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May 13 - 14, 2022

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## Litigating Gender & Domestic Violence based Asylum Claims in Courts of Appeal

#FBA

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# Panelists

- **Karen Musalo**, Bank of America Foundation Chair in International Law, Professor & Director, Center for Gender & Refugee Studies, UC Hastings College of the Law
- **Alicia Triche**, D.Phil. (Oxf.), sole proprietor, [www.tricheimmigrationappeals.com](http://www.tricheimmigrationappeals.com)
- **Deborah Anker**, Clinical Professor of Law; Founder, Harvard Immigration and Refugee Clinical Program



# Overview of Presentation

- Developments from *A-R-C-G-* through the Trump and Biden administrations—Prof. Musalo
- Litigating domestic-violence based asylum claims in the aftermath of *A-B-III* (a personal memoir)—Dr. Triche
- Gender Cases in Federal Courts of Appeal: The Political Opinion Ground—Prof. Anker



# Developments from *A-R-C-G-* through the Trump and Biden administrations



# *Matter of A-R-C-G-*

Issued in 2014 by the BIA

- Held that **“married women in Guatemala who are unable to leave their relationship”** can constitute a social group
- Recognized that **marital status can be immutable due to religious, cultural, or legal constraints**
- Found the group to meet the requirements of social distinction (perceived by society to be a group), and particularity (clear benchmarks for membership)
- Was basis for grants in cases of women in domestic relationships (i.e., where not formally married)

Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014)



# *Matter of A-B-I*

Issued in 2018 by AG Sessions

- **Overruled *Matter of A-R-C-G***- stating that the BIA was not rigorous in its reasoning
- Decision questioned the viability of PSGs which included characteristic of “**unable to leave**” suggesting they are defined by the harm (circularity)
- Questioned the **social distinction** and **particularity** of such groups
- Raised doubts about **nexus**, stating that DV is generally motivated by the “preexisting personal relationship” rather than a protected ground
- Attempted to increase the burden for “unable/unwilling” by restating the standard as “**completely helpless**” for unable and “**condoned**” for unwilling
- ***Included harmful dicta that “Generally claims by aliens pertaining to domestic or gang violence perpetrated by non-governmental actors will not qualify for asylum.”***

Matter of A-B-I, 27 I&N Dec. 316 (AG 2018)

# *Matter of A-B-II*

Issued in 2021 by Acting AG Rosen

- Established **two part nexus test** requiring that the protected ground 1) be a “**but-for**” cause of the persecution, and 2) **not be incidental or tangential** to another reason for the harm
- Held that the “**completely helpless/condoned**” standard was the same as “unable/unwilling”

*Matter of A-B-II*, 28 I&N Dec. 199 (AG 2021)

# *Matter of A-C-A-A-*

Issued in 2020 by AG Barr

- Reaffirmed pronouncement in *A-B-I* that where there is a **personal relationship it will be difficult to establish nexus to a protected ground**
- Departed from long-standing practice, and **prohibited the BIA from relying on stipulations** made by the parties

*Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020)



# *Matter of A-B- III*

Issued in 2021 by AG Garland

- **Fully vacated *A-B-I* and *A-B-II*** in light of pending rulemaking
- Flagged problematic aspects to two *A-B-* decisions, including fact that **dicta re domestic violence and gang claims could be “read to create a strong presumption against asylum claims based on private conduct,”** and could discourage **“careful case-by-case adjudication of asylum claims.”**

*Matter of A-B-III*, 28 I&N Dec. 307 (AG 2021)



# *Matter of A-C-A-A-II*

Issued in 2021 by AG Garland

- **Vacated A-C-A-A-**; notes that A-C-A-A- substantially relied upon now vacated A-B- decisions
- Stated that the decision also merited vacatur because its **prohibition on stipulations ran counter to “long-standing practice”** which “expressly contemplate” narrowing of issues, including by stipulation

*Matter of A-C-A-A- II, 28 I&N Dec. 351 (A.G. 2021)*



# The *L-E-A* Decisions: Family as a Social Group

- *L-E-A-I*, decision by BIA, holding that **nexus** fails where the targeting of the family member is “as a means to an end” (Matter of *L-E-A-*, 27 I&N Dec. 40 (BIA 2017))
- *L-E-A-II*, decision by AG Barr, holding that “in the ordinary case, **a nuclear family will not, without more**” constitute a **PSG** (Matter of *L-E-A-*, 27 I&N Dec. 581 (A.G. 2019))
- **L-E-A-III**, decision by **AG Garland**, vacating *L-E-A-II*, noting that the issue will be determined in rule-making, and that the decision itself had acknowledged its conflict with “several courts of appeals that have recognized families as particular social groups”

# Significance of Vacatur/ Case Strategies

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On June 16, 2021, Associate AG Vanita Gupta directed the Office of Immigration Litigation (OIL) to:

***“review any pending cases that may be affected by the Attorney General’s vacatur of L-E-A-II, A-B-I and A-B-II and take appropriate steps in light of that development, including seeking remands in appropriate cases to allow the Board to reconsider claims based on this change in the law”***

*Memorandum for the Civil Division, Impact of Attorney General decisions in Matter of L-E-A- and Matter of A-B-*



# Strategies in light of vacatur

- Request OIL join in request to remand to the BIA any cases pending at the Circuit Courts where the BIA expressly or implicitly relied upon any of the vacated cases
- For cases remanded back to the BIA, you may ask ICE to join in a request to reopen based on the vacatur (ICE HQ has stated that it sent guidance to its attorneys along the lines of the Gupta memo)



# Circuit Court Decisions Prior to Vacatur of Trump era AG Rulings

## Negative decisions

- *S.E.R.L. v. U.S. Attorney General*, 894 F. 3d 535, (3d Cir. 2018): rejecting a PSG of “immediate family members of Honduran women unable to leave a domestic relationship”
- *Gonzalez-Veliz v. Barr*, 938 F. 3d 219 (5<sup>th</sup> Cir. 2019): rejecting PSG of Honduran women unable to leave the relationship
- *Amezcuca-Preciado v. U.S. Attorney General*, 943 F. 3d 1337 (11<sup>th</sup> Cir. 2019): rejecting PSG of “women in Mexico who cannot leave domestic relationships”

# Circuit Court Decisions Prior to Vacatur of Trump era AG Rulings

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## Positive decisions

- *De Pena Paniagua v. Barr*, 957 F.3d 88 (1<sup>st</sup> Cir. 2020): Holding that ***Matter of A-B-* did not categorically preclude PSGs defined by women unable** to leave their domestic relationship. Suggested on remand BIA should consider remand to IJ for consideration of a **nationality/gender PSG**
- *Juan Antonio v. Barr*, 959 F.3d 778 (6<sup>th</sup> Cir. 2020): Remanding to determine cognizability of a PSG defined as “**married indigenous women in Guatemala who are unable to leave the relationship**”
- *Diaz-Reynoso v. Barr*, 968 F. 3d 1070 (9<sup>th</sup> Cir. 2020): Holding that ***Matter of A-B-* did not preclude DV cases defined by inability to leave.**
- In a number of unpublished decisions, Ninth Circuit remanded to consider whether cognizable PSG could be based on **nationality and gender alone.**



# Circuit Court Decisions– Post Vacatur

## Negative decision

- *Ortiz v. Garland*, 6 F. 4<sup>th</sup> 685 (6<sup>th</sup> Cir. 2021): Petitioner failed to establish government **unable or unwilling** because she never contacted the police (distinguishing from *Juan Antonio v Barr* where she requested assistance and had been ignored)

## Positive decision

- *Portillo Flores v. Garland*, 3 F. 4<sup>th</sup> 615 (4<sup>th</sup> Cir. 2021)(en banc): BIA committed **legal error in applying a per se rule that a petitioner is required to seek out the police in order to prove a lack of state protection** (fear of gang case). Cites the controlling standard as government unable or unwilling.



# Circuit Court Decisions (unpublished)

## Post Vacatur

### Negative decisions

- *Alvarez-Castro v. Att’y Gen.*, 2022 WL 421396 (3d Cir. Feb. 11, 2022): Holding that the A-B- standards of “**condone or complete helplessness**” **although now vacated is “functionally equivalent” to the unable/unwilling standard**
- *Soriano-Salinas*, 2022 WL 68968 (5<sup>th</sup> Cir. Jan. 6, 2022): Denies petition for review holding that in spite of vacatur of A-B-, “Honduran women who are unable to leave the relationship is not a cognizable PSG (more from Alicia in discussion of 5<sup>th</sup> circuit landscape)
- *Rodriguez-Lopez v. Garland*, 2021 WL 3140324 (6<sup>th</sup> Cir. July 26, 2021): Rules that petitioner failed to establish membership in group of “married indigenous women in Guatemala who are unable to leave the relationship” because **she left and relocated on two occasions**

# Circuit Court Decisions (unpublished) **Post**

## Positive decisions

- *Leiva v. Att’y Gen.*, 2022 WL 72727 (3d Cir. Jan. 7, 2022): Remands in case of Salvadoran man with gang-violence persecution claims because **PSG and nexus determination relied in part on A-B-**
- *Menjivar Umana v. Atty’Gen.*, 860 Fed. Appx. 237 (3d Cir. July 26, 2021): Remands in case of Salvadoran man who suffered past persecution by gangs who tried to extort him and committed violence against family because **BIA and IJ had relied on A-B- and L-E-A- on PSG and nexus issues.**
- *Palma-Ulloa v. Garland*, 854 Fed. Appx. 42 (6<sup>th</sup> Cir. July 26, 2021): **Remands case where BIA relied on A-B-I and L-E-A- to conclude that “Honduran women unable to leave a domestic relationship” was not a valid PSG**



# Circuit Court Decisions (unpublished) ~~Post~~ **IMMIGRATION LAW CONFERENCE**

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## Positive decisions

- *Corea v. Garland*, 860 Fed. Appx. (6<sup>th</sup> Cir. July 2, 2021): Remanded case of Honduran woman who claimed fear on basis of **PSG of Honduran women unable to leave her relationship** because BIA relied on *A-B-*
- *Chule-Lopez v. Garland*, WL 4786909 (9<sup>th</sup> Cir. Oct. 14, 2021): Remanded in case where PSG was “female victims of domestic violence or gender-based violence” and **BIA had relied on *A-B-* to deny cognizability**
- *Niz-Chavez v. Garland*, WL 4240406 (9<sup>th</sup> Cir. Sept. 17, 2021): Remanded in case where **PSGs were “Guatemalan women” and “Guatemalan women who are viewed as property”** in light of **vacatur of *A-B-***



# Circuit Court Decisions (unpublished) – Post-Immigration Law Conference

## Vacatur

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### Positive decisions

- *Padilla v. Garland*, 860 Fed. Appx. 465 (9<sup>th</sup> Cir. July 8, 2021): Remanded where Honduran woman who had suffered physical and sexual abuse at hands of family member proposed three PSGs: **1) Honduran women; 2) dependent children of women unable to leave domestic relationship; and 3) stepfather's immediate family.** Instructed BIA to address cognizability under post-vacatur standards. Court also criticized BIA for faulting applicant for not reporting abuse when she was a minor at the time it occurred.



# Biden's Feb. 2 Executive Order on Regulations

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Asylum Eligibility. The Attorney General and the Secretary of Homeland Security shall:

[W]ithin 180 days of the date of this order, conduct a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims and determinations of refugee status **to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards;** and

Executive Order on Creating a Comprehensive Regional Framework to Address the Cause of Migration, to Manage Migration Through North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, Feb. 2, 2021.



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- [W]ithin 270 days of the date of this order, **promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a “particular social group,” as that term is used in 8 U.S.C. 1101(a)(42)(A), as derived from the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.**
- **Regulations should have issued at beginning of November, but still have not been released**



# Litigating domestic-violence based asylum claims in the aftermath of *A-B-III*

*A personal memoir*



# Status of *A-B-III* in Courts of Appeals (Published cases)

- ***Zometa-Orellana v. Garland***, 19 F.4<sup>th</sup> 970 (6<sup>th</sup> Cir. 2021): the Sixth Circuit will remand for consideration of ALL potential PSGs, recognizing and applying *A-B-III* vacatur
- ***Jaco v. Garland***, 24 F.4<sup>th</sup> 395, 399 (5<sup>th</sup> Cir. 2021): the Fifth, whilst rejecting the *A-R-C-G- PSG* as circular, also rules that, it was not arbitrary of the BIA to reject newly posited post *A-B-III* groups on motion for reconsideration. In a later case, the 5<sup>th</sup> says, “We subsequently clarified that [\*A-B-III\*](#) has not undermined circuit precedent.” *Sanchez-Amador v. Garland*, 30 F.4<sup>th</sup> 529, n.3 (5<sup>th</sup> Cir. 2022)



# *Zometa-Orellana v. Garland :* Seinfeld, Obama and the football analogy

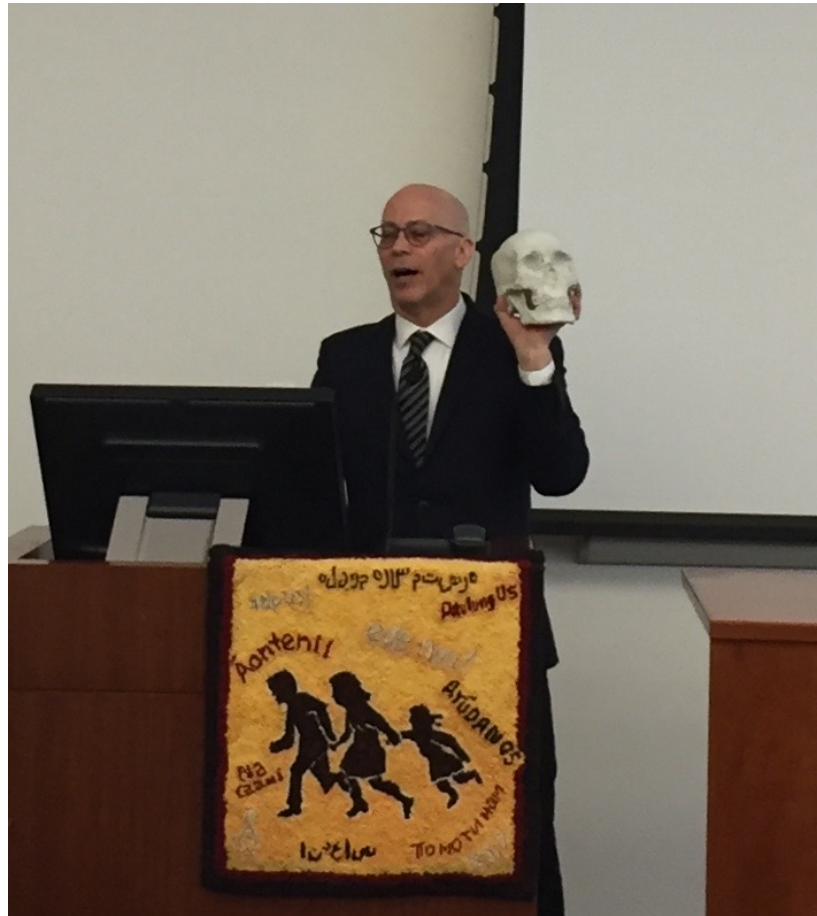


# Challenging Invocation of *A-B-I: Zometa-Orellana v. Garland*, 19 F.4<sup>th</sup> 970 (6<sup>th</sup> Cir. 2021)

- **Introduction: case background and strategic considerations**
  - Only group proposed by counsel below: “El Salvadoran women of childbearing age in domestic partnerships”
  - Ana Mercedes had reportedly told her partner she had “spoken out against his machismo,” which made his abuse “worse” and expressed her belief he had abused her because of the “machismo...in El Salvador”
  - The BIA had made numerous conclusory findings w/almost no analysis



# Framing the narrative



Dorothy Harbeck and Lisa E. Bernstein, *Telling the Story: Theme and Rhetoric in Asylum Cases*, 46 Rutgers Law Record 196 (2018/2019) (“To be credible and convincing, asylum seekers must connect with the judge through the diverse means of sincerity and strategy. Their messages should dramatize, humanize, and organize the pertinent details of their life and history in a logical and understandable manner.”)



# *A-B- III: the opening*



# Challenging Invocation of *A-B-I*: *Zometa-Orellana v. Garland*

- **Argument Made: Straightforward stare decisis.**

Excerpt from Reply brief:

Regarding her proposed particular social group, “El Salvadoran women of childbearing age in domestic partnerships”, (ROA.3), the BIA offered conclusions—but no analysis, whatsoever, on cognizability. (ROA.4) Instead, the Board cited the sentence above, from *A-B-I*, illustrating the very reason that case is now vacated; invoking the *de facto* blanket presumption against domestic violence-based asylum claims.

# Zeroing in on the Vacatur

(Most likely) dispositive language from Reply Brief:

*A-B- III* wholly vacated *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) [*A-B- I*] and *Matter of A-B-*, 28 I&N Dec. 199 (A.G.2021) [*A-B- II*]. As part of the rationale for vacating *A-B- I*, *A-B- III* specifically referenced language that the BIA has also used to deny this Petitioner's case: "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non- governmental actors will not qualify for asylum." *A-B- III*, 28 I&N Dec. at 309, citing *A-B- I*, 27 I&N Dec. at 320.



# Zero in on the Vacatur

dispositive language 2:

*A-B- III* specifically rejected the quote above, stating: “That broad language could be read to create a strong presumption against asylum claims based on private conduct. As a result, *A-B- I* threatens to create confusion and discourage careful case-by-case adjudication of asylum claims.” 28 I&N Dec. at 309.

This is precisely what has happened here.



# *Zometa-Orellana* and A-B-III

“The BIA here concluded that *Zometa-Orellana*’s proposed social group ...is not cognizable....In essence, the BIA, relying on *Matter of A-B-*, disposed of the element on the grounds that particular social groups presumptively cannot be defined by domestic violence by non-government actors.” 19 F.4<sup>th</sup> at 978.

...”then also determined that the nexus element had not been met...[also relying on A-B-I] ...because she was the domestic partner of her abuser”

# *Zometa-Orellana* and A-B-III

- “This “change in the law counsels remand”...”the agency on remand should consider what change this vacatur has had on the particular social group analysis, and **specifically whether groups pertaining to domestic violence are now cognizable**. And to the extent that its analysis regarding PSG changes on remand, it should then reassess the nexus requirement.” 19 F.4<sup>th</sup> at 979
- Thus, the remand order is not to assess this particular PSG, but to assess domestic violence in GENERAL—under ANY PSG that the BIA and/or IJ come up with on this record. *Id.*



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# *Zometa-Orellana*: Lagniappe Holdings

- “In assessing the PSG supported by the record in this case, we emphasize that the IJ and the BIA “have certain obligations under international law to extend refuge to those who qualify for such relief” and “bear the responsibility for ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant’s claim.” 14 F.4<sup>th</sup> at 979 (citations omitted)
- In other words, the BIA and IJ have an independent role to assess the plausibility of the application on the record as a whole and must do so on remand.” *Id.*



# *Zometa-Orellana* and Country Conditions

- Ms. Ana had not filed a police report
- Her partner had pursued her at least twice after she left the house, threatening (to her parents) to kill her
- Country conditions evidence was not voluminous, but it was directly on point, and uncontroverted
- As with her personal story, we used direct quotes from the country conditions to frame the narrative—El Salvador had the highest rate of femicide in the world; the US State Dept called DV a “principal human rights problem”—on page 1



# *Zometa-Orellana* and Country Conditions

- Failure to report the abuse to the police was not dispositive, in light of Ana’s subjective belief the police would not protect her, supported explicitly by country conditions evidence. 19 F.4<sup>th</sup> at 979. The BIA had ignored highly probative evidence on this point that reporting to police put victims in *more* danger; and was sometimes ridiculed by the police themselves. *Id.* at 980. Unwilling/unable was remanded for lack of substantial evidence—with BIA directed to draw a new conclusion. *Id.* Internal relocation was remanded for the same reason—with note of Ana’s statement that you can drive through ES in only 3 hours. *Id.*

# *Jaco v. Garland,* 24 F.4<sup>th</sup> 395 (5<sup>th</sup> Cir. 2021)



# Arguing DV-Based PSGs in the 5<sup>th</sup> Circuit

- *Jaco v. Garland* rejected A-R-C-G- specifically made because the group's "unable" requirement was "circular." 24 F.4<sup>th</sup> at 405.
- Group proposed: "women in Honduras unable to leave their domestic relationships" 24 F.4<sup>th</sup> at 399.
- "In holding that Jaco's proposed group is not cognizable, we do not hold that women who have suffered from domestic violence are categorically precluded from membership in a particular social group. We hold only that a particular social group's immutable characteristics must make the group sufficiently particularized and socially distinct without reference to the very persecution from which its members flee." 24 F.4<sup>th</sup> at 406.



# *Jaco v. Garland* and Vacatur

- Court considered whether the BIA's failure to remand on motion to reconsider was an abuse of discretion (a very high standard) 24 F.4<sup>th</sup> at 401. Reconsider motion, in light of *A-B-III*, asked for consideration of several other groups, including "Honduran women". 24 F.4<sup>th</sup> at 399. The 5<sup>th</sup> held the BIA's choice not to consider NEW groups, was not arbitrary. 24 F.4<sup>th</sup> at 401. It did not reach any other questions on the issue.
- In an almost opposite move from the 6<sup>th</sup>, cites *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018), on full duty of applicant to raise PSG before the IJ. Court puts consequences of "strategic decision not to proffer additional social groups" at IJ stage upon applicant for asylum. 24 F.4<sup>th</sup> at 402.



# Arguing DV-Based PSGs in the 5<sup>th</sup> Circuit (2)

- *Gonzales-Veliz v. Barr*, 938 F.3d 219, 232 (5<sup>th</sup> Cir. 2019): “Honduran women unable to leave their relationship” is impermissibly defined in a circular manner. The group is defined by, and does not exist independently of, the harm—i.e., the inability to leave. *A-B-*, 27 I. & N. Dec. at 334–35; *M-E-V-G-*, 26 I. & N. Dec. at 236 n.11. *Gonzales-Veliz*'s group also lacks particularity because “broad swaths of society may be susceptible to victimization.” *A-B-*, 27 I. & N. Dec. at 335; *cf. Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5<sup>th</sup> Cir. 2012) (rejecting “men who ... refused to join [a gang]” because that group was “exceedingly broad” and “encompass[ed] a diverse cross section of society”); *Santos Mejia v. Sessions*, 717 F. App'x 257, 261 (4<sup>th</sup> Cir. 2018) (“[A] group consisting of ‘Honduran women evading rape and extortion’ would surely include every woman in Honduras.”).
- This case is being used to deny *per se* PSGs by at least 1 Nola IJ. Argument—it’s dicta and it cites *A-B-*, which is now vacated.
- Note reliance on *A-B-I*, which IS now vacated, which frees up the 5<sup>th</sup> to Honduran women. BIA cases ARE being remanded for “change of law” (vacatur) on motion, regularly, in the 5<sup>th</sup> now. Check Winograd and CGRS indexes.

# How might a decision invoke *A-B-I* or *II*?

- **Explicit invocation of the presumption (or the invalidity of *A-R-C-G*).** In *Zometa-Orellana v. Garland*, 19 F.4<sup>th</sup> 970 (6<sup>th</sup> Cir. 2021), the BIA’s decision stated “generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-government actors will not qualify for asylum and related relief”, citing *A-B-I*, 27 I&N Dec. 316 (w/no pin).
- The BIA had made the exact above statement in *Jaco v. Garland*, 24 F.4<sup>th</sup> 395, 399 (5<sup>th</sup> Cir. 2021)
- Here the argument is straight stare decisis

# How else might a decision invoke *A-B-I* or *A-B-II*?

- **Citation of *A-B-I* or *II* for a particular proposition or conclusion.** For example-- *Recent Nola IJ*:

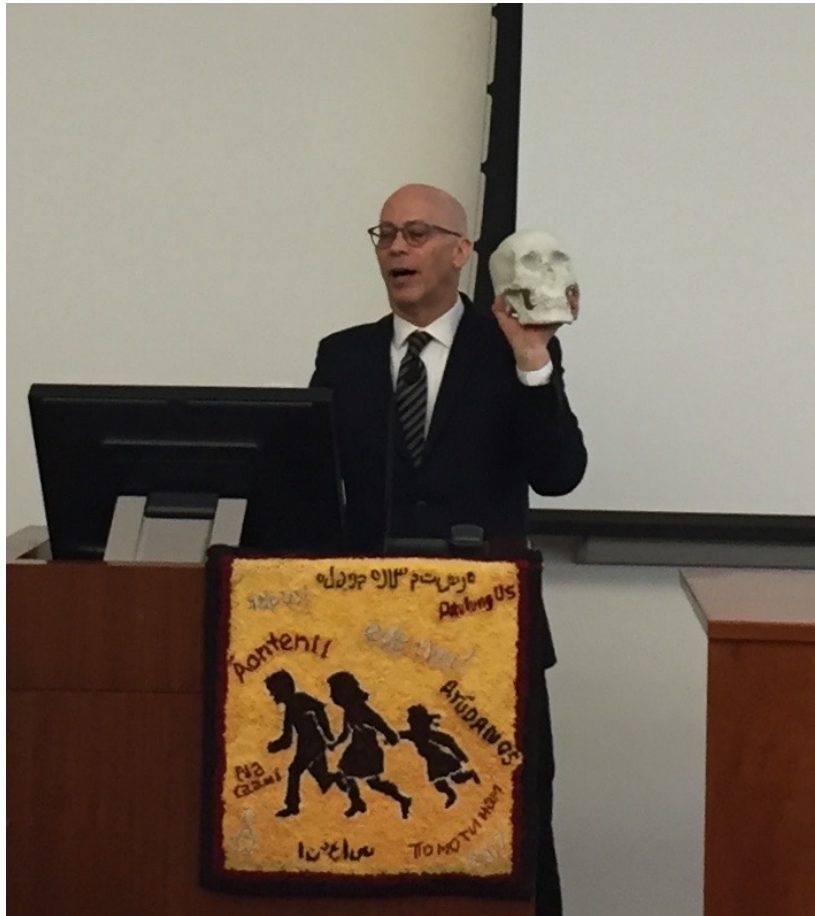
When the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country's government. *Matter of A-B-*; 27 I&N Dec 316 (AG 2018). A Respondent's sole basis

- **Citation of *A-B-I* or *II* within template legal authorities**
- Here the argument is that *A-B-I* substantially effected case

# Contested Membership in the A-R-C-G- group: *Navarro-Vega v. Garland*

- Unpublished 6<sup>th</sup> Circuit Order: *Navarro-Vega v. Garland*, Case Nos. 20-3111/3740 (6<sup>th</sup> Cir. Jun. 4, 2021) (Mem. Order), *available at* <http://tricheimmigrationappeals.com/wp-content/uploads/2021/11/REMAND-June-4-2021.pdf>
- Issues: membership in group “Honduran women in domestic relationships who are unable to leave their relationship”; unwilling/unable
- Like in *Jaco*, we filed a motion to reconsider for “Honduran women” (but under *A-B-I*); the BIA denied for lack of exhaustion and this panel upheld it for lack of exhaustion

# Contested Membership in the A-R-C-G- group: *Navarro-Vega v. Garland*



Approximately 9 rapes,  
pursuit through at least 4  
locations, the police report  
calling her married--these  
had been called “able to  
leave” by a Memphis IJ

# Gender Cases in Federal Courts of Appeal: The Political Opinion Ground

Federal Bar Association Annual Conference: May 2022

Deborah Anker, Clinical Professor of Law

Founder, Harvard Immigration and Refugee Clinical Program



# Gender and Particular Social Group (PSG) ground

- Emphasize gender per se as the best formulation in these cases (rather than gender plus - e.g., women plus unable to leave the relationship).
- Acosta (1985). All the grounds including PSG, defined by a shared characteristic that may be innate, e.g., sex, or shared experience like land ownership “that person cannot change or should not be required to change”.
- Pena-Peniagua: gender per se best formulation, adopting reasoning from amicus brief.
  - “‘Women’ or ‘women in a certain country’ are groups that are much more clearly defined, thus eliminating the problems presented by groups defined as ‘women who are unable to leave’”.
- Zometa-Orellana v. Garland (see below). Court remanded PSG of “El Salvadoran women of childbearing age in domestic partnership,” but noted better as “Salvadoran women.” (BIA did not explain why did not accept this formulation).

# Gender and Political Opinion Ground

**General (increasing) recognition that feminism, belief in women’s rights, is a political opinion.**

- Background, analysis: Law of Asylum in the United States. 2022. Section 5:30.
- *Fatin v. I.N.S.*, 12 F.3d 1233 (3d Cir 1993) (then Judge Alito!); “We have little doubt that feminism qualifies as a political opinion...”
- Resistance to suppression of rights, assertions of women’s rights and symbolic speech (e.g. refusal to wear the chador) qualify.
- U.S. Gender Guidelines (1995)1: “women’s rights are human rights,” beliefs about the status, treatment, conditions, or appropriate behavior of women are forms of political opinion.
- Also, UNHCR Gender Guidelines:2 A” person with a “well-founded fear” on account of his or her beliefs about the role and status of women in society could be eligible under political opinion ground.
- U.S. Asylum Officer Training Material.

# Gender, Domestic ‘Intimate Partner’ Violence and Political Opinion

## **Lazo-Majano v. I.N.S., 813 F.2d 1432 (9th Cir. 1987)**

- Lazo-Majano made a sexual and domestic slave by sergeant in Salvadoran army ((Zuniga) who threatened to impute her with anti-government political opinion if did not comply.
- Imputed political opinion: more salient to statutory scheme than express political opinion: “Political opinion of the victim as seen by the persecutor.”
- Machismo: effectively, sexism: “generalized animosity to the opposite sex.”
- “Olimpia does have a political opinion, camouflage it though she does. She believes that the Armed Forces is responsible for lawlessness, rape, torture, and murder. Such views constitute a political opinion. And she has been persecuted for possessing it. Because she believes that no political control exists to restrain a brutal sergeant in the Armed Force and has been subject to his brutality”.
- Her oppositional, express, political opinion: asserted by her through flight.
- Dissent: What she suffered “purely for sexual, and clearly ego reasons.” “Pure fiction” that this is political opinion.: “The majority has outdone Lewis Carroll in its application of the term ‘political opinion’ and in finding that male domination in such a personal relationship constitutes political persecution”.
- (Way) ahead of its time: looks to effect, not formal statements or memberships. Role of state.

# Gender, Domestic ‘Intimate Partner’ Violence and Political Opinion (cont’d)

## **Hernández-Chacon v. Barr, 948 F. 3d 94 (2d Cir. 2019).**

- Resistance to gender violence both express and imputed political opinion. Beaten unconscious by gang members after resisting one gang member’s attempt to rape her. Subsequent attack.
- Testified as to her feminist political beliefs: Despite awareness of danger, she resisted “because I have every right to.” Screamed when dragged away to be raped. Severe injuries, hospitalized. More threats. Leaves El Salvador (ES).
- Country condition evidence and expert testimony re machismo culture, including among gangs, and prevalence of violence against women in ES. Highest rate in world of femicide. Extensive background material submitted.
- IJ, while accepting a great deal of the evidence, rejects PSG and political opinion claims, finding that she did not “advance a political opinion.” Rather, “she simply chose not to be the victim and chose to resist being a victim of a criminal act.”
- Finds she (only) resisted being a victim (though granted CAT claim). Court reverses, finding analysis of what is political opinion “involves a complex and contextual factual inquiry into the nature of the asylum applicant’s activities in relation to the political context.
- Opposition to government corruption may constitute a political opinion. Resistance to gang violence can constitute a political opinion (cites 4 circuit caselaw). Mixed motives: ok if one of her reasons was not to be a crime victim.
- Imputed political opinion: need to consider whether the attackers imputed an anti-patriarch political opinion to her when she resisted their sexual advances.
- Record evidence “suggests that the gang members wanted to punish her because they believed she was taking a stand against the pervasive norm of sexual subordination.” (Note: Court does not accept PSG claim of “Salvadoran women who have rejected sexual advances of a gang member”, not cognizable, as lacking social distinction).



# Gender, Domestic ‘Intimate Partner’ Violence and Political Opinion (cont’d)

## Rodriguez Tornes v. Garland, 993 F2d 743 (9th Cir. 2020)

- Mexican woman; IJ grants CAT, asylum, PSG and political opinion. BIA reverses. But agrees with IJ: “pandemic” of violence against women in Mexico. DHS agrees re past persecution and CAT, political opinion and PSG (latter Mexican females).
- Resistance to domestic violence by husband and lover constitute political opinion; one central (not exclusive) reason requirement.
- “Reams of documentary evidence” re Mexico lack of protection to women. At best “complete helplessness”.
- Court: repeatedly has held that political opinions are “more than electoral politics or formal political ideology or action”.
- Extensive, deep portrait of male chauvinism in Mexico: norms her mother taught.
- Husband burned her face, lover (after comes to U.S.) says she could not resist sex because she was his property; kicked her so hard had a vaginal hemorrhage. Not allowed to take a job where would talk to men.
- She is deported to Mexico. Threats from lover who was deported to Guatemala. Believes he knows where she is and will find her.
- Extensive testimony by her of reasons for resistance. Testimony includes her belief that “there should be equality among the sexes.” She spoke back to him and violence increases; he told her not entitled to have an opinion.
- Testimony by domestic violence expert.
- Court: feminism is a political opinion, manifested in her testimony, work habits, and insistence on autonomy. Persecuted because of those beliefs. Some of worst acts of violence occurred after she expressly asserted to them her opinion that she was their equal.

# Zometa-Orellana v Garland: 19 F.4th 970, 979 (6th Cir. 2021)

- Salvadoran woman, extensive abuse by domestic partner; physical and mental (calling her whore, locking her up) from which she eventually escapes.
- Court grants PSG claim but finds that she failed to show nexus between her stated political opinion and her persecution, and thus relief was not warranted on the ground of her “anti-machismo” political opinion. Unlike in *Rodriguez Tornes*, it is not clear whether Zometa-Orellana ever asserted her rights as a woman in a way that would demonstrate a nexus between her political opinion and her persecution.”
- She submitted substantial evidence of “machismo” culture that exists in ES, and other record evidence (US DOS and Canadian report that DV in ES is human rights issue), which she says shows “primacy of machismo” in ES.
- Court does not really address the imputed political opinion claim; similarities here with *Lazo-Majano*.

# Gender and State responsibility: “unable or unwilling to protect” and Bifurcated Nexus

- All of these cases find (either explicitly or implicitly) state unwilling/unable to protect.
- Bifurcated nexus: Can connect gender to either the harm she suffered or the state’s inability/unwillingness to protect. The latter may be easier, as a practical matter; effectively lower evidentiary burden.
- Zometa-Orellana, 19 F.4th 970 (6th Cir. 2021), court held BIA wrong in finding she did not establish state responsibility.
- Zometa-Orellana court also emphasizes that applicants should not be held to high standards in articulation of ground.

