A Proposal for Defining a Core Zone of Protection Under Membership in a Particular Social Group: Refocusing the Analysis to Utilize Both the *Social* Visibility Component and the *Group* Immutability Component Approach.

Stanley Radtke
University of San Francisco, School of Law
May 11, 2007

INTRODUCTION

> *Every spot of the world is overrun with oppression. Freedom hath been hunted round the globe. Asia and Africa have long expelled her. – Europe regards her like a stranger, and England hath given her a warning to depart. O! receive the fugitive, and prepare in time an asylum for mankind.*[1]

Gamil and Gamal were cowering inside their uncle's house, fearful of their father's homicidal rage.[2] Salah Al Hassan, the boys' father, burst into the uncle's house waving a gun and screaming, "I'm going to kill those bastards." The boys' uncle struggled with Al Hassan, grabbing the gun and wrestling him to the ground, trying to save the boys' lives.

Al Hassan's rage was triggered by the ridiculing he had just received by a local police officer who mocked him, "you're not a man, you're not man enough, or your children would not be like this [illegitimate]." The police officer continued to excoriate Al Hassan, shaming him with the fact that he had been cuckold, as the boys were not his, "and this has brought shame to your family."

As the boys' uncle pleaded with Al Hassan to spare their lives, the patriarch of the family, Al Hassan's father was summoned to the house. The grandfather arrived and brokered a deal to spare Gamal and Gamil's lives. The uncle was given a sixty-day reprieve in order to sheppard them out of the country. He procured travel documents, passports, and obtained tourist visas for entry into the United States. Once safely inside of the U.S., the boys applied for political asylum, basing their claim on membership in a

---

[1] Thomas Paine, *Common Sense* (1776). http://www.bartleby.com/133/3.html (last viewed January 20, 2007).

[2] This hypothetical is based on a true story of two Yemeni refugee brothers. *See Al-Omaisi, et al v. Gonzales*, No. 05-70615 (9th Cir. filed Aug. 19, 2005).

particular social group.[3] Their proposed social group comprises illegitimate children born into an Islamic country, under the strict Law of *Sharia'a*.

Gamil and Gamal's claim for asylum is based on the persecution they faced and would continue to face solely on account of their innate status as illegitimate children in the Country of Yemen. In Muslim countries, such as Yemen, where the Islamic Law of *Sharia'a* is codified as the supreme law of the land, the religiously based abhorrence of illegitimacy and the subsequent taint of adultery that accompanies any out-of-wedlock child has a profound and dramatic impact. Illegitimate children under *Sharia'a* suffer, at best, unequal treatment; at worst they suffer abandonment by the birth mother[4] or sometimes become the targets of an honor killing,[5] such as almost caused the death of the boys at the hands of their putative father.

Yet, United States political asylum law and jurisprudence fails to recognize a claim for a particular social group based upon the status of illegitimacy within an Islamic country that incorporates the Law of *Sharia'a*. Initially, the boys' asylum application was denied by the asylum hearing officer. Next, the Immigration Judge held that the boys' claim was "entirely too speculative," opining, "it appears to be a social group of

---

[3] Membership in a particular social group is only one of the five enumerated grounds in the Immigration and Nationality Act ("INA"). The relevant parts of the statute states, "any person who is outside any country of such person's nationality . . . who is unable or unwilling to return to . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42); 8 U.S.C. § 1101(a)(42).

[4] The Edhi Foundation in Karachi, Pakistan estimates that more than 500 abandoned infants, the children of unmarried women, are found dead in 'gutters, trash bins, and on the streets' every year." Safir Syse, *The impact of Islamic law on the implementation of the Convention on the Rights of the Child: The plight of no-martial children under Shari'a*, 6 Int'l J. Child. Rts. 359, 379 (1998).

[5] "It is estimated by the United Nations Population Fund that as many as 5,000 women and girls are murdered by family members each year in so-called "honor killings" around the world." Hakim Almasmari, *Honor crime in Yemen: Unjust against women*, Yemen Observer, Oct 3, 2006, *available at* http://www.yobserver.com/article-11025.php.

two individuals, the respondents only."[6] Subsequently, the Board of Immigration Appeals ("BIA") denied the case appeal finding the boys had "failed to establish that illegitimate children are persecuted in Yemen on account of such status."[7] This left the boys' with no administrative relief and facing a deportation order back to Yemen. Their last recourse was a petition for review before the Ninth Circuit Court of Appeals for consideration of their unique claim for membership in a particular social group.[8] At each step in the process, the adjudicator was hamstrung by the current understanding of what permissibly constitutes a particular social group under U.S. law.

The current analytical approach employed in assessing the merits of a new and novel claim for asylum, based upon "membership in a particular social group," looks to define an outer boundary, or attempts to draw a bright-line rule where relief is granted or denied. This line drawing approach has proven to be exceedingly difficult in practice, as there currently is no agreed upon definition of what constitutes membership in a particular social group, let alone an agreed upon test for evaluating such a claim.

By establishing such a core zone of protection, decision makers can feel secure in deciding the cases that then fall squarely within this zone, and alternatively, offer a touchstone, or threshold, as a point of comparison in deciding the more difficult outlying penumbral cases. However, this Comment makes no suggestions, nor attempts to argue for any limitation to the protection afforded individual asylees under a social group claim. This Comment is not suggesting nor advocating a downward spiral of protection towards the lowest common denominator. Rather, this Comment attempts to reinvigorate the

---

[6] *Matter of Al Omesi et al.*, Oral Decision of Immigration Judge Paul D. Grussendorf, San Francisco Immigration Court, dated June 17, 2003, pg. 14.
[7] *Matter of Al Omesi et al.*, *Per Curiam* Decision of the Board of Immigration Appeals, dated January 24, 2005.
[8] Al-Omaisi, et al, *supra* note 2.

protection for bona fide refugees as originally intended under international law and to differentiate these asylees from ordinary immigrants.

This Comment suggests an alternative approach to analyzing new and novel claims for membership in a particular social group by calling for defining a core area of protection that can be supported and delineated within the current refugee definition. The current approach in adjudicating any social group claims derives from seminal decision by the Board of Immigration Appeals in *Matter of Acosta*.[9] This approach is essentially a line drawing attempt to create an outermost limit as to which claims establish a social group for the purposes of refugee protection. This approach only looks at one side of the coin, it looks only to the inherently internal component of any social group claim, the group's unifying foundational characteristic, i.e., on what basis the group is formed and is differentiate from others in society.

This Comment suggests an alternative approach that looks not only to the internal unifying characteristic of the "particular social group," but also to the flip side of the coin, which is the external cognizability of the proposed social group. Through this integrated analysis of looking for both the "social" or externally visible component and the "group" or inner component, a core zone of protection can be identified. It is this eternally visible component of social cognizability or social perception, in conjunction with the internal innate or immutable characteristic that can establish the validity of a new and novel social group claim by showing whether the novel claim falls squarely within the core zone of intended protection.

[9] "Members of the group must share a common, immutable trait or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

Thus, when an asylee can affirmatively establish that their social group claim comports with both aspects of the analysis, this should be an easy case for decision-makers because such a claim falls much closer to the core zone of protection that was the intent under the refugee definition.

One additional benefit in using both the social visibility test in conjunction with the immutable characteristic test is that such an approach provides a touchstone that can assure decision-makers that any novel social group claim remains tethered to a core foundational principle underpinning refugee law.

This Comment contains three sections. After this introduction, Part I briefly describes the extent of the current problem with the existing social group definition and the problems courts encounter when adjudicating a new and novel claim. Part II looks at the historical intent of the 1951 Convention Framers for guidance as to the extent of the protection afforded under the "particular social group" ground. Then using the endorsed interpretive doctrine of *ejusdem generis*,[10] this Comment looks for commonality and a unifying component between the enumerated grounds. Next, Part II briefly looks at case law precedent that has held for a social cognizabilty approach to determining whether a social group falls within the zone of protection, using both U.S. decisions and other international common law jurisdictions. Finally, Part II examines relevant policy issues such as the looming indeterminacy within the existing law and the floodgates fear to supports this Comments argument that a social cognizability component is an integral

[10] "A cannon of construction that when a general word or phrase follows a list of specifics, the general word of phrase will be interpreted to include only items of the same type as those listed. For example; in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animal*, the general language *or any other farm animal* – despite its seeming breadth – would probably be held to included only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens." Blacks Law Dictionary 556 (8th ed. 2004).

part in defining a core zone of protection under the social group ground. Part III applies the dual social and group component analysis to Gamil and Gamal's novel social group claim for membership in a particular social group based on the status of being born illegitimate under the strict Islamic religious laws of *Sharia'a*.

I. BACKGROUND

One traditional definition of a political refugee is an individual for whom the bonds of trust, loyalty, protection, and assistance existing between a citizen and his country has been replaced by the relationship of an oppressor and his victim.[11] Implicit in this refugee definition is the idea that such an individual is in need of international protection. Thus, international protection is premised upon the idea that an individual's country of origin is not safe and cannot protect the individual from persecution.

The current enforceable definition of who may be granted political asylum lists five enumerated grounds, race, nationality, religion, membership in a particular social group, and political opinion.[12] Among the five grounds, social group claims are the least well defined. Perhaps the social group ground is the most complex and difficult to understand because "there is relatively little precedent about the meaning of what is necessary for the formation of a social group and what precedent exists is often subject to conflicting interpretations.[13] Therefore, when a court or immigration judge is confronted with a new and novel claim for membership in a particular social group, there is

---

[11] *Matter of Acosta*, 19 I&N Dec. 211, 223 (BIA 1985).
[12] *See* INA § 101(a)(42); 8 U.S.C. § 1101(a)(42).
[13] Asylum and Withholding Definitions, 65 Fed. Reg. 76589, 76593 (Dec. 7, 2000) (to be codified at 8 CFR Part 208).

relatively little precedent, nor legislative history to guide the decision-maker in ascertaining the merits of such a claim.

This problem of lack of guidance was recognized by the Department of Justice ("DOJ") in its most recent attempt to rectify this definitional vagueness in its proposed rule change to the definition of membership in a particular social ground. "In recent years . . . the United States increasingly has encounter asylum and withholding applications with more varied bases . . . Many of these new types of claims are based on the grounds of 'membership in a particular social group,' which is the least defined."[14] The DOJ continued, "[s]ome of these cases have raised difficult analytical questions about the interpretation of the refugee definition, question that have not always been address consistently through the administrative adjudication and judicial review process."[15] Looking at the history of these social group decisions leaves no clear delineation between what constitutes a particular social group and what does not. There is no consistency between various immigration judges, courts, and different jurisdictions leaving an impression that this area is slipping into confusion and potentially indeterminacy. When the immigration judge and the BIA confronted Gamal and Gamil's novel claim for a social group comprising illegitimate children under the Islamic Religious Code of *Sharia'a*, they were limited in their analytical approach and ultimately failed to find that the boys comprised a discrete and discernable social group.

[14] Asylum and Withholding Definitions, 65 Fed. Reg. 76589 (Dec. 7, 2000) (to be codified at 8 CFR Part 208).
[15] *Id*.

A. Brief History of Refugee Definition

The current U.S. statutory definition[16] of "refugee" originates in the 1951 United Nations Convention relating to the Status of Refugees (the "Convention").[17] While the United States never ratified the 1951 Convention, it did accede to the 1967 United Nations Protocol relating to the Status of Refugees (the "Protocol"),[18] which incorporated the refugee definition without substantive review or alteration.[19]

When the United States Congress ratified the 1967 Protocol, it indicated the United States' intention to follow international obligations and recognized international standards on the treatment of refugees.[20] Congress followed up on its international obligation twenty-seven years ago, when it passed the Refugee Act of 1980 ("Refugee Act").[21] With the passage of this Refugee Act, Congress codified within the United States Codes, U.S. compliance with the treaty obligations it had undertaken twelve years previously. However, in doing so Congress offered no insight into the intended scope of the protection afforded a member of a particular social group, nor any intended definition of the ground.[22]

---

[16] "[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

[17] Convention relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259; 189 U.N.T.S. 150, [hereinafter "Convention"].

[18] Protocol relating to the Status of Refugees, entered into force October 4, 1967, 606 U.N.T.S. 8791, [hereinafter "Protocol"].

[19] James C. Hathaway, *The Law of Refugee Status*, 10 (Butterworths Canada 1991).

[20] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987) (stating that the 1967 Protocol demonstrated United States' intention to follow international human rights guidelines).

[21] Refugee Act, Pub. L. No. 96-212, 94 Stat. 103 (1980) (The provisions of the Refugee Act governing the law of asylum are incorporated into the current Immigration and Nationality Act. *See* 8 U.S.C. § 1158).

[22] The legislative history of the Refugee Act of 1980 contains no clarification of the term "social group." *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575 (9th Cir. 1986).

II. ARGUMENT

The logical locus in a search for what the intended core zone of protection under a particular social group claim starts with the 1951 United Nations Convention on the status of Refugees,[23] since this is the source of the currently used definition. The dual approach advocated by this Comment, advocating the use of the social visibility test in conjunction with the immutable characteristic test finds substantial support within the intent of the 1951 Convention Framers. Contemporaneous discussions surrounding the drafting of refugee definition show a clear refusal to extend the protections to persons whose migration is prompted by a natural disaster, broadly-based political or economic turmoil, or on account of war and would remain *de facto* excluded from the refugee definition.[24] This history is fairly unassailable and indicates the explicit intent of the Convention Framers was to limit refugee protection in the aggregate, and thus, inferentially, to limit protection under a social group claim. The essentially Eurocentric perspective of the original language and the historical context in which this language was crafted further supports this conclusion.

Additionally, the drafting history shows a concerted effort at thwarting the Soviet Bloc and the scope of protection was "stratified along Eastern and Western ideologies."[25] The 1951 Convention was essentially designed as a weapon to use against the Soviet Bloc in the impending Cold War, limiting refugee protection to individuals strictly on the basis of a deprivation of civil or political rights.

---

[23] Convention, *supra* note 17.
[24] James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int'l L.J. 129, 162 (Winter 1990).
[25] *Id.* at 145.

Thus, the Framers intent, the historical context, and the politicized nature of the refugee definition indicates that refugee protection was intentionally limited. The question of what is the intended core protection for membership in a particular social group is not clear. However, through inference to the limited discussion surrounding the insertion of this ground into the refugee definition and looking to the other grounds of protection, some form of group identification by society necessarily must differentiate the members from non-members, and therefore, the component of social cognizability is present to create this sense of otherness.

A. Framers of the 1951 Convention: Finding Original Intent

"The membership of a particular social group ground is the Convention ground with the least clarity. . . The ground must be given its proper meaning within the refugee definition, in line with the object and purpose of the Convention. It is important that its interpretation should not render the other Convention grounds superfluous."[26] Therefore, to understand the original role and scope of this ground, it is essential that the intent of the Convention Framers be understood. It is only through this type of inferential understanding that a core zone of protection can be discovered. On account of the ambiguity inherent within the refugee definition, many scholars, humanitarians, and courts argue for an expansive or expanding definition of what constitutes a "social group." However, this Comment does not seek to add to this already exhaustive exploration of seeking an outer limit, or bright-line rule delineating those protected from those unprotected. Rather, this Comment looks to highlight a core zone of intended

[26] *Summary Conclusions: membership of a particular social group*, Expert Roundtable organized by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law, San Remo, Italy , 6-8 September 2001; published in *Refugee Protection in International Law: UNHCR's Global Consolations on International Protection*, 312-13 (Erika Feller, Volker Turk, & Frances Nicholson eds. Cambridge University Press 2003).

protection, as envisioned and agreed upon by all the signatory nations to the 1951 Convection and 1967 Protocol.

As the 1967 Protocol had no substantive discussion[27] involving the fundamental refugee definition, the focus of any inquiry must be the 1951 Convention. The refugee definition, as created in international law by the 1951 Convention, is a term of art. More specifically, the text of the Convention itself fails to clarify the term "social group." The sole reference to the term is contained in the *travaux preparatories*.[28] Membership in a particular social group is the international law equivalent of Justice Potter Stewart's famous attempt at defining obscenity, "I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it . . . "[29]

Notwithstanding this dearth of express intent by the Convention Framers, there can be inferred a general outline of the Framers' intended protection for a social group member from looking at underlying motives driving the delegates to the 1951 Convention. First, these Framers were influenced in their decision-making by the unique historical moment in which they operated and the political events that overshadowed the Convention and its delegates. The Convention Framers were uniquely focused on the ongoing European refugee crisis, which resulted in the Eurocentric perspective of the

---

[27] "The drafting history [of the Protocol] nonetheless reveals a determination to avoid the discussion of fundamental issues of refugee protection, and particularly to steer clear of a strategy that would give rise to 'political discussion' of refugee issues in the General Assembly. There was clearly a risk that detailed discussion of the scope of refugee protection in the non-Western dominated General Assembly could have resulted in a broadening of the conceptualization of refugee status in line with regional shifts in the less developed world." James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int'l L.J. 129, 163-64 (Winter 1990).

[28] Mr. Sture Petren, the Swedish diplomat to the 1951 Convention, introduced membership of a particular social group as a last minute amendment: ". . . experience has shown that certain refugees had been persecuted because they belonged to particular social group. . . . Such cases existed, and it would be as well to mention them explicitly," James C. Hathaway, *The Law of Refugee Status*, 157 (Butterworths Canada 1991); *citing* Statements of Mr. Petren of Sweden, U.N. Doc. A/CONF.2/SR.3, at 14, November 19, 1951; and U.N. Doc. A/CONF.2/SR.19, at 14, November 26, 1951.

[29] *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

1951 Convention. Additionally, the Framers, having witnessed the horrors of the Nazi Holocaust just five years earlier were acutely aware of the real consequences of the international community's failure of not having a mechanism for providing protection to refugees. Finally, the looming Cold War overshadowed the ongoing work on the Convention because the frontier states that were still coping with the refugees from the Second World War were facing an new onslaught of émigrés escaping persecution in the Soviet Bloc nations.

1. Eurocentric Perspective of 1951 Convention

The 1951 Convention was drafted between 1948 and 1951 by a combination of United Nations organs, *ad hoc* committees, and a conference of plenipotentiaries.[30] This work was being performed in the shadow cast by the atrocities committed by the Nazis during the Second World War and the desire to avoid repetition of these atrocities. [31] Europe was still in the thralls of an ongoing humanitarian crisis as there still existed a massive number of internally dislocated Europeans refugees. Between 1948 and 1951, the International Refugee Organization[32] ("IRO") relocated more than 1 million Europeans to the Americas, Israel, Southern Africa, and Oceania.[33]

---

[30] James C. Hathaway, *The Law of Refugee Status*, 6 (Butterworths Canada 1991).
[31] James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int'l L.J. 129, 153 (Winter 1990).
[32] The Constitution of the IRO specified certain categories of refugees to be assisted, "victims of the Nazi, Fascist, or Quisling regimes which had opposed the United Nations, certain persons of Jewish origin, or foreigners or stateless persons who had been victims of Nazi persecution, as well as persons considered as refugees before the outbreak of the Second World War for reasons of race, religion, nationality, or political opinion." Guy S. Goodwin-Gill, *The Refugee in International Law*, 7 (Oxford University Press, 2d ed. 1996).
[33] James C. Hathaway, *The Rights of Refugees under International Law*, 91 (Cambridge University Press, 2005).

The Eurocentric approach is not surprising as the states that drafted and participated in the Convention were Western strategic and military allies.[34] It was successfully argued that the Convention should deal only with the refugees then of most interest to the Western states that dominated the conference. It should therefore not be surprising that in the final text of the Convention the international protection was limited both temporally and geographically to those refugees whose flight was prompted by a pre-1951 event within Europe.[35]

2. "Particular Social Group" Inserted as Insurance Against Future Holocaust

The undercurrent that was motivating the 1951 Convention was directly attributable to the revulsion that the civilized world experienced at the end of the Second World War upon the discovery of the full extend of the barbarism that the Nazi Regime exhibited in rounding up and exterminating the European Jewry and other people deemed to be unworthy. The unspoken conviction of the Convention was to prevent any reoccurrence of any such genocide.

In pursuing their work, the Convention Framers did not have to start from scratch; they had the existing IRO Constitution as a template. This Constitution specified certain categories of refugees to be assisted. The IRO definition was, "refugees included victims of the Nazi, Fascist, or quisling regimes which had opposed the United Nations, certain persons of Jewish origin, or foreigners or stateless persons who had been victims of Nazi

---

[34] James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int'l L.J. 129, 177 (Winter 1990).

[35] States were required to protect only European refugees, although they might elect to declare the Convention applicable to all post-1951 refugees without distinction. *See* Convention, *supra*, note 17, *ref.* 189 U.N.T.S. 2545, at Art.1(B)(1)(b)(2).

persecution, as well as persons considered as refugees before the outbreak of the Second World War for reasons of race, religion, nationality, or political opinion."[36]

It can be reasonably inferred that an integral part of the Framers' intent was to ensure that such a holocaust should never again occur and that some form of international protection for the potential holocaust victims be ccodified. Therefore, the last minute insertion of the social group ground can be seen as insurance that the atrocities visited upon the European Jewry and others the Nazi's deemed undesirable should never happen again. The amendment adding "membership in a particular social group" to the refugee definition was adopted without discussion by a voted of 14-0-8.[37]

The extent of this ground of protection however, is quite limited. "It is clear from the comments of the Swedish proponent of the social group category, Mr. Sture Petren,[38] and others that the Convention was designed simply as a means of identifying and protecting refugees from know forms of harm,[39] not of anticipating future, distinct types of state abuse."[40] Therefore, the most reasonable inference of the extent of the inner core of protection intended by the Framers in creating the social group ground is to provide a safety net, or insurance, for a group that cannot find protection ordinarily under the other four grounds of race, nationality, religion, or political opinion.

---

[36] Guy S. Goodwin-Gill, *supra* note 32, at 6.
[37] James C. Hathaway, *The Law of Refugee Status*, 157, fn. 153 (Butterworths Canada 1991).
[38] *Id*. at 157.
[39] "The United States successfully argued that the Convention should concern itself with 'neo-refugees,' the definition of which was broad enough to allow the inclusion of persons who had left their home since the Second World War as a result of political, racial or religious persecution, or those who might be obliged to flee from their countries for similar reasons in the future": Statement of Mr. Henkin of the U.S.A., U.N. Doc.E/AC.32/SR.3, at 10, January 26, 1950, *cited in* James C. Hathaway, *The Law of Refugee Status,* 159, fn. 169 (Butterworths Canada 1991).
[40] *Id*. at 159.

3. Cold War Influence

Another consideration to the complexity of the history of the Convention was the political overtone due to the onset of the Cold War. The Western Powers, and specifically the United States, looked for a strategy to address the impending refugee flows from the Communist states of the Eastern Bloc.[41] This political focus by the Western countries gave priority to providing protection to persons fleeing the Soviet Bloc. The Soviet Union conversely did not want to provide international protection under the refugee definition for political émigrés.[42] As result of this conflict, it was agreed to restrict the scope of protection by limiting the refugee definition to "only persons who feared 'persecution' because of their civil or political status."[43]

As illustrative of this political orientation, from 1946 through 2000, the United States gave legal permanent resident (LPR) status to 3.5 million refugees, asylees, and other humanitarian entrants.[44] Over half (53%) of all of those refugees and asylees were from three countries: Vietnam (19%), Cuba (18%), and the former Soviet Union (16%), all Communist or formerly Communist regimes.[45]

The current refugee definition is a compromise, forged in the Cold War, between the "sovereign prerogative of states to control immigration and the reality of coerced movements of persons at risk."[46] The fundamental purpose of international refugee law is not "specifically to meet the needs of the refugees themselves (as both the

---

[41] James C. Hathaway, *The Rights of Refugees under International Law*, 91 (Cambridge University Press, 2005).
[42] James C. Hathaway, *The Law of Refugee Status*, 6 (Butterworths Canada 1991).
[43] *Id*. at 7.
[44] Congressional Research Service Report, *U.S. Immigration Policy on Asylum Seekers*, CRS-2 (The Library of Congress, updated January 27, 2007).
[45] *Id*.
[46] James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee L*aw, 31 Harv. Int'l L.J. 129, 133 (Winter 1990).

humanitarian and human rights paradigms would suggest), but rather is to govern disruptions of regulated international migration in accordance with the interest of states."[47] The state interest that is being served by the refugee definition is to afford protection only to individuals being deprived of their civil or political rights. Any core zone of protection for a particularly social group must comport with this explicitly intended limitation. The dual analytical approach advocated by this Comment is fundamentally aligned with this limitation.

4. Explicit Rejection of Humanitarian or Human Rights Basis

Finally, the Convention Framers explicitly rejected an overarching humanitarian or human rights approach to international refugee protection. "French efforts to link refugee status to violations of fundamental human rights and to the general human right to seek asylum were summarily rejected as 'theoretical' and 'too far removed from reality.' In sum, neither a holistic view of humanitarian need nor of human rights protection was seen as the appropriate foundation for the new convention."[48]

The resulting refugee definition, of which the social group ground was included, was intentionally limited in scope and expressly circumscribed due to the political calculus of the time and the *realpolitik* events of the Cold War confrontation between the Western Powers and the Soviet Bloc. There is a strong inference from the history of the Convention that international refugee protections were intended to encompass only persons who were disenfranchised of their civil or political rights. Thus, the clear intent of the Framers was to offer international legal protection for refugees in only limited situations where a deprivations of a civil or political right occurs. Thus, careful scrutiny

---

[47] *Id*.
[48] James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int'l L.J. 129, 148 (Winter 1990).

of the original intent of the Framers indicates that social group protection was not expansive, almost an afterthought to include any group suffering a civil or political deprivation that did not fall under any of the other four grounds, the equivalent of the obscenity approach, "I'll know it when I see it."

B. *Ejusdem Generis* – Comparative Analysis of Four Other Grounds

Ever since Congress passed the Refugee Act and incorporated the Convention refugee definition into U.S. law, initial interpretation falls to the executive agency, in this instance, the Board of Immigration Appeals ("BIA"). The BIA has subsequently struggled to define what constitutes a particular social group by trying to elucidate one definition that can delineate a social group claim that is afforded protection from one that is not. The BIA specifically endorsed an approach recognizes that only those groups defined by possession of an innate or immutable characteristic.[49]

In their efforts to create a workable definition, the BIA explicitly endorsed the Doctrine of *Ejusdem Generis*[50] in their seminal decision, *Matter of Acosta.*[51] In the analysis of Acosta's claim, based on membership in a Salvadorian taxicab collective, the BIA held that there was a requirement of immutability based on the observation that the other four grounds of persecution enumerated in the refugee definition are immutable. However, two of the grounds said to be immutable are clearly capable of change, religion and political opinion.[52] These grounds, religion and political opinion are held to be

---

[49] David T. Parish, *Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 Colum. L. Rev. 923, 934 (May 1992).

[50] *Ejusdem Generis* is a doctrine of statutory interpretation where a law lists specific classes of persons or things and then refers to them in general; the general statements only apply to the same kind of persons or things specifically listed. For example: if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, "vehicles" would not include airplanes, since the list was of land-based transportation.

[51] *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

[52] David T. Parish, *supra*, note 49, at 937.

immutable in a different sense, "they are beyond the power of the holder to alter willfully, being the product of conscience," and it would be repugnant to force someone to change.[53]

The BIA in applying the Doctrine of *Ejusdem Generis* tried to decipher the extent of the protection afforded under a social group claim. This Comment suggests applying the same analytical approach of *ejusdem generis*, however, looking for a core zone of protection that clearly comports with the comparable protections afforded by the other four enumerated grounds. Much like diagramming the logical relationship between each enumerated ground and looking for the overlapping fields, as within a Venn diagram, to ascertain the core zone of protection within a social group claim.

1. Race and Nationality Grounds

Race is defined as "race, color, descent, or national or ethnic origin" and is a physical characteristic or perceived innate characteristic beyond the control or choice of the individual.[54] "While the drafters of the Convention did not specially define the term, the historical context makes clear that their intent was to include those Jewish victims of Nazism who had been persecuted because of their ethnicity, whether or not they actively practiced their religion."[55] This historical rationale is important in establishing the legitimatization of a broad social meaning to the term "race" to include all persons of identifiable ethnicity.[56] Thus, the fundamental attribute of this ground is the social cognizability of the individual to that associated race or ethnicity.

---

[53] Parish, T. David, *supra*, note 49, at 937.
[54] Deborah E. Anker, *Law of Asylum in the United States*, 407 (Refugee Law Center 1999).
[55] James C. Hathaway, *The Law of Refugee Status*, 141 (Butterworths Canada 1991).
[56] *Id*.

Nationality is closely linked to the notion of race or ethnicity. Race and nationality are physical attributes or imputed attributes that are primarily viewed externally.

Persecution on account of race and nationality by necessity must identify characteristics that distinguish them from others in society.[57] There is an inherent social visibility component implicit within these two enumerated grounds.

2. Religion and Political Opinion Grounds

The other two enumerated grounds, religion and political opinion, do not have the explicit external characteristic of race or nationality. However, religion includes behavior which flows from belief, and it is this behavior that comprises the socially visible component of the protection. If a religious adherent is indistinguishable from any other member of society, then the likelihood that they will be persecuted on account of their intimate belief is highly improbable. Thus, the enumerated ground of religion also has a necessary externally visible component that supports this Comment's advocating for the dual analytical approach of a unifying and fundamental component of social cognizability in order to ascertain a core zone of protection

Political opinion is somewhat more problematic in that some instances of persecution have been imputed to an individual without any type of overt act by the individual. Under this analysis, claims of neutrality have been found to form the basis of the persecution. Regardless, the claimant must necessarily be externally viewed as either having a particular political opinion, or not having a political opinion. Therefore, the political opinion ground still has this essentially external cognizable component for a

[57] Deborah E. Anker, *supra*, note 54, at 290.

claim. The society in which the claimant originates still necessarily must be able to identify the individual as a member of the group from any other member of the society.

In a comparison of the four enumerated grounds, one of the intrinsic threads that ties all the various protections together is the core necessity of otherness -- being distinguished from the others in society that then forms the basis for persecution. Therefore, in using the *ejusdem generis* cannon of statutory construction in comparing the four enumerated grounds with the social group ground, the implicit overlapping constant between the various grounds is necessity that the claimant be socially cognizable. This result supports this Comment's contention that looking for a core zone of protection within the social group ground should incorporate the social cognizability test in any analytic approach.

C. Precedential Case Law Decisions – U.S. and International Courts

The use and application of the social cognizability approach, in conjunction with the current Immutable Characteristic Test, advocated by this Comment to identify a core zone of protection under the social group ground, finds explicit support and existing authority within the current body of decisional law of the U.S. Circuit Courts and from international common law jurisdictions. In addition, recent BIA decisions coupled with the 2002 Guidelines published by the United Nations High Commissioner on Refugees provide further evidence of the growing trend and recognition of the importance of using the two approaches in analyzing asylum claims.

1. U.S. Circuit Court of Appeals

The United States Supreme Court had never expressly decided the meaning of the what constitutes membership in a particular social group.[58] However, the U.S. Supreme Court had consistently taken the methodology of "plain meaning" or "textual" approach in its interpretation of the 1951 Refugee Convention and its domestic law analogues.[59]

Without a decision on point, the various U.S. Circuit Courts have tried to define what constitutes a social group by adhering to a textual approach. Different Circuit Courts have reached the three different logical conclusions that can be derived from the phrase "membership in a particular social group."

By first looking to the word "group," a strict textual analysis would require that some characteristic identifies and distinguishes the group from any other set of individuals by a unifying relationship. Logically flowing from this analysis is a definition that requires some immutable or unifying characteristic. This is the approach taken by the BIA in *Matter of Acosta* and subsequently endorsed by the First and Third Circuit Courts.

By next focusing on the word "social," a strict textual analysis would logically conclude that any definition would necessitate that the purported group be recognizable by the society in which it resides. The Second Circuit took this approach, which forms the basis of their "Externally Distinguishable Test."

Finally, by looking to the statutory words of both "particular" and "social," together which modify "group," one reasonable interpretation is that the term does not encompass every definable segment of a population. Instead, the phrase in the aggregate,

---

[58] Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. Rev. 733, 743 (Feb. 1998).
[59] *Id*.

implies a collection of people closely affiliated with each other, which is the logical conclusion of the Ninth Circuit's "Associational Test."

Thus, there is currently a split of authorities inside the circuit courts on this question of what constitutes a particular social group under the refugee definition; they are the (1) "Associational Test" from the Ninth Circuit,[60] (2) the "Externally Distinguishable Test" from the Second Circuit,[61] and (3) the "Immutable Characteristic Test" from the First and Third Circuits, [62] which essentially incorporates the test endorsed by the BIA in *Matter of Acosta*.

Whenever an asylum claim is presented before the administrative agency, either the immigration judge or the BIA is bound to decide any case coming before it on the basis of the law within the Circuit Court from which the case originates.[63]

a. Second Circuit's "Externally Distinguishable Test"

The approach taken by the Second Circuit supports and validates the necessity and importance for any society to be able to recognize the members of a purported social group. The Second Circuit held in *Gomez v. INS*, 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

---

[60] In *Sanchez-Trujillo v. INS*, 810 F.2d 1571, 1574-75 (9th Cir. 1986), the Ninth Circuit enumerated a four-part test for determining membership in a particular social group. The factors in the Ninth Circuit's test are generally preclusive criteria for social group formation and the Circuit continues to give it a narrow interpretation. Under this test, an applicant must: (1) identify a cognizable social group under the immigration statutes; (2) prove they are a members of that group; (3) prove the persecution is aimed at one of the group's unifying characteristics; and (4) show "special circumstances" that merit the recognition of a group-based claim.

[61] *See Gomez v. INS*, 947 F.2d 660 (2nd Cir. 1991).

[62] *See Fatin v. INS*, 12 F.3d 1233, 1239 (3rd Cir. 1993); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1rst Cir. 1985).

[63] "A federal agency is obligated to follow circuit precedent in cases originating within that circuit." *Singh v. Ilchert*, 63 F.3d 1501, 1508 (9th Cir. 1995); *quoting NLRB v. Ashkenazy Prop. Management Corp.,* 817 F.2d 74, 75 (9th Cir.1987), *cert. denied,* 501 U.S. 1217, 111 S.Ct. 2825.

in general."[64] In adopting this approach, the Second Circuit took the Ninth Circuit's "Voluntary Associational Relationship" standard, but additionally noted that the members of a social group must be externally distinguishable.[65] In *Gomez*, the court dismissed the asylum application of a Salvadorian women who claimed membership in a particular social group that was comprised of "women who have been previously battered and raped by Salvadorian guerillas."[66]

The court held that, "[l]ike the traits which distinguish the other four enumerated categories -- race, religion, nationality and political opinion -- the attributes of a particular social group must be recognizable and discrete."[67] The court opined, "Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics -- other than gender and youth -- such that would-be persecutors could identify them as members of the purported group."[68]

However, the Second Circuit's test differs from this Comment's thesis because the "Externally Distinguishable Test" is being applied in an effort to define which social group claims fall within the refugee definition, and thus, are afforded protection. This Comment suggests that the "Externally Distinguishable Test" be utilized in conjunction with the "Immutable Characteristic Test" to map out a core zone of protection within the social group ground.

2. International Common Law Jurisdictions

Other common law jurisdictions, such as the Australian High Court and Canadian Supreme Court have explicitly decided the meaning of social group under the Refugee

---

[64] Gomez, *supra* note 61, at 664.
[65] *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir. 2003).
[66] Gomez, *supra* note 61, at 663-64.
[67] Gomez, *supra* note 61, at 664.
[68] Gomez, *supra* note 61, at 664.

Convention. However, even within these other common law jurisdictions, there is a split of authorities in the approaches taken in defining a social group within the international Refugee definition, originating in the 1951 Convention.

a. High Court of Australia

The Australian High Court decided the meaning of membership of a particular social group in *Applicant A v. Minster for Immigration and Ethnic Affairs*,[69] and endorsed a two-fold approach, similar to this Comment's suggestion. The question before the Court was whether asylum applicants who asserted fear of forced sterilization because of their non-acceptance of China's one-child policy would fall within the refugee definition of a particular social group.[70] The Court adopted an ordinary meaning approach, holding that a social group must share a common, uniting characteristic that sets it apart for the society in which is exists.[71]

The Australian High Court began its discussion on the question by noting that "[t]he phrase is indeterminate and lacks a detailed legislative history and debate. Not only is it impossible to define the phrase exhaustively, it is pointless to attempt to do so."[72] However, after looking to the history of the Convention, decisions by the U.S. Circuit Courts and the Supreme Court of Canada, the Australian High Court held that what constitutes a particular social group is a "common attribute and a societal perception that they stand apart."[73] The court reasoned that, "[t]he existence of such a group depends in most, perhaps all cases on external perceptions of the group . . . the term

---

[69] *Applicant A v. Minster for Immigration and Ethnic Affairs,* 190 CLR 225, 265-6 (1997).
[70] Alexander T. Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group*," published in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 271 (Erika Feller, Volker Turk, & Frances Nicholson eds., Cambridge University Press 2003).
[71] *Id*.
[72] Applicant A, *supra* note 69, at 259.
[73] Applicant A, *supra* note 69, at 265-66.

particular social group connotes persons who are defined as distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them."[74]

This court went further through a textual analysis of the phrase "membership in a particular social group" and compared it to the other four enumerated grounds. The High Court concluded, "[o]nly in the 'particular social group' category is the notion of 'membership' expressly mentioned. The use of that term in conjunction with 'particular social group' connotes persons who are defined as a distinct social group by reason of some characteristic, attributes, activities, beliefs, interests or goals."[75] Justice Dawson opined that "not only must such persons exhibit some common element; the element must unite them, making those who share it a cognizable group within their society."[76]

This approach taken by the Australian High Court looks only to external factors -- whether the claimed social group is perceived as distinct by society -- rather than identifying a protected characteristic that defines the group.[77] The court did not sustain the applicants claim for asylum protection holding that the asserted social group was too disparate and represented only a collection of persons in China who objected to a general social policy. The social group had no social attribute or characteristic linking the couples, so there was nothing externally that would allow them to be perceived as a particular social group.[78]

The High Court of Australia's methodology is analogous to the U.S. Second Circuit's test in *Gomez*, emphasizing the critical nature the social group's unifying

---

[74] Applicant A, supra note 69, at 264.
[75] Applicant A, supra note 69, at 264.
[76] Applicant A, supra note 69, at 241.
[77] Alexander T. Aleinikoff, *supra* note 70, at 272.
[78] Alexander T. Aleinikoff, *supra* note 70, at 272-73.

characteristic being externally visible, somehow discernable by society. Without the particular social group being seen as somehow different or being outside of the society, membership within the group cannot form the basis of persecution and ultimately asylum protection.

b. Supreme Court of Canada

Alternatively, the Supreme Court of Canada endorsed an analytic approach along the lines taken by the BIA in *Matter of Acosta*, using the Doctrine of *Ejusdem Generis* as the method of interpretation resulting in the adoption of the "Immutable Characteristic Test" where decision-makers looks for a shared common innate or immutable characteristic.[79]

The leading Canadian case involving membership of a particular social group is *Canada (Attorney-General) v. Ward*.[80] This case involved the claim by a former member of the Irish National Liberation Army (INLA) who was sentenced to death by this group for aiding in the escape of hostages.[81] Applying this test to Ward, the Supreme Court of Canada held that he did not meet the Convention definition of a refugee for a number of reasons, but specifically, the court held that INLA itself did not constitute a particular social group because there was no innate or immutable characteristic uniting the putative social group.

As seen in the foregoing discussion, other international common law jurisdictions have wrestled with trying to define what a social group is for the purposes of

---

[79] Just as the BIA held in *Matter of Acosta*, the Canadian Supreme Court held that a particular social group can be either (1) a group defined by an innate or unchangeable characteristic, (2) a group whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; AND (3) groups associated by a former voluntary status, unalterable due to historical permance. *See* James C. Hathaway & Michelle Foster, *Membership of a Particular Social Group*, 15 Int'l J. Refugee L. 477, 480-81 (2003).

[80] *Canada (Attorney-General) v. Ward* , 2 SCR 689 (1993); 103 DLR (4th) 1 (1993) (hereinafter "*Ward*").

[81] Alexander T. Aleinikoff, *supra* note 70, at 268.

international protection and they have come to a familiar split in approaches. On the one hand is the immutability test endorsed by the BIA in *Matter of Acosta* and the Canadian Supreme Court in *Ward*. On the other hand is the social cognizability approach taken by the U.S. Second Circuit in *Gomez* and by the Australian High Court in *Applicant A*.

3. United Nations High Commissioner on Refugees

The United States Supreme Court held that in enacting the Refugee Act of 1980, "one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees."[82] When interpreting the definition of "refugee," U.S. courts are guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Id.* at 438–39.[83]

a. 1978 Handbook

The United Nations High Commissioner on Refugees ("UNHCR"), initially defined a particular social group as consisting of "persons of similar background habits or social status."[84] The 1978 Handbook published by UNHCR notes that "membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook."[85] Implicit in this definition is the recognition that a government must be able to distinguish the group from any others in society.

---

[82] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

[83] S*ee also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (recognizing the UNHCR Handbook as "a useful interpretative aid" that is "not binding on the Attorney General, the BIA, or United States courts").

[84] United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee States Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/4/REV.1, UNHCR, Reedited January 1992, ¶ 77. [Hereinafter *Handbook*]. The *Handbook* is viewed by the Supreme Court as an authoritative guide (although not formally binding) with respect to refugee status/asylum determinations. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

[85] Handbook, *supra* note 84, at ¶ 78.

Additionally, the Handbook states that a claim based on membership in a social group "may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality."[86]

This initial attempt at defining a social group under international law was subsequently materially modified after the U.N. held their Second Track of the Global Consultations on International Protection at the San Remo Expert Roundtable meeting held in September 2001.

b. 2002 Guidelines on International Protection

In 2002, the UNHCR published the conclusions of this international conference in their 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.[87]

Within these Guidelines, the High Commissioner's Office opined that "there is no closed list of what groups may constitute a particular social group within the meaning of Article 1A(2)."[88] However, the Guidelines summarizes the two dominant approaches taken by states in interpreting the Convention definition of a social group, first the "protected characteristic approach" or the "immutability approach" and the second is the "cognizability test" or the "social perception" approach.[89]

After evaluating the expert's discussions at the Roundtable meeting, the UNHCR's Office makes the bold assertion that the two dominant strands of analysis

---

[86] Handbook, *supra* note 84, at ¶ 77.
[87] 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*. HCR/GIP02/02, 7 May 2002, [hereinafter "Guidelines"].
[88] Guidelines, *supra* note 87.
[89] Guidelines, *supra* note 87, at § II.A.6-7.

currently bifurcating the refugee definition should be integrated into a single standard. "UNHCR believes that the two approaches ought to be reconciled,"[90] largely endorsing the work of Professor Aleinikoff, a noted scholar of refugee law.

Professor Aleinikoff presented his analysis at the UNHCR's San Remo Roundtable of the two approaches that have developed in common law jurisdictions, which have been called the "Protected Characteristics Test" and the "Social Perceptions Test."[91] The "protected characteristics" approach looks for the innate or immutable characteristic so fundamental to human dignity that a person should not be forced to forsake it.[92] Alternatively, the "social perception" approach examines whether the group shares a common characteristic that sets it apart for society at large.[93] "My proposal is that, rather than viewing the two approaches as inconsistent and competing analysis, one should conceptualize the protected characteristic as the core of the social perception analysis."[94] This result is so because immutable characteristics generally produced social perceptions, particularly when those characteristics are being used as the reason for persecution.[95]

"The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches."[96]

---

[90] Guidelines, *supra* note 87, at § II.B.10.
[91] Volker Turk and Frances Nicholson, *Refugee Protection in International Law: An Overall Perspective*, 17, published in *Refugee Protection in International Law: UNCHR's Global Consultations on International Protection*, (Erika Feller, Volker Turk, & Frances Nicholson eds., Cambridge University Press 2003).
[92] *Id*.
[93] *Id*.
[94] Alexander T. Aleinikoff, *supra* note 70, at 300.
[95] Alexander T. Aleinikoff, *supra* note 70, at 300.
[96] Guidelines, *supra* note 87, at II.B.11; the Guidelines propose an integrated definition as "a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is

The dual component analysis suggested by this Comment offers an alternative approach to the integration of the two competing standards. Professor Aleinikoff's approach is still to set a limit or boundary at which protection stops, looking at how far the social group definition can be stretched while still comporting to the statutory intent.

Professor Aleinkoff's analysis differs from this Comment's approach in that he suggests that the two tests be combined for the purpose of creating a single test to define for the scope of protection under a social group claim. This approach is distinguishable from this Comment's suggestion to look simultaneously at both the immutable characteristic and the social visibility components, for the purpose of identifying the core zone of protection. When both tests clearly show a social group that is persecuted on account of an innate or immutable characteristic that is socially cognizable, then an adjudicator can feel certain that this social group falls within the inner core of protection.

In sum, the UNHCR's recently adopted approach contained within their 2002 Guidelines is analogous and closely aligned to the efforts of the Department of Justice's contained in their published notice of a pending rule change to the social group definition.[97] Both of the advocated approaches will have a similar effect in creating a multi-factor test for adjudicating a social group claim. The DOJ's approach even goes further in offering six non-exclusive and non-determinative factors to use in weighing any such claim, seemingly creating a totality of the circumstances test or perhaps suggesting a sliding scale analysis.

---

innate, unchangeable, or which is otherwise fundamental to identify, conscience or the existence of one's human rights."

[97] *See Asylum and Withholding Definitions*, 65 Fed. Reg. 76589, 76593 (Dec. 7, 2000) (to be codified at 8 CFR Part 208).

4. U.S. Administrative BIA Decisions

Two recent BIA decisions reinforced the importance of social visibility in the particular social group determination. The Board approach in these decisions is consistent with the approach advocated by the Department of Justice in their proposed rule change to the regulation defining membership in a particular social group.[98]

The proposed rule change "provides a non-exclusive list of additional factors that may be considered in determining whether a particular social group exists."[99] The DOJ in advocating this non-exclusive, non-determinative factor test, is attempting to reconcile all the divergent approaches within the circuit courts, along with the existing agency decision.[100] The result of this attempted integration is essentially a totality of the circumstances test that does not provide a foundational and definable core of protection as advocated by this Comment. However, implicit in both the DOJ's proposed rule change and the most recent Board decisions in this area is the recognition of the importance of the social visibility component in determining any social group claim.

In 2006, the Board held in *Matter of C-A-*[101] that the social visibility of the members of a claimed social group is an important consideration in identifying the existence of a particular social group. Here the asylum applicant was asserting a claim for protection under a social group comprised of "noncriminal informants working

---

[98] *See* 8 C.F.R. § 208.15.

[99] Asylum and Withholding Definitions, 65 Fed. Reg. 76589, 76593 (Dec. 7, 2000) (to be codified at 8 CFR Part 208).

[100] The actual language in the proposed rule change lists the relevant factors as, § 208.15(c)(3)(iv) "The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;" and § 208.15(c)(3)(vi) "The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society," Asylum and Withholding Definitions, 65 Fed. Reg. 76589, 76593 (Dec. 7, 2000) (to be codified at 8 CFR Part 208).

[101] *Matter of C-A* -, 23 I&N Dec. 951 (BIA 2006).

against the Cali drug cartel."[102] The BIA held that this claimed group did not constitute a valid particular social group under the Refugee definition because of the lack of social visibility of the members of the purported group.[103]

In January of 2007, the BIA against held in *Matter of A-M-E & J-G-U-*, "the requirement that the shared characteristic of the group should be generally recognizable by others in the community."[104] The Board in this decision looked to the 2002 UNHCR Guidelines that endorsed the approach "in which an important factor is whether the members of the group are perceived as a group by society."[105]

D. Public Policy Considerations Supporting the Application of the Integrated Analysis of Social Group Claims

Several public policy considerations weigh in favor of identifying a process that helps to create some order out of the current chaos in asylum jurisprudence. Specifically membership in a particular social group, which is the least developed and least well-defined of the five enumerated grounds for asylum protection.[106]

Without an effort to re-identify the core zone of protection that was guaranteed by the U.S. treaty obligations under the 1951 Convention definition, refugees that were clearly the intended beneficiaries will fail to receive such recognition. "Refugee protection is not about immigration."[107] It is about the protection of individuals being persecuted on account of one of the five enumerated grounds contained in the refugee definition, specific and limited. By identifying a core zone of protection within the

---

[102] *Matter of C-A -*, *supra* note 101, at 957.
[103] *Matter of C-A -*, *supra* note 101, at 961.
[104] *Matter of A-M-E & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007).
[105] *Id*.
[106] Asylum and Withholding Definitions, 65 Fed. Reg. 76589, 76593 (Dec. 7, 2000) (to be codified at 8 CFR Part 208).
[107] James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 Harv. Human Rights J. 115, 117 (Spring 1997).

social group definition the fear of an immigration policy that is out of control and the fear of indeterminacy in outcomes can be alleviated. Thus, assuring that the rights and protections of *bona fide* refugees are guaranteed.

1. Fear of Uncontrolled Immigration – Asylum as a Backdoor Route to Immigration

"When refugees are grouped together with all other manner of migrants, be they legal or illegal, skilled or unskilled, law-abiding or undesirable, the fundamental distinction between refugees and other migrants, namely the involuntary nature of the refugee's journey is lost."[108] By losing this fundamental distinction, political refugees are in danger of being lumped together with all other immigrants in public policy decisions. As the Congressional Research Service noted in their annual report to Congress, "there are many who would revise U.S. asylum law and policy . . . [s]ome assert that asylum has become an alternative pathway for immigration rather than humanitarian protection provided in extraordinary cases."[109]

The danger in this dilution of the distinction between and the commingling of claims between refugees and other immigrants is the inevitable result of the failure to distinguish the legitimate claims of persons who are statutorily entitled to international protection.

Therefore, one of the potential benefits of recognizing a core zone of protection within the social group ground is a reaffirmation of the true nature of refugee protection. This international protection is fundamentally limited to individuals that have been persecuted and dispossessed of their political and civil rights and is not intended for general economic migrants or displaced persons by reason of conflict or natural disaster.

---

[108] James C. Hathaway & R. Alexander Neve, *supra* note 107, at 152.
[109] CRS Report for Congress, *supra* note 44.

2. Fear of Indeterminacy

Social group claims are unevenly and inconstantly decided. This lack of cohesion can ultimately lead to indeterminacy. The Department of Justice acknowledges this difficulty in their background statement to the current proposed rule change in citing the Seventh Circuit's decision in *Lwin v. INS*.[110] "The legislative history behind the term . . . is uninformative, and judicial and agency interpretations are vague and sometimes divergent. As a result, courts have applied the term reluctantly and inconsistently."[111]

This current drift towards inconsistency can be ameliorated by reestablishing the core zone of protection as suggested by this Comment to anchor social group decisions upon some firm footing. By focusing on the core zone of protection embedded within the refugee definition, the process of adjudicating social group claims can be made more predicable, abating the fear of indeterminacy.

3. Assuring the Legal Protections for *Bona Fide* Refugees

Refugee protection is a first and foremost a human rights remedy and should be separated from immigration policies.[112] The most basic difference separating the two migrants is the involuntary nature of the refugee. A refugee has been forced to flee from his or her home by some form of persecution and is fundamentally different from a voluntary immigrant. With the demise of the Cold War, refugee law has fallen out of favor and thus rendered the Convention protections illusory or shifting towards an inferior status.[113]

---

[110] *Lwin v. INS*, 144 F.3d 505, 510 (7th Cir. 1998).
[111] Asylum and Withholding Definitions, 65 Fed. Reg. 76589, 76593 (Dec. 7, 2000) (to be codified at 8 CFR Part 208); *citing Lwin v. INS*, 144 F.3d 505, 510 (7th Cir. 1998).
[112] James C. Hathaway & R. Alexander Neve, *supra* note 107, at 152.
[113] James C. Hathaway & R. Alexander Neve, *supra* note 107 at 116.

Through a process of refocusing asylum law, specifically membership in a particular social group, towards a core zone of intended protection within the Convention definition, the *bona fide* claims of the oppressed refugee can be reaffirmed in importance under U.S. law.

III. APPLICATION TO BOYS' NOVEL CLAIM OF PARTICULAR SOCIAL GROUP, ILLEGITIMACY IN MUSLIM SOCIETIES INCORPORATING ISLAMIC LAW OF *SHARIA'A*

"Refugee law exists in order to interpose the protection of the international community in situation where resort to national protection is not possible. Refugees are unprotected persons, not just in the sense that their basic liberties or entitlements are in jeopardy, but more fundamentally because it is impossible for them to work within or even to restructure the national community of which they are nominally a part in order to exercise those human rights."[114] This is never more the case when the persecuted victims are children without recourse to the state for protection. How did the boys' asylum claim fail here in the U.S.? Is theirs one of the easy cases that falls within the inner core of protection as envisioned by the law, or one of the more difficult cases?

The Immigration Court, being presented with a new and novel claim for a particular social group, had no precedent or controlling decision on point, leaving the Immigration Judge with no guidance on how to decide this case. After hearing all the testimony presented before the court, the Immigration Judge ("IJ") held that the boys' claim was "entirely too speculative."[115] The IJ was hesitant to recognize the boys' novel claim because he felt that no one in Yemen "would have an interest in harming them if

[114] James C. Hathaway, *The Law of Refugee Status*, 135 (Butterwoths Canada 1991).
[115] Oral Decision of Immigration Judge, *supra* note 6, at 14.

they returned."[116] Implicit in his decision is the determination that the boys' innate characteristic of illegitimacy would not render them different from any other boys in Yemen. The Immigration Judge held, without explicitly acknowledging that he was doing so, that the boys' particular social group lacked social visibility.

Had the IJ used the dual approach suggested by this Comment, looking to both the internal innate or immutable unifying characteristic of the social group and the social cognizability component of the group, the boys' claim would not be so speculative.

A. Analysis of the Immutability Characteristic Component

Analyzing the boys' claim of a particular social group under the traditional Acosta approach, neither the Immigration Judge nor the BIA questioned the validity of a proposed social group comprised of children having the innate and immutable characteristic of being born illegitimately within an Islamic culture. This component of the claim was established and not contested. However, the difficulty the Immigration Judge and the BIA faced was the issue of whether the boys' social group was socially recognizable without actually asking this explicit question and formally analyzing it.

B. Social Cognizability Component

By using the framework suggested by this Comment, the Immigration Judge would look for the social visibility component of the boys' proposed claim. In asking the right question, the Immigration Judge would be looking for evidence that would support a finding that the proposed social group is seen as different and outside of the society on account of the innate or immutable characteristic. Then the issue becomes a factual determination, specific to the individual case.

---

[116] Oral Decision of Immigration Judge, *supra* note 6, at 15.

Arguably there is sufficient evidence to support the boys' claim that they are in danger of being persecuted or subjected to an "honor killing," by their putative father or other tribal members because of their status as illegitimate children based upon their status as illegitimate children. In fact, tribal membership is at the essence of a Yemeni's identity in determining his or her relations to others in and outside of the tribe, the principal of patrilineal descent assigns each individual a place in the social structure.

Along this vein, "[p]arentage in Islam establishes a legal patrelineal relationship between father and child, conferring certain obligations and entitlements, respectively, which include mutual rights of inheritance, guardianship, and maintenance."[117] As a collateral matter, pregnancy out of wedlock is *prima facie* evidence of an illicit relationship bringing dishonor to the family. A man is shamed by both his immediate family and his community by permitting this dishonor initially and he is considered effeminate if he does not take authoritative action to re-assert his patriarchical authority over a normative transgression; thus, it is only by an act of violence towards a women or child that the dishonored man demonstrates the power of his masculinity.[118] This behavior exemplifies tribal authority used to impose a strict social order.

Being illegitimately born would render even the boys' very existence in doubt, given the acquiescence by the Islamic society and the government to so called "honor killings." At the root of this violence is the Islamic religious belief derived from the Qur'an. This injunction originates from the Prophet Mohammed, and is quite clear and

---

[117] Safir Syed, *The Impact of Islamic Law on the Implementation of the Convention on the Rights of the Child: The Plight of Non-Marital Children under Sharia'a*, 6 Int'l Journal of Children's Rights 359, 375 (1998).

[118] Mazna Hussain, *Take My Riches, Give Me Justice: A Contextual Analysis of Pakistan's Honor Crimes Legislation*, 29 Harv. J.L. & Gender 223, 227 (Winter 2006).

.

unequivocal, ". . . nor come nigh to adultery for it is shameful deed and an evil, opening the road to other evils."[119] Therefore, under Islamic law unlawful intercourse, or *zina*[120] -- intercourse without the right to it arising from marriage, is among certain acts, specifically forbidden in the Qur'an, thus constituting a crime against religion and society. "In these circumstances, the punishment which is proscribed in the Qur'an is called *hadd*, a right of claim of Allah, for which no pardon is possible. The *hadd* for unlawful intercourse by a person who has concluded and consummated a valid marriage (the adulterer/adulteress) is stoning to death."[121]

"Honor" is a deeply-rooted traditional notion that originated in pre-Islamic eras in the ancient culture of desert tribes and shaped the formation of both Western and Islamic family law.[122] In general, Islam views pre-martial and extra-martial relationships as anathema to the family structure, which forms the cornerstone of Muslim society. One type of honor, *sharaf* applies to men (though in theory, it applies to both men and women), and can be attained through family reputation, hospitality, generosity, chivalry, and to some degree, socioeconomic status or political power.[123] There is another variant of honor, (*ardh*, in Arabic) which pertains to women, and more specifically to women's sexuality and the sexual use of their bodies. The honor of the tribe is besmirched if unmarried women lose their virginity or married women are unfaithful, thus while this

---

[119] Safir Syed, *supra* note 117; *quoting* Chapter 17, verse 32; A.Y. Ali, *The Holy Qur'an: Text, Translation and Commentary*, (Durban 1984).
[120] For example, adultery, incest, fornication, and rape.
[121] Safir Syed, *supra* note 117.
[122] Mazna Hussain, *supra* note 118, at 227.
[123] , *Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: a Comparative Study*, 14 (Women for Women's Human Rights (WWHR) – New Ways, Feb. 2005), available at http://www.synergyaids.com/documents/Turkey_GenderSex&CriminalLaws.pdf (last viewed on May 7, 2007).

form of *sharaf* is strictly attached to women, it actually reflected upon the clan or tribe as a whole.[124]

This cultural conception of honor is fundamentally a view that sexual activities by women affects the honor of the family; and as such, the men are the protectors of this value.[125] "Rather than possessing honor herself, a women is a symbolic vessel of male honor, therefore all of her actions are considered to reflect upon her male family members."[126]

Women's honor corresponds to men's lineage rights, because the ultimate violation of *ardh* takes place if a woman, unmarried or married, gives birth to an illegitimate child. Women have often practiced infanticide in such cases, since a single mother could not demand support for her offspring.[127] Under Islamic law, this held true as well, since adoption was not formally permitted. In addition, she would be considered to have committed *zina* and had to be punished.

The boys' putative father's homicidal rage directly derives from his pious religious belief in Islam, which holds that children born out of wedlock are an abomination against God. As the Prophet Mohammed said, "The one who claims descent from someone other than his (real) father, and the slave who attaches himself to someone other than his (real) master, are cursed by Allah, His angels, and the people. Allah will accept neither repentance nor ransom from such a person on the Day of Resurrection."[128] The Prophet (peace be on him) listed this practice among the abominable evils deserving

---

[124] Dr. Sherifa Zuhur, *supra* note 123.
[125] Mazan Hussain, *supra* note 119, at 227.
[126] *Id*.
[127] Dr. Sherifa Zuhur, *supra* note 120, at 14.
[128] Dr. Yusuf al-Qaradawi, *The Lawful and Prohibited in Islam (Al-Halal Wal Haram Fil Islam),* 100 (Islamic Book Service 1982), (Statement of the Prophet Mohammed, peace be on him, reported by al-Bukhari and Muslim).

the curse of both the Creator and His creatures.[129] The Prophet's explicit warning on this subject is now codified within the Islamic religious code of conduct, the Law of *Sharia'a*. Currently, *Sharia's* provisions on personal status have been codified in Tunisia, Morocco, Egypt, Lebanon, Syria, Iraq, Jordan, Algeria, Kuwait, and Yemen. In those modern Islamic States where there is as yet no legislative enactment on personal status (i.e., Saudi Arabia, Libya, and the Sudan), the *Sharia'a*, as complied in the classical legal manuals, is still formally applied in its entirety.[130]

Where *Sharia'a* is codified as the supreme law of the land, this abhorrence of illegitimacy and the taint of adultery that accompanies the out-of-wedlock child has a profound and dramatic impact upon the children thus implicated. Merely the giving of the family's name to an illegitimate child dishonors the family name and as such requires the patriarch to cleanse the family's honor by virtue of the accepted cultural norm of "honor killing."

Furthermore, the putative father is legally entitled to deny the boys' use of his family name under the Law of *Sharia'a*, relegating them to an inferior legal and social status, subsequently "institutionalized by the state through discriminatory treatment in obtaining identity papers, and the unnecessary embarrassment of having [their] illegitimate status indicated on them."[131]

Once the boys' status of being illegitimate became common knowledge within the close-knit tribal society that constitutes Yemen, as exemplified by the local policed officer's taunting of the boys' putative father, the social cognizablility component is established. The boys' status as illegitimate children within this Islamic society is

---

[129] *Id*.
[130] *See* Safir Syed, *supra* note 117, at 372.
[131] *See* Safir Syed, *supra* note 117, at 380.

analogous to that of a religious belief that became know to members of the community and subsequently forms the basis of persecution solely on account of that status. In the protected grounds of religious belief and political opinion, once the greater society distinguishes the particular group as being distinct and different, then the social cognizability component is met. This is also the case here with the Gamil and Gamal's proposed social group united by the innate characteristic of being born illegitimate in a Muslim country where the Islamic Law of *Sharia'a* is incorporated into the supreme law of the land.

CONCLUSION

The Federal Government's stated objective in the administration of immigration laws is to apply them fairly and uniformly.[132] However, any objective evaluation of the manner in which membership in a particular social group claims are adjudicated leaves this commitment in doubt. The latest effort by the Department of Justice to bring some semblance of order to this area of the law was the 2000 Proposed Rule Change to 8 C.F.R. § 208.[133] This Proposed Rule is still pending at the time of this writing, almost seven years later.

Even if the Proposed Rule is enacted, the rule would merely incorporate a non-exclusive, non-determinative six factor test[134] for judges and courts to use. This feeble

---

[132] Department of Justice, Strategic Plan 2001-2006, Goal 5 – Fairly and Effectively Administer the Immigration and Naturalization Laws of the U.S., http://www.usdoj.gov/archive/mps/strategic2001-2006/goal5.htm (last viewed on May 10, 2007).

[133] *Ref.* Asylum and Withholding Definitions, *supra* note 97.

[134] The six factors are; (1) The members of the group are closely affiliated with each other; (2) the members are driven by a common motive or interest; (3) a voluntary associational relationship exists among the members; (4) the group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question; (5) members view themselves as members of the group; and (6) the society in which the group exists distinguishes members of the group for different

effort is seemingly inadequate to the difficult task and the end result of the Rules' implementation would be just another totality of the circumstances test.

However, if this Comment's suggestion is utilized by looking for both key components in any new or novel social group claim, specifically the group's innate or immutable unifying characteristic and the social cognizability component, then any claim that comports to these two components can be reasonably assured of fitting within the core of the refugee definition's intended zone of protection. In practice, utilization of these two essential components can be squared with the multi-factor test proposed by the DOJ. By viewing the test as a sliding scale, with a showing of both components presumptively establishing eligibility for a social group claim and not necessarily fatal to the claim if either component is not established.

It is through just such a process of rediscovering the core zone of intended protection afforded refugees under U.S. international treaty obligations that the slide towards confusion and eventual indeterminacy can be averted and reestablishing the legitimate rights of the *bone fide* asylee to protection under the law.

"*Everyone has the right to seek and to enjoy in other countries asylum from persecution*."[135]

---

treatment or status than is accorded to other members of the society. *See* Asylum and Withholding Definitions, *supra* note 97.

[135] Universal Declaration of Human Rights, Article 14.