

**Particular Social Group Practice Advisory:
Applying for Asylum Based on Membership in a Particular Social Group¹**
Updated July 2021

Since 2008, successive administrations have attempted to restrict the definition of the particular social group ground for asylum as a means of limiting access to asylum for certain populations, primarily Central American and Mexican asylum seekers. During this time, significant differences have arisen in the way courts of appeals defer to and apply the particular social group definition asserted by the Board of Immigration Appeals (BIA). Now, under a new administration, the approach towards particular social group is again in flux.

This practice advisory is geared towards lawyers practicing in the Seventh Circuit, but it discusses asylum law broadly and attorneys practicing in all circuits will find it useful. It is intended to explain the current state of particular social group case law at the BIA and in the Seventh Circuit and equip attorneys to prevail in particular social group-based asylum claims – specifically those involving gender and gang violence – while preserving issues for litigation in case asylum is denied. [Part I](#) provides background regarding the development of the BIA’s particular social group case law, focusing specifically on gang and gender cases, [Part II](#) discusses the Seventh Circuit case law that developed parallel to the BIA’s decisions, [Part III](#) discusses *Matter of A-B- I* and *II*, *Matter of L-E-A- II*, and the Attorney General’s subsequent vacatur of these decisions, [Part IV](#) discusses the state of Seventh Circuit particular social group case law today, and [Part V](#) provides detailed practice tips for attorneys representing asylum seekers with particular social group-based claims after the vacatur of *A-B-* and *L-E-A- II*, particularly in the Seventh Circuit. Despite confusing and evolving case law and a challenging adjudicatory system, asylum matters based on particular social group membership, including those involving domestic violence or gang-based claims, remain winnable with proper case preparation and adept lawyering.

I. Background

To qualify for asylum, an individual must demonstrate a well-founded fear of persecution on account of “race, religion, nationality, membership in a particular social

¹ This practice advisory is primarily intended for attorneys practicing within the jurisdiction of the Seventh Circuit. Attorneys practicing within other jurisdictions are encouraged to supplement this practice advisory with resources specific to their jurisdictions.

group, or political opinion.” INA § 101(a)(42)(A). In *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), the BIA first defined the term “particular social group” (PSG). Relying on the doctrine of *ejusdem generis*, “of the same kind,” the BIA construed the term in comparison to the other protected grounds within the refugee definition (i.e. race, religion, nationality, and political opinion). It concluded that the other four protected grounds all encompass innate characteristics (like race and nationality) or characteristics that one should not be required to change (like religion and political opinion). *Id.* at 233. To be a protected ground then, PSG membership can be based either on a shared characteristic members cannot change (like gender or sexual orientation) or a characteristic they should not be required to change (like being an uncircumcised woman). *See id.* (listing gender as an immutable characteristic); *see also Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (recognizing sexual orientation as an immutable characteristic); *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996) (recognizing the status of being an uncircumcised woman as a characteristic one should not be required to change).

Federal courts of appeals have endorsed the *Acosta* standard for discerning PSGs as a valid interpretation of the statute. The *Acosta* test – or a variation of it – governed the analysis of PSG claims for decades. *See Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); *Castellano-Chacon v. INS*, 341 F.3d 533, 546-48 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993); *Alvarez-Flares v. INS*, 909 F.2d 1, 7 (1st Cir. 1990). Under the *Acosta* test, an immutable characteristics like gender should be sufficient to establish a particular social group.

A. The fight to obtain protection for survivors of domestic violence

Women often experience human rights abuses that are particular to their gender, such as rape, domestic violence, female genital mutilation, forced relationships, honor killing, and human trafficking. Women typically experience these forms of persecution because of their membership in a PSG related to their gender. Historically, adjudicators have rejected gender-based PSGs as being too broad and due to floodgates concerns. Other adjudicators have rejected these claims under the “on account of” or nexus element in the asylum test, finding that the asylum seeker was not persecuted due to her gender, but because of “personal” reasons (for example, because the persecutor found the asylum seeker attractive or because the persecutor was drunk). Though these decisions typically misconstrue controlling legal precedent, it has often been challenging to convince adjudicators to recognize these claims.

In 1995, the Immigration and Naturalization Service (INS) (the predecessor to U.S. Citizenship and Immigration Services) adopted guidelines known as “[Considerations for Asylum Officers Adjudicating Asylum Claims from Women](#).” These guidelines

acknowledge women often experience persecution that is different from persecution faced by men, and cite domestic violence as one form of gender-related persecution that can be the basis of an asylum claim. Although these guidelines applied to asylum officers in particular, they had a persuasive impact on many immigration and federal court judges. *E.g.*, *Cece v. Holder*, 773 F.3d 662, 676 (7th Cir. 2013); *Fiadjoe v. U.S. Att’y Gen.*, 411 F.3d 135, 158 (3d Cir. 2005); *Mohammed v. Gonzales*, 400 F.3d 785, 797-98 (9th Cir. 2005).

These guidelines, however, did not lead all adjudicators to grant asylum in domestic violence claims and so for years, practitioners awaited a definitive ruling from the BIA on whether a situation of domestic violence could be the basis for asylum. When the BIA issued its precedential decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), advocates were sorely disappointed. The respondent in that matter, Ms. Alvarado, fled Guatemala and applied for asylum after suffering years of horrific persecution by her husband, a Guatemalan army soldier. Ms. Alvarado sought and was refused assistance from the Guatemalan police and the courts. Although the BIA found Ms. Alvarado had been persecuted and her government had failed to provide adequate protection, it determined she was not persecuted on account of a protected ground.

In December 2000, Attorney General Janet Reno and the INS issued [proposed rules](#) for adjudicating asylum claims based on domestic violence that called into question much of the reasoning in *Matter of R-A-*. In January 2001, Attorney General Reno vacated *Matter of R-A-* and sent it back to the BIA for reconsideration in light of the proposed rules.

In March 2003, Attorney General John Ashcroft certified *Matter of R-A-* to himself and in February 2004, the Department of Homeland Security (DHS) [submitted a brief](#) to Attorney General Ashcroft, articulating its position that “married women in Guatemala who are unable to leave the relationship” is a viable PSG. DHS subsequently announced that the brief represented its official position on domestic violence-based asylum claims.

In his last days as Attorney General, John Ashcroft remanded Ms. Alvarado’s case back to the BIA and directed the BIA to reconsider its decision once the proposed DOJ rules were published. The rules, however, were never published and as a result, *Matter of R-A-* remained stayed at the BIA level. The majority of domestic violence-based claims that had reached the BIA level were stayed as well. On September 25, 2008, Attorney General Michael Mukasey certified *Matter of R-A-* to himself, lifted the stay and remanded the case back to the BIA. The BIA then remanded the case to the immigration judge and in December 2009, the judge granted Ms. Alvarado asylum, nearly 15 years after she applied. Significantly, even before Ms. Alvarado had been granted asylum and notwithstanding the lack of clarity from the BIA, many adjudicators granted asylum in domestic violence-based claims during this time, in part due to the DHS position brief.

B. The emergence of gang-based asylum claims

While the state of domestic violence-based asylum law remained unclear, other asylum claims based on PSG membership increased. Many of these claims involved individuals from Central America who had fled gang-related violence. Some claims involved children who feared persecution for having resisted gang recruitment; others involved asylum seekers who had been harmed for having disobeyed a gang's extortion demands or for having been a witness to a gang crime. The claims of women and girls often involved threats of forced relationships with gang members or domestic violence by a partner who was a gang member.

In what seemed to be a direct response to the increase in Central American asylum seekers with gang-related claims, the BIA issued two precedential decisions in 2008 in cases involving gang-based asylum claims, both affecting the test for establishing membership in a PSG: *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008). In these cases, for the first time, the BIA added two new requirements to the PSG test.² The BIA held that in order to establish a viable PSG, the group must be based on an immutable characteristic, *and* be socially visible and particularly defined. According to the BIA, "particularity" meant that a group is defined in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. *S-E-G-*, 25 I&N Dec. at 584. To meet the particularity requirement, a group must not be "too amorphous . . . to create a benchmark for determining group membership." *Id.* The BIA went on to reject the respondent's proposed group in *S-E-G-* under the particularity requirement because the group was made up of "a potentially large and diffuse segment of society." *Id.* at 585. The BIA did not provide a definition of "social visibility" beyond stating that a PSG's shared characteristic "should generally be recognizable by others in the community." *Id.* at 586.

Immigrant advocates harshly criticized these decisions. The BIA's reasoning in *S-E-G-* and *E-A-G-* was circular and conflated social visibility and particularity with nexus (the "on account of" requirement), which is a separate question from whether the PSG is viable. For example, in analyzing the *S-E-G-* respondents' proposed group of "Salvadoran youth who have resisted gang recruitment, or family members of such Salvadoran youth," the BIA held that the group (1) failed the particularity test because the gang could have had many different motives for targeting Salvadoran youth, and (2) failed the social visibility test because members of the group weren't targeted for harm more frequently than the rest of the population. These justifications relied on a finding that the asylum seekers were not harmed *because of* their status as gang resisters – a nexus issue – and not because the PSG

² Although the BIA had previously referenced the concepts of social visibility and particularity, *see e.g.*, *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007) and *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), it never made them requirements until *S-E-G-* and *E-A-G-*.

suffered from legal infirmity. The decisions ignored the fact that PSGs the BIA had previously accepted, such as young women of a particular tribe who oppose female genital mutilation, or gay men from a particular country, no longer appeared viable under this new test. While many circuits deferred to the BIA's addition of the two new PSG requirements under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), other courts – specifically the Seventh Circuit and, for a while, the Third Circuit – rejected the requirements and declined to find that they merited *Chevron* deference.

In February 2014, the BIA doubled-down on its PSG test and issued two decisions, *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014)³ and *Matter of W-G-R-*, 26 I&N Dec. 20 (BIA 2014), which restated and emphasized the BIA's decision in *S-E-G-*. In *M-E-V-G-*, the BIA clarified that social visibility does not mean literal visibility, but instead refers to whether the PSG is recognized within society as a distinct entity. 26 I&N Dec. at 240-41. The BIA therefore renamed the requirement "social distinction." The decisions did not clarify or re-interpret the "particularity" requirement, but did include troubling dicta. For example, in *W-G-R-*, the BIA applied the particularity test to a PSG composed of former gang members. The BIA held that such a group failed the "particularity" requirement because "the group could include persons of any age, sex, or background," despite having previously noted in *Matter of C-A-*, 23 I&N Dec. 951, 956-57 (BIA 2006), that homogeneity was *not* a requirement for a PSG. 26 I&N Dec. at 221. According to the BIA, such a group would need to be defined with additional specificity to be viable. *Id.* at 222.

The BIA claimed its intention in issuing the two decisions was to "provide guidance to courts and those seeking asylum," *M-E-V-G-*, 26 I&N Dec. at 234, citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). The decisions, however, suffer from the same errors as *S-E-G-* and *E-A-G-*, and are made worse by the fact that *M-E-V-G-* and *W-G-R-* seek to rationalize a legal test that is irreconcilable with prior domestic and international asylum law. These errors continued in the BIA's August 2014 decision, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), in which it found that the group of "married women in Guatemala who are unable to leave their relationship" was socially distinct and sufficiently particular. While this decision provided much-needed recognition that domestic violence survivors can be eligible for asylum, the BIA's particular social group analysis remained inconsistent with prior BIA case law and problematic. Below are some of the critical errors in the BIA's analysis.

1. The BIA's post-hoc rationalization of the social distinction and particularity requirements is disingenuous.

A frequent criticism of the BIA's decisions in *S-E-G-* and *E-A-G-* was that the BIA had not explained how previously accepted PSGs would still qualify under the new standard.

³ NIJC submitted [an amicus brief](#) in support of the respondent in *M-E-V-G-*.

See e.g., *Gatimi*, 578 F.3d at 615-16 (“[R]egarding “social visibility” as a criterion for determining “particular social group,” the Board has been inconsistent rather than silent. It has found groups to be “particular social groups” without reference to social visibility . . . as well as, in this and other cases, refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases.”).

The BIA attempted to respond to this criticism in *M-E-V-G-* and *W-G-R-*, but its attempts ring false. For example, the BIA asserted that in *Matter of Kasinga*, it had found that the group of young women of the Tchamba-Kunsuntu Tribe who had not been subjected to FGM and opposed the practice was a distinct group based on the record evidence regarding the prevalence of FGM and the expectation that women would undergo it. *M-E-V-G-*, 26 I&N Dec. at 246. But in the BIA’s decision in *Kasinga*, the BIA at no time discussed whether the group was perceived as distinct within the applicant’s society. The entire analysis of the PSG in *Kasinga* was two, short paragraphs and merely stated that the characteristics which make up the group either cannot be changed or should not be required to be changed. *Kasinga*, 21 I&N Dec. at 365-66. Country evidence discussed in the decision related to conditions for women in Togo generally, or in some cases, in all of Africa, as opposed to just the applicant’s tribe. *Id.* at 361-62. All of this undercuts the BIA’s claim, nearly 20 years later, that the PSG in *Kasinga* was found to have met the social distinction test and is not inconsistent with the BIA’s new analysis.

2. The combination of “particularity” and “social distinction” creates a Scylla and Charybdis dilemma.

According to the BIA, a PSG cannot be defined by language commonly used in society (such as “wealth” or “young”) if the language would not define the group with precision. *W-G-R-*, 26 I&N Dec. at 221-22. For example, “young” does not say how young; “wealthy” does not say how wealthy. Even “former gang member” does not pass the particularity test – says the BIA – because a variety of people from different backgrounds and levels of gang involvement could be former gang members. *Id.* However, the BIA simultaneously requires the definition to capture a concept which is “distinct” in the eyes of the society from whence the claim arises. That is, if the group is defined as “18 to 25 year olds,” the applicant would need to demonstrate that society views that group as distinct from, e.g., 26 year olds. Thus, the particularity requirement, as defined in *M-E-V-G-* and *W-G-R-*, effectively precludes the use of common parlance labels to describe a PSG, even as the social distinction test requires that a PSG be limited by parameters a society would recognize. Taken together, it’s hard to see how any PSG-based claim can succeed on the BIA’s stated terms.

In fact, after the BIA announced its social visibility and particularity requirements in 2008, it did not recognize a new particular social group until August 2014 (six years later), when the BIA issued the first published decision recognizing a particular social group since

it created the social visibility and particularity requirements in the case of a woman who claimed asylum based on domestic violence. *A-R-C-G-*, 26 I&N Dec. 388. The BIA’s new decision demonstrates how a group’s viability may depend on the BIA’s arbitrary policy determinations regarding the categories of individuals it believes deserve asylum, rather than the application of the BIA’s own particular social group tests. In *W-G-R-*, the BIA held that the group of “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” was not defined with sufficient particularity because it was “too diffuse” and “broad” since it could include persons of any age, sex, or background. 26 I&N Dec. at 221. In *A-R-C-G-*, the BIA found that the group of “married women in Guatemala who are unable to leave their relationship” was sufficiently particular even though this group, as in *W-G-R-*, could also include persons of any age or background, including women who had been married for 20 years or only two weeks. 26 I&N Dec. at 393. Thus, the BIA’s test alone cannot purport to explain why one group allegedly met the test and another did not.

3. The BIA requirements severely limit the ability of pro se applicants from obtaining asylum.

As noted above, the BIA requires an asylum applicant to formulate a group in terms which are statistically precise, i.e., not using natural, common linguistic descriptors, and also commonly recognized. Nearly all pro se applicants will be unable to posit such a group. For example, a former child soldier who fears persecution in her home country because of that former affiliation will not know the duration of membership necessary to formulate a PSG – she only knows that people in her country wish to harm her for something she cannot change.⁴

Second, the BIA’s social distinction test requires a country condition expert or similar evidence to show how the society from whence the claim arises views the group. *M-E-V-G-*,

⁴ The Fourth Circuit discussed this concern in *Quintero v. Garland*, 998 F.3d 612 (4th Cir. 2021). There, the Court explained:

[W]hile U.S. immigration law is generally notorious for its esoteric nature, the law of asylum is one of the more complex areas thereof. As relevant here, the law concerning particular social groups is “rife with ambiguities, inconsistent applications, and circuit splits.” . . . While a particular social group’s cognizability often makes or breaks an asylum or withholding claim, it is a highly technical legal issue, and “[e]ven experienced immigration attorneys have difficulty articulating the contours of a [cognizable social group].” . . . Thus, we deem it unreasonable and fundamentally unfair to expect *pro se* asylum seekers—many of whom suffer from the effects of trauma and lack literacy, English proficiency, formal education, and relevant legal knowledge—to even understand what a particular social group is, let alone fully appreciate which facts may be relevant to their claims and articulate a legally cognizable group.

998 F.3d at 632 (internal citations omitted).

26 I&N Dec. at 244 (“Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as ‘distinct’ or ‘other’ in a particular society.”). This standard effectively requires sociological evidence, though it appears that significant country conditions documentation might suffice. Pro se applicants are unlikely to be able to marshal such evidence.

In addition to prejudicing pro se applicants, the BIA’s tests disadvantage underrepresented asylum applicants, whose attorneys may understand asylum generally but are not experts in the area. Notably, nowhere on the application for asylum or in its accompanying instructions does the government ask the applicant for a precise PSG. And even where one manages to articulate a PSG, many applicants have limited resources and cannot pay for experts – who often charge thousands of dollars – even where they can be identified. In *Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2013), the Seventh Circuit noted that it is the substance of the claim rather than the precise construction of the PSG that should drive the adjudicator’s assessment in asylum cases. The BIA’s tests purport to tie the hands of adjudicators, forcing them to determine asylum eligibility based on whether an applicant can craft a sufficient PSG, rather than by discerning whether she is a bona fide refugee.⁵

4. The BIA requirements call on the BIA and immigration judges to act outside their expertise.

The BIA’s decisions call upon the BIA and immigration judges (IJs) to not merely decide the facts and law before them, but to opine on sociological matters in foreign societies, in cases which will commonly lack any kind of expert opinion that might enable adjudicators to make such findings. The BIA and IJs are tasked with arriving at conclusions based on evidence in the record, but the BIA has not developed any way for adjudicators to competently make the determinations required by these tests. Cf. *Banks v. Gonzales*, 453 F.3d 449, 453–55 (7th Cir. 2006) (suggesting the use of agency experts); *Chun Hua Zheng v. Holder*, 666 F.3d 1064, 1068 (7th Cir. 2012) (same).

The issues that arise when the BIA acts outside its expertise and issues opinions on the sociology of another country are immediately evident from the decision in *W-G-R*-. Here, the BIA found the group of former gang members not sufficiently particular because it could include someone who joined the gang many years ago, but left shortly after initiation, as well as a long-term hardened gang member. According to the BIA, “[i]t is doubtful that someone in the former category would consider himself, or be considered by others, as a

⁵ The BIA doubled down on this concept in *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191-92 (BIA 2018), where the BIA held that “it is an applicant’s burden to specifically delineate her proposed social group” and determined that the respondent – who had counsel before the immigration judge – could not present a newly defined particular social group on appeal.

“former gang member” or could be said to have any but the most peripheral connection to someone in the latter category.” 26 I&N Dec. at 221. The BIA provides no evidence to support this speculative conclusion, which is at odds with the stories told by asylum seekers from Central America and objective evidence offered in many asylum cases. Federal courts of appeals, including the Seventh Circuit, have been troubled by the attempts of IJs to substitute their own judgment for that of an expert, but this is precisely what these tests compel adjudicators to do. *See Torres v. Mukasey*, 551 F.3d 616, 632 (7th Cir. 2008) (criticizing an IJ for having “improperly relied on his own assumptions about the Honduran military . . . to reach his conclusion.”).

5. The BIA’s international law analysis conflicts with the UNHCR

In *M-E-V-G-*, the BIA noted – after years of avoidance – that while it had derived the “social visibility” test from the UNHCR, it had not followed the UNHCR’s use of that concept. 26 I&N Dec. at 248. The UNHCR advocates for a disjunctive test, finding a social group where the characteristic forming the group is *either* immutable or the group is perceived as a group by society. UNHCR, Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, at 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), available at <http://www.unhcr.org/3d58de2da.html>. The BIA requires both.

6. The BIA’s approach conflicts with *ejusdem generis* principles.

The BIA has historically interpreted “particular social group” in parallel with the other four protected grounds, pursuant to principles of *ejusdem generis*. *Acosta*, 19 I&N Dec. at 233. In *M-E-V-G-* and *W-G-R-*, the BIA continued to pay lip service to that doctrine but simultaneously violated its core principle. *M-E-V-G-*, 26 I&N Dec. at 234 n.10. The BIA’s PSG tests are entirely unlike those employed in the analysis of the other four protected grounds. Responding to the criticism that the particularity requirement involves boundary determinations that do not exist for the other protected grounds, the BIA asserts that “there is a critical difference between a political opinion or religious belief, which may in theory be entirely personal and idiosyncratic, and membership in a particular social group, which requires that others in the society share the characteristics that define the group.” *Id.* at 239 n.13. This blanket assertion lacks any explanation.

According to the BIA, where a proposed group doesn’t have precise boundaries, it is not cognizable, but no such rule applies to political groups or religious groups. The fact that the word “Catholic” might be thought to apply either to devoted practitioners or to “cultural” members of the group would not preclude a religious-based claim where

Catholicism was the basis of the persecution.⁶ Yet a “former gang member” group would not be cognizable simply because the boundaries of the group may be unclear (although possibly irrelevant to the claim). Likewise, no expert testimony is required to show that a society recognizes Catholics; the fact that the individual has established her own status as a Catholic is enough.

It is true that the PSG ground refers by its nature to particular groups. But the BIA’s definitional tests go far beyond this justification and the excuses that some protected grounds may be “personal and idiosyncratic” while such characteristics are fatal in the PSG context is unfounded in the law and unsupported by commonsense.

7. The BIA considers society’s view when determining social distinction, not the persecutor’s view.

In *M-E-V-G-*, the BIA clarifies that when determining whether a group is socially distinct, it is society’s perspective – not the persecutor’s – which is relevant. 26 I&N Dec. at 242. The BIA reasons that considering the persecutor’s views would conflate the fact of the persecution with the reasons for it. *Id.* This does not follow. If a persecutor targets redheads for death, a redheaded person might reasonably fear death even if society in general does not think of redheads differently than other people. Limiting the viability of a PSG by requiring that society – and not merely the persecutor – view the group as distinct conflicts with well-reasoned appellate case law, *Henriquez-Rivas*, 707 F.3d at 1089-90, and draws false lines that honor neither the purpose nor intent of the statute.

C. A development in gender-based asylum case law

The same year the BIA further restricted gang-based asylum claims (and as a result, all particular social group-based asylum claims) via *M-E-V-G-* and *W-G-R-*, the BIA issued *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014). There, the BIA found that the group of “married women in Guatemala who are unable to leave their relationship” was socially

⁶ The Fourth Circuit seems to agree with this particular argument, making a similar point in the case of *Amaya v. Rosen*, 986 F.3d 424, 434-35 (4th Cir. 2021):

The government wants us to conclude that because there are gradations in gang involvement, the term “member” is amorphous. But that same argument could be made for any other particular social group and even the other statutorily listed grounds protected from persecution, which the BIA explained “are commonly defined” with enough “specificity” to be “particular.” *Matter of W-G-R-*, 26 I&N Dec. at 213. Consider, for example, a claim of persecution as a result of being Catholic. Catholics, of course, vary widely in the time they have been part of that faith as well as in their level of commitment and involvement. Those differences may make it difficult to establish the required nexus of persecution or even whether a petitioner is or is not Catholic. But they have nothing to do with particularity.

distinct and sufficiently particular.⁷ While this decision provided the long-awaited recognition that domestic violence survivors could be eligible for asylum, the BIA's particular social group analysis remained inconsistent with prior BIA case law.

In *A-R-C-G-*, DHS conceded that the respondent had established persecution on account of the PSG "married women in Guatemala who are unable to leave their relationship." Despite this concession, the BIA examined the PSG and found it to be particularly defined and socially distinct to satisfy both *M-E-V-G-* and *W-G-R-*. *A-R-C-G-*, 26 I&N Dec. at 393-94. In doing so, the BIA noted that "the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions, law enforcement statistics, and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information." *Id.* at 394-95. The BIA further noted that although DHS had conceded to nexus in this case, in other cases, nexus would be determined on a case-by-case basis and would "depend on the facts and circumstances of the individual claim." *Id.* at 395.

After the BIA's decision, establishing asylum eligibility in domestic violence-based claims became more straightforward, but subject to different challenges, like getting judges to understand that the logic applied to non-marital relationships and to circumstances involving non-traditional forms of domestic violence. Some judges still routinely denied claims involving non-consensual relationships, same-sex relationships, or non-marital relationships because they did not match the precise definition of the *A-R-C-G-* group.

II. The Reaction of the Seventh Circuit

As asylum cases involving PSG claims and the BIA's new social visibility/distinction and particularity requirements soon began to make their way to the U.S. Courts of Appeals, many courts deferred to the BIA's addition of the two new PSG requirements under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), while a few courts struck down the requirements and refused to find that they merited *Chevron* deference. Within about four years, however, all circuits aside from the Seventh Circuit had deferred to the BIA's new PSG requirements.⁸

⁷ NIJC's amicus brief in support of the respondent in *A-R-C-G-* can be found at http://immigrantjustice.org/press_releases/board-immigration-appeals-rules-guatemalan-mother-who-fled-domestic-violence-can-be-g

⁸ Recently, the Fourth Circuit declined to defer to the BIA's particularity test as applied to the petitioner in a case in which the particular social group was identical to that of the respondent in *W-G-R-* (former gang members). In *Amaya v. Rosen* (also discussed above in n.6), the Court declined to defer to the BIA's finding that the petitioner's former gang member PSG was insufficiently particular, holding that it "was unreasonable for the BIA to reiterate its three-part test for a PSG and then apply its particularity requirement in a way that disregards and distorts its own test." 986 F.3d at 437. In reaching this decision, the Court determined that the BIA's description of particularity "impermissibly conflates it with the

The Seventh Circuit has a strong body of case law exploring the parameters of PSG-based asylum claims. In *Lwin*, the Seventh Circuit accorded *Chevron* deference to *Matter of Acosta*. 144 F.3d at 511–12. For approximately two decades afterwards, the Court applied *Acosta*'s immutable characteristic test to determine whether proposed PSGs were cognizable for asylum purposes. *E.g.*, *Sepulveda v. Gonzales*, 464 F.3d 770 (7th Cir. 2006).

When the BIA added “social visibility” and “particularity” to the PSG analysis in 2008, the Seventh Circuit declined to follow suit and instead rejected the social visibility requirement. *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). The Court explained that social visibility “cannot be squared” with prior Seventh Circuit or BIA decisions and, “[m]ore important, [social visibility] makes no sense” because many characteristics that are well-recognized for asylum purposes, such as sexual orientation or female genital mutilation, are not outwardly visible or publicly known. *Id.* at 615–16; *see also Benitez Ramos v. Holder*, 589 F.3d 426, 429–31 (7th Cir. 2009) (rejecting any social visibility requirement and holding that the PSG of “tattooed, former Salvadoran gang members” was cognizable under *Acosta*).

In 2013, the Seventh Circuit issued an *en banc* decision in *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013). Against the backdrop of the *S-E-G-* line of cases, *Cece* reiterated that “[t]his Circuit has deferred to the Board’s *Acosta* formulation of social group.” *Id.* at 669. The Seventh Circuit recognized that it had “rejected a social visibility analysis,” *Id.* at 668 n.1, and also refused to apply the BIA’s particularity requirement because “breadth of category has never been a *per se* bar to protected status.” *Id.* at 674, 676. Applying only the immutable characteristic test, the Court held that the proposed group of “young Albanian women living alone” was cognizable. *Id.* at 677.

Since the BIA issued *M-E-V-G-* and *W-G-R-* in 2014, which relabeled “social visibility” as “social distinction,” the Seventh Circuit has continued to apply *Cece* and its predecessor cases in PSG asylum matters. No Seventh Circuit decision has relied on social distinction or particularity to reject a proposed PSG. Instead, the Court’s decisions continue to apply *Acosta*'s immutable characteristics test and to cite to *Cece*. *See, e.g., Orellana-Arias v. Sessions*, 865 F.3d 476, 485 (7th Cir. 2017); *Sibanda v. Holder*, 778 F.3d 676, 681 (7th Cir. 2015). In a 2018 published decision, the Seventh Circuit noted that “[w]hether the Board’s particularity

social distinction requirement;” erroneously treated the particularity inquiry as an evidentiary one, rather than a definitional one; and unreasonably rejected the PSG simply because the group “can be subdivided based on some arbitrary characteristic.” *Id.* at 432-34. Although the Fourth Circuit did not reject the particularity test across-the-board or decline to defer to the test as part of the broader particular social group definition, the Court’s rejection of the BIA’s application of the particularity test in a case where the BIA had applied the test exactly the same way as it had done in *W-G-R-*, strongly supports arguments against the application of particularity in similar ways in other cases and against deference to the test as a whole.

and social distinction requirements are entitled to *Chevron* deference remains an open question in this circuit.” *W.G.A. v. Sessions*, 900 F.3d 957, 964 (7th Cir. 2019). The Court “decline[d] to make the *Chevron* determination in this case,” *id.* at 965, but noted in a footnote that “W.G.A.’s arguments that the Board’s interpretation is unreasonable have some force.” *Id.* at 964 n.4.

Meanwhile, the Attorney General also issued several decisions affirming the Attorney General’s understanding that in the Seventh Circuit, the social distinction and particularity requirements do not apply. See *Matter of L-E-A-*, 27 I&N Dec. 581, 590 (A.G. 2019) (*L-E-A- II*) (“[T]he Seventh Circuit has declined to apply the particularity and social distinction requirements, requiring only that members of a particular social group share a common, immutable characteristic.”), vacated by *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021) (*L-E-A- III*); *Matter of E-R-A-L-*, 27 I&N Dec. 767, 769 n.3 (BIA 2020) (noting the same). Moreover, it is NIJC’s position that *Chevron* deference is unwarranted because the Court has already refused to defer to “social visibility” and rejected the BIA’s description of particularity, and as the BIA made clear in *M-E-V-G-* and *W-G-R-*, those decisions are simply new framing of the same issue and did not change the law.

In sum, despite some back and forth at the BIA and before the Attorney General, the unaltered *Acosta* test remains law in the Seventh Circuit. This means that all PSG asylum claims, including matters where the persecutor is a non-governmental actor, must pass the immutable characteristic test and there is no established requirement that those groups be socially distinct or particular.

III. *Matter of A-B-* and *L-E-A*

The immense confusion created by the BIA’s 2014 decisions on particular social group created were compounded by the problems caused by the Attorney General’s decision in *Matter of A-B- I*, *A-B- II*, and *L-E-A- II*.

In June 2018, former Attorney General Sessions issued *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (*A-B- I*), a decision with a relatively narrow holding, but copious, anti-asylum dicta. *A-B- I* overruled *A-R-C-G-* on procedural grounds because the AG found the decision was the product of concessions by DHS and not the application of law by the BIA. In addition to this holding, the AG broadly opined that domestic violence and gang-based violence “generally” cannot be the basis for asylum; that domestic violence is “private” and related to a “personal relationship” (and thus, cannot be on account of a protected ground); and that gender-based particular social groups, like the group in *A-R-C-G-*, are impermissibly defined by the harm the group members suffered or feared and do not exist independently of the persecution. The decision also created confusion regarding another element in the asylum analysis – whether the government is “unable or unwilling to

control” a non-state actor persecutor – by using “unable or unwilling to control” interchangeably with the phrase “condone or completely helpless.”

The next year, former Attorney General Barr issued another decision, *L-E-A- II*, that attempted to further restrict asylum access, this time for claims based on family membership. *L-E-A- II* overruled a portion of the BIA’s decision in *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017) (*L-E-A- I*), a case regarding nexus to a family-based PSG, with a narrow holding that found the BIA in *L-E-A- I* did not conduct a proper analysis of the family-based particular social group posited in that case. But similar to *A-B- I*, *L-E-A- II* also contains substantial dicta untethered from legal basis or evidentiary support.

In *L-E-A- II*, the AG reasserted the now-uncontroversial rule (outside of the Seventh Circuit), that family-based particular social groups, like all particular social groups, must meet the three requirements established by the BIA: (1) immutability; (2) particularity; and (3) social distinction. It is this third prong on which the AG focused much of his dicta. Without any legal or evidentiary support – and despite the AG’s emphasis on the importance of a case-by-case analysis – the AG asserted that many asylum seekers with family-based particular social groups will find it difficult to establish that their family-based group is seen as distinct within their societies, 27 I&N Dec. at 585, and thus, their particular social groups will fail.⁹

Finally, on January 14, 2021, the Acting Attorney General issued *A-B- II*, which he claimed was issued due to a need to provide:

additional guidance regarding three recurring issues in asylum cases involving applicants who claim persecution by non-governmental actors on account of the applicant’s membership in a particular social group: (1) whether Attorney General Sessions’s 2018 opinion altered the existing standard for determining whether a government is “unwilling or unable” to prevent persecution by non-governmental actors; (2) whether a government that makes efforts to stop the harm in third-party persecution cases is “unable or unwilling” to prevent persecution; and (3) whether a protected ground must be more than a but-for cause in order to be at least “one central reason” for persecuting an asylum applicant.

⁹ In attempting to explain why he believed many nuclear families will be unable to establish social distinction, the AG appeared to confuse “social distinction” with “social notoriety.” For example, the AG asserted, “But unless an immediate family group carries greater societal import, it is unlikely that a proposed family-based group will be “distinct.” 27 I&N Dec. at 595. The AG did not explain exactly what societal import an immediate family group must be greater than and at no time did he assert that he was creating a new test or definition for establishing a particular social group.

28 I&N Dec. 199, 200-201 (A.G. 2021).

Although this decision did not speak to the particular social group definition, the decision repeatedly implied that asylum claims based on PSG membership (as well as those based on harm by non-state actors) require different standards than asylum claims based on other protected grounds. This only increased the confusion caused by *A-B- I*, particularly for two of the asylum elements. First, the AG claimed that *A-B- I* had not intended to create a new standard for the “unable or unwilling to control” element (even though the decision had used different terminology – condone or completely helpless – that did not, on its face, appear to be interchangeable with “unable or unwilling to control”). Second, the AG asserted for the first time that *L-E-A- I* “refined” a two-prong test for determining the nexus element, even though no such test had been articulated in *L-E-A- I* or *L-E-A- II*.¹⁰

On June 16, 2021, AG Garland issued two decisions: one vacated *A-B- I* and *A-B- II* in their entirety and one vacated *L-E-A- II* in its entirety. In *Matter of A-B-* 28 I&N Dec. 307 (A.G. 2021) (*A-B- III*), the AG stated that adjudicators should now follow pre-*A-B- I* precedent, including *A-R-C-G-*. The AG noted that the broad statement in *A-B- I* that victims of private criminal activity will not qualify for asylum except in exceptional circumstances could be read to create a strong presumption against asylum claims based on “private conduct” and therefore “threatens to create confusion and discourage careful case-by-case adjudication of asylum claims.” The AG also noted that other portions of *A-B- I* had “spawned confusion” regarding, for example, whether the decision changed the “unable or unwilling to control” standard.

In *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021) (*L-E-A- III*), the AG asserted that the decision returned the immigration system to the preexisting state of affairs and that adjudicators should no longer follow *L-E-A- II*. The AG noted that *L-E-A- II* was inconsistent with the decisions of several other courts of appeals that have recognized family-based PSGs and was also effectively an advisory opinion since the analysis of the PSG in *L-E-A- II* was unnecessary to decide the case.

In both decisions, the AG stated that rulemaking, rather than decisions issued by the agency, was the preferred method for clarifying the PSG definition and the other issues addressed by *L-E-A- II* and *A-B- I* and *II*.

IV. The State of Seventh Circuit Particular Social Group Case Law Today

As noted above, while *A-B- I* and *L-E-A- II* contained extensive, negative dicta regarding PSG-based asylum claims, these decisions did not say anything new regarding the BIA’s

¹⁰ This part of *A-B- II* appeared directed specifically at a line of Fourth Circuit decisions, which the Acting Attorney General rejected as “not the best reading of the statutory language.” 28 I&N Dec. at 211.

PSG test or provide any new interpretation or rule. See *A-B- I*, 27 I&N Dec. at 335 (reaffirming the three-part PSG test). Furthermore, the discussion of PSG cognizability in both *A-B- I* and *L-E-A- II* focused heavily on issues with the social distinction test, which the Seventh Circuit has not accepted. Thus, while AG Garland’s vacatur of the *A-B-* decisions and of *L-E-A- II* are very welcome and should make it simpler for adjudicators to properly assess asylum claims based on gender violence or family membership, it may not have a substantial impact on asylum claims in the Seventh Circuit.

As noted above, before *M-E-V-G-* and *W-G-R-*, the Seventh Circuit had rejected the BIA’s social visibility (now distinction) requirement and had issued decisions that appeared to limit the particularity definition. For example, while the BIA rejected the former gang member PSG in *W-G-R-* as insufficiently particular, the Seventh Circuit explicitly found that the same PSG was “neither unspecific nor amorphous.” *Benitez-Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009).

The BIA has a longstanding policy of following circuit precedent in any case arising within that circuit. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Where there is disagreement regarding an ambiguous statute, the BIA may invoke its authority to interpret the statute, and may in some cases decline to follow circuit precedent, even within that circuit. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Under *Brand X* principles, the Seventh Circuit may have to consider anew whether the BIA’s interpretation is reasonable. However, because the BIA in *M-E-V-G-* and *W-G-R-* did not purport to clarify or issue a new interpretation of the particularity requirement, *Brand X* arguably does not require new analysis of particularity by circuits, like the Seventh Circuit, that previously issued decisions conflicting with the BIA’s interpretation.

Since the BIA published *M-E-V-G-* and *W-G-R-*, the Seventh Circuit has issued multiple, precedential decisions that have discussed or referenced the particular social group definition. None have cited to *M-E-V-G-*, *W-G-R-*, or the social distinction and particularity tests with approval. See *Salgado Gutierrez v. Lynch*, 834 F.3d 800, 805 (7th Cir. 2016) (rejecting breadth and homogeneity as requirements for establishing a particular social group); *Lozano–Zuniga v. Lynch*, 832 F.3d 822, 827 (7th Cir. 2016) (“This circuit defines social group as a group “whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change.”); see also *Sibanda v. Holder*, 778 F.3d 676 (7th Cir. 2015); *R.R.D. v. Holder*, 746 F.3d 807 (7th Cir. 2014); *N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014). In *W.G.A. v. Sessions*, 900 F.3d 957 (7th Cir. 2018), the Seventh Circuit declined to take up the question of whether the social distinction and particularity tests merit *Chevron* deference, but noted that arguments that these requirements are unreasonable “have some force.” 900 F.3d at 964 n.4. Based on

these decisions, it appears that the Seventh Circuit does not believe that the BIA decisions are binding on it.¹¹

Even without a Seventh Circuit decision explicitly rejecting *M-E-V-G-* and *W-G-R-*, however, it can be argued at the asylum office and immigration court levels that conflicting circuit precedent remains binding law despite the BIA decisions. First, where the BIA has declined to follow binding circuit precedent within a federal circuit, it has explicitly said so in a published decision. See, e.g., *Matter of Konan Waldo Douglas*, 26 I&N Dec. 197 (BIA 2013) (“we respectfully decline to follow the Third Circuit’s case law to the contrary and will apply our holding in *Matter of Baires* to cases arising in that circuit”); *Matter of Gallardo*, 25 I&N Dec. 838, 844 (BIA 2012) (“our holding... should apply uniformly nationwide”); *Matter of Armendarez-Mendez*, 24 I&N Dec. 646, 653 (BIA 2008) (“we ... respectfully decline to follow *Lin v Gonzales*, *supra*, and *Reynoso-Cisneros v. Gonzales*, *supra*, even within the Ninth Circuit”).

Matter of W-G-R- does not invoke *Brand X* at all. *Matter of M-E-V-G-* only does so in passing reference to the general proposition that the BIA’s reasonable interpretation of “membership in a particular social group” is entitled to deference and when explaining why the BIA has decided to use a different PSG test than the UNHCR. *M-E-V-G-*, 26 I&N Dec. at 230. At no point in either *M-E-V-G-* or *W-G-R-* does the BIA ever state or imply that it is declining to follow the Seventh Circuit’s analysis within the Seventh Circuit.

It also seems unlikely that *Brand X* would apply to the BIA’s discussion of particularity in *M-E-V-G-* and *W-G-R-* because the BIA has not issued any new clarification or interpretation of the term. The definition of particularity asserted in *M-E-V-G-* and *W-G-R-* is the same definition that has existed throughout the time the Seventh Circuit issued numerous decisions that have focused on the immutable characteristics underlying the PSG as opposed to the specific language used to define the PSG.

Because the BIA in *M-E-V-G-* and *W-G-R-* did not explicitly decline to follow Seventh Circuit precedent regarding the social distinction or particularity requirements, the Seventh Circuit’s decisions rejecting the BIA’s social visibility/distinction requirements and affirming the *Acosta* immutable characteristic test should remain binding precedent on the Chicago Asylum Office and Chicago Immigration Court. Moreover, even if *Brand X* principles are implicated at the asylum office and immigration court levels, arguments can still be made that the BIA’s requirements do not merit deference because – as described in

¹¹ As noted above, the Attorney General and BIA have appeared to believe the same. See *L-E-A- II*, 27 I&N Dec. at 590 (“[T]he Seventh Circuit has declined to apply the particularity and social distinction requirements, requiring only that members of a particular social group share a common, immutable characteristic.”); *E-R-A-L-*, 27 I&N Dec. at 769 n.3 (noting the same).

section I– they are an impermissible and unreasonable interpretation of “membership in a particular social group.”

V. Practice Pointers

While all of the recent BIA and AG particular social group decisions have involved asylum seekers from Central America and Mexico, the decisions impact all asylum seekers with PSG-based asylum claims, including asylum claims based on gender; sexual orientation; resistance to recruitment and extortion by criminal organizations; status as former child soldiers or trafficking victims; and many other common and well-established reasons that individuals seek protection in the United States.

Attorneys representing asylum seekers with PSG-based asylum claims within the Seventh Circuit must be prepared to respond to the BIA and AG line of decisions from *M-E-V-G-* and *W-G-R-* to *A-B- III* and *L-E-A- III*. Attorneys should plan to both educate adjudicators about the impact -- or lack thereof -- of the BIA and AG decisions on PSG case law and establish, possibly in the alternative, how their clients' cases meets the BIA's requirements.

A. Formulating a PSG

During the past decade, it has become increasingly important that attorneys formulate PSGs carefully and with a clear understanding of the current law in their jurisdictions. Moreover, since PSG claims are now more likely to result in federal litigation, it is important that the strongest PSG(s) possible be preserved at the IJ level since new PSG definitions cannot be introduced on appeal. Pro bono attorneys representing NIJC asylum clients are strongly encouraged to consult with NIJC when formulating PSGs for their clients' cases.

Practice Tips

When determining the parameters of a PSG, attorneys should first follow these steps:

- 1) Explore why the persecutor targeted or will target your client and determine whether those reasons are characteristics your client cannot change or should not be required to change.
- 2) Be sure to differentiate between the initial reason for targeting and the subsequent targeting based on an action by your client. For example, Central American gangs often target young men for recruitment and the population generally for extortion. But once an individual opposes recruitment or extortion, or takes steps such as

reporting the gang to the police, the gang’s persecution frequently shifts and becomes more severe. It is generally best to focus on that secondary reason – the act in opposition or violation of the gang’s demands, rules, or norms – as the characteristic forming the social group, rather than the general socio-economic reasons the gang may have targeted the individual in the first place.¹²

- 3) Do NOT define the PSG by the harm suffered or feared. Although referencing the harm suffered does not necessarily invalidate the social group, it will make the nexus element almost impossible to prove because of the circularity problem – “young Salvadoran men who have been targeted by gangs” are not targeted by gangs because they “have been targeted by gangs” and “Guatemalan women who have suffered domestic violence” are not targeted with domestic violence because they “have suffered domestic violence.” In many instances, young men in Central American are targeted after taking the irretrievable step of refusing the gang and that is what prompts the harm. Similarly, many women are abused because of their gender. These characteristics – having opposed the gang and/or being female – are immutable characteristics that exist independent of the persecution. Attorneys must clearly explain the difference and be prepared to respond to government attorneys who will assert the characteristic and the harm are one. The First Circuit’s decision in *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020) (discussing the reasons why a woman may be unable to leave a relationship other than the persecution itself) and the Ninth Circuit’s decision in *Diaz-Reynoso v. Barr*, 968 F.3d 1070 (9th Cir. 2020) (explaining why the mere reference to the feared persecution does not disqualify an otherwise valid group), while not binding in the Seventh Circuit, are particularly useful for strategizing on this point.

Do not define the PSG by the harm your client suffered or fears.

- 4) When looking for supportive case law, look to Seventh Circuit law first, then to BIA precedent that may have found viable social groups in cases with similar rationales, but different countries of origin; and then to other circuits. For example, the

To support Central American and Mexican asylum claims, look to Seventh Circuit precedent involving asylum seekers from other countries.

¹² Although related to nexus and not the particular social group element, the Fourth Circuit noted the importance of differentiating between the initial and subsequent reasons for targeting in *Perez Vasquez v. Garland*, 2021 WL 2879488 *6 (4th Cir., July 9, 2021). There, the Court determined that “the agency erred by focusing too narrowly on the immediate trigger for the gang’s extortion demands and death threats – i.e., their “greed” or desire for monetary gain.” 2021 WL 2879488 at *6. Instead, the agency should have considered “the intertwined reasons for the persecution – in particular, Petitioner’s familial relationship to her husband.” *Id.*

Seventh Circuit has recognized the PSG of “former Salvadoran gang members,” *Benitez Ramos*, 589 F.3d at 429; “the educated, landowning class of cattle farmers in Colombia,” *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666 (7th Cir. 2005); and “Jordanian women who have allegedly flouted moral norms,” *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011). The Seventh Circuit has not yet recognized a group based on resistance to gangs, but it has recognized a group based on resistance to the FARC. *Escobar v. Holder*, 657 F.3d 537 (7th Cir. 2011). Similarly, the Seventh Circuit has not had occasion to recognize a group that followed the A-R-C-G- definition, but it has recognized the group of “single women in Albania who live alone.” *Cece*, 733 F.3d at 671. Significantly, the BIA has also recognized a particular social group related to gender and resistance to a particular activity. In *Matter of Kasinga*, (which the BIA has repeatedly asserted remains viable even under the BIA’s new PSG test, see *M-E-V-G-*), the BIA found viable the PSG of “young women of the Tchamba-Kunsuntu tribe who had not been subjected to female genital mutilation and opposed the practice.” 21 I&N Dec. 357.

Based on these guidelines, NIJC recommends that attorneys practicing in the Seventh Circuit use PSG formulations in gender and gang-based claims that generally follow these types of definitions (keeping in mind that PSGs are case-specific and must be the reason for the harm experienced and/or feared in order to satisfy the nexus requirement):

Domestic violence/forced relationships claims:

“Ms. X belongs to the particular social group of “Salvadoran women,” or more narrowly “Salvadoran women in [domestic/intimate/marital] relationships they are unable to leave” or “women in the X family/immediate family members of Mr. X” or “Salvadoran women who have flouted or resisted Salvadoran social norms.”

Gang-based claims:

“Mr. X belongs to the particular social group of “Salvadorans who have [violated/opposed/disobeyed] gang norms;” “Salvadoran small business owners who have opposed the MS-13;” “Salvadorans who have witnessed gang crimes and reported them to law enforcement;” “family members of MS-13 gang members,” or more narrowly, “the immediate family members of Mr. X.”

B. Client affidavits and testimony

While making the argument that the BIA’s social distinction requirement is not a recognized factor in the Seventh Circuit, attorneys should nonetheless establish social distinction to protect their clients in the event an adjudicator erroneously relies on this factor. Attorneys must use their client’s affidavit and testimony to help establish that the proposed PSG is socially distinct. A client should provide examples of how her community

viewed her group as a group. For example, in an asylum claim based on forced gang recruitment, the client's affidavit and testimony should explain how the community viewed individuals who resisted recruitment. Descriptions of the way in which community members treated those who resisted recruitment differently from others in the community (perhaps by helping them escape from the gangs or ignoring their requests for assistance) can help establish the group's "distinction." Similarly, in a case involving domestic violence, the client's affidavit and testimony should explain how the community viewed women broadly and more specifically, within a particular relationship. How does the community respond to domestic violence as opposed to a random assault by one man against another man or other kinds of crimes? What is a woman's ability to leave a relationship and what rights does a woman have to oppose the control or abuse of her partner? Showing that women who are harmed in the context of a relationship are treated differently than individuals harmed in other contexts can be useful to prove the group is socially distinct.

C. Other evidence

Country condition experts have long been critical in asylum cases, but their importance has grown significantly in PSG-based asylum claims. It is difficult to see how most PSGs could meet the social distinction test without the assistance of an expert witness. Therefore, whenever possible, attorneys representing clients with PSG-based claims should plan to provide an expert affidavit and in some cases, expert testimony to support their claims. Generally, country condition experts are most useful when they are truly experts, such as academics or professionals with substantial scholarly credentials, and when they are not overtly partisan. Individuals who are active in political or advocacy organizations with a pronounced point of view about a particular country may have their credentials as "experts" called into question by Immigration and Customs Enforcement (ICE) attorneys, asylum officers, and immigration judges.

Although generally it is not wise for an expert to make legal conclusions as to whether an individual meets the asylum elements, that rule does not apply to the social distinction requirement. Once a qualified expert is found, it will be important for the expert's affidavit and testimony to specifically address the social distinction issue. Attorneys may find it useful to review the evidentiary findings in *M-E-V-G-* and *W-G-R-* and ask the expert whether he or she can adopt similar language in the expert's affidavits. See *e.g.*, *M-E-V-G-*, 26 I&N Dec. at 246 (explaining that the group of young women of a certain tribe who had not been subjected to FGM was a socially distinct group based on objective evidence regarding the prevalence of FGM in the society and the expectation that women of the tribe would undergo FGM).

In asylum claims arising out of countries in which civil strife or criminal violence is wide-spread, it will be particularly important that experts differentiate clients' PSGs from the rest of the population. *See id.* at 250-51; *W-G-R-*, 26 I&N Dec. at 222-23. Attorneys should also be sure to clarify that the question of whether the client fears persecution on account of her PSG membership (as opposed to random violence) is a separate question from whether the PSG is cognizable in the first place.

D. Considering nexus

Even though establishing a nexus between the PSG and the persecution suffered or feared is completely separate from the question of whether the PSG is cognizable, the two elements are closely connected. One may clearly be a member of one or more cognizable PSGs, but if there is no nexus between that PSG and the harm experienced and/or feared, the asylum claim ultimately fails.

In all asylum claims, context is a significant part of establishing nexus since the circumstances in which the harm arose can signal the reason for it or, the nexus. *See Sarhan*, 658 F.3d at 656 (rejecting the immigration judge's assertion that a threatened honor killing was due to a "personal dispute" and determining instead that the threat was due to a "widely-held social norm in Jordan" that makes such honor killings permissible); *Ndonyi v. Mukasey*, 541 F.3d 702, 711 (7th Cir. 2008) (vacating a removal order after finding that the immigration judge and BIA "utterly fail[ed] to consider the context of [the asylum seeker's] arrest."); *see also Hernandez-Chacon v. Barr*, 948 F.3d 94, 103-04 (2d Cir. 2020); *De Brenner v. Ashcroft*, 388 F.3d 629, 638 (8th Cir. 2004); *Osorio v. INS*, 18 F.3d 1017, 1029 (2d Cir. 1994). While taking care to keep the PSG and nexus elements separate, attorneys must build records that clearly establish the link between the PSG and the harm.

Context is critical.
Use all forms of evidence
(affidavits, country reports,
expert statements) to establish
context.

Practice Tips

Attorneys presenting PSG-based asylum claims should be sure to heavily corroborate their arguments that their client was and will be persecuted on account of her PSG membership(s).

- 1) Attorneys must present gang and gender violence claims within the broader context of gender/gang violence generally and the country at issue specifically. For example, it is well-established that domestic violence is rooted in power and control, as opposed to attraction or desire. Attorneys should include and reference articles and/or affidavits from experts like Nancy K. D. Lemon, whose affidavit on domestic

violence is available via the [Center for Gender and Refugee Studies](#) and explains that domestic violence stems from a desire to exercise power and control within a social and cultural construct that enforces men’s entitlement to superiority and control over family members. Affidavits from country condition experts and other

Place the persecution within the context of a broader policy or practice.

country condition resources should explain how domestic and sexual violence in the country at issue are based on deep-rooted beliefs that women are subordinate to men.¹³

Attorneys should explain the cultural phenomenon of “machismo” to ensure the adjudicator understands how misplaced it is to view domestic violence as a “private matter.”

Similarly, in cases involving gangs or cartels, attorneys must place the harm suffered or feared by the client within the context of the country at issue and the policies of the gang or cartel. The Seventh Circuit’s analysis in *R.R.D. v. Holder*, 746 F.3d 807 (7th Cir. 2014) is instructive. In that case, the Seventh Circuit rejected the BIA’s determination that a former Mexican police officer could not establish a nexus between the persecution he feared from Mexican cartels and his status as a former police officer. The Court determined it was erroneous for the BIA to have ignored evidence that cartels have a *policy* of targeting former police officers, which, the Court noted, is a “rational way to achieve deterrence” (from the perspective of the cartel). *Id.* at 810.

The Seventh Circuit has referenced the importance of a gang or cartel’s *modus operandi* as evidence of nexus in other cases as well. In *Gonzalez Ruano v. Barr*, 922 F.3d 346, 355 (7th Cir. 2019), the Court found that a Mexican cartel’s specific use of violence against particular parts of the community (particularly women) to terrorize the community into submission demonstrated that the violence inflicted on the petitioner and his family was not merely a personal dispute, but part of the cartel’s operational policy. Similarly, in *W.G.A.*, 900 F.3d at 966, the Court referenced country condition documentation demonstrating “widespread recognition that the Salvadoran gangs target nuclear family units to enforce their orders and to discourage defection” as evidence that the gang had targeted the petitioner on account of his family membership, as opposed to a personal dispute. Attorneys should focus on country condition documentation and expert affidavits that discuss violence against those who resist extortion or recruitment as part of an intentional policy that is vital to the gang’s ability to control territory and maintain its financial stability.

¹³ Despite prior gaps in some of the State Department Human Rights Reports, the 2020 report for Honduras, for example, refers specifically to “a pattern of male-dominant culture and norms” as one of many obstacles to the country’s response to domestic violence.

- 2) Attorneys should remind adjudicators that while a gang or cartel may target many individuals for many reasons, the relevant question for the client’s case is whether he was or will be targeted on account of his protected ground. It is not necessary to establish that the gang targets all members of the group or that the gang does not target anyone but members of the group. *R.R.D.*, 746 F.3d at 809; see *Tapiero de Orejuela*, 423 F.3d at 673 (“While we are sure that FARC would be happy to take the opportunity to rob any Colombian (or foreigner for that matter) of his money, it is those who can be identified and targeted as the wealthy landowners that are at continued risk once they have been approached and refused to cooperate with the FARC’s demands.”). Similarly, *Sarhan* provides a useful response to the idea often raised by ICE trial attorneys or adjudicators that an individual’s failure to abuse other women who are in relationships they are unable to leave undercuts the nexus element. *A-B-1*, 27 I&N Dec. at 339. As the Seventh Circuit noted regarding honor killing:

[T]he families are not taking this step [honor killing] to make a personal statement. They do it because their society tells them . . . their own social standing will suffer if they do nothing. The fact that Besem has not killed others says nothing about whether his persecution of Desi will be on account of her membership in a particular social group. Imagine the neo-Nazi who burns down the house of an African-American family. We would never say that this was a personal dispute because the neo-Nazi did not burn down all of the houses belonging to African-Americans in the town. The situation here is analogous.

658 F.3d at 657.

- 3) Finally, NIJC recommends that attorneys break their nexus argument into three sections.

Prove Nexus Through:

- 1) Statements made by the persecutor and others
- 2) Discussion of the type of harm itself and how it demonstrates nexus
- 3) Country condition evidence demonstrating the persecution occurs because of the persecutor’s operational policy and/or because the government has deemed it a permissible way to treat the people who share the protected ground.

First, provide the direct evidence (primarily, the specific statements made by the persecutor and others) demonstrating the client was persecuted on account of her social group membership. *See W.G.A.*, 900 F.3d at 966 (explaining that the timing of the persecution demonstrates the reason for it and that “the gang’s own words reveal their motivation.”).

Second, where appropriate, demonstrate that the harm itself is evidence of the reason for the harm.¹⁴

Third, establish that the country condition evidence provides circumstantial evidence of the reason for the harm, explaining the *modus operandi* of the persecutor and/or that when there is governmental inaction in the face of overwhelming evidence of gender violence, the country condition evidence itself demonstrates persecution on account of a gender-based protected ground. *See Sarhan*, 658 F.3d at 656 (“[The asylum seeker’s brother] is killing her because society has deemed that this is a permissible . . . course of action and the government has withdrawn its protection from the victims.”).

E. Briefing the issue

After consulting with NIJC and defining the PSGs (making sure to preserve all groups per W-Y-C-), NIJC pro bono attorneys must defend the PSGs in their legal briefs under Seventh Circuit law and in the face of BIA case law. NIJC pro bono attorneys should

¹⁴ In *Kasinga*, 21 I&N Dec. at 366, the BIA recognized that female genital mutilation (“FGM”) is a form of “sexual oppression that is based on the mutilation of women’s sexuality in order to assure male dominance and exploitation.” In an asylum claim based on a fear of FGM, it is therefore not required for the persecutor to state a desire to control the female victim’s sexuality in order to establish the nexus element; the reason for the harm is implicit in the act itself. *See Karouni v. Gonzales*, 399 F.3d 1163, 1174 (9th Cir. 2005) (finding that the shooting of the petitioner in the anus was “essentially *res ipsa loquitur* evidence” that he was shot because he was gay).

Rape, stalking, domestic violence, sexual assault, and femicide, similar to FGM, are particular types of harm inflicted on women and used to demonstrate and assert power over them. *See Angoucheva v. INS*, 106 F.3d 781, 793 n.2 (7th Cir. 1997) (Rovner, J., concurring) (stating that “[r]ape and sexual assault are generally understood today . . . as acts of violent aggression that stem from the perpetrator’s power or and desire to harm his victim”); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (asserting that “[r]ape is . . . about power and control”) (citation omitted). The Department of Justice has described domestic violence as one of several “forms of mistreatment *primarily directed at girls and women*” that “may serve as evidence of past persecution on account of one or more of the five grounds.” Phyllis Coven, U.S. Dep’t of Justice, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, at 4 (May 26, 1995) (emphasis added) available at <http://www.unhcr.org/refworld/docid/3ae6b31e7.html>.

request a template brief from their NIJC point-of-contact; it is not necessary to reinvent the wheel!

As noted above, attorneys should argue that positive circuit precedent remains binding, but also assert that their clients' groups meet the social distinction and particularity tests. Arguments can be made that Seventh Circuit precedent remains binding unless and until the Court reexamines the reasonableness of the BIA's new decisions. However, attorneys should nonetheless briefly explain how their clients' PSGs remain viable under the social distinction and particularity requirements, even if they should not apply. In all PSG cases arising in the Seventh Circuit, NIJC recommends that attorneys include a footnote explaining the following:

The Seventh Circuit had repeatedly rejected the social visibility/distinction and particularity tests and affirmed the pure, *Acosta*-only test. *See, e.g., Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) (rejecting the social visibility test); *Cece*, at 674-75 (rejecting particularity (breadth) as a bar to social group status); *Salgado Gutierrez v. Lynch*, 834 F.3d 800, 805 (7th Cir. 2016) (rejecting breadth and homogeneity as requirements for establishing a particular social group); *Lozano –Zuniga v. Lynch*, 832 F.3d 822, 827 (7th Cir. 2016) (“This circuit defines social group as a group “whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change.”); *W.G.A.*, 900 F.3d at 964, 294 n.4 (noting that the Court is declining to analyze the BIA's particular social group requirements under *Chevron*, but that the petitioner's arguments that these requirements are unreasonable “have some force.”).

The importance of asserting all applicable PSGs at the immigration court level cannot be overstated in light of *W-Y-C-*. Proposing more groups than necessary does pose some risk that the strongest claims will be diluted or overshadowed by the others. Discussing PSGs with NIJC far in advance of briefing, and sending briefs to NIJC for review far in advance of the merits hearing will help ensure that attorneys are presenting all the necessary groups, without including too many unnecessary ones. Attorneys must also remember that for each social group presented, a full legal argument must be made (regarding whether persecution was or will be on account of that group).

In all asylum cases, but especially those based on PSG membership, it is vital that attorneys clearly separate the asylum elements in their briefs and when arguing their cases before the courts. Although the BIA in *M-E-V-G-* states that adjudicators must be sure to separate the assessment of whether the applicant has established a protected ground from the issue of nexus (the “on account of” prong), the rest of the BIA's analysis says otherwise. 26 I&N Dec at 242. The BIA's analysis of the PSGs in *M-E-V-G-* and *W-G-R-* frequently

conflates the question of whether the PSG is cognizable with the question of whether the applicant was targeted on account of his PSG membership. *See e.g., W-G-R-*, 26 I&N Dec. at 222 (“Other parts of the report also indicate that such discrimination and . . . harassment are directed at a broader swatch of people . . . even if they never had any affiliation with a gang. . . . This broader grouping suggests that former gang members are not considered to be a distinct group by Salvadorans.”). Attorneys briefing PSG-based asylum claims must therefore clearly separate the PSG element from the nexus element in their briefs. Discussion of reasons why a client was targeted should remain within the nexus section of the brief, not the PSG section.

* * *

The definition of the particular social group ground for asylum eligibility is in flux and is likely to remain that way for the foreseeable future. Through skilled lawyering and carefully developed records, asylum seekers and attorneys will be able to successfully present particular social group-based claims no matter what changes occur in the coming years.

For more information on representing asylum seekers, please review the resources on NIJC’s website at <https://immigrantjustice.org/for-attorneys/legal-resources>. Attorneys representing asylum clients through NIJC are encouraged to consult with NIJC regarding any questions about their case.