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REDEFINING IMMUTABILITY: A DOOR TO THE OSTRACIZED

Adriana Domingo*

INTRODUCTION

Defining a Particular Social Group (PSG) is a work in progress. It is one of the most challenging elements that a petitioner for asylum has to demonstrate.¹ Although the United Nations Human Rights Council (UNHRC) has established broad parameters aligned to the purpose of the Convention Relating to the Status of Refugees (“Convention on Refugees”), it has been up to each member state to apply their own criteria for determining a PSG. In the United States, the first formal attempt to define a PSG was made in 1985 when the Board of Immigration Appeals (BIA) established “the *Acosta* test.” This test outlined the elements that should be considered when determining if a PSG falls within the grounds for asylum.²

The BIA’s decision in *Matter of Acosta* (“the *Acosta* decision”) sets forth the “immutability test” that needs to be established to form a PSG. In *Acosta*, the BIA defines immutability as a characteristic so intrinsic to the individual’s identity that the individual is not able to change that characteristic, or they should not be required to change it..³ The *Acosta* test, however, has not been applied uniformly by the BIA and United States courts. Indeed, both have recognized a wide variety of social groups that somehow fit within the criteria for asylum.⁴

The UNHRC’s definition of “immutability” has fundamental variations in language and scope compared with the *Acosta* test. The main hurdle for both the UNHCR and United States’ approaches is the application of the immutability criteria. In the United States, the *Acosta* test is the only applicable test and the immutable element is static and individual. That means that courts will evaluate whether a characteristic that cannot be transformed exists, or, if it can be changed,

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¹ Neither the Convention on the Status of Refugees nor its Protocol provides a definition; nor does the Immigration and Nationality Act (INA).

² STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY, 955 (Robert C. Clark et al. eds., 6th ed. 2015).

³ *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

⁴ For an extended list of groups *see* 30 Illinois Jurisprudence Immigration Law § 20:14 (2018).

the characteristic should not be required to do so because it is fundamental to a person's identity. On the other hand, the UNHRC's analysis considers the immutability test, plus an alternative second approach. This other approach is the "social visibility" test that analyzes whether a group that lacks an immutable characteristic can be perceived as a cognizable group within its own society.

The United States has a single-approach analysis, but it has recently raised the bar by adding the "social visibility" (renamed "social distinction") test and the "particularity" requirements for a PSG determination.⁵ The United States analysis has excluded economic activities and occupations, such as small business owners, taxi drivers, and others persecuted by nongovernmental criminal groups, from being part of a PSG.⁶ That exclusion results from the willingness or capacity of an immigrant to transform their situation, which is an element of immutability. The single-approach analysis and the extra requirements of the original *Acosta* test added by later cases have only increased difficulties for asylum petitioners who lack an immutable characteristic according to this criterion.

Because it is the current tendency of United States jurisdictions to continue the one-track-only analysis, the immutability definition deserves to be redefined. The new analysis should include in its scope those individuals who lack an innate or fundamental immutable characteristic, but instead possess an imposed immutability. Imposed immutability means a characteristic that remains immutable due to external factors, such as structural problems within a society,⁷ or a government's inability to protect the group or provide members with other options to transform their shared characteristic. The analysis should consider a person's inability to change their circumstances due to structural obstacles, despite their willingness to transform them.

Redefining immutability into a uniform and flexible concept would benefit both asylum seekers and the country. On one side, it would benefit asylum seekers by preventing them from going back to a country whose conditions endanger their life, which is an essential purpose of asylum.⁸ As a matter of justice, establishing a

⁵ For the social visibility elements *see* Matter of R-A-, 22 I&N Dec. 906 (BIA 1999) and Matter of A-M-E & J-G-U-, 24 I&N Dec. 69 (BIA 2007); for the particularity elements *see* Matter of A-M-E & J-G-U-, 24 I&N Dec. 69 (BIA 2007), Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008) and Matter of E-A-G 24 I&N Dec. 591 (BIA 2008).

⁶ Matter of *Acosta*, 19 I&N Dec. at 234. *See also* *Ochoa v. Gonzales*, 406 F. 3d 1166 (9th Cir. 2005) (finding that small business owners rejecting demands from drug traffickers was not a cognizable particular social group).

⁷ Structural problems may include extreme poverty, lack of opportunities, and the government's inability to protect the group or provide options for its members to avoid harm.

⁸ Cynthia Bansak, *Legalizing Undocumented Immigrants*, IZA INST. LAB. ECON. 1 (2016), <https://wol.iza.org/uploads/articles/245/pdfs/legalizing-undocumented-immigrants.pdf>; Maureen Meyer & Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum Seekers*,

broader and flexible immutability criterion provides for a right to seek asylum to those applicants who may have an actionable case. Furthermore, doing so would prevent immediate dismissal of an asylum claim before assessing the merits on procedural grounds.

On the other hand, a more uniform concept that adapts to current country conditions of immutability would reduce costs. Flexible-uniform criteria would allow backlogs to be reduced by speeding up the processes.⁹ It would incentivize Executive Office for Immigration Review (EOIR) attorneys to reach “settlement agreements” with asylee advocates to either provide for asylum or a withholding of removal. A more flexible concept might allow for more asylum cases being granted. If not, asylum denials might lead to increases in the number of unauthorized immigrants.¹⁰ Furthermore, granting asylum to people who might otherwise get their case rejected due to imputed immutability would regularize immigration law. Regularized migration means more control over the immigrant population, labor markets, tax revenues, and national security.¹¹

This article’s aim is to propose a new analysis for examining immutability. Part I will explain the background and current criteria for analyzing immutability and determining a PSG. Part II will discuss the proposed new analysis, and Part III will identify some practical points to consider when applying it.

I. THE PARTICULAR SOCIAL GROUP (PSG) DETERMINATION AND IMMUTABILITY ELEMENT

Defining a PSG has been a challenge for U.S. practitioners and advocates. The term stems from the Convention on Refugees and was later incorporated into that document’s Protocol and the United States Immigration and Nationality Act. (INA).¹² Although all these instruments define a PSG similarly, the analysis for determining a PSG has differed significantly among them over time.

WOLA (2018), <https://reliefweb.int/report/united-states-america/fact-sheet-us-immigration-and-central-american-asylum-seekers>.

⁹ As of January 2019, Courts were facing a backlog of about 800,000 asylum cases pending. See Denise Lu And Derek Watkins, *Court Backlog May Prove Bigger Barrier from Migrants than Any Wall*, N.Y. TIMES, Jan. 24, 2019, <https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html>.

¹⁰ Sherrie A. Kossoudji, *What are the consequences of regularizing undocumented immigrants?*, IZA INST. LAB. ECON. 1 (2016), <https://pdfs.semanticscholar.org/aa7c/dd6445d79d8b2bdd8c68ae99e94711054aba.pdf>.

¹¹ Bansak, *supra* note 8.

¹² Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 40-47 (1983).

a. *The United Nations Standard*

The United States became a party to the Convention on Refugees in 1968 when it adopted the Protocol Relating to the Status of Refugees.¹³ The Convention on Refugees is the lead instrument that sets forth the definition of a “Refugee.” Article 1A(2) of the Convention defines “Refugee” as “any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”¹⁴

The UNCHR has identified two different approaches when determining what constitutes a PSG.¹⁵ The first is known as the “immutability approach.” This approach assesses the existence of an immutable characteristic within a group.¹⁶ The core of this analysis is that an immutable characteristic may be innate or unalterable for different reasons, such as a historical past association, occupation, or status.¹⁷ Specifically, applying this approach requires the evaluation of whether the group “is defined: 1. By an innate, unchangeable characteristic; 2. By a past temporary or voluntary status that is unchangeable because of its historical permanence; or 3. By a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.”¹⁸ The second approach, named the “social perception approach,” examines whether there is a common characteristic recognized by society.¹⁹ Often, both approaches overlap, and thus both are applicable. In some instances, the results of the analysis of one method may exclude groups that the other does not.²⁰

In an attempt to reconcile the two approaches, the UNCHR crafted a definition of a PSG that combines elements of both. As such, the UNCHR’s definition of a PSG is “a particular social 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

¹³ LEGOMSKY & RODRIGUEZ, *supra* note 2, at 919.

¹⁴ United Nations Convention Relating to the Status of Refugees [hereinafter Refugee Convention], July 28, 1951.

¹⁵ UNITED NATIONS HUMAN RIGHTS COUNCIL -UNCHR-, HCR/GIP/02/02, 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, ¶. 12 & 13, (May 7, 2002).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at ¶ 12.

¹⁹ *Id.* at ¶ 9.

²⁰ *Id.*

otherwise fundamental to identity, conscience or the exercise of one's human rights”²¹

The definition is broad, but it is not intended to cover the groups that are defined exclusively through the persecution that they suffer.²² In other words, a PSG cannot be circular in its reasoning. Persecution needs to be on account of a protected ground. Persecution cannot be both the protected ground *and* the nexus for asylum. The application of the UNCHR test should follow one of two tracks. The first approach is applicable if a group possesses an immutable characteristic that cannot be transformed, or the group should not be required to remove that characteristic.²³ However, if the characteristic can be transformed, and the characteristic is not a fundamental one, then the analysis switches to the second approach and a determination of whether the group's characteristic is perceived by society.²⁴ The aim of having different analyses is to respond to the evolutionary nature of groups and human rights.²⁵

b. The United States' interpretation and application

The UNHRC's definition has become the standard model for domestic laws, including the laws of the United States.²⁶ However, the final definition and application is up to the jurisdiction that applies the rule.²⁷ The “Particular Social Group” term is so vague and broad that it invites different interpretations as to its meaning and applicability.²⁸

In the United States, it was the BIA that first defined a PSG in the 1985 *Acosta* decision.²⁹ The Board said that its decision was based on the *ejusdem generis* doctrine, which means “of the same kind.”³⁰ The BIA stated that each of the grounds of persecution within the INA (race, religion, nationality, political opinion, and PSG) described persecution aimed at an “immutable characteristic,”³¹ that being a “characteristic that either is beyond the power of an individual to change or

²¹ *Id.* at ¶ 11.

²² *Id.* at ¶ 2.

²³ *Id.* at ¶ 12.

²⁴ *Id.* at ¶ 13.

²⁵ *Id.* at ¶ 3.

²⁶ 8 U.S.C § 1101(a)(42).

²⁷ *Matter of Acosta*, 19 I&N Dec. at 232-33.

²⁸ LEGOMSKY & RODRIGUEZ, *supra* note 2, at n. 22.

²⁹ *Matter of Acosta*, 19 I&N Dec. at 233.

³⁰ LEGOMSKY & RODRIGUEZ, *supra* note 2, at n. 22.

³¹ *Matter of Acosta*, 19 I&N Dec. at 233.

is so fundamental to individual identity or conscience that it ought not be required to be changed.”³²

This interpretation has been deemed valid by federal courts.³³ Since *Acosta*, however, the question has remained as to what is actually immutable; that is, what group characteristic can be determined to be permanent or should not be required to change. In the *Acosta* case, the respondent, a Salvadorian taxi driver, was denied asylum on the ground that, belonging to a group of taxi drivers, was not immutable.³⁴ According to the BIA, the respondent could have avoided threats by changing jobs or cooperating with his persecutors.³⁵ Although changing jobs may sound like an “easy” alternative, Central American countries have been historically poor, where inhabitants often struggle to find work.³⁶ Similar analyses have controlled in other asylum cases where the applicant was excluded from the PSG analysis for not possessing a static and unchangeable characteristic.

In *Melnik v. Sessions*,³⁷ the Court of Appeals for the Seventh Circuit stated that small-business owners lacked an immutable characteristic because they could change their occupation.³⁸ In *Escobar v. Holder*,³⁹ the same court found that the petitioner had an immutable characteristic due to his past experience,⁴⁰ but the court agreed with the BIA’s rejection of asylum on the basis of lacking immutability because the petitioner was able to change profession.⁴¹ However, United States courts and the BIA have sometimes been flexible when considering a non-static

³² *Id.*

³³ NATIONAL IMMIGRANT JUSTICE CENTER, PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER MATTER OF *M-E-V-G-* AND MATTER OF *W-R-R*, 1 (2016).

³⁴ Matter of *Acosta*, 19 I&N Dec. at 234.

³⁵ *Id.*

³⁶ ZACHARY DRYER, *Central America Remains the Poorest Region in Latin America, Despite Success Reducing Extreme Poverty*, TICO TIMES, June 24, 2013, <http://www.ticotimes.net/2013/06/24/central-america-remains-the-poorest-region-in-latin-america-despite-success-reducing-extreme-poverty>.

³⁷ *Melnik v. Sessions*, 891 F.3d 278 (7th Cir. 2018). In this case, Ruslana Melnik and Mykhaylo Gnatyut, an Ukrainian married couple petitioned for asylum. The couple used to own a small clothing business. They alleged extortion, threatening and physical violence against them and the inability of their government to protect them.

³⁸ *Id.* at 287.

³⁹ *Escobar v. Holder*, 657 F.3d 537, 545 (7th Cir. 2011).

⁴⁰ *Id.* Sergio Escobar was a Colombian truck driver. He fled Colombia after the Revolutionary Armed Forces of Colombia pursued him and threatened him due to his reluctance to cooperate with them in their transportation needs.

⁴¹ *Id.* at 545.

characteristic to be immutable. In *Matter of R-A-*,⁴² the BIA found that the situation of Guatemalan women was immutable due to their inability to leave their relationships because of social factors.⁴³

Differing from the UNCHR analysis, the BIA's analysis has always involved a single approach. Satisfying such a strict requirement has challenged advocates' creativity, and it has erected barriers for those in PSGs that lack immutability.⁴⁴ To make things even more challenging, the BIA raised the bar in the PSG test by requiring evidence of two more elements—social visibility and particularity.

In 2007, the UNCHR submitted an *amicus curiae* brief in *Matter of Gonzalez v. Thomas*,⁴⁵ where it clarified the meaning and applicability of the “social perception” approach. The UNCHR explained that the application set out in the “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” was a single standard that reconciled two different approaches. The UNCHR argued that it was not necessary for a group to be visible or easily recognizable; if the group was perceived by the society in which it is located, that was enough.⁴⁶

In 2009, however, the BIA rejected the asylum claim of a victim of domestic violence due to lack of social visibility. The BIA acknowledged the immutability of “Guatemalan women intimately involved with Guatemalan men who believe in male domination,” but the group was “not visible to the society of her [the petitioner's] home country.”⁴⁷ This same analysis was restated later as a requisite for determining the existence of a PSG.⁴⁸

⁴² *Matter of R-A-*, 22 I&N Dec. 906 (BIA 2001). Rody Alvarado was a Guatemalan woman who suffered brutal domestic violence at the hands of her husband. Despite Alvarado's efforts to seek protection from the government, authorities refused to intervene. She also did not find help within her community. To save her life from her abusive husband, Alvarado ran away and was forced to leave behind her two children in the care of relatives.

⁴³ *Id.* at 918-20. Although in *Matter of R-A-* the BIA recognized immutability, it did not grant asylum for lack of social visibility.

⁴⁴ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS AN *AMICUS CURIAE*, *Brief Amicus Curiae of the United Nations High Commissioner for Refugees*, 1, 6 (Jan. 25, 2007).

⁴⁵ *Thomas v. Gonzales*, 409 F.3d 1177, 1188-89 (9th Cir. 2005) (en banc) (holding that family membership may, standing alone, constitute a particular social group), *vacated on other grounds*, 547 U.S. 183 (2006).

⁴⁶ *Id.*

⁴⁷ *Matter of R-A-*, 22 I&N Dec. at 906.

⁴⁸ *Matter of A-M-E & J-G-U-*, 24 I&N Dec. 69 (BIA 2007). Here, a Guatemalan married couple petitioned for asylum arguing persecution due to belong to the particular social group of “higher socio-economic” Guatemalans.

The particularity requirement was introduced as a way to try and shape what a PSG should look like.⁴⁹ In *Matter of A-M-E & J-G-U*,⁵⁰ the BIA held that, in trying to identify a PSG of “wealthy Guatemalans,” the group was too amorphous or not particular enough, since it was not clear how much money makes someone wealthy.⁵¹ The BIA later refined the particularity criterion in *Matter of S-E-G*⁵² and *Matter of E-A-G*.⁵³ In those 2008 cases, the BIA held the group must have (1) an immutable characteristic; (2) be socially visible; and (3) be particularly defined.⁵⁴ Particularity was defined to be a characteristic “sufficiently distinct that the group be recognized in a manner, in the society in question, as a discrete class of persons.”⁵⁵

The social visibility and particularity requirements have evoked a controversial discussion. Advocates have expressed concern that the particularity requirement confuses both the social visibility and particularity with the nexus, also known as the “on account of” element, which is a different test when analyzing the viability of a PSG.⁵⁶ Federal courts have been divided on this issue. Some have disallowed the pair of new requirements.⁵⁷ Others, however, have accepted them, but their analyses and application have resulted in clumsy and hesitant interpretations.⁵⁸

In 2014, the BIA responded to this series of critiques from federal courts by issuing two decisions that restated and clarified its interpretation of social visibility. Those decisions, *Matter of M-E-G-V* and *Matter of W-G-R*,⁵⁹ stated

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ LEGOMSKY & RODRIGUEZ, *supra* note 2, at 960.

⁵² *Matter of S-E-G*, 24 I&N Dec. 579 (BIA 2008). This case involves a Salvadoran female petitioning asylum. She argued to belong to the particular social group of youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their personal, moral, and religious opposition to the gang’s values and activities.

⁵³ *Matter of E-A-G*, 24 I&N Dec. 591 (BIA 2008). Here, a Honduran young man petitioned for asylum in the basis of belonging to the particular social group characterized as “young persons who are perceived to be affiliated with gangs (as perceived by the government and/or the general public, and persons resistant to gang membership”.

⁵⁴ *Matter of S-E-G*, 24 I&N Dec. at 582-583; *Matter of E-A-G*, 24 I&N Dec. at 594-596.

⁵⁵ *Matter of S-E-G*, 25 I&N Dec. at 584.

⁵⁶ NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 33, at 2.

⁵⁷ *Id.* at 3. The Seventh and Third Circuits have refused to afford *Chevron* deference to the BIA’s additional requirements of social visibility and particularity requisites.

⁵⁸ *Id.* at 2. Except for the Seventh and Third Circuits, the appellate circuit courts have accepted the social visibility and particularity requisites.

⁵⁹ *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014) (denying the particular social group of “Honduran youth who have been actively recruited by gangs but who have refused to join because

the “visibility” the BIA referred to was not literal, but rather the recognition of the group within the society as a distinct entity.⁶⁰ Thus, “social distinction” is a characteristic that “set[s] apart or [distinguishes] from other persons within the society in a significant way.”⁶¹

In *Matter of M-E-G-V*, the BIA also restated the particularity requirement as a means to “put outer limits” on the PSG definition, but it did not provide a clear interpretation of it. The decision barely even mentions that in order to be particular, the group must be “discrete and have definable boundaries—not be amorphous, overbroad, diffuse, or subjective.”⁶² Although the BIA intended those decisions to provide guidance, the new test is irreconcilable with domestic and international asylum law.⁶³

Despite the requisites added to the *Acosta* test to determine a PSG, some members of groups have been granted asylum. Some examples include “young, single women living alone in Albania”⁶⁴ and “married women in Guatemala who are unable to leave their relationship.”⁶⁵ Other social group articulations remain good law despite the existence of the additional requirements including those groups that have been categorized based on gender, sexuality, or being victim of female genital mutilation.⁶⁶ Groups like these have been considered to possess an immutable characteristic that cannot be changed because it is a characteristic that ties a group through their shared unchangeable past, or group members possess a characteristic so fundamental to their identity that should not be altered.

The real hurdle is the “social visibility test” had been hardly taken into account when it started being applied as part of a single-approach test. For example, in *Matter of R-A-*, a victim of domestic violence was deemed to meet the immutability requirement because she was unable to leave the relationship due to her gender and the experience of having been “intimately involved with

they oppose the gangs”); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) (denying the particular social group “former members of the Mara 18 gang in El Salvador who have renounced their gang membership”).

⁶⁰ NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 33, at 4.

⁶¹ *Matter of M-E-V-G-*, 26 I&N Dec. at 238.

⁶² *Id.* at 239.

⁶³ NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 33, at 4.

⁶⁴ *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013).

⁶⁵ *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).

⁶⁶ See *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) (finding Guatemalan women who oppose male domination by living independently and self-sufficiently to be a cognizable social group); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (finding certain women forced to undergo female genital mutilation to be a cognizable social group); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (finding sexual orientation to be a cognizable social group).

a male companion who practices male domination through violence”⁶⁷; such a determination depends on personal and social factors, like her unavailability to leave the relationship due to the male domination and to avail herself of the protection of the government of her country.⁶⁸ However, the applicant was rejected for asylum on the ground that the PSG claimed was not “socially visible.”⁶⁹

When analyzing the types of groups lacking immutability, other factors should be considered. These factors include evidence about societal attitudes towards group members, potential and actual harm to members, and a willingness and capacity of their own countries’ governments to help victims. The latter includes such factors as the levels of responsiveness, the capacity for protection, and the provision of benefits.⁷⁰ This analysis is close to matching the UNCHR’s second approach, except it adds a requirement of “social visibility” to the *Acosta* test,⁷¹ rather than utilizing it as a separate and second alternative approach.

Just when victims started to become more hopeful, *Matter of A-B-* was decided.⁷² This decision overruled *Matter of A-R-C-G-*, a case that benefited women fleeing domestic violence. In *Matter of A-R-C-G-*, the BIA recognized “married women in Guatemala who are unable to leave their relationship was particular enough to constitute a cognizable particular social group.”⁷³ *Matter of A-B-* was a controversial decision since it appeared to raise the bar for victims of persecution by private (non-government) actors. The case seems to be requiring victims to demonstrate that the government of their country either condoned the private activity or was unable to protect them from it.⁷⁴ However, *Matter of A-B* merely overrules *Matter of A-R-C-G-*.⁷⁵ Is important to note that

⁶⁷ *Matter of R-A-*, 22 I&N at 918.

⁶⁸ *Id.* at 919.

⁶⁹ *Id.* at 918; LEGOMSKY & RODRIGUEZ, *supra* note 2, at 960.

⁷⁰ *Membership in a Particular Social Group*, U.S. CITIZENSHIP & IMMIGR. SERVS. <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-62325/0-0-0-64099/0-0-0-64242/0-0-0-64298.html>, (last visited on Nov. 21, 2018).

⁷¹ *Matter of Acosta*, 19 I&N Dec. at 233.

⁷² *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

⁷³ *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).

⁷⁴ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

⁷⁵ *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 124 (D.D.C. 2018); *See also* NATIONAL IMMIGRANT JUSTICE CENTER, PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-*, 1, 6 (Jan. 2019); IMMIGRANT LEGAL RESOURCE CENTER, *MATTER OF A-B- CONSIDERATIONS 3* (Oct. 2018); CLINIC, ATTORNEY GENERAL ISSUES PRECEDENT DECISION, *MATTER OF A-B-, SEEKING TO LIMIT PROTECTION FOR ASYLUM SEEKERS* (June 28, 2018), available at <https://cliniclegal.org/resources/asylum-and-refugee-law/attorney-general-issues-precedent-decision-matter-b-seeking-limit>.

in some jurisdictions the basis upon which *Matter of A-R-C-G-* was decided upon is still supported by other precedent.⁷⁶ In fact, six months after *Matter of A-B-*, the District of Columbia District Court stated “The government emphasizes that the only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled.”⁷⁷

In sum, the analysis used by the majority of United States immigration courts and the BIA for determining the existence of a PSG relies upon a single approach (the immutability test). This approach, which includes the two requisites of social distinction and particularly, has raised the bar for attaining asylum, making it even more difficult for those who fear persecution by private actors.

II. REANALYZING IMMUTABILITY

The addition of the two extra requirements that go beyond what *Acosta* formulated appear to have set aside the immutability test. Furthermore, none of the analyses consider the immutability of certain social groups. Although barely recognized by the overruled *A-R-C-G* decision, local structural circumstances may be analyzed when determining immutability.

The UNCHR’s alternate approaches may be a solution to this problem. If applied in the United States, after finding that an individual lacks an unchangeable characteristic, or one fundamental to their identity, a court’s analysis would proceed to a determination of whether the claimed group is socially cognizable; it would end there. However, there might be other reasons why this approach has been transformed into one with an extremely high bar. One of these reasons is the possibility of making a determination so broad that it could become a “catch-all” for all groups. That would, in turn, raise a concern about admitting aliens to the country without any type of filter.

The current tendency of the BIA and the federal courts is to narrow the particular social group analysis in asylum cases by adding elements to the immutability analysis, such as the confusing social visibility and particularity tests. As a result of raising the bar by requesting asylum seekers to prove their persecutors’ motives and the government inability or unwillingness to protect them, these cases are harder and harder to win. For that, the *Acosta* test should be reconsidered. Specifically, the immutability element should be redefined and reworked since immutability is the first step when determining a PSG.

⁷⁶ Such is the case of the Seventh Circuit. See NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 75, at 6.

⁷⁷ Grace, 344 F. Supp. 3d at 125.

The UNCHR's definition of immutability describes it as a characteristic that *often* will be innate, unchangeable or fundamental.⁷⁸ United States case law excludes groups that lack a static characteristic. Therefore, the only option that currently exists for group members is to somehow fit into the current definition of PSG. However, in doing this, the BIA and federal courts need to consider external circumstances that make the characteristics of asylum seekers immutable. By accepting these criteria, petitioners who are members of groups threatened by local private actors could pass the immutability test. Thus, besides victims of domestic violence, individuals with certain occupations could also be considered part of a PSG.

Mr. Acosta was denied asylum on the grounds that he lacked an immutable characteristic.⁷⁹ In his case, the BIA pointed out some options he had to avoid persecution, such as changing his job or doing what his persecutors asked him to do (participating in work stoppages against the government politics)⁸⁰. The last of these options is far from reasonable since that was Acosta's reason for fleeing El Salvador. The first option includes a relocation requirement. In that sense, a petitioner must demonstrate whether he could internally relocate in order to avoid persecution.⁸¹ However, in many instances, a requirement to change an economic activity is not feasible because of local structural problems or an attempt at doing so could lead to unreasonable life conditions.

Taxi drivers, public bus drivers, truck drivers, shopkeepers, and small local business owners in Central America are subject to extortion by gangs. So far, in many of their asylum petitions, the BIA and federal appellate courts have not found their occupations to be an immutable characteristic in determining whether they belong to PSG.⁸² This is due to advocates' implied or subconscious beliefs that asylum applicants have the option to switch to professions where they are not targeted by private actors.

⁷⁸ UNITED NATIONS HUMAN RIGHTS COUNCIL -UNCHR-, HCR/GIP/02/02, 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. 11 (May, 7, 2002).

⁷⁹ Matter of Acosta, 19 I&N Dec. at 234.

⁸⁰ Acosta was the co-founder of one of five taxi cooperatives, called "Cotaxi". The members of "Cotaxi" were threatened by guerrilla members to participate in work stoppages against the government. At the same time, the government was against this type of cooperatives for believing them "too socialistic". See Matter of Acosta 19 I&N Dec. at 216.

⁸¹ U.S.C.T. 8 C.F.R. § 208.13.

⁸² See *Quinteros v. Holder*, 707 F.3d 1006 (8th Cir. 2013) (finding family members of local business owners not to be a cognizable social group); *Escobar*, 657 F.3d at 540 (finding truck drivers not to be a cognizable social group); *Melnik*, 891 F.3d at 283 (finding small business owners targeted for extortion not to be a cognizable social group).

In addition to local structural circumstances that bar many potential applicants from changing professions, United States case law is another hurdle. The majority of petitioners being excluded due to their occupation often face extortion and threats of bodily harm by criminals or gang members.⁸³ Often, extortion is considered a separate motivating factor for persecution instead of being “on account of” an immutable characteristic.⁸⁴ Some courts also view extortion as the only characteristic that binds a group, so asylum seekers in those jurisdictions are failing the PSG requirement prior to even reaching the question of persecution.⁸⁵

In *Melnik v. Sessions*, the BIA reasoned “small business owners simply have money that the criminals want...[a]bsent some demonstration of a causal link, there is no reason to infer that the threats and demands for money experienced by the respondents were made for any purpose other than enriching the extortionists, which would not constitute persecution on account of a protected ground.”⁸⁶ In this analysis, it is true that small business owners or bus drivers may be targeted because they are perceived as a source of enrichment and are easy targets for criminals. Thus, according to the BIA, if these people were to leave their jobs, they would potentially save themselves from persecution and be “safe.”

Seen from a different perspective, if a bus driver is targeted because he manages money, and it is easy to obtain that money through violence and threats, the “money element” would become an inherent characteristic of this group. As a result, extortion in and of itself is a legitimate claim of persecution. In that regard, appellate courts have treated extortion and threats collectively as a legitimate claim of persecution, and thus individuals with this type of claim could be viewed as members of a protected group.⁸⁷ If that type of ruling was uniform across the circuit courts, then the only missing element would be the immutability of those groups. Unfortunately, for many people fleeing from violence, poverty, and threats in Central America, changing occupations is not an option.

⁸³ Sofia Martinez Fernandez, *Today's Migrant Flow is Different*, THE ATLANTIC, (Jun. 26, 2018), <https://www.theatlantic.com/international/archive/2018/06/central-america-border-immigration/563744/>; Maureen Meyer and Elyssa Pachico, *Fact Sheet: US Immigration and Central American Asylum Seekers*, (Feb. 1, 2018), <https://www.wola.org/analysis/fact-sheet-united-states-immigration-central-american-asylum-seekers/>.

⁸⁴ See *Melnik*, 891 F.3d at 286-87; *Orellana-Arias v. Sessions*, 865 F.3d 476 (7th Cir. 2017); *Matter of T-M-B-*, 21 I&N Dec. 775, 779 (BIA 1997).

⁸⁵ See *Melnik*, 891 F.3d at 286-87.

⁸⁶ *Id.* at 284.

⁸⁷ *Ayala v. Sessions*, 855 F.3d 1012 (9th Cir. 2017).

Recognizing that asylum is not an appropriate type of relief for all immigrants seeking to improve their economic situations, but rather a benefit to those suffering real persecution, a petition for asylum should involve a meticulous evaluation. This evaluation needs to be made for those groups of applicants who are lacking an innate or fundamental immutable characteristic, as defined by *Acosta*, but who instead share a forced or imposed immutability.

An imposed immutability may be a characteristic that, despite a willingness to change, is not possible to alter due to local structural problems. These structural problems include extreme poverty, a lack of opportunities, and the government's inability to protect the group or provide options for its members to avoid harm. Personal barriers may also prevent an individual from changing their shared characteristic, such as their level of formal education, physical limitations, household size, etc. Although some of the factors that prevent an individual from changing a characteristic that they share with other group members, the question of whether someone should benefit from asylum be should be determine on a case-by-case basis.

For example, a taxi driver could be viewed as belonging to a cognizable group of taxi drivers whose public exposure and lack of security are targeted by gang members. In that instance, a court should be open to assessing whether the taxi driver could change his group membership, and if not, the court should also be open to examining the factors that compelled the driver to remain in the group. Reasons for staying could include the difficulty of finding another job due to the lack of job openings or the driver being rejected for other jobs, despite having proper qualifications.⁸⁸

If the asylum seeker is willing to change their situation, they should describe the actions that were taken and why they were unable to ultimately change their situation. A similar inquiry as to whether the individual could live without fear or in hiding should be made when determining whether a change in profession would be substantially detrimental to their life conditions. An unlivable wage,

⁸⁸ See LA POBREZA EN EL SALVADOR [Poverty in El Salvador], PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO (PNUD) EL SALVADOR, 1, 14 (2014), http://www.sv.undp.org/content/dam/el_salvador/docs/povred/UNDP_SV_Miradas_Pobreza_2015.pdf; ERICKA ALEJANDRA JIMENEZ RODRIGUEZ, DISCRIMINACIÓN LABORAL HACIA LOS ASPIRANTES DE PUESTOS VACANTES EN EL PROCESO DE RECLUTAMIENTO Y SELECCIÓN [Labor Discrimination towards the Applicants to Positions Available during the Recruitment and Selection Process], 31 (Nov. 2015), <http://www.repositorio.usac.edu.gt/3826/1/T%2013%282912%29.pdf><http://www.repositorio.usac.edu.gt/3826/1/T%2013%282912%29.pdf> (unpublished thesis, Universidad de San Carlos) (on file with the Universidad de San Carlos library); Kleymer Bakedano, *Los Rechazan por Vivir en Zonas de Riesgo* [They are Rejected for Living in Non-Secure Zones, LA PRENSA, (Oct. 27, 2016) <https://www.laprensa.hn/honduras/1012100-410/empresas-los-rechazan-por-vivir-en-zonas-de-riesgo>.

for example, could be substantially detrimental to one's life conditions. A fundamental requirement for this type of inquiry should entail showing the foreign government's failure to protect or provide other options for the specific group's safety.

III. PRACTICAL POINTS TO CONSIDER WHEN APPLYING THE NEW IMMUTABILITY DEFINITION

Concerns regarding how this approach will affect litigation rest on the willingness of courts to accept this new definition of immutability. Other concerns rest on how it would affect the work of advocates and what the government's response would be to this analysis.

a. Concerns regarding courts' receptiveness

To determine a court's receptiveness to this proposed change, it is necessary to first look at the criteria applied to date; the *Acosta* test has guided the PSG determination until now.⁸⁹ Contrary to the *Acosta* test, the social distinction and particularity requirements are still being tested, with some federal circuit courts rejecting them. As a result, some courts have deferred to the BIA under a theory of *Chevron* deference, while others have struck down the new requirements refusing to grant *Chevron* deference.⁹⁰

Among the courts rejecting the two new requirements were the Seventh and Second Circuits.⁹¹ The Seventh Circuit found that the social visibility test "makes no sense."⁹² As to the particularity elements, the Seventh Circuit has not explicitly rejected them. However, in *Cece v. Holder*, the court criticized the BIA's decision and established that the numerosity of a protected group has never been a per se bar to asylum. The Seventh Circuit further criticized the BIA's decision, stating that "it would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because *too many* have valid claims."⁹³ In fact, the Seventh Circuit has made it clear that it follows an *Acosta*-only formulation.⁹⁴ The Second Circuit also

⁸⁹ NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 33.

⁹⁰ *Id.* at Appendix A.

⁹¹ *Id.* at 3.

⁹² *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009).

⁹³ *Cece*, 733 F.3d at 662. This case involves the description of a particular social group of "young Albanian women living alone." *Cece*, a young Albanian women, was targeted by the leader of a prostitution ring, who followed, harassed and threatened her.

⁹⁴ NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 33, at 16.

rejected the social visibility and particularity requirements, finding them unreasonable and inconsistent with prior BIA decisions.⁹⁵

The remaining federal appellate courts have accepted the new requirements. The Ninth Circuit appears to be analyzing and applying them the most heavily. Although the Ninth Circuit accepted both social visibility and particularity, the court also mentioned they and the BIA had previously conflated the two elements. The Ninth Circuit also held that a PSG need not be homogenous, and that the persecutor's view of social visibility is the one that matters the most for a valid asylum claim.⁹⁶

Drawing from these perspectives, it may be possible to predict which courts would be more open to incorporating a new analysis of immutability and which would be reluctant to accept it. Following an *Acosta*-only analysis does not guarantee that a court would be open to accept the expansion of the immutability test. However, there is hope, especially considering that courts have established precedential decisions that analyzed and weighted external and structural factors to make PSG determinations, such as courts finding a PSG for victims of domestic violence.

It is important to note that although most jurisdictions have accepted the new requirements for analyzing whether a PSG exists, this analysis is still conducted on a case-by-case basis. This system provides a good opportunity to open the door to this new definition by offering the argument in favorable asylum cases.

Lastly, we must address that this is not a completely new analysis. To apply this new definition, courts will have to take a step further in their decisions. They need to reinstate the overruled *A-R-C-G* analysis that considered victims of non-state private actors as having a valid claim for asylum due to the foreign state unwillingness or inability to protect them. This would mean overruling in part *Matter of A-B* as to get rid of all the unnecessary and harmful dicta. If this recommendation is taken, I believe that it could actually allow for an easier determination of whether a group is socially distinct and particular enough, especially when taking into account how problematic applying these new requirements has been in the past few years since being introduced as PSG determinations.

b. Advocacy-related concerns

We should remember that it was a matter of time and tireless advocacy that took *R-A-*, and *A-R-C-G-* to finally be accepted as fitting an immutable and

⁹⁵ *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. 2011) (remanding to the BIA, after which the BIA later filed an opinion on remand titled *Matter of M-E-V-G-*).

⁹⁶ NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 33, at 3.

socially visible group. Hasty politics may sometimes push justice backwards, but time and zealous advocacy may bring back relief for those being left behind.

In regard to future advocate concerns, arguing the proposed test of this article in court should not take more than what the lawyers already need to prepare. Advocates should submit detailed country conditions and affidavits when necessary to supplement the applicant's history. When the social visibility and particularity requirements emerge, practitioners and advocates are recommended to narrow the PSG definition, have a thorough corroboration of facts, and detailed client affidavits in order to link the applicant's story to the persecution and the group claimed.⁹⁷

Currently, practitioners already make herculean efforts trying to prove the social visibility and particularity requirements. If the concept of immutability were to be expanded, all that effort could just be transferred to preparing the other analysis. This needs to be done for victims arguing imposed immutability in their countries of origin or residence. The victims claiming a PSG bearing an unchangeable or fundamental characteristic would follow the original *Acosta* formulation.

Arguing a new immutability criterion should also require a carefully crafted PSG. When doing this, a practitioner should consider current case law such as the social visibility and particularity requirements, and, of course, not making a circular definition of the PSG. The PSG should be described as one that exists independently of the persecution.⁹⁸ It is also better to describe the acts of opposition or resistance that the group shares.

Corroboration is a key factor to support a favorable finding for a PSG. This is relevant to show that structural circumstances oblige the person to remain immutable. Well-researched country conditions using reliable sources could make the difference when the decision maker analyzes the record. Practitioners are encouraged to corroborate all the information presented by the client with supporting evidence and country conditions. Practitioners should take care that what they submit is linked to the social or personal circumstances their clients are presenting. If the organization happens to have access to a multidisciplinary team, careful research on societal conditions like security, economy, etc., may heighten the chances of receiving a favorable finding to support a PSG based on imposed immutability.

Access to a multidisciplinary team may not be necessary on a day-to-day case load, but it would be recommendable when litigating a high-impact case. However, a practitioner should consider this possibility every time and should make the effort to present it if possible. This type of practice not only helps

⁹⁷ NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 75, at 14-16, 20, 23.

⁹⁸ *Id.* at 17.

build additional evidence, but it also educates the decision maker on the context, challenges, and fears other victims in similar circumstances may be facing.

Documentation and corroboration are also important to establish nexus. This is the element that establishes that the persecution is on account of the immutable characteristic.⁹⁹ Taking in consideration current case law, a practitioner should include why a PSG should be seen as a cognizable particular social group and how society perceives the group when describing the nexus. It is important to address in the nexus discussion the inability of the foreign government to protect the victim and provide them with alternatives to avoid the persecution and whether those alternatives are reasonable or not.

Evidence of policy and behavioral patterns should be included when demonstrating imposed immutability. Evidence of public policies could include showing how governmental institutions handle petitions for an order of protection and how they address other structural problems such as labor market and financial stability. The behavioral patterns could help when there is not enough information available. These patterns can also be used to demonstrate the way the persecutors act towards the PSG.

When clients are from especially vulnerable populations, such as women, LGBTQs or children, special research should be done to address the inequalities that affect them specifically. It is important to focus on the social patterns that both the society and the persecutor may demonstrate towards these particularly vulnerable populations and how the foreign society reacts towards these acts of persecution. When it comes to children, it is also important to address whether the country of origin has any specialized protection systems and, if they do, their effectiveness.

The affidavits are another important element. Declarations should address a detailed explanation of the group, the persecution, and the responses given from the governmental institutions to the client when requesting assistance from these institutions. The relationship dynamics of the client's family and community should also be included as it would help to reinforce the social visibility and petitioner's availability to change her situation. It is important to fit the facts to each of the elements presented.

In practice, it is common that the client does not feel comfortable telling their whole story, the details, or simply forgets some details. If possible, the advocate should encourage the client to look for simultaneous psychological assistance and evaluation to bolster their claim and prepare their testimony. That will help the asylum seeker to ease her stress and start to overcome her trauma. It will also have the intended consequence of a more detailed testimony. Practitioners often lack this resource. As such, it will fall onto the practitioner

⁹⁹ NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 75, at 20.

to provide enough tools and resources to the client to empower them as an individual. This should provoke a more honest testimony based on the created rapport. The advocate should avoid the revictimization of their client by making the victim only speak about her pain and persecution when necessary. This is especially important with victims that have suffered extreme harm due to violence.

c. The role of politics

Introducing a new legal analysis in the courts is always a challenge, and the ensuing decisions are usually met with skepticism, especially when it comes to political concerns. Courts and practitioners generally opt for applying an already existing standard before they expand or rethink it. Additionally, when it comes to immigration law, one of the first factors to consider is the United States Attorney General (AG), as that position is the main political arm of the asylum process.¹⁰⁰ Immigration courts and the BIA will follow the lead of the AG's determinations. Concurrently, the AG's policies will play upon the existing ideologies that predominate within the current administration. When arguing for a new analysis, it is always best practice to consider the positions and case law of federal courts and to prepare the record for a possible appeal.

The political context, public opinion, and case law are all factors that will influence a court's decision. Creating a pathway for new ideas can be difficult, but that in and of itself doesn't signify that those ideas won't be accepted. However, to make efforts worthwhile, skilled lawyering and a meticulous record must be kept. After all, change cannot occur if one does not take the first step.

CONCLUSION

United States case law only denotes one approach when it comes to immutability; its definition should be redefined. The new definition should include those petitioners claiming a PSG that lack an inherent immutable characteristic. It should include those who are unwilling, or are unable, to transform their current situation due to local structural factors. Immutability should not only be considered personal; the analysis should be deeper in order to identify structural immutability. Applying this standard will also help those victims who fit squarely within the *Acosta* test, without having to demonstrate social distinction and particularity. Plus, it will avoid the confusion and current disagreement on the definition and applicability of these new criteria.

¹⁰⁰ 8 U.S.C § 208(b)(1).

When applying the new criterion, the evidence should shift from the current social visibility and particularity requirements to the new immutability element. For that, it is important to bear in mind the court receptiveness to new criteria, advocacy strategies, and the role of politics.