Pro Bono Asylum Roundtable
“Membership in a Particular Social Group”

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www.immigrantjustice.org
Welcome

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The National Immigrant Justice Center (NIJC), a program of Heartland Alliance for Human Needs & Human Rights, promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. Throughout its over 30-year history as an organization and its more than 25 years of pro bono service, NIJC has been unique in blending individual client advocacy with broad-based systemic change.

NIJC serves more than 8,000 immigrants annually with the support of a professional legal staff and a network of over 1,500 pro bono attorneys.

NIJC has pro bono opportunities available for a variety of immigration case types, including asylum, detention, special immigrant juvenile status, VAWA & U visas, citizenship clinics, and asylee/refugee family petition and adjustment clinics.

NIJC’s pro bono programs
- Conduct in-depth case screening, assessment and acceptance
- Placement with pro bono attorneys
- Case management, attorney support and technical assistance
About NIJC’s Asylum Project

NIJC’s Asylum Project represents asylum seekers through *pro bono* attorneys at law firms in Chicago, Milwaukee, and Indiana.

NIJC has over 200 open asylum cases today.

The majority of NIJC’s asylum clients currently come from Eritrea, the Republic of the Congo, the Democratic Republic of the Congo, and Central America.

NIJC maintains a 90 percent success rate in representing asylum seekers. Nationwide, USCIS and EOIR have only approved about 30 percent of all asylum cases in recent years.

In FY2011, NIJC and its network of *pro bono* attorneys obtained asylum and other protection-based relief for over 100 individuals.
The Evolution of Particular Social Group Case Law

Katie Kersh,
Legal Intern

National Immigrant Justice Center
An individual is eligible for asylum if she “is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA §§ 101(a)(42)(A); 208(b)(1)(A).

- Definition based on international law: UN Protocol Relating to the Status of Refugees, Art I(2)
Asylum: Elements

1. “Well-Founded Fear”
2. of “Persecution”
3. Perpetrated by the government or an entity the government cannot control
4. On account of the following factor(s)
   - Race
   - Religion
   - Nationality
   - Political Opinion
   - Membership in a Particular Social Group
Must establish nexus between the persecution suffered/feared and …

…at least one of the five protected grounds

- Race
- Religion
- Nationality
- Political Opinion
- Membership in a Particular Social Group
1. **Race**: Broad meaning
2. **Religion**
3. **Nationality**: Not just citizenship; can include ethnic or linguistic group. May overlap with race.
4. **Political Opinion**: Actual or Imputed (e.g. child of political activist, NGO worker in rebel-controlled area)
5. **Membership in a Particular Social Group**: One of the most common and most complex bases for asylum claims.
UNHCR Protocol

- Handbook definition of a PSG:
  “A particular social group” normally comprises persons of similar background, habits or social status.”
- No specific, closed list
Reconciles the two main approaches to the particular social group analysis:

- **Immutability**: innate, unchangeable characteristics, so fundamental to human dignity that group members should not be compelled to forsake them.

- **Social Perception**: whether a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.
UNHCR Approach

“A particular social 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.”

- 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 ¶ 11.
UNHCR approach

- Acknowledges historical permanence
- Acknowledges sex as social subset
- Persecution cannot define social group, but acts of persecution may serve to satisfy or create group
- Social visibility is an alternative way to establish a PSG, not an additional requirement
- Size of social group not relevant criterion
Standards for determining PSG (*Acosta* test)

- Characteristics must be:
  - Common
  - Immutable
  - Something members *cannot change* OR something they *should not be required to change* because it is fundamental to their individual identities or consciences

- May include shared past experience: former military leadership or land ownership

- Decided on a case-by-case basis
“A group whose members share common characteristics that members of the group either cannot change or should not be required to change because such characteristics are fundamental to their individual identities.”

(Acosta at 17.)
Social Visibility

- **Matter of C-A:** “Volunteer government informants” are not a socially visible group
  - Social visibility is an important consideration in identifying a PSG
  - Prevents PSGs from being a “catch all” applicants who are not protected by other four grounds

- **Matter of H:** Applicant’s membership in the Marehan subclan in Somalia was socially visible
  - “Linguistic commonalities” of clan are recognizable
  - Note: size of group is not relevant to determining PSG
Particularity (and confusion with nexus)

- **Matter of C-A-:**
  - Not in a “substantially different” situation from anyone who “threatens the cartels interests”
  - Characteristics of social group must have significance to persecutor
  - Cannot encompass general population, must be “narrower”

- **Matter of S-E-G-,**
  - “whether the proposed description is sufficiently “particular” or is too amorphous.”
  - “Family members” could include uncles, aunts, cousins etc.
  - The motivations of the gang members in targeting young males could arise apart from any perception that the males in question were members of a class.
In general, the 7th Circuit has:

- Adopted the BIA’s definition of PSG (shared, immutable characteristics)
- BUT has rejected the social visibility requirement
Parents of Burmese student dissidents comprise a particular social group

- Adopts *Acosta* test:
  - Common, immutable characteristic
  - Defining characteristic cannot be changed or should not be required to be changed
- Rejects social visibility as a requirement, although notes it’s useful in the overall analysis
- Emphasizes that establishing PSG is only one of three requirements for eligibility (must also establish membership in the group and a well-founded fear based on this membership)
Gatimi v. Holder (2009): Former members of the Mungiki faction in Kenya constitute a PSG

- Reaffirms “former membership” as an immutable characteristic
- Rejects social visibility requirement
  - BUT, reiterates that group must have common characteristics other than persecution

- No PSG exists when:
  - Members have no common characteristics, OR
  - They can change characteristics without significant hardship
7th Circuit continued

*Benitez-Ramos v. Holder (2009)*

- Applicant’s former membership in a well-recognized gang is sufficiently specific and not amorphous and warrants classification as a PSG

- Rejects BIA’s social visibility requirement
  - “External criteria” should not determine PSG
  - Visibility is relevant on grounds of whether a person is likely to be persecuted, but irrelevant to whether persecution is on the ground of group membership
Perdomo v. Holder

At the BIA on remand from the 9th Circuit (published decision)

- Perdomo, a Guatemalan woman, enters the US in 1991 at age 15. In 2003, she is placed in removal proceedings. In immigration court, she requests asylum because she fears future persecution as member of the social group “women between the ages of fourteen and forty who are Guatemalan and live in the United States.”

- Perdomo’s fear is based on high incidence of femicide in Guatemala. She provides several country reports that document the brutal torture and killings of women, as well as the impunity of the perpetrators.
  - No past persecution – future fear claim only
“Guatemalan women” constitutes a PSG under a pure reading of Acosta

- Gender is an immutable characteristic
- Size of group not relevant
  - None of the other protected grounds are limited by number
- Establishing PSG ≠ establishing nexus
Particular Social Group vs. Nexus

Lisa Koop,

National Immigrant Justice Center
Why does a proper PSG analysis matter?

Improper analysis:
- Makes for an *ad hoc* system
- Creates overly narrow refugee determinations
- Prevents attorneys from being able to meaningfully counsel clients
Revisiting the Elements of Asylum

1. “Well-Founded Fear”
2. of “Persecution”
3. Perpetrated by the government or an entity the government cannot control
4. On account of the following factor(s)
   - Race
   - Religion
   - Nationality
   - Political Opinion
   - Membership in a Particular Social Group
The characteristic of an asylum seeker that causes the persecutor to seek to inflict harm.
The connection between the harm and the protected ground.
“On Account Of”

PERSECUTION → NEXUS → PSG
“The question whether a proposed group [meets the PSG requirements] must be considered in the context of the country of concern and the persecution feared….The respondents in this case are victims of harassment, beatings, and threats from a criminal gang in El Salvador. There is little . . . evidence . . . To indicate that Salvadoran youth who are recruited by gangs but refuse to join . . . suffer from a higher incidence of crime than the rest of the population…. [S]uch gangs have directed harm against anyone . . . . The respondents are therefore not in a substantially different situation from anyone who has cross the gang, or who is perceived to be a threat to the gangs interests.”

“We also disagree with the respondent’s claimed social group . . . The respondent’s reliance on *Tapiero de Orejuela v. Gonzales*…is misplaced. In *Tapiero*…the group was defined not simply as wealthy landowners, but as wealthy and educated cattle farmers….The record there reflected that this particular combination of features was a target of the FARC’s violent campaigns. Here . . . The record does not demonstrate that the FARC targets the proposed group.”

-Unpublished BIA decision, 2011.
“Safaie asserts that Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group. We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.”

Safaie v. INS, 25 F.3d 636 (8th Cir. 1994)
Rejecting a PSG on Policy Grounds

“The Board has a legitimate interest in resisting efforts to classify people who are targets of persecution as members of a particular social group when they have little or nothing in common beyond being targets.”

Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009).
Creating and Defending a Particular Social Group

Ashley Huebner, Supervising Attorney

National Immigrant Justice Center
Ask, “why did the persecutor target my client in the past?” and “why will the persecutor target my client in the future?”

Find the immutable characteristic

- Remember that the characteristic can be one that the members cannot change OR
- that members should not be required to change because the characteristic is fundamental to their identities OR consciences
Tips for Creating a Particular Social Group

Common Errors to Avoid

- Defining the social group by the persecution
  - But remember that if the future harmed fear is different than the past harm, the social group for the future persecution can be related to the past persecution suffered

- Using ambiguous terms
  - E.g., “wealthy/affluent”; “Americanized”; “family members”;
Defending Your Particular Social Group

Common adjudicator concerns and possible responses:

- Criticism: the social group is too broad
  - Response: there is no requirement that PSGs be narrowly defined. All of the other protected grounds are extremely broad.

- Criticism: not all members of the group are being persecuted
  - Response: this relates to nexus, not to the existence of a PSG.
  - Also, there is no requirement that all members of the group be persecuted. Individuals seeking asylum based on another protected ground do not need to show that all individuals with that protected characteristic have been persecuted.
Defending Your Particular Social Group

Common adjudicator concerns and possible responses:

➢ Criticism: the persecutor targets other people not included in the social group
  • Response: the only relevant question is whether the persecutor targeted my client on account of her PSG.

➢ Criticism: the group is not based on an immutable characteristic.
  • Response: the group is based on a characteristic that is fundamental to the group members’ identities or consciences.
Ana’s Case:

Ana grew up in El Salvador. In 2008, Ana met Juan at her job and they began dating. Soon after they began dating, Juan became controlling and began verbally and emotionally abusing Ana. In December 2009, Juan began to physically abuse Ana. While beating her, he often told her that she was his woman and if she did not do as he said, she would have to face the consequences. Ana called the police during one violent incident, but although the police only detained him for 24 hours and then let him go without any punishment. When Juan returned home, he grabbed a pair of scissors and threatened to cut out Ana’s tongue for calling the police. Ana fled El Salvador two days later and entered the United States on May 6, 2010.
Mariama from Mali:

Mariama is a 17-year-old girl from Mali. When she was 14 years old, her father ordered that she undergo female genital mutilation (FGM) to prepare her for an arranged marriage. Mariama’s older sister had been subjected to FGM when she was a teenager and suffered many medical problems afterwards as a result. After Mariama’s cousin was subjected to FGM, she bled to death. Mariama was terrified of being subjected to FGM and told her father she did not want to undergo the procedure. In response, her father beat her and threatened to disown her if she refused to undergo FGM. Mariama’s aunt helped her to flee Mali and she entered the United States on a tourist visa.
Veronica from Honduras:

Veronica is an 18-year-old girl from Honduras. Veronica grew up in a poor neighborhood of San Pedro Sula controlled by the Mara Salvatrucha gang. In 2009, she began receiving threats from Carlos, an MS member who told her that she was going to be his girlfriend. Whenever Veronica saw him or his friends on the street, they made lewd comments to her and said that she would be Carlos’s girlfriend whether she liked it or not. One afternoon, Carlos stopped Veronica on the street and asked her if she wanted to be his girlfriend. Veronica tried to run away, but he grabbed her arm, forced her into an alley and raped her. He told her that he would kill her if she told anyone and that the police wouldn’t help her because they were afraid of MS. Veronica did not report the attack to the police because she was afraid Carlos would find out. She also knows other girls in her neighborhood have been sexually assaulted and the police have not done anything to find the perpetrator. Veronica fled Guatemala in 2010 and entered the United States on July 1, 2010.
Hector from Mexico:

Hector is a 35-year-old man from Mexico. He lives with his wife and two sons in Cuernavaca and works as a mechanic. In 2010, a drug cartel came to his garage and told him that he had to begin paying the cartel a tax if he wanted to continue operating his business. The cartel went to every other small business in the town and threatened that they all had to pay a tax as well. Hector and several other of the businesses decided that they would all oppose the cartel and refuse to pay the tax. Two weeks later, the cartel killed one of the other businessmen in the group who had refused to pay the tax and left threatening notes at the businesses of all the other men warning them to pay the tax. Two days later, the body of one of the other businessmen in the group was found. The following day, cartel members attempted to kidnap Hector’s son on his way home from school and shot at Hector’s garage. Hector and his family fled to the U.S. border and requested asylum. After he passed a credible fear interview, Hector and his family were paroled into the United States so they could apply for asylum.
Jose from Guatemala:

Jose is a 17-year-old boy from Guatemala. He has never known his father and his mother went to the United States when he was five years old, leaving him in the care of his grandmother. Jose’s grandmother was unable to support him and from a young age, Jose worked in the streets as a shoe shiner to earn money to buy food for himself. When he was 12 years old, he began selling drugs on occasion for the Mara 18 gang. Sometimes, the gang paid him in drugs instead of money. When Jose was 14 years old, the gang began pressuring him to join them and repeatedly beat him up until eventually, he was initiated into the gang. When Jose was 15 years old, the gang ordered him to kill the uncle of Jose’s childhood friend. Jose did not want to kill the man, but knew the gang would kill him if he did not obey. He left his town the next day and fled Guatemala. He eventually entered the United States without inspection.
Luis from Honduras:

Luis is a 19-year-old man from Honduras. When Luis was a teenager, the Mara Salvatrucha gang began gaining power in his neighborhood. Soon Luis began to see young men with MS tattoos outside his school and the field where he played soccer with his friends. They began threatening Luis and his friends that they had to join MS. On several different occasions, MS members waited for Luis outside his school and outside his home. The MS members had guns and would follow Luis menacingly. In May 2009, two MS members flashed their guns at Luis outside of his school. Two weeks later, MS killed one of Luis’s friends after he had repeatedly refused to join the gang. For the next three weeks, Luis stayed inside his house and did not go to school because he feared the gang would kill him next. In early July 2009, Luis left his home to buy food. After leaving his house, two MS members saw him and began chasing him. Luis was able to get away and ran to the home of his aunt. He fled Honduras two days later and entered the United States in late 2009.
Interviewing Survivors of Gender Violence

Lisa Koop,

National Immigrant Justice Center
Cultural Barriers Facing Immigrants

- Language limitations
- Extreme Isolation
- Cultural ideas of family shame and honor
- Close-knit communities
- Role of religion
Domestic Violence Tactics Used by Abusers to Exert Power and Control

- Isolation
- Emotional Abuse
- Economic Abuse
- Intimidation
- Sexual Abuse
- Using Citizenship or Residency Privilege
- Physical Abuse
- Threats

Power and Control
The Cycle of Abuse

- Denial
- The Honeymoon
- Explosion
- Tension-Building
Best Practices: Getting Started

- Consider gender dynamics of the legal team
- Ensure client is physically comfortable
- Build rapport
- Stress confidentiality
- Establish your role as the attorney
  - You are not a therapist
  - You are not a social worker
Best Practices: Getting Started

- Explain legal requirements
- Offer estimated timeline
- Manage expectations
Best Practices: Interviewing

• **Don’t ask**: Did your husband beat you?

  **Ask**: Did your husband every slap you, punch you, kick you, shove you, bite you, choke you, poke his finger in your chest, raise his fist at you, grab you, pull your hair, throw things at you, destroy your property, threaten to use a weapon, threaten you with a weapon, etc.?

• **Don’t ask**: Did your husband ever rape you?

  **Ask**: Did your husband ever force you to do anything sexually against your will?

• **Don’t ask**: Did your husband ever threaten you?

  **Ask**: Did your husband tell he would hurt you physically, tell you he would take your children away from you, tell you he would hurt your family, etc.?
Best Practices: Concluding

• Transition out of emotionally intense interview when concluding

• Resist drifting into non-attorney role
Questions & Answers
THANK YOU!

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