

DEATH OF THE PARTICULAR SOCIAL GROUP

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ABSTRACT

Applicants seeking asylum in the United States must demonstrate that they fear persecution on account of one of five protected grounds—race, religion, national origin, political opinion, or membership in a particular social group (PSG). The PSG ground has long been the most complex and challenging avenue for relief, and in the Trump era, already precarious protections for vulnerable people such as survivors of intimate partner and gang violence were further impaired.

The Board of Immigration Appeals' first, and longstanding, definition of a PSG in Matter of Acosta required members to possess "common immutable characteristics," those that, like the other statutory grounds, either could not be changed or were so fundamental that one should not be required to change them. This Article reveals that since the Board imposed two additional requirements—that PSGs possess social distinction and particularity—over a decade ago, the Board has recognized only two new particular social groups. Both of those groups, one protecting survivors of domestic violence and the other family membership, were invalidated by Trump administration attorneys general. Thus, when examining BIA jurisprudence, it appears that the particular social group is dead.

This Article discusses the evolution of the particular social group ground in both domestic and international law and reviews the disparate treatment of PSGs by the Board of Immigration Appeals and federal circuit courts. It then makes recommendations—including legislation, reconsideration of the attorney general's broad authority to overrule cases using the power of self-referral, and consideration of whether Chevron deference remains appropriate for PSG jurisprudence—for a return to the more equitable, and legally sound, Acosta immutability test.

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I.

INTRODUCTION

Asylum seekers faced relentless attacks in the Trump era. The former president “consistently characterized asylum as a ‘loophole’ in U.S. southern border security” and sought to curtail both access to asylum and the rights of those seeking refuge in the United States.¹ After instituting a “zero tolerance” policy,² under which asylum seekers who enter the United States without authorization are

1. SARAH PIERCE, MIGRATION POL’Y INST., IMMIGRATION-RELATED POLICY CHANGES IN THE FIRST TWO YEARS OF THE TRUMP ADMINISTRATION 18 (2019), <https://www.migrationpolicy.org/research/immigration-policy-changes-two-years-trump-administration> [<https://perma.cc/9VLV-TUGS>].

2. Memorandum from the Off. of the Att’y Gen. to Fed. Prosecutors Along the Sw. Border (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/7XLH-AZEM>].

criminally prosecuted, the administration separated children from their parents detained pursuant to the new directive.³ A rule promulgated in July 2019 stated that anyone who had passed through a country other than their own while en route to the southern border of the United States would be denied asylum if they did not apply for protection in the transit country.⁴ The administration placed limits on the number of individuals who are permitted to enter the United States to apply for asylum at ports of entry each day; this “metering” policy led to people “waiting weeks or sometimes months for their opportunity to request asylum.”⁵ Those who were able to enter and declare their intention to apply for asylum were sent to Mexico to await future court hearings.⁶ Others, including children, are held in overcrowded and unhygienic detention centers.⁷ Those who can overcome the newly heightened standards⁸ for passing credible fear interviews⁹ are ineligible for release on bond if transferred from expedited to full removal proceedings.¹⁰ Asylum applicants are no longer entitled to full evidentiary hearings,¹¹ are being

3. See DHS, *Fact Sheet: Zero Tolerance Immigration Prosecutions – Families* (June 15, 2019), <https://www.cbp.gov/newsroom/zero-tolerance-immigration-prosecutions-family-fact-sheet> [<https://perma.cc/F657-SCWX>].

4. See Guidelines Regarding New Regulations Governing Asylum and Protection Claims from James R. McHenry III, Dir., Dept. of Just., to All of EOIR (July 15, 2019), <https://www.justice.gov/eoir/file/1183026/download> [<https://perma.cc/4WFP-8TF8>]. This followed a prior rule, issued by the former president in November 2018, which barred individuals who did not present themselves at a port of entry from applying for asylum. See Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018).

5. James Frederick, ‘Metering’ at the Border, NAT’L PUB. RADIO (June 29, 2019), <https://www.npr.org/2019/06/29/737268856/metering-at-the-border> [<https://perma.cc/XB4Q-JUSD>] (noting that “19,000 asylum-seekers are waiting on the Mexican side of the border for their chance to request asylum in the U.S.”).

6. DHS, *Migrant Protection Protocols* (Jan. 24, 2018), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/N5M8-D5VL>].

7. See Andrew Gumbel, ‘They Were Laughing at Us’: Immigrants Tell of Cruelty, Illness and Filth in US Detention, GUARDIAN (Sept. 12, 2018), <https://www.theguardian.com/us-news/2018/sep/12/us-immigration-detention-facilities> [<https://perma.cc/AJ3H-VUMU>].

8. See U.S. CITIZENSHIP & IMMIGR. SERVICES, LESSON PLAN OVERVIEW: CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS (2019), <https://fingfx.thomsonreuters.com/gfx/mkt/11/10239/10146/2019%20training%20document%20for%20asylum%20screenings.pdf> [<https://perma.cc/FC6H-GWFS>]. The newly issued lesson plans also removed previously existing guidance for officers to consider trauma and cultural background when assessing the credibility of applicants. *Id.* See also CATH. LEGAL IMMIGR. NETWORK, INC. & AM. IMMIGR. LAWS. ASS’N, CREDIBLE FEAR LESSON PLANS COMPARISON CHART (2019), <https://www.aila.org/infonet/updated-credible-fear-lesson-plans-comparison> [<https://perma.cc/EX9B-WV5Y>].

9. Individuals who enter the United States without authorization and claim fear of returning to their home country must demonstrate “credible fear” in order to remain in the United States. 8 C.F.R. § 1208.30 (2020). During the credible fear interview, an asylum officer determines whether there is a “reasonable possibility” that the applicant could establish eligibility for asylum. 8 C.F.R. § 1208.31(c) (2020).

10. See *Matter of M-S-*, 27 I. & N. Dec. 509 (Att’y Gen. 2019).

11. See *Matter of E-F-H-L*, 27 I. & N. Dec. 226 (Att’y Gen. 2018).

charged fees for their applications for the first time in history,¹² and can be denied work permits¹³ as they wait years for their applications to be adjudicated.¹⁴ And after years of methodically chipping away at the rights and dignity of asylum seekers, in June 2020, the Trump administration launched its most significant attack, when it issued comprehensive regulations that would systematically dismantle nearly every aspect of our nation's asylum laws.¹⁵

Another significant but underexplored way that the Trump administration attempted to undermine the rights of asylum seekers was by limiting the already precarious jurisprudence of “particular social group” (PSG), one of the five grounds for asylum in the United States. Unlike the other bases for asylum—race, religion, national origin, and political opinion—the particular social group ground is more subjective and open to interpretation. It is not defined in either international or domestic law, which has led to varied and evolving definitions across time and jurisdictions. As its jurisprudence has developed, the PSG ground has provided critical protections to many fleeing serious harms, in particular, harms that were not foreseen when the asylum regime was created in the aftermath of World War II, such as intimate partner abuse, gang-based violence, and persecution of LGBTQ and disabled individuals.

The Board of Immigration Appeals (BIA), the highest administrative body to interpret U.S. immigration laws, defined particular social group in the landmark 1985 case *Matter of Acosta*.¹⁶ Its definition—requiring groups to possess common immutable characteristics—drew from international interpretations as well as established concepts of statutory construction. Several PSGs were recognized by the Board after the *Acosta* decision,¹⁷ but approximately 20 years later, the court

12. See Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46,788 (Aug. 3, 2020).

13. See Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 85 Fed. Reg. 37,502 (June 22, 2020); Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532 (June 26, 2020).

14. See Denise Lu & Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html> [<https://perma.cc/6X4B-PB5E>] (describing long delays at immigration courts, and reporting that “asylum seekers accounted for about half of new immigration cases [in 2018], at a record 159,590 cases” and that “pending cases have increased by nearly 50 percent since Mr. Trump took office in 2017”); DOJ, *Executive Office for Immigration Review Adjudication Statistics - Pending Cases* (Dec. 31, 2018), <https://www.justice.gov/eoir/page/file/1060836/download> [<https://perma.cc/VC8A-EUXP>] (reporting a backlog of nearly 900,000 cases in U.S. immigration courts).

15. See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264 (June 15, 2020). The regulations impact nearly every facet of asylum law, including who may enter the United States to seek asylum, who is eligible for a hearing before an Immigration Judge, and the definitions of key terms in the refugee definition, such as persecution, political opinion, and particular social group. See *id.*

16. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

17. See *infra* Section III.A.

introduced two new criteria—particularity¹⁸ and social distinction¹⁹—to the PSG definition. Since that time, the Board has recognized only two new particular social groups: a group encompassing survivors of domestic violence in 2014,²⁰ and a group defined by family membership in 2017.²¹

As was extensively detailed in the media,²² in June 2018, Attorney General (AG) Sessions issued *Matter of A-B*,²³ overruling the case that granted asylum to those fleeing intimate partner abuse. A little over a year later, AG Barr overruled *Matter of L-E-A*,²⁴ the case that recognized family as a particular social group. The actions of these two attorneys general have effectively eradicated the particular social group ground, as the Board of Immigration Appeals has not recognized a valid social group that its parent agency, the Department of Justice (DOJ), has upheld since new requirements were added fifteen years ago.²⁵

18. See *Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (defining “particularity” as “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”).

19. See *Matter of C-A-*, 23 I. & N. Dec. 951, 951 (B.I.A. 2006) (“The social visibility of the members of a claimed social group is an important consideration in identifying the existence of a ‘particular social group’ for the purpose of determining whether a person qualifies as a refugee.”); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 227 (B.I.A. 2014) (renaming the “social visibility” element “social distinction,” and holding that “[a]n applicant for asylum . . . based on ‘membership in a particular social group’ must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question”); *Matter of W-G-R*, 26 I. & N. Dec. 208, 208 (B.I.A. 2014) (pronouncing the same).

20. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389–90 (B.I.A. 2014) (finding that “the lead respondent, a victim of domestic violence in her native country, is a member of a particular social group composed of ‘married women in Guatemala who are unable to leave their relationship’”).

21. *Matter of L-E-A-*, 27 I. & N. Dec. 40, 42 (B.I.A. 2017) (“We agree with the parties that the members of an immediate family may constitute a particular social group.”).

22. See e.g., Katie Benner & Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html> [<https://perma.cc/WD3W-LTM2>]; Evan Halper, *Trump Administration Moves to Block Victims of Gang Violence and Domestic Abuse from Claiming Asylum*, L.A. TIMES (June 11, 2018), <https://www.latimes.com/politics/la-na-pol-sessions-asylum-20180611-story.html> [<https://perma.cc/F83B-EW5C>]; Elise Foley, *Trump Administration Restricts Asylum Access for Victims of Gang and Domestic Violence*, HUFFINGTON POST (June 11, 2018), https://www.huffpost.com/entry/sessions-immigrants-asylum_n_5b1e981de4b0adfb826c3204 [<https://perma.cc/72W6-GGPB>].

23. *Matter of A-B-*, 27 I. & N. Dec. 316 (Att’y Gen. 2018).

24. 27 I. & N. Dec. at 40.

25. As will be detailed, *infra* Section IV, a small number of federal courts have declined to follow the BIA’s PSG jurisprudence. Further, because decisions of a federal circuit court are binding on the BIA when it considers cases arising in that circuit, the PSG is alive and well in those jurisdictions. See *Singh v. Ilchert*, 63 F.3d 1501, 1508 (9th Cir. 1995) (citing *NLRB v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987), *cert. denied*, 501 U.S. 1217 (1991) (asserting that “[a] federal agency is obligated to follow circuit precedent in cases originating within that circuit”). However, the BIA’s decisions remain critically important in this area because they provide uniformity and, perhaps more importantly, are a statement of values from the agency tasked with interpreting immigration law.

This Article describes and explains the particular social group's evolution and demise. Section II details the PSG definition in both international and domestic law. Section III discusses the application of the U.S. definition by the Board of Immigration Appeals, which has imposed requirements that are unduly restrictive and inconsistent with international law. Section IV examines the federal courts of appeals' review of the BIA's PSG jurisprudence, with some circuit courts accepting and others rejecting the administrative court's evolving definition. Section V proposes ways to resuscitate the particular social group, including through legislative action, addressing the overuse of attorney general certification, and a reexamination of whether *Chevron* deference remains appropriate for PSG jurisprudence. Section VI concludes.

II.

EVOLUTION OF THE PARTICULAR SOCIAL GROUP DEFINITION

The term “particular social group” is not defined in either the international treaties or domestic statutes in which it originated. Neither the United Nations nor U.S. legislative history provide insight into the meaning of the term.²⁶ As such, “[b]oth courts and commentators have struggled to define” the phrase.²⁷ This section traces the origins and evolution of the definition of particular social group, first in the international community and in its eventual adoption and modification in the United States, in an effort to better understand its meaning and significance.

A. *International Definitions*

The grounds for asylum that are widely in use across the world today were established in the 1951 Convention Relating to the Status of Refugees.²⁸ Nations came together to protect European refugees who had been displaced in the aftermath of World War II.²⁹ Sixteen years later, the 1967 Protocol Relating to the Status of Refugees expanded the scope of the Convention to refugees beyond Europeans impacted by the second World War.³⁰ Together, the Convention and the

26. See *Matter of Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 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.”).

27. *Fatin v. I.N.S.*, 12 F.3d 1233, 1238 (3d Cir. 1993).

28. See generally Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter *1951 Convention*].

29. UNITED NATIONS HIGH COMM’R FOR REFUGEES, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* 1 (Sept. 2011), <https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html> [https://perma.cc/KL26-R2P2] [hereinafter *UNHCR Convention Background*].

30. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter *1967 Protocol*]. The Protocol incorporates the Convention by reference, stating: “The States Parties to the present Protocol undertake to apply Articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.” Art. 1, ¶ 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268. The refugee definition in the Protocol is nearly identical to that in the Convention; only the references to “events occurring before 1 January 1951” are removed. *Id.*

Protocol “remain the cornerstone of refugee protection” to this day.³¹ The United States acceded to the Protocol in 1968 and is therefore bound by all the substantive provisions of the Refugee Convention.³²

The Convention defines a refugee as an individual who:

[o]wing 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.³³

This refugee definition was developed over a series of meetings at the Conference of Plenipotentiaries held in Geneva in 1951. At the third meeting of the conference, the Swedish representative proposed an amendment to add membership of “a particular social group” as a ground for asylum.³⁴ In support of his proposal, he simply noted that “experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included.”³⁵ At a later meeting, he added that “such cases existed, and it would be as well to mention them explicitly.”³⁶

The conference unanimously adopted the amendment to add “particular social group” to the refugee definition without discussion, debate, or comment. Scholars and jurists have speculated about the drafter’s intentions, suggesting that the PSG ground was included to protect against persecution for reasons that could not be foreseen³⁷ or “in order to stop a possible gap in the coverage of the U.N. Convention.”³⁸ But in the absence of a written historical record, a conclusive answer remains elusive.

31. *UNHCR Convention Background*, *supra* note 29, at 1.

32. *See 1967 Protocol*, *supra* note 30, 19 U.S.T. at 6257.

33. *1951 Convention*, *supra* note 28, at art. 1.

34. U.N. GAOR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 3d mtg. at 14, U.N. Doc. A/Conf.2/SR.3 (July 3, 1951).

35. *Id.*

36. U.N. GAOR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 19th mtg., U.N. Doc. A/Conf.2/SR.19 (Nov. 26, 1951).

37. *See, e.g.*, ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219–20 (A.W. Sijthoff ed., 1996).

38. *Matter of Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985).

The United Nations High Commissioner for Refugees (UNHCR)³⁹ attempted to provide some clarity by issuing guidelines on the particular social group ground in 2002.⁴⁰ A product of the Global Consultations on the International Protection of Refugees, the PSG Guidelines are intended to provide “legal interpretive guidance for governments, legal practitioners, decision-makers and the judiciary.”⁴¹ As the Guidelines were issued more than fifty years after the refugee definition was created, their standards inherently take into account nations’ analysis and application of the PSG ground in the intervening time.

The Guidelines recognize that PSG “is the ground with least clarity” but that any “proper interpretation must be consistent with the object and purpose of the Convention,” which requires that the term be understood “in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”⁴² UNHCR then describes two potential ways in which the term “particular social group” had come to be understood in international jurisprudence—the “protected characteristics” approach and the “social perception” approach.

A particular social group that is defined by protected characteristics requires members of the group to possess “a characteristic or association that is so fundamental to human dignity that a person should not be compelled to forsake it.”⁴³ The protected characteristics approach is followed by many “major common law countries, [including] the United States, Canada, New Zealand, and the United Kingdom.”⁴⁴ Courts in Canada, New Zealand, and the U.K. utilized theories of

39. The UNHCR functions as the “administrative body for the Refugee Convention.” Nicholas R. Bednar & Margaret Penland, *Asylum’s Interpretive Impasse: Interpreting “Persecution” and “Particular Social Group” Using International Human Rights Law*, 26 MINN. J. INT’L L. 145, 162 (2017).

40. UNITED NATIONS HIGH COMM’R FOR REFUGEES, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (May 7, 2002), <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html> [<https://perma.cc/H5YB-ZZ8U>] [hereinafter *UNHCR PSG Guidelines*].

41. *Id.* at 1.

42. *Id.* at 2.

43. *Id.* at 3. The Guidelines elaborate on how “[a] decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.” *Id.*

44. Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 48 (2008). The protected characteristics approach is called “immutability” in the United States. *See id.* at 47–49. *See also* discussion *infra* Section II.B. Professor Marouf details the “significant attention” the “persuasive” reasoning utilized in the *Acosta* case, which established immutability as the test for PSG in the United States, has received in foreign courts. Marouf, *supra* note 44, at 54–57.

non-discrimination and human rights—ideas they understood as central to the Refugee Convention—to arrive at the protected characteristics approach.⁴⁵

A particular social group defined by social perception, on the other hand, “examines whether . . . a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.”⁴⁶ Australia is the only common law country to define a PSG by social perception.⁴⁷ Notably, however, the High Court of Australia rejected a purely subjective approach to social perception, which it believed would be an unreliable indicator of whether a particular social group existed and also impose a criterion that had no basis in the 1951 Convention.⁴⁸

The Guidelines review both methods of defining “particular social group” and ultimately recommend a single definition that merges the two approaches, defining PSG as “a group of persons who share a common characteristic . . . 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.”⁴⁹ The term “or” in UNHCR’s definition is critical, as it indicates that the analysis should proceed in sequential steps: “[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.”⁵⁰ In other words, the UNHCR Guidelines do not create dual requirements; a particular social group defined by immutability or protected characteristics alone is sufficient.⁵¹

Ultimately, a review of international law reveals that the particular social group ground stemmed from international agreement, and the definition ultimately arrived at similar international consensus. Intended to be construed broadly and with a recognition of its humanitarian origins, a valid PSG under international law

45. *Id.* at 54–57.

46. *UNHCR PSG Guidelines*, *supra* note 40, at art. 7.

47. The High Court of Australia created the social perception approach for defining particular social group in *Applicant A and Another v Minister for Immigr. and Ethnic Affs.* [1997] 190 CLR 225 (Austl.).

48. *Applicant S v Minister for Immigr. and Multicultural Affs.* [2004] 217 CLR 387, 421–22 (Austl.).

49. *UNHCR PSG Guidelines*, *supra* note 40, at art. 11 (emphasis added).

50. *Id.* at art. 13 (emphasis added).

51. In a 2009 amicus brief, the UNHCR explained its goal in defining PSG this way as giving “validity to both approaches, which may frequently overlap.” Brief of the United Nations High Commissioner for Refugees as Amicus Curiae Supporting the Petitioner at 10, *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582 (3d Cir. 2011) (No. 08-4564), 2009 WL 8754827, at *10. The agency confirmed that its intent “was by no means . . . to create a further requirement nor to serve as a basis to exclude otherwise eligible refugees from protection. . . . [W]hile social perceptions may provide evidence of immutability or the fundamental nature of a protected characteristic, heightened social perception is merely an ‘indicator’ of the social group’s existence rather than an additional factor.” *Id.*

is made up of members who possess immutable protected characteristics *or* who are perceived as a group by the society in which they exist. As the next Section will demonstrate, the U.S. definition also includes these requirements but has implemented them in a way that significantly narrows the PSG's reach.

B. Domestic Definitions

It was not until 1980 that the United States enacted legislation to implement its obligations under the Refugee Convention and Protocol. When Congress passed the Refugee Act of 1980, it adopted a refugee definition in the Immigration and Naturalization Act (INA) that was taken almost word-for-word from the 1951 Convention:

any person who is outside any country of such person's nationality . . . 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.⁵²

As a result, "[a]sylum law is one of the most thoroughly international areas of U.S. law."⁵³

In another parallel to the Convention and Protocol, the phrase "membership in a particular social group" is not defined in the INA or in the Code of Federal Regulations.⁵⁴ It was not until 1985 that the Board of Immigration Appeals provided the first definition of the term in *Matter of Acosta*.⁵⁵

Mr. Acosta was a 36-year-old taxi driver from El Salvador. He founded a co-op that became a target for guerillas, who tried to force the drivers to participate in work stoppages in order to advance their goal of harming the Salvadoran economy. The co-op refused to comply, and the guerillas retaliated with threats, beatings, and murders. Mr. Acosta was beaten and received three death threats that were similar to those received by others who were ultimately killed. He fled to the United States and claimed asylum based on his membership in the particular social

52. 8 U.S.C. § 1101(a)(42)(A) (2018). *Accord 1951 Convention, supra* note 28, art. 1.

53. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1061 (2011). *See also* Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1 (1997) (explaining how U.S. refugee law draws heavily from international standards).

54. *See, e.g.*, 8 C.F.R. § 208.13(b)(2)(i)(A) (2020).

55. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) ("[W]e interpret 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. The shared characteristic might 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.").

groups of “COTAXI drivers” and “persons engaged in the transportation industry of El Salvador.”⁵⁶

In attempting to determine whether Mr. Acosta’s proposed particular social groups were viable, the Board first had to define the term. The Board began by utilizing the doctrine of *ejusdem generis*, a Latin phrase that translates to “of the same kind” and holds that “general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.”⁵⁷ In this case, the general term “particular social group” appears alongside four more specific terms—race, religion, national origin, and political opinion. Thus, the Board found that PSG should be defined in a manner that is consistent with the other four grounds for asylum protection.⁵⁸

Applying *ejusdem generis*, the BIA defined a “particular social group” as a “group of persons all of whom share a common, immutable characteristic.”⁵⁹ The common characteristic “must be one that the members of the group . . . cannot change,” like one’s race or nationality, or one that they “should not be required to change because it is fundamental to their individual identities or consciences,” like their religion or political opinion.⁶⁰ Only when defined in this way, the Board held, “does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act.”⁶¹ The Board further explained that the shared characteristics that could potentially comprise a particular social group might be “innate . . . such as sex, color, or kinship ties, or in some circumstances . . . might be a shared past experience such as former military leadership or land ownership.”⁶²

The analysis in *Acosta* derived from close textual scrutiny and resulted in a definition that “is sufficiently 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.”⁶³ It also served as a model for other countries’ PSG definitions.⁶⁴

The definition established by the Board of Immigration Appeals in *Matter of Acosta* remained good law, and led to recognition of several PSGs,⁶⁵ until a series of cases in the early 2000s imposed additional requirements for applicants seeking relief based on their membership in a particular social group. The first of those cases was *Matter of C-A*.⁶⁶

56. *Id.* at 232.

57. *Id.* at 233.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 161 (1st ed. 1991).

64. *See* Marouf, *supra* note 44, at 56–57.

65. *See infra* Section III.

66. *Matter of C-A*, 23 I. & N. Dec. 951 (B.I.A. 2006).

The applicant in *Matter of C-A-* was a Columbian baker who was friendly with both the head of security for the Cali drug cartel and the General Counsel for the city of Cali. After sharing information he learned about the cartel with the General Counsel, both Mr. C-A- and his son were threatened and assaulted. Mr. C-A- eventually fled to the United States at the recommendation of the General Counsel and sought asylum based on his membership in the particular social group of “noncriminal informants working against the Cali drug cartel.”

In analyzing Mr. C-A-’s claim, the Board said that it would “continue to adhere to the *Acosta* formulation” but “consider[] as a relevant factor the extent to which members of a society perceive those with the characteristic in question as members of a social group.”⁶⁷ Applying this new “social visibility” test to the case at hand, the BIA found that “the very nature of the conduct at issue is such that it is generally out of the public view” and could therefore not satisfy the requisite social visibility.⁶⁸ Thus, although the Board did not officially make social visibility a requirement at this time, it utilized the concept to deny Mr. C-A-’s claim for asylum.

The Board in *C-A-* also noted that the proposed group was “too loosely defined to meet the *requirement* of particularity.”⁶⁹ The following year, the BIA elaborated on the concept of particularity in *Matter of A-M-E & J-G-U-*, a case involving a couple who faced threats and feared extortion, kidnapping, and physical harm as a result of their status as, and membership in the particular social group of, “affluent Guatemalans.”⁷⁰ The Board held that the proposed group was “too amorphous to provide an adequate benchmark for determining group membership” and denied the couple’s claim.⁷¹ Particularity was thus cemented as a mandatory element of the PSG definition, and groups that were “too subjective, inchoate, and variable” were no longer considered valid.⁷² Additionally, the BIA used *Matter of A-M-E & J-G-U-* as an opportunity to reaffirm social visibility, recognizing it as a required factor in the particular social group analysis.⁷³

A year after *Matter of A-M-E & J-G-U-*, the Board issued companion decisions that shed more light on its views regarding the definition of “particular social

67. *Id.* at 956–57.

68. *Id.* at 960.

69. *Id.* at 957 (emphasis added).

70. 24 I. & N. Dec. 69, 70–71 (B.I.A. 2007).

71. *Id.* at 76.

72. *Id.* After *Matter of A-M-E- & J-G-U-*, the Board also determined that the terms “young,” see *Matter of S-E-G-*, 24 I. & N. Dec. 579, 584–88 (B.I.A. 2008); and “poverty,” see *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 239–40 (B.I.A. 2014) (citing *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005)); were too subjective and amorphous to satisfy the requirement of particularity.

73. The Board stated: “In reaffirming the *requirement* that the shared characteristic of the group should generally be recognizable by others in the community. . . .” *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74 (emphasis added).

group”—*Matter of S-E-G*⁷⁴ and *Matter of E-A-G*.⁷⁵ Both cases involved young men fleeing violent gangs in El Salvador; when issued, they were the BIA’s most comprehensive articulation of the social visibility and particularity requirements to date.⁷⁶ Blurring the lines between the two requirements, the Board in *Matter of S-E-G* described “the essence of the particularity requirement” as “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.”⁷⁷ “The key question,” according to the Board, was “whether the proposed description is sufficiently ‘particular’ or is ‘too amorphous . . . to create a benchmark for determining group membership.’”⁷⁸ Both decisions also addressed social visibility and ultimately concluded that the proposed gang-based PSGs were insufficiently visible.⁷⁹ As the Board stated in *Matter of S-E-G*, “the respondents are . . . not in a substantially different situation from anyone who has crossed the gang, or who is perceived to be a threat to the gang’s interests” because “gangs have directed harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises and territorial power.”⁸⁰

Another key step in the Board of Immigration Appeals’ efforts to define “particular social group” was a second set of companion cases: *Matter of M-E-V-G*⁸¹ and *Matter of W-G-R*.⁸² The cases were issued in response to federal courts’ calls for “more clarity” about the Board’s PSG framework.⁸³ The facts in both cases once again centered around young men from Central America fleeing gang-based violence. The PSG articulated in *Matter of M-E-V-G* was “Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.”⁸⁴ Mr. W-G-R- asserted, as his basis for protection, the PSG “former members of the Mara 18 gang in El Salvador who have renounced their gang membership.”⁸⁵

The Board used the cases as a vehicle to rename social visibility as “social distinction.” Emphasizing that the decisions did not constitute “a new

74. 24 I. & N. Dec. 579 (B.I.A. 2008).

75. 24 I. & N. Dec. 591 (B.I.A. 2008).

76. The proposed PSG in *S-E-G* was “Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities” and “family members of such Salvadoran youth.” 24 I. & N. Dec. at 581. The proposed PSG in *E-A-G* was “persons resistant to gang membership.” 24 I. & N. Dec. at 593.

77. 24 I. & N. Dec. at 584.

78. *Id.* (quoting *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628–29 (8th Cir. 2008)).

79. *E-A-G*, 24 I. & N. Dec. at 593–96; *Matter of S-E-G*, 24 I. & N. Dec. at 587.

80. 24 I. & N. Dec. at 587.

81. 26 I. & N. Dec. 227 (B.I.A. 2014).

82. 26 I. & N. Dec. 208 (B.I.A. 2014).

83. *Matter of M-E-V-G*, 26 I. & N. Dec. at 236. An in-depth discussion about the concerns expressed by both the federal judiciary and legal scholars can be found *infra* Section II.B.1.

84. 26 I. & N. Dec. at 228.

85. *Matter of W-G-R*, 26 I. & N. Dec. at 209.

interpretation,”⁸⁶ but instead a further explanation of the visibility requirement, the Board clarified that social visibility “was never intended to, and does not require, literal or ‘ocular’ visibility,” as critics had argued.⁸⁷ In doing so, the Board implicitly addressed concerns about the validity of groups like *Matter of C-A*’s “noncriminal informants,” LGBT individuals, or survivors of intimate partner violence, who by definition, or for their own safety and protection, were hidden from public view and were thus not actually visible to those in the applicant’s society, including persecutors.⁸⁸

Thus, after eight years of post-*Acosta* tinkering, the Board’s definition of “particular social group” seems to have settled on three required elements: 1) immutability, 2) social distinction, and 3) particularity.

1. Critiques of the Board of Immigration Appeals’ Approach

The definition of “particular social group” promulgated by the Board of Immigration Appeals has been the subject of robust critique. First, as detailed in Section II.A, the UNHCR PSG Guidelines provide critical guidance on international interpretations of the phrase “particular social group.” The PSG definition suggested by the Guidelines incorporates both the *Acosta* immutability approach and the “social perception” or “social distinction” approach. However, UNHCR considers these to be alternative, as opposed to dual, requirements. As former Immigration Judge (IJ) and Senior Advisor to the BIA Jeffrey Chase stated, “by changing the ‘or’ to an ‘and,’ the Board required applicants to establish *both* immutability and social distinction, thus *narrowing* the ranks of those able to qualify,” which is contrary to UNHCR’s intent.⁸⁹ As such, when the Board cited to the Guidelines to support its addition of what was then called social visibility to the PSG definition,⁹⁰ this “justification . . . was most disingenuous.”⁹¹

Another significant concern relates to the Board’s abandonment of traditional standards of statutory interpretation. As discussed above, in arriving at its initial definition of PSG, the Board utilized the principle of *ejusdem generis*, which requires words in a group or series to be construed in a manner consistent with one

86. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 253 n.9. The Board further noted that the *M-E-V-G-* decision was not a departure from precedent and that the Board still “adhere[d] to [its] prior interpretations of [visibility].” *Id.* at 228, 247.

87. *Id.* at 234.

88. *Matter of C-A-*, 23 I. & N. Dec. 951, 961 (B.I.A. 2006). *See also* Marouf, *supra* note 44, at 79–88 (discussing the challenges of demonstrating ocular visibility for claims based on sexual orientation both because “sexual orientation is not externally visible, and sexual minorities often feel compelled to hide their orientation for various reasons”).

89. Jeffrey S. Chase, *The Immigration Court: Issues and Solutions*, Lecture at Cornell Law School’s Berger International Speaker Series (Mar. 28, 2019) (transcript available at <https://www.jeffreyschase.com/blog/2019/3/28/i6e11do6l5p443u1nkf8vwr28dv9qi> [<https://perma.cc/CKH2-74ZN>]).

90. *Matter of C-A-*, 23 I. & N. Dec. at 956, 960.

91. Chase, *supra* note 89.

another.⁹² *Matter of Acosta* created the immutability test for particular social group because the other bases for asylum—race, religion, national origin, and political opinion—are similarly immutable. No additional criteria are required to prove the non-PSG asylum grounds. Thus, “the adoption of social visibility signaled abandonment by the Board of an approach that interpreted the PSG ground homogeneously with the [other asylum] grounds.”⁹³

The non-PSG grounds do not require proof of social distinction and particularity. For example, in *Matter of S-A-*, the BIA found that a young Moroccan woman was persecuted by her father because her liberal Muslim beliefs differed from his conservative religious views, specifically as related to the role of women.⁹⁴ In that case, the Board did not inquire whether Ms. S-A-’s religious views were publicly known or whether Muslims were too amorphous of a group to receive protection. The Board simply recognized that Ms. S-A- had been persecuted on account of her religion and granted her relief. Similarly, the law does not require inquiry beyond evidence of nationality if, for example, a woman claims persecution in Eritrea based on her Ethiopian ancestry.⁹⁵ As such, because the BIA’s “particular social group” definition demands more than what is needed to prove the other four grounds for asylum, it violates the principle of *ejusdem generis*.

The social distinction and particularity requirements are also mutually exclusive. In demanding both elements to satisfy the PSG definition, the Board has created an impossible needle to thread. If a proposed group is too big, it risks not satisfying the particularity requirement. As the BIA has said, “major segments of the population will rarely, if ever, constitute a distinct social group.”⁹⁶ Yet, if a group is defined discretely enough to be sufficiently particular, it could fail to satisfy the requirement of social distinction, because a small group is unlikely to be perceived as a group by society.

This catch-22 is not the only one relating to size. The Board’s claim that large or numerous groups are not viable PSGs is also inconsistent with the way it analyzes the other grounds for asylum. For example, 34% of Lebanese citizens are Christians, a total of nearly two million people.⁹⁷ Christians account for approximately “10% of Syria’s 22 million people.”⁹⁸ Yet if a Christian sought asylum from one of these majority-Muslim countries based on religious persecution, an

92. See *supra* text accompanying notes 57–59.

93. Helen P. Grant, *Survival of Only the Fittest Social Groups: The Evolutionary Impact of Social Distinction and Particularity*, 38 U. PA. J. INT’L L. 895, 910 (2017).

94. 22 I. & N. Dec. 1328 (B.I.A. 2000).

95. See *Giday v. Gonzales*, 434 F.3d 543, 545 (7th Cir. 2006).

96. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239.

97. CIA, *Lebanon*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/le.html#field-anchor-people-and-society-religions> [https://perma.cc/3J3W-6KAH] (Dec. 17, 2020).

98. *Syria’s Beleaguered Christians*, BBC (Feb. 25, 2015), <https://www.bbc.com/news/world-middle-east-22270455> [https://perma.cc/56U2-7GAP].

immigration court would not be required to deny the claim because too many other Christians were at risk of harm. Nor would a group composed of Christians be considered “too subjective, inchoate, and variable” even though it could be made up of multiple denominations or individuals with diverse levels of religious observance.⁹⁹

What is likely at the root of these “numerosity” limitations is a fear of opening the floodgates; in other words, the fear that recognizing a broad group will lead to an overwhelming influx of asylum seekers from that group into the United States. Yet such concerns are supported neither by the law nor the reality of migration. As the UNHCR Guidelines plainly state, “the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.”¹⁰⁰ U.S. courts agree: the Seventh Circuit Court of Appeals, for one, asserted that it is “antithetical to asylum law to deny refuge to a group of persecuted individuals . . . merely because too many have valid claims.”¹⁰¹ Even the BIA has recognized that humanitarian immigration law should not be influenced by political concerns, noting that the “distinction between the goals of refugee law (which protects individuals) and politics (which manages the relations between political bodies) should not be confused.”¹⁰²

Fear that an expansive definition of particular social group will lead to skyrocketing claims also ignores historical reality. As Professor Karen Musalo explains, opponents of gender-based asylum evoked floodgate concerns as the U.S. immigration court system considered a PSG that would provide protection for survivors of female genital mutilation/cutting (FGM/C).¹⁰³ Yet, after *Matter of Kasinga*¹⁰⁴ established the right to asylum for women who feared FGM/C, “the dire predictions of a flood of women seeking asylum never materialized.”¹⁰⁵ Similarly, when Canada recognized gender as a basis for asylum, gender-based claims “actually declined.”¹⁰⁶ The absence of a rise in claims after a change that applied

99. *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007) (quoting the Board’s assessment of the characteristic of wealth with regard to a proposed—and rejected—PSG of “wealthy Guatemalans”).

100. *UNHCR PSG Guidelines*, *supra* note 40, at 5.

101. *Cece v. Holder*, 733 F.3d 662, 675 (7th Cir. 2013). *See also* *Reyes v. Lynch*, 842 F.3d 1125, 1135 (9th Cir. 2016) (“The BIA’s statement of the purpose and function of the ‘particularity’ requirement does not, on its face, impose a numerical limit on a proposed social group or disqualify groups that exceed specific breadth or size limitations.”).

102. *Matter of S-P-*, 21 I. & N. Dec. 486, 492–93 (B.I.A. 1996).

103. 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).

104. 21 I. & N. Dec. 357 (B.I.A. 1996).

105. Musalo, *supra* note 103, at 132.

106. *Id.* at 133. As Professor Musalo explains, “the number of women asylum seekers has not dramatically increased with the legal recognition of gender claims for protection” for a number of reasons, including women’s inability to leave their home countries to seek protection, caretaking responsibilities, and lack of resources. *Id.*

to such a significant portion to the world's population poses a serious challenge to arguments based on a fear of opening the floodgates.

Moreover, Canada is not alone in its willingness to accept broad groups as PSGs. As Professor Maryellen Fullerton explains, neither the Canadian nor German governments have allowed concerns about size “to influence the development of the social group concept.”¹⁰⁷ Instead, “they have recognized that other elements of the refugee definition will narrow the pool of those who have claims to refugee status.”¹⁰⁸ For example, even with an expansive PSG definition, the INA still requires asylum seekers to prove that they suffered or fear harm that amounts to persecution, that the persecution was perpetrated on account of a protected ground, and that the government is either the persecutor or is unable or unwilling to protect them from the persecutor.¹⁰⁹ Numerous bars to asylum, including for those who did not apply within one year of entering the United States,¹¹⁰ have been found to

107. Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 561 (1993).

108. *Id.*

109. *See* 8 U.S.C. § 1101(a)(42)(A) (2018).

110. *See* 8 U.S.C. § 1158(a)(2)(B) (2012) (stating that applicants are ineligible for asylum unless they demonstrate “by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States.”). Scholars and advocates alike have critiqued the requirement to file for asylum within one year of entry as unduly restrictive. *See, e.g.,* Roy Xiao, *Refuge from Time: How the One-Year Filing Deadline Unfairly Frustrates Valid Asylum Claims*, 95 N.C. L. REV. 523 (2017) (critiquing the one-year asylum filing deadline); Nat’l Immigrant Just. Ctr., *Report: The One-Year Asylum Deadline and the BIA: No Protection, No Process* (Oct. 21, 2010), <https://immigrantjustice.org/research-items/report-one-year-asylum-deadline-and-bia-no-protection-no-process> [<https://perma.cc/R5YZ-5FHK>] (examining how the BIA has ruled on issues concerning the one-year filing deadline).

have persecuted others,¹¹¹ or have been convicted of a particularly serious crime¹¹² or an aggravated felony¹¹³ in the United States, also apply.

Lastly, but importantly, the current definition of “particular social group” presents significant disadvantages to pro se litigants. Because asylum seekers do not have the right to counsel at government expense, a significant percentage of applicants appear in immigration court without an attorney.¹¹⁴ An unrepresented migrant faces substantial obstacles in establishing and proving membership in a post-*Acosta* particular social group. Language barriers,¹¹⁵ trauma, and lack of familiarity with the U.S. legal system present significant challenges in formulating a group that would be sufficiently immutable, socially distinct, and particular. The impact of these issues was exacerbated by the BIA’s holding in *Matter of W-Y-C- & H-O-B-*, which permits an immigration judge to summarily deny the claim of an asylum seeker who fails to articulate a viable PSG in an initial hearing.¹¹⁶

111. 8 C.F.R. § 208.13(c)(2)(E) (2020); *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811 (B.I.A. 1988) (holding that asylum applicants who were persecutors of others are barred from asylum relief). The “persecutor bar” has faced criticism for lacking nuance and preventing legitimate victims from accessing asylum protection. See, e.g., Kathryn White, *A Chance for Redemption: Revising the “Persecutor Bar” and “Material Support Bar” in the Case of Child Soldiers*, 43 VAND. J. TRANSNAT’L L. 191, 222 (2010); Lori K. Walls, *The Persecutor Bar in U.S. Immigration Law: Toward a More Nuanced Understanding of Modern “Persecution” in the Case of Forced Abortion and Female Genital Cutting*, 16 PAC. RIM L. & POL’Y J. 227, 228 (2007); Nicole Lerescu, *Barring Too Much: An Argument in Favor of Interpreting the Immigration and Nationality Act Section 101(a)(42) to Include a Duress Exception*, 60 VAND. L. REV. 1875, 1889–90 (2007).

112. 8 C.F.R. § 208.13(c)(2)(A) (2020). Scholars and advocates have argued that the “particularly serious crime” bar is unduly expansive and severe. See, e.g., Mary Holper, *Redefining “Particularly Serious Crimes” in Refugee Law*, 69 FLA. L. REV. 1093, 1095 (2017); Rebecca Sharpless, *Balancing Future Harms: The “Particularly Serious Crime” Bar to Refugee Protection*, 69 FLA. L. REV. F. 27, 29–30 (2017); Fatma Marouf, *Response to Professor Holper’s Article, Redefining “Particularly Serious Crimes” in Refugee Law*, 69 FLA. L. REV. F. 32, 38 (2017). See generally PHILIP L. TORREY, CLARISSA LEHNE, COLLIN POIROT, MANUEL D. VARGAS & JARED FRIEDBERG, IMMIGRANT DEF. PROJECT, UNITED STATES FAILURE TO COMPLY WITH THE REFUGEE CONVENTION: MISAPPLICATION OF THE PARTICULARLY SERIOUS CRIME BAR TO DENY REFUGEES PROTECTION FROM REMOVAL TO COUNTRIES WHERE THEIR LIFE OR FREEDOM IS THREATENED (2018), https://www.immigrantdefenseproject.org/wp-content/uploads/IDP_Harvard_Report_FINAL.pdf [https://perma.cc/C542-PXF4].

113. 8 C.F.R. § 208.13(c)(2)(D) (2020). The aggravated felony bar is a sweeping limit to asylum access, having “been interpreted broadly to reach misdemeanor offenses such as shoplifting and other types of conduct that would not normally be considered ‘aggravated’ or ‘felonious.’” Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 394 (2007).

114. A study of cases decided between 2007 and 2012 found that only 37% of all immigrants, and 14% of detained immigrants, secured representation in immigration court. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015).

115. The Trump administration eliminated interpretation services for initial hearings in immigration court. See Tal Kopan, *Trump Administration Ending In-Person Interpreters at Immigrants’ First Hearings*, S.F. CHRON. (July 3, 2019), <https://www.sfchronicle.com/politics/article/Trump-administration-ending-in-person-14070403.php> [https://perma.cc/Y77K-SAQC].

116. 27 I. & N. Dec. 189, 191 (B.I.A. 2018).

Moreover, the BIA's heightened PSG standard requires significant proof.¹¹⁷ The Board has explained that “[e]vidence 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.”¹¹⁸ Obtaining such corroboration of social distinction is challenging even with an attorney, but likely impossible for the typical asylum applicant who faces significant financial, logistical, and psychological constraints.¹¹⁹

In sum, the Board of Immigration Appeals' PSG definition ignores international guidelines, is discordant with the other asylum grounds, is internally inconsistent, relies on unproven floodgates narratives, and harms pro se asylum seekers. These concerns prompted challenges to the definition in federal courts; a discussion of that jurisprudence follows in Section IV, after a review of how the BIA and DOJ implemented the PSG definition.

III.

APPLICATION BY THE BOARD OF IMMIGRATION APPEALS

The Board of Immigration Appeals' evolving definition of “particular social group” led to a varied line of cases from the court after its initial decision in 1985. The Board recognized a number of PSGs after *Acosta*, but when the requirements of social visibility/distinction and particularity were introduced, the rate of PSG recognition slowed dramatically. Eventually, the only two PSGs recognized after the BIA added new elements to the definition were overruled by Trump administration attorneys general. Put another way, since adding additional criteria to the

117. This is particularly true because petitioners bear the burden of proof in an asylum case, which is heard in an adversarial system. See 8 C.F.R. § 1208.13 (2020) (“The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act.”).

118. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 244 (B.I.A. 2014).

119. See Joline Doedens, *The Politics of Domestic Violence-Based Asylum Claims*, 22 DUKE J. GENDER L. & POL'Y 111, 125 (2014) (describing the “fact-intensive” process involved in demonstrating asylum based on intimate partner violence, a claim almost certain to be based on membership in a particular social group); Sarah R. Goodman, *Asking for Too Much? The Role of Corroborating Evidence in Asylum Proceedings in the United States and United Kingdom*, 36 FORDHAM INT'L L.J. 1733, 1739–42 (2013) (concluding that evidentiary requirements are unrealistic when considering the situation of refugees).

Acosta definition, no particular social groups have survived BIA and DOJ scrutiny.¹²⁰

A. *Particular Social Groups Recognized Under the Acosta Immutability Test*

Although it denied the proposed PSGs in *Matter of Acosta*, the Board of Immigration Appeals soon thereafter issued a series of precedent decisions recognizing several new particular social groups based on its newly created PSG test.¹²¹ In *Matter of Fuentes*, the Board found that former members of the national police of El Salvador were a valid PSG.¹²² A few years later, in the landmark case *Matter of Toboso-Alfonso*, the Board recognized persecution based on sexual orientation as a basis for asylum.¹²³

In *Matter of H-*, the Board held that “members of the Marehan subclan of Somalia who share ties of kinship and linguistic commonalities” constitute a particular social group.¹²⁴ In reaching its conclusion, the Board reasoned that “clan membership is a highly recognizable, immutable characteristic that is acquired at birth and is inextricably linked to family ties.”¹²⁵

120. As of March 2021. Some examples of particular social groups the Board rejected after imposition of the particularity and visibility/distinction criteria include “secularized and westernized Pakistanis perceived to be affiliated with the United States,” *Ahmed v. Holder*, 611 F.3d 90, 91 (1st Cir. 2010); “Guatemalan citizens who [do] not sport gang colors and tattoos,” *Paiz-Morales v. Lynch*, 795 F.3d 238, 240 (1st Cir. 2015); “women with children whose husbands live and work in the U.S. and it is known to society as a whole that the husbands live in the U.S.,” *Granada-Rubio v. Lynch*, 814 F.3d 35, 39 (1st Cir. 2016); “young Albanian women between the ages of 15 and 25,” *Paloka v. Holder*, 762 F.3d 191, 193 (2d Cir. 2014); “individuals with bipolar disorder who exhibit erratic behavior,” *Temu v. Holder*, 740 F.3d 887, 890 (4th Cir. 2014); “active and long-term former gang members,” *Zaldana Menijar v. Lynch*, 812 F.3d 491, 497 (6th Cir. 2015); “truckers who, because of their anti-FARC views and actions, have collaborated with law enforcement and refused to cooperate with FARC,” *Escobar v. Holder*, 657 F.3d 537, 545 (7th Cir. 2011); “effective honest police,” *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); “family business owners” in Guatemala, *Davila-Mejia v. Mukasey*, 531 F.3d 624, 627 (8th Cir. 2008); “Mungiki defectors,” *Gathungu v. Holder*, 725 F.3d 900, 904 (8th Cir. 2013); “escapee Mexican child laborers,” *Gonzalez Cano v. Lynch*, 809 F.3d 1056, 1058 (8th Cir. 2016); “Guatemalan repatriates who have lived and worked in the United States for many years and are perceived to be wealthy,” *Cinto-Velasquez v. Lynch*, 817 F.3d 602, 605 (8th Cir. 2016); and “imputed wealthy Americans,” *Ramirez-Munoz v. Lynch*, 816 F.3d 1226, 1229 (9th Cir. 2016).

121. Only a small number of cases are designated as precedent by the BIA. *See* 8 C.F.R. § 1003.1(g)(3) (2020) (“By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues.”). Similarly, “[t]he vast majority of the Board’s decisions are unpublished.” DEP’T OF JUST., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 8 (2018), <https://www.justice.gov/coir/page/file/1101411/download> [<https://perma.cc/AZ3E-E8Z9>].

122. 19 I. & N. Dec. 658, 662 (B.I.A. 1988).

123. 20 I. & N. Dec. 819, 822 (B.I.A. 1990), *adopted as precedent in all future proceedings*, Att’y Gen. Order No. 1895-94 (June 19, 1994).

124. 21 I. & N. Dec. 337, 337 (B.I.A. 1996).

125. *Id.* at 342.

Later that same year, the Board issued a decision in *Matter of Kasinga*, recognizing the particular social group of young women of the Tchamba-Kunsuntu tribe of Northern Togo who did not undergo “female genital mutilation, as practiced by that tribe, and who opposed the practice.”¹²⁶ Although the wordy PSG appears on its face to be limited, and the specific facts of the case centered around the practice of female genital mutilation/cutting, the case was groundbreaking in its recognition of gender as a basis for asylum. Finally, in *Matter of V-T-S-*, the Board found that Filipinos of “mixed Filipino-Chinese ancestry”—a group that could arguably also fall under the nationality ground—are a viable particular social group.¹²⁷

B. Particular Social Groups After the Addition of the Social Distinction and Particularity Requirements

In contrast to the relatively generous acceptance of particular social groups in the decade after the *Acosta* decision, in the 14 years since the Board of Immigration Appeals began instituting additional requirements for PSGs, it has only recognized two new groups—one providing protection to survivors of intimate partner violence and the other relating to family membership. Both have since been overruled by Trump administration attorneys general.

1. Claims Based on Intimate Partner Violence

After *Matter of Kasinga* opened the door for the United States’ acceptance of gender-based asylum claims, the path to recognition of domestic violence as a ground for asylum was a long and winding one. The first significant intimate partner violence case to be adjudicated by the immigration court system was *Matter of R-A-*.¹²⁸ Ms. R-A- (whose full name is Rodi Alvarado) endured horrific violence at the hands of her husband, a former soldier in the Guatemalan army, from the time she married him at age sixteen.¹²⁹ In the face of increasing and near-deadly abuse, Ms. Alvarado fled to the United States and sought asylum.¹³⁰

A 14-year legal battle ensued. After the government appealed her original asylum grant by the immigration judge, the BIA concluded that “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination,” did not constitute a

126. 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

127. 21 I. & N. Dec. 792, 798 (B.I.A. 1997).

128. 22 I. & N. Dec. 906 (B.I.A. 1999), *vacated*, 22 I. & N. Dec. 906 (Att’y Gen. 2001), *remanded*, 23 I. & N. Dec. 694 (Att’y Gen. 2005), *stay lifted*, 24 I. & N. Dec. 629 (Att’y Gen. 2008).

129. *Id.* at 909.

130. *Id.*

PSG.¹³¹ Two attorneys general intervened in the case,¹³² and the Department of Homeland Security (DHS)¹³³ ultimately reversed its position, supporting a grant of asylum for Ms. Alvarado based on the PSG “married women in Guatemala who are unable to leave the relationship.”¹³⁴ The brief filed by DHS in support of Ms. Alvarado marked the first time that this “unable to leave” social group formulation, one that would become entrenched in domestic violence asylum claims in years to come, was officially posited. Several years, remands, and attorneys general later, an immigration judge in San Francisco granted Ms. Alvarado asylum.¹³⁵

Because the grant of asylum in *Matter of R-A-* was at the immigration judge, or trial court, level, the lack of precedent meant that another domestic violence asylum case was soon ripe for consideration. In *Matter of L-R-*, DHS originally defended the IJ’s denial of Ms. L-R-’s claim before the BIA, but as the case progressed, the agency came to support Ms. L-R-’s request for asylum.¹³⁶ In a brief to the BIA, DHS posited two alternative groups that Ms. L-R-, and supporters of intimate partner violence more generally, could advance—“Mexican women in domestic relationships who are unable to leave” and “Mexican women who are viewed as property by virtue of their positions within a domestic relationship”—and explained how each met the immutability, visibility, and particularity requirements.¹³⁷

After the parties filed supplemental briefings with BIA, DHS requested remand of *Matter of L-R-* to the immigration judge.¹³⁸ DHS stipulated that Ms. L-R- was eligible for asylum, and in August of 2010, she was granted asylum in a

131. *Id.* at 917.

132. Because the Board of Immigration Appeals is an administrative court housed within the Department of Justice, the Attorney General has the authority to intervene in any case before the BIA and issue decisions on that matter. *See infra* note 219.

133. Attorneys from the Department of Homeland Security—specifically, Immigration and Customs Enforcement’s Office of the Principal Legal Advisor—represent the interests of the U.S. government in immigration proceedings. *See* DHS, *Office of the Principal Legal Advisor—Overview*, <https://www.ice.gov/opla> [<https://perma.cc/9QQX-66K5>] (last visited Aug. 26, 2020).

134. Department of Homeland Security’s Position on Respondent’s Eligibility for Relief at 15, *Matter of Alvarado-Pena*, No. A 73 753 922 (Att’y Gen. Feb. 19, 2004), <https://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf> [<https://perma.cc/LY89-XZKC>].

135. *Matter of Alvarado-Pena*, [redacted] (Exec. Off. for Immigr. Rev. Dec. 10, 2009) (on file with author). The immigration judge’s decision was brief, reading simply, “Inasmuch as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the parties [to grant asylum].” *Id.*

136. Supplemental Brief for Department of Homeland Security, *Matter of L-R-*, [redacted] (B.I.A. Apr. 13, 2009), http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [<https://perma.cc/9ND5-CF9H>].

137. *Id.* at 14–19.

138. *Matter of L-R-*, CTR. FOR GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/our-work/matter-l-r> [<https://perma.cc/R6QU-J58T>] (last visited Aug. 26, 2020).

summary order, once again, a procedural history that left future survivors and domestic violence advocates without binding precedent upon which to rely.¹³⁹

After decades of uncertainty and ambiguity during both the pendency and after the resolution of *Matter of R-A-* and *Matter of L-R-*, the BIA issued a precedent decision addressing the eligibility of survivors of domestic violence for asylum in August of 2014. In *Matter of A-R-C-G-* the Board considered the case of a woman from Guatemala, who, like Ms. Alvarado and Ms. L-R-, was subjected to brutal abuse by her intimate partner.¹⁴⁰ The BIA found, and DHS conceded, that the abuse Ms. A-R-C-G- suffered was on account of her membership in the particular social group of “married women in Guatemala who are unable to leave their relationship.”¹⁴¹ *Matter of A-R-C-G-* was hailed as a landmark case, one which, after decades of advocacy and litigation, finally established precedent for the right to asylum for survivors of intimate partner violence.¹⁴²

139. Much like the final order in *Matter of R-A-*, this decision is also extremely brief. The order simply states that asylum is granted, with a notation that the grant was a result of “stipulation of the parties.” *Id.* (quoting the summary order).

140. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389–90 (B.I.A. 2014).

141. *Id.* at 388–90.

142. Julia Preston, *In First for Court, Woman is Ruled Eligible for Asylum in U.S. on Basis of Domestic Abuse*, N.Y. TIMES (Aug. 29, 2014), <https://www.nytimes.com/2014/08/30/us/victim-of-domestic-violence-in-guatemala-is-ruled-eligible-for-asylum-in-us.html> [<https://perma.cc/3WJJ-BKVR>]; Tatyana Delgado, *Landmark Asylum Decision for Domestic Violence Victims*, CATH. LEGAL IMMIGR. NETWORK, <https://cliniclegal.org/resources/articles-clinic/landmark-asylum-decision-domestic-violence-victims> [<https://perma.cc/9633-AEG7?type=image>] (last visited Oct. 31, 2020); Amy Grenier, *Landmark Decision on Asylum Claims Recognizes Domestic Violence Victims*, IMMIGR. IMPACT (Sept. 2, 2014), <http://immigrationimpact.com/2014/09/02/landmark-decision-on-asylum-claims-recognizes-domestic-violence-victims/#.XV1hy3MyfU> [<https://perma.cc/6T52-TCQW>].

The relative certainty¹⁴³ provided by *Matter of A-R-C-G-* was, however, short-lived. In March 2018, then-AG Jeff Sessions referred to himself¹⁴⁴ a domestic violence asylum case, *Matter of A-B-*, with the stated goal of seeking to answer the question of “whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.”¹⁴⁵ Three months later, Sessions used *Matter of A-B-* to overrule *Matter of A-R-C-G-* and generally cast doubt on the viability of asylum claims based on intimate partner violence.¹⁴⁶

In his opinion, Sessions makes the sweeping assertion that claims “pertaining to domestic violence . . . perpetrated by non-governmental actors will not qualify for asylum.”¹⁴⁷ His decision is based in part on his view that “married women in Guatemala who are unable to leave their relationship” lack social distinction as a particular social group because “there is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances.”¹⁴⁸

A full exploration of *Matter of A-B-* is outside the scope of this Article, but scholars and others have critiqued Sessions’ antiquated views of intimate partner violence as a “private matter;” the excessive dicta throughout the opinion; his understanding of nexus, or the requirement that persecution be inflicted “on account

143. Despite the significance of the precedent decision in *A-R-C-G-*, it was not a panacea. Even after the decision, “arbitrary and inconsistent outcomes . . . continued to characterize asylum adjudication in this area of the law.” Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT’L L. 1, 2 (2016).

144. As discussed above, *supra* note 132, Attorneys General, as head of the Department of Justice, which houses the Board of Immigration Appeals, have broad power to refer cases to themselves. *See also infra* note 219. However, the manner in which *Matter of A-B-* reached Sessions’ desk is a matter of some controversy. The case was originally heard by an immigration judge, who denied Ms. A-B-’s claim. On appeal, the BIA reversed and remanded the case to the IJ for approval. However, the IJ did not do as instructed, instead attempting to recertify the case to the Board. At some point thereafter, the Attorney General learned of the decision (through unknown means) and certified the case to himself. *See* NAT’L IMMIGRANT JUST. CTR., ASYLUM PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-* 7–8, <https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%2006.21.18.pdf> [<https://perma.cc/333L-BMJM>] (last visited Aug. 26, 2020). The immigration judge, V. Stuart Couch, who presided over the original trial, denied the claims of 93.2% of applicants who appeared before his court, one of the highest denial rates in the country. *Judge V. Stuart Couch*, TRAC IMMIGRATION, <https://trac.syr.edu/immigration/reports/judgereports/00394CHL/index.html> [<https://perma.cc/P3QC-NCCY>] (last visited Sept. 11, 2020). After his actions relating to *Matter of A-B-*, IJ Couch was appointed by AG Barr to serve on the Board of Immigration Appeals. *See Executive Office for Immigration Review Swears in Six New Board Members*, DOJ EXEC. OFF. FOR IMMIGR. REV., (Aug. 23, 2019), <https://www.justice.gov/eoir/page/file/1197631/download> [<https://perma.cc/K2EX-7GGE>].

145. 27 I. & N. Dec. 316, 227 (Att’y Gen. 2018).

146. *Matter of A-B-*, 27 I. & N. Dec. 316, 317 (Att’y Gen. 2018).

147. *Id.* at 320.

148. *Id.* at 336.

of” or “in order to overcome” a protected characteristic; and his creation of a heightened, and ultra vires, standard for claims of persecution at the hands of non-state actors.¹⁴⁹ Despite these critiques, *Matter of A-B-* is now the precedent case on intimate partner violence and asylum and the PSG recognized by *Matter of A-R-C-G-* has been abrogated. Although asylum claims are still adjudicated on a case-by-case basis¹⁵⁰ and survivors of domestic violence continue to have a path to lawful immigration status by positing PSGs that are immutable, socially distinct, and particular, the lack of precedent poses serious challenges.¹⁵¹ Moreover, the reasoning utilized by then-Attorney General Sessions in *Matter of A-B-* was soon cited and echoed by Attorney General Barr to overrule the only other post-*Acosta* particular social group.

2. Claims Based on Family Membership

A particular social group based on family membership has an unparalleled foundation in the BIA’s jurisprudence. *Matter of Acosta* listed “kinship ties” as one of the prototypical characteristics of an immutable particular social group,¹⁵² and in *Matter of H-*, the Board, citing the link between clan and family ties, recognized clan membership as the basis for a PSG.¹⁵³ In 2017, the Board decided *Matter of L-E-A-*, which explicitly recognized a particular social group based on immediate family.¹⁵⁴

149. See, e.g., Natalie Nanasi, *Commentary: Matter of A-B-*, in FEMINIST JUDGMENTS: REWRITTEN FAMILY LAW OPINIONS 360 (Rachel Rebouche ed., 2020); Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J. L. REFORM 343, 373–406 (2019). Additionally, and significantly, eleven of twelve amici and the Department of Homeland Security itself argued in briefings that *A-R-C-G-* should not be vacated as it constituted a valid application of law. See Jeffrey S. Chase, *The Immigration Court: Issues and Solutions*, <https://www.jeffreyschase.com/blog/2019/3/28/i6el1do615p443u1nkf8vwr28dv9qi> [<https://perma.cc/9C7G-QWHR>] (last visited Aug. 27, 2020).

150. See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (“The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.”); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242, 251 (B.I.A. 2014) (noting that, since “social group determinations are made on a case-by-case basis,” its “holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs”).

151. Although significant legal hurdles remain for those seeking asylum based on intimate partner violence, a number of federal courts have questioned the analysis in *Matter of A-B-* and rejected Sessions’ categorical rule precluding asylum based on domestic abuse. See, e.g., *De Pena-Paniagua v. Barr*, 957 F.3d 88, 89 (1st Cir. 2020); *Juan Antonio v. Barr*, 959 F.3d 778, 785 (6th Cir. 2020); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126–27 (D.D.C. 2018).

152. *Matter of Acosta*, 19 I. & N. Dec. at 233.

153. *Matter of H-*, 21 I. & N. Dec. 337, 342 (B.I.A. 1996). Family as a particular social group also has a strong basis in international law. The International Covenant on Civil and Political Rights states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” International Covenant on Civil and Political Rights, art. 23(1), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force in the United States Sept. 8, 1992); Universal Declaration of Human Rights, G.A. Res. 217A (III), at art. 16(3), U.N. Doc. A/810 at 74 (Dec. 10, 1948).

154. 27 I. & N. Dec. 40, 42 (B.I.A. 2017).

The applicant in *Matter of L-E-A-* was the son of a Mexican grocer who refused to allow La Familia Michoacana, a criminal cartel, to sell drugs in his store. A week after Mr. L-E-A- also rejected a similar demand, the cartel attempted to kidnap him, leading him to flee to the United States.¹⁵⁵ In analyzing Mr. L-E-A-'s claim, the BIA, echoing the language of social distinction, first stated that “a claim based on family membership will depend on the nature and degree of the relationships involved and how those relationships are regarded by the society in question.”¹⁵⁶ It then concluded that in the instant case, it had “no difficulty identifying the respondent, a son residing in his father’s home, as being a member of the particular social group comprised of his father’s immediate family.”¹⁵⁷

Recognizing a PSG, however, is only one step in the asylum analysis. Applicants must also demonstrate that the persecution they suffered or fear is “on account of” their membership in that PSG, also known as the “nexus” requirement.¹⁵⁸ In its discussion of nexus in *Matter of L-E-A-*, the Board stated that “the fact that a persecutor targets a family member simply as a means to an end is not, by itself, sufficient to establish a claim, especially if the end is not connected to another protected ground.”¹⁵⁹ It then concluded that Mr. L-E-A- did not meet this new and heightened nexus standard because he “did not establish that his membership in a particular social group comprised of his father’s family members was at least one central reason for the events he experienced and the harm he claims to fear in the future.”¹⁶⁰ In reaching this decision, the Board appeared to create a separate requirement, a so-called “double nexus” requirement,¹⁶¹ applicable only to family-based particular social groups—that an applicant must suffer persecution on account of a *second* protected ground in order to merit asylum protection.

Analyzing nexus in this way would mean that a family-based PSG is subject to requirements that other groups—and other grounds—are not. This is, of course, contrary to the statute, which makes no such distinction. Moreover, as federal courts have unequivocally stated, “the law in this circuit and others is clear that a family may be a particular social group simply by virtue of its kinship ties, without requiring anything more.”¹⁶²

155. *See id.* at 41.

156. *Id.* at 43.

157. *Id.*

158. *See* 8 U.S.C. § 1101(a)(42) (2012).

159. 27 I. & N. Dec. at 45.

160. *Id.* at 47. In 2005, Congress passed the REAL ID Act, which requires applicants for asylum to prove that a protected ground is “at least one central reason” for the fear of persecution. REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302, 303 (2005). *Accord Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208 (B.I.A. 2007) (applying the “at least one central reason” language).

161. *See* Fatma Marouf, *Becoming Unconventional: Constricting the ‘Particular Social Group’ Ground for Asylum*, 44 N.C. J. INT’L L. 487, 509 (2019).

162. *Aldana-Ramos v. Holder*, 757 F.3d 9, 15 (1st Cir. 2014).

Concerns about nexus did not have much time to manifest in future cases, however, because in December 2018, Acting Attorney General Matthew Whitaker (who served in his position for a little over three months) referred *Matter of L-E-A-* to himself.¹⁶³ The question posed in Whitaker's order was "[w]hether, and under what circumstances, an alien may establish persecution on account of membership in a 'particular social group' . . . based on the alien's membership in a family unit."¹⁶⁴

In July 2019, Attorney General William Barr issued a decision that overruled the part of *Matter of L-E-A-* that recognized family membership as a basis for a particular social group.¹⁶⁵ Barr's order asserts that most families likely cannot constitute a valid PSG because they are not sufficiently socially distinct.¹⁶⁶ According to the Attorney General, only families with "greater meaning in society" or with "societal importance" satisfy the element of social distinction.¹⁶⁷ "The average family," he argues, would be "unlikely" to satisfy meet his new PSG criteria.¹⁶⁸

Barr's order also asserts that since "almost every alien is a member of a family of some kind, categorically recognizing families as particular social groups would render virtually every alien a member of a particular social group."¹⁶⁹ This statement echoes the reasoning of those who fear that a broad PSG definition would open the floodgates of asylum seekers. The flaw in Barr's argument becomes readily apparent by substituting the word "family" with "race" or "national origin."¹⁷⁰ In doing so, one can easily see that broad membership in an asylum ground should not disqualify it from serving as a basis for protection under existing law.

The Attorney General's opinion in *Matter of L-E-A-* also claims that if "Congress intended for refugee status to turn on one's suffering of persecution 'on account of' family membership, Congress would have included family identity as one of the expressly enumerated covered grounds for persecution."¹⁷¹ This too is a disingenuous argument and an unsound reason for rejecting an otherwise valid PSG. Particular social group has long been "understood to constitute a dynamic category, open to future developments."¹⁷² Countless categories of individuals

163. *Matter of L-E-A-*, 27 I. & N. Dec. at 494.

164. *Id.*

165. *Matter of L-E-A-*, 27 I. & N. Dec. 581, 596–97 (Att'y Gen. 2019).

166. *Id.* at 582 (citing *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (B.I.A. 2014)) ("[W]hat qualifies certain clans or kinship groups as particular social groups is not merely the genetic ties among the members. Rather, it is that those ties or other salient factors establish the kinship group, on its own terms, as a 'recognized component of the society in question.'").

167. *Id.* at 594.

168. *Id.*

169. *Id.* at 593.

170. Every person has a race or a national origin, yet asylum law explicitly recognizes those expansive categories as bases of protection. 8 U.S.C. § 1101(a)(42)(A) (2018).

171. *Id.*

172. THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 391 (Andreas Zimmerman, ed. 2011).

were not explicitly mentioned in the refugee definition, but the statute has long been interpreted in a way that protects unenumerated groups that fall under the broad categories of the other asylum grounds (especially particular social group).¹⁷³

Barr's order addresses, but ultimately dismisses, the firmly established legal precedent recognizing families as viable PSGs.¹⁷⁴ Since *Acosta*, family has been described as the "quintessential particular social group"¹⁷⁵ and courts have declared that "the family provides a prototypical example of a 'particular social group.'"¹⁷⁶ Many federal circuit courts agree with the Seventh Circuit's assessment that "case law has suggested, with some certainty, that a family constitutes a cognizable 'particular social group.'"¹⁷⁷ Barr's decision in *Matter of L-E-A-* was thus a drastic break with not only sound precedent but the reasoned analysis of nearly every court or jurist who has considered the issue.

It is important to note that *Matter of A-B-* and *Matter of L-E-A-* do not eliminate domestic violence or family-based asylum. When stripped of dicta, Sessions'

173. In fact, when the House of Representatives debated the 1980 Refugee Act, Representative Elizabeth Holtzman noted that the Act "does not specifically refer to any particular group, because this is legislation not for today or next year, but for many years to come." 125 CONG. REC. 35,813 (1979).

174. *Matter of L-E-A-*, 27 I. & N. Dec. at 589 ("I recognize that a number of courts of appeals have issued opinions that recognize a family-based social group as a 'particular social group' under the asylum statute. . . . I also recognize that certain courts of appeals have conserved the requisite elements of a 'particular social group' and, despite the requirements set forth in *M-E-V-G-* and *W-G-R-*, have nonetheless suggested that shared family ties alone are sufficient to satisfy the INA's definition of 'refugee.'").

175. *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015).

176. *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (recognizing family members of "those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses" as a PSG). The court further opined: "[W]e can conceive of few groups more readily identifiable than the family." *Id.* See also *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (finding that a group of family members was a "prototypical example" of a PSG).

177. *Iliev v. INS*, 127 F.3d 638, 642 n.4 (7th Cir. 1997) (noting that "other circuits have found that family is perhaps the most easily identifiable 'particular social group' that could serve as the basis for persecution"). See also *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common identifiable and immutable characteristics than that of the nuclear family."); *Vumi v. Gonzales*, 502 F.3d 150, 154–55 (2d Cir. 2007) ("The Board has unambiguously held that membership in a nuclear family may substantiate a social-group basis of persecution."); *Fatin v. INS*, 12 F.3d 1233, 1238–40 (3d Cir. 1993) (accepting that "kinship ties" qualify as a particular social group); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004) ("We join our sister circuits in holding that 'family' constitutes a 'particular social group.'"); *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) ("The first characteristic of their proffered social group—membership in the same family—is widely recognized by the caselaw.").

and Barr's¹⁷⁸ opinions rest only on their objection to the BIA accepting too many stipulations from the parties, which led them to conclude that the court's analysis "lacked rigor and broke with [its] own precedents."¹⁷⁹ Eligibility for asylum is still, as it has always been, determined on a case-by-case basis,¹⁸⁰ which means that judges remain free to recognize particular social groups based on intimate partner violence and family membership even in the absence of BIA precedent. However, with precedent-setting cases overruled, future decisions will lack predictability, uniformity, and consistency.¹⁸¹

The volatility of the Board of Immigration Appeals' jurisprudence—the changing PSG definition and the inconsistency of its application—led to the intervention of the federal courts. A discussion of federal circuit courts of appeals' particular social group jurisprudence follows.

IV.

APPLICATION BY FEDERAL COURTS

Although the Board of Immigration Appeals is the highest administrative body to interpret U.S. immigration laws, appeals of its decisions can be made to

178. *Matter of L-E-A-*, 27 I. & N. Dec. at 596 (“[T]he Board’s particular social group analysis merely cited past Board and federal court precedents recognizing family-based groups and then agreed with the parties’ stipulations. The Board summarily concluded that ‘the facts of this case present a valid particular social group,’ without explaining how the facts supported this finding or satisfied the particularity and social visibility requirements. This cursory treatment could not, and did not, satisfy the Board’s duty to ensure that the respondent satisfied the statutory requirements to qualify for asylum.”). Barr’s arguments and concerns relating to stipulations are surprising, because the family-based particular social group was firmly settled precedent, so such stipulations were routine and even expected. In fact, the rare consensus between immigration advocates and the Department of Homeland Security could arguably indicate the strength of the domestic violence and family-based particular social groups. The attacks are also disingenuous because the Trump administration argued it sought to make the system “more efficient” when it imposed quotas on immigration judges. Tal Kopan, *Justice Department Rolls Out Case Quotas for Immigration Judges*, CNN POLITICS (Apr. 2, 2018), <https://www.cnn.com/2018/04/02/politics/immigration-judges-quota/index.html> [<https://perma.cc/JBR5-PNAT>]. Were that truly the case, it seems illogical for Sessions and Barr to ignore the role of stipulations in increasing judicial efficiency.

179. *Matter of A-B-*, 27 I. & N. Dec. 316, 333 (A.G. 2018).

180. *See supra* note 150.

181. According to studies conducted by Professors Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag, the asylum adjudicatory system is already beset with rampant inconsistency. *See* Jaya Ramji-Nogales, Andrew Schoenholtz & Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 389 (2007). The authors describe “remarkable variation in decisions . . . even during periods when there has been no intervening change in the law” based on non-substantive factors such as the national origin or current geographic location of the applicant or the attitude and identity of the adjudicator. *Id.* at 302. *See generally* PHILLIP G. SCHRAG, ANDREW SCHOENHOLTZ & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY (2014).

the federal court of appeals. A federal court's decision is binding on the BIA when it considers cases arising in that circuit.¹⁸²

Every federal court of appeals in the United States has considered the Board's post-*Acosta* criteria. Many courts have accepted the social distinction and particularity tests,¹⁸³ but several others have rejected the imposition of these additional requirements. This section will review the decisions of the Seventh Circuit Court of Appeals, the Third Circuit Court of Appeals, and the Ninth Circuit Court of Appeals to highlight the varied approaches taken by federal courts.

The Seventh Circuit Court of Appeals has rejected outright the social visibility and particularity requirements. In *Gatimi v. Holder*, the court found that social visibility was inconsistent with past decisions, and thus not entitled to *Chevron* deference.¹⁸⁴ The principle of deference under *Chevron v. Natural Resources Defense Council* will be discussed in detail in Section V.C. below, but in brief, it is a doctrine that requires courts to defer to an agency's (in this case, the Board of Immigration Appeals') reasonable interpretation of an ambiguous statute.¹⁸⁵

Judge Posner, who authored the *Gatimi* opinion, concluded that the Board's formula "makes no sense" and that the BIA had not "attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility."¹⁸⁶ In holding that the Board's interpretation of particular social group was unreasonable, the court highlighted concerns about the BIA's lack of uniformity in decision-making, stating that when "an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one . . . [s]uch picking

182. See *Singh v. Ilchert*, 63 F.3d 1501, 1508 (9th Cir. 1995) ("A federal agency is obligated to follow circuit precedent in cases originating within that circuit.") (citing *NLRB v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987), *cert. denied*, 501 U.S. 1217 (1991)).

183. See *Mendez-Barrera v. Holder*, 602 F.3d 21, 25 (1st Cir. 2010) (holding that social visibility is not a departure from the *Acosta* standard, but rather an "elaboration of how the immutable characteristic requirement operates"); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) (finding the social visibility requirement "consistent with this Court's reasoning that a 'particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general'") (quoting *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991)); *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011) (recognizing both social distinction and particularity as criteria for a valid particular social group); *Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012) (upholding additional PSG requirements as "a subtle shift that evolved out of the BIA's prior decisions on similar cases"); *Umama-Ramos v. Holder*, 724 F.3d 667, 669 (6th Cir. 2013) (upholding social distinction and particularity criteria); *Costanza v. Holder*, 647 F.3d 749, 754 (8th Cir. 2011) (holding that "a social group requires sufficient particularity and visibility such that the group is perceived as a cohesive group by society"); *Rivera-Barrientos v. Holder*, 658 F.3d 1222, 1230–35 (10th Cir. 2011) (upholding and elaborating on the definitions of particularity and social visibility); *Pinzon Pulido v. U.S. Att'y Gen.*, 427 F. App'x 729, 730 (11th Cir. 2011) (stating that "[i]n assessing whether the alien's alleged group constitutes a particular social group, we consider the group's immutability and social visibility").

184. 578 F.3d 611, 615–16 (7th Cir. 2009).

185. See 467 U.S. 837, 842–43 (1984).

186. *Gatimi*, 578 F.3d at 615.

and choosing would condone arbitrariness and usurp the agency's responsibilities."¹⁸⁷

The *Gatimi* decision was issued before the Board redefined social visibility as social distinction, and the court devoted significant attention to the illogical nature of the visibility requirement. It noted the obvious—that those at risk of persecution will often hide, and that “to the extent that the members of the target group are successful in remaining invisible, they will not be ‘seen’ by other people in the society as ‘a segment of the population.’”¹⁸⁸

Even after the Board subsequently clarified that ocular visibility was not required and renamed social visibility as social distinction, the Seventh Circuit did not reverse its position. In the 2018 case *W.G.A. v. Sessions*, the court noted that “[w]hether the Board’s particularity and social distinction requirements are entitled to *Chevron* deference remains an open question in this circuit.”¹⁸⁹ The court also validated concerns that “social distinction and particularity create a conceptual trap that is difficult, if not impossible, to navigate” because “[t]he applicant must identify a group that is broad enough that the society as a whole recognizes it, but not so broad that it fails particularity.”¹⁹⁰

Like the Seventh Circuit, the Third Circuit Court of Appeals initially rejected the BIA’s imposition of the visibility and particularity requirements. However, in 2018, the Third Circuit reversed its position and now accepts the Board’s formulation.¹⁹¹

The Third Circuit’s initial precedent arose in the case of *Valdiviezo-Galdamez v. United States Attorney General*, in which it considered the particular social group of “Honduran youth who have been actively recruited by gangs but have refused to join because they oppose the gangs.”¹⁹² The court concluded that because the BIA had departed from *Acosta* without a principled explanation, the visibility and particularity requirements were not entitled to *Chevron* deference.¹⁹³ The court based its decision on its view that the Board’s actions were both inconsistent and irrational.¹⁹⁴ Understanding social visibility to impermissibly mandate on-sight visibility, the court determined that the new requirement was “inconsistent with past BIA decisions . . . [and therefore] an unreasonable addition” to

187. *Id.* at 616.

188. *Id.* at 615.

189. 900 F.3d 957, 964 (7th Cir. 2018). *See also* Orellana-Arias v. Sessions, 865 F.3d 476, 484 (7th Cir. 2017) (reviewing the Board’s factual determinations for substantial evidentiary support and its legal conclusions de novo).

190. *W.G.A.*, 900 F.3d. at 965 n.4.

191. *See* S.E.R.L. v. U.S. Att’y Gen., 894 F.3d 535, 547 (3d Cir. 2018).

192. 663 F.3d 582, 617 (3d Cir. 2011).

193. *Id.* at 608–9.

194. *Id.* at 604 (“Although we afforded the BIA’s interpretation of ‘particular social group’ *Chevron* deference in *Fatin*, this did not give the agency license to thereafter adjudicate claims of social group status inconsistently, or irrationally.”).

the PSG requirements.¹⁹⁵ The court also took issue with social visibility's inconsistent application, finding that the Board sometimes described visibility as recognizability by others in society but at other times in reference to internal characteristics, such as sexual orientation, that are invisible absent self-disclosure.¹⁹⁶

Finally, irreconcilability lay at the root of the *Valdiviezo-Galdamez* court's explicit rejection of the particularity requirement. As it stated, social visibility and particularity "appear to be different articulations of the same concept" with the latter being "little more than a reworked definition [of the former]."¹⁹⁷ Thus, because it was "hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility,'" the Third Circuit declined to support the Board's definition of particular social group.¹⁹⁸

However, after the BIA's decisions in *Matter of M-E-V-G-* and *Matter of W-G-R-* reclassified social visibility as social distinction, the Third Circuit reversed course. In *S.E.R.L. v. United States Attorney General*, the court stated that the BIA had responded to the concerns expressed in *Valdiviezo-Galdamez* by providing a "'principled reason' and explanation" for the new requirements and distinguishing between particularity and visibility/distinction.¹⁹⁹ As such, the appeals court found that the BIA's new "statutory interpretation is entitled to *Chevron* deference."²⁰⁰

Lastly, the Ninth Circuit Court of Appeals takes a wholly different approach. In *Sanchez-Trujillo v. INS*, the court stated that a particular social group "implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest."²⁰¹ The court further explained that "[o]f central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group."²⁰² Later, in *Hernandez-Montiel v. INS*, the court clarified that this "voluntary associational relationship" test is an alternative to the *Acosta* immutability definition.²⁰³

After *Hernandez-Montiel*, the court further elaborated on its PSG standard by addressing the BIA's jurisprudence. In *Henriquez-Rivas v. Holder*, the Ninth Circuit found that social visibility was a "refinement" of *Acosta* and required

195. *Id.*

196. *Id.* at 603–04.

197. *Id.* at 608.

198. *Id.*

199. 894 F.3d 535, 547 (3d Cir. 2018).

200. *Id.* at 540. Despite its acceptance of the BIA's PSG definition, the court also acknowledged "arguable inconsistencies in the [BIA's] precedent" that pose a risk of the requirements being "applied arbitrarily and interpreted to impose an unreasonably high evidentiary burden." *Id.* at 550.

201. 801 F.2d 1571, 1576 (9th Cir. 1986).

202. *Id.*

203. 225 F.3d 1084, 1092 (9th Cir. 2000).

“perception” as opposed to on-sight visibility.²⁰⁴ As such, because the visibility (and particularity) requirements could be applied in such a way as to avoid direct conflict with prior precedent, the court did not reject outright the new criteria as unreasonable under its *Chevron* analysis.²⁰⁵ However, the court left the matter unresolved, concluding that it “need not decide, in this case, at this time, whether [it] should align [itself] with the Third and Seventh Circuits and invalidate these requirements.”²⁰⁶

In sum, federal courts have had varied responses to the BIA’s imposition of the social visibility/distinction and particularity requirements on top of *Acosta*’s immutability test. Some courts have accepted the new requirements, some have rejected them entirely, and others have adopted different standards and definitions. What remains is a circuit split and continuing critiques of the BIA’s PSG jurisprudence, particularly in light of the Trump administration’s elimination of the only two particular social groups recognized by the BIA after new criteria were introduced in 2006. The next Section proposes recommendations that could resuscitate the now-dead PSG ground.

V.

RECOMMENDATIONS

The stated goal of the 1980 Refugee Act was “to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States.”²⁰⁷ The Act’s language suggests a desire for consistency and fairness in the adjudication of claims for asylum, regardless of shifting political winds.

Notably, nearly all of the cases that imposed extra conditions on the particular social group definition accepted by the international community and originally adopted by the Board of Immigration Appeals involved applicants facing persecution at the hands of Central American gangs. As Professor Susan Bibler Courtin has noted, the United States government has long treated Central Americans “as generally undeserving of political asylum,” regardless of the legal merits of their

204. 707 F.3d 1081, 1089 (9th Cir. 2013) (en banc). The court stated: “[O]n-sight’ visibility would be inconsistent with previous BIA decisions and likely impermissible under the statute. However, we do not read *C-A-* and subsequent cases to require ‘on-sight’ visibility.” *Id.* at 1087–88.

205. *Id.* at 1089 (“So long as the ‘social visibility’ and ‘particularity’ criteria area are applied in a way that did not directly conflict with prior agency precedent, we would be hard-pressed to reject the new criteria as unreasonable under *Chevron*.”).

206. *Id.* at 1091. In *Reyes v. Lynch*, the court held that the BIA’s particularity and social distinction requirements were entitled to *Chevron* deference. See 842 F.3d 1125, 1133–37 (9th Cir. 2016).

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

claims.²⁰⁸ This politicization of asylum was exacerbated in the Trump era, as “[r]efugees of the Northern Triangle . . . face[d], in many courts, something of a Sisyphean struggle to obtain asylum with denial rates for these cases remaining far higher than for other countries.”²⁰⁹

Discrimination and animus against asylum seekers from Central America are evident in PSG jurisprudence. As Professor Helen Grant has explained, “[i]n the twenty-first century, it is former gang members, youth vulnerable to recruitment by gangs . . . females subject to forced sexual relationships with gang members, and informants on drug cartels and organized crime that form a sample of the groups now seeking protection under the PSG ground.”²¹⁰ These applicants do not look like the political dissidents and survivors of race and religious-based persecution who were originally envisioned by the drafters of international and domestic asylum law. They also evoke floodgates and modern domestic political concerns. Yet although these asylum seekers face as serious and deadly risks as their forbearers, U.S. courts have methodically curtailed particular social group eligibility to exclude them.²¹¹

While the BIA systematically denied claims of asylum seekers fleeing gang violence in the 2000s, claims based on intimate partner violence and family membership were ultimately approved, perhaps because they seemed “safer” or more

208. See Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 LAW & SOC. INQUIRY 569, 570 (2011). Echoing the current Justice Department’s view of intimate partner violence as a personal matter, Professor Coutin explains that the change in law and policy regarding Central American asylum seekers resulted in part from the United States’ shifting view of “the character of violence” in the region “from overtly political to seemingly criminal in nature.” *Id.* at 570.

209. Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 608 (2019). Professor Sherman-Stokes explains the rationale behind the low grant rates for Central American asylum seekers by noting that “[e]arly on, it was clear what law enforcement, Congress, political leaders, courts, and adjudicators thought of these Central Americans: that they were undeserving economic migrants whose admission would open the ‘floodgates’ for the world’s most poor and vulnerable to come pouring into the United States.” *Id.* at 593.

210. See Grant, *supra* note 93, at 899.

211. The dangerous conditions in the Northern Triangle have been well documented. See, e.g., UNITED NATIONS HIGH COMM’R FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO (2015), <https://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html> [<https://perma.cc/B7XR-KRV3>]; MÉDECINS SANS FRONTIÈRES, *Forced to Flee Central America’s Northern Triangle: A Neglected Humanitarian Crisis* (May 2017), http://www.msf.org/sites/msf.org/files/msf_forced-to-flee-central-americas-northern-triangle_e.pdf [<https://perma.cc/U8XW-6YUK>]; Ben Raderstorff, Carole J. Wilson, Elizabeth J. Zechmeister & Michael J. Camilleri, *Beneath the Violence: How Insecurity Shapes Daily Life and Emigration in Central America: A Report of the Latin American Public Opinion Project and the Inter-American Dialogue* (The Dialogue, Working Paper, Oct. 2017), <https://www.thedialogue.org/wp-content/uploads/2017/10/Crime-Avoidance-Report-FINAL-ONLINE.pdf> [<https://perma.cc/A8PD-4UD8>].

politically palatable for the BIA and DOJ.²¹² But in an administration that was hostile to asylum seekers and attempted, in countless ways,²¹³ to curtail rights of those who seek refuge in the United States, even these more sympathetic applicants were denied.

A review of PSG jurisprudence suggests that what truly underlies the actions of the Board of Immigration Appeals and the Department of Justice is politics. As such, the way to depoliticize asylum, and return to the balanced and rights-protective system the drafters of both international and domestic law intended, is to legislate a PSG definition, address the overuse of attorney general certification, and reconsider the application of the *Chevron* doctrine. This Section will address each in turn.

A. Enact Legislation to Codify the *Acosta* Standard

In imposing the social distinction and particularity requirements, the Board of Immigration Appeals has effectively stripped the particular social group ground of all efficacy. Thus, in order to restore the law's intent, Congress should amend the refugee definition in the Immigration and Nationality Act and codify the *Acosta* immutability standard alone as the definition of particular social group. Alternatively, Congress could adopt a PSG definition modeled on the UNHCR Guidelines—one in which social distinction is an alternative, used only when a group does not possess the requisite immutability.²¹⁴ In this way, the Board of Immigration Appeals' desire for particular social groups to be perceived as such by society would be achieved without compromising protections for survivors.

A return to the *Acosta* test would not constitute a dramatic shift in PSG jurisprudence. Despite the BIA's imposition of additional criteria between 2006 and 2014, the 1980s-era *Acosta* immutability standard continues to be a core part of the particular social group definition.²¹⁵ Requirements have been added, but *Acosta* remains, which suggests its strength and its critical place in PSG jurisprudence.

Moreover, an *Acosta*-centered definition best comports with the intentions of the drafters of 1951 Refugee Convention (and the 1967 Protocol that incorporated the Convention by reference), international jurisprudence that has developed to

212. See generally Diane Uchimiya, *Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence*, 23 BERKELEY LA RAZA L.J. 109 (2013); Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12–10 IMMIGR. BRIEFINGS 1 (“The often cursory denials of asylum claims based on resistance to gangs seem to be largely a function of fear of floodgates, misunderstanding of precedent, or ignorance of conditions on the ground.”).

213. See *supra* notes 1–15 and accompanying text.

214. UNHCR PSG Guidelines, *supra* note 40, at 4.

215. See *In re R-A-*, 22 I. & N. Dec. 906, 919 (B.I.A. 1999) (“The starting point for ‘social group’ analysis remains the existence of an immutable or fundamental individual characteristic in accordance with *Matter of Acosta*.”).

implement it, and UNHCR guidance.²¹⁶ And because, as described above, the goal of the 1980 Refugee Act was to align domestic law with the Convention and Protocol, a definition emphasizing immutable characteristics also respects the intent of Congress.

Since 2009, Congress has advanced a number of bills defining “particular social group” as “any group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person’s human rights such that the person should not be required to change it, shall be deemed a particular social group, without any additional requirement.”²¹⁷ These bills containing *Acosta*-only language have not gained sufficient traction in the legislature, and in today’s divisive political climate, may be difficult to pass. As such, until such time as legislation is practicable, regulatory reform may provide an easier path.²¹⁸

B. Create Article I Immigration Courts to Address the Politicization of Immigration Adjudication

As described above, the two particular social groups recognized after the BIA added social distinction and particularity requirements onto the *Acosta* test were both overruled by Trump-appointed attorneys general. A single individual has the power to overturn an appellate tribunal’s decision because immigration courts are administrative bodies located within the Department of Justice. As such, AGs have the authority to review, and overrule, decisions issued by the Board of Immigration Appeals.²¹⁹

216. See Marouf, *supra* note 44, at 54–57 (detailing the use of the *Acosta* standard in foreign courts).

217. Refugee Protection Act of 2010, S. 3113, 111th Cong. (2010); Refugee Protection Act of 2011, S. 1202, 112th Cong. (2011); Refugee Protection Act of 2011, H.R. 2185, 112th Cong. (2011); Violence Against Immigrant Women Act of 2012, H.R. 5331, 112th Cong. (2012); Violence Against Immigrant Women Act of 2013, H.R. 629, 113th Cong. (2013); Refugee Protection Act of 2013, S. 645, 113th Cong. (2013); Refugee Protection Act of 2013, H.R. 1365, 113th Cong. (2013); Refugee Protection Act of 2016, S. 3241, 114th Cong. (2016); Refugee Protection Act of 2016, H.R. 5851, 114th Cong. (2016).

218. See Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2539–44 (2014) (positing that regulatory reform would be easier and more effective than amending the INA).

219. See 8 C.F.R. § 1003.1(h)(1)(ii) (2020) (“The Board shall refer to the Attorney General for review of its decision all cases that . . . [t]he Attorney General directs the Board to refer to him.”). For a detailed examination of the attorney general certification process, see Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841 (2016). Responses to Gonzales and Glen’s article also provide thoughtful analysis of this broad power. See, e.g., David A. Martin, *Improving the Exercise of the Attorney General’s Immigration Referral Power: Lessons from the Battle over the “Categorical Approach” to Classifying Crimes*, 102 IOWA L. REV. ONLINE 1 (2016); Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129 (2017); Margaret H. Taylor, *Midnight Agency Administration: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18 (2016).

The power of case certification has been used with significantly increasing frequency in recent years. Trump's attorneys general certified 16 cases to themselves, which is more than triple the number of cases certified in the Obama and Clinton administrations combined.²²⁰ Attorney General William Barr, who issued the opinion in *Matter of L-E-A-*, did not certify any cases to himself when he was the AG from 1991–1993 in the George H. W. Bush administration.²²¹

In 2018, the Department of Justice took steps to further expand the circumstances in which attorneys general can refer cases to themselves for review. A proposed rule would give the AG power to hear cases pending before (as opposed to decided by) the BIA, as well as certain decisions by immigration judges that have not been appealed to the BIA.²²²

The attorney general's certification authority allows the politically appointed head of an executive department to singlehandedly override the opinions of judges. This is not, however, the only example of partisan interference in the immigration courts. For example, in 2002, former Attorney General John Ashcroft cut the BIA's membership "by more than half, removing four of the five members who ruled in favor of noncitizens at the highest rates."²²³ In a strikingly similar move, in June 2020, nine members of the 23-member Board were reassigned, which critics argued was a mechanism to dilute "the independence of an important appeals body by filling it with new hires more willing to carry out the Trump administration's restrictive immigration policies."²²⁴ The executive branch also houses both the prosecutors and the judges in the immigration court system,

220. *Comprehensive List of AG-Certified Opinions in Trump Administration to Date*, IMMIGRATIONPROFBLOG (Nov. 9, 2020), <https://lawprofessors.typepad.com/immigration/2020/11/comprehensive-list-of-ag-certified-opinions-in-trump-administration-to-date.html> [<https://perma.cc/9VNF-4K2Y>]. See also Lorelei Laird, *Whose Court is this Anyway? Immigration Judges Accuse Executive Branch of Politicizing Their Courts*, A.B.A. J., APRIL 2019, at 56, <http://www.abajournal.com/magazine/article/immigration-judges-executive-politicizing-courts> [<https://perma.cc/3XCV-X4H6>]. President Clinton's Attorney General, Janet Reno, certified only one case to herself; President Obama's Attorneys General, Eric Holder and Loretta Lynch, certified a combined four. *Id.*

221. *Id.*

222. OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, RIN 1125-AA86, REFERRAL OF DECISIONS IN IMMIGRATION MATTERS TO THE ATTORNEY GENERAL, (2018), <https://reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1125-AA86> [<https://perma.cc/22EB-8X3Z>].

223. Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 GEO. IMMIGR. L.J. 261, 272 (2019).

224. Tanvi Misra, *DOJ 'Reassigned' Career Members of Board of Immigration Appeals*, ROLL CALL (June 9, 2020, 4:55 PM), <https://www.rollcall.com/2020/06/09/DOJ-REASSIGNED-CAREER-MEMBERS-OF-BOARD-OF-IMMIGRATION-APPEALS/> [<https://perma.cc/DV6F-GGH6>].

creating, at bare minimum, the appearance of conflict and collusion.²²⁵ Concerns about fairness in the immigration court system generally, and the asylum adjudicatory process more specifically, were exacerbated in the Trump era, when “the President, the Attorney General, and the Secretary of Homeland Security . . . applied extraordinary pressure on IJs and [Asylum Officers] to deny both applications for asylum and requests for asylum hearings, with predictable results.”²²⁶ In these and many other ways, justice in immigration court is politicized and the independence of judges undermined.

Establishing an immigration court system that is independent from the Department of Justice could solve the problem of politicization of immigration justice. Many have called on Congress to establish the immigration courts as federal Article I courts, unaffiliated with the Department of Justice.²²⁷ Precedent exists for such a move, as other specialized courts, including the Court of Veteran’s Appeals, the Court of Federal Claims, and the U.S. Tax Court, function as Article I courts.²²⁸ Such systems provide independence, transparency, and impartial justice for all who appear before them, characteristics now lacking in our nation’s immigration courts.

C. *Reconsider Chevron Deference*

As discussed above in Section IV, the federal courts’ dominant jurisprudential lens for evaluating the BIA’s particular social group decision-making is whether the administrative court’s opinions should be entitled to deference under *Chevron v. Natural Resources Defense Counsel*. The *Chevron* doctrine states that courts should defer to reasonable agency interpretations of ambiguous statutes.²²⁹ This

225. AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *AILA Policy Brief: Restoring Integrity and Independence to America’s Immigration Courts* (Jan. 24, 2020), <https://www.aila.org/File/DownloadEmbeddedFile/77605> (noting “a conflict of interest built into the [U.S. immigration court] system itself” because “[t]he Executive Office for Immigration Review (EOIR), which manages the Immigration Court and the Board of Immigration Appeals (BIA), is currently housed under DOJ. While trial-level immigration prosecutors are housed under the U.S. Department of Homeland Security (DHS) within Immigration and Customs Enforcement (ICE), the Attorney General supervises the Office of Immigration Litigation (OIL) which defends immigration cases on behalf of the government in the circuit courts of appeals.”).

226. Richard J. Pierce, Jr., *Due Process, Immigration Judges, and Immigration Officers*, YALE J. REG.: NOTICE & COMMENT (July 24, 2019), <https://www.yalejreg.com/nc/due-process-immigration-judges-and-immigration-officers-by-richard-j-pierce-jr/> [<https://perma.cc/JM9V-8P2C>].

227. See, e.g., Letter from the American Bar Association, American Immigration Lawyers Association, Federal Bar Association, and National Association of Immigration Judges, *Congress Should Establish an Independent Immigration Court* (July 11, 2018) (on file with author) (arguing that “in its current state, the immigration court system requires a structural overhaul to solve its foundational problems”). An Article I court is a federal court organized under Article I of the United States Constitution, which confers upon Congress the power “[t]o constitute tribunals inferior to the Supreme Court.” U.S. CONST. art. I, § 8, cl. 9.

228. See David A. Case, *Article I Courts, Substantive Rights, and Remedies for Government Misconduct*, 26 N. ILL. U. L. REV. 101, 145 (2005).

229. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

Section will address *Chevron*'s applicability in cases involving immigration law, examine the waning strength of the *Chevron* doctrine, and explain why the BIA's PSG definition should not be entitled to deference.

1. *Chevron and Its Applicability in Immigration Cases*

Chevron analysis is applicable to the decisions of the Board of Immigration Appeals because although the attorney general is the final interpreter of immigration laws,²³⁰ the AG has delegated this power to the Board.²³¹ Several exceptions to the applicability of *Chevron* deference to the Board exist, however. Deference is only accorded to published BIA decisions²³² and cases decided by a three-member panel of the Board.²³³ A federal court also does not have to defer to the BIA if "neither the IJ's nor BIA's decision contains any analysis with persuasive power."²³⁴

The process for judicial review of agency decision-making under *Chevron* involves two steps, which are discussed in turn below.²³⁵ Step One requires a court to decide whether Congress has spoken to the question at issue. To determine this, a court looks at whether Congress' intent is "clear" and "unambiguously expressed."²³⁶ If the court determines, using traditional tools of statutory

230. The INA provides that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1) (2018).

231. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("The Attorney General, while retaining ultimate authority, has vested the BIA with power to exercise the 'discretion and authority conferred upon the Attorney General by law' in the course of considering and determining cases before it."); *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012 (9th Cir. 2006) ("It is well-established that Congress delegated to the BIA the authority to promulgate rules, on behalf of the Attorney General, that carry the force of law 'through a process of case-by-case adjudication.'" (quoting *Aguirre-Aguirre*, 526 U.S. at 425)).

232. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) ("[W]e have held that the Board's precedential orders, which bind third parties, qualify for *Chevron* deference because they are made with a 'lawmaking pretense.' We have not accorded *Chevron* deference to the Board's unpublished decisions, however, because they do not bind future parties." (citations omitted)).

233. *Garcia-Quintero*, 455 F.3d at 1012–13 (holding that a case must be decided by a three-member panel if it presents "[t]he need to establish a precedent construing the meaning of laws, regulations, or procedures") (alteration in original). Only a small number of cases are decided by a three-member panel; panel decision are reserved for times when the BIA is required "to settle inconsistencies among the rulings of different immigration judges," 8 C.F.R. § 1003.1(e)(6)(i) (2020); "to establish a precedent," 8 C.F.R. § 1003.1(e)(6)(ii) (2020); "to resolve a case or controversy of major national import," 8 C.F.R. § 1003.1(e)(6)(iv) (2020); or "to resolve a complex, novel, unusual, or recurring issue of law or fact," 8 C.F.R. § 1003.1(e)(6)(vii) (2020). More often, a single Board member will "affirm the decision of . . . the immigration judge, without opinion. . . ." 8 C.F.R. § 1003.1(e)(4)(i) (2020).

234. *Mendis v. Filip*, 554 F.3d 335, 338 n.3 (2d Cir. 2009).

235. Professor Cass Sunstein, among others, has argued that *Chevron* also has a "Step Zero," wherein federal courts should determine whether *Chevron* is applicable. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

236. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

construction, that Congress expressed its intent, that intent must control.²³⁷ If, however, the court determines that the statute is silent or ambiguous, it can infer that Congress intended to vest definitional authority in the agency that regularly administers in that area of law. The court then moves to Step Two of the *Chevron* analysis.

The goal of Step Two is to decide whether the agency's approach is "based on a permissible construction of the statute."²³⁸ The Court has generally defined "permissible" as either "reasonable"²³⁹ or not "arbitrary or capricious."²⁴⁰ In making its Step Two determination, a court can review the text, structure, and purpose of the statute.²⁴¹ But if, after doing so, a court finds that the agency did not "provide a reasoned explanation for its action"²⁴² or that the outcome is unreasonable, it fails at Step Two and its action cannot stand.

2. *The Waning Strength of the Chevron Doctrine*

Although *Chevron* is a pillar of administrative law jurisprudence,²⁴³ scholars argue that its "importance is fading,"²⁴⁴ noting that in "recent years, we have seen a growing call from the federal bench, on the Hill, and within the legal academy to rethink administrative law's deference doctrines to federal agency interpretations of law."²⁴⁵ A full review of the critiques of *Chevron* is outside the scope of

237. The *Chevron* Court stated that courts "must reject administrative constructions that are contrary to clear congressional intent." *Id.* at 843 n.9.

238. *Id.* at 843.

239. *See, e.g., id.* at 845; *Edelman v. Lynchburg College*, 535 U.S. 106, 121 (2002).

240. The reasonableness analysis of *Chevron* Step Two is similar to the "arbitrary and capricious" standard in the Administrative Procedures Act (APA), 5 U.S.C. §§ 551–559 (2018). *See* Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 621 (2009) ("Courts and commentators have converged on an emerging consensus that the 'arbitrary, capricious, and abuse of discretion' standard set forth in Section 706(2)(A) supplies the metric for judicial oversight at *Chevron*'s second step."). *See also* Nat'l Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000 (2005) (finding that an "arbitrary or capricious" deviation from previous agency policy was impermissible under a *Chevron* analysis); *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (noting that the arbitrary and capricious standard used in Step 2 of the *Chevron* analysis was the same as arbitrary and capricious review under the Administrative Procedures Act).

241. *See, e.g., Troy Corp. v. Browder*, 120 F.3d 277, 285 (D.C. Cir. 1997) (requiring an agency's interpretation to "be reasonable and consistent with the statutory purpose").

242. *Judulang*, 565 U.S. at 45. The Court in *Judulang* further expounded that the bar is "not . . . high . . . but it is an unwavering one." *Id.*

243. *Chevron* is often described as the most cited decision in administrative law. *See* Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 731 (2014) (stating that *Chevron* is the most cited Supreme Court administrative law decision); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006) (labeling *Chevron* the most cited case in "modern public law").

244. Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 726–27 (2007).

245. Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 104 (2018).

this Article, but briefly, its legitimacy has been questioned on grounds that include concerns about separation of powers and a view that the doctrine vests too much power and authority in both the executive branch and the federal government as a whole.²⁴⁶

A majority of the justices currently sitting on the Supreme Court have criticized or call the *Chevron* doctrine into question. Justice Thomas authored a concurring opinion in *Michigan v. EPA*, writing separately solely to “note that [the EPA’s] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes.”²⁴⁷ Thomas argued that *Chevron* was a threat to separation of powers, as it vested too much authority in the executive branch and precluded judges from exercising independent judgment.

A few years earlier, Chief Justice Roberts authored a dissent joined by Justice Alito, in which he warned that “the danger posed by the growing power of the administrative state cannot be dismissed.”²⁴⁸ Justice Alito also questioned the judiciary’s deference to agency interpretations of regulations in the 2015 case, *Perez v. Mortgage Bankers Association*.²⁴⁹

Chevron critiques have also arisen in the Court’s examination of immigration law. In *Pereira v. Sessions*, a case in which the Court considered the validity of a notice to appear in immigration court that does not designate a specific time or place for the removal proceeding, Justice Kennedy drafted a concurrence, writing separately “to note [his] concern with the way in which the Court’s opinion in [*Chevron*] has come to be understood and applied.”²⁵⁰ He critiqued the Fourth Circuit’s decision-making process in another immigration case, *Urbina v. Holder*, arguing that the court’s limited “analysis suggests an abdication of the Judiciary’s

246. Professor Christopher Walker recently published a detailed overview of *Chevron* critiques. See *id.* See also Emily Hammond, Elizabeth Garrett & M. Elizabeth Magill, *Judicial Review of Statutory Issues Under the Chevron Doctrine*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 67 (2015).

247. 576 U.S. 743, 760 (2015) (Thomas, J., concurring).

248. *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, J., dissenting).

249. 575 U.S. 92 (2015). Justice Alito’s concurring opinion addressed the *Paralyzed Veterans* doctrine, which required federal agencies to engage in notice-and-comment rulemaking when they substantially altered an “interpretive” rule. See generally *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). He speculated that the “creation of that doctrine may have been prompted by an understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, . . . and (3) this Court’s cases holding that courts must ordinarily defer to an agency’s interpretation of its own ambiguous regulations.” 575 U.S. at 107–08 (Alito, J., concurring).

250. 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). Justice Alito also used the *Pereira* case as an opportunity to express his view that *Chevron* is an “increasingly maligned precedent.” *Id.* at 2121 (Alito, J., dissenting).

proper role in interpreting federal statutes.”²⁵¹ Kennedy concluded that he found “the type of reflexive deference exhibited in some of these cases . . . troubling.”²⁵²

Similarly, Justice Kennedy’s replacement, Justice Kavanaugh, “indicated skepticism of the [*Chevron*] doctrine in both academic and judicial writings” prior to his confirmation to the Supreme Court.²⁵³ In a 2016 *Harvard Law Review* article, he argued that the *Chevron* framework should not apply when “an agency is . . . interpreting a specific statutory term or phrase.”²⁵⁴ In a dissent in *United States Telecom Association v. FCC*, then-Judge Kavanaugh argued that “for an agency to issue a major rule, Congress must *clearly* authorize the agency to do so.”²⁵⁵ Thus, if his past writings are any indication, Justice Kavanaugh may, like his predecessor, join his colleagues in seeking to limit the Court’s deference to administrative agency decisions.

Like Justice Kavanaugh, Justice Gorsuch also expressed skepticism about the *Chevron* doctrine prior to his appointment to the Court. In *Gutierrez-Brizuela v. Lynch*, then-Judge Gorsuch raised separation-of-powers as well as other concerns, noting that “[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions.”²⁵⁶ He added that both “*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”²⁵⁷ Thus, given his prior decisions, Justice Gorsuch would likely vote to limit *Chevron*’s reach in any case that came before the Supreme Court.²⁵⁸

251. *Id.* at 2120.

252. *Id.*

253. CONG. RES. SERV., DEFERENCE AND ITS DISCONTENTS: WILL THE SUPREME COURT OVERRULE *CHEVRON*? 3 (2018), <https://fas.org/sgp/crs/misc/LSB10204.pdf> [<https://perma.cc/C7J6-DCNF>]. See also Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Judge Kavanaugh, Chevron Deference, and the Supreme Court*, REGUL. REV. (Sept. 3, 2018), <https://www.theregreview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/> [<https://perma.cc/MP5F-DTYK>] (reviewing decisions authored by then-Judge Kavanaugh in an effort to predict how he might review federal agency statutory interpretations that come before him on the Court).

254. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2154 (2016) (book review).

255. 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

256. 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

257. *Id.* at 1149.

258. See Trevor W. Ezell & Lloyd Marshall, *If Goliath Falls: Judge Gorsuch and the Administrative State*, 69 STAN. L. REV. ONLINE 171, 175–76 (2017) (discussing then-Judge Gorsuch’s anti-*Chevron* views).

Finally, although Justice Amy Coney Barrett does not have an extensive record on administrative law matters,²⁵⁹ she too may be inclined to limit *Chevron* deference. Experts who have studied Barrett's record and writings believe that her commitment to textualism and her expressed willingness to overrule precedential cases may make her open to revisiting the doctrine.²⁶⁰

In sum, one might assume that the increasingly conservative Supreme Court would be reluctant to expand protections to immigrants. However, if the Court does intervene to resolve the circuit split regarding the definition of particular social group, support for a return to the *Acosta* standard may come from the Court's desire to uphold its preferred values in the area of administrative law.²⁶¹

3. *The BIA's Definition of "Particular Social Group" Does Not Merit Chevron Deference*

Whether the Supreme Court or federal courts of appeals should afford *Chevron* deference to the definition of particular social group promulgated by the Board of Immigration Appeals is, of course, more than just a matter of who sits on those courts. A closer analysis of *Chevron* and the BIA's jurisprudence reveals that the Board's interpretation of the phrase "particular social group" fails at *Chevron* Step Two.²⁶²

The Board of Immigration Appeals' PSG definition is unreasonable for two distinct reasons: (i) it is not in keeping with Congress' intent for the Refugee Act to comport with international law and obligations; and (ii) the Board's actions have defined the PSG out of existence, which cannot be a reasonable outcome. As such, deference to the Board of Immigration Appeals' interpretation is no longer appropriate.

259. Evan Bernick, *Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, YALE J. REG.: NOTICE & COMMENT (July 3, 2018), <https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick/> [<https://perma.cc/4NME-N5NE>] (noting that "then-Professor Barrett didn't write much about administrative law while at Notre Dame Law School" and that Barrett did not write any opinions "in any major administrative law case" during her tenure on the Seventh Circuit).

260. *Id.* See also Jeff Overley, *Chevron Deference's Future in Doubt if Barrett is Confirmed*, LAW360 (Oct. 23, 2020), <https://www.law360.com/articles/1318381/chevron-deference-s-future-in-doubt-if-barrett-is-confirmed>; James Goodwin, *Will Confirming Judge Barrett be the Death of Chevron Deference?*, UNION OF CONCERNED SCI. BLOG (Oct. 15, 2020, 2:21 PM), <https://blog.ucsusa.org/guest-commentary/will-confirming-judge-barrett-be-the-death-of-chevron-deference> [<https://perma.cc/RA8Z-ZMTD>].

261. Some have expressed concern about this "circuit conflict on an issue where national uniformity is vital." *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1095 (9th Cir. 2013) (Kozinski, C.J., dissenting).

262. The BIA's interpretation of PSG likely satisfies *Chevron* Step One because Congress did not explicitly express its intent regarding the definition of particular social group when enacting the Refugee Act of 1980, nor is the term defined in the statute or in the implementing regulations. See *supra* Section II.B.

i. *The BIA's Definition of "Particular Social Group" Is Inconsistent with Congressional Intent*

There exists no single definition for what constitutes a “reasonable” agency interpretation under *Chevron* Step Two, but scholars have suggested that “by ‘reasonable,’ the Court seemed to mean reasonable in light of the text, *history*, and interpretative conventions that govern the interpretation of a statute by a court.”²⁶³ The Supreme Court itself has explained that “reasonable statutory interpretation must account for both ‘the specific context in which . . . language is used’ and ‘the broader context of the statute as a whole.’”²⁶⁴ Similarly, the Supreme Court has held that *Chevron* deference does not apply to an agency interpretation that is not “rationally related to the goals of the statute.”²⁶⁵

Although legislative history regarding the PSG definition is absent,²⁶⁶ great clarity exists with respect to congressional intent regarding the refugee definition and U.S. asylum law as a whole. An examination of the statute reveals that the current “particular social group” definition is not in keeping with the history, context, or goals of the 1980 Refugee Act that created it. As such, the BIA’s interpretation of the term cannot be considered reasonable under *Chevron*.

First, there is no question that Congress intended that the Refugee Act “be interpreted in conformance with the [1967] Protocol’s definition.”²⁶⁷ As the Supreme Court stated in *INS v. Cardoza-Fonseca*,

If one thing is clear from the legislative history of the new definition of ‘refugee’ and indeed the entire 1980 Act it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Protocol] . . . Indeed, the definition of ‘refugee’ that Congress adopted . . . is virtually identical to the one prescribed by Article 1(2) of the Convention . . .²⁶⁸

As such, the phrase “particular social group” must be understood within the broader context of a statute that both originated in international law and sought to

263. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 977 (1992) (emphasis added).

264. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). *See also* *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) (explaining that the canons of construction in [the court’s] review of administrative decisions [is] normally . . . limited to determining whether or not the agency interpretation is ‘rational and consistent with the statute’” (emphasis added) (citation omitted)).

265. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999); *Pharm. Res. & Mfrs. of Am. v. FTC*, 790 F.3d 198, 208 (D.C. Cir. 2015) (quoting *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 667 (D.C. Cir. 2011)).

266. *See supra* note 26.

267. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987).

268. *Id.* at 436. The Court added that “there were . . . many statements indicating Congress’ intent that the new statutory definition of ‘refugee’ be interpreted in conformance with the Protocol’s definition.” *Id.* at 437.

maintain a strong connection between domestic asylum law and international refugee law.

Moreover, Congress passed the Refugee Act in 1980, nearly thirty years after “particular social group” was defined in the Refugee Convention. In the intervening time, both international bodies and States had begun to give meaning to the otherwise ambiguous term. Thus, “although the United States Congress may not have articulated the meaning it intended for social group-based persecution, a substantial body of academic, administrative, and judicial interpretations of this term had developed, and Congress gave no indication that it intended to reject those developments.”²⁶⁹

As Professor Bassina Farbenblum has explained, “the Refugee Act is one of a small number of incorporative statutes that directly incorporate international treaty language and concepts into U.S. domestic law.”²⁷⁰ Yet the Board of Immigration Appeals’ definition of “particular social group” has caused “domestic asylum law [to] become jurisprudentially unmoored from international refugee law.”²⁷¹ The United States’ particular social group requirements are now significantly more stringent than those applied in every other developed country;²⁷² they also disregard the approach suggested by UNHCR. The increasing detachment from international jurisprudence created by the Board of Immigration Appeals’ interpretation of PSG squarely contravenes congressional intent.

Lastly, in addition to seeking to align domestic and international refugee law, Congress also passed the Refugee Act with a recognition of the underlying aims of the statute.²⁷³ As the BIA itself recognized, “it is important to keep in mind the fundamental humanitarian concerns of asylum law.”²⁷⁴ The court noted that “in enacting the Refugee Act of 1980, Congress sought to bring the Act’s definition of ‘refugee’ into conformity with the United Nations Convention and Protocol Relating to the Status of Refugees and, in so doing, give ‘statutory meaning to our national commitment to human rights and humanitarian concerns.’”²⁷⁵ And as a result of this context, the Board held that the asylum system should “afford a generous standard for protection in cases of doubt,” an axiom that should extend to the definition of “particular social group.”²⁷⁶ Despite its prior benevolent

269. Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505, 514 (1993).

270. Farbenblum, *supra* note 53, at 1069.

271. *Id.* at 1059.

272. See Marouf, *supra* note 44, at 56–57.

273. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 § 101(a) (1980) (“The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas.”).

274. *In re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1998).

275. *Id.* (quoting S. REP. NO. 256, 96th Cong., 2d Sess. 1, 4, as reprinted in 1980 U.S.C.C.A.N. 141, 144).

276. *Id.*

language, the effect of, and perhaps arguably the motivation behind, the BIA's imposition of additional requirements onto the *Acosta* immutability test has been to exclude many in need from lifesaving legal protections.²⁷⁷

In sum, the Board of Immigration Appeals' PSG definition is not in keeping with either the intent of Congress to conform the Refugee Act to international law, specifically the 1951 Convention and the 1967 Protocol, and to comport with international obligations. It also disregards the humanitarian underpinnings of U.S. asylum law. Consequently, when considering the history of the statute in which PSG was established and "the broader context of the statute as a whole" the Board's interpretation of the phrase "particular social group" must be unreasonable under *Chevron* Step Two.²⁷⁸

ii. *The BIA's Definition Cannot Be Reasonable Because It Has Defined the Particular Social Group out of Existence*

As the Supreme Court has stated, "[e]ven under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" ²⁷⁹ Reasonableness, as mentioned above, has no precise definition, but increasingly, "[a]rguments for narrowing *Chevron* at Step Two call for a more searching analysis regarding what should constitute a 'reasonable' interpretation."²⁸⁰

A growing number of courts are placing limits on what constitutes reasonable for *Chevron* purposes. For example, "[a]gencies are *not* free, under *Chevron*, to generate *erratic, irreconcilable* interpretations of their governing statutes."²⁸¹ The D.C. Circuit stated that deference is not "owed to any agency action that is based on an agency's purported expertise where the agency's explanation for its action lacks any coherence."²⁸² When an agency interprets a statutory term in a manner that conflicts with its prior positions and does not provide a plausible explanation

277. See, e.g., Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 12 (1997) (noting that "divorcing international and domestic law tends to operate to the grave detriment of asylum-seekers."). See also Farbenblum, *supra* note 53, at 1121 ("Interpreting the INA consistently with the Convention will invariably provide a more rights-protective framework than the domestic immigration statute alone.").

278. Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 321 (2014). See also *Negusie v. Holder*, 555 U.S. 511, 518 (2009) (holding that "concepts of international law . . . may be persuasive in determining whether a particular agency interpretation is reasonable").

279. Util. Air Regulatory Grp., 573 U.S. at 321.

280. Walker, *supra* note 245, at 118. See also Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1411 (2017) ("The Supreme Court has shown substantially greater willingness to invalidate agency interpretations at *Chevron* step two.").

281. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 920 (9th Cir. 2009) (Berzon, J., dissenting) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)).

282. *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012).

for that departure, *Chevron* deference may not apply.²⁸³ Lastly, an unreasonable outcome may also cause an agency's interpretation to fail at Step Two.²⁸⁴

In *Matter of M-E-V-G-* and *Matter of W-G-R-*, the BIA satisfied federal courts' concerns about the social visibility element by clarifying the requirement and renaming it social distinction. However, the Board has still not provided an explanation for the tension between the social distinction and particularity elements. In fact, in both *Matter of M-E-V-G-* and *Matter of W-G-R-* the court conceded the "considerable overlap" between particularity and social distinction and could not offer an example of a group that would be both socially distinct and particular.²⁸⁵ Even DHS has advocated for the two requirements to be combined.²⁸⁶

In *Mellouli v. Lynch*, a case considering whether possession of drug paraphernalia was a deportable offense, the Supreme Court held that if an agency's interpretation does not lead to a sensible outcome, deference is not appropriate.²⁸⁷ The Board of Immigration Appeals' definition of particular social group has led to a result that, like in *Mellouli*, "makes scant sense."²⁸⁸ It has crafted a definition of particular social group whose requirements—social distinction and particularity—are mutually exclusive. This has led to only two PSGs being recognized since the imposition of the new elements, both of which have since been overruled by attorneys general largely on social distinction and particularity grounds.

As the Supreme Court stated in *Judulang v. Holder*, "[t]he BIA may well have legitimate reasons for [making a decision, b]ut still, it must do so in some rational way. . . . [T]he BIA's approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system."²⁸⁹ Here, the Board has effectively defined the particular social group out of existence, which is neither a rational nor a reasonable result. It is, like in *Judulang*, an outcome "unmoored from the purposes and concerns of the immigration laws. . . . [I]t

283. See *Nat'l Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (finding that an "[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice").

284. See Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 315 (1996).

285. See *In re M-E-V-G-*, 26 I. & N. Dec. 227, 240 (B.I.A. 2014); *In re W-G-R-*, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).

286. See *Matter of M-E-V-G-*, 26 I. & N. Dec. at 253 n.11 (explaining that DHS "argued for the combination of the 'social visibility' and 'particularity' requirements into a single 'social distinction' requirement because of the close relationship between the two concepts").

287. 135 S. Ct. 1980, 1982 (2015). The Court explained that the Board's decision led to "[t]he incongruous upshot . . . that an alien is *not* removable for *possessing* a substance controlled only under Kansas law, but he *is* removable for using a sock to contain that substance." *Id.* It ultimately held that, because the BIA's decision "makes scant sense, [its] interpretation is owed no deference under the doctrine described in *Chevron*." *Id.*

288. *Id.*

289. 565 U.S. 42, 55 (2011).

is not supported by text or practice or cost considerations. The BIA's approach therefore cannot pass muster under ordinary principles of administrative law."²⁹⁰

iii. *The Rule of Lenity*

Lastly, another consideration relevant to the *Chevron* analysis is the rule of lenity, a principle of statutory interpretation originating in criminal law that requires a court to construe ambiguity in the manner most favorable to the defendant.²⁹¹ The rule of lenity was first applied in the immigration context in *Fong Haw Tan v. Phelan*, when the Supreme Court stated that because "deportation is a drastic measure and at times the equivalent of banishment or exile," deportation provisions should be strictly construed in favor of the noncitizen.²⁹² As the Court explained, "since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."²⁹³

The rule of lenity is firmly established in immigration law.²⁹⁴ Its relationship to *Chevron*, however, is more uncertain. In 2017, the Supreme Court declined to decide whether *Chevron* deference or the rule of lenity should be prioritized.²⁹⁵ When to consider the rule of lenity also remains an open question. As Professor David Rubenstein has noted, courts' "treatment of the issue has . . . been quite varied. Indeed, just about every conceivable approach has been employed or

290. *Id.* at 64.

291. *Rule of Lenity*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the rule of lenity as the "judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment").

292. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). Deportation can lead to more than exile; in certain cases, it can lead to death. *See, e.g.*, Sarah Stillman, *When Deportation is a Death Sentence*, NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> [<https://perma.cc/ZEV2-GYBL>]; Chris Gelardi, *The Tragic Story of Jimmy Aldaoud, Deported from the Streets of Detroit to His Death in Iraq*, INTERCEPT (Aug. 8, 2019), <https://theintercept.com/2019/08/08/ice-deportation-iraq-jimmy-aldaoud/> [<https://perma.cc/P26R-DTL7>].

293. *Fong Haw Tan*, 333 U.S. at 10.

294. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (describing the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 156 (Oxford, Clarendon Press 1987) (stating that the rule of lenity is "[t]he most important rule of statutory interpretation peculiar to immigration").

295. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation. Therefore, neither the rule of lenity nor *Chevron* applies."). Many scholars have also analyzed the rule of lenity and its relation to *Chevron*. *See, e.g.*, Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1 (2006); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

suggested by the circuit courts . . .”²⁹⁶ Scholars and the Board of Immigration Appeals are similarly divided. Professor Rebecca Sharpless has argued that the rule of lenity should apply at Step Zero.²⁹⁷ In *Matter of Small*, Board Member Lory Rosenberg stated that the rule should apply at Step One.²⁹⁸ Other scholars have argued that it is applicable at Step Two²⁹⁹ and even “at the very end of the process—after the court determines both that the statute is ambiguous under step one and [that deference is not warranted because] the agency’s interpretation is unreasonable under step two.”³⁰⁰

Ultimately, while the precise relationship of the rule of lenity to the *Chevron* doctrine continues to be debated, what is certain is that the rule serves as another mitigating factor against any deference to the Board of Immigration Appeals that would result in draconian outcomes for asylum seekers.

VI.

CONCLUSION

When Congress enacted the Refugee Act in 1980, it declared that asylum seekers were “of special humanitarian concern to the United States,” and highlighted “the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands.”³⁰¹ From its origin, U.S. asylum law was intended to conform with international refugee law, which is an expansive and rights-protective doctrine.³⁰² In generating particular social group jurisprudence that does not allow any applicants to qualify, the Board of Immigration Appeals has abrogated both its legal and moral responsibilities to those seeking refuge in the United States.

The particular social group ground is the mechanism by which many who are facing grave violence at the hands of gangs, their intimate partners, or their

296. David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 502–04 (2007) (identifying nine discrete approaches undertaken by federal courts when attempting to reconcile the rule of lenity and *Chevron* deference).

297. See, e.g., Rebecca Sharpless, *Zone of Nondeference: Chevron and Deportation for a Crime*, 9 DREXEL L. REV. 323, 377 n.88 (2017) (“Like the criminal rule of lenity, the presumption against deportation in immigration cases arguably kicks in at *Chevron* step zero—when courts are deciding whether *Chevron* even applies in the first place.”).

298. *In re Small*, 23 I. & N. Dec. 448, 454 (B.I.A. 2002) (Rosenberg, Mem., dissenting) (stating that the rule of lenity “maintains its currency today and applies even to interpretations of the plain language of the statute under the first prong of the test prescribed in *Chevron*”).

299. See, e.g., Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 575 (2003) (arguing that the rule of lenity should be considered in Step Two of the *Chevron* analysis, as part of a court’s determination of whether an agency’s interpretation is reasonable).

300. Rubenstein, *supra* note 296, at 504.

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

302. See Farbenblum, *supra* note 53, at 1063 (noting that the international refugee law framework has a rights-protective purpose).

families seek solace and protection. Out of a misplaced fear of opening floodgates, the Board of Immigration Appeals has effectively closed our borders to them. We must do what we can to save a legal doctrine that stands to save so many lives.³⁰³

303. See SHANE DIZON & NADINE WETTSTEIN, IMMIGRATION LAW SERVICE § 10:137 (2d ed. 2008) (“After political opinion claims, the largest body of U.S. asylum and withholding jurisprudence is based upon claims of membership in a particular social group.”).