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Germany Homeschoolers as "Particular Social Group": Evaluation Under Current U.S. Asylum Jurisprudence

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GERMAN HOMESCHOOLERS AS "PARTICULAR SOCIAL GROUP": EVALUATION UNDER CURRENT U.S. ASYLUM JURISPRUDENCE

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Abstract: Thirty years after the enactment of the Refugee Act of 1980, the Board of Immigration Appeals and U.S. courts and have not reached consensus on a uniform definition for the protected category of "particular social group." The lack of consensus has created much confusion and inconsistent results for applicants seeking asylum in the United States. This Note examines one family's grant of asylum as a vehicle for analyzing the two main approaches to "particular social group" and argues that the current treatment of the two standards as mutually exclusive by the BIA and the federal courts is inconsistent with the U.N. Guidelines. The Note concludes that U.S. jurisprudence on "particular social group" should mirror the approach of the U.N. Guidelines, which envisions broader protection under that category.

Introduction

On January 26, 2010, U.S. Immigration Judge Lawrence Burman granted political asylum to the Romeikes, a German family who fled their native country to escape government persecution for homeschooling their children.[1] In 2006, Uwe and Hannelore Romeike, concerned that the national school curriculum did not comport with their religious beliefs as evangelical Christians, withdrew their children from a public

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[1] *Homeschooling Family Granted Political Asylum*, Home Sch. Legal Def. Ass'n (Jan. 26, 2010), http://www.hslda.org/hs/international/Germany/201001260.asp. The Homeschool Legal Defense Association (HSLDA) is a nonprofit advocacy organization based in the United States whose mission is to advance the right of parents to direct the education of their children. The Immigration Court usually issues oral decisions after the hearing, and this case is no exception in that regard. Regina Germain, AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure 127–28, 145 (4th ed. 2005); *see* Tristana Moore, *Give Me Your Tired, Your Poor, Your Huddled Masses Yearning to Homeschool*, Time, Mar. 8, 2010, at 47.

school in Bissengen, Germany and began educating them at home.[2] They considered the public school curriculum to be contrary to their religious beliefs, in part because language and images contained in textbooks conflicted with their moral views.[3] Concerned that their children were being bullied as a result of their religious beliefs, they chose to withdraw their children from public school and begin educating them at home.[4]

One morning in October 2006, German police officers entered the Romeike home without a written court order, forcibly removed the Romeike children, and escorted them to public school.[5] A few days later, the police returned to the home but were prevented from taking the children by a citizens' group protesting outside.[6] The parents received several notices from the school principal and the chief law enforcement official in Bissengen ordering them to send their children to school or face legal consequences.[7]

From the time they removed their children from public school until they left for the United States, the Romeikes accumulated approximately $10,000 in fines for refusing to send them to school.[8] They unsuccessfully petitioned the authorities and filed complaints in the courts.[9] After court decisions in 2006 and 2007 paved the way for the German government to take custody of home-schooled children,[10] the Romeikes fled Germany out of fear of losing their children.[11]

The Romeikes entered the United States as tourists in August 2008 and filed for asylum within several months of their arrival.[12] They successfully persuaded the immigration court in Memphis, Tennessee to

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[2] *German Family Seeks U.S. Asylum to Homeschool Kids*, Fox News (Mar. 31, 2009), http://www.foxnews.com/story/0,2933,511825,00.html; *see* Moore, *supra* note 1.

[3] *See id.*

[4] *See* Moore, *supra* note 1.

[5] Respondent's Pre-Hearing Brief in Support of Asylum or Withholding of Removal at 6, *In re* Romeike, File No. A087–368-[redacted], Exec. Off. Immigr. Rev., Immigr. Ct. (Dep't of Justice 2009), *available at* http://www.hslda.org/hs/international/Germany/RomeikeBrief.pdf [hereinafter Respondent's Brief].

[6] *Id.*

[7] *Id.*

[8] *See* Travis Loller, *German Homeschoolers Granted Political Asylum*, Boston Globe (Jan. 26, 2010), http://www.boston.com/news/education/k_12/articles/2010/01/26/german_homeschoolers_granted_political_asylum/.

[9] Respondent's Brief, *supra* note 5, at 6.

[10] *See* Moore, *supra* note 1; Loller, *supra* note 8; *Homeschooling Family Granted Political Asylum*, *supra* note 1.

[11] *See* Moore, *supra* note 1; Loller, *supra* note 8; *Homeschooling Family Granted Political Asylum*, *supra* note 1.

[12] Respondent's Brief, *supra* note 5, at 7.

grant asylum on the grounds that the German government persecuted the family and violated their basic human rights.[13] The court's decision was the first grant of political asylum for persecution based on violation of compulsory education laws.[14]

In light of the U.S. government's appeal of the immigration court's decision to the Board of Immigration Appeals (BIA),[15] this Note examines the current standard for grant of asylum on the basis of the protected ground of "particular social group."[16] Part I of this Note describes the compulsory education law in Germany under which the Romeikes claim persecution, explores the practice of homeschooling in Germany, and provides a brief procedural overview for gaining "refugee" status in the United States. Part II discusses two distinct approaches adopted by the BIA and federal circuit courts of appeal in defining "particular social group." Part III applies those approaches to the *Romeike* case and identifies inconsistent applications in the various circuits and advocates for a uniform standard to comport with the aims of international law. This Note argues that, on appeal, the BIA should find that all German homeschoolers comprise a "particular social group," regardless of whether the Romeike family successfully established a claim of "well-founded fear of persecution."

I. Background

A. *The German Education Law Regime Prohibits Homeschooling*

The unfavorable treatment of homeschoolers in Germany is not a unique phenomenon; indeed, there is a robust debate in the United States and elsewhere regarding the validity of homeschooling as a means of education.[17] For instance, in February 2008 the Second District Court of Appeals in Los Angeles handed down a surprising decision upholding the constitutionality of a state statute prohibiting homeschooling for children between the ages of six and eighteen unless

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[13] *See Homeschooling Family Granted Political Asylum*, *supra* note 1.

[14] *See* Moore, *supra* note 1.

[15] Telephone interview with Michael Donnelly, Staff Att'y, HSLDA (Mar. 12, 2010).

[16] At the time of this writing, the BIA had not yet issued a decision in the case. *Id.*

[17] *See* Aaron T. Martin, *Homeschooling in Germany and the United States*, 27 Ariz. J. Int'l & Comp. L. 1, 23–30 (2010); Amanda Petrie, *Home Education in Europe and the Implementation of Changes to the Law*, 47 Int'l Rev. Educ., 477, 479–80 (2001).

their parents possess teaching credentials.[18] Within six months, however, the same court reversed, holding that as long as parents declare their home to be a private school, they may teach their children even without teaching credentials.[19]

Moreover, there is a movement to end homeschooling in United Nations member countries on the theory that a child's right to education may be vindicated only by compulsory education in traditional schools outside the home.[20] By the same token, there is also a movement to recognize the right of parents to choose the appropriate form of schooling for their children.[21] The issue has also concerned U.S. policymakers; the Georgia and Tennessee state legislatures have passed resolutions expressing disapproval of the German compulsory education laws.[22]

In Germany, compulsory education laws require that children not only receive formal education from ages six or seven for a period of nine years, they also require all children to attend either a public school or state-approved private school.[23] In addition, German law generally does not recognize correspondence education for children living within Germany.[24] Before World War II, the state recognized homeschooling as

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[18] *See In re* Rachel L., 73 Cal. Rptr. 3d 77, 83–84 (Dist. Ct. App. 2008); Kristin Kloberdanz, *A Homeschooling Win in California*, Time, Aug. 13, 2008, *available at* http://www.time.com/time/nation/article/0,8599,1832485,00.html.

[19] *See In re* Jonathan L., 81 Cal. Rptr. 3d 571, 590 (Dist. Ct. App. 2008).

[20] *See* Martin, *supra* note 17, at 56; Petrie, *supra* note 17, at 480.

[21] *See e.g.*, Home Sch. Legal Def. Ass'n, http://www.hslda.org (last visited Apr. 16, 2011) (American homeschooling organization that advocates for parents' freedom of choice over the direction of their children's education); Netzwerk Bildungsfreiheit, http://www.netzwerk-bildungsfreiheit.de (last visited Apr. 16, 2011) (a German lobbying organization advancing educational freedom in Germany and providing support for homeschooling families).

[22] *See* H.R. 850, 149th Gen. Assemb., 2d Sess. (Ga. 2009), *available at* http://www.legis.state.ga.us/legis/2009_10/pdf/hb850.pdf [hereinafter Georgia Resolution]; H.R. 87, 106th Gen. Assemb., Reg. Sess. (Tenn. 2009), *available at* http://www.capitol.tn.gov/Bills/106/Bill/HR0087.pdf [hereinafter Tennessee Resolution]; *see also* Martin, *supra* note 17, at 1, 30–31 (noting support for homeschooling movement on the federal and state level).

[23] *See* Thomas Spiegler, *Home Education in Germany: An Overview of the Contemporary Situation*, 17 Evaluation & Res. in Educ. 179, 180 (2003). By comparison, in the United States, although the education of children is compulsory under the laws of every state, parents are not required to send their children to a state-approved school. *See* Marilyn Grady et al., Compulsory Education: A Policy Analysis 15 (Apr. 25, 1994), *available at* http://www.eric.ed.gov/PDFS/ED377556.pdf. Compulsory education statutes differ state by state and impose varying minimum and maximum ages. *Id.* Courts have recognized parents' rights to direct their children's upbringing under the First and Fourteenth Amendments to the U.S. Constitution. *See id.* at 8.

[24] *Id.* Correspondence education for children living abroad is accepted. *Id.* Correspondence education, or distance learning, is a method of providing education for students who

a valid exception to laws mandating compulsory education.[25] In 1938, however, those exceptions were eliminated, and violations of compulsory education laws triggered criminal penalties.[26]

Such violations constitute an civil offense in the first instance, and can result in a fine of several thousand Euros for subsequent violations.[27] Continued contravention may incur forcible enforcement, and other significant penalties.[28] In extreme cases, courts may revoke custody of the children and even imprison the parents for up to six months.[29] Alternatively, courts may impose fines that accrue daily for as many as 180 days.[30]

In 2003, Germany's Federal Constitutional Court, its highest court, reaffirmed the government's authority to compel attendance in state-run schools and held that the state's interest in ensuring access to adequate education outweighed the parents' interest in choosing how to educate their children.[31] The court recognized an impracticability exemption for children whose parents' occupations required extensive travel.[32] It did not, however, create an exemption for homeschooling on the basis of religion or conscience.[33]

B. *Homeschooling Movement*

Notwithstanding the threat of punishment, the parents of approximately 500 German children choose to teach their children at home.[34] Teaching children outside of the public school setting is commonly known as "homeschooling," but many parents join together in "learning groups" in a place other than a home to educate their chil-

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receive lessons by mail or internet. *Id.* Students typically return their assignments to their instructors for evaluation and comment. *See Correspondence Education Definition*, ENCYCLOPAEDIA BRITTANICA.COM, http://www.britannica.com/EBchecked/topic/138674/correspondence-education (last visited Apr. 17, 2011).

[25] *See* Martin, *supra* note 17, at 7–8.

[26] *See id.* at 8. For instance, in one case a father who homeschooled his children for religious reasons faced a five-day prison sentence and the loss of child custody. *Id.*

[27] *See* Spiegler, *supra* note 23, at 180–81.

[28] *See id* at 181.

[29] *See id.*

[30] *See id.*

[31] *See* Martin, *supra* note 17, at 19, 22; *Homeschooling Family Granted Political Asylum*, *supra* note 1.

[32] *See Homeschooling Family Granted Political Asylum*, *supra* note 1.

[33] *See id.*

[34] Spiegler, *supra* note 23, at 179.

dren.[35] Some parents even opt to join homeschooling organizations for support, to exchange ideas, and to find legal representation.[36]

German parents have chosen to homeschool for a variety of reasons, including religious concerns or because a child's medical condition precludes conventional schooling.[37] Regardless of the impetus for the decision, homeschooling parents generally share one outlook: that they have the right to direct their child's education, tailored to the individual needs and abilities of the child.[38] They believe this is consistent with internationally accepted principles of human rights.[39] The Universal Declaration of Human Rights provides that "[e]veryone has the right to education[;]" "elementary education shall be compulsory[;]" and, "parents have a prior right to choose the kind of education that shall be given to their children."[40] Furthermore, Article 13 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognizes:

> [T]he liberty of parents . . . to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.[41]

That right is also recognized by the European Convention on Human Rights, which states that "the State shall respect the right of parents to

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[35] *See* Petrie, *supra* note 17, at 479; Spiegler, *supra* note 23, at 184.

[36] *See id.* For instance, Stuttgart Area Home Schoolers maintains a website that provides resources for curriculum providers, educational requirements, and social gatherings. Stuttgart Area Home Schoolers, http://www.stuttgarthomeschoolers.com (last visited Apr. 16, 2011).

[37] *See* Spiegler, *supra* note 23, at 182, 183. The decision to homeschool is often motivated by religious beliefs, but not always. *See* Petrie, *supra* note 17, at 479–80. Parents might have any number of reasons for choosing homeschooling, including a child's specialized needs, practical reasons that hinder a child's attendance, or philosophical outlook, among others. *See* Martin, *supra* note 17, at 7.

[38] *See* Spiegler, *supra* note 23, at 183.

[39] *See* Universal Declaration of Human Rights, art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Economic, Social, and Cultural Rights, art. 13(3), Dec. 16, 1966, 1966 U.S.T. 521, 993 U.N.T.S. 3 [hereinafter ICESCR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 312 U.N.T.S. 221 [hereinafter European Convention for Human Rights].

[40] Petrie, *supra* note 17, at 480 (citing Universal Declaration of Human Rights, *supra* note 39, art. 5).

[41] ICESCR, *supra* note 39, art. 13, ¶ 3.

ensure such education and teaching in conformity with their own religions and philosophical convictions."[42]

In reference to these rights of parents, and relying specifically on the ICESCR, the U.N. Special Rapporteur to the Human Rights Council of the General Assembly has urged the German government to respect a parent's choice for his or her children.[43] The report stated that "education may not be reduced to mere school attendance," noted that "[d]istance learning methods and home schooling represent valid options," and urged states to refrain from restricting "forms of education that do not require attendance at a school."[44]

German education law, diverging from international conventions, prioritizes the interest of the state in requiring attendance at public schools, with narrow exceptions.[45] Having received penalties and threats from the German authorities, the Romeikes feared losing custody of their children.[46] Ultimately, this fear led them to flee Germany and seek asylum in the United States.[47]

II. Discussion

As previously discussed, to successfully obtain asylum in the United States, a refugee must prove that, on account of[48] at least one of five protected grounds—race, nationality, religion, political opinion, or membership in a particular social group—he or she either suffered persecution, or has a well-founded fear[49] of future persecution.[50] In the

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[42] European Convention on Human Rights, *supra* note 39, art. 2.

[43] *See* U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, ¶ 62, U.N. Doc. A/HRC/4/29/Add.3 (Feb. 21, 2006) (prepared by Vernor Munoz) [hereinafter Report by U.N. Rapporteur]; Petrie, *supra* note 17, at 480.

[44] *See* Report by U.N. Rapporteur, *supra* note 43, ¶ 62. Some countries have confused the right of a child to education with a right to education in a public, state-approved school. *See* Petrie, *supra* note 17, at 480.

[45] *See* Martin, *supra* note 17, at 10; *see also* Petrie, *supra* note 17, at 480.

[46] *See* Moore, *supra* note 1; Loller, *supra* note 8.

[47] *See* Moore, *supra* note 1; Loller, *supra* note 8.

[48] An applicant must show that the past persecution or fear of future persecution was "on account of" one of the protected grounds. *See* Immigration and Nationality Act (INA) § 1101(a)(42), 8 U.S.C. § 1158 (2009). Courts have interpreted the phrase to signify that a "nexus" must exist between the persecution and the protected grounds. *See* Deborah E. Anker, Law of Asylum in the United States 268 (3d ed. 1999).

[49] Under the INA, the applicant can either establish a well-founded fear of future persecution upon returning to his or her home country to satisfy that prong, or show past persecution. *See* Ira J. Kurzban, Immigration Law Sourcebook 347, 360 (10th ed. 2006). In *INS v. Cardoza Fonseca*, the Supreme Court ruled that applicants are required to establish that "persecution is a reasonable possibility" to satisfy the burden of proof for "a well-

Romeike case, Immigration Judge Burman found that the family had a "well-founded fear of persecution" on account of membership in the "particular social group" of homeschoolers.[51]

A. *Seeking Asylum in the United States—Procedural Overview*

Upon arriving in the United States, the Romeikes sought safe haven as refugees fleeing persecution.[52] The process begins with an application to the U.S. Citizenship and Immigration Services, to be filed within one year of arrival in the United States.[53] Asylum officers process asylum applications, hold "non-adversarial" interviews and make determinations as to the applicant's eligibility for asylum.[54] The officer may consider the applicant's testimony, information presented at the

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founded fear." *See* 480 U.S. 421, 431, 449 (1987). According to the Court, a fifty percent chance satisfies the requirement, but even a ten percent chance could establish "well-founded fear." *See id.* at 431, 440.

[50] INA § 1101(a)(42). The term "persecution" is not defined in U.S. law or in the 1951 Convention. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 860 (6th ed. 2008); *see* United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter U.N. Convention]; United Nations Protocol Relating to the Status of Refugees art. I(2), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter U.N. Protocol]. The drafters of the Convention declined to adopt a comprehensive list of all forms of persecution, instead implementing a framework that could be adapted to changing conditions. *See* ANKER, *supra* note 48, at 173. The U.N. Handbook provides general guidance, stating that "a threat to life or freedom" on account of one of five protected grounds constitutes persecution. United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*, ¶ 51, U.N. Doc HCR/IP/4/Eng/REV.1 (1979) [hereinafter U.N. Handbook]. Some prejudicial actions or threats may amount to persecution, depending on the nature and seriousness of the acts. *See id.* ¶¶ 52, 54–55. The *Basic Law Manual*, issued by the Immigration and Naturalization Services (now DHS), instructs asylum officers that basic human rights protected by international law should be the standard for persecution. *See* U.S. DEP'T OF JUST., IMMIGR. & NATURALIZATION SERV., BASIC LAW MANUAL 20 (1994).

[51] *Homeschooling Family Granted Political Asylum*, *supra* note 1.

[52] *See* Respondent's Brief, *supra* note 5, at 7; Moore, *supra* note 1.

[53] *See* INA § 208(a)(2)(B). Applications by refugees may be divided into three categories: affirmative applications, defensive applications, and expedited removal. ALEINIKOFF, *supra* note 50, at 849–50. Affirmative asylum applications are those filed by applicants who are not in removal proceedings. *See id.* at 850. Defensive asylum applications are cases filed by applicants whose removal proceedings are underway and require a higher burden of proof. *See id.* at 851; ANKER, *supra* note 48, at 17. Expedited removal procedures apply to applicants who enter the United States without an inspection, and must first establish a "credible fear." ALEINIKOFF, *supra* note 50, at 852. After clearing that initial hurdle, those cases are treated as defensive applications. *See id.* The Romeikes filed an affirmative application a few months after an inspected entry as tourists. *See* Respondent's Brief, *supra* note 5, at 7.

[54] *See* 8 C.F.R. § 1208.9 (2010); ALEINIKOFF, *supra* note 50, at 851.

interview, and information from the U.S. State Department and "other credible sources," including international organizations.[55] Given the difficulties of proof in asylum cases, the asylum interview is designed to elicit all relevant information, with little limitation on the types of evidence that may be considered.[56]

The asylum officer decides whether the applicant is eligible for asylum.[57] Officers may deny a grant of asylum either because the officer does not believe that the applicant satisfied his or her burden of proof in establishing the necessary statutory definition of "refugee," or because the officer believes the applicant falls outside of the scope of that definition.[58] Where the asylum officer feels the applicant failed to adequately establish his or her case, the officer refers the case to the immigration court for a hearing.[59]

An applicant may appeal an unfavorable decision by the immigration judge to the BIA.[60] Similarly, the Department of Homeland Security (DHS) may also appeal a decision by the immigration judge to the BIA.[61] In the *Romeike* case, the government has appealed the immigration judge's decision in favor of the applicants.[62] If the BIA denies the appeal, applicants may file a further appeal to the federal Court of Appeals in the circuit in which the case originated.[63] A circuit court is required to afford great deference to the BIA's findings of fact and may reverse a BIA decision only if it finds that the BIA committed legal error or abused its discretion.[64] Generally, when a court of appeals re-

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[55] *See* 8 C.F.R. §§ 1208.9(e), 1208.11, 1208.12.

[56] *See* Anker, *supra* note 48, at 88.

[57] *See id.* Withholding of deportation is unlike an affirmative grant of asylum; it is a mandatory form of relief, and the Attorney General may not return the applicant to his or her home country. An order to withhold deportation, however, is not the same as a grant of permanent residence. *See id.*

[58] *See* Jaya Ramji-Nogales et al., Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform 13 (2009).

[59] *See* 8 C.F.R. § 1208.14(c)(1).

[60] *See id.*

[61] *See id.*

[62] Telephone interview with Michael Donnelly, *supra* note 15; *see also* Moore, *supra* note 1.

[63] *See* INA § 242(a)(1); Ramji-Nogales, *supra* note 58, at 14; Thomas Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group," in* Refugee Protection in International Law: UNHCR's Global Consultations on International Protection 263, 275 (Erika Feller et al. eds., 2003).

[64] Ramji-Nogales, *supra* note 58, at 14.

verses a decision of the BIA, it may only remand to the BIA and cannot grant asylum.[65]

B. *Sources of U.S. Asylum Law*

U.S. asylum law derives from international law, particularly the 1951 United Nations Convention relating to the Status of Refugees (Convention) and the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol).[66] In 1980, Congress enacted the Refugee Act, which aimed to tailor its asylum laws to uphold international treaty obligations under the Protocol.[67] The Act also standardized the procedure and requirements for granting asylum to refugees, repealed restrictions limiting asylum to refugees from certain countries, and extended asylum to people fleeing from "friendly" governments.[68] Although Congress intended for the definition of "refugee" to mirror the definition in the Protocol, the Protocol is not binding on the BIA or U.S. courts in construing legal requirements.[69]

The definition of "refugee" set forth in § 101(a)(42) of the INA is identical to the Protocol definition:

> [A]ny person . . . who is unable to or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. [70]

When Congress initially ratified the Protocol, however, it omitted the "particular social group" basis, despite modeling the remainder of the definition of "refugee" after the Convention and Protocol.[71] The Refu-

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[65] *Id.*

[66] GERMAIN, *supra* note 1, at 1.

[67] *See Cardoza-Fonseca*, 480 U.S. at 436–37; GERMAIN, *supra* note 1, at 2–3.

[68] Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 739, 744 (1989).

[69] *See* Medellin v. Texas, 552 U.S. 491, 505–06 (2008); *In re* Acosta, 19 I&N Dec. 211, 220 (BIA 1985).

[70] *See* INA § 101(a)(42); U.N. Protocol, *supra* note 50, art. I(2). Although Congress intended the definition of "refugee" to mirror the definition in the Protocol, the Protocol is not binding on the BIA or U.S. courts. *See Medellin*, 552 U.S. at 505–06; *Acosta*, 19 I&N Dec. at 220.

[71] Graves, *supra* note 68, at 746–47.

gee Act did not introduce "particular social group" as an additional ground on which asylum could be granted until 1980.[72]

Congress did not provide guidance on the meaning or the requirements of "particular social group;"[73] for this reason, the Supreme Court sought guidance in the Handbook on Procedures and Criteria on Determining Refugee Status published by the Office of United Nations High Commissioner for Refugees (UNHCR) (U.N. Handbook), which emphasizes conformity with the Protocol.[74] Accordingly, immigration judges, the BIA, and federal courts frequently cite to the U.N. Handbook in their decisions.[75] To supplement the U.N. Handbook, the UNHCR issued *Guidelines on International Protection: "Membership of a Particular Social Group,"* which provide further guidance on the interpretation of "particular social group."[76]

C. *Defining a "Particular Social Group"*

Of the five protected categories, "particular social group" may be the most difficult to define,[77] and neither the Protocol nor Congress provide any clear guidance.[78] Due to the lack of a clear definition, conflicting interpretations of the drafters' intended purpose have spawned confusion on the proper construction of "particular social group."[79] The competing positions may be divided into two camps.[80]

One view is that Congress intended to meet international human rights standards and to adequately respond to humanitarian needs.[81] Proponents of that view cite to the Swedish delegate's observation at the Conference of Plenipotentiaries that "certain refugees have been persecuted because they belonged to particular social groups," which led to the addition of the "particular social group" category to the Con-

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[72] *See id.*

[73] *See Acosta*, 19 I&N Dec. at 232.

[74] *See Cardoza-Fonseca*, 480 U.S. at 436–37.

[75] *See id.*; Poradisova v. Gonzalez, 420 F.3d 70, 79–81 (2d Cir. 2005); *Acosta*, 19 I&N Dec. at 232.

[76] United Nations High Commissioner for Refugees, *Guidelines on International Protection: "Membership of a Particular Social Group,"* ¶¶ 7, 8, 10, U.N. Doc HCR/GIP/02/02 (2002) [hereinafter U.N. Guidelines].

[77] ALEINIKOFF, *supra* note 50, at 897.

[78] *Acosta*, 19 I&N Dec. at 232.

[79] *See* Aleinikoff, *supra* note 63, at 265.

[80] *See* ANKER, *supra* note 48, at 379; Aleinikoff, *supra* note 63, at 266.

[81] *See* Graves, *supra* note 68, at 750.

vention near the end of the deliberations.[82] Some commentators speculate that the impetus behind this late addition was to establish an expansive category to extend protections to those people not covered by the other four grounds.[83]

The other competing view derives from a fear that a broad construction of "particular social group" will result in a flood of asylum seekers.[84] Under this view, limits are necessary to prevent an influx of a large number of people fleeing civil war and ethnic strife.[85] Another theory underpinning this approach is that expanding the category beyond that intended by the drafters would effectively impose obligations on the signatory states to which they did not consent.[86]

The BIA and courts of appeals have developed general standards for interpreting "particular social group" that generally follow two approaches: one focuses on the immutable characteristics common to the group; the other considers external perceptions of the group.[87] The following case illustrations explore the tests, their application, and their ramifications.

1. The Internally Defined Approach

a. *Immutable Characteristics Test*

The BIA first introduced this approach in *Matter of Acosta*.[88] To determine the scope of protection, the BIA employed the doctrine of *ejusdem generis* to identify connections between race, religion, nationality, and political opinion.[89] The BIA identified immutability as the common thread between race and nationality.[90] In recognition of the fact that immutability cannot be a basis for the two other protected categories of

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[82] *See* Aleinikoff, *supra* note 633, at 266; John Hans Thomas, *Seeing Through a Glass, Darkly: The Social Context of "Particular Social Groups" in* Lwin v. INS, 1999 BYU L. Rev. 799, 801.

[83] *See* Aleinikoff, *supra* note 63, at 266; Graves, *supra* note 68, at 748.

[84] *See* Anker, *supra* note 48, at 379.

[85] *See* Aleinikoff, *supra* note 50, at 830; Talia Inlender, *The Imperfect Legacy of* Gomez v. INS: *Using Social Perceptions to Adjudicate Social Group Claims*, 20 Geo. Immigr. L.J. 681, 684 (2006).

[86] *See* Aleinikoff, *supra* note 63, at 265.

[87] *See* Anker, *supra* note 48, at 379; Inlender, *supra* note 85, at 709; Thomas, *supra* note 82, at 804–07.

[88] *See Acosta*, 19 I&N Dec. at 233; Aleinikoff, *supra* note 63, at 275.

[89] *Acosta*, 19 I&N Dec. at 233. The doctrine of *ejusdem generis*, as the BIA explained, holds that "general words used in an enumeration with specific words should be construed in a manner consistent with the specific words." *Id.*

[90] *See id.*

religion and political opinion, the BIA added a second factor to the immutability test, explaining that characteristics which "ought not to be required to be changed" are also protected.[91] The *Acosta* definition of "particular social group," as a group sharing "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed," relies on the internal unifying characteristic of group members.[92] The BIA referred to the U.N. Handbook's suggestion that "a particular social group" connotes "persons of similar background, habits, or social status" in support of the formulation of its standard.[93] Examples of such groups are those characterized by gender, clan membership, sexual orientation, family, shared past experiences, and "matter[s] of conscience."[94]

The BIA applied the standard to determine whether Acosta was a member of a "particular social group" consisting of taxi drivers in San Salvador who "refus[ed] to participate in guerrilla-sponsored efforts to destabilize the government, such as work-stoppages."[95] The BIA ruled that neither being a taxi driver nor refusing to participate in guerrilla-sponsored activities qualified as immutable characteristics, because the members of the group could avoid the threats either by changing their jobs or by cooperating in work stoppages.[96] In upholding the immigration judge's denial of asylum, the BIA noted that, although it would be unfortunate for taxi drivers to have to change their jobs or to have to cooperate with guerrillas, international law does not guarantee an individual's choice of work.[97]

In *Lwin v. INS*, the Seventh Circuit Court of Appeals applied the *Acosta* test for "immutable characteristics," noting that it best "preserve[d] the concept that refugee status is restricted to 'individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.'"[98] Lwin, a Burmese citizen, was the father of a student dissident who fled the Burmese military regime's crackdown on protests.[99] After being interrogated twice by Burmese police, he agreed to report any future contact with his son.

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[91] *See* Aleinikoff, *supra* note 63, at 276.
[92] *See Acosta*, 19 I&N Dec. at 233; ANKER, *supra* note 48, at 378.
[93] *See Acosta*, 19 I&N Dec. at 233(citing U.N. Handbook, *supra* note 50, ¶ 77).
[94] *See id.*; Aleinikoff, *supra* note 63, at 276.
[95] *See Acosta*, 19 I&N Dec. at 234.
[96] *Id.*
[97] *See id.* at 213, 234, 236.
[98] 144 F.3d 505, 512 (7th Cir. 1998).
[99] *Id.* at 507.

Ultimately, he refused to do so and his home was searched on three occasions.[100] On a visit to see his son in the United States, Lwin filed for asylum on grounds of persecution for his membership in a "particular social group," which he defined as parents of student dissidents.[101] In support, he provided evidence that a parent of another dissident had been sentenced to twelve years in prison.[102] The court reversed the BIA's denial of asylum, holding that Lwin had established that he was a member of the social group comprised of parents of Burmese student dissidents who have received punishment by the government because of their contact with their dissident children.[103] The BIA continues to rely on the "immutable characteristics" test as the primary standard by which it determines whether an applicant is a member of a "particular social group."[104]

The strength of this internally defined "immutable characteristics" approach is that it provides protection for traits that are fundamental to human dignity, and civil and human rights.[105] A weakness, however, is that in the absence of clear guidance, the subjective nature of the inquiry of whether characteristics are fundamental to human dignity and "ought not be required to be changed" might improperly result in value judgments rather than legal judgments.[106] Moreover, critics have argued that the framework denies protection to groups—like students, unions, refugee camp workers, or homeless children—who may be persecuted for an identity that is widely recognized by society, but that nevertheless lacks a sufficient basis in civil or political rights.[107]

b. *Voluntary Associational Relationship Test*

The Ninth Circuit Court of Appeals diverged from the BIA's "immutable characteristics" approach and set forth a different definition of "particular social group" in *Sanchez-Trujillo v. INS.*[108] Although both ap-

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[100] *Id.* at 508.

[101] *See id.*

[102] *See id.*

[103] *See id.* at 510, 512. Ultimately, the case was remanded on the ground that Lwin had failed to establish that he had a well-founded fear of persecution. *See id.* at 508.

[104] *In re* C-A-, 23 I&N Dec. 951, 956 (BIA 2006) (explaining that the BIA will "continue to adhere to the Acosta formulation" after "[h]aving reviewed the range of approaches to defining particular social group").

[105] *See* Inlender, *supra* note 85, at 686.

[106] *See Acosta*, 19 I&N Dec. at 233; Inlender, *supra* note 85, at 693.

[107] *See* Aleinikoff, *supra* note 63, at 295; *see also* Inlender, *supra* note 85, at 686 (citing James Hathaway, The Law of Refugee Status 8 (1991)).

[108] 801 F.2d 1571, 1576 (9th Cir. 1986); Thomas, *supra* note 82, at 805.

proaches focus on immutable characteristics common to the group, the Ninth Circuit further narrowed the category by requiring that the group result from a "voluntary associational relationship."[109] Construing the statutory phrase "particular social group," the court determined that the words "particular" and "social" indicate that the term does not encompass large demographic segments of the population.[110] By requiring that individuals take some affirmative action to affiliate with others, the standard excludes those who have chosen not to associate with others with similar characteristics.[111]

Applying this standard, the *Sanchez-Trujillo* court determined that young, working class urban males of military age did not constitute a "particular social group" because such a definition was impermissibly broad.[112] In an effort to avoid granting asylum to unacceptably large demographic groups, the court cited the lack of cohesiveness and homogeneity within the group as the basis for denying the group protected status.[113]

The court used contrasting examples to illustrate the scope of the test.[114] It posited hypothetically that a group of males taller than six feet would fall outside the scope of "particular social group," despite the immutability of a person's physical features.[115] By contrast, the court explained that the family unit is a paradigmatic example of a "particular social group" and emphasized its fundamental affiliational concerns, common interests, and size.[116] This comparison, however, revealed potential inconsistencies in the Ninth Circuit's test, given that families are not necessarily voluntary associations.[117]

In *Hernandez-Montiel v. INS*, the court retreated from the *Sanchez-Trujillo* test, apparently in an effort to resolve the tension between the BIA's *Acosta* ruling and the voluntary associations test in *Sanchez-*

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[109] *See Sanchez-Trujillo*, 801 F.2d at 1576; Thomas, *supra* note 82, at 806.

[110] *See Sanchez-Trujillo*, 801 F.2d at 1576.

[111] *See* Aleinikoff, *supra* note 63, at 278 (explaining that classes of gays and lesbians are unlikely to be cohesive or display close affiliation among members); Thomas, *supra* note 82, at 807 (giving as an example Nazi persecution of non-religious Jews despite the victims' lack of interest in associating with each other and complete assimilation into German society).

[112] *See Sanchez-Trujillo*, 801 F.2d at 1576.

[113] *See id.* at 1577; *see also* Perdomo v. Holder, 611 F.3d 662, 666 (9th Cir. 2010) (remanding case where BIA denied asylum and declined to recognize "particular social group" consisting of women from Guatemala).

[114] *See Sanchez-Trujillo*, 801 F.2d at 1576.

[115] *See id.*; *Acosta*, 19 I&N Dec. at 233.

[116] *See Sanchez-Trujillo*, 801 F.2d at 1576.

[117] *See* Thomas, *supra* note 82, at 806.

Trujillo.[118] Ostensibly, the court combined the *Acosta* and *Sanchez-Trujillo* standards, but it did not provide any guidance for application of this new test in future cases.[119] Holding that the test is whether one is "united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it," the court determined that Mexican "gay men with female sexual identities" qualified as a particular social group.[120] In its application of the new standard, however, the court implicitly abandoned the "voluntary association" test it purported to be upholding, and instead relied solely on *Acosta's* "immutable characteristics" test.[121]

2. Externally Oriented Social Perceptions Approach

In stark contrast to the internally defined "immutable characteristics test," the U.S. Court of Appeals for the Second Circuit interpreted "particular social group" from an external perspective.[122] In *Gomez v. INS*, the court referred to the Ninth Circuit's holding in *Sanchez-Trujillo*, but imposed an additional requirement: the persecutor or society in general must perceive the common characteristic as recognizable and discrete.[123] The court's emphasis on a common characteristic that "serves to distinguish [a victim] in the eyes of a persecutor—or in the eyes of the outside world in general" departs from precedent.[124] Despite expressing approval of the *Sanchez-Trujillo* voluntary associations test, the court ultimately ruled based on whether there is an objective perception that a cognizable group exists, rather than on immutable characteristics.[125]

After evaluating whether the attributes of a group comprising El Salvadoran women who had been brutalized by guerillas were recognizable and discrete from the perspective of the persecutor, the *Gomez* court denied asylum to a woman who suffered similar abuse.[126] The court dismissed the merits of Gomez's claim without considering the

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[118] 225 F.3d 1084, 1093–94 (9th Cir. 2000); *see* Aleinikoff, *supra* note 63, at 278.
[119] *See id.*
[120] *Hernandez-Montiel*, 225 F.3d at 1093.
[121] *See id.* at 1093–96.
[122] Thomas, *supra* note 82, at 807.
[123] 947 F.2d 660, 664 (2d Cir. 1991); Thomas, *supra* note 82, at 807.
[124] Thomas, *supra* note 82, at 807 (citing *Gomez*, 947 F.2d at 664).
[125] *See Gomez*, 947 F.2d at 664; Inlender, *supra* note 85, at 696.
[126] *Gomez*, 947 F.2d at 663–64.

group in the social context of El Salvador.[127] Despite having announced its test as one that evaluates a group based on the perspective of the persecutor or that of society in general, the court imposed without explanation a limiting principle, stating that "broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group."[128] Under this new, two-pronged requirement, asylum was denied.[129]

In spite of the ruling in *Gomez*, commentators have praised the adaptability of the social perceptions approach to evolving social contexts, so that a common trait may set a group apart in one particular social context, but not in another.[130] One commentator argues that whereas some characteristics are immutable because people are born with them or because of past experience, other changeable characteristics such as conduct, manner of dress, or expression of belief are used by persecutors to identify targets.[131] Another commentator, while bemoaning the ruling in *Gomez*, nevertheless believes that the approach, if applied correctly, is actually broader than the immutable characteristics approach; under this view, *Gomez* would give fair opportunity for recognition to groups of people that may not share immutable characteristics under the current doctrine and thus would be ineligible for protection.[132]

In contrast, in *Gatimi v. Holder*, Judge Richard Posner of the Seventh Circuit was highly critical of the BIA's use of the social perceptions standard.[133] Gatimi argued that she was subject to persecution for her membership in the Kikuyu tribe in Kenya, which forces women to undergo genital mutilation.[134] Reversing the BIA's denial of asylum, Judge Posner stated that the BIA's approach was illogical, and concluded that:

> If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in re-

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[127] *See* Inlender, *supra* note 85, at 705.
[128] *Gomez*, 947 F.2d at 664; s*ee* Inlender, *supra* note 85, at 701.
[129] *Gomez*, 947 F.2d at 664; s*ee* Inlender, *supra* note 85, at 701.
[130] *See* Aleinikoff, *supra* note 63, at 300; Inlender, *supra* note 85, at 697.
[131] *See* Thomas, *supra* note 82, at 820.
[132] *See* Inlender, *supra* note 85, at 705, 709.
[133] *See* Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).
[134] *See id.* at 613–14.

> maining invisible, they will not be "seen" by other people in the society "as a segment of the population."[135]

Thus, by Judge Posner's reasoning, the BIA's reliance on the externally defined test of "visibility" resulted in the denial of "particular social group" status to women who have not yet suffered genital mutilation and, thus, are not visibly distinct from the rest of society.[136] Such a result would contravene the goal of the Convention to protect targeted individuals from persecution.[137]

Despite Judge Posner's criticisms, the social perceptions test could be applied in a manner consistent with the humanitarian goals of the Convention.[138] This result may be achieved if the BIA and the courts consider not only whether the common characteristic of the group "serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general," but also the entire social context, by hearing evidence such as expert testimony, country conditions reports, and media coverage.[139]

3. Recent Cases Illustrating the BIA's Approach

In the cases mentioned above, the BIA and the courts applied either the internally-defined immutable characteristics approach or the externally-oriented social perceptions approach, thereby treating the two, effectively, as mutually exclusive standards.[140] More recently, however, the courts and the BIA have issued decisions that discuss both approaches.[141] In *Matter of C-A-*, the BIA recognized that social perceptions are a "relevant factor," but ultimately relied more heavily on the immutable characteristics test.[142] Because it concluded that the respondent failed both the immutable characteristics and social perceptions test, however, the BIA did not address whether the immutable characteristics and social perceptions constitute a two-pronged requirement.[143]

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[135] *See id.* at 615.

[136] *Id.*

[137] *See* Inlender, *supra* note 85, at 703.

[138] *See Gomez*, 947 F.2d at 663–64; Inlender, *supra* note 85, at 708.

[139] *See Gomez*, 947 F.2d at 663–64; Inlender, *supra* note 85, at 707.

[140] *See Gatimi*, 578 F.3d at 614–16; *Hernandez-Montiel*, 225 F.3d at 1093; *Lwin*, 144 F.3d at 512; *Gomez*, 947 F.2d at 663–64; *Sanchez-Trujillo*, 801 F.2d at 1576; *Acosta*, 19 I&N Dec. at 232.

[141] Santos-Lemus v. Mukasey, 542 F.3d 738, 744 (9th Cir. 2008) (stating that "social visibility" and "particularity" are factors to consider in determining whether a group constitutes a particular social group under the INA); *In re* S-E-G-, 24 I&N Dec. 579 (BIA 2008); *C-A-*, 23 I&N Dec. at 956–57.

[142] *See C-A-*, 23 I&N Dec. at 956–57.

[143] *See id.*

Two years later, in *Matter of S-E-G-*, the BIA rendered a decision exhibiting stronger reliance on the social perceptions test than the immutable characteristics test.[144] Examining a social group of "Salvadoran youths who have resisted gang recruitment," the BIA briefly mentioned that age is a mutable characteristic due to its temporary nature.[145] It then introduced a new test of "particularity" to be satisfied in addition to the social perceptions test.[146] The stated purpose of the "particularity test" is to limit "particular social group" designation to cases where "the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[147]

In a companion case, the BIA held that the "analysis must focus on fundamental characteristics and social visibility within the country in question."[148] The court declined to address issues of "particularity," but focused instead on "the existence and visibility of the group in the society in question."[149] From this line of cases, it remains unclear how the two primary tests will be applied in the future.[150]

III. Analysis

A. *The United Nations Guidelines*

The BIA and the courts have relied on the U.N. Handbook for guidance in formulating asylum standards.[151] That document defines "particular social group" as "persons of similar background, habits or social status;" moreover, suggesting a focus on internal characteristics common to individual members, it notes that claims may overlap with other grounds such as race, religion, or nationality.[152] The next paragraph, however, implicates the perspective of the persecutor, noting that certain groups may be targeted because of a perceived lack of loy-

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[144] *See S-E-G-*, 24 I&N Dec. at 587.

[145] *See id.* at 583 (noting the ages of respondents as 18 and 21 years respectively and that they were 16 and 19 years of age at the time of the hearing).

[146] *See id.* at 584.

[147] *See id.* at 585 (declining to recognize social group because it makes up a "potentially large and diffuse segment of society").

[148] *In re* E-A-G-, 24 I&N Dec. 591, 595 (BIA 2008).

[149] *Id.*

[150] *See E-A-G-*, 24 I&N Dec. at 595; *S-E-G-*, 24 I&N Dec. at 584–88; *C-A-*, 23 I&N Dec. at 956–57.

[151] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 439 (1987); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986); *In re* Acosta, 19 I&N Dec. 211, 233 (BIA 1985).

[152] U.N. Handbook, *supra* note 50, ¶ 77.

alty to the government.[153] No provision in the U.N. Handbook suggests that the approaches are mutually exclusive.[154]

On the contrary, the U.N. Guidelines, issued in 2002, urge the reconciliation of the two standards.[155] The U.N. Guidelines affirm both the immutable characteristics approach and the social perceptions approach.[156] Referring to the immutable characteristics approach as the "protected characteristics approach," the U.N. Guidelines echo the *Acosta* standard: "an immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status)."[157] To determine whether a group is defined by such a characteristic, the U.N. Guidelines suggest reference to "a past temporary or voluntary status that is unchangeable because of its historical permanence" or, to "a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it."[158] Describing the external approach as the "social perception" test, the U.N. Guidelines look to a common characteristic of group members that "makes them a cognizable group or sets them apart from society at large," an analysis that "depend[s] on the circumstances of the society in which they exist."[159]

Upon defining the two approaches, the U.N. Guidelines indicate that the two must be reconciled, to prevent gaps in coverage.[160] In a significant move, they formulate a new, unified standard incorporating those two approaches, concluding that:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[161]

The new standard would find a "particular social group" in cases where the internal characteristic standard would have excluded them, such as voluntary behavior, conduct, or expression of belief, which are funda-

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[153] *See id.*, ¶ 78.
[154] *See generally id.*
[155] U.N. Guidelines, *supra* note 76, ¶¶ 7, 8, 10.
[156] *Id.*, ¶¶ 6, 7.
[157] *See id.*; *Acosta*, 19 I&N Dec. at 233.
[158] U.N. Guidelines, *supra* note 76, ¶ 6.
[159] *See id.* ¶ 7.
[160] *Id.* ¶¶ 6, 7, 10.
[161] *See id.* ¶ 11 (emphasis added).

mental to a person's identity but which courts might not have considered "immutable."[162] Furthermore, that standard would also permit a finding of "particular social group" in cases where, under the social perceptions standard, an applicant would have been excluded from the category for having successfully concealed their identity which would otherwise have been a target.[163] The U.N. Guidelines suggest that the immutable characteristics and social perceptions test do not comprise two prongs of a test, both of which must be satisfied.[164] Rather, the U.N. Guidelines indicate that an asylum seeker merits the protection as a member of a "particular social group" upon the satisfaction of one of two tests.[165]

B. *Applying the U.N. Guidelines to the* Romeike *Case*

The BIA should not merely mention the U.N. Guidelines; it should apply both the immutable characteristics and the social perceptions tests to determine whether the Romeikes merit protection as members of a "particular social group."[166] In evaluating the family as part of a group of German parents who choose to homeschool their children, the BIA should assess whether the group shares a common characteristic that could be "innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."[167] It should then thoroughly consider whether that group is perceived as a distinct group by German society.[168] Under this approach, the Romeikes should qualify as a "particular social group" worthy of asylum.[169]

First, the decision to homeschool one's children is a characteristic that can be considered immutable.[170] Characteristics that are "so fundamental to individual identity or conscience that [they] ought not be required to be changed" qualify as an immutable characteristic.[171] Moreover, under the U.N. Guidelines, "human rights norms may help identify" such characteristics.[172]

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[162] *See* Thomas, *supra* note 82, at 820.

[163] *See* Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

[164] *See* U.N. Guidelines, *supra* note 76, ¶ 11.

[165] *See id.*

[166] *See id.*; *Homeschooling Family Granted Political Asylum*, *supra* note 1.

[167] *See* U.N. Guidelines, *supra* note 76, ¶ 11.

[168] *See id.*

[169] *See* Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998); Gomez v. INS, 947 F.2d 660, 663–64 (2d Cir. 1991); *Acosta*, 19 I&N Dec. at 232; U.N. Guidelines, *supra* note 76, ¶ 6.

[170] *See* U.N. Guidelines, *supra* note 76, ¶ 6.

[171] *See Acosta*, 19 I&N Dec. at 233.

[172] *See* U.N. Guidelines, *supra* note 76, ¶ 6.

As "parents who for religious, political, social, academic, or conscientious reasons do not send their children to state-approved schools, but choose to educate them at home," the Romeikes should qualify as members of a "particular social group."[173] Their beliefs are "so fundamental to their identities or consciences that they ought not to be required to be changed."[174] This view is supported by the recognition in the Universal Declaration of Human Rights, the ICESCR, and the European Convention of a parent's broad latitude to make decisions affecting his or her child's education, including conscience-based decisions.[175] In light of this broad, international support, the BIA should find that homeschoolers comprise a "particular social group."[176]

Second, German homeschoolers may properly be perceived as a group by German society in general;[177] indeed, there is ample evidence of a broader homeschooling movement throughout Germany.[178] Furthermore, the German Constitutional Court affirmed that compulsory education laws apply to homeschoolers.[179] The court's description of homeschoolers, as "religiously or philosophically motivated 'parallel societies,'" evinces the state's perception of homeschoolers as a recognizable group.[180]

Moreover, the resolutions passed by American state legislatures strongly suggest that in the United States, German homeschoolers have already received recognition as a distinct group.[181] For example, as previously mentioned, state legislatures in Georgia and Tennessee have passed resolutions urging Germany to allow homeschoolers to determine their children's education.[182] In order "to prevent the emergence of parallel societies based on separate philosophical convictions," both resolutions denounce the policy of the German government against

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[173] Respondent's Brief, *supra* note 5, at 9.

[174] *See id.* at 11.

[175] *See* Universal Declaration of Human Rights, *supra* note 39, art. 5; ICESCR, *supra* note 39, art. 13, § 3; European Convention for Human Rights, *supra* note 39, art. 2.

[176] *See* Universal Declaration of Human Rights, *supra* note 39, art. 5; ICESCR, *supra* note 39, art. 13, § 3; European Convention for Human Rights, *supra* note 39, art. 2.

[177] *See* Inlender, *supra* note 85, at 707.

[178] *See* Respondent's Brief, *supra* note 5, at 2–3, 9–12; Petrie, *supra* note 17, at 490; Spiegler, *supra* note 23, at 184.

[179] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Entscheidungen des Bundesverwaltungsgerichts Apr. 29, 2003, 436 (03), ¶¶ 8, 11, 12 (certified English translation on file with author).

[180] *See id.*

[181] *See* Respondent's Brief, *supra* note 5, at 11; *supra* text accompanying notes 20–23.

[182] *See supra* text accompanying notes 20–23.

homeschooling.[183] The resolution passed by the Georgia legislature also refers to the high academic standards achieved by "home educated students," reinforcing the perception of homeschoolers as not merely a recognizable group, but as a viable one as well.[184] Thus, the Romeikes have a strong case for "particular social group" under the social perceptions test recognized by the U.N. Guidelines.[185]

The BIA should follow the U.N. Guidelines and accord equal weight to both the immutable characteristics and the social perceptions tests and find that the Romeikes are members of a "particular social group" under either test.[186] By considering the Romeikes' claims in light of the U.N. Guidelines, the BIA would fulfill the humanitarian vision of the Convention Relating to the Status of Refugees.[187] Moreover, the proposed approach would further Congress' intent underlying the enactment of the Refugee Act of 1980—to standardize the procedure and requirement for "particular social group."[188]

Conclusion

The Romeikes made a conscientious choice to homeschool their children because the public school curriculum did not comport with their religious beliefs. By withdrawing their children from public school, they violated German compulsory education laws. They continued to homeschool their children despite considerable financial penalties, and ultimately fled Germany to avoid losing custody of their children. They came to the United States as tourists and sought asylum.

The requirements under current INA provisions on asylum pertaining to "particular social group," based on the Convention Relating to the Status of Refugees and further implemented by the Refugee Act of 1980, are ill-defined and are the source of much confusion, especially with regard to the "particular social group" category. The BIA and the courts have evaluated "particular social group" under two approaches that have been applied inconsistently, leading to arbitrary denials of asylum. Commenting on the phenomenon, Judge Posner warned that "given the uncertainties in the law, the difficulties in the facts, [and] the seemingly arbitrary variance among the immigration judges, the court of appeals judges are also going to be falling back on

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[183] *See* Georgia Resolution, *supra* note 22; Tennessee Resolution, *supra* note 22.
[184] *See* Georgia Resolution, *supra* note 22.
[185] See Report by U.N. Rapporteur, *supra* note 43, ¶ 62.
[186] *See* U.N. Guidelines, *supra* note 76, ¶ 11.
[187] *See* U.N. Convention, *supra* note 50, ¶ 62; Inlender, *supra* note 85, at 701.
[188] *See* Graves, *supra* note 68, at 743–44.

. . . personal reactions, intuitions, values, and so on. . . . This is supposed to be a uniform body of federal law."[189]

In the *Romeike* case, the BIA can and should find that the family is a member of a "particular social group" under either the immutable characteristics or the social perceptions approaches. German homeschoolers share characteristics, the validity of which are recognized by international law, that ought not to be changed. The U.N. Declaration of Human Rights, the ICESCR, and the European Convention for Human Rights all recognize a parent's right to choose the appropriate educational venue for her child. Moreover, homeschoolers in Germany join organizations to provide support for each other, exchange ideas, and share legal representation. They are perceived as a recognizable group by their alleged persecutor, as well as by society at large—in Germany and abroad.

While some groups constitute a "particular social group" under one standard and not the other, the U.N. Guidelines address this discrepancy. In the future, the BIA and the courts must uniformly adopt the standard provided by the U.N. Guidelines. Under the guidelines, the two standards do not comprise a two-pronged test; they constitute two distinct tests, and the satisfaction of one test should lead to a finding of "particular social group." This approach will realize the vision intended by Congress in its enactment of the Refugee Act of 1980. In formulating a cogent standard, DHS, BIA, and the courts must not be blinded by fears of a flood of applicants. They should strive to fulfill the humanitarian obligations required by the Convention, to provide a safe haven for those in dire straits.

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[189] Ramji-Nogales, *supra* note 58, at 79.