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Seeing Through a Glass, Darkly: The Social Context of "Particular Social Groups" in Lwin v. INS

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I. INTRODUCTION

The world and its courts are in turmoil. Crime, civil and political violence, persecution, and war affect untold millions, as "'social suffering' [has become] a hallmark of our 'chaotic and cruel century.'"[1] As those fleeing hardship within their countries seek refuge in the safe and relatively affluent United States, federal administrative and appellate courts struggle to apply the Refugee Act of 1980 (Refugee Act).[2] Passed almost twenty years ago, the Refugee Act provides a safe haven for "refugees"—those who are unable or unwilling to return to their 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."[3] The Refugee Act also allows refugees who have either entered or stayed in the United States illegally to remain in the United States.[4] Congress passed the Refugee Act declaring "that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homeland."[5]

Fear of persecution provoked by "membership in a particular social group" is a unique basis for granting refugee status to those seeking asylum. Although for the past forty years this criterion has been included in international refugee law, courts still struggle to find a workable and consistent way to define a "particular social group." There is little international and domestic legislative history on the meaning of "particular

1. Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 737 (1998) (quoting Stephen R. Graubard, *Preface* to *Social Suffering*, DAEDALUS, Winter 1996, at v).

2. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended at 8 U.S.C. §§ 1101, 1151, 1153, 1157-59, 1182, 1225-27, 1255, 1521-25; 20 U.S.C. § 3401; 22 U.S.C. § 2601; 42 U.S.C. §§ 601, 620, 1381, 1396; 50 U.S.C. § 121 (1994)).

3. 8 U.S.C. § 1101(a)(42)(A) (1994).

4. 8 U.S.C. § 1158(a) (1994).

5. Pub. L. No. 96-212(a), § 101(a), 94 Stat. 102 (1980).

social group," and courts have been forced to interpret its meaning without a significant amount of meaningful guidance. Because defining social groups is essential to refugee law, and because the interpretation of the definition of "particular social group" has significant impact on people inside and outside of the United States, a workable definition must be developed, allowing courts to apply refugee law consistently and in accord with stated congressional and international humanitarian policies.

Lwin v. INS[6] is a recent example of the Seventh Circuit's attempt to sort through the various definitions developed throughout the other circuits.[7] The definition applied by the Seventh Circuit in *Lwin*, which defines "particular social groups" by their "immutable characteristics," although fundamentally sound, is incomplete. The term "immutable" is misleading in that it includes not only characteristics that *cannot* be changed, but also characteristics that a person *should not have* to change. Thus, the most difficult cases to decide are those in which a person seeks asylum based on voluntary actions or conduct that the person can change but feels he or she should not have to change. If courts are to decide whether those changeable characteristics are "immutable," and thereby define a valid particular social group, they must consider the significance of a person's conduct in the economic, social, and political context of the person's own country.

Part II of this note provides the historical and legislative background of modern refugee law and introduces *Lwin v. INS*. Part III identifies the humanitarian purposes of refugee law and concludes that the test applied in *Lwin* accurately reflects those purposes but ultimately fails to provide a means of

6. 144 F.3d 505 (7th Cir. 1998).

7. *See* T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 944 (1992) ("No U.S. court has yet defined clear-cut and adequate criteria for determining social group status. The BIA [Board of Immigration Appeals], rather than developing a true definition, has confined itself to delineating an outer limit. While *Sanchez-Trujillo* proffers a solution to the difficult problem of defining the social group category, it has not been adopted outside the Ninth Circuit. Even within the Ninth Circuit, *Sanchez-Trujillo*'s authority is problematic. Other circuits have either remained silent on this issue or reached conclusions as to the cognizability of particular purported social groups without revealing the criteria upon which these conclusions are based." (footnote omitted)).

achieving them. This note concludes that in order to meaningfully and consistently apply refugee law, courts should make factual inquiries to determine the social significance of the person's actions as perceived in their own country.

II. BACKGROUND

A. International History of Refugee Law

In 1951, the United Nations convened a conference of plenipotentiaries in Geneva with the purpose of making laws to protect refugees. The result of this conference was the 1951 Geneva Convention Relating to Status of Refugees.[8] This was the "first international compact to adopt a universal refugee definition, rather than one tied to a particular national or ethnic group."[9] Under this definition, a "refugee" is

> any person who
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> . . . .
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> . . . 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 . . . is unable or, owing to such fear, is unwilling to return to it.[10]

The phrase "particular social group" was added as an "afterthought."[11] It was proposed by the Swedish representative who explained only that it was needed because "experience had shown that certain refugees had been persecuted because they belonged to particular social groups."[12] Nations that ratified the convention agreed to abide by the definition of "refugee"

8. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 137 [hereinafter Convention].

9. Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 508 (1993).

10. Convention, *supra* note 8, 189 U.N.T.S. at 152.

11. 1 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 219 (1966).

12. Fatin v. INS, 12 F.3d 1233, 1239 (3d Cir. 1993) (quotation omitted).

established by the convention, but they were not required to admit those who acquired refugee status.[13]

B. Refugee Law in the United States

1. The Refugee Act of 1980

The United States did not sign the 1951 Convention, but acceded to the 1967 United Nations Protocol Relating to the Status of Refugees.[14] In order to comply with the Protocol, Congress passed the Refugee Act of 1980 and codified the Protocol's definition of "refugee," which included, among others, those who were persecuted as members of particular social groups.[15]

Before 1980 there was no statutory basis for granting refugee status to people who applied for asylum from within the United States.[16] The Refugee Act changed this by allowing people already in the United States to receive refugee status and be granted asylum under 8 U.S.C. § 1158, or to receive withholding of deportation under 8 U.S.C. § 1153(h). While the Attorney General has discretion to grant or deny asylum, the Attorney General is obligated to grant withholding of deportation to those who qualify.[17] The Attorney General's

13. *See* Fullerton, *supra* note 9, at 510 n.26. Signatory states are not required to admit refugees, but they are required to grant them specific rights. Article 33 of the Convention prohibits states from returning refugees to territories where they would face threats to their life or freedom due to race, religion, nationality, political opinion or membership in a social group. *See* Convention, *supra* note 8, at 176. Article 32 prevents states from expelling refugees absent a showing of national security. *Id* at 175. Article 31 prohibits states from penalizing aliens who entered the state illegally as long as they came directly from a state where their lives or freedom are in jeopardy. *Id* at 175.

14. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268.

15. *See Fatin*, 12 F.3d at 1239; *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol] . . . ."); H.R. CONF. REP. NO. 96-781, at 19 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160, 160; S. REP. NO. 96-256, at 4, 14–15 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 144, 154–55 (incorporating the obligations and definitions of the Protocol into United States law).

16. *See Cardoza-Fonseca*, 480 U.S. at 433.

17. *See* Bolanos-Hernandez v. INS, 767 F.2d 1277, 1281–83 (9th Cir. 1984). By making withholding of deportation a non-discretionary remedy, Congress finally complied with the Convention's Article 33.1 nonrefoulment requirement that "[n]o

immigration duties are delegated to the Immigration and Naturalization Service (INS)[18] and to the Board of Immigration Appeals (BIA).[19] People seeking refugee status can appeal BIA decisions to the federal circuit courts and, ultimately, to the U.S. Supreme Court.

2. Congressional legislative history

Congress has provided little meaningful guidance to courts that must interpret the term "particular social group," merely stating that its purpose in passing the Refugee Act was to comply with international refugee law.[20] Because of the lack of legislative guidance, a court defining the term "particular social group" must employ regular rules of statutory interpretation. Courts have been "cautioned that when Congress, implicitly or explicitly, leaves gaps in a statutory program, 'the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the . . . program.'"[21] The Third Circuit further explained that "the Board of Immigration Appeals' interpretation of a provision of the Refugee Act is entitled to deference."[22] A court "must uphold the Board's conclusion 'if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole.'"[23] Therefore, in light of the scant legislative history, courts should give substantial deference to BIA decisions when applying refugee law.

3. Judicial interpretations of the Refugee Act

To determine who can be classified as a member of a particular social group under the Refugee Act (which is nearly

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Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his . . . membership of [sic] a particular social group." Convention, *supra* note 8, 189 U.N.T.S. at 176.

18. *See* 8 C.F.R. § 2.1 (1998).

19. See *id.* §§ 3.1–.8.

20. *See* sources cited *supra* note 15.

21. Alvarez-Flores v. INS, 909 F.2d 1, 3 (1st Cir. 1990) (quoting *Cardoza-Fonseca*, 480 U.S. at 448).

22. Fatin v. INS, 12 F.3d 1233, 1239 (3d Cir. 1993); *see also* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–45 (1984).

23. 8 U.S.C. § 1105(a)(4) (1994).

identical to the international law under the 1967 United Nations Protocol), a court should determine the reasons for the person's flight from her country. This is because "displaced persons"— "[t]hose fleeing economic hardship, anarchy, war, personal vendettas by government officials, or a generally oppressive and brutal government"—are usually *not* considered refugees under U.S. law.[24] Without legislative guidance, this difficult and fact-intensive task has resulted in inconsistent, illogical, and sometimes inhumane decisions by the courts. The following cases illustrate the inconsistencies of four prominent definitions of "particular social group" developed in the federal circuit courts.

a. The "immutable characteristic" test. In *Matter of Acosta*,[25] the BIA addressed whether Acosta was entitled to asylum as a member of a particular social group consisting of Salvadoran taxi drivers who participated in organized protests against the government. Acosta testified that, as a consequence of the protests, he and other taxi drivers received death threats and that some of his fellow drivers had been killed. The BIA concluded that persecution of a particular social group is persecution that is

> directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.[26]

According to the BIA, a particular social group consists of individuals who share truly immutable characteristics (such as

24. Parish, *supra* note 7, at 931 (footnotes omitted). The author concludes that "a valid definition of the social group category must exclude from refugee status those deemed displaced persons under U.S. law, recognizing only those truly rejected by their states of origin." *Id.* at 932.

25. 19 I. & N. Dec. 211 (1985).

26. *Id.* at 212. The BIA relied on the doctrine of *ejusdem generis*, which means that general words used in conjunction with specific words should be construed consistently with the specific words listed in the definition of "refugee." *Id.* at 233. Thus, the term "particular social group" must be interpreted consistently with the other terms. *Id.* Race and nationality cannot be changed; religion and political opinions should not be required to be changed. Thus, "social group" must be interpreted to include only groups which share "immutable" characteristics, as defined by the other terms of the definition.

race and nationality), or characteristics that are "immutable" in the sense that an individual should not be forced to change them (such as religion and political opinion).[27]

The BIA concluded that Acosta did not meet the definition of "particular social group" because being a taxi driver is not immutable—a taxi driver can change jobs to avoid persecution. In support of its ruling, the BIA noted that "the internationally accepted concept of refugee simply does not guarantee an individual a right to work in the job of his choice."[28] Because Acosta had the power to change his job, a group consisting of politically active taxi drivers who had received death threats did not share an immutable characteristic. Therefore, Acosta was not a member of a persecuted social group.

The BIA noted that the category of "particular social group" was more expansive than the other four categories of race, religion, nationality and political opinion combined,[29] and that "a 'particular social group' normally comprises persons of similar background, habits or social status."[30] Despite this liberal language, some commentators have read the BIA's interpretation of "particular social group" as applied in *Acosta* as "narrow and elitist" and as evidence of a significant United States bias.[31] A possible basis for this criticism is that the BIA did not inquire into the social significance of Acosta's actions in an effort to understand the social importance of his conduct to him and to others within his society and did not recognize that Acosta really was powerless to change his past as a protesting taxi-driver.

b. The "voluntary associational relationship" test. In *Sanchez-Trujillo v. INS*[32] the Ninth Circuit's interpretation of "particular social group" was drastically different from the BIA's. The court held that a class of young, urban, working-class men of military age who had maintained political

27. *See* GRAHL-MADSEN, *supra* note 11, at 217; *see also* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 30–31 (1983).

28. *Acosta*, 19 I. & N. Dec. at 234.

29. *See id.* at 219.

30. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 19 (1988) [hereinafter HANDBOOK].

31. Fullerton, *supra* note 9, at 546–47.

32. 801 F.2d 1571 (9th Cir. 1986).

neutrality was not a particular social group and, therefore, did not qualify for refugee status. Apparently disregarding the BIA's holding in *Acosta*, this court held that

> "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a *voluntary associational relationship* among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.[33]

Thus, the Ninth Circuit will find "particular social groups" only if they have been formed or entered into voluntarily. The court further explained that the family group was the prototypical example of a social group.[34] However, this example is logically inconsistent since membership in a family generally is not a voluntary relationship.

The *Sanchez-Trujillo* decision is also inconsistent with the BIA's earlier decision in *Acosta*.[35] First, the court improperly narrowed the immutable characteristic test. The *Sanchez-Trujillo* court recognized that in *Acosta* the BIA set outer limits to what a social group could consist of. But the court decided to narrow the immutable characteristic test by requiring that social groups be voluntary in nature to avoid "extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country."[36] This language is consistent with the distinction made between refugees and

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

34. *See id.* However, in 1990, the Ninth Circuit contradicted itself by holding that family members of deserters are

> by no means closely affiliated or discrete. While there may be some common impulse or interest that, at a high level of generality, ties the families of deserters together, the differences between such families far outweigh the similarities. . . . "[i]ndividuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings."

De Valle v. INS, 901 F.2d 787, 793 (9th Cir. 1990) (quoting *Sanchez-Trujillo*, 801 F.2d at 1576–77). This criteria was apparently supposed to clear up the confusion, but it appears to have only exacerbated it.

35. By developing its own definition, the Ninth Circuit failed to give proper deference to the BIA's immutability requirement. *See* Fatin v. INS, 12 F.3d 1233, 1239 (3d Cir. 1990); Alvarez-Flores v. INS, 909 F.2d 1, 3–4 (1st Cir. 1990); Ananeh-Firempong v. INS, 766 F.2d 621, 623–24 (1st Cir. 1985).

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

"displaced persons." However, the court may have been overly concerned about the potential size of certain social groups and, therefore, could have mistakenly equated the relatively restrictive U.S. immigration policies with a congressional intent to narrowly define social groups.[37] In reality, this court's ruling seems to contradict Congress' stated purpose to "respond to the urgent needs of persons subject to persecution in their homelands, . . . [and] to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible."[38]

Second, by requiring a voluntary association as an element necessary to be considered a "particular social group," the court ignored the fact that "[h]istory shows that members of particular social groups have been persecuted despite group members' lack of interest in associating with each other. The Nazi persecution of non-religious Jews totally assimilated into German society is only one vivid example."[39] In fact, the Jewish persecution at the hands of the Nazis was a major motivating force behind the original international refugee laws.[40] In the face of such dramatic and tragic history, it seems strange for a circuit court to state that "major . . . population[s] . . . will rarely, if ever, constitute a distinct social group."[41] It is also revealing that since *Sanchez-Trujillo*, the Ninth Circuit has not been able to apply its "voluntary associational relationship test" in a consistent manner (a persistent problem with all of the tests). Specifically, the Ninth Circuit has in later cases contradicted *Sanchez-Trujillo* by holding that family groups usually do not constitute particular social groups.[42]

c. The "distinguishing characteristic" test. In *Gomez v. INS*[43] the Second Circuit accepted the *Sanchez-Trujillo* definition of "particular social groups" but included an additional requirement. The Second Circuit held that "[a]

37. *See* Parish, *supra* note 7, at 941.

38. Refugee Act of 1980, Pub. L. No. 96-212(a), § 101(a), 94 Stat. 102 (1980).

39. Fullerton, *supra* note 9, at 557.

40. *See* Steinbock, *supra* note 1, at 790 ("Like other midcentury international law, these developments are a direct response to World War II and its immediate prelude and aftermath.").

41. Fullerton, *supra* note 9, at 558 (quoting DeValle v. INS, 901 F.2d 787, 793 (9th Cir. 1990)).

42. *See supra* note 34.

43. 947 F.2d 660 (2d Cir. 1991).

particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general. . . . [T]he attributes of a particular social group must be recognizable and discrete."[44] This was the first time a U.S. court emphasized that the perceptions of others are important when defining the scope of a social group[45] and thereby put the United States more in line with the decisions of foreign courts.[46] Unfortunately, and despite its progressive holding, the *Gomez* decision fails to answer important questions concerning the definition of "particular social group." Does requiring a "recognizable characteristic" narrow or expand the other definitions? Must the distinguishing characteristic be "immutable" as defined in *Acosta*? Is the distinguishable characteristic voluntary or can it be imposed by the persecutors? The *Gomez* decision declares a necessary element of refugee law analysis and application. However, by accepting the *Sanchez-Trujillo* voluntary relationship test and at the same time defining social groups by outside perceptions, the *Gomez* test is seemingly unworkable because not all (or even most) characteristics perceived by an outsider are voluntarily chosen but instead may be arbitrarily imposed by the outsider. These two tests contradict each other.

d. Combining the "immutable characteristic" and "voluntary associational relationship" tests. As a final example of the circuit turmoil, in *Safaie v. INS*,[47] the Eighth Circuit held that both the *Sanchez-Trujillo* "voluntary associational relationship" test and *Acosta*'s "immutable characteristic" test were relevant in determining the existence of a social group. Although broad and seemingly all-encompassing in its scope,

44. *Id.* at 664.

45. The court ultimately held that the group to which Gomez belonged (women who had been raped and beaten) did not have any discrete characteristic which could distinguish her from other women. *See* Gomez v. INS, 947 F.2d 660, 663-64 (2d Cir. 1991). This seems to be a necessary, yet narrow, interpretation in this instance.

46. *See* Fullerton, *supra* note 9, at 562. For an example of a German court decision, see Judgment of March 29, 1985, No. 17 K 10.343/83, Verwaltungsgericht Gelsenkirchen [Gelsenkirchen Administrative Court]. For an example of a Canadian court decision, see Astudillo v. Minister of Employment and Immigration [1979] 31 Nat'l Rep. 121. For discussion of these and other foreign court decisions, see Fullerton, *supra* note 9, at 531–41 nn.166–216 and accompanying text.

47. 25 F.3d 636, 640 (8th Cir. 1994).

this holding is also internally contradictory since immutable characteristics are not necessarily voluntary as required by *Sanchez-Trujillo*. Like *Gomez*, a test which contradicts itself is no test at all.

C. Lwin v. INS

1. The facts

Lwin v. INS[48] is a recent example of a circuit court's attempt to define particular social groups. Mya Lwin, a Burmese citizen, was the father of a student dissident who fled Burma in the wake of the military junta's crackdown on pro-democracy uprisings in 1988. Despite orders from the police that he report any contact with his son, Mya maintained unauthorized communications with him: first when his son reached Thailand, and later after his son made his way to the United States.[49] After his son's escape, military officials twice interrogated Mya and his wife. The government also intercepted a letter from Mya's son to Mya's wife, who was later interrogated about the letter's contents.

Mya eventually visited his son in the United States and applied for political asylum and withholding of deportation. His application was based on his well-founded fear of persecution due to: (1) the political opinions of his son that the Burmese government would impute to him, and (2) his membership in a particular social group, namely, parents of Burmese student dissidents.[50] At trial, Mya submitted evidence of Burma's mistreatment of other dissidents' parents. A former student testified that the student's father had been arrested and sentenced to twelve years in prison for trying to contact the student. Finally, Mya and his son testified about other parents who had been arrested and imprisoned for trying to contact their children.[51]

The Immigration Judge (IJ) denied Mya's petition for asylum and withholding of deportation, ruling that Mya had failed to establish that he was persecuted on account of any

48. 144 F.3d 505 (7th Cir. 1998).
49. *See id.* at 507.
50. *See id.*
51. *See id.* at 507–08.

imputed political opinion. The IJ did not address Mya's social group claim. Mya appealed the IJ's ruling, and the BIA affirmed with little explanation.[52] On appeal, the Seventh Circuit upheld the lower courts' ruling that Mya had not suffered persecution based on imputed political opinion. But the court also found that, although Mya had pressed his social group claim repeatedly before the IJ and the BIA, his arguments were disregarded at each step of the administrative proceedings.[53] The Seventh Circuit then held that Mya had established that he was a member of the social group of parents of Burmese student dissidents, and remanded the case for an examination of the extent to which parents of dissident students were exposed to persecution by the Burmese government.[54]

2. The court's reasoning

After finding that Mya had sufficiently raised his social group claim,[55] the court articulated the following three-part asylum test previously adopted in the Seventh Circuit: "[a]n alien must (1) identify a particular social group; (2) establish that [the alien] is a member of that group; and (3) establish that [the alien's] well-founded fear of persecution is based on [the alien's] membership in that group."[56] Noting the lack of legislative guidance, the court recognized that the BIA had delineated the outer limit of the social group definition by requiring that members of a particular social group share a "common, immutable characteristic" such as sex, race, ethnicity, or past experience.[57]

The *Lwin* court next recognized the struggle courts have had in developing a workable definition of "particular social group." The First and Third Circuits endorse the BIA's "immutable characteristic" definition,[58] while the Ninth Circuit

52. *See id.*

53. *See id.* at 512.

54. *See id.*

55. *See id.* at 510.

56. *Id.* (quoting Iliev v. INS, 127 F.3d 638, 642 n.3 (7th Cir. 1997)) (alterations in original).

57. *Id.* at 511 (quoting Matter of Acosta, 19 I. & N. Dec. 211, 233 (1985)).

58. *Id.* (citing Meguenine v. INS, 139 F.3d 25, 28 n.2 (1st Cir. 1998); Fatin v. INS, 12 F.3d 1233, 1239–41 (3d Cir. 1993); Alvarez-Flores v. INS, 909 F.2d 1, 7 (1st

diverges and construes "social group" to require a "voluntary associational relationship."[59] Meanwhile, the Second Circuit emphasizes the importance of external perceptions.[60] As a result of this split among the circuits, the *Lwin* court had at least three different tests to choose from.

The *Lwin* court elected to follow the *Acosta* immutable characteristic test because 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.'"[61] The court noted that the Ninth Circuit's "voluntary associational relationship" test conflicted with *Acosta*'s immutability requirement. The court also remarked that while the Second Circuit accurately articulated the significance of external perception, it "offers little guidance in the way of a positive definition."[62] The court concluded that parents of Burmese student dissidents share common immutable characteristics and do form a particular social group.[63] But because this was only one of the elements of the three-part test, the court remanded the case so the lower court could determine the likelihood that members of this particular social group would suffer persecution. Thus, the Seventh Circuit recognized the confusion among the courts and adopted the *Acosta* definition, which it considered most reasonable.

III. ANALYSIS

The "immutable characteristic" test espoused by the BIA and the Seventh Circuit in *Lwin* reflects the humanitarian purpose of refugee law: to protect people suffering from persecution based on status, characteristics, or expressions of belief. Both international and domestic commentators have consistently contended that the definition of "refugee," which includes "particular social groups," was intended to be, and

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Cir. 1990); Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985)).

59. *Id.* at 511–12 (citing Li v. INS, 92 F.3d 985, 987 (9th Cir. 1996); De Valle v. INS, 901 F.2d 787, 792–93 (9th Cir. 1990); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986)).

60. *See id.* (citing Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991)).

61. *Id.* at 512 (quoting *Acosta*, 19 I. & N. Dec. at 233).

62. *Id.*

63. *See id.*

should be, interpreted broadly.[64] "They note that the purposes underlying the Refugee Act of 1980 [as well as the underlying international legislation] were generous: to expand the recognition of refugees and to standardize the refugee processing procedures."[65] These purposes stand in stark contrast to the tendency of U.S. courts to adopt restrictive and inconsistent definitions of "social group."[66] The persistent chasm between progressive U.S. and international refugee policies and the misapplication and inconsistent interpretation of these policies by U.S. courts on a case-by-case basis demands a closer look at the purposes and goals of refugee law.[67] It is possible that the circuits have not yet caught the spirit of refugee law.

Although in harmony with the humanitarian goals of refugee law, *Lwin*'s "immutable characteristic" test fails to provide a consistent means of defining "particular social groups." This problem arises when a court's vision is blurred by its own perceptions of the significance of the alien's behavior. These decisions are usually made with little helpful explanation and, as mentioned above, can reflect a judicial tendency to narrow the scope of refugee law by imposing the courts' sometimes biased judgments of the alien's behavior. This restrictive tendency is most apparent when a court must decide when *voluntary actions* give rise to characteristics which a person should not be expected to change in order to avoid persecution.

In order to determine when voluntary conduct is sufficient to establish membership in a persecuted particular social group, courts, such as the court in *Lwin*, need to make a factual inquiry into the social environment of the alien's country which can reveal the negative perceptions and social stigma of the alien's actions and behavior. Without an objective, factual inquiry (which could include eyewitness or first-hand testimony, news reports, or statements of governmental

64. *See* Fullerton, *supra* note 9, at 523.

65. *Id.*; *see also* Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 739, 748 n.51 (1989); Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 40 n.9, 41 n.13 (1983).

66. Fullerton, *supra* note 9, at 543.

67. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 428 (1987).

investigations), courts might adopt arbitrary definitions of particular social groups which would exclude many aliens deserving the protection and security available in the United States. The following sections look at the purposes of international refugee law and how current United States case law reflects those purposes.

A. Lwin *and the Humanitarian Purposes of International Refugee Law*

1. International commentary on international refugee law

In 1979, the Office of the United Nations High Commissioner for Refugees published a *Handbook on Procedures and Criteria for Determining Refugee Status* (Handbook) in hopes of aiding courts' efforts to define the term "refugee."[68] The Handbook states that "'[a] particular social group' normally comprises persons of similar background, habits or social status. A fear of persecution claim under this heading may frequently overlap with a fear of persecution claim on other grounds, i.e. race, religion or nationality."[69] Thus, the United Nations has determined that one can be persecuted because of both immutable characteristics (background and social status) and characteristics which one should not be forced to change (habits). This language is meaningful because courts in the United States consider the Handbook to be "a significant source of guidance."[70]

Another significant source of guidance is a work by Atle Grahl-Madsen, the author of an early and authoritative two-volume treatise on international refugee law.[71] Grahl-Madsen wrote that the five refugee categories can be separated into two general categories: those who are persecuted for reasons beyond their control and those who are persecuted for reasons over which they have control.[72] He notes that "'social group' is of

68. *See* HANDBOOK, *supra* note 30, at 19.

69. *Id.*

70. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (quoting Zavala-Bonilla v. INS, 730 F.2d 562, 567 (9th Cir. 1986)); *see also* Hernandez-Ortiz v. INS, 777 F.2d 509, 514 n.3 (9th Cir. 1985); Matter of Acosta, 19 I. & N. Dec. 211, 221 (1985).

71. *See* GRAHL-MADSEN, *supra* note 11.

72. *See id.* at 217.

broader application than the combined notions of racial, ethnic, and religious groups."[73] Accordingly the Convention included "social group" in order to fill possible gaps in refugee law. Under this interpretation, the purpose of adding "particular social group" was to cover any unexpected or new types of persecution, based on both voluntary and involuntary characteristics. It was meant to be flexible and liberally interpreted.[74]

More recently, James Hathaway, the Canadian scholar responsible for the important work entitled *The Law of Refugee Status*, interpreted the definition of social groups in refugee law.[75] Hathaway rejects Grahl-Madsen's interpretation as overbroad and argues that "particular social group" was meant to encompass groups defined by innate, unalterable characteristics; groups defined by their past, since history cannot be changed; groups defined by their volitional acts which are fundamental to their human dignity; and groups defined by their voluntary associations, the required changing of which would force renouncing basic human rights.[76] This interpretation seems to echo the immutable characteristic test applied in *Lwin*.

By incorporating basic human rights into the definition of refugee, the drafters of the current definition effectively decided to establish certain basic human rights as privileged so that violation of these privileged rights would constitute persecution.[77] Article 19 of the Universal Declaration of Human Rights states that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[78] This bold statement implies that holding opinions is protected under both human rights law and refugee law and

73. *Id.* at 219. The author goes on to argue that groups such as nobility, capitalists, landowners, businessmen, farmers, members of linguistic or other minorities, and even members of certain clubs or associations should all constitute particular social groups. *See id.* at 219–20.

74. *See id.* at 220.

75. JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS (1991).

76. *See id.* at 164–68; *see also* Fullerton, *supra* note 9, at 520.

77. *See* Steinbock, *supra* note 1, at 784, 795.

78. UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 19, U.N. Doc. A/810 (1968).

that the expression of these opinions and ideas should also be protected. When an alien seeks asylum from persecution based on the alien's voluntary acts, courts must inquire whether the alien is expressing, through conduct, opinions protected by human rights. Thus, it is easy to see that the "particular social group" and "political opinion" categories overlap. The drafters of the refugee laws meant to single out certain human rights violations and elevate them to a protected status under refugee law. A human rights interpretation of "refugee" strongly favors a test requiring courts to examine the alien's motives and the persecutor's perceptions in order to determine if persecution has occurred or is likely to occur.

2. *The* Lwin *"immutable characteristic" test reflects the humanitarian purposes of refugee law*

Lwin's immutable characteristic test can encompass voluntary actions and behavior. What guidance there is seems to support the *Lwin* court's evaluation that

> the common characteristic that defines the group "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." . . . This preserves 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."[79]

This definition can include voluntary relationships or behaviors which an individual can change but should not be required to change when viewed, not only through the lens of a westernized, industrialized, democratic culture, but through the lens of the social and political atmosphere of the country where the alien resides. In this regard, the immutable characteristic test is entirely consistent with international human rights policies.

79. Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998) (quoting Matter of Acosta, 19 I. & N. Dec. 211, 233 (1985)).

3. Although harmonious with refugee law goals, the immutable characteristic test fails to provide a consistent means of determining when voluntary conduct is an extension of a person's identity or conscience

a. Voluntary conduct as a basis for membership in a particular social group. Problems of interpretation arise when a court must decide whether voluntary conduct is conduct that a person should not be required to change in order to avoid persecution. Voluntary behavior and characteristics are not immutable in the sense that they are unalterable; therefore, it is difficult, if not impossible, for a court to definitively label certain behavior as fundamental to individual identity, conscience, human dignity, or basic human rights. The immutable characteristic test alone does not help to resolve this issue because

> persecution for reasons beyond one's control is obviously offensive. The converse, however, is not true. Punishing individuals for attributes or actions within their control does not necessarily involve punishment of blame-worthy behavior. [The "immutable characteristic" test does] not distinguish when punishment for voluntary acts involves blameworthy behavior from when it does not.[80]

It is difficult for courts to differentiate between voluntary behavior which would give rise to a "particular social group" classification and voluntary behavior which would not; the classification "involves profound normative judgments about such elements as the legitimacy of the allegedly persecuting government's policies, the asylum seeker's response to those policies, the necessity of that response, and the proportionality between the response and the practice at which it is directed."[81] The myriad of judicial interpretations of the definition of "refugee" are a testimony to the inherent difficulty of removing oneself from one's own world view and understanding the perceptions and attitudes of the persecutors and the persecutees. Because of this difficulty, when the existence of a

80. Fullerton, *supra* note 9, at 516–17.

81. Steinbock, *supra* note 1, at 802; *see also* Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 465–66 (1985).

particular social group is alleged, it is inadequate to rely on the old adage that judges will know them when they see them.[82]

b. Courts' inconsistent applications of the immutable characteristic test to voluntary behavior. As requests for asylum and withholding of deportation have increased, the number of aliens who seek this relief as members of persecuted social groups has also increased. The advantages of applying a test which defines social groups by "immutable" characteristics has been discussed above. Despite the soundness of the test, however, the following cases illustrate the need to broaden the test's criteria by taking into account the social context of the alien's country, especially when the particular social group is based on voluntary conduct.

Fatin v. INS is one example of when the immutable characteristic test worked.[83] In *Fatin*, an Iranian woman argued that she was a member of a group of the "upper class of Iranian women who supported the Shah of Iran, a group of educated, Westernized, free-thinking individuals."[84] Specifically, Fatin disagreed with the requirement of wearing a veil. The Third Circuit adopted the immutable characteristic test and held that the social group

> identified by the petitioner may well satisfy the BIA's definition of that concept, for if a woman's opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as "so fundamental to [her] identity or conscience that [they] ought not be required to be changed."[85]

Instead of finding that Fatin was bringing the persecution upon herself through her actions, the court attempted to understand Fatin's motives and the social and societal consequences of Fatin's conduct.

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82. *See* Jacobellis v. United States, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (recalling Justice Stewart's infamous frustration).

83. *See* 12 F.3d 1233 (3rd Cir. 1993).

84. *Id.* at 1237.

85. *Id.* at 1241 (quoting Matter of Acosta, 19 I. & N. Dec. 211, 234 (1985)) (alterations in original).

In *Sharif v. INS*[86] the court considered whether a particular social group can arise through the violation of a country's generally applicable laws. Sharif's argument was essentially the same argument made in *Fatin*—that she feared persecution on account of being a "westernized woman." The court denied Sharif's request for asylum because "even assuming that 'westernized women' as defined by Sharif are a cognizable social group—a proposition that is debatable at best—Sharif is still unable to demonstrate a reasonable fear of persecution."[87] Although the court did not attempt to affirmatively define "particular social group," it did state that punishment for conduct which violates a country's laws of general applicability does not amount to persecution (and thus does not give rise to a social group) "absent some showing that the punishment is being administered for a nefarious purpose."[88] The court limited the scope of social groups that violate a country's laws by focusing on the type of punishment. This back door approach to defining "particular social group" shows the court's hesitancy to construct a concrete definition; but it also demonstrates at least a tentative willingness to look at the problem from both Sharif's and Iran's points of view.

In *Bastanipour v. INS*[89] the court considered the social context of Bastanipour's criminal and religious acts and concretely held that punishment for nonpolitical criminal conduct does not give rise to a persecutable social group. Bastanipour was convicted of a felony drug charge while residing in the U.S. After Bastanipour served nine years of a fifteen year sentence, the INS initiated deportation proceedings.[90] Bastanipour argued that he feared persecution by the Iranian government upon deportation because drug trafficking "in present-day Iran is punishable by death frequently administered after summary proceedings that would be regarded in this country as a travesty of due process of

86. 87 F.3d 932 (7th Cir. 1996).

87. *Id.* at 936.

88. *Id.* at 935.

89. 980 F.2d 1129 (7th Cir. 1992).

90. *See id.* at 1130. An amendment which came into effect after Bastanipour applied for asylum forbids the grant of asylum to an alien who has committed an aggravated felony. *See* 8 U.S.C. § 1158(b) (1994).

law."[91] The court held that "drug traffickers are not the sort of 'particular social group' to which the provision on asylum refers."[92] The court continued,

> [w]hatever its precise scope, the term "particular social groups" surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do. A contrary conclusion would collapse the fundamental distinction between persecution on the one hand and the prosecution of nonpolitical crimes on the other.[93]

Bastanipour also argued that he would be put to death for becoming a Christian while in prison. The court held that Muslims who renounce Islam and convert to Christianity do constitute a social group because under Iranian law apostasy is punishable by death. Thus, the court distinguished between political and nonpolitical conduct. On the one hand, this rule reflects the privileged protection refugee law offers the basic human right of religious expression. On the other hand, it gives little guidance as to what types of nonpolitical crimes, if any at all, are persecutable by a government. As this court seems to imply, the harshness of the punishment may provide insight into the "true" goals and motives of the punishment. In other words, crimes may become political by the severity of the penalties attached. If, in fact, those who commit nonpolitical crimes are never afforded refugee protection, perhaps courts should make objective, factual evaluations of whether the crime is political in nature in the context of the alien's country. The political/nonpolitical distinction may provide valuable guidance in interpreting the definition of "particular social group."

The fundamental weakness of the "immutable characteristic" test was illustrated in *Alvarez-Flores v. INS*[94] when the court failed to consider the social ramifications of cheesemaking. In this case, Alvarez-Flores asserted his membership in a group of campesino cheesemakers who feared retaliation by the military government for having succumbed to

91. *Bastanipour*, 980 F.2d at 1132.
92. *Id.* (citations omitted).
93. *Id.*
94. 909 F.2d 1 (1st Cir. 1990).

guerrillas' demands for cheese.[95] The court denied this argument "[s]ince it is considered that cheesemaking is not an immutable characteristic which cannot be changed by the campesinos, or which they should not be required to change."[96] Alvarez-Flores also argued that he was not merely a cheesemaker, but a cheesemaker who had already supplied food to the guerrillas, a past characteristic beyond his power to change. The court refused to endorse such a "strained" interpretation of *Acosta*.[97] Ultimately, however, the court's denial rested on Alvarez-Flores' lack of evidence proving that cheesemakers had been subject to persecution and his lack of credibility. Furthermore, the court appears to dismiss the idea that voluntary conduct can become an "immutable characteristic" with the passage of time, even though it is obvious that a past action or status cannot be changed and may become the basis for persecution.

The above cases illustrate the courts' reluctance to conduct a factual inquiry into the social significance of an alien's past and present conduct. This is the fundamental flaw of the immutable characteristic test as applied in *Lwin*. Without a test which allows for inquiry into the social significance of a person's actions, the *Lwin* test will never fully embrace or promote the true purposes of refugee law.

B. Social Context Defines "Particular Social Groups"

Even though the *Lwin* court correctly adopted the immutable characteristic test from *Acosta*, the test only identified the "outer limits" of the refugee definition.[98] In order to determine what types of voluntary conduct establish the existence of a particular social group, courts must consider the social environment and the perceptions of those living in the person's country.[99] A more concrete and workable interpretation of this test must include the classification of groups "based

95. He argued that cheesemakers are especially susceptible to guerrillas' demands because the hard cheese is resistant to spoilage. *See id.* at 7.

96. *Id.*

97. *Id.*

98. *See supra* note 7 and accompanying text.

99. *See* Stevic v. Sava, 678 F.2d 401, 406 (2d Cir. 1982), *rev'd. on other grounds sub nom.* INS v. Stevic, 467 U.S. 407 (1984) (stating that courts must evaluate the "conditions in the country of origin, its laws, and the experiences of others").

upon a socially meaningful distinction—on common identity rather than mere similarity. . . . [A] merely descriptive label is insufficient to define a social group; the label must reflect social reality in the refugee's country of origin."[100] Any distinction used to identify social groups must be made on a case-by-case basis, taking into account the conduct's political and social resonance. "By focusing on social resonance, it allows determination of social group status to be based upon a factual inquiry into what a particular classification connotes in a given culture. Inquiry into the congnizability of a purported social group is thus placed upon an objective foundation."[101]

Our own perceptions, as well as how we are perceived by others, identify us within our society. Refugee law is based on determining the motivations underlying persecution. Some persecutable characteristics are innate or immutable in that we cannot alter them because of our birth or our past. Often they are easily identifiable by physical characteristics, manner of dress, or speech patterns, while other identifiable traits are the result of voluntary behavior, conduct, or expression of belief. Both of these types of traits often become the basis for persecution. From all points of view, these traits are irrelevant and inadequate reasons to justify harming another. However, in a persecutor's eyes, these traits serve to identify groups of individuals marked for mistreatment. Because of the important role perception plays in any society, *Lwin* is partially flawed because its immutable characteristic test does not explicitly call for an examination of external social perceptions. This examination is essential because

> [i]f forces in a society mistakenly believe that a group exists, and act on that belief, any persecution that follows would be deemed persecution based on membership in a social group. Similarly, if forces in society correctly believe that a group exists, but incorrectly attribute dangers and threats to the

100. Parish, *supra* note 7, at 944–45 (citing John Boswell, *Jews, Bicycle Riders, and Gay People*, 1 YALE J.L. & HUMAN. 205, 219–20, 226–27 (1989)); *see generally* John C. Turner, *Towards a Cognitive Redefinition of the Social Group*, *in* SOCIAL IDENTITY AND INTERGROUP RELATIONS 11 (Henri Tajfel ed., 1982) (arguing that the perception of "common category membership" is more important to formation of functional social classification than similarity among members).

101. Parish, *supra* note 7, at 946–47.

> group, any resulting persecution would constitute persecution due to membership in a social group.[102]

A United States court is necessarily limited to its own perceptions or comprehension of what social groups exist and whether these social groups suffer persecution. As discussed above, some courts that accept the immutable characteristic test refuse to accept that past acts can become immutable in the eyes of a persecutor.[103] Other courts have summarily determined that certain occupations are not significant enough and have held that an alien must change jobs in order to avoid persecution.[104] These holdings are often tainted by the normal biases that result from living in the United States. While these biases and prejudices are, to some extent, unavoidable, they must not form the basis for case law which ignores the social environment and attitudes of other countries and which disregards the express and implicit purposes of refugee law.

An examination of the "social resonance" of an individual's conduct, heritage, or beliefs will provide a more stable and consistent basis for courts to decide questions of social group status. The social significance of certain behavior can be determined by an objective gathering and analysis of facts relating to the prevailing social and political conditions and attitudes of the countries and their citizens. Those applying for refugee protection should be allowed to present, among other things, journalistic accounts, expert opinions, and third party reports and statements in order to establish the factual background of their social group claims.

IV. CONCLUSION

Whenever refugee law fails, a person's life that should have been protected is threatened. A simple addition to the immutable characteristic test as set out in *Lwin v. INS* is needed to correct its deficiency. Particular social groups must be defined by immutable characteristics which have social significance in the society and culture of the person's home

102. Fullerton, *supra* note 9, at 541.

103. *See, e.g.*, Alvarez-Flores v. INS, 909 F.2d 1 (1st Cir. 1990)

104. *Acosta* itself, the originator of the "immutable characteristic" test, is the prime example of a court requiring an alien to change jobs.

country. The social significance of certain behavior can be determined by an objective, factual inquiry into the social, economic, and political atmosphere of the alien's country. By using a social significance test, courts will begin to look past their own cultural biases and to understand how a person's voluntary actions and conduct are viewed through the cultural and social biases of the home countries. When this happens, U.S. courts will finally embrace the humanitarian goals of refugee law by accurately and consistently identifying particular social groups.

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