DIFFERING INTERPRETATIONS OF THE "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP" CATEGORY AND THEIR EFFECTS ON REFUGEES

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I. INTRODUCTION

Since 740 B.C., the world has known the tragedy that refugee crises bring.[1] Until World War I, refugee crises were seemingly a once-a-century occurrence.[2] However, in the last century, the world has seen at least ten refugee crises.[3] In 2013, individual governments and the United Nations High Commissioner of Refugees (UNHCR) received 1.1 million applications for asylum or refugee status; it is estimated that 916,900 were from first-time applicants.[4] The trend is startling and raises the question of

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1. Mona Chalabi, *What Happened to History's Refugees?*, THEGUARDIAN: DATA BLOG (July 25, 2013, 10:06 AM), http://www.theguardian.com/news/datablog/interactive/2013/jul/25/what-happened-history-refugees#Israelites [https://perma.cc/L8T6-JFBA].

2. *See id.*

3. *See id.*

4. U.N. High Comm'r for Refugees, *25 Years of Global Displacement*, UNHCR STAT. Y.B. 2013, at 56 (2014) [hereinafter UNHCR STAT. Y.B. 2013], http://www.unhcr.org/54cf9a629.html [https://perma.cc/4WJS-ERY3]. The essential difference between refugees and asylees is that refugees apply for asylum while outside both the country they are applying to and their country of origin, while asylees apply for asylum while inside the country they are applying to. LENNI B. BENSON, LINDSAY A. CURCIO, VERONICA M. JEFFERS & STEPHEN W. YALE-LOEHR, IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES § 8.01, at 856 (2013). For purposes of this Note, both asylee and refugee will be used depending on what the applicant in the case discussed is considered to be. This does not affect the overall discussion of the refugee definition's treatment because a part of receiving asylum as an asylee is meeting the refugee definition. *Id.*

whether developed countries are doing their part to protect refugees.[5]

This Note discusses the different interpretations of the membership-in-a-particular-social-group asylum category[6] in the United States, Germany, and Australia; focusing primarily on the issue of whether to use immutability, social visibility, or both to define the category. Additionally, this Note analyzes the effects of the differing approaches and proposes that the UNHCR definition be adopted universally because it best embodies the policy and purpose behind refugee status. Part II discusses the history of the refugee definition and how the current definition came to be. Next, Part III explains the United Nations' interpretation of "refugee." The UN's interpretation is especially important because the United States, Germany, and Australia are all parties to the UN's convention and protocol that define refugee.[7] Additionally, a full explanation of the refugee definition is critical to understand the membership-in-a-particular-social-group category, immutability, and social visibility.

Membership in a particular social group is one of five grounds for determining whether a person is a refugee; the other grounds are race, religion, nationality, and political opinion.[8] The immutability approach determines whether the characteristic defining the group is one so fundamental that the people within the group should not have to change it; if the characteristic is so fundamental that it should not have to be changed, then the group is considered a particular social group.[9] Social perception is a different way to determine membership in a particular social group; this approach considers whether the group is visible to society.[10]

5. *See generally* Elizabeth A. James, *Is the U.S. Fulfilling Its Obligations Under the 1951 Refugee Convention? The Colombian Crisis in Context*, 33 N.C. J. INT'L & COM. REG. 455, 456–60 (2008) (discussing how judicial interpretation of Convention language has drastically narrowed the meaning and that this narrowing has led to the United States violating the Convention).

6. The UNHCR uses the phrase "membership *of* a particular social group," but over time the phrase "membership *in* a particular social group" has also become prevalent. *See* 8 U.S.C. § 1101(a)(42) (2012) (using "in"). This Note will use the phrase "membership in a particular social group" unless quoting a source using the alternative convention.

7. U.N. High Comm'r for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 66–67, 69, U.N. Doc. HCR/1P/4/Eng/REV.3, annex IV (2011) [hereinafter *Handbook and Guidelines*], http://www.unhcr.org/en-us/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html [https://perma.cc/Q4TG-BJND].

8. § 1101(a)(42).

9. *See infra* Section III.B.1.

10. *See infra* Section III.B.2.

Part IV details the differing approaches to immutability and social visibility in the United States, Germany, and Australia. This section also explains the United States' current stances on the immutability and social visibility approaches and examines the current circuit split on the issue. Finally, Part V concludes that changes need to be made to the interpretation of the membership-in-a-particular-social-group category to better protect refugees and fulfill obligations under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.

II. HISTORY OF THE REFUGEE DEFINITION

A. Statutory Refugees

After World War I, the League of Nations led the charge toward international action for refugees.[11] Various agreements to protect refugees were formed, and those agreements are now codified in Article IA(1) of the U.N.'s 1951 Convention Relating to the Status of Refugees.[12] Persons classified as refugees under this article are known as "statutory refugees,"[13] and while some people may still fit into this classification today, it is rare.[14] The statutory-refugee article encompasses the persons that international agreements in force before the 1951 Convention defined as refugees; these international agreements were aimed at "specific refugee situations."[15]

B. The 1951 Convention Relating to the Status of Refugees

After World War II, the UN adopted the 1951 Convention Relating to

11. *Handbook and Guidelines*, *supra* note 7, ¶ 2, at 5.
12. *See id.* ¶ 32, at 10.
13. *Id.* ¶¶ 32–33, at 10; *cf.* William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 BERKELEY J. INT'L L. 94, 94 (2012) ("The Refugee Convention is . . . a very narrow instrument, protecting a very specific group of persons.").
14. *Handbook and Guidelines*, *supra* note 7, ¶ 4, at 5.
15. *Id.* ¶¶ 4–5, 7, at 5.

the Status of Refugees[16] in response to the post-war refugee crisis.[17] Instead of targeting specific situations, the 1951 Convention created a general refugee definition.[18] The general definition is found in Article IA(2) of the 1951 Convention and states that a refugee is anyone who fits within the following categories:

> As a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[19]

The 1951 Convention enacted the membership-of-a-particular-social-group category that this Note focuses on.[20]

As the 1951 Convention was being created, the Statute of the Office of the United Nations High Commissioner for Refugees was being crafted as well.[21] The High Commissioner is to provide for the protection of refugees and to ensure this protection in the following ways:

> (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
>
> (b) Promoting through special agreements with governments the execution of any measures calculated to improve the situation

16. Throughout this Note, the 1951 Convention Relating to the Status of Refugees will be referred to as the 1951 Convention. KATE JASTRAM & MARILYN ACHIRON, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW 8 (Erika Feller et al. eds., 2001), http://www.ipu.org/pdf/publications/refugee_en.pdf [https://perma.cc/AXP3-UNPU]; *Handbook and Guidelines*, *supra* note 7, ¶¶ 5, 7, at 5.

17. *Handbook and Guidelines*, *supra* note 7, ¶¶ 5, 7, at 5; *see also* JASTRAM & ACHIRON, *supra* note 16, at 8.

18. *Handbook and Guidelines*, *supra* note 7, ¶ 5, at 5; *see also id.* ¶ 34, at 10.

19. Convention Relating to the Status of Refugees, art. IA(2), 189 U.N.T.S. 152 (July 28, 1952) [hereinafter 1951 Convention].

20. *See id.*

21. CORINNE LEWIS, UNHCR AND INTERNATIONAL REFUGEE LAW: FROM TREATIES TO INNOVATION 23 (2012).

> of refugees and to reduce the number requiring protection;
> (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
> (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
> (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
> (f) Obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
> (g) Keeping in close touch with the governments and inter-governmental organizations concerned;
> (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;
> (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.[22]

These responsibilities can effectively be placed into two categories: development of refugee law and effectiveness of refugee law.[23] Although the UNHCR is tasked specifically with developing effective refugee law, nations have been coordinating less with the UNHCR when formulating standards.[24] Likewise, nations have seemingly become less willing to accept refugees, so "a significant divergence between [the] UNHCR's and [nations'] views of how asylum seekers and refugees should be treated has emerged."[25]

C. 1967 Protocol Relating to the Status of Refugees

Before the 1967 Protocol Relating to the Status of Refugees,[26] the 1951 Convention only applied to refugees arising from events that occurred prior to January 1, 1951.[27] Because new refugee situations had

22. G.A. Res. 428 (V), annex, ¶ 8, Statute of the Office of the United Nations High Commissioner for Refugees (Dec. 14, 1950).
23. LEWIS, *supra* note 21, at 47.
24. *Id.*
25. *Id.* at 81.
26. Throughout this Note, the 1967 Protocol Relating to the Status of Refugees will be referred to as the 1967 Protocol.
27. *Handbook and Guidelines*, *supra* note 7, ¶¶ 6–9, at 5–6 (quoting 1951 Convention,

emerged, the 1967 Protocol removed this requirement so that the 1951 Convention's definition could be applied to persons suffering from events occurring after the January 1, 1951 dateline.[28]

III. The United Nations' Interpretation of the Refugee Definition

Although the scope of this article is limited to the membership-in-a-particular-social-group category, a general explanation of the definition's other elements is required to fully understand this category's significance. As of November 1, 2011, 143 states are parties to both the 1951 Convention and the 1967 Protocol.[29] Because the UN's 1951 Convention and 1967 Protocol are the backdrop for refugee law in Germany, Australia, and the United States,[30] this refugee definition overview will specifically focus on the UN's explanation of the refugee definition.

A. Well-founded Fear of Persecution[31]

The well-founded-fear element calls for a subjective and objective analysis.[32] Fear is inherently subjective and should be analyzed from the point of view of the person seeking refugee status.[33] The subjective analysis of a person's fear requires "an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin."[34] The analysis's objectivity comes from the requirement that the fear be well founded.[35] Essentially, this means that an objective

supra note 19, art. IA(2), 189 U.N.T.S. at 152).

28. *Id.* ¶¶ 6, 8, at 5–6 (quoting 1951 Convention, *supra* note 19, art. IA(2), 189 U.N.T.S. at 152).

29. *Handbook and Guidelines*, *supra* note 7, at 66, annex IV.

30. *Id.* at 66–69, annex IV.

31. Technically, the first element in the refugee definition is "events occurring before 1 January 1951." *Id.* ¶ 6, at 5 (quoting 1951 Convention, *supra* note 19, art. IA(2), 189 U.N.T.S. at 152). However, the 1967 Protocol mostly nullified this requirement. *Id.* ¶ 35, at 10–11. This requirement is still relevant for states that have not adopted the 1967 Protocol. *Id.* Australia, Germany, and the United States have all adopted the 1967 Protocol, so a lengthy discussion of this issue is outside the scope of this Note. *See id.* at 66, annex IV (listing States that have adopted the 1951 Convention, 1967 Protocol, or both).

32. *Id.* ¶ 38, at 11.

33. *Id.* ¶ 37, at 11.

34. *Id.*

35. *Id.* ¶ 38, at 11.

situation must support the person's fear.[36] A person's fear should be considered well founded if the person can establish, "to a reasonable degree," that he or she could not tolerate being in the country of origin.[37]

This combination of a subjective and objective analysis allows for a thorough analysis of the person's situation. The subjective prong allows a person who may be more afraid of his situation than others because of his past experiences, state of mind, or general disposition to not be evaluated in terms of someone else's fear, but his own fear.[38] At the same time, the objective prong allows the person charged with determining refugee status to decide whether the fear is justifiable based on the situation at hand.[39]

Refugee seekers do not need to show that they have already been the victims of persecution; rather, it will suffice to show that they fear their persecution is inevitable based on the persecution of those around them.[40] Persecution varies in each case, and the subjectivity of the fear requirement contributes to the variations.[41] Because each person's fear will vary, his or her idea of what qualifies as persecution will vary as well.[42] Additionally, a refugee seeker can claim persecution on "cumulative grounds," which allows a refugee seeker to show that events, which may not on their own amount to persecution, together with "other adverse factors" have led to the well-founded fear of persecution.[43] A person subject to the typical punishment for an offense is not considered persecuted.[44] Likewise, whether discrimination is considered persecution depends on the situation, but discrimination alone does not necessarily establish persecution.[45]

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36. *Id.*
37. *Id.* ¶ 42, at 12.
38. *Id.* ¶ 40, at 11. ("An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure." (emphasis omitted)).
39. *Id.* ¶ 42, at 12.
40. *Id.* ¶¶ 51–52, at 13.
41. *Id.* ¶ 52, at 13.
42. *Id.*
43. *Id.* ¶¶ 52–53, at 13.
44. *Id.* ¶ 56, at 14.
45. *Id.* ¶¶ 54–55, at 14.

B. For Reasons of Membership of a Particular Social Group[46]

This is commonly referred to as "the ground with the least clarity";[47] however, it is "the second most popular category."[48] "A 'particular social group' normally comprises persons of similar background, habits, or social status."[49] Membership alone will not be sufficient to find a well-founded fear of persecution, except in special circumstances.[50]

The UNHCR's guidelines for the membership-in-a-particular-social-group category specifically note that the category is not a "catch all."[51] The purpose of the category was not to protect everyone who fears persecution or groups that are "defined exclusively by the fact that [they are] targeted for persecution."[52] Rather, the category is meant to evolve and be "open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[53] There are two approaches to interpret the membership-in-a-particular-social-group category, and the UNHCR definition seeks to reconcile both approaches.[54]

1. The Immutability Approach

One approach is often "referred to as [the] 'immutability' approach."[55] The immutability approach looks at the group as a whole and determines whether it is "united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be

46. *Id.* ¶ 34, at 10 (quoting 1951 Convention, *supra* note 19, art. I(A)(2), 189 U.N.T.S. at 152). Again, the other grounds for persecution are race, religion, nationality, and political opinion. *Id.*

47. *Id.* ¶ 1, at 92. *See generally* Michelle Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments Relating to 'Membership of a Particular Social Group*,*'* U.N. Doc. PPLA/2012/02 (Aug. 2012), http://www.unhcr.org/4f7d8d189.html [https://perma.cc/SL9W-288N] (acknowledging that of the various grounds for refugee status the membership-in-a-particular-social-group category is the ground with the least clarity).

48. Elyse Wilkinson, Comment, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 401 (2010).

49. *Handbook and Guidelines*, *supra* note 7, ¶ 77, at 17.

50. *Id.* ¶ 79, at 17.

51. *Id.* ¶ 2, at 92.

52. *Id.* (emphasis omitted).

53. *Id.* ¶ 3, at 92.

54. *Id.* ¶¶ 5–10, at 92–93.

55. *Id.* ¶ 6, at 92.

compelled to forsake it."[56] An immutable characteristic is one that is "not capable of or susceptible to change."[57] In determining whether a characteristic is immutable or fundamental to human dignity, factors considered are

> whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.[58]

2. The Social-Perception Approach

An alternative approach is "the 'social perception' approach."[59] To establish membership in a particular social group under the social-perception approach, a group must have a common characteristic that makes the group recognizable to society as one.[60] This approach allows for groups to be recognized, even if they do not have a characteristic that is "immutable [or] fundamental to human dignity," so long as the characteristic makes them recognizable or socially visible.[61]

3. The UNHCR's Definition

The UNHCR recognizes that having two separate approaches can lead to differences in who receives refugee status, depending on which approach the jurisdiction uses.[62] For example, immutability may not protect someone who is protected under the social-perception approach and vice versa.[63] To prevent these "protection gaps,"[64] the UNHCR *Handbook* explains it is best to have a single standard that integrates both approaches:

56. *Id.* ¶ 6, at 92–93.
57. *Immutable*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 622 (11th ed. 2003).
58. *Handbook and Guidelines*, *supra* note 7, ¶ 6, at 93.
59. *Id.* ¶ 7, at 93.
60. *Id.*
61. *Id.* ¶ 9, at 93.
62. *Id.*
63. *Id.*
64. *Id.* ¶ 10, at 93.

> [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.[65]

The most significant aspect of this definition is that it allows a group that "could not meet the immutability requirement" to nonetheless be analyzed under the social-perception approach.[66] The definition "combines the two alternate approaches."[67] The UNHCR is of the view that "[t]he group only needs to be identifiable through one of the approaches, not both."[68] This allows for a more expansive determination of refugee status.[69]

In addition, the UNHCR notes that persecution alone cannot define a particular social group, but persecution is a "factor in determining [social] visibility."[70] In other words, people may share an innate characteristic but not be recognized as a particular social group; however, if the people are persecuted because of the characteristic, the persecution would "create a public perception" that the people are members of a particular social group.[71]

C. *Outside His Country of Nationality*[72]

A person's fear of persecution must be based on persecution from that person's country of citizenship.[73] If his or her country of citizenship were not the persecuting country, then the person could seek the protection of his or her country of citizenship and would not need international assistance.[74] Similarly, refugee seekers are required to be outside their

65. *Id.* ¶ 11, at 93 (emphasis added).
66. Wilkinson, *supra* note 48, at 414.
67. Division of International Protection, U.N. High Comm'r for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, ¶ 34, at 12 (2010), http://www.refworld.org/docid/4bb21fa02.html [https://perma.cc/H4U2-YWPJ].
68. *Id.*
69. *See id.* ¶¶ 34–35, at 12.
70. *Handbook and Guidelines*, *supra* note 7, ¶ 14, at 94.
71. *Id.*
72. The term *nationality* means citizenship. *Id.* ¶ 87, at 18.
73. *Id.* ¶¶ 89–90, at 18–19.
74. *Id.* ¶ 90, at 19.

countries of citizenship because "[i]nternational protection cannot come into play as long as a person is within the territorial jurisdiction of his home country."[75] If a person is stateless, then the country of last habitual residence is considered instead "of the country of his [citizenship]."[76]

D. Unable or Unwilling to Avail Himself to the Protection of His Country of Nationality or Country of Last Habitual Residence[77]

This element is the same for refugee seekers with a country of citizenship and those who are stateless; as mentioned above, the referenced country for a stateless person is the country of last habitual residence.[78] Generally speaking, "[b]eing *unable* to avail himself of such protection implies circumstances that are beyond the will of the person concerned."[79] For example, a person's country of citizenship may be unable to protect its citizen when there is "a state of war, civil war[,] or other grave disturbance, which prevents the country of nationality from extending protection."[80] There are also instances where "[p]rotection by the country of nationality may also have been denied to the applicant."[81] The grounds for denial of protection is determined on a case-by-case basis, but "[i]f it appears that the applicant has been denied services . . . normally accorded to his co-nationals, this may constitute refusal of protection," and the refugee seeker is *unable* to avail himself or herself to the protection of the country.[82] It is important to note that "[s]uch denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution."[83]

On the other hand, "[t]he term *unwilling* refers to refugees who refuse to accept the protection of the Government of the country of their [citizenship]."[84] When refugee seekers refuse protection from their countries because of fear of persecution, they are *unwilling* to avail

75. *Id.* ¶ 88, at 18.
76. *Id.* ¶ 89, at 19.
77. This element is typically divided into two sub-elements: one for persons with a nationality and one for stateless persons. *Id.* ¶¶ 97, 101, at 20. For the sake of brevity, the two have been combined into one section.
78. *Id.* ¶ 101, at 20.
79. *Id.* ¶ 98, at 20.
80. *Id.*
81. *Id.*
82. *Id.* ¶ 99, at 20.
83. *Id.* ¶ 98, at 20.
84. *Id.* ¶ 100, at 20.

themselves of the protection of their countries.[85]

IV. DIFFERING APPROACHES AROUND THE WORLD

A. United States of America

In 2013, the United States received "the second largest number of individual asylum applications" in the world.[86] That year, the United States had approximately 84,400 "registered" applications—a nineteen percent increase in asylum claims.[87] The United States actually recognized 21,200 asylum seekers, second only to Sweden.[88] Because these numbers are so large and the United States plays such an important role in taking refugees, it is important that the United States have an efficient refugee system.[89]

In 1980, the United States adopted the 1951 Convention's "definition of 'refugee' into United States law" with the Refugee Act of 1980.[90] The

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85. *Id.*
86. UNHCR STAT. Y.B. 2013, *supra* note 4, at 56.
87. *Id.*
88. *Id.* at 59.
89. *See id.* at 55.
90. Wilkinson, *supra* note 48, at 399; Refugee Act of 1980, Pub. L. No. 96-112, § 201(a), 94 Stat. 102, 102–03 (codified at 8 U.S.C. § 1101(a)(42) (2012)). § 1101(a)(42) states the following:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well

purpose of the Refugee Act was "to establish a more uniform basis for the provision of assistance to refugees."[91] Additionally, its purpose was to "reflect[] one of the oldest themes in America's history—welcoming homeless refugees to our shores."[92] While the adoption of the 1951 Convention's refugee definition was a positive move toward accepting more refugees, interpretation of the statute has moved the United States away from the Senate's stated purpose.[93] Membership in a particular social group was initially defined as "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic,"[94] applying the immutability approach. But circuits are now split, and some have moved toward requiring immutability and social perception.[95]

The change in judicial interpretation began in a Board of Immigration Appeals (BIA) case, *In re C-A-*.[96] The BIA looked to the UNHCR guidelines to begin its membership-in-a-particular-social-group analysis.[97] The BIA noted that the guidelines state that the membership-in-a-particular-social-group category "was not meant to be a 'catch all'" and that social visibility and immutability should be considered.[98] Contradicting the UNHCR, the BIA interpreted the guidelines to mean that

> founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Id.; *see also* H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 160, 160 ("The Senate bill incorporated the internationally-accepted definition of refugee contained in the U.N. Convention and Protocol Relating to the Status of Refugees."); S. REP. NO. 96-256, at 4 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 144 ("[T]he new definition will bring United States law into conformity with our international treaty obligations . . . .").

91. H.R. REP. NO. 96-781, at 19, *as reprinted in* 1980 U.S.C.C.A.N. at 160; *see also* S. REP. NO. 96-256, at 1, *as reprinted in* 1980 U.S.C.C.A.N. at 141.

92. S. REP. NO. 96-256, at 1, *as reprinted in* 1980 U.S.C.C.A.N. at 141.

93. *See generally* Wilkinson, *supra* note 48, at 390 (explaining the United States' narrow interpretation of refugee status).

94. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds by In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987), *abrogated by* Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997).

95. *See* Wilkinson, *supra* note 48, at 404–08; *see* discussion *infra* Sections IV.A.1–6.

96. *In re* C-A-, 23 I. & N. Dec. 951, 960 (B.I.A.) (explaining the importance of social visibility when "identifying the existence of a 'particular social group'"), *aff'd sub nom.* Castillo-Arias v. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006).

97. *Id.* at 960.

98. *Id.* (quoting *Handbook and Guidelines*, *supra* note 7, ¶ 2, at 93).

"'visibility' is an important *element* in identifying the existence of a particular social group."[99] The BIA then noted that persecution alone does not define a group, but persecution was a factor in considering social visibility.[100] After *In re C-A-*, the BIA found additional support for requiring social visibility in *In re A-M-E- & J-G-U-*.[101] There, the BIA stated that it was "reaffirming the *requirement* that the shared characteristic of the group should generally be recognizable by others in the community."[102] To support this proposition, the BIA relied on *In re C-A-* and the Second Circuit case *Gomez v. INS*.[103]

1. The Second Circuit

Gomez further solidified a two-part test for determining refugee status.[104] Gomez was a Salvadoran woman who had been the victim of guerilla violence.[105] She "was raped and beaten" five times "[b]etween the ages of twelve and fourteen."[106] She stayed in El Salvador until she turned eighteen, then she and her guardian "fled to the United States."[107] While in the United States, Gomez pled guilty to selling drugs, which led to her removal proceedings.[108] During those proceedings, Gomez requested relief from removal in the form of political asylum, which required Gomez to show that she met the definition of refugee.[109] The immigration judge found that Gomez did not have a well-founded fear of persecution, and the BIA agreed.[110] Gomez argued that her prior rapes and beatings gave her a well-founded fear of persecution, and she feared future persecution because those prior attacks placed her in the social group "women who

99. *In re C-A-*, 23 I. & N. Dec. at 960 (emphasis added). *Contra Handbook and Guidelines*, *supra* note 7, ¶ 14, at 94 (describing immutability and social visibility as separate approaches, not two elements within the same analysis).
100. *Id.*
101. *In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 69 (B.I.A. 2007).
102. *Id.* at 74 (emphasis added).
103. *Id.*; Gomez v. INS, 947 F.2d 660 (2d Cir. 1991).
104. *See id.* at 664; *see also* Wilkinson, *supra* note 48, at 405 (describing the way the Second Circuit added a visibility requirement and decided that "this perception of the group is as important as immutability").
105. *Gomez*, 947 F.2d at 662.
106. *Id.*
107. *Id.*
108. *Id.*
109. *See id.*
110. *Id.* at 662–63.

have been previously battered and raped by Salvadoran guerillas."[111] She argued that this group was "subject to, and singled out for, persecution in El Salvador."[112]

Describing the membership-in-a-particular-social-group category, the Second Circuit first noted the immutability requirement and then continued to say that those immutable characteristics of the particular social group "must be recognizable and discrete."[113] The court reasoned that because the "other four enumerated categories—race, religion, nationality and political opinion—" had characteristics that distinguished them from society, members-of-the-particular-social-group category must also be distinguishable from society.[114] This analysis of the membership-in-a-particular-social-group category requires a two-part test: (1) the group has a characteristic that is immutable or fundamental to human dignity; and (2) society must be able to perceive the group.[115]

The *Gomez* court relied on Ninth Circuit case law to come to its conclusion,[116] particularly *Sanchez-Trujillo v. INS*.[117] *Sanchez-Trujillo* was decided in 1986, twenty-five years before the new 2011 UNHCR guidelines.[118] In *Sanchez-Trujillo*, the refugee seeker claimed that he was a member of the particular social group of "young, working class, urban males of military age."[119] The court noted the UNHCR lacked guidance on the membership-of-a-particular-social-group category and established its own analysis.[120]

The *Sanchez-Trujillo* court began its analysis by initially stating the immutability requirement; however, it then stated that "[o]f 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

111. *Id.* at 663–64.
112. *Id.* at 664.
113. *Id.*
114. *Id.*
115. *See* Wilkinson, *supra* note 48, at 405.
116. *See Gomez*, 947 F.2d at 664.
117. Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986), *abrogated by* Cordoba v. Holder, 726 F.3d 1106 (9th Cir. 2013).
118. *Id.*; *Handbook and Guidelines*, *supra* note 7 (published December 2011). Since the new guidelines, the Ninth Circuit abrogated *Sanchez-Trujillo*. *See Cordoba*, 726 F.3d at 1115–16.
119. *Sanchez-Trujillo*, 801 F.2d at 1576.
120. *Id.*

group."[121] The court reasoned that, while a family would qualify as a particular social group because it was "small" and "readily identifiable," "young, working class, urban males of military age" was not a group that was small or readily identifiable.[122] While the small-and-readily-identifiable standard does not expressly call for a social-perception requirement, that is precisely what it establishes.[123] Requiring that the group be "readily identifiable," which implies that society must easily identify it as a group, in addition to the immutability approach, effectively upholds the two-part test.[124]

While the Second Circuit has not overruled *Gomez*, the case law in other circuits indicates that its interpretation of the membership-in-a-particular-social-group category is no longer applicable.[125] Additionally, *Gomez* was decided twenty years before the new UNHCR guidelines.[126] The UNHCR guidelines indicate that the Second Circuit's two-part test for determining refugee status is outdated and should no longer be applied.[127] However, in the 2012 unpublished opinion of *Mena Lopez v. Holder*,[128] the Second Circuit held that social visibility is still a requirement for determining refugee status and that the social-visibility requirement is in line with the UNHCR guidelines.[129] While the UNHCR guidelines do lean toward social visibility, the guidelines do not establish a two-part test requiring both immutability and social visibility, unlike the Second Circuit.[130] The UNHCR approach, as discussed above, is to require the person to meet either social perception or immutability.[131]

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121. *Id.*
122. *Id.*
123. *See* Wilkinson, *supra* note 48, at 405; *Handbook and Guidelines*, *supra* note 7, ¶ 13, at 94 (explaining social perception).
124. *Readily* is defined as "without hesitating," "without much difficulty," and "easily." *Readily*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1035 (11th ed. 2003).
125. *See* discussion *infra* Sections IV.A.2–3, 5.
126. Gomez v. INS, 947 F.2d 660 (2d Cir. 1991); *Handbook and Guidelines*, *supra* note 7 (published December 2011).
127. *See Handbook and Guidelines*, *supra* note 7, ¶ 13, at 94.
128. Mena Lopez v. Holder, 468 Fed. App'x 57 (2d Cir. 2012).
129. *Id.* at 58.
130. *See Handbook and Guidelines*, *supra* note 7, ¶¶ 13–15, at 94; *Mena Lopez*, 468 Fed. App'x at 58; *see also Gomez*, 947 F.2d at 664.
131. *Handbook and Guidelines*, *supra* note 7, ¶¶ 13–15, at 94.

2. The Ninth Circuit

The Ninth Circuit elaborated on social visibility in *Cordoba v. Holder*,[132] which abrogated *Sanchez-Trujillo*.[133] The *Cordoba* opinion consolidated two cases, and the fundamental question was whether landownership was sufficient to form a particular social group.[134] Cordoba claimed that he was subject to persecution because he and his family were "wealthy, educated landowners and businesspeople."[135] Cordoba had inherited property and businesses—a fact that was well known in the community.[136]

The group that Cordoba argued was persecuting him was the Revolutionary Armed Forces of Colombia (FARC), which was known for targeting wealthy landowners.[137] Cordoba described multiple times that the group targeted him and his family.[138] Three times, the group confronted Cordoba's wife and children, and in one instance, Cordoba's wife had to exchange gunfire with the individuals.[139] On two occasions she called the police; the first time the police did not respond, and the second time, Cordoba testified, the police came and wrote a report, but they neither prosecuted anyone nor investigated the matter any further.[140] Eventually, in an attempt to flee FARC's harassment and because he did not believe the police would protect them, Cordoba and his family went to the United States on visitor visas.[141] When Cordoba returned to Colombia, FARC continued to harass him and his family.[142] After appealing the immigration judge's denial of asylum, the BIA held that landowners do not meet the membership-in-a-particular-social-group definition because society would not perceive them as a group.[143]

Medina-Gonzalez's case was the other case before the Ninth Circuit in the *Cordoba* decision.[144] Similar to Cordoba, Medina-Gonzalez was

132. Cordoba v. Holder, 726 F.3d 1106, 1115 (9th Cir. 2013).
133. *Id.* at 1115–16.
134. *Id.* at 1108.
135. *Id.* at 1109.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 1110.
142. *Id.*
143. *Id.* at 1111.
144. *Id.*

from "a well-known, upper-middle class family" in a town in Mexico.[145] The Zetas cartel abducted Medina-Gonzalez and held him captive for eight days.[146] He was beaten, sexually molested, given electric shocks, and "forced to urinate and defecate in his own clothes."[147] During that time, his abductors repeatedly asked about Medina-Gonzalez's brother—a U.S. citizen.[148] After the Zetas, who were demanding a $100,000 ransom, contacted his brother who then contacted a cousin that worked for the government in Mexico.[149] The cousin told Medina-Gonzalez's brother that it "was too dangerous for her [or the authorities] to help."[150] The Zetas released Medina-Gonzalez after his brother gave them $15,000, but the Zetas continued to make threats to his brother for the rest of the money.[151] At his hearing before the immigration judge, Medina-Gonzalez presented an expert who testified that Medina-Gonzalez's status as a landowner made him a target for kidnapping.[152] On appeal from the immigration judge's denial of asylum, the BIA said that landowners were not a particular social group because the group was not "defined . . . with sufficient particularity" and was not visible to society.[153]

To decide these two cases, the Ninth Circuit first stated that social visibility does not "require 'on-sight' visibility."[154] This effectively revoked the "readily identifiable" standard established in *Sanchez-Trujillo*.[155] The *Cordoba* court said that the correct question is "whether the shared characteristic would 'generally be recognizable by other members of the community,' or whether there was 'evidence that members of the proposed group would be perceived as a group by society.'"[156] Next, the court said the manner in which a group is found visible is not strict: "the group might be perceived—from [the perspective] of the society in question as a whole, [from] that of the residents of a particular region, or members of a different social group" and still satisfy social visibility.[157]

145. *Id.*
146. *Id.* at 1111–12.
147. *Id.* at 1112.
148. *Id.* at 1111–12.
149. *Id.* at 1112.
150. *Id.*
151. *Id.*
152. *Id.* at 1113.
153. *Id.*
154. *Id.* at 1115 (quoting Henriquez-Rivas v. Holder, 707 F.3d 1081, 1088 (2013)).
155. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).
156. *Cordoba*, 726 F.3d at 1115 (quoting *Henriquez-Rivas*, 707 F.3d at 1088–89).
157. *Id.*

Finally, and most importantly, the court explained that society's perception is not dispositive.[158] Instead, social visibility might be fulfilled based on the persecutor's perception of the group, and the persecutor's perception is "highly relevant to, or even potentially dispositive of, the question of social visibility."[159] Both Cordoba's and Medina-Gonzalez's claims were remanded to the BIA for decisions consistent with the Ninth Circuit's opinion.[160]

3. The Seventh Circuit

In the Seventh Circuit's *Gatimi v. Holder* decision, the court reversed the BIA, saying it made "no sense"[161] to deny asylum to Gatimi merely because he did not, as the BIA had found,

> "possess[] any characteristics that would cause others in Kenyan society to recognize him as a former member of Mungiki. . . . There [was] no showing that membership in a larger body of persons resistant to Mungiki [was] of concern to anyone in Kenya or that such individuals [were] seen as a segment of the population in any meaningful respect."[162]

The *Gatimi* court noted that groups that had previously been held to be particular social groups did not meet this standard of social visibility.[163] To elaborate, it stated that females who had not "undergone female genital mutilation,"[164] a group that the BIA consistently holds to be a particular social group,[165] would not appear any differently than the rest of society.[166] Likewise, homosexuals, another group the BIA consistently holds to be a particular social group,[167] can appear heterosexual to make themselves

158. *Id.*
159. *Id.* (quoting *Henriquez-Rivas*, 707 F.3d at 1090).
160. *Id.* at 1117.
161. Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).
162. *Id.* (second alteration in original) (quoting the BIA opinion).
163. *See id.*
164. *Id.*
165. *See, e.g.*, *In re* Kasinga, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996).
166. *Gatimi*, 578 F.3d at 615.
167. *See, e.g.*, *In re* Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990) (recognizing that homosexuals can be a particular social group); Doe v. Holder, 736 F.3d 871, 877 (9th Cir. 2013) (same).

invisible to society.[168] In addition to being inconsistent in determining what groups have social visibility, the BIA has yet to distinguish which groups meet social visibility from the groups that do not.[169] This inconsistency, according to the Seventh Circuit, "condone[s] arbitrariness and usurp[s] the agency's responsibilities."[170]

The Seventh Circuit agreed that many claimed groups that the other circuits had held to lack social visibility did merit rejection as a particular social group.[171] But the court said that social visibility was not the groups' fatal flaw; rather, the groups "flunked the basic 'social group' test."[172] Further, the court determined that the BIA's decision to reject Gatimi was inconsistent with an underlying theme in determining refugee status: When a person claims refugee status because of a well-founded fear of persecution based on religion, that person will not fail to be defined as a refugee simply because he or she could conceal the religious beliefs to avoid persecution.[173] According to the BIA's decision in this case, the only way to be a part of a social group was for a person to affirmatively announce membership in the group; concealing membership in the group to avoid persecution is not enough.[174] The Seventh Circuit rejected this contention.[175]

4. The Tenth Circuit

Similar to the Second Circuit, the Tenth Circuit agreed in *Rivera Barrientos v. Holder*[176] that social visibility, along with immutability, is a requirement for finding refugee status.[177] Rivera Barrientos was a Salvadoran woman who was asked to join the Mara Salvatrucha (MS-13) gang but refused to join.[178] The gang persisted in asking her to join; abducting her, raping her, and beating her when she continued to refuse.[179] She fled to the United States and was put into removal proceedings for

168. *Gatimi*, 578 F.3d at 615.
169. *See id.* at 615–16.
170. *Id.* at 616.
171. *Id.*
172. *Id.*
173. *See id.*
174. *Id.*
175. *See id.*
176. Rivera Barrientos v. Holder, 658 F.3d 1222 (10th Cir. 2011).
177. *Id.* at 1231–33.
178. *Id.* at 1225.
179. *Id.*

being present in the United States without being admitted; she then conceded removability and applied for asylum.[180] Rivera Barrientos claimed that she was a member of the group "made up of 'women in El Salvador between the ages of 12 and 25 who resisted gang recruitment.'"[181] The Tenth Circuit found that this was not a particular social group and affirmed the BIA's denial of asylum.[182]

The Tenth Circuit deferred to the BIA's decision requiring social visibility.[183] It explained that in determining social visibility, the BIA requires two conditions: (1) "that citizens of the applicant's country would consider individuals with the pertinent trait to constitute a distinct social group"; and (2) "the applicant's community is capable of identifying an individual as belonging to the group."[184] The UNHCR joined Rivera Barrientos as amicus curiae in challenging the BIA's—and now the Tenth Circuit's—two-part social-visibility requirement.[185] They argued that the recognition requirement was unreasonable.[186]

The court addressed the Seventh Circuit's holding in *Gatimi*,[187] which eliminated the social-visibility requirement because it was unreasonable.[188] As discussed earlier, the *Gatimi* court explained that the social-visibility requirement was unreasonable because it demanded that the required immutable characteristic also be "visually or otherwise easily identified."[189] The Tenth Circuit disagreed and stated that *In re C-A-* did not demand such a narrow understanding of the social-visibility requirement.[190] The Tenth Circuit said that instead of visual or easy identification, "social visibility requires that the relevant trait be potentially identifiable by members of the community, either because it is evident or because the information defining the characteristic is publically accessible."[191]

The *Rivera Barrientos* court found that the BIA's social-visibility

180. *Id.* at 1226.
181. *Id.* at 1228–29 (footnote omitted).
182. *Id.* at 1235.
183. *See id.* at 1229–30, 1233.
184. *Id.* at 1232.
185. *Id.* at 1229, 1232.
186. *Id.* at 1232–33.
187. *Id.* at 1233 (citing Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009)).
188. *Gatimi*, 578 F.3d at 616–17.
189. *Rivera Barrientos*, 658 F.3d at 1233; *see also Gatimi*, 578 F.3d at 615.
190. *Rivera Barrientos*, 658 F.3d at 1233.
191. *Id.*

requirement was reasonable for two reasons.[192] First, the requirement "does not deviate from past precedent" because it encompasses the groups that were held to be particular social groups before the BIA established the social-visibility requirement.[193] Second, the Tenth Circuit stated that the Seventh Circuit had incorrectly interpreted the BIA's social-visibility requirement when the Seventh Circuit found the requirement unreasonable.[194] The Tenth Circuit said that, unlike the standard the Seventh Circuit discussed, the BIA's actual standard did not "exclude groups whose members might have some measure of success in hiding their status in an attempt to escape persecution."[195] Additionally, the court noted that simply because the BIA diverged from the UNHCR guidelines did not mean the BIA's interpretation was unreasonable.[196]

5. The Third Circuit

In a similar manner as the Seventh Circuit, the Third Circuit rejected the social-visibility requirement in *Valdiviezo-Galdamez v. Attorney General*.[197] Valdiviezo-Galdamez had fled Honduras to avoid the notorious MS-13.[198] Like Rivera Barrientos, Valdiviezo-Galdamez claimed that the MS-13 "had threatened to kill him if he did not join their gang."[199] He moved around to avoid the gang and "filed five separate police reports about the incidents, but claimed he received no response from the police."[200] During a trip to visit his brother-in-law in Guatemala, MS-13 members kidnapped Valdiviezo-Galdamez and the other passengers of the vehicle he was traveling in.[201] The MS-13 members thought that he was going to Guatemala to avoid being recruited and threatened to kill him, and "then they beat him for five hours."[202] Eventually, the Guatemalan police arrived and freed Valdiviezo-Galdamez.[203] Unbeknownst to the MS-13 captors, Valdiviezo-Galdamez

192. *See id.*
193. *Id.*
194. *See id.*
195. *Id.*
196. *Id.* at 1234.
197. Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 608–09 (3d Cir. 2011).
198. *Id.* at 586.
199. *Id.*
200. *Id.* at 587.
201. *Id.*
202. *Id.*
203. *Id.*

had family members following in a separate car behind him who had been able to call the police.[204] When Valdiviezo-Galdamez filed an official report with the Guatemalan police, they said they were not going to pursue it because he was not from Guatemala.[205]

"In his asylum application, Valdiviezo-Galdamez alleged that he had [faced] persecut[ion] in Honduras [based on] his membership in a particular social group . . ."; however, the immigration judge found that he failed to prove such membership.[206] On appeal to the BIA, Valdiviezo-Galdamez argued that "he belonged to the 'particular social group' of 'Honduran youth who have been actively recruited by gangs but have refused to join because they oppose the gangs.'"[207] The BIA rejected his argument, but the Third Circuit remanded to the BIA to determine whether "'young men who have been actively recruited by gangs and who have refused to join the gangs' is a 'particular social group' within the meaning of the [Immigration and Nationality Act]—an issue that neither the [immigration judge] nor the BIA had decided."[208]

Back before the BIA for the second time, the Board determined that "the proposed 'particular social group' of 'Honduran youth who have been actively recruited by gangs but have refused to join because they oppose gangs' lacked 'particularity' because it was a 'potentially large and diffuse segment of society' and 'too broad and inchoate' to qualify for relief."[209] In addition, the BIA found that the group did not meet social visibility "because persons who resist gangs were not shown to be socially visible or a recognizable group or segment of Honduran society, and the risk of harm Valdiviezo-Galdamez feared was actually an individualized gang reaction to his specific behavior."[210]

On his second appeal to the Third Circuit, Valdiviezo-Galdamez argued that the BIA had applied a new standard to his case based on two new cases but did not provide him with a chance to argue against the standard because the cases were decided after his first appearance to the BIA.[211] The Third Circuit held that the BIA had not relied on a new

204. *Id.*
205. *Id.*
206. *Id.* at 587–88.
207. *Id.* at 588.
208. *Id.* at 588 (quoting Valdiviezo-Galdamez v. Att'y Gen., 502 F.3d 285, 290 (3d Cir. 2007)).
209. *Id.* at 589.
210. *Id.*
211. *Id.* at 602.

standard but had only used those cases to demonstrate the original standard set out in *In re C-A-*.[212]

In addition, Valdiviezo-Galdamez argued that social visibility goes against the intent of § 1101(a)(42)(A).[213] The court acknowledged it had previously said that the legislative history did not "shed much light" on the intent of the statute.[214] Because of this, the court had, to this point, generally concluded that the BIA's decisions regarding these issues were entitled to *Chevron* deference.[215] However, Valdiviezo-Galdamez argued that the BIA's decision "that a 'particular social group' possess the elements of 'social visibility' and 'particularity'" was not entitled to such deference.[216] The Third Circuit agreed that social visibility "is inconsistent with a number of the BIA's prior decisions and is therefore not entitled to deference."[217]

Regarding the BIA's prior inconsistent decisions, the Third Circuit agreed with the way the Seventh Circuit dealt with them in *Gatimi*.[218] It discussed the BIA's holdings that homosexuals, females subject to genital mutilation, and former members of the El Salvador national police constituted particular social groups:

> [N]either anything in the Board's opinions in those cases nor a general understanding of any of those groups, suggests that the members of the groups are "socially visible." The members of each of these groups have characteristics which are completely internal to the individual and cannot be observed or known by other members of the society in question (or even other members of the group) unless and until the individual member chooses to

212. *Id.* (citing *In re* C-A-, 23 I. & N. Dec. 951 (B.I.A.), *aff'd sub nom.* Castillo-Arias v. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006)).
213. *Id.* at 603 (citing 8 U.S.C. § 1101(a)(42)(A) (2012)).
214. *Id.*
215. *See id.*
216. *Id.*
217. *Id.*
218. *Compare Valdiviezo-Galdamez*, 663 F.3d at 604 (rejecting the BIA's social-visibility requirement as unreasonable, noting the requirement, when applied to groups found to be particular social groups under the current formulation, would be an immense obstacle), *with* Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009) (noting that while the BIA should be afforded deference, it has been inconsistent in its determinations, often making determinations without discussing "social visibility").

make that characteristic known.[219]

The court noted that had members of those groups come before the BIA after it began requiring social visibility, none of the groups would meet this requirement.[220] The court then concluded that because social visibility is inconsistent with BIA decisions that came prior to the requirement, social visibility "is an unreasonable addition to the requirements for establishing refugee status where that status turns upon persecution on account of membership in a particular social group."[221] To support this finding, the Third Circuit relied heavily on the Seventh Circuit's holding in *Gatimi*.[222]

6. The Eleventh Circuit

In *Castillo-Arias v. U.S. Attorney General*,[223] the Eleventh Circuit implicitly upheld the social-visibility requirement.[224] Castillo-Arias was a bakery operator who disclosed information to the police about the Cali drug cartel, making him a noncriminal informant.[225] Castillo-Arias learned the information from a Cali cartel member who regularly visited the bakery and openly discussed the Cali cartel's business.[226] One day, "Castillo-Arias was watching his son . . . ride his bicycle in the street," when three armed men blocked his son's path and eventually began beating Castillo-Arias.[227] His son screamed, so one of the men hit his son in the face with a pistol.[228] His son's screams drew the neighborhood's attention, so the men fled, but not before telling "Castillo-Arias that things would only get worse for him and his family."[229] The investigator who Castillo-Arias had been working with suggested that Castillo-Arias and his family hide until they could leave Colombia.[230] After overstaying his

219. *Valdiviezo-Galdamez*, 663 F.3d at 604.
220. *Id.*
221. *Id.*
222. *See id.* at 604–07.
223. Castillo-Arias v. Att'y Gen., 446 F.3d 1190 (11th Cir.), *aff'g*, *In re* C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).
224. *Id.* at 1197.
225. *Id.* at 1191.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 1192.

B-2 visa in the United States, Castillo-Arias requested relief from deportation based on asylum.[231] The immigration judge denied the asylum application; the BIA affirmed the denial; and the Eleventh Circuit remanded the case back to the BIA to determine whether Castillo-Arias was a member of a particular social group based on being a noncriminal informant.[232] "[T]he BIA [determined] that noncriminal informants did not constitute a particular social group."[233] In discussing social visibility, "the BIA noted that 'the very nature of the conduct at issue is such that it is generally out of the public view,' and it thereby concluded that informants lacked the necessary social visibility to be recognized as a 'particular social group.'"[234]

On the second appeal to the Eleventh Circuit, Castillo-Arias argued that the BIA's finding was unreasonable because other groups had qualified as particular social groups but were not any "more visible . . . than noncriminal informants."[235] The court reasoned that because criminal informants tend to remain invisible, their social visibility is distinguishable from the social visibility of other groups that have met the social-visibility requirement.[236] In doing this, the court implicitly upheld the social-visibility requirement.[237]

B. Germany

Germany received more refugee and asylum claims than any other country in 2013 "with 109,600 new asylum applications."[238] This number is a seventy-percent increase from 2012, and 2013 was the sixth consecutive year that Germany's number of asylum applications increased.[239] Two thousand thirteen was the first year since 1999 that Germany was the "largest single recipient of new asylum claims."[240] From

231. *Id.*
232. *Id.* at 1192–93.
233. *Id.* at 1193.
234. *Id.* at 1194.
235. *Id.* at 1196.
236. *Id.* at 1197.
237. *See id.*
238. UNHCR STAT. Y.B. 2013, *supra* note 4, at 56.
239. *Id.*
240. *Id.*

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the 2013 asylum seekers, Germany recognized the third-largest number of asylum-seekers that year with 20,100.[241]

"Germany, . . . unlike many other countries," has included asylum as a fundamental right in its constitution.[242] It is the only right in its constitution that applies exclusively to foreigners.[243] The right to asylum "has high priority and expresses Germany's willingness to fulfil its historical and humanitarian obligation to admit refugees."[244]

But, like some courts in the United States, Germany also requires both immutability and social visibility in order to fulfill the membership-in-a-particular-social-group test.[245] Although this approach was discussed in great detail in the preceding section, a brief discussion of Germany's refugee law is relevant to show that well-established countries that receive large numbers of asylum and refugee applications are using differing approaches to ignore the UNHCR in the same ways.

The membership-in-a-particular-social-group category did not get much attention in German refugee law until the European Qualification Directive took effect in 2004.[246] Currently, the 2011 European Directive states the following:

> [A] group shall be considered to form a particular social group where in particular: members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country,

241. *Id.* at 59.

242. FED. MINISTRY OF THE INTERIOR, MIGRATION AND INTEGRATION: RESIDENCE LAW AND POLICY ON MIGRATION AND INTEGRATION IN GERMANY 147 (2014), http://www.bmi.bund.de/SharedDocs/Downloads/EN/Broschueren/2014/migration_and_integration.pdf [https://perma.cc/9WC7-FA3D].

243. *Asylum and Refugee Protection*, FED. MINISTRY OF THE INTERIOR, http://www.bmi.bund.de/EN/Topics/Migration-Integration/Asylum-Refugee-Protection/asylum-refugee-protection_node.html [https://perma.cc/8JSU-DA7N].

244. *Asylum and Refugee Policy in Germany*, FED. MINISTRY OF THE INTERIOR, http://www.bmi.bund.de/EN/Topics/Migration-Integration/Asylum-Refugee-Protection/Asylum-Refugee-Protection_Germany/asylum-refugee-policy-germany_node.html [https://perma.cc/L59G-LGAL].

245. Foster, *supra* note 47, at 25.

246. *Id.* at 24.

> because it is perceived as being different by the surrounding society.[247]

The European directives are official legislation that "set[] out a goal that all [European Union] countries must achieve."[248] "[I]t is up to the individual countries to devise their own laws on how to reach these goals," but they must follow the directives nonetheless.[249] Because the Directive uses the conjunctive connector "and" instead of the disjunctive connector "or," Germany's interpretation that both immutability and social visibility are required is not only reasonable but perfectly logical.[250]

Additionally, Germany added this requirement into its Asylum Procedure Act.[251] The Asylum Procedure Act is the law that governs refugees and asylum seekers in Germany.[252] The Act defines the membership-in-a-particular-social-group category:

> [A] group shall be considered to form a particular social group where in particular:
>
> a) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
>
> b) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
>
> a particular social group may include a group based on a common

247. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, art. 10(1)(d), 2011 O.J. (L 337) 9, 16.

248. *Regulations, Directives and Other Acts*, EUR. UNION, http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm [https://perma.cc/M44T-3JTS].

249. *Id.*

250. *Cf.* KATHARINE CLARK & MATTHEW CONNOLLY, A GUIDE TO READING, INTERPRETING AND APPLYING STATUTES 11 n.34 (2006), https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutory interpretation.pdf [https://perma.cc/6VG6-8D2U] (discussing the interpretation of the connectors "and" versus "or").

251. Asylgesetz [AsylVfG] [Asylum Procedure Act], June 26, 1992, BGBL. I S. at 2439, § 3b(4) (Ger.), http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html#p0020 [https://perma.cc/S9D6-34AD].

252. *Asylum and Refugee Policy in Germany*, *supra* note 244.

> characteristic of sexual orientation; this shall not include acts punishable under German law; if a person is persecuted solely on account of their sex or sexual identity, this may also constitute persecution due to membership of a certain social group.[253]

Again, because the European Directive binds Germany[254] as a member of the European Union,[255] this statute is not *wrong* because it is uniform with the Directive.[256] But this interpretation of the membership-in-a-particular-social-group category is not what the UNHCR supports.[257] Thus, while Germany's statute is reasonable based on the European Directive, the European Directive is not reasonable based on the UNHCR guidelines.[258]

The European Directive states that "[t]he Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees."[259] However, the European Directive later states that "[c]onsultations with the United Nations High Commissioner for Refugees *may* provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention."[260] Despite this flexibility and leniency in looking to the UNHCR for guidance, it would have been appropriate for the European Directive to follow the UNHCR's membership-in-a-particular-social-group interpretation. This conclusion stems from the fact that the European Directive itself says that the Geneva Convention and Protocol are "the cornerstone of the international legal regime,"[261] and the UNHCR was created specifically to protect refugees under the Geneva Convention and Protocol.[262] Because the UNHCR is the agency that is "mandated to lead and co-ordinate international action to protect refugees and resolve refugee

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253. Asylgesetz [AsylVfG] [Asylum Procedure Act], June 26, 1992, BGBL. I S. at 2439, § 3b(4) (Ger.), http://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.html#p0020 [https://perma.cc/S9D6-34AD].

254. *Regulations, Directives and Other Acts*, *supra* note 248.

255. *Countries*, EUR. UNION, http://europa.eu/about-eu/countries/index_en.htm [https://perma.cc/TQ2E-7W35].

256. *Compare* BGBL. I S. at 2439, § 3b(4) (Ger.), *with* Directive 2011/95/EU, *supra* note 247, art. 10(1)(d). *See also supra* text accompanying notes 247, 253.

257. *See supra* Section III.B.3.

258. *See Handbook and Guidelines*, *supra* note 7, ¶ 11, at 93; Directive 2011/95/EU, *supra* note 247, art. 10(1)(d); BGBL. I S. at 2439, § 3(b)(4) (Ger.).

259. Directive 2011/95/EU, *supra* note 247, art. (4).

260. *Id.* art. (22) (emphasis added).

261. *Id.* art. (4).

262. *Handbook and Guidelines*, *supra* note 7, ¶¶ 14–15, at 6–7.

problems worldwide,"[263] its interpretation should be given much more deference than the European Directive gave it. Because the European Directives bind Germany as a member of the European Union, it is highly likely that if the European Directive broadened its interpretation to no longer require social visibility and immutability, Germany would follow that lead and do the same with its statute.[264]

C. Australia

While the number of people seeking asylum in Australia is small, Australia's treatment of refugees is important to consider because it "has a long history of accepting refugees."[265] Additionally, Australia is one of only a few nations that actively participates in the UNHCR program that helps resettle refugees,[266] which makes Australia a key figure in the area of refugee law.

Australian law adopted the 1951 Convention in section thirty-six of the Migration Act 1958.[267] In *Minister for Immigration and Ethnic Affairs v Guo*,[268] the High Court of Australia determined that refugee status requires four elements:

> (1) the applicant must be outside his or her country of nationality; (2) the applicant must fear "persecution"; (3) the applicant must fear such persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion"; and (4) the applicant must have a "well-founded" fear of persecution for one of the Convention reasons.[269]

Applicant A v Minister for Immigration and Ethnic Affairs[270] is an

263. *Office of the United Nations High Commissioner for Refugees*, UNHCR, http://www.unhcr.org/turkey/home.php?lang=en&page=52 [https://perma.cc/S4FG-BZ2J].

264. *Regulations, Directives and Other Acts*, *supra* note 248.

265. JANET PHILLIPS, PARLIAMENT OF AUSTR., ASYLUM SEEKERS AND REFUGEES: WHAT ARE THE FACTS? 1 (2011), http://www.aph.gov.au/binaries/library/pubs/bn/sp/asylumfacts.pdf [https://perma.cc/49H5-CLBR].

266. *Id.* at 12.

267. MIRKO BAGARIC ET AL., MIGRATION AND REFUGEE LAW IN AUSTRALIA: CASES AND COMMENTARY 224 (2007).

268. *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 (Austl.).

269. *Id.* at 570.

270. *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (Austl.).

important Australian case interpreting the membership-in-a-particular-social-group category.[271] Applicants for refugee status in this case were a husband and wife from the People's Republic of China (PRC).[272] Shortly after arriving in Australia, the wife gave birth to the couple's first son.[273] Because of the PRC's policy that allowed only one child per couple, the couple feared that they would now undergo sterilization because they had their first child.[274] Siding with the majority of the court, Justice McHugh found that the man and wife were not members of a particular social group.[275]

To begin, Justice McHugh explained that the Migration Act's meaning of refugee is the same as the 1951 Convention meaning.[276] He further explained that "treaties are interpreted [according to] . . . the Vienna Convention on the Law of Treaties," particularly Article 31.[277] Justice McHugh then concluded that the Vienna Convention required Australian courts "to examine both the 'ordinary meaning' and the 'context[,] . . . object and purpose' of a treaty."[278] Then, foreshadowing an argument the Eleventh Circuit would find persuasive in *Castillo-Arias*,[279] Justice McHugh noted that while the purpose of the membership-in-a-particular-social-group category was to "broaden the reach of the other four grounds," the purpose was not to provide a catchall for those who did not fall into another ground.[280] He then looked to American and Canadian case law to examine the different approaches to interpreting the membership-in-a-particular-social-group category.[281]

Justice McHugh began with a discussion of *Sanchez-Trujillo*.[282] First, he noted that *Sanchez-Trujillo* was a narrow refugee interpretation that has

271. *See id.* at 249–50 (opinion of McHugh, J.); *cf.* BAGARIC ET AL., *supra* note 267, at 248 (recognizing the importance of *Applicant A* to Australian refugee law).

272. *Applicant A* (1997) 190 CLR 225, 250.

273. *Id.* at 251.

274. *See id.*

275. *Id.* at 266–67.

276. *Id.* at 251.

277. *Id.* at 251–52.

278. *Id.* at 256 (quoting Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1115 U.N.T.S. 331).

279. Castillo-Arias v. Att'y Gen., 446 F.3d 1190, 1198 (11th Cir. 2006) ("'[P]articular social group' should not be a 'catch all' for all persons alleging persecution who do not fit elsewhere.").

280. *Applicant A* (1997) 190 CLR 225, 259–60.

281. *See id.* at 260–63.

282. *See* discussion *supra* Section IV.A.1.

been criticized, "particularly its employment of the notion of the necessity of a 'voluntary associational relationship.'"[283] Next, he contrasted the reasoning in *Sanchez-Trujillo* with "the reasoning of MacGuigan JA in his dissenting judgment in the Canadian Federal Court of Appeal in *Canada (Attorney-General) v. Ward*."[284] Justice of Appeal MacGuigan "preferred a definition of 'membership of a particular social group' that included persons who were 'united in a stable association with common purposes,' reasoning that '[i]n a world fractured by racism and religion, politics and poverty, reality is too complex to be thus limited by conceptual absolutes.'"[285] The Supreme Court of Canada rejected MacGuigan's analysis because it was too wide and essentially created a catchall provision for those people who did not fall into one of the other enumerated categories.[286] Justice McHugh then noted the many American and Canadian decisions that could not "be reconciled with each other."[287]

After discussing American and Canadian interpretations, Justice McHugh began his own analysis of the membership-in-a-particular-social-group category. He first stated that persecution could not define a particular social group.[288] In other words, a group cannot be a particular social group simply because its members fear persecution.[289] "[T]he group must exist independently of . . . the persecution."[290] Allowing an interpretation where persecution was a defining characteristic would

> permit the "particular social group" ground to take on the character of a safety-net[,] . . . impermissibly weaken, if . . . not destroy, the cumulative requirements of "fear of persecution," "for reasons of" and "membership of a particular social group" in the

283. *Applicant A* (1997) 190 CLR 225, 260–61 (quoting Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986), *abrogated by* Cordoba v. Holder, 726 F.3d 1106 (9th Cir. 2013)).
284. *Id.* at 261; *see also* Canada (Att'y Gen.) v. Ward, [1993] 2 S.C.R. 689, 704–06 (Can.) (discussing Justice of Appeal MacGuigan's dissent in Canada (Att'y Gen.) v. Ward, 1990 CanLII 7985 (FCA)).
285. *Applicant A* (1997) 190 CLR 225, 261 (footnote omitted) (quoting *Ward*, 1990 CanLII 7985, paras. 58, 60 (MacGuigan, J.A., dissenting)).
286. *Id.*
287. *Id.*
288. *Id.* at 263.
289. *Id.* at 263–64.
290. *Id.* at 263.

> definition of "refugee" [and] . . . effectively make the other four grounds of persecution superfluous.[291]

The persecution should be on the basis of the membership in a particular social group; it should not be that the qualification for membership in the particular social group is conditioned upon the persecution.[292] Nonetheless, the persecution can be essential to identifying or creating the social group.[293] To demonstrate this concept, Justice McHugh used an example about left-handed men:

> Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become [recognizable] in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.[294]

This illustration led to Justice McHugh's fundamental conclusion that social perception determines membership in a particular social group.[295] Justice McHugh explained that the existence of a particular social group depends on whether it is externally perceived and can be identified as a "social unit."[296] Additionally, he reasoned that the use of the terms "membership" and "particular social group" together meant that the group has "some characteristic, attribute, activity, belief, interest or goal that unites them."[297] Justice McHugh went on to say that

> [a] group may qualify as a particular social group, however, even though the distinguishing features of the group do not have a public face. It is sufficient that the public is aware of the characteristics or attributes that, for the purposes of the Convention, unite and identify the group. . . . Nor is it necessary

291. *Id.*
292. *Id.*
293. *Id.* at 264.
294. *Id.*
295. *See id.*
296. *Id.*
297. *Id.*

> that the group should possess the attributes that they are perceived to have.[298]

The court elaborated on the social-perception approach in *Applicant S v Minister for Immigration and Multicultural Affairs*[299] and listed three elements for determining whether a group is a particular social group: the group must have an identifiable characteristic that is common to all members; the common characteristic cannot be a fear of persecution; and the common characteristic must separate the group from the rest of society.[300] If the group had an identifiable characteristic that is not fear of persecution, but the common characteristic does not separate the group from the rest of society, then the group "is merely a 'social group,' and not a 'particular social group.'"[301]

The applicant for refugee status in *Applicant S* was an Afghan male whom the Taliban had tried to recruit.[302] The first time the Taliban tried to recruit him, Applicant S paid the recruiters off; the second time, he told them "that he needed to speak with his parents" then promptly fled the country, ultimately ending up in Australia.[303] The Refugee Review Tribunal (Tribunal) had found that when the Taliban recruited people, it looked specifically for young, able-bodied men.[304] But the Tribunal rejected Applicant S's application for refugee status because he was "not targeted by reasons of any political opinion or religious beliefs."[305] On appeal, the intermediate appellate judge decided that the Tribunal should have considered whether the applicant was a member of a particular social group and would have set aside the Tribunal's decision.[306] But after reconsidering the appellate judge's decision as a full court, a majority of the appellate court concluded that the applicant was not a member of a particular social group because there was no evidence that society could perceive "young[,] able-bodied men" as a group.[307]

298. *Id.* at 265 (citing Hernandez-Ortiz v. INS, 777 F.2d 509, 517 (9th Cir. 1985)).
299. *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 (Austl.).
300. *Id.* at 400 (opinion of Gleeson, C.J., Gummow and Kirby, JJ.); *see also* Foster, *supra* note 47, at 10.
301. *Applicant S* (2004) 217 CLR 387, 400.
302. *Id.* at 391.
303. *Id.*
304. *Id.* at 391–92.
305. *Id.* at 392.
306. *Id.* at 392–93.
307. *Id.* at 393.

Australia's High Court, agreeing that the correct issue was whether the applicant was a member in a particular social group, disagreed with the full appellate court and found that evidence that society was able to perceive the group was not required.[308] While the Court was still engaging in a social-perception approach, it was doing so in a less stringent way than the appellate court.[309] To do this, the Court went back to McHugh's example of left-handed men:

> Left-handed men share a common attribute (ie, they are left-handed), but, ordinarily, there is nothing to separate or to distinguish them from the rest of the community. However, to expand on his Honour's example, if the community's ruling authority were to legislate in such a way that resulted in discrimination against left-handed men, over time the discriminatory treatment of this group might be absorbed into the social consciousness of the community. In these circumstances, it might be correct to conclude that the combination of legal and social factors (or norms) prevalent in the community indicate that left-handed men form a particular social group distinguishable from the rest of the community.[310]

The High Court set aside the decision of the Tribunal and remitted the case back to the Tribunal to be reconsidered in light of the High Court's opinion.[311]

V. THE DIFFERING APPROACHES IN APPLICATION

This Note has shown that the interpretation of the membership-in-a-particular-social-group category differs across the globe.[312] In the United States, the BIA requires both immutability and social perception.[313] Germany, because of the European Directive, also requires immutability and social perception.[314] Australia, however, requires only social

308. *Id.* at 404.
309. *See id.* at 393–400.
310. *Id.* at 399.
311. *Id.* at 405.
312. *See supra* Part IV (noting the similarities and differences between approaches in the United States, Germany, and Australia).
313. *See supra* Section IV.A.
314. *See supra* Section IV.B.

perception.[315] Despite the variation, not a single country interprets the membership-in-a-particular-social-group category how the UNHCR guidelines suggest.[316]

The most underinclusive way to determine membership in a particular social group is to require both immutability and social perception, which is the approach taken by Germany, many United States circuits, and the BIA.[317] When both are required, the category is far too narrow. Many people who meet all the other elements of refugee do not receive refugee status, typically because they do not meet the social-visibility requirement.[318] This approach hampers the system and goes against the goals that the 1951 Convention, the Refugee Act, and the European Directive are intended to fulfill, such as promoting a uniform system of refugee assistance and welcoming refugees.[319] People persecuted by gangs best demonstrate the effects of this approach. As seen in Part IV Section A, people persecuted by gangs who applied for refugee status in a circuit that required both immutability and social visibility were denied refugee status on the basis of membership in a particular social group.[320]

The argument that the narrower interpretation of the membership-in-a-particular-social-group category is better because the ground was never meant to be a catchall is flawed. Requiring either immutability or social perception is effective in eliminating the catchall tendency because both restrict the membership-in-a-particular-social-group category.[321] Immutability eliminates those who do not have a characteristic that is unchangeable or should not have to be changed, while social visibility eliminates those who do not have a cognizable characteristic.[322] Neither allow for persecution alone to establish a particular social group.[323]

For those concerned with rendering the membership-in-a-particular-social-group category a catchall, the better argument is to require social perception only, like Australia does.[324] When only social perception is

315. *See supra* Section IV.C.
316. *See supra* Section III.B.
317. *See supra* Part IV.
318. *See* Wilkinson, *supra* note 48, at 413.
319. *Cf.* H.R. REP. NO. 96-781, at 19 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 160, 160; S. REP. NO. 96-256, at 1 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 141; JASTRAM & ACHIRON, *supra* note 16, at 21–22.
320. *See supra* Section IV.A.4; Wilkinson, *supra* note 48, at 406–07.
321. *See Handbook and Guidelines*, *supra* note 7, ¶¶ 2, 6–7, at 92–93.
322. *See* Wilkinson, *supra* note 48, at 414.
323. *Handbook and Guidelines*, *supra* note 7, ¶ 14, at 94.
324. *See supra* Section IV.C.

required, the membership-in-a-particular-social-group category is tailored in a way that does not render the ground superfluous because it prevents a person from being a refugee based solely on an immutable characteristic.[325] But this approach still allows leeway for those who are suffering actual persecution that their government cannot or will not control, so long as they have some common characteristic that is distinguishable from the rest of society.[326] The facts of *Applicant S*, discussed in Part IV Section C, best demonstrate this. The facts in *Applicant S* were similar to those in the United States cases where the applicants were persecuted by gangs.[327] In both situations, the applicants were being driven from their countries because they feared for their safety after refusing to join a group.

But even in light of the concern that the membership-in-a-particular-social-group category is becoming a catchall, the best approach is the UNHCR approach, which determines refugee status based on social visibility *or* immutability.[328] The UNHCR approach addresses the fact that the membership-in-a-particular-social-group category is not meant to be a catchall and does not allow a group to be defined solely because it is "targeted for persecution."[329] This way of determining the membership-in-a-particular-social-group category is the most reasonable in light of all the humanitarian concerns that need to be considered and still does not render the membership-in-a-particular-social-group category a catchall. When combined with the other elements for determining refugee status, it tends

325. *Cf. Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 263 (Austl.) (using social perception to interpret "particular social group" and finding the category not superfluous when correctly defined). *See generally* Foster, *supra* note 47, at 36–37 (describing jurisdictions who only use the social-perception approach).

326. *See Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 393–400, 404–05 (Austl.) (applying the social-perception approach and requiring the Tribunal to re-evaluate its denial of refugee status to the claimed social group of "young[,] able-bodied [Afghan] men" whom the Taliban had forcibly attempted to recruit to become Taliban guerrilla fighters).

327. *Compare id.* at 391–93, 401, 404–05 (fleeing Taliban recruitment), *with* Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 586–90, 603–09 (3d Cir. 2011) (concluding that "young [Honduran] men who have been actively recruited by gangs and who have refused to join the gangs" might qualify as members of a particular social group and remanding to the BIA (quoting Valdiviezo-Galdamez v. Att'y Gen., 502 F.3d 285, 290 (3d Cir. 2007))), *and* Rivera Barrientos v. Holder, 658 F.3d 1222, 1225–29, 1235 (10th Cir. 2011) (rejecting the proposed particular social group of "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment" (footnote omitted)).

328. *Handbook and Guidelines*, *supra* note 7, ¶¶ 2, 6–7, 10–12, at 92–93.

329. *Id.* ¶ 2, at 92.

to protect the people the 1951 Convention intended to protect.[330] It cannot be forgotten that even if someone satisfies the membership-in-a-particular-social-group category, that person must still have a well-founded fear of persecution, be outside his or her country of origin, and because of that fear be unable or unwilling to be protected by or return to the country of origin.[331]

Nations have become increasingly disinterested in the protection of refugees.[332] Mechanisms, such as requiring both social perception and immutability to narrow the membership-in-a-particular-social-group definition, helped to establish this disinterest.[333] While such a narrowing is not a direct violation of the 1951 Convention, it is "contrary to the humanitarian spirit and the notion of international protection that underpin[s] the 1951 Refugee Convention."[334] Additionally, this type of narrowing undermines the framework of international refugee law.

While Australia's social-perception approach is better than what the United States and Germany are doing, allowing a finding of refugee status under the immutability approach as well would bring all three countries closer to the UNHCR's approach. Instead, the United States and Germany are backing away from the humanitarian concerns of the UNHCR. By requiring both immutability and social perception, the United States and Germany are causing many people who would otherwise qualify for refugee status to be sent back to the place of their persecution. It is because of these humanitarian considerations that Australia, Germany, and the United States should change their interpretations to that of the UNHCR.

330. *The 1951 Refugee Convention*, UNHCR, http://www.unhcr.org/en-us/1951-refugee-convention.html [https://perma.cc/3VQH-W8FG] ("The core principle is non-refoulement, which asserts that a refugee should not be returned to a country where they face serious threats to their life or freedom.").

331. 8 U.S.C. § 1101(a)(42) (2012).

332. LEWIS, *supra* note 21, at 99.

333. *Id.*

334. *Id.*