POLITICKING ASYLUM'S POLITICAL OPINION

LINDA KELLY*

ABSTRACT

Does saying "No" to a rapist and being brutally attacked in retaliation establish political opinion for asylum? Is a political opinion expressed by an individual who is severely and repeatedly beaten for refusing to join a street gang because it is "bad for my town and country"?

Politicking Asylum's Political Opinion *provides a new approach to winning asylum claims for victims of private violence like rape and gang recruitment. It suggests that recent case law, both administrative and judicial, can provide direction to winning asylum cases for private violence victims by interpreting their political opinion within the proper context and by relying upon both direct and circumstantial evidence to establish that their fear of persecution on account of such political opinion is reasonable.*

TABLE OF CONTENTS

INTRODUCTION 44

I. THE LIMITS OF ASYLUM'S "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP" 46

II. DEFINING ASYLUM'S "POLITICAL OPINION" 49

A. *Whose Political Opinion* 49

B. *What Is Political Opinion* 50

C. *How Is Political Opinion Expressed* 51

D. *The Why of Political Opinion: The Mixed Motives of "on Account of"* 53

III. PROMOTING POLITICAL OPINION FOR PRIVATE VIOLENCE VICTIMS . . . 54

* M. Dale Palmer Professor of Law, McKinney School of Law, Indiana University.

A. *Hernandez-Chacon V. Barr* 55
B. *Zelaya-Moreno V. Wilkinson* 57

IV. POLITICAL OPINION 101: LESSONS LEARNED 58

V. APPLYING THE LESSONS 59
A. *Rape Victims* 60
B. *Gang Resisters* 61

CONCLUSION 63

INTRODUCTION

Does saying "no" to a rapist and being brutally attacked in retaliation establish a political opinion for asylum? Is a political opinion expressed by an individual who is severely and repeatedly beaten for refusing to join a street gang because it is "bad for my town and country"[1]? The definition of refugee creates numerous challenges for victims of private violence to qualify for asylum under U.S. immigration law.

Politicking Asylum's Political Opinion provides a new approach to winning asylum claims for victims of private violence like rape and gang recruitment. It suggests that recent case law, both administrative and judicial, can provide direction to winning asylum cases for private violence victims by interpreting their political opinion within the proper context and by relying upon both direct and circumstantial evidence to establish that their fear of persecution on account of such political opinion is reasonable.

To win asylum, an individual must successfully demonstrate that they have a fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion."[2] While every criterion has its challenges,[3] a great deal of legal attention has been recently devoted to considering how individuals seeking safety from "private violence" can establish the nexus between persecution and the basis for such persecution.[4] Significant

1. *See* Zelaya-Moreno v. Wilkinson, 989 F.3d 190, 200 (2d Cir 2021).

2. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A). Asylum (as set out in 8 U.S.C. § 1158(b)(1)(A)), relies upon the definition of a refugee (as set out in 8 U.S.C. § 1101(a)(42)(A)). While this underlying statutory substantive standard of asylum and refugee is identical, the two standards literally divide based upon where an individual is physically located upon making their claim. An individual is only eligible for asylum when they "are physically present" or are considered to have "arrived" in the United States. 8 U.S.C. § 1158(a)(1). An individual otherwise seeking the safety of the United States under this standard is considered to be applying for refugee status. For further discussion of procedural and other distinctions between asylum and refugee law, see, e.g., IRA J. KURZBAN ET AL., KURZBAN'S IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL 376–392 (18th ed. 2023) and STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REGUGEE LAW AND POLICY 951–957 (7th ed. 2019).

3. For comprehensive discussion of each of asylum's criteria, *see* KURZBAN, *supra* note 2, at 384–386; LEGOMSKY, *supra* note 2, at 360–362.

4. *See infra* note 149 and accompanying text.

strides have been made in the use of the "particular social group" factor for private violence. However, the "particular social group" is not without its limits and challenges.

In the shadow of "particular social group" claims, private violence cases are quietly being waged on the alternative front of "political opinion." The successes of these political opinion claims are notable and worthy of much greater exploration.[5] In 2021, in deciding *Hernandez-Chacon v. Barr*, the Second Circuit acknowledged that a political opinion could be voiced by a Salvadoran woman who was brutally attacked in retaliation for saying "no" and fighting off a would-be rapist.[6] Building upon the political opinion recognition in *Hernandez-Chacon*, *Zelaya-Moreno v. Wilkinson* brought another claim for asylum on account of political opinion.[7] Zelaya-Moreno's refusal to join El Salvador's Mara-Salvatrucha (MS) street gang included telling his recruiters that their gang was "bad for his town and country."[8] The Second Circuit majority in *Zelaya-Moreno v. Wilkinson* declined to find persecution took place on account of political opinion.[9] However, Judge Pooler's lengthy dissent convincingly analogized *Zelaya-Moreno* to *Hernandez-Chacon*. Like the outcries of the word "No" to a would-be rapist in *Hernandez-Chacon*, the "direct" challenge to MS authority in *Zelaya-Moreno* was seen as political opinion by Judge Pooler.[10]

This Article purports to further the use of political opinion for individuals seeking asylum on account of private violence. Part I begins by reviewing the successes and limits posed by the particular social group basis for asylum. Part II then provides an overview of what constitutes political opinion in asylum law. Part III moves to a discussion of the potential of using political opinion to qualify for asylum for private violence victims in the two contexts of intimate violence and gang violence. The section uses *Hernandez-Chacon* and *Zelaya-Moreno* as a framework for developing theories which can be applied in other private violence cases. After Part IV articulates four essential lessons learned from these case studies, Part V applies the lessons to other cases of intimate and gang violence. *Politicking Asylum's Political Opinion* suggests how existing case law, both administrative and judicial, can provide direction to winning asylum cases for private violence victims by interpreting political opinion within the proper context. Once political opinion is established, private violence victims can innovatively rely upon both direct and

---

5. For the limited number of recent articles dedicated to asylum's political opinion, *see* the Supreme Court's critical 1992 decision of *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); Donald W. Yoo, *Exploring the Doctrine of Imputed Political Opinion and its Application in the Ninth Circuit*, 19 GEO. IMMIGR. L.J. 391 (2005); Mark G. Artlip, *Neutrality as Political Opinion: A New Asylum Standard for a Post*-Elias-Zacarias *World,* 61 U. CHI. L. REV. 559, (1994); Catherine Dauvergne, *Toward a New Framework for Understanding Political Opinion*, 37 MICH. J. INT'L L. 2213 (2016); Peter Smith, Note, *Suffering in Silence: Asylum Law and the Concealment of Political Opinion as a Form of Persecution*, 44 CONN. L. REV. 1021 (2012).

6. Hernandez-Chacon v. Barr, 948 F.3d 94, 104–05 (2d Cir. 2020).

7. *Zelaya-Moreno*, 989 F.3d at 196.

8. *Id*. at 195.

9. *Id*. at 199–201.

10. *Id*. at 208 (Pooler, J., dissenting).

circumstantial evidence to establish that their fear of persecution on account of such political opinion is reasonable.

I. THE LIMITS OF ASYLUM'S "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP"

Almost 40 years ago, *In re Acosta* provided the Board of Immigration Appeals (BIA) its first opportunity to define the statutory term "membership in a particular social group."[11] Based on the legal canon of *ejusdem generis* ("of the same kind"), *Acosta* compared "particular social group" to the alternative "on account of" factors of "race, religion, nationality and political opinion" and concluded that individuals within each of the five factors possessed a "shared characteristic" that was "immutable" and that "could not or should not be changed."[12] *Acosta* further suggested that a trait of "membership in a particular social group" could be evidenced in an "innate" or a "shared past experience."[13] Consequently, shortly after *Acosta*, the particular social groups of "clan membership"[14] and "former police officers"[15] were relatively easily recognized. Quickly, the creative potential of particular social group claims and numerous arguments of "immutable" and "innate characteristics" were seized upon by other asylum claimants who could not readily fit within the more traditional four factors.[16]

In 2008, the BIA responded to the burgeoning particular social group claims by announcing the twin gang-based asylum cases of *Matter of S-E-G-*[17] and *Matter of E-A-G-*.[18] Through this formidable pair, the BIA added the additional

---

11. Matter of Acosta, 19 I. & N. Dec. 211, 232–33 (B.I.A. 1985), overruled by Matter of Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1989) (overruled for other reasons).

12. *Id.* at 233.

13. *Id.*

14. Matter of H-, 21 I. & N. Dec. 337, 345–346 (B.I.A. 1996) (Somali clan membership).

15. Matter of Fuentes, 19 I. & N. Dec. 658, 661 (B.I.A. 1988) (Salvadoran former police officers).

16. For federal circuit examples of the variety of early successful particular social group cases, *see e.g.*, Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998) (parents of Burmese student dissidents); Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993) (Iranian feminists who refuse to conform to the government's gender-specific laws and social norms); Ananeh-Firempong v. INS, 766 F.3d 621, 626 (1st Cir. 1985) (family); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) ("collection of people closely affiliated with each other, who are actuated by some common impulse or interest"); Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) ("voluntary association, including a former association, or by an innate characteristic. . ."). For BIA examples of the variety of early successful particular social group cases, *see, e.g.*, Matter of V-T-S-, 21 I. & N. Dec. 792, 798 (B.I.A. 1997) (Filipinos of mixed Filipino-Chinese ancestry); Matter of Kasinga, 21 I. & N. Dec. 357, 358–59, 365–66 (B.I.A. 1996) (young women of the Tchamba-Kunsunta tribe of northern Togo who did not undergo female genital mutilation as practice by that tribe and who opposed the practice); Matter of Toboso-Alfonso, 20 I. & N. Dec. 819, 319 (B.I.A. 1990) (persons identified as homosexual by the Cuban government).

17. Matter of S-E-G-, 24 I. & N. Dec. 579, 582–83 (B.I.A. 2008). While S-E-G- initially coined both the terms "particularity" and "social visibility," circuit criticism of "social visibility" as a demand that the group's defining characteristics be physically visible led to the term being replaced by "social distinction." In adopting the new "social distinction" term, the BIA maintained the terms' shared the same meaning. *See In re* W-G-R-, 26 I. & N. Dec. 208, 216 (B.I.A. 2014) ("We now rename that requirement "social distinction" to clarify that social visibility does not mean "ocular" visibility. . ."). *See also* M-E-V-G-, 26 I. & N. Dec. 227, 238 (B.I.A. 2014) ("Literal or "ocular" visibility is not, and never has been, a prerequisite for a viable particular social group"). For circuit rejection of the former "social visibility" standard, *see e.g.*, Valdiviezo Galdamez v. A.G., 663 F.3d 582, 603 (3d Cir. 2011); Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009); Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

18. Matter of E-A-G-, 24 I. & N. Dec. 591, 593 (B.I.A. 2008).

requirements of "particularity" and "social distinction."[19] Working together, the BIA declared these concepts would "give greater specificity to the definition of a social group."[20] "Particularity" looks inward, requiring the proposed group to be "accurately described" so that it avoids being considered "'too amorphous. . . to create a benchmark for determining group membership.'"[21] By contrast, "social distinction" looks outward, asking whether the society in question "perceives, considers, or recognizes persons sharing the particular characteristics to be a group."[22]

When applied,[23] "particularity" and "social distinction" present hurdles that often prove insurmountable for intimate violence and gang violence claims. A rape victim, without more, cannot establish persecution based on being a member of a particular social group. Rape, in and of itself, cannot create a distinguishable particular social group of "rape victims." The "circularity" restriction prevents a particular social group from being defined by the act of violence.[24] Likewise, numerous permutations of particular social groups based on gang resistance[25] and being family members of gang

19. Matter of S-E-G-, 24 I. & N. at 582–83. *See also* Matter of E-A-G-, 24 I. & N. at 594.

20. Matter of S-E-G-, 24 I. & N. at 582.

21. *Id*. at 584 (quoting *Davila-Mejia v. Mukasey,* 531 F.3d 624, 629 (8th Cir. 2008).

22. *In re* W-G-R-, 26 I. & N. at 217.

23. There are significant circuit differences in the use of both or either of the "particularity" and "social distinction" terms. The Third Circuit has rejected both "particularity" and the previous "social visibility" term. *See* Valdiviezo-Galdamez v. Att'y Gen. (Valdiviezo-Galdamez II), 663 F.3d at 608. The Fourth and Seventh Circuits rejected the earlier social visibility terminology but have not explicitly accepted or rejected the particularity or social distinction terms. For relevant cases in the Fourth Circuit rejecting social visibility, see e.g., Martinez v. Holder, 740 F.3d 902, 910 (4th Cir. 2014); Zelaya v. Holder, 668 F.3d 159, 165–66 (4th Cir. 2012); Temu v. Holder, 740 F.3d 887, 894 (4th Cir. 2014). For cases in the Seventh Circuit rejecting social visibility, *see e.g*., Gatimi v. Holder, 578 F.3d at 616; Benitez Ramos v. Holder, 589 F.3d at 430. For circuit decisions accepting the "social distinction" and "particularity" requirements, *see e.g*., Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013) (clarifying while still reserving assessment of validity of "particularity" and "social visibility"); Orellana-Monson v. Holder, 685 F.3d 511, 511 (5th Cir. 2012); Rivera-Barrientos v. Holder, 666 F.3d 641, 650–52 (10th Cir. 2012); Gaitan v. Holder, 671 F.3d 678, 681 (8th Cir. 2012); Bonilla-Morales v. Holder, 607 F.3d 1132, 1137 (6th Cir. 2010); Larios v. Holder, 608 F.3d 105, 108 (1st Cir. 2010); Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007), aff'g, *In re* A-M-E-& J-G-U-, 24 I & N Dec. 69, 69 (B.I.A. 2007); Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1196 (11th Cir. 2006), aff'g sub nom. *In re* C-A, 23 I & N Dec. 951, 951 (B.I.A. 2006).

24. "[A] social group cannot be defined exclusively by the fact that it is targeted for persecution. . . [However], persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society." *See* Matter of C-A-, 23 I & N at 960 (quoting U.N Refugee Agency, Guidelines on International Protection ¶¶ 2, 14: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002)). *See also* Matter of A-M-E- & J-G-U, 24 I & N at 74; Matter of S-E-G-, 24 I. & N. at 584. The broad resistance to viewing "women" as a particular social group also prevents a female rape victim from arguing the rape was "on account of" being a woman. *See e.g*., Perdomo v. Holder, 611 F.3d. 662, 666 (9th Cir. 2010) ("Whether females in a particular country, without any other defining characteristics, could constitute a protected social group remains an unresolved question for the BIA."); Argueta v. Garland 2022, U.S. App. LEXIS 31490 (2d Cir. Nov. 15, 2022) (rape is act of "ordinary criminality" and does not establish particular social group).

25. Matter of S-E-G-, 24 I & N at 581 (rejecting particular social group of "Salvadoran youth who have been subjected to recruitment efforts by MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities. . ."); Matter of E-A-G-, 24 I & N at 593 (rejecting particular social group of "young persons who are perceived to be affiliated with gangs (as perceived by the government and/or general public)" and "persons resistant to gang membership"). For circuit rejection of gang resister claims, *see e.g*.,

resisters[26] do not succeed. The common failing of such proposed groups is that there is no "outer delineation"[27] which earmarks the group to prevent it from being so "amorphous or overbroad"[28] that it cannot be legally cognizable.

Certainly, the particular social group factor is invaluable. While hard won, intimate violence claimants have found success in the particular social group category for victims of female genital mutilation,[29] family,[30] and domestic violence.[31] After a lengthy fight in the gang arena, versions of "former gang member"[32] and

---

Mayorga-Vidal v. Holder, 675 F.3d 9, 17 (1st Cir. 2012) (rejecting young Salvadoran men who have resisted gang recruitment and whose parents are unavailable to protect them as a particular social group); Garcia v. Garland, No. 20-2241, 2023 WL 2941515, at *2 (2d Cir. 2023) (rejecting "Guatemalans who have informed on the gang to local authorities. . ."); Umana-Ramos v. Holder, 724 F.3d 667, 667 (6th Cir. 2013) (rejecting "young Salvadorans who ha[ve] been threatened because they refuse to join the [MS] gang"); Ortiz-Puentes v. Holder, 662 F.3d 481, 483 (8th Cir. 2011) (young Guatemalans who refuse to join gangs); Ngugi v. Lynch, 828 F.3d 1132, 1137 (8th Cir. 2016) (Mungiki gang resisters not a particular social group); Barrios v. Holder, 581 F.3d 849, 849 (9th Cir. 2009) (refusal to join gang is not a basis for a particular social group); Ramos-Lopez v. Holder, 563 F.3d 855, 855 (9th Cir. 2009) (Honduran males resisting MS-gang membership not a particular social group); Santos Lemus v. Mukasey, 542 F.3d 738, 741 (9th Cir. 2008) (class of young men in El Salvador who resist the violence and intimidation of gang rule not basis for a particular social group).

26. Matter of S-E-G-, 24 I & N at 588. (rejecting particular social group of "family members of such Salvadoran youth" who have resisted gang membership). However, for more recent circuit developments recognizing the potential that "family of gang" particular social group claims may survive notwithstanding the failure to recognize underlying "gang resister's" claims, *see e.g.*, WGA v. Session, 900 F.3d 957, 965 (7th Cir. 2018) (recognizing the family particular social group claim of an applicant persecuted in retribution for his brother's failure to comply with gang demands in El Salvador). *See also* Crespin-Valladares v. Holder, 632 F.3d 117, 126–27 (4th Cir. 2011) (recognizing particular social group status for family members of individuals who serve as prosecutorial witnesses against gang members although it did not recognize prosecutorial witnesses themselves as a particular social group).

27. *In re* W-G-R-, 26 I & N Dec. 208, 214 (B.I.A. 2014).

28. *In re* M-E-V-G-, 26 I & N Dec. 227, 239 (B.I.A. 2014).

29. *In re* Kasinga, 21 I & N Dec. 357 (B.I.A. 1996) (young women of the Tchamba-Kunsuntu Tribe who have not had FGM as practiced by the tribe, and who oppose the practice.").

30. Matter of L-E-A- III, 28 I & N Dec. 304 (AG 2021) (overruling *Matter of L-E-A- II*, 27 I & N Dec. 581 (A.G. 2020), thereby restoring *Matter of L-E-A-*, 27 I & N. Dec. 40 (B.I.A. 2017) (recognizing particular social group of immediate family members). *See* Catholic Legal Immigration Network, *Attorney General Garland Vacates* Matter of A-B- *and* Matter of L-E-A-, CLINIC (July 28, 2021), https://perma.cc/BMJ3-KHQT, for a further discussion of the challenges of "family" and the importance of sufficiently delineating a particular social group based on family. *See also* Linda Kelly, *"On Account of" Private Violence: The Personal/Political Dichotomy of Asylum Nexus*, 21 U.C.L.A. A. J. INT'L L. & FOREIGN AFF. 98, 108–114 (2017).

31. Matter of A-R-C-G-, 26 I & N Dec. 388 (B.I.A. 2014) ("married women in Guatemala who are unable to leave their relationship"). *See also* Matter of A-B-, 28 I & N Dec. 307 (A.G. 2021) (overruling Matter of A-B-, 27 I & N Dec. 316 (A.G. 2018) and allowing Matter of A-R-C-G-, 26 I & N Dec. 338 (B.I.A. 2014) to be followed). *Matter of A-R-C-G-*'s recognition of a particular social group claim for domestic violence survivors has been a long battle, which may not be over. *See infra* note 40 for further discussion of the lengthy, controversial and ongoing battle for domestic violence asylum applicants pursuant to A-R-C-G. *See, e.g.,* Blaine Bookey, *Gender-Based Asylum Post-*Matter of A-R-C-G*: Evolving Standards and Fair Application of the Law*, 22 SW J. INT'L L 1 (2016) (finding that despite A-R-C-G's "undeniable contributions" for domestic violence asylum cases, that the ruling is "narrow and fact-specific" allows for too much discretion, relies on a "muddled definition" particular social group and has led to a "hodgepodge of jurisprudence").

32. For the recognition of a valid particular social group for "former gang members," *see* Valdiviezo Galdamez v. A-G, 663 F.3d 582 (3d 2011) (former gang members); Amaya v. Rosen, 986 F.3d 424 (4th Cir. 2021); Urbina Mejia v. Holder, 597 F.3d 360, 266 (6th Cir. 2010) (former Honduran 18th Street gang members); Gatimi v. Holder, 578 F.3d 61 (7th Cir. 2009) (former Mungiki members); Benitez Ramos v. Holder, 58 F3d 426 (7th Cir. 2009) (former gang members); Gathungu v. Holder, 725 F.3d 900 (8th Cir. 2013) (Mungiki gang defectors); *but c.f.* Matter of W-G-R-, 26 I & N Dec. 208 (B.I.A. 2014) (rejecting

"perceived gang member"[33] claims have also been recognized in many circuits as legally cognizable particular social groups. However, these successes cannot be easily replicated for other private violence claimants. The successful particular social group claims are arguably perceived as possessing the underlying "innate or immutable characteristic" which pass applicable "particularity" and "social distinction" requirements.[34] A more cynical explanation would suggest that political intervention for certain sympathetic victims of otherwise incoherent particular social groups account for this.[35] The undeniable takeaway is that the particular social group category does not provide protection for all private violence asylum claimants, which is why political opinion demands further exploration.

II. DEFINING ASYLUM'S "POLITICAL OPINION"

Like particular social group, the term "political opinion" is not defined by the controlling asylum statutes.[36] Nothwithstanding the deference to BIA interpretation, the Supreme Court and circuit courts also provide critical contributions to help clarify the scope of "political opinion."[37] Breaking down political opinion into the "who," "what," "how," and "why," helps us understand its discrete and overlapping dimensions.

A. *Whose Political Opinion*

The Supreme Court's decision of *INS v. Elias-Zacarias* drastically limited the scope of the political opinion definition.[38] Despite the statute failing to

---

particular social group of former members of the Mara 18 in El Salvador who have renounced gang membership); Chavez v. Garland, 51 F. 4th 424 (1st Cir. 2022) (affirming that "actual gang members" cannot form a valid particular social group but remanding for determination on validity of particular social group of "perceived" gang members); Artega v. Mukasey, 511 F.3d 940, 945 (9th Cir. 2007) (rejecting particular social group of tattooed gang member); Vasquez Rodriguez v. Garland, 7 F.4th 888, 896–897 (9th Cir. 2021) (rejecting the BIA's position that perceived gang members can established a particular social group but upholding Artega precedent that former gang members cannot qualify).

33. Chavez v. Garland, 51 F. 4th 424 (1st Cir. 2022) (remanded to determine whether "perceived members of MS-18 can be a valid particular social group).

34. *See e.g.*, *In re* W-G-R-, 26 I & N Dec. 208 (B.I.A. 2014); Matter of M-E-V-G-, 26 I & N Dec. 227 (2014). For further discussion of social distinction and particularlty, *see supra* notes 24–35 (appx).

35. For domestic violence survivors, successful particular social groups are found in variations of those accepted in *Matter of A-R-C-G-*, *supra* note 31 ("married women in Guatemala who are unable to leave their relationship). For Blaine Bookey's criticism of the confusing, "muddled" particular social groups for domestic violence survivors, *see* Bookey, *supra* note 31.

FGM based asylum applicants form particular social groups in reliance on *In re Kasinga*, *supra* note 16 ("young women of the Tchamba-Kunsuntu Tribe who have not had FGM as practiced by the tribe, and who oppose the practice."). For my earlier criticism of *Kasinga*'s convoluted particular social group and "good victim" justification for its development, *see* Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 587-92 (2000).

36. INA §101(a)(42); 8 USC § 1101(a)(42).

37. Traditionally, such judicial deference to administrative interpretation was based on *Chevron U.S. A v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Chevron was overturned as the paper went to press. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024). The recent overturning of Chevron and its impact on judicial deference to agency interpretation is beyond the scope of this paper.

38. INS v. Elias Zacarias, 502 U.S. 478 (1992).

identify *whose* political opinion is controlling (i.e., the persecutor or the victim), *Elias-Zacarias* directs that only the victim's political opinion is relevant.[39] Writing for the majority, the otherwise literalist Justice Scalia announced that "persecution or a well-founded fear of persecution on account of political opinion refers to persecution on account of the *victim's* political opinion, not the *persecutor's* political opinion."[40] Critically, in addition to a victim's *actual* political opinion the victim-focused political opinion standard continues to allow for a victim's *imputed* political opinion.[41] Post *Elias-Zacarias*, asylum's political opinion also continues to recognize conscientious objectors.[42]

B. *What Is Political Opinion*

As an initial matter, political opinion "must transcend self-protection."[43] The victim must be in disagreement (or imputed disagreement) with the policies or the ideology of their persecutor.[44]

> Even when a widespread conflict between a foreign government and an opposing non-state actor [exists] . . . a party seeking political opinion asylum must do more than describe how this overshadowing has affected his life. To receive protection as a refugee, he must also demonstrate that he has a particular stake in the conflict and a position on how governance in that country ought to occur.[45]

Importantly, the victim's disagreement can be with *either* the government *or* the private, non-state actor.[46] "[U]nder appropriate circumstances, even overtly apolitical or nongovernmental organizations may take on a political valence such that support or opposition to them can constitute political opinion."[47] However, in either instance, the policies or ideology opposed must

---

39. *Id.*

40. *Id.* at 481 (Guatemalan guerrilla organization's efforts to recruit the asylum applicant did not necessarily constitute persecution on account of political opinion).

41. *See, e.g.*, Vasquez v. INS, 177 F.3d 62 (1st Cir. 1999) (recognizing the imputed political theory, but finding a government witness to FMLN guerrilla assassinations was only a witness to a crime, not imputed by guerrillas to be pro-government); *cf.*, Rios v. Ashcroft 287 F.3d 895 (9th Cir. 2002) (anti-guerrilla opinion imputed to wife of Guatemalan military husband after the guerrillas repeatedly attack, threaten, and associate her with her murdered husband).

42. *See, e.g.*, Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993) (recognizing applicant's feminist views as political opinion and alternatively acknowledging that disobeying Iran's "gender-specific laws and repressive social norms" on grounds of conscience would be a valid political opinion).

43. *Zelaya-Moreno*, 989 F.3d 190.

44. A political opinion "must involve some support for or disagreement with the belief system, policies, or practices of a government and its instrumentalities, an entity that seeks to directly influence laws, regulations, or policy, an organization that aims to overthrow the government, or a group that plays some other similar role in society." *Zelaya-Moreno*, 989 F.3d at 199.

45. Saldarriaga v. Gonzalez, 402 F.3d 461, 467 (4th Cir. 2005).

46. Ruqiang Yu v. Holder, 693 F3d 294, 298 (2d Cir. 2012) (relying on *Pavlova v. INS*, 441 F.3d 82, 91 (2d Cir. 2006)).

47. *Zelaya-Moreno*, 989 F.3d at 199.

have political underpinnings.[48] For non-governmental opposition, a victim's political opinion may be framed against "an entity that seeks to directly influence laws, regulations, or policy, an organization that aims to overthrow the government, or a group that plays some other similar role in society."[49]

Recognition of a victim's political opinion can also include opposing the persecutor's violent practices, if such practices are part of the persecutor's political ideology.[50] However, if the use of violence is simply perceived as being used by "criminal organizations and not political or government organizations," the activities of such entities are deemed criminal, not political.[51] In these cases, "expressing an opinion against [a criminal] group is not expressing a political opinion; it is merely expressing opposition to that group and its attempts to recruit."[52] Nor can evoking the "enmity" of a criminal gang through such opposition to their practices parlay into political opposition.[53] In short, in both public and private cases, evidence must exist that the persecutor holds a belief system which the applicant opposes or is perceived to oppose based on the applicant's own political or ideological ideals.[54]

C. *How Is Political Opinion Expressed*

Given that persecution must be "on account of" political opinion, a victim may not simply hold an "internal political opinion" which is unbeknownst to others.[55] "Holding a political opinion, without more, is not sufficient to show persecution on account of that political opinion."[56] Nor can political opinion be inferred from "random acts of violence."[57] If an individual claims he has refused to join a gang based on political opinion, "[t]here must be evidence that the gang knew of his political opinion and targeted him because of it."[58]

---

48. In this respect, notwithstanding Elias Zacarias' claimed focus solely on the victim's political opinion, the "political opinion" statutory factor does effectively account for both the victim and persecutor's political opinion asylum. For further discussion of Elias Zacarias, see *supra* note 5 and accompanying text.

49. *Zelaya-Moreno*, 989 F.3d at 199.

50. Regalado-Escobar v. Holder, 717 F.3d 724 (9th Cir. 2013). *See also* Borja v. INS, 175 F.3d 732, 736 (9th Cir. 1999) (en banc) ("revulsion" against the violent practices of armed forces against women and children recognized as political opinion).

51. *Zelaya-Moreno*, 989 F.3d 190 (quoting underlying BIA decision).

52. *Id*. at 196.

53. *Id*.

54. Denying asylum to applicant as "[n]o evidence . . . that the gang held any sort of belief system that they perceived Santos-Lemus to oppose [or that] . . . he was politically or ideologically opposed to the ideals espoused by the Mara or to gangs in general." Santos-Lemus v. Mukasey, 542 F.3d 738, 747–48 (9th Cir. 2008), *abrogated on other grounds by* Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013) (en banc).

55. *See* Valdiviezo-Galdamez v. Att'y Gen. (Validviezo II), 663 F.3d 582, 609 (3rd Cir. 2011).

56. *Id*.

57. "[P]ersecution on account of political opinion . . . can[not] be inferred merely from acts of random violence by members of a village or political subdivision against their neighbors who may or may not have divergent . . . political views." Santos-Lemus, 542 F.3d at 747 (quoting Ochave v. INS, 254 F.3d 859, 865 (9th Cir. 2001)).

58. *See Valdiviezo-Galdamez*, 663 F.3d at 609. As stated by the Second Circuit, "[W]hile one need not broadcast one's beliefs to the entire world to hold belief that are political in nature, these beliefs and

While the "how" a political opinion is expressed is entangled with the "what" the political opinion is, a narrow focus on political expression leads to a critical question: What constitutes the expression of a political opinion? Circuits are divided. The Seventh Circuit, for example, requires political opinion to be expressed through more traditional political activities and speech:

> Campaigning against the government, writing op-ed pieces, urging voters to oust corrupt officials, founding an anti-corruption political party, actively participating in an anti-corruption party's activities, or speaking out repeatedly as a 'public gadfly' are classic examples of political speech.[59]

By contrast, the Second and Ninth Circuits disavow such an "impoverished" view of political opinion in favor of a more contextual approach–[60]

> This analysis necessarily involves a 'complex and contextual factual inquiry into the nature of the asylum applicant's activities in relation to the political context in which the dispute took place.'. . .Because the form and nature of political opposition can vary widely, the assessment of when opposition to corruption becomes an expression of a political opinion involves a context-specific, case-by-case determination.[61]

Following the traditional or contextual approach can be decisive to a determination that political opinion is being expressed. For example, in the Seventh[62] and Second Circuits,[63] similar cases were brought by Chinese asylum applicants who disagreed with wages and policies at government-controlled factories and encouraged fellow works to join them in protest. In each case, the applicants were imprisoned, beaten, and fired for their actions.

Based on the traditional approach, the Seventh Circuit found no political opinion.[64] This was not a "matter of public concern" nor a "protest of government corruption," but rather an "economic demand."[65] The applicant "never belonged to a political organization or demonstrated against the Chinese government."[66] He organized workers to get their jobs and benefits back, nothing

---

actions taken in support of them must have some political ambition in mind – or, for an imputed claim, must be perceived in this manner." *Zelaya-Moreno*, 989 F.3d at 199.

59. Haichun Liu v. Holder, 692 F.3d 848 (7th Cir. 2012).

60. *See* Regalado-Escobar v. Holder, 717 F.3d 724, 730 n.5 (9th Cir. 2013). The Second Circuit also adheres to a contextual determination of what constitutes political opinion. *See, e.g.*, *Zelaya-Moreno*, 989 F. 3d at 196. *See also* Zhang v. Gonzales, 426 F. 3d 540, 546-49 (2d Cir. 2005); Osorio v. INS, 18 F.3d 1017 (2d Cir. 1994).

61. Rugiang Yu v. Holder, 693 F.3d 294 (2d Cir. 2012) (quoting Castro v. Holder, 597 F.3d 93, 101 (2d Cir. 2010)).

62. *See* Haichun Liu v. Holder, 692 F.3d 848, 850 (7th Cir. 2012). *See also* Weiping Chen v. Holder, 744 F.3d 527, 530 (7th Cir. 2014).

63. *See Ruqiang Yu*, 693 F.3d at 295-97.

64. *Haichun Liu*, 692 F.3d at 853.

65. *Id*. at 852.

66. *Id*.

more.[67] By contrast, the contextual approach led the Second Circuit to find political opinion.[68] The applicant's conduct was "typical of political protest" as he "had no personal, financial motive to oppose the corruption, undertook to vindicate the rights of numerous other persons as against an institution of the state and suffered retaliation."[69]

D. *The Why of Political Opinion: The Mixed Motives of "on Account of"*

Establishing political opinion and the persecutor's awareness of such opinion leads to an important bridge. Can the victim establish their persecution or fear of persecution "on account of" such political opinion? The "mixed motives" standard prevents the applicant from having to conclusively establish that the persecutor's harm is politically motivated. Instead, based on "direct or circumstantial evidence," the applicant need only show that it is reasonable to believe that the harm was motivated in part by an actual or imputed protected ground."[70]

Drawing reasonable inferences from direct or circumstantial evidence is particularly helpful in claims of intimate violence. Why should victims have to depend on the rapists to explain their actions? As *Garcia-Martinez v. Ashcroft* made clear, such a demand is "patently unreasonable."[71] Garcia-Martinez came from the small Guatemalan village of San Andres Villa Seca.[72] During the 1980s, the guerrillas forcibly conscripted (or killed) one man from every house in her village.[73] Garcia-Martinez's brother was amongst those who never returned after being forcibly recruited.[74] A few years later, the military started regularly coming to the town.[75] Townspeople were beaten and killed.[76] Women were raped.[77] When the military came to Garcia-Martinez's home, they raped her, killed her father, and beat her mother.[78]

---

67. *Id.*
68. *See Rugiang Yu*, 693 F.3d at 298.
69. *Id.* at 299.
70. "In mixed motive cases, an asylum applicant is not obliged to show conclusively why persecution has occurred or may occur. . .[Instead] the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed protected ground." *In re* S-P, 21 I & N Dec. 486, 495 (B.I.A. 1996) (Asylum granted to applicant detained and abused by the Sri Lankan Government, not only to obtain information about the identity of guerrilla members and the location of their camps, but also because of an assumption that his political views were antithetical to those of the Government).
71. *See* Garcia Martinez v. Ashcroft, 371 F.3d 1066, 1076 (9th Cir. 2004). For a similar recognition, *see also* Espinosa-Cortez v. U.S. Att'y Gen., 607 F.3d 101, 109 (3d Cir. 2010) (finding it "patently absurd" to expect an applicant to produce documentary evidence of the persecutor's motives).
72. *See* Garcia Martinez v. Ashcroft, 371 F.3d 1066, 1069 (9th Cir. 2004).
73. *See id.* at 1070.
74. *See id.*
75. *See id.*
76. *See id.*
77. *See id.*
78. *See id.* at 1070–71.

Denying asylum, the immigration judge (IJ) and BIA found no nexus between the military's actions and any protected ground. Although horrific, the soldiers were just "acting physically."[79] The Ninth Circuit disagreed and granted asylum.[80] Relying on the circumstantial evidence, the Ninth Circuit was able to draw the reasonable inference that the military's actions were in retaliation for the imputed support of Garcia-Matinez (as well as the town) for the guerrillas.[81] Moreover, the mixed motives standard prevented the applicant from having to show persecution "solely" on account of political opinion.[82] "The soldiers' carnal interest and imputation of political opinion to Garcia-Martinez both existed. Simply because the soldiers 'might have had more than one motivation for raping [Garcia-Martinez] does not in itself defeat her asylum claim.'"[83]

Garcia-Martinez illustrates the value of using a mixed motives analysis and relying on circumstantial evidence.[84] In rare instances, the courts are even more adamant about how easily the inference can be drawn. As the Ninth Circuit repeatedly states, "[We] have held persecution to be on account of political opinion where there appears to be no other logical reason for the persecution at issue."[85]

III. PROMOTING POLITICAL OPINION FOR PRIVATE VIOLENCE VICTIMS

Against this backdrop of the interconnected dimensions of asylum's political opinion it is instructive to consider the success of the political opinion arguments accepted by the Second Circuit majority in *Hernandez-Chacon v. Barr*[86] and the Second Circuit dissent in *Zelaya-Moreno v. Wilkinson*.[87] Both decisions rely heavily on a contextual approach in order to find the victim expressed a valid political opinion. In so doing, the Second Circuit's opinions reflect detailed discussions of the facts and full evaluations of other critical evidence, such as country conditions. Finding political opinion, a mixed motives analysis

79. *See id.* at 1072.
80. *See id.* at 1079.
81. *Id.* at 1077.
82. *Id.* at 1073.
83. *Id.* (quoting Shoafera v. INS, 228 F.3d 1070, 1075–76 (9th Cir. 2000)).
84. For additional great examples of mixed motives and circumstantial evidence, *see e.g.*, Rios v. Ashcroft, 287 F.3d 895 (9th Cir. 2002) (imputed political opinion of pro-military support to wife of Guatemalan military officer based on attack and threats against wife and killing of husband); Molina Morales v. INS, 237 F.3d 1048 (9th Cir. 2001) (dissenting opinion) (imputed political opinion when applicant beaten and threated after helping aunt report being raped and murder by political mayoral candidate); Malonda v. Barr, 837 Fed. Appx. 12 (2d Cir. 2020) (imputed political opinion of father to son after soldiers in the DRC attacked him, raped and killed three of his sisters, and abducted his father and brother on account of the father's political opinion).
85. Navas v. INS, 217 F.3d 646, 657 (9th Cir. 2000). "Where police beat and threaten the spouse of a known dissident, it is logical, *in the absence of other evidence pointing to another motive*, to conclude that they did so because of the spouse's presumed guilt by association. In the eyes of those who persecute the spouse of a political activist, the activist's political sins are, by derivation, the spouse's." *Id.* at 659 n.18 (emphasis added). In reliance on Navas' no "other reasonable explanation"/"evidence of other motive" standard, *see e.g.*, Rios v. Ashcroft, 287 F.3d 895, 900–901 (9th Cir . 2002).
86. *See* Hernandez-Chacon v. Barr, 948 F.3d 94, 103–104 (2d Cir. 2020).
87. *See Zelaya-Moreno*, 989 F.3d 190, 206–207 (2d Cir. 2021) (Pooler, J. dissent).

then ensues.[88] The law reflects that direct *or* circumstantial evidence (or both) can establish that the critical "on account of" nexus can be reasonably drawn between the victim's political opinion and the feared persecution.

On behalf of private violence victims, these arguments should be adapted and made throughout the circuits. After breaking down the *Hernandez-Chacon* majority and *Zelaya-Moreno* dissenting opinions, the following section proposes how various private violence victims can further their political opinion claims by adhering to the lessons learned from these cases.

A. *Hernandez-Chacon V. Barr*

In El Salvador, Hernandez-Chacon resists the forced sexual advances of a man two times.[89] The first time, he is alone.[90] Without permission, he enters her home.[91] When he tries to force her to have sex, she says "no," struggles free, runs into an interior room of the home, and locks herself in.[92] During testimony she tells court that she said "no" "even though she knew that resisting his advances would put her in danger."[93] She further testifies she resisted "because I have every right to."[94]

Three days after the man tries to rape Hernandez-Chacon in her home, she is attacked by him again on the street.[95] He and two other men walk out of a cemetery, wearing masks.[96] She recognizes his voice.[97] Her attacker says, "if you didn't want to do this in a good way, it will happen in a bad way."[98] One of the other men has a MS gang tattoo on his arm.[99] When they try to take her by force, she screams.[100] They pull her into the cemetery. [101] She is beaten until she loses consciousness and awakes in the hospital.[102] Upon leaving the hospital she finds a threatening note under the door saying if she goes to the police they will kidnap her daughter, and that they will rape her and kill her and pull out her tongue.[103] After hiding at home for several months, she saves enough money to flee to El Salvador with her daughter.[104]

Apart from Hernandez-Chacon's testimony, the Second Circuit recounts in detail an expert witness declaration introduced at trial on the "plight of

88. Hernandez-Chacon v. Barr, 948 F.3d 94 at 104. *Zelaya-Moreno*'s dissent does not reach the nexus stage as it was not considered below.
89. *Hernandez-Chacon*, 948 F.3d at 97–98.
90. *Id.* at 97.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 98.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*

women in El Salvador."[105] The affidavit details El Salvador's "entrenched. . .machismo. . .and patriarchal culture."[106] It acknowledges that Salvadoran society "accepts and tolerates men who violently punish women for violating these gender rules or disobeying male relatives."[107] Other El Salvador country condition reports, including recent documents of the U.S. Department of State and news articles confirm the abuse of women and prevalence of gangs.[108]

Based on such evidence, the Second Circuit reverses the BIA and IJ's determination that Hernandez-Chacon did not express a political opinion.[109] "[T]he agency did not adequately consider whether Hernandez-Chacon's refusal to acquiesce was – or could be seen as – an expression of political opinion, *given the political context of gang violence and the treatment of women in El Salvador."*[110] The Second Circuit also looks at the gang members' words to find imputed political opinion. Their opinion repeats the gang member telling Hernandez-Chacon that if she would not "do this with him in a good way, it was going to happen in a bad way." For the Second Circuit, this statement is punishment for political opinion.[111] It "suggests that the gang members wanted to punish her because they believed she was taking a stand against the pervasive norm of sexual subordination."[112]

The Second Circuit also follows a mixed motives analysis to find the nexus between Hernandez-Chacon's political opinion and the persecution she endured – namely being beaten to unconsciousness for resisting being raped. While the IJ concludes Hernandez Chacon resisted because she "simply chose to not be a victim," the Second Circuit finds that more than self-protection was at stake.

> While Hernandez Chacon surely did not want to be a victim, she was also taking a stand; as she testified, she had "every right" to resist. As we have held in a different context, "opposition to endemic corruption or extortion . . .may have a political dimension when it transcends mere self-protection and represents a challenge to the legitimacy or authority of the ruling regime."[113]

---

105. *Id. at 99.*
106. *Id.*
107. *Id.* at 99.
108. *Id.* at 99.
109. *Id.* at 105.
110. *Id.* at 104 (emphasis added).
111. On need to establish persecution as punishment for the underlying factor, see Kurzban, *supra* note 2, at 839.
112. *Hernandez-Chacon*, 948 F.3d 94 at 105.
113. *Id.* at 104 (2d Cir. 2020) (quoting Yueqing Zhang v. Gonzales, 426 F.3d 540, 547–48 (2d Cir. 2005)).

B. *Zelaya-Moreno V. Wilkinson*

Zelaya-Moreno is twenty years old when he is approached for the first time by members of the Mara Salvatrucha (MS) gang in El Salvador.[114] The gang demands that he join them, and he refuses.[115] He tells the gang that they are "bad for his town and country."[116] Zelaya-Moreno is beaten.[117] Several months later, three police officers appear at his home.[118] The police beat him, put him in a car and take him to a house where the local MS leader and other gang members are waiting.[119] Zelaya-Moreno is again told to join.[120] In front of the police and gang members, he again refuses, again saying the gang is "bad for his town and country."[121] Zelaya-Moreno is beaten so severely that his left arm is fractured.[122] For two months after being beaten, Zelaya-Moreno leaves home on only one occasion – to seek medical help for his fractured arm. [123] The gang members see him and threaten him.[124] Within days he flees El Salvador.[125]

Judge Pooler's dissenting opinion relies heavily upon the pattern and the logic of *Hernandez-Chacon* to find an expression of political opinion.[126] Like in *Hernandez-Chacon,* Zelaya-Moreno's refusal to join the gang transcends self-protection. Repeatedly telling the gang and their police cronies, that the gang is "bad for his town and country" is political opinion.[127]

Specifically, Judge Pooler expresses this contention by saying, "One can attempt to avoid gang recruitment in many ways, but directly informing gang leaders that you oppose them and what they stand for is no way to do so, if one is merely seeking self-protection."[128]

The gang's clear alliance with the police further confirms the political nature of Zelaya-Moreno's opinion. "Zelaya-Moreno clearly invokes the long history of corrupt partnerships between the state and gangs, and he expressed his opposition to this role by informing both gang and state agents that he stood against their role in El Salvador."[129]

---

114. *Zelaya-Moreno*, 989 F.3d at 194.
115. *Id.* at 194.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 194–95.
126. Because the lower agencies found no political opinion, their decisions do not reach the "on account of" nexus. Consequently, Judge Pooler's opinion is limited to finding a political opinion and opining that the case should be remanded for the agency determination on nexus. *Zelaya-Moreno*, 989 F.3d 190 at 209 (2d Cir. 2021) (Pooler, J., dissenting).
127. *Zelaya-Moreno*, 989 F.3d 190 at 209 (Pooler, J., dissenting).
128. *Id.*
129. *Id.* at 208.

IV. POLITICAL OPINION 101: LESSONS LEARNED

What political opinion lessons can other private violence victims learn from the *Hernandez-Chacon* majority and *Zelaya-Moreno* dissenting opinions? The initial and most critical lesson – use the facts. Certainly, the facts of an asylum applicant's story must always be exceptionally closely examined. Credibility often turns on nothing more than the asylum applicant's testimony.[130] To pass the initial credibility threshold, an asylum applicant's story, at minimum, must be "detailed, consistent and plausible."[131] However, *Hernandez-Chacon* and *Zelaya-Moreno* do not simply *present* the facts. They *interpret* them. Hernandez-Chacon's feminist political opinion is built on her outcry of "No" to the would-be rapist coupled with her later statements in court that she resisted being raped "because I had every right to."[132] Likewise, Judge Pooler's dissent in *Zelaya-Moreno* seizes on the applicant's twice repeated statement to the gang and police that the gang is "bad for my town and country."[133] According to Judge Pooler, Zelaya-Moreno "did not merely express some generalized aversion to gangs; he publicly challenged the gang and its police allies for their role in El Salvador."[134] Note that neither Hernandez-Chacon nor Zelay-Moreno gives a lengthy dissertation on their political stance. Nor do they have to. As the *Zelaya-Moreno* majority readily confirms, asylum applicants are not required to articulate their politics with "extraordinary eloquence or erudition."[135]

Second, the facts of an asylum applicant's story must be put in context. Circuits such as the Second and Ninth explicitly adhere to the "contextual approach" to determining political opinion. However, asylum standards require all courts to consider country condition reports[136] and any other

---

130. Uncorroborated but credible testimony of the applicant may be sufficient to sustain the burden of proof. 8 C.F.R. § 208.13(a) (2024); 8 C.F.R. § 208.16(b) (2024); 8 C.F.R. § 1208.13(a) (2024); 8 C.F.R. § 1208.16(b) (2024).

131. *See also* Matter of Acosta, 19 I. & N. Dec. 211, 215–16 (B.I.A. 1985) (basing an asylum applicant's credulity on whether their testimony is "plausible, detailed and consistent") (overruled on other grounds by Matter of Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1989)) . Pursuant to asylum procedures, credibility determinations may be based on "demeanor, candor, or responsiveness" and "consistency" [both internal and with external evidence]. . ."and any inaccuracies of falsehoods in such statements without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." 8 U.S.C. § 1158 (b)(1)(B)(iii). Additionally, pursuant to the REAL ID Act, the INA now imposes a statutory requirement that credibility also requires corroborating evidence when "reasonably available". 8 U.S.C. § 1158 (b)(1)(B)(ii).

132. Hernandez-Chacon v. Barr, 948 F.3d 94, 97 (2d Cir. 2020).

133. "This case does not involve refusal to join a gang 'without more.' Zelaya-Moreno did not simply flee to avoid the gang's recruitment efforts but on two occasions took public stands against the gang." Zelaya Moreno v. Wilkinson, 989 F.3d 190, 206 (2d Cir. 2021) (Pooler, J., dissenting) (holding that "refusing to join a gang without more does not constitute political opinion" (citing Matter of E-A-G-, 24 I&N Dec. 591 (B.I.A. 2008))).

134. *Zelaya-Moreno*, 989 F.3d at 207 (Pooler, J., dissenting opinion).

135. *Id*. at 203 (majority opinion).

136. 8 C.F.R. §§ 208.11(b), 1208.11(b). *See also* Matter of H-L-H- & Z-Y-Z-, 25 I & N Dec. 209, 213 (B.I.A. 2010) abrogated on other grounds by Hui Lin Huang v. Holder, 677 F.3d 130, 137 (2d Cir. 2012) (noting the highly probative nature of Department of State (DOS) reports); Matter of R-S-H-, 23 I & N Dec. 629, 643 (B.I.A. 2003) (noting agency reliance on DOS country reports).

corroborative evidence which is "reasonably" available.[137] Like the facts of an asylum applicant's story, asylum applicants (and their advocates) must critically examine and interpret all evidence to the applicant's advantage.[138]

Third, mixed motives have to be considered as a means of establishing the feared persecution is "on account of" political opinion. All circuits adhere to the BIA's mixed motives standard and the use of both direct *and* circumstantial evidence.[139] Throughout every stage of the hearing – from preliminary briefs to closing arguments – each piece of direct and circumstantial evidence needs to be clearly identified and enumerated.

Lastly and most emphatically, the reasonableness standard of asylum needs to be repeatedly stated and restated. According to the U.S. Supreme Court, asylum is predicated on a ten percent chance that an asylum applicant *might* be persecuted upon return to their home country.[140] This reasonableness standard filters through all of asylum's criteria. Indeed, the BIA explicitly states in its mixed motives standard that it only needs to be "reasonable to believe" that the "harm was motivated in part by an actual or imputed protected ground."[141] And when evidence supporting the claim proves challenging, asylum advocates should cite the legal refrain: "No other reasonable explanation exists."[142]

V. APPLYING THE LESSONS

Hopefully, these four lessons may serve all private violence asylum applicants claiming political opinion. To illustrate, this section shows how rape victims and gang resisters can more successfully argue political opinion based asylum claims by applying these lessons.

---

137. 8 U.S.C. § 1158(b)(1)(B)(ii).

138. As an example, the U.S. State Department Country Condition report on Nicaragua currently read that in 2018 "the Ortega government instituted a policy of "exile, jail, or death" for *anyone* perceived as opposition, amended terrorism laws to include prodemocracy activities, and used the justice system to characterize civil society actors as terrorists, assassins, and coup-mongers." The U.S. State Department concession that "anyone perceived as opposition" can be severely persecuted arguably allows "any" Nicaraguan who engaged in "any" level of political activity to qualify for asylum. See U.S. State Department, *2022 Country Reports on Human Rights Practices: Nicaragua*, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR (March 2023) https://perma.cc/XZ9J-EQTR.

139. "In mixed motive cases, an asylum applicant is not obliged to show conclusively why persecution has occurred or may occur. . .[Instead] the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed protected ground." Matter of S-P-, 21 I& N Dec. 486, 489, 490, 494 (B.I.A. 1996). For further discussion of mixed motives see *supra* note 84 and accompanying text.

140. INS v. Cardoza Fonseca, 480 U.S. 421, 440 (1987). *See also* 8 C.F.R. §§ 208.13(b)(2)(i)(B), 1208.13(b)(2)(i)(B).

141. Matter of S-P-, 21 I & N Dec. 486, 494 (B.I.A. 1996).

142. Navas v. INS, 217 F.3d 646, 657 (9th Cir. 2000).

A. *Rape Victims*

Like Hernandez-Chacon, any verbal exchanges between the victim and rapist are critical.[143] However, the absence of such "direct" evidence is not fatal. It is "patently unreasonable" for a rape victim to have to depend upon statements by their rapist in order to secure asylum.[144] Moreover, circumstantial evidence and the reasonableness standard cannot be overlooked.[145] In *Ochave v. INS*, an asylum applicant claimed her rape by guerrillas was on account of an imputed political opinion because her father was a government official.[146] The Ninth Circuit agreed with the IJ that there was "substantial evidence tending in the other direction."[147] Such a statement reveals the incorrect application of a "more likely than not" instead of a reasonableness based, mixed motives standard.[148] It further masks the IJ's refusal to elicit all possible relevant testimony which could have changed the balance.[149] Instead, the rape was simply characterized as a "random act of violence."[150] This sexist presumption – that rape is just an uncontrollable act done by men to satisfy physical needs – must be routinely called out and shut down. Three years after *Ochave*, U.S. Department of Homeland Security counsel again relied upon the "carnal needs" motivation to explain why the Guatemalan soldiers were raping the women in a village believed to be a guerrilla stronghold.[151] This time, the Ninth Circuit recognized the many dimensions of rape.[152] *Garcia-Martinez v. Ashcroft* refused to "perpetuate the myth," recognized the "power and control" dynamics of rape and saw that "indisputably, rape and other forms of sexual violence are used as weapons of war."[153]

---

143. For discussion of Hernandez Chacon, see *supra* note 89 and accompanying text. *See also In re* D-V-, 21 I & N Dec. 77,80 (B.I.A. 1993) (linking Haitian soldiers' rape of President (and Catholic priest) Jean Bertrand Aristide linked to victim's support of Aristide through their anti-Aristide comments, military attire and admission to killing other church members).

144. "[T]he fact that the soldiers failed explicitly to inform Garcia that they were raping her on account of a protected ground is not highly relevant. Indeed, to rely solely upon, and insist that an asylum applicant be bound by, a persecutor's own statements regarding motive would be patently unreasonable." Garcia Martinez v. Ashcroft, 371 F.3d 1066, 1076 (9th Cir. 2004). For my similar criticism that dependence on the rapist's statements "empowers the perpetrator," *see* Kelly, *supra* note 35 at 105. *See also* Espinosa-Cortez, *supra* note 71 (finding it "patently absurd" to have to rely upon the persecutor's statements).

145. On the use of direct and circumstantial evidence, see *supra* note 70 and accompanying text.

146. Ochave v. INS, 254 F.3d 859, 862 (9th Cir. 2001).

147. Relying on evidence to discount applicant's imputed political opinion theory such as 1) the rape of other victims; 2) the petitioner's acknowledgement that it "may have been a random act"; 3) the attack was outside and not in her home; and 4) no evidence that the attackers knew her name. *Id.* at 865–66.

148. The failure to use mixed motives is also evident when the Ninth Circuit stated: "To demonstrate that persecution was 'on account of' an imputed political opinion, an applicant first must show that her persecutors actually imputed a political opinion to her at the time that they persecuted her." *Id.* at 865.

149. *Id.* at 870–72 (Pregerson, J., dissenting).

150. *Id.* at 866 (Pregerson, J., dissenting).

151. *See e.g.*, Garcia Martinez v. Ashcroft, 371 F.3d 1066, 1076 (9th Cir. 2004) (government explaining soldiers' motive for rape is "to be with a woman" and satisfy "unlawful, violent, carnal desire"). *See also* Argueta v. Garland, No. 20-963, 2022 U.S. App. LEXIS 31490, *4 (2d Cir. Nov. 15, 2022) (rape is "ordinary criminality").

152. *See e.g.,* Garcia-Martinez v. Ashcroft, 371 F.3d at 1076–77.

153. "The DOJ's argument simply perpetuates the myth that is just forceful sex by men who cannot control themselves. In reality is not about sex; it is about power and control." *Garcia-Martinez*, 371 F.3d

B. *Gang Resisters*

When Rochez-Torres told a Salvadoran gang which was in collusion with the police that he did not want to join them because they were "delinquent," the Second Circuit was unsatisfied.[154] "Gang members could have inferred from this statement that he was 'risk adverse' rather than anti-gang, particularly given that he complied with their other demands by declining to reveal the collusion that he witnessed and complying with their demands for money whenever they confronted him in person."[155]

This statement of the Second Circuit's statement is correct. But their legal reasoning and conclusion are misguided. Yes, the gang members "could have" inferred that Rochez-Torres was "risk adverse." But, the gang members also could have imputed a political opinion to Rochez-Torres. Following a mixed motives analysis, any feared targeting by the gang, "could have" reasonably been for both reasons. Telling a government linked gang that they are "delinquent" can be construed as a direct expression of political opinion as much as denouncing a public official for corruption would be perceived as political opinion.[156] The Second Circuit's repeated characterization of the police officers as "rogue" suggests the Second Circuit minimized the state affiliation of the gang.[157] Country condition evidence of the endemic nature of a government's corruption and connection with gangs can assist in educating asylum decisionmakers. Emphasizing an applicant's "reasonable" fear of persecution because of denouncing such state corruption is also important. Rather than using the reasonableness

---

at 1076 (quoting Margaret A. Cain, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*, 34 TULSA L.J. 367, 407 n.32). "In reality is not about sex; it is about power and control." *Id*. This observation is especially trenchant when viewed in the context of war, where rape may be used to intimidate "a civilian population perceived to be in political opposition to the armed force in question.'" *Garcia-Martinez*, 371 F.3d at 1076 (quoting Exec. Comm. of the High Comm'r's Programme, Note on Certain Aspects of Sexual Violence Against Refugee Women, UNHCR, Forty-Fourth Sess., Doc. A/AC.96/822, at 7 (1993); *see also Kelly D. Askin, Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles,* 21 BERKELEY J. INT'L L. 288, 297 (2003) ("Indisputably, rape and other forms of sexual violence are used as weapons of war")." Garcia Martinez v. Ashcroft, 371 F.3d 1066, 1076 (9th Cir. 2004).

154. Rochez-Torres v. Garland, 855 F. App'x 794, 796 (2d Cir. 2021). For similar gang resister cases denied despite expressing disagreement with the gang, see, for example, Zelaya-Moreno v. Wilkinson, 989 F.3d 190, 200 (2d Cir 2021) (Salvadoran gang "bad for [petitioner's] town and country"); Oliva-Oliva v. Garland, No. 20-1319 NAC, 2022 U.S. App. LEXIS 21281, *3 (2d Cir. Aug, 2 2022) (Guatemalan gang "bad").

155. Rochez-Torres, F. App'x at 796–97.

156. A victim's political opinion may be in opposition to "an entity that seeks to directly influence laws, regulations, or policy, an organization that aims to overthrow the government, or a group that plays some other similar role in society." Zelaya-Moreno, 989 F. 3d 190 at 199–200 (citations omitted). *See also* Ruqiang Yu v. Holder, 693 F.3d 294, 298-3000 (2d Cir. 2012) (BIA failed to consider imputed political opinion where applicant opposed corruption at state run enterprise); Haichun Liu v. Holder, 692 F.3d 848, 852–53 (7th Cir. 2012) (political opinion expressed in opposing government corruption).

157. "The issue before us is whether Rochez-Torres established that *rogue* officers and gang members in El Salvador harmed him in the past and would target him in the future on account of an imputed anti-gang political opinion or membership in a social group of Salvadoran men who have witnessed collusion between the police and a gang. . . . [T]he agency was not compelled to conclude that Rochez-Torres established that the *rogue* officers or gang members targeted him or would do so in the future. . . ." Rochez-Torres, 855 F. App'x at 796–97 (emphasis added).

standard, Rochez-Torres's holding that the applicant failed to show he "would be" persecuted shows an inappropriately higher standard was applied.[158]

Stronger reliance on the mixed motive analysis and the use of direct as well as circumstantial evidence could arguably have also improved the outcome of *Ngugi v. Lynch*.[159] Ngugi was a Kenyan bus driver who refused to be recruited by the Mungiki gang.[160] Although a member of the same Kikuyu sect to which the Mungiki gang belongs, he opposed the gang. Working as a bus driver, he also recruited and trained other drivers and conductors, "encouraging them to become transport drivers instead of joining the Mungiki."[161] When the Mungiki tried to get him to join and recruit members for them instead, he refused.[162] Mungiki members sought him out with guns and knives.[163] They beat him and robbed him.[164] When he still refused to join, he was beat with the butt of a gun and stabbed.[165] After subsequently being attacked on multiple other occasions, he fled.[166]

The Eighth Circuit conceded the possible "political nature of the Mungiki gang" because of its "corruption of the political process." However, "the mere refusal to join [such a gang], *without more* does not compel a finding that the gang's threats were on account of an imputed political opinion."[167] However, the "more" of circumstantial evidence to establish a reasonable link between the imputed political opinion and multiple acts of persecution is clearly evident. Ngugi did not simply personally refuse to join the Mungiki gang. His activities "transcended self-protection."[168] He actively encouraged others to resist joining and gave them alternative opportunities by training them as bus drivers.[169] Four out of the five times he was attacked were while he was driving the bus.[170] This bolsters an argument that the attacks were motivated by an effort to punish Ngugi in a public way for serving as a role model for others.[171]

---

158. On the use of the "would be" higher standard, see *Rochez-Torres* at 797 (emphasis added).
159. Ngugi v. Lynch, 826 F.3d 1132 (8th Cir. 2016).
160. *Id.* at 1135.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 1137 (emphasis added) (quoting Marroquin-Ochoma v. Holder, 574 F.3d 574, 579 (8th Cir. 2009)).
168. *Zelaya-Moreno*, 989 F.3d at209. (Pooler, J., dissenting).
169. For comparable activity working to promote employment opportunities of others that is deemed to constitute political opinion, *see also* Rugiang Yu v. Holder, 693 F.3d 294, 299 (2d Cir. 2012) (repeatedly helping workers get better wages at state run factory is conduct "typical of political protests. . . . [He] had no personal, financial motive to oppose the corruption, undertook the rights of numerous other persons as against an institution of the state and suffered retaliation").
170. On the other occasion he was riding the bus. Ngugi, 826 F.3d at 1135.
171. *Id.* at 1135; *cf.* Ochave v. INS, 254 F.3d 859, 866 (9th Cir. 2001) (including amongst the evidence to discount applicant's imputed political opinion theory that there was no evidence the attackers knew the victim and attacked her in a setting having no connection to her).

CONCLUSION

Asylum is always a hard-won battle. Each criterion is critical. For private violence victims, additional challenges exist. Their claims do not readily fit within the five factors of "race, religion, membership in a particular social group or political opinion." *Politicking Asylum's Political Opinion* hopes to offer "political opinion" as a viable alternative, particularly in light of the shortcomings of the "particular social group" factor. Fortunately, a path to political opinion based asylum for private violence victims exists. Evaluating their stories within context is the first step toward a true understanding of whether an actual or imputed political opinion exists. Such an analysis considers and interprets the facts within the richness of all surrounding events and conditions. Only then can the "on account of" bridge between the political opinion and the feared persecution be built upon the direct and circumstantial evidence. Each piece of evidence must be clearly enumerated in order to draw the reasonable inference that the feared persecution is on account of political opinion. It is a painstaking, but necessary road that private violence victims and their advocates can navigate together.