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# Ohio Northern University Law Review

## Student Comments

### Interpreting “Membership in a Particular Social Group” in Light of International Standards

KLAUDIA K. CAMBRIDGE\*

#### I. INTRODUCTION

As one of the five grounds for asylum, the definition of “membership in a particular social group” has a great importance to refugees who flee their home country because of persecution but cannot fit into the other four enumerated grounds for asylum.<sup>1</sup> In 2021, President Biden issued an executive order (Executive Order) calling for a comprehensive examination of asylum laws and regulations in order to assess whether the United States adjudicates asylum cases related to domestic and gang violence consistently with international standards and obligations and ordering the Attorney General and Secretary of Homeland Security to propose regulations addressing who “should be considered a member of a ‘particular social group’ according to 8 U.S.C. 1101(a)(42)(A) based on the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.”<sup>2</sup> The deadlines set by

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1. See 8 U.S.C. §§ 1011(a)(42)(A), 1158 (b)(1)(B)(i).

2. Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, Feb. 2, 2021, 86 Fed. Reg. 8267 (Feb. 5, 2021) sec. 4(c) [hereinafter Executive Order No. 14010].

*Asylum Eligibility.* The Attorney General and the Secretary of Homeland Security shall:

(i) within 180 days of the date of this order, conduct a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines

President Biden were August 1, 2021—180 days from the date of the Executive Order—for the examination of the national and international asylum laws and October 30, 2021—270 days from the date of the Executive Order—for proposing new regulations regarding membership in a particular social group.<sup>3</sup>

While the Executive Order provided an excellent opportunity to review the long-debated U.S. asylum policies in order to create a new framework and a unified interpretation of membership in a particular social group, only limited actions were taken by the current administration to restore protection for asylum seekers based on this ground, and neither the comprehensive review nor the proposed regulation has been implemented.<sup>4</sup> Thus, the results of the examination ordered by the President, as well as the joint regulations to improve our immigration system by clearly defining the requirements for membership in a particular social group, are yet to be presented. The lack of progress on this issue is especially problematic in light of the current circuit split which, leads to inconsistent results in asylum cases.<sup>5</sup>

This paper will provide a short overview of the history and definition of “particular social group” as the fifth ground for asylum, the United States’s obligations based on international law, and the inconsistencies between the

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governing the adjudication of asylum claims and determinations of refugee status to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards; and

(ii) within 270 days of the date of this order, promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a “particular social group,” as that term is used in 8 U.S.C. 1101(a)(42)(A), as derived from the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

3. *Id.*

4. See Virtual briefing held by U.S. Citizenship and Immigration Services (“USCIS”) Director Ur M. Jaddou on February 2, 2022, the first anniversary of the Biden Administration’s executive orders related to immigration “aimed at restoring faith in our nation’s legal immigration system,” <https://www.uscis.gov/outreach/notes-from-previous-engagements/virtual-briefing-uscis-progress-on-executive-orders> (discussing the progress and changes implemented); see also <https://www.uscis.gov/newsroom/alerts/readout-of-director-ur-m-jaddous-virtual-briefing-with-stakeholders-to-mark-one-year-anniversary-of-executive-order-progress-fact-sheet>, at 4. [https://www.uscis.gov/sites/default/files/document/fact-sheets/FINAL\\_EO\\_Anniversary\\_Progress\\_FactSheet\\_2\\_3.pdf](https://www.uscis.gov/sites/default/files/document/fact-sheets/FINAL_EO_Anniversary_Progress_FactSheet_2_3.pdf) (stating that USCIS conducted a comprehensive examination of the immigration laws and regulations governing asylum, and after the Attorney General vacated *Matter of A-B-1* and *II* and *Matter of L-E-A-*, USCIS revoked their prior guidance for processing asylum claims and updated the “Nexus-Particular Social Group Lesson Plan” accordingly); United States Department of Justice, DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings, Press Release, May 28, 2021, DOJ, <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings> (accelerating dockets of asylum seekers). See also RAIO Combined Training Program, *Nexus – Particular Social Group Training Module*, USCIS, [https://www.uscis.gov/sites/default/files/document/foia/Nexus\\_-\\_Particular\\_Social\\_Group\\_PSG\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf) (July 20, 2021) [hereinafter *USCIS PSG Training*].

5. See *infra* Part III.A (discussing circuit split).

different interpretations currently applied to adjudicate asylum cases based on membership in a particular social group and the guidance provided by international law. As this article will show, inconsistencies exist between national and international law, and the Executive Order, as mentioned above, was aimed to correct these issues by the promulgation of joint regulations consistent with international standards. This paper will consider alternative approaches from different countries, arguing that as the Executive Order directed, a new framework should be adopted without further delay to properly define membership in a particular social group according to the guidelines provided by the United Nations High Commissioner for Refugees (UNHCR), whose standards are widely accepted by the international community.

## II. BACKGROUND

### *A. Importance of the Definition of Membership in a Particular Social Group*

The meaning of "particular social group" as one of the five grounds for asylum is a debated topic of U.S. immigration law, and it is highly important for those applicants who could not successfully assert an asylum claim based on the other four enumerated grounds—race, religion, nationality, or political opinion.<sup>6</sup> As the Executive Order correctly pointed out, the promulgation of the new regulation is necessary to properly address the definition and application of membership in a particular social group, as many asylum seekers have been facing difficulties because of the lack of clear guidance on this issue and the reluctance to find their claims cognizable, especially for asylum claims based on domestic violence or gang violence.<sup>7</sup> As shown below, even after Attorney General Garland vacated *Matter of A-B- I* and *II* and *Matter of L-E-A- II*, directed to return to pre-A-B- and pre-L-E-A- II precedent in 2021, these decisions did not resolve the questions regarding the interpretation of "particular social group," they only allowed the necessary time and flexibility for future rulemaking to provide clear guidance on the application of the law.<sup>8</sup>

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6. See 8 U.S.C. § 1011(a)(42)(A), 1158 (b)(1)(B)(i).

7. See *The Biden Plan for Securing Our Values as a Nation of Immigrants*, <https://files.epi.org/uploads/Biden-Harris-2020-immigration-plan.pdf> (promising to restore our nation's asylum laws in order to protect people who fear persecution in their home country and the previous administration's "detrimental asylum policies" which "drastically restrict[ed] access to asylum in the U.S.", including the attempts to exclude victims of gang and domestic violence).

8. See generally *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) (vacating *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (*A-B- I*), *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) (*A-B- II*)); *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021) (vacating *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) (*L-E-A- II*)); see also *infra* Part II.C.

Without further progress in providing clarity on this issue, applicants for asylum based on membership in a particular social group will continue to encounter serious obstacles, which led scholars and asylum advocates to believe that the Board of Immigration Appeals' (BIA) current interpretation is "willfully distorted."<sup>9</sup> As scholars who advocate for a policy change explain, the "particular social group" framework is less clearly defined than the other four grounds for asylum in order to provide relief for people facing persecution in their home country who would not qualify for asylum under the other grounds.<sup>10</sup> Therefore, the ambiguity and lack of clear definition should be interpreted consistently with the national legislation implementing this type of protection according to the international definition of refugee and principles of human rights. Following that approach would allow for an evolving interpretation instead of a restrictive application that significantly narrows eligibility for asylum on this ground by requiring a refugee to meet a heavy burden of establishing all additional requirements imposed by the BIA, which not only lacks support in international law but also stand in the way of recognizing new particular social groups.<sup>11</sup> For this reason, creating a new legal framework without further delay based on the correct interpretation of international standards is an important step toward providing appropriate protection to refugees who fear persecution on the basis of their membership in a particular social group.<sup>12</sup>

*B. International Standards of Refugee Law Relating to Membership in a Particular Social Group*

The first comprehensive source that articulated standards for the status of refugees was the 1951 Convention Relating to the Status of Refugees (Convention), which consolidated previous international instruments, provided a codification of the rights of refugees, and enumerated five grounds for refugee status—race, religion, nationality, membership of a particular social group, and political opinion.<sup>13</sup> The Convention, however, only set the

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9. See Stephen Legomsky & Karen Musalo, *Asylum and the Three Little Words that Can Spell Life or Death*, JUST SECURITY (May 28, 2021), <https://www.justsecurity.org/76671/asylum-and-the-three-little-words-that-can-spell-life-or-death/> (discussing the BIA's distorted interpretation of membership in a particular social group).

10. *Deadly Inertia: Needless Delay of "Particular Social Group" Regulations Puts Asylum Seekers at Risk*, CTR. FOR GENDER & REFUGEE STUD. 1 (Feb. 10, 2022), [https://cgrs.uchastings.edu/sites/default/files/Deadly%20Inertia%20-%20PSG%20Regs%20Guide\\_Feb.%202022.pdf](https://cgrs.uchastings.edu/sites/default/files/Deadly%20Inertia%20-%20PSG%20Regs%20Guide_Feb.%202022.pdf) [hereinafter *Deadly Inertia*].

11. *Id.* at 1-2.

12. *Id.* at 3.

13. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, Introductory Note art. 1, ¶ A(2), available at <https://www.unhcr.org/en-us/3b66c2aa10> [hereinafter 1951 Convention]. According to the Convention, a refugee is someone who,

minimum standards of protection and rights which states that are parties to the Convention must afford to refugees; thus, party states are allowed to accord wider protection to refugees.<sup>14</sup>

Sixteen years later, the 1967 Protocol to the Refugee Convention expanded the Convention's refugee definition by eliminating the restriction requiring the claim to have arisen in connection with "events occurring before 1 January 1951" in Europe.<sup>15</sup> While the United States has not ratified the Refugee Convention, it is a party to the 1967 Protocol, which states that "[t]he States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined."<sup>16</sup> As states that adopted the Protocol are also bound by the provisions of the Convention, both documents are binding on the United States.<sup>17</sup> While both of these documents provide protection for refugees, neither the Convention nor the Protocol laid out a definition for a "particular social group."<sup>18</sup>

The UNHCR provided interpretative guidelines (UNHCR Guidelines) for UNHCR staff, governments, legal practitioners, and judges or other decision-makers in asylum cases on the issue of who can be considered to

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. . . 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.

*Id.* However, the Convention contained a restriction regarding the applicable time-period and geographical area, stating that the claim must be "a result of events occurring before 1 January 1951" "in Europe" or "in Europe or elsewhere." *Id.* art. 1, ¶¶ A(2), B(1). 146 states ratified the Convention. See *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, UNHCR, <https://www.unhcr.org/en-us/5d9ed32b4> (last visited Apr. 15, 2023).

14. PIRKKO KOURULA, BROADENING THE EDGES: REFUGEE DEFINITION AND INTERNATIONAL PROTECTION REVISITED, in 1 REFUGEES AND HUMAN RIGHTS 59 (1997).

15. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 art. 1, ¶ 2 [hereinafter 1967 Protocol]. 147 states are parties to the Protocol. See *States parties, including reservations and declarations, to the 1967 Protocol Relating to the Status of Refugees*, UNHCR, <https://www.unhcr.org/en-us/protection/convention/5d9ed66a4/states-parties-including-reservations-declarations-1967-protocol-relating.html> (last visited Apr. 15, 2023) [hereinafter *Parties to 1967 Protocol*]. 149 states are parties to either one or both the 1951 Convention and its 1967 Protocol. The United States is only a party to the 1967 Protocol.

16. 1967 Protocol, *supra* note 15, art. 1, ¶ 1.

17. *Parties to 1967 Protocol*, *supra* note 15, at 5.

18. It has been suggested that the purpose of creating the particular social group was to provide protection for refugees who fear persecution for reasons other than the four enumerated grounds; therefore, the lack of a clear definition allows for an evolving interpretation. See, e.g., Arthur Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RIGHTS L. REV. 39, 39, 47 (1983). See also *Matter of Acosta*, 19 I&N Dec. 211, 232 (BIA 1985) ("the notion of a 'social group' was considered to be of broader application than the combined notions of racial, ethnic, and religious groups and that in order to stop a possible gap in the coverage of the U.N. Convention, this ground was added to the definition of a refugee").

have a well-founded fear of persecution on the basis of their membership in a particular social group.<sup>19</sup> First, the UNHCR Guidelines pointed out that membership in a particular social group “cannot be interpreted to render the other four Convention grounds superfluous,” and there is no “closed list” of specific social groups that might qualify under the Convention; rather, this term “should be read in an evolutionary” manner consistent with the evolving international human rights standards.<sup>20</sup> In addition, a person may qualify for refugee status based on more than one enumerated ground; thus, the grounds listed in the 1951 Convention “are not mutually exclusive.”<sup>21</sup>

Although the UNHCR Guidelines expanded the 1951 Convention’s “refugee concept” through practice, these guidelines are not considered as binding law, resulting in different approaches regarding the interpretation of the particular social group definition and as to who was intended to be protected by this ground.<sup>22</sup> On the other hand, as Professor Hathaway pointed out, while the UNHCR Guidelines are not considered “formal amendments to the Convention definition, they are nonetheless indicative of a widening of the circumstances in which persons may be said genuinely to be in need of international protection,” and therefore states that ratified the 1951 Convention “may be expected to consider these developments in determining” who is eligible for asylum under their national law.<sup>23</sup> Similarly, both the Convention and the Protocol outline the requirements of cooperating with the UNHCR as the international agency responsible for supervising the application of the international agreement provisions, which supports the argument that states that are parties to either or both the Convention and Protocol are also required to follow the UNHCR Guidelines.<sup>24</sup>

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19. *United Nations High Commissioner for Refugees, Guidelines on International Protection No. 2: “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* (May 7, 2002, HCR/GIP/02/02), available at <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html> [hereinafter UNHCR Guidelines].

20. *Id.* ¶¶ 2-3.

21. *Id.* ¶ 4.

22. See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 25 (1991) (also discussing that the UNHCR practice expanding the refugee definition does not constitute *opinion juris* to broaden the rights of refugees provided under the 1951 Convention) (quoting Kay Halibroner, *Non Refoulment and Humanitarian Refugees*, 26 VA. J. INT’L L. 857, 869 (1986)).

23. *Id.* at 11.

24. See 1951 Convention, *supra* note 13, art. 35 § 1. Article 35 of the Convention states:

The Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

See 1967 Protocol, *supra* note 15, art. 2 § 1. Article 2 of the 1967 Protocol states:

As Professor Hathaway explained, some scholars argue that the particular social group category was added to clarify the elements of the four other grounds, while others believe that it is a "safety net," and was intended to provide protection to all refugees who fear persecution "without invidious or unnecessary distinction."<sup>25</sup> *Acosta* defined "particular social group" as "a group of persons all of whom share a common, immutable characteristic," which definition is neither "redundant [n]or all-inclusive" and thus provides a "middle ground" for interpreting the concept of "particular social group."<sup>26</sup>

It is important that we interpret the refugee definition—and the definition of "particular social group"—in accordance with the spirit of the Convention and Protocol, keeping in mind that the purpose of creating these international agreements was to provide standards regarding the protection of refugees who fear persecution in their home country.<sup>27</sup> However, as discussed above, the definition of refugee is ambiguous, and therefore it is not clear who should be afforded the protection outlined in the Convention and Protocol, which has led to different interpretations among the parties to these treaties.<sup>28</sup> In order to maintain the integrity of the international standards and provide consistent protection to refugees, both "excessively narrow" and "over-broad interpretations" should be avoided.<sup>29</sup>

As recognized by the UNHCR Guidelines, there are two main approaches regarding the definition of "particular social group."<sup>30</sup> The "protected characteristics" approach—or "immutability" approach, which was established by *Acosta* in the United States and was uniformly followed for almost two decades—"examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it".<sup>31</sup> This approach is

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The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

25. HATHAWAY, *supra* note 22, at 157-58 (citing Helton, *supra* note 18, at 41-42, 45).

26. *Id.* at 160 (citing Matter of *Acosta*, 19 I&N Dec. 211 (BIA 1985)).

27. KOURULA, *supra* note 14, at 63.

28. *Id.*

29. *Id.* at 64.

30. UNHCR Guidelines, *supra* note 19, ¶ 5. The UNHCR Guidelines noted that under both approaches, women, families, and homosexuals have been recognized; however, application of the two approaches does not always leads to the same results. *Id.* ¶¶ 6-7.

31. *Id.* ¶ 6. The main difference between the protected characteristic approach and *Acosta's* immutability standard is that the first one examines not only immutable characteristics but characteristics that are fundamental to human dignity as well.

followed by Canada, the United Kingdom, and New Zealand.<sup>32</sup> The “social perception approach,” on the other hand, concentrates on the existence of a common characteristic shared by a group “which makes them a cognizable group or sets them apart from society at large.”<sup>33</sup> Australia, for example, follows the social perception approach; however, it also considers immutable characteristics as an alternative test.<sup>34</sup>

As mentioned above, because the application of these different approaches often leads to different results in finding whether a particular social group is cognizable, the UNHCR Guidelines recommend that the two approaches should be reconciled into one standard, under which satisfying either the immutability (protected characteristic) or the social perception requirement is sufficient to establish eligibility for asylum on this ground:

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.<sup>35</sup>

As shown below, the United States’s implementation of the 1951 Convention and its 1967 Protocol created a three-part test, imposing the “social distinction” and “particularity” requirements in addition to the immutable characteristics standard established by *Acosta*, which significantly narrowed the eligibility for asylum based on membership in a particular social group.<sup>36</sup>

### C. History of Membership in a Particular Social Group in the United States

In order to apply for asylum in the United States, one must be a refugee.<sup>37</sup> The Refugee Act of 1980 adopted the 1967 Convention’s refugee term, stating that

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32. 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, 47-49 (2008) (noting that the protected characteristics approach is called “immutability” in the United States) [hereinafter *Social Visibility*].

33. UNHCR Guidelines, *supra* note 19, ¶ 7.

34. See Natalie Nanasi, *Death of the Particular Social Group*, 45 N.Y.U. REV. L. & SOC. CHANGE 260, 268 (2021) (citing *Applicant A and Another v Minister for Immigr. and Ethnic Affs.* [1997] 190 CLR 225 (Austl.); *Applicant S v Minister for Immigr. and Multicultural Affs.* [2004] 217 CLR 387, 421-22 (Austl.)); *infra* notes 159-61 and accompanying text.

35. UNHCR Guidelines, *supra* note 19, ¶ 11.

36. See *infra* Part II.C.

37. See 8 U.S.C. § 1158 (b)(1)(A).

[t]he term "refugee" means (A) any 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>38</sup>

While the Refugee Act enumerated five grounds for asylum, it did not provide a definition for membership in a particular social group either.<sup>39</sup> Instead, in 1985, the BIA provided a workable test in *Acosta*, which was used for almost twenty years to determine whether a particular social group was cognizable.<sup>40</sup>

*Acosta* was a 36-year-old El-Salvadorian COTAXI driver, who fled his country because he was threatened by guerillas when he refused to participate in work stoppages in El-Salvador.<sup>41</sup> He entered the United States unlawfully, and when he was placed in deportation proceedings, he applied for asylum based on his membership in a particular social group, contending that he was beaten and threatened with death by the guerillas.<sup>42</sup> He provided proof that the guerillas killed other taxi drivers who refused to participate in stoppages.<sup>43</sup> In *Acosta*, the BIA interpreted "persecution on account of membership in a particular social group" as "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic," which might be "sex, color, or kinship ties, or . . . a shared past experience such as former military leadership or land ownership."<sup>44</sup> The immutable characteristic standard applied by

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38. 8 U.S.C. § 1101(a)(42)(A).

39. *See generally id.*

40. *Matter of Acosta*, 19 I&N Dec. 211, 232 (BIA 1985) ("Congress did not indicate what it understood [the particular social group] ground of persecution to mean, nor is its meaning clear in the Protocol").

41. *Id.* at 213, 216-17.

42. *Id.* at 218.

43. *Id.* at 216.

44. *Id.* at 233.

Acosta—consistent with international standards<sup>45</sup>—also requires that the immutable characteristic is “one that [members of the group] cannot change”—just as race or nationality—or “should not be required to change because it is fundamental to their industrial identities or consciences”—like former military leadership or land ownership.<sup>46</sup>

The BIA found that Acosta had not established his eligibility for asylum.<sup>47</sup> The BIA reasoned that Acosta’s proposed social groups—El Salvador taxi drivers who refused to participate in work stoppages sponsored by guerrillas—lacked the required immutable characteristics because he could have changed his employment in order to avoid persecution.<sup>48</sup> Applying the statutory construction principle of *ejusdem generis*, the BIA held that:

the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages. It may be unfortunate that the respondent either would have had to change his means of earning a living or cooperate with the guerrillas in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.<sup>49</sup>

As Professor James C. Hathaway explained, the *Acosta* standard is “[s]ufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without a serious basis for claim to international protection.”<sup>50</sup> The *Acosta* test was uniformly applied and accepted by the courts for twenty years, and based on this standard, several particular social groups were found cognizable.<sup>51</sup> Then, the BIA began to consider additional factors, and later officially imposed two new, distinct requirements—social visibility (later

45. See “protected characteristics approach”, UNHCR Guidelines, *supra* note 19, ¶ 11.

46. *Acosta*, 19 I&N Dec. at 233 (interpreting the phrase “‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic”, which can be “an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership”).

47. *Id.* at 237.

48. *Id.* at 234.

49. *Id.* at 233-34.

50. HATHAWAY, *supra* note 22, at 161.

51. See *infra* Part III.A (discussing differing standards among the circuits). See, e.g., *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 819 (BIA 1990) (recognizing that homosexuals can be considered a particular social group); *In re Kasinga*, 21 I&N Dec. 357, 357 (BIA 1996) (holding that “[y]oung women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized” as a particular social group); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (recognizing former members of the El Salvador national police as a particular social group).

renamed to social distinction) and particularity—to narrow the *Acosta* immutability standard.<sup>52</sup> This altered the definition of a particular social group and significantly decreased the number of social groups found cognizable under this new test, although the BIA contended that these additional requirements were simply an interpretation of the test established by *Acosta*.<sup>53</sup>

Starting in 1999, in *Matter of R-A*, the BIA found no cognizable particular social group to warrant the grant of asylum for a Guatemalan woman who had suffered domestic violence for a decade, holding that in addition to the *Acosta* immutability test, other factors should also be considered when deciding whether a particular social group is cognizable, “including how members of the grouping are perceived by the potential persecutor, by the asylum applicant, and by other members of the society.”<sup>54</sup> Attorney General Reno vacated the BIA’s decision in *R-A*, and the case was remanded to the BIA for reconsideration once the proposed regulations regarding gender-based asylum claims were finalized.<sup>55</sup> The respondent was granted asylum in 2009.<sup>56</sup>

In 2006, with *In re C-A*, the BIA continued to consider other factors in addition to the *Acosta* standard, holding that “[t]he group of ‘former noncriminal drug informants working against the Cali drug cartel’ does not have the requisite social visibility” and the group was “too loosely defined to meet the requirement of particularity,” it only noted that social visibility was an “important consideration,” without making those an official requirement in identifying whether a particular social group is cognizable.<sup>57</sup> In 2007, the BIA reaffirmed the social visibility and particularity requirement in *Matter of A-M-E & J-G-U*, holding that “[f]actors to be considered in determining whether a particular social group exists include whether the group’s shared characteristic gives the members the requisite social visibility to make them readily identifiable in society and whether the group can be defined with sufficient particularity to delimit its membership.”<sup>58</sup>

Similarly, in 2008, in *Matter of E-A-G*, the BIA reiterated the particularity and social visibility requirements by finding that the

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52. See Legomsky & Musalo, *supra* note 9 (discussing why the BIA’s particularity and social distinction requirements should be abandoned).

53. See Nanasi, *supra* note 34, at 263-64.

54. See *In re R-A*, 22 I&N Dec. 906, 907, 920 (BIA 1999; A.G. 2001).

55. *Id.* at 906. See *Matter of R-A*, 24 I&N Dec. 629 (A.G. 2008) (The BIA’s decision was vacated by Attorney General Reno in 2001. Attorney General Ashcroft certified the case to himself, and in 2005, remanded it to the BIA for decision once the proposed regulations are finalized.).

56. See generally *Matter of R-A*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uclawsf.edu/our-work/matter-r-a/> (last visited Feb. 13, 2024).

57. *In re C-A*, 23 I&N Dec. 951, 957 (BIA 2006).

58. *Matter of A-M-E & J-G-U*, 24 I&N Dec. 69 (BIA 2007).

respondent's proposed social group—"persons resistant to gang membership"—was not cognizable, as he failed to show that "members of Honduran society, or even gang members themselves, would perceive those opposed to gang membership as members of a social group".<sup>59</sup> The BIA further interpreted the particularity and social visibility requirements in *Matter of S-E-G-*, holding that particularity means "whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons," and it is "sufficiently 'particular' . . . to create a benchmark for determining group membership."<sup>60</sup> In addition, regarding the social visibility requirement, the BIA held that in order to be cognizable, a social group must be "perceived as a group' by society," and respondents were "not in a substantially different situation from anyone who [had]crossed the gang, or who [was] perceived to be a threat to the gang's interests."<sup>61</sup> With *Matter of S-E-G-*, social visibility and particularity became distinct, formal requirements in addition to the *Acosta* immutability test.<sup>62</sup>

In *Matter of M-E-V-G*, the BIA clarified the social visibility requirement and renamed this element to "social distinction," noting that it does not mean literal or "ocular visibility," rather, the group must be distinct in society.<sup>63</sup> Thus, as the BIA noted, the three requirements to establish membership in a particular social group are (1) immutable characteristic, (2) particularity, and (3) social distinction.<sup>64</sup> The immutability test remained the same, requiring a common immutable characteristic to be one that a group either cannot change or should not be required to change because it so fundamental.<sup>65</sup> As for the two new requirements, the BIA explained that particularity means that the group must have "well-defined boundaries" or "outer limits;" thus, it "must be defined by characteristics that provide a clear benchmark for determining who falls within the group," but it cannot be circularly defined by the harm suffered, while social distinction mean whether the group is "meaningfully

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59. *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

60. *Matter of S-E-G- et al.*, 24 I&N Dec. 579, 584 (BIA 2008) (quoting *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628-29 (8th Cir. 2008)) (citing *A-M-E- & J-G-U-*, 24 I&N Dec. 69).

61. *Id.* at 587.

62. *Id.* at 588.

63. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 228, 236-237 (BIA 2014) (claiming that the social distinction and particularity requirements are simply a clarification of the *Acosta* test; renaming "social visibility" to "social distinction" to clarify that it does not mean "on-sight" visibility, and the group does not need to be seen by society; instead, it should be "perceived as a group by society;" also finding that the social visibility requirement is based on the perception of society and not the perception of the persecutor). *See also* *Matter of W-G-R-*, 26 I&N Dec. 208, 216-17 (BIA 2014).

64. *M-E-V-G-*, 26 I&N Dec. at 237.

65. *Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 1985).

distinguished" in the society in question, even though on-site visibility is not required.<sup>66</sup>

In a case based on domestic violence, *Matter of A-R-C-G-*, the BIA held that "'married women in Guatemala who are unable to leave their relationship' can constitute a cognizable particular social group."<sup>67</sup> The decision was important as it resolved the question of whether victims of domestic violence were eligible for asylum; however, in *Matter of A-B-I*, Attorney General Sessions vacated *A-R-C-G-*, holding that survivors of domestic violence, save perhaps for exceptional circumstances, did not qualify for asylum based on their membership in a gender-based particular social group.<sup>68</sup> In 2021, Attorney General Garland certified the matter to himself and vacated *A-B- I* and *II* and directed the immigration courts to return to pre-*A-B-* precedent, including *Matter of A-R-C-G-*, which again expanded asylum eligibility for domestic violence survivors.<sup>69</sup> The Attorney General found that the BIA's broad finding "threaten[ed] to create confusion and discourage careful case-by-case adjudication of asylum claims," and therefore he vacated *A-B- I* and *II* in order to "afford[] all interested parties a full and fair opportunity to participate and ensure[] that the relevant facts and analysis are collected and evaluated."<sup>70</sup>

While returning to pre-*A-B-* precedent is a positive improvement ensuring that victims of domestic violence are not fully excluded from asylum and that case-by-case adjudication is required in each case, without promulgating new rules that clarify eligibility on the basis of membership in a particular social group, asylum seekers now face the same difficulties and inconsistencies that led to a split among the circuits and the BIA's addition of the two new requirements in the first place.<sup>71</sup>

66. *M-E-V G-*, 26 I&N Dec. at 238, 239; *W-G-R-*, 26 I&N Dec. at 214.

67. *Matter of A-R-C-G-*, 26 I&N Dec. 388, 388-89, 394 (BIA 2014) (recognizing that being a married woman who cannot leave her relationship is an immutable characteristic).

68. *Matter of A-B- I*, 27 I&N Dec. 316, 320 (A.G. 2018) ("Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.").

69. *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) (vacating *A-B-I*, 27 I&N Dec. 316 and *A-B-II*, 28 I&N Dec. 199 (A.G. 2021)).

70. *Id.* at 308, 309. See also Executive Order No. 14010, *supra* note 2, sec. 4(c)(ii) (directing the Attorney General and the Secretary of Homeland Security to promulgate regulations "addressing the circumstances in which a person should be considered a member of a 'particular social group'"). For similar reasons, the Attorney General vacated another decision "considering whether a family may constitute a 'particular social group' and holding that 'in the ordinary case, a nuclear family will not, without more,' qualify." *Matter of L-E-A*, 28 I&N Dec. 304 (A.G. 2021) (overruling *Matter of L-E-A-II*, 27 I&N Dec. 581 (A.G. 2019) and restoring previous standards, including *Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017) (*L-E-A- I*) (holding that "family ties may meet the requirements of a particular social group depending on the facts and circumstances of the case"))).

71. As an attempt to restore rights of refugees and asylum applicants, the Refugee Protection Act of 2019 was introduced in the House on November 21, 2019; however, it never passed Congress. See Refugee Protection Act of 2019, § 101(a)(C)(iii) (Modification of Definition of Refugee) ((among other

## III. CIRCUIT SPLIT AND RECOGNIZED PARTICULAR SOCIAL GROUPS

The vacatur of *Matter of A-B* resulted in returning to the case law prior to *Matter of A-B*, leaving several questions unanswered and allowing for various interpretations on the issue of “particular social group.” The lack of clear definition leads to inconsistent and unpredictable results in asylum cases. As noted in several BIA decisions, applicants for asylum who claim membership in a particular social group must meet a high burden: they must establish that the group shares a common, immutable characteristic, which is defined with particularity, and is socially distinct within the society in question; membership in that group is a central reason for their persecution; and that the alleged harm was inflicted upon them by the government of their home country or by persons the government is unable or unwilling to control.<sup>72</sup>

A. *Differing Standards and Circuit Split*

The U.S. Circuit Courts of Appeals do not fully agree on the definition and all elements of membership in a particular social group.<sup>73</sup> Some courts apply *Chevron* deference and follow the BIA’s three-part definition, while others reject the additional particularity and social visibility requirements.<sup>74</sup>

The First Circuit accepted the BIA’s new social visibility and particularity requirements, holding that “[t]he social visibility criterion does not signal an abandonment of the common and immutable characteristic requirement. Rather, it represents an elaboration of how that requirement operate.”<sup>75</sup> Thus, the First Circuit requires the following four elements for a cognizable social group: immutability, social visibility, sufficient particularity to avoid indeterminacy, and the group must not have been

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positive changes, the Refugee Protection Act of 2019 proposed to modify 8 U.S.C. § 1101(a)(42)) in accordance with the UNHCR Guidelines), available at [https://www.congress.gov/bill/116th-congress/house-bill/5210/text#toc-HC4EFE459F7284E1EA1737584129A\\_3CD5](https://www.congress.gov/bill/116th-congress/house-bill/5210/text#toc-HC4EFE459F7284E1EA1737584129A_3CD5). The proposed modification provided that,

‘particular social group’ means, without any additional requirement not listed below, any group whose members (I) share—(aa) a characteristic that is immutable or fundamental to identity, conscience, or the exercise of human rights; or (bb) a past experience or voluntary association that, due to its historical nature, cannot be changed; or (II) are perceived as a group by society.

*Id.*

72. See *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208, 210 (BIA 2014).

73. See Benjamin Casper et al, *Matter of M-E-V-G- and the BIA’s Confounding Legal Standard for “Membership in a Particular Social Group,”* n.192, 14-06 IMMIGRATION BRIEFINGS (June 2014).

74. See generally *id.*

75. See *Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st Cir. 2010).

defined exclusively by the fact that its members have been targeted for persecution.<sup>76</sup>

Similarly, the Second,<sup>77</sup> Fifth,<sup>78</sup> Sixth,<sup>79</sup> Tenth,<sup>80</sup> and Eleventh Circuits<sup>81</sup> applied *Chevron* deference, and these circuits also followed the controlling BIA precedent requiring immutable characteristics, social distinction, and particularity in order to establish membership in a particular social group.<sup>82</sup> While the Third Circuit initially held that the particularity and social visibility requirements were inconsistent with previous precedent and denied *Chevron*

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76. *Ramirez-Perez v. Barr*, 934 F.3d 47, 51 (1st Cir. 2019). *But see* *Rojas-Perez v. Holder*, 699 F.3d 74, 81 (1st Cir. 2012), cert. denied, 134 S. Ct. 1274 (2014) (criticizing the additional BIA requirements and noting that

[i]t is particularly unclear how courts are to square the BIA's more recent statements regarding the social visibility requirement with its former decisions, which allow as cognizable those characteristics in particular social groups that are only visible when made known by individual members. Also, if an "immutable" characteristic is one that an individual possesses but either cannot change or should not be required to change, it is not clear why an individual with a hidden characteristic need make that characteristic known for it to be deemed immutable.

*Rojas-Perez*, 699 F.3d at 81 (citing *In re Kasinga*, 21 I&N Dec. 357, 365–66 (BIA 1996); *In re Toboso-Alfonso*, 20 I&N Dec. 819, 822–23 (BIA 1990); *Matter of Acosta*, 19 I&N Dec. 211, 233–34 (BIA 1985)).

77. *See, e.g., Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 71 (2d Cir. 2007); *Koudriachova v. Gonzales*, 490 F.3d 255, 258 (2d Cir. 2007) (applying *Chevron* deference). The Second Circuit recently articulated the following requirement as part of the definition of particular social group: common immutable characteristic, particularity, and social distinction based on the perception of the society in question, the persecutor's perception is not sufficient. *Quintanilla-Mejia v. Garland*, 3 F.4th 569, 588 (2d Cir. 2021).

78. *See, e.g., Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012) (applying *Chevron* deference and stating that the BIA's interpretation of "particularity" and "social visibility" is not "an impermissible construction of a statute that is decidedly vague and ambiguous").

79. *See Umana-Ramos v. Holder*, 724 F.3d 667, 672 (6th Cir. 2013) (upholding social distinction and particularity requirements, but emphasizing that on-sight visibility is not a requirement; instead, social visibility refers to "whether the set of individuals with the shared characteristic would be perceived as a group by society—not whether a group's individual members are recognizable 'on-sight' by others in the community"). *See also* *Kante v. Holder*, 634 F.3d 321, 327 (6th Cir. 2011) (articulating the following requirements for cognizable particular social groups: "(1) shared 'immutable' or 'fundamental' characteristic; (2) 'social visibility;' (3) 'particularity;' and (4) the group 'cannot be defined exclusively' by the fact that its members have been subject to harm"); *Zaldana Menjar v. Lynch*, 812 F.3d 491, 498 (6th Cir. 2015) (following immutable characteristic, particularity, and social distinction as the BIA's clarification of the social visibility requirement).

80. *See Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012) (accepting immutable characteristic, particularity, and social visibility requirements, and holding that "Congress did not define the term 'particular social group' in the INA;" therefore, the Tenth Circuit "defer to the BIA's interpretation unless it is unreasonable.").

81. *See Gonzalez v. U.S. Attorney General*, 820 F.3d 399, 404 (11th Cir. 2016) (adopting social distinction and particularity requirements and holding "particular social group" is ambiguous and therefore the BIA's interpretation is entitled to *Chevron* deference); *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006); *see also Jimenez-Perez v. U.S. Att'y Gen.*, 817 F. App'x 676, 682 (11th Cir. 2020) (reaffirming particularity and social distinction criteria).

82. *See Ucelo-Gomez*, 509 F.3d at 71; *Orellana-Monson*, 685 F.3d at 515; *Umana-Ramos*, 724 F.3d at 668; *Rivera-Barrientos*, 666 F.3d at 643; *Gonzalez*, 820 F.3d at 401.

deference,<sup>83</sup> it ultimately accepted the BIA's three-part test.<sup>84</sup> The Fourth Circuit published decisions adopting both the particularity and social distinction requirements;<sup>85</sup> however, another Fourth Circuit decision questioned whether the social visibility requirement was a reasonable interpretation of the statute, noting that "[w]hile we have endorsed both the immutability and particularity criteria, we have explicitly declined to determine whether the social visibility criterion is a reasonable interpretation of the INA."<sup>86</sup>

The Seventh Circuit openly criticized the additional BIA requirements, which created a circuit split.<sup>87</sup> The Seventh Circuit noted that the BIA recognized social groups in the past without any reference to social visibility, while in other cases, "refus[ed] to classify socially invisible groups as particular social groups but without repudiating the other line of cases."<sup>88</sup> Therefore, the Seventh Circuit rejected the BIA's social visibility requirement holding that it was inconsistent with previous BIA decisions and already recognized social groups, such as homosexuals, former military and police, women who are victims of female genital mutilation, etc., and held that "a court cannot pick one of the inconsistent lines and defer to that one, . . . [s]uch picking and choosing would condone arbitrariness and usurp the

83. See *Valdiviezo-Galdamez II*, 663 F.3d 582, 604 (3d Cir. 2011) (noting that nothing suggests that members of previously recognized social groups are "socially visible" (citing *In re Kasinga*, 21 I&N Dec. 357 (BIA 1996); *In re Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990); *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988)) (following Seventh Circuit precedent and citing *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009)).

84. The Third Circuit adopted the *Acosta* test, and after the Board provided clarification of its definition of particular social group, it granted *Chevron* deference to the BIA's definition and applied the social distinction and particularity requirements. See generally *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); see *S.E.R.L. v. U.S. Att'y Gen.*, 894 F.3d 535, 549-50 (3d Cir. 2018) (holding that "BIA is entitled to deference in interpreting ambiguous provisions of the INA," as the particularity and social distinction requirements are reasonable interpretation of the ambiguous statutory term of "particular social group").

85. See, e.g., *Lizama v. Holder*, 629 F.3d 440, 442 (4th Cir. 2011) (adopting all three BIA criteria); *Zelaya v. Holder*, 668 F.3d 159, 160 (4th Cir. 2012); *Temu v. Holder*, 740 F.3d 887, 889 (4th Cir. 2014).

86. See *Martinez v. Holder*, 740 F.3d 902, 910 (citing *Zelaya*, 668 F.3d at 165 n. 4). In a more recent decision, the Fourth Circuit held that the BIA applied the particularity requirement to former Salvadorian gang members was arbitrary and capricious, as the BIA conflated its particularity analysis by incorporating the social distinction requirement into its analysis; thus, the two standards impermissibly overlap. *Amaya v. Rosen*, 986 F.3d 424, 432-33 (4th Cir. 2021).

87. See *Gatimi*, 578 F.3d at 615 (rejecting social visibility requirement as "it makes no sense; nor has the Board attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility," "the Board has been inconsistent rather than silent" regarding social visibility as a requirement for a cognizable social group). See also *Cece v. Holder*, 733 F.3d 662, 668 (7th Cir. 2013) ("this Court rejected a social visibility analysis and concluded that applicants need not show that they would be recognized as members of a social group") (citing *Gatimi*, 578 F.3d at 614-15).

88. See *Gatimi*, 578 F.3d at 615-16 (citing *In re Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996); *In re Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990); *In re Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988)).

agency's responsibilities."<sup>89</sup> In 2018, the Seventh Circuit reiterated that particularity and social visibility have not been entitled to *Chevron* deference and it "remains an open question in this circuit."<sup>90</sup>

The Eighth Circuit—while noting that the reasonableness of the two additional requirements could be subject to challenge under *Chevron*—accepted and applied the BIA's three-part test.<sup>91</sup> Similarly, the Ninth Circuit previously held that the social distinction and particularity criteria could be open to challenge and left open the question whether or not they were valid; however, the court eventually reaffirmed the particularity and social distinction requirements stating that they were entitled to *Chevron* deference.<sup>92</sup>

### B. Examples of Recognized Social Groups

As mentioned above, several social groups have been established according to the *Acosta* standard, including but not limited to groups based on family and clan membership, age, gender and sexual orientation, ancestry, and military or police membership.<sup>93</sup> *Acosta* and the UNHCR Guidelines both suggested that family might be a social group, and later the BIA held that family could be a cognizable social group.<sup>94</sup> The BIA also found that

89. *Id.* at 616.

90. See *W.G.A. v. Sessions*, 900 F.3d 957, 964 (7th Cir. 2018) (noting that the Seventh Circuit "not yet accorded *Chevron* deference to the Board's interpretation that includes social distinction and particularity"). See also *N.L.A. v. Holder*, 744 F.3d 425, 438 (7th Cir. 2014) (citing *Cece*, 733 F.3d at 675) ("it would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims").

91. The Eighth Circuit adopted the BIA's three criteria. See, e.g., *Bautista-Bautista v. Garland*, 3 F.4th 1048, 1052 (8th Cir. 2021) (requiring immutable characteristic, particularity, social distinction); *Mayorga-Rosa v. Session*, 888 F.3d 379, 383 (8th Cir. 2018); *Ngugi v. Lynch*, 826 F.3d 1132, 1138 (8th Cir. 2016); *Garcia v. Holder*, 746 F.3d 869, 872 (8th Cir. 2014). But see *Gaitan v. Holder*, 683 F.3d 951 (8th Cir. 2012) (Colloton, J., concurring) (arguing that "*Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012), erred in refusing to decide whether the Board of Immigration Appeals . . . validly declared 'social visibility' and 'particularity' to be 'requirements' of a 'particular social group.'"). See also Benjamin Casper et al, *Matter of M-E-V-G- and the BIA's Confounding Legal Standard for "Membership in a Particular Social Group"* n.192, 14-06 IMMIGRATION BRIEFINGS (June 2014).

92. See *Ramos-Lopez v. Holder*, 563 F.3d 855, 858–59 (9th Cir. 2009) (followed BIA precedent applying the social visibility and particularity requirement); *Reyes v. Lynch*, 842 F.3d 1125, 1129, 1135 (reaffirming particularity and social distinction criteria and holding that these requirements are entitled to *Chevron* deference). But see *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091 (9th Cir. 2013) (the Ninth Circuit reviewed and clarified the particularity and social visibility requirements but has not answered the question whether these criteria are valid or not, or whether the Ninth Circuit should join the Third and Seventh Circuits and invalidate these requirements, also noting that the BIA blended the two criteria together).

93. See *supra* note 51 and accompanying text. See generally *USCIS PSG Training*, *supra* note 4, Part 4, at 22-51 (summarizing decisions on particular social groups).

94. *Matter of Acosta*, 19 I&N Dec. 211, 232-33 (BIA 1985) (noting that membership in a particular social group can encompass persecution based on "family background"); UNHCR Guidelines, *supra* note 19, ¶¶ 6-7 (noting that under both approaches, families have been recognized as particular social group); *Matter of L-E-A-*, 28 I&N Dec. 304, 305 (A.G. 2021) (restoring the standard for family-based claims

Filipinos of mixed Filipino-Chinese ancestry,<sup>95</sup> members of subclans in Somalia,<sup>96</sup> former policemen,<sup>97</sup> gender-related groups such as women subjected to female genital cutting, and other sexual orientation and gender identity social groups may constitute cognizable social groups.<sup>98</sup> The Courts of Appeals have recognized many other categories of cognizable social groups, for example, young women and widows,<sup>99</sup> individuals who publicly cooperate with law enforcement,<sup>100</sup> and individuals with physical or mental disabilities.<sup>101</sup>

With regard to victims of private violence, as a result of the vacatur of *Matter of A-B-*,<sup>102</sup> *Matter of A-R-C-G-* became good law again, allowing for

established by *Matter of L-E-A-I*, 27 I&N Dec. 40 (BIA 2017) and holding that immediate family is presumably cognizable depending on the degree and nature of the relationship and how that is regarded by society). See also *USCIS PSG Training*, *supra* note 4, at 22 (stating that family may be recognized as a particular social group). See, e.g., *Arita-Deras v. Wilkinson*, 990 F.3d 350, 353 (4th Cir. 2021) (recognizing membership in a nuclear family); *Aldana-Ramos v. Holder*, 757 F.3d 9, 18-19 (1st Cir. 2014) (remanding the case to the BIA to decide whether the applicants' family membership was "one central reason" for their persecution).

95. See *In re V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) (finding that "being a Filipino of mixed Filipino-Chinese ancestry" is an immutable characteristic).

96. See *Matter of H-*, 21 I&N Dec. 337 (BIA 1996) (finding that "the Marehan subclan of Somalia, the members of which share ties of kinship and linguistic commonalities, is such a 'particular social group'"). See also *USCIS PSG Training*, *supra* note 4, at 24 ("clan is an extended family group" and may be found cognizable).

97. See *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (recognizing former members of the El Salvador national police). See also *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014) (recognizing "effective honest police").

98. See *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (holding that sex may be an immutable characteristic); *In re Kasinga*, 21 I&N Dec. 357, 357 (BIA 1996) (holding that "[y]oung women . . . of the Tehamba-Kunsuntu Tribe . . . who have not been subjected to female genital mutilation" are a particular social group). However, as the USCIS noted, in most cases, the applicant's gender is not the central reason for the persecution. *USCIS PSG Training*, *supra* note 4, at 26. See *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1994) (homosexuals in Cuba is a cognizable social group). See also *Ayala v. U.S. Atty' Gen.*, 605 F.3d 941, 949 (11th Cir. 2010) (recognizing that homosexuality can constitute a social group); *Akosung v. Barr*, 970 F.3d 1095, 1103 (9th Cir. 2020) (finding that women who resist forced marriage proposals are a cognizable social group).

99. See, e.g., *Perdomo v. Holder*, 611 F.3d 662, 667, 669 (9th Cir. 2010) (recognizing young Guatemalan women subject to femicide). The USCIS also noted that a particular social group may be cognizable based on age. *USCIS PSG Training*, *supra* note 4, at 25 (citing *Matter of S-E-G-*, 24 I&N Dec. 579, 583-84 (BIA 2008)); *Gatimi v. Holder*, 578 F.3d 611, 617 (7th Cir. 2009) (recognizing a group of Cameroonian widows as a particular social group).

100. See, e.g., *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (finding that witnesses who testify against gang members is a cognizable particular social group).

101. *Temu v. Holder*, 740 F.3d 887, 892 (4th Cir. 2014) (holding that individuals with bipolar disorder can constitute a particular social group).

102. *Matter of A-B-I*, 27 I&N Dec. 316, 320, 335 (A.G. 2018) (overruling *A-R-C-G-* and holding that domestic violence and gang violence are not sufficient grounds for asylum based on membership in a particular social group except under exceptional circumstances, and providing a presumption against eligibility for asylum in these cases, without assessing the individualized facts and circumstances in each case: "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum"). See *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) (recognizing that married Guatemalan women who are unable to leave the relationship can constitute a particular social group).

case-by-case adjudication of asylum cases based on domestic violence and gang violence ("victims of private criminal activity") while also providing flexibility for ongoing rulemaking regarding the definition of particular social groups.<sup>103</sup> However, returning to pre-A-B- precedent did not alleviate the inconsistencies nor did it resolve the current circuit split; thus, there are still different views among the circuits regarding the necessary elements needed to establish membership in a particular social group, especially based on domestic violence<sup>104</sup> and gang violence.<sup>105</sup>

As mentioned above, President Biden's Executive Order specifically mandated that the Attorney General and Secretary of Homeland Security conduct an examination to analyze particular social groups based on domestic and gang violence and propose new regulations consistent with international standards.<sup>106</sup> As the case law illustrates, while rulemaking is pending, asylum seekers who are victims of domestic and gang violence will continue to suffer

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103. *Matter of A-B-*, 28 I&N Dec. 307, 308 (A.G. 2021); *A-R-C-G-*, 26 I&N Dec. 388. *A-R-C-G-* relied on prior precedent including *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014) and *Matter of W-G-R-*, 26 I&N Dec. 208, 210-12 (BIA 2014) (holding that in order to establish membership in a particular social group, members of such group must share a common immutable characteristic, defined with particularity, and must be socially distinct in the society in question; further, membership in the group must be a central reason for the persecution, and the harm must be inflicted by the government of their home country or by persons the government is unwilling or unable to control).

104. *A-B-*, 28 I&N Dec. at 308 (restoring *A-R-C-G-*). See, e.g., *Zometa-Orellana v. Garland*, 19 F.4th 970 (6th Cir. 2021) (reversing and remanding decision that women of childbearing age in El Salvador in domestic partnerships is not a cognizable social group in order to comply with the Attorney General's decision to vacate *A-B-I* and *A-B-II*); *Rodriguez Fuentes v. Barr*, 969 F.3d 865 (8th Cir. 2020) (holding that "Salvadoran female heads of households" and "vulnerable Salvadoran females" are not cognizable social groups as they lack social distinction and particularity). But see *Jaco v. Garland*, 24 F.4th 395 (5th Cir. 2021) (refusing to grant *Chevron* deference to the Attorney General's decision vacating *A-B-I* and *A-B-II* and directing the courts to return to pre-*A-B-* precedent, including *A-R-C-G-*).

105. Compare *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016) (holding that former Mara 18 gang members who renounced their gang membership and were deported to El Salvador do not satisfy the social distinction and particularity requirements), with *Amaya v. Rosen*, 986 F.3d 424 (4th Cir. 2021) (holding that former Mara 13 members satisfy the particularity requirement). But see *Nolasco v. Garland*, 7 F.4th 180 (4th Cir. 2021) (finding that former gang members and former gang members who left for moral reasons do not satisfy the social-distinction requirement); *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014) (finding that former MS-13 gang member in El Salvador is an immutable characteristic); *Urbina-Mejia v. Holder*, 597 F.3d 360 365-67 (6th Cir. 2010) (holding that former gang membership is an immutable characteristic); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (gang membership is not a *per se* ground for ineligibility for asylum; recognizing former gang membership as a ground for asylum). But see *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) (holding that former Mara-18 gang members who renounced their gang membership are not a cognizable social group); *Rodas-Orellana v. Holder*, 780 F.3d 982 (10th Cir. 2015) (holding that men in El Salvador who oppose the gangs and refuse joining them are not socially distinct); *Gomez-Abrego v. Garland*, 26 F.4th 39 (1st Cir. 2022) (holding that victims of gang violence ignored by the police or which the police collaborate with due to their affiliation with the gangs is not cognizable as a particular social group).

106. Executive Order No. 14010, *supra* note 2.

the consequences of the delay in creating a new, workable framework for particular social groups.<sup>107</sup>

IV. FORTHCOMING RULEMAKING SHOULD CREATE A WORKABLE FRAMEWORK FOR “MEMBERSHIP IN A PARTICULAR SOCIAL GROUP” CONSISTENT WITH INTERNATIONAL STANDARDS

While the vacatur of *Matter of A-B-* and return to pre-*A-B-* precedent is a positive change, it has left several questions unanswered and has yet to resolve the inconsistencies among the circuit courts and between national and international law.<sup>108</sup> Because of that, scholars advocate that steps must be taken to eliminate the circuit split and bring U.S. laws into compliance with international law. While there is a general consensus that “particular social group” was never intended to be a limitless category and should not be understood as a catch-all term to create eligibility for all cases that would not qualify under the other four grounds, it is a highly controversial topic, and there is not a clear understanding as to what approach should be followed by forthcoming rulemaking in order to interpret the term in accordance with international law.<sup>109</sup>

A. *Return to the Acosta Immutability Test*

Followers of this approach advocate that the U.S. should resolve the inconsistencies surrounding the particular social group jurisprudence by returning to the *Acosta* immutability test and abandoning the BIA’s additional social distinction and particularity requirements.<sup>110</sup> As Professor Hathaway argued, *Acosta* is “sufficiently open ended” to provide appropriate protection for grounds other than the four enumerated bases for asylum, but it is not too broad to result in recognition of asylum claims without proper basis.<sup>111</sup> The *Acosta* test was used for twenty years as the nationally accepted standard in the U.S. before the BIA’s implementation of the two additional requirements, which significantly narrowed the eligibility for asylum claims based on membership in a particular social group.<sup>112</sup> In addition, it is consistent with internationally accepted standards, the text of the 1951 Convention and its

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107. *Reyes*, 842 F.3d at 1125; *Amaya*, 986 F.3d at 424; *Nolasco*, 7 F.4th at 180; *Martinez*, 740 F.3d 902; *Urbina-Mejia*, 597 F.3d at 365-67; *Benitez Ramos*, 589 F.3d at 426; *W-G-R-*, 26 I&N Dec. at 208; *Rodas-Orellana*, 780 F.3d at 982; *Gomez-Abrego*, 26 F.4th at 39.

108. *A-B-*, 28 I&N Dec. at 308 (vacating “*A-B- I* and *A-B- II* to leave open the questions that those opinions sought to resolve and to ensure that the Departments have appropriate flexibility in the forthcoming rulemaking”).

109. MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 293 (2007).

110. See Legomsky & Musalo, *supra* note 9.

111. HATHAWAY, *supra* note 22, at 161.

112. *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

1967 Protocol, and the UNHCR Guidelines.<sup>113</sup> Arguably, the UNHCR is in the best position to provide a definition and guidance regarding membership in a particular social group in order to achieve international consistency and harmonization due to its special expertise in this field and its role in implementing the 1951 Convention and its 1967 Protocol globally and supervising their application.<sup>114</sup>

As Professor Michelle Foster argued, when interpreting the definition of "particular social group," we must look at the purpose and objectives of the 1951 Convention and its context, as this term does not have an ordinary meaning.<sup>115</sup> Professor Foster explained that the protected characteristic approach is preferable, as it is an "objective, principled approach" which allows for future evolution and extension of this category to other groups, while the social perception approach is "open-ended and unprincipled," limiting eligibility, and noted that it can be especially problematic to assess "the 'social perceptions' of other societies."<sup>116</sup>

As Professor Fatma E. Marouf pointed out, Canada, the United Kingdom, and New Zealand, refused to apply the social visibility requirement; instead, they follow the protected characteristic approach.<sup>117</sup> Canada's protected characteristic approach, for instance, recognizes particular social groups on the following grounds:

The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers, supra*, *Cheung, supra*, and *Matter of Acosta, supra*, provide a good working rule to achieve this result. They identify three possible categories: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a

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113. FOSTER, *supra* note 109, at 299-300.

114. *Id.* at 300 (citing UNHCR Summary Conclusions, at 312.) (noting that the protected characteristics approach was accepted as the dominant approach by the Expert Roundtable of the UNHCR's Global Consultations Project). *See also Deadly Inertia, supra* note 10, at 3 (discussing that the UNHCR Guidelines were developed based on state practice and expert consultations with legal professionals, including scholars, government officials, judges, and practitioners).

115. FOSTER, *supra* note 109, at 299.

116. *Id.* at 299-300.

117. Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. INT'L L. & POL. 391, 434-51 (2013) (discussing standards adopted by other countries for membership in a particular social group). *See also* FOSTER, *supra* note 109, at 295-96.

former voluntary status, unalterable due to its historical permanence.<sup>118</sup>

Canada's approach is not only consistent with the UNHCR guidelines, but it is even more inclusive than the *Acosta* test, as—in addition to innate or immutable characteristics—it also recognizes group membership based on voluntary association.<sup>119</sup>

While the *Acosta* test is generally endorsed by the UNHCR and the international community, the question can be raised whether simply returning to *Acosta* would provide a sufficient solution, and whether that would resolve all issues surrounding the definition of membership in a particular social group. It has been argued that when *Acosta* was first applied in 1985, it was not sufficiently clear to provide guidance and clarification on its application on a case-by-case basis, which resulted in the implementation of the additional two requirements by the BIA in the first place as its “interpretation” of the *Acosta* test.<sup>120</sup>

As Professor Guy S. Goodwin-Gill noted, when determining whether a group can be considered a particular social group according to the 1951 Convention, “attention should . . . be given to the presence of linking and uniting factors such as ethnic, cultural, and linguistic origin; education; family background; economic activity; shared values outlook, and aspirations,” also adding that “the importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others . . . .”<sup>121</sup> Professor Goodwin-Gill continued to explain that it is possible that instead of a “coherent definition,” rule makers should adopt a “set of variables” or a “range of permissible descriptors” in determining whether a person is considered a member of a particular social group for the purposes of asylum, including but not limited to “voluntary association” based on certain value(s); “involuntary linkages” (family, shared past experience, innate and unchangeable characteristics); and “the perception of others.”<sup>122</sup> Therefore, an important criticism of the immutable characteristic approach is that it simply concentrates on innate, unalterable characteristics. In doing so, the approach fails to allow courts to consider several other aspects of the word “social,” even though those other aspects, such as different classes of society, could also be sufficient in determining whether a particular social group is

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118. *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 739 (Can.).

119. *Compare Ward*, 2 S.C.R. at 739, with *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

120. *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

121. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 47 (2d ed. 1998).

122. *Id.* at 365-66.

cognizable under the 1951 Convention, in accordance with the ordinary meaning of "social groups" in society.<sup>123</sup>

Another important point is that while "*Acosta* . . . specifically mentioned 'sex' as an innate characteristic that could link the members of a 'particular social group,'" the BIA and the Circuit Courts did not recognize that gender alone is sufficient to establish a cognizable social group.<sup>124</sup> However, the UNHCR noted that:

. . . sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men. Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.<sup>125</sup>

The UNHCR further clarified that "refusing to recognize 'women' generally as a particular social group [based on the size of the group] . . . has no basis in fact or reason, as the other grounds are not bound by this question of size."<sup>126</sup> Thus, it can be argued that the immutable characteristic approach—without recognizing gender-based claims on that basis alone as a particular social group—is in conflict with the UNHCR guidelines, and therefore returning to *Acosta* would not resolve all issues surrounding the definition of the term "particular social group," including the current inconsistencies and circuit split.<sup>127</sup>

While these concerns are not completely without merit, membership in a particular social group, as the fifth ground for asylum, should be sufficiently broad to allow for evolving interpretation and application to changing

123. *Id.* at 366.

124. *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3rd Cir. 1993); *Acosta*, 19 I&N Dec. at 233 (holding that the shared common, immutable characteristic can be sex).

125. United Nations High Commissioner for Refugees, 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, ¶ 30 (May 7, 2002, HCR/GIP/02/01) [hereinafter UNHCR Guidelines on Gender-Related Persecution].

126. *Id.* ¶ 31.

127. *See supra* Part III.A. *See also* Matter of L-E-A-, 27 I&N Dec. 581, 587 (A.G. 2019). Attorney General Barr explained:

According to the Board, "[t]he shared characteristic might be an innate one such as sex, color, or kinship ties," and immigration judges should engage in a case-by-case analysis to determine whether a particular innate characteristic would qualify. *Id.* The Board did not clarify whether the sharing of a "common, immutable characteristic" was a sufficient, as opposed to just a necessary, condition for qualifying as a particular social group under the statutory definition of "refugee."

*L-E-A-*, 27 I&N Dec. at 587.

circumstances, but also objective enough for consistent adjudication of asylum claims in order to properly serve the intention of the drafters of the Refugee Convention and the drafters of national legislations to provide a ground for asylum for those who cannot qualify under the other four categories.<sup>128</sup> The UNHCR Guidelines, as mentioned above, recognize the “protected characteristics” (or “immutability”) and the “social perception” approaches as *alternative* tests; however, it is not required by the UNHCR that an asylum applicant satisfy both tests.<sup>129</sup> Therefore, the *Acosta* test, requiring only a showing of immutable characteristic, is consistent with international standards, without further requiring a refugee to establish social distinction and particularity.<sup>130</sup>

### B. *The Cumulative Approach and the BIA’s Three-Part Test*

Contrary to the *Acosta* standard, the cumulative approach—and the BIA’s three-part test requiring both immutable characteristics, particularity, and social distinction—not only has little support in international law, but also causes unnecessary confusion and uncertainty, and radically narrows the eligibility for asylum, which creates a barrier for many asylum seekers.<sup>131</sup> Scholars have noted that the BIA’s additional particularity and social distinction requirements “make no logical sense, . . . [are] unpredictable, . . . nearly impossible to satisfy, and have no convincing legal basis.”<sup>132</sup>

The UNHCR noted that its definition for a particular social group “combines the two alternate approaches emerging in State practice, that is, the ‘protected characteristics’ approach and the ‘social perception’ approach into one definition.”<sup>133</sup> In UNHCR’s view, both approaches are legitimate.<sup>134</sup> The group only needs to be identifiable through one of the approaches, not both.<sup>135</sup> Therefore, adding particularity and social distinction as additional elements to the immutable characteristic test is inconsistent with international standards, as the UNHCR guidelines clearly state that establishing all of these elements is not required for a cognizable particular social group.<sup>136</sup>

128. *Deadly Inertia*, *supra* note 10, at 1. See also Helton, *supra* note 18, at 45 (“The ‘social group’ category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up”).

129. UNHCR Guidelines, *supra* note 19, ¶¶ 6-7.

130. *Id.*

131. *Deadly Inertia*, *supra* note 10, at 2 (noting that after imposing the social visibility and particularity requirements, the BIA has not recognized new particular social groups for years).

132. Legomsky & Musalo, *supra* note 9.

133. UNHCR Guidance Note on Refugee Claims relating to Victims of Organized Gangs art. 4, ¶ 34, UNHCR (March 2010), available at <https://www.refworld.org/docid/4bb21fa02.html> [hereinafter UNHCR Guidance Note on Gangs].

134. *Id.*

135. *Id.*

136. UNHCR Guidelines, *supra* note 19, ¶¶ 10-13.

Moreover, requiring that only applicants who claim membership in a particular social group satisfy the additional social distinction and particularity requirements is inconsistent with the BIA's previous *ejusdem generis* interpretation of the statute in *Acosta*. This is because refugees who apply for asylum based on the four other grounds are not required to show social distinction and particularity, and these additional two requirements also cannot be reconciled with previously recognized particular social groups.<sup>137</sup>

In addition, the BIA requires social distinction as if it were interchangeable with "social perception," although the UNHCR Guidelines specifically state that social perception "examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large," and it can be used alternatively, as a secondary test, if a social group is not cognizable because it lacks protected characteristics.<sup>138</sup> Social distinction, however, as a separate test, inquires into the perception of the social group by the society in question, not the persecutors, which also causes uncertainties, as not only does it require the courts to assess the perception of the society of a foreign country, but it also disregards the fact that certain groups may remain invisible in society.<sup>139</sup>

Moreover, the particularity requirement is often concerned with the size of the group; thus, it is also inconsistent with the UNHCR Guidelines, which explicitly state that "[t]he size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2)."<sup>140</sup> This relates to the "floodgates" concern, which was raised in the past to support the argument that defining particular social group too broadly can result in a huge number of refugees seeking asylum in

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137. *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985); *Particular Social Group Practice Advisory: Applying for Asylum Based on Membership in a Particular Social Group*, at 5, NIJC (July 2021), available at <https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-applying-asylum-based-membership-particular> (discussing that the BIA has not explained how previously recognized social groups would qualify under the new social distinction and particularity standards) [hereinafter *NIJC Practice Advisory*].

138. UNHCR Guidelines, *supra* note 19, ¶¶ 10-13 (stating that "[i]f a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society"). See also *Matter of S-E-G- et al.*, 24 I&N Dec. 579, 588 (BIA 2008) (stating that the UNHCR Guidelines "endorse an approach in which an important factor is whether the members of the group are 'perceived as a group by society'").

139. *NIJC Practice Advisory*, *supra* note 137, at 8-10; *Matter of M-E-V-G-*, 26 I&N Dec. 227, 242 (BIA 2014).

140. UNHCR Guidelines, *supra* note 19, ¶ 18 (also noting that religious or political beliefs, for example, can be shared by a majority of the society in question, which should not be a ground for denying protection for asylum); UNHCR Guidelines on Gender-Related Persecution, *supra* note 125, ¶ 31 (refusing to recognize a particular social group solely because of the size of the group "has no basis"); *but see S-E-G- et al.*, 24 I&N Dec. at 584 ("the size of the proposed group may be an important factor").

the United States.<sup>141</sup> Scholars, however, including Professor Karen Musalo, argued that the floodgates argument is unfounded and does not pose a real threat, as after the BIA's decision in *Kasinga*, for example there was no "appreciable increase in the number of claims based on [female genital mutilation]"; similarly, when Canada first started to recognize gender-based asylum claims, there was once again no evidence of an "explosion of claims" to support the floodgate concerns.<sup>142</sup> Likewise, Professor Fatma Maurof argued that "fear of opening the floodgates is not a legal reason to reject a [particular social group]," especially because it is only one of the five grounds of asylum, and applicants must also satisfy other elements to qualify, such well-founded fear of persecution; nexus; and that the government is unable or unwilling to help them (if the applicant fears harm by the hands of private persecutors).<sup>143</sup> Therefore, the floodgates argument does not provide sufficient basis to narrow eligibility for asylum based on policy considerations of controlling migration and managing the number of eligible asylum seekers, which could result in devastating consequences to those fleeing from persecution.<sup>144</sup>

As Professor Marouf also noted, the failure of the BIA to provide sufficient clarification regarding the meaning of its additional requirements has led to more confusion and differing interpretations by the circuit courts.<sup>145</sup> This confusion has risen to the point where social distinction and particularity not only overlap, but might also conflict with each other, as the group must be narrow enough so that it can be defined with particularity, but it must be broad enough to be socially distinct.<sup>146</sup> These vague standards lead to inconsistent application, not only making the three-part test very hard to meet but often requiring asylum applicants to submit evidence, including proof of country conditions or expert testimony. This imposes an extremely high evidentiary burden, especially on *pro se* applicants, refugees who are unable

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141. See KOURULA, *supra* note 14, at 66 (discussing that historically, not only legal but also political, social, and economic reasons were behind narrowing the eligibility for refugee status, such as "fear of uncontrolled and unmanageable movements of 'foreigners' from developing countries to developed ones," which could result in uncontrollable migration).

142. Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 132-33 (2007) (noting concluding that the floodgate argument is "without basis").

143. Fatma Marouf, *Becoming Unconventional: Constricting the Particular Social Group Ground for Asylum*, 44 N.C. J. INT'L L. 487, 514 (2019); 8 U.S.C. § 1101 (a)(42).

144. See Musalo, *supra* note 142, at 132-33; Marouf, *supra* note 143, at 514.

145. Marouf, *supra* note 143, at 490-92.

146. *Id.* at 492; *Matter of A-B-*, 27 I&N Dec. 316, at 336 (A.G. 2018) (pointing out that "[a] particular social group must avoid, consistent with the evidence, being too broad to have definable boundaries and too narrow to have larger significance in society"). See also *Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 604 (3d Cir. 2011).

to afford legal representation, or to those who have limited access to free legal services.<sup>147</sup>

The above analysis shows that while the particular social group category is deeply rooted in international law and was intended to provide a basis for asylum for applicants who fear harm in their home country but would not fall under the other four requirements, it is also the least straightforward category.<sup>148</sup> Although the vagueness of this term can be interpreted to sufficiently allow for an evolving application of asylum claims in order to provide relief for a broader category of applicants, the BIA's interpretation used this ambiguity to significantly narrow eligibility for asylum on this ground by adding the additional social distinction and particularity requirements and, thus, creating a vague and confusing test which is extremely hard to meet and inconsistent with the purpose of the 1951 Convention.<sup>149</sup> This result is exemplified by the fact that since the BIA started applying the social distinction and particularity requirements in 2008, no additional social groups were recognized by the BIA until six years later in 2014.<sup>150</sup>

### *C. Two Alternative Tests: Protected Characteristics or Social Perception*

As discussed above, the UNHCR Guidelines do not endorse particularity and social distinction as distinct requirements in addition to the protected characteristic (or immutability as defined by *Acosta*) standard; instead, they refer to "social perception" as an *alternative* to the protected characteristics test for determining eligibility for asylum on the basis of membership in a particular social group.<sup>151</sup> According to the UNHCR, social perception means "whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large."<sup>152</sup> Social perception, therefore, does not require that the group is distinct from and recognized by the society in question ("social distinction").<sup>153</sup> In *Matter of M-E-V-G-*, the BIA recognized that its interpretation is inconsistent with the UNHCR definition and noted that

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147. Marouf, *supra* note 143, at 492; *Matter of M-E-V-G-*, 26 I&N Dec. 227, 244 (BIA 2014) ("Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as "distinct" or "other" in a particular society").

148. STEPHEN H. LEGOMSKY & CHRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 961 (6th ed. 2015).

149. Legomsky & Musalo, *supra* note 9.

150. *Id.*; *NJIC Practice Advisory*, *supra* note 137, at 6. See also *Matter of A-R-C-G-*, 26 I&N Dec. 388, at 392-93 (BIA 2014).

151. UNHCR Guidelines, *supra* note 19, ¶¶ 10-13; *Deadly Inertia*, *supra* note 10, at 3; Legomsky & Musalo, *supra* note 9.

152. UNHCR Guidelines, *supra* note 19, ¶ 7.

153. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 248-49 (BIA 2014).

[w]e recognize that our interpretation of the ambiguous phrase “particular social group” differs from the approach set forth in the UNHCR’s social group guidelines, which sought to reconcile two international interpretations that had developed over the years. UNHCR Guidelines. . . . While the views of the UNHCR are a useful interpretative aid, they are “not binding on the Attorney General, the BIA, or United States courts.” . . . Indeed, the UNHCR has disclaimed that its views have such force and has taken the position that the determination of “refugee” status is left to each contracting State.<sup>154</sup>

The BIA also pointed to the “particular social group” definition adopted by the European Union’s Qualification Directive, which also “departs from the UNHCR Guidelines by requiring a social group to have both an immutable/fundamental characteristic and social perception.”<sup>155</sup> However, the BIA has failed to mention that there is not a clear consensus in European Union law regarding the interpretation of the term “particular social group” provided by the Qualification Directive.<sup>156</sup> The Court of Justice of the European Union (CJEU) interpreted Article 10(1)(d) of the Qualification Directive to mean that in order to recognize a social group, two requirements must be met: first, the group must have a “common characteristic;” second, it must be a “distinct identity in the relevant country” which resembles the BIA’s cumulative approach.<sup>157</sup> Although the CJEU has not stated specifically

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154. *Id.* at 248 (citing UNHCR Guidelines, *supra* note 19) (referring to the approach adopted by the European Union requiring both immutable or fundamental characteristic and social perception).

155. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast), 2011 O.J. (L 337) 9, art 10(1)(d) [hereinafter Qualification Directive].

Article 10.1(d), provides:

[A] group shall be considered to form a particular social group where in particular:

—members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

—that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

*Id.*

156. Christel Querton, *One Step Forward, Two Steps Back? Interpreting ‘Particular Social Group’ in the European Union*, INT’L & COMP. L.Q. 425, 433-438 (2022).

157. European Asylum Support Office, *Guidance on Membership of a Particular Social Group* 11, EASO (March 2020), <https://www.easo.europa.eu/sites/default/files/EASO-Guidance-on%20MPSG-EN.pdf> [hereinafter EASO Guidance] (citing Joined Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, EU:C:2013:720, para 45, holding that in order to constitute a particular social group, the following two conditions should be met: (1) “

that it adopted the cumulative approach, the European Asylum Support Office's *Guidance on Membership of a Particular Social Group* explains that the CJEU endorsed the cumulative interpretation, stating that "Article 10(1)(d) QD defines a particular social group by two cumulative elements:"

The cumulative approach means that the two criteria outlined above, respectively "common characteristics" and "distinct identity", both need to be met. In other words, it is not sufficient to establish that the group share certain characteristics or background or beliefs, this must, at the level of the group, also be visible for others so that the group is identified as being different. The cumulative approach was reaffirmed in the CJEU judgment of the case X, Y and Z.<sup>158</sup>

The cumulative interpretation of the Qualification Directive, just like the BIA's cumulative approach, has been subjected to criticism for defining eligibility too narrowly.<sup>159</sup>

Australia, on the other hand, follows an alternative approach endorsed by the UNHCR – as membership in a particular social group can be established by either protected characteristics *or* social perception.<sup>160</sup> It is important to note that Australia's social perception test is distinguishable from the BIA's social distinction requirement as social perception does not require "that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of society" and that the group is recognized by some people, at least by the persecutor(s) "as sharing some

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members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it" (2) "that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society").

158. EASO Guidance, *supra* note 157, at 11.

159. JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 432 (2d ed. 2014).

160. Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014, No. 135, 2014, <https://www.legislation.gov.au/Details/C2014A00135>. Section 5L states:

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if: (a) a characteristic is shared by each member of the group; and (b) the person shares, or is perceived as sharing, the characteristic; and (c) any of the following apply: (i) the characteristic is an innate or immutable characteristic; (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it; (iii) the characteristic distinguishes the group from society; and (d) the characteristic is not a fear of persecution.

*Id.* Prior to 2014, Australia followed the social perception approach. See *Applicant A v. MIEA* (1996) 190 CLR 225, 264 (Austl.) (defined particular social group as "persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them").

kind of connection or falling under some general classification.”<sup>161</sup> Therefore, the Australian approach is not only completely different than the BIA’s approach because the social distinction requirement imposed by the BIA is not the equivalent of the social perception approach, but also because the BIA’s interpretation did not create alternative tests; rather, it added two additional requirements to the existing immutability standard to create a single three-part test.<sup>162</sup>

Immutable characteristics and social perception are both important factors, and both should be sufficient—if used as an alternative test rather than two distinct requirements of a single cumulative test—to provide appropriate level of protection and allow for an application that is capable of evolving with the changing norms of society and consistent with the UNHCR Guidelines and international human right standards.<sup>163</sup> Thus, defining membership in a particular social group, either by the protected characteristic approach (or *Acosta* immutability standard) or the social perception test, as two separate, alternative tests, would be a sufficiently flexible solution to broaden eligibility as endorsed by the UNHCR.<sup>164</sup> On the contrary, the BIA’s current cumulative test requires a showing of both immutable characteristic, social distinction, and particularity, as three distinct requirements, which drastically narrows asylum eligibility based on membership in a particular social group and is therefore inconsistent with international standards.<sup>165</sup>

## V. CONCLUSION

As the Executive Order issued by President Biden noted, it is essential that the current inconsistencies and circuit split regarding the definition of “particular social group” caused by the BIA’s interpretation of the term are resolved by proposing new regulations.<sup>166</sup> Currently, the U.S. asylum laws concerning membership in a particular social group are not consistent with UNHCR’s interpretation of the 1951 Convention and its 1967 Protocol.<sup>167</sup>

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161. *Applicant S v. MIMA* (2004) 217 CLR 387 (Austl.).

162. The social perception approach is less restrictive than the social distinction requirement. *Compare* Matter of W-G-R-, 26 I&N Dec. 208, 216 (BIA 2014) (“Social distinction refers to recognition by society . . . . To be socially distinct, a group need not be seen by society; it must instead be perceived as a group by society.”) (citing *In re C-A-*, 23 I&N Dec. 951, 956-57 (BIA 2006), with *Applicant S v. MIMA* (2004) 217 CLR 387 (Austl.) (a “particular social group” may exist although it is not recognised or perceived as such by the society in which it exists. . . . it is not necessary that it be recognised generally within the society as a collection of individuals which constitutes a group that is set apart from the rest of the community”).

163. UNHCR Guidelines, *supra* note 19, ¶ 3 (“the term membership of a 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”).

164. *Id.*

165. Legomsky & Musalo, *supra* note 9; *Social Visibility*, *supra* note 32, at 62.

166. See Nanasi, *supra* note 34, at 296-97.

167. Legomsky & Musalo, *supra* note 9.

These international agreements codified fundamental rights that are deeply rooted in and recognized by international law; therefore, the definition of "particular social group" should also be interpreted by looking at the objectives of the 1951 Convention, allowing for harmonization and uniform application of the particular social group jurisprudence on an international level.<sup>168</sup> Uniform application of international refugee rights requires that refugees who are entitled to protection based on their fear of persecution in their home country are not subjected to uncertainties and different standards when applying for asylum.<sup>169</sup>

In order to achieve that goal, the forthcoming regulation should address the ambiguities which resulted from the lack of clear guidance and the addition of the social distinction and particularity requirements, and create a new framework consistent with the UNHCR Guidelines, which endorse both the protected characteristic and social perception approaches as two alternative tests.<sup>170</sup> Alternatively, the Supreme Court of the United States could resolve the current circuit split by providing clarification on the definition of particular social group and applicable test to establish eligibility. To bring the United States into compliance with international standards and resolve the ambiguities and uncertainties, the existing three-part test should be replaced with a new standard, recognizing both of the approaches endorsed by the UNHCR as alternative tests of establishing membership in a particular social group. Doing so would create a uniform, more inclusive test, which is capable of evolving with the changes of our society and fundamental rights grounded in international law.

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168. FOSTER, *supra* note 109, at 299-300.

169. *Id.*

170. UNHCR Guidelines, *supra* note 19, ¶¶ 10-13; UNHCR Guidance Note on Gangs, *supra* note 133, art. 4, ¶ 34.