

NOTES

THE STATE OF DISABILITY-BASED ASYLUM CLAIMS UNDER CURRENT (AND REINTERPRETED) LAW: ASSESSING VIABILITY THROUGH DISABILITY STUDIES FRAMEWORKS

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ABSTRACT

Throughout history, societies all over the world—including the United States—have viewed persons with disabilities a group, and often, subjected that group to discrimination, marginalization, and outright violence. Disabled individuals may find protection from these injustices in the United States, and in some cases, existing U.S. asylum law can offer that protection. At the same time, though, fitting a disability-based claim into the strict requirements of U.S. asylum law risks further perpetuating harmful ideas about disability and may fail to fully capture disabled individuals’ lived experiences and protection needs. The emerging field of disability studies disrupts the conceptions of disability that often inform the mistreatment of disabled persons. In analyzing asylum law through disability studies frameworks, this Note both demonstrates the viability of disability-based claims and suggests modest expansions and reinterpretations of existing law that can more effectively offer needed protection without further marginalizing or stereotyping persons with disabilities.

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I. INTRODUCTION

Ms. F. was in the United States on a temporary visa when she suffered a devastating health crisis.¹ Suddenly, Ms. F. had significant physical disabilities, and as a result, feared returning to her home country. Ms. F. recalled the way that disabled people were treated in her community back home. They were isolated by widespread inaccessibility of buildings and transit, cut off from economic opportunity due to employment discrimination, and viewed as targets for violent crime. Ms. F. feared that, as a visibly disabled person in her home country, she would have no way to make a living and would constantly be at risk of violent victimization. She feared she would essentially be cut off from the world due to her reliance on accessible infrastructure.

1. Ms. F.’s story is adapted from an asylum case I worked on as a legal intern at a Washington, D.C.-area nonprofit, with some details modified to protect confidentiality. An immigration judge granted Ms. F. asylum in 2022.

Meanwhile, in the United States, Ms. F. utilized the accommodations that her workplace, apartment complex, local businesses, and transit agencies are required by law to provide her. With these accommodations, Ms. F. could work and move around the city independently. She could not imagine trading that for what awaited her in her home country. In search of protection from an uncertain fate, Ms. F. applied for asylum.

It is not easy to win asylum in the United States. Because of narrow eligibility criteria—not to mention the complex law and overburdened systems of adjudication—many marginalized individuals fleeing grave harm are not able to demonstrate that they qualify as “refugees” under U.S. law. In other words, they are unable to show that the harm they face is inflicted “on account of” one or more of only five protected grounds. In addition, that harm must be sufficiently serious to constitute persecution. Many harms—from pervasive discrimination to denial of basic needs to incidents of arbitrary detention and physical violence—fail to meet this high bar. Despite her vivid fear and clear need to stay in the United States, Ms. F. faced an uphill battle in demonstrating eligibility for asylum.

The stories of millions of disabled persons worldwide resemble Ms. F.’s. Like Ms. F., some of these individuals have sought asylum in the United States, claiming that they faced or fear facing persecution on account of their disabilities. Some of these claims have been successful. Disabled individuals may be able to demonstrate that they face persecution on account of their membership in a particular social group, even though current law sets an exacting standard for what constitutes such a group. Demonstrating that the harm a disabled individual has suffered, or fears, constitutes persecution can be more difficult, though there are novel arguments to be made in support of this conclusion. However, an expansion or reinterpretation of this requirement could help extend protection to persons with disabilities.

Although many disabled persons could—and should—benefit from asylum, it is reductive to consider disabled people as merely a vulnerable minority in need of protection. Evaluating asylum law through engagement with the emerging field of disability studies allows for a more nuanced understanding of how disability-based claims fit into existing asylum law—as well as how asylum law may be modified to better reflect the lived realities and protection needs of people with disabilities.

II. HISTORY AND BACKGROUND OF DISABILITY AND ASYLUM LAW

This Note will discuss disability and asylum through the lens of disability studies. Analyses of disability and society have progressed past the perception of disability as “solely a medical problem or a personal tragedy” thanks in large part to the growth of disability studies, a diverse, interdisciplinary field that examines disability “as a social, cultural, and political phenomenon” that results not from physical or mental impairments, but rather, from

“the socio-cultural dynamics that occur in interactions between society and people with disabilities.”²

A. *Framing Disability*

Disability, though traditionally framed exclusively in medical terms, has come to be understood more as a social and cultural construct. The Americans with Disabilities Act (ADA) defines disability as “a physical or mental impairment that substantially limits one or more major life activities.”³ The United Nations Convention on the Rights of Persons with Disabilities (CRPD) states that individuals with disabilities “include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.”⁴ The World Health Organization (WHO) makes the link between disability and society more explicit: disability “refers to the interaction between individuals with a health condition (e.g., cerebral palsy, Down syndrome and depression) and personal and environmental factors (e.g., negative attitudes, inaccessible transportation and public buildings, and limited social supports).”⁵ Based on this definition, the WHO estimates that about 15% of the global population lives with some form of disability, with prevalence highest in developing countries.⁶

While persons with disabilities are by no means a homogenous group,⁷ societies often assign group status to people with disabilities.⁸ And most societies—including the United States—have, at least at some time, “treated people with disabilities as unwanted, undesirable, or dangerous, subjecting them to discrimination, neglect, abuse, or even death” on account of their perceived difference (and the implications of that difference the culture in question assigns to them).⁹ Persons with disabilities also face barriers to accessing essential services like basic healthcare.¹⁰ Further, disabled people may be

2. Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 407 (2011).

3. 42 U.S.C. § 12102(1).

4. Convention on the Rights of Persons with Disabilities, May 3, 2008, 2515 U.N.T.S. 3, art. 1 [hereinafter CRPD].

5. WORLD HEALTH ORG., FACT SHEET: DISABILITY AND HEALTH (Nov. 24, 2021), <https://perma.cc/8V4T-DXDZ>.

6. WORLD HEALTH ORG. & THE WORLD BANK, WORLD REPORT ON DISABILITY 29–30 (2011).

7. See *id.* at 7–8 (discussing diversity among persons with disabilities worldwide).

8. See, e.g., 42 U.S.C. § 12101(a)(6) (“people with disabilities, as a group. . . occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally”) (emphasis added); Kanter, *supra* note 2, at 435 (discussing how disabled persons with little else in common share “one important and salient feature: each of them is perceived by their respective societies as disabled, regardless of whether they see themselves or each other that way”); Corey Leshandon Moore, *The Minority Group Model and Persons with Disabilities: Toward a More Progressive Disability Public Policy in the United States of America*, 4 AUSTRALIAN J. REHABILITATION COUNSELLING 36 (1998) (“The enactment of legislation addressing the civil rights of persons with disabilities was accompanied by a new perspective which emphasized viewing individuals with disabilities as a minority group.”).

9. Arlene Kanter & Kristin Dadey, *The Right to Asylum for People with Disabilities*, 73 TEMP. L. REV. 1117, 1118 (2000).

10. WORLD HEALTH ORG. & THE WORLD BANK, *supra* note 6, at 9.

viewed through the lenses of negative cultural stereotypes that associate impairment with dependence, incapacity, and contamination.¹¹ While much of this harm is perpetrated by private actors (though it may be implicitly condoned, or at least go unpunished, by governments), states also inflict harm upon disabled persons. In countries all over the world, journalists and human rights groups have documented inhumane conditions and widespread abuse within state institutions for persons with disabilities, as well as troubling practices surrounding involuntary institutionalization.¹² Disabled persons are forcibly sterilized in many countries¹³ (as they have been throughout U.S. history¹⁴), the process of which the U.N. has labeled as torture.¹⁵ And even in countries where such egregious abuses are rare, denial of accommodations in workplaces, public facilities, and healthcare remains a problem.¹⁶ Many countries have laws on the books forbidding discrimination and mandating the provision of accommodations in these spaces.¹⁷ However, these laws frequently go unenforced.¹⁸

Disability studies scholars often examine disability and its relation to society through the lenses of the models of disability—namely, the medical and social models. The medical model of disability asserts that a person’s disability, or impairment, is the cause of social exclusion or persecution.¹⁹ It holds that utilizing medicine to cure or rehabilitate a disabled person is the ideal way to ensure equality and dignity—and that if an individual cannot be

11. See, e.g., Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 215–16 (2000); Brigitte Rohwerder, DISABILITY STIGMA IN DEVELOPING COUNTRIES, U.K. DEP’T FOR INT’L DEV. K4D HELPDESK (May 9, 2018). For an illustrative country-specific example, see Anne Soy, *Infanticide in Kenya: ‘I was told to kill my disabled baby,’* BBC NEWS (Sept. 27, 2018), <https://perma.cc/RG3M-HTJE> (discussing widespread social pressure for Kenyan mothers to kill babies born with disabilities stemming from perception that disabled children are “cursed, bewitched and possessed”).

12. See, e.g., MENTAL DISABILITY RTS. INT’L & CTR. FOR LEGAL & SOC. STUDS., RUINED LIVES, SEGREGATION FROM SOCIETY IN ARGENTINA’S PSYCHIATRIC ASYLUMS: A REPORT ON HUMAN RIGHTS AND MENTAL HEALTH IN ARGENTINA (2007), <https://perma.cc/63CU-X66M> (discussing broad criteria for involuntary commitment of persons with mental and intellectual disabilities, lengthy terms of commitment, lack of procedural protections for those committed to institutions, and unhygienic conditions within institutions in Argentina); HUM. RTS. WATCH, RUSSIA: ADULT PROSPECTS DIM FOR YOUTH WITH DISABILITIES (Dec. 6, 2018), <https://perma.cc/4265-XLJ6> (describing forced institutionalization of disabled persons, as well as denial of appropriate education and healthcare to institutionalized disabled children in Russia); Chris Rogers, *Inside the ‘World’s Most Dangerous Hospital’*, BBC NEWS (Dec. 5, 2014), <https://perma.cc/3VBR-RBY4> (describing inhumane conditions and severe abuse of individuals with mental and intellectual disabilities in a public psychiatric hospital in Guatemala).

13. HUM. RTS. WATCH, STERILIZATION OF WOMEN AND GIRLS WITH DISABILITIES: A BRIEFING PAPER (2011). In 1996, the INA was amended to include a new category of persons who qualify as refugees: individuals subjected to “coercive population control” (or with a well-founded fear thereof), including involuntary sterilization; Kanter & Dadey, *supra* note 9, at 1121 (citing INA § 1101a (42)).

14. See generally NAT’L WOMEN’S LAW CENTER, FORCED STERILIZATION OF DISABLED PEOPLE IN THE UNITED STATES (Jan. 24, 2022).

15. See HUM. RTS. WATCH, STERILIZATION OF WOMEN AND GIRLS WITH DISABILITIES, *supra* note 13.

16. WORLD HEALTH ORG. & THE WORLD BANK, *supra* note 6, at 170–73.

17. See sources cited *infra* notes 93–94.

18. See sources cited *infra* notes 93–94.

19. Stephen Bunbury, *Unconscious Bias and the Medical Model: How the Social Model May Hold the Key to Transformative Thinking about Disability Discrimination*, 19 INT’L J. OF DISCRIMINATION & L. 26, 28–29 (2019).

“cured,” they are “considered as someone who as a consequence [of incurable disability] has a limited ability to participate in society.”²⁰ The medical model also provides a foundation for the exclusion of disabled individuals through “institutional methods that reinforce the marginalization of such persons even while helping them.”²¹

The social model of disability flips this paradigm by asserting that society, not the disabled person, must change to ensure equality for people with disabilities.²² The social model argues that disability is a social construct, and that societal barriers, not “functional, physiological, and cognitive elements” hold disabled people back from full participation.²³ In other words, “it is the negative treatment of someone with an impairment that constitutes a disability.”²⁴ A third framework, the minority group model, is sometimes considered interchangeable with the social model but may be even more useful in thinking about disability and asylum law.²⁵ The minority group model views persons with disabilities as a marginalized group in society subject to exclusion and discrimination in a manner analogous to other marginalized groups, such as racial minorities.²⁶ Like the social model, the minority group model reflects a “socio-political approach” to disability rights that advocates for changing the culture and environment in which disabled individuals live, rather than changing the disabled individual.²⁷ One final, relevant framework that stems from the social model is the human rights approach. The human rights approach “focuses on the talents of persons with disabilities” rather than the capabilities they lack, thereby “plac[ing] a greater emphasis on dignity and autonomy.”²⁸ The human rights approach calls for societal modifications to address barriers to “individual flourishing” for persons with disabilities.²⁹

There is an inherent tension in thinking about disability through the lens of the social model and its offshoots while also arguing that persons with disabilities constitute social groups that need protection from persecution. Stating an asylum claim based on membership in a particular social group necessarily requires demonstrating an applicant’s otherness within a society, as well as their vulnerability to harm on account of that difference.³⁰ However, the social model—and the field of disability studies more broadly

20. *Id.* at 28.

21. Vandana Peterson, *Understanding Disability Under the Convention on the Rights of Persons with Disabilities and its Impact on International Refugee and Asylum Law*, 42 GA. J. INT’L & COMP. L. 687, 702 (2014) (citing Kanter, *supra* note 2, at 419).

22. *See e.g.*, Bunbury, *supra* note, 19 at 29–31.

23. *Id.* at 29.

24. Peterson, *supra* note 21, at 703.

25. Kanter, *supra* note 2, at 426.

26. *See* Moore, *supra* note 8, at 42.

27. *Id.* at 36.

28. Peterson, *supra* note 21, at 704.

29. *Id.*

30. *See* discussions *infra* Section III.B.iii (discussing the social distinction element required to state a cognizable PSG) and Section III.A.iii (discussing the nexus requirement).

—de-emphasize the idea of individuals’ vulnerability and instead construe disability as the result of society’s failure to break down barriers to access and equality.³¹

But just as the social model shifts focus to a society’s perception and treatment of persons with disabilities, asylum law requires analyzing the harm an individual experiences or fears through the eyes of their persecutor.³² In order to demonstrate eligibility for asylum, a claimant must show that they were harmed or fear harm on account of a protected characteristic.³³ However, in some cases, a claimant need not actually possess the protected characteristic—they must only show that the persecutor believes that they do.³⁴ In a sense, then, asylum law would not require an applicant to present their disability as an innate, individualized trait that has caused them harm (as the medical model might characterize it). And because the persecutor must be “an agent of the government or an entity that the government is unable or unwilling to control,”³⁵ an applicant who demonstrates that they are persecuted by one or both of these kinds of actors because of the way they are perceived by that actor will functionally demonstrate that they are persecuted by their society at large (or, at least that their society condones or otherwise fails to curtail such persecution).

Does extending asylum protections to disabled persons promote disability rights as understood through the framework of the social model? It is possible to fall into the paternalistic trap of casting asylum seekers—and disabled persons—as vulnerable in a one-dimensional manner. But this is not inherent to recognizing that individuals with disabilities are subject to persecution and may find safe harbor in the United States. The social model of disability allows us to dig deeper into what kinds of harms might merit protection. While the model would likely have some critiques of the current legal conception of particular social groups (PSGs), disability based PSGs can certainly be in line with the social model.³⁶

In addition, there is some common ground in the way that disability studies frames disability as a “culture utilizing a minority group model.”³⁷ Other

31. See Kanter, *supra* note 2, at 414 (citing one of the core values behind disability studies as moving away from viewing persons with disabilities as “victims”).

32. See U.S. Citizenship and Immigr. Servs., *RAIO Combined Training Program: Nexus and the Protected Grounds* 10–12 (Dec. 20, 2019), <https://perma.cc/M3U9-B4YH> [hereinafter *RAIO Training-Nexus*].

33. See 8 U.S.C. § 1101(a)(42).

34. *RAIO Training-Nexus*, *supra* note 32, at 21. For example, in a case cited in the RAIO training program, the Third Circuit found that an individual was harmed because his persecutors *believed* he was gay, even though he testified that he was not. *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003). The court found that the applicant was therefore persecuted on account of his *imputed* membership in the PSG “homosexuals in Ghana.” *Id.*

35. U.S. Citizenship and Immigr. Servs., *RAIO Combined Training Program: Definition of Persecution and Eligibility Based on Past Persecution* 11 (Dec. 20, 2019), <https://perma.cc/RM5N-X3K2> [hereinafter *RAIO Training-Persecution*].

36. See discussion *infra* Section III.b.

37. Kanter, *supra* note 2, at 408 (quoting Disability Studies scholar Simi Linton).

minority groups, such as racial, ethnic, or religious minorities, may be eligible for asylum when they are persecuted on account of their minority status.³⁸ When viewed as a cultural minority within a society, disabled persons who are targeted for mistreatment because of their disabilities may have analogous claims. Further, the idea that disabled persons are limited by society is in line with an inherent assumption underlying asylum law: that offering persecuted people a chance to live lawfully in a different society will not only protect them from persecution, but also allow them to thrive.

B. *Disability in U.S. and International Law*

The Convention on the Rights of Persons with Disabilities (CRPD), enacted in 2008 at the United Nations, represents a “significant paradigm shift” in international understandings of disability and the rights of persons with disabilities worldwide.³⁹ The CRPD adopts a human rights-centered approach to disability (and reflects many tenets of the social model) in contrast to past perceptions of persons with disabilities as meriting charity rather than being “rights-bear[ing]” members of society.⁴⁰ Signatory nations to the CRPD agree to take measures to eradicate discrimination “by any person, organization, or private enterprise” in order to safeguard “all human rights and fundamental freedoms” of disabled persons.⁴¹ Further, the CRPD urges states to “recognize the rights of persons with disabilities to liberty of movement, [and] freedom to choose their residence.”⁴² Most countries have ratified the CRPD, although the United States has not.⁴³

Historically, U.S. immigration policy has outright excluded noncitizens with disabilities, or at least made it more difficult for disabled individuals to immigrate to or obtain legal status in the United States.⁴⁴ Fear of disability, as well as a desire to select a “healthy and able-bodied citizenry”—in part driven by the labor needs that shaped early immigration law—motivated policies including disability related and public charge grounds of inadmissibility.⁴⁵ Exclusionary language in the first immigration laws reflected the idea that disabled individuals, particularly those with mental and intellectual

38. See, e.g., *Mihalev v. Ashcroft*, 388 F.3d 722, 726–27 (9th Cir. 2004) (finding applicant’s membership in minority Roma ethnic group to be one motive for police persecution); *Matter of L-K-*, 23 I&N Dec. 677, 682–83 (BIA 2004) (finding applicant persecuted because she practiced a minority religion in Ukraine); see also *RAIO Training- Nexus*, *supra* note 32, at 45–46.

39. Mary Crock, Christine Ernst & Ron McCallum, *Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities*, 24 INT’L J. REFUGEE L. 735, 737 (2012).

40. *Id.* at 736–38.

41. CRPD, *supra* note 4, at art. 4.

42. See U.N. DEP’T OF ECON. AND SOC. AFFS, REFUGEES AND MIGRANTS WITH DISABILITIES, <https://perma.cc/VD5N-2FCQ> (last visited May 9, 2022).

43. UNITED NATIONS, *CRPD AND OPTIONAL PROTOCOL SIGNATURES AND RATIFICATIONS*, <https://perma.cc/43U6-NUC4> (last visited May 6, 2022); see also Brian Montopoli, *U.N. treaty on disabilities falls short in Senate*, CBS NEWS (Dec. 4, 2012, 3:55 PM), <https://perma.cc/D4JF-QMXG>.

44. Medha D. Makhlof, *Destigmatizing Disability in the Law of Immigration Admissions*, in *DISABILITY, HEALTH, LAW, AND BIOETHICS* 187 (I. Glenn Cohen et al. eds., 2020).

45. *Id.* at 189–90.

disabilities and those considered limited in their ability to work, would create a burden on U.S. society—and were therefore not desirable immigrants.⁴⁶ Disability related restrictions on immigration began to relax in the 20th century, and today, it is unlikely that prospective immigrants with disabilities will be excluded solely on these grounds.⁴⁷

The U.S. disability rights movement also gained momentum in the 20th century. Persons with disabilities have historically faced widespread exclusion from professional and educational spaces in the United States.⁴⁸ Beginning in the 1970s, a series of landmark civil rights laws guaranteed disabled children’s access to public education⁴⁹ and enacted a widespread prohibition on discrimination by any “program or activity receiving federal financial assistance.”⁵⁰ The latter legislation, Section 504 of the Rehabilitation Act of 1973, represented a significant reframing of disability, aligning federal policy with the social model’s focus on barriers presented by a disabled person’s environment, not their impairment.⁵¹ However, portions of the law—specifically those requiring physical accessibility in federally funded facilities—took many years to implement, leading to widespread demonstrations by disability rights activists.⁵² Their efforts finally led to the passage of regulations implementing Section 504, which formed a basis for the Americans with Disabilities Act (ADA), enacted in 1990.⁵³ The ADA is a sweeping piece of legislation that sought to curtail discrimination and eliminate barriers to disabled persons’ participation in U.S. society.⁵⁴ However, despite its great successes,⁵⁵ the ADA has not ended marginalization of disabled persons in the United States. Persons with disabilities are about twice as likely as non-disabled Americans to be unemployed and live in poverty.⁵⁶ Persons with disabilities are also both overrepresented in the

46. *Id.* at 190.

47. *Id.* at 191–92.

48. Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts under Title I and its Impact on the Poor*, 8 J. GENDER RACE & JUST. 595 (2005). Additionally, disabled Americans have historically been subjected to other forms of severe mistreatment, including involuntary institutionalization and forced sterilization. Kanter & Dadey, *supra* note 9, at 1151.

49. Education for All Handicapped Children Act, Pub. L. No. 94-142 (1975) (now the Individuals with Disabilities Education Act).

50. Julia Carmel, *Before the A.D.A., There Was Section 504*, N.Y. TIMES (July 22, 2020), <https://perma.cc/BV89-H2M7>.

51. *Id.*; see also Moore, *supra* note 8, at 37.

52. Carmel, *supra* note 50.

53. *Id.*

54. Scotch, *supra* note 11, at 216.

55. Rulli & Leckerman, *supra* note 48, at 605–08 (citing accessibility in buildings and transit as a major area of improvement post-ADA, in part due to consistent enforcement).

56. Abigail Abrams, *30 Years after a Landmark Disability Law, the Fight for Access and Equality Continues*, TIME (July 23, 2020, 9:03 AM), <https://perma.cc/Q63Q-85PR>. Rulli and Leckerman cite declining enforcement and the Supreme Court’s narrow interpretation of the ADA’s employment protections as reasons for these persistent issues. Rulli & Leckerman, *supra* note 48, at 610–11. The authors also offer a lengthier discussion of unemployment and poverty among disabled Americans that remains relevant, though some of the data they rely on is outdated. See *id.* at 623–29.

criminal system and more likely to be victimized by violent crime as compared to non-disabled persons.⁵⁷

Shortly before the passage of the ADA, a provision of the Immigration Reform and Control Act of 1986 created a disability waiver of the public charge ground of inadmissibility (which bars from admission noncitizens deemed likely to depend on public assistance in the United States) for a subset of unauthorized persons eligible to gain legal status under that law.⁵⁸ And in 1990, Congress updated the health-related grounds of inadmissibility and removed a provision of the Immigration and Nationality Act (INA) that compelled disabled applicants to affirmatively demonstrate that they would not become “public charges.”⁵⁹ Despite these changes, Medha D. Makhoulouf argues that recent proposals around immigration reform—including increasing the proportion of immigrants who enter through “merit-based” pathways and expanding the kinds of public benefits factored into a public charge determination—reflect continued “political and popular support for immigration restrictions that operate as exclusions against [disabled persons].”⁶⁰

C. *Asylum*

Asylum is a form of humanitarian protection for individuals present in the United States or at a U.S. border who demonstrate that they qualify as refugees.⁶¹ In a definition adopted from the 1951 U.N. Refugee Convention, a refugee is “any 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.”⁶² Applicants have the burden of demonstrating that they qualify as refugees, and applicants are not provided counsel.⁶³ Asylum is a discretionary form of relief that can be granted by either an asylum officer or an immigration judge.⁶⁴ Noncitizens granted asylum are protected from deportation and afforded a path to permanent residency and citizenship in the United States.⁶⁵

57. Abrams, *supra* note 56; U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME AGAINST PERSONS WITH DISABILITIES, 2009-2019 (Nov. 2021), <https://perma.cc/QB4R-E8AV>; REBECCA VALLAS, DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA’S JAILS AND PRISONS, CENTER FOR AMERICAN PROGRESS 1-4 (July 2016), <https://perma.cc/YFJ8-5U6U>.

58. Makhoulouf, *supra* note 44, at 191.

59. *Id.* (“[T]he provision that specifically excluded noncitizens with mental retardation, psychopathic personality, or insanity was replaced with a more general exclusion that applied to noncitizens with disabilities who may pose a threat to themselves or others.”).

60. *Id.* at 191–92.

61. 8 U.S.C. § 1158(a)(1), (b)(1)(A).

62. 8 U.S.C. § 1101(a)(42).

63. AMERICAN IMMIGRATION COUNCIL, FACT SHEET: ASYLUM IN THE UNITED STATES (June 11, 2020), <https://perma.cc/5CTS-QTX3>.

64. *Id.*

65. *Id.*

U.S. asylum law is derived from the 1951 Refugee Convention⁶⁶, as well as the 1967 Protocol⁶⁷, to which the United States is a signatory.⁶⁸ Notably, the Refugee Convention was enacted in part as a response to the Holocaust,⁶⁹ in which persons with disabilities were systematically persecuted by the Nazis.⁷⁰ It is therefore well within the spirit of the Convention's refugee definition—and in turn, U.S. asylum law⁷¹—to extend protection to persons with disabilities fleeing persecution.

III. EVALUATING DISABILITY-BASED ASYLUM CLAIMS

Under current U.S. law, it is difficult, but not impossible, for individuals persecuted on account of disability to successfully state an asylum claim. Although disabled persons face mistreatment that varies widely in severity and impact between societies, current interpretations of what constitutes persecution represent a significant hurdle for many disability-based claims. Novel ways of analyzing the harm inflicted upon disabled persons, in line with the social, minority group, and human rights models of disability, could help expand the scope of what constitutes persecution to both better reflect the lived realities of disabled persons and extend protections to those who need them.

On the other hand, many disabled applicants can show membership in a particular social group (PSG) defined, entirely or in part, by their disabilities. There is tension in applying the tenets of the social model to a PSG analysis. Disabled individuals who claim membership in a PSG based on diagnosis are more likely to succeed in meeting the required elements, thus encouraging the medicalization of disability. Yet even the elements that are likely to lean most heavily on diagnosis—immutability and particularity—are not necessarily contrary to the conception of disability promoted by the social model. And the final PSG element, social distinction, may be read as harmonious with this conception.

66. Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 137.

67. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

68. Immigration Equality, *Asylum Manual: I. A Brief History*, <https://perma.cc/CN6U-6F6Z> (last visited May 3, 2022) (summarizing international agreements that formed a basis for U.S. asylum law).

69. Kanter & Dadey, *supra* note 9, at 1118; *see also* Sadako Ogata, U.N. High Comm'r for Refugees, Address at the Holocaust Memorial Museum, Washington, DC (Apr. 30, 1997), <https://perma.cc/X5YF-K6EU> ("Today's system of international refugee protection was born out of the Holocaust."); NAT'L IMMIGRANT JUST. CTR. & FWD.US, PUSHING BACK PROTECTION: HOW OFFSHORING AND EXTERNALIZATION IMPERIL THE RIGHT TO ASYLUM 7 (Aug. 3, 2021), <https://perma.cc/CVK4-9BVJ> ("Throughout the world, nations are required not to violate non-refoulement, a principle born out of the atrocities that resulted from denying safe haven to World War II refugees, including Jewish refugees fleeing the Holocaust, and forcing them to return to territories where they faced almost certain genocide.").

70. *See generally* SUSANNE E. EVANS, FORGOTTEN CRIMES: THE HOLOCAUST AND PEOPLE WITH DISABILITIES (2004). *See also* Kanter & Dadey, *supra* note 9, at 1151 n. 277.

71. *See, e.g.*, 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, 46 (1981) ("The intent to implement a broad, nondiscriminatory refugee policy embodied in the new UN definition was evidenced during committee and subcommittee hearings in both houses.").

Finally, there is precedent for granting humanitarian asylum as an alternative form of protection to some disabled applicants who do not qualify for asylum. The use of humanitarian asylum in disability-based cases is a hopeful indicator that options for refuge remain even when applicants cannot meet the stringent requirements for asylum.

A. *Past Persecution and Well-Founded Fear of Future Persecution*

To be eligible for asylum, an applicant must show that they suffered past persecution or have a well-founded fear of future persecution in their home country on account of a protected ground.⁷² A showing of past persecution creates a rebuttable presumption of future persecution.⁷³ If an applicant has not experienced past persecution, they must demonstrate a fear of future persecution that is both subjective and objective, based in fact, events, or country conditions documentation.⁷⁴ Such an applicant could establish eligibility for asylum by satisfying the four-part test for well-founded fear outlined in *Matter of Mogharrabi*.⁷⁵ First, the applicant must possess, or be perceived by the persecutor to possess, a protected characteristic. Second, the persecutor must be aware, or could become aware, that the applicant possesses this characteristic. Third, the persecutor must be capable of “punishing” the applicant. Finally, the persecutor must be inclined to punish the applicant. Applicants claiming a well-founded fear may not need to establish that they would be singled out for mistreatment if they can demonstrate a “pattern or practice” of mistreatment of similarly situated individuals in their home country.⁷⁶

An applicant with a disability who is unable to demonstrate past persecution could feasibly satisfy the *Mogharrabi* factors to show that they have a well-founded fear of future persecution. An applicant could claim membership in a particular social group based on their disability and would therefore possess the protected characteristic of that disability. The awareness factor of *Mogharrabi* mirrors the social distinction requirement of establishing a cognizable particular social group. An applicant who is a member of a socially distinct group inherently runs the risk of their group membership attracting the attention of a persecutor (and an applicant is not required to attempt to hide their protected characteristic to avoid awareness).⁷⁷ It may be more difficult for applicants with disabilities to show capacity and inclination, depending on the persecutor and type of persecution they fear. However, one procedural safeguard imposed by the Board of Immigration Appeals (BIA) in *Matter of J-R-R-A-* may help applicants with mental or intellectual

72. 8 U.S.C. § 1101(a)(42)(A); 8 U.S.C. § 1158(b)(1)(A).

73. 8 C.F.R. § 208.13(b)(1).

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

75. 19 I&N Dec. 439, 446 (BIA 1987).

76. 8 CFR § 208.13(b)(2)(iii)(A)-(B).

77. U.S. Citizenship and Immigr. Servs., *RAIO Combined Training Program: Well-Founded Fear* 15 (Dec. 20, 2019), <https://perma.cc/T6RX-6JQ4> [hereinafter *RAIO Training- Well-Founded Fear*].

disabilities who might struggle to satisfy the *Mogharrabi* test.⁷⁸ In *Matter of J-R-R-A-*, the BIA held that when “an applicant for asylum has competency issues that affect the reliability of his testimony, the Immigration Judge should, as a safeguard, generally accept his fear of harm as subjectively genuine based on the applicant’s perception of events.”⁷⁹

1. *Defining Persecution*

In asylum law, not all harms constitute persecution. Persecution denotes “a threat to [a person’s] life or freedom” on account of a protected ground, as well as “harm or suffering [inflicted]. . . to overcome a characteristic of the victim.”⁸⁰ Non-physical harm may amount to persecution.⁸¹ However, persecution must be more than “mere harassment” and “does not encompass all treatment that society regards as unfair, unjust, or even unlawful.”⁸² A single instance of harm may suffice to demonstrate persecution, but when multiple harms have occurred, they are considered “in the aggregate” to determine whether they collectively rise to the level of persecution.⁸³ The persecutor must be the government of the applicant’s home country or private actors the government is unwilling or unable to control.⁸⁴

Some of the harms disabled asylum seekers may be fleeing or may fear in the future rise to the level of persecution under the current definition. For example, an individual who demonstrates that they will be involuntarily confined in an institution in which conditions are barbaric could be considered to have a well-founded fear of future persecution.⁸⁵ In a Fourth Circuit case, *Temu v. Holder*, Mr. Temu faced past persecution when he was singled out for especially brutal treatment while imprisoned, with institution staff making statements like “this is how we treat people who are mentally ill like you.”⁸⁶ Beyond confinement and physical harm, an asylum applicant may demonstrate that they have been subjected to (or would be upon return) economic harm so grave that it constitutes persecution. The BIA and several federal Courts of Appeals have held that the “deliberate imposition of severe economic disadvantage” can constitute persecution.⁸⁷ Further, in *Matter of T-Z-*,

78. 26 I&N Dec. 609 (BIA 2015).

79. *Id.* See also discussion *infra* Section III.a.iv (suggesting that this modification may help broaden the reading of persecution to encompass more disability-based claims).

80. *Acosta*, 19 I&N Dec. at 222-23; *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).

81. *Matter of T-Z-*, 24 I&N Dec. 163, 169-71 (BIA 2007).

82. *Matter of A-E-M-*, 21 I. & N. Dec. 1157, 1159 (B.I.A. 2018) (citing *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) and *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993)).

83. See *O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26 (B.I.A. 1998).

84. RAIO TRAINING – PERSECUTION, *supra* note 35, at 27-28 (citing cases).

85. See, e.g., *J-M-*, AXXX XXX XXX (B.I.A. May 31, 2007) (unpublished), <https://perma.cc/Y3FQ-YFLP> (holding that applicant established well-founded fear of future persecution on account of his mental disability by showing at least a ten percent chance that he would be tortured by being subjected to electroconvulsive therapy without anesthesia in a state psychiatric institution).

86. *Temu v. Holder*, 740 F.3d 887, 893 (4th Cir. 2014).

87. See, e.g., *T-Z-*, 24 I. & N. Dec. at 163; *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1089 n.3, 1091 (10th Cir. 2008) (adopting economic persecution test from *T-Z-*; however, finding that employment discrimination based on race and language alone did not rise to the level of economic persecution); *Borca v.*

the BIA noted that “the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution.”⁸⁸ To constitute persecution, economic harm must be “above and beyond [economic difficulties] generally shared by others in the country of origin and involve more than the mere loss of social advantages or physical comforts.”⁸⁹

Individuals with disabilities all over the world are subjected to systemic discrimination that affects their livelihoods.⁹⁰ Discrimination itself is unlikely to constitute persecution⁹¹; however, its effects—especially if viewed as cumulative throughout an individual’s life—may rise to the level of persecution.⁹² Unemployment, underemployment, and employment discrimination against persons with disabilities are problems worldwide.⁹³ Although many nations have laws on the books that prohibit such discrimination (or otherwise address barriers to employment), in some societies, these laws go unenforced.⁹⁴ An applicant facing employment discrimination so extreme as to functionally deny them the means to meet their basic needs could therefore argue that such discrimination constitutes persecution, and their government is unwilling or unable to protect them from harm by private actors in the labor market.⁹⁵

INS, 77 F.3d 210, 216–17 (7th Cir. 1996) (holding that “total deprivation of livelihood” not required for harm to amount to economic persecution); *Li v. U.S. Att’y Gen.*, 400 F.3d 157, 168–69 (3d Cir. 2005) (finding that imposition of a fine constituting over a year of applicant’s salary, blacklisting from many forms of employment, loss of public benefits and food rations, and confiscation of personal property could constitute economic persecution).

88. *T-Z*, 24 I. & N. Dec. at 163.

89. *Id.* at 173 (citing *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967)).

90. *See, e.g.*, WORLD HEALTH ORG. & THE WORLD BANK, *supra* note 6, at xi (“Across the world, people with disabilities have poorer health outcomes, lower education achievements, less economic participation, and higher rates of poverty than people without disabilities. This is partly because people with disabilities experience barriers in accessing services. . . including health, education, employment, and transport as well as information.”).

91. RATIO TRAINING – PERSECUTION, *supra* note 35, at 18; *see* Peterson, *supra* note 21, at 713.

92. *See Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1192 (9th Cir. 2005), *cert. granted and vacated on other grounds*, 549 U.S. 801 (2006); *see also* U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶¶ 54–55, U.N. Doc. HCR/1P/4/ENG/REV. 4 (Feb. 2019) [hereinafter UNHCR HANDBOOK] (discussing situations in which cumulative discrimination may constitute persecution or spark a well-founded fear). Canada has recognized cumulative instances of discrimination in multiple spheres (education, employment, healthcare, etc.) as sufficiently degrading to disabled persons’ fundamental rights to constitute persecution. *See* Crock, Ernst & McCallum, *supra* note 39, at 748–49 (citing Decision MA1-08719, Immigr. & Refugee Bd. of Can. (Apr. 16, 2022) (unreported)).

93. *See* U.N. DEP’T OF ECON. & SOC. AFFS., FACT SHEET: DISABILITY AND EMPLOYMENT (2007), <https://perma.cc/4FH7-BKEQ>; INT’L LAB. OFF., DISABILITY DISCRIMINATION AT WORK, <https://perma.cc/PQG9-7KFR> (last visited May 11, 2022).

94. Joseph Shapiro, *How a Law to Protect Disabled Americans Became Imitated Around the World*, NAT’L PUB. RADIO (July 24, 2015 4:28 PM), <https://perma.cc/9LJF-U4E2>. The US Department of State’s Country Reports on Human Rights Practices survey the existence of anti-discrimination legislation and enforcement; the reports note that in several countries including Honduras, Ethiopia, Russia, laws forbidding employment discrimination against disabled persons are enforced unevenly, ineffectively, or not at all. *See 2021 Country Reports on Human Rights Practices*, U.S. DEP’T OF STATE (Apr. 12, 2022), <https://perma.cc/7RK7-QIQZ>.

95. *See* discussion *infra* Section III.a.ii (discussing persecution by nonstate actors).

The unavailability or inadequacy of medical treatment or related services for persons with disabilities is unlikely to constitute persecution, especially if such a lack can be attributed to an under-resourced healthcare system in the home country.⁹⁶ This presents a problem for scholars who argue that signatory states that do not comply with the CRPD effectively persecute individuals with disabilities when their health systems fail to provide needed services and care.⁹⁷ The CRPD's requirement to provide "reasonable" accommodations necessarily requires evaluating a state's resources and capacity, which may lead to a determination that a state is not in violation, even if the lived experience of citizens with disabilities would suggest otherwise.⁹⁸

2. *Analyzing Persecution by Non-Governmental and Private Actors*

To constitute persecution, a harm or feared harm must be inflicted by the government of the applicant's home country or an actor that the government is "unable or unwilling to control."⁹⁹ In some cases, government actors may directly harm persons with disabilities. In *Temu*, for example, the persecutors were prison guards and nurses in a public hospital who, as evidenced by their conduct and explicit statements, targeted Mr. Temu on account of his mental illness.¹⁰⁰

However, in many cases, persons with disabilities are more likely to suffer or fear harm at the hands of private entities. Harm inflicted by non-governmental actors may constitute persecution when an asylum applicant demonstrates that the government of their home country is unable or unwilling to control the persecutor's actions.¹⁰¹ Persons with disabilities may face difficulty in demonstrating that their governments are unable or unwilling to protect them from private discrimination and other harm, especially in countries

96. See, e.g., *Mendoza-Alvarez v. Holder*, 714 F.3d 1161, 1165 (9th Cir. 2013) ("[A]n inadequate healthcare system is not persecution and is not harm inflicted because of membership in a particular social group."); *Khan v. U.S. Att'y Gen.*, 691 F.3d 488, 499 (3d Cir. 2012) ("The lack of access to mental health treatment alone. . . does not create a well-founded fear of persecution."); *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 655–56 (8th Cir. 2007) (upholding BIA finding that applicant "failed to establish that inadequacies in health care for HIV-positive individuals in Mexico was an attempt to persecute those with HIV"); *Massaquoi v. U.S. Att'y Gen.*, 313 Fed. Appx. 483, 485–86 (3d Cir. 2008) (denying petition for review in part because lack of mental healthcare in respondent's home country not persecution absent a state-sanctioned policy against persons with mental illnesses).

97. See Peterson, *supra* note 21, at 720–22 (recognizing the problem of "budgetary deference," but noting that monitoring and reporting required by the CRPD may demonstrate failures of state protection and "provide an added layer of evidentiary support for asylum applications brought on the basis of disability").

98. *Id.* at 724–25.

99. RAI0 TRAINING – PERSECUTION, *supra* note 35, at 27 n.102 (citing cases).

100. See *Temu v. Holder*, 740 F.3d 887, 890 (4th Cir. 2014).

101. This standard is the subject of pending rulemaking and may change soon; however, stricter standards have so far been rejected by some circuit courts. See generally Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUM. RTS. L. REV. 441, 441–42, 470–88 (2021). Further, Attorney General Garland recently vacated the previous Attorney General's decision in *Matter of A-B-*, which made it more difficult for applicants to establish persecution by non-state actors. See *A-B-*, 28 I. & N. Dec. 307 (A.G. 2021).

that have anti-discrimination laws on the books. Evidence of “ineffectiveness and corruption” underlying a country’s failure to protect from persecution on its own likely does not suffice to meet the “unable or unwilling” standard.¹⁰² But at least one circuit court decision has recognized that even when a state explicitly outlaws particular conduct, it can still be considered unwilling or unable to put a stop to that conduct as it unfolds on the ground.¹⁰³

3. *Nexus: Persecution “On Account of” Disability*

Aside from establishing that harm rises to the level of persecution and is perpetrated by the state or a qualifying non-state actor, an asylum applicant must also demonstrate that the persecutor harmed them on account of at least one protected ground.¹⁰⁴ An applicant need not establish the persecutor’s exact motive (the adjudicator can make “reasonable inferences” given the difficulty of showing a persecutor’s subjective state of mind).¹⁰⁵ And a protected ground need only be “at least one central reason” for the persecution, not the *sole* reason.¹⁰⁶

Perez-Rodriguez v. Barr is a recent case that demonstrates the difficulty of establishing a nexus for disability-based asylum claims, even where the persecutors are government actors. Mr. Perez-Rodriguez applied for asylum because he feared institutionalization in degrading conditions on account of his membership in the PSG “individuals with schizophrenia who exhibit erratic behavior.”¹⁰⁷ The Eighth Circuit acknowledged the poor treatment of mentally ill persons in public institutions in Mr. Perez-Rodriguez’s home country; however, its analysis turned on the institutions’ motives for this mistreatment.¹⁰⁸ The court held that the BIA did not err in finding that the conditions could be traced back to resource constraints and “insufficient political commitment” to improving mental health treatment, rather than a specific intent to mistreat persons with mental disabilities.¹⁰⁹ Further, the court did not disturb the BIA finding that, although institution staff did injure some patients by restraining them, workers generally restrained patients in order to protect them, rather than to harm them on account of their conditions.¹¹⁰ This case reaffirms the notion that a country’s lack of resources for persons with disabilities is unlikely to constitute persecution, even when it results in substantial and disproportionate harm to disabled individuals.

102. *Khilan v. Holder*, 557 F.3d 583, 586 (8th Cir. 2009).

103. *Fiadjoe v. U.S. Att’y Gen.*, 411 F.3d 135, 160 (3d Cir. 2005).

104. 8 U.S.C. § 1101(a)(42)(A); *I.N.S. v. Elias-Zacarias*, 502 U.S. 478 (1992).

105. *RAIO TRAINING – NEXUS.*, *supra* note 32, at 11.

106. 8 U.S.C. § 1158(b)(1)(B)(i).

107. *Perez-Rodriguez v. Barr*, 951 F.3d 972, 973 (8th Cir. 2020).

108. *Id.* at 974–75 (immigration judge and BIA disagreed, with the IJ finding that institution staff restrained patients because they were “motivated by a desire to overcome [their] erratic behavior” while the BIA found that staff restrained patients “to protect them, not target them.”).

109. *Id.* at 975.

110. *Id.* at 974–75. Notably, though, punitive intent is not required for an act to constitute persecution. *Kasinga*, 21 I&N Dec. at 357.

As evidenced by *Perez-Rodriguez*, establishing nexus is challenging, even in cases where an applicant can show that the harm they suffered or would suffer is severe.¹¹¹ This is especially true in cases of economic persecution and cases in which incidents of harassment and discrimination are found to constitute persecution in the aggregate, particularly because these kinds of harm are most often perpetrated by private actors.¹¹² However, a slightly more expansive reading of the “unable or unwilling” standard could help establish nexus. For example, scholars have argued that signatory states to the CRPD—an agreement that supposedly obligates states to proactively safeguard the human rights of disabled persons—could be considered unwilling and unable to protect their citizens when they fall short of these obligations by failing to provide “reasonable accommodations” or otherwise put a stop to private harms like employment discrimination and interpersonal violence against disabled persons.¹¹³ Further, while the inadequacy of services or healthcare may be a product of limited government resources, not an intention to mistreat or neglect persons with disabilities, this inquiry could involve digging deeper. For example, adjudicators may ask, what are the reasons for underinvestment? Is underinvestment driven by underlying societal attitudes towards disability in that country?¹¹⁴ Such approaches, borrowing from the social and human rights models of disability, could preserve the nexus requirement while acknowledging the complex motives behind harms inflicted on disabled persons.

4. *Expanding the Scope of Persecution to Extend Protection to Persons with Disabilities*

The current definition of particular social group leaves room for disability-based claims. However, demonstrating persecution or a fear thereof on account of disability may be a substantial barrier for applicants. The definition of persecution need not be completely overhauled to extend protections to disabled persons. But modest expansions and the incorporation of supplemental considerations in evaluating disability-based claims could widen the eligibility criteria just enough to provide needed protection to disabled individuals seeking safety. Doing so would be in line with commitments in

111. See, e.g., *Korneenkov v. Holder*, 347 F. App'x. 93, 99–100 (5th Cir. 2009) (crediting disabled applicants' testimonies reflecting that they experienced harassment, detention by police, and attempted rape, but finding that none of these harms inflicted on account of their mental disabilities).

112. See *Makatengkeng v. Gonzales*, 495 F.3d 876 (8th Cir. 2007) (finding no past persecution where disabled individual harassed by private actors absent a finding of government unwillingness or inability to control); *Ghaly*, 58 F.3d at 1431 (finding that “prejudice and occasional acts of individual discrimination” that are “neither condoned by the state nor the prevailing social norm” are not persecution); *Matter of V-F-D-*, 23 I. & N. Dec. 859, 863 (BIA 2006) (finding no past persecution where applicant experienced discrimination in “his school, neighborhood, and employment opportunities” because actors were private individuals).

113. Peterson, *supra* note 21, at 713–16; Crock, Ernst & McCallum, *supra* note 39, at 749.

114. Crock, Ernst & McCallum, *supra* note 39, at 753.

domestic disability rights law,¹¹⁵ the spirit of the Refugee Convention (and the U.S. asylum law that draws from it)¹¹⁶, and the realities of how cumulative harms affect the livelihoods and well-being of disabled persons worldwide. In addition, as the social model of disability holds, it is society, not innate impairment, that prevents disabled persons from fully realizing their human rights. While barriers to full participation in society certainly remain in the United States, the accommodations and protections disabled persons can access here may be the key difference in a noncitizen's ability to live a safe and dignified life.

Examining a society's treatment of persons with disabilities through the lenses of the different models of disability may affect whether a certain harm rises to the level of persecution.¹¹⁷ Vandana Peterson notes that an adjudicator viewing disability through the medical model could conclude that a disabled person's application for refugee status based on lack of access to healthcare would likely not constitute a well-founded fear of future persecution because such a lack may stem from a country's insufficient resources, which do not constitute grounds for refugee status.¹¹⁸ However, viewed through a human rights or social model, an adjudicator might consider the effects of this lack of access on the applicant's exercise of their fundamental human rights and freedoms.¹¹⁹ The human rights model of disability focuses on positive socio-economic rights (in addition to civil and political rights), including the rights to education, employment, and housing.¹²⁰ As a result, a lack of access to healthcare and services may be viewed as depriving a disabled individual of their liberty and ability to meet their basic needs—thus potentially rising to the level of persecution.¹²¹

International definitions of persecution also offer guidance for modest expansions that could better protect persons with disabilities. The High Court of Australia has interpreted "persecution" as used in the 1951 Convention as including "significant detriment or disadvantage," or "selective harassment" directed at both individuals and members of groups.¹²² In New Zealand, persecution has been interpreted to include "the sustained or systemic denial of basic or core human rights such as to be demonstrative of a failure of state protection."¹²³ The UNHCR Handbook further states that discrimination may constitute persecution when it leads to "consequences of a substantially prejudicial nature," including "serious restrictions" on the right to earn a livelihood.¹²⁴

115. Kanter & Dadey, *supra* note 9, at 1158.

116. *See supra* notes 66–69 and accompanying text.

117. Peterson, *supra* note 21, at 705–06.

118. *Id.*

119. *Id.*

120. *Id.* at 714.

121. *See id.* at 705–06.

122. Crock, Ernst & McCallum, *supra* note 39, at 746.

123. *Id.* at 746–47.

124. *Id.* at 748 (citing UNHCR HANDBOOK, *supra* note 92, at ¶ 54).

Finally, Crock, Ernst, and McCallum argue for the application of a doctrine analogous to the “eggshell skull rule” in U.S. tort law to evaluate the fear-based claims of asylum seekers with disabilities.¹²⁵ This approach “would mean that asylum seekers whose disabilities make them particularly vulnerable to harm would have those vulnerabilities taken into account” in determining their need for protection.¹²⁶ The authors explain that such a rule would account for the fact that some persons with disabilities may not comprehend fear—or may hold a seemingly exaggerated fear—relative to a non-disabled person confronted with the same harm.¹²⁷ Although this approach would not necessarily modify the definition of persecution, allowing adjudicators to take into account an applicant’s heightened fear of harm may factor into whether harm is found to constitute persecution, especially in cases in which the harm consists of aggregated incidents of discrimination and harassment.¹²⁸ Further, there is precedent for this modification as a procedural safeguard in U.S. immigration proceedings.¹²⁹ There is also some precedent in the way that children’s claims are considered under U.S. and international asylum law.¹³⁰ For example, when asylum applicants in the United States base their claims on harm suffered when they were children, adjudicators must consider the applicants’ age at the time they were harmed in determining whether the harm constitutes persecution.¹³¹ Adjudicators must consider the harm from the perspective of a child, taking into account the possibility that harms that may not qualify as persecution for adults would have an out-sized impact on children.¹³² Similarly, an adjudicator might consider a person’s disability in determining the severity of the harm they have suffered or fear, thereby accounting for possible differences in perception, ability, and vulnerability.

B. *Disability-Based Particular Social Groups*

The term “particular social group” (PSG) is not clearly defined in the Refugee Convention, the Refugee Act, or the implementing regulations.¹³³ It is unclear what exactly the Convention’s drafters intended when they included this term in the refugee definition. As a result, interpretation of this term in U.S. law has largely been left up to the BIA and the federal Courts of

125. *Id.* at 744.

126. *Id.*

127. *Id.* at 744–46.

128. *But see id.* at 746 (noting that some courts have expressed reservations about the idea that recognizing heightened levels of subjective fear affects the objective fear standard).

129. *See* Matter of J-R-R-A-, 26 I. & N. Dec. 609, 612 (B.I.A. 2015).

130. For discussion of differentiated evaluation of children’s claims outside of the U.S., see Peterson, *supra* note 21, at 708.

131. *RAIO Training- Persecution*, *supra* note 35, at 16 (citing cases); *see also* Santos-Guaman v. Sessions, 891 F.3d 12, 17–18 (1st Cir. 2018) (citations omitted).

132. *Santos-Guaman*, 891 F.3d at 17–19.

133. *See* Natalie Nanasi, *Death of the Particular Social Group*, 45 N.Y.U. REV. L. & SOC. CHANGE 260, 269 (2021).

Appeals.¹³⁴ In 1985, the BIA provided a framework for determining the feasibility of a proposed PSG in *Matter of Acosta*.¹³⁵ Employing the doctrine of *ejusdem generis*—which holds that ambiguous words used alongside more clearly defined words should be read in a manner consistent with the unambiguous language—the BIA found that the term “particular social group” should be defined in a manner consistent with the other grounds for asylum protection.¹³⁶ As a result, the BIA held that a PSG must be composed of members who share a “common, immutable characteristic.”¹³⁷ That common characteristic must be one that group members cannot change (such as their race) or should not be required to change because it is fundamental to their identities (like religion) in order to avoid persecution.¹³⁸

A subsequent BIA case, *Matter of C-A-*, reaffirmed the *Acosta* framework but added a new “social visibility” test. Moving forward, the BIA would consider as a relevant (though not mandatory) factor “the extent to which members of a society perceive those with the characteristic in question as members of a social group.”¹³⁹ The BIA elaborated on and cemented its particularity requirement—that groups be “sufficiently particular” by demonstrating discrete boundaries—in both *C-A-* and *Matter of A-M-E- & J-G-U-*, decided the following year, which also recognized social visibility as a requirement, not just a factor to be considered, in determining the validity of a PSG.¹⁴⁰ Finally, two companion cases, *Matter of W-G-R-* and *Matter of M-E-V-G-* further clarified the BIA’s definition.¹⁴¹ These cases renamed “social visibility” to “social distinction” to address the misconception that this test requires a group to have “literal or ‘ocular’ visibility.”¹⁴² After *Acosta* and this string of cases further interpreting (and narrowing) its standard, to qualify as a PSG a group must be sufficiently particular, consist of members who share a common, immutable characteristic, and be socially distinct within the society in question.¹⁴³

One critical difference between the BIA’s interpretation and the United Nations High Commissioner for Refugees’ (UNHCR) guidance on PSGs is the fact that the UNHCR guidelines consider a PSG cognizable if it meets the immutability requirement *or* the social distinction (also called social perception) requirement.¹⁴⁴ The BIA’s requirement of both elements (in addition to

134. *See id.* at 266, 269–73.

135. 19 I&N Dec. 211 (BIA 1985).

136. *Id.* at 233–34; *see also* Nanasi, *supra* note 133, at 270.

137. *Acosta*, 19 I&N Dec. at 233.

138. *Id.*

139. *Matter of C-A-*, 23 I&N Dec. 951, 957 (B.I.A. 2006).

140. Nanasi, *supra* note 133, at 271 (citing *C-A-*, 23 I&N Dec. at 957 and *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (B.I.A. 2007)).

141. *Matter of W-G-R-*, 26 I&N Dec. 208, 217 (B.I.A. 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 240–43 (B.I.A. 2014).

142. *M-E-V-G-*, 26 I&N Dec. at 234.

143. Nanasi, *supra* note 133, at 288–92. (While these are the current criteria imposed by the BIA, the federal Courts of Appeals do not all adhere to this exact definition.)

144. *Id.* at 273.

particularity) therefore narrows who may qualify as a member of a PSG, diverging from international law and other states' interpretations.¹⁴⁵ In addition, while the immutability requirement places the definition of PSG in line with the other protected grounds, the remaining grounds have no additional criteria analogous to social distinction or particularity. As a result, the PSG definition "demands more than what is needed to prove the other four grounds for asylum."¹⁴⁶ In addition to straying from the principle of *ejusdem generis* the BIA purported to adhere to in *Acosta*, these additional requirements create substantial hurdles for applicants claiming persecution on account of membership in a PSG.¹⁴⁷

Despite these important criticisms, particular social groups predicated on disability can often satisfy the required elements.¹⁴⁸ However, there are certainly challenges to prevailing on a disability-based PSG claim. As Natalie Nanasi points out, the social distinction and particularity requirements read together may present a "catch-22" for large groups (like "persons with mental disabilities") or discrete groups that may be too small to be recognizable within society at large (like "persons diagnosed with schizophrenia").¹⁴⁹ Even the immutability requirement could present a hurdle to an individual whose disability manifests in behaviors or physical characteristics that are controlled with treatment.¹⁵⁰

Again, tension arises between understanding disability through disability studies frameworks and needing to meet the exacting standard to state a cognizable PSG. Prevailing on a disability-based PSG claim often requires relying on diagnosis, rather than focusing on the societal basis for an individual's disability.¹⁵¹ Further, the combination of diagnosis and manifestation that has

145. Several countries utilize a "protected characteristics" approach (like immutability) to define PSGs. Nanasi, *supra* note 133, at 267-68. Australia is the only common law country to instead use a "social perception" approach. *Id.* In 2002, UNHCR issued guidelines that recommended combining the two approaches into a single, somewhat flexible definition: "a group of persons who share a common characteristic. . . or who are perceived as a group by society." *Id.* at 268. The guidelines and asylum laws in many other common law countries, thus do not require a PSG to meet *both* an immutability and a social distinction requirement, as U.S. law does. *Id.*

146. Nanasi, *supra* note 133, at 274. *See also* cases cited *infra* note 198.

147. Nanasi, *supra* note 133, at 274.

148. The BIA first recognized a disability-based PSG in an unpublished decision from 1999, *Matter of Ricardo de Santiago-Carrillo*. Arlene S. Kanter and Eric Rosenthal, *The Right of People with Disabilities to Asylum and Protection from Deportation on the Grounds of Persecution or Torture Related to their Disability*, HUM. RTS. BRIEF DISABILITY RTS. SYMP. (Apr. 2018), <https://perma.cc/38GH-EAD9>.

149. *Id.*; Nanasi, *supra* note 133, at 274. *See also* cases cited *infra* note 167.

150. *See* *Temu v. Holder*, 740 F.3d 887, 896-97 (4th Cir. 2014). The Fourth Circuit held that the BIA erred when it found respondent's bipolar disorder was not immutable because the effects of his disability were managed by medication. The court found this conclusion inconsistent with the BIA's factual finding that the needed medication would not be available to respondent in his home country. However, the court relies on this inconsistency in overturning the BIA (although it also finds immutability based on the incurable nature of bipolar disorder), leaving open the possibility that a disability could be found not immutable if an individual would not be cut off from medication or treatment upon removal to their home country.

151. *See, e.g.*, Kanter, *supra* note 2, at 410 (describing disability studies as refocusing on the social, political, and cultural dimensions of disability, rather than studying disability as a medical defect that must be "eliminated, treated, or cured").

formed successful PSGs based on mental or intellectual disability casts disability as a medicalized problem that sets the individual apart from society without recognizing the society's role in shaping that perception.¹⁵² However, the minority group model supports the argument that persons with disabilities may constitute a particular social group (or groups) analogous to groups protected by the other grounds listed in the refugee definition.¹⁵³ Although the individual elements required to state a cognizable PSG may not be completely in line with the social model and its offshoots, each can be met—though not always easily—by disability-based PSGs.

1. *Immutability*

Central to the definition of a particular social group is the *Acosta* definition of “a group of persons all of whom share a common, immutable characteristic.”¹⁵⁴ The immutability element is likely to be straightforward in its application to individuals with disabilities. Many disabilities would certainly be categorized as immutable for their long-lasting nature and the inability of the disabled person to change their disability.¹⁵⁵ Diagnosis may provide strong support for immutability.¹⁵⁶

Several BIA and circuit court decisions have recognized mental and intellectual disabilities as immutable characteristics.¹⁵⁷ Further, in *Tchoukhrova v. Gonzales*, the Ninth Circuit noted that “[w]hile not all disabilities are ‘innate’ or ‘inherent,’ in the sense that they may be acquired, they are usually, unfortunately, ‘immutable.’”¹⁵⁸ The Ninth Circuit relied in part on an excerpt from the ADA to support this assertion, and it qualified its analysis by stating that it includes within the social group “persons with disabilities” only those whose disabilities are “serious and long-lasting or permanent in nature.”¹⁵⁹

The tension between the social model and the demands of the PSG definition is perhaps most apparent in evaluating the immutability element.¹⁶⁰ The social model focuses on the relationship between a person's impairment and

152. See, e.g., *Scotch*, *supra* note 11, at 219 (“[T]he medical model of disability characterizes people with disabilities as having pathological individual attributes, typically linked to incapacity and dependence, which in turn may lead to social and economic isolation.”).

153. See, e.g., *Moore*, *supra* note 8, at 36–37, 42 (discussing characteristics of minority groups shared by persons with disabilities, including society's perception of the group as a minority and group members' shared experiences, including discrimination).

154. *Acosta*, 19 I&N Dec. at 233–34.

155. See *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1188–89 (9th Cir. 2005).

156. See, e.g., *Acevedo Granados v. Garland*, 992 F.3d 755, 762 (9th Cir. 2021) (applying diagnostic criteria to find “several universal, specific, immutable characteristics” that provide a clear benchmark for psychologists to determine who falls within the group of persons with intellectual disabilities).

157. *Id.*; *Temu v. Holder*, 740 F.3d 887, 896–97 (4th Cir. 2014) (finding bipolar disorder immutable because it is incurable; citing unpublished BIA decisions finding other severe mental illness immutable); *Kholyavskiy v. Mukasey*, 540 F.3d 555, 573 (7th Cir. 2008) (finding IJ and BIA erred in holding respondents' mental disability not immutable); *Matter of Lopez-Sanchez*, 2010 Immigr. Rpt. LEXIS 7882 (BIA May 20, 2010) (finding that “[m]ental disabilities are clearly immutable characteristics in that those suffering from them cannot change their disability”).

158. *Tchoukhrova*, 404 F.3d at 1189.

159. *Id.*

160. See, e.g., *Kanter*, *supra* note 2, at 407.

their environment, which results in disability.¹⁶¹ In theory, corrections to the environment could therefore mitigate, or even functionally erase, the disability by adapting an individual's surroundings to their impairment. Under this conception, then, disability may not be so easily viewed as immutable. Nevertheless, under current case law regarding disability-based PSGs—and considering the country conditions an individual must establish to make the requisite showing of past persecution or well-founded fear—it is unlikely that evaluating immutability through the lens of the social model would lead an adjudicator to conclude that a disability is not immutable. In addition, the definition of immutability includes both characteristics individuals cannot change and characteristics that are “so fundamental to individual identity or conscience that [they] ought not be required to be changed.”¹⁶² Not all disabled persons consider their disability to be such an integral part of their identity. However, many do, finding empowerment, community, and cultural connections through their identities as disabled persons.¹⁶³ Where a more medicalized immutability may be in question—either due to the nature of an individual's disability or an evolving understanding of disability that disfavors such conceptions—the fundamentality of an individual's disability to their identity may meet the immutability requirement.

2. Particularity

To be sufficiently particular, a proposed social group must be “defined by characteristics that provide a clear benchmark for determining who falls within the group.”¹⁶⁴ The group must be “discrete,” with clear, definable boundaries of who falls within and who does not.¹⁶⁵ For PSGs composed of more than one element, not every element must be deemed sufficiently particular; instead, the group as defined by each distinct element read together must satisfy the particularity requirement.¹⁶⁶ In a sense, particularity could be an easy requirement to satisfy; either an individual has a disability, or they do not. Diagnosis might offer a straightforward metric for the particularity of a disability-based PSG, although in some cases even diagnosis has not been interpreted to make a PSG sufficiently particular. For example, in cases in which an individual has a relatively common disability or one that encompasses broader diagnostic criteria, at least one circuit has dismissed proposed PSGs as overbroad or amorphous.¹⁶⁷

161. Scotch, *supra* note 11, at 217.

162. *Acosta*, 19 I&N Dec. at 233.

163. See generally Christopher J. Johnstone, *Disability and Identity: Personal Constructions and Formalized Supports*, 24 DISABILITY STUDS. Q. (2004), <https://perma.cc/9RHZ-A2TN> (compiling and analyzing studies of disability and personal identity).

164. *M-E-V-G-*, 26 I&N Dec. at 239.

165. *Id.*

166. See *Crespin-Valladares v. Holder*, 632 F.3d 117, 124-25 (4th Cir. 2011).

167. *Mendoza-Alvarez v. Holder*, 714 F.3d 1161, 1164 (9th Cir. 2013) (holding that chronic health problems that are widespread in petitioner's home country, including “insulin-dependent diabetes,” coupled with inability to afford medication, do not constitute a sufficiently particularized basis for a PSG).

One recent Ninth Circuit case that analyzed a disability-based PSG, *Acevedo Granados v. Garland*, included an illustrative analysis of the particularity element as it relates to diagnosis.¹⁶⁸ Mr. Acevedo argued that, if returned to El Salvador, he would face persecution or torture on account of his membership in the PSG “El Salvadoran men with intellectual disabilities who exhibit erratic behavior.”¹⁶⁹ Mr. Acevedo was diagnosed with an Intellectual Disability per the Diagnostic and Statistical Manual of Mental Disorders (DSM) by two evaluating mental health professionals.¹⁷⁰ His disability manifested in difficulty with communication, understanding, and memory.¹⁷¹ The Immigration Judge and BIA found this proposed social group to lack sufficient particularity and social distinction.¹⁷² With regards to the particularity element, the BIA held that “intellectual disability” and “erratic behavior” were overbroad and amorphous, and that the proposed group could include “individuals with vastly different intellectual disabilities as well as diverse behavioral manifestations.”¹⁷³ However, according to the Ninth Circuit, the BIA erred by using a “layperson[‘s]” definition of intellectual disability rather than treating it as a specific diagnosis.¹⁷⁴ The Ninth Circuit agreed that a group defined by something like “mental illness” could indeed be too broad to meet the particularity element.¹⁷⁵ But the court noted that in this case, utilizing the DSM diagnosis instead provided “several universal, specific, immutable characteristics” that set a clear benchmark for psychologists to determine who has an intellectual disability, and therefore, who falls within the group.¹⁷⁶ Mr. Acevedo’s proposed PSG based on his disability was therefore sufficiently particular.¹⁷⁷

Particularity has proven a difficult hurdle for other mental health-based PSG claims. In a recent unpublished case, the Second Circuit held that the BIA did not err in finding that “individuals in Belize who suffer visibly from disabilities or mental health problems” was not a cognizable PSG because “it lack[ed] definitive boundaries and cover[ed] an overly broad swath of

because “these described groups sweep up a large and disparate population.”). *Iglesias-Iglesias v. Garland*, No. 20-70650, 2022 WL 898597, at *1 (9th Cir. Mar. 28, 2022) (finding “psychotic illness” not sufficiently particular despite being a DSM diagnosis because the DSM calls psychotic disorders “heterogenous” and defined by “abnormalities” across various domains.). In *Iglesias-Iglesias*, the court found that the group, “locos violentos”—encompassing persons with severe psychosis who exhibit violent behavior—was sufficiently particular because the two terms limit one another when used in conjunction. *Id.* The court cites *Temu* in its reasoning. *Id.*

168. 992 F.3d 755, 762–63 (9th Cir. 2021). The Ninth Circuit held that the Immigration Judge and BIA erred in finding the proposed group was not sufficiently particular or socially distinct. The court remanded for a determination of whether the PSG was cognizable. *Id.* at 758.

169. *Id.* at 760.

170. *Id.* at 759–60.

171. *Id.* at 760.

172. *Id.* at 761.

173. *Id.* at 762.

174. *Id.* at 758.

175. *Id.* at 762.

176. *Id.*

177. *Id.* at 762–63.

illness.”¹⁷⁸ In another unpublished case from 2021, the Ninth Circuit found the proposed PSG “Mexicans suffering from a severe psychotic illness” to be overbroad based on the “heterogeneous” nature of psychotic disorders.¹⁷⁹ And in a case that attempted to combine physical and mental disability into cognizable PSGs, the Ninth Circuit further found that various PSGs including persons with insulin-dependent diabetes and mental illnesses were overly amorphous because they grouped together “large numbers of people with different conditions and in different circumstances.”¹⁸⁰

Proponents of the social model may disfavor defining disability in a way that easily satisfies the particularity element. Particularity still focuses on the individual and their impairment, and current readings of particularity may inherently require medicalization of disability based on preference for diagnosis. Even analyzing the particularity element through a less medicalized definition of disability, like that found in the ADA, may cut against the social model. This analysis would still rely on a definition that includes some and excludes others, precluding a more flexible construction that considers impairment and its relation to society as fluid.¹⁸¹ In other words, the particularity requirement may be incompatible with “evolving” definitions of disability encompassed by the social model.¹⁸²

3. *Social Distinction*

To constitute a PSG, a proposed group must be recognized as a distinct group by the society in question.¹⁸³ Although a social group cannot be circularly defined by harm inflicted on its members,¹⁸⁴ social distinction may be shown when people are “singled out for mistreatment” based on the “manifest[ation] of a certain condition.”¹⁸⁵ Harassment and discrimination based on some shared characteristic may therefore be indicators of social distinction. Further, “laws, policies, or cultural practices of a society,” and even evidence that a society offers some *protections* to a certain group, can serve to demonstrate social distinction.¹⁸⁶

178. *Bonilla v. Garland*, 855 Fed. App’x 798, 800 (2d Cir. 2021). *See also* *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003) (finding proposed PSG “mentally ill patients” overbroad because “the mentally ill are too large and diverse a group to qualify”).

179. *Iglesias-Iglesias v. Garland*, No. 20-70650, 2022 WL 898597, at *1 (9th Cir. Mar. 28, 2022). Other proposed social groups in this case—including “Mexicans with incurable delusional disorder who exhibit manic symptoms and bizarre, grandiose delusions”—were deemed sufficiently particular. *Id.*

180. *Mendoza-Alvarez v. Holder*, 714 F.3d 1161, 1164 (9th Cir. 2013).

181. *See* Peterson, *supra* note 21, at 705.

182. *See id.* at 689–90.

183. *M-E-V-G-*, 26 I&N Dec. at 240-43. *See also* *W-G-R-*, 26 I&N Dec. at 217 (holding that a group is socially distinct when “society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.”).

184. *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005).

185. *Acevedo Granados v. Garland*, 992 F.3d 755, 763–64 (9th Cir. 2021).

186. U.S. Citizenship and Immigr. Servs., *RAIO Combined Training Program: Nexus- Particular Social Group* 14-15 (July 20, 2021), <https://perma.cc/F4YY-CPY8> [hereinafter *RAIO Training- Nexus and PSG*] (citing *Matter of A-R-C-G-*, 26 I&N Dec. 388, 394 (BIA 2014)).

The social distinction element has also been called “social visibility.” However, “a group can qualify as a social group even if one cannot identify members of the group by sight.”¹⁸⁷ A disabled applicant therefore does not necessarily need to prove that their society would recognize them as a group member—they must only show that if their disability were known, they would be considered different or apart from nondisabled persons.¹⁸⁸

A Fourth Circuit case concerning an asylum applicant with bipolar disorder, *Temu v. Holder*, offers a useful analysis of this element. Mr. Temu’s mental illness manifested in erratic behavior that ultimately caught the attention of authorities in his home country, who subjected him to years of hospitalization and imprisonment.¹⁸⁹ The record reflected that in Mr. Temu’s home country, Tanzania, persons with severe mental illness who exhibit such behaviors are singled out for abuse in institutions and labeled “mwenda wazimu,” which means “demon-possessed.”¹⁹⁰ The BIA found that Mr. Temu’s proposed PSG, “individuals with bipolar disorder who exhibit erratic behavior,” was not sufficiently socially distinct because Tanzanian society’s mistreatment of individuals who exhibit erratic behavior is not limited to those diagnosed with bipolar disorder.¹⁹¹ The Fourth Circuit, however, held that despite the fact that the society applied the label in an overbroad manner—and the persecution may have been “poorly aimed”—that Tanzanians appeared to view people with severe mental illness as a group was all that the social distinction element required.¹⁹²

Unlike the other two factors, relying on the social distinction element is more in line with the social model of disability. Analyzing social distinction requires viewing the proposed PSG from the perspective of the society in question. In the case of a disabled applicant, the analysis does not center on the individual and their impairment; instead, it asks whether the pertinent shared characteristic (disability and/or a manifestation of a disability) is perceived as distinct by society.¹⁹³ To establish social distinction, there is no requirement that disabled individuals self-identify as members of a group defined by their disability, and there is no requirement that individuals have an outwardly apparent disability.¹⁹⁴ The social model of disability explains that the marginalization of disabled persons can be traced back to the ways in which societies are organized around what is perceived as “normal.”¹⁹⁵ Subsequently, assumptions around disabled persons’ inability to fully participate—as well as assumptions about inferiority and vulnerability—become

187. *Temu v. Holder*, 740 F.3d 887, 892 (4th Cir. 2014) (citing Ninth and Tenth Circuit cases holding the same).

188. *RAIO Training- Nexus and PSG*, *supra* note 186, at 17 (citing *M-E-V-G-*, 26 I&N Dec. at 238).

189. *Temu*, 740 F.3d at 890.

190. *Id.*

191. *Id.* at 891–92.

192. *Id.* at 893.

193. See *M-E-V-G-*, 26 I&N Dec. at 240; *W-G-R-*, 26 I&N Dec. at 216.

194. *RAIO Training- Nexus and PSG*, *supra* note 186, at 13–16.

195. See *Scotch*, *supra* note 11, at 214–15.

“self-fulfilling prophecies.”¹⁹⁶ Employing the social model, there is thus an inherent link between establishing that a society views persons with disabilities as divergent from “normal” and showing some sort of differential treatment—perhaps including harm rising to the level of persecution—as a result.

4. *Physical Disabilities and Particular Social Groups*

Most case law on disability-based PSGs concerns mental and intellectual disabilities. However, while less extensively explored, groups based on physical disability could clearly satisfy the above factors and constitute cognizable PSGs.¹⁹⁷ In most of the cases in which disability has been accepted as a PSG, proposed PSGs have tied the disability to a manifestation, usually in the form of a behavior.¹⁹⁸ In many instances, the combination of the disability and manifestation is essential; a PSG based on the disability or manifestation alone may not be seen as cognizable for failure to meet one or more of the BIA’s factors.¹⁹⁹ Many physical disabilities are analogous to these behaviors in that they make the disabled person noticeable within a society. In addition, like an “erratic” behavior, a perceivable physical disability may carry stigma or stereotypes that form a basis for mistreatment.²⁰⁰ And while persons with physical disabilities are less likely to face potential harms like institutionalization, they are also subject to discrimination²⁰¹ (with the potential for extreme economic deprivation resulting from employment discrimination) and may be at a heightened risk of violent victimization.²⁰² Further, a widespread lack of physical accessibility may subject persons with physical disabilities to additional harm by functionally depriving them of their liberty.²⁰³ In *Tchoukhrova*²⁰⁴, the Ninth Circuit recognized that physical disability can form the basis for a PSG; in fact, the court writes that “persons with disabilities are precisely the kind of individuals that our asylum law contemplates

196. *Id.* at 215.

197. *But see* Baptiste v. Att’y Gen., 229 Fed. Appx. 66, 68 (3d Cir. 2007) (finding no PSG membership for applicant who feared persecution on account of a limp in part because condition deemed “exceedingly minor”).

198. *See, e.g.*, Temu v. Holder, 740 F.3d 887, 892–97 (4th Cir. 2014); Acevedo Granados v. Garland, 992 F.3d 755, 760–62 (9th Cir. 2021); Iglesias-Iglesias v. Garland, No. 20-70650, 2022 WL 898597, at *1 (9th Cir. Mar. 28, 2022); C-E-P-E-, AXXX XXX 950 (BIA Aug. 8, 2020) (unpublished), <https://perma.cc/HQ5P-QKG8> (finding that “Salvadorans with polio, spasticity, hemiplegia, and epilepsy who exhibit involuntary and exaggerated movement and speech patterns” constitutes a cognizable PSG).

199. *See, e.g.*, Temu, 740 F.3d at 895–97; Iglesias-Iglesias, 2022 WL 898597 at *1.

200. *See generally* ROHWERDER, *supra* note 11 (discussing stigma and cultural perceptions around disability in research from several countries).

201. *See generally* Aldred H. Neufeldt, *Empirical Dimensions of Discrimination Against Disabled People*, 1 HEALTH AND HUMAN RIGHTS 174 (1995) (surveying research on different forms of discrimination against persons with disabilities, including those with physical disabilities, across several countries).

202. U.S. DEP’T OF JUSTICE, *supra* note 57.

203. Crock, Ernst & McCallum, *supra* note 39, at 748.

204. The Supreme Court vacated and remanded the holding in *Tchoukhrova*, however, the issues raised on appeal were unrelated to the formulation of the PSG. USCIS states in an asylum officer training document, last updated in 2021, that this formulation is consistent with its interpretation of disability-based PSG. *See* RAI0 Training-Nexus and PSG, *supra* note 186, at 35.

by the words ‘members of a particular social group.’”²⁰⁵ While the Ninth Circuit’s analysis does not explicitly delineate physical and mental or intellectual disabilities, it recognized that a child with cerebral palsy was a member of the particular social group “Russian children with disabilities that are serious and long-lasting or permanent in nature.”²⁰⁶

C. *Humanitarian Asylum for Persons with Disabilities*

Humanitarian asylum is an alternative, discretionary form of relief that may be granted when an adjudicator finds that an applicant was subjected to especially severe past persecution *or* demonstrates a “reasonable possibility” that they will suffer serious harm, even if not related to a protected ground, if returned to their home country.²⁰⁷ Humanitarian asylum may be available when the government rebuts the presumption of well-founded fear afforded to applicants who have established past persecution by demonstrating that there has been a change in circumstances so that the applicant no longer has such a fear or by demonstrating that the applicant could avoid future persecution by relocating within their home country.²⁰⁸

At least two cases have noted the possibility that a person with disabilities may be eligible for humanitarian asylum, not because of the extreme severity of the past persecution they suffered, but rather, due to suffering some level of past persecution *and* showing “a reasonable possibility that [they] will suffer other serious harm upon removal [to their home country].”²⁰⁹ In *Kholyavskiy v. Mukasey*, a respondent who feared return to Russia in part due to his mental illness established that he had suffered past persecution; however, the persecution was on account of different protected grounds.²¹⁰ The Seventh Circuit held that the reasons Mr. Kholyavskiy cited for his fear of return—the unavailability of medication and subsequent inability to live independently, as well as the barriers he would face to obtaining housing and medical treatment—did not constitute persecution but could constitute “serious harm” for the purposes of humanitarian asylum.²¹¹ This interpretation could offer a lifeline to individuals with disabilities who were persecuted in the past, perhaps on account of some other protected ground, but who fear return for reasons like lack of access to medical treatment, lack of accommodations for their disability, or rampant discrimination—all problems that may be debilitating but fail to rise to the level of persecution.

Further, in an unpublished opinion from 2017, the BIA granted humanitarian asylum to a lawful permanent resident with a serious mental disability

205. *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1188–89 (9th Cir. 2005).

206. *Id.* at 1181.

207. 8 C.F.R. § 1208.13(b)(1)(iii)(B).

208. 8 C.F.R. § 1208.13(b)(1)(i)(A)–(B).

209. *Kholyavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008) (quoting 8 CFR § 1208.13(b)(1)(iii)(B)).

210. *Id.* at 565.

211. *Id.* at 577.

who faced removal pursuant to a criminal conviction.²¹² The respondent established that he had faced past persecution, but DHS rebutted the resulting presumption of well-founded fear by demonstrating a change in home country conditions.²¹³ Even absent a well-founded fear, though, the BIA held that there was a reasonable possibility that the respondent would face “debilitation, homelessness, and victimization”—which were sufficient to constitute “serious harm”—if he were returned.²¹⁴ The BIA relied in part on country conditions evidence that demonstrated the likelihood that the respondent could face imprisonment (and abuse while in prison) and inadequate care as a disabled person in his home country, as well as his subjective fear of return.²¹⁵ Although this decision does not have precedential weight, it offers a useful framework for an alternative form of protection for disabled asylum seekers who can’t meet the high bar required for asylum eligibility.

IV. CONCLUSION: SHOULD DISABILITY BE ADDED AS A PROTECTED GROUND?

Some scholars have suggested that, instead of arguing for the recognition of new particular social groups, certain shared characteristics should be added to the refugee definition’s list of protected grounds.²¹⁶ For example, gender or sexual orientation could constitute their own protected grounds, and an individual persecuted for these reasons could state a valid claim for asylum without needing to demonstrate that theirs is a particular social group. Could disability constitute its own protected ground?

For one, disability can be analogous to other protected grounds. Like race, it may be visible; and like both race and nationality, it is not freely chosen, and it (often) cannot be changed. And like race, religion, and national origin, while disability may have visibly identifiable components, it is largely socially constructed.²¹⁷ However, as Kate Jastram and Sayoni Maitra discuss in their evaluation of the proposal to add gender as a sixth ground, there are drawbacks to separating disability into its own protected ground.²¹⁸ The difficulty of meeting the high bars required to win asylum could instead be better addressed by reinterpreting—and expanding—the definitions of persecution and nexus, in a manner informed by disability studies.

212. V-P-, AXXX XXX 344 (BIA June 29, 2017) (unpublished), <https://perma.cc/GN3E-MZCA>.

213. *Id.*

214. *Id.*

215. *Id.*

216. See, e.g., Kate Jastram & Sayoni Maitra, *Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*, 18 SANTA CLARA J. INT’L L. 48, 88 (2020) (citing other scholars who have argued in favor of adding gender as an independent protected ground for asylum).

217. See discussion *supra* Section II.A.i.

218. Jastram & Maitra, *supra* note 216, at 88–91.