

# CATEGORICAL CONFUSION IN ASYLUM LAW

*Brian Soucek\**

## Abstract

As the Trump administration placed ever-new categorical limits on asylum, its opponents countered that asylum decisions have to be made on an individualized basis. The government, they claimed, cannot categorically exclude groups, like former gang members or victims of gender-based violence, from protection against persecution. Successful as this insistence on case-by-case adjudication has recently been, it stands in tension with past cases in which groups such as nuclear families or gay men were categorically deemed eligible for asylum. The litigation and rulemaking currently reshaping asylum law suggest that neither side in this debate fully understands whether, when, and why case-by-case rather than categorical decision-making is required. In fact, it turns out that what at first seems like confusion over procedure actually stems from unclarity about the substantive tests being adjudicated: the “social distinction” and, even more, the “particularity” requirements that are currently (mis)used as the primary reason for denying asylum claims, especially those brought by the tens of thousands of refugees fleeing gang- and gender-related violence. Properly understanding these tests allows for a better understanding of whether they can be categorically applied—either to bar asylum claims or, perhaps in the Biden administration, to make them possible.

INTRODUCTION .....	474
I.    THE CASE-BY-CASE DEVELOPMENT OF ASYLUM LAW .....	478
II.   CONFUSION ABOUT THE CATEGORICAL.....	485
A. <i>Regulatory Changes</i> .....	486
B. <i>Litigation About Gang-Based Claims</i> .....	491
C. <i>Litigation About Gender-Based Claims</i> .....	495
D. <i>Litigation About Circularity</i> .....	500
E. <i>Litigation About Family-Based Claims</i> .....	503

---

\* Professor of Law and Chancellor’s Fellow, University of California, Davis School of Law. Thank you to Dean Kevin Johnson, both for his helpful suggestions and for supporting this project through the UC Davis School of Law’s Martin Luther King, Jr. Hall Research Fund. The Author is grateful to Raquel Aldana, Anya Bernstein, Jack Chin, Shayak Sarkar, and the students in the 2020 Asylum/Refugee Law seminar at UC Davis for discussion and disagreement about these topics. Thanks also to Jack Mensik and Senior Research Law Librarian David Holt for their research assistance.

III. PROPERLY CATEGORIZING THE CATEGORICAL AND THE CASE-BY-CASE.....506

A. *Immutability and Social Distinction*.....509

B. *Particularity* .....512

C. *Nexus* .....515

D. *Symmetry* .....517

CONCLUSION.....521

INTRODUCTION

Asylum law during the Trump administration was largely a series of attempts to identify new groups of asylum-seekers to categorically exclude from protection.<sup>1</sup> The Trump administration’s opponents then responded, often successfully, that asylum claims have to be considered individually, case-by-case.<sup>2</sup> Their success with this argument was surely helped by the fact that the Trump administration often argued the same thing—especially when asylum advocates had gotten courts or agency officials to say, categorically, that certain groups, such as women, nuclear families, or domestic violence victims, were eligible for protection from

---

1. See, e.g., Security Bars and Processing, 85 Fed. Reg. 41,201, 41,208, 41,211 (proposed July 9, 2020) (to be codified at 8 C.F.R. pts. 208, 1208) (allowing the categorical exclusion of refugees from countries where a contagious disease is deemed prevalent); Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 36,264, 36,281, 36,283 (proposed June 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235) (excluding generally gang-, wealth-, and gender-based asylum claims, claims by refugees who traveled through another country, and others); Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,061 (Mar. 26, 2020) (categorically forbidding the “introduction” of refugees and others crossing the Canadian and Mexican borders during the COVID-19 pandemic); Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,835 (July 16, 2019) (categorically excluding refugees who passed through another country when they fled to the United States from their place of persecution); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations, 83 Fed. Reg. 55,934, 55,934, 55,935, 55,952 (Nov. 9, 2018) (categorically barring refugees who cross the Mexican border at somewhere other than a designated port of entry); Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,215, 13,216 (Mar. 9, 2017) (halting the U.S. refugee resettlement program for 120 days and reducing the yearly refugee quota). For a comprehensive catalogue of immigration restrictions during the Trump presidency, see generally SARAH PIERCE & JESSICA BOLTER, MIGRATION POL’Y INST., DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY (2020), <https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency> [<https://perma.cc/M5GF-XSPH>]; IMMIGRATION POLICY TRACKING PROJECT (2021), <https://immpolicytracking.org/> [<https://perma.cc/KB5U-8DYM>].

2. See discussion *infra* Part II.

persecution.<sup>3</sup> In 2020, the Trump administration simultaneously argued in some federal courts that asylum claims have to be evaluated case-by-case<sup>4</sup> even as it insisted, in other federal courts<sup>5</sup> and through the rulemaking process,<sup>6</sup> that categorical exclusions of certain types of asylum-seekers were within its power.

This debate over case-by-case versus categorical adjudication of issues or claims within asylum law generally gets framed as a procedural problem—perhaps even one that implicates the Due Process Clause.<sup>7</sup> But any procedural confusion here actually stems from a deeper, substantive issue: a failure to understand the doctrinal tests that now determine, for example, whether victims of gender-based violence, LGBTQ refugees, those fleeing gangs, or family members of those fleeing gangs might qualify for asylum. The underlying substantive law—which currently looks at a persecuted group’s immutability, particularity, and social salience in the country of persecution<sup>8</sup>—is so poorly and inconsistently applied that litigants have lost sight even of *how* it should be applied: whether categorically or case-by-case. Lacking any principled justification, claims about the necessity of case-by-case adjudication become nothing but a litigation gambit opportunistically employed by anyone on the losing end of a prior categorical judgment.

Consider a quick sample of the Trump administration’s inconsistency. A rule proposed in June 2020 that aimed to fundamentally alter both the substance and process of asylum law in the United States noted that federal courts have “called into question”—which is to say, struck down—the U.S. Department of Justice’s “approach of announcing general rules of particular social group definitions”: rules dictating, for example, that people who resist gangs or women who experience intimate partner violence will not qualify for asylum.<sup>9</sup> But the Proposed Rule, like the Final Rule that followed,<sup>10</sup> then went on to announce just such a

3. See discussion *infra* Part II. As will become clear, to say that these groups are eligible is not to say that all group members will receive asylum. It merely means that theirs is the kind of group that U.S. law recognizes as a potential ground for claims of asylum. See discussion *infra* Part I.

4. See, e.g., Transcript of Motions Hearing Before the Honorable Rudolph Contreras United States District Judge at 35–38, *S.A.P. v. Barr*, No. 19-cv-03549 (D.D.C. Mar. 2, 2020).

5. See, e.g., Brief for the Appellants at 56–57, *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020) (No. 19-5013); Appellants’ Reply Brief at 28, *Grace v. Barr*, 965 F.3d 883 (No. 19-5013).

6. See Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. at 36,281–82.

7. See, e.g., Complaint for Declaratory and Injunctive Relief at 32, *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018) (No. 18-cv-01853) (originally filed as *Grace v. Sessions*).

8. The official term is now “social distinction.” See, e.g., *Matter of W-G-R-*, 26 I. & N. Dec. 208, 210, 212 (B.I.A. 2014), *vacated in part*, *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016).

9. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. at 36,278 n.27, 36,281.

10. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 80,274, 80,386, 80,395 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235).

general rule, in fact expanding it to include all claims based on gender, as well as past, present, or perceived gang membership and resistance to gangs.<sup>11</sup> Meanwhile, in federal court in the District of Columbia, the Trump administration argued in one case that the Attorney General and the Board of Immigration Appeals<sup>12</sup> “must determine particular social groups through case-by-case adjudication,”<sup>13</sup> while simultaneously insisting in another case that “the Board can and has adopted . . . general rules applicable to what is a cognizable social group.”<sup>14</sup>

This Article provides a way out of this confusion: an account of whether, when, and why asylum claims, or issues within them, can be answered categorically.<sup>15</sup> The clarity this account provides would not

11. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. at 36,292, 36,300.

12. This Article, much like the caselaw it discusses, will refer to the Board of Immigration Appeals as either the “BIA” or “the Board” in all that follows.

13. Opposition to Plaintiffs’ Motion for Preliminary Injunction at 23, S.A.P. v. Barr, No. 19-cv-03549 (D.D.C. Dec. 27, 2019); *see also id.* at 26 (“[T]o the extent that circuit precedent does make categorical statements about families generally, those decisions are not in keeping with the Board’s interpretation of the criteria for cognizable social groups, which depends on case-by-case adjudication, applying the facts of the case at hand to the criteria for valid groups.”); *id.* at 16 (“As the Supreme Court has long recognized, administrative and federal courts regularly and properly interpret the asylum statute in the course of case-by-case adjudication.”).

14. Appellants’ Reply Brief, *supra* note 5, at 28.

15. This Article focuses exclusively on claims about categorical versus case-by-case adjudication in *particular social group asylum claims*. But important disputes over categorical exclusions are raging elsewhere in asylum law as well. The Trump administration’s recently proposed bar on refugees coming from areas where contagious diseases are prevalent, *see* Security Bars and Processing, 85 Fed. Reg. 41,201, 41,211 (proposed July 9, 2020) (to be codified at 8 C.F.R. pts. 208, 1208), provides one example, since the decision to deport refugees for national security reasons has always previously been made in an individualized fashion, *see* Jerrold Nadler et al., Comment Letter on Joint Notice of Proposed Rulemaking: Security Bars and Processing, at 4–6 (Aug. 10, 2020), [https://judiciary.house.gov/uploadedfiles/security\\_bars\\_and\\_processing\\_regulation\\_comment\\_08.10.2020.pdf](https://judiciary.house.gov/uploadedfiles/security_bars_and_processing_regulation_comment_08.10.2020.pdf) [<https://perma.cc/UA3V-JEED>].

Another example comes from the Trump Administration’s attempt to categorically bar asylum to refugees who do not request relief from another country on their way to the United States. *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,835 (July 16, 2019) (codified at 8 C.F.R. § 208.13(c)(4) (2020)); *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 930 (N.D. Cal. 2019) (“Under our laws, the right to determine whether a particular group of applicants is categorically barred from eligibility for asylum is conferred on Congress.”), *aff’d*, 964 F.3d 832 (9th Cir. 2020).

Perhaps the most studied use of the “categorical” in asylum law is the so-called “categorical approach” used (or not) to determine whether a refugee’s prior conviction triggers the particularly serious crime bar to deportation. *See* Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U. L. REV. 1427, 1428–31 (2017). To be clear, that is not the way that “categorical” is used anywhere in this Article.

Though none of these disputes over categorical decision-making are discussed here, the lesson of this Article—that the prohibition against categorical adjudication is not procedural, but substantive, based solely on the nature of the thing being adjudicated—may well have implications in these other areas. Developing those implications is left to future work, but even

only save the government from the contradictions of its recent litigation and regulatory strategy, but it would also offer asylum advocates a firmer basis for challenging the remnants of that strategy and making the kinds of categorical changes that will be necessary if the Biden administration wants to reverse course. Categorical decision-making is not always anti-refugee, after all, and case-by-case decision-making, while sometimes more sensitive to individual refugees' circumstances, can also be a burden on those without the resources to relitigate every issue afresh.

To begin, Part I offers a short history of the substantive law governing asylum claims based on "membership in a particular social group"—which, along with race, religion, nationality, and political opinion, is one of the five bases for protection from persecution under U.S. and international law.<sup>16</sup> Tracing the development of doctrine in this area not only establishes the stakes of the current confusion over case-by-case adjudication but also shows how some of the confusion developed.

As the government has added new elements to its test for particular social groups over time, it has done more than increase the burden on asylum-seekers; the government's additions have changed the nature of the procedural burdens the government itself must meet. A test that once could be answered on a group-wide basis now includes fact-bound elements that the government has to consider anew in each case. It turns out that case-by-case adjudication is neither a constitutional due process requirement nor a statutory directive. The need for it simply stems from the nature of the test being adjudicated.

Next, Part II examines the confusion over this point within recent litigation and regulatory efforts. In claims about gender-based violence, persecution directed at gang resisters and their families, LGBTQ refugees, and others, the government (and to a lesser extent its opponents) have played both sides of the field—sometimes insisting on case-by-case adjudication, while at other times either imposing or fighting for categorical rulings.

Strategically choosing among reasonable arguments is to be expected from advocates responsible for advancing the interests of their asylum-seeking clients. It is more troubling, however, when done by the government, tasked as it is with consistent and uniform enforcement of the law. And, at least from a theoretical standpoint, it is unnecessary. Categorical versus case-by-case adjudication is not an either/or; one option or the other need not be, as it were, categorically pursued. The

---

here it is worth flagging the need to qualify overly sweeping claims, like this one from Representative Nadler: "The INA simply does not permit, or even contemplate, class-based bars to asylum or related forms of relief." Nadler et al., *supra*, at 4–5. For reasons described below, this claim is not just wrong, but potentially harmful to asylum-seekers, for it suggests that the INA might not permit "class-based" *grants* of eligibility for asylum and related forms of relief either.

16. See *infra* text accompanying note 19.

substance of current asylum doctrine, when properly understood, reveals what procedure is required to apply it.

Finally, Part III offers a theory of when, and on what questions, categorical pronouncements are allowable, and when case-by-case adjudication is necessary. It explains why some parts of the “particular social group test,” such as social distinction, require individualized consideration while other parts, such as immutability, (often) particularity, and (sometimes) circularity, can be decided categorically. Part III also asks whether the problems with categorical adjudication, such as they are, operate symmetrically—for those seeking to expand eligibility for asylum just like those seeking to restrict it.

Importantly, the account developed here is meant to be more clarifying than revisionary. That is to say, its presentation of asylum law is not a revisionary account of what it might look like if written from scratch. This Article takes blackletter asylum law largely as it stands but offers advice for clearing up the inconsistencies, slippages, and misunderstandings that often mar its application.<sup>17</sup> If substance is to drive procedure, as is argued here, one cannot understand what kind of adjudication is required unless the substantive tests being adjudicated are well understood.

Clarifying the doctrine in this way makes it easier to see whether, for example, women persecuted because of their gender should qualify as candidates for asylum under current law. But just as importantly, it clarifies whether such questions can be answered categorically—in either direction—or whether answers must be reached anew in each individual case, one asylum-seeker at a time.

## I. THE CASE-BY-CASE DEVELOPMENT OF ASYLUM LAW

Asylum is a statutory protection offered to refugees who have reached the United States.<sup>18</sup> Refugees have been defined—in international law since 1951, as part of U.S. treaty commitments since 1968, and in federal law since the Refugee Act of 1980—as people who have a “well-founded

---

17. For example, the Author believes the particularity criterion for social groups discussed below in Part I and in Sections II.B and III.B is unnecessary and should be jettisoned. But here, this Article argues instead how “particularity” is best understood, and whether, on that proper understanding, the particularity test has to be applied case-by-case rather than categorically. See discussion *infra* Section III.B.

18. 8 U.S.C. § 1158(a)–(b). Refugees can also be resettled from overseas; each year, the President, in consultation with Congress, sets a cap on the number of those who will be. See *id.* § 1157(a)(2). For a history of this system, see generally Brian Soucek, *The Last Preference: Refugees and the 1965 Immigration Act*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965*, at 171 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).

fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>19</sup>

Given the vagueness of so many of these statutory terms, the standard for asylum and related protections<sup>20</sup> has needed fleshing out “through a process of case-by-case adjudication.”<sup>21</sup> By this, the U.S. Supreme Court did not mean that each new asylum applicant has to, or even gets to, argue afresh the meaning of a “well-founded fear of persecution” or any of the other statutory requirements. The Court meant only that precedent would accumulate case-by-case, gradually clarifying the statute and further binding future litigants with each new decision. (It is worth remembering in what follows that case-by-case adjudication can have this meaning.<sup>22</sup>)

Perhaps the most ambiguous part of the refugee definition is the fourth of its five grounds: membership in a particular social group. In 1985, the BIA took a first crack at clarifying what this means in *Matter of Acosta*,<sup>23</sup> where the Board applied the *ejusdem generis* canon, construing general words (here, “membership in a particular social group”) “in a manner consistent with the specific words” in the same list (here, race, religion, nationality, and political opinion).<sup>24</sup> All were said to share one thing: an immutable characteristic that someone either cannot change or should not have to change, since it is fundamental to their identity or conscience.<sup>25</sup> Describing the “common, immutable characteristic” that unites cognizable social groups, the Board went on to say:

The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.<sup>26</sup>

---

19. Convention Relating to the Status of Refugees art. 1, ¶ A(2), July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees art. 1, ¶ A(2), Jan. 31, 1967, 19 U.S.T. 6223; see 8 U.S.C. § 1101(a)(42)(A).

20. Those who fail to qualify for a discretionary grant of asylum might still receive the lesser benefits of withholding of removal. See 8 U.S.C. § 1231(b)(3)(A). Like asylum, this is offered to those facing persecution on account of one of the five grounds. *Id.* And like asylum, withholding of removal provides a guarantee of *non-refoulement*—the international law norm of non-return to the country of persecution. See Convention Relating to the Status of Refugees, *supra* note 19, art. 33, 189 U.N.T.S. at 176.

21. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

22. See *infra* note 58 (citing widespread confusion on this point).

23. 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled in part by* *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

24. *Id.* at 233.

25. *Id.*

26. *Id.*

Here again, importantly, talk of “case-by-case” determinations clearly refers to the BIA’s intention to proceed trait-by-trait, or group-by-group, deciding in future cases whether some “particular kind of group characteristic” forms the basis of a social group—a potential ground for an asylum claim.<sup>27</sup>

This, in fact, is exactly what went on to happen. Future cases resulted in precedential opinions by the BIA or the courts of appeals recognizing groups such as homosexuals in Cuba,<sup>28</sup> the Marehan subclan in Somalia,<sup>29</sup> parents of Burmese student dissidents,<sup>30</sup> and “young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice” as potential refugees.<sup>31</sup> Meanwhile, they rejected other groups, such as campesino cheesemakers,<sup>32</sup> attractive young Albanian women,<sup>33</sup> and “homeless Honduran street children,”<sup>34</sup> as cognizable “particular social groups” for asylum purposes, meaning that members of these groups would fail to gain asylum no matter how severe their persecution.

To be clear, each of these groups were accepted or rejected categorically, not just for purposes of the case at hand. Thus, the U.S. Court of Appeals for the Ninth Circuit, considering a case about “gay men with female sexual identities in Mexico,” began with the fact that the Attorney General had previously designated the BIA’s decision about sexual orientation to be “precedent in all proceedings involving the same

27. *Id.* Findings that a particular social group is cognizable, and that the asylum-seeker is a member of that group, are not all that is needed for the asylum claim to succeed. Applicants must also show that they have a well-founded fear of persecution, and that their membership in the particular social group would be “one central reason” for that persecution (the so-called nexus requirement). 8 U.S.C. § 1158(b)(1)(B)(i).

28. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990) (rejecting the argument by INS that “homosexuals were not a particular social group contemplated under the [Immigration and Nationality] Act”). In June 1994, Attorney General Reno designated *Toboso-Alfonso* “as precedent in all proceedings involving the same issue or issues.” *Id.* at 819 n.1 (quoting Att’y Gen. Order No. 1895-94 (June 19, 1994)).

29. *Matter of H-*, 21 I. & N. Dec. 337, 342–43 (B.I.A. 1996) (“Family Membership in the Marehan Subclan Constitutes a Social Group.”).

30. *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998) (holding that parents of Burmese student dissidents share “a common, immutable characteristic” capable of classifying as a particular social group).

31. *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

32. *Alvarez-Flores v. INS*, 909 F.2d 1, 7 (1st Cir. 1990) (“Since it considered that cheesemaking is not an immutable characteristic which cannot be changed by the campesinos, or which they should not be required to change, the BIA found that petitioner’s claim did not meet the statutory requirement.”).

33. *Rreshpja v. Gonzales*, 420 F.3d 551, 555–56 (6th Cir. 2005).

34. *Escobar v. Gonzales*, 417 F.3d 363, 365, 367 (3d Cir. 2005).

issue or issues.”<sup>35</sup> The court noted that “sexual identities are so fundamental” that no one should be required to change them.<sup>36</sup> And it then “conclude[d] as a matter of law” that the particular social group in question was cognizable<sup>37</sup>—which is to say that it could ground an asylum claim, assuming all the other requirements (e.g., persecution and nexus) were also established. Five years later, the Ninth Circuit doubled down on the categorical nature of its holding: “[T]o the extent that our case-law has been unclear, we affirm that *all* alien homosexuals are members of a ‘particular social group.’”<sup>38</sup>

These categorical decisions made sense, given the test under *Acosta*. Having determined that, say, homosexuality is immutable<sup>39</sup> but youth is not,<sup>40</sup> courts or the BIA could decide as a matter of law that certain groups do or do not qualify under the particular social group prong. Like any other legal holding, these conclusions could always be revisited later, but absent an argument sufficient to overcome *stare decisis*, these determinations were otherwise meant, as Attorney General Janet Reno put it, to serve as “precedent in all proceedings involving the same issue or issues.”<sup>41</sup> Social group determinations were categorical.

The *Acosta* immutability criterion remains a necessary but not sufficient test of particular social groups under current asylum law. The BIA’s and appellate courts’ “process of case-by-case adjudication”<sup>42</sup> did not just gradually expand the groups that had been categorically accepted or rejected as potential grounds for asylum claims. It also eventually expanded the number of criteria those groups had to meet.

A problem with the *Acosta* formulation—not in itself, but as the sole criterion for recognizing social groups—is the fact that an infinite number of groups are based around immutable characteristics. “People who watched the Tony Awards with Brian Soucek in 2017” is a group united by an immutable trait—the kind of “shared past experience” *Acosta* rightly identified as unchangeable.<sup>43</sup> But fellow award-show watchers are

35. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (quoting Att’y Gen. Order No. 1895-94 (June 19, 1994)), *overruled in part by* *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

36. *Id.*

37. *Id.* at 1094–95.

38. *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005).

39. *Hernandez-Montiel*, 225 F.3d at 1094 (noting that the INS did not contest immutability in *Toboso-Alfonso*).

40. *Escobar v. Gonzales*, 417 F.3d 363, 367 (3d Cir. 2005) (“Nor is youth alone a sufficient permanent characteristic, disappearing as it does with age.”).

41. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 819 n.1 (B.I.A. 1990) (quoting Att’y Gen. Order No. 1895-94 (June 19, 1994)).

42. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

43. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by* *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

not a group that, frankly, anyone cares about. Put a different way, American society does not see itself as carved up into different camps based on who watched the Tonys with whom. Things might have been otherwise in a world that cared more about showtunes. However, no real-world society sees this as a salient basis for group membership—certainly nothing like membership in a subclan, being gay or bisexual, or having resisted your tribe’s practice of female genital mutilation.

In a series of decisions between 2006 and 2008, the BIA fumbled its way toward a criterion that would make this insight explicit. *C-A*,<sup>44</sup> a 2006 case about confidential informants, talked of immutable characteristics that are “generally easily recognizable and understood by others to constitute social groups.”<sup>45</sup> The BIA referred to this as a group’s “social visibility”<sup>46</sup>—a metaphor that unfortunately led many astray, causing adjudicators to sometimes require that a group’s unifying characteristic be identifiable on sight.<sup>47</sup> (*C-A* itself rejected the confidential informant’s claim because “the very nature of the conduct at issue is such that it is generally *out of the public view*.”<sup>48</sup>) The BIA’s subsequent opinions added an additional requirement: “[T]hat the group have particular and well-defined boundaries.”<sup>49</sup> This particularity requirement asks “whether the proposed group can accurately be described in a manner sufficiently distinct” rather than be “too amorphous . . . to create a benchmark for determining group membership.”<sup>50</sup>

Continued confusion and judicial resistance caused the BIA to revisit these new criteria in 2014. In *Matter of W-G-R*<sup>51</sup> and *Matter of M-E-V-G*,<sup>52</sup> the BIA clarified that social visibility was never meant to be taken literally. Just as a person’s religious or political beliefs can be known without being seen, so too can society “consider persons to comprise a group without being able to identify the group’s members on sight.”<sup>53</sup> To forestall further confusion, the BIA introduced a new name for the criterion—“social distinction”<sup>54</sup>—and reaffirmed it, along with

44. 23 I. & N. Dec. 951 (B.I.A. 2006).

45. *Id.* at 959.

46. *Id.*

47. Brian Soucek, Comment, *Social Group Asylum Claims: A Second Look at the New Visibility Requirement*, 29 YALE L. & POL’Y REV. 337, 345 (2010).

48. *C-A*, 23 I. & N. Dec. at 960 (emphasis added).

49. *Matter of S-E-G*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).

50. *Id.* at 584 (quoting *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628–29 (8th Cir. 2008)).

51. 26 I. & N. Dec. 208 (B.I.A. 2014), *vacated in part*, *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016).

52. 26 I. & N. Dec. 227 (B.I.A. 2014).

53. *Id.* at 240.

54. *W-G-R*, 26 I. & N. Dec. at 216 (“[O]ur use of the word ‘visibility’ unintentionally promoted confusion.”).

particularity and immutability, as the three elements needed to establish a cognizable particular social group.<sup>55</sup> The BIA took pains in both opinions to note that this three-part test was not a departure from *Acosta*; it was simply a clarification of the meaning of “particular social group,” a phrase that the BIA said had been given “more ‘concrete meaning through a process of case-by-case adjudication.’”<sup>56</sup>

Importantly, however, this was not the only way in which the BIA used the term “case-by-case,” even in those same opinions. Consider the following, somewhat lengthy but hugely clarifying discussion in *Matter of M-E-V-G-*:

[A] proposed social group composed of former employees of a country’s attorney general may not be valid for asylum purposes. Although such a shared past experience is immutable and the group is sufficiently discrete, the employees may not consider themselves a separate group within the society, and the society may not consider these employees to be meaningfully distinct within society in general. Nevertheless, *such a social group determination must be made on a case-by-case basis*, because it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society.

The former employees of the attorney general may not be considered a group by themselves or by society unless and until the government begins persecuting them. . . . The act of persecution by the government may be the catalyst that causes the society to distinguish the former employees in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution.<sup>57</sup>

Notice an importantly different sense in which “case-by-case” adjudication is being used here. Instead of saying either that the test for particular social groups will be further specified case-by-case, or that individual groups will be accepted or rejected group-by-group, here “case-by-case” means that the cognizability of individual groups must be relitigated anew in each new case.<sup>58</sup> After all, a group such as “former

55. See *M-E-V-G-*, 26 I. & N. Dec. at 237.

56. *Id.* at 237 (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)); *W-G-R-*, 26 I. & N. Dec. at 212.

57. *M-E-V-G-*, 26 I. & N. Dec. at 242–43 (emphasis added).

58. Advocates and scholars have often conflated the different ways “case-by-case” gets used. See, e.g., NAT’L IMMIGRANT JUST. CTR., PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-* 16 (2019), <https://immigrantjustice.org/media/173/download>

employees of the attorney general” might have achieved social salience in one country but not another, or—even more significantly—at one point in time but not another. Factual differences at different places and times might lead to different answers to the question of whether a particular group is cognizable for asylum purposes.

The upshot of this variability across societies and times is that particular social groups cannot be accepted or rejected categorically, once and for all, as they had been under the *Acosta* test. As the BIA recognized in *Matter of M-E-V-G-*, decisions that rejected social group claims by Salvadoran youth who refused to join gangs, or Hondurans falsely perceived to be gang members, “should not be read as a blanket rejection of all factual scenarios involving gangs.”<sup>59</sup> They cannot be so categorically read since “[s]ocial group determinations are made on a case-by-case basis.”<sup>60</sup>

The Attorney General passage from *M-E-V-G-* reveals why this is so. In the example, it is a group’s *social distinction* that varies over time, as the group’s persecution gives it a societal recognition that it previously lacked. It is easy to imagine a group losing its salience over time as well. (For instance, the Supreme Court’s solicitude for “hippies” in *U.S. Department of Agriculture v. Moreno*<sup>61</sup> can be mystifying to students learning constitutional law almost fifty years later.) Either way, social distinction adds a fact-specific variability that the *Acosta* test, looking only at immutability, had previously lacked. Put another way, it made sense for courts or the BIA to decide once and for all that homosexuality is a trait that someone either cannot change or should not have to. That is a question that can be answered categorically. But whether a given society, at a given time, thinks of itself as carved up into groups like “gay” or “straight” is a fact-bound question to which the answers might differ

---

[<https://perma.cc/Y9G7-JC4J>] (“[I]t is well established that adjudicators must evaluate asylum claims on a case-by-case basis, paying close attention to the particular facts [and] evidence of the individual case.”) (conflating *Acosta*, *M-E-V-G-*, and *Pirir-Boc*, among other cases); Kate Jastram & Sayoni Maitra, *Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*, 18 SANTA CLARA J. INT’L L. 48, 61 n.53 (2020) (citing both *Acosta* and *M-E-V-G-* for the notion that “social group cognizability is a case-by-case determination, so a social group rejected in one case may still be viable under the facts and record of another case”); Nora Snyder, Note, *Matter of A-B-, LGBTQ Asylum Claims, and the Rule of Law in the U.S. Asylum System*, 114 NW. U. L. REV. 809, 835 (2019) (“A foundational principle of asylum law is that asylum claims must be decided on a case-by-case basis.”) (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985)); see also *infra* notes 137–41, 166–67 and accompanying text (discussing similar claims and citations in D.C. and Ninth Circuit cases).

59. *M-E-V-G-*, 26 I. & N. Dec. at 249–51.

60. *Id.* at 251.

61. 413 U.S. 528, 534 (1973).

in different places and times.<sup>62</sup> The answer must be individualized—offered case-by-case.

If immutability can be categorically determined but social distinction must be determined case-by-case, where does that leave the third element of the particular social group test—particularity? A full response will have to wait for Section III.B; for now, it is worth flagging another hypothetical that appears in the BIA’s 2014 social group opinions. “[I]n an underdeveloped, oligarchical society, ‘landowners’ may be a sufficiently discrete class to meet the criterion of particularity,” says *M-E-V-G-*, “[h]owever, such a group would likely be far too amorphous to meet the particularity requirement in Canada.”<sup>63</sup> The example is somewhat strange. Surely Canadians either are or are not landowners, just like citizens of the oligarchy. Perhaps wealth would be a better example, for “the wealthy” would demarcate something much more particular in a society with a large gap between the rich and poor than it would in one where all income brackets are filled and being “wealthy” is all relative.

Regardless, the point is that a group’s particularity, like its social distinction, *may* be tied to “societal considerations”<sup>64</sup> that are too fact-bound and variable to admit of categorical determination. Part III explores further the extent to which this is true—and what should be said about case-by-case adjudication as a result.

But first, Part II shows how often—and more confusedly—questions about categorical versus case-by-case adjudication have arisen in the recent rulemaking and litigation that together are fundamentally reshaping some of the most crucial issues in asylum law.

## II. CONFUSION ABOUT THE CATEGORICAL

The sweep of the Trump administration’s regulatory agenda related to asylum law, the volume of litigation challenging it, and the Biden administration’s early attempts to change course together make the current moment easily the most transformative period since the modern U.S. asylum system was put into place in 1980.<sup>65</sup> Time and again, categorical attempts to shut down certain types of asylum claims have been met with an insistence that such claims be decided case-by-case. Often, this resistance has been successful. But that does not mean it has always been fully consistent. After all, certain groups have sometimes

---

62. See DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY 15 (1990) (discussing the “invention of homosexuality” in the late nineteenth century).

63. *M-E-V-G-*, 26 I. & N. Dec. at 241; see also *Matter of W-G-R-*, 26 I. & N. Dec. 208, 214–15 (B.I.A. 2014) (offering the same example), *vacated in part*, *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016).

64. *M-E-V-G-*, 26 I. & N. Dec. at 241.

65. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

gained categorical *support* for their claims, and in these cases it was the Trump administration that pushed for more nuanced, individualized consideration. There is an asymmetry here worth noting at the outset: Categorically rejecting a particular social group dooms all group members' asylum claims, whereas categorically accepting a group—finding it cognizable—does not automatically mean that group members get asylum; it only means that asylum-seekers have the chance to prove past or feared future persecution on the basis of their group membership. The following sections describe how both types of categorical judgments have played out in recent regulation and litigation concerning persecution based on gender, gang, and family affiliation.

### A. Regulatory Changes

In June 2020, the U.S. Departments of Homeland Security and Justice (“the Departments” in what follows) jointly proposed what the union representing federal asylum officers called the “most extreme in a recent series of draconian changes to the American asylum process”: a rule that would fundamentally remake and narrow U.S. asylum law.<sup>66</sup> After receiving over 87,000 comments from the public, the Departments published a final Rule in December 2020, having made only five substantive changes, none relevant here.<sup>67</sup> Many of the Rule’s 112 pages of commentary and 16 pages of regulatory text are spent on procedural reforms that would speed up the expedited removal process for immigrants arriving in the United States without proper documentation, bar refugees who might have applied for protection elsewhere on their way to the United States, and expand the kinds of asylum applications that can be penalized as frivolous.<sup>68</sup>

Most relevant here, though, are the Rule’s changes to the substantive grounds for asylum—the standards governing what types of people and situations U.S. asylum law covers. The Rule, in a section the initial draft described as “provid[ing] clearer guidance to adjudicators regarding whether an alleged group . . . is cognizable as a particular social group in order to ensure . . . consistent consideration,”<sup>69</sup> says that, “*in general*,” groups will not be recognized if they are based on the following: past or

---

66. Zolan Kanno-Youngs, *Asylum Officers Condemn What They Call ‘Draconian’ Plans by Trump*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/15/us/politics/asylum-officers-trump.html> [<https://perma.cc/5TKH-XQZR>] (discussing Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 36,264 (June 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235)).

67. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 80,274 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235); *see id.* at 80,284 (noting the number of comments); *id.* at 80,274–76 (discussing changes made).

68. Kanno-Youngs, *supra* note 66.

69. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 36,264, 36,278 (June 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235).

present criminal, gang, terrorist, or persecutory activity, or recruitment for such activity; presence in a country with a high-crime rate; “status as an alien returning from the United States”; targeting by criminals because of their perceived wealth; or criminal acts or interpersonal disputes “of which governmental authorities were unaware or uninvolved.”<sup>70</sup>

Meanwhile, a parallel section on “[n]exus”—the “on account of” part of the refugee definition—announces “eight nonexhaustive situations” in which the Departments will, again “in general,” not find that persecution is based on one of the statutory grounds.<sup>71</sup> Most of these duplicate the proscribed social groups, although the Rule does clarify that “interpersonal animus” will not give rise to an asylum claim, especially when the persecutor “has not targeted, or manifested an animus against, other members of an alleged particular social group.”<sup>72</sup> The Rule bars claims based on “generalized . . . disagreement” with non-state actors, such as gangs, unless the disagreement is “related to control of a State.”<sup>73</sup> The Rule would also disallow claims arising from “persecution based on . . . [g]ender”—at least “in general.”<sup>74</sup>

Though the Rule was finalized in the last months of the Trump administration, President Biden released an Executive Order at the start of his own term giving the Attorney General and Secretary of Homeland Security 180 days to reexamine current asylum rules and decisions “to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards”; within 270 days they are “to promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a ‘particular social group.’”<sup>75</sup> The Biden administration’s review means that the parts of the December 2020 Rule might not be long for this world. But the Rule itself, and the vast discussion it prompted, show how tricky the difference between categorical and individualized decision-making can be—potentially for

---

70. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. at 80,385 (emphasis added).

71. *Id.* at 80,386.

72. *Id.*

73. *Id.*

74. *Id.* In the wake of *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020), which clarified that actions taken because of sexual orientation and gender identity are necessarily taken because of sex, I have argued that a rule prohibiting claims of persecution on account of gender would also threaten to bar asylum claims by LGBTQ refugees. Brian Soucek, Comment Letter on Proposed Rule on Procedures for Asylum and Withholding of Removal, at 11–12 (June 29, 2020), <https://beta.regulations.gov/document/EOIR-2020-0003-3471> [<https://perma.cc/YX95-2UK4>]. The Trump administration did nothing to acknowledge, much less justify, these sweeping implications of its Rule.

75. Exec. Order 14,010, 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021).

asylum advocates inside and outside of the Biden administration no less than the asylum restrictionists who authored the Rule.

For an example of the confusion, consider how the preface to the Proposed Rule acknowledged that “[f]ederal courts have raised questions about whether the Board or the Attorney General can recognize or reject particular social groups” by “announcing general rules of particular social group definitions.”<sup>76</sup> In fact, the two federal cases cited in the Proposed Rule both did more than “raise[] questions.”<sup>77</sup> The D.C. District Court enjoined the Attorney General’s approach in *Grace v. Whitaker*,<sup>78</sup> a case about domestic violence claims that is discussed below.<sup>79</sup> And *Pirir-Boc v. Holder*,<sup>80</sup> a 2014 Ninth Circuit opinion, unambiguously held that it would be “error”<sup>81</sup> to refuse to recognize a particular social group in a given country without making a case-by-case determination:

To determine whether a group is a particular social group for the purposes of an asylum claim, the agency must make a case-by-case determination as to whether the group is recognized by the particular society in question. To be consistent with its own precedent, the BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity, especially where, as here, it is presented with evidence showing that the proposed group may in fact be recognized by the relevant society.<sup>82</sup>

Note the emphasis in this passage on the fact-specific nature of the social distinction and particularity tests. As the history canvassed in Part I explained, these are the prongs of the particular social group test that necessitate case-by-case (re)consideration.

Instead of answering the “questions” it describes courts as raising, the Proposed Rule instead just described how, in the first two decades after *Acosta*, the BIA “routinely issued decisions delineating which groups did and did not qualify as particular social groups in the context of the relevant societies for purposes of asylum protection.”<sup>83</sup> By counterposing

76. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 36,264, 36,278 n.27 (June 15, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235).

77. *Id.*

78. 344 F. Supp. 3d 96 (D.D.C. 2018), *aff’d in part, rev’d in part sub nom.* *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

79. See *infra* Section II.C. This part of the district court’s opinion was reversed by the D.C. Circuit, but only on the understanding that the general rule was not really a rule. See *Grace v. Barr*, 965 F.3d at 906.

80. 750 F.3d 1077 (9th Cir. 2014).

81. *Id.* at 1084 n.7.

82. *Id.* at 1084.

83. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 36,264, 36,278 (citing cases on Somali subclans and Cuban homosexuals).

categorical social group determinations from the 1990s against more recent judicial insistence on case-by-case adjudication, the implication was that past practice had been contradictory, so the Trump administration could do what it wanted. But there was no contradiction.

What the Trump administration failed to see is exactly what Part I revealed: categorical adjudication became problematic only once the particularity and social distinction tests were added. Note, for example, how the passage above from *Pirir-Boc* ties case-by-case adjudication solely to those tests. Before they came along, back when the *Acosta* test stood alone, social groups could be accepted or rejected categorically since the decision turned only on the immutability of the characteristics uniting those groups. A trait like “homosexuality,” for example, could be deemed immutable as a matter of law, once and for all. Not so for a group’s particularity or, especially, its social distinction. Since these can vary across societies and over time, determinations have to be made case-by-case. What the Proposed Rule treats as an unresolved tension in the caselaw is simply a product of that caselaw’s evolution over time. Procedural requirements—individualized versus categorical adjudication—follow developments in the underlying substantive standards being adjudicated. In this case, by adding more criteria to the social group test, the Board did not just raise the substantive bar for asylum-seekers; ironically, it also raised the procedural requirements to which the Board itself is now subject.

To see this is to realize that the government cannot now decide to categorically reject certain social groups (such as those based on gender or gang resistance) using the categorical decision-making of the 1990s as its model. It cannot point to precedent about LGBTQ claims to support new attempts to categorically exclude other kinds of claims. After all, those earlier cases could operate categorically only because they were not applying the current test, the individualized elements of which the Trump administration’s Rule reaffirms.<sup>84</sup>

After public comments were received, the Trump administration emphatically denied that it was acting categorically at all.<sup>85</sup> As it had done in recent litigation, described below,<sup>86</sup> the Trump administration leaned heavily on language in the Rule that says only that certain groups and situations will not “*in general*” give rise to successful asylum claims. Before turning to litigation, then, it is worth pausing to consider a few points about the categorical nature of the Rule itself.

---

84. See Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 80,274, 80,385 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235).

85. *Id.* at 80,314 (“The Departments also note again that the rule will not categorically exclude the listed groups, rather it issues guidance that such groups will ‘generally’ not meet the requirements of a cognizable particular social group ‘without more.’”).

86. See *infra* Sections II.C–D.

First, although the Proposed Rule had noted courts' resistance to categorical decision-making, it did not indicate agreement, much less capitulation. In fact, as just discussed, the Proposed Rule instead emphasized past BIA cases where categorical determinations *were* "routinely issued."<sup>87</sup>

Second, the Departments' best argument against treating the final Rule's bars as categorical is their allowance that, "in rare circumstances," "additional evidence" might provide "the basis for finding a particular social group, given the fact- and society-specific nature of this determination."<sup>88</sup> This qualification does not make it into the regulatory text itself, however, and the discussion sections in the Proposed Rule and Rule both lack any indication of what kinds of "additional evidence" or "rare circumstances" might justify a departure from their otherwise categorical guidance. Given that the guidance is meant to "reduce the amount of time the adjudicators must spend evaluating such claims" and lead to "more uniform application,"<sup>89</sup> exceptions are surely meant to be rare.

Finally, even if the Rule is understood as a series of generalizations or predictions about certain claims' likelihood of success, the Departments do *nothing* to justify these generalizations. Take gender-based claims, for example. To understand the Rule as a prediction about their likely failure, rather than a categorical bar against them, one would need some reason for thinking that only in "rare circumstances" will women be persecuted on account of their gender.<sup>90</sup> The Departments' Rule gives no such reason.<sup>91</sup>

---

87. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. at 36,278.

88. *Id.* at 36,279.

89. *Id.*

90. Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 80,274, 80,323, 80,324, 80,329, 80,334 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235). Recall that the general bar against gender-based asylum claims is placed in the "Nexus" rather than "Membership in a Particular Social Group" section of the Rule. *See id.* at 80,386. The Rule's language thus would not technically affect the cognizability of women as a social group but instead would suggest that, in general, one's membership in that group is not a central reason for one's persecution. *But see id.* at 80,335 (purporting to answer this objection by stating: "The Departments do not make any statement about the question or prevalence of gender-based harm in other countries, but instead the point is that such harm is not on account of a protected ground and accordingly generally fails to support a valid claim to asylum or to statutory withholding of removal.").

91. Worse, the Proposed Rule offers a single citation to support its exclusion of gender, *Niang v. Gonzalez*, 422 F.3d 1187 (10th Cir. 2005), a 2005 case that holds the exact opposite of the proposition for which it is cited. For more on this point, see Soucek, Comment Letter, *supra* note 74, at 6–7. The Departments' response to this criticism appears in Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. at 80,334.

### B. *Litigation About Gang-Based Claims*

In July 2020, the U.S. Court of Appeals for the Second Circuit released a rare published opinion on an immigration matter,<sup>92</sup> sending a particular social group case back to the BIA for more individualized consideration. The petitioner, Mario Ordonez Azmen, had fled Guatemala in 2003 after trying to leave the Mara 18 gang a year or two earlier.<sup>93</sup> Ordonez Azmen claimed asylum and withholding of removal because of his fear of persecution targeting “former Mara 18 gang members who lived in Guatemala.”<sup>94</sup> The BIA denied the claim, relying on *Matter of W-G-R-*, “a decision in which it had rejected as insufficiently particular a proposed group of ‘former gang members in El Salvador who have renounced their gang membership.’”<sup>95</sup> The BIA, in other words, treated its decision in *W-G-R-* as a categorical bar against Central American gang claims.<sup>96</sup>

In *Ordonez Azmen v. Barr*,<sup>97</sup> the Second Circuit followed *W-G-R-* in defining “[p]articularity” to require that “members of society generally agree on who is included in the group.”<sup>98</sup> This, the court said, makes the “particularity inquiry . . . closely tied to the society out of which the claim arises.”<sup>99</sup> This has an important implication: insofar as particularity is society-specific, “the BIA may not reject a group solely because it had previously found a similar group in a different society to lack . . . particularity.”<sup>100</sup>

The Second Circuit was unsure whether the Board had made this mistake in *Ordonez Azmen*. The BIA’s non-precedential opinion claimed that “Guatemalans *may* not agree on how long one will be considered a former gang member,”<sup>101</sup> and it found no “meaningful distinction” between Ordonez Azmen’s situation and that of the Salvadoran applicant in *W-G-R-*, despite the fact that Ordonez Azmen submitted 200 pages of additional country conditions evidence about the perceptions of his group

92. According to Westlaw, in 2019 the Second Circuit decided 204 petitions for review from the BIA but published precedential opinions in only 13 (or 6%) of them.

93. *Ordonez Azmen v. Barr*, 965 F.3d 128, 132 (2d Cir. 2020).

94. *Id.* at 131, 134.

95. *Id.* at 134.

96. *See id.* at 135 (“The BIA rather appears to have imposed a general rule, untied to any specific country or society, that groups consisting of ‘former gang members’ are insufficiently particularized.”).

97. 965 F.3d 128 (2d Cir. 2020).

98. *Id.* at 135 (internal quotation mark omitted) (quoting *Matter of W-G-R-*, 26 I. & N. Dec. 208, 221 (B.I.A. 2014)).

99. *Id.*

100. *Id.* (alteration in original) (quoting *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014)).

101. *Id.*

in Guatemalan society.<sup>102</sup> The former observation, the Second Circuit said, was error, for the question is what Guatemalan society *does* “generally agree on,” not merely what it “‘may’ (or may not).”<sup>103</sup>

The latter issue—how to distinguish one case from another—is the more difficult one—and it raises a number of important questions. First, what exactly would it mean for the BIA to take seriously its own requirement that social group determinations must be considered on a case-by-case basis, particularly when tens of thousands of claims arise from a short list of countries, all turning on the cognizability of similarly or identically phrased social groups?

On the one hand, *Ordonez Azmen*’s fate should hardly depend on what may have been less persuasive factual records assembled by the former gang members who reached the BIA before him.<sup>104</sup> Case-by-case adjudication would be meaningless if later applicants cannot overcome prior failures. On the other hand, when successive cases raise similar claims and contain similar evidence, it is unclear how much the BIA should be required to say to indicate to courts of appeal that the latest case presents nothing meaningfully different than those that came before. One lesson of *Ordonez Azmen* is that if the BIA just cites its own precedent and claims the case before it is not meaningfully different, it may be accused of applying “per se rules.”<sup>105</sup>

Another important question is what to make of precedential opinions in particular social group cases that seem to reject specific groups—“former gang members in El Salvador,” for example, or “gang resisters in Honduras”? In subsequent cases, is the evidence about such groups’ particularity or social distinction really presented on a clean slate?<sup>106</sup> Or is there, in practice at least, a presumption against cognizability that needs to be overcome? If the point is that more or better evidence is needed than what was presented, say, in *Matter of W-G-R-*, subsequent litigants would need to know what evidence had been presented there and what was found wanting. *W-G-R-* mentions a report from a clinic at Harvard Law School discussing tattoos, as well as a U.S. State Department country report that lumps gang members and former gang members together in a

---

102. *Id.* at 133, 135.

103. *Id.* at 135 (internal quotation mark omitted).

104. *See, e.g.,* Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (“A person who was not a party to a suit generally has not had a ‘full and fair opportunity to litigate’ the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the ‘deep-rooted historic tradition that everyone should have his own day in court.’” (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996))).

105. *See Ordonez Azmen*, 965 F.3d at 135.

106. *Cf. Gonzales-Veliz v. Barr*, 938 F.3d 219, 232 (5th Cir. 2019) (“As an adjudicatory body, the BIA necessarily relies on established precedents to decide matters pending before it and to avoid reinventing the wheel every time.”).

statistic about prison populations.<sup>107</sup> Ordonez Azmen's 200 pages of expert testimony and other evidence on societal perceptions in Guatemala surely went further than this, but the BIA still found no meaningful basis for coming out a different way.

All of this is complicated by the fact that Ordonez Azmen is from Guatemala, while *W-G-R-* fled El Salvador. The Second Circuit emphasizes this fact at several points in its opinion, expressing concern that the BIA "appears to have imposed a general rule, untied to any specific country or society."<sup>108</sup> And as already noted, it quotes the Ninth Circuit in prohibiting a group's rejection "solely because [the BIA] had previously found a similar group *in a different society* to lack . . . particularity."<sup>109</sup> This leaves open the possibility that the courts' requirement of case-by-case decision-making does not refer to individual *cases* so much as individual *countries*. Like the group-by-group adjudication envisioned in *Acosta*, this would simply require adjudicators to accept or reject groups on a society-by-society basis. The BIA would only need to decide a Guatemalan counterpart to *W-G-R-* to categorically exclude future gang-based social group claims from that country. This, to be sure, would be a significantly weaker sense of case-by-case adjudication than the truly individualized consideration most litigants seem to assume is required. In Section III.A, this Article returns to consider which notion of "case-by-case" makes the most sense.

The weaker version of "case-by-case" means that each group, in each society, should be considered separately. The stronger version would actually refer to each *case*: every applicant would have the chance to prove her group's particularity and social distinction in her country of origin, unencumbered (or at least not precluded) by previous applicants' attempts to do so. Importantly, *both* of these understandings of the "case-by-case" requirement turn on the notion that a group's particularity, like its social distinction, is a society-specific, fact-bound question.

But consider the problem the BIA identified with the particularity of Ordonez Azmen's asserted social group: it said the group was "'too loosely defined' because 'Guatemalans *may* not agree on how long one will be considered a former gang member.'"<sup>110</sup> This is absurd. Someone

---

107. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 222 (B.I.A. 2014), *vacated in part*, *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016). The fact that the courts of appeals provide access to the briefing in these cases and the underlying record only "at the courthouse," FED. R. CIV. P. 5.2(c)(2); *see* FED. R. APP. P. 25(a)(5), makes it much harder to find out what evidence has proven insufficient in the past.

108. *Ordonez Azmen*, 965 F.3d at 135.

109. *Id.* (second alteration in original) (emphasis added) (quoting *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014)).

110. *Id.*

either is or is not a former gang member.<sup>111</sup> They do not age out of former gang membership—that is why shared past experiences were offered in *Acosta* as a paradigmatic example of immutability.<sup>112</sup> It may be the case that a person’s gang membership becomes so distant in time that potential persecutors stop caring about it. But if so, that is a nexus issue: harm would not then be inflicted on account of group membership. It is not a problem with the group itself.

This misunderstanding of “particularity” is not unique to *Ordonez Azmen*; it can be found in *W-G-R-* as well. There, the particularity of former Mara 18 gang members in El Salvador was rejected “because it is too diffuse, as well as being too broad and subjective. As described, the group could include persons of any age, sex, or background. It is not limited to those who have had a meaningful involvement with the gang . . . .”<sup>113</sup> The BIA draws a general conclusion from this:

[W]hen a former association is the immutable characteristic that defines a proposed group, the group will often need to be further defined with respect to the duration or strength of the members’ active participation in the activity and the recency of their active participation if it is to qualify as a particular social group under the Act.<sup>114</sup>

Section III.B discusses all that is wrong with this. Not only does it continue to confuse the existence of a particular social group with nexus, but it also imposes a homogeneity requirement on social groups that does not apply to other grounds like religion, race, or political opinion.

For present purposes, however, the crucial thing to note is that the particularity problems just identified are not society-specific or even fact-bound in any meaningful way at all. There is no reason to believe that the BIA’s claim about aging out of former gang membership would be any

111. *Cf. Rivera-Barrientos v. Holder*, 666 F.3d 641, 650 (10th Cir. 2012) (finding that even “the past experience of *having resisted* gang recruitment can be a particularly defined trait,” in contrast to more ambiguous traits like being middle class or lacking a stable family (emphasis added)).

112. *See Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (discussing “former military leadership or land ownership” as examples of immutable shared characteristics that could give rise to a particular social group), *overruled in part by* *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

113. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 221 (B.I.A. 2014) (citation omitted), *vacated in part*, *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016).

114. *Id.* at 221–22. It is worth noting that the Ninth Circuit, in affirming this aspect of *W-G-R-*, accepted the notion that grouping people who renounced their gang membership “regardless of the length and recency of that membership” poses a particularity problem. *Reyes*, 842 F.3d at 1137–38. But, significantly, the Ninth Circuit’s deference to the BIA’s particularity test does not extend to any understanding of particularity as a limit on either the *size* or *diversity* of potential groups. *Id.* at 1135.

different in Guatemala than in El Salvador, or that an expanded factual record might change these conclusions.

In short, the BIA's claims about particularity are conceptual, not factual. Thus, case-by-case adjudication, in either the weaker or stronger sense described above, is not going to lead to different or better results. The BIA's misunderstanding of its own particularity requirement not only mangles the substantive test but also makes case-by-case application of that test pointless. If particularity can be analyzed conceptually—say by making armchair observations about how connection to one's former associations diminishes over time—then fact-bound, individualized adjudication becomes unnecessary. Categorical judgments would be just as acceptable as they were under *Acosta's* immutability test.

### C. Litigation About Gender-Based Claims

Worries about categorical determinations in social group cases work both ways. While cases like *Ordonez Azmen* show applicants complaining—successfully—about how their social group was categorically rejected, other cases raise concerns about groups that seem to have been categorically *accepted* for asylum purposes.

Take the decision by Attorney General Sessions in *Matter of A-B-*,<sup>115</sup> later challenged in the D.C. District Court,<sup>116</sup> then the U.S. Court of Appeals for the D.C. Circuit under the name *Grace v. Barr*.<sup>117</sup> The most recent in decades of litigation and regulatory efforts concerning asylum claims by victims of domestic violence,<sup>118</sup> *A-B-* overturned a precedential

115. 27 I. & N. Dec. 316 (A.G. 2018), *abrogated in part by* *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

116. *Grace v. Barr*, 344 F. Supp. 3d 96, 105 (D.D.C. 2018), *aff'd in part, rev'd in part sub nom.* *Grace v. Barr*, 965 F.3d 883.

117. 965 F.3d 883 (D.C. Cir. 2020). These cases are procedurally unusual, in that they depart from the normal progression from Immigration Judge to Board of Immigration Appeals to Court of Appeals. Instead, the Attorney General directed that a previous BIA decision, *Matter of A-B-*, be referred to him for reconsideration. *See* 8 C.F.R. § 1003.1(h)(1)(i) (2020); *Grace v. Barr*, 965 F.3d at 889. And because the substantive standards established in *A-B-* applied not just to ordinary asylum proceedings but also the expedited removal system, plaintiffs in D.C. invoked 8 U.S.C. § 1252(e)(3), which provides jurisdiction solely in that district for legal or constitutional challenges to policy directives or guidelines governing expedited removal. *See Grace v. Barr*, 965 F.3d at 891–96.

118. *See, e.g., R-A-*, 22 I. & N. Dec. 906, 906 (B.I.A. 1999), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008); Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208); *see also* Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1209–14 (2016) (describing the bottom-up development of gender-based asylum claims from *R-A-* through *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014)). In proposed rules that were never finalized, the Clinton Administration “tentatively concluded” that a “case-by-case approach” to domestic violence claims, guided by a statement of “broadly applicable principles,” “would be more useful

BIA decision, *Matter of A-R-C-G*,<sup>119</sup> which had recognized “married women in Guatemala who are unable to leave their relationship” as a particular social group.<sup>120</sup>

According to the Attorney General in *A-B*, “Subsequent Board decisions . . . read *A-R-C-G* as *categorically extending* the definition of a ‘particular social group’ to encompass most Central American domestic violence victims.”<sup>121</sup> Just as the BIA in *Ordonez Azmen* had found no meaningful distinction between his gang-based claim and the one denied in *W-G-R*, so had the BIA in *A-B* found that “El Salvadoran women who are unable to leave their domestic relationships where they have children in common” was “substantially similar” to the group it had approved in *A-R-C-G*.<sup>122</sup> According to the Attorney General, this was error.<sup>123</sup>

But was the BIA’s error the categorical answer it reached or the fact that its answer was categorical? Put another way: Attorney General Sessions clearly found that “women who are unable to leave their domestic relationships” cannot categorically count as a particular social group; left unclear was whether that group is categorically *uncognizable*, or if its cognizability simply cannot be determined categorically.

The ambiguity stems from statements in *A-B* like this: “Had the Board properly analyzed the issues [in *A-R-C-G*], then it would have been clear that the particular social group *was not cognizable*.”<sup>124</sup> This could be read as a blanket rejection, but it could also mean that the group was not shown to be cognizable based on the evidence presented in that particular case. Indeed, the Attorney General faults the BIA for failing in its duty to evaluate “the existence of a particular social group in a country . . . in the context of the evidence presented regarding the particular circumstances in the country in question.”<sup>125</sup> And a guidance memo the U.S. Citizenship and Immigration Services (USCIS) issued to explain *Matter of A-B* stressed that asylum officers “must analyze each case on its own merits in the context of the society where the claim

---

than simply announcing a categorical rule that a victim of domestic violence is or can be a refugee.” Asylum and Withholding Definitions, 65 Fed. Reg. at 76,595. *But see* Jessica Marsden, Note, *Domestic Violence Asylum After Matter of L-R*, 123 YALE L.J. 2512, 2553 (2014) (calling for a categorical rule).

119. 26 I. & N. Dec. 388 (B.I.A. 2014), *overruled by A-B*, 27 I. & N. Dec. 316 (A.G. 2018).

120. *Id.* at 388–89.

121. *A-B*, 27 I. & N. Dec. at 332 (emphasis added); *see id.* at 339 (“[T]he Board recognized a new *category* of asylum claims that did not satisfy the requirements set forth by the Board’s precedent.” (emphasis added)).

122. *Id.* at 321, 332.

123. *Id.* at 317.

124. *Id.* at 334 (emphasis added).

125. *Id.* at 339 (omission in original) (quoting *A-R-C-G*, 26 I. & N. Dec. at 392).

arises.”<sup>126</sup> The Attorney General’s ambiguous position in *A-B-* prefigured and provided a model for that of the Rule discussed above.<sup>127</sup> Sweeping beyond domestic violence claims, the Attorney General dictated—or perhaps predicted—that:

*Generally*, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum. While I do not decide that violence inflicted by non-governmental actors may *never* serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are *unlikely* to satisfy the statutory grounds for proving group persecution . . . .<sup>128</sup>

According to the *Grace* plaintiffs, challenging *Matter of A-B-* in the District of Columbia, the opinion and guidance together “instruct asylum officers to deny virtually all . . . claims based on domestic violence or gang-related harms, in violation of the requirement that each case be adjudged based on its specific facts.”<sup>129</sup> Their Complaint alleged that the Government had violated the Due Process Clause “by foreclosing their claims regardless of their individual facts or merits”—which is to say, by offering a categorical rule instead of case-by-case adjudication.<sup>130</sup> The district court did not reach the due process claim in *Grace*, but it did find that *A-B-* set out a general rule, and that general rules that “effectively bar[] . . . certain categories” of claims are inconsistent with U.S. immigration law and treaty commitments, both of which the court described (without citation) as requiring “case-specific factually intensive analysis.”<sup>131</sup>

The Government’s response to the district court’s decision was intriguing. On the one hand, it emphatically denied that *Matter of A-B-* established “any blanket rule against asylum claims involving harm by gangs or domestic violence.”<sup>132</sup> On the other, the Government insisted to the D.C. Circuit that the BIA can and *has* “adopted policy rules in interpreting ‘particular social group’”—including in 2008’s *Matter of*

126. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., PM-602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* 3 (2018).

127. *See supra* Section II.A.

128. *A-B-*, 27 I. & N. Dec. at 320 (emphases added) (footnote omitted).

129. Complaint for Declaratory and Injunctive Relief, *supra* note 7, at 21 (“[I]t is well established that credible fear and asylum claims must be assessed on a case-by-case basis according to the specific circumstances and evidence presented . . .”).

130. *Id.* at 32.

131. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 & n.14 (D.D.C. 2018), *aff’d in part, rev’d in part sub nom. Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

132. Brief for the Appellants, *supra* note 5, at 56.

*E-A-G-*, which the Government described as “holding that particular social groups cannot be based on gang membership.”<sup>133</sup> In its Reply Brief, the Government doubled down, claiming that the plaintiffs had no answer to the fact that categorical rules about social groups were made in the past.<sup>134</sup> Moreover, the brief insisted that the Government would be “harmed by” an injunction preventing it from “implementing general rules concerning domestic or gang violence should it choose to” in the future.<sup>135</sup>

The *Grace* plaintiffs were not alone in interpreting *Matter of A-B-* as categorical. Sontos Maudilia Diaz-Reynoso, an indigenous woman who fled abuse in Guatemala, argued to the Ninth Circuit in 2019 that:

*A-B-* amounts to a categorical ban on claims based on being a domestic violence victim, a prohibition that runs counter to a statutory scheme that otherwise imposes bars to asylum and withholding only for applicants who are fugitives from the law, perpetrators of humanitarian atrocities, or risks to national security.<sup>136</sup>

In addition to this statutory argument, Diaz-Reynoso also claimed that *A-B-*’s categorical rule violates the BIA’s “longstanding recognition that particular social group determinations must be individualized.”<sup>137</sup> Here, she cited the case-by-case language of *M-E-V-G-*,<sup>138</sup> the Ninth Circuit’s

133. *Id.* at 57 (quoting *Matter of E-A-G-*, 24 I. & N. Dec. 591, 595–96 (B.I.A. 2008)). The rule announced in *E-A-G-* is actually complicated. In regard to the group of “persons resistant to gang membership,” the BIA held only that the applicant had not made a sufficient factual showing to establish social visibility (as it was then called). *E-A-G-*, 24 I. & N. Dec. at 594. More categorical was its claim about “young persons who are perceived to be affiliated with gangs”: agreeing with the Ninth Circuit that gang membership cannot constitute a cognizable social group because it would be “inconsistent with the principles underlying” the criminality bars elsewhere in asylum law, *see* 8 U.S.C. § 1158(b)(2), the BIA nonsensically extended that principle to perceived—even *incorrectly* perceived!—gang membership. *E-A-G-*, 24 I. & N. Dec. at 595–96. This is misguided because not all gang members have necessarily run afoul of asylum law’s bars against those who have committed or been convicted of serious crimes, *see* 8 U.S.C. § 1158(b)(2)(A)(ii)–(iii), and of course there is no reason at all to think that people *incorrectly* perceived to be gang members will have engaged in that sort of criminality.

134. Appellants’ Reply Brief, *supra* note 5, at 28.

135. *Id.* at 27–28 (“[T]he government is harmed by the district court’s advisory opinion about a general rule that the district court invented and then relied upon to enjoin the government from ever implementing general rules concerning domestic or gang violence should it choose to. Indeed, Plaintiffs have no answer to the fact that the Board can and has adopted other general rules applicable to what is a cognizable social group.”).

136. Petitioner’s Opening Brief at 24, *Diaz-Reynoso v. Barr*, 968 F.3d 1070 (9th Cir. 2020) (No. 18-72833) (quotation marks and emphasis omitted).

137. *Id.* at 27.

138. *See supra* notes 57–60 and accompanying text.

opinion in *Pirir-Boc*,<sup>139</sup> and *Acosta*.<sup>140</sup> But as this Article has shown, one of these citations is not like the other: “case-by-case” in *Acosta* really refers to group-by-group adjudication, not individualized fact determinations.<sup>141</sup>

The D.C. and Ninth Circuits responded to these arguments in the same way.<sup>142</sup> The courts both stressed the fact that *A-B-* spoke about domestic violence (and gang-based) social group claims only “[g]enerally”<sup>143</sup> failing to qualify, much like the Rule discussed above does too.<sup>144</sup> According to the D.C. Circuit, “the record . . . does not support the asylum seekers’ argument that USCIS and the Attorney General have erected a rule against asylum claims involving allegations of domestic and/or gang violence.”<sup>145</sup> The Ninth Circuit concurred: “Despite the general and *descriptive* observations set forth in the opinion, the Attorney General’s *prescriptive* instruction is clear: the BIA must conduct the proper particular social group analysis on a case-by-case basis.”<sup>146</sup> In both courts, the asylum-seekers wanted categorical decision-making struck down; instead, the courts—perhaps aspirationally—read the Attorney General’s decision as not categorical at all. The asylum-seekers may have lost their claim but still have gotten what they wanted.

Things turned out differently in *Gonzales-Veliz v. Barr*,<sup>147</sup> where the Fifth Circuit was asked to review a BIA decision holding that the social group presented—“Honduran women unable to leave their relationship”—was similar enough to those in *A-B-* (“El Salvadoran [*sic*] women who are unable to leave their domestic relationships where they have children in common with their partners”) and *A-R-C-G-* (“married women in Guatemala who are unable to leave their relationship”) that it too could be rejected as insufficiently particular and lacking in social distinction.<sup>148</sup> Affirming the BIA’s decision, the Fifth Circuit not only

139. See *supra* notes 81–82 and accompanying text

140. See *supra* notes 26–38 and accompanying text.

141. See *supra* notes 26–38 and accompanying text.

142. See *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1078–80, 1090 (9th Cir. 2020); *Grace v. Barr*, 965 F.3d 883, 905–06 (D.C. Cir. 2020).

143. *Diaz-Reynoso*, 968 F.3d at 1079 (alteration in original) (quoting *Matter of A-B-*, 27 I. & N. Dec. 316, 320 (A.G. 2018)); *Grace v. Barr*, 965 F.3d at 905 (quoting *A-B-*, 27 I. & N. Dec. at 320). *Grace*, which unlike *Diaz-Reynoso*, also reviewed the USCIS Guidance Memo on *A-B-*, and observed that the memo referred to claims failing “[i]n general.” *Grace v. Barr*, 965 F.3d at 905 (alteration in original) (quoting U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 126, at 6).

144. See *supra* Section II.A.

145. *Grace v. Barr*, 965 F.3d at 906.

146. *Diaz-Reynoso*, 968 F.3d at 1080 (“*Matter of A-B-* did not announce a bright-line rule concerning applications based on domestic violence; in fact, it underscored the need for an intensive case-by-case analysis.”).

147. 938 F.3d 219 (5th Cir. 2019).

148. *Id.* at 232; see *Jastram & Maitra*, *supra* note 58, at 61 (“[T]he court did not separately assess the facts, evidence, or country in question in *Gonzales-Veliz*.”).

concluded that the Attorney General had avoided categorical reasoning in *A-B-*, but that the BIA had done so as well in *Gonzales-Veliz*'s case, despite the fact that it relied solely on *A-B-* to find her group non-cognizable.<sup>149</sup> The BIA, it said, “did not blindly apply *A-B-* as a categorical ban”; rather, “[a]s an adjudicatory body, the BIA necessarily relies on established precedents to decide matters pending before it and to avoid re-inventing the wheel every time.”<sup>150</sup>

As *Ordonez Azmen* revealed,<sup>151</sup> the line between categorical rule-following and analogical reasoning from precedent can be hard to draw. Part III returns to the question of how the case-by-case adjudication that *Matter of A-B-* requires—at least according to the D.C., Fifth, and Ninth Circuits—can be squared with precedential decision-making about the cognizability of particular social groups.

#### D. *Litigation About Circularity*

A related debate has played out in courts of appeals across the country in regard to a common way domestic violence claims have come to be framed. Both *A-R-C-G-* and *A-B-*, recall, defined their particular social group in terms of women “unable to leave” their intimate relationships.<sup>152</sup> But as the Attorney General emphasized in *A-B-*, members of a particular social group “must share a narrowing characteristic other than their risk of being persecuted.”<sup>153</sup>

This requirement is sometimes framed as an additional criterion for the cognizability of a social group.<sup>154</sup> However, it is more properly understood as a nexus problem—an issue with the “on account of” part of the test for asylum. Persecutors do not target people on account of their “risk of being persecuted.”<sup>155</sup> If, say, Nazis start getting punched, this is because they are Nazis, not because they are part of the group “people punched by anti-fascists.”<sup>156</sup> The latter group definition would lead to the

149. *Gonzales-Veliz*, 938 F.3d at 232 (“[T]he BIA never even stated that groups based on domestic violence are categorically banned.”).

150. *Id.*

151. *See supra* Section II.B.

152. *See supra* notes 120, 122 and accompanying text.

153. *Matter of A-B-*, 27 I. & N. Dec. 316, 335 (A.G. 2018) (quoting *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005)), *abrogated by* *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

154. *See, e.g., M-E-V-G-*, 26 I. & N. Dec. 227, 237 n.11 (B.I.A. 2014) (“DHS’s proposed test also included a separate requirement that the social group must exist independently of the fact of persecution. However, this criterion is well established in our prior precedents and is already a part of the social group analysis.”); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 223 (B.I.A. 2014), *vacated in part*, *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016).

155. *A-B-*, 27 I. & N. Dec. at 335 (quoting *Rreshpja*, 420 F.3d at 556).

156. *Cf. Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1093 (9th Cir. 2020) (Bress, J., concurring in part and dissenting in part) (explaining that “[d]efining [the] group by the harm” would cause the nexus requirement to be satisfied in every case).

circular claim that anti-fascists punch people because they are people punched by anti-fascists.<sup>157</sup>

This clarification matters because acts of persecution *can* be part of a group's definition as long as they are not the very acts of persecution group members flee and fear. So, for example, making someone a slave would surely count as persecution. That persecution could, in turn, give rise to a particular social group, enslaved people. Enslaved people might then be targeted for further persecution by government and private actors alike. If a slave were to claim a fear of assault, this might not involve any circularity at all. The claim would not be that someone is targeted for *enslavement* because they are enslaved but rather that the enslaved person fears assault or similar harms directed at those seen as slaves.

This Article previously showed another way persecution might affect a group's cognizability. Recall the former employees of a country's attorney general who were never noticed by society as a distinct or salient group until they started getting persecuted.<sup>158</sup> Persecution might be what gives a group social distinction; however, the group itself—former employees of the attorney general—is *defined* without reference to the persecution, so there is no circularity problem.<sup>159</sup> This point requires belaboring only because it is so widely misunderstood in the litigation over circularity that has arisen in domestic violence asylum cases.

The USCIS Guidance Memo applying *Matter of A-B-* stated that women who claim an inability to leave their relationships due to the violence of their persecutors are “circularly defining the particular social group by the harm on which the asylum claim was based.”<sup>160</sup> “Such a formulation would generally not share a ‘narrowing characteristic other than their risk of being persecuted’”—in other words, a group defined that way would generally fail to qualify for asylum.<sup>161</sup> According to the plaintiffs and district court in *Grace*,<sup>162</sup> as well as the petitioners in recent

---

157. See *Sarkisian v. Att’y Gen.*, 322 F. App’x 136, 141 (3d Cir. 2009) (“This is a matter of logic: motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution.”).

158. See *supra* note 57 and accompanying text (quoting *M-E-V-G-*, 26 I. & N. Dec. at 242–43).

159. See *M-E-V-G-*, 26 I. & N. Dec. at 243 (“[T]he immutable characteristic of their shared past experience exists independent of the persecution.”). Cf. *Diaz-Reynoso*, 968 F.3d at 1093 (Bress, J., concurring in part and dissenting in part).

160. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 126, at 5.

161. *Id.* (quoting *Matter of A-B-*, 27 I. & N. Dec. 316, 335 (A.G. 2018)).

162. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 133 (D.D.C. 2018), *aff’d in part, rev’d in part sub nom. Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020); Brief for the Appellees at 53, *Grace v. Barr*, 965 F.3d 883 (No. 19-5013) (“Because assessment of whether a social group definition is circular is necessarily a fact-bound inquiry, the Guidance was wrong to assume that ‘inability to leave’ a relationship is always the same as the feared harm.”).

cases in the U.S. Court of Appeals for the First,<sup>163</sup> Fifth,<sup>164</sup> and Ninth<sup>165</sup> Circuits, this passage amounted to a categorical determination that a social group defined as “women unable to leave their relationships” was impermissibly circular. The plaintiffs in *Grace* argued that the Guidance Memo’s “blanket assumption is incompatible with the required case-by-case analysis,”<sup>166</sup> citing and conflating the same, disparate mix of cases Diaz-Reynoso cited to the Ninth Circuit.<sup>167</sup>

Plaintiffs’ and petitioners’ substantive argument was that women may be unable to leave their relationships for a variety of reasons, not just because of their partner’s violence.<sup>168</sup> Legal or religious limits on divorce, the social inequality of women, or community pressures all might keep women from leaving their abusers.<sup>169</sup> The First, Ninth, and D.C. Circuits agreed that case-by-case adjudication was therefore necessary to determine whether the social group definition in any *particular* case proves circular.<sup>170</sup> This, however, required the D.C. Circuit to disregard (and discredit) the more categorical claims government lawyers had made.<sup>171</sup> And the First and Ninth Circuits both faulted (and remanded their cases back to) the BIA for its failure to conduct “the case-specific inquiry demanded by *Matter of A-B*.”<sup>172</sup> According to the First Circuit, the BIA “must have viewed the circularity objection as categorical; *i.e.*, that any group defined by its members’ inability to leave a relationship must be insufficient.”<sup>173</sup> This, it said, was error.<sup>174</sup>

Meanwhile, the Fifth Circuit in *Gonzales-Veliz* needed only two sentences to decide that “[a]s in *A-R-C-G- and A-B*, ‘Honduran women unable to leave their relationship’ is impermissibly defined in a circular

163. *De Pena-Paniagua v. Barr*, 957 F.3d 88, 93 (1st Cir. 2020).

164. *Gonzales-Veliz v. Barr*, 938 F.3d 219, 232 (5th Cir. 2019).

165. *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1086 (9th Cir. 2020).

166. Brief for the Appellees, *supra* note 162, at 54.

167. *See supra* notes 137–141 and accompanying text.

168. Brief for the Appellees, *supra* note 162, at 53–54.

169. *See Grace v. Barr*, 965 F.3d 883, 904 (D.C. Cir. 2020); *De Pena-Paniagua v. Barr*, 957 F.3d 88, 93–94 (1st Cir. 2020) (“We therefore do not see any basis other than arbitrary and unexamined fiat for categorically decreeing without examination that there are no women in Guatemala who reasonably feel unable to leave domestic relationships as a result of forces other than physical abuse.”); *Diaz-Reynoso*, 968 F.3d at 1087 (noting that petitioner’s inability to leave could be due to “financial dependence on her husband, limited education, rural location, and an ingrained Mayan cultural view that a relationship does not end until the man so agrees”).

170. *Grace v. Barr*, 965 F.3d at 904 (“In short, whether a given group is circular depends on the facts of the particular case.”); *De Pena-Paniagua*, 957 F.3d at 94; *Diaz-Reynoso*, 968 F.3d at 1086.

171. *Grace v. Barr*, 965 F.3d at 905 (citing government counsel’s acknowledgement at oral argument that its briefing had been inaccurate and that groups of women unable to leave their relationships are “not categorically barred”).

172. *Diaz-Reynoso*, 968 F.3d at 1088; *see De Pena-Paniagua*, 957 F.3d at 94.

173. *De Pena-Paniagua*, 957 F.3d at 93.

174. *Id.*

manner.”<sup>175</sup> Presumably finding those precedents indistinguishable, the Fifth Circuit was once again happy to allow the BIA to avoid “reinventing the wheel every time.”<sup>176</sup>

Putting the Fifth Circuit aside, the courts that insisted on case-by-case adjudication once again found that it was needed because of the substance of whatever was being adjudicated. When circularity is under consideration, adjudicators may need to conduct a factual investigation into what is causing a woman’s entrapment. Only then can they decide, case-by-case, whether “women who cannot leave their relationships” is a group defined in terms of persecution, and therefore circular.

Notice, however, that were the social group defined differently, case-by-case adjudication of circularity might *not* be required. For instance, if the group asserted were “Guatemalan women who cannot leave their relationship because of cultural norms,” adjudicators could say categorically that this definition is not circular.<sup>177</sup> In that case, social norms rather than the persecutor’s abuse is what is said to trap women in their relationships. The lesson here is that categorical claims about circularity—unlike, say, those about social distinction—are not inherently impermissible. Case-by-case adjudication means something different in those two contexts: whereas social distinction questions are fact-bound and thus may need to be considered anew in each case, circularity analysis needs to remain open-ended only because certain group definitions—like women unable to leave their relationships—admit of multiple interpretations, not all of which can be foreclosed at once.

Judge Daniel Bress of the Ninth Circuit, dissenting in *Diaz-Reynoso*,<sup>178</sup> recognized this point—although he disagreed with his colleagues about what prevented Diaz-Reynoso herself from being able to leave her relationship. As Judge Bress put it: “Whether the anti-circularity rule applies is determined on a case-by-case basis by examining the proposed social group that an applicant brings forward. But when the rule does apply, it is, indeed, a categorical one.”<sup>179</sup> Again, the lesson is that case-by-case adjudication is not a general due process or even statutory necessity; rather, it is an imperative that stems from the nature of the thing being adjudicated.

### E. *Litigation About Family-Based Claims*

The Attorney General’s opinion in *A-B-* was prompted by what he saw as an impermissibly categorical *acceptance* of domestic violence claims

---

175. 938 F.3d 219, 232 (5th Cir. 2019) (emphasis added).

176. *Id.*

177. *See* *Grace v. Barr*, 965 F.3d 883, 904 (D.C. Cir. 2020).

178. 968 F.3d 1070 (9th Cir. 2020).

179. *Id.* at 1096 (Bress, J., concurring in part and dissenting in part) (citations omitted).

in the BIA's opinion in *Matter of A-R-C-G*.<sup>180</sup> But according to the plaintiffs in *Grace*, *Matter of A-B*- overcorrected, acting categorically in the other direction.<sup>181</sup>

A similar dynamic has played out in another important area of asylum law—that governing claims based on persecution directed at individual families. In 1985, the BIA said in *Acosta* that “kinship ties” were among the paradigmatically immutable characteristics that could establish a particular social group.<sup>182</sup> Then, in 2006, the BIA said in *Matter of C-A*-<sup>183</sup> that “[s]ocial groups based on innate characteristics such as . . . family relationship are generally easily recognizable and understood by others to constitute social groups.”<sup>184</sup> And in 2017, in *Matter of L-E-A*-,<sup>185</sup> the BIA accepted as a particular social group the “‘immediate family of [L-E-A-’s] father,’ who owned a store targeted by a local drug cartel.”<sup>186</sup> By then, nearly every court of appeals had found family-based groups to be cognizable,<sup>187</sup> with some referring to families as the “prototypical”<sup>188</sup> or “quintessential particular social group.”<sup>189</sup>

In 2019, Attorney General William Barr reversed the social group determination in *L-E-A*-, casting aside conflicting circuit precedent either as “outdated,”<sup>190</sup> dicta,<sup>191</sup> or—most relevantly here—as inappropriately “categorical.”<sup>192</sup> Since *Acosta*, the Attorney General wrote, “the Board has emphasized that a ‘particular social group’ must be particular and socially distinct in the society at question, which itself requires a fact-specific inquiry based on the evidence in a particular case.”<sup>193</sup> Note that the necessity of case-by-case adjudication is tied here—as this Article argues it should be—to the social distinction and particularity prongs of the social group test, not the immutability criterion.

180. *Matter of A-B*-, 27 I. & N. Dec. 316, 346 (A.G. 2018), *abrogated in part by* *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

181. Brief for the Appellees, *supra* note 162, at 13–14.

182. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by* *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

183. 23 I. & N. Dec. 951 (B.I.A. 2006).

184. *Id.* at 959.

185. 27 I. & N. Dec. 581 (A.G. 2019).

186. *Id.* at 581.

187. Recent Adjudication, *Asylum Law—Particular Social Group—Attorney General Overrules Finding of Family as a Social Group—Matter of L-E-A*-, 27 I. & N. Dec. 581 (*Att’y Gen. 2019*), 133 HARV. L. REV. 1500, 1505 (2020).

188. *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)).

189. *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015).

190. *L-E-A*-, 27 I. & N. Dec. at 590.

191. *Id.*

192. *Id.* at 591.

193. *Id.*

Having found categorical acceptance of family-based social groups to be inappropriate, the Attorney General instead required that, to be cognizable, nuclear families must not only be generally salient *types* of units in society, but the applicant's *specific* family unit must also be set apart and socially recognized.<sup>194</sup> The Kennedys and the Kardashians may be cognizable social groups in our society, in other words, though the Souceks, for better or worse, are not.

The Attorney General emphasized that *L-E-A-* “does not bar all family-based social groups from qualifying for asylum.”<sup>195</sup> But that is not how plaintiffs described his ruling when they challenged it in the D.C. District Court, using the same jurisdictional hook as *Grace*.<sup>196</sup> “Despite the Attorney General’s stated adherence to the principle of case-by-case adjudication,” the plaintiffs in *S.A.P. v. Barr*<sup>197</sup> alleged, “he nonetheless made several statements in *dicta* suggesting that family-based groups *usually* will not meet the social distinction requirement for PSGs.”<sup>198</sup> This “unlawful presumption against family-based PSGs, arbitrarily departing from decades of agency guidance requiring an individualized, fact-based, case-by-case social group analysis,”<sup>199</sup> was said to violate federal immigration law as well as the Due Process Clause.<sup>200</sup>

Given the D.C. Circuit’s refusal to treat a general presumption as a categorical bar in *Grace*, it now seems unlikely that the plaintiffs in *S.A.P.* will be able to convince courts that *L-E-A-* operates categorically, violating what they describe as a statutory or even constitutional right to individualized adjudication of their family-based social group claims. To be sure, the Attorney General, in *L-E-A-*, made family-based claims *much* harder to win. Raising the substantive legal standard will always lead to a loss for a certain category of claimants: those whose claims fall between the old standard and the new. But this is not because the adjudication of their cases has become less individualized.

There is an irony in the fact that plaintiffs in *S.A.P.*, whose families were, but no longer are, categorically *recognized* as particular social groups, should now fault the Attorney General for being overly categorical in rejecting their groups. But their claim raises an important question: Does the demand for case-by-case rather than categorical decision-making operate symmetrically? In other words, might there be questions in asylum law that can be answered categorically in favor of

---

194. *Id.* at 594.

195. *Id.* at 595.

196. Complaint for Declaratory and Injunctive Relief at 1, 23, *S.A.P. v. Barr*, No. 19-cv-03549 (D.D.C. Nov. 25, 2019).

197. No. 19-cv-03549 (D.D.C. filed Nov. 25, 2019).

198. Complaint for Declaratory and Injunctive Relief, *supra* note 196, at 20.

199. *Id.* at 34.

200. *Id.* at 34–36.

protection, but which have to be individually assessed when denying applicants' claims? Perhaps it was fine for the BIA or the courts to declare nuclear families to be categorically (or presumptively) cognizable as particular social groups, whereas a categorical, or even presumptive, rejection of such groups would raise concerns of a different sort.<sup>201</sup> Section III.D takes up this question below.

The DOJ's insistence in *Grace* that it can and has made categorical rules regarding social groups is in significant tension with the Attorney General's outrage in *L-E-A-* about judges recognizing family-based claims across the board. But there is tension too in asylum advocates' demands for case-by-case adjudication of issues that they were formerly happy to have categorically resolved in their favor.

This Part has distinguished several ways and contexts in which "case-by-case" adjudication gets invoked, not always consistently. With those in mind, Part III can now provide a prescriptive account of when and what types of case-by-case adjudication is necessary in asylum law.

### III. PROPERLY CATEGORIZING THE CATEGORICAL AND THE CASE-BY-CASE

Time and again, the Trump administration and its opponents both insisted on the need for case-by-case adjudication of asylum claims while, at other times, enjoyed (and tried to protect) the benefits of categorical decisions about whom asylum law protects. In documenting confusions and contradictions on this issue, Part II issued a series of promissory notes—questions pushed off to this Part about when case-by-case adjudication is necessary and, when so, what it should entail.

The main lesson that has emerged so far is that case-by-case adjudication is necessary (or not) based solely on the nature of the thing being adjudicated. Basic as this may sound, it is a lesson repeatedly misunderstood in the regulatory and litigation efforts described in Part II. And the lesson's implications are important.

For one thing, it follows that the problem with categorical adjudication—to the extent there is one—does not stem from some abstract principle like the Due Process Clause, despite what advocates sometimes allege.<sup>202</sup> There is no constitutional requirement that the various elements of an asylum-seeker's claim can only be rejected (or for that matter, accepted) on an individualized rather than categorical basis. In fact, there is not even a *statutory* requirement prohibiting the sort of categorical judgments contested in the cases described above.

---

201. See *infra* Section III.C.

202. Complaint for Declaratory and Injunctive Relief, *supra* note 7, at 32; Complaint for Declaratory and Injunctive Relief, *supra* note 196, at 35–36.

Perhaps that is why there is no citation after the claim by the district court in *Grace* that a general rule against domestic violence or gang-based claims would “run[] contrary to the individualized analysis required by the INA.”<sup>203</sup> The opinion does go on to cite a regulation requiring asylum officers to create a written record summarizing the particular facts in each expedited removal case.<sup>204</sup> But the necessity of hearing each applicant’s particular factual story is in no way incompatible with applying categorical rules to those facts. (Officials at the Department of Motor Vehicles might be required to look at the birth certificate of every aspiring driver who comes to the office, but that does not mean they cannot reject everyone under a designated age.) The fact that certain aspects of asylum claims are necessarily particularized—an applicant’s subjective fear of persecution, for example<sup>205</sup>—does not mean that general rules cannot be applied to other aspects of the decision.

In the discussion above, the most promising statutory argument against categorical adjudication of social group claims was the one offered in *Diaz-Reynoso*, the Ninth Circuit domestic violence case.<sup>206</sup> The claim there was that federal law enumerates specific categorical bars to asylum and withholding of removal—for example, bars against terrorists or people who have persecuted others.<sup>207</sup> Were the Attorney General or BIA to add additional categorical restrictions—against victims of domestic violence, say, or former gang members—this would subvert the statutory scheme Congress enacted. As *Diaz-Reynoso* put it, Congress barred certain *criminals* from asylum, not *victims* of criminality like her.<sup>208</sup>

Unfortunately, this argument proves too much. It would make every precedential decision limiting the meaning of the phrase “membership in a particular social group” into an illicit addition to the statutory asylum bars. Take *Acosta*, the first such decision: after it established the

203. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018), *aff’d in part, rev’d in part sub nom. Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

204. *See id.*; 8 C.F.R. § 208.30(e)(1) (2020) (“The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, [and] any additional facts relied on by the officer . . .”).

205. *See* David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1271 (1990) (discussing the “individualized inquiry” ordinarily required under asylum law’s “‘well-founded fear’ standard”).

206. *See supra* note 136 and accompanying text.

207. *See, e.g.*, 8 U.S.C. § 1158(b)(2) (stating that an alien is not eligible for asylum if “the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion”); *id.* § 1231(b)(3)(B)(i) (stating that an alien can be deported to a country where his or her life or freedom would be threatened if “the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual’s race, religion, nationality, membership in a particular social group, or political opinion”).

208. Petitioner’s Opening Brief, *supra* note 136, at 24.

immutability requirement, it held that being a taxi driver is *not* an immutable characteristic and thus cannot serve as the basis for asylum.<sup>209</sup> The argument in *Diaz-Reynoso* would treat this as an addition to the statutory bars to asylum. (No criminals, terrorists, or taxi drivers . . . .) But it is not; it is an interpretation that fleshes out another part of the statute, namely its ambiguous language about social groups.<sup>210</sup>

If the categorical decision to reject asylum claims from taxi drivers is wrong, the problem is not that the decision is categorical. The error would be substantive: a misunderstanding of how people's jobs might be "fundamental to their individual identities," something they "should not be required to change."<sup>211</sup> The BIA might have misapplied its immutability standard, but the result would have been categorical even if it had come out the other way. That is just the nature of immutability, which is the substantive test being applied. Saying no to a group on this basis is no more akin to an additional statutory bar than saying yes (as in the BIA's case about gay men<sup>212</sup>) would have been akin to adding another ground to the five listed in the statute.<sup>213</sup>

This once again reinforces this Article's main lesson: whether categorical adjudication is proper depends solely on the nature of the thing being adjudicated. Arguments against categorical adjudication in asylum law turn out to be substantive, not procedural. Making precedential decisions that affect entire groups of potential asylees is not inherently wrong. It is wrong only if the decisions turn on a substantive standard that itself requires individualized application.

When it comes to particular social group claims, the biggest flashpoint in current fights over the future of asylum law, one needs to look closely at the individual tests that have evolved—tests for immutability, social distinction, particularity, anti-circularity, and nexus—to determine which allow for categorical rather than case-by-case results. It is not helpful to ask whether victims of domestic violence can be categorically excluded from asylum. Instead, one must ask *which test* leads to the exclusion, for the categorical or particularized nature of the test will determine the permissibility of a categorical rather than case-by-case exclusion.

209. See *Matter of Acosta*, 19 I. & N. Dec. 211, 234 (B.I.A. 1985) ("It may be unfortunate that the respondent . . . would have had to change his means of earning a living . . . in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice."), *overruled in part by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

210. See 8 U.S.C. § 1101(a)(42); see also *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1092 (9th Cir. 2020) (stating that "particular social group" is an ambiguous term and that the BIA is entitled to *Chevron* deference in its interpretation).

211. *Acosta*, 19 I. & N. Dec. at 233. One might wonder whether the BIA would have been as dismissive of a job-based claim from an artist, a professor, or a lawyer.

212. See *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

213. See 8 U.S.C. § 1101(a)(42).

This Part considers these criteria one by one, determining to what extent each can be categorically applied. It then goes on to ask whether this Article's prescriptions about asylum adjudication apply symmetrically, both to asylum-seekers and the government, expansions and restriction of protection, alike.

### A. *Immutability and Social Distinction*

The immutability criterion and the later-added social distinction test for particular social groups provide the easiest cases of categorical and case-by-case adjudication, respectively. Despite the government's confusion on this point (described in Section II.A), Part I showed how routinely the courts and BIA approved or rejected social groups categorically in the years after *Acosta*, when immutability was the only explicit requirement. In fact, as this Article has shown, "case-by-case" in *Acosta* really meant "group-by-group": the Board envisioned a gradual accumulation of caselaw clarifying what groups would categorically qualify as "particular social groups" for asylum purposes.<sup>214</sup>

By contrast, social distinction is, as the BIA recognized from the beginning, a fact-intensive, society-specific determination about what groups are socially salient at a given time and place.<sup>215</sup> This Article need not belabor the point, made already, that even if traits like sex or sexual orientation are recognized categorically as immutable,<sup>216</sup> societies might not always and everywhere have thought of themselves as carved up into groups defined by sexuality.<sup>217</sup> That is why case-by-case adjudication of social distinction is needed. Determining whether a group such as "Cuban homosexuals" is cognizable requires adjudicators to delve into the specifics of Cuban society at a given point in history. The variability of a group's social distinction across time and place prevents that test from being answered categorically, once and for all.

That said, there are three points about the particularized nature of the social distinction test that need to be explored. *First*, Section II.B drew a distinction between a weaker and stronger sense in which social distinction might be determined "case-by-case." The weaker one derives from the BIA's and courts' emphasis on the "context of the country of

214. See *supra* notes 26–38 and accompanying text.

215. See *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586–87 (B.I.A. 2008) ("The question whether a proposed group has a shared characteristic with the requisite 'social visibility' must be considered in the context of the country of concern . . ."); cf. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (B.I.A. 2014) (noting that *S-E-G-* "should not be read as a blanket rejection of all factual scenarios involving gangs").

216. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 657–58 (2015) (recognizing the "immutable nature" of gays and lesbians); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . .").

217. See *supra* text accompanying note 62.

concern.”<sup>218</sup> “Case-by-case” here really means “society-by-society.” In other words, group-based decisions could be made, but new precedential decisions would be required for each country. Honduran women unable to leave their relationships could not be bound by a decision about a woman in Guatemala, but Guatemalan women presumptively would be.

The better understanding of “case-by-case” is probably the stronger reading, according to which *every* applicant gets their own bite at the social distinction apple. This understanding is better for two reasons. For one, it is more sensitive to societal changes over time—the kind of evolution in a group’s social salience that the BIA itself has described.<sup>219</sup> The weak version of case-by-case adjudication is likely to lock in whatever society-specific answers it arrives at. Being forced to consider the question afresh case-by-case, not just society-by-society, might help keep this from happening.

The other advantage of the stronger reading is based in the due process notion that everyone deserves their day in court.<sup>220</sup> It would be unfair if the first, say, gang opponent from Honduras were to do a poor job presenting evidence of his group’s social distinction in that country, leading to a precedential opinion that binds better-counseled Honduran gang opponents who happen to arrive later. For this reason, “case-by-case” should mean that when it comes to social distinction, decisions must be made based on the particular evidence offered *in that case*.

But, *second*, if this is so, how are courts and agency officials to treat cases arising from similar situations? Does the BIA need to “reinvent[] the wheel,” as the Fifth Circuit put it,<sup>221</sup> with each new case? That court approved a BIA decision in which it treated the domestic violence claim before it as “substantially similar” to those decided in *Matter of A-R-C-G-* and *A-B-*.<sup>222</sup> The Second Circuit, meanwhile, sent back a case where the Board had found no “meaningful distinction” between it and *W-G-R-*, an earlier, precedential decision on gangs in a neighboring country.<sup>223</sup> The Ninth Circuit similarly admonished the BIA recently, writing that “[t]here are no shortcuts” when it comes to case-by-case adjudication.<sup>224</sup>

218. *S-E-G-*, 24 I. & N. Dec. at 586–87; *see also supra* notes 108–09 and accompanying text (discussing *Ordonez Azmen v. Barr*, 965 F.3d 128 (2d Cir. 2020)).

219. *See M-E-V-G-*, 26 I. & N. Dec. at 242–43. Recall the example of the former employees of a country’s attorney general.

220. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (“It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.”).

221. *Gonzales-Veliz v. Barr*, 938 F.3d 219, 232 (5th Cir. 2019).

222. *Id.* at 230–31.

223. *Ordonez Azmen*, 965 F.3d at 135, 140 (2d Cir. 2020).

224. *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1087 (9th Cir. 2020).

It is unrealistic, given the volume of claims, to think that the BIA or immigration judges will start with a blank slate each time. But when it comes to social distinction, case-by-case adjudication must at least mean that the result in case one cannot be the *reason* for the result in case two. Of course, if the evidence presented in the two cases were the same, the same decision can (and probably should) result. Judges could copy and paste or, better, incorporate by reference, the reasoning of their prior opinion.<sup>225</sup> But when new evidence is presented, new reasoning is required. So, for example, in *Ordonez Azmen*, the 200 supplemental pages of evidence about how former gang members are perceived in Guatemala needed to be considered and acknowledged, and the BIA should have explained what remained lacking.<sup>226</sup> Without this, it is hard to see how the BIA was doing anything other than following “per se rules”<sup>227</sup> about what groups qualify—the very thing the Attorney General rejected as impermissibly categorical in *Matter of A-B*.<sup>228</sup>

*Third*, it is important to note that the necessity of case-by-case adjudication of the social distinction criterion hinges on a correct understanding of what social distinction means. Before 2014, when the requirement was still referred to as “social visibility,” judges often interpreted visibility literally.<sup>229</sup> This was a substantive mistake, now officially corrected,<sup>230</sup> but consider its implications for case-by-case versus categorical adjudication. If social visibility/distinction really did come down to whether groups were recognizable on sight, adjudicators might legitimately have decided *categorically* that, say, confidential informants<sup>231</sup> or people who are HIV-positive<sup>232</sup> were insufficiently visible. These are questions judges could answer once and for all.

Here again, the permissibility of categorical adjudication depends entirely on the substance of the thing being adjudicated. Perhaps one reason courts have been so suspicious of even hints of categorical adjudication by the BIA is because it might suggest that its members are

225. For a discussion about the dangers posed by unacknowledged copying-and-pasting in asylum opinions, see generally Brian Soucek, Essay, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153 (2012).

226. See *Ordonez Azmen*, 965 F.3d at 133.

227. *Id.* at 135.

228. See *Matter of A-B*, 27 I. & N. Dec. 316, 339 (A.G. 2018), *abrogated in part* by *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

229. *Matter of W-G-R*, 26 I. & N. Dec. 208, 211 (B.I.A. 2014) (“Contrary to our intent, the term ‘social visibility’ has led some to believe that literal, that is, ‘ocular’ or ‘on-sight,’ visibility is always required for a particular social group to be cognizable under the Act.”), *vacated in part*, *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); Soucek, *supra* note 47, at 338.

230. See *W-G-R*, 26 I. & N. Dec. at 212.

231. See *Matter of C-A*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006).

232. See *Rodriguez v. Att’y Gen.*, 381 F. App’x 217, 219 (3d Cir. 2010) (per curiam) (noting the immigration judge’s finding that “it is unlikely that anyone would be able to tell from looking at [Rodriguez] that he is HIV positive”).

misunderstanding the substantive requirements being applied. This, as Section III.B argues, is precisely what seems to be happening when it comes to particularity.

### B. Particularity

According to *Matter of M-E-V-G-*, the particularity requirement demands that terms used to describe a particular social group “have commonly accepted definitions” within the relevant society and “provide a clear benchmark for determining who falls within the group.”<sup>233</sup> “The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”<sup>234</sup> Traits that fail this test, according to the BIA, include wealth, poverty, homelessness, and youth<sup>235</sup>—traits inconsistently described both as “too vague”<sup>236</sup> and too “all encompassing.”<sup>237</sup>

Notice the different directions the BIA’s adjectives point: a group that has amorphous, vague, or overly subjective boundaries is notably different than one that is overbroad, diffuse, or all encompassing—which is to say, too big or diverse.<sup>238</sup> To be “narrowly defined”<sup>239</sup> is something other than being sharply defined. An example of one group that would meet the latter but not the former test is women.

Significantly, when the Ninth Circuit granted *Chevron* deference to the BIA’s particularity standard in 2016, it did so with the express proviso that the requirement does not “disqualify groups that exceed specific breadth or size limitations” or because of the “diversity within a proposed particular social group.”<sup>240</sup> And yet it said all this while reviewing *Matter of W-G-R-*, where the groups “former members of the Mara 18 gang in El Salvador who have renounced their membership” and “deportees from the United States to El Salvador” were both rejected as insufficiently particular.<sup>241</sup> The gang-based claim was problematic, the BIA said,

233. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 239 (B.I.A. 2014).

234. *Id.*

235. *Id.* at 239–40.

236. *Id.* at 240 (internal quotation mark omitted) (quoting *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005)).

237. *Id.* (internal quotation mark omitted) (quoting *Escobar*, 417 F.3d at 368).

238. *Id.* at 239 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170–71 (9th Cir. 2005), for the proposition that “a particular social group must be narrowly defined and that major segments of the population will rarely, if ever, constitute a distinct social group”); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 214 (B.I.A. 2014) (same), *vacated in part*, *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016). Insofar as *Ochoa* rejected social groups based on the diversity of their membership, that holding does not survive *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093–94 (9th Cir. 2013) (en banc).

239. *M-E-V-G-*, 26 I. & N. Dec. at 239.

240. *Reyes*, 842 F.3d at 1135.

241. *Id.* at 1137–39.

because it lumped together former gang members “regardless of the length and recency of [their] membership”;<sup>242</sup> the group of “deportees was too amorphous, overbroad and diffuse because it included men, women, and children of all ages, regardless of the length of time they were in the United States, the reasons for their removal, or the recency of their removal.”<sup>243</sup>

Both of these rejections are suspect, at least on their own terms.<sup>244</sup> Unlike wealth or youth, which admit of degrees, someone either is or is not a former gang member. The same goes for deportees from the United States. Maybe no one in El Salvador cares that an individual belongs to either group, but that would be a society-specific problem with those groups’ *social distinction*—not their particularity. Assuming, as the Ninth Circuit did, that particularity is about delineation and not a group’s size or homogeneity,<sup>245</sup> there should not be particularity problems in groups based on gang membership, deportation, or gender.

Importantly, one can say this *categorically*. There is nothing fact-bound or society-specific about the binary nature of gang membership or deportation status. Determining whether these groups have boundaries that are sharp rather than ambiguous, or objective rather than subjective, is like determining whether a trait is immutable: it is a question of law that can be determined once and for all.<sup>246</sup> When particularity is understood this way, case-by-case adjudication of a group’s particularity becomes unnecessary.

There is an exception to this claim, and it is suggested by the BIA’s own example of landowners as a group that might be particular in an underdeveloped oligarchy but not in Canada.<sup>247</sup> As noted before, this is a strange example since land ownership itself seems binary. But imagine property ownership more broadly: there could be a difference between Canada, where most everyone owns something, however little, and a society where, say, everything is communal except for those at the top. Property ownership would be on a spectrum in Canada but more distinctly cabined in the oligarchy. Gender might provide a parallel example. Although the gender binary remains entrenched in most of the world, one can easily imagine a society in which gender was widely viewed on a spectrum, like the Kinsey scale for sexual orientation. That is to say that the particularity of gender-based groups could *theoretically*

242. *Id.* at 1137–38 (citing *W-G-R-*, 26 I. & N. Dec. at 221).

243. *Id.* at 1139 (citing *W-G-R-*, 26 I. & N. Dec. at 223).

244. *See id.* at 1139 n.12 (suggesting that a lack of evidence presented, rather than the group definitions themselves, may have been more to blame for *W-G-R-*’s failure before the BIA).

245. *Id.* at 1135.

246. “Once and for all” of course only means that these issues can be decided as a precedential matter, binding unless and until future judges are offered reasons sufficient to overcome *stare decisis*.

247. *See W-G-R-*, 26 I. & N. Dec. at 214–15.

vary across place and time, but in our current world, categorical determinations can generally be made that groups like “Dominican women” have the particularity needed to ground an asylum claim.<sup>248</sup>

Again, though, all of this depends on understanding particularity to mean well-delineated. Were it to refer to a group’s size or the heterogeneity of its membership, questions about particularity would more likely be fact-intensive and society-specific, necessitating case-by-case answers. Are gang members drawn from a broad cross-section of society? Are they a “major segment[] of the population”?<sup>249</sup> These are questions more like the typical social distinction determination, where case-by-case adjudication is needed, not like questions about a term’s ambiguity—something courts decide categorically all the time.<sup>250</sup>

This may be no place for a full defense of the proper way to interpret the particularity requirement, yet it is worth underscoring: fuzzy boundaries, rather than a group’s size or diversity, are what particularity should be understood to preclude.<sup>251</sup> Not only have the courts of appeals increasingly taken this position,<sup>252</sup> but size and diversity limitations are inconsistent with the basic principles that have shaped social group caselaw from its beginning in *Acosta*. As the Fifth Circuit said about “membership in a particular social group” in *Gonzales-Veliz v. Barr*, “Consistent with the interpretive canon “*ejusdem generis*,” the proper interpretation of the phrase can be only achieved when it is compared with the other enumerated grounds of persecution,’ such as race, religion, nationality, and political opinion.”<sup>253</sup> None of the other grounds are limited by size, or the fact that members of a particular religion, for example, may share little in common beyond their faith. Persecution can target majority races and religions yet still give rise to asylum claims. It is ironic, then, that the Fifth Circuit made its comparison of social groups to the other four grounds only after saying that a gender-based social

---

248. See *De Pena-Paniagua v. Barr*, 957 F.3d 88, 95–96 (1st Cir. 2020) (“[I]t is difficult to think of a country in which women are not viewed as ‘distinct’ from other members of society. In some countries, gender serves as a principal, basic differentiation for assigning social and political status and rights . . . . It is equally difficult to think of a country in which women do not form a ‘particular’ and ‘well-defined’ group of persons.”).

249. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 239 (B.I.A. 2014).

250. See, for example, the thousands of cases applying Step One of *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

251. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* § 5:43 (2020 ed.) (“[T]he Board’s clearest articulation of ‘particularity,’ is ‘definable boundaries . . . .’” (quoting *M-E-V-G-*, 26 I. & N. Dec. at 239)).

252. See, e.g., *De Pena-Paniagua*, 957 F.3d at 96–97; *Mayorga-Rosa v. Sessions*, 888 F.3d 379, 384–85 (8th Cir. 2018); *Reyes v. Lynch*, 842 F.3d 1125, 1135 (9th Cir. 2016); *Cece v. Holder*, 733 F.3d 662, 675–77 (7th Cir. 2013) (en banc).

253. *Gonzales-Veliz v. Barr*, 938 F.3d 219, 235 (5th Cir. 2019) (quoting *M-E-V-G-*, 26 I. & N. Dec. at 234).

group “lacks particularity because ‘broad swaths of society may be susceptible to victimization.’”<sup>254</sup>

Under current doctrine, particular social groups need to be particular,<sup>255</sup> but the substantive understanding of that requirement affects whether it can be met categorically, or whether particularity, like social distinction, needs to be decided on a case-by-case basis. Properly understood in terms of delineation instead of size or diversity, the particularity requirement should often, though not always, allow for categorical decision-making. The problem with cases involving former gang members and abused women is not that the Board answered the particularity question categorically.<sup>256</sup> The problem is that the BIA answered the question incorrectly—perhaps because it misunderstood the question itself.

### C. Nexus

Issues around nexus are less complicated. Whether one of the five grounds was or will be “one central reason”<sup>257</sup> for someone’s persecution will almost always require case-by-case adjudication in one basic sense: judges need to ask why this *particular* applicant has or will be targeted. But there are also obvious ways in which *categorical* decisions about nexus can be made. Deciding whether the statute requires one of the grounds to be the sole cause, a but-for cause, or merely a motivating factor, is one such decision.<sup>258</sup>

The Rule discussed in Section II.A presents some slightly harder cases. It says, for example, that the government, “in general, will not favorably adjudicate” claims based on “[i]nterpersonal animus or retribution;” “[p]erceived, past or present, gang affiliation;” or “[g]ender.”<sup>259</sup> The cases discussed in Section II.C read similar language

254. *Id.* at 232 (quoting *Matter of A-B-*, 27 I. & N. Dec. 316, 335 (A.G. 2018)).

255. “[T]he particularity requirement flows quite naturally from the language of the statute, which, of course, specifically refers to membership in a ‘*particular* social group.’” *Matter of W-G-R-*, 26 I. & N. Dec. 208, 213 (B.I.A. 2014) (quoting *Rivera-Barrientos v. Holder*, 666 F.3d 641, 649 (10th Cir. 2012)), *vacated in part*, *Reyes*, 842 F.3d 1125.

256. *But see* *Ordonez Azmen v. Barr*, 965 F.3d 128, 132 (2d Cir. 2020) (noting that “per se rules” about particularity would be improper); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1087 (9th Cir. 2020) (reminding the BIA that “[t]here are no shortcuts”).

257. 8 U.S.C. § 1158(b)(1)(B)(i). For withholding claims, one of the five grounds just needs to be “a reason,” *id.* § 1231(b)(3)(C) (emphasis added), a standard the Ninth Circuit has held to be lower than that needed to show nexus for purposes of asylum, *see Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017).

258. *See Barajas-Romero*, 846 F.3d at 360.

259. *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 80,274, 80,386 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235).

as something less than categorical—more prediction than rule.<sup>260</sup> But one might ask whether rules of this sort *could* be made.

A categorical bar on claims based solely on interpersonal animus might be possible.<sup>261</sup> However, this is just a matter of logic: if an individual persecutes someone solely because of a personal grudge, the individual is not persecuting them on account of one of the five grounds, as the nexus test requires.

By contrast, making a categorical rule against finding nexus in gang- and gender-based cases would be improper. Gang- and gender-based social groups might fail for any of the reasons already discussed—immutability, social distinction, or particularity—and some of those failures might be categorical. But there is no substantive basis in asylum law for saying that being perceived as a former gang member, or being a woman, will never be a central reason why someone is persecuted. In fact, as discussed above, the Rule offers no reason why nexus should fail even “in general” in such cases.<sup>262</sup>

Finally, the circularity issues encountered in Section II.D present an example of where nexus only sometimes requires case-by-case adjudication. One can categorically say that an applicant should fail the nexus test if they define their social group in terms of the persecution they are fleeing. But this, again, is—in the words of the Third Circuit—“a matter of logic: motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution.”<sup>263</sup>

What cannot always be categorically decided is the question of whether the group asserted actually *is* defined in terms of the persecution alleged. So, in domestic violence cases, judges might need to decide, case-by-case, the reason why the applicant cannot escape her marriage. Is it because she fears her husband’s abuse, or because religion or economics or cultural norms prevent her from leaving? Only the former is impermissibly circular.

And even here, case-by-case adjudication of this issue would no longer be required if victims of domestic violence framed their social groups differently. “Women in Honduras who are unable to leave their marriages because of religious prohibitions” is categorically not circular. (Whether that group satisfies the social distinction requirement is another

---

260. See, e.g., *Diaz-Reynoso*, 968 F.3d at 1080 (“Despite the general and *descriptive* observations set forth in the opinion, the Attorney General’s *prescriptive* instruction is clear: the BIA must conduct the proper particular social group analysis on a case-by-case basis.”).

261. “Solely” is doing work here, for otherwise persecution that is based in part on interpersonal animus might *also* have one of the five grounds as “a central reason” for the persecution.

262. *Supra* Section II.A.

263. *Sarkisian v. Att’y Gen.*, 322 F. App’x 136, 141 (3d Cir. 2009).

matter.) Alternatively, a group like “women in Honduras” dodges the circularity issue entirely.<sup>264</sup>

#### D. *Symmetry*

Throughout this Article, the choice between categorical and case-by-case adjudication has been framed symmetrically—as if any answers will necessarily apply both to asylum-seekers and the government alike—to decisions both extending and restricting protection. But is that true?

Though categorical decision-making during the Trump administration was employed only to restrict eligibility for asylum, that need not be so. The government might choose to categorically *recognize* certain social groups or particular types of claims.<sup>265</sup> Indeed, one overarching asymmetry of doing so should be acknowledged at the outset: deciding categorically that a particular group is not cognizable flatly defeats all claims brought by persecuted members of those groups, whereas deciding that a group is categorically cognizable does not lead to an automatic grant of asylum. To the contrary, finding a group cognizable is only the first step; nexus and persecution must still be shown, and bars to asylum must still be sidestepped. The stakes of categorical decision-making are thus far greater when employed restrictively than when being used to expand who qualifies.

Should the Biden administration propose categorical expansions to eligibility, asylum advocates would surely not be heard to complain about the necessity of case-by-case adjudication. Their turnabout would obviously be justified pragmatically—asylum advocates are responsible for saving their clients, not for maintaining the law’s internal consistency or theoretic purity. But there may in fact also be theoretical reasons why categorical adjudication is more palatable, or case-by-case adjudication less necessary, when granting rather than denying asylum claims.<sup>266</sup>

---

264. Cf. *De Pena-Paniagua v. Barr*, 957 F.3d 88, 95 (1st Cir. 2020) (“One might therefore ask, why bother with ‘unable to leave’ in the group definition.”); *Diaz-Reynoso*, 968 F.3d at 1096 (Bress, J., concurring in part and dissenting in part) (“Whether the anti-circularity rule applies is determined on a case-by-case basis by examining the proposed social group that an applicant brings forward. But when the rule does apply, it is, indeed, a categorical one.” (citations omitted)).

265. For example, Congress in 1996 amended federal law to dictate categorically that those who were “forced to abort a pregnancy or to undergo involuntary sterilization . . . shall be deemed to have been persecuted on account of political opinion.” Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Division C, Title VI, § 601(a)(1), 110 Stat. 3009, 3009–689 (1996) (codified as amended at 8 U.S.C. § 1101(a)(42)(B)). In 2000, the Clinton Administration considered but decided against a regulation making domestic violence victims categorically eligible. See *supra* note 118 and accompanying text.

266. Although this Article has argued against a due process right to case-by-case adjudication, that would be an example of an asymmetric claim, were it applicable. After all, the Due Process Clause protects individuals, including asylum-seekers, not the government.

Determining whether the government has more leeway in categorically *expanding* rather than *restricting* asylum is important, not least because case-by-case adjudication might not always be in asylum-seekers' interest.<sup>267</sup> However useful it was as a cudgel against the Trump administration's sweeping restrictions to asylum,<sup>268</sup> reinventing the wheel through case-by-case adjudication is resource intensive, and those seeking asylum often do not have resources to spare. It almost goes without saying, then, that a refugee would rather point to binding precedent, or some regulation, that makes former gang members or domestic violence victims categorically cognizable instead of having to assemble their own record demonstrating their group's particularity and social distinction.<sup>269</sup> One problem with recent statutory arguments demanding case-by-case adjudication is that, were they successful, they might also be seen to preclude categorical decision-making that *protects* asylees.<sup>270</sup> So again, one must ask whether what is good for the goose really is good for the gander: Is case-by-case adjudication, when necessary for some, necessary for all?

The main place where case-by-case adjudication has proven necessary is on the question of a group's social distinction.<sup>271</sup> Given how fact-bound, society-specific, and potentially evolving social distinction can be, it seems unfair to preclude future asylum-seekers from making their evidentiary showing simply because previous asylum seekers failed in theirs.

The principle here is basically just the well-known procedural idea that issue preclusion can only be applied against those who fully and fairly litigated the issue in a previous case.<sup>272</sup> To take an example from above, *Ordenez Azmen* should not be prevented from showing that former gang members are a socially distinct group simply because *W-G-R-* failed to show it previously (especially since *W-G-R-*'s case arose out

---

267. Historically, in fact, the insistence on case-by-case adjudication of refugee claims has been aimed at blocking protection rather than expanding it. The 1980 Refugee Act, which established the parameters of the current asylum system in the United States, was driven in significant part by Congressional displeasure with the way the Executive Branch used its so-called "parole" authority to admit refugees on a group-wide rather than individualized basis. *See Soucek, supra* note 18, at 185–87.

268. *See supra* notes 1–2 and accompanying text.

269. As noted above, President Biden has instructed the Attorney General and Secretary of Homeland Security to review current U.S. protections for "those fleeing domestic or gang violence." *See* Executive Order 14,010, 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021).

270. *See supra* notes 208–13 and accompanying text.

271. *See supra* Section III.A.

272. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

of El Salvador and Ordonez Azmen fled Guatemala).<sup>273</sup> One applicant's loss cannot preclude the possibility of a future applicant's win. Thus, case-by-case consideration is needed.

Accepting that principle, however, still leaves two questions unanswered: first, whether anything prevents the government from saying on its own, categorically, that former gang members or other groups are socially distinct; and second, whether a case in which an asylum-seeker successfully proved social distinction could preclude the government from denying that group's distinction going forward. In other words, even if an asylum-seeker's loss cannot preclude a future win, might a win preclude future losses? This Article finishes by taking these questions in order.

*First*, any restriction on the Biden administration's ability to deem a particular social group categorically cognizable would have to come from one of two sources: either the Administrative Procedure Act (if the categorical decision was made through regulation and courts found it arbitrary, capricious, or contrary to law),<sup>274</sup> or an appellate court's reversal of a BIA or Attorney General decision (if the court found their interpretation of "particular social group" unreasonable under *Chevron* Step Two).<sup>275</sup>

This is where the statutory arguments that some advocates have advanced recently about case-by-case adjudication could hurt asylum-seekers down the road. Recall that the main statutory claim is that categorical decisions restricting social groups illicitly add to the statutory bars explicitly enumerated in federal law.<sup>276</sup> Categorical decision-making is said to usurp Congress's power to say what asylum law protects. Were that so, however, it should follow that categorical decisions *expanding* asylum protections illicitly add to the five explicit statutory grounds spelled out in federal law. This would similarly usurp Congress's power.

In fact, neither is true. As argued throughout this Article, when categorical decision-making about asylum is barred, it is because of the nature of the question being decided—not because of any constitutional or statutory limitation. So, any attempt to categorically deem certain groups cognizable, whether through adjudication or regulation, should succeed unless it strikes courts as an unexplained or unreasonable departure from past agency interpretations of the asylum statute.<sup>277</sup>

---

273. Compare *Ordonez Azmen v. Barr*, 965 F.3d 128 (2d Cir. 2020), with *Matter of W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014); see also *supra* Section II.B.

274. See 5 U.S.C. § 706(2)(A).

275. See *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

276. See *supra* notes 208–13 and accompanying text.

277. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[T]he agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s

*Second*, even if the government were unwilling to make its own binding policy through adjudication or regulation, could it be categorically bound anyway? Ordinarily, an issue fully and fairly litigated by and decided against a party—the social distinction of a certain group in a certain country, for example—could be given preclusive effect in future litigation against that party, preventing them from being able to relitigate a battle they previously fought and lost.<sup>278</sup> Nonmutual offensive collateral estoppel, as this type of preclusion is formally known, would mean that future asylum-seekers could benefit from a previous applicant’s win, even though they cannot be harmed by a previous applicant’s loss.<sup>279</sup> The asymmetry of issue preclusion could prove especially lifesaving to asylum applicants since it would preserve the possibility of case-by-case adjudication for those who hope to do better than others who came before them. But it would offer a form of categorical adjudication for those wanting to benefit from predecessors who won.

The problem here is *United States v. Mendoza*,<sup>280</sup> which held on policy grounds that nonmutual issue preclusion does not bind the U.S. government as it does private parties.<sup>281</sup> The *Mendoza* doctrine has come in for withering critique,<sup>282</sup> and some of its rationales—like the idea that precluding the government from relitigating an issue it lost would “impede the development of the law through ‘percolation’ in the lower courts”<sup>283</sup>—are especially inapplicable to asylum claims, which are funneled through a single agency. The idea of nonmutual offensive issue preclusion is well-suited to the practical realities of asylum adjudication, where the government has far greater resources than its opponents and the same incentives to litigate every case with equal vigor. But with *Mendoza* standing in the way, asylum advocates would do better to seek precedential opinions and regulations rather than preclusion. One major point of this Article is to show that nothing in either the Constitution or federal immigration law stands in the way of an administration that wants

---

satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.”).

278. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. L. INST. 1982); *see also id.* § 83 cmt. b (applying this principle to administrative tribunals).

279. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329–30 (1979).

280. 464 U.S. 154 (1984).

281. *Id.* at 158.

282. *See, e.g., Zachary D. Clopton, National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 5 (2019) (“There is no justifiable reason to reflexively treat federal defendants differently from other defendants for preclusion purposes, and there are other preclusion doctrines that protect the interests purportedly at stake.”).

283. *Id.* at 22.

to expand eligibility for particular social groups in a categorical, rather than a case-by-case, manner.

### CONCLUSION

Protests against categorical decision-making in asylum law have themselves been overly categorical. They are not attentive enough to the particulars of what actually drives the need for case-by-case adjudication.

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. In social group cases, for example, immutability does not require individualized attention, but social distinction does. Particularity lies somewhere in between, and the need for case-by-case application of that test depends in large part on what the test means.

The idea that categorical adjudication is appropriate (or not) based solely on the nature of the question being adjudicated, is one that has been largely missing in recent fights over the future of asylum law. The Trump administration's sweeping regulations on asylum betrayed the government's confusion on this point. That is why its lawyers appeared in court arguing that they could make categorical decisions about asylum if they want, but also complaining when groups like families and domestic violence victims have received protection on a categorical basis.

Asylum advocates, meanwhile, repeatedly and often successfully insisted on case-by-case adjudication as a way of fighting the Trump administration's categorical restrictions. But some of the arguments they made along the way could make it harder for the current administration to change course and extend categorical protections down the road. Insisting on case-by-case adjudication as a general rule would impose its expense and complications on refugees who, due to poverty and trauma, are so often unprepared to bear them.