

# Gender-Related Claims

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# Overview

1. Types of Gender-Based Harm
2. Factors Related To Gender That Must Be Considered
3. Factors That May Inhibit An Applicant's Ability to Present Fully a Gender- Related Claim
4. Effective Interviewing Techniques To Fully Elicit Sensitive Issues

*(continued on next slide)*



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# Overview (cont.)

5. Factors Related To Gender That Must Be Considered In Evaluating Credibility
6. Evidentiary Considerations
7. Factors Related To Gender That May Affect An Ability To Relocate
8. Applying Appropriate Legal, Policy, Procedural, And International Guidance



# Examples of Gender-Based Harm

\* Sexual Violence

\* Domestic Violence

\* Female Genital Mutilation  
(FGM)

\* Human Trafficking

\* Forced and Early Marriage

\* Honor Crimes

\* Forced Abortion

\* Sexual Slavery



# Sexual Violence

\* “Any act of a sexual nature which is committed on a person under circumstances which are coercive.”

\* Examples include rape, sexual slavery, sexual mutilation

\* Rape can be used on mass scale to terrorize but individual claims don't mean it's purely personal harm (look to case facts and country condition information)

\* For rape, consider harm of act AND social harm/stigma as a consequence



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# Female Genital Mutilation (FGM)

\* Females of \_\_\_\_\_ nationality or ethnicity who are subject to gender-related cultural traditions

\* **What are types of FGM?**

- \* circumcision
- \* excision
- \* infibulation

\* **What are short and long term consequences of FGM?**

- \* Short: Without anesthesia, often at home (unsanitary, non-medical personnel); bleeding, shock, infection
- \* Long: Chronic infections, painful menstruation, child birth, HIV risk, psychological problems, sexual dysfunction



# FGM PSG Reformulation

Females of X nationality or ethnicity who are subject to gender-related cultural traditions.

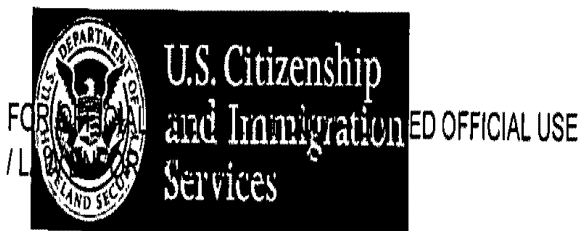
\* Previously articulated as women of X nationality/ethnicity who have not undergone FGM as practiced in that culture.



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# FGM PSG continued

- \* *Kasinga* is still good law.
- \* In *Matter of A-T-*, both the AG and BIA acknowledged that the future harm need not take the identical form as the past harm of FGM in order for the presumption that the applicant will be persecuted in the future on the basis of the original claim.
- \* The LP PSG formulation generally permits a presumption of well-founded fear where the applicant suffered past persecution in the form of FGM and fears future persecution in the form of forced marriage.





# FGM Exercise



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# Forced and Early Marriage

## \* *What are some possible reasons*

- \* poverty
- \* settling debt
- \* “punishment” for rapist

## \* *What are some of the questions to distinguish between arranged and forced marriage*

- \* Level of coercion
- \* Ability to avoid the marriage
- \* Consequences for refusing to submit



# Domestic Violence

\* (Nationality) women unable to leave a domestic relationship  
– Matter of A-R-C-G; or

\* (Nationality) women viewed as property because of their  
position within a domestic relationship – DHS brief in Matter  
of L-R.

\* Consider ability to leave the relationship at the time that the harm  
occurred

## Additional Considerations

- \* Fear of arrest
- \* Social stigma
- \* Inability to support oneself + children



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# Human Trafficking

What is the difference between smuggling and trafficking?

Smuggling:

“the importation of people into the United States involving deliberate evasion of immigration laws”

Trafficking:

“The recruitment, harboring, transportation, or obtaining of a person (regardless of citizenship or immigration status) for forced labor or commercial sex.



# Honor Crimes

\* Carried out to "restore" a family's honor

\* Including: stoning, abduction, imprisonment, rape, poisoning, acid attacks, disfigurement, forced marriage, murder, or attempts to coerce the victim to commit suicide

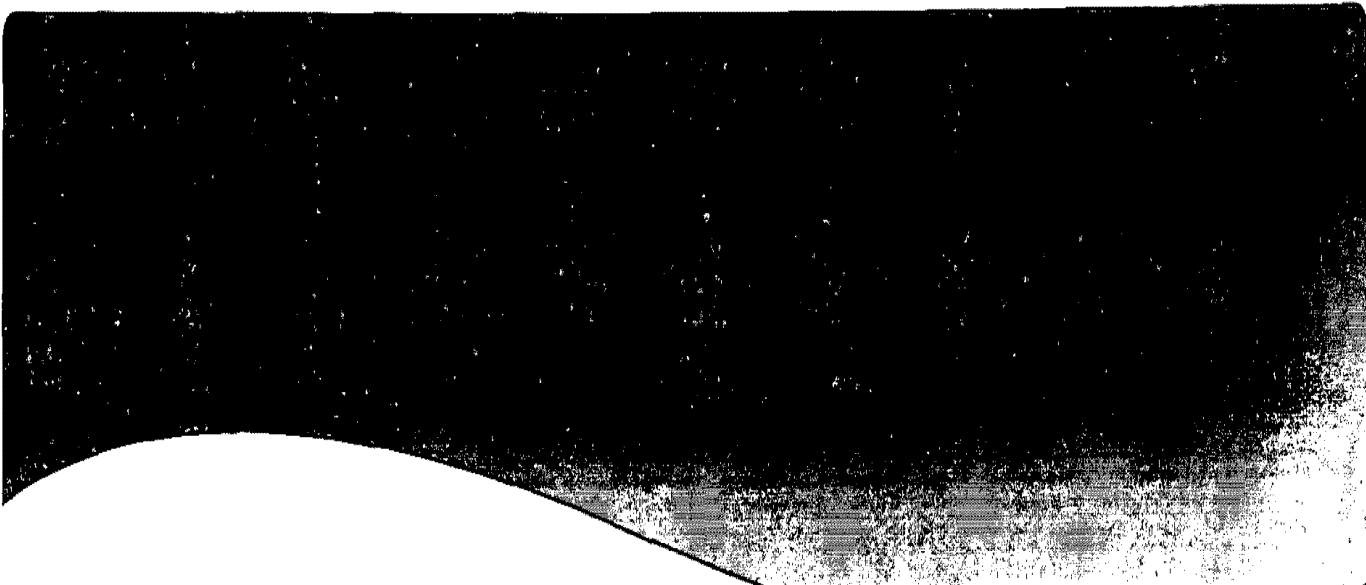


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# Nexus

- \* The persecutor is motivated to persecute the applicant because the persecutor perceives the applicant to possess a protected characteristic
- \* Determining whether the abuser believes he has the authority to abuse and control the victim "on account of" her status in the relationship
- \* Where other evidence shows that the persecutor harms the victim because of her status within the relationship, the absence of a motivation to harm others with that trait does not undermine a finding of nexus
- \* Issues with mixed motives (one central reason)





# Factors That May Inhibit an Applicant's Ability to Fully Present a Gender-Related Claim



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# Inhibiting Factors During Interview

**Pre-Interview File Review: consult with supervisor about interviewer of same sex**

**Considerations Related to Gender and Culture: Shame, feelings of responsibility and blame**

## **The presence of relatives or the interpreter**

- \* Men who end up “speaking” for the women
- \* Men present may be the persecutor
- \* The interpreter who may substitute the word “harm” for “rape”
- \* Ask applicant’s preference, when possible in the absence of others

**One year rule – consider changed circumstances (new threats) and extraordinary circumstances (PTSD)**





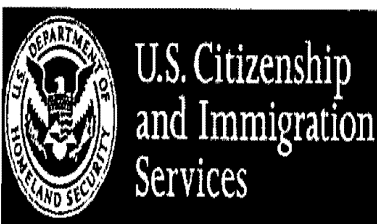
# Effective Interviewing Techniques

## Suggested Interview Techniques

- \* Emphasize confidentiality
- \* Begin with easy topics
- \* Pause if the applicant becomes upset
- \* Acknowledge how difficult it may be for the applicant

## Examples of Questions to Elicit Sensitive Information

- \* Open ended questions



# Factors When Evaluating Credibility

## Assess Credibility in least invasive way possible

- \* Applicant may be able to provide sufficient detail about certain parts of the claim to establish credibility, without providing minute detail on particularly sensitive topics.
- \* Elicit testimony about before and after (instead of act itself)
- \* An applicant may initially characterize the attack as motivated by sexual desire, but you should make efforts to elicit any evidence that the assault occurred on account of a protected ground
- \* Detail (is it already in written documents, education level, gender roles)
- \* Consistency
- \* Plausibility (culturally specific)
- \* Demeanor (impossible to know)



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# Factors Related to Gender That Must Be Considered



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# Reporting, Law Enforcement, and Access to State Protection

- \* Law enforcement officials and government entities often lack the sensitivity, professionalism and training to handle complaints of violence against women, and may use informal justice systems or cultural pressure to encourage women to return to an abusive situation rather than undertake serious investigations
- \* In many countries, a woman's testimony in court is not accorded the same legal weight as a man's testimony
- \* The law may also criminalize female victims of violence, e.g., rape victims may be detained and prosecuted as adulterers and victims of trafficking may be prosecuted as prostitutes.
- \* *What sort of questions do you need for non-state actors?*



# Evidentiary Considerations

- \* Evidence that the government does not respond to requests for protection is a strong indication that state protection is unavailable

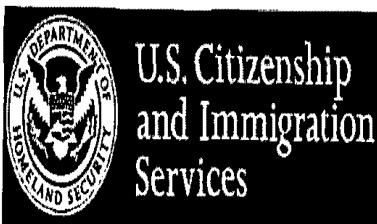
- \* In some cases, an applicant may establish that state protection is unavailable even when she did not actually seek protection

- \* Lack of documents; reluctance to file police reports due to stigma



# Ability To Relocate

- \* Whether relocation would be reasonable under all the circumstances
- \* Groups operating countrywide that the government is unable or unwilling to control
- \* Ability to Travel (e.g., Saudi Arabia and driving)
- \* Economic Circumstances (ability to survive, support children, have bank account, own property)
- \* Social Circumstances



# Applying Appropriate Guidance

- \* (UNHCR) specifically addresses the need for special training on gender-related issues. (UNHCR Executive Committee Conclusion No. 98 (LIV) (2003))
- \* UNHCR also provides guidelines for those adjudicating refugee protection claims
- \* However, gender claims are not different in their analysis of harm and persecution
- \* Consult country conditions information



# Exercise 2

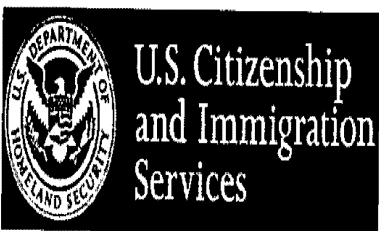


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# Questions?



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# Nexus: Particular Social Group (PSG)

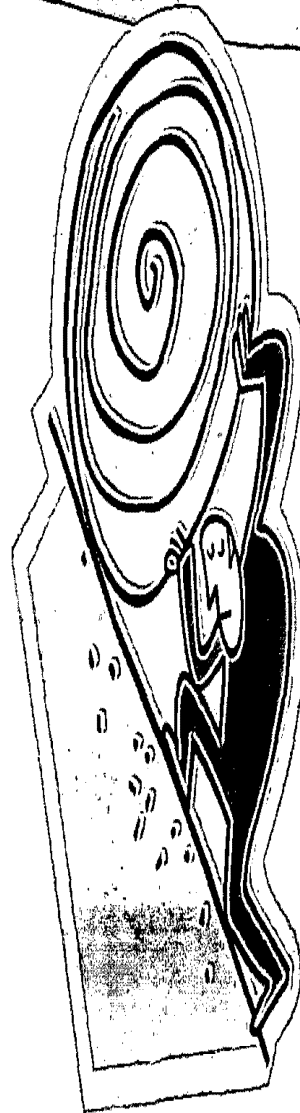
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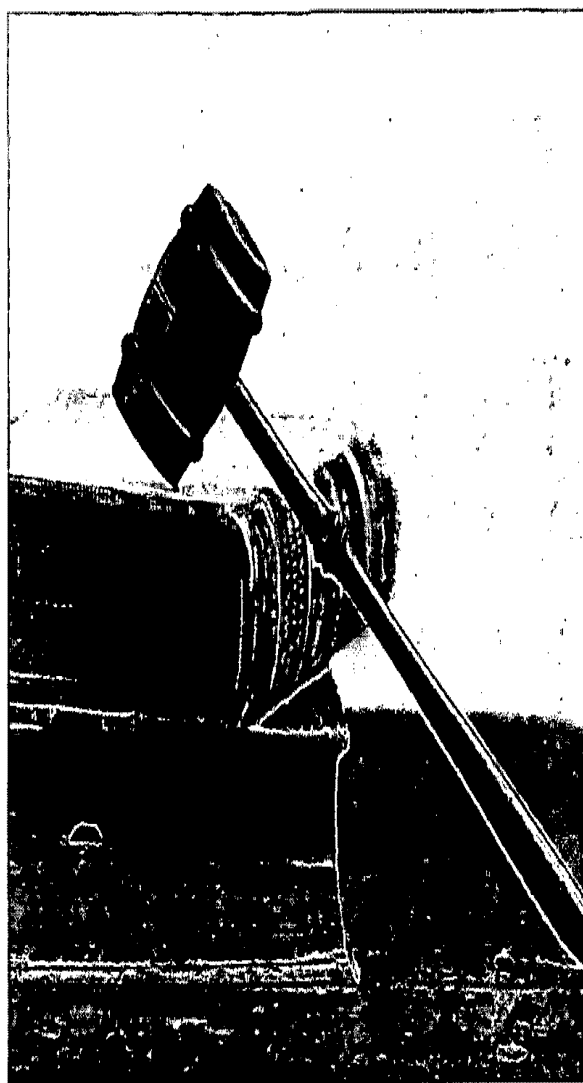
# Agenda

- \* Basics – Definition of PSG
- \* Three-Step Process
- \* PSG Examples
- \* Practical Exercises



## Particular Social Group - 3-part test

- 1) **Immutability:** Comprised of individuals who share a common, immutable characteristic that members cannot change or should not be required to change. *Acosta*
- 2) **Social distinction:** “[T]hose with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.” *M-E-V-G-*
- 3) **Particularity:** “characteristics that provide a clear benchmark for determining who falls within the group.” *M-E-V-G-; W-G-R-*



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# Matter of Acosta

19 I&N Dec. 211 (BIA 1985)

- \* Eiusdem generis – Latin for “of the same kind”
  
- \* BIA looked at other four grounds (race, religion, nationality and political opinion) to determine the meaning of PSG
  
- \* BIA noted that each of the other four is:
  - ✓ An immutable characteristic:
    - \* Beyond the power of the individual to change, or
    - \* Fundamental to the individual’s identity or conscience

# Matter of Acosta

19 I&N Dec. 211, 233 (1985)

“...we interpret the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share an common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience, such as former military leadership or land ownership...”

# Matter of Acosta

## 19 I&N Dec. 211, 233 (1985)

The particular kind of group characteristic that will qualify under this construction remains to be determined on a case by case basis . . . Whatever the common characteristic of the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”



# Characteristic

Defined as:

“A distinguishing trait, quality or property.”  
Webster’s

**Note:** The applicant must possess or be perceived as possessing the characteristic.

Characteristic may include:

- ✓ Social status
- ✓ Physical trait
- ✓ Voluntary association
- ✓ Past experience
- ✓ Cultural Identity

# Immutable Characteristic

\*Unchangeable

or

\*Fundamental to Identity or  
Conscience

# Fundamental

Generally consider:

Also consider:

- ✓ Applicant's personal circumstances
- ✓ Impact giving up characteristic would have on applicant's:
  - Identity
  - Conscience
- ✓ Human rights norms – is there a fundamental right to retain the characteristic?
- ✓ Voluntary assumption of extraordinary risk may be evidence of the fundamentality

# Social Distinction

*Matter of M-EV-G-*, 26 I&N Dec. 227 (BIA 2014)-Holding:

- ✓ Renames “social visibility” as “social distinction” and clarifies that social distinction **does not require** “**outwardly observable characteristics**” or actual visibility.

*M-E-V-G-* is binding on all Asylum Officers, including in the 3rd and 7th Circuits. This case clarifies social distinction/visibility.

The Board clarified that social distinction relates to society’s, not the persecutor’s, perception.

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# Social Distinction

✓ Those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.

\* Members of a social group may seek to hide their characteristic to avoid persecution, and may not be ocularly visible

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# Social Distinction Continued

- \* Must be evaluated on case-by-case and society-by-society basis
- \* Officers' duty to elicit information to develop the record

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# Evidence of Social Distinction

\* Testimony

\* Country conditions information

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# Social Distinction - Society

- Group is defined by perception of society in question.
  - ✓ Does society view group as distinct?
- Society may include:
  - ✓ the entire country
  - ✓ a region of the country
  - ✓ a town within the country
  - ✓ must be more than just the persecutor's view
- Group cannot be defined by perception of persecutor alone.
  - ✓ Must separate the social group from the nexus (on account of).
  - ✓ A group cannot be defined exclusively by the fact that its members have been subjected to harm.



# Particularity

In Plain Language of INA – “*particular*-social group”

To meet *particularity* requirement, group must:

- \* Have a clear benchmark for determining who falls within the group.
- \* Be discrete, with definable boundaries.
- \* Not be overbroad or subjective.
- \* Address outer limits of group’s boundaries.

# Particularity

- \* Does the group's size matter?
- \* Does the ability to identify members matter?
- \* Does cohesiveness matter?
- \* Must members associate voluntarily?
- \* Society's perspective (W-G-R-).

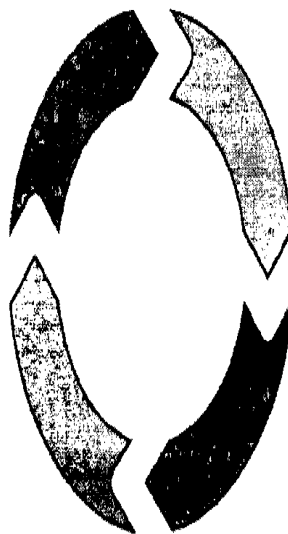
Are these groups “particular”?

- \* The wealthy
- \* Lawyers
- \* Ranchers
- \* Young women
- \* Widows

# Other Requirements

- \* A social group cannot be defined by terrorist, criminal, or persecutory activity or association, past or present

- \* Avoid Circular Reasoning



# On Account Of

- \* Do not conflate membership with nexus.
- \* Remember that even if an applicant establishes that she is a member of a cognizable particular social group, she must still establish that she was persecuted, or has a well-founded fear of persecution, on account of her membership in the group.

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# On Account Of

- \* **Motive** is critical.

- \* *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

- \* The “**motivation of the persecutors** involves questions of fact, and the burden **can be met by testimonial evidence.**”

- \* *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007).

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# Imputed Membership

- \* As with any protected ground, membership-in-a-PSG can be imputed.
- \* Persecutor falsely believes that an applicant is a member of the PSG.
- \* Do not include “imputed” in the PSG definition; instead, it is the applicant’s PSG *membership* that is imputed.

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# Exercise 1



# Domestic Violence PSGs

Claims re violence within spousal-like relationship:

1. (Nationality) women unable to leave a domestic relationship – *Matter of A-R-C-G-*
2. (Nationality) women viewed as property because of their position within a domestic relationship – DHS brief in *Matter of L-R-*;

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# Domestic Violence PSGs

Claims re violence to children within the domestic relationship:

- \* Children viewed as property because of their position within a domestic relationship.
- \* Reformulation of PSG involving children lacking effective familial protection.
- \* First time the LP articulates the PSG.

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# Domestic Violence PSGs

Ming Li Hui v. Holder, 769 F.3d 984 (8th Cir. 2014).

- \* Did not analyze but accepted the PSG of “Chinese daughters who are viewed as property by virtue of their position within a domestic relationship.”
- \* Found a fundamental change in circumstances.

# Exercise 2

# Exercise 3

# Family PSGs Involving Gang Targeting

## Courts finding a nexus:

- \* Hernandez-Avalos v. Lynch, 784 F.3d 944 (4th Cir. 2015).
- \* Cordova v. Holder, 759 F.3d 332 (4th Cir. 2014).
- \* Aldana-Ramos v. Holder, 757 F.3d 9 (1st Cir. 2014).

## Court finding no nexus:

- \* Perlera-Sola v. Holder, 699 F.3d 572 (1st Cir. 2012).

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# Exercise 4

# Law Enforcement Assistance

## *Matter of C-A-*

- \* Non-criminal informants generally not socially visible or particular, but there may be social visibility for those informants discovered because they appear as witnesses or otherwise come to the cartel's attention.
- \* In *M-E-V-G-*, BIA acknowledged C-A- "language highlighting... ocular visibility" and clarified that it's not required.

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# Witnesses

## Cases recognizing witness PSGs:

- \* *Garcia v. Att’y Gen. of U.S.* (3d Cir. 2011).
  - \* “[c]ivilian witnesses who have the ‘shared past experience’ of assisting law enforcement against violent gangs that threaten communities in Guatemala”
- \* *Gashi v. Holder* (2d Cir. 2012).
  - \* cooperating witnesses [who met with war crimes investigators]
- \* *Henriquez-Rivas* (9th Cir. 2013).
  - \* witnesses “who testified in court against gang members” in El Salvador

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# Law Enforcement Assistance: Lack of Consistent Precedent

- \* Proposed PSGs involving youth who report gang threats or gang beatings:
  - \* *Garcia v. Holder* (8th Cir. 2014).
  - \* *Zelaya v. Holder* (4th Cir. 2012).
- \* Those courts only examined the proposed PSG formulations put forward by the applicants, and rejected them.

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# Law Enforcement Assistance: Lack of Consistent Precedent

- \* *Carvalho-Frois v. Holder* (1st Cir. 2012).
  - \* Woman who received threats from two men leaving a neighbor's home where a murder occurred did not establish membership in a valid PSG.
- \* *Escobar v. Holder* (7th Cir. 2011).
  - \* Upheld PSG of truckers who refused to cooperate with FARC and collaborated with law enforcement.

# Law Enforcement Assistance

- \* “[Nationality] who assist law enforcement by reporting a serious gang-related crime”
- \* No bright line rule re proposed PSG. Elicit information re persecutor’s motive, circumstances of threats received, & similarly situated individuals. Review COI.
- \* If a valid proposed PSG exists, then examine nexus.

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# Law Enforcement Assistance in the U.S.

- \* Several circuits have rejected claims involving informants who help U.S. law enforcement.
  - \* *Martinez-Galarza v. Holder* (8th Cir. 2015).
  - \* *Costa v. Holder* (1st Cir. 2013).
- \* The courts decided those cases based on the record evidence. AOs should examine the specific facts of the case at hand to determine if an informant to U.S. law enforcement officials may be able to establish eligibility.

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# Exercise 5

# FGM PSG Reformulation

Will be covered during gender presentation.

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FGM PSG continued

Will be covered during gender  
presentation.

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# FGM Exercise

Will be covered during gender presentation.

# Former Gang Members

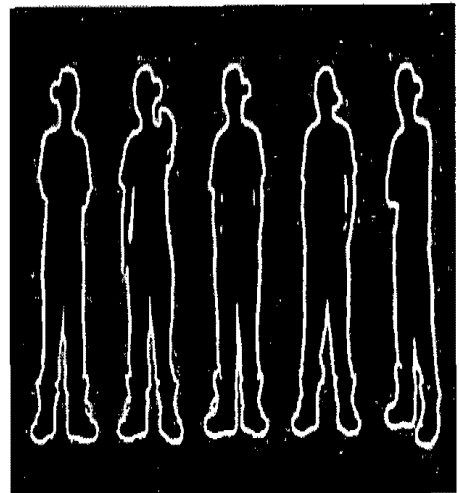
## Fourth, Sixth and Seventh Circuits

- \* Sixth and Seventh – Former gang membership can form the basis for a PSG

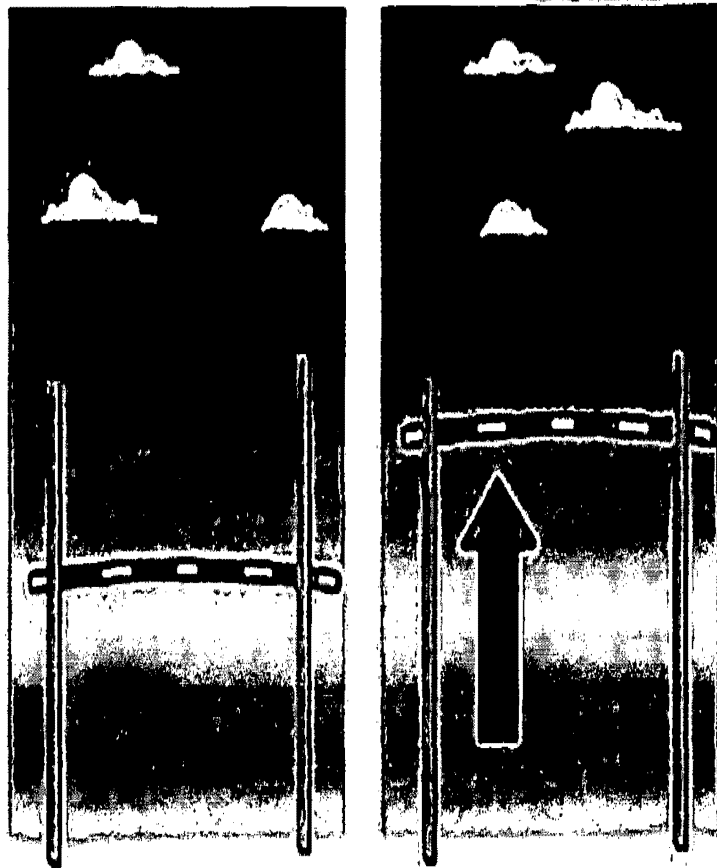
- *Urbina-Mejia v. Holder*  
(6th Cir. 2010) and *Benitez  
Ramos v. Holder* (7th Cir.  
2009).

- \* Fourth – former gang membership is immutable, remanded for application of other criteria.

- *Martinez v. Holder*,  
(4th Cir. 2014).



# CF/RF vs. Affirmative



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# Review: Road Map for PSG Claims

Ask

Avoid

- \* Is there a common, immutable characteristic?
- \* Does the society in question distinguish people with the characteristic?
- \* Is the group defined with particularity?
- \* Claims based on past criminal, terrorist or persecutory activity
- \* Circular reasoning





# Questions?