

UNIVERSITY of PENNSYLVANIA
JOURNAL of LAW & PUBLIC AFFAIRS

Vol. 5

April 2020

No. 3

**FAMILY FLEEING:
FAMILY MEMBERSHIP AS A BASIS FOR ASYLUM**

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INTRODUCTION

Over the last five years, there has been a well-documented increase in the number of asylum seekers coming from the Northern Triangle of Central America,¹ many of whom are fleeing horrific human rights abuses including gang and intrafamilial violence.² Their claims have met with limited success. Under U.S. law, applicants for asylum must demonstrate that, upon return to their home countries, they would experience harms rising to the level of persecution on account of a protected ground: race, religion, nationality, political opinion, or membership in a particular social group.

This last category has evolved to offer the most promise for asylum claims that do not satisfy any of the other four bases of eligibility. As such, “membership in a particular social group” has become a battleground between those who would like to see asylum protection in the U.S. expanded and those more inclined to limit its reach. A follower of the latter camp, Attorney General Sessions issued *Matter of A-B-* in June 2018, rejecting the claim of an asylum seeker who argued that she had been harmed as a member

¹ Guatemala, El Salvador, and Honduras.

² See EXEC. OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS, <https://www.justice.gov/eoir/page/file/1106366/download> [<https://perma.cc/W6DE-RWT2>] (last updated Jan. 23, 2020) (reflecting that 47,581 asylum applications were filed in fiscal year 2014, 63,701 in fiscal year 2015, 82,657 in fiscal year 2016, 144,983 in fiscal year 2017, 163,936 in fiscal year 2018, and 211,794 in fiscal year 2019). Between 2013 and 2015, the United States received more affirmative asylum applications from the Northern Triangle “than in the 15 years prior combined.” Maureen Meyer & Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum Seekers*, WASH. OFF. ON LATIN AM. (Feb. 1, 2018), <http://www.wola.org/analysis/fact-sheet-united-states-immigration-central-american-asylum-seekers/> [<https://perma.cc/7A8W-C9L4>].

of a particular social group defined by gender, nationality, and relationship status.³ In addition to vacating the order from the Board of Immigration Appeals (“the Board” or “BIA”) to grant asylum to Ms. A-B-, Sessions also overruled *Matter of A-R-C-G-*, a groundbreaking 2014 decision that recognized that domestic violence can be the basis for an asylum claim.⁴ In doing so, Sessions opined that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors⁵ will not qualify for asylum.”⁶

Despite this broad statement, a central tenet of asylum law is that each case must be analyzed on its individual record and there can be no blanket ruling for or against a certain particular social group or category of cases.⁷ However, the practical effect of decisions issued unilaterally by Attorneys General cannot be underestimated. Following *Matter of A-B-*, attorneys around the country reported heightened scrutiny and a higher rate of denial of cases involving gender-based violence and gang violence.⁸ It is clear that

³ *Matter of A-B-*, 27 I. & N. Dec. 316, 317-21 (Att’y Gen. 2018).

⁴ *Id.* at 319.

⁵ An applicant for asylum must show either that the persecution is by the government *or* by a private actor that the government is unwilling or unable to control. *See* 8 U.S.C. § 1158(B)(1) (2018) (citing 8 U.S.C. § 1101(a)(42)(A)) (emphasis added) (linking the eligibility for asylum to the refugee definition, which only requires that the applicant be “unable or unwilling to avail himself or herself of the protection of” his or her country rather than have been persecuted by that country); *see, e.g.*, *INS v. Elias-Zacarias*, 502 U.S. 478, 481-83 (1992) (addressing a claim of persecution at the hands of non-governmental guerillas).

⁶ *Matter of A-B-*, 27 I. & N. Dec. at 320. The District Court Judge in *Grace v. Whitaker* found that this constituted an impermissible blanket rule for claims involving domestic violence or gang violence. 344 F. Supp. 3d 96, 126 (D.D.C. 2018). Although this case specifically challenged the application of *Matter of A-B-* and the corresponding U.S. Citizenship & Immigration Services policy memorandum in the context of credible fear determinations, many of the judge’s conclusions are equally applicable to asylum and withholding of removal.

⁷ *See, e.g.*, *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (B.I.A. 2014) (“[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 [a] shared past experience to be a basis for distinction within that society.”).

⁸ *See* Kennji Kizuka, *Central Americans Were Increasingly Winning Asylum Before President Trump Took Office*, HUM. RIGHTS FIRST (Jan. 30, 2019), <https://www.humanrightsfirst.org/resource/central-americans-were-increasingly-winning-asylum-president-trump-took-office> [https://perma.cc/LC4W-STJB] (connecting the drop in asylum grants for Central Americans with the decision in *Matter of A-B-*); *see also* Dree Collopy, *Matter of A-B-: Case Updates, Current Trends, and Suggested Strategies*, AM. IMMIGR. LAWYERS ASS’N (Jan. 31, 2019), <https://thinkimmigration.org/blog/2019/01/31/matter-of-a-b-case-updates-current-trends-and-suggested-strategies/> [https://perma.cc/6UQX-UTS3] (noting that, after *Matter of A-B*, “[p]ractitioners across the country have noticed the application of heightened legal and evidentiary standards, and even the systematic and categorical denial of asylum claims involving domestic and gang violence”).

Matter of A-B- has given adjudicators who were already predisposed to deny asylum substantially more ground to stand on.

The Trump Administration has propagated the message that we are facing a crisis at the border to justify increasingly draconian immigration policies.⁹ What this messaging ignores, however, is that this is a crisis of our own making, borne in large part from these very policies. Not to discount the very real human rights violations that immigrants are fleeing in their home countries, the situation has been dramatically exacerbated by the Administration's choices, for example to restrict access to the border, to separate families, and to ramp up detention in conditions that have been likened to concentration camps.¹⁰ The attack on the legal framework for asylum has received less attention but is in many ways more insidious.

There is an incredible amount of discretion involved in asylum adjudication, as demonstrated by the fact that the single most important variable in the success of an asylum application is the forum in which it is heard. In 2018, the San Francisco Immigration Court granted almost 70% of asylum cases whereas the Atlanta Court's grant rate was 3.2%.¹¹ A decision

⁹ See SARAH PIERCE, MIGRATION POL'Y INST., IMMIGRATION-RELATED POLICY CHANGES IN THE FIRST TWO YEARS OF THE TRUMP ADMINISTRATION 1 (2019), <https://www.migrationpolicy.org/research/immigration-policy-changes-two-years-trump-administration> [<https://perma.cc/J9KD-MUJH>] ("After framing immigration as a threat to U.S. economic security and public safety during his campaign, upon taking office Trump immediately turned his administration's focus to immigration enforcement by signing two executive orders . . .").

¹⁰ See, e.g., Julia Love, *Asylum Seekers Anxiously Cross into U.S. As New Policy Kicks in*, REUTERS (July 17, 2019), <https://www.reuters.com/article/us-usa-immigration-mexico-border/asylum-seekers-anxiously-cross-into-us-as-new-policy-kicks-in-idUSKCN1UC2VH> [<https://perma.cc/6YSE-EGYC>] ("[New U.S. policy] requires asylum-seekers crossing a third country on the way to the United States to first pursue safe-haven there, precluding claims for the thousands who traverse Central American countries and Mexico to reach the U.S. border."); *U.S.: Family Separation Harming Children, Families*, HUM. RIGHTS FIRST (July 11, 2019), <https://www.hrw.org/news/2019/07/11/us-family-separation-harming-children-families> [<https://perma.cc/AZF4-6J8D>] ("United States officials are separating migrant children from their families at the border . . ."); Charles M. Blow, *Trump's 'Concentration Camps'*, N.Y. TIMES (June 23, 2019), <https://www.nytimes.com/2019/06/23/opinion/trump-migrants-camps.html> [<https://perma.cc/XX7T-3FFF>] (explaining that migrant children have been separated from their parents and are being held in conditions more akin to concentration camps than summer camp).

¹¹ See *Asylum Decisions in San Francisco in 2018*, TRAC IMMIGRATION: ASYLUM DECISIONS, <https://trac.syr.edu/phptools/immigration/asylum/> [<https://perma.cc/US9Z-LHTN>] (last visited Jan. 28, 2020) (set "Immigration Court" filter to San Francisco, "Fiscal Year of Decision" filter to 2018, and select "Decision" filter) (showing that the San Francisco immigration court granted 1,620 applications out of 2,392, or 68%); see also *Asylum Decisions in Atlanta in 2018*, TRAC IMMIGRATION: ASYLUM DECISIONS, <https://trac.syr.edu/phptools/immigration/asylum/> [<https://perma.cc/US9Z-LHTN>] (last visited Jan. 28, 2020)

like *Matter of A-B*- that did not actually change the law, but was teeming with restrictionist dicta, clearly emboldens less-refugee-friendly judges and suggests to migrants that it may be safer to enter the country without inspection than try their luck at “refugee roulette.”¹²

In 2018, the Board issued a precedential decision requiring asylum applicants to clearly delineate in Immigration Court to which particular social group they are claiming membership in order to preserve them on appeal.¹³ It is now that much more critical in all cases, but especially those involving domestic or gang violence, for applicants not to overlook any workable legal theories. One promising line of argumentation is family-based particular social group membership. There is ample jurisprudence accepting the family as a cognizable social group and indicating that there is nexus to a protected ground when the persecutor was motivated by the applicant’s relationship to a family member.¹⁴

In May 2018, the Board published *Matter of L-E-A-*, its first and only precedential decision on persecution on account of family membership.¹⁵ Six months later, Interim Attorney General Whitaker referred *Matter of L-E-A-* to himself, staying the decision and requesting *amicus* briefing on the circumstances under which an asylum claim based on family membership should be granted.¹⁶ On July 29, 2019, Attorney General Barr, who replaced Whitaker in February 2019, issued his decision, asserting that most families will not qualify as particular social groups.¹⁷ Family-based claims have since

(set “Immigration Court” filter to Atlanta, “Fiscal Year of Decision” filter to 2018, and select “Decision” filter) (showing that the Atlanta immigration court granted only 14 applications out of 430, or 3%).

¹² The “refugee roulette” phrase was coined in Jaya Ramji-Nogales, Andrew Schoenholtz & Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

¹³ *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189, 191 (B.I.A. 2018) (holding that an applicant must delineate all particular social groups on the record before the Immigration Judge and that the Board will generally not consider new groups not previously advanced before the Immigration Judge).

¹⁴ See *infra* Section I, which presents an overview of the law, including analyses of multiple cases in which family was accepted as a cognizable particular social group and nexus was found to be satisfied.

¹⁵ *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 41 (B.I.A. 2017).

¹⁶ *Matter of L-E-A- (L-E-A- II)*, 27 I. & N. Dec. 494 (Att’y Gen. 2018). The Attorney General may review decisions de novo under 8 C.F.R. § 3.1(h) and supersede the authority of the immigration judge and the Board. Deportation Proceedings of Joseph Patrick Thomas Doherty, 12 Op. O.L.C. 1, 7 (1988). The previous two Attorneys General referred cases to themselves just four times in eight years whereas Attorney General Sessions certified seven cases to himself in the course of twenty-one months. Lorelei Laird, *Whose Court Is This Anyway? Immigration Judges Accuse Executive Branch of Politicizing Their Courts*, A.B.A. J. (Apr. 1, 2019), <http://www.abajournal.com/magazine/article/immigration-judges-executive-politicizing-courts> [<https://perma.cc/NPM2-4652>].

¹⁷ *L-E-A- II*, 27 I. & N. Dec. at 581.

become more difficult to win, though the decision and accompanying guidance from U.S. Citizenship and Immigration Services (USCIS)¹⁸ have recently been challenged in court.¹⁹ With the Administration aiming to make family-based particular social groups the latest casualty in its war on asylum seekers, the goal of this Article is for practitioners and legal scholars alike to understand the underpinnings of a family-based theory of persecution, the longstanding case law that supports it, and the dangers as well as the limitations of the Attorney General's decision.

Part I analyzes the existing state of the law on particular social groups involving families, including *Matter of L-E-A-*, circuit court rulings, unpublished decisions,²⁰ as well as international and comparative jurisprudence. Part II explores the practical application of family-based particular social groups, offering lessons from case law about how best to argue both that a social group defined by family is cognizable and that nexus has been satisfied.

I. OVERVIEW OF THE LAW

To determine whether a particular social group is cognizable, an applicant must demonstrate that the group is (1) composed of members who share a common immutable characteristic; (2) is socially distinct; and (3) is defined with particularity.²¹

¹⁸ U.S. CITIZENSHIP & IMMIGR. SERVS., GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF L-E-A-* (2019), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/USCIS_Memorandum_LEA_FINAL.pdf [<https://perma.cc/L3PD-YJ8W>] [hereinafter USCIS L-E-A-GUIDANCE]; Complaint at Exhibit A, *S.A.P. v. Barr*, No. 1:19-cv-03549 (D.D.C. Nov. 22, 2019) [hereinafter S.A.P. Complaint] (explaining the U.S. Citizenship & Immigration Services' September 2019 revisions to "Credible Fear of Persecution and Torture Determinations" training materials).

¹⁹ See generally *id.*

²⁰ The unpublished decisions included in this Article are from the Center for Gender & Refugee Studies (CGRS) and the Immigrant & Refugee Appellate Center, L.L.C. (IRAC). CGRS collects decisions through its technical assistance program, which provides consultation and litigation resources to attorneys. *Technical Assistance and Training*, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/our-work/technical-assistance-training> [<https://perma.cc/4HAC-8J77>] (last visited June 11, 2019). The IRAC publishes a monthly Index of Unpublished Decisions of the Board of Immigration Appeals. See *Index of Unpublished Decisions of the Board of Immigration Appeals*, IMMIGRANT & REFUGEE APP. CTR., www.iraac.net [<https://perma.cc/9QEE-HNK3>] (last visited June 11, 2019).

²¹ *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014); see also *Matter of A-B-*, 27 I. & N. Dec. 31, 320 (Att'y Gen. 2018) (articulating the same three-factor test). Although the Board endeavored to clarify the particularity and social distinction tests in *Matter of M-E-V-*

First, members of the group must share common characteristics which are either immutable or so fundamental that they cannot or “should not be required to change” them.²² Second, the group must be defined with sufficient particularity such that it has “well-defined boundaries” and constitutes a “discrete class of persons.”²³ It must be easy to determine who is a member of the group and who is not. Thus, the terms used to describe the group must have “commonly accepted definitions in the society of which the group is a part.”²⁴ Third, the social distinction prong requires that members of the group be “set apart, or distinct, from other persons within the society in some significant way. In other words . . . those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.”²⁵ The Board explained, “The perception of the applicant’s persecutors may be relevant, because it can be indicative of whether society views the

G- and its companion case, *Matter of W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014), the more legally defensible standard for determining cognizability is that asserted in *Matter of Acosta*, that a particular social group must be defined by characteristics that are immutable or fundamental. *Acosta* was the first articulation by the Board of the legal standard for particular social group membership. 19 I. & N. Dec. 211, 233 (B.I.A. 1985). It was not until decades later in *Matter of S-E-G* and *Matter of E-A-G* that the Board added the particularity and social distinction tests. 24 I. & N. Dec. 579, 582-83 (B.I.A. 2008); 24 I. & N. Dec. 591, 593-94 (B.I.A. 2008). To impose additional requirements solely on social group claims and not the other protected grounds violates the principle of *ejusdem generis*, meaning “of the same kind.” See *Matter of Acosta*, 19 I. & N. at 233 (using the *ejusdem generis* doctrine to interpret particular social group as requiring the same type of characteristics inherent in the other protected grounds in the refugee definition). In fact, not all circuits have applied *Chevron* deference to the Board’s imposition of the particularity and social distinction requirements. See, e.g., *Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013) (deferring to the Board’s definition of social group in *Acosta* while failing to mention *S-E-G* or *E-A-G*); *W.G.A. v. Sessions*, 900 F.3d 957, 964-65 & n.4 (7th Cir. 2018), *reh’g denied* (Oct. 22, 2018) (refusing to make a *Chevron* determination about particularity and social distinction). While this Article argues that family-based particular social groups satisfy social distinction and particularity, this is not intended to validate the Board’s current approach to social group claims.

²²*Matter of Acosta*, 19 I. & N. Dec. at 233.

²³*Matter of M-E-V-G-*, 26 I. & N. Dec. at 245, 249; see also *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007) (stating that the court will consider “whether the group can be defined with sufficient particularity to delimit its membership”); *Matter of S-E-G-*, 24 I. & N. Dec. at 584 (“The essence of the ‘particularity’ requirement, therefore, is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”).

²⁴*Matter of M-E-V-G-*, 26 I. & N. Dec. at 239; see also *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007) (rejecting the proposed group as “too amorphous to provide an adequate benchmark for determining group membership”).

²⁵*Matter of M-E-V-G-*, 26 I. & N. Dec. at 238; see also *Matter of W-G-R-*, 26 I. & N. Dec. at 217 (requiring “evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group”).

group as distinct. However, the persecutors' perception is not itself enough to make a group socially distinct²⁶ The key inquiry is therefore whether the specific society views the group members as distinct and treats members differently in some way.²⁷

The majority of adjudicators agree that family-based particular social groups meet the requirements for cognizability.²⁸ In *Matter of Acosta*, the first decision to define particular social group membership, the Board explicitly mentioned "kinship ties" as a characteristic that can comprise a cognizable social group.²⁹ The Board went on to repeatedly refer to families as the paradigmatic example of a particular social group.³⁰ Most of the circuit courts have joined the Board in accepting family-based groups as cognizable.³¹ There is widespread consensus that nuclear families can constitute a cognizable social group, and many adjudicators have also

²⁶ *Matter of M-E-V-G-*, 26 I. & N. Dec. at 242.

²⁷ *Id.*

²⁸ See *infra* Section II.A for a more detailed discussion of how family-based particular social groups meet the requirements for cognizability.

²⁹ See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) ("[W]e interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or *kinship ties*" (emphasis added)).

³⁰ See, e.g., *Matter of C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006) ("Social groups based on . . . family relationship are generally easily recognizable and understood by others to constitute social groups."); *Matter of H-*, 21 I. & N. Dec. 337, 342 (B.I.A. 1996) (finding clan membership to constitute a cognizable particular social group because it was "inextricably linked to family ties").

³¹ See, e.g., *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) ("[T]he family remains the quintessential particular social group."); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125-26 (4th Cir. 2011) (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) and the BIA opinion) (agreeing that family is a "prototypical" particular social group and finding the family members of "those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses" as sufficiently particular and socially distinct); *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) ("[A]s acknowledged by this court and by other circuits, a family is a 'particular social group' if it is recognizable as a distinctive subgroup of society."); *Vumi v. Gonzalez*, 502 F.3d 150, 154-55 (2d Cir. 2007) (remanding a case to consider the applicant's claim of persecution based on membership in her husband's family and noting that that "the Board has held unambiguously that membership in a nuclear family may substantiate a social-group basis of persecution"); *Bernal-Rendon v. Gonzalez*, 419 F.3d 877, 881 (8th Cir. 2005) (recognizing that "a nuclear family can constitute a social group"); *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997) (confirming that that 7th Circuit case law "has suggested, with some certainty, that a family constitutes a cognizable 'particular social group' within the meaning of the law"); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family."); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (stating that the family provides "a prototypical example of 'a particular social group'").

recognized groups that encompass more extended family members.³²

In order to be eligible for asylum, applicants must demonstrate not only that they are members of a cognizable particular social group, but that there is a nexus to the persecution: that they were harmed *because* of this group membership.³³ There is a longstanding recognition that persecutors may have mixed motives when targeting individuals; for that reason, so long as a protected ground was “one central reason” for the persecution, the nexus is deemed sufficient.³⁴ Furthermore, the applicant does not bear the “unreasonable burden” of establishing the persecutor’s exact motivation³⁵ but can satisfy the nexus requirement through direct evidence, such as statements made by the persecutor and circumstantial evidence including country conditions documentation, a pattern of harm to others similarly-situated, and the timing of the persecution.³⁶

³² See *infra* Subsection I.C.1 and Section II.A.

³³ See 8 U.S.C. § 1101(a)(42)(A) (2018) (including in the definition of a refugee that persecution be “on account of” a protected ground). The U.S. puts the burden of proof on the asylum seeker to provide evidence of the persecutor’s motive. *Id.* § 1158(b)(1)(B)(i); *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that the applicant must provide at least some evidence of motive). “One central reason” for the persecution must be a protected ground, 8 U.S.C. § 1158(b)(1)(B)(i), as amended by §101(a) of the REAL ID Act, P.L. 109-13, 119 Stat. 302 (2005). However, adjudicators in the U.S. frequently ignore the doctrine of mixed motives and seem to require that the sole cause of the persecution be a Convention ground. See Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT’L L. 265, 270-73 (2002) (stating that in practice, courts frequently apply the effective sole cause test by rejecting the Convention-related explanations for persecution and hypothesizing about the alternative non-Convention grounds for the persecution). Though beyond the scope of this Article, it is worth noting that the UNHCR applies a lower burden of proof for a finding of nexus, for example indicating that “[o]ften the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.” U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 66 (1992). Some foreign jurisdictions, such as Canada, also apply a less stringent nexus test, requiring that a Convention ground be “a reason” but not “one central reason” for the persecution. See *infra* note 209.

³⁴ *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007) (“[T]he protected ground cannot play a minor role That is, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm. Rather, it must be a central reason for persecuting the respondent”); see also *Grace v. Whitaker*, 344 F. Supp. 3d 96, 130 (D.D.C. 2018) (“The INA expressly contemplates mixed motives for persecution when it specifies that a protected ground must be ‘one central reason’ for the persecution.” (citing to 8 U.S.C. § 1158(b)(1)(B)(i))).

³⁵ *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988).

³⁶ See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (describing how plaintiffs must provide proof of a persecutors’ motives, but that proof may be direct or circumstantial); see also RAIO COMBINED TRAINING COURSE: NEXUS AND THE PROTECTED GROUNDS, U.S. CITIZENSHIP & IMMIGR. SERVS.18-20 (2012), <https://www.uscis.gov/sites/default/files/>

In the context of particular social group claims, whether or not the persecution was on account of the applicant's membership in the group is a question that should be entirely separate from inquiries into whether the group is cognizable and whether the applicant is a member of the group. It is possible for an applicant to present a cognizable particular social group and to demonstrate membership in this group, but then for the adjudicator to find that there is insufficient evidence that one central reason that the persecutor harmed the applicant was the group membership. Social group cognizability is usually considered a legal issue with nexus typically categorized as a finding of fact.³⁷ This distinction is significant because findings of fact are reviewed by the Board under a "clearly erroneous" standard,³⁸ whereas questions of law may be reviewed de novo.³⁹ Similarly, the federal courts of appeal limit their review to questions of law⁴⁰ and treat findings of fact as conclusive "unless any reasonable adjudicator would be compelled to conclude to the contrary."⁴¹ As such, adjudicators predisposed to deny asylum may do so based on a lack of nexus, interpreting the facts to support the conclusion that the persecutor was not motivated by the family relationship. Ruling on nexus rather than social group cognizability increases the likelihood that a decision will survive appeal given the highly deferential standard of review for findings of fact.

A. Purported Circuit Split

Some circuits considering family-based cases have consistently questioned whether the persecutor was motivated by reasons unrelated to family membership, such as general criminal intent, a desire for financial gain, or

files/nativedocuments/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf [https://perma.cc/NYX3-N8LF] (outlining examples of direct and circumstantial evidence of the persecutor's motive).

³⁷ See, e.g., *Hincaipe v. Att'y Gen.*, 494 F.3d 213, 218 (1st Cir. 2007) ("[T]he question of whether persecution is on account of . . . protected grounds is fact-specific."); *Silva v. Attorney General*, 448 F.3d 1229, 1236 (11th Cir. 2006) (holding that the review of petitioner's credible evidence of past persecution or a well-founded fear of persecution is considered an administrative fact finding); *Jahed v. INS*, 356 F.3d 991, 1003 (9th Cir. 2004) ("Whether persecution is 'on account of' a petitioner's political opinion is a question of fact; it turns on evidence about the persecutor's motive."). *But see* *Menghesha v. Gonzales*, 450 F.3d 142, 147 (4th Cir. 2006) ("In this instance, however, we are concerned with the IJ's legal conclusions, not factual findings. We find that the IJ erred as a matter of law in holding [petitioner] to an overly stringent legal standard: proving that political persecution was the government's sole motive."); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990) (addressing the sufficiency of the petitioner's testimony about motive as a legal question).

³⁸ 8 C.F.R. § 1003.1(d)(3)(i) (2019).

³⁹ *Id.* § 1003.1(d)(3)(ii).

⁴⁰ 8 U.S.C. § 1252(a)(2)(D) (2018).

⁴¹ *Id.* § 1252(b)(4)(B).

revenge.⁴² Others, in particular the Fourth Circuit, have been more inclined to find nexus to the family-based particular social group even when the persecutor also had other reasons for targeting the victim unrelated to a protected ground.⁴³ Another central dispute around family claims among the circuits focuses on the reason the initial family member was targeted (hereinafter referred to as the “defining family member”). There is considerable variation among the courts as to whether the “defining family member” need also have been persecuted on account of a protected ground in order for the applicant to be eligible for asylum.

For example, in *Ramirez-Mejia v. Lynch*, the petitioner’s brother, a gang member, was killed by a rival gang, after which the petitioner, her parents, and her brother’s wife were threatened.⁴⁴ The facts do not support any obvious claim for refugee protection by the “defining family” member, the deceased brother in this case. Given that the brother may not have been himself targeted on account of a protected ground, it is unclear whether this would disqualify the petitioner’s family as a cognizable particular social group. However, the Fifth Circuit essentially circumvented the issue by concluding that the gangs were targeting the petitioner, not because of her family relationship, but to obtain information that they believed her brother had given her,⁴⁵ noting, “there is no reason to suppose that those who persecute to obtain information also do so out of hatred for a family, or vice versa.”⁴⁶ The Court explicitly declined to address the issue of whether the petitioner’s proposed particular social group of her family was cognizable.⁴⁷

Reaching more directly the issue of whether the “defining family member” need be persecuted on account of a protected ground, the Seventh Circuit in *Yin Guan Lin v. Holder* considered the case of a Chinese petitioner who was threatened and detained by debt collectors from whom his father had borrowed money.⁴⁸ In denying the petition to review, the Court acknowledged that “the family unit can constitute a social group” but found that the petitioner’s

⁴² See, e.g., *Marin-Portillo v. Lynch*, 834 F.3d 99, 102 (1st Cir. 2016) (“[T]he record adequately supports the IJ’s finding . . . that the threats against [petitioner] stemmed not from . . . kinship ties . . . , but rather . . . retaliation”); *Cambara-Cambara v. Lynch*, 837 F.3d 822, 824-26 (8th Cir. 2016) (holding that persecution based on wealth is not a cognizable social group and targeting only wealthy family members fails to provide the required nexus); *Demiraj v. Holder*, 631 F.3d 194, 199 (5th Cir. 2011) (finding that the persecution against petitioner was based on revenge as opposed to family ties); see also *infra* note 103 (discussing cases in which the persecutors were found to be motivated by financial gain).

⁴³ For Fourth Circuit case law following *Matter of L-E-A-*, see *infra* Subsection I.C.3.

⁴⁴ *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 488 (5th Cir. 2015).

⁴⁵ See *id.* at 492-93 (differentiating between persecuting to obtain information about a relative and persecuting because of status as a relative).

⁴⁶ *Id.* at 493.

⁴⁷ *Id.* at 492.

⁴⁸ *Yin Guan Lin v. Holder*, 411 F. App’x 901, 903 (7th Cir. 2011).

persecution was not on account of his family membership.⁴⁹ The Court concluded, “[a]ny harm that Lin faced arose from a personal dispute between his father and his father’s creditors. Debtors who fear creditors do not qualify for social-group membership.”⁵⁰ Because the “defining family member” had been targeted due to what the Court deemed to be a personal dispute around attempts to collect a debt, his son was also not eligible for protection.⁵¹

In contrast, the Fourth Circuit in *Hernandez-Avalos v. Lynch* remanded a case involving a petitioner who had been threatened by gang members who wanted her son to join the gang.⁵² The Board denied asylum based on lack of nexus, finding that the petitioner was threatened because she opposed her son’s involvement in criminal activity rather than on account of her family membership.⁵³ Even though the petitioner’s son had not been harmed for a protected reason,⁵⁴ the Fourth Circuit concluded, “Hernandez’s relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members’ demands leveraged her maternal authority to control her son’s activities.”⁵⁵ The Ninth Circuit came to a similar decision in *Flores-Rios v. Lynch*, in which the petitioner argued that he had been persecuted because of his family’s opposition to a gang, including that his cousin had agreed to testify against a gang member.⁵⁶ The Court remanded the case to address whether the petitioner had been persecuted due to his family membership, citing to previous precedent in which the Circuit had “declined to hold . . . ‘that a family can constitute a particular social group

⁴⁹ See *id.* at 905 (qualifying how the family unit may be a social group).

⁵⁰ *Id.* at 905-06. It is not entirely clear from the decision, but the court seemed to imply that the very cognizability of the petitioner’s particular social group turned on whether his father had been persecuted on account of a protected ground, a position that conflates the separate issues of cognizability and nexus.

⁵¹ *Id.*

⁵² *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 947 (4th Cir. 2015).

⁵³ *Id.* at 949.

⁵⁴ Cases involving gang recruitment have been largely unsuccessful, finding a lack of nexus to a protected ground. See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. 579, 590 (B.I.A. 2008) (“We concur with the Immigration Judge’s finding that the respondents failed to demonstrate that either Salvadoran youth who refused recruitment into the MS-13 criminal gang or their family members constitute a particular social group.”); *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008) (“[W]e find that the particular social group identified by the Immigration Judge as ‘persons resistant to gang membership’ lacks the social visibility that would allow others to identify its members as part of such a group.”).

⁵⁵ See *Hernandez-Avalos*, 784 F.3d at 950 (describing how family ties do not have to be the central or even the dominant reason for persecution, but that they must only be more than an incidental or superficial reason).

⁵⁶ *Rios v. Lynch*, 807 F.3d 1123, 1125 (9th Cir. 2015).

only when the alleged persecution on that ground is intertwined with' another protected ground."⁵⁷

In 2016, the Board published an amicus invitation to consider the question: Where an asylum applicant has demonstrated persecution because of his or her membership in a particular social group comprised of the applicant's family, has he or she satisfied the nexus requirement without further analysis? Or does the family constitute a particular social group only if the defining family member also was targeted on account of another protected ground?⁵⁸

The Board specifically requested that parties compare the Fourth Circuit's *Hernandez-Avalos* and the Ninth Circuit's *Flores Rios* with the Fifth Circuit's *Ramirez-Mejia* and the Seventh Circuit's *Lin v. Holder*.⁵⁹ Although the Board in effect was indicating that there was a circuit split, a closer read of the named cases—as well as additional case law across jurisdictions—reveals that the inconsistencies in rulings may not actually rise to the level of a split.⁶⁰ Regardless, it is clear that the issue was ripe for the Board's consideration given that adjudicators at all levels in all circuits were, and still are, applying

⁵⁷ See *id.* at 1128 (citing to *Thomas v. Gonzales*, 409 F.3d 1177, 1188 (9th Cir. 2005), *judgment vacated*, 547 U.S. 183 (2006)); see also *Hernandez-Ramos v. Sessions*, 686 F. App'x 385, 387 (9th Cir. 2017) (indicating that the B.I.A. applied the incorrect legal standard in requiring that the respondent provide evidence that the deaths of his family members occurred on account of a protected ground); *Sanchez-Canizalez v. Holder*, 520 F. App'x 528, 530 (9th Cir. 2013) (holding that the petitioner was not required to show that another family member was persecuted on account of a protected ground).

⁵⁸ U.S. Dep't of Justice, Amicus Invitation, No. 16-01-11 (Jan. 11, 2016), <https://www.justice.gov/coir/file/811976/download> [perma.cc/A7RL-HKUE].

⁵⁹ The amicus invitation also included the Eighth Circuit's *Malonga v. Holder* in the category of circuits that require nexus as to the "defining family member." 621 F.3d 757 (8th Cir. 2010). However, this case is not as instructive in the analysis of social group claims because the petitioner did not actually assert that he was targeted on account of his family membership, but rather relied on political opinion and ethnicity claims. *Id.* at 763. The petitioner did argue that his father, wife, and child were harmed, but the court did not comment on the extent to which the facts might support a family-based argument. *Id.* Although not referenced in the amicus invitation, it is also worth noting that the First Circuit joined the Fourth Circuit and Ninth Circuit in clearly stating that the "defining family member" need not demonstrate nexus to a protected ground. See *Aldana-Ramos v. Holder*, 757 F.3d 9, 15 (1st Cir. 2014) ("The law in this circuit and others is clear that a family may be a particular social group simply by virtue of its kinship ties, without requiring anything more.").

⁶⁰ A deeper dive into this issue is beyond the scope of this Article. For more, see, e.g., Rachel M. Lee, *One Step Forward, Two Steps Back: The Board of Immigration Appeals Must Remind Courts That Family Is the Quintessential Particular Social Group to Prevent Courts from Sidestepping Family-Based Asylum Claims*, 50 CREIGHTON L. REV. 405, 427 (2017) (arguing the "purported circuit split does not exist" because "the cases identified as creating a split merely add ambiguity to the issue and do not directly contradict the well-settled precedent").

inconsistent reasoning to cases involving family-based targeting and often conflating the separate issues of cognizability and nexus. In fact, the Board's *amicus* instruction itself appears to do just this by suggesting that the cognizability of a social group defined by family might depend on the motivations of the persecutor.⁶¹ The Board attempted to clarify the parameters of permissible family-based claims in its first published decision on the issue, *Matter of L-E-A-*, but still left quite a bit of room for confusion.

B. Matter of L-E-A- as Decided by the Board

Despite conflating the issues in its *amicus* invitation, the Board analyzed the cognizability of the particular social group in *L-E-A-* independently from nexus and explicitly acknowledged this distinction, citing to *Matter of W-G-R-*, which emphasized the need to “separate the assessment [of] whether the applicant has established the existence of one of the enumerated grounds . . . from the issue of nexus. The structure of the Act supports preserving this distinction, which should not be blurred”⁶² In *L-E-A-*, the Mexican respondent faced threats from cartel members after his father refused to let them sell drugs in his store.⁶³ The cartel members also approached the respondent himself to ask him to sell drugs from his father's store, and he refused.⁶⁴ The Board opened by recognizing that the particular social group consisting of the respondent's father's immediate family was cognizable, citing much of the aforementioned case law as well as the fact that both parties were in agreement on the issue.⁶⁵ In its supplemental brief submitted in response to the Board's *amicus* invitation, the Department of Homeland Security (“the Department” or “DHS”) asserted that an immediate family member will “generally meet the social distinction test” since “virtually all societies draw significant distinctions” around immediate family relationships.⁶⁶ The Board accepted this reasoning, stating that the respondent, a son living at home with his father, was undoubtedly a member of the particular social group.⁶⁷ The Board did not squarely address the limits of cognizability

⁶¹ *See id.* (asking whether a family group needs to show that “the defining family member was also targeted on account of another protected ground” in order to constitute a particular social group).

⁶² *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 43 (B.I.A. 2017) (citing to *Matter of W-G-R-*, 26 I. & N. Dec. 208, 218 (B.I.A. 2014)).

⁶³ *Id.* at 41.

⁶⁴ *Id.*

⁶⁵ *Id.* at 43.

⁶⁶ Dep't of Homeland Sec. Supplemental Brief at 9, *In re Alba*, No. A200 553 090 (B.I.A. 2016) [hereinafter DHS 2016 Brief].

⁶⁷ *L-E-A- I*, 27 I. & N. Dec. at 43.

when it comes to family-based particular social group membership. However, leaving room for groups beyond nuclear families, the decision peripherally mentioned that “the inquiry in a claim based on family membership will depend on the nature and degree of the relationships involved and how those relationships are regarded by the society in question.”⁶⁸ This statement aligns with the Department’s suggestion in its brief that in some societies, “extended family groupings may have greater social significance, such that they could meet the requirement of social distinction.”⁶⁹

Having taken no issue with the particular social group, the Board turned next to nexus. The Board first laid out the “easy” scenarios in which nexus to a particular social group defined by family would clearly be found—where a persecutor has an animus against the family itself⁷⁰ or where the family status is connected to another protected ground, such as political opinion.⁷¹ The Board then contended that “nexus is not established simply because a particular social group of family members exists and the family members experience harm,”⁷² or because the persecutor targeted the victim as a means to an end, “especially if the end is not connected to another protected ground.”⁷³ Through this repeated commentary about the relevancy of connecting the persecution to a non-family-based protected ground, the Board intimated that a family-based claim should fail where the “defining family member” was not persecuted for Convention reasons.⁷⁴ However, in the final footnote of the decision, the Board made the opposite point, saying, “[w]e accept the parties’ position that a separate, independent inquiry into the motivation of a persecutor towards the respondent’s father, as the defining or primary family member, is not part of the nexus calculus.”⁷⁵

The Board ultimately interpreted the facts of the case to find that there was no nexus to the respondent’s family relationship because the cartel was motivated only by a desire to increase its profits.⁷⁶ *L-E-A-* thus mirrored much of the existing precedent: acknowledging the cognizability of family-based particular social groups, offering seemingly contradictory statements around nexus and the requirements as to the “defining family member,” and

⁶⁸ *Id.*

⁶⁹ DHS 2016 Brief, *supra* note 66, at 9.

⁷⁰ *L-E-A- I*, 27 I. & N. Dec. at 44 (giving as an example the Bolshevik assassinations of the Romanovs).

⁷¹ *Id.* at 45 (citing to *Ayele v. Holder*, 564 F.3d 862 (7th Cir. 2009); *Vumi v. Gonzales*, 502 F.3d 150, 154 (2d Cir. 2007); *Gebremichael v. I.N.S.*, 10 F.3d 28, 31 (1st Cir. 1993)).

⁷² *L-E-A- I*, 27 I. & N. Dec. at 45.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 46 n.5.

⁷⁶ *Id.* at 46-47.

ultimately circumventing the issue entirely by defaulting to the position that the respondent was not harmed due to his family membership at all.

C. Board Decisions Post-*L-E-A-*

In the wake of the Board's decision in *L-E-A-*, there remained a lack of clarity around how to analyze family-based asylum claims. At the immigration judge level, decisions have been varied, with some judges challenging the very cognizability of family-based particular social groups and others easily finding nexus.⁷⁷ The Board has not published any further decisions implicating family-based particular social group membership since *L-E-A-*. Of the eleven unpublished Board decisions subsequent to *L-E-A-* that were identified in researching this Article, four of the appeals were dismissed and seven sustained. Although unpublished decisions have no precedential value, it is still instructive to delve into the reasoning of such decisions to identify some patterns in how the Board analyzed family-based claims subsequent to its decision in *L-E-A-*.

1. Family-based particular social groups, including those involving extended families, can be cognizable

Ten out of eleven of the unpublished Board decisions found the family-based particular social group that the respondents had asserted to be cognizable. For the most part, the Board did not engage in any kind of robust rationale for this finding, indicating that the cognizability of a social group comprised of family members remained uncontroversial following the Board's decision. However, this limited analysis is exactly what Attorney General Barr used to justify his overruling of the Board's cognizability finding in *Matter of L-E-A-*.⁷⁸

The Board also accepted, with virtually no discussion, family-based particular social groups consisting of non-nuclear family members in three of the eleven cases. In one, *Matter of H-G-N-*, the Board found the respondent's family unit to be a cognizable group and explicitly noted that it encompassed

⁷⁷ Of the eight unpublished immigration judge decisions post-*L-E-A-* collected for this Article, three were grants of relief and five were referrals. There were no clear patterns in decision-making that I could glean, nor is a set of eight decisions from eight different judges a particularly good data set from which to draw any conclusions. As such, these decisions are not analyzed as a whole, but are instead described throughout this Article as applicable.

⁷⁸ *Matter of L-E-A- (L-E-A- II)*, 27 I. & N. Dec. 494, 596 (Att'y Gen. 2018) (finding that the Board "summarily concluded" the case involved a valid particular social group "without explaining how the facts supported this finding or satisfied the particularity and social visibility requirements").

his aunt, uncle, cousins, and siblings.⁷⁹ However, in that case the respondent and his siblings had moved in with his aunt's family at the age of seven after his mother relocated to the United States, so it could be argued that his aunt's family had effectively become his nuclear family. In one of the other cases, the Board and the immigration judge took no issue with the social group defined as the respondent's family, which included extended family members.⁸⁰ In a third unpublished decision, the Board accepted the cognizability of the particular social group "relatives of persons who testified and are/were prosecution witnesses against transnational criminal groups," where the "defining family member" was the respondent's cousin.⁸¹ The Board cited to past precedent "acknowledging the Board's definition of a legally cognizable particular social group"⁸² and indicated without further discussion that the social group in this case was cognizable. Again, this perfunctory recognition of cognizability will likely not be so widespread in future decisions involving family-based claims given Barr's recent critique of such a "cursory treatment" in *Matter of L-E-A-*.⁸³

2. Cognizability and nexus continue to be conflated

Although the Board stated in *L-E-A-* that the cognizability of the particular social group and nexus should not be conflated,⁸⁴ the Board made just this conflation in a decision less than one month after *L-E-A-* was issued. The Board considered the case of a Honduran respondent who had been threatened and assaulted by his father, a gang member, who wanted him to join the gang as well as to turn over to the gang a house that had been left to the respondent.⁸⁵ The Board concluded that, "[w]hile an immediate family is typically recognized as a cognizable particular social group under the Act, the facts in this particular case do not support a finding that the respondent has met his burden that he is a member of a cognizable social group" because only he and one other member of the group, identified as nuclear family members of his father, were targeted.⁸⁶

⁷⁹ H-G-N-, A XXX XXX 536, 2 (B.I.A. Mar. 14, 2019) (on file with the IRAC).

⁸⁰ Center for Gender & Refugee Studies Database Case No. 19905, (B.I.A. undated but post-*L-E-A-*).

⁸¹ Center for Gender & Refugee Studies Database Case No. 25459, 4 (B.I.A. July 26, 2017).

⁸² *Id.*

⁸³ *L-E-A- II*, 27 I. & N. Dec. at 596.

⁸⁴ *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 43 (B.I.A. 2017) (citing *Matter of W-G-R-*, 26 I.&N. Dec. 208, 218 (B.I.A. 2014)).

⁸⁵ Center for Gender & Refugee Studies Database Case No. 16808, 2-3 (B.I.A. June 16, 2017).

⁸⁶ *Id.*

The Board implied that the lack of evidence that the persecutor was motivated by the family relationship in and of itself indicated that the group was not cognizable. The Board noted, “[there is no external threat against the nuclear family of X, the defining attribute of the respondent’s proposed social group is his persecution by his own father, and the risk of persecution alone does not create a particular social group.”⁸⁷ This analysis conflates the question of the cognizability of a particular social group with whether the persecution suffered was on account of this group, which should be two separate inquiries. This case appears to be an outlier since the Board separately analyzed the cognizability of the particular social group and whether there was a nexus in the other ten unpublished decisions consulted for this Section. Nevertheless, this decision reflects the Board’s tendency to ignore that there should be separate inquiries into whether a particular social group’s construction is permissible and whether the persecutor was motivated by the applicant’s membership in the group.

3. Nexus is more likely to be found in Fourth Circuit cases

Six of the seven positive unpublished BIA decisions identified for this Article arose in the Fourth Circuit, where the precedent is much more favorable.⁸⁸ The Fourth Circuit has warned in family-based cases against an “excessively narrow interpretation” of the nexus standard that focuses on the immediate cause of the persecution rather than the bigger picture.⁸⁹ In the Fourth Circuit, it appears that the “defining family member” need not have been targeted on account of a protected ground, and the Court is much less likely to find that the persecutor was motivated by “personal reasons” rather than membership in the particular social group consisting of the applicant’s family.⁹⁰

For example, in *Cruz v. Sessions*, the Honduran respondent had considered going to the police after her common law husband was killed by a member of an organized crime group. She asserted a well-founded fear of persecution on account of her membership in the group: “nuclear family members of Johnny Martinez.”⁹¹ The immigration judge concluded that the “main reason” that the respondent had been threatened was to convince her not to go to the police and the Board adopted this conclusion, adding “[h]arm meted out by a private actor for personal reasons or solely on general levels

⁸⁷ *Id.* at 2.

⁸⁸ In fact, the Board acknowledged in *L-E-A-* that the case may have been decided differently in the Fourth Circuit. *L-E-A- I*, 27 I. & N. Dec. at 46 n.3.

⁸⁹ *Cruz v. Sessions*, 853 F.3d 122, 129 (4th Cir. 2017), *as amended* (Mar. 14, 2017).

⁹⁰ *See id.* at 130 (criticizing the BIA’s conclusion that the applicant was persecuted for “personal reasons”).

⁹¹ *Id.* at 126.

of crime and violence in Honduras” did not qualify for asylum or withholding of removal.⁹² In contrast, the Fourth Circuit held “that the BIA and IJ applied an improper and excessively narrow interpretation of the evidence relevant to the statutory nexus requirement.”⁹³ The Court explained that it was a “shortsighted[.]” approach to only consider the persecutor’s stated objective of preventing the petitioner from reporting him to the police when the very reason that she had investigated her husband’s disappearance was their family relationship.⁹⁴ The Court did not even speak to the motivations of the persecutor in harming the respondent’s husband, demonstrating the irrelevance of nexus for the “defining family member” in the Fourth Circuit.

Similarly, in *Salgado-Sosa v. Sessions*, in which the Honduran petitioner’s family store was targeted for extortion by gang members, the Fourth Circuit determined that “the IJ and BIA erred by focusing narrowly on the ‘immediate trigger’ for MS-13’s assaults—greed or revenge—at the expense of Salgado-Sosa’s relationship to his stepfather and family, which were the very relationships that prompted the asserted persecution.”⁹⁵ The Court further criticized the Board for improperly focusing on whether the “defining family member” was persecuted on account of a protected ground, reiterating that this is not a requirement for asylum eligibility.⁹⁶ Given the similarities in facts to *L-E-A-*, also a case involving extortion of a family business, the Fourth Circuit’s differing conclusion here is particularly striking.

Since *L-E-A-*, the Board has cited to these decisions (and others in the same vein)⁹⁷ to remand cases arising in the Fourth Circuit, where it has been foreclosed from applying its otherwise largely restrictive interpretation of the nexus standard. In *Matter of C-O-M-*, a case involving a wife who was targeted after her husband resisted extortion by gang members, the Board wrote, “[t]his case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, which has cautioned this Board against applying an excessively narrow interpretation of the nexus requirement in cases involving particular social groups defined by

⁹² *Id.* at 126-27.

⁹³ *Id.* at 129.

⁹⁴ *Id.*

⁹⁵ *Salgado-Sosa v. Sessions*, 882 F.3d 451, 458 (4th Cir. 2018) (citing to *Oliva v. Lynch*, 807 F.3d 53, 60 (4th Cir. 2015)).

⁹⁶ *Id.* at 458-59.

⁹⁷ See generally *Zavaleta-Policiano v. Sessions*, 873 F.3d 241 (4th Cir. 2017) (reversing the BIA’s determination that petitioner did not show persecution due to a familial relationship); *cf.* *Velasquez v. Sessions*, 866 F.3d 188, 196 (4th Cir. 2017) (finding that a custody dispute between relatives did not satisfy nexus).

family identity.”⁹⁸ In another decision, *Matter of H-G-N-*, the Board found nexus where a man was threatened after his aunt did not pay extortion and concluded, “[t]he critical assessment under Fourth Circuit precedent is whether the familial reason is why the applicant, rather than another person, was targeted.”⁹⁹ Per a straightforward reading of the statutory language around nexus, it seems that this should be the key question for all cases of family-based persecution regardless of the circuit in which they arise.¹⁰⁰ The fact that the Board distinguished the Fourth Circuit from others in this way further indicates the Board’s proclivity for finding no nexus in family-based claims when not limited by federal court precedent.

Aside from the Fourth Circuit, there has been limited circuit court jurisprudence on family-based asylum claims since the Board’s decision in *L-E-A-*. The circuits appear to have largely proceeded with the same posture they previously held, with the Seventh Circuit going so far as to explicitly note that, “*L-E-A-* did not establish a new rule. As the government agreed at oral argument, *L-E-A-* applied the same analysis that the Board has followed since at least 2007.”¹⁰¹ The majority of circuits continue to recognize family-based groups as cognizable, but tend to find on the facts that a non-protected reason was what motivated the persecution.¹⁰² This appears to be a particularly

⁹⁸ C-O-M-, A XXX XXX 428, 2 (B.I.A. June 22, 2018) (on file with the IRAC); *see also* P-R-R-, A XXX XXX 272, 2 (B.I.A. Feb. 22, 2019) (on file with the IRAC) (describing the Fourth Circuit as having found the Board to be “shortsighted” in its analysis of nexus in *Cruz v. Sessions*); K-A-A-P-, A XXX XXX 625, 2 (B.I.A. Mar. 7, 2019) (on file with the IRAC) (“The Fourth Circuit has found nexus to family relationship when the alien was threatened as a result of or as revenge for the acts of a family member.”).

⁹⁹ H-G-N-, A XXX XXX 536, 2 (B.I.A. Mar. 14, 2019) (on file with the IRAC).

¹⁰⁰ 8 U.S.C. § 1158(b)(1)(B)(i) (2018) (“[T]he applicant must establish that [a protected ground] was or will be at least one central reason for persecuting the applicant.”).

¹⁰¹ *W.G.A. v. Sessions*, 900 F.3d 957, 963 (7th Cir. 2018), *reh’g denied* (Oct. 22, 2018).

¹⁰² *See, e.g., Lopez v. Barr*, 773 Fed. App’x 459, 462 (10th Cir. 2019) (reasoning that the nexus did not exist where the applicant was threatened for helping her sister escape abuse, because the persecutor would have threatened anyone who had helped her sister regardless of whether they were related); *Diaz-Rivas v. U.S. Attorney Gen.*, 769 Fed. App’x 748, 755 (11th Cir. 2019) (deferring to the BIA’s determination that the gang targeted the petitioner for reporting her brother-in-law’s disappearance rather than because of their family relationship); *Sosa-Perez v. Sessions*, 884 F.3d 74, 81 (1st Cir. 2018) (finding insufficient evidence that the attacks on the applicant’s family were due to family status rather than widespread criminality); *Ruiz-Escobar v. Sessions*, 881 F.3d 252, 259 (1st Cir. 2018) (finding that petitioner failed to establish nexus following a break-in because he did not know who the persecutors were looking for or why); *Revencu v. Sessions*, 895 F.3d 396, 405 (5th Cir. 2018), *as revised* (Aug. 2, 2018) (holding that the persecution of the applicant’s wife did not establish asylum eligibility where he was not also targeted); *Rivas v. Sessions*, 899 F.3d 537, 542 (8th Cir. 2018) (holding the record did not sufficiently show that petitioner’s family

popular viewpoint in cases involving extortion where the alternative perception of the persecutor's motivation as purely pecuniary has frequently prevailed.¹⁰³ By reaching this conclusion, the circuits have continued to avoid the need to squarely address the question of whether the “defining family member” need have been persecuted on account of a protected ground.

D. Matter of L-E-A- as Decided by the Attorney General

In December 2018, Acting Attorney General Whitaker certified *Matter of L-E-A-* to himself, staying the Board's decision and requesting briefing on the question: “Whether, and under what circumstances, an alien may establish persecution on account of membership in a ‘particular social group’ . . . based on the alien's membership in a family unit.”¹⁰⁴

Previewing the Attorney General's posture, DHS argued emphatically in its February 2019 brief not only against finding nexus in claims involving family-based targeting, but also against the heretofore largely unchallenged cognizability of particular social groups defined by

membership was the reason for her persecution rather than her status as a witness to her brother's murder); *Quero-Quero v. Sessions*, 740 F. App'x 140, 140 (9th Cir. 2018) (citing to *L-E-A-* and denying the petition for review because there was insufficient nexus between petitioner's family membership and the persecution); *Alvarez v. Sessions*, 739 F. App'x 372, 375 (9th Cir. 2018) (concluding without factual discussion that there was insufficient nexus between petitioner's familial relationships and his feared harm); *Maravilla v. Sessions*, 695 F. App'x 179, 180 (8th Cir. 2017) (holding that petitioner failed to prove that her family membership was “at least one central reason” she was targeted for extortion).

¹⁰³ See, e.g., *Cruz-Guzman v. Barr*, 920 F.3d 1033, 1037 (6th Cir. 2019) (“Cruz's evidence does not show that 18th Street's actions were motivated by a particular animus toward the Cruz-Guzman family itself, as opposed to an ordinary criminal desire for financial gain.”); *Cruz v. Att'y Gen.*, 746 F. App'x 869, 872 (11th Cir. 2018) (“[S]ubstantial evidence supports the BIA and IJ's conclusion that the threat Orozco's aunt levied against Orozco was motivated by a personal dispute, namely, money”); *Betancourt-Applicano v. Sessions*, 747 F. App'x 279, 284 (6th Cir. 2018) (“[W]here threats made against a family member are simply ‘a means to achieve the [robbers'] objective to increase [their] profits,’ there is no nexus.” (quoting *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 46-47 (B.I.A. 2017))); *Macias-Padilla v. Sessions*, 729 F. App'x 541, 543 (9th Cir. 2018) (“[T]he record indicates the cartel was criminally motivated to obtain money.”); *Sanchez v. Sessions*, 706 F. App'x 897, 899 (9th Cir. 2017) (“[A]ny persecution or fear of future persecution was not because of Ramirez's membership in a particular social group, but rather because of the criminals' desire to rob the hotel for which her husband worked.”); Center for Gender & Refugee Studies Database Case No. 28588, (B.I.A. July 16, 2018) (“The respondent left El Salvador because of a fear of criminal violence and extortion by gang members, conditions which are widespread in El Salvador. However, individuals who are fleeing general conditions of violence in a country do not qualify for asylum or withholding of removal under the Act.”).

¹⁰⁴ *Matter of L-E-A- (L-E-A- II)*, 27 I. & N. Dec. 494, 584 (Att'y Gen. 2018).

family.¹⁰⁵ This stance represented a complete about-face from the Department's position in its 2016 brief in *L-E-A* that "[o]rdinarily, in many, if not most societies, an 'immediate family' unit . . . will qualify as a cognizable particular social group."¹⁰⁶ In contrast, in its 2019 brief, the Department asserted, "excluding such family relationship-based protection claims would not be inconsistent with U.S. obligations under the 1967 Protocol" ¹⁰⁷ The Department in its 2019 brief further urged the Attorney General to find that "protection claims purportedly based on membership in a family unit will ordinarily fail to satisfy the all-important nexus requirement."¹⁰⁸ To justify this position, the Department asserted that most persecutors harm their victims not because of their family membership but on account of "personal disputes," which are not a protected ground.¹⁰⁹ The Department listed out common scenarios that implicate family-based targeting, including issues between families; intrafamilial conflicts; domestic violence; punishment or retaliation; and threats arising from extortion,¹¹⁰ concluding that in each of these scenarios, a "personal dispute" rather than family membership is likely to have motivated the persecution.¹¹¹ The Department was silent as to the question of whether the "defining family member" need demonstrate nexus, as if this issue were irrelevant given the improbability of finding that the persecutor targeted the victim due to a family relationship.

On July 29, 2019, Attorney General Barr issued his decision, overruling the Board's recognition of the respondent's particular social group as cognizable and asserting that most families—including nuclear families—fail the social distinction test and therefore will not qualify as particular social groups.¹¹² Barr did not comment on nexus, except to indicate that he was not overruling that portion of the Board's decision.¹¹³ The Board's finding that the respondent's persecutors were motivated by financial gain, rather than a protected ground,¹¹⁴ remains undisturbed. Taking a cue from *Matter of A-B*,¹¹⁵

¹⁰⁵ See generally Dep't of Homeland Sec. Supplemental Brief, *Matter of L-E-A*, Respondent, 27 I. & N. Dec. 40 (B.I.A. 2017) [hereinafter DHS 2019 Brief].

¹⁰⁶ DHS 2016 Brief, *supra* note 66, at 1.

¹⁰⁷ DHS 2019 Brief, *supra* note 105, at 2.

¹⁰⁸ *Id.* at 31.

¹⁰⁹ See *id.* at 27 (labeling one section as "Claims for Protection Are Unsuccessful When Arising from Personal Disputes and Portrayed as Membership in a Family Unit-Based Particular Social Group").

¹¹⁰ *Id.* at 29-32.

¹¹¹ *Id.* at 32.

¹¹² *L-E-A-II*, 27 I. & N. Dec. at 581.

¹¹³ *Id.* at 597.

¹¹⁴ *L-E-A-I*, 27 I. & N. Dec. at 46-47.

¹¹⁵ *L-E-A-II*, 27 I. & N. Dec. at 588-89 (citing to *Matter of A-B*-, 27 I. & N. Dec. 316, 333-36 (Att'y Gen. 2018)).

Barr's decision turned on the critique that the Board improperly relied on the parties' agreement on the cognizability of the respondent's particular social group rather than engaging in a detailed factual analysis.¹¹⁶ Alongside this narrow holding, Barr also took the opportunity to include far-reaching dicta about family-based particular social groups more generally. He argued that cases finding families to be a particular social group should not be followed if they were decided prior to *M-E-V-G-* and *W-G-R-* in 2014 when the Board clarified the particularity and social distinction requirements.¹¹⁷ He also maintained that many of the decisions following 2014 that accepted groups defined by family should be given no weight because they failed to adequately assess particularity and social distinction¹¹⁸ or "relied upon outdated dicta from the Board's early cases."¹¹⁹

Having summarily dismissed the decades of Board and circuit case law recognizing the cognizability of family-based particular social groups, Barr devoted a paragraph to underscoring his authority as Attorney General to interpret immigration law.¹²⁰ He then proceeded to assert an interpretation of family-based particular social group membership that requires applicants to demonstrate that their specific families are well-known and distinct in some way in their societies.¹²¹ For over a decade prior to 2019, USCIS instructed its asylum officers that "[t]he question here is not whether a specific family is well-known or visible in the society. Rather, the question is whether that society views the degree of relationship shared by group members as so significant that the society distinguishes groups of people based on that type of relationship."¹²² In contrast, under Barr's interpretation in *Matter of L-E-A-*, adjudicators must "focus on the particular social group as it is defined by the applicant and ask whether *that group* is distinct in the society in question It is not sufficient to observe that the applicant's society (or societies in general) place great significance on the concept of the family."¹²³ The Attorney General concluded that most families would not be able to meet this standard¹²⁴ and found that the respondent in *L-E-A-* failed to establish a cognizable particular social group because he "did not

¹¹⁶ *Id.* at 584, 586.

¹¹⁷ *Id.* at 588-90.

¹¹⁸ *Id.* At 589.

¹¹⁹ *Id.* At 590-91.

¹²⁰ *Id.* at 591-92.

¹²¹ *Id.* at 594.

¹²² U.S. CITIZENSHIP & IMMIGR. SERVS., ASYLUM OFFICER BASIC TRAINING COURSE, ELIGIBILITY PART III: NEXUS 33 (2009) <https://www.aila.org/infonet/aobt-lesson-nexus-five-protected-characteristics> [<https://perma.cc/DRK7-9U23>].

¹²³ *L-E-A-* II, 27 I. & N. Dec. at 594.

¹²⁴ *Id.* at 594.

show that anyone, other than perhaps the cartel, viewed the respondent's family to be distinct in Mexican society."¹²⁵

On September 30, 2019, USCIS published guidance "in accordance with *Matter of L-E-A-*" directing USCIS employees to "no longer recognize family-based particular social groups based only on the general significance of family relationships in the society in question" but to require that the specific family be well-known or essentially famous in the society.¹²⁶ The guidance also notes that "[o]fficers should be alert that . . . the Attorney General predicted that the average or ordinary family typically will not meet the standard, because it will not have the kind of identifying characteristics that render a specific family socially distinct within the society in question."¹²⁷ USCIS also amended its Asylum Division Officer Training Course on credible fear and torture determinations to quote heavily from *L-E-A-* with similar instructions.¹²⁸

Given the recency of the Attorney General's decision, there has been limited jurisprudence since on cases involving family relationships. However, attorneys around the country have reported receiving negative determinations in cases of family-based targeting that seemingly would have been granted prior to *L-E-A-*. In November 2019, the Catholic Legal Immigration Network (CLINIC) brought a lawsuit challenging the new USCIS guidance on behalf of thirteen plaintiffs who were subjected to expedited removal orders following application of this new guidance.¹²⁹ The plaintiffs are all individuals who would most likely have been found to have a credible or reasonable fear¹³⁰ prior to Barr's 2019 decision,

¹²⁵ *Id.* at 592.

¹²⁶ USCIS *L-E-A-* GUIDANCE, *supra* note 18, at 3.

¹²⁷ *Id.* at 7.

¹²⁸ See generally U.S. CITIZENSHIP & IMMIGRATION SERV., ASYLUM DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS (2019), <https://www.aila.org/infonet/uscis-updates-officer-training-credible-fear> [<https://perma.cc/E4RM-MMBJ>].

¹²⁹ S.A.P. Complaint, *supra* note 18.

¹³⁰ Individuals subject to Expedited Removal or who enter at a port-of-entry must demonstrate that they have a credible fear, meaning that they have a "significant possibility" of establishing eligibility for asylum or protection under the Convention Against Torture. Individuals who have a prior order of removal against them or who have certain criminal convictions must demonstrate a "reasonable possibility" they would be persecuted on account of a protected ground or would be subject to torture. Credible and Reasonable Fear determinations are beyond the scope of this Article, but more information can be found from U.S. Citizenship and Immigration Services, e.g. *Questions & Answers: Credible Fear Screenings*, U.S. CITIZENSHIP & IMMGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> [<https://perma.cc/9NWD-LSQD>] (last visited Mar. 12, 2020); *Questions & Answers: Reasonable Fear Screenings*, U.S. CITIZENSHIP & IMMGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings> [<https://perma.cc/FYY4-3XL7>] (last visited Mar. 12, 2020).

including a four-year-old boy who was threatened because his father refused to join a political campaign.¹³¹ The father was found to have a reasonable fear on account of his political opinion.¹³² Under prior precedent, the boy would have satisfied even the most stringent of interpretations of asylum law on family-based targeting: the “defining family member” was persecuted on account of a protected ground, the family relationship was nuclear, and, given his very young age, there were no other reasonable explanations for the threats against the boy besides his family membership. The case of this plaintiff, and the others included in the suit, clearly demonstrates the marked shift in the way that some adjudicators are now analyzing protection claims that involve targeting of family members. The complaint details how almost all of the plaintiffs were subject to negative determinations because the officers found that they had not satisfied the social distinction requirement.¹³³

In contrast, it appears that at least some immigration judges have continued to grant cases based on family. For example, an Omaha immigration judge granted withholding of removal in a September 2019 case, Center for Gender & Refugee Studies Database Case No. 27115, finding that the respondent had been persecuted on account of her membership in the particular social group of female members of her family.¹³⁴ Although the judge liberally referenced the 2019 *L-E-A-* opinion in other parts of the decision, it is notably absent in the section discussing social distinction. The court cited only to *Matter of M-E-V-G-*, but did seem to be implicitly incorporating Barr’s more stringent social distinction test, noting that “the [redacted surname] family as a whole is meaningfully distinguished” within the society in question because the family was known to be involved in drug and human trafficking.¹³⁵ In another September 2019 case, Center for Gender & Refugee Studies Database Case No. 34658, a Baltimore immigration judge relied heavily on the positive Fourth Circuit precedent discussed *infra*, finding

¹³¹ S.A.P. Complaint, *supra* note 18, ¶¶ 18, 19, 24; Press Release, Crowell Moring LLP, CLINIC Lawsuit Seeks to Protect Asylum Seekers who Fear Family-Based Harm (Nov. 25, 2019), <https://www.crowell.com/NewsEvents/PressReleasesAnnouncements/CLINIC-Lawsuit-Seeks-to-Protect-Asylum-Seekers-who-Fear-Family-Based-Harm/pdf> [<https://perma.cc/M9JQ-WS2M>].

¹³² S.A.P. Complaint, *supra* note 18, ¶ 24.

¹³³ *Id.* at ¶¶ 24–35; In fact, representatives from the San Francisco Asylum Office stated in a presentation on October 22, 2019 that families effectively have to be “Kennedys” or “Kardashians” in order to satisfy the social distinction requirement. San Francisco Asylum Office, Presentation to the U.C. Hastings Refugee & Human Rights Clinic (Oct. 22, 2019).

¹³⁴ Center for Gender & Refugee Studies Database Case No. 27115, 13 (Immigration J. Dec. Sept. 27, 2019).

¹³⁵ *Id.* at 11.

the respondent's proposed particular social groups of "family members of [respondent's uncle]" and "family members of [respondent's sister]" to be cognizable.¹³⁶ The court cited to *L-E-A-* as standing for the proposition that while family is "not *inherently* a cognizable particular social group, family may still constitute a particular social group"¹³⁷ The court then went on to accept as sufficient evidence of social distinction the fact that the persecutor stated on multiple occasions that he knew the respondent's entire family and that the respondent was from a small community where all of the neighbors know each other.¹³⁸ Given that similar facts are likely to be present in many family-based targeting cases, it appears that this judge correctly parsed the holding and dicta from Barr's decision to reject as binding the portion opining that most nuclear families will not meet the social distinction requirement.

At the circuit level, the courts have had mixed reactions to the Attorney General's opinion in *L-E-A-*. For example, in October 2019, the Fifth Circuit characterized the decision quite differently from the USCIS guidance, stating that "*Matter of L-E-A* stands for the proposition that families *may* qualify as social groups, but the decision must be reached on a case-by-case basis."¹³⁹ The court also "recognize[d] that *Matter of L-E-A-* is at odds with the precedent of several circuits."¹⁴⁰ The Eleventh Circuit in an August 2019 case remanded the petitioner's asylum and withholding of removal claims, finding that his relationship to his father-in-law was "one central reason, if not the central reason" for his persecution by a Mexican cartel.¹⁴¹ Because the petition for review only dealt with nexus and not with the cognizability of the particular social group—"his father-in-law's immediate family," which the Board and the immigration judge had accepted prior to the Attorney General's decision—the Court "express[ed] no view on how, *if at all*, *Matter of L-E-A-* impacts Mr. Perez-Sanchez's proposed PSG or *whether* the Attorney General's decision is entitled to deference."¹⁴² In contrast, the Tenth Circuit in a September 2019 decision framed *L-E-A-* in much the same way that USCIS has, emphasizing that nuclear families will generally not be socially distinct.¹⁴³ However, the court declined to reach this issue directly, upholding the determination of the immigration judge and the

¹³⁶ Center for Gender & Refugee Studies Database Case No. 34658, 17 (Immigration J. Dec. Sept. 2019).

¹³⁷ *Id.* at 18.

¹³⁸ *Id.* at 18.

¹³⁹ *Pena Oseguera v. Barr*, 936 F.3d 249, 251 (5th Cir. 2019).

¹⁴⁰ *Id.* at 251.

¹⁴¹ *Perez-Sanchez v. Att'y Gen.*, 935 F.3d 1148, 1158-59 (11th Cir. 2019).

¹⁴² *Id.* at 1158, n.7 (emphasis added).

¹⁴³ *Saucedo-Miranda v. Barr*, 758 Fed. App'x 586 (10th Cir. 2019).

Board of Immigration Appeals that the petitioner had failed to demonstrate nexus because his family was simply the victim of criminal activity.¹⁴⁴

Adjudicators at all levels are still grappling with Barr's decision in *L-E-A-*, although it has already done serious damage to prior decades of legal precedent recognizing the validity of claims involving family relationships. However, as was the case with domestic violence and gang cases following *A-B-*,¹⁴⁵ *Matter of L-E-A-* should not be seen as foreclosing family-based asylum. In fact, Barr acknowledged that his "opinion does not bar all family-based social groups from qualifying for asylum"¹⁴⁶ and emphasized that the determination must be made on a case-by-case basis.¹⁴⁷ Despite USCIS's guidance to the contrary, the holding of *L-E-A-* is not that particular social groups defined by family are categorically impermissible. Instead, it is the much narrower holding that the Board's analysis of the cognizability of the respondent's proposed social group "did not . . . satisfy the Board's duty to ensure that the respondent satisfied the statutory requirements to qualify for asylum" and thus that the Board's conclusion that the particular social group was valid should be reversed.¹⁴⁸ The remainder of the decision, including Barr's sweeping statements about previous case law, and his new interpretation of social distinction, is dicta that need not be followed. Furthermore, the Attorney General's more restrictive positions on family-based asylum represent a significant departure from prior precedent,

¹⁴⁴ *Id.* at 7.

¹⁴⁵ See *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018) (finding that the blanket rule in *Matter of A-B-* against domestic violence and gang-related particular social groups was impermissible as both arbitrary and capricious with no legal basis and running contrary to the individualized analysis required by the INA).

¹⁴⁶ *Matter of L-E-A- (L-E-A- II)*, 27 I. & N. Dec. 494, 595 (Att'y Gen. 2018). He was likely motivated to take this position by a District Court Judge's rebuke of his predecessor in *Grace v. Whitaker*, which challenged Attorney General Sessions's seemingly categorical rejection of domestic violence and gang-related particular social groups in *Matter of A-B-*. See *Grace*, 344 F. Supp. 3d at 126.

¹⁴⁷ *L-E-A- II*, 27 I. & N. Dec. at 591; see also *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) ("[T]he 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."); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (B.I.A. 2014) ("Social group determinations are made on a case-by-case basis."); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) ("The particular kind of group characteristic that will qualify under this construction remains 'to be determined on a case-by-case basis.'"); U.S. CITIZENSHIP & IMMGR. SERVS., PM-02-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM AND REFUGEE CLAIMS IN ACCORDANCE WITH MATTER OF A-B- 3 (2018) ("Officers must analyze each case on its own merits in the context of the society where the claim arises.").

¹⁴⁸ *L-E-A- II*, 27 I. & N. Dec. at 596.

making them even less deserving of judicial consideration.¹⁴⁹ For all of these reasons, it is clear that the Attorney General lacks the authority to make a blanket ruling that a specific particular social group is not cognizable, leaving room for practitioners to present family-based claims while taking additional care to build the record for their individual clients.

E. International and Comparative Views on Family-Based Particular Social Groups and Nexus

Having examined the history of particular social groups defined by family membership in the United States, this Article now turns to consider the same subject beyond our borders. Per the United States Supreme Court, “[i]f one thing is clear from the legislative history of the . . . definition of ‘refugee,’ and indeed the entire 1980 [Refugee] Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol”¹⁵⁰ As such, guidance from the United Nations High Commissioner for Refugees (UNHCR), while not binding, is considered persuasive and “may be a useful interpretive aid.”¹⁵¹ The UNHCR has published

¹⁴⁹ In *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court held that where *Chevron* deference was owed to the agency on an issue, but a federal court published an opinion on the issue before the agency did, the court must defer to the agency’s subsequent published interpretation. 545 U.S. 967, 980 (2005). However, given the decades of preceding Board case law supporting the cognizability of family-based particular social groups, this change could potentially be challenged as representing an unreasoned and arbitrary departure from the agency’s preceding position that does not merit deference by the courts. *See id.* at 1001 (“[T]he Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.”); *Smiley v. Citibank (S. Dakota)*, 517 U.S. 735, 742 (1996) (indicating that “[s]udden and unexplained change” or “change that does not take account of legitimate reliance on prior interpretation” may be arbitrary, capricious, or an abuse of discretion not requiring deference); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.”).

¹⁵⁰ *Cardoza-Fonseca*, 480 U.S. at 436-37 & n.19 (1987) (citing H.R. CONF. REP. NO. 96-781, at 19 (1980)). The United States acceded to the 1967 Protocol Relating to the Status of Refugees in 1968. The 1967 Protocol is effectively identical to the 1951 Convention Relating to the Status of Refugees, but expands its scope beyond events that occurred in Europe before January 1, 1951. Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267. The fundamental concept behind both the Convention and the Protocol is the principle of *non-refoulement*, which prohibits countries from returning individuals to return to a country where they would be subjected to persecution.

¹⁵¹ *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999); *see also* *Negusie v. Holder*, 555 U.S. 511, 536-37 (2009) (citing the U.N. handbook as a source “to which the Court has looked for

multiple guidelines and position papers to aid states parties in assessing protection claims.

The UNHCR has recognized that the family constitutes a cognizable particular social group since “[m]embers of a family, whether through blood ties or through marriage and attendant kinship ties, meet the requirements of the definition by sharing a common characteristic which is innate and unchangeable, as well as fundamental and protected.”¹⁵² The UNHCR in another document called the family “[o]ne of the most visible examples of a particular social group” and further provided that nexus can be established “for example where family members . . . are targeted for persecution as a means of punishing the [“defining family member”] or forcing them to surrender or cease their activities.”¹⁵³ The UNHCR has indicated that family membership could be a viable way of analyzing asylum claims based on gender-based violence¹⁵⁴ as well as gang violence.¹⁵⁵ The recognition of families as a social group is further reinforced by other sources of international law such as the American Convention on Human Rights, to which the U.S. is a signatory, which describes the family as “the natural and fundamental group unit of society,”¹⁵⁶ and the Universal Declaration of

guidance in the past”); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 248 (B.I.A. 2014) (confirming that, while not binding on U.S. authorities, the views of the UNHCR “are a useful interpretive aid”).

¹⁵² U.N. HIGH COMM’R FOR HUMAN RIGHTS, POSITION ON CLAIMS FOR REFUGEE STATUS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES BASED ON A FEAR OF PERSECUTION DUE TO AN INDIVIDUAL’S MEMBERSHIP OF A FAMILY OR CLAN ENGAGED IN A BLOOD FEUD ¶ 18 (2006), <https://www.refworld.org/docid/44201a574.html> [<https://perma.cc/6LEH-JWA4>].

¹⁵³ U.N. HIGH COMM’R FOR HUMAN RIGHTS, REFUGEE STATUS DETERMINATION: IDENTIFYING WHO IS A REFUGEE, SELF-STUDY MODULE 2, at 37 (2005), <https://www.unhcr.org/publications/legal/43144dc52/self-study-module-2-refugee-status-determination-identifying-refugee.html> [<https://perma.cc/A3WQ-YQGF>].

¹⁵⁴ See U.N. HIGH COMM’R FOR HUMAN RIGHTS, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 33 (2002), <https://www.unhcr.org/3d58ddef4.pdf> [<https://perma.cc/86AM-UV7Z>] (explaining that women are frequently persecuted because of the political opinions and activities of their male relatives, and these family connections must be taken into account when considering gender-based claims).

¹⁵⁵ See U.N. HIGH COMM’R FOR HUMAN RIGHTS, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS ¶ 40 (2010), <https://www.refworld.org/pdfid/4bb21fa02.pdf> [<https://perma.cc/PNT9-XFQV>] (explaining that relatives of individuals targeted by gang members can be persecuted because of their family ties, and in such a case, family membership would constitute a particular social group).

¹⁵⁶ Organization of American States, American Convention on Human Rights art. 17(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

Human Rights, recognizing that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by Society and the State.”¹⁵⁷

In addition to considering the viewpoints of international bodies, the United States Supreme Court has indicated that the interpretations of other treaty signatories should be given considerable weight.¹⁵⁸ It is thus instructive to examine the jurisprudence of other common law countries¹⁵⁹ that have considered the grounds for refugee protection on the basis of family.

1. United Kingdom—family is a cognizable particular social group and “defining family member” need not establish nexus

The United Kingdom House of Lords¹⁶⁰ issued its seminal decision around family-based particular social groups in 2006. In *Secretary of State for the Home Department v. K and Fornah v. Secretary of State for the Home Department*,¹⁶¹ the House of Lords considered two different cases, the first of which implicated family-based particular social group membership wherein an Iranian woman and her son faced persecution after her husband was arrested and detained by the Revolutionary Guards.

¹⁵⁷ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 16(3) (Dec. 10, 1948); *see also* International Covenant on Civil and Political Rights art. 23(1) (Dec. 19, 1966), S. TREATY DOC. NO. 95-20, 999 UNTS 171 (containing the same language); International Covenant on Economic, Social and Cultural Rights art. 10(1) (Dec. 16, 1966), S. TREATY DOC. NO. 95-19; 993 UNTS 3 (identifying the family as “the natural and fundamental group unit of society”).

¹⁵⁸ *See* *Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (“In interpreting any treaty, the opinions of our sister signatories . . . are entitled to considerable weight” (internal quotation marks omitted)).

¹⁵⁹ As noted by the UNHCR, “In civil law jurisdictions, the particular social group ground is generally less well developed. Most decision-makers place more emphasis on whether or not a risk of persecution exists than on the standard for defining a particular social group.” U.N. HIGH COMM’R FOR HUMAN RIGHTS, GUIDELINES ON INTERNATIONAL PROTECTION: “MEMBERSHIP OF A PARTICULAR SOCIAL GROUP” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 8 (2002), <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guide-lines-international-protection-2-membership-particular-social-group.html> [<https://perma.cc/V9KS-XXPQ>].

¹⁶⁰ The House of Lords was the United Kingdom’s highest Court of Appeal until 2009, when the Supreme Court of the United Kingdom was created. *See generally* HOUSE OF LORDS, HOUSE OF LORDS BRIEFING: JUDICIAL WORK (2008), <https://www.parliament.uk/documents/lords-information-office/hoflbpjudicial.pdf> [<https://perma.cc/C496-TV5T>]. The judicial work was done by twelve Law Lords, who became the first justices of the UK Supreme Court. *See generally id.* When the House of Lords retained jurisdiction over judicial matters, the procedure was for each of the Law Lords on the Appellate Committee (usually five Law Lords) to give their opinions in the order of seniority. *See generally id.*

¹⁶¹ *Sec’y of State for the Home Dep’t v. K* [2006] UKHL 46, [2007] 1 AC 412 (HL) (appeal taken from Eng.) (UK).

The Law Lords were unequivocal that a family can constitute a particular social group. Lord Bingham of Cornhill noted that the Secretary of State (the party opposing the appellant's claim) accepted that family could be a particular social group and stated that this "reflects a consensus very clearly established by earlier domestic authority . . . and also by international authority. The consensus is clearly reflected in the academic literature."¹⁶² Both Lord Hope of Craighead¹⁶³ and Lord Rodger of Earlsferry concurred, with the latter stating, "it is obvious that a family can constitute a 'particular social group'. Indeed, the family could well be regarded as the archetypal social group."¹⁶⁴

Having established that family is a cognizable particular social group, the Committee focused more on the question of whether the "defining family member" must have been persecuted on account of a protected ground. The Lords considered two 1997 Court of Appeal cases that reached opposite conclusions on the question,¹⁶⁵ and determined that the Refugee Convention "directs attention to the position of the asylum-seeker, not to that of any other person with whom he or she may be associated. It is his or her fear of persecution for a Convention reason, not someone else's fear, that is in issue."¹⁶⁶ Lord Hope emphasized that to require nexus to a protected ground for the "defining family member" would impermissibly require more of family-based claims than of others.¹⁶⁷ He wrote that what is critical is the connection between the protected ground and the persecution but that clearly, "it is not necessary to show that everyone else of the same race, for example, or every other member of the

¹⁶² *Id.* at [19] (citing to Sec'y of State for the Home Dep't v. Savchenkov [1996] Imm AR 28, [1995] EWCA Civ 47 (UK); *Minister for Immigration and Multicultural Affairs v. Sarrazola* [2001] FCA 263 28–34 (Austl.); *Thomas v. Gonzales*, 409 F.3d 1177, 1188 (9th Cir. 2005); JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 164–66 (1st ed. 1991); GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 361 (2d ed. 1996)).

¹⁶³ *Id.* at [45] (citing to U.N. HIGH COMM'R FOR HUMAN RIGHTS, POSITION ON CLAIMS FOR REFUGEE STATUS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES BASED ON A FEAR OF PERSECUTION DUE TO AN INDIVIDUAL'S MEMBERSHIP OF A FAMILY OR CLAN ENGAGED IN A BLOOD FEUD 5 (2006), <https://www.refworld.org/docid/44201a574.html> [<https://perma.cc/6LEH-JWA4>]; International Covenant on Civil and Political Rights, *supra* note 157, art. 23(1)).

¹⁶⁴ *Id.* at [61].

¹⁶⁵ *Compare* Quijano v. Sec'y of State for the Home Department [1996] EWCA Civ 1244 (U.K.) ("[T]he fact that the stepfather was not entitled to claim asylum demonstrated that the family was not a social group liable to persecution because it was a particular social group."), *with* R v. Immigration Appeal Tribunal, Ex parte De Melo, [1997] Imm. AR 43, 49 (U.K.) ("The original evil which gives rise to persecution against an individual is one thing; if it is then transferred so that a family is persecuted, on the face of it that will come within the Convention.").

¹⁶⁶ *Sec'y of State for the Home Dep't v. K and Fornah v. Sec'y of State for the Home Dep't*, [2006] UKHL 46 at [48].

¹⁶⁷ *Id.* at [47].

particular social group, is subject to the same threat.”¹⁶⁸ Lord Rodger pointed out that to require animus against the family itself would render family-based claims virtually impossible to win.¹⁶⁹ Lord Bingham reiterated the doctrine of mixed motives, noting “[t]he ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason.”¹⁷⁰

This unanimous decision by the five Law Lords established binding precedent in the United Kingdom that the “defining family member” need not have been persecuted on account of a protected ground, laying the groundwork for subsequent decisions to this effect in lower courts, as well as other jurisdictions that have cited approvingly to the case. Furthermore, the U.K. jurisprudence seems much less focused on whether a persecutor’s motives in family-based cases can be instead characterized as based on personal or criminal reasons. For example, a judge from the Upper Tribunal, Immigration and Asylum Chamber considered a case in 2012 involving an Albanian blood feud but made no indication that the persecutor’s motivations may not have been connected to a protected ground,¹⁷¹ a stark contrast to the Department of Homeland Security’s 2019 brief in *L-E-A-* that specifically identified blood feuds as failing to meet the standard for nexus because they are “based on personal disputes and involve criminal acts of personal retribution.”¹⁷²

2. New Zealand—family is a cognizable particular social group and “defining family member” need not establish nexus

The New Zealand Refugee Status Appeals Authority¹⁷³ has explicitly cited to and adopted the reasoning in *Secretary of State for the Home*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at [64].

¹⁷⁰ *Id.* at [17].

¹⁷¹ See *EH v. Sec’y of State for the Home Dep’t* [2012] UKUT 00348 (IAC) [61]-[62] (U.K.) (citing to *Secretary of State for the Home Department v. K* and *Fornah v. Secretary of State for the Home Department* and noting “[i]t is settled therefore, that members of families or clans are capable of constituting a particular social group and that the Refugee Convention would be engaged where there existed a reasonable degree of likelihood that members of a particular family would be at risk of serious harm on return”); see also *AN and NN v. Sec’y of State for the Home Dep’t* [2007] UKAIT 97 [21] (U.K.) (discussing whether an actual risk of harm existed while noting that the existence of a blood feud affecting the petitioners’ family was uncontested).

¹⁷² DHS 2019 Brief, *supra* note 105, at 29.

¹⁷³ The New Zealand Refugee Status Appeals Authority was established in 1991 to adjudicate appeals from the Refugee Status Branch of the New Zealand Immigration Service. The Authority was replaced by the Immigration and Protection Tribunal in 2010. *New Zealand:*

Department v K and *Fornah v Secretary of State for the Home Department*.¹⁷⁴ In a 2010 case, the Colombian appellant had been threatened by paramilitary groups for refusing to alter land records for them and had fled with her husband and son, who also applied for protection. In defining the term “particular social group,” the Authority embraced the “fundamental or immutable” test initially set out by the United States in *Acosta* but notably made no mention of the particularity or social distinction requirements added later.¹⁷⁵ The Authority found “uncontroversial” the proposition that membership of a family can constitute a particular social group, citing to a number of preceding New Zealander cases as well as case law from the United Kingdom, Australia, the United States, and international law secondary sources.¹⁷⁶ On the issue of nexus, the Authority held, “although it is clear that the primary family member (the wife) does not face a risk of being persecuted for a Convention reason, the sole reason for the risk faced by the husband and the child is their membership of the wife’s family.”¹⁷⁷ The Authority granted Convention protection to the husband and child and, in contrast to much of the U.S. jurisprudence, did not see fit to even discuss whether the reason for the persecution was family-based targeting or a generalized criminal intent on the part of the paramilitary.

The Immigration and Protection Tribunal of New Zealand continues to apply this same reasoning in cases involving family-based persecution to date. For example, in 2012, the Tribunal considered the case of a South African man and his family who had been threatened by a criminal group because of the man’s successful business.¹⁷⁸ The Tribunal found that the man was not eligible for protection because he did not face persecution on account of a Convention ground but “for reasons of crime.”¹⁷⁹ The Tribunal noted “it can also be said of

Immigration and Protection Tribunal, REFWORLD, <https://www.refworld.org/publisher/NZ-IPT.html> [<https://perma.cc/Y9DH-V4B9>] (last updated Mar. 27, 2020, 5:14 PM).

¹⁷⁴ *Refugee Appeal Nos 76485, 76486, 76487* [2010] NZRSAA 71 at [81]-[83] (N.Z.) New Zealand is not the only foreign jurisdiction that followed the UK House of Lord’s decision in *Secretary of State for the Home Department v. K and Fornah v. Secretary of State for the Home Department*. The High Court of Ireland has also done the same. See, e.g., *AVB v. Refugee Appeals Tribunal* [2015] IEHC 13 [27] (Ir.) (“It seems to me that the tribunal member fell into error of law in finding that feuds among family members did not have a convention nexus . . .”).

¹⁷⁵ *Id.* at [97].

¹⁷⁶ *Id.* at [79]-[80] (citing *Sec’y of State for the Home Dep’t v. Savchenkov* [1995] EWCA Civ 47 (U.K.); *Minister for Immigration and Multicultural Affairs v Sarrazola* [2001] FCA 263 ¶¶ 28-34 (Austl.); *Thomas v. Gonzales*, 409 F.3d 1177, 1188 (9th Cir. 2005); JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 164-66 (1st ed. 1991); GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 361 (2d ed. 1996), among other sources).

¹⁷⁷ *Id.* [83].

¹⁷⁸ *AK (South Africa)* [2012] NZIPT 800174-176 (N.Z.).

¹⁷⁹ *Id.* at [66].

the mother and daughter that they, too, are at risk because of crime” but ultimately concluded, “[t]hey are also at risk, however, for another reason . . . because they are members of the father’s family.”¹⁸⁰ As in this case, New Zealand adjudicators as a whole appear to be more willing than their counterparts in the U.S. to extend protection to applicants even when the persecutors acted in part out of non-Convention grounds¹⁸¹ and give no consideration to whether the “defining family member” can demonstrate nexus.¹⁸²

3. Australia—family is a cognizable particular social group but “defining family member” must demonstrate nexus

The Federal Court of Australia¹⁸³ in 2000 considered the case of a husband and wife from Colombia in *Sarrazola v Minister for Immigration and Multicultural Affairs (No 3)*.¹⁸⁴ After the wife’s brother was killed by a criminal group for failing to pay a debt, members of the same group demanded that she pay the money or they would kill her children.¹⁸⁵ The applicant asserted a fear of persecution based on her family membership. The Federal Court found “no obstacle to viewing the usual family as a ‘particular social group,’”¹⁸⁶ and held that the “defining family member” need not have been persecuted on account of a protected ground.¹⁸⁷

¹⁸⁰ *Id.* at [67].

¹⁸¹ *See, e.g., AC (Colombia)* [2012] NZIPT 800279 at [50] (N.Z.) (finding the appellant eligible for protection because a “contributing reason” he was at risk was his relationship to his older brother who had been killed by gangs even though he was “substantially” targeted for recruitment); *see also FK (Sri Lanka)* [2019] NZIPT 801383 at [69] (N.Z.) (citing to a Refugee Status Appeals Authority decision holding that protection was warranted since, as long as family membership is a contributing cause, “It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or ‘but for’ cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted”).

¹⁸² *See, e.g., CM (Bangladesh)* [2019] NZIPT 801411 at [91, 93] (N.Z.) (finding that the appellant, a successful businessman in a dispute with former colleagues, had not demonstrated nexus but that his wife was entitled to protection on account of her membership in the particular social group consisting of her husband’s family members).

¹⁸³ The Federal Court of Australia has appellate jurisdiction from the Federal Circuit Court of Australia, which in turn reviews decisions made by the Minister for Immigration and Border Protection and the Administrative Appeals Tribunal. *The Court’s Jurisdiction*, FED. CT. OF AUSTL. <https://www.fedcourt.gov.au/about/jurisdiction> [<https://perma.cc/9GP2-6722>] (last visited Mar. 18, 2020).

¹⁸⁴ *Sarrazola v Minister for Immigration and Multicultural Affairs [No. 3]* [2000] FCA 919 (Austl.).

¹⁸⁵ *Id.* ¶¶ 5–8.

¹⁸⁶ *Id.* ¶ 33.

¹⁸⁷ *Id.* ¶ 36.

However, reacting to this decision,¹⁸⁸ the Australian Parliament in 2001 passed the Migration Legislation Amendment Bill (No. 6), adding subsection 91S, which states that persecution must be disregarded if the “defining family member” was not persecuted on account of a Convention reason.¹⁸⁹ The Minister for Immigration and Multicultural Affairs explained, “[t]he convention was not designed to protect people who fear persecution for personal reasons that have little or nothing to do with the convention - for example, because they have failed to pay their family’s debts.”¹⁹⁰ This legislation was introduced and first read on August 28, 2001 in the midst of the so-called *Tampa* crisis, during which the Australian government refused to grant permission to a boat carrying 433 rescued refugees to enter its waters.¹⁹¹

In applying Section 91S, the Australian Courts have since denied family-based asylum cases where the “defining family member” was not persecuted on account of a protected ground. Given this requirement, Australian adjudicators often need not even reach the issue of whether the applicant’s persecution was motivated by the family relationship versus personal reasons or generalized criminal intent. Illustrating how 91S operates in practice, in 2006, the High Court of Australia¹⁹² considered the case of an Albanian appellant who feared persecution due to a blood feud deriving from when his grandfather killed a member of another family. The Court dismissed the appeal, holding that, “it is clear that the grandfather had a fear of persecution

¹⁸⁸ The Explanatory Memorandum to the Migration Legislation Amendment Bill (No 6) 2001 indicated that the amendment was aimed at addressing the *Sarrazola* holding to prevent its future application. *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 61, ¶ 17 (Austl.).

¹⁸⁹ *Migration Act 1958* (Cth) 91S (Austl.).

¹⁹⁰ *STCB*, [2006] HCA ¶ 18 (quoting the Second Reading Speech of the Minister for Immigration and Cultural Affairs).

¹⁹¹ The Migration Legislation Amendment Bill (No. 6) was first introduced and read in the House of Representatives on August 28, 2001 and was assented to on September 27, 2001. *Migration Legislation Amendment Bill (No. 6) 2001* (Cth) (Austl.). <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr1391%22> [<https://perma.cc/H6KW-MLQK>]. The bill was passed on September 26, along with a number of other bills significantly curtailing the rights of migrants seeking asylum, collectively known as the “Pacific Solution.” Parliament of Australia, *Border Protection: A New Regime*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/c01 [<https://perma.cc/RVW2-GK9Y>]. Among other things, the Pacific Solution allowed for asylum-seekers to be processed offshore in places like Nauru and Papua New Guinea. *See, e.g.*, Refugee Council of Australia, OFFSHORE PROCESSING, <https://www.refugeecouncil.org.au/offshore-processing/> [<https://perma.cc/JPT4-R8RJ>] (last visited July 17, 2019).

¹⁹² The High Court of Australia is the final court of appeal and has broad authority to exercise both original and appellate jurisdiction. *About the AAT*, AUSTL: ADMIN. APPEALS TRIBUNAL, <https://www.aat.gov.au/about-the-aat> [<https://perma.cc/4YC5-A4N6>] (last visited Mar. 18, 2020).

for a reason other than those mentioned in . . . the Convention—revenge for murder. Section 91S(a) requires that fear of persecution [as to the appellant] to be disregarded.”¹⁹³ The Refugee Review Tribunal of Australia¹⁹⁴ adjudicated a similar case in 2013, finding the family-based particular social group to be cognizable and stating that “the essential and significant reason for the well-founded fear of persecution is the applicant’s membership of this particular social group.”¹⁹⁵ However, in light of section 91S, since the “defining family member” was targeted for “revenge . . . purely criminal in motive, not for any Convention reason,”¹⁹⁶ the applicant was not eligible for protection.

4. Canada—family is a cognizable particular social group but “defining family member” must demonstrate nexus

Canadian law has also settled in the same place as Australia, albeit without legislative action. It is well-accepted in Canada that family, not limited to just nuclear families, can constitute a particular social group.¹⁹⁷ However, despite an earlier line of cases indicating that the “defining family member” need not have been persecuted on account of a protected ground,¹⁹⁸ more recent jurisprudence in Canada has fallen squarely into the opposite camp.

¹⁹³ *TCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 61, ¶ 24 (Austl.).

¹⁹⁴ The Refugee Review Tribunal of Australia provided final review of decisions by officers of the Department of Immigration and Citizenship denying protection visas to non-citizens. In 2015, the Tribunal was amalgamated into the Administrative Appeals Tribunal, which provides merits review of a wide range of administrative decisions. Its decisions are subject to review by the Federal Court of Australia and the Federal Circuit Court of Australia.

¹⁹⁵ *1217750* [2013] RTTA ¶ 82, ¶ 78 (Austl.).

¹⁹⁶ *Id.* ¶ 80.

¹⁹⁷ *See, e.g., Estrada v. Canada (Ministry of Citizenship & Immigration)*, [2015] F.C. 1019, para. 8 (Can.) (“[M]embership in a family may take the place of membership in a particular social group for the purposes of a refugee claim.”); *Hercules Santos v. Canada (Minister of Citizenship & Immigration)*, [2011] F.C. 644, para. 23 (Can.) (accepting the applicant’s extended family as a particular social group); *Ndegwa v. Canada (Minister of Citizenship & Immigration)*, [2006] F.C. 847, para. 9 (Can.) (“That the family is a valid social group for the purposes of seeking refugee protection is well established.”); *Serrano v. Canada (Minister of Citizenship & Immigration)*, [1999] F.C.J. 570, para. 30 (Can.) (“It is common ground that a family may be a ‘particular social group.’”).

¹⁹⁸ *See, e.g., Rojas v. Canada (Minister of Employment & Immigration)*, [1995] F.C.J. 296, para. 2 (Can.) (stating that family membership is “a ground of persecution which stands on its own and need not be related to another of the grounds recognized by the Convention”); *see also Hristova v. Canada (Minister of Employment & Immigration)*, [1994] F.C.J. No. 132, para. 31 (Can.) (“It would seem that immediate family can be seen to fit within the definition of ‘particular social group.’”); *Al-Busaidy v. Canada (Minister of Employment &*

In 2000, the Federal Court of Canada – Appeal Division¹⁹⁹ heard the case of a Ukrainian businessman who reported government corruption. After the entire family received threats and suffered retaliation, his son applied for protection based on membership in the particular social group of their family.²⁰⁰ The court of first instance, the Immigration and Refugee Board, found that because the businessman had not been persecuted on account of a protected ground, his son did not meet the requirements for refugee status.²⁰¹ On appeal, the Trial Division upheld the Board’s decision “in concluding that when the primary victim of persecution does not come within the Convention refugee definition, any derivative Convention refugee claim based on family group cannot be sustained. Otherwise, the anomaly of derivative claims being allowed but primary claims being denied could result.”²⁰² The Federal Court declined to rule on this issue since it decided the case on other grounds.²⁰³

There is a growing consensus among Canadian adjudicators²⁰⁴ around the principle that it would be an impermissible anomaly for the “defining

Immigration), [1992] F.C.J. 26, para. 3 (Can.) (“Accordingly the [Refugee] Board has committed reviewable error in not giving due effect to the applicant’s uncontradicted evidence with respect to his membership in a particular social group, namely, his own immediate family.” (internal footnote omitted)); *cf. Velasquez v. Canada (Minister of Employment & Immigration)*, [1994] F.C.J. 4777, para. 5 (Can.) (declining to return an applicant who had not suffered persecution to her home country because her husband undisputedly had suffered persecution).

¹⁹⁹ From 1971 to 2003, the Federal Court of Canada consisted of the Trial division and the Appeal Division. In 2003, the Trial Division continued on as the Federal Court and the Appeal Division became the Federal Court of Appeals. *History*, FED. CT. | COUR FÉDÉRALE, <https://www.fct-cf.gc.ca/en/pages/about-the-court/history> [<https://perma.cc/8MWG-GHH6>] (last visited Mar. 18, 2020).

²⁰⁰ *Klinko v. Canada (Minister of Citizenship & Immigration)*, [2000] 3 F.C. 327, paras. 6–7 (Can.).

²⁰¹ *Id.* at para. 12.

²⁰² *Id.* at para. 16.

²⁰³ *Id.* at para. 38.

²⁰⁴ *See, e.g., X, Re*, [2018] R.A.D.D. No. 293, ¶ 23 (Can.) (“[W]hen the primary victim does not come within the definition of ‘Convention refugee,’ any derivative claims based on family group cannot be sustained.”); *Acevedo Beza v. Canada (Minister of Citizenship & Immigration)*, [2006] F.C. 478, para. 32 (Can.) (“Because [the applicants] did not prove that . . . the principal claimant before the Board . . . met the definition of Convention refugee, their related application cannot be granted, since there is no nexus with the persecution grounds.”); *Serrano v. Canada (Minister of Citizenship & Immigration)*, [1999] F.C.J. 570, para. 42 166 (Can.) (“I do not accept that family connection is an attribute requiring Convention protection, in the absence of an underlying Convention ground for the claimed persecution.”). Canadian applicants have met with much more success when they can demonstrate that the “defining family member” was persecuted on account of a protected ground. *See, e.g., Hercules Santos v. Canada (Minister of Citizenship & Immigration)*, [2011] F.C. 644, para. 33 (Can.) (finding reviewable error where the defining family member had been persecuted on account of her political opinion).

family member” not to be eligible while his family members are afforded protection.²⁰⁵ For example, in 2002, the Trial Division ruled that a Guatemalan applicant who had been kidnapped to extort a ransom from her parents, who were successful restaurant owners, had not been persecuted on account of a Convention ground and was thus not eligible for protection.²⁰⁶ The Judge concluded,

This . . . also avoids the anomaly that Ms. Gonzalez’s parents, as the victims of crime, cannot claim the protection of the Convention, but Ms. Gonzalez could, solely because of the relationship with her parents. It avoids the further anomaly that Ms. Gonzalez cannot claim status as a Convention refugee on the basis of her ordeal as a kidnap victim, but could do so as the daughter of the recipient of the ransom demand.²⁰⁷

As one Federal Court Judge observed in a 2015 decision, “The family, as a group, must therefore be subjected to retaliation and revenge to hope to be granted the protection of Canada.”²⁰⁸ However, this position may be somewhat mitigated by the fact that the Canadian courts apply a less restrictive standard for nexus in requiring that the Convention ground be a reason, but not necessarily the central or sole reason, for the persecution.²⁰⁹

II. FAMILY-BASED PARTICULAR SOCIAL GROUP MEMBERSHIP IN PRACTICE

The second half of this Article transitions from describing the existing state of the law to surfacing the lessons it yields for practitioners handling family-based cases going forward. Given Barr’s recent ruling in *Matter of L-E-A*-challenging social group cognizability and the Board’s previous denial of the

²⁰⁵ It is not clear from the case law why the “defining family member” not being eligible for protection should justify barring their family members from protection. If so troubled by this “anomaly,” it would be equally defensible for the Court to consider whether there are grounds for extending protection to the “defining family member,” rather than taking it away from applicants who otherwise meet the Refugee definition.

²⁰⁶ *Gonzalez v. Canada (Minister of Citizenship & Immigration)*, [2002] F.C.J. 456, paras. 3, 15 (Can.).

²⁰⁷ *Id.* at para. 17.

²⁰⁸ *Estrada v. Canada (Minister of Citizenship & Immigration)*, [2015] F.C. 1019, para. 10 (Can.).

²⁰⁹ *See, e.g., Canada (Minister of Citizenship and Immigration) v. B344*, [2013] F.C. 447, para. 40 (Can.) (“[I]f at least one of the motives can be related to a Convention ground, nexus may be established.”); *Shahiraj v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 734, para. 20 (Can.) (finding nexus where the applicant was targeted “based at least partially on his own association with his brother”); *Zhu v. Canada (Minister of Employment & Immigration)*, [1994] F.C.J. 80, para. 2 (Can.) (“[I]t is enough for the existence of political motivation that one of the motives was political.”).

case based on nexus, it is all the more important that asylum applicants submit detailed evidence as well as explicit arguments as to how they meet both of these requirements.²¹⁰ Furthermore, as noted in the Introduction, in light of the Board's 2018 ruling that applicants must delineate all particular social group formulations before the Immigration Judge or lose them on appeal,²¹¹ practitioners should consider and assert all possible viable legal theories for their clients.

A family-based particular social group may be possible under a diverse set of circumstances. One category particularly germane in the present day is cases involving gang violence. Many of the recent asylum seekers fleeing Central America and Mexico report that they left their countries to escape gangs and other organized criminal groups.²¹² While a family-based theory of targeting will of course not apply to all cases, it may be feasible in many given that members of armed groups frequently target family members of individuals who oppose them.²¹³ This opposition may take many forms including resisting extortion,²¹⁴ testifying as a witness to crimes committed by gangs,²¹⁵ threatening to report or in fact reporting criminal activity,²¹⁶ turning down attempts at recruitment,²¹⁷ rejecting sexual advances,²¹⁸ being a member of a rival gang,²¹⁹ or defecting from a gang.²²⁰ Although the person who engages in

²¹⁰ This Article focuses on cognizability and nexus for particular social group claims. The other statutory requirements for a grant of asylum are outside the scope of this article, but of course should also be carefully analyzed and supported by evidence.

²¹¹ *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189, 191 (B.I.A. 2018).

²¹² *See, e.g.,* Robbie Whelan, *Why Are People Fleeing Central America? A New Breed of Gangs is Taking Over*, WALL ST. J. (Nov. 2, 2018), <https://www.wsj.com/articles/pay-or-die-extortion-economy-drives-latin-americas-murder-crisis-1541167619> [<https://perma.cc/Z9HZ-7EUK>] (discussing how gang violence is driving migration away from Central America).

²¹³ U.N. HIGH COMM'R FOR HUMAN RIGHTS, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS, *supra* note 155, at ¶¶ 17, 40.

²¹⁴ *See generally* *Salgado-Sosa v. Sessions*, 882 F.3d 451 (4th Cir. 2018); *Zavaleta-Policiano v. Sessions*, 873 F.3d 241 (4th Cir. 2017); *Aldana-Ramos v. Holder*, 757 F.3d 9 (1st Cir. 2014), *as amended* (Aug. 8, 2014); *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 41 (B.I.A. 2017).

²¹⁵ *See, e.g.,* *Rivas v. Sessions*, 899 F.3d 537 (8th Cir. 2018); *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011).

²¹⁶ *See, e.g.,* *Cruz v. Sessions*, 853 F.3d 122 (4th Cir. 2017), *as amended* (Mar. 14, 2017); *Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015); *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015).

²¹⁷ *See, e.g.,* *Hernandez-Avalos*, 784 F.3d 944; *Cordova v. Holder*, 759 F.3d 332 (4th Cir. 2014); *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012); *Bonilla-Morales v. Holder*, 607 F.3d 1132 (6th Cir. 2010).

²¹⁸ *See, e.g.,* *Gonzalez Ruano v. Barr*, 922 F.3d 346, 349-50, 357 (7th Cir. 2019).

²¹⁹ *See, e.g.,* *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015); *Cordova*, 759 F.3d 332.

²²⁰ *See, e.g.,* *W.G.A. v. Sessions*, 900 F.3d 957 (7th Cir. 2018), *reh'g denied* (Oct. 22, 2018).

these activities may be found not to satisfy nexus to a protected ground,²²¹ their family members may have winning claims, especially with the submission of strong evidence and a clearly-articulated legal theory.

Family-based particular social groups could also be workable in cases involving intrafamilial violence. In 2001, the Ninth Circuit in *Aguirre-Cervantes v. INS* considered the case of a young Mexican woman who had suffered extreme abuse by her father, who also beat her siblings and her mother.²²² The Court held the petitioner had been persecuted on account of her membership in the particular social group consisting of her immediate family because, “Mr. Aguirre’s goal was to dominate and persecute members of his immediate family There is no evidence that he ever acted violently toward any non-family member It was established by abundant evidence—and undisputed—that it was the petitioner’s status as a member of that family that prompted her beatings.”²²³

Similarly, a Philadelphia immigration judge issued a grant of asylum in 2018 to a Mexican woman and her children who had experienced years of abuse from the woman’s husband. The judge found the particular social group of “immediate family members of [name of husband]” to be cognizable²²⁴ and concluded that although the persecutor may have held mixed motives,

²²¹ See, e.g., *Matter of S-E-G*, 24 I. & N. Dec. 579, 589-90 (B.I.A. 2008) (holding that gang recruitment resisters do not constitute a particular social group); *Matter of E-A-G-*, 24 I. & N. Dec. 91, 593-94 (B.I.A. 2008) (same); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 221-23 (B.I.A. 2014) (finding that former gang members do not constitute a particular social group). However, some of these characteristics have been found by certain courts to be cognizable particular social groups. For example, claims involving witnesses, persons who testify against gang members, and persons who assist law enforcement have met with some success. See, e.g., *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013); *Madrigal v. Holder*, 716 F.3d 499, 502 (9th Cir. 2013) (finding that a former military official who participated in anti-drug enforcement might have a meritorious particular social group claim); *Garcia v. Att’y Gen.*, 665 F.3d 496, 504 (3d Cir. 2011), *as amended* (2012) (finding “a ‘common, immutable characteristic’ with other civilian witnesses who have the ‘shared past experience’ of assisting law enforcement against violent gangs”). *But see* *In re C-A-*, 23 I. & N. Dec. 951, 961 (B.I.A. 2006) (finding that government informants, unlike public witnesses, do not constitute a particular social group for purposes of designation as refugees). Though beyond the scope of this Article, it is worth noting that applications in these categories have been granted, especially with the submission of a robust record. The Center for Gender & Refugee Studies, for example, has tracked outcomes and does have grants in many of these areas. See *Technical Assistance and Training*, *supra* note 20.

²²² *Aguirre-Cervantes v. I.N.S.*, 242 F.3d 1169, 1172 (9th Cir. 2001), *reh’g en banc granted, opinion vacated*, 270 F.3d 794 (9th Cir. 2001), *withdrawn from bound volume, and opinion vacated on reh’g en banc*, 273 F.3d 1220 (9th Cir. 2001). The decision was vacated and superseded because the persecutor in the case, the petitioner’s father, died.

²²³ *Id.* at 1178.

²²⁴ Center for Gender & Refugee Studies Database Case No. 17509, 12 (Immigration J. Dec. Oct. 11, 2018).

one central reason for his actions was to dominate and control the immediate family members whom he saw as property.²²⁵ The court went on to point out that the persecutor would not have harmed his wife and children “were one to remove the characteristic of ‘kinship tie’ from the equation,” and that this was clear evidence that family membership was central to the persecution.²²⁶

These cases notwithstanding, fact patterns involving intrafamilial violence may be especially prone to the conclusion that the persecutor was not motivated by the victim’s social group membership. In fact, the Department of Homeland Security commented on this very matter in its 2016 brief, indicating that intrafamilial harm will often be for “purely personal reasons,” but acknowledging as well that all cases must be assessed on their individual record.²²⁷ By 2019, the Department had taken a harder line, dismissing domestic violence cases as unlikely to satisfy the requirements for persecution on account of family membership.²²⁸

A. Arguing Cognizability of a Family-Based Particular Social Group

As presented in the first half of this Article, the majority of adjudicators—with Attorney General Barr in the distinct minority²²⁹—have accepted the cognizability of family-based particular social groups when they involve nuclear family members.²³⁰ As such, when possible, respondents should articulate their social groups as “immediate/nuclear members of the [surname] family” or “immediate/nuclear family members of [name of defining family member].”

As an illustration of the importance of how social groups are formulated: the Board considered a case in June 2017 in which the respondent defined his particular social group as “nuclear family members of X, his father and a leader of a local MS-13 clique.”²³¹ The Board found this formulation lacked social distinction, focusing on the additional terms appended to the core “nuclear family members of X.”²³² The Board stated that the group was not socially distinct because there was insufficient

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ DHS 2016 Brief, *supra* note 66, at 17 n.10.

²²⁸ See DHS 2019 Brief, *supra* note 105, at 1 (“[A]n abusive spouse inflicts harm on his or her spouse because of their personal relationship, but that fact alone does not suffice to demonstrate nexus between the harm and membership in their family unit.”).

²²⁹ See *Matter of L-E-A- (L-E-A- II)*, 27 I. & N. Dec. 494, 494 (Att’y Gen. 2018) (noting that some nuclear families are socially distinct and can be considered “particular social groups”).

²³⁰ See *supra* Section I.

²³¹ Center for Gender & Refugee Studies Database Case No. 16808 1 (B.I.A. June 16, 2017).

²³² *Id.* at 2.

evidence to show that children or family members of gang leaders are viewed or treated distinctly in Honduran society.²³³ The Board failed to appreciate that the phrase “the leader of a local MS-13 clique,”²³⁴ is merely a descriptor of individual X and thus does not substantively alter the formulation of the group. Had the respondent described his social group simply as “nuclear family members of X,” it seems like there may have been a different outcome—or at least a substantially different analysis. Further elucidating the importance of carefully delineating the particular social group, the Department of Homeland Security, in its 2019 brief in *L-E-A-*, argued the particular social group of the respondent’s family should be rejected because it lacked particularity.²³⁵ It seems evident that the respondent meant “nuclear family” given that the “defining family member” was his father, but the Department appeared to be willfully ignoring this and considered only the more general group of “his family” because the respondent did not explicitly say otherwise.²³⁶ In light of these cases and others, practitioners should avoid overcomplicating their social groups by including additional terms and characteristics, but also should take care to specify “nuclear family” or “immediate family” where appropriate.

Attorney General Barr has asserted that the family should generally not be recognized as a cognizable social group, but it is well-established that social groups must be assessed on a case-by-case basis.²³⁷ Rather than assuming that any given formulation will automatically succeed (or fail) on cognizability, practitioners should make explicit arguments and submit evidence²³⁸ to this effect.²³⁹ It will be even more important to do this when presenting a social group that extends beyond the bounds of immediate family membership in light of the significant disagreement among adjudicators as to the cognizability of extended family-defined groups. In these cases, practitioners should consider asserting multiple alternative formulations of social groups, forcing the immigration judge to separately analyze their merits and to preserve them on appeal. The following Subsections present arguments that can be made along with types of evidence to support them to demonstrate that family-based particular social groups meet the requirements for cognizability.

²³³ *Id.*

²³⁴ *Id.* at 1.

²³⁵ DHS 2019 Brief, *supra* note 105, at 38.

²³⁶ *Id.*

²³⁷ *Compare L-E-A- II*, 27 I. & N. Dec. 494, with *supra* notes 112, 147 and accompanying text.

²³⁸ *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 244 (B.I.A. 2014) (listing “country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities and the like” as relevant to establishing a social group).

²³⁹ *But see supra* note 21 (arguing that the Board should return to solely using the *Acosta* standard).

1. *Acosta* – fundamental or immutable

The first requirement for particular social groups to be found cognizable is that characteristics of the group be either fundamental or immutable, as set out in *Matter of Acosta*.²⁴⁰ This test is relatively easy for family-based groups to satisfy, and even Attorney General Barr conceded that “many family relationships will be immutable” in *L-E-A*.²⁴¹ Family membership is an immutable characteristic because people generally cannot change the family to which they belong. Children will always have their same parents. Brothers and sisters will always be siblings. Eccentric aunts, uncles, and cousins can be avoided at family gatherings but not entirely denied. Family also falls into the “fundamental” category envisioned by *Acosta*. Even in cases where family membership could arguably be changed, such as joining another family by marriage, as described in the Department’s 2016 brief in *L-E-A*, [E]ven where it may be possible to leave an immediate family group in such a way that one can no longer be considered to have the trait, this type of family relationship is generally fundamental to an individual’s identity, and is not a change that one should be required to make.²⁴²

Family bonds, whether immediate or extended, are so intrinsic to an individual’s identity that they should not have to be severed or hidden.

2. Particularity

In order to be found cognizable, particular social groups must also be defined with particularity. Nuclear families satisfy this requirement because they have clear, definable boundaries comprised of a person’s parents, spouse, siblings, and children.²⁴³ Oftentimes, it is clear who is a member of a nuclear family because they share a surname and may cohabit. Even when individuals in a family have different surnames—for example, when a wife and husband do not share a surname or where a daughter has taken on a new surname and moved into another home after marriage—persecutors and members of a given community may still identify them as part of the same family. Most adjudicators, including the

²⁴⁰ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

²⁴¹ *L-E-A II*, 27 I. & N. Dec. at 593.

²⁴² DHS 2016 Brief, *supra* note 66, at 7-8; *see also Matter of Acosta*, 19 I. & N. Dec. at 233 (identifying kinship as an innate characteristic that satisfies the immutable requirement).

²⁴³ In fact, this position was taken by the Department of Homeland Security in its 2016 brief. The Department cited the Merriam-Webster definition of “immediate family” as support. DHS 2016 Brief, *supra* note 66, at 1 n.1.

Attorney General in *L-E-A-*,²⁴⁴ accept that nuclear families can satisfy the particularity requirement.

Some adjudicators, however, have rejected family-based social groups as lacking sufficient particularity where the family relationship was more attenuated. In *Matter of S-E-G-*, the Board found that “[t]he proposed group of ‘family members,’ which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is also too amorphous a category.”²⁴⁵ This is not to say, however, that no social group that includes extended families can be particular.²⁴⁶ The Fourth Circuit in *Crespin-Valladares v. Holder* found cognizable the social group “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses” where the petitioner’s uncle was the “defining family member.”²⁴⁷ The court stated, “[t]he family unit—centered here around the relationship between an uncle and his nephew—possesses boundaries that are at least as ‘particular and well-defined’ as other groups whose members have qualified for asylum.”²⁴⁸ In a 2018 decision, the Seventh Circuit seemed to accept that the petitioner was part of a cognizable social group consisting of his family where the “defining family member” was his cousin.²⁴⁹ The Ninth Circuit has also indicated that it might find particular social groups involving extended family members cognizable.²⁵⁰

In order to satisfy the particularity requirement, practitioners may cite to positive case law but should also create an individual record clearly demonstrating that the proposed social group has definable boundaries. A social group such as *family of X person* or *members of the X family* could encompass extended family members so long as the evidence supports that, within the given community or society, this group is sufficiently particular.

²⁴⁴ See *L-E-A- II*, 27 I. & N. Dec. at 593-94 (citing other cases to point out that an extended family definition might be “too vague” to be particular before continuing to argue that even clearly defined family groups must also be socially distinct).

²⁴⁵ In re S-E-G-, 24 I. & N. Dec. 579, 585 (B.I.A. 2008); see also Center for Gender & Refugee Studies Database Case No. 20641, 17 (Immigration J. Dec. May 2018) (finding that that the particular social group of “[name] family” lacked particularity because “there are a large number of individuals who may qualify as a member of this family”);

²⁴⁶ See *supra* Subsection I.C.1 (describing how the BIA has found particular social groups that include extended family members cognizable following *L-E-A-*).

²⁴⁷ *Crespin-Valladares v. Holder*, 632 F.3d 117, 120-21 (4th Cir. 2011).

²⁴⁸ *Id.* at 125; see also *Cordova v. Holder*, 759 F.3d 332, 338, 340 (4th Cir. 2014) (remanding a case to the BIA to consider whether the petitioner’s kinship ties to his uncle and cousin constituted a cognizable social group).

²⁴⁹ See *Plaza-Ramirez v. Sessions*, 908 F.3d 282, 286 (7th Cir. 2018) (denying petition for review on other grounds, nonetheless).

²⁵⁰ *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (remanding for consideration of a particular social group that included the petitioner’s cousin).

As an illustration, the Refugee & Human Rights Clinic had a client who was from a small village in El Salvador. Multiple members of his family had been killed or threatened by gangs, including uncles, aunts, and cousins.²⁵¹ We argued that, in the context of the community in question, the extended family constituted a discrete family unit with definable boundaries that could satisfy the particularity requirement. We included as evidence statements from the applicant and his family members such as, “[f]amilies in our village and nearby villages know one another. Because there are only about 200 houses in village, we mostly know who everybody is,”²⁵² and “[m]y family and I are well-known within our village and the neighboring village. Because our village is small, and because my family has lived there for a long time, most people know and can easily recognize my family.”²⁵³ Alongside these types of statements, we also submitted country conditions documentation demonstrating that the concept of family is broader than just nuclear family in El Salvador. For example, the Family Code obligates grandparents, siblings, uncles and aunts, and first cousins to provide for minors in their families.²⁵⁴

3. Social distinction

The final requirement for cognizability is social distinction. There is ample evidence demonstrating that families are viewed as distinct in most societies. Many countries have laws, policies, and customs that recognize family units.²⁵⁵ In fact, the very existence of family-based immigration in the

²⁵¹ Declaration of X, represented by the UC Hastings Refugee & Human Rights Clinic, granted asylum Apr. 14, 2017.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See Código de Familia, Decreto No. 677, Book 4, Title II, Ch. 2, § 1, art. 287 (Oct. 11, 1993), http://www.oas.org/dil/esp/Codigo_de_Familia_El_Salvador.pdf [<https://perma.cc/6LHU-SK9D>] (allowing a judge to name as a child’s guardian the child’s grandparents, siblings, uncles and aunts, or first cousins).

²⁵⁵ For example, in *Matter of L-E-A-*, the Department argued against the cognizability of the respondent’s particular social group because he had not submitted evidence that “this paternal relationship between two male individuals is perceived” to be distinct. DHS 2019 Brief, *supra* note 105, at 39. It would have been relatively easy to submit evidence that the father-son relationship is viewed distinctly in Mexican society. See generally ALFONSO SEPÚLVEDA GARCÍA & HABIB DÍAZ NORIEGA, FAMILY LAW IN MEXICO: OVERVIEW (2014) (discussing the laws that set out parental rights and obligations in Mexico); Kimberly Updegraff et al., *Exploring Mothers’ and Fathers’ Relationships with Sons Versus Daughters: Links to Adolescent Adjustment in Mexican Immigrant Families*, 60 SEX ROLES 559 (2009) (exploring the differences in how Mexican mothers and fathers treat their sons versus daughters). The respondent could also have submitted an expert affidavit on how Mexican society views the relationship between a father and son or simply testified to this on the record regarding his own experiences.

U.S. reflects that this country views the family as significant in some way. The Supreme Court has stated, “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”²⁵⁶ Of course, the relevant inquiry is whether the society in question, not the United States, views the group distinctly. Nevertheless, the fact that the United States has a longstanding history of recognizing the family as the fundamental unit of society should give immigration adjudicators some foundation to understand how the same might be true in other countries.

As discussed previously, Attorney General Barr, in *L-E-A-*, sought to establish a new standard for social distinction in cases involving a family-based particular social group that would require the applicants to demonstrate that their specific families are widely-recognized or well-known in their societies.²⁵⁷ This position runs counter to the well-established rule that the proper question is whether nuclear or extended families, as a general matter, are socially distinct in the relevant society.²⁵⁸ However, given the recent decision in *L-E-A-*, it is quite likely that this erroneous line of reasoning may become increasingly common among adjudicators. Practitioners may thus want to consider arguing that the applicant’s family is in fact well-known or “famous” in some way in the society in question, while at the same time pushing back on the position that this is a *requirement* for social distinction.

For example, the Refugee & Human Rights Clinic regularly submits evidence demonstrating that our clients’ families are known as being particularly religious, affluent, influential, or some other characteristic and are therefore treated differently than others in the community. A recent client testified that his was only one of four black families in his town, so they stood out and faced widespread derision.²⁵⁹ Another client stated that his family was well-known as being one of only a few that were Mormon amidst the

²⁵⁶ *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503-04 (1977); *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (“Cicero . . . wrote, ‘The first bond of society is marriage; next, children; and then the family.’”). The Court has also indicated that one of the primary concerns of our immigration laws is to protect family unity. *See, e.g., I.N.S. v. Errico*, 385 U.S. 214, 224 (1996) (“The fundamental purpose of [the 1957 amendment to the INA] was to unite families.”).

²⁵⁷ *See supra* Section I.D.

²⁵⁸ *See, e.g., U.S. CITIZENSHIP & IMMIGR. SERVS.*, *supra* note 122, at 33 (instructing asylum officers to assess how the relevant society views the degree of relationship).

²⁵⁹ Declaration of X, represented by the UC Hastings Refugee & Human Rights Clinic, granted asylum May 6, 2019.

predominantly Catholic community.²⁶⁰ Oftentimes the same evidence that supports particularity may also be relevant to social distinction. The client referenced in the preceding section was able to argue that the fact that he was from a small village where everyone knew his family was evidence of both particularity and social distinction. Practitioners should emphasize in these cases that the relevant “society” for the social distinction analysis is the smaller community or town rather than the country as a whole. *Matter of M-E-V-G-* acknowledges that social distinction can be analyzed as “an inquiry into a more limited subset of the country’s society.”²⁶¹

As with the particularity requirement, adjudicators may be more hesitant to find social distinction for particular social groups that include extended family members. However, the Department of Homeland Security in 2016 acknowledged that, in some societies, “extended family groupings may have greater social significance, such that they could meet the requirement of social distinction.”²⁶² USCIS stated the same in its 2009 training materials and instructed that “[a]sylum officers should carefully analyze [social distinction] in light of the nature and degree of the family group asserted and should pay close attention to country conditions evidence about the relevant social attitudes toward family relationships.”²⁶³ Though the 2009 materials have been superseded, the 2019 USCIS guidance on family-based claims still acknowledges the standing requirement that country conditions documentation and societal context be considered in each individual case, stating that “[o]fficers must analyze each case on its merits...each case requires a fact-specific analysis based on the evidence presented by the applicant.”²⁶⁴ Regardless of whether the social group is limited to nuclear family members or a more extended grouping, practitioners should submit clear evidence of social distinction, such as laws and policies in the country in question that recognize the family relationship in some way,²⁶⁵ secondary sources speaking to the significance of family,²⁶⁶ affidavits

²⁶⁰ Declaration of X, represented by the UC Hastings Refugee & Human Rights Clinic, granted asylum Apr. 14, 2017.

²⁶¹ *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 243 (B.I.A. 2014).

²⁶² DHS 2016 Brief, *supra* note 66, at 9.

²⁶³ U.S. Citizenship & Immigration Services, *supra* note 122, at 33.

²⁶⁴ USCIS *L-E-A-* GUIDANCE, *supra* note 18, at 6.

²⁶⁵ See *supra* note 254 and accompanying text (noting that the Salvadoran Family Code creates obligations for not just parents, but also grandparents, siblings, uncles and aunts, and first cousins to provide for minors in their families).

²⁶⁶ For example, a 1995 country study on Honduras states:

The family is the fundamental social unit in Honduras . . . People emphasize the trust, the assistance, and the solidarity that kin owe to one

from experts to this same effect, and testimony from the applicant about how families operate as distinct units with the society in question.²⁶⁷

B. Arguing Nexus in Family-Based Targeting Cases

Once the cognizability of a particular social group has been established, as well as the fact that the applicant is indeed a member of the group, practitioners must next turn to the issue of nexus. Although each case must be examined on its individual record, respondents can maximize their chances of success by demonstrating how their claims mirror existing case law. The following subsections present pointers drawn from the Board's ruling in *L-E-A*²⁶⁸ and other cases.

1. Posit a clear theory or theories of why the family was targeted

Applicants should try to explain *why* the family was targeted rather than relying solely on the pattern of harm against family members. Of course, as the Fourth Circuit has acknowledged, “[i]t is unrealistic to expect that a gang would neatly explain in a note all the legally significant reasons it is targeting someone.”²⁶⁹ An asylum applicant is not expected to testify as to the exact motivations of her persecutors, but may rely on direct

another. Family loyalty is an ingrained and unquestioned virtue; from early childhood, individuals learn that relatives are to be trusted and relied on, whereas those outside the family are, implicitly at least, suspect. In all areas of life and at every level of society, a person looks to family and kin for both social identity and assistance.

HONDURAS: A COUNTRY STUDY, LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION 88-90 (Tim Merrill, ed., 1995).

²⁶⁷ For example, an applicant might comment on how everyone refers to children as “[name of parent’s] son/daughter” and to women as “[name of husband’s] wife,” demonstrating how people are defined by their families.

²⁶⁸ As previously noted, the Attorney General in *L-E-A* left undisturbed the nexus-related portion of the Board’s decision. *Matter of L-E-A- (L-E-A- II)*, 27 I. & N. Dec. 494, 597 (Att’y Gen. 2018). Focusing instead on cognizability, the Attorney General’s decision includes virtually no commentary about nexus.

²⁶⁹ *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 248 (4th Cir. 2017); *see also* *Espinosa-Cortez v. Att’y Gen.*, 607 F.3d 101, 109 (3d Cir. 2010) (“[I]t would be patently absurd to expect an applicant . . . to produce . . . documentary evidence of a persecutor’s motives . . . since persecutors are hardly likely to submit declarations explaining exactly what motivated them to act.” (internal quotation marks and citations omitted)); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1073 (9th Cir. 2004) (recognizing that, “because it is difficult to prove motive” for persecution, asylum applicants “need only provide *some* evidence of motive, direct or circumstantial” (emphasis added)).

or circumstantial evidence.²⁷⁰ However, in practice, where there is no theory presented of why the family would have been targeted, it gives adjudicators more leeway to instead conclude that the persecutor was motivated by “personal reasons” or a generalized criminal intent.

For example, in *Sosa-Perez v. Sessions*, the First Circuit upheld the Board’s denial of a Honduran woman whose family had suffered repeated harm by gangs.²⁷¹ The petitioner stated that she did not know why the gangs targeted her family,²⁷² and both the immigration judge and the Board made particular note of this in concluding that she had not experienced harm on account of a protected ground but had been the victim of “rampant crime” and “pervasive societal violence.”²⁷³ The First Circuit noted that although the petitioner argued that the pattern of harm against her family was sufficient evidence of nexus, the record did not compel that conclusion.²⁷⁴ The court distinguished the petitioner’s case from a number of Fourth Circuit decisions where the petitioners gave clear explanations of why their families had been targeted.²⁷⁵ Similarly, in an unpublished Board decision that followed *L-E-A-*,

²⁷⁰ See, e.g., *Ndayshimiye v. Att’y Gen.*, 557 F.3d 124, 131 (3d Cir. 2009) (stating that “[a]pplicants for asylum bear the burden of providing *some* evidence of [a motive based on a statutorily protected ground], direct or circumstantial” (emphasis added) (internal quotations omitted)); *Bolanos-Hernandes v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (stating that because refugees are rarely able to offer direct corroboration of specific threats, the applicant’s own credible testimony is sufficient); *Matter of J-B-N- S-M-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007) (holding that the burden of proof for the persecutor’s motive may be met by testimonial evidence).

²⁷¹ *Sosa-Perez v. Sessions*, 884 F.3d 74, 78 (1st Cir. 2018); see also *Ruiz-Escobar v. Sessions*, 881 F.3d 252, 259-260 (1st Cir. 2018) (finding no nexus to family where the petitioner acknowledged he did not know who his attackers were and had no personal knowledge of the circumstances surrounding harm to other family members); *Marin-Portillo v. Lynch*, 834 F.3d 99, 102 (1st Cir. 2016) (finding no nexus where the petitioner testified that he did not know why the persecutor wanted to kill him, and rejecting the argument that the pattern of targeting the petitioner’s family meant that “the only logical inference” was that family membership was the reason for the death threats).

²⁷² *Sosa-Perez v. Sessions*, 884 F.3d at 78.

²⁷³ *Id.* at 80-81.

²⁷⁴ The court implied that the record could have permitted a different conclusion than that reached by the Board, it but noted that it is required to sustain the findings of the Board unless the record “compels” a reasonable factfinder to find otherwise. *Id.* at 80 (citing *Palma-Mazariegos v. Gonzales*, 428 F.3d 30, 34 (1st Cir. 2005)).

²⁷⁵ See *Sosa-Perez v. Sessions*, 884 F.3d at 82 n.3 (citing *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 248-50 (4th Cir. 2017), in which the petitioner argued she was threatened because her father had fled the country after refusing to pay extortion to gang members; *Cruz v. Sessions*, 853 F.3d 122, 129 (4th Cir. 2017), in which the petitioner was targeted by organized criminals after she began investigating the disappearance of the father of her children; and *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015), in which the petitioner was threatened by gang members after refusing to allow her son to join the gang).

the Board dismissed the appeal where “[t]he respondent testified to many deaths within her extended family, but was unable to provide any reasons or even speculate as to the reasons for several of the deaths.”²⁷⁶ The Board agreed with the Immigration Judge that the respondent had been targeted “based on general criminality or attempts at extortion.”²⁷⁷

In order to minimize the likelihood that the adjudicator will conclude that the applicant was not actually harmed due to the family relationship, practitioners should present evidence of the persecutor’s motivation and assert a reasonable theory—or theories—as to why the family might have been targeted. This can be achieved through careful fact investigation involving interviews with the client and other family members where appropriate, as well as country conditions documentation and expert affidavits on patterns of family-based targeting by specific persecutors in a given country. As an illustration, the Refugee & Human Rights Clinic represented a young woman who received gang threats, but initially came to us not knowing why.²⁷⁸ She told us that her father had been beaten and her mother raped by members of the same gang.²⁷⁹ There was a clear pattern of family-based targeting, but the client had no explanation of why her family had been singled out. Clients may not be privy to all of the information that supports their family-based claims.²⁸⁰ Interviewing and documenting facts from other family members, including obtaining police reports and death certificates, may make the difference between a grant or a denial. In this case, after interviewing the client’s parents, we learned that they were being extorted, but our client was unaware of this fact, because her parents did not want to worry her.²⁸¹ The

²⁷⁶ Center for Gender & Refugee Studies Database Case No. 19905, 1 (B.I.A. undated but post-*L-E-A-*).

²⁷⁷ *Id.* at 2.

²⁷⁸ Declaration of X, represented by the UC Hastings Refugee & Human Rights Clinic, decision pending (on file with author).

²⁷⁹ *Id.*

²⁸⁰ This may be particularly true of children and young persons. In fact, the Asylum Officer Basic Training Course Guidelines (AOBTC) recognize the importance of relying on objective evidence to determine nexus in cases involving children, since minors often do not fully grasp why they have been targeted:

A child’s inability to understand all of the circumstances surrounding his or her flight creates difficulty in analyzing the nexus of the harm or fear of harm to a protected ground. Officers must pay close attention to the objective facts surrounding the child’s claim to determine if there is a nexus regardless of the child’s ability to articulate one.

U.S. CITIZENSHIP & IMMIGRATION SERVICES, ASYLUM DIVISION, AOBTC GUIDELINES FOR CHILDREN’S ASYLUM CLAIMS 53 (2009).

²⁸¹ Declarations of X and Y, parents of the client represented by the UC Hastings Refugee & Human Rights Clinic, decision pending (on file with author).

affidavits that this client's parents submitted in her case were critical to demonstrating that her persecution was tied to her family membership. We also submitted country conditions documentation and obtained an affidavit from an expert on the client's home country speaking to the reasons that certain families there may be singled out for persecution by gangs.

2. Emphasize that mixed motives are permissible

Claims become more complicated when applicants were also persecuted for reasons that may not fall into a protected category, as well as on account of their family membership. Despite the clear recognition in the law that “mixed motives” are permissible,²⁸² adjudicators appear to be less likely to grant such cases. As noted previously, in *L-E-A-*, the Board found that the respondent was targeted by the gangs because they wanted him to sell drugs rather than on account of his family membership.²⁸³ Similarly, in *Crespin-Valladares v. Holder*, the Board found that the respondent had not been threatened because of his uncle's cooperation with the investigation of the death of his cousin, but so that he would not testify himself.²⁸⁴

In order to guard against these types of conclusions, practitioners should consider affirmatively identifying nonprotected reasons for the persecution that occur alongside the family-based targeting and emphasize that the presence of these nonprotected reasons does not constitute evidence of the absence of a protected reason.²⁸⁵ The First Circuit accepted this proposition in *Aldana-Ramos v. Holder*, stating “we are aware of no legal authority supporting the proposition that, if wealth is one reason for the alleged persecution of a family member, a protected ground—such as family membership—cannot be as well.”²⁸⁶ In the same case, the First Circuit acknowledged that motivations can change over time, giving the

²⁸² See *supra* note 34 and accompanying text.

²⁸³ Matter of L-E-A- (*L-E-A- I*), 27 I. & N. Dec. 40, 46-47 (B.I.A. 2017).

²⁸⁴ *Crespin-Valladares v. Holder*, 632 F.3d 117, 127 (4th Cir. 2011). The Fourth Circuit found the Board had applied the incorrect standard in reviewing the Immigration Judge's finding on nexus and remanded, but did not weigh in on the substantive issue of whether the petitioner had satisfied nexus.

²⁸⁵ See, e.g., *Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010) (“[I]f there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus.”); *Menghesha v. Gonzales*, 450 F.3d 142, 148 (4th Cir. 2006) (“[A]n IJ may not treat the presence of a nonpolitical motive as evidence of the absence of a political motive.” (internal quotation marks omitted)); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 131 (D.D.C. 2018) (citing *Aldana-Ramos* and *Qu* to conclude that the simultaneous existence of a personal dispute “does not preclude a positive credible fear determination . . . so long as the one central reason for the persecution is a protected ground”).

²⁸⁶ 757 F.3d 9, 18 (1st Cir. 2014), *as amended* (Aug. 8, 2014).

example of a local militia that initially targets a family because of their wealth but then “pursue[s] them throughout the country in order to show the local community that even its most prominent families are not immune and that the militia’s rule must be respected.”²⁸⁷ There is ample documentation that the gangs and cartels that operate in Mexico and Central America do not countenance challenges to their authority.²⁸⁸ Practitioners could explore the theory that a family was initially targeted for one reason, but that the motives of the persecutor changed over time to a desire to augment their power in the community by making an example of the family in question.

On the other hand, although mixed motives are permissible, it can nevertheless be helpful to explicitly rule out other motivations the persecutors might have held in order to leave the family-based theory as the most viable contender. Again, since a persecutor will rarely state why he is harming someone, it can be effective to engage in a “process of elimination” type of analysis. For example, in cases where the applicants are children or spouses with no access to money, it is harder to argue that they were persecuted for their own wealth or as a direct target of extortion. Along these lines, in the aforementioned Refugee & Human Rights Clinic case of a young person whose parents were being extorted, the client had been threatened by the gangs starting from the age of ten.²⁸⁹ The gang members never asked her directly for money and it would not have been reasonable to think that she would have been able to pay extortion herself since she was just a child.²⁹⁰ Because of the client’s youth, we were able to rule out pecuniary motives as to the persecutors and underscore that she was targeted because of her family relationship to her father, as a means to control or punish him, rather than for any other reason. Indeed, the gang members only ever threatened to harm the client immediately after asking her father for money.²⁹¹

²⁸⁷ *Id.* at 19.

²⁸⁸ According to the *UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gang*,

Because respect and reputation play such an important role in gang culture, members and entire gangs go to great lengths to establish and defend both. Refusals to succumb to a gang’s demands and/or any actions that challenge or thwart the gang are perceived as acts of disrespect, and thus often trigger a violent and/or punitive response.

U.N. HIGH COMM’R FOR HUMAN RIGHTS, *supra* note 155, at ¶ 2.

²⁸⁹ Declaration of X, represented by the UC Hastings Refugee & Human Rights Clinic, decision pending.

²⁹⁰ *Id.*

²⁹¹ *Id.*

3. Identify temporal patterns in targeting

One piece of evidence that can be critical for family-based persecution claims is the timing of targeting of the applicant as well as other family members. The Seventh Circuit, in particular, has focused on this issue in recent cases. In the August 2018 case *W.G.A. v. Sessions*, the Seventh Circuit found substantial evidence did not support the Board’s conclusion that there was no nexus,²⁹² noting that the threats against the petitioner began just two days after his brother left the gang, demonstrating that the family relationship was what caused him to be targeted.²⁹³ In April 2019, the Seventh Circuit found nexus in a case where a husband was targeted by a cartel member who wanted to “possess” his wife, analogizing it to *W.G.A.* in that “the timing of the persecution and statements made by the persecutors leave no doubt that he was and remains a target because of his relationship with his wife.”²⁹⁴ The Seventh Circuit is not alone in its interest in looking at temporal patterns. In *Zavaleta-Policiano v. Sessions*, the Fourth Circuit pointed out that the petitioner had not been harmed prior to when her father—who was the initial target for extortion—fled the country, but that the gangs began threatening her immediately after he left.²⁹⁵ Reviewing the converse set of facts, the Sixth Circuit, in *Bonilla-Morales v. Holder*, found no nexus where the majority of the harms that the petitioner suffered from gang members actually happened prior to their attempts to recruit her son.²⁹⁶

The timing of harms may be especially relevant as evidence of nexus in cases where the persecutor demanded something of the applicant, and the applicant complied, but the targeting continued. Illustrating this principle, in an unpublished 2019 decision, the Board remanded a case in which the respondent acquiesced to paying extortion to gang members, but continued to receive threats from them, indicating that the underlying reason for the persecution could not have been solely financially-motivated.²⁹⁷ The First Circuit, in *Aldana-Ramos v. Holder*, similarly remanded to consider the petitioners’ argument that they could not have been targeted on account of their wealth

²⁹² *W.G.A. v. Sessions*, 900 F.3d 957, 966 (7th Cir. 2018), *reh’g denied* (Oct. 22, 2018).

²⁹³ *Id.*; see also Center for Gender & Refugee Studies Database Case No. 20037, 6 (Immigration J. Dec. July 14, 2017) (discussing a case arising in the Seventh Circuit granting asylum while noting the fact that the respondent was only harmed by the gang members after her son refused their requests to join).

²⁹⁴ *Gonzalez Ruano v. Barr*, 922 F.3d 346, 355-56 (7th Cir. 2019).

²⁹⁵ *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 249 (4th Cir. 2017) (“The timing of the threats against Zavaleta-Policiano is key, as it indicates that MS-13 was following up on its prior threat to target Barrientos’s family if he did not accede to the gang’s demands.”).

²⁹⁶ *Bonilla-Morales v. Holder*, 607 F.3d 1132, 1137 (6th Cir. 2010).

²⁹⁷ P-R-R-, A XXX XXX 272, 2-3 (B.I.A. Feb. 22, 2019) (on file with IRAC).

because they had paid their father’s kidnappers, exhausted all of their financial resources, and still received threats.²⁹⁸ This logic is not restricted to extortion cases. In *Cruz v. Sessions*, the Fourth Circuit pointed out that the persecutor had continued to target the respondent and her children even after she promised not to report his criminal activity.²⁹⁹ This pattern of harm evidenced that the central underlying reason for the persecution was not the demands—in this case, that the respondent stay silent about her husband’s murder—but the familial relationship.³⁰⁰ These cases provide a meaningful distinction from *L-E-A-*, in which the respondent refused to give in to the cartel’s request that he sell drugs from his father’s store.³⁰¹ Had he consented and had the threats continued, this would clearly have rebutted the Board’s conclusion that the respondent was targeted solely to increase the cartel’s profits.³⁰²

4. Connect to another protected ground

While adjudicators continue to disagree over whether the “defining family member” must also establish nexus to a protected ground, it is indisputable that it certainly strengthens an applicant’s claim. The Board stated in *L-E-A-* that nexus is “often” established “in cases where the family status is connected to another protected ground, particularly where there is a political motive . . . that is intertwined with or underlies the dispute.”³⁰³ Similarly, in *Rios v. Lynch*, the Ninth Circuit indicated its belief that “persecutors are more likely to identify individual family members as part of a particular social group when familial ties are ‘linked to race, religion, or political affiliation,’” though the court also acknowledged that this is not a requirement for nexus.³⁰⁴ In *Ayele v. Holder*, the Seventh Circuit found that the Immigration Judge and Board had erred in not considering whether she faced persecution on account of her family membership, given her family’s involvement in the opposition political party.³⁰⁵ And in *Vumi v. Gonzales*, the Second Circuit remanded the case of a Congolese petitioner who had been persecuted by members of the military, who suspected that her husband had

²⁹⁸ *Aldana-Ramos v. Holder*, 757 F.3d 9, 18-19 (1st Cir. 2014), *as amended* (Aug. 8, 2014).

²⁹⁹ *Cruz v. Sessions*, 853 F.3d 122, 129 (4th Cir. 2017), *as amended* (Mar. 14, 2017).

³⁰⁰ *Id.*

³⁰¹ *Matter of L-E-A- (L-E-A- I)*, 27 I. & N. Dec. 40, 46 (B.I.A. 2017).

³⁰² *Id.* at 46-47.

³⁰³ *Id.* at 45 (citing to *Ayele v. Holder*, 564 F.3d 862 (7th Cir. 2009); *Vumi v. Gonzales*, 502 F.3d 150 (2d Cir. 2007); *Gebremichael v. I.N.S.*, 10 F.3d 28, 36 (1st Cir. 1993)).

³⁰⁴ *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (citing to *Thomas v. Gonzales*, 409 F.3d 1177, 1188 (9th Cir. 2005), *judgment vacated*, 547 U.S. 183 (2006)).

³⁰⁵ *Ayele*, 564 F.3d at 869.

been involved in the assassination of then-president Kabila.³⁰⁶ The court held that the Board had not adequately considered the petitioner's claims based on both her membership in the particular social group of her husband's family members, as well as an imputed anti-Kabila political opinion.³⁰⁷

In order to maximize an applicant's likelihood of success, practitioners should ascertain if there is any possible way to argue that the "defining family member" was targeted on account of protected ground.³⁰⁸ Under these circumstances, it may also be effective to argue this same protected ground as imputed to the applicant,³⁰⁹ in addition to the family-based particular social group. It seems logical that someone whose family member is exceptionally religious or known to be involved in a political party may also be assumed by persecutors to fall into the same category.

5. Explain why other members of the family were not harmed

Where the persecutor harmed multiple members of the same family, this lends support to the proposition that the persecution was on account of the family relationship.³¹⁰ On the flip side, adjudicators have consistently considered the ability of other family members to continue living in their country of origin unharmed as evidence that there was no connection between the persecution the applicant suffered and family membership.³¹¹ The case law

³⁰⁶ *Vumi*, 502 F.3d at 154.

³⁰⁷ *Id.* at 159.

³⁰⁸ In doing so, it may be useful to apply some of the other tips in this section as to the "defining family member" as well, e.g. emphasizing the permissibility of mixed motives, ruling out non-protected grounds, and examining the timing of persecution.

³⁰⁹ See, e.g., *Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018) (finding that the petitioner had been persecuted on account of both his membership in his family and the political opinion that the gang members had imputed upon him due to his family's military service); *Mema v. Gonzalez*, 474 F.3d 412, 416 (7th Cir. 2007) ("[A]sylum is available to persons who have been persecuted based on imputed political opinion, including situations where a persecutor attributes the political opinion of one or more family members to the asylum applicant.").

³¹⁰ See, e.g., *Ayele*, 564 F.3d at 870 ("Every member of Ayele's immediate family either is in exile, has disappeared, has been imprisoned and tortured, or is under house arrest."); see also U.N. HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 155, at ¶ 20 (noting that harm to other family members may constitute evidence of a well-founded fear of future persecution).

³¹¹ See, e.g., *Plaza-Ramirez v. Sessions*, 908 F.3d 282, 286 (7th Cir. 2018) (noting the "[t]he absence of evidence of threats to or attacks on other family members"); *Macias-Padilla v. Sessions*, 729 F. App'x 541, 543 (9th Cir. 2018) ("Any inference of a nexus between the cartel's actions and the Padilla family relationship is undermined by the fact that other family members continue to reside in Mexico, and in the same region, without any known issues with the cartel."); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 493 (5th Cir. 2015) (finding the fact that other family members remained in Honduras and have not faced persecution as

clearly states that applicants are not required to show that other members of the group—in this context, other family members—were also harmed by the same persecutor.³¹² However, it can significantly strengthen the legal theory to affirmatively proffer an explanation of why they have remained safe.

In order to do so, the key question is what characteristics distinguish the applicant from family members who were unharmed. In an unpublished Board decision from 2018, *Matter of G-F-N-A-*, the respondent posited that his siblings had not been harmed because they had a different last name and thus were not readily identifiable as members of the family.³¹³ In a recent Refugee & Human Rights Clinic case, the client was substantially older than her siblings. We obtained an affidavit from an expert indicating that gang members are more likely to target girls when they have become sexually mature enough to be of interest to them.³¹⁴ Because the client's sisters were all under the age of sexual maturity, the expert hypothesized that this was why they had not yet been harmed.³¹⁵ Another possible explanation for family members that appear to be living in safety is that they are in fact not actually safe, but are constantly moving, in hiding, or have only been exposed to danger for a limited

evidence against nexus to family-based social group); DHS 2016 Brief, *supra* note 66, at 18 (indicating that evidence of whether the persecution was on account of family membership should include “of course, any evidence about the circumstances of other family members and whether they have been targeted on account of their family relationship”). This position appears to be particularly predominant in the Eighth Circuit, which has consistently used the fact that other family members were able to remain safely in the country as evidence to deny petitions for review of family-based asylum claims. *See, e.g.,* *Cambara-Cambara v. Lynch*, 837 F.3d 822, 826 (8th Cir. 2016) (noting that the fact that the petitioners each left daughters in their country of origin undermined their claim); *Aguinada-Lopez v. Lynch*, 825 F.3d 407, 409 (8th Cir. 2016) (denying the petition and noting that “extended family” still lived in their home country); *Constanza v. Holder*, 647 F.3d 749, 753-54 (8th Cir. 2011) (noting that the petitioner's siblings and children remained in El Salvador and had not been particularly targeted). The Eighth Circuit almost seems to require that the entire family as a group have been targeted. *See, e.g.,* *Antonio-Fuentes v. Holder*, 764 F.3d 902, 905 (8th Cir. 2014) (“Fuentes . . . did not establish that gangs specifically targeted his family as a group.”).

³¹² *See, e.g.,* *W.G.A. v. Sessions*, 900 F.3d 957, 967 (7th Cir. 2018), *reh'g denied* (Oct. 22, 2018) (nothing that “it was improper for the immigration judge to rely on a lack of harm to other family members, without more, to find that [petitioner] was not targeted on account of his kinship ties”); *Cordova v. Holder*, 759 F.3d 332, 339 (4th Cir. 2014) (finding that “even though the petitioner's family members in El Salvador remained unharmed... this fact did not ‘undermine the reasonableness of [petitioner's] own fear of persecution’”); *Mgoian v. INS*, 184 F.3d 1029, 1036-37 (9th Cir. 1999).

³¹³ *G-F-N-A-*, A XXX XXX 670 3 (B.I.A. Oct. 19 2018) (on file with IRAC).

³¹⁴ Declaration of Héctor Silva Ávalos, Expert on Organized Crime in Guatemala (Dec. 2, 2017).

³¹⁵ *Id.*

time.³¹⁶ For example, the Fourth Circuit, in *Crespin-Valladares v. Holder*, noted that even though the petitioner's children remained in El Salvador, the period during which they had been unharmed was only two months long.³¹⁷

In addition to developing an explanation of why some family members were not harmed, practitioners might consider narrowing the particular social group formulation to exclude individuals who continue to live in the country safely. In an unpublished 2017 decision a few months prior to *L-E-A-*, the Board considered the case of a Salvadoran respondent who argued the gangs had targeted him for recruitment as the child of a policeman. In denying the appeal, the Board pointed out that the respondent's sister—another member of the particular social group defined as nuclear family members of the respondent's father—had not been harmed by the gangs.³¹⁸ Per controlling authority, this fact should not have been dispositive.³¹⁹ However, given that country conditions documentation shows that gangs predominantly recruit young men,³²⁰ it may have been a more successful strategy to limit the particular social group in this case to “*male* nuclear family members of the respondent's father” rather than formulating it as the entire nuclear family.³²¹

6. If the persecutor harmed other individuals outside of the family, explain how the applicant's persecution is distinguishable

In a way the converse of the preceding Subsection, where the persecutor also targeted people that were not members of the family in question, practitioners should be prepared to incorporate this into the theory of the case. In the aforementioned 2017 Board decision, another of the reasons that the Board found no nexus was that the gang members had also tried to recruit the respondent's friends rather than just members of the

³¹⁶ Practitioners should take particular care not to concede that the applicant could live safely and reasonably in another part of the country, for example by pointing out that it would not be reasonable to have to constantly move around or remain confined in the house day-and-night. The internal relocation prong of asylum eligibility is outside the scope of this paper but should be carefully documented as well in all asylum cases.

³¹⁷ *Crespin-Valladares v. Holder*, 632 F.3d 117, 127 n.6 (4th Cir. 2011).

³¹⁸ Center for Gender & Refugee Studies Database Case No. 13187, 2 (B.I.A., Feb. 27, 2017).

³¹⁹ See *supra* note 311 (citing to cases that stand for the proposition that applicants are not required to show that other members of the group—in this context, other family members—were also harmed by the same persecutor).

³²⁰ U.N. HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 155, at ¶ 11.

³²¹ This strategy may, however, make it more challenging to satisfy the particularity and social distinction tests.

particular social group of the respondent's nuclear family.³²² The fact that a persecutor harmed others should have no impact on the nexus analysis as to the specific applicant, though adjudicators sometimes use this information to make inferences about a persecutor's motivations.³²³

Therefore, under these circumstances, practitioners should present evidence that the persecutor treated the respondent differently than other victims in some way. In this case, the respondent testified that the gang members mentioned his father by name when they approached him and had an expert witness testify that the gangs disproportionately targeted family members of policemen for recruitment.³²⁴ These facts support the argument that even if the gang members persecuted other young men in the community, one central reason for the respondent's persecution was his family membership. Perhaps additional facts could have been presented to further differentiate how the respondent was treated versus his friends, who were also approached for recruitment. If the respondent had been harmed more severely—such as receiving more serious threats or more frequent attempts at recruitment—this could have further supported the family-based nexus argument.

CONCLUSION

Last year, I was part of a group of students and attorneys that traveled to the border to volunteer with migrants waiting to enter the United States. It was eminently clear that Trump's characterization of asylum seekers as "stone cold criminals"³²⁵ and their applications for asylum as a "big fat con job"³²⁶ could not be further from the truth. Person after person recounted truly horrific stories, including children threatened with kidnapping, siblings murdered, and entire families that uprooted their lives to escape abuses that are

³²² Center for Gender & Refugee Studies Database Case No. 13187, 2 (B.I.A., Feb. 27, 2017).

³²³ The applicant is only required to show that "one central reason" for the persecution was a protected ground. *See supra* note 34 and accompanying text. Persecutors may have similar or different reasons for harming other victims, but this is immaterial to the nexus analysis as to the individual applicant.

³²⁴ *Center for Gender & Refugee Studies Database Case No. 13187*, at 2.

³²⁵ Allen Smith, *Trump Demands Mexico Send Migrants Back to Countries of Origin After Border Patrol Fires Tear Gas*, NBC NEWS (Nov. 26, 2018), <https://www.nbcnews.com/politics/immigration/trump-asks-mexico-send-migrants-back-countries-origin-after-border-n939966> [<https://perma.cc/C6CN-VHLX>].

³²⁶ Maria Sacchetti, *U.S. Asylum Process is at the Center of Trump's Immigration Ire*, WASH. POST (Apr. 9, 2019), https://www.washingtonpost.com/immigration/us-asylum-process-is-at-the-center-of-trumps-immigration-ire/2019/04/09/7f8259b8-5aec-11e9-842d-7d3ed7eb3957_story.html?utm_term=.9fed1fe8c0db [<https://perma.cc/3TGU-PT9L>].

unimaginable in our country. These were not individuals who made the decision lightly to abandon their homes and undertake the dangerous journey north.³²⁷

Attorney General Barr's decision in *Matter of L-E-A-* gives adjudicators who favor denials another excuse to rebuff asylum applicants and return them to countries where they face serious harm, including death.³²⁸ However, the central thesis of this Article is that family-based particular social group membership is buttressed by decades of legal precedent that cannot be erased with a stroke of the Attorney General's pen. People are being beaten, kidnapped, hunted down, tortured, and killed—not because of anything that they have done, but because of who their family members are. Our laws should—and *do*—protect these individuals.

³²⁷ See, e.g., PBS News Hour, *Migrants Risk the Dangerous Trip to the U.S. Because It's Safer Than Staying Home*, PBS (June 20, 2018), <https://www.pbs.org/newshour/show/migrants-risk-the-dangerous-trip-to-the-u-s-because-its-safer-than-staying-home> [<https://perma.cc/NGY8-9B YN>] (interviewing asylum seekers who were escaping horrific situations in their home countries).

³²⁸ See, e.g., Maria Sacchetti, 'Death is Waiting for Him,' WASH. POST (Dec. 6, 2019), https://www.washingtonpost.com/graphics/2018/local/asylum-deported-ms-13-honduras/?utm_term=.57fa3520b4bc [<https://perma.cc/7FRW-4NTD>] (reporting on a case in which a man was denied asylum, and was murdered soon after he was deported).