The Evolution of the PSG Ground and Domestic Violence Asylum Claims

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Introduction

Zury Alvizuriz-Lorenzo, a young adult woman and Guatemalan native, fled to the United States (US) in 2015 to escape the severe sexual abuse and rape she had experienced from childhood and into early adulthood. Her persecutors were her own family and supposed loved ones. Since the age of nine, her grandfather sexually abused her on a weekly basis. When Alvizuriz-Lorenzo's brother, Luis Miguel, witnessed the abuse, he informed his grandmother. When their grandmother confronted the grandfather, she suffered a stroke during the argument, and a year later died from a heart attack. Her grandfather stopped the sexual abuse but continued to torment Alvizuriz-Lorenzo psychologically by blaming her for his wife's death. A few years later, when Alvizuriz-Lorenzo was sixteen, her father returned to the household after a long absence. Within a year, her father had begun to molest her, and sexually abused her for the next five years. The incestual abuse ended when her brother confronted their father. However, the intra-family violence persisted. Three months after the abuse from her father, Alvizuriz-Lorenzo began working for her cousin as a caretaker for her toddler. Her cousin's husband, Bernardo, had told her to come in early one day to look after his child. When she arrived, Bernardo raped and impregnated Alvizuriz-Lorenzo. Fearing for her life after Bernardo, a powerful man with police connections, told her he would kill her if she did not end the pregnancy, she fled from her native country. Upon entering the US without inspection, she gave birth to her daughter.

Throughout Alvizuriz-Lorenzo's emotional, psychological, and sexual abuse, her government was never responsive to protecting her rights. Guatemalan police officers rarely incarcerate rapists and sexual crimes against women are generally not seen as a public concern. Even when women file their crimes, the Guatemalan justice system's onerous delays and tedious processes usually re-victimize women psychologically. When the immigration and customs enforcement (ICE) detained Alvizuriz-Lorenzo while she was on a bus heading from Laredo, Texas to Florida, she was immediately placed into removal proceedings due to her undocumented status. Alvizuriz-Lorenzo conceded removal yet applied for asylum defensively. Her request for asylum was denied by the Immigration Judge (IJ) and the Board of Immigration Appeals (BIA or Board). When she appealed to the federal courts, her final avenue for relief, the Eleventh Circuit, in a two-one panel decision, denied her request for asylum. There are no further records about Alvizuriz-Lorenzo's story, but it is more than likely that she has already been deported. She will have returned to a country where she faced traumatic experiences and could once again become exposed to her persecutors. Another devastating outcome is that Alvizuriz-Lorenzo was likely separated from her US born daughter.

What makes Alviruriz-Lorenzo's story even more tragic is that the denial of her application for asylum relief did not stem from fraud or lack of credibility but from an archaic assumption that women's rights are not human rights. According to the US government, Alviruriz-Lorenzo's gender and family-based persecution were too "private" and that her persecution was not cognizable under any of the legal grounds for asylum. Her federal appeals case, rendered recently, *Alvizuriz-Lorenzo v. United States AG* (2019)[1], is only one of many gender-based violence cases since the 1990s that deeply question US commitments to human rights. The denial of Alviruriz-Lorenzo's application for asylum relief practically means that neither she nor so many other women who have experienced horrific sexual persecution can find protection or justice from *any* governmental authority, not even from the US – one of the most liberal and democratic countries in the world. This is a travesty of justice, especially for persecuted women worldwide.

Alviruriz-Lorenzo's case is also important for four main reasons. The first is that her case was not a unanimous decision. Second, the legal question that led to the denial of her application relief rested on the highly contested and ambiguous Particular Social Group (PSG) standard of US asylum law. Third, the timing of her case coincided with the Trump Administration, which has implemented a restrictionist

[1] Alvizuriz-Lorenzo v. United States AG, U.S. App, __ Fed. Appx. __ (11th Cir. 2019).

immigration policy,[2] and has engineered key administrative changes regarding the PSG standard. Fourth, according to a 2015 study from the United Nations High Commissioner for Refugees (UNHCR), Alviruriz-Lorenzo is part of a larger group of tens of thousands of women fleeing from "epidemic levels of violence" in the Northern Triangle region of Central America, which includes Guatemala, Honduras, and El Salvador.[3]

While keeping in mind the unique aspects of Alviruriz-Lorenzo's case, which typifies a historical debate about women's asylum claims, this paper will qualitatively trace the evolution of the PSG standard in asylum law and its relation to gender-based claims, with particular attention to domestic violence cases. This paper will argue that the refusal of the US to recognize gender-based violence has led to contempt for precedent and international norms, unjust inequalities, and logical inconsistencies under the PSG standard. We will begin with a brief background review of US asylum law and its origins.

History & Brief Overview of US Asylum Standards

US asylum law originates from post-World War II international agreements that protect people fleeing from or fearing future persecution. The first written agreement, led and drafted by the United Nations (UN), was the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention). In this convention, the UN sought to create an international standard for assessing who is a refugee. Article 33 of the 1951 Refugee Convention stated the principle of non-refoulement and defined a refugee: "No Contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The 1951 Refugee Convention had only applied to refugees who went through certain events that occurred before January 1, 1951. The second major agreement, the 1967 UN Protocol Relating to the Status of Refugees (1967 Protocol), incorporated the refugee definition from the 1951 Refugee Convention but also included all future refugees. In 1980, the US enacted the Refugee Act, which amended the Immigration and Nationality Act (INA) by adopting the same definition of a refugee as the international agreements. The INA statute code, 8 U.S.C. § 1101(a) (42) (A) notes four major elements that an asylee candidate must meet to qualify for asylum. First, they must have a well-founded fear of past or future persecution. Second, they must have been unable to find relief through relocation in their country of origin. Third, their home government must have actively engaged in the persecution or withheld involvement, allowing the persecution to continue.[4] Fourth, is the nexus requirement, which is that a noncitizen must have been persecuted on account of[5] at least one of the five protected grounds, which are race, religion, nationality, political opinion, or membership in a particular social group (PSG).

A noncitizen can apply for asylum either defensively or affirmatively. A defensive asylum claim is when a noncitizen already has removal proceeding charges against them and applies for asylum. An affirmative asylum application is when a noncitizen is physically present at an official port of entry with a fear of persecution and applies for asylum. An important part of the asylum process is the credible fear interviews (CFIs), which are done by asylum officers under the Department of Homeland Security

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[2] The Trump Administration has taken a hard stance on immigration through the "remain in Mexico" policy, the safe third country rule, the zero tolerance policy, "expedited removal" deportations, expansion of immigration detention centers, the travel ban, the border wall, and also narrowing asylum qualification grounds.

[3] UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015), available at http://www.unhcrwashington.org/womenontherun.

[4] For private actor crimes, the "unwilling or unable" standard is used, i.e. the government was unwilling or unable to provide adequate protection from the persecutor.

[5] The nexus "account of" standard was amended by Congress in 2005. The amendment held that the applicant had to prove that a protected ground *was or will be once central reason* for persecution (emphasis added). *See* 8 U.S.C. § 1158(b) (1) (B) (i). There are many issues with the nexus standard, especially relating to the PSG and gender-based claims, which will be explored later in this paper. The UNHCR has argued against the "one central reason" nexus standard and suggested that such a high standard was not in accordance with the 1967 Protocol (explored later).

(DHS)[6]. Once a noncitizen claims a well-founded fear of death or persecution if returned to their country of origin, the noncitizen is screened by an asylum officer and could be granted either a positive CFI result or a negative one (NCFI). A positive CFI allows a noncitizen to continue the asylum application process by having their case reviewed by an IJ, who are under the Department of Justice (DOJ). If the IJ denies asylum relief, the applicant can appeal to the BIA, which reviews first order appeals of immigration cases and can overrule decisions of IJs. If the BIA denies relief, the applicant can appeal to the federal courts.

Domestic and international legal scholars as well as feminists have theorized why the 1951 Refugee Convention and the 1967 Protocol never recognized "gender" as an asylum ground.[7] In the historical context of the international agreements, attention was focused on the racial and religious persecution of refugees in Europe, hence the drafters never considered whether to include "gender" as a protected ground.[8] Social mores at the time also conformed to an outlook that privatized female suffering. Women's rights were not regarded as human rights.[9] Although the "refugee" definition appears to be gender-neutral, scholars have argued that women are less likely to meet the criteria because the definition ignores the unique types of gender-based persecution that women have faced over millennia.[10] The 2019 UNHCR Handbook has defined (though not conclusively) gender based persecution as acts of sexual violence, rape, domestic violence, honor crimes, female genital mutilation (FGM), trafficking, coercive sterilization/abortion, forced marriage, repressive social mores, and discrimination against homosexuals.[11] Scholars have also found that human rights law generally "privileges male-dominated public activities over the activities of women which take place largely in the private sphere."[12] The legal realm has often viewed women's activities as outside of the public domain and nonpolitical. Thus many judges have dismissed harms suffered by women as "personal abuse."[13] As will be shown later in this paper, this logic, which privatizes the suffering of women, was used in *Matter of A-B-*, *infra*, to constrict substantively the PSG ground. Hence, US asylum law continues to be blind to certain gender-based violence claims despite Congressional recognition of forced abortion, involuntary sterilization, and coercive population control.[14]

The Evolution of the Particular Social Group (PSG) Ground of asylum

Present Day Case Law and Controlling Requirements for the PSG

Three elements ("prongs") currently define the PSG standard of asylum, and these must be

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[6] In 2003, most Immigration and Naturalization Services (INS) functions were transferred to the DHS. This will be relevant to past case law, which refers to the INS as the "Service." Post 2003, the INS no longer existed.

[7] *See* Emily Love, *Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution*, 17 Harv. Women's L.J. 133,152 (1994); Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, 36 Harvard International Review. 45, 48 (2014); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 Cornell I.L.J. 625, 674 (1993); *Trevor R. Larkin, Sex and Gender Violence in Asylum Law: Expanding Protection beyond Domestic Violence*, 9 Drexel L. Rev. 227 (2016); Judith Kumin, *Gender: Persecution in the Spotlight*, 2:123 REFUGEES 12 (2001), available at http://www.unhcr.ch/1951convention/gender.html (last visited May 19, 2004); See *Daliah Setareh, Women Escaping Genital Mutilation — Seeking Asylum in the United States*, 6 UCLA WOMEN'S L.J. 123 (1995); *Amy M. Lighter Steill, Incorporating the Realities of Gender and Power into U.S. Asylum Law Jurisprudence, I TENN. J.L. & POL'Y 445 (2005).*

[8] Kumin, *supra* note 7.

[9] Love *supra* note 7 at 138.

[10] *Supra* note 7.

[11] UN High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, available at: https://www.refworld.org/docid/5cb474b27.html

[12] Kelly, *supra* note 7, at 628.

[13] Lighter Steill, *supra* note 7. (Provided a more particularized analysis of this pattern in judicial reasoning).

[14] *See* INA 8 U.S.C. § 1101 (a) (42) (2000). The INA explicitly refers to these types of gender-based violence.

addressed before looking at the origins and evolution of the standard. US asylum law has been narrowed both procedurally and substantively by recent decisions related to the PSG ground to the detriment of noncitizens, but especially to Central American migrants. In *Matter of A-B-* (2018),[15] Attorney General (AG) Jeff Sessions overruled the Board of Immigration Appeals (BIA) decision in *Matter of A-R-C-G-* (2014), which held that victims of domestic violence could qualify for asylum under the particular social group (PSG) standard. In *Matter of L-E-A-* (2019),[16] the present AG, William Barr further limited the grounds for asylum by holding that nuclear families would generally not meet the PSG standard.[17] Today, then, the PSG ground is composed of three prongs, which were officially established in *Matter of W-G-R* (2014)[18] and *Matter of M-E-V-G* (2014)[19]: (1) members must share common immutable characteristics; (2) the group must be "socially distinct" within the applicant's society; and (3) the group must also be defined with "particularity." The latter two requirements have been heavily contested, despite being approved by most federal courts.

Grace v. Whitaker (2019)[20] attempted to challenge the decision in *Matter of A-B-* but more important it successfully disputed the authority of a 2018 DHS Policy Memorandum that directed asylum officers how to undertake CFIs in light of *Matter of A-B-*. The plaintiffs were migrants contesting NCFI results, attributing their negative review to the policy memo and *Matter of A-B-*. The D.C. District court granted Chevron deference[21] to the *Matter of A-B-* ruling, yet agreed with the abridged party that the memo policies related to the expedited removal process and CFI determinations "violated the Administrative Procedure Acts and Immigration laws," and vacated the unlawful policies. However, despite the declaration that the policy memo was unlawful, *Matter of A-B-* continues to be a precedential decision that affects all immigration cases. The BIA also established two recent procedural changes in Matter *of W-Y-C- & H-O-B (2018),*[22] which affect asylum applicants seeking relief under the PSG ground. The first change is that applicants must describe their proposed PSG ground with "exact delineation." The second is that applicants are prohibited from revising the suggested PSG wording when appealing a negative decision from an IJ.

Origins of the PSG Ground

The BIA first attempted to define the PSG ground in *Matter of Acosta* (1985).[23] In this case, the BIA noted that Congress had not defined the standard and that the 1967 Protocol was not clear on the meaning either.[24] The Board found that the PSG ground had not been included in the first draft of the 1951 Refugee Convention,[25] but rather added as an "afterthought,"[26] and that international jurisprudence

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[15] Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018)

[16] Matter of L-E-A-, 27 I&N Dec. 581 (A.G. 2019)

[17] Although the AG states that the precedential decision, *Matter of L-E-A* "does not bar all family-based social groups from qualifying for asylum," his later analysis does use general language that effectively narrows family based PSGs. In particular, the AG Barr explained that generally nuclear families are not particular in society or socially distinct, hence failing the two parts of the three-prong test for meeting the PSG standard.

[18] Matter of W-G-R-, 26 I&N Dec. 208, 208 (BIA 2014)

[19] Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014)

[20] Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018)

[21] Chevron deference is a legal principle in administrative law that urges federal courts to defer to an agency's interpretation of an ambiguous law if Congress was silent on the matter and had delegated such authority.

[22] Matter of W-Y-C- & H-O-B, 27 I&N Dec. 189 (BIA 2018)

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

[24] *Id.* at 233.

[25] *Id.*

[26] In the published document, the 1951 Refugee Convention, The Travaux Preparatoires Analysed with a commentary by Dr. Paul Weis, Sweden had proposed the addition of the PSG ground. The suggestion of the addition was adopted unanimously. The published document does not delve into the reasons of the Swedish in suggesting the PSG ground nor the unanimous agreement to officially include it.

defining the PSG was "sparse."[27] However, the BIA contemplated a potential explanation for the inclusion of the PSG as part of the refugee definition by observing that "a 'social group' was considered to be of broader application than the combined notions of racial, ethnic, and religious groups, and that it had been included in order to stop a possible gap in the coverage of the U.N. Convention."[28] The Board cited a "purely linguistic analysis" of the ground and noted that "it may encompass persecution seeking to punish either people in a certain relation, or having a certain degree of similarity, to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins, education, family background, or perhaps economic activity."[29] The Board then referenced the suggested definition of the UNHCR, which held that the PSG "connotes persons of similar background, habits, or social status and that a claim to fear persecution on this ground may frequently overlap with persecution on other grounds such as race, religion, or nationality."[30] The Board concluded that the doctrine of *ejusdem generis*, i.e. 'of the same kind,' best helped in determining the PSG's definition. The Board argued that such doctrine "holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words."[31] The BIA then referenced how the other grounds – race, religion, nationality, and political opinion – were all associated with "membership in a particular social group" and how they were all "immutable characteristics."[32] An immutable characteristic meant "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[33] Hence, in the application of the *ejusdem generis* doctrine, persecution on account of membership in a PSG referred to persecution "that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership."[34] It should be emphasized that gender or "sex" is a characteristic specifically mentioned by the BIA, which means that the characteristic could comprise a social group. However, *Matter of Acosta* provides no further analysis regarding the characteristic, nor does it mention gender-based violence. The Board later elaborated that social groups would be determined on a "case-by-case basis" while underscoring the "immutability" of the characteristics defining the group, i.e. that a characteristic must be so fundamental to the applicant's identity that it should not be required to change.

The plaintiff in *Matter of Acosta* had proposed a PSG of "being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages."[35] The Board concluded that the plaintiff's membership in the PSG of taxi drivers was not an immutable characteristic, since "he had the power to change" his profession and that "he was able by his own actions to avoid the persecution of the guerillas."[36] Hence, the plaintiff failed to meet the "immutability" standard that defined the PSG.[37]

In US asylum law, despite further evolution of the PSG definition, *Matter of Acosta*'s "immutability" definition for the PSG is accepted and widely influential, heavily referenced by IJs, the

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[27] Matter of Acosta*,* 19 I&N Dec. 211 (BIA 1985) at 233.

[28] *Id.* The BIA notes this observation after referencing the source, G. Goodwin-Gill, The Refugee in International Law 30 (1983). Although the language is confusing, the BIA likely meant that the PSG "closed a gap" in the types of persecution recognized by the UN Convention.

[29] *Id.* Board also cites G. Goodwin-Gill, supra, at 31.

[30] *Id.* Board cites UNHCR Handbook, supra, at 19.

[31] *Id.* at 234. The BIA references the sources: *Cleveland v. United States*, 329 U.S. 14 (1946); 2A C. Sands, supra, § 47.17.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id*.

[37] Although the plaintiff was not granted asylum relief under the PSG standard, he also failed other elements of the asylum requirements.

BIA, federal courts, amicus curiae briefs, lawyers, nonprofit and immigrant rights organizations, and even influencing the asylum laws of other countries.[38] The UNHCR has also explicitly recognized and endorsed the immutability characteristics definition of the PSG.[39] However, in *Sanchez-Trujillo v. INS* (1986)[40] the Ninth Circuit Court did not directly mention *Matter of Acosta* as a controlling definition for the PSG standard. In this federal appeals case, the Court reviewed a proposed PSG of "young, urban, working class males."[41] When reviewing this PSG, instead of emphasizing the analysis made by the BIA in *Matter of Acosta* the Ninth Circuit Court noted that the first published edition of the 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) was a "significant source of guidance with respect to the UN Protocol" but had provided little guidance on the definition of the PSG other than saying that it includes "persons of similar background, habits or social status."[42] The Ninth Circuit Court was also influenced by the Handbook's assertion that "Mere membership in a particular social group will not normally be enough to substantiate a claim to refugee status." The Handbook allowed that exceptions to this rule could include "special circumstances."[43] However, the Court held that the UNHCR had provided no examples of "special circumstances."[44]

As a result of its analysis, the Ninth Circuit Court concluded that interpretation of PSG must be based on a "careful evaluation of the statutory language and a practical application of the reasonably limited scope" recognized by the refugee definition.[45] The Court held that even should one agree that the social group category is "flexible" and that it broadly encompasses many groups, the scope must still have a limit.[46] Through a careful statutory analysis, the Court found that the words "particular" and "social" which modify the word "group" meant that PSG could not include "every broadly defined segment of a population."[47] Instead the Court proposed its own definition of the PSG, which is "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group."[48] The Court also included as an example that met this definition "immediate members of a certain family."[49]

Although the Ninth Circuit's definition includes the observation that PSG requires a "common characteristic that is fundamental to their identity," which is similar enough to the "immutability"

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[38] Canada's Supreme Court referenced the *Matter of Acosta* and the immutability definition of the PSG in their decision, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

[39] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, available at: https://www.refworld.org/docid/3d36f23f4.html

[40] *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986)

[41] *Id.* at 1576. The Ninth Circuit Court first began their analysis by laying out the four questions to be addressed: (1) Whether the class of people identified could cognizably define a PSG. (2) The petitioners must show that they are members of the group. (3) Whether the persecution is on account of their membership in a social group (the nexus analysis). (4) If there are "special circumstances" that must be considered to allow relief based simply on membership in the social group. However, this fourth question would largely be forgotten in future cases. Still, in a later case, *De Valle v. INS*, 901 F.2d 787, 792-93 (9th Cir. 1990), these four questions were used by the Ninth Circuit Court as a "four part test" for "establishing eligibility for relief premised upon group membership." Further, the Ninth Circuit applied the *Sanchez-Trujillo* PSG definition and never referenced the *Matter of Acosta*.

[42] *Id.* at 1577.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* This referenced example would later become relevant in future case law concerning family based PSGs.

definition described in the *Matter of Acosta*, the Court never explicitly mentioned the words "immutability" or "immutable characteristic," while also adding new words to the PSG definition (e.g. the "voluntary associational relationship"). Although never clearly addressed, the lack of acknowledgement of *Matter of Acosta* in determining the PSG might have been a human error or oversight. Still, this oversight has made the debates in the federal courts surrounding the PSG even more confusing, and the Ninth Circuit Court has been heavily criticized by other circuit courts for deviating from the BIA's definition of the PSG.[50] Criticism notwithstanding, other federal courts have also maintained their own distinct approaches in defining the PSG. Before addressing key recognized social groups related to sexual orientation, clan membership, FGM, and early domestic violence cases by precedential BIA decisions during the early 1990s, it is critical to assess further how the PSG definition within the circuit courts (including the UNHCR's definition) evolved in the period between *Sanchez-Trujillo v. INS* and the BIA's adoption of further requirements to the PSG definition through a precedential decision in 2006.[51]

The Sixth Circuit Court decision in *Castellano-Chacon v. INS* (2003)[52] is helpful in outlining the different approaches taken by the circuit courts in defining the PSG. The Sixth Circuit noted that the case was the first to come before it requiring a decision on a test for assessing PSG claims. The Court observed that defining the social group remained "elusive and inconsistent," referencing how the "circuits that have taken a position on this issue have adopted overlapping definitions that resemble variations on a common theme."[53] Still, the Court noted that the First, Third, and Seventh Circuits had explicitly used the BIA's "immutable characteristics" definition.[54] The Sixth Circuit then referenced the Ninth Circuit Court's "voluntary associational relationship" definition, but noted that the Ninth Circuit Court had subsequently also incorporated the BIA's immutability requirement in the case *Hernandez-Montiel v. INS* (2000).[55] By integrating both definitions, outlined respectively in *Sanchez-Trujillo v. INS* and *Matter of Acosta*, the Ninth Circuit Court thus held a broader interpretation of the PSG than other circuits.

The Sixth Circuit then addressed the approach of the Second Circuit in *Gomez v. INS (1991).*[56] The Second Circuit had adopted the Ninth Circuit Court's "voluntary association" standard, but had added its own requirement that "members of a social group must be externally distinguishable."[57] The court defined "externally distinguishable" as having a "fundamental characteristic in common which serves to distinguish [members of the alleged group] in the eyes of a persecutor -- or in the eyes of the

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[50] *See* Castellano-Chacon v. INS, 341 F.3d 533 (6th Cir. 2003).

[51] This is important because parts of the PSG analysis made by federal courts and the UNHCR in these early decisions would later become incorporated into the modern-day PSG standard.

[52] Castellano-Chacon v. INS, 341 F.3d 533 (6th Cir. 2003). The case has since been superseded by statute concerning jurisdictional authority and overruled in part, yet the PSG analysis remains useful.

[53] *Id.* at 546.

[54] *Id*. at 546. The Court cites the following cases: Lwin v. INS, 144 F.3d 505, 511 (7th Cir. 1998); Fatin v. INS, 12 F.3d 1233, 1239 (3d Cir. 1993); Alvarez-Flores v. INS, 909 F.2d 1, 7 (1st Cir. 1990). In an early case, Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985), the First Circuit referenced the 1979 UNHCR Handbook PSG definition ("persons of similar background, habits or social status") yet also acknowledged the *Matter of Acosta* "immutable characteristics" definition.

[55] Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 n.6 (9th Cir. 2000). Specifically, the Ninth Circuit held that "a "particular social group" is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." The Ninth Circuit Court admitted that the voluntary association requirement could conflict with the *Matter of Acosta*'s immutability definition, conceding to a criticism made by the Seventh Circuit in *Lwin v. INS*. However, the Ninth Circuit Court did not admit to any error nor addressed the lack of acknowledgement of the *Matter of Acosta* in the *Sanchez-Trujillo v. INS* case.

[56] Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991). This case has also been criticized by *Lwin v. INS* and *Niang v. Gonzales* for deviating from the BIA's PSG definition.

[57] *Castellano-Chacon v. INS at* 546. The Sixth Circuit cited the case Saleh v. United States Dep't of Justice, 962 F.2d 234, 240 (2d Cir. 1992). In this case, the Second Circuit cited both *Sanchez-Trujillo v. INS* and *Gomez v. INS.*

outside world in general."[58] Another important argument that would spur debate in the federal courts was the Second Circuit's assertion that "Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."[59] This statement likely reflected the "distinguishable" criteria that the Second Circuit emphasized, as well as its observation that in past significant cases[60] proposed social groups based on "broad characteristics" had never been recognized by circuit courts.

The Sixth Circuit held that the "UNHCR takes the Second Circuit's approach in that the external perception of the group can be considered as an additional factor in the overall calculus of what makes up a "particular social group.""[61] The Sixth Circuit recognized that the UNHCR guidelines were not binding. Still, it is critical to point out that the Second Circuit and the 2002 UNHCR guidelines on the PSG may well have represented very different views on the application of the "external perception" (or as the UNHCR calls it, "social perception") requirement. The 2002 UNHCR Handbook defined the PSG as "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."[62] While the UNHCR interpreted the social perception requirement as broadening the PSG ground,[63] the Second Circuit's "external perception" requirement is practically used to narrow the PSG ground.[64] For example, the UNHCR held that "If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."[65] Hence, the UNHCR argued that a PSG analysis should not end on the immutability of a characteristic as was done in *Matter of Acosta*, but that the reviewer should further assess the fact situation.[66]

Another argument separating the Second Circuit from the 2002 UNHCR PSG definition is that the UNHCR did not explicitly hold that a fundamental characteristic was one distinguishable in the eyes of a persecutor but mainly addressed the perception of a society. Distinction through the perception of a persecutor is tied to the nexus analysis since a noncitizen must prove persecution "on account of" a protected ground. This analysis has largely been a barrier to gender-based asylum claims, as it is difficult

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[58] *Gomez v. INS* at 664. It is unclear where the Second Circuit derived this reasoning. The only two cited cases, *De Valle v. INS* and *Ananeh-Firempong v. INS* never explicitly referenced the perspective of the persecutor or the outside world. Furthermore the 1979 UNHCR handbook never addressed this point either. However, it should be noted that this reasoning would later be recognized and then later denounced by the BIA.

[59] *Id*. at 664.

[60] Following the assertion that "broad characteristics" would not be enough to define a social group, the Court cited Sanchez-Trujillo, 801 F.2d at 1574-77; cf. Vides-Vides v. INS, 783 F.2d 1463, 1467 (9th Cir. 1986); Zepeda-Melendez v. INS, 741 F.2d 285, 290 (9th Cir. 1984); Chavez v. INS, 723 F.2d 1431, 1434 (9th Cir. 1984).

[61] *Castellano-Chacon v. INS* at 548.

[62] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, available at: https://www.refworld.org/docid/3e50de6b4.html

[63] *Supra*, at 3. The 2002 UNHCR Handbook stated that "Given the varying approaches [referencing the "immutability" and "social perception" requirements and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled." Hence, both approaches are adopted for broadening the ground.

[64] *See Saleh v. United States Dep't of Justice* and *Gomez v. INS*

[65] 2002 UNHCR Handbook, *supra*, note 61, at 4.

[66] *Supra.* The UNHCR interestingly chooses the example of a profession, arguing that such a characteristic could still constitute a PSG if "in the society they are recognized as a group which sets them apart. "Under the approach of the UNHCR, even if a profession is not an immutable characteristic, the plaintiff in *the Matter of Acosta* could have been granted relief through the social perception analysis.

to assess the motivations of the persecutor in such cases.[67] In *Castellano-Chacon v. INS,* the Sixth Circuit also referenced a key gender-based violence case, *In re R- A-* (BIA 1999)[68] to argue that the BIA was moving towards recognizing the UNHCR's "social perception" standard. In that case the BIA held that for a "group to be viable for asylum purposes, we believe there must also be some showing of how the characteristic is understood in the alien's society, such that we, in turn, may understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm."[69] However, this explanation of the "social perception" approach is explicitly tied to influence on the perception of the persecutor (the nexus analysis becomes meshed with the PSG analysis)[70] which differs from the UNHCR's 2002 definition. It is unclear whether the social perception interpretation of *In re R-A-* is closer to the view held by the Second Circuit or the UNHCR. Still, similar to the Second Circuit, the court's purpose in citing *In re R-A-*'s "social perception" approach was to narrow the PSG ground, as the opinion later stated that "the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."[71] This reasoning means that applicants must meet both the "immutability" *and* the social perception requirements (with a focus on societal perceptions and to some extent the persecutor). In contrast, the approach of the UNHCR is much more flexible, as "immutability" *or* "social perception" (with a focus on societal perceptions) could constitute a PSG.

Recognized Gender-Related Social Groups: LGBT, Clan Membership, and FGM

Substantively, while these disputes remained ongoing in the federal circuit courts, the BIA issued a series of precedential decisions in the 1990s concerning the types of groups that could comprise a PSG. *Matter of Toboso-Alfonso* (BIA 1990)[72] established that sexual orientation could define a PSG. The case involved a 40-year-old citizen of Cuba. He asserted that the Cuban government was persecuting him on account of his status as a homosexual. In applying the *Matter of Acosta*'s "immutability" test, the BIA found that homosexuality was an "immutable" characteristic and that the applicant had a credible testimony and fear of persecution based on that characteristic alone.[73] In 1994, AG Janet Reno issued an order that officially considered *Matter of Toboso-Alfonso* as precedent for all cases involving persecution based on sexual preference. The political context for this declaration is significant, as AG Reno was heavily influenced by former Representative Barney Frank, who was part of the House Judiciary Committee at this time.[74] Hence, the recognition of this social group (LGBTQ individuals) was greatly

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[67] "Personal relationships" between the victim and persecutor (common in domestic violence or other gender-based violence cases) is seen as personal motivations behind the persecution and not a protected ground.

[68] In re R-A-, 22 I. & N. Dec. 906, (BIA 1999). This case has a long history that will be explored substantively later in this paper. This case will later be referred to as *Matter of R-A-*.

[69] *Id* at 918.

[70] A potential critique of looking at whether a fundamental characteristic distinguishes an applicant in the eyes of a persecutor is that this analysis is too close to the nexus determination. The PSG and nexus analyses should be kept separate as the UNHCR and the US have cautioned that the PSG cannot be defined by the persecution or abuse (e.g. a social group cannot be defined as "young females who are victims of *domestic violence*"). Furthermore, considering that a persecutor may have many different motives, it could also be difficult to prove whether the persecutor views the victim as part of a larger social group (this is especially problematic for gender-based violence cases which will be further explored later in this paper).

[71] *Id.* at 919.

[72] Matter of Toboso-Alfonso*, 20 I&N 819 (BIA 1990)*

[73] Although this case was straightforward in legal analysis, persecution based on LGBTQ identity or status also has become a complex legal debate. However, this topic is not the focus of this paper.

[74] *See* Sharita Gruberg, *The U.S. Asylum System's Role in Protecting Global LGBT Rights,* Center for American Progress (June 15, 2015), https://www.americanprogress.org/issues/lgbt/reports/2015/06/18/115370/humanitarian-diplomacy/ . (In a conversation with the Center for American Progress concerning his efforts to protect LGBTQ people fleeing persecution, Frank said, "I asked him [President Clinton] to do that. The way to do that was through the attorney general declaring that case [Toboso-Alfonso] to be precedential. There was a little back and forth over

influenced by political support.[75]

In *Matter of H-* (BIA 1996),[76] the BIA recognized that "membership in a clan" constituted a PSG. The precedential decision cited *Matter of Acosta's* immutability test. However, the BIA also adopted opinions from other sources. The BIA cited the Immigration Service *Basic Law Manual* on asylum adjudications, and from the source referenced the legal opinion of the Office of the INS General Counsel (1993) who supported the conclusion that a Somali clan was a social group. The BIA later stated that the "Basic Law Manual recognizes generally that clan membership is a highly recognizable immutable characteristic that is acquired at birth and is inextricably linked to family ties."[77] The BIA also cited *Gomez v. INS*, and acknowledged the Second Circuit's reasoning that "a social group must be recognizable and discrete, allowing would -be persecutors to identify victims as members of the purported group."[78] This acknowledgement is significant as the BIA concluded that "The record before us makes clear not only that the Marehan share ties of kinship, but that they are identifiable as a group based upon linguistic commonalities."[79] Hence, the BIA used both the immutability test and the Second Circuit's social perception test as determinants for recognizing a Somali clan. However, it is important to emphasize that it is not clear why the BIA only acknowledged the Second Circuit's approach and not the Sixth Circuit's test in *Sanchez-Trujillo v. INS*. Admittedly, the Second Circuit's interpretation could be seen as more applicable to the fact situation in *Matter of H-*. But it is odd for the BIA to pick and choose tests for deciding cases and not formalize its approach by clarifying why *Matter of Tobonso-Alfonso* was subjected only to the immutability test and not any other test, unlike in this case.[80]

In *Matter of Kasinga* (BIA 1996),[81] the BIA recognized the PSG of "young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation [FGM], as practiced by that tribe, and who oppose the practice."[82] The BIA argued that this PSG met the test in *Matter of Acosta* while also citing *Matter of H-* to support the argument that kinship ties, in this case, members of the Tchamba-Kunsuntu tribe, "warrant characterization as a social group."[83] The case also referenced the Third Circuit's opinion in *Fatin v. INS* (1993)[84] to underscore that "opposition" to a practice, e.g. FGM, could satisfy the *Matter of Acosta* immutability test.[85] The BIA later argued that characteristics of "young

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it. Janet [Reno] was not initially convinced that she had the legal authority but I, frankly, kept up the heat with the president, and that's how it happened. It was explicitly done by [President] Clinton after the failure of the effort to get gays in the military in part because he recognized the importance of showing he was not only pro-LGBT but capable of doing some real things.").

[75] This case provides an important example of how gender-based violence could also be recognized more easily with government or political support.

[76] Matter of H-, 21 I&N Dec. 337 (BIA 1996). Originally, the IJ denied asylum to the applicant because the judge argued that a country with no government (Somalia) or victims of civil strife could not qualify for asylum. On appeal, the BIA disagreed and recognized the PSG of a Somali clan.

[77] *Id.* at 342.

[78] *Id.*

[79] *Id.* at 343.

[80] *Id.* The BIA also never clarified whether all cases must adopt the Second Circuit's societal perception approach.

[81] Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996).

[82] *Id.* at 357. It should be noted that the wording of this PSG was later contested on two grounds. The first was that the social group was defined by the persecution, e.g. FGM. The second was whether the act of "opposition" was necessary to define a social group. Future case law would settle both matters, concluding that neither descriptors were necessary to describe the group. Yet both matters are still debated in domestic violence claims.

[83] *Id* at 365.

[84] Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993)

[85] In *Fatin v. INS,* the Third Circuit focused on the BIA's interpretation of the PSG in *Matter of Acosta*. The Court explicitly mentioned that because "sex" was an immutable characteristic recognized in *Matter of Acosta*, then the applicant, as an Iranian woman, met the test. Hence, the Third Circuit argued that gender or sex alone could constitute a PSG. But the applicant still needed to prove that "she would suffer or that she has a well-founded fear of suffering "persecution" based solely on her gender" (1240). On this matter, the Court did not agree. Still, the Third

woman" and "member of the Tchamba-Kunsuntu Tribe" are immutable, that the characteristic of "having intact genitalia" is fundamental to a women's identity, and that women should not be forced to mutilate or change it.[86]

In a concurring opinion in this case, Board Member Lory D. Rosenberg offered a persuasive critique of the above analysis. She argued that the BIA's adoption of the Third Circuit's reasoning in *Fatin v. INS*, added a new standard to the PSG definition, which was the "opposition" requirement. Further, she asserted that gender-based persecution cases should not be subjected to additional standards, as precedent (*Matter of Acosta* and *Matter of H-*[87]*),* had already established the immutability test. The critique first considered the purpose of the "social group" category. Rosenberg argued that the category "has been recognized as having deliberately been included as a "catch-all" for individuals not falling into the first four…enumerated categories..."[88] She supported her claim by arguing that international law scholars viewed the PSG as a broad category that was added to the Convention "to protect against persecution that would arise from unforeseeable circumstances."[89] Rosenberg analytically reasoned that because the four other protected grounds[90] did not "necessarily require a showing of the presence of an individual's opinions or activities" then "it is surplusage to define the social group in this case by including as an element the applicant's opposition to the practice of [FGM]."[91]

The comparison of the different treatment of *Matter of H-* and *Matter of Kasinga* is significant, yet the cause of this discrepancy may be linked to the confusion over the controlling interpretation of the PSG among the circuit courts. Both cases were issued in 1996, but *Matter of H-* referenced not only *Matter of Acosta* (the immutability test) but also *Gomez v. INS* (social perception test). In *Matter of Kasinga*, in contrast, although the BIA also mentioned *Matter of Acosta,* the opinion focused on *Fatin v. INS* rather than *Gomez v. INS* (or even *Sanchez-Trujillo v. INS*).[92] Still, this outcome may have had a rational basis. Compared to *Gomez v. INS* (concerning El Salvador guerillas),[93] the fact situation of *Fatin v. INS* was closer to that of *Matter of Kasinga* (e.g. *Fatin v. INS* involved a gender-based persecution claim by a woman). However, inconsistency in the application of standards is problematic. *Fatin v. INS* and *Gomez v. INS* both held variations of the PSG test. Depending on which one a decision maker chose,

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Circuit also reviewed a narrower PSG, which was "Iranian women who *refuse to conform* to the government's gender-specific laws and social norms." This PSG was characterized by the Court as satisfying the BIA's immutability test in. Yet, this PSG emphasized "opposition" to government enforced laws or practices. However, the Court found that the applicant did not prove that she was part of this social group, and she was not granted relief.

[86] *Matter of Kasinga* 21 I&N Dec. at 366.

[87] Rosenberg had not mentioned that the *Matter of H-* also cited the Second Circuit's social perception test.

[88] *Id.* at 375. Rosenberg cited the following sources: See Kristin E. Kandt, United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison, 9 Geo. Immigr. L.J. 137, 145 (1995) (citing T. Alexander Aleinikoff, The Meaning of "Persecution" on United States Asylum Law, 3 Int'l J. Refugee L. 5, 11 (1991); Nancy Kelly, Guidelines for Women's Asylum Claims, 26 Cornell Int'l L.J. 625 (1993); Pamela Goldberg, Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence, 26 Cornell Int'l L.J. 565, 591-92 (1993).

[89] *Id.*

[90] E.g. race, religion, nationality, and political opinion

[91] *Id.* Rosenberg had also noted that in the *Matter of H-*, the Board had found without much difficulty that a man, member of a tribe that was systematically persecuted had established persecution based on that characteristic alone and that women's claims should not be assessed differently since the applicant, like *Matter of H-,* is also a member of a group of "women of a given tribe, some perhaps of marriageable age, whose members are routinely subjected to the harm which the majority finds to constitute persecution."

[92] *Fatin v. INS* was explicitly referenced for the "opposition" component that was never clarified as controlling or dicta at the time. Although both *Gomez v. INS* and *Sanchez-Trujillo v. INS* were mentioned, the former twice and the latter only once, the citations were ancillary to the decision.

[93] *Gomez v. INS* had asserted that "possession of broadly-based characteristics…youth and gender will not by itself endow individuals with membership in a particular group" (664). This reasoning could have pushed back against the BIA's finding in *Matter of Kasinga* that "young woman" was a recognizable characteristic under *Matter of Acosta*.

this could result in different outcomes. Although *Fatin v. INS* did not necessarily narrow the PSG ground and did recognize a group that included women, as noted by Rosenberg, it added an undue burden on an applicant (particularly females) of also proving "opposition" to a practice.

Rosenberg also highlighted the importance of a "consistent framework for adjudication."[94] She argued that this framework recognized gender-related asylum claims within the PSG ground.[95] She also held that such a framework was consistent with US and Canadian jurisprudence as well as with international norms, particularly the UNHCR.[96]Another authoritative source mentioned by Rosenberg was INS gender guidelines established to help asylum officers assess gender-based claims.[97] In summarizing her arguments, Rosenberg concluded that "what we have done here...is to posit...the proper framework in which the individual facts of such [gender-based] claims made before the Service and before the [IJs] should be considered and judged."[98] The framework proposed by Rosenberg is persuasive. Her analysis grounded the rights of women in international law and human rights norms.

After meeting all other requirements of asylum, the applicant in *Matter of Kasinga* was granted asylum. This was the first precedential case that recognized FGM as persecution and that granted protection on such basis under the PSG ground.[99] The news coverage and political context for this case was also pertinent,[100] although, unlike the *Matter of Tobonso-Alfonso*, the AG did not have a distinguished role. Still, recognition and protection of LBGTQ people, clan members, and FGM based claims, all occurred under the Clinton Administration.

Domestic Violence and the PSG Ground: In re R-A-

The next substantive social group that the BIA addressed was victims of domestic violence, in *In re R-A-* (BIA 1999).[101] As analyzed earlier in this paper, the Sixth Circuit in *Castellano-Chacon v. INS* had looked to this case when determining the BIA's definition of the PSG ground. In this case, the BIA reviewed a proposed domestic violence based PSG of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[102] The IJ who had initially reviewed the case had recognized this PSG and had granted asylum to the applicant, Rody Alvarado Peña, a Guatemalan woman who fled from heinous abuse

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[94] *Matter of Kasinga* 21 I&N at 377.
[95] *Id.*
[96] *Id.* at 377. Rosenberg cited: *Fatin v. INS*; Cheung v. Canada, 102 D.L.R. 4th 214 (1993); and *Gomez v. INS.* Rosenberg also cited the United Nations High Commissioner for Refugees, Memorandum: Female Genital Mutilation (Geneva, UNHCR, Division of International Protection, May 1994)
[97] Rosenberg noted that these guidelines were influenced by the 1991 UNHCR and 1993 Canadian gender guidelines.
[98] *Id.*
[99] Subsequent precedential cases, which concerned variations of FGM based claims, have led to more complicated legal debates. Yet, this is out of the scope for this paper. However, in *Matter of A-T-*, 24 I&N Dec. 296, 296-97 (BIA 2007) the BIA found that since FGM was only inflicted once, then there was no well-founded fear of future persecution and how the situation differed from *Matter of Kasinga* as well as forcible sterilization. However, in 2009, the BIA granted asylum to the applicant in *Matter of A-T-*, 25 I&N Dec. 4, 4 (BIA 2009) and recognized that if past persecution is shown then a "presumption is triggered" that future harm from the same protected ground is probable. Relevant federal cases: Abankwah v. INS, 185 F.3d 18 (2nd Cir. 1999); Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005); Bah v. Mukasey, 529 F.3d 99 (2nd Cir. 2008).
[100] *See* Center for Gender and Refugee Studies, *Matter of Kasinga (1996)* (last visited, Dec 2019), https://cgrs.uchastings.edu/our-work/matter-kasinga-1996 (The win in this case "came not simply because of effective legal advocacy, but also through the coordinated efforts of women's rights and human rights organizations nationally...Ms. Kassindja's quest for refugee protection became one of the most highly publicized political asylum cases since the passage of the 1980 Refugee Act. The story ended up on the front pages of national newspapers, and Ms Kassindja was interviewed on Nightline, National Public Radio, and CNN."
[101] In re R-A-, 22 I&N Dec. 906 (BIA 1999)
[102] *Id.* at 357.

inflicted by her spouse. However, the INS appealed the grant of asylum and the decision went before the BIA. The BIA concluded that "the group identified by the [IJ] has not adequately been shown to be a [PSG] for asylum purposes. We further find that the respondent has failed to show that her husband was motivated to harm her, even in part, because of her membership in a [PSG]."[103] In coming to this result, the Board explicitly referenced the immutability test and cited the *Matter of Kasinga*, *Matter of H-*[104], and *Matter of Acosta*[105] as well as the "voluntary associational test" in *Sanchez-Trujillo v. INS.*[106] Further, the Board focused on the nexus requirement.[107] The BIA referred to the Supreme Court decision, *INS v. Elias-Zacarias* (1992),[108] and argued that "The Court in Elias-Zacarias pointed out that overcoming or punishing a protected characteristic of the victim, and not the persecutor's own generalized goals, must be the motivation for the persecution."[109]

The BIA referenced the IJ's analysis on the above points. The BIA found that the IJ had "relied in part on the May 26, 1995, INS Asylum Gender Guidelines."[110] Although the BIA agreed with the IJ that the guidelines point to the conclusion that the level of harm experienced by the applicant met the persecution standard, the Board found that the guidelines' analysis on "social group" had not provided definitive answers. Furthermore, the BIA argued that the language of the statute did not provide a definitive answer either.[111] The BIA then assessed Congressional laws regarding derivative refugee status for spouses and non-refugee battered spouse relief, in an attempt to find legislative intent as a basis to answer this matter. In determining legislative intent, the BIA wondered whether the absence of "changes relative to battered spouses…made in the refugee definition or the asylum statute at the time of enactment of the battered spouse provisions" meant that perhaps Congress did not intend for US refugee laws to grant asylum to applicants fleeing from abusive spouses.[112] However, the BIA cautioned that this analysis did not "foreclose a construction that would accord refugee status to a battered spouse."[113] The Board concluded that to address this case particular attention had to be paid to the nexus requirement.[114]

After the Board laid out the controlling precedent and reviewed the other potential authoritative

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[103] *Id.* at 907.

[104] Although the BIA cited this case, which incorporated into its analysis the Second Circuit's social perception test in *Gomez v. INS*, the Board never explicitly mentioned *Gomez v. INS* even though the Board had mentioned *Sanchez-Trujillo v. INS* as relevant (yet not necessarily controlling).

[105] *Id.* at 912. The Board also cited *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). This case was cited on the grounds that it clarified and overruled the suggested persecution standard in *Matter of Acosta*. This case also hinged on the Supreme Court's determination in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), which ruled that the "clear probability" standard of persecution used for withholding of deportation should not be confounded with the "well-founded" fear of persecution standard used for asylum (*Matter of Acosta* had argued that both the "probability" and "well-founded" standards were not meaningfully different). For proving future persecution *Matter of Mogharrabi* changed *Matter of Acosta*'s wording from an asylum applicant showing that the persecutor "could easily become aware" of an immutable characteristic and therefore become persecuted for such a reason by omitting the word "easily."

[106] *Id.* The BIA also cited *Li v. INS* and *De Valle v. INS*

[107] *Id.* The BIA cited INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992); Matter of T-M-B-, 21 I&N Dec. 775 (BIA 1997), petition granted and remanded sub nom. Borja v. INS, 175 F.3d 732 (9th Cir. Apr. 30, 1999).

[108] INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992)

[109] *Id.* at 913.

[110] The BIA cited Phyllis Coven, U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims from Women (1995) ("DOJ Guidelines").

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 914. The BIA specifically said that the "determinative issue, as correctly identified by the [IJ], is whether the harm experienced by the respondent was, or in the future may be, inflicted "on account of" a statutorily protected ground." The BIA also analyzed whether there was an imputed political opinion. However, this is not the topic of this paper.

sources (gender guidelines and congressional laws), the Board denied recognition of the proposed PSG based on a new "social or external perception test" that was deemed relevant for assessing the persecutor's motivations in targeting the applicant. It should be emphasized that the BIA's precedent and cited sources had never before established this test (the BIA never cited the Second Circuit's social perception approach in *Gomez v. INS* nor did it mention the UNHCR's approach). Hence, the assertion that although the applicant fell within the social group under the immutability test but that the applicant had not shown that "their male oppressors see their victimized companions as part of this group" is a new standard that appears to be baseless. The cited material (*Matter of Acosta, Matter of Kasinga, Matter of H-*, and *Sanchez-Trujillo v. INS)* had never touched on this requirement. The only cited case which may relate to the BIA's determination is *INS v. Elias-Zacarias.* The main reason the BIA stressed the perception of the victim themselves in a broader group[115] and "most importantly" the persecutor's perception was to determine whether the abuse was "on account of" the applicant's membership in the social group.

Adding more confusion and inconsistency, the BIA asserted that *Matter of Kasinga* held that a characteristic (likely referring to FGM) should be viewed as important in a society and that the applicant had not shown that the "characteristic of being abused is one that is important within Guatemalan society."[116] Still, the Board argued, "While not determinative, the prominence or importance of a characteristic within a society is another factor bearing on whether we will recognize that factor as part of a [PSG] under our refugee provisions. If a characteristic is important in a given society, it is more likely that distinctions will be drawn within that society..."[117] However, this assertion is confusing. The characteristics of FGM or "being abused" constitute the persecution and not the "immutable characteristics." It is also odd to argue whether a type of persecution is "significant" within a society as relevant for the PSG analysis. In *Matter of Acosta*, this type of analysis was never determined as relevant. The Board further distanced itself from *Matter of Acosta*'s immutability test when it argued that "mere existence of shared descriptive characteristics is insufficient to qualify those possessing the common characteristics as members of a [PSG]."[118] The BIA reasoned that despite the importance of the immutability test, *Matter of Acosta* had never established that the "starting point for assessing social group claims articulated in Acosta was also the ending point."[119] It should be pointed out however, that in making this claim, the BIA confounded both the nexus and PSG test analyses. The end point to the establishment of a social group was the immutability test in *Matter of Acosta* for the precedential cases of *Matter of H-* and *Matter of Kasinga*. The next *separate* test was determining nexus for those two cases as well. The additional requirement for the PSG test of an assessment of the persecutors perception of a victim's characteristic meant that motivations of persecutors were being used to define the PSG.

The BIA moved on to criticizing the IJ's nexus analysis. The BIA argued that the IJ's nexus finding was "too broad and too narrow."[120] The persecutor did not target all "Guatemalan women intimate with abusive Guatemalan men." On the other, the record indicated that the persecutor would have targeted any woman he married. In determining the motivation of the persecutor, the BIA held that he abused the applicant because "she was his wife, not because she was a member of some broader collection of women…whom he believed warranted the infliction of harm...Of all...reasons for abuse, none was 'on account of' a protected ground, and the arbitrary nature of the attacks further suggests it was not the respondent's claimed social group characteristics that he sought to overcome."[121] This reasoning rendered

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[115] This criterion is arguably different from whether a society at large perceives the victim as part of a broader social group, but the BIA also mentioned this perception earlier in the opinion.
[116] *In re R-A-,* 22 I&N at 919.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 921.
[121] *Id.* The UNHCR would push back on this type of argument. The DHS brief on behalf of *In re R-A-* also contested this claim through an analogy concerning slave owners. *See* note 114.

the suffering of women as personal abuse, and hence private. The BIA also addressed the IJ's finding that "views of society and of many governmental institutions in Guatemala can result in the tolerance of spouse abuse" at appalling levels.[122] This argument was linked to a "societal perception" analysis, i.e. how the society in Guatemala regards abused women in domestic relationships. However, the Board argued that Guatemalan society saw abusive marriages as non-desirable and that it was a recognized problem.[123] Furthermore, the BIA asserted that the lack of governmental protection for abused women in Guatemala did not support "a finding that her husband inflicted the abuse because she was a member of a [PSG]."[124] Although the BIA argued that "adequacy of state protection is...an essential inquiry," the Board found that this case did "not show that [the persecutor's] actions represent desired behavior within Guatemala or that the Guatemalan Government encourages domestic abuse."[125] This reasoning emphasized the motivations of a persecutor and granted lesser authority to societal attitudes and context. The BIA concluded that "the respondent must show more than a lack of protection or the existence of societal attitudes favoring male domination."[126]

The BIA also emphasized the differences between the fact situation of *Matter of Kasinga* and *In re R-A-*. First the Board argued that the applicant had not shown that "domestic violence is as pervasive in Guatemala as FGM is among Kunsuntu Tribe, or, more importantly, that domestic violence is a practice encouraged and viewed as societally important in Guatemala."[127] As argued earlier, however, assessing whether a type of persecution was significant to a society was not a determinative criteria for the immutability test in *Matter of Acosta*.[128] Furthermore, the Board found as important that the government (police in Togo) was actively seeking to subject the applicant in *Matter of Kasinga* to FGM, while in *In re R-A-*, the government did nothing. Yet, asylum law had already recognized that proving active government involvement was not necessary for asylum purposes.[129] Furthermore, the BIA asserted that because *In re R-A-'s* persecutor was her spouse and did not abuse any other woman "it calls into question both the propriety of the group definition and the alleged group motivation of the persecutor."[130]

Board member John Guendelsberger offered an important dissenting opinion in this case. He argued that the applicant was a member of the proposed social group and that she met the nexus requirement as well. Guendelsberger first criticized the Board for proposing "a laundry list of hurdles to be cleared before she may demonstrate membership in a particular social group" and that such a "stringent" approach disregarded domestic and foreign authoritative decisions[131] and ignored international

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[122] *Id.* at 922.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 923. This heightened standard is inconsistent with the "unwilling or unable" standard of asylum.
[126] *Id.* Contra the BIA, proving lack of government protection likely satisfied the "unwilling or unable standard."
[127] *Id.* at 924.
[128] Even in the *Matter of Kasinga*, the analysis of whether FGM was practiced in her tribe principally served to ensure that the applicant was reasonably fleeing from that type of persecution and the likelihood of her becoming subjected to the practice if she returned to her country.
[129] An applicant could also prove that their government withheld involvement, allowing the persecution to continue, which was the situation in *In re R-A-* (the "unwilling or unable" standard).
[130] *Id.* The Board also held that even with the acknowledgement of the proposed social group, the applicant failed the nexus requirement.
[131] Guendelsberger referenced international bodies such as the Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/Res/48/104 (1994); Conclusions on the International Protection of Refugees, U.N. High Commissioner for Refugees, 36th Sess., No. 39(k) (1985). Domestic sources included the DOJ's gender guidelines, see Phyllis Coven, U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Claims from Women (1995) ("DOJ Guidelines"). Canada's gender guidelines were also cited: Immigration and Refugee Board of Canada, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update 3 (1996). Lastly, US DOJ violence against women guidelines for asylum officers, which the BIA had also considered though found as not determinative.

human rights developments.[132] He further argued that the applicant had a "fundamental right to protection from abuse based on gender" and that she should be afforded protection.[133] Guendelsberger then went over precedential decisions that emphasized the immutability test in *Matter of Acosta*.[134] He also highlighted the "striking similarities" of *Matter of Kasinga* and *In re R-A-*.[135] He noticed that both cases consisted of social groups defined by gender "in combination with one or more additional factors."[136] Further, Guendelsberger pointed out that the IJ had observed that "the respondent's relationship to, and association with, her husband is something she cannot change" and hence an immutable characteristic.[137] Guendelsberger later critiqued the BIA's emphasis on the "pervasiveness" and "societal importance" of a type of persecution in a society. Guendelsberger asserted that the reason *Matter of Kasinga*'s applicant had been granted asylum was "not because she faced societal ostracization, but because she demonstrated a well-founded fear of harm on account of her membership in a group composed of persons sharing her specific circumstances."[138] Guendelsberger concluded that both cases did not have any meaningful distinctions. He also commented on the "narrowness" or "broadness" of the proposed PSG, and found that the IJ used a "fairly precise and narrow focus" for the PSG while the judge could have "legitimately broadened the perspective to include all Guatemalan women or, possibly, all married Guatemalan women as the particular social group."[139]

On the nexus analysis, Guendelsberger argued that four main factors should have been considered. His is an extensive analysis, but what should be highlighted is that his approach focused on the circumstances of the violence and did not rely so heavily on the persecutor's motivations: Guendelsberger considered that many inflictions of violence against women are incomprehensible.[140] Overall, in contrast to the Board, Guendelsberger's approach to the nexus determination was much more sensitive to gender-based claims.[141]

In 2001, AG Janet Reno vacated and remanded *In re R-A-*, and ordered the BIA to reconsider the decision in light of a proposed rule.[142] In 2004, AG John Ashcroft certified the case to himself while the DHS filed a brief that explained why domestic violence claims met the *Matter of Acosta* test and why the applicant of *In re R-A-* should be granted asylum. In 2005, AG John Ashcroft remanded the case to the BIA, and ordered the Board to issue a decision once the PSG asylum standards had been finalized.

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[132] *Id.* at 930.

[133] *Id.*

[134] *Id.* at 932. He cited varying examples of recognized social groups in the following cases: Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988) (concerning past experience: "former members of the national police force in El Salvador" seen as an immutable characteristic); Matter of Toboso-Alfonso; Matter of H-; Matter of V-T-S- (concerning Filipinos of Chinese ancestry); Matter of Kasinga.

[135] *Id.*

[136] *Id.*

[137] *Id.* A few other mentioned similarities were that "In both cases, the victims opposed and resisted a practice which was ingrained in the culture, broadly sanctioned by the community, and unprotected by the state…[and that] the overarching societal objective underlying the cultural norm was the assurance of male domination."

[138] *Id* at 933. He also found that even in the *Matter of Kasinga*, her father had not approved of the FGM practice and hence the practice might not have been as "pervasive" as the Board argued.

[139] *Id.* at 935. He cited the discussion: Islam (A.P.) v. Secretary of State for the Home Dep't, ___ App. Cas. ___ (Mar. 25, 1999), available in ‹http://www.parliament.the-stationery-office.co.uk/pa/ld9899/ldjudgmt/jd990325/islam01.htm›

[140] *Id.* at 938.

[141] The BIA had responded to this dissent briefly. The BIA concluded that the dissent's arguments concerning the motivations of the persecutor were artificial since the applicant never understood herself to have been abused because she was part of a larger group and that the husband never argued that he persecuted her because she was part of a group. The BIA stressed that the dissent disregarded the importance of the nexus requirement for asylum.

[142] The proposed rule concerned amending the terms "persecution," "on account of" and "particular social group" *See* Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000). However, the rule was never finalized or adopted.

A New Standard? The Social Visibility Requirement Debate

In 2006, the BIA issued the precedential decision of *Matter of C-A-* (BIA 2006).[143] In that case, the Board attempted to clarify the importance of the social perception requirements for the PSG standard. The BIA held that "The social visibility of the members of a claimed social group is an important consideration in identifying the existence of a "particular social group.""[144] In making this assertion the BIA looked at precedent BIA cases, the circuit court debates,[145] and also the UNHCR's PSG requirements.[146] However, the Board primarily emphasized its decision in *Matter of H-* and certain UNHCR arguments. The BIA argued that "Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable...In considering clan membership in *Matter of H-* ...we did not rule categorically that membership in any clan would suffice...we examined the extent to which members of the purported group would be recognizable to others in Somalia."[147] The BIA further observed that their precedential decisions involved social groups with "characteristics that were highly visible and recognizable by others in the country in question."[148]

The Board also found that the 2002 UNHCR Guidelines confirmed "visibility" as an "important element" and that the UNCHR believed that the "social group category was not meant to be a "catch all" applicable to all persons fearing persecution."[149] However, although the BIA noted that the UNHCR had adopted both the immutability and social perception approaches, the Board never considered that the UNHCR's interpretation was broader and more inclusive. As a result of this analysis, in *Matter of C-A-* the BIA ruled that the proposed social group of "former noncriminal drug informants working against the Cali drug cartel"[150] had not met the new social visibility requirements of the PSG.[151] The BIA also referenced the Eleventh Circuit's question whether an alternative group of "noncriminal informants"[152] met the PSG test. On this question, the BIA argued that the group was "too loosely defined to meet the requirement of particularity."[153] It should be noted that the BIA had not elaborated what was a "particularity" requirement[154] as its analysis mainly focused on "social visibility."[155] As argued before, the UNHCR's definition recognized social groups under the immutability test or the social perception test, meaning that the applicant in *Matter of C-A-* would have not been required to prove "visibility" or "social perception" if the applicant had already met the immutability test. However, at least this case somewhat clarified the relevance of "social perception."

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[143] *Matter of C-A-*, 23 I&N Dec. 951, 951 (BIA 2006)

[144] *Id.* at 951.

[145] *Id.* The BIA mentioned *Gomez v. INS* but in the rest of the opinion, the case was not referred to again regarding its potential relevance to the "social visibility" requirement.

[146] The BIA's analysis largely follows this paper's summarized review of the origins of the PSG arguments in the federal circuit courts, which includes a misinterpretation of the UNHCR's approach.

[147] *Id.* at 959.

[148] *Id*. at 960. (The BIA cited Matter of V-T-S-; Matter of Kasinga; Matter of Toboso-Alfonso; Matter of Fuentes; Matter of Acosta).

[149] *Id.* (The BIA also forgot the potential "exception" rule by the UNHCR).

[150] *Id.*

[151] *Id.* at 951.

[152] *Id. See* Castillo-Arias v. United States AG, 446 F.3d 1190 (11th Cir. 2006) (The Court had remanded the case to the BIA to answer the question of whether "noncriminal informants" was a social group under the PSG ground. The Court accepted the BIA's reasoning that such a group was not cognizable and denied review.)

[153] *Id.* at 957.

[154]What is problematic is that the BIA had not argued whether this "particularity" requirement was a new test or a test tied to the immutability or the social visibility test. However, this "particularity" requirement would later be emphasized and articulated in *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007)

[155] However, from the surrounding arguments, the BIA stressed that the group was too broad and not specific or "particular" enough.

Within a few years, the social visibility requirement established in *In re C-A-* led to contestation in the federal courts. However, the BIA issued a series of precedential decisions that elaborated on the social visibility test and that emphasized the particularity requirement. In *Matter of A-M-E- & J-G-U-* (2007)[156] the BIA held that the proposed group of "affluent Guatemalans" was not "readily identifiable" or sufficiently defined as to meet the requirements of a particular social group."[157] The authoritative sources used by the BIA to arrive at this conclusion relied on the IJ's original analysis of the case. The BIA found that the IJ had correctly applied the *Matter of Acosta* framework and the Second Circuit's decision in *Gomez v. INS.*[158]The BIA also referred to *Matter of C-A-*, to that case's affirmation of the "social visibility" requirement[159] and its finding that the proposed group of "noncriminal informants" was not defined with the "requisite particularity."[160] Concerning the social visibility requirement, the BIA found that with regard to the country context and the type of persecution, wealthy Guatemalans were not recognized as a group in society at greater risk of crime, robbery, or extortion. Regarding the particularity requirement, the BIA held that the terms "wealthy" and "affluent" were too "amorphous," "expansive," and "indeterminate" to define a group adequately. In two subsequent precedential cases, *Matter of S-E-G-* (2008)[161] *and Matter of E-A-G-* (2008)[162] the BIA denied recognition to social groups of males who had resisted or opposed gang membership.

In 2008, AG Michael Mukasey lifted a stay order that had prevented the BIA from reviewing *In re R-A-* and other similar cases concerning domestic violence. In *Matter of R-A-* (2008),[163] the AG remanded the case to the BIA and ordered that a decision be reached in light of the precedent decisions that concerned the PSG requirements, e.g. *Matter of C-A-* , *Matter of A-M-E- & J-G-U-*, *Matter of S-E-G*, and *Matter of E-A-G-*. The BIA remanded the case to an IJ. In 2009, the DHS had filed a brief on behalf of a Mexican woman, L-R-, who sought protection from spousal abuse. The brief explained how domestic violence claims met both the "social visibility" and "particularity" requirements of the PSG ground. In December of that same year, the IJ granted the applicant in *Matter of R-A-* asylum relief. However, the Board had not issued a published or precedential decision on a domestic violence claim for either L-R- or in *Matter of R-A-*[164].

The Seventh and Third Circuit courts pushed back against the new "social visibility" and "particularity" requirements of the PSG. In *Gatimi v. Holder* (2009),[165] the Seventh Circuit dismissed the social visibility standard as nonsensical and criticized the Board's failure to explain why the visibility requirement was necessary. The Seventh Circuit argued that "Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they

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[156] *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007).
[157] *Id.* at 74.
[158] *Id.* The BIA had relied on grounding its social visibility requirement in the Second Circuit's opinion that "'the attributes of a particular social group must be recognizable and discrete.'" However, the BIA noted that in Gao v. Gonzales, 440 F.3d 62 (2d Cir. 2006) the Second Circuit moved away from *Gomez v. INS*. Still, in the case before them, the BIA argued that "the approach outlined in Gomez v. INS, supra, and the Board's decision in Matter of H-, supra, established that "social visibility" was an important factor in identifying a "particular social group.""
[159] *Id.* The BIA also cited *Matter of H-*
[160] *Id.*
[161] Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008)
[162] Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008)
[163] Matter of R-A-, 24 I&N Dec. 629 (A.G. 2008)
[164] *See* Center for Gender and Refugee Studies, *Matter of R-A-* (last visited, Dec 2019), https://cgrs.uchastings.edu/our-work/matter-r-a-
[165] Gatimi v. Holder, 578 F.3d 611, 611 (7th Cir. 2009). Still, the opinion also cited other circuit courts, which recognized the social visibility criteria.

will not be 'seen' by other people in the society 'as a segment of the population.'"[166] The Seventh Circuit had also observed that when it came to social visibility criteria the Board was "inconsistent rather than silent. It has found groups to be [PSGs] without reference to social visibility."[167] In *Valdiviezo-Galdamez v. Att'y Gen. of U.S.* (2011),[168] the Third Circuit denied Chevron deference to both the "social visibility" and "particularity" requirements. The Court referenced the Seventh Circuit's criticism of the social visibility requirement. The Third Circuit also criticized the "particularity" requirement briefly noted in *Matter of C-A-* and later emphasized in *Matter of A-M-E- & J-G-U-*, *Matter of S-E-G-*, and *Matter of E-A-G-*. Specifically, the Court argued that there was no discernible difference between "particularity and "social visibility" because they appeared as "different articulations of the same concept..."Particularity" appears to be little more than a reworked definition of "social visibility" and the former suffers from the same infirmity as the latter. The government's use of "particularity" is inconsistent with the prior BIA decisions discussed in the "social visibility" portion of this opinion."[169]

New PSG Requirements: Social Distinction and Particularity

After these debates in the circuit courts, the BIA revised the PSG standard in *Matter of W-G-R-* (2014)[170] and *Matter of M-E-V-G-* (2014).[171] In *Matter of W-G-R-* the Board held that the "social visibility" requirement did not mean "literal" or "ocular" visibility; hence the requirement was re-defined as "social distinction." The BIA clarified the test of what established a social group, now composed of the three prongs with which this essay began: a group must be "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[172] In *Matter of W-G-R-,* the BIA responded to the Third Circuit's critique of the particularity requirement. The BIA argued that although there may be some overlap between the particularity and social visibility requirements, the societal context of the claim is determinative. The BIA held that "'Particularity' chiefly addresses the question of delineation, or as earlier court decisions described it, the need to put 'outer limits' on the definition of the [PSG]… In assessing a claim, it may be necessary to take into account the social and cultural context of the alien's country of citizenship or nationality. This is why we require inquiry into whether the group …'would be recognized, in the society in question, as a discrete class of persons.'"[173] Regarding social distinction, the BIA emphasized *Gomez v. INS*, namely that a group "must share a "fundamental characteristic" that is "recognizable and discrete" such that it "distinguish[es] them in the eyes" of others."[174] The Board further elaborated that "Social distinction refers to recognition by society, taking as its basis the plain language of the Act—in this case, the word 'social.' To be socially distinct, a group need not be seen by society; it must instead be perceived as a group by society."[175] The Board then cited past recognized groups, e.g. *Matter of Kasinga*, *Matter of Tobonso-Alfonso*, and *Matter of Fuentes*, and emphasized how such groups were not "occularly" visible.[176] *Matter of M-E-V-G-* clarified that "Whether a social group is recognized for asylum purposes is determined by the perception of the society in question, rather than by the perception of the

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[166] *Id.*

[167] *Id.* at 615. The Court cited *Matter of Kasinga*; Matter of Toboso-Alfonso; Matter of Fuentes; and Matter of Acosta. This observation is also supported by the analysis of such cases in this paper.

[168] Valdiviezo-Galdamez v. Att'y Gen. of U.S., 663 F.3d 582, 582 (3d Cir. 2011). (However, after the BIA's explanation of the "particularlity" and "social distinction" requirements in *Matter of W-G-R-* and *Matter of M-E-V-G-*, the Third Circuit accepted these requirements. *See* S.E.R.L. v. Att'y Gen., 894 F.3d 535, 535 (3d Cir. 2018)).

[169] *Id.* at 608.

[170] Matter of W-G-R-, 26 I&N Dec. 208, 208 (BIA 2014).

[171] Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014).

[172] Matter of W-G-R-, 26 I&N at 208.

[173] *Id*. at 214. The BIA's cited quote is from *Matter of S-E-G-,* 24 I&N Dec. at 584.

[174] *Id.* at 216.

[175] *Id.*

[176] *Id.* at 217.

persecutor."[177] This decision at least settled an important uncertainty of whether the focus should be on the perception of the persecutor.

Domestic Violence Claims under new PSG Requirements: Matter of A-R-C-G- and Matter of A-B-

In 2014, the BIA reviewed an important domestic violence case, *Matter of A-R-C-G-.*[178] In this case, the BIA had recognized a PSG of "married women in Guatemala who are unable to leave their relationship" yet remanded the case back to the IJ to consider other issues and to make the final ruling.[179] Before the subsequent decision of *Matter of A-B-* (2018), *Matter of A-R-C-G-* was seen as a landmark case for victims of domestic violence. In this case, the BIA addressed arguments from the DHS of whether the proposed PSG was cognizable. The BIA noted that the DHS had conceded the proposed group was defined with particularity since the terms "married," "women," and "unable to leave the relationship" were recognized in Guatemalan society (these three terms were also seen as immutable characteristics). The BIA further argued that "In some circumstances, the terms can combine to create a group with discrete and definable boundaries." The Board also pointed to *Matter of W-G-R-* and how the social and cultural context of an applicant's society may be relevant; the "inability" of the applicant in *Matter of A-R-C-G-* "to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation."[180] The Board addressed the social distinction requirement and referred to *Matter of M-E-V-G,* which clarified that the focus should be on whether the society in question perceives a group. The BIA determined that Guatemala's culture of "machismo and family violence" lent support to the claim that married women in Guatemala who cannot leave their relationships were perceived as a group.[181]

In *Matter of A-B-, [182]*AG Jeff Sessions overruled the *Matter of A-R-C-G* and criticized the BIA's reasoning. The AG also reviewed the proposed PSG of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common" and used his analysis of *Matter of A-R-C-G-* to find this group uncognizable.[183] The AG argued that "the Board decided A-R-C-G-...without performing the rigorous analysis required by the Board's precedents."[184] He further asserted that the decision had caused confusion since it "it recognized an expansive new category of [PSGs] based on private violence."[185] In line with this argument, the AG provided numerous examples of gang related violence claims that had gone unrecognized in many circuit courts as fulfilling social group criteria. The main reason why the AG referred to gang violence claims in a case about domestic violence was that both types of persecution were committed by private actors. According to the AG, "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[186] To support this argument the AG relied in particular on the opinion of Fourth Circuit Judge Wilkinson in *Velasquez v. Sessions* (2017),[187] who had argued that "...general extortion

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[177] *Id.* The BIA noted two reasons for not focusing on the perception of the persecutor. The first already is that both the social group and the nexus analyses must be kept separate. Second, defining the social group from the perception of the persecutor conflicts with the requirement that the social group must not be defined by the harm.

[178] Matter of A-R-C-G, 26 I&N Dec. 388, 389 (BIA 2014)

[179] *Id.* at 389.

[180] *Id.* at 393.

[181] *Id.*

[182] Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018)

[183] *Id.*at 316.

[184] *Id*. at 319. Although the AG may be correct that deep analysis was not provided in the BIA's published opinion in *Matter of A-R-C-G*, the BIA was in conversation with the DHS brief that extensively addressed many of the points made by the AG. The 2009 unpublished brief by the DHS for the *In re R-A-* had also provided extensive analysis.

[185] *Id.* at 319.

[186] *Id*. at 320.

[187] Velasquez v. Sessions, 866 F.3d 188 (4th Cir. 2017)

[specifically gang violence] and domestic violence...'affects all segments of the population'" and that these groups were "…seizing upon the 'particular social group' criterion in asylum applications."[188] The AG also quoted Judge Wilkinson's assertion that "the asylum statute is not a general hardship statute" and further referenced his opinion that the BIA's view of the PSG was "at risk of lacking rigor" and that Congress had not intended the ground to be an "omnibus catch all."[189] However, it should be noted that Congress was silent on this matter, and that Judge Wilkinson provided no further evidence of legislative motives for the PSG ground.[190]

Generally, in having cited Judge Wilkinson, the AG appeared to argue that if the social groups of victims of domestic violence were recognized, then inevitably, all victims suffering from other types of private violence would have to be granted asylum. However, this claim was misguided. The AG was cognizant that there were other requirements for asylum.[191] Recognition of a certain social group would not automatically allow for all claims based on private violence to meet each criterion. In making general arguments such as these, the AG forgot that social groups have always been assessed through careful individualized analysis centered on the facts of the case. Legal scholar Blaine Bookey has observed that despite the precedent status and recognition of domestic violence claims in *Matter of A-R-C-G-* (before *Matter of A-B-*), "the legal holding in the case [was] narrow and fact specific, leaving immigration judges a great deal of discretion."[192] On this point, the AG himself cited circuit court cases regarding domestic violence claims, which according to their fact situation did not merit asylum.[193]

At the beginning of his analysis, the AG observed that the PSG was an ambiguous provision. He noted the proposed definitions of the PSG by the BIA and the federal courts yet ignored the views of the UNHCR. The UNHCR was only referred to in a footnote and simply to point out that the 1967 Protocol provided little insight. Yet the AG disregarded all the UNHCR guidelines and handbooks that had since addressed the purpose of the PSG and had provided guidance for gender-based violence claims. The AG also ignored the 2015 UNHCR report that described how Central Americans were experiencing a human rights crisis and that many of these migrants merited asylum.[194] The AG was silent on the UNHCR's amicus curiae brief in support of *Matter of A-R-C-G* (UNHCR ACBr. *Matter of A-R-C-G-*).[195] In this brief, the UNHCR persuasively argued that the proposed group in *Matter of A-R-C-G-* constituted a PSG under both the immutability and social perception tests. The UNHCR also urged US jurisprudence to focus on the immutability test and only refer to the social perception test when an immutable characteristic was not found.[196] On the nexus requirement, the UNHCR argued that "the intent or motive of the perpetrator may be a relevant factor, but is not determinative. What is required is an overall assessment of the facts of the case, taking into account the context in which the persecution takes

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[188] *Id.* at 198. Judge Wilkinson had cited *Matter of S-E-G-*, 24 I. & N. Dec. 579, 587 (BIA 2008).
[189] *Id.*
[190] *Id.* at 199. (At the same time, Judge Wilkinson had also argued that broadening the "statutory grounds for relief from those conditions must by definition be a congressional rather than a judicial enterprise.")
[191] *See* 8 U.S.C. § 1101(a) (42) (A).
[192] Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G: Evolving Standards of the Law*, 22 Southwestern J.of I.L. 1, 16 (2016).
[193] The cited cases in *Matter of A-B-* at 332 were Velasquez v. Sessions, 866 F.3d 188 (4th Cir. 2017); *Fuentes-Erazo v. Sessions*, 848 F.3d 847 (8th Cir. 2017); *Jeronimo v. U.S. Attorney General*, 678 F. App'x 796 (11th Cir. 2017)
[194] UNHCR, Women on the Run, *supra* note 3. (This report could have substantiated many of the contextual claims made by the BIA in their decision of *Matter of A-R-C-G*, which the AG had found insufficient in *Matter of A-B-*).
[195] Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, Matter of A-R-C-G- et al.
[196] As described in the previous analysis on the origins of the PSG, the UNHCR largely continued to uphold the dual immutability "or" social perception approaches.

place."[197] The UNHCR also asserted that "requiring proof of intent to "punish or overcome" the protected characteristic goes far beyond the threshold required by the 1951 Convention, its 1967 Protocol, and the 1980 Refugee Act."[198] Also, contra the AG, the UNHCR held that "Over the more than sixty years of its existence, UNHCR has issued authoritative guidance on the interpretation of this definition." That guidance had included "unequivocal recognition that domestic violence can form the basis for refugee status."[199]

Specifically, the UNHCR ACBr. *Matter of A-R-C-G-* addressed how a domestic violence related PSG claim could be "defined by gender alone or by gender in combination with other characteristics."[200] Thus, the UNHCR recognized the proposed social groups of women in domestic relationships in Guatemala or El Salvador who are unable to end those relationships. This approach satisfied the immutability test; nevertheless, the UNHCR also elaborated how the groups met the social perception test. The UNHCR held that gender is seen in all societies as a "distinguishing attribute."[201]It found that in Guatemalan and Salvadoran cultures the "intersection of gender and relationship status" identified a group because "women in domestic relationships are typically considered subordinate to, and under the control of, their male partners—a societal view that contributes to the serious problem of domestic violence" in both countries.[202] Since cultural norms in those societies largely subordinate women, the UNHCR observed that such women are generally not given adequate protection from spousal abuse.[203]

On nexus, the UNHCR called for concentration on "the reasons for the applicant's feared predicament within the overall context of the case and how he or she would experience the harm rather than on the mind-set of the perpetrator."[204]Hence, the UNHCR emphasized cultural context and country conditions assessments as evidence for meeting the nexus requirement. The UNHCR argued that under US law, *Matter of Acosta* had recognized that "suffering inflicted on the basis of a Convention ground by a non-State actor that the government is unwilling or unable to control is persecution on account of that Convention ground."[205] Furthermore, the UNHCR observed that "Perpetrators of domestic violence in societies that oppress women often abuse their victims precisely because they are the women with whom they are in a domestic relationship and the women are unable to leave."[206] Similar to the argument made by the BIA in *Matter of A-R-C-G-*, the UNHCR also noted that domestic violence often escalates when a woman tries to leave a relationship, and that this is evidence both of intent and of how an abuser persecutes their partners because they believe that women "lack the right to leave or end the relationship."[207]

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[197] UNHCR ACBr. *Matter of A-R-C-G-, supra* note 194, at 23. (The UNHCR had acknowledged that under US law, the nexus determination is based on the "one central reason" standard, yet the following language largely pushed back against this standard. Further, the UNHCR asserted that the Supreme Court decision of *INS v. Elias-Zacarias* held that direct evidence on the motivation of the persecutor was not required. Still, the UNHCR also noted how US courts have included the persecutor's motive as determinative because of the "one central reason" standard).

[198] UNHCR ACBr. *Matter of A-R-C-G-, supra* note 194, at 4.

[199] UNHCR ACBr. *Matter of A-R-C-G-, supra* note 194, at 6. (The UNHCR referenced the issued Handbooks that provided such guidance: 1979, reissued 1992 and 2011).

[200] *Supra.*

[201] UNHCR ACBr. *Matter of A-R-C-G-, supra* note 194, at 20.

[202] *Supra.*

[203] *Supra.*

[204] UNHCR ACBr. *Matter of A-R-C-G-, supra* note 194, at 22.

[205] UNHCR ACBr. *Matter of A-R-C-G-, supra* note 194, at 23.

[206] UNHCR ACBr. *Matter of A-R-C-G-, supra* note 194, at 24. (The UNHCR cited DHS R-A- Br. at 27).

[207] UNHCR ACBr. *Matter of A-R-C-G-, supra* note 194, at 25. (The UNHCR also addressed an argument that asserted nexus could not be established in domestic violence claims because the abuser did not target other members of the social group, e.g. females that are domestic partners of other men. However, the UNHCR referenced the DHS Br. for *Matter of R-A-* and argued that "The government made this point well in Matter of R-A-, where it analogized to a slave owner who may beat his own slave but have neither the inclination nor the opportunity to beat his neighbor's slave—it would still be reasonable to conclude that the beating was on account of the victim's status as a

The AG methodically denounced the BIA's analysis in *Matter of A-R-C-G-*. First, the AG held that *Matter of A-R-C-G-*'s social group component of "inability to leave a relationship" described a "harm," hence the social group was defined by the persecution.[208] However, the AG never addressed the BIA's (and UNHCR's) determination that "inability to leave a relationship" could be based on unique societal expectations or norms, hence that the description was *not* per se the persecution. Regarding the particularity requirement, the AG found the BIA's determination that the terms used to describe the social group were recognized definitions in Guatemala was not enough to establish "requisite particularity."[209] The AG emphasized the *Matter of M-E-V-G-* in asserting that a PSG should not be "amorphous, overbroad, diffuse, or subjective," and "not every 'immutable characteristic' is sufficiently precise to define a particular social group."[210] Furthermore, the AG offered the general observation that "Social groups defined by their vulnerability to private criminal activity likely lack the particularity required under M-E-V-G-, given that broad swaths of society may be susceptible to victimization," and cited examples of circuit court decisions that had denied recognition of social groups based on gang violence claims.[211]However, it should be noted that previous cases had clarified that it did not matter whether a type of persecution was rampant within a society; or in more basic terms, the size of the group should not matter.[212] Further, the AG was meshing together two separate analyses of whether the government was unwilling to control the private actor, or violence, and the social group's particularity requirement. The AG also ignored the question whether the *specific* immutable characteristics in *Matter of A-R-C-G-*, "women" and "marriage" were or were not recognizable or distinct enough, since *Matter of M-E-V-G-* was referring to different characteristics such as "poverty, youth, and homelessness."[213] The AG had cited *Matter of Acosta* and noted the characteristics outlined in that case such as sex, color, or kinship ties but never addressed the question whether the *specific* immutable characteristic of "sex" was recognized by the BIA and how this might influence the particularity requirement. Furthermore, the AG ignored how certain federal courts had recognized "sex" as an immutable characteristic.[214] In *Perdomo v. Holder* (2010),[215] the Ninth Circuit had concluded that because of the pervasive violence against women in the country, "Guatemalan women" were indeed a cognizable social group.

On the social distinction requirement, the AG argued that *Matter of A-R-C-G-'*s social group failed the test because it mainly described individuals who shared certain traits or experiences.[216] The AG cited *In re R-A-* to make this claim and emphasized that the group must be a recognized "societal faction" or "segment of a population" within the country.[217] The AG further elaborated that a PSG "must avoid…being too broad to have definable boundaries and too narrow to have larger significance in

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slave... Similarly, it is the woman's subordinate status in the domestic relationship that motivates—and permits—the abuser to harm her.").

[208] Matter of A-B-, 27 I&N Dec. at 335.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] Especially considering that countries experiencing massive human rights crises likely have broad swaths of people fleeing from the same type of persecution. Also, the UNHCR has consistently emphasized that even if gender alone could constitute a PSG, not all women would be granted asylum automatically and that the size of the social group should not matter since it does not matter for the other four protected grounds.

[213] *Matter of M-E-V-G* referred to Escobar v. Gonzales, 417 F.3d 363, 368 (3d Cir. 2005) to address these characteristics.

[214] *See, e.g.*, Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005) (The Court found that gender was a "prototypical immutable characteristic"); Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005) (The Court recognized a social group defined by gender and tribal membership); *Fatin v. INS* (The decision had noted that gender could define a PSG).

[215] Perdomo v. Holder, 611 F. 3d 662 (9th Cir. 2010).

[216] Matter of A-B-, 27 I&N at 336.

[217] *Id*. at 328.

society."[218] However, the AG never indicated what type of evidence would be adequate enough to establish social distinction, merely stressing the insufficiency of the evidence in *Matter of A-R-C-G-*. Instead, the AG repeated that a social group must be seen as distinct in "society at large," and cited *Matter of H-* to support the argument of how a specific tribal clan had met that standard.[219]

Another important argument made by the AG considered the nexus analysis. The AG generally held that "When private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group may well not be 'one central reason' for the abuse...in domestic violence cases, like A-R-C-G-, the Board cited no evidence that her ex-husband attacked her because he was aware of, and hostile to" the proposed group.[220] The AG based this argument on *In re R-A-,* which had concerned the relevance of the perception of the persecutor for assessing the existence of the social group in question. However, although the AG referenced this observation for the nexus analysis, *In re R-A-* was decided before *Matter of M-E-V-G-*, which had clarified that social groups would be based on the perception of society and not by the perception of the persecutor. After *Matter of M-E-V-G-,* the BIA argued that it was not necessary to prove that a social group was recognized by the persecutor. Hence this argument by the AG strayed away from recent precedent.

The AG generally accepted the position that domestic violence claims perpetrated by private actors are motivated by private vendettas, rather than composed of characteristics that combine to describe social groups. This assertion ignored the analysis provided by the UNHCR ACBr. *Matter of A-R-C-G-,* which asserted that abusers persecuted their domestic partners because they believed that the women had no right to leave the relationship. Furthermore, the AG never addressed whether systematic abuse against women in a certain country was predominantly based on "private motivations" or motivations arising from the immutable characteristic of "gender." With such generalized statements, the AG may have precluded contextualized country analysis as evidence that might be relevant to the nexus determination. Accepted evidence for determining nexus was not addressed by the AG either.

Legal scholar Fatma Marouf has argued that the *Matter of A-B-* imposed two substantive restrictions: first, the decision attempted to exclude entire categories of claims; second, it also heightened the legal standard for proving persecution by private actors.[221] The analysis of *Matter of A-B-* offered in this paper emphasizes that the AG generally attempted to exclude both domestic and gang related violence victims from asylum relief. *Grace v. Whitaker*[222] also recognized this in the context of CFIs. However, although Marouf correctly refers to the words "condoned" and "complete helplessness" as establishing a heightened standard, the D.C. District Court in *Grace v. Whitaker* clarified that this was not a new standard, but rather different words used to express the same "unwilling or unable" standard.[223] However, Marouf does correctly point out how the AG's wording led to confusion as to whether a new standard had been created or not, and that it is still unclear how other circuit courts will handle the matter (i.e. whether they will agree with *Grace v. Whitaker* that no new standard was established). It should be emphasized that clarifying such points is critical. This paper has demonstrated how consistently the BIA's lack of clarity as to whether a new standard has or has not been established (or alternatively that a rule has somehow already been in existence despite the absence of any explicit assertions, as evidenced in the social visibility requirement debate) has meant confusion and arbitrariness in the application of asylum law, and generated a series of legal disputes, especially in the circuit courts.

The Case of Alvizuriz-Lorenzo v. United States AG

In the wake of *Matter of A-B-*, many domestic violence cases have been appealed to the federal

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[218] *Id.* at 336.
[219] *Id.*
[220] *Id.* at 338-339.
[221] Fatma Marouf, Becoming Unconventional: Constricting the Particular Social Group Ground for Asylum, 44 N.C. J. Int'l L. 487 (2019) at 489.
[222] *See* note 19.
[223] *Grace v. Whitaker* (D.D.C. 2018), 344 F. Supp. at 129.

circuit courts. Thus far, most of the circuit courts have largely agreed with the particularity and social distinction requirements as well as the reasoning in *Matter of A-B-*.[224] Still, there is a recent and important precedential case that merits merit brief consideration.[225] In *Matter of L-E-A-* (2019)[226] AG William Barr argued that "most nuclear families are not inherently socially distinct and therefore do not qualify as 'particular social groups.'"[227] Similar to *Matter of A-B-*, AG Barr offered many generalized arguments that could substantially limit the PSG ground. Like domestic violence and gender-based claims, there is a historical debate as to whether a family group should be recognized as a PSG. Exploring that debate is not germane to the topic of this paper. Nevertheless, the decision is noteworthy because it is relevant to the PSG and to the case with which we began. In *Alvizuriz-Lorenzo v. United States AG*, the Eleventh Circuit had reviewed a proposed PSG of "girls or young women in Guatemala who cannot leave their family as a result of their age or economic conditions," or alternatively, "girls or young women in Guatemala who cannot leave their family."[228] The Eleventh Circuit found that the PSG met the immutability test yet failed the particularity and social distinction requirements.[229] In a footnote, the Court found that the PSG was not analogous to *Matter of A-R-C-G-,* yet clarified that the case was not decided based on the application of *Matter of A-R-C-G-*, or *Matter of A-B-*, or *Grace v. Whitaker*.[230] What is noteworthy in this case, however, is the dissent authored by Judge Wilson, arguing that the majority Court's analysis of the PSG was "not supported by substantial evidence."[231]

On the immutability requirement, Judge Wilson argued that gender ("young girls") and kinship ties ("who cannot leave their family") are recognizable immutable characteristics.[232] She also emphasized that family has been recognized as an immutable characteristic that could define a social group.[233] However, Judge Wilson was silent on how *Matter of L-E-A-* should be applied in this case. Regarding particularity, she argued that "particularity varies depending on cultural context. That is, a proposed social group can satisfy particularity in one region and simultaneously lack particularity in different region."[234] Judge Wilson referenced *Matter of W-G-R-*, noting that the case explained how the PSG standard should not be viewed in isolation but must be "considered in the context of the society" of the applicant. She underscored that each phrase defining the applicant's group combined to "describe a group with distinct boundaries in *her region*."[235] She referenced country condition reports of Guatemala and found that the lack of "prosecution for intrafamily violence against women has left Alvizuriz-Lorenzo without recourse to distance herself from her family."[236]

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[224] *See* Rivera-Geronimo v. United States AG, 2019 U.S. App, __ Fed. Appx. __ (11th Cir 2019); Gonzales-Veliz v. Barr, 938 F.3d 219 (5th Cir. 2019); Alvizuriz-Lorenzo v. United States AG, U.S. App, __ Fed. Appx. __ (11th Cir 2019) (These cases concerned variations of domestic or gender-based violence claims, where the Circuit Courts have argued that the proposed social groups lacked particularity and social distinction).

[225] The subsequent precedential case concerning two procedural restrictions related to PSG cases has already been mentioned. *See* note 20. (*Matter of W-Y-C- & H-O-B*).

[226] Matter of L-E-A-, 27 I&N Dec. 40, 44-45 (BIA 2019)

[227] *Id* at 581.

[228] *Alvizuriz-Lorenzo v. United States AG, U.S. App, __* at *2.

[229] *Id*. at *9.

[230] *Id.* at footnote 4. The Court did recognize Matter of A-R-C-G- was overruled in *Matter of A-B-* yet noted that *Grace v. Whitaker* may have found the opinion as "arbitrary and capricious." At the same time, the Court awknowledge that the Fifth Circuit had concluded that Grace v. Whitaker did not barr their ability to review or rely on Matter of A-B- for their opinion. *Gonzales-Veliz v. Barr*, 938 F.3d 219, 2019 WL 4266121, at *5 (5th Cir. 2019).

[231] *Id* at *14.

[232] *Id* at *18.

[233] *Id.* at *19. She cited Gebremichael v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993) (The Court held in that decision that "There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of a nuclear family.")

[234] *Id* at *19-20.

[235] *Id* at *20

[236] *Id*. Judge Wilson referred to Karen Musalo and Blaine Bookey's article of *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala 10 Hastings Race & Poverty L.J. 265, 274 (2013).*

Concerning social distinction, Judge Wilson argued that *Matter of M-E-V-G-* required an evidence based inquiry, which included society specific evidence such as "country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like."[237] Judge Wilson argued that the evidence showed that "Guatemalan society recognizes the particular vulnerability of young girls and women unable to leave their families. Incest, for example, is one of the pervasive forms of violence against women in Guatemala."[238]Judge Wilson further noted that efforts to protect women from family abuse, despite their lack of success, showed that Guatemalan society recognized the "vulnerability of young girls and women unable to leave their families" as socially distinct.[239] This approach to social distinction and particularity was straightforward, evidence based, and attuned to precedent. Although she did not specifically address the nexus requirement, Judge Wilson asserted that, given the level of persecution, Alvizuriz-Lorenzo was entitled to humanitarian asylum.[240]

Conclusion

Judge Wilson may be one of only a few federal court judges who have tried to reason how a domestic violence and family-based violence claim could meet the stringent particularity and social distinction requirements of the PSG ground. However, Alvizuriz-Lorenzo is likely one of thousands of persecuted women from Central America who have been denied any relief. What is most alarming is how the US is attempting to ignore the Central American crisis at the expense of due process and our international commitments to human rights. As explored in this paper, although federal judges, the BIA, and successive AGs have attempted to clarify the PSG ground, the cursory analysis of international sources such as the UNHCR's Handbooks and Guidelines, and the lack of careful review of all domestic precedential decisions and guidelines, has led to persistent inconsistencies and confusion. These actors have also dismissed the implications of the type of approaches used for defining the PSG. Even when the BIA or circuit courts have referred to the UNHCR, they have misinterpreted the agency's flexible approach, and failed to recognize how it is different from the US. Neither the BIA nor the AG have provided reasoned explanations for why our asylum jurisprudence must be substantially different from the flexible approach of other countries and the UNHCR.

Recent decisions such as *Matter of A-B-* may have further confounded the law. Although it clarified that the PSG should not encompass the harm, *Matter of A-B-* added uncertainty to this point in relation to domestic violence cases as the argument was likely inapplicable. The decision also ignored whether "sex," an immutable characteristic that was recognized since *Matter of Acosta,* could describe a social group and how the particularity and social distinction requirements affected this matter. Instead, the AG, with his general statements, stemming from the logically inconsistent arguments in *Matter of R-A-*, maintained an archaic view that privatizes the suffering of women. For these reasons, and many others, the PSG ground for asylum continues to be uncertain for victims of gender-based violence. The clarity and straightforwardness of the UNHCR's approach, which is likely the most consistent with human rights principles in the 1967 Protocol, should be praised; understanding the law is a basic first step for any asylum applicant. Although judges like Judge Wilson have attempted to explain how a victim of gender-based violence could find relief under our US asylum laws, they remain in a minority, and our laws remain unreasonably rigid. Unless the US adopts the UNHCR approach, or until gender is finally recognized as a protected ground, or until Congress intervenes, women like Alvizuriz-Lorenzo will continue to be ignored and abandoned by the world.

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[237] *Id.* at *23-24.

[238] *Id.* She cited a 2015 US Department of State Human Rights Report on Guatemala and noted that the government tracked the number of ""intrafamily violence against women and children," and that the government also distinguished "between sexual crimes against women and the "sexual exploitation of children."

[239] *Id.* at *24-25.

[240] Humanitarian asylum is a distinct form of relief where a noncitizen who may not ordinarily qualify for asylum could still be granted asylum for humanitarian reasons.