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ASSESSING THE BOARD OF IMMIGRATION APPEALS' SOCIAL VISIBILITY DOCTRINE IN THE CONTEXT OF HUMAN TRAFFICKING

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INTRODUCTION

United States asylum law provides individuals who have been persecuted in their country of origin with relief in the form of residency in the United States. To qualify as a refugee under United States asylum laws, the applicant must be unable or unwilling to return to their country of origin 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."[1] This definition has been part of the legal framework for almost a century, yet legal scholars still hotly debate its concepts and parameters. Specifically, the definition of a "particular social group" ("PSG") plagues courts and publicists alike, especially considering the impact the chosen definition will have on various claims.

Asylum applicants that do not meet the other four grounds (race, religion, nationality, or political opinion) must show a well-founded fear of persecution because of their individual membership in a PSG. However, courts have never explicitly defined that concept, and the circuits are split over whether the existence of a particular social group should be measured by 'social visibility' or shared 'immutable characteristic.' The Board of Immigration Appeals ("BIA") initially adopted an "immutable characteristic" test.[2] This test requires an immutable characteristic, one that is unchangeable or so fundamental to one's identity as to be unchangeable, and a nexus between the shared immutable trait of the social group and the persecution, such that the persecutors are motivated by the immutable characteristic.[3]

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1. 8 U.S.C.A. § 1101(a)(42) (West 2006).

2. *In re* Acosta, 19 I. & N. Dec. 211, 212 (B.I.A. 1985), *overruled on other grounds by In re* Mogharrabi, 19 I. & N. Dec. 439, 441 (B.I.A. 1987).

3. *Id.* at 211-12.

This immutable characteristic test proved workable; however, the BIA added two additional requirements to the analysis. First, the BIA added "social visibility," which requires that the alleged particular social group be viewed as a distinct group by the society from which its members come.[4] Second, "particularity" commands that the particular social group be specifically defined.[5] Initially, the BIA viewed these two concepts only as factors in its analysis; however, over time, "social visibility" and "particularity" crystallized into requirements. Now, in their absence, the applicant's claim will fail. Only two circuits continue to adhere solely to the "immutable characteristic" test. The rest have added the BIA's "social visibility" and "particularity" requirements, finding membership in a particular social group only when the group has characteristics that are recognizable by others in the members' native country.[6]

This widespread acceptance of the social visibility requirement has many problematic implications, especially for gender-based asylum claims. Gender-based violence remains an area of growing international concern as victims of female genital mutilation, forced marriage, honor killings, and human trafficking apply in increased numbers for asylum in the United States. Victims of gender violence seeking protection under United States asylum laws face an upward battle. These women already must show that they possess a shared immutable characteristic apart from their gender, and as the BIA continues to add mandatory factors to the definition of a PSG, a favorable claim becomes increasingly unlikely. This note will focus primarily on victims of human trafficking.

These concerns are multiplied in cases of human trafficking precisely because trafficked women are *socially invisible*, often being transported and imprisoned by non-state actors throughout the world. Those who escape and apply for asylum may share common characteristics, or they may share only the past experience of having been trafficked. In any event, these women do not have distinct characteristics recognizable by others in their native country aside from being poor, vulnerable young women. Quite the opposite, the social stigma prevalent in many societies often prevents previously trafficked women from speaking out about their experiences. In this situation, it is nearly impossible for trafficked women to meet the "social visibility" and "particularity" requirements. However, many women who have escaped traffickers do possess a well-founded fear of returning

4. *In re* C-A, 23 I. & N. Dec. 951, 956-57 (B.I.A. 2006), *aff'd sub nom.,* Castillo-Arias v. U.S. Att'y. Gen., 446 F.3d 1190 (11th Cir. 2006).

5. *In re* A-M-E, 24 I. & N. Dec. 69, 76 (B.I.A. 2007).

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

to, or remaining inside, their native country because of the likelihood that they will be trafficked repeatedly. And time and again, governments have shown their inability or unwillingness to fiercely attack this crime, often underreporting the prevalence of sex trafficking to preserve their international reputations or to continue to reap the financial rewards of sex tourism. In this situation, continuing to use and expand the "social visibility" test means that many victims of human trafficking substantively meet the requirements for refugee status, and therefore political asylum, but fall through the cracks on a technicality, ending in prosecution and deportation.

Human trafficking is a global phenomenon; every country is affected by trafficking, whether as a country of origin, transit or destination. But despite growing awareness and outreach efforts, the number of sex-trafficking victims continues to rise. In 2008, 12.3 million individuals identified themselves as "forced laborers, bonded laborers, or sex-trafficking victims."[7] And although the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children called on national and international bodies to devote more resources to its enforcement,[8] prosecutions have remained stagnant. Faced with this human rights crisis, the United States needs to take a second look at its asylum laws and consider ways to make them more accepting of trafficked women. Immigration policies are primarily a function of the receiving countries' values. The United States cannot purport to be actively combatting human trafficking while at the same time failing to adequately protect its victims.

Part I of this Note will give an overview of the international and domestic framework surrounding refugee law, analyzing the historical development of both the "social visibility" and "immutable characteristic" tests. Part II will analyze the circuit split between the "social visibility" and "immutable characteristic" tests. Part III will then discuss the implications of applying both tests to asylum claims, in particular human trafficking applications, and it will conclude that courts should require only the "immutable characteristic" test. To support this conclusion, this Note will illustrate how the "immutable characteristic" requirement better aligns with the international framework as well as with other countries' asylum laws, focusing primarily on the immigration policies of Australia and Canada. Finally, Part IV will argue that expanding the definition of "social group" to include victims of human trafficking, whether by judicial interpretation or

7. Heather M. Smith, *Sex Trafficking: Trends, Challenges, and the Limitations of International Law*, 12 HUM. RTS. REV. 271, 274 (2011).

8. U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2217 U.N.T.S. 319.

political amendment, is necessary. This Note will use the United States' 1996 Amendment enacted in response to China's One Child Policy as an example of why and how policymakers should take action.

I. INTERNATIONAL REFUGEE LAW AND ITS DOMESTIC FRAMEWORK

This Part presents an overview of international refugee law and the corresponding domestic immigration laws in the United States. This overview of United States immigration policy will necessarily involve a discussion of United States asylum law and the United States' legal framework for granting refugee status, including the "social group" requirement. After discussing the surrounding context, this Part discusses the development of the methods courts use to identify a "particular social group" ("PSG"), a shared immutable characteristic, or the group's social visibility and particularity.

A. International Origins

According to the 1951 Convention Relating to the Status of Refugees ("Refugee Convention"), a "refugee" is an individual who:

> [o]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[9]

This definition provides the foundation for both international and United States asylum law. First, the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol") incorporated this definition.[10] Since the 1967 Protocol's inception, international courts have consistently returned to this specific definition in their rulings. Second, Congress codified a virtually identical definition into United States domestic law through the Refugee Act of 1980.[11] Therefore, the definition of a "refugee" in United States domestic law derives from these international law origins.[12]

But despite its long-term usage, the Refugee Convention's text does not define a "social group." In addition, international courts and jurists

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

10. 1967 Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

11. *See* 8 U.S.C.A. § 1101(a)(42) (West 2006).

12. *Id.*; *see* 1967 Protocol, *supra* note 10, at art. 1; Refugee Convention, *supra* note 9, at art. 1.

provide relatively little guidance on what constitutes a PSG. The 2002 United Nations High Commissioner for Refugees Guidelines ("UNHCR Guidelines") attempt to provide some instruction, informing states that "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."[13] If no protected characteristic exists, the UNHCR Guidelines state that, "further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."[14] The UNHCR Guidelines do not bind the United States; however, the U.S. Supreme Court, the BIA, and the circuit courts all consider the Guidelines strongly persuasive.[15]

The UNHCR Guidelines suggest that a PSG must share a "common characteristic other than the risk of being persecuted," suggesting that a shared immutable characteristic is enough to create a PSG.[16] Only if no "protected characteristic" exists does the UNHCR suggest looking into the group's social visibility.[17] Therefore, the UNHCR seems to view social visibility only as an additional factor that can help establish the PSG, not a requirement that operates to preclude its existence. Moreover, the UNHCR's Guidelines on the International Protection for Victims of Trafficking ("Trafficking Guidelines") state that, in order to constitute a PSG, trafficking victims must "either share a common characteristic other than their risk of being persecuted or are perceived as a group by society."[18] The shared characteristic will often be "innate, unchangeable or otherwise fundamental to identity, conscience or the exercise of one's human rights."[19] The Trafficking Guidelines further stipulate that certain subsets of women may constitute PSGs, and that "[f]ormer victims of trafficking may also be considered as constituting a social group based on the unchangeable, common and historic characteristic of having been trafficked."[20] These Guide-

13. U.N. High Comm'r for Refugees, Guidelines on Int'l 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, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR Guidelines].

14. *Id.* at ¶ 13.

15. See I.N.S v. Cardoza-Fonseca, 480 U.S. 421, 438-39 n.22 (1987) (noting that "the Handbook provides significant guidance in construing the Protocol . . . [and] [i]t has been widely considered useful in giving content to the obligations that the Protocol establishes.").

16. UNHCR Guidelines, *supra* note 13, at ¶ 29.

17. *Id.* at ¶¶ 29-31.

18. U.N. High Comm'r for Refugees, Guidelines on Int'l Protection: The App. of Art. 1A(2) of the 1951 Convent. and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking & Pers. at Risk of Being Trafficked, ¶ 37, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006) [hereinafter UNHCR Guidelines 2].

19. *Id.*

20. *Id.*

lines confirm the UNHCR's stance that either a common characteristic *or* social visibility can confer PSG status; both conditions need not be present.

B. United States Asylum Law

As discussed in Part IA, the Refugee Act of 1980's definition of "refugee" originated in international law. This statute similarly defines a refugee as:

> [a]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[21]

United States courts have generated a plethora of cases interpreting this definition. First, to establish "past persecution," the conduct must rise above the level of mere harassment; instead, the conduct must "threaten death, imprisonment, or the infliction of substantial harm or suffering."[22] A finding of past persecution creates a rebuttable presumption that the applicant has a well-founded fear of future persecution.[23] Second, the persecution of the applicant must be caused either by government agents in the applicant's country of origin or by non-state actors in the applicant's country of origin that the government is unable or unwilling to control.[24]

Procedurally, an asylum applicant first brings their claim before an Immigration Judge ("IJ").[25] If the IJ denies the applicant asylum, the applicant can appeal to the Board of Immigration Appeals ("BIA").[26] Only after an adverse finding by the BIA will the applicant be allowed to appeal to the federal circuit courts.[27]

On appeal, the *Chevron* principle commands that the federal circuit court give due deference to the decisions of the BIA. This principle stems from the seminal case *Chevron U.S.A. v. National Resource Defense Council, Inc*.[28] In *Chevron*, the EPA had analyzed the language of the Clean Air

21. 8 U.S.C.A. § 1101(a)(42) (West 2006).
22. Sharif v. INS, 87 F.3d 932, 935 (7th Cir. 1996).
23. 8 C.F.R. § 1208.16 (2009); Milanouic v. Holder, 591 F.3d 566, 569 (7th Cir. 2010).
24. Jonaitiene v. Holder, 660 F.3d 267, 270 (7th Cir. 2011).
25. C.F.R. § 208.14 (1996).
26. C.F.R. § 208.18 (1996).
27. EXEC. OFFICE FOR IMMIGR. REVIEW, DEPT. OF JUSTICE, ASYLUM VARIATIONS IN IMMIGRATION COURT FACT SHEET (Nov. 5, 2007), *available at* http://www.justice.gov/eoir/press/07/AsylumVariationsNov07.pdf.
28. 467 U.S. 837 (1984).

Act, and concluded that the Act required specific quality standards.[29] On appeal, the Supreme Court considered whether the EPA's interpretation of the Clean Air Act was reasonable, and whether it was entitled to any persuasive effect.[30] In its opinion, the Supreme Court set forth a two-prong test for determining when to give deference to an administrative agency's interpretation.[31] First, if Congress has directly spoken on the question at issue, then the court must give effect to Congress' intent.[32] Second, if Congress has not spoken, the Court must find that the agency's interpretation is reasonable, and only then will the Court be compelled to adopt the agency's interpretation.[33] In rationalizing this deference, the Court reasoned that Congress had, either explicitly or implicitly, delegated to the administrative agency the power to decide the issue by virtue of its statutory conferral of adjudicative power.[34] Therefore, by deferring to the agency's interpretation, the court is still effectuating Congressional intent.[35]

Under the Refugee Act of 1980, United States asylum laws grant protection to an individual that establishes "refugee" status.[36] However, like its international counterparts, the Refugee Act of 1980 does not define membership in a PSG.[37] Moreover, very limited legislative history exists to shed light on the drafters' intended meaning of a PSG.[38] Absent any Congressional intent, courts must apply the second prong of *Chevron* deference, submitting to the BIA's construction of a PSG only when the BIA's interpretation is reasonable.[39] The BIA continues to place hurdles in the way of individuals attempting to establish refugee status via membership in a PSG, such as requiring both "social visibility" and "particularity" in addition to

29. *Id.* at 840.

30. *Id.*

31. *Id.* at 842-43 ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. INS v. Cardoza Fonseca, 480 U.S. 421, 423 (1987).

37. 8 U.S.C.A. § 1101(a)(42) (West 2006).

38. Fatin v. INS, 12 F.3d 1233, 1239 (3rd Cir. 1993) (discussing how little legislative history exists about what the drafters of the 1980 Refugee Act considered as the definition of social group).

39. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

the traditional "immutable characteristic" test. And in the human trafficking situation, the BIA's interpretation may no longer be reasonable.

C. Historical Development of the Ways to Define a "Social Group"

As discussed above, neither the international framework nor United States statutory law define with particularity what constitutes a PSG. As a result, courts faced with an asylum application asserting membership in a PSG struggle to interpret this requirement. The BIA and courts throughout the country have suggested and applied various tests. This Section provides a chronological overview of the BIA and the circuit courts' various interpretations of what constitutes a PSG.

1. Protected Characteristic Approach

In *In re Acosta*, the BIA first recognized the protected characteristic approach, which states that when individuals share a common immutable characteristic, they constitute a PSG.[40] In *In re Acosta*, the BIA rejected the asylum applicant's argument that COTAXI drivers and persons engaged in the transportation industry in El Salvador constitute a PSG.[41] The court used the canon *ejusdem generis* to conclude that the more general "social group" should be construed in a manner consistent with the other, more specific words in the enumeration, "race," "religion," "nationality," and "political opinion."[42] The court then found that each of those specific words describe an immutable characteristic, so "social group" must also mean "a group of persons all of whom share a common, immutable characteristic."[43]

In addition, *In re Acosta* explained that an "immutable characteristic" can be an innate characteristic, such as sex or race, but it does not have to be.[44] The BIA instructed that what constitutes an "immutable characteristic" must be determined on a case by case basis; however, "whatever the common characteristic that defines the group, it 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."[45] Applying this definition, the BIA concluded that Acosta's membership in

40. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds by In re* Mogharrabi, 19 I. & N. Dec. 439, 441 (B.I.A. 1987).

41. *Id.* at 234.

42. *Id.* at 233.

43. *Id.*

44. *Id.*

45. *Id.*

COTAXI was not an immutable characteristic. Acosta could change jobs, and therefore he could change his membership in the particular group of threatened taxi drivers.[46] Therefore, because its members did not possess shared *immutable* characteristics, COTAXI did not constitute a PSG.

2. Innate Characteristics Test

The Ninth Circuit agreed with *In re Acosta*'s "immutable characteristic" test, but felt the test was too broad. Therefore, in *Sanchez-Trujillo v. INS*, the Ninth Circuit designed its own "voluntary association" test.[47] This test required the "existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group."[48] Essentially, this test means that a "collection of people closely affiliated with each other, who are actuated by some common impulse or interest" constitute a PSG.[49] While substantially similar to the BIA's "immutable characteristic" test, the Ninth Circuit added the "voluntary relationship" language to address the concern that social groups would be based on "demographic distributions." For example, the court feared that all six-foot-tall men would constitute a social group because height is an unchangeable, immutable characteristic.[50]

However, in *Hernandez-Montiel v. INS*, the Ninth Circuit expanded this test, holding that "a 'particular social group' is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."[51] The court then granted the applicant asylum because he would face almost certain persecution in Mexico because of his sexual orientation.[52] This articulation of the voluntary association test suggests that a voluntary association is no longer necessary; rather, either a voluntary association or an innate characteristic suffices to create a PSG.

46. *Id.* at 234.
47. 801 F.2d 1571 (9th Cir. 1986).
48. *Id.* at 1576.
49. *Id.*
50. *Id.*
51. 225 F.3d 1084, 1093 (9th Cir. 2000).
52. *Id.* at 1099.

3. Social Visibility and Particularity

In *In re C-A*, the BIA heightened the requirement for establishing a social group. In that case, the BIA considered the definition set out in the UNHCR Guidelines, which state that a court can consider social visibility in establishing a PSG if the immutable characteristic is not readily apparent.[53] From this review, the BIA decided to retain the *Acosta* immutable characteristic definition, but concluded that the social visibility of the alleged social group is a relevant factor.[54] This social visibility analysis requires that other members of the applicant's community perceive the applicant as a member of a particular social group.[55] Applying these standards to *In re C-A*, the BIA declared that noncriminal informants do not constitute a social group because they are not a recognizable subset of Columbian society.[56] Rather, the very nature of being a confidential informant means that an individual is shielded from public view.[57] In its reasoning, the BIA did not focus on the immutable characteristic of these informants, the shared past experience, but rather allowed the group's lack of social visibility to defeat their claim. In so doing, the BIA strongly suggested that social visibility is not simply a factor in the analysis, but a requirement.

Similarly, in *In re A-M-E*, the BIA used yet another requirement to justify its rejection of an application for asylum: particularity.[58] According to the BIA, particularity requires that the social group not be "too amorphous" or "indeterminate."[59] In *In re A-M-E*, the BIA rejected a proposed social group of wealthy Guatemalans because "the characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group."[60] In its opinion, the BIA also rejected any circular reasoning, holding that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm."[61] Therefore, this requirement denies the existence of a PSG whose members share the common characteristic of having been subjected to similar past harms. The refusal to recognize this kind of PSG marks an

53. *In re* C-A, 23 I. & N. Dec. 951, 956-57 (B.I.A. 2006), *aff'd sub nom,* Castillo-Arias v. U.S. Att'y. Gen., 446 F.3d 1190 (11th Cir. 2006).
54. *Id.*
55. *Id.* at 957.
56. *Id.* at 960-61.
57. *Id.* at 960.
58. 24 I. & N. Dec. 69, 74, 76 (B.I.A. 2007).
59. *Id.* at 76.
60. *Id.*
61. *Id.* at 74.

unprecedented heightening of the requirements for attaining refugee status based on membership in a social group.

II. CIRCUIT SPLIT OVER THE DEFINITION OF A "PARTICULAR SOCIAL GROUP"

Currently, the circuit courts are split over the definition of a PSG, with some adhering to the BIA's current framework, and some rejecting the BIA's added requirements of social visibility and particularity. This Part will analyze recent cases from different circuits to illustrate each court's reasoning for their chosen formulation. This Part will also show how the circuits produce disparate results depending on their chosen standard. Essentially, courts that apply the additional requirements of "social visibility" and "particularity" will often rule against asylum-seekers who would have been granted asylum if they had appealed to a court which uses only the "immutable characteristics" definition.

A. Circuits that Adopt Social Visibility and Particularity

Most circuit courts defer to the BIA's analysis, requiring that the PSG have social visibility and particularity. The First,[62] Second,[63] Fourth,[64] Sixth,[65] Eighth,[66] Tenth,[67] and Eleventh Circuits[68] all require an immutable characteristic, as well as social visibility and particularity before recognizing a PSG. Although these circuits retain the *Acosta* test, the existence of an "immutable characteristic" does not automatically confer status as a PSG. For example, in *Castillo-Arias v. U.S. Attorney General*, the Eleventh Circuit found that a PSG encompasses only those individuals who, in addition to immutability, have social visibility.[69] In response, the First, Second, Fourth, Sixth, Eighth and Tenth Circuits followed suit, using "social visibility" as a mandatory element of the PSG definition, without which the court can reject the applicant's asylum claim.

62. Scatambuli v. Holder, 558 F.3d 53, 59 (1st Cir. 2009).
63. Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007).
64. Crespin-Valladares v. Holder, 632 F.3d 117, 124 (4th Cir. 2011).
65. Al-Ghorbani v. Holder, 585 F.3d 980, 994 (6th Cir. 2009).
66. Costanza v. Holder, 647 F.3d 749, 753 (8th Cir. 2011).
67. Rivera-Barrientos v. Holder, 658 F.3d 1222, 1229-33 (10th Cir. 2011).
68. Castillo-Arias v. U.S. Att'y. Gen., 446 F.3d 1190, 1196 (11th Cir. 2006).
69. *Id.* at 1197.

B. Circuits that Adopt Only Immutable Characteristic

Conversely, the Third and Seventh Circuits refuse to apply social visibility and particularity to their analyses, retaining only the "immutable characteristics" test. In *Gatimi v. Holder*, the Seventh Circuit became the first court to reject the social visibility doctrine, criticizing its inconsistent application within the BIA.[70] In *Gatimi*, a Kenyan national was harassed and tortured by members of the political group Mungiki, both on account of his defection from the group and his wife's refusal to undergo female genital mutilation ("FGM").[71] The Seventh Circuit found that the BIA had found similar groups to constitute PSGs both with and without reference to their "social visibility."[72] Therefore, because of the BIA's inconsistent application of the "social visibility" requirement, the court refused to defer to the BIA's analysis.[73] Essentially, the Seventh Circuit found that "when an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one" without "condon[ing] arbitrariness" and "usurp[ing] that agency's responsibilities."[74]

Moreover, writing for the court, Judge Posner attacked the "social visibility" doctrine itself, asserting that the doctrine does not make any sense, and that the BIA has not attempted to explain the reasoning behind its mandatory usage.[75] Judge Posner found the doctrine illogical because a member of a group who is targeted for persecution "will take pains to avoid being socially visible."[76] Take, for example, homosexuals in a homophobic society, members of a group targeted for assassination, or women that have not yet undergone FGM in societies where the practice is common.[77] In all these cases, "to the extent that the members of the target group are successful in remaining invisible, they will not be 'seen' by other people in the society 'as a segment of the population.'"[78] Indeed, by requiring the Mungiki defectors in this case to become socially visible, the BIA is essentially requiring them to pin "a target to their backs with the legend 'I am a Mungiki defector.'"[79]

70. 578 F.3d 611, 616 (7th Cir. 2009).
71. *Id.* at 614.
72. *Id.* at 615.
73. *Id.*
74. *Id.* at 616.
75. *Id.* at 615.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 616.

In response to the Seventh Circuit's holding in *Gatimi*, the Third Circuit also rejected "social visibility" in *Valdiviezo-Galdamez*.[80] In that opinion, the Third Circuit cited extensively from *Gatimi*, indicating its approval of the Seventh Circuit's reasoning.[81] In addition, the Third Circuit specifically refused to apply the BIA's "particularity" requirement, finding that "social visibility" and "particularity" "appear to be articulations of the same concept and the government's attempt to distinguish the two oscillates between confusion and obfuscation."[82] The Third Circuit then declined to require "particularity" for the same reasons it rejected "social visibility."[83] Like the Seventh Circuit in *Gatimi*, the Third Circuit found that the BIA inconsistently applied these tests, making their interpretations unreasonable. Therefore, the court refused to provide *Chevron* deference to such unreasonable interpretations.[84]

C. Innate Characteristic, Voluntary Association, and Chevron Deference

As briefly discussed above, the Ninth Circuit developed its own test, which the court only utilizes in the absence of a prior decision by the BIA. First, the Ninth Circuit looks at the facts of the case, and if the asserted PSG is substantially similar to a social group in a previously decided BIA opinion, the court will give the BIA due deference and apply its ruling.[85] However, if the alleged social group is not similar to any precedential BIA ruling, the court will apply its own two-alternative test.[86] Under this test, if the applicant can show either voluntary association or a shared innate characteristic, the court will find a PSG.[87] The Ninth Circuit has applied this two-prong analysis in recent cases. For example, in *In S-E-G*, the BIA found that Salvadoran young adults resisting gang membership did not constitute a "social group" because they lacked "social visibility" and "particularity."[88] In a later case with similar facts, *Ramos-Lopez*, the Ninth Circuit considered whether youths resisting gang membership constitute a

80. Valdiviezo-Galdamez v. U.S. Att'y Gen., 663 F.3d 582, 604 (3d Cir. 2011).

81. *Id.* at 604-06.

82. *Id.* at 608.

83. *Id.*

84. *Id.*

85. Santos-Lemus v. Mukasy, 542 F.3d 738, 745-46 (9th Cir. 2008) (determining that Chevron deference is due to the BIA's analysis of the proposed PSG of Guatemalan youths who refuse to join gangs based on the BIA's earlier precedential decision in S-E-G, which rejected those who resist recruiting by a Salvadoran gang as a PSG).

86. Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000).

87. *Id.*

88. *In re* S-E-G, 24 I. & N. Dec. 579, 582-83, 590 (B.I.A. 2008).

PSG.[89] In that situation, the Ninth Circuit found that the BIA intended their analysis to apply to similar cases, and applied the BIA's "social visibility" and "particularity" requirements.[90] After applying those requirements, the Ninth Circuit similarly denied the existence of a PSG.[91]

III. PROBLEMS WITH SOCIAL VISIBILITY AND PARTICULARITY

After discussing the development of the various definitions of a PSG, Part III concludes that the BIA should abandon the added requirements of "social visibility" and "particularity." Instead, retaining only the "immutable characteristic" test better protects asylum seekers by ensuring that courts do not reject deserving claims due to an arguably arbitrary requirement. Part III will illustrate the negative consequences for asylum seekers, specifically victims of gender violence, if courts retain the BIA's additional requirements of "social visibility" and "particularity."

A. Problems with "Social Visibility" and "Particularity"

The addition of social visibility and particularity to the PSG analysis created many practical problems. First, *Chevron* deference should not apply to the BIA's construction of a PSG because of the BIA's inconsistent use of social visibility in its past decisions. For this reason, both the Third Circuit and the Seventh Circuit found that *Chevron* deference does not apply when defining a PSG. In *Gatimi*, Judge Posner pointed out that historically the BIA "has found groups to be 'particular social groups' without reference to social visibility, as well as, in this and other cases, refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases."[92] This ambiguity is untenable, and courts should hesitate before deferring to such a conflicted body. Instead, before *Chevron* deference is appropriate, the BIA must specifically reject its old framework, clarifying any inconsistencies in the law.

Second, social visibility is inherently difficult to apply. At a basic level, it is incredibly difficult to define public perceptions. Social perception is "a subjective process shaped by an individual's current motivation, emotion, and cognition, as well as his or her more long-standing traits."[93] So-

89. *See* Ramos-Lopez v. Holder, 563 F.3d 855, 855 (9th Cir. 2009).

90. *Id.* at 860-61.

91. *Id.*

92. Gatimi v. Holder, 578 F.3d 611, 615-16 (7th Cir. 2009) (internal citations omitted).

93. 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, 73 (2008) (quoting Matthew D. Lieberman & Jennifer H. Pfeifer, *The*

cial perception depends "not only on the identity of the perceiver, but the emotional states of the perceiver and the perceived at any given moment, as well as the interactions that group members have had in the past."[94] Moreover, just as individuals around the world perceive groups differently, societies around the world vary widely in their political systems, religions, and tolerance of cultural "others." Put simply, some countries have little tolerance for those who are different, and may target specific groups based on assumptions and stereotypes. Because of the individualized nature of social perception, a test that rests on who the public perceives to constitute a PSG opens the door to subjectivity, arbitrariness, and validation of social stereotypes.

Moreover, it is almost impossible for courts to identify when society has confirmed the existence of a PSG. Is a PSG required to attain government recognition? Must the BIA conduct an investigation into particular subcultures? Why is self-recognition insufficient? Proponents of social visibility left these questions largely unanswered, and these gaps will inevitably lead to disparate results because each society views minority groups with varying degrees of acceptance. This issue is especially problematic in cases where the alleged PSG is one whose members wish to remain invisible to the rest of society, but who must become visible in order to be recognized as a PSG. That example shows that a definition entirely dependent on social visibility will inevitably lead to distorted outcomes, often failing to grant asylum to members of groups that need protection the most.

Conversely, requiring only a shared "immutable characteristic" is much easier to apply, and this rule can be defined through traditional principles of interpretation. An "immutable characteristic" is one that is innate and unchangeable, or so fundamentally important to one's identity that the individual should not be required to change it.[95] Rather than forcing courts to accept other societies' judgments on whether a group constitutes a PSG, this standard places the power to decide what characteristics are "immutable" with courts. And when that threshold is met, the absence of visibility in the applicant's native country should not preclude that individual from attaining refugee status. Relying primarily on "social visibility" leads not only to arbitrary results, but it also often culminates in the United States returning deserving applicants to countries where they will almost certainly face persecution.

Self and Social Perception: Three Kinds of Questions in Social Cognitive Neuroscience, *in* THE COGNITIVE NEUROSCIENCE OF SOCIAL BEHAVIOUR 195, 195 (Alexander Easton & Nathan J. Emery eds., 2005)).

94. *Id.* at 72.

95. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

B. Problems with Social Visibility and Particularity Specific to Victims of Human Trafficking

The BIA's social visibility requirement particularly burdens victims of human trafficking. First, trafficked individuals already struggle to establish a shared immutable characteristic, let alone additional elements. For example, the UNHCR[96] and some other nations[97] recognize that gender comprises at least an important factor in finding a PSG, if gender is not a PSG in and of itself. However, in United States courts, a PSG of "women" is not accepted, and trafficked women must construct a narrower PSG based on their uniting characteristics. These characteristics—shared past experience, marital status, socioeconomic class, lower educational levels, or lack of a familial support system—do not always succeed. For this reason, commentators such as Martina Pomeroy argue that in societies where "women as a group are perceived as inferior," gender can create a PSG. In these cases, "it is not the form of persecution directed at them in their particular society that defines their group; it is the fact that, as women, they are perceived as inferior, which then invites persecution upon any one of them[.]"[98] Acceptance of this norm would greatly aid trafficked women because countries where women are perceived as inferior often correspond with countries plagued by sex trafficking.

Second, trafficked individuals will very rarely meet the social visibility and particularity requirements. As Judge Posner reasoned in *Gatimi*, requiring that a social group be "visible" is counter-intuitive because the persecuted social group will "take pains to avoid being socially visible[.]"[99] Essentially, the "social visibility" standard makes the false assumption that women across the world are socially visible. While women in the United States and other developed countries have almost attained gender equality, women within other regions of the world remain politically voiceless and removed from the public sphere. A great percentage of the women who seek asylum in the United States are fleeing from these countries. Therefore, it does not make sense to grant these women asylum because of their "social visibility"; in fact, requiring social visibility actually contributes to a large gender gap in United States asylum law.

96. UNHCR Guidelines 2, *supra* note 18, at ¶ 38.

97. *See, e.g.*, Regina v. Immigration Appeal Tribunal, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.); *MIMA v. Khawar* (2002) 210 CLR 1 (Austl.).

98. Martina Pomeroy, *Left out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention*, MICH. J. GENDER & L., 454, 468 (2010).

99. Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

This problem is especially apparent in cases of human trafficking because trafficked women, or those at risk of being trafficked, constitute an extremely vulnerable population. These women are usually poor and uneducated, and thus particularly susceptible to traffickers that promise legitimate jobs. These women often voluntarily travel with sex traffickers to third-world countries, not realizing that no legitimate job exists until they are forced into prostitution. At this point, trafficked women become invisible; they are smuggled to different countries and kept as property with little to no human rights. For those who escape, the social stigma prevalent in many societies often causes them to hide their experience. With such an invisible crime, how can its victims possibly become socially visible? Therefore, when courts adopt a social visibility requirement, they essentially erase any likelihood that victims of human trafficking will obtain a legal remedy in the United States.

Third, cementing social visibility and particularity into the definition of a PSG would overrule many stable precedents decided before the BIA's imposition of social visibility and particularity.[100] This overhaul would invalidate cases finding that persons opposed to FGM[101] and LGBT[102] individuals constitute members of a PSG. Those cases would fail under a social visibility test because the cases include two areas where the asylum applicant would reasonably attempt to hide his or her immutable characteristic—her sexual orientation or her failure to undergo FGM—in order to evade persecution. Therefore, according to Nitzan Sternerg, the use of social visibility will "harm the ability of asylum applicants to obtain asylum on the ground of a PSG based on opposition to FGM, a PSG of Cuban homosexuals, and PSG based on [a] past experience," all individuals our society has decided are deserving of asylum.[103] If these narrower claims fail, little chance exists that courts will recognize a PSG based on its members' shared risk of being trafficked or past trafficking experience.

IV. WHY COURTS SHOULD ADOPT THE SEVENTH CIRCUIT'S IMMUTABLE CHARACTERISTIC STANDARD

After discussing the reasons why social visibility and particularity should be abandoned, Part IV advocates that courts retain only the immuta-

100. Marouf, *supra* note 93, at 78-102.

101. *See In re* Fauziya Kasinga, 21 I. & N. Dec. 358, 365 (B.I.A. 1996) (holding that young Togolese women who have not had FGM and who oppose the practice constitute a PSG).

102. *See In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 820-23 (B.I.A. 1994) (holding that homosexuals known to the Cuban government constitute a PSG).

103. Nitzan Sternberg, *Do I Need to Pin a Target to my Back?: The Definition of "Particular Social Group" in U.S. Asylum Law*, FORD. L. J. 245, 284-86 (2011).

ble characteristic standard. This test protects both the asylum applicant and the receiving state by retaining a narrow definition of a PSG that will not overburden the immigration system. Part IV will show how "immutable characteristic" fits within the international law framework, and aligns well with United States values. Part IV will then conclude by comparing the United States' 1996 Amendment to the Immigration and Nationality Act, which granted asylum to Chinese individuals opposed to China's One Child Policy, to this situation. This comparison shows that even a broad definition of PSG will not overburden the United States' immigration system, or, alternatively, that the United States could pass a similar amendment here to specifically protect trafficked individuals.

A. Immutable Characteristic Standard in Line with the International Framework

International law requires only an immutable characteristic standard. As previously discussed, the 1951 Refugee Convention does not define "membership in a particular social group."[104] However, the UNHCR Guidelines provide that "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."[105] This language implies that either a shared immutable characteristic, or the group's social visibility, defines the PSG, but neither test operates to the exclusion of the other. Only if no protected (immutable) characteristic exists should "further analysis . . . be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."[106] In this way, international law uses social visibility as an alternative when an immutable characteristic is not readily identifiable, but does not allow the lack of social visibility to defeat a claim.[107]

Moreover, the UNHCR Guidelines note that a "proper interpretation [of PSG] must be consistent with the object and purpose of the Convention," which is to provide protection for specific groups targeted for persecution.[108] Adding social visibility and particularity as prerequisites to the establishment of a PSG is counterintuitive to the Convention's stated goals. Admittedly, the drafters of the Refugee Convention did not intend PSG as a "catch-all" provision. However, they also did not intend to render the defi-

104. Refugee Convention, *supra* note 9, at art. 1.
105. UNHCR Guidelines, *supra* note 13, at ¶ 11.
106. *Id.* at ¶ 13.
107. *Id.*
108. *Id.* at ¶ 2.

nition of a PSG completely dependent on the persecuting society. Rather, the UNHCR Guidelines posit that membership in a PSG "should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[109] Social visibility does not allow for this diverse and changing nature of groups, as it is completely dependent on societies' viewpoint, which may remain static on certain issues. For these reasons, retaining only an immutable characteristic approach will better adhere to the traditional aims and contemporary confines of international law.

B. Response to China's One Child Policy

Countries align their immigration policies with their own value systems by tailoring their refugee laws in response to world events. The response of the United States to the Chinese government's One Child Policy is indicative of this hypothesis.

In the late 1970's, the Chinese government instituted a one-child policy, restricting Chinese families from having more than one child in order to control China's rapidly growing population.[110] The government severely punished those who disobeyed with forced abortions, imprisonment, infanticide, or violence.[111] In some cases, officials allowed the woman to carry the fetus to term, but forcibly sterilized her after the birth of the child.[112] In response, some Chinese nationals fled the country, applying for political asylum in countries such as the United States, the United Kingdom, and Australia. However, fleeing a coercive family planning program does not explicitly fall within one of the five grounds necessary to attain refugee status. Therefore, applicants typically argued persecution because of "membership in a particular social group," with varying degrees of success.

Many states refused to grant these Chinese applicants asylum based on persecution because of a PSG.[113] For example, in *Applicant A. v. Minister of Immigration and Ethnic Affairs*, the Australian High Court recognized that "[n]ot only is it impossible to define the phrase [PSG] exhaustively, it is pointless to attempt to do so."[114] Nevertheless, the Court held that a social group must share a "common attribute and a societal perception that

109. *Id.* at ¶ 3.

110. Sean T. Masson, Note, *Cracking Open the Golden Door: Revisiting U.S. Asylum Law's Response to China's One-Child Policy*, 37 HOFSTRA L. REV. 1135, 1136-37 (2009).

111. *Id.* at 1138.

112. *Id.*

113. *See Applicant A v. Minister of Immigration & Ethnic Affairs* (1997) 190 CLR 225, 241, 265-66 (Austl.).

114. *Id.* at 258.

they stand apart."[115] More important than any innate characteristic, "the existence of such a group depends in most, perhaps all, cases on external perceptions of the group."[116] Utilizing this standard, the Australian High Court found that asylum seekers from China, although possessing a well-founded fear of persecution because of a risk of forced sterilization, did not receive refugee status.[117] The Court refused to consider these individuals members of a PSG, instead defining them as a collection of persons in China who objected to a general social policy.[118]

In *Applicant A*, Australia used its version of social visibility to reject Chinese nationals opposed to China's One Child Policy. This example shows how social visibility operates to disqualify individuals deserving of asylum, and illustrates social visibility's incompatibility with the United States' refugee law framework. Essentially, at the same time that many Chinese nationals began to flee China, the BIA and most circuit courts had confirmed that social visibility and particularity were required. The United States recognized that this specific group of individuals did not constitute a PSG because they lacked social visibility, and would typically not fulfill the nexus requirement "on account of . . . political opinion."[119] However, the United States felt compelled to grant asylum to these individuals because of the certain human rights abuses these individuals would face if returned to China. Therefore, Congress amended the Immigration and Nationality Act to include individuals fleeing forced sterilization, identifying forced sterilization in this context as persecution on account of political opinion.[120]

Similarly, even before the 1996 Amendment, the BIA granted Chinese nationals asylum while remaining silent on how these applicants fit within the traditional terms of the refugee definition.[121] In *In re C-Y-Z*, a Chinese national sought asylum based on his family's opposition to China's coercive family planning program.[122] When the applicant's wife became pregnant with their second child, the government ordered her to have an abortion, but she escaped into hiding and had the child.[123] The family only had to pay a fine as punishment, but after the birth of the couple's third

115. *Id.* at 262.
116. *Id.* at 261.
117. *Id.* at 263-65.
118. *Id.* at 287.
119. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1101(a)(42) (2006)).
120. *Id.*
121. *In re* C-Y-Z, 21 I. & N. Dec. 915, 915 (B.I.A. 1997).
122. *Id.* at 915-16.
123. *Id.*

child, the government forcibly sterilized the applicant's wife.[124] The BIA felt the claim deserving of asylum, but the claim did not fit within the current definition of a refugee. In that case, the BIA still granted the applicant and his family asylum, but did not provide any specific reasoning why in terms of the refugee definition.[125]

Both of these strategies exemplify how the United States can structure and interpret its asylum laws to meet the needs of the world's refugees. The BIA itself recognized the flaws inherent in its "social visibility" standard when faced with a Chinese national's application that it considered deserving of asylum, but knew did not possess "social visibility." In that instance, unlike the Australian High Court, the BIA simply ignored its previous decisions and granted the applicant asylum without specifically articulating why. While this author commends the BIA for doing so, the BIA should not continue to promulgate a standard that it itself deviates from when it subjectively views the application as deserving of asylum. This practice will only lead to arbitrary and inconsistent results, and allows the BIA and courts to insert an intolerable amount of subjectivity into the law. Instead, the BIA should recognize that "social visibility" is inapplicable not just in some situations, but all, and the BIA should abandon the requirement altogether.

Alternatively, if the United States is willing to bend their asylum laws for those in opposition to China's One Child Policy, a similar framework should exist for gender-based asylum claims of similar magnitude, such as victims of human trafficking. Forced prostitution and sex trafficking constitute grave violations of human rights. The international community has become increasingly aware and concerned about their rise, calling on all countries to help combat this modern day slavery. Protecting trafficking victims is a crucial piece of eradicating this transnational crime. Therefore, a similar amendment protecting victims of human trafficking would illustrate that the United States is serious about stopping human trafficking, and the amendment would help alleviate the concerns that trafficking victims will not be able to meet the BIA's requirements of social visibility and particularity.

C. Why the Courts Need to Address This Issue

The United States receives thousands of asylum applications a year. In 2011, the United States received the second highest amount of applications

124. *Id.*
125. *Id.* at 919-20.

in the world, and courts granted asylum to around 66% of those applications.[126] The high number of individuals seeking asylum in the United States indicates how important a stable, predictable immigration system is to the world's refugee population. However, right now, the United States' immigration system is vague and unworkable with two competing standards. Without Supreme Court resolution, an asylum seeker in the Third or Seventh Circuit will automatically have a much higher chance of enjoying asylum than his or her counterpart in the rest of the country. A well-functioning legal system does not support such arbitrary results. Therefore, it is imperative that the Supreme Court resolves this split among the circuits, and takes into account the detrimental effect on asylum seekers if the social visibility and particularity requirements remain.

CONCLUSION

In conclusion, the Supreme Court should resolve the circuit split between the "social visibility" test and "immutable characteristic" test in favor of the "immutable characteristic" standard. Requiring social visibility and particularity marks an unprecedented heightening of United States asylum law, and courts should either abandon these standards or relegate them to less impactful factors These standards cannot remain implemented because they negatively affect gender-related claims and help to create a gender gap in United States' asylum law. Instead, the "immutable characteristic" test better comports with the international framework and overall purpose of the refugee protection regime. Moreover, "immutable characteristic" adequately protects both asylum seekers and receiving countries. This standard ensures that the United States does not return an individual with a well-founded fear of persecution to the state provoking that fear, at the same time assuaging the concerns of the receiving country that its immigration system will not be overwhelmed.

126. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, DEPT. OF JUSTICE, FY 2011 STATISTICAL YEAR BOOK (2012), *available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf.