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Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum

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[A]djudication [of a particular social group claim] is not a conventional lawyer's exercise of applying a legal litmus test to ascertain facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political, and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.[1]

I. INTRODUCTION

Since the late 1990s, Latin America has been plagued by gang violence. The increasingly organized and progressively larger gangs are known as the Mara Salvatrucha 13 (MS-13) and the 18th Street Gang (collectively referred to as the "Mara" in this Comment).[2] These gangs are ubiquitous within certain Latin American countries and pose a serious threat to the economic and social stability of the region.[3] The targets of the Mara are mostly youth between the ages of fifteen and eighteen (but as young as eight), women, and those who decry the gang's violence. Resistance to the Mara has resulted in death for many.[4] The substantial disruption to the peace and safety of society and the states' current inability to control the gangs has forced many individuals who have been targeted by the gangs' violence to flee their home countries of El Salvador, Guatemala, and Honduras to seek asylum in the United States.[5] Very few people trying to escape gang violence are granted asylum and the denial has serious consequences for many of them.

Part I of this Comment will introduce the gang problem Latin America is

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1. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group*,' REFUGEE PROTECTION IN INTERNATIONAL LAW 263, 309 (Erika Feller et al. eds., 2003) (quoting R v. IAT and Sec'y of State for the Home Dep't, ex parte Shah, English Court of Appeal, [1997] Imm. AR 145 at 153) [hereinafter Aleinikoff].

2. Although they will be discussed collectively in this paper, the MS-13 and 18th Street Gang are rivals. The etymology of Mara Salvatrucha is not consistent. One version is that *Mara* is slang for "gang" or "group of friends" and *Salvatrucha* is slang for Salvadorian. The numbers "13 and 18" were added to represent the gangs' territorial area in Los Angeles. *Former Gang Member Details Life Inside MS-13* (National Public Radio radio broadcast Apr. 22, 2008) [hereinafter *Former Gang Member*].

3. Press Release, Org. of Am. States, Gangs Pose a Serious Threat to Hemisphere, El Salvador Official Tells OAS (Nov. 30, 2005) *available at* http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-274/05.

4. INT'L HUMAN RIGHTS CLINIC, HARVARD LAW SCHOOL, NO PLACE TO HIDE: GANG, STATE AND CLANDESTINE VIOLENCE IN EL SALVADOR 76 (2007), *available at* http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport(3-6-07).pdf [hereinafter Int'l Human Rights Clinic].

5. *See*, *e.g.*, Gabriela Reardon, *A Long Walk From Honduras to Escape Gang Vengeance*, CITY LIMITS, Nov. 26, 2007, http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=3450 (describing the journey of a young man who chose to flee Honduras in order to escape from the Mara and pressure to continue participating in crimes).

grappling with and describe the nature of asylum. Part II of this paper will address the history of these Latin American street gangs—the Mara—and factors contributing to the gangs' current ability to undermine the stability of El Salvador, Guatemala, and Honduras. It will also discuss recent governmental attempts to deal with the gang crisis. Part III will discuss the asylum process and the statutory framework for bringing an asylum claim. Part IV will describe the development of the Board of Immigration Appeals' (BIA) recent "social visibility" requirement into the particular social group definition, as observed in the BIA and court of appeals case law. Next, the international and the UNHCR's approach to social visibility will be examined. It will be argued that the recent requirement significantly decreases the likelihood of success for future victims of gang violence who bring asylum petitions under the "particular social group" category. Part V will examine the problems with a social visibility requirement and suggest that the imposition of social visibility is insupportable. Next, solutions will be discussed, including the BIA's ability to rectify this problem by reverting to traditional particular social group framework. Finally, Part V will conclude that those who claim asylum based on Mara persecution are deserving of asylum, and returning to the *Acosta* framework is a way to leave open a possibility for gang based asylum claims in the future. However, the social visibility component may have merit as an alternative test and that approach should be cautiously explored.

Asylum is driven by the broad humanitarian purpose of offering the United States as a safe-haven for an individual being persecuted in their country when the country has failed to protect the individual. Framing this goal is a very specific statutory framework for bringing an asylum claim. Asylum is awarded only to "refugees"—a relatively small category of people that can prove they were persecuted because of race, religion, nationality, political opinion, or membership in a particular social group. The particular social group category has been used increasingly in the past years by victims of gang violence, and also by others seeking asylum based on their sexual orientation, gender, domestic violence, and victims or potential victims of female genital mutilation.[6] The social group category has been described as "pushing the boundaries" of refugee law[7] because of the variety of groups who bring claims under the statute, paired with the fact that the category itself was never well defined. Generally, victims of gang violence bring claims for asylum under the social group category because the absence of a highly-particularized definition allows for claims to be more individualized.

The ability to have particularized claims means immigration judges are often confronted with social groups that are a matter of first impression. This means the judges have wide latitude in defining what constitutes a "particular social group." While case law continues to define what groups are a cognizable particular social group, many individuals have asserted membership in a group that the immigration court, BIA, or court of appeals has not yet recognized—making it difficult for petitioners with the same or similar social groups to be granted asylum. For

6. *See*, *e.g.*, Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (homosexuals); Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990) (homosexuals); Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993) (gender); Matter of R-A, 24 I. & N. Dec. 629 (B.I.A. 2008) (domestic violence); Matter of Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996) (opposition to female gentile mutilation).

7. Aleinikoff, *supra* note 1, at 264.

example, some groups that have brought gang related asylum claims that have not been recognized are: affluent Guatemalans,[8] young males[9] and those who claim to categorically resist gang membership.[10] However, this problem is not limited to gang related claims.

Victims of the Mara's violence have recently been unsuccessful in obtaining asylum because the BIA, the branch of the Department of Justice responsible for identifying standards and uniform definitions of immigration law,[11] has defined "particular social group" more narrowly. The BIA now requires that asylum applicants who frame claims under the "particular social group" category demonstrate that their social group be "socially visible,"[12] meaning objectively recognized in society. Taking this lead from the BIA, some circuit courts have also imposed a social visibility requirement.[13] However, as will be discussed, the social visibility requirement is ambiguous, leaving practitioners without appropriate guidance for how to bring future asylum claims under the particular social group category. Further, the addition of social visibility also contravenes what the United Nations (UN) has set as the definition for a particular social group. Lastly, this new requirement creates evidentiary proof problems that nearly no victim of gang violence can meet.[14]

II. HISTORY

A. A Gang is Born

Beginning in the 1980s, El Salvador experienced a long and violent civil war.[15] As a result, more than 700,000 El Salvadorians fled to the United States[16] and some were granted Temporary Protected Status in 1990.[17] Of those refuges that settled in

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8. *In Re* A-M-E & J-G-U, 24 I. & N. Dec. 69 (B.I.A. 2007).

9. Gomez-Benitez v. United States, 295 F. App'x 324 (11th Cir. 2008).

10. Matter of E-A-G, 24 I. & N. Dec. 591 (B.I.A. 2007).

11. 8 C.F.R. § 1003.1(d)(1) (2008).

12. *See infra* notes 149 to 170 and accompanying text discussing *In Re C-A*, 23 I. & N. Dec. 951 (B.I.A. 2006); Matter of S-E-G, 24 I. & N. Dec. 579 (B.I.A. 2008); Matter of A-M-E and J-G-U, 24 I & N. Dec. 69 (B.I.A. 2007).

13. *See infra* notes 152 to 170 and accompanying text discussing the BIA's development of the social visibility requirement.

14. In at least one instance, however, an applicant has successfully circumvented the social visibility requirement by stating that his particular social group was based on his "subset of nuclear [] family at which MS 13 directed its persecution because [] (the respondent's brother) refused to join MS 13." In the Matter of Respondent (name redacted), No. [], slip op. at 3 (Decision and Order (Immigration Ct. June 11, 2009)) (on file with author). The immigration judge recognized that subsequent cases had imposed a social visibility requirement but found that respondent's case satisfied this burden because his group was not amorphous and was particular and visible. *Id.* at 3-4. This opinion is good news for gang victims whose families have also been attacked by the gang and who can establish that they were targeted by the Mara because of their familial association. In the above case, the respondent's family testified on his behalf.

15. Int'l Human Rights Clinic, *supra* note 4, at 2-3.

16. U.S. AGENCY FOR INT'L DEVS., CENTRAL AMERICAN & MEXICO GANG ASSESSMENT 45 (2006), *available at* http://www.crin.org/docs/usaid_gang_assessment.pdf (estimating that by 1990 more than 700,000 El Salvadorians had settled in the US) [hereinafter USAID].

17. Immigration and Nationality Act, Pub. L. No. 82-414, § 244, 66 Stat. 210, 214 (1952) (governing Temporary Protection Statute). *See also* 8 C.F.R. § 244 (2009) (implementing regulations).

the United States, 52 percent were in west downtown Los Angeles,[18] an area previously dominated by Mexican and Mexican-American gangs.[19] Similarly, Guatemala experienced a war during the same period, and many Guatemalans fled to the United States.[20]

The roots of both the MS-13 and the 18th Street Gang are in Los Angeles during the early 1990s. El Salvadorian and Guatemalan refugees created and joined gangs to protect themselves from other gangs already established in the Los Angeles neighborhoods.[21] In the early 1990s, the United States initiated its immigration reform policy and a "get tough on gangs" approach.[22] As a result, thousands of gang members were deported back to El Salvador and Guatemala.[23] However, sections of the Mara remain in Los Angeles today,[24] and Mara activity has been found in almost every state in the United States.[25]

B. Return to Broken Homes: Gangs Take Hold

The MS-13 and 18th Street Gang members brought their gang culture back with them to their native countries when they were deported.[26] The large number of violent gang members, combined with the social, economic, and political instabilities in El Salvador and Honduras, created an environment ripe for the Mara to root in these countries.[27] The Mara was initially in El Salvador and then spread to Guatemala and Honduras and, to a lesser extent, Mexico.[28] Today, El Salvador

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Some El Salvadorians who were illegally in the United States were granted legal status under this statute. *Id.* Jessica Vaughan & Jon Feere, *Taking Back the Streets: ICE and Local Law Enforcement Target Immigrant Gang*, BACKGROUNDER (Ctr. For Immigration Studies, Washington, D.C.), Oct. 2008, at 5, *available at* http://www.cis.org/articles/2008/back1208.pdf. *See also* Juan J. Fogelbach, Comment, *Mara Salvatrucha (MS-13) and Ley Anti Mara: El Salvador's Struggle to Reclaim Social Order*, 7 SAN DIEGO INT'L L. J. 223, 227 (2005). Inhabitants of El Salvador and Honduras are currently eligible for temporary protection status. U.S.C.I.S., Temporary Protection Status, http://www.uscis.gov/portal/site/uscis (follow "Services & Benefits"; then follow "Humanitarian Benefits"; then follow "Temporary Protection Status").

18. Fogelbach, *supra* note 17, at 227.

19. WASH. OFFICE ON LATIN AM., CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE § 1 (2008), *available at* http://www.wola.org/media/Gangs/WOLA_Gang_Asylum_Guide.pdf [hereinafter WOLA].

20. *Id.* § 4.

21. *Id.* (stating that the gangs in Los Angeles were created by El Salvadorians and were made up mainly of El Salvadorians, however, many Guatemalans joined as well).

22. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). *See* Antiterrorism and Effective Death Penalty Act, Pub. L. NO. 104-132, 110 Stat. 1214 (1996), codified in various sections of 18 U.S.C. (2006). These laws immediately impact the El Salvadorians, Guatemalans, and Hondurans in the United States because portions of the bill expanded the scope of crime-related grounds that render a lawful permanent resident deportable.

23. More than 33,000 El Salvadorans were deported from the U.S. between 1998 and 2004. U.S. DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS, tbl.43 (2004).

24. *See FBI Cracks Down on Gangs at L.A.'s MacArthur Park* (National Public Radio radio broadcast June 2, 2008) (discussing Los Angeles' attempt to eliminate the Mara).

25. Vaughan & Feere, *supra* note 17, at 1.

26. USAID, *supra* note 16, at 16.

27. Vaughan & Feere, *supra* note 17, at 6; Int'l Human Rights Clinic, *supra* note 4, at 20.

28. Vaughan & Feere, *supra* note 17, at 6.

is known as one of the most dangerous countries in the Latin American world,[29] and the gangs undermine the security of the country and government stability. Some estimate that there are approximately 10,500 gang members in El Salvador alone.[30]

The Mara were originally more territorially oriented, operating "*clikas*," or neighborhood groups, but as the Mara evolved they became more organized with an increasingly "vertical" structure and better coordinated between *clikas*.[31] The increased organization has exacerbated the police's inability to control the problem. Specifically, the evolution of the gang structure has allowed jailed gang members continue to operate their *clikas* from jail, whereas before once in jail they were closed off from the gang. The vertical structure also allows gang leaders who are jailed or killed to be quickly replaced, making it harder to fight the gangs. Recently, the gangs have also become more transnational which means victims of gang violence have a harder time escaping by moving to another part of the country or a different country.[32] In the past, they have used tattoos to identify one another, as well as clothing and hairstyles, but police crackdowns on gangs and laws forbidding gang tattoos have curbed this behavior.[33]

The Mara use various violent coercion techniques to recruit new members, and those who resist the recruiting efforts often find themselves being further targeted or killed by the Mara.[34] The Mara recruit new members primarily at schools and prisons and may target students as young as the second grade.[35] However, they may choose not to fully recruit certain individuals into the gang and extort them instead. For instance, the gang will threaten to kill or kidnap the children of

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29. USAID, *supra* note 16, at 44.

30. However, the National Council on Public Security says that this number is closer to 39,000. *Id.* at 45. USAID also estimates that there are approximately 10,500 gang members in El Salvador; 36,000 in Honduras; and 14,000 in Guatemala. *Id.* at 17. The populations of these countries for mid-2007 were 6,900,000; 7,100,000; and 13,400,000, respectively. POPULATION REFERENCE BUREAU, MID-2008 GENERAL POPULATION (2008), http://www.prb.org/Datafinder/Geography/MultiCompare.aspx?variables=21&regions=77,78,79.

31. Int'l Human Rights Clinic, *supra* note 4, at 25; Cara Buckley, *A Fearsome Gang and Its Wannabees,* N.Y. TIMES, Aug. 17, 2007 (stating that the MS-13 groups communicate with each other, even internationally).

32. USAID, *supra* note 16, at 18 (reporting that although the transnational character of the Mara is limited, this is changing). Currently Mara gangs are becoming more likely to communicate with other sections of the gang within the country, and the gang structure is becoming increasingly developed and organized. *See also* CELINDA FRANCO, CRS REPORT FOR CONGRESS: THE MS-13 AND 18TH STREET GANGS: EMERGING TRANSNATIONAL GANG THREATS?, 8-9 (2008), *available at* http://fpc.state.gov/documents/organization/102653.pdf (stating that the Mara have both a presence in multiple countries and a more organized structure—both characteristics of a transnational gang).

33. Int'l Human Rights Clinic, *supra* note 4, at 26-27.

34. *Id.* at 30-32. Initiation into the Mara is violent for women—involving either a group beating, which often leaves the recruits seriously injured, or sexual exploitation. For men it is also a violent process and overall has also become increasingly violent and may involve killing rival gang members or other violent missions. However, not all those who participate in Mara activities become initiated gang members. Some may just perform "errands," such as collecting *renta* for the Mara. *Id.* at 31. *See also Former Gang Member*, *supra* note 2.

35. Vaughan & Feere, *supra* note 17, at 10.

businessmen unless they give the gang money.[36] Alternatively, the Mara will collect *renta* ("rent") from targeted individuals and businesses, such as bus drivers, for money or "fees" repeatedly.

Information about the actual structure of the MS-13 and 18th Street Gang is difficult to obtain.[37] Much of the information has been compiled from newspaper reports, interviews with victims or past gang members, government workers, and others who provided services to gang members or victims. For asylum applicants this poses evidentiary problems when they are trying to show the pervasiveness of the gang problem and how police have either acquiesced to the behavior or are unable to control the problem. Asylum applicants must also show they cannot simply relocate to another part of the country, and the lack of information about the transnational nature of gangs and how they communicate between *clikas* can make satisfying this element difficult.

C. El Salvador

Although the civil war in El Salvador ended in 1991, the country continues to have a weak government and an unstable economy.[38] After there were 3,875 homicides in a ten month period from 1998 to 1999, the El Salvadorian president enacted zero tolerance "Mano Dura" ("firm hand") policies,[39] which criminalized membership in gangs and unlawful association.[40] The international community has criticized the Mano Dura policies for violating human rights.[41] The Supreme Court of Justice in El Salvador held that the Mano Dura policies were unconstitutional in 2004, days before the initial Maro Dura legislation expired.[42] Despite this, El Salvador continues to enforce its Mano Dura policies.[43] This may be due in part due to their widespread support by the El Salvadorian people.[44]

Despite the anti-gang legislation, the homicide rate has risen in past years and jail conditions continue to degrade.[45] The Mano Dura policies have forced the

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36. According to an ex-gang member named El Faco, the gang has a saying, "If you don't pay, we won't hurt the father—sadly, it's the children who'll pay." *Private Assassins Target Gangs in Guatemala* (National Public Radio broadcast Dec. 22, 2008).

37. Int'l Human Rights Clinic, *supra* note 4, at 20.

38. WOLA, *supra* note 19, §§ 4, 1.

39. USAID, *supra* note 16, at 52 (stating that Super Mano Dura resulted in the arrests of more than 11,000 gang members in one year). *Id.*

40. Fogelbach, *supra* note 17, at 225 (quoting Rt. 1, ¶ 2 of the Anti-Mara Law) ("A mara is loosely defined as an unlawful association that disrupts the public order, decorum or good customs of society, and that meet some or all of the following criteria: a group of people that (1) get together habitually, (2) mark off segments of territories as their own, (3) use signs or symbols as modes of identification, and (4) mark their bodies with scars or tattoos.").

41. CLARE RIBANDO SEELKE, CRS REPORT FOR CONGRESS: GANGS IN CENTRAL AMERICA 9 (2008), *available at* http://opencrs.com/document/RL34112/2008-10-17. The Mano Dura laws also make it more difficult for victims to get asylum because they have a harder time showing that the government acquiesced to the violence.

42. Int'l Human Rights Clinic, *supra* note 4, at 40 (detailing why the law was struck down).

43. *See* Fogelbach, *supra* note 17, at 245. After the El Salvadorian Supreme Court decision, the Salvadorian legislator passed Ley Anti Mara 2 (LAM-2) on April 2, 2004. LAM-2 is nearly identical to the LAM-1 but is less vague. LAM-2's constitutionality has not yet been challenged.

44. *Id.* at 251-52.

45. *Seelke*, *supra* note 41, at 9.

gangs to be more clandestine in their activities. They have also increased tension between the gangs and the police because the law allows police to arrest gang members solely for congregating with one another or having tattoos.[46]

The homicide rates in El Salvador, Honduras, and Guatemala are extremely high. In 2004, the rate per 100,000 people was approximately 46 percent in Honduras, 42 percent in El Salvador, and 35 percent in Guatemala.[47] The murder rate in the United States is about 6 percent.[48] However, the government has recently begun to allocate 20 percent of the anti-gang funds for prevention and rehabilitation programs.[49]

D. Guatemala

After a bloody thirty-six year war, the Guatemalan government remains weak and the economy unstable.[50] As a result of the internal struggles and the influx of deportees from the United States back into the country, the gangs were able to reestablish and thrive within Guatemala. The gang problem is heightened in Guatemala because half of its population is under the age of eighteen.[51] Unlike El Salvador or Honduras, Guatemala has not enacted any anti-gang legislation and has received less criticism for keeping crime prosecution "individualized."[52] However, the police enacted *Plan Escoba* ("Broom Plan"), which uses mass detentions as a means to combat gangs.[53] Citizens in some towns, however, feel the government is not doing enough to protect them and have taken the matter into their hands, conducting "security patrols" where groups of men armed with machetes find gang members and turn them over to the police or kill them.[54]

E. Honduras

Honduras did not experience a war like in El Salvador or Guatemala, but the Cold War and regional conflicts left Honduras with serious economic problems.[55] Honduras is an extremely poor and young country.[56] Honduras has been identified as one of the most dangerous countries in the world, and both the MS-13 and the 18th Street Gang are entrenched in Honduras's largest cities.[57]

To deal with the growing gang crisis, Honduras amended its penal code to allow arrests based on illicit association and then implemented anti-Mara

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46. WOLA, *supra* note 19, §§ 3, 4.
47. Vaughan & Feere, *supra* note 17, at 3.
48. *Id.*
49. SEELKE, *supra* note 41, at 9.
50. USAID, *supra* note 16, at 62-63.
51. *Id.* at 64.
52. *Id.* at 78.
53. WOLA, *supra* note 19, §§ 4, 3.
54. *Fed Up, Ordinary Guatemalans Turn to Vigilantism* (National Public Radio broadcast Dec. 23, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=98614371&ps=rs.
55. WOLA, *supra* note 19, §§ 1, 5.
56. USAID, *supra* note 16, at 91 (stating that about 71 percent of the population is poor and 41 percent is under the age of fourteen).
57. *Id.* at 92.

legislation in 2001.[58] As with the Mano Dura policies in El Salvador, Honduras's legislation was criticized by the international community for alleged abuses and civil liberties violations of those suspected of gang membership.[59] Honduras also has a severe prison over-crowding problem.[60] The gangs are segregated from the rest of the prison population and they are offered no rehabilitation services.[61] The police force in Honduras is under-staffed. Thus, many question the effectiveness of the anti-Mara legislation.[62] In 2006, the government launched "Operation Thunder," which increased the number of police and military controls and conducted joint raids in search of gang members, leading to 1,600 arrests.[63] These too have been criticized by the international community.[64]

It is recognized that the gang problem in Honduras, Guatemala, and El Salvador is beyond the governments' control, despite their efforts.[65] Scholars and citizens allege that the anti-Mara legislation has only made the problem worse by forcing the gangs to be more clandestine and become more organized.[66] Specifically, the governments are unable to provide citizens with appropriate protection from the Mara. In rural areas the problem is even worse, and in many neighborhoods the *clikas* dominate. Further, it is rare that people who witness the gangs' atrocities are willing to serve as actual witnesses because they are not afforded any police protection. Lastly, according to a study by the Harvard Law Human Rights Clinic, the governments rarely investigate or prosecute gang members.[67] The civilian population is largely without any government protection, and there is no barrier between the citizens and the gang. A Honduran citizen described his experience as being "like the only one in a war without a weapon." Other citizens feel that joining the gang is the only alternative to death.[68]

III. ASYLUM LAW

A. The Asylum Process

An asylum applicant has three potential ways to request relief: asylum under the Immigration and Nationality Act (INA),[69] withholding of removal,[70] or relief

58. *Id.* at 96 (the anti-Mara legislation allows police to arrest youth who are congregating and look like gang members).

59. SEELKE, *supra* note 41, at 8.

60. *Central America: Bringing It All Back Home*, THE ECONOMIST, May 22, 2004, 31, 32 (describing a fire at the San Pedro Sula jail which was meant for only 800 inmates but had 2,200). *See also* Int'l Human Rights Clinic, *supra* note 4, at 55 (stating that in February 2006, there were more than 3,000 gang members in El Salvadorian prisons and also describing other prison "massacres").

61. USAID, *supra* note 16, at 97.

62. *Id.*

63. SEELKE, *supra* note 41, at 9.

64. *Id.*

65. *Id.* at 6.

66. Int'l Human Rights Clinic, *supra* note 4, at 26.

67. *Id.* at 61-67.

68. *Id.* at 76-77.

69. Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 108 (codified as amended at 8 U.S.C. § 1158(a) (2008)).

70. 8 U.S.C. § 1227 (2006). "Withholding from removal" implements the United States *non-refoulement* obligations under Article 3 of the 1951 U.N. Convention Relating to the Status of Refugees,

under the U.N. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment, or Punishment (CAT).[71] All three claims may be brought at the same time, but they do not provide the same type of relief[72] and do not have the same burdens of proof. Asylum is generally the more coveted form of relief than relief granted under CAT or withholding of removal because, if granted asylum, an applicant can apply for permanent residency after one year.[73]

The statutory framework for asylum and withholding of removal are the same, but the burden of proof is higher for withholding of removal.[74] As a result, though applicants may bring both claims, a court will often only reach the merits of the asylum claim. However, relief under asylum is discretionary: an asylum officer or immigration judge may find an applicant eligible but choose to deny their petition.[75] Certain types of individuals are ineligible for asylum, such as

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July 28, 1951) 19 U.S.T. 6264, 189 U.N.T.S. 150 [hereinafter 1951 Convention]. The principle of *non-refoulement* prohibits a person from being returned to a country where his or her life or freedom would be threatened because of their race, religion, nationality, political opinion, or membership in a particular social group.

71. United Nations Convention Against Torture and other Cruel, Inhumane or Degrading Treatment, or Punishment, Dec. 22, 1984, S. TREATY DOC. NO. 100-20 (1988). [hereinafter CAT]. The United States signed CAT on April 18, 1988, pursuant to 8 C.F.R. § 1208.16(c)(1), and Congress passed the Foreign Affairs Reform and Restructuring Act ("FARRA") in 1988 to implement Article 3 of CAT. *See* PUB. L. NO. 105-277, Div. G, Title XXII, 112 Stat. 2681-821 (codified as a note to 8 U.S.C. § 1231). The implementing regulations for CAT are found in 8 C.F.R. §§ 1208.16 to 1208.18. Article 3 states that "[n]o State party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." To be eligible, an applicant must show that "is it more likely than not that he or she would be tortured if removed to the proposed country of removal" and that the torture was instigated or inflicted "with the consent or acquiescence of a public official or other person acting in official capacity." CAT, part I art. 1. Under the CAT, the applicant will have to establish both that they were tortured by the gang and that the government either acquiesced to the torture or failed to do anything about it once they were aware of the behavior. *Id.*

72. Under asylum, an applicant granted relief may apply for permanent residence after one year. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 428-29 n.6 (1987). Under "withholding from removal," the successful applicant is only given a right not to be removed to the country of persecution. *See* I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 419-20 (1999).

73. 8 C.F.R. § 209.2(a)(ii) (2009).

74. An applicant must show that he or she is a refugee and establish persecution or a well-founded fear of persecution. 8 U.S.C. § 1101(a)(42)(A) (2006). An applicant also has the burden of showing that membership in a particular social group is a "central reason" for persecution. *Id.* § 1158(b)(1)(B)(i) (2006). Importantly, the REAL ID Act amended the INA to state that persecution on one of the five grounds "was or will be at least one central reason for persecuting the applicant." REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(i)(A) 119 Stat. 303. The burden of proof under withholding of removal is "more likely than not" or a "clear probability of persecution," which is a higher standard than well founded fear and requires objective evidence to show that it is more likely than not that the applicant will be subject to persecution if deported. 8 C.F.R. § 1208.16(b)(2) (2009); *Cardoza-Fonseca*, 480 U.S. at 430. Under the CAT the applicant must show that it is more likely than not they will suffer intentionally inflicted cruel and inhuman treatment that either is not lawfully sanctioned by that country or is lawfully sanctioned by that country, *but* defeats the object and purpose of CAT. *See* 8 C.F.R. § 1208.16(c)(2) (2009). Unlike "withholding of removal," the testimony of the applicant, if credible, may be enough to satisfy this burden. *Id.*

75. 8 U.S.C. § 1158(b)(1)(A) (2006); 8 C.F.R. § 208.14 (a) & (b) (2009). *See also Cardoza-Fronseca*, 480 U.S. at 428 (stating that the Attorney General is not required to grant asylum, even to somebody who meets the statutory definition of refugee).

individuals who participated in past persecution or those have been convicted of a serious crime—making it nearly impossible for ex-gang members to be granted asylum.[76] This Comment focuses only on the courts' analysis of asylum claims in relation to those who fear persecution based on gang violence.

Individuals applying for asylum may make either an "affirmative" or a "defensive" application. In either case applicants have the burden of proof to establish that they are eligible for asylum.[77] Applicants who make affirmative claims will begin the asylum process on their own initiative with an asylum officer.[78] An applicant who is in the United States illegally and is denied his or her affirmative asylum application will be referred to the Department of Justice, which will place the applicant in removal proceedings.[79] Once in removal proceedings, the applicant can make a defensive asylum claim before an immigration judge.[80] In addition to a referral from the affirmative asylum process, one can assert a defensive claim after being arrested by the Department of Homeland Security.[81] The defensive asylum process is adversarial, with the potential for witnesses, exhibits, and cross examination.[82] From 1999 to 2004, 19 percent of all affirmative asylum applications that were adjudicated were ultimately approved.[83]

If an application for asylum arises affirmatively, an asylum officer will interview the applicant[84] and may grant asylum or refer the case to an immigration judge.[85] Immigration courts are run by the Executive Officer for Immigration Review, which is part of the Department of Justice.[86] Immigration judges are administrative judges within the Department of Justice. They conduct full proceedings, and their decisions are final unless appealed to the BIA.[87] Additionally, immigration judges have jurisdiction to make decisions under both

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76. 8 U.S.C. § 1158(b)(2) (2006).

77. 8 C.F.R. § 208.13(a) (2009).

78. *Id.* § 208.9(b).

79. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), SYRACUSE UNIV., TRAC IMMIGRATION REPORT: THE ASYLUM PROCESS (2006), http://trac.syr.edu/immigration/reports/159/ [hereinafter TRAC Asylum Process].

80. *Id*.

81. *Id*.

82. *Id*.

83. *Id.* Asylum seekers who are represented by lawyers have a higher success rate than those who are not. The applicant's country of nationality may also play a role in the asylum seekers' chances of getting asylum. El Salvador, Haiti and Mexico are denied about 80 percent of the time, while Burma and Afghanistan were approved 70 percent of the time. *Id.* Recently, the asylum process has been criticized because of the wide disparities in the rate at which immigration judges grant asylum. A recent study done by three law professors found that the sex of the judge and geographic location of the court may determine the outcome. *See* Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 332-342 (2007).

84. 8 C.F.R. § 208.9 (2009).

85. *Id.* § 208.14(b) & (c)(1). For instance, a case may be referred to an immigration judge because of an adverse credibility finding, giving the applicant more time to establish their testimony. Alternatively, the applicant may be found credible but the judge may decide she needs more information to establish persecution or another element.

86. Dep't. of Justice, Executive Officer for Immigration Review (EOIR) http://www.usdoj.gov/eoir/background.htm (last visited Sept. 30, 2009).

87. *Id.*

the INA and CAT.[88] Further, immigration judges have almost complete discretion in determining findings of fact and the applicant's credibility because the standard of review on appeal is "clear error."[89]

If an applicant is denied any form of requested relief, he or she may appeal to the BIA.[90] Like the Immigration Court, the BIA is an administrative body. There are fifteen members on the board who are appointed by the Attorney General. The board is divided into three-judge panels, which review appeals from each immigration court in the country[91] and decide cases by a majority vote.[92] The BIA almost always does a "paper review" of the cases and rarely hears oral argument.[93] The BIA reviews facts by a "clear error" standard,[94] while questions of law and other issues are reviewed *de novo*.[95] The BIA decisions are binding on all Immigration Judges unless the rules are modified by Congress, the Attorney General, or the BIA.[96] Importantly, the board's decisions "provide clear and uniform guidance to [Department of Homeland Security], the immigration judges, and the general public on the proper interpretation and administration of the [Immigration and Nationality] Act and its implementing regulations."[97]

If the BIA does not grant the applicant asylum, the applicant may appeal

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88. 8 C.F.R. § 208.1(a) (2009).

89. *Id.* § 1003.1(d)(3)(i).

90. *Id.* § 1003.1(b).

91. *Id.* § 1003.1(a)(2)(ii)(3).

92. *Id.* However, in certain situations a case may be decided by only one judge. For example, when a party fails to specify the reasons for appeal, a single board member may dismiss the appeal. *See id.* § 1003.1(d)(2).

93. *Id.* § 1003.1(e)(7).

94. *Id.* § 1003.1(d)(3)(i).

95. *Id.* § 1003.1(d)(3)(ii).

96. *Id.* § 1003.1(d)(7).

97. *Id.* § 1003.1(d)(1). In 1999, the Justice Department made various "streamlining" reforms designed to accelerate the asylum process. Richard Acello, *Asylum Logjam*, 91 A.B.A. J., Oct. 2005, 18, 20. Although these reforms aimed to diminish the BIA's extensive case backlog at the time, they have shifted the pending cases from the BIA to the courts of appeals. *Id.* at 18. *See also* David A. Martin, 84 INTERPRETER RELEASES 2069, 2070 (2007), *available at* Westlaw, 84 No. 35 INTERREL 69 (commenting that the circuit court case load for appeals from the BIA has expanded to 17 percent in 2006). The Second and Ninth Circuit Courts of Appeals have seen the greatest shift, with appeals from the BIA jumping 463 percent and 1,448 percent, respectively. Acello, *supra* note 97, at 20. Further amendments were made in 2002, which included a provision allowing the BIA to affirm an immigration judge's decision without a written opinion and another that increased the number of cases heard by a single immigration judge. There is also no longer "de novo review of factual issues and . . . the grounds for mandatory dismissal" were expanded. *Id.* (Acello also argues that this is a problem because the immigration judges have different views on the law; without written opinions there is inadequate analysis, and the courts of appeals have expressed dissatisfaction. However, the number of cases in the BIA's backlog has been reduced from 56,000 in August 2002 to 33,000 in October 2004). *Id. See also* Margaret Graham Tebo, *Asylum Ordeals: Some Immigrants Are 'Ground to Bits' in a System That Leaves Immigration Judges Impatient, Appellate Courts Irritated and Lawyers Frustrated*, 92 A.B.A. J. 36, 40 Nov. 2006 (arguing that the streamlining has resulted in little more than "rubberstamping" the B.I.A. opinions and that immigration lawyers have "beg[u]n to question the fairness of the process"). Lastly, the number of judges was reduced from twenty-three to eleven. *Id.* at 40; Press Release, Executive Office for Immigration Review, Dep't. of Justice, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002), *available at* http://www.usdoj.gov/eoir/press/02/BIARestruct.pdf.

directly to the federal court of appeals for the circuit in which the applicant resides.[98] The court of appeals then reviews the BIA's decision under an abuse of discretion standard.[99] Nationwide, the courts of appeals overturn about forty percent of the BIA's decisions.[100] An order of deportation will be issued if at any time the applicant is not granted relief and he or she is otherwise in the country illegally. The decisions made by the courts of appeals are binding on the BIA for cases arising in the same circuit.[101] As with all types of cases, the United States Supreme Court rarely grants certiorari.

B. Defining a Particular Social Group

Under the INA, the Attorney General has authority to confer asylum on any alien who qualifies as a refugee.[102] When the United States ratified the 1967 UN Protocol Relating to the Status of Refugees,[103] it incorporated the definition of "refugee" from the 1951 UN Convention Relating into the Status of Refugees.[104] In 1980, Congress passed the Refugee Act, formally codifying the 1951 convention's definition of "refugee" into United States law. [105] A refugee is defined by the convention as:

> [A]ny person 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.[106]

Under both the convention and the Refugee Act, in order to qualify for asylum, an applicant has the burden of showing: that they have either suffered persecution or they have a well-founded fear of persecution in their home country; that such persecution or fear is based on race, religion, nationality, political opinion, or membership in a particular social group;[107] and that the government is "unable or unwilling" to provide protection. Generally, the government's inability to control

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98. 8 U.S.C. § 1252(b)(2) (2006).

99. For a court of appeals to reverse on factual grounds, the asylum seeker must "show that the evidence he presented was so compelling that no reasonable fact finder could fail to find the requisite fear of persecution." I.N.S. v. Elias-Zacharias, 502 U.S. 478, 483-84 (1992).

100. Tebo, *supra* note 97, at 39.

101. Dep't. of Justice, Executive Officer for Immigration Review (EOIR) http://www.usdoj.gov/eoir/background.htm (last visited Sept. 30, 2009).

102. 8 U.S.C. § 1158(a)(2)(A) (2006).

103. 1967 Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6225, 606 U.N.T.S. 268 [hereinafter 1967 Protocol].

104. Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150. This is so because the protocol was not an amendment to the 1951 Convention but incorporates the 1951 Conventions provisions by reference, so by becoming a signatory to the protocol the United States accepted the terms of the 1951 Convention. *See* JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 111 (2005).

105. 8 U.S.C. § 1101(a)(42) (2006).

106. 8 U.S.C. § 1101(a)(42)(A) (2006); Convention Relating to the Status of Refugees, *supra* note 104, 19 U.S.T. 6261, 189 U.N.T.S. 150; *see also* Matter of Acosta, 19 I. & N. Dec. 211, 235-36 (B.I.A. 1985) (the applicant must show that he is not able to relocated to another city within the country to avoid persecution).

107. 8 U.S.C. § 1158(b)(1)(B)(i) (2005).

the problem is demonstrated with research documenting the existence of the problem in the applicant's home country, such as newspaper articles, reports from organizations like Amnesty International, the UNHCR, and the U.S. Department of State, affidavits from friends or family, expert testimony, and the applicant's testimony. However, because persecution by non-state actors, unlike government-sponsored persecution, is amorphous, as discussed previously, this poses unique problems for the asylum officers and judges adjudicating the claim. Non-state persecution is much harder to prove, often less visible, and forces the adjudicator to decide if the government's inability or unwillingness rises to the appropriate level of inaction to warrant granting asylum.[108]

There is no universal definition of "persecution."[109] Whether or not an individual faced harm amounting to persecution is a fact-specific analysis that is taken up in each case.[110] However, in each case the applicant must establish that he or she was persecuted or fears persecution "on account of" the category that he or she specifies.[111] The social group category must have characteristics that set them apart from the general population.[112] There is, however, no requirement that the social group be cohesive or that all members know each other or even associate with one another.[113]

The applicant's proof of well-founded fear has both a subjective and objective component. Subjectively, applicants must show either that they personally have suffered persecution or fear persecution in their home countries. Objectively, the applicant must demonstrate that a reasonable person in the applicant's position would fear persecution on account of one of the five grounds.[114] The applicant's subjective belief is a credibility determination made by the asylum officer or judge.[115]

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108. Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 787-89 (2003).

109. U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS para. 51 (1992) [hereinafter UNHCR Handbook].

110. *Id.* at para. 52.

111. The United States Supreme Court held that the persecution must be on account of the victim's membership in one of the groups, not the persecutor's belief or motive. *Elias-Zacarias*, 502 U.S. at 482.

112. Expert Roundtable organized by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law, *Summary Conclusions: Membership of a Particular Social Group*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW 312, 313 (Erika Feller et al. eds., 2003) [hereinafter Expert Roundtable].

113. *Id. See also infra* note 6.

114. *Cardoza-Fonseca*, 480 U.S. at 451 n.32. "An alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country." *Id.* (quoting Guevara-Flores v. I.N.S., 786 F.2d 1242, 1249 (5th Cir. 1986). "In contrast, the term 'well-founded fear' requires that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded." *Id.* (quoting Cardoza-Fonseca v. I.N.S., 767 F.2d 1448, 1452-53 (9th Cir. 1985)). The Supreme Court also stated that an individual can have a well-founded fear even if the chance of the event is less than 50 percent. *Id.* at 431. "[T]he 'well-founded fear' standard would indicate 'that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.'" *Id.* at 440 (quoting I.N.S. v. Stevic, 467 U.S. 407, 424-25 (1984)).

115. 8 U.S.C. § 1158(a)(3)(B)(iii) (2006) states that:

(iii) Credibility Determination

Of the five statutory grounds for relief, the particular social group category is the least well-defined,[116] but the second most popular category for asylum claims.[117] Sweden suggested the particular social group category be included in the definition of "refugee" at the convention along with the four other grounds, and it was added to the definition of "refugee" at the 1951 Refugee Convention on a unanimous vote without debate.[118] The convention never defined a "particular social group" or its intended purpose and there is no unified definition of "particular social group" within the United States or the international community at-large.[119] The Department of Justice has recognized the absence of a clear definition and has attempted to bring clarity with proposed changes to the Code of Federal Regulations.[120]

In United States jurisprudence, the first key decision interpreting membership in a particular social group was the BIA's decision in *In re Acosta*.[121] The *Acosta* decision set forth an analytical framework that has been characterized as the "immutable approach." Under this framework social groups based on gender, tribal and clan membership, sexual orientation, family, and past experiences have been recognized.[122] *Acosta* has also been used as precedent in other foreign

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> Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

See also Matter of Mogharrabi, 19 I. & N. Dec. 439, 447 (B.I.A. 1987) (laying out a four-part test for establishing eligibility for asylum based on well-founded fear).

116. Expert Roundtable, *supra* note 112, at 312.

117. Anna Marie Gallagher, 2 Immigr. Law Service 2d (West) § 10:138 (2009).

118. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 19th mtg. at 14, U.N. Doc. A/CONF.2/SR.3.19 (Nov. 26, 1951).

119. *See* Stanley Dale Radtke, *Defining a Core Zone of Protection in Asylum Law: Refocusing the Analysis of Membership in a Particular Social Group to Utilize Both the Social Visibility and Group Immutability Component Approaches*, 10 J. L. & SOC. CHALLENGES 22, 30-33 (2008) (stating that the framers of the convention were influenced by the human rights atrocities stemming from Nazi Germany which resulted in a hyper-awareness of the international community's failure to protect refugees. As a result, the framers wanted to make sure refugees would be protected).

120. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76, 589-90 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (while the proposed rules recognized the absence of a clear definition and attempted to bring some clarity to the particular social group category, there is no indication that the these proposed rules will be adopted, but they would be included in 8 C.F.R. § 208).

121. 19 I. & N. Dec. 211 (B.I.A. 1985) *overruled in part by* Matter of Mogharrabi, 19 I. & N. Dec. 439, 439 (B.I.A. 1987) (*Mogharrabi* stated that the *Matter of Acosta* court was incorrect in its holding that the "clear probability" standard for withholding or removal and the "well-founded fear" standard for asylum are not meaningfully different.).

122. Aleinikoff, *supra* note 1, at 276. *See*, *e.g.*, Gomez-Zuluaga v. Att'y Gen., 527 F.3d 330 (3d Cir. 2008) (escape of involuntary servitude); Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (homosexuals); Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003) (escaped child soldiers); *In re*

jurisdictions.[123]

However, the applicant in *Acosta* did not assert a cognizable social group. Acosta, a thirty-six year old male citizen of El Salvador, claimed that he feared persecution by guerrillas on account of his membership in a group of COTAXI drivers and persons engaged in the transportation industry. [124] This "group" was targeted by the guerillas for refusing to participate in work stoppages.[125] The BIA found that these COTAXI drivers could not be a "particular social group," reasoning that being a driver was not an immutable trait because the drivers could have changed jobs or participated in the work stoppages.[126] Thus, the petitioner had the power to change his group characteristic.[127] The BIA determined that because the other statutory grounds for asylum (political opinion, nationality, race and religion) are immutable characteristics, the characteristics making up membership in a particular social group should also be immutable. The BIA elaborated that persecution on account of membership in a particular social group refers to:

> [P]ersecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. . . . [I]t must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of membership become something comparable to the other four grounds of persecution under the Act, namely, something that is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing "persecution on account of membership in a particular social group" in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.[128]

Scholars have identified *Acosta* as the "middle ground" approach to defining social groups, allowing for an application that is "sufficiently open ended to allow for evolution . . . but not so vague as to admit persons without a serious basis for claim to international protection."[129]

Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996) (opposition to female gentile mutilation); *In re* Toboso-Alfonso, 20 I.& N. Dec. 819 (B.I.A. 1990) (homosexuals).

123. Shah & Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.) (United Kingdom); Ward v. Att'y Gen. of Canada, [1993] 2 S.C.R. 689 (Can.); *In re* G.J., Refugee Appeal No. 1312/93 (N.Z. R.S.A.A. 1995) (New Zealand).

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

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 233-34. This definition is narrower and more specific than the one provided by the United Nations. *See also* UNHCR Handbook, *supra* note 109. *See also infra* text and accompanying notes 133-35.

129. JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 160-61 (1991) (citations omitted).

In 1978, the United Nations High Commissioner for Refugees[130] (UNHCR) issued a Handbook on Procedures for Determining the Status of Refugees (UNHCR Handbook).[131] The UNHCR Handbook was the first attempt to define the particular social group with more detail, but remained broad. The handbook defines membership in a particular social group as follows:

> 77. A "particular social group" normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.
> 78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.
> 79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.[132]

In 2001, the UNHCR organized a roundtable discussion on membership in a particular social group. The summary conclusions from this roundtable stated that "there is no requirement that a group be cohesive in order to be recognized as a particular social group within the meaning of the Convention, that is, there needs to be no showing that all members of a group know each other or associate together."[133] However, the group must share common characteristics, other than risk of persecution, which set them apart from the general population and evidence of persecution may be relevant to determining the social visibility of the group.[134] The roundtable group also stated that as the category of membership in a particular social group evolves the relevance of the "social perception" test could be considered.[135]

In 2002, UNHCR issued guidelines defining membership in a particular social group. Ultimately the Guidelines were meant to supplement the UNHCR Handbook.[136] The Guidelines summarized the two main approaches to defining "particular social group" used by courts in common law jurisdictions applying the particular social group requirement to asylum claims. These two approaches were

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130. The Office of the United Nations High Commissioner for Refugees was created in 1950 by the United Nations General Assembly simultaneously with the 1951 Convention on Refugees. The office was designed to monitor the Convention and cooperate with signatory states on implementing the Convention, Regulations, or laws created by the Agency or the States. U.N. HIGH COMM'N FOR REFUGEES, PROTECTING REFUGEES AND THE ROLE OF UNHCR 17-19 (2007).

131. UNHCR Handbook, *supra* note 109.

132. *Id.* at ¶¶ 77-79.

133. Expert Roundtable, *supra* note 112, at 313.

134. *Id.*

135. *Id.*

136. 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].

the "immutable approach"[137] and the "social perceptions" approach.[138] The UNHCR decided to reconcile the two approaches and issued its own standard definition of a particular social group, which incorporated both approaches.[139] The definition is as follows:

> [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.[140]

Lastly, the UNHCR articulated that the size of the applicant's stated social group is irrelevant to the determination of whether a social group exists.[141] Although the UNHCR Handbook is not binding on the United States, the Supreme Court has recognized the Handbook as highly influential because it explains the United Nations Protocol ratified by Congress in 1967.[142]

VI. MOVEMENT TOWARDS SOCIAL VISIBILITY

Prior to the BIA's imposition of social visibility as a requirement, the First, Third, Sixth, and Seventh Circuits included in their determinations of a particular social group the "social visibility" or social perception inquiry as an important consideration.[143] Social visibility is generally understood to be the extent to which members of society perceive those with the characteristic in question as members

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137. This is the framework used in *In re Acosta*, 19 I. & N. Dec. at 233-34. The UNHCR Guidelines define this framework as:

> An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them. A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.

UNHCR Guidelines, *supra* note 136, at 3.

138. This 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. This has been referred to as the "social perception" approach. Again, women, families, and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist. *Id.*

139. This was largely the influence of the Refugee Law scholar Professor Aleinikoff. *See* RADTKE, *supra* note 119, at 43 (stating that Aleinikoff's approach creates a "single test to define for the scope of protection under a social group claim" not a test that looks both simultaneously at the immutable characteristic and social visibility components).

140. UNHCR Guidelines, *supra* note 136, at 3-4.

141. *Id.* at 5.

142. *Cardoza-Fonseca*, 480 U.S. at 438-39 n.22 (stating that the explanations offered in the U.N. Handbook do not have the force of law. However, "the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.").

143. *See, e.g.*, Ananeh-Firempong v. I.N.S., 766 F.2d 621 (1st Cir. 1985); Fatin v. I.N.S., 12 F.3d 1233 (3d Cir. 1993); Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003).

of a social group.[144] However, the Ninth Circuit defined particular social group as having a voluntary associational relationship, meaning that the group closely affiliates with one another or is cohesive, but the Ninth Circuit also recognized groups sharing immutable characteristics.[145] Thus, the Ninth Circuit framework was broader than the approaches in *Acosta* and other circuits. The Second Circuit generally followed the Ninth Circuit's voluntary association standard, but added a requirement that the particular social group be externally distinguishable and that this perception of the group is as important as immutability and voluntariness.[146] The voluntary association approach has been criticized and rejected by other courts for being overly broad.[147] Critics claim that it would allow asylum for large segments of the population who, even if they are persecuted, are not a distinct social group while other groups that have been afforded protection, such as gays and lesbians, would not be able to satisfy the cohesiveness requirement.[148] The circuit split means that asylum may be granted to an applicant in the Ninth Circuit, but denied to the same applicant in the First Circuit. The development of the split between circuits then, created an opportunity for the BIA to attempt to bring uniformity to the social group analysis.

Amidst the circuit split over the appropriate social group analysis, the BIA has recently developed its own definition of "particular social group" and did not adopt, in words or analysis, the definition suggested by the UNHCR, which represented a significant departure from *Acosta*. The BIA chose to adopt a framework similar to the Second Circuit approach, requiring that the particular social group be socially visible. For those seeking asylum based on gang persecution then, the probability of succeeding under a "particular social group" claim became hard to ascertain because of the lack of uniformity among the courts.

In June 2006, the BIA issued the decision of *In re C-A*,[149] which included social visibility in its analysis of a particular social group. In this case, the court held that non-criminal drug informants working against the Cali Drug Cartel were not a particular social group for the purposes of asylum because, among other things, they do not have the necessary social visibility.[150] Referencing a prior BIA decision, the court noted that they had included social visibility in their determination of whether or not membership in the Marehan sub-clan in Somalia

144. *See, e.g.*, Matter of E-A-G, 24 I. & N. Dec. 591, 594 (B.I.A. 2007).

145. *See, e.g.*, Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1092-93 (9th Cir. 2000); Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1576 (9th Cir. 1986).

146. Gomez v. I.N.S., 947 F.2d 660, 664 (2d Cir. 1991). In *Gomez*, the Second Circuit held that an El Salvadorian woman's claim for asylum based on membership in the particular social group of women abused by guerillas lacked the requisite visibility and particularity and denied her claim. The court stated that a particular social group "is comprised of individuals who possess some fundamental characteristics in common which serves to distinguish them in the eyes of the persecutor-or in the eyes of the outside world in general." *Id.* at 664. The court reasoned that the traits for a particular social group must be "recognizable and discrete" because the other four categories are also "recognizable and discrete." *Id.*

147. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES: ADMINISTRATIVE DECISIONS AND ANALYSIS 382 (3rd ed. 1994).

148. Aleinikoff, *supra* note 1, at 277-78.

149. 23 I. & N. Dec. 951 (B.I.A. 2006), *aff'd sub nom*. Castillo-Arias v. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006), *cert. denied*, Castillo-Arias v. Gonzales, 549 U.S. 1115 (2007).

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

constituted a social group.[151] The court then stated that past social groups identified under the *Acosta* framework have all been "highly visible," for instance: Filipinos of mixed Filipino-Chinese ancestry, young women of a particular tribe who were opposed to female genital mutilation, and those with former military leadership or land ownership.[152] The court further analyzed the social visibility component, suggesting that it was an important consideration when determining if a particular social group existed.[153] In rejecting the proposition that the drug informants were a particular social group, the court reasoned that the informants were, by their nature, out of the public view and acting on their own free will, thus not socially visible.[154] However, the court explicitly affirmed adherence to the *Acosta* formula and stated it was considering "the extent to which members of society perceive those with the characteristic in question as members of a social group" as a "relevant factor."[155]

In 2007, in *In re A-M-E & J-G-U*,[156] the BIA returned to its decision in *In re C-A*. The petitioners were requesting asylum based on persecution in Guatemala for being affluent Guatemalans, after a family member had been kidnapped and injured by gang members for ransom.[157] Relying on *In re Acosta* and *In re C-A*, the court reasoned that while wealth was not an immutable characteristic, it might have been fundamental to the petitioner's identity.[158] However, the court held that it did not need to determine if wealth was fundamental, which may have allowed the petitioner to qualify for asylum under the *Acosta* framework, because wealthy Guatemalans were not "so readily 'identifiable' or sufficiently defined as to meet the requirements of a *particular* social group . . . ."[159] The court then added that "shared characteristic[s] with the requisite 'social visibility' must be considered in the context of the country of concern and the persecution feared."[160] The court also reasoned that wealth failed the particularity requirement because it was too amorphous a concept and the group could compose anywhere from 1 to 20 percent of the population.[161]

Next, in *In re S-E-G*,[162] the BIA explicitly imposed a social visibility

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151. *Id.* at 959.

152. *Id.* at 960.

153. *Id. See also* UNHCR Guidelines, *supra* note 136, at 3.

154. *In re C-A*, 23 I. & N. Dec. at 960-61.

155. *Id.* at 956-57.

156. 24 I. & N. Dec. 69 (B.I.A. 2007), *petition for review denied*, Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007).

157. *In re A-M-E*, 24 I. & N. Dec. at 70.

158. *Id.* at 73-74.

159. *Id.*

160. *Id.* at 74.

161. *Id.* at 76.

162. 24 I. & N. Dec. 579 (B.I.A. 2008). *See also* Joe Palazzolo, *Fight Over New Asylum Barrier: Lawyers Ask Holder for Review*, LEGAL TIMES, Mar. 2, 2009 (requesting the case be referred to the Attorney General pursuant to 8 C.F.R. § 1003.1(h)(1)(iii) (2009)). Seemingly in an effort to set clear precedent, *In re E-A-G*, 24 I. & N. Dec. 591 (B.I.A. 2007) was decided on July 30, 2007, but published later as a companion case to *In re S-E-G*, and references *Matter of E-A-G* in its published opinion. The facts, analysis and holding in *Matter of E-A-G* are similar to *Matter of S-E-G* but *Matter of S-E-G* provides a more detailed analysis of social visibility.

requirement for asylum petitions under the social group category.[163] The BIA held that neither Salvadorian youth who have been subject to recruitment efforts by MS-13 and who have rejected or resisted membership based on personal, moral, and religious opposition to the gang lifestyle, nor the family members of such youth, constitute a particular social group.[164] Again, relying on *In re A-M-E & J-G-U* and *In re C-A*, the court held that this category of Salvadorian youth did not have particular and well-defined boundaries, nor did they possess a recognized level of social visibility in order to be a particular social group, and in fact failed the "'social visibility' test."[165] Further, the court held that youth is not an immutable characteristic.[166] Though the court did not doubt that MS-13 retaliated against them for their refusal to join the MS-13, the court refused to recognize the group as a particular social group because gang violence is widespread across the population and gangs retaliate against all who threaten or question their power.[167] Thus, respondents failed to differentiate themselves from anyone else who has refused the gang's authority or who is perceived by the gang as a threat.[168] The BIA's decision in *In re S-E-G* made clear what was left open by *In re C-A*: that a particular social group must have at least one trait that is not just "fundamental" or "immutable" but also "socially visible." The court acknowledged the refinement to the *Acosta* framework, stating that "'particularity' and 'social visibility' give greater specificity to the definition of a social group . . . ."[169] The BIA continues to adhere to this new framework.[170]

The circuit courts are not uniform in their interpretation of *In re S-E-G*. While some have adopted the social visibility requirement, others do not think social visibility is a requirement. For example, in *Davila-Mejia v. Mukasey,*[171] the Eighth Circuit referenced the social visibility requirement in dicta. In this case, the court affirmed the BIA's denial of asylum for Guatemalans who alleged they were persecuted on account of membership in a group of "competing family business owners,"[172] stating that this was not a cognizable social group because it was not an immutable trait.[173] Noting *In re A-M-E & J-G-U*, the court also stated that the petitioners in this instance failed to show that "'competing family business owners' gave them sufficient social visibility to be perceived as a group by society."[174] Lastly, the court reasoned that competing family business owners is too amorphous to be categorized as a social group.[175] Similarly, the Second, Sixth, and Eleventh

163. In re *S-E-G*, 24 I. & N. Dec. at 582.
164. *Id.* at 583-84.
165. *Id.* at 584-88.
166. *Id.* at 583.
167. *Id.* at 587.
168. *Id.*
169. *In re S-E-G*, 24 I. & N. Dec. at 582.
170. *See* In re *R-A*, 24 I. & N. Dec. 629 (B.I.A. 2008).
171. 531 F.3d 624 (8th Cir. 2008).
172. *Id.* at 628.
173. *Id.* at 628-29.
174. *Id.* at 629.
175. *Id.*

Circuits have also adopted this social visibility requirement.[176]

V. RESISTANCE TO SOCIAL VISIBILITY AS A REQUIREMENT

A. The Ninth and First Circuits

The Ninth Circuit's evolving approach to social visibility is particularly interesting and represents movement away from *In re S-E-G*. As noted before, the Ninth Circuit had used a "voluntary association" framework for determining social group status, but this approach was strongly criticized and rejected by other jurisdictions.[177] In 2008, in *Santos-Lemus v. Mukasey*,[178] Santos-Lemus appealed to the BIA for asylum arguing, in part, that he was persecuted in his home country of El Salvador on account of his membership in "the class of young men in El Salvador who resist the violence and intimidation of gang rule."[179] The BIA held below that this group lacked both the requested particularity and social visibility.[180] The Ninth Circuit noted that this social group was a matter of first impression for the court but, deferring to *In re S-E-G*, determined that this group was "too loosely defined to meet the requirement for particularity" and was even broader than the social group in *In re S-E-G*.[181] Again relying on *In re S-E-G*, the court held that Santos-Lemus's group lacked social visibility because "there [was] little evidence that Salvadoran youth who [were] recruited by gangs but refuse[d] to join . . . would be perceived as a group by society, or that these individuals suffer[ed] from a higher incidence of crime than the rest of the population."[182] Further, the court reasoned that, because gang violence was highly prevalent within El Salvador, the applicant's stated social group was not one that set him apart from the general population, nor was he persecuted by the gang because of his membership in that group.[183]

However, more recently, the Ninth Circuit has seemed to renege the social visibility approach. In *Donchev v. Mukasey*,[184] the Ninth Circuit, addressing a gang related asylum claim stated that:

> To determine whether a claimed group is a "particular social group," we consider "whether a group's shared characteristics gives members social visibility and whether the group can be defined with sufficient particularity to delimit its membership." This attempt at a general definition is instructive, but very abstract. When we are talking about membership in something other than a tribe or clan, this definition is not very helpful to deciding cases because the abstractness allows

176. *See, e.g.*, Jiang v. Mukasey, 296 F. App'x 166, 168 (2d Cir. 2008); Guzman-Cubias v. Holder, 323 F. App'x 42 (2d Cir. 2009); Flores v. Mukasey, 297 F. App'x 389 (6th Cir. 2008); Gomez-Benitez v. U.S. Att'y Gen., 295 F. App'x 324 (11th Cir. 2008).

177. In re *C-A*, 23 I. & N. Dec. 951, 956-57 (B.I.A. 2006).

178. 542 F.3d 738 (9th Cir. 2008).

179. *Id.* at 741.

180. *Id. See also* Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007).

181. *Santos-Lemus*, 542 F.3d at 745-46.

182. *Id.* at 746 (citations omitted).

183. *Id.*

184. 553 F.3d 1206 (9th Cir. 2009).

most disputes to be decided either way.[185]

The decision highlights that while social visibility may be helpful, it is not determinative of the existence of a social group. However, most recently the Ninth Circuit returned to its *Santos-Lemus* holding, stating that resistance to gang membership is not a protected ground for the same reasons as in *In re S-E-G* and *Santos-Lemus*.[186]

Similarly to the Ninth Circuit in *Donchev*, in *Scatambuli v. Holder*,[187] the First Circuit interpreted the BIA's decision in *In re C-A* as a substantial break from *Acosta* because it added a social visibility *requirement*.[188] In this case, a Brazilian family claimed asylum based on fear of persecution for their status as government informants against a Brazilian smuggling ring.[189] The BIA denied their claim, and the Scatambuli family appealed, arguing that the BIA improperly relied on the social visibility component.[190] The BIA reasoned that petitioners had not shown they possess characteristics that would make them outwardly visible in order for society to recognize them as informants.[191] Reviewing the BIA's legal interpretations de novo, the First Circuit surveyed other circuit courts' use of the BIA's social visibility requirement and concluded that social visibility is only a *relevant* consideration.[192] Ultimately, the court denied review, reasoning that the BIA's findings were based on substantial evidence and that petitioners did not suffer persecution, nor were they socially visible.[193]

B. Department of Justice

In 2000, the Department of Justice proposed changes to the Code of Federal Regulations that would have brought substantial clarity to the "particular social group" definition. These regulations would have codified the *Acosta* approach requiring members to share a common, immutable trait.[194] The rules also included factors to be considered in determining the existence of a social group, such as whether the group was closely affiliated or recognized and understood by society as distinct. However, it was clear in the proposed regulations that such factors were not required.[195]

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185. *Id.* at 1215-16. The court ultimately denied the claim for asylum, holding that those who have declined to join gangs chose the course of conduct that led to the harm, and thus their social group claim was not based on a fundamental or immutable trait. *Id.* at 1220. This seems to be a misinterpretation of facts by the judges or, perhaps, a failure to properly brief the court on the nature of the Mara. *See supra* notes 15-37 and accompanying text, discussing the nature of the Mara.

186. Barrios v. Holder, No. 06-74983, 2009 WL 2882868, at *3 (9th Cir. Sept. 10, 2009).

187. 558 F.3d 53 (1st Cir. 2009).

188. *Id.* at 59.

189. *Id.* at 55.

190. *Id.*

191. *Id.* at 57.

192. *Id.* at 59.

193. *Scatambuli*, 558 F.3d at 61.

194. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (Dec. 7, 2000). If adopted, this requirement would be included in 8 C.F.R. § 208.15(C)(1). *Id.*

195. *Id.* at 76, 594.

C. UNHCR Brief

In 2007, in *In re Thomas*,[196] the UNHCR filed an amicus curiae brief in support of the asylum applicant on appeal to the BIA.[197] The UNHCR argued that the suggested analysis for asylum claims in *In re C-A* is inconsistent with the UNHCR guidelines.[198] UNHCR clarified that the new definition for particular social group announced in the 2002 Guidelines was a two-part approach: If the immutability requirement was not satisfied, then the court should undertake a second inquiry to determine if the stated social group was perceived as a cognizable group within the applicant's society.[199] Further, the UNHCR argued that there was no requirement that "the members of the group . . . be visible to society at large," using homosexuals in Cuba and tribal members who oppose female genital mutilation as examples of such groups.[200] Lastly, the brief stated that the UNHCR Guidelines were "intended to create alternative approaches for particular social group analysis rather than a dual requirement, and 'social visibility' [was] not a requirement of the definition."[201]

D. Canadian Supreme Court: Protected Characteristics Approach

The Canadian Supreme Court, in *Canada v. Ward*[202] addressed the meaning of "particular social group" under the 1951 Refugee Convention. Although the Supreme Court remanded the case back to the Immigration and Refugee Board,[203] the case remains important for its particular social group analysis. Ward was a former member of the Irish National Liberation Army (INLA) and was sentenced to death for aiding the escape of hostages.[204] Ward sought asylum in Canada based on his membership in the INLA.[205] Relying heavily on the *In re Acosta* framework and the UNHCR Handbook, the court adopted a three prong approach to determining membership in a particular social group, under which an applicant's asserted social

196. Thomas v. Ashcroft, 359 F.3d 1169 (9th Cir. 2004), *en banc reh'g granted*, Thomas v. Ashcroft, 382 F.3d 1154 (9th Cir. 2004), Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005) (en banc rehearing), *cert. granted, vacated, and remanded*, Gonzales v. Thomas, 547 U.S. 183 (2006). The Supreme Court remanded the case to the Ninth Circuit, ordering the Ninth Circuit to remand the case back to the BIA for a determination of whether family members of Thomas constituted a particular social group. *Gonzales*, 547 U.S. at 186-87. The Ninth Circuit had decided that the family members were a particular social group, although the BIA had not, which the Supreme Court decided on certiorari was a procedural error because circuit courts do not conduct de novo review of the BIA cases, and so the Supreme Court remanded the case back to the Ninth Circuit. *Id.* at 185-86. The BIA opinion was remanded from the Ninth Circuit and was not published.

197. Brief for the Office of the U.N. High Comm'r for Refugees as Amici Curiae Supporting Claimants, *In re* Thomas, No. A75-597-033/-04/-05/-06 (BIA Jan. 25, 2007), *available at* http://www.unhcr.org/refworld/docid/45c34c244.html (last visited Aug. 17, 2009) [hereinafter UNHCR Brief in *Thomas*].

198. *Id.* at 7.

199. *Id.*

200. *Id.* at 8 (emphasis omitted).

201. *Id.* at 9.

202. Canada v. Ward, [1993] 2 S.C.R. 689 (Can.).

203. *Id.* at 700.

204. *Id.* at 755.

205. *Id.* at 700-01.

group must fit into any one of the three categories: "(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."[206] The court denied Ward's claim, reasoning that his fear "was based on his action, not on his affiliation."[207] Thus, *Ward's* significance is that it broadened the *Acosta* analysis by recognizing groups based on "voluntary association" or an association with a group that they are capable of changing.[208] Although the court did not provide a rationale for broadening the analysis, Professor Aleinikoff suggests that the court was expanding the scope of protection to individuals who should not be asked to forsake an association that is fundamental, covering things like freedom of thought.[209]

Professor Aleinikoff labeled the *Ward* analysis the "protected characteristics" approach and pointed out that the *Ward* framework looked to internal factors and innate characteristics shared by groups, not the social perception of the group.[210] Consequently, unlike the requirements imposed by the BIA and circuit courts, the Canadian Supreme Court has not adopted a social visibility requirement.

E. Australian High Court

In *Applicant S v. Minister for Immigration and Multicultural Affairs*,[211] the High Court of Australia expressly rejected the notion that a social group must be perceived within society as a collection of individuals who are "set apart from the rest of that society."[212] In this case, an Afghan male was seeking asylum in Australia under the 1951 Refugee Convention after fleeing from the Taliban.[213] He feared that if he stayed in Afghanistan, or returned there, he would be recruited by the Taliban for military service as he had been previously.[214] His asserted social group was "young, able-bodied Afghan men."[215] The minister, on behalf of the Australian Government, argued that there was a "social visibility" requirement in order to qualify as a particular social group. The High Court disagreed:

> There is nothing in the relevant Article of the Convention or [section] 36 of the [Migration] Act adopting it which states or implies such a requirement. The question is not whether some undefined section of, or minority, or majority, or leaders of a country regard and recognise a particular group as a social group, as relevant and helpful to the giving of an answer to the correct question, an answer to that question might be. The correct question is simply whether an identifiable group or class of persons constitutes a particular social group. The attitude expressed by acts or words of people within a country towards others may, and

206. *Id.* at 739.
207. *Id.* at 745.
208. Aleinikoff, *supra* note 1, at 269-70.
209. *Id*. at 270.
210. *Id.*
211. (2004) 217 C.L.R. 387 (Austl.).
212. *Id.* ¶ 62.
213. *Id.* ¶ 56.
214. *Id.*
215. *Id.* (internal quotations omitted).

> usually will provide cogent evidence that those others are of a particular social group, but such acts or words cannot be conclusive of the issue.[216]

However, the court denied asylum finding that conscription into a military force does not amount to persecution.[217] The court was careful to assert that, while evidence demonstrating that a society perceives a particular social group is influential, generally a particular social group must be objectively cognizable within the relevant society and have characteristics to set it apart from society.[218] However, a particular society group may exist even if it is not perceived by society.[219] The court adopted a similar framework to that in *In re Acosta*:

> Thus, although the group must be a cognisable group within the society, it is not necessary that it be recognised generally *within the society* as a collection of individuals which constitutes a group that is set apart from the rest of the community. To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle. As I have indicated, it is not necessary that the persecutor or persecutors actually perceive the group as constituting "a particular social group[."] It is enough that the persecutor or persecutors single out the asylum-seeker for being a member of a class whose members possess a "uniting" feature or attribute, and the persons in that class are cognisable objectively as a particular social group.[220]

The *Acosta* approach is also followed in New Zealand and the United Kingdom.[221]

VI. EXAMINING SOCIAL VISIBILITY

A. The Definition Itself & Balancing Tension

The social group category has always been, and should remain, a forum for those who have more particularized claims. The absence of a highly particularized definition allows for evolution in refugee claims as societies evolve. However, this places judges presiding over asylum cases in a difficult position: they must construe "particular social group" in a way that is broad enough to allow for evolving claims but not so broad as to expand the scope of protection beyond the intent of the 1951 Convention[222] or make the other categories (race, nationality,

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216. *Applicant S*, 217 C.L.R. ¶ 98.

217. *Id.* ¶ 101.

218. *Id.* ¶¶ 61-62.

219. *Id.* ¶¶ 67-69. As an example, the court used homosexuals, who may either be targeted for being homosexuals or the existence of homosexuality within their culture may be denied completely. *Id.* Homosexuals are objectively a cognizable social group whether or not they are perceived, or even recognized, within society.

220. *Id.* ¶ 69.

221. *See* Aleinikoff, *supra* note 1, at 273-75, 280 (discussing Islam v. Sec'y of State for the Home Dep't, *available at* 11 INT'L J. REFUGEE L. 496 (1999)); New Zealand seemed to have rejected the social perception approach as overly broad in *In re G.J.*, New Zealand Refugee Status Appeals Authority (RSAA), Refugee Appeal No. 1312/93, *available at* REFUGEE LAW CENTER, INC., GENDER ASYLUM LAW IN DIFFERENT COUNTRIES 522-80 (1st ed. 1999).

222. *See* Akinikoff, *supra* note 1, at 265-66.

political opinion, religion) "superfluous."[223] Also, there is the fear that granting asylum to any one group will open the floodgates to many other types of claims. The imposition of "social visibility" is the BIA's attempt to refine the social group category by applying a limiting principle. Immigration judges are under a lot of pressure. Asylum claims are increasing, and there is substantial backlog in the system with applicants waiting years for their claims to be heard before the BIA. Additionally, there is intense political pressure from the Department of Homeland Security and a national "anti-immigrant" sentiment. The BIA is attempting to balance these pressures against an individual's need for asylum.

Although both external societal pressures and a need to refine the social group definition are valid reasons for *changing* the balance, the BIA has found an imperfect balance. The social visibility requirement narrows the "particular social group" definition to such an extent that it will stifle the development of future gang-based asylum social group claims and other social group claims as well. Thus, it will no longer allow claims it has in the past.[224] The only justification the BIA has offered is that social visibility would bring greater specificity to the definition—but it did not explain why social visibility is the appropriate narrowing principle. More importantly, the BIA failed to offer a clear definition of "social visibility" in any of the cases in which it chose to impose the requirement. Further, the BIA offered no explanation for what necessitated a break from the *Acosta* framework. For years, *Acosta* was seen by the BIA, and most circuit courts, as striking the appropriate balance for construing the social group definition. The *Acosta* framework was clear and led to predictable results. *Acosta* also set forth a burden of proof that was substantial but not insurmountable. The addition of a social visibility requirement only adds to this burden and will require additional resources to establish the existence of this "external" factor. Thus, the lack of a clear definition combined with the heightened burden changes the balance almost positively in favor of denial of asylum.

Internationally, there are two major problems with the social visibility requirement. First, by breaking with *Acosta*, the BIA is moving away from an analysis that has become international precedent. The BIA's requirement stands alone in the worldwide interpretation of the term "social group." Should the BIA deviate from what is so widely accepted precedent, it would be prudent to provide

223. Expert Roundtable, *supra* note 112, at 313.

224. For an analysis of the potential effects of social visibility on gender claims, such as domestic violence and sexual orientation, see generally Fatma E. Marouf, *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*, 27 YALE L. & POL'Y REV. 47 (2008). *See also* Heyman, *supra* note 108, at 767. Heyman's article focuses on persecution of victims of domestic violence by non-state actors. Heyman argues that since the U.S. Supreme Court decision in *Elias-Zacharias* asylum cases have focused on the "nexus issue"—that the persecution must be on account of the state ground. *Id.* at 802. Based on this analysis, the BIA has concluded that domestic violence is a marital problem, not persecution based on a social group. *Id.* at 794. Heyman argues that asylum law does not require a "conscious intent" of the persecutor to punish based on membership in a particular social group (or any other group) and a court may alternatively inquire into whether the persecution intended to cause the harm. *Id.* at 803-04. The motive or causation factor is inappropriate when the persecutor is a non-state actor due to the complex nature of the non-state actor and poses "insurmountable barriers to relief for victims of domestic violence." *Id.* at 790, 793, 802.

an explanation why (such as the problems caused by the *Acosta* framework or why the court sees social visibility as an appropriate addition to social group claims). International uniformity should be valued because asylum stems from an international convention, signed by multiple countries, many of who have referred to the United States jurisprudence as precedential. Breaking with what is now international precedent opens the United States to serious criticism. Refugee law has many humanitarian elements and the United States should be begrudged to deviate from the norm.

Second, the requirement is unsupported by the UNHCR. Although the BIA in *In re C-A* stated that the requirement was supported by the UNHCR's definition of social group in the 2002 Guidelines, it misconstrued the definition.[225] The UNHCR proposed that social visibility be an alternative test to the *Acosta* immutability approach—an inquiry that would take place if the applicant could not meet the immutability requirement.[226] The UNHCR upheld this definition in their amicus brief filed in *In re Thomas*, in which the UNHCR pointed out that the proposed definition does not require that social visibility be present. The UNHCR then specifically pointed to groups like homosexuals and those who oppose female genital mutilation as groups worthy of asylum protection under the Convention but lacking social visibility.[227]

Importantly, although what the UNHCR says is not expressly binding on the United States, by being a signatory to the United Nations Refugee Convention the United States recognized that it would defer to the United Nations as the ultimate authority on refugee issues. Both the 1951 Refugee Convention and the 1967 Protocol state that the contracting states:

> undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention [or the Protocol].[228]

The UNHCR has been explicit in its interpretation of "particular social group" and both the Convention and Protocol advise the BIA to heed their guidance.

As noted by both the BIA in *In re C-A* and the Ninth Circuit in *Donchev*, the use of social visibility began with clan or tribal membership. Such groups are highly visible and objectively recognized as subsets within society. Clans may also provide individuals with more than just beliefs but also an identity with a subgroup. The social group category, however, has always been used for a variety of groups, not limited to clan membership. Thus, a requirement employed for clan-like groups should not be imposed on all social groups. Asylum claims based on clan membership demonstrate that social visibility can be important and compelling evidence in such cases, but it does not extend from this that social visibility is appropriate in all instances.

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225. *See supra* notes 130-42 and accompanying text (discussing the UNHCR's definition of "particular social group" to include social visibility as an alternative analysis).

226. *See* UNHCR Guidelines, *supra* note 136, at 3. This is made explicit by the use of the word "or" to separate the two tests.

227. *See supra* notes 195-99 and accompanying text.

228. 1951 Convention, *supra* note 104, at art. 35(1); 1967 Protocol, *supra* note 103, at art. II(1).

B. Analytically Misguided

The BIA's social visibility requirement is also analytically misguided. Requiring that a group be visible is close to requiring that the asylum applicant be part of a cohesive group that society views as closely associating with one another. However, as discussed previously, it is not required and has been rejected as a requirement that members of a social group know and associate with one another, or all share the same characteristics.[229] What should matter is not whether society recognizes the group but rather the persecutor's ability to see and recognize the social group.

Evidence of visibility is more appropriate to determine the likelihood of persecution. If a group is socially visible, it is easier for a persecutor to identify the group and it is more likely that the individual will be persecuted. However, persecutors, especially non-state actors such as gangs, target groups, and individuals for a variety of reasons and are not constrained by visibility. For example, gang members who go after family members of those who oppose the gang are not socially visible to society at large but are distinctly visible to the gang members seeking them for persecution. The gang seeks them out, despite their lack of visibility (or attempts to hide from the gang) because of their familial association. Familial association also highlights the confusion over the definition of social visibility. While the First Circuit has denied a claim based on gang persecution due to family membership, at least one immigration judge has interpreted a similar claim to have fulfilled the requisite social visibility.[230]

The BIA has used evidence of social visibility to show persecution and also for the stand-alone social visibility requirement. In *In re C-A*, the court stated that while past persecution alone does not render a group socially visible, past persecution may be a relevant factor in considering the group's visibility in society.[231] Applicants will have proof problems because the fact that a persecutor was able to seek out the individual proves only that they were visible to the persecutor, not that they were objectively within society. The BIA recognizes that social visibility is a good indicator of past persecution but then implies that the same evidence used for what the persecutor may find visible, can also be used for what society may find visible. This is misguided because the visibility for persecution is not the same visibility for the "social visibility test," and the BIA has failed to distinguish the two. Beyond evidence of past persecution, the BIA has not provided applicants with any guidance for how they might prove that their group is objectively cognizable within society.

C. BIA's Purpose of Providing Uniformity

As stated before, the BIA's opinions should provide "clear and uniform guidance"[232] on immigration law to immigration judges, the courts of appeals, practitioners, and asylum applicants. The social visibility standard, however, is so

229. Expert Roundtable, *supra* note 112, at 313.
230. *See supra* note 13.
231. *In re* C-A, 23 I. & N. Dec. 951, 960 (B.I.A. 2006).
232. 8 C.F.R. § 1003.1(d)(1) (2009).

abstract and amorphous that it cannot be implemented uniformly and contravenes the BIA's purpose. There is no guidance in *In re C-A* or *In re S-E-G* about what social visibility means, what it might look like, or how judges can apply the standard. Further, social visibility is likely grounded in societal contexts, making it a fact-based—and not legal—analysis. This gives the immigration judges an extraordinary amount of discretion to determine whether a group is socially visible. The *Acosta* framework, however, confines judges to determining if the stated social group is fundamental or immutable. This is a more objective analysis; one widely used by judges in equal protection and due process claims, and as a result, more likely to lead to consistent results. What is fundamental or immutable is rarely context specific, nor does it change often. The immutability component allows for more individualized and evolving claims. The fact specific inquiry will lead to inconsistent results for similar claims within immigration courts. Further, shifting the analysis to facts makes evidence and expert testimony more important. In effect, this will allow only those with more resources who can compile additional proof of social visibility and financial ability to provide expert testimony to win their claims.

D. Social Visibility and Humanitarian Goals

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

By imposing a social visibility requirement, the BIA has cut asylum relief off from an entire group of worthy individuals. Those who oppose gangs are not cohesive groups; they do not generally bind together in opposition, nor are they socially visible because they do not outwardly show their resistance—it would only make them more susceptible to the Mara. The visibility requirement poses problems to other groups as well, such as victims of domestic violence, homosexuals and those who fear or are victims of female genital mutilation, even though these groups have been recognized in the past.[233] Likewise, these groups would have problems of proof, as they would have to assert that they are recognized within society.[234] For example, domestic violence usually happens in the private domain, and while society may perceive domestic violence to be a problem, it likely does not see victims of domestic violence as a cohesive segment of society.[235] The effects of this requirement will be unacceptable to a society that is likely to view these groups as deserving—and even as discrete groups—though not socially visible.

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233. *See generally* Marouf, *supra* note 224, at 78-98; *Jiang*, 296 F. App'x at 168; *Flores*, 297 F. App'x 324; *Santos-Lemus*, 542 F.3d 738.

234. *See* Marouf, *supra* note 224, at 78-98.

235. *Id.* at 94-98.

Social group claims can also be based on a fundamental association or belief that the applicant should not be required to change.[236] Those who claim asylum because of resistance to gangs make a fundamental choice to live peacefully. This choice is similar to other choices those granted asylum have made, such as those who oppose female genital mutilation. Both groups are "unable by their own actions, or as a matter of conscience should not be required [to change], to avoid persecution."[237] Those who oppose female genital mutilation have been granted asylum in the past,[238] and like those who resist gangs, they believe they have a right to live without physically harming themselves. This could not be changed without significant destruction to their beliefs. Further, neither group is readily visible to society at large.

VII. SOLUTIONS

Although there is little support for social visibility as a requirement in assessing the existence of a social group, there is support in the UNHCR, Department of Justice-proposed rules, and circuit court decisions for the use of social visibility as an important factor. The Department of Justice suggested that societal recognition of the group may be considered by the judge. In 2002 the UNHCR urged that the social visibility test be used by all signatory states as co-equal with the *Acosta* immutability test, allowing applicants to fall in either group and be granted relief. This is the approach that Professor Aleinikoff suggests.[239]

However, because social visibility as an alternative test is untested in any jurisdiction, the BIA should proceed cautiously. While the two tests together would maintain the narrow *Acosta* framework, they would open up asylum to alternative groups currently denied relief because they are based solely on socially recognized associations, not characteristics that are fundamental or immutable, such as students and union members.[240] For example, school children targeted by gangs might have a cognizable claim as school children. Their status as students likely would not be considered immutable because it is easy to change and, like youth, is not permanent.[241] However, both traits make the group highly visible. If the school-aged applicants could show that they were targeted by the gangs because of this status, they would have a claim under this new category. There is substantial evidence to support that gangs target children because they are easy to coerce. Further, school children constitute only a limited group of individuals. Their claim is not based on their fear of persecution but on their label as school children. The common characteristics are their age and schooling, not likelihood of persecution.[242]

Despite this support, what is most important is that the BIA clarify that social visibility is not a requirement. If the BIA tests the new definition, they should

236. In re *Acosta*, 19 I. & N. Dec. at 223-34.
237. *Id.* at 234.
238. In re *Fauziya*, 21 I. & N. Dec. at 368.
239. Aleinikoff, *supra* note 1, at 309-11.
240. *Id.* at 295. *See also supra* note 224.
241. *See supra* notes 121-28, 162-66 and accompanying text.
242. *See* Expert Roundtable, *supra* note 112, at 313.

proceed cautiously by picking a case that makes clear the utility of visibility. The BIA should also consider withholding the case from publication until they have issued a few precedential decisions to release together to provide better guidance to the legal community. If the BIA decides not to adopt the new definition, they should clarify that in *In re C-A* the court was positing a factor, not a requirement, and then overrule *In re E-A-G* and *In re S-E-G* to the extent that they impose a social visibility requirement. It would also be useful for the BIA to include further guidance about when social visibility is appropriate, and to indicate their willingness to explore visibility as an alternative to the immutability approach in limited instances, such as clan membership. While the BIA has explicitly imposed social visibility on gang related asylum claims, the BIA could also clarify that the social visibility framework does not apply to domestic violence, homosexuality, or female genital mutilation cases.

Similar to this approach, the BIA could refer a case for review by the Attorney General or the Attorney General could direct the board to refer the case to him/her for review.[243] If the Attorney General issues an opinion, it must be in writing[244] and will be binding precedent on all asylum officers and judges, including the BIA.[245] This approach would be ideal because it would be binding throughout all the circuit courts and be more efficient.

Alternatively, the United States Supreme Court could take an asylum case from a circuit court which imposes the visibility requirement. The Supreme Court could then affirm *Acosta* and clarify that social visibility is not—and has never been—a requirement. However, this is not likely, despite the circuit split and ample controversy, because the Supreme Court has denied recent social visibility cases.[246]

On the other hand, a slower process might be the best solution. Circuit Courts have the ability to reject the BIA's "guidance" and so the individual circuits could reject social visibility as a requirement, as the Ninth and First Circuits have in certain instances. Functionally, this would overturn the BIA's approach because the circuit courts have jurisdiction over BIA cases arising within their circuit. Beyond just taking a long time, there are other drawbacks to this approach. This easily gives rise to a circuit split and the lack of guidance is confusing—leaving applicants without clear precedent and it creates tension between the circuit courts and the BIA.

Lastly, the Department of Justice could refine the rules proposed in 2000, and Congress could adopt them. Regardless of the framework chosen, this approach would be binding on all courts and would potentially be less nebulous than case law. The BIA could also request specific comments from the Department of State on the issue of social visibility, within the context of a specific case.[247] These comments would become part of the record of the case[248] and could easily settle the

243. 8 C.F.R. § 1003.1(h)(1) (2009).

244. *Id.* § 1003.1(h)(2).

245. *Id.* § 1003.1(f) & (g).

246. *See* In re *C-A*, 23 I. & N. Dec. 951, *aff'd sub nom*. Castillo-Arias v. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006), *cert. denied*, Castillo-Arias v. Gonzales, 549 U.S. 1115 (2007).

247. 8 C.F.R. § 208.11 (2009).

248. *Id.* § 208.11(d).

matter within a factual context that would provide useful guidance to the legal community.

VIII. CONCLUSION

Those who resist the Mara risk their lives for their beliefs. However, despite their lack of recognition within the community, they are fundamentally opposed to how gangs treat people. These individuals are left to their own devices as the Mara continue to control villages in Latin America. Often the crimes and human targets of the Mara are random—committed towards no group in particular. However, for many individuals and families the violence was not random, it was persecution: the individuals were repeatedly targeted, threatened, beaten, robbed and in all likelihood would have been killed by the Mara if they did not get away.

When the Refugee Act of 1980 was passed it was regarded as "one of the most important pieces of humanitarian legislation ever enacted by a U.S. Congress."[249] Its ability to protect victims of gang violence, however, has fallen by the wayside because the BIA has overly narrowed the social group definition. Those who stand up to the Mara are not just brave, but resilient in their beliefs that the acts committed by Mara members are amoral. Their choice not to associate with gangs should never be compromised and they are individuals worthy of asylum protection. Further, the BIA has other ways of narrowing the particular social group definition without imposing additional requirements. The applicant's burden of proof is already quite substantial, and many gang based asylum claims already fail without the social visibility requirement because they cannot show that they were persecuted on account of membership in their stated social group.

However, the social visibility test imposed by the BIA is not without merit. Properly refined, social visibility may be a way to provide asylum to people not currently covered under the traditional *Acosta* framework, and thus this proposal is worth exploring. However, the BIA should proceed cautiously, considering not just gang-based asylum claims but also other highly used social groups, such as homosexuals and victims of domestic violence. This exploration would be supported by the UNHCR and refugee scholars such as Professor Aleinikoff.

249. 126 CONG. REC. H 4501, 1500 (daily ed. Mar. 4, 1980) (statement of Rep. Rodino).