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The Board of Immigration Appeals's New Social Visibility Test for Determining Membership of a Particular Social Group in Asylum Claims and Its Legal Policy Implications

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The Board of Immigration Appeals's New "Social Visibility" Test for Determining "Membership of a Particular Social Group" in Asylum Claims and its Legal and Policy Implications

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INTRODUCTION

Within the area of asylum law, there has been a great deal of confusion and debate over the past several years surrounding the meaning of one of the five protected grounds for receiving asylum: membership of a particular social group. The debate focuses on how that vague phrase can and should be interpreted in order to stay true to the 1951 Refugee Convention.[1] Little to no analytical clarity on the meaning of membership of a particular social group existed upon the adoption of the phrasing in the Refugee Convention. None truly came until the United States Board of Immigration Appeals' ("BIA") decision in *Matter of Acosta*[2] in 1985 and the Australian High Court's decision in *Applicant A. v. Minister for Immigration and Ethnic Affairs*[3] in 1997. Although they came to two very different conclusions, the BIA and the Australian High Court provided the only two frames of reference in this confusing area of law.

These two tests dominated the determination of membership of a particular social group in asylum proceedings after they were formulated. In the United

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1. United Nations Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter "Refugee Convention"].

2. 19 I. & N. Dec. 211 (B.I.A. 1985).

3. Applicant A. v. Minister for Immigration and Ethnic Affairs (1997) 190 C.L.R. 225 (Austl.) [hereinafter "*Applicant A.*"].

States, for the two decades after *Acosta* was decided, the BIA applied a singular test in order to determine whether or not an asylum applicant qualified as a member of a particular social group.[4] In *Acosta*, the BIA set forth a test that granted protection based on the existence of an immutable characteristic, an approach now known as the "protected characteristic" approach. On the other hand, since 1997, the Australian High Court has applied a test based on the "social perception" of the purported social group in order to determine whether the group qualifies for asylum under the Refugee Convention.[5] This inquiry focuses on the external factors of the purported group, such as whether the group is identified as distinct in society.[6]

In 2001, the United Nations High Commissioner for Refugees ("UNHCR"), in conjunction with the International Institute of Humanitarian Law, convened a roundtable in San Remo, Italy, which included experts drawn from various governments, non-governmental organizations, academia, the judiciary and the legal profession, in an attempt to streamline and clarify the meaning of membership of a particular social group.[7] The result of that meeting was an announcement via the UNHCR Guidelines on International Protection that either the protected characteristic approach or the social perception approach could be used to determine membership of a particular social group depending on the context of the case.[8] The publication of these Guidelines seemed to settle the applicable standards in this previously murky area of asylum law.

Despite the finding put forth in the UNHCR Guidelines, the BIA continued to apply only the protected characteristic test as set out in *Acosta* for the next five years. However, the clarity that the *Acosta* standard provided within the United States lasted only until 2006, when the BIA decided *In re C-A-*.[9] In that case, the BIA emphasized for the first time the importance of the "social visibility" of the members of the purported particular social group in determining whether the asylum applicant should be protected on that ground.[10]

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4. *See Acosta*, 19 I. & N. Dec. 211.

5. *See Applicant A.*, 190 C.L.R. 225, 241.

6. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group"*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 312 (Erika Fuller, Volker Turk & Frances Nicholson, eds., 2003).

7. *See* U.N. High Commissioner for Refugees [UNHCR], *Refugee Protection in International Law, List of Participants, Expert Roundtable, San Remo, Italy, 6-8 September 2001*, *available at* http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=419cbf094&query=san%20remo,%20italy (last visited 11/29/10).

8. UNHCR, *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter "UNHCR Guidelines"].

9. *In re* C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).

10. *Id.* at 961.

In re C-A- was followed by another BIA decision, *In re A-M-E-*, which placed even more emphasis on the importance of social visibility.[11]

As a result of the BIA's sudden and unexplained application of a dispositive social visibility test, the confusion surrounding the meaning of membership of a particular social group is now more acute than ever. This paper argues that the social visibility standard used today by the BIA in determining membership of a particular social group in asylum cases is legally misguided and creates undesirable public policy. Adopting an alternative test that incorporates both the protected characteristic and social perception approaches will ensure that the United States honors its obligations under the Refugee Convention and addresses the legal and policy problems associated with a dispositive social visibility standard.

Part I of this paper describes the various methods used today to define membership of a particular social group. These methods include: the protected characteristic approach, the social perception approach, the UNHCR's Guidelines, and the BIA's social visibility test.

Part II of this paper argues that the use of the social visibility test as a requirement to finding membership of a particular social group is both legally misguided and promotes undesirable public policy. Section A focuses on the *Chevron* deference that immigration judges and Courts of Appeal give to the BIA's decisions in *C-A-* and *A-M-E-* and why, in the context of the social visibility test, this deference should not apply. Section B will concentrate on the policy concerns raised by the arbitrary and inconsistent results that stem from the BIA's social visibility test, and focuses on the groups that are at risk of being excluded from qualifying for asylum in the United States despite the fact that they were previously covered by the protected characteristic standard. Section B also grapples with an oft-discussed policy concern in the arena of asylum law: that a more flexible definition of membership of a particular social group will open the "floodgates" to far too many asylum-seekers.

Part III focuses on solutions to the confusion that has taken hold in asylum law. It argues that adoption of the alternative test put forth by the UNHCR Guidelines, which includes an inquiry into both the protected characteristic approach and the social perception approach, would state a clearer standard and would result in the fewest protection gaps.

I.
DETERMINING MEMBERSHIP OF A PARTICULAR SOCIAL GROUP

There are several different approaches discussed and used in defining membership of a particular social group in the world today. These approaches include the protected characteristic test, the social perception test, the BIA's new

11. *In re* A-M-E-, 24 I. & N. Dec. 69 (B.I.A. 2007).

social visibility test, and the UNHCR's recommended approach, which includes use of both the protected characteristic and social perception tests.[12]

A. The Protected Characteristic Test

The BIA set forth its seminal definition of a particular social group in *Acosta*[13] when it held that members of a taxi cooperative were not members of a particular social group because they could change jobs; that is, the members of that cooperative did not have a "common immutable characteristic" that they "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[14] The BIA relied on the canon of statutory construction known as *ejusdem generis* to give meaning to "particular social group" within the Immigration and Nationality Act (the "INA").[15] This doctrine is used to give meaning to groups of words when one of the words is ambiguous or unclear. The BIA stated that *ejusdem generis* "holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words."[16]

In the refugee definition, the phrase "membership of a particular social group" is listed alongside the other grounds for asylum: "race," "religion," "nationality," and "political opinion."[17] The BIA determined that each of the more specific grounds described "an immutable characteristic," that is, "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed."[18] Therefore, it defined membership of a particular social group in the same way, stating that "the shared characteristic might be an innate one, such as sex, color or kinship ties, or in some circumstances, it might be a shared past experience such as former military leadership or land ownership."[19] The key is that the trait is permanent to the identity or conscience of the individual.

The holding in *Acosta* has been widely praised, adopted and upheld in

12. The Ninth Circuit also used what was called a "voluntary association test" to determine membership of a particular social group. *See* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (holding that of "central concern" to determining membership of a particular social group was "the existence of a voluntary associational relationship among the purported members . . . ."). The Ninth Circuit has since clarified that the voluntary association test is to be used only as an alternative to the protected characteristic test. *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 1999).

13. *Acosta*, 19 I. & N. Dec. 211.

14. *Id.* at 233.

15. *Id.*

16. *Id.*

17. Immigration and Nationality Act [hereinafter "INA"] § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2000); 1967 Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter "Protocol"]; Refugee Convention, *supra* note 1.

18. *Acosta*, 19 I. & N. Dec. at 233.

19. *Id.*

defining what it means to be a member of a particular social group. According to scholars in this field, the definition put forth in *Acosta* "not only engages in a serious textual analysis of the Convention and its Protocol,"[20] but also respects "the specific situation known to the drafters – concern for the plight of persons whose social origins put them at comparable risk to those in the other enumerated categories, as well as 'the more general commitment to ground refugee claims in civil or political status.'"[21] These scholars maintain that the *Acosta* standard "is sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without a serious basis for claims to international protection."[22]

The reasoning in *Acosta* has also been recognized and adopted in a number of foreign jurisdictions. In *Ward v. Attorney General of Canada*,[23] the Supreme Court of Canada approved of *Acosta*'s application of *ejusdem generis* and reasoned that "the manner in which groups are distinguished for the purposes of discrimination law can . . . appropriately be imported into this area of refugee law."[24] Furthermore, both New Zealand and the United Kingdom have adopted the *Ward/Acosta* protected characteristic approach to defining a particular social group. Both of these countries "apply fundamental human rights norms to determining which characteristics are fundamental to identity of conscience."[25] The New Zealand Refugee Authority stated that "the Acosta *ejusdem generis* interpretation of 'particular social group' firmly weds the social group category to the principle of the avoidance of civil and political discrimination."[26] In the United Kingdom, the seminal case that defines membership of a particular social group is the House of Lords' decision in *Islam*,[27] which relied on *Acosta* and the framework of anti-discrimination law.

As can be gleaned from the above cases and examples, the protected characteristic approach has several major strengths relative to other standards for defining membership of a particular social group. Its objectivity provides a firm and principled framework because "the same kinds of non-discrimination concerns that underpin the other four Convention grounds"[28] form the basis for

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20. Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 52 (2008).

21. *Id.* (quoting JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 161 (1991)).

22. *Id.*

23. [1993] 2 S.C.R. 689 (Can.).

24. *Id.* at 735.

25. Marouf, *supra* note 20, at 56. *See, e.g.*, MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS 300 (2007); Aleinikoff, *supra* note 6.

26. *Re* GJ [1993] No. 1312/93 (Refugee Status App. Auth. Aug. 30, 1995), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/ref_19950830_1312.pdf (last visited 11/29/10).

27. Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.).

28. James C. Hathaway & Michelle Foster, *Membership of a Particular Social Group*,

determining whether a group qualifies as a particular social group. Such a framework promotes consistency by relying on "clear external standards of reference which are of universal applicability."[29]

However, some believe that the framework is difficult to apply "since it requires a knowledge of non-discrimination and related areas of human rights law."[30] Most critically, the approach excludes groups that are "perceived by many to be deserving of protection" but lack a common permanent characteristic ("examples raised in recent cases and commentaries being street children, students, professionals, and refugee camp workers.").[31] In response to the English courts' application of the protected characteristic approach, an English Court of Appeal judge warned that "to add the requirement of some distinguishing civil or political status would narrow the types of persecuted minority capable of being recognised as entitled to asylum without, in my view, sufficient justification."[32] Therefore, while the protected characteristic approach offers some great advantages in it ability to draw a clear line between those that qualify as a member of a particular social group and those that do not, it falls short of protecting many individuals who are perceived as deserving of protection.

B. The Social Perception Test

The social perception test, unlike the protected characteristic test, is not "based on an analogy to anti-discrimination principles," but instead "looks to external factors – namely, whether the group is perceived as distinct in society – rather than identifying some protected characteristic that defines the group . . . ."[33]

Australia is the only common law country that emphasizes social perception in analyzing asylum claims based on membership of a particular social group. In its seminal decision defining membership of a particular social group, *Applicant A.*,[34] the High Court of Australia held that "a group must share a common, uniting characteristic that sets its members apart in the society" [35] in order for its membership to constitute a particular social group. The Court stated that the "existence of such a group depends in most, perhaps all, cases on

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Discussion Paper No. 4, Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, Oct. 2002, 15 INT'L J. REFUGEE L. 477, 481-82.

29. *Id.* at 482. *See also* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (discussing the amount of disparity that exists between grants of asylum depending on the judge who is deciding the case).

30. Hathaway & Foster, *supra* note 28, at 484.

31. *Id.*

32. Quijano v. SSHD, [1997] Imm. AR 227, at 233 (U.K.C.A.).

33. *Id.*

34. 190 C.L.R. 225; 142 ALR 331.

35. Aleinikoff, *supra* note 6, at 271.

external perceptions of the group . . . [The term "particular social group"] connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them."[36]

The High Court's decision in *Applicant A.* demonstrated that the social perception standard was not as inclusive as the "safety net" approach that some scholars have advocated.[37] For example, the *Applicant A.* standard would not reach "'statistical groups' that may share a demographic factor but neither recognize themselves as a group nor are perceived as a group in society."[38] Another limiting principle identified by the High Court is that the group "could not be defined solely by the persecution inflicted; that is, the 'uniting factor' could not be 'a common fear of persecution.'"[39]

In the 2004 case of *Applicant S.*, the High Court of Australia clarified its application of the social perception approach by adopting an objective third-party perspective for determining membership of a particular social group.[40] The Court explained that the "general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society."[41] The Court reasoned:

> Communities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community. Those communities do not recognize or perceive the existence of the particular social group, but it cannot be said that the particular social group does not exist.[42]

In so holding, the Court determined that the characteristic that defines a particular social group is not necessarily visible; rather, it must, by an objective standard, set the group apart from other members of society.[43]

Frequently, the protected characteristic approach and the social perception approach will overlap in the types of groups they recognize as a particular social group. For example, both tests are likely to conclude that homosexuals, prior large landowners in communist states, and China's so-called "black children"—children born outside the family planning policies—constitute a particular social group.[44] However, the two standards may reach different results in other cases.

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36. *Applicant A.*, 190 C.L.R. at 264.

37. Aleinikoff, *supra* note 6, at 271. The "safety net" interpretation of particular social group reads the Convention as essentially listing four grounds, and then adding a fifth "such as 'and all other grounds that are frequently a basis for persecution'." *Id.* at 289.

38. *Id.*

39. *Id.* (citing *Applicant A.*, 190 C.L.R. at 242).

40. Applicant S. v. Minister of Immigration and Multicultural Affairs (2004) 217 C.L.R. 387 (Austl.).

41. *Id.* at 397-98.

42. *Id.* at 400.

43. *Id.* at 410-11.

44. *See* Chen Shi Hai v. Minister for Immigration and Multicultural Affairs (2000) 170 A.L.R. 553 (Austl.).

For example, claims asserted by "private entrepreneurs in a socialist State, wealthy landowners targeted by guerilla groups, or members of a labor union"[45] have, depending on the facts of the particular case or society, a good chance of qualifying as a particular social group under the social perception approach, but not the protected characteristic approach.

These different outcomes bring to light some of the advantages of using the social perception approach rather than the protected characteristic approach. First, the social perception approach is more fluid than the protected characteristic approach because it is a "pragmatic recognition of the absence of a completely settled and authoritative set of external standards of reference."[46] Furthermore, the judges applying the social perception approach will have more discretion than they would under the protected characteristic approach, permitting them to take more of the political and cultural factors of the applicant's home country into account.[47] Finally, as the examples above demonstrate, the social perception approach is likely to recognize more groups as particular social groups than the protected characteristic approach, "especially groups in which membership is voluntary and the purpose of which cannot be readily linked to non-discrimination or other human rights principles."[48]

However, some judges and scholars criticize the social perception approach for being overly broad and failing to put a meaningful limit on the class of persons that qualifies for protection under the Convention. For example, the New Zealand Refugee Status Appeals Authority rejected the social perception approach, stating:

> The difficulty with the 'objective observer' approach is that it enlarges the social group category to an almost meaningless degree. That is, by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group.[49]

Finally, adjudicators faced with determining if a given group qualifies as a particular social group may have difficulty in assessing the social perceptions of other societies. It is unclear whose perceptions should matter in making this determination: the views of the alleged persecutors, those of a majority of the society, those of the ruling elites, or those of other groups?[50] While the High Court of Australia has attempted to answer this question by determining that an objective version of the social perception test is best, some of these evidentiary problems may still be at issue even when using an objective test.

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45. Aleinikoff, *supra* note 6, at 272.

46. Hathaway & Foster, *supra* note 28, at 484.

47. *Id. But see* Ramji-Nogales et al., *supra* note 29 (discussing the negative impact of wide judicial discretion in asylum law).

48. *Id.*

49. Re GJ [1993] No. 1312/93 (Refugee Status App. Auth. Aug. 30, 1995), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/ref_19950830_1312.pdf (last visited 11/29/10).

50. Aleinikoff, *supra* note 6, at 298.

C. *The UNHCR Guidelines on Membership of a Particular Social Group*

In 2002, the UNHCR issued Guidelines on Membership of a Particular Social Group. The Guidelines recommend that States adopt an approach that utilizes both the protected characteristic and social perception approaches.[51] These Guidelines are a product of the Global Consultations on the International Protection of Refugees, which the UNHCR launched in 2000.[52] In September of 2001, the UNCHR convened a roundtable of experts from various governments, non-governmental organizations, academia, the judiciary and the legal profession in San Remo, Italy, in order to address the topic of membership of a particular social group.[53] The purpose of the meeting was "to take stock of the state of the law and practice in these areas, to consolidate the various positions taken and to develop concrete recommendations to achieve more consistent understandings of these various interpretive issues."[54]

The Guidelines recognize that the protected characteristic and social perception approaches represent the two main approaches to interpreting membership of a particular social group. They recommend "adopting a single standard" that incorporates both the protected characteristic and social perception approaches as alternative, sequential tests in order to avoid "gap[s]" in protection.[55] The Guidelines set forth the following definition:

> [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.[56]

The Guidelines make clear that the existence of a protected characteristic is sufficient to establish a particular social group. However, if there is not a protected characteristic at issue, the social perception test should be used. They state that only "if a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental" should "further analysis . . . be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."[57] Adopting this alternative approach thereby closes the protection gaps inherent in both the protected characteristic approach and the social perception approach when either stands alone. While the Guidelines are explicit in setting out this

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51. UNHCR Guidelines, *supra* note 8.

52. *See Refugee Protection in International Law, List of Participants*, *supra* note 7.

53. *Id.*

54. Brief for U.N. High Comm'r for Refugees as Amicus Curiae Supporting Claimants at 4-5, Thomas, No. A75-597-0331-034/-034/-036 (B.I.A. Dec. 27, 2007).

55. UNHCR Guidelines, *supra* note 8, para. 11.

56. *Id.* (emphasis added).

57. *Id.* at ¶ 13; *see also* Aleinikoff, *supra* note 6, at 294-301 (recommending this alternative test).

recommendation, the BIA has taken a sharp turn away from implementing this test, misinterpreting the UNHCR's recommendation and creating a new test unique to the United States, as discussed below.

D. The BIA's Social Visibility Test

Between 1985 and 2006, the BIA used *Acosta*'s protected characteristic approach as its test for deciding asylum claims based on membership of a particular social group. However, in its recent decisions in *In re C-A-*[58] and *In re A-M-E-*,[59] the BIA purportedly relied on the UNCHR Guidelines when it emphasized the importance of social visibility in defining membership of a particular social group. Although neither the BIA nor the federal courts used this concept of social visibility prior to these decisions as part of the particular social group analysis, the BIA has never recognized a departure from precedent.[60] Furthermore, the BIA referenced the UNHCR Guidelines in a way inconsistent with their intended meaning. The BIA did not properly apply the UNHCR's recommendation of an alternative test, and its use of social visibility did not adhere to the principles of the social perception test.

1. In re C-A-

In *C-A-*, the BIA held that a group defined as "noncriminal drug informants working against the Cali drug cartel" did not qualify as a particular social group because of "the voluntary nature of the decision to serve as a government informant, the lack of 'social visibility' of the members of the purported social group, and the indications in the record that the Cali cartel retaliates against anyone perceived to have interfered with its operations."[61]

In reaching its decision, the BIA surveyed the various approaches that federal circuit courts have taken in determining membership of a particular social group.[62] It recognized the *Acosta* approach as the most widely adopted, and pointed out that the Second Circuit "requires that the members of a social group must be externally distinguishable."[63] The BIA also noted that the UNHCR Guidelines combine the elements of the *Acosta* framework with those of the social perception approach.[64] However, after reviewing the "range of approaches to defining particular social group," the BIA concluded that it would "continue to adhere to the *Acosta* formulation."[65]

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58. *In re* C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).
59. *In re* A-M-E, 24 I. & N. Dec. 69 (B.I.A. 2007).
60. Marouf, *supra* note 20, at 63.
61. *In re* C-A-, 23 I. & N. Dec. at 961 (B.I.A. 2006).
62. *Id.* at 955-957.
63. *Id.* at 956 (citing Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991)).
64. *Id.* at 956.
65. *Id.*

The BIA then proceeded to apply the *Acosta* formulation to the applicant group under two subheadings of analysis: 1) Immutability Based on Past Experiences and 2) Visibility.[66] The BIA fails to explain why it broke its analysis into these two parts. Other than the references to (and subsequent rejections of) the Second Circuits use of "externally distinguishable" and the UNHCR Guidelines' inclusion of the social perception test, there is no indication of why application of the *Acosta* framework now requires a separate "visibility" inquiry. In fact, the first sentence of the "visibility" inquiry simply states, "Our decisions involving social groups have considered the recognizability, i.e., the social visibility, of the group in question."[67]

To justify this statement, the BIA lists a series of cases that it believes demonstrates that particular social groups possess characteristics that are "highly visible" and "recognizable" by others in the country at issue.[68] Specifically, the BIA cited to cases involving "Filipinos of mixed Filipino-Chinese ancestry,"[69] "young women of the Tchamba-Kunsuntu tribe of northern Togo who did not undergo female genital mutilation as practiced by that tribe and who opposed the practice,"[70] "persons listed by the [Cuban] government as having the status of homosexual,"[71] and "former members of the national police" of El Salvador.[72] According to the BIA, all of these groups were "highly visible," and therefore members of these groups were entitled to asylum based on membership of a particular social group.

The BIA fails to acknowledge that the decisions in all of the listed cases turned on an *Acosta* analysis based on protected characteristics or immutable traits, not social perception or visibility. That these groups are easily identifiable or recognizable in society does not support the BIA's assertion that it consistently evaluated social visibility or perception when determining membership of a particular social group.[73] By claiming that its decisions have considered "recognizability" and "social visibility" in the past, the BIA failed to recognize that it was departing from precedent.[74]

Moreover, the cases cited by the BIA as examples of "recognizability" do not involve "highly visible" traits.[75] An amicus brief filed by the UNHCR in opposition to the use of social visibility in defining particular social groups highlights that "the general population of Cuba would not recognize

66. *Id.* at 958-961.

67. *Id.* at 959.

68. *Id.* at 960.

69. *Id.* (citing Matter of V-T-S-, 21 I. & N. Dec. 792, 798 (B.I.A. 1997)).

70. *Id.* at 955 (citing *In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996)).

71. *Id.* at 960 (citing Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990)).

72. *Id.* (citing Matter of Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988)).

73. Marouf, *supra* note 20, at 65.

74. *See In re* C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006).

75. *Id.* at 960.

homosexuals, nor would average Salvadorans necessarily recognize former members of the national police, nor would a typical Togolese tribal member inevitably be aware of women who opposed female genital mutilation but had not been subjected to the practice."[76] The group characteristics in these instances as listed by the BIA, instead of being "highly visible," actually seem to be immutable.

Furthermore, in concluding that the confidential informants were not a cognizable social group, the BIA set the bar very high for the level of visibility groups must show in order to be considered socially visible. The BIA stated that, "the very nature of [acting as a confidential informant] is such that it is generally out of the public view."[77] The BIA also stressed that "informants against the Cali cartel intend[] to remain unknown and undiscovered," and "recognizability or visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members."[78] This analysis suggests that under the social visibility test, "the group *members* must be recognizable by the general public; it is not enough for the group itself to be recognized."[79] The BIA's reasoning also seems to imply that the visibility of some group members is not sufficient to satisfy the social visibility test. "By focusing on the visibility of group members and examining only the subjective perceptions of the relevant society to determine whether a group is recognizable, the BIA's 'social visibility' test departs from the 'social perception' approach,"[80] and therefore does not comport with the UNHCR's Guidelines.

2. In re A-M-E-

In *A-M-E-*, decided in 2007, the BIA again stressed the importance of social visibility.[81] There, the BIA held that "wealthy Guatemalans" did not constitute a particular social group.[82] The BIA began its analysis by repeating the *Acosta* standard, and agreeing with the Immigration Judge below that "wealth" is not an immutable characteristic.[83] However, the BIA did not answer whether "wealth" qualified as a "shared characteristic" so "fundamental to identity or conscience that it should not be expected to be changed."[84] Rather, the BIA stated that it "would not expect divestiture when considering wealth as

76. Brief for U.N. High Comm'r for Refugees as Amicus Curiae, Thomas, *supra* note 54, at 8.

77. *In re C-A-*, 23 I. & N. Dec. at 960.

78. *Id.*

79. Marouf, *supra* note 20, at 64 (emphasis added).

80. *Id.*

81. *In re* A-M-E-, 24 I. & N. Dec. 69, 73-75 (B.I.A. 2007), *aff'd*, Ucelo-Gomez v. Mukasey, 509 F.3d 70, 72-73 (2d Cir. 2007).

82. *Id.* at 73-76.

83. *Id.*

84. *Id.* at 73.

a characteristic on which a social group might be based."[85] Instead of explaining whether "wealth" qualified as a protected characteristic, the BIA began analysis of the group based on its visibility, rejecting it on those grounds.[86]

The internal inconsistency of the BIA's discussion of the social visibility standard in *A-M-E-* is noteworthy. First, the BIA stated that it "recently reaffirmed the importance of social visibility as a *factor* in the particular social group determination in *Matter of C-A-*. . . ."[87] One sentence later, 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 . . . ."[88] Ultimately, the BIA found that the proposed group of "wealthy Guatemalans" failed the social visibility test because it found "little" evidence that "wealthy Guatemalans would be recognized as a group that is at a greater risk of crime in general or of extortion or robbery in particular" because crime in Guatemala is "pervasive at all social-economic levels."[89]

The BIA's application of the social visibility test in *A-M-E-* "strongly suggests that the BIA is now applying the traditional 'protected characteristic' test and its new 'social visibility' test . . . as dual requirements instead of alternative tests."[90] Regardless of whether the BIA intended such a radical change, appellate courts have applied a requirement of social visibility as a result of the BIA's decision.[91] The BIA and appellate courts' continued use of this test will result in major gaps in protection for individuals seeking asylum in the United States. Furthermore, from both a legal and policy standpoint, the implementation of a social visibility test is problematic.

II.
THE USE OF SOCIAL VISIBILITY AS A DISPOSITIVE TEST TO DETERMINE MEMBERSHIP OF A PARTICULAR SOCIAL GROUP AND ITS IMPLICATIONS IN LAW AND POLICY

Requiring social visibility as a factor in determining membership of a particular social group does not conform to well-established law in the United States, or to desirable policy aims. In this section, Part A will explore how the BIA's departure from precedent in *C-A-* and *A-M-E-*, and the circuit courts' tendency to give deference to the BIA's required use of social visibility both fail

85. *Id.* at 73-74.

86. *Id.*

87. *Id.* at 74 (emphasis added).

88. *Id.* (emphasis added).

89. *Id.* at 74-75.

90. Marouf, *supra* note 20, at 67.

91. *See, e.g.*, Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007); Santos-Lemus v. Mukasey, 542 F.3d 738, 746 (9th Cir. 2008) (holding that a group of young men in El Salvador resisting gang violence "fails to qualify as a particular social group because it lacks social visibility.").

to reach sound legal results. Part B will explain why requiring social visibility in all claims on the basis of membership of a particular social group contravenes the policy goal of providing clear and consistent standards that also conform to the United States' international legal obligations.

A. Legal Analysis: Chevron Deference and its Application to the BIA's Requirement of Social Visibility

Very few areas of U.S. law are as thoroughly international as asylum law. The United States has ratified the core international refugee law treaty,[92] and Congress adopted the Refugee Act of 1980 with the intent to bring U.S. law into conformity with its international obligations under the treaty.[93] Furthermore, the United States was a founding member of the Executive Committee of the UNHCR.[94] Given the strong international foundation of U.S. asylum law, courts in the United States have been "surprisingly willing to discount international law governing domestic asylum statutes, by deferring to expansive Executive agency statutory interpretations that do not conform – and in many cases, have made no effort to conform – with limitations created by U.S. international treaty obligations."[95]

For example, the circuit courts' widespread deference to the BIA's social visibility requirement under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[96] is surprising, given the BIA's faulty reasoning for adopting the test. The *Chevron* doctrine instructs courts that, where Congress does not express a clear intent regarding the interpretation of statutory language, courts should defer to any "reasonable" interpretation made by the agency charged

92. The United States ratified the Protocol Relating to the Status of Refugees, ("Protocol") Oct. 4, 1967, 606 U.N.T.S. 267, obligating the United States to comply with the substantive provisions of the Refugee Convention, *supra* note 1.

93. Pub.L. 96-212, 94 Stat. 107 (codified at 8 U.S.C. § 1521, et seq.). Congress passed this legislation so that U.S. law would be in conformity with its obligations under the Protocol. The House Judiciary Committee stated that the amendments ensured that "U.S. statutory law clearly reflects our legal obligations under international agreements." H.R. REP. NO. 96-608, at 17-18 (1979).

94. *EXCOM Membership by Admission of Members*, UNHCR, http://www.unhcr.org/40112e984.html (last visited April 6, 2011).

95. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1062-63 (2011).

96. 467 U.S. 837, 842-43 (1984). The *Chevron* Court put forth a two-step approach in reviewing agency interpretations of acts of Congress in order to determine whether deference is owed: first, courts must determine, "employing traditional tools of statutory construction," whether Congress expressed a clear intent as to the meaning of a statutory term. *Id.* at 843 n.9. In such cases, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* However, if the statute is silent or ambiguous with respect to the specific issue, the reviewing court proceeds to the second step, in which "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

with administering the given statute.[97]

In *I.N.S. v. Aguirre-Aguirre*, the Supreme Court held that *Chevron* deference applies to the BIA's interpretation of the asylum provisions of the INA.[98] In that case, which dealt with the statute's definition of "serious nonpolitical crime[s],"[99] the Supreme Court held that the Ninth Circuit erred in failing to apply *Chevron* deference to the BIA's construction of the statutory language.[100] The Court explicitly stated that the principles of *Chevron* deference are applicable to the INA.[101] Therefore, as long as "'the statute is silent or ambiguous with respect to the specific issue' before it . . . 'the question for the court [is] whether the agency's answer is based on a permissible construction of the statute.'"[102]

This section argues that there are two main reasons why the Supreme Court's holding that courts should grant *Chevron* deference to the BIA's interpretation of the INA does not apply to the BIA's use of a social visibility test in asylum claims. First, applying such deference in the context of social visibility would thwart Congress's intent that courts apply the 1969 Vienna Convention on the Law of Treaties[103] to interpret seemingly "ambiguous" language. Second, *Chevron* deference to the BIA on the issue of social visibility is not merited under *National Cable and Telecommunications Association v. Brand X Internet Services* because the BIA's imposition of the requirement was "arbitrary and capricious."[104]

1. U.S. Obligations Under the Protocol and Congressional Intent

Since the adoption of the *Chevron* doctrine, U.S. courts have been operating "under the mistaken perception that they are bound . . . to defer to the BIA's construction of U.S. refugee statutes, regardless of whether that construction is consistent with international law."[105] However, such "reflexive"[106] deference is not appropriate in the context of asylum law, where Congress's passage of the Refugee Act of 1980 clearly and unambiguously

97. *Id.* at 843.

98. I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 424-425 (1999).

99. *Id.* at 417.

100. *Id.* at 424.

101. *Id.*

102. *Id.*

103. Vienna Convention of the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

104. 545 U.S. 967, 972 (2005).

105. Farbenblum, *supra* note 95, at 1064. Because of this mistaken perception, anytime a U.S. court references international law, it does so by treating it as a "persuasive, nonbinding guide that is trumped by *Chevron* deference . . . even if that interpretation is inconsistent with international law." *Id.*

106. *Id.*

stated its desire to conform domestic asylum law to the United States' international obligations.[107] As a result, congressional intent is thwarted when U.S. courts give *Chevron* deference to BIA decisions that do not conform to the Protocol's provisions.

U.S. courts that interpret and apply the Refugee Act of 1980, including those hearing and deciding asylum cases, should base their decisions and interpretations on law that is consistent with the Protocol, and therefore, the Convention. They should not blindly defer to BIA decisions. While the text of the Convention provisions may not always lead to a single, clear interpretation, such ambiguity "does not mean courts cannot authoritatively determine a provision's meaning."[108]

The Vienna Convention codified an established methodology for the interpretation of treaties, which has been recognized by courts in the United States[109] and by the International Court of Justice[110] as customary international law.[111] However, judges in the United States often overlook the principle of treaty interpretation that treaty language has "no 'ordinary meaning' in the absolute or abstract."[112] Indeed, Article 31(1) of the Vienna Convention highlights that the "ordinary meaning" of a treaty provision is determined in context and in light of a treaty's "object and purpose."[113] A court can determine the "object and purpose" of a treaty by considering its preamble,[114] the

107. *Id.* at 1062. "[T]he Refugee Act is one of a small number of 'incorporative statutes' that directly incorporate international treaty language and concepts into U.S. domestic law." *Id.* Furthermore, the Supreme Court has held that there is a strong relationship between the United States' obligations under the Protocol and the provisions in the Refugee Act related to asylum and withholding of removal. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) (affirming that it is "clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act . . . that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]."). The BIA has also recognized congressional intent to conform domestic refugee law to U.S. obligations under the Protocol, and to "give 'statutory meaning to our national commitment to human rights and humanitarian concerns.'" *In re* S-P-, 21 I. & N. Dec. 486, 492 (1996) (citing S. REP. NO. 96-256 at 4, 9 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 144).

108. Farbenblum, *supra* note 95, at 1073.

109. While the United States is not a party to the Vienna Convention, courts in the United States have "treated the Vienna Convention as an authoritative guide to the customary international law of treaties." Chubb & Son, Inc. v. Alaska Airlines, 214 F.3d 301, 309 (2d Cir. 2000).

110. *See, e.g.*, Oil Platforms (Islamic Rep. of Iran v. U.S.), 1996 I.C.J. 803, 812 (Dec. 12) (Preliminary Objection).

111. IAN SINCLAIR, THE VIENNA CONVENTION AND THE LAW OF TREATIES 153 (1984) ("There is no doubt that articles 31 to 33 of the [Vienna] Convention constitute a general expression of the principles of customary international law relating to treaty interpretation.").

112. Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), 1992 I.C.J. 351, 719 (Sept. 11).

113. Vienna Convention, *supra* note 103, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

114. Guinea-Bissau v. Senegal, 1991 I.C.J. 53, 142 (Nov. 12) (J. Weeramantry, dissenting on another point) (regarding the preamble to a treaty as "a principle and natural source from which

historical drafting records or *travaux préparatoires*,[115] the interpretation of the treaty by other State Parties,[116] scholarly work on the treaty,[117] and, in the case of the Refugee Convention, the views of the UNHCR.[118]

Since the passage of the Refugee Act in 1980, federal courts have routinely granted *Chevron* deference to the BIA's interpretation of INA refugee provisions, even though the agency's interpretations often conflict with corresponding Refugee Convention provisions.[119] The social visibility requirement that the BIA imposed in *C-A-* and *A-M-E-* is an example of a standard that contravenes both the United States' obligations under international law and the congressional intent of the Refugee Act of 1980. Appellate courts may and should reject the BIA's requirement of this standard when applying social visibility in particular social group cases.

The Supreme Court has held that Congress expressed clear intent that INA asylum provisions be interpreted consistently with the United States' obligations under the Protocol.[120] Applying this holding, "courts may treat many apparent textual ambiguities in the Refugee Act as pure issues of statutory construction that may be resolved by reference to the Convention instead of by delegation to the BIA."[121] As stated by the *Chevron* Court: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[122]

The BIA's creation of a social visibility requirement is contrary to congressional intent. The Protocol and UNHCR do not create such a limited standard, and the BIA misinterpreted the UNHCR Guidelines' meaning of "visibility" when it concluded that the Guidelines supported the imposition of a

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indications can be gathered of a treaty's objects and purposes").

115. Vienna Convention, *supra* note 103, art. 32. Unlike other treaties, the *travaux préparatoires* of the Refugee Convention are precisely written, ratified by states, and published.

116. *Id.* art. 3.

117. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179, art. 38(d).

118. Article 35 of the Convention states that the "Contracting States undertake to co-operate with the Office of the [UNHCR] . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of th[e] Convention." Refugee Convention, *supra* note 1, art. 35. Protocol, *supra* note 17, art. 2. Some scholars argue that U.S. courts have a legal obligation under the Protocol to consider UNHCR sources in interpreting the relevant laws. *See* Walter Kalin, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond, in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 613, 627 (Erika Feller, Volker Turk & Frances Nicholson eds., 2003) (arguing that while domestic courts are not obligated to consider UNHCR sources to be legally binding, they should regard them as authoritative sources, which may not be dismissed without justification).

119. Farbenblum, *supra* note 95, at 1080.

120. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 432-33 & n.12 (1987).

121. Farbenblum, *supra* note 95, at 1097.

122. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 843 n.9.

social visibility requirement.[123] For all of these reasons, the BIA's social visibility standard does not deserve *Chevron* deference as a matter of law. Instead of deferring to a standard that conflicts with congressional intent, appellate courts should turn to the Protocol to interpret ambiguous language in the INA's asylum provisions.[124]

2. The "Arbitrary and Capricious" Standard

Chevron deference is not warranted when an agency's interpretation of a statutory term conflicts with positions that the agency has taken in the past absent an explanation of that change.[125] In *Brand X*, the Supreme Court held that an "[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[126]

a. "Unexplained Inconsistency": A Sudden and Unexplained Departure from Precedent

As it stands today, all of the circuit courts that have addressed the application of the social visibility test to the analysis of membership of a particular social group, with the exception of the Seventh Circuit, have accepted the BIA's social visibility requirement as a qualification for withholding of removal[127] or asylum.[128]

However, the BIA has offered little to no justification for its conclusion that social visibility is the appropriate narrowing principle in social group

123. UNHCR Guidelines, *supra* note 8.

124. *Chevron*, 467 U.S. at 862.

125. *See* Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 981 (2005).

126. *Id*; *see also* Lal v. I.N.S., 255 F.3d 998, 1006-07 (9th Cir. 2001), *as amended on reh'g*, 268 F.3d 1148 (9th Cir. 2001) (finding that the BIA's interpretation of its own regulation should be overturned because the BIA committed an "arbitrary and capricious act" by suddenly changing its interpretation). *But see* Ucelo-Gomez v. Mukasey, 509 F.3d 70, 72-73 (2d Cir. 2007) (granting *Chevron* deference to *A-M-E-* based on its finding that the BIA's construction of membership of a particular social group was a reasonable interpretation of the statute). For detailed reasoning as to why this decision is unpersuasive in regards to granting *Chevron* deference, *see* Marouf, *supra* note 20, at 68-71.

127. "Withholding of removal" is a status similar to asylum. However, while asylees have the right to apply for legal permanent residence, people with a "withholding" status do not. Individuals who win "withholding" actually have a final order of removal against them, and therefore if they ever travel outside of the United States, they may not be permitted to return. 8 C.F.R. § 1208.16.

128. It is not clear that the Sixth Circuit has expressly accepted or rejected the BIA's requirement of "social visibility" to qualify for asylum under the category of "membership in a particular social group." *See* Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010) (granting a petition for review, while citing favorably to the Seventh Circuit decisions in *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) and *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009), to examine the BIA's holding that expressed opposition to gang activity constituted neither a political opinion nor membership in a particular social group).

claims. In *In re C-A-*, the BIA reasoned that:

> [t]he recent *Guidelines* issued by the [UNHCR] confirm that 'visibility' is an important element in identifying the existence of a particular social group . . . [T]he *Guidelines* state that 'a social group cannot be defined *exclusively* by the fact that it is targeted for persecution.' However, 'persecutory action toward a group may be a relevant factor in determining *visibility* of a group in a particular society.'[129]

The BIA's construction of the UNHCR Guidelines in *C-A-* is improperly stretched. The BIA correctly notes that the UNHCR Guidelines discuss the concept of "visibility."[130] However, the text of the Guidelines does not, as the BIA claims, establish social perception or social visibility as a requirement that must be met in order to determine membership of a particular social group. Rather, the Guidelines discuss "visibility" in relation to the role of persecution in defining a particular social group.[131] This "is meant to illustrate how being targeted can, under some circumstances, lead to the identification or even the creation of a social group by its members having been set apart in some way that has rendered them subject to persecution."[132] Thus, the Guidelines use the word "visibility" to describe "the potential relationship between persecution and social group and nothing more."[133] The BIA's reliance on the language from the UNHCR Guidelines in *C-A-* demonstrates that the imposition of a social visibility requirement does not draw textual support from the Guidelines.

The BIA has provided only one additional explanation for its drastic change of imposing a visibility requirement. [134] In *Matter of S-E-G*, the BIA acknowledged that it had refined the *Acosta* framework, stating that "'particularity' and 'social visibility' give greater specificity to the definition of a social group . . . ."[135] The BIA has not clearly defined social visibility in any of the cases in which it imposed the requirement, nor has it offered an explanation for what necessitated a break from the *Acosta* framework.

For many years the BIA, most circuit courts, and many courts around the world viewed the *Acosta* framework as a "best practice" for construing membership of a particular social group because it was clear, led to largely predictable results, and set forth a burden of proof that was high but not insurmountable.[136] While the *Acosta* framework is not the ideal standard for defining membership of a particular social group, see *infra* Section III, the

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129. *In re* C-A-, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (emphasis in the original).

130. UNHCR Guidelines, *supra* note 8, para. 14.

131. *Id.*

132. Brief for U.N. High Comm'r for Refugees as Amicus Curiae Supporting Petitioner at 13, Valdiviezo-Galdamez v. Holder, No. 08-4564 (A97-447-286) (B.I.A. Apr. 14, 2009).

133. *Id.*

134. 24 I. & N. Dec. 579, 582 (B.I.A. 2008).

135. *Id.*

136. *See, e.g.*, *Acosta*, 19 I. & N. Dec. 211; *Ward*, [1993] 2 S.C.R. 689 (Can.); *Islam*, [1999] 2 A.C. 629 (H.L.) (U.K.).

BIA's imposition of a social visibility requirement, in addition to the protected characteristic requirement, heightens the burden on the asylum applicant substantially by requiring them to expend additional resources to establish this "external" factor.

This heightened burden, along with the BIA's failure to clearly define social visibility, imposes unduly stringent requirements on asylum seekers to demonstrate that they are members of a particular social group. This burden makes U.S. law regarding particular social group inconsistent with the standard set by the Refugee Convention and the UNHCR. In failing to clearly define social visibility, or to reconcile this new standard with previously recognized particular social groups,[137] the BIA falls short of its duty to issue precedential decisions that provide "clear and uniform guidance . . . on the proper interpretation and administration of the [INA]."[138]

Furthermore, when determining whether an individual asylum applicant has been persecuted, or has a "well-founded fear of persecution,"[139] courts should consider not whether society recognizes the individual's alleged group, but rather whether the persecutor can identify and recognize the social group.[140] Persecutors, especially non-state actors such as gangs, target groups and individuals for a variety of reasons other than visibility. For example, "family members of those who oppose the gang are not socially visible to society at large but are distinctly visible to the gang members seeking them for persecution."[141] The gang seeks them out because of their familial association, despite their attempts at hiding or avoiding visibility within society.[142] The BIA has not explained why social visibility, which fails to account for "visibility to the persecutor," should be the proper standard for judging cases brought based on membership of a particular social group.

The BIA's sudden and unexplained requirement of social visibility was both unwarranted and unexpected. While seemingly misconstruing the UNHCR Guidelines, and offering no further explanation other than improved

137. *See, e.g.*, Gomez-Zuluaga v. Attorney Gen., 527 F.3d 330 (3d Cir. 2008) (escape from involuntary servitude); Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (homosexuals); Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003) (escaped child soldiers); In re Kasinga, 21 I. & N. Dec. 357 (BIA 1996) (opposition to female genital mutilation); Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990) (homosexuals).

138. 8 C.F.R. § 1003.1(d)(1) (2008).

139. INA, *supra* note 17.

140. This approach is more in line with "social perception" analysis, which examines if the social group is cognizable in the society in question, not visibility of the group to the society at large. *See* UNHCR Guidelines, *supra* note 8. For more discussion of the "social perception" approach, *see infra* Section III.

141. Elyse Wilkinson, *Comment: Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 415 (2010).

142. *See* Marouf, *supra* note 20, at 91-92 & nn. 204-205.

"specificity,"[143] the BIA altered the state of the law with regards to particular social group claims for asylum. Furthermore, the BIA did not justify this change, but rather merely cited precedents to artificially piece together a "visibility" requirement in previous cases.[144]

In making such comparisons, the BIA makes a conclusory assertion that certain traits, such as "young women of a particular tribe who were opposed to female genital mutilation" and "former military leadership or land ownership,"[145] are "easily recognizable." There is no obvious reason to conclude that any of these traits is determinatively socially visible in the literal sense in which the BIA uses the term. Who is the "society" that the BIA refers to in this standard?[146] How literally is the word "visibility" being used? The BIA's social visibility requirement leaves too many questions unanswered. For all of these reasons, courts should reject the BIA's unexplained departure from *Acosta* as arbitrary and capricious.

b. Inconsistent Application of the Law

In its application of social visibility as a criterion for determining particular social group, the BIA has been inconsistent at best. It has found groups to be particular social groups without any reference to social visibility,[147] as well as refused "to classify socially invisible groups as particular social groups but without repudiating the other line of cases."[148]

Again, *Chevron* deference does not apply when an agency's interpretation of a statutory term conflicts with positions that the agency has previously taken absent further explanation and clarification of the change.[149] Furthermore, the BIA's failure to offer a reasonable justification or explanation for why its new interpretation "distinguishes the situation at hand from cases where courts have granted substantial deference despite a revised agency interpretation because of a 'well-considered basis for the change.'"[150]

In his opinion in *Gatimi v. Holder* rejecting the BIA's use of the social

143. Matter of S-E-G-, 24 I. & N. Dec. 579, 582 (BIA 2008).

144. *In re* C-A-, 23 I. & N. Dec. 951, 959-960 (B.I.A. 2006) ("Our other decisions recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question.").

145. *Id.* at 960.

146. *See* Marouf, *supra* note 20, at 71-75 (identifying "The Inherent Difficulty in Assessing Public Perceptions").

147. *See, e.g.*, In re Kasinga, 21 I. & N. Dec. 357 (BIA 1996) (opposition to female genital mutilation); Matter of Toboso-Alfonso; 20 I. & N. Dec. 819 (B.I.A. 1990) (homosexuals); Matter of Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) (former members of the national police).

148. Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009).

149. *See* Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 981 (2005).

150. Marouf, *supra* note 20, at 68 (citing Robertson v. Methow Valley Citizens' Council, 490 U.S. 332, 356 (1989)).

visibility requirement, Judge Richard Posner stated that "[w]hen an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one . . . . Such picking and choosing would condone arbitrariness and usurp the agency's responsibilities."[151] Due to the inconsistent application of the social visibility standard, lower courts should not give *Chevron* deference to the BIA on this issue.

The BIA's social visibility requirement is not legally sound because of its lack of foundation in precedent, because it contradicts United States' obligations under the Protocol and congressional intent, and because it lacks clarity and consistency. The social visibility requirement does not merit *Chevron* deference as a matter of law, and lower courts should refrain from deferring to the BIA in their assessments of particular social group cases.

B. Policy Concerns With the BIA's Requirement of Social Visibility

The BIA's imposition of a social visibility requirement is not consistent with desirable policy aims. Sound public policy demands that the BIA put forth standards that bring clarity and consistency to the circuit courts in interpreting statutory language.[152] It further demands that U.S. law conform to international law, and that people who qualify for asylum find protection within U.S. borders.[153] The BIA's requirement of social visibility in particular social group claims puts both of these policy aims at risk.

1. Arbitrary and Inconsistent Results

First, the BIA's lack of explanation or justification, along with its conclusory language in its introduction of the social visibility requirement, will inevitably lead to arbitrary and inconsistent results as various judges and courts apply the test. For example, it is unclear whether the BIA's use of social visibility is meant to be taken literally or if it merely refers to some external criterion to identify a social group.[154] A certain group of people may not share similar visible characteristics, but still share common external criteria that is not necessarily visible, but would nonetheless expose them to differential treatment.[155] As Judge Posner observed: "In our society, for example, redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can't be."[156] Applied literally—as the BIA has sometimes applied the standard—"visibility" may be relevant to the likelihood of

151. 578 F.3d 611, 616. *See also* AT&T Inc. v. FCC, 452 F.3d 830, 839 (D.C. Cir. 2006); Idaho Power Co. v. FERC, 312 F.3d 454, 461-62 (D.C. Cir. 2002).

152. This includes language from the Protocol. *See also* 8 C.F.R. § 1003.1(d)(1).

153. Protocol, *supra* note 17.

154. *See* Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

155. *See id.*

156. *Id.*

persecution, "but it is irrelevant to whether if there is persecution it will be on the ground of group membership."[157] For instance, if understood literally, persecuted LBGT individuals in a homophobic environment may not constitute a socially visible group; however, if understood in the "external criterion" sense, they might. Whether the BIA means for the term social visibility to be used in the literal sense, in the "external criterion" sense, "or even whether it understands the difference" is unclear.[158]

As a policy matter, it is important that administrative agencies and circuit courts across the country are able to apply the standards for a particular social group claim consistently.[159] In order to do so, judges must be able to understand the standard they are applying, and why they are applying it. The requirement of social visibility within particular social group claims does not meet those criteria. As illustrated by Judge Posner's pointed remarks, the standard falls far short of reaching the necessary clarity and consistency.

Allowing for more standards that are neither clear nor justified piles on more uncertainty in an area of law that has become infamous for judges having inappropriately wide discretion and the resulting inconsistencies.[160] Social visibility is a fact-based analysis rather than a legal analysis. This gives the immigration judge an enormous amount of discretion in determining whether or not a group is socially visible. Putting forth an opaque standard that does not have an explanation or justification will not improve consistency across the courts.

2. Improper Exclusion of Groups Previously Recognized as Particular Social Groups

The second major policy issue this section addresses is the concern that individuals and groups who deserve protection under U.S. asylum law will be improperly excluded based on the social visibility requirement. The groups that are likely to suffer most from this new standard, given the "invisibility" of the traits at issue, are those that bring claims based on sexual orientation, as well as gender-related claims such as those based on domestic violence. In addition, claims brought by those targeted by gang violence will be all but impossible under the required social visibility standard. In order to fulfill its obligations under the Protocol, the United States must adopt standards and policies that will allow for deserving claims to be granted.

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157. *Id.*

158. *Id.*

159. *See, e.g.*, Ramji-Nogales, *supra* note 29.

160. *See id. See also* Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (explaining that federal courts of appeal have "repeatedly excoriated immigration judges" for "a pattern of biased and incoherent decisions in asylum cases."). Judge Posner of the Seventh Circuit commented that "adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." *Id.*

a. Claims Based on Sexual Orientation or Identity

Despite that fact that "homosexuals,"[161] "gay men,"[162] "gay men with female sexual identities,"[163] and "lesbians"[164] have all been recognized as particular social groups in the United States, the requirement of social visibility will likely make it more difficult for individuals with claims based on sexual orientation or identity to prevail on asylum claims. Unlike other characteristics such as skin color, sexual orientation or identity is not externally visible, "and sexual minorities often feel compelled to hide their orientation for various reasons."[165] In Latin America:

> The social stigma associated with homosexuality forces the majority of lesbians and gay men to hide their sexual orientation . . . . Secrecy, silence and invisibility are themselves contributing factors to the human rights violations suffered by lesbians and gay men . . . . With a few exceptions, most of the abuses committed against lesbians and gay men in Latin America remain shrouded in silence, misinformation, and misunderstanding.[166]

"These observations, which apply to gay men and lesbians in many countries around the world, stress the link between invisibility and persecution."[167] The BIA, by requiring social visibility in particular social group cases, completely neglects to recognize that invisibility "forms a core part of the experience of oppression."[168]

The BIA's social visibility requirement is problematic because it suggests that being socially visible is black or white, without accounting for the shades of gray in between. It also operates without any "awareness that the same group may be able to move between visibility and invisibility depending on time and context."[169] Furthermore, a literal application of the social visibility requirement may have the discriminatory effect of rendering only effeminate men or masculine women eligible for asylum because only they are visibly perceived as homosexual by their societies.[170] Encouraging such arbitrary distinctions creates bad public policy, and these examples show how the application of the social

161. Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990) (recognizing "homosexuals" as members of a particular social group in a case involving a gay man from Cuba).

162. Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that "all alien homosexuals are members of a 'particular social group'").

163. Hernandez-Montiel v. I.N.S., 225 F.3d 1084 (9th Cir. 2000) (recognizing a "gay man with a female sexual identity" as a member of a particular social group).

164. Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (finding, implicitly, that a Ugandan lesbian was a member of a particular social group).

165. Marouf, *supra* note 20, at 79.

166. Bill Fairbairn, *Gay Rights are Human Rights: Gay Asylum Seekers in Canada*, in PASSING LINES 237, 243-44 (Brad Epps et al. eds., 2005).

167. Marouf, *supra* note 20, at 79.

168. *Id.*

169. *Id.* at 83.

170. *Id.* at 87.

visibility requirement could produce undesirable results.

b. Claims Based on Domestic Violence

Claims based on domestic violence are also threatened by the social visibility requirement. Domestic violence, by definition, occurs in the private sphere of the home. It is rarely a phenomenon that is socially visible. Over the past two decades, great strides have been made in bringing asylum claims on the basis of domestic violence.[171] The social visibility requirement will likely inhibit this progress.

Application of the social visibility test in all particular social group cases would seem to effectively end the possibility for victims of domestic violence to qualify because they lack any visible shared characteristic. However, in some cases, immigration judges have continued to grant asylum to victims of domestic violence on the basis of membership of a particular social group, despite the BIA's adoption of the social visibility requirement.[172] While it is certainly positive that some judges are still granting asylum on the basis of domestic violence, it begs the question of whether or not these judges are applying the social visibility requirement at all in such cases. Given the inherently invisible nature of domestic violence, it is likely they are not. This emphasizes the inconsistency of application in the immigration and circuit courts since the adoption of the social visibility requirement, and highlights the fact that even judges realize the limits of the doctrine and that it is inapplicable to some necessary situations.[173] Again, good public policy demands a reform of this requirement in order for U.S. law to stay faithful to its obligations under the Protocol and to afford protection to those who need it most.

c. Claims Based on Gang Membership or Potential Targets of Gang Violence

The majority of case law that deals explicitly with the social visibility requirement focuses on asylum applicants that were targets or potential targets of gang violence. The social visibility requirement has been used to deny asylum (or petitions for review) in a growing number of cases based on this issue.[174] In *Matter of S-E-G-*, the BIA determined that that the proposed social group of "young men resisting criminal gang recruitment" was insufficiently socially

171. *See generally* Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391 (2001).

172. *See, e.g.*, IJ Decision DV Honduras (San Antonio, TX, 4/2/08); IJ Decision LGBT, Activist, Honduras (Newark, NJ, 11/26/07); IJ Decision, Honduras, DV, Gang (Portland, OR, 2/15/08), *available at* http://cgrs.uchastings.edu/law/detail.php.

173. *See Matter of* R-A-, 24 I. & N. Dec. 629, 631 (B.I.A. 2008) (recognizing that "providing a consistent, authoritative, nationwide interpretation of ambiguous provisions of the immigration law is one of the key duties of the Board" and its failure to do so).

174. *See generally* Wilkinson, *supra* note 141.

visible to constitute a particular social group.[175] The BIA reasoned that there was little evidence that "Salvadoran youth who are recruited by gangs but refuse to join . . . would be 'perceived as a group' by society, or that these individuals suffer from higher incidence of crime than the rest of the population."[176]

This decision and reasoning resounded through the courts and has been subsequently cited in a large number of cases involving victims or potential victims of gang violence.[177] As in cases based on sexual orientation and domestic violence, the BIA's social visibility requirement has the potential to eliminate eligibility for asylum based on membership of a particular social group for victims of gang violence. As a policy matter, this is an undesirable outcome, and one that the BIA does not explicitly state as a goal. The BIA and circuit courts should consider that:

> Individuals, especially youth, who fundamentally oppose the violent and coercive tactics of the Mara [gang] are worthy of asylum protection. They live in countries plagued by gang violence, with police forces that are also victims of the gang's wrath or engage in persecutory tactics. Citizens targeted for recruitment by the gang are repeatedly persecuted and often killed. Their choice to live without violence is not just brave but a fundamental human right that they should not have to relinquish. Further, individuals who stand up to the gang in such circumstances are the type of people the United States should embrace.[178]

Furthermore, the BIA's adherence to the *Matter of S-E-G-* reasoning – based on the social visibility requirement – in *all* gang cases can produce absurd results. For example, in *Arteaga v. Mukasey,*[179] the Ninth Circuit denied a petition for review of a withholding of removal claim[180] based on the fact that a tattooed former gang member was not a member of a particular social group because he was not socially visible.[181] In its reasoning, the Court admitted that the BIA's decision in *In re A-M-E-*[182] stated that a shared characteristic of a group must generally be recognizable to others.[183] It is common knowledge, and thus the court was aware, that gang tattoos are used to mark a person and classify which gang he or she is a member of. Further, the Court stated that in "assessing visibility, we must consider the persecution feared in the context of the country concerned."[184]

The Court's decision went on to state that "Arteaga's tattoos might make

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175. 24 I. & N. Dec. 579, 587 (B.I.A. 2008).

176. *Id.*

177. *See, e.g.*, Santos-Lemus v. Mukasey, 542 F.3d 738 (9th Cir. 2008); Soriano v. Holder, 569 F.3d 1162 (9th Cir. 2009); Ramos-Lopez v. Holder, 563 F.3d 855 (9th Cir. 2009).

178. Wilkinson, *supra* note 141, at 416.

179. 511 F.3d 940 (9th Cir. 2007).

180. The standard for granting withholding of removal in this context is the same as that for the granting of asylum. *See* 8 C.F.R. § 1208.16.

181. Arteaga v. Mukasey, 511 F.3d 940, 945 (9th Cir. 2007).

182. *In re* A-M-E-, 24 I. & N. Dec. 69 (B.I.A. 2007).

183. *Arteaga*, 511 F.3d at 945.

184. *Id.*

him visible to the police and other gang members as a gang member."[185] From this statement, the reasonable inference expected to follow would be that as a result, Arteaga was a socially visible member of society, regardless of whether or not the Court felt that he was eligible for asylum. However, the Court goes on to say that it did not believe "that the BIA's requirement of social visibility intended to include members or former members of violent street gangs under the definition of 'particular social group' merely because they could be readily identifiable."[186] This decision is clearly mistaken. In order to come to such a strange conclusion, the Court draws on no direct evidence from any BIA opinion or statement that the BIA intended any such result.

This decision makes obvious the courts' inconsistent and confused application of the social visibility standard. While there are many reasons that a former gang member would not be granted asylum in the United States, it is difficult to justify the idea that visible gang tattoos on someone's body do not qualify that individual as socially visible.[187] This example demonstrates another reason why the BIA's social visibility requirement does not reach desirable policy aims.

3. The "Floodgates"

One of the policy concerns that must be addressed when dealing with access to asylum is that of the opening of the floodgates. The fear is that granting asylum cases based on broad social group definitions will open the floodgates, allowing every person that is a member of that widely defined group to be eligible for asylum in the United States.[188] This concern, while a valid one given the benefits of protecting asylum law and shielding it from anti-immigration politics, is somewhat misplaced.

Qualifying as a member of a particular social group does not automatically qualify an individual for asylum. Upon meeting that standard, asylum-seekers must prove that the persecution they have experienced, or that they fear experiencing, is "on account of" that membership (often called the "nexus" requirement).[189] In addition, there are bars to asylum, such as the persecutor's bar,[190] the material support bar,[191] and in the gang-related cases, a bar for those

185. *Id.*

186. *Id.*

187. Regarding tattoos as immutable characteristics, *see* Matter of Anon., IJ Decision, York, PA (September 28, 2005), *available at* www.nationalimmigrationproject.org ("A tattoo is not an immutable characteristic. It can be removed . . . Just as a hair cut can be changed, just as clothing can be changed, a tattoo can in fact be removed.").

188. David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, *in* REFUGEE POLICY: CANADA AND THE UNITED STATES 34 (Howard Adelman ed., 1991) (stating that asylum is a "scarce resource").

189. INA, *supra* note 17.

190. *Id.* ("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,

who have been involved in criminal activities.[192] The asylum applicant must also be able to prove that his or her home country is unwilling or unable to protect that individual, that there are not changed circumstances making it safe for that individual to return to that country, and that there is nowhere else in their home country that the applicant could go to find safety.[193]

A good example can be drawn from the United Kingdom, where particular social groups are defined broadly and the floodgates have not burst open. In the case of *Islam and Shah*,[194] the House of Lords considered the claims of two married Pakistani women who were subjected to serious physical abuse by their husbands and hence forced to leave their homes.[195] A majority of the House of Lords concluded that the relevant social group in the case could appropriately be defined as "Pakistani women."[196]

In naming "Pakistani women" as the relevant social group, the House of Lords did not take issue with the fact that not every member of the group would be eligible for asylum; rather, it relied on the additional elements of the definition within the law (such as the "nexus" requirement) to separate out undeserving claims.[197] The BIA and circuit courts should take a similar approach, granting asylum where it is deserved instead of creating opaque and confusing standards out of fear that the floodgates will open and the number of asylum claims will rise. The Convention does not have a footnote saying that the courts or the BIA can stop granting asylum to refugees once the United States reaches a certain capacity. Rather, the United States is obligated to conform to the treaty and grant deserving claims; the floodgates concern does not change that obligation.

The social visibility requirement imposed by the BIA does not lead to desirable policy outcomes. Not only is it inconsistently applied and understood, but it also puts many groups of people who were previously eligible for asylum under the particular social group category at risk of being denied protection despite their deserving claims. The BIA should revoke its social visibility requirement and instead adopt the alternate test for membership of a particular social group as put forth by UNHCR.

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membership in a particular social group, or political opinion.").

191. INA, *supra* note 17, at § 212(a)(3)(B).

192. INA, 18 U.S.C. § 1182(a)(2)(A)(i) (2000).

193. INA, *supra* note 17, at §208(a)(2)(D).

194. Islam v. Secretary of State for the Home Department and R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah, UK House of Lords, [1999] 2 WLR 1015; [1999] INLR 144, *reprinted in* 11 INT'L J. OF REFUGEE L. at 496 (1999).

195. *Id.*

196. *Id.*

197. Aleinikoff, *supra* note 6, at 271-74.

III.
SOLUTIONS: THE UNHCR'S RECOMMENDATION TO USE BOTH THE PROTECTED CHARACTERISTIC AND SOCIAL PERCEPTION APPROACHES TO DEFINE MEMBERSHIP OF A PARTICULAR SOCIAL GROUP

Courts around the world, including courts in the United States, have attempted to collapse the qualifications for membership of a particular social group to one test that encompasses every possible applicant that is deserving of asylum. While many of these courts have settled on the protected characteristic approach as set forth in *Acosta*, others have relied on social perception or social visibility alone. This paper contends that each of these tests in isolation fails to bring about this goal.

Asylum is a complex area of the law, and people across the globe experience persecution for innumerable reasons, not all of which can be captured by any one of those tests. In the wake of the BIA's decisions that rely on social visibility as a dispositive test, there has been an outcry to return to the protected characteristic approach of *Acosta*.[198] While this paper agrees that the use of social visibility in the context of the *Acosta* framework is misguided, it argues that the *Acosta* standard could be improved by adding a social cognizability/perception analysis. Without some inquiry into social cognizability, groups of people who have experienced or feared persecution based on membership in a group that is not based on an immutable characteristic will not be eligible for asylum in the United States.

This paper argues that there are many weaknesses of social visibility as a dispositive test for determining membership of a particular social group. In now advocating for the addition of a social perception/cognizability analysis to the test, it is important to return to the differences between a dispositive "social *visibility*" test and a secondary, or alternative, "social *perception*" inquiry. The idea of social perception as put forth by the UNHCR is distinct from the social visibility requirement that was created by the BIA. The High Court of Australia established the social perception approach that is referenced in the UNHCR's Guidelines. In *Applicant A.*,[199] the High Court emphasized that the social perception approach "examines whether or not a group shares a common characteristic which makes them a *cognizable* group *or* sets them apart from society at large."[200] Under the social perception analysis, the question is whether the members:

> [S]hare a common attribute that is understood to exist in the society or that in some way sets them apart or distinguishes them from the society at large .... It does not require that the common attribute be visible to the naked eye in a literal sense of the term nor that it be one that is easily recognizable to the general

198. 19 I. & N. Dec. 211 (B.I.A. 1985).

199. Applicant A. v. Minister for Immigration and Ethnic Affairs (1997] 190 C.L.R. 225 (Austl.).

200. UNHCR Guidelines, *supra* note 8, para. 7 (emphasis added).

public.[201]

This understanding is very different from the approach taken by the BIA's social visibility requirement. Social perception analysis does not rely on a literal application of visibility. Rather, it works to identify any social groups that are not based on an immutable characteristic, but instead share a common attribute or attributes that set them apart from society in some way. In adopting the UNHCR alternate test approach, the United States would improve its application of membership of a particular social group in asylum cases by closing this gap in protection that exists under the protected characteristic framework.

The UNHCR's recommended approach to determining membership of a particular social group will close the protection gaps that result from the use of either the protected characteristic approach or the social perception approach alone. The former fails to include groups that deserve protection for a reason other than an immutable characteristic; the latter fails to include people who are forced to hide or who are invisible due to their identity within their home country. Neither of these outcomes comports with the United States' obligations under the Protocol, nor to the range of groups that have been considered particular social groups in the past within U.S. asylum law.

The current lack of cohesion and uniformity across immigration judges and circuit courts with regard to particular social group claims is cause for concern. The social visibility test lacks clarity and has little legal basis or justification, which makes it difficult for judges to apply consistently. The lack of consistency in asylum law in the United States today is a widely recognized and well documented,[202] especially in a legal system that generally has a great distaste for the inconsistent application of any law. This problem could be solved by a more satisfying and fair test when it comes to particular social group claims within asylum law.

CONCLUSION

When it was passed, the Refugee Act of 1980 was regarded as "one of the most important pieces of humanitarian legislation ever enacted by a U.S. Congress."[203] The BIA's unexplained imposition of the social visibility requirement has potentially jeopardized the Refugee Act's ability to protect those who need it most. Such a requirement greatly narrows the particular social group definition, which even before the imposition of the social visibility requirement necessitated a very high burden of proof. A dispositive social visibility requirement raises that burden too high for asylum applicants whose claims are based on sexual orientation or identity, for domestic violence victims,

201. Brief for U.N. High Comm'r for Refugees as Amicus Curiae, Valdiviezo-Galdamez v. Holder, *supra* note 132, at 11.

202. *See* Ramji-Nogales, *supra* note 29.

203. 126 CONG. REC. H 4501, 1500 (daily ed. Mar. 4, 1980) (statement of Rep. Rodino).

for victims of gang violence, and many others.[204]

Immigration and circuit court judges should not grant *Chevron* deference to the BIA's social visibility requirement. The Seventh Circuit has already explicitly rejected the requirement,[205] and other circuits should follow suit. Not only does granting *Chevron* deference to the social visibility requirement thwart congressional intent and the United States' obligations under the Protocol,[206] but it also falls within the "arbitrary and capricious" exception set forth by the U.S. Supreme Court in *Brand X*.[207]

However, while the BIA's language, and the manner in which the social visibility requirement was implemented in the adjudication of membership of a particular social group claims went too far, the idea of creating some sort of inquiry into social perception/cognizability in determining claims based on membership of a particular social group is not without merit. In fact, this paper argues that including such an inquiry as an alternative test to the protected characteristic approach would be beneficial, aligning U.S. asylum law more closely to that of the Protocol and the UNHCR's recommendations. Including an alternative test would close protection gaps and ensure that all applicants who should qualify for asylum are able to satisfy the requirement by qualifying as a member of one of the five protected classes of individuals.

At risk if the BIA does not reform its new social visibility requirement, or if immigration judges and circuit courts do not choose to reject it, are important policy goals that will not be achieved by such an unclear and subjective standard. The social visibility test will further compound the problem of inconsistent, incoherent and biased decisions by immigration judges, rather than promote consistent and easy-to-understand principles. Furthermore, the United States will fall short of its obligations under the 1980 Refugee Act and the Protocol by denying asylum to those refugees that should qualify for protection based on a dispositive and subjective test that is difficult to apply. Adopting the alternative test put forth by the UNHCR is a solution to this problem, and it will not leave judges with unclear guidelines and unfettered discretion when formulating their decisions. The result of the implementation of this alternative test will be a more just and consistent application of membership of a particular social group within asylum claims.

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204. *See* Hathaway & Foster, *supra* note 28, at 482.

205. *See* Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009); Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009).

206. *See supra* section II.A.1.

207. Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 972 (2005); *see supra* section II.A.2.