Kan. 1991) (stating that distinction between homosexual conduct and homosexual orientation is proper and useful in analyzing constitutional rights of homosexuals), *rev'd on other grounds*, 976 F.2d 623 (10th Cir.) (basing decision on qualified immunity of defendant), and *cert. denied*, 113 S. Ct. 2445 (1993); *see also* William Safire, *On Language*, N.Y. TIMES MAGAZINE, Feb. 14,

mosexuality is viewed as behavioral, it is considered mutable because individuals can change their behavior.[219] When viewed in terms of status as opposed to behavior, however, homosexuality is considered immutable.[220]

The Supreme Court's decision in *Bowers v. Hardwick*[221] holding that a Georgia sodomy statute was constitutional, upheld a statute against homosexual conduct, not status.[222] In addition, most U.S. circuit courts have viewed homosexuality as behavioral[223] and therefore as a mutable characteristic.[224] These decisions, however, contain concurring and dissenting opinions that treat homosexuality as a status and therefore immutable.[225]

The minority decisions that characterize homosexuality as immutable argue that homosexuals cannot change their sexual

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1993, at 14 (stating that phrases "sexual preference" and "sexual orientation" "deal with condition, not behavior, and can thus be referred to delicately as status in contrast to activity"); Parish *supra* note 20, at 950-52 (discussing thoroughly, legitimate distinction between identifying homosexuals by their status and identifying them by their conduct). For example, a homosexual can be celibate, and a heterosexual can have sexual contact with partners of the same sex. *Id.* This Comment refers to homosexual status and sexual orientation interchangeably and as distinct from conduct.

219. *See* High Tech Gays v. Defense Indus. Clearance Office, 895 F.2d 563, 573 (9th Cir.) (finding that homosexuality is behavioral and therefore not immutable), *reh'g denied*, 909 F.2d 375 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (stating that while blacks or women exhibit immutable characteristics, homosexuality is primarily behavioral), *cert. denied*, 494 U.S. 1003 (1990).

220. *See* High Tech Gays v. Defense Indus. Clearance Office, 909 F.2d 375 (9th Cir. 1990) (Canby, J., dissenting) (arguing that sexual orientation is not matter of controllable choice and therefore is immutable); Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) (en banc) (Norris, J., concurring) (stating that homosexuality is immutable), *cert. denied*, 498 U.S. 957 (1990).

221. Bowers v. Hardwick, 478 U.S. 186 (1986) (denying challenge to state anti-sodomy statute).

222. *Id.*

223. *High Tech Gays*, 895 F.2d at 573 (addressing equal protection claim, court stated that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes"); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (reviewing equal protection claim, court stated that "[m]embers of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in character"), *cert. denied*, 494 U.S. 1003 (1990).

224. *High Tech Gays*, 895 F.2d at 573; *Woodward*, 871 F.2d at 1076. The Supreme Court, however, has not ruled on this issue. Further, a majority of circuit courts have also failed to address this question.

225. High Tech Gays v. Defense Indus. Clearance Office, 909 F.2d 375 (9th Cir. 1990) (Canby, J., dissenting); Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) (en banc) (Norris, J., concurring).

orientation without immense difficulty.[226] Furthermore, a district court judge in *Jantz v. Muci*[227] pointed out that the circuit court decisions finding that homosexuality is behavioral fail to cite any scientific or medical authority supporting such conclusions.[228] In contrast, this district court cited a number of scientific articles concluding that sexual orientation generally cannot be changed.[229] Thus, the court held that homosexuality is immutable.[230]

3. Claims of Persecution Based on Homosexuality and Recognition of Homosexuals as a Particular Social Group

Claiming persecution on account of membership in a particular social group, homosexuals from numerous countries are currently applying to the United States for asylum, refugee status or for the suspension of deportation.[231] One BIA decision and one Immigration Judge's decision recognize homosexuals as

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226. *See* High Tech Gays v. Defense Indus. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, J., dissenting) (stating that it was not enough to say homosexuality is behavioral); Watkins v. U.S. Army, 875 F.2d 699, 711 (9th cir. 1989) (en banc) (Norris, J., concurring). Judge Canby, in *High Tech Gays*, argued that homosexuality is immutable. *High Tech Gays*, 909 F.2d at 377. In support of his argument, the judge claimed that homosexuals do not choose to be attracted to members of their own sex. *Id.* Sexual identity, the judge stated, is established at a very early age and is not a matter of conscious or controllable choice. *Id.* In *Watkins*, Judge Norris considered homosexuality immutable because changing it would require either a major physical change or traumatic change of identity. *Watkins*, 875 F.2d at 726. To support this argument, the judge relies on scientific research demonstrating that individuals have little control over their sexual orientation. *Id.* The judge asked

> [w]ould heterosexuals living in a city that passed an ordinance burdening those who engaged in or desired to engage in sex with persons of the opposite sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?

Id.

227. 759 F. Supp. 1543, 1547 n.3 (D.Kan. 1991) *rev'd on other grounds*, 976 F.2d 623 (10th Cir.) (basing decision on qualified immunity defense), and *cert. denied*, 113 S. Ct. 2445 (1993).

228. *Id.*

229. *Jantz*, 759 F. Supp. at 1547, 1547 n.4 (citing numerous sources).

230. *Id.* at 1551. *But see* Steffan v. Cheney, 780 F. Supp. 1, 6 n.12 (D.D.C. 1991) (holding that although causes and attributes of homosexuality are scientifically unknown, homosexuality is not immutable because it is sometimes chosen by individuals). This district court decision cited the lack of scientific evidence proving that homosexuality is either mutable or immutable but left open the possibility that homosexuality, at least sometimes, can not be chosen. *Id.*

231. *See, e.g.*, In re "Chau," No. A71 039 582 (Immigration Judge, June 14, 1993) (on file with the *Fordham International Law Journal*); *see also* Tuller and Levy, *supra* note 12 (stating that experts on immigration and gay and lesbian rights estimate 20 claims

members of a particular social group.[232] These decisions, however, are not binding on other Immigration Judges, other panels of the BIA, or the federal courts.[233]

First, in 1990, in *In re Toboso*,[234] the BIA upheld an Immigration Judge's decision to halt deportation proceedings against Mr. Toboso-Alfonso, a gay Cuban man.[235] Mr. Toboso testified that he was subjected to recurring medical examinations and interrogations that were given because he was a homosexual.[236] During these interrogations, he was detained in the police station for days at a time without a legitimate reason.[237] The applicant further testified that he would be incarcerated because of his sexual orientation if he returned to Cuba.[238] The Immigra-

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are pending for asylum based on sexual orientation but that INS does not keep statistics on grounds which asylum is sought).

Thousands of aliens in the United States may have been persecuted in their country of origin because of their sexual orientation. *See* Tuller, *supra* note 5, at A1, A8; *see also* In re Tenorio, No A72 093 558 at 8-11 (Immigration Judge July 26, 1993) (discussing persecution of homosexuals in Brazil); Joiro A. Marin, *In Some Societies, to be Gay is to be Dead*, L.A. TIMES, Oct. 18, 1991, at B7 (describing killing of homosexuals in Columbia); Chris Nealson, *Anti-gay Attacks Up in Peru*, GAY COMMUNITY NEWS, Feb. 18-24, 1990, at 2 (describing persecution of homosexuals in Peru); Debbie Rich, *Gay Men Tortured in Romania*, GAY COMMUNITY NEWS, Feb. 18-24, 1990, at 2 (reporting that gay men have been arrested, interrogated and tortured in Romania); Susan Schmitz, *Gay Executions in Iran Continue*, GAY COMMUNITY NEWS, June 10-16, 1990 at 2 (describing persecution of homosexuals in Iran); David Tuller and Dan Levy, *Gay Rights on a Worldwide Front*, S.F. CHRON., Aug. 24, 1992, at A1 (stating that homosexuals are murdered in Mexico, imprisoned in Russia, executed in Iran and "disappeared" by death squads in Columbia); Aras van Hertum, *Amnesty International Report Warns of Abuse Against Gays*, WASH. BLADE, July 17, 1992 (describing persecution of gays in Columbia, Turkey, Brazil, Russia and other former Soviet republics); Doris Sue Wong, *More Gays Seeking US Asylum*, BOSTON GLOBE, Nov. 7, 1992, at 13, 19 (stating that People's Republic of China has employed electroshock and herbs that induce vomiting to discourage erotic thoughts).

232. In re Toboso, No. A23 220 644 (BIA Mar. 12, 1990) (on file with the *Fordham International Law Journal*); In re Tenorio, No. A72 093 558 (Immigration Judge July 26, 1993) (on file with the *Fordham International Law Journal*). The BIA had the authority to designate *Toboso* as a precedent decision but declined. *See* Letter from W. Lee Rawls, Assistant Attorney General, to Barney Frank, United States Congressman, (July 2, 1992) (on file with the *Fordham International Law Journal*).

233. *See* 8 C.F.R. § 3.1(g) (1993); In re Ruis, 18 I. & N. Dec. 320, 321 (BIA 1982); *supra* note 7 (discussing weight of BIA and Immigration Judge decisions).

234. In re Toboso, No. A23 220 644 (BIA Mar. 12, 1990) (on file with the *Fordham International Law Journal*).

235. *Id.*

236. *Id.*

237. *Id.*

238. In re Toboso, No. A23 220 644 (BIA Mar. 12, 1990) (on file with the *Fordham International Law Journal*). Applicant claimed that the government was not acting against specific acts by homosexuals, but merely against applicant's status as a homosex-

tion Judge decided that the homosexual alien-applicant was persecuted on the basis of his status as a homosexual, as opposed to homosexual conduct, and further, that homosexuality is an immutable characteristic.[239] The Judge granted refugee status and held that homosexuals constitute a particular social group.[240] The BIA affirmed this holding.[241] While the *In re Toboso* decision is not binding, the decision has not been challenged.

Furthermore, in June, 1993, the INS was confronted again with the issue of whether homosexuals constitute a particular social group.[242] In *In re "Chau,"* the respondent was a bisexual man from Hong Kong who came to the United States, overstayed his one-year visitor's visa and applied for asylum in the United States.[243] The respondent asserted that he feared persecution on account of his membership in a particular social group made up of the bisexual and homosexual community.[244] The respondent testified that the Hong Kong Government would imprison him for life if the government learned of his sexual orientation.[245] Furthermore, he asserted that the Chinese Government, which assumes control of Hong Kong in 1997, persecutes homosexuals through forms of electroshock therapy, labor camps, imprisonment, and re-education in order to "cure" them of their sexual orientation.[246]

The U.S trial attorney representing the INS explicitly stated

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ual. *Id.* The BIA cited the applicant's testimony that there is a municipal office within the Cuban Government which registers and maintains files on all homosexuals. *Id.* The applicant would be required every few months to appear at a hearing at which he would receive a physical examination and be interrogated about his sex life. *Id.* In addition he could be detained for 3 or 4 days without being charged. *Id.* The applicant further testified that he was threatened by the chief of police that if he did not leave Cuba for the United States, he could spend four years in prison for being a homosexual. *Id.*; *see* Tuller, *supra* note 4 at A8 (describing *Toboso* case).

239. In re Toboso, Dec. No. A23 220 644 (BIA Mar. 12, 1990) (on file with the *Fordham International Law Journal*).

240. *Id.*

241. *Id.* The applicant was granted withholding of deportation but was denied asylum only because of criminal record in the United States. *Id.* *But see* Tuller, *supra* note 5, at A1, A8 (stating that it is believed that U.S.'s antipathy towards Cuba played significant role in decision to grant withholding of deportation).

242. *See* In re "Chau," No. A71 039 582 (Immigration Judge June 14, 1993) (on file with the *Fordham International Law Journal*). Respondent's real name is not revealed in order to protect his identity.

243. In re "Chau" (manuscript at 2).

244. In re "Chau" (manuscript at 6).

245. *Id.*

246. In re "Chau" (manuscript at 7).

that he would not raise the issue of whether homosexuals constitute a particular social group.[247] The attorney essentially conceded to an Immigration Judge that persons claiming asylum on the basis of persecution because of sexual orientation qualify as a cognizable social group under the definition of "refugee."[248] As a result, the issue was narrowed to a factual determination of whether Mr. Chau had a well-founded fear of persecution.[249] The Immigration Judge determined that Mr. Chau did not satisfy the persecution requirement and, therefore, Mr. Chau's application for asylum was denied.[250]

Finally, on July 26, 1993, *In re Tenorio* was decided, recognizing homosexuals as a particular social group.[251] In *In re Tenorio*, an Immigration Judge in San Francisco, California, granted asylum to the respondent, a Brazilian national who had been persecuted in Brazil for being a homosexual.[252] Immigration Judge Philip P. Leadbetter granted asylum on the grounds that homosexuals constitute a particular social group.[253] The decision cited *Re: Inaudi*, as well as *In re Acosta*, *Sanchez-Trujillo v. INS*, and *Ananeh-Firempong v. INS*.[254]

Noting that reviewing a foreign country's finding on this issue would be useful, the Immigration Judge discussed and agreed with Canada's analysis in *Re: Inaudi*.[255] In accordance with *Re: Inaudi*, the Immigration Judge concluded that an associational relationship exists among homosexuals, homosexuals share a common characteristic that is fundamental to their identity, and sexual orientation is arguably immutable.[256] *In re Te-*

247. Telephone Interview with William SooHoo, Attorney for respondent in *In re "Chau"* (July 17, 1993).

248. *Id.*

249. *See* In re "Chau" (manuscript 17-27).

250. *Id.*

251. In re Tenorio, No. A72 093 558 (Immigration Judge July 26, 1993) (on file with the *Fordham International Law Journal*).

252. *Id.* at 4-7. Respondent testified that he was beaten, stabbed, robbed and verbally abused while waiting for a bus after attending a gay discotheque. *Id.* at 4-5. His persecutors called him a "faggot" and "gay." *Id.* at 5. Respondent stated that he did not report the attack to the police because he believed it might have been police officers who attacked him. *Id.* at 6. In addition, respondent was turned down from a job because he admitted to the potential employer that he was a homosexual. *Id.* at 7.

253. *Id.* at 14.

254. *Id.* at 11-14.

255. *Id.* at 14.

256. *Id.*

norio, however, is not binding on any other Immigration Judge, the BIA, or the Federal Courts. In addition, the INS is appealing the decision.

II. RE: INAUDI

In *Re: Inaudi*, Mr. Jorge Alberto Inaudi, a 28-year-old Argentine, was persecuted by the Argentine government because of his homosexuality.[257] He fled Argentina, his country of origin, and sought asylum in Canada because of continuous and abusive treatment by Argentine government authorities.[258] Mr. Inaudi argued that he was a persecuted homosexual, that homosexuals were a particular social group, and that, therefore, he was a "Convention refugee."[259] The Canadian CRDD of the IRB held that Mr. Inaudi satisfied the definition of "Convention refugee" because homosexuals constitute a particular social group.[260]

A. *The Facts of the Case*

Mr. Inaudi had been persecuted because of his homosexuality since he was a child.[261] As an adult, when Mr. Inaudi served in the Argentine military, he was blackmailed and incarcerated by military authorities for eight days because of his romantic relationship with another soldier.[262] After his military service, government officials continued to harass Mr. Inaudi.[263]

Mr. Inaudi was arrested by the police on numerous occasions while patronizing gay bars.[264] Each time, the police detained Mr. Inaudi and abused him because of his sexual orientation.[265] On several of these occasions the police beat, sexually abused, or robbed Mr. Inaudi after they arrested him.[266] In ad-

257. Re: Inaudi, I.R.B. No. T91-04459 at 1-4 (Apr. 9, 1992).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 1. Mr. Inaudi "suffered humiliation and degradation" at boarding school because he was a homosexual. *Id.*

262. *Id.*

263. *Id.* at 2-4 (describing claimant's being arrested, blackmailed, beaten and verbally abused by the police).

264. *Id.*

265. *Id.*

266. *Id.* Mr. Inaudi alleged that on one occasion, he was

> beaten with billy clubs and fists, stripped, sodomized, blindfolded, tied to the walls in spread eagle fashion, given electric shock and then was forced to listen

dition to physical abuse, Mr. Inaudi was also blackmailed and compelled to bribe police officers in order to guarantee that his homosexuality remained secret.[267] As a result of these events, Mr. Inaudi left Argentina and sought refuge in Canada,[268] where he applied for political asylum.[269]

B. *The Canadian Immigration and Refugee Board's Analysis*

A panel of the IRB heard Mr. Inaudi's request for asylum.[270] The issue before the IRB was whether Mr. Inaudi's fear of persecution was based on a Convention reason.[271] The IRB held that Mr. Inaudi was a Convention refugee[272] because he was persecuted on account of his homosexuality and homosexuals are a particular social group.[273]

The IRB analyzed two concepts to determine the definition of a particular social group in general, and why homosexuals, in particular, fall within this definition.[274] First, the alleged members of a particular social group must possess an immutable characteristic.[275] Second, the purported members of a social

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> to others being tortured in the same manner. . . . While he was unconscious he was dumped on the side of a road under a bridge, naked, with his clothes next to him.

Id. at 3-4.

267. *Id.* at 2-4. One time, the police notified Mr. Inaudi's landlady of Mr. Inaudi's homosexuality and he was evicted from his apartment. *Id.* at 1-2. On another occasion, Mr. Inaudi did not have enough money to bribe the police. Consequently, the police informed his employer and co-workers that he was gay. The humiliation Mr. Inaudi suffered compelled him to resign from his job. *Id.* at 2. On yet another occasion, a police officer informed Mr. Inaudi's employer of his homosexuality. This employer subsequently told fellow employees that Mr. Inaudi was a homosexual, and fired Mr. Inaudi. *Id.* at 3. Furthermore, Mr. Inaudi's family learned of Mr. Inaudi's homosexuality after one of Mr. Inaudi's arrests, and his father renounced him. *Id.* at 4.

268. *Id.* at 4.

269. *Canada Grants Political Asylum to Oppressed Argentinean Gay*, BAY AREA REP., Jan. 23, 1992.

270. *See* Re: Inaudi, I.R.B. No. T91-04459 (Apr. 9, 1992).

271. *Id.* at 4. The presiding member of the Immigration and Refugee Board held that, based on the record of facts, there was no question that Inaudi was persecuted. *Id.*

272. *Id.* at 10.

273. *Id.* at 4-10. Even the dissent agrees that Inaudi was a member of a particular social group because of his homosexual orientation, finding that his homosexuality "constitutes an innate and fundamental personal characteristic" and that "[h]omosexuals have a pattern of social interaction and share some common understandings." *Id.* at 11. The dissent only disputes the panel's holding that Inaudi was at risk of persecution. *Id.* at 11-19.

274. *Id.* at 5-6.

275. *Id.*

group need to share the degree of similarity required by the statute defining "refugee."[276]

The IRB stated that if homosexuality is an immutable characteristic, then homosexuals constitute a particular social group.[277] Citing a decision of the Federal Administrative Court of the Federal Republic of Germany[278] and an analysis of *Veysey v. Commissioner of the Correctional Service of Canada*,[279] the IRB illustrated that sexual orientation can be considered immutable. The IRB held that homosexuals constitute a particular social group, therefore implying that the IRB accepted the fact that homosexuality is immutable.[280]

The IRB first relied on the case decided by the Federal Administrative Court of the Federal Republic of Germany to demonstrate that homosexuality has been considered immutable.[281] In this case, the Federal Administrative Court of Germany held that homosexuality, if considered an irreversible, personal characteristic could be grounds for asylum.[282] The IRB stated that the German court appeared to have accepted that homosexuality is an immutable characteristic.[283]

Second, the IRB relied on James C. Hathaway's[284] analysis of *Veysey v. Commissioner of the Correctional Service of Canada*.[285] Mr. Hathaway stated that *Veysey* applied the doctrine of *ejusdem generis* in holding that homosexuality was at least as immutable as

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276. *Id.* at 5.

277. *Id.* at 6.

278. *Id.* (citing 1 INT'L J. REFUGEE L. 110 (1989) (summarizing German case)).

279. *Id.* (citing JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 163-164 (1991) (analyzing Veysey v. Commissioner of the Correctional Serv. of Canada (1989), 1 F.C. 321 (FCTD)). *Re: Inaudi* does not cite any Canadian precedent applying asylum law in its analysis of whether homosexuals should be considered a particular social group within the definition of "refugee." *See Re: Inaudi* I.R.B. No. T91-04459 (Apr. 9, 1992).

280. *Id.* Ethel Teitelbaum of the IRB stated, "[i]f I accept (as the German court and Mr. Justice Dube have) that homosexuality is an immutable characteristic, that alone, in my opinion, suffices to place homosexuals in a particular social group." *Id.*

281. *Id.* at 5 (citing 1 INT'L J. REFUGEE L. 110 (1989) (summarizing German case)). In this case, an Iranian citizen claimed that he was in danger of being executed in Iran because he was a homosexual. 1 INT'L J. REFUGEE L. 110 (1989).

282. 1 INT'L J. REFUGEE L. 110. The court in the German court case, however, did not directly address the definition of a "particular social group because it assessed the plaintiff's claim within context of political opinion. *Id.*

283. *Re: Inaudi* at 5.

284. Author of THE LAW OF REFUGEE STATUS (1991).

285. *Re: Inaudi* at 6 (citing JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS, at 163-164 (1991) (analyzing Veysey v. Commissioner of the Correctional Serv. of Canada (1989), 1 F.C. 321 (FCTD)).

race, national or ethnic origin, color, age, religion, sex, or mental or physical disability.[286] As a result, he concluded that *Veysey* provided the basis for treating sexual orientation as an immutable characteristic capable of defining a social group.[287]

According to the IRB, even if homosexuality is considered a voluntary condition, it is one so fundamental to a person's identity that a claimant ought not be compelled to change it.[288] As a result, the IRB implied that whether homosexuality is immutable or voluntary, homosexuals are members of a particular social group.[289]

The IRB also examined the statutory language defining a refugee in determining that homosexuals qualify as Convention refugees.[290] Noting that Canada's Immigration Act does not define the phrase "particular social group," the IRB referred to the interpretation provided by the *Handbook*.[291] The *Handbook* states that a particular social group requires similar background, habits or social status.[292] The IRB stated that homosexuals possess a sufficient degree of similarity.[293]

Furthermore, the IRB examined the plain meaning of the words "social" and "group" as defined by the *Oxford English Dictionary*.[294] The *Oxford English Dictionary* defines "social" as possessing the capability of being associated or united.[295] In addition, the dictionary defines "group" as a number of persons classed together on the basis of a certain degree of similarity.[296] The IRB concluded that homosexuals clearly are capable of being associated or united because homosexuals possess a certain degree of similarity.[297] This similarity stems from their attraction

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286. HATHAWAY, *supra* note 78, at 163-64.

287. *Id.*

288. *Re: Inaudi* at 5.

289. *Id.*

290. *Id.* (analyzing language in Canadian Immigration Act).

291. *Id.* (citing HANDBOOK); *see* HANDBOOK, *supra* note 34, ¶ 77.

292. HANDBOOK, *supra* note 34, ¶ 77 ("A 'particular social group' normally comprises persons of similar background, habits or social status").

293. *Re: Inaudi*, (Apr. 9, 1992) No. T91-04459 at 5 (I.R.B.).

294. *Id.* at 5 (citing OXFORD ENGLISH DICTIONARY).

295. *Id.*

296. *Id.*

297. *Id.* The Board stated

> [h]omosexuals are classed together on account of a certain degree of similarity, i.e. that they are attracted to persons of their own gender. I therefore find

to persons of their own gender.[298] The IRB stated that therefore homosexuals, whether they are male or female, are members of a particular social group.[299]

The IRB held that homosexuals form a particular social group.[300] Therefore, the IRB found Mr. Inaudi to be a Convention refugee.[301] Although the Minister of Employment and Immigration could have appealed the decision to Canada's federal courts, he did not.[302]

III. RE: INAUDI *SHOULD INFLUENCE U.S. REFUGEE POLICY*

The BIA and U.S courts should rely on *Re: Inaudi* to recognize that homosexuals constitute a particular social group for purposes of satisfying the definition of "refugee." The IRB's analysis in *Re: Inaudi* demonstrates that the United States can include homosexuals in its definition of "refugee" without broadening or modifying its interpretation of a particular social group.[303] The analysis provided in *Re: Inaudi* is not only consistent with U.S. interpretations of the phrase "particular social group" previously set out by the BIA and federal courts, but *Re: Inaudi* integrates into its reasoning the various factors applied in the United States to define a "particular social group." In addition, because the U.S. government historically has treated homosexuals as a distinct group[304] and federal judges recognize homosexuality as an immutable trait,[305] labeling homosexuals as a particular social group for refugee status only would entail

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that homosexuals, be they male or female, are members of a particular social group.

Id.

298. *Id.*

299. *Id.*

300. *Id.* at 5.

301. *Id.* at 10.

302. *See* Farnsworth, *supra* note 90 (stating that I.R.B. decisions are usually final).

303. *Compare Re: Inaudi* (holding that homosexuals constitute particular social group) *with* Saleh v. United States Dep't of Justice, 962 F.2d 234 (2d Cir. 1992) (relying on factors similar to that relied on in *Re: Inaudi* to determine what constitutes particular social group) *and* Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) (demonstrating that U.S. analysis is similar to *Re: Inaudi*) *and* Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985) *and* In re Acosta, 19 I. & N. Dec. (BIA 1985) (focusing on immutability, similarly to Canadian Board in *Re: Inaudi*).

304. *See supra* notes 201-16 and accompanying text (discussing U.S. immigration, military, and criminal law that classifies homosexuals as group).

305. *See supra* notes 225-30 and accompanying text (setting out federal judges' arguments that homosexuality is immutable).

application of well-established policy. Furthermore, that an Immigration Judge has actually cited *Re: Inaudi* demonstrates the decision's significance and implies that the United States is willing to adopt *Re: Inaudi*.[306]

A. Re: Inaudi *Is Consistent with U.S. Standards*

1. The BIA Standard

Because the Canadian IRB determined that, pursuant to the doctrine of *ejusdem generis*, a particular social group is formed by an immutable trait, *Re: Inaudi* is consistent with the BIA standard for determining a particular social group.[307] The Canadian IRB explained immutability as a characteristic that is either virtually irreversible or so fundamental to the identity of an individual that it should not be required to be changed.[308] The Canadian IRB held that homosexuality is immutable and even if it is considered voluntary, it is so fundamental to an individual's identity that an individual ought not be required to change it.[309] As a result, the Canadian IRB held that homosexuals constitute a particular social group.[310]

The Canadian IRB's standard is consistent with the interpretation of a particular social group applied by the U.S. BIA in *In re Acosta*.[311] Similarly to the IRB, in *In re Acosta*, the BIA applied the doctrine of *ejusdem generis* to define a particular social group.[312] In addition, like the Canadian IRB, the BIA concluded that members of a particular social group should share an immutable characteristic.[313] Furthermore, the BIA similarly defined immutability as a trait impossible to change or so fundamental to one's identity that it ought not be required to be changed.[314]

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306. *See* In re Tenorio, No. A72 093 558 at 14 (Immigration Judge 1993).

307. Re: Inaudi, (Apr. 9, 1992) No. T91-04459 at 6 (I.R.B.); *see supra* notes 119-41 and accompanying text (setting forth BIA standard).

308. *Supra* notes 277-87 (discussing *Re: Inaudi's* finding that homosexuality is immutable).

309. *Id.*

310. *Id.*

311. *Compare* Re: Inaudi, (Apr. 9, 1992) No. T91-04459 (I.R.B.) (finding that homosexuality can be considered immutable, and therefore homosexuals constitute particular social group) *with* In re Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) (defining particular social group as group shaped by immutable characteristic). *See supra* notes 119-41 and accompanying text (discussing *Acosta*).

312. *Acosta*, I. & N. Dec. at 233.

313. *Id.*

314. *Id.*

Therefore, *Re: Inaudi* provides the United States with an application of its own standard and should convince the BIA to recognize homosexuals as a particular social group.

2. The Federal Courts

The Canadian IRB's decision and analysis is also consistent with the standard applied by the U.S. Court of Appeals for the Ninth Circuit.[315] First, the Canadian IRB examined relevant statutory language and found that the plain meaning of "social" and "group" required a certain degree of similarity among individuals.[316] *Re: Inaudi* cited the *Oxford English Dictionary's* definition of "social" as "capable of being associated or united," while "group," according to the dictionary, was defined as "a number of persons classed together on account of a certain degree of similarity."[317] Homosexuals, according to the Canadian IRB, meet this level of similarity because they share an attraction to persons of their own gender.[318]

Similarly, the U.S. Court of Appeals for the Ninth Circuit, in *Sanchez-Trujillo v. INS*, stated that the phrase "particular social group" connotes "a collection of people closely affiliated" and sharing "some common impulse or interest."[319] Because the Ninth Circuit has adopted a very similar definition of social group, it would not have to reinterpret the Refugee Act of 1980 to find that homosexuals constitute a particular social group.

Second, the IRB stated that even if homosexuality is voluntary, homosexuals still constitute a particular social group.[320]

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315. *Compare* Re: Inaudi, (Apr. 9, 1992) No. T91-04459 at 5 (I.R.B.) (relying on persecutor's perception, HANDBOOK, and statutory language to conclude that even if homosexuality is voluntary, homosexuals constitute particular social group) *with* Saleh v. United States Dep't of Justice, 962 F.2d 234, 240 (2d Cir. 1992) (discussing persecutor's perception in its analysis) and Gomez v. I.N.S., 947 F.2d 660, 664 (2d Cir. 1991) (recognizing persecutor's perception as important in determining particular social group) and Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1576 (9th Cir. 1986) (stating that existence of "voluntary associational relationship" is essential to finding particular social group in its analysis of what constitutes particular social group) and Ananeh-Firempong v. I.N.S., 766 F.2d 621, 626 (1st Cir. 1985) (relying on HANDBOOK, *supra* note 34, and *In re Acosta* in its decision).

316. Re: Inaudi, (Apr. 9, 1992) No. T91-04459 at 5 (I.R.B.).

317. *Id.*

318. *Id.*; *supra* notes 294-99 and accompanying text (analyzing *Re: Inaudi*).

319. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986); *see supra* notes 145-71 and accompanying text (discussing *Sanchez-Trujillo*).

320. Re: Inaudi, (Apr. 9, 1992) No. T91-04459 at 5 (I.R.B.).

The Ninth Circuit in *Sanchez-Trujillo* stated that voluntary association was central to the formation of a particular social group.[321] Therefore, the court's emphasis on voluntary association is consistent with the Canadian IRB's reasoning that voluntary traits can form a particular social group.[322]

Finally, the Ninth Circuit in *Sanchez-Trujillo* stated that a family was a prototype of a particular social group, implying that the inability to disassociate oneself from other members of the group may underlie its decision despite the court's emphasis on voluntary association.[323] If this factor was determinative in *Sanchez-Trujillo*, *Re: Inaudi* still remains consistent with the Ninth Circuit analysis because the Canadian Board held that homosexuals constitute a particular social group whether homosexuality is considered voluntary or immutable.[324]

Re: Inaudi also addressed the same concerns articulated by the U.S. Court of Appeals for the First Circuit in *Ananeh-Firempong v. INS*: whether homosexuality is immutable and whether homosexuals satisfy the *Handbook's* definition of a particular social group.[325] According to the Canadian IRB in *Re: Inaudi*, homosexuality can be considered immutable.[326] In addition, *Re: Inaudi* found that homosexuals possess the requisite level of similarity required by the *Handbook*.[327]

Unlike the Canadian IRB, however, neither the U.S. federal courts nor the BIA has relied on foreign cases to define a particular social group.[328] Although the United States has not been influenced by foreign decisions, the BIA and courts are more

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321. *See Sanchez-Trujillo*, 801 F.2d at 1576. *But see* Blum, *supra* note 52, at 86-87 (stating that immutability seems to have been more relevant criteria underlying Ninth Circuit's decision in *Sanchez*); Parish, *supra* note 20, at 942-43 (stating that *Sanchez* must be read as "referring to groups defined by a voluntary relationship which existed in the past").

322. *Re: Inaudi* at 5. *But see* Blum, *supra* note 52, at 91 (stating that under Ninth Circuit's "voluntary association" test, homosexuals could be excluded).

323. *Sanchez-Trujillo*, 801 F.2d at 1576; *see* Blum, *supra* note 52, at 86; *supra* notes 173-79 and accompanying text (discussing *Sanchez-Trujillo's* implied reliance on immutability as factor in its analysis).

324. Re: Inaudi, (Apr. 9, 1992) No. T91-04459 at 5 (I.R.B.).

325. *Compare id.* at 5-6 (addressing importance of immutability and citing HANDBOOK, *supra* note 33) *with* Ananeh-Firempong v. I.N.S., 766 F.2d 621, 626 (1st Cir. 1985) (citing *In re Acosta* and HANDBOOK).

326. *Re: Inaudi* at 5.

327. *Id.* 4-5.

328. *But see* In re Tenorio, No. A72 093 558 (Immigration Judge 1991) (on file with the *Fordham International Law Journal*) (citing *Re: Inaudi*).

likely to be influenced by a Canadian decision because the United States and Canada have similar cultures and a common legal tradition, and are geographically contiguous.[329] Therefore, this difference between the U.S. and Canadian analyses should not preclude U.S. courts and administrative agencies from following *Re: Inaudi.*

Re: Inaudi is consistent with the standards set forth by the U.S. BIA and the federal courts.[330] The Canadian Board, like these authorities, addressed immutability, voluntary association, the plain meaning of the statutory language defining "refugee," and the *Handbook's* definition of a particular social group.[331] Considering these factors, the Canadian Board determined that homosexuals constitute a particular social group.[332] Therefore, U.S. courts and the BIA should be convinced that homosexuals are members of a particular social group.

B. *The U.S. Government's View of Homosexuality Supports a Finding that Homosexuals Constitute a Particular Social Group*

Aliens from various parts of the world allege that, in their

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329. *See* Farnsworth, *supra* note 90, at A5 (quoting law professor at University of Toronto as saying that *Re: Inaudi* is important new precedent for United States).

330. *Re: Inaudi* is also consistent with many American commentators' views that the judiciary and BIA should interpret the scope of a particular social group more broadly than it has been by the BIA and the circuit courts. *See* Helton, *supra* note 118. Arthur Helton stated that "the contours of a social group for purposes of refugee status are limited only by the imagination of the persecutor." *Id.* at 66; *accord* Daniel Compton, Note, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar—Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986)*, 62 WASH. L. REV. 913 (1987) (criticizing *Sanchez-Trujillo* test as too narrow and advocating broader standard which considers the perceptions and actions of the persecutor); Graves, *supra* note 117, at 740-41 (stating that neither courts nor BIA should reduce asylum eligibility to level narrower than broad and flexible standard intended by Congress); David L. Neal, Note, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203 (1988) (arguing that phrase has catch-all type purpose and therefore should be extended to women if persecuted on account of their sex); *see also* Parish, *supra* note 20, at 944-47 (advocating broader definition of particular social group, but with some limits). In fact, one leading commentator on this issue advocates that any group perceived by the government as deserving persecution should be considered a particular social group. *See, e.g.*, Helton, *supra* note 118, at 45-46, 51, 60. "The 'social group' category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up." *Id.* at 45. Furthermore, "the presumption must be that it was intended that all victims of capricious persecution. . . be included in the 'social group' category." *Id.* at 46.

331. *See* Re: Inaudi, (Apr. 9, 1992) No. T91-04459 at 4-8 (I.R.B.).

332. *Id.*

countries of origin, homosexuals are persecuted on account of their sexual orientation.[333] These aliens are seeking protection in the United States claiming that they are members of a particular social group comprised of homosexuals.[334] Whether homosexuals will be considered a particular social group depends significantly on how the U.S. government views homosexuality.[335]

1. The U.S. Government Treats Homosexuals as a Distinct Group

The U.S. government has historically treated homosexuals as a distinct group.[336] The INA categorically excluded homosexuals from immigration until 1990.[337] Under this policy, homosexuals were banned because they were viewed as having psychopathic personalities.[338] Additionally, the DOD's traditional policy of banning homosexuals from the military demonstrates that the Pentagon viewed homosexuals as a distinct social group.[339]

The U.S. government's current treatment of homosexuals, however, demonstrates a more favorable attitude toward homosexuals. The U.S. government, while still recognizing homosexuals as a group, is beginning to recognize that homosexuals have been unjustifiably discriminated against.[340] President Clinton's recent efforts to repeal the ban against homosexuals in the mili-

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333. *See supra* note 231 (providing articles reporting persecution of homosexual in other countries).

334. *Id.*

335. *See, e.g.*, Wong, *supra* note 5, at 19 (stating that extent to which homosexuals will be granted asylum on account of their homosexuality depends on extent to which homosexuality is sanctioned in United States).

336. *See supra* notes 201-16 and accompanying text (describing how U.S. immigration, military, and criminal law address homosexuals as group).

337. *See* 8 U.S.C. § 1182(a)(4) (1988) (categorically excluding homosexuals from immigration) (repealed 1990).

338. *See supra* notes 207-08 and accompanying text (discussing Boutilier v. INS, 387 U.S. 118 (1967)).

339. 32 C.F.R. Pt. 41, App. A, pt. 1(H)(1)(a) (1993) (banning homosexuals from military).

340. While homosexuals are not considered a suspect or quasi-suspect class under the Equal Protection Clause of the Constitution, *see, e.g.*, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (holding that homosexuals are not suspect or quasi-suspect class for purposes of Equal Protection Clause of Constitution); Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1990) (concluding that homosexuals are not a suspect or quasi-suspect class with regard to Equal Protection Clause of Constitution), the Ninth Circuit, in *Pruitt v. Cheney*, refused to defer to military judgment when military policy was challenged on equal protection grounds. Pruitt v. Cheney, 943 F.2d 989 (9th Cir. 1991). The court remanded the case to district court and directed

tary, for example, reflects the administration's recognition that the government no longer should persecute this group.[341] The repeal of the exclusionary policies toward homosexuals in immigration also reflects a more favorable attitude towards homosexuals.[342] In addition, the Hate Crime Statistics Act's includes homosexuals.[343] This law reflects an understanding that homosexuals are potential victims of discrimination and therefore need protection.[344]

2. Homosexuality Is Considered Immutable

Federal judges, in areas other than immigration, have ar-

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the court to apply "active" rationality test to determine whether anti-gay military policies are "rationally related to permissible government purpose." *Id.* at 996.

Furthermore, in *Meinhold v. United States Dep't of Defense*, a district court judge held that the Department of Defense is "permanently enjoined from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States." 808 F. Supp. 1455 (C.D. Cal 1993). To do so, reasoned the court, would violate the Equal Protection clause of the Fifth Amendment. *Id.*; *see also* Janine M. Dascenzo and Neal A. May, *Cleaning Out the Pentagon's Closet: An Overview of the Defense Department's Anti-Gay Policy* 23 U. TOL. L. REV. 433 (arguing that homosexuals should be considered suspect class); Chad S. Johnson, Note, *A Judicial Blow to the Military's Anti-Gay Policies: Pruitt v. Cheney, 943 F.2d 989 (9th Cir. 1991)*, 27 HARV. C.R.-C.L. L. REV. 244, 261 (1992) (arguing that Ninth Circuit realized need to "disentrench the cycle of homophobia and discrimination within the military establishment"); Mark Stasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEM. L. REV. 937, 938 (1991) (arguing that "neither the Court nor society can afford to pay the costs associated with the Court's refusal to recognize that homosexuals constitute a suspect class"); Dirk Johnson, *Colorado's Anti-Gay Measure Set Back*, N.Y. TIMES, July 20, 1993, at A8 (reporting that the Colorado State Supreme Court held that a measure against gay rights appeared to violate the equal protection clause of U.S. Constitution).

341. *See The Pentagon's New Policy Guidelines on Homosexuals in the Military*, N.Y. TIMES, July 20, 1993, at A16. The Pentagon's new policy states, for example, that applicants will no longer be asked or required to reveal if they are homosexual, sexual orientation will not be a bar to service unless manifested by homosexual conduct, and no investigations will be conducted solely to determine a service member's sexual orientation. *Id.* The new policy attempts to distinguish between homosexual status and homosexual conduct. Thomas L. Friedman, *Accord is Reached on Military Rules for Gay Soldiers*, N.Y. TIMES, July 17, 1993, at A1, A7. Homosexual status will be condoned if kept discreet, while homosexual conduct most likely will lead to an investigation and discharge. *Id.*

342. *See* Wong, *supra* note 5, at 19 (quoting Rep. Barney Frank for proposition that because homosexuals are no longer barred from immigrating to United States, they should be eligible for asylum).

343. *See* Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (to be codified at 28 U.S.C. § 534).

344. *See* Parish, *supra* note 20, at 950 n.151.

gued that homosexuality is an immutable characteristic.[345] A Ninth Circuit judge argued that homosexuality is inherent.[346] This judge stated that homosexuality is immutable because it cannot be changed without immense difficulty.[347] Another Ninth Circuit judge stated that homosexuality is immutable because it would require a traumatic change of identity, citing scientific authority supporting the fact that individuals have little control over their sexual orientation.[348] Additionally, circuit court decisions rejecting the claim that homosexuality is immutable have been attacked on the ground that their conclusions are not supported by credible evidence.[349]

Although the Supreme Court denied a constitutional challenge to sodomy statutes in *Bowers v. Hardwick*, the decision focused on homosexual conduct rather than status.[350] In *Bowers v. Hardwick*, the Supreme Court held that statutes prohibiting sodomy are Constitutional.[351] Such statutes prohibit homosexual conduct.[352] In contrast, homosexuals seeking asylum in the United States claim that their countries of origin persecute them on account of their status as homosexuals.[353] The Supreme Court, in fact, has held that statutes criminalizing status, such as drug addiction, are unconstitutional.[354] Therefore, *Bowers* does

345. *See* High Tech Gays v. Defense Ind. Sec. Clearance Office, 909 F.2d 375 (9th Cir. 1990) (Canby, J., dissenting) (arguing that homosexuality is immutable); Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (Norris, J., concurring) (arguing that homosexuality is immutable).

346. *High Tech Gays*, 909 F.2d at 377.

347. *Id.*

348. *Watkins*, 875 F.2d at 726.

349. *See* Jantz v. Muci, 759 F. Supp. 1543, 1547, n.3 (D. Kan. 1991) (arguing that Circuit decisions holding homosexuality is immutable were devoid of scientific support), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992) and *cert denied*, 113 S.Ct. 2445 (1993).

350. Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that anti-sodomy statute was constitutional).

351. *Id.*

352. *See id.* at 190-96 (upholding statute prohibiting private, consensual sodomy); HUNTER, ET AL., *supra* note 211, at 148-75 (providing state-by-state compilation of consensual sodomy statutes and related laws).

353. *See supra* notes 231-56 and accompanying text (describing claims by homosexuals of persecution on account of sexual orientation).

354. Robinson v. California, 370 U.S. 660, 666-67 (1962) (holding that statute making "status" of narcotic addiction, as opposed to use, purchase, sale or possession of narcotics, criminal offense inflicts cruel and unusual punishment in violation of Fourteenth Amendment); *see* Powell v. Texas, 392 U.S. 514 (1968) (Black, J., concurring). Justice Black states:

not undermine a policy to protect homosexuals from persecution on account of their status as homosexuals.[355]

4. Homosexuals Have Been Considered a Particular Social Group

In *In re Toboso*, the BIA held that homosexuals are a particular social group for purposes of satisfying the definition "refugee."[356] The BIA upheld an Immigration Judge's decision that petitioner was persecuted on account of his status as a homosexual, not his conduct.[357] This case demonstrates that the administrative authority in charge of refugee claims believes that homosexuality is immutable.[358]

In addition, the U.S. trial attorney representing the INS in *In re "Chau"* essentially conceded to an Immigration Judge, by not raising the issue, that persons claiming asylum on the basis of persecution for sexual orientation qualify as a cognizable social group under the definition of "refugee."[359] The attorney's concession does not mean necessarily that other U.S. attorneys who represent the INS also will concede that persons persecuted for their sexual orientation constitute a particular social group.[360] The attorney's concession in *In re "Chau,"* however, is persuasive authority.[361]

Furthermore, on July 26, 1993, an Immigration Judge actually relied on *Re: Inaudi* to hold that homosexuals constitute a

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> Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law. . . .

Id. at 543.

Important to the Court's holding in *Robinson* was the fact that the Court considered drug addiction involuntary. *Robinson*, 370 U.S. at 666.

355. *See* Parish, *supra* note 20, at 951-53. *But see* Wong, *supra* note 5, at 19 (implying that *Bowers* is obstacle for homosexuals applying for asylum).

356. In re Toboso, No. A23 220 644 (BIA Mar. 12, 1990) (on file with the *Fordham International Law Journal*); *see supra* notes 234-41 and accompanying text (discussing *Toboso*).

357. *Id.*

358. *Id.*

359. *See supra* notes 242-50 and accompanying text (discussing *Matter of "Peter Chau"*).

360. Telephone Interview with Mr. William SooHoo, Attorney for the respondent in *In re "Chau"* (Mar. 12, 1993).

361. *Id.*

particular social group.[362] *In re Tenorio* has two significant implications. First, *In re Tenorio* provides another authority that can be relied on to hold that homosexuals constitute a particular social group. The more decisions there are, the more persuaded other Immigration Judges, panels of the BIA, and the federal courts should be. Second, *In re Tenorio* cited *Re: Inaudi*,[363] demonstrating that the U.S. agrees with *Re: Inaudi* and is willing to adopt its analysis and holding.

In re Toboso, *In re "Chau,"* and *In re Tenorio* support the argument that the BIA and federal courts should recognize homosexuals as a particular social group. *Re: Inaudi*, however, provides more thorough and detailed reasoning for holding that homosexuals constitute a particular social group.[364] In *In re Toboso* the BIA found that the applicant was persecuted for being homosexual, that homosexual status is immutable, and, therefore, that homosexuals constitute a particular social group.[365] The decision neither cites precedent nor provides an in-depth analysis explaining its holding.[366] Additionally, *In re "Chau"* does not address at all why homosexuals should be considered a particular social group.[367] Furthermore, while *In re Tenorio* cites *In re Acosta*, *Sanchez-Trujillo*, and *Ananeh-Firempong*, the decision in *In re Tenorio* merely states the holdings in these cases without drawing any conclusions or applying them to the claimant at issue.[368] The Immigration Judge in *In re Tenorio*, instead, relies on *Re: Inaudi* to determine whether homosexuals constitute a particular social group.[369]

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362. In re Tenorio, No. A72 093 558 (Immigration Judge July 26, 1993) (on file with the *Fordham International Law Journal*); *see supra* notes 251-56 and accompanying text (discussing *Tenorio*).

363. *Id.* at 14.

364. *Compare supra* notes 270-302 and accompanying text (setting forth *Re: Inaudi's* decision) *with supra* notes 234-56 and accompanying text (discussing holdings in *Toboso*, *In re "Chau"*, and *Tenorio*).

365. In re Toboso, No. A23 220 644 at 4 (BIA Mar. 12, 1990).

366. *Id.*

367. *See supra* notes 242-50 and accompanying text (discussing *In re "Chau"*).

368. In re Tenorio, No. A72 093 558 at 11-14 (Immigration Judge July 26, 1993) (on file with the *Fordham International Law Journal*).

369. *Id.* at 14. The Immigration Judge stated, "[i]n order to determine whether homosexuals as a group is the type of 'social group' for which the immigration laws provide protection from persecution, it may be useful to review a foreign country's finding on this issue. . . . This court is in agreement with [*Re: Inaudi's*] analysis. . . . Thus, homosexuals are considered to be members of a particular social group." *Id.*

5. The United States Will Not Become a Haven for All Homosexuals

If homosexuals are held to constitute a particular social group, the United States will not be obliged to open its doors as a haven for all homosexuals.[370] Each person who applies for asylum must satisfy the other requirements set out by the definition of "refugee" in the Refugee Act of 1980.[371] Therefore, neither the courts nor the BIA should reject homosexuals' claims of persecution on account of membership in a particular social group for fear of a flood of these refugees.

CONCLUSION

Holding that homosexuals constitute a particular social group is consistent with BIA and federal court precedent, and treatment of homosexuals by the federal government. Thus far the definition of a particular social group has not been applied to its full potential. The stage is set for homosexuals to be recognized in the United States as a particular social group and thereby obtain refugee status. The BIA and Federal Courts should adopt the reasoning in *Re: Inaudi* and hold that homosexuals constitute a particular social group.

*Ellen Vagelos**

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370. *See* Clyde H. Farnsworth, *Canada Refugee Ruling in Favor of Gay Man May Affect U.S. Cases*, HOUSTON CHRON., Jan. 19, 1992, at A21 (quoting lawyer in *Re: Inaudi* case as saying that *Re: Inaudi* does not mean Canada will suddenly become haven for all homosexuals claiming refugee status because homosexuals will have to prove persecution, not merely harassment); Graves, *supra* note 117, at 781-83 (arguing that there is no statutory basis for denying refuge merely because many people are persecuted); Robert Kozak, *Canada's Homosexual Refugee Ruling Has Wider Implications*, REUTERS, Jan. 14, 1992 (reporting that analysts do not think *Re: Inaudi* will lead to large influx of refugees claiming persecution due to sexual orientation because it is difficult to prove); Neal, *supra* note 330 (arguing that class size is not proper judicial concern in asylum cases). *But see* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1577 (9th Cir. 1986). The Ninth Circuit, in *Sanchez*, expressed its disapproval of an over-broad interpretation of a "particular social group" that would include individuals with "a plethora of different lifestyles, varying interests, diverse cultures and contrary political leanings." *Id.* at 1577. The court in *Sanchez* offered a family as a prototypical example of a particular social group. *Id.* Tuller, *supra* note 5 (stating that holding that homosexuals constitute particular social group could be harbinger of thousands of similar cases).

371. *See* 8 U.S.C. § 1101(a)(42)(A) (1988) (providing full definition of refugee); *supra* notes 25-29 and accompanying text (setting forth requirements for being considered refugee).

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