Note

Social Group Semantics: The Evidentiary Requirements of "Particularity" and "Social Distinction" in Pro Se Asylum Adjudications

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In 2003, the Mara Salvatrucha (MS-13) gang threatened to kill Mauricio Edgardo Valdiviezo-Galdamez for refusing to join their gang.[1] Two-to-three times a week, gang members shot at him, yelling, "Don't run. Don't be afraid. Sooner or later you will join us."[2] Mauricio filed five separate police reports, but "he received no response from the police."[3] In September 2004, members of MS-13 kidnapped Mauricio, drove him into the mountains of Guatemala, and beat him for five hours.[4] The gang members told Mauricio that they "were no longer offering him the option of joining their gang, and had decided to kill him instead."[5] Mauricio escaped. Fearing for his life, he fled to the United States in October 2004 and applied for asylum while in removal proceedings.[6]

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1. *See* Valdiviezo-Galdamez v. Attorney Gen. of the U.S., 663 F.3d 582, 586 (3d Cir. 2011).
2. *Id.* at 587.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 586.

An asylum applicant, like Mauricio, must establish that he or she was persecuted on one of five grounds: race, religion, nationality, membership in a particular social group, or political opinion.[7] Applicants unable to claim asylum on one of the four more specific protected grounds—for instance those fleeing gang violence,[8] victims of female genital mutilation (FGM),[9] or victims of domestic violence[10]—claim asylum on the basis of membership in a particular social group. These applicants must produce evidence showing that their particular social group (1) shares an *immutable characteristic*; (2) is defined with *particularity*; and (3) is *socially distinct*.[11] Mauricio claimed he was a member of a particular social group made of "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs."[12]

Mauricio's application was denied by an Immigration Judge (IJ), appealed to the Board of Immigration Appeals (BIA), and subsequently remanded by the Third Circuit to allow the BIA to distinguish between particularity and social distinction.[13] On February 7, 2014, in *Matter of M-E-V-G-*, the BIA used Mauricio's case to "clarify" its interpretation of the particular social group standard.[14] According to the BIA, particularity defines the "outer limits" of the group's boundaries.[15] Social distinction requires the particular social group to be "perceived as a group by society."[16] The applicant has the burden of proof to produce corroborating evidence, "such as country conditions re-

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

8. *See, e.g.*, *Valdiviezo-Galdamez*, 663 F.3d at 588 (claiming "Honduran youth who have been actively recruited by gangs but have refused to join because they oppose the gangs" as a social group).

9. *See, e.g.*, *Matter of* Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) (claiming "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice" as a social group).

10. *See, e.g.*, *Matter of* A-R-C-G-, 26 I. & N. Dec. 388, 389 (B.I.A. 2014) (claiming "married women in Guatemala who are unable to leave their relationship" as a social group).

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

12. *Id.* at 228.

13. *See Valdiviezo-Galdamez*, 663 F.3d at 587–88, 608 ("[W]e are hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility.'").

14. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 229. *Matter of W-G-R-* accompanied *M-E-V-G-* as a companion case and is thoroughly discussed in Part I.B. of this Note. *See Matter of* W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014).

15. *M-E-V-G-*, 26 I. & N. Dec. at 238 (citing Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003)).

16. *Id.* at 240–42.

ports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like," demonstrating that the particular social group is socially distinct.[17] Following this discussion, the BIA denied Mauricio's asylum application because his proposed particular social group failed to satisfy these "clarif[ied]" elements of particularity and social distinction.[18]

Rather than clarifying the particular social group standard, the BIA's decision in *M-E-V-G-* creates a game of semantics that requires an applicant to navigate the fine line between social distinction and particularity. As the National Immigrant Justice Center (NIJC) suggests, an applicant cannot easily define a particular social group that satisfies both particularity and social distinction.[19] If the applicant defines her group too discretely, the group may fail to satisfy the element of social distinction because the society in question is unlikely to perceive it as a group. But an amorphous or overbroad particular social group, according to BIA precedent, fails the requirement of particularity. To avoid denial of her application due to a lack of either particularity or social distinction, the applicant must define her particular social group with calculated wording.

If the applicant succeeds in articulating an acceptable particular social group, she will still need to present evidence that the particular social group is recognizable to the society in question. This evidence—mostly in the form of expert witnesses—is largely unavailable to pro se asylum applicants.[20] As such, the BIA's current interpretations of social distinction and particularity result in unnecessarily high bars for pro se asylum applicants. Furthermore, the need for sociological evidence is inconsistent with BIA precedent, which, prior to *M-E-V-G-*, avoided defining particularity in a manner that would require

17. *Id.* at 244.

18. *Id.* at 249 (relying on *Matter of S-E-G-* and *Matter of E-A-G-* in concluding that "the applicant's membership in a particular social group was not established because he did not show that the proposed group was sufficiently particular or socially distinct").

19. *See* NAT'L IMMIGRANT JUSTICE CTR., PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF M-E-V-G-* AND *MATTER OF W-G-R-* 5 (2014) [hereinafter NIJC *M-E-V-G-* ADVISORY], https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20PSG%20Practice%20Advisory_ Final_3.4.14.pdf.

20. *See generally* Sarah R. Goodman, Note, *Asking for Too Much? The Role of Corroborating Evidence in Asylum Proceedings in the United States and United Kingdom*, 36 FORDHAM INT'L L.J. 1733 (2013) (concluding that United States evidence requirements for immigration are unrealistic given the situation of refugees).

"sociological analysis."[21]

Scholars and immigrant rights activists contend that the most effective way to reduce prejudice to pro se applicants is to eliminate the elements of particularity and social distinction from the particular social group standard.[22] Yet the opinion in *M-E-V-G-* makes clear that the BIA has no intention of abandoning these elements. Consequently, this Note proposes an alternative precedential fact-finding regime, based on the United Kingdom's Country Guidance System, to eliminate the burden on pro se applicants of producing sociological evidence in many asylum adjudications. Part I begins by evaluating the evidentiary standards of the United States and United Kingdom asylum systems. It then describes the evolution of the particular social group standard in United States case law. Part II analyzes the new undue burdens created by the elements of particularity and social distinction on pro se applicants. This analysis concludes that the implicit requirement of sociological evidence prevents pro se applicants from defining a satisfactory particular social group. Part III proposes a system of precedent-setting cases—similar to the United Kingdom's Country Guidance System—that provide standardized evidence and factual findings in certain types of asylum claims to decrease the systemic prejudices against pro se applicants. The BIA would frame these decisions around particular forms of persecution or countries, to allow the courts to compare asylum claims against predetermined, authoritative sets of country conditions.[23] Such a system overcomes the restrictively high standards of particularity and social distinction without requiring a change in the definition of particular social group.

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21. *Compare Matter of M-E-V-G-*, 26 I. & N. Dec. at 244 (requiring applicants to present "evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like" to establish "particularity"), *with Matter of* S-E-G-, 24 I. & N. Dec. 579, 585 (B.I.A. 2008) (quoting Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007)) (noting that the Second Circuit in *Ucelo-Gomez v. Mukasey* declined to find that "wealth" satisfied the "particularity" requirement, as it "would necessitate a sociological analysis as to how persons with various assets would have been viewed by others in their country").

22. *See infra* note 233 and accompanying text.

23. *See generally* CM Zimbabwe CG, [2013] UKUT 59 (IAC) (establishing country guidance for Zimbabwe political claims); MK Albania CG, [2009] UKAIT 36 (protecting Albanian lesbians); RT Sri Lanka CG, [2008] UKAIT 9 (establishing guidance for medical reports and scarring in asylum claims); Robert Thomas, *Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom*, 20 INT'L J. REFUGEE L. 489 (2008) (explaining the country guidance system in the United Kingdom).

I. THE INCREASING DIFFICULTY OF DEFINING A PARTICULAR SOCIAL GROUP

Before analyzing how the BIA's interpretation of particularity and social distinction has resulted in unreasonably high burdens for pro se applicants, it is imperative to understand how the definition has evolved. As a preface to this history, Section A provides a brief look into the inherent procedural burdens in the United States asylum procedures and the United Kingdom's solution to these problems. Section B addresses the evolution of the definition of particular social group in the United States from the inception of the immutable characteristic standard to the addition of social visibility and particularity. It then describes how the BIA changed social visibility and particularity in *M-E-V-G-* and subsequent cases.

A. UNITED STATES AND UNITED KINGDOM ASYLUM PROCEDURES

To examine the evidentiary difficulties of proving particularity and social distinction, one must first understand the inherent procedural burdens in the United States immigration system. Subsection 1 examines two barriers to asylum for pro se applicants: the lack of counsel and the evidentiary burden of proof. As this Note ultimately argues for the adoption of an alternative precedential fact-finding system, Subsection 2 surveys the United Kingdom's Country Guidance System. Later in this Note, Part III expands on this background and argues that the United Kingdom's Country Guidance System, while partially flawed, serves as an ideal template for a similar United States precedential fact-finding system.[24]

1. Asylum Law in the United States

Like many countries, the United States derives its definition of "refugee" from the 1951 Convention Relating to the Status of Refugees.[25] Indeed, the 1980 Refugee Act adopted a defi-

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24. *See infra* Part III.A.

25. *See* Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137; *see also* Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267. Some countries, such as Sweden, have expanded the definition of refugee to protect groups persecuted on account of other grounds, including gender and sexual orientation. *See, e.g.*, 4 ch. 1 § Utlänningslag (Svensk författningssamling [SFS] 2005:716) (Swed.). At least one piece of forthcoming scholarship suggests that the United States should expand its own refugee definition to encompass gender. *See generally* Tina Zedginidze, Note, *Domestic Abuse and Gang Violence Against Women: Expanding the Particular Social Group Finding in* Matter of A-R-C-G- *to Grant Asy-*

nition of refugee analogous to the Convention's definition:

> [A]ny person who is outside any country of such person's nationality. . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution *on account of race, religion, nationality, membership in a particular social group, or political opinion* . . . .[26]

To obtain asylum in the United States, applicants must persuade the adjudicator that they meet all of the elements of the above definition—including persecution on account of one of the five protected grounds. The identity of the adjudicator depends on whether or not the applicant applies for asylum affirmatively or defensively. Applicants not in removal proceedings apply *affirmatively* to United States Citizenship and Immigration Services (USCIS) and appear before an asylum officer for a non-adversarial interview.[27] Applicants in removal proceedings may apply *defensively* before an IJ as a defense to removal.[28] Unlike in affirmative asylum proceedings, removal proceedings before an IJ are adversarial and the applicant must contend against an attorney from United States Immigration and Customs Enforcement (ICE).[29]

Both affirmative and defensive proceedings present asylum applicants with numerous legal, linguistic, and economic barriers—many of which are outside the scope of this Note.[30] Moreo-

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lum to Women Persecuted by Gangs, 34 J. L. & INEQ. (forthcoming 2016) (encouraging the Department of Justice to propose legislation to incorporate gender as a sixth protected ground that could later be adopted by Congress).

26. 8 U.S.C. § 1101(a)(42) (2012) (emphasis added). *Compare id.* (providing for the five protected grounds of race, religion, nationality, membership in a particular social group, or political opinion), *with* Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137, 152 (providing for the same five protected grounds), *and* Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267 (defining "refugee" as "any person within the definition of article 1 of the Convention [Relating to the Status of Refugees]").

27. *See* 8 C.F.R. § 208.2(a) (2014); 8 C.F.R. § 208.9(b).

28. *See* 8 C.F.R. § 208.2(b).

29. *See* DEP'T OF JUST., THE IMMIGRATION COURT PRACTICE MANUAL 9 (2009) ("The Department of Homeland Security (DHS) enforces the immigration and nationality laws and represents the United States government's interests in immigration proceedings . . . . DHS is entirely separate from the Department of Justice and the Executive Office for Immigration Review. When appearing before an Immigration Court, DHS is deemed a party to the proceedings and is represented by its component, U.S. Immigration and Customs Enforcement (ICE).").

30. *See* Aguilera-Cota v. INS, 914 F.2d 1375, 1382 (9th Cir. 1990) (describing asylum seekers as "poor, illiterate people who do not speak English and are unable to retain counsel"). For a more thorough analysis of procedural burdens, see generally Rachel D. Settlage, *Affirmatively Denied: The Detri-*

ver, unlike in criminal proceedings,[31] the government does not provide affirmative or defensive asylum applicants with legal representation.[32] While the asylum application instructions provide information for obtaining pro bono counsel,[33] one study suggests only 7% of individuals in removal proceedings are actually represented by pro bono counsel or a nonprofit legal service organization.[34] In 2013, 41% of individuals appeared before the IJ without representation.[35] In affirmative proceedings before USCIS, two-thirds of asylum applicants lack representation.[36] Unfortunately for pro se applicants, representation is critical to the success of an asylum application. Applicants represented by an attorney before the IJ have a 45.6% grant rate, compared to the 16.3% grant rate for pro se individuals.[37] Without counsel, pro se applicants must rely on the asylum application instructions and pro se manuals provided by non-profit organizations—neither of which provides sufficient guidance on defining a particular social group that conforms to the expecta-

mental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers, 27 B.U. INT'L L.J. 61 (2009).

31. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that criminal defendants have a right to counsel). Removal proceedings are not criminal proceedings. As determined by the Supreme Court, "deportation is not a punishment for crime," it is a civil proceeding. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The proceeding before a United States judge . . . is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. . . . He has not, therefore, been deprived of life, liberty, or property, without due process of law, and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.").

32. *See* 8 U.S.C. § 1229a(b)(4)(A) (2012) ("[T]he alien shall have the privilege of being represented, at no expense to the Government . . . ."); U.S. CITIZENSHIP & IMMIGR. SERVS., OMB NO. 1615-0067, I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL INSTRUCTIONS 4 (2012) [hereinafter I-589 INSTRUCTIONS] ("You have a right to provide your own legal representation at an asylum interview . . . at no cost to the U.S. government.").

33. I-589 INSTRUCTIONS, *supra* note 32 (providing a phone number and website to obtain information on the availability of pro bono counsel).

34. New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 381 (2011) [hereinafter NYIRS Justice].

35. *See* U.S. DEP'T OF JUST., FY 2013 STATISTICS YEARBOOK (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf.

36. *See* Settlage, *supra* note 30, at 81.

37. *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

tions of the BIA.[38]

In addition, applicants applying for asylum on the basis of membership in a particular social group encounter evidentiary barriers—shrouded by a decade of convoluted case law[39]—that often prevent them from proving the social distinction of their particular social group before the asylum officer or the IJ.[40] The adjudicator determines the existence of a particular social group on a "case-by-case basis."[41] The applicant has the burden to produce country condition evidence—documentary or testimonial evidence describing the situation in the foreign country—that the proposed particular social group meets the criteria of an immutable characteristic, particularity, and social distinction.[42] The applicant may rely solely on testimony, but testimony "may nonetheless fail to satisfy an applicant's burden of proof."[43] As IJs and asylum officers are not country condition experts,[44] they may, and often do require, the applicant to submit corroborating evidence.[45]

Traditionally, applicants represented by counsel submit as

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38. *See* I-589 INSTRUCTIONS, *supra* note 32, at 2 (failing to list the elements of a particular social group); *see, e.g.*, CTR. FOR GENDER & REFUGEE STUDIES, PRO SE MANUAL (2013), http://cgrs.uchastings.edu/sites/default/files/CGRS_Pro_Se_DV_Manual_English_2014_FINAL.pdf (providing brief descriptions of immutable characteristic, particularity, and social visibility requirements, but only in the context of gender violence).

39. *See infra* Part I.B.

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

41. *Matter of* Acosta, 19 I. & N. Dec. 211, 227 (B.I.A. 1985), *overruled on other grounds by Matter of* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

42. *See* 8 U.S.C. § 1158(b)(1)(B)(i) (2012) ("[A]pplicant must establish . . . membership in a particular social group . . . was or will be at least one central reason for persecuting the applicant."); *Matter of M-E-V-G-*, 26 I. & N. Dec. at 244. Notably, the Federal Rules of Evidence are not binding in immigration proceedings. *See* Garry Malphrus, *Expert Witnesses in Immigration Proceedings*, 4 IMMIGR. L. ADVISOR 2–3 (May 2010); *see also* Malkandi v. Holder, 576 F.3d 906, 916 (9th Cir. 2009).

43. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM ELIGIBILITY PART IV: BURDEN OF PROOF, STANDARDS OF PROOF, AND EVIDENCE PARTICIPANT WORKBOOK 6–7 (2006) [hereinafter USCIS EVIDENCE TRAINING], http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Burden-of-Proof-Standards-Proof-Evidence-31aug01.pdf.

44. *See* Banks v. Gonzales, 453 F.3d 449, 453 (7th Cir. 2006) ("An IJ is not an expert on conditions in any given country . . . .").

45. *See* 8 U.S.C. § 1158(b)(1)(B)(ii); *see also Matter of* S-M-J-, 21 I. & N. Dec. 722, 727 (B.I.A. 1997) ("[W]here it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided . . . ."). The affirmative asylum process is more forgiving, as the asylum officer is required to research country conditions. *See* USCIS EVIDENCE TRAINING, *supra* note 43, at 23.

country condition evidence the United States Department of State Human Rights Report, news articles, witness affidavits, and personal documentation.[46] Notably, the State Department report is often given substantial weight over other evidence, despite concerns that these reports are "generalized summaries of recent country conditions"[47] and that "the [State] Department softpedals human rights violations by countries that the United States wants to have good relations with."[48] In order to rebut an IJ or BIA finding based on the State Department report the applicant will need to produce "a highly credible independent source of expert knowledge."[49] If the applicant fails to submit the requisite evidence, the adjudicator may find that the applicant has failed to meet her burden of proof.[50]

If her application is denied by an IJ, an applicant may appeal to the BIA.[51] The BIA is not permitted to engage in de novo fact-finding,[52] though it may "tak[e] administrative notice" of "current events or the contents of official documents."[53] Under current regulations, BIA decisions are precedential only with regard to findings of law.[54] Therefore, adjudicators require each applicant to independently submit the necessary corroborating evidence to establish their claim regardless of whether or not adjudicators granted asylum in previous cases with a similar factual basis.

While experienced immigration attorneys are aware of these evidentiary requirements, USCIS makes little effort to notify pro se applicants of the true legal requirements—defined only by case law—of an asylum application based on membership in a particular social group. Neither the asylum application nor its instructions list the three elements of a particular social group—immutability, particularity, and social distinction.[55] Moreover, the application neither provides a space, nor

46. USCIS EVIDENCE TRAINING, *supra* note 43, at 17–20.

47. Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW. J.L. & SOC. POL'Y 1, 7 (2007).

48. Gramatikov v. INS, 128 F.3d 619, 620 (7th Cir. 1997).

49. *Id.* at 620.

50. *Matter of* S-M-J-, 21 I. & N. Dec. at 733 ("The 'absence of such corroborating evidence' alone supports a finding that 'an applicant has failed to meet her burden of proof.'").

51. *See* 8 C.F.R. § 1003.1(b)(9) (2014).

52. *See* 8 C.F.R. § 1003.1(d)(3)(i)–(ii).

53. *See* 8 C.F.R. § 1003.1(d)(3)(iv).

54. *See* 8 C.F.R. § 1003.1(d)(1), (g).

55. *See* I-589 INSTRUCTIONS, *supra* note 32, at 2 (failing to list the elements of a particular social group).

prompts the applicant to define their particular social group.[56] While the instructions inform the applicant to submit corroborating evidence showing country conditions and individualized facts, nowhere do they suggest the applicant should submit sociological evidence establishing the recognition of the particular social group within the society.[57]

The sheer amount of evidence that applicants must submit in every claim has led jurists to criticize the lack of precedential fact-finding in United States asylum adjudications. In *Banks v. Gonzales*, Judge Easterbrook criticized the BIA for failing to provide expert evidence. Instead, he suggested that "[w]hat the immigration bureaucracy needs is a[n] [expert] . . . for each country."[58] As Judge Easterbrook noted, while the individualized facts of a particular social group claim vary from applicant-to-applicant, the overall country conditions and recognition of the group often do not:

> Many disputes about asylum are recurring and could be resolved once and for all by the Secretary of Homeland Security, the Attorney General, and their delegates . . . . While Taylor ruled Liberia, all ethnic Krahns (and Unity Party supporters) should have been treated the same way. Similarly, adherents to the Ahmadi sect either are or are not persecuted in Pakistan . . . . Many asylum claims similarly could be handled by the sort of detailed regulations that the Social Security Administration uses. Others, of the kind that arise less frequently, could be resolved with the assistance of country specialists along the lines of vocational experts. What cannot continue, however, is administrative refusal to take a standing on recurring questions, coupled with the reliance on IJs to fill in for the expertise missing from the record. The immigration bureaucracy has much to learn from the experience of other federal agencies that handle large numbers of comparable claims with individual variations.[59]

As Judge Easterbrook recognized, the United States immigration system needs some form of precedential fact-finding that allows for speedy adjudication of similar claims and eliminates the need for individual applicants to produce the sociological evidence necessary to satisfy the element of social distinction.

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56. *See id.* at 4.

57. *See id.* at 7–8 ("You must submit reasonably available corroborative evidence showing (1) the general conditions in the country from which you are seeking asylum, and (2) the specific facts on which you are relying to support your claim. . . . Supporting evidence may include but is not limited to newspaper articles, affidavits of witnesses or experts, medical and/or psychological records, doctors' statements, periodicals, journals, books, photographs, official documents, or personal statements or live testimony from witnesses or experts.").

58. Banks v. Gonzales, 453 F.3d 449, 454 (7th Cir. 2006).

59. *Id.* at 454–55.

2. The United Kingdom Country Guidance System

The similarities between United States and United Kingdom asylum law facilitate easy comparison. Like the United States, the United Kingdom derives its definition of "refugee" from the 1951 Refugee Convention.[60] However, unlike the United States, the United Kingdom engages in precedential fact-finding through its Country Guidance System. Reminiscent of Judge Easterbrook's own frustrations, Lord Justice Sedley, Judge of the Court of Appeals of England and Wales, explained that asylum law is not simply the application of facts to a legal standard, but "a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose."[61] Such an appraisal is unwieldy when an adjudicator must engage in this "global appraisal" on a case-by-case basis. As such, the United Kingdom's Country Guidance System addresses some of the evidentiary concerns for pro se asylum applicants discussed above in Subsection 1.

Adopted in 2003, the Country Guidance System produces decisions that advise lower courts "on how asylum appeals from a particular country are to be approached by decision makers."[62] The process of issuing a Country Guidance Determination begins when the United Kingdom Asylum and Immigration Tribunal (AIT) identifies an appeal that requires broader country condition examination.[63] The Tribunal frames the issue in one of three ways: (1) the conditions of a particular country; (2) the risk of a particular group; or (3) risk factors used to evaluate whether an individual is at risk of persecution.[64]

Once the Tribunal frames the issue, the asylum appellant and the Home Office present substantial country condition evidence and country-specific experts before a three judge panel.[65]

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60. *Accord* The Refugee or Person in Need of International Protection (Qualification) Regulations, (2006) § 2 (UK) ("'[R]efugee' means a person who falls within Article 1(A) of the Geneva Convention . . . ."); *UNHCR—About Us*, UNHCR, http://www.unhcr.org/pages/49c3646c2.html (last visited Oct. 15, 2015) (referring to the 1951 Refugee Convention as the "Geneva Refugee Convention"). This Note avoids using the term Geneva Convention to avoid confusion with the other Geneva Conventions.

61. R v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah [1997] Imm.A.R. 145, 153 (HC).

62. Thomas, *supra* note 23, at 490.

63. *See id.* at 502–03.

64. *See id.* at 511–14.

65. *See id.* at 494.

Procedurally, it is difficult to classify the presentation of country condition evidence in the United Kingdom system as strictly adversarial or inquisitorial. Professor Robert Thomas, an expert on the United Kingdom asylum process, best explains the difference between traditional appellate decisions and Country Guidance Determinations:

> Traditionally, this has been an adversarial appellate jurisdiction . . . . However, the task of producing authoritative country guidance is of a different nature from that of determining individual asylum appeals. If the Tribunal were strictly confined to the body of evidence presented before it by the parties, even though it was aware that this omitted other potentially material evidence, then this would undermine the whole purpose of producing authoritative guidance. The country guidance exercise can therefore assume "something of an inquisitorial quality, although the adversarial structure of the appeal procedure of course remains." In this respect, much may depend upon the awareness of the senior judges of recent country information and the discussion between the parties at pre-hearing reviews concerning the sources of country information to be relied upon.[66]

Following this mixed adversarial-inquisitorial fact-finding exercise, the Tribunal issues an opinion with broad findings of fact applicable to asylum claims stemming from similar circumstances.[67] Unlike BIA decisions in the United States, the factual findings of a United Kingdom Country Guidance Determination are binding on lower courts, as long as it "(a) relates to the country guidance issue in question; and (b) depends upon the same or similar evidence."[68] Appellants may challenge the Country Guidance Determination as an error of law or based on evidence that it has been "superseded by a change in country conditions or that new evidence has come to light."[69]

While the Country Guidance System promotes efficiency and consistency in asylum adjudications, it is not without its faults. First, practitioners have attacked the Tribunal's failure to explain how it weighs evidence when making its decision.[70]

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66. *Id.* at 509.

67. *Cf.* CM Zimbabwe CG, [2013] UKUT 59 (IAC) (examining country guidance for Zimbabwe political claims); AMM Somalia CG, [2011] UKUT 445 (IAC) (discussing asylees from Somalia); MK Albania CG, [2009] UKAIT 36 (establishing country guidance for Albanian lesbians); RT Sri Lanka CG, [2008] UKAIT 9 (establishing guidance for medical reports and scarring in asylum claims).

68. TRIBUNALS JUDICIARY, PRACTICE DIRECTIONS: IMMIGRATION & ASYLUM CHAMBERS OF THE FIRST-TIER TRIBUNAL AND THE UPPER TRIBUNAL ¶ 12.2 (2014) (U.K.) [hereinafter PRACTICE DIRECTIONS], http://www.judiciary.gov.uk/wp-content/uploads/2014/11/revised-pd-3112014.pdf.

69. Thomas, *supra* note 23, at 505.

70. *See* IMMIGRATION ADVISORY SERV., COUNTRY GUIDELINE CASES: BENIGN AND PRACTICAL? 38–39 (Colin Yeo ed., 2005), http://www.freemovement

Second, the risks of poor decision-making in a country guidance case are higher than in an individualized claim, as the resulting precedent has the potential to affect an entire class of asylum seekers.[71] Finally, country guidance decisions issued to date tend to be negative to the asylum appellant—limiting rather than expanding protection for future applicants.[72] These flaws, however, do not deprive the United Kingdom Country Guidance System of the protection it provides to asylum applicants otherwise unable to produce thorough country condition evidence.

B. THE DEVELOPMENT OF THE DEFINITION OF PARTICULAR SOCIAL GROUP

Since 2006, the BIA has continued to tighten the requirements of the particular social group formulation.[73] Subsection 1 discusses the BIA's adoption of the *Acosta* standard in 1985, which required members of the particular social group to share a common immutable characteristic.[74] For two decades, federal circuit courts and other common law nations embraced the *Acosta* standard.[75] As Subsection 2 reveals, in 2006 the BIA began requiring applicants to define their particular social group with particularity and social visibility. Legal scholars and the Seventh Circuit have resisted the BIA's addition of these elements. Finally, Subsection 3 recounts the BIA's more recent decisions in 2014—*Matter of M-E-V-G-*, *Matter of W-G-R-*, and *Matter of A-R-C-G-*—applying the newest elements to the particular social group formulation. Despite the hopeful outcome in *A-R-C-G-*, the BIA's most recent particular social group case, the reformulation of "particularity" and "social distinction" in *M-E-V-G-* and *W-G-R-* erects evidentiary barriers that cannot be overcome by pro se applicants.

.org.uk/wp-content/uploads/2012/01/Country-Guideline-cases-benign-and-practical.pdf.

71. *See* Thomas, *supra* note 23, at 498.

72. *See id.* at 523.

73. *See infra* Part I.B.2–3.

74. *See Matter of* Acosta, 19 I. & N. Dec. 211, 232–33 (B.I.A. 1985), *overruled on other grounds by Matter of* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

75. See Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 48–49 (2008).

1. The *Acosta* Standard

At the 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, the Swedish delegation urged the inclusion of particular social groups in the refugee definition. They noted, "[s]uch cases existed, and it would be as well to mention them explicitly."[76] As previously mentioned, the United States implemented the 1951 Refugee Convention definition—and its five protected grounds—in the 1980 Refugee Act. Yet neither the 1951 Convention nor the 1980 Refugee Act explicitly define particular social group.[77] Furthermore, the legislative history surrounding the 1980 Refugee Act ignores the meaning of particular social group, favoring instead wholesale adoption of the 1951 Refugee Convention's definition.[78] Without this statutory or legislative guidance, the BIA and circuit courts have struggled to develop a consistent—and coherent—definition of particular social group.

In 1986, *Matter of Acosta* presented the BIA with the first opportunity to interpret the phrase "particular social group." The BIA—citing the lack of guidance and using the interpretative canon of *ejusdem generis*[79]—adopted the immutable characteristic standard.[80] Under the immutable characteristic standard, members of a particular social group must share "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[81] Support-

76. *See Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, UNHCR (Nov. 26, 1951), http://www.unhcr.org/3ae68cda4.html.

77. *See* 8 U.S.C. § 1101(a)(42) (2012); Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137.

78. *See Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, *supra* note 76; Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 513–14 (1993).

79. *See Matter of Acosta*, 19 I. & N. Dec. at 233 ("We find the well-established doctrine of ejusdem generis, meaning literally, 'of the same kind,' to be most helpful in construing the phrase 'membership in a particular social group.' That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words . . . . Thus, the other four grounds of persecution enumerated in the Act and the Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution." (citation omitted)), *overruled on other grounds by Matter of* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

80. *See id.* at 232–34.

81. *Id.* at 233. For a more thorough analysis of the *Acosta* standard, see generally REGINA GERMAIN, ASYLUM PRIMER 50–58 (6th ed. 2010); IRA J.

ers of the *Acosta* standard favored its extension of protection to otherwise unprotected groups, such as women and homosexuals.[82] Critics attacked its denial of protection to "groups who may well be targets of persecution based on their associations that are widely recognized in society."[83] Despite these criticisms, the majority of federal circuits embraced the new standard.[84]

The *Acosta* standard resulted in expansive protection for large and otherwise unprotected groups. For example, in *Hassan v. Gonzales*, the Eighth Circuit accepted "Somali females" as a particular social group, finding that "all Somali females have a well-founded fear of persecution . . . given the prevalence of FGM."[85] *Hassan* is perhaps the broadest particular social group an appellate court has ever adopted, but remains illustrative of the potential protection offered by the *Acosta* standard. More representative of common particular social groups during the *Acosta* era, the BIA and circuit courts have also accepted particular social groups defined by homosexuality,[86] forced marriage,[87] ethnicity,[88] and a variety of other immu-

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KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 559–67 (13th ed. 2012).

82. James C. Hathaway & Michelle Foster, Discussion Paper, *Membership of a Particular Social Group*, 15 INT'L J. REFUGEE L. 477, 481–82, 486–90 (2002) (providing pros and cons of the immutable characteristic test).

83. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group*," *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 263, 295 (Erika Fuller et al. eds., 2003) (suggesting groups such as students, union members, and professionals will not be protected under the immutable characteristic standard). Adjudicators frequently refuse to recognize "particular social groups" defined by employment. *Cf.* Alvarez-Flores v. INS, 909 F.2d 1, 7 (1st Cir. 1990) (denying asylum to a "campesino cheesemaker").

84. *See, e.g.*, Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005); Castellano-Chacon v. INS, 341 F.3d 533, 546–48 (6th Cir. 2003); Lwin v. INS, 144 F.3d 505, 511 (7th Cir. 1998); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994); Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993); Alvarez-Flores v. INS, 909 F.2d 1, 7 (1st Cir. 1990). *But see* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1574–75 (9th Cir. 1986) (adopting the "voluntary associational relationship" test). Since *Sanchez-Truijllo*, the Ninth Circuit has shifted more towards the *Acosta* standard. *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000), *vacated on other grounds*, 409 F.3d 177 (2006); GERMAIN, *supra* note 81, at 52.

85. *See* Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007). *But see Safaie*, 25 F.3d at 640 (rejecting "Iranian women" as a particular social group for being "overbroad").

86. *See, e.g.*, *Matter of* Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

87. *See* Gao v. Gonzales, 440 F.3d 62, 70 (2d Cir. 2006).

88. *See, e.g.*, Ahmed v. Keisler, 504 F.3d 1183, 1198–99 (9th Cir. 2007) (finding Bihari living in Bangladesh to be a particular social group); Ali v.

table characteristics.[89] The size of the population of the group remained irrelevant, so long as the particular social group was grounded so deeply in the identity of the individual it would be impossible or unreasonable to suggest it should be changed to avoid persecution.

As the critics feared, the BIA and circuit courts rejected particular social group claims that demonstrated persecution, but failed to meet the immutable characteristic standard. For example, the First Circuit rejected "campesino cheesemakers" as a particular social group, even though "cheesemakers are especially likely to be subjected to guerilla demands for food because the hard cheese . . . is resistant to spoilage."[90] Deferring to the BIA, the First Circuit reasoned employment is something that an individual has "the power to change."[91] Thus, *Acosta* did not open the floodgates to any individual able to cognizably allege persecution. Despite these limitations, for two decades *Acosta* broadened protection to asylum seekers while providing a coherent standard for adjudicators to apply.

2. The Addition of the Particularity and Social Visibility Tests

Most common law countries—in particular Canada, New Zealand, and the United Kingdom—adopted some formulation of the immutable characteristic standard derived from *Acosta*.[92] Australia, however, formulated a social perception test that examined "whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart

Ashcroft, 394 F.3d 780, 784–87 (9th Cir. 2005) (holding gang-rape of asylum seeker was on account of her membership in the Midgan clan of Somalia); Mihalev v. Ashcroft, 388 F.3d 722, 726 (9th Cir. 2004) (holding Bulgarian national of Roma descent constituted a particular social group).

89. *See, e.g.*, *Lwin*, 144 F.3d at 510–12 (holding that parents of Burmese student dissidents constituted a particular social group); Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family."). For a substantial list of additional cases finding the existence of a particular social group, see KURZBAN, *supra* note 81, at 563–69.

90. Alvarez-Flores v. INS, 909 F.2d 1, 7 (1st Cir. 1990). However, prior to *Acosta*, there is at least one recorded grant of asylum for persecution on account of "cheesemaking." *Id.*

91. *Matter of* Acosta, 19 I. & N. Dec. 211, 234 (B.I.A. 1985) (finding that taxi drivers could not constitute a particular social group, because it is within the ability of the individual to change his livelihood so as to avoid persecution), *overruled on other grounds by Matter of* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

92. *See* Marouf, *supra* note 75; *see also* Canada (Attorney-General) v. Ward, [1993] 2 S.C.R. 689; Aleinikoff, *supra* note 83, at 294.

from society at large."[93] In an effort to unify the immutable characteristic and the social perception tests, the U.N. High Commissioner for Refugees (UNHCR) proposed the following definition of particular social group in its 2002 Guidelines on International Protection:

> [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.[94]

The BIA first toyed with the idea of adding a social perception element to the *Acosta* standard as early as 1999—even before the publication of the UNHCR Guidelines. In *Matter of R-A-*, the BIA rejected the particular social group of "Guatemalan women who have been intimately involved with Guatemalan companions, who believe that women live under male domination."[95] Skeptical of this particular social group definition, the BIA feared the group was created for the purposes of the asylum application and questioned "whether anyone in Guatemala perceives this group to exist in any form whatsoever."[96] The BIA concluded that "there must also be some showing of how the characteristic is understood in the alien's society, such that we, in turn, may understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm."[97] Foreshadowing an eventual expansion of the particular social group definition, the BIA defended its inclusion of a social perception factor:

> We never declared, however, that the starting point for assessing social group claims articulated in *Acosta* was also the ending point. The factors we look to in this case, *beyond* Acosta's "*immutableness*" *test, are not prerequisites*, and we do not rule out the use of additional consideration that may properly bear on whether a social group should be recognized in an individual case.[98]

It is clear that at this point in time the BIA did not intend to mandate the inclusion of social perception as a required ele-

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93. 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, ¶ 7, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR Guidelines]; *see also Applicant A. v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 (Austl.) (rejecting the BIA's reasoning in *Matter of Acosta*).

94. UNHCR Guidelines, *supra* note 93, ¶ 11.

95. *See In re* R-A-, 22 I. & N. Dec. 906, 917 (B.I.A. 1999).

96. *Id.* at 918.

97. *Id.*

98. *Id.* at 917 (emphasis added).

ment for the particular social group standard. In 2001, the Attorney General vacated *R-A-*,[99] and the social perception test remained dormant for five years.

In 2006, following the publication of the UNHCR Guidelines in 2002, the BIA reinterpreted the particular social group standard to explicitly include the elements of social visibility and particularity. The BIA discussed these elements for the first time in *Matter of C-A-* while considering a proposed particular social group of "noncriminal informants."[100] First, the BIA determined that "noncriminal informants" "was too loosely defined."[101] "'[N]oncriminal informants' could potentially include persons who passed along information concerning any numerous guerrilla factions or narco-trafficking cartels currently active in Colombia . . . . [I]t is important to know the persons between whom the information is being provided, as well as the nature of the information . . . ."[102] Next, the BIA discussed social visibility, noting that "visibility is an important element"[103] according to the UNHCR Guidelines.[104] The BIA found that "noncriminal informants" was not socially visible, because informants remain unknown until they are discovered.[105]

Echoing *C-A-*, the BIA reaffirmed its adoption of particularity and social visibility in *Matter of A-M-E- & J-G-U-* when it declined to find that "affluent Guatemalans" met either standard.[106] The BIA held that the particular social group failed the social visibility element because criminals "even target persons with relatively modest resources or income . . . or other forms of wealth" and, therefore, "affluent Guatemalans" are not at a greater risk of crime than the general population.[107] Moreover, the BIA determined that the particular social group was not defined with particularity because "wealthy" and "affluent" are "too amorphous to provide an adequate benchmark for determining group membership."[108] "Depending upon one's perspective, the wealthy may be limited to the very top echelon [or]

99. *See In re* R-A-, 22 I. & N. Dec. 906 (A.G. Jan. 19, 2001).
100. *See Matter of* C-A-, 23 I. & N. Dec. 951, 957 (B.I.A. 2006).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 960.
105. *Id.*
106. *See Matter of* A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 69–71 (B.I.A. 2007).
107. *Id.* at 74–75.
108. *Id.* at 76.

might include small business owners living a relatively comfortable existence in a generally impoverished country."[109]

A year later, in 2008, the BIA developed its most comprehensive articulation of social visibility and particularity in *Matter of S-E-G-*. First, the BIA defined the test for particularity as "whether the proposed description is sufficiently 'particular,' or is 'too amorphous . . . to create a benchmark for determining group membership.'"[110] Importantly, the BIA relied on *Ucelo v. Mukasey*, which held "wealth" and "affluence" to be too subjective, because they would "necessitate a *sociological analysis* as to how persons with various assets would have been viewed by others in their country."[111] Turning to social visibility, the BIA determined that the group "should generally be recognizable by others in the community and considered in the context of the country of concern and the persecution feared."[112] Departing from its initial statement in *R-A-* that factors "beyond *Acosta's* 'immutableness' test, are not prerequisites,"[113] *S-E-G-* affirmed that particularity and social visibility are required elements, as opposed to factors, of the particular social group standard.[114]

Legal scholars and the UNHCR have suggested that the BIA misinterpreted the UNHCR guidelines in its adoption of "particularity" and "social visibility" in *C-A-*, *A-M-E- & J-G-U-*, and *S-E-G-*.[115] Under the UNHCR Guidelines, only in the absence of an immutable characteristic should "further analysis . . . be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."[116] Legal scholars, the United Kingdom, and the UNHCR have read the UNHCR definition to permit alternative tests, as opposed to dual requirements.[117] Both legal scholars and the UNHCR ad-

109. *Id.*

110. *Matter of* S-E-G-, 24 I. & N. Dec. 579, 582 (B.I.A. 2008) (emphasis added) (citing Davila-Mejia v. Mukasey, No. 07-2567, 2008 WL 2630085, at *3 (8th Cir. July 7, 2008)).

111. *Id.* at 585–86 (citing Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007)).

112. *Id.* at 586.

113. *In re* R-A-, 22 I. & N. Dec. 906, 918–20 (B.I.A. 1999).

114. *See* Marouf, *supra* note 75, at 66; *see also A-M-E- & J-G-U-*, 24 I. & N. Dec. 69; *Matter of* C-A-, 23 I. & N. Dec. 951, 957–60 (B.I.A. 2006).

115. *See* Marouf, *supra* note 75, at 63 ("[A]lthough the BIA referenced the UNHCR Guidelines in both C-A- and A-M-E-, its use of 'social visibility' did not coincide with the 'public perception' approach described above; nor did the BIA apply the UNHCR's approach correctly.").

116. UNHCR Guidelines, *supra* note 93, ¶ 13.

117. *See* Sec'y of State for Home Dep't v. K, [2006] 1 AC 412, 432 (U.K.); Brief of the Office of the United Nations High Commissioner for Refugees as

vocated a return to the *Acosta* standard—or at least the abolition of social visibility as a required element.[118]

Many circuit courts deferred to the BIA's interpretation and adopted particularity and social visibility without issue.[119] The Seventh and Third Circuits, however, remained skeptical of adopting social visibility as part of the particular social group standard. In *Gatimi v. Holder*, Judge Posner of the Seventh Circuit refused to accord deference to the BIA's interpretation of particular social group because "it makes no sense; nor has the Board attempted . . . to explain the reasoning behind the criterion of social visibility."[120] Posner quipped that the only way that asylum applicants could satisfy the social visibility element is by "pinning a target to their backs."[121]

In 2011, the Third Circuit reviewed Mauricio Edgardo Valdiviezo-Galdamez's particular social group for the second time in *Valdiviezo-Galdamez v. Attorney General of the United States*.[122] Reviewing particular social groups accepted under the *Acosta* standard, Chief Judge McKee noted, "If a member of any of these groups applied for asylum today, the BIA's 'social visibility' requirement would pose an insurmountable obstacle to refugee status, even though the BIA has already held that membership in any of these groups qualifies for refugee sta-

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Amicus Curiae at 5–6, *Matter of* Thomas, No. A75-597-033 (2007), [hereinafter UNHCR Brief] http://www.refworld.org/docid/45c34c244.html; Marouf, *supra* note 75, at 62.

118. *See* UNHCR Brief, *supra* note 117, at 10 ("The Board in *Acosta* did not require either a 'social perception' or 'social visibility' test, and the UNHCR would caution the Board against adopting such a rigid approach which may disregard groups that the Convention is designed to protect."); Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12-10 IMMIGR. BRIEFINGS 1, 2 (2012) ("[T]his interpretation patently misconstrues the [UNHCR] guidelines."); Marouf, *supra* note 75, at 103 (arguing that the *Acosta* standard reflects the basic principles of the 1951 Convention); Elyse Wilkinson, Comment, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 417 (2010) ("[W]hat is most important is that the BIA clarify that social visibility is not a requirement.").

119. *See, e.g.*, Ramos-Lopez v. Holder, 563 F.3d 855, 859–62 (9th Cir. 2009); Scatambuli v. Holder, 558 F.3d 53, 58–60 (1st Cir. 2009); Davila-Mejia v. Mukasey, 531 F.3d 624, 628–29 (8th Cir. 2008); Ucelo-Gomez v. Mukasey, 509 F.3d 70, 72–73 (2d Cir. 2007); Castillo-Arias v. Attorney Gen. of the U.S., 446 F.3d 1190, 1194–95, 1197 (11th Cir. 2006).

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

121. *Id.* at 616.

122. Valdiviezo-Galdamez v. Attorney Gen. of the U.S., 663 F.3d 582, 588 (3d Cir. 2011).

tus . . . ."[123] While the Third Circuit had previously accorded the BIA *Chevron* deference for its interpretation of "particular social group" in *Acosta*, Chief Judge McKee declared that "this did not give the agency license to thereafter adjudicate claims of social group status inconsistently, or irrationally."[124] Hence, the Third Circuit held that the requirement of social visibility was not entitled to *Chevron* deference, because it was inconsistent with prior BIA decisions.[125] The Third Circuit remanded the case to the BIA for further review.[126]

3. Matter of M-E-V-G- and Matter of W-G-R-

Following the Third Circuit's decision in *Valdiviezo-Galdamez*, the BIA reconsidered Mauricio's case in *Matter of M-E-V-G-*.[127] In doing so, it rejected his particular social group defined as "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs."[128] On the same day it announced *M-E-V-G-*, the BIA also decided *Matter of W-G-R-*.[129] In *W-G-R-* the BIA denied asylum to an applicant claiming persecution on account of membership in a particular social group defined as "former members of the Mara 18 gang in El Salvador who have renounced their gang membership."[130] Together, *M-E-V-G-* and *W-G-R-* reformulated the BIA's interpretation of the elements of particularity and social distinction, and the evidentiary requirements for proving social distinction.[131]

According to the BIA, in order to satisfy the element of particularity, a particular social group must "be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective."[132] Rather, "[a] particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group."[133] Adjudicators must consider particularity "in the context of the society out of which the claim for asylum arises."[134]

123. *Id.* at 604.
124. *Id.*
125. *Id.* at 603–04.
126. *Id.* at 612.
127. *Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 228–29 (B.I.A. 2014).
128. *Id.* at 228.
129. *Matter of* W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014).
130. *Id.* at 209.
131. *Matter of M-E-V-G-*, 26 I. &. N. Dec. at 239–44.
132. *Id.* at 239.
133. *Matter of W-G-R-*, 26 I. & N. Dec. at 214.
134. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 238.

Following its discussions of particularity in *M-E-V-G-* and *W-G-R-*, the BIA moved to reformulate its understanding of social visibility. Correcting Posner's interpretations in *Gatimi*, the BIA noted "[l]iteral or 'ocular' visibility is not . . . a prerequisite."[135] Therefore, the BIA rebranded "social visibility" as "social distinction" to eliminate any such confusion.[136] Instead of "ocular visibility," social distinction requires a particular social group to "be perceived as a group by society."[137] The perception must be of the society in question—not solely the persecutor's perception.[138] Though it acknowledged some overlap, the BIA disagreed with the Third Circuit's holding that there is no difference between particularity and social distinction.[139] The BIA clarified that particularity addresses the "'outer limits' of a group's boundaries," while social distinction addresses whether "society would perceive a proposed group as sufficiently separate or distinct."[140]

Following this analysis, the BIA disposed of the claim that such an interpretation of particular social group would result in "significant burdens on the applicant."[141] The BIA drew no distinction between the evidentiary requirements of an applicant who claims persecution based on political opinion and one who claims persecution based on membership in a particular social group.[142] "[T]here must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristics to be a group."[143] As such, the applicant may establish social distinction through corroborating evidence "such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like."[144]

Of the two cases, *W-G-R-* offers the more robust application

135. *Id.*

136. *Id.* at 240.

137. *Id.*

138. *Id.* at 242–43 ("Only when the inquiry involves the perception of the society in question will the 'membership in a particular social group' ground of persecution be equivalent to the other enumerated grounds of persecution.").

139. *Id.* at 240; *see also* Valdiviezo-Galdamez v. Attorney Gen. of the U.S., 663 F.3d 582, 608 (3d Cir. 2011) (stating the Court was "hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility'").

140. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 241 (citing Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003)).

141. *Id.* at 244.

142. *Id.*

143. *Matter of* W-G-R-, 26 I. & N. Dec. 208, 217 (B.I.A. 2014).

144. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 244.

of the reformulated particularity and social distinction elements.[145] In assessing particularity, the BIA found "former gang membership" was too amorphous, because it "could include persons of any age, sex, or background."[146] "Former gang membership" was "not limited to those who have had a meaningful involvement with the gang" and included those who were members of the gang for a short period of time or those considered a "long-term, hardened gang member."[147] Furthermore, the respondent provided insufficient evidence to establish that "Salvadoran society considers former gang members . . . a distinct social group."[148] The BIA rejected a report produced by Harvard Law School's International Human Rights Clinic "stating that there is a societal stigma against former gang members because of their tattoos."[149] Instead, citing the 2008 State Department report for El Salvador, the BIA concluded that Salvadoran society does not distinguish between former and active gang members.[150]

Commentators criticized the BIA's discussion of particularity and social distinction. According to the NIJC, particularity "effectively precludes the use of common parlance labels to describe a [particular social group], even as the social distinction test requires that a [particular social group] be limited by parameters a society would recognize."[151] Others claimed the BIA's reinterpretation is contradictory to *Acosta* and presents "equitable challenges" to asylum applicants.[152] These advocates continue to argue for a return to the *Acosta* standard.[153]

Since *M-E-V-G-* and *W-G-R-*, the BIA has applied its reformulated particularity and social distinction elements in only one precedential case. In *Matter of A-R-C-G-*, the only BIA case to apply *M-E-V-G-* and *W-G-R-*, the BIA recognized "married women in Guatemala who are unable to leave their relation-

145. While the BIA claims to apply these reformulated elements in *Matter of M-E-V-G-*, the BIA essentially cites its analysis in *Matter of S-E-G-* and *Matter of E-A-G-* and the opinion contains almost no new discussion. *Id.* at 249.

146. *Matter of W-G-R-*, 26 I. & N. Dec. at 221.

147. *Id.*

148. *Id.* at 222.

149. *Id.*

150. *Id*.

151. NIJC *M-E-V-G-* ADVISORY, *supra* note 19.

152. See Benjamin Casper et al., Matter of M-E-V-G- *and the BIA's Confounding Legal Standard for "Membership in a Particular Social Group*," 14-06 IMMIGR. BRIEFINGS 1, 19 (2014).

153. Brief of Amicus Curiae the American Immigration Lawyers Association at 18, *Matter of* M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014).

ship" as a cognizable particular social group.[154] *A-R-C-G-* offered an insight into the kind of evidence that may help prove social distinction. Cultural evidence of family violence and ineffective domestic violence laws persuaded the BIA that the proposed particular social group was socially distinct.[155] While *A-R-C-G-* is the first BIA decision to accept a particular social group since the inception of the particularity and social distinction elements, it is not evidence that the BIA and circuit courts are loosening the rigidity with which they apply these elements.[156]

Circuit court decisions have been limited since *M-E-V-G-* and *W-G-R-* but widely deferential to the BIA.[157] The First Circuit,[158] Second Circuit,[159] Fourth Circuit,[160] Fifth Circuit,[161] Eighth Circuit,[162] Ninth Circuit,[163] Tenth Circuit,[164] and Eleventh Circuit,[165] have favorably cited to *M-E-V-G-* or *W-G-R-* and applied the reformulated particularity and social distinction elements. In many of these cases, the circuit court deferred to the BIA's interpretation and remanded the case to the BIA for further consideration consistent with *M-E-V-G-* and *W-G-R-*.[166] At the time of writing, the Third Circuit and Seventh Circuits have not yet released an opinion analyzing either *M-E-V-G-* or *W-G-R-*.

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154. *Matter of* A-R-C-G-, 26 I. & N. Dec. 388, 388–89 (B.I.A. 2014).

155. *See id.* at 394.

156. *Compare Matter of A-R-C-G-*, 26 I. & N. Dec. at 392–95 (recognizing "married women in Guatemala who are unable to leave their relationship"), *with Matter of M-E-V-G-*, 26 I. & N. Dec. at 249–53 (declining to recognize the proposed particular social group "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs").

157. *See* Sabrina Damast, *How To Define Your Particular Social Group: Case Law Developments After* Matter of W-G-R- *and* Matter of M-E-V-G-, 20 BENDER'S IMMIG. BULL. 272, 277 (2015).

158. *See* Paiz-Morales v. Lynch, No. 14-1182, 2015 WL 4560270, at *2–3 (1st Cir. July 29, 2015).

159. *See* Paloka v. Holder, 762, F.3d 191, 195 (2d Cir. 2014) (granting the BIA's interpretation in *M-E-V-G- Chevron* deference).

160. *See* Solomon-Membreno v. Holder, No. 13-1491, 578 F. App'x 300, 304 (4th Cir. 2014).

161. *See* Villalobos-Ramirez v. Lynch, 608 F. App'x 261 (5th Cir. 2015).

162. *See* Juarez Chilel v. Holder, 779 F.3d 850, 855 (8th Cir. 2015).

163. *See* Pirir-Boc v. Holder, 750 F.3d 1077, 1081–82 (9th Cir. 2014).

164. *See* Rodas-Orellana v. Holder, 780 F.3d 982, 992 (10th Cir. 2015) (concluding that *M-E-V-G-* and *W-G-R-* are "consistent with [the court's] past interpretation of social visibility").

165. Chavez v. Attorney Gen. of the U.S., No. 13-15486, 571 F. App'x 861, 864–65 (11th Cir. 2014).

166. *See* Damast, *supra* note 157, at 276 n.55 ("Following its decision in *Pirir-Boc*, the Ninth Circuit remanded dozens of asylum cases involving particular social groups, citing the evolving case law . . . .").

As newer circuit court cases, *A-R-C-G-* and *M-E-V-G-* imply, the BIA and circuit courts are unwilling to dispose of particularity and social distinction.[167] Scholars, NGOs, and the Third and Seventh Circuits have raised concerns that these criteria are unworkable and unduly prejudicial toward the asylum applicant. While it is difficult to know how adjudicators will apply *M-E-V-G-* and *W-G-R-*, precedent suggests the federal circuit courts will be largely deferential to the BIA's holdings. As these elements are now permanent fixtures to the particular social group formulation, the BIA must consider the evidentiary burden that particularity and social distinction impose on pro se asylum applicants.

II. PRO SE PROBLEMS PROVING "PARTICULARITY" AND "SOCIAL DISTINCTION"

Commentators have identified countless problems that social distinction and particularity pose for asylum applicants. Social distinction creates valid concerns that the United States is in violation of its international obligations.[168] Moreover, the addition of social distinction conflicts with prior BIA precedent and is therefore unworthy of *Chevron* deference.[169] A thorough discussion of these arguments is outside the scope of this Note. Instead, this section analyzes the BIA's current particular social group requirements with an eye to the difficulties presented to pro se applicants looking to prove their claim. Section A examines the problem of producing a definition that satisfies the requirement of particularity and remains recognizable to

167. *Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 228 (B.I.A. 2014) ("[We] will clarify our interpretation of the phrase 'particular social group.' We adhere to our prior interpretations of the phrase but . . . we rename the 'social visibility' element as 'social distinction.'").

168. *See generally* UNHCR Brief, *supra* note 117, at 5–10 (arguing that the BIA misinterpreted the UNHCR guidelines); Casper et al., *supra* note 152, at 20; Marouf, *supra* note 75, at 70–71 (comparing the BIA's "social visibility" interpretation to the UNHCR guidelines). *Contra Matter of M-E-V-G-*, 26 I. & N. Dec. at 247–49 (asserting that recent decisions "more accurately capture[] the concepts underlying the United States' obligations under the Protocol").

169. *See generally* BENJAMIN CASPER, "PARTICULAR SOCIAL GROUP" LITIGATION IN THE WAKE OF *S-E-G-* 5–11 (Kate Evans ed., 2012), http://www.ilcm.org/documents/litigation/ILCM_Nov_2012_CLE_Advisory_PSG_litigation.pdf (suggesting "social visibility" under *S-E-G-* is unworkable, contrary to *Acosta*, and contrary to Congressional policy); NIJC *M-E-V-G-* ADVISORY, *supra* note 19, at 7–9; Casper et al., *supra* note 152, at 22; Marouf, *supra* note 75, at 68–70 (arguing that *Chevron* deference is improper due to the BIA's conflicting positions). *Contra Matter of M-E-V-G-*, 26 I. & N. Dec. at 244–47 (claiming the BIA analyzed social visibility and particularity in cases prior to the official formulation of those tests).

the relevant society. Section B takes the problems presented in Section A and analyzes the evidentiary requirements necessary to satisfy the particular social group standard. This analysis concludes that pro se applicants will be unable to satisfy these new evidentiary requirements.

A. THE INTERPLAY BETWEEN PARTICULARITY AND SOCIAL DISTINCTION

Asylum applicants—and even experienced immigration attorneys—find it difficult to formulate a particular social group that satisfies both particularity and social distinction. The more a particular social group is defined with particularity, the greater the risk that it lacks social distinction. This section looks at the interplay between these two elements. Subsection 1 analyzes the BIA's requirements for particularity, ultimately concluding that the criterion no longer satisfies its initial goal of demarcating who is and who is not a member of a particular social group. Subsection 2 combines the analysis of particularity from Subsection 1 and pairs it with social distinction. It concludes that the resulting dilemma is a game of semantics that pro se asylum applicants are unequipped to play.

1. "Amorphous, Overbroad, Diffuse, or Subjective" Particular Social Groups

Under the BIA's interpretation of particularity, an applicant cannot define her particular social group with characteristics that are "amorphous, overbroad, diffuse, or subjective."[170] The applicant must define the particular social group "by characteristics that provide a clear benchmark for determining who falls within the group."[171] A well-defined particular social group will permit an adjudicator to determine group membership without a linguistic analysis of the words used to define the group. The BIA has determined that words such as "affluent,"[172] "young,"[173] and "poverty"[174] are too subjective and amorphous to satisfy the criteria of particularity. Instead, the BIA requires applicants to define particular social groups with concrete, discrete parameters.[175] An age range replaces "young."[176] A mone-

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

171. *Matter of* W-G-R-, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).

172. *Matter of* A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 76 (B.I.A. 2007).

173. *Matter of* S-E-G-, 24 I. & N. Dec. 579, 584–87 (B.I.A. 2008).

174. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239–40 (citing Escobar v. Gonzales, 417 F.3d 363, 368 (3d Cir. 2005)).

175. *See* NIJC *M-E-V-G-* ADVISORY, *supra* note 19, at 5.

tary income figure replaces "affluent" or "poverty."[177] Concrete parameters make it simple for an adjudicator to place individuals inside or outside of the group.

Even seemingly well-defined terms, however, are not safe from the scrutiny of particularity. In *W-G-R-*, the BIA reasoned that "former [gang] members" could include "persons of any age, sex, or background," without regard to how long the individual had remained a member of the gang.[178] The respondent had been a member of the gang "for less than a year" when he left and was shot as a consequence of leaving.[179] Nothing in the facts indicates that the respondent's age, sex, background, or length of membership influenced his persecution. "Former gang member" should thus satisfy particularity because it has definable boundaries: those who have been initiated into a gang and have subsequently left.[180] Because "former gang member" has definable boundaries, the BIA's call to define the group with "respect to the duration or strength of the members' active participation in the activity" should be inapplicable to the formulation of a particular social group.[181] Similarly, in *M-E-V-G-*, the BIA suggested that "landowners" may be discrete in an "underdeveloped, oligarchical society," but "would likely be far too amorphous to meet the particularity requirement in Canada."[182] A group of landowners, however, "has clear boundaries based on a common definition; it just may be large and diverse."[183]

It is unclear why the BIA rejected "former gang members" and "landowners" if the purpose of particularity is truly to "delineate" who is and who is not a member of a particular social group.[184] Scholars have attacked this rejection of "overbroad"

176. *Id.*

177. *Id.*

178. *Matter of* W-G-R-, 26 I. & N. Dec. 208, 221 (B.I.A. 2014).

179. *Id.* at 209.

180. *Cf. Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 241 (B.I.A. 2014) (citing Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003)) ("'[P]articularity' chiefly addresses the 'outer limits' of a group's boundaries and is definitional in nature . . . .").

181. *Matter of W-G-R-*, 26 I. & N. Dec. at 221–22.

182. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 241.

183. Casper et al., *supra* note 152.

184. *Compare Matter of W-G-R-*, 26 I. & N. Dec. at 214 ("'Particularity' chiefly addresses the question of delineation . . . ."), *and Matter of M-E-V-G-*, 26 I. & N. Dec. at 241 (stating that "'particularity' chiefly addresses the 'outer limits' of a group's boundaries and is definitional in nature"), *with* Casper et al., *supra* note 152, at 20 (explaining that the BIA "limits social group asylum claims by creating standards for particularity and social visibility that work in opposition to each other").

categories as contrary to the BIA's own interpretations of particularity and the statute.[185] No other ground of protection (race, religion, political opinion, or nationality) requires these precise boundaries or an evaluation of the strength of membership.[186] The BIA's rejection of these concrete terms makes it difficult for asylum applicants and practitioners to ascertain which words they must avoid when framing a particular social group. With enough analysis, the BIA could reject any particular social group formulation as amorphous or subjective—other than those defined with statistical precision.[187] Therefore, particularity requires an asylum applicant to define her particular social group with wording calculated to sustain judicial scrutiny.

2. A Game of Semantics

A particular social group formulation defined with the utmost particularity, however, is unlikely to satisfy the criterion of social distinction.[188] When evaluating social distinction, the question is whether or not the society perceives the particular social group as a distinct group.[189] An overly-particularized particular social group is unlikely to be able to meet this standard. A particular social group defined as "Guatemalans between the ages of 30 and 65, who earn over $65,000 a year" is discrete and likely satisfies the element of particularity. But, it is hard to imagine that society would perceive the group in those terms. The applicant would be required to prove that society perceives the group as distinct from 29-year-olds who makes $60,000 year.[190] "Young, affluent Guatemalans" is simply a more realistic interpretation of society's perception. While such a formulation may be socially distinct, it would not satisfy the requirement of particularity. The Tenth Circuit's holding in *Rivera-Barrientos v. Holder* exemplifies this problem, finding that

185. *See* Casper et al., *supra* note 152, at 19–20.

186. *See* NIJC *M-E-V-G-* ADVISORY, *supra* note 19, at 7 ("The fact that the word 'Catholic' might be thought to apply either to devoted practitioners or to 'cultural' members of the group would not preclude a religious-based claim where Catholicism was the basis of the persecution. Yet a 'former gang member' group would not be cognizable simply because the boundaries of the group may be unclear (although possibly irrelevant to the claim).").

187. *Cf. id.* at 5 ("[T]he BIA requires an asylum applicant to formulate a group in terms which are statistically precise, i.e., not using natural, common linguistic descriptors, and also commonly recognized.").

188. NIJC *M-E-V-G-* ADVISORY, *supra* note 19.

189. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 240.

190. *Cf.* NIJC *M-E-V-G-* ADVISORY, *supra* note 19, (suggesting concrete parameters are necessary to satisfy particularity).

"women in El Salvador between the ages of 12 and 25 who resisted gang recruitment" satisfied the element of particularity, but was not socially visible.[191]

Supporters of social distinction and particularity may suggest that the BIA intended to exclude groups not defined by gender or a highly-visible societal construct (e.g., ethnicity, tribe, etc.). This is not the case. First, in *M-E-V-G-* the BIA reasserted that "[s]ocial group determinations are made on a case-by-case basis" and reaffirmed that its decisions in *S-E-G-* and *E-A-G-* are not a "blanket rejection of all factual scenarios involving gangs."[192] Second, since the inception of social visibility and particularity, circuit courts have recognized particular social groups framed around government witnesses, truckers who refuse to cooperate with insurgent groups, and other groups not defined by gender or societal constructs.[193] The BIA has not closed the possibility of asylum to any specific group. Instead, social distinction and particularity create unfathomable barriers for groups, otherwise entitled to asylum, to overcome. Furthermore, an attempt by the BIA to restrict the definition of particular social group in this way would be contrary to the United States' obligations under international law and prior interpretations of domestic law.[194]

The above observations suggest that word choice is the key to a good particular social group formulation. Unfortunately, most asylum applicants lack the necessary English skills to participate in this game of semantics.[195] The courts have

191. Rivera-Barrientos v. Holder, 666 F.3d 641, 647, 650, 653 (10th Cir. 2012); *see also* Casper et al., *supra* note 152, at 20 (noting that *Rivera-Barrientos* illustrates the tension between the social particularity requirement and visibility requirement).

192. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 251.

193. *See, e.g.*, Garcia v. Attorney Gen. of the U.S., 665 F.3d 496, 503–04 (3d Cir. 2011) (concerning witnesses who have assisted the government in testifying against gang violence); Escobar v. Holder, 657 F.3d 537, 545 (7th Cir. 2011) (recognizing "truckers who, because of their anti-FARC views and actions, have collaborated with law enforcement and refused to cooperate with FARC"); Ayala v. Holder, 640 F.3d 1095, 1097–98 (9th Cir. 2011) (suggesting former military officers as a particular social group, but denying the applicant asylum for failure to establish a nexus between his membership in that group and his persecution); *see also* KURZBAN, *supra* note 81 (listing cases that have found particular social groups in the past).

194. *See supra* notes 168–69 and accompanying text.

195. *Cf.* U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: INTERVIEWING PART VI: WORKING WITH AN INTERPRETER 5 (2006) [hereinafter USCIS INTERVIEWING] ("While some applicants can speak English well enough to be interviewed in English without the use of an interpreter, most applicants need an interpreter during the interview.").

acknowledged that asylum applicants are frequently "poor, illiterate people who do not speak English and are unable to retain counsel."[196]

In the affirmative process, asylum applicants must provide their own interpreter (a "family member, friend, or other person associated with the [Limited English Proficiency] person") "at no expense to the Government."[197] Unfortunately, "[n]early all of these interpreters are not professionally trained and they do not have experience translating in formal settings."[198] Accurate interpretation is crucial where the interpretation of a specific word, with discrete connotations in the applicant's own language, may be interpreted into an English word the asylum officer would find amorphous or vague.

This presupposes, however, that the applicant will understand the interplay between particularity and social distinction well enough to carefully craft her particular social group in the first place. The asylum application and its instructions do not list the elements of a particular social group, nor do they provide a designated space for the applicant to describe their particular social group.[199] While asylum applicants may obtain a rudimentary understanding of social visibility and particularity from non-profit published resources, these resources are not substitutes for an experienced immigration attorney.[200]

Even the most experienced immigration attorneys struggle to define a particular social group with particularity and social distinction.[201] If an applicant defines her particular social group with the requisite statistical and calculated particularity, she risks being unable to meet the requirement of social distinction. The BIA's arbitrary rejection of particular social groups with seemingly concrete membership (e.g., "former gang members" and "landowners") further complicates this problem. The BIA cannot expect pro se applicants to engage in this game of se-

196. Aguilera-Cota v. INS, 914 F.2d 1375, 1382 (9th Cir. 1990).

197. U.S. CITIZENSHIP & IMMIGRATION SERVS., DRAFT LANGUAGE ACCESS PLAN 4 (2014).

198. Dree K. Collopy, *Lost in Translation: Why Professional Interpreters Are Critical in Asylum Interviews*¸ 27 IMMIGR. L. TODAY, no. 3, May–June 2008, at 12, 14.

199. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., OMB No. 1615-0067, I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL 5–6 (2012); I-589 INSTRUCTIONS, *supra* note 32, at 2.

200. *See, e.g.*, CTR. FOR GENDER & REFUGEE STUDIES, *supra* note 38, at 9–10.

201. *See* Casper et al., *supra* note 152, at 20 (noting the special difficulty of bringing "particular social group" asylum claims).

mantics. The complexity of this game, risk of misinterpretation, and lack of comprehensive resources makes it more likely for deserving individuals to be denied asylum not on merit, but on account of a technicality.

B. THE REQUIRED EVIDENCE AND THE PROBLEMS OBTAINING IT

Supposing an applicant arrives at an acceptable particular social group formulation that survives the semantic requirements of social distinction and particularity, the applicant will still need to provide evidence of social distinction. Subsection 1 analyzes the need for sociological evidence—as *W-G-R-* and *A-R-C-G-* demonstrate through their consideration of presented evidence. Subsection 2 suggests that only expert evidence will be able to satisfy this need. As this section ultimately concludes, pro se applicants are generally unable to obtain expert witnesses—let alone any corroborating evidence—thereby making it difficult for them to satisfy social distinction's evidentiary requirements.

1. The Need for Sociological Evidence

The applicant's need for sociological evidence supporting social distinction is the greatest difference between *S-E-G-* and *M-E-V-G-*. In *S-E-G-*, the BIA refused to accept particular social groups that "would necessitate a sociological analysis as to how persons . . . would have been viewed by others in their country."[202] In contrast, *M-E-V-G-* requires the applicant to present evidence of social distinction, i.e., that the group is perceived by the society in question.[203] Now, social distinction requires adjudicators to engage in a "sociological analysis" to assess the sufficiency of group perception. This evidentiary requirement imposes unnecessary burdens on applicants—in particular pro se applicants who cannot obtain evidence that is able to satisfy the requirements of social distinction.

Shortly after the BIA decided *S-E-G-*, Professor Fatma Marouf argued that IJs are not suited for sociological analysis.[204] Drawing from studies in social psychology, Marouf concluded that "social perception depends not only on the identity of the perceiver, but the emotional states of the perceiver and the perceived at any given moment, as well as the interactions

202. *Matter of* S-E-G-, 24 I. & N. Dec. 579, 585 (B.I.A. 2008) (quoting Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007)).

203. *See Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 241–44 (B.I.A. 2014).

204. *See* Marouf, *supra* note 75, at 71–78.

that group members have had in the past."[205] Simply put, "the complexity of the human mind can never be captured in a limited legal proceeding."[206] Unfortunately, social distinction forces adjudicators to analyze the "mind" of a broader society.

The asylum applicant has the burden to establish through sufficient corroborative country condition evidence that the formulated particular social group satisfies social distinction.[207] The BIA has provided little guidance to help applicants ascertain what evidence may establish social distinction. The discussion in *M-E-V-G-* suggests that applicants should provide "country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like."[208] However, asylum applicants traditionally provide these forms in any asylum application. The BIA has done little to substantiate what information within these sources would illustrate social distinction.

W-G-R- and *A-R-C-G-* contain some discussion of these evidentiary requirements. In *W-G-R-*, the applicant provided reports showing that Salvadoran society recognized former gang members because of their distinct tattoos.[209] The BIA, however, rejected this particular social group because reports indicated that Salvadoran society discriminated against "a broader swath of young people" suspected of gang membership, not just former gang members.[210] Furthermore, the BIA concluded that nothing in the State Department reports suggested that former gang members were socially distinct.[211] *W-G-R-* evidences two trends. First, the evidence must show that the persecution is limited to the articulated group and not any broader (e.g., targeting only former gang members and not youth perceived as gang members). The BIA fails to realize, however, that there is no reason that former gang members and youth perceived as gang members could not constitute two separate particular social groups, as gangs persecute the former, and society or specific elements

205. *Id.* at 72.

206. *Id.* at 78.

207. 8 U.S.C. § 1158(b)(1)(B)(i) ("The burden of proof is on the applicant to . . . establish that . . . membership in a particular social group . . . was or will be at least one central reason for persecuting the applicant."); *accord Matter of M-E-V-G-*, 26 I. & N. Dec. at 244; *In re* S-M-J-, 21 I. & N. Dec. 722, 727 (B.I.A. 1997) ("The absence of such corroborating evidence can lead to a finding that an applicant has failed to meet her burden of proof.").

208. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 244.

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

210. *Id.*

211. *Id.*

within the society (e.g., police, vigilante groups, and rival gangs) persecute the latter. As a second trend, the BIA gives greater deference to State Department reports than to the applicant's own evidence.

A-R-C-G- presents an interesting lens with which to analyze evidentiary requirements, as it is the first and only precedential example where the applicant proved social distinction. News articles showing that Guatemala has a culture of "machismo and family violence" persuaded the BIA that "married women in Guatemala who are unable to leave their relationship" were socially distinct.[212] Unlike in *W-G-R-*, the State Department reports supported social distinction because they revealed that the Guatemalan government fails to prosecute domestic violence crimes.[213] More generally, the BIA said in cases of domestic violence it would look for evidence of "whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors."[214] *A-R-C-G-* reaffirms the importance of the State Department reports—in the eyes of the BIA—in assessing social distinction. More perplexing, though, is that the BIA relied on more generalized evidence (i.e., news articles) in *A-R-C-G-* compared to the specific well-studied reports cited in *W-G-R-*.[215] This observation raises concerns that the BIA inconsistently weighs evidence. However, this Note cannot evaluate this claim with the limited sample size of BIA cases currently available.

2. The Necessary Evidence

Ultimately, few conclusions can be drawn about what evidence persuasively illustrates social distinction. References to the harmed group in the State Department reports appear to be the most persuasive form of evidence to the BIA. State Department reports, however, are conclusory and "risk carrying 'a weight they do not deserve' because they may oversimplify the relationship between political conditions, human rights abuses,

212. *Matter of* A-R-C-G-, 26 I. & N. Dec. 388, 392–94 (B.I.A. 2014).

213. *See id.* at 393–94.

214. *Id.* at 394.

215. *Compare id.* at 393–94 (citing the State Department report and tangentially related news articles), *with Matter of W-G-R-*, 26 I. & N. Dec. at 222 (citing HARVARD LAW SCHOOL, NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 101 (2007)).

and the particular situation of the applicant."[216] State Department reports cannot describe every problem in a society, which may lead an adjudicator to believe the problem does not exist. Nor do the reports provide citations to other sources or information about how facts are gathered. The applicant is not provided with a meaningful opportunity to rebut the evidence presented in the State Department report. As the Eighth Circuit recognized in *Banat v. Holder*:

> Reliance on reports of investigations that do not provide sufficient information about how the investigation was conducted are fundamentally unfair because, without that information, it is nearly impossible for the immigration court to assess the report's probative value and the asylum applicant is not allowed a meaningful opportunity to rebut the investigation's allegations.[217]

Even so, certain IJs have denied asylum applications as a result of information obtained from unofficial sources that are just as vague and hard to verify—namely Wikipedia.[218]

Applicants must carefully select additional country condition information from news articles, non-governmental organizations, and similar print sources and be able to explain how the evidence relates to social distinction. An adjudicator may quickly dispose of social distinction if the evidence suggests that the group is broader than the formulated particular social group. However, in some cases, the persecution may be underreported internationally or in the society in question. In such cases, the applicant may have a difficult time finding evi-

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216. Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEGAL STUD. 197, 211 (2000).

217. Banat v. Holder, 557 F.3d 886, 891 (8th Cir. 2009).

218. *See, e.g.*, Sibanda v. Holder, 778 F.3d 676, 680 (7th Cir. 2015) (citations omitted) ("During the hearing, he quizzed [the applicant] about the custom of bride-price, comparing her answers to a Wikipedia article he had in front of him. But we have no way of knowing what that article said or how reliable it was, and it appears that the IJ never shared the article with [the applicant]. Asylum regulations and case law invite IJs to consider reports produced by the State Department and other credible sources in evaluating country conditions. Although the IJ was not required to obtain country reports on his own initiative, . . . because the IJ already had found the Wikipedia entry, he could just as easily have retrieved more reliable country reports and properly put them into the record."); Singh v. Holder, 720 F.3d 635, 643–44 (7th Cir. 2013) ("As a means of testing religious belief, IJ Zerbe questioned Singh on the tenets of Sikhism using information gathered from Wikipedia. . . . IJ Zerbe . . . seemed only interested in answers that parroted back the exact language of the Wikipedia entry . . . . IJ Zerbe's behavior was inappropriate. . . . Rather than seeking a verbatim recitation of an encyclopedia article, IJs should listen to a petitioner's personal explanation of religious beliefs.").

dence to establish that society, not solely the persecutor, recognizes the particular social group.[219] Country conditions are limited to what has been published, and the adjudicator is accorded significant deference in choosing how to interpret the provided material.

Given the scrutiny under which the BIA has examined corroborative country condition evidence, most cases will require the assistance of an expert witness. The NIJC encourages attorneys to use "academics or professionals with substantial scholarly credentials" as expert witnesses to establish social distinction whenever possible.[220] An expert witness can provide sociological evidence that distinguishes the applicant's particular social group from the society as a whole. An expert is also more likely to prevent the adjudicator from conducting her own sociological analysis, instead synthesizing the expert's own knowledge with the provided country conditions and the facts of the applicant's case to explain to the adjudicator how the particular social group is recognizable to the society in question.[221]

The expert witness is the strongest tool an applicant has in proving social distinction.[222] Unfortunately, most pro se applicants cannot afford to hire counsel, let alone an expert witness.[223] Therefore, in most cases, a pro se applicant will be limited to evidence brought from her home country or found in documented sources. In many cases, the applicant may only be able to provide her testimony.

Even USCIS's own guidelines admit that asylum applicants—and experts, such as human rights monitors—have difficulty obtaining corroborative evidence. According to USCIS, "[t]he most common form of evidence that informs asylum eligi-

219. *Cf. Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 242 (B.I.A. 2014) (requiring the perception to be of the society in question, not the persecutor).

220. NIJC *M-E-V-G-* ADVISORY, *supra* note 19, at 10.

221. *Cf. Matter of* Marcal Neto, 25 I. & N. Dec. 169, 176 (B.I.A. 2010) ("Immigration Judges, like other trial judges generally, are often required to determine factual disputes regarding matters on which they possess little or no knowledge or substantive expertise, and, in making such determinations, they typically rely on evidence, including expert testimony, presented by the parties.").

222. *See* NIJC *M-E-V-G-* ADVISORY, *supra* note 19, at 10 (describing the increasing importance of country condition experts in asylum cases).

223. One source estimates that the average cost of a non-medical expert witness ranges from $275 to $322 per hour, depending on the services provided. Joe O'Neill, *Expert Witness Fees: An Infographic*, THE EXPERT INST. (Sept. 23, 2014), https://www.theexpertinstitute.com/expert-witness-fees/.

bility is the applicant's own testimony."[224] USCIS acknowledges that "[b]ecause of the circumstances that give rise to flight, asylum applicants often will not be able to provide documentary evidence."[225] The Seventh Circuit too has stated that "[t]o expect [an applicant] to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face."[226] Persecutors usually "do not provide evidence of their persecution."[227] "Human rights monitors and reporters may have difficulty documenting abuses in some refugee-producing countries that do not allow human rights monitors access to the country and maintain firm control over the press."[228] Given USCIS's acknowledgement of the difficulties in obtaining general corroborating evidence, it is unreasonable to require pro se applicants to obtain evidence supporting societal perception. The evidentiary requirements of social distinction ignore the difficulties applicants—and even experts—have in obtaining satisfactory sociological evidence.

Pro se applicants may not even realize the need to provide such in-depth evidence. The asylum application instructions inform the applicant to "submit reasonably available corroborative evidence showing (1) the general conditions in the country from which you are seeking asylum . . . ."[229] As explained above, societal perception is not found in "general" country conditions. An objective reading of the above requirement suggests applicants should submit news articles, government reports, and the like; not sociological expert testimony on societal group perception. And, an applicant is unlikely to have notice that they will be questioned regarding the societal perception of their proposed group, as the elements of a particular social group are not listed in the instructions.[230]

The BIA cannot realistically expect asylum applicants to produce expert witnesses at removal proceedings or asylum interviews, especially when it barely provides notice of the evidentiary requirements of social distinction in the first place. The evidentiary requirements of social distinction ignore the economic and social situations from which most refugees come. Even USCIS has acknowledged the difficulties applicants have

224. USCIS EVIDENCE TRAINING, *supra* note 43, at 16.
225. *Id.* at 19.
226. Dawoud v. Gonzales, 424 F.3d 608, 613 (7th Cir. 2005).
227. USCIS EVIDENCE TRAINING, *supra* note 43, at 19.
228. *Id.*
229. I-589 INSTRUCTIONS, *supra* note 32, at 7.
230. *See supra* note 199 and accompanying text.

in obtaining general country condition information.[231] The affirmative asylum process alleviates some of this burden by requiring the asylum officer to "provide background country conditions information through sources such as *Refworld*, the USCIS intranet, the Asylum Division Virtual Library, and others."[232] These traditional forms of documentary evidence, however, rarely contain evidence of social distinction tailored to specific particular social groups. Furthermore, the BIA requires defensive applicants to provide their own country condition evidence. A system of precedential country condition fact-finding may alleviate some of these evidentiary burdens on pro se asylum applicants.

III. ADOPTING A SYSTEM OF GUIDANCE DECISIONS

Critics of social distinction and particularity have called for a reformed standard. In particular, they advocate for a return to the *Acosta* standard as the only way to eliminate the prejudice caused to pro se applicants.[233] The BIA, however, refuses to abrogate the social distinction and particularity elements.[234] While the circuit courts, the Supreme Court, or Congress could overturn the BIA precedents in *M-E-V-G-* and *W-G-R-*, such a solution seems unlikely at this time. Instead, the BIA should adopt an alternative system of precedential fact-finding to alleviate the burden on pro se applicants. Section A describes how the United States could adopt a system similar to the United Kingdom's Country Guidance system. This proposed system would permit the BIA to issue precedential decisions based on commonly reoccurring situations in asylum adjudications. Sec-

231. *See* USCIS EVIDENCE TRAINING, *supra* note 43 at 29 (explaining that an applicant "may not understand which documents are relevant to his or her claim," and that "there generally is insufficient time for an applicant to provide any additional documentation that may take more than a short period of time to access").

232. *Id.* at 23.

233. *See, e.g.*, Casper et al., *supra* note 152, at 22 ("Other options for advocacy could include asking the Attorney General to certify an appropriate case in order to roll back the Board's flawed social group precedents, seeking a social group regulation consistent with *Acosta*, or pursuing a legislative fix."); Marouf, *supra* note 75, at 104 ("Adjudicators could easily avoid such chaos by remaining true to *Acosta*'s law-based standard.").

234. *See, e.g.*, *Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 234 (B.I.A. 2014) ("[W]e adhere to the social group requirements announced in *Matter of S-E-G-* and *Matter of E-A-G-*, as further explained here . . . . We believe that these requirements provide guidance to courts and those seeking asylum based on 'membership in a particular social group,' are necessary to address the evolving nature of claims asserted on this ground of persecution, and are essential to ensuring the consistent nationwide adjudication of asylum claims.").

tion B responds to possible critiques of this system, concluding that the benefits of the proposed system, despite imperfections, offer significant improvements over the current absence of protection for pro se asylum applicants.

A. A SYSTEM OF UNITED STATES GUIDANCE DECISIONS

In his opinion in *Banks v. Gonzales*, Judge Easterbrook stated, "An IJ is not an expert on conditions in any given country, and *a priori* views about how authoritarian regimes conduct themselves are no substitute for evidence—a point that we have made repeatedly, but which has yet to sink in."[235] This need for a country condition expert in every case could be circumvented through the creation of precedential "Guidance Decisions" modeled after the United Kingdom's Country Guidance System.

Analysis of an actual Country Guidance Determination in the United Kingdom reveals the potential benefits of such decisions. *AMM Somalia* concerned five asylum claims arising from risks of persecution from Al-Shabab and FGM.[236] The Tribunal began by broadly describing the humanitarian crisis in various regions of Somalia.[237] Following this, the Tribunal spent 327 paragraphs weighing the oral testimony of the 5 appellants, 2 expert witnesses, and 1266 documents of background evidence.[238] Having critiqued the presented evidence, the Tribunal laid out a succinct statement of fact-finding and the legal implications of that finding.[239] The Tribunal's FGM guidance is illustrative of how the Country Guidance Determination informs the lower courts to apply the fact-finding:

> The risk will be greatest in cases where both parents are in favour of FGM. Where both are opposed, the question of whether the risk will reach the requisite level will need to be determined by reference to the extent to which the parents are likely to be able to withstand the strong societal pressures. Unless the parents are from a socio-economic background that is likely to distance them from mainstream social attitudes, or there is some other particular feature of their case, the fact of parental opposition may well as a general matter be inca-

235. Banks v. Gonzales, 453 F.3d 449, 453 (7th Cir. 2006).

236. *See* AMM Somalia CG, [2011] UKUT 445, [54] (IAC) (stating the scope of the decision).

237. *Id.* at [73]–[81].

238. *See id.* at [241]–[567]; *id.* at app. 1 [1]–[146] (summarizing the testimony of each appellant, one appellant's partner, and two expert witnesses); *id.* at app. 2 [1]–[1266] (listing all of the documentary evidence provided).

239. *See id.* at [594]–[610] (providing the Country Guidance Determination for Somalia).

> pable of eliminating the real risk to the daughter that others (particularly relatives) will at some point inflict FGM on her.[240]

Country Guidance Determinations accomplish three objectives. First, they allow the Tribunal to consider a large amount of evidence and set standards for interpreting this evidence in future adjudications. As such, Country Guidance Determinations eliminate the need for lower courts to weigh country condition evidence in every decision. This promotes consistency from case to case. Second, they allow the Tribunal to consider many potentially related humanitarian issues at once. By joining cases with similar, although somewhat different claims, the Tribunal may efficiently engage in broader country condition analysis. In contrast, the United States has had numerous asylum cases arising from Somalia,[241] none of which can draw on the previous country condition fact-finding of the others due to the case-by-case nature of United States asylum law.[242] Third, the Country Guidance Determination narrows the focus of future cases because it presents a succinct question by which the lower court should analyze similar claims. The Country Guidance Determinations promote consistency and efficiency by eliminating the need to conduct country condition fact-finding in every case.

A United States system of Guidance Decisions would alleviate some of the problems in analyzing evidence of social distinction.[243] A proper analysis of social distinction necessarily requires substantial documentary evidence and expert testimony. By combining similar claims into a single precedential fact-finding case, the BIA can address reoccurring issues in one decision. IJs and asylum officers will not need to analyze the country condition evidence in every case. Less fact-finding will result in quicker consideration and adjudication of asylum claims. Quicker adjudication will lessen the backlog of Immi-

240. *Id.* at [610].

241. *See, e.g.*, Hassan v. Gonzales, 484 F.3d 514, 518 (8th Cir. 2007) (recognizing "Somali females" as a particular social group due to the prevalence of female genital mutilation); Ali v. Ashcroft, 394 F.3d 780, 785 (9th Cir. 2005) (accepting the "Muuse Diriiye clan" as a particular social group); *Matter of* S-A-K- & H-A-H-, 24 I. & N. Dec. 464, 465–66 (B.I.A. 2008) (granting asylum to a mother and daughter subjected to female genital mutilation); *In re* H-, 21 I. & N. Dec. 337, 340–42 (B.I.A. 1996) (accepting the "Marehan subclan" as a particular social group).

242. *Cf.* Banks v. Gonzales, 453 F.3d 449, 454 (7th Cir. 2006) ("While Taylor ruled Liberia, all ethnic Krahns (and Unity Party supporters) should have been treated the same way. . . . We remanded . . . because the agency had failed to confront that recurring question.").

243. *See supra* Part II.B.

gration Court cases, which has risen from 113,702 pending cases in 1998 (with an average wait time of 324 days) to 422,104 cases in 2015 (with an average wait time of 627 days).[244] Moreover, this would alleviate the burden on the applicant to present sociological evidence in cases where the BIA has rendered a Guidance Decision. Pro se applicants would not need to hire expert witnesses or collect substantial documentary evidence. They would only need to provide evidence of their own personal persecution.

Broadly, the proposed system would work as follows. The BIA would identify cases that are representative of a recurring issue in asylum adjudications and consolidate the appeals.[245] In addition, the BIA would permit advocates to petition for a case or group of cases to be heard as a Guidance Decision. These cases would be heard at a single hearing, with all applicants and their counsel given a chance to present their arguments. The BIA would frame the proposed issue around (1) specific country conditions; (2) a particular social group; or (3) a widespread form of persecution.[246] For example, the BIA could issue decisions addressing when asylum is appropriate for victims of domestic violence,[247] or which particular social groups may claim asylum due to Salvadoran gang persecution.[248] The BIA would then notify the applicant, the government, and the public that the case would be a Guidance Decision. The applicant and the government would create extensive evidentiary records supporting their respective arguments on the proposed issue. Academics and non-profits could submit comments and additional documentary evidence. The BIA would permit amici curiae, such as the UNHCR, NIJC, and other non-profit organiza-

244. *See Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRACIMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/ (last updated Sept. 2015) (tracking the number of immigration-related charges from 1998 to 2015, excluding criminal/national security/terrorism charges).

245. *Cf.* BD. OF IMMIGR. APPEALS, PRACTICE MANUAL § 4.10, at 66 (2015) ("[T]he Board may consolidate . . . appeals where the cases are sufficiently interrelated.").

246. *Cf.* Thomas, *supra* note 23, at 511–14 (describing how the United Kingdom Tribunal identifies risk categories and risk factors in issuing country guidance).

247. *Cf. Matter of* A-R-C-G-, 26 I. & N. Dec. 388, 391 (B.I.A. 2014) (describing the history of domestic violence-based asylum claims).

248. *Cf. Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 251 (B.I.A. 2014) (acknowledging that scenarios may exist in which applicants facing gang-related persecution could be awarded asylum).

tions, to file briefs and present evidence.[249] In circumstances involving complex or broad issues, the BIA would permit amici curiae to present oral arguments.[250] The BIA would then consider all presented evidence at an oral hearing.

The BIA would frame its Guidance Decision similar to the Tribunal's decision in *AMM Somalia*. The BIA would begin with a thorough analysis of the evidence and its factual findings. It would then issue a guideline for lower courts to adjudicate similar issues. Because adjudicators evaluate claims on case-by-case basis and country conditions constantly evolve, this guideline would not be a strict rule but a measurement of when a case satisfies the requirements of asylum. An example of this is the FGM guideline in *AMM Somalia*, where the Tribunal instructs lower courts to examine the parents' opinions of FGM.[251] The purpose of such formulations is to draw the inquiry away from the country conditions generally and to the applicant's own personal situation. The resulting Guidance Decision would bind "all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States . . . ."[252]

The basic regulatory structure for this system already exists.[253] The Department of Justice would need to amend current regulations to allow the BIA to engage in fact-finding and provide structure for the Guidance Decision process. Under 8 C.F.R. § 1003.1(d)(3), the BIA is prohibited from engaging in de novo review of facts or engaging in fact-finding.[254] The Depart-

249. *See* BD. OF IMMIGR. APPEALS, *supra* note 245, § 2.10, at 30 ("The Board may grant permission to an amicus curiae to appear, on a case-by-case basis, when it serves the public interest."); *see also* 8 C.F.R. § 1292.1(d) (2014) (permitting the appearance of amicus curiae).

250. *Cf.* BD. OF IMMIGR. APPEALS, *supra* note 245, § 8.7(e)(xiii), at 104 ("Amicus curiae may present oral argument only upon advance permission of the Board.").

251. AMM Somalia CG, [2011] UKUT 445, [610] (IAC).

252. *See* 8 C.F.R. § 1003.1(g) (2014).

253. *See supra* notes 51–54 and accompanying text (citing federal regulations describing the BIA's standard of review).

254. *See* 8 C.F.R. § 1003.1(d)(3)(i)–(iv) ("The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. . . . [T]he Board will not engage in factfinding in the course of deciding appeals."). This Note is not oblivious to the burdens the Administrative Procedure Act (APA) poses to administrative rulemaking. Some commentators have deemed the regulatory process confusing and circular, leading to many dead ends. *See* Maxwell Mensinger, Note, *Remodeling "Model Aircraft": Why Restrictive Language That Grounded the Unmanned Industry Should Cease to Govern It*, 100 MINN. L. REV. 405, 409, 433 (2015); Samuel D. Posnick, Note, *A Merry-Go-Round of Metal and Manipulation: Toward a New Framework for Commodity*

ment of Justice would need to amend the regulation to allow for fact-finding in Guidance Decisions. The regulations would restrict the use of precedential fact-finding to country conditions in asylum cases. After the BIA issues a Guidance Decision, the BIA would remand the case to the IJ for further review in conformance with the recent decision.[255] The Department of Justice will also need to promulgate rules permitting the use of Guidance Decisions and describing when the BIA should issue such decisions. The rule, however, must allow the BIA wide discretion in choosing when to use Guidance Decisions.

Guidance Decisions result in efficient and consistent adjudications of asylum cases. In commonly reoccurring cases the BIA would be able to engage in broad fact-finding, saving IJs and asylum officers the trouble of having to hear expert testimony and sort through thousands of pages of country conditions evidence. Furthermore, this form of decision-making better protects pro se applicants as it lessens the evidentiary burden on them. In a comprehensive Guidance Decision the BIA can identify socially distinct groups for future adjudications. While this solution is not a return to *Acosta*, it does alleviate some of the evidentiary burdens placed particularly upon pro se applicants.

B. CRITICISMS OF THE PROPOSED SYSTEM AND SOLUTIONS TO ADDRESS THOSE CRITICISMS

Critics drawing from the experience of the United Kingdom will note problems with this proposed system.[256] Of course, such a system creates a demand for more judicial resources in the short-term, but the potential to clear the Immigration Court docket of years of backlogged cases and quick adjudication of common asylum claims renders this complaint moot.[257] Aside from this complaint, however, this Note addresses two primary concerns. First, country conditions will change faster than the BIA can amend or change a Guidance Decision. Second, a poorly-decided precedential decision affects more than just the present applicant and has the potential to bar thousands of appli-

Exchange Self-Regulation, 100 MINN. L. REV. 441, 454–60 (2015). These procedural burdens, however, are inherent in any notice-and-comment rulemaking procedure, and this Note therefore ignores them.

255. *See* 8 C.F.R. § 1003.1(d)(3) ("If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.").

256. For further critiques of the United Kingdom Country Guidance system, see generally IMMIGRATION ADVISORY SERVICE, *supra* note 70.

257. *See supra* Part III.A.

cants from obtaining asylum. Despite the risk of careless decision-making, this Guidance Decision system remains the only way of insulating pro se applicants from the troubles of proving social distinction—other than by an abrogation of particularity and social distinction through judicial or congressional action.

1. Changing Country Conditions

"[C]ountry guidance is always at the risk of becoming—or appearing to become—out of date."[258] Country conditions change faster than the United States immigration system can respond to them. A coup in a country could suddenly entitle thousands of refugees, who under a previous Guidance Decision would be ineligible, to asylum. Of the two presented counterarguments against a United States system of Guidance Decisions, this is the least troublesome. Practically, if such a severe refugee crisis would call for immediate action, the Secretary of Homeland Security may protect such refugees by granting them Temporary Protected Status, until such time that the BIA may reconsider its previous Guidance Decision.[259] Moreover, the BIA could implement safeguards to ensure that Guidance Decisions do not prevent IJs from deciding in favor of otherwise qualified asylum applicants.

First, Guidance Decisions would be authoritative guidance as long as the case "(a) relates to the country guidance issue in question; and (b) depends upon the same or similar evidence."[260] Yet country conditions will change, forcing IJs to decide cases contrary to prior Guidance Decisions. "No judicial decision has the power of crystallizing the facts of the real world to an extent where not reality, but what has been said about it is the guide."[261] Adjudicators, however, must still evaluate asylum applicantions on a "case-by-case basis" and can avoid being bound to obsolete Guidance Decisions.[262] Applicants in removal proceedings, and the opposing counsel for ICE, have the opportunity to produce evidence showing that the original decision was wrongly decided, country conditions have changed, or the Guidance Decision is inapplicable to the applicant based on the

258. Thomas, *supra* note 23, at 505.

259. *See* 8 U.S.C. § 1254a(b) (2012) (permitting Temporary Protected Status designation in cases of armed conflict, natural disaster, or other extraordinary circumstances).

260. PRACTICE DIRECTIONS, *supra* note 68, ¶ 12.2.

261. LT Turkey CG, [2004] UKIAT 175, [3] (IAT).

262. *See Matter of* Acosta, 19 I. & N. Dec. 211, 227 (B.I.A. 1985), *overruled on other grounds by Matter of* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

individualized facts of the case.[263] The BIA should not overturn IJ decisions where individualized facts warrant ignoring a Guidance Decision as a result of newly presented evidence that renders the Guidance Decision inapplicable to the applicant's case, or out of date. The BIA, however, should overturn IJ decisions that ignore Guidance Decisions that would otherwise protect the applicant. For example, suppose *Matter of A-R-C-G-* were a Guidance Decision establishing that the particular social group of "married women . . . who are unable to leave their relationship" satisfied all three elements of the particular social group standard in countries, such as Guatemala, that fail to protect women from domestic violence.[264] The BIA should overturn any decision from an IJ concluding that "women who are unable to leave their relationship" is not socially distinct in Salvadoran society, if El Salvador also fails to protect women from domestic violence.

Second, applicants would be free to challenge Guidance Decisions where the decision has been "superseded by a change in country conditions."[265] The BIA must be able to freely amend and abrogate Guidance Decisions as new evidence shows substantive changes in the country conditions. As the Court of Appeal of England and Wales acknowledges, "'no country guidance case is for ever' [sic]; such decisions are always open to revision in the light of new facts—new either in the sense of being newly ascertained or in the sense that they have arisen only since the decision was promulgated."[266] As such, the BIA would issue a new Guidance Decision in order to adapt its previous decision to changed circumstances. Until reconsideration is possible, IJs would continue to favorably decide asylum cases contrary to an otherwise unfavorable Guidance Decision, as discussed above.

Finally, the BIA can tailor its Guidance Decisions to prevent them from becoming "too rigid."[267] First, the BIA can include flexibility within the language of its Guidance Decisions

263. *See* Thomas, *supra* note 23, at 517 ("Country guidance cases should be applied except where they do not apply to the particular facts raised in a subsequent appeal and they can properly be held inapplicable for legally adequate reasons, such as a change in country conditions. The country guidance system 'does not have the rigidity of legally binding precedent but has instead the flexibility to accommodate individual cases, changes, fresh evidence and . . . other circumstances.'").

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

265. Thomas, *supra* note 23, at 505.

266. *Id.* at 517 (citing KH (Sudan) v. Sec'y of State for the Home Dep't [2008] EWCA Civ 887, [4] (Sedley LJ) (CA)).

267. *Id.* at 518.

to ensure that while most individuals may or may not be protected, the IJ has the discretion to find otherwise in any particular case. For example, while the United Kingdom Tribunal found that "Afghan Sikhs and Hindus are not at risk of . . . persecution . . . simply by reason of being members of those minority communities anywhere in Afghanistan," the Tribunal made a point to note that certain individuals may still be subject to societal discrimination in their given communities.[268] Second, the BIA can indicate whether or not a decision is likely to require revisiting in the near future.[269] A Guidance Decision analyzing country conditions in a politically turbulent country is much more likely to need correction sooner than a Guidance Decision finding a particular social group for those subjected to a targeted form of persecution.[270] For example, a Guidance Decision similar to *Hassan v. Gonzales*, which creates a particular social group for those who oppose FGM, is unlikely to require future amendment because a cultural practice such as FGM is unlikely to change in the near future and will never be an acceptable practice according to human rights law.[271] Providing a temporal element to the Guidance Decisions informs IJs that a decision may soon become outdated as a result of shifting country conditions. Then, IJs know to more carefully examine evidence to determine if an applicant who would be ineligible under a preexisting Guidance Decision is now eligible as a result of changing country conditions. By flexibly framing the decision and acknowledging when it is likely to change, the BIA can create a malleable Guidance Decision that remains authoritative, but allows IJs to adjust as new evidence emerges and when individualized facts warrant protection.

2. Poor Precedent Prejudices Future Applicants

The risk of poor precedent is the most dangerous aspect of the proposed system and must be addressed. Of course, appli-

268. *See* SL and Others (Returning Sikhs and Hindus) Afghanistan CG [2005] UKIAT 00137, [76] (IAT).

269. *Cf.* Thomas, *supra* note 23, at 519 (noting that the United Kingdom Tribunal occasionally indicates when its guidance may "soon be overtaken by events in the country concerned").

270. *See, e.g.*, *id.* (comparing country guidance cases relating to politically unstable countries like Iraq with country guidance cases relating to long-standing issues such as female genital mutilation or persecution of religious minorities).

271. *Cf.* Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) (recognizing Somali females who are threatened with female genital mutilation as a particular social group).

cants would be able to appeal to the circuit courts for errors of law. However, circuit courts, as shown throughout this Note, tend to be highly deferential to the BIA. Therefore, an appeal may not afford applicants substantial protection in the case of a bad decision.

Poorly decided Guidance Decisions may affect a large group of future applicants—setting poor factual precedent for future cases.[272] Because a poorly decided Guidance Decision may bar thousands from seeking asylum for any given reason, a United States system would necessarily require substantial public input. Indeed, advocates would reject the adoption of a system that does not allow for such input.[273] The United States system would permit scholars, non-governmental actors, and other advocacy organizations to file amici curiae briefs with additional evidentiary reports in support of their own conclusions. In this respect, the BIA would be forced to examine public commentary and an evidentiary record comprised of all available country condition evidence.

The procedure for gathering third-party evidence would be conducted in a manner similar to Administrative Procedure Act notice-and-comment rulemaking.[274] The BIA would publish a notice in the Federal Register providing a timeframe for submission of documentary evidence.[275] The BIA would permit legal scholars, social scientists, non-profit organizations, other federal agencies, and interested individuals to submit articles, scholarly works, human rights reports, and other studies, which it would then consider at the adjudication. More influential and informed commentators—the NIJC, UNHCR, the State Department, and other non-profits and NGOs—would submit full amici curiae briefs and potentially present oral arguments before the BIA. Necessarily, the United States system must be inquisitorial in nature, allowing for the creation of a full record, but must also permit both the government and appellant to present their respective arguments before the BIA.

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272. *Cf.* Thomas, *supra* note 23, at 505 ("Good country guidance presupposes good country information.").

273. *Cf.* Brief of the National Immigration Justice Center as *Amicus Curiae* in Support of Respondents at 13–17, Holder v. Gutierrez, No. 10-1542, *cert. granted*, 132 S. Ct. 71 (Sept. 27, 2011), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1542_respondent_amcu_nijc.authcheckdam.pdf.

274. *See generally* 5 U.S.C. § 553 (2012) (describing the process of notice-and-comment rulemaking).

275. *Cf.* 5 U.S.C. § 553(b) ("General notice of proposed rule making shall be published in the Federal Register . . . .").

Ultimately, the applicant's counsel, non-profits, amici curiae, and other interested parties have a duty to ensure the BIA reviews all potential evidence. The submission of documentary evidence by members of the public, amici curiae briefs, and potentially the oral arguments of amici curiae would protect future applicants from the present applicant's ineffective counsel. Professor Robert Thomas acknowledges the risk a Guidance Decision system would present if the fact-finding "were strictly confined to the body of evidence presented before it by the parties" in an adversarial system.[276] For this reason, the BIA has a duty to develop the above-described procedures and widely accept amici curiae and publicly submitted documents, in addition to granting the most authoritative amici curiae time for oral arguments, when issuing a Guidance Decision. The participation of a wide range of actors ensures that the BIA reviews all available evidence and preserves some notion of procedural due process.

Pro se asylum applicants do not have the funds or know-how to obtain the necessary sociological evidence—almost always from expert witnesses—to present a compelling asylum claim. Under the proposed system, amici curiae, as well as a skilled appellate immigration lawyer, have the opportunity to speak for a large class of people. Even if the BIA issues a poorly reasoned decision that denies the future pro se applicant relief, it is unlikely that said applicant would have been able to produce the requisite evidence anyway. And, arguably, the BIA already relies on unfavorable precedent to deny applicants with similar claims.[277] Countless individuals, however, could be protected from the evidentiary burdens with the release of a beneficial Guidance Decision. While the BIA must create procedures promoting an environment for fair adjudication, the onus is on skilled immigration attorneys and amici curiae to create a compelling record and strive for a beneficial country guidance determination.

Currently, pro se applicants lack any protection from the burdens of the current evidentiary requirements of proving the existence of a particular social group. This proposed Guidance Decision system is just one method—with researchable results from the United Kingdom—to lessen these evidentiary burdens. Without a return to *Acosta*, the BIA must put some prec-

276. Thomas, *supra* note 23, at 509.

277. *See, e.g.*, *Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 249–51 (B.I.A. 2014) (relying heavily on *Matter of S-E-G-* and *E-A-G-* in assessing the proposed particular social group).

edential fact-finding regime in place to protect future applicants. As discussed extensively in Part II, pro se applicants cannot be expected to produce the colossal record necessary to prove social distinction. This system places the duty of creating such an evidentiary record in the hands of a team of competent immigration lawyers and expert witnesses who can ensure protection for future asylum applicants. As Judge Easterbrook stated, "What cannot continue . . . is administrative refusal to take a stand on recurring questions, coupled with reliance on IJs to fill in for the expertise missing from the record."[278]

CONCLUSION

Indisputably, neither the 1951 Refugee Convention nor the 1980 Refugee Act adequately define "particular social group." As the Third Circuit stated in *Fatin v. INS*:

> Both courts and commentators have struggled to define "particular social group." Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a "particular social group." Thus, the statutory language standing alone is not very instructive.[279]

Adjudicators need a standard to determine whether or not individuals are members in a particular social group. And, for over twenty years, *Acosta* provided that standard.[280] Now, the BIA seeks to tighten the particular social group standard with the elements of particularity and social distinction.

Yet pro se applicants cannot successfully play the game of semantics that emerges as a result of the interplay between particularity and social distinction. If an applicant avoids the wrath of particularity by defining her particular social group with statistical precision, she will struggle to find sufficient sociological evidence supporting the recognition of that particular social group in the society in question. Social distinction and particularity erect evidentiary barriers that pro se asylum applicants cannot be expected to overcome. This Note's proposed solution of Guidance Decisions is a practical system that will alleviate some of the burden on pro se applicants. Such a system will lessen the evidentiary burden by creating precedential fact-finding cases, thereby reducing the amount of country condition evidence that will need to be produced by any individual asylum applicant. This Guidance Decision system better protects pro se applicants by providing them with a team of advo-

278. Banks v. Gonzales, 453 F.3d 449, 454 (7th Cir. 2006).
279. Fatin v. INS, 12 F.3d 1233, 1238 (3d Cir. 1993).
280. *See supra* Part I.B.1.

cates. Experienced immigration attorneys and amici curiae can advocate at a Guidance Decision hearing not only for their own client, but also for future pro se applicants who may otherwise be denied protection due to evidentiary pitfalls. Until the BIA implements such a system, pro se applicants will continue to lose this game of social group semantics.