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Revisiting Immutability: Competing Frameworks for Adjudicating Asylum Claims Based on Membership in a Particular Social Group

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REVISITING IMMUTABILITY: COMPETING FRAMEWORKS FOR ADJUDICATING ASYLUM CLAIMS BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Talia Shiff*

ABSTRACT

The Immigration and Nationality Act (INA) defines a refugee as any person who has a "well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion." An emerging issue in U.S. asylum law is how to define the category "membership of a particular social group." This question has become ever-more pressing in light of the fact that the majority of migrants seeking asylum at the U.S.-Mexico border are claiming persecution on account of their "membership in a particular social group." The INA does not define the meaning of "particular social group" and courts are split over the correct definition of the term. According to one approach, the focus should be on which immutable characteristics should be protected from systemic discrimination. According to a second approach, the focus should rather be on how members of a given society define the boundaries of the proposed group. Each framework centers the analysis on a fundamentally distinct set of questions and concerns. This Article outlines the development and conceptual basis of each framework, to show that an immutability-centered approach to defining particular social group generates more consistency in asylum decisions and broadens the scope of asylum to include women and victims of harm traditionally categorized as falling within the category of "private criminal activity." This Article contributes to debates on asylum policy by shedding new light on how to define the contours of asylum status and proposing concrete means by which to accomplish change.

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INTRODUCTION

In recent years, an increasing number of migrants have begun seeking asylum at the U.S.-Mexico border. Many of these migrants hope to escape widespread domestic violence and other forms of gender-motivated harms.[1] The Immigration and Nationality Act (INA) authorized the Attorney General to grant asylum if an alien is unable or unwilling to return to his or her country of origin based on "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[2] An emerging issue in U.S. asylum law is whether victims of gender-motivated harms—such as domestic violence—are eligible for asylum as members of a "particular social group." Circuit courts debate the matter and immigration judges have issued conflicting decisions on similar claims.[3]

Of the five protected grounds, the phrase "membership of a particular social group" is the most ambiguous, generating the most debate.[4] The INA does not define "persecution on account of

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1. HILLEL R. SMITH, CONG. RES. SERV., ASYLUM AND RELATED PROTECTIONS FOR ALIENS WHO FEAR GANG AND DOMESTIC VIOLENCE 1 (2019).

2. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended at 8 U.S.C. §§ 1101, 1157–1159 (1980)).

3. Circuit courts debate whether victims of gender-motivated violence can constitute members of a particular social group for asylum purposes. Some have recognized social groups defined by gender. Fatin v. Immigration & Naturalization Serv., 12 F.3d 1233, 1240 (3d Cir. 1993) (stating that "to the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has" identified herself as a part of a group within the interpretation of asylum); *see* Cece v. Holder, 733 F.3d 662, 677 (7th Cir. 2013) (recognizing young women living alone in Albania as a particular social group); Perdomo v. Holder, 611 F.3d 662, 663 (9th Cir. 2010) (recognizing a particular group of young women in Guatemala between the age of fourteen and forty who lived in the United States).

Other circuits have claimed that groups defined by gender alone, or in combination with other characteristics, are not cognizable for asylum purposes. Velasquez v. Sessions, 866 F.3d 183, 197 (4th Cir. 2017) (holding that the petitioner's asylum claim concerned personal, private conflict rather than persecution on a protected ground); Fuentes-Erazo v. Sessions, 848 F.3d 847, 853 (8th Cir. 2017) (holding that the proposed group of "Honduran women in domestic relationships who are unable to leave their relationships" is not necessarily cognizable for asylum purposes); Jeronimo v. U.S. Att'y Gen., 678 F. App'x 796, 802–03 (11th Cir. 2017) (denying application of a woman who claimed membership in a group of "indigenous women who live with a domestic partner and who suffer abuse and cannot leave safely from that domestic partner relationship"); *see also* Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012,* 24 HASTINGS WOMEN'S L.J. 107 (2013) (documenting the inconsistent outcomes of cases involving domestic violence and other forms of gender-motivated harms); Blaine Bookey, *Gender-Based Asylum Post-In re A-R-C-G: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L. L. 1 (2016).

4. *In re* Acosta, 19 I. & N. Dec. 211, 232–33 (B.I.A. 1985).

membership in a particular social group."[5] The Board of Immigration Appeals (hereinafter "the Board") first defined the term in the seminal case, *In re Acosta*, where it held that a particular social group requires "a group of persons all of whom share a common, immutable characteristic . . . that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[6] This legal standard has become the dominant view of the international community.[7] Major common law countries like Canada, New Zealand, and the United Kingdom follow the *In re Acosta* "protected characteristic" approach.[8]

In the years after *In re Acosta*, the Board refined the legal standard for a particular social group, holding that the mere existence of a shared immutable trait was not enough to establish a cognizable particular social group for the purpose of asylum. Rather, the group also had to exhibit "particularity" and to be "socially distinct within the society in question."[9] The new "social distinction" approach shifted the focus of analysis away from the protected trait to the discernibility of the group's outer limits; decision-makers became less concerned about how the presence of a shared immutable trait warranted asylum protection, and more concerned with the extent to which members of a given society perceive the group to exist. The international community adheres to *In re Acosta's* immutability approach; but in recent years, U.S. courts have predominantly relied on the social distinction approach to process asylum claims in terms of membership in a social group for gender-related harms.[10] This study challenges the social distinction approach by examining its negative implications for asylum claims based on gender-motivated violence. The Board's new social distinction approach undermines the "immutability" framework, set forth in *In re Acosta*, reaffirming a problematic distinction between "private" and "public" harms that courts have used to justify the denial of asylum

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5. *See id.*

6. *Id.* at 233.

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

8. *Id.*

9. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014). The Board qualified the immutability standard in *In re C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006), holding that when defining a particular social group, "a relevant fact [is] the extent to which members of a society perceive those with the characteristic in question as members of a social group." By 2014, the Board clarified that applicants seeking asylum must establish that their group is not only "composed of members who share a common immutable characteristic" but is also "defined with particularity, and . . . socially distinct within the society in question." *M-E-V-G-*, 26 I. & N. Dec. 227, 227, 252 (B.I.A. 2014).

10. *See* Marouf, *supra* note 7, at 48.

to victims of gender-motivated violence.[11] Specifically, in its focus on how members of a given society define the proposed group, it reifies preexisting societal subdivisions often to the detriment of women who, while subject to systemic discrimination, do not fit within mainstream societal subdivisions.

This Article argues that the Board should readopt immutability as the primary standard for defining membership in a particular social group. Restrictions on asylum eligibility should not focus on the particularity and social discernibility of group boundaries, but rather on whether there is nexus between the individual's proposed grouping and the alleged claim of persecution. This approach is consistent with recent Seventh Circuit decisions, in which the court rejected the Board's social distinction approach in favor of an immutability-centered approach for defining "membership of a particular social group."[12] An immutability-centered approach to defining membership in a particular social group provides for more consistency in asylum decisions. Moreover, in focusing asylum status determinations on the question of who is deserving of asylum, rather than on the breadth of a legally constructed group, it provides protection to women and victims of non-standard forms of harm traditionally categorized as falling within the category of "private criminal activity."

Part I of this Article outlines the "immutability" approach to social group claims, which the Board set-forth in *In re Acosta*. This includes a discussion of the historical roots of *Acosta*'s immutability approach in U.S. equal protection jurisprudence and how the meaning of immutability changed when it migrated from equal protection cases to the context of asylum. Specifically, three consecutive decisions defined the meaning of immutability as a criterion for group membership, each of which associated immutability with innate identity traits: sexual orientation, kinship ties, and gender.[13] These traits, in turn, shaped how decision-makers applied

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11. *In re* A-B-, 27 I. & N. Dec. 316, 320 (A.G. 2018) ("Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum. While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum . . . in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address.").

12. *See, e.g.*, Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009); Cece v. Holder, 733 F.3d 662, 677 (7th Cir. 2013).

13. The Board published three precedent decisions during the 1990s, each of which recognized a distinct identity-trait as immutable. *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990) (holding that sexual orientation is an immutable characteristic that defines membership of a particular social group); *In re* H-, 21 I. & N. Dec. 337, 342 (B.I.A. 1996) (stating "that clan membership is a highly recognizable, immutable characteristic that is acquired at birth and is inextricably linked to family ties"); *In re* Kasinga, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) ("The characteristics of being a 'young woman' and a 'member of the

the term when defining membership in a particular social group. The reasoning put forth in *In re Acosta* and clarified through the Board's consecutive decisions on the nature of immutability resonates with classic antidiscrimination analysis and its focus on protecting traits because of their inherent importance to personhood.[14] In these cases, the Board centered its analysis on identifying the applicant's protected characteristic and on the extent to which the applicant was the target of systemic discrimination.

Part II of this Article outlines the development of the Board's social distinction approach, outlining how this framework is incompatible with the immutability framework. The social distinction approach shifts the focus of analysis away from the nature of the protected trait to the size, cohesivity, and distinction of the proposed social group. Adherents of the social distinction framework ask if the group is sufficiently distinct and particular for members of the larger society to recognize it as a discrete social group. The immutability framework, by contrast, identifies which individual-level characteristics decision-makers should protect from systemic discrimination.

In Part III of this Article, the judicial processes through which the Board's social distinction approach became the primary framework for adjudicating gender-related asylum claims is outlined. By highlighting the practical challenges involved in implementing a framework focused on social distinction, this section demonstrates the profoundly negative impact of this approach on victims of gender-motivated violence. These individuals come from all sectors of society, and thus, the courts would not typically recognize them as members of a discrete social group.

Part IV of this Article concludes with an argument for why adjudicators should reject the social distinction approach and adhere to *In re Acosta's* immutability framework for determining membership in a particular social group. Although immutability has its limitations, it reflects a fundamental motivation of contemporary asylum law: to protect individuals from systemic discriminatory persecution when they are targeted for traits for which they are either not at fault or which they should not be required to change.

Tchamba-Kunsuntu Tribe' cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.").

14. In *Cece*, 733 F.3d at 677, the Seventh Circuit drew a direct analogy between the protected categories under Title VII and the protected categories of asylum law.

I. THE IMMUTABILITY FRAMEWORK FOR DEFINING MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

A. *The Historical Roots of Immutability*

The INA does not define any of the five enumerated categories of persecution, but "membership of a particular social group" has caused the greatest confusion.[15] The phrase "membership of a particular social group" was first introduced during the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (1951), which was convened to complete the drafting of the 1951 U.N. Convention Relating to the Status of Refugees.[16] The conference debates were the first concentrated effort to create a clear definition of the term *refugee*. During the conference, the Swedish representative introduced an amendment to include a reference to persons who might be persecuted "because they belonged to particular social groups."[17] At the time, neither the Swedish representative nor any other state representative attempted to define the meaning and scope of the proposed category of *refugee*.[18] The legislative history of the Refugee Act sheds little light on the social group aspect of the refugee definition.[19]

The Board first addressed the meaning of the term "membership of a particular social group" in *In re Acosta*.[20] The respondent,

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15. Interview with Judge Paul W. Schmidt, Immigration Judge (Feb. 9, 2017). Judge Schmidt explained that prior to 1980, Congress and the courts had never formally defined the terms "race," "religion," "nationality" and "political opinion," but their meanings were well established within U.S. political culture and garnered wide-political support. Interviews with asylum officers and immigration judges suggest that when applying the grounds of race, religion, nationality and political opinion, asylum officers and immigration judges could more easily rely on institutional scripts which associated refugee status with state-sponsored persecution of religious and political minorities rooted in Cold War politics. In this respect, rather than signaling a sharp break from Cold War refugee policy, the new regime drew from, and to a certain extent preserved, understandings of refugee status formed during the Cold War. This was not the case with "membership of a particular social group." The category had no clear referent in U.S. political culture and lawmakers perceived the term as ambiguous.

16. IVOR JACKSON, THE REFUGEE CONCEPT IN GROUP SITUATIONS 69 (1999).

17. U.N. GAOR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 3d mtg. at 14, U.N. Doc. A/CONF.2/SR.3 at 14 (Nov. 19, 1951).

18. *Id.*

19. *See* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

20. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). *Acosta* is one of the most cited decisions in asylum law, setting the shape of particular social group jurisprudence not only in the United States but in other principle asylum receiving countries. *See also* Rebecca Hamlin, *International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia*, 37 L.& SOC. INQUIRY 933 (2012); Catherine Dauvergne & Jenni Millbank, *Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers*, 31 FED. L. REV. 299 (2003).

a native and citizen of El Salvador, was persecuted by guerrillas because of his refusal to participate in the guerrilla-sponsored work stoppages as a taxi driver. The question before the Board was whether the respondent's claimed suffering of persecution based on his membership in a group comprised of "COTAXI drivers and persons engaged in the transportation industry of El Salvador" was cognizable for asylum purposes.[21] To answer this question, the Board defined the meaning of the term, "membership of a particular social group." According to the Board, a "particular social group" must first and foremost "preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution."[22] This ruling emphasized that "dissent or disagreement with the conditions in another country or a desire to experience greater economic advantage or personal freedom in the United States" did not represent sufficient grounds for asylum.[23]

The Board held that an applicant is "worthy" of asylum if he or she is persecuted for an *immutable attribute* that the *applicant cannot change or should not be required to change*.[24] Accordingly, the Board interpreted the phrase "persecution on account of membership of a particular social group" to mean:

> [P]ersecution that is directed toward an individual who is a member of a group of persons all of whom share a common, *immutable* characteristic. . . . that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it not be required to be changed.[25]

The Board rationalized its new emphasis on immutability on the well-established doctrine of *ejusdem generis* (of the same kind), stating that "membership of a particular social group" should be understood in light of the other four enumerated categories: race, religion, nationality, and political opinion. These terms, according to the Board, all described "persecution aimed at an *immutable* characteristic."[26]

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21. *Acosta*, 19 I. & N. Dec. at 232.
22. *Id.* at 234.
23. *Id.* at 221–22.
24. *See id.* at 218, 233.
25. *Id.* at 233–34.
26. *Id.* (emphasis added) (internal quotation marks omitted). A critical reading of U.S. asylum policy suggests, however, that this explanation is partial at best. Analysis of reports of international refugee conventions dating back to the interwar period indicates that at the time deservingness for asylum was a function of an individual's political and religious motivation to flee. That is, the focus was not on the immutable nature of the trait prompting the

The concept of immutability was not particular to asylum law but rather central to U.S. jurisprudence at the time.[27] Immutability first appeared in the U.S. Supreme Court's equal protection jurisprudence in *Frontiero v. Richardson*, where a plurality of the Court reasoned:

> [S]ince sex, like race and national origin, is an *immutable* characteristic determined solely by the accident of birth, the imposition of special disabilities upon members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .[28]

The logic behind the immutability standard was that certain traits—like race, sex, and national origin—are not blameworthy, as they represent "accidents of birth."[29] This reflects a shared moral intuition that it is unjust to discriminate against an individual because of a trait that bears no relationship to individual responsibility.[30] The *In re Acosta* Board did not directly cite the *Frontiero* decision, but the language it used was reminiscent of this logic. In importing the immutability standard from equal protection jurisprudence to asylum law, the Board centered eligibility for asylum on the nature of the trait for which an individual was persecuted; the implicit notion was that only persons who could not avoid persecution under any circumstances were eligible for asylum protection.

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persecution of an individual, but on whether the motivation to flee was religious/political—rather than economic. That the board's use of the immutability standard signals a new development in U.S. asylum law is further indicated by the fact that the board's definition of *particular social group* in *Acosta* diverged from prior definitions of the category, all of which emphasized shared background, habits, interests, values, and social status, as defining factors of particular social groups for asylum purposes. *See* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW (3d ed. 2007); ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW (1972).

27. *See* Jessica A. Clarke, *Against Immutability*, 125 YALE L. J. 2 (2015). Clarke contends that the concept of immutability as chance or 'an accident of birth' arose in the Supreme Court's equal protection jurisprudence: "the Supreme Court has mentioned immutability as one of several factors that might be relevant to the question of whether a legislative classification based on a particular trait deserves heightened scrutiny by the courts." *Id.* at 13–14.

28. *Id.* at 14–15 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (emphasis added) (internal quotation marks omitted)).

29. *Id.* at 9 (internal quotation marks omitted).

30. *See id.* at 9–10.

B. *The Migration of the Immutability Standard from Equal Protection Jurisprudence to Asylum Law: Expanding the Immutability Concept*

Once imported from equal protection jurisprudence to asylum law, the concept of immutability transformed. In *Frontiero v. Richardson*, the Court adopted a literal interpretation of the term and restricted immutability to physically unchangeable traits, whose "possessors are powerless to escape or set aside."[31] In *In re Acosta*, the Board expanded this definition to include characteristics that are "so fundamental to individual identity or conscience that [they] ought not be required to be changed."[32] From this perspective, decision-makers could only understand immutability in the literal sense of the term: traits that members of the class are physically unable to change or traits that are so fundamental to a person's identity that it would be unjust for a government to penalize a person for refusing to change them—regardless of their physical capability to do so.[33]

In 1985, immutability was still a vague concept in U.S. asylum law. Arguing that the "shared characteristic might be an innate one such as sex, color, or kinship ties," the Board held in *In re Acosta* that neither the characteristics of being a taxi driver or refusing to participate in guerrilla-sponsored work stoppages were *immutable* "because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages."[34] According to the Board, "because the respondent's membership in the group of taxi drivers was something he *had the power to change*, . . . he has not shown that the conduct he feared was persecution on account of membership in a particular social group."[35]

Following this decision, the Board denied asylum to an increasing number of applicants under the rationale that the claimants did not have characteristics or traits that were immutable or fundamental to a person's individual identity or conscience. These in-

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31. *Id.* at 14 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978)) (internal quotation marks omitted); *see also* Johnson v. Robinson, 415 U.S. 361, 365 (1974) (holding that conscientious objectors lacked an immutable characteristic determined solely by the accident of birth).

32. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). The broadening of immutability to include traits that are "fundamental" to individual identity is not unique to asylum. *See* Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343 (1981). As early as 1981, Douglas Laycock argued for a more expansive understanding of immutability under the rationale that "some characteristics should be treated as immutable because of fundamental interests in not changing them." *Id.* at 383.

33. The broadening of immutability to include traits that are fundamental to individual identity is not particular to asylum law but is characteristic of antidiscrimination law and plays a vital role in employment discrimination disputes. *See* Clarke, *supra* note 27, at 8.

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

35. *Id.* (emphasis added) (internal quotations omitted).

cluded proposed social groups defined by age, living environment, socio-economic status, and former professional status.[36] During this early period, however, it was still unclear what attributes qualified as *immutable*, in ways that warranted asylum protection. Over the course of a decade, three traits came to define the meaning of the phrase "fundamental to individual identity:" sexual orientation, kinship ties, and gender identity.

1. Sexual Orientation as a New Standard for Defining Immutability

In the 1990 case of *In re Toboso-Alfonso,* the Board held that homosexuality constitutes a trait that is both immutable and fundamental to individual identity.[37] Fidel Toboso-Alfonso, a forty-year-old native and citizen of Cuba, applied for asylum and withholding of deportation as a member of a particular social group composed of homosexuals.[38] The applicant claimed that he was a homosexual who had experienced persecution on account of that status at the hands of the Cuban government. In February 1986, the immigration judge found Toboso-Alfonso eligible for asylum as a "member of a particular social group who fears persecution by the Cuban Government."[39] The Immigration and Naturalization Service (hereinafter "the Service"), however, appealed the judge's decision on the claim that the applicant failed to establish a cognizable particular social group for asylum.[40] On appeal, the Board held that the Service did not present "persuasive arguments" on which to reverse the immigration judge's decision.[41] Specifically, whereas the Service argued that he was harmed on account of specific activities, the Board held that "[t]he applicant's testimony and evidence . . . do not reflect that it was specific activity that resulted in the governmental actions against him in Cuba, it was his having the status of being a homosexual."[42] In support of its holding, the Board cit-

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36. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1577 (9th Cir. 1986) (holding that the petitioners' class of young, urban, working class males are not a cognizable social group since "[i]ndividuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings").

37. *In re* Fidel Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990).

38. *Id.* at 820.

39. *Id.* The immigration judge denied the applicant's asylum application due to his criminal record in the United States but granted his application for withholding of deportation to Cuba. *Id.* at 822.

40. *Id.* at 820.

41. *Id.* at 822.

42. *Id.*

ed social and behavioral scientists who claimed that sexual orientation is an immutable characteristic that is highly resistant to change and that is fundamental to personhood.[43] Although the Board rejected Toboso-Alfonso's application for asylum due to his criminal record, it held that homosexuality is an immutable trait that can constitute membership in a particular social group.

In 1993, a judge in United States immigration court granted asylum to Marcelo Tenorio from Brazil based on his membership in a particular social group defined by same-sex sexual orientation.[44] Although immigration judges' decisions are not precedential, this was the first such decision to award asylum by acknowledging that homosexuals were members of a particular social group.[45] On June 19, 1994, Attorney General Janet Reno designated the decision in *In re Toboso-Alfonso* as precedent in all proceedings involving the same or similar issues.[46] Under U.S. asylum law, homosexuality was now an innate identity trait that was immutable and definitive to personhood. Following the decision, the Ninth Circuit extended the *In re Toboso-Alfonso* ruling to include transgender identity, holding that female sexual identity is an immutable trait that is fundamental to how a person defines his or her sense of self.[47]

2. Kinship Ties and Female Genital Mutilation as Immutable Characteristics

In the summer of 1996, the Board published two precedential decisions in which it further clarified the meaning of immutability for asylum purposes. The first case, known as *In re H-*,[48] involved a native of Somalia who was a member of the Darood clan and the Marehan sub-clan, who claimed to have experienced persecution

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43. *Id.* The Board, however, did not grant asylum to Toboso-Alfonso due to a criminal conviction for drug possession. *Id.* at 822.

44. *In re* Tenorio, No. A72-093-558 (B.I.A. 1999), *reprinted in* REFUGEE LAW AND POLICY 713 (Karen Musalo et al. eds., 1997); *see* Alan G. Bennett, *The Cure that Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution*, 29 GOLDEN GATE U.L. REV. 279 (1999).

45. Bennett, *supra* note 44, at 287.

46. *In re* Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990). The designation of the original case, decided in 1990, as precedent in 1994, paved the way for asylum based on sexual orientation. *See* Stefan Vogler, *Legally Queer: The Construction of Sexuality in LGBQ Asylum Claims,* 50 LAW & SOC'Y REV., 862 (2016).

47. Hernandez-Montiel v. INS, 225 F.3d 1084, 1085, 1094 (9th Cir. 2000) (concluding that the Board erred in defining the particular social group as "homosexual males who dress as females" holding that correct definition is "gay men with female sexual identities;" according to the court, female sexual identity is an immutable trait that is fundamental to a person's individual identity). *See* Stefan Vogler, *Legally Queer: The Construction of Sexuality in LGBQ Asylum Claims,* 50 L. & SOC'Y REV. 4, 862 (2016).

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

on account of his clan-membership.[49] In December of 1990, there was an uprising against the Marehan sub-clan. Members of the opposition United Somali Congress murdered the applicant's father and brother, while they detained and severely beat him. The applicant succeeded escaping to Kenya, after his maternal uncle (a member of the United Somali Congress), recognized him and assisted in his escape.[50]

The immigration judge initially denied the applicant's request for asylum on the conclusion that "[a] person is not entitled to political asylum in the United States because of clan warfare or because of civil warfare."[51] The question before the Board was whether "family membership in the Marehan subclan" constitutes a particular social group.[52] To answer this question, the Board analyzed the nature of clan membership as a personal trait. Citing *The Immigration and Naturalization Service Basic Law Manual* on asylum adjudications, the Board concluded that clan membership is "acquired at birth and is inextricably linked to family ties."[53] According to the Board, because the applicant could not disassociate himself from the clan (clan membership is acquired at birth) nor should he be required to (tribal membership is a definitive aspect of Somalian culture and identity), clan membership constituted an immutable characteristic and the basis of a particular social group cognizable for asylum purposes.[54] Significantly, the Board proceeded to clarify that the size of the group is irrelevant to a determination of whether the proposed group is cognizable: "[t]he fact that almost all Somalis can claim clan membership and that interclan conflict is prevalent should not create undue concern . . . ."[55] Rather, the relevant criterion for determining membership in a particular social group is the *immutability* of the trait for which an individual suffers persecution. Citing "considerable evidence" that the applicant was indeed injured on account of his membership in the Darood clan and the Marehan sub-clan, the Board held that "members of the Marehan sub-clan of Somalia, which share kinship ties and linguistic commonalities," constituted a particular social group for asylum purposes.

No more than two weeks after publishing *In re H-*, the Board rendered a second precedential decision, known as *In re Kasinga*. In this case, the Board concluded that the subordinate gender sta-

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49. *Id.* at 340.
50. *Id.* at 340–41.
51. *Id.* at 338.
52. *Id.* at 342.
53. *Id.*
54. *See id.* at 342–43.
55. *See id.* at 343–44.

tus and sexuality of victims of female genital mutilation (FGM) make them targets constituting a particular social group. Kasinga was a nineteen-year-old native and citizen of Togo, who fled coerced female genital cutting and forced marriage. The immigration judge denied Kasinga's claim on the ground that she was not credible, and that female genital cutting is part of a tribal culture and does not constitute persecution under asylum law.[56] On appeal, the Board reversed the immigration judge's verdict in a nearly unanimous decision. The Board stated that FGM is a form of persecution "used to control woman's (sic) sexuality," and a form of "sexual oppression" that is "based on the manipulation of women's sexuality in order to assure male dominance and exploitation."[57] The Board cited Nahid Toubia, an advisor to the World Health Organization and director of the Global Action Against FGM Project at Columbia University School of Health, who established that FGM was not merely a cultural practice, but rather a form of oppression aimed at violating and exploiting a woman's sexuality.[58] The Board added that "FGM, is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe [intact genitalia] who have not been, and do not wish to be, subjected to FGM." [59] Holding that the "characteristic of having intact genitalia is so *fundamental* to the individual identity of a young woman that she should not be required to change it,"[60] the Board concluded that FGM is a form of persecution inflicted on a shared immutable characteristic—female sexuality—and therefore constituted the basis of a particular social group.[61]

The reasoning put forth in *In re Acosta* and clarified through the Board's three consecutive decisions on the nature of immutability resonates with classic antidiscrimination analysis. In these cases,

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56. *In re* Kasinga, 21 I. & N. Dec. 357, 358–59 (B.I.A 1996). Kasinga's case caught the attention of Karen Musalo, the acting head of the Human Rights Clinic at American University, who agreed to handle the appeal pro bono. Shortly after becoming involved in the case, Musalo turned to various human rights and feminist organizations. Among them was Surita Sandosham, the executive director of Equality Now, a women's rights organization and a leading player in the emerging global anti-FGM campaign. In the following months, there was a steady progression of incredibly positive media in favor of Kasinga, who was portrayed as a victim of a horrific practice aimed at subordinating women. *See* David Martin, *Adelaide Abankwah, Fauziya Kasinga, and the Dilemmas of Political Asylum*, *in* IMMIGRATION STORIES 243 (David A. Martin & Peter H. Schuck eds., 2005).

57. *Kasinga*, 21 I. & N. Dec. at 366.

58. *Id.* at 361. Through its focus is on female genital cutting, the Board generated an understanding of immutability associated with bodily (sexual) traits framed as innate and fundamental to individual personhood. *See id.* at 366.

59. *Id.* at 367.

60. *Id.* at 366.

61. *Id.* at 367.

the Board focused on identifying the protected characteristic and the extent to which it was the target of systemic discrimination. Foreign courts have further elaborated on the analogy between the protected categories of asylum law and the protected categories under antidiscrimination law. In *Ward v. Attorney General of Canada*, the Supreme Court of Canada held that the principle stated in the Preamble of the Refugee Convention should serve as the guiding criteria for which cases are embraced by the Convention: "In distilling the contents of the head of 'particular social group', [sic] account should be taken of the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative."[62] New Zealand and the United Kingdom have also adopted the *In re Acosta* "protected characteristic" approach to define a particular social group; both courts have argued that the protected characteristic defining a cognizable particular social group is intrinsically linked to the principle of discrimination.[63] In the United States, an alternative approach to defining particular social groups for asylum purposes began to emerge, which focused not on identifying what traits required protection from systemic discrimination, but rather, on whether the particular group represented a recognized subdivision within the asylum applicant's society. The Board rationalized its social distinction requirement as "the need to put 'outer limits' on the definition of a 'particular social group.'"[64]

II. THE SOCIAL DISTINCTION FRAMEWORK FOR DEFINING MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Soon after the *Acosta* decision, the Ninth Circuit provided an alternative definition of a particular social group.[65] In *Sanchez-Trujillo v. INS*, the petitioners—Luis Alonzo Sanchez-Trujillo and Luis Armando Escobar-Nieto, natives and citizens of El Salvador—applied for asylum based on their membership in a purportedly persecuted

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62. Canada (A.G.) v. Ward, 1993, 2 S.C.R. 689, 692 (1993); *see* Marouf, *supra* note 7, at 54.

63. The New Zealand Refugee Status Appeals Authority specifically found that the *Acosta* interpretation of a "particular social group" connects this social category to "the principle of the avoidance of civil and political discrimination." Marouf, *supra* note 7, at 56. In the United Kingdom, the leading case on membership in a particular social group is the House of Lords' decision on Islam, which also relied heavily on *Acosta*. "Lord Hoffman reasoned that the Convention 'is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination.'" *See id.*

64. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 238 (B.I.A. 2014).

65. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576–77 (9th Cir. 1986).

social group of "young, working-class males who have not served in the military of El Salvador."[66] In a decision rendered in September 1982, the immigration judge found that such a large division of the population did not constitute a cognizable "social group."[67] The Board affirmed the immigration judge's findings, holding, "[the] status of a young, urban, working class male without military service" did not constitute membership in a particular social group. On appeal, the Ninth Circuit affirmed the Board's finding that the class of people that the petitioners identified did not represent a cognizable social group, emphasizing, "the statutory words 'particular' and 'social' which modify 'group' . . . indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance."[68] According to the court, "[o]f central concern [to the formation of a cognizable social group] is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group."[69]

The court never cited *Acosta's* immutability standard, instead centering its analysis on the "particularity" of the group, the extent to which it is "cohesive" and "homogenous." The court made the term "homogenous" the primary criterion for determining whether a proposed social group was cognizable for asylum purposes.[70] According to the court, "such an all-encompassing grouping as the petitioners identify simply is not that type of cohesive, homogeneous group to which we believe the term 'particular social group' was intended to apply."[71] In what would become a recurring theme in social group jurisprudence, the court referred to the "fear of floodgates" argument to justify its emphasis on the group's cohesivity and particularity, claiming that "[t]o hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home coun-

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66. *Id.* at 1572.

67. *Id.* at 1573.

68. *Id.* at 1576. The court cited the Ninth Circuit decisions that rejected similar formulations on the ground that these are too broad; *see, e.g.*, Chavez v. INS, 723 F.2d 1431, 1434 (9th Cir. 1984) (holding that the alien's "status as a 'young urban male' is not specific enough for asylum").

69. *Sanchez-Trujillo*, 801 F.2d at 1576.

70. *Id.* at 1577.

71. No other court adopted the Ninth Circuit's "voluntary associational requirement." The Ninth Circuit eventually remanded the *Sanchez-Trujillo* decision to clarify that voluntary associational relationship is not a qualifying criterion for defining particular social group. *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1092 (9th Cir. 2000).

try."[72] According to the court, "[r]efugee status simply does not extend as far as the petitioners would contend."[73]

In a 1991 case, *Gomez v. Immigration and Naturalization Service*,[74] the Second Circuit held that the salient definition of a particular social group was a group that consists of "individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general."[75] In complete contradiction of the immutability centered framework for social group put forth in *Acosta*, the court concluded that "[p]ossession of broadly-based characteristics such as youth and *gender* will not by itself endow individuals with membership in a particular group."[76] Over the course of the next decade, this focus on particularity and social perceivability became the basis for a new approach to defining a "particular social group," which emphasized not the shared (immutable) identity traits that make one the target of systemic discrimination, but rather, the social distinction and particularity of the group's outer limits.

The first time the Board shifted the focus of its analysis away from the immutability standard and toward the social cognizability of the proposed social group was in the landmark case, *In re R-A-*.[77] The respondent in the case, Rodi Alvarado, a native and citizen of Guatemala, suffered brutal physical and sexual violence at the hands of her husband, a former soldier in the Guatemalan army. After repeated failed attempts to obtain government protection, she fled to the United States in search of asylum. The immigration judge found the respondent to be credible and concluded that she suffered persecution on account of her membership in the particular social group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[78] Importantly, the immigration judge held that members of such a group are subordinated and targeted for persecution on account of their gender by the men who seek to dominate and control them.

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72. *Id.*
73. *Id.*
74. Gomez v. INS, 947 F.2d 550 (2d Cir. 1991); *see also* Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985) (adopting the United Nations High Commissioner for Refugees interpretation that "a 'particular social group' normally comprises persons of similar background, habits or social status . . . .").
75. *Gomez*, 947 F.2d at 664.
76. *Id.* (emphasis added).
77. *In re* R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999).
78. *Id.* at 911.

The Service appealed the immigration judge's decision, claiming that the applicant's proposed group was not cognizable for asylum purposes. On appeal, the Board held that the immigration judge was wrong to conclude that Alvarado was harmed on account of her membership in a particular social group.[79] The Board based its conclusion on the fact that "[a]bsent from [the] group's makeup [was] a 'voluntary associational relationship' that [was] of central concern [to] the Ninth Circuit."[80] The Board then clarified, "regardless of Ninth Circuit law . . . [the respondent's claimed social group fails under its own] independent assessment of what constitutes a qualifying social group."[81] According to the Board, the proposed social group:

> [A]ppears to have been defined principally, if not exclusively, for purposes of this asylum case, and without regard to the question of whether anyone in Guatemala perceives this group to exist in any form whatsoever. . . . [The group] seems to bear little or no relation to the way in which Guatemalans might identify subdivisions within their own society . . . .[82]

Although the Board noted, "[t]he proposed group may satisfy the basic requirement of containing an immutable or fundamental individual characteristic," the Board did not address the question of whether members of the proposed group are targets of systematic discrimination.[83] Instead, the Board spent the crux of its analysis explaining that "for the group to be viable for asylum purposes, we believe there must also be some showing of how the characteristic is understood in the alien's society . . . ."[84] According to the Board, because the respondent in this case had failed to show that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination is a group that is recognized and understood to

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79. Alvarado also made a claim of imputed political opinion. The Board rejected this argument, stating that, "the respondent has failed to show that her husband was motivated to harm her, even in part, because of her membership in a particular social group or because of an actual or imputed political opinion." *See id.* at 907.

80. *Id.* at 917–18 (quoting Sanchez-Trujillo v. INS, 801 F.2d 1571, 1572 (9th Cir. 1986) (rejecting the proposed social group of "young, working class males who have not served in the military of El Salvador")).

81. *R-A-*, 22 I. & N. Dec. at 918.

82. *Id.*

83. *Id.*

84. *Id.*

be a societal faction," she failed to establish her membership within a cognizable particular social group.[85]

In a 2006 case, *In re C-A-*, the Board formally introduced changes to its original immutability framework for the first time, turning social visibility into an official criterion for defining membership in a particular social group for asylum purposes.[86] The case involved a married couple and their two minor children, all natives and citizens of Colombia, who claimed persecution on account of their membership in the group of "noncriminal drug informants working against the Cali drug cartel."[87] After clarifying that it would continue to adhere to the *In re Acosta* formulation of a particular social group, the Board added a second "relevant factor" in considering whether a given particular social group was cognizable: "the extent to which members of a society perceive those with the characteristic in question as members of a social group."[88] Addressing the respondents' proposed group, the Board held that "noncriminal drug informants working against the Cali cartel" in Colombia did not constitute a particular social group for asylum purpurposes because of "the lack of social visibility of the members of the purported social group, and the indications in the record that the Cali cartel retaliates against anyone perceived to have interfered with its operations . . . ."[89] Moreover, for a group to be cognizable by members of the given society, the Board explained, it cannot be "too loosely defined to meet the requirement of particularity" as in the case of noncriminal informants who come from all sectors of society.[90]

Several months after *C-A-*, the Board rendered a decision in a case known as *In re A-M-E & J-G-U-*.[91] The Board not only affirmed the importance of social visibility, but also formally added the criterion of "particularity."[92] In this case, the question before the Board was whether "affluent Guatemalans" constitute a cognizable particular social group for asylum purposes. The respondents in the case, a married couple from Guatemala, claimed to have received repeated threats against their life. As a result, they had to continually change their location because of their membership in a particular social group composed of "higher socio-economic" Guatemalans. The Board first noted that the determination of

85. *Id.* (internal quotations omitted).
86. *In re* C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).
87. *Id.* at 951, 957.
88. *Id.* at 957.
89. *Id.* at 961.
90. *Id.* at 957.
91. *In re* A-M-E & J-G-U-, 24 I. & N. Dec. 69 (B.I.A. 2007).
92. *Id.* at 69, 74–76.

"wealth" was not "immutable," though it did not disqualify the proposed group if "the shared characteristic is so fundamental to identity or conscience that it should not be expected to be changed."[93] The Board, however, chose not to reach a decision on whether wealth constitutes a trait fundamental to individual identity, holding that the group failed on another ground: it was not sufficiently "identifiable" to meet the requirements of a particular social group within the meaning of the refugee definition.[94] Center-Centering its analysis on the issue of "social visibility," the Board stated that there was little evidence in the case to indicate that "wealthy Guatemalans would be recognized as a group that is at greater risk of crime in general or of extortion or robbery in particular."[95] According to the Board, the terms "wealth" and "affluent" were too amorphous; the proposed group of "wealthy" Guatemalans was not "sufficiently defined as to meet the requirements of a *particular* [and *socially visible*] social group within the meaning of the refugee definition."[96]

A year later, the Board further refined its *particularity* and *social visibility* requirements in a pair of rulings involving gang-related violence.[97] Here, the Board explained that the "essence of the 'particularity' requirement is whether the proposed group can accurately be described in a manner sufficiently distinct such that the group would be recognized in the society in question as a *discrete class of persons*." Social visibility refers to a characteristic that could be recognizable by others in the community.[98] The Board noted

93. *Id.* at 73.
94. *Id.* at 74.
95. *Id.*
96. *See id.*
97. *In re* S-E-G-, 24 I. & N. Dec. 579 (B.I.A. 2008); *In re* E-A-G-, 24 I. & N. Dec. 591 (B.I.A. 2008). In *S-E-G-*, the Board rejected the social groups of "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities," as well as "family members of such Salvadoran youth," holding that these formulations do not satisfy the standards of "particularity" and "visibility." *S-E-G-*, 24 I. & N. Dec. at 581, 587, 590. Although the Board conceded that the respondents were victims of harassment, beatings and threats from a criminal gang in El Salvador, it held that, "[t]here is little in the background evidence of [the] record to indicate that Salvadorian youth who are recruited by gangs but refuse to join (or their family members) would be 'perceived as a group' by society, or that these individuals suffer from a higher incidence of crime than the rest of the population." *S-E-G-*, 24 I. & N. Dec. at 587. *In re E-A-G-*involved a native and citizen of Honduras who claimed asylum on account of his membership in the particular social group of "young persons who are perceived to be affiliated with gangs" and "persons resistant to gang membership." *E-A-G-*, 24 I. & N. Dec. at 593. Also, the Board failed to conduct any analysis of the immutability of the protected trait, focusing instead on the group's social visibility and particularity. *See id.* According to the Board, "[p]ersons who resist joining gangs have not been shown to be part of a socially visible group within Honduran society . . . or that individuals who are part of that body of persons are seen as a segment of the population in any meaningful respect." *Id.* at 594–95.
98. *S-E-G-*, 24 I. & N. Dec. at 586–88.

that although size may represent an important factor in determining whether a group was recognizable, the key factor was whether "the proposed description is sufficiently 'particular,' or is 'too amorphous . . . to create a benchmark for determining group membership.'"[99] Turning to the facts of the particular case, the Board held that the respondents' groups "make up a potentially large and diffuse segment of society," and thus, lacked sufficient particularity and visibility.[100] Accordingly, "the motivation of gang members in recruiting and targeting young males" may have had no relationship to the fact that "the males in question were members of a class."[101] In both decisions, the Board deliberately avoided engaging in an analysis of the group's immutability, and instead centered its analysis on the question of whether or not members of the claimants' society could sufficiently perceive the groups as distinct from the broader population.

In response to critiques from the circuit courts concerning the lack of clarity of the new "social visibility" and "particularity" requirements, the Board renamed the "social visibility" standard as "social distinction," to clarify that the standard did not refer to literal or "ocular" visibility, but rather to whether the society in question could recognize the particular social group as a distinct entity.[102] According to the Board, an *In re Acosta*-only test would cause considerable confusion and lack of consistency that would "virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."[103] In these consecutive decisions issued over a period of almost a decade, the Board essentially abandoned the immutability framework in favor of one centered on "social cognizability." The emphasis was no longer on the immutable protected characteristic that was the target of systemic discrimination, but rather on the particularity and delineation of the group's outer boundaries.

This reading of social group case law highlights the two competing frameworks for adjudicating social group claims: one focused on immutability and the other on social distinction. Although the Board maintains that these frameworks are compatible with one another, this study has revealed how the two frameworks contradict one another. Each centers the analysis on a fundamentally distinct set of questions and concerns. The immutability framework, set

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99. *Id.* at 584.
100. *Id.* at 585.
101. *Id.*
102. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 227 (B.I.A. 2014); *see also In re* W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014).
103. *M-E-V-G-*, 26 I. & N. at 231.

forth in the Board's landmark *Acosta* decision, focuses on discerning which individual-level characteristics should be protected from systemic discrimination. In this framework, the concern is with what constitutes an "immutable" identity-based trait and the extent to which this trait is the target of discriminatory persecution. From this perspective, the scope of the social group is irrelevant; regardless of how broad the category may be, the individual applicants still must establish that their persecution was the result of their protected characteristic.[104] Conversely, the social distinction framework concentrates on the discernibility of the proposed group's outer-limits. The focus is not on what individual-level trait deserves state protection from systemic discriminatory persecution but what groups members of a given society recognize according to the traditional segments and subdivisions of that culture. The group's particularity, visibility, and cohesiveness replace the question of the immutability of individual-level traits. The following section includes an examination of how this emphasis on social distinction became the Board's primary framework for analyzing claims of gender-motivated violence. Given that the Board has consistently refused to recognize gender alone as constitutive of a particular social group, instead combining it with other qualifying characteristics, such an analysis is necessary.

III. APPLYING THE SOCIAL DISTINCTION FRAMEWORK TO GENDER-RELATED ASYLUM CLAIMS

A. *Combining Gender with Qualifying Characteristics*

In *In re Acosta*, the Board explicitly stated that sex is an "immutable characteristic" that may constitute the basis of a particular social group. Foreign courts, adhering to the *In re Acosta* immutability standard, have recognized social groups defined solely by gen-

104. In *Cece v. Holder*, 733 F.3d 662, 673–74 (7th Cir. 2013), the court drew a direct analogy between social group analysis for asylum purposes and Title VII, holding that: "the breadth of the social group says nothing about the requirements for asylum, just as the breadth of categories under Title VII of the Civil Rights Act says nothing about who is eligible to sue an employer for discrimination. All African Americans and all women, for example, are members of 'protected' categories under Title VII, but not all African Americans and women have a claim for discrimination. In order to be entitled to asylum, Cece must be able to demonstrate a particular link between her mistreatment and her membership in the stated social group." According to the court, "[i]t would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims." *Id.* at 675.

der.[105] The United Nation's High Commissioner for Refugees' guidelines on gender similarly state that gender may establish membership in a particular social group.[106] The guidelines specifically instruct that, "sex can properly be within the ambit of the social group category, *with women being a clear example of a social subset defined by innate and immutable characteristics*."[107] In the United States, however, decision-makers have been more reluctant to recognize gender alone as a characteristic of group membership.[108] To date, the Board has never defined a particular social group for asylum purposes by solely by gender. *In re Kasinga* was the first case in which the Board held that victims of a gender-motivated harms (i.e., FGM) are eligible for asylum. However, rather than defining Kasinga's group by gender alone, the Board combined gender with other qualifying characteristics like age, nationality, and opposition to the practice of FGM. Immigration judges, influenced by the Kasinga decision, mirrored this formulation when adjudicating claims involving gender-based violence.[109] Although some circuit courts have accepted broad formulations of social groups defined by gender,[110] the Board has consistently defined particular social groups narrowly, centering its analysis on the characteristics of the proposed group (i.e., is the group sufficiently distinct and particular) as opposed to whether there is evidence of systemic discrimi-

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105. Islam v. Sec'y of State for the Home Dep't, 2 ALL E.R. 546 (1999); Minister for Immigration & Multicultural Affairs v. Khawar, 76 A.L.G.R. 667 (2002); Refugee Appeal No. 71427/99 (1999); *see* Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777 (2003).

106. U.N. High Comm'r for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, U. N. Doc. HCR/GIP/02/01 (2002).

107. *Id.* at 8 (emphasis added).

108. *But see* Fatin v. I.N.S., 12 F.3d 1233 (3d Cir. 1993) (accepting the Board of Immigration Appeal's conclusion that sex might be a shared characteristic for asylum purposes). *See also* Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010) (suggesting that Guatemalan women might constitute a particular social group). Since the early 1990s, legal scholars increasingly called for adjudicating gender-related claims as a form of persecution inflicted on account of a woman's immutable gender, and the number of law journal articles on the topic of gender asylum proliferated. *See, e.g.*, Deborah E. Anker, *Woman Refugees: Forgotten No Longer*, 32 SAN DIEGO L. REV. 771 (1995); Karen Bower, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173 (1993); Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486 (1990); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625 (1993); E. Dana Neacsu, *Gender-Based Persecution as a Basis for Asylum: An Annotated Bibliography, 1993-2002*, 95 LAW LIBR. J. 191 (2003).

109. *See* Lisa Frydman, *Recent Developments in Domestic-Violence-Based Asylum Claims*, 2009 LEXISNEXIS EMERGING ISSUES ANALYSIS 4075, 4–5 (2009).

110. *See, e.g.*, *Fatin*, 12 F.3d 1233; Cece v. Holder, 733 F.3d 662 (7th Cir. 2013); *Perdomo*, 611 F.3d 662.

nation against the group.[111] This, in turn, poses various challenges to victims of gender-motivated harms.

B. *Challenges to Women's Claims*

1. The Difficulty of Assessing Societal Perceptions

In *In re M-E-V-G-*, the Board clarified that applicants for asylum-seeking relief had to demonstrate "that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[112] The Board further clarified this to mean that members of a particular social group will generally understand their own affiliation with that group, as will other people in their country.[113] Studies in psychology and sociology have documented that social perceptions are subjective; the ways that individuals categorize and perceive of groups vary greatly along lines of race, gender, and class—influenced by stereotypes, professional background, and culture.[114] Given that there are multiple and varied social perceptions, the Board's requirement that a given society will recognize the applicant's social group as particular and social distinct is highly problematic, leaving decision-makers with considerable discretion to decide what members of a society determine the existence of a particular social group.

The Board has also neglected to outline the criteria for determining social distinction. In *In re A-R-C-G-*, the Board reasoned that the laws of a given society may indicate whether the proposed social group is socially distinct. According to the Board, "evidence

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111. For the first time in 1993, the Third Circuit Court drew on this framing of gender persecution. The case, *Fatin*, 12 F.3d at 1241, involved a native and citizen of Iran who claimed that she feared persecution on account of her membership in the social group of Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them. The court, citing *In re Acosta*, 19 I. & N. Dec. 211, 234 (B.I.A. 1985), reaffirmed that sex is an innate characteristic that could link members of a particular social group, but nonetheless denied the case on the ground that Fatin's opposition to Iranian laws, including the requirement that all women wear the traditional veil, did not amount to persecution. *Fatin*, 12 F.3d at 1241. Although Fatin did not receive asylum, this was the first time a federal court recognized gender as a basis for a particular social group for asylum purposes.

112. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 251–52 (B.I.A. 2014).

113. *See id.* at 240.

114. *See, e.g.*, Elizabeth Bruch & Fred Feinberg, *Decision-Making Processes in Social Contexts*, 43 ANN. REV. SOC. 207, 207–27 (2017); Marouf, *supra* note 7; Sara L. McKinnon, GENDERED ASYLUM: RACE AND VIOLENCE IN US LAW AND POLITICS (2016); Paloma E. Villegas, *Moments of Humiliation, Intimidation and Implied 'Illegality': Encounters with Immigration Officials at the Border and the Performance of Sovereignty*, 41 J. ETHNIC & MIGRATION STUD. 2357, 2357–75 (2015).

showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group . . . would include 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."[115] Citing evidence that Guatemala has a culture of "machismo and family violence" and laws in place to prosecute domestic violence crimes, the Board concluded that the proposed social group of "married women in Guatemala who are unable to leave their relationship" is socially distinct within Guatemalan society.[116]

Shortly after the Board published its *In re A-R-C-G-* decision, Attorney General Sessions rejected this analysis in *In re A-B-*. Sessions noted that the *In re A-R-C-G-* Board "provided no explanation for why it believed that this evidence [i.e., laws designed to protect victims of domestic violence] established that Guatemalan society perceives, considers, or recognizes 'married women in Guatemala who are unable to leave their relationship' to be a distinct social group." Yet, he similarly failed to outline the factors for determining social distinction. Despite identifying that membership in a particular clan or tribe is "an instructive example" of a socially distinct group, the Attorney General provided no explanation for why "married women in Guatemala who are unable to leave their relationship" failed to constitute a cognizable social group for asylum purposes.[117] Attorney General Session's closest explanation was, "there is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances."[118] Attorney General Sessions, however, explained neither the basis for this assertion nor whom he was referring to by "Guatemalan society."

2. The Applicability of Narrow Particular Social Groups

A second challenge posed by the formation of narrow and fact-specific social groups is the confusion generated over these groups'

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115. *In re* A-R-C-G-, 26 I. & N. Dec. 388, 393–94 (B.I.A. 2014) (citing *In re* W-G-R-, 26 I. & N. Dec. 208, 217 (B.I.A. 2014)).
116. *Id.* at 392, 394.
117. *In re* A-B-, 27 I. & N. Dec. 316, 319, 336 (A.G. 2018).
118. *Id.* at 336.

broader applicability. In the period following *In re A-R-C-G-*, decision-makers diverged greatly in their interpretations of the broader applicability of the Board's ruling that "married women in Guatemala who are unable to leave their relationship" constituted a particular social group cognizable for asylum purposes. This has led to considerable confusion and disparate decisions on cases involving similar fact patterns.[119] In some cases, immigration judges have interpreted the protection granted in *In re A-R-C-G-* to encompass women who never formally married their abusers. From this perspective, the analysis should not center on formal marriage, but rather, on whether the victim is in a long-term relationship from which she cannot escape.[120] In other cases, immigration judges have interpreted *In re A-R-C-G-* as applying only to formal marriage, and have accordingly rejected claims involving long-standing relationships between the women and their abusers even when they presented themselves as husband and wife in the community.[121] Similar issues arise in terms of determining the victim's ability to leave the relationship. In *In re A-R-C-G-*, the Board asserted that a determination of whether a woman is able to leave her relationship is a "fact-specific inquiry," but provided little guidance on the criteria needed to make this determination. In turn, decision-makers have rendered disparate decisions in cases involving quite similar fact patterns.[122] Finally, courts conflict over the broader applicability of *In re A-R-C-G-* to forms of gender-motivated violence aside from domestic violence. In *In re A-R-C-G-*, the Board explicitly cited evidence that "sexual offenses against women [are] a serious societal problem in Guatemala," but did not clarify if this meant that victims of gender-motivated violence—outside of domestic violence—may also qualify for asylum as members of particular social groups.[123] Confusion over the broader applicability of the proposed groupings has not only led to inconsistencies in court decisions, but it has also shifted the focus away from creating a guiding principle of asylum, designed to protect victims who are targets of sys-

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119. *See* Bookey, *supra* note 3.

120. *Id.* at 13. In a DHS brief, the government officially stated that women in "domestic relationships" other than marriage could proffer viable social groups. Dep't of Homeland Security's Supplemental Brief at 18 n.12, Matter of L-R- (B.I.A. Apr. 13, 2009), http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_ 2009.pdf.

121. *See* Bookey, *supra* note 3, at 15.

122. *Id.* at 15. Some judges determined that if an applicant has successfully divorced her husband, she was able to leave the relationship (regardless of whether or not the husband continues to stalk her) whereas other judges focus more on whether the abuser sees the divorce or separation as terminating his right to abuse his wife or partner. Bookey, *Gender-Based Asylum Post-*Matter of A-R-C-G-, *supra* note 3, at 15.

123. *In re* A-R-C-G-, 26 I. & N. Dec. 388, 393 (B.I.A. 2014).

temic discriminatory persecution on account of traits that they can neither change nor should be required to change.[124]

3. Reaffirming the Public/Private Distinction

The Board's adherence to the social distinction framework reifies an outdated and problematic distinction between "public" and "private" forms of harm. Feminist scholars have long criticized the definition of a *refugee* for systematically privileging male-dominated public activities above those of women, which largely take place in spaces traditionally considered "private."[125] Courts often consider forms of gender-related violence as falling within the private (as opposed to the public) realm: they are committed by non-government actors against women from all sectors of society. Accordingly, courts do not recognize women who experience gender-motivated harms as members of conventional minority groups (typically defined by race, religion and class); instead, they are victims of generalized violence and private criminal acts.[126] Despite considerable evidence that the dynamics of domestic violence often involve more than personal disputes and animosity, decision-makers have overlooked how such violence stems from culturally-normed practices that sanction women's gender-subordinated status.[127] By focusing on how members of a given society perceive particular groups, decision-makers have privileged and reified traditional societal sub-divisions organized along the lines of race, religion, and class. Women and victims of generalized forms of vio-

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124. In *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009), the court held that the Board's implementation and justification of the "social visibility" standard is inconsistent. The court reasoned that many of the previous PSG's accepted by the BIA would fail to meet the standard of "social visibility," such as "former employees of the Colombian attorney general," as they either were or could be unknown to their society as a whole. *Id.* Claiming the Board was thus offering two lines of decision making, the court accused the Board of "refusing to classify socially invisible groups as particular social groups [] without repudiating the other line of cases." *Id.* at 616.

125. Bower, *supra* note 108, at 182–83, 486–98; Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213, 233 (1995).

126. Vega-Ayala v. Lynch, 833 F.3d 34, 39 (1st Cir. 2016) (holding that "being in an intimate relationship with a partner who views you as property is not an immutable characteristic"); Velasquez v. Sessions, 866 F.3d 188, 197 (4th Cir. 2017) (holding that the basis for the petitioner's persecution was "solely personal" rather than on the basis of a protected ground); Maldonado v. Sessions, 721 Fed. Appx. 351, 353 (5th Cir. 2018) (holding that gangs are motivated to sexually abuse "single women living alone" for personal and criminal reasons); *In re* A-B-, 27 I. & N. Dec. 316 (A.G. 2018) (holding that gang-related violence and domestic violence are based on personal and criminal motives).

127. Brief for Tshiri Justice Center et al. as Amici Curiae Supporting Plaintiffs at 9, Grace v. Sessions, No. 18-cv-01853, 2018 WL 3812445 (D.D.C. Aug. 9, 2018), ECF No. 80.

lence, who do not bear relation to mainstream societal subdivisions, are resultingly ineligible for asylum protection.

This line of reasoning is most clearly articulated in *In re A-B-*, where the Attorney General drew a direct analogy between victims of domestic violence and victim of private criminal activity. Consequently, other than in exceptional circumstances, victims of "private criminal activity" could not satisfy the requirements for establishing a cognizable particular social group.[128] The Attorney Gen-General rationalized his decision by showing that victims of private criminal activity generally come from all segments of society, and thus, their societies do not generally perceive them as members of socially-distinct marginalized groups subject to systemic discrimination.[129] According to the *In re A-B-* case, broad swaths of society may be susceptible to victimization and victims of private criminal activity "are too diffuse to be recognized as a particular social group."[130] The detrimental effects of this approach are not limited to gender-related claims but extend to other forms of violence that do not align with government-sponsored persecution of well-recognized minority groups.

IV. BRINGING BACK THE IMMUTABILITY FRAMEWORK

In recent decades, the Board and most circuit courts adhere to a social distinction framework for determining the scope of membership in a particular social group. This Article outlined the practical challenges a framework centered on social distinction poses for victims of gender-motivated violence and other forms of violence traditionally located within the sphere of "private criminal activity." Specifically, the Board's emphasis on social distinction leads to inconsistent and unintelligible decisions that often undermine established jurisprudence around the definition of "membership in a particular social group." The Board's use of social distinction also reifies public/private distinctions, disadvantaging women who are often the victims of forms of violence relegated to the "private" sphere of the home. Finally, in demanding that the members of the given society recognize the particular social group, the social distinction framework undermines the core motivation of asylum: to provide protection to victims of systemic discrimination targeted for traits beyond an individual's control to change,

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128. *A-B-*, 27 I. & N. Dec. at 317.
129. *See id.* at 335.
130. *See id.* (citing *Costanza v. Holder*, 647 F.3d 749, 754 (8th Cir. 2011)).

including those traits that do not fall within the more traditional categories of "racial, ethic, and religious groups."[131]

The immutability framework is not without limitations. Courts applying the immutability framework tend to prioritize harms that target a person's body and sexuality over forms of environmental and societal-based violence, which do not neatly fall within the category of innate identity traits. Moreover, the determination of what constitutes an innate identity trait is far from objective, leaving adjudicators with considerable discretion.[132] The Seventh Circuit—one of the only circuit courts to have consistently rejected the Board's social distinction framework in favor of the immutability framework set forth in *In re Acosta*—adheres to a broad interpretation of immutability that is not limited to innate identity traits like gender and sexual orientation. The Seventh Circuit includes such traits as shared past experience or status, recognizing groups as diverse as "former truckers,"[133] former members of a violent and criminal faction in Kenya,[134] and "tattooed, former Salvadoran gang members" who had since turned to God.[135] The court clarified that "members of a social group [neither be] swimming against the stream of an embedded cultural norm," nor does the breadth of the social group say anything about its cognizability. According to the court, the test should determine if the applicant who claims membership in the proposed group can establish "a particular link between her [or his] mistreatment and her [or his] membership in the stated social group."[136] From this perspective, questions concerning the breadth of the proposed group, and the extent to which a specific trait is considered "fundamental," are irrelevant to a determination of whether a particular social group is cognizable for asylum purposes.[137]

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131. *In re* Acosta, 19 I. & N. Dec. 211, 232 (B.I.A. 1985).
132. Clarke, *supra* note 27, at 2.
133. *See* Escobar v. Holder, 657 F.3d 537, 545–46 (7th Cir. 2011).
134. *See* Gatimi v. Holder, 578 F.3d 611, 614 (7th Cir. 2009).
135. *See* Benitez-Ramos v. Holder, 589 F.3d 426, 428-29 (7th Cir. 2009).
136. Cece v. Holder, 733 F.3d 662, 674 (7th Cir. 2013).
137. *Id.* at 673–74. According to the court, "[t]he breadth of the social group says nothing about the requirements for asylum, just as the breadth of categories under Title VII of the Civil Rights Act says nothing about who is eligible to sue an employer for discrimination. All African Americans and all women, for example, are members of 'protected' categories under Title VII, but not all African Americans and women have a claim for discrimination. In order to be entitled to asylum, Cece must be able to demonstrate a particular link between her mistreatment and her membership in the stated social group." *Id.* at 673–74. Accordingly, rather than coming up with standards for narrowly defining the scope of the social group category, the court stated that the asylum adjudication process should focus on the nexus: whether or not the individual applicant can prove a link between the alleged mistreatment and membership in the stated social group. *See id.* The circuit judges disregarded the fear that such an approach would open the floodgates, arguing that "[a]lthough the cat-

In this Article, I have argued that the Board should center asylum status determinations on the types of characteristics deemed worthy of protection, rather than on the discernibility of legally constructed social groups. This would center questions of eligibility on what constitutes an "immutable" identity-based trait and the extent to which this trait is the target of discriminatory persecution. From this perspective, the scope of the social group is irrelevant; regardless of how broad the category may be, the individual applicants still must establish that their persecution was the result of their protected characteristic. Accordingly, the Board would restrict the scope of asylum status determinations not by narrowly defining group boundaries but by discerning whether there is nexus between the individual's proposed grouping and the alleged claim of discrimination. The generality and broadness of a proposed social group should not be a disqualifying factor. Such an approach allows for more consistent decisions and avoids reifying a problematic private/public dichotomy, in turn leading then-Attorney General Sessions to conclude that victims of domestic violence and other forms of private criminal activity are not eligible for asylum protection.[138] But perhaps most importantly, an immutability-centered approach to social group jurisprudence resonates with a core motivation of contemporary asylum law: to protect all individuals subject to systemic discriminatory persecution on account of traits for which they are not at fault or which they should not be required to change.

egory of protected persons may be large, the number of those who can demonstrate the required nexus likely is not." *Id.* at 673.

138. *See, e.g.*, *In re* A-B-, 27 I. & N. Dec. 316, 336 (A.G. 2018).