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Social Group Asylum Claims: A Second Look at the New Visibility Requirement

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INTRODUCTION

In an article appearing in this journal in 2008,¹ Fatma E. Marouf identified a worrisome development in asylum law: refugees persecuted because of their membership in a “particular social group”—one of the five grounds for asylum in the United States²—must now show that their group is “socially visible” in the country from which they fled.³ For the past five years, the Board of Immigration Appeals (BIA)⁴ and the federal courts have increasingly relied on this social visibility criterion to deny asylum claims. Groups deemed insufficiently visible range from youth who resist gangs, to whistleblowers, to women who have children outside of wedlock.⁵ Meanwhile, calls to abolish the requirement have grown louder. In the past several months, advocates have sought to challenge social visibility through legislation,⁶ executive action,⁷ and judicial

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1. 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).
 2. See 8 U.S.C. § 1101(a)(42) (2006); 8 U.S.C. § 1158(b)(1)(B) (2006).
 3. See C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).
 4. The BIA, part of the Executive Office for Immigration Review in the Department of Justice, consists of fifteen members appointed by the Attorney General. The Board reviews decisions made by immigration judges under the Immigration and Nationality Act. See 8 C.F.R. § 1003.1 (2010).
 5. See, e.g., *Larios v. Holder*, 608 F.3d 105 (1st Cir. 2010); *Castro v. Holder*, 597 F.3d 93 (2d Cir. 2010) (remanding for the BIA to reconsider its denial of whistleblower’s asylum claim); *Faye v. Holder*, 580 F.3d 37 (1st Cir. 2009).
 6. See Refugee Protection Act of 2010, S. 3113, 111th Cong. § 5(a) (2010).
 7. Under 8 C.F.R. §1003.1(h)(1)(i) (2010), the Attorney General may direct the BIA to refer cases to him for review. A variety of groups have called for Attorney General Holder to certify *S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008), a recent social group case. See *Matter of S-E-G- and Gang-Based Asylum Claims*, IMMIGRANT LAW CENTER OF MINNESOTA, <http://www.immigrantlawcentermn.org/Litigation/seg>

intervention.⁸ This Comment argues that those attempts have been misguided; “social visibility” only needs to be properly understood, not discarded.

Marouf’s article shows how the BIA borrowed its social visibility criterion from the United Nations High Commissioner for Refugees (UNHCR), then turned the UNHCR’s alternative analysis of social groups into a necessary requirement. Marouf thus offers compelling evidence that the new criterion is a departure both from international law and the Board’s own precedent.⁹ She also exposes the dangerous implications of the social visibility requirement for gay and lesbian refugees and any other asylum applicants who keep their group-defining characteristics from public view.¹⁰

What Marouf’s otherwise helpful analysis overlooks is a misunderstanding at the heart of the social visibility requirement. The confusion arises because “social visibility” is a metaphor. Groups are “socially visible” when a society “sees” itself—that is, *thinks* of itself—as divided into such groups. This Comment argues that only this cognitive understanding of visibility makes sense in the context of asylum. Yet often the BIA and the courts instead take “social visibility” literally, requiring that members of a group *look* a certain way in order to gain asylum. The literalist reading makes social visibility turn on a group’s appearance rather than its social salience. As one immigration judge recently said of an asylum applicant from Colombia, “it is unlikely that anyone would be able to tell from looking at him that he is HIV positive.”¹¹ Unable literally to see the applicant as “part of any particular social group,” the judge denied his claim.¹²

By reducing knowledge to sight, those adjudicating and litigating asylum cases have failed to “see” what the visibility criterion can contribute to our definition of social groups. Properly interpreted, the visibility criterion serves as a test of objectivity (or at least intersubjectivity); it prevents applicants from concocting ad hoc social groups in their quest for asylum. What it does not do

.htm (last visited Oct. 30, 2010) (collecting requests for certification from various organizations). Another route to reform would require new regulations, which the Department of Homeland Security has pledged to *formulate*. See Unified Agenda, Department of Homeland Security, Statement of Regulatory Priorities, 74 Fed. Reg. 64,213, 64,220 (Dec. 7, 2009).

8. In May 2010, the Supreme Court denied a petition for certiorari in *Contreras-Martinez v. Holder*, a social visibility case from the Fourth Circuit. 346 F. App’x 956 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 3274 (2010).
9. Marouf’s article was cited for this purpose in a recent brief to the Supreme Court. Petition for a Writ of Certiorari at 17, *Contreras-Martinez v. Holder*, 130 S. Ct. 3274 (2010) (No. 09-830).
10. Marouf, *supra* note 1, at 78-102.
11. *Rodriguez v. Att’y Gen.*, No. 09-2593, slip op. at 4-5 (3d Cir. May 20, 2010).
12. *Id.* Affirming on alternate grounds, neither the Board nor the Third Circuit reached the question of whether HIV-positive Colombians constitute a particular social group.

is demand that individuals be visually recognizable as group members in order for courts to recognize their asylum claims.

The argument that follows is divided into three parts. Part I provides background on how the visibility criterion, and the confusion surrounding it, arose from the BIA's social group opinions. Part II suggests that confusion between the metaphorical and literal understandings of visibility aided the latter's acceptance by courts reviewing the Board's new criterion, even as it has intensified resistance to the criterion by advocates and commentators. Part III argues that clarification would decrease the demands for courts, Congress, and the Executive Branch to drop the social visibility requirement altogether. Rather than abandon the criterion, the government need only reaffirm what should be obvious: Social visibility has nothing to do with how groups look.

I. THE NEW VISIBILITY REQUIREMENT

Those who seek asylum in the United States must establish that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason" for their persecution in their country of origin.¹³ Of the five grounds, "membership in a particular social group" has long proven the most vexing.¹⁴

For years, the leading definition of "particular social group" came from *Matter of Acosta*,¹⁵ a 1985 BIA opinion. There, the Board applied the doctrine of *ejusdem generis*¹⁶ to analogize social groups to the other four grounds (race, religion, nationality, and political opinion), which were said to involve "something that either 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."¹⁷ The Board held that social groups consist of individuals who "share a common, immutable characteristic," whether "an innate one such as sex, col-

13. 8 U.S.C. § 1158(b)(1)(B) (2006); see also 8 U.S.C. § 1101(a)(42) (2006). The statutory language stems from Article I of the United Nations' 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

14. See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1238 (3d Cir. 1993) (Alito, J.) ("Both courts and commentators have struggled to define 'particular social group.' Read in its broadest literal sense, the phrase is almost completely open-ended.")

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

16. "Meaning literally 'of the same kind,'" the *ejusdem generis* canon instructs that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A NORMAN J. SINGER & J.D. SHAMBLE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 47:17, at 357-60 (7th ed. 2007).

17. *Acosta*, 19 I. & N. Dec. at 233-34.

or, or kinship ties, or . . . a shared past experience such as former military leadership or land ownership.”¹⁸

This definition remained largely undisturbed for two decades.¹⁹ Not until 2006 did the BIA offer social visibility as an additional requirement. In *Matter of C-A-*, the Board noted and tacitly altered the meaning of two sources: *Gomez v. INS*, a 1991 Second Circuit opinion that the Board summarized as requiring “members of a social group be externally distinguishable,”²⁰ and UNHCR guidelines describing social groups as persons “who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.”²¹ Fatma Marouf’s article shows how the BIA, in a short sequence of opinions, began to construe the UNHCR’s “or” as an “and.”²² Even quicker, however, was the Board’s shift within *Matter of C-A-* from groups that are “easily recognizable and understood by others to constitute social groups”²³ to the claim that previous decisions “recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question.”²⁴ This shift from figurative to literal sight occurred in the space of a single paragraph, and allowed the BIA to conclude that informants against a Colombian drug cartel do not constitute a social group, since their conduct “is generally out of the public view.”²⁵

18. *Id.* at 233.

19. After describing five intervening cases in which it had applied the *Acosta* standard, the Board in 2006 reconfirmed that, “[h]aving reviewed the range of approaches to defining particular social group [sic], we continue to adhere to the *Acosta* formulation.” *C-A-*, 23 I. & N. Dec. 951, 956 (B.I.A. 2006).

20. *Id.* More precisely, *Gomez v. INS* held that “[a] particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor - or in the eyes of the outside world in general.” 947 F.2d 660, 664 (2d Cir. 1991).

21. UNHCR, Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1 A(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) (emphasis added); cf. *C-A-*, 23 I. & N. Dec. at 956.

22. Marouf, *supra* note 1, at 66-67.

23. *C-A-*, 23 I. & N. Dec. at 959 (emphases added).

24. *Id.* at 960 (emphases added). Strangely, the BIA cited as support *Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990), in which the social group consisted of “persons identified as homosexuals by the Cuban Government.” *C-A-*, 23 I. & N. Dec. at 955; see Marouf, *supra* note 1. Surely Cuban homosexuals, no less than Colombian informants, generally conduct their activity “out of the public view.” See *infra* note 25 and accompanying text.

25. *C-A-*, 23 I. & N. Dec. at 960.

The BIA followed *Matter of C-A-* with opinions in 2007²⁶ and 2008²⁷ that confirmed “social visibility” as a necessary element for social group claims. One 2008 opinion, *Matter of E-A-G-*, demonstrated how the new requirement could prove fatal to an asylum claim:

[W]e find that the particular social group identified by the Immigration Judge as “persons resistant to gang membership” lacks the social visibility that would *allow others to identify its members* as part of such a group. Persons who resist joining gangs have not been shown to be part of a *socially visible group within Honduran society*, and the respondent does not allege that he possesses any characteristics that would *cause others in Honduran society to recognize him* as one who has refused gang recruitment.²⁸

As in *C-A-*, the Board equivocates between multiple interpretations of “identification,” “visibility,” and “recognition.” Initially, the phrase “social visibility” describes categories by which individuals are cognitively identified. By the final lines, it becomes clear that some physical demarcation is required. Visibility comes to require recognition not in the metaphorical sense, as when governments recognize each other or courts recognize claims, but in the literal sense, as a wanted poster helps people recognize a fugitive.

II. TWO MEANINGS OF ‘VISIBILITY’

The confusion that arises from the Board’s recent social group decisions raises questions about what the new visibility criterion actually adds to the previous *Acosta* formulation.²⁹ Two possible interpretations, with the additions to *Acosta* in italics, are:

- (a) a social group must be based on a trait that is *recognized by society* as either unchangeable or fundamental to conscience; or
- (b) a social group must be based on a *visibly recognizable* trait that is either unchangeable or fundamental to conscience.

Phrased so starkly, it becomes difficult to defend (b) as a legitimate interpretation of the statutory text. In the list “race, religion, nationality, membership in a particular social group, or political opinion,”³⁰ visibility is hardly the common element; race may be visible to the eye, but religion and political

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

27. *E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008); *S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008).

28. *E-A-G-*, 24 I. & N. Dec. at 594 (emphases added).

29. The Board insists that it “continue[s] to adhere to the *Acosta* formulation.” See *C-A-*, 23 I. & N. Dec. at 956.

30. 8 U.S.C. § 1101(a)(42)(A) (2006).

opinion generally require “evidence of things not seen.”³¹ Were it not for the metaphorical connection between sight and knowledge, seeing social groups would be no more plausibly required than having to hear or smell them.

Interpretation (a) merely amends the *Acosta* definition to reflect its actual use. Despite *Acosta*'s language, not every immutable characteristic forms the basis of a cognizable social group.³² “Having been born in the morning” is an immutable characteristic, but the “morning-born” are unlikely to qualify as a valid social group, since societies generally do not carve themselves up along that particular joint. In its cognitive sense, social visibility establishes whether a purported group is recognized in the refugee's country of origin; it protects against ad hoc formulations invented for the purpose of an asylum application.³³

Reading (a) is what the Board offers when it interprets the statutory language governing asylum. However, when it applies the visibility criterion to the facts of its social group cases, the Board takes a pivotal second step, shifting to reading (b) and interpreting literally words such as “perception,” “recognition,” “identification,” and “visibility.”

Consider again *Matter of C-A-*, where the Board states its criterion in cognitive terms at the outset: “[W]e have considered as a relevant factor the extent to which members of a society perceive those with the characteristic in question as members of a social group.”³⁴ Substitute “think of” for “perceive” and the meaning remains unchanged. However, when the Board applies the criterion, it claims that “the very nature of the conduct at issue is such that it is generally out of the public view. . . . Recognizability or visibility is limited to those infor-

31. *Hebrews* 11:1 (defining faith); cf. *Antipova v. U.S. Att’y Gen.*, 392 F.3d 1259, 1264-65 (11th Cir. 2004) (those seeking asylum need not “avoid signaling to others that they are indeed members of a particular race, or adherents of a certain religion, etc.”).

32. As *Acosta*'s definition has never been taken literally, enshrining that definition in the Refugee Protection Act of 2010 may cause confusion. The Act requires that “any group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person’s human rights such that the person should not be required to change it, shall be deemed a particular social group, without any additional requirement.” S. 3113, 111th Cong. § 5(a) (2010).

33. Consider the social group asserted in *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008): “[A]ny widowed Cameroonian female member of the Bamileke tribe, in the Southern region [of Cameroon] that belongs to a family or has in-laws from a different tribe and region, [namely] the Bikom tribe in the Northwest province, who have falsely accused her of causing her husband’s death.” Citing *Matter of C-A-*, the Eighth Circuit held that, “[t]he BIA was correct to reject the first asserted social group because Ngengwe’s definition is too narrow; people with those characteristics are not perceived by society as a particular social group.” *Id.*

34. *C-A-*, 23 I. & N. Dec. at 957.

mants who are discovered because they appear as witnesses”³⁵ Perception and recognition now require physical appearance in public view. The words hardly change, but their meaning is literalized, the requirement is heightened, and the applicant’s claim is ultimately denied.

Because the Board couches both (a) and (b) in the same words, the unhelpfulness or even irrationality of reading (b) has largely escaped judicial attention.³⁶ Courts of appeals reviewing the visibility criterion generally consider the Board’s initial cognitive formulations rather than the literalist ones that follow. For example, the Second Circuit has described *C-A-* as holding that “a group’s ‘visibility’—meaning the extent to which members of society perceive those with the relevant characteristic as members of a social group—is a factor in determining whether it constitutes a particular social group under the [Immigration and Nationality Act].”³⁷ In other words, the Second Circuit understood *C-A-*’s language as metaphorical, found it reasonable, and granted the Board deference on that basis. The literalist reading of social visibility evaded review entirely.

III. RECENT DEVELOPMENTS, FUTURE APPROACHES

As social group claims increasingly fail the visibility requirement, advocates have heightened their efforts to abolish it. Three routes are available: the Attorney General or the BIA itself could reconsider the Board’s precedent;³⁸ the courts of appeals or the Supreme Court could refuse to grant deference to the BIA’s interpretation of “particular social groups”;³⁹ or Congress could pass legislation clarifying or altering the statute.⁴⁰

Yet what the foregoing analysis suggests is that advocates working to have the visibility criterion abolished might do better to see that it is properly applied. Distinguishing between the metaphorical and literal interpretations of so-

35. *Id.* at 960.

36. For the exceptions, see *infra* notes 41-45 and accompanying text.

37. *Koudriachova v. Gonzales*, 490 F.3d 255, 261 (2d Cir. 2007) (citing *C-A-*, 23 I. & N. Dec. at 957, 959-60); see also, e.g., *Feng Ming Lin v. Holder*, 339 F. App’x 102, 103 (2d Cir. 2009) (requiring that the petitioner “show that the group she describes is generally perceived as a discrete group by Chinese society”); *Malonga v. Mukasey*, 546 F.3d 546, 553 (8th Cir. 2008) (citing *C-A-*, 23 I. & N. Dec. at 959-61) (“[T]he more likely that the society at large recognizes the alleged group (by, for example, linguistic or kinship commonalities), the more likely that the group is a particular social group for purposes of withholding of removal.”).

38. See *supra* note 7.

39. For a recent case in which the Supreme Court denied certiorari, thus refusing to examine social groups, see *supra* note 8.

40. For one recent legislative proposal, see *supra* note 6.

cial visibility would allow litigants and policy makers to focus on the truly harmful, and more readily corrected, prevalence of the literalist interpretation.

Recent judicial developments suggest an emerging recognition of visibility's dual meaning. In 2009, Seventh Circuit Judge Richard Posner twice skewered the Board's visibility approach. In *Gatimi v. Holder*, the court found that the visibility requirement not only conflicted with prior precedent, but worse, that it "makes no sense."⁴¹ Where the Board had conflated both interpretations of visibility,⁴² the court of appeals focused only on the literal one. Four months later, the court explicitly distinguished the two meanings in *Benitez Ramos v. Holder*.⁴³ Referring to metaphorical visibility as the "external criterion" (because it relies on societal beliefs), Judge Posner observed: "Often it is unclear whether the Board is using the term 'social visibility' in the literal sense or in the 'external criterion' sense, or even whether it understands the difference."⁴⁴

At oral argument in *Benitez Ramos*, the government insisted that social visibility requires a "discernible characteristic" that would allow a "complete stranger" to identify a group member on the street.⁴⁵ Yet this insistence conflicts with a second judicial development: a brief filed by the Solicitor General in the Supreme Court last April *denying* that "members of a particular social group must literally be visible to the naked eye."⁴⁶ Conceding that the government's earlier arguments might have "contributed to the confusion," the Solicitor General maintained that "the Board's precedential decisions have equated 'social visibility' with the extent to which the relevant society perceives there to be a group in the first place, rather than the ease with which one may necessarily be able to identify particular individuals as members of such a group."⁴⁷

As a description of the Board's past decisions, this is simply incorrect. The Board has repeatedly required literal visibility, as shown above, denying claims

41. 578 F.3d 611, 615 (7th Cir. 2009). Judge Posner rejected "the Board's view, that the [only way the] Mungiki defectors can qualify as members of a particular social group is by pinning a target to their backs with the legend 'I am a Mungiki defector.'" *Id.* at 616.

42. *Compare id.* at 615 ("The Board said there was no evidence that Gatimi 'possesses any characteristics that would cause others in Kenyan society to recognize him as a former member of Mungiki'"), *with id.* ("There is no showing that . . . such individuals are seen as a segment of the population in any meaningful respect.").

43. *See Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). Since the Seventh Circuit is currently alone in rejecting the literalist interpretation, asylum applicants from non-visible social groups would do well to file their claims in Illinois, Indiana, or Wisconsin.

44. *Id.* at 430.

45. *Id.*

46. Brief for the Respondent in Opposition at 13, *Contreras-Martinez v. Holder*, 130 S. Ct 3274 (2010) (No. 09-830).

47. *Id.*

as a result. Yet insofar as the non-literal reading is now the official litigation position of the federal government, the Solicitor General's statement is momentous. Though still underappreciated, it should be seen as a major victory for opponents of the visibility criterion.⁴⁸

The importance of the government's concession was not fully recognized, even by the parties litigating the case in which it was made. Replying to the Solicitor General, lawyers seeking Supreme Court review of their client's asylum denial noted in passing that the government's new interpretation of visibility could provide grounds for reversal. However, they immediately went on to claim that uncertainty surrounding the visibility requirement "underscores the bankruptcy of the BIA's approach (and the inappropriateness of *any* social-visibility requirement)."⁴⁹

The government's belated recognition of the difference between literal and metaphorical understandings of social visibility—and its explicit rejection of the former—provides an opportunity not to be missed. Those troubled by the visibility criterion should see the government's move for what it is: a fundamental change of course that, if encouraged, could end the confusion that has caused so much harm to asylum-seekers for the past five years.

48. One factor that clouds the victory is the uncertain relationship between the Solicitor General's litigation positions and the precedential decisions of the BIA. The need for the Department of Justice to present a unified stance is complicated by the fact that the Board and the Solicitor General are both based in the Department—and that the Office of Immigration Litigation, which represents the Board's position in the courts of appeals, also defers to positions taken by the Solicitor General. Cases such as this in which those positions are at odds present a particular need for resolution by the Attorney General. *See supra* note 7 (explaining the procedure by which the Attorney General can review BIA decisions).

49. Reply Brief for the Petitioner at 9-10, *Contreras-Martinez v. Holder*, 130 S. Ct 3274 (2010) (No. 09-830).

