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Weresh, Melissa H.

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# RETHINKING RHETORIC IN THE ASYLUM CONTEXT: Lessons from #MeToo

Melissa H. Weresh<sup>1</sup>

## ABSTRACT

Women face greater difficulties than men in establishing asylum in the United States. This is due in part to the fact that the Refugee Act situates asylum primarily in forms of persecution associated with the male experience. Women who seek asylum in the United States because they flee gender-based violence must establish that their persecution occurs on account of their membership in a particular social group. Such a showing is challenging, both in terms of the test to establish membership in a particular social group and because this form of harm is positioned in gendered notions of activities that are societally considered as operating in the private sphere. This Article therefore draws on existing scholarship, but also expands the lens to encourage advocates in this space to consider effective rhetorical strategies employed in the #MeToo movement. It then offers suggestions for how those strategies might be directed at advocacy in the asylum context.

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“Look at the world around you. It may seem like an immovable, implacable place. It is not. With the slightest push—in just the right place—it can be tipped.”<sup>2</sup>

This Article considers what advocates who represent women seeking asylum in the United States might learn from effective rhetorical strategies employed in the #MeToo movement. The reader may benefit from an overview of the Article that considers the *problem*, the *opportunity*, and the *lens*. In short, the *problem* is that women who seek asylum in the United States are challenged by gender-based norms associated with establishing persecution in the context of the refugee definition. The *opportunity* is a potential tipping point, or kairic moment, to address this problem. In this context, the Biden Administration has opened a door to reconsider the asylum claims of women fleeing gender-based violence in their countries of origin, and that opportunity might benefit from a consideration of #MeToo—an analogous social movement involving gender-based violence. Finally, the *lens* is a rhetorical analysis of an arguably analogous and relatively successful social movement involving gender-based violence: #MeToo.

The *problem*: Under international asylum laws, and particularly in the United States, women who seek asylum are subject to a number of challenges that do not extend to their male peers. A primary reason for this is that the international refugee definition<sup>3</sup> identifies five grounds protecting groups from persecution: race, religion, nationality, membership in a particular social group, and political opinion.<sup>4</sup> Four of these grounds—race, religion, nationality, and political opinion—prioritize activities in the public sphere and

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2. Malcolm Gladwell, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 259 (1<sup>st</sup> ed. 2000).

3. The international refugee definition appears in the 1967 United Nations Protocol Relating to the Status of Refugees (“Protocol”). U.N. Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 606 U.N.T.S. 267. The United States, as a party to the Protocol, incorporated the refugee definition in 8 U.S.C. § 1101(a)(42)(A).

4. 8 U.S.C. § 1101(a)(42)(A).

are therefore ones that more often pertain to the male experience.<sup>5</sup> Women, however, often suffer harm in the private sphere, as in the case of domestic or gender-based violence.<sup>6</sup> Thus, women who seek asylum face challenges in establishing refugee status because the persecution they are subject to often does not fall neatly into the particularized, public grounds.<sup>7</sup> They must therefore demonstrate that the persecution they face is on account of their “membership in a particular social group.”<sup>8</sup> This is especially challenging for asylum-seeking women who flee their countries of origin because of gender-based violence—a form of persecution that is commonly thought of as private harm.<sup>9</sup>

The *opportunity*: There is a current opportunity to bring these challenges to light. In 2018, then–U.S. Attorney General Jeff Sessions issued a decision in *Matter of A-B* that significantly limited the ability of asylum-seeking women who had been subject to gender-based violence to demonstrate refugee status in the United States.<sup>10</sup> The discretionary power in immigration law granted to the Attorney General<sup>11</sup>—and reflected in how the *A-B*

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5. As one scholar notes, “[t]he key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men.” Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L.J. 625, 628 (1993) (quoting Doreen Indra, *A Key Dimension of the Refugee Experience*, 6 REFUGEE 3 (1987)) (internal quotation omitted).

6. See *id.* at 627–28. Kelly notes that the “failure to incorporate the gender-related claims of women refugees is a product of the general failure of refugee and asylum law to recognize social and economic rights and its emphasis on individual targeting and specific deprivation of civil and political rights.” *Id.* at 627. She explains that this relates to the criticism of human rights law generally “that it privileges male-dominated public activities over the activities of women which take place largely in the private sphere.” *Id.* at 628.

7. *Id.* at 627–28.

8. Marisa Silenzi Cianciarulo, *Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims*, 35 HARV. J. L. & GENDER 117, 120 (2012) (explaining that “[m]ost gender-based asylum claims tend to focus on the woman’s membership in a particular social group, principally because U.S. courts have frequently rejected political opinion as a basis for gender-based claims.”).

9. See generally *id.* at 132–39 (tracing how gender-based violence and, in particular, domestic violence, was historically viewed as harm in the private sphere). Cianciarulo also asserts that “[t]he notion of the private sphere, consisting of a man’s home and family, was a sacred one—even if that man treated his family and dependents in ways that would be punishable had the victims been strangers.” *Id.* at 136.

10. See discussion and accompanying notes *infra* Part I.C.

11. The Attorney General’s discretionary power to certify cases for referral and review is set forth in 8 C.F.R. § 1003.1(h)(1)(i). It has been observed that such a grant of authority allows for executive branch policymaking: “Attorney General referral and review is a potent tool through

decision reinforced the Trump Administration's restrictive immigration position<sup>12</sup>—underscores the manner in which immigration law can be subject to political influence. The tortuous progression of *A-B*<sup>13</sup> ultimately led the Biden Administration to issue an Executive Order in 2021 that directed the Attorney General and the Secretary of Homeland Security to formulate regulations regarding what constitutes a “particular social group” for purposes of immigration.<sup>14</sup> While those regulations have not yet been released,<sup>15</sup> the Executive Order has opened the door for a tipping point. There may now be an opportunity to bring into the public consciousness the harmful and outdated public/private distinction with regard to gender-based violence in the asylum context.

The *lens*: Existing scholarship addresses the inability of women to obtain asylum in the United States based solely on gender violence.<sup>16</sup> This Article adds to existing scholarship by

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which the executive branch can lawfully advance its immigration policy agenda. It provides for both definitive resolution of legal issues and the opportunity to promulgate binding policy pronouncements on all executive branch immigration officials.” Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 920 (2016). *But see* Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18, 19 (2016) (observing that “Attorney General review of [Board of Immigration Appeals] decisions is controversial for a number of reasons”).

12. *See, e.g.*, Karen M. Sams, *Out of the Hands of One: Toward Independence in Immigration Adjudication*, 5 ADMIN. L. REV. ACCORD 85, 102 (2019) (noting that the “Trump Administration use[d] case certification in a profoundly different way, seemingly choosing cases through which to drive policy change rather than responding to cases of first impression or requests for policy and interpretive guidance, as had previous administrations” and that the first case then Attorney General Jeff Sessions certified to himself “foreshadowed his approach to docket-management tools and signaled th[at] administration’s prioritization of non-citizen removal over pathways to legal residency”).

13. *See* discussion and accompanying notes *infra* Part I.C.

14. Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 5, 2021).

15. It is not clear why the new regulations have not been released, but there certainly have been calls made for progress on this Executive Order. *See* Eleanor Acer, *Upholding President Biden’s Asylum Commitments: 18-month Progress Checklist Since February 2021 Executive Order*, HUM. RTS. FIRST (Sept. 20, 2022), <https://humanrightsfirst.org/library/upholding-president-bidens-asylum-commitments-18-month-progress-checklist-since-february-2021-executive-order> [https://perma.cc/Z7T2-Z8NS] (last visited March 30, 2023).

16. *See generally, e.g.*, Deborah Anker, *The History and Future of Gender Asylum Law and Recognition of Domestic Violence as A Basis for Protection in the United States*, 45 HUM. RTS. 14 (2020); Karen Musalo, *The Struggle for Equality: Women’s Rights, Human Rights, and Asylum Protection*, 3 SW. L. REV.

considering what asylum advocates might learn from successful rhetorical strategies employed in the #MeToo movement.<sup>17</sup> The #MeToo movement involved an analogous cohort: women who experienced gender-based violence, whose stories were considered private, and whose harm was therefore ignored. #MeToo was a relatively successful social movement, bringing this form of violence into the public sphere and initiating a cultural shift in attitudes toward gender-based harm. Thus, this Article employs a rhetorical analysis of #MeToo to examine whether the #MeToo movement involved effective strategies that can be useful to advocates in the asylum context.

Part I examines the historical development of asylum law and challenges women fleeing gender-based violence have in establishing persecution on account of a particular social group. Part II explores a rhetorical approach rooted in the work of Kenneth Burke<sup>18</sup> to consider the rhetorical strategies employed by victims of sexual violence in the #MeToo movement. Part III then pivots to a critical application of those rhetorical strategies, questioning whether some of the successful (and less successful) strategies employed in #MeToo have promise in advocacy and activism around laws and policies that impact asylum-seeking women who flee gender-based violence.

#### INTRODUCTION: KAIROS AND THE TIPPING POINT

In *The Tipping Point: How Little Things Can Make a Big Difference*, Malcolm Gladwell explains that tipping points in history can be compared with epidemics and that they share three characteristics: contagiousness, little causes with big effects, and dramatic moments as opposed to gradual change.<sup>19</sup> He further asserts that

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531 (2019).

17. The #MeToo movement was a social movement to bring awareness to sexual violence, largely against women. The phrase associated with the movement, “me too,” was originally used by sexual violence survivor Tarana Burke. The phrase then became a global hashtag used by survivors of sexual violence on social media in the wake of sexual violence allegations against Harvey Weinstein in 2017. *Understanding the Me Too Movement: A Sexual Harassment Awareness Guide*, MARYVILLE U., <https://online.maryville.edu/blog/understanding-the-me-too-movement-a-sexual-harassment-awareness-guide/> [HTTPS://PERMA.CC/M8LH-MS7Y] (last visited Apr. 3, 2023).

18. See Emma Frances Bloomfield, *Rhetorical Constellations and the Inventional/Intersectional Possibilities of #MeToo*, 43 J. COMM’N INQUIRY 394, 395 (2019).

19. Gladwell, *supra* note 2 at 9. Gladwell characterizes the tipping point as the “biography of an idea” that “[i]deas and products and messages and behaviors spread just like viruses do.” *Id.* at 7.

tipping points are based upon three agents of change which he refers to as “the [l]aw of the [f]ew, the [s]tickiness factor, and the [p]ower of [c]ontext.”<sup>20</sup> The law of the few is the principle that, in both medical and social epidemics, the tipping point is driven by a few, rather than the majority, of people.<sup>21</sup> Stickiness in terms of social movements is the concept that a message is memorable and “makes an impact.”<sup>22</sup> The power of context is simply the idea that both medical and social epidemics are influenced “by the circumstances and conditions and particulars of the environments in which they operate.”<sup>23</sup> Gladwell describes physical epidemics and social revolutions by revealing how a few exceptional individuals can unbalance equilibrium to instigate change, how a tipping point is influenced by the impact of a particularly compelling message or contagion, and how context makes a significant difference in facilitating change.<sup>24</sup>

With respect to tipping points associated with social movements, all components or “agents of change” of the tipping point relate to rhetorical aspects: the rhetor, the message, and the scene or context.<sup>25</sup> We can add to these components the notion of Kairos, or the most opportune time.<sup>26</sup> Linda Berger has explained that the Kairos moment presumes that the rhetor will “intervene in history’s causal chain,” recognizing the Kairos moment as a “door to be opened to a new possibility, a thread to be pulled to unravel the existing fabric.”<sup>27</sup> Kairos also attends to the setting for the message to be received—the right environment for the message to be communicated.<sup>28</sup>

#MeToo was a social movement which brought sexual violence, primarily directed at women, into public consciousness. It has been described as a tipping point to raise awareness about the

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20. *Id.* at 19.

21. *See id.* at 19–22.

22. *Id.* at 25.

23. *Id.* at 26.

24. *See id.* at 22–28.

25. In other words, Gladwell’s law of the few can be compared to the few select individuals whose messages influence social trends. Stickiness refers to the impact of the message and the context agent of change is the scene. *Id.* at 25.

26. Linda L. Berger, *Creating Kairos at the Supreme Court: Shelby County, Citizens United, Hobby Lobby, and the Judicial Construction of Right Moments*, 16 J. APP. PRAC. & PROCESS 147, 152 (2015).

27. *Id.* at 153.

28. *Id.* at 153–54. Gladwell describes a conception of Kairos where “the ‘tool’ of kairos (the most opportune moment) and its ‘setting’ (the essence of the problem) must act together.” *Id.* at 155.

pervasive nature of sexual violence.<sup>29</sup> It gained traction when influential women in the entertainment industry acknowledged being victims of gender-based harm.<sup>30</sup> The inclusive hashtag was certainly sticky. And, in some but not all ways, it was delivered in a receptive environment, such that its message may have tugged at a thread in the social consciousness of gender-based violence.<sup>31</sup> We might therefore look to the rhetorical strategies employed in #MeToo and consider whether they might be useful in advocacy in a related area: women fleeing gender-based violence<sup>32</sup> and seeking asylum in the United States.

This following Part outlines the development of United States' law in the context of asylum-seeking women who flee sexual violence. The subsequent Part then pivots to a rhetorical analysis of another context addressing sexual violence—#MeToo.

## I. OVERVIEW OF U.S. LAW RELATING TO ASYLUM FOR WOMEN FLEEING GENDER-BASED VIOLENCE

Asylum-seeking women who flee gender-based violence must establish that they are being persecuted on account of their

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29. Robert Redford was quoted as characterizing #MeToo as a tipping point “changing the order of things.” Gregg Kilday, *Sundance: Robert Redford Calls #MeToo and Time’s Up Movements ‘A Tipping Point,’* HOLLYWOOD REPORTER (Jan. 18, 2018, 4:45 PM), <https://www.hollywoodreporter.com/news/general-news/sundance-robert-redford-calls-metoo-times-up-movements-a-tipping-point-1075798/> [<https://perma.cc/T4Q3-3YME>].

30. Of course, #MeToo was also criticized in this context as having the message co-opted by white women with agency and silencing the voices of women who were subject to intersectional forms of oppression. See *infra* Part II.

31. Critics have challenged the overarching success of #MeToo. See *infra* Part II. Nonetheless, it certainly sparked more public discussion of gender-based violence and arguably moved the needle. As Ruth Anne Robbins explains, a Kairos moment may miss the mark, either because of erroneous timing, lack of force associated with the message, or a missed target. Ruth Anne Robbins, *Three 3Ls, Kairos, and the Civil Right to Counsel in Domestic Violence Cases*, 2015 MICH. ST. L. REV. 1359, 1363 (2015). In those situations, “all is not lost. . . . What may look like [a] missed opportunity may still have yielded enough success to snag a thread in the weave that can later be pulled to unravel the existing fabric of the social sky when the moment is right and the opportunity next presents itself.” *Id.*

32. Scholars have differentiated between types of gendered harm. In some instances, the harm is specific to gender, as in the case of female genital mutilations. Other types of harm are connected to gender: “This is the case, for example, when women are persecuted because they wish to pursue an education, love who they want, dress as they please, seek employment, or live free from male violence.” Alexia Tizzano, *Why Doesn’t She Seek International Protection in the European Union?*, 54 N.Y.U. J. INT’L L. & POL. 559, 565 (2022).

membership in a particular social group (PSG). This has been a challenge because neither sex nor gender alone are protected categories under United States asylum law.<sup>33</sup> This Part traces the foundation of United States asylum law, the gender-based violence jurisprudence, and an analytical lens for considering reform in this context.

### A. *The Refugee Act*

In the United States, asylum-seekers proceed under the Refugee Act, 8 U.S.C. § 1101.<sup>34</sup> The refugee definition comes from the definition in the 1967 United Nations Protocol Relating to the Status of Refugees.<sup>35</sup> As one court acknowledged, the intent of Congress in establishing the Refugee Act was to align U.S. law with the Protocol, to “give statutory meaning to ‘our national commitment to human rights and humanitarian concerns,’ and ‘to afford a generous standard for protection in cases of doubt.’”<sup>36</sup> The Refugee Act codifies obligations undertaken by the United States when it ratified the United Nations Refugee Convention in 1968.<sup>37</sup> Under the Refugee Act, “refugee” is defined as:

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33. While this Article uses the term “gender” to characterize the type of harm asylum seekers are often fleeing, it is well accepted that “sex” and “gender” have different meanings. As Tizzano explains:

It is now well-known that the terms “sex” and “gender,” while often used interchangeably, in fact have different meanings. Sex, on the one hand, refers to biological, physiological, and anatomical attributes of female and male, while gender, on the other hand, refers to the expectations about characteristics, aptitudes, and behaviors that are socially constructed (femininity and masculinity). On that basis, concerning gender persecution, the term gender appears more pertinent for emphasizing the social constructions that exist behind such persecution, but considerations of sex may also be relevant, for example when determining a common innate and immutable characteristic in the assessment of membership to a particular social group.

*Id.* at 565.

34. 8 U.S.C. § 1101(a)(42)(A).

35. Kate Evans, *Drawing Lines Among the Persecuted*, 101 MINN. L. REV. 453, 518–19 (2016) (explaining that “[t]he Protocol requires States Parties to protect ‘refugees’ through its mandate that ‘[n]o Contracting State shall expel or return (*refouler*)’ a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”).

36. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 106 (D.D.C. 2018) (quoting *In re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1998) (quoting S. REP. NO. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144), *aff’d in part, rev’d in part and remanded sub nom.* *Grace v. Barr*, 965 F.3d 883, 914-920 (D.C. Cir. 2020).

37. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 19

[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>38</sup>

The Refugee Act underscores the duty of non-refoulement emphasized in the Refugee Convention.<sup>39</sup> This duty provides that:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.<sup>40</sup>

In accordance with the statute, an applicant must demonstrate a well-founded fear of persecution on account of her race, religion, nationality, membership in a particular social group (PSG), or political opinion to establish refugee status.<sup>41</sup> These five categories are commonly referred to as the grounds for asylum status.<sup>42</sup> Four of the grounds are associated with defined identity characteristics, including race, religion, nationality, and political opinion.<sup>43</sup> The fifth category, membership in a PSG, was drafted broadly, likely because the drafters recognized it was impossible to identify every reason an applicant might rightfully demonstrate persecution.<sup>44</sup>

In addition to situating herself within a protected ground, an asylum applicant must demonstrate either actual persecution

U.S.T. 6259 [hereinafter 1951 Convention].

38. 8 U.S.C. § 1101(a)(42)(A).

39. Evans, *supra* note 35 at 518–19.

40. 1951 Convention, *supra* note 37, at art. 33(1).

41. 8 U.S.C. § 1101(a)(42)(A).

42. Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J. L. REFORM 343, 352 (these "are commonly referred to as 'Convention reasons,' 'Convention grounds,' or 'the five categories/grounds' for asylum or refugee status").

43. 8 U.S.C. § 1101(a)(42)(A).

44. Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2517 (2014). Marsden notes:

The drafters may have been thinking specifically of the victims of persecution in newly socialist states, such as "landowners, capitalist class members, independent business people, the middle class and their families." But the language of the Convention itself is broad, suggesting that the drafters did not intend to limit its protection to groups that it knew were subject to persecution in 1951.

*Id.* (quoting GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 74–76 (3d ed. 2007)).

or a well-founded fear of persecution to qualify for asylum in the United States.<sup>45</sup> Courts have interpreted persecution to mean “the credible threat of death, torture, or injury to one’s person or liberty.”<sup>46</sup> Because the statute requires the persecution to be “on account of” one of the protected grounds, the applicant must establish a nexus between the persecution and membership in one of the protected grounds.<sup>47</sup>

The applicant must also demonstrate that the persecution was “either condoned by the government or . . . committed by private actors that the government was unwilling or unable to control.”<sup>48</sup> If the asserted persecution is based on the conduct of a private actor, the applicant “must show that the government condoned the private behavior ‘or at least demonstrated a complete helplessness to protect the victims.’”<sup>49</sup>

While the refugee definition is gender neutral, many scholars have called attention to the fact that the persecution grounds prioritize the protection of male experiences.<sup>50</sup> Focusing on violations of civil and political rights by the state, rather than social rights, the grounds for asylum reinforce the public/private gender divide by protecting against harm in public activities.<sup>51</sup> Women, on the other

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45. 8 U.S.C. § 1101(a)(42)(A).

46. *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732 (8th Cir. 2013). The court explains that persecution does not include “low-level intimidation and harassment.” *Id.* (quoting *Matul-Hernandez v. Holder*, 685 F.3d 707, 711 (8th Cir. 2012)) (internal quotation omitted). The court further explains that if the asylum applicant demonstrates past persecution, a “fear of future persecution is presumed.” *Id.* If the applicant cannot demonstrate “past persecution, he must demonstrate a well-founded fear of future persecution” by providing “credible, direct, and specific evidence” to show that “he actually fears persecution and that a reasonable person in the alien’s position would fear persecution if returned to the alien’s native country.” *Id.* (quoting *Suprun v. Gonzales*, 442 F.3d 1078, 1081 (8th Cir. 2006)) (internal quotation omitted).

47. Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 285 (2013) (explaining that asylum “applicants cannot demonstrate that they qualify as refugees without establishing a nexus between the persecutory actions and one of the five protected grounds”).

48. *Matul-Hernandez*, 685 F.3d at 711.

49. *Gutierrez-Vidal*, 709 F.3d at 732 (emphasizing that the applicant “must show more than just a difficulty controlling private behavior”) (quoting *Salman v. Holder*, 687 F.3d 991, 995 (8th Cir. 2012) (internal quotation omitted)).

50. Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 780 (2003) (explaining that “commentators are legion who observe that the Convention has been interpreted within a male paradigm, which has resulted in the historic exclusion from protection of women”).

51. Andrea Binder, *Gender and the “Membership in a Particular Social Group” Category of the 1951 Convention*, 10 COLUM. J. GENDER & L. 167, 170

hand, tend to experience harm in the private sphere, as in the case of domestic violence.<sup>52</sup> Therefore, the stated persecution grounds tend to protect against the persecution of men, and the failure to include sex or gender as protected grounds undermines the ability of women to fall neatly into the refugee categories. This public/private focus and male-centered orientation can further spill over into the way that PSG aspects of the refugee test are interpreted.<sup>53</sup>

Thus, absent claims that gender-based violence is being perpetrated on account of one of the defined identity characteristic grounds (race, religion, nationality, or political opinion), women fleeing gender-based violence who seek asylum must demonstrate that their persecution is on account of their membership in a PSG. As illustrated below, this is challenging because establishing membership in a PSG requires a showing that the group shares an immutable characteristic, is defined with particularity, and has social distinction.<sup>54</sup> Further, women must demonstrate a nexus between the violence and membership in a PSG.<sup>55</sup> Finally, because gender-based violence is often perpetrated by private actors, women must show that the government is unwilling or unable to provide protection against such violence.<sup>56</sup> The next Part traces the development of relevant asylum law in the United States.

### B. *Particular Social Group Jurisprudence*

As immigration expert Theresa A. Vogel has observed, “[t]he United States system governing immigration and asylum is more convoluted than an ordinary judicial or executive system.”<sup>57</sup> One reason it is complicated is because it is overseen by two federal agencies: the Department of Homeland Security (DHS) and the Department of Justice (DOJ).<sup>58</sup> A person who is in removal proceedings may apply for defensive asylum before an immigration judge at the Executive Office for Immigration Review (EOIR), located in the DOJ.<sup>59</sup> Affirmative asylum cases (cases involving

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(2001).

52. *Id.*

53. *See infra* Subparts I.B and D. *See also* Tizzano, *supra* note 32 at 569 (explaining how the “framework of male experience” has influenced female asylum claims).

54. *See infra* Subpart I.B.

55. Rempell, *supra* note 47 at 285.

56. *Matul-Hernandez*, 685 F.3d at 711.

57. Vogel, *supra* note 42 at 348.

58. AMERICAN IMMIGRATION COUNCIL, *Asylum in the United States* (Aug. 16, 2022), <https://www.americanimmigrationcouncil.org/research/asylum-united-states> [<https://perma.cc/A6WD-6WJN>].

59. *Id.*

applicants who are not in removal proceedings) proceed through U.S. Citizenship and Immigration Services (USCIS), a division of DHS, where they are heard by asylum officers.<sup>60</sup> If asylum is not granted and the person is placed in removal proceedings, she may renew the request for asylum in a defensive proceeding before an immigration judge.<sup>61</sup>

The Board of Immigration Appeals (BIA) has jurisdiction over appeals from decisions made by immigration judges, and BIA decisions are binding on immigration judges and officers of the DHS.<sup>62</sup> Asylum applicants may further appeal decisions of the BIA to federal court.<sup>63</sup> In addition, the Attorney General has the authority to employ the process of certification to modify or overrule decisions of the BIA.<sup>64</sup>

With respect to the standard of review, interpretations of the Attorney General and the BIA are entitled to deference.<sup>65</sup> Vogel explains that, in the PSG context:

The U.S. circuit courts are required to give deference to the agency's interpretations of ambiguous provisions of the Immigration and Nationality Act, including its definition of membership in a particular social group. However, the Attorney General and the BIA cannot "adjudicate claims of social group status inconsistently, or irrationally" or "generate erratic, irreconcilable interpretations of their governing statutes." In determining whether the interpretation is "reasonable," "consistency over time and across subjects is a relevant factor."<sup>66</sup>

In terms of gender-based violence claims in the context of PSG, the BIA first considered a gender-based asylum claim in 1996 in *Matter of Kasinga*.<sup>67</sup> In *Kasinga*, the applicant was a nineteen-year-old member of the Tchamba-Kunsuntu Tribe in northern Togo.<sup>68</sup> The tribe forced female members to undergo female genital mutilation (FGM).<sup>69</sup> The applicant based her asylum argument on

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60. *Id.*

61. *Id.*

62. Vogel, *supra* note 42 at 349.

63. *Id.* at 349–350.

64. *Id.* at 349 (citing 8 C.F.R. § 1003.1(h)(1) (2018)).

65. *Id.* at 350.

66. *Id.*

67. 21 I. & N. Dec. 357 (B.I.A. 1996).

68. *Id.* at 358.

69. *Id.* FGM is the practice of performing surgical mutilation of female genitalia. *Id.* at 361–62. As the *Kasinga* court explained:

FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection,

being a member of a PSG of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>70</sup> Focusing on whether the PSG reflected an immutable characteristic, the court accepted the proffered PSG, ruling that the “characteristics of being a ‘young woman’ and a ‘member of the Tchamba-Kunsuntu Tribe’ cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.”<sup>71</sup>

Importantly, and with respect to establishing a nexus between the persecution and the PSG, the court emphasized that FGM promoted “male dominance and exploitation” and constituted “sexual oppression.”<sup>72</sup> Because FGM was widely practiced, “most African women [could] expect little governmental protection from FGM.” And in recognition that Togo police tolerated violence toward women, the court ruled that the applicant established a fear of persecution based on her membership in a PSG.<sup>73</sup> Karen Musalo, a leading expert on refugee law, has noted that this constitutes a “bifurcated analysis,” which “does not limit the nexus consideration to an analysis of the motives of the individual perpetrator of the persecution, but includes societal and State actors in the equation.”<sup>74</sup>

In *Matter of R-A-*, decided in 2001, the BIA considered an asylum claim by Rody Alvarado Peña, a woman fleeing gender-based violence.<sup>75</sup> Peña claimed persecution on account of her membership in the PSG of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>76</sup> An immigration judge initially ruled in favor of the applicant, finding that she was persecuted on account of her membership in the claimed PSG.<sup>77</sup>

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urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions.

*Id.* at 361.

70. *Id.* at 368.

71. *Id.* at 366.

72. *Id.*

73. *Id.* at 367.

74. Karen Musalo, *supra* note 50 at 779. Musalo explains that “Although the BIA did not refer to it as such, it adopted a bifurcated analysis by considering nexus in relation to both the non-State actors (i.e., those who carried out the FGM) and the State/society.” *Id.* at 799.

75. *In re R-A-*, 22 I. & N. Dec. 906, 908 (B.I.A. 2001).

76. *Id.* at 907.

77. *Id.* at 911.

On appeal to the BIA, the Board denied asylum to Peña.<sup>78</sup> The Board rejected the claimed PSG, finding that it did not demonstrate a group that would be recognized by its members, the perpetrators of the persecution alleged,<sup>79</sup> or Guatemalan society.<sup>80</sup> The Board further concluded that merely demonstrating shared descriptive characteristics was insufficient to establish a PSG, and that an applicant must further show that the characteristic is understood in the society from which the applicant fled.<sup>81</sup>

The Board also found that the applicant failed to establish the nexus between her persecution and alleged PSG.<sup>82</sup> The Board rejected a comparison to *Kasinga*, ruling that while the situations were similar insofar as both applicants suffered persecution at the hands of a family member, the applicant in *R-A-* failed to establish that her abuse was on account of her membership in the proffered PSG:

The respondent in this case has not demonstrated that domestic violence is as pervasive in Guatemala as FGM is among the Tchamba-Kunsuntu Tribe, or, more importantly, that domestic violence is a practice encouraged and viewed as societally important in Guatemala. She has not shown that women are expected to undergo abuse from their husbands, or that husbands who do not abuse their wives, or the nonabused wives themselves, face social ostracization or other threats to make them conform to a societal expectation of abuse.<sup>83</sup>

The dissenting opinion criticized the Board's rejection of *Kasinga*, emphasizing that, as in *Kasinga*, the applicant in *Matter of R-A-* demonstrated that "[t]he gender-based characteristics shared by the members of each group [were] immutable, the form of abuse

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78. *Id.* at 928.

79. *Id.* at 918 (noting that the applicant had "shown neither that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group").

80. *Id.* at 919 (reasoning that the applicant failed to show that society expected women to be abused).

81. *Id.* at 918–19. The Board explained that:

The proposed group may satisfy the basic requirement of containing an immutable or fundamental individual characteristic. But, for the group to be viable for asylum purposes, we believe there must also be some showing of how the characteristic is understood in the alien's society, such that we, in turn, may understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm.

*Id.* at 918.

82. *Id.* at 920–23.

83. *Id.* at 924.

resisted in both cases was considered culturally normative and was broadly sanctioned by the community, and the persecution imposed occurred without possibility of state protection.”<sup>84</sup>

In 2014, in *Matter of M-E-V-G-*, the BIA considered a gang-based violence asylum claim situated in the context of a PSG defined as “Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.”<sup>85</sup> There, the court explicitly clarified the test for PSG, ruling that such a claim required the court to consider whether the PSG was “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”<sup>86</sup> Asserting that the particularity requirement was consistent with the language of the Refugee Act and “consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined,”<sup>87</sup> and that the social distinction requirement was supported by precedent that “focused on the extent to which the group is understood to exist as a recognized component of the society in question,”<sup>88</sup> the court remanded the matter to be considered in the context of the new framework.

The first precedential case to approve a domestic violence-based asylum claim was decided in 2014.<sup>89</sup> In *Matter of A-R-C-G-*, the applicant made a successful case for the PSG of “married women in Guatemala who are unable to leave their relationship.”<sup>90</sup> The BIA applied the three part test set forth in *Matter of M-E-V-G-*.<sup>91</sup> It found that the PSG shared the common immutable characteristics of sex and gender and reasoned that marital status could be an immutable characteristic when it prevents the applicant from leaving their relationship.<sup>92</sup> Importantly, the Board focused on social, cultural, and legal influences that made the applicant unable to leave her relationship, considering that “a married woman’s inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation.”<sup>93</sup> In determining

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84. *Id.* at 933 (Guendelsberger, Board Member, dissenting).

85. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 228 (B.I.A. 2014).

86. *Id.* at 237.

87. *Id.* at 239.

88. *Id.*

89. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), *overruled by Matter of A-B- (A-B-I)*, 27 I. & N. Dec. 316 (A.G. 2018), *vacated*, 28 I. & N. Dec. 307 (A.G. 2021).

90. *Id.* at 388–89.

91. *Id.* at 392.

92. *Id.* at 392–93.

93. *Id.* at 393.

whether the applicant was unable to leave her marital relationship, the Board emphasized the applicant's inability to obtain assistance from the police because of their refusal to interfere in a marital relationship.<sup>94</sup> The Board also found that the PSG was defined with particularity, reasoning that terms used to describe the PSG had commonly accepted definitions within Guatemalan society.<sup>95</sup>

Finally, the Board concluded that the group was socially distinct within Guatemalan society, emphasizing that the group's recognition should be determined by societal perceptions rather than the persecutor's perceptions.<sup>96</sup> Focusing on the context of domestic violence, the Board emphasized the Guatemalan culture of "machismo in family violence," and the persistent inability of abused women in Guatemala to obtain assistance from the police.<sup>97</sup>

Based on this analysis, in the 2016 case *Matter of A-B-*, the BIA approved the asylum application of an applicant who claimed membership in the PSG composed of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common' with their partners."<sup>98</sup> The Board explicitly noted the similarity of the group designation to that approved in *Matter of A-R-C-G-* and approved the applicant's asylum status on the basis of her persecution on account of membership in a PSG.<sup>99</sup>

### C. *Moving Toward a Kairic Opportunity*

Following what appeared to be the Board's straightforward analysis in *Matter of A-B-*, then-Attorney General Sessions referred the matter to himself to consider the following question: "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."<sup>100</sup> His somewhat sweeping determination and ultimate rejection of the Board's decision initiated a great deal of activity in the PSG analysis.

Considering whether a victim of private criminal activity could establish membership in a PSG for purposes of asylum protection,

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94. *Id.* (observing that "it is significant that the respondent sought protection from her spouse's abuse and that the police refused to assist her because they would not interfere in a marital relationship").

95. *Id.*

96. *Id.* at 394.

97. *Id.* at 394-95.

98. *Matter of A-B- (A-B-I)*, 27 I. & N. Dec. 316, 321 (2018), *vacated*, 28 I. & N. Dec. 307 (A.G. 2021).

99. *Id.*

100. *Id.* at 323.

Sessions vacated the Board's determination.<sup>101</sup> His reasoning focused heavily on the private nature of the persecution, asserting that "[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required under *M-E-V-G-*, given that broad swaths of society may be susceptible to victimization."<sup>102</sup> With respect to the nexus requirement, Sessions observed that "[w]hen private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group may well not be 'one central reason' for the abuse."<sup>103</sup>

Sessions asserted that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum"<sup>104</sup> and that, in the context of such a claim, the applicant "must show that the government condoned the private actions 'or at least demonstrated a complete helplessness to protect the victims.'"<sup>105</sup> In the wake of Sessions' opinion in *Matter of A-B-*, the USCIS released a policy memorandum instructing USCIS officers that:

In general . . . claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.<sup>106</sup>

Three months later, *Grace v. Whitaker* overruled *Matter of A-B-* and the resulting USCIS guidance.<sup>107</sup> In that case, a federal court held that the categorical denial of claims based on domestic abuse or gang-related violence was an impermissible interpretation of the Refugee Act.<sup>108</sup> It further determined that Sessions's assertion

101. *Id.* at 316.

102. *Id.* at 335 ("[f]or example, groups comprising persons who are 'resistant to gang violence' and susceptible to violence from gang members on that basis 'are too diffuse to be recognized as a particular social group'" (quoting *Constanza v. Holder*, 647 F.3d 749, 754 (8th Cir. 2011))).

103. *Id.* at 338–39.

104. *Id.* at 320.

105. *Id.* at 337 (quoting *Galina v. I.N.S.*, 213 F.3d 955, 958 (7th Cir. 2000)).

106. Joshua Breisblatt, *USCIS Is Redefining Who Qualifies For Asylum in This New Guidance*, IMMIGR. IMPACT (July 18, 2018), <https://immigrationimpact.com/2018/07/18/uscis-redefining-qualifies-asylum-guidance/#.X6C-T1NKhQI> [<https://perma.cc/R9KK-5E3Q>].

107. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018), *aff'd in part, rev'd in part and remanded sub nom.* *Grace v. Barr*, 965 F.3d 883, 914–920 (D.C. Cir. 2020).

108. *Id.* The Court explained that "[f]irst, the general rule is arbitrary and capricious because there is no legal basis for an effective categorical ban on domestic violence and gang-related claims. Second, such a general rule runs contrary to the individualized analysis required by the INA." *Id.*

that asylum applicants need to demonstrate that the government condoned the persecution or acted with “complete helplessness” impermissibly heightened the standard and was inconsistent with the Refugee Act and other immigration laws.<sup>109</sup> The court noted that such an articulation was an impermissible expansion of the clear and settled persecution definition set forth in *Acosta*, which required a showing that the persecution was perpetrated “either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”<sup>110</sup>

In the context of the nexus requirement, the court reinforced the understanding that “although the nexus standard forecloses cases in which *purely* personal disputes are the impetus for the persecution, it does not preclude a positive credible fear determination simply because there is a personal relationship between the persecutor and the victim, so long as the one central reason for the persecution is a protected ground.”<sup>111</sup>

Finally, the court addressed the circularity problem evident in cases involving domestic violence situations—the prohibition that the PSG be defined solely on the basis of the persecution. The court rejected the plaintiffs’ position that was based on a Department of Homeland Security Policy Memorandum’s articulation that “claims of domestic violence are impermissibly circular and therefore not cognizable as a basis for persecution in a credible fear determination.”<sup>112</sup> Rather, the court held that the plaintiffs’ argument was a misunderstanding of the concept of circularity and an impermissible misinterpretation of existing caselaw, which allows

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109. *Id.* at 127–31. The court found that “[a]s *Rosales Justo* illustrates, a requirement that police condone or demonstrate complete helplessness is inconsistent with the current standards under immigration law.” *Id.* at 129.

110. *Id.* at 128. The court emphasized that “under the government’s formulation of the persecution standard, no asylum applicant who received assistance from the government, regardless of how ineffective that assistance was, could meet the persecution requirement when the persecutor is a non-government actor.” *Id.* at 129.

111. *Id.* at 131 (emphasis in original).

112. *Id.* The court explained:

The Policy Memorandum states that “married women . . . who are unable to leave their relationship” are a group that would not be sufficiently particular [and] . . . “even if ‘unable to leave’ were particular, the applicant must show something more than the danger of harm from an abuser if the applicant tried to leave because that would amount to circularly defining the particular social group by the harm on which the asylum claim is based.”

*Id.* at 133.

for an articulation of a PSG where members contain “characteristics independent from the feared persecution.”<sup>113</sup>

Following this arguably positive development for asylum seekers, additional judicial and rulemaking developments introduced new confusion in asylum law. With regard to caselaw, in January 2021, Sessions issued a decision attempting to reinstate *Matter of A-B-* (*Matter of A-B-II*).<sup>114</sup> In July 2021, however, current Attorney General Merrick Garland issued a decision vacating both *Matter of A-B- I* and *II*.<sup>115</sup>

In terms of rulemaking, the Trump Administration passed rules addressed at adjudicating asylum cases that would seriously limit asylum law and undermine successful gender-based violence claims.<sup>116</sup> Relevant to the PSG analysis, the rules provide that “in general,” certain groups would not be recognized for asylum, including, for example, groups based on gang-related activity and groups based on “interpersonal disputes of which governmental authorities were unaware or uninvolved.”<sup>117</sup> The rules further provide that the list of groups “is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group

113. *Id.* at 133.

114. 28 I. & N. Dec. 199, 202 (A.G. 2021).

115. *Matter of A-B-* (*A-B-III*), 28 I. & N. Dec. 307, 309 (A.G. 2021) (instructing that “pending rulemaking, immigration judges and the Board should follow pre-*Matter of A-B- I* precedent, including *Matter of A-R-C-G-*”).

116. See Minha Jutt, “*Build Back Better*”: *Domestic Violence-Based Asylum After the “Death to Asylum” Rule*, 70 KAN. L. REV. 561, 572-73 (2022) (asserting that the rules would disallow the proof of governmental involvement in domestic violence cases and would both constrict the ability of domestic violence victims from establishing PSG status).

117. 8 C.F.R. § 208.1(a)(1)(c) (2023). The rule provides that:

The Secretary, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: Past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or status as an alien returning from the United States.

*Id.*

falls within one of the categories on the list.”<sup>118</sup> In another section, the rules address the nexus requirement, carving out the types of persecution that, in general, would not be favorably adjudicated.<sup>119</sup> Relevant to the gender-based violence issue, the rules provide that nexus typically cannot be established when an applicant is persecuted on account of: “(1) interpersonal animus or retribution; (2) interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;” and (3) gender.<sup>120</sup>

The Trump Administration’s rules, described above, were enjoined from going into effect.<sup>121</sup> In light of considerable confusion in asylum law, the Biden Administration followed up on campaign promises in the asylum law context in February 2021, issuing an Executive Order directing the Attorney General and the Secretary of Homeland Security to promulgate regulations regarding PSG.<sup>122</sup> As of 2022, however, no regulations have been issued.<sup>123</sup>

118. *Id.*

119. 8 C.F.R. § 208.1(a)(1)(f) (2023).

120. *Id.*

121. *Pangea Legal Servs. v. United States Dep’t of Homeland Sec.*, 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021). In *Pangea*, organizations providing asylum and immigration services challenged the Trump Administration rules, noting that the rulemaking process had followed a truncated notice and comment period. *Id.* at 970–71. The court applied the injunction factors analysis and ruled in favor of the plaintiffs. *Id.* at 977.

122. Exec. Order No. 14,010, *supra* note 14. The Executive Order addresses “root causes of irregular migration” and advises that proposals take into account “combating sexual, gender-based, and domestic violence.” *Id.* In terms of PSG analysis, the Executive Order directs the Attorney General and the Secretary of Homeland Security to

(i) within 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

(ii) within 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.

*Id.*

123. CTR. FOR GENDER & REFUGEE STUD., *DEADLY INERTIA: NEEDLESS DELAY OF “PARTICULAR SOCIAL GROUP” REGULATIONS PUTS ASYLUM SEEKERS AT RISK* (2022).

Therefore, much confusion remains about both the substance of the rules and their application to asylum-seeking women fleeing gender-based violence. This means that attention to these issues at this time is critical.<sup>124</sup>

To the extent that the Biden Administration has indicated a willingness to revisit this issue, there is an opportunity for advocacy in this area. Indeed, there might be a kairic moment. The Biden Administration's Executive Order, together with increasing national attention to immigration issues, may facilitate the "right time" aspect of Kairos. With regard to the "right place and under the right circumstances"<sup>125</sup> aspect of Kairos, the #MeToo movement's impact on public awareness about gender-based violence and female oppression may have both opened the door and illustrated effective rhetorical strategies to advocate for women seeking asylum in the context of gender-based harm. Before we turn to those, however, our analysis will benefit from a clarification of the PSG analysis.

D. *Confusion about Categories, or Categorical Confusion?*<sup>126</sup>

The Trump Administration's position on PSG jurisprudence is confusing; while in some instances it suggests the creation of categorical limitations on PSG asylum, at other times it insists on case-by-case adjudication of PSG claims.<sup>127</sup> The Administration's "clarifications" in the rule therefore appear to carve out categories of groups that are excluded from PSG status and/or that would not be able to establish the nexus requirement for refugee status. This type of categorical ban appears to run contrary to the general practice of deciding PSG status on a case-by-case basis. But, as explained below, such a blanket statement may go too far.

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124. *See id.* (asserting that "[w]omen who have survived domestic violence, and all other asylum applicants who must rely on the particular social group ground, are stuck on a deeply unfair playing field" and advocating that such rules reinstate the straightforward *Acosta* test of immutable characteristic for PSG claims).

125. Robbins, *supra* note 31 at 1361.

126. Brian Soucek, *Categorical Confusion in Asylum Law*, 73 FLA. L. REV. 473, 476 (2021).

127. *Id.* at 474–76. Soucek explains that:

In federal court in the District of Columbia, the Trump administration argued in one case that the Attorney General and the Board of Immigration Appeals "must determine particular social groups through case-by-case adjudication," while simultaneously insisting in another case that "the Board can and has adopted . . . general rules applicable to what is a cognizable social group."

*Id.* at 476 (citations omitted).

In *Categorical Confusion in Asylum Law*, Brian Soucek observes that some of the confusion in asylum law is framed as a procedural issue associated with whether PSG claims can be considered categorically or whether they must be examined on a case-by-case basis.<sup>128</sup> Upon closer examination, however, Soucek explains that the confusion is actually based on misunderstandings about substantive aspects of the test,<sup>129</sup> including immutability, particularity, social distinction, nexus, and circularity. Tracing the twists and turns in the caselaw surrounding these issues, Soucek illustrates “whether, when, and why asylum claims, or issues within them, can be answered categorically.”<sup>130</sup>

In terms of categorical versus case-by-case determinations, Soucek asserts that the two most straightforward aspects of the test appear to be immutability, which can be analyzed categorically, and social distinction, which must be assessed on a case-by case basis.<sup>131</sup> He explains that, in light of the immutability test set forth in *Acosta*, social groups were routinely approved or rejected categorically.<sup>132</sup> In contrast, social distinction was always meant to be a “a fact-intensive, society-specific determination about what groups are socially salient at a given time and place.”<sup>133</sup> Soucek does differentiate, however, between what he refers to as weaker and stronger senses of case-by-case analysis in the social distinction test.<sup>134</sup> In the weaker version, group-based decisions would be made country-by-country, and then presumably apply categorically.<sup>135</sup> In the stronger sense—in Soucek’s view, the preferable understanding—every applicant would

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128. *Id.* at 475.

129. *Id.* (emphasizing that the “underlying substantive law—which currently looks at a persecuted group’s immutability, particularity, and social salience in the country of persecution—is so poorly and inconsistently applied that litigants have lost sight even of *how* it should be applied: whether categorically or case-by-case”).

130. *Id.* at 476.

131. *Id.* at 509.

132. *Id.* (explaining that “‘case-by-case’ in *Acosta* really meant ‘group-by-group’: the Board envisioned a gradual accumulation of caselaw clarifying what groups would categorically qualify as ‘particular social groups’ for asylum purposes”).

133. *Id.* (contrasting immutability and social distinction, Soucek illustrates that “even if traits like sex or sexual orientation are recognized categorically as immutable, societies might not always and everywhere have thought of themselves as carved up into groups defined by sexuality”).

134. *Id.* at 509–10.

135. *Id.* at 510 (“Honduran women unable to leave their relationships could not be bound by a decision about a woman in Guatemala, but Guatemalan women presumptively would be”).

get an individualized analysis as to the social distinction of the group at that point in time.<sup>136</sup>

With regard to particularity, Soucek asserts that, properly understood, it should be a categorical determination.<sup>137</sup> Examining the caselaw in this area, Soucek points to the statement in *Matter of M-E-V-G* that, with respect to particularity, the “group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”<sup>138</sup> This statement introduces inconsistencies: “Notice the different directions the BIA’s adjectives point: a group that has amorphous, vague, or overly subjective boundaries is notably different than one that is overbroad, diffuse, or all encompassing—which is to say, too big or diverse.”<sup>139</sup> In Soucek’s view, particularity should be interpreted to mean well-delineated, and its analysis can be conducted categorically: “Determining whether these groups have boundaries that are sharp rather than ambiguous, or objective rather than subjective, is like determining whether a trait is immutable: it is a question of law that can be determined once and for all.”<sup>140</sup>

The nexus requirement presents opportunities for both case-by-case and categorical analysis. Soucek argues that the issue of whether “one central reason” an applicant was persecuted “on account of” one of the five refugee grounds will typically require individualized analysis: “judges need to ask why this *particular* applicant has or will be targeted.”<sup>141</sup> Nonetheless, there may be instances in which an applicant’s nexus claim can fail categorically on the nexus requirement, as in the case of claims of persecution for solely interpersonal animus,<sup>142</sup> the “solely” defining feature of which

136. *Id.* Soucek explains that the stronger version is preferable both because it is more attuned to societal changes and it comports with “the due process notion that everyone deserves their day in court.” *Id.*

137. *Id.* at 515.

138. *Id.* at 512 (citing *Matter of M-E-V-G*, 26 I. & N. Dec. at 239).

139. *Id.* (illustrating that “[t]o be ‘narrowly defined’ is something other than being sharply defined. An example of one group that would meet the latter but not the former test is women.”).

140. *Id.* at 513. Soucek does allow for an exception for groups whose boundaries—not social distinction—might be on a spectrum in a particular society, as in the case of gender in a non-binary society where gender is viewed on a spectrum. Even allowing that “the particularity of gender-based groups could *theoretically* vary across place and time,” Soucek concludes that “in our current world, categorical determinations can generally be made that groups like ‘Dominican women’ have the particularity needed to ground an asylum claim.” *Id.* at 513–14 (emphasis in original).

141. *Id.* at 515.

142. *Id.* at 516 (observing that “[s]olely’ is doing work here, for otherwise persecution that is based in part on interpersonal animus might *also* have one

precludes a finding that the persecution was on account of membership in a protected ground. But in the gang and gender-based violence context, Soucek argues that a categorical rejection of nexus would be improper, as there is no reason to assume, or to conclude on the basis of substantive law, that being perceived as either a woman or a former gang member could not be a central reason why an individual is persecuted.<sup>143</sup>

Soucek ties his analysis of the nexus requirement to asylum claims that may fail based on circularity issues.<sup>144</sup> In terms of avoiding circularity, a PSG cannot be defined solely in terms of the persecution.<sup>145</sup> Soucek explains that claims around circularity are often framed as though avoiding circularity is an additional aspect of the test for a PSG.<sup>146</sup> In his view, however, circularity relates to nexus, because defining the group by the harm would eliminate the need to demonstrate nexus.<sup>147</sup> As the *Diaz-Reynoso* court explains, “[d]efining a group by the harm, in other words, eliminates a petitioner’s obligation to demonstrate persecution because of membership in the group, effectively satisfying the nexus requirement in every case.”<sup>148</sup>

In terms of his analysis of whether and when the court can, or should, make categorical determinations, Soucek reiterates that categorical rejections can be made where the group is defined in an impermissibly circular way.<sup>149</sup> He notes that this is “a matter of logic: motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution.”<sup>150</sup> Whether a group is defined on the basis of the persecution, however, may require a case-by-case analysis. For example, a group defined as “women who are unable to leave their marriage” would require a case-by-case analysis; the court might need to further examine whether the reason an applicant claims persecution is because she simply fears abuse by her husband or, more broadly, “because religion or economics or cultural norms prevent her from leaving.”<sup>151</sup> As Soucek explains, “[o]nly

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of the five grounds as ‘a central reason’ for the persecution”).

143. *Id.*

144. *Id.* at 516–17.

145. *Id.*

146. *Id.* at 500.

147. *Id.*

148. *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1093 (9th Cir. 2020) (Bress, J., concurring in part and dissenting in part).

149. Soucek, *supra* note 126, at 516.

150. *Id.* (quoting *Sarkisian v. Att’y Gen. of United States*, 322 F. App’x 136, 141 (3d Cir. 2009)).

151. *Id.*

the former is impermissibly circular.”<sup>152</sup> Thus, in the case of women fleeing gender-based violence, Soucek recommends that the PSG be framed in a way to avoid claims of circularity, such as “[w]omen in Honduras who are unable to leave their marriages because of religious prohibitions.”<sup>153</sup>

Soucek’s persuasive analysis of how certain aspects of the rule are best considered on a case-by-case basis may help guide advocacy in this space, particularly where efforts are addressed at certain aspects of the test, either in individual cases or in more large-scale reform. In order to further consider how to galvanize conversation around the issue, we now turn to a consideration of #MeToo, and how that social movement might illuminate rhetorical strategies that could be imported into the asylum context.

## II. RHETORICAL ANALYSIS OF #METOO: A CONSTELLATION APPROACH

#MeToo has been studied from a number of rhetorical perspectives, some of which have been criticized by feminist scholars.<sup>154</sup> For example, some criticize the manner in which affluent women with agency co-opted the hashtag and therefore overshadowed the voices of marginalized individuals who had experienced gender violence.<sup>155</sup> Another criticism of #MeToo was its focus on criminal punishment and carceral politics.<sup>156</sup>

These observations and criticisms of the #MeToo movement can be useful in analyzing how its rhetorical strategies might be

152. *Id.*

153. *Id.* Soucek acknowledges that the inquiry in this formulation might be whether the group can demonstrate social distinction. *Id.* at 516–17.

154. See, e.g., Lisa M. Corrigan, *The #MeToo Moment: A Rhetorical Zeitgeist*, 42 *WOMEN’S STUD. COMMC’N* 264 (2019).

155. *Id.* Corrigan notes:

While I was generally glad for the public outcry over sexual harassment and sexual violence and thought that hashtagging experiences was good to both amplify the frequency of sexual harassment and violence and to provide community for survivors, I was also concerned about white women hijacking a hashtag started by a black woman (Tarana Burke, an advocate for victims of sexual violence and Time’s 2017 Person of the Year along with women the magazine named “the silence breakers”), celebrity whitewashing (on Twitter and at the 2018 Oscars), the erasure of male victims, the lack of nuance about bidirectional violence, and disregard of sexual violence against LGBTQ people but especially trans women of color.

*Id.* at 264.

156. See, e.g., V. Jo Hsu, *(Trans)forming #MeToo: Toward a Networked Response to Gender Violence*, 42 *WOMEN’S STUD. COMMC’N* 269 (2019).

applicable to asylum advocacy. Because this Article is directed at the oppression of female asylum seekers who are fleeing gender-based violence, an intersectional analysis of the rhetorical strategies employed during the #MeToo seems quite fitting.<sup>157</sup> After all, “[t]heories possess ideological hegemony, delimiting the territory of study, suggesting what seems natural and reasonable, and thus controlling how we think about an area of study such as rhetoric.”<sup>158</sup>

While there are many rhetorical analyses of #MeToo that may offer suggestions for rhetorical strategies in the asylum context,<sup>159</sup> this Article will focus on one in particular. In *Rhetorical Constellations and the Inventional/Intersectional Possibilities of #MeToo*,<sup>160</sup> Emma Frances Bloomfield conducted a powerful rhetorical approach to study how the rhetoric of individual and aggregate voices assigns guilt and manifests blame for sexual violence in #MeToo context.

Bloomfield employs Kenneth Burke’s theories of identification, guilt-redemption, and consubstantiality to craft what she refers to as a “constellation” approach to guilt redemption rhetoric in media coverage of #MeToo.<sup>161</sup> At the outset, Bloomfield acknowledges that the use of Burke’s theories in a feminist inquiry might be questioned on the basis of what she characterizes as Burke’s patriarchal bias, glossing over of individual differences, and overreliance on the Western, male experience as the stand-in for the human experience.<sup>162</sup> Nonetheless, she emphasizes Burke’s own invitation to move beyond limitations in his approaches<sup>163</sup> and situ-

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157. Jennifer Jihye Chun et al., *Intersectionality as a Social Movement Strategy: Asian Immigrant Women Advocates*, 38 *SIGNS: J. WOMEN CULTURE & SOC’Y* 917, 917 (2013) (noting that “[s]ocial movement groups embrace intersectionality as a radical yet viable strategy because the core problems that women of color face are themselves both intersectional and radical. Intersectionality helps women of color invent and inhabit identities that register the effects of differentiated and uneven power, permitting them to envision and enact new social relations grounded in multiple axes of intersecting, situated knowledge.”).

158. Sonja K. Foss and Cindy L. Griffin, *A Feminist Perspective on Rhetorical Theory: Toward a Clarification of Boundaries*, 56 *W. J. COMM’N* 330, 330 (1992).

159. See generally, e.g., Hsu, *supra* note 156; Emily Winderman, *Anger’s Volumes: Rhetorics of Amplification and Aggregation in #MeToo*, 42 *WOMEN’S STUD. IN COMM’N* 327 (2019); Ashley Noel Mack & Bryan J. McCann, *Critiquing State and Gendered Violence in the Age of #MeToo*, 104 *Q. J. SPEECH* 329 (2018).

160. Bloomfield, *supra* note 18, at 395.

161. See generally *id.*

162. *Id.*

163. *Id.* (noting that Burke “specifically calls for [one of] his definition[s]

ates her work in the context of both Burke and Barry Brummett.<sup>164</sup> She proceeds by asserting that the use of Burke's guilt-redemption analysis in a feminist project might be uniquely well-suited because "women are oftentimes categorized as the scapegoat because of their difficulty establishing agent status and setting the dominant redemptive frame."<sup>165</sup> In light of this tension, Bloomfield employs and also reworks Burke's framework "with the conviction that looking at the language of guilt and redemption within the #MeToo movement can provide insight into the dominant narratives that circulate about sexual violence."<sup>166</sup>

Bloomfield explains Burke's guilt-redemption cycle analysis as one employed to examine how societies use guilt management to maintain order.<sup>167</sup> Because societal order is constantly disrupted by sources of "pollution," societies manage order by addressing those sources of pollution through rhetorical techniques such as scapegoating and transcendence.<sup>168</sup> In the context of scapegoating, a rhetor assigns guilt for the societal disruption to a person or entity to "figuratively or literally sacrifice" that source of pollution.<sup>169</sup> In transcendent appeals to purge guilt, the rhetor may place the source of guilt in society at large.<sup>170</sup>

Bloomfield then looked for instances of both scapegoating and transcendence in media coverage of #MeToo.<sup>171</sup> In her examination of scapegoating, Bloomfield identified three themes: sacrifice, individual accountability, and justice.<sup>172</sup> Instances of sacrifice and individual accountability in #MeToo discourse focused on the punishment of perpetrators, with articles "prais[ing] the punishment of losing careers, a figurative sacrifice of the prominence and positions of power after violations were revealed to the public."<sup>173</sup>

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to be challenged").

164. *Id.* at 396.

165. *Id.* at 397.

166. *Id.* at 396.

167. *Id.*

168. *Id.*

169. *Id.* Bloomfield offers an illustration of scapegoating in environmental discourse, where an individual or individual act is blamed for environmental damage even though these individuals or individual acts have no largescale impact on the environment. *Id.* at 397. Nonetheless, a narrow focus is easier to accept than blaming systemic factors for environmental harm and it has the satisfying effect of "assuag[ing] any sense of collective guilt." *Id.*

170. *Id.* at 396 ("[d]uring appeals to transcendence, a rhetor purges guilt by placing the guilt in a new perspective that addresses society at large or recasts the pollution as something not worthy of guilt").

171. *See id.* at 401–07.

172. *Id.* at 401–03.

173. *Id.* at 401.

These forms of scapegoating may be cathartic in assigning and addressing guilt, but they narrow the focus of sexual violence to “targeting and eliminating individual perpetrators.”<sup>174</sup> Bloomfield found that scapegoating discourse addressing themes of justice cuts two ways: one related to claims that justice was being furthered by outing perpetrators and, in the instance of high profile perpetrators, removing them from their positions of authority.<sup>175</sup> On the other hand, some scapegoating rhetoric that focused on a theme of justice cautioned against unsubstantiated claims and “premature condemnation of individuals.”<sup>176</sup>

Turning to transcendent rhetoric, Bloomfield also identifies three themes: inclusivity, increasing the circumference, and proposed solutions.<sup>177</sup> In terms of inclusivity, Bloomfield acknowledged rhetoric addressed at the pervasive aspect of sexual violence—the #MeToo hashtag was an invitation to share. She noted that this correlates with Burke’s notion of consubstantiality and the locating of “common sensations, concepts, images, ideas, and attitudes’ that foster ‘acting-together.’”<sup>178</sup> She also emphasizes *TIME Magazine’s* choice of #MeToo as its collective Person of the Year and reinforces the inclusion of male voices in *TIME Magazine’s* “The Silence Breakers” article.<sup>179</sup> Bloomfield emphasizes that the movement itself was designed to be, if not entirely effective as,<sup>180</sup> a social movement designed to create an inclusive environment for survivors of sexual violence. In spite of these inclusive aspects, media coverage around the movement was also criticized for focusing on crafting

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174. *Id.* at 402.

175. *Id.* at 403.

176. *Id.*

177. *Id.* at 404–07. Bloomfield explains how the inclusive hashtag united victims of sexual violence, and the breadth of sharing it through social media expanded the impact of its message. *Id.*

178. *Id.* at 404.

179. *Id.* at 404–05.

180. *See, e.g.,* Hsu, *supra* note 156 at 273–75. Hsu examines the #MeToo movement through a critical trans theory, which is not focused on a horizontal consideration of gender identity, from male to female, but on a vertical axis, considering how sources of oppression move individuals closer to, or further from, resources. *Id.* at 272. Hsu criticized “The Silence Breakers” in terms of its focus not on the inclusion of male voices, but on its emphasis of the criminalization of high-profile defendants including Bill Cosby and Harvey Weinstein and on the affluence and agency of the accusers. *Id.* at 273–74. As a result of this collapsing of voices, Hsu reminds the reader that “as intersectional feminists have continually insisted, narrow forms of recognition available to a privileged few do not transform oppressive regimes. Rather, they disguise and justify the conditions of oppression.” *Id.* at 274.

white women as the perfect victims and white men as the perpetrators,<sup>181</sup> therefore erasing or ignoring other intersectionalities.

In her analysis of increasing the circumference discourse around sexual violence, Bloomfield explains that the scope of a narrative has a marked impact on its message.<sup>182</sup> Transcendent rhetoric in #MeToo moved the conversation around sexual harassment beyond individual acts and toward a societal-level consideration of the problem.<sup>183</sup> Bloomfield examines rhetorical strategies designed to elucidate this, illustrating references to sexual violence as “a plague on global health,” and an “epidemic,” thus widening the conception of “public health” from “the circumference of an individual story to a collective story and from sexual assault as an issue only for women to a public health crisis.”<sup>184</sup> She points to several sources that specifically reject scapegoating and call for solutions that dismantle systemic sexual violence.<sup>185</sup>

In terms of the discourse around proposed, transcendent solutions, Bloomfield points to a *New York Times* article suggesting an examination of “‘the entire sensibility’ of sexual assault by looking at ‘the way that people understand what a problem is and what needs fixing,’” noting that the article recognized that the solution to sexual harassment depended upon societal views.<sup>186</sup> Focusing on rhetoric around sexual violence in the entertainment industry, she acknowledges proposed transcendent solutions.<sup>187</sup> Bloomfield explains that the “transcendent rhetoric within #MeToo seeks to

181. Bloomfield, *supra* note 18 at 404.

182. *Id.* at 405. Bloomfield explains that:

The circumference of a story will have a marked difference on the narrative that gets told. For example, if someone tells the story of a person killing another person, they are likely telling the story of a murder. But, if they expand the circumference and consider the scene of the murder as part of a battle between warring nations, the murder might now be described as a heroic act of defending one’s country.

*Id.*

183. *Id.* at 406–07.

184. *Id.* at 405–06.

185. *Id.* at 406. Bloomfield illustrates this rhetorical move in the following example: “If you think the #MeToo reckoning is over because the Weinsteins of the world have been toppled, you’ve missed the point.” *Id.* In addition, she notes sources in which the solutions call for turning “microscope inward” in order to confront sexual violence as a societal issue, admonishing that to do so we must “confront ourselves, not just perpetrators’ behaviors.” *Id.*

186. *Id.*

187. *Id.* (“Having more women’s voices in all stages of media production will allow for new perspectives, narratives, content, and opportunities that challenge the assumptions of the current entertainment industry.”).

establish a new order that raises awareness about the ways that sexism, racism, ableism, and heteronormativity lead to power imbalances that enable sexual violence in Hollywood, workplaces, and society at large.”<sup>188</sup> Nonetheless, as with inclusivity, Bloomfield acknowledges limitations of transcendent rhetoric, and its tendency to “erase individual differences, construct the idea of a perfect or typical victim, and undermine or silence certain people and their stories.”<sup>189</sup>

Moving toward her constellation theme, Bloomfield highlights the risks and opportunities associated with scapegoating and transcendent rhetorical strategies.<sup>190</sup> In her analysis, rhetorical scapegoating in #MeToo—in the form of shaming the perpetrator and communicating retribution in the form of cancel culture, loss of career, and reputation—was “a beneficial route to redemption because it provide[d] catharsis for individual ills and highlight[ed] unique circumstances.” It was also inadequate, however, insofar as it focused on isolated instances of sexual misconduct,<sup>191</sup> “falsely narrow[ed] guilt and blame to an individual,”<sup>192</sup> and “situate[d] solutions solely in the private sphere.”<sup>193</sup> A transcendent strategy, beneficial when directed more expansively at wider, structural systems, also carries the disadvantage of “overshadowing of individual identities, such as the experiences of trans women, people of color, and men who are victims of sexual violence, along with other intersectional identities.”<sup>194</sup> In order to capitalize on the promise of each

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188. *Id.* at 407.

189. *Id.* at 408.

190. *See id.* at 407–11.

191. *See* Hsu, *supra* note 156 at 270 (“While #MeToo has ruptured a pervasive silence around sexual assault, it has also done so largely through a vocabulary of criminalization and carceral punishment. This limited vision of justice has left many—specifically those most vulnerable to gender violence—beyond the purview of #MeToo.”).

192. Bloomfield, *supra* note 18 at 407 (illustrating how the use of scapegoating in the context of an attempted assassination and how media coverage of the shooter “closed off rhetorical alternatives that would allow the nation collectively to take responsibility for, learn from, and work to prevent similar instances of violence in the future”) (quoting Francesca Marie Smith & Thomas A. Hollihan, “*Out of the Chaos Breathes Creation*”: *Human Agency, Mental Illness, and Conservative Arguments Locating Responsibility for the Tucson Massacre*, 17 RHETORIC & PUB. AFFS. 587 (2014)) (internal quotations omitted).

193. *Id.* at 398.

194. *Id.* (explaining that “[w]hen we turn toward transcendence and view sexual violence more broadly, we may inadvertently erase the stories of certain groups and identities and craft a perfect victim, who is typically a White, cisgender female.”).

strategy, while avoiding their shortcomings, Bloomfield proposes an inventional/intersectional “constellation” approach to considering how scapegoating and transcendence narratives “simultaneously embod[y] the duality between individual elements and the ‘fusion of elements’ created by their ‘interrelated forces.’”<sup>195</sup>

Bloomfield uses the power of scene—reminiscent of our consideration of the appropriate setting in terms of Kairos and the power of context in Gladwell’s conception of the tipping point<sup>196</sup>—to support her constellation approach.<sup>197</sup> She notes that scapegoating limits the scene and may facilitate a “narrative that individual perpetrators are isolated incidents[, which] . . . forget[s] the larger culture and climate that contributes to empowering and shielding those in power.”<sup>198</sup> While scapegoating limits the scene, transcendent rhetoric employs too wide a lens, erasing important distinctions and diminishing the impetus for individual action.<sup>199</sup>

Situating her theory in the #MeToo context, Bloomfield explains that the rhetorical impact of individual instances of sexual harassment—individual “stars” in the constellation framework—can be conceptualized as “loci of attention spark[ing] public responses that seek to define, assign blame, and offer ways to restore the order through sacrifice.”<sup>200</sup> She emphasizes that part of the rhetorical impact of #MeToo is viewing sexual violence in the aggregate, or in a constellation of experiences.<sup>201</sup> This invokes the sentiment that scapegoating must be tethered to individual experience in situations “where one size for redemption does not fit all.”<sup>202</sup> The constellation also signals the need for structural solutions, as “a rhetorical constellation views individual stars/stories as part of a larger narrative/pattern/arrangement that speaks to the pervasiveness and common experiences of sexual violence that can only be redeemed and prevented by turning to structural and societal-level changes.”<sup>203</sup>

Bloomfield’s constellation approach attends to Burke’s concepts of identification and consubstantiality.<sup>204</sup> Bloomfield explains

195. *Id.*

196. *See supra* Introduction.

197. *See* Bloomfield, *supra* note 18, at 408.

198. *Id.*

199. *Id.* (“Some people may engage in transcendent rhetoric as means to downplay, ignore, or shift focus from their personal accountability.”).

200. *Id.* at 399.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

that division is inherent in the identification process,<sup>205</sup> and that a state of consubstantiality exists within discourse that both unites and highlights division.<sup>206</sup> Consubstantiality is then a way to amplify voices that might be marginalized when instances of sexual violence are generalized, thereby including those “voices that would otherwise be ‘excluded from the dominant conception and articulation of ‘society,’ which has a stake in crafting a particular redemptive narrative that maintains a private/public dichotomy.”<sup>207</sup> Maintaining a focus on both individual and aggregate patterns also “enables intersectional understandings of how people experience sexual violence and prevents public structures from being ignored as potential solutions.”<sup>208</sup> Such an approach also “considers the scene and all the agents in the scene as being in mutually constitutive relationships, requiring modification of both systems and the people that create and support them to change the overall shape.”<sup>209</sup>

Bloomfield’s constellation approach is thus designed to evaluate how scapegoating and transcendent rhetoric can work together in a context involving victims who may be impacted by intersectional forms of oppression. She offers an approach that merges the effective aspects of each strategy while also attending to the limitations of both. To the extent that gender-based violence in the asylum context is analogous to gender-based violence in the #MeToo context, might Bloomfield’s observations about the efficacy and limitations of both approaches be applicable in the asylum context? This is the focus of the following Part.

### III. APPLICATION OF RHETORICAL ANALYSIS TO GENDER-BASED VIOLENCE IN THE PARTICULAR SOCIAL GROUP FRAMEWORK

Thus far, this Article has considered the development of the caselaw in the PSG context, specifically examining how the test for PSG has evolved to include an analysis of immutability, particularity, and social distinction, and how that analysis has been applied to women fleeing gender-based violence. It has also considered the questions of nexus, and how women can (or cannot) establish that their persecution is on account of their membership in a PSG. Relatedly, the Article has examined issues associated with

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205. *Id.* (asserting Burke’s position that “[i]dentification is compensatory to division”) (internal quotation omitted).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 409.

circularity. Enlightened by Soucek's analysis, these questions may be best considered after an initial determination about whether the particular aspect of the test should be examined categorically or considered on a case-by-case basis.

We have also considered the efficacy of rhetorical strategies including scapegoating, transcendence, and a constellation fusion of the two. Bloomfield's constellation approach recommends that advocates "attend to the specific circumstances of individual cases, framing those unique people, voices, and stories as part of a series of interactions with other instances of sexual violence that constitute a call for societal change."<sup>210</sup> How might we then tether Bloomfield's proffered rhetorical strategies to Soucek's categorical (or case-by-case) suggestions about PSG analysis to craft a tipping point in this space? At first glance it might appear that scapegoating, with its focus on individual acts of violence, aligns with case-by-case questions. Knowing what we know about the limitations of scapegoating as focused too narrowly on individual perpetrators and the challenges women must overcome with respect to establishing gender-based violence as something more than a merely private act, we can see that this is not a perfect fit. Transcendent rhetorical strategies might also not be perfectly aligned with categorical determinations. However, by combining Soucek's observations about categorical analysis with Bloomfield's constellation approach, which fuses scapegoating and transcendence, we may nonetheless consider rhetorical approaches to gender-based violence in the PSG context.

One potential target for a constellation approach is advocacy around the social distinction requirement, which Soucek reminds us must be analyzed on a case-by-case basis.<sup>211</sup> Establishing social distinction in individual cases will likely benefit from the constellation approach of situating individual experience in a systemic context. To the extent that individual cases filed on behalf of individual litigants are rooted in the facts of that particular case,<sup>212</sup> an advocate has the opportunity to tell a story of gender-based violence against an individual. The social distinction requirement, however, provides the opportunity to engage in transcendent

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210. *Id.* at 394.

211. *See, e.g.*, Section I(D).

212. This is just to clarify a distinction between the rhetoric that may be effective for individual litigants and the rhetorical techniques that might be employed in amicus briefs and activism more broadly, the latter of which may not be so constrained by individual facts. We will return to this distinction in the conclusion, which challenges the reader to think more broadly about these rhetorical strategies.

rhetoric that grounds gender-based violence in systemic regimes of oppression against women, particularly in certain social or political climates where gender-based violence is pervasive and widely tolerated. So, for example, in *In re R-A-*, the court acknowledged that the record in the “case reflects that the views of society and of many governmental institutions in Guatemala can result in the tolerance of spouse abuse at levels we find appalling.”<sup>213</sup> It nonetheless concluded that the applicant had failed to demonstrate that the government had wholly failed to respond to the acknowledged problem or that the potential inadequacy of governmental response could be equated with a finding that the applicant was abused on account of her membership in the PSG.<sup>214</sup> Transcendent rhetoric focusing on systemic structures of gender-based violence might help overcome this perceived deficiency.

We see an example of this, surprisingly, in a government brief filed in the context of a domestic violence case which (ultimately) resulted in asylum for the applicant. In *Matter of L-R-*, the asylum applicant was a woman who had suffered horrific gender-based violence at the hands of her abuser, a school sports coach who initially raped the applicant at gunpoint when she was nineteen and he was thirty three.<sup>215</sup> For two decades he continued to abuse the applicant, “ke[eping] her in virtual captivity, using physical force and beatings, and threatening death to her and her family members, to prevent her from leaving. He raped her regularly and tormented her mentally and verbally.”<sup>216</sup> The applicant tried to avail herself of assistance from both the police and the judiciary, but those attempts were both unsuccessful and further subjected the applicant to gender-based harm.<sup>217</sup> She fled to the United States and tried, initially unsuccessfully, to gain asylum as a member of the PSG which she framed as “Mexican women in an abusive domestic relationship who are unable to leave.”<sup>218</sup>

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213. *In re R-A-*, 22 I. & N. Dec. 906, 922 (B.I.A. 2001).

214. *Id.*

215. See *Matter of L-R-*, CTR. FOR GENDER & REFUGEE STUD, <http://cgrs.uchastings.edu/our-work/matter-l-r> [<https://perma.cc/6EGN-TNFC>] (last visited March 31, 2023) [hereinafter CGRS, Our Work, *Matter of R-A-*].

216. *Id.*

217. *Id.* The Center for Gender and Refugee Studies explains that “[t]he response of the judiciary was for the most part equally atrocious. When her abuser prevented L-R- from seeing her three children, the judge from whom she sought assistance told her he would help only if she had sex with him. When she refused, he told her she was a bad mother, because a good mother would do anything for her children.” *Id.*

218. See Dep’t of Homeland Security’s Supplemental Brief, *Matter of L-R-* (B.I.A. Apr. 13, 2009), <https://cgrs.uchastings.edu/sites/default/files/>

Failing to establish PSG status before an immigration judge, the applicant appealed to the BIA.<sup>219</sup> Initially, DHS challenged the applicant's claim, filing a brief asserting that the applicant had neither established a PSG nor established the nexus requirement.<sup>220</sup> However, DHS, then operating under the new Obama administration, changed course, filing a new brief in support of the applicant's membership in a PSG and agreeing that she had suffered persecution on account of her membership in the group.<sup>221</sup>

Maintaining its earlier position that the applicant's asserted PSG failed the PSG test because the group, as defined, was circular,<sup>222</sup> in its new brief DHS offered two modified group formulations that could be cognizable as PSGs based on the facts of the case. These included: "[ (1) Mexican women in domestic relationships who are unable to leave'[:] or... '(2) Mexican women who are viewed as property by virtue of their position in a domestic relationship.'"<sup>223</sup>

In DHS's argument in support of the applicant's PSG claim, we see some evidence of a focus on the applicant's individual situation vis-à-vis her abuser, reminiscent of scapegoating rhetoric. With regard to the analysis of societal distinction, we also see some evidence of an acknowledgment of the systemic nature of the harm, reminiscent of transcendent rhetoric. DHS argued that:

[T]he particular social group in asylum and withholding of removal claims based on domestic violence is best defined in light of the evidence about how the respondent's abuser and her society perceive her role within a domestic relationship. The evidence in this case at least raises the possibility that [the abuser] believes that women should occupy a subordinate position within a domestic relationship and that, in his eyes, the female respondent remains in this subordinate position in the relationship even though she has physically separated from [the abuser]. The evidence further suggests that [the abuser] believes that the abuse of women within such a relationship can therefore be tolerated, and that societal expectations in Mexico reinforce this view.<sup>224</sup>

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Matter\_of\_LR\_DHS\_Brief\_4\_13\_2009.pdf [https://perma.cc/9TSL-27W6] [hereinafter DHS Brief, *Matter of L-R*].

219. *Id.*

220. CGRS, Our Work, *Matter of R-A*, *supra* note 215.

221. DHS Brief, *Matter of L-R*, *supra* note 218.

222. The DHS also asserted that the group might suffer from a lack of particularity, asserting that "[t]he female respondent has not shown that there exists in Mexican society a sufficient general consensus as to what constitutes an "abusive" domestic relationship, a term which is subjective and thus amorphous." *Id.* at 11, n.8.

223. *Id.* at 14.

224. *Id.*

Of course, this rhetoric is tethered to the nature of the societal distinction aspect of the PSG test, but it is illuminating when viewed in the context of a brief filed by a government that initially opposed PSG status and a reflection, perhaps, of a more nuanced understanding of the systemic nature of gender-based violence.

In contrast to its use by litigants in individual cases, the constellation approach may be used to challenge social distinction as a necessary, additional criteria to immutability. Immigration expert Deborah E. Anker explains, if *Acosta* is properly applied, the social distinction component may be unnecessary: “[i]ndeed, if decision-makers properly applied *Acosta*, the social distinction test . . . would be irrelevant or redundant.”<sup>225</sup> The social distinction requirement can be particularly problematic in cases of gender-based violence because of the private nature of the harm.<sup>226</sup> As both transcendent and constellation rhetoric made clear in the #MeToo context, however, gender-based harm may be hidden from societal views because of the systemic ways women have been oppressed in the private sphere.<sup>227</sup> A constellation approach reminiscent of that employed in #MeToo might be particularly powerful in gender-based violence claims which, as rooted in the public/private distinction, are difficult for women to overcome in the asylum context. Therefore, the use of constellation rhetoric might be a useful strategy in arguing that the social distinction requirement itself is an unnecessary addition to *Acosta*’s immutability framework.

Requiring an applicant who seeks asylum based on gender-based violence to demonstrate social distinction (and thereby requiring a case-by-case analysis) is challenging because of the oftentimes embedded and invisible nature of the harm. For example, the harm may be hidden from the public by the perpetrator or the victim, who may feel shame about the abuse.<sup>228</sup> In addition, the

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225. Deborah E. Anker, *The Requirements of Particularity and Social Distinction*, in *LAW OF ASYLUM IN THE UNITED STATES* § 5:44 (2022 ed.) (“Social distinction should be read as another way of stating the basic *Acosta* test: after all, how can a risk be said to be for reasons of a characteristic if the characteristic itself or group cannot be identified?”).

226. Tizzano, *supra* note 32, at 614 (emphasizing that “[t]he conduct may be so normalized that victims may not be socially distinct”).

227. Ronnie Cohen & Shannon O’Byrne, “*Can You Hear Me Now . . . Good!*” *Feminism(s), the Public/Private Divide, and Citizens United v. FEC*, 20 *UCLA WOMEN’S L.J.* 39, 39 (2013) (explaining that the “private sphere—idealized by the notions of hearth and home—denigrated and endangered women in part by isolating them and rendering them subject to male control, including by way of domestic violence”).

228. Tizzano, *supra* note 32, at 614.

very cultural norms that make the violence tolerable by society may also obscure the violence as a systemic problem:

‘[I]nternalized misogynistic attitudes’ generate the cultural and social acceptance of patriarchal behaviors and female subordination to men. Those cultural and social norms may then instill the invisibility and unimportance of the harm within society. Requiring the perception of the group by society presumes that society is aware of the harm, which may not always be the case in instances of violence against women. What is more, even where the society knows about the harmful conduct, it may still not perceive victims as forming a particular social group where the conduct is considered socially and culturally acceptable and therefore nothing would make that group distinct enough to render them ‘different or a ‘cognizable group’ from the rest of society.<sup>229</sup>

Activists who seek to challenge social distinction as a criterion additional to that of immutability established in *Acosta* might benefit from considering the rhetorical constellation strategy suggested by Bloomfield, which marries the scapegoating rhetoric that brings individual acts of violence into the light while importing transcendent, systemic solutions into the analysis.<sup>230</sup>

A constellation approach may also have traction in the context of the nexus requirement, where women may fail to establish persecution on account of their membership in a PSG because judges dismiss gender-based violence as rooted in personal animus and/or as a private matter.<sup>231</sup> With respect to establishing nexus, advocates could employ rhetorical strategies similar to those suggested with respect to social distinction. That is to say, in articulating nexus in the case of private actors, advocates can illustrate and situate individual acts of violence within the pervasive ways that women are both oppressed and abused by systemic tolerance of gender-based violence. We do see courts and advocates drawing attention to specific instances of violence, illustrating scapegoating rhetoric in the context of demonizing individual abusers.<sup>232</sup> But, as we have seen in the #MeToo context, this strategy lends itself to isolating those acts of violence and ignoring the systemic nature of gender-based violence.<sup>233</sup>

It certainly may be possible that a man abuses a woman because he is a bully, but to overcome the nexus requirement,

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229. *Id.*

230. *See supra* Part II.

231. *See In re R-A-*, 22 I. & N. Dec. 906, 911 (B.I.A. 2001).

232. *See, e.g., id.*

233. *See supra* Part II.

asylum advocates must illustrate the structural and systemic forces that enable that form of abuse to rise to the level of persecution. To challenge the assumption that such acts can be siloed within a private, isolated context, we must widen the lens associated with nexus. After all, “[w]hether things happened as the court says or not, to all practical purposes they now did: a court’s [decision] creates truth . . . legal truth, in turn has a tendency to become historical truth as well.”<sup>234</sup>

That should not be the case. Using a constellation approach to nexus in both individual cases and with respect to the court’s broader analysis, we must situate the “on account of” test to consider how historical social and cultural conditions of oppression analogize this manner of persecution to the ways in which we envision the persecution of men in the public sphere.

If we broaden our gaze by utilizing this rhetorical approach we might reimagine how the public/private focus of asylum law prioritizes the protection of the male experience and how the refugee definition might be reimagined in light of sex and gender. This broader consideration is, according to experts in the field, a thornier issue,<sup>235</sup> but one that might benefit from considering the constellation approach.

For example, scholars do not agree about whether the most promising solution to gender-based claims in the asylum context might be to add gender as a protected ground, to cabin gender-based claims PSG category, or to advocate for a gender-informed lens across the grounds.<sup>236</sup> While some have advocated for including gender as a separate ground in the refugee definition, others have illustrated how such an approach is inconsistent with international law and would require a “whole new framework for interpretation and analysis.”<sup>237</sup> In order to consider each of these approaches, we

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234. Alessandro Portelli, *Oral Testimony, the Law and the Making of History: the “April 7” Murder Trial*, HIST. WORKSHOP J. 5, 31 (1985).

235. See, e.g., Vogel, *supra* note 42 at 417. Vogel acknowledges that:  
[S]cholars have proposed that gender should be a sixth ground for asylum in addition to race, religion, nationality, political opinion, and particular social group. As a separate ground, gender can be interpreted outside the construct of the particular social group category. Similar to identifying gender as a particular social group, gender as a sixth ground for asylum would eliminate the need to narrow particular social groups of women identified in gender-related asylum cases.

*Id.* Nevertheless, Vogel recommends that gender be incorporated into the PSG definition. *Id.*

236. See *id.*

237. *Id.* at 417 (emphasizing that “the addition of gender as a sixth ground

might imagine how transcendent rhetoric or, ideally, a fused, constellation approach, could advance advocacy.

With respect to the suggestion to incorporate gender specifically in the context of the PSG ground (as opposed to adding gender itself as a separate ground), a constellation lens reveals that such a strategy would enable courts to consider the unique experiences women face in terms of oppression. Theresa Vogel argues that regulations should define PSG as:

composed of members who share a common, immutable characteristic, such as sex, gender, color, kinship ties, or past experience, or who are perceived as a group by society. The characteristic is one which the member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.<sup>238</sup>

Vogel explains that such an approach could simplify confusion created by the addition of social distinction to the *Acosta* immutability requirement, noting that new legislation could use the traditional immutability approach and consider social distinction as an alternative, rather than an additional, requirement.<sup>239</sup> Such an approach, she asserts, would allow adjudicators to use the existing analytical framework for PSG, with some refinement,<sup>240</sup> and would continue to align United States asylum law with that of other countries.

Scholar Alexia Tizzano further explains that using gender as an established PSG might be beneficial in calling attention to the historical (and transcendent) ways in which women have been oppressed.<sup>241</sup> She reasons that “analyzing acts of persecution against women under the prism of the particular social group of women can draw attention to the social construction that exists behind the category of ‘women,’ including, the gender norms that underlie how women are perceived, how they are expected to behave, and what they are expected to think and want.”<sup>242</sup> Nonetheless, she cautions that emphasizing gender on the PSG ground may

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for asylum would set apart the refugee definition in U.S. asylum law from other countries in a very important way”).

238. *Id.* at 415.

239. *Id.*

240. *Id.* at 417 (arguing that the “societal perception requirement could follow the UNHCR’s approach, rather than the BIA’s confusing social visibility and particularity tests, and could be used in the alternative to the common immutable characteristic requirement—not as an additional requirement”).

241. Tizzano, *supra* note 32 at 598 (“Utilizing [the PSG ground] as a default category for assessing women’s claims may build recognition for the specificity of women’s experiences and oppression.”).

242. *Id.* at 598–99.

deprive women of the ability to claim refugee status across other grounds, “strengthen[ing] the notion that the traditional refugee is male[,] . . . reinforc[ing] the original and dominant interpretation of the Refugee Convention through a male perspective[, and] limiting the identity of women to a specific aspect of their experience.”<sup>243</sup> Her observations seem to invoke the need for a constellation-focused, rhetorical strategy to consider these questions, relying both on scapegoating to focus on individualized acts of violence and oppression, as well as transcendent observations of systemic harm and proposed structural solutions.

Tizzano’s reflections regarding the gender-based difficulties in establishing refugee status are rooted in the public/private divide and prioritization of male experiences.<sup>244</sup> Tizzano explains that segregating gender as protected in the PSG category “would perpetuate the notion that women’s activities, traditionally considered private and confined to the home, are seen as fundamentally different from men’s activities, and, thus, do not fit neatly within the remaining grounds.”<sup>245</sup> Such an approach is problematic insofar as it:

[c]onceiv[es] the persecution suffered by women, whose perpetrators typically are nonstate actors, as warranting the granting of refugee status amounts to recognizing the possibility of persecution in the private sphere. This is in direct opposition to the general conception of the persecuting state, whose victim in traditional thinking is a man fleeing because of his political opinions.<sup>246</sup>

Importantly, and returning to the constellation approach to fuse rhetorical strategies of individual harm with those proposing transcendent solutions, Tizzano asserts that adopting a “default category for gender-related claims also assumes that all women live the same experience, failing to recognize the diversity of their journey and identity, even where they depart from the same country of origin.”<sup>247</sup> Consequently, where women seek asylum based on other recognized grounds like political or religious beliefs, a default, gender-based PSG category could “[obscure] the more nuanced and diverse experiences of women.”<sup>248</sup> As a result, Tizzano recommends that gender pervade all refugee grounds. She concludes that:

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243. *Id.* at 600.

244. *Id.*

245. *Id.* at 600–01.

246. *Id.* at 601 (“Secluding women to a residual ground further marginalizes them and their experiences—often considered as “private”—falls under a subcategory of persecution.”).

247. *Id.*

248. *Id.*

Only with this approach would we achieve real women empowerment, as opposed to their victimization, and gender equality. Viewing gender horizontally, across all Refugee Convention grounds, would effectively place women on an equal footing with men before refugee status determination, thereby actualizing the European Union's commitment to promoting gender equality in all of its policies. This approach would also take into account the diversity of women's experiences, recognizing that their experience may not always be linked to their gender and not always in the same way.<sup>249</sup>

### CONCLUSION

The approach that emerges from Bloomfield's analysis demonstrates the advantages and limitations of using scapegoating and/or transcendent rhetoric in the fight against gender-based violence and suggests, instead, to marry the two in a constellation approach that invokes the benefits of each strategy in an intersectional context. This Article does not suggest that the approach provides a neat, theoretical framework to apply to other issues involving gender-based violence. Rather, the Article seeks to suggest new rhetorical dimensions to consider in advocating on behalf of women, particularly in instances such as asylum where such violence is systemically ignored or condoned.

Beyond my observations about how such a constellation approach might inform our understanding of the social distinction and nexus requirements, I invite the reader to consider broader uses of the constellation approach. This Article endeavors to illustrate the use of a constellation approach in individual cases, but its application in this context might be limited by the nature of litigation on behalf of individual applicants. Amicus briefs, on the other hand, often focus on policy implications and present materials beyond the record.<sup>250</sup> Further, general advocacy in the asylum context is not limited to the facts of an individual case. So, might advocates employ this rhetorical approach more narrowly, perhaps in activism around other aspects of the PSG test, such as particularity or immutability? Or, as touched upon earlier, doesn't the constellation approach have promise in addressing broader issues

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249. *Id.* at 604–05.

250. Reagan Wm. Simpson, *How to Be a Good Friend to the Court: Strategic Use of Amicus Briefs*, 28 BRIEF 38, 40 (1999) (explaining that the “facts an amicus intends to present may not be contained in the record of the case, and may extend beyond the facts of the particular case at issue. Nevertheless, the amicus should not lose sight of the case actually before the court and should not go too far afield. After all, the court is limited to deciding the dispute at hand.”).

implicated in this context, such as whether gender should be added as an additional refugee ground, or to the PSG definition, or to a consideration of all grounds? And doesn't the constellation show some promise in addressing what is the likely root of many of these problems: that the Refugee Treaty was constructed with the male experience in mind?

In short, my hope is that this Article helps demonstrate how advocacy about gender-based violence might benefit from considering the rhetorical lessons of the #MeToo movement. My sense is that we do have a tipping point, a kairic moment, fueled by important experts in this space (the rhetors), but also one that is galvanized by the scenic forces established in #MeToo (the message, the context, and the time). It strives therefore to spark conversations around gender-based violence in different contexts, and to consider how rhetorical strategies that were successful, but perhaps limited, in #MeToo—an arguably effective social, perhaps kairic, and Gladwell-esque tipping point—might be imported into, if not necessarily mapped onto, the asylum context.