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Deference Condoning Apathy: Social Visibility in the Eleventh Circuit

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DEFERENCE CONDONING APATHY: SOCIAL VISIBILITY IN THE ELEVENTH CIRCUIT

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INTRODUCTION

Lola Mendez De Vasquez, a Salvadoran single mother of two girls, realized that gang members (Maras) in El Salvador were attempting to recruit her daughters.[1] The Maras demanded that Lola allow her eldest daughter, Heidy, to join the gang. After Lola refused, the Maras threatened to kill her family."[2] One day, during Heidy's walk home from school, two Maras raped her.[3] Knowing the Maras would kill her and her family if she said anything, Heidy did not report the rape."[4] El Salvador, which has one of the highest homicide rates worldwide, has a highly evolved gang warfare system in which "rape is used as a weapon" to terrorize the community.[5] Heidy's cousin,

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1. Vasquez v. U.S. Attorney Gen., 345 F. App'x 441, 443–44 (11th Cir. 2009).

2. *Id.*

3. *Id*. If Heidy had become pregnant from this rape, she would have been legally unable to terminate the pregnancy. AMNESTY INT'L, ON THE BRINK OF DEATH: VIOLENCE AGAINST WOMEN AND THE ABORTION BAN IN EL SALVADOR 7 (2014).

> In 1997, El Salvador's Legislative Assembly passed into law the prohibition of all forms of abortion, making it a criminal offen[s]e for a woman to have an abortion[] or for anyone to assist her in procuring or carrying out an abortion. Women found guilty of terminating their pregnancies may be sentenced to long jail terms. Conviction is often based on weak or inconclusive evidence, following flawed trials. This prohibition denies access to safe and legal abortions for women and girls who are pregnant as a result of rape or whose pregnancy endangers their life and health.

Id.

4. *Vasquez*, 345 F. App'x at 443.

5. Alberto Arce, *El Salvador's Gangs Target Women and Girls*, SAN DIEGO UNION-TRIB. (Nov. 5, 2014, 10:36 PM), http://www.sandiegouniontribune.com/sdut-el-salvadors-gangs-target-women-and-girls-2014nov05-story.html [https://perma.cc/7DC4-DHVZ] (describing how gang members are initiated through rape to prove their worth and ensure silence regarding crimes and explaining how women raised in the society see rape so frequently that many do not recognize it as a crime); *see also* Angelika Albaladejo, *How Violence Affects Women in El Salvador*, LATIN AM. WORKING GROUP (Feb.

Yessenia, also endured threats from the Maras to join their gang on multiple occasions.[6] Eventually, the Maras threatened Yessenia at knife-point, promising to rape her or kill her family if she did not join them.[7] Yessenia explicitly rebuffed the Maras, countering that "they did bad things" and that "they were going to hell."[8]

Seeking refuge, the women entered the United States without inspection in 2005.[9] After receiving notices to appear before a Florida immigration judge for removal proceedings, the women applied for asylum.[10] To succeed in their claims, the women would have to prove that their experiences at the hands of the Maras amounted to persecution (or alternatively, that they possessed a well-founded fear of future persecution) on account of race, religion, nationality, political opinion, or membership in a particular social group ("Particular Social Group"), rendering them unable or

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22, 2016), http://www.lawg.org/action-center/lawg-blog/69-general/1590-how-violence-affects-women-in-el-salvador/ [https://perma.cc/E4T8-VPGJ].

> Gangs rape and violently murder young girls, or claim them as "*novias de las pandillas*"—"girlfriends" of the gangs. "Women's bodies were treated like territory during the civil war and continue to be today by the gangs," says Jeanette Urquilla, the director of the Organization of Salvadoran Women for Peace (ORMUSA). In many gang-controlled neighborhoods, young girls expect they will be raped, abducted, and/or murdered by the gangs.

Id.

The United States government is not blameless in this conflict—as in much of Central America during the 1980s, the United States sent El Salvador "military advisers" and "hundreds of millions of dollars in economic and military aid," intensifying a civil war that claimed 75,000 lives. Raymond Bonner, *Time for a US Apology to El Salvador*, NATION (Apr. 15, 2016), https://www.thenation.com/article/time-for-a-us-apology-to-el-salvador [https://perma.cc/AB6F-WNND]. In December 1981, a single operation carried out by the "Atlacatl Battalion, which had just completed a three-month counterinsurgency training course in the United States," killed 1,200 people. Raymond Bonner, *America's Role in El Salvador's Deterioration*, ATLANTIC (Jan. 20, 2018), https://www.theatlantic.com/international/archive/2018/01/trump-and-el-salvador/550955/ [https://perma.cc/F78H-QWR8].

6. *Vasquez*, 345 F. App'x at 443.

7. *Id.*

8. *Id.* Heidy also stated that she "believed in God and did not want to do such things." *Id.*

9. *Id.* Many immigrants who enter without inspection do not know that they should present to Customs Officers at ports of entry to apply for asylum; others are increasingly turned away "illegally" by border agents claiming that the government is not "accepting" asylum applications. *See* Ana Adlerstein, *Asylum Seekers Routinely Turned Away from Ports of Entry, Advocates Say*, GUARDIAN (Dec. 19, 2018, 7:53 AM), https://www.theguardian.com/us-news/2018/dec/19/us-mexico-border-migrants-claim-asylum-difficulties [https://perma.cc/53FC-CSKW].

10. *Vasquez*, 345 F. App'x at 443.

unwilling to return to El Salvador.[11] As asylum seekers applying in the southeastern United States, the women faced odds of success varying wildly from approximately 2%–75%, depending on the immigration judge.[12] Had the women applied in Atlanta, Georgia, they would have faced a 98% chance of failure.[13] Of the three women, only Heidy was found to have suffered persecution.[14] However, the Eleventh Circuit affirmed that Heidy, who sought asylum under the proposed Particular Social Group of "young Salvadorian [sic] students who expressly oppose gang practices and values and . . . wish to protect their family members against such practices," failed to establish membership in a "cognizable" Particular Social Group.[15] Approving the application of two relatively new criteria, "particularity" and "social visibility," the Eleventh Circuit found that Heidy was ineligible for asylum because no evidence indicated that the Maras "limited" their recruitment to

11. Establishing Asylum Eligibility, 8 C.F.R. § 208.13(b)(1) (2018). Establishing past persecution gives rise to a presumption that the applicant also possesses a well-founded fear of persecution. *Id.* Further, if applicants can establish only that they possess a fear of future persecution, not a history of past persecution, they must prove that simply relocating to a different place within their country of origin would not eliminate the danger. *Id.* § 208.13(b)(1)(i)(B). Additionally, applicants may need to defend against government arguments that conditions in their countries of origin have changed since their departure such that the applicant no longer possesses a well-founded fear of persecution. *Id.* § 208.13(b)(1)(i)(A). Asylum-seekers must also take care to avoid any perception that they firmly resettled in a third country before entering the United States (for example, receiving asylum in a third country before seeking asylum in the United States could constitute firm resettlement). *Id.* § 208.13(c)(2)(B). Once an asylum-seeker fulfills all the statutory requirements, she still must receive a favorable exercise of discretion by the immigration judge. *Id.* § 208.13(b)(1)(i). Persons with certain criminal histories, including persecution of others, serious nonpolitical crimes, and terrorism, are barred from receiving asylum. 8 C.F.R. § 208.13(c) (detailing grounds for asylum-seeker inadmissibility under the Immigration and Naturalization Act §§ 208(a)(2) and 208(b)(2)).

12. *Judge-by-Judge Asylum Decisions in Immigration Courts Before and After the Attorney General's Directive*, TRAC IMMIGR., http://trac.syr.edu/immigration/reports/240/include/denialrates.html [https://perma.cc/54V2-AMUS] (last visited Dec. 22, 2017). Of the courts in the southeastern United States feeding into the Eleventh Circuit Court of Appeals, Miami's immigration judges produce the highest asylum grant rates. *Id.*

13. OFFICE OF PLANNING, ANALYSIS, & STATISTICS, U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK, at K2 (2017), https://www.justice.gov/eoir/page/file/fysb16/download [https://perma.cc/RM5E-V9E9].

14. *Vasquez*, 345 F. App'x at 443.

15. *Id.* at 446.

students in Heidy's position and because students in Heidy's position were not "generally . . . recognizable by others in the community."[16]

The criteria used to deny Heidy's asylum application, particularity and social visibility, were not originally part of the Particular Social Group inquiry.[17] Social visibility, which requires asylum-seekers to prove that they were perceived as part of a "group" by society at large in their countries of origin, was not referenced as a requirement to forming a Particular Social Group in the Eleventh Circuit until 2006.[18] Before the early 2000s, the circuit courts generally agreed that establishing persecution on account of membership in a Particular Social Group mirrored the requirement for establishing persecution based on race, religion, nationality, or political opinion.[19] This consensus recognized that each ground "describes persecution aimed at an immutable characteristic: a characteristic . . . either . . . beyond the power of an individual to change or . . . so fundamental to individual identity or conscience that it ought not be required to be changed."[20] The social-visibility requirement, which gained acceptance in the circuit courts beginning in 2006 to 2008, has been roundly criticized as irreconcilable with the pre-2000 line of accepted case law by commentators, international organizations, and some circuit courts.[21] In their zeal to ensure that Particular Social Groups do not function as "catch-alls" for individuals who cannot neatly tie their persecution to their race,

16. *Id.* The particularity requirement seeks to combat what courts viewed as overly broad, amorphously defined Particular Social Groups. S-E-G-, 24 I. & N. Dec. 579, 584–85 (B.I.A. 2008). Under this requirement, asylum applicants must concretely define the boundaries of their Particular Social Group. *Id.* at 585. Particular Social Groups defined too broadly or "inchoate" (for example, young women in Brazil) will fail the particularity inquiry and result in asylum application denials. *Id.* at 586.

17. 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, 48 (2008).

18. Castillo-Arias v. U.S. Attorney Gen., 446 F.3d 1190, 1194 (11th Cir. 2006).

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

20. *Id.*

21. Nitzan Sternberg, *Do I Need To Pin a Target to My Back?: The Definition of "Particular Social Group" in U.S. Asylum Law*, 39 FORDHAM URB. L.J. 245, 295–96 (2011).

religion, nationality, or political opinion, the courts have levied a requirement that results in vastly different outcomes for similar case facts and denials of claims that would have fulfilled the requirements for asylum before 2006.[22] United States circuit courts' continued rubber-stamping of lower courts' applications of the social-visibility criterion has strangled asylum grant rates and emboldened callous treatment toward asylum-seekers in immigration courts like Atlanta, where immigration judges have been observed belittling applicants and conducting proceedings without interpreters.[23] Were Lola, Yessenia, and Heidy to apply for asylum in Atlanta today, not only would they face a one-in-fifty chance of success but they would relive their trauma before judges noted for "appearing wholly disinterested" in asylum applicants' testimonies and only becoming alert when "scold[ing] an attorney or a respondent."[24]

This Note examines the history of the social-visibility requirement for Particular Social Groups in Eleventh Circuit asylum claims and the adjudication disparities that have resulted from its imposition in the southeastern United States. Part I of this Note introduces the asylum application process, examines the historical treatment of Particular Social Groups nationally, and traces the recent restrictions on Particular Social Groups within the Eleventh Circuit in particular.[25] Part II compares the Eleventh Circuit's treatment of Particular Social Groups to treatment in the Third and Seventh Circuits and considers how previously successful claims for asylum would fare under the current state of the law in the Eleventh

22. *Id.* at 295.

23. Letter from Hallie Ludsin, Professor, Emory Law Sch., to Juan P. Osuna, Dir., Exec. Office for Immigration Review (Mar. 2, 2017), *available at* https://www.splcenter.org/sites/default/files/2017-atl_complaint_letter_final.pdf.

24. *Id.*; *see also* OFFICE OF PLANNING, ANALYSIS, & STATISTICS, *supra* note 13.This grant rate has a chilling effect on immigration attorneys' willingness to accept asylum cases and access to pro or low-bono asylum assistance in Atlanta. Ted Hesson, *Why It's Almost Impossible To Get Asylum in Atlanta*, VICE (Jun. 8, 2016), https://www.vice.com/en_us/article/bn38x5/why-its-almost-impossible-to-get-asylum-in-atlanta [https://perma.cc/4YRZ-4UCS]. According to Professor Shana Tabak, although attorneys outside Atlanta can generally expect relief if they enter court "with good preparation and a meritorious case," in Atlanta, "attorneys don't seem to have that feeling when they go into a courtroom." *Id.*

25. *See infra* Part I.

Circuit.[26] Last, Part III proposes that the Eleventh Circuit adopt a standard suggested by a prominent source of United States asylum law to evaluate Particular Social Groups and weighs the effects of this standard.[27]

I. Background

A. Origins of United States Asylum Law

The 1951 Convention Relating to the Status of Refugees (*"*1951 Convention*"*)—the *"*only global legal instrument dealing with the status and rights of refugees*"*—originally set forth the modern definition of *"*refugee*"* and defined *"*the kind of legal protection, other assistance, and social rights*"* that governments should provide to refugees.[28] The United Nations High Commissioner for Refugees (*"*UNHCR*"*) serves as the *"*guardian*"* of the 1951 Convention and subsequent 1967 Protocol.[29] In 1980, the United States codified its international treaty obligations with the Refugee Act of 1980, declaring, *"*[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands,*"* and promising to *"*encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.*"*[30]

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26. *See infra* Part II.

27. *See infra* Part III.

28. U.N. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150; UNHCR, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 5 (Sept. 2011) [hereinafter THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL]. Under the Convention, a person is a refugee if he, "[a]s a result of events occurring before 1 January 1951 and owing to well[-]founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group[,] or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not 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." U.N. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150.

29. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL, *supra* note 28, at 4. The 1967 Protocol "broaden[ed]" the 1951 Convention by eliminating its original "geographical and time limits"; for example, the limitation of refugees to people affected by events that occurred before January 1, 1951. *Id.*

30. Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102. Numerous subsequent

B. Applying for Asylum

1. Elements of Successful Asylum Claims

To establish eligibility for asylum, applicants must prove that they are unable or unwilling to return to their country of origin because of past persecution (or a "well-founded fear" of future persecution) "on account of" race, religion, nationality, political opinion, or membership in a Particular Social Group.[31]

The elements of an asylum case are not statutorily defined; they have evolved through case law over the last several decades.[32] Persecution "requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty."[33] Applicants need to prove that one of the grounds was "at

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statutes have modified immigration law; notable among these is 1996's Illegal Immigration Reform and Immigrant Responsibility Act ("IRIRA"). *See generally* Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546. IRIRA added a requirement that asylum seekers demonstrate "by clear and convincing evidence" that they filed their asylum applications within one year of arriving within the United States, although some exceptional circumstances (for example, extreme medical conditions like comas or post-traumatic stress disorder) can allow asylum seekers to circumvent the requirement. *Id.* § 604(a), 110 Stat. at 3009-691 (codified as amended at 8 U.S.C. § 1158(a)(2)(B) (1998)).

31. 8 C.F.R. § 208.13 (2018). Successfully proving past persecution accords applicants the "presumption" of a well-founded fear of future persecution. *Id.* However, an asylum officer or immigration judge can rebut this presumption by determining that "a fundamental change in circumstances" occurred "such that the applicant no longer has a well-founded fear of persecution" in his home country or that "the applicant could avoid future persecution by relocating to another part of" his home country. *Id.*

32. Martine Forneret, *Pulling the Trigger: An Analysis of Circuit Court Review of the "Persecutor Bar,"* 113 COLUM. L. REV. 1007, 1039 (2013).

33. Mikhailevitch v. INS., 146 F.3d 384, 390 (6th Cir. 1998). Further, applicants must prove that the persecution suffered entailed both objective and subjective components. *See* Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 239 (2d Cir. 1992) ("The applicant must show he has a subjective fear of persecution[] and that the fear is grounded in objective facts."). Asylum seekers typically cannot establish that "prosecution for criminal violations of fairly administered laws" entails persecution. Janusiak v. INS, 947 F.2d 46, 48 (3d Cir. 1991). *But see* Dwomoh v. Sava, 696 F. Supp. 970, 972–79 (S.D.N.Y. 1988) (ruling that a former Ghanaian soldier who, "disturbed by worsening political conditions (including summary execution of eight generals and several judges, among others)," committed to "participate in resistance activities" involving "free[ing] his friend from prison and . . . support[ing] a coup against the military government" did suffer persecution by the government because the Ghanaian government provided no due process protections, may have punished the

least one central reason" for the claimed persecution.[34] The phrase "on account of" requires that the persecution be "causally linked" to one of the statutory grounds.[35] Among the five grounds (race, religion, nationality, political opinion, or membership in a Particular Social Group), Particular Social Groups—the most amorphous, politically vulnerable ground—generates the most confusion and debate.[36]

2. Procedure

Applicants can seek asylum affirmatively within one year of arrival in the United States (subject to certain exceptions) or defensively after being placed in removal (deportation) proceedings.[37] Affirmative asylum seekers attend nonadversarial

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applicant "arbitrarily," and given the political conditions in Ghana, "a coup [may have been] the only means by which political change [could have been] effected.").

34. REAL ID Act of 2005, Pub. L. No. 109–13, § 101, 119 Stat. 231, 303 (codified as amended at 8 U.S.C. § 1158(b)(1)(B)(i) (2006)).

35. Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781 (2003). This requirement, called the "nexus" between one of the five protected grounds and the persecution, is often difficult to prove:

> In *INS v. Elias-Zacarias*, the Court considered the case of a Guatemalan man who was seeking asylum based on political opinion. His basic claim was that he was being pressured to join a guerrilla group opposed to the government. He feared that if he did join, the government would harm him and his family, so he left Guatemala. In an opinion by Justice Scalia, the Court upheld the Board of Immigration Appeals'[s] ("BIA") decision denying asylum and reversed the [c]ourt of [a]ppeals, finding that any persecution Elias-Zacarias would face could not be proven to be on account of his political opinion. Elias-Zacarias failed to demonstrate that he had a political opinion or that his opinion was the motivating factor behind his persecution. In short, the Court required convincing evidence of the motive of the persecutor, which would (presumably) prove that the asylum seeker was being persecuted on account of an enumerated ground. Through this decision, the Court effectively shifted the focus from the fear experienced by the victim to the thoughts and motives of the persecutor. Thus, a two-part test to establish a nexus between persecution and an enumerated ground developed. To pass this test, the asylum seeker must (1) establish that she has a race, religion, nationality, social group membership, or political opinion, and (2) show that the persecutor was motivated by that race, religion, etc. Proving the persecutor's motive is often difficult, if not impossible, and courts have subsequently encountered significant difficulties in applying *Elias-Zacarias*'s holding.

Brigette L. Frantz, Note, *Proving Persecution: The Burdens of Establishing a Nexus in Religious Asylum Claims and the Dangers of New Reforms*, 5 AVE MARIA L. REV. 499, 511 (2007).

36. Marouf, *supra* note 17, at 48.

37. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS.,

interviews with asylum officers.[38] Defensive asylum seekers and affirmative asylum seekers whose applications were denied by an asylum officer (and are not present in the country under another legal status like a work visa) are issued a notice to appear for a hearing in front of an immigration judge.[39]

During this adversarial process, the immigration judge hears arguments from the applicant and from the United States government (represented by an attorney from Immigration and Customs Enforcement (ICE)).[40] Approximately 91% of asylum seekers who face this hearing without an attorney are denied asylum.[41] If the immigration judges exercise their discretion to deny the application, the decision can be appealed to the Board of Immigration Appeals ("BIA"), the United States's "highest administrative body for interpreting and applying immigration laws."[42] Faced with another

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https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states [https://perma.cc/6D2L-8KS6] (last updated Oct. 19, 2015).

38. *Id.*

39. *Id.* Defensive asylum seekers are typically detained. To secure release from detention, a detained asylum seeker must pass a "credible fear" interview. Review of Credible Fear Determination, 8 C.F.R. § 1003.42 (2018). Taking into account an asylum seeker's credibility, asylum officers examine whether a "significant possibility" exists that the asylum seeker could establish asylum eligibility in a full hearing. *Id.* If a significant possibility exists, the asylum officer may release the asylum seeker on bond. *Id.*

40. *Obtaining Asylum in the United States*, *supra* note 37.

41. *Judge Earle B. Wilson*, TRAC IMMIGR., http://trac.syr.edu/immigration/reports/judgereports/00132ATL/index.html [https://perma.cc/8RT6-L629] (last visited Sept. 24, 2017).

42. *Board of Immigration Appeals*, U.S. DEP'T JUST., https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/R7AB-CBCF] (last updated Oct. 15, 2018). Even if an immigration judge finds an applicant eligible to receive asylum, the judge may exercise discretion to deny asylum relief:

> [C]ourts and [immigration judges (IJs)] should consider, when relevant, the following non-exhaustive list of factors as part of the totality of the circumstances. On the positive side, an IJ should consider:
> 1) Family, business, community, and employment ties to the United States, and length of residence and property ownership in this country;
> 2) Evidence of hardship to the alien and his family if deported to any country, or if denied asylum such that the alien cannot be reunited with family members (as derivative asylees) in this country;
> 3) Evidence of good character, value, or service to the community, including proof of genuine rehabilitation if a criminal record is present;
> 4) General humanitarian reasons, such as age or health;
> 5) Evidence of severe past persecution and/or well-founded fear of future persecution,

denial, asylum seekers may seek federal review by a court of appeals. These appeals rarely succeed. The Courts of Appeals usually defer to the BIA under the doctrine of *Chevron* deference, which means, that the BIA's conclusions can only be overturned if "any reasonable adjudicator would be compelled to conclude to the contrary."[43] Considering the "extreme hardships and difficulties that result" from deportation, some commentators have called for more exacting review of lower courts' decisions.[44] *Chevron* deference, which bows to the BIA's judgment in part to promote adjudicative uniformity, has precipitated a post-social-visibility drop in the percentage of cases

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> including consideration of other relief granted or denied the applicant (e.g., withholding of removal or CAT protection).
> On the negative side, relevant factors include the:
> 1) Nature and underlying circumstances of the exclusion ground;
> 2) Presence of significant violations of immigration laws;
> 3) Presence of a criminal record and the nature, recency, and seriousness of that record, including evidence of recidivism;
> 4) Lack of candor with immigration officials, including an actual adverse credibility finding by the IJ;
> 5) Other evidence that indicates bad character or undesirability for permanent residence in the United States.
> We emphasize that an IJ need not analyze or even list every factor. To the contrary, we explicitly reject such an "inflexible test" and recognize the "undesirability and 'difficulty, if not impossibility, of defining any standard in discretionary matters of this character.'" But at the very least, an IJ must demonstrate that he or she reviewed the record and balanced the *relevant* factors and must discuss the positive or adverse factors that support his or her decision.

Zuh v. Mukasey, 547 F.3d 504, 510–11 (4th Cir. 2008) (internal citations omitted).

43. 8 U.S.C. § 1252(b)(4)(B) (2018). The Ninth Circuit Court of Appeals recently invalidated § 1252(e), but § 1252(b) remains valid. Thursaissigiam v. U.S. Dep't of Homeland Sec., No. 18-55313, 2019 WL 1065027 at *5 (9th Cir. Mar. 7, 2019). Before 1984, courts applied varying, inconsistent standards of review to decisions from administrative agencies. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2082 (1990). In *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, the Supreme Court implemented "a two-step inquiry. The first question was whether Congress had explicitly foreclosed the agency's decision. The second was whether that decision was reasonable or permissible." *Id.* at 2084. *Chevron* deference, in combination with the "limited scope of judicial review," began to concentrate the BIA's power "not only to decide cases but also to shape future law. As a result, the proposed centralization of judicial review would alter the extent of the concentration of adjudicatory power only marginally." Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1707 (2010).

44. Matthew F. Soares, *Agencies and Aliens: A Modified Approach to* Chevron *Deference in Immigration Cases*, 99 CORNELL L. REV. 925, 944 (2014). Previously a common law concept applied in criminal and early immigration cases, the idea of "lenity" pushed courts "to construe ambiguous laws in favor of the defendant *due to the overwhelming constitutional concerns associated with punishment* and depriving an individual of life, liberty, or property." *Id.* at 933 (emphasis added).

reversed or remanded by a court of appeals from 17.5% in 2006 to 11.3% in 2016.[45]

C. The Thorniest Basis for Asylum: Particular Social Group

For years, *Matter of Acosta* offered leading guidance in forming cognizable Particular Social Groups; members must possess a "common, immutable characteristic" (similar to race, religion, nationality, or political opinion) that is "so fundamental to individual identity or conscience that it ought not be required to be changed."[46] Immutable characteristics that may form the basis for a Particular Social Group under *Matter of Acosta*'s formulation include "sex, color, or kinship ties, or in some circumstances . . . a shared past experience such as former military leadership or land ownership."[47] In adopting this approach to Particular Social Groups, the BIA expressed its objective of restricting asylum grants to applicants who were either unable or could not be conscientiously required to avoid persecution by forsaking past experiences or values central to their identities.[48]

1. An Additional Requirement: Social Visibility

In its 2006 decision, *In Re C-A-*, the BIA began to include social visibility as an additional requirement for Particular Social Groups. This change occurred after the UNHCR refined its definition of Particular Social Groups, limiting members to "persons who share a

45. John Guendelsberger, *Circuit Court Decisions for December 2016 and Calendar Year Totals for 2016*, IMMIGR. L. ADVISOR (Exec. Office for Immigration Review, D.C.), Jan. 2017, at 3; Soares, *supra* note 44, at 931. As opposed to cases involving expedited removal orders and those in which "noncitizens are removable on crime-related grounds," which cannot be appealed, asylum cases are reviewable and "make up the bulk of the courts' immigration caseloads." Legomsky, *supra* note 43, at 1643–44. Appeals from BIA decisions flood federal courts, occupying a significant portion of federal circuits' caseloads and resulting in "duplicat[ion]" of the BIA's decisions, with few cases reaching a different result. *Id.* at 1646.

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

47. *Id.* at 233.

48. *Id.*

common characteristic other than their risk of being persecuted, or who are perceived as a group by society."[49] The same year, in *Castillo-Arias v. U.S. Attorney General*, the Eleventh Circuit Court of Appeals suggested that the social-visibility criterion was always a part of the Particular Social Group analysis dating back to before *Matter of Acosta*, stating that "the two illustrations provided in *Acosta*, 'former military leadership and land ownership'—are also easily recognizable traits."[50] Ultimately, the court in *Castillo-Arias* found that noncriminal informants working against the Cali drug cartel in Colombia were not sufficiently "visible" to form a Particular Social Group.[51] Because "the very nature of [serving as an informant against a drug cartel] prevented the applicant from 'being recognized by society at large,'" he was "not visible enough to be considered a member of a 'particular social group.'"[52]

2. Castillo-Arias's Legacy in the Eleventh Circuit

The Eleventh Circuit continued to defer to the BIA's new criterion in 2008, holding that "Honduran schoolboys who conscientiously refuse to join gangs" were not sufficiently socially visible.[53] In *Gomez-Benitez v. U.S. Attorney General*, the court again warned against the use of Particular Social Groups as "a 'catch-all' ground

49. Castillo-Arias v. U.S. Attorney Gen., 446 F.3d 1190, 1193 (11th Cir. 2006); 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*, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter *Guidelines on International Protection*]; *see also* S-E-G-, 24 I. & N. Dec. 579, 579–87 (B.I.A. 2008) (holding that two Salvadoran teenagers who were approached by MS-13 gang members and asked to join the gang, beaten, threatened, and told their sister would be raped if they did not join the gang did not belong to a sufficiently socially visible group because "Salvadoran youth who are recruited by gangs but refuse to join" are not "'perceived as a group' by society[]" and do not "suffer from a higher incidence of crime than the rest of the population." Although the court was wary of allowing asylum seekers to define particular social groups by the persecution their members experienced, this reasoning seems to require a higher level of persecution and focused targeting for a group to be considered a particular social group.).

50. *Castillo-Arias*, 446 F.3d at 1194.

51. *Id.* at 1198. However, countless Particular Social Groups accepted under *Matter of Acosta*'s formula might not be sufficiently "visible" in society's eyes to form a more visible group than noncriminal informants working against a drug cartel. *Id.* at 1197.

52. *Id.*

53. Gomez-Benitez v. U.S. Attorney Gen., 295 F. App'x 324, 326 (11th Cir. 2008).

for all persons alleging persecution . . . who cannot establish refugee status under any of the other recognized grounds."[54] The next year, the Eleventh Circuit extended this same reasoning to the proposed Particular Social Group of young men who pledged membership to a formal group protesting against the MS-13 gang.[55] In 2010, the Eleventh Circuit held that a dental-prosthetics expert in Colombia was not a member of a sufficiently visible Particular Social Group.[56] The same year, professionals unwilling to collaborate and share their knowledge and skills with revolutionaries against the Colombian government were also denied status as members of a Particular Social Group.[57] Drawing a parallel to noncriminal informants, the Eleventh Circuit held in *Jai Lok Ling v. U.S. Attorney General* that business owners who owe money to loan sharks lack social visibility because loan sharks' crimes "tend to be criminal in nature and are often conducted secretly."[58]

Even when an individual is misidentified publicly in a Honduran newspaper as a murderer, the Eleventh Circuit will not find that she is sufficiently socially visible to be counted as part of a Particular Social Group if doing so would run the risk of allowing her to use

54. *Id.*

55. *See* Navas-Villanueva v. U.S. Attorney Gen., 338 F. App'x 859, 861 (11th Cir. 2009) (holding that a young man belonging to a formal group protesting against MS-13 was not a member of a particular social group because he was not sufficiently socially visible).

56. *See* Cantillo-Charris v. U.S. Attorney Gen., 382 F. App'x 817, 819–20 (11th Cir. 2010) (finding that a dentist who operated a dental-prosthetics laboratory and received numerous threats from gang members promising consequences if he did not provide dental-prosthetics services who left his profession and began to sell bananas instead in order to escape from the gangs was not sufficiently socially visible).

57. *See* de Padilla v. U.S. Attorney Gen., 403 F. App'x 472, 473 (11th Cir. 2010) (holding that a man with education and training desired by revolutionaries who refused to share his skills to revolutionaries was not a member of a particular social group because "countless persons could declare membership based on any occupational skill they possess that is desired by the revolutionaries.").

58. Ling v. U.S. Attorney Gen., 404 F. App'x 426, 429 (11th Cir. 2010). Like noncriminal informants, business owners in debt to loan sharks are too "numerous and inchoate"; the court also found this particular-social-group formulation unacceptable because it was defined by persecution by the loan sharks. *Id.* The Eleventh Circuit reaffirmed its distaste for noncriminal informants in *Pinzon Pulido v. U.S. Attorney General*, where it found that a paid informant who worked against a Colombian cartel for several years engaged in "risks similar to those of the police or military" and thus could not be considered a member of a cognizable particular social group. Pinzon Pulido v. U.S. Attorney Gen., 427 F. App'x 729, 730 (11th Cir. 2011).

membership in this Particular Social Group as a catchall when her persecution did not fit into one of the other four grounds.[59] Additionally, wearing a uniform specifically distinguishing oneself as a United States embassy security guard will not render an individual sufficiently socially visible for the Eleventh Circuit. In 2011, the court determined that the Haitian society would not perceive a former embassy guard as a member of a Particular Social Group because he did not prove that this group would "be generally recognized and perceived as a group in [his] community."[60] This narrow construction of Particular Social Groups continues today.[61] In the summer of 2018, then-Attorney General Jefferson B. Sessions III issued a controversial opinion in *Matter of A-B*, overturning a previous BIA decision approving surviving domestic violence as a potential basis

59. Solis v. U.S. Attorney Gen., 411 F. App'x 256, 257–58 (11th Cir. 2011). In declining the woman's petition for review of the single-panel BIA decision, the Eleventh Circuit also offered as justification "that being misidentified by a newspaper as a murderer falls outside the category of shared experiences that Congress intended to protect." *Id.* at 259. Although the woman's son and husband were murdered in Guatemala after her misidentification, the Eleventh Circuit found that her failure to "present any evidence beyond her own assertion" that the misidentification spurred the murders dampened her motion to reopen her asylum application. Solis v. U.S. Attorney Gen., 463 F. App'x 859, 862 (11th Cir. 2012).

60. Pierre v. U.S. Attorney Gen., 432 F. App'x 845, 848 (11th Cir. 2011).

61. In 2011, the Eleventh Circuit also upheld the BIA's decision that a family targeted as part of a blood feud could not represent a cognizable Particular Social Group because the targeted family was not "sufficiently visible to Albanian society as a whole." Perkeci v. U.S. Attorney Gen., 446 F. App'x 236, 239 (11th Cir. 2011). Two years later, the Eleventh Circuit also found that a woman seeking asylum on the basis of her membership in the Particular Social Group of attractive women sexually harassed by government or police offers was not sufficiently socially visible. Udesh v. U.S. Attorney Gen., 518 F. App'x 921, 924 (11th Cir. 2013). In 2014, the Eleventh Circuit upheld a lower court's determination that witnesses to a police murder in South Africa were, like noncriminal informants, insufficiently socially visible to belong to a Particular Social Group. Swart v. U.S. Attorney Gen., 552 F. App'x 922, 925 (11th Cir. 2014). The same year, the Eleventh Circuit explicitly defied *Matter of Acosta* by affirming that former military members who testified in successful investigations and prosecutions of illegal armed groups in Colombia were not socially visible because the criminal proceedings were private and, as with regular noncriminal informants, the court found no evidence that "the drug cartel would treat informants differently from any other person the cartel perceived to have interfered with its activities." Granados v. U.S. Attorney Gen., 578 F. App'x 866, 871–72 (11th Cir. 2014). The court also noted that the danger cartels pose to the population at large diluted the court's perception of danger to this witness specifically: "virtually the entire population is a potential subject of persecution by the cartel." *Id.* In 2015, the Eleventh Circuit affirmed the lower court's decision not to recognize religious teachers who explicitly oppose gang membership and "deter other[s] from joining" gangs as socially visible by insisting that the Roman Catholic catechist at issue, who urged his constituents against joining the Maras, "had not distinguished his particular social group from people who oppose criminal organizations generally." Balam-Ruiz v. U.S. Attorney Gen., 608 F. App'x 908, 909 (11th Cir. 2015).

for forming a Particular Social Group.[62] *Matter of A-B* encourages immigration judges to take an even stricter posture toward Particular Social Groups, urging that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by nongovernmental actors will not qualify for asylum," sparking fears among immigrant activists that judges would outright forbid Particular Social Groups involving gender or gang ties.[63] Although the Eleventh Circuit has reviewed BIA decisions since *Matter of A-B*, it has not yet cited the decision as controlling authority.

II. Analysis

The UNHCR itself, whose updated 2002 guidelines inspired the social-visibility requirement, has suggested that the BIA misinterpreted its guidance by adopting social visibility as an *additional* requirement to the Particular-Social-Group inquiry, stating in an amicus brief that "groups need not be easily recognizable to the general public" to be perceived as a Particular Social Group.[64] Instead, the UNHCR clarified that its guidelines "sought to reconcile" two different approaches to evaluating Particular Social Groups ("protected characteristics" and "social perception") by

62. A-B-, 27 I. & N. Dec. 316, 316 (U.S. Attorney Gen. 2018) (interim decision), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018) (appeal filed D.C. Cir. Jan. 30, 2019).

63. *See id.* at 320.

64. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae, Michelle Thomas et al., A75-597-033/-034/-035/-036, 6 (B.I.A. Jan. 25, 2007), http://www.unhcr.org/refworld/docid/45c34c244.html [https://perma.cc/9T6Z-KTTF] [hereinafter Brief for Refugees as Amicus Curiae]. The UNHCR criticized the BIA's imposition of social visibility as determinative to the Particular Social Group inquiry:

> DHS argues in its brief that the Board has adopted a new test in *Matter of C-A-*, 23 I & N Dec. 951 (BIA 2006) that adds an additional requirement to the "immutable or fundamental characteristic" approach to the particular social group analysis that was established in *Matter of Acosta*, 19 I&N Dec. 211 (1985). According to DHS, the additional requirement is that there must be "social perception" or "visibility" of the group. It is not clear to us that the Board meant to adopt such a requirement, particularly given that the Board in *Matter of C-A-* referenced the definition set forth in the UNHCR Guidelines on Membership of a Particular Social Group, which does not include a requirement that a particular social group meet the "social perception" test nor that the group be "socially visible."

Id. at 6. The UNHCR does caution against imposing too rigid a test, urging the Board against "adopting such a rigid approach which may disregard groups that the Convention is designed to protect." *Id.* at 10.

endorsing a "single standard." In its brief, the UNHCR emphasized 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."[65]

Not only has the international organization that influences much of United States asylum law denounced imposition of the social-visibility requirement but various United States circuit courts have criticized or declined to apply it.[66] Even among the circuits courts that do apply the social-visibility requirement, like the Eleventh Circuit, the social-visibility criterion leads to drastically disparate outcomes.[67] Certain types of cases—most notably gang-based and gender-based persecution claims—are disproportionately shuttered by the social-visibility requirement. Unlike claims based on readily apparent grounds like membership in an indigenous tribe, these claims based on personal convictions or stemming from past trauma can often be concealed. Both types of claims involve especially vulnerable people (for example, cartel informants and women opposed to forced marriages) who must by necessity remain invisible to escape further persecution. But by expending every effort to avoid standing out in society (for example, women pretending to support female genital mutilation to avoid being beaten for speaking out against community leaders), these vulnerable individuals, often persecuted due to factors more complex and localized than race, religion, nationality, or political opinion, can lose their eligibility to win asylum in the United States. In this way, the social-visibility requirement acts as a perverse incentive. Only by broadcasting their vulnerabilities to their oppressors can persecuted people hope to prove that they were sufficiently socially visible in their native countries to win asylum in the United States.

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65. *Id.* at 6.

66. Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 603–04 (3d Cir. 2011); Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009).

67. Jason Dzubow, *The Easiest Office to Win Asylum, and Why You Shouldn't Apply There*, ASYLUMIST (Feb. 25, 2016), http://www.asylumist.com/2016/02/25/the-easiest-office-to-win-asylum-and-why-you-shouldnt-apply-there/ [https://perma.cc/TX7U-RHSX].

A. The Third and Seventh Circuits Reject the Social-Visibility Requirement

In 2009, the Seventh Circuit acknowledged the other circuit courts' adoption of the BIA's social-visibility requirement but declined to apply it.[68] In *Gatimi v. Holder*, the court held that "it makes no sense" to require a Kenyan defector from the Mungiki political group to show that "others in Kenyan society [would] recognize him as a former member of Mungiki."[69] Requiring vulnerable classes of individuals to be recognized by society is unrealistic because these targeted people "will take pains to *avoid* being socially visible."[70] Thus, to the extent that "members of the targeted group are successful in remaining invisible, they will not be 'seen' by other people in society 'as a segment of the population.'"[71] The Seventh Circuit acknowledged the Supreme Court's reminder that "the Board's definition of 'particular social group' is entitled to deference"; however, the court maintained that the BIA "inconsistent[ly]" applied social visibility by recognizing cognizable Particular Social Groups "without reference to social visibility" while also refusing to classify "socially invisible groups as particular social groups . . . without repudiating the other line of cases."[72]

Two years later, the Third Circuit also rejected social visibility as inconsistent with the *Acosta* line of cases.[73] The court pointed to various Particular Social Groups that were approved following *Acosta*—women "opposed to female genital mutilation," "homosexuals required to register in Cuba," and "former members of the El Salvador national police"—noting it was "hard-pressed to

68. *Gatimi*, 578 F.3d at 616. The court had "no quarrel" with their sister court's rejection of various proposed Particular Social Groups, but "just [didn't] see what work 'social visibility' does" that improves upon the *Matter of Acosta* test. *Id.*

69. *Id.* at 615.

70. *Id.* (emphasis added).

71. *Id.* "Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual." *Id.*

72. *Gatimi*, 578 F.3d at 615–16.

73. Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 603–04 (3d Cir. 2011).

understand how the 'social visibility' requirement was satisfied" in these prior cases involving groups not particularly "recognizable by others in the country."[74] The court insisted that *Chevron* deference does not entitle the BIA to "generate erratic, irreconcilable interpretations of their governing statutes" and stated that it would assess "whether the agency's current interpretation is 'reasonable'" by evaluating the BIA's "[c]onsistency over time and across subjects."[75] Because the Third Circuit considered social visibility "inconsistent with past BIA decisions," it concluded that social visibility "is an unreasonable addition" to the components of a cognizable Particular Social Group.[76]

B. The Eleventh Circuit's Application of Social Visibility

The Eleventh Circuit—and Atlanta's Immigration Court specifically—is one of the most difficult regions in which to win asylum.[77] Out of 604 claims adjudicated by the Atlanta Immigration

74. *Id.* at 604.

75. *Id.*

76. *Id.* In 2013, the Ninth Circuit responded to the Third Circuit, acknowledging that although "it is difficult to articulate precisely what the BIA meant by 'social visibility,'" this requirement does not entail literal "on-sight visibility"; instead, the court interpreted social visibility to mean that a social group is "*understood* by others to constitute [a] social group[]." Henriquez-Rivas v. Holder, 707 F.3d 1081, 1088 (9th Cir. 2013). Specifically, the Ninth Circuit held that the *persecutors*' understanding of their victims was most dispositive in finding a group sufficiently visible:

> The petitioner is persecuted precisely because the persecutor recognizes the object of his persecution. Further, the petitioner's awareness of her own group status is not a baseline requirement—for example, an infant may not be aware of race, sex, or religion. Society in general may also not be aware of a particular religious sect in a remote region. However, a group may be persecuted because of the *persecutor*'s perceptions of the existence of those groups. We do not mean to imply that an alien should be required in every case to prove that his persecutors perceived his social group to be socially visible. When there is evidence that a social group is visible to society, there is no need to prove that the petitioner's persecutors perceived that group as visible. We mean only to suggest that evidence of perceptions in society as a whole is not the exclusive means of demonstrating social visibility. When a particular social group is not visible to society in general (as with a characteristic that is geographically limited, or that individuals may make efforts to hide), social visibility may be demonstrated by looking to the perceptions of persecutors.

Id. at 1089–90 (internal citations omitted).

77. *See* OFFICE OF PLANNING, ANALYSIS, & STATISTICS, *supra* note 13, at K2.

Court in 2016, only fourteen were granted.[78] Compared to a national average grant rate of 43%, this 2% approval rate suggests that the Atlanta Immigration Court is applying the law significantly more harshly than its peers.[79] Indeed, the vast disparities among national grant rates, which range from 0% to 85%, indicate that inconsistent interpretation of the law poses a serious problem across the United States.[80]

Immigration judges, concerned about fraud, report denying asylum applications because they were "copied word-for-word" from other applicants' applications.[81] But legal observers, lacking evidence that the rate of fraud among asylum seekers is higher in Georgia than other states, suggest that contempt or apathy toward asylum seekers may help to explain the Atlanta Immigration Court's low asylum approval rate.[82] When students from Emory Law School observed proceedings at the Atlanta Immigration Court, they were told by one judge that his applicants were "trying to scam the system."[83] Another judge regularly "closed his eyes during hearings" and leaned back with his head in his hands in an apparent expression of disinterest, and a third spoke to a Portuguese-speaking applicant who did not understand English without an interpreter, outside the presence of his attorney, before setting a $25,000 bond.[84] This report supports the

78. *Id.*

79. *See id.*

80. *See id.* In addition to disparate applications of the law, swells of different types of cases reaching different immigration courts contribute to these inconsistent grant rates. Dzubow, *supra* note 67. Some immigration courts, like Houston, are likelier, due to proximity, to receive Central American asylum applicants fleeing gang persecution, who are less likely to neatly fit into one of the prescribed grounds for asylum. *Id.* Larger numbers of these disfavored cases may lead to lower grant rates in the southern United States. *Id.*

81. Jeremy Redmon, *Winning Asylum Is Tough in Georgia's Immigration Courts*, ATLANTA J.-CONST. (Apr. 18, 2014), https://www.ajc.com/news/national-govt—politics/winning-asylum-tough-georgia-immigration-courts/lQpQfNsmOALlIX8sB2HXXP [https://perma.cc/Q753-83PK].

82. Letter from Hallie Ludsin, *supra* note 23.

83. *Id.*

84. *Id.* In 2018, the median U.S. immigration bond was approximately $7,500. *Three-fold Difference in Immigration Bond Amounts by Court Location*, TRAC IMMIGRATION, http://trac.syr.edu/immigration/reports/519 (last visited Jan. 8, 2019). In most Atlanta immigration court cases, the students observed "[i]mmigration [j]udges den[ying] bond to immigrant detainees[] or set[ting] bonds at a prohibitively high amount." Letter from Hallie Ludsin, *supra* note 23.

idea that Atlanta's remarkably low asylum grant rates result in part from insufficient attention and resources for asylum seekers' due process rights.

According to the Georgia Commission on Interpreters, courts must "provide access to competent professional interpreters to ensure understanding and participation for all non-English speaking persons" facing the court.[85] The Atlanta Immigration Court's casual approach to in-court interpretation suggests, at best, a cursory commitment to ensuring immigrants' due process rights. At worst, the Atlanta Immigration Court's documented behavior toward immigrants reveals contempt toward asylum seekers that is seemingly unmatched by other immigration courts. The Eleventh Circuit's reluctance to overturn, or even challenge, the lower courts' continued application of social visibility represents a missed opportunity to remind the Atlanta Immigration Court of its due process and humanitarian obligations to asylum seekers.

1. The Eleventh Circuit's Application of Social Visibility to Claims Based on Gang Opposition

Beginning with *Castillo-Arias*, the Eleventh Circuit has used the social-visibility requirement to justify the lower courts' growing distaste for gang-based asylum claims.[86] These claims are particularly vulnerable to the harsh social-visibility requirement because people persecuted by gangs typically try their best *not* to be recognizable as gang targets.[87] Central America's Northern Triangle (El Salvador, Guatemala, and Honduras) contains some of the most violent countries in the world.[88] Gangs in these countries have

85. *Georgia Commission on Interpreters*, JUD. COUNCIL GA., http://coi.georgiacourts.gov/ [https://perma.cc/PLW4-VQLE] (last visited Mar. 15, 2019).

86. Castillo-Arias v. U.S. Attorney Gen., 446 F.3d 1190, 1194 (11th Cir. 2006).

87. *See* U.S. DEP'T STATE, EL SALVADOR 2016 HUMAN RIGHTS REPORT 13 (updated 2017).

88. Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle [https://perma.cc/Q753-83PK] (last updated Jan. 19, 2016). El Salvador in particular is the "world's most violent country not at war." *Id.* Of thirty million residents, "nearly 10[%]" of people from countries in the Northern Triangle have left, "mostly for the United States." *Id.*

assumed significant control; according to the most recent Human Rights Report for El Salvador:

> Each gang had its own controlled territory. Gang members did not allow persons living in another gang's controlled area to enter their territory, even when travelling in public transportation. Gangs forced persons to present identification cards (that contain their addresses) to determine where they lived. If gang members discovered that a person lived in a rival gang's territory, that person might be killed, beaten, or not allowed to enter the territory. Bus companies paid extortion fees to operate within gang territories, often paying numerous fees for the different areas in which they operated. The extortion costs were passed on to paying customers.[89]

Because gangs have amassed the power to restrict movement to the point where people who live in rival gangs' territories are killed simply for entering certain areas, gang victims are understandably reluctant to identify themselves as targets.[90] Just as a gay man in Brazil might do everything in his power to avoid presenting as gay because he is significantly more likely to be killed for his sexuality in Brazil than in the United States, people in Central America who oppose gangs must necessarily avoid making their opinions publicly known.[91] Legal critics argue that the Eleventh Circuit's continued application of the social-visibility requirement makes winning asylum nearly impossible for victims of gang persecution because people in societies overridden by gangs must hide their opposition to gangs to survive.[92]

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89. U.S. DEP'T STATE, *supra* note 87, at 16.

90. *Id.*

91. Vinicius de Vita, *An LGBT Person is Murdered Every 28 Hours in Brazil*, HUFFINGTON POST (July 11, 2016), https://www.huffingtonpost.com/vinacius-de-vita/one-lgbt-killed-every-28-_b_10927070.html [https://perma.cc/JH9F-EUZ6].

92. *See* U.S. DEP'T STATE, *supra* note 87, at 16.

2. Applicability to Gender-Based Claims

Just as those who oppose or work against gangs are not typically "visible" to society at large, minorities who suffer from gender-based persecution are frequently invisible (or encouraged to remain invisible) within their societies.[93] According to the most recent Human Rights Report from El Salvador:

> NGOs reported that public officials, including police, engaged in violence and discrimination against sexual minorities. Persons from the LGBTI community stated that the agencies in charge of processing identification documents, the PNC, and the Attorney General's Office harassed transgender and gay individuals when they applied for identification cards or reported cases of violence against LGBTI persons. The LGBTI community reported authorities harassed LGBTI persons by conducting strip searches and questioning their gender in a degrading manner. The government responded to these abuses primarily through PDDH reports that publicized specific cases of violence and discrimination against sexual minorities.[94]

Further, "a large portion of the population" in South America considers domestic violence "socially acceptable"; just as with rape, domestic violence is not widely reported.[95] This instinct to normalize

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93. *Id.*

94. *Id.*

95. *Id.* The report further details that in 2016:

> Laws against domestic violence were not well enforced, and cases were not effectively prosecuted. The law prohibits mediation in domestic violence disputes. Between January and July 2016, ISDEMU reported 21 cases of femicide, 458 cases of physical abuse, 385 cases of sexual violence, and 2,259 cases of psychological abuse. ISDEMU reported 3,070 cases of domestic violence against women during the same period. In June ISDEMU issued its 2015 annual report on violence against women and reported that 230 died due to violence in the first six months of 2015, compared with 294 during the same period in 2014 and 217 in 2013.

Id.

gender and sexuality-based violence in countries where this violence is rampant renders its victims invisible.[96]

Even when an applicant fought publicly against an oppressively silent society, the Eleventh Circuit relied on the social-visibility requirement to affirm the lower court's asylum denial.[97] In *Fejza v. U.S. Attorney General*, the Eleventh Circuit Court of Appeals denied asylum to a woman who, as a fifteen-year-old, was designated for an arranged marriage with a thirty-year-old man. When she refused to marry him, her father beat her badly.[98] Two years later, she fled to another village and married her boyfriend, which prompted death threats from her own family and from her previous fiancé and his family.[99] While she and her husband stood at a bus stop, the applicant's former fiancé fired gunshots at her and her husband.[100] After receiving continued threats over several years from her former fiancé and his family, the applicant fled to the United States with her daughter.[101] The Eleventh Circuit affirmed the BIA's decision that "women in Albania who refuse their families' arranged marriages" do not belong to a cognizable Particular Social Group because "the record did not indicate that the members of this group are a distinct and recognizable group in Albanian society."[102] However, the applicant was apparently recognizable enough to her persecutors—even after disowning her family and fleeing to a different village, two different families managed to find her and threaten her for years until she left the country.[103] The BIA suggested that her Particular Social Group failed because it was "not defined by an economic, cultural, or ethnic grouping . . . or other characteristics that define[d] the group in other than in an amorphous fashion."[104] Aside from formally creating

96. *See id.*
97. Fejza v. U.S. Attorney Gen., 489 F. App'x 326, 329–30 (11th Cir. 2012).
98. *Id.* at 327–28.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 329–30.
103. Fejza v. U.S. Attorney Gen., 489 F. App'x 326, 328 (11th Cir. 2012).
104. *Id.* at 330.

a group to demonstrate her opposition to the longstanding cultural institution of arranged marriage and to patriarchal attitudes in Albanian society, it is unclear what more the applicant could have done to become socially visible.[105]

III. Proposal

In 2011, the Eleventh Circuit Court of Appeals considered the possibility of rejecting the social-visibility requirement, acknowledging an asylum seeker's argument that social visibility is "arbitrary, inconsistent, and contrary to the law."[106] Somewhat reluctantly, the court ultimately decided it was "bound" to apply social visibility because the requirement had not been struck down by the Supreme Court or by the Eleventh Circuit Court of Appeals en banc.[107] Here, five years after *Castillo-Arias*, the Eleventh Circuit Court of Appeals explicitly considered criticism of the social-visibility requirement and demonstrated a potential willingness to reconsider the requirement in the future.[108] In 2019, the Eleventh Circuit, which unlike several other circuit courts has not yet discussed *Matter of A-B*, has the opportunity to reject lower courts' overt hostility toward those seeking asylum based on persecution stemming from gender or gang violence.

The Eleventh Circuit should revisit its position in *Pierre v. U.S. Attorney General* in light of the UNHCR's clarification and criticism of the BIA's social-visibility requirement, imposed after

105. See Albania: Forced Marriages of Women, Including Those Who Are Already Married; State Protection and Resources Provided to Women Who Try to Avoid a Marriage Imposed on Them, IMMIGR. & REFUGEE BOARD CAN. (Aug. 13, 2015), https://www.ecoi.net/local_link/311896/436061_en.html [https://perma.cc/7SL6-8ECF]. Nongovernmental organizations report that "forced marriages occur frequently, especially in rural areas and informal settlements; however, 'real figures do not exist' regarding the incidence [sic] forced marriage . . . ." Id. Although "society in general does not approve [of] forced marriages," they are a "well[-]known phenomenon in the country, especially in rural remote areas" where "patriarchal menalit[ies]" are more prevalent. Id.

106. Pierre v. U.S. Attorney Gen., 432 F. App'x 845, 847 (11th Cir. 2011).

107. *Id.* at 848.

108. *Id.*

misinterpreting UNHCR guidance.[109] By rejecting this requirement and adopting a more nuanced test for Particular Social Groups, the Eleventh Circuit would encourage immigration courts with wildly disparate outcomes to again reach decisions consistent with the international agreements that formed the basis for United States asylum law and with the original *Matter of Acosta* line of asylum decisions.

A. The Eleventh Circuit Should Adopt the UNHCR's Clarified Guidance Suggesting Social Visibility as an Alternative Basis for Forming a Particular Social Group

Although the UNHCR's guidelines are not binding on United States asylum law, as previously discussed, the UNHCR is the "guardian" of the 1951 Convention—the source of United States asylum law; moreover, the BIA relied on its interpretation of the UNHCR's 2002 guidance to impose the social-visibility requirement.[110] The UNHCR called for a reconciliation of the "immutability" and "social perception approaches" with a single standard for Particular Social Groups: "persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society."[111] The BIA then described visibility

109. Brief for Refugees as Amicus Curiae, *supra* note 64, at 6.

110. C-A-, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006); *Guidelines on International Protection*, supra note 49, at 1; THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL, supra note 28, at 6. The Board of Immigration Appeals (BIA) characterized the UNHCR's guidelines as "combin[ing] elements of the *Acosta* immutable or fundamental characteristic approach, as well as the Second Circuit's 'social perception' approach." C-A-, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006). The BIA also interpreted the guidelines to "confirm that 'visibility' is an important element in identifying the existence of a particular social group." *Id.* at 960. Those guidelines, "intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers, and the judiciary," in part urged that "particular social group 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." *Guidelines on International Protection*, *supra* note 49, at ¶ 3.

111. *Guidelines on International Protection*, *supra* note 49, at ¶ 6 (emphasis added). UNHCR added:

> This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a

as an "important element in identifying the existence of a particular social group."[112]

Given the UNHCR's integral role in originating and contributing to the evolution of United States asylum law, the Eleventh Circuit should recognize the UNHCR's caution against the BIA's overreliance on social visibility by following the UNHCR's Particular Social Group definition: "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."[113] The Eleventh Circuit should correct the BIA's misinterpretation of the UNHCR's "alternate approaches" as "dual requirements" and thus restore the circuit's consistency with the *Matter of Acosta* line of cases.[114] In light of the "overwhelming constitutional concerns"[115] associated with returning an asylum seeker to a country that he believes will torture or kill him, the Eleventh Circuit should retreat from its current level of deference to the BIA and adopt the UNHCR's clarified guidance to standardize lower courts' inconsistent asylum grant rates and correct for biases against asylum seekers in immigration courts like Atlanta with outlying denial rates.

This rule adds social visibility as an *alternative* to *Matter of Acosta*'s immutable-characteristic test, helping adjudicators "identify and discern social groups that exist in a particular society, without opening up . . . ground" for Particular Social Groups "to become a 'catch all' classification" for claims that simply do not merit asylum

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> social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.

Id. at ¶ 12.

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

113. *Guidelines on International Protection*, *supra* note 49, at ¶ 11. The UNHCR also notes that "the Board in *Acosta* did not require either a 'social perception' or 'social visibility' test, and [we] would caution the Board against adopting such a rigid approach which may disregard groups that the Convention is designed to protect." Brief for Refugees as Amicus Curiae, *supra* note 64, at 10.

114. Brief for Refugees as Amicus Curiae, *supra* note 64, at 5.

115. Matthew F. Soares, *Agencies and Aliens: A Modified Approach to* Chevron *Deference in Immigration Cases*, 99 CORNELL L. REV. 925, 933 (2014).

relief.[116] For example, this test would not allow a proposed group that the Eleventh Circuit Court of Appeals previously rejected ("attractive women sexually harassed by government or police officers")[117] to amount to a cognizable Particular Social Group. Attractiveness is not a characteristic "so fundamental to individual identity or conscience" that it can be considered immutable.[118] This asylum claim, which was previously rejected by the Eleventh Circuit, would still fail under the more reasonable alternatives test. The addition of immutability as an *alternative* basis to social visibility for forming a Particular Social Group will not open the floodgates to undeserving "catch[]all" cases; instead, it will produce outcomes in the same spirit as *Matter of Acosta* and reduce the wide variances in asylum adjudications between judges.[119]

1. Effects on Gender-Based Particular Social Groups

Reintroducing immutability as an alternative to social visibility will lead to fairer outcomes for gender-based Particular Social Groups. Gender, which is excluded from the primary four bases for asylum (race, religion, nationality, and political opinion), is a target for numerous forms of persecution.[120] Immigration courts currently fail to "respond to the urgent needs" of women subjected to persecution in their countries of origin.[121] The primary cause of this failure is the stringent application of social visibility to claims of persecution based on gender. Women who oppose female genital mutilation, women who oppose arranged marriages, and transgender women, for example, must by necessity remain invisible in

116. Brief for Refugees as Amicus Curiae, *supra* note 64, at 9–10.

117. Udesh v. U.S. Attorney Gen., 518 F. App'x 921, 924 (11th Cir. 2013).

118. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

119. *See id.*; Brief for Refugees as Amicus Curiae, *supra* note 64, at 5.

120. 8 C.F.R. § 208.13(b)(1) (2018). The UNHCR acknowledged that asylum has been approached through "male experiences," meaning that "many claims of women and of homosexuals[] have gone unrecognised [sic]." UNHCR, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 5, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

121. Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102 (1980).

oppressive societies. Returning to women the ability to present an immutable characteristic as the basis for a Particular Social Group rather than requiring women to lay bare their vulnerabilities in public would represent a "logical and disciplined application of the law" that takes a "middle-ground approach" to recognize gender-based groups.[122] The immutable-characteristic test "acknowledge[es] that the Particular Social Group category was meant to expand relief" beyond race, religion, nationality, and political opinion but not to the point that the test becomes "inconsequential."[123]

Under the "alternatives" framework proposed by UNHCR, *Fejza v. U.S. Attorney General* would have a more reasonable outcome. No longer constrained by social visibility, the court would be free to find that the asylum seeker's opposition to and defiance of forced marriage amounted to an immutable characteristic because her resistance to societal norms is fundamental to her identity, conscience, and exercise of her human rights.[124] Thus, under this alternative framework, women opposed to forced marriages could escape their predicaments without having to prove that they were *perceived* in society as cultural opposition. By removing the perverse incentive for vulnerable individuals to project their opposition to government or cultural forces of persecution to society at large, the

122. Jesse Imbriano, Note, *Opening the Floodgates or Filling the Gap?:* Perdomo v. Holder *Advances the Ninth Circuit One Step Closer to Recognizing Gender-Based Asylum Claims*, 56 VILL. L. REV. 327, 344 (2011).

123. *Id.* To those who would argue that this treatment of gender-based claims would "open the floodgates," Imbriano responds:

> Emphasis on the size of the social group is misplaced. Appropriate interpretation of the refugee definition does not require that a particular social group be a small category but actually suggests that it is a very large category parallel to race, religion, and nationality. Additionally, concern for the size of the group ignores the importance of other requirements for protection under asylum law. Recognition of a gender-based particular social group does not grant blanket asylum to all women in the cited country. Female victims of random criminal activity, for example, would not be eligible for asylum. If an immigration judge finds that a female asylum applicant was victimized through an individualized attack, unrelated to her identity as a woman, the judge will not approve her claim for asylum.

Id. at 350–51.

124. Fejza v. U.S. Attorney Gen., 489 F. App'x 326, 329 (11th Cir. 2012); *Guidelines on International Protection*, *supra* note 49, at ¶ 11.

Eleventh Circuit can help restore reasoned compassion to the asylum process in the southeastern United States.

2. Effects on Gang-Based Particular Social Groups

Likewise, allowing immutability as an alternative to social visibility will result in fairer adjudications of gang-based asylum claims in southeastern immigration courts. People like Heidy, who expressly oppose gang practices through words or action, would have the opportunity to prove that their anti-gang positions are characteristics fundamental to their identity or conscience.[125] Under this framework, the success of Heidy's claim would not hinge upon showing that gang members limited their persecution to students like Heidy and that people like her opposed to the gangs were "generally . . . recognizable by others in the community."[126] The fact that gangs target many groups of people should not preclude their lower profile opposition from winning safety from persecution.

The Eleventh Circuit is hesitant to exercise its discretion favorably toward gang-based asylum claims. Indeed, these claims are unpopular—some in the judiciary view being targeted by gangs as a poor reflection on asylum seekers' own characters, or at best, a nonactionable instance of a country "hav[ing] problems effectively policing certain crimes."[127] This current approach only punishes those courageous enough to defy the gangs. The Eleventh Circuit should encourage opposition to gangs among asylum seekers by applying the UNHCR's framework and by welcoming "individuals who have rejected the gangster lifestyle and have been persecuted and harmed as a result of that rejection."[128]

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125. Vasquez v. U.S. Attorney Gen., 345 F. App'x 441, 445 (11th Cir. 2009); *Guidelines on International Protection*, *supra* note 49, at ¶ 11.

126. *Vasquez*, 345 F. App'x at 446.

127. A-B-, 27 I. & N. Dec. 316, 316 (U.S. Attorney Gen. 2018) (interim decision) , *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018) (appeal filed D.C. Cir. Jan. 30, 2019); *see* Cantillo-Charris v. U.S. Attorney. Gen., 382 F. App'x 817, 819–20 (11th Cir. 2010); Navas-Villanueva v. U.S. Attorney Gen., 338 F. App'x 859, 861 (11th Cir. 2009); Gomez-Benitez v. U.S. Attorney Gen., 295 F. App'x 324, 326 (11th Cir. 2008).

128. Lorena S. Rivas-Tiemann, *Asylum to a Particular Social Group: New Developments and Its*

Adopting immutability as an alternative to social visibility would realign decisions with *Matter of Acosta*. For example, former military members who testified against illegal armed groups in Colombia who are not sufficiently socially visible because they testified in "private" criminal proceedings[129] would no longer be barred from asylum. These applicants could again rely upon the immutable fact of their military service and recorded opposition to gangs when applying for asylum. By allowing those opposed to gangs to gain asylum through an immutable characteristic rather than recognition by society (for example, young men who protested MS-13 but, despite belonging to a formal group, were not recognized by society as MS-13's opposition),[130] the Eleventh Circuit would restore consistency to the Particular Social Group analysis.

CONCLUSION

By continuing to accept lower courts' strict application of social visibility as a requirement for cognizable Particular Social Groups, the Eleventh Circuit excludes meritorious asylum claims and condones troubling behavior toward asylum seekers. The current application of the social-visibility requirement punishes vulnerable groups for hiding their vulnerabilities within hostile societies. To

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Future for Gang-Violence Victims, 47 TULSA L. REV. 477, 501 (2011). Rivas-Tiemann recognizes the value of the immutability test for gender and gang-based particular social groups:

> On the other hand, both groups of gender violence and gang violence victims have a greater opportunity to pass the *Acosta* test. The characteristics of having intact genitalia, being involved with a male companion who practiced male domination through violence, and refusing to join a gang are all common characteristics that cannot be changed or should not be made to change. Additionally, the youth characteristic that many gang violence victims use also meets the Acosta test because a person cannot change their age. Therefore, the particular social groups consisting of gang violence victims would meet the Acosta test and be able to proceed to the rest of the asylum analysis. Since the social visibility test has not been used for victims of FGM and domestic violence, it should similarly be rejected and not used for victims of gang violence.

Id. at 499.

129. Granados v. U.S. Attorney Gen., 578 F. App'x 866, 871–72 (11th Cir. 2014).

130. *Navas-Villanueva*, 338 F. App'x at 861.

reach decisions consistent with the United States's original asylum law, the Eleventh Circuit should adopt the immutability-and-social-visibility-alternatives test proposed by the UNHCR. This adoption would correct the lower courts' misapplication of UNHCR guidance and provide fairer remedies for vulnerable but less visible groups seeking refuge from persecution. Even more critically, adopting the UNHCR's test would send an important message to immigration courts like Atlanta's with outlying denial rates: the social-visibility requirement will no longer shield apathy and inconsistency.