

A note to readers: The attached draft is truly a work-in-progress, intended to spark discussion, and open to revision. I look forward to the discussion in San Remo and to any comments and suggestions you might have.

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Please note also that the footnotes are not yet finalised (UNHCR)

**“MEMBERSHIP IN A PARTICULAR SOCIAL GROUP”:
ANALYSIS AND PROPOSED CONCLUSIONS**

Background Paper for “Track Two” of the Global Consultations

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I. Introduction

In recent years, the number and variety of refugee claims based on “membership in a particular social group” have increased dramatically. The social group cases have been pushing the boundaries of refugee law, raising issues such as domestic abuse,¹ homosexuality,² coercive family planning policies,³ female genital mutilation (FGM),⁴ and discrimination against the disabled.⁵

Invocation of the particular social group category is not surprising. Its potential breadth makes it a plausible vehicle for refugee claims that do not easily fit within the

¹ *Islam v. Sec’y of State for the Home Dept. and R. v. Immigration Appeal Tribunal and Sec’y of State for the Home Dept. ex parte Shah*, [1999] 2 W.L.R. 1015; [1999] INLR 144. Also reprinted in the *International Journal of Refugee Law*, vol. 11, at 496 (1999).

² See Derek McGhee, *Persecution and Social Group Status: Homosexual Refugees in the 1990s*, 14 *J. Ref. Studies* 20 (2001)

³ *A v. Minister for Immigration and Ethnic Affairs*, (1997) 142 A.L.R. 331; [1997] INLR 1 (hereafter “Applicant A”).

⁴ *In Re Kasinga*, Int. Dec. 3278 (B.I.A. 1996).

other categories. And because the usual materials consulted in the interpretation of international agreements provide little help in this case, adjudicators have adopted a range of (often conflicting) constructions of the Convention language.⁶ Courts and administrative agencies have at times announced a standard that adequately resolves the case before them only to later conclude that the rule must be modified because of subsequent claims.

Because of the growing importance of the social group category and the wide-ranging interpretations it has received, it is an appropriate topic for “Track Two” of the UNHCR Global Consultations. This paper provides a detailed analysis of the various legal approaches to “membership in a particular social group” and to specific issues arising under the definition for the discussion of Experts.

The paper is guided by the underlying premise that a sensible interpretation of the term “membership in a particular social group” (MSPG) must be responsive to victims of persecution without so expanding the scope of the Convention as to impose upon states obligations to which they did not consent. In striking that delicate balance, it must be kept in mind that international refugee law bears a close relationship to international human rights law⁷—that refugees are persons whose human rights have been violated and who merit international protection.

⁵ Arlene Kanter and Kristin Dadey, *The Right of Asylum for People with Disabilities*, 73 *Temple L. Rev.* 1117 (2000).

⁶ See McHugh J. in *Applicant A* (at 259):

Courts and jurists have taken widely differing views as to what constitutes “membership in a particular social group” for the purposes of the Convention. This is not surprising. The phrase is indeterminate and lacks a detailed legislative history and debate. Not only is it impossible to define the phrase exhaustively, it is pointless to attempt to do so.

⁷ Cf. Krista Daley and Ninette Kelley, *Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence*, 12 *Int’l J. Ref. L.* 148 (2000).

The paper has four parts. Part II briefly surveys the *travaux préparatoire* and UNHCR interpretations of MSPG. Part III undertakes a detailed examination of state jurisprudence in order to provide a basis for discussion of particular issues relating to the definition of MSPG. In Part IV, interpretive issues that have been of concern to adjudicative bodies are discussed. “Conclusions” are proposed for each issue. Part V summarizes the Conclusions stated in earlier parts of the paper. Also attached to the paper is an Annex that identifies a range of fact patterns in which social group claims have been made. The paper offers a tentative approach to such situations, but the examples are intended more to spark discussion than to provide a definitive resolution of such cases.

II. International Standards

A. The Convention and the Travaux Préparatoires

As is well known, the term “membership in a particular social group” was added near the end of the deliberations on the Convention. The *travaux* is particularly unhelpful as a guide to interpretation. All that is recorded is the Swedish delegate’s observation that “experience has shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included.”⁸ Accordingly, courts and scholars have generally turned to the term’s association with the other “for reasons of” categories—race, religion, nationality, and political opinion—for interpretive guidance. That is, they have sought to identify elements central to the other categories (such as the “immutability” or “fundamentality” of the category) and then to adopt an interpretation of

particular social group consistent with the identified element. While this strategy may provide a limiting principle, it is not compelled by the Convention or other authoritative sources; it is possible that the term was adopted to cover an assortment of groups whose need for protection was based on circumstances distinct from those that provide the justification for inclusion of the other categories.⁹

B. UNHCR Interpretations

1. The Handbook

The Handbook’s discussion of “membership in a social group” is general and rather brief—reflecting, no doubt, the undeveloped nature of such claims at the time of Handbook’s writing. It reads, in its entirety:

77. 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.

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

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⁹ For example, state anti-discrimination principles may condemn classifications based on race, religion, age, handicap, sexual orientation and other characteristics on the grounds these forms of classification are

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.

2. Position taken in court cases

In a brief filed in *Islam v. Sec’y of State for the Home Department* and *R. v. Immigration Appeal Tribunal and Sec’y of State for the Home Department ex parte Shah*¹⁰ (“*Islam and Shah*”), UNHCR submitted the following:

The UNHCR’s position is as follows. Individuals who believe in or are perceived to believe in values and standards at odds with the social mores of the society in which they live may, in principle, constitute a “particular social group” within the meaning of Article 1A(2) of the 1951 Convention. Such persons do not always constitute a “particular social group”. In order to do so the values at stake must be of such a nature that the person concerned should not be required to renounce them.

...
“Particular social group” means a group of people who share some characteristic which distinguishes them from society at large. That characteristic must be unchangeable, either because it is innate or otherwise impossible to change or because it would be wrong to require the individuals to change it. Thus, where a person holds beliefs or has values such that requiring them to renounce them would contravene their fundamental human rights, they may in principle be part of a particular social group made up of like-minded persons.

...
It is important to appreciate that UNHCR’s position does not entail defining the particular social group by reference to the persecution suffered. Indeed, the UNHCR agrees with the conclusion of the Court of Appeal in the

“unfair”—even if one can identify no single element common to all that accounts for the conclusion of “unfairness.”

¹⁰ [1999] 2 W.L.R. 1015; [1999] INLR 144. Also reprinted in the *International Journal of Refugee Law*, vol. 11, at 496 (1999).

present cases that persecution alone cannot determine a group where none otherwise exists.

...
[I]t is not the *reaction* to the behaviour of such persons which is the touchstone defining the group. However, the reaction may provide evidence in a particular case that a particular group exists.

3. Other guidance

In its 1985 conclusion on Refugee Women and International Protection, the Executive Committee noted [paragraph (k)]:

States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhumane treatment due to their having transgressed the social mores of the society in which they live many be considered as a “particular social group” within the meaning of [the Convention].

III. State Jurisprudence

The most detailed discussions of the “social group” category occur in cases in common law jurisdictions. Accordingly, primary attention will be paid here to decisions in Australia, Canada, New Zealand, the United Kingdom and the United States. The cases display a number of approaches—even within jurisdictions, jurists frequently adopt conflicting interpretations of the Convention and domestic law. However, as will be summarized at the conclusion of this section, it is possible to identify convergence among states on several issues. This section will also discuss “guidelines” and other interpretive principles proposed or adopted by non-judicial bodies in the relevant states.

To a surprising degree, courts in the common law countries tend to read and analyze cases decided in other common law states. The courts of the United States provide an exception, relying almost exclusively on domestic cases.¹¹ Recent proposed regulations by the Immigration and Naturalization Service, however, take note of “social group” cases decided by courts of other countries.

A. Canada

The Supreme Court of Canada offered an important discussion of MPSG in *Attorney General v. Ward*.¹² The case involved the claim of a former member of the Irish National Liberation Army who was sentenced to death by the INLA for aiding in the escape of hostages. Ward asserted that he would be persecuted if returned to Northern Ireland based on his membership in the INLA.

The Supreme Court rejected an interpretation of the MPSG category that would render it a “safety net to prevent any possible gap in the other four categories.”¹³ As La Forest, J. explained, such a broad reading would make the other Convention categories superfluous. Seeking a limiting principle, La Forest reasoned that the meaning of MPSG should “take into account the general underlying themes of the defence of human rights

¹¹ For a rare example of peering beyond U.S. borders, see the B.I.A.’s mention of *Islam* and *Shah* in *Matter of R.A.*, Int. Dec. 3403 (B.I.A. 1999).

¹² The Court identified this approach with the scholarship of, *inter alia*, Isi Foighel, “The Legal Status of the Boat-People,” 48 *Nordisk Tidsskrift for International Relations* 217; Arthur Helton (“Persecution on Account of Membership in a Social Group As a Basis for Refugee Status,” 15 *Columbia H. Rights L. Rev* 39 (1983)); Guy Goodwin-Gill, *The Refugee in International Law* 30 (1996); Maureen Graves, “From Definition to Exploration: Social Groups and Political Asylum,” 26 *San Diego L. Rev.* 739 (1989). This seems to be an overly broad reading of Goodwin-Gill’s interpretation, as will be discussed below.

and anti-discrimination law that for the basis for the international refugee protection initiative.”¹⁴ Accordingly he defined MPSG to encompass:

- (1) groups defined by an innate or unchangeable characteristic; [gender, linguistic background, sexual orientation]
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; [human rights activists] and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.¹⁵

Applying the test, the Court determined that Ward could not meet the Convention definition: his feared persecution was not based on former membership in the INLA, nor did the INLA itself constitute a “particular social group.” Furthermore, Ward could not establish the requisite nexus between a social group and a well-founded fear of persecution. His membership in the INLA “placed him in the circumstances that led to his fear, but the fear itself was based on his action, not his affiliation.”¹⁶

The *Ward* standard is frequently referred to as an “immutability” test, but it plainly would recognize groups beyond those based on characteristics that are unchangeable: the second category includes voluntary associations based on characteristics that are fundamental to human dignity but perhaps changeable (an example used by the Court is human rights activists). It is further important to notice that the conduct condemned by the category is not compulsion to forsake a voluntarily assumed characteristic (such as occupation), but rather compulsion to forsake voluntary association based on the characteristic. The difference in practice between the two might be slight, because it is

¹⁴ La Forest here follows the approach of the American case *Matter of Acosta*, 19 I & N Dec. 211 (B.I.A. 1985) (described below) and Hathaway, *The Law of Refugee Status*.

¹⁵ 103 D.L.R. (4th) at 33-34. The Court notes that the third category is included “more because of historical intentions,” but also comes within an anti-discrimination approach in that “one’s past is an immutable part of the person.”

likely that adjudicators will conclude that persons have a right to associate with others based on characteristics fundamental to human dignity. For example, if the exercise of freedom of thought is a fundamental human right, then arguably persons should not be compelled to forgo associations with like-minded persons—in other words, freedom of thought means more than the right to believe what one wants in the privacy of one’s home; it includes the right to join with others who share the same views.

Because “immutability” does not fully describe groups that would come within the *Ward* standards, the analysis will be labeled the “protected characteristics” approach. This terminology embraces the groups defined by the *Ward* test and also signals that the analysis primarily looks at “internal” factors—that is, group definition will be based primarily on innate characteristics shared by a group of persons, not on the “external” perceptions of the group.

Once it is recognized that the *Ward* test extends beyond immutable characteristics, however, conceptual problems emerge. What, for instance, is the underlying principle that unites the categories identified in *Ward*? It is sometimes asserted that the concept of “discrimination” is the key: it is unjust to discriminate against groups for characteristics which they cannot change or, based on human rights principles, should not be compelled to change (assuming, here, that compelling a person to forsake a voluntary association based on a characteristic fundamental to human dignity violates human rights). But if this is the justification, it cannot explain why groups must “voluntarily associate” in order to receive protection. That is, it would seem equally unjust to discriminate against a group of persons who are a group because of a shared protected characteristic whether or not the group

¹⁶ Id at 38. In another section of the opinion, the Court concluded that might state a claim for refugee status based on his political opinion.

members know each other and choose to associate. An apt example would be persons who resist forced sterilization or abortion. From a human rights perspective, persons should not be compelled to go through such procedures whether or not they have formed voluntary groups. La Forest J. followed the logic of *Ward* in this manner in concluding that Chinese applicants resisting coercive family practices could constitute a particular social group.¹⁷ But the reason that *Ward* does not go this far—and that other jurists have rejected La Forest’s conclusion—is that such an interpretation risks expanding the social group category to include all persons whose human rights might be violated.

In sum, the “voluntary association” test of *Ward*’s second category appears intended to ensure that the social group definition not become a safety net. But accepting the limitation makes it difficult to construct a coherent principle that underlies the *Ward* categories.

B. Australia

The leading Australian High Court decision, *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997),¹⁸ involved applicants who asserted fears of forced sterilization because of their non-acceptance of China’s “one baby” policy. (Claims arising out of China’s state family planning policies are common in other jurisdictions as well, as will be described below.)

The Justices adopted what might be termed a “social perception” or “ordinary meaning” approach: to be a “particular social group,” a group must share a common, uniting, characteristic that sets them apart in the society. As described by McHugh, J.,

¹⁷ *Chan*. The majority in the case does not reach the issue; and courts in other jurisdictions have rejected La Forest’s reasoning. See discussion below.

what distinguishes the members of a particular social group from other persons in their country “is a common attribute and a societal perception that they stand apart.”¹⁹ To the same effect is Dawson, J: a particular social group is “a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognizable group within their society.”²⁰

The High Court made clear that its standard was not as inclusive as the “safety net” approach advocated by some scholars. The analysis of *Applicant A*, for example, would not reach “statistical” groups that may share a demographic factor but neither recognize themselves as a group nor are perceived as a group in society. (An example, drawn from the American jurisprudence, is an asserted class of “young, urban men” subject to forced conscription and harassment in El Salvador.²¹)

Another limiting principle identified by the High Court is that the group not be defined solely by the persecution inflicted; that is, the “uniting factor” could not be “a common fear of persecution.”²² The rule is necessary to avoid tautological definitions of groups. As Dawson, J. notes, “[t]here is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their

¹⁸ (1997) 142 A.L.R. 331; [1997] INLR 1.

¹⁹ At 265-66. See also 264: “[T]he existence of such a group depends in most, perhaps all, cases on external perceptions of the group. . . . [The term particular social group] connotes persons who are defined as a distinct *social* group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.”

²⁰ 241 (footnote omitted).

²¹ *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

²² Dawson, J. at 242.

common fear of persecution.”²³ (In other jurisdictions, this well-established principle is described as requiring that the social group exist “*dehors* the persecution.”²⁴)

The analysis in *Applicant A* stands in rather sharp contrast to the Canadian Supreme Court’s reasoning in *Ward*. The High Court’s approach is not based on an analogy to anti-discrimination principles; it is more sociological. That is, it looks to external factors—*i.e.*, whether the group is perceived as distinct in society—rather than identifying some protected characteristic that defines the group (or a characteristic that group members should not be asked to change).

Frequently these standards will overlap. Both tests, for example, are likely to conclude that homosexuals and prior large land-owners in communist states constitute particular social groups. Another example arises in a subsequent High Court case, *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*,²⁵ where the Australian-born applicant was the third child of a Chinese couple. The High Court found no error in the Refugee Review Tribunal’s conclusion that so-called “black children”—children born outside the family planning policies—constituted a particular social group in China. That conclusion is justified under either the *Applicant A* or *Ward* standards because “black children” are perceived and treated as a distinct group in China and because birth order is immutable.²⁶ But at times the two standards may produce different results in MPSG cases. Consider, for example, claims asserted by private entrepreneurs in a socialist state or

²³ At 242.

²⁴ *Shah and Islam*, at .

²⁵ (2000).

²⁶ The central issue in *Chen She Hai* was not the social group definition, but rather whether the targeting of “black children” constituted the application of general laws and hence was non-persecutory. The High Court rejected this reasoning, upholding the RTT’s finding that the harmful treatment accorded “black children” rose to the level of persecution and is inflicted based on their membership in a particular social group, not based on their parent’s failure to obey family planning policies.

members of a labor union. According to the facts of the particular society, either might constitute a social group under the social perception approach; it would be far harder to reach such a conclusion under the protected characteristics approach.

In *Applicant A*, the High Court did not sustain the claim. Arguably, the characteristic that united the claimed social group was the members' assertion of the human rights to not be subject to forced sterilization and to make fundamental choices about one's family.²⁷ But a majority of the Court concluded that the asserted group was too disparate, representing simply a collection of persons located in China who objected to a general social policy.²⁸ According to Dawson J., there was "no *social* attribute or characteristic linking the couples, nothing external that would allow them to be perceived as a particular *social* group for Convention purposes."²⁹ Furthermore, to recognize a class united solely by the abuse of human rights would permit the persecution to define the class.³⁰

C. United Kingdom

The recent joint decision by the House of Lords in *Islam* and *Shah* considered the claims of two married Pakistani women who were subjected to serious physical abuse by their husbands and forced to leave their homes. The applicants further asserted that the state would either be unable or unwilling to prevent further abuse if they were returned to

²⁷ Alternatively, the group might be described without reference to human rights. See Brennan, C.J.: "The characteristic of being the parent of a child and not having voluntarily adopted an approved birth-preventing mechanism distinguishes the appellants as members of a social group that share the characteristic."

²⁸ At 247 (Dawson J.); 269- 270(McHugh J.).

²⁹ At 270.

³⁰ See also *Minister for Immigration and Multicultural Affairs v. Khawar*, [2000] FCA 1130 (applying *Applicant A* to case involving Pakistani woman beaten by her husband and failure by state to prevent or stop the abuse; "particular social group" to be determined "according to the perceptions of the society in question").

Pakistan .³¹ The case is of major significance. It reaches important conclusions about gender-based asylum claims and the issue of non-state actors; and the judgements include important discussions of the jurisprudence of other states. Furthermore, the careful reasoning of the Lords is likely to attract attention from adjudicators in other common law jurisdictions.³²

Counsel for the women claimants urged that the relevant social group for the case should be defined as women in Pakistan accused of transgressing social mores who are unprotected by their husbands or other male relatives. (The UNHCR, as intervener, suggested a definition—consistent with Ex. Comm. Conclusion 39, quoted above—as “individuals who believe in or are perceived to believe in values and standards at odds with the social mores of the society in which they live.”³³)

A majority of the Lords concluded that the social group could appropriately be defined as Pakistanian women, although there was also support for the more limited definition urged by the claimants.³⁴ The Lords agreed on certain principles, such as the now widely accepted views that the social group cannot be defined solely by the persecution and that the definition of a group is not defeated simply by showing that some

³¹ This paper will leave aside the “political opinion” claim pressed in the *Islam* case.

³² The case has already received significant attention. See, e.g., Goodwin-Gill, “Judicial Reasoning and ‘Social Group’ after *Islam* and *Shah*,” 11 *Int’l J. Refugee L.* 537 (1999); Vidal, “Membership of a Particular Social Group’ and the effect of *Islam* and *Shah*,” 11 *Int’l J. Refugee L.* 528 (1999).

³³ UNHCR’s position appears to ride two horses, perhaps hoping that one will cross the finish line first. The statement quoted in text is placed in bold in the brief, and appears to state the overall approach. (The brief elsewhere notes that “[t]he distinguishing characteristic which defines the group consists in a shared set of values which are not shared by society at large or, conversely, a common decision to opt out of a set of values shared by the rest of society.”) Alternatively, the brief favorably cites, and appears to rely upon, the reasoning of the *Acosta* decision of the U.S. Board of Immigration Appeals (discussed below). It therefore states: “It is UNHCR’s position that the relevant distinguishing characteristic may consist in any feature which is innate or unchangeable, either because it is impossible to change or because an individual should not be required to do so.” At 15. While these standards may frequently overlap, they represent precisely the difference between *Ward* and *Acosta*, on the one hand, and *Matter of Applicant A*, on the other.

³⁴ Lords Steyn, Hoffmann, and Hope of Craighead adopted the broader class definition. Lord Steyn also signed on to the more restricted definition and was joined by Lord Hutton.

members of the group may not be at risk. The Lords also rejected that part of the U.S. appeals court decision in *Sanchez-Trujillo* (discussed below) holding that a social group must display “cohesiveness” in order to be recognized under the Convention. Furthermore, a majority of the Court identified an anti-discrimination principle as underlying the five grounds mentioned in the Convention.

But the Lords indicated varying overall approaches to the MPSG question. Lords Steyn and Hoffman largely relied upon the protected characteristics analysis of the Canadian Supreme Court in *Ward*; Lords Hope of Craighead (with the majority) and Millett (in dissent) adopted language closer to the social perception approach of the Australian High Court in *Applicant A*.³⁵ There was no need for a choice between these views—under the facts of the case, women in Pakistan met either test; and a majority of the Court accepted the broadest definition of the class (Pakistani women).

Islam and *Shah* is also important because of its analysis of the “nexus” element in the refugee definition in a case involving persecution by a non-state actor. This aspect of the case will be discussed below.

D. United States

For a number of years, there have been two distinct lines of analysis for “social group” cases in the United States, owing to the peculiar administrative structure of the American system. Asylum cases are heard by I.N.S. asylum officers; if not granted, they may be raised before immigration judges in a removal proceeding and then appealed to the

³⁵ Lord Hope of Craighead: “In general terms, a social group may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society. . . . As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person’s

Board of Immigration Appeals (both the judges and the B.I.A. are located within the Department of Justice). B.I.A. decisions may be appealed to a federal circuit court of appeals; the applicant files in the circuit in which his or her case originated. The decisions of the courts of appeals are, by administrative practice, binding on the B.I.A. only for cases arising in that circuit. The Ninth Circuit Court of Appeals (which cover California and other western U.S. states) hears many more asylum cases than any other circuit; hence its decisions play a crucial role in the development of asylum law in the U.S.

The B.I.A. and the Ninth Circuit have constructed different interpretations of “particular social group.” The other federal circuit courts of appeals have largely adopted the B.I.A.’s approach.³⁶ Accordingly, asylum cases brought in the Ninth Circuit are judged by one standard; cases heard by the B.I.A. and appealed to other circuit courts are judged by a different standard.

The B.I.A.’s approach, first announced in the 1985 case of *Matter of Acosta*,³⁷ has been highly influential. It was cited with approval and largely followed in the Canadian Supreme Court’s *Ward* decision, and has been widely cited in cases arising in other jurisdictions as well. The Board stated that a “particular social group” refers to “a group of persons all of whom share a common, immutable characteristic.” That characteristic might be “an innate one such as sex, color or kinship ties” or “a shared past experience such as former military leadership or land ownership.” Importantly, the common characteristic must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership

nationality. The phrase can thus accommodate particular social groups which may be recognisable as such in one country but not in others or which, in any given country, have not previously been recognised.”

³⁶ See Deborah Anker, *Law of Asylum in the United States* 382-83 (3d ed. 1999).

³⁷ 19 I & N Dec. 211 (B.I.A. 1985).

become something comparable to the other four grounds of persecution under the Act.³⁸

In *Acosta*, the B.I.A. proceeded by identifying a common element in the other four Convention grounds and then applying that element to the term “particular social group.” (This form of reasoning—purportedly an application of the interpretive principle of *ejusdem generis*—has also been adopted in cases arising in other jurisdictions.³⁹ As discussed below, it is not clear that application of the principle is appropriate in interpreting the “for reasons of” grounds.) The Board identified that element as “immutability,” no doubt focusing on the race and national origin aspects of the Convention definition and drawing parallels to U.S. constitutional law and anti-discrimination principles. The focus on “immutability” has appeal because immutable characteristics (such as gender, ethnic background) have frequently been grounds for invidious treatment and because it provides a sensible way to limit a potentially very broad and ill-defined category. But as was apparent to the B.I.A., the “immutability” standard cannot be a basis for the “religion” or “political opinion” Convention grounds; hence, the second aspect of the test was added (applying to characteristics so fundamental that one should not be required to change them).

Under the *Acosta* standard, U.S. cases have recognized that social groups could be based, for example, on gender,⁴⁰ tribal and clan membership,⁴¹ sexual orientation,⁴²

³⁸ Id. at 234 [?] Note that the formulation is not quite the same as that adopted by the Canadian Supreme Court in *Ward* because it states that the *characteristic*—not the *voluntary association* based on the characteristic—must be so fundamental that an individual should not be compelled to forsake it.

³⁹ See *Islam and Shah*; In re GJ, Refugee Appeal No. 1312/93, 1 N.L.R. 387 (1995).

⁴⁰ *Fatin v. I.N.S.*, 12 F3d 1233 (3d Cir. 1993); see also INS guidelines and proposed regulations.

⁴¹ In Re Kasinga, Int. Dec. 3278 (1996); In re H--, Int. Dec. 3276 (1996).

⁴² Matter of Toboso-Alfonso, 20 I&N Dec. 819 (B.I.A. 1990).

family,⁴³ and past experiences.⁴⁴ Other claims have been rejected, such as those involving Chinese opposed to coercive family planning practices⁴⁵ and women subjected to sexual and physical abuse.⁴⁶ (The standards for this latter category are evolving⁴⁷ and require careful consideration beyond the scope of this paper.) *Acosta* itself refused to recognize as a social group members of a taxi driver collective.

The Ninth Circuit court of appeals' analysis of social group contrasts rather dramatically with the B.I.A.'s *Acosta* standard. In *Sanchez-Trujillo v. INS*,⁴⁸ a case asserting a social group of young, urban, working class males of military age in El Salvador, the court stated

[t]he term ["social group"] does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete group.⁴⁹

The group claimed by the applicant did not come within this definition because it was not a "cohesive, homogeneous group."

⁴³ *Lwin v. INS*, 144 F.3d 505, 511-12 (7th Cir. 1998)(parents of Burmese student dissidents); *Grebemichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *Iliev v. INS*, 127 F.3d 638, 642 & n.4 (7th Cir. 1997).

⁴⁴ *Matter of Fuentes*, 19 I&N Dec. 658 (B.I.A. 1988)(former member of national police).

⁴⁵ *Matter of Chang*, 20 I&N Dec. 38 (B.I.A. 1989).

⁴⁶ *R.A.*; *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991)(rejecting social group claim where group is defined as "women who have been previously battered and raped by Salvadoran guerrillas).

⁴⁷ The Department of Justice has not yet developed a consistent approach to these issues. On her final day in office in January 2001, Attorney General Janet Reno vacated the B.I.A.'s decision in *In re R.A.*, Int. Dec. 3403 (B.I.A. 1999), and ordered that the issue be reconsidered once proposed Department of Justice regulations on "particular social group" became final. It is far from clear whether or when proposed rules (issued on Dec. 7, 2000 (65 Fed. Reg. 76588-98)) will be promulgated in final form by the Bush Administration. See also *Aquirre-Cervantes v. INS* (9th Cir., March 21, 2001)(recognizing a claim brought by an abused Mexican daughter based on a social group defined as family group).

⁴⁸ 801 F.2d 1571 (9th Cir. 1986).

⁴⁹ *Id* at 1576.

The “voluntary association” and “cohesiveness” elements of the *Sanchez-Trujillo* definition were no doubt crafted—like the protected characteristics standard—to prevent a seemingly unlimited social group category. As the court explained, “[m]ajor segments of a population of an embattled nation, even though undoubtedly at some risk for general political violence, will rarely, if ever, constitute a distinct ‘social group’ for the purposes of establishing refugee status. To hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country.”⁵⁰

The *Sanchez-Trujillo* analysis has been widely criticized⁵¹ and explicitly rejected by high courts in the United Kingdom⁵² and Australia.⁵³ They are surely in significant tension with the B.I.A.’s protected characteristics standard,⁵⁴ as can be seen by considering how the approaches apply to claims brought by homosexuals or women: both characteristics are either immutable or so fundamental that it would be unjust to demand that they be changed; yet classes of gays and lesbians or women are unlikely to be cohesive, homogenous or to display close affiliation among members. (Interestingly, both approaches have been interpreted to cover claims asserting a family-based group.⁵⁵)

The Ninth Circuit in a recent case seems to have recognized the weaknesses of the *Sanchez-Trujillo* standard. The case, *Hernandez-Montiel v. INS*,⁵⁶ held that Mexican “gay men with female sexual identities” constituted a particular social group—a group that fits

⁵⁰ Id at 1577.

⁵¹ E.g., Anker, *Law of Asylum in the United States*, at 382.

⁵² *Islam and Shah*.

⁵³ *Applicant A*.

⁵⁴ See *Lwin v. INS*, 144 F.3d at 512.

⁵⁵ *Sanchez-Trujillo* itself notes that “immediate members of a certain family” would constitute a “prototypical” social group embraced by the Convention’s language. 801 F.2d at 1576. See also *Aquirre-Cervantes v. INS* (9th Cir., March 21, 2001). [add Acosta-based cases]

⁵⁶ 2000 WL 1199531 (9th Cir. Aug. 24, 2000).

within the *Acosta* standard but is hard to square with the cohesive and associational test of *Sanchez-Trujillo*. The court acknowledged that it was the only circuit to adopt a “voluntary associational relationship” requirement and that its standard conflicted with the B.I.A.’s rule in *Acosta*. It resolved the tension by simply combining the conflicting standards:

We thus hold that a “particular social group” is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.⁵⁷

No theoretical justification is offered for this rather remarkable move.⁵⁸ It appears to be a capitulation to the *Acosta* standard without a willingness to admit defeat.

The confusion that the competing standards and the *Hernandez-Montiel* “solution” has spawned is only compounded by proposed regulations issued by the INS in December 2000. The INS rule would establish the following:

(c) Membership in a particular social group

(1) A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. . . .

(3) Factors that may be considered in addition to the required factors . . . , but not necessarily determinative, in deciding whether a particular social group exists include whether:

- (i) The members of the group are closely affiliated with each other;
- (ii) The members are driven by a common motive or interest;
- (iii) A voluntary associational relationship exists among the members;
- (iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
- (v) Members view themselves as members of the group; and

⁵⁷ Id at .

⁵⁸ And, as I will suggest below, it still fails to develop an appropriate standard.

(vi) The society in which the group exists distinguishes members of the group for different treatment of status than is accorded to other members of the society.

In explanatory notes to the proposed rule, the INS states that the identified factors are drawn from administrative and judicial decisions which have been “subject to conflicting interpretations.” The proposed provision, it is argued, “resolves those ambiguities by providing that, while these factors may be relevant in some cases, they are not requirements for the existence of a particular social group.”⁵⁹ The thoughtful reader of the proposed rule might well think that the rule has produced more ambiguities than it has resolved. For instance, the opening paragraph states that group members must share a “common, immutable characteristic” that either cannot be changed or that is so fundamental that he or she should not be required to change it. But if the characteristic must be “immutable,” then what sense does it make to add that a person should not be required to change it? And what purpose is served, for instance, by listing other factors that may be consulted if the “immutability” elements are required? The INS formulation seeks to be inclusive and responsive, but in the end may provide rather little guidance to adjudicators.

The discussion so far has considered two alternative approaches expressly adopted in the U.S. jurisprudence. There is a third approach, however, that is hinted at in some of the sources, usually without the recognition that it is providing a different analysis.⁶⁰ For example, in *Gomez v. INS*, the Second Circuit Court of Appeals, after quoting the familiar language from *Sanchez-Trujillo*, goes on to state “A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to

⁵⁹65 Fed. Reg. at 76594.

distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.”⁶¹ The proposed INS rules likewise state that external factors may play a role in the definition of a social group. (See subparagraphs (iv): “The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question”; and (vi): “The society in which the group exists distinguishes members of the group for different treatment of status than is accorded to other members of the society.”)⁶² This third approach charts a route between the voluntary association and protected characteristics standards that have dominated the U.S. cases. It looks in the direction of the “sociological” approach of *Applicant A*.

E. New Zealand

The concept of membership in a particular social group has been developed in the New Zealand case law largely through the careful and exhaustive analysis of Rodger Haines, Chairman of the Refugee Status Appeals Authority (RSAA). The New Zealand cases generally follow the *Ward/Acosta* protected characteristics approach, placing significant weight on anti-discrimination principles in the Convention.⁶³ Under this test, the RSAA has recognized groups based on sexual orientation⁶⁴ and gender.⁶⁵ The Appeals

⁶⁰ See Maryellen Fullerton, “A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group,” 26 *Cornell Int’l L.J.* 505, 560 (1993).

⁶¹ 947 F.2d 660, 664 (2d Cir. 1991). This “externalist” approach is mentioned, but not given much weight, in a footnote in *Sanchez-Trujillo*: “We do not mean to suggest that a persecutor’s perception of a segment of a society as a ‘social group’ will invariably be irrelevant to [the] analysis. But neither would such an outside characterization be conclusive.” 801 F.2d at 1576 n.7.

⁶² These elements are said to follow from the B.I.A.’s decision in *In re R.A.*, in which the Board had found it significant that the applicant had not shown the asserted group “is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population.” At 15. See 65 Fed. Reg. at 76594.

⁶³ See *Re GJ*, Refugee Appeal No. 1312/93, 1 N.L.R. 387 (1995); *Refugee Appeal No. 71427/99* (2000).

⁶⁴ *Re GJ*.

⁶⁵ *Re MN*, Refugee Appeal No. 2039/93 (1996); *Refugee Appeal No. 71427/99*.

Authority has suggested that a test that looks to external social perceptions would be too encompassing: “The difficulty with the ‘objective observer’ approach is that it enlarges the social group category to an almost meaningless degree. That is, by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group.”⁶⁶

F. France

The French jurisprudence does not include detailed analyses of MPSG. A number of decisions by French authorities, however, have approved social group claims, and the results are largely consistent with the decisions of the common law countries. Thus, cases decided in the mid-1980s recognized Cambodians as belonging to social groups of persons persecuted by the Khmer Rouge, members of the “bourgeoisie commercante,” and persons persecuted because of their social origins.⁶⁷ More recently, the CCR has affirmed that women, under certain circumstances, may constitute a particular social group. Thus, it has held that women who refuse to submit to FGM may state a valid claim to refugee status.⁶⁸ (The case under consideration was denied because the applicant did not show that she was personally threatened with FGM.) In a case brought by an Algerian woman, who returned to Algeria after having lived abroad for a number of years, the CRR stated that women who object to generally applicable discriminatory legislation do not, by that fact alone, constitute a particular social group. Nonetheless, in the particular case the applicant had

⁶⁶ *Re GJ*, at .

⁶⁷ Cases cited in annex on French Jurisprudence to IARLJ paper.

⁶⁸ *Aminata Diop*, CRR, 18 Sept. 1991, 164078.

shown that the authorities had tolerated threats against her by Islamic militants who sought to compel her to adopt a traditional life style; thus the claim was recognized.⁶⁹

French adjudicators have also considered claims brought by Chinese applicants based on a claim of threatened forced abortion and sterilization. The results in the cases follow decisions in other jurisdictions that have held that persons who oppose generally applied population policies do not constitute a particular social group.⁷⁰

French cases have also held that homosexuals⁷¹ and transsexuals may constitute a particular social group. Although the reported decisions do not analyze the issue in detail, the Conseil d'Etat has used language that suggests an underlying approach. In the *Ourbih* case, the CCR had denied the claim of an Algerian transsexual. The Conseil d'Etat rejected the decision of the CRR, on the ground that the Commission had not properly examined the evidence to determine whether transsexuals were regarded as a social group in Algeria “en raison des caractéristiques communes qui les définissent aux yeux des autorités et de la société.”⁷² Upon reconsideration, the CRR held that transsexuals in Algeria could constitute a particular social group because of a common characteristic that set them apart and exposed them to persecution that was tolerated by the authorities in Algeria.⁷³ The result here parallels the *Hernandez-Montiel* decision in the United States, although arguably *Ourbih* goes further if it purports to allow the fact of persecution aid in the definition of the social group. Indeed, in most of these cases (with the exception of the Chinese coercive family planning cases), the fact that an applicant can show a specific risk

⁶⁹ *El Kebir*, CRR, 22 juillet 1994).

⁷⁰ *Zhang*, CRR, SR, 8 juillet 1993; *Wu*, CRR, SR, 19 mars 1994.

⁷¹ *Aourai*, CRR, 22 fev. 2000, 343157 (Algerian asylum seeker); *Albu*, CRR, 3 avril 2000, 347330 (Roumanian asylum seeker).

⁷² *Ourbih* [171858], Conseil d'Etat, SSR, 23 juin 1997.

⁷³ *Ourbih* [269875], CRR, SR, 15 mai 1998.

of persecution seems to be a more important factor than definition of a particular social group.⁷⁴

G. Germany

Fullerton describes a number of German decisions in low level courts. She identifies two different analyses in her 1990 review of German jurisprudence. Some courts look for homogeneity among group members and some sort of internal group structure; other courts asked whether the alleged group is perceived by the general population as a group and, if so, whether it is perceived in strongly negative terms. I have been unable to discover any significant discussions in higher German courts. Judge Tiedman, a judge of the Administrative Court Frankfurt am Main, likewise describes the German jurisprudence as “very sparse”—accounted for in part by the requirement under German law that persecution be inflicted by state actors and by the preference of German courts to see social group cases as instances of political persecution (due to the fact that Art. 16 of the Basic Law specifically mentions only political persecution). A good example of the latter tendency is the decision of the Bundesverwaltungsgericht (Federal Administrative Court) granting asylum in a case involving an Iranian homosexual. The Court noted that the appeals court had determined that the applicant’s homosexuality was foundational to his emotional and sexual life and could not expect to be relinquished as a personal act of will. This analysis is quite similar to the “protected characteristics” approach in MPSG cases;

⁷⁴ Cf. Aleinikoff, “The Meaning of ‘Persecution’ in U.S. Asylum Law,” 3 Int’l J. Ref. L. 5 (1991), suggesting that once risk of harm is demonstrated, adjudicators should be lenient in considering the “for reasons of” grounds.

nonetheless, the Court concludes that the applicant is eligible for asylum status based on the likelihood of political persecution.⁷⁵

also FGM case permitted, but ground not specified. Spkboer at 118-9

I. The Netherlands

Cases in the Netherlands have considered many of the kinds of social group claims that have been adjudicated in other States Parties, including those based on gender, homosexuality, and Chinese coercive family planning policies.⁷⁶ But, as stated by Thomas Spijkerboer in a leading study of Dutch refugee law,

In Dutch legal practice, just which of the five persecution grounds is related to the (feared) persecution is virtually considered immaterial. Whether the persecution is clearly discriminatory and not just random, however, is critical. Once the discriminatory nature of the persecution has been established, the particular rubric under which it falls is “of less importance.” Without much ado, persecution on account of sexual orientation, on account of the nationality or religion of the spouse, on account of descent, and on account of transgression of the Chinese one-child policy have been brought under the refugee concept. Only in the decision on sexual orientation was the persecution ground actually specified (“a reasonable interpretation of persecution for reasons of membership in a particular social group can include persecution for reason of sexual nature”).⁷⁷

⁷⁵ No. 9-c-278.86, 79 BverwGE 143 (Mar. 15, 1988).

A judgment more similar to other cases involving homosexuality was rendered by the Administrative Court in Wiesbaden in 1983. (Case No. IV/1 E 06244/81, 26 April 1983.) In that case, the court held that homosexuals in Iran constituted a social group based on a conclusion that an objective observer in Iran would recognize that homosexuals are perceived of as, and treated as belonging to, a particular social group.

⁷⁶ In the coercive family planning case, the Council of State accepted the UNHCR position that family policies are not per se persecutive but may be implemented in a persecutory manner. In the particular case, the Council rejected the asylum claim because of lack of evidence that the applicant (a male) would be targeted upon return to China. Afdeling bestuursrechtspraak van de Raad van State (Netherlands) 7 Nov. 1996, R V 1996, 6 GV 18d-21 (China).

⁷⁷ Thomas Spijkerboer, *Gender and Refugee Status 115* (2000) (footnotes omitted). Spijkerboer further notes, regarding claims brought by women who have objected to prevailing social mores of their society, that “[a]n early Dutch decision concerning an Iranian woman who had been removed from the university on account of improper behavior held that, in the absence of authoritative Council of State case law, women may be considered ‘a relevant persecution category.’ More recently, however, social group appears to have given way to political opinion or religion as the persecution ground in Dutch social mores cases.” *Id.* at 117 (footnotes omitted).

As to claims based on gender, Dutch cases have recognized claims brought by women persecuted due to activities of male relatives; the “for reasons of” ground, however, has not been specified.⁷⁸ Spijkerboer reports that particular social group cases involving sexual abuse are rare.⁷⁹ A “Work Instruction” on “Women in the asylum process” issued by the Immigration and Naturalization Service states that in cases raising gender claims “consideration should be given primarily to persecution for reasons of political opinion” (including imputed political opinion). Moreover, the Instruction specifically declares that

[s]ex cannot be the sole ground to determine membership of a “particular social group.” *Women in general* are too diverse a group to constitute a particular social group. In order to establish membership of a particular social group one should be put in an exceptional position compared to those whose situation is similar. In addition, the persons should be targeted individually.⁸⁰

In sum, while the *results* in Dutch cases are consistent with results in social group cases elsewhere, theoretical and doctrinal analysis of the category remains underdeveloped in the Dutch jurisprudence.

IV. Interpretive Issues

A. General Considerations

Despite the variety of approaches discussed above, there is some degree of convergence among adjudicative bodies on several interpretive principles. The overriding concern expressed in the legal sources is that some limiting principle be identified to

⁷⁸ Id. at 121.

⁷⁹ Id. at 123.

⁸⁰ DIND Work Instruction no. 148, reprinted in Spijkerboer at 231 (UNHCR translation).

ensure that the “social group” category not be all-encompassing. An overly broad interpretation is resisted for several reasons. First, it is stated that the Convention was not intended to provide protection to all victims of persecution—only to those who come within one of the five Convention grounds. Thus, to read the social group category to include groups of all persons who flee across borders or suffer human rights abuses would conflict with the structure of the Convention. Second, as a matter of legal logic, the social group cannot be read so broadly that it renders the other Convention grounds superfluous. Third, it is argued that an overly broad definition of “particular social group” would undermine the balance between protection and limited state obligations implicit in the Convention.⁸¹

At a more particular level, adjudicative bodies have largely rejected the “cohesiveness” standard of *Sanchez-Trujillo*.⁸² Indeed, with its recent decision in *Montiel-Hernandez*, the Ninth Circuit itself has moved away from “cohesiveness” as the central test for the existence of a “particular social group.”

And at a substantive level, various “social groups” have received widespread recognition. Of particular significance are cases in a number of states recognizing homosexuals⁸³ and women⁸⁴ as groups eligible for protection. (As will be noted below, the

⁸¹ Perhaps the broadest definition of “social group” has been suggested by Arthur Helton. He would include within the Convention’s purview “statistical groups” that are victims of discrimination (such as persons with sickle cell anemia), societal groups (people who share basic innate characteristics, such as race and gender), social groups (voluntary groups that interact socially, such as friends, neighbors, audiences) and associational groups (groups of persons that self-consciously pursue a shared goal or interest, such as trade unions, universities or the YMCA). Recognizing the breadth of the definition, Helton argues that it is the “only reasonable interpretation” because “it is profoundly irrational to differentiate between the types of arbitrary and capricious persecution that an oppressive regime may impose.” Arthur Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 Colum. Hum. Rights L. Rev. 39, 59 (1983).

⁸² See Lord Hoffman in *Islam and Shah; Ward; Applicant A*.

⁸³ The jurisprudence is summarized in *Re GJ*.

⁸⁴ See, e.g., *Islam and Shah*.

gender category has generated some of the most difficult interpretive issues for state adjudicators, particularly as to the establishment of “nexus.”)

Proposed Conclusions (I)

- I.A: The term “particular social group” must be given a meaning that does not render the other categories superfluous.**
- I.B: There is no requirement that a group be “cohesive” in order to be recognized as a “particular social group” within the meaning of the Convention; that is, there need be no showing that all members of a group know each other or associate together.**

B. The role of “persecution” in the definition of a particular social group

The cases frequently assert that a social group must exist independent of the persecution imposed on members of the group. As explained by Dawson J. in *Applicant A*:

[T]he characteristic or element which unites the group cannot be a common fear of persecution. There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution.⁸⁵

This view seems eminently sensible, but it can also be misapplied. An example is provided by cases arising from the enforcement of generally applicable criminal and regulatory statutes. Consider the common claim that enforcement of China’s family planning policies persecute on the basis of social group. It is sometimes said that such claims cannot be allowed because it would be permitting the persecution to define the social group.⁸⁶ Again, here is the reasoning of Dawson J:

⁸⁵ *Applicant A*, at 341.

⁸⁶ Another frequent ground for rejecting such claims is that enforcement of such policies are not inherently persecutive. See *Matter of Chang*, 20 I&N Dec. 38 (1989).

[T]he reason the appellants fear persecution is not that they belong to any group, since there is no evidence that being the parents of one child and not accepting the limitations imposed by government policy is a characteristic which, because it is shared with others, unites a collection of persons and sets them apart from society at large. It is not an accurate response to say that the government itself perceives such persons to be a group and persecutes individuals because they belong to it. Rather, the persecution is carried out in the enforcement of a policy which applies generally. The persecution feared by the appellants is a result of the fact that, by their actions, they have brought themselves within its terms.⁸⁷

It may well be that the claim in *Applicant A* properly failed because of a lack of proof that those who violated the “one-baby” policies were a group “set apart” from society. But the careful words of Dawson J. should not be taken to mean that those who oppose a generally applicable state policy will always be seeking to define a social group simply on the basis of the persecution they might suffer. (These cases will be analyzed in more detail below.)

Another example is provided by cases involving abused spouses, in which the definition of social group has been particularly difficult. Advocates have suggested a number of approaches, including “women,” “battered women,” and “battered women for whom the state will not provide protection.” Cross-cutting concerns place the applicant on the horns of a dilemma: if the class is defined too broadly, adjudicators might conclude that few members of the class are likely to be subject to persecution and hence the group does not, in fact, stand apart from society; but if the class is defined too narrowly, it is likely to be seen as drawn simply for the purposes of the claim and not because it reflects a group cognizable in the society at large. Lord Millet, in his dissent in *Islam and Shah*, relied upon the latter ground in rejecting the asserted class (“women in Pakistan who have been or who are liable to be accused of adultery or other conduct transgressing social norms and who are unprotected by their husbands or other male relatives”):

⁸⁷ *Applicant A*, at 243.

Whether the social group is taken to be that contended for by the appellants . . . or the wider one of Pakistani women who are perceived to have transgressed social norms, the result is the same. No cognisable social group exists independently of the social conditions on which the persecution is founded. The social group which the appellants identify is defined by the persecution, or more accurately (but just as fatally) by the discrimination which founds the persecution. It is an artificial construct called into being to meet the exigencies of the case.⁸⁸

It is possible to agree with Lord Millett but still not reject the claim, if the appropriate social group is defined as “Pakistani women.” (Lord Millett rejects this definition as well because he concludes that there is insufficient evidence to demonstrate that the claimants are being persecuted on this ground.) But, with all respect, it is difficult to see how the class of “Pakistani women who have transgressed social norms” is defined by the persecution suffered. Such a group might well be seen in Pakistan as a pariah group, identified not by the persecution they suffer but rather persecuted because of their conduct.

Furthermore, to say that the group must exist *dehors* the persecution is not to say that persecution may not help define a group, both by giving the persons subject to maltreatment a sense of “groupness” and by creating societal perceptions that the group stands apart. McHugh, J. stated it this way:

[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.⁸⁹

⁸⁸ Cite. See also *Matter of R.A.*, finding that asserted class was constructed for the purposes of the litigation.

⁸⁹ at 264.

Under this reasoning, it would appear that an applicant would have a valid claim if he or she could establish that persons asserting the human rights at issue are, in fact, perceived by society at large as a distinct group.⁹⁰

Proposed Conclusions (II)

II.A: A “particular social group” cannot be defined solely by the fact that all members of the group suffer persecution nor by a common fear of persecution. However, persecutory action toward a group may be a relevant factor in determining whether a group is cognizable as such in a particular society.

B. Ejusdem Generis

It has sometimes been suggested that the principle of *ejusdem generis* provides a useful interpretive limit on MPSG. The principle holds that a general term included in a list of particular terms should be interpreted consistent with the general nature of the enumerated items.⁹¹ So, for example, if a city ordinance prohibits “loud noise, motorized vehicles, unleashed animals and other conduct likely to disturb peaceful enjoyment of public parks,” it would be appropriate to seek in the specific examples an underlying concept that might be applied in interpreting the broader final phrase.

The five Convention grounds are not written in a manner, however, that makes application of *ejusdem generis* appear appropriate. The Convention does not list four grounds and then add a fifth such as “and all other grounds that are frequently a basis for

⁹⁰ See McHugh, J.: “There is no reason why persons ‘who, having only one child, . . . do not accept the limitations placed on them’ and who communicate that view to Chinese society could not be a ‘particular social group’ in some situations. If, for example, a large number of persons with one child who wished to have another had publicly demonstrated against the government’s policy, they may have gained sufficient notoriety in China to be perceived as a particular social group. At 269.

⁹¹ See Black’s Law Dictionary.

persecution.”⁹² The term “particular social group” appears to define a free-standing category of equal kind and status as the other identified categories. (To return to the city ordinance example, it would be analogous to an ordinance that prohibited “motorized vehicles, unleashed animals and all conduct that is excessively noisy.”) As stated by Kirby J. in *Applicant A*, “it is difficult to find a genus which links the categories of persecution unless it be persecution itself.”⁹³ Indeed, an *ejusdem generis* reading of the five grounds, as Kirby J. goes on to note, would appear to violate the rule that the group must exist outside the persecution: it would be a sensible interpretive guide only if the term “particular social group” were intended to be a “safety net” category—an interpretation widely rejected for the reasons described above.⁹⁴

The suggestion that *ejusdem generis* can play a useful interpretive role may be based on a slightly different kind of argument that looks to the underlying motivation for the designation of particular categories. As discussed in the next section, one might attempt to identify a norm of non-discrimination as crucial to the structure of the Convention, and thereby see the five “for reasons of” grounds as categories of persons likely to be victims of persecutions. This might then provide an argument that “particular social group” should be read, in the main, to cover groups that are discriminated against. I will argue below that an “anti-discrimination” approach does not significantly advance the search for a definition of “particular social group.” More to the point, this is not an

⁹² This is also grounds for rejecting the “safety net” interpretation of particular social group.

⁹³ *Applicant A* at 295. One possibility is that the list includes personal characteristics that are either immutable or so fundamental that it would be unjust to compel persons to forsake them. But, as noted in the discussion *Ward*, it is not clear what unifying concept underlies these separate considerations.

⁹⁴ See Goodwin-Gill, Judicial Reasoning and ‘Social Group’ after *Islam and Shah*,” 11 *Int’l J. Refugee Law* 537, 541 (1999).

argument based on the principle of *ejusdem generis*, but rather on the underlying purposes of the Convention.

Proposed Conclusion (III)

III.A: The principle of *ejusdem generis* has only a limited relevance in interpreting the term “particular social group.”

D. Anti-discrimination and the definition of “particular social group”

The search for a limiting principle has lead adjudicators in a number of states to identify anti-discrimination as an underlying norm of the Convention that can provide interpretive guidance. It is thus regularly noted⁹⁵ that the opening paragraph of the Convention declares:

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings *shall enjoy fundamental rights and freedoms without discrimination* (emphasis supplied).

The anti-discrimination approach is said to supply a common basis for the enumerated “for reasons of” grounds. That is, persons who are persecuted for reasons of race, religion, nationality, or political opinion are persons whose human rights are being violated for discriminatory reasons. Lord Hoffman, in *Islam and Shah*, states:

In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect. . . . [T]he inclusion of ‘particular

⁹⁵ *GJ, Islam and Shah*.

social group’ recognised that there might be different criteria for discrimination, in pari materiae with discrimination on other grounds, which would be equally offensive to principles of human rights. . . . In choosing to use the general term ‘particular social group’ rather than an enumeration of specific groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.⁹⁶

The invocation of an anti-discrimination principle appears to accomplish four goals: it resists a “safety net” approach to social group (by defining a limiting principle); by stressing lack of state protection and marginalization, it explains why persons fleeing natural disasters and civil war might not be Convention refugees⁹⁷; it rejects the “cohesiveness” and “voluntary association” analysis of *Sanchez-Trujillo*; and it makes easier the recognition of women as a social group (as women are frequently the victims of serious societal discrimination).

Despite these benefits of an anti-discrimination approach, there are significant problems with identifying it as the sole underlying principle of the five Convention grounds.⁹⁸ The anti-discrimination principle is invoked primarily to drive home the point that the Convention does not provide protection to all persons who are victims of persecution. But one doesn’t need an anti-discrimination approach to reach this result; it seems plain on the face of the Convention itself. That is, one *could* say that a political dissident is being discriminated against because of the views she holds (others persons with views favored by the regime are not being persecuted); but this would be true of any

⁹⁶ Cite.

⁹⁷ See Hathaway, *The Law of Refugee Status* 137.

⁹⁸ As Goodwin-Gill has noted, “it remains a gloss on the original words, of which advocates need to be aware.” IJRL

person whose human rights were being violated—as compared to all those in the particular society whose rights are not being violated.⁹⁹

Furthermore, an anti-discrimination analysis may suggest additional norms that unduly restrict the scope of the Convention. It may lead adjudicators, for example, to inappropriately import into refugee law concepts from domestic anti-discrimination law, such as those relating to causation.¹⁰⁰ More significantly, an anti-discrimination understanding of the Convention may lean toward an “immutability” approach for defining particular social group.¹⁰¹ This is so because domestic anti-discrimination law in many states typically defines protected groups as those who share characteristics that ought to be irrelevant to state decision-making; and frequently, immutable characteristics are so identified: it is seen as unjust to distinguish people based on characteristics that they cannot alter (such as race, gender, ethnicity, caste). Finally, it appears that even those adjudicative bodies that purport to adopt an anti-discrimination approach define it in a manner that actually goes beyond it. For example, the New Zealand Refugee Status Appeals Authority, which is firmly committed to an anti-discrimination/protected characteristics analysis, states that under its approach “recognition is given to the principle that refugee law ought to concern itself with actions which deny human dignity in any key way.”¹⁰² While the conclusion may well be sensible, it is far from clear what work the anti-discrimination norm ultimately does in the analysis.

⁹⁹ Goodwin-Gill has suggested that “while it may be, and often is, possible to interpret persecution as some form of discriminatory denial of human rights, to think exclusively in these terms may fail to reflect the social reality of oppression.” *Id.* at 539.

¹⁰⁰ See Hathaway project.

¹⁰¹ See eg *GJ*.

¹⁰² *GJ?*

Proposed Conclusion (IV)

IV.A: Although non-discrimination is a crucial element of human rights jurisprudence and is frequently cited in refugee law, it provides only limited guidance in interpretation of the term “particular social group.”

E. Social groups and human rights violations

The requirement that a particular social group exist outside of the alleged persecution casts doubt on groups defined solely on the basis that members’ human rights have been violated. For example, it is unlikely that an adjudicator would recognize the claim of a victim of torture if the asserted social group is all persons in the country who have been or might become victims of torture.

It is this reasoning that has generally defeated the claims of Chinese applicants alleging fear of forced sterilization and abortion. Although such acts would surely violate fundamental human rights, adjudicators have been hesitant to recognize such claims because they conclude that the only characteristic shared by the purported group is the alleged persecution.

La Forest J. (who authored the *Ward* decision for the Canadian Supreme Court), however, has argued that social group claims might be made out by a class of persons whose fundamental human rights have been violated. In his dissenting opinion in *Chan v. Canada*,¹⁰³ he stated that he would amend the second *Ward* category (“groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake their association”) by deleting the “voluntary association” requirement. The relevant question, according to La Forest J., is whether the persecutor

¹⁰³ [1995] 3 S.C.R. 593.

treats people with a shared attribute as comprising a group—not whether the members of the group voluntarily associate with each other.¹⁰⁴ Thus if an individual is associated voluntarily with a status for reasons fundamental to human dignity, then a group could be cognizable; it would exist “by virtue of a common attempt to exercise a fundamental human right.” Under the facts of the case, La Forest J. would have held that persons who are persecuted for having more than one child can allege membership in a particular social group.¹⁰⁵

Dawson J. in *Applicant A* takes issues with La Forest’s conclusion, reasoning that the group cannot simply be a random collection of persons across China whose human rights have been violated by coercive family planning practices. However, Dawson J. adds that it would be appropriate to recognize a social group if the violation of human rights gives rise to a self-perception or societal perception of a group:

A fundamental human right could only constitute a unifying characteristic if persons associated with each other on the basis of the right or, it may be added, if society regarded those persons as a group because of their common wish to exercise the right. And in that situation, it would be the unifying aspect of that element, and not its character as a fundamental human right, which allowed it to delineate a particular social group.¹⁰⁶

Following Dawson J.’s logic, if persons across China united in “support” groups for families with more than one child, or if state policy coercing abortions produced a societal perception that persons resisting forced abortions were social pariahs, then a social group claim might be sustainable. This appears to be a sensible approach that neither recognizes

¹⁰⁴ At 645 (quoting Audrey Macklin, “Canada (*Attorney General*) v. *Ward*: A Review Essay,” 6 *Int’l J. Refugee Law* (1994)).

¹⁰⁵ See also Daley and Kelley, *Particular Social Group*, *supra* .

¹⁰⁶ *Applicant A* at 246.

all human rights victims as members of a social group nor denies the possibility that victims of “generally applicable” policies might be a cognizable social group.

Proposed Conclusions (V):

V.A: All Convention refugees are persons whose human rights have been violated. But the fact of a human rights violation, by itself, does not establish refugee status, nor does a group of persons whose human rights have been violated necessarily constitute a “particular social group” within the meaning of the definition of “refugee.” (The presence of human rights abuses may, of course, be relevant to a finding of “persecution.”)

V.B: The fact that a group of persons has suffered human rights abuses may be a significant element in determining that a “particular social group” exists to the extent such abuse is visited on persons who share an independent identifiable characteristic because it may demonstrate that the group is perceived as a group in society in which it is located—that is, it is identified as “persecutable,” or in fact attracts persecution, because of its shared characteristic.

F. The core inquiry: of protected characteristics and social cognizability

The “protected characteristics” approach is well-entrenched in the jurisprudence of a number of the States’ Parties and has received strong support from noted scholars.¹⁰⁷ It has obvious appeal: it provides a limiting principle for interpretation of “particular social group” that resonates with a human rights perspective. That is, it might plausibly be argued that each of the first four “for reasons of” categories are predicated on human rights conceptions, and thus the “particular social group” category ought to also be limited to groups defined in human rights terms—as the protected characteristics approach purports to do. (This search for an underlying organizing principle for the refugee definition is

¹⁰⁷ James Hathaway, in particular, has forcefully and thoughtfully advocated the *Acosta* approach to the social group definition.

consistent with accepted norms of treaty interpretation.¹⁰⁸) A protected characteristics approach identifies groups that we might generally believe merit protection: those that would suffer significant harm if asked to give up their group affiliation (either because it would be virtually impossible to give up an “immutable” characteristic or because the basis of affiliation is the exercise of a fundamental human right). The approach also provided an important innovation as adjudicative bodies found the “voluntary association” analysis of *Sanchez-Trujillo* lacking. It has permitted recognition of groups fully warranting protection—such as women and gays—that are generally not constituted by members who are closely affiliated with one another.

Balanced against these advantages, however, are disadvantages that need to be assessed. Significantly, the protected characteristics test is in tension with a common sense meaning of the term social group. Nothing in the definition of refugee—and nothing in the *travaux préparatoires*—suggests that the immutability or fundamentality of characteristics is the key to understanding the “for reasons of” grounds. Furthermore, although the States Parties’ jurisprudence displays a deep concern that the particular social group category not be so broadly defined as to swallow up the other Convention grounds or to make all victims of persecution automatically refugees—a concern that is plainly consistent with the language, structure, and purposes of the Convention—this consideration alone cannot support limitations that are not otherwise consistent with and reasonably inferable from the Convention.¹⁰⁹

¹⁰⁸ [add cites]

¹⁰⁹ As stated by Brennan J. in *Applicant A*: “An attempt to confine the denotation of the term ‘a particular social group’ in order to restrict the protection accorded by the Convention” is inappropriate where the “object and the purpose of the Convention is the protection so far as possible of the equal enjoyment by every person of fundamental rights and freedoms.” At 236.

The protected characteristics approach also appears to deny refugee protection to members of groups who may well be targets of persecution based on their associations that are widely recognized in society.¹¹⁰ Examples could include such groups as students, union members, professionals, refugee camp workers, or street children. (To list these groups is not to assert that each is always entitled to recognition; it is, however, to help the reader imagine cases in which recognizing such groups might be justifiable.) The protected characteristics test might be stretched to include these groups. For instance, Professor Hathaway suggests that “[s]tudents are logically within the social group category, since the pursuit of education is a basic international human right” that a person should not be compelled to forgo.¹¹¹ But this seems to strain the category for the sake of reaching an appropriate result without throwing over the protected characteristics approach. It is interesting, then, that the proposed INS regulations, by recognizing other factors relevant to a social group determination, appear to be pushing the U.S. jurisprudence beyond the *Acosta* formulation.¹¹²

A more natural reading of the Convention language is suggested by the majority opinions in the Australian High Court case *Applicant A*: what constitutes a particular social group is “a common attribute and a societal perception that they stand apart.”¹¹³ The attribute must not only be shared, it must unite the group as a matter of self-perception or societal perception. That is to say, the shared characteristic must make “those who share it

¹¹⁰ Goodwin-Gill at 365: “Clearly, there are social groups other than those that share immutable characteristics, or which combine for reasons fundamental to their human dignity.”

¹¹¹ James Hathaway, *The Law of Refugee Status* 168 (19).

¹¹² From the foregoing discussion, it ought to be clear that an acceptable alternative is not the “cohesiveness” and “voluntary association” standards of *Sanchez-Trujillo*. As noted, the Ninth Circuit itself has backed away from this test in *Montiel-Hernandez*.

¹¹³ At 265-66. See also 264: “[T]he existence of such a group depends in most, perhaps all, cases on external perceptions of the group. . . [The term particular social group] connotes persons who are defined as a distinct *social* group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.”

a cognizable group within their society.”¹¹⁴ To similar effect is language in the French Conseil d’Etat’s *Ourbih* judgment—that membership in a particular social group must be examined from the perspective of whether members of the group will risk persecution “en raison des caractéristiques communes qui les définissent aux yeux des autorités et de la société.”¹¹⁵ (This approach might best be labeled “common characteristic/social perception,” but the term “social perception” will be used for shorthand.)

This social perception interpretation is present—if unrecognized—in some of the U.S. sources (as described above) and is expressly mentioned in two judgments in the *Islam* and *Shah* decisions. Thus, Lord Hope of Craighead, who is with the majority in the cases, states:

In general terms, a social group may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society. . . . As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person’s nationality. The phrase can thus accommodate particular social groups which may be recognisable as such in one country but not in others or which, in any given country, have not previously been recognised.¹¹⁶

Importantly, the social perception analysis would appear to encompass the groups currently recognized under the protected characteristics approach. But this is not because the protected characteristics standard establishes a “core” to which the social perception groups are added. Rather it is because groups recognized under the protected characteristics analysis are likely to be perceived as social groups. Why is this the case? It is so because persons in groups that are the subject of persecutory, discriminatory treatment will avoid the shared characteristic that defines the group if they are able to; but groups defined by immutable characteristics cannot do so, and groups defined by

¹¹⁴ 241 (footnote omitted).

¹¹⁵ *Ourbih* [171858], Conseil d’Etat, SSR, 23 juin 1997.

characteristics fundamental to human dignity often choose not to do so, and we believe they should not be required to do so.¹¹⁷ Thus, such groups are likely to maintain their membership despite unfavorable treatment, and generally will be perceived as social groups—defined by the characteristic for which the abuse is imposed. (For example, persons are likely to preserve religious and deep political convictions even if they face harm in doing so because they may view such convictions as core to their identities. Persons who maintain these kinds of affiliations despite social pressure to change are likely to be perceived as social groups.)

While most “protected characteristics” groups are likely to be perceived as social groups, there may also be social groups not based on protected characteristics. A social perception approach, therefore, moves beyond protected characteristics by recognizing that external factors can be important to a proper social group definition. Asking whether a group has been “marked as other”¹¹⁸ is not to collapse the social group and persecution issues, but rather to examine whether the group is a cognizable group in a particular cultural context.¹¹⁹

The social perception approach could also reach claims advanced by persons who believe in values at odds with the social mores of the societies in which they live.¹²⁰ For example, women who object to FGM or who refuse to wear traditional garb are likely to be

¹¹⁶ cite

¹¹⁷ Note that this also explains why not all immutable characteristics define social groups—consider height in this regard. Persons are generally not persecuted on this ground, and generally not perceived as a social group. However, if they were perceived as a social group and so persecuted, they ought to receive Convention recognition. But the immutable characteristics approach cannot provide an explanation as to why some immutable characteristics establish groups and others do not.

¹¹⁸ [Parish, p. 946]

¹¹⁹ See Goodwin-Gill [1996, p. 362](while “victimization” alone is not enough to demonstrate a social group, persecutory laws and practices may be “one facet of broader policies and perspectives, *all* of which contribute to the identification of the group.”

¹²⁰ Such claims are also frequently analyzed as political opinion or imputed political opinion claims.

perceived as constituting a social group because they have set themselves against the cultural, religious or political practices of the society. (It may be more difficult to recognize some of these claims—for instance, one based on attire—under the protected characteristics approach.)

The approach recommended here also finds support in the scholarly literature. Goodwin-Gill suggests that “[f]or the purposes of the Convention definition, internal linking factors cannot be considered in isolation, but only in conjunction with external defining factors, such as perceptions, policies, practices and laws.”¹²¹ He would eschew a single principle (such as “immutability”), examining instead a range of variables:

These would include, for example, (1) the fact of voluntary association, where such association is equivalent to a certain *value* and not merely the result of accident or incident, unless that in turn is affected by [social perceptions]; (2) involuntary linkages, such as family, shared past experience, or innate, unalterable characteristics; and (3) the perception of others.¹²²

Goodwin-Gill recognizes that this interpretation might well embrace groups of “apparently unconnected and unallied individuals”—such as mothers, women at risk of domestic violence, capitalists, and homosexuals.¹²³

The proposed social perception test may be objected to as creating too broad an interpretation of social group. But so long as adjudicators observe the rule that the group must exist outside the persecution (properly understood), the social group category will be significantly limited. Furthermore, other elements of the refugee definition—e.g., the requirements that “nexus” be shown and that the applicant’s fear be well-founded—supply additional limits.

¹²¹ [(1996), p. 362.]

¹²² *Id.* at 366.

As noted above, applicants sometimes face a dilemma in offering a definition of a “particular social group.” A group defined too narrowly may appear to have been constructed solely for the litigation;¹²⁴ a group defined too broadly may appear to include persons facing no risk of persecution, thus making establishment of the “nexus” requirement difficult. There is no simple solution to this problem; however, one important consideration is that there is no requirement that an applicant prove that every member of a particular social group has a well-founded fear of persecution. Indeed, if this were the test, the analysis would come perilously close to mandating that persecution define the class. Thus, homosexuals have been found to be a social group in a number of states; yet not all members of the class may be at risk of persecution (depending on how openly they express their sexual orientation or whether they have allies in the government). Again, the well-founded fear element of the definition will have to be brought to bear in each case. An applicant will not be able to establish refugee status simply because he or she belongs to a group recognized as such by the society from which he or she seeks protection.

The B.I.A.’s *Kasinga* decision illustrates these points. The case involved a claim brought by a young woman who feared being subjected to FGM by her tribal group. The B.I.A., which sustained the claim, defined the social group as: “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”¹²⁵ It is far from clear, however, why such an elaborate definition was necessary. Perhaps the Board was concerned that some female members of the tribe consent to FGM; thus the narrower definition was viewed as preferable in order to make more congruent the social group and victimhood. But this concern seems misplaced. The

¹²³ Id. See also the “sociological” approach as suggested by Maureen Graves.

¹²⁴ See, e.g., *Matter of R.A.*

persecutory conduct is visited solely on *women of the tribe*; it is for that reason that the applicant is at risk—because she is a female member of the tribe. That other women of the tribe may not seek to flee FGM is irrelevant both to the definition of the class and to the establishment of “nexus.” In sum, the definition of the class must describe a group that stands apart in society where the shared characteristic of the group reflects the *reason* for the persecution. This is importantly different from saying that a defined class must only include persons likely to be persecuted.

Finally, it should be considered whether no single standard should be adopted, but rather a range of possible conceptions of “social group” affirmed. (The proposed INS regulations point in this direction.) The problem with this “let a thousand flowers bloom” approach, however, is that adjudicators need more than a range of factors to consult. They need to have an underlying principle or schema that permits them to make sense of the various factors. An appropriate standard may well have to be flexible, open-ended, and stated a sufficient level of abstraction to permit it to identify groups that ought to be brought within the protection of the Convention. Such a standard may not always yield easy answers. But adjudicators regularly apply less-than-fully-determinate standards. The fact that no single standard will, in effect, list the social groups that ought to be recognized is not a basis for preferring a plethora of standards or no standard at all.

Proposed Conclusions (VI)

VI.A: “Particular social group” should be understood to designate those groups in a particular society that are united by a common characteristic by which they identify themselves or are identified by the government or society.

¹²⁵ cite

VI.B: The adoption by a number of States Parties of a “protected characteristics” approach to interpreting membership in a particular social group has been important in affirming a human rights approach to the Convention and in moving beyond earlier interpretations that had required that groups be “cohesive.” These States ought to also consider whether in certain circumstances it would be appropriate to recognize as a “particular social group” a group that is generally recognized—“marked”—by the society in which it exists, even if such a group is not based on a characteristic that is either immutable or fundamental. That is, identification of a group under the protected characteristics approach is *sufficient*, but not *necessary*, for Convention purposes.

VI.C: An applicant need not demonstrate that every member of a group is at risk of persecution in order to establish that a particular social group exists.

VI.D: A conclusion that a particular social group exists in a case does not, of course, establish that all members of the group are entitled to recognition as refugees. An applicant would need to demonstrate a well-founded fear of persecution for reasons of membership in the group.

G. “Voluntary association” and group membership

It is important to distinguish between two different meanings of “voluntary association.” As used in *Sanchez-Trujillo*, the term describes a kind of cohesiveness requirement—that is, that a group be organized in some fashion, constituted by people who have consciously joined it and who wish to further some common purpose. This meaning of voluntary association, as noted above, has been generally rejected (the issue has arisen in many cases involving claims of homosexuals).

Second, the term may refer to whether or not the common characteristic is voluntarily assumed, in contrast to an immutable characteristic that is generally not chosen and cannot be shed. The question is whether refugee protection ought to be afforded to persons if the applicant could remove him or herself from a risk of persecution by forgoing the voluntarily assumed characteristic. (In *Ward*, La Forest, J. seems to conflate these two meanings in including in the definition of particular social group “groups whose members

voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association.”)

The second meaning is central to the protected characteristics approach. The human rights basis of the approach suggests that no person should be asked to give up (non-immutable) characteristics fundamental to their identity. For example, compelled divorce might trench on fundamental associational rights, even if marriage is a voluntarily assumed characteristic. So too human rights activists might view belonging to a human rights group as fundamental to their identity; thus, they should receive protection should the group face persecution rather than be expected to give up their work and association.

It is less clear, however, how a social perception approach would address the issue of voluntarily assumed characteristics. It might be argued that if a person has the ability not to undertake the activity that places him or her in the designated social group (e.g., by “going underground,” by disassociating from the group, by forgoing the activity altogether), then there is no need for the international community to extend protection. And unless prior membership in the group leads to a present social perception of a group based on a common characteristic (e.g., former university professors or national policemen), then the social perception test would not come into play. To take an example, if a woman gives up Western dress for a chador even though she disagrees with the social norm that compels her to do so, then it could be argued under the social perception test that she is in no need of international protection—she has removed herself from the targeted group, no longer shares with members of the group a common characteristic (Western

dress), and is not a part of any group perceived by society to be a group.¹²⁶ Similarly, a homosexual could perhaps avoid persecution by staying “closeted.”

The answer here must be that no person can be under a duty to alter legitimate behavior in order to avoid a violation of human rights. This is so whether or not behavior represents exercise of a fundamental human right. (For instance, if a government decides that it wants to suppress philately clubs, stamp collectors threatened with persecution should not be told by the international community to stop collecting stamps.) To conclude otherwise would be to simply give the persecutor what he or she generally wants—suppression of the characteristic upon which the group is based. (It is conceivable that sadistic persecutors actually seek to inflict harm, but it is more generally the case that persecutors seek to get rid of the offending characteristic.) *Any* approach to social group, that is, would have to embrace a principle that persons cannot be compelled to choose between a voluntarily assumed characteristic and persecution. Thus, the social perception approach must be understood to affirm such a principle.

Proposed Conclusions (VII)

VII.A: There is no requirement that members of a particular social group voluntarily associate, as in the sense of establishing informal ties or a formal organization. The relevant issue is whether or not group members share a common characteristic that defines a group.

VII.B: An applicant cannot be denied recognition as a refugee simply because he or she has refused to forgo a voluntary activity or suppress a non-immutable personal characteristic for which he or she is threatened with persecution.

H. The “Nexus” Issue and Non-state Actors

¹²⁶ Cf. *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (*en banc*).

In many social group cases, the difficult issue for the adjudicator may not be the definition of the group so much as the “nexus” requirement: that the persecution be *for reasons of* membership in the group. A full analysis of the “nexus” issue is beyond the scope of this paper,¹²⁷ but several discrete issues need to be considered concomitant with a study of “particular social group.” These relate to the situation where the agent of persecution is not the state.

Examples may be drawn from the cases: (1) a woman is abused by her spouse in a state that takes no action against such abuse; (2) a woman is threatened with FGM by her tribal group in a state that prohibits, but cannot stop, the practice; (3) a criminal enterprise threatens the family of someone who owes it money. Difficulties arise in such cases in deciding whether the conduct of the persecutor and/or the failure of state protection is “for reasons of” the victim’s membership in a social group. For instance, in *Matter of R.A.*, the B.I.A. concluded that the applicant—who had suffered very severe abuse—could not satisfy the nexus requirement because she could not show that group membership was the motivation behind the abuse by her husband.¹²⁸ This was so, according to the majority, because there was no evidence that the husband had or would target other members of the group¹²⁹: “On the basis of this record, we perceive that the husband’s focus was on the respondent because she was *his* wife, not because she was a member of some broader

¹²⁷ For an in-depth analysis, see Hathaway Study (forthcoming).

¹²⁸ *In re R.A.*, Interim Dec. # 3403 (B.I.A. 1999), at 21-22. The B.I.A. also held that the applicant had not shown that the government encouraged spouse abuse or failed to protect women with the expectation that abuse would occur.

¹²⁹ At 20: “If group membership were the motivation behind his abuse, one would expect to see some evidence of it manifested in actions toward other members of the same group.”

collection of women, however defined, whom he believed warranted the infliction of harm.”¹³⁰

The specific reasoning in *R.A.* is open to serious question.¹³¹ Indeed, the INS’ proposed rules—formulated to provide “clarification” of the Board’s reasoning—in fact implicitly disapprove of the Board’s nexus analysis.¹³² Whether or not the persecutor has acted against others in a similar situation may be probative, but it surely cannot be a required element of the case (any more than a person who claims race discrimination must show that the perpetrator has also discriminated against others on the basis of race). The Convention requires a showing that *her* fear of persecution is for reasons of a characteristic *she* possesses.

But even where it cannot be shown that the persecutor has acted “for reasons of” one of the protected grounds, there are circumstances in which a refugee claim might be recognized. Chairman Haines provides a persuasive account in *Refugee Appeal No. 71427/99*:

[T]he nexus between the Convention reason and the persecution can be provided *either* by the serious harm limb *or* by the failure of the state protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state actor (eg, husband, partner or other non-state agent) for reasons unrelated to any Convention grounds, but the failure of state protection is for reason of a

¹³⁰ *Id.* at 21.

¹³¹ See also the thoughtful dissenting B.I.A. opinion authored by Board Chairman Paul Schmidt, concluding that it was reasonable to believe that the harm inflicted on the applicant was motivated on account of *R.A.*’s membership in a particular social group that is defined by her gender, her relationship to her husband and her opposition to domestic violence. The dissent further argues that *R.A.* is indistinguishable from *Kasinga* (an FGM case where membership in a particular social group was established) because in both cases “[t]he gender-based characteristic shared by the members of each group are immutable, the form of the abuse resisted in both cases was considered culturally normative and was broadly sanctioned by the community, and the persecution imposed occurred without possibility of state protection.” At 36.

¹³² The explanatory material to the proposed rules state that an applicant is not required to show that a persecutor would be prone to harm other members of the defined social group: “Thus, it may be possible in some cases for a victim of domestic violence to satisfy the ‘on account of’ requirement, even though social limitations and other factors result in the abuser having the opportunity, and indeed the motivation, to harm only one of the women who share the characteristic, because only one of these women is in a domestic relationship with the abuser.” 65 Fed. Reg. at 76593.

Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. This is because “persecution” is a construct of two separate but essential elements, namely the risk of serious harm and failure of protection.¹³³

In other words, the claimant must show that the feared persecution is “for reasons of” one of the Convention grounds and that the state does not afford protection, and the Convention ground may be supplied either by the non-state persecutor (coupled with a state that is unable or unwilling to afford protection) or by the state (when it is unwilling to afford protection for one of the Convention reasons).¹³⁴

This bifurcated analysis means that a social group claim may require separate analyses of both the conduct of the non-state actor and the state to see if either is acting for reasons of the claimant’s membership in a particular social group. Consider again the example of an abusive husband. A social group claim may be established either by showing (1) that the man’s actions are predicated on his spouse’s gender and the state is unable (or unwilling) to prevent such conduct; or (2) that whatever the reasons for the husband’s actions, the state is unwilling to protect the spouse because of her gender.¹³⁵

Importantly, this analysis does not suggest that every case of domestic abuse states a refugee claim. First, the state may have an adequate legal process for sanctioning abusers; thus the application would be unable to establish a lack of state protection.

Furthermore, even where a particular applicant had been unable to secure police protection,

¹³³ Cite. See also *Islam and Shah*

¹³⁴ The Australian Federal Court has suggested that the “state’s systemic failure to protect the members of the particular social group” from an abusive husband might itself constitute “persecutory conduct.” See *Khawar* (“The husband’s motivation would be irrelevant: his violence would not be the persecutory conduct and would be relevant only as providing the occasion of an instance of persecution by the state.”) See also Pamela Goldberg, “Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence,” 26 *Cornell Int’l L.J.* 565, 584-88 (1993).

¹³⁵ Cf, *Islam and Shah*.

it might be—as explained by the Australian Federal Court in *Khawar*—that the failure was atypical, due to the attitude or ineptitude of a particular police officer, based on police inefficiency, or based on police reluctance to become involved with domestic disputes. The claimant would have to show “something more”—a requirement that “would be satisfied at least by a sustained or systemic absence of state protection for members of a particular social group attributable to a perception of them by the state as not deserving equal protection under the law with other members of the society.”¹³⁶

Proposed Conclusions (VII)

VI.A: Where an applicant is harmed by a non-state actor, such harm may constitute persecution for reasons of membership in a particular social group if (1) the harm is inflicted for reasons of such membership and the state is unable or unwilling to prevent the harm; or (2) the harm is inflicted and the state, for reasons of the applicant’s membership in a particular social group, is unwilling to prevent the harm.

VI.B: An applicant need not demonstrate that a persecutor would persecute every member of the particular social group upon which the applicant’s claim is based; the applicant need only demonstrate that a fear of persecution is based on his or her membership in the group.

¹³⁶ *Khawar*. See also Lord Hoffman in *Islam* and *Shah*:

[S]uppose the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? . . . [I]n my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question “Why was he attacked?” would be “because a competitor wanted to drive him out of business. But another answer, and in my view the right answer in the context of the Convention, would be “he was attacked by a competitor who knew that he would receive no protection because he was a Jew.”

V. Summary of Conclusions

In considering the conclusions proposed in this study, it would be wise to keep in mind the words of Sedly J., writing for the Immigration Appeal Tribunal in the *Islam* and *Shah* case¹³⁷ (and quoted by Lord Steyn in *Islam* and *Shah*):

[A]djudication [of a particular social group claim] is not a conventional lawyer's exercise of applying a legal litmus test to ascertain facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political, and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.¹³⁸

Proposed Conclusions (I): General considerations

- I.A: The term “particular social group” must be given a meaning that does not render the other categories superfluous.
- I.B: There is no requirement that a group be “cohesive” in order to be recognized as a “particular social group” within the meaning of the Convention; that is, there need be no showing that all members of a group know each other or associate together.

Proposed Conclusions (II): Persecution and the definition of social group

- II.A: A “particular social group” cannot be defined solely by the fact that all members of the group suffer persecution nor by a common fear of persecution. However, persecutory action toward a group may be a relevant factor in determining whether a group is cognizable as such in a particular society.

Proposed Conclusion (III): *Ejusdem Generis*

- III.A: The principle of *ejusdem generis* has only a limited relevance in interpreting the term “particular social group.”

¹³⁷ [1997] Imm.A.R. 145, 153)

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Proposed Conclusion (IV): Non-discrimination

IV.A: Although non-discrimination is a crucial element of human rights jurisprudence and is frequently cited in refugee law, it provides only limited guidance in interpretation of the term “particular social group.”

Proposed Conclusions (V): Human rights abuses and social group

V.A: All Convention refugees are persons whose human rights have been violated. But the fact of a human rights violation, by itself, does not establish refugee status, nor does a group of persons whose human rights have been violated necessarily constitute a “particular social group” within the meaning of the definition of “refugee.” (The presence of human rights abuses may, of course, be relevant to a finding of “persecution.”)

V.B: The fact that a group of persons has suffered human rights abuses may be a significant element in determining that a “particular social group” exists to the extent such abuse is visited on persons who share an independent identifiable characteristic because it may demonstrate that the group is perceived as a group in society in which it is located—that is, it is identified as “persecutable”, or in fact attracts persecution, because of its shared characteristic.

Proposed Conclusions (VI): The Central Inquiry: Common characteristic/social perception

VI.A: “Particular social group” should be understood to designate those groups in a particular society that are united by a common characteristic by which they identify themselves or are identified by the government or society.

VI.B: The adoption by a number of States Parties of a “protected characteristics” approach to interpreting membership in a particular social group has been important in affirming a human rights approach to the Convention and in moving beyond earlier interpretations that had required that groups be “cohesive.” These States ought to also consider whether in certain circumstances it would be appropriate to recognize as a “particular social group” a group that is generally recognized—“marked”—by the society in which it exists, even if such a group is not based on a characteristic that is either immutable or fundamental. That is, identification of a group under the protected characteristics approach is *sufficient*, but not *necessary*, for Convention purposes.

VI.C: An applicant need not demonstrate that every member of a group is at risk of persecution in order to establish that a particular social group exists.

VI.D: A conclusion that a particular social group exists in a case does not, of course,

establish that all members of the group are entitled to recognition as refugees. An applicant would need to demonstrate a well-founded fear of persecution for reasons of membership in the group.

Proposed Conclusions (VII): Voluntary association

VII.A: There is no requirement that members of a particular social group voluntarily associate, as in the sense of establishing informal ties or a formal organization. The relevant issue is whether or not group members share a common characteristic that defines a group.

VII.B: An applicant cannot be denied recognition as a refugee simply because he or she has refused to forgo a voluntary activity or suppress a non-immutable personal characteristic for which he or she is threatened with persecution.

Proposed Conclusions (VIII): The nexus requirement

VIII.A: Where an applicant is harmed by a non-state actor, such harm may constitute persecution for reasons of membership in a particular social group if (1) the harm is inflicted for reasons of such membership and the state is unable or unwilling to prevent the harm; or (2) the harm is inflicted and the state, for reasons of the applicant's membership in a particular social group, is unwilling to prevent the harm.

VIII.B: An applicant need not demonstrate that a persecutor would persecute every member of the particular social group upon which the applicant's claim is based; the applicant need only demonstrate that a fear of persecution is based on his or her membership in the group.

Annex: Applications

This annex considers a range of representative “social group” cases. The analysis does not purport to be definitive; social group cases must always be examined in light of the circumstances of a particular society, the actions of the government and non-state actors, and the like. And, of course, the recognition of a social group does not necessarily establish refugee status. A claimant would still have to demonstrate a well-founded fear of persecution based on membership in the group. These considerations apply to all following hypotheticals.

1. Sexual orientation

Mr. A is an openly gay male. He has been seriously beaten and harassed by persons in his hometown. His complaints to local police have been unavailing. He alleges that homosexuality is criminalized in his country and that local and state police either tolerate or encourage violence against gays.

In a number of states, homosexuality has been recognized as a particular social group within the meaning of the Convention.¹³⁹ Under either the protected characteristics or the social perception test, gays and lesbians could constitute a social group. Sexual orientation is now generally understood as unchangeable or so fundamental to human dignity that change should not be compelled. Furthermore, in many societies gays are

¹³⁹ See *Re GJ*, and cases cited therein. Importantly, the reasoning of the House of Lords in *Islam* and *Shah* also appears to cover sexual orientation; the case may therefore be read as clearing up an ambiguity that had existed in lower court cases in the United Kingdom. See Vidal, 11 *Int'l J. Refugee Law* at 535-36. See also

viewed as pariah groups. The lack of “cohesiveness” among members of the class should not defeat the claim. To meet the “nexus” requirement a claimant would have to establish either that the persecutor abused the claimant because of the claimant’s homosexuality (and the state refused to act) or that the state failed to provide protection because of the claimant’s homosexuality.

2. Family-based claims

A. Persecution by non-family member based on victim’s membership in a family

Ms. R. is an 18-year old whose father has physically and sexually abused her and her 3 sisters for many years. Her father has threatened her mother with death if she seeks to intervene. Complaints to the police have not prevented the abuse.

Under all the approaches discussed above (including the *Sanchez-Trujillo* standard) family has been identified as a plausible particular social group. It is perhaps a novel use of the category in this instance, where the persecutor himself is a member of the family. But in an important decision (*Aquirre-Cervantes v.INS*), a court of appeals in the U.S. has recognized the family as a social group in such circumstances.¹⁴⁰ The definition of the particular social group as “family” avoids a number of difficult issues that are raised when abuse claims are stated as persecution for reason of gender—for example, because “nexus” can be established by showing that the father has assaulted members of his family, there is

Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), “Replies to the questionnaire on gay and lesbian asylum seekers,” (March 14, 2001).

no need to show that the state acted “for reasons of” the applicant’s membership in a social group. Furthermore, the class definition avoids the difficulty noted by the B.I.A. in *R.A.* that the husband showed no inclination to abuse women other than his wife (thereby, according to the Board, undermining the definition of social group as “women”). In *Aguirre-Cervantes* there was a close fit between the group and the victims of persecution—the abuser’s immediate family.

Other courts and other jurisdictions may resist following the *Aguirre-Cervantes* approach because it appears to transmute any domestic violence case that is not prevented by the state into a refugee claim—irrespective of the reasons for the failure of state protection. In abuse cases alleging a particular social group based on gender, the applicant normally identifies social values and norms that tolerate abuse of women that underlies both the actions of the abuser and the lack of protection by the state. That is, women as a class are devalued, deemed not entitled to equal protection by the state from violence. In *Aguirre-Cervantes*, however, it would be hard to conceive of proof that a society devalues family life. Perhaps it is the social construction of family—with a male head who is free to treat members of the family as he chooses without intervention from the state—that is the key to the case. Thus, the court cited evidence that domestic violence is widely condoned in Mexico, that the state is either unwilling or unable to stop it, and that the state apparently gives “tacit approval of a certain measure of abuse.”

¹⁴⁰ Cf. *Aguirre-Cervantes v.INS*.

B. Persecution by non-state actor who victimizes members of applicant's family

Mrs. S and her children have received death threats from criminals to whom her husband owes money. The family lives in an area where the government cannot exercise effective control over criminal syndicates.

As in the prior hypothetical, family may constitute a particular social group. The difficult issue in this case is whether the family may assert a valid claim even if the criminal group's relationship with the husband is not related to one of the Convention grounds. (Compare, for example, the classic case of a state threatening a dissident's family in order to deter the dissident's activities.¹⁴¹) The Australian Federal Court has found the family cognizable as a social group in such circumstances, rejecting a lower court's conclusion that the dispute was personal because "the main target of the persecution falls outside the scope of the Convention."¹⁴²

3. Chinese coercive family practices

Mr. and Mrs. C fled China after the birth of their second child. They assert that they have been threatened with involuntary sterilization by local Chinese authorities.

¹⁴¹ For a review of German cases on this point, see Fullerton, 4 Geo. Immig. L.J at 428-37.

¹⁴² *Minister for Immigration and Multicultural Affairs v. Sarrazola*, [1999] FCA 1134, 1999 AUST FEDCT LEXIS 667. cf. Dutch decs that generally recog harm to family member to get at other member, Skilj at 120.

Applicants claiming refugee status based on a fear of coercive family practices have generally been unsuccessful.¹⁴³ The cases express a number of concerns. First, while not condoning forced abortion or sterilization, courts and administrative agencies have tended to view population control measures as permissible social policies—that is, they are not inherently persecutive. Second, reports of actions taken by local officials may be deemed to be isolated incidents; thus, claims may fail for not establishing a *well-founded* fear of persecution.¹⁴⁴ No doubt adjudicators have also been influenced by the fact that the majority of applicants are males from regions in China that have traditionally sent migrants abroad.

Most important for present purposes, adjudicators are hesitant to conclude that persons who object to a general social policy constitute a particular social group. Such persons are not affiliated as a group, nor—it is found—are they identified as a group by society at large. The clear underlying concern here is that a rule not be affirmed that would recognize ordinary criminals as a social group, who allegedly might be deemed to be affiliated by their violation of general state policies.

Applicants have sought to distinguish ordinary criminals by noting that the coercive family planning cases assert punishment for the exercise of fundamental human rights (such as the right to be free from egregious bodily intrusions and the right to determine one's family). This links up with the second *Ward/Acosta* category encompassing characteristics fundamental to human dignity. That is, a social group might be asserted as

¹⁴³ See *Chang (US)*, Applicant A (Australia); cf. *Chan (Canada)*. Importantly, the *children* of two-child families have been deemed to constitute a particular social group. See *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, 170 A.L.R. 533 (2000) (so-called “black children”). Moreover, applicants may be able to state claims based on persecution for reasons of religion or political opinion.

¹⁴⁴ Cf. *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 (fear of forced sterilization not objectively well-founded).

constituted by persons united in their assertion of fundamental human rights.¹⁴⁵ The problem with this analysis, however, is that it would appear to replace the individual Convention grounds with a single ground protecting all persons whose human rights have been violated (with a social group designated for each right violated—or perhaps for all persons whose human rights are violated in a particular society). This kind of general non-refoulement principle might well be an admirable advance for human rights protection, but it clearly goes beyond the intent and scope of the Convention.

But adjudicators should pause before leaping to the conclusion that opponents of China’s family planning practices may never constitute a social group. Adoption of the approach suggested above would require examination of whether persons who have had two children or who have asserted a human right to do so have been perceived to be a social group in China. In this inquiry, the fact of persecution might support the recognition of a social group—without running afoul of the rule that the persecution cannot define the group. That is, coercive state action may be perceived by the society at large as affirming the idea that those who oppose the policy are enemies of the state. Indeed, the severity of the human rights abuse underscores the statement being made by the state—as if the state were saying: “these people’s conduct transgresses social norms to such an extent that it is justifiable that we violate their fundamental human rights.” (Even if the punishment inflicted did not include forced abortion or sterilization, it might still help to identify violators as a pariah group in Chinese society.) In sum, the relevant question in the Chinese coercive family planning cases ought to be whether those who oppose the policy are perceived to be a group apart in China. This would be so whether or not the group is “cohesive” or whether or not the members of the group voluntarily affiliate with each

¹⁴⁵ See La Forest J. dissenting in *Chan*, at 642-46.

other. It is sufficient that the group is recognized as a group in society so that any person with the characteristic that defines the group is seen as a member of the group. If so, then action taken against them that violates fundamental human rights ought to be understood to be persecution inflicted for reasons of their membership in a particular social group.

This example demonstrates the way in which the proposed approach charts a middle course—neither concluding that all persons who suffer human rights abuses receive Convention protection on social group grounds nor automatically ruling out claims brought by those who oppose general social policies. It avoids the untoward consequences of a *Sanchez-Trujillo* approach, and also does not require a stretched application of the protected characteristics test in order to provide protection appropriate under the Convention.

4. Spouse abuse

Mrs. T., who had been beaten many times by her husband, told him that she wants a divorce. He has thrown her out of the house and told her that he will not consent to a divorce. Although they no longer live together, the husband continues to harass the wife. Her appeal to local authorities have brought no assistance; under the social norms of the state, the husband is free to discipline a wife who has abandoned the home.

No set of cases has tested the social group ground as much as claims involving spouse abuse. Although domestic violence claims were virtually non-existent two decades ago, they now are brought with increasing frequency in many jurisdictions. These claims

raise difficult issues of the interpretation of both membership in a particular social group and the nexus requirement. Adjudicators—aided by officially promulgated guidelines relating to gender-based refugee claims¹⁴⁶—have shown a general willingness to entertain such claims, but the reasoning of the cases differs substantially across jurisdictions.

The precise definition of the social group has been a particular difficulty.¹⁴⁷ Cases have considered groups defined as women, married women, women who express opposition to abuse, and women married to abusive husbands. The protected characteristics and social perception approaches both might recognize *women* as the appropriate group. This was the conclusion of a majority of the Lords in the important *Islam* and *Shah* decision. It might be objected that this definition fails because not all members of the group are at risk.¹⁴⁸ However, as noted by Lord Steyn in *Islam* and *Shah*, this would be an inappropriate limitation on the class; the relevant question is not whether all members are subject to risk but whether the membership of the applicant in the group is the basis for *her* fear of persecution. Another objection to definition of the class as *women* could be based on the idea that an abuser might well have targeted his wife for abuse because she is a woman but rather because she is married to him (or because he is simply an abusive person). But this reasoning seems open to question, once the analysis is expanded to take into account social norms. It may well be that broader norms in society, in essence, license abuse of women by neither stigmatizing the persecutor nor insisting that the state take action to prevent it. In such a case, the abuse suffered by the applicant seems plainly to befall her because she is a woman.

¹⁴⁶ Australia, Canada, U.S.

¹⁴⁷ See Goldberg, “Any place but Home.”

¹⁴⁸ This was the argument of the Counsel for the Secretary of State in *Islam* and *Shah*. See judgment of Lord Steyn.

Some adjudicators have been more comfortable with the category of *married women*, perhaps because it more narrowly identifies the group of persons likely to suffer abuse. That is, an abusive husband may not persecute women on the street, but might well abuse any woman to whom he is married.

Under the proposed approach, it could be appropriate for adjudicators to identify either *women* or *married women* as a particular social group—it is hard to imagine a society in which these groups are not widely recognized as sharing a distinct and socially relevant characteristic. (Both groups would also likely be recognized under the protected characteristics approach.) The question would then be whether the applicant could demonstrate that the persecution was suffered for reasons of belonging to this group. As the “nexus” discussion above noted, this could be established in two ways. Either the applicant could show that the abuser persecuted her because of her membership in the particular social group (and that the state was either unable or unwilling to prevent the abuse) or she could show that, whatever the motives of the abuser, the state was *unwilling* to prevent the abuse because of her membership in the defined group.

Admittedly, this analysis is at odds with the B.I.A.’s decision in *Matter of R.A.*, but that judgment seems open to serious question—as indicated by the proposed INS rules and the ruling of the U.S. Attorney General vacating the Board’s decision and remanding the case to the Board for reconsideration once the INS promulgates a final rule. There is no justification for a requirement that an applicant prove that her abuser would abuse all women (or married women). Again, the issue for investigation is whether the applicant is at risk because of circumstances she is in and whether her membership in a group that puts her at risk.