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Particular Social Groups: Vague Definitions and an Indeterminate Future for Asylum Seekers

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VAGUE DEFINITIONS AND AN INDETERMINATE FUTURE FOR ASYLUM SEEKERS

INTRODUCTION

Victims fleeing their native countries in order to escape violence, discrimination, or persecution are provided a limited number of mechanisms under current immigration law in which to seek refuge in the United States. The Immigration & Nationality Act (INA) governs the claims of all applicants seeking asylum in the United States.[1] Under the INA, aliens entering the United States (or who are already present within its borders) are eligible for asylum if they qualify under one of five protected grounds.[2] Aliens must be seeking asylum based upon persecution related to their "race, religion, nationality, membership in a particular social group, or political opinion."[3] Critically, the INA requires aliens prove a nexus between their claimed protected group and their fear of harassment or mistreatment—there must be a causal connection between their fear of persecution (or the actual persecution that they have suffered) and their membership in one of these five protected grounds.[4]

Such burdens of proof create difficulties for an applicant under any of the five protected grounds, but no ground has been subject to more dispute and judicial analysis than "membership in a 'particular social group.'"[5] The complete lack of statutory guidance surrounding what constitutes a particular social group is controversial and confusing, as the INA provides no language

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[1] *See generally* Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2012).

[2] *Id.* § (b)(1)(B)(i).

[3] *Id.*

[4] *Id.*; *see also* 8 C.F.R. § 208.13(b)(1), (2)(i)(A) (2017).

[5] Ariel Lieberman, *What Is A "Particular Social Group"?:* Henriquez-Rivas *Provides A Possible Solution to Circuit Courts' Confusion*, 28 GEO. IMMIGR. L.J. 455, 456 (2014) (quoting 8 U.S.C. § 1101(a)(42)). Issues of proof and definition of the other four protected grounds—"race, religion, nationality, . . . [and] political opinion"—are beyond the purview of this note. *Id.*

defining this protected ground.[6] Thus, the guiding framework and eligibility criteria establishing membership in a particular social group has come from U.S. case law.[7]

The Board of Immigration Appeals (BIA), the appellate tribunal for immigration courts, has presented an evolving number of definitions of what makes up a particular social group in the past.[8] In 2014, however, the BIA decided two cases simultaneously that set the new standard definition of what elements constitute membership in a particular social group. In *Matter of W-G-R-* and *Matter of M-E-V-G-*, the BIA created a three-element test that must be satisfied in order to establish eligibility in this protected group.[9] Under this test, an applicant "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."[10]

With the adoption of this new standard, courts have struggled in applying all three elements, but the "particularity" and "social visibility" elements have proven the most challenging and the source of much judicial analysis.[11] Indeed, there is a split amongst the U.S. Circuit Courts of Appeals over the adoption of many elements of the BIA's new standard.[12] The confusion and controversy over this new standard has created tremendous difficulties for asylum applicants who, demonstrating a reasonable fear of returning to their native countries, have credible claims but otherwise do not qualify under one of the other four protected grounds. In particular, for those escaping violence in their native countries—both domestic and gang-related—the situation is especially dire.[13]

While the purpose of this note is singular in focus, it has been divided into three parts. Part I analyzes the standard set by the BIA in 2014 in *Matter of W-G-R-* and *Matter of M-E-V-G-*and includes a glimpse into the statutory and regulatory foundation of the definition of a particular social group. Part II explores the

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[6] *See* Lieberman, *supra* note 5, at 456–57; *see also* Immigration and Nationality Act § 208. Nor does the definition section of the INA provide any clarification. *See* Immigration and Nationality Act § 101(a), 8 U.S.C. § 1101(a).

[7] Lieberman, *supra* note 5, at 458–59; Kenneth Ludlum, *Defining Membership in A Particular Social Group: The Search for A Uniform Approach to Adjudicating Asylum Applications in the United States*, 77 U. PITT. L. REV. 115, 116, 119 (2015).

[8] *See* Ludlum, *supra* note 7, at 119–24.

[9] Matter of W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014); Matter of M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014) (both cases were decided on February 7, 2014).

[10] *Matter of W-G-R-*, 26 I. & N. Dec. at 208; *Matter of M-E-V-G-*, 26 I & N. Dec. at 227. *See* discussion *infra* Part I for a complete analysis of these elements and their aftermath.

[11] *See* Lieberman, *supra* note 5, at 461.

[12] *Id.*

[13] *See* discussion *infra* Part II.

categories of individuals who have been most affected by this new standard, particularly victims of gang violence and battered women fleeing violence from their partners, as well as some of the solutions, or lack thereof, courts have implemented to confront these problem. Finally, Part III provides a solution to the problem presented by the BIA's 2014 definition of particular social groups by looking to Canadian case law and suggests the adoption of a standard, and indeed a new statutory definition, more closely in harmony with Canadian jurisprudence.

I. PARTICULAR SOCIAL GROUPS—AN ELUSIVE DEFINITION

The INA provides little guidance toward defining particular social groups. The only language on point in the act is general and nonspecific: "the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."[14] Beyond this general statement, there is no further clarification on what constitutes "membership in a particular social group."[15] Indeed, even the definition section of the INA offers no guidance towards understanding Congress's meaning of "particular social group."[16]

Moreover, Federal Regulations governing adjudication of asylum applications fail to provide any clearer guidance: "[t]he applicant has a fear of persecution in his or her country of nationality . . . on account of race, religion, nationality, membership in a particular social group, or political opinion."[17] Again, beyond this general statement of eligibility, there is no further statement defining particular social groups.[18] Thus, without any statutory or regulatory guidance, the courts have been forced to fill the gap left by the INA and the Code of Federal Regulations and provide (what has become) an evolving definition for the factors which constitute membership in a particular social group.

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[14] Immigration and Nationality Act § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

[15] *See generally id.* § 208.

[16] *See id.* § 101(a), 8 U.S.C. § 1101(a). A quick scan of this section shows no provided definition of "particular social group." The only relevant language resides at Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (defining a refugee as "any person who is outside any country of such person's nationality . . . who is unable or unwilling to return to . . . 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.").

[17] 8 C.F.R. § 208.13(b)(2)(i)(A) (2017); *see also id.* § 208.13(b)(1).

[18] *See generally id.* § 208.13.

A. Particular Social Groups Prior to Matter of W-G-R- *and* Matter of M-E-V-G-

Prior to the current disputed case law, the prevailing definition of particular social groups came from *Matter of Acosta* which focused on an individual's characteristics that cannot be changed.[19] Utilizing concepts from the U.N. definition of refugees, the BIA held that "'[p]ersecution on account of membership in a particular social group' refers to persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."[20] In *Acosta*, the applicant claimed fear of returning to his native country of El Salvador because he was a member of a taxi cooperative targeted by local guerillas because of the group's refusal to conduct work stoppages.[21] The court found that such a group failed to meet the immutability requirement because "members of the group could avoid the threats of the guerillas either by changing jobs or by cooperating in work stoppages."[22] The court further pointed out that these threats were "something [the applicant] had the power to change, so that he was able by his own actions to avoid the persecution of the guerillas."[23]

These characteristics, however, do not have to be those that are impossible to change. Indeed, in further defining an immutable characteristic, the court noted "it must be one that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[24] Such characteristics might be "sex, color, or kinship ties."[25] The court even allowed for the remote possibility that "shared past experience[s]" might constitute the

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[19] Matter of Acosta, 19 I. & N. Dec. 211, 212 (B.I.A. 1985).

[20] *Id.* at 212; *see also id.* at 233 (explaining that the "the other four grounds of persecution enumerated in . . . the [U.N.] Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution"); Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Jan. 1982) (explaining that "[a] 'particular social group' normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality").

[21] *Matter of Acosta*, 19 I. & N. Dec. at 234.

[22] *Id.* It seems that the court, in its rejection of the taxi cooperation's immutability, suggests and even encourages criminal cooperation with the guerillas, or, at the very least, succumbing to the violent threats of one's persecutors. The court is essentially taking the view that Acosta could have prevented harm or further persecution by giving in to the demands and threats of his abusers.

[23] *Id.*

[24] *Id.* at 233.

[25] *Id.*

fundamental and immutable glue holding together a particular social group, but the limitations on such a trait are so strict as to hardly be useful to the average asylum seeker.[26] The court rationalized the structure of its immutability definition by comparing the particular social group to the other protected grounds (i.e., race, religion, political opinion, and nationality).[27] The court concluded that these traits are so fundamental to the person that it would be impossible to change, or the person should not be forced to alter his or her ways.[28] Such a shared trait, like a strongly held religious belief or political affiliation, are so critical to the identity of the asylum seeker that the United States would offer protection and safe haven rather than force the applicant to face persecution in his or her native country.[29] Moreover, as the *Acosta* court noted, these immutable traits are either impossible for the asylum seeker to change, or they should not be made to change, and thus, are worthy of government protection. "The 'protected characteristics approach' supports the fundamental ideals behind the Refugee Convention of safeguarding the core human rights of individuals when their state refuses to or fails to provide protection."[30] The definition of particular social group offered in *Acosta*, crafted solely around a shared immutable characteristic, was the prominent authority on defining this protected ground, and remains an essential element in the BIA's new tripartite construction.[31]

As the definition and surrounding case law evolved, the BIA included additional factors that were invariably used to set the outermost borders around particular social groups. Chief among these elements was the "social visibility" requirement.[32] In two successive cases in 2006 and 2007, the BIA reaffirmed and made concrete the requirement that an asylum seeker demonstrate visibility to form a cognizable particular social group.[33] In *Matter of C-A-,* the BIA found that "[t]he group of 'former noncriminal drug

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[26] *Id.*

[27] *Id.* at 234.

[28] *Id.*

[29] *Id.* ("By construing 'persecution on account of membership in a particular social group' in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.").

[30] 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, 905 (2017).

[31] *See* discussion *infra* Section I.B.

[32] Matter of A-M-E & J-G-U-, 24 I. & N. Dec. 69 (B.I.A. 2007); Matter of C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).

[33] *Matter of A-M-E & J-G-U-*, 24 I. & N. Dec. at 69; *Matter of C-A-*, 23 I. & N. Dec. at 951.

informants working against the Cali drug cartel' does not have the requisite social visibility to constitute a 'particular social group.'"[34] First, the court applied the *Acosta* formulation to determine the immutability of the Respondent's particular social group based upon shared past experiences.[35] The BIA conceded, "[a] past experience is, by its very nature, immutable, as it has already occurred and cannot be undone."[36] The court, however, quickly pulled back from this broader, perhaps more humanitarian view of past experiences.[37] Thus, even informants who have provided information on Colombian drug cartels, an experience that would certainly leave an individual at risk of danger will not be able to demonstrate a sufficient past experience to form a particular social group. If we assume the humanitarian purpose of asylum law,[38] as its function would suggest, then this extreme limitation on the application of the immutability of shared past experiences, in the face of an obvious and unavoidable danger, pushes away from that spirit, and perhaps even Congress's intent in drafting and passing INA § 208. Nonetheless, even after eliminating the possibility of forming a particular social group for failure to meet the *Acosta* standard, the BIA proceeded to analyze the proposed social group in light of the social visibility requirement.[39]

In its analysis, the court in *Matter of C-A-* paralleled "visibility" with "recognizablility."[40] The court looked to "the extent to which members of the purported group would be recognizable to others" in the native country or locality of the applicant.[41] Further clarifying this standard, the BIA noted that these characteristics should be "highly visible and recognizable by others in the country in question."[42] Through this additional requirement, the court sought to distinguish particular social groups from overly broad, liberally constructed groups. For instance, the court distinguished between a "group" comprised of informants who report information to authorities out of a sense of "civic responsibility"—which would be considered an overbroad social group—against a "group" of informants who do

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[34] *Matter of C-A-*, 23 I. & N. Dec. at 951.

[35] *Id.* at 958–59.

[36] *Id.* at 958.

[37] *Id.*

[38] *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., 7-5700, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY HEARING ON "ASYLUM ABUSE: IS IT OVERWHELMING OUR BORDERS?" 1 (2013) (noting that "[t]he United States has long held to the principle that it will not return a foreign national to a country where his or her life or freedom would be threatened.").

[39] *Matter of C-A-*, 23 I. & N. Dec. at 959–61.

[40] *Id.* at 959.

[41] *Id.*

[42] *Id.* at 960.

so in return for monetary compensation.[43] In applying this requirement to the Respondent, whose membership in the group of "former noncriminal drug informants working against the Cali drug cartel"[44] was the basis of his claim, the court pointed out that "it is difficult to conclude that any 'group,' as actually perceived by the cartel, is much narrower than the general population of Colombia."[45] The social group must not only be visible and recognized by—at least some—members of that society, but must also be distinguishable from the society at large.[46] The court here implies that a group may satisfy the visibility requirement if they are recognizable group to the persecutors, rather than to society at large.[47]

The court solidified the social visibility requirement one year later in *Matter of A-M-E & J-G-U-*.[48] Here, the Respondent claimed that he was kidnapped, held for one month, and shot while in captivity, all because of his membership in the particular social group of "affluent Guatemalans."[49] Following his release, he and his wife received demands for money and threats against their lives from an anonymous criminal element in Guatemala,[50] forcing them to constantly relocate.[51] Despite their continuous relocations, the Respondent alleged that the threats persisted, finally forcing them to flee to the United States.[52] The Respondent further contended that this harassment was due to his family's membership in the group consisting of "higher socio-economic Guatemalans."[53] The court commenced its analysis in the same fashion as in *Matter of C-A-*, and could have dismissed the claim with its application of the *Acosta* immutability threshold.[54] Instead, the court offered no underlying basis for its reasoning, upholding the Immigration Judge's determination that "'wealth' is not an immutable characteristic,"[55] by applying the social visibility analysis to the wealthy Guatemalan social group.[56]

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[43] *Id.*
[44] *Id.* at 951 (internal quotations omitted).
[45] *Id.* at 961.
[46] *Id.* at 959–60.
[47] *See id.* at 961.
[48] Matter of A-M-E & J-G-U-, 24 I. & N. Dec. 69 (B.I.A 2007).
[49] *Id.* at 69–70.
[50] *Id.* at 71–72.
[51] *Id.* at 69–70.
[52] *Id.*
[53] *Id.* (internal quotations omitted).
[54] *Id.* at 73–74.
[55] *Id.* at 73 (internal quotations omitted).
[56] *Id.* at 74–75.

In solidifying the reestablishment of the social visibility requirement, the court turned to the factors discussed in *Matter of C-A-* and clarified that "the attributes of a particular social group must be recognizable and discrete."[57] The BIA adds further limitation by providing that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm."[58] Thus, there can be no circularly defined groups—a group that has been persecuted cannot be defined by such persecution. Instead, there must be some underlying, unifying (and now visible) reasoning for that persecution, and which is the basis for such targeted mistreatment. Social visibility, thus, will "be considered in the context of the country" in question.[59] The court then reviewed the country conditions in Guatemala at the time of the Respondent's departure, and concluded that "violence and crime in Guatemala appear to have been pervasive at all socio-economic levels."[60] With crime rampant at all areas of Guatemalan society, the court found that the alleged targeting of affluent members of society would be no different than the targeting of those Guatemalans of lesser means.[61] Thus, even "[f]rom the point of view of a criminal bent on extortion, persons with relatively modest resources or income may possess sufficient land, crops, or other forms of wealth to make them potential targets."[62] As the wealthy and not wealthy are indistinguishable to the criminal looking to take from the easiest victim, a group composed of the affluent hoping to escape such extortion fails to demonstrate the required level of visibility. It should again be noted that the court seems to be willing to consider visibility from the perspective of the persecutor and not just from the point of view of that society as a whole.[63] Thus, as long as a group is visible to the category of persecutors the victim seeks to escape, the group may meet the standard set by *Matter of C-A-* and solidified by in *Matter of A-M-E and J-G-U-*.

Having already eliminated the possibility of the Respondent's group succeeding under the other two separate qualifying factors, the court thus added the third element of particularity. The BIA further attempted to close in the borders of the particular social group definition by adding another essential factor, concluding that elements "to be considered in determining

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[57] *Id.* at 74 (internal quotations omitted).
[58] *Id.*
[59] *Id.*
[60] *Id.* at 75.
[61] *Id.*
[62] *Id.*
[63] *Id.*

whether a particular social group exists include . . . whether the group can be defined with sufficient particularity to delimit its membership."[64] In applying the new particularity element to the Respondent's purported social group, the court found that "[t]he terms 'wealthy' and 'affluent' standing alone are too amorphous."[65] The BIA justified this conclusion by noting that since "the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more."[66] Thus, the defining trait of the group is overbroad, failing to impose sufficient limitation to form a cognizable social group.[67] In clarifying particularity, the BIA noted that often constructions of particular social groups will constitute those "at the margins" of society, rather than large groups defined by characteristics that are "too subjective, inchoate, and variable."[68] The court here provided less of an affirmative definition of particularity, or even of visibility, than they explained what would *not* be considered sufficient to establish these requirements. Using an inverse analysis, the court explained how affluent Guatemalans are not a particularly defined social group to establish the particularity standard going forward. By defining in the negative, the court failed of offer adequate guidelines for applicants begging for protection and safe haven in the United States.

The BIA's evolution of how to define a particular social group thus did not constitute any sort of rigid test. These cases show how the lack of formulation of these inadequately defined factors did not constitute a three-part test where each requirement must be satisfied to achieve particular social group status. Only more recently has the BIA turned to create such a rigid formula.

B. The Current Standard—Particular Social Groups under Matter of W-G-R- *and* Matter of M-E-V-G-

In 2014, in two simultaneously decided cases, the BIA consolidated the disparate factors of particular social group eligibility, factors of varying degrees of importance, into a standard three-element test.[69] Going forward, these rules apply to any applicant seeking asylum as a member of a particular social group. The rule, as announced, is as follows: to qualify as

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[64] *Id.* at 69.
[65] *Id.* at 76.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] Matter of W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014); Matter of M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014).

a member of a particular social group, it must be established 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."[70]

1. Immutable Characteristics

The BIA's immutability element is no different than that announced in *Matter of Acosta*.[71] In 2014, the court solidified the *Acosta* framework by noting "[t]he critical requirement is that the defining characteristic of the group must be something that either cannot be changed or that the group members *should not be required to change in order to avoid persecution*."[72] Oddly, the BIA then proceeded to defend its holding in *Acosta*, where it found no immutable characteristic, by pointing out that El Salvadoran taxi drivers "could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages."[73] Again, the court is still requiring at least *some* people to change certain traits in order to avoid harm or mistreatment, thus excluding them from the protection of asylum.[74]

2. Particularity

The court turned next to its interpretation of particularity, now an essential element of the particular social group definition.[75] The court provided that "particularity" is a concept "included in the plain language of the Act."[76] Citing to a Tenth Circuit decision, the BIA noted "the particularity requirement flows quite naturally from the language of the statue, which, of course, specifically refers to membership in a '*particular* social group.'"[77] As a matter of plain statutory interpretation, the particularity element would appear to be the primary intent of Congress when formulating the particular social group as a protected group. Though the requirement may apparently be an undisputable consideration Congress has

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[70] *Matter of W-G-R-*, 26 I. & N. Dec. at 208; *Matter of M-E-V-G-*, 26 I. & N. Dec. at 227.

[71] *Matter of Acosta*, 19 I. & N. at 211–12.

[72] *Matter of W-G-R-*, 26 I. & N. Dec. at 213 (emphasis added).

[73] *Id.* (quoting Matter of Acosta, 19 I. & N. Dec. 211, 234 (B.I.A. 1985)).

[74] Nevertheless, this decision does not change the *Acosta* immutability standard. *See supra* Section I.B; *see also* Grant, *supra* note 30, at 905.

[75] *Matter of W-G-R-*, 26 I. & N. at 213.

[76] *Id.*

[77] *Id.* (emphasis in original) (quoting Rivera-Barrientos v. Holder, 666 F.3d 641, 649 (10th Cir. 2012)).

imposed on social groups, the definition of "particularity" is not in the statute and has been left for the BIA to interpret.

Providing further clarification, the BIA expounded on precedent, noting that this "requirement relates to the group's boundaries or . . . the need to put 'outer limits' on the definition of 'particular social group.'"[78] This contextual analysis reviews the purported group against the social make-up of the country in question.[79] Thus, a particular social group "must also be discrete and have definable boundaries."[80] But it is imperative for purposes of particularity, per the court, that the group "not be amorphous, overbroad, diffuse, or subjective."[81]

Here, the BIA inversely defined a concept by indicating what would *not* meet the requirements. The BIA has provided little guidance of what would be critically relevant in positively establishing particularity, but instead outlined a number of considerations for what would fail to meet that standard. Perhaps this is because particularity "chiefly addresses the question of delineation," which marks a group as other, different, and separate from the whole of society.[82] The BIA pointed out that such determinations on particularity, and indeed on the entire particular social group definition, must be made on a case-by-case basis due to the varying social and cultural considerations impacting these potential groups.[83] Even considering the fact-specific nature of such analyses, the particularity requirement seems to only be a "limiting characteristic,"[84] a tool by which the courts use, perhaps to reduce the administrative burden an increased amount of social group approvals would incur, to carve out and trim such groups out of the larger sections of society.

3. Social Distinction

In these dual opinions, the BIA then proceeded to analyze the final factor in the tripartite particular social group formulation: social distinction. Renamed but not entirely distinguished from "social visibility," which "clarifie[s] the importance of perception or recognition,"[85] the court opted to rename this factor to point out that

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[78] Matter of M-E-V-G-, 26 I. & N. Dec. 227, 238 (B.I.A. 2014).
[79] *Id.*
[80] *Id.* at 239.
[81] *Id.*
[82] *Matter of W-G-R-*, 26 I. & N. Dec. at 214; *see also* Grant, *supra* note 30, at 918–19.
[83] *Matter of W-G-R-*, 26 I. & N. Dec. at 214–15.
[84] *Id.* at 215 (internal quotations omitted).
[85] *Id.* at 216.

literal visibility is not required.[86] As a person espousing a protected political opinion or the fearful religious believer is not "'ocularly' visible," neither does a member of a particular social group need to demonstrate such literal visibility.[87] Perception, not sight, is required.[88] The court offered further clarification by announcing a fuller definition of social distinction—"there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group."[89] Moreover, members of such groups do not need to be easily identifiable to society, but "must be commonly recognized that the shared characteristic is one that defines the group."[90] The defining glue that unites members of the group must be the shared trait; the shared trait cannot be some superfluous characteristic that is common among members, but is not the definitive feature forming group membership.[91] Unlike particularity, however, social distinction cannot be established based upon the "perception of an applicant's persecutors."[92] The court reasoned that such a prohibition is warranted due to the concern of circularly defined particular social groups (i.e., "a social group cannot be defined exclusively by the fact that its members have been subjected to harm.").[93]

In applying the new standard to the applicant's specific circumstances in *Matter of W-G-R-*, the BIA limited the breadth and scope of what facts will sufficiently meet the requirements of a particular social group. The court found that the Respondent's purported group—"former members of the Mara 18 gang in El Salvador who have renounced their gang membership"—failed to establish a cognizable social group under the announced formulation.[94] The particular social group claim is defeated on both the particularity and social distinction requirements.[95] Firstly, with regard to particularity, the BIA found that the group was "too diffuse, . . . broad and subjective"[96] noting that, as described, the group was open-ended and "could include persons of any age, sex, or background."[97] The court implied that a group such as the one proposed would need to be characterized as those gang members who have had "meaningful involvement"

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[86] *Id.*
[87] *Id.* (internal quotations omitted).
[88] *Id.* at 216–17.
[89] *Id.* at 217.
[90] *Id.*
[91] *Id.* at 217–18.
[92] *Id.* at 218.
[93] *Id.* (quoting *In re* A-M-E & J-G-U-, 24 I & N Dec. 69, 74 (B.I.A. 2007)).
[94] *Id.* at 221 (internal quotations omitted).
[95] *Id.* at 221–22.
[96] *Id.* at 221.
[97] *Id.*

in the gang.[98] As asserted by the court, the purported group could include members who were recruited as youths but left immediately after joining and it might include members who have only recently left behind their gang membership after years of criminal service.[99] Thus, "the boundaries of the group . . . are not adequately defined."[100]

Next, the court held that the Respondent's group failed to meet the social distinction element because they did not have clear evidence that "Salvadoran society considers former gang members who have renounced their gang membership" constituted a distinct group.[101] The court then referred to submitted evidence that indicated there was a "stigma against former gang members because of their tattoos."[102] The court, however, diminished such evidence by pointing out that it is not clear that this stigma exists due to the fact that the individuals are former gang members, or because the tattoos may lead others to consider them as *active* gang members.[103]

Unlike in *Matter of W-G-R-*, the Court in *Matter of M-E-V-G-* was not so quick to discard the proposed social group on the grounds of social distinction and particularity. There, the Respondent's proposed particular social group was "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs."[104] Following a recitation of precedent and the announcement of the new three-part test, the BIA remanded the case back to the Immigration Judge to "revisit the issues," especially since "the respondent's proposed particular social group has evolved during the pendency of his appeal."[105] Thus, at least on first glance, the BIA may be receptive to the applicant's gang-related social group since the court did not immediately reject the construction of "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs."

Thus, the BIA's three-part rubric provided a road map for potential asylum seekers. This road map, however, is fraught with inconsistency and vagueness. [106] As discussed in the proceeding Sections, victims fleeing both gang-based and

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[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 222.

[102] *Id.*

[103] *Id.*

[104] Matter of M-E-V-G-, 26 I. & N. Dec. 227, 228 (B.I.A. 2014).

[105] *Id.* at 252. What happened to M-E-V-G-'s claim is unknown. There is no public case history following the BIA's remand.

[106] For a discussion of subsequent case law see *infra* Parts II and III.

domestic violence have experienced differing applications of the new three-part standard.[107]

A glimpse of how this all may play out occurred in the Ninth Circuit in *Rios v. Lynch*.[108] Considering the BIA's new standard, the Ninth Circuit found that "[e]ven under this refined framework, the family remains the quintessential particular social group."[109] Even though that court's prior holdings hinted that family relations would constitute membership in a particular social group when that relation was tied to one of the other four protected grounds. The court refused to hold that this would be the *only* manner in which a cognizable social group could be established via family relationships. In fact, the court noted that "few groups are more readily identifiable than the family."[110] With a liberal analysis of the BIA's elements, the Ninth Circuit may be setting the stage for a less stringent application of the new three-part test.

II. TYPES OF CLAIMS MOST AFFECTED BY THE BIA'S NEW STANDARD FOR PARTICULAR SOCIAL GROUPS

The BIA's three-part test has been problematic mostly when applied to specific categories of individuals who, heretofore, have been unable to achieve particular social group status.[111] The BIA has, to varying degrees, applied limited flexibility to groups seemingly outside the reach of this new test.[112] But where one category of people has caused a relaxing of the standard, others have received a rigid application of the test. "In 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 [particular social group] ground."[113] Given this influx of particular social group

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[107] *See infra* Part II.

[108] Rios v. Lynch, 807 F.3d 1123 (9th Cir. 2015).

[109] *Id.* at 1128.

[110] *Id.* (internal quotations and citation omitted).

[111] *See* Timothy Greenberg, *The United States Is Unwilling to Protect Gang-Based Asylum Applicants*, 61 N.Y.L. SCH. L. REV. 473, 474–75 (2017). For a more detailed discussion see *infra* Section III.B.

[112] *See* Alicia Triche, *Matter of* A-R-C-G- *and Domestic Violence as Persecution: Assessing the First Two Years After A Landmark Decision*, 63 FED. LAW. 8 (2016), http://www.fedbar.org/PDFs/The-Federal-Lawyer-August-2016.aspx?FT=.pdf [https://perma.cc/DB6T-LDMN]; *see generally* Johanna K. Bachimair, *Asylum at Last: Matter of* A-R-C-G-'s *Impact on Domestic Violence Victims Seeking Asylum*, 101 CORNELL L. REV. 1053, 1055–56 (2016). For a more detailed discussion see *infra* Section II.A.

[113] Grant, *supra* note 30, at 899.

cases, no group of people has received more deference than battered women, whereas no group has been boxed out by the court quite like victims fleeing gang violence.

A. Women Fleeing Domestic Violence

The BIA seemed to have quickly realized the need to mold its standard to provide relief to battered women escaping their native countries due to abusive domestic situations. *Matter of A-R-C-G-* not only provides a step-by-step guideline for how such women can meet the particular social group standard but shows the extent to which the elements can be molded (or, more cynically, manipulated) to comply with BIA guidance.[114] Appropriately, the BIA analyzed the Respondent's claim on a point-by-point basis, taking each newly refined element in turn. The purported social group in *Matter of A-R-C-G-* is "married women in Guatemala who are unable to leave their relationship."[115] First, without much analysis, the court noted that "the group is composed of members who share the common immutable characteristic of gender."[116]

Next, the court analyzed the Respondent's group against the particularity requirement. The court notes that terms such as "married, women, and unable to leave the relationship—have commonly accepted definitions within Guatemalan society."[117] Thus, such terms will "combine to create a group with discrete and definable boundaries."[118] In defending this analysis, the court notes further "that a married woman's inability to leave a relationship" can be influenced not only by restrictions related to the termination of marriages, but also, and perhaps most critically, by "societal expectations about gender and subordination."[119] Thus, the group of the Respondent's proposed group is particular.[120]

Finally, the court turns to the question of social distinction. The BIA looks to whether the particular society in question makes meaningful distinctions on the common immutable characteristics of being a woman in a domestic relationship she cannot leave.[121] Further, in determining

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[114] Matter of A-R-C-G-, 26 I. & N. Dec. 388, 394 (B.I.A. 2014).

[115] *Id.* at 388 (internal quotations omitted).

[116] *Id.* at 392. It must be noted that the BIA has historically found sex to be an immutable characteristic. *See* Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

[117] *A-R-C-G-*, 26 I. & N. Dec. at 393 (internal quotations omitted).

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.* at 394.

whether society considers these groups socially distinct, it is significant "whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors."[122] In analyzing the Respondent's claim, the court found that there was a "culture of 'machismo and family violence'" which the laws of the native country, and the enforcement of those laws, failed to adequately address.[123] Thus, the Respondent's group was socially distinct within the meaning of the BIA's 2014 standard.

Matter of A-R-C-G- provides a roadmap for battered women seeking asylum in the United States, but it is also an indication of the flexibility of an otherwise rigidly applied three-part standard. Such lenient application, while a progressive shift in the right direction, has not been provided to other categories of individuals, particularly victims of gang violence.[124]

The degree and nature of the abuse and mistreatment suffered by the applicant, however, will limit the applicability of the domestic violence social group. The First Circuit has recently erected a potential barrier to the battered women social group. In *Vega-Ayala v. Lynch*, the First Circuit held that "Salvadoran women in intimate relationships with partners who view them as property" did not demonstrate the requisite immutability and social distinction.[125] The social distinction issue is easily distinguished from *Matter of A-R-C-G-* as the circumstances of the two cases are eminently different. In *A-R-C-G-*, the abuse was "repugnant" and significant.[126] Vega-Ayala's situation, however, was "a far cry from the circumstances in *A-R-C-G-*."[127] The Respondent never lived with her partner, they were only together eighteen months (for twelve of those eighteen months her partner was in jail), and when they were together, he saw her only two times a week.[128] Given the circumstances, the court found there was no evidence to "set apart" her group from others in society.[129]

The question of immutability, however, is more troubling. The *A-R-C-G-* court concluded that the Respondent's gender was

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[122] *Id.*

[123] *Id.* at 394–95.

[124] *See* discussion *infra* Section III.B.

[125] Vega-Ayala v. Lynch, 833 F.3d 34, 36 (1st Cir. 2016) (internal quotations omitted).

[126] *Id.* at 39.

[127] *Id.*

[128] *Id.*

[129] *Id.*

sufficient to meet the immutability standard.[130] For the *Vega-Ayala* court, however, gender is not the defining factor. In fact, gender never even enters the calculation.[131] Indeed, the First Circuit noted that "[b]eing in an intimate relationship with a partner who views you as property is not an immutable characteristic."[132] Further, the First Circuit misconstrued the plain language of the BIA in *A-R-C-G-*, noting that the purported group in that case "may share an immutable trait, where specific facts demonstrated a woman's inability to leave her abusive marriage."[133] Certainly, those facts were relevant to the BIA's holding in *A-R-C-G-*, but to social distinction and particularity, not immutability.[134]

B. Gangs

Following the new standard set by the BIA, particular social group asylum claims related to gangs and gang-related violence have increasingly failed to cross the three-part test threshold and be recognized as cognizable social groups.[135] More specifically, courts have found that these claims do not fulfill the social distinction, visibility, and particularity requirements.[136] Indeed, this is not a new phenomenon; prior to the 2014 BIA standard, gang-related claims regularly failed.[137] The BIA's new consolidated standard, however, has solidified the near impossibility for fleeing victims of gang violence to form a cognizable social group, leaving countless individuals with credible claims of persecution without any form of relief.

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130 Matter of A-R-C-G-, 26 I. & N. Dec. 388, 392 (B.I.A. 2014).

131 *Vega-Ayala*, 833 F.3d at 39.

132 *Id.* at 39.

133 *Id.*

134 *Matter of A-R-C-G-*, 26 I. & N. Dec. at 393.

135 *See* Grant, *supra* note 30, at 929–33.

136 *See* Gonzalez v. U.S. Att'y Gen., 820 F.3d 399, 401 (11th Cir. 2016); Juarez Chilel v. Holder, 779 F.3d 850, 854–55 (8th Cir. 2015); Rodas-Orellana v. Holder, 780 F.3d 982, 989 (10th Cir. 2015).

137 *See* Tay-Chan v. Holder, 699 F.3d 107, 112 (1st Cir. 2012) (finding that the particular social group of "'victims of gang threats and possible extortion' as overly broad and having insufficient particularity to meet the social group criterion."); Beltrand-Alas v. Holder, 689 F.3d 90, 93 (1st Cir. 2012) (finding that the particular social group of "people who oppose gang[s]" lacked the requisite particularity and visibility); Gaitan v. Holder, 671 F.3d 678, 682 (8th Cir. 2012) (holding that the particular social group of "young males from El Salvador who have been subjected to recruitment by MS–13 and who have rejected or resisted membership in the gang based on personal opposition to the gang" was "no different from any other Salvadoran . . . that has experienced gang violence" (quoting Constanza v. Holder, 647 F.3d 749, 754 (8th Cir. 2011))); Larios v. Holder, 608 F.3d 105, 109 (1st Cir. 2010) (finding that the particular social group of "youth resistant to gang recruitment" lacked the necessary visibility and particularity requirements (quoting Mendez-Barrera v. Holder, 602 F.3d 21, at 26–27 (1st Cir. 2010))).

Since the 2014 standard, a number of circuit courts have taken an even more demanding approach to gang-based asylum claims. A recent example of the courts' bias against such claims is the Eighth Circuit's decision in *Juarez Chilel v. Holder*.[138] The Eighth Circuit upheld the BIA's decision to affirm the Immigration Judge's denial of the alien's application for relief via Withholding of Removal.[139] The court concluded that the application for "withholding of removal . . . fails" because he "has offered no evidence to support the conclusion that his purported group . . . shares a 'common immutable characteristic,' is 'defined with particularity,' or is sufficiently distinct to qualify as a 'particular social group.'"[140] Chilel's claim of particular social group—in his case, "those who refuse to join a gang and suffer from threats of violence as a result"[141]—was based upon an alleged, albeit brief family history with gang violence in his native country of Guatemala[142] and to his own encounters with gang members prior to his departure from that country.[143] The court found that Chilel's social group was based upon a circular definition where suffering violence was a defining characteristic of the group,[144] rather than a result of some other trait. More significantly, however, the Eighth Circuit upheld the BIA's reasoning that victims who suffer gang violence following a refusal to join the gangs do not meet either the visibility or particularity requirements.[145] Oddly, the court also noted that Chilel failed to establish membership in a group that shared an immutable characteristic, while also defining "immutable characteristic" as a "shared past experience."[146] Certainly, refusal to join a gang can constitute a unifying past experience.[147] And surely that past experience is shared by countless and diverse individuals in areas overrun by gang activity—as demonstrated by the high influx of these types of asylum claims in the last two decades.[148] Nevertheless, claims by individuals resistant to gang violence will

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138 Juarez Chilel v. Holder, 779 F.3d 850 (8th Cir. 2015).

139 *Id.* at 855–56. Withholding of Removal is a similar claim to asylum based upon nexus to the same protected grounds. *See* 8 U.S.C. § 1231 (2012).

140 *Id.*

141 *Id.*

142 *Id.* at 853.

143 *Id.* at 852.

144 *Id.* at 855.

145 *Id.*

146 *Id.* at 854 (internal quotations omitted).

147 *See* Escobar v. Holder, 657 F.3d 537, 545 (7th Cir. 2011) (holding that the shared past experience of being "former truckers who resisted FARC and collaborated with authorities" may constitute a particular social group).

148 Grant, *supra* note 30, at 899.

fall short of the definition in the Eight Circuit as such groups are "too diffuse to be recognized as a particular social group."[149]

Under a similar set of facts, the Tenth Circuit also found a gang victim's social group claim lacking under the BIA's three-part scheme.[150] In *Rodas-Orellana v. Holder*, however, the applicant sought to define his social group more thoroughly—"El Salvadoran males threatened and actively recruited by gangs, who resist joining because they oppose the gangs."[151] Finding the BIA's decisions in 2014 in line with Tenth Circuit precedent regarding social visibility, the court concluded that Rodas "failed to demonstrate his proposed group is socially distinct."[152] Unlike in *Chilel*, Rodas' past experience with gangs was more significant, occurring over the course of several years.[153] When he was a teenager, the MS-13 gang in El Salvador pressured Rodas to join, and upon his refusals, threatened his life, offered him "protection," and, in one instance, beat him and left him bleeding on the ground.[154] Rodas' fear of MS-13 was not limited to his personal interactions. Rodas' brother-in-law was murdered by gang members after he failed to make an extortion payment.[155]

In evaluating these facts, the court first noted that no evidence was provided to demonstrate that "Salvadorans . . . perceive individuals who resist gang recruitment as a distinct social group."[156] The perceptions of others again plays a significant role in setting the outermost boundaries of a distinct social group. What society perceives will allow a group to be formed. In *Rodas*, the court took a strict stance against finding those who refuse gang recruitment as forming a distinct social group, noting that "[t]he evidence . . . depicts a widespread gang violence problem in El Salvador."[157] Therefore, "although gang members may have targeted Mr. Rodas-Orellana for resisting recruitment, this reflects generalized gang violence toward anyone resisting their efforts rather than defining a distinct social group."[158] Thus, even acknowledging his past persecution, and seemingly conceding the immutability and particularity requirements in Rodas' favor (by

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[149] *Juarez Chilel*, 779 F.3d at 855 (quoting Constanza v. Holder, 647 F.3d 749, 754 (8th Cir. 2011).

[150] Rodas-Orellana v. Holder, 780 F.3d 982 (10th Cir. 2015).

[151] *Id.* at 991.

[152] *Id.* at 992–93.

[153] *Id.* at 987.

[154] *Id.*

[155] *Id.* at 988.

[156] *Id.* at 992.

[157] *Id.* at 993.

[158] *Id.*

completely omitting a discussion of these elements), the court concluded that a particular social group had not been established.

Turning to an entirely separate calculation of gang-based asylum claims, in 2016 the Eleventh Circuit upheld the denial of a claim based upon the proposed social group of "former members of the Mara-18 gang from Honduras."[159] In *Gonzalez v. U.S. Attorney General*, the Respondent was recruited by Mara-18 as a fourteen-year-old child.[160] "[U]nder a sense of coercion," Gonzalez participated in violent gang activities.[161] According to Gonzales, "disobedience would result in . . . potentially even death."[162] He participated in gang activities for about two years until, following a severe beating he received from a rival gang, he felt it necessary to flee to the United States.[163] According to Gonzalez, death is the punishment Mara-18 inflicts upon members who leave the gang.[164] Again, the court upheld the BIA's decision to dismiss the asylum claim, citing Gonzalez's failure to demonstrate the particularity of his particular social group.[165] The Eleventh Circuit deferred to the BIA's analysis, indicating that Gonzalez's "social group was too diffuse, broad, and subjective."[166] The court reasoned that such a social group could include anyone, irrespective of "age, sex, or background,"[167] and, as such, was "not limited to those who had meaningful involvement with the gang."[168] Thus, considerably deeper ties with the gang may lead to a finding of particularity, where the status of general street members would fail to reach that threshold.

The relative detail provided for these gang-related asylum claims serves a twofold purpose: (1) to evince the fact-specific nature of asylum law and (2) to demonstrate the seeming impossibility of obtaining asylum for individuals with genuine fears of returning to their home countries due to gang-related persecution. Asylum seekers fleeing gang violence face an uphill battle when seeking asylum. Often, these groups will fail despite a showing of fear and the possibility of continued violence upon their return to their native countries. Despite even the most obvious credibility of the applicant, failing to formulate a specifically defined particular social group, a nebulous concept to begin with, will result in the denial of the claim or, even worse,

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159 Gonzalez v. U.S. Att'y Gen., 820 F.3d 399, 401 (11th Cir. 2016).
160 *Id.* at 402.
161 *Id.*
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.* at 406.
166 *Id.* at 405.
167 *Id.* (quoting Matter of W-G-R-, 26 I & N Dec. 208, 209 (B.I.A. 2014)).
168 *Id.* (internal quotations omitted).

removal from the United States.[169] Elements of credibility and fear have been highlighted in this note above not for sympathy, but to clearly illustrate how far the BIA's new standard has strayed from the humanitarian purpose of asylum law—a statutory scheme enacted to provide a safe haven to those fleeing enormous dangers and persecution.

In order to succeed in meeting the BIA's three-part requirement, it is imperative that gang victims, and former gang members, carefully assess the formulation of their particular social group, adding the same detailed specificity permitted for victims of domestic violence.[170] Yet even if such asylum seekers plead the appropriate specificity, courts have not provided gang-based claims the same deference that such gender-based claims have received.[171] Perhaps this is a side effect of a system correcting itself to provide much needed protection for a class of individuals, battered women, who have faced a long history of neglect. Regardless of the motivation, the disparity between these domestic-violence cases and the treatment of gang-based social groups is striking. The linguistic acrobatics that must be accomplished to fit a domestic-violence claim into the three-party requirement entirely undermines the strict application the BIA's tripartite test has received when applied to gang-related claims. Certainly, such a distinction may constitute a development in favor of progress and a widening of the humanitarian mission of asylum law. The courts, however, must then allow for other categories of at-risk groups to catch up.

III. A SOLUTION FROM THE NORTH: A NEW STATUTORY DEFINITION

Due to the vagueness and inconsistency in the definition of "particular social group," reform is needed to correct the difficult path facing individuals hoping to qualify for asylum as a member of particular social group. Total revision of the INA, or even of the section governing asylum claims, is not necessary. Rather, this note proposes that Congress add a definition of "particular social group" to the INA, either in the act's definition section[172] or within the asylum section following the enumeration of the protected grounds.[173] As Canada now sees more asylum claims than the country has in over two decades, seeking guidance in Canadian

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169 Greenberg, *supra* note 111, at 475.

170 *See* discussion *supra* Sections III.A–B.

171 *Id.*

172 *See* Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2012).

173 *Id.* § 208(c), 8 U.S.C. § 1158(c).

asylum law is particularly timely.[174] As the United States removes protections for certain vulnerable noncitizens, Canada has seen a reciprocal rise in asylum applications.[175] Congress must act to provide a legal pathway to safe haven in the United States for such individuals. Such statutory guidance would provide courts with clear guidance on the application of the particular social group standard. How then do we consider such reform? Should BIA precedent form the backbone of such a rewiring of the INA's social group definition—precedent which has confused and has closed out entire categories of individuals? Or should we look elsewhere for inspiration, perhaps even to other jurisdictions or nations?

Congress should look to Canadian case law when drafting a new particular social group definition in order to adopt a revised standard. In 1993, the Canadian Supreme Court announced its *Canada v. Ward* decision,[176] which provided a "good working rule" for the meaning of particular social group.[177] The Canadian Supreme Court provided that membership in a particular social group can be satisfied if the group falls into one of three categories: "(1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence."[178] While much broader than the current U.S. definition, the Canadian standard clings closely to the humanitarian mission of asylum law: to protect and provide safe haven to those fleeing violence and mistreatment.[179] Rather than delimit group membership under the standard, such a widely drawn standard will permit many to claim asylum whose claims would otherwise have failed.

Taking the Canadian example as inspiration, a new definition, currently absent in the INA, should be included in the statutory scheme, eliminating the need for an evolving,

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[174] Tara Carman, *Canada's Acceptance Rate of Asylum Seekers is the Highest in 27 Years—Here's Why*, CBC, (Feb. 7, 2018, 4:00 AM), http://www.cbc.ca/news/canada/asylum-seekers-overview-data-1.4503825 [https://perma.cc/5QY4-JLLA].

[175] THE CANADIAN PRESS, *Salvadoran Asylum Seekers Could Test Canada's Immigration System*, CBC, (Jan. 7, 2018, 5:23 PM), http://www.cbc.ca/news/politics/el-salvador-canada-immigration-surge-1.4476961 [https://perma.cc/WL87-XW5L].

[176] Canada (Att'y Gen.) v. Ward, 2 S.C.R. 689 (1993).

[177] *Id.* at 692. The Canadian Supreme Court also outlines criteria for political opinion asylum claims, clarifies issues of evidence, and reviews certain criminal exclusions.

[178] *Id.* at 78–79.

[179] *See* WASEM, *supra* note 38, at 1.

judicially conceived standard. The note proposes the following definition of social group is included in the INA[180]:

> A 'particular social group' is a group whose members:
>
> (1) share a common, immutable characteristic;
>
> (2) share a former voluntary status, unalterable due to its historical permanence; or
>
> (3) share an unalterable opinion or belief that is neither religious nor political in nature.

As noted in *Ward*, such a three-tier definition would provide "a good working rule" to classify particular social group membership.[181] No longer will the boundaries of particular social group membership tighten around the necks of those excluded due to the BIA's 2014 definition. Rather, the limits will broaden and new classes of individuals who have otherwise been excluded, will now qualify under this more humanitarian construction.

For instance, the "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" from *W-G-R-*[182] would indeed qualify under Subsection 2 of the proposed statute as individuals who "share a former voluntary status, unalterable due to its historical permanence." Applicants who simply shared the current status as ex-gang members would satisfy the particular social group membership requirement. Similarly, the proposed group of "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs" of *M-E-V-G-*[183] would now qualify under subsection (3) of the proposed statute as persons who "share an unalterable opinion or belief that is neither religious nor political in nature." The group members' opposition to gang recruitment unifies them into a single particular social group. Moreover, victims of domestic violence, as in *A-R-C-G-,* would satisfy Subsection 2 of the proposed statute given their former voluntary status as the domestic partner of their abuser.[184]

First, the Canadian inspired definition will cover the claims victims of domestic violence, women viewed as property by their partners, and women who are unable to leave a domestic relationship. This new definition would fall under the Subsection 2 of the definition: share a former voluntary status,

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[180] The proposed addition to the INA would be included as a new subsection (i) to § 101(a)(42)(A) of the Immigration and Nationality Act; 8 U.S.C. 1101(a)(42)(A).

[181] *Ward*, 2 S.C.R at 692.

[182] Matter of W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014) (internal citations omitted).

[183] Matter of M-E-V-G-, 26 I. & N. Dec. 227, 228 (B.I.A. 2014).

[184] Matter of A-R-C-G-, 26 I. & N. 388 (B.I.A. 2014)

unalterable due to its historical permanence. These applicants' status as former partners of abusers, who are regarded in such an objectified fashion, are all united by the single fact of their former voluntary status as domestic partners in societies that view women as a second-class gender. The prevailing culture of machismo in those countries will help to inform the court's analysis of such claims, as in *A-R-C-G-*.[185] It is not the shared experience of being domestic-violence victims that will unite these applicants—that would be circular and against the BIA's clear interpretation of the nexus requirement.[186] Rather, their former status as partners in such socio-cultural atmospheres will provide the necessary unifying factor.

With regard to victims of gang violence, the analysis will be twofold. Firstly, former gang members will qualify as a member of a particular social group under Subsection 2: groups that share a former voluntary status, unalterable due to its historical permanence. As former gang members who are being targeted because they have left the gang, their status as former gang members, a voluntary association, is entirely unalterable. Thus, assuming the applicant satisfies the necessary nexus requirement (i.e. demonstrates that his persecution is on account of his former gang membership) a former gang member will satisfy the requirements for asylum.

Finally, the victim of gang violence that refuses either recruitment, extortion, or other gang-related activities, would classify as a member of a particular social group under Subsection 3 of the revised definition: groups who share an unalterable opinion or belief that is neither religious nor political in nature. These applicants' mere opposition to the gang would form the requisite unifying element to classify them as members of a particular social group. Again, however, the claimant must sufficiently demonstrate the received persecution is on account of this opposition to the gangs. The violence or mistreatment received cannot be mere acts of random street crime or untargeted acts of mistreatment. Rather the applicant must provide evidence demonstrating that he either rejected recruitment into the gang or otherwise refused direct (and perhaps continued) gang interference in his life. This nexus requirement will be the delimiting factor to put up boundaries on the particular social group definition.

Indeed, while the number of claims may increase, and certainly the number of credible, approved claims will also rise,

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185 *See supra* Part II.

186 *See supra* Section II.B.

this new formulation will not result in an overwhelming influx of illegitimate approvals. The nexus requirement must still be satisfied. There must be a causal connection between the victim's suffering or persecution and the proposed social group.[187]

Thus, upon considering the application of the new *Ward*-based standard against the backdrop of the categories of affected individuals, this note recommends the revision of the INA to include such a definition of "particular social group." This formula provides a good working definition and will allow applicants that have been otherwise excluded from demonstrating membership in a particular social group to now qualify for asylum and the protection of the United States.

CONCLUSION

BIA and circuit court jurisprudence regarding particular social groups prior to the decisions in *M-E-V-G-* and *W-G-R-* was plagued by an inconsistent application of a vague and inconsistently defined standard.[188] The BIA's attempt to implement a uniform three-part standard, however, has suffered a similar fate and has been inconsistently applied, particularly regarding victims of domestic and gang-based violence.[189] To remedy this spiraling inconsistency, Congress must amend the INA to add a definition of "particular social group." Such definition should take cue from Canadian case law, which has permitted a more expansive application of the particular social group standard.[190] In amending the INA and utilizing Canadian jurisprudence, Congress will create a uniform approach. This amendment to the immigration laws will not only ease the burden on the courts trying to keep up with an evolving body of case law but will provide potential asylum seekers with a clearer path to finding safe harbor in the United States.

Christopher C. Malwitz[†]

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[187] *See* Immigration and Nationality Act § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

[188] *See supra* Part I.

[189] *See supra* Part II.

[190] *See supra* Part III.

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