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ARTICLES

QUEER CASES: A COMPARATIVE ANALYSIS OF GLOBAL SEXUAL ORIENTATION-BASED ASYLUM JURISPRUDENCE

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I. INTRODUCTION

American scholars have produced a substantial body of legal periodical literature on domestic sexual orientation-based asylum jurisprudence. But few articles have ventured beyond casual mention of the parallel jurisprudence developing in at least a dozen other nations.¹ This is quite understandable given the fact that most asylum adjudications are decided at an administrative level and are rarely published.²

At the same time, however, there appears to be a growing trend among tribunals, policymakers, and commentators toward looking abroad for guidance on interpretation and application of relevant international instruments.³ This trend has several important effects. First, it helps the adjudicator

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1. For a notable exception see Ellen Vagelos, Comment, *The Social Group That Dare Not Speak Its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status? Comment on Re: Inaudi*, 17 *FORDHAM INT'L L.J.* 229 (1993) (arguing for U.S. adoption of the logic in a prominent Canadian case granting asylum to a gay man).

2. In most countries, only the decisions of the highest appellate administrative tribunal or reviewing judicial body are published. Even these are often only selectively published. Nonpublication may be a result of resource constraints or concern for the confidentiality of refugees, but may also be motivated by restrictionist impulses. For instance, an American Board of Immigration Appeals member has admitted that the Board deliberately avoids publishing successful asylum claims in order to keep a successful "blueprint" of arguments inaccessible to potential applicants. Derek Smith, *A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 *VA. L. REV.* 681, 706 (1989).

3. Arthur C. Helton, *The Use of Comparative Law and Practice Under the International Refugee Treaties*, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS* 9 (Geoffrey Coll & Jacqueline Bhabha eds., 1992); Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 *SAN DIEGO L. REV.* 739, 747-50 (1989).

formulate a coherent approach to relatively novel claims. Insight into how other legal systems approach a novel problem not only encourages creativity, but also reveals the advantages and disadvantages of particular solutions.⁴ Second, comparative analysis focuses the adjudicator on the international context of refugee law—the relevant treaties and the universal human rights obligations they embody. This is particularly important in an era of increasing restrictionism by major Western nations.⁵ Finally, a comparative perspective encourages harmonization of asylum doctrine both internally, i.e., between domestic tribunals, and transnationally. Internal consistency is fundamental to systemic legitimacy and accountability. Transnational consistency is increasingly important in a global economy that emphasizes freedom of movement, international cooperation, and equal sharing of perceived humanitarian “burdens.” Harmonization is particularly essential for protection of refugees who have contact with more than one jurisdiction, and are shifted around under laws regarding “first asylum.”⁶

Although the first queer⁷ asylum claims were decided as early as 1981,⁸ a global comparative analysis of such claims would have been impossible until quite recently. Enough decisions have now been adjudicated in sufficient jurisdictions to provide the critical mass necessary for meaningful comparison. This Article collects thirty asylum decisions from the four nations in which the majority of published decisions have been adjudicated.⁹ Compari-

4. Arthur T. von Mehren, *The Comparative Study of Law*, 67 TUL. CIV. L. F. 43, 47 (1991-92).

5. Restrictionism is discussed, *infra* Section II.A.

6. The debate over “first asylum,” the practice by which nations refuse refugees who have prior contacts with other countries by strictly applying jurisdictional guidelines, is beyond the scope of this Article. A major concern is that even countries with legitimate asylum mechanisms will send refugees back to an intermediate country with inadequate procedural or substantive protections, thus indirectly violating the principle of non-refoulement. Jacqueline Bhabha, *European Harmonisation of Asylum Policy: A Flawed Process*, 35 VA. J. INT'L L. 101, 111-12 (1994).

7. The word “queer” is neither meant to provoke a reaction from those that find it radical or vulgar, nor as a statement about the inadequacy of other available terms, such as gay, gay man, lesbian, bisexual, sexual minority, or transgendered person. While I certainly mean for the term to include all of the latter groups, and “queer” provides a convenient shorthand, the choice is more principled. A “queer asylum” claim is more than an asylum application by a queer person; it is an asylum claim based on *persecution on account of being queer or being perceived as being queer*. In my research, I have found an overwhelming global trend in English and even non-English sources toward classification of these cases as “queer asylum” claims—often in conjunction with “queer immigration,” or “QI” sources. To preserve this level of international coordination and emphasize the connectedness of asylees with other queer migrants, I will use this term henceforth. I realize that using the term “queer” may gloss over very real differences in the types of persecution faced by groups of individuals, particularly along the axis of gender and gender identity. In discussing cases below, however, I hope to do justice to these distinctions. For a more precise definition of the categorical terms I hope to subsume in the word queer, see Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605, 605 n. 1 (1993).

8. A sexual orientation-based asylum application was rejected in 1981 in the Netherlands. Judgement of Aug. 13, 1981, Afd. Rechtspr. [Jud. Commission of the Council of State] no. A-2.1113, Rechtspraak Vluchtelingenrecht No. 5, 1981.

9. I have chosen to focus on the United States, Canada, Australia and the United Kingdom because their common law legal systems have encouraged greater publication of cases which are reported in English. Similar developments can, however, also be found in Germany, Sweden and the Netherlands. Primary materials and analysis of these cases are often available from the International Gay and Lesbian Human Rights Commission.

son reveals a wide diversity of interpretation, application, and outcome both within jurisdictions and among nations.

The primary aim of this Article is to enable the reader to compare the queer asylum jurisprudence of several nations and to understand the issues and solutions debated in each jurisdiction. Comparative law, as used here, is meant in the elementary sense of comparing the interpretations and applications of asylum law to a novel group of claims, rather than in the more ambitious sense of attempting to reconcile disparities or to fully understand the systemic and cultural underpinnings of the decisions.

Part II of this Article discusses the terms of the U.N. Convention refugee¹⁰ definition that are most susceptible to variable interpretation and application in queer asylum cases. These include choosing among the five grounds listed in the refugee definition, defining a social group, defining persecution, evaluating evidence, and incorporating universal human rights standards. Part II also takes a brief look at other implications of divergent outcomes and adjudicatory discretion.

In Part III, I survey queer asylum cases in the United States, United Kingdom, Canada, and Australia. In addition to offering a doctrinal comparison, this section should provide needed access to a poorly distributed body of jurisprudence. Although few of these cases have precedential effect, they should nonetheless be very influential to tribunals seeking to promote consistent and principled decision making.

II. ISSUES OF DISHARMONY

At the time of writing, 131 nations are parties to the 1951 Convention¹¹ or the 1967 Protocol Relating to the Status of Refugees.¹² These widely accepted international instruments provide common ground by defining the

10. I use the term "Convention refugee" here to emphasize that this Article deals primarily with those refugees falling under the refugee definition delineated in the 1951 Convention. See *infra*, note 11. Many nations recognize other types of refugees under regional agreements or discretionary refugee policies, which may afford additional protection. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 21-27 (1991) [hereinafter HATHAWAY]. Many discretionary and *de facto* refugee programs have recently been eliminated. The reader should nonetheless be aware that alternative protections may still be available for asylum seekers who fail to satisfy the Convention refugee definition.

11. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

12. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. As of June 30, 1995, 125 States were parties to the 1951 Convention, 125 were parties to the 1967 Protocol, and 121 were parties to both. *Status of Ratifications to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, 14 REFUGEE SURV. Q. 259 (Summer 1995). In September 1995, Antigua and Barbuda acceded to the 1967 Protocol. DEP'T ST. DISPATCH, Special Issue, Summer, 1995. The 1967 Protocol incorporates the substantive provisions of the earlier treaty and extends the 1951 Convention beyond its former geographic and temporal limits. 1967 Protocol, Art. I(2)-(3). For the purposes of this Article, this distinction is unimportant. All of the States discussed are parties to both instruments, with the exception of the United States, which is a party to the 1967 Protocol only. For more detailed information on ratification and reservations, see UNITED NATIONS, OFFICE OF LEGAL AFFAIRS, TREATY SECTION, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 208-21 (1951 Convention) & 230-34 (1967 Protocol) (1995).

term "refugee"¹³ and establishing the principle of *non-refoulement*, which prohibits party states from returning a refugee to a country "where his life or freedom would be threatened" on account of one of the five grounds listed in the refugee definition.¹⁴ In addition, the Office of the United Nations High Commissioner for Refugees (UNHCR) has drafted a handbook that attempts to flesh out the meaning of these central provisions, offering the basis for intergovernmental consensus on many interpretation issues.¹⁵

Each party to the 1951 Convention or 1967 Protocol is responsible for domestic legislation and implementation of the treaty framework. Tribunals in each jurisdiction decide asylum cases according to the domestic refugee regime. Because the domestic framework typically incorporates the relatively imprecise international definitions with little amendment or further comment, international and foreign interpretations are of obvious value in interpretation and application. Normally, however, tribunals look first to domestic judicial, legislative, and executive interpretations, which are more easily influenced by national economic and social interests. This tension between international obligations and national responsibilities has led to divergent and dissonant interpretations of fundamental elements of the refugee definition.

A. *What Causes Disharmony?*

Western asylum law is in a state of crisis. Most Western refugee tribunals are over-burdened and backlogged, contributing to a perception of inefficiency, or efficiency only at the cost of procedural and substantive fairness.¹⁶ There is also a widespread belief that asylum applicants are abusing the system by claiming persecution on one of the five Convention grounds, when in truth they are fleeing economic blight.¹⁷

13. The term "refugee" applies to "any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, . . . is unable or, owing to such fear, is unwilling to return to it." 1951 Convention, *supra* note 11, art. 1 A (2).

14. 1951 Convention, art. 33, 19 U.S.T. at 6276, 189 U.N.T.S. at 176. *Non-refoulement*, a basic human rights concept, is the lowest level of refugee protection. It is a proscription on return rather than a direction to the receiving government to make a specific response. Individual nations must pass enabling legislation that provides for adjudications and designations such as "asylee," "permanent residency," or, as basic *non-refoulement* is called in the United States, "withholding of deportation." Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897 (1986).

15. OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/IP/4/Eng. Rev. 1 (1988) [hereinafter UNHCR HANDBOOK].

16. Eduardo Arboleda & Ian Hoy, *The Convention Refugee Definition in the West: Disharmony of Interpretation and Application*, 5 INT'L J. REFUGEE L. 66, 73-75 (1993).

17. *Id.* For another perspective, see LAWYER'S COMMITTEE FOR HUMAN RIGHTS, THE UNHCR AT 40: REFUGEE PROTECTION AT THE CROSSROADS (1991).

As a result, most Western nations have, to varying degrees, sought to restrict the number of asylum applications considered and granted.¹⁸ This restrictionism may take the form of strict jurisdictional rules for considering asylum applications that disregard the ultimate fate of the applicant,¹⁹ summary procedures for adjudication of asylum claims,²⁰ or detention of asylum-seekers pending status determination.²¹ But it can also take the more subtle form of unduly restrictive interpretation of the Convention refugee definition. In particular, refugee tribunals may seek to narrow the definition of persecution, raise the standard of proof for demonstrating fear of persecution, or severely limit the content of the five grounds under which a Convention refugee must state her claim. In addition, tribunals may choose to ignore human rights instruments which might have a bearing on the determination. Finally, the fact that most systems allow the adjudicator to exercise some degree of discretion means that determinations may be more susceptible to prejudices against historically unpopular groups of asylum applicants, such as queer refugees.

B. *Are Queers Convention Refugees?*

The 1951 Convention does not protect all of the world's refugees, regardless of the extent of their misery. Rather, it defines refugees as individuals in need of surrogate protection from a state other than their home state. There must be a nexus between the individual's perilous situation and her sociopolitical marginalization at the hands of government authorities or private actors whom the government is unwilling or unable to control.²² For this reason, the 1951 Convention limits the refugee definition to individuals experiencing persecution relating to one of five independent grounds: race, religion, nationality, membership of a particular social group, or political opinion.²³ Three of these grounds—religion, political opinion, and social group membership—may be particularly relevant to queer asylum claims. Asylum applicants may base their claim upon any combination of these grounds.

Although I am unaware of any queer asylum cases based on religious persecution, such a claim might be viable where homosexual status conflicts

18. See T. Alexander Aleinikoff, *The Refugee Convention at Forty: Reflections on the IJRL Colloquium*, 3 INT'L J. REFUGEE L. 617 (1991); Bruce C. Bailey, *Conflicting Trends in Western European Refugee Policies*, in REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 55, 61 (Ved P. Nanda ed., 1989). For a detailed analysis of Western European restrictionism, see Maryellen Fullerton, *Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights*, 29 VA. J. INT'L L. 35 (1988).

19. See generally Bhabha, *supra* note 6.

20. *Id.* at 43-44. For specific examples of summary adjudication legislation, see Fullerton, *supra* note 18, at 45-49 (Belgium), 80-82 (Netherlands).

21. DANIELE JOLY, REFUGEES: ASYLUM IN EUROPE 41-42 (1992).

22. HATHAWAY, *supra* note 10, at 136-37.

23. 1951 Convention, *supra* note 11, art. 1A (2).

with conventional religious doctrine, compliance with which is enforced by state or private actors. Religious rights under international law include both the right to adhere to any theistic or atheistic religion and the right to conform one's behavior to one's religious beliefs.²⁴ Queer individuals may be perceived and persecuted as atheists or members of minority religious groups.²⁵ They may be barred from membership in a religious community or from worshiping in public places. They might also be punished for not following the formal requirements of their religion, which may, for instance, include abstinence from sexual interaction with individuals of the same sex.

Prosecution for illegal behavior under religiously-motivated laws might not suffice, however. Religious behavior may generally be curtailed in order "to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."²⁶ For example, prosecution for homosexual sodomy in a Catholic state would likely be justified as a moral regulation, rather than persecution on account of religion. Excessive punishment or selective prosecution for such offenses, or religiously-inspired persecution for the status of being queer could, however, be grounds for refugee status.²⁷

More frequently, queer refugees can show that their persecution was based on political opinion. Queer asylum-seekers need not be politically affiliated activists to experience or claim persecution on the ground of political opinion.²⁸ First of all, the political opinion of the refugee need not have been expressed or acted upon while she was still living in her home country.²⁹ It may be enough that a queer refugee has strongly held beliefs that would have eventually led her into conflict with the persecutor³⁰ or would now subject her to persecution, if returned, because her opinion has since come to the attention of the persecutor by direct expression or by implication from the fact of her flight.³¹ More importantly for many queer refugees, many countries accept that political opinion may also be imputed.³² In other words, a refugee may not think of his sexuality as a political matter or hold strong beliefs about "gay rights," but may nonetheless be seen by the persecutor as a political actor by virtue of being queer. The very existence of queers may be seen as an anathema to state policies or as a certain sign of disloyalty to the government.³³

24. HATHAWAY, *supra* note 10, at 145-46.

25. Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 60, 64 (John C. Gonsiorek & James D. Weinrich eds., 1991).

26. International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171, art. 18 [hereinafter ICCPR].

27. *See infra*, Section II.D, for more on the act/status and prosecution/persecution distinctions.

28. HATHAWAY, *supra* note 10, at 149.

29. *Id.* at 149-52; UNHCR HANDBOOK, *supra* note 15, ¶¶ 82 & 83.

30. UNHCR HANDBOOK, *supra* note 15, ¶ 82.

31. *Id.* ¶ 83. *See also id.*, ¶¶ 94-96 (describing the status of refugees "sur place").

32. *See* HATHAWAY, *supra* note 10, at 152-57.

33. *See* UNHCR HANDBOOK, *supra* note 15, ¶ 78.

An additional distinction must be made between persecution and prosecution for violating a generally applicable law. As a general proposition, the object of prosecution may only claim persecution if the law is pretextual, is selectively enforced, or is accompanied by excessive punishment.³⁴

C. *Are Queers Members of a Particular Social Group?*

Most of the initial queer asylum opinions in each jurisdiction primarily addressed not whether queers experienced a well-founded fear of persecution in their home countries, but whether queers could constitute a particular social group. At least ten countries now consistently accept that gay men and lesbians comprise a social group within the meaning of the Convention's definition of refugee.³⁵ This fact, however, disguises the significant degree to which each nation varies in its interpretation of the social group concept.³⁶ The means by which each country has arrived at its acceptance of queer asylees influences the persuasive effect on tribunals in other countries, the likelihood of a higher authority reversing the general policy, and the extension of the social group class to other possible candidates, such as women or HIV-positive individuals.

The social group category was given very little content by the 1951 Convention that introduced it and the *travaux préparatoires* to the Convention shows that the idea was somewhat of an afterthought, adopted with little debate or comment.³⁷ The category was virtually dormant in jurisprudence and scholarly commentary until the early 1980s, when prominent commentators and courts began to explore its potential use.³⁸ The UNHCR Handbook, which says that a " 'particular social group' normally comprises persons of similar background, habits or social status,"³⁹ offers little guidance in determining the contours of the category. At most, this sets a minimal threshold for social group—a requirement that the group has some quantum of similarity or cohesion that makes it an identifiable "group." I will refer to this concept as "group identity." The cases in Part III should suggest that this threshold is very low indeed, and that tribunals that have attempted to focus

34. *Id.*, ¶¶ 84-86. This distinction is developed further *infra* Section II.D.

35. The countries are: Australia, Austria, Canada, Denmark, Finland, Germany, Ireland, the Netherlands, New Zealand, Sweden, and the United States. International Lesbian & Gay Association, *Queer Immigration: Countries That Accept Homosexuals Are a Distinct Social Class*, available on the World Wide Web at <http://www.qrd.org/qrd/www/world/immigration/asylumc.html>. I use the words "gay men and lesbians" to emphasize that the inclusion of transgendered persons in the social group framework is likely but, with the exception of Canada, unclear. See *infra*, Section III.B (discussing two Canadian cases).

36. For an excellent comparative review of jurisprudence and scholarly commentary interpreting the social group concept in the United States, Canada, and Germany, 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 (1993).

37. *Id.* at 509.

38. *Id.* at 514.

39. UNHCR HANDBOOK, *supra* note 15, ¶ 77.

on group cohesion and identity have failed to invent persuasive tests for the social group nexus.

Some of the earliest attempts to outline the content of the social group category debated whether "membership of a particular social group" was meant as a miscellaneous category or, instead, was intended to have finite and definable content. An American scholar, Arthur Helton, has argued that the meaning of "membership of a particular social group" was intentionally left ambiguous, to leave ample room for expansion to unanticipated future refugee groups.⁴⁰ This residual category would function as a "catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up."⁴¹ By surveying sociological literature and American social group jurisprudence, Maureen Graves reached a similar conclusion.⁴² She finds efforts to limit the social group category arbitrary and has argued for a liberal, common sense definition applied on a case-by-case basis.⁴³ Not surprisingly, many scholars and tribunals have rejected this broad "safety net" interpretation as essentially boundless.⁴⁴ Such an interpretation would seem to eliminate the need for any enumeration of grounds, or for a nexus requirement at all. The question, then, becomes one of identifying the limitations on the social group class. The most persuasive and enduring approaches seem to fall into one of two categories, or a combination of the two.

One approach, which I will call the "control test," grows out of the principle of *ejusdem generis*, which says that the meaning of an enumerated item in a list of items should be construed consistently with the meaning of the accompanying items.⁴⁵ "Membership of a particular social group" should share the same basic characteristics as race, nationality, religion, and political opinion. The unifying principle is typically summarized as immutability, innateness, or involuntariness.⁴⁶ In other words, each of the five grounds is either literally uncontrollable or so fundamental to the refugee's identity, dignity, or conscience as to be uncontrollable in a society that protects basic human rights.⁴⁷ This approach finds its roots in Atle Grahl-Madsen's famous two volume treatise,⁴⁸ and has been widely popularized by the American Board of Immigration Appeals decision in *Matter of Acosta*,⁴⁹ and refined by James Hathaway's book⁵⁰ and the Canadian Supreme Court's

40. Arthur Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 42-45 (1983).

41. *Id.* at 45.

42. Graves, *supra* note 3, at 787-92.

43. *Id.* at 795-96.

44. *E.g.*, HATHAWAY, *supra* note 10, at 158-60; *Canada (Attorney-General) v. Ward*, 2 S.C.R. 689 (Can. 1993).

45. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

46. *See, e.g., id.*

47. HATHAWAY, *supra* note 10, at 161.

48. ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 217-19 (1966).

49. *See Matter of Acosta*, I & N Dec. 211; *see also infra* notes 151-53 and accompanying text.

50. HATHAWAY, *supra* note 10.

decision in *Canada (Attorney-General) v. Ward*.⁵¹ Although the innateness and immutability of sexual orientation and identity are not entirely settled as a scientific or sociological matter,⁵² we will see in Part III that, in practice, most tribunals have found this test quite favorable to queer asylum seekers.

The other major school of analysis, which I will call the "social context test" looks not just at the social identity of the persecuted group but also at the way in which the rest of society, and the persecutor, as a function of that society, perceive the target group. This contextual perspective asks about the "cultural resonance" of a particular social grouping.⁵³ Professor Guy Goodwin-Gill has argued that negative societal attitudes toward certain subsets of the population often indicate the existence of a persecuted social group, regardless of the numerical prevalence of that group.⁵⁴ He urges tribunals to focus not only on factors that unify an alleged social group, but also on traits that distinguish the group from the rest of society and contribute to its targeted status.⁵⁵

Social context can take many forms. Most obviously, the existence of a social group is revealed by evidence of widespread discrimination against that group. Discrimination against those identified as queer is pervasive in nearly every nation of the globe.⁵⁶ Although discrimination may not always rise to the level of persecution,⁵⁷ it should provide strong evidence of a cognizable social group. In a similar vein, legal distinctions can inform the existence of a social group. Thus, laws that disfavor queers on the basis of their status, including commonplace laws which exclude gay men and lesbians from immigration, prohibit them from serving in the military, or fail to recognize their marriage to a partner of the same sex, all indicate state recognition of a meaningful social group.⁵⁸ Finally, the historical permanence of persecution and discrimination against queer people is well-documented. This shared history gives additional weight to the social meaning of queers as a social group. The experience of queers in the Holocaust⁵⁹ has proven particularly persuasive evidence of social group status for tribunals in Germany and Canada.⁶⁰

51. See 2 S.C.R. 689; see also *infra* notes 228-33 and accompanying text.

52. Larry Kraus, *Sexual Orientation as the Basis for Membership in a Particular Social Group*, at 20-28 (May 10, 1993) (unpublished paper on file with author).

53. T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 945 (1992).

54. GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 30-31 (1983).

55. *Id.*

56. See Goldberg, *supra* note 7, at 615-16. For a discussion of global discrimination at greater length see *infra* notes 72-75 and accompanying text.

57. See *infra* notes 72-75.

58. See, e.g., Parish, *supra* note 53, at 949-50 (arguing that the past exclusion of gay men and lesbians under U.S. immigration law gives them a strong claim to social group status under U.S. asylum law).

59. See generally HEINZ HEGER, *THE MEN WITH THE PINK TRIANGLE* (1980); RICHARD PLANT, *THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS* (1986); HIDDEN HOLOCAUST: *GAY AND LESBIAN PERSECUTION IN GERMANY 1933-1945* (Gunter Grau ed. 1995).

60. Ryan Goodman, Note, *The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary "Medical" Intervention*, 105 YALE L.J. 255, 262-63 (1995). See *infra* notes 235-39 and accompanying text.

D. *What is Persecution?*

The word "persecution" is difficult to define in a universal way.⁶¹ The term must, at a minimum, include a "threat to life or freedom," as used in Article 33 of the 1951 Convention, which prohibits *refoulement*.⁶² But it is generally agreed that the concept of persecution is broader than this, encompassing "[o]ther serious violations of human rights"⁶³ and "other prejudicial actions or threats"⁶⁴ such as severe discrimination⁶⁵ and excessive punishment.⁶⁶ Alex Aleinikoff proposes a simpler criterion—that the "harm imposed must be of a serious nature" rather than a "minor inconvenience."⁶⁷ Because the determination of persecution depends a great deal on the circumstances of a particular case,⁶⁸ the unfamiliar reader should consult Part III for particular fact patterns and determinations. However, a few general principles should be kept in mind.

First, it is important to establish the identity of the agent of persecution. Although the traditional model of refugee law tends to focus on official persecution by government authorities, the 1951 Convention does not limit the concept of persecution to the actions of state officials.⁶⁹ UNHCR and most parties to the Convention agree that refugees may also fear persecution at the hands of private actors, whose actions the government is unwilling or unable to control.⁷⁰ Both forms of persecution against queers are quite common in many countries.⁷¹ Examples of official persecution include police harassment and torture, involuntary medical treatment, and prosecution under laws making queer status or sexual acts illegal. Instances of private

61. UNHCR HANDBOOK, *supra* note 15, ¶ 51. *See also* Goodwin-Gill, *supra* note 54, at 40 ("[t]here being no limits to the perverse side of human imagination, little purpose is served by attempting to list all known measures of persecution.").

62. UNHCR HANDBOOK, *supra* note 15, ¶ 51; *Desir v. Ilchert*, 840 F.2d 723, 726 (9th Cir. 1987).

63. UNHCR HANDBOOK, *supra* note 15, ¶ 51.

64. *Id.* ¶ 52.

65. *Id.* ¶ 54.

66. *Id.* ¶ 57.

67. T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 12 (1991).

68. UNHCR HANDBOOK, *supra* note 15, ¶¶ 52-53.

69. *Id.*, ¶ 65; Rupert Colville, *Persecution Complex*, REFUGEES, Mar. 1995, at 16, 18.

70. Colville, *supra* note 69, at 17-20. In several countries, however, including Germany and Sweden, jurisprudence has developed which rejects the actions of non-state agents as persecution falling within the refugee definition, particularly where the government is unable, rather than unwilling, to control vigilantism. *Id.* at 17. For a helpful discussion of government complicity doctrine in the United States, see Jin S. Park, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy*, 42 UCLA L. REV. 1115, 1137-40 (1995).

71. *See generally* Rob Tielman & Hans Hammelburg, *World Survey on the Social and Legal Position of Gays and Lesbians*, in THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 249 (Aart Hendriks et al. eds., 1993); AMNESTY INTERNATIONAL USA, *BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION* (1994) [hereinafter *BREAKING THE SILENCE*]. These important human rights reports on the global persecution of queers are a major source of documentary evidence for queer asylum seekers. The fact that they are regularly referred to in the cases described in Part III demonstrates their importance and authoritative force for tribunals considering queer asylum claims.

persecution sanctioned or ignored by governments include the activities of paramilitary "death squads" and more loosely organized vigilante groups that target queers for assault, torture, rape, or murder.

One question that often arises is whether state or private discrimination against queers can rise to the level of persecution. Discrimination against queers is pervasive in most societies.⁷² A 1988 human rights survey found only eight countries in which a majority of a societal sample favored equal rights for lesbians and gay men as a general proposition.⁷³ Of the remaining ninety-two countries about which there was adequate information, less than half demonstrated even minimal support for gay rights.⁷⁴ State discrimination is also common in the form of exclusions from such benefits as immigration, military service, public employment, and marriage recognition, and in the failure of police to protect queers from private discrimination.⁷⁵

The UNHCR Handbook recognizes that discrimination may amount to persecution where it "lead[s] to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities,"⁷⁶ or where it is less serious but nonetheless "produce[s] a feeling of apprehension and insecurity as regards his future existence."⁷⁷ This account sounds more permissive than the corresponding doctrine in most jurisdictions. Because of its pervasiveness, most tribunals are unlikely to accept discrimination as the sole basis of a persecution claim. Instead, they are much more likely to cite incidents of discrimination as cumulative factors that strengthen a persecution claim based on more overt action.⁷⁸

The persecution issue that has most preoccupied tribunals considering queer asylum claims, however, is whether and when state *prosecution* for laws that criminalize homosexual sex acts rise to the level of persecution.

The notion of homosexuality encompasses three distinct ideas,⁷⁹ each of which may occur independently of the other.⁸⁰ First, it refers to sexual

72. See Goldberg, *supra* note 7, at 615-16.

73. INTERNATIONAL LESBIAN & GAY ASSOCIATION, SECOND ILGA PINK BOOK 186, 188-242 (The Pink Book Editing Team eds., 1988).

74. Inadequate information existed for 82 countries. *Id.* See also Kraus, *supra* note 52, at 37.

75. This should be distinguished from *prosecution* under criminal laws. See *supra* notes 86-89, 92-93, 95-106 and accompanying text.

76. UNHCR HANDBOOK, *supra* note 15, ¶ 54.

77. *Id.*, ¶ 55.

78. Kraus, *supra* note 52, at 37-38. See also UNHCR HANDBOOK, *supra* note 15, at ¶¶ 53 (describing the cumulative nature of persecution evidence), 55 (expressly suggesting that discrimination be used to bolster an independent persecution claim).

79. See generally Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 133, 134 (1991); John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation*, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 1-12 (John C. Gonsiorek & James D. Weinrich eds., 1991).

80. Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 943-44 (1989).

activity or a desire for sexual activity with partners of the same biological sex (*sexual behavior*).⁸¹ Second, it identifies the enduring mental and emotional attraction of an individual to a person of the same sex (*sexual orientation*).⁸² Finally, it describes the private identity by which people with the first two traits think of themselves as queer (*sexual identity*).⁸³ In many cultures, queers may also develop a *community identity* in which they associate and form strong social bonds with other queers.⁸⁴ Despite the complexity of sexuality, the public identity of queers is often perceived by society exclusively or primarily in terms of sexual behavior.⁸⁵

Few laws penalize queer status unaccompanied by queer sexual conduct.⁸⁶ Sodomy laws, which provide criminal penalties for queer sexual conduct are, however, still quite prevalent.⁸⁷ At least sixty-seven nations prohibit sex between men and at least twenty-seven forbid sex between women.⁸⁸ Other laws, particularly prohibitions with such nondescript titles as "disorderly conduct," "lewd behavior," or "hooliganism" are also used to harass, detain, and imprison queers.⁸⁹ Because persons who flee from the law are generally considered fugitives rather than refugees,⁹⁰ it is crucial for queer asylum seekers who face prosecution in their home countries to show that the law is (1) pretextual, (2) accompanied by excessive punishment, and/or (3) administered under inadequate or arbitrary procedures.⁹¹

Sodomy laws are typically justified as legitimate regulations of public health or morality.⁹² But enforcement of prohibitions on private, consensual sex are notoriously difficult to enforce, and most commentators agree that the primary motivation of sodomy laws is to oppress and demoralize queers as a group, to justify discriminatory laws that deny queers benefits and equal rights, and to rationalize private discrimination and hostility towards queer

81. See Herek, *supra* note 79, at 134. I use the phrase "biological sex" to emphasize the inclusion of transgendered persons, who typically have sex with a person of the same sex, but the opposite gender.

82. *Id.*

83. *Id.*

84. Goldberg, *supra* note 7, at 613.

85. Herek, *supra* note 79, at 134-35.

86. Because so many people conflate queerness with sexual behavior, however, a declaration that one is gay or lesbian may be taken as conclusive proof of sexual conduct. *Cf. id.*

87. Shannon Minter, Note, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT'L L.J. 771, 801-04 (1989). Such laws may apply only to one sex, to both sexes, only to same-sex partners, or to certain sex acts, such as fellatio or anal sex, regardless of the identity of the participants. *Id.* Many laws are also ambiguously worded, leaving room for significant discretion in their application. *Id.* These laws are, however, typically enforced selectively against queers, particularly gay and bisexual men. See, e.g., Pearson, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811, 846 (1984).

88. Tielman & Hammelburg, *supra* note 71.

89. *Id., passim.*

90. UNHCR HANDBOOK, *supra* note 15, ¶ 56.

91. Asylum applicants may also appeal to international human rights standards. See *infra*, Section II. F.

92. See EDITORS OF THE HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* 12-13 (1989).

people.⁹³ While this seems like persuasive evidence of pretext, not all courts will be convinced.⁹⁴

Additional support for the pretext argument may also be provided by evidence of *selective* prosecution.⁹⁵ Thus, a neutral sodomy law enforced only against same-sex partners may be strong evidence of pretext and of persecution.⁹⁶ Likewise, a pretextual sodomy law prohibiting same-sex sexual conduct might be enforced with zeal far disproportionate to that accorded other morality-based crimes, such as adultery, or with a lower standard of proof.⁹⁷

Excessive penalties for same-sex sexual activity may also amount to persecution, even if the underlying regulation is legitimately enacted.⁹⁸ In countries that enforce the Islamic law, Shari'a,⁹⁹ a fourth conviction for consensual homosexual conduct is grounds for capital punishment.¹⁰⁰ Iran, which has executed several queers in recent years,¹⁰¹ reportedly gives victims a gruesome choice of fates, including stoning, beheading, being thrown off a cliff, and being quartered by horses.¹⁰² Sodomy laws in at least four non-Islamic countries carry a maximum penalty of life imprisonment,¹⁰³ while dozens of others impose sentences as long as twenty years.¹⁰⁴ Still other nations subject offenders to involuntary medical "cures" and "conversion therapies."¹⁰⁵ These penalties have been extremely persuasive evidence of persecution to most of the tribunals that have considered them.¹⁰⁶

Finally, prosecution may constitute persecution if it is applied extrajudicially or without minimal due process, such as an evidentiary hearing and an

93. *Id.* at 11; Richard Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43, 53 (1986-87) ("[U]nenforced sodomy laws are the chief systemic way that society as a whole tells gay men they are scum."); RICHARD GREEN, *SEXUAL SCIENCE AND THE LAW* 55 (1992) (describing a 1974 study that found the primary impact of sodomy laws in several Western countries to be symbolic degradation and demoralization).

94. A prominent example is the U.S. Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting a substantive due process challenge to a Georgia sodomy law despite similar evidence of pretext).

95. Park, *supra* note 70, at 1142-43.

96. *Id.* at 1145.

97. *Id.*

98. See UNHCR HANDBOOK, *supra* note 15, ¶ 57.

99. These countries include Afghanistan, Bahrain, Bangladesh, Iran, Kuwait, Libya, Malaysia, Mauritania, Saudi Arabia, and Yemen. Minter, *supra* note 87, at 803-04 and n.223. See also Park, *supra* note 70, at 1144 n.159.

100. Park, *supra* note 70, at 1144. See also Tielman & Hammelburg, *supra* note 71, *passim*.

101. AMNESTY INTERNATIONAL, *THE 1993 REPORT ON HUMAN RIGHTS AROUND THE WORLD* 162 (1993).

102. Jonathan Mandell, *The New New Yorkers: Homosexual Oppression as a Human Rights Issue, Free to Be Gay Many Arriving Here to Escape Persecution*, NEWSDAY, June 6, 1994, at A15; Park, *supra* note 70, at 1146 n.174.

103. Park, *supra* note 70, at 1144 n.161 (noting that India, Tonga, Trinidad and Tobago, and Guyana all have maximum life sentences for homosexual sodomy).

104. *Id.* at 1144; Tielman & Hammelburg, *supra* note 71.

105. Park, *supra* note 70, at 1144 n.165 (citing such measures in China and Mozambique). Involuntary "medical" treatment of lesbians and gay men is reviewed extensively in Goodman, *supra* note 60, *passim*.

106. See Part III, *passim*.

adequate standard of proof.¹⁰⁷ Police harassment and beating of suspected queers, perhaps the most ubiquitous elements in tales of queer persecution, may also reveal an intent by authorities to persecute rather than to regulate sexual behavior.¹⁰⁸

E. How Do Queer Asylum Seekers Prove Their Claims?

A queer refugee need not have personally experienced past persecution in her home country.¹⁰⁹ She must, however, demonstrate a "well-founded fear of persecution" on account of one of the five nexuses.¹¹⁰ This standard of proof has both a subjective and an objective component.¹¹¹ Although there are subtle, but important, variations, the doctrine surrounding standard of proof is quite similar in practice in each jurisdiction.¹¹² Generally, an asylum applicant establishes her subjective fear by testifying credibly about persecution that she or her queer friends or family have suffered or expect they might suffer and why this fear has made life in her home country intolerable.¹¹³ Jurisdictions vary in the weight they accord this testimony. As a general proposition, courts often deemphasize subjective testimony in favor of objective evidence.¹¹⁴

The objective element is best satisfied by documentation of past persecution or by evidence of human rights abuses against queers in the asylum seeker's home country. Thanks to the intense documentation and dissemination efforts of the International Gay and Lesbian Human Rights Commission (IGLHRC), International Lesbian & Gay Association (ILGA), and Amnesty International, authoritative, objective evidence, and even expert testimony, is increasingly available to corroborate claims of persecution.¹¹⁵ The refugee typically need only show a "reasonable degree of likelihood of persecution or a reasonable chance that the feared events will take place."¹¹⁶ Finally, it is

107. Park, *supra* note 70, at 1141, 1146.

108. *Id.* at 1141-42.

109. Past persecution may, however, provide presumptive evidence of a well-founded fear of future persecution. UNHCR HANDBOOK, *supra* note 15, ¶ 45.

110. 1951 Convention, *supra* note 11, art. 1 A (2); Walter Kälin, *Well-Founded Fear of Persecution: A European Perspective*, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS* 21, 26 (Geoffrey Coll & Jacqueline Bhabha eds., 1992).

111. Kälin, *supra* note 110, at 26-27; UNHCR HANDBOOK, *supra* note 15, ¶ 38.

112. For a thorough review of differences in European law, see Kälin, *supra* note 110. For United States and Canadian tests, see Barbara Jackman, *Well-Founded Fear of Persecution and Other Standards of Decision-Making: A North American Perspective*, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS* 37, 43-49 (Geoffrey Coll & Jacqueline Bhabha eds., 1992).

113. See generally UNHCR HANDBOOK, *supra* note 15, ¶¶ 40, 41 and 43.

114. Kälin, *supra* note 110, at 35. Credibility overall, however, remains an extremely important factor in asylum decisions. Jackman, *supra* note 112, at 56-57.

115. For more information on the origin and limitations on the documentation efforts of these groups, see Park, *supra* note 70, at 1152-53.

116. Kälin, *supra* note 110, at 35. Kälin draws this general conclusion from his analysis of the European trend toward applying a liberal standard of proof, such as that applied by the U.S. Supreme Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and the Canadian Federal Court of Appeal in *Adjei*

important to note that if no documentary evidence is available, most tribunals will base their decision entirely on the credibility, plausibility, and specificity of the refugee's testimony.¹¹⁷

F. *Can Human Rights Instruments Support an Asylum Claim?*

Refugee law, though aspiring to humanitarian norms such as the principle of non-refoulement, is constrained by the terms of the 1951 Convention and its incorporation of basic principles of national sovereignty.¹¹⁸ The Convention framework extends refugee status to only certain categories of those persecuted, namely those whose basic civil and political rights are infringed in a particularly severe way, and who can escape to and enter a foreign nation to request asylum.¹¹⁹ Professor Hathaway maintains that this traditional conception of the international refugee regime is essentially a means of reconciling state sovereignty and national interests with the reality of involuntary migration,¹²⁰ rather than a cohesive scheme for protecting human rights.¹²¹

Professor Hathaway suggests that, in a just refugee system, persecution is "most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community."¹²² Drawing on the framework of the Universal Declaration of Human Rights,¹²³ Hathaway describes a hierarchy of human rights comprising four distinct levels.¹²⁴

The two highest levels of rights are codified in the International Covenant on Civil and Political Rights (ICCPR).¹²⁵ Violations of the most important class of rights, which includes freedom of thought, conscience, and religion, protection from torture, and protection from cruel, inhumane or degrading punishment, necessarily rise to the level of persecution.¹²⁶ The second echelon includes the remaining rights expressed in the ICCPR, such as the

v. M.E.I., 7 Imm. L.R.(2d) 169 (Fed. Ct. 1988). *Id.* at 30-32. Under *Cardoza-Fonseca*, for instance, there "need be as little as a ten-percent chance that persecution will actually occur." 480 U.S. at 431.

117. See, e.g., HATHAWAY, *supra* note 10, at 84; Blanco-Comarribas, 830 F.2d 1039, 1042 (9th Cir. 1987). See also Kälin, *supra* note 110, at 33-34 (describing doctrinal disparity among European countries on this issue, but describing actual practice as less demanding of corroboration).

118. See LAWYERS COMMITTEE FOR HUMAN RIGHTS REFUGEE PROJECT, THE HUMAN RIGHTS OF REFUGEES AND DISPLACED PERSONS: PROTECTIONS AFFORDED REFUGEES, ASYLUM SEEKERS AND DISPLACED PERSONS UNDER INTERNATIONAL HUMAN RIGHTS, HUMANITARIAN AND REFUGEE LAW 2-3 (1991) [hereinafter HUMAN RIGHTS OF REFUGEES].

119. James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113-21 (1991).

120. *Id.* at 113.

121. *Id.* at 113-21, *passim*.

122. HATHAWAY, *supra* note 10, at 112.

123. *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

124. HATHAWAY, *supra* note 10, at 108-11.

125. *Id.* at 108-10; ICCPR, *supra* note 26.

126. HATHAWAY, *supra* note 10, at 109.

right of privacy, right to equal protection, and freedom of association.¹²⁷ A breach of these rights may be persecutory if the degree of restriction extends beyond what is necessary to address a public emergency or risk to national security, or if its impact disproportionately burdens a segment of the populace.¹²⁸

Interference with the two lowest levels of human rights is only persecutory if the resulting deprivation is so severe as to be tantamount to cruel, inhumane, or degrading treatment.¹²⁹ The higher (third) level includes the right to work, the freedom to engage in and benefit from cultural life, and entitlements to food, housing, and education, as set forth in the International Covenant on Economic, Social, and Cultural Rights.¹³⁰ The lowest level of rights, which have not been included in universal treaty regimes, would include, for instance, protection from arbitrary interference with property rights.¹³¹

Professor Hathaway's attempt to link persecution more closely to universal human rights standards has been very influential with refugee tribunals.¹³² On the whole, this has represented a tremendous boon to queer asylum seekers. Although international human rights standards have not always been interpreted in a way that protects the rights of queer individuals,¹³³ domestic and international courts are increasingly recognizing queers as full rights-bearing individuals.¹³⁴ The affirmation that torture and degrading punishment are inherently persecutory supports recognition that many sodomy laws impose excessive punishment and an understanding that police assaults and interrogations of queers are persecutory. Moreover, as courts begin to clarify and extend the rights to privacy and equal protection in queer impact litigation, it should eventually become clear that the existence of *any* sodomy law and also many types of discrimination amount to persecution under the refugee regime.

Potent human rights protections for asylum seekers may also arise from regional instruments, such as the European Convention on Human Rights.¹³⁵

127. *Id.*

128. *Id.* at 110.

129. *Id.* at 110-11.

130. *Id.*; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

131. HATHAWAY, *supra* note 10, at 111.

132. *See infra*, Section III. B (Canada) and Section III. C (Australia).

133. Jenni Millbank, *A Well-Founded Fear of Persecution, or Just a Queer Feeling? Refugee Status and Sexual Orientation in Australia*, 20 ALTERNATIVE L.J. 261, 267-68 (1995).

134. *See generally* ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER 97-111 (1995).

135. Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]. Other regional instruments, which have not yet been invoked in queer asylum cases, include Article 12, paragraph 3 of the African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), and Article 22, paragraphs 7 and 8 of the American Convention on Human Rights, *adopted* Nov. 22, 1969, O.A.S. T.S. No. 36, OEA/Ser. L./V/II.23 doc. rev. 2. *See generally* HUMAN RIGHTS OF REFUGEES, *supra* note 118, at 24-28.

Article 3 of the European Convention prohibits torture and inhumane or degrading treatment and has been broadly construed to prohibit refoulement to a country where a refugee fears such treatment.¹³⁶ In addition, Article 8, which guarantees the right to privacy and family life, might also offer protection.¹³⁷ Finally, subject-specific human rights instruments may also provide the basis for stronger persecution claims.¹³⁸ Reliance on such instruments is consistent with the UNHCR admonition that "recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded."¹³⁹

G. What Other Variables Exist?

Before diving into the case law, the reader should remember that the asylum system in most nations involves a considerable degree of formal and informal discretion. One type of discretion is institutional discrimination—the way in which prejudices about queer people influence the ends reached by adjudicators.¹⁴⁰ The reader should ask herself whether the adjudicator would have chosen the same legal approach or applied it in the same way to an individual from a traditionally more-favored group. Another form of discretion involves credibility determinations.¹⁴¹ To what extent do adjudicators believe or discredit the fears and stories queer asylum seekers tell? Finally, many systems allow for formal discretion, particularly in regard to the remedy granted to refugees. The reader might ask whether perceptions about queer "character" affect the formality or permanency of the status bestowed upon queer asylum seekers.

III. COMPARATIVE DOCTRINAL ANALYSIS BY COUNTRY

The following survey is intended to present an overview of the developing case law in four of the jurisdictions in which queer asylum cases have arisen.

136. Bailey, *supra* note 18, at 60-61. For a more thorough analysis of European Convention applicability, see Hanneke D. M. Steenbergen, *The Relevance of the European Convention on Human Rights for Asylum Seekers*, in *THE NEW REFUGEE HOSTING COUNTRIES: CALL FOR EXPERIENCE—SPACE FOR INNOVATION* 45-68 (Peter R. Baehr & Geza Tessenyi eds., 1991).

137. In particular, applicants might invoke the *Dudgeon* decision, which held that blanket prohibitions of consensual sodomy violate the right to privacy embodied in Article 8 of the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149 (1981). See generally WINTEMUTE, *supra* note 134, 97-111 (1995).

138. Goodman, *supra* note 60 (explaining how the Nuremberg Code and Helsinki Accord could be used to demonstrate that involuntary "medical" treatment of queers is inherently persecutive).

139. UNHCR HANDBOOK, *supra* note 15, ¶ 60.

140. See, e.g., Anne B. Goldstein, Comment, *Bowers v. Hardwick: The Hidden Determinants*, 97 YALE L.J. 1073, 1096-1102 (1988) (describing the way in which the perceptions of queers held by each Justice of the U.S. Supreme Court influenced their conclusions in *Bowers v. Hardwick*).

141. See Jackman, *supra* note 112, at 56-57.

There are probably about seven hundred decided or pending decisions at this time, and the number of cases has been growing exponentially.¹⁴² This section must, therefore, focus on selected cases and proceed at a higher level of generality than might be desirable in a specific regional analysis. The emphasis is on comparing parallel doctrinal developments, particularly each nation's resolution of the social group and persecution questions. Domestic background doctrine is generally noted only when it is referred to extensively in specific cases or when it differs significantly from the framework set out in Part II.

A. *The United States*

When the U.S. Congress enacted the Refugee Act of 1980,¹⁴³ it explicitly incorporated the international Convention refugee definition.¹⁴⁴ If an asylum seeker meets the requirements of the refugee definition, the Attorney General may, at her discretion, grant asylum status.¹⁴⁵ If the applicant can show that there is a clear probability that her "life or freedom would be threatened," a higher threshold, the applicant must be granted "withholding of deportation" and may not be returned to her home country.¹⁴⁶ Asylum decisions are heard by individual asylum officers (AOs), with administrative appeal to an Immigration Judge (IJ) and, later, to the Board of Immigration Appeals (BIA).¹⁴⁷ Further appeals may be had to the federal Courts of Appeals and the Supreme Court,¹⁴⁸ but queer asylum cases have not yet been decided at this level.

The most contested element of the refugee definition, as applied to American queer asylum seekers, has clearly been the meaning of "membership in a particular social group."¹⁴⁹ It is not surprising, then, that the bulk of the American literature on queer asylum claims has focused on reconciling the disparate definitions of "social group" advanced by four different courts.¹⁵⁰ The most influential test was offered by the BIA in *Matter of*

142. Telephone Interview with Sydney Levy, Asylum Project Coordinator, International Gay and Lesbian Human Rights Commission (Jan. 17, 1996).

143. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

144. Immigration and Naturalization Act (INA) § 101(a), 8 U.S.C. § 1101(a)(42)(A) (1988). Although the incorporation is not verbatim, the legislative history indicates that the legislation was intended to codify the international framework. *Cardoza-Fonseca*, 480 U.S. at 436-37. Although the United States did not sign the 1951 Convention, it is a party to the 1967 Protocol. *See supra*, note 12.

145. INA § 208(a), 8 U.S.C. § 1158(a) (1988).

146. INA § 243(h), 8 U.S.C. § 1253(h) (Supp. 1990); *INS v. Stevic*, 467 U.S. 407, 430 (1984) (establishing clear probability as the standard of proof).

147. THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION: PROCESS AND POLICY* 112-14 (3d ed. 1995).

148. *Id.*

149. Although the word "of" in the 1951 Convention was changed to "in" in the Refugee Act, there is no apparent change of meaning.

150. In addition to the sources cited in notes 151-72, see also Peter C. Godfrey, Note, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL'Y 257 (1994); Brian J. McGoldrick, *United States Immigration Policy and Sexual*

Acosta.¹⁵¹ There, the BIA interpreted "persecution on account of membership in a particular social group" to mean:

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. . . . Whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.¹⁵²

This "common, immutable characteristic" test, a variation of the "control test,"¹⁵³ has been adopted in several other jurisdictions, and has generally been favorable to queer claimants.¹⁵⁴ Even tribunals that express uncertainty as to the biological immutability of homosexuality are typically willing to admit that it is a fundamental identity that an individual should not be forced to change.¹⁵⁵ A similar test was established in *Ananeh-Firempong*,¹⁵⁶ where the First Circuit described several potential social groups based on characteristics that are "beyond the power of an individual to change."¹⁵⁷

The Ninth Circuit advanced its own test for analyzing social group claims in *Sanchez-Trujillo*.¹⁵⁸ The court interpreted the word "particular" to narrow the term "social group," implying that the phrase referred to "a collection of people *closely affiliated* with each other, who are actuated by some *common impulse or interest*. Of central concern is the existence of a *voluntary associational relationship* among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group."¹⁵⁹ This test has not been very influential, despite its pedigree.¹⁶⁰ The decision has been almost unanimously criticized

Orientation: Is Asylum for Homosexuals a Possibility?, 8 GEO. IMMIGR. L.J. 201 (1994); Julia Blanche Meister, *Orientation-Based Persecution as Grounds for Refugee Status: Policy Implications and Recommendations*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 275 (1995).

151. 19 I. & N. Dec. 211 (B.I.A. 1985).

152. *Id.* at 233.

153. The control test is defined and explained *supra* notes 45-52 and accompanying text.

154. *But see* Kraus, *supra* note 52, at 16 (explaining the limits of the *Acosta* test in addressing cultural situations where homosexuality is not as fundamental to personal identity as in the prominent Western paradigm).

155. Park, *supra* note 70, at 1126. For an excellent review of the immutability issue, see Kraus, *supra* note 52, at 20-28.

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

157. For a helpful discussion of *Ananeh-Firempong* and its social group definition, see Fullerton, *supra* note 36, at 548-51.

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

159. *Id.* at 1576 (emphasis added).

160. Parish, *supra* note 53, at 944.

as logically flawed,¹⁶¹ inconsistent with international standards,¹⁶² arbitrary,¹⁶³ and unduly restrictive.¹⁶⁴ Of equal importance, it is likely to be a hostile standard if applied literally to queer asylum seekers. While queers arguably share a common impulse or interest, the degree to which they resemble a closely knit associational group typically varies inversely with the degree of persecution faced. The more queers must escape detection, the more they tend to dissociate from fellow queers.¹⁶⁵ Cultural constructions of sexual, gender, and racial identity also affect the degree to which queers voluntarily associate.¹⁶⁶

A fourth test was suggested by the Second Circuit in *Gomez v. INS*.¹⁶⁷ There, the court explained that “[a] particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.”¹⁶⁸ This is an excellent example of what I have called the “social context test.”¹⁶⁹ The *Gomez* court recognized that external perceptions of a group are at least as important as immutability and voluntary association in defining a meaningful social group. Often, government persecution is intended to punish queer existence and identification because queers are regarded as an obstacle to state policies.¹⁷⁰ Even the United States has treated lesbians and gay men as a distinct social group for the purpose of military service and immigrant admissions.¹⁷¹ By emphasizing the persecutor’s perspective, the *Gomez* test should be most favorable to queer claimants. Several commentators have encouraged the proliferation of the *Gomez* test as the best way of reconciling global social group jurisprudence.¹⁷²

The confusion resulting from these inconsistent interpretations was resolved somewhat in June 1994, when Attorney General Janet Reno designated the previously unpublished BIA decision in *In re Toboso-Alfonso*¹⁷³ as an administrative precedent, affirming that “an individual who has been identified as homosexual and persecuted by his or her government for that reason alone may be eligible for relief under the refugee laws on the basis of

161. *Id.* at 942; Fullerton, *supra* note 36 at 555-57; Kraus, *supra* note 52, at 7-8; Daniel Compton, *Asylum for Persecuted Groups: A Closed Door Left Slightly Ajar—Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), 62 WASH. L. REV. 913, 921-23 (1987).

162. Parish, *supra* note 53, at 943.

163. *Id.*

164. Park, *supra* note 70, at 1128-30; Compton, *supra* note 161, at 921-23.

165. Goldberg, *supra* note 7, at 612.

166. Park, *supra* note 70, at 1130-31.

167. 947 F.2d 660 (2d Cir. 1991).

168. *Id.* at 664.

169. *See supra*, notes 53-60 and accompanying text.

170. Goldberg, *supra* note 7, at 611; Park, *supra* note 70, at 1135.

171. Vagelos, *supra* note 1, at 254.

172. *See, e.g.*, Fullerton, *supra* note 36, at 560; Stuart Grider, Recent Development, *Sexual Orientation as Grounds for Asylum in the United States—In re Tenorio, No. A72 093 558 (EOIR Immigration Court, July 26, 1993)*, 35 HARV. INT’L L.J. 213, 221 (1994).

173. *In re Toboso-Alfonso*, Int. Dec. 3222 (No. A23-220-644) (B.I.A. Mar. 12, 1990).

persecution because of membership in a social group.”¹⁷⁴ Although BIA precedent may be overturned by the judiciary, courts typically defer to administrative decisions when Congress has not spoken unambiguously on an issue.¹⁷⁵

In *Toboso-Alfonso*,¹⁷⁶ an IJ granted withholding of deportation¹⁷⁷ to a gay Cuban Marielito, who had endured thirteen years of frequent detention, interrogation, physical examination, and abuse at the hands of Cuban officials.¹⁷⁸ The Castro regime had an official policy of discouraging homosexual status and conduct, viewing gay men as “antisocial dissidents.”¹⁷⁹ The IJ had no difficulty accepting that the applicant had a well-founded fear of persecution,¹⁸⁰ leaving the social group issue as the primary inquiry. The judge cited the *Acosta* test, but then merely assumed the immutability or fundamental nature of homosexual status.¹⁸¹ Ironically, he went on to use the INS’ pre-1990 exclusion of homosexuals from immigration to demonstrate U.S. recognition of gays as a social group.¹⁸²

On appeal to the BIA, the INS did not contest the immutability of homosexuality, but rather argued that a conduct-based group should not be recognized as a “social group” under the Refugee Act.¹⁸³ Rather than elaborate on the status/act distinction, however, the BIA majority simply stated that *Toboso-Alfonso* had been persecuted based on his status rather than his conduct.¹⁸⁴ A two-member dissent ignored the social group issue and focused instead on the status/act dichotomy in the context of persecution. The dissent noted that sodomy was a criminal offense in Cuba, and that sodomy laws do not violate fundamental rights under U.S. law.¹⁸⁵ The detentions and physical examinations thus appeared to be “related to the investigation of criminal activities and the control of health matters rather than persecution of the applicant.”¹⁸⁶

174. Memorandum from Attorney General Janet Reno to Mary Maguire Dunne, Acting Chair, Board of Immigration Appeals 1 (June 16, 1994) (on file with author and available at <http://www.qrd.org/qrd/world/immigration/us.gay.asylum.policy>). See also David K. McGraw, *Toboso-Alfonso Case to be Treated as Precedent for Gays Seeking Asylum*, 8 GEO. IMMIGR. L.J. 635 (1994).

175. See generally, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Despite this rule, however, the *Sanchez-Trujillo* court ignored the *Acosta* precedent when establishing its own standard for social group. See Kraus, *supra* note 52, at 7-8.

176. *In re Toboso-Alfonso*, No. A23-220-644 (EOIR Immigr. Ct. Feb 3, 1986) (on file with author).

177. Because *Toboso-Alfonso* had been convicted of burglary and a drug offense since living in the United States, he was denied discretionary asylum but granted withholding status. *Id.* at 5-6.

178. *Id.* at 2-3.

179. *Id.*

180. *Id.* at 3-4.

181. *Toboso-Alfonso*, No. A23-220-644 (EOIR Immigr. Ct. Feb 3, 1986), at 4-5.

182. *Id.* at 5-6.

183. *Toboso-Alfonso*, No. A23-220-644 (EOIR Immigr. Ct. Feb 3, 1986), at 4.

184. *Id.*

185. *Id.* at 2 (citing *Bowers v. Hardwick*).

186. *Id.* at 2-3.

Toboso-Alfonso is significant for several reasons. First, it establishes that homosexuals¹⁸⁷ are members of a social group under U.S. asylum law.¹⁸⁸ Second, it suggests that the *Acosta* test is the proper definition of a social group, and assumes that homosexuals meet that test. Third, it conducts its analysis from the persecutor's perspective, finding it important that Mr. Toboso-Alfonso was "registered" by the government as a homosexual and forced to leave Cuba or face imprisonment on that basis alone.¹⁸⁹ Finally, the majority arguably rejects the prosecution/persecution dichotomy proposed by the INS and the dissent. The decision does not, however, make it clear how the Board would handle a case involving *only* prosecution under a sodomy law.¹⁹⁰

The first widely publicized queer asylum case in the United States involved a successful asylum claim by Marcelo Tenorio, a gay man from Brazil.¹⁹¹ Mr. Tenorio was attacked outside a gay discotheque in Rio de Janeiro by a carload of people, who taunted him and then beat him, inflicting a twenty centimeter-long stab wound to his side.¹⁹² They threatened that if they ever found him in the area again, they would "get him" worse than the last time.¹⁹³ He fled in fear of his life.

Faced with conflicting precedent on the social group issue, the IJ applied both the *Acosta* and the *Sanchez-Trujillo* tests, emphasizing that both look to the *internal* characteristics of a group.¹⁹⁴ Collapsing the two tests, the IJ asserted that homosexuals have a "voluntary associational relationship" in which there exists "a common characteristic fundamental to [the] identity" of the group members.¹⁹⁵ He found support for the immutability concept in the Canadian *Inaudi* case,¹⁹⁶ and ultimately relied primarily on the logic of *Acosta*, despite using the terminology of *Sanchez-Trujillo*. More importantly, he rejected the social context analysis of *Gomez*, which, although not cited in

187. Note that the term "homosexuals" is often used without definition and does not necessarily extend to bisexuals or transgendered persons. See *supra*, Section II.D.

188. But see John D. Ayon, Jr., *The Current Law of Asylum After Toboso-Alfonso: A Particular Social Group for Sexual Minorities or HIV Positive People?*, 18-21 and 25-27 (May 16, 1995) (unpublished paper on file with author) (questioning the idea that Toboso-Alfonso settles the social group question).

189. *Id.* at 19-20.

190. Other American case law suggests that prosecution under a neutral sodomy law might not be seen as rising to the level of persecution. In *Matter of Chang*, the BIA rejected the contention that China's "one-couple, one-child" policy regulating reproduction was inherently persecutive because it was applied across-the-board and did not appear to be a "subterfuge" for another type of persecution prohibited by the Convention. Int. Dec. 3107 (B.I.A. 1989), at 10-12. The court explained that a social group of people who oppose the policy would be overly broad and would threaten a legitimate attempt to regulate overpopulation. *Id.* Because reproductive freedom is fundamental in the same sense as privacy for queer people, this ruling suggests that regulation of health or morality could be considered an acceptable reason for a neutral sodomy law. See Kraus, *supra* note 52, at 41-43. Sodomy prosecutions might, nonetheless, be challenged where they are applied selectively or carry excessive penalties. See generally *supra*, Section II.D.

191. In re Tenorio, No. A72-093-558 (Immigr. Ct. July 26, 1993) (on file with author). For an in-depth review of the case, see Grider, *supra* note 172.

192. *Tenorio* at 4-5.

193. *Id.* at 5.

194. *Id.* at 11-14.

195. *Id.* at 14.

196. The *Inaudi* case is discussed *infra*, at notes 239-44 and accompanying text.

Toboso-Alfonso, was implicit in its analysis of the government's perceptions of gay men as dissidents.¹⁹⁷

The other important issue in *Tenorio* was whether a single attack, however brutal, could account for a well-founded fear of persecution. The judge found that the lone queer-bashing incident did not amount to past persecution within the meaning of the Refugee Act.¹⁹⁸ The court then analyzed Tenorio's fear of future persecution, by looking at both subjective and objective indicia of fear.¹⁹⁹ The subjective component was fulfilled by credible testimony about the threats of future beatings. The objective component was satisfied primarily by testimony showing the presence of activity by anti-gay paramilitary death squads and other vigilante groups that frequently attack, torture, and kill Brazilian queers without sanction from the government.²⁰⁰ The lengthy discussion of persecution is a useful supplement to *Toboso-Alfonso's* assumption of persecution. The IJ decision in *Tenorio* does not have precedential weight, but it has nonetheless been influential on more recent tribunals looking for guidance on applying *Toboso-Alfonso*. The decision is currently on appeal to the BIA.²⁰¹

Two other American opinions are important for their treatment of the persecution issue. Both deal primarily with the issue of forced "medical" intervention targeted at queer people.²⁰² In *In re Chau*, a bisexual man from Hong Kong sought asylum to escape the threat of life imprisonment and involuntary "psychiatric treatment."²⁰³ Chau established that the Chinese government, which will assume control of Hong Kong in 1997, sends homosexuals and bisexuals to reeducation camps, where electroshock therapy is employed to "cure" them of their sexual orientation.²⁰⁴ Although the INS did not challenge the inclusion of bisexuals as members of a particular social group,²⁰⁵ they did question whether Mr. Chau had a well-founded fear of persecution.²⁰⁶ After a lengthy discussion of the evidence, the IJ decided that involuntary medical intervention qualified only as *discrimination*, and fell short of persecution.²⁰⁷

Only one day earlier, in *In re Pitcherskaia*,²⁰⁸ another IJ held that a Russian lesbian activist, who had been summoned by the militia to report for

197. See Grider, *supra* note 172, at 220-21.

198. *Tenorio*, *supra* note 191, at 16.

199. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987).

200. *Tenorio*, *supra* note 191, at 16.

201. Letter from Sydney Levy, Asylum Project Coordinator, International Gay and Lesbian Human Rights Commission, to Erik D. Ramanathan, Harvard Law School 1 (Feb. 16, 1996) (on file with author)[hereinafter Levy letter].

202. For a superb discussion of involuntary institutionalization and "medical" treatment of queer people, including these two cases, see Goodman, *supra* note 60.

203. *In re Chau*, No. A71-039-582, at 2, 6-7 (Immigr. Ct. June 14, 1993) (on file with author).

204. *Id.* at 6-7.

205. *Id.* at 18; Vagelos, *supra* note 1, at 261.

206. *Chau* at 18.

207. *Id.* at 17-27.

208. No. A72-143-932 (Immigr. Ct. June 13, 1994) (transcript of oral opinion) (on file with author).

involuntary institutionalization and psychiatric "treatment" for "schizophrenia," did not have an objectively reasonable fear of persecution.²⁰⁹ The use of electric shocks and mind-altering drugs were "a question of degree . . . [not] reach[ing] the point of persecution."²¹⁰ This decision appeared to rest on a notion of psychiatric treatment as a professional act of beneficence, a conception which is at odds with the long history of Russian psychiatry as a punitive technique.²¹¹ Once again, social group membership was not questioned by the INS.²¹²

Pitcherskaia appealed to the BIA, and was again denied asylum in a 2-1 split decision.²¹³ The majority opinion, written by the dissenting judge in *Toboso-Alfonso*, rejected Ms. Pitcherskaia's claims of past and feared future persecution on account of both political opinion and membership in a social group.²¹⁴ In particular, he concluded that her past psychiatric treatment did not involve "long-term confinement or invasive therapy such as a lobotomy, electric shock treatment, or administration of certain psychotropic drugs," and, therefore, did not rise to the level of persecution.²¹⁵ Although the majority felt that medical treatment of lesbianism was "misguided and inappropriate," they concluded that such actions did not constitute "deliberate" or "punitive" imposition of harm or suffering, i.e. persecution.²¹⁶ In fact, Judge Vacca pointed to the INS' own pre-1990 regulations, excluding gays from immigration because of their affliction with "psychopathic personality," thereby implying that a "marked liberalization" of Russian attitudes toward homosexuals would follow trends in the United States.²¹⁷ As a result of this liberalization, Pitcherskaia did not have an objectively reasonable fear of persecution if returned to Russia.²¹⁸

A separate opinion concurred in the majority's rejection of the political opinion and past persecution claims. Judge Schmidt would have found a

209. *Id.* at 12-13. Pitcherskaia also experienced many acts of harassment and discrimination at the hands of the Russian mafia and the police, including an attack on the business she owned. The IJ said that these acts also constituted discrimination rather than persecution on the basis of political opinion or social group. *Id.*

210. *Id.* at 24.

211. Goodman, *supra* note 60, at 285-88.

212. Lisa Keen, *Russian Lesbian Appeals Asylum Ruling*, WASH. BLADE, Mar. 24, 1995 (statement of Steve Briggs, attorney for INS) (available at <http://www.qrd.org/qrd/www/world/immigration/all95.html> or <http://www.qrd.org/world/immigration/russian.lesbian.appeals.asylum.ruling>).

213. *In re Pitcherskaia*, No. A72-143-932 (B.I.A. Nov. 13, 1995) (unpublished opinion on file with author).

214. *Id.* at 18-19. The IJ had ignored Pitcherskaia's original political opinion claim, which was based on her lesbian activism and her connection to her father's political dissidence. *Id.* at 6. Long-term surveillance and three arrests with detentions of 10-15 days did not rise to the level of persecution and future fear of political repression was not well-founded because of "profound changes in the political and human rights situation in Russia since the respondent's last confrontation with authorities." *Id.* at 6-9. The dissent did not dispute this analysis. *Id.* at page 1 of the concurring and dissenting opinion.

215. *Id.* at 14.

216. *Id.* at 14, 17 (citing *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992), for the proposition that persecution must be the result of a punitive *motive*).

217. *Id.* at 15-16.

218. *Id.* at 18-19.

well-founded fear of persecution on account of membership in a social group because he could not ignore specific threats of long-term confinement and electroshock therapy made during Pitcherskaia's past treatment sessions, as well as a long tradition of punitive psychiatry in Russia.²¹⁹ Ms. Pitcherskaia's appeal will be heard by the Ninth Circuit later this year; it is the first case to reach the U.S. judiciary on appeal.²²⁰ The *Chau* and *Pitcherskaia* decisions are extremely problematic because they require an unduly high standard of proof for demonstrating past persecution or an objective fear of future persecution, and ignore violations of the basic human rights that underlie the refugee regime.²²¹

B. Canada

Canada ratified the 1951 Convention and 1967 Protocol in 1969, and adopted an administrative refugee regime in 1976.²²² This system was quickly overwhelmed, leading to a complete overhaul in the Immigration Act of 1985, which expressly incorporated the Convention refugee definition.²²³ In 1989, separate legislation established a new organizational refugee framework and asylum determination system under the jurisdiction of the Immigration and Refugee Board (IRB).²²⁴ After an initial hearing at which she may establish eligibility and "credible basis" for an asylum claim,²²⁵ an asylum seeker receives a full hearing on the merits before a one or two-member panel of the Convention Refugee Determination Division (CRDD).²²⁶ Further appeal may be had to the Federal Court of Appeals,²²⁷ but queer asylum claims have not yet reached this stage.

219. *Id.* at 4-5. He would have accepted testimony that there had been no recent, major changes in governmental attitudes toward lesbians and that official intolerance of lesbianism was sufficient motivation for persecution under *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). *Id.* at 5-7.

220. Levy letter, *supra* note 201.

221. See generally Goodman, *supra* note 60.

222. Debra M. McAllister, *Refugees and Public Access to Immigration Hearings: A Clash of Constitutional Values*, 2 INT'L J. REFUGEE L. 562, 563 (1990); LAWYERS COMMITTEE FOR HUMAN RIGHTS, UNCERTAIN HAVEN: REFUGEE PROTECTION ON THE FORTIETH ANNIVERSARY OF THE 1951 UNITED NATIONS REFUGEE CONVENTION 135 (1991) [hereinafter UNCERTAIN HAVEN].

223. McAllister, *supra* note 222, at 563. UNCERTAIN HAVEN, *supra* note 222, at 135. The Act is most easily referenced by THE ANNOTATED IMMIGRATION ACT OF CANADA (Frank N. Marrocco & Henry M. Goslett eds., 1993). The refugee definition is set forth at Immigration Act, R.S.C. 1985, c. I-2, as amended, s. 2(1).

224. Bill C-55, An Act to Amend the Immigration Act, 1976, and to Amend Other Acts in Consequence Thereof, S.C. 1988, c.35. See UNCERTAIN HAVEN, *supra* note 222, at 135-36; McAllister, *supra* note 222, at 564. For more in-depth information, see generally *Canada's New Refugee Determination System*, 27 CANADIAN Y.B. OF INT'L L. 295 (1989).

225. The applicant must present prima facie evidence of a valid claim to an Adjudicator and Refugee Division member. If either official decides that there is any credible evidence that might lead to a refugee claim, a hearing on the merits is guaranteed. McAllister, *supra* note 222, at 564-65; Sharon Rusu, *Canada's Immigration and Refugee Board Documentation Centre*, 1 INT'L J. REFUGEE L. 319, 320-21 (1989).

226. McAllister, *supra* note 222, at 565-66.

227. *Id.* at 566-67. Leave to appeal is discretionary. *Id.* at 567.

The scope of the phrases "membership in a social group" and "persecution" under Canadian asylum law received definitive and thorough treatment under the 1993 Supreme Court decision in *Canada (Attorney-General) v. Ward*.²²⁸ The lengthy unanimous opinion by Justice LaForest describes the five nexuses listed in the refugee definition as a limited set, but one which is linked to principles of human rights and nondiscrimination under Canadian and international law.²²⁹ The Court quotes extensively from the refugee theories of Professors Hathaway and Goodwin-Gill, and essentially adopts what I have described above as their moderate but progressive views of the social group category and its relation to human rights and group marginalization.²³⁰

Drawing on earlier Canadian and American precedents, the Court then identifies three types of social groups:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association;
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.²³¹

The Court explicitly notes that individuals persecuted on the basis of sexual orientation fall under the *first* category, which is framed by the language of *Matter of Acosta*.²³² Although *Acosta* relied on internal characteristics to define a social group, Justice LaForest's invocation of discrimination law and the perception of the persecutor in the political opinion context²³³ implies that external perceptions may also be important in defining social groups.²³⁴ Such an interpretation would be consistent with *Veysey*, an important anti-discrimination decision prohibiting sexual orientation discrimination under the Canadian Charter both because it is immutable and because "the individuals or groups involved have been victimized and stigmatized throughout history because of prejudice."²³⁵

228. 2 S.C.R. 689 (Can. 1993). For extensive commentary on the *Ward* case, see Audrey Macklin, *Canada (Attorney-General) v. Ward: A Review Essay*, 6 INT'L J. REFUGEE L. 362(1994); Linda E. Tranter, *A Step Forward in Protecting Human Rights: Canada v. Ward*, 13(4) REFUGEE 16 (1993).

229. *Ward* at 733-38 (citing, *inter alia*, the important precedent of *Cheung v. M.E.I.*, 2. F.C. (Fed. Ct. 1993)).

230. *Id.* See also discussion *supra* at Section II .D; Macklin, *supra* note 228, at 367-68.

231. *Id.* at 739.

232. *Id.* For discussion of *Acosta*, see *supra* notes 151-53 and accompanying text.

233. *Ward* at 726-27.

234. See Macklin, *supra* note 228, at 375-76.

235. *Veysey v. Commissioner of the Correctional Service of Canada*, 29 F.T.R. 74, 78 (T.D. 1989). *Veysey's* significance is discussed in HATHAWAY, *supra* note 10, at 163-65; ROBERT WINTIEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER* 176-77 (1995).

Although persecution analysis is always limited to the facts of a case, and *Ward* had nothing to do with sexual orientation, its persecution discussion is nonetheless important. In particular, the opinion approves of a persecution definition encompassing "sustained or systematic violation of basic human rights."²³⁶ While the decision does not elaborate on what comprised a "basic human right," this formulation is significant for its breadth, which contrasts sharply with the narrow view of persecution taken in American decisions such as *Pitcherskaia*.²³⁷

The Canadian Supreme Court's explicit inclusion of sexual orientation-based asylum claims within the social group nexus vitiates the necessity of discussing the earliest queer asylum cases in detail. The idea that homosexuals form a particular social group was considered as early as 1991,²³⁸ but was widely accepted only after the highly-publicized decision in *In re Inaudi*.²³⁹ Mr. Inaudi, a gay man from Argentina, was arrested and blackmailed by the police, who beat him, tortured him with electric shocks, and raped him on multiple occasions.²⁴⁰ The majority of the CRDD panel had no difficulty accepting Inaudi's persecution claim,²⁴¹ and spent the remainder of the opinion discussing social group eligibility.²⁴² The panel unanimously accepted that homosexuality defined a social group within the refugee definition,²⁴³ relying in part on support from an early German queer asylum case recognizing gay men as a social group.²⁴⁴

One question left unresolved by *Ward* is whether state prosecution of queer sex acts can rise to the level of persecution. In the case of a gay man from Pakistan who fled after an arrest and subsequent sexual abuse by the police,²⁴⁵ the CRDD panel examined a sodomy law that proscribed "carnal

236. *Id.* at 733-34 (quoting Professor Hathaway).

237. *See supra*, Section III.A.

238. Re R. (U.W.), No. U91-03331, [1991] C.R.D.D. No. 501 (Oct. 7, 1991) (available on Quicklaw, CRDD database, and on file with author). Only one of two panel members accepted this proposition, saying, "[h]omosexuals . . . are definable, and form a particular social group. It is their right of conscience or human dignity that these individuals should not be required to change their sexual preference if persecuted because of their sexual preference." *Id.* at *4.

239. *In re Inaudi*, No. T91-04459, [1992] C.R.D.D. No. 47 (Apr. 9, 1992) (unpublished opinion on file with author).

240. *Id.* at 1-4.

241. *Id.* at 4. The dissent questioned Inaudi's credibility because he did not believe that the authorities would sodomize and sexually abuse a gay man if they were persecuting him for his sexuality. *Id.* at 11-12, 16-17. This view is not uncommon in queer asylum decisions. It is, however, misguided because it misconstrues rape as a sexual act and assumes that all cultures view the penetrator as queer, regardless of the context of the act. *See generally* BREAKING THE SILENCE, *supra* note 71, at 18.

242. *In re Inaudi*, *supra* note 239, at 5-9.

243. The majority opined that "even if homosexuality were a voluntary condition, it is so fundamental to a person's identity that a claimant ought not be compelled to change it." *Id.* at 5. As such, "homosexuals, be they male or female, are members of a particular social group." The dissent agreed that homosexuality "constitutes an innate and fundamental personal characteristic." *Id.* at 11.

244. *Id.* at 5.

245. Re H. (Y.N.), No. U93-11000, [1994] C.R.D.D. No. 13, at *5-12, 29-30 (Aug. 4, 1994) (available on Quicklaw, CRDD database, and on file with author). The arrest was likely related to his political activism as an Ahmadi, as well as for his homosexuality, which was revealed after his lover's suicide. *Id.* at *5-6.

intercourse against the order of nature” and carried a prison term of two to ten years.²⁴⁶ Although the law was “of general application,” and neutral laws are ordinarily presumed valid,²⁴⁷ government statements and documentary evidence suggested that prosecution was selectively targeted at Ahmadi queers.²⁴⁸ The continued existence of the sodomy law, combined with evidence of his rape by authorities, convinced the panel that the claimant had a well-founded fear of persecution on account of his membership in a social group.²⁴⁹

In a later case, Russia’s sodomy law, which prohibited consensual sex between men, was also viewed as a pretextual basis for official persecution of queers.²⁵⁰ More importantly, however, threatened arrest was seen as part of a larger pattern of discrimination and harassment by both authorities and civilians. The applicant had experienced extensive employment and workplace discrimination including beatings by coworkers, gay-bashing by street thugs, and multiple arbitrary detentions by the police.²⁵¹ The police kept “pink lists” on homosexuals and did not sanction civilian beatings.²⁵² The claimant also feared false imprisonment and involuntary psychiatric treatment if he returned.²⁵³ The tribunal corroborated these incidents with extensive documentary evidence of official and societal homophobia which has endured “perestroika.”²⁵⁴ In the end, widespread discrimination, accompanied by pervasive threats of unsanctioned violence, was held sufficient to demonstrate a well-founded fear of persecution.²⁵⁵

A similar pattern of discrimination and physical beatings by Russian authorities and civilians led another panel to grant asylum to Igor Elsakov.²⁵⁶ Mr. Elsakov was beaten by coworkers and street gangs and threatened with imprisonment under Russia’s sodomy law.²⁵⁷ In addition, the militia sent him to a doctor when it discovered his homosexuality.²⁵⁸ Although he was never

246. *Id.* at *13-14.

247. *Id.* at *14-15 (citing *Zolfagharkhani v. M.E.I.*, 3 F.C. 540 (Fed. Ct. 1993)).

248. *Id.* at *16-20. The tribunal also noted that the government did not necessarily observe the ten year maximum sentence, suggesting that the statute might also be construed as excessive or arbitrary punishment. *Id.* at *16.

249. *Id.* at *31-32. The asylum seeker’s political persecution claim was rejected due to changed circumstances. *Id.* at *26. Social group membership was simply assumed under *Ward*. *Id.* at *12-13. Many later decisions do not even mention social group criteria.

250. *Re L. (O.V.)*, No. A93-81408, [1995] C.R.D.D. No. 4, at *4, 15-16 (Mar. 23, 1995) (available on Quicklaw, CRDD database, and on file with author). Although the law had been repealed by the time of the applicant’s refugee claim, the panel implied that other criminal laws, such as “hooliganism” would be used in the same pretextual way. *Cf. id.* at *16-19.

251. *Id.* at *4-10.

252. *Id.* at *15-16.

253. *Id.* at *13-17. The panel remarked that false imprisonment alone might rise to the level of persecution. *Id.* at *13.

254. *Id.* at *16-24.

255. *Id.* at *25-27.

256. *Re Elsakov*, No. M91-12609 (June 2, 1992) (unpublished opinion on file with author).

257. *Id.* at 2-4.

258. *Id.* at 4.

“treated” for mental illness, the tribunal appeared particularly moved by his fear of involuntary psychiatric treatments designed to “cure” sexual orientation, and found his fear of persecution to be objectively well-founded.²⁵⁹ This reaction contrasts sharply with the reluctance of American tribunals to accept forced medical treatments as persecution.²⁶⁰ Quoting an opinion poll that found ninety percent of Russians in favor of execution, imprisonment, or psychiatric confinement of homosexuals, the author of the opinion exclaimed: “With this type of attitude toward homosexuals so prevalent and widespread, I can only conclude that homosexuals in Russia are victims of discrimination, prosecution, and persecution.”²⁶¹

Canada has also led the way in recognizing the asylum claims of transgendered people. In 1994, the CRDD granted asylum status to an Iranian male-to-female transgendered person who had been politically active against the Iranian government while she was a student in Germany.²⁶² The panel found that her fear of persecution was well-founded, not because of her earlier activism, but because of her transsexualism, which would be certain to come to the attention of the Iranian authorities and would be perceived as “being a defiant demonstration of political opposition to the current regime.”²⁶³ As a result, it was unnecessary to consider her social group asylum claim.²⁶⁴ This decision is groundbreaking both for its enlightened understanding of transgender identity and for its remarkable acceptance of nonconformity with a fundamentalist regime as a potential ground for political opinion-based asylum.

More recently, the CRDD has also recognized transgendered individuals as members of a social group.²⁶⁵ Over a period of 14 years, Marianna Oviedo was repeatedly blackmailed by the Venezuelan police, arrested and imprisoned for vagrancy, and assaulted and raped by authorities.²⁶⁶ In 1993, she was assaulted by police officers, shot three times with a pellet gun, and grabbed with such force that her silicone breast implant ruptured.²⁶⁷ She fled the country shortly after her home was burned down and authorities did not bother to take a police report.²⁶⁸ In considering the social group issue, the tribunal relied on *Ward*'s explicit inclusion of both gender and sexual orientation to reason that transgendered people, who are persecuted because of their gender identity and their homosexual orientation, are also members

259. *Id.* at 6.

260. *See Chau and Pitcherskaia, supra*, Section III. A.

261. *Elsakov*, No. M91-12609 (June 2, 1992), at 7.

262. *Re J. (H.A.)*, No. V93-01711, [1994] C.R.D.D. No. 404 (July 4, 1994) (available on Quicklaw, CRDD database, and on file with author).

263. *Id.* at *14.

264. *Id.* at *15.

265. *Re Oviedo*, No. T94-07129 (Aug. 14, 1995) (unpublished opinion on file with author).

266. *Id.* at 2-3.

267. *Id.* at 3.

268. *Id.*

of a social group within the Convention definition.²⁶⁹ The fact that society perceives transsexuals as homosexuals also supports the social group claim.²⁷⁰ Finding a well-founded fear of persecution on the facts, the tribunal found support in *Ward's* statement that "sustained or systemic violation[s] of basic human rights demonstrat[e] a failure of state protection."²⁷¹

C. Australia

Australia ratified the 1951 Convention in 1954, acceded to the 1967 Protocol in 1973, and has incorporated the Convention refugee definition into domestic law.²⁷² Following passage of a new Migration Act in 1990, Australia overhauled its refugee determination system.²⁷³ In 1993, an independent administrative body, the Refugee Review Tribunal (RRT), replaced the backlogged Refugee Status Review Committee (RSRC), which had been criticized for lacking transparency, binding decisions, and administrative appeals.²⁷⁴ Under the new system, a primary determination is made by a case officer in the Department of Refugee Status (DORS) Section of the Department of Immigration and Ethnic Affairs.²⁷⁵ Adverse determinations may be appealed to the RRT, which conducts a de novo review on the merits using the Convention refugee definition as its standard.²⁷⁶ Further appeal on matters of law is available from the judiciary.²⁷⁷ Fortunately for the researcher, RRT decisions are always written and are published on the Attorney-General's SCALE database.²⁷⁸

As in Canada and the United States, the earliest Australian cases dealt primarily with the issue of social group eligibility. The first published queer asylum opinion²⁷⁹ involved an Iranian man whose father had discovered his

269. *Id.* at 5. To support this analysis, the panel examined literature explaining the historical permanence of transsexuality and concluded that transgender identity is "innate" within the meaning of *Ward*. *Id.*

270. *Id.* at 6. This logic suggests that it is indeed possible under *Ward* to use external perceptions of a group to define a cognizable social group.

271. *Id.* (citing *Ward*, which, in turn, quotes HATHAWAY).

272. Migration Act 1958, AUSTRALIAN C. ACTS § 4(1). For a detailed history and analysis of Australia's refugee regime, see generally PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, JOINT STANDING COMMITTEE ON MIGRATION REGULATIONS, AUSTRALIA'S REFUGEE AND HUMANITARIAN SYSTEM: ACHIEVING A BALANCE BETWEEN REFUGEE AND CONTROL at 47-85, 113-40 (1992) [hereinafter AUSTRALIA'S REFUGEE AND HUMANITARIAN SYSTEM]. See also *Refugees—determination of refugee status—changes to procedures*, 13 AUSTRALIAN Y.B. INT'L L. 334-40.

273. See generally AUSTRALIA'S REFUGEE AND HUMANITARIAN SYSTEM, *supra* note 272, at 113-40.

274. *Id.* at 126-28.

275. Jean-Pierre L. Fonteyne, *Refugee Determination in Australia: An Overview*, 6 INT'L J. REFUGEE L. 253-54 (1994).

276. *Id.* at 255. The RRT does not have jurisdiction over DORS' discretionary humanitarian determinations, which may allow for refugee status outside the Convention definition. *Id.* at 255-56. Cases are typically heard by a single Member. *Id.*

277. *Id.* at 258-59.

278. *Id.* at 257-58. Online publication begins in 1994 and can be found in the REFDEC library on SCALE. Selected cases may also be found in the LEXIS online service in the AUST library, AUSMAX file.

279. At least one earlier unpublished RSRC decision granted asylum on the basis of sexual orientation. On March 19, 1992, a gay male couple from China was granted refugee status on account of

sexual orientation.²⁸⁰ The father threatened to report the applicant to the police and apparently did report the applicant's lover, who was subsequently arrested and imprisoned.²⁸¹ The RRT Member found that the applicant faced a "real chance" of imprisonment and persecution because of the likelihood that the father would report his son.²⁸² By noting the fate of the applicant's lover and briefly discussing human rights abuses in Iran, the opinion awkwardly sidestepped the issue of prosecution under sodomy laws.²⁸³

The decision's logic is much clearer on the social group issue. Drawing primarily on Professor Hathaway's social group analysis, and the Canadian opinions in *Ward* and *Veysey*, the adjudicator held these theories to be consistent with the vague Australian Federal Court opinion in *Morato*.²⁸⁴ In *Morato*, the court held that for a refugee to be a member of a particular social group, she must "belong[] to or [be] identified with a recognisable or cognisable group within a society that shares some interest or experience in common."²⁸⁵ The RRT Member referred approvingly to both the "relative immutability of sexual orientation" and the "stigmatisation throughout history of those who depart from accepted sexual norms" as reasons for finding a cognizable social group.²⁸⁶ Ultimately, the tribunal concluded that homosexuals are "recognisable and cognisable for the community of their social, recreational and other interests such as health and their protection from the forms of harassment they have traditionally faced within most societies."²⁸⁷ Although this logic is not entirely coherent, and the quoted sources are not completely consistent, it appears that the opinion adopts a combination of the "control test" internal standard and a "social context" external definition of a social group.²⁸⁸

The next queer asylum case to reach the RRT undertook a slightly different social group analysis. The case involved a gay man from China who had been repeatedly harassed, threatened with various legal charges, and beaten for his long-time relationship with a same-sex partner.²⁸⁹ His partner was deliberately transferred to a distant work unit, and was later arrested for "hooligan-

sexual orientation-based persecution. International Gay and Lesbian Human Rights Commission, *Press Release: Gay Refugee Status—A New World Trend?* 1 (Mar. 26, 1992) (available at <http://www.qrd.org/qrd/orgs/IGLHRC/gay.refugees>); *Gay Couple Escapes Mainland Repression*, S. CHINA MORNING POST, Oct. 25, 1992, at 7.

280. Decision of Jan. 21, 1994, RRT No. N93/02240, ¶¶ 47-54, available on LEXIS, AUST library, AUSMAX file.

281. *Id.*, ¶¶ 49-54. Details of the charges and sentence involved were not in evidence.

282. *See id.*, ¶¶ 56-63.

283. *Id.*

284. *Morato v. Minister for Immigration, Local Government and Ethnic Affairs*, 111 A.L.R. 417 (Fed. Ct. Austl. 1992).

285. *Id.* at 432.

286. Decision of Jan. 21, 1994, RRT No. N93/02240, ¶¶ 28-30.

287. *Id.*, ¶¶ 55.

288. For a slightly different but equally uncertain interpretation of the queer social group definition in Australian jurisprudence, see Millbank, *supra* note 133, at 263-64.

289. Decision of Mar. 8, 1994, RRT No. N93/00846, available on LEXIS, AUST library, AUSMAX file.

ism" and sent to an "education-through-labour camp."²⁹⁰ In deciding that homosexuals are a social group under the refugee regime, the tribunal canvassed the same sources as the Iranian opinion,²⁹¹ and concluded that:

this social group is 'a recognizable or cognizable group within a society that shares some interest or experience in common' when certain societies, including the Australian and the Chinese choose to identify the group by that immutable characteristic, 'Homosexual' or 'tong-xinglian' in Chinese. . . .²⁹²

Despite the mention of immutability, this perspective seems to rely primarily on an external view of the social group.²⁹³ Although RRT decisions are not binding precedent,²⁹⁴ later cases either cite these cases or follow their social group analysis quite closely, reaching the same result *de novo*.

The aforementioned cases are also important for their view of what constitutes a well-founded fear of persecution.²⁹⁵ On this issue, Australian tribunals are much more willing to discuss universal human rights standards such as the ICCPR and ICESCR, and the leading case relies heavily on Hathaway's theory of persecution, defining persecution to include measures "in disregard of human dignity."²⁹⁶ In particular, many opinions refer to the case of *Toonen v. Australia*, which held that Tasmania's sodomy law was invalid because it arbitrarily interfered with the right of privacy guaranteed in Article 17 of the ICCPR.²⁹⁷

The Iranian case was decided before *Toonen* and it consciously reserves the question of "whether Iranian laws criminalising homosexual acts between consenting adults are persecutory of themselves."²⁹⁸ Nonetheless, the decision goes on to say "that it would be a very surprising result if laws merely prohibiting homosexual acts between consenting adults . . . were held to be persecutory."²⁹⁹ The opinion then observes that Tasmania still had a

290. *Id.*, ¶¶ 8-31.

291. *Id.*, ¶¶ 60-67. The opinion also notes the American *Acosta* decision. *Id.* at 64.

292. *Id.*, ¶¶ 67.

293. See Millbank, *supra* note 133, at 264 (describing the tribunal's analysis as an endorsement of a societal significance standard).

294. *Id.*

295. Australian jurisprudence, like most others, requires both a subjective and objective fear of persecution. *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs*, 169 C.L.R. 379 (Austl. 1990). The objective element requires that "there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage . . . as distinct from a remote chance [thereof]." *Id.* at 388-89 (per Mason, C.J.).

296. *Id.* at 429 (per McHugh, J.). See generally HATHAWAY, *supra* note 10, at 104-05 (defining persecution as "the sustained or systemic violation of basic human rights demonstrative of a failure of state protection").

297. Commun. No. 488/1992, Mar. 31, 1994, 50th Sess., UN H.R. Committee Doc. No. CCPR/C/50/D/488/1992, 1 I.H.R.R. 91. For extensive commentary on *Toonen*, see Wintemute, *supra* note 134, at 143-49.

298. Decision of Jan. 21, 1994, RRT No. N93/02240, ¶¶ 31-32.

299. *Id.*, ¶ 32.

sodomy law and that "many major religions" condemn homosexuality, implying that criminalizing consensual queer sex could not be a human rights violation because Australians would then be guilty of human rights abuses.³⁰⁰ Given this negative inference and the positive outcome for the applicant, I can only conclude that the adjudicator saw the threatened sanctions of imprisonment, torture, and execution as excessive or arbitrary punishment under a sodomy law.³⁰¹

The case of the gay man from China, discussed above,³⁰² questions the proposition that criminalization of queer acts does not alone rise to the level of persecution. China does not have a sodomy law, but consistently prosecutes queer citizens under laws against "hooliganism" and "disturb[ing] the order of society."³⁰³ These vaguely worded statutes are accompanied by sentences of six months to eight years, but also are often used to justify subjudicial punishment, such as labor re-education camps and lengthy detentions.³⁰⁴ Unlike the case of the Iranian man, this opinion looks favorably at the applicant's human rights claim. The tribunal concludes that the refugee was denied his right to privacy, guaranteed by ICCPR Article 17.³⁰⁵ The Member then notes that if this were a "heterosexual matter," it would clearly be labeled as persecution, implying that the same must be true for queer couples.³⁰⁶ But it is unclear whether the tribunal would accept sodomy laws as an invasion of privacy, or only that in this case that right was violated by the police, who publicly interrogated the applicant, invaded his personal quarters, tied him up and spat on him, and failed to interfere with civilian beatings.³⁰⁷ Ultimately, the outcome can be explained as a recognition of *selective* prosecution rising to the level of persecution.³⁰⁸

Several other cases reflect the incongruence of Australian doctrine on the prosecution question. Considering the asylum claim of a Fijian man,³⁰⁹ an RRT tribunal found that sodomy laws are justified under Article 29 of the Universal Declaration of Human Rights, which allows for legislation restricting the exercise of human rights for reasons of "morality, public order and

300. For an excellent analysis of the "imperialism" and "cultural relativism" evident in this case, see Millbank, *supra* note 133, at 267-68. Compare these assumptions with the dissenting opinion's discussion of *Bowers v. Hardwick* in the American *Toboso-Alfonso* decision. See *supra*, Section III.A.

301. Jenni Millbank comes to a similar conclusion. See Millbank, *supra* note 133, at 268.

302. See *supra*, notes 203-07 and accompanying text.

303. Decision of Mar. 8, 1994, RRT No. N93/00846, ¶¶ 81-84 (describing Articles 158 and 160 of the PRC Criminal Code and their implications).

304. See generally *id.*, ¶¶ 12, 43, 49, 81-85.

305. *Id.*, ¶¶ 77-79.

306. *Id.*, ¶ 79.

307. *Id.*, ¶ 86.

308. See *id.*, ¶ 85 ("[T]here is a differential application of the laws relating to public disturbance and hooliganism between heterosexual persons and homosexuals. This removes the application of the law from prosecution and renders it persecution as it targets this particular social group.")

309. Decision of July 28, 1994, RRT No. BN93/00015, discussed in Millbank, *supra* note 133, at 270-73.

the general welfare."³¹⁰ Likewise, the seven year maximum jail sentence that accompanied Fiji's sodomy law was not deemed to be persecutory.³¹¹ The accompanying caning, however, was held to be inherently persecutory because it violated Article 7 of the ICCPR, which prohibits cruel, inhuman, or degrading treatment.³¹² Nonetheless, the tribunal denied asylum because the incidence of caning, or any prosecution under the sodomy provision, was too infrequent to be well-founded.³¹³

The case of a gay man from Zimbabwe presents a striking contrast to earlier cases dealing with the prosecution issue.³¹⁴ Under Zimbabwean law, homosexual sex acts are criminal offenses typically punished by a fine or suspended prison sentence.³¹⁵ Under customary law, however, homosexuality is considered an unnatural activity "akin to witchcraft."³¹⁶ As a result, societal ostracism of queers "would be almost total, and discrimination certain."³¹⁷ Considering the criminal provision together with evidence of likely ostracism and employment discrimination, and possible violence, the tribunal held that the applicant had a well-founded fear of persecution.³¹⁸ This decision is groundbreaking. It appears to accept that sodomy laws, without further qualification, may amount to persecution. In addition, it accepts serious discrimination, most of which was likely to be nonviolent, as legitimate persecution. Unfortunately, these meritorious outcomes may lay dormant beneath the opinion's cursory analysis and the ambiguously-weighted cumulation of the two elements in reaching the decision.

Overall, the prosecution issue appears to be unresolved. The most recent relevant case sidesteps the prosecution issue by considering Bangladesh's Islamic law prohibiting "carnal intercourse against the order of nature."³¹⁹ Rather than challenging selective application of a neutral statute to homosexuals or the excessive penalty of life imprisonment or beheading,³²⁰ the tribunal chose not "to enter into a lengthy discussion" of the issue.³²¹ Instead, it held the law to be one of a number of factors cumulatively amounting to persecution.³²²

Tribunals have examined the issue of discrimination rising to the level of persecution in two recent cases.³²³ In the case of a queer asylum seeker from

310. Millbank, *supra* note 133, at 270 (quoting UDHR Article 29). The tribunal distinguished *Toonen* on the ground that "mere interference" with the right to privacy does not rise to the level of persecution. *Id.* at 270-71.

311. *Id.* at 271.

312. *Id.* at 271.

313. *Id.*

314. Decision of May 11, 1995, RRT No. N94/06573 (slip op. on file with author).

315. *Id.* at 4. Specific penalties are not provided by law. *Id.*

316. *Id.* at 5 (citing testimony by anthropologist Dr. Ken Wilson).

317. *Id.*

318. *Id.* at 6.

319. Decision of Sept. 28, 1995, RRT No. N94/05400, at 14 (slip op. on file with author).

320. *Id.* at 8, 14.

321. *Id.* at 21.

322. *Id.* at 22.

323. For discussion of discrimination in the case of a gay Zimbabwean man, see notes 314-18 and accompanying text.

Brazil, the applicant had been ostracized from his family and mugged by a man who had accompanied him to a hotel.³²⁴ He feared further violence and discrimination against him in the future.³²⁵ The tribunal denied asylum based on this relatively weak evidence of past discrimination. The result is nonetheless surprising considering that the adjudicating Member granted an asylum claim based on well-documented evidence of pervasive violence against Brazilian queers only six months earlier.³²⁶

The case of a gay man from Poland appears to go even further than the Zimbabwe case toward recognition of serious discrimination as persecution.³²⁷ The asylum seeker was ostracized by his employer and coworkers, harassed and verbally abused by the police, and detained for brief police interrogations, during which he was photographed and fingerprinted.³²⁸ Although the tribunal noted that much of the evidence related to discrimination which fell short of persecution, it nonetheless felt that queers had an objective fear of having their police records used against them and of having the police fail to protect them from violence.³²⁹ The adjudicator then noted the outcome of the *Toonen* decision, and added that the United Nations Human Rights Committee has "effectively endorsed" the position that "homosexual people enjoy not only a right to privacy, but a right to equal protection from discrimination before the law."³³⁰ The fact that Poland had not yet passed a proposed constitutional amendment to prohibit discrimination on the basis of sexual orientation demonstrated that state protection of queers had not changed significantly since the applicant's departure.³³¹ Furthermore, the applicant need not be required to relocate to a major city, where discrimination would be less severe, due to several pragmatic concerns such as shortages of housing and jobs.³³² It will be interesting to note how this expansive view of the discrimination issue holds up over time.

Australian asylum jurisprudence has also confronted in detail an issue that remains subtextual or nonexistent in the queer asylum decisions of most other jurisdictions—whether a queer refugee may be refoiled if some degree of "discretion" is required to avoid persecution. This issue was first raised by a Member who adjudicated the case of a gay Chinese man who had been married to a woman before fleeing Shanghai, thereby escaping past persecution.³³³ After reviewing extensive evidence of imprisonment, medical "treatment," and violence towards Chinese queers, the Member quoted several

324. Decision of Jan. 25, 1996, RRT No. N95/08735, at 6-7 (slip op. on file with author).

325. *Id.*

326. Decision of July 31, 1995, RRT No. BN94/06026 (slip op. on file with author).

327. Decision of Feb. 9, 1996, RRT No. V95/03527 (slip op. on file with author).

328. *Id.* at 10.

329. *Id.* at 23.

330. *Id.* at 26 (the RRT cites Article 26 of the ICCPR for the equal protection proposition).

331. Decision of Feb. 9, 1996, RRT No. V95/03527, at 26-27.

332. *Id.* at 34-35.

333. See decision of June 10, 1994, RRT No. BV93/00242, ¶¶ 4, 30, LEXIS, AUST library, AUSMAX file.

sources that suggested Shanghai was more "liberal" and that "discreet" homosexuals were seldom prosecuted there, concluding that "it appears likely that in Shanghai a homosexual who is discreet in his behaviour can avoid the risk of harm."³³⁴ The tribunal then attempted to distinguish this idea from Hathaway's observation, in the context of political opinion-based asylum claims, that it is "inappropriate simply to discount the risk of harm on the ground that the claimant could avoid detection by keeping silent," by invoking Article 19 of the ICCPR, which allows for regulations of public morals.³³⁵ Given that notions of public morals vary widely, and recognizing that Chinese society is "conservative," the Member found that "it is not unreasonable for the applicant to exercise discretion in giving expression to his homosexuality and that this restriction on his activities would not constitute persecution."³³⁶ The opinion makes it clear that the discretion expected is not simply a matter of avoiding public sex acts, but would include such things as making "every effort to keep [a] relationship private."³³⁷

The next two decisions, which involved asylum seekers from China, carefully sidestepped the "discretion" issue. The first involved a gay man who, although discreet in China, had become a fairly prominent queer activist since his arrival in Australia.³³⁸ He was well-known to the Chinese community in Sydney and his picture was featured in a major queer periodical.³³⁹ The tribunal concluded that "after his experiences and his openly gay lifestyle in Australia . . . he would be more outspoken and honest about his sexual preference on return to China."³⁴⁰ The following decision involved another gay man who had escaped serious persecution in China.³⁴¹ There the tribunal avoided the discretion issue by noting that the applicant wanted to have a "life partner," and that in such a permanent relationship, presumably involving shared housing and public activities, he would not be able to be as discreet as before.³⁴² The tribunal granted asylum based on an aggregate fear of prosecution on account of political opinion, religion, and membership in a social group.³⁴³

334. *Id.*, ¶ 68. The tribunal then compared the existence of "some risk of violence" to the situation in Australia, where a majority of queers have been verbally abused or queer-bashed, suggesting the near equivalence of these situations. *Id.* This is reminiscent of relativist assumptions in earlier cases. See *supra* note 300 and accompanying text.

335. *Id.*, ¶ 69, citing HATHAWAY, *supra* note 10, at 150.

336. Decision of June 10, 1994, *supra* note 333, ¶ 69.

337. *Id.*, ¶ 71.

338. Decision of July 7, 1994, RRT No. BN94/03199, ¶ 8, available on LEXIS, AUST library, AUSMAX file.

339. *Id.*, ¶¶ 8, 32.

340. *Id.*, ¶ 32.

341. Decision of Aug. 25, 1994, RRT No. BN93/01754 (slip op. on file with author).

342. *Id.* at 6, 10.

343. *Id.* at 11.

The only Australian case involving a lesbian applicant was denied largely on grounds of "discretion."³⁴⁴ The asylum seeker, a lesbian from rural China, was disowned by her parents after revealing her sexual orientation and refusing to marry a man.³⁴⁵ She had never had a sexual relationship with a woman, but wanted to have the freedom to do so.³⁴⁶ The tribunal did not discuss persecution of lesbians under the criminal laws or discuss the types of private abuse disproportionately borne by female applicants.³⁴⁷ Instead, the adjudicator stated that she was not a "practising lesbian" and that there was no evidence that "she would pursue an overt relationship should she return" or that "her sexuality has been forcibly repressed."³⁴⁸ In any case, a "homosexual-lesbian can avoid the risk of harm by being discreet in her conduct."³⁴⁹ This opinion demonstrates the special danger of a "discretion" requirement for women, who typically recognize their sexual orientation at a later time than men, and who are often less "public" about their sexuality. One can only hope that this opinion is not indicative of future responses to lesbian asylum claims in Australia.

The next relevant case attempted to save the "discretion" doctrine from growing criticism. In the case of another gay man from China, the tribunal noted the asylum seeker's advocate's objection to the discretion concept, and again reviewed Professors Hathaway's comments on "keeping silent."³⁵⁰ The adjudicator explained that *Toonen* and similar human rights precedents guarantee a right to private consensual sex, but nothing more.³⁵¹ As a result, it is "reasonable to expect a homosexual to avoid persecution by being discreet in his conduct where this discretion does not involve giving up this right."³⁵² Fortunately, the tribunal recognized that protection of the right to private consensual sex requires that a queer individual must be able to safely disclose her sexual orientation.³⁵³ It is uncertain, however, how far the tribunal would allow this freedom of disclosure to be pushed. May it only involve whispers in dark alleys? Perhaps the tribunal has something more permissive in mind, since it granted asylum to the applicant.³⁵⁴

The most recent case, that of the Polish gay man discussed above,³⁵⁵ finally attempted to repudiate the discretion doctrine. After surveying the

344. Decision of Apr. 26, 1995, RRT No. V95/02999 (slip op. on file with author). It would be disingenuous not to note that the tribunal also seemed extremely suspicious of the applicant's economic motives for leaving China. Nonetheless, the tribunal claimed to consider the sexual orientation-based claim on its merits.

345. *Id.* at 5-6.

346. *Id.*

347. See generally Millbank, *supra* note 133, at 275-76.

348. Decision of Apr. 26, 1995, *supra* note 344, at 12, 18.

349. *Id.* at 8.

350. Decision of Oct. 12, 1995, RRT No. V95/03188, at 14 (slip opinion on file with author).

351. *Id.* at 14-15.

352. *Id.* at 15.

353. *Id.*

354. *Id.* at 16.

355. Decision of Feb. 9, 1996, RRT No. V95/03527.

earlier decisions, the tribunal noted that neither homosexuals nor heterosexuals have a right to behave indiscreetly, in the sense of engaging in public sex acts.³⁵⁶ But the opinion rejects any further obligation to be "discreet." Finding support from a German queer asylum case and an unreported Australian Federal Court opinion, the RRT Member concluded that it would simply be "unacceptable to require of a homosexual person that he or she 'live a hidden, inconspicuous life' in order to avoid a prospect of serious harm."³⁵⁷ The Member continued:

In the view of the Tribunal there is no sustainable basis for importing into refugee law a requirement in relation to the core rights of homosexuals that is different from that which applies, say, to heterosexuals, or to persons holding religious convictions. . . . Although it is arguable as to what actually constitutes core rights, there seems no doubt that they would include a right to openly acknowledge one's sexual identity and to behave in ways that do not amount effectively to the renunciation of that fundamental characteristic.³⁵⁸

This response seems both logically coherent and normatively correct. With any luck, later Australian tribunals, and foreign tribunals considering introducing a "discretion" concept, will choose to follow this reasoning.

D. *The United Kingdom*

Asylum claims in the U.K. are adjudicated under the refugee regime established by the Immigration Act of 1971,³⁵⁹ which does not explicitly incorporate the 1951 Convention framework and refugee definition.³⁶⁰ This legislation is supplemented by the Immigration Rules, regulations formulated by the Home Secretary, which set out specific procedural and substantive criteria.³⁶¹ The Home Office Refugee Unit hears asylum claims³⁶² and appeals are available before an Adjudicator.³⁶³ Further appeals on matters of law may be heard by a three-member Immigration Appeals Tribunal (IAT).³⁶⁴

356. *Id.* at 28.

357. *Id.* at 29.

358. *Id.* at 30.

359. See Immigration Act of 28 October 1971, 31 Halsbury 52-127 (1994 Reissue), as amended by the British Nationality Act 1981, 31 Halsbury 112-79 (1994 Reissue).

360. Dallal Stevens, *Re-introduction of the United Kingdom Asylum Bill*, 5 INT'L J. REFUGEE L. 91, 91 (1993).

361. See HELENE LAMBERT, *SEEKING ASYLUM: COMPARATIVE LAW AND PRACTICE IN SELECTED EUROPEAN COUNTRIES* 17-18 (1995). The term "Home Secretary" is the common title for the Secretary of State for the Home Department. This near-total delegation of the asylum system to an administrative process has been criticized for its informality and nontransparency. See Stevens, *supra* note 360, at 91.

362. AUSTRALIA'S REFUGEE AND HUMANITARIAN SYSTEM, *supra* note 272, at 16-17. In addition to granting asylum, the Unit may permit "exceptional leave to remain," a discretionary *de facto* status offered to some denied applicants. *Id.* at 17.

363. *Id.* at 17.

364. *Id.*

The recent Asylum and Immigration Appeals Act of 1993³⁶⁵ limits judicial review of these administrative tribunals by creating a procedure for direct certification of legal questions to the Court of Appeal, thereby reducing the incentive to launch a *de novo* appeal.³⁶⁶ Although the IAT is not technically bound by administrative precedent, it relies heavily on the principle of *stare decisis* in its asylum adjudications. Therefore, it is most useful to consider British queer asylum jurisprudence in chronological order.

The first case to consider whether queers comprise a social group was *Shewaish v. Home Secretary*.³⁶⁷ There, the IAT rejected the asylum claim of a gay man from Iraq.³⁶⁸ His original hearing had been based entirely on his fear of repercussions for political activity, which the panel rejected as unfounded.³⁶⁹ On appeal to the IAT, the applicant added a claim based on his sexual orientation, which he had been too embarrassed to mention earlier.³⁷⁰ Without any consideration of the merits of the claim, the IAT simply asserted that "such proclivities" do not bring an individual within a social group, as used in the Convention.³⁷¹

In the only queer asylum case to reach the British judiciary, *Regina v. Binbasi*, the court denied asylum to a gay man from the Turkish Republic of Northern Cyprus.³⁷² Discussing the social group nexus, the court found little guidance in British precedent.³⁷³ The Home Secretary opined that homosexuals were not a social group because "their only common characteristic is a sexual preference which, if it is revealed at all, is normally only revealed in private. A group cannot be a social group if its only common characteristic is so concealed."³⁷⁴

Rather than rejecting this misguided equation of sexual orientation and sexual acts, the court avoided the social group issue. The Home Secretary's opinion was unnecessary in this case because "it is clear that in Cyprus there is no discrimination against homosexuals who are not active."³⁷⁵ "Active" homosexuals could be prosecuted under Cyprus' sodomy law, which sanctions consensual homosexual sex with relatively brief imprisonment,³⁷⁶ but "it is not the necessary consequence of being homosexual that the individual

365. See LAMBERT, *supra* note 361, at 19 (noting passage of the Act in July 1993).

366. Nicholas Bamforth, *Protected Social Groups, the Refugee Convention and Judicial Review: The Vraciu Case*, PUBLIC L. 382, 382 (Autumn 1995).

367. *Shewaish v. Secretary of State for the Home Dep't*, No. TH/3147/88 (I.A.T. Oct. 11, 1988) (unpublished opinion on file with author).

368. *Id.* at 6.

369. *Id.* at 5.

370. *Id.*

371. *Id.*

372. *Regina v. Secretary of State for the Home Dep't ex parte Zia Mehmet Binbasi*, [1989] Imm. A.R. 595 (Q.B. Div. July 25, 1989) (LEXIS, UK library, ALLCAS file).

373. *Id.* at 598 (discussing the earlier case of *Home Secretary v. Otchere*, [1988] Imm. A.R. 21 (I.A.T. 1988)).

374. *Id.* at 599.

375. *Id.*

376. *Id.* at 597.

performs homosexual acts”³⁷⁷ or “openly behave[s] in a homosexual manner.”³⁷⁸ The risk of prosecution could be “avoided by self-restraint,” i.e. refraining from “future activity.”³⁷⁹ It was inconsequential that Mr. Binbasi would also be shunned and ridiculed for being gay because that “degree of discrimination would not be such as to have the quality of persecution.”³⁸⁰ In addition, the applicant could not invoke Article 8 of the European Convention on Human Rights, which both Cyprus and the U.K. have signed, because it has “no application . . . in the context of immigration.”³⁸¹

The *Binbasi* decision is flawed for several reasons. First, its logic is quite incoherent because of words like “homosexual” and “active,” which are not defined and appear to conflate sexual acts with other aspects of queer identity and individual behavior. Second, it embraces the “discretion doctrine” which has proven to be ineffective and confusing in Australian jurisprudence.³⁸² Third, it gives no serious consideration to the question of what level of discrimination for queer status might amount to persecution. Finally, it apparently rejects the relevance of human rights instruments to the concept of persecution without due comment.

In the case of an Iranian gay man named *Golchin*, the IAT returned to the social group question, which *Binbasi* had avoided and which had been “peripheral” to *Shewaish*.³⁸³ The tribunal canvassed German and Dutch queer asylum opinions and lengthy passages from Professor Goodwin-Gill and a UNHCR representative, who described the leading external and internal definitions of a social group.³⁸⁴ Ultimately, however, the IAT asserted its prerogative to decide the question for itself, concluding that “homosexuals *per se* do not constitute a social group within the meaning of the Convention.”³⁸⁵ Specifically, the panel doubted that homosexuals as a class possessed the required “characteristics of an historical and cultural nature . . . capable of affiliating succeeding generations.”³⁸⁶ Homosexuals were instead associated only “by way of inclination.”³⁸⁷

The *Golchin* tribunal also dealt briefly with the issue of persecution. The opinion begins with the observation that Iranian law calls for the execution of homosexuals, and that such treatment amounts to persecution.³⁸⁸ Yet, at the end of the opinion, the panel upholds the Adjudicator’s factual findings,

377. *Binbasi*, Imm. A.R. 595 (Q.B. Div. July 25, 1989), at 599.

378. *Id.* at 600.

379. *Id.* at 599, 601.

380. *Id.* at 497, 500.

381. *Id.* at 601-02. Article 8 is discussed *supra*, Section II.F.

382. *See supra*, Section III.C.

383. *Golchin v. Secretary of State for the Home Dep’t*, No. TH/17184/89, at 3 (I.A.T. Jan. 17, 1991) (unpublished opinion on file with author).

384. *Id.* at 3-8.

385. *Id.* at 8.

386. *Id.* at 7-8.

387. *Id.* at 8.

388. *Id.* at 2.

which endorse the *Binbasi* view that homosexuals may be required to exercise "self-restraint" to avoid identification as homosexuals.³⁸⁹ Of course, the IAT fails to emphasize that failure to be "discreet" in Iran might cost the asylum seeker his life.

The highly-publicized appeal by Ioan Vraciu, a gay man from Romania, may nonetheless indicate the viability of future queer asylum claims in the United Kingdom.³⁹⁰ Mr. Vraciu was involved in a discreet two-year relationship with another young man in Romania.³⁹¹ When his lover was arrested for "public disorder," Mr. Vraciu did not investigate for fear of being arrested, and thus could not be sure that the charge was based on his lover's sexual orientation.³⁹² He fled the country soon after, fearing persecution on account of his sexual orientation.³⁹³

The Adjudicator had thought himself bound, under *Binbasi*, to reject a social group claim, even though he felt Vraciu had a well-founded fear of persecution, such as police torture and sodomy prosecution in Romania.³⁹⁴ The IAT pointed out that *Binbasi* had avoided the social group issue, and that the IAT was free to reevaluate its position since *Golchin*.³⁹⁵ Citing Professor Hathaway and the U.S. *Acosta* opinion, the tribunal mentioned the existence of internally and externally defined social groups,³⁹⁶ and essentially chose Hathaway's theory over *Golchin*'s.³⁹⁷ The two criteria under the panel's test are "historical immutability" and a "characteristic identifying the group [which has] a "public" content in the society in which the group is said to exist."³⁹⁸ Without clarifying whether these standards are alternatives or prerequisites, the tribunal declared that "[t]here is no doubt that there is both an external and internal recognition of those who are sexually orientated [sic] in such a way as to form a 'group' so identified by that characteristic."³⁹⁹

On the issue of persecution, the IAT remanded Vraciu's case to a Special Adjudicator.⁴⁰⁰ Before doing so, however, it noted that the Romanian Constitutional Court's finding that Romania's sodomy law violated the European Convention was strong evidence that prosecution under that law

389. *Id.* at 9-10.

390. *Vraciu v. Secretary of State for the Home Dep't*, No. HX/70517/94 (I.A.T. Oct. 26, 1994). The opinion on remand, issued May 17, 1995, is discussed at greater length below. Because the remand elaborates considerably on the facts, it will be cited with asterisk pages.

391. *Id.* at* 4-6.

392. *Id.* at *4-6, *8, *20-21.

393. *Id.* at *6. The opinion on remand also deals at great length with a confusing situation regarding compulsory military service, but this claim is clearly peripheral to the IAT decision.

394. *Id.* at *3.

395. *Id.* at *10, 13.

396. *Id.* at *8-10.

397. *Id.* at *13.

398. *Id.* at *14.

399. *Id.* The panel notes the existence of a sodomy law, and current debate over its repeal as evidence of societal significance. *Id.*

400. *Id.* at *16.

alone might amount to persecution.⁴⁰¹ The IAT thus appeared to directly contradict *Binbasi's* treatment of human rights instruments as irrelevant.⁴⁰²

The lengthy remand is more interesting for the context it provides than for its content. The IAT decision had been devoured by the British tabloid press, which focused its criticism on doubts about Mr. Vraciu's credibility, including whether he was a homosexual at all.⁴⁰³ Relying primarily on the fact that he had not mentioned his homosexuality in earlier hearings, and that a true homosexual would neither keep pictures of naked women up in his flat nor abandon his long-time lover without confirming his fate, the Special Adjudicator concluded that Mr. Vraciu had fabricated his claim.⁴⁰⁴ Notwithstanding this questionable credibility determination, the Special Adjudicator damaged the progress made in the IAT opinion by questioning its social group reasoning⁴⁰⁵ and suggesting that any chance of persecution could be mitigated by due "discretion" on the part of the applicant.⁴⁰⁶ Mr. Vraciu has appealed the dismissal of his asylum claim to the High Court.⁴⁰⁷

Vraciu's legitimacy is also threatened by another IAT decision decided the following day. In *Jacques v. Home Secretary*, an HIV-positive gay man from Jamaica feared serious and unsanctioned violence from the general public in his hometown of Kingston.⁴⁰⁸ He had been assaulted and harassed on several occasions, including being spat upon and having a knife held to his throat.⁴⁰⁹ In an opinion by the author of *Shewaish* and *Golchin*, the IAT panel, with less than a page of analysis, stated that it did not accept that *Shewaish* and *Golchin* were wrongly decided, and affirmed its opinion "that homosexuals do not, *per se*, constitute a social group."⁴¹⁰ Furthermore, the tribunal agreed with the Adjudicator's conclusion that the hostility and harassment faced by Mr. Jacques did not rise to the level of persecution.⁴¹¹ The opinion entirely ignored the issue, presented on appeal, of whether HIV-positive individuals could comprise a social group.⁴¹² As a result of this cursory evaluation, it is uncertain whether queers may claim social group status in the U.K.

401. See *id.* at *16.

402. See *supra*, note 381 and accompanying text.

403. See, e.g., David Williams, *Why I've Kept Changing My Story, by 'Gay' Romanian Asylum-Seeker Whose Case Could Start a Rush; Claims They'll Cut My Throat if You Send Me Home*, DAILY MAIL (London), Jan. 3, 1995, at 6.

404. *Vraciu*, *supra* note 390, at *19-22. This observation was enhanced by the Adjudicator's knowledge of homosexuals as "gentle and sensitive people," a stereotype to which Mr. Vraciu apparently failed to conform. *Id.* at *21.

405. *Id.* at *22.

406. *Id.* at *25.

407. Stonewall Immigration Group Asylum Page, available at <http://www.tyger.co.uk/sig/asylum.html>.

408. *Jacques v. Secretary of State for the Home Dep't*, No. HX/70684/94, at 2-4 (I.A.T. Nov. 9, 1994) (unpublished opinion on file with author).

409. *Id.* at 3-5.

410. *Id.* at 8.

411. *Id.*

412. *Id.* at 6.

Two recent Adjudicator decisions suggest that the *Vraciu* analysis might ultimately prevail. In *Gelab*, a gay man from Syria feared official persecution and prosecution for imputed political opinion and social group status.⁴¹³ Asylum was granted primarily on the basis of perceived political opinion, resulting from the political activity of Mr. Gelab's family.⁴¹⁴ Nonetheless, the Adjudicator found that the "appellant's sexual orientation would increase the risks of severe ill-treatment."⁴¹⁵

In what appears to be dicta, the opinion addressed the conflict between *Vraciu* and *Jacques* and criticized the logic set forth in *Golchin*.⁴¹⁶ Looking to "overseas authorities" such as *Tenorio*⁴¹⁷ and *Inaudi*,⁴¹⁸ the Adjudicator concluded that "[a]s sexual orientation is a characteristic which can go so fundamentally to a person's very identity, it seems to me that there is no reason in principle why homosexuals should not be considered to be part of a social group."⁴¹⁹ Adopting an external analysis of social group, the adjudicator found that the existence of sodomy legislation and negative attitudes towards homosexual behavior in Syria created a cognizable social group.⁴²⁰ Continuing, the Adjudicator opined that sodomy prosecution alone might not rise to the level of persecution, but that here the asylum seeker risked arbitrary application of those laws, including selectively enhanced penalties, because of his sexual orientation.⁴²¹ Finally, Mr. Gelab's open homosexuality itself would be seen as opposing the government and Islamic values, and "could properly be categorised as a perceived political opinion."⁴²² It is unfortunate that these observations were then labeled as unnecessary to the determination of the appeal.⁴²³

Most recently, another Adjudicator concluded that homosexuals were members of a particular social group in Iranian society.⁴²⁴ Furthermore, the male applicant, as a "practicing homosexual," faced a serious likelihood of prosecution and excessive punishment (i.e. execution) under Iran's penal code.⁴²⁵

413. *Gelab v. Immigration Officer—Heathrow*, No. HX/75712/94, at 2 (Special Adjudicator Aug. 9, 1995) (unpublished opinion on file with author).

414. *Id.* at 7-8.

415. *Id.* at 8.

416. *Id.* at 9.

417. *Supra*, notes 191-93 and accompanying text.

418. *Supra*, notes 239-44 and accompanying text.

419. *Gelab*, HX/75712/94, at 9.

420. *Id.*

421. *Id.* at 10.

422. *Id.*

423. *Id.*

424. Stonewall Immigration Group, *Case Summaries and Reports*, at 4, available at <http://www.tyger.co.uk/sig/caserep.html> (case abstract of Sadegh, No. HX/75394/95 (Adjudicator Oct. 1995)).

425. *Id.*

Asked recently to clarify the Home Office's position on queer social group eligibility, Immigration Minister Ann Widdecombe hinted at a "control test" approach to the content of social groups.⁴²⁶ A social group must be:

defined by some innate or unchangeable characteristic of its members analogous to race, religion, nationality or political opinion, for example their sex, linguistic background, tribe, family or class which the individual cannot change or should not be required to change. . . .⁴²⁷

Minister Widdecombe then opined that homosexuality *might* satisfy this definition, and that, regardless, there must be a "real risk of persecution" in the individual case.⁴²⁸ It will be interesting to see if the United Kingdom will be able to categorically resolve the social group issue in the near future, and to begin developing its jurisprudence on other aspects of queer asylum law, such as those mentioned in *Vraciu* and *Gelab*.

IV. CONCLUSION

The disharmony revealed in this study has grave implications for the growing volume of sexual orientation-based asylum cases, as well as other asylum claims with a social group component, such as gender and disability-related claims. Inconsistent application within and between States seriously threatens the ability of tribunals to render justice for individual applicants and to coordinate their asylum efforts to respond to urgent global humanitarian needs.

At the same time, tribunals in many countries appear more willing than ever to look abroad for guidance in applying the international refugee regime. Groundbreaking decisions, particularly in Canada and Australia, have allowed domestic tribunals to move beyond the question of social group eligibility and on to more difficult line-drawing issues on the subject of persecution. The use of human rights instruments continues to offer a universal and progressive framework under which to analyze the actions of persecutors and prosecutors.

This is an exciting point in the development of global queer asylum jurisprudence. I sincerely hope that this Article will offer the infrastructure from which we may build a more uniform, accountable, and just asylum system that is responsive to the horrors faced by so many queers around the world.

426. Letter from Ann Widdecombe, Immigration Minister, to David Alton, Minister of Parliament, House of Commons 2 (Jan. 31, 1996) (on file with author). The opinion was sought by the Stonewall Immigration Group, a grassroots lobby and support group for queer immigration and asylum claims in the U.K. Stonewall Immigration Group, Press Release, *Homosexuals Could Be "Social Group" Concedes Home Office*, at 1 (Feb. 5, 1996), available at <http://www.qrd.org/QRD/orgs/SIG/european.campaign/press.release-02.05.96>.

427. Letter from Ann Widdecombe, *supra* note 426, at 2.

428. *Id.*

