Gaining Ground(s)

The Argument to Include Survivors of Domestic Violence and Individuals Escaping Gang Recruitment in the Northern Triangle countries of Latin America

Policy Brief

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POL 523A SP22 201 401: Immigration and Border Security

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April 10, 2022

Executive Summary

For those fleeing their home country due to victimization through domestic violence or fleeing gang recruitment and violence because of resistance, there is no readily identified protected ground that one could use for claiming asylum. Individuals have in the past used the concept of *particular social group* (PSG) a rather ambiguous and amorphous claim to make the argument that they are fleeing from persecution through non-state elements within their own country. U.S. immigration law and officials tasked to make judgements on these claims are often at odds with what constitutes a PSG and depending on the court or individual trier of fact make conflicting judgments that may spell a death sentence for those fleeing from such persecution. This brief will address the issue of fleeing domestic violence and gang recruitment as grounds for asylum in the United States, the laws that partly and weakly address such claims, and the recommendations to make the argument to include these two issues to at least be acknowledged as a PSG or to rightly add two more protected grounds for asylum, fleeing domestic violence and fleeing gang recruitment and associated retribution of violence for refusing to be recruited into such criminal gangs.

Background

Human migration has existed for millennia and seemingly is a part of the human experience. For much of human existence movement was relatively free without the concept of political boundaries and protectionist states. Once sovereign lands and governments began to lay out boundaries to keep others out, human migration was limited to those lands that would welcome outsiders. People throughout history have moved from one place to another for a variety of reasons; to find a better life and livelihood, for food, water, or to escape harsh climatic conditions. Others have moved to flee warfare and conflict as well as to find safe haven or "asylum" from persecution. The concept of asylum had it roots in religion where one would find safety from persecutors within a "temple or church (that) provided a sanctuary from manmade jurisdiction and provided religious protection, or altar, protection (Asylum Insight, 2016). It appeared simple as that – find a sacred house of worship or religion, beg for sanctuary, be let in within the walls, and no harm would come to them. Today, it is much more complicated. What constitutes a refugee, asylee, and various other terms to asylum have prevented many from finding those safe havens from prosecution from which they seek.

In the United States people may seek asylum provided that they can persuade a trier of fact that they have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" (Grayner, 2012, p. 1427). Focusing on *particular social group* (PSG), if a person seeking claims their "membership" in a PSG they must ""(1) identify a group that constitutes a 'particular social group' . . . (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership" (Mendoza, p. 16) Essentially this is interpreted as; this group exists in form, I (the asylee) am part of that group, and these are the reasons why I would be prosecuted by this particular group. Identifying a PSG has been identified under a number of guises to include homosexuals, persons belonging to work unions, and targeted individuals and victims of forced genital mutilation through traditional societal customs or governmental population control (Mendoza, 2016). At the same time a PSG can also be difficult to properly define as no such proper definition is found in the U.S. Refugee Act of 1980. What is considered a PSG often falls to the Bureau of Immigration Appeals (BIA). The BIA has provided the requirements to determine that a group may be a PSG if it has "a shared 'immutable' or 'fundamental' characteristic, 'social visibility", and 'particularity" (Mendoza, p. 16). Furthermore, a person seeking asylum must show "that he has been a victim of persecution at the hands of a government actor or a group of individuals the government is unable or unwilling to control" (Mendoza, p. 13-14) and there must be a nexus that can be seen between that persecution of the government or non-government actors and one of the protected grounds for asylum which "was or will be at least one central reason for persecuting the applicant" (Smith, p. 2) Thus, the Refugee Act does not necessarily extend to everyone seeking asylum in the United States despite the seemingly catch-all, ambiguous description of *particular social group.* Asylum is a matter of discretion (Smith, 2020) and in the United States it is at the exclusive discretion of the United States Attorney General who is part of the Executive Branch

of government. Of the five protected grounds for considering asylum in the United States, "political opinion and membership in a particular social group are the most nebulous and discretionary bases for granting asylum" (Mendoza, p. 15), and beyond the BIA, the U.S. Attorney General has what seemingly has been seen as a subjective view of what constitutes a PSG based on each matter the Attorney General gets involved in. Bermeo (2018) notes that in 2016 "

Asylum in the United States has been considered for persons of all backgrounds and ages. Recently these general categories have found salience in two groups of individuals from the Central American countries of Guatemala, El Salvador, and Honduras. The three countries have consistently ranked in the top ten globally for homicide rates (Bermeo, 2018). From 2014 to 2016, Mendoza (2016) notes that "57,000 unaccompanied minors have crossed the United States border" (p. 1). Bermeo (2018) notes that in 2016 "42 percent of people apprehended at the U.S. southern border came from Northern Triangle countries, compared to 13 percent in 2010." In a survey conducted by Médecins Sans Frontières (Doctors Without Borders) on people who were from the Northern Triangle countries that were waiting in Mexico to cross over into the United States found that "Thirty-nine percent of respondents cite attacks or threats to themselves or family as the reason for leaving" (Bermeo, 2018) In addition, 40 percent said they had a relative who had been killed within two years and 17 percent reported knowing someone who had disappeared. Both forced gang recruitment on young males and women fleeing abusive domestic relationships has had a push factor for people fleeing those Northern Triangle countries to the United States. As a result, "generalized violence "has played a decisive and forceful role" for recent arrivals" (Bermeo, 2018) in the United States.

Two Particular Social Groups that Apparently Are Not *That* Particular

"Abuse in Guatemala and El Salvador, though domestic violence is by no means limited to two countries" (Lewis, p. 384-385) but the author notes that it is "one of the most dangerous places in the western hemisphere for women and girls due to high rates of physical and sexual violence." More than a quarter of the women in El Salvador have experienced domestic violence" (Lewis, p. 387) Lack of proper police response and investigation often does not bring criminal charges against the batterer due to the societal construct of the domestic conflict being considered more of a private matter between two people in a relationship than a criminal act shows the indifference of government authorities (the national police and courts) and the complicit nature which these entities allow men to commit violence on women. With it being in the spotlight on the world stage, Guatemala has attracted the attention of "human rights offices and commissions (who) have remarked on the deeply rooted discrimination against women, as well as an environment conducive to repeated violence against women" (Lewis, P. 385). The high rate of domestic violence has even caught the attention of the U.S. State Department (Lewis, 2020). Given the attention that domestic violence has attracted global observers, and the indifference and lack of enforcement these countries show towards these violent acts to control, it would seem obvious that countries like the U.S. would at the very least give prime

consideration for asylum claims under domestic violence persecution. Unfortunately, that is not always the case.

As it pertains to criminal gangs such as MS-13 *(Mara Salvatrucha*) and the 18th Street Gang (*Calle Dieciocho*) and their activity of forced recruitment in the Northern Triangle countries, young males who have resisted efforts to forced gang recruitment have been met with threats, violent reprisals, and even death (Grayner, 2012) The gangs aforementioned gangs had their roots in Los Angeles, California, in the 1990s as young men from El Salvador fled civil war and strife in their country and sought refuge in the U.S. Seeking a sense of belonging in a new country, these young men came together for belonging and protection, forming criminal gangs. Strict immigration laws in the mid-1990s had caused many of these gang members rounded up for criminal activity and deported back to El Salvador where they regrouped and became a powerful presence, rivaling even the El Salvadoran national police and security agencies. Their presence had become powerful enough to control large population areas where the police would seek permission to enter these enclaves controlled by these gangs (Grayner, 2012). To keep up membership numbers and operating with relative impunity, these gangs became involved in a new form of recruitment, forced recruitment (Grayner, 2012). Those who resisted recruitment against their own morals and principles were seen as disrespecting the gang's intent and mandates and thus harassed and persecuted for failing to comply. Simply put, Mendoza (2016) in quoting Juan Fogelback, noted a saying in some Salvadoran neighborhoods, "if you're not in a gang, then you're against gangs" (p. 10).

Specifically, criminal gangs in the Northern Triangle countries target three groups of youth or young males, "individuals from gang-controlled neighborhoods, young men who spend time in prison, and at-risk children" (Grayner, p. 1425). According to Grayner (2012) "Well-intentioned youth raised in gang-controlled neighborhoods are more susceptible to repeated harm and recruitment efforts" (p. 1425). Resisting not only puts the youth in harms way but retaliation may also be inflicted on the youth's family in the form of violence or in the case of female family members, rape. Concerning men who are recruited in prisons and detention facilities, as a result of perceived gang associations made by the national police young men in El Salvador are often detained with no probable cause concerning gang affiliation or association but only "look the part." These detentions put them in directly with known gang members and affiliates. Given a choice of joining for protection of being on one's own and risking injury or death, these young men are put in an unnerving situation of saving themselves from harm or joining a criminal gang they would not have otherwise had joined if they were free. Once individuals join gangs, it is extremely difficult, if not impossible, to leave the gang without serious repercussions. The last vulnerable group, at-risk children are often targeted, unbelievably, in schools where other youth gang members may also be present attending (Grayner, 2012). Mendoza (2016) notes that such young "child recruits may be particularly useful to gangs because they are generally immune from prosecution under the law" (p. 11) and thus a valuable resource to these gangs in performing such functions like message delivery and being lookouts before moving on to more advanced criminal activity. It is these vulnerable demographics that have no protection from these criminal de facto ruling powers paired with the pervasiveness and reach of the gangs that makes escaping forced gang recruitment extremely difficult, dangerous, and potentially deadly.

Like survivors of domestic violence who flee their batterers, youth attempt to flee to another locale in country but are found easily enough in time. As a result, "(o)ften, the only choice is to run beyond the gang's sphere of influence" (Mendoza, p. 1423) and they flee north to the U.S.-Mexico border seeking asylum in the U.S. Often with them but unbeknownst to them, in these large caravans, are women who have been subjected to extreme forms of domestic violence from their partners or husbands.

Origins of asylum law

International laws regarding asylum are mentioned in the 1948 Universal Declaration of Human Rights, and The United Nations 1951 Refugee Convention, with the 1967 Protocols that are often paired with the articles of the 1951 Convention. Article 14 of the Universal Declaration of Human rights declares, "(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations" (United Nations, 1948, p.5)

In the United States, there exists an "affirmative asylum process that lays out the steps for an asylum seeker who is looking to gain asylum in the United States" (Lee, p. 510). The Refugee Act of 1980 seeks to address issues of refugee and asylum status of those seeking entry under these premises. In the 1980 Act, lawmakers added to the definition of "refugee" to "include a person with a "well-founded fear of persecution" (Lee, p. 515) Additionally, under the Act a "refugee" also includes "a person "who is outside his/her country of nationality or habitual residence", or someone who is without any nationality, and is unable or unwilling to return to his or her homeland because of persecution or a well-founded fear of persecution on account of raise, religion, nationality, membership in a social group or membership in a political group or party" (Lee, p. 515). Under this Act, survivors of domestic violence were given consideration to seek asylum under that category but a recent decision in 2018, *Matter of A-B-* had shut that door of opportunity. A more recent decision in *Grace v. Whitaker* reopened the door for domestic violence survivors to argue for asylum once again under that claim.

Issues/Problems in Asylum consideration

Particular Social Group, social visibility and particularity

"At the heart of refugee law is the ideal that remedies such as asylum are for the helpless men, women, and children who are persecuted in their countries on account of their race, religion, nationality, membership in a particular social group, or political opinion" (Mendoza, p. 3). The problem however lies that when these asylees claim such rationales under the oppression they faced in their home country, domestic violence abuse or forced gang recruitment, they use *particular social group* (PSG) as their protected grounds. The reason for this is that *gender* (for domestic violence survivors) and *age vulnerability* (for youth forced into gang recruitment) in conjunction a with country of origin where segments of the population are apparent and

vulnerable are not included in the remaining four protected grounds. As a result of using *particular social group as grounds for asylum*, "many have been denied…as they do not fit neatly into the legal framework of asylum adjudication" (Mendoza p. 3). Grayner (2012) notes, ""Membership in a PSG is the most ambiguous (and contentious) of the five grounds for asylum" (p.1427). This is because there is not a concrete definition as to what constitutes a PSG in U.S. immigration law. Such considerations as to what constitutes or does not constitute a PSG falls to the BIA.

According to Lewis (2020) "Victims of domestic violence almost exclusively argue that the grounds for their persecution fall within the fourth category noted in this immigration statute: that the abused woman is a member of a PSG" (p. 384) To prove a PSG, the applicant seeking asylum must "establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question" (Lewis, p.384). Similarly, "Youth who articulate a particular social (group) based on their resistance to gang recruitment" (Mendoza, p. 3) are apt to be denied asylum as evidenced by a number of immigration/asylum hearing rulings find that "that this group lacks particularity and social visibility, two of the three requirements applicants must meet in order to articulate an acceptable particular social group" (Mendoza, p. 3). This is because of the ambiguous and amorphous qualities that applicants apply to their particular social group.

In one particular immigration case concerning PSG and asylum, *Matter of C-A-* (2006) the applicant in this case was denied asylum because the "proposed PSG was not socially visible" (Grayner, p. 1428). The applicant described the PSG he belonged to as "noncriminal drug informants working against the Cali drug cartel" (Grayner, p. 1428). Given that *social visibility* is the "extent to which members of a society perceive those with the characteristic in question as members of a social group" (Grayner, p. 1428), the judge found that this particular group was not socially visible (nor would they want to be) as being so would readily identify them not only socially but also to the Cali cartel on who they are informing on. Grayner (2012) further explained that the BIA articulated that "[w]hen considering the visibility of groups of confidential informants, the very nature of the conduct at issue is such that it is generally out of the public view" (p. 1428). Though this is only one matter in which the social visibility requirement was weighed with the proposed social group used by an applicant, the "social visibility requirement has been criticized as arbitrary" (Grayner, p. 1429) and has created a number of judgments all across the board either granting or refusing asylum with seemingly similar PSGs applied with similar circumstances for the applicant seeking asylum. The Seventh Circuit has criticized the social visibility requirement for asylum because the rationale used was that "because "a member of a group that has been targeted for assassination or torture or some other mode of persecution, (they) will take pains to avoid being socially visible" (Grayner, p. 1429), thus not satisfying the social visibility requirement. But they may qualify for the particularity element of the PSG requirement. The problem is when defining particular social group for asylum consideration, the BIA erroneously misinterpreted the United Nations Social Group Guidelines for defining a PSG where the UN only required one approach to defining a PSG, that is, either social perception *or* protected characteristic(s). The BIA has interpreted this as requiring both. As a result, the threshold to meet PSG has been harder to cross. It has not

however been without efforts to try to navigate the PSG landscape to fully understand what exactly a PSG is or isn't.

Court cases that reflect conflicting views using social visibility and particularity in PSG and the problems that stem from this

The first case that sought to find concrete ground in applying PSG status to asylum claims was the 1985 case of *Matter of Acosta* (Congressional Research Service, 2014). Though the applicant was not granted asylum based on the PSG defined, the court did identify that a PSG "should be 'construed as describing a "group of persons all of whom share a common, immutable characteristic'" (Congressional Research Service, p. 14). Mendoza (2016) notes that 'immutable' is something that "is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed" (p. 17), this could be seen as something readily identifiable as sex, or color of skin or even something not so readily identifiable but could be known like military affiliation or land ownership (Mendoza, 2016). With the foundations of particular social group laid, Grayner (2012) notes that the "*Acosta* definition makes sense because it captures the essence of the other four grounds of asylum—race, religion, nationality, and political opinion" (p. 1428), things which people cannot or should not change if they are targeted for persecution. This would appear to give the meaning of PSG virtually anything that which a person should not have to change to ensure their safety or lives. However, in the United States immigration system the "executive branch and the federal courts have been reluctant to treat "particular social group" as a "catch-all" (Congressional Research Service, 2014, p. 13) for any other group not able to specifically claim race, religion, nationality, or political opinion. Thus began the difficult journey down a road to asylum. The following cases are the chronological points along the way, after *Acosta,* that the immigration courts made several important decisions as to the consideration of immutable characteristics, social visibility, and/or particularity of a particular social group.

1999 – *Matter of R-A-*

One of the first notable attempts of using victims of domestic violence as a PSG for asylum was the 1999 case of *Matter of R-A-*. The applicant in this matter described her PSG as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" (Smith, 2020, p. 3). The BIA determined that she did not meet the threshold that her PSG was "recognized and understood to be a societal faction, or is otherwise a recognized segment of the population" in Guatemala" (Smith, 2020, p. 3). *R-A-* was later granted asylum when other conditions were met but this matter showed that meeting the threshold of a well-defined PSG for asylum purposes was difficult based on the construction of the definitions in immigration law.

2006 – *Matter of C-A-*

As mentioned in the section above, *Matter of C-A-* involved an applicant who was a noncriminal informant who dropped information on the Cali drug cartel and was now seeking

asylum on as such as a PSG. The courts again held that the PSG described did not meet the social visibility threshold but rather "limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members" (Congressional Research Service, p. 15). It is then, the court reasoned, that persecution from the cartel commences, not before discovery. The court also noted that the "proposed grouping of noncriminal informants was "too loosely defined to meet the requirement of particularity," (Congressional Research Service, p. 15) as informants could pass along information about anyone, not just the Cali cartel, to a number of entities to include the government or a competing cartel.

2008 - *Matter of S-E-G*

In *S-E-G-* the deciding court sought to define where along the PSG spectrum "the proposed description is sufficiently "particular," or is "too amorphous . . . to create a benchmark for determining group membership" (Grayner, 2012, p. 1430). The BIA in this matter denied asylum to three siblings claiming a PSG under "forced gang recruitment." Building from *Matter of C-A-,* the BIA in *S-E-G-* noted that the "essence (in *S-E-G-*) is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons" (Grayner, 2012, p. 1430). Though the BIA found that the PSG lacked social visibility and particularity, the matter did not entirely shut the door for people seeking to use forced gang recruitment as a PSG for asylum, but using direction from another immigration matter, *INS v. Elias-Zacarias,* "asylum cases must be decided on the facts and evidence set forth in the record of each individual case… by the reasonable, substantial, and probative evidence on the record" (Grayner, p. 1432), in other words, the totality of the circumstances of that particular matter presented to the court.

2009 - Gatimi v. Holder

As the BIA has defined the loose parameters of what can be a PSG, a number of federal courts have sought not to run against the grain and reinvent the wheel as to what exactly is a PSG but rather has deferred to the BIA's "guidelines." The Seventh Circuit however broke ranks and in the 2009 decision of *Gatimi v. Holder* rejected the "social visibility" requirement "on the grounds that it was inconsistent with the BIA's prior decisions (as well as) it viewed the BIA's discussion of social visibility as referring to literal or ocular visibility" (Congressional Research Service, p. 16)

2009 - *Matter of L-R*

The decision of the Seventh Circuit in *Gatimi v. Holder* was further built upon in the same year in *Matter of L-R-* with regards to social visibility. In *L-R-,* the Department of Homeland Security issued a supplement that "provided a template for a Mexican woman and victim of domestic violence to articulate a PSG with social visibility and particularity" (Grayner, 2012) through the new concept of *societal view* in establishing social visibility, meaning particular cultural norms that exist in a particular country can establish country conditions where society knows particular vulnerable groups of people exist in their society, it is that they are often *not seen*, thus taking the literal interpretation visibility out of the requirement for a PSG.

Though *L-R-* was a matter of a Mexican woman who was a victim of domestic violence where the police refused to help her because of those condoned norms of domestic violence between partners, the matter appeared to also apply to PSG asylum claims on forced gang recruitment where vulnerable youth may be able to apply the same "country-conditions" standard to prove that government entities like law enforcement cannot protect them from criminal gangs who forcefully try to recruit this particular social group that is *known to exist* in that society. By applying the *societal view* construct in lieu of *social visibility,* L-R- was granted asylum into the U.S. based on her claimed PSG. Social visibility was further built upon in the 2014 case of *Valdiviezo-Galdamez v. Attorney General* where the Third Circuit "viewed "*particularity* as "little more than a reworked definition" of the "discredited requirement of '*social visibility"* (Congressional Research Service, p. 16).

2014 – *Matter of M-E-V-G-*

The concept of social visibility was once again at the forefront in the asylum matter of *Matter of M-E-G-V* in 2014. Addressing a forced gang recruitment asylum claim, the Board of Immigration Appeals sought to clarify 'social visibility' and 'particularity' to assist triers of fact in making prudent judgments in asylum claims based on PSG. It appeared that the Circuit Courts were in obvious disagreement as to how to apply the social visibility and particularity requirements, with the Third and Seventh Circuit noting that the social visibility requirement lacked consistency (Mendoza, 2016) while the First Circuit normally deferred to the BIA's guidance concerning determining PSG. Over time, it appeared that one's chances of gaining asylum depended more on venue than on the specific facts of one's case. In *M-E-G-V-,* the BIA renamed 'social visibility' as 'social distinction' (Mendoza, 2016), which "according to the BIA, "[s]ocial distinction refers to social recognition" (Mendoza, p. 23). This renaming again, took out the ocular misperception that courts felt compelled to make judgments upon facts in the matter before them. Mendoza noted the BIA's rationale as "[t]o be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society" (p. 23-24). Social distinction provided a clearer path from which to establish asylum claims on PSG status, but the BIA held firm in *M-E-G-V-* when it addressed 'particularity'. In particular, the PSG "must also be discrete and have definable boundaries - it must not be amorphous, overbroad, diffuse, or subjective" (Mendoza, p. 24) meaning that it must show identifiable parameters to distinctly describe the group in question but not be as so broad to arguably include everyone. Further, "The BIA concluded that "not every immutable characteristic is sufficiently precise to define a particular social group" (Mendoza, p. 24)

Matter of A-R-C-G-, Matter of A-B-, and Grace v. Whitaker

While a relatively dangerous road toward asylum was smoothed out from *Acosta* through *M-E-G-V-* for domestic violence survivors, and young males and youth subjected to forced gang recruitment in the Northern Triangle countries, the matters of *Matter of A-R-C-G-, Matter of A-B-, and Grace v. Whitaker* showed once again the inconsistency of immigration law and the subjective rationales of those deciding such cases for these groups. In *A-R-C-G-,* the BIA held

"married women in Guatemala who are unable to leave their relationship" constitute a particular social group" and that they additionally share "the immutable characteristic…of marital status…where the individual is unable to leave the relationship" (Smith p. 3) as the terms "married", "women" and "unable to leave the relationship" have "commonly accepted definitions in Guatemalan society" (Smith, p. 3). With a machismo culture centered on male domination over women they are in domestic relationships with, people in Guatemala perceive that women in such relationships are subjected to domestic violence and thus constitute a PSG based on 'social distinction'. *A-R-C-G-* was monumental in opening the door for survivors of domestic violence originating from the Northern Triangle to seek asylum from their abusers that their country's government was unable to unwilling to protect them from, satisfying the concept of refugee and asylee. Despite the granting on asylum to the applicant in this particular case, it should be noted again that each claim of asylum based on similar PSGs must be carefully weighed and decided upon in each case, this matter was not the precedent, just the path.

The door to successful asylum claims based on PSG for survivors of domestic violence and forced gang recruitment was shut by Trump administration Attorney General Jeff Sessions when he intervened in the 2018 case *Matter of A-B-*. The applicant in *Matter of A-B-* was a Salvadoran woman who experienced domestic abuse from her husband and sought asylum in the U.S. The BIA reversed the denial of asylum from the immigration judge's ruling which was then subsequently reversed to denial of asylum by Sessions. The Attorney General claimed that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum," or meet the "credible fear" standard to warrant consideration of an asylum application" (Smith, p. 4). This decision also extended to individuals seeking asylum from forced gang recruitment as well. The rationale for Sessions' decision was that "a particular social group must 'exist independently' of the harm asserted," (Smith, p.4) such as claims found in *Matter of A-R-C-G-* where the PSG was married Guatemalan women who cannot to leave their relationship with their abuser. Essentially the harm inflicted upon the survivor is the reason why a woman cannot leave. In addition to claiming harm inflicted by private actors to those seeking asylum, the applicant must also show more than the government's "difficulty (in) controlling the private behavior…(it) "must show that the government condoned the private action 'or at least demonstrated a complete helplessness to protect the victims" (Smith, p. 4)

Later that same year in 2018, a federal court decision largely reversed the opinion of Attorney General Sessions in *Grace v. Whitaker.* A class action suit challenging Sessions ruling in *Matter of A-B-,* the federal judge ruled "that "the general rule [established by Matter of A-B-] is arbitrary and capricious because there is no legal basis for an effective categorical ban on domestic violence…claims"(Lewis, p. 400) and further, the Attorney General had "failed to 'stay within the bounds' of his statutory authority" (Lewis, p. 400), when he interpreted 'particular social group' in *Matter of A-B-.* Thus, *Grace v. Whitaker* once again provided an avenue for domestic violence victims and young men and youth to file asylum claims in the United States based on establishing a PSG ground; it again, however, did not explicitly say that domestic abuse victims could always establish PSG membership to qualify for asylum" (Lewis, p. 402). The

ruling "only recognized that there is no legal basis for an effective categorical ban on domestic violence victims presenting" (Lee, p. 527) their claims for asylum.

Lewis (2020) finds that the "legal tug-of-war in these decisions demonstrates a fundamental problem with the United States' current approach to domestic violence in the context of asylum" (p. 381). The issue also extends to people fleeing from conditions where they are forced to join criminal organizations that go against their principles and ideals but have no other alternative to do so lest great harm or death comes to them or their family. The alphabet soup of cases mentioned in this section provides no confidence for those seeking asylum for their persecutors despite the clearly legitimate claims that are on an equal level with the other four protected grounds. Unfortunately, what may work for one person seeking asylum from their abusive husband or partner as well as gangs like MS-13 and the 18th Street Gang, will not work the next time for another who desperately needs the same relief.

Recommendations

Despite these clarifications by the BIA for better interpreting the terms social distinction and particularity and the recent positive rulings that provides a path for asylum for survivors of domestic violence and those persecuted for resisting gang recruitment, the current climate can change at any time, in any case, brought before immigration judges. The BIA, the Attorney General under a new Executive administration, or even a future ruling party itself may turn the asylum process upside down. To avoid major overhauls of the asylum process in especially addressing what constitutes a particular social group, reform in that area is urgently needed in retooling or reinterpreting what constitutes PSG or additional protected grounds for those seeking asylum. If such considerations are not made, then there will continue to be formidable barriers for successful asylum claims and judgments.

So, what can be done? This brief proposes two options; one is to affirmatively include survivors of domestic violence and those persecuted for resisting forced gang recruitment as special classes within the ground of "particular social group" without the need for choosing the correct words that either may be too amorphous and ambiguous on one end of the spectrum and too constrained that it would fail to show a class or group that exists in that society. Many applicants that have similar claims shoot themselves in the foot for choosing the wrong wording that describes their PSG and as a result of the subjectivity of judges in immigration hearings up to the Federal Circuit Courts find that the PSG used does not meet the standard for asylum. Concepts for social visibility (now, social distinction) can be interpreted in many ways based on their own perceptions. Questions may arise as to in which context is the distinction is being perceived from, the applicant's view? The area in which he or she lives (neighborhood, town, region)? the country or wider region of Latin America? the United States? Mendoza (2016) rightly asserts that "expecting applicants to meet the social distinction burden is based on an unreasonable assumption that citizens of other countries will view the applicant's affliction as persecution in the same way that our society might" (p. 28). This is because of cultural differences from which the lens is looked through and filtered. Young males growing up in gang-controlled

neighborhoods or cities in El Salvador, Honduras, or Guatemala meet daily harassment by gang members on the streets or in their school to either join the gang or show disrespect that may end up costing them their lives. For those wrongly accused of gang affiliation or criminal activity, they are placed in prisons and detention facilities where gang members are also housed. If they do not accept the offer of gang membership, they will find themselves in precarious situations behind bars where they may not come out alive. Legislation in these Northern Triangle countries that address youth recruitment in gangs already know the dangers that these young children face, or else such legislation would not be needed. Thus, the need to show the *correct* PSG to a trier of fact in immigration court is placing an added burden to them. The same applies for domestic violence survivors; the Latin American 'machismo' is a globally known construct. A search of the term "Latin American machismo" on Google will produce articles of interest, news reports, blogs and even research papers on the topic. There should be no need to demonstrate or prove the particulars of the applicant belonging to such a group that is under threat of daily violence and rape in these countries. Outside of Latin America, "violence against women is a 'massive social problem' globally…and one of the most common forms of violence against women" (Lewis, p. 402) The U.S. understands this and addresses domestic violence through criminal and civil law, and even immigration law to those who have made it *into* the county – but it has not addressed it for those who have sought refuge literally *just outside* our borders but are desperately seeking relief from the U.S. government. U.S. law has already "recognized these victims (inside the U.S) as a distinct social group" (Lewis, p. 403). It is now time to affirmatively address the fourth group outside looking in as well.

Internationally, countries such as Canada, Sweden, and Germany grant asylum to survivors of domestic violence. Canada does have a high threshold for applicants to meet in proving persecution through domestic violence, but it nonetheless opens the door for those people to make their claim. Sweden, doing one better, "has continued to recognize domestic violence victims as a part of particular social groups allowing them to be able to seek asylum" (Lee, p. 502). Germany also has done the same by ratifying and adopting the protocols of the Istanbul Convention whose "legislative framework recognizes gender-based violence as persecution and the importance of providing a gender-sensitive interpretation for particular social groups regarding reception procedures and support services for asylum seekers" (Lee, p. 504). While the United States may be the leader in many things, it is not in considering domestic violence survivors as viable candidate for asylum. It may be time to take a page out of the global playbook and apply it to U.S. immigration law.

The other alternative to addressing asylum for domestic violence survivors and persecuted individuals escaping forced gang recruitment is to create legislation that adds two more protected grounds to the existing five for asylum consideration. Much of this brief, the author feels, has proven the argument that these two classes of individuals from the Northern Triangle countries are deserving for asylum if they seek it within our borders. Such enactment already had foundations concerning domestic violence with the Violence Against Women Act and its subsequent reauthorizations over the years. Each reauthorization had added to the Act and in a future renewal an addendum can be placed for a provision authorizing gender-based violence as a protected ground. In addressing asylum claims for both domestic violence survivors and

young men and youth who are persecuted for resisting forced gang recruitment, legislation should be considered in amending the INA regarding burden of proof under the section titled Asylum to read "(t)o establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, ***gender-based violence, forced recruitment in a criminal organization or to any armed group or organization that opposes the peaceful law and order of a sovereign government regime*** (amended language italicized), membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant" (Immigration and Nationality Act, 1965). Such addition to the Act would not require those seeking for asylum to undue pressure to make such claims for asylum under particular social group and would have a clearly identifiable and defined protected ground for asylum.

Curiously, when *Matter of R-A-* was being considered, the then Attorney General and Commissioner of the INA "proposed a new rule recognizing that "victims of domestic violence may, under certain circumstances, qualify for asylum under the Immigration and Nationality Act (INA)" (Lewis, p. 412). The rule never came to fruition, but the important aspect of this proposal was the fact that it was actually considered. Consideration now needs to turn into action which needs to turn into amending to include these two vulnerable groups as protected grounds for asylum.

Conclusion

As it stands, U.S. immigration law as it pertains to asylum is in a mess. Decisions on asylum, though outlined in statute have been arbitrarily and subjectively decided upon based on terms that can be ambiguous and amorphous in nature. Different Circuit Courts have either deferred to the BIA in applying the elements of considering what particular social group encompasses to other Circuit Courts that have broken ranks and chided the elements as confusing and lacking reason. Further, sentiment in considering groups like domestic violence victims and young men fleeing from forced gang recruitment may go in one direction one day and change direction the next, causing further confusion in asylum law. But the foundational decisions established since *Acosta* up to *Grace v. Whitaker* has provided the framework from which to draft and consider new legislation to include gender-based violence victims and individuals escaping forced gang recruitment conditions in areas like Central America's Northern Triangle to be included as one of the protected grounds from which to claim asylum or alternately, at the very minimum, be an affirmative group that has established particular social group status. Mendoza (2016) notes that "requiring an applicant to prove that others in his society and community recognize that a distinguishing trait makes a group of people, to which the applicant belongs, more vulnerable to persecution (places) a much higher burden to meet (for those individuals) than that which is imposed on applicants fearing persecution on account of the other four protected grounds" (p. 27-28). These groups of individuals have endured too much to only be denied asylum because they were not convincing enough because of the poor word choice and arrangement they used to show to triers of fact that they are in fact a persecuted group in their home country. Lee (2020) notes that "United States' asylum laws are currently unstable" (p. 532). It does not have to be a

balancing act. It is time to create even ground and bring gender-based domestic victims and individuals fleeing forced gang recruitment up to the level where they too are given the same considerations as the other four readily identified protected grounds of asylum - race, religion, nationality, and political opinion. Particular social group should also be a viable option for others seeking asylum that cannot otherwise claim the aforementioned four grounds, but it also should not be reserved for domestic violence survivors nor young people who are forced to recruitment in activities that go against their protected beliefs and free will. It is time to make their dreams of asylum a reality.

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