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The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender

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INTRODUCTION

An emerging issue in U.S. asylum claims based on "membership in a particular social group" is the relevance of social visibility in determining whether such a group exists.[1] Of the five protected grounds for asylum, "membership in a particular social group" has always generated the most debate.[2] Until recently, however, neither the Board of Immigration Appeals (BIA) nor the federal courts focused on "social visibility" in defining this term. The dominant view of the international community, rooted in the BIA's seminal decision in *Acosta*, defines a "particular social group" based solely on the existence of an "immutable" characteristic," one that an individual either cannot change or should not be required to change because it is fundamental to identity of conscience.[3] External perceptions are irrelevant to the *Acosta* standard. Among the major common law countries, the United States, Canada, New Zealand, and the United Kingdom follow the principled "protected characteristic" approach.[4]

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1. In order to qualify for asylum, an individual must establish "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2000). This definition of a refugee adopts the definition set forth in the 1967 Protocol Relating to the Status of Refugees (the "Protocol"), which incorporates Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees. 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 1967 Protocol]; Convention Relating to the Status of Refugees, art. 1, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

2. *See generally Summary Conclusions: Membership of a Particular Social Group, Expert Roundtable, San Remo, September 2001*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 312 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003) [hereinafter UNHCR'S GLOBAL CONSULTATIONS]; James C. Hathaway & Michelle Foster, Development, *Membership of a Particular Social Group*, 15 INT'L J. REFUGEE L. 477 (2003) (noting the lack of clarity in defining a "particular social group," discussing the points of consensus that have emerged, and setting forth the two major approaches to defining this term).

3. *See* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds*, Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987); Ward v. Att'y Gen. of Can., [1993] 2 S.C.R. 689, 736-39; G.J., No. 1312/93, (Refugee Status App. Auth. Aug. 30, 1995) (N.Z.); Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.); *see also* MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS 300 (2007); T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group,"* *in* UNHCR'S GLOBAL CONSULTATIONS, *supra* note 2, at 294; Hathaway & Foster, *supra* note 2.

4. *See supra* note 3. Most civil law jurisdictions have not developed the "particular social group" ground at all. *See* FOSTER, *supra* note 3, at 295 n.17.

Australia, on the other hand, has emphaszied social perceptions, while also taking immutable characteristics into account.[5]

In 2002, the United Nations High Commissioner for Refugees (UNHCR) issued guidelines that present the "protected characteristic" and "social perception" approaches as *alternative* ways of establishing a particular social group, instructing States Parties to the 1951 Refugee Convention (the "Convention") to determine first if there is a protected characteristic and, only if no such characteristic exists, to determine whether the group is recognized by society.[6] Two recent decisions by the BIA, *C-A-* and *A-M-E-*, purported to rely on the UNHCR guidelines when emphasizing the importance of "social visibility" in defining a particular social group.[7] The BIA's interpretation of "social visibility" in *C-A-*, however, diverged from the international community's understanding of the "social perception" approach, as it focused on the visibility of group *members* rather than whether the group *as a whole* was recognized by society, and stressed a subjective rather than an objective standard.[8] Furthermore, in *A-M-E-*, the BIA failed to follow the sequential steps set forth by the UNHCR, suggesting in an ambiguous and internally inconsistent decision that the "protected characteristic" and "social visibility" tests may now represent *dual* requirements in all social group cases.[9] Read together, these cases represent a significant departure from precedent. The BIA's new emphasis on "social visibility" undermines the principled framework for analyzing social group claims set forth in *Acosta* and will lead to incoherent, inconsistent decisions that have no basis in the 1951 Refugee Convention and its 1967 Protocol (the "Protocol").

Part I of this Article sets forth the "protected characteristic" and "social perception" approaches, showing how the former has a foundation in law while the latter does not. I then discuss the BIA's new "social visibility" test against

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5. *See, e.g.*, Applicant A v. Minister for Immigration & Ethnic Affairs (1997) 190 C.L.R. 225 (Austl.). Chief Judge Gleeson's opinion in *Minister for Immigration & Multicultural Affairs v. Khawar*, (2002) 210 C.L.R. 1, 14 (Austl.), which reasoned that "women in any society" comprise a particular social group, comports with both the protected characteristic and social perception approaches. Some commentators also support the social perception approach. *See, e.g.*, GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 365 (1996); Aleinikoff, *supra* note 3, at 294-301.

6. U.N. High Comm'r for Refugees [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 on Membership of a Particular Social Group*].

7. A-M-E-, 24 I. & N. Dec. 69 (B.I.A. 2007), *aff'd*, Ucelo-Gomez v. Mukasey, 509 F.3d 70, 72-73 (2d Cir. 2007); C-A-, 23 I. & N. Dec. 951, 961 (B.I.A. 2006), *aff'd*, Castillo-Arias v. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006). The BIA designated *C-A-* as precedent after the fact, without open consideration or argument.

8. *See C-A-*, 23 I. & N. Dec. at 955-61; *see also infra* Part I.

9. *See A-M-E-*, 24 I. & N. Dec. at 73-75; *see also infra* Part I.

this background, explaining how it diverges from domestic and international decisions. In Part II, I argue that adjudicators in the United States should not give deference to the BIA's decisions in *C-A-* and *A-M-E-* because they do not provide a permissible interpretation of the Convention and represent a sudden, unexplained change in the way the BIA defines "membership of a particular social group."[10] In Part III, I turn from the legal reasons for rejecting the "social visibility" test to the practical challenges involved in applying this approach, drawing on studies in the fields of cognitive science and psychology to show that public perception is highly context-dependent and inherently difficult to pin down. This Part also discusses the difficult evidentiary issues that will confront adjudicators when determining the perceptions of a foreign society.

Part IV highlights how the "social visibility" test may have a profound, negative impact on asylum cases related to sexual orientation and gender, where not only the harm is hidden in the private sphere, but the group members themselves may be veiled from sight. With respect to sexual orientation, the United States and international authorities have rejected the notion that gays and lesbians who remain "discreet"—and therefore "invisible"—are not protected by the refugee definition.[11] Under the "social visibility" test, however, their claims may well be denied. Indeed, even claims brought by "out" gays and lesbians may be rejected if they come from societies that do not recognize homosexuals as a group or homosexuality as a social identity.

In addition, the "social visibility" test poses a new twist in the public/private distinction that has long pervaded the debate around gender-based asylum. Initially, gender-related forms of harm, such as sexual violence, domestic abuse, female genital cutting, and honor killings were dismissed as "pri-

10. At the time of writing, the BIA issued two more decisions that clearly emphasize the importance of social visibility in defining a particular social group: *S-E-G-*, 24 I. & N. Dec. 579, 582-83 (B.I.A. 2008) (finding that "Salvadoran youths who have resisted gang recruitment, or family members of such Salvadoran youth" do not satisfy the social visibility test and do not constitute particular social groups), and *E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) ("[T]he particular social group identified by the Immigration Judge as 'persons resistant to gang membership' lacks the social visibility that would allow others to identify its members as part of such a group."); *see also* A-T-, 24 I. & N. Dec. 296, 303 (B.I.A. 2008) ("[W]e are doubtful that young Bambara women who oppose arranged marriage have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them."). These decisions rely on the reasoning set forth in *C-A-* and *A-M-E-*. *See S-E-G-*, 24 I. & N. Dec. at 586-88; *E-A-G-*, 24 I. & N. Dec. at 594-96; *A-T-*, 24 I. & N. Dec. at 303.

11. *See, e.g.*, Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) (noting that "*all* alien homosexuals are members of a 'particular social group'"); Appellant S395/2002 v. Minister for Immigration & Multicultural Affairs (2003) 216 C.L.R. 473 (Austl.) (same); No. 74665/03 (Refugee Status App. Auth. July 7, 2004) (N.Z.), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/REF_20040707_74665.pdf (finding that a gay man from Iran who is "discreet" and unknown to the authorities satisfies the definition of a refugee).

vate matters" that did not constitute persecution.[12] In the same way that "private" harm was discounted, so, too, was harm perpetuated by private individuals (i.e., non-state actors), such as family members.[13] While most countries now recognize that "private" harm can constitute persecution and that non-state actors can perpetrate harm where the state fails to provide protection, asylum cases brought by women still raise complex questions.[14] The new "social visibility" requirement raises the specter of the private/public distinction by requiring members of a particular social group to have a public face. Thus, it may well result in the denial of asylum claims brought by some of the most vulnerable individuals, notwithstanding the existence of a "protected characteristic."

Finally, I conclude that adjudicators should reject the "social visibility" approach because it destroys *Acosta*'s principled framework, represents an abdication of U.S. obligations under the 1967 Protocol, cannot be applied in a consistent way, and ignores the complex relationship between visibility and power.

I. Four Approaches to Defining Membership of a "Particular Social Group"

A. The "Protected Characteristic" Approach

The BIA set forth the seminal definition of a "particular social group" in *Acosta*, which required that group members have a "common immutable characteristic" that they "either cannot change, or should not be required to change

12. Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question*, 15 Geo. Immigr. L.J. 391, 391 (2001) ("Forms of harm that are unique to or disproportionately affect women . . . are no longer routinely dismissed as 'private.' Instead, they are accepted as core human rights violations included within the concept of persecution."); Andrea Binder, *Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention*, 10 Colum. J. Gender & L. 167, 172-75 (2001) (discussing various types of gender-specific persecution).

13. *See, e.g.*, Anker, *supra* note 12, at 392.

14. *See, e.g.*, Anker, *supra* note 12, at 393-94 (discussing the complex questions of interpretation that arise in non-state actor asylum cases); Alice Edwards, *Age and Gender Dimensions in International Refugee Law*, *in* UNHCR's Global Consultations, *supra* note 2, at 59 ("Whether persecution, within the context of the 1951 Convention definition, can be derived from non-State actors or agents, as opposed to State agents, has been at the forefront of debate on international refugee law."); Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. Mich. J.L. Reform 767, 788 (2003) ("The non-state actor, particularly because of his myriad shapes, presents unique analytical challenges to asylum law."); Daniel Wilsher, *Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?*, 15 Int'l J. Refugee L. 68 (2003) (arguing that the degree to which the 1951 Convention protects victims of persecution by non-state actors is controversial).

because it is fundamental to their individual identities or consciences."[15] In arriving at this formative definition, the BIA relied on traditional methods of statutory interpretation. Specifically, the BIA applied "the well-established doctrine of ejusdem generis, meaning literally, 'of the same kind,'" to the five protected grounds in the refugee definition.[16] This doctrine helps give meaning to groups of words where one of the words is ambiguous or inherently unclear. As the BIA explained, ejusdem generis "holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words."[17] In the refugee definition, the general term "membership of a particular social group" appears alongside the more specific words "race," "religion," "nationality," and "political opinion."[18] Since each of the more specific words describes "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," the BIA defined "membership of a particular social group" in the same way.[19] By way of example, the BIA stated that "[t]he 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."[20]

Applying the ejusdem generis doctrine to defining "membership of a particular social group" not only engages in a serious textual analysis of the Convention and its Protocol, 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 grounding refugee claims in civil or political status."[21] In addition, 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] By remaining true to the text, context, and object or purpose of the Convention, the *Acosta* standard comports with Article 31 of

15. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

16. *Id.*

17. *Id.*

18. *See* Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2000); *see also* 1951 Convention and 1967 Protocol, *supra* note 1.

19. *See* 8 U.S.C. § 1101(A)(42)(A).

20. *Id.*

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

22. *Id.*

the 1969 Vienna Convention on the Law of Treaties, which provides that adjudicators must consider these three elements in interpreting treaties.[23]

The U.S. courts of appeal generally have followed *Acosta* in analyzing claims based on membership of a particular social group.[24] While there are minor differences in the definitions of "particular social group" adopted by the Ninth and Second Circuits, these courts also embrace *Acosta* and recognize that the existence of a protected characteristic lies at the heart of the definition.[25] Indeed,

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23. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (entered into force Jan. 27, 1980). Since the VCLT postdates the Refugee Convention, it is not strictly applicable. *Id.* art. 4 ("[T]he Convention applies only to treaties which are concluded by States after the entry into force of the present Convention."). However, the VCLT "nevertheless constitutes an authoritative statement of customary public international law on the interpretation of treaties." No.74665/03, slip op. para. 45 (Refugee Status App. Auth. July 7, 2004) (N.Z.), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/REF_20040707_74665.pdf.

24. *See, e.g.*, Koudriachova v. Gonzales, 490 F.3d 255, 262-63 (2d Cir. 2007) (according *Chevron* deference to the *Acosta* standard and remanding to the BIA for "additional investigation or explanation with respect to the question of whether defected KGB agents form a particular social group"); Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005) (applying *Acosta* and finding that the female members of the Tukulor Fulani tribe in Senegal constitute a particular social group); Mohammed v. Gonzales, 400 F.3d 785, 797-98 (9th Cir. 2005) (applying *Acosta* reasoning and holding that "Somalian females" and "young girls in the Benadiri clan" comprise a particular social group); Castellano-Chacon v. Immigration & Naturalization Serv., 341 F.3d 533, 546-51 (6th Cir. 2003) (applying *Acosta* to find that "tattooed youth" do not comprise a particular social group); Lwin v. Immigration & Naturalization Serv., 144 F.3d 505, 511-12 (7th Cir. 1998) (finding that parents of Burmese student dissidents shared a common, immutable characteristic sufficient to comprise a particular social group); Fatin v. Immigration & Naturalization Serv., 12 F.3d 1233, 1239-41 (3d Cir. 1993) (applying *Acosta* in holding that a subgroup of Iranian feminists who refuse to conform to the government's gender-specific laws and norms may constitute a particular social group); Ananeh-Firempong v. Immigration & Naturalization Serv., 766 F.2d 621, 626-27 (1st Cir. 1985) (applying *Acosta* in determining that family relations can be the basis of a particular social group); *see also* Deborah Anker, *Membership in a Particular Social Group: Developments in U.S. Law*, 1566 PLI/CORP 195, 201-02 (2006) (confirming that a growing number of circuits, including the Second and Ninth Circuits, have affirmed the *Acosta* framework).

25. In *Sanchez-Trujillo v. Immigration & Naturalization Service*, 801 F.2d 1571, 1576 (9th Cir. 1986), the Ninth Circuit stated that "of central concern" to the existence of a particular social group "is the existence of a *voluntary associational relationship* among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group." However, the Ninth Circuit subsequently clarified that "a 'particular social group' is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."

the reasoning in *Acosta* has proven so persuasive that it has received significant attention from foreign courts as well.[26] Part of *Acosta*'s international appeal is its fit with fundamental norms of human rights, including non-discrimination.[27] In *Ward v. Attorney General of Canada*, the Supreme Court of Canada found that *Acosta*'s application of ejusdem generis reflects "classic discrimination analysis."[28] Delving even further into the text and context of the Convention to determine its underlying principles, the Court drew on the Preamble, which affirms the international community's commitment to upholding "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination."[29] The Court then reasoned that this principle "outlines the

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Hernandez-Montiel v. Immigration & Naturalization Serv., 225 F.3d 1084, 1092-93 & n.5 (9th Cir. 2000) (holding that "gay men with female sexual identities" in Mexico constitute a particular social group). The Second Circuit, in *Gomez v. Immigration & Naturalization Service*, 947 F.2d 660, 664 (2d Cir. 1991), defined a particular social group as one "comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of the persecutor—or in the eyes of the outside world in general." The court, however, modified its approach to bring it in line with *Acosta* in *Gao v. Gonzales*, 440 F.3d 62, 69 (2d Cir. 2006), *vacated on other grounds*, Keisler v. Gao, 128 S. Ct. 345 (2007); *see also* Koudriachova v. Gonzales, 490 F.3d 255, 262 (2d Cir. 2007) ("[T]he best reading of *Gomez* is one that is consistent with *Acosta*."). For further discussion of *Gomez* and its aftermath, see *infra* Part II.

26. While these international decisions do not have the weight of precedent in U.S. courts, they are highly relevant because all State Parties to the Convention and its Protocol interpret the same criteria of the refugee definition. "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 [Refugee] Act, it is that one of Congress's primary purposes was to bring United States refugee law into conformance with the [1951 Convention and 1967 Protocol]." Immigration & Naturalization Serv. v. Cardozo-Fonseca, 480 U.S. 421, 436 (1987); *see also* Deborah E. Anker, *Refugee Law, Gender and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 135 (2002) ("[R]efugee law *is* international law, grounded in an international treaty.").

27. *See* HATHAWAY, *supra* note 21, at 161; *see also* FOSTER, *supra* note 3, at 27 ("explor[ing] the emerging tendency to refer to human rights standards in refugee adjudication.").

28. Ward v. Att'y Gen. of Can., [1993] 2 S.C.R. 689, 736 (Can.); *see also* Veysey v. Comm'r of the Corr. Serv., [1989] 29 F.T.R. 74 (T.D.) (Fed. Ct.) (Can.) (applying the ejusdem generis rule to define the scope of non-enumerated prohibited grounds for discrimination and concluding that sexual orientation is one such ground because it "has the attribute of immutability" and because individuals "have been victimized and stigmatized throughout history" on this basis).

29. [1993] *Ward*, 2 S.C.R. at 733 (quoting 1951 Convention, pmbl.). As previously noted, the VCLT requires the text to be interpreted according to its ordinary meaning *in context*. The permissible sources set forth in Article 31(2) of the VCLT for examining the context of a treaty include the Preamble. The European Court of Human Rights has also emphasized that "the [P]reamble is generally very useful for the determination of the 'object' and 'purpose' of the instrument to be

boundaries of the objectives sought to be achieved and consented to by the delegates . . . and thereby provides an inherent limit to the cases embraced by the Convention."[30] Accordingly, "[t]he manner in which groups are distinguished for the purposes of discrimination law can . . . appropriately be imported into this area of refugee law."[31] Based on this reasoning, *Ward* identified three possible categories that could constitute particular social groups: "(1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence."[32]

Ward's approach adopts the formulation set forth by James C. Hathaway in his classic text, *The Law of Refugee Status*, which states that "[t]he dominant view . . . is that refugee law ought to concern itself with actions which deny human dignity in any key way . . . ."[33] Since the Convention has its roots in the modern human rights movement, it constitutes part of the wider corpus of international human rights law.[34] Numerous other refugee scholars have also endorsed a human rights-based approach to interpreting the Convention, stressing not only its context, but also the importance of interpreting an international treaty as consistently and uniformly as possible.[35] In explaining the need for a universal and objective standard, Michelle Foster writes that "[i]t could hardly be consistent with the non-derogable nature of art. 1A(2) for domestic courts to

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construed." Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 16 (1975). The Inter-American Court of Human Rights has adopted a similar approach. *See, e.g.*, Other Treaties Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, 1982 Inter-Am. Ct. H.R. (ser. A) No. 1 (Sept. 24, 1982), *reprinted in* 3 HUM. RTS. L.J. 140 (1982); The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75), Advisory Opinion No. OC-2/82, 1982 Inter-Am. Ct. H.R. (ser. A) No. 2 (Sept. 24, 1982), *reprinted in* 3 HUM. RTS. L.J. 153 (1982).

30. *Ward*, [1993] 2 S.C.R. at 733; *see also* U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS para. 60 (1992) (recognizing the significance of the preamble); *id.* paras. 5, 17 (accepting that human rights principles should inform the interpretation of the refugee definition).

31. *Ward*, [1993] 2 S.C.R. at 735.

32. *Id.*

33. HATHAWAY, *supra* note 21, at 108.

34. *See* FOSTER, *supra* note 3, at 49-50.

35. For further discussion of the relationship between refugee law and international human rights law, see FOSTER, *supra* note 3; Anker, *supra* note 12; Alice Edwards, *Human Rights, Refugees, and the Right 'To Enjoy' Asylum*, 17 INT'L J. REFUGEE L. 293 (2005); James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113 (1991).

undertake subjective and idiosyncratic interpretations, according to their own notions of the kinds of applicants deemed worthy to receive protection under the Refugee Convention scheme."[36] Consequently, "the human rights framework for interpreting key aspects of the refugee definition" has become "the dominant approach in refugee status determination . . . ."[37]

New Zealand and the United Kingdom, two common law countries with well-developed jurisprudence on refugee law, have both adopted the *Ward/Acosta* "protected characteristic" approach to defining a particular social group and apply fundamental human rights norms to determine which characteristics are fundamental to identity or conscience.[38] Rodger Haines, Chairperson of New Zealand's Refugee Status Appeals Authority (the "New Zealand Refugee Authority"), has provided detailed and principled opinions that expound on the arguments set forth above to explain why "[t]he particular social group category is limited by anti-discrimination notions inherent in civil and political rights . . . ."[39] The New Zealand Refugee Authority specifically found that "[t]he *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."[40]

In the United Kingdom, the leading case on membership in a particular social group is the House of Lords' decision in *Islam*, which also relied heavily on *Acosta*. *Islam* confirmed that "the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention."[41] Lord Hoffman reasoned that the Convention "is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination."[42] Applying this principle, the Lords found that "women in Pakistan" constitute a particular social group based on evidence of widespread discrimination against them.[43]

These decisions from Canada, New Zealand, and the United Kingdom show how the "protected characteristic" approach set forth in *Acosta* has be-

36. FOSTER, *supra* note 3, at 36.

37. *Id.* at 75.

38. *See, e.g.*, FOSTER, *supra* note 3, at 27-31; Aleinikoff, *supra* note 3, at 280.

39. GJ, No.1312/93 (Refugee Status App. Auth. Aug. 30, 1995), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_19950830_1312.pdf.

40. *Id.*

41. Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. 629, 651 (H.L.) (appeal taken from Eng.) (U.K.); (finding that "women in Pakistan" constitute a particular social group); *see also* Horvath v. Sec'y of State for the Home Dep't, [2000] 1 A.C. 489, 495F, 501C, 512F, 517D (H.L.) (appeal taken from Eng.) (U.K.) (emphasizing that the principle of non-discrimination is central to the Refugee Convention).

42. *Islam*, [1999] 2 A.C. at 650-51.

43. *Id.* at 652.

come "transnationalized."[44] While the United States may be reluctant to participate in the international dialogue among state parties, well-reasoned foreign precedents like those discussed above can not only aid U.S. adjudicators in their own deliberations, but also serve as a way of testing their interpretations and analysis by "examining them in the reflection of others'."[45] Comparative law "exposes the practices of one's own legal system as contingent and circumstantial, not transcendent and timeless."[46] Mary Ann Glendon and her colleagues have described this process as a "dialogical" mode of comparative interpretation, noting that "[c]omparison often picks up issues or makes connections that remain invisible," thereby forcing adjudicators to question their assumptions and engage in legal self-reflection.[47] Here, the foreign cases discussed above provide a deeper understanding of *Acosta*'s "protected characteristic" approach by grounding it more firmly in the text, context, and purpose of the Convention.[48]

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44. As Deborah Anker points out, "several states' administrative bodies and courts engage in a productive dialoge with each other: by borrowing, adapting, and building on each other's jurisprudence and instruments such as national guidelines, they are beginning to create a complex and rich body of 'transnationalized' international law." Anker, *supra* note 26, at 136. Aleinikoff confirms that, "[t]o a surprising degree, courts in the common law countries tend to read and analyze cases decided in other common law States." Aleinikoff, *supra* note 3, at 268.

45. Vicki Jackson, Comment, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 114 (2005).

46. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 836 (1999).

47. MARY ANN GLENDON, MICHAEL WALLACE GORDON & CHRISTOPHER OSAKWE, COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 10 (2d ed. 1994); *see also* Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 423-39 (2003) (exploring the potential impact of a comparative approach on a court's perception of its role in the larger legal community and discussing the "dialogic model" and "enforcement model" of judicial decision-making).

48. While the United States has been reluctant to participate in this international dialogue, there have been glimpses of hope. For example, the INS's draft regulations on "particular social group" mention the House of Lord's decision in *Islam*. *See* Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76594 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (citing *Islam*). The BIA also mentioned this decision in its vacated opinion in *R-A-*, if only to disavow its interpretation. *See* R-A-, 22 I. & N. Dec. 906, 917-18 (B.I.A. 1999), *vacated* 22 I. & N. Dec. 906 (Att'y Gen. 2001), *remanded for redecision*, 23 I. & N. Dec. 694 (Att'y Gen. 2005). Recent decisions by the U.S. Supreme Court that give weight to foreign jurisprudence in constitutional cases will hopefully prompt adjudicators to draw on international decisions in the refugee context as well. *See* Roper v. Simmons, 543 U.S. 551, 577-78 (2005) (citing international covenants prohibiting the juvenile death penalty and discussing the United Kingdom's experience in abolishing capital punishment); Lawrence v. Texas, 539 U.S. 558, 573 (2003) (discussing the European Court of Human Rights' decision in *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), which held that laws proscribing consensual homosexual

B. *The "Social Perception" Approach*

Unlike the "protected characteristic" approach, which is based on the doctrine of ejusdem generis and anti-discrimination principles, the "social perception" approach is based loosely on "sociological methodology."[49] Of the common law countries, only Australia has emphasized social perception in analyzing claims based on membership of a protected social group. In *Applicant A v. Minister of Immigration and Ethnic Affairs*, the High Court of Australia found that the defining characteristics of a particular social group are a common attribute and a societal perception that the group is set apart from other members of society.[50] In *Applicant S v. Minister for Immigration and Multicultural Affairs*, however, the High Court clarified that while social perception may be *relevant* to determining whether a "particular social group" exists, it is not a *requirement.*[51] The High 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*" examining whether

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conduct were invalid under the European Convention on Human Rights). In *Roper*, the Court found it "proper" to "acknowledge the overwhelming weight of international opinion," noting that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusions." 543 U.S. at 578; *see also* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45 (2004) (arguing that the U.S. Supreme Court has historically looked to foreign jurisdictions for aid in interpretation in at least three situations, one of which is where there are "parallel rules," in other words, "when American legal rules seem to parallel those of other nations, particularly those with similar legal and social traditions"). The United States, Canada, New Zealand, the United Kingdom, and Australia are all common law countries interpreting the same definition of a "refugee" in their asylum cases. It is therefore particularly appropriate for U.S. courts to look to decisions from these countries in interpreting the refugee definition.

49. Hathaway & Foster, *supra* note 2, at 486; Aleinikoff, *supra* note 3, at 272 (describing the Australian High Court's social perception approach as "sociological," because it "is not based on an analogy to anti-discrimination principles," but rather "looks to external factors—namely, whether the group is perceived as distinct in society").

50. *See* Applicant A v. Minister of Immigration & Ethnic Affairs (1997) 190 C.L.R. 225, 241 (Dawson, J.), 265-66 (McHugh, J.) (holding that married couples who fear forced sterilization due to their opposition to China's "one-child policy" do not comprise a particular social group).

51. Applicant S v. Minister for Immigration & Multicultural Affairs (2004) 217 C.L.R. 387, 393 (finding that the lower court had erred in requiring there to be evidence that Afghan society perceived young, able-bodied men to comprise a particular social group).

the society in question *perceives* there to be such a group" is just "[*o*]*ne way*" to make this determination.[52]

The High Court found that cultural, social, religious, and legal norms may also reflect whether a group is set apart and that adjudicators can assess such norms from an objective third-party perspective. In rejecting a purely subjective approach, the High 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.[53]

In addition to recognizing that subjective perceptions may, at times, be unreliable indications of whether a particular social group exists, the High Court found that requiring a society to perceive the group as being set apart would impose a criterion that had no basis in the 1951 Convention.[54] Thus, while the court did not engage in the same type of principled statutory interpretation found in *Acosta*, *Ward*, and *Islam*, it nevertheless attempted to avoid an approach that would be wholly unsupported by the Convention's text, context, or purpose.[55] Judge McHugh summarized the court's conclusion as follows: "To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in the country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle."[56]

The court's conclusion in *Applicant S* is consistent with the UNHCR's understanding of the social perception approach. According to the UNHCR, "[t]he question to be established is whether the particular social group is '*cognisable*' as a group, viewed objectively in terms of the relevant society."[57] The

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52. *Id.* at 397-98 (emphasis added); *see also id.* at 408 (McHugh, J.) (expounding on the distinction between an objective and subjective analysis, and stressing that the requirement that a group be "cognisable" within a society by no means requires that the society recognizes the group as set apart).

53. *Id.* at 400 (footnote omitted); *see also id.* at 410 (McHugh, J.) ("[T]hose who form the 'particular social group' may be perceived by the society in which the group exists as aberrant individuals and may even be described by a particular name, yet the society may not perceive these individuals as constituting a particular social group. Nevertheless, those living outside that society may easily recognise the individuals concerned as comprising a particular social group.").

54. *Id.* at 410 (McHugh, J.); *id.* at 421-22 (Callinan, J.).

55. *See also Applicant A*, 190 C.L.R. at 264 (McHugh, J.) (stating that what may be critical "in most, perhaps all, cases" is "external perceptions of the group").

56. *Applicant S*, 217 C.L.R. at 410-11.

57. *See* U.N. High Comm'r for Refugees [UNHCR], *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for*

UNHCR has stressed that a group "may be cognizable *'objectively'* having regard to the circumstances considered by a Court," and "[i]t may be seen to be *'set apart'* for cultural, social, religious or legal factors."[58] In *Secretary of State for the Home Department v. K (FC)*, the House of Lords accepted the UNHCR's and High Court's interpretation of the social perception approach.[59] Lord Hope stated that it would be "a mistake to say that a particular social group does not exist unless it is always perceived as such by the society in which it exists," finding it "sufficient that the asylum-seeker can be seen *objectively* to have been singled out by the persecutor or persecutors for reasons of his or her membership of a particular social group whose defining characteristics exist independently of the words or actions of the persecutor."[60]

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

In 2002, the UNHCR issued Guidelines on Membership of a Particular Social Group (the "Guidelines") that updated its Handbook and, like the Handbook, provide legal "interpretive guidance for governments, legal practitioners and decision-makers, including the judiciary."[61] These Guidelines represent an outcome of the Global Consultations on the International Protection of Refu-

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the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004), Comment on art. 10(d), at 23 (Jan. 28, 2005), *available at* http://www.unhcr.org/refworld/docid/4200d8354.html ("The 'social perception approach' is based on a common characteristic which creates a *cognizable* group that sets it apart from the society at large.") (emphasis added); Brief for U.N. High Comm'r for Refugees as Amicus Curiae Supporting Claimants at 8, *Thomas*, No. A75-597-0331-034/-035/-036 (B.I.A. Dec. 27, 2007) [hereinafter UNHCR Brief in *Thomas*] (unpublished brief and decision on file with the Yale Law & Policy Review) ("[M]embers of a group need not be easily recognizable to the general public in order for the group as a whole to be perceived by society as a particular social group.").

58. UNHCR Brief in *Thomas*, *supra* note 57, at 7 (internal citations omitted).

59. [2006] 1 A.C. 412, 445 (appeal taken from Eng. & Wales) (Lord Hope) (internal citations omitted).

60. *Id.* (emphasis added).

61. UNHCR, *Guidelines on Membership of a Particular Social Group*, *supra* note 6 para. 1. The UNHCR issued the Guidelines pursuant to its mandate, particularly its supervisory role set forth in paragraph 8 of the UNHCR Statute, together with Article 35 of the 1951 Refugee Convention and Article II of the 1967 Protocol. In addition, the Agenda for Protection, endorsed by the Executive Committee and welcomed by the United Nations General Assembly in 2002, specifically instructed the UNHCR to produce such complementary guidelines to its Handbook. *See* U.N. GAOR, 53d Sess., at goal 1, obj. 6, U.N. Doc. A/AC.96/965/Add.1 (June 26, 2002).

gees, which the UNHCR launched in 2000.[62] As part of the "second track" of the Global Consultations, which explored different interpretations of certain elements of the Convention an expert round table convened in San Remo in September 2001 to address the topic of membership of a particular social group.[63] The San Remo seminar "enjoyed broad participation by governments, the International Association of Refugee Law Judges, other legal practitioners, non-governmental organizations and academia . . . ."[64] 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."[65]

Noting that the "protected characteristic" and "social perception" approaches represent the two main approaches to interpreting membership of a particular social group, the Guidelines sought to reconcile them by "adopt[ing] a single standard" that incorporates both as alternative, sequential tests in order to avoid "gaps" in protection.[66] Specifically, 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.[67]

Only "[i]f 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."[68] Thus, the Guidelines clearly indicate that

62. For information on the Global Consultations on International Protections, see the Consultations on the UNHCR's website at http://www.unhcr.org/protect/3b7cea164.htm (last visited Nov. 15, 2008).

63. *Id.*

64. UNHCR Brief in *Thomas*, *supra* note 57, at 4.

65. *Id.* at 4-5.

66. UNHCR, *Guidelines on Membership of a Particular Social Group*, *supra* note 6, para. 11.

67. *Id.* (emphasis added).

68. *Id.* para. 13 (emphasis added). In making social perception an alternative, secondary test in analyzing claims based on membership of a particular social group, the UNHCR relied on arguments made by Aleinikoff as part of the UNHCR's Global Consultations on International Protection. *See* Aleinikoff, *supra* note 3, at 294-301 (recognizing that common law countries have developed the social group ground primarily through the protected characteristics approach, but arguing that a social perception approach would be more inclusive). Aleinikoff's arguments have been rejected by scholars such as James C. Hathaway and Michelle Foster, who argue for a more principled, law-based approach and point out that "there is

the existence of a protected characteristic is sufficient to establish a particular social group and that the public perception approach should only be applied if no such characteristic exists.

In *K*, several members of the House of Lords interpreted the European Union Refugee Qualification Directive (QD), which became effective on October 10, 2006, as consistent with these Guidelines in that it recognizes that the "protected characteristic" and "social perception" approaches are alternative tests rather than dual requirements.[69] Lord Bingham indicated that interpreting the QD as requiring a group to satisfy both the "protected characteristic" and "social perception" tests would make the QD "more stringent than is warranted by international authority."[70] The BIA, on the other hand, has strayed from the UNHCR's interpretation, as discussed below.

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no clear evidence that the social perception test dependably results in the recognition of more groups than does the *ejusdem generis* (i.e. 'protected characteristic') framework." Hathaway & Foster, *supra* note 2, at 488 (alteration in original). Rodger Haines, on the other hand, has criticized the social perception approach as "enlarg[ing] the social group category to an almost meaningless degree." *See* RODGER HAINES, INTERIM REPORT ON MEMBERSHIP OF A PARTICULAR SOCIAL GROUP (1998), *available at* http://www.refugee.org.nz/Reference/Iarljpaper.htm.

69. Sec'y of State for the Home Dep't v. K, 1 A.C. 412, 432 (appeal taken from Eng. & Wales) (Lord Bingham); *id.* para. 46 (Lord Hope); *id.* para. 118 (Lord Brown). The UK Asylum and Immigration Tribunal (UKAIT), a lower level tribunal, however, has recently taken a different view. *See SB* [2008] UKAIT 00002 paras. 69, 73-74, *available at* http://www.ait.gov.uk/Public/Upload/j2087/00002_ukait_2008_sb_moldova_cg.doc (finding that Article 10.1(d) of the Qualification Directive, and regulation 6(1)(d), which implements it, do present dual requirements and that "the observations of their Lordships [in *K*] were obiter, although very persuasive, because it is clear that their Lordships did not decide the cases under regulation 6(1)(d) or Article 10.1(d) of the Qualification Directive"). The Qualification Directive outlines the minimum standards for qualifying third country nationals and stateless persons as refugees or persons otherwise in need of international protection. Article 10.1(d) of the QD provides:

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

Council Directive 2004/83/EC, On Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, art. 10(d), 2004 O.J. (L 304/12) (emphasis added).

70. *K*, [2006] 1 A.C. at 432 (Lord Bingham). The interpretation of Lords Bingham, Hope, and Brown is consistent with the UNHCR's comments on the Qualification

D. The BIA's New "Social Visibility" Test

Although the BIA has relied on *Acosta*'s "protected characteristic" approach for over two decades as virtually the sole method for determining whether a particular social group exists, its recent decisions in *C-A-* and *A-M-E-* emphasize the additional importance of "social visibility." Prior to these decisions, neither the BIA nor the federal courts mentioned "social visibility" as relevant to the particular social group analysis, yet the BIA did not acknowledge any departure from precedent. Moreover, although the BIA referenced the UNHCR Guidelines in both *C-A-* and *A-M-E-*, its use of "social visibility" did not coincide with the "public perception" approach described above; nor did the BIA apply the UNHCR's approach correctly.

1. The *C-A-* Case

In *C-A-*, the BIA found that a group defined as "noncriminal drug informants working against the Cali drug cartel" did not constitute 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."[71] After "review[ing] the range of approaches to defining particular social group," including the UNHCR Guidelines, the BIA asserted that it would "continue to adhere to the *Acosta* formulation," but added that it would "consider[] *as a relevant factor* the extent to which members of a society perceive those with the characteristic in question as members of a social group."[72] The BIA first analyzed whether the proposed social group had an "immutable characteristic" and, finding that it did not, turned to the issue of "visibility."[73]

In rejecting the group of confidential informants as socially visible, the BIA reasoned that "*the very nature of the conduct at issue is such that it is generally out of the public view.*"[74] The BIA stressed that "informant[s] against the Cali cartel intend[] to remain unknown and undiscovered," and "[r]ecognizability or visibility is limited to those informants who are discovered because they appear as

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Directive, which highlight the potential "gap" in protection that may emerge if both the "protected characteristic" and "social perception" tests must be satisfied to meet the definition of a particular social group. UNHCR, *Annotated Comments on the EC Council Directive*, *supra* note 57, comment on Article 10(d) (emphasis added).

71. C-A-, 23 I. & N. Dec. 951, 961 (B.I.A.), *aff'd*, Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006) (emphasis added).

72. *Id.* at 956-57 (emphasis added).

73. *Id.* at 958-59.

74. *Id.* at 960 (emphasis added).

witnesses or otherwise come to the attention of cartel members."[75] The BIA's analysis in *C-A-* 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. Moreover, *C-A-* seems to indicate 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 set forth above. Thus, although the BIA referenced the UNHCR Guidelines, it did not truly apply the "social perception" approach set forth therein.

In placing so much emphasis on "social visibility," the BIA never acknowledged a departure from precedent. On the contrary, it justified the "social visibility" test by asserting that its "decisions involving social groups have considered the recognizability, i.e., the social visibility, of the group in question."[76] After noting that "[s]ocial groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups," the BIA cited several cases that it decided under the *Acosta* standard.[77] For example, the BIA reasoned that in considering clan membership in *H-*, it "did not rule categorically that membership in any clan would suffice" but "examined the extent to which members of the purported group would be recognizable to others in Somalia."[78] The BIA went on to state that its "other decisions recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question," citing cases involving "Filipinos of mixed Filipino-Chinese ancestry,"[79] "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,"[80] "persons listed by the [Cuban] government as having the status of a homosexual,"[81] and "former members of the national police" of El Salvador.[82]

All of these decisions turned on an *Acosta* analysis based on immutable characteristics, not social perception or visibility. For example, in *Kasinga*, the BIA found that "[t]he characteristics of being a 'young woman' and a 'member of the Tchamba-Kunsuntu Tribe' *cannot be changed*" and that "[t]he character-

75. *Id.* Insofar as the respondent relied on the distinction between informants who "act out of a sense of civic responsibility" and those who act for compensation, the BIA found that this distinction "would also tie group membership to a factor not 'visible' to the Cali cartel or to other members of society." *Id.*

76. *Id.* at 959.

77. *Id.* at 959-60.

78. *Id.* at 959 (citing H-, 21 I. & N. Dec. 337 (B.I.A. 1996)).

79. *Id.* at 960 (citing V-T-S-, 21 I. & N. Dec. 792, 798 (B.I.A. 1997)).

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

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

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

istic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she *should not be required to change it.*"[83] Likewise, the homosexual status at issue in *Toboso-Alfonso* is an immutable characteristic that either cannot be changed or that one should not have to change; the characteristic of being of mixed race at issue in *V-T-S-* cannot be changed; and the past experience of belonging to the national police at issue in *Fuentes* is immutable. The mere fact that these groups may be recognizable does not support the BIA's suggestion that it has always examined social visibility or social perception in analyzing claims based on membership of a particular social group.

Furthermore, it seems doubtful that all of the cases cited by the BIA actually involved "highly visible" traits.[84] Even if one were to accept that the groups in question are recognized by the relevant societies, one would be hard-pressed to argue that the *members* of these groups are socially visible, as required by *C-A-*. The BIA's decision in *Kasinga*, for example, contains no information indicating that young women who oppose female genital cutting are publicly vocal about their opinion, or that anyone outside their families has reason to know whether or not they have undergone the practice.[85] In an amicus brief challenging the use of "social visibility" in defining a particular social group, the UNHCR points out that "the general population of Cuba would not recognize 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."[86]

2. The *A-M-E-* Case

Just seven months after deciding *C-A-*, the BIA issued its decision in *A-M-E-*, which placed even greater emphasis on "social visibility."[87] The Second Circuit remanded this case for the BIA to "'expand upon' *Acosta* . . . as to the meaning of 'particular social group' and to explain why 'affluent Guatemalans' are not a 'particular social group.'"[88] Although the BIA began its analysis in *A-M-E-* by stating the *Acosta* standard, it never actually conducted a thorough analysis under *Acosta* to determine whether the group of "wealthy Guatema-

83. Kasinga, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996) (emphasis added).

84. C-A-, 23 I. & N. Dec. 951, 960 (B.I.A. 2006), *aff'd*, Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006).

85. *Kasinga*, 21 I. & N. Dec. at 366.

86. UNHCR Brief in *Thomas*, *supra* note 57, at 8.

87. 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).

88. *Id.* at 73 (quoting Ucelo-Gomez v. Gonzales, 448 F.3d 180 (2d Cir. 2006)). The Second Circuit subsequently issued an order amending its opinion in the case. Ucelo-Gomez v. Gonzales, 464 F.3d 163 (2d Cir. 2006).

lans" has a protected characteristic. Specifically, the BIA found that wealth is a characteristic that *can* be changed, but did not fully address whether it is a characteristic so fundamental to identity that individuals should not be required to change it.[89] In fact, the BIA dedicated only one ambiguous sentence to this issue, stating "we would not expect divestiture when considering wealth as a characteristic on which a social group might be based."[90] While this one sentence suggests that wealth *might* be a protected characteristic, the BIA nevertheless immediately turned to the issue of visibility and rejected the proposed group on that basis.[91] In so doing, the BIA failed to apply the approach set forth in the UNHCR Guidelines, which explicitly provides that social perception should be considered only if there is no protected characteristic. Indeed, the BIA misconstrued the UNHCR Guidelines as generally "endors[ing] an approach in which an important factor is whether the members of the group are 'perceived as a group by society.'"[92]

The BIA then compounded the ambiguity of its analysis, stating that it "recently affirmed the importance of social visibility *as a factor* in the particular social group determination in *C-A-*," but in the very next sentence referring to "the *requirement* that the shared characteristic of the group should generally be recognizable by others in the community."[93] Thus, *A-M-E-* is internally inconsistent about whether social visibility is a factor or a requirement. From this point of confusion, the BIA began its analysis of whether the group of "wealthy Guatemalans" is socially visible. Finding "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," since the reports indicated that

89. *A-M-E-*, 24 I. & N. Dec. at 73.

90. *Id.* Given the dispute among refugee scholars as to whether a privileged social class can constitute a protected characteristic, the BIA should have engaged this complex issue, instead of avoiding it by basing its decision on "social visibility." *See* FOSTER, *supra* note 3 (arguing generally that the Refugee Convention is capable of accommodating claims based on the deprivation of economic and social rights); Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 461 (1985) (arguing that "the poor as a class . . . may constitute a persecuted 'social group' when the economic conditions underlying their poverty are attributable to the exercise or maintenance of political power"). *Compare* HATHAWAY, *supra* note 21, at 166 ("[T]he members of a privileged social class who resist renunciation of economic privilege are not protected, since it is within their ability voluntarily to renounce their property, an interest which is not protected under core human rights norms."), *with* T. Le & M. Esser, *The Vietnamese Refugee and U.S. Law*, 56 NOTRE DAME L. REV. 656, 664-65 (1981) (arguing that the Vietnamese "who left as a result of government action (such as the creation of 'New Economic Zones' or the promulgation of decrees eliminating private ownership)" qualify within the social group category).

91. *A-M-E-*, 24 I. & N. Dec. at 73.

92. *Id.* at 74.

93. *Id.* (emphasis added).

crime is "pervasive at all social-economic levels," the BIA concluded that it had "no reason to believe that the general societal perception would be otherwise."[94] The BIA also noted that "[f]rom the point of view of a criminal bent on extortion, persons with relatively modest resources or income [might still be] . . . potential targets."[95] For these reasons, the Board found that the proposed group of wealthy Guatemalans "fails the 'social visibility' test."[96]

While ambiguous and internally inconsistent, the BIA's decision in *A-M-E-* strongly suggests that the BIA is now applying the traditional "protected characteristic" test and its new "social visibility" test (which, as previously noted, differs from the international community's understanding of the "social perception" approach) as *dual* requirements instead of *alternative* tests.[97] In fact, a recent decision by the Ninth Circuit found that, under *A-M-E-*, "a shared characteristic of a group *must* generally be recognizable to others" and specifically referred to "the BIA's *requirement* of social visibility."[98] However, even if the

94. *Id.*

95. *Id.*

96. *Id.* In addition, the BIA held that the proposed group "fails the particularity requirement of the refugee definition," finding that "[t]he terms 'wealthy' and 'affluent' standing alone are too amorphous to provide an adequate benchmark for determining group membership." *Id.* at 76.

97. The BIA's decision in *Thomas*, No. A75-597-0331-034/-035/-036 (B.I.A. Dec. 27, 2007) supports this interpretation of *A-M-E-*. *Thomas* was remanded by the Ninth Circuit for consideration of whether the specific family involved ("Boss Ronnie's family") constitutes a particular social group, pursuant to the Supreme Court's decision in *Gonzalez v. Thomas*, 547 U.S. 183, 186 (2006) ("The agency has not yet considered whether [petitioner's] family presents the kind of 'kinship ties' that constitute a 'particular social group.' The matter requires determining the facts and deciding whether the facts as found fall within a statutory term."). In *Thomas*, the BIA found:

> Not all groups that have an immutable or fundamental characteristic will be considered particular social groups for purposes of asylum. As we explained in *C-A-*, *supra*, the group must also have a distinct, recognizable identity in the particular country at issue . . . The group must be perceived as being different from other groups or from society at large . . . .

Thomas, No. A75-597-0331-034/-035/-036, slip op. 6.

98. Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007) (emphasis added) (finding that "tattooed gang members" do not constitute a particular social group). In *Arteaga* the petitioner argued that his tattoos made him visible to the police and other gang members as a gang member. In rejecting the proposed social groups, the court reasoned 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." *Id.*; *see also*, Santos-Lemus v. Mukasey, 542 F.3d 738, 746 (9th Cir. 2008) (finding that young men in El Salvador resisting gang violence "fails to qualify as a particular social group because it lacks social visibility").

BIA is applying "social visibility" as an important factor in all social group cases, rather than a requirement, it still represents a sudden, significant departure from *Acosta* and other precedents, not to mention international authorities.

II. "Social Visibility" and Federal Judicial Deference to the BIA's Interpretation of a "Particular Social Group"

Since the BIA's decisions in *C-A-* and *A-M-E-* represent sudden, unexplained and incoherent departures from precedents—particularly *Acosta*—the federal courts should not defer to these decisions insofar as they emphasize "social visibility" when interpreting the meaning of "membership of a particular social group."[99] *Chevron* deference does not apply when an agency's interpretation of a statutory term conflicts with positions that the agency has taken in the past.[100] Moreover, the BIA's failure to offer any reasonable explanation for 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."[101]

The Second Circuit's decision in *Ucelo-Gomez v. Mukasey*, which granted *Chevron* deference to *A-M-E-* after remanding the case to the BIA for a published decision, is unpersuasive for several reasons.[102] First, the court reasoned that "*C-A-*'s social visibility requirement is consistent with" the reasoning of

99. The principles of deference under the rule of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), apply to the statutory scheme of the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503. *See* Immigration & Naturalization Serv. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (stating that the BIA, which is vested with the Attorney General's discretion and authority in cases before it, "should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication'") (quoting Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 448-49 (1987)). *Chevron* provides that when "the statute is silent or ambiguous with respect to the specific issue," the reviewing court should ask "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843.

100. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (finding that an "[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice"); Lal v. Immigration & Naturalization Serv., 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).

101. Robertson v. Methow Valley Citizens' Council, 490 U.S. 332, 356 (1989).

102. *Ucelo-Gomez*, 509 F.3d at 73.

Gomez v. INS, which provided that a "'particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.'"[103] The court did not recognize the key differences between *Gomez*'s approach, which resembles the international community's understanding of the "social perception" approach, and the BIA's new "social visibility" test. Like the Australian High Court's decision in *Applicant S*, *Gomez* indicated that a group may be distinguished from society based on an objective, third-party perspective ("the outside world in general") and that recognition by the persecutor is sufficient.[104] Furthermore, unlike *C-A-*, *Gomez* did not focus on whether group *members* were visible. Finally, while *Gomez* mentioned the relevance of external perception and distinguishing the group from society at large, it did not require *social* perception, much less *social visibility*, as integral to the particular social group analysis. *Gomez* therefore fails to justify or explain "*C-A-*'s social visibility requirement."[105]

Second, *Ucelo-Gomez* ignored how *Gomez* was seriously criticized by other circuits and significantly limited, if not repudiated, by the Second Circuit itself in *Gao v. Gonzales* because the decision "could (and has) been read as conflicting with *Acosta*."[106] In *A-M-E-*, the BIA acknowledged in a footnote that *Gao* limited the relevant language in *Gomez*, but nevertheless relied on *Gomez* because it represented the law "at the time of the Immigration Judge's decision

103. *Id.* (quoting Gomez v. Immigration & Naturalization Serv., 947 F.2d 660, 664 (2d Cir. 1991)). In *Gomez*, the court held that "women who have been previously battered and raped by Salvadoran guerillas" do not constitute a particular social group, reasoning that "broadly-based characteristics such as youth and gender will not by itself [sic] endow individuals with membership in a particular group." 947 F.2d at 663-64.

104. *Gomez*, 947 F.2d at 664.

105. *Ucelo-Gomez*, 509 F.3d at 73.

106. Gao v. Gonzales, 440 F.3d 62, 69 (2d Cir. 2006) (holding that women sold into marriage in a certain area of China belong to a "particular social group"), *vacated on other grounds*, Keisler v. Gao, 128 S. Ct. 345 (2007). In *Gao*, the Second Circuit found that "*Gomez* can reasonably be read as limited to situations in which an applicant fails to show a *risk* of future persecution on the basis of the 'particular social group' claimed, rather than as setting an *a priori* rule for which social groups are cognizable." *Id.* at 69. The court reasoned that this reading of *Gomez* "would appear to conform better to the BIA's reasonable interpretation of [the refugee definition] in *Acosta* and the consensus among the other circuits." *Id.* at 69-70. Prior to *Gao*, *Gomez* was criticized in *Lwin v. Immigration & Naturalization Serv.*, 144 F.3d 505, 512 (7th Cir. 1998) (stating that *Gomez* was "useful in pointing out the significance of external perceptions of a group," but "offer[ed] little guidance in the way of a positive definition of the term 'social group'"); and *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (finding that *Gomez* failed to take *Acosta* into account).

and [the BIA's] summary affirmance."[107] Insofar as the BIA's decisions in *C-A-* and *A-M-E-* may suggest that the BIA adopted *Gomez*'s "recognizable and discrete" requirement in precedents such as *H-*, this argument is unconvincing because that standard has only been mentioned sporadically by the BIA. While *H-* notes that tribal affiliations are "highly visible" and cites the standard in *Gomez*, neither perception nor visibility was integral to the BIA's conclusion, which stressed that "the Marehan share ties of kinship" and "are identifiable as a group based upon linguistic commonalities," confirming that it relied on immutable kinship and linguistic ties.[108] Just two weeks after deciding *H-*, the BIA issued its decision in *Kasinga*, where the social group was defined, in part, based on tribal affiliation, yet the BIA never mentioned *Gomez* or visibility in its brief analysis of the "particular social group," which focused solely on the immutable characteristics of gender, age, and "having intact genitalia."[109] Reading *H-* and *Kasinga* together, it is clear that the BIA never adopted the standard in *Gomez*, much less a social visibility test, prior to *C-A-*.

Last but not least, the court in *Ucelo-Gomez* found the BIA's "social visibility" test to be reasonable because it "relied heavily" on the UNHCR Guidelines.[110] As discussed above, however, the BIA's approach in *A-M-E-* clearly contradicts the UNHCR Guidelines by failing to follow the proper sequential analysis, and the BIA's interpretation of "social visibility" differs from the UNHCR's (and the international community's) understanding of "social perception." Thus, the BIA's new approach not only diverges from domestic precedents and international decisions, but also contradicts the views of the preeminent authority on the interpretation of refugee law. As a State Party to the 1967 Protocol, the United States is obliged to "co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol."[111] By misconstruing and misapplying the UNHCR's approach to analyzing social group claims, the United States shirks its responsibilities under the Protocol. Moreover, the U.S. Supreme Court has long held that courts must construe statutes in a manner consistent with the United States's international obligations whenever possible.[112] The

107. A-M-E-, 24 I. & N. Dec. 69, n.7 (B.I.A. 2007).

108. H-, 21 I. & N. Dec. 337, 342-43 (B.I.A. 1996).

109. Kasinga, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996).

110. *Ucelo-Gomez*, 509 F.3d at 73.

111. 1967 Protocol, *supra* note 1, at art. II, para. 1; *see also* 1951 Convention, *supra* note 1, art. 35, para. 1.

112. *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. (1 Cranch) 64, 118 (1804) ("[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."); Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 432-33 (1987) (finding "abundant evidence" that Congress intended to conform the definition of refugee and the asylum law of the United States "to the United Nations Protocol to which the United

BIA's construction of the statutory term "membership in a particular group" in *C-A-* and *A-M-E-* is inconsistent with its international obligations. The federal courts should therefore reject the BIA's "social visibility" test and interpret "membership of a particular social group" in a manner consistent with the statute and international law.

III. The Practical Challenges of the "Social Visibility" Approach

While the previous Parts explain why the BIA's new "social visibility" test is inconsistent with domestic and international law, this Part explores why the "social visibility" test will be inherently difficult to apply. Since this approach seems mostly subjective and sociological in nature, not based on legal norms and principles like the "protected characteristic" approach, it poses unique evidentiary challenges and likely will result in inconsistent and incoherent decisions. As Rodger Haines, Chairperson of the New Zealand's Appeals Authority, has noted, "[a]t a practical level the state of mind of the persecutor [or society in general] may be beyond ascertainment even from the circumstantial evidence."[113]

A. The Inherent Difficulty in Assessing Public Perceptions

In *The Principles of Psychology*, William James wrote, "a man has as many social selves as there are individuals who recognize him."[114] Recent studies in cognitive science, neuroscience, and psychology have dissected the ways in which we perceive and categorize people differently depending on numerous factors, including, but not limited to, our own group membership, emotional state, recent interactions with group members, the stereotypes that we hold

States has been bound since 1968"). The Supreme Court has also confirmed that the basis for Congress's extremely broad power over aliens comes not from the Constitution, but from international law. "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions . . . ." Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). Since Congress's power over aliens rests at least in part on international law, courts should consider international law norms in interpreting statutes that pertain to aliens. *See, e.g.*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) ("[W]e note that in upholding the plenary power of Congress over exclusion and deportation of aliens, the Supreme Court has sought support in international law principles. It seems proper then to consider international law principles for notions of fairness . . . .") (citation omitted).

113. No. 72635/01, slip op. para. 168 (Refugee Status App. Auth. Sept. 6, 2002) (N.Z.), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_20020906_72635.pdf.

114. 1 William James, The Principles of Psychology 280-81 (Frederick Burkhardt & Fredson Thayer Bowers eds., Harvard Univ. Press 1981) (1890) (emphasis omitted).

about particular groups, and perceptions of emotional displays.[115] In other words, social perception depends not only on the identity of the perceiver, but the emotional states of the perceiver and the perceived at any given moment, as well as the interactions that group members have had in the past. Social perception may also be quite different "depending on whether perceivers put themselves in the shoes of the perceived."[116]

The concept of social perception becomes even fuzzier when one realizes that our "momentary construals" of our own "ingroups" shape our judgments about "outgroups."[117] Furthermore, "[s]ince nearly any kind of social judgment implies a comparison to a standard, changing standards can have strong effects on how people judge a particular target."[118] How we perceive others is further complicated because:

> [e]very person belongs to a diverse variety of social categories (e.g., gender, ethnicity, occupation, etc.), and this complexity of identities poses challenges for processes of social perception and impression formation. Given the array of characteristics associated with each of a target's social identities, the perceiver faces a glut of implied information, not all of which will necessarily be useful in any given situation. Social perceivers must navigate among these multiple categories when

115. *See, e.g.*, THE PSYCHOLOGY OF GROUP PERCEPTION: PERCEIVED VARIABILITY, ENTIATIVITY, AND ESSENTIALISM (Vincent Yzerbyt, Charles M. Judd & Olivier Corneille eds., 2004) (discussing recent research in the study of group perception, focusing on "entiativitiy," which means the extent to which an aggregate of individuals is perceived as a group, "variability," which refers to the extent to which group members are perceived as homogenous or diverse, and "essentialism," which describes the extent to which social groups/categories are seen as natural kinds); Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342, 345 (2004); Matthew D. Lieberman & Jennifer H. Pfeifer, *The Self and Social Perception: Three Kinds of Questions in Social Cognitive Neuroscience*, *in* THE COGNITIVE NEUROSCIENCE OF SOCIAL BEHAVIOUR 195-235 (Alexander Easton & Nathan J. Emery eds., 2005) (discussing how social stimuli are often ambiguous and often interpreted in accordance with our self-serving biases).

116. Lieberman & Pfeifer, *supra* note 115, at 223.

117. Bertram Gawronski, Galen V. Bodenhausen & Ranier Banse, *We Are, Therefore They Aren't: Ingroup Construal as a Standard of Comparison for Outgroup Judgments*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 515, 524 (2005) (internal citations omitted). An "ingroup" is a social group towards which an individual feels loyalty and respect, usually due to membership in the group. *Id.* An "outgroup," conversely, is a social group towards which the individuals feel contempt, opposition, or a desire to compete. *Id.*

118. *Id.* at 515 (internal citations omitted).

> making decisions about others, constantly determining which categories are situationally important and which are not.[119]

Consequently, an individual may be perceived as belonging to a particular social group in one situation but not in another, depending on which of the individual's characteristics are most relevant in the given context.

These studies shed light on the inherent difficulties that adjudicators will face in attempting to assess a given society's perception of a particular group, especially if they consider visibility a static rather than dynamic phenomenon. As Kenji Yoshino points out,

> a common strategy employed to control invisible groups forces them to convert their invisibility into visibility—through brandings, scarlet letters, public notifications, and the like. Conversely, the discretion of invisible groups may be cabined by precluding them from voluntarily converting their invisibility into visibility.[120]

In short, it would be naïve for adjudicators to treat social perception or social visibility as a consistent and reliable means of determining whether a particular social group exists. Whether a group is socially perceived as distinct cannot be treated as an all-or-nothing phenomenon, as social perception is a "subjective process shaped by an individual's current motivation, emotion, and cognition, as well as his or her more long-standing traits," such as personality and assumptions, beliefs and expectations about the self and the world.[121] In some cases, the same group may be both socially invisible and hypervisible as a stereotypical object. For example, in discussing the perception of blacks in the United States, Patricia Williams writes, "[h]ow, or whether, blacks are seen depends upon a dynamic of display that ricochets between hypervisibility and oblivion."[122] While "the real lives of real blacks unfold outside the view of many whites, the fantasy of black life as a theatrical enterprise is an almost obsessive indulgence."[123] Williams's description echoes the experience of the unnamed African-American narrator in Ralph Ellison's novel, *Invisible Man*, who is "invisible" simply because "people refuse to see [him]."[124] He states, "[l]ike the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorted glass. When they approach me they see only my surroundings, themselves, or figments of their imagination—

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119. Kurt Hugenberg & Galen V. Bodenhausen, *Category Membership Moderates the Inhibition of Social Identities*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 233 (2004) (internal citations omitted).

120. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 544 (1998).

121. Lieberman & Pfeifer, *supra* note 115, at 195.

122. PATRICIA J. WILLIAMS, SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE 17 (1997).

123. *Id.*

124. RALPH ELLISON, INVISIBLE MAN 7 (Penguin Books 1981) (1952).

indeed, everything and anything except me."[125] Thus, even a physical characteristic such as race can be visible and invisible at the same time, due to the "peculiar disposition" of the eyes of the perceiver.[126]

Another problem that the emphasis on social perception poses in analyzing a particular social group is that the group may be defined in terms of only one aspect (or a few aspects) of the individual's identity, while social perception may respond to multiple aspects of the individual's identity. For example, in the case *SB Moldova*, where the UKAIT applied the social perception approach, the tribunal accepted a particular social group that focused exclusively on one characteristic of the appellant—having been trafficked for sexual exploitation in the past—and ignored her gender, reasoning that both men and women could be "former victims of trafficking for sexual exploitation" and that the social group was therefore gender neutral.[127] In other words, the UKAIT artificially separated the appellant's gender from her past experience of being trafficked. This type of artificial separation is not usually possible, however, in analyzing social perceptions. Indeed, the evidence on which the UKAIT relied indicated that the vast majority of sexual trafficking victims in Moldova are female.[128] Moreover, the stigma these women experience within their families and communities after being sexually exploited is related to their gender, since they are perceived to be akin to female prostitutes.[129] Thus, the social perception analysis implicitly took gender into account although the definition of the particular social group did not.

Of course, social perceptions often do not capture the true complexity of an individual's identity. "[T]he sheer complexity of social life, paired with an all-too-common lack of motivation or capacity to process others in a complex manner, can lead to focusing on just one of the many available categorizations" and forming "a simplified impression of the target, based on the single, dominant category."[130] Some studies indicate that if there are two competing categories—for example religion and sexual orientation—focusing on one category actually tends to inhibit perception of the second category.[131] However, when the categories are female gender and sexual exploitation, the cultural values and stigmas associated with female sexuality clearly come into play, and the two categories of gender and sexuality can be triggered simultaneously.[132] As previ-

125. *Id.*

126. *Id.*

127. SB [2008] UKAIT 00002, para. 53, *available at* http://www.ait.gov.uk/Public/Upload/j2087/00002_ukait_2008_sb_moldova_cg.doc.

128. *Id.* paras. 92-93.

129. *Id.* paras. 102-05.

130. Hugenberg & Bodenhausen, *supra* note 119, at 233 (internal citations omitted).

131. *See id.* at 237.

132. *See, e.g.*, Svati P. Shah, *Producing the Spectacle of Kamathipura: The Politics of Red Light Visibility in Mumbai*, 18 CULTURAL DYNAMICS 269, 270 (2006) (discussing

ously noted, people have multiple, dynamic social identities that vary according to context, and different aspects of identity may be more or less prominent in any given situation.[133] While advocates and adjudicators may be able to tease these identities apart in framing the particular social group, it would be extremely difficult, if not impossible, for them to do so in analyzing social perception. Due to the various difficulties inherent in assessing social perception, adjudicators may simply rely on assumptions, instincts, or generalizations rather than actual evidence in determining whether or not a certain group is perceived as a social group by society.[134] For all of these reasons, the "social perception" and "social visibility" approaches will result in inconsistent and incoherent decisions.

B. The Difficulty of Deriving "Social Perception" or "Social Visibility" from Traditional Types of Documentary Evidence

The types of documentary evidence typically submitted in asylum cases could never capture the complexity of social perceptions described above. Indeed, adjudicators would be hard-pressed to derive even an oversimplified view of social perceptions from State Department reports, human rights reports, news articles, and other documents that focus on "objective" reporting. In *A-M-E-*, for example, the record appears to have contained little, if any, direct evidence of Guatemalan society's perceptions of the wealthy. The only direct evidence of social perception of *any kind* mentioned in the decision pertains to perceptions of crime. Specifically, the BIA quoted a passage from a U.S. State

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how the discourse of trafficking has become largely synonymous with female prostitution in the global South, excluding discussion of men or transgendered people selling sexual services).

133. *See, e.g.*, S. Alexander Haslam et al., *Context-Dependent Variation in Social Stereotyping 1: The Effects of Intergroup Relations as Mediated by Social Change and Frame of Reference*, 22 EUR. J. SOC. PSYCHOL. 3, 5 (1992). *See generally* Penelope J. Oakes, S. Alexander Haslam & Katherine J. Reynolds, *Social Categorization and Social Context: Is Stereotype Change a Matter of Information or of Meaning?*, *in* SOCIAL IDENTITY AND SOCIAL COGNITION 55, 71 (Dominic Abrams & Michael A. Hogg eds., 1999); S. Alexander Haslam & John C. Turner, *Context-Dependent Variation in Social Stereotyping 2: The Relationship Between Frame of Reference, Self-Categorization and Accentuation*, 22 EUR. J. SOC. PSYCHOL. 251, 251-77 (1992); S. Alexander Haslam & John C. Turner, *Context-Dependent Variation in Social Stereotyping 3: Extremism as a Self-Categorical Basis for Polarized Judgment*, 25 EUR. J. SOC. PSYCHOL. 341, 341-47 (1995).

134. This is particularly true in cases involving prostitution, whether forced or voluntary. *See, e.g.*, X, T98-06186, [1999] CanLII 14662 (Immigration & Refugee Bd. Refugee Div. Nov. 2) (Can.), *available at* http://www.irb.gc.ca/en/decisions/reflex/index_e.htm?action=article.view&id=2822 (asserting, without citing any evidence, that "sex trade workers in almost any society, are easily identified and associated in the eyes of others, most notably the police, as a particular group of people").

Department report that cited an August 1996 "public opinion poll" showing that "70 percent of those interviewed considered violence the major problem in Guatemala."[135] The report further stated that "[i]n the past, most acts of violence in the country tended to be regarded as politically motivated, but the public perception seems to be changing now that the civil war has ended."[136] It is unclear from the BIA's decision whether or how these comments regarding perception of crime affected the analysis, but they clearly do not address the issue of how wealthy Guatemalans are socially perceived.

Given the dearth of direct evidence on social perception in typical background documents, adjudicators may place undue weight on whether a proposed group has been subjected to past harm in determining whether society recognizes the group. As both *C-A-* and *A-M-E-* recognize, the UNHCR Guidelines indicate that past harm may be *a relevant factor* in determining whether society perceives a proposed group.[137] When no other evidence of perception is available, however, adjudicators may end up relying primarily, if not exclusively, on evidence of harm in analyzing the social group issue. The risk, of course, is that the resulting analysis would confuse or conflate the "persecution" (i.e., seriousness of harm), "well-founded fear" (i.e., level of risk), "on account of" (i.e., causal nexus) and protected ground elements of the refugee definition, making it impossible to determine whether a "particular social group" exists without discussing the harm experienced or feared by the proposed group and the causal connection between the shared characteristic and the harm. This is exactly what happened in *A-M-E-*, where the BIA limited its analysis to whether "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.*"[138] Instead of simply asking whether "wealthy Guatemalans would be recognized as a group," the BIA folded the feared persecution into the social group inquiry. Moreover, in emphasizing that crime cuts across all socioeconomic classes in Guatemala, the BIA's discussion of "social visibility" appears more relevant to an analysis of the nexus requirement than to the protected ground.[139] While various courts have

135. A-M-E-, 24 I. & N. Dec. 69, 75 (B.I.A. 2007) (quoting U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, GUATEMALA-PROFILE OF ASYLUM CLAIMS & COUNTRY CONDITIONS 4 (1997)).

136. *Id.*

137. UNHCR, *Guidelines on Membership of a Particular Social Group*, *supra* note 6, para. 14.

138. *A-M-E-*, 24 I. & N. Dec. at 74 (emphasis added).

139. On review, when the court in *Ucelo-Gomez* expanded on the reasons for rejecting the proposed group, it similarly erred by conflating the "particular social group" and "nexus" elements, stating:

> [I]t matters that the petitioner's self-definition as a social group for asylum purposes depends on no disadvantage other than purported visibility to criminals. When the harm visited upon members of a group is attributable to the incentives presented to ordinary criminals rather than to

endorsed a holistic approach to interpreting the refugee definition, a holistic approach "does not deny the necessity to analyse each constituent element or to examine the relationship of the elements to each other," as "[i]t is essential to ensure that one element is not inadvertently given a function or meaning which more properly belongs to another."[140] The "social visibility" approach significantly increases these risks, and will likely lead to incoherent, legally unsound decisions.[141]

Even in cases with more extensive documentary evidence that provide alternative sources for analyzing social perception besides the experience of harm, the "social visibility" test will be difficult to apply and may well result in inconsistent decisions. In *SB*, for example, the UKAIT clearly struggled with determining social perception, despite the case's thorough record, since the evidence could be interpreted in different ways. For example, the evidence indicated that Moldovans are very concerned about human trafficking, which the UKAIT noted could be a "potential indicator[] as to whether trafficked victims are perceived as being different by the surrounding society."[142] Immediately afterwards, however, the UKAIT asserted that "the mere fact that there are high levels of awareness of a particular problem in a given society does not mean that those members of society in the problem group are perceived to be different by the surrounding society."[143]

The UKAIT also struggled with inconsistencies in the evidence. For example, it noted that, on the one hand, "the fact that Modlovans do not blame the victims . . . for their experience of having been trafficked . . . may be an indication that victims may not be perceived differently by the surrounding society."[144] On the other hand, however, it found that "the evidence of social stigmatisation in Moldova . . . against persons who have been trafficked for sexual

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> persecution, the scales are tipped away from considering those people a 'particular social group' within the meaning of the [Immigration and Nationality Act].

Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007). In other words, the Court found that the absence of a nexus decreased the likelihood of the existence of a particular social group.

140. No. 74665/03, slip op. para. 48 (Refugee Status App. Auth. July 7, 2004) (N.Z.), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/REF_20040707_74665.pdf.

141. Since social perceptions and attitudes may also be relevant to showing that the harm feared is *on account of* membership in a particular social group, adjudicators applying the social perception approach are particularly likely to confuse or conflate the "nexus" and "protected ground" elements of the refugee definition.

142. SB [2008] UKAIT 00002 para. 96, *available at* http://www.ait.gov.uk/Public/Upload/j2087/00002_ukait_2008_sb_moldova_cg.doc.

143. *Id.*

144. *Id.* para. 98.

exploitation tends to go against any assumption along these lines.[145] The UKAIT reasonably found that this evidence of stigmatization, including the practice of painting a prostitute's door black, was "indicative of societal attitudes towards prostitutes in Moldova."[146] After asserting its "misgivings about the evidence," the tribunal ultimately concluded that "individuals who have been trafficked for the purposes of sexual exploitation are reasonably likely to be perceived as being different by the surrounding society if the fact that they had been trafficked for the purposes of sexual exploitation is known to the surrounding society."[147] Overall, the UKAIT's analysis in *SB* conveys how challenging it can be for an adjudicator to determine social perceptions even in well-documented cases.

The "social perception" and "social visibility" approaches to asylum claims implicitly recognize the ways in which social judgments define who we are and how our lives unfold; they also implicitly recognize that group categories are largely imagined.[148] For the same reasons, however, these approaches are inherently difficult to apply: the complexity of the human mind can never be captured in a limited legal proceeding.

IV. The Possible Negative Impact of the BIA's New "Social Visibility" Test on Asylum Claims Based on Sexual Orientation and Gender

The "social visibility" test not only represents a sudden departure from precedent and is inherently difficult to apply, but also may pose significant new challenges for asylum claims based on sexual orientation and gender. Since claims based on sexual orientation, especially those brought by women, provide the clearest example of visibility's negative impact, I discuss these claims in the most detail. I then discuss three other types of gender-related claims—those based on family ties, domestic violence, and human trafficking—as additional examples of how a "social visibility" test may lead to the exclusion of some of the most vulnerable groups.[149]

145. *Id.*

146. *Id.* para. 105.

147. *Id.* at 106.

148. As the linguist George Lakoff notes, "there are a great many categories of mind and language that are not reflections of alleged categories of the world." George Lakoff, Women, Fire and Dangerous Things: What Categories Reveal About the Mind 197 (1990).

149. In its amicus brief in *Thomas*, the UNHCR cautioned the BIA against requiring either a "social perception" or "social visibility" test because "such a rigid approach . . . may disregard groups that the Convention is designed to protect." UNHCR Brief in *Thomas*, *supra* note 57, at 10.

A. The Potential Impact of the "Social Visibility" Test on Asylum Claims Based on Sexual Orientation

While "homosexuals," "gay men," "gay men with female sexual identities," and, implicitly, "lesbians" have all been recognized as particular social groups in the United States, requiring social visibility may make it more difficult to prevail in asylum claims based on sexual orientation, particularly where the claimants are women.[150] Unlike some characteristics or traits, sexual orientation is not externally visible, and sexual minorities often feel compelled to hide their orientation for various reasons. Writing about Latin America, Bill Fairbairn explains:

> [T]he 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 few exceptions, most of the abuses committed against lesbians and gay men in Latin America remain shrouded in silence, misinformation, and misunderstanding.[151]

These observations, which apply to gay men and lesbians in many countries around the world, stress the link between invisibility and persecution. By requiring social visibility to establish a particular social group, the BIA neglects the ways that invisibility forms a core part of the experience of oppression.[152] In

150. *See, e.g.*, Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (finding, implicitly, that a Ugandan lesbian was a member of a particular social group); Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that "*all* alien homosexuals are members of a 'particular social group'"); Hernandez-Montiel v. Immigration & Naturalization Serv., 225 F.3d 1084 (9th Cir. 2000) (recognizing a "gay man with a female sexual identity" as a member of a particular social group); 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).

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

152. In *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005), the court reasoned that even if the petitioner had not been "outed" as a gay man and was not at risk of persecution in Lebanon based on his past homosexual acts, being forced to stay in the closet and live a life of celibacy was not an "acceptable" option. Quoting the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), the Ninth Circuit found that "'[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.'" *Karouni*, 399 F.3d at 1173 The Court went on to explain that "[t]his is but one reason why 'the[] sexual identities [of homosexuals] are so fundamental to their human identities that they should not be required to change them.'" *Id.* (quoting *Hernandez-Montiel*, 225 F.3d at 1094). Accordingly, the court rejected the argument "that the [Immigration and Nationality Act] requires Karouni to change 'an innate characteristic . . . so fundamental,' or to relinquish such an 'integral part of [his] human freedom.'" *Id.* (internal citations omitted);

"Marxist terms, invisibility is the most extreme form of alienation—the ultimate manifestation of self-estrangement."[153]

As Justice Albie Sachs of the Constitutional Court of South Africa eloquently stated in a decision invalidating South Africa's anti-sodomy laws:

> In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.
> ... Gays constitute a distinct though invisible section of the community that has been treated not only with disrespect or condescension but with disapproval and revulsion ... their identifying characteristic combines all the anxieties produced by sexuality with all the alienating effects resulting from difference ....[154]

Justice Sachs's opinion forcefully demonstrates how oppressive domestic laws, societal hostility, discrimination, and prejudice can force gays to remain socially invisible. Ironically, a social visibility requirement will make it more difficult for sexual minorities from the most oppressive countries to obtain asylum.[155]

Iranian President Mahmoud Ahmedinejad's recent speech at Columbia University highlights the significant gap in protection of sexual minorities that may emerge because of a social visibility requirement.[156] President Ahmedinejad publicly maintained that Iranian homosexuals do not exist, although the international gay advocacy group Outrage reports over 4000 executions of gay men

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see also Yoshino, *supra* note 120, at 547 (discussing the "dramatic" costs that concealing identity imposes on invisible groups such as gays, including "the epistemic harms of alienation, the onerous labor of passing, and the moral burden of doing so," as well as "the ontic harm of identity erasure").

153. Lynn May Rivas, *Invisible Labors: Caring for the Independent Person*, *in* GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 70, 79 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002).

154. Nat'l Coal. for Gay and Lesbian Equal. v. Minister of Justice 1998 (1) SA 1 (CC) paras. 127-28 (S. Afr.).

155. *Cf.* Fadi Hann, Soto Vega: *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913, 918 (2005) (arguing that "reactionary covering," defined as "covering motivated by fear," is "more than mere evidence of fear of persecution: It constitutes persecution").

156. *See, e.g.*, CNN News, *Ahmedinejad Speaks; Outrage and Controversy Follow*, Sept. 24, 2007, http://www.cnn.com/2007/US/09/24/us.iran/index.html (last visited Nov. 19, 2008). President Ahmedinejad asserted that "[i]n Iran, there are no homosexuals like in your country." *Id.*

and lesbians in Iran since the Ayatollah seized power in 1979.[157] Ahmedinejad's point of view demonstrates how a society can publicly deny the existence of sexual minorities, thereby rendering them socially "invisible" while at the same time persecuting them. Moreover, it shows that a society can persecute individuals based on a certain trait or characteristic without ever recognizing individuals with that trait as having a special social identity, even though individuals who possess the trait and the outside world may perceive the group to exist. The BIA's social visibility test fails to take this into account, as neither *C-A-* nor *A-M-E-* considers the perspective of the group members themselves, and *C-A-* completely fails to consider an objective, third-party perspective, while *A-M-E-* merely notes that the affluent do not seem to be subject to greater human rights violations than the rest of society, without any further analysis of whether the affluent objectively constitute a distinct social segment.[158] As noted above, in *Applicant S*, the High Court of Australia explicitly rejected such a narrow interpretation of the social perception approach.[159]

Before the Australian High Court repudiated its "discretion" requirement in asylum cases based on sexual orientation—the requirement that applicants adjust their behavior to become discreet and avoid persecution—the invisibility of homosexuals in highly repressive countries such as Iran actually led to the perverse conclusion that such countries were "tolerant" of homosexuality.[160] In *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*, which involved a gay couple from Bangladesh, the High Court of Australia implicitly recognized the perversity of this logic in finding that "persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of

157. *See, e.g.*, Integrated Reg'l Info. Networks (IRIN), *Iran: Activists Condemn Execution of Gay Teens*, Jan. 27, 2008, http://www.irinnews.org/report.aspx?reportid=25296 (last visited Nov. 19, 2008).

158. C-A-, 23 I. & N. Dec. 951, 960-61 (B.I.A. 2006) (considering only the perspective of the Cali drug cartel and other drug cartels); A-M-E-, 24 I. & N. Dec. 69, 75 (B.I.A. 2007) (considering the "general societal perception" in Guatemala and "the point of view of a criminal bent on extortion").

159. *See supra* Section I.B.

160. *See* Nezhadian v. Minister for Immigration & Multicultural Affairs (2001) F.C.A.1415 (Fed. Ct.) (Austl.), *aff'd* Applicant W.A.B.R. v. Minister for Immigration & Multicultural Affairs (2002) 121 F.C.R. 196 (Austl.); Khalili v. Minister for Immigration & Multicultural Affairs [2001] F.C.A. 1404 (Fed. Ct.) (Austl.), *aff'd* S.A.A.F. v. Minister for Immigration & Multicultural Affairs [2002] F.C.A. 343 (Austl.); Jenni Millbank, *Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation*, 1 SEATTLE J. SOC. JUST. 725, 731 & n.32 (2003) (citing Applicant S.A.A.M. v. Minister for Immigration & Multicultural Affairs (2002) F.C.A. 444 para. 20 (Fed. Ct.) (Austl.)). The Federal Court has held that such conclusions are unreviewable. Gholami v. Minister for Immigration & Multicultural Affairs (2001) F.C.A. 1091 para. 14 (Fed. Ct.) (Austl.).

nationality."[161] The country conditions evidence submitted in the case indicated that "homosexuality is not accepted or condoned by society in Bangladesh, that it is not possible to live openly as a homosexual, but that people prefer to ignore the issue rather than confront it, and that 'Bangladeshi men can have homosexual affairs or relationships, provided they are discreet.'"[162] In other words, as in Iran, gay men in Bangladesh remained largely invisible in society. The tribunal had denied the men's claims on the basis that they could avoid persecution in Bangladesh by being "discreet" about their sexual orientation and relationships. Although the High Court's decision focused on this "discretion requirement," which it ultimately rejected as discriminatory, and not on "social perception" of homosexuals per se, the decision provides valuable insight into the ways in which a social perception requirement could lead to bizarre results.[163] Likewise, in *Refugee Appeal No. 74665/03*, the New Zealand Refugee Status Appeals Authority explained that most homosexuals in Iran must carefully hide their sexual orientation in order "[t]o avoid severe criminal penalties, extrajudicial beatings, societal disapproval, public humiliation, discrimination and unequal treatment."[164] This decision highlights how group *members* may remain invisi-

161. Appellant S395/2002 v. Minister for Immigration & Multicultural Affairs (2003) 216 C.L.R. 473 (Austl.) (McHugh & Kirby, JJ.); *see also* Catherine Dauvergne & Jenni Millbank, *Before the High Court, Applicants S396/2002 and S395/2002, A Gay Refugee Couple from Bangladesh*, 25 SYDNEY L. REV. 97, 104 (2003) (noting "the paradox involved in characterizing various regimes as 'tolerant' of something that is officially non-existent and kept secret through the force of legal proscriptions and extreme cultural hostility).

162. *Gholami*, at (2001) F.C.A. 1091 para. 5.

163. *See also* Karouni v. Gonzales, 399 F.3d 1163, 1172-73 (9th Cir. 2005) (rejecting arguments that gay individuals can avoid persecution by being discreet or refraining from homosexual conduct).

164. No. 74665/03, slip op. para. 126 (Refugee Status App. Auth. July 7, 2004), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/REF_20040707_74665.pdf (holding that a homosexual from Iran "who is discreet and who is unknown to the authorities" remains at risk of being persecuted). In this case, the Authority took the "being persecuted" element as the starting point of its analysis because it "allow[ed] identification of the boundaries set by international human rights law for both the individual and the state." *Id.* para. 120. Identifying these boundaries, in turn, made it "possible to determine whether the proposed action by the claimant is at the core of the right or at its margins and whether the prohibition or restriction imposed by the state is lawful in terms of international human rights law." *Id.* The Authority reasoned that "[i]f the proposed action is at the core of the right and the restriction unlawful," then "the claimant has no duty to avoid the harm by being discreet or by complying with the wishes of the persecutor." *Id.* Whether the claimant "choose[s] to carry out the intended conduct or to act 'reasonably' or 'discreetly' in order to avoid the threatened serious harm" is not relevant to the analysis because "[n]one of these choices . . . engages the Refugee Convention." *Id.*

ble even if there is "strong religious and societal disapproval of homosexuality."[165]

Roger Lancaster has used the term "public secret" to describe "the uneasy predicament of queers in Nicaragua."[166] He explains,

> In public secrecy, one is neither completely hidden nor, short of catastrophe, completely exposed, but always, it would seem, on the cusp of the two: concealed within what is revealed, and revealed within what is concealed; installed in a liminal space of magical transformations and creative spectacle but also of terror, madness, and paranoia.[167]

According to Lancaster,

> [T]olerant intolerance . . . explains the somewhat schizoid picture conveyed by ethnographic and historical reports on sexual cultures in Latin America: on the one hand, the happy-go-lucky adventurism of carnival transvestism and *zócalo* cruising; on the other, the everyday brutality of inescapable stigma and relentless taunting. Whether one sees expression or repression, tolerance or intolerance, depends on where one looks, on which conversations, and in what settings, one participates.[168]

Lancaster's words emphasize that social perception and visibility depend highly on context. Visibility depends not only on who is looking and where, but also on contemporaneous economic, political, and cultural events. For example, middle-class gay men may suddenly become much more visible during a "moral renovation" campaign linked to a political legitimacy crisis and crackdowns on gay subcultures.[169] This is one reason why the BIA's interpretation of "social visibility" in *C-A-* and *A-M-E-* is so problematic: it suggests that social visibility is a black or white phenomenon without recognizing the shades of gray in between, and ostensibly without any awareness that the same group may be able to move between visibility and invisibility depending on time and context. Lancaster's analysis also highlights why the social perception approach raises such complex evidentiary issues. Country conditions documents and human rights reports rarely convey the complexity of the "schizoid picture" that Lancaster describes.

The complexity surrounding the "social visibility" of sexual minorities in general makes application of the social perception test to this group very challenging and, as discussed above, may well lead to paradoxical and grossly unfair results. "When covering [i.e. passing] is the result of fear, denial of asylum based even in part on gay visibility contravenes the central goal of asylum

165. *Id.* para. 126.

166. Roger N. Lancaster, *Tolerance and Intolerance in Sexual Cultures in Latin America*, *in* PASSING LINES, *supra* note 151, at 262 (internal citations omitted).

167. *Id.* at 263.

168. *Id.* at 264.

169. *Id.* at 266.

law."[170] Asylum claims brought by lesbians, in particular, are likely to be detrimentally impacted by the social visibility requirement. While gay men's sexualities sometimes have a public face, lesbians often remain completely invisible in the public sphere.[171] Researchers investigating how gender shapes gay and lesbian geographies confirm that "gay men often . . . [produce] highly visible territorial enclaves in inner-city areas, whereas lesbian forms of territoriality at the urban scale . . . [often remain] 'invisible' since their communities are constituted through social networks rather than commercial sites."[172] The "complete lack of visibility of lesbians" from the public sphere "has been noted as an act of repression in and of itself."[173]

Likewise, the type of harm that lesbians experience "does not often take place in the public arena."[174] A comparative study of refugee decisions from Canada and Australia found that "[l]esbians had great difficulty grounding their claims, as their experiences were 'too private,' while the experiences of gay men were often characterized as 'too public.'"[175] The "private" harm experienced by lesbians may include physical and sexual abuse by family members or other non-governmental individuals; forced marriages; coercive and harmful medical or psychological "treatment"; family isolation and ostracism; and eviction from the home. These risks are, of course, compounded by institutionalized discrimination against women and sexual minorities. In order to avoid the harm that results from visibility, lesbians may marry men, lead double lives, or otherwise attempt to pass as heterosexual, which reduces the likelihood that they will be perceived socially as gay. The economic oppression of women in general may also force lesbians to remain silent about their sexual orientation;

170. Hanna, *supra* note 155, at 918. Hanna borrows the term "covering" from constitutional law scholar Kenji Yoshino and sociologist Erving Goffman, who use it to describe how individuals downplay stigmatized identities, even when those identities are known to the world. *See* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 102 (1963) ("It is a fact that persons who are ready to admit possession of a stigma . . . may nonetheless make a great effort to keep the stigma from looming large . . . this process will be referred to as covering."); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 91-92 (2006) (describing four axes along which individuals can cover: "appearance," or how an individual physically presents himself to the world, "affiliation," which concerns cultural identifications, "activism," which concerns how much someone politicizes his identity, and "association," which concerns someone's choice of companions).

171. Millbank, *supra* note 160, at 725-36, 729.

172. Julie A. Podmore, *Gone 'Underground'? Lesbian Visibility and the Consolidation of Queer Space in Montréal*, 7 SOC. & CULTURAL GEOGRAPHY 595, 595 (2006).

173. Victoria Neilson, *Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL'Y REV. 417, 437 (2005).

174. *Id.* at 426.

175. Millbank, *supra* note 160, at 725-26.

they cannot risk losing family support if it means foregoing their only security network. Consequently, it is often easier for financially privileged women to be "out" (and therefore visible) than for working-class and poor women, and it is often easier for gay men to be "out" than for lesbians.[176]

Lesbians are able to pass as heterosexual more easily than gay men because stereotypes about women as passive objects of male desire contribute to the invisibility of female sexuality in general, and lesbian sexuality in particular. "To acknowledge lesbians would allow women an active sexuality that is not part of 'women's destiny.'"[177] In Western societies, there have been fewer explicit prohibitions on women's homosexual behavior than men's homosexual behavior due, in large part, to disbelief that women engage in such behavior. For example, it is widely rumored that the reason female homosexual behavior was never criminalized in the United Kingdom was because Queen Victoria did not believe that sex between women was possible.[178] Even in 1921, when a proposal to criminalize lesbianism came before the House of Lords, it was argued that 999 women out of 1000 had "never even heard a whisper of these practices."[179]

Not only government officials, but also ethnographers could not even imagine the possibility of married women engaging in non-heterosexual sex practices.[180] Where men were available as sexual partners, it was simply assumed that lesbianism did not exist.[181] Indeed, until relatively recently, Western observers and scholars remained largely silent on the topic of female sexuality.[182] Such silence, due partly to the limitations of the observers and partly to problems in collecting and interpreting data, has led to a dearth of information about lesbians around the world.[183] Not only social scientists but also human rights reporters have found it difficult to gather information about lesbians:

176. *See generally* URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION (1995) (emphasizing that homophobia does not occur in a vacuum and has dimensions of gender, race, class, age, and ability); David P. Becker, *Growing up in Two Closets: Class and Privilege in the Lesbian and Gay Community*, *in* QUEERLY CLASSED 227, 230 (Susan Raffo ed., 1997) (describing why "it is easier for lesbians and gay men with wealth to come out sexually").

177. Alison J. Murray, *Let Them Take Ecstasy: Class and Jakarta Lesbians*, *in* FEMALE DESIRES: SAME-SEX RELATIONS AND TRANSGENDER PRACTICES ACROSS CULTURES 139, 145 (Evelyn Blackwood & Saskia E. Wieringa eds., 1999).

178. LAURA DOAN, FASHIONING SAPPHISM: THE ORIGINS OF A MODERN ENGLISH LESBIAN CULTURE 56 (2001).

179. *Id.*

180. Evelyn Blackwood & Saskia E. Wieringa, *Sapphic Shadows: Challenging the Silence in the Study of Sexuality*, *in* FEMALE DESIRES: SAME-SEX RELATIONS AND TRANSGENDER PRACTICES ACROSS CULTURES, *supra* note 177, at 39, 41.

181. *Id.*

182. *Id.* at 39.

183. *Id.*

"[d]ocumentation on the 'invisible lesbian' has been, as the term suggests, notoriously hard to produce for traditional rights groups."[184]

Even without a social visibility requirement, the scarcity of documentation about lesbians can present a significant challenge in asylum claims. For example, a 2004 decision by the UKAIT denied a lesbian claimant asylum based on its finding that there was no evidence of discriminatory laws against lesbians in Serbia and Montenegro.[185] Furthermore, in a 2001 decision denying asylum to an Iranian lesbian who testified that she fled Iran after her former lover informed her university of her sexual orientation, Canada's Immigration and Refugee Board (IRB) found that the applicant was not credible and had failed to show that she was really a lesbian.[186] However, the Refugee Division eventually held that even if the applicant were really a lesbian, there was only a mere possibility that she would face persecution in Iran. Although Iranian laws punish homosexuality by death, the documentary evidence indicated that homosexuals rarely are tried or sentenced. The paucity of country conditions evidence regarding the treatment of lesbians also makes the issue of internal relocation particularly challenging. For example, in *Parrales v. Canada Minister of Citizenship and Immigration*, the Federal Court of Canada reviewed an asylum case involving a Mexican lesbian who had been seriously assaulted several times in Mexico.[187] The court found that the documentary evidence indicated Mexico City was relatively safe for lesbians in general, but reversed on the basis that the Immigration and Refugee Board had failed to give sufficient attention to whether it was reasonable to expect the claimant in her particular circumstances to relocate to Mexico City.[188] These cases highlight some of the challenges involved when lesbians bring asylum claims. The relatively small number of successful asylum cases brought by lesbians as compared to gay men further stresses the obstacles involved.

184. Alice Miller, *Gay Enough: Some Tensions in Seeking the Grant of Asylum and Protecting Global Sexual Diversity*, *in* PASSING LINES, *supra* note 151, at 158.

185. DM [2004] UKAIT 00288, http://www.ait.gov.uk/Public/Upload/j922/2004_ukiat_00288_dm_serbiaandmontenegro.doc (last visited Dec. 8, 2008).

186. X, TA0-05930, [2001] CanLII 26956 (Immigration & Refugee Bd. Refugee Div. May 17), http://www.canlii.org/en/ca/irb/doc/2001/2001canlii26956/2001canlii26956.pdf (last visited Nov. 19, 2008); cf. Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007) (holding that an Immigration Judge's findings that a gay applicant from Albania was not credible because his mannerisms and speech did not indicate that he was homosexual, and because he had not reported instances of abuse to the authorities or an LGBT rights organization, were clearly erroneous and tainted the entire decision).

187. Parrales v. Minister of Citizenship & Immigration, [2006] F.C. 504 (Fed. Ct.) (Can.), *available at* http://decisions.fct-cf.gc.ca/en/2006/2006fc504/2006fc504.html.

188. *Id.*

Requiring social visibility as an element of a "particular social group" not only will make it more difficult for lesbians to prevail in asylum claims, but also may have the discriminatory effect of rendering only effeminate men or "butch" women eligible for asylum because they are the only ones perceived as homosexual by their societies. For example, in Indonesia:

> Where tomboys are clearly marked linguistically in West Sumatra, their sexual partners or lovers have no distinct designation or identity but belong to the category woman. Like an earlier generation of femmes in the U.S. . . . the partner is nearly invisible in rural areas. These women maintain a 'feminine' gender, that is, they adhere to the hegemonic standards of femininity in their appearance and behavior."[189]

Applying the BIA's new "social visibility" test in this scenario could lead to the rejection of "femme" lesbians who are perceived as straight in their societies. Since *C-A-* requires the group members to be visible, claims brought by individuals who do not conform to societal stereotypes may be rejected under the "social visibility" test.

In addition to excluding individuals who conform to certain gender norms and therefore, either intentionally or unintentionally, pass as straight, the social visibility requirement also could exclude those who have no opportunity to "come out," much less organize publicly. In Zimbabwe, for example, many "black lesbians have no opportunities to come out because they are so controlled by their families and by society. . . . [B]lack lesbians remain[] fairly invisible."[190] The "social visibility" requirement also would exclude lesbians who choose to organize under a broader, less controversial rubric, such as "single women," for strategic or political reasons. In other words, this requirement might well lead to the same discriminatory results as the "discretion" requirement that the High Court of Australia and the New Zealand Refugee Status Appeals Authority repudiated as a violation of fundamental human rights.[191] The intent of the Refugee Convention is to protect individuals who face persecution because of a lesbian or gay identity, which is "distinct from social perception of what is 'gay.'"[192] Thus, application of a "social visibility" test

189. Evelyn Blackwood, Tombois *in West Sumatra: Constructing Masculinity and Erotic Desire, in* FEMALE DESIRES: SAME-SEX RELATIONS AND TRANSGENDER PRACTICES ACROSS CULTURES, *supra* note 177, at 187.

190. Margrete Aarmo, *How Homosexuality Became "Un-African": The Case of Zimbabwe, in* FEMALE DESIRES: SAME-SEX RELATIONS AND TRANSGENDER PRACTICES ACROSS CULTURES, *supra* note 177, at 255, 272.

191. *See* Hanna, *supra* note 155, at 916 (arguing that asylum cases punish homosexuals who "cover" their sexuality and that "the covering-spectrum framework incorrectly assumes that homosexual men who cover are less vulnerable to persecution and unjustifiably treats gays who cover as a social group distinct from those who don't").

192. *Id.* at 920.

to these cases may contravene the very purpose of the Convention, which pertains to the protection of fundamental human rights and the principle of nondiscrimination.[193]

Since homosexuality is now well established as the basis for a particular social group in the United States and many other countries, some might question what impact a social visibility requirement really would have on such cases. In at least one unpublished decision, however, the BIA already has used the "social visibility" test to limit the circumstances under which persons with an immutable characteristic constitute a "particular social group." Specifically, in *Thomas*, discussed below, the BIA limited the criteria that determine when a family constitutes a particular social group, flying in the face of precedent and requiring the relevant family to be visible to society at large.[194] The BIA could easily apply the same logic in finding that homosexuals comprise a particular social group only if their sexual orientation is visible. At a minimum, the "social visibility" test likely will lead to confusion and inconsistent, unprincipled decisions by immigration judges in cases involving sexual orientation.

B. The Potential Impact of the "Social Visibility" Test on Other Types of Gender-Related Asylum Claims

Gender-based social groups clearly involve an innate and immutable characteristic.[195] Even if an individual can change his or her gender, it is nevertheless "immutable" in the sense that it is a characteristic so fundamental to identity that no one should have to change it. Significantly, the recognition of gender as an immutable characteristic that can define a particular social group had its roots in *Acosta*, which noted that "[t]he shared characteristic might be an innate one such as sex."[196] While claims brought by women can, of course, be based on any of the five protected grounds, the particular social group ground is the one most frequently relied upon by women "at risk of persecution because they are

193. *See* 1951 Convention, *supra* note 1, pmbl.; *supra* note 29 and accompanying text.

194. *See* Thomas, No. A75-597-0331-034/-035/-036 (B.I.A. Dec. 27, 2007); *see also infra* Subsection III.B.1 (discussing the BIA's unpublished decision in *Thomas*).

195. HATHAWAY, *supra* note 21, at 162; Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT'L J. REFUGEE L. 518 (1989) (arguing that gender falls within the ambit of the particular social group category).

196. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); Anker, *supra* note 24, at 201. In July 1985, a few months after the BIA issued its decision in *Acosta*, the UNHCR first recognized that "women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group.'" U.N. High Comm'r for Refugees [UNHCR], Executive Comm., *Refugee Women and International Protection*, Conclusion No. 39, para. (k), U.N. Doc. HCR/IP/2/Rev. 1986 (Oct. 18, 1985).

women."[197] The promulgation of gender guidelines by the UNHCR and numerous countries, including the United States, has helped adjudicators to "mov[e] away from paradigms dominated by the experiences of male refugees, and towards a gender-sensitive and gender-inclusive interpretation and application of refugee law."[198] Despite these guidelines, however, and "[d]espite the logic of the well established *Acosta* ruling, courts, adjudicators and advocates have for many years shirked naming sex, gender or women as a [particular social group] in itself."[199] While the High Court of Australia, the Supreme Court of Canada,

197. FOSTER, *supra* note 3, at 324; *see also* HEAVEN CRAWLEY, REFUGEES AND GENDER 72-75 (2001) (arguing that all five protected grounds must be interpreted in a gender-sensitive manner).

198. Edwards, *supra* note 14, at 52; *see also* U.S. DEP'T OF STATE, MEMORANDUM, GUIDELINES, OFFICE OF INTERNATIONAL AFFAIRS, IMMIGRATION AND NATURALIZATION SERVICE, REGARDING ADJUDICATING ASYLUM CASES ON THE BASIS OF GENDER (1996), *available at* http://www.state.gov/s/l/65633.htm; AUSTL. DEP'T OF IMMIGRATION AND MULTICULTURAL AFFAIRS, REFUGEE AND HUMANITARIAN VISA APPLICANTS: GUIDELINES ON GENDER ISSUES FOR DECISION-MAKERS (1996); CAN. IMMIGRATION & REFUGEE BD., WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: UPDATE (1996); U.N. High Comm'r for Refugees [UNHCR], *Guidelines on the Protection of Refugee Women* UN Doc. ES/SCP/67 (July 1991) (all endorsing gender sensitive and gender inclusive interpretations of refugee law). The UNHCR subsequently has issued several guidelines that specifically discuss gender as a particular social group. *See, e.g.*, U.N. High Comm'r for Refugees [UNHCR], *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, HCR/GIP/06/07 (April 2006) [hereinafter UNHCR, *Trafficking Guidelines*]; U.N. High Comm'r for Refugees [UNHCR], *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01 para. 30, May 7, 2002 [hereinafter UNHCR, *Gender Guidelines*]; UNHCR, *Guidelines on Membership of a Particular Social Group*, *supra* note 6, paras. 12, 19.

199. Anker, *supra* note 24, at 201-02; *see also* FOSTER, *supra* note 3, at 325 ("[N]otwithstanding the important progress that has been made in achieving recognition of the fundamental notion that women are capable of constituting a [particular social group], decision-makers continue to display difficulty (and sometimes reticence) in upholding gender-based claims."). Whether women constitute a particular social group is a topic beyond the scope of this Article. For some of the most influential writing on this subject, see CRAWLEY, *supra* note 197, at 70-77; THOMAS SPIJKERBOER, GENDER AND REFUGEE STUDIES 115-28 (2000); Anker, *supra* notes 12 and 26; Jane Connors, *Legal Aspects of Women as a Particular Social Group*, 9 INT'L J. REFUGEE L. 115 (1997); Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505 (1993); Lisa Gilad, *The Problem of Gender-Related Persecution: A Challenge of International Protection, in* ENGENDERING FORCED MIGRATION: THEORY AND PRACTICE (Doreen Indra ed., 1999); Pamela Goldberg, *Where in the World Is There Safety for Me?: Women Fleeing*

and the House of Lords now all recognize particular social groups defined by gender, the United States has been reluctant to follow suit.[200] In specific cases, the Third, Ninth, and Tenth Circuits have recognized that gender may define a particular social group, while decisions by the Second, Sixth, and Eighth Circuits have rejected particular social groups defined, in part, by gender.[201] As Deborah Anker points out, "[t]he recognition of gender itself as defining a [particular social group] has encountered opposition based on a misunderstanding

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Gender-Based Persecution, *in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 345 (Julie Peters & Andrea Wolper eds., 1995); Greatbatch, *supra* note 195; Rodger Haines, *Gender-Related Persecution*, *in* UNHCR's GLOBAL CONSULTATIONS, *supra* note 2; Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213 (1995); David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203 (1988).

200. *See* Minister for Immigration & Multicultural Affairs v. Khawar [2002] HCA 14, 210 C.L.R. 1, 13-14 (Austl.); Ward v. Att'y Gen. of Can., [1993] 2 S.C.R. 689, 739; Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.).

201. *See* Mohammed v. Gonzales, 400 F.3d 785, 797-98 (9th Cir. 2005) (approving a particular social group defined as "Somalian females" or "young girls in the Benadiri clan" in a case involving female genital mutilation); Fatin v. Immigration & Naturalization Serv., 12 F.3d 1233, 1341 (3d Cir. 1993) (holding that a subgroup of Iranian feminists who refuse to conform to the government's gender-specific laws and norms may constitute a particular social group). In *Mohammed*, the Ninth Circuit stressed the BIA's long-standing decision in *Acosta*, stating "[a]lthough we have not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law. *Few would argue that sex or gender, combined with clan membership or nationality, is not an 'innate characteristic,' 'fundamental to individual identity.'*" *Mohammed*, 400 F.3d at 797 (emphasis added); *see also* Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005) (finding that females belonging to the Tukulor-Fulani tribe in Senegal constitute a particular social group in a case involving female genital mutilation, and noting that the court was "not persuaded that the BIA, contrary to the language of *Acosta*, requires more than gender plus tribal membership to identify a social group"). *But see* Rreshpja v. Gonzales, 420 F.3d 551, 555-56 (6th Cir. 2005) (rejecting "young (or those who appear to be young), attractive Albanian women who are forced into prostitution" as a particular social group and distinguishing the Ninth Circuit's decision in *Mohammed* on the basis that "Rreshpja did not introduce any evidence to show that the practice of forcing young women into prostitution in Albania is nearly as pervasive as the practice of female genital mutilation in Somalia"); Safaie v. Immigration & Naturalization Serv., 25 F.3d 636, 640 (8th Cir. 1994) (rejecting the claim that "Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group"); Gomez v. Immigration & Naturalization Serv., 947 F.2d 660, 663-64 (2d Cir. 1991) (rejecting the claim that "women who have been previously battered and raped by Salvadoran guerillas" are a particular social group).

that it is overbroad and in effect would recognize every woman in certain countries as a refugee," when, in fact, only claimants who meet *all* of the statutory requirements would be eligible for asylum.[202] In order to circumvent adjudicators' fears of opening the "floodgates" to define particular social groups in terms of gender, applicants often define groups in "overly complicated and unnecessarily detailed" ways, including characteristics such as marital status, age, education level, the absence of male protection, opposition to abuse, transgression of social/cultural norms, and past experiences of harm.[203]

The BIA's new "social visibility" test will make it even harder to define the social group in gender-related cases and will make it easier for fearful adjudicators to reject such groups. This Section illuminates the potential impact of social visibility on three types of claims commonly brought by women: those based on (1) family membership; (2) domestic violence; and (3) human trafficking.

1. Claims Based on Family Membership

Since *Acosta*, the BIA and circuit courts consistently have held that the family provides a prototypical example of a particular social group.[204] Decisions by

202. Anker, *supra* note 24, at 201 (citing Rreshpja v. Gonzales, 420 F.3d 551, 555 (6th Cir. 2005) ("We do not necessarily agree with the Ninth Circuit's determination that virtually all of the women in Somalia are entitled to asylum in the United States.")).

203. FOSTER, *supra* note 3, at 326-28 (noting that "there is a tendency, found generally in the [particular social group] jurisprudence, but particularly heightened in that relating to gender, to formulate overly complicated and unnecessarily detailed [particular social groups], rather than simply to find that 'women' or 'gender' constitutes the relevant [particular social group]"). Foster notes that Canada "is the most comfortable with the notion that 'women' or 'gender' may constitute a [particular social group]," but cites examples of overly complicated definitions in Canada, Australia, and the United States. *Id.* at 326-27 nn.156-60.

204. *See* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); Lopez-Soto v. Ashcroft, 383 F.3d 228, 235 (4th Cir. 2004) ("We join our sister circuits in holding that 'family' constitutes a 'particular social group.'"); Lin v. Ashcroft, 377 F.3d 1014, 1028 (9th Cir. 2004) ("Like our sister circuits, we recognize that a family is a social group."); Aguirre-Cervantes v. Immigration & Naturalization Serv., 242 F.3d 1169, 1177 (9th Cir. 2001) (finding that "[f]amily membership is clearly an immutable characteristic, fundamental to one's identity" in a case involving a young Mexican girl who had been abused by her father); Iliev v. Immigration & Naturalization Serv., 127 F.3d 638, 642 & n.4 (7th Cir. 1997) ("Our case law has suggested, with some certainty, that a family constitutes a cognizable 'particular social group.'"); Hamzehi v. Immigration & Naturalization Serv., 64 F.3d 1240, 1243 (8th Cir. 1995) (implicitly recognizing family membership as a basis for a particular social group); Fatin v. Immigration & Naturalization Serv., 12 F.3d 1233, 1238-40 (3d Cir. 1993) (accepting that "kinship ties" qualify as a particular social group); Gebremichael v. Immigration & Naturalization Serv., 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common identifiable and

foreign courts and legal scholars confirm that the family constitutes a class example of a particular social group.[205] Claims based on family membership are particularly important for vulnerable individuals, especially women and children, since the persecuting state or non-state actors often "target family members when they cannot or dare not target their intended victim."[206]

The BIA's unpublished decision in *Thomas*, which was issued after the Ninth Circuit remanded the case pursuant to the Supreme Court's order, highlights how requiring social visibility may seriously limit the family as a particular social group despite its archetypal status.[207] Michelle Thomas was a citizen of South Africa whose racist father-in-law, known as "Boss Ronnie," abused his workers.[208] Seeking revenge, some of the workers attacked Thomas and her children in place of Boss Ronnie, although she disagreed with his views and actions.[209] Going against twenty years of precedents, the government argued on appeal that the family unit does not comprise a particular social group.[210] In rejecting this argument, the Ninth Circuit reasoned, "there is nothing in the statute itself, nor in the BIA's interpretation of the relevant provisions, to suggest that membership in a family is insufficient, standing alone, to constitute a particular social group."[211] The Supreme Court vacated the Ninth Circuit's decision due to an error of administrative law, reasoning that the Ninth Circuit should

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immutable characteristics than that of the nuclear family."); Sanchez-Trujillo v. Immigration & Naturalization Serv., 801 F.2d 1571, 1576 (9th Cir. 1986) (recognizing a group of family members as a "prototypical example" of a particular social group); H-, 21 I. & N. Dec. 337 (B.I.A. 1996) (indicating that even distant relatives can constitute a social group).

205. *See, e.g.*, Minister for Immigration & Multicultural Affairs v. Sarrazola [1999] F.C.A. 1134 (Austl.) (finding that a family member could assert a claim to refugee protection when the motive for persecuting the principal member of the family was not on account of one of the five protected grounds); Sec'y of State for the Home Dep't v. K [2006] 1 A.C. 412 (H.L.) (appeal taken from Eng. & Wales) (U.K.) (finding that an Iranian woman was persecuted on account of her membership of the particular social group of her husband's family); *see also* HATHAWAY, *supra* note 21, at 165-66 ("As a rule . . . whenever there is an indication that the status or activity of a claimant's relative is the basis for a risk of persecution, a claim grounded in family background is properly receivable under the social group category."); Anker, *supra* note 24, at 207 (confirming that family has been accepted as the "quintessential" example of a particular social group).

206. Anker, *supra* note 24, at 206.

207. Thomas, No. A75-597-0331-034/-035/-036 (B.I.A. Dec. 27, 2007); *see also* Thomas v. Gonzales, 409 F.3d 1177, 1181-82 (9th Cir. 2005) (en banc), *vacated* 547 U.S. 183 (2006).

208. *Thomas*, 409 F.3d at 1181-82.

209. *Id.*

210. *Id.* at 1188.

211. *Id.*

have remanded the case to the BIA because "the agency [had] not yet considered whether [petitioner's] family presents the kind of 'kinship ties' that constitute a 'particular social group."[212]

Upon remand to the BIA, the Department of Homeland Security argued that, under *C-A-*, a family unit cannot constitute a cognizable particular social group unless the relationship that unifies it "is so significant in the society in question that the people who share it are distinguished from other groups or from society at large."[213] The UNHCR's amicus brief sharply criticized this formulation, rejecting the notion that a family must be "famous" or "visible to society at large" in order to constitute a particular social group.[214] Likewise, the Harvard Immigration and Refugee Clinic's amicus brief argued that "application of a 'social visibility test' in all social group cases would be fundamentally inconsistent with the Board's reasoning in *Acosta*," since "family relationships are innate and cannot be changed (in the case of a blood relationship), or are so fundamental to identity or conscience that the individual ought not be required to disavow them (in the case of marriage)."[215] Nevertheless, in its unpublished decision, the BIA relied on the social visibility test to sharply limit when family may constitute a particular social group, stating:

> Not all groups that have an immutable or fundamental characteristic will be considered particular social groups for purposes of asylum. As we explained in *C-A-*, *supra*, the group must also have a distinct, recognizable identity in the particular country at issue. *See C-A-*, *supra*, at 959-60. The group must be perceived as being different from other groups or from society at large. *See* [*A-M-E-*], *supra* . . . . While not every family will have the distinct, recognizable identity in society that is necessary to be a particular social group, some families certainly will.[216]

In Thomas's case, the BIA accepted "Boss Ronnie's family" as a particular social group because the parties agreed "that the family of Boss Ronnie has a distinct, recognizable identity, such that they are perceived as being different from other groups within their society or from society at large."[217] In other cases, however, where the relevant family is an ordinary one and not so well known, the "social visibility" test may have a detrimental effect. Requiring families to be famous

212. *Thomas*, 547 U.S. at 186.

213. Supplemental Brief for Dep't of Homeland Security at 10, Thomas, No. A75-597-0331-034/-035/-036 (B.I.A. Dec. 27, 2007) (on file with the Yale Law & Policy Review).

214. UNHCR Brief in *Thomas*, *supra* note 57, at 13.

215. Supplemental Brief of Harvard Immigration & Refugee Clinic & the Women's Refugee Project as Amicus Curiae at 14, 17, Thomas, No. A75-597-0331-034/-035/-036 (B.I.A. Dec. 27, 2007) (on file with the Yale Law & Policy Review).

216. Thomas, No. A75-597-0331-034/-035/-036, slip op. at 6 (B.I.A. Dec. 27, 2007).

217. *Id.*

(or infamous) in order to constitute a particular social group not only will lead to the rejection of many gender-based claims, but will also undermine claims brought by vulnerable children who risk persecution because of an unpopular or stigmatized family member, or whose family members abuse them at home or traffic them for sex or labor.[218] If the BIA can use the social visibility test to limit a particular social group that is as well-established as the family unit, then it certainly can use visibility to constrain or undermine groups that courts have only recently recognized in gender-related cases.

2. Claims Based on Domestic Violence

Given the invisibility of domestic violence as a phenomenon, as well as the invisibility of its victims, the BIA's new emphasis on "social visibility" likely will impede the significant strides that have been made during the past two decades in bringing asylum claims on this basis.[219] Social scientists describe the large-scale invisibility of domestic violence as the "iceberg phenomenon":

> As the "iceberg" image suggests, recorded or official cases represent only a minimal portion of the problem of family violence in society. The majority of cases of violence fall "below the water line", invisible both socially and institutionally. That is, despite the increased social acknowledgment and concern with regard to family violence, it is still a largely hidden problem.[220]

Like sexual orientation, domestic violence may be considered a "public secret." Domestic violence remains largely invisible for many reasons, including wide-

218. Foster notes that "[w]hile family-related claims are well established in the situation where a child will likely suffer persecution because of his or her association with a political or religious family member, for example, a more recent set of cases has raised the question whether the family can constitute a [particular social group] when a family member is inflicting the relevant harm." FOSTER, *supra* note 3, at 336. Adjudicators have considered this issue in the context of claims based on domestic violence as well as where parents have trafficked their children for sex or labor. *Id.* at 336-37. Foster cites numerous decisions by Canada's Convention Refugee Determination Decision finding that the family constitutes a particular social group in cases involving children. *Id.* at 336-37 & nn.197-98, 202; *see also* Aguirre-Cervantes v. Immigration & Naturalization Serv., 242 F.3d 1169 (9th Cir. 2001) (recognizing the family as a particular social group in a claim brought by a young Mexican girl who had been abused by her father).

219. *See generally* Anker, *supra* note 12 (discussing some of the strides made in asylum claims based on domestic violence); Edwards, *supra* note 14, at 53 ("Victims of domestic violence where the State is unable or unwilling to intervene to provide protection have in recent years increasingly also been recognized as refugees, not least as a result of evolving jurisprudence on 'membership of a particular social group.'").

220. Enrique Garcia, *Social Visibility and Tolerance to Family Violence*, 7 PSYCHOL. SPAIN 39, 39-45 (2003).

spread social tolerance and the social prominence of an idealized view of the home and family life. Women may hide their situations due to shame, fear of reprisal by an abuser, fear that their children may also become victims, financial or psychological dependence on the abuser, lack of social support, fear of being blamed by society, or general feelings of helplessness.

The social stigma attached to abuse may make women reluctant to seek help or discuss their situations openly. Likewise, social norms that legitimate or even glorify domestic violence against women may convince women to accept their situations in silence. This problem is compounded by social isolation, which makes it harder for abused women to find help and decreases their social visibility. Deep-rooted ideas about the privacy of the family also reduce the sense of community responsibility for women subjected to domestic violence, which, in turn, makes them less visible. Requiring social visibility for women subjected to domestic violence is particularly inappropriate since such violence, by definition, occurs in the private sphere. As the dissent pointed out in the BIA's vacated opinion in *R-A-*, the purpose and effect of domestic violence is to control women "'in the one space traditionally dominated by women, the home.'"[221]

In most domestic violence cases, defining the particular social group represents a threshold issue, since U.S. adjudicators generally eschew groups defined solely based on gender, and a particular social group can never be defined in terms of the feared persecution.[222] So far, the BIA has issued only two decisions

221. R-A-, 22 I. & N. Dec. 906, 939 (B.I.A. 1999) (Guendelsberger, J., dissenting) (quoting U.N. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women*, 47th Sess., Supp. No. 38, para. 26, at 8, U.N. Doc. A/47/38 (1992)), *vacated*, 22 I. & N. Dec. 906 (Att'y Gen. 2001). *R-A-*, which was vacated by Attorney General Janet Reno in January 2001, involved a Guatemalan woman who had suffered horrific violence at the hands of her husband. In its vacated opinion, the BIA indicated for the first time that *Acosta* was not the "ending point" for social group analysis, setting forth additional "factors" that it considered relevant to determining whether a particular social group exists in an individual case, including whether the group is identified by the applicant's society as a subdivision of society. *R-A-*, 22 I. & N. Dec. at 919-20. The case was remanded to the BIA for reconsideration after finalization of the INS's draft regulations on "membership of a particular social group," proposed in December 2000. *See* Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76598 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). Two years later, in February 2003, Attorney General John Ashcroft removed *R-A-* from the jurisdiction of the BIA and certified it to himself. Shortly before leaving office in January 2005, Ashcroft remanded the case to the BIA for reconsideration following publication of the proposed rule. In September 2008, Attorney General Mukasey certified *R-A-* to himself and issued a decision ordering the BIA to reconsider it, removing the requirement that the BIA await the issuance of proposed regulations. R-A-, 24 I. & N. Dec. 629 (Att'y Gen. 2008).

222. Internationally, two of the most significant decisions that have accepted a particular social group based on gender in claims involving domestic violence are *Islam v. Secretary of State for the Home Department*, [1999] 2 A.C. 629 (H.L.) (appeal taken

in cases involving domestic violence, both of which demonstrate its reluctance to define the particular social group in terms of gender. The first case, *R-A-*, which Attorney General Reno vacated in 2001, rejected a group defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination," based, in part, on the finding that Guatemalan society did not perceive such a group to exist.[223] In the other case, *S-A-*, which involved a Moroccan woman who was physically, verbally, and emotionally abused by her father, the BIA found that the persecution was "on account of her religious beliefs, as they differed from those of her father concerning the proper role of women in Moroccan society."[224] The BIA reached this conclusion despite the absence of any evidence regarding the applicant's religious beliefs or those of her father. By basing its decision on religion rather than gender, the BIA found this case "distinguishable on the facts from circuit court decisions holding that persecution on account of gender alone does not constitute persecution on account of membership in a particular social group."[225] Thus, the BIA abandoned the particular social group category altogether in analyzing the claim.

Instead of making such a disingenuous move, applicants whose claims are related to domestic violence often define the particular social group based on various characteristics in addition to gender, such as marital status. For example, the Department of Homeland Security's (DHS) 2004 brief in *R-A-*, defined the social group as "married women in Guatemala who are unable to leave the relationship."[226] The DHS argued that this group satisfies the social perception

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from Eng.) (U.K.) (holding that "women in Pakistan" constitute a particular social group due to the systemic discrimination again women in Pakistani society); and *Minister for Immigration & Multicultural Affairs v. Khawar* [2002] 210 C.L.R. 1 (Austl.) (same). In *Khawar*, Chief Justice Gleeson concluded that "[w]omen *in any society* are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments." *Id.* paras. 34-35. He stressed that "[n]either the conduct of those who perpetrate domestic violence, or of those who withhold the protection of the law from victims of domestic violence, identifies women as a group." *Id.* para. 35 (Gleeson, C.J.). As previously noted, however, U.S. adjudicators have been reluctant to follow suit.

223. R-A-, 22 I. & N. Dec. 906, 917-18 (B.I.A. 1999), *vacated*, 22 I. & N. Dec. 906 (Att'y Gen. 2001), *remanded*, 23 I. & N. Dec. 694 (Att'y Gen. 2005); *see also supra* note 221.

224. S-A-, 22 I. & N. Dec. 1328, 1329-30, 1336 (B.I.A. 2000). The applicant's father burned her thighs with a heated razor for wearing a short skirt, beat her at least once a week, and forbade her from leaving her home after he saw her speaking to a man on the street. *Id.* at 1329-30.

225. *Id.* at 1336 (citing Gomez v. Immigration & Naturalization Serv., 947 F.2d 660 (2d Cir. 1991)).

226. Department of Homeland Security's Position on Respondent's Eligibility for Relief 25, DHS brief submitted in *R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999). The DHS

test because it "may reflect a societal view that the status of a wife places a woman into a segment of society that will not be accorded protection from harm inflicted by a spouse."[227] In other words, the DHS argued that Guatemalan society perceives individuals who do not receive state protection from physical harm differently from those who do, and that married women are a segment of society falling into the first category. Even if the DHS is correct in stating that this group satisfies the social perception test, the group is nevertheless likely to fail the BIA's social visibility test because the general population in Guatemala would not automatically recognize which women are married and unable to leave their relationships. In other words, Guatemalan society may recognize the abstract group proposed by the DHS, but the group's members are not socially visible, as required by *C-A-*. Moreover, if the BIA takes the position that not all families are socially visible, then it is also likely to assert that many marital relationships (which comprise a subset of the family unit) may not be socially visible.

Even if the BIA were to accept "married women who are unable to leave the relationship" as a socially visible group this would not resolve the challenges posed by the social visibility test in domestic violence cases. One important concern is that the social visibility test would automatically privilege claims brought by married women because the most socially legitimate relationships, i.e. marriages, enjoy the greatest social visibility; relationships deemed illegitimate, on the other hand, are likely to be concealed by the partners or those around them.[228] Thus, women who are abused by boyfriends or same-sex partners will have particular difficulty in satisfying the "social visibility" test. Such privileging of marital status already is apparent in forced abortion cases where U.S. courts have found that the husband of a woman required to terminate a pregnancy is eligible for asylum, but a boyfriend is not, although he suffers the same harm of having his child forcibly aborted.[229] Even in jurisdictions where gender-related claims, including those based on domestic violence, are firmly established, particular social groups involving unmarried women prove challenging. For example, Australian courts have rejected "young single women" in China and "unwed mothers in Japan" as particular social groups, and have expressed doubts about "single women" or "single women without protection in

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not only recommended that R-A- be granted asylum, but also "elaborated a well-reasoned, 'immutability' modeled analysis of [membership of a particular social group], and essentially recognized that gender could define a [particular social group]." Anker, *supra* note 24, at 204. The initial formulation of the particular social group in this case was rather poor, as it was defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." *R-A-*, 22 I. & N. Dec. at 911.

227. Brief of DHS at 25, R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999).

228. EDWARD LAUMANN, THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 33 (1994).

229. *See, e.g.*, Ma v. Ashcroft, 361 F.3d 553 (9th Cir. 2004).

Sri Lanka," although they *have* accepted "single women in India" as a particular social group.[230] By privileging claims brought by heterosexual, married women, the social visibility test would strengthen this trend and have the ironic effect of excluding some of the most vulnerable victims of domestic violence.

Finally, the BIA's interpretation of "social visibility" as an all-or-nothing phenomenon may encourage claimants and their representatives to portray women's rights in a particular society as fixed and absolute, rather than as "negotiated and changing cultural constructs, produced in response to lived realities, through debates that are now going on all over the world, through the voices of women and men who want either to retain or to change the present situation."[231] Both *C-A-* and *A-M-E-* seem to operate on the assumption that social perceptions (and the underlying norms that shape them) are static and unchanging. Under the BIA's social visibility test, it will therefore be even more difficult to submit gender-based claims in ways that do not simply "recirculate ahistorical images of immigrant women as backward, passive, and dependent victims of third-world patriarchy."[232]

3. Claims Based on Human Trafficking

Victims and potential victims of trafficking represent another group whose members are invisible. The United Nations has defined "trafficking" as trapping someone by means of threats, force or other forms of coercion, or by abuse of vulnerability, and transporting that person for the purpose of exploitation, which can include prostitution, slavery or the removal of organs.[233] While the phenomenon of trafficking is now well-known and recognized by societies around the world, its actual victims still remain largely unknown and undiscovered. In fact, a recent study of trafficking patterns in the Balkan region found that although the total number of trafficking victims is increasing, their visibility is decreasing. The study explained that "[t]he lack of visibility in trafficking has been due to changed methods of operation, changes in sexual exploitation taken into private contexts such as private apartments, internet and phone communication, victims being given small payments and the recruitment of

230. *See* Michael A. Ross & Patricia Milligan-Baldwin, THE INTERPRETATION OF MEMBERSHIP OF A PARTICULAR SOCIAL GROUP 37 (2006), *available at* http://www.iarlj.org/conferences/mexico/images/stories/forms/WPPapers/Michael%20Ross.pdf.

231. ZIBA MIR-HOSSEINI, ISLAM AND GENDER: THE RELIGIOUS DEBATE IN CONTEMPORARY IRAN 6 (2002).

232. EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 140 (2002).

233. G.A. Res. 55/25, Annex II, art. 3, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/RES/55/25 (Jan. 8, 2001).

women as traffickers and pimps."[234] Factors such as fear of retaliation, fear of arrest, isolation, lack of social support, shame and stigma, a sense of learned helplessness, and lack of knowledge of available services also keep victims of trafficking socially invisible.[235] For example, "human trafficking for sexual exploitation in Brazil was viewed as an isolated phenomenon" for decades, as "[t]he victims' lack of visibility made it difficult for them to identify those who could help."[236] More importantly, however, most victims of trafficking "are rarely seen in public places. Hidden from view, they toil in sweatshops, brothels, farms, and private homes."[237] Their captors employ various means to ensure that they do not escape, including "confiscat[ing] their identification documents, forbid[ding] them from leaving their workplaces or contacting their families, threaten[ing] them with arrest and deportation, and restrict[ing] their access to the surrounding community."[238]

The UNHCR's *Guidelines on Gender-Related Persecution*, issued in 2002, specifically recognize that trafficking imposes

> serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents, [and that trafficked women may] face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination.[239]

The control tactics used by traffickers and captors not only render victims of trafficking literally invisible to the outside world, but also destroy their sense of identity. Psychiatrist Judith Herman explains: "[I]n situations of captivity, the perpetrator becomes the most powerful person in the life of the victim, and the psychology of the victim is shaped by the actions and beliefs of the perpetra-

234. Ladan Rahmani, *Invisible Routes: An Exploratory Study of Changing Patterns and Trends in Routes of Trafficking in Persons in the Balkan Region*, *in* TRAFFICKING IN PERSONS IN SOUTH EAST EUROPE - A THREAT TO HUMAN SECURITY: 11TH WORKSHOP OF THE STUDY GROUP "REGIONAL STABILITY IN SOUTH EAST EUROPE" 77, 78 (Nilufer Narli ed., 2006) *available at* http://www.bmlv.gv.at/pdf_pool/publikationen/10_wg11_trafpers_50.pdf.

235. FREE THE SLAVES & THE HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY, HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES 43 (2004), *available at* http://hrc.berkeley.edu/download/hiddenslaves_report.pdf.

236. Bureau of International Information Programs, U.S. Dep't of State, *Program Helps Trafficking Victims in Brazil Rebuild Their Lives*, Feb. 23, 2007, http://www.america.gov/st/washfileenglish/2007/February/20070223081059AKllennoCcMo.548467.html (last visited Nov. 19, 2008).

237. FREE THE SLAVES & THE HUMAN RIGHTS CTR., *supra* note 235, at 5.

238. *Id.*

239. UNHCR, *Gender Guidelines*, *supra* note 198, para. 18.

tor."[240] The methods of establishing control are based on "the organized techniques of disempowerment and disconnection," so as to "instill terror and helplessness and to destroy the victim's sense of self in relationship to others."[241]

In addition, victims of trafficking remain invisible because they are put to work in sectors that remain largely unregulated, including the sex industry, domestic services, and agriculture. Lack of adequate legal protection for workers in these sectors, coupled with the difficulty involved in monitoring working conditions and compliance with labor laws, allows "unscrupulous employers and criminal networks to gain virtually complete control over workers' lives" and contributes to the invisibility of the workers themselves.[242] For example, in the United States, household workers are denied certain protections and limited in their ability to organize because they are not considered "employees" under the National Labor Relations Act.[243] Their invisibility as employees in the eyes of the law reflects their general invisibility in society.

Women who are trafficked for non-sexual forms of forced labor often remain particularly invisible precisely because their work is *not* criminalized and neither the police nor the public take much, if any, interest in their places of business. Whether or not prostitution is legal, it is not often accepted as an entirely legitimate profession, which means that prostitutes will be subject to the public gaze and to regimes of social control. Spatial segregation of sex workers into "red light districts" is one mechanism of social control that necessarily increases the visibility of sex workers.[244] By contrast, individuals engaged in domestic services remain tucked away in private homes and are veiled from view "by a series of practices that enable and enhance tropes of invisibility."[245] Rivas remarks that "[i]mmigrant women are the caregivers par excellence because both they and their work are often rendered invisible."[246] Since domestic workers often live in complete isolation from the public view, become personally invisible within the domestic sphere, and perform work that society erases as a form of labor, they remain socially invisible on multiple levels.

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240. JUDITH HERMAN, TRAUMA AND RECOVERY 75 (1997).

241. *Id.*

242. FREE THE SLAVES & THE HUMAN RIGHTS CTR., *supra* note 235, at 1.

243. *Id.* at 15; *see also* Mika Toyota, *Health Concerns of 'Invisible' Cross-Border Domestic Maids in Thailand*, 2 ASIAN POPULATION STUD. 19, 19 (2006) (discussing how Burmese maids in Thailand remain invisible because "domestic work is not recognized as a formal occupation" and domestic workers are "normally out of reach of labour unions, religious organizations, non-governmental organizations and public health services").

244. *See, e.g.*, Shah, *supra* note 132, at 287 (2006) (discussing the red light district of Kamathipura in Mumbai, India, as "an object that can and must be seen," and the "proliferation of visual representations of the district").

245. Radhika Chopra, *Invisible Men: Masculinity, Sexuality, and Male Domestic Labor*, *in* 9 MEN AND MASCULINITIES 152, 156-57 (2006).

246. Rivas, *supra* note 153, at 76.

This discussion demonstrates that a "social visibility" requirement may impose significant new challenges for asylum claims brought by female victims of trafficking, especially women trafficked for non-sexual forms of forced labor.[247] In the case of *SB*, which found that former victims of trafficking for sexual exploitation constitute a particular social group but that other former victims of trafficking do not, the UKAIT accounted for evidence about how Moldovan society perceives the *phenomenon* of trafficking and how it perceives victims of trafficking *in the abstract*, without requiring the actual victims of trafficking to be recognizable.[248] The BIA's decision in *C-A-*, on the other hand, indicates that the group members themselves must be socially visible.[249] This critical distinction may well result in the denial of many asylum claims based on trafficking under the "social visibility" test, despite the significant international attention that the issue of trafficking has attracted over the past decade.[250] Excluding vic-

247. While the phrase "trafficking in women" is often used almost synonymously with trafficking for prostitution, it appears that the vast majority of women are trafficked for non-sexual forms of forced labor. According to the International Labor Organization, less than 10% of the 9.5 million victims of human trafficking in Asia are trafficked for commercial sex work. David A. Feingold, *Think Again: Human Trafficking*, FOREIGN POL'Y, Sept.-Oct. 2005, at 26, *available at* http://www.hrusa.org/workshops/trafficking/ThinkAgain.pdf. Forced labor for prostitution and sex services comprises less than half (46%) of the total forced labor in the United States; other major sectors of the U.S. economy utilizing forced labor include domestic services (27%), agriculture (10%), sweatshop/factory (5%), and restaurant and hotel work (4%). *See* FREE THE SLAVES & THE HUMAN RIGHTS CTR., *supra* note 235, at 1.

248. SB [2008] UKAIT 00002, *available at* http://www.ait.gov.uk/Public/Upload/j2087/00002_ukait_2008_sb_moldova_cg.doc.

249. C-A-, 23 I. & N. Dec. 951, 960-61 (B.I.A. 2006).

250. In 2000, the United Nations adopted the Convention Against Transnational Organized Crime and the accompanying Protocol To Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children. G.A. Res. 55/25, *supra* note 233. In 2004, the UN established a Special Rapporteur on Trafficking in Human Beings, Especially Women and Children, and, two years later, it issued its guidelines on trafficking in persons. UNHCR, *Trafficking Guidelines*, *supra* note 198. The United States has also taken serious steps to prevent trafficking during the past decade. In 2000, Congress passed the U.S. Victims of Trafficking and Violence Protection Act, which criminalized procuring and subjecting another human being to peonage, involuntary sex trafficking, slavery, involuntary servitude, or forced labor, as well as withholding or destroying documents as part of the trafficking scheme. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 8 U.S.C. § 1101 (2000)) [hereinafter TVPA]. The TVPA established the Office to Monitor and Combat Trafficking in Persons in the U.S. State Department, which reports annually on the efforts of countries around the world to combat human trafficking, based on compliance with a set of minimum standards, and classifies countries into three categories: full compliance (Tier 1), making significant efforts to comply (Tier 2), or not in compliance and not making significant efforts to become so (Tier 3). *Id.*

tims and potential victims of trafficking under the "social visibility" test would contradict not only the UNHCR's *Guidelines on Membership in a Particular Social Group*, but also its *Guidelines on Trafficking*, adopted in April 2006, which confirm that "women," "certain subsets of women," and "former victims of trafficking" may constitute particular social groups.[251] This result would also contradict decisions by numerous foreign courts finding that a particular social group exists in trafficking cases.[252]

In 2003, Congress reauthorized the TVPA, allotting additional measures and funding to fight trafficking. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

251. UNHCR, *Trafficking Guidelines*, *supra* note 198, paras. 38-39; *see also* Edwards, *supra* note 14, at 61 ("There is no reason why a victim of trafficking, who fears returning home due to the real possibility of being re-trafficked, targeted for reprisals, or threatened with death, should not be granted refugee status where the State of origin is unable or unwilling to protect that person against such harm.").

252. The only published U.S. asylum decision addressing trafficking is *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005), which rejected a particular social group defined as "young (or those who appear to be young), attractive Albanian women who are forced into prostitution," in part, because the group was improperly defined in terms of the feared persecution. Adjudicators in Australia, Canada, New Zealand, and the United Kingdom, however, have all accepted particular social groups defined primarily by gender in trafficking cases. *See, e.g.*, SXPB v. Minister for Immigration & Multicultural & Indigenous Affairs, (2005) FCA 1110 paras. 30-36 (Fed. Ct.) (Austl.) (accepting "young women in Albania" as a particular social group in a case involving a mother and daughter who feared being sold to a trafficker); SZBFQ v. Minister for Immigration & Anor [2005] F.C.M.A. 197 (Fed. Magis. Ct. June 10, 2005) (Austl.) (holding that the Refugee Review Tribunal erred in finding that "women in Azerbaijan" did not constitute a particular social group in a case involving an ethnic Russian woman who feared being trafficked for prostitution); No. V01/13062 (2004) R.R.T.A. 221 (Refugee Rev. Trib. March 16, 2004) (Austl.) (accepting "single women without male protection" as a particular social group in a case involving an Albanian woman who feared being trafficked for prostitution); No. N03/45573 (2003) R.R.T.A. 160 paras. 70-74 (Refugee Rev. Trib. February 24, 2003) (Austl.) (finding that "Shan women," "trafficked Shan women," "women who have been working in prostitution in countries neighbouring Burma," and "women who have left or been forced to leave Burma illegally" all constitute particular social groups); Zheng v. Minister of Citizenship & Immigration, [2002] F.C.J. No. 580; 2002 F.C.T. 448 (Fed. Ct. Trial Div.) (Can.) (finding that the applicant, who was smuggled from China to Canada when she was fourteen years old, belonged to the particular social group defined as "young, female, rural Fujanese"); X, TA4-16915, [2006] CanLII 52155, at 3 (Immigration & Refugee Bd., Refugee Protection Div. Mar. 16) (recognizing "single women who were trafficked in Ethiopia" as a particular social group); No. 75233, slip op. paras. 26-27 (Refugee Status App. Auth. Feb. 1, 2005) (N.Z.), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/REF_20050201_75233.pdf (accepting the particular social group defined as "women of a minority clan" where the Somalian applicant feared being forced into prostitution); JO [2004] UKAIT 00251, http://www.ait.gov.uk/Public/Upload/j1032/2004_ukiat_00251_jo_nigeria.doc (last

CONCLUSION

In recent years, the federal courts of appeal have "repeatedly excoriated immigration judges" for "a pattern of biased and incoherent decisions in asylum cases."[253] The BIA's new "social visibility" test will greatly compound this problem, leading to even more inconsistent and unintelligible decisions that will destroy consensus in U.S. jurisprudence, created by *Acosta*, around the definition of "membership in a particular social group." This Article shows that the new "social visibility" test represents a sudden, unexplained departure from U.S. precedent and the dominant view of the international community. The BIA's interpretation of "social visibility" also contradicts Australia's "social perception" approach and the UNHCR's understanding of that analytical mode. In demanding that the *members* of a social group be publicly visible, not just that the group as a whole be distinct, and in focusing on *subjective* perceptions, the BIA's "social visibility" test remains unique and unprecedented among State Parties' interpretations of "membership in a particular social group." While there is relatively little scholarly writing on the "social perception" approach, what does exist underscores the inconsistencies between the international community's understanding of this term and the BIA's new "social visibility" test.[254]

As a matter of law, as well as policy, adjudicators should eschew the BIA's new emphasis on visibility in defining a particular social group. The *Acosta* standard reflects the basic concept that "the Refugee Convention protects certain rights because of their *intrinsic importance.* Such protection is not made

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visited Nov. 19m 2008) (expressing a "provisional view" that the particular social group could be defined as "women in Nigeria" in a case involving a young Nigerian woman who was trafficked for prostitution).

253. Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1. Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit concluded that "adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." *Id.* Similarly, Judge Marsha S. Berzon of the U.S. Court of Appeals for the Ninth Circuit described an immigration judge's decision as "literally incomprehensible," "incoherent," and "indecipherable," finding that it "defie[d] parsing under ordinary rules of English grammar." *Id.* In 2004, immigration cases, mostly involving asylum seekers, accounted for about 17% of all federal appeals cases, up from just 3% in 2001. *Id.* In New York and California, nearly 40% of federal appeals involved immigration cases. *Id.* The increase occurred after Attorney General John Ashcroft instituted a controversial new regulation that allows "streamlin[ed]" review, whereby one member of the BIA may summarily affirm without opinion the decision of an immigration judge. *Id.*

254. *See generally* FOSTER, *supra* note 3, at 292-303; Aleinikoff, *supra* note 3, at 294 (both discussing Australia's social perception test).

contingent on whether those rights can be hidden,"[255] nor should it be contingent on whether those rights are visible. The BIA's new focus on "visibility" contradicts the very logic of the "protected characteristic" approach, which created a disciplined and principled framework for analyzing social group claims, This approach, based on the doctrine of ejusdem generis, is grounded in the language of the refugee definition and consistent with the preamble's focus on antidiscrimination and protection of fundamental human rights; it reflects the context of the modern human rights movement in which the 1951 Refugee Convention has its roots, as well as the historical concerns of the delegates.

The "social perception" and "social visibility" approaches, on the other hand, are not based on the text, context, or purpose of the Convention, and therefore derive no support from the general rules of interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties. By focusing on the mindset and views of the relevant society, rather than the predicament of the claimant, these approaches distort the refugee definition.[256] Furthermore, they are inherently difficult to apply due to the highly context-dependent nature of social perception. These sociological approaches will create numerous practical challenges for adjudicators, who will struggle to derive subjective social perceptions from the types of "objective" background evidence generally submitted in support of asylum claims, leading to contradictory decisions. Decision-makers also will be more likely to confuse and conflate the different elements of the refugee condition in the absence of direct evidence about social perception, because they will be forced to rely on evidence that a group has been targeted for harm to determine whether it is recognized by society. Adjudicators could easily avoid such chaos by remaining true to *Acosta*'s law-based standard.

Insofar as one of the assumptions underlying the "social visibility" approach is that a group is not vulnerable to persecution if it is not visible, such reasoning is flawed on multiple levels. First, it improperly conflates the "persecution," "well-founded fear," "nexus," and "particular social group" elements

255. No. 74665/03, slip op. para. 81 (Refugee Status App. Auth. July 7, 2004) (N.Z.), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/REF_20040707_74665.pdf (emphasis added).

256. Even Australia, which considers social perception, recognizes that the Convention's definition of a refugee focuses on the reasons of the claimant's predicament rather than on the mindset of the persecutor. *See* Chen Shi Hai v. Minister for Immigration & Multicultural Affairs (2002) 201 C.L.R. 293 paras. 33, 65 (Austl.); *see also* No. 72635/01, slip op. para. 168 (Refugee Status App. Auth. Sept. 6, 2002) (N.Z.), *available at* http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_20020906_72635.pdf (emphasizing the focus on the claimant's predicament); Haines, *supra* note 2, at 325 (stressing that the inquiry into whether an individual is entitled to refugee protection must focus on that individual's specific characteristics and circumstances, "who that individual is or what he or she believes and the reason why that person is unable or unwilling to avail him or herself of the protection of the country of origin"); James C. Hathaway, *Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT'L L. 211, 215 (2002) (emphasizing that in analyzing the causal link, "[t]he focus [is] on the applicant's predicament").

of the refugee definition. Second, if visibility were required to be vulnerable to persecution, then it would be required for each of the protected grounds, not just membership of a particular social group. Making visibility a requirement for membership of a particular social group, when it is not a requirement for the protected grounds of race, religion, nationality or political opinion, contradicts the doctrine of ejusdem generis. Third, this assumption ignores the ways in which power relations directly shape social identities and influence the relative visibility or invisibility of various groups.[257] Socially marginalized groups often are stripped of social agency and denied the ability to define their own identities; those in power determine whether and how they are seen. Negating a marginalized group's identity may even be integral to the identity of the dominant group.[258] This is particularly true in situations of intense conflict, where social identities are often perceived and debated as "zero-sum," as if "A's identity can be recognized and expressed only if B's identity is denied and suppressed."[259] Requiring marginalized groups to be socially visible may therefore paradoxically demand that they be recognized by the very people who have denied or suppressed their identities.[260]

Asylum claims based on sexual orientation and gender provide helpful examples for understanding the relationship between oppression and invisibility, as well as the detrimental impact that the "social visibility" test may have on some of the most vulnerable groups. Given that the principled human rights paradigm has played a key role in the development of asylum claims related to sexual orientation and gender, embracing the inherently incoherent "social

257. *See, e.g.*, Taylor & Spencer, *supra* note 148, at 4 (drawing on the views of Michel Foucault and Jacques Lacan in discussing how "social identity is directly related to discourses of power"). In analyzing the relationship between "visibility" and power, Kenji Yoshino argues that "[t]here is no innate connection between visibility and political powerlessness, nor is there an innate connection between invisibility and political power. Rather, the net effects of visibility will depend on context, sometimes disempowering a group and sometimes empowering it." Yoshino, *supra* note 120, at 537 (footnotes omitted).

258. Herbert C. Kelman, *The Role of National Identity in Conflict Resolution: Experiences from Israeli-Palestinian Problem-Solving Workshops*, *in* 3 SOCIAL IDENTITY, INTERGROUP CONFLICT, AND CONFLICT REDUCTION 192 (Richard D. Ashmore, Lee Jussim & David Wilder eds., 2001).

259. *Id.* at 194.

260. *Cf.* Michael Pickering, *Racial Stereotypes*, *in* SOCIAL IDENTITIES: MULTIDISCIPLINARY APPROACHES, *supra* note 148, at 102-03 (discussing how individuals who are "racially marked" by stereotypes must strive for self-worth and self-creation "within the dominant/subordinate relations of the racist culture," and how their "struggle for identity is confined to recognition by those who have denied their identity").

visibility" test could negate many of the achievements that have been gained in these areas over the past two decades.[261]

In short, the "social visibility" test effectively gives decision-makers total discretion to decide whether or not a particular social group exists. Since the test is not law-based and social perceptions are so fluid, adjudicators will be able to deny freely the existence of a particular social group, despite the existence of a protected characteristic, based on a finding that the group is not socially visible. Moreover, since the BIA has not adequately defined social visibility, the amount of discretion remains virtually unlimited. Embracing the BIA's new approach not only will lead to chaotic case law and abdication of the United States' obligations under the Convention, but also will cause the legal community to reject the refugee status determination as a serious, principled process.

261. *See, e.g.*, Anker, *supra* note 26; Anker, *supra* note 12, at 391-92; Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155 (2002); Binaifer A. Davar, *Rethinking Gender-Related Persecution, Sexual Violence, and Women's Rights: A New Conceptual Framework for Political Asylum and International Human Rights Law*, 6 TEX. J. WOMEN & L. 241 (1997); Edwards, *supra* note 14, at 49; Ryan Goodman, Note, *The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary "Medical" Intervention*, 105 YALE L.J. 255 (1995); Haines, *supra* note 199, at 322 (discussing how the analysis and understanding of sex and gender in refugee law has run parallel to and been assisted by developments in international human rights law and international humanitarian law); James Hathaway, *The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute*, *in* INT'L ASSOC. OF REFUGEE LAW JUDGES, THE REALITIES OF REFUGEE DETERMINATION ON THE EVE OF A NEW MILLENNIUM: THE ROLE OF THE JUDICIARY 86 (1998); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 633 (1993); Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 28-30 (1998).