GENDER PLUS ONE: BROADENING JUDICIAL INTERPRETATION OF GENDER-BASED SOCIAL GROUP FORMULATIONS

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INTRODUCTION

To determine the cognizability of a purported social group for asylum relief, all circuits\(^1\) consider the framework set out by the Board

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of Immigration Appeals ("BIA") in Matter of Acosta.\(^2\) There, the BIA stated that the asylum applicant may establish membership in a particular social group if the applicant "is a member of a group of persons all of whom share a common, immutable characteristic."\(^3\) An immutable characteristic is either unchangeable or so fundamental to one’s identity or conscience such that the person should not be required to change.\(^4\) That immutable characteristic “might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience.”\(^5\) Despite the BIA’s inclusion of "sex"\(^6\) as an immutable characteristic, few circuits have recognized the possibility of a cognizable social group based on gender\(^7\) alone, specifically, a social group of women.\(^8\) But, a number of circuits have


\(^3\) Id. at 233.

\(^4\) Id.

\(^5\) Id. (emphasis added).


\(^7\) Even if gender can be changed, it is still immutable under Acosta because gender “is a characteristic so fundamental to identity that no one should have to change it.” Fatma E. Marouf, The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender, 27 YALE L. & POL’Y REV. 47, 88 (2008).

\(^8\) See, e.g., Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005) (acknowledging that females might constitute a particular social group in some circumstances and that Acosta “listed gender as an example of a prototypical immutable characteristic that could form the basis for a social group”); Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) (noting Acosta “specifically mentioned sex as an innate characteristic that could link the members of the particular social group[,] [t]hus to the extent that [Fatin] suggests that she would be persecuted or has a well-founded fear that she would be persecuted . . . simply because she is a woman, she
recognized social groups defined by gender and one or more characteristics.\(^9\)

In *Cece v. Holder*, the en banc Seventh Circuit recognized that the formulation of “gender plus one or more narrowing characteristics” is a legitimate method to form a cognizable social group.\(^10\) Other circuits and the BIA have found cognizable gender plus social groups, with the plus being characteristics making the asylum applicant particularly vulnerable to persecution, such as “nationality, ethnicity, tribal affiliation, age, religion, marital or relationship/status, family membership (‘kinship ties’), education level, absence of male protection, opposition to abuse, or transgression of social/cultural norms.”\(^11\) The gender plus approach is supported domestically and internationally.\(^12\)

\(9\) See, e.g., *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (concluding “women in Guatemala” could be a cognizable social group); *Gomez-Zuluaga v. U.S. Att’y Gen.*, 527 F.3d 330, 345 (3d Cir. 2008) (concluding “women who have escaped involuntary servitude after being abducted and confined by the FARC” were a cognizable social group); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (concluding female tribal members constituted a cognizable social group); *Fatin*, 12 F.3d at 1241 (concluding Iranian women refusing to conform to gender-specific laws and social norms were a cognizable social group).

\(10\) *Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013) [hereinafter Cece II] (en banc).


Historically, women pursuing gender-based asylum claims have faced significant barriers for three main reasons: (1) the harms women experienced were not considered persecution because their culture or religion either condoned or required the harms, the harms disproportionately affected women, or the harms were different than those experienced by men in similar circumstances; (2) non-State actors, like relatives or members of the community perpetrated the harms; and (3) women are often persecuted on account of gender, which is not one of the five protected grounds.\textsuperscript{13} Even though women and children are significantly overrepresented in the world’s refugee population,\textsuperscript{14} the difficulty women face fitting into one of the protected grounds causes them to constitute the minority of successful asylum claims.\textsuperscript{15}

The Acosta decision showed promise of expanding the definition of social group to include gender as a cognizable social group – a promise that asylum jurisprudence has largely not realized.\textsuperscript{16} No consensus exists among courts regarding the use of gender in defining a social group.\textsuperscript{17} The BIA and circuits are reluctant to accept gender as the basis of the social group formulation absent another qualifying

\begin{footnotes}
\item[16] Randall, supra note 14, at 294.
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This reluctance to accept gender-based social groups is due to the concern that “half a nation’s residents [can] obtain asylum on the ground that women are persecuted there.” Accordingly, courts have narrowly construed social group formulations to control refugee numbers. But, “the size and breadth of a group alone does not preclude a group from qualifying as a social group.”

Narrow construction of the social group ground, the most widely used and applicable ground for gender-based asylum claims, has left women unable to utilize social groups defined in whole or in part by gender. This has led to an under-inclusive effect in granting asylum to women. Even when a gender-based social group is found cognizable, it is based on convoluted logic. The protected grounds of race, religion, and nationality are broadly defined; therefore, the social group ground should similarly be broadly defined.

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19 Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005). Annually, the President of the United States, consulting with Congress, establishes an overall ceiling for refugee admissions and regional allocations before the beginning of the fiscal year. Daniel C. Martin & James E. Yankay, *Refugees and Asylees: 2012*, Office Immigr. Stat., DEPARTMENT OF HOMELAND SECURITY (Apr. 2013), at 2. For example, the overall ceiling for refugee admissions was 76,000 in 2012. Id.


21 Perdomo v. Holder, 611 F.3d 662, 669 (9th Cir. 2010); see Cece II, 733 F.3d 662, 673 (7th Cir. 2013) (en banc) (“The breadth of the social group says nothing about the requirements for asylum.”).


25 Imbriano, *supra* note 18, at 353.
Narrow construction of gender-based social groups requires female applicants to narrowly define their social group, making the social group ground unlike the other protected grounds.\textsuperscript{26} Even though the social group ground was intended to provide asylum relief to those who did not fit into the other protected grounds, the ground has always been narrowly construed.\textsuperscript{27} \textit{Acosta} strikes a balance between expanding the social group ground beyond relief provided by the other four protected grounds and applying the ground so broadly that the requirement becomes inconsequential.\textsuperscript{28}

The BIA should return to its conclusion in \textit{Acosta} that gender is an immutable characteristic defining a social group.\textsuperscript{29} The BIA and circuits require the plus characteristics to also be immutable for gender plus social groups. In \textit{Cece v. Holder}, the court held Cece was a member of a cognizable social group “united by the common and immutable characteristic \textit{sic} of being (1) young, (2) Albanian, (3) women, (4) living alone.”\textsuperscript{30} Because the BIA already held gender is an immutable characteristic,\textsuperscript{31} applicants should not be required to prove the plus characteristics are immutable as well. Gender alone should be the immutable characteristic, and the issue should be whether the plus characteristics narrow the group sufficiently so that group members can establish the nexus between group membership and persecution.\textsuperscript{32}

Part I of this Comment explains the requirements of establishing asylum eligibility. Part II discusses establishing the protected ground

\textsuperscript{26} Id.
\textsuperscript{27} Heitz, supra note 23, at 215.
\textsuperscript{28} Imbriano, supra note 18, at 345.
\textsuperscript{29} Id. at 359.
\textsuperscript{30} Cece II, 733 F.3d 662, 672 (7th Cir. 2013) (en banc).
\textsuperscript{32} See Niang v. Gonzales, 422 F.3d 1187, 1199–1200 (10th Cir. 2005) (“[T]he focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ‘on account of’ their membership.”); Gao v. Gonzales, 440 F.3d 62, 68 (2d Cir. 2006), vacated on other grounds sub nom. Keisler v. Gao, 552 U.S. 801 (2007) (same).
of membership in a particular social group. Part III summarizes the background, panel opinion, and en banc opinion of *Cece v. Holder*. Part IV addresses the circuit split created by *Cece v. Holder*. Part V outlines representative cases where gender plus social groups were found cognizable and analogizes the cases’ facts and reasoning to *Cece v. Holder*. Part VI, *inter alia*, proposes a judicial interpretation of gender-based social group formulations that will assist in creating uniformity of interpreting the cognizability of gender-based social groups and increasing protection for persecuted women.

I. **ESTABLISHING REFUGEE STATUS**

An alien must establish she is a refugee within the meaning of the Immigration and Nationality Act\(^\text{33}\) to obtain asylum, meaning she is unable or unwilling to return to her country due to past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.\(^\text{34}\) Congress did not define persecution. Thus, the BIA and the circuits define persecution on a case by case basis.\(^\text{35}\)

The BIA defines persecution broadly as “the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments.”\(^\text{36}\) Most circuits broadly define persecution as well.\(^\text{37}\) The Seventh Circuit listed actions that

\[^{33}\text{8 U.S.C § 1158(b)(1)(B)(i) (2012).}\]
\[^{34}\text{8 U.S.C. § 1101(a)(42)(A) (2012); 8 C.F.R. § 208.13(b)(1).}\]
\[^{35}\text{See Topalli v. Gonzales, 417 F.3d 128, 132 (1st Cir. 2005).}\]
\[^{36}\text{Matter of Laipenieks, 18 I. & N. Dec. 433, 456-57, rev'd on other grounds, 750 F.2d 1427 (9th Cir. 1985).}\]
\[^{37}\text{By circuit: Aguilar-Solis v. INS, 168 F.3d 565, 570 (1st Cir. 1999) (“[P]ersecution encompasses more than threats to life or freedom . . . but less than mere harassment or annoyance.”) (citations omitted); Ivanishvili v. U.S. Dep’t of Justice, 433 F.3d 332, 341 (2d Cir. 2006) (“[P]ersecution is the infliction of suffering or harm upon those who differ on the basis of a protected statutory ground.”) (citation omitted); Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) (“[P]ersecution’ [includes] threats to life, confinement, torture, and economic restrictions so severe}\]
constitute past persecution, including “detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture.” Establishing past persecution creates the rebuttable presumption of a well-founded fear of future persecution, which the government can rebut by showing changed conditions in the alien’s home country such that the alien no longer has a well-founded fear or that internal relocation is reasonable.

Absent past persecution, asylum may be granted if the alien demonstrates a well-founded fear of persecution. The alien must show her fear of persecution is “subjectively genuine and objectively reasonable.” The United States Supreme Court stated that a “well-
“founded” fear of an event occurring does not mean it must be “more likely than not” an event will occur. To satisfy the objective well-founded fear requirement, the alien must demonstrate she will be singled out for persecution. Alternatively, the alien can show those similarly situated to her are targeted for persecution by establishing that: (1) in her home country, there is a pattern or practice of persecuting persons similarly situated to the applicant on account of one of the protected grounds; and (2) she is in one of those groups, and thus her fear is reasonable.

Finally, the alien must show a nexus between one of the five protected grounds and the past persecution or fear of future persecution, meaning the past persecution or fear of future persecution is “on account of” a protected ground. “On account of” means the protected ground must be “at least one central reason” for the persecution.

The alien must also establish that her persecutor is aware or could become aware of her association to the protected

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44 INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (“One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.”).
45 Kotasz v. INS, 31 F.3d 847, 852-53 (9th Cir. 1994); see 8 C.F.R. § 208.16(b)(2).
47 8 U.S.C. § 1101(a)(42)(A); Escobar v. Holder, 657 F.3d 537, 542 (7th Cir. 2011) (citation omitted). Establishing a nexus is a two-step analysis that requires identifying the relevant protected ground, then establishing the causal connection between that ground and persecution. Meghan Casey, Refugee Women as Cultural Others: Constructing Social Group and Nexus for FGM, Sex Trafficking, and Domestic Violence Asylum Claims in the United States, 10 Seattle J. For Soc. Just. 981, 1006 (2012).
ground.\textsuperscript{49} Finally, the alien must be found credible.\textsuperscript{50} If granted asylum, the alien may remain indefinitely in the U.S.\textsuperscript{51}

II. FORMULATING A COGNIZABLE SOCIAL GROUP\textsuperscript{52}

To establish refugee status based on social group membership, the alien must: "(1) identify a particular social group; (2) establish that [s]he is a member of that group; and (3) establish that [her] past persecution or well-founded fear of persecution is based on [her] membership in that group."\textsuperscript{53} The BIA first defined a social group in \textit{Matter of Acosta}. There, the BIA stated a social group is a group whose members "share a common, immutable characteristic."\textsuperscript{54} An immutable characteristic is a characteristic that is either "beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."\textsuperscript{55} All circuits currently rely on the \textit{Acosta} analysis.\textsuperscript{56} Further, the purported social group must be defined with particularity.\textsuperscript{57}

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\item \textsuperscript{49} Matter of Mogharrabi, 19 I. & N. Dec. 439, 446 (B.I.A. 1987).
\item \textsuperscript{50} 8 U.S.C. § 1158(b)(1)(B)(iii) (2012).
\item \textsuperscript{51} 8 U.S.C. § 1158(c)(1)(A). The right to remain in the U.S. may be revoked under certain circumstances. 8 U.S.C. § 1158(c)(2).
\item \textsuperscript{52} This Comment only addresses gender and the protected ground of membership in a particular social group. But, refugee status can be based on one ground or a combination of grounds. \textit{See Osorio v. INS.}, 18 F.3d 1017, 1027 (2d Cir. 1994). Also, a gender-based asylum claim may fall under protected grounds other than membership in a particular social group. Chan, supra note 17, at 185. This Comment does not address asylum claims based on race, nationality, religion, or political opinion. Further, this Comment does not address other requirements to qualify as a refugee, including demonstrating past persecution or a well-founded fear of persecution based on a protected ground and being credible.
\item \textsuperscript{53} Escobar v. Holder, 657 F.3d 537, 545 (7th Cir. 2011) (citation omitted).
\item \textsuperscript{55} Id. at 233-34.
\item \textsuperscript{56} \textit{See} cases cited supra note 1.
\item \textsuperscript{57} Matter of S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) ("[T]he key question is whether the proposed description is sufficiently particular, or is too
Shortly after Acosta was decided, the Ninth Circuit declined to follow the Acosta definition and instead defined a social group as "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest."\textsuperscript{58} To meet that definition, a current or former voluntary association of the group’s members must exist imparting "some common characteristic that is fundamental to their identity as a member of that . . . group."\textsuperscript{59} The Ninth Circuit later changed its social group definition to encompass Acosta’s immutability requirement by stating that the group members must be united by a current or former voluntary association or an innate characteristic that is so fundamental to its members’ identities or consciences that they cannot or should not be required to change it.\textsuperscript{60}

The Second Circuit added a visibility requirement to the Acosta definition, meaning the social group members must share an immutable or fundamental characteristic making them identifiable to potential persecutors.\textsuperscript{61} Because the social group definitions in some circuits differed from the Acosta definition, the BIA clarified the definition in Matter of C-A- by reaffirming the Acosta definition, rejecting the Ninth Circuit’s voluntary associational relationship definition, and approving the Second Circuit’s visibility requirement.\textsuperscript{62}

The BIA termed the Second Circuit's visibility definition “social visibility” and added it as a relevant factor in the social group analysis.\textsuperscript{63} Later, the BIA added social visibility as a requirement to

\textsuperscript{58} Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).
\textsuperscript{59} Id.
\textsuperscript{60} Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 n.6 (9th Cir. 2000), overruled in part, in part, on other grounds, Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005), vacated and remanded, Gonzales v. Thomas, 547 U.S. 183 (2006).
\textsuperscript{63} Id. at 959-61.
form a cognizable social group. Most circuits accepted the BIA’s inclusion of social visibility as a requirement to establish membership in a particular social group. Social visibility is broadly defined as requiring that "the relevant trait be potentially identifiable by members of the community, either because it is evident or because the information defining the characteristic is publicly accessible." The Third Circuit and Seventh Circuit rejected the social visibility requirement as inconsistent with past BIA decisions.

64 Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 73-74 (B.I.A. 2007) (concluding “wealthy Guatemalans” were not a cognizable social group because the group lacked social visibility). The social visibility requirement may inhibit a female applicant’s ability to present a cognizable social group because “one tactic of persecution is to force a subjugated group [like women] to remain invisible.” Marisa Silenzi Cianciarulo & Claudia David, Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women, 59 Am. U. L. Rev. 337, 370 (2009).

65 By circuit: Scatambuli v. Holder, 558 F.3d 53, 59 (1st Cir. 2009); Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007) (per curiam); Al-Ghorbani v. Holder, 585 F.3d 980, 994 (6th Cir. 2009); Davila-Mejia v. Mukasey, 531 F.3d 624, 628–29 (8th Cir. 2008); Ramos-Lopez v. Holder, 563 F.3d 855, 858–62 (9th Cir. 2009); Rivera-Barrientos v. Holder, 666 F.3d 641, 648 (10th Cir. 2012); Castillo-Arias, 446 F.3d at 1197–98.

66 Rivera-Barrientos, 666 F.3d at 652. The BIA has not adequately defined social visibility, which has led to disparity and an unlimited amount of discretion in its definition. Heitz, supra note 23, at 235.

67 Valdiviezo-Galdamez v. Att’y Gen., 663 F.3d 582, 604 (3d Cir. 2011) (stating the social visibility requirement “is an unreasonable addition to the requirements for establishing refugee status where that status turns upon persecution on account of membership in a particular social group”); Gatimi v. Holder, 578 F.2d 611, 615-16 (7th Cir. 2009) (noting the inconsistency of the BIA’s use of the social visibility requirement and citing cases where the BIA found a cognizable social group absent referencing the group’s social visibility).
III. CECE V. HOLDER

A. Background

Johanna Cece ("Cece"), an Albanian citizen, entered the U.S. as a twenty three year old in 2002. 68 She used a fraudulent Italian passport to enter the U.S. under the Visa Waiver Program. 69 Within a year of her entry, she applied for asylum and withholding of removal. 70 In addition to her fear of persecution based on her religion (as an Orthodox Christian) and her political opinion (supporting the Democratic party), she also feared persecution as a young woman living alone at risk of being kidnapped and forced into prostitution. 71 The last mentioned fear of persecution has fueled the contention among various appellate levels regarding the formulation of a cognizable social group.

After Cece’s parents left Albania in 2001, Cece lived alone in the city of Korçë. 72 In 2001, a gang leader named Reqi began harassing Cece by asking her out on dates, offering her rides, and stalking her throughout Korçë. 73 Reqi’s gang was known for forcing women into prostitution rings, trafficking drugs, and murdering other gang members. 74 Cece ignored Reqi’s advances. 75 On June 4, 2001, Reqi

68 Cece I, 668 F.3d 510, 511-12 (7th Cir. 2012), rev’d en banc, Cece II, 733 F.3d 662 (7th Cir. 2013) (en banc).
69 Id. Italy is a participant of the Visa Waiver Program; Albania is not. See 8 C.F.R § 217.2(a).
70 Id. at 512. An alien must apply for asylum within one year of her last arrival in the U.S. 8 U.S.C. § 1158(a)(2)(B) (2012). A late filing is excused if the alien demonstrates changed circumstances materially affecting asylum eligibility or extraordinary circumstances directly related to her failure to apply within one year. 8 U.S.C. § 1158(a)(2)(D) (2012). To qualify for withholding of removal, the alien must meet a higher burden of proof – that it is more likely than not that the alien would be persecuted on account of one of the five protected grounds. 8 U.S.C. § 1231.
71 Cece I, 668 F.3d at 512.
72 Cece II, 733 F.3d at 666.
73 Id.
74 Id.
followed Cece into a cosmetics store and pinned her against a wall, refusing to let her go. Reqi questioned why she would not go out with him, making it clear “he could not be stopped and that he would find her and do whatever he wanted to her.” None of the customers aided Cece.

Cece reported the incident to the police, who claimed she lacked proof and took no action. Several days later, someone threw a rock through Cece’s window. For her safety, Cece moved 120 miles north to the city of Tirana where her sister lived in a university dormitory. Her sister left Albania the following year. Cece then left Albania because as a young woman living alone, Cece feared she was a target for kidnapping and forced prostitution. Dr. Bernd Fischer, an expert on Albania and Professor in Balkan History, testified on Cece’s behalf at her hearing before the immigration judge. Dr. Fischer explained the grave problem of human trafficking for prostitution by Albanian gangs who are often protected by the police.

The 2004 U.S. Department of State reports

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75 Cece I, 668 F.3d at 512.
76 Cece II, 733 F.3d at 666-67.
77 Id. at 667.
78 Id.
79 Id.
80 Id.
81 Id.
82 Id.
83 Id.
84 Id.
85 Cece I, 668 F.3d 510, 512 (7th Cir. 2012), rev’d en banc, Cece II, 733 F.3d 662 (7th Cir. 2013) (en banc); see Cece II, 733 F.3d at 667 (noting the immigration judge’s conclusions that “Albania stands out in Europe as a major country of origin of traffickers in prostitution; the government’s judicial system is not effective against the problem; Albania suffers from a major and ongoing trafficking of young women by gangs; and there is no prospect in the foreseeable future of the government being able or willing to address the problem.”).
corroborated his testimony.\textsuperscript{86} Dr. Fischer explained that gangs target women between the ages of sixteen and twenty six, but force many women outside that age range into prostitution as well.\textsuperscript{87} A single woman living alone, he testified, is particularly vulnerable to trafficking, especially if previously pursued by a gang member.\textsuperscript{88} He emphasized the Albanian government could not protect women from forced prostitution because law enforcement often either protects or assists the gangs.\textsuperscript{89} The prevalence of trafficking nationwide prevented Cece from relocating safely within Albania, Dr. Fischer asserted.\textsuperscript{90}

In 2006, the immigration judge granted Cece asylum, concluding she belonged to the social group of “young women who are targeted for prostitution by traffickers in Albania.”\textsuperscript{91} On appeal, the BIA vacated the immigration judge’s decision, concluding (1) Cece did not establish past persecution; (2) Cece relocated successfully within Albania; and (3) Cece did not identify a cognizable social group.\textsuperscript{92} Specifically, Cece’s social group failed because the group members lacked social visibility and “a narrowing characteristic other than the risk of being persecuted.”\textsuperscript{93} On remand, the immigration judge deferred to the BIA’s conclusion that Cece was not a member of a cognizable social group.\textsuperscript{94} The immigration judge reluctantly accepted the BIA’s finding that Cece could successfully relocate within

\textsuperscript{86} Cece I, 668 F.3d at 512. Courts generally regard State Department reports as reliable. El Moraghy v. Ashcroft, 331 F.3d 195, 204 (1st Cir. 2003) (citation omitted).
\textsuperscript{87} Cece II, 733 F. 3d at 667. Cece was twenty three years old when she entered the U.S. in 2002. Cece I, 668 F.3d at 512. As such, when the immigration judge granted her asylum in 2006, she was either twenty six or twenty seven years old. Cece II, 733 F. 3d at 667.
\textsuperscript{88} Cece I, 668 F.3d at 512.
\textsuperscript{89} Cece II, 733 F.3d at 667.
\textsuperscript{90} Cece I, 668 F.3d at 512.
\textsuperscript{91} Cece II, 733 F.3d at 667.
\textsuperscript{92} Id. at 668.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
Albania. The BIA dismissed Cece’s second appeal by emphasizing Cece’s purported social group “was defined in large part by the harm inflicted on its members and did not exist independently of the traffickers.” The BIA noted again that internal relocation was reasonable. Cece then appealed to the Seventh Circuit.

B. The Panel Opinion

In an opinion authored by Judge Daniel Manion and joined by Judge Frank Easterbrook, the panel denied Cece’s petition for review, affirming the BIA’s findings that Cece was not a member of a cognizable social group and Cece could relocate safely within Albania. The panel stated that members of a social group “must share a common immutable or fundamental characteristic beyond the risk, past or present, of harm.” On appeal, Cece argued the BIA erred by concluding members of the purported social group were united only by persecution suffered in the past; Cece argued the members of the proposed group were united by a present risk of persecution. The panel stated the members of Cece’s purported social group had “little or nothing in common beyond being targets.” Further, Cece failed to establish asylum eligibility because of (1) her fraudulent entry into the U.S.; (2) her failure to demonstrate she would be singled out for persecution; and (3) her failure to demonstrate she could not relocate within Albania.
Judge Ilana Rovner\textsuperscript{104} dissented, disagreeing with the panel’s conclusion that the purported social group was defined solely by harm suffered by its members.\textsuperscript{105} Another characteristic besides being targets united the purported social group, specifically, “the common and immutable characteristic of being women between the ages of sixteen and twenty-seven who meet the profile of traffickers.”\textsuperscript{106} To illustrate, Judge Rovner listed cases finding a cognizable social group even though the members shared the characteristic of being targets of persecution.\textsuperscript{107} Accordingly, using persecution as one characteristic in a social group definition does not foreclose finding a cognizable social group.\textsuperscript{108} Judge Rovner noted the uniqueness of Albania and the problem of sex trafficking due to the country’s economic, political, and legal instability.\textsuperscript{109}

Despite the prevalence of trafficking, however, Judge Rovner explained a generalized fear would not be a viable asylum claim.\textsuperscript{110} Cece was special: (1) she lived alone in a country where women do not commonly live alone; (2) Cece was in the target age group of women most at risk for forced prostitution; and (3) a gang leader targeted her already and the police refused to help.\textsuperscript{111} Judge Rovner would have remanded to the immigration judge regarding two asylum eligibility issues: (1) Cece was no longer within her expert’s target age group of women at risk for forced prostitution, and (2) Judge Rovner and the immigration judge expressed doubt regarding the BIA’s conclusion that Cece could relocate safely considering the BIA failed to recognize that Cece lived with her sister when she relocated

\textsuperscript{104} Judge Rovner and her parents fled Latvia before the Nazi occupation.


\textsuperscript{105} Cece I, 668 F.3d at 514 (Rovner, J., dissenting).

\textsuperscript{106} \textit{Id}.

\textsuperscript{107} \textit{Id.} at 514-15.

\textsuperscript{108} \textit{See id}.

\textsuperscript{109} \textit{Id.} at 515.

\textsuperscript{110} \textit{Id}.

\textsuperscript{111} \textit{Id}.
successfully within Albania.\textsuperscript{112} Cece filed a petition for rehearing \textit{en banc}; the Seventh Circuit granted her petition and vacated the panel’s opinion.\textsuperscript{113}

\textit{C. En Banc Opinion}

1. Majority Opinion

The remaining Seventh Circuit judges agreed with Judge Rovner, with Judge Rovner writing the \textit{en banc} opinion and Judge Manion and Judge Easterbrook writing dissenting opinions.\textsuperscript{114} The court held Cece was a member of a cognizable social group “united by the common and immutable characteristic [sic] of being (1) young, (2) Albanian, (3) women, (4) living alone.”\textsuperscript{115} The age, gender, nationality, or living situation of the group members’ are not alterable.\textsuperscript{116} To begin, the court discussed defining a social group.\textsuperscript{117} The Seventh Circuit follows the \textit{Acosta} social group definition\textsuperscript{118}: membership in a particular social group is defined by “a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to be changed.”\textsuperscript{119}

The court found that Cece and the immigration judge articulated the relevant social group.\textsuperscript{120} Nonetheless, the court noted that the

\begin{itemize}
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} Cece II, 733 F.3d 662 (7th Cir. 2013).
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{Id. at 672.}
\item \textsuperscript{116} \textit{Id. at 673.}
\item \textsuperscript{117} \textit{Id. at 669-71.}
\item \textsuperscript{118} Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998).
\item \textsuperscript{120} \textit{Id. at 670.} Per \textit{Gonzales v. Thomas}, 547 U.S. 183 (2006) (per curiam) and \textit{INS v. Orlando Ventura}, 537 U.S. 12 (2002) (per curiam), “[a]n appellate court errs by deciding in the first instance, without giving the [BIA] the first opportunity on remand, whether a proposed social group is cognizable.” \textit{Id. at 677.} In his dissent,
immigration judge omitted the crucial characteristic of living alone as part the relevant social group.\textsuperscript{121} Cece’s asylum application asserted she was the “perfect target” because she was young and living alone, Cece’s testimony emphasized that it is uncommon for women to live alone in Albania and she was afraid to do so, and the expert’s testimony addressed the risk of women living alone in Albania.\textsuperscript{122} Accordingly, the court declared the immigration judge’s definitions of Cece’s social group (first as “young women who are targeted for prostitution by traffickers in Albania,” then “women in danger of being trafficked as prostitutes”) “shorthand for describing women vulnerable to trafficking.”\textsuperscript{123} This formulation conformed to the court’s observation that an immutable or fundamental characteristic forming a cognizable social group can include “membership in a group whose ideas or practices run counter to the cultural or social convention of the country.”\textsuperscript{124}

The court found that contrary to the BIA and panel’s opinions, Cece’s social group was not defined solely by the harm inflicted, as the social group of young women living alone in Albania existed independently of the traffickers.\textsuperscript{125} The group members shared the immutable or fundamental characteristics of being: (1) young, (2) female, and (3) living alone.\textsuperscript{126} For support, the court cited precedent for the assertion that a purported social group may still be cognizable even if partly defined by the persecution; it just cannot be defined solely by the persecution.\textsuperscript{127} The court derived its conclusion from the

\textsuperscript{121} Id. at 670 (majority opinion).
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 671.
\textsuperscript{124} Id. at 669.
\textsuperscript{125} Id. at 677.
\textsuperscript{126} Id. at 672.
\textsuperscript{127} Id. at 676.
reasoning in mixed motive cases. Courts look beyond persecution at the underlying characteristics accounting for fear and vulnerability.

Next, the court addressed the slippery slope argument of the dissenters— that defining broad categories of social group cognizability will lead to asylum eligibility for everyone facing a safety risk in her home country notwithstanding the reason. By example, the court stated that just because all women and African Americans are protected under Title VII of the Civil Rights Act does not mean all members of the protected class have a discrimination claim. Besides establishing a cognizable social group, the asylum applicant must prove a nexus—that she will be persecuted on account of the membership in a particular social group. Thus, even if the number of members of a cognizable social group were many, fewer members can establish all statutory asylum eligibility requirements. The court listed examples where cognizable social groups had many members.

To overcome Chevron deference, the court stated the BIA decision was inconsistent with its similar decisions. Accordingly, the BIA erred by concluding a young woman living alone cannot

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128 Id. at 672. See supra text accompanying note 48.
129 Cece II, 733 F.3d at 672.
130 Id. at 673-74.
131 Id.
132 Id.
133 Id. at 674-75.
134 Id.
136 Cece II, 733 F.3d at 676.
constitute a social group.\textsuperscript{137} For example, in \textit{Matter of Kasinga}, the BIA found a cognizable social group of young women of a tribe practicing female genital mutilation.\textsuperscript{138} The court did not find that case distinguishable from Cece’s case because both cases involved a broad group “narrowed by other changeable but fundamental characteristics.”\textsuperscript{139} That narrowing characteristic in Cece’s case is living alone, rather than experiencing female genital mutilation as in \textit{Matter of Kasinga}.\textsuperscript{140} The court did not decide whether gender alone could form a cognizable social group.\textsuperscript{141} But, the court held that “gender plus one or more narrowing characteristics” could form a cognizable social group.\textsuperscript{142}

After concluding that Cece proffered a cognizable social group, the court found the BIA’s conclusion that internal relocation was reasonable was not supported by substantial evidence.\textsuperscript{143} Actually, the BIA’s decision was not supported by any evidence or analysis and the only discussion on the issue was the immigration judge’s disagreement with the BIA’s conclusion.\textsuperscript{144} Instead, the facts supported the conclusion that internal relocation was unreasonable: (1) Cece lived safely in Tirana because she lived with her sister; (2) given the small size of Albania, it would be difficult to hide; (3) throughout Albania, the norm is for people to live in family or clan groupings; and (4) Cece was already known to traffickers, and thus at an increased risk of

\textsuperscript{137} \textit{Id.} at 677.
\textsuperscript{139} \textit{Cece II}, 733 F.3d at 676.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 677-78. The court defers to the BIA’s factual findings unless the record lacks substantial evidence to support the factual findings. Malek v. INS, 198 F.3d 1016, 1021 (7th Cir. 2000). The standard for substantial evidence is whether the BIA’s determination “is supported by reasonable, substantial, and probative evidence on the record considered as a whole.” Escobar v. Holder, 657 F.3d 537, 542 (7th Cir. 2011).
\textsuperscript{144} \textit{Cece II}, 733 F.3d at 677-78.
being targeted. The court granted Cece’s petition for review and remanded her case.

2. Dissenting Opinions

Judge Easterbrook’s dissent addressed the fallacies of the court’s acceptance of Cece’s social group, namely, that anyone facing a risk of harm in her home country could point to an alleged immutable characteristic and establish asylum eligibility, no matter the reason for the risk of harm. In effect, this would skip the issue of establishing a protected ground and go straight to the issue of whether persecution occurred, thus not giving effect to all the statutory requirements. Judge Easterbrook appeared to question whether Cece had a well-founded fear of persecution. He noted that (1) the number of Albanian prostitutes is not indicative of how many are in the sex trade involuntarily; (2) presumably, the number of young women living alone is Albania is substantially higher than the statistics of Albanian trafficking victims; (3) the State Department ranks numerous other countries as having a greater sex trafficking risk than Albania; and (4) “[d]eplorable as human trafficking is, any given woman’s danger in Albania may be modest.” Judge Easterbrook contended the BIA had substantial evidence to conclude internal relocation was reasonable because Cece was not followed or confronted when she moved to Tirana. Further, Judge Easterbrook doubted Cece’s eligibility for asylum because of the adverse factor of entering the U.S. by fraud absent imminent danger.

145 Id.
146 Id. at 678.
147 Id. at 678-83 (Easterbrook, J. dissenting).
148 Id. at 680.
149 See id. at 678-79.
150 Id.
151 Id. at 679-80.
152 Id. at 683.
Like Judge Easterbrook, Judge Manion disagreed with the social group formulation, stating that characteristics like “young” and “living alone” are not immutable or fundamental characteristics. A characteristic based on age is subjective and subject to manipulation for the purpose of social group formulation, as shown by Cece’s expert, who offered a target age group of approximately age 16 to age 27. Judge Manion argued the majority erred by considering whether “young” and “living alone” could be social group characteristics because the BIA did not consider these characteristics and thus the court lacked authority to do so, making remand the proper action. Regardless, human trafficking is a risk facing all Albanians – men, women, and children. Finally, Judge Manion argued the majority erred by stating the BIA did not support its decision that internal relocation was reasonable with substantial evidence because the BIA analyzed the facts and declared internal relocation was feasible in its first opinion.

IV. THE CIRCUIT SPLIT

Cece v. Holder conflicts with the Sixth Circuit decision Rreshpja v. Gonzales, which held that young and attractive Albanian women forced into prostitution were not a cognizable social group. Like Cece, Rreshpja feared returning to Albania because she was at risk for forced prostitution. While living with her aunt in Tirana, Rreshpja escaped from a man trying to abduct her. As she escaped, the man

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153 Id. at 684 (Manion, J. dissenting).
154 Id. at 685. In his dissent, Judge Easterbrook contemplated that “[p]erhaps Cece looks younger than her age and would be targeted by mistake, but [Cece] does not argue this.” Cece II, 733 F.3d at 678 (Easterbrook, J. dissenting).
155 Cece II, 733 F.3d at 685 (Manion, J. dissenting).
156 Id. at 685-86.
157 Id. at 687.
159 Id. at 554-55.
160 Id. at 553.
asserted “she should not get too excited because she would end up on her back in Italy, like many other girls.”  

Perceiving this as a threat of forced prostitution, Rreshpja and her aunt reported the incident to the police, who said there was insufficient information to identify or arrest the man. Rreshpja entered the U.S. on a nonimmigrant visa which was issued based on fraudulent documents.

The court based its conclusion that young and attractive Albanian women forced into prostitution did not constitute a cognizable social group on two reasons. First, the proposed group was a too generalized and sweeping classification, particularly considering Rreshpja did not demonstrate there was a pervasive practice of forcing young women into prostitution. Second, the social group was circularly defined by its persecution, as group members did not share a narrowing characteristic besides the risk of persecution. Besides not establishing a cognizable social group, Rreshpja faced asylum eligibility problems because (1) she did not prove past persecution nor did she prove an objectively reasonable fear of future persecution, and (2) the immigration judge found some of her testimony lacked credibility. Therefore, Rreshpja was denied asylum.

Cece’s majority rejected the Rreshpja court’s reasoning that the purported social group of “young-looking, attractive Albanian women who are forced into prostitution” was too broad and sweeping a classification. The Cece court noted that many social groups recognized by the BIA and other circuits included broad characteristics; regardless, a potentially large pool of valid asylum

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161 Id.
162 Id.
163 Id. at 553-54.
164 Id. at 555.
165 Id. at 555-56.
166 Id. at 556.
167 Id.
168 Id. at 556-57. Rreshpja’s applications for withholding of removal and protection under the Convention against Torture were also denied. Id. at 557.
169 Cece II, 733 F.3d 662, 675 (7th Cir. 2013) (en banc).
claims is not a basis for rejecting an otherwise cognizable social group.\textsuperscript{170} To illustrate, Judge Rovner pointed out that the large number of ethnic Tutsis in Rwanda (almost 700,000) before they were targeted for genocide, and six million Jews in Nazi-controlled Europe would have had valid asylum claims today despite the large size of the groups.\textsuperscript{171}

Further, while the social group formulations of Cece and Rreshpja alluded to the persecution suffered by the female group members – being targeted for prostitution – the group members were not united solely by persecution they suffer.\textsuperscript{172} Therefore, the \textit{Cece} majority rejected the \textit{Rreshpja} court’s conclusion that “young (or those who appear to be young), attractive Albanian women . . . forced into prostitution” were not a cognizable group because the group was circularly defined by the persecution suffered.\textsuperscript{173} Judge Easterbrook’s dissent referenced the conflicting \textit{Rreshpja} decision to contend that Cece’s case was a poor choice to set aside the approach of the BIA and sister circuits.\textsuperscript{174}

While the majority acknowledged another potentially conflicting decision only in a footnote,\textsuperscript{175} Judge Easterbook emphasized the Second Circuit decision, \textit{Gjura v. Holder}, in his dissent.\textsuperscript{176} Like Cece, Gjura entered the U.S. with a fraudulent Italian passport under the Visa Waiver Program.\textsuperscript{177} Gjura feared returning to Albania because she claimed the Albanian mafia tried to kidnap and force her into prostitution twice, and her sister and cousin were kidnapped and murdered.\textsuperscript{178} Besides finding that Gjura did not establish a nexus

\begin{itemize}
  \item \textsuperscript{170} Id. at 673-74.
  \item \textsuperscript{171} Id. at 674.
  \item \textsuperscript{172} Id.
  \item \textsuperscript{173} Id. at 672.
  \item \textsuperscript{174} Id. at 682-83 (Easterbrook, J. dissenting).
  \item \textsuperscript{175} Id. at 672 n.5 (majority opinion).
  \item \textsuperscript{176} Id. at 683.
  \item \textsuperscript{177} Gjura v. Holder, 695 F.3d 223, 225 (2d Cir. 2012) (per curiam), withdrawn and superseded by, 502 Fed. App’x. 91 (2d Cir. 2012).
  \item \textsuperscript{178} Id.
\end{itemize}
between social group membership and her attacks or that the Albanian
government was unable or unwilling to protect her, the Second Circuit
analyzed her social group formulation. The initial opinion held that
young, unmarried Albanian women were not a cognizable social
group. The court followed the reasoning of the Rreshpjë court – the
purported social group formulation was too generalized and sweeping
and the group was circularly defined by its persecution.

Gjura v. Holder was decided after the Cece panel opinion but
before the panel opinion was vacated. While the Second Circuit agreed
with the Sixth Circuit’s social group reasoning in Rreshpjë, the Second
Circuit stated: “Gjura’s proposed social group differs from, and is more
amorphous [sic] than the social group defined in Cece [sic] v.
Holder.” Further, Gjura’s replacement opinion, decided after Cece’s
panel opinion was vacated and before the en banc decision, declined to
tackle whether young, unmarried Albanian women were a cognizable
social group. Judge Easterbrook noted that Gjura was denied
asylum mainly because the criminal conduct of a private actor does
not demonstrate that the Albanian government was unable or unwilling
to prevent persecution.

Cece v. Holder, Rreshpjë v. Gonzales, and Gjura v. Holder were
not the only occasions where the Seventh Circuit, Sixth Circuit, and
Second Circuit, respectively, considered an Albanian woman’s risk of
forced prostitution as part of a social group formulation for asylum
relief. Since Rreshpjë, the Sixth Circuit has twice relied on its
reasoning in that case to not find social group cognizability of

179 Id. at 226-27.
180 Id. at 226.
181 Id.
182 Id. n.1. (emphasis added).
183 Gjura v. Holder, 502 Fed. App’x. 91, 92 (2d Cir. 2012), cert. denied, 133 S.
Ct. 2356 (2013); see Cece II, 733 F.3d 662, 672 n.5 (7th. Cir. 2013) (en banc) (“The
Second Circuit . . . skirted the issue of whether ‘young, unmarried Albanian women
could constitute a social group’ and found instead that the applicant, Gjura, had
failed to establish a nexus.”).
184 Cece II, 733 F.3d at 683 (Easterbrook, J. dissenting).
185 Gjura, 502 Fed. App’x. at 92.
Albanian women fearing forced prostitution.\textsuperscript{186} The Second Circuit was previously confronted with the issue addressed in \textit{Gjura v. Holder}, but each time the court declined to determine the cognizability of the purported social group of the asylum applicants.\textsuperscript{187} Before the \textit{Cece} decision, the Seventh Circuit held that “young women in Albania without male protection” from gang sex trafficking recruitment were not cognizable because while a social group may be defined partly by gender, the applicant’s social group formulation was defined largely by the crime problem in Albania.\textsuperscript{188}

Additionally, the Third Circuit faced a similar issue and rejected the purported social group of “young women who have been approached or threatened with kidnapping, forced prostitution or killing by human traffickers that the government of Albania either cannot or will not control,” finding the social group did not exist absent persecution.\textsuperscript{189}

While Judge Easterbrook criticized the majority’s decision as being inconsistent with \textit{Gjura v. Holder},\textsuperscript{190} the Second Circuit might

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\textsuperscript{186} Kalaj v. Holder, 319 Fed. App’x. 374, 376-77 (6th Cir. 2009) (concluding “young, impoverished, single, uneducated women who risk kidnapping and forced prostitution” were not a cognizable social group”); Papapano v. Gonzales, 188 Fed. App’x. 447, 453-54 (6th Cir. 2006) (concluding “women likely to be kidnapped or forced into prostitution” were not a cognizable social group).

\textsuperscript{187} Lushaj v. Holder, 380 Fed. App’x. 41, 43 (2d Cir. 2010) (declining to consider whether “young women in Albania” or “women who were previously targeted for sex-trafficking by members of the Haklaj gang and who managed to escape and avoid capture” formed a cognizable social group); Celaj v. Gonzales, 186 Fed. App’x. 44, 46-47 (2d Cir. 2006) (remanding to the BIA the issue of whether “young Albanian women who fear being sold into prostitution” formed a cognizable social group); Nilaj v. Gonzales, 205 Fed. App’x. 902, 903-04 (2d Cir. 2006) (remanding to the BIA the issue of whether young Albanian women at risk for abduction and forced prostitution formed a cognizable social group).

\textsuperscript{188} Lleshanaku v. Ashcroft, 100 Fed. App’x. 546, 549-50 (7th Cir. 2004).


\textsuperscript{190} Cece II, 733 F.3d 662, 682-82 (7th Cir. 2013) (en banc) (Easterbrook, J. dissenting).
\end{flushright}
have concluded Cece was a member of a cognizable social group. First, the initial opinion of Gjura stated “Gjura’s proposed social group differs from, and is more amorphous [sic] than the social group defined in Cece [sic] v. Holder.”\(^{191}\) As Gjura was decided before Cece’s panel opinion was vacated, the Gjura court cited Judge Rovner’s dissenting opinion approvingly, where Judge Rovner noted the expert’s testimony that “the group of threatened women in Albania is composed of women who are between the ages of sixteen and twenty-six (perhaps twenty-seven) who live alone.”\(^{192}\) This means the Second Circuit believed Cece’s purported social group was not as amorphous as Gjura’s, hence it was more likely to constitute a cognizable social group.

A potential problem with Gjura’s social group formulation is that the broad and amorphous term of “young” was not defined.\(^{193}\) Cece’s purported social group defined young as age sixteen to age twenty six or twenty seven.\(^{194}\) The replacement Gjura opinion declined to address whether young, unmarried Albanian women were a cognizable social group “because Gjura failed to establish a nexus between her attacks and her membership in a particular social group” and failed to show that the government was unable or unwilling to protect her from persecutors.\(^{195}\) If the Second Circuit decided the cognizability of Cece’s purported social group, the court may have likewise concluded Cece formed a cognizable social group.

The Sixth Circuit’s Rrleshpja v. Gonzalez decision is contrary to Cece v. Holder in that the purported social groups are similar, but Rrleshpja’s purported social group of young (or perceived to be young), attractive, Albanian women at risk of forced prostitution was

\(^{191}\) Gjura v. Holder, 695 F.3d 223, 226 n.1 (2d Cir. 2012) (per curiam) (emphasis added), withdrawn and superseded by, 502 Fed. App’x. 91 (2d Cir. 2012).

\(^{192}\) Id.

\(^{193}\) Id. at 226-27.

\(^{194}\) Cece II, 733 F.3d at 667 (majority opinion). Dr. Fischer, however, testified that while that is the targeted age group, there are numerous instances of kidnapping and trafficking outside of that age group. Id. at 673.

not cognizable,\textsuperscript{196} and Cece’s purported social group of young, Albanian women living alone was cognizable.\textsuperscript{197} The two purported social groups are factually distinguishable, however. First, Rreshpja did not define young, which could have alleviated the concern that the purported social group was broadly defined and too generalized.\textsuperscript{198} Cece’s expert, on the other hand, defined young as between the ages of sixteen and approximately twenty seven.\textsuperscript{199} Second, Rreshpja included the potential persecution – forced prostitution – in the social group formulation.\textsuperscript{200} Cece did not include the potential persecution in her purported social group, but included the characteristic of living alone.\textsuperscript{201} Living alone was a significant factor of her vulnerability to persecution, specifically, sex trafficking.\textsuperscript{202} As such, Cece’s social group existed independent of the persecution,\textsuperscript{203} whereas Rreshpja’s social group was considered “circularly defined by the fact that it suffers persecution.”\textsuperscript{204} Even if the Sixth Circuit had reached a contrary decision on the exact same social group formulation as Cece, the Seventh Circuit’s acknowledgment of gender plus one or more narrowing characteristics as a legitimate method to form a social group\textsuperscript{205} adequately addresses the concern that a social group based on gender would be overly broad.

V. \textbf{USE OF THE GENDER PLUS ONE FORMULATION}

The predominant reason the BIA and circuits are reluctant to accept a social group defined by gender alone is the concern that too

\textsuperscript{196} Rreshpja v. Gonzales, 420 F.3d 551, 555 (6th Cir. 2005).
\textsuperscript{197} Cece II, 733 F.3d at 674-78.
\textsuperscript{198} Rreshpja, 420 F.3d at 556.
\textsuperscript{199} Cece II, 733 F.3d at 667.
\textsuperscript{200} Rreshpja, 420 F.3d at 556.
\textsuperscript{201} Cece II, 733 F.3d at 67-71.
\textsuperscript{202} Id. at 677-78.
\textsuperscript{203} Id.
\textsuperscript{204} Rreshpja, 420 F.3d at 556.
\textsuperscript{205} Cece II, 733 F.3d at 676.
many individuals would belong to a social group, and consequently too many individuals would be asylum eligible.\textsuperscript{206} A social group should be narrowly defined, and it may be found overbroad if it encompasses much of the home country.\textsuperscript{207} Other elements besides establishing membership in a particular social group, or alternatively, one of the other four protected grounds, are required to establish asylum eligibility. These elements include establishing (1) past persecution or a well-founded fear of future persecution and (2) a nexus between the protected ground and persecution.\textsuperscript{208} Also, the applicant must be credible.\textsuperscript{209}

Given the high burden of establishing all asylum eligibility requirements, a broader interpretation of gender-based social groups would not lead to an influx of asylees.\textsuperscript{210} Regardless, courts are inclined to bypass the complex issue of social group cognizability\textsuperscript{211} or presume social group membership and deny the asylum claim on other grounds.\textsuperscript{212} Therefore, the social group formulation of gender plus one would hardly increase the number of aliens granted asylum, if increase it at all.\textsuperscript{213} Other circuits used the gender plus one formulation.\textsuperscript{214}

\textsuperscript{206} See id. at 680 (Easterbrook, J. dissenting) (expressing the concern that the Seventh Circuit has created precedent that everyone qualifies for social group membership, rendering statutory asylum eligibility requirements meaningless).

\textsuperscript{207} See, e.g., Ochoa v. Gonzales, 406 F.3d 1166, 1170-71 (9th Cir. 2005).

\textsuperscript{208} 8 U.S.C. § 1101(a)(42)(A) (2012); 8 C.F.R. § 208.13(b)(1).


\textsuperscript{210} Randall, supra note 14, at 299.

\textsuperscript{211} See, e.g., Gjura v. Holder, 502 Fed. App’x. 91, 92 (2d Cir. 2012), cert. denied, 133 S. Ct. 2356 (2013).

\textsuperscript{212} See, e.g., Urbina-Dore v. Holder, 735 F.3d 952, 953 (7th Cir. 2013) (discussing the pointlessness of the applicants arguing social group membership on appeal because the BIA assumed they belonged to a cognizable social group and denied asylum on other grounds).

\textsuperscript{213} See Protecting Victims, supra note 13, at 132-33 (discussing the lack of an appreciable increase in claims based on female genital mutilation after Matter of Kasinga); see also Chan, supra note 17, at 177 (“Although women and children constituted the majority of [European refugee asylum-seekers post World War II], women often faced significant difficulty leaving their countries of origin due to a lack of financial means and other resources.”).
formulation alleviates the concern that gender may comprise too large a group by narrowing the group with one or more additional characteristics besides gender.

The following cases consist solely of cognizable social group formulations of gender plus one or more narrowing characteristics. They are not exhaustive of all the asylum cases discussing gender in defining a social group. Numerous decisions rejected a social group formulated in part or in whole by gender. Moreover, the BIA or circuits may have bypassed the issue of whether a purported social group based in whole or in part on gender was cognizable if another issue was conclusive against the applicant. Further, even if there were a finding of a cognizable social group, it does not mean the applicant was granted asylum, considering all of the other asylum eligibility requirements that must be met.

A. Gender Plus Transgression of Social, Cultural, or Religious Norms

A social group united by “ideas or practices [that] run counter to the cultural or social convention of [their home] country . . . might seem plausibly alterable;” however, individuals have the right to retain characteristics fundamental to their individual identity. For example, women who oppose suppressing “their core, fundamental values or beliefs” may form a cognizable social group. In Fatin v. INS, the

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214 E.g., Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993).
215 E.g., Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).
216 E.g., Gjura v. Holder, 502 Fed. App’x. at 92. “As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.” Immigr. & Naturalization Serv. v. Bagamasbad, 429 U.S. 24, 25 (1976).
217 E.g., Fatin, 12 F.3d at 1241–42 (holding that while the gender plus social group was cognizable, the applicant did not demonstrate she was a member of that group, and thus, she could not establish persecution).
218 Cece II, 733 F.3d 662, 670 (7th Cir. 2013) (en banc).
219 Al-Ghorbani v. Holder, 585 F.3d 980, 996 (6th Cir. 2009), reh’g denied, 594 F.3d 546 (6th Cir. 2010).
Third Circuit recognized that Iranian women who refused to conform to the gender-specific laws and social norms of Iran formed a cognizable social group.\textsuperscript{220} Parastoo Fatin ("Fatin") left Iran to be educated in the United States.\textsuperscript{221} Before entering the U.S., Fatin participated in a political group and a women’s rights group.\textsuperscript{222} Fatin opposed the Islamic dress code, and as a feminist, opposed gender laws constraining women.\textsuperscript{223}

Recognizing that the Acosta definition “specifically mentioned ‘sex’ as an innate characteristic that could link the members of ‘a particular social group,’” the court stated that a social group based solely on gender could form a cognizable social group.\textsuperscript{224} Nonetheless, the court accepted the cognizability of Fatin’s more narrowly defined social group formulation: women refusing to conform to gender-specific laws and social norms.\textsuperscript{225} Opposition to gender specific laws can be so fundamental to a woman’s identity that she should not be required to change.\textsuperscript{226} Complying with the Islamic dress code may be so abhorrent to some women that it would constitute persecution; however, that does not mean it would constitute persecution for all women.\textsuperscript{227}

In the Seventh Circuit decision \textit{Sarhan v. Holder}, Sara Issa Mohamad Disi ("Disi") feared persecution due to a cultural practice.\textsuperscript{228} Disi’s sister-in-law spread a rumor in Disi’s home country of Jordan that Disi had committed adultery.\textsuperscript{229} At the time, Disi was in the U.S.

\begin{footnotesize}
\textsuperscript{220} Fatin, 12 F.3d at 1241. Similarly, the Seventh Circuit in \textit{Yadegar-Sargis v. INS} held that Christian women in Iran who opposed adhering to the Islamic female dress code were a cognizable social group. Yadegar-Sargis v. INS, 297 F.3d 596, 603 (7th Cir. 2002).
\textsuperscript{221} Fatin, 12 F.3d at 1235.
\textsuperscript{222} Id. at 1236.
\textsuperscript{223} Id.
\textsuperscript{224} Id. at 1240.
\textsuperscript{225} Id. at 1241.
\textsuperscript{226} Id.
\textsuperscript{227} Id. at 1242.
\textsuperscript{228} Sarhan v. Holder, 658 F.3d 649, 650 (7th Cir. 2011).
\textsuperscript{229} Id. at 651.
\end{footnotesize}
on a visitor visa with her family.\footnote{Id.}{230} The rumor spread to Disi’s family.\footnote{Id.}{231} Disi’s brother believed the rumor, and Disi was informed that her brother planned to kill her as an honor killing.\footnote{Id.}{232} Honor killings are common, usually occurring “in countries where the moral code tightly restricts women; government offers little protection for the victims; and killers receive light punishment, if charges are not dropped altogether.”\footnote{Id.}{233} Typically, the victim of an honor killing is a female whose male relative kills the female to cleanse the family of the reputational harm caused by the female’s immoral behavior.\footnote{Id. (citation omitted).}{234}

When Disi’s brother visited her in the U.S., he informed Disi that he would murder her when she returned to Jordan.\footnote{Id. at 652.}{235} The court found that Disi was a member of the cognizable social group of Jordanian women accused of being immoral criminals due to their transgression of social and religious norms.\footnote{Id. at 654-55.}{236} Its holding rejected the BIA’s assertion that the members of Disi’s purported social group are only united by the shared experience of being targets for honor killings.\footnote{Id. at 655.}{237} Jordanian society treats women who violate the moral code as outcasts and permits honor killings of those women by family members.\footnote{Id.}{238} Moreover, women at risk of honor killings are unable “to shed the stigmatizing characteristics that render them victims.”\footnote{Id.}{239} The court noted the global plight of women by stating that “[a]long with female genital mutilation, human trafficking and slavery, spousal rape, and domestic battery [the practice of honor killing] is among the most severe abuses that women face.”\footnote{Id. at 662-63.}{240}
Like Fatin and Sarhan, Cece transgressed social and cultural norms by living alone in Albania. Much of Cece’s testimony before the immigration judge focused on her status of living alone in Albania.\footnote{Cece II, 733 F.3d 662, 671 (7th Cir. 2013) (en banc).} Cece testified that women in Albania do not live alone, she did not know anyone living alone, she feared living alone, and she was targeted because she was living alone.\footnote{Id.} Dr. Fischer’s testimony stressed the risk facing women living alone in Albania.\footnote{Id.} Women who lack protection from husbands and other family members become particularly vulnerable to traffickers in Albania.\footnote{Id.} Analogous to Sarhan’s transgression of social norms placing her at risk of an honor killing,\footnote{Sarhan, 658 F.3d at 655.} Cece’s stigmatizing characteristic of living alone rendered her at a significantly higher risk of forced prostitution than the overall population, especially because she was already targeted by a gang leader.\footnote{Cece II, 733 F.3d at 667, 670-71.}

The court stated that Cece’s living situation was not alterable.\footnote{Id. at 673.} Living alone ran counter to the social and cultural norms of Albania. Even though the characteristic of living alone is plausibly alterable, the court considered it a fundamental trait to one’s identity such that she should not be required to change.\footnote{Id. at 669.}

B. Gender Plus Ethnicity, Nationality, or Tribal Membership

The plight of women facing female genital mutilation in their home countries has led many courts to conclude that gender plus ethnicity, nationality, or tribal membership constitutes a cognizable
The landmark BIA decision involving female genital mutilation is *Matter of Kasinga*. The applicant was a young member of the Tchamba-Kunsuntu Tribe in Togo, where it is the normal practice of young tribal members to undergo female genital mutilation. While Kasinga’s father was alive, Kasinga was protected from female genital mutilation. After her father’s death, the tribal custom was for her paternal aunt to become the family’s primary authority figure. Kasinga’s aunt forced her into a polygamous marriage with an older man, and her aunt and new husband planned to submit Kasinga to genital mutilation. She escaped Togo.

The BIA held that Kasinga belonged to the cognizable social group of “young women of the Tchamba-Kunsuntu Tribe who have not had [genital mutilation], as practiced by that tribe, and who oppose the practice.” Two characteristics of the social group formulation were immutable: (1) being a young woman, and (2) being a member of the Tchamba-Kunsuntu Tribe. Further, having intact genitalia is a characteristic that “is so fundamental to the individual identity of a young woman that she should not be required to change it.” At length, the BIA discussed the pervasive problem of the practice of

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251 *Id.* at 358.
252 *Id.*
253 *Id.*
254 *Id.*
255 *Id.*
256 *Id.* at 358-59.
257 *Id.* at 365.
258 *Id.* at 366. Similarly, the Tenth Circuit held in *Niang v. Gonzales* that female members of the Tukulor Fulani tribe in Senegal constituted a cognizable social group because of the immutable characteristics of gender and tribal membership. Niang v. Gonzales 422 F.3d 1187, 1199 (10th Cir. 2005).
259 *Kasinga*, 21 I. & N. at 366.
female genital mutilation in Africa, specifically in Togo, in that it is a grave harm inflicted upon females who lack governmental protection because the government is complicit in the practice. While \textit{Kasinga} was a breakthrough decision in gender-based asylum claims in that it explicitly recognized gender as a component of a cognizable social group, the BIA reached its decision through a restrictive analytical route. Recognizing that genital mutilation is gender-based persecution would have established precedent that gender alone can form a social group, but instead, the BIA defined Kasinga’s social group as gender plus tribal membership and opposition to female genital mutilation.

In the Ninth Circuit’s \textit{Mohammed v. Gonzales}, Khadija Ahmed Mohammed (“Mohammed”) was a member of the Benadiri clan of Somalia. If removed to Somalia, Mohammed feared she would fall victim to female genital mutilation. The court found that Mohammed belonged to two cognizable social groups: (1) young girls in the Benadiri clan and (2) Somali females. Somali females, a group based on gender alone, was found cognizable due to the deeply imbedded cultural practice of female genital mutilation in Somalia, where approximately 98% of women underwent female genital mutilation. Despite not having recognized women as a social group previously, the court stated “the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law.” Moreover, the court noted that “[f]ew would

\begin{itemize}
  \item \textit{Id.} at 366-68.
  \item Randall, \textit{supra} note 14, at 295.
  \item \textit{Id.}
  \item Mohammed v. Gonzales, 400 F.3d 785, 789 (9th Cir. 2005).
  \item \textit{Id.}
  \item \textit{Id.} at 796-97.
  \item \textit{Id.} at 797.; In \textit{Hassan v. Gonzales}, the Eighth Circuit also concluded Somali females constituted a cognizable social group given the prevalence of female genital mutilation. Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007).
  \item Mohammed, 400 F.3d at 797.
\end{itemize}
argue that sex or gender, combined with clan membership or
nationality, is not an ‘innate characteristic,’ ‘fundamental to individual
identity.’”268 The risk of harm Mohammed faced, female genital
mutilation, occurs because the person is female and is subjected to
others’ efforts to exert control over women’s sexuality.269

Successful asylum claims in female genital mutilation cases
demonstrate how courts may manipulate the social group definition to
accommodate a claim based essentially on gender alone.270 For
example, both Kasinga271 and Mohammed272 used the term “young” in
e a cognizable social group, yet numerous decision makers find the term
too amorphous.273 Gender alone could have been a cognizable social
group in Kasinga; instead, the BIA narrowed the breadth of a gender
only social group with the characteristics of tribal membership and
opposition to the practice of female genital mutilation.274 Numerous
forms of persecution are gender specific.275 Sexual violence, like
forced prostitution in Cece, disproportionately affects women.276

Decision makers tend to attribute gender-based persecution to the
backward religious, tribal, or societal customs that foster persecution
of women rather than the problem of violence against women in

268 Id.
269 Id. at 798 (internal quotation marks omitted).
270 Chan, supra note 17, at 180.
272 Mohammed, 400 F.3d at 797.
273 See, e.g., Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (stating that
“[p]ossession of a broadly-based characteristics such as youth and gender will not by
itself endow individuals with membership in a particular social group.”).
274 Randall, supra note 14, at 295.
275 Id. at 285-86 (listing forms of persecution that are gender specific,
including sexual violence, genital mutilation, “dowry deaths, purdah, coerced or
forced adherence to religious dress codes and other specific customs, and the use of
mass rapes as a weapon of war”).
276 Deborah Anker, Refugee Status and Violence Against Women in the
“Domestic” Sphere: The Non-State Actor Question, 15 GEO. IMMIGR. L.J. 391, 391
The persecution women face is often related to cultural or religious practices, so those opposing gender-based asylum presume harms facing women are not that serious. But, the harms facing women in gender-based asylum cases are human rights violations that are not minor or trivial.

The tendency of decision makers to distinguish non-Western harms from Western harms is evident in Judge Easterbrook’s dissenting opinion in Cece. Judge Easterbrook considered forced prostitution a criminal act, not persecution, and declared “[p]eople are forced into prostitution in Chicago.” Also, he questioned whether Cece was at a high risk of persecution. Regardless, the discussion regarding the risk of forced prostitution pertains to establishing persecution, not a social group.

C. Gender Plus Relationship Status

In Qu v. Holder, the Sixth Circuit held Bi Xia Qu (“Qu”) was a member of the cognizable social group of Chinese women who have been subjected to forced marriage and involuntary servitude. Qu’s father took out a loan from Zhang that he was unable to repay. Zhang demanded that either the loan be repaid or that Qu become his wife. Zhang also threatened to use his police and gang connections to imprison the family if anyone reported the incident.

278 Protecting Victims, supra note 13, at 131.
279 Id.
280 See Cece II, 733 F.3d 662, 678-79 (7th Cir. 2013) (en banc) (Easterbrook, J. dissenting).
281 Cece II, 733 F.3d at 679 (Easterbrook, J. dissenting).
282 Id. at 678-79.
283 Qu v. Holder, 618 F.3d 602, 607 (6th Cir. 2010).
284 Id. at 604.
285 Id.
286 Id. at 604-05.
Subsequently, Zhang kidnapped Qu, detained her at his home, attempted to rape her, threatened to imprison her if she did not have sex with him or repay the debt, and threatened to cut off her hands and feet if she tried escaping. After being detained at his home for about two weeks, Qu escaped to her aunt’s house, who helped smuggle Qu into the U.S. Qu feared Zhang would search for her everywhere so that he could keep her hostage or sell her and that she was afraid the government would harm her if she returned to China. In holding Qu was a member of a cognizable social group, the court concluded the members of the social group shared the common, immutable characteristic of being a woman abducted by a man for forced marriage in an area recognizing forced marriages.

Another decision with a social group based on gender plus relationship status was the Eighth Circuit’s Nwengwe v. Mukasey, which held that Cameroonian widows were a cognizable social group. As soon as the husband of Elizabeth Simeni Ngengwe ("Ngengwe") died, her in-laws detained her in their home for two months, “shaved her head with a broken bottle, forbade her from dressing, kept her children from her, and forced her to sleep on the ground” in accordance with traditional mourning rituals. The family also took all of the belongings of her and her deceased husband and closed their bank account. Approximately a month after escaping with her children to her sister’s home within Cameroon, the in-laws arrived at the home demanding Ngengwe marry her brother-in-law or pay the bride’s price. Ngengwe refused to marry the brother-in-law because he was older and already had two other wives, and Ngengwe informed them she was unable to pay the bride’s

287 Id. at 605.
288 Id.
289 Id.
290 Id. at 607.
291 Ngengwe v. Mukaskey, 543 F.3d 1029, 1034 (8th Cir. 2008).
292 Id. at 1031.
293 Id. at 1031-32.
294 Id. at 1032.
Ngengwe’s in-laws beat her, then told her that when they returned to her sister’s home in a month, they would kill Ngengwe and take her children if she neither married her brother-in-law nor paid the bride’s price. Ngengwe did not inform the police, believing they would not become involved in a family matter.

The court reasoned that Cameroonian widows shared an immutable characteristic – the shared experience of losing a husband. The court rejected the immigration judge’s contention that Ngengwe did not have an immutable characteristic because she could change her marital status. Further, the court found that Cameroonian widows were a cognizable social group because Cameroonian society pervasively discriminates against widows and women are subject to mourning rituals.

The Cece court analogized the characteristic of living alone to relationship status. During Cece’s testimony, the government attorney asked Cece why she could not find a man to marry and protect her. The court stated that “this is the type of fundamental characteristic change that [is] not ask[ed] of asylum applicants.” This reasoning is analogous to that of the Ngengwe court, which rejected the immigration judge’s conclusion that Ngengwe did not have an immutable characteristic because she could change her marital status. Living alone is a plausibly alterable, but fundamental characteristic.

295 Id.
296 Id.
297 Id.
298 Id. at 1034.
299 Id.
300 Id. at 1034-35.
301 Cece II, 733 F.3d 662, 669 (7th Cir. 2013) (en banc).
302 Id.
303 Id.
304 Ngengwe, 543 F.3d at 1034.
305 Cece II, 733 F.3d at 669.
VI. PROPOSAL FOR GENDER-BASED SOCIAL GROUP FORMULATIONS

A. The Logical Fallacies of the Cece Opinion

While the court correctly found Cece’s gender plus social group cognizable based on prior case law, the majority’s reasoning consisted of convoluted logic. Specifically, the court stated the group members’ “age, gender, nationality, [and] living situation are not alterable.” Generally speaking, gender and nationality are unalterable. But, age is an inherently changeable characteristic, and one’s living situation changes.

The court did not discuss age beyond explaining that Cece’s expert defined a target age group of women at risk of persecution. Surely one cannot volitionally alter her age, but age naturally progresses. Judge Easterbrook and Judge Manion discussed the fallacies of considering a changeable characteristic like age as an immutable characteristic. Like many previous adjudicators, Judge Manion criticized using young as a characteristic in a social group because it is too amorphous and subjective. Cece’s expert defined young by testifying that females between age sixteen and twenty six are primarily targeted for forced prostitution, but others outside the age range could also become victims. Judge Easterbrook opined that Cece was not even in the social group because she is now thirty four years old. For that reason, Judge Manion criticized that accepting a

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306 Id. at 673.
307 Id.
308 Cece II, 733 F.3d at 680 (Easterbrook, J. dissenting); Cece II, 733 F.3d at 684-85 (Manion, J. dissenting).
309 Cece II, 733 F.3d at 684-85 (Manion, J. dissenting).
310 Cece II, 733 F.3d at 667 (majority opinion).
311 Cece II, 733 F.3d at 678 (Easterbrook, J. dissenting).
social group using the term “young” would make the social group formulation malleable.\(^{312}\)

The pervasive problem of backlogs in immigration courts affects any social group using age as a characteristic.\(^{313}\) Asylum applicants wait, often years, before they appear for a merits hearing before an immigration judge.\(^{314}\) An immigration judge did not decide Cece’s claim until approximately four years after she applied for asylum.\(^{315}\) This does not account for the subsequent appeals and remands of her case. Approximately seven years passed from the date the immigration judge first heard her case to the date of the en banc Seventh Circuit decision.\(^{316}\) Cece was twenty three years old when she entered the U.S.\(^{317}\) and currently is approximately thirty four years old.\(^{318}\) When the immigration judge granted her asylum application in 2006, Cece was approximately twenty six years old and within the age group defined by her expert.\(^{319}\) Penalizing an applicant like Cece for aging out of her social group creates a perverse incentive to delay adjudication of asylum claims and the appellate process. Nevertheless, the court emphasized her expert’s testimony that women outside the target age group were also at risk of forced prostitution.\(^{320}\)

\(^{312}\) Cece II, 733 F.3d at 685 (Manion, J. dissenting) (“Is 34 young? It depends on whom you ask. And that is the problem with using such subjective characteristics to define a ‘social group.’”).


\(^{314}\) Id.

\(^{315}\) Cece II, 733 F.3d at 667 (majority opinion).

\(^{316}\) Id.

\(^{317}\) Cece I, 668 F.3d 510, 511-12 (7th Cir. 2012), rev’d en banc, Cece II, 733 F.3d 662 (7th Cir. 2013) (en banc).

\(^{318}\) Cece II, 733 F.3d at 678 (Easterbrook, J. dissenting).

\(^{319}\) Cece II, 733 F. 3d at 667 (majority opinion).

\(^{320}\) Id. at 673.
Likewise, the court’s finding that one’s living situation is not alterable\(^{321}\) suffers from logical fallacies. The court explained that while it is plausibly alterable, it is a fundamental characteristic.\(^{322}\) Judge Manion believed living alone is not immutable or fundamental to one’s identity like relationship status.\(^{323}\) Similarly, Judge Easterbrook stated that “[p]eople may marry, live with relatives, or join forces with similarly situated persons[, and] [m]any single women live with other single women.”\(^{324}\) As such, one’s living situation is changeable.\(^{325}\) The differing interpretation of adjudicators regarding what characteristics are immutable potentially dooms any purported gender plus social group.

**B. A Proposed Interpretation of Gender-Based Social Group Formulations**

The BIA decided in *Acosta* that gender is an immutable characteristic that could form a social group.\(^{326}\) All circuits follow the *Acosta* test.\(^{327}\) As such, applicants should not have to prove the plus characteristics are immutable as well. Gender alone should be the immutable characteristic defining the social group, and the issue should be whether the plus characteristics narrow the group.

\(^{321}\) *Id.*

\(^{322}\) *Id.* at 669. Other than Cece continuing to live alone, nothing suggested Cece found living alone fundamental to her identity. While the *Fatin* court found Iranian women who refused to conform to gender-specific laws and social norms formed a cognizable social group, the court concluded opposition to the gender-specific laws was not fundamental to Fatin, and she was not granted asylum. *Fatin v. INS*, 12 F.3d 1233, 1241-42 (3d Cir. 1993).

\(^{323}\) Cece II, 733 F.3d at 684 (Manion, J. dissenting).

\(^{324}\) Cece II, 733 F.3d at 680-81 (Easterbrook, J. dissenting).

\(^{325}\) *Id.* at 680.


\(^{327}\) See cases cited *supra* note 1.
sufficiently so that group members can establish the nexus between group membership and persecution.328

This approach would not bypass the requirement of establishing a social group, as Acosta already decided gender is an immutable characteristic.329 Nor would it bypass the nexus requirement. In Cece, the court emphasized the significance of demonstrating a nexus between group membership and persecution because the nexus is a requirement for asylum eligibility and narrows the breadth of the social group.330 The nexus cannot be analyzed completely independently from the protected ground because identifying the relevant protected ground “requires an examination of against whom the harm is directed before the persecutor’s motivation for the harm is examined.”331

C. Increased Recognition of Gender-Based Social Groups Would Not Open the Floodgates

The concern that increased recognition of gender-based social groups would result in an influx of asylees is unfounded for numerous reasons. First, numerous aliens fearing persecution cannot leave their home countries due to a lack of financial resources.332 Second, only a small percentage of immigrants admitted into the U.S. are asylees, so concern regarding the number of immigrants is misplaced.333 Third, the applicant must still establish the other procedural and evidentiary

328 See Niang v. Gonzales, 422 F.3d 1187, 1199–1200 (10th Cir. 2005) (“[T]he focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ‘on account of’ their membership.”); Gao v. Gonzales, 440 F.3d 62, 68 (2d Cir. 2006), vacated on other grounds sub nom. Keisler v. Gao, 552 U.S. 801 (2007) (same).
329 Acosta, 19 I. & N. at 233.
330 Cece II, 733 F.3d 662, 673–74 (7th Cir. 2013) (en banc).
331 Casey, supra note 47, at 1006-07 (emphasis in original).
332 Chan, supra note 17, at 188-89.
333 Imbriano, supra note 18, at 351.
elements to be granted asylum. The stringent statutory requirements already safeguard against potentially innumerable asylum claims. A woman cannot be granted asylum merely because she is a woman unless she can establish a nexus between group membership and persecution. Thus, courts should not be concerned everyone would qualify for asylum and the narrow refugee definition would be lost if gender were a recognized basis for a social group. Finally, the concern of broadening the interpretation of social group formulations fails to recognize that other protected grounds, specifically race, nationality, and religion, also encompass large populations. Regardless, refugee status is determined on a case by case basis and should not be affected by the fear of hypothetical asylum claims that other women may present in the future.

D. Criticisms of the Gender Plus Formulation and Other Proposals

Others have suggested proposals to ameliorate the problem of narrow construction of gender-based social group formulations. For example, gender could be added as a sixth protected ground in the refugee definition. Congress’s historically slow movement of immigration reform is reason enough to doubt the feasibility of this

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334 Randall, supra note 14, at 299. The social group category “is often seen as a gap filler, but it does not soften the requirements for asylum.” Imbriano, supra note 18, at 345.
335 Cece II, 733 F.3d at 673-74.
336 Heitz, supra note 23, at 242.
337 See Imbriano, supra note 18, at 350.
338 Randall, supra note 14, at 299.
339 See id.
340 Chan, supra note 37, at 185.
341 Mary Giovagnoli, Overhauling Immigration Law: A Brief History and Basic Principles of Reform, IMMIGRATION POLICY CENTER, available at http://www.immigrationpolicy.org/perspectives/overhauling-immigration-law-brief-history-and-basic-principles-reform (discussing the history and issues inhibiting immigration reform). Also, gender as a protected ground might be over-inclusive
proposal. Moreover, the most significant problem facing gender-based asylum claims is the interpretation of the law, not the law itself.\textsuperscript{342} Another proposal is that courts should recognize gender as the basis of persecution, and thus gender alone should form a cognizable group.\textsuperscript{343} But, some applicants may face difficulty meeting the nexus requirement using this approach.\textsuperscript{344}

A criticism of using the gender plus formulation is that the applicant must establish gender as well as some other characteristic to establish a cognizable social group, thus requiring the applicant to “prove twice as much to meet the nexus requirement” compared to applicants asserting other protected grounds.\textsuperscript{345} This criticism recognizes the problem of the current interpretation of gender plus social group formulations. Cece’s majority argued that each plus characteristic in Cece’s social group was immutable.\textsuperscript{346} The dissenters disagreed.\textsuperscript{347} If the proposal were accepted that gender alone is the immutable characteristic defining the social group so the plus characteristics do not need to be immutable as well, then the applicants would not have to prove twice as much as applicants asserting other protected grounds.

A related criticism is that the applicant would need to add qualifications to narrow the purported social group significantly.\textsuperscript{348} The female applicant may need to add characteristics to her social group formulation if she lacks evidence that the risk of persecution is

\begin{itemize}
\item\textsuperscript{342} Sinha, supra note 278, at 1565.
\item\textsuperscript{343} Randall, supra note 14, at 298.
\item\textsuperscript{344} Barbara Barreno, In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims, 64 VAND. L. REV. 225, 256 (2011).
\item\textsuperscript{345} Chan, supra note 17, at 183.
\item\textsuperscript{346} Cece II, 733 F.3d 662, 669, 673 (7th Cir. 2013) (en banc).
\item\textsuperscript{347} Cece II, 733 F.3d at 681-82 (Easterbrook, J. dissenting); Cece II, 733 F.3d at 684-85 (Manion, J. dissenting).
\item\textsuperscript{348} Randall, supra note 14, at 296.
\end{itemize}
not based solely on gender.\textsuperscript{349} While some courts have recognized that gender alone can form a cognizable social group,\textsuperscript{350} additional characteristics may be necessary to establish a nexus. Also, additional characteristics may be necessary to meet the particularity requirement.\textsuperscript{351}

Presumably considering \textit{Acosta}, Judge Easterbrook admitted the BIA would find Cece is a member of the cognizable social group of Albanian women.\textsuperscript{352} He, correctly, pointed out that Cece did not argue she would be persecuted based solely on being a woman.\textsuperscript{353} Cece needed to add characteristics to her social group formulation to meet the nexus requirement. Because no asylum adjudicators contest gender is an immutable characteristic, applicants should not be penalized for adding characteristics narrowing the breadth of a social group based solely on gender so that they can meet the nexus requirement. The current interpretation of gender plus social groups requires applicants to prove the plus characteristics are immutable too. This disadvantages applicants because the applicant must prove at least twice as much as applicants who use one of the other protected grounds. Accordingly, a better approach is to return to the \textit{Acosta} view that gender is an immutable characteristic\textsuperscript{354} and to not require applicants to prove that the additional characteristics are immutable.

\textsuperscript{349} Barreno, \textit{supra} note 345, at 257.

\textsuperscript{350} See, \textit{e.g.}, Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005) (acknowledging that females might constitute a particular social group in some circumstances and that \textit{Acosta} “listed gender as an example of a prototypical immutable characteristic that could form the basis for a social group”).

\textsuperscript{351} Matter of S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (“[T]he key question is whether the proposed description is sufficiently particular, or is too amorphous to create a benchmark for determining group membership.”) (citation omitted) (internal quotation marks omitted).

\textsuperscript{352} Cece II, 733 F.3d at 681 (Easterbrook, J. dissenting).

\textsuperscript{353} \textit{Id.}

E. Necessity of Uniform Interpretation of the Law

Asylum officers, immigration judges, and courts have significant discretionary power to decide claims, and that discretion contravenes the goal of uniform application of the law and the humanitarian purpose of asylum.\(^{355}\) Social group cognizability turns on arbitrary decision making, resulting in a lack of uniformity, including circuit splits, and uncertainty for asylum applicants.\(^{356}\) A circuit’s decision only has precedential effect within the circuit.\(^{357}\) Thus, a gender-based social group can be cognizable in one jurisdiction, but not another.\(^{358}\) Future asylum applicants like Cece will likely present a cognizable social group in the Seventh Circuit, where Cece v. Holder has precedential effect, but not in the Sixth Circuit, where Rreshpja v. Gonzales has precedential effect.

The issues presented by arbitrary and discretionary decision making of the cognizability of gender-based social group formulations were evident in Cece. Besides the circuit split created by the decision, the Seventh Circuit was divided on the cognizability of Cece’s social group. Of all the possible Seventh Circuit panel combinations, Cece’s panel comprised Judge Easterbrook and Judge Manion, who rejected Cece’s social group formulation. Judge Rovner dissented. The remaining Seventh Circuit judges agreed with Judge Rovner, who wrote the en banc opinion finding Cece’s social group cognizable.\(^{359}\) The fate of an asylum applicant should not turn on luck.\(^{360}\)

\(^{355}\) Sinha, supra note 278, at 1571.

\(^{356}\) Chan, supra note 17, at 180, 182.

\(^{357}\) 18 JAMES WM MOORE ET AL., MOORE’S FEDERAL PRACTICE § 134.02(1)(c) (3d ed. 2013). While another circuit’s decision is not binding, it is persuasive and should be considered “in the interest of maintaining a reasonable uniformity of federal law.” Id.

\(^{358}\) Chan, supra note 17, at 180.

\(^{359}\) Cece II, 733 F.3d 662 (7th Cir. 2013) (en banc).

\(^{360}\) See Chan, supra note 17, at 169 (“[T]he fate of the asylum-seeker may . . . turn on the arbitrary discretion and decision-making authority of a single judge.”).
The U.S. Supreme Court rarely grants certiorari for immigration cases because of the availability of review by the BIA and the appropriate circuit. 361 Consequently, the BIA and circuits establish the standards and create the trends of immigration law. 362 Accepting the proposed interpretation that gender alone should be the immutable characteristic and the additional characteristics should not have to be immutable would create uniformity because there would be no subjective interpretation of whether the plus characteristics are immutable. The plus characteristics would serve to narrow the social group so the nexus requirement can be met.

CONCLUSION

Considering case law of the BIA and circuits, the Seventh Circuit correctly accepted the cognizability of a social group formulation based on gender plus other narrowing characteristics in Cece v. Holder. Nevertheless, the court’s reasoning used the same convoluted logic of other courts who have found gender plus social groups cognizable. 363 Historically, the narrow construction of gender-based groups has left women unable to establish group membership. 364 The current narrow interpretation of gender-based social groups, specifically the requirement that the plus characteristics be immutable, inhibits the ability to establish group membership and leads to arbitrary decision making and circuit splits. 365

The gender plus formulation is considered a more limited approach rather than recognizing gender alone as a social group because it narrows the breadth of gender-based asylum claims. 366

361 Imbriano, supra note 18, at 331-32.
362 Heitz, supra note 23, at 239.
363 See Randall, supra note 14, at 294.
364 Kounelas, supra note 22, at 597.
365 See Chan, supra note 17, at 180, 182.
Given the other stringent requirements for asylum eligibility, broader acceptance of gender-based social groups would not dramatically increase the number of asylees or grant blanket asylum to women.\footnote{Imbriano, supra note 18, at 351.} Even if acceptance of gender-based social groups significantly increased asylees, only an individual’s claim should be considered.\footnote{Id.}

While asylum relief was not intended to protect everyone fleeing persecution, those who establish asylum eligibility should not be stagnant.\footnote{Id. at 358.} A uniform standard regarding interpretation of gender-based social group formulations should be created to “provide equal protection for women suffering from gender-based persecution.”\footnote{Heitz, supra note 23, at 239.} The Acosta decision showed promise of expanding the social group definition to include gender as a cognizable social group.\footnote{Randall, supra note 14, at 294.} Returning to the Acosta holding that gender is an immutable characteristic defining a social group,\footnote{Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985), overruled, in part, on other grounds, Matter of Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).} the new interpretation that should be adopted is that gender alone establishes the requisite immutable characteristic for social group membership, and the issue should be whether the plus characteristics narrow the group sufficiently so that group members can establish the nexus between group membership and persecution.\footnote{See Niang v. Gonzales, 422 F.3d 1187, 1199–1200 (10th Cir. 2005) (“[T]he focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ‘on account of’ their membership.”).}