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**HOW DO THE COURTS SEE SEXUAL AND GENDER-BASED VIOLENCE IN THE
U.S. ASYLUM CONTEXT: ISSUES OF JUDICIAL ETHICS IN THE FACT-FINDING
AND DECISION-MAKING PROCESS**

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May 2023

A Thesis Submitted in Partial Fulfillment of the Requirements
for the Degree of Master of Public Health

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Secondary Reader: Laura Bothwell, PhD

Abstract

Background: There are many concerns regarding the U.S. asylum system, especially regarding how it views cases based on claims of sexual and gender-based violence. Wide discrepancies in decision-making in the various courts throughout the U.S. not solely attributed to the strength of the asylum case or the evidence presented leads to injustice for people seeking asylum.

Methods: Precedential cases were selected and read in their entirety, grouped together by topic or executive branch era in which it occurred, and the types of evidence extracted and tallied.

Categories for evidence were expert testimony, DOS reports, US agency reports, UN agency reports, and scholarly works. In each group of cases, I analyzed: (1) The state of precedent and decisions of each case, and the disparities in outcomes within each group of cases (2) Potential contributing factors to the disparities in outcomes (primarily the type and usage of evidence, gender of the judge, experience in immigration work) (3) The relationship of these factors to the ethical principles governing judicial practice as they relate to bias and competence

Law/case review: discussion and analysis: The three case categories were: (1) Decisions regarding female genital mutilation (2) Decisions regarding domestic violence-based asylum claims, and (3) Domestic violence asylum claims under the shifting policies of the Trump and Biden administrations. In terms of gender bias, it was found that for all three case categories, a majority of the decisions were written by male judges. Bias based on political affiliation was considered primarily for the third case group, as it was found that shifting executive administrations likely influenced the decision-making. Competence had the most significant connection to the evidence presented in these claims. Based on a decision-maker's previous experience and the types of evidence analyzed and incorporated into the decision, a relationship was found between these factors to the ethical principles governing judicial practice as they relate to bias and competence.

Conclusion: To hold the U.S. asylum system and system of judicial reasoning accountable to ethics and to the promises of the international human rights law the U.S. has undertaken, it needs to be aligned with contemporary, evidence-based understandings of what bias and competence are. Whatever bias judges have that come with gender, political affiliation, or any other biases, and any lack of competence that is seen through incorporations or lack thereof of evidence, it is best overcome not by restricting the gender of decision-makers, but rather training them to overcome bias and increase competence.

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Foremost, I would like to express my sincere gratitude to my brilliant thesis advisors, Professor Ali Miller and Dr. Laura Bothwell, both of whom the completion of this thesis would not have been possible. Ali, your infinite wisdom never fails to inspire me. I left every conversation we had over this past year, as both your student and advisee, in complete awe of you. Your guidance and support as I bravely ventured into this thesis meant a great deal to me as a mentor that I aspire to become even just a fraction of. Laura, your words of affirmation and encouragement as I have gotten to work with you throughout my time at YSPH have been incredibly meaningful to me. You have continuously uplifted me and believed in my capabilities, which has meant so much to me. Thank you both for everything.

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Introduction

Deisy Ramírez, a young Guatemalan woman, escaped from a forced and abusive marriage and entered the United States (U.S.) in 2019, seeking refuge from her abusive husband and father.¹ In 2021, after multiple delays due to COVID-19, Deisy was finally able to present her asylum case to an immigration judge (IJ). This judge had been appointed by then-Attorney General Jeff Sessions in 2017, and in his first three years as an IJ denied nearly 87% of asylum cases and had a reputation as a “tough” judge.² During the hearing, Deisy described how her father sold her to a neighboring family when she was 14 years old, and the subsequent years of forced servitude, abuse, and sexual assault she endured from her husband. She described how local authorities would neither protect or assist her nor other battered women, and how she could not return home due to fear of her father and husband.³ Deisy’s legal representation supplemented her asylum application with over 500 pages of expert testimony and reports on human rights conditions in Guatemala.⁴ Fortunately, Deisy’s story ends positively. She won her asylum case against this “tough” judge, and both she and her two daughters were granted asylum in the U.S.⁵ However, Deisy’s legal team and her colleagues do not attribute their success to the clear strength of her asylum case. Rather, they attribute it, and other recent successes, to the shift in presidential administration that occurred in 2020, and with that a more generous interpretation of asylum law by seated judges.⁶

¹ Hendricks, T. (2022) For Immigrations Fleeing Gender-Based Violence, a Long Road to Asylum in US. *KQED*.
<https://www.kqed.org/news/11910789/for-guatemalan-women-fleeing-gender-based-violence-a-long-road-to-asylum-in-us>

² TRAC Immigration (2022) (rep.). “*Judge Joseph Y. Park FY 2017-2022, San Francisco Immigration Court*” Retrieved from
<https://trac.syr.edu/immigration/reports/judgereports/00526SFR/index.html>

³ Hendricks, 2022

⁴ Hendricks, 2022

⁵ Hendricks, 2022

⁶ Hendricks, 2022

Deisy's story highlights concerns about the U.S. asylum system, especially in regard to how it views cases based on claims of sexual and gender-based violence (SGBV). The U.S. currently operates the world's largest refugee resettlement program, with President Biden setting the refugee admissions ceiling at 125,000 in September 2022, the largest number in recent years.⁷ In a statement from President Biden in 2021 commemorating World Refugee Day, he said that "The United States is proud to stand as a beacon of liberty and refuge to the world, and whether it's taking in those seeking safety or providing more humanitarian relief than any other nation, we're going to do our part."⁸ This is a noble endeavor. Under human rights norms, the idea of refugee protection is that states have an obligation to protect people and provide them with basic human rights and physical security when their own government fails in doing so.⁹ As part of these protections, they should be guaranteed not only basic human rights but a range of other economic and social rights that are equally guaranteed to any other citizens of that country. The U.S. government prides itself on its humanitarian efforts to protect refugees, going as far as calling protecting refugees "part of our DNA."¹⁰

However, the true effectiveness of the U.S. asylum system has been called into question and is largely viewed by many experts as fundamentally flawed in terms of asylum law itself, to all the

⁷ USCRI. (2022). *USCRI Statement on Refugee Admissions Ceiling for Fiscal Year 2023* [Press Release]. <https://refugees.org/uscri-statement-on-refugee-admissions-ceiling-for-fiscal-year-2023/#:~:text=On%20September%2027%2C%202022%2C%20President,for%20the%20coming%20fiscal%20year>

⁸ The White House, 2021

⁹ UNHCR. (2002). *Protecting Refugees: questions and answers*. Retrieved from <https://www.unhcr.org/en-us/publications/brochures/3b779dfe2/protecting-refugees-questions-and-answers.html>

¹⁰ The White House. (2021). *Statement by President Joseph R. Biden, Jr. on World Refugee Day* [Press Release]. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/20/statement-by-president-joseph-r-biden-jr-on-world-refugee-day/>

actors and practices involved in the processes of asylum. As emphasized in Deisy's story, the judge, in her case, was known as a "tough" judge, denying asylum at a ratio that was nearly nine out of every ten cases he heard. However, with a change in presidential administration, many "tough" judges seemed to be changing the methods and approaches in which they decided cases. Even within a singular judge themselves, there are wide discrepancies in decision-making behaviors that are outwardly not solely attributed to the strength of the asylum case or the evidence presented to them. The U.S. court system, and even more significantly, the asylum system as part of human rights norms of protection, is predicated on the moral obligations of judges to conduct themselves ethically. However, these discrepancies in decision-making throughout the immigration court system have consequential implications for both outcomes for asylum seekers and for judicial ethics.

Legal scholars have focused on the ethical principles of bias and competence of judges as the primary concerns of judicial ethics in regard to how they view asylum cases.¹¹ This is especially relevant for asylum cases concerned with issues of SGBV, as current asylum law is vague in its language towards SGBV which allows for much discretion and discrepancy in judges' decision-making that can be based on their biases and competence in reviewing such cases. This thesis intends to examine three sets of prominent, precedential asylum cases based on claims of SGBV, and by utilizing judicial ethics as an analytic frame, examine the factors that contribute to

¹¹ See e.g. Vaala, L.R. (2007) Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers. *William and Mary Law Review*, 49(3). Retrieved from https://heinonline.org/HOL/Page?handle=hein.journals/wmlr49&div=30&g_sent=1&casa_token=&collection=journals, Schoenholtz, A.I. & Bernstein H. (2008) Improving Immigration Adjudications through Competent Counsel. *Georgetown Journal of Legal Ethics*, 21(1). Retrieved from <https://heinonline.org/HOL/Page?handle=hein.journals/geojlege21&id=57&collection=journals&index=>

disparate outcomes, starting from the type and usage of evidence in decisions. Migration experts have claimed that studies and policies need to move beyond the essentialist views of SGBV in migration that exists in current literature and rather take a *constructivist approach*, analyzing the multifaceted factors of SGBV – with regard to wider timeframes, geographies, and contexts – rather than limiting the harmful manifestations of SGBV to refugees’ past, as that is not the reality.¹² As such, this initial application of a more constructivist frame suggests the importance of how these decisions can use a wider frame of understanding of ‘persecution’ for example, that would take into account more context, and would further the application of ethical principles. Finally, judicial ethics as an analytic frame for these cases is critical because if judges do not conduct themselves according to their own sworn ethical principles, the discrepancies seen in decision-making will perpetuate a broken system of asylum in the U.S. and continue to create issues of injustice for those fleeing from SGBV.

Background

Sexual and gender-based violence and forced displacement

Sexual and gender-based violence is a broad term that encompasses any physical, sexual, or psychological violence perpetrated against an individual based on gender.¹³ Forms of physical and sexual violence include intimate partner violence, physical or sexual abuse, sexual assault, dowry-related murder, rape, selective malnourishment, forced prostitution, forced marriage, and

¹² Ozcurumez, S., Akyuz, S., & Bradby, H. (2020). The conceptualization problem in research and responses to sexual and gender-based violence in forced migration. *Journal of Gender Studies*, 30(1), 66–78. <https://doi.org/10.1080/09589236.2020.1730163>

¹³ UNHCR (2015) *Emergency handbook: Sexual and gender based violence (SGBV) prevention and response*. UNHCR. Retrieved from <https://emergency.unhcr.org/entry/60283/sexual-and-gender-based-violence-sgbv-prevention-and-response#:~:text=Sexual%20and%20gender%2Dbased%20violence,norms%20and%20unequal%20power%20relationships.>

genital mutilation.¹⁴ Health ramifications of SGBV range from fatal, to physical, reproductive, and mental health outcomes.¹⁵ SGBV is grounded in social and cultural norms regarding the gender roles for men and women that often provide justifications for violence and perpetuate the acceptability of violence against a wide range of persons, including women, men, and gendered ‘others’.¹⁶ Conflict settings pose an increased risk of SGBV. Refugees fleeing from conflict and violence are at an increased vulnerability to SGBV, not only in their home countries but along their migrant journeys and in their country of destination.¹⁷ Widespread and systemic SGBV is strongly correlated with both high levels of gender discrimination, and ongoing violence and conflict.¹⁸

Forcibly displaced persons experience higher rates of SGBV compared to non-displaced persons. An estimated rate of one in five displaced women have experienced some form of SGBV, with research suggesting that to be an underestimate.¹⁹ Conflicts, violence, fears of persecution, and

¹⁴ Heise, L., Ellsberg, M., & Gottmoeller, M. (2002). A global overview of gender-based violence. *International Journal of Gynecology & Obstetrics*, 78.
[https://doi.org/10.1016/s0020-7292\(02\)00038-3](https://doi.org/10.1016/s0020-7292(02)00038-3)

¹⁵ Heise et al., 2002

¹⁶ Heise et al., 2002; World Health Organization (WHO) (2021). *Violence against women*. WHO. Retrieved from <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> ; International Committee of the Red Cross. (2022). (rep.). “*That never happens here*”: *Sexual and gender-based violence against men, boys, LGBTIQ+ people*. International Committee of the Red Cross. Retrieved from https://www.rodekors.no/globalassets/_rapporter/thatneverhappenshere_uu.pdf?mc_phishing_protection_id=28048-c7t8vm70s0vafoouhkkq

¹⁷ Simon-Butler A, McSherry B. (2019). (rep.). Defining Sexual and Gender-Based Violence in the Refugee Context. Available from: <https://www.birmingham.ac.uk/Documents/college-social-sciences/social-policy/iris/2019/iris-working-papers-28-2019.pdf> ; UNHCR, 2015

¹⁸ Davies, S. E., & True, J. (2015). Reframing conflict-related sexual and gender-based violence: Bringing gender analysis back in. *Security Dialogue*, 46(6), 495–512.
<https://doi.org/10.1177/0967010615601389>

¹⁹ Vu, A., Adam, A., Wirtz, A., Pham, K., Rubenstein, L., Glass, N., Beyrer, C., & Singh, S. (2014). The prevalence of sexual violence among female refugees in complex humanitarian

human rights violations forcibly displaced 89.3 million people by the end of 2021, which is double the number from just ten years prior.²⁰ With increased displacement globally in 2022, in addition to the war in Ukraine, that number has since exceeded 100 million people.²¹ Women comprise 50% of the population of refugees and migrants, therefore the number of women and girls forcibly displaced due to SGBV is at least 20 million.²² This is likely an underestimate as it does not account for men, boys, and gender non-conforming people displaced due to SGBV.

Human rights norms trajectory into U.S. asylum law

The partial effectiveness of the U.S. asylum system is due to the incorporation of several human rights norms in its initial development. U.S. asylum law originates from three critical, universal instruments from the United Nations (UN). Firstly, the Universal Declaration of Human Rights (UDHR) (1948), which contains an article pertaining to the rights of those seeking asylum and refuge in other countries.²³ However, this instrument is not legally binding. As such, advocates claim that the U.S. has only selectively embraced certain rights from the UDHR.²⁴ The two other critical instruments are more specific to refugees and asylum, the UN Convention Relating to the Status of Refugees from 1951 and the UN Protocol Relating to the Status of Refugees from 1967, the two of which have directly been rendered into current U.S. immigration and asylum

emergencies: A systematic review and meta-analysis. *PLoS Currents*.

<https://doi.org/10.1371/currents.dis.835f10778fd80ae031aac12d3b533ca7>

²⁰ UNHCR. (2021) (rep.). “*Global Trends Report: Global Forced Displacement*” Retrieved from <https://www.unhcr.org/us/global-trends>

²¹ UNHCR, 2021

²² Women for Women International. 5 Facts About What Refugee Women Face [Internet].

Women for Women International. 2021. Available from:

<https://www.womenforwomen.org/blogs/5-facts-about-what-refugee-women-face>

²³ United Nations. (1948). “Universal Declaration of Human Rights.”

²⁴ ACLU. (2013). (rep.). “*What You Should Know About The U.S. And Human Rights*”

<https://www.aclu.org/sites/default/files/assets/121013-humanrightsfacts.pdf>
765402&usg=AOvVaw0rGJ77GFJo_KAkPM-iu4qI

law. Title 8 codifies all statutes made by Congress relating to aliens and nationality.²⁵ The most important law for refugees is the United States Refugee Act of 1980. This act defined a refugee as “any person who is outside of his country of nationality (or in the case of a person having no nationality, is outside any country in which he last habitually resided), and who is unable or unwilling to return to their country of origin because of persecution or a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group.”²⁶ To be eligible for asylum, refugees need to demonstrate a credible “fear of persecution,” or “membership in a particular social group,” as described in Section 1158 of Title 8.²⁷ This language is critical, and those two categories – fear of persecution and membership in a particular social group – form the basis of all asylum claims and are often the issues in question in appeals cases.

Furthermore, in the U.S., the former Immigration and Naturalization Services (INS), (now comprised of Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS)), is the U.S. agency mandated to handle all issues related to immigration. It previously defined the standards that must be met by an applicant to be eligible for protection under the Convention Against Torture, which has been ratified by the U.S.²⁸ To constitute the former INS’ definition of torture, it must be an “act specifically intended to inflict severe physical or mental pain or suffering” committed by a public

²⁵ Legal Information Institute. (n.d.) *8 U.S. Code § 1158 - Asylum*. Legal Information Institute. Cornell Law School. Retrieved from: <https://www.law.cornell.edu/uscode/text/8/1158>

²⁶ Legal Information Institute, *8 U.S. Code § 1158 - Asylum*

²⁷ Legal Information Institute, *8 U.S. Code § 1158 - Asylum*

²⁸ UNHCR. (2003). *Convention Against Torture*. Retrieved from <https://www.unhcr.org/5859a0464.pdf>

official against persons within their custody or control.²⁹ Furthermore, if one fears being subjected to torture if returned to their home country, they may be eligible for protection under the Convention Against Torture.³⁰

Overview of the asylum process in the U.S.

There are three different ways to obtain asylum in the U.S. – the affirmative process, an asylum merits interview with a “credible fear” determination, or the defensive asylum process.³¹ In *the affirmative process*, the applicant – who has not been subject to removal and does not go before an immigration judge (IJ) – a non-adversarial affirmative asylum interview with a USCIS asylum officer. In an *asylum merits interview*, the applicant has been subject to removal and then was found to have a ‘credible fear’, a determination which happens during the initial screening process, and that applicant subsequently has a non-adversarial asylum merits interview with a USCIS asylum officer to determine if they are eligible for withholding of removal or protection under the CAT. The credible fear interviews are supposed to be a generous initial screening that uses a lower standard, designed by Congress to ensure that anyone who might have a claim for asylum is able to present it to an immigration judge.³² In the *defensive asylum process*, the applicant has been placed in removal proceedings and must go before an IJ for an adversarial hearing and court proceedings.³³ If either party disagrees with the decision of the IJ, then they have the right to appeal the decision: the Board of Immigration Appeals (BIA) will review the

²⁹ UNHCR, 2003; See 8 CFR 208.18(a) for additional information on the “torture” definition and eligibility for asylum

³⁰ UNHCR, 2003

³¹ USCIS. (2023, March 15). *Obtaining asylum in the United States*. USCIS. Retrieved from <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>

³² See *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020)

³³ USCIS, 2023

initial decision of the IJ and will either issue a new decision or uphold the original.³⁴ This includes if an asylum applicant disagrees with a denial of asylum by an IJ. The government will not remove applicants from the U.S. if they “reserve” their right to appeal and undergo the BIA appeals process. In making their decision, the board reviews briefs, exhibits, transcripts, and any oral arguments.³⁵ BIA decisions are binding on all asylum officers and IJs unless overruled by a federal court or the Attorney General (A.G.).³⁶ If an asylum applicant further disagrees with the decision made by the BIA, then they can file a petition for review of the BIA’s decision in the corresponding circuit’s court of appeals.³⁷ Unlike appeals going before the BIA, an applicant is not guaranteed a right to stay when a federal appeal is filed, therefore counsel for the applicant must immediately seek a stay of removal while their federal appeal is being reviewed, to circumvent ICE hastily taking action toward deportation.³⁸

Actors, practices, and the arc of the asylum process in the U.S.

As seen in the overview of the asylum process, there are various decision-makers involved throughout the asylum process that can have an impact on the final outcome of appeals – from the asylum officers involved in initial screenings and interviews to the legal counsel for the applicant in charge of writing briefs and presenting appropriate exhibits. Decision-makers with the greatest impact throughout the arc of the asylum process are the BIA, federal courts of

³⁴ EOIR. (2022). *What if You Disagree with the Judge’s Decision? An Overview of the Appeals Process*. Retrieved from <https://www.justice.gov/eoir/page/file/1480826/download>

³⁵ EOIR Legal Careers. (2018). *Appellate Immigration Judge (Board Member)*. Retrieved from <https://www.justice.gov/legal-careers/job/appellate-immigration-judge-board-member>

³⁶ EOIR, 2022

³⁷ American Immigration Council. (2015). (Practice Advisory). “*How to File a Petition for Review*” https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_for_review_2015_update.pdf

³⁸ Immigration Equality. (2006). Federal Court Review. *Asylum Manual*. <https://immigrationequality.org/asylum/asylum-manual/federal-court-review/>

appeals, Supreme Court of the United States (SCOTUS) (if the case proceeds), and the A.G. of the U.S., as their decisions are binding precedent nationwide, and to a lesser extent IJs, as IJ decisions determine what moves to appellate courts. ICE and CBP also play a role in setting the speed of deportations.

My analysis seeks to understand the discrepancies in decisions between individual decision-makers and their contributing factors based on overarching ethical principles, bias and competence. The factors differ by individual judges, as they each have their own sworn ethical principles and backgrounds they bring when exercising their independent judgment as directed. Therefore, such flawed decision-making needs to take into account the qualifications and qualities of the decision-makers. All board members, including the chairman and vice chairman, are appointed by the A.G. The only qualifications to be considered are being a licensed member of the state bar and having at least seven years of post-bar experience as a licensed attorney in hearings or trials involving litigation and/or administrative law.³⁹ IJs are also appointed by the A.G., and the core requirements by the Executive Office of Immigration Review (EOIR) are an LL.B., J.D., or LL.M. degree, active bar membership, and seven years of post-bar admission legal experience. The EOIR also states that it seeks candidates with “good temperament, appropriate demeanor, good courtroom management skills, and skill at conducting proceedings in a courteous, fair and impartial manner.”⁴⁰ The EOIR has a self-described “robust” training program for new IJs that is multiple weeks long.⁴¹ This training program primarily includes information on both the administrative and judicial duties of an IJ. It has one section on possible

³⁹ EOIR Legal Careers, 2018

⁴⁰ EOIR. (2023). *Make a difference: apply for an immigration judge position*. Retrieved from <https://www.justice.gov/eoir/Adjudicators>

⁴¹ EOIR, 2023

asylum scenarios and an overview of the types of documents that could serve as corroboration for asylum cases. My review of training materials revealed no information on how to actually analyze those documents as evidence in asylum processes.⁴²

Understanding the role of judicial ethics in the U.S. asylum process

The A.G., part of the executive branch, is responsible for appointing BIA members and IJs. At the same time as differently situated IJs are appointed by the executive branch, other judges key to immigration (those in any federal court) are also part of the independent Article III U.S. Court system. Regardless of whether a judge is part of the executive/administrative or judicial branch, all judges are governed by their ethical obligations. Judicial ethics consists of the standards and norms those in the judiciary should adhere to.⁴³ The American Bar Association (ABA) has published a “Model Code of Judicial Conduct,” most recently revised in 2010.⁴⁴ This code defines a judge as “anyone who is authorized to perform judicial functions,” which includes members of the administrative law judiciary, such as IJs and BIA board members.⁴⁵

This Code being promulgated by the ABA aspires that a uniform system of ethical principles should apply to all judges.⁴⁶ The three overarching ethical obligations are independence, impartiality, and avoiding impropriety.⁴⁷ According to the ABA’s educational resources, judicial

⁴² TRAC Immigration. (2009). (rep.). “*EOIR Training Materials for New Immigration Judges.*” Retrieved from <https://trac.syr.edu/immigration/reports/211/>

⁴³ Legal Information Institute. (n.d.). *Judicial ethics: an overview*. Legal Information Institute. Cornell Law School. Retrieved from https://www.law.cornell.edu/wex/judicial_ethics

⁴⁴ ABA. (2020). *Model Code of Judicial Conduct*. Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/

⁴⁵ ABA, 2020, *Model Code of Judicial Conduct*

⁴⁶ ABA, 2020, *Model Code of Judicial Conduct*

⁴⁷ Legal Information Institute, *Judicial ethics: an overview*

independence means that judges should not be subject to pressure and influence, including from shifting political climates, and should make impartial decisions that are solely based on law and fact.⁴⁸ Rule 2.2 of the code regards impartiality and fairness and states that a judge should uphold and apply the law fairly and impartially.⁴⁹ As part of their ethical duties, judges must also make “competent decisions in an impartial manner, free from personal bias or prejudice.”⁵⁰ Rule 2.3 of the Code regards bias, prejudice, and harassment. It states that judges shall perform judicial and administrative duties without bias or prejudice, by words or conduct, “including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.”⁵¹ Bias is defined as a “prejudiced outlook.”⁵² Implicit bias is defined as “a bias or prejudice that is present but not consciously held or recognized.”⁵³ Being unconsciously held, it becomes harder to recognize and confront.

Here, the work to understand bias in the broader social sciences becomes important to the practice of immigration related judges. Scientifically, data from the Implicit Associations Test

⁴⁸ ABA Division for Public Education. (2019). *Rule of Law and the Courts*. ABA. Retrieved from https://www.americanbar.org/groups/public_education/resources/rule-of-law/rule-of-law-and-the-courts/

⁴⁹ ABA. (2020). Rule 2.2 Impartiality and Fairness. *Model Code of Judicial Conduct*. Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness/

⁵⁰ Benedetto, 2008

⁵¹ ABA. (2020). Rule 2.3 Bias, Prejudice, and Harassment. *Model Code of Judicial Conduct*. Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_3biasprejudiceandharassment/

⁵² Merriam-Webster. (n.d.). *Bias*. Retrieved from <https://www.merriam-webster.com/dictionary/bias>

⁵³ Merriam-Webster. (n.d.). *Implicit bias*. Retrieved from <https://www.merriam-webster.com/dictionary/implicit%20bias>

(IAT), the most prominent and significant current test for implicit biases, has found that the most salient examples of implicit bias are racial, and gender, and sexuality biases, as seen through their well-known different versions of the IAT – Race, Skin-tone, Sexuality, Transgender, and Gender-Science/Career.⁵⁴ The IAT is known to do well in predicting average outcomes of implicit bias for larger entities, and therefore predicting levels of structural discrimination due to these biases.⁵⁵

As flagged above, the ABA Judicial Code textually addresses primarily concerns the biases of individual judges. However, individuals who hold implicit or unconscious biases towards any of the categories aforementioned in the code in practice comprise larger institutions, such as the asylum system.⁵⁶ Thus, biases of individuals make up a larger system that maintains institutional inequities.⁵⁷ Studies on trial judges have found that they hold implicit racial biases and these biases have certain influences on their judgments.⁵⁸ Applied to the asylum system, there is a fundamental issue of discrimination – particularly racial, ethnic, sex, and gender discrimination – that is evident throughout all parts of the asylum process. This systematic discrimination seen in the asylum system can thus be attributed to biases of individual judges which in turn perpetuate

⁵⁴ Project Implicit. (2011). *Select a test*. Retrieved from <https://implicit.harvard.edu/implicit/selectatest.html>

⁵⁵ Payne, K., Niemi, L., & Doris, J.M. (2018). *How to Think about 'Implicit Bias.'* Scientific American. Retrieved from <https://www.scientificamerican.com/article/how-to-think-about-implicit-bias/#>

⁵⁶ Brown University Office of Institutional Equity and Diversity. (n.d.) *Unconscious Bias Discussion Guide*. Retrieved from <https://www.brown.edu/about/administration/institutional-diversity/sites/oidi/files/Unconscious%20Bias%20Discussion%20Guide.pdf>

⁵⁷ Brown University Office of Institutional Equity and Diversity

⁵⁸ Rachlinski, J.J., Johnson, S.L., Wistrich, A.J., & Guthrie, C. (2009). Does Unconscious Racial Bias Affect Trial Judges? *Notre Dame Law Review*, 84(3). Retrieved from <https://www.njcourts.gov/sites/default/files/jurors/rachlinskidoesunconsciousbiasaffecttrialjudges.pdf>

inequities. However, despite this, there is a lack of universal, mandatory training on implicit bias for U.S. judges. In my review of trainings for IJs, training primarily consisted of procedural guidance and avoiding impropriety, not so much on proper decision-making in immigration cases. In a set of the full EOIR training materials for new immigration judges in 2008 obtained through a FOIA request by Syracuse University's Transaction Records Access Clearinghouse (TRAC), neither an assessment of biases nor any implicit bias training was included as part of the training.⁵⁹ Training is still similar, as a 2022 fact sheet on the EOIR IJ training did not list implicit bias training as a subject.⁶⁰ An article from 2016 regarding mandatory, Department of Justice (DOJ) led anti-bias training for all federal employees came up in my review of trainings for IJs.⁶¹ The article notes that many IJs felt that the training was desperately needed, but it would not be enough.⁶² Rather than expanding on these efforts, in 2020, the DOJ banned all diversity and inclusion training under the Trump administration in 2020.⁶³ The Biden administration has since repealed this ban, but my review did not reveal any expansions or revisions of the previous anti-bias trainings offered in 2016.⁶⁴

⁵⁹ TRAC Immigration. (2009). (rep.). "EOIR Training Materials for New Immigration Judges." Retrieved from <https://trac.syr.edu/immigration/reports/211/>

⁶⁰ EOIR. (2022). *IJ Training Fact Sheet*. Retrieved from <https://www.justice.gov/eoir/page/file/1513996/download>

⁶¹ Dickerson, C. (2016) "How U.S. Immigration Judges Battle Their Own Prejudice." *The New York Times*. Retrieved from <https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html?hpw&rref=us&action=click&pgtype=Homepage&module=well-region®ion=bottom-well&WT.nav=bottom-well>

⁶² Dickerson, 2016

⁶³ Benner, K. (2020) "Justice Dept. Suspends All Diversity and Inclusion Training for Staff." Retrieved from <https://www.nytimes.com/2020/10/09/us/politics/justice-department-diversity-training.html>

⁶⁴ Spiggle, T. (2021) "Why Biden's Repeal of the Anti-Bias Training Ban Was So Important for Federal Employees." *Forbes*. Retrieved from <https://www.forbes.com/sites/tomspiggle/2021/02/03/why-bidens-repeal-of-the-anti-bias-training-ban-was-so-important-for-federal-employees/?sh=1584f0d6525b>

Lastly, Rule 2.5 of the ABA Code regards competence, diligence, and cooperation, and states that “a judge shall perform judicial and administrative duties, competently and diligently.”⁶⁵ According to the LII, a court being of “competent jurisdiction” means that it has the power to adjudicate the case before it.⁶⁶ According to a comment on Rule 2.5, judicial competence requires “the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge’s responsibilities of judicial office.”⁶⁷ The ABA has a committee that does an extensive, yearly peer review process in which it evaluates judicial nominees on their integrity, professional competence, and judicial temperament.⁶⁸ Integrity is characterized as “the nominee’s character and general reputation in the legal community, as well as the nominee’s industry and diligence.”⁶⁹ Professional competence is characterized as “qualities such as intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional experience.”⁷⁰ Judicial temperament is characterized as “the nominee’s compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law.”⁷¹ Based on these three criteria, each nominee is rated by a committee of

⁶⁵ ABA. (2020). Rule 2.5 Competence, Diligence, and Cooperation. *Model Code of Judicial Conduct*. Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_5competencediligenceandcooperation/

⁶⁶ Legal Information Institute. (2022). *Competent*. Cornell Law School. Retrieved from <https://www.law.cornell.edu/wex/competent#:~:text=In%20both%20criminal%20and%20civil,s%20sought%20to%20be%20proved.>

⁶⁷ ABA. (2020). “Comment on Rule 2.5.” Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_5competencediligenceandcooperation/commentonrule2_5/

⁶⁸ ABA. (n.d.) “Ratings of Article III and Article IV Judicial Nominees.” Retrieved from https://www.americanbar.org/groups/committees/federal_judiciary/ratings/

⁶⁹ Ballotpedia. (2023). “ABA ratings of presidential federal judicial nominees.” Retrieved from https://ballotpedia.org/ABA_ratings_of_presidential_federal_judicial_nominees#cite_note-quote-disclaimer-2

⁷⁰ Ballotpedia, 2023

⁷¹ Ballotpedia, 2023

the ABA as either “well qualified,” “qualified,” or “not qualified.”⁷² This yearly rating carried out by a private professional organization, the ABA, includes ratings of federally appointed nominees to district courts and federal appellate courts, but notably, not the immigration courts or the BIA. Specifically towards IJs, there is much historical concern regarding the competence of applicants and literature to supplement it, and varied ideas of competence arise in the scholarly literature; however, when it comes to IJs themselves, the idea of “competence” remains a vague term. The term is repeatedly invoked in various guides to judicial conduct but is never explicitly defined.

International norms that influence U.S. law

In regard to the current U.S. asylum system and SGBV, the U.S. is partially set up to effectively provide refuge to those fleeing SGBV. International human rights law has acknowledged that SGBV is a widespread public health and human rights issue, and in recent years, UN human rights bodies have increasingly been taking on new norms related to sexuality, health, and harm.⁷³ One universal, core instrument that has been ratified by the U.S. is the International Covenant on Civil and Political Rights (ICCPR) (1966). The ICCPR contains articles that protect against discrimination on any grounds such as race, sex, religion, or political opinion, and protects against torture or other cruel punishment.⁷⁴ There are two other universal instruments from the UN that address specifically sex/gender discrimination, the first being the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) and the second being the Declaration on the Elimination of Violence against Women (1993). CEDAW

⁷² ABA, “ABA ratings of presidential federal judicial nominees”

⁷³ Simon-Buter and McSherry, 2019; Miller, A. M., & Vance, C. S. (2004). Sexuality, human rights, and health. *Health and Human Rights*, 7(2), 5. <https://doi.org/10.2307/4065346>

⁷⁴ UNHCR. (1966). “International Covenant on Civil and Political Rights.”; See Article 26, Article 7

contains articles raising particular concern for groups of women at increased vulnerability to violence, including refugee women, migrant women, and women in situations of armed conflict. It has been interpreted over time to authoritatively address SGBV, including through interpretive general recommendations 19 and 35. However, it has not been ratified by the U.S., meaning that the U.S. is not bound to the articles of the CEDAW. The Declaration is hortatory on all member states, and as such, the U.S. is understood to accept its guidance but not as a matter of law. As such, neither CEDAW nor interestingly the Declaration have been brought into jurisprudence around US asylum claims.

Other non-binding (because they have either not been ratified or adopted as treaty law) instruments that are influential to the U.S. government and agencies to varying extents are the American Convention on Human Rights (1978), Beijing Declaration and Platform for Action (1995), the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (1994), the Rio Statement of Reproductive Health and Justice (1994), Gender and social group Guidelines on international protection (2002), and EXCOM Conclusions No. 39 (1985) and No. 73 (1993). While not directly relevant, the Rome Statute of the International Criminal Court (1998) recognizes widespread and systematic sexual violence against women as a crime against humanity or a war crime.

One particularly significant, however non-binding, instrument addressing gender diversity is the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity and the Yogyakarta Principles plus 10.⁷⁵ Principle 23 is

⁷⁵ International Commission of Jurists (ICJ). (2006) “The Yogyakarta Principles.” Retrieved from http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf; ICJ. (2017). The

the right to seek asylum, and the Yogyakarta Principles state that “everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity,” and instructs states to enact or amend legislation to ensure sexual orientation or gender identity are grounds for persecution.⁷⁶ The Yogyakarta Principles plus 10 further instruct states to ensure that a well-founded fear of persecution as described above is accepted as a ground for refugee status, including where “sexual orientation, gender identity, gender expression, or sex characteristics are criminalized and such laws, directly or indirectly, create or contribute to an oppressive environment of intolerance and a climate of discrimination and violence.”⁷⁷ These principles come the closest to showing how non-binding law can become persuasive in U.S. law and other national legal systems, as it thoroughly incorporates well-known previous research on factors that increase the risk of SGBV, including social norms and oppressive laws.

Critical norms, actual judicial competence, and shifts in U.S. practice of asylum

This rise in human rights norms has corresponded with a surge of international humanitarian law and U.S. national law and guidance related to SGBV, particularly domestic violence.⁷⁸ One notable example in the U.S. is the Violence Against Women Act (VAWA), developed in response to the 1993 Declaration on the Elimination of Violence against Women, and largely intended as a measure protecting against domestic violence. The U.S. Department of State (DOS) has also

Yogyakarta Principles plus 10.” Retrieved from http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

⁷⁶ ICJ, 2006

⁷⁷ ICJ, 2017

⁷⁸ Klugman, J. (2017). *Gender based violence and the law*. World Development Report 2017 Governance and the Law. Retrieved from <https://openknowledge.worldbank.org/server/api/core/bitstreams/f9647c7b-88d1-5dec-8679-c6bf-b43a75c9/content>

issued guidance on addressing gender-based violence globally, most recently updated in 2022 that responds to an executive order made in 2021.⁷⁹ This DOS guidance largely focuses on U.S. humanitarian efforts and foreign assistance. U.S. government policy efforts under this guidance include the integration of SGBV prevention and response specific to girls and young women, including migrants and refugees.⁸⁰ There are also agency guidelines, such as the former INS, now USCIS, guidelines, entitled *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*. These non-mandatory guidelines were developed based on the UN Declaration on the Elimination of Violence Against Women and EXCOM Conclusion No. 73. The guidelines begin by discussing procedural considerations for U.S. asylum officers, detailing the importance of ensuring that women can comfortably discuss the details of their claims during the interview process. It notes that women may be more likely than men to present evidence of past persecution in the guise of or associated with sexual violence. It then delves into the legal analysis of these claims within the framework of U.S. law. They discuss the criterion from the U.S. Refugee Act of 1980 of “fear of persecution” and examples of how claims can be described as gender-related. It emphasizes that while all asylum claims must be analyzed following U.S. law, gender-related claims can be very complex. However, as “non-mandatory” suggests, much of the U.S. law, policy, and guidance has been rather rhetorical and aspirational, by and large not thoroughly considering the unique needs of refugees, in terms of both political and clinical responses.

⁷⁹ Office of Women’s Issues (2022) *United States Strategy to Prevent and Respond to Gender-Based Violence Globally 2022*. U.S. Department of State. Retrieved from <https://www.state.gov/reports/united-states-strategy-to-prevent-and-respond-to-gender-based-violence-globally-2022/>

⁸⁰ Office of Women’s Issues, 2022

Furthermore, SGBV asylum jurisprudence has considerably slowed down in recent years. Asylum grant rates have been fairly steady over the past two decades.⁸¹ However, asylum denial rates have been increasing over the years, hitting a peak of 71% in 2020 under the Trump administration.⁸² Progressive jurisprudence has also considerably slowed down in the past two decades, particularly under the Trump administration's restrictive immigration policies. This includes items such as Title 42 and rulings from then A.G. Jeff Sessions. The Biden administration has been moderately working to undo some of these restrictive policies. For example, in an executive order from President Biden, a line regarding SGBV as a root cause of irregular migration prompted A.G. Merrick Garland to throw out previous restrictive rulings.⁸³ At the same time, the Biden administration has also been implementing new or expanding upon restrictive policies, such as implementing a new version of the transit ban, and not providing any guidance in the way of SGBV claims. Thus, there has not been much progress made beyond the jurisprudence that was made in the early 2000s.

A 2008 government accountability office (GAO) report found that seven factors regarding the applicant statistically, significantly affected asylum case outcomes: (1) filing affirmatively or defensively (2) the applicant's nationality (3) the time period when the decision was made (4) whether the applicant had representation (5) filing the application within one year of U.S. entry (6) claiming dependents, and (7) for defensive cases if the applicant was ever detained.⁸⁴ This

⁸¹ TRAC Immigration (2021) (rep.). "*Asylum Grant Rates Climb Under Biden.*" Retrieved from <https://trac.syr.edu/immigration/reports/667/>

⁸² TRAC Immigration, 2021

⁸³ Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border (Feb. 2, 2021)

⁸⁴ U.S. Government Accountability Office (GAO). (2008). (rep.). "*U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges.*" Retrieved from <https://www.gao.gov/products/gao-08-940>

GAO report also found that two factors regarding the IJ are statistically significant in affecting asylum case outcomes. First is the gender of the IJ, and it was found that male IJs were 60 percent as likely, and therefore less likely, as female IJs to grant asylum in both affirmative and defensive cases.⁸⁵ The next factor was the length of the experience as an IJ. It was found that IJs with less than 3 ½ years of experience as an IJ had a lower affirmative grant rate than those with more experience, and those with greater than 10 years of IJ experience had the highest defensive grant rate.⁸⁶ Besides the length of experience as IJ, any previous experience doing immigration work, including public immigration experience or experience doing immigration work for a non-profit organization, was found to also significantly affect asylum decisions, but not statistically.⁸⁷ These discrepancies in decision-making based on gender and experience, seen far throughout the immigration court system, have consequential implications for judges conformity with their judicial ethical obligations.

Legal scholars have focused on the ethical principles associated with the operation of bias and competence (or lack of) of IJs as the primary contributing factors to the surge of appeals cases in the immigration system, as the lack of conformity in decision-making by judges perpetuates the need for appealing decisions that are not agreed upon either by the applicant or the U.S. government.⁸⁸ Given that the U.S. court system is premised on judges upholding their ethical obligations, the fact that decision-makers in the asylum court system frequently violate the principles of judicial ethics in their inability to counteract bias and their demonstrated lack of competence is a major problem. Issues of bias and lack of competence can be seen through

⁸⁵ GAO, 2008

⁸⁶ GAO, 2008

⁸⁷ GAO, 2008

⁸⁸ Benedetto, 2008

discrepancies in decisions, and discrepancies in judges' ability to incorporate and analyze evidence both in light of human rights norms and with regard to its strength as scientific research. Toward these issues, there have been discrepancies in the most prominent SGBV-related asylum jurisprudence in the U.S. on female genital mutilation and domestic violence. These concerns of judicial ethics surrounding issues of SGBV form the basis of my analytic frame.

Discussion of Methods

Given this setting of the asylum system and the U.S.'s commitments to refugees – and the system's flawed structure for enacting law, this thesis carries out a qualitative discourse analysis of precedential asylum cases based on claims of SGBV, and by utilizing judicial ethics as an analytic frame, examine how evidence is evaluated and incorporated into the decisions of these cases. I focus on ethical principles of judicial ethics as they relate to bias and competence, specifically seen through concerns for the gender of judges and their experience, as highlighted in the 2008 GAO report. The cases considered in the analysis were chosen as they are either Board of Immigration Appeals decisions deemed precedential, or decisions from federal appellate courts with specific precedential power in the context of refugees and asylees seeking asylum in the U.S. from SGBV. To find relevant case law and their official documents, I referred to the DOJ BIA Precedent Chart and the litigation work of the Center for Gender and Refugee Studies to find cases with decisions deemed precedential.⁸⁹ The holdings were read for each of the cases deemed precedential. Based on the brief review of the holdings, selected cases were grouped together for close reading of the facts, holding, and evidence brought into the decision.

⁸⁹ EOIR. (2017). "BIA Precedent Chart" Retrieved from <https://www.justice.gov/eoir/bia-precedent-chart> ; Center for Gender & Refugee Studies. (2023). "Litigation." Retrieved from <https://cgrs.uchastings.edu/our-work/litigation>

The groups include cases with decisions that either contradict or expand upon each other, to examine similarities and differences in how evidence was evaluated and incorporated. For each of the cases, the decision was read in its entirety and each of the holdings and pieces of evidence cited were collected (Appendix II), and then types of evidence were tallied for each of the case groups (Figures 1a-3b). To determine gender and experience, information about the decision-makers (BIA board members, federal judges, or the A.G.) was searched for through their personal biographies that were online (primarily from the EOIR website or academic institutions), or information from news articles. This thesis intends to add to the literature that seeks to move beyond essentialist views of SGBV in migration in the existing literature, and rather take a constructivist approach in analyzing the significance of the evidence used in decisions, as recommended by experts in migration studies.⁹⁰

Law/Case Review: Discussion and analysis

In each group of cases, I analyze:

- The state of precedent and decisions of each case, and the disparities in outcomes within each group of cases
- Potential contributing factors to the disparities in outcomes (primarily the type and usage of evidence, gender of the judge, experience in immigration work)
- The relationship of these factors to the ethical principles governing judicial practice as they relate to bias and competence

The types of evidence cited in the decision were categorized into five groups based on close readings of the decisions: expert testimony, U.S. Department of State (DOS) reports, U.S. agency reports, UN agency reports, and scholarly work. U.S. agency reports include reports from the

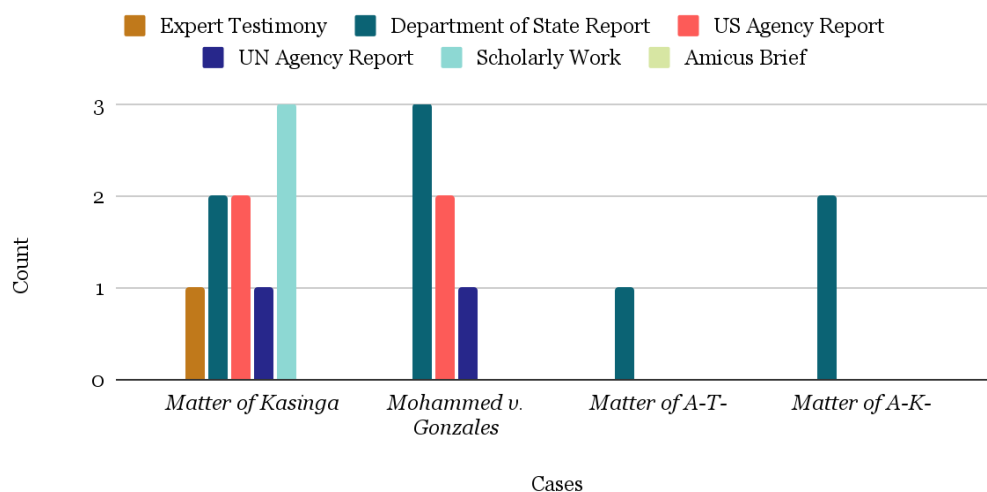
⁹⁰ Ozcurumez, 2021

former INS or current USCIS, and any other federal agencies. UN agency reports included any reports from the UNHCR and WHO. Scholarly work included any journal articles, law review articles, or books written for academic use. News articles were added as a category only for groups of cases in which a news article was cited as evidence, as that is not a highly common practice due to news articles being generally held inadmissible under the hearsay rule unless deemed necessary and trustworthy.⁹¹

Regarding female genital mutilation-based asylum claims

Figure 1a:⁹²

Tally of types of evidence cited by cases with FGM-based asylum claims



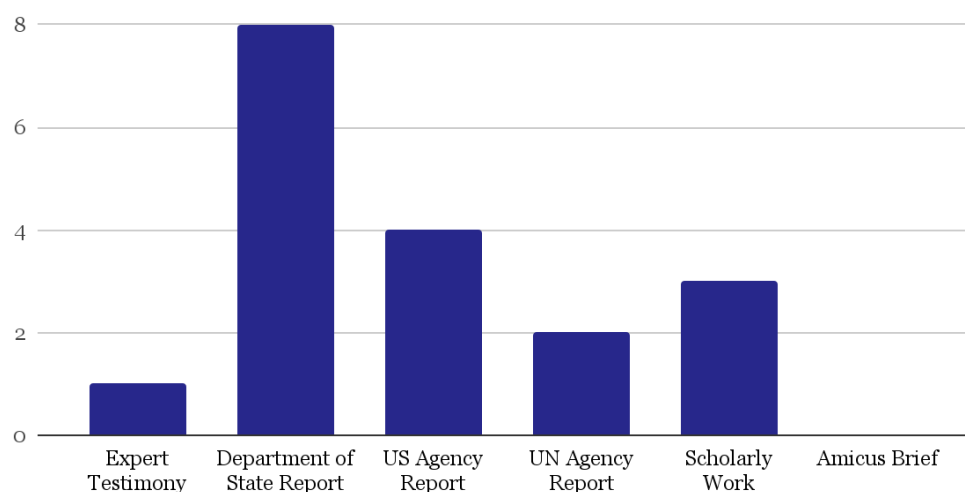
⁹¹ Duke Law Journal (1961). Evidence: Admissibility of Newspapers Under the Hearsay Rule. *Duke Law Journal*. Retrieved from

<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1770&context=dlj>

⁹² See Appendix II, Group 1 for table of holdings and evidence

Figure 1b:

Total count of each type of evidence cited for all selected FGM-based asylum claims



In 1996, the BIA made their first significant precedent-setting decision on a gender-based asylum claim, in the *Matter of Kasinga*. The BIA established a precedent for women fleeing gender-based persecution, the practice of female genital mutilation (FGM) could be eligible for asylum in the United States.⁹³ The BIA found that the Togolese claimant, Kassindja's, fear of FGM, if returned to Togo, formed a well-founded fear of persecution and that her fear of persecution was country-wide. Furthermore, they found that the young women of the Tchamba-Kunsuntu Tribe who oppose the tribe's practice of FGM, and have not yet gone through FGM, constitute a particular social group.⁹⁴ The BIA decision incorporated background materials "on the practice of FGM, its harmful effects on women, its lack of legitimate justification, and its condemnation by the international community, and the [...] poor human rights situation in Togo."⁹⁵ The BIA references two DOS reports – Country Report on Human

⁹³ *Matter of Kasinga*, 21 I&N Dec. 357, p. 357, (BIA 1996)

⁹⁴ *Matter of Kasinga*, 21 I&N Dec. 357, p. 357, (BIA 1996)

⁹⁵ *Matter of Kasinga*, 21 I&N Dec. 357, p. 361, (BIA 1996)

Rights Practices for 1993 and Togo - Profile of Asylum Claims & Country Conditions – for documentation of poor human rights conditions in Togo under the President of Togo at the time, and serious human rights abuses committed by the government’s military and security forces.⁹⁶ They also referenced multiple sources describing FGM to constitute FGM as a form of persecution. The first is a book entitled *Female Genital Mutilation: A Call for Global Action* (1993) by Nahid Toubia.⁹⁷ The second is a resource distributed by the INS Resource Information Center entitled *Alert Series - Women - Female Genital Mutilation* (1994).⁹⁸ The last is a memorandum from Phyllis Coven, Director of the Office of International Affairs under the former INS, entitled *Considerations For Asylum Officers Adjudicating Claims From Women* (1995), that explicitly states genital mutilation as a form of persecution primarily directed at girls and women.⁹⁹ The BIA also includes a letter offered by the applicant’s prior counsel from Charles Piot, an Assistant Professor of Cultural Anthropology at Duke University, who is of the opinion that women of the Tchamba tribe would be expected to undergo FGM prior to marriage.¹⁰⁰ However, the BIA further noted that minimal weight would be given to this letter given their inability to cross-examine Professor Piot.¹⁰¹ The BIA found Kassindja’s testimony and documentary evidence credible and were reasonably supportive of a well-founded fear of persecution regarding FGM and granted them asylum.¹⁰² The concurring opinion to this decision cited evidence that was included in the majority decision and expanded upon it through the addition of scholarly works and UNHCR memorandum. These included several law review articles – *United States Asylum Law: Recognizing Persecution Based on Gender using Canada*

⁹⁶ Matter of Kasinga, 21 I&N Dec. 357, p. 362, (BIA 1996)

⁹⁷ Matter of Kasinga, 21 I&N Dec. 357, p. 361, (BIA 1996)

⁹⁸ Matter of Kasinga, 21 I&N Dec. 357, p. 361, (BIA 1996)

⁹⁹ Matter of Kasinga, 21 I&N Dec. 357, p. 362, (BIA 1996)

¹⁰⁰ Matter of Kasinga, 21 I&N Dec. 357, p. 360, (BIA 1996)

¹⁰¹ Matter of Kasinga, 21 I&N Dec. 357, p. 360, (BIA 1996)

¹⁰² Matter of Kasinga, 21 I&N Dec. 357, p. 366, (BIA 1996)

as a Comparison (Kandt, 1995), *Guidelines for Women's Asylum Claims* (Kelly, 1993), and *Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence* (Goldberg, 1993) – and a memorandum from the UNHCR on FGM published in 1994.¹⁰³ Notably, although there was a dissent to the decision, however, without elaboration¹⁰⁴ The *Kasinga* case has been considered monumental for gender-based persecution claims.

Cases arising in federal district courts have treated FGM as an ongoing harm, most notably a case from the Ninth Circuit, *Mohammed v. Gonzales*, 400 F.3d (9th Circuit 2005). In this case, the court held that FGM constitutes “a permanent and continuing act of persecution,” and compared it to the ramifications of forced sterilization.¹⁰⁵ They cited the World Health Organization (WHO) as contributing to their conclusion, specifically WHO’s reporting on the health complications and psychological trauma that women suffer even when having gone through the least drastic form of FGM.¹⁰⁶ Similar to *Kasinga*, the court also referred to DOS Reports on the human rights conditions in Somalia and to prove that FGM is an ongoing form of persecution ask women can be at risk of further FGM depending on the type of FGM they were inflicted previously.¹⁰⁷ The court also wrote that Mohammed’s claims for protection under the UN Convention Against Torture were plausible, although they held less weight than the claims of FGM as an ongoing persecution.¹⁰⁸ Despite the successful outcomes of *Mohammed v Gonzales* and *Kasinga* which occurred almost twenty and thirty years ago respectively, adjudicators continue to deny gender-based asylum claims, including those claims made on the

¹⁰³ Matter of Kasinga, 21 I&N Dec. 357, p. 375, (BIA 1996)

¹⁰⁴ Matter of Kasinga, 21 I&N Dec. 357, p. 378, (BIA 1996)

¹⁰⁵ 400 F.3d 785, p. 800, (9th Circuit 2005)

¹⁰⁶ 400 F.3d 785, p. 800, (9th Circuit 2005)

¹⁰⁷ 400 F.3d 785, p. 800 (9th Circuit 2005)

¹⁰⁸ 400 F.3d 785, p. 802 (9th Circuit 2005)

basis of fear of FGM. As such, it is two cases in which the BIA denied asylum claims based on fear of FGM as persecution that I would like to analyze to compare and contrast opposing jurisprudence on FGM through the analytic framework of judicial ethics.

In the case of *Matter of A-T*, a young woman from Mali who had been forced to undergo FGM when she was a young girl, who additionally feared both a forced, arranged marriage and the consequences from her family for not complying, was denied asylum and protection under the Convention Against Torture by an IJ. This decision was upheld by the BIA.¹⁰⁹ Like both *Kasinga* and *Mohammed v. Gonzales*, the report cited a 2006 DOS country report on human rights practices in Mali to determine the extent of the practice of FGM in Mali.¹¹⁰ Despite this, the BIA proceeds to claim that as FGM can only be inflicted once, therefore the presumption of future FGM persecution is null. Furthermore, they rejected the analysis made by the Ninth Circuit in *Mohammed v. Gonzales* that any past FGM can be constituted as continuing persecution due to Congress not recognizing FGM as having a basis for asylum.¹¹¹ While Congress has recognized persons who have been subjected to forced sterilization or forced abortion as having a basis for asylum on the strength of past persecution alone, however, they have not done the same for FGM. The BIA used Congressional action as evidence of Congress' overall intent, which was then used as its reasoning to deny asylum in this case of FGM but grant asylum in cases of forced sterilization.¹¹² Then A.G. Mukasey eventually remanded the BIA's decision (*A-T*) for a new hearing. The BIA made a decision comparable to that of the *Matter of A-T* in the *Matter of A-K*, and held that a claimant may not establish eligibility for asylum based solely on fear that

¹⁰⁹ *Matter of A-T*, 24 I&N Dec. 296 (BIA 2007)

¹¹⁰ 24 I&N Dec. 296, p. 299 (BIA 2007)

¹¹¹ 24 I&N Dec. 296, p. 300 (BIA 2007)

¹¹² see *In Re Y-T-L*, 23 I&N Dec. 601 (BIA 2003)

their daughter will be harmed by FGM upon returning to their home country.¹¹³ The decision also cited two DOS reports on human rights conditions in Senegal.¹¹⁴

The question that naturally arises is, despite *Kasinga*'s precedent, why do adjudicators continue to distinguish and resist FGM-based asylum claims in particular, as part perhaps of resisting gender-based asylum claims as a whole? While I cannot here parse the legal reasoning claims by which the adjudicators distinguish their decisions from *Kasinga*, I note here, as part of my lens on 'bias and competence' as revealed in use of evidentiary sources that, apart from DOS reports, the BIA did not cite any other evidence in their decisions in the *Matters of A-T-* and *A-K-*. This is in stark contrast to both *Kasinga* and *Mohammed v. Gonzales* which both cited a myriad of resources on FGM from the WHO, the former INS, and expert testimony from scholars (Figure 1a). When taking into account the constructivist context of each of the cases and how the decision came to be what it was, moreover, there are two aspects to consider – the applicant, and the decision-maker. In seeking to account for difference in the outcomes of these four cases, I note that the applicants came from similar backgrounds and contexts. Therefore, I infer that these cases are best analyzed in terms of their decision makers and their differences in biases, competence, and other ethical principles of the decision-makers leading to their differing outcomes. This inference applies to analysis of the other case groups as well.

Based on the 2008 GAO report highlighted earlier, two factors to consider when considering the judicial ethics principles of bias and competence are the gender of the IJ and experience (primarily as an IJ, or less significantly, in other immigration work). Beginning with the *Matter*

¹¹³ Matter of A-K-, 24 I&N Dec. 275 (BIA 2007)

¹¹⁴ 24 I&N Dec. 275, p. 277 (BIA 2007)

of *Kasinga*, the author of the majority decision was former BIA chairman Paul W. Schmidt. He began working for the BIA in 1973, serving as acting General Counsel of the former INS from 1979-1987,¹¹⁵ served as BIA chairman from 1995-2001, and as a regular board member from 2001-2003.¹¹⁶ One concurring opinion was written by board member Lauri S. Filppu.¹¹⁷ The other concurring opinion, which expands upon the evidence provided in the majority opinion, was written by former board member Lory D. Rosenberg, who served in that position from 1995-2002. Prior to serving as a board member, she served as the Director of the Legal Action Center as part of the American Immigration Council/American Immigration Law Foundation from 1991-1995.¹¹⁸ The dissenting opinion was written by Fred Vacca, who served as a staff lawyer at the BIA and executive assistant to the board chairman prior to becoming a board member in 1981.¹¹⁹ *Mohammed v. Gonzales* was presented before the U.S. Court of Appeals for the Ninth Circuit judges Reinhardt, Thompson, and Berzon, and the decision was written by Stephen Reinhardt who was nominated to the Ninth Circuit by the Carter administration in 1979. The majority decision in the *Matter of A-T-*, which contradicted the decision in *Mohammed v. Gonzales*, was written by board member Lauri S. Filppu, who was also a concurring board member in the *Matter of Kasinga*.¹²⁰ *Matter of A-K-* was presented before the same board

¹¹⁵ Georgetown Law. (n.d.) “Paul Schmidt” Retrieved from <https://www.law.georgetown.edu/faculty/paul-wickham-schmidt/>

¹¹⁶ The Asylumist. (2016). Former BIA Chairman Paul W. Schmidt on His Career, the Board, and the Purge (part 1). *The Asylumist*. Retrieved from <https://www.asylumist.com/2016/09/28/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-1/>

¹¹⁷ *Matter of Kasinga*, 21 I&N Dec. 357, p. 368, (BIA 1996)

¹¹⁸ Rosenberg, L. (n.d.) “LinkedIn – Experience” Retrieved from <https://www.linkedin.com/in/loryrosenberg/details/experience/>

¹¹⁹ Brown, E. (2011) Fred Vacca, immigration judge. *The Washington Post – Obituaries*. Retrieved from

https://www.washingtonpost.com/local/obituaries/fred-vacca-immigration-judge/2011/02/16/ABfm0nQ_story.html

¹²⁰ 224 I&N Dec. 296, p. 296 (BIA 2007)

members as in *Matter of A-T*-, however, the majority decision was instead written by board member Roger Pauley.

It is noteworthy that the majority decisions of these four cases were written by male judges, with solely one concurring opinion in *Matter of Kasinga* being written by a female judge. The decisions were split in half in granting versus denial of asylum, and three out of the four concerned FGM of the female applicant, with only one out of the four concerning FGM as it impacts a male applicant (the *Matter of A-K*-, as the case concerned a father applying for asylum based on fear of FGM for his daughter). As such, for this group of cases, it is not entirely clear in these cases the role that gender bias may play in these decisions. However, the role of competence is more evident, particularly when comparing the *Matter of Kasinga* to the two denials of asylum. While the length of experience for each of these judges ranged similarly, the two board members that heavily cited evidence in the decision-making process in the *Matter of Kasinga* – Schmidt and Rosenberg – had extensive experience in immigration law prior to this case, either at the former INS or in other immigration law centers. Reinhardt did not have a publicized ABA rating as a federal judge, as the earliest available ratings were for judges appointed in 1989. He is a unique judge in this group. He did not have extensive experience in immigration law prior to being appointed to the Ninth Circuit, but was renowned as an extremely liberal judge, which does not equate to competence, but his long experience as a liberal judge likely influenced his decision in *Mohammed v. Gonzales* and his in-depth analysis of FGM as an ongoing harm.¹²¹ *Matter of A-T*- and *Matter of A-K*- consisted of the same panel of board members. Two of the board members – Filppu and Cole – had pretty standard career trajectories,

¹²¹ Dolan, M. (2018) *Stephen Reinhardt, 'liberal lion' of the 9th Circuit, dies at 87*. Los Angeles Times. Retrieved from <https://www.latimes.com/local/lanow/la-me-ln-reinhardt-obit-20180329-story.html>

beginning their careers in the BIA. However, Pauley, who wrote the decision in *Matter of A-K-*, and was also on the panel for *Matter of A-T-*, had a career heavily focused on criminal law rather than immigration law prior to becoming a board member for the BIA.¹²² The level of competence, in being able to interpret and analyze the significance of expert testimony, U.S. and UN agency reports, and scholarly works regarding FGM is clear. If even one board member on the panel is lacking in such ability, it is apparent that the judges incorporated only evidence comprehensible to them. This was most frequently DOS reports on general country conditions (Figure 1b), as providing evidence of country conditions applies to all asylum claims not just those related to SGBV. These reports do not typically get into the minutiae of the harms of FGM/SGBV that these decision-makers do not have the proper training, experience, or background to understand. As a result, their decisions do not find a well-founded fear of persecution based on FGM, as the evidence that they used/had the understanding and trust to deploy, does not accurately portray the harms of FGM that claimants fear.

¹²² EOIR. (2014). "Board of Immigration Appeals Biographical Information." Retrieved from https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/04/BIA_Bios_February2014.pdf

Regarding historic domestic violence-based asylum claims

Figure 2a:¹²³

Tally of types of evidence cited by historic domestic violence-based asylum claims

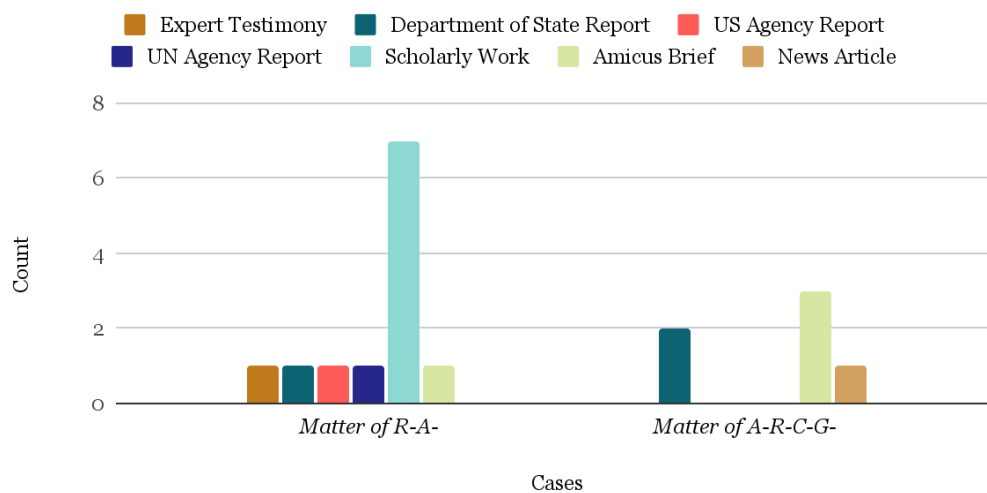
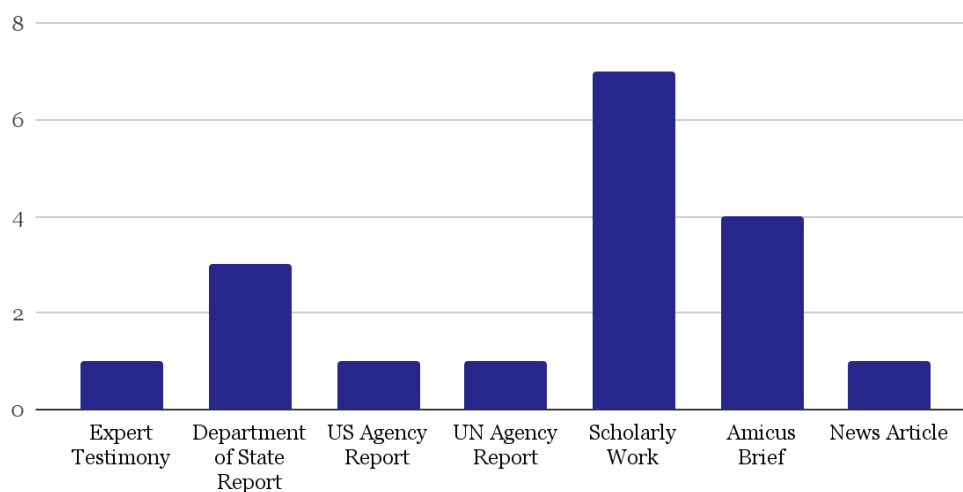


Figure 2b:

Total count of each type of evidence cited for historic domestic violence-based asylum claims



¹²³ See Appendix II, Group 2 for table of holdings and evidence

Besides FGM, the other type of SGBV asylum claim to reach precedential weight in the U.S. courts is domestic violence. There are two significant precedential cases regarding asylum claims based in domestic violence. First, is the *Matter of R-A-*, which held that when a victim of domestic violence fails to present “meaningful evidence” that her husband’s behavior was influenced by his perception of her political opinion, she can not demonstrate “harm on account of political opinion” or membership in a particular social group; the original grant of asylum by an IJ was reversed by the BIA.¹²⁴ As background to the decision, evidence was presented of the extent of the abuse that Alvarado faced from her husband in Guatemala. In addition to this agreed upon background information, both the decision and dissenting opinions cited a variety of evidence to supplement the applicant’s claims. The decision cited expert testimony from Dr. Doris Bersing about spousal abuse in Latin America, and Guatemala specifically, a Department of State advisory opinion on the Alvarado’s request for asylum, and an article prepared by the Canada Immigration and Refugee Board about the state of domestic violence in Guatemala.¹²⁵ It also made note of a joint amicus curiae brief from the Refugee Law Center and the International Human Rights and Migration Project that supported the applicant’s claims of persecution.¹²⁶ The decision also cited guidelines from the former INS on adjudicating asylum claims from women.¹²⁷ The dissenting opinion primarily cited scholarly work, but also referred to the same joint amicus brief and former INS guidelines as in the majority opinion, and further cited the Declaration on the Elimination of Violence Against Women and Conclusions on the International Protection of Refugees.¹²⁸ Notably, this case became a politically salient case, and the decision by the BIA was eventually vacated by the A.G. in 2001 and the applicant was granted asylum.

¹²⁴ *Matter of R-A-*, 22 I&N Dec. 906, p. 906 (BIA 1999)

¹²⁵ 22 I&N Dec. 906, p. 910 (BIA 1999)

¹²⁶ 22 I&N Dec. 906, p. 911 (BIA 1999)

¹²⁷ 22 I&N Dec. 906, p. 911 (BIA 1999)

¹²⁸ 22 I&N Dec. 906, p. 913 (BIA 1999)

The *Matter of A-R-C-G- et al.* can be contrasted with the original *Matter of R-A-* in its disposition. It has been highly regarded as it set a precedent for domestic violence-based asylum claims, and held that “depending on the facts and evidence in an individual case, ‘married women in Guatemala who are unable to leave their relationship’ can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal.”¹²⁹

The decision cited a news article on the human rights conditions for women in Guatemala, further supplementing it with two human rights reports on the human rights conditions in Guatemala, one from the Committees on Foreign Relations and Foreign Affairs and the other from the Department of State.¹³⁰ The decision also cited to amicus curiae briefs from the American Immigration Lawyers Association, the UNHCR, and the Center for Gender & Refugee Studies as alternative “reliable and credible sources of information,” although based on the applicants’ past testimony alone, these materials were not needed to make a determination.¹³¹

Considering the the two factors of gender of the judge and experience, in the *Matter of R-A-*, the author of the majority decision was board member Lauri S. Filppu. It is of note, that multiple board members that the *Matter of R-A-* was presented before also adjudicated the *Matter of Kasinga*, including Filppu. Filppu began his career as an attorney advisor with the BIA in 1973, and eventually served as board member for 16 years.¹³² The dissenting opinion was written by board member John Guendelsberger. Guendelsberger began serving as a board member in 1995, prior to which he was a professor of law specialized in immigration law, comparative law, and international law. He also has served as an attorney with the Ohio Legal Rights Service, an

¹²⁹ *Matter of A-R-C-G- et al.*, 26 I&N Dec. 388, p. 388 (BIA 2014)

¹³⁰ 26 I&N Dec. 388, p. 394-395 (BIA 2014)

¹³¹ 26 I&N Dec. 388, p. 395 (BIA 2014)

¹³² Advent Funeral. (2011). “Obituary of Lauri Steven Filppu.” Retrieved from <https://adventfuneral.com/tribute/details/175240/Lauri-Filppu/obituary.html>

agency that advocated for the rights of persons with mental or developmental disabilities.¹³³ In the *Matter of A-R-C-G-*, the decision was primarily written by BIA Vice Chairman Charles Adkins-Blanch. Adkins-Blanch had various experiences in immigration law from 1989-2013, in both the private sector and in government agencies, prior to his appointment as the Deputy Chief Appellate IJ (otherwise known as the Vice Chairman of the BIA).¹³⁴ As the judges in these cases are members of the BIA, they do not have ABA ratings. For both cases the authors of the majority decisions were male, again adjudicating on cases of female applicants. There were female judges who joined the dissenting opinion of *Matter of R-A-*, but they did not write separately. It is worthy of mention that both of these judges had extensive experience as an IJ prior to these decisions, which likely lended itself to the sympathetic overall tone of both of these decisions. In the case of the *Matter of R-A-*, the decision to deny asylum based on the applicant was not primarily based on the evidence, but rather, a theory of what makes a particular social group cognizable to asylum law. More precisely, the BIA claimed that the facts presented by the applicant herself did not properly establish her as a member of a particular social group, and that they were more an account of abuse targeted towards herself, not an entire social group, and the evidence was cited towards that claim. As noted, the *Matter of R-A-* was vacated by the A.G. in 2001, and in 2009 the applicant was eventually granted asylum. In contrast, the evidence cited in the *Matter of A-R-C-G- et al.* – although the facts and content of the evidence cited were similar in nature to the *Matter of R-A-* – was cited toward the claim that a cognizable particular social group existed, and therefore the applicant should be granted asylum. Both judges in these cases had experience in immigration law prior to joining the BIA, therefore they were adequately able to analyze a variety of types evidence (Figure 2a and 2b) and relate them to legal categories, and

¹³³ EOIR, 2014

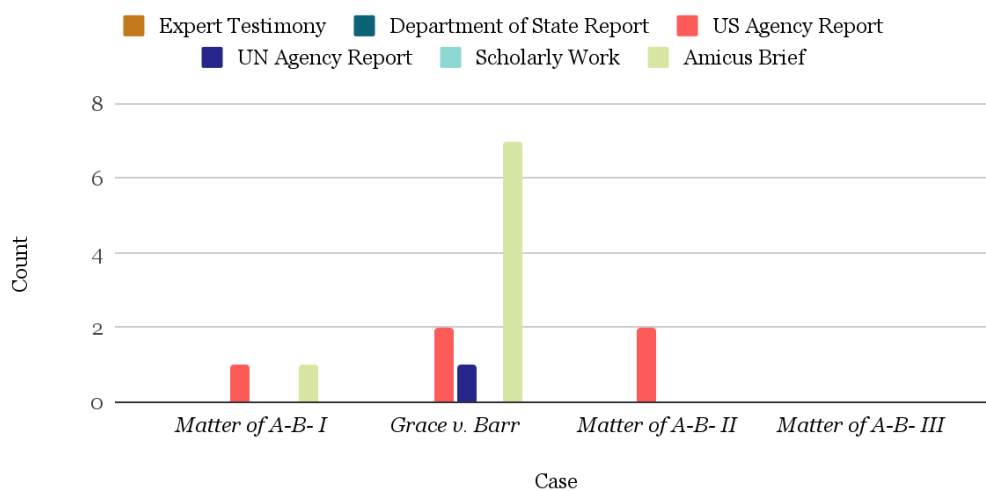
¹³⁴ EOIR. (2023). *Biographical Information*. Department of Justice. Retrieved from <https://www.justice.gov/eoir/board-of-immigration-appeals-bios#CharlesAdkins-Blanch>

incorporate that into their decision. The contrasting decisions between these two cases were seemingly more related to the application of legal theory to fact, and the language of the law, rather than the bias or competence of the judges towards the evidence per se.

Domestic violence asylum claims under the shifting Trump and Biden administrations

Figure 3a:¹³⁵

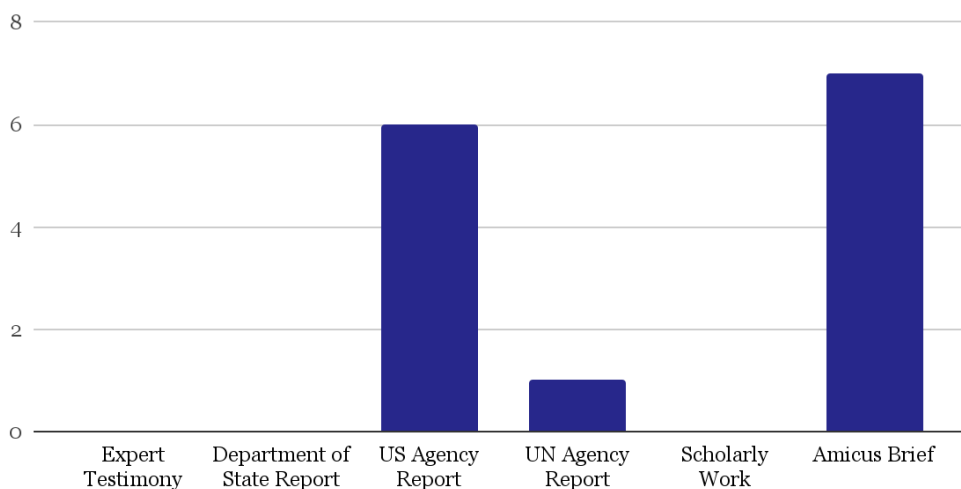
Tally of types of evidence cited in domestic violence claims under the shifting Trump and Biden administrations



¹³⁵ See Appendix II, Group 3 for table of holdings and evidence

Figure 3b:

Total count of each type of evidence cited for Matters of A-B- and select associated cases



In 2018, then A.G. Jeff Sessions made a massively altering decision to the asylum system in the *Matter of A-B-*. This case concerned a domestic violence survivor from El Salvador, seeking to flee severe abuse from her husband, and who claims she had no support from local police.¹³⁶ The initial *Matter of A-B-* held that *Matter of A-R-C-G-* was wrongly decided and overturned it.¹³⁷ This was one of the many asylum decisions that occurred under the new restrictions imposed by the Trump administration, overtly and more implicitly, and was the restriction most detrimental to people fleeing SGBV, particularly cases of domestic violence, and seeking asylum in the U.S. Here, Sessions solely focuses on the language of “membership in a particular social group” to reconstruct what the law will ‘see’ in the evidence, and thus reverses the decision of *Matter of A-R-C-G-*. In terms of evidence, Sessions acknowledges at the top of the decision that he had

¹³⁶ Center for Gender and Refugee Studies. (2021). “Matter of A-B-” Retrieved from <https://cgrs.uchastings.edu/our-work/matter-b-0>

¹³⁷ *Matter of A-B-*, 27 I&N Dec. 316 p. 316 (A.G. 2018)

invited any interested amici to submit briefs, but did not reference any specific amici briefs within the decision.¹³⁸ Sessions cited a DOJ report entitled *Extent, Nature, and Consequences of Intimate Partner Violence* (2000) as evidence of domestic violence being “a difficult crime to prevent and prosecute.”¹³⁹ The former A.G. goes as far to hold that generally, domestic violence claims will not qualify for asylum under the credible fear of persecution.¹⁴⁰ Much could be said here about the ethics of Sessions’ practice as A.G. under the Trump Administration, but here I focus on the effects of his arguably biased and less than competent reading of the law against the facts.¹⁴¹ *Grace v. Barr* is one of the first, prominent appellate asylum cases that occurred following the ruling in *Matter of A-B-*.¹⁴² It upheld the former A.G.’s decision in the *Matter of A-B-* against credible fear of persecution claims related to domestic violence not qualifying for asylum. There were seven amici curiae briefs cited at the top of the decision, but were not referenced elsewhere within the decision itself. There were two USCIS documents cited in the decision – *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, and *USCIS Lesson Plan: Credible Fear of Persecution and Torture Determinations*.¹⁴³ These two documents of agency guidance and training were utilized to compare and contrast asylum policy prior to and following *Matter of A-B-*. Lastly, the decision refers to the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* as a means of denying the asylum seekers wishes of the appellate judges to meaningfully include it as evidence, and emphasizes that the Handbook is not binding

¹³⁸ 27 I&N Dec. 316 p. 317 (A.G. 2018)

¹³⁹ 27 I&N Dec. 316 p. 343 (A.G. 2018)

¹⁴⁰ 27 I&N Dec. 316 p. 320 (A.G. 2018)

¹⁴¹ Sheppard, B. (2018, forthcoming) The Ethics Resistance. *Georgetown Journal of Legal Ethics*. Retrieved from <https://ssrn.com/abstract=3174178> or <http://dx.doi.org/10.2139/ssrn.3174178>

¹⁴² *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020)

¹⁴³ 965 F.3d 883, p. 900 (D.C. Cir. 2020)

on the A.G., the BIA, or any other U.S. courts.¹⁴⁴ In a follow-up case to the initial *Matter of A-B-*, the decision in *Matter of A-B- II* by acting A.G. Jeffrey Rosen affirmed the original decision.¹⁴⁵ In this decision, two reports from the Bureau of Justice Statistics were cited to show the high prevalence of domestic violence in the U.S., in order to reaffirm the original claim that claims of persecution due to domestic violence do not hold valid. In the final follow-up to this set of cases, A.G. Merrick Garland vacated both *Matter of A-B-* and *Matter of A-B- II* in *Matter of A-B- III*, restoring the precedence set by *Matter of A-R-C-G-* regarding asylum claims and domestic violence.¹⁴⁶ It was a considerably shorter decision, sitting at three pages in length, and did not cite to any other evidence.

The *Matters of A-B-* and related cases are unique, as they follow changes in the review of a single case over multiple years and through two different presidential administrations. Questions of judicial ethics are pertinent for this era of judicial-decision making, as the qualifications of many of the judges appointed during the Trump administration were consistently called into question.¹⁴⁷ Furthermore, the fact that the decisions that had the most precedential consequences for the asylum system were made by different AGs complicates one aspect of this analysis, as AGs appoint BIA members, but AGs are appointed by sitting U.S. Presidents, yet one constant remains: judicial ethics of all kinds require unbiased and competent decision-making.

¹⁴⁴ 965 F.3d, p. 898 (D.C. Cir. 2020)

¹⁴⁵ *Matter of A-B- II*, 28 I&N Dec. 199 (A.G. 2021)

¹⁴⁶ *Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021)

¹⁴⁷ Feinstein, D. (2020). *Republicans Keep Confirming Unqualified Judicial Nominees - Law360*. United States Senator for California Dianne Feinstein. Retrieved from <https://www.feinstein.senate.gov/public/index.cfm/2020/6/republicans-keep-confirming-unqualified-judicial-nominees-law360>

Based on the ethical issues of bias and competence, the gender and experience of the AGs and judge in *Grace v. Barr* will be analyzed. Former A.G. Jeff Sessions, who made the decision to overturn the *Matter of A-R-C-G-* in the *Matter of A-B-*, was appointed under the Trump administration, and served A.G. from 2017-2018. In his prior federal experience, he served as attorney general and a senator for Alabama. He was also ranked one of the the most conservative senators during his term, having strong anti-immigration and anti-abortion stances, is a strong opponent of same-sex marriage, and has faced allegations of racism that came out during a previous confirmation hearing.¹⁴⁸ Judge David S. Tatel, wrote the opinion in *Grace v. Barr*. He was appointed to the D.C. Circuit Court of Appeals in 1994, received an ABA rating of well-qualified upon his appointment.¹⁴⁹ Prior to his federal appointment, he served as the Director of the Chicago Lawyers' Committee for Civil Rights Under Law, then Director of the National Committee, and then Director of the Office of Civil Rights of the U.S. Department of Health, Education and Welfare.¹⁵⁰ He has also had several law review articles published on administrative law, particularly law that affects public education. Former acting A.G. Jeffrey Rosen wrote the decision in the *Matter of A-B- II*. His prior federal experience included serving as General Counsel of the U.S. Department of Transportation under the Bush administration and Deputy Secretary of Transportation under the Trump administration. Finally, A.G. Merrick Garland vacated both *Matter of A-B-* and *Matter of A-B- II* in the *Matter of A-B- III*, restoring the protections provided by the *Matter of A-R-C-G-*. He has spent a substantial portion of his career

¹⁴⁸ Beggin, R., De la Cuetara, I., & Jacobo, J. (2018). *Jeff Sessions: Everything you need to know about the former attorney general*. ABC News. Retrieved from <https://abcnews.go.com/Politics/jeff-sessions/story?id=40279756>

¹⁴⁹ ABA Standing Committee. (1994). "Ratings of Article III Judicial Nominees for the 103rd Congress." Retrieved from https://www.americanbar.org/content/dam/aba/administrative/federal_judiciary/ratings103.pdf

¹⁵⁰ District of Columbia Circuit. (n.d.). "David S. Tatel." Retrieved from <https://www.cadc.uscourts.gov/internet/home.nsf/content/vl+-+judges+-+dst>

prior to his appointment as the current A.G. working under previous A.G.s doing criminal, civil, and national security work.¹⁵¹ Prior to his federal career, he worked in private practice focused on antitrust and administrative law, and had law review articles published in these areas as well.¹⁵²

Once again, all of the AGs and judges with the final decision-making power in these cases were male. Aside from bias that may be associated with gender, there may have also been bias associated with political affiliation and personal views on immigration, particularly in the case of former A.G. Sessions, who was notorious for being a conservative Senator with extremely conservative views that appear to have transited into legal decisions he made as A.G. In regard to competence, as the qualifications to be appointed as A.G. are substantially different from that of a BIA member – the overall experience as an IJ, or in doing any immigration work, of the A.G.s and Judge Tatel is none as far as as could be found. Very little evidence was cited throughout all of these decisions. No scholarly works, no expert testimony, nor DOS reports were cited – as AGs, their job was to conceptualize the law and U.S. legal obligations under the Constitution, international law and specific precedents. Evidence qua evidence played a lesser role, but here they revealed a legal fiction about legal reasoning: that it is detached from context, and historical meaning of social practices. A.G. reasoning reveals a separation from the evidence that social practices, such as tolerance of domestic violence and intimate partner violence, is part of how we evaluate state promises to rights.

¹⁵¹ Office of the Attorney General. (2022). *Staff Profile on Attorney General Merrick B. Garland*. U.S. Department of Justice. Retrieved from <https://www.justice.gov/ag/staff-profile/meet-attorney-general>

¹⁵² Office of the Attorney General, 2022

Conclusion

For the U.S. to fulfill its intended promise to protect refugees and asylum seekers, much change in the asylum system needs to occur. From a public health perspective, a shift towards a more humane and trauma-informed asylum system is critical and needed as flagged in the fact that SGBV is contextual and its impacts do not ‘end’ when the specific initial acts may no longer occur (see above), such that courts and legal processes may be part of that trauma.¹⁵³ However, the focus here is for the system to work according to its own claims: in order for such a system to work, judges must conduct themselves fairly and ethically. Based on the findings of this thesis – bias, particularly related to gender and political affiliation, and competence which is gained through experience in immigration law, are two factors that significantly affect the outcomes of decisions. It is difficult to make a concrete conclusion on gender bias, as only a few cases were analyzed and it so happened that a majority of the decisions were written by male judges. A commentary could be made about male judges being primary authors of decisions on issues of SGBV that more commonly impact women and girls, especially in cases of asylum, but it is difficult to significantly conclude upon. However, restricting the gender of decisionmakers is not an equitable way forward. In order to hold the asylum system and system of judicial reasoning accountable to its own terms, I turn to ethics, and here I find that it needs to be aligned with contemporary, evidence-based understandings of what bias and competence are. Whatever bias judges have that come with gender, political affiliation, or any other biases, and any lack of competence that is seen through incorporations or lack thereof of evidence, it is best overcome not by restricting the gender of decision-makers, but rather training them to overcome bias and

¹⁵³ See e.g. Habbah, H., Hampton, K. & Mishori, R. (2020) (rep.) “*You Will Never See Your Child Again*”: *The Persistent Psychological Effects of Family Separation*. Physicians for Human Rights. Retrieved from https://phr.org/our-work/resources/you-will-never-see-your-child-again-the-persistent-psychological-effects-of-family-separation/?utm_source=webpromo

increase competence. One suggestion towards the evidence used is revising DOS reports on country conditions to more thoroughly capture non-state gender persecution, as they are a form of evidence frequently comprehensible as evidence of persecution. One suggestion toward bias is to incorporate mandatory implicit bias training in order to increase awareness of what bias is and how it works, which could enable to make more fair and impartial judgements. One suggestion toward competence could be changing the requirements for being a BIA member to include a standard amount of previous immigration law experience prior to being eligible, and then further incorporating trauma-informed training on specific asylum-related issues, including SGBV, so that decision-makers can properly analyze and incorporate evidence into their decisions. These suggestions can be for the DOJ in amending training on a structural level, but also for individual decision-makers who seek these types of judicial positions or are currently in these positions. No matter how, change needs to occur in the asylum system, as the irregularities seen in decision-making regarding SGBV lead to injustice for people seeking asylum. To remedy this injustice, on a structural level and on an individual level, judges need to work towards reducing bias and increasing competence to properly protect asylum seekers as promised.

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965 F.3d 883 (D.C. Cir. 2020)

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

Appendix I: List of Abbreviations

ABA = American Bar Association
 AG = Attorney General
 CAT = Convention Against Torture
 CBP = Customs and Border Protection
 DOJ = U.S. Department of Justice
 DOS = U.S. Department of State
 EOIR = Executive Office of Immigration Review
 FGM = Female genital mutilation/cutting
 GAO = U.S. Government Accountability Office
 ICCPR = International Covenant of Civil and Political Rights
 IHRL = International human rights law
 IJ = Immigration Judge
 INA = Immigration and Nationality Act
 INS = former Immigration and Naturalization Services
 IPV = Intimate partner violence
 SGBV = Sexual and gender-based violence
 UDHR = Universal Declaration of Human Rights
 UN = United Nations
 UNHCR = United Nations High Commissioner for Refugees (otherwise known as the UN Refugee Agency)
 U.S. = United States of America
 USCIS = U.S. Citizenship and Immigration Services
 VAWA = Violence Against Women Act
 WHO = World Health Organization

Appendix II: Tables for Law Review

Group 1: Cases with FGM-based claims

Case with Brief Holding and Evidence Cited in the Decision	
Holding	Overview of evidence cited in the decision
Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996)	
The BIA held that women fleeing gender-based persecution, specifically female genital cutting (FGM), could be eligible for asylum in the U.S. with FGM as a basis for a claim of persecution and that members of the Tchamba-Kunsuntu	<i>Decision</i>
	<ol style="list-style-type: none"> 1. Letter dated August 24, 1995 from Charles Piot, Assistant Professor of Cultural Anthropology at Duke University (Exh. 6) 2. Nahid Toubia, <i>Female Genital Mutilation: A Call for Global Action</i> 9, 24-25 (Gloria Jacobs ed.,

<p>Tribe or northern Togo would be recognized as members of a “particular social group.” (see Matter of Kasinga, 21 I. & N. 357, BIA 1996)</p>	<p>Women Ink. 1993)</p> <ol style="list-style-type: none"> 3. INS Resource Information Center, <i>Alert Series – Women – Female Genital Mutilation</i>, Ref. No. AL/NGA/94.001 (July 1994) 4. Coven, U.S. Dep’t of Justice, <i>Considerations For Asylum Officers Adjudicating Claims From Women</i> (1995) 5. 103d Cong., 2d Sess., <i>Country Report on Human Rights Practices for 1993</i> (Joint Comm. Print 1994) 6. Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, <i>Togo - Profile of Asylum Claims & Country Conditions</i> (April 1995) <p><i>Concurring opinion</i></p> <ol style="list-style-type: none"> 1. Kristin E. Kandt, <i>United States Asylum Law: Recognizing Persecution Based on Gender sing Canada as a Comparison</i>, 9 Geo. Immigr. I.J. 137, 145 (1995) 2. Nancy Kelly, <i>Guidelines for Women’s Asylum Claims</i>, 26 Cornell Int’l L.J. 565, 591-92 (1993) 3. Pamela Goldberg, <i>Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence</i>, 26 Cornell Int’l L.J. 565, 591-92 (1993) 4. United Nations High Commissioner for Refugees, <i>Memorandum: Female Genital Mutilation</i> (Geneva, UNHCR, Division of International Protection, May 1994) <p><i>Dissenting opinion</i></p> <p>None</p>
Mohammed v. Gonzales, 400 F.3d 785, 796-98 (9th 2005)	
<p>The court held that FGM constitutes “a permanent and continuing act of persecution.”</p>	<ol style="list-style-type: none"> 1. World Health Organization, <i>Female Genital Mutilation: An Overview</i> (1998) 2. U.S. Dept. of State, <i>Report on Female Genital Mutilation</i> (updated June 27, 2001) available at http://www.state.gov/g/wi/rls/rep/c6466.htm 3. Phyllis Coven, INS Office of International Affairs, <i>Gender Guidelines, Considerations for Asylum Officers Adjudicating Asylum Claims From Women</i> (May 26, 1995) 4. UNHCR, <i>Guidelines on International Protection: Membership of a Particular Social Group</i>

	<ol style="list-style-type: none"> 5. Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, <i>Country Report on Human Rights Practices 2004 – Somalia</i> (February 28, 2005) available at https://2009-2017.state.gov/j/drl/rls/hrrpt/2004/41626.htm 6. Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, <i>Somalia Profile of Asylum Claims and Country Conditions</i>
Matter of A-T-, 24 I&N Dec. 296 (BIA 2007)	
Due to FGM being a type of harm that is generally only inflicted once, asylum applicants no longer have a “well-founded fear of persecution” based on the fear that they will again be subject to FGM.	<ol style="list-style-type: none"> 1. Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, <i>Mali Country Reports on Human Rights Practices – 2006</i> (Mar. 6 2007)
Matter of A-K-, 24 I&N Dec. 275 (BIA 2007)	
An applicant is not eligible for asylum based solely on the fear that their daughter will be harmed by FGM upon returning to their home country.	<ol style="list-style-type: none"> 1. Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, <i>Senegal Country Reports on Human Rights Practices – 2005</i> (Mar. 8, 2006) available at http://www.state.gov/g/drl/rls/hrrpt/2005/61589.htm 2. Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, <i>Senegal Profile of Asylum Claims and Country Conditions</i> 9 (June 1998)

Group 2: Cases with domestic violence-based claims

Case with Brief Holding and Evidence Cited in the Decision	
Holding	Overview of evidence cited in the decision
Matter of R-A-, 22 I&N Dec. 906 (BIA 1999)	
The BIA held that when a victim of domestic violence fails to present “meaningful evidence” that the husband’s behavior was influenced by his perception of her opinion, she has not demonstrated “harm on	<i>Decision</i>
	<ol style="list-style-type: none"> 1. Expert testimony from Dr. Doris Bersing 2. Department of State advisory opinion to the applicant’s asylum request 3. “Respondent submitted numerous articles and

account of political opinion.”
 Furthermore, they also held that the existence of shared descriptive characteristics does not qualify one as a member of a “particular social group.”

reports regarding violence against women in Guatemala and other Latin American countries” – cites one specific article prepared by the Canada Immigration and Refugee Board

4. Joint amicus curiae brief from the Refugee Law Center and the International Human Rights and Migration Project
5. Phyllis Coven, INS Office of International Affairs, *Gender Guidelines, Considerations for Asylum Officers Adjudicating Asylum Claims From Women* (May 26, 1995)

Dissenting opinion

1. Joint amicus curiae brief from the Refugee Law Center and the International Human Rights and Migration Project
2. Declaration on the Elimination of Violence Against Women and Conclusions on the International Protection of Refugees
3. Phyllis Coven, INS Office of International Affairs, *Gender Guidelines, Considerations for Asylum Officers Adjudicating Asylum Claims From Women* (May 26, 1995)
4. Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update 3* (1996)
5. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291, 303-06 (1994)
6. *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Comm. on the Elimination of Discrimination Against Women, 27th Sess., Supp. No. 38, para. 26, at 8, U.N. Doc. A/47/38 (1992)
7. Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution due to Membership in a Particular Social Group*, 26 Cornell Int’l L.J. 505, 562 (1993)
8. Kristin E. Kandt, *United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison*, 9 Geo. Immigr. L.J. 137, 145 (1995)
9. Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 Cornell Int’l L.J. 625 (1993)

	<p>10. Pamela Goldberg, <i>Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence</i>, 26 Cornell Int'l L.J. 565, 591-92 (1993)</p> <p>11. Deborah Anker et al., <i>Women Whose Governments are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law</i>, 11 Geo. Immigr. L.J. 709, 713 (1997)</p>
Matter of A-R-C-G- et al., 26 I&N Dec. 388 (BIA 2014)	
<p>Depending on individual facts and evidence in a case, in the basis of an asylum claim, “married women in Guatemala who are unable to leave their relationship” can constitute a cognizable particular social group.</p>	<ol style="list-style-type: none"> 1. Committees on Foreign Relations and Foreign Affairs, 111th Cong., 2d Sess., Country Reports on Human Rights Practices for 2008 2598 (Joint Comm. Print 2010), available at http://www.gpo.gov/fdsys/pkg/CPRT-111JPRT62931/pdf/CPRT-111JPRT62931.pdf 2. Bureau of Human Rights, Democracy, and Labor, U.S. Dep't of State, Guatemala Country Reports on Human Rights Practices—2008 (Feb. 25, 2009), http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119161.htm 3. Guatemala Failing Its Murdered Women: Report, Canadian Broad. Corp. (July 18, 2006), http://www.cbc.ca/news/world/guatemala-failing-its-murdered-women-report-1.627240 4. Amicus curiae brief from the American Immigration Lawyers Association 5. Amicus curiae brief from the United Nations High Commissioner for Refugees 6. Amicus curiae brief from the Center for Gender & Refugee Studies

Group 3: The Matters of A-B-

Case with Brief Holding and Evidence Cited in the Opinion	
Holding	Overview of evidence cited in the opinion
Matter of A-B- I, 27 I&N Dec. 316 (A.G. 2018)	
Matter of A-R-C-G-, 26 I&N Dec. 338 (BIA 2014) is overruled.	<ol style="list-style-type: none"> 1. Makes reference to amici that were invited to respond but does not reference specific briefs

	<p>2. Office of Justice Programs, U.S. Dep’t of Justice, <i>Extent, Nature, and Consequences of Intimate Partner Violence</i> (2000)</p>
<p>Grace v. Barr, 965 F.3d 883 (D.C. Cir. 2020)</p>	
<p>Concerning the credible fear interview,</p>	<p><i>Opinion</i></p>
	<ol style="list-style-type: none"> 1. USCIS, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-, PM-602-0162 (July 11, 2018) 2. U.N. High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 65 (1979) (“Handbook”) 3. USCIS, Lesson Plan: Credible Fear of Persecution and Torture Determinations 17 (Feb. 13, 2017) 4. Amici curiae brief of Immigration Reform Law Institute 5. Amici curiae brief of The District of Columbia, et al. 6. Amici curiae brief of Current Members of Congress and Bipartisan Former Members of Congress 7. Amici curiae brief of The Tahirih Justice Center, et al. 8. Amici curiae brief of Administrative Law Professors 9. Amici curiae brief of Immigration Law Professors 10. Amici curiae brief of United Nations High Commissioner for Refugees <p>* Note on 4-10: The opinion mentions each of the amici at the top of the opinion, however does not reference any in the actual analysis.</p>
	<p><i>Dissenting opinion</i></p>
<ol style="list-style-type: none"> 1. USCIS, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-, PM-602-0162 (July 11, 2018) 	
<p>Matter of A-B- II, 28 I&N Dec. 199 (A.G. 2021)</p>	

Interprets Matter of A-B- I and affirms the holding	<ol style="list-style-type: none"> 1. Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 255113, Criminal Victimization, 2019, at 3 tbl.1, 5 tbl.3 (Sept. 2020) 2. Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 250231, Police Response to Domestic Violence, 2006–2015, at 1 (May 2017)
Matter of A-B- III, 28 I&N Dec. 307 (A.G. 2021)	
Matter of A-B- (A.G. 2018) and Matter of A-B- II (A.G. 2021) are vacated in their entirety.	None