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"MEMBERSHIP IN A PARTICULAR SOCIAL GROUP": WHY UNITED STATES COURTS SHOULD ADOPT THE DISJUNCTIVE APPROACH OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

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INTRODUCTION

The function of international refugee law is to consolidate states' approaches to *non-refoulement*, the principle that no refugee should be forced to return to a country in which the refugee will be subjected to persecution.[1] When states deviate from international refugee law, refugees' liberties can become vulnerable to infringement. This is the landscape of immigration law in the United States today. Congress enacted the Refugee Act of 1980 ("Refugee Act") to incorporate the United States' legal obligations under the 1951 Convention Relating to the Status of Refugees ("Convention")—an instrument of international law to which the United States is bound[2]—into domestic law.[3] In doing so, Congress adopted the Convention's definition of refugee: any individual who is forced to flee his or her country of nationality due to a "well-founded fear of being persecuted" based on "race, religion, nationality, membership of a particular social group or

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[1] GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 201 (3d ed. 2007). *Non-refoulement* is a relatively recent concept; it did not begin to surface in international conventions until after World War I. *Id.* at 202 (citing Convention Relating to the International Status of Refugees art. 3, Oct. 28, 1933, 159 L.N.T.S. 3663).

[2] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 1:5 (Thomson Reuters/West 2013) (1989), *available at* Westlaw LOAUS; *see* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 178 (1993) ("[T]he history of the 1980 Act . . . disclose[s] a general intent to conform our law to Article 33 of the Convention . . . .").

[3] *See* H.R. REP. NO. 96-608, at 17–18.

political opinion."[4] A split of authority among the circuit courts regarding who qualifies as a member of a "particular social group" has led to the adoption of a rigorous standard, to varying degrees, for refugee status determination that deviates from international law and strips away some of the protections it affords.[5]

To remedy this split of authority, courts should adopt the approach of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), the leading authoritative source on international refugee law and the agency tasked with supervising application of, and compliance with, the Convention.[6] The United States is not a party to the Convention. It is, however, a party to the Convention's 1967 Protocol Relating to the Status of Refugees ("Protocol"),[7] which commits the United States "to apply articles 2 to 34 inclusive of the Convention to refugees."[8] By virtue of the Protocol, the United States is legally obligated to cooperate with the UNHCR.[9] For this reason, U.S. courts should adopt the UNHCR's approach to defining "membership of a particular social group," as enumerated in its *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*

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[4] Convention Relating to the Status of Refugees art. 1A(2), July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention]; *see* Protocol Relating to the Status of Refugees art. I(1)–(2), *done* Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter Protocol].

[5] *See infra* Part II.

[6] *See* Convention, *supra* note 4, pmbl., para. 6; Protocol, *supra* note 4, art. II.

[7] The Convention's definition of "refugee" included only those individuals who suffered from persecution "[a]s a result of events occurring before 1 January 1951." Convention, *supra* note 4; Protocol, *supra* note 4, art. I(2). The 1967 Protocol Relating to the Status of Refugees amended the Convention by eliminating the quoted language. Protocol, *supra* note 4, art. I(2).

[8] Protocol, *supra* note 4, art. I(1); *see Multilateral Treaties Deposited with the Secretary-General*, U.N. TREATY COLLECTION ch. V.5, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en (last visited Jan. 14, 2015); *see also id.* at ch. V.2 (current parties to the Convention); Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 DUKE L.J. 1059, 1067 (2011) (stating that although the United States is not a signatory to the 1951 Convention, when the United States acceded to the Protocol, it bound itself to all the "substantive provisions of the Convention").

[9] *See Multilateral Treaties Deposited with the Secretary-General*, *supra* note 8; *see also* U.N. High Comm'r for Refugees, Convention and Protocol Relating to the Status of Refugees: Introductory Note by the Office of the United Nations High Commissioner for Refugees 4 (Dec. 2010), http://www.unhcr.org/3b66c2aa10.pdf.

Status of Refugees ("*Guidelines on International Protection*" or "*Guidelines*").[10] The majority of U.S. circuit courts have neglected to do so, however, resulting in the creation of a restrictive criteria that requires applicants to exhibit three characteristics: "immutability," "social visibility," and "particularity."[11] For the United States to fully comply with its international and domestic obligations, circuit courts must instead adopt the *Guidelines*' disjunctive approach to defining membership of a particular social group.

This Note calls for the adoption of the *Guidelines on International Protection* of the UNHCR in defining "membership in a particular social group" under the Refugee Act of 1980. Part I discusses the United States' obligations under the Convention and Protocol, and the process by which these obligations were incorporated into domestic law with the enactment of the Refugee Act of 1980. Part I also demonstrates how deviation from the United States' international obligations led to the circuit split. Part II outlines the views adopted by circuits on both sides of the split. Part III asserts that circuit courts should adopt the *Guidelines on International Protection*, and demonstrates what adherence to these Guidlines looks like in practice. Lastly, Part IV provides a more focused demonstration of the difficulties associated with requiring social visibility and particularity.

I. BACKGROUND

Article 1 of the Convention,[12] as amended by the Protocol, defines a "refugee" as any individual who:

> [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not

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[10] *See generally* U.N. High Comm'r for Refugees, *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*, ¶¶ 10–23, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter *Guidelines*], *available at* http://www.unhcr.org/3d58de2da.html.

[11] *See infra* Part II.2.

[12] The Convention was born after World War II and in the context of the adoption of the Universal Declaration of Human Rights in 1948. Farbenblum, *supra* note 8, at 1066–67.

> having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[13]

The United States acceded to the non-self-executing[14] Protocol in 1968.[15] To convert the Protocol into domestically enforceable federal law, Congress enacted implementing legislation, the Refugee Act of 1980, which incorporates the Protocol's definition of refugee into U.S. immigration law "without substantive alteration."[16]

The Refugee Act does not define particular social group[17] because Congress "was not engaged in threshing out and explaining a new idea, but in the importation into U.S. law of an established idea—the refugee definition of the Convention and Protocol,"[18] to fill a gap in protection.[19]

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[13] Convention, *supra* note 4; *see* Protocol, *supra* note 4.

[14] A non-self-executing treaty is not domestically binding until Congress enacts implementing legislation that incorporates the treaty into domestic law. Medellín v. Texas, 552 U.S. 491, 505 (2008). A self-executing treaty is domestically binding upon the United States' accession to the treaty. *See id.* at 504–05.

[15] United States v. Aguilar, 883 F.2d 662, 680 (9th Cir. 1989) (stating that the Protocol is a non-self-executing treaty), *superseded by statute on other grounds*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 112, 100 Stat. 3359, *as recognized in* United States v. Gonzalez-Torres, 309 F.3d 594 (9th Cir. 2002).

[16] *See* T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 924–25 (1992). The term refugee means:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C.A. § 1101(a)(42)(A) (West 2014).

[17] *See* 8 U.S.C.A. § 1101(a)(42)(A).

[18] Parish, *supra* note 16, at 925; *see* H.R. REP. NO. 96-608, at 17–18 (1979) (stating that the Refugee Act brings U.S. domestic law into conformity with the nation's international obligations); *see also* H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.) (stating that the Senate's bill and the House's amendment incorporated the U.N.'s definition of refugee, as enumerated in the Protocol); CONG. RESEARCH SERV., S. COMM. ON THE JUDICIARY, 96TH CONG., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 37 (Comm. Print 1980) ("[T]he Refugee Act proposed a definition of the term 'refugee,' designed to bring the United States into accord with our treaty obligations under the United Nations Convention and Protocol Relating to the Status of Refugees.").

[19] *See* CONG. RESEARCH SERV., *supra* note 18. Prior to the Refugee Act, U.S. immigration law lacked a definition of refugee; subsection 42 was entirely

The Refugee Act converts the Protocol into domestically enforceable federal law.[20] Therefore, to properly apply membership in a particular social group pursuant to the Refugee Act, U.S. courts must focus their efforts on interpreting what the nation's obligations are under the Protocol.[21]

A. *Interpreting the United States' Obligations Under the 1951 Convention Relating to the Status of Refugees and 1967 Protocol*

The text and negotiating history of the Convention and Protocol provide minimal guidance in construing the meaning of membership of a particular social group. During the Convention's drafting at the Conference of Plenipotentiaries, the Swedish delegate recommended including this basis of persecution simply on the ground that social groups existed, and individuals were often persecuted by virtue of their membership in those groups.[22] There was little debate concerning this addition, which suggests that the delegates had a common understanding of what membership of a particular social group entailed at that point in history: quite possibly individuals fleeing persecution by socialist governments, in particular "landowners, capitalist class members, independent business people, the middle class and their families."[23] Regardless, any definition of the term would include the factor of shared interests, values, or backgrounds.[24]

Because the drafters did not define membership of a particular social group, one must look beyond the four corners of the Convention and Protocol to decipher the phrase's meaning. The Vienna Convention on the Law of Treaties ("VCLT") provides

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nonexistent. *See id.* Refugee status was limited to individuals fleeing communism. *See id.*

[20] *See* H.R. REP. NO. 96-608, at 17–18.

[21] U.S. refugee law has its origins in treaty law. In light of this, "the Supreme Court, other federal courts, and the BIA have all recognized that it may be appropriate to consider international law when adjudicating requests for asylum and withholding of removal." U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: INTERNATIONAL HUMAN RIGHTS LAW 4 (2005) [hereinafter BASIC TRAINING], *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/International-Human-Rights-Law-31aug10.pdf.

[22] GOODWIN-GILL, *supra* note 1, at 74.

[23] *Id.*

[24] *Id.* at 75.

possible methods of doing so.[25] Article 32 of the VCLT states that "ambiguous or obscure" treaty provisions may be clarified by resorting to supplemental materials[26] such as *travaux preparatoires*, or preparatory works.[27] The Convention and Protocol's *travaux preparatoires*, however, shed little light on the meaning of "social group." As was previously discussed, the delegate responsible for suggesting the addition of this basis of persecution provided a curt, somewhat circular, explanation to his fellow diplomats: "[E]xperience had shown that certain refugees had been persecuted because they belonged to particular social groups."[28] Other articles of the VCLT provide instruction on additional ways of construing ambiguous provisions.

Pursuant to Article 31 of the VCLT, treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[29] The Convention's Preamble states that the purpose of the treaty is to "consolidate" the existing international agreements related to the status of refugees, and to "extend the scope of and protection accorded by such instruments."[30] Furthermore, the Convention's drafting took place simultaneously with the adoption of the Universal Declaration of Human Rights ("UDHR") in 1948.[31] The UDHR extended the scope of "political, social, economic and cultural rights," providing a "new and firmer basis for the development of

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[25] Although the Senate has not ratified the VCLT, it is viewed as an authoritative source. Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 435 (2004).

[26] Vienna Convention on the Law of Treaties art. 32, *done* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[27] *Id. Travaux preparatoires* are "preparatory work[s]," like the "negotiating and drafting history . . . and the postratification understanding of the contracting parties" to a treaty. Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996).

[28] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 2-25, 1951, *Summary Record of the Third Meeting*, at 14, U.N. Doc. A/CONF.2/SR.3 (Nov. 19, 1951).

[29] Vienna Convention, *supra* note 26, art. 31(1). The preamble of a convention is a telling source for determining a treaty's "object and purpose." Farbenblum, *supra* note 8, at 1074.

[30] Convention, *supra* note 4, pmbl, para. 3.

[31] *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

the rights of refugees."[32] In light of the above, the Convention was drafted for the purpose of broadening the scope and enhancing the flexibility of protections already in place.

Beyond the text of the Convention and Protocol, and the Vienna Convention's methods of treaty interpretation, there is an alternative source that provides the most enlightening guidance in defining membership of a particular social group: the United Nations High Commissioner for Refugees, the leading international authority on refugee law.[33]

The UNHCR, a subsidiary organ created by the General Assembly of the United Nations, is responsible for the "international protection" of refugees and is tasked with "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."[34]

The United States, as well as states across the globe, have requested the assistance of the UNHCR in developing instruments of refugee law. For example, in Europe, the UNHCR has contributed to treaties pertaining to social security and visa requirements affecting refugees.[35] Furthermore, the UNHCR was instrumental in the development of the 1959 European Agreement on the Abolition of Visas for Refugees,[36] the 1957 European Convention on Extradition,[37] the 1990 Dublin Convention,[38] and is currently working with members of the European Union to harmonize their immigration laws.[39]

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

[33] Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), Annex, U.N. Doc. A/RES/428(V) (Dec. 14, 1950). Unlike Security Council resolutions, resolutions of the General Assembly are non-binding.

[34] *Id.* Annex ¶¶ 1, 8(a). The United States is a member of the UNHCR's Executive Committee, which is responsible for advising the UNHCR on international protection, as well as approving the Agency's programs.

[35] LEWIS, *supra* note 32, at 35.

[36] *Id.* The European Agreement on the Abolition of Visas for Refugees codifies a right of travel amongst Western European countries for refugees without a visa. *Id.*

[37] *Id.*

[38] *Id.* The 1990 Dublin Convention addressed the issue of which states of the European Economic Community, the "forerunner" of the European Union, would be responsible for assessing asylum applications. *Id.*

[39] *Id.* This is by no means an exhaustive list of ways in which the UNHCR has influenced the creation of states' domestic legal instruments relating to refugees. The UNHCR has played a significant role in the development of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa as well. *Id.* at 34.

Not only is the UNHCR influential abroad, but the U.S. government also frequently seeks out the assistance of the UNHCR in developing policies affecting refugees and asylum-seekers.[40] For example, in 1994, during the Clinton administration, the U.S. government followed the UNHCR's recommendation to "reverse[] the policy of summary return of Haitian asylum seekers."[41] The U.S. government has consulted with, and funded the UNHCR in establishing refugee screening procedures, including that of the U.S.N.S Comfort, the Guantanamo Bay Naval Base, as well as the screening operation applicable to "interdicted Cuban asylum seekers."[42] Additionally, during the Bosnia-Herzegovina civil war, the UNHCR was appointed "gatekeeper" of determining which Bosnians fleeing Serbian persecution were eligible for resettlement in the United States.[43]

Article 35 of the Convention commits contracting parties to cooperate with the UNHCR in its endeavor to promote the international protection of refugees.[44] This agency has published materials that explicitly define membership of a particular social group. The *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ("*Handbook*") states that a particular social group "normally comprises persons of similar background, habits or social status."[45]

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[40] Scott Busby, *The Politics of Protection: Limits and Possibilities in the Implementation of International Refugee Norms in the United States*, 15 BERKELEY J. INT'L L. 27, 27 (1997).

[41] *Id.* at 30.

[42] *Id.*

[43] *Bosnian Refugees: Hearing Before the Subcomm. on Int'l Operations & Human Rights of the H. Comm. on Int'l Relations*, 104th Cong. 38 (1995); Daniel P. Derechin, Note, *Alan Freeman, Refugee Law and Bosnian Rape Camps: Our Role in the Slaughter*, 11 GEO. IMMIGR. L.J. 811, 819–20 (1997).

[44] Convention, *supra* note 4, art. 35(1) ("The Contracting States undertake 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 this Convention."); *see also* LEWIS, *supra* note 32, at 23.

[45] U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 77, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter *Handbook*], *available at* http://www.unhcr.org/3d58e13b4.html.

The *Handbook* is an authoritative source in the United States. For example, it guided the U.S. Supreme Court in its interpretation of a provision of the Refugee Act in *INS v. Cardoza-Fonseca*,[46] a case involving the interpretation of a "well-founded fear of persecution."[47] The Court articulated that "the Handbook provides *significant guidance* in construing the Protocol, to which Congress sought to conform" U.S. immigration law with the Refugee Act.[48] The Court justified its interpretation of well-founded fear of persecution under the Refugee Act by highlighting that it was consistent with that of the UNHCR, as outlined in the *Handbook*.[49] Additionally, the training manual for the "Asylum Officer Basic Training Course" of the Department of Homeland Security's U.S. Immigration and Citizenship Services cites the *Handbook* as a source to refer to when determining whether an individual is eligible for refugee status pursuant to the Convention and Refugee Act.[50]

The *Handbook*'s broad definition of particular social group—individuals who are "of similar background, habits or social status"[51]—indicates that the UNHCR did not intend for this basis of persecution to be applied in a restrictive manner.

In 2002, the High Commissioner published a more comprehensive and focused set of instructions: the *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*.[52] The *Guidelines* outline two *alternative* routes to refugee status on the ground of "persecution" based on membership in a particular social group.[53] First, pursuant to the "protected characteristics approach," a particular social group is comprised of members who

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[46] 480 U.S. 421, 438–39 (1987).

[47] *Id.* at 423.

[48] *Id.* at 439 n.22 (emphasis added); *see also id.* at 438–39 ("In interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status." (citation omitted)).

[49] *Id.* at 439. The Refugee Act's provision pertaining to the requirement of a well-founded fear of persecution "mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980." *Id.* at 424.

[50] BASIC TRAINING, *supra* note 21, at 4, 5.

[51] *Handbook*, *supra* note 45.

[52] *See generally Guidelines*, *supra* note 10.

[53] *Id.* ¶¶ 4, 6–7.

exhibit a common characteristic that is immutable or is so "fundamental to human dignity" that members should not be required to alter that characteristic to escape persecution.[54] Second, under the alternative "social perception approach,"[55] members need not exhibit an immutable or unalterable trait; rather the purported group must be cognizable, or recognized by society as a distinct group.[56] Therefore, an individual who is a member of a group comprised of individuals who share, for example, the same profession, would be entitled to the protections of the Convention and Protocol pursuant to the social perception approach, even though that person could potentially change professions to escape persecution, assuming all other requirements have been met. The *Guidelines* also provide that there is no additional requirement of cohesiveness; members of the group need not associate with one another.[57]

After applying the VCLT, and in light of the UNHCR's *Handbook* and *Guidelines*, the standard for determining whether an applicant is a member in a particular social group is relatively broad and flexible. As long as the purported group shares a common, "immutable characteristic," *or* is cognizable by society, it qualifies as a social group pursuant to the Convention and Protocol. This broad approach, however, differs significantly from the more restrictive standard that U.S. circuit courts employ when determining whether an alien falls within the category of membership in a particular social group.

B. United States' Interpretation of "Membership in a Particular Social Group"

Immigration judges, the Board of Immigration Appeals ("BIA"), and federal circuit court judges are the primary interpretative bodies of U.S. immigration law.[58] The BIA is an

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[54] *Id.* ¶ 6 (internal quotation marks omitted) ("The first, the 'protected characteristics' approach . . . examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it.").

[55] *Id.* ¶ 7 (internal quotation marks omitted).

[56] *Id.* ("The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.").

[57] *Id.* ¶ 15.

[58] *Board of Immigration Appeals*, U.S. DEPARTMENT OF JUST., http://www.justice.gov/eoir/biainfo.htm (last updated Nov. 2011).

administrative body of the U.S. Department of Justice that has jurisdiction over appeals arising from decisions of immigration judges across the nation.[59] The parties to these proceedings are the U.S. government and an alien seeking a remedy under U.S. immigration law.[60]

1. "Particular Social Group" Under *Acosta*

In *Acosta*, a case of first impression, the BIA defined membership in a particular social group.[61] The BIA held that members of a taxi cooperative in El Salvador who were targeted by anti-government guerillas were not members of a particular social group.[62] Members of the cooperative were assaulted and received threats of retaliation when they refused to comply with the guerillas' demands.[63]

In grappling with the meaning of particular social group, the BIA first referred to the other bases of persecution enumerated in the Refugee Act—"political opinion," "nationality," "race," and "religion"[64]—immutable, fundamental characteristics that an individual should not be required to alter to escape persecution.[65] Pursuant to the canon of *ejusdem generis*,[66] when general and specific words are listed together, the general words should be interpreted "in a manner consistent with the specific words."[67] The BIA reasoned that in light of *ejusdem generis*, "persecution on account of membership in a particular social group" must also be triggered by an immutable characteristic that is shared by members of the purported group.[68] The BIA articulated that the characteristic can be innate, like gender, or it can be a "shared past experience such as former military leadership or land

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[59] *Id.*

[60] *Id.*

[61] *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987). Although *Acosta* was partly overruled by a subequent BIA decision, its interpretation of membership in a particular social group was left untouched. *See Mogharrabi*, 19 I. & N. Dec. at 439 (overruling *Acosta*'s interpretation of the proper standard for establishing a well-founded fear of persecution).

[62] *Acosta*, 19 I & N. Dec. at 234. Taxi drivers were targeted to create transportation stoppages in an attempt to weaken the country's economy. *Id.* at 216.

[63] *Id.*

[64] *Id.* at 233.

[65] *Id.*

[66] "[O]f the same kind." *Id.*

[67] *Id.* (citing Cleveland v. United States, 329 U.S. 14 (1946)).

[68] *Id.*

ownership."[69] The BIA held that the occupation in question, taxi driver, was not an unalterable characteristic.[70] Therefore, members of the taxi cooperative who refused to kowtow to the guerillas did not constitute a particular social group under the Refugee Act.[71]

Circuit courts nationwide adopted *Acosta*'s immutability standard, which is the same as the *Guidelines*' protected characteristics approach.[72] Some of the characteristics which were held to be immutable include: sexual orientation;[73] Somalian females who are forced to undergo genital mutilation;[74] "the educated, landowning class of cattle farmers targeted by" Columbian rebels;[75] Christian women in Iran who opposed the Islamic dress code for women;[76] "parents of Burmese student dissidents";[77] and Ugandan children who were formerly enslaved by guerillas.[78]

2. The Emergence of "Social Visibility"

After *Acosta*, the BIA's application of membership in a particular social group took on a new form. The following cases track the BIA's evolving approach, which resulted in the addition

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[69] *Id.*

[70] *Id.* at 234.

[71] *See id.* at 236.

[72] *See Guidelines*, *supra* note 10, ¶ 6.

[73] Karouni v. Gonzales, 399 F.3d 1163, 1172–73 (9th Cir. 2005) (holding that homosexuality is an innate characteristic that an individual should not be forced to suppress to evade persecution).

[74] Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir. 2005) (stating that the victim's gender, an immutable characteristic, was a "motivating factor" for the persecutor).

[75] Tapiero de Orejuela v. Gonzales, 423 F.3d 666, 672 (7th Cir. 2005). Applying *Acosta*, the court stated that members of the wealthy, educated, landowning class of cattle farmers comprise a particular social group because even if they were to alter these characteristics, the guerillas would likely still target them. *Id.* at 672–73.

[76] Yadegar-Sargis v. INS, 297 F.3d 596, 604 (7th Cir. 2002) (holding that the applicant was a member of a particular social group, but she did not sufficiently demonstrate that she was persecuted or had a well-founded fear of persecution because of her membership in that group).

[77] Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998) ("When the *Acosta* formulation is applied to the facts of this case, we conclude that parents of Burmese student dissidents do share a 'common, immutable characteristic' sufficient to comprise a particular social group.").

[78] Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009); Lukwago v. Ashcroft, 329 F.3d 157, 178–79 (3d Cir. 2003).

of two new requirements—social visibility and particularity—to the existing standard for refugee status determination under *Acosta*.

a. In re R-A-

In *In re R-A-*,[79] the BIA held that in Guatemala, women in relationships with men who believed they were superior to women did not constitute a particular social group because they were not recognized by society as comprising a "societal faction."[80] This case demonstrates the BIA's earliest attempt to incorporate a social visibility determination into the particular social group analysis.[81] The BIA articulated that "political opinion," "nationality," "race," and "religion" are all characteristics that distinguish recognizable factions in society.[82] Therefore, in order for a group to constitute a particular social group under the Refugee Act, that group must be recognized as distinct from society.[83] The BIA's use of the term "recognize" laid the groundwork for a more developed social visibility factor in *In re C-A-*.

b. In re C-A-

In *In re C-A-*,[84] the BIA declined to recognize informants against a Columbian drug cartel as a particular social group.[85] The applicant's claim was dismissed, in part, on the ground that the purported group lacked social visibility, given the applicant's conduct was performed "out of the public view."[86]

The BIA fell short of explicitly labeling social visibility as a requirement. However, it did place unprecedented emphasis on the need for visibility and recognizability.[87] Pursuant to the BIA's approach, social visibility hinges on whether society

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[79] 22 I. & N. Dec. 906 (B.I.A. 1999).
[80] *Id.* at 918.
[81] *Id.*
[82] *Id.*
[83] *See id.*
[84] 23 I. & N. Dec. 951 (B.I.A. 2006).
[85] *Id.* at 961.
[86] *Id.* at 960–61.
[87] *Id.* at 960.

perceives the *individual*, based on an external characteristic, as a member of the purported group, not on whether the *group as a whole* is cognizable or perceived by society.[88]

Furthermore, the BIA distinguished this case from *In re H-*,[89] an earlier decision in which it held that a subclan in Somalia, the Marehan, constituted a particular social group.[90] As in *C-A-*, the BIA in *H-* considered the extent to which *members* of the purported group would be recognizable to society.[91] It reasoned that the subclan was distinguishable from society based on, among other things, linguistics.[92] This reasoning indicates that when the BIA discusses social visibility, it is not only referring to the visibility of the individual within the purported group, but also to a type of literal visibility based on characteristics that are externally distinguishable, such as behavior, physical attributes, and language.[93]

c. *In re* A-M-E & J-G-U-

In *In re A-M-E & J-G-U-*,[94] the BIA refused to recognize "affluent Guatemalans" as a particular social group.[95] The BIA placed even greater emphasis on the importance of recognizability.[96] This case was remanded to the BIA by the Second Circuit with the request that it further explain the meaning of particular social group and why the purported group, affluent Guatemalans, did not qualify as one.[97] On remand, the BIA cited its decision, *C-A-*, as a reaffirmation of the importance of the social visibility requirement in determining what

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[88] *Id.* at 956–57 ("[W]e have considered 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.").

[89] 21 I. & N. Dec. 337 (B.I.A. 1996).

[90] *Id.* at 343 ("The record before us makes clear not only that the Marehan share ties of kinship, but that they are identifiable as a group based upon linguistic commonalities.").

[91] *See id.* at 342–43.

[92] *Id.* at 343.

[93] *See id.* Language is "socially visible" because upon hearing an individual speak, society has the potential to, based on a difference in language or accent, for example, categorize that person as being part of a particular social group.

[94] 24 I. & N. Dec. 69 (B.I.A. 2007).

[95] *Id.* at 77.

[96] *Id.* at 74.

[97] *Id.* at 69.

constitutes a particular social group,[98] and further articulated "the attributes of a particular social group *must* be recognizable and discrete."[99]

The BIA began its analysis by applying the *Acosta* immutability standard,[100] stating that although "wealth" is not an immutable characteristic, individuals should not be expected to divest themselves of wealth.[101] The BIA held that regardless of the conclusion of its immutability analysis, the group failed to meet the particular social group standard on other grounds.[102] Wealthy Guatemalans were not identifiable in society and therefore lacked the requisite social visibility under the Refugee Act.[103] In addition, the group was too "amorphous" and could potentially encompass a large fraction of society.[104] Therefore, the group did not demonstrate the requisite particularity to constitute a particular social group.[105]

Throughout the majority of its opinion, the BIA focused on whether the aliens themselves were readily identifiable by society, based on an externally visible characteristic, as members of the purported group.[106] This focus marked a departure from the BIA's opinion in *Acosta*, which hinged instead on whether individuals of the purported group shared an immutable characteristic so fundamental to their identity that they cannot,

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[98] *See id.* at 74.

[99] *Id.* (emphasis added) (quoting *In re* C-A-, 23 I. & N. Dec. 951, 956 (B.I.A. 2006)) (internal quotation marks omitted).

[100] *See id.* at 73. In *Acosta*, the BIA stated:

> "Persecution on account of membership in a particular social group" refers to persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic, [that is], a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.

19 I. & N. Dec. 211, 212 (B.I.A. 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

[101] *A-M-E & J-G-U-*, 24 I. & N. Dec. at 73–74.

[102] *Id.*

[103] *Id.* at 69.

[104] *Id.* at 76.

[105] *Id.*

[106] *See id.* at 74.

or should not, be required to alter that trait in order to escape persecution.[107] The BIA solidified its characterization of social visibility and particularity as requirements in *In re S-E-G-*.[108]

d. In re S-E-G-

In *In re S-E-G-*, the BIA refused to recognize a group of El Salvadoran youths who evaded recruitment into the criminal gang "Mara Salvatrucha," as members of a particular social group.[109] With reference to *A-M-E & J-G-U-* and *C-A-*, the BIA stated that in order for an applicant to demonstrate that he is a member of a particular social group, he *must* exhibit social visibility, to the extent that he is recognized by society as being part of the purported group, and particularity.[110] The aliens provided insufficient evidence that they were "perceived as a group" by society at large, and failed to demonstrate the requisite social visibility.[111]

R-A-, *C-A-*, *A-M-E & J-G-U-*, and *S-E-G-* gradually elevated social visibility and particularity from mere factors to consider when assessing an alien's asylum claim, to absolute prerequisites.[112] This approach deviates from the BIA's immutability standard in *Acosta*, which only requires the alien to

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[107] *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

[108] 24 I. & N. Dec. 579 (B.I.A. 2008).

[109] *Id.* at 582–88.

[110] *Id.* 582, 587 ("[M]embership in a purported social group requires that the group have particular and well-defined boundaries, and that it possess a recognized level of social visibility.").

[111] *Id.* at 583, 587.

[112] Gaitan v. Holder, 671 F.3d 678, 685 (8th Cir. 2012) (Bye, J., concurring). First, in *In re R-A-*, the BIA's dismissal of the respondent's asylum claim was premised on the finding that the respondent himself was not recognized as being part of a faction in society. 22 I. & N. Dec. 906, 918 (B.I.A. 1999). Subsequently, in *In re C-A-*, the BIA placed even greater emphasis on the need for recognizability and social visibility. 23 I. & N. Dec. 951, 961 (B.I.A. 2006). The BIA held that the purported group did not constitute a particular social group because its members lacked the requisite social visibility—that is, recognizability, given "the very nature of the conduct at issue is such that it is generally out of the public view." *Id.* at 960. In *In re A-M-E- & J-G-U-*, the BIA reasoned that "the attributes of a particular social group *must* be recognizable and discrete." 24 I. & N. Dec. 69, 74 (B.I.A. 2007) (emphasis added) (quoting *C-A-*, 23 I. & N. Dec. at 956) (internal quotation marks omitted). Lastly, in *In re S-E-G-*, the BIA articulated that the common characteristic must make the members easily identifiable in society. 24 I. & N. Dec. at 584.

provide sufficient evidence of persecution on account of an immutable characteristic, and is still treated as relevant and authoritative by circuit courts today.[113]

II. THE CIRCUIT SPLIT

The BIA's addition of social visibility and particularity requirements has led to a split of authority among federal circuit courts. Courts are divided on whether these two characteristics are in fact requirements that must be met when assessing an application for refugee status. Both sides of the circuit split apply a more rigorous standard than that of the *Guidelines*. The minority of circuits does not view social visibility and particularity as prerequisites. Instead, the minority applies *Acosta*'s immutability standard alone. The minority's approach differs from that of the *Guidelines*, which provides, in addition to the protected characteristic, or immutability approach, an alternative route to refugee status via the social perception approach. The majority of circuits, on the other hand, require immutability, social visibility, and particularity.

A. *Approach One: Immutability and Nothing More*

The Third and Seventh Circuits have declined to follow the BIA's lead in applying social visibility and particularity as requirements of classification as a particular social group under the Refugee Act.[114] The courts' rejections stem primarily from the difficulties they associate with applying an " 'external' criteri[on] [like 'social visibility'] to identify a social group."[115]

In *Gatimi v. Holder*[116] and *Ramos v. Holder*,[117] the Seventh Circuit rejected social visibility as a requirement.[118] *Gatimi* involved defectors of a Kenyan clan,[119] and *Ramos*, a young man who resisted recruitment into violent gangs in El Salvador.[120]

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[113] *In re* Acosta, 19 I. & N. Dec. 211, 212 (B.I.A. 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

[114] Valdiviezo-Galdamez v. Att'y Gen. of U.S., 663 F.3d 582, 608–09 (3d Cir. 2011); Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

[115] *Benitez Ramos*, 589 F.3d at 430; *see Valdiviezo-Galdamez*, 663 F.3d at 604.

[116] 578 F.3d 611 (7th Cir. 2009).

[117] 589 F.3d 426 (7th Cir. 2009).

[118] *See Gatimi*, 578 F.3d at 616; *see also Benitez Ramos*, 589 F.3d at 428.

[119] *Gatimi*, 578 F.3d at 614.

[120] *Benitez Ramos*, 589 F.3d at 428.

To illustrate the impracticalities of requiring social visibility, the Seventh Circuit provides several examples. "[R]edheads," the court in *Ramos* articulated, are externally distinguishable, but they do not constitute a particular social group.[121] Veterans, however, do constitute a particular social group, yet their attributes do not put society on notice that they are members of that group.[122] Furthermore, those who are, or could potentially be persecuted, will try to remain invisible and conceal the characteristic for which they will be targeted.[123] For example, the court in *Gatimi* noted that "homosexual[s] in a homophobic society will pass as heterosexual[s]"[124] if they suppress their sexuality.

In *Valdiviezo-Galdamez v. Attorney General of the United States*,[125] the Third Circuit gave an impassioned critique of the BIA's approach to social visibility and particularity.[126] Valdiviezo-Galdamez fled from his country of origin, Honduras, to escape Mara Salvatrucha, a criminal gang heavily involved in drug trafficking.[127] As a consequence of Valdiviezo-Galdamez's refusal to join the gang's ranks, he was subjected to severe physical abuse and death threats.[128] The BIA, however, rejected the alien's application for asylum on the ground that he did not exhibit the requisite social visibility and particularity.[129]

On appeal, the Third Circuit asserted that the inconsistencies of the BIA's application of social visibility[130] and particularity undermined the deference that the BIA would otherwise be entitled to under the Supreme Court's *Chevron* test.[131] The court articulated that "[a]gencies [like the BIA] are

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[121] *Id.* at 430.

[122] *Id.*

[123] *Gatimi*, 578 F.3d at 615.

[124] *Id.*

[125] 663 F.3d 582 (3d Cir. 2011).

[126] *Id.* at 604.

[127] *Id.* at 586–87.

[128] *Id.*

[129] *Id.* at 589. The Third Circuit vacated and remanded the BIA's judgment. *Id.* at 612.

[130] For example, pursuant to *Acosta*'s immutability standard, the BIA previously held that homosexuals were members of a particular social group. *Id.* at 604. Under the new standard that requires social visibility, however, a homosexual would be precluded from refugee status because homosexuality can be concealed and kept out of public view. *Id.* at 604–05.

[131] *Id.* at 604. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court stated that when a court reviews the interpretation of a

not free, under *Chevron*, to generate erratic, irreconcilable interpretations of their governing statutes."[132] What was particularity worrisome to the Third Circuit was the fact that the BIA added the social visibility and particularity requirements haphazardly, without even providing a "principled reason" as to why it did so.[133]

The Third Circuit heavily critiqued the substance of the requirements as well. Application of a criterion that hinges on whether members exhibit "on-sight visibility" is an impractical approach to determining whether an individual is a member of a particular social group.[134] Citing the Seventh Circuit, the Third Circuit asserted that members of persecuted groups conceal the characteristic that triggers persecution.[135] To deny these victims asylum on the ground that they are not "socially visible," to put it simply, just does not make sense.[136]

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statute by a federal government agency, like the BIA, it must first determine whether Congress "has directly spoken to the precise question at issue." 467 U.S. 837, 842 (1984). If it has, then the agency's interpretation is not entitled to deference. *Id.* at 842–44. However, if Congress has not spoken directly on the issue, then the agency's interpretation is entitled to deference; the reviewing court does not simply fill the void with its own interpretation of the statute. *Id.* at 843. Furthermore, courts can only overturn a judgment of the BIA if that judgment constitutes an abuse of discretion. *See* Melissa J. Hernandez Pimentel, Law Summary, *The Invisible Refugee: Examining the Board of Immigration Appeals' "Social Visibility" Doctrine*, 76 MO. L. REV. 575, 580 (2011).

[132] *Valdiviezo-Galdamez*, 663 F.3d at 604 (emphasis omitted) (quoting Marmolejo-Campos v. Holder, 558 F.3d 903, 919 (9th Cir. 2009) (Berzon, J., dissenting)) (internal quotation mark omitted).

[133] *Id.* at 608. In a number of early decisions, the BIA approved the asylum applications of individuals who alleged persecution on account of their membership in a particular social group even though the characteristics on which persecution were based were entirely internal and could not be perceived by society. *In re* Kasinga, 21 I. & N. Dec. 357, 366–67 (B.I.A. 1996) (approving the application of a woman opposed to genital mutilation on the ground that she was persecuted on account of her membership in a particular group); *In re* Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) (holding that members of the El Salvadoran national police were members of a particular social group under certain circumstances); *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (B.I.A. 1990) (holding that homosexuals required to register in Cuba were members of a particular social group); *see also Valdiviezo-Galdamez*, 663 F.3d at 604. However, beginning with *R-A-*, the BIA introduced social visibility and particularity requirements that preclude individuals to which the BIA had previously afforded refugee status from qualifying as members of a particular social group. *Id.* at 596. Therefore, the addition of social visibility and particularity represents a divergence from precedent.

[134] *See Valdiviezo-Galdamez*, 663 F.3d at 606–07.

[135] *Id.* at 607.

[136] *See id.*

The Third Circuit asserted that particularity is just another "articulation" of social visibility and the "government's attempt to distinguish the two oscillates between confusion and obfuscation."[137] In its brief, the government argued that a social visibility determination ensures that the applicant is part of a social group that is perceived by society as a distinct group of persons.[138] The particularity requirement, on the other hand, requires that the group be "definable."[139] The court saw no difference between these two concepts.[140] In sum, the Third and Seventh Circuits reject social visibility and particularity as requirements on the ground that they are impractical and arbitrary; they can be taken into consideration pursuant to a holistic analysis however.[141]

B. *Approach Two: "Social Visibility" and "Particularity" as Additional Requirements to Immutability*

Outside of the Third and Seventh Circuits, circuit courts that have addressed the issue have held that the BIA's application of social visibility and particularity as requirements is entitled to *Chevron* deference on the ground that they constitute valid efforts to specify the meaning of particular social group pursuant to the Refugee Act.[142]

In *Gaitan v. Holder*,[143] the Eighth Circuit held that an applicant who fled his country of origin to escape retaliation after refusing to join a criminal gang did not constitute membership in a particular social group on the ground that he did not exhibit the requisite social visibility and particularity.[144] The court articulated that in *S-E-G-*, the BIA "refined its definition of a 'particular social group' " by reasoning that an asylum-seeker must exhibit both a level of social visibility that would allow

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[137] *Id.* at 608.

[138] *Id.*

[139] *Id.*

[140] *Id.* (" 'Particularity' appears to be little more than a reworked definition of 'social visibility' and the former suffers from the same infirmity as the latter.").

[141] *Id.* at 608–09; Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

[142] *E.g.*, Gaitan v. Holder, 671 F.3d 678, 680 (8th Cir. 2012).

[143] 671 F.3d 678.

[144] *Id.* at 682.

society to recognize that the asylum-seeker is part of the purported social group, as well as particularity, which ensures that the group is discrete and well-defined.[145]

For the very same reasons outlined in *Gaitan v. Holder*, the Eleventh Circuit in *Velasquez-Otero v. United States Attorney General*[146] held that a man who fled Honduras to escape recruitment by a violent gang was not entitled to refugee status under the Refugee Act.[147] The First, Fourth, Ninth, and Tenth Circuits have also denied aliens' petitions for review on the ground that individuals fleeing Central America to escape gangs are not members of a particular social group under the BIA's framework.[148]

In *Gomez v. INS*,[149] the Second Circuit reviewed the BIA's dismissal of a young El Salvadoran woman's application for asylum, which was based on the claim that she belonged to a particular social group comprised of women who have been dehumanized by violent guerillas through brutal beatings and rape.[150] In assessing the viability of the woman's claim, the court asserted that to qualify as a member of a particular social group, individuals must share an immutable characteristic that "serves to *distinguish them in the eyes of a persecutor—or in the eyes of*

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[145] *Id.* at 680. The court adopted the BIA's approach because panels of judges in earlier decisions did so. *Id.* at 681 ("As a result, this Court cannot find that the social visibility and particularity requirements articulated in *Matter of S-E-G* are arbitrary or capricious.").

[146] 456 F. App'x 822 (11th Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 524 (2012).

[147] *Id.* at 824–26.

[148] Orellana-Monson v. Holder, 685 F.3d 511, 522 (5th Cir. 2012) (denying the petition for review on the ground that the purported group was not "perceived as a group" by society); Zelaya v. Holder, 668 F.3d 159, 166 (4th Cir. 2012) (petition for review was denied on the ground that, in part, the purported group lacked a shared, innate, "easily recognizable" characteristic); Rivera-Barrientos v. Holder, 666 F.3d 641, 652–54 (10th Cir. 2012) (requiring social visibility but defining the phrase in a less restrictive manner by stating that. social visibility "requires that the relevant trait be potentially identifiable by members of the community, either because it is evident or because the information defining the characteristic is publically accessible."); Mendez-Barrera v. Holder, 602 F.3d 21, 26–27 (1st Cir. 2010) (holding that the petitioner's claim failed on the ground that the purported group lacked cognizability, cohesiveness, and social visibility); Ramos-Lopez v. Holder, 563 F.3d 855, 860–62 (9th Cir. 2009) (denying the petition for review on the ground that the shared characteristic was not "recognizable and discrete" (quoting S-E-G-, 24 I. & N. Dec. 579, 586 (B.I.A. 2008)) (internal quotation mark omitted)), *overruled in part by* Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013).

[149] 947 F.2d 660 (2d Cir. 1991).

[150] *Id.* at 663–64.

the outside world in general."[151] The court denied the woman's petition for review on the ground that there was insufficient evidence that she exhibited a characteristic, other than gender or youth, that made her identifiable to persecutors as a member of the purported group.[152]

The Fifth Circuit joined the majority of its sister circuits in adopting the BIA's approach to social visibility and particularity in *Orellana-Monson v. Holder*.[153] The court stated that incorporation of these two requirements into the existing standard constituted "a subtle shift that evolved out of the BIA's prior decisions."[154] Furthermore, the court asserted that the BIA is entitled to refine and make adjustments to the definition of particular social group to accommodate for asylum-seekers' claims.[155]

C. *How the Guidelines Differ from the Circuit Courts' Approaches*

There are two major differences between the approach outlined in the *Guidelines*, and that of the BIA and U.S. circuit courts. First, the *Guidelines* call for the adoption of two alternative approaches to refugee status,[156] whereas a majority of circuit courts utilize one approach that requires the alien to demonstrate three characteristics, immutability, social visibility, and particularity—a far more demanding standard to satisfy.

Under the UNHCR's *Guidelines*, the asylum-seeker need only prove that: (1) pursuant to the protected characteristics approach, the purported group shares a characteristic that is immutable or is "so fundamental to human dignity that a person should not be compelled to forsake it";[157] *or* that, (2) pursuant to the social perception approach, the common characteristic makes the purported group cognizable, setting it apart from the rest of society.[158] Circuit courts, on the other hand, require members of

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[151] *Id.* at 664 (emphasis added) (citing Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986)).

[152] *Id.*

[153] *Orellana-Monson*, 685 F.3d at 520.

[154] *Id.* at 521.

[155] *Id.*

[156] *Guidelines*, *supra* note 10, ¶¶ 5–7, 10, 11.

[157] *Id.* ¶ 6.

[158] *Id.* ¶¶ 7, 11.

the purported group to, at a minimum, share a common, immutable characteristic, and in some circuits even exhibit social visibility and particularity.

Second, although the social perception approach and the social visibility requirement sound similar, they are two distinct concepts. The *Guidelines*' social perception approach requires the purported group as a whole to be cognizable by society,[159] whereas the social visibility approach of some circuits requires the individual asylum-seeker within the group to possess an externally distinguishable trait that sets the asylum-seeker apart from society "in the eyes of a persecutor."[160] According to Alice Edwards, the Senior Legal Coordinator and Chief of the Protection Policy and Legal Advice Section of the Division of International Protection for the UNHCR, the Agency "has been at pains to stress that the social perception approach is different from social visibility and . . . does not require that the group be visible to the naked eye in a literal sense [or] that the common attribute be one that is easily recognizable to the general public."[161]

III. THE UNHCR'S APPROACH TO DEFINING "MEMBERSHIP OF A PARTICULAR SOCIAL GROUP"

Methods of statutory interpretation under the VCLT, the Convention's allocation of authority to the UNHCR, the extent to which the United States has relied in the past on the UNHCR for guidance in developing domestic refugee law, and the impracticalities of applying an "external criterion," all demonstrate that circuit courts should adopt the UNHCR *Guidelines*' approach to defining membership of a particular social group. Congress enacted the Refugee Act to convert the Protocol—which legally binds the United States to the

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[159] *Id.*

[160] Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) ("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." (citing Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986))).

[161] U.N. High Comm'r for Refugees, Distinction, Discretion, Discrimination: The New Frontiers of Gender-Related Claims to Asylum 6 (June 18-19, 2012), http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=category&category=REFERENCE&publisher=&type=&coi=&docid=4ffd430c2&skip=0 (by Alice Edwards).

Convention—into domestically enforceable federal law[162] that honors the United States' "tradition of welcoming the oppressed of other nations" and is consistent with the United States' obligations under international law."[163] Furthermore, it is well-established that federal statutes, like the Refugee Act, must, to the furthest extent possible, be construed in a manner consistent with the United States' international obligations, such as those stemming from the Convention.[164] This legal instrument commits its signatories to cooperate with the UNHCR, which is tasked with coordinating and supervising compliance with the Convention.[165] In light of the above, U.S. circuit courts should adopt the UNHCR's approach to defining membership of a particular social group under the Refugee Act.

This method of using the United States' international obligations to decipher domestic obligations under implementing legislation is not without precedent. In *Sale v. Haitian Centers Council, Inc.*,[166] the Supreme Court did just that.[167] The Court grappled with whether the relevant provision of the Refugee Act applied extraterritorially on the high seas and thus precluded the Attorney General from repatriating Haitians coming to the United States by boat without first assessing whether they fell within the category of refugee under the Refugee Act.[168] After looking to the Convention's text and the delegates' statements during negotiations, the Court held that it was not intended to apply extraterritorially.[169] Construing the Refugee Act in a manner consistent with the Convention, the Court held that it too must not apply extraterritorially.[170] *Sale* provides authority for U.S. courts to look to our nation's international obligations in defining membership in a particular social group pursuant to the Refugee Act.

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[162] *See supra* notes 13–16 and accompanying text.

[163] H.R. REP. NO. 96-608, at 17–18 (1979).

[164] Murray v. Schooner Charming Betsy, 6 U.S. 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 . . . .").

[165] U.N. High Comm'r for Refugees, *supra* note 9.

[166] 509 U.S. 155 (1993).

[167] *Id.* at 177–80, 182–83, 187–88.

[168] *Id.* at 158.

[169] *Id.* at 184–85, 187–88.

[170] *Id.* at 187–88.

A. A Demonstration: The United Kingdom's House of Lords

The highest court in the United Kingdom[171] relies heavily on the UNHCR's *Guidelines* to assess whether an individual qualifies as a member of a particular social group, and in doing so has dismissed inappropriately rigorous standards for proving same.[172]

In the consolidated cases *Fornah v. Secretary of State for the Home Department* and *K v. Secretary of State for the Home Department*, the House of Lords grappled with provisions of the European Union Council Directive 2004/83/EC that were interpreted by the respondents to impose a dual-requirement framework that was inconsistent with the *Guidelines*.[173] The Directive provides in relevant part that:

> Member states shall take the following elements into account when assessing the reasons for persecution:
>
> . . . .
>
> (d) a group shall be considered to form a particular social group where in particular:
>
> [(i)] members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
>
> [(ii)] that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society . . . .[174]

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[171] At the time of the cases discussed in this Section, the "House of Lords" was the name of the highest court. In 2009, however, the court was renamed the United Kingdom Supreme Court.

[172] The Supreme Court's opinion in *Abbott v. Abbott* illustrates why it is appropriate for United States courts to interpret the nation's obligations under the implementing legislation of an international treaty in light of how other contracting parties apply that treaty. 560 U.S. 1 (2010). In *Abbott*, the Supreme Court was tasked with deciphering provisions of Congress's International Child Abduction Remedies Act, which implemented legislation for the Hague Convention on the Civil Aspects of International Child Abduction, to which the United States is a contracting party. *Id.* at 5. The Court looked to the approaches of the English High Court of Justice, the Supreme Court of Israel, the Canadian Supreme court, as well as other foreign courts. *Id.* at 16–17.

[173] K v. Sec'y of State for the Home Dep't, [2006] UKHL 46, [2007] 1 A.C. 412, 426, 432–33 (appeal taken from Eng.).

[174] Council Directive 2004/83, art. 10(1)(d), 2004 O.J. (L 304) 12, 17 (EC), *available at* http://www.refworld.org/pdfid/4157e75e4.pdf.

The court asserted that if the Council Directive was interpreted to require both immutability, as set out in (i), and social cognizability, as set out in (ii), the Directive would be inconsistent with the Convention and Protocol,[175] to which the United Kingdom acceded in 1954 and 1968, respectively.[176] If, however, the provision is interpreted literally to mean a group exists when (i) and (ii) are found to exist, then the provision is not inconsistent with the Convention and Protocol.[177] The court adopted the literal interpretation on the ground that adopting the respondents' interpretation would result in the application of a standard that was far too stringent than that of the Convention, Protocol, and *Guidelines*.[178] The practical difficulty of applying such a standard is illustrated below.

IV. A CASE STUDY OF THE *HEI HAIZI* AND THE DIFFICULTIES OF REQUIRING "SOCIAL VISIBILITY"

The group of children born in violation of China's one-child policy provides a striking example of the difficulties of applying social visibility as a prerequisite to qualifying for refugee status on account of persecution based on membership in a particular social group. These individuals are referred to as the *hei haizi*, and they lack any externally distinguishable characteristic, whether it be physical, linguistic, or behavioral, that would put

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[175] *K*, [2007] 1 A.C. at 431–33.

[176] *See Multilateral Treaties Deposited with the Secretary-General*, *supra* note 8, ch. V.2, V.5.

[177] *K*, [2007] 1 A.C. at 432.

[178] *Id.* at 432–33. Furthermore, the House of Lords has rejected attempts at engrafting additional requirements onto the *Guidelines*' disjunctive approach. In *Islam v. Secretary of State for the Home Department*, the asylum-seekers, married Pakistani women, were at risk of being falsely accused of committing adultery. [1999] 2 A.C. (H.L.) 629, 629 (appeal taken from Eng.). One of the justices of the Court of Appeal held that the women did not qualify for asylum on the ground that they lacked a sufficient degree of "cohesiveness, co-operation or interdependence." *Id.* at 638 (quoting Islam v. Sec'y of State for the Home Dep't, [1998] 1 W.L.R. 74 (C.A.) [93d] (Eng.)). Relying on *Acosta* and the *Guidelines*, the House of Lords rejected cohesiveness as a requirement on the ground that making it indispensible would be too restrictive and would be contrary to the principle of *ejusdem generis*. *Id.* at 643. The court used the case of homosexuals to demonstrate how a "cohesiveness" requirement would preclude an otherwise eligible group from qualifying for asylum. *Id.* Homosexuals do not make up a cohesive group; denying them asylum on this ground would constitute a grave injustice and contravene the purpose of the Convention, which is to extend refugee status to individuals who are persecuted based on, amongst other things, characteristics that are immutable and unalterable. *Id.*

their status as a member of the *hei haizi* in public view.[179] To deny the persecuted *hei haizi* asylum on the ground that they lack the requisite social visibility would constitute a grave injustice.

A. A Brief History

In an attempt to stymie the growth of its population, the People's Republic of China implemented a one child policy in 1979 that limits the number of children a couple can have to one. Exceptions to the rule vary amongst provinces but examples include couples in rural areas,[180] and couples in which both parents are only children.[181] Couples who have children in excess of the quota are often subjected to forced sterilization and abortion, as well as exorbitant fines.[182] The *hei haizi* are ostracized and precluded from health care and higher education,[183] and cannot be listed on the family's *hukou*, a mandatory national record of household registration.[184] Failure to be included in a *hukou* excludes the child from the family's food ration.[185] In extreme cases, "[t]he *hei haizi* are also excluded from many jobs, may not acquire property, and in some cases are denied the right to marry and have children."[186]

B. Hei Haizi *as a "Particular Social Group"*

Many U.S. courts have assessed the asylum claims of *hei haizi* on the basis of imputed political opinion.[187] Pursuant to this approach, the child must prove that the child is persecuted or has a well-founded fear of persecution because the oppressor is

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[179] Brian Edstrom, *Assessing Asylum Claims from Children Born in Violation of China's One-Child Policy: What the United States Can Learn from Australia*, 27 WIS. INT'L L.J. 139, 149 (2009).

[180] *Id.* at 142.

[181] Cong.-Exec. Comm'n on China, *Population Planning* 1, http://www.cecc.gov/sites/chinacommission.house.gov/files/documents/AR14Population%20Planning_final.pdf. Please be advised that since the drafting of this Note, China's committee of the National People's Congress amended the Policy. Today, couples in which only one parent is an only child are permitted to have a second child. *Id.*

[182] Edstrom, *supra* note 179, at 142–43.

[183] *Id.* at 144.

[184] *Id.*

[185] *Id.*

[186] Chen v. Holder, 604 F.3d 324, 328 (7th Cir. 2010).

[187] *See id.*; Jiang v. Gonzales, 500 F.3d 137, 139–40 (2d Cir. 2007); Zhang v. Gonzales, 408 F.3d 1239, 1246 (9th Cir. 2005).

imputing the political opinion of the child's parents, who violated the policy, to the child.[188] However, critics of the "imputed political opinion approach" in this context refuse to apply it on the ground that it would result in too many undeserving grants of refugee status. Judge Sneed, for example, from the Ninth Circuit articulated, "We distort the meaning of an important requirement for refugee status when we permit political aloofness to serve as an active 'political opinion,' that endangers its holder. It also demeans the true martyr for whom asylum was intended."[189] Courts need to disconnect the asylum claims of children born in violation of the policy from the claims of their parents, and stop limiting themselves to the theory of imputed political opinion.[190] Instead, courts must ground these asylum claims on the basis of persecution on account of membership in a particular social group, the *hei haizi*.

Defining the *hei haizi* as a particular social group has support in Australian jurisprudence. In *Chen Shi Hai v. Minister of Immigration and Multicultural Affairs*,[191] the Australian High Court did not contemplate the theory of imputed political opinion. Instead, it found that children born in violation of China's one-child policy are members of a particular social group.[192]

Even if courts were to adopt Australia's approach to assessing these asylum claims, the *hei haizi* would confront a serious obstacle, the requirement that they themselves be socially visible. Under the more restrictive approach of the majority of the circuit courts in the United States, minors born in violation of the policy would not qualify because, individually, they exhibit no externally distinguishable characteristic that

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[188] Donald W. Yoo, *Exploring the Doctrine of Imputed Political Opinion and Its Application in the Ninth Circuit*, 19 GEO. IMMIG. L.J. 391, 396 (2005).

[189] Mendoza Perez v. U.S. INS, 902 F.2d 760, 767–68 (9th Cir. 1990) (Sneed, J., concurring); *see also* Yoo, *supra* note 188, at 397–98.

[190] In *Chen v. Holder*, the Seventh Circuit based Chen's asylum claim on two alternative theories: persecution on account of political opinion, and persecution on account of membership in a particular social group. 604 F.3d at 330. The court articulated that Chen is not per se eligible for asylum because his mother was forcibly sterilized. *Id.* at 332. However, Chen could prevail on the theory of imputed political opinion. *Id.* The court noted that the BIA was dismissive of recognizing the existence of a particular social group comprised of *hei haizi*. *Id.* at 333.

[191] *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* (2000) 201 C.L.R. 293 (Austl.).

[192] *Id.* at 304–06.

puts the persecutor on notice of their membership in the particular social group.[193] In addition to lacking any physical, linguistic, or behavioral characteristics that highlight their membership in the *hei haizi* to the public, efforts of parents to conceal these children in an attempt to evade fines, sterilization, or other forms of punishment further entrench the *hei haizi*'s invisibility. Under the approach of the minority of circuits, the *hei haizi* would satisfy the immutability test because they exhibit an unalterable trait. Pursuant to the *Guidelines*' approach, these minors would qualify pursuant to either the protected characteristics approach or the social perception approach.

Under the protected characteristics approach, the asylum-seeker must demonstrate that the asylum-seeker shares an immutable characteristic with other members of the purported group.[194] "An immutable characteristic may be innate . . . or unalterable for other reasons."[195] Members of the *hei haizi* are united by the circumstance of their birth in violation of China's one-child policy, a characteristic that is both immutable and unalterable, absent eradication of the policy. Furthermore, pursuant to the social perception approach, children born in violation of the policy are cognizable, or recognized as a group that is distinct from society,[196] as evidenced by their exclusion from, for example, government-funded health care and higher education.

CONCLUSION

In determining whether an alien qualifies as a member of a particular social group U.S. courts should adopt the UNHCR's approach. The UNHCR is the leading authority in refugee status determination and is responsible for coordinating and supervising application of the Convention and Protocol.[197] Therefore, its *Guidelines*, which clearly explain what an

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[193] Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) ("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." (emphasis added)).

[194] *Guidelines*, *supra* note 10, ¶ 6.

[195] *Id.*

[196] *Id.* ¶ 7 ("The second approach [the 'social perception' approach] examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.").

[197] *See* Convention, *supra* note 4, pmbl., para. 6.

applicant must demonstrate to qualify as a member of a particular social group, should be used to decipher the United States' obligations under the Refugee Act, which converts the Convention and Protocol into domestically enforceable federal law. This is particularly true in light of the fact that the U.S. government frequently requests the guidance and expertise of the UNHCR in developing domestic refugee law. U.S. courts should require a showing of immutability *or* cognizability, consistent with the *Guidelines*.[198] Requiring immutability, social visibility, *and* particularity is arbitrary and impractical. This approach is overly restrictive and deviates from international law to which the U.S. is bound. In practice, the approach precludes deserving aliens in flight of persecution who lack any externally distinguishable feature and are often concealed from society,[199] like members of the *hei haizi*, from qualifying for refugee status in the United States.

[198] *See generally Guidelines*, *supra* note 10.

[199] *See supra* notes 143–48 and accompanying text.