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INTRODUCTION

Of the five grounds for asylum established in the 1951 Refugee Convention,[1] none is more heavily scrutinized than that of "particular social group." While the other four asylum grounds of race, religion, political opinion, and nationality immediately draw to mind certain traits, behaviors, or beliefs for which a person could be persecuted, the particular social group (PSG) category is open-ended and does not immediately suggest any specific characteristics. The ambiguity of the PSG category presents the opportunity for those who fear returning to their home country, but do not fit into one of the other four grounds, to gain asylum.[2] Under U.S. asylum law, women who oppose female genital mutilation (FGM)[3] or have been victims of domestic violence,[4] homosexuals,[5] former police officers,[6] and

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1 *See* U.N. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The United States is not party to the 1951 Convention, but is party to the 1967 Protocol. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

2 However, PSG should not be interpreted as a "catch-all" covering everyone who fears return to their country of origin. U.N. 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, para. 2 (May 7, 2002), http://www.unhcr.org/3d58de2da.pdf [hereinafter UNHCR guidelines].

3 *See In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

4 *See Matter of* A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014).

5 *See* Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005); Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000); *Matter of* Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990).

6 *See Matter of* Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988).

others have been found to be members of PSGs. The ambiguity of the PSG classification, however, also creates the possibility that certain deserving groups will be arbitrarily denied protection.

In February 2014, the Board of Immigration Appeals (BIA or the Board) issued two new precedential decisions, *Matter of M-E-V-G-*[7] and *Matter of W-G-R-*,[8] clarifying the legal requirements for PSG asylum. This Essay argues that the BIA's decisions further confuse this already complex area of law and the standards established in the decisions exclude particular social groups already recognized under U.S. law. The complications and contradictions in these and other BIA decisions carry the risk of excluding valid claims to PSG protection and rely upon criteria that cannot be applied consistently. Because the new BIA PSG standards are unworkable, courts should defer to the standard established in the 1985 BIA decision, *Matter of Acosta*.[9] The criteria recognized in *Matter of Acosta* are accepted internationally and will lead to clearer and more consistent outcomes.

Next, this Essay proposes a novel way to re-conceptualize "social distinction"—a requirement in BIA and other PSG decisions—as "social construction" to better align the standard with the *Acosta* decision, and more accurately capture social reality and the intent of the Refugee Convention. Finally, this Essay argues that "particularity"—another requirement in many PSG decisions—should be eliminated entirely because it is already implied by a social distinction or social construction standard.

I. GROUPS OF PARTICULAR SOCIAL GROUPS

In order to meet the legal definition of "refugee" established in the 1951 Refugee Convention and 1967 Protocol one must demonstrate: a well-founded fear of persecution, a nexus between that persecution and an asylum ground (race, religion, nationality, political opinion, or particular social group), and a lack of state protection.[10]

The United States Board of Immigration Appeals established three distinct standards for determining the existence of a particular social group at different times. The first was recognized in the 1985 BIA decision, *Matter of Acosta*. In *Acosta* the BIA found that a particular social group is:

> [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

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

8 *Matter of* W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014).

9 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

10 *See* Refugee Convention, *supra* note 1, art. 1(A)(2); Refugee Protocol, *supra* note 1, art. I(2).

> ship. . . . [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.[11]

The legal rationale behind the "immutable/fundamental" standard established in *Acosta* is that it is in line with the other four grounds for asylum in the 1951 Refugee Convention. Under the *ejusdem generis* ("of the same kind") canon of statutory construction, general terms in a statute should be interpreted as being consistent in nature with the enumerated terms. Therefore, particular social group should be interpreted as being consistent with, or similar in nature to, the enumerated grounds of race, religion, nationality, and political opinion. According to the BIA in *Acosta*, persons who are members of these groups have characteristics they cannot change or should not have to change because they are so fundamental to their identity.

The BIA introduced the second distinct PSG standard in the case *In re C-A-*.[12] In *In re C-A-* the BIA held that, in addition to the criteria established in *Acosta*, "social visibility" was a factor and "particularity" was a requirement in determining PSG.[13] The proposed PSG in *In re C-A-* was composed of "'former noncriminal government informants working against the Cali drug cartel.'"[14] The BIA found that this group was "too loosely defined" to meet the new particularity requirement.[15] The BIA also found that "decisions recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question," and the proposed group was not "highly visible and recognizable" because criminal informants "intend[] to remain unknown and undiscovered."[16]

In the 2007 case *In re A-M-E & J-G-U-* the BIA considered the potential PSG "wealthy Guatemalans" and found that the group also failed the social visibility and particularity requirements.[17] The BIA applied the same legal standard as *In re C-A-* in this case. The BIA found that the group "wealthy Guatemalans" failed the particularity requirement because the term wealthy was "too amorphous to provide an adequate benchmark for determining group membership."[18] The Board also found that because members of all socio-economic classes suffered from violence and crime

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11 *Acosta*, 19 I. & N. Dec. at 233.
12 23 I. & N, Dec. 951 (B.I.A. 2006).
13 *Id.* at 957–59.
14 *Id.* at 957.
15 *Id.*
16 *Id.* at 960.
17 *In re* A-M-E & J-G-U-, 24 I. & N. Dec. 69, 74–76 (B.I.A. 2007).
18 *Id.* at 76.

the proposed group was not socially visible.[19] *In re A-M-E & J-G-U-* does not make clear how the relative amount of violence suffered by a group directly relates to its social visibility, although presumably the reasoning was that if a group suffers greater violence people in the society have identified members of that group and targeted them.

This reasoning is faulty, however, because a group may suffer a greater amount of violence than the general population even if it is not socially visible, or suffer the same or lesser amount of violence than the general population even if it is socially visible. For example, if women are less likely than men to be victims of violent crime, then are they not socially visible? Are noncriminal government informants hidden from the public view (as decided in *In re C-A-*) now socially visible as a group because they are more likely to be killed than the average person? If heterosexuals are just as likely to be victims of violence as homosexuals, can homosexuals not form a particular social group? In *In re A-M-E & J-G-U-* the BIA confused the existence of a PSG with the question of nexus between the group membership and persecution. A PSG can exist and be socially visible even if the asylum seeker fails to show she was persecuted *because* she is a member of that group.

The third BIA legal standard for PSGs was articulated in a set of companion cases, *Matter of S-E-G-*[20] and *Matter of E-A-G-*.[21] In these cases the BIA found that particularity and social visibility were both requirements for establishing the existence of a PSG, in addition to the *Acosta* factors.[22] The PSG proposed in *Matter of S-E-G-*, which the BIA rejected, was "Salavadoran [sic] youths who have resisted gang recruitment, or family members of such Salvadoran youth."[23] The BIA held that particularity is "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."[24] The BIA held that although the number of members in the group could be a factor in determining its particularity, the key issue was whether a "'benchmark for determining group membership'"[25] could be created so that the group was not "amorphous."[26]

In terms of the visibility requirement, the BIA found in *Matter of S-E-G-* that society must perceive the group as such, in line with its previous decisions in *In re C-A-* and *In re A-M-E- & J-G-U-*.[27] It found that gangs

19 *Id.*
20 *Matter of* S-E-G-, 24 I. & N. Dec. 579 (B.I.A. 2008).
21 *Matter of* E-A-G-, 24 I. & N. Dec. 591 (B.I.A. 2008).
22 *S-E-G-*, 24 I. & N. Dec. at 582; *E-A-G-*, 24 I. & N. Dec. at 593.
23 *S-E-G-*, 24 I. & N. Dec. at 582.
24 *Id.* at 584.
25 *Id.* (quoting Davila-Mejia v. Mukasey, 531 F.3d 624, 628–29 (2008)).
26 *S-E-G-*, 24 I. & N. Dec. at 584–85.
27 *Id.* at 586.

were no more likely to harm the group than any other group that presented a challenge to their power.[28] Again, the BIA focused on the reason gangs targeted the group (a separate nexus question) rather than the visibility of the group within society.

In addition to the three legal standards articulated by the BIA, the United Nations High Commissioner for Refugees (UNHCR), an international authority on refugee and asylum law, has established PSG standards. According to the UNHCR:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[29]

The UNHCR standard includes two criteria (immutability and social perception) but does not require both. Furthermore, the particularity criterion is not part of the UNHCR standard.

II. THE CIRCUITS SCATTER ON PARTICULAR SOCIAL GROUP

Federal courts of appeals across the United States responded differently to the BIA PSG decisions.[30] In 2009, soon after the BIA decided *Matter of S-E-G-* and *Matter of E-A-G-*, the Seventh Circuit rejected the social visibility requirement. In *Gatimi v. Holder* the Seventh Circuit found:

> [The social visibility requirement] makes no sense; nor has the [BIA] attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility. Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual.[31]

Furthermore the Seventh Circuit found, regarding the social visibility requirement, that "[i]f you are a member of a group that has been targeted . . . you will take pains to avoid being social visible."[32] An on-sight social visibility standard would therefore require persecuted groups to "pin[] a target to their backs" to qualify for relief.[33]

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28 *Id.* at 587.

29 UNHCR guidelines, *supra* note 2, para. 11.

30 Federal courts of appeals must defer to a federal administrative agency's (such as the Board of Immigration Appeals) interpretation of ambiguous term in a statute (such as particular social group) unless they find that interpretation is unreasonable. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 844 (1984).

31 Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

32 *Id.*

33 *Id.* at 616.

Addressing the particularity requirement in 2013, the Seventh Circuit found in *Cece v. Holder* that the number of people included in a group should not be a factor in determining refugee status because it is "antithetical to asylum law to deny refuge to a group of persecuted individuals . . . merely because too many have valid claims."[34] Furthermore, the court held that the nexus requirement would narrow those eligible for asylum because even if one belonged to a large group, not all members would be targeted for persecution. Ultimately, the court accepted the proposed particular social group—"young Albanian women living alone"[35]—and held that gender "plus one or more narrowing characteristics" could constitute a particular social group.[36]

In 2011, the Third Circuit rejected the social visibility and particularity requirements in the case *Valdiviezo-Galdamez v. Attorney General*.[37] In this case the court found that many groups already recognized as particular social groups were not "highly visible and recognizable" by others in the country.[38] Like the Seventh Circuit, the Third Circuit reasoned that women who were opposed to genital mutilation, homosexuals, and former police (previously recognized as forming PSGs) were all not visible on-sight.[39] The court also could not find a meaningful difference between the social visibility and particularity requirements and therefore found that this requirement was "unreasonable" and "inconsistent with many of the BIA's prior decisions."[40]

The Ninth Circuit, in the 2013 case *Henriquez-Rivas v. Holder*, did not go as far as the Seventh and Third Circuits in completely rejecting the social visibility requirement, but held "that a requirement of 'on-sight' visibility would be inconsistent with previous BIA decisions and likely impermissible under the statute."[41] The court also held that "[w]hen a particular social group is not visible to society in general (as with a characteristic that is geographically limited, or that individuals may make efforts to hide), social visibility may be demonstrated by looking to the perceptions of persecutors."[42]

On the other hand, a number of other courts of appeals have upheld the Board's PSG requirements, including the First Circuit in *Mendez-*

34 Cece v. Holder, 733 F.3d 662, 675 (7th Cir. 2013).

35 *Id.* at 673.

36 *Id.* at 676; *see* Jaya Ramji-Nogales, *Gender "Plus" as a Particular Social Group*, INTLAWGRRLS (Aug. 20, 2013), http://ilg2.org/2013/08/20/gender-plus-as-a-particular-social-group/.

37 Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582 (3d Cir. 2011).

38 *Id.* at 559 (quoting *In re* C-A-, 23 I. & N. Dec. 951, 960 (B.I.A. 2006)).

39 *Valdiviezo-Galdamez*, 663 F.3d at 604.

40 *Id.* at 608.

41 Henriquez-Rivas v. Holder, 707 F.3d 1081, 1087 (9th Cir. 2013).

42 *Id.* at 1090.

Barrera v. Holder (2010),[43] the Second Circuit in *Ucelo-Gomez v. Mukasey* (2007),[44] the Fifth Circuit in *Orellana-Monson v. Holder* (2012),[45] the Sixth Circuit in *Al-Ghorbani v. Holder* (2009),[46] the Eighth Circuit in *Gaitan v. Holder* (2012),[47] and the Tenth Circuit in *Rivera-Barrientos v. Holder* (2012).[48] The Fourth Circuit has declined to decide whether the social visibility standard merited deference.[49]

III. NEW BIA PRECEDENT: *MATTER OF M-E-V-G-* AND *MATTER OF W-G-R-*

In February 2014 the BIA issued two new precedential decisions: *Matter of M-E-V-G-*[50] and a companion case, *Matter of W-G-R-*.[51] In these cases the BIA established a three-part test for determining the existence of a cognizable PSG, including: immutability, particularity, and social distinction within the society in question.[52] This standard was the same as that in *Matter of S-E-G-* and *Matter of E-A-G-* except that it replaced "social visibility" with "social distinction."[53] In *Matter of M-E-V-G-*, the Board considered the PSG "'Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.'"[54]

The BIA clarified that social visibility "may be based on characteristics that are overt and visible to the naked eye or on those that are subtle and only discernable by people familiar with the particular culture. The characteristics are sometimes not literally visible."[55] In light of this clarification the Board renamed the social visibility requirement "social distinction" to "more accurately describe[] the function of the requirement" although it maintained that the requirement itself remained unchanged.[56] The BIA described social distinction as consideration of:

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43 Mendez-Barrera v. Holder, 602 F.3d 21 (1st Cir. 2010).

44 Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007) (decided before *Matter of S-E-G-*).

45 Orellana-Monson v. Holder, 685 F.3d 511 (5th Cir. 2012).

46 Al-Ghorbani v. Holder, 585 F.3d 980 (6th Cir. 2009).

47 Gaitan v. Holder, 671 F.3d 678 (8th Cir. 2012).

48 Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012).

49 *See* Martinez v. Holder, 740 F.3d 902, 906 (4th Cir. 2014) (finding being a former member of MS-13 was an immutable characteristic); Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011); Lizama v. Holder, 629 F.3d 440 (4th Cir. 2011).

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

51 *Matter of* W-G-R-, 26 I. & N. Dec. 208, 208 (B.I.A. 2014).

52 *M-E-V-G-*, 26 I. & N. Dec. at 227; *W-G-R-*, 26 I. & N. Dec. at 208.

53 *M-E-V-G-*, 26 I. & N. Dec. at 236 (internal quotation marks omitted); *W-G-R-*, 26 I. & N. Dec. at 212 (internal quotation marks omitted).

54 *M-E-V-G-*, 26 I. & N. Dec. at 228 (quoting another source).

55 *M-E-V-G-*, 26 I. & N. Dec. at 235–36.

56 *Id.* at 236–37.

> [W]hether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group.[57]

The BIA also described particularity as the group being "discrete and hav[ing] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective."[58] It noted that there was "considerable overlap" between the social distinction and particularity requirements.[59] It held, however, that they each serve a separate purpose because one considers whether the group is too indefinable or amorphous (particularity) and the other considered whether society viewed the group as separate (social distinction).[60] However, the BIA did not offer an example of a group that would be socially distinct but not particular. Although a group could certainly be particular but not socially distinct (i.e., a group that one could clearly define but that was not recognized by society), it seems impossible that a group could be socially distinct and not particular (i.e., a group that society recognizes as separate, but is also amorphous). Therefore, if social distinction is a requirement, particularity is unnecessary and only confuses the PSG analysis.

In *Matter of M-E-V-G-*, even the Department of Homeland Security (DHS), acting as counsel for the government, argued that the two standards should be combined because of the significant overlap between the two.[61] Still, the Board failed to consider where the overlap between the two terms was and how that overlap functioned before rejecting this argument.

Ultimately, the BIA concluded that because gang violence affects large segments of the population and many people are targeted, the applicant could not establish that he was targeted on a protected basis.[62] The Board, however, did not specifically address its own social distinction and particularity requirements with regard to the proposed PSG.

Matter of W-G-R-, the companion case to *Matter of M-E-V-G-*, considered the proposed PSG "'former members of the Mara 18 gang in El Salvador who have renounced their gang membership.'"[63] The BIA held

57 *Id.* at 238.

58 *Id.* at 239.

59 *Id.* at 240.

60 *Id.* at 241.

61 *Id.* at 236 n.11.

62 *Id.* at 251.

63 *Matter of* W-G-R-, 26 I. & N. Dec. 208, 209 (B.I.A. 2014) (quoting another source).

that former membership in the Mara 18 gang was clearly immutable, so it focused instead on the particularity and social distinction requirements.[64]

In terms of social distinction the BIA held, as in *Matter of M-E-V-G-*, that the requirement was not ocular or on-sight visibility.[65] It found that the requirement was based on the perception of society in general rather than the persecutor because basing social distinction on the perception of the persecutor could lead to groups being defined solely by the persecution they face.[66] It did not, however, consider that groups already recognized under U.S. asylum law, most notably family or kinship groups explicitly listed in *Acosta*, are almost never perceived by society in general, but rather by the persecutor and individuals in society.

The BIA held that the proposed group of former gang members was not sufficiently particular because the "group as defined . . . [wa]s too diffuse, as well as being too broad and subjective. . . . [T]he group could include persons of any age, sex, or background."[67] According to the BIA:

> [The group] could include a person who joined the gang many years ago at a young age but disavowed his membership shortly after initiation without having engaged in any criminal or other gang-related activities; it could also include a long-term, hardened gang member with an extensive criminal record who only recently left the gang.[68]

It is therefore unclear whether homogeneity is now required to meet the particularity standard. Other PSGs, for example former police officers, upheld in *Matter of Fuentes*, could similarly be of different age, sex or background.[69] Again, the standard upheld in *Fuentes* ("former member[s] of the national police"[70]) could include a police officer that recently joined the force, or a long-time police officer. Additionally, the PSG upheld in the BIA decision *In re H-* (Marehan subclan of Somalia)[71] contains people of different ages and sexes as does the PSG upheld in the decision *In re V-T-S-* (Filipinos of mixed Filipino-Chinese ancestry).[72] The explanation in *Matter of W-G-R-* therefore directly contradicts previous BIA precedent without explanation. If the BIA intends to require that a group be homogenous it must describe what sort of characteristics must be homogenous within a group, and then apply that rule consistently.

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64 *Id.* at 213.

65 *Id.* at 216–17.

66 *Id.* at 218; *cf.* Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089–90 (9th Cir. 2013) (finding that the perception of the persecutor was relevant in determining the existence of a particular social group).

67 *Id.* at 221 (citation omitted).

68 *Id.*

69 *Matter of* Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988).

70 *Id.* at 662.

71 *In re* H-, 21 I. & N. Dec. 337, 343 (B.I.A. 1996).

72 *In re* V-T-S-, 21 I. & N. Dec. 792, 798 (B.I.A. 1997).

The BIA held that the PSG of former gang members was not socially distinct. The BIA did not find sufficient evidence to determine whether former gang members faced discrimination because they were former gang members or because their tattoos made people believe they were current gang members. It held, in sum, that former gang members were not viewed by society as a distinct group.[73] Although the BIA held in the same case that social distinction was the standard and not on-sight visibility, it reasoned that because members of society cannot visually tell the difference between current and former gang members, they do not view them as separate groups.[74] The BIA also failed to consider how the persecutors (e.g., current gang members) view former gang members as a separate group.

The decisions in *Matter of M-E-V-G-* and *Matter of W-G-R-* create more confusion over PSG claims. First, it is unclear whether homogeneity is now required for a group to be considered particular. And if homogeneity is required, how homogenous must the group be, and based upon which factors must it be homogenous? It is also unclear whether the size of the group is relevant, and if size is relevant, it is unclear how small the group must be. Finally, it is uncertain how the perception of the persecutor will be used in PSG determinations.[75]

In addition to these concerns, the new BIA decisions threaten to shut out PSG claims by holding prospective PSGs to contradictory requirements. Under a potential interpretation of particularity a group must be small and homogenous. However, a small and homogenous group is much less likely to be viewed by society as a whole as a separate group. For example, if former gang members are not a PSG, but former gang members who were part of a gang for longer than fifteen years (which limits group size and likely makes the group more homogenous) are a PSG, it is unlikely that society at large will view these two groups as different. Therefore, a proposed PSG would have to meet one requirement at the expense of the other. A standard that is impossible to meet is clearly not reasonable, and therefore not entitled to deference.

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73 *Matter of* W-G-R-, 26 I. & N. Dec. 208, 222 (B.I.A. 2014).

74 *Id.*

75 *Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 242 (B.I.A. 2014). Furthermore, this conflicts with recent Ninth Circuit jurisprudence. *See, e.g.*, Cordoba v. Holder, 726 F.3d 1106 (9th Cir. 2013) (finding that the perception of the persecutor was relevant in determining the existence of a particular social group); Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013) (same).

IV. THE NINTH CIRCUIT RESPONDS TO *MATTER OF M-E-V-G-* AND *MATTER OF W-G-R-*

The Ninth Circuit responded to the new 2014 BIA precedents in the recent case *Pirir-Boc v. Holder*.[76] In this case, the court considered the proposed PSG "'persons taking concrete steps to oppose gang membership and gang authority.'"[77] The Ninth Circuit found that the BIA's decisions in *Matter of M-E-V-G-* and *Matter of W-G-R-* were not "'blanket rejection[s] of all factual scenarios involving gangs' and that '[s]ocial group determinations are made on a case-by-case basis.'"[78] It therefore held that the case should be remanded to the Board, which failed to "consider how Guatemalan society views the proposed group, and [] did not consider the society-specific evidence submitted by [the applicant]."[79] The court declined to decide whether the social distinction and particularity requirements were reasonable until it was clearer how the BIA rule would be implemented.[80] The Ninth Circuit again did not go as far as the Third and Seventh Circuits in rejecting BIA PSG requirements,[81] but did hold that the BIA had to make reasonable social distinction determinations based on country-specific evidence.

V. *ACOSTA* AND SOCIAL CONSTRUCTION: TOWARDS A WORKABLE STANDARD

While the social distinction standard is preferable to an "on-sight" social visibility standard, a further revision could improve the criterion and align it more strongly with the decision in *Matter of Acosta*. In light of recent BIA PSG decisions, many have proposed a return to the *Acosta* PSG standard or to a standard that requires either immutability or social distinction, but not both (the UNHCR PSG standard).[82] These two approaches would certainly be preferable to the current BIA standard, but the BIA has already rejected these suggestions.[83] Therefore, this Essay proposes to reconceptualize "social distinction" as "social constriction" as a way to pos-

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76 750 F.3d 1077 (9th Cir. 2014).

77 *Id.* at 1084 (quoting another source).

78 *Pirir-Boc*, 750 F.3d at 1083 (quoting *M-E-V-G-*, 26 I. & N. Dec. at 251 (first alteration added)).

79 *Pirir-Boc*, 750 F.3d at 1084.

80 *Id.*

81 *See supra* notes 31–40 and accompanying text.

82 Josh Lunsford, *Not Seeing Eye to Eye on Social "Visibility,"* IMMIGR. L. ADVISOR (U.S. Dep't of Justice, D.C.), Feb. 2014, at 3, *available at* http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%202014/vol8no2.pdf.

83 *Id.*

sibly move beyond the current impasse between the *Acosta*/UNHCR standard and the BIA standard.[84]

Considering the *ejusdem generis* approach established in *Acosta*, another commonality among the other four grounds for asylum in the 1951 Refugee Convention, besides being immutable and/or fundamental to identity, is that they are all social constructs. A social construct is "an idea or notion that appears to be natural and obvious to people who accept it but may or may not represent reality, so it remains largely an invention or artifice of a given society."[85] The international system,[86] nationality, and nationalism[87] are all socially constructed, as are religious and political systems. Race is socially constructed[88] and gender, another ground on which asylum is routinely sought outside of the four Convention grounds,[89] is also a social construction.[90] Finally, characteristics that have been identified in particular social group analysis, including linguistic and kinship ties,[91] are all socially constructed.

The difference between social construction and social distinction is that social distinction assumes the ground for persecution arises separately and that society is merely identifying it—or observing it, as suggested by the "social visibility" test. In reality, society is not observing or setting aside a group, but rather, creating it.[92] The social construction approach

84 The "social construction" standard advocated in this Essay is intended to be used in conjunction with the *Acosta* standard, not on its own.

85 7 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 578–79 (William A. Darity Jr. ed., 2d ed. 2008).

86 *See* John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 855–57 (1998) (discussing social construction in international relations); Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 403–07 (1992) (same).

87 *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 1–7 (rev. ed. 2006).

88 *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 7–8 (6th ed. 2008); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–37 (1994).

89 *See, e.g.*, Cece v. Holder, 733 F.3d 662, 675 (7th Cir. 2013); Yadegar-Sargis v. INS, 297 F.3d 596 (7th Cir. 2002); *Matter of* A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014); *In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

90 *See* CATHERINE MACKINNON, SEX EQUALITY 212 (2d ed. 2007). For a leading treatise on the topic, see generally SIMONE DE BEAUVOIR, THE SECOND SEX (1949).

91 *See In re* H-, 21 I. & N. Dec. 337, 343 (B.I.A. 1996) (holding that members of the Somalian Marehan subclan were part of a particular social group because of shared "kinship" and "linguistic commonalities").

92 "The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or *sets them aside from society at large*. This has been referred to as the 'social perception' approach." UNHCR guidelines, *supra* note 2, at para. 7 (emphasis added).

also avoids a dictum with a premise that "society" is white, straight, and male, and people who are not are somehow less of a part of society or are set apart from it.

At first glance the social construct description seems to contradict the immutability test—if a characteristic is socially constructed it can be undone because it is not physically "real." However, there is no contradiction with the immutability standard for several reasons. First, many social constructs have an underlying biological feature, for example sex, race, ancestry, or sexual orientation. Therefore, the underlying biological feature would still be immutable. Second, certain social constructs may be so strong in a particular society that they seem immutable to those in that society, and in fact this aspect makes up the definition of social construct. Furthermore, because of the nature of social constructs—they are made up of the ideas and actions of many people—an individual person would not be able to change social constructs on their own even if they wanted to. Finally, because many social constructs make up a person's social identity, they could still fit under the *Acosta* standard of fundamental characteristics one should not have to change even if she could.

The case of the Tutsi and Hutu ethnic groups in Rwanda illustrates how a social construction test would work practically. For example, the fact that one is tall and has a long nose and long neck is biologically determined and almost impossible to change; it is immutable. Still, there is no social construct in, say, Canada concerning tall people with long noses and long necks, so being persecuted for that reason in that country would not be grounds for asylum even though it is immutable and visible. However, set in Rwandan society the same biological traits would suggest a person is a Tutsi—a once fluid social/ethnic group that long existed in Rwandan society and was later constructed into an oppressive social hierarchy by Belgian and German colonizers.[93] The distinguishing feature between the two potential asylum claims is social construction, not social distinction, visibility, or particularity. Members of Rwandan society do not see those traits more

93 Kenneth R. White, *Scourge of Racism: Genocide in Rwanda*, J. BLACK STUD. 471, 472–73 (2009) ("Prior to the arrival of the German and Belgian colonizers, the social boundaries between the Hutus and the Tutsis were fluid. The type of work was the primary difference between the groups. Hutus had a penchant for farming, and the Tutsis were cattle breeders. The Twa (an aboriginal group) were hunters and gatherers. Although precolonial Rwandan society had social stratification, the social boundaries were permeable, which allowed for crossing over from one group to another. . . . With the establishment of German colonialism (i.e., hegemony), the impositioning of European racial theories (e.g., Great Chain of Being and the Hamitic Curse) solidified ethnic lines. The more physical European-featured Tutsis were deemed to be the natural-born local rulers, and the Hutus (short, stocky, more pronounced African physical features) were destined to serve them. The distinctions between the various groups were racialized into hierarchies, with the Europeans at the top, the Tutsis in the middle, the Hutus at the bottom, and the Twa on the periphery." (citation omitted)).

clearly or think of people with those traits as set apart from society. In fact, it is quite the opposite—those traits are part of a social construction that is a deeply rooted part of society.

The case of Rwanda also serves as an example of why the particularity requirement—that a group not be too large—may ultimately be unworkable as well. While the Hutu social group is a majority in the country, they may present valid claims for asylum if they are being targeted because of their membership in this socially constructed group.[94] Furthermore, the standard of particularity conflicts with the *Acosta ejusdem generis* reading—the four other grounds in the 1951 Refugee Convention (race, religion, political opinion, and nationality) make up groups that are often large segments of the population, not small or isolated factions.

Another reason why the particularity requirement may ultimately fail is that its meaning beyond that the group may not be too large (i.e., that the group must be well-defined and not amorphous) is already captured by a social construction or social distinction test. While a group with well-defined boundaries is not necessarily socially distinct, a group that is socially distinct would always be particular in this sense. Therefore, the particularity requirement is unnecessary. The only additional purpose that the requirement could serve after a group has been determined to be socially distinct or constructed would be to limit group size, which is not in line with the *Acosta* and other BIA decisions.[95]

Thinking of PSGs in terms of social construction instead of social visibility, social distinction, or particularity more accurately captures the reality of persecution and aligns it with the *Acosta* criteria. Social construction, combined with the *Acosta* criteria, would therefore be a preferable standard to the social visibility, social distinction, and/or particularity requirements that have been articulated by courts, the BIA, and other authorities in the past.

CONCLUSION

PSG jurisprudence in the United States is still evolving and many issues remain unsettled. Unfortunately the recent BIA decisions in *Matter of M-E-V-G-* and *Matter of W-G-R-* do not provide answers and only raise more questions. Courts should, for now, defer to the standard established in *Matter of Acosta* until the BIA rationalizes additional requirements. A

94 U.S. CITIZENSHIP AND IMMIGR. SERVS., ASYLUM OFFICER BASIC TRAINING COURSE, PARTICIPANT WORKBOOK 18 (March 12, 2009), *available at* http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Nexus-the-Five-Protected-Characteristics-31aug10.pdf ("Hutu is the majority tribal group in Rwanda, while Tutsi, the minority group, controls the government. Both Hutus and Tutsis have presented valid claims for asylum.").

95 *See e.g.*, *H-*, 21 I. & N. Dec. 337.

way to possibly improve the PSG requirements in the future would be to replace social distinction with a social construction standard and eliminate the particularity standard entirely. This scheme would be in line with internationally accepted standards and lead to more reliable and just outcomes in U.S. asylum law.