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Particular Social Group: United States Immigration Law and the Right to Asylum for Those
Fleeing Gender-Based and Gang Violence

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Abstract

Membership in a particular social group is one of the five legal categories for asylum protected under international law. In the United States, this category particularly important for those fleeing gender-based and gang violence and seeking asylum in the United States. While not clearly defined under international or U.S. law, the vagueness and flexibility of the particular social group category enables it to account for new and evolving situations and groups of people understood to face persecution. This thesis examines the historical treatment of the particular social group category in the U.S. immigration system, and the impact of this treatment on the right to asylum in the United States, particularly for those fleeing gender-based and gang violence. Analyzing two decisions issued under the Trump Administration, the *Matter of A-B-* and the *Matter of L-E-A-*, that had an immediate negative impact on the right to asylum, this thesis examines the barriers to asylum for those seeking asylum through the particular social group category, the influence of political ideology on changes in asylum law, and how asylum seekers and their advocates have overcome barriers to successfully win asylum.

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Chapter 1 Introduction

I. Introduction

In El Salvador, Maria's ex-partner had been abusive towards her for years.¹ When he found out that she was pregnant with another man's child, he threatened to kill her and her unborn child and take away the daughter they already shared. When she turned to police, they told her she should get back together with him as he was the father of her older child. Fearing for her and her children's lives, Maria was left with no choice but to flee El Salvador. She fled to the United States and sought asylum protections, armed with documentation and proof of her persecution. Maria's asylum claim centered on the gender-based violence she faced in El Salvador at the hands of her ex-partner. Maria is currently being represented by a team of immigration attorneys as her asylum case is tried in immigration court. If her case is granted, she will receive asylum in the United States and will be protected from future persecution from her ex-partner. However, should the immigration judge deny her case, rejecting her asylum claim, it is very likely that she will be forced to return to El Salvador where she will again be subject to abuse from her ex-partner, and her life will again be at risk, with little other options.

While Maria is only one instance of an individual fleeing gender-based violence and seeking asylum in the United States, her case is representative of thousands of people in similar situations. Thousands of people cross the southern border of the United States each year to seek asylum from persecution. In fiscal year 2020, 400,651 individuals were apprehended by U.S. Customs and Border Protection on the Southwest Border between the United States and Mexico, and in 2019, 241,614 asylum petitions were filed in the United States. These large numbers

¹ Meredith Lawrence, "Confronting the long, uneven path to gender-based asylum in the US," *The New Humanitarian*, September 21, 2021, <https://www.thenewhumanitarian.org/analysis/2021/9/21/the-uneven-path-to-gender-based-asylum-in-the-US>

include adults, families, and unaccompanied children desperate to enter and receive protection from persecution.² Like Maria, many are fleeing gender-based violence, gang violence, and sometimes both.

Rates of gender-based and gang violence are particularly high in the Northern Triangle in Central America, made up of El Salvador, Guatemala and Honduras. The United Nations reports that in 2019, over 800,000 people from the Northern Triangle had sought protection from persecution either internally, in other parts of their own country, or externally by crossing international borders.³ El Salvador, Guatemala and Honduras have some of the highest murder rates in the world.⁴ Women in these countries face extremely high levels of violence based on their gender, including violence from local armed groups and domestic violence, and rarely receive protection from this violence when they report it to authorities.⁵ According to the UN Refugee Agency, for female homicides globally, El Salvador ranks first, Guatemala third and Honduras seventh.⁶ The presence of gang violence is also prolific in the Northern Triangle, where the presence of armed groups impacts citizens of all types, with little respite from their governments to control the violence.⁷ Those fleeing gang and gender-based violence are fleeing

² "Southwest Border Migration FY 2020," U.S. Customs and Border Protection, Homeland Security, November 19, 2020, <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2020>; Department of Homeland Security, Office of Immigration Statistics, Office of Strategy, Policy and Plans, *Annual Flow Report, Refugees and Asylees: 2019*, Ryan Baugh, 2019.

³ UNICEF, "Death threats and gang violence forcing more families to flee northern Central America – UNHCR and UNICEF survey," UNICEF, December 17, 2020, <https://www.unicef.org/press-releases/death-threats-and-gang-violence-forcing-more-families-flee-northern-central-america>

⁴ United Nations High Commissioner for Refugees, "Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico," UNHCR, October 2015, <https://www.unhcr.org/en-us/about-us/background/56fc31864/women-on-the-run-full-report.html>

⁵ United Nations High Commissioner for Refugees, "Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico"

⁶ United Nations High Commissioner for Refugees, "Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico"

⁷ United Nations High Commissioner for Refugees, "Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico"

threats of violence and death to themselves and often their families, demands for ‘rent’ payments from gangs, and physical violence, from which their government is not able to protect them. Despite having genuine fear for their lives and safety, many of these asylum seekers will be denied asylum in the United States. Though the United States has obligations to these asylum seekers under international refugee law, it continues to implement policies, legislation and procedures that make it harder for those fleeing persecution to seek asylum. Many of those seeking asylum in the United States, specifically those fleeing gang and gender-based violence, are doing so under the asylum category of membership in a particular social group, a category under which asylum seekers often face unique obstacles in winning their cases and gaining asylum.

This thesis examines the ways in which the United States immigration system has historically treated the particular social group category of asylum seekers, and how this treatment has impacted their right to asylum in the United States, particularly for those fleeing gender based and gang violence. How has the United States historically dealt with the particular social group category of asylum? What have been the barriers to the inclusion of those fleeing gender based and gang violence in the particular social group category, and what have been the consequences? How have these barriers been overcome to successfully gain asylum for those fleeing persecution from gender based and gang violence? In the coming pages, this thesis will explore the right to asylum under international law and domestic law in the United States, the particular social group category of asylum, and the ways in which this category has been treated within the U.S. immigration system. Further, it will examine how the powers of the Attorney General can be wielded to impact the right to asylum in the United States, at times breaking with precedent and case law to limit asylum in pursuit of political policy goals and agendas.

The particular social group category is one of immense importance to those fleeing types of persecution that do not fit into the other asylum categories, and therefore its protection within the U.S. immigration system is vital for ensuring the right to asylum is respected in the United States. As this thesis will demonstrate, the unique nature of the particular social group category, its vagueness and ability to shift with evolving understandings of persecution, make it both a key category of asylum protections for many asylum seekers, and a category that remains at risk for interpretations motivated by political goals that limit its application. While the category's ability to adapt and evolve with changing understandings of persecution, power and social groups, it is also easily influenced by changing political ideologies in the United States. For those like Maria, who are fleeing very real threats to their lives, changes to asylum law for the particular social group category can mean the difference of life and death. However, the need to prevent the influence of political ideologies dictating decisions and leading to an inaccurate reading of precedent must be weighed with the necessity of the adaptability of the particular social group category.

II. Methodology

During the Trump Administration, from 2016 through 2020, a number of new immigration policies and decisions from the Attorney General were implemented that specifically targeted those fleeing persecution as a member of a particular social group. This thesis will examine two of these decisions, the *Matter of A-B-* and the *Matter of L-E-A-*, and their implications for those fleeing gender based and gang violence⁸. These two recent decisions by Attorney General Sessions and Attorney General Barr had huge implications for the right to

⁸ U.S. Department of Justice Office of the Attorney General, *Matter of A-B- Respondent*, 27 I&N Dec. 316, A.G. 2018, <https://www.justice.gov/eoir/page/file/1070866/download>; U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A- Respondent*, 27 I&N Dec. 581, A.G. 2019

asylum under the particular social group category. These case studies will offer a closer look at the barriers that those seeking asylum as members of a particular social group face, the role of the Attorney General in this process, and the impact of these barriers on the right to asylum. In order to provide greater context for the case studies, this thesis will examine the foundation of the right to asylum under international and domestic U.S. immigration law, as well as the historical treatment of the particular social group category in the United States, particularly for those trying to escape gender based and gang violence. In doing so, this thesis will examine a number of cases and decisions that form the foundation for case law on the category. Further, it will examine the subsequent roll-back of some aspects of the *Matter of A-B-* and *L-E-A-* decisions by the courts, Attorney General Garland and the Biden Administration, and will explore the ways in which the interpretation of the particular social group category can be improved to better ensure the right to asylum for those fleeing gender based and gang violence. The examination of the *Matter of A-B-* and the *Matter of L-E-A-* and their impact on asylum will illustrate the ways in which an understanding of the particular social group category remains vital to the protection of the right to asylum in the United States.

III. The Right to Seek Asylum

The right to seek asylum is a fundamental right granted to all people under international law. This right was first codified within the Universal Declaration of Human Rights (UDHR).⁹ Drafted by the United Nations in the years following the end of World War II, the Universal Declaration of Human Rights is considered a foundational document within the international human rights framework. Since its creation, the UDHR paved the way for the formation of a

⁹ United Nations, *Universal Declaration of Human Rights*, 10 December 1948, <https://www.un.org/en/universal-declaration-human-rights/>

number of other international human rights documents and conventions in later years. The Declaration was a direct response to the atrocities of World War II, the Holocaust, and the millions of Europeans who had lost or fled their homes during the war.¹⁰ The Universal Declaration of Human Rights outlines the fundamental human rights of all peoples, regardless of their nationality or citizenship. Article 14 of the Declaration states, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”¹¹ In other words, all people, regardless of their country of origin, have the right to leave that country and seek protection from persecution without the fear that they will be returned to that country.¹² While at its creation asylum was meant to apply only to those Europeans who had been forced from their homes in the aftermath of World War II, later human rights documents expanded the scope of asylum.

The UDHR offers the first codification of the right to asylum within the international human rights framework, however, the right to asylum was further enumerated in the 1951 UN Convention Relating to the Status of Refugees.¹³ The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol outline the rights of refugees and asylum seekers as well as the obligations of states party to the Convention. As detailed within the Convention, a refugee is

Any person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside

¹⁰ “Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 14,” News and Events, United Nations Human Rights, Office of the High Commissioner, accessed January 2, 2021, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23923&LangID=E>

¹¹ United Nations, *Universal Declaration of Human Rights, 10 December 1948*, <https://www.un.org/en/universal-declaration-human-rights/>

¹² “Glossary,” UNHCR Global Report 2005, United Nations High Commissioner for Refugees, 2005, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi07c_L597zAhUyRTABHZVoCX8QFnoECAsQAQ&url=https%3A%2F%2Fwww.unhcr.org%2F449267670.pdf&usq=AOvVaw0y2N-fv9IVUGXJAsAoOX4S

¹³ United Nations High Commissioner for Refugees, *Convention Relating to the Status of Refugees*, 28 July 1951, <https://www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx>

the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁴

The 1967 Protocol expanded the scope of the original Convention, which was focused only on protecting European refugees in the post- World War II period, to include no geographical or time limitations on the right to asylum.¹⁵ This expanded the right to asylum to citizens around the world, with no time limit imposed upon the right. These documents solidify the right to seek asylum under international law, and the asylum category of ‘membership in a particular social group’.

While international law and the international human rights framework offers the initial codifications of the right to asylum, it is further protected within domestic law in the United States. The United States is party to the 1967 Protocol, having joined in 1968.¹⁶ The United States further codified its commitment and responsibility to those seeking asylum under domestic law in the U.S. Refugee Act of 1980, which amended the earlier Immigration and Nationality Act.¹⁷ Specifically, the U.S. Refugee Act mandated a procedure for non-U.S. citizens in the United States or at a United States land border to apply for asylum irrespective of their

¹⁴ United Nations High Commissioner for Refugees, *Convention Relating to the Status of Refugees*

¹⁵ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <https://www.refworld.org/docid/3ae6b3ae4.html>

¹⁶ United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention Relating to the Status of Refugees and 1967 Protocol*, April 2015, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiig8LU8YHwAhXjct8KHQFTD_cQFjAJegQIAhAD&url=https%3A%2F%2Fwww.unhcr.org%2Fprotect%2FFPROTECTION%2F3b73b0d63.pdf&usg=AOvVaw2qJrm4bRvhwYrskVOXRz0J

¹⁷ Ninety Sixth Congress of the United States of America, *Refugee Act of 1980*, Public Law 96-221, Washington, D.C.: 17 March 1980, <https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf>

immigration status.¹⁸ The Act additionally created the Federal Refugee Resettlement Program, with its annual refugee caps set by the President in consultation with Congress, as well as adopted the UN definition of a refugee.¹⁹ With the UDHR, UN Convention Relating to the Status of Refugees and its 1967 Protocol, and the U.S. Refugee Act of 1980, the United States has a clear obligation under both domestic and international law to uphold the right to asylum. However, while the right to asylum is protected under both international and United States domestic law, there continues to also be tension in the way in which the United States interacts with the international legal framework around asylum. This can be seen in the way in which the treatment of those seeking asylum as a member of a particular social group in the United States has continued to evolve and change over time with changing legal interpretations and individual asylum cases, which do not always align with the understanding of and international guidelines around the category.

As noted above, the understanding of the particular social group category has also evolved over time within the international human rights framework. In more recent years, the United Nations Office of the High Commissioner for Refugees (UNHCR) has provided additional guidance on the persecution of women as related to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Released in 2002, the *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* provide legal interpretive guidance to governments and the institutions and individuals involved in the determination of refugee and

¹⁸ Ninety Sixth Congress of the United States of America, *Refugee Act of 1980*

¹⁹ Ninety Sixth Congress of the United States of America, *Refugee Act of 1980*

asylum status.²⁰ The Guidelines outline the ways in which international law protects gender related claims and specifically details the way gender related claims can be considered under the particular social group grounds for asylum.²¹ This Guidance serves to provide additional direction to states handling asylum claims from those fleeing gender-based violence, and also lends additional legitimacy to their protection under the particular social group category.

In 2010, the UNHCR also provided guidance on those seeking asylum from gang violence. The *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* addresses the protection afforded to victims of gang violence under the 1951 Convention and 1967 Protocol.²² The Guidance describes numerous situations under which those fleeing gang violence should be considered for asylum as members of a particular social group. These include when those resisting gang membership have distinct and immutable social characteristics, such as their age and social status; due to their past actions or experience, such as refusing to join the gang in the past; due to characteristics fundamental to their conscience or human rights, such as if their ethical beliefs prevent them from joining a gang; and if those targeted for gang recruitment can be identified as a unique social group by their community due to their origin, class or social background.²³ As with the Guidelines on Gender-Based Persecution, this Guidance provides states with direction on how to treat asylum petitions from those fleeing gang violence, and provides legitimacy for the inclusion of those fleeing gang violence, in certain circumstances, under the particular social group category. This guidance, along with the guidance around

²⁰ UN High Commissioner for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, May 7, 2002, HCR/GIP/02/01, <https://www.refworld.org/docid/3d36f1c64>

²¹ UN High Commissioner for Refugees, *Guidelines on International Protection No. 1*

²² UN High Commissioner for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, May 31, 2010, <https://www.refworld.org/docid>

²³ UN High Commissioner for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*

gender, offer additional direction on how the protections outlined within the original 1951 Convention and its 1967 Protocol should be interpreted and how they are applicable to all states party to them. They provide direction on how to interpret the existing legal standards outlined by the 1951 Convention and its Protocol with the developing understanding of gender-based and gang violence. Both guiding documents account for ongoing evolving understandings of what motivates asylum in the modern world as well as understandings of the particular social group category that the original drafters of the Convention and Protocol may not have explicitly identified, but no less should be protected.

IV. Asylum Process in the United States

There are two ways to obtain asylum in the United States, through the Affirmative Asylum process and through the Defensive Asylum process.²⁴ Each process requires that the asylum seeker be physically presented in the United States and file for asylum within one year of entering the country, and in each, the asylum seeker has the burden of proof to prove their asylum claim. If the asylum seeker files for asylum after they have been in the United States for over one year, they must demonstrate that they qualify for an exception to the one-year deadline, and that they filed in an appropriate timeframe given that exception.²⁵ The type of asylum is determined by the manner in which an asylum seeker entered the United States and how they were taken into custody by immigration officials. Those who seek asylum through the Affirmative process are individuals who are not in the process of being removed from the United

²⁴ "Obtaining Asylum in the United States," Humanitarian, U.S. Citizenship and Immigration Services, last updated September 16, 2021, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>

²⁵ "Asylum Law and Procedure," Asylum, Human Rights First, accessed January 3, 2022, <https://www.humanrightsfirst.org/asylum/asylum-law-and-procedure>

States by the government.²⁶ Individuals applying for asylum through the Affirmative process will file an asylum application with the U.S. Department of Homeland Security and will then be interviewed by an Asylum Officer at a local Asylum Office.²⁷ The Asylum Officer can either grant their application, giving them asylum, or deny it, at which point the asylum seeker is referred to Immigration Court where their case will be heard by an Immigration Judge.²⁸

Those who seek asylum through the Defensive Asylum process seek asylum while in removal proceedings in Immigration Court with the Executive Office for Immigration Review (EOIR), as a defense against removal.²⁹ Asylum seekers who enter the United States at a port of entry and express fear of being returned to their country of origin are often placed in Immigration Court Removal Proceedings, where they will make their asylum case before an Immigration Judge, or in Expedited Removal Proceedings, where border agents can order an individual to be deported without a hearing before an immigration judge.³⁰ Those placed in expedited removal proceedings are given a credible fear screening if the asylum seeker has told Customs and Border Protection (CBP), the branch of United States Homeland Security that secures the border, that they would like to apply for asylum, fear returning to their country of origin, or fear persecution or torture.³¹ The Credible Fear Screening consists of an interview with a U.S. Citizenship and Immigration Services Asylum Officer, and if the Officer finds the asylum seekers fear of persecution is credible, their case will be referred to an Immigration Judge for a full hearing on

²⁶ Human Rights First, "Asylum Law and Procedure"

²⁷ Human Rights First, "Asylum Law and Procedure"

²⁸ Human Rights First, "Asylum Law and Procedure"

²⁹ U.S. Citizenship and Immigration Services, "Obtaining Asylum in the United States"

³⁰ "Is it legal to cross the U.S. Border to Seek Asylum?" International Rescue Committee, last updated February 2, 2021, <https://www.rescue.org/article/it-legal-cross-us-border-seek-asylum>

³¹ "Questions and Answers: Credible Fear Screening," Asylum, U.S. Citizenship and Immigration Services, last updated July 15, 2015, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening>

their asylum claim.³² Many asylum seekers are placed in Immigration Detention upon entering the United States. Those asylum seekers who are in Immigration Detention undergo the same process within Immigration Court, though they face the added challenge of preparing their case while incarcerated.³³ In all cases of the Defensive Asylum process, if the Immigration Judge grants their application, then the individual has asylum.

Those who are granted asylum in the United States are entitled to a number of rights. These include the ability to petition the United States government to allow their family members to join them in the country, work authorization, or the legal ability to work in the United States, the ability to travel overseas, and the ability to gain legal documents such as a social security card.³⁴ While their cases are pending within the immigration system, asylum seekers are left in a state of uncertainty, and while they are legally allowed to apply for work authorization after their case has been pending for 150 days, they often face gaps in employment, education, and participation in their communities.³⁵ The United States immigration courts have a large backlog of cases, leaving many asylum seekers waiting years for the decisions of their asylum cases. In April 2020, the backlog of cases in the immigration courts reached over 1.17 open removal cases, with cases pending for an average of 734 days.³⁶ By the time the court grants or denies their asylum claim, many asylum seekers have been waiting for over two years.

All asylum cases denied by the Immigration Judge can be appealed with the Board of Immigration Appeals (BIA), and if denied again, with the U.S. Court of Appeals in the circuit in

³² U.S. Citizenship and Immigration Services, “Questions and Answers: Credible Fear Screening”

³³ Human Rights First, “Asylum Law and Procedure”

³⁴ “Asylum in the United States,” American Immigration Council, June 11, 2020, <https://www.americanimmigrationcouncil.org/research/asylum-united-states>

³⁵ American Immigration Council, “Asylum in the United States”

³⁶ American Immigration Council, “Asylum in the United States”

which the case was originally denied.³⁷ The Attorney General, the chief law enforcement officer of the country appointed by the President of the United States, has the power to refer themselves cases and overrule decisions issued by the Board of Immigration Appeals, a power often called “referral and review power” or “certification”.³⁸ While this power of referral and review has historically been used infrequently, the Attorneys General under President Trump referred more cases to themselves for review than any other Attorneys General under previous administrations.³⁹ In effect, the Attorney General, through this power, has the final review of all decisions issued by the BIA. Under the Trump Administration, this resulted in a number of decisions issued by the Attorney General that reversed decisions previously issued by the BIA and walked back years of legal precedent around asylum and the particular social group category.

Chapter 2: The Particular Social Group Category

I. Membership in a Particular Social Group

The particular social group category of asylum is one of the five grounds for asylum protected under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The category was originally added to the 1951 Convention by Judge Petrèn, a member of the Swedish Delegation to the United Nations. As justification for its inclusion, Judge Petrèn noted only that cases of people persecuted for their membership in a particular social group exist, and therefore should also be included in the categories for asylum.⁴⁰ This category is unique in its

³⁷ Human Rights First, “Asylum Law and Procedure”

³⁸ Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review*, Washington, DC: Migration Policy Institute, 2021, accessed January 3, 2021, p. 1-2, <https://www.migrationpolicy.org/research/obscure-powerful-immigration-attorney-general-referral-review>

³⁹ Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review*, 1

⁴⁰ Jason Dzubow, “The Obscure Swedish Diplomat Who Gave Us “Particular Social Group,” *The Asylumist (blog)*, October 9, 2014, <https://www.asylumist.com/2014/10/08/the-obscure-swedish-diplomat-who-gave-us-particular-social-group/>

vagueness, and therefore its ability to adapt to new and evolving situations of persecution and social group membership, including those which Petrèn and other writers of the original 1951 Convention may not have considered at the time of its writing. Groups such as women, Lesbian, Gay, Bisexual, Transgender and Queer + (LGBTQ+) people, those fleeing gang violence, and groups of people working a particular occupation have applied for asylum under the particular social group category and received recognition from states, including the United States.

II. Asylum Protections for those fleeing Gender Based and Gang Violence

While the right to seek asylum is clearly protected under both international and domestic law, in practice, there continues to be conflicting interpretations and understandings of what constitutes membership in a particular social group as grounds for asylum within the United States immigration system. This is described by Aimee Heitz who notes that the category was originally created to account for those who did not fit into the other categories for asylum.⁴¹ The ambiguity of the category ensures that a wide range of groups are able to access asylum protections under this category. While this is often utilized to the benefit of those seeking asylum as a member of a particular social group, as there is room to apply this category to a wider range of situations, states often look to restrict the category through legal interpretations and decisions. As stated by Heitz, states can interpret the category to exclude those perceived to not fit neatly into a ‘social group’, often denying this status to those fleeing persecution on the basis of gender.⁴² For asylum seekers applying for the protection of the United States, such

⁴¹ Aimee Heitz, “Providing a Pathway to Asylum: Re-Interpreting ‘Social Group’ to Include Gender,” *Indiana International & Comparative Law Review* 23 vol. 2 (2013): 214-215. doi:10.18060/17878.

⁴² Heitz, “Providing a Pathway to Asylum,” 214-215.

interpretations and attempts to restrict the particular social group category are particularly important, as many are fleeing gender-based and gang violence.

In conceptualizing gender as a particular social group, Heitz argues that one can use the framework presented by the UNHCR guidelines when it states, “gender, as interpreted within its social or political context, is designated as a protected social group. Second, gender is arguably socially perceptible-female and male gender identities are perceived by the greater society. Under either of these interpretations of the international definition, gender can be treated as an underlying basis for a social group.”⁴³ Per the 1951 Refugee Convention, women fleeing domestic violence are included within the refugee framework through their membership in a particular social group.⁴⁴ By nature of their gender, women belong to a particular social group, and domestic violence largely exists as a product of the gender, the patriarchy and power. This makes the case that women fleeing gender-based violence should be identified under international refugee law as an immutable, socially perceived social group. It is under this framework that gender-based violence has been recognized as part of the membership in a particular social group category.

A similar argument can be made for the inclusion of those fleeing gang violence. As described by Katelyn Masetta-Alvarez, “victims of gang violence face similar rights violations as victims of gender-based violence, and for those states with high levels of gang violence, the cultural impacts are similarly severe.”⁴⁵ Speaking specifically about the United States, Masetta-

⁴³ Heitz, “Providing a Pathway to Asylum,” 223

⁴⁴ United Nations High Commissioner for Refugees, *Convention Relating to the Status of Refugees*, July 28, 1951, <https://www.ohchr.org/en/professionalinterest/pages/statusofrefugees.aspx>

⁴⁵ Katelyn, Masetta-Alvarez, “Tearing Down the Wall Between Refugee and Gang-based Asylum Seekers: Why the United States Should Reconsider its Stance on Central American Gang-Based Asylum Claims,” *Case Western Reserve Journal of International Law*, 50 no. 1, (2018) 404. <http://ezproxy.cul.columbia.edu/login?url=https://www-proquest-com.ezproxy.cul.columbia.edu/scholarly-journals/tearing-down-wall-between-refugee-gang-based/docview/2168846009/se-2?accountid=10226>

Alvarez points out that the state approves asylum claims on the grounds of familial affiliation and nationality, and those fleeing gang violence have similar characteristics solidifying them as members of a social group.⁴⁶ Claudia Quintero supports this argument, pointing out that past gang members can particularly be considered members of an immutable social group, as their membership has already been established, and therefore they are unable to change their membership in this social group by merely disaffiliating.⁴⁷ They were once gang members, and therefore are unable to remove themselves from this social group and the threat of violence that comes with it, without leaving the state. The inability to change one's membership in a particular social group, as those who were once affiliated with gangs cannot, is fundamental to the understanding of the particular social group category. The same logic can be used to understand those seeking asylum from gang violence who are not affiliated with gangs, but face persecution from gangs. These individuals often share similar characteristics, including their age, socio economic status, occupation, or neighborhood of residence, that make them targets for gang violence.⁴⁸ These individuals cannot change their age, or poverty level at any point in time, therefore making it a fundamental element of their social group.

As noted by Michele Voss, in the United States, "there is no statute defining what the term 'particular social group' means, and the various U.S. Circuit Courts of Appeals and the Board of Immigration Appeals ("BIA") are divided as to what the exact definition should be".⁴⁹ These many interpretations and definitions leave room for the continued reimagining of what

⁴⁶ Masetta-Alvarez, "Tearing Down the Wall," 404.

⁴⁷ Claudia B Quintero, "Ganging Up on Immigration Law: Asylum Law and the Particular Social Group Standard; Former Gang Members and Their Need for Asylum Protections." *UMass Law Review*, vol. 13, no. 2 (2018) link.gale.com/apps/doc/A550067457/OVIC?u=columbia&sid=OVIC&xid=019ef743. Accessed 15 Feb. 2021.

⁴⁸ Masetta-Alvarez, "Tearing Down the Wall," 408

⁴⁹ Michele A. Voss, "Young and Marked for Death: Expanding the Definition of Particular Social Group in Asylum Law to Include Youth Victims of Gang Persecution." *Rutgers Law Journal* 37, no. 1 (Fall 2005): 235-276.

membership in a particular social group is within immigration law in the United States. It is within this interpretation and reimagination that those fleeing gender-based and gang violence can be left particularly vulnerable to changes in immigration policy. On one hand, the vagueness of the category leaves room for flexibility in accommodating new situations under which individuals need asylum, particularly in a world with evolving understandings of social groups and the role of the state. Without a clear legal definition, arguments can be made to encompass more people within the particular social group category, however, in the case of the United States, this vagueness can also often leave the particular social group category open to more restrictive interpretations as well.

The conception of refugees and asylum seekers has evolved over time to encompass those fleeing modern conflicts and persecution from non-state actors. As explained by Zetter, “The understanding of the term refugee, and there-by the understanding of asylum seekers has evolved within the international refugee regime, there are also different, more subtle, forms of persecution in the contemporary world which reflect a less categorical interpretation of the label ‘refugee’ and the slow onset of forced exile”.⁵⁰ It is under this evolving understanding of refugees and asylum seekers that women fleeing domestic violence and individuals fleeing gang violence began to receive recognition under the international refugee regime, and asylum specifically through the particular social group category. While those fleeing gang and gender-based violence are often fleeing persecution from non-state actors, it is important to note the role of the state in this persecution. For those fleeing gender-based and gang violence from the Northern Triangle specifically, the state is often unable or unwilling to provide protection from the violence. Often, the arms of the state that would provide protection, the police or government

⁵⁰ Roger Zetter, “More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization,” *Journal of Refugee Studies*, no. 2 (2007) 177.

officials, are complicit in the very systems of power that perpetuate the persecution. The framework for asylum, and particularly the understanding of the particular social group category, have accounted for this such evolution of persecution. It is through this understanding that the particular social group category has evolved to include social groups that may not have originally been considered during the category's initial creation. However, due to the nature of the category, the inclusion of these asylum seekers remains precarious, susceptible to changes in immigration policy and restrictive interpretations by immigration courts.

Despite the support found in the international refugee regime within the 1951 Convention and the 1967 Protocol for recognizing those fleeing gender-based and gang violence as members of a particular social group and valid grounds for asylum, the United States and its policy makers are often resistant. They argue that this definition of social group is too broad and would let in too many undeserving people. Further, they claim that limiting the particular social group category is long overdue and would allow for a faster decision process for immigration officials and would reduce the backlog of cases that plague immigration courts.⁵¹ This view fails to account for the stringent requirements that all those applying for asylum in the United States must meet, even without further limits placed the particular social group category. As stated by Roger Haines, "The asylum seeker must still establish that the fear of persecution is well founded, that the nature of the harm anticipated raises to the level of serious harm, that there would be a failure of state protection of he or she were returned."⁵² The membership of a particular social group category of asylum can be interpreted to encompass the categories of

⁵¹ Andrew R. Arthur, "Attorney General Sets Standards for 'Family' as a 'Particular Social Group,'" *Center for Immigration Studies*, August 5, 2019, <https://cis.org/Arthur/Attorney-General-Sets-Standards-Family-Particular-Social-Group>

⁵² Roger Haines, "Gender Related Persecution," in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, ed. Erika Feller, Volker Türk and Frances Nicholson, (Cambridge: Cambridge University Press, 2003), 322-323. <https://www.refworld.org/docid/470a33b50.html>

asylum seekers left out by the other four categories. This does not mean, however, that any asylum seeker who is a woman, for example, is entitled to asylum. The standard to which the international human rights framework and U.S. domestic law hold asylum seekers applies to all applicants, and those seeking asylum under the particular social group category must meet these standards.

III. The History of the Particular Social Group Category in the United States

When the original international legal framework for the right to asylum was created, the world was vastly different from how it is today. The vagueness of the particular social group category can be used to include groups and individual asylees that the original authors of the UDHR, Refugee Convention and 1980 Refugee Act had not originally considered at the time of their creation but are now groups and individuals understood to face persecution. This vagueness, and therefore the flexibility of this category to account for new and evolving situations, has led to individual cases making up the legal bases for particular social group asylum seekers in the United States. In describing the treatment of gender-based asylum in the United States, Sara McKinnon states, “Gender is still not recognized as an established identity category for which one may experience persecution. Instead, each gender-based claimant must define that person’s social group and prove that persecution is on account of that gendered social group.”⁵³ Each individual case creates the basis for which those fleeing gender-based persecution can win asylum in the United States. This treatment of those fleeing persecution from gender-based violence is indicative of the way in which the particular social group category has been applied. In order to gain an understanding of the way in which the particular social group

⁵³ Sara L. McKinnon, *Gendered Asylum: Race and Violence in U.S. Law and Politics*, (Chicago: University of Illinois Press: 2017)

category has historically been treated in the United States, it is important to look at the history of litigation around this category, and how cases have been decided within the immigration court system to develop the foundation of the particular social group asylum category within U.S. immigration law.

The *Matter of Acosta* is the first instance of the Bureau of Immigration Appeals defining the particular social group category of asylum.⁵⁴ The 1984 decision dealt with the case of a man, the respondent, from El Salvador seeking asylum in the United States. He had founded a taxi cooperative in San Salvador and began receiving threats for refusing to comply with an order to stop working. Subsequently, three other founders of the taxi cooperative were killed, and the respondent was beaten and robbed. He then fled to the United States fearing for his life. In the decision, the BIA defined persecution on account of membership in a particular social group as “an individual who is a member of a group of persons, all of whom share a common, immutable characteristic”.⁵⁵ In other words, the individual belongs to a group whose characteristics are not changeable or are too fundamental to their identity to be changed. The BIA rejected the respondent’s argument that being a taxi driver qualified them as a member of a particular social group, as the characteristics of the group are not immutable, and the driver could change jobs at any time.⁵⁶ While the respondent did not win asylum, the definition of a particular social group applied in *Acosta* provided additional clarity used in subsequent asylum petitions and decisions, setting the immutable characteristic requirement. This case has created the framework by which many fleeing gender-based and gang violence have sought asylum under the membership in a particular social group category within the United States. Those fleeing persecution based on

⁵⁴ United States Board of Immigration Appeals, *Matter of Acosta*, A-24159781. March 1, 1985, https://www.refworld.org/cases,USA_BIA,3ae6b6b910.html

⁵⁵ United States Board of Immigration Appeals, *Matter of Acosta*

⁵⁶ United States Board of Immigration Appeals, *Matter of Acosta*

their gender cannot merely change their gender in order to escape persecution, as it is fundamental to their person. Similarly, those fleeing gang violence often possess a characteristic or characteristics, including their age or poverty level, that they are unable to change. The immutable characteristic requirement allowed many asylum seekers fleeing gender-based and gang violence a pathway to asylum through the membership in a particular social group category.

After the *Acosta* decision, this definition of a particular social group was applied in a number of other cases. In the 1990 *Matter of Toboso-Alfonso*, a homosexual man fled Cuba due to persecution for his sexuality. The persecution he faced including forced medical examinations, arbitrary detention by the police and forced labor for missing work.⁵⁷ The BIA determined that the applicant qualified as a member of a particular social group as a homosexual, with immutable characteristics, and demonstrated that they had a well-founded fear of persecution due to their membership in this group.⁵⁸ This marked the Board's recognition of those who have faced persecution due to their sexual orientation as valid particular social group for asylum protections. The case of *Toboso-Alfonso* demonstrated that a person's sexuality is fundamental to who they are, and cannot be changed, thereby meeting the immutable characteristic requirement for the particular social group category. This case added to the precedent within U.S. immigration law regarding the immutable characteristic requirement, strengthening the case law supporting the including of those fleeing gang and gender-based violence in the particular social group category.

⁵⁷ United States Board of Immigration Appeals, *Matter of Toboso-Alfonso*, A-23220644, March 12, 1990, <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3222.pdf>

⁵⁸ United States Board of Immigration Appeals, *Matter of Toboso-Alfonso*

The application of the *Acosta* definition from the Board of Immigration Appeals can also be seen in the decision of *Matter of Kasinga*.⁵⁹ This case, decided in 1996, involved a Togolese teenager fleeing persecution in the form of female genital mutilation and seeking asylum in the United States. In this case, the BIA made a number of key holdings with implications for gender-based asylum as part of the particular social group category. In its decision, the BIA found that the respondent is part of a social group made up of young women members of her Togolese tribe who oppose and have not had female genital mutilation, and the characteristics of this group are immutable.⁶⁰ Further, the BIA found that female genital mutilation constitutes persecution and that her persecution is due to her membership in this particular social group.⁶¹ This decision was a landmark decision for those fleeing gender based violence as a member of a particular social group, and recognized gender as the basis for asylum.⁶² The decision paved the way for those fleeing domestic violence to have their asylum claims granted in the United States, as it specifically cited gender-based violence as grounds for asylum under the particular social group category.⁶³

The particular social group category was further developed in the United States in the subsequent cases of the *Matter of S-E-G-* and the *Matter of E-A-G-*.⁶⁴ In the *Matter of S-E-G-*, three teenage siblings fled El Salvador due to violence and threats from the MS-13 gang, including threats of harm, threats of rape against the female sibling, beatings and harassment

⁵⁹ United States Board of Immigration Appeals, *Matter of Kasinga*, A73 476 695, June 13, 1996, <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3278.pdf>

⁶⁰ United States Board of Immigration Appeals, *Matter of Kasinga*

⁶¹ United States Board of Immigration Appeals, *Matter of Kasinga*

⁶² Natalie Nanasi, "Death of the Particular Social Group," *the Review* 45 no. 2 (2019):280, [Death of the Particular Social Group \(smu.edu\)](#)

⁶³ Nanasi, "Death of the Particular Social Group"

⁶⁴ United States Board of Immigration Appeals, *Matter of S-E-G-*, 24 I&N Dec. 579, July 30, 2008, <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3617.pdf>; United States Board of Immigration Appeals *Matter of E-A-G-*, 24 I&N Dec. 591, July 30, 2008, available at: https://www.refworld.org/cases,USA_BIA,4ae9acc00.html

from the gang.⁶⁵ They feared retaliation and therefore did not go to the police, and others in their neighborhood had been killed for refusing to join the gang.⁶⁶ In their decision, the BIA reinforced some of their earlier decisions that those seeking asylum as member of a particular social group must meet standards of ‘particularity’ or ‘social visibility’.⁶⁷ The group must be able to be sufficiently distinct, and easily recognized in their society as a unique class of people.⁶⁸ Applying these requirements, the BIA found that the siblings did not meet the standards for particularity or social visibility. Therefore, the BIA did not overturn the lower court’s ruling in the *Matter of S-E-G-* to grant the siblings asylum. In the *Matter of E-A-G*, a man from Honduras claimed a fear of persecution from gangs, who had killed his two older brothers and threatened members of his family, including his mother.⁶⁹ The BIA decision held that those who resist joining gangs do not meet the social visibility requirement, as others in society would not recognize them as a unique group with discrete characteristics, and therefore the respondent did not meet the grounds for asylum.⁷⁰ Both of these cases applied the additional requirements of particularity and social visibility to the BIA’s original definition of the particular social group in *Acosta*. In addition to the immutable characteristic requirement, those seeking asylum under the membership in a particular social group category must meet standards of particularity and social visibility. The *Matter of S-E-G-* and *Matter of E-A-G-* decisions upheld the addition of these two conditions for an individual to establish a viable social group. These decisions narrowed the interpretation of particular social group, limiting those groups that might qualify to only those

⁶⁵ United States Board of Immigration Appeals, *Matter of S-E-G*

⁶⁶ United States Board of Immigration Appeals, *Matter of S-E-G*

⁶⁷ United States Board of Immigration Appeals, *Matter of S-E-G*

⁶⁸ United States Board of Immigration Appeals, *Matter of S-E-G*

⁶⁹ United States Board of Immigration Appeals *Matter of E-A-G*

⁷⁰ United States Board of Immigration Appeals *Matter of E-A-G*

who possessed immutable characteristics and could be sufficiently distinct so that others in society would be able to identify them as a unique social group.

However, the ‘social visibility’ requirement was further classified by the BIA in the *Matter of M-E-V-G* in 2014.⁷¹ In this case, the BIA amended their interpretation of the ‘social visibility’ requirement to clarify that it did not necessitate literal visibility, or the ability of others to see the group with their eyes.⁷² The BIA renamed the ‘social visibility’ requirement as ‘social distinction’.⁷³ With this decision, the BIA hoped to eliminate confusion relating to this requirement for those seeking asylum under a particular social group, while maintaining the additional analysis needed to address the varying claims submitted under the category. Specifically, they sought to clarify that the term ‘visibility’ used previously did not mean being able to see these groups ocularly, in public, but rather that these groups should be uniquely identifiable in society in public or private. This case offered an important clarification for the definition of the requirements for the particular social group category of asylum, particularly as many of the groups considered within the particular social group category are not those that could be identified easily by the general public. Many people fleeing gender-based and gang violence, or those who identify as gay, may not be discernable to just anyone walking down the street. For many belonging to persecuted social groups, their ability to avoid further violence depends on their ability to mask or downplay their membership in this social group in public. However, with the clarification provided by the BIA in the *Matter of M-E-V-G*-, these individuals can still be considered for asylum within the particular social group category as long as they are uniquely identifiable. This social distinction requirement can be viewed within an

⁷¹ United States Board of Immigration Appeals, *Matter of M-E-V-G*-, February 7, 2014, https://www.refworld.org/cases,USA_BIA,52fa36164.html

⁷² United States Board of Immigration Appeals, *Matter of M-E-V-G*-

⁷³ United States Board of Immigration Appeals, *Matter of M-E-V-G*

understanding of the case-by-case nature of the particular social group category, in which each individual asylum case is adjudicated, and their social distinction requirement assessed independently, thereby allowing for greater sensitivity to changes in society over time.⁷⁴ The BIA was able to provide additional clarity to the requirements for the particular social group category as the need for more nuance was identified through subsequent cases. This decision helped the BIA clarify this requirement for those seeking asylum under the particular social group category, protecting the evolutionary nature of the category to account for new situations the courts may not have seen previously.

The cases detailed above demonstrate the ever-evolving standards and definitions that make up the particular social group category within the United States. The cases have contributed to the precedent and case law that provides the foundation for the understanding of the particular social group category within the U.S. immigration system, evolving with each decision to account for the current application of asylum law to those cases that fall within the particular social group category. This case-by-case adjudication of asylum claims is a key element of the way in which the particular social group category is understood within the United States. As explained by Sousek, “Case-by-case adjudication is not an abstract procedural necessity that is somehow inherent in the nature of asylum claims. Rather, it is something that is required, sometimes, based on the nature of the substantive issues that arise within asylum claims.”⁷⁵ While the full scope of immigration law as it relates to the particular social group category of asylum has not been established by decisions issued on individual cases, case law serves to provide a foundation for the understanding of the category. Looking at each case individually

⁷⁴ Brian Sousek, “Categorical Confusion in Asylum Law,” *Florida Law Review* 73 no. 3 (November 2021): 510, [Categorical Confusion in Asylum Law \(ufl.edu\)](https://www.ufl.edu/~brian.sousek/categorical-confusion-in-asylum-law/)

⁷⁵ Sousek, “Categorical Confusion in Asylum Law,”

allows immigration courts to interpret new and evolving asylum cases that fall under the category, and apply precedent based on the nature of each particular social group claim. This process has built upon the understanding of the particular social group category found in international and domestic U.S. law, providing additional clarity to the interpretation of the category. As stated by Claudia Quintero, “Each case that the BIA takes on for review regarding the particular social group standard and a claim for a new particular social group adds on to the already complex field of asylum law.”⁷⁶ The decisions issued in these and subsequent cases, where arguments have developed through years of litigation around a number of cases and where decisions are rooted in precedent, have expanded upon the understanding of the particular social group category. For those fleeing gender based and gang violence, the ever-evolving understanding of the particular social group category can have a huge impact on not only individual asylum cases, but the overall right to asylum for the particular social group category in the United States.

Chapter 3: Case Studies: *Matter of A-B-*, *Matter of L-E-A-*

The Trump Administration, from 2016 to 2020, implemented a number of policies aimed at curtailing both immigration and the right to asylum in the United States. The Administration implemented a ‘zero-tolerance’ policy, prosecuting asylum seekers who entered the United States illegally, policies of family separations, which detained children separate from their parents, and placed limits on the number of asylum seekers who could enter the United States each day, among a myriad of other policies.⁷⁷ These policies had extremely negative impacts on the right to asylum in the United States as well as on individual asylum seekers themselves, who

⁷⁶ Quintero, "Ganging Up on Immigration Law"

⁷⁷ Nanasi, "Death of the Particular Social Group"

faced increased risks of harm and increased levels of trauma.⁷⁸ During this time, Trump's Attorneys General also issued a number of decisions that specifically impacted the right to asylum as a member of a particular social group for those fleeing gender based and gang violence. This chapter will explore two such decisions, the *Matter of A-B-* and the *Matter of L-E-A-* and their impact on the right to asylum. The decisions issued by the Attorneys General in the *Matter of A-B-* and the *Matter of L-E-A-* had immediate negative impacts on the right to asylum for those seeking asylum as a member of a particular social group, erasing decades of precedent and effectively eliminating their chances of winning their asylum cases in immigration court. These cases illustrate the way in which the power of the Attorney General of certification, to refer and review cases to himself, can be used to further political aims, thereby undermining the judicial process and precedent set by case law and decisions issued by immigration courts. This chapter will examine the consequences of these decisions, the reaction of immigration advocates, and the Biden Administration's subsequent response to these decisions. Further, it will examine the ways in which barriers to asylum can be overcome by asylees and their advocates.

I. Matter of A-B-

The *Matter of A-B-* decision was issued by Attorney General Jeff Sessions in 2018, after he referred the case to himself for review.⁷⁹ In this decision, Sessions vacated a decision by the Board of Immigration Appeals granting asylum to a El Salvadorian woman fleeing domestic violence.⁸⁰ The woman had fled El Salvador to escape abuse from her ex-husband, with whom she shared children. Despite attempts to seek help from authorities in El Salvador and a number

⁷⁸ Nanasi, "Death of the Particular Social Group"

⁷⁹ U.S. Department of Justice Office of the Attorney General, *Matter of A-B- Respondent*, 27 I&N Dec. 316, A.G. 2018, 316-346.

⁸⁰ U.S. Department of Justice Office of the Attorney General, *Matter of A-B-*, 317.

of restraining orders issued against her ex-husband, the abuse did not stop. The woman finally sought asylum in the United States. In the decision, Sessions characterized the abuse faced by A-B- as ‘private violence’ based on a personal relationship with her ex-husband, and that she did not establish her membership in a particular social group as grounds for asylum.⁸¹ Sessions argued that A-B- failed to establish that the government of El Salvador was unable or unwilling to protect her, arguing that no country is able or expected to protect its citizens from all private criminal activity.⁸² Further, Sessions overturned precedent set in 2014 in the BIA decision *Matter of A-R-C-G*, in which asylum was granted to a woman fleeing domestic violence under that grounds that the BIA based on their membership in a particular social group.⁸³ In the decision, Sessions argued that decision the BIA issued in the *Matter of A-R-C-G* created an expansive new category of asylum based on personal violence, and that this case failed to establish membership in a distinct social group as the cause of the violence and the unwillingness of the government to intervene.⁸⁴

Once issued, this decision appeared to have effectively eliminated domestic violence as grounds for asylum in the United. A major factor in the Attorney General's decision centers on the understanding of domestic violence as a ‘private’ matter, and therefore beyond the scope of asylum and refugee protections. This ignores the guidance from the United Nations regarding understanding of domestic violence as grounds for asylum and the evolution of the conception of a refugee under the international refugee regime, which has grown to reflect more than just persecution of a citizen by its own government and account for the persecution of individuals by

⁸¹ U.S. Department of Justice Office of the Attorney General, *Matter of A-B*

⁸² U.S. Department of Justice Office of the Attorney General, *Matter of A-B*

⁸³ U.S. Department of Justice Office of the Attorney General, *Matter of A-B* -, 317.

⁸⁴ U.S. Department of Justice Office of the Attorney General, *Matter of A-B*

non-state actors. Further, the decision ignores and subsequently overturns the decades of legal precedent in which those fleeing gender-based violence received asylum based on their immutable characteristics and social visibility.

Though the *Matter of A-B-* did not categorically negate domestic violence as grounds for asylum, the decision made it harder for those fleeing domestic violence to be granted asylum as members of a particular social group. Following the decision, U.S. Citizenship and Immigration Services (USCIS) instructed asylum officers to apply the heightened requirements for asylum claims outlined in the *Matter of A-B-* to credible fear interviews.⁸⁵ This increased the barrier to asylum for those fleeing gender-based persecution, and all those fleeing persecution from so called ‘private violence’. According to Snyder, “statistical evidence shows that the release of *Matter of A-B-* coincided with a spike in asylum denials, and anecdotal evidence indicates that some immigration judges have construed A-B- to have broader implications than the BIA and court of appeals decisions indicate, causing them to reject more cases.”⁸⁶ This statistical and anecdotal evidence indicates that, while the decision does not eliminate the possibility of asylum for those fleeing domestic violence, it has further burdened them to prove they deserve the asylum protection. The decision heightened the burden of proof for asylum seekers fleeing domestic violence as well as all seeking asylum under the particular social group category.

⁸⁵ U.S. Department of Homeland Security, U.S. Citizen and Immigration Services, “Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-,” PM-602-0162, July 11, 2018, <https://www.uscis.gov/sites/default/files/USCIS/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF>

⁸⁶ Nora Snyder, “Matter of A-B-, LGBTQ Asylum Claims and the Rule of Law in the U.S. Asylum System,” *Northwestern University Law Review* 114 no. 3 (2019).

II. *Matter of L-E-A-*

The *Matter of L-E-A-* decision was issued by Attorney General Barr on July 29, 2019, after the case was originally self-referred by Acting Attorney General Whittaker. The respondent in the case was seeking asylum in the United States due to persecution from a local gang. His father owned a store being targeted by a local drug cartel in Mexico, and the respondent subsequently became a target after his father refused to sell the cartels drugs from his store.⁸⁷ The respondent faced attempted kidnapping, threats, and a shooting attempt on his life.⁸⁸ While the Board of Immigration Appeals had previously found that the respondent did sufficiently prove that the familial relationships accounted for membership in a particular social group, they did find that the respondents claims of persecution were directly due to his membership in this social group.

In the decision, Barr argued against the BIAs earlier reasoning, that a family-based group does not constitute a particular social group, unless society also views it to be socially distinct.⁸⁹ Using this argument, Barr overruled the BIA and found that the respondent's immediate family, his father, did not constitute a particular social group.⁹⁰ Further, Barr referred to the decision issued by Attorney General Sessions in the *Matter of A-B-*, specifically in that the social group must exist independently of the persecution in question.⁹¹ Of key importance in Barr's decision is his understanding of familial ties as they relate to membership in a particular social group. Barr warns that an asylum applicant's society putting an emphasis on the concept of family, as

⁸⁷ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*, Respondent. 27 I&N Dec. 581 A.G. 2019.

⁸⁸ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

⁸⁹ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

⁹⁰ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

⁹¹ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

this would leave everyone in that society as a ‘member of a cognizable particular social group’.⁹² Barr’s argument goes as far to state that the United States Congress did not mean for the particular social group category to include the nuclear family, as this would cast too ‘wide a net’.⁹³

This argument and interpretation of the particular social group category by Attorney General Barr marked a sharp break with the BIA’s understanding of the term and the precedent set by previous cases. The decision resulted in increased scrutiny for those seeking asylum via the particular social group category due to family membership, as well as an effective limiting of the particular social group category for family-based particular social group asylum claims. Further, the limitations placed on those who can qualify for family-based asylum under the particular social group category, according to Barr’s definition, can be viewed as harsher limitations than those for other asylum categories. As pointed out by Fullam, “Naming a protected class as a PSG will often be broad; a nuclear family as a general concept is broad, just like religion as a general concept is broad.”⁹⁴ The undue burden the *Matter of L-E-A-* decision placed on those seeking family-based asylum significantly narrowed the category. Barr himself noted this in the decision, stating that this would make it unlikely for ‘the average family’ to be recognized.⁹⁵ As stated by Fullam, “While technically Barr’s statements on most families failing the social distinction requirements may be classified as dicta, evidently, the Attorney General sought to drastically change particular social group theory.”⁹⁶ These comments, and the

⁹² U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

⁹³ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

⁹⁴ Fullam, “The Folly of the Famous Family: Why *Matter of L-E-A-*’s Definition of Distinction Does Not Merit Deference,” *Connecticut Law Review* 53, no. 1 (May 2021): 179. <https://search-ebscohost-com.ezproxy.cul.columbia.edu/login.aspx?direct=true&db=a9h&AN=150659456&site=ehost-live&scope=site>

⁹⁵ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

⁹⁶ Fullam, “The Folly of the Famous Family: Why *Matter of L-E-A-*’s Definition of Distinction Does Not Merit Deference,” 175

overruling of the BIAs previous ruling, left family-based particular social group asylum claims at risk for denial, and the caselaw and precedent previously established regarding family-based particular social group asylum claims overturned.⁹⁷

An important aspect of the decision is Barr's assertions of his authority to review the case at all. In the decision Barr argued that though he had previously made comments regarding immigration and asylum, they were not specifically about this case and that he had no personal stake in the outcome of the case, therefore making him impartial in his decision making.⁹⁸ Barr also addressed the argument that he did not have jurisdiction over the case, as the BIA had previously referred the case for additional consideration due to the respondents claims of torture and cruel, inhuman, or degrading treatment.⁹⁹ To this argument, Barr stated that nothing in the Immigration and Nationality Act (INA) prevented him from referring the case for review in this circumstance.¹⁰⁰ Finally, Barr also rejected the argument that he did not have jurisdiction as the notice lacked the time and place of the first hearing, however stated that this was not required by the INA and the BIA had previously ruled that as long as a subsequent notice contain this information it was sufficient.¹⁰¹ Beyond the criticisms to be made of Barr's application of precedent and case law, this justification put forth by Barr in the *Matter of L-E-A-* decision highlights the unusual nature of his review of the case. While all Attorneys General have the power of certification exercised by Barr in this case, and by Sessions in the *Matter of A-B-*, under the Trump Administration the Attorneys General exercised this power more than those under either of the previous two Administrations.¹⁰² In both cases, Barr and Sessions overturned

⁹⁷ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

⁹⁸ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

⁹⁹ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

¹⁰⁰ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

¹⁰¹ U.S. Department of Justice Office of the Attorney General, *Matter of L-E-A-*

¹⁰² Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review*, 1

decisions issued by the BIA and erased years of case law that had laid the foundation for the BIA's rulings. They first chose to refer themselves these cases for review, and then their decision effectively stripped asylum protections from many seeking asylum under the particular social group category. The *Matter of A-B-* and *Matter of L-E-A-* cases are only two of many cases self-referred by the Attorneys General that served under Trump, part of a strategy to meet their policy goals to restrict asylum and immigration.

III. Asylum After the *Matter of A-B-* and the *Matter of L-E-A-*

Both the *Matter of A-B-* and the *Matter of L-E-A-* had immediate negative impacts on the right to asylum for those seeking asylum under the member of a particular social group category. For those fleeing gender based and gang violence, the main avenues by which they had previously been able to win their asylum claims in the United States were effectively erased. Subsequent to the decisions, Immigration and Customs Enforcement (ICE) issued a memo for Office of the Principal Legal Advisor (OPLA) attorneys litigating asylum and withholding removal cases after *Matter of A-B-*.¹⁰³ The memo instructed that OPLA attorneys should ensure that particular social group claims are sufficiently tested under the “rigorous analysis required by the boards precedents” and that victims of private crimes by themselves not sufficient to establish asylum eligibility.¹⁰⁴ After the *Matter of A-B-* and the *Matter of L-E-A-* decisions were issued, some judges followed the Attorney Generals direction and denied all asylum claims based on gender-based on gang violence, while others tried to avoid hearing cases based on

¹⁰³ U.S. Immigration and Customs Enforcement, *Litigating Domestic Violence-Based Persecution Claims Following Matter of A-B-*, by Tracy Short, Washington, D.C., July 11, 2018, <https://impolicytracking.org/policies/ice-issues-guidance-for-opla-attorneys-on-litigating-asylum-claims-after-matter-of-a-b-/#/tab-policy-documents>

¹⁰⁴ U.S. Immigration and Customs Enforcement, *Litigating Domestic Violence-Based Persecution Claims Following Matter of A-B-*

membership in a particular social group.¹⁰⁵ By fiscal year 2020, asylum grant rates had fallen by almost 37 percent from fiscal year 2016, with asylum seekers from Central America particularly impacted by asylum denials, dropping almost 50 percent from their 2016 rates.¹⁰⁶ The number of asylum seekers passing preliminary credible fear of persecution screenings also declined, falling 50 percent from 2019 levels.¹⁰⁷ Most severely impacted were those fleeing gang and gender-based violence from Central American, and specifically asylum seekers from Guatemala, Honduras and El Salvador.¹⁰⁸

The *Matter of A-B-* and the *Matter of L-E-A-* left both the asylum seekers and their immigration advocates looking for ways to overcome the barriers created by these two decisions and maintain the right to asylum within the particular social group category. Immigration advocates used a number of strategies to overcome these barriers, while also advocating for greater protections for asylum seekers. Ultimately, the election of President Joe Biden, the beginning of his presidency in January 2021, and the appointment of a new Attorney General proved hugely important in restoring some of the protections for those seeking asylum from gender based and gang violence. However, as this chapter will explore in additional detail,

A. Asylum for the Particular Social Group Category Post *A-B-* and *L-E-A-*

Immigration advocates, those who support asylum seekers and fight for immigration rights, spoke out against the *Matter of A-B-* and *Matter of L-E-A-* decisions. Since the decisions were issued, asylum under the particular social group category was demonstrably undermined,

¹⁰⁵ Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review*, 15

¹⁰⁶ "Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees," Human Rights First, June 11, 2020, <https://www.humanrightsfirst.org/resource/grant-rates-plummet-trump-administration-dismantles-us-asylum-system-blocks-and-deports>

¹⁰⁷ "Grant Rates," Human Rights First

¹⁰⁸ "Grant Rates," Human Rights First

and years of caselaw was erased. However, these decisions did not put a stop to the flow of those fleeing gender based and gang violence seeking protection in the United States. Immigrant advocacy organizations, groups and lawyers continued to fight for asylum for these individuals and represent them in their court proceedings.

The National Immigrant Justice Center, for example, continued to represent those fleeing gender-based and gang violence despite the obstacles and barriers created by the *Matter of A-B- and L-E-A-* decisions. They represented and won over 30 cases for individuals seeking asylum from persecution from claims relating to gender, gang and family membership and published a number of legal resources to help other immigration lawyers win asylum for their clients.¹⁰⁹ Their strategies focused on building cases for their clients with robust documentation and records supporting their asylum claims, deep knowledge of the *A-B-* and *L-E-A-* decisions and their relationship to existing case law, and an emphasis on case-by-case adjudication.¹¹⁰ These efforts have often been successful despite the obvious barriers. As stated by Jastram and Maitra, “Notwithstanding the intent of some immigration judges to prejudge domestic violence claims post-*Matter of A-B-*, attorneys continued to report grants in such cases at the immigration court level in the one-year period following the decision”.¹¹¹ The same can also be said for a number of gang violence claims. This is largely due to the work of immigration lawyers and advocates in navigating the courts in the post-*A-B-* and *L-E-A-* environment.

Perhaps the most important case in the post-*A-B-* period for those seeking asylum with gender-based or gang violence claims is *Grace v. Whitaker. Grace*, filed by the American Civil

¹⁰⁹ “*Matter of A-B- and Matter of L-E-A-: Information and Resources*,” National Immigrant Justice Center, <https://immigrantjustice.org/matter-b-and-matter-l-e-information-and-resources>

¹¹⁰ “*Matter of A-B- and Matter of L-E-A-: Information and Resources*,” National Immigrant Justice Center

¹¹¹ Kate Jastram and Sayoni Maitra, “*Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*,” *Santa Clara Journal of International Law* 48 18 no. 1 (2020).

Liberties Union and Center for Gender and Refugee Studies at the University of California on behalf of twelve plaintiffs, alleged that the policies reflected in the *Matter of A-B-* decision and accompanying USCIS policy memo sought to increase the credible fear standard for claims related to domestic violence and gang violence unlawfully at the credible fear interview stage.¹¹² In its decision, issued on December 19, 2018 by the U.S. District Court for the District of Columbia, the court ruled that a number of the elements of the *Matter of A-B-* and subsequent USCIS policy violated the Immigration and Nationality Act (INA) and the Administrative Procedures Act (APA).¹¹³ While only applicable during credible fear interviews, this ruling, it significantly rolled back some of the aspects of the *A-B-* decision. Specifically, the ruling and subsequent USCIS guidance clarified that there was no general rule against domestic violence and gang violence claims as related to the membership in a particular social group category, and that each claim must be evaluated individually.¹¹⁴ The ruling also reinforced the intent of Congress to bring domestic refugee law in line with the 1967 Protocol and the importance of looking at the UNHCR guidance on the particular social group category.¹¹⁵ While the ruling did not vacate the *Matter of A-B-* decision, it did provide guidance applicable beyond the credible fear interview for those fleeing gang and gender-based violence. Further, its reinforcement of the interpretation of U.S. refugee law within the context of the international legal framework, including the UNHCRs guidance around the particular social group, could be relied on by future asylum cases.

¹¹² *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018)

¹¹³ *Grace v. Whitaker*

¹¹⁴ John J. Lafferty, email to asylum division staff, December 19, 2018

¹¹⁵ *Grace v. Whitaker*

While many immigration advocates relied on the courts to fight the implications of the *Matter of A-B-* and *Matter of L-E-A-* decisions, others turned to the international human rights framework. Particularly in response to the *Matter of A-B-* decision, some advocated for the expansion of the categories of asylum protected under international law and called for the addition of a sixth asylum category to the refugee definition.¹¹⁶ They highlighted the reluctance of immigration judges to recognize gender as a protected grounds within the particular social group category, and its susceptibility to be impacted with narrow interpretations of the category.¹¹⁷ They argued that the addition of a sixth ground to the refugee definition would ensure the protection of the category. However, this argument fails to take into consideration the risks of adding to the refugee definition. One such risk, as noted by Jastram and Maitra, is “opening up the refugee definition in this hostile political climate.”¹¹⁸ It could leave other protected rights of refugees in question and lead to an overall limiting of the human rights of refugees. Further, the vagueness of the particular social group category, the ability of the category to evolve and expand as understandings of persecution, power and social groups evolve, is one of the key strengths of the category. It is this vagueness that has seen persecution due to gender, sexual orientation, occupation and gang affiliation, or lack thereof, included within the category and grounds for asylum. It is this vagueness that will continue to allow for expanded understandings, influenced by new information, of membership in a particular social group moving forward. To add gender as a protected ground under the refugee definition risks the benefits of its inclusion under the particular social group category. To create this new ground

¹¹⁶ Jastram and Maitra, “Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation,” 88

¹¹⁷ Jastram and Maitra, “Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation,” 88

¹¹⁸ Jastram and Maitra, “Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation,” 88

would risk limiting the way in which gender is considered a protected group, for whom, and under which circumstances. It is not a guarantee that this new ground would encompass all the intricacies of the category. Finally, as pointed out by Jastram and Maitra, the inclusion of a new category is unnecessary.¹¹⁹ As demonstrated by the UN Guidelines, decades of case law and legal precedent, those seeking asylum from gender-based persecution are protected under the membership in a particular social group category. The focus of those seeking to protect the rights of those seeking asylum under this category should be on its protection within the right to asylum as it currently exists within the international human rights framework and within domestic law in the United States. As demonstrated by immigration advocates in the aftermath of the *Matter of A-B-* and *Matter of L-E-A* decisions, while difficult, this has been possible.

B. Biden Administration Response to *Matter of A-B-* and *Matter of L-E-A-*

Upon President Joe Biden's election in Fall 2020, immigration advocates hoped the state would increase protections for those seeking asylum in the United States and that the *Matter of A-B-* and the *Matter of L-E-A-* would be vacated by the new administration. On February 2, 2021, Biden issued the "Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border".¹²⁰ The Executive Order outlines the Biden Administration's approach to migration throughout

¹¹⁹ Jastram and Maitra, "Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation," 89

¹²⁰ U.S. President, Executive Order, "Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, Executive Order of February 2, 2021," (February 2, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>

North and Central America, and plan to ‘restore and strengthen’ the asylum system in the U.S.¹²¹ In addition to outlining the Administration’s plans to address root causes of migration in the region, the Order called for the review of a number of Trump era policies relating to immigration and asylum.¹²² Further, the Order stipulated that the Attorney General and Secretary of Homeland Security must, within 180 days, evaluate if the United States provides protection for those seeking asylum from domestic and gang violence, in accordance with international standards and, within 270 days, address the circumstances under which asylum seekers qualify for the category ‘member of a particular social group’.¹²³ This Executive Order, issued within the first Month of Biden’s presidency, signaled the Administrations intent to roll-back many of the previous Administrations anti-immigrant and anti-asylum policies and restructure the asylum process in the U.S., specifically for those fleeing gender-based and gang violence. However, the Order did not go as far as to indicate what the conclusions reached by the Attorney General and Secretary of Homeland Security would be, leaving asylum seekers to face the same barriers to protection in the interim.

While many in the immigrant rights community were hopeful that the Biden Administration would put an end to the anti-immigration policies and decisions implemented under the Trump Administration, change did not come quickly enough. In April 2021, the Center for Gender and Refugee Studies, the Catholic Legal Immigration Network and Pangea Legal

¹²¹ U.S. President, Executive Order, “Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border”

¹²² U.S. President, Executive Order, “Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border”

¹²³ U.S. President, Executive Order, “Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border”

Services called on Attorney General Garland to immediately vacate the decisions issued in the *Matter of A-B-*, *Matter of L-E-A-* and the *Matter of A-C-A-A-*.¹²⁴ In May of 2021, the American Immigration Council, along with 356 other organizations, lawyers and individuals, also issued a letter to Attorney General Garland urging him to vacate the *Matter of A-B-*, *Matter of L-E-A-* and *Matter of A-C-A-A-* decisions immediately.¹²⁵

Finally, on June 16, 2021, Attorney General Merrick Garland vacated both the *Matter of A-B-* and the *Matter of L-E-A-* decisions.¹²⁶ The vacation of these decisions returned the immigration to the previous state of affairs, therefore returning the ability of those seeking asylum protections under the particular social group category, specifically for those fleeing gang and gender-based violence, to win asylum. The decisions from Attorney General Garland cited the errors in the decisions issued by Sessions and Barr, specifically pointing out the errors in thinking surrounding private violence that the *A-B-* decision relied on, and the inconsistent analysis regarding the recognition of families as particular social groups that the *L-E-A-* decision relied on.¹²⁷ These decisions demonstrate the ways in which the immigration policy goals of the Biden Administrations differ from those of the Trump Administration, specifically in Garland's focus on the ways in which the Attorneys General referral and review of *A-B-* and *L-E-A-* broke with precedent. It is important to note, however, that Attorney General Garland used these same

¹²⁴ Blaine Bookey, Bradley Jenkins, Karen Musalo and Jehan Laner Romero to Attorney General Merrick B. Garland, April 13, 2021, https://cgcs.uchastings.edu/sites/default/files/Request%20for%20Vacatur%20of%20AB%20ACAA%20LEA_2021.04.13.pdf

¹²⁵ American Immigration Council, et al. to Attorney General Merrick B. Garland, May 7, 2021, <https://www.americanimmigrationcouncil.org/research/Letter-Urging-Garland-to-Vacate-Matter-of-A-B-and-L-E-A-and-A-C-A-A->

¹²⁶ U.S. Department of Justice Office of the Attorney General. *Matter of A-B- Respondent*. 28 I&N Dec. 307, A.G. 2021 <https://www.justice.gov/eoir/volume-28>; U.S. Department of Justice Office of the Attorney General. *Matter of L-E-A- Respondent*. 28 I&N Dec. 304, A.G. 2021 <https://www.justice.gov/eoir/volume-28>

¹²⁷ U.S. Department of Justice Office of the Attorney General. *Matter of A-B- Respondent*; U.S. Department of Justice Office of the Attorney General. *Matter of L-E-A- Respondent*

powers of certification to vacate these decisions and restore the precedent and case law guiding the particular social group category prior to the *A-B-* and *L-E-A-* decisions. Additionally, while the Biden Administration returned the rights of those fleeing gender-based and gang violence to their pre-2018 levels when vacating the *A-B-* and *L-E-A-* decisions, they did not expand on the rights of these asylees, but merely left room for the drafting of future legislation and policies on the particular social group category.

While the Biden Administration has restored some of the opportunity for those fleeing gender-based and gang violence to seek asylum under the membership in a particular social group category, it is important to note that the Administration has not rescinded all of the Trump Administration's anti-immigrant policies, and in fact, has continued or expanded on some instead. One such example is the Administrations revival and expansion of the Migrant Protections Protocol policy, commonly referred to as the 'Remain in Mexico' policy, which forces many asylum seekers to wait in Mexico while they await their immigration hearing in the United States.¹²⁸ Another such example is the Administration's May 2021 announcement that they will accelerate the dockets of asylum seekers, thereby expediting their court proceedings.¹²⁹ Both policies have been criticized heavily for violating asylum seekers rights and placing them in undue danger. While the Biden Administration has returned some protections to a subset of those fleeing persecution and seeking asylum in the United States in vacating the *Matter of A-B-* and the *Matter of L-E-A-*, the state continues to violate asylum seekers rights in other ways, creating

¹²⁸ U.S. Department of Homeland Security, "DHS, Justice, and State Prepare for Court-Ordered Reimplementation of MPP," Press Release, December 2, 2021, On DHS Website, <https://www.dhs.gov/news/2021/12/02/dhs-justice-and-state-prepare-court-ordered-reimplementation-mpp>

¹²⁹ United States Department of Justice, "DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings," Press Release, May 28, 2021, On DOJ Website, <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>

barriers to access asylum and placing asylum seekers in what is often extremely dangerous situations.

Chapter 4: Conclusion

While protected under both international and domestic United States law, the understanding of the asylum category of membership in a particular social group, and who exactly qualifies for asylum protections under this category, has evolved over time. The vagueness of the category has been used to include within the scope of the particular social group category groups of asylum seeker that the original authors of the Universal Declaration of Human Rights may not have considered, to encompass an evolving understanding of persecution and persecuted identities. It is within this evolving understanding of the particular social group category that those fleeing gender-based and gang violence seek asylum from persecution. In the U.S. context, those fleeing gender-based and gang violence have largely won protections through development of legal precedent in individual cases, beginning with the *Matter of Acosta* and building precedent for those seeking asylum under the particular social group category on a case by case basis. As each case and its outcome depend on the individual asylum seeker and their circumstances, over time the definition of the particular social group category has been expanded and interpreted to encompass situations created by modern circumstances and power structures.

However, there continue to be devastating barriers to asylum for many of those seeking asylum under the particular social group category. As this thesis has demonstrated, the *Matter of A-B-* and the *Matter of L-E-A-* provide an in depth look at these barriers, namely the ability for the courts and the Attorney General to roll back precedent through new decisions. When the Attorney General self-refers cases and issued decisions that break with precedent and case law, it undermines confidence in the immigration system and its ability to fairly uphold the right to

asylum in the United States. While the *Matter of A-B-* and the *Matter of L-E-A-* decisions have since been vacated by Attorney General Garland, they severely limited the circumstances through which asylum seekers seeking protection from gang or gender-based violence could win protection, and heightened the requirements they must meet for a number of years. Those seeking asylum under the particular social group category from the time that these decisions were issued through the vacating of the decisions in 2021 were left without the protections offered by the previous years of precedent and case law, leaving them at risk for the denial of their cases and even more gravely, their lives in danger upon their return to their country of origin.

The *Matter of A-B-* and the *Matter of L-E-A-* were overturned by Attorney General Garland, thereby again allowing for the inclusion of those fleeing gender-based and gang violence within the particular social group category. However, this highlights the way in which each Administration brings their own policy goals and agenda to the U.S. immigration system, often leaving asylum seekers at the mercy of whichever political party is in office. As demonstrated by the differences in immigration policies of the Trump Administration, followed by those of the Biden Administration, consequences of one President or political parties immigration agenda often stretch beyond one Administration and into the next. Despite changes in policy goals and priorities, legal decisions take time to challenge and overturn, even in cases where the referral and review process is utilized by the Attorney General. The consequences of such politically motivated decisions could give rise to a call for the reformation of the Attorney General's power of referral and review. The power of referral and review must be viewed in light of its ability to reverse precedent and decades of case law. As stated by Pierce,

Referral and review places a powerful adjudicatory tool in the hands of the nation's chief law enforcement officer—an administrator who no longer has jurisdiction over the

policy-making and operations of the immigration system, and who is no longer tasked with ensuring policy coherence on immigration—enabling the official to issue consequential decisions with a near absence of procedures.¹³⁰

However, it is important to note both the anomaly of the Trump Administration's frequent use of this power, and the importance this power of referral and review has played in the ability for the Biden Administration and Attorney General Garland to quickly reverse the decisions issued by Attorney General Barr and Sessions. Additionally, it is important to also consider the entire framework of the immigration system. The power of referral and review is not the only aspect of the immigration system that is weaponized to undermine and scale-back the rights of asylum seekers in the pursuit of political goals and policies motivated by political ideologies. Executive orders often produce similar results, as does legislation passed along patrician and ideological lines. The key element in ensuring the right to asylum, specifically under the particular social group category, is that the rights of asylum seekers should not be fundamentally at risk each time attitudes surrounding immigration and asylum of those in power change.

The challenge of protecting the membership in a particular social group category of asylum lies in its vagueness and ability to evolve, which while a fundamental strength of the category, also leaves it susceptible to decisions rooted in political ideologies that seek to limit the category. The changes in the treatment of asylum seekers, particularly those fleeing gender-based and gang violence through the membership in a particular social group category can be compared to the changes in attitudes toward immigration in general. As with the particular social group category, attitudes towards asylum in the United States are perpetually changing, and politicians

¹³⁰ Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review*, 21

harness and encourage these attitudes for the gain of their political party and ideology. While multiple interpretations of the particular social group category often exist at once, so do different attitudes around asylum. As demonstrated by the reaction of the pro-immigration community to the Trump Administrations decisions, the integrity of the immigration system relies on a process in which the legal system is not derailed by political influence. As attitudes toward immigration change, and as the understanding of the particular social group category change, the immigration system in the United States must be equipped to change with it, while maintaining the legitimacy of the system.

For the thousands of asylum seekers, like Maria, whose case was examined above, who are fleeing persecution from gender-based and gang violence and seeking asylum in the United States, there are few other options. While it is unreasonable to think that every asylum seeker in the United States will be granted asylum, it is not unreasonable to expect the United States to fairly apply the legal standards, precedent and years of case law to the adjudication of the cases of those seeking asylum as a member of a particular social group, thereby upholding the right to asylum and their obligations under international and domestic law. When political motivations interfere in the application of asylum law, real peoples' lives are endangered. The integrity of the asylum system and the preservation of the right to asylum remains intact only if decisions are issued that align with precedent, case law and a fair application of the law within the immigration system. Confidence in the safeguarding of the understanding of the particular social group category must be held by the courts, case law and precedent, where arguments have developed over years of litigation and decisions that break with precedent can be appropriately challenged. While it can be said that this leaves room for future decisions motivated by politics or an inaccurate reading of prior case law, it also maintains the adaptability of the particular

social group category. As we have seen over the last half century, there is great importance in the ability of the particular social group category to evolve as new circumstances and needs for protection emerge. As such, a balance must be reached between an application of the law that allows for the continued adaptability of the particular social group category, and the safeguarding of the category for future asylum seekers.

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