

**CURING WHAT AILS U.S. (ASYLUM LAW):
DISMANTLING THE MYTHOLOGY OF “PRIVATE
VIOLENCE” UNDERGIRDING *MATTER OF A-B-***

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Abstract

This Note examines and critiques former Attorney General Jefferson Sessions' 2018 opinion in Matter of A-B- and the Trump Administration's broader hostility to domestic- and sexual violence-based asylum claims. Within the past decade, migration from Central America's Northern Triangle region has increased significantly, due in large part to an epidemic of gang violence effectuated across public and private spheres. Powerful transnational gangs MS-13 and Barrio 18 have gained control of the region, and in most areas, their power is augmented by varying levels of state acquiescence or complicity. The gangs draw from and perpetuate historical legacies of violence against women and other marginalized groups as a means of social control.

Yet, U.S. immigration laws and policies have restricted the workability of asylum as a tool for responding to this international human rights crisis—despite the United States' instrumental role in creating the conditions of violence that have plagued the Northern Triangle region. This Note demonstrates the disastrous consequences of the United States' ongoing dereliction of duty with respect to victims of Central American gang violence and more broadly, to victims of domestic, sexual, and gender-based violence seeking asylum in the United States.

Applying a conceptual framework of structural violence theory provides critical context for understanding the hybridized public-private nature of gender-based and sexual violence in the present-day Northern Triangle. Using this lens to bring these issues into focus, this Note identifies and subsequently dismantles the central mythology undergirding the rationale and ultimate decision in Matter of A-B-. It demonstrates how the opinion disingenuously relies on outmoded formulations of domestic violence as “merely” a form of “interpersonal” or “private violence” to mischaracterize persecution occurring in this format as categorically falling beyond the ambit of U.S. asylum law protections. After referencing the overall challenge of shoehorning gender-based persecution into the “particular social group” category of statutory asylum eligibility, this Note discusses the possibilities for formulating legally cognizable particular social groups that may better withstand judicial interpretations in a post-A-B- era and other periods of political hostility.

Whether Matter of A-B-'s holding survives the Biden Administration's immigration reform agenda or is eventually fully nullified, this Note's central discussion will remain relevant due to the

inherent vulnerability of domestic, sexual, and gender-based violence claims under the statutory framework. Absent an amendment to the Immigration and Nationality Act to add gender as a sixth statutory asylum ground, asylum seekers fleeing gender-based violence will continue to face uncertain and inconsistent protections under U.S. immigration law. This Note intentionally works within the legal confines of the narrow adjudicatory framework suggested by the ruling in A-B- in an effort to supply functional approaches to address the current needs of asylum seekers fleeing domestic, sexual, and gender-based violence and in anticipation of unfavorable future political landscapes.

I. INTRODUCTION

In July 2018, the former Trump Administration's Department of Justice, led at the time by Attorney General Jefferson Sessions, published an opinion in *Matter of A-B-* that attempted to rewrite the legal landscape around asylum law protections for victims of domestic violence from Central America. Although its holding is technically narrow in scope, and portions of it have been subsequently revised or nullified, the opinion has required practitioners to reframe sexual- and domestic violence-based asylum claims, especially for Central American client populations, so as not to run afoul of *A-B-*'s directives, generally to the detriment of female¹ asylum seekers from Central America.

Matter of A-B- decontextualizes systemic, structural gender-based persecution by framing violence occurring within the domestic sphere as inherently private and interpersonal in nature, rather than as inextricably connected to broader social structures of power and oppression. In doing so, the opinion not only reductively conflates the motivation, purpose, and effect of an act of violence with the spatial or relational context in which it is perpetrated, it also misunderstands the broader historical and contemporary context(s) in a way that may provide openings for viable particular social groups based on structural factors. Using particular social group categories to identify sources of structural violence under a rubric of *machista/marianismo* culture strategically refocuses the asylum analysis away from the interpersonal and ties it back to statutorily eligibility grounds. Similarly, recognizing opportunities to buttress particular social group claims by weaving in applicants' indigenous heritage can potentially concretize claims by tethering them to the comparatively stronger asylum ground of race or ethnicity.

Part II of this Note provides historical and contemporary context for the epidemic of sexual violence in the Northern Triangle countries

1. Throughout, this Note uses terminology rooted in a binary concept of gender—namely, “female,” “women,” and “girls”—to refer to both female-coded and female-identifying persons without distinction. This usage is primarily intended to align with legal terminologies and other codified vocabularies used to define and measure gender-based violence, as well as to reflect the dominance of gender binary-ordered thinking in contemporary Central American culture, perhaps especially among gang members, and is not intended to erase or marginalize the experiences of non-binary or gender non-conforming persons. Although this Note does not discuss gender identity as separate from gender, it broadly recognizes the importance and urgency of the topic of gang violence against trans, non-binary, gender non-conforming, and other non-cisgender persons, while also envisioning its central arguments and proposals as largely applicable to these populations where they are targeted on the basis of gender non-conformity or otherwise encounter gender- or gender identity-based violence.

of Central America, linking current conditions to legacies of state and state-sanctioned colonial and “post-colonial” violence in the region, including by repressive regimes and, more recently, by transnational gangs, namely MS-13 and Barrio 18. Part II also briefly summarizes gender roles and hierarchies in Central American culture and provides an overview of structural violence theory. Part III outlines the statutory grounds for asylum, the traditional and ongoing exclusion of gender-based persecution as an enumerated basis for asylum claims, and the legal evolution of the “particular social group” category. Part IV demonstrates how *Matter of A-B* relies on an inherently faulty premise that is fundamentally inconsistent with a contemporary understanding of domestic and sexual violence. It exposes the mythology underpinning Sessions’ opinion in *A-B*, arguing that labeling sexual violence in the Northern Triangle context as so-called “private violence” intentionally misunderstands reality and ignores the hybridized public-private nature and function of domestic and sexual violence as forms of gender-based oppression. Part V discusses legal possibilities for circumventing *A-B*’s holding. It proposes configuring *machista* culture, as well as indigenous identities, as potential “building blocks” to formulate legally cognizable particular social groups for asylum seekers fleeing sexual or domestic violence. This Note concludes by acknowledging the gendered nature of the statutory bases for asylum and reiterating the profound and urgent need for the U.S. immigration system to better serve the needs of this vulnerable population.

II. FACTUAL BACKGROUND

A. Historical and Contemporary Context(s) of Sexual, Domestic, and Gender-Based Violence in the Northern Triangle Region of Central America

There was an 800% increase in the number of applications for asylum in the United States filed by refugees from Guatemala, Honduras, and El Salvador between 2012 and 2017.² According to data published by the United States Citizenship and Immigration Services (“USCIS”), there were more applications for asylum submitted by

2. Jill Filipovic, “*I Can No Longer Continue to Live Here*”: What’s Driving So Many Honduran Women to the U.S. Border?, POLITICO (June 7, 2019), <https://www.politico.com/magazine/story/2019/06/07/domestic-violence-immigration-asylum-caravan-honduras-central-america-227086>. Citizens of these three countries collectively filed approximately 3,500 asylum applications in 2012. *Id.* By 2017, that number had skyrocketed to upwards of 31,000. *Id.*

citizens from these countries (collectively referred to as the “Northern Triangle” or “NTCA”) over the course of the two-year period spanning 2013 to 2015 than had been filed in aggregate in the preceding 15 years.³ These numbers have continued to grow, with applications increasing an additional 25% between 2016 and 2017.⁴

According to one study, in 2015, 82% of women claiming asylum at the southern border of the United States were determined to have a credible fear in support of an asylum application.⁵ Experts attribute the pronounced increase in asylum seekers from the Northern Triangle to the “record levels of violence” in the region.⁶

Sexual and gender-based violence is widespread in Northern Triangle countries.⁷ Experts have estimated that up to 90% of women in Guatemala and El Salvador experience intimate partner violence at some point during their lives.⁸ Both El Salvador and Honduras consistently rank among the most violent countries in the world.⁹ One survivor’s account paints a clear and harrowing picture of the type of violence and fear routinely experienced by women in these countries.¹⁰ After fleeing physical violence suffered at the hands of her gang-affiliated partner and his friends, the woman eventually found a police officer, who promised to drive her to the bus station; instead, the officer raped her and abandoned her in a remote area outside of Tegucigalpa.¹¹

3. Maureen Meyer & Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum Seekers*, WOLA (Feb. 1, 2018), <https://www.wola.org/analysis/fact-sheet-united-states-immigration-central-american-asylum-seekers/>.

4. *Id.*

5. Silva Mathema, *They Are Refugees: An Increasing Number of People Are Fleeing Violence in the Northern Triangle*, CTR. FOR AM. PROGRESS (Feb. 24, 2016), <https://www.americanprogress.org/issues/immigration/news/2016/02/24/131645/they-are-refugees-an-increasing-number-of-people-are-fleeing-violence-in-the-northern-triangle/>.

6. Meyer & Pachico, *supra* note 3.

7. *E.g.*, KIDS IN NEED OF DEFENSE, SEXUAL AND GENDER BASED VIOLENCE (SGBV) & MIGRATION FACT SHEET 1 (Apr. 2018),

<https://supportkind.org/wp-content/uploads/2018/05/SGBV-Fact-sheet-April-2018.pdf>.

Between January and November 2017, in Guatemala alone, the nation’s Public Ministry “received 51,742 reports of violence against women,” in addition to “10,963 reports of sexual violence against women and girls,” though due to persistent underreporting, “[t]he total number of incidents is likely much higher.” *Id.* (further noting that in Honduras, “a woman reports sexual violence every three hours” and that some 30,000 Honduran women report domestic violence annually, with similarly high rates of underreporting impacting those statistics).

8. SARA MCKINNON, *GENDERED ASYLUM* 31 (2016).

9. *Id. Accord.* Sarah Schmalbruch, *The 20 Most Dangerous Countries in the World*, THE INDEPENDENT (Sept. 7, 2017, 1:22 PM), <https://www.independent.co.uk/news/world/world-s-most-dangerous-countries-colombia-yemen-el-salvador-pakistan-nigeria-a7934416.html>.

10. *See* Filipovic, *supra* note 2.

11. *See id.*

After walking back to the city and boarding a homebound bus, the woman encountered an intoxicated man, who attempted to sexually assault her and continued to pursue her, following her off the bus when she disembarked.¹² The woman was verbally and sexually harassed by yet another group of men while waiting for her second bus.¹³ She later found out that she had become pregnant as a result of the rape.¹⁴ She is one of the “lucky ones”—she survived.

i. Historical Legacies of State-Perpetrated and State-Sanctioned Violence

The Northern Triangle remains pre-post-conflict. Vestigial violence from the decades of civil war that rocked the NTCA continues to reverberate throughout the region at levels Doctors Without Borders has described as “unprecedented . . . outside a war zone.”¹⁵ A 2017 report published by the organization noted the common use of “sexual violence as a tool of intimidation and control” by non-state actors in the region.¹⁶ In 2015, the United Nations High Commissioner for Refugees (“UNHCR”) issued a report similarly describing country conditions where women and girls were frequently “raped, assaulted, extorted, and threatened by members of heavily-armed, transnational criminal groups.”¹⁷

Sexual and domestic violence (often but not exclusively against women) has a long history of widespread use in the NTCA as “a conscious tool of social control imposed on . . . communities in the eras of dictatorship and civil war.”¹⁸ For example, the Guatemalan national army systematically deployed the threat of mass sexual violence to “terrorize whole communities into compliance with the state,” using the “[p]ervasive violation of the female body” as a tool to generate widespread fear among both men and women;¹⁹ state and

12. *See id.*

13. *See id.*

14. *See id.*

15. DOCTORS WITHOUT BORDERS, FORCED TO FLEE CENTRAL AMERICA’S NORTHERN TRIANGLE: A NEGLECTED HUMANITARIAN CRISIS 4 (May 2017), https://www.msf.org/sites/msf.org/files/msf_forced-to-flee-central-americas-northern-triangle_e.pdf.

16. *Id.*

17. UNITED NATIONS HIGH COMM’R FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO i (Oct. 2015), <https://www.unhcr.org/5630f24c6.html>.

18. Sarah Knopp, *There Is No Private Violence*, JACOBIN (Nov. 27, 2018), <https://jacobinmag.com/2018/11/central-america-migrants-asylum-ms13-gang-violence>.

19. *Id.*

quasi-state actors in El Salvador used sexual violence for similar purposes.²⁰

Additionally, by habitually enshrouding state-sanctioned persecution in covert acts of private violence, regimes effectively dissolved programmatic state violence into the nearly impenetrable periphery of the domestic sphere and blurred the line between private and state actors and actions. NTCA state governments commonly employed “off duty security forces,” sometimes known as “death squads,” to surreptitiously inflict brutal, “private” violence on civilians behind closed doors but on behalf of the state.²¹ Throughout the region, myriad “human rights abuses . . . were committed by paramilitary groups, including death squads and civil defense patrols with nebulous links to the police, military, and ruling class.”²² Some of these groups, including the Guatemalan *patrullas*, were historically used to “police[] the behavior of women and enforce[] gender norms and chastity,” and their modern incarnations, such as Guatemala’s “security committees,” continue to perform this function today.²³

ii. *Contemporary Incarnations: Gang Violence*

Today, the NTCA is “plague[d]” by a “complex criminal ecosystem . . . which includes transnational gangs.”²⁴ The most powerful gangs in the NTCA are the *Mara Salvatrucha* (“MS-13”) and Barrio 18 (also referred to as “Calle 18,” or the “18th Street” gang).²⁵ MS-13 has a strong presence throughout the region but is particularly powerful in El Salvador, which is considered the gang’s “spiritual birthplace”—though, notably, MS-13 was actually born in the United States, specifically Los Angeles, and took root in the NTCA due, in

20. Cf. MICHELE LEIBY, STATE-PERPETRATED WARTIME SEXUAL VIOLENCE IN LATIN AMERICA 233 (2012),

https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1003&context=pols_etds.

21. TRISTAN W. LYNCH, THE EVOLUTION OF MODERN CENTRAL AMERICAN STREET GANGS AND THE POLITICAL VIOLENCE THEY PRESENT: CASE STUDIES OF GUATEMALA, EL SALVADOR AND HONDURAS 24 (2008),

<https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1369&context=etd>.

22. Lauren Gilbert, *Gender Violence, State Action, and Power and Control in the Northern Triangle*, in FROM EXTRACTION TO EMANCIPATION: DEVELOPMENT REIMAGINED 257, 260 (Raquel Aldana & Steven W. Bender eds., 2018).

23. Knopp, *supra* note 18.

24. Amelia Cheatham, *Central America’s Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELS. (Oct. 1, 2019), <https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle>.

25. Steven Dudley, *Part II: Gangs, Deportation and Violence in Central America*, INSIGHT CRIME (Nov. 24, 2012), <https://www.insightcrime.org/investigations/part-ii-gangs-deportation-and-violence-in-central-america/>.

large part, to the sharp increase in the deportation of non-citizens convicted of crimes in the United States as a result of immigration policy crackdowns beginning in the mid-1990s.²⁶ Overall, it is estimated that there are between 60,000 and 95,000 MS-13 and Barrio 18 gang members throughout the NTCA.²⁷ However, gangs are not the only violent actors: Numerous reports have indicated that “violence by police and other authorities is . . . widespread” throughout the region as well.²⁸

State and non-state actors in the Northern Triangle continue to use violence against women as a mechanism for social control. Using “sexual violence as a tool of intimidation and control,” gangs frequently employ gender-based violence tactics to threaten or retaliate against detractors and others who are non-compliant with gang orders.²⁹ Kids in Need of Defense has reported, for example, that gang members often “threaten sexual violence against girls as reprisal for a family member having rebuffed or crossed the gang in some way.”³⁰

26. See INSIGHT CRIME, *MS13 IN THE AMERICAS: HOW THE WORLD’S MOST NOTORIOUS GANG DEFIES LOGIC, RESISTS DESTRUCTION* 3–4, 13–15 (2018),

<https://www.justice.gov/eoir/page/file/1043576/download>. According to the Department of Homeland Security (“DHS”), upwards of 90% of criminal convicts deported to Central America between 2001 and 2010 were deported to Northern Triangle countries. See *id.* at 15.

27. Dudley, *supra* note 25. Violent conflict between Barrio 18 and MS-13 first erupted in Los Angeles in the late 1980s and has been ongoing since that time. INSIGHT CRIME, *supra* note 26, at 13.

28. *E.g.*, KIDS IN NEED OF DEFENSE, *supra* note 7. Violence committed by police may be virtually indistinguishable from gang violence due to dual memberships, shared interests, and other entanglements and points of overlap between the two groups. *Cf.* DOCTORS WITHOUT BORDERS, *supra* note 15, at 15.

29. See DOCTORS WITHOUT BORDERS, *supra* note 15, at 4, 5.

30. KIDS IN NEED OF DEFENSE, *NEITHER SECURITY NOR JUSTICE: SEXUAL AND GENDER-BASED VIOLENCE AND GANG VIOLENCE IN EL SALVADOR, HONDURAS, AND GUATEMALA* 11 (May 2017),

https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice_SGBV-Gang-Report-FINAL.pdf.

B. Gender Constructs in Central American Culture: Machista, Marianismo, and the Norming of Gender-Based and Domestic Violence

In general, in Central American cultures, “machismo defines manhood.”³¹ Machismo³² refers to a set of cultural ideals that influences gender behavior and gender relationships, while the term *machista* denotes the stereotypical performance of rigid gender norms as a kind of chauvinism.³³ Accepted gender theory commonly holds that men experience and achieve masculinity through an ongoing, iterative process of “engaging in masculine social practices in order to prove their manhood.”³⁴

Machismo refers to a particular brand of hegemonic masculinity that has been observed in Central American cultures. It inscribes “a set of cultural expectations for men” that defines masculinity and identifies men as “physically and morally superior” in order to justify the subjugation of women within the patriarchal structure.³⁵ Machismo culture prizes “sexual independence and domination over women as sources of ‘pride and prestige.’”³⁶ In these cultures, “male superiority is zealously guarded and supported by the major social systems.”³⁷

Sexual dominance is a key feature and function of machismo identity and culture. Patricia Hernandez notes that in many Central American societies, male-female relationships are frequently characterized by “arrogance and sexual aggression” on the part of

31. Patricia M. Hernandez, *The Myth of Machismo: An Everyday Reality for Latin American Women*, 15 ST. THOMAS L. REV. 859, 861 (2003) (emphasizing that while there is significant variation among the diversity of cultures comprising the geographic region of Central America, it is nevertheless possible and productive to speak in generalizations about common understandings of gender, identity, and power).

32. Machismo roughly translates from Spanish to “hypermasculinity” and has been adopted into the English lexicon under a similar meaning. See *Machismo*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/machismo> (last visited May 18, 2021).

33. Hernandez, *supra* note 31, at 861.

34. Beverly A. McPhail, *Feminist Framework Plus: Knitting Feminist Theories of Rape Etiology into a Comprehensive Model*, 17 TRAUMA, VIOLENCE & ABUSE 314, 320 (2016).

35. Hernandez, *supra* note 31, at 861–62.

36. Meredith Kimelblatt, Note, *Reducing Harmful Effects of Machismo Culture on Latin American Domestic Violence Laws: Amending the Convention of Belém do Pará to Resemble the Istanbul Convention*, 49 GEO. WASH. INT’L L. REV. 405, 412 (2016).

37. Yolanda Quiñones Mayo & Rosa Perla Resnick, *The Impact of Machismo on Hispanic Women*, 11 AFFILIA 257, 270 (1996).

men.³⁸ In these societies, traditional “gender scripts dictate a high degree of control by the male.”³⁹ Male actors “use violence to sustain their dominance against their perceived-inferior female counterparts in public and private spaces via ‘catcalling,’ harassment, assault, rape, and murder.”⁴⁰

Marianismo refers to a concurrent, counterpart framework that codifies acceptable feminine social construct(s) in reciprocal relation to machismo. It is, in a sense, a form of hegemonic femininity structured under the syntax of machismo as what Hernandez describes as a kind of “cult of femininity.”⁴¹ Girls are socialized from a young age “to respond to the needs and expectations of their future husbands” and are taught to accept as an “unquestionable right” men’s unabridged authority “to discipline and make demands on their wives” and to internalize as wifely duty their husbands’ expectation of “undisrupted loyalty.”⁴² The hallmark ideals of *marianismo*-aligned femininity include female “submissive[ness], self-sacrific[e], and stoic[ism]” to passively accommodate male agency and desire.⁴³

C. *Formats of Violence: Theoretical Frameworks*

i. *Gender-Based Violence*

Gender-based violence traditionally refers to “violence that is directed against a woman because she is a woman or that affects women disproportionately” and “includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”⁴⁴ It more generally serves as “an umbrella term for any harmful act that is perpetrated against a person’s will and that is based on socially ascribed (gender) differences between

38. Hernandez, *supra* note 31, at 862 (quoting Martha I. Morgan, *Founding Mothers: Women’s Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1, 4 n.9 (1990)).

39. *Id.* at 863 (quoting Julia L. Perilla et al., *Cultural and Domestic Violence: The Ecology of Abused Latinas*, 9 VIOLENCE & VICTIMS 325, 326 (1994)).

40. VICTORIA COLBERT, MURDER AND MACHISMO: BEHIND THE MOTIVATIONS OF SALVADORAN WOMEN ASYLUM SEEKERS 20 (2019).

41. Hernandez, *supra* note 31, at 864.

42. Quiñones Mayo & Resnick, *supra* note 37, at 266.

43. Hernandez, *supra* note 31, at 864.

44. Gloria Gaggioli, *Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law*, 96 INT’L REV. RED CROSS 503, 509 (2014) (quoting Comm. on Elimination of Discrimination Against Women, *General Recommendation No. 19*, 1992, para. 6) (noting that the term is also generally understood to be inclusive of gender-based violence directed at men and boys).

males and females.”⁴⁵ Domestic and sexual violence are both considered forms of gender-based violence.⁴⁶

Sexual violence is a narrower term that typically refers to violence where the violent act itself is both “gender-specific” and sexual, but only in a purely literal sense.⁴⁷ It encompasses a range of activities including rape, sexual mutilation, and honor killings.⁴⁸ Regardless of setting or context, sexual violence generally “has no relation to sexual desire, but is instead linked to power, dominance and abuse of authority.”⁴⁹ International legal bodies have recognized that “sexual violence is not limited to a physical invasion of the human body and may include acts which do not involve . . . physical contact.”⁵⁰ Moreover, the World Health Organization has expressly stated that it may occur in “any setting, including but not limited to home and work.”⁵¹ Overall, “[w]omen often experience human rights abuses that are particular to their gender,” including “rape, domestic violence, female genital mutilation, forced relationships, honor killing, and trafficking”—all of which fall under the broad umbrella of gender-based violence (as well as, in some cases, other labels).⁵²

Both legal and social science scholars have consistently recognized gender-based violence as a form of structural oppression that occurs “on a systematic level.”⁵³ They generally contend that gender-based violence “is built on social and state tolerance of . . . everyday forms of violence,” noting that “discrimination against women” frequently functions as a structural cause of domestic and

45. *Id.* at 510 (quoting Inter-Agency Standing Comm., *Guidelines for Gender-Based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies* 4 (2005)).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 504.

50. *Id.* at 506 (quoting from an opinion issued by the International Criminal Tribunal for Rwanda Trial Chamber).

51. *Id.* at 507 (quoting World Health Org., *World Report on Violence and Health*, ed. Etienne G. Krug 149 (2003)).

52. *Asylum Practice Advisory: Applying for Asylum After Matter of A-B-*, NAT’L IMMIGRANT JUST. CTR. (June 2018),

<https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%2006.21.18.pdf>.

53. Carol Jane Hall, *The Link Between Public and Private Harm: Is There Hope for Gender-Based Violence as a Ground for Asylum in the United States?*, 21 IMMIGR. & NAT’Y L. REV. 679, 687 (2000).

intimate partner violence.⁵⁴ Such violence is inextricable from social, political, and economic structures that “restrict women’s freedom” and “access to . . . rights” and ultimately “undermine the autonomy of girls . . . and women over different areas of their li[ves].”⁵⁵ It is precisely these “structural conditions” that enable and sanction violence against women.⁵⁶

Broadly, sexual violence is at once “a political, aggregate act whereby men as a group dominate and control women as a group” and “a very personal, intimate act in which the body of a singular person is violated by another person(s).”⁵⁷ In other words, it is *both* public *and* private. Feminist scholars have argued that “[s]tructural and interpersonal violence are dynamically related” and that “male-perpetrated, interpersonal violence against women” is “integral to a system of ‘sexual terrorism’” used “to control women and keep them in subordinate positions.”⁵⁸ Under a Foucauldian framework, acts of sexual violence become inscribed with an important sociopolitical function: “to create ‘docile bodies’ useful to sustaining systems of power and domination.”⁵⁹

Women living in cultures with extremely high rates of sexual violence, such as those in the NTCA, contend daily with what Megan Burke describes as the “spectrality” of the ongoing threat of sexual violence under the patriarchal order.⁶⁰ Burke theorizes that “the prevalence of the specter of rape . . . defines, disciplines, and punishes” women and facilitates the surveillance, control, and domination of women by forcing them to exist in a state of fear and “heightened vulnerability.”⁶¹

54. Natalia Gherardi, *Violence Against Women in Latin America*, 24 SUR–INT’L J. HUM. RTS. 129, 132 (2016).

55. *Id.* at 133.

56. *Id.* at 134.

57. McPhail, *supra* note 34, at 323.

58. *E.g.*, BARBARA SUTTON, *Embattled Bodies: Violence Against Women*, in CULTURE, VIOLENCE, AND WOMEN’S RESISTANCE IN NEOLIBERAL ARGENTINA 129, 130 (2010).

59. *Id.* at 131 (citing Michel Foucault).

60. *See generally* MEGAN BURKE, *Specters of Violence*, in WHEN TIME WARPS: THE LIVED EXPERIENCE OF GENDER, RACE, AND SEXUAL VIOLENCE 105 (2019).

61. *Id.* at 121.

ii. *Structural Violence Theory*

Sociologist Johan Galtung identified “structural violence” as one of three primary manifestations of violence.⁶² In addition to what he referred to as direct or private violence (and what we might think of as default, or interpersonal, “actual” violence occurring between or among people), Galtung theorized two additional forms of violence: structural, or indirect, violence and cultural violence, which refers to the cultural scripts that generate, support, and perpetuate systemic patterns of actual and/or structural violence.⁶³ “Actual violence,” including in private or “interpersonal” settings, functions “as a method of social control by which systems of oppression are maintained,” and thus reflects and reinforces, and is ultimately inextricable from, structural violence.⁶⁴

III. U.S. ASYLUM LAW

A. *Statutory Requirements*

The Immigration and Nationality Act (“INA”) § 208 defines the statutory requirements to demonstrate eligibility for asylum protection under U.S. law.⁶⁵ An applicant seeking asylum in the United States must demonstrate persecution by an actor in their home country and “must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”⁶⁶ Adjudicators of asylum claims may be asylum officers (who may or may not be attorneys but who receive training in asylum law and policy) or immigration judges (or the Board of Immigration Appeals (“BIA”) or a federal circuit court, on appeal).⁶⁷

The BIA has underscored that persecution “does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.”⁶⁸ However, domestic, sexual, and other forms of gender-based violence have been recognized as capable of meeting this high standard, and *Matter of A-B-* does not contest that gender-based

62. See Catia C. Confortini, *Galtung, Violence, and Gender: The Case for a Peace Studies/Feminism Alliance*, 31 PEACE & CHANGE 333, 335 (2006).

63. See *id.* (summarizing Galtung).

64. SUTTON, *supra* note 58, at 131.

65. Immigration and Nationality Act § 208; 8 U.S.C. § 1158.

66. *Id.* at § 208(b)(1)(B)(i).

67. *Id.* at § 207; 8 U.S.C. § 1157.

68. *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

and domestic violence could be sufficiently severe as to constitute persecution.⁶⁹

The adjudicator must find the applicant credible after “[c]onsidering the totality of the circumstances, and all relevant factors,” including the applicant’s “demeanor,” “the inherent plausibility of the applicant’s . . . account,” “the consistency between the applicant’s or witness’s written and oral statements,” and “the internal consistency” of written testimony.⁷⁰ Finally, applicants must demonstrate that they merit a favorable grant of discretion from the adjudicator.⁷¹

B. Particular Social Group

Under U.S. immigration law, “[g]ender alone does not constitute a social group and is not sufficient to establish asylum status.”⁷² Because gender is not specifically included among the five statutory grounds (race, religion, nationality, membership in a particular social group, and political opinion), gender-based asylum claims must be argued under one or more of the enumerated grounds, usually the catch-all category of “particular social group” or, less frequently (and generally less successfully), political opinion.⁷³

Membership in a particular social group (“PSG”) must be based on a “common, immutable characteristic,”⁷⁴ meaning a characteristic that “the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”⁷⁵

Groups must be defined with “particularity” to be cognizable as PSGs.⁷⁶ Although courts have traditionally expressed a desire for “small, easily identifiable” groups, particularity is not defined quantitatively, meaning there are no technical restrictions on the

69. Matter of A-B-, 27 I&N Dec. 316, 337 (A.G. 2018).

70. Immigration and Nationality Act § 208(b)(1)(B)(iii); 8 U.S.C. § 1158.

71. See generally Immigration and Nationality Act § 208; 8 U.S.C. § 1158.

72. YULE KIM, CONG. RESEARCH SERV., ASYLUM LAW AND FEMALE GENITAL MUTILATION: RECENT DEVELOPMENTS (Feb. 15, 2008), <https://fas.org/sgp/crs/misc/RS22810.pdf> (citing *Fatin*, 12 F.3d at 1233).

73. See Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim’s Particular Social Group*, 49 LOY. L. REV. 287, 289 (2003).

74. Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985) (explaining that “immutable” characteristics are those which either cannot be changed or those which, were members forced to change, would cause them to “suffer significant harm”).

75. *Id.*

76. See generally Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008).

maximum or minimum size of a PSG's membership.⁷⁷ Rather, the BIA has required that groups be "discrete and have . . . definable boundaries"⁷⁸ and rejected PSGs that are "amorphous, overbroad, diffuse, or subjective."⁷⁹ In *Sanchez-Trujillo v. INS*, the Ninth Circuit observed that despite the lack of formal or numerical size limitations on PSG membership, "[m]ajor segments of the population of an embattled nation . . . will rarely, if ever, constitute a distinct 'social group' for the purposes of establishing refugee status," reasoning that such a decision would extend refugee status to all individuals "displaced by general conditions of unrest or violence in his or her home country" to the point of unworkability.⁸⁰

Groups must also be "socially distinct" within the culture of the applicant's home country to serve as viable PSGs.⁸¹ Although applicants themselves need not have been visible as members of the PSG to qualify for asylum, the society must have some perception that the group alleged exists ("social visibility"⁸²).⁸³ Thus, PSG descriptors should generally "have commonly accepted definitions in the society of which the group is a part."⁸⁴

Finally, particular social groups "must exist independently of the persecution suffered by the applicant for asylum," a point which *Matter of A-B* heavily underscores.⁸⁵ However, while this standard means that "the mere existence of shared circumstances" is insufficient to establish membership in an eligible PSG, it does not follow that the group members' common characteristic may not derive *in part* from "a shared experience."⁸⁶

77. See *Matter of S-E-G-*, 24 I&N Dec. 579, 582 (BIA 2008).

78. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014) (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170–71 (9th Cir. 2005)).

79. *Id.*

80. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1577 (9th Cir. 1986) (finding that the particular social group of "young, working class, urban males of military age" was too "broad and encompass[ed]" too many "variables" to be cognizable).

81. See *S-E-G-*, 24 I&N Dec. at 586.

82. In *Matter of M-E-V-G-*, the BIA stated that it would henceforth refer to what *Matter of E-A-G-* had previously termed "social visibility" as "social distinction." *M-E-V-G-*, 26 I&N Dec. at 247.

83. See generally *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990).

84. *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007)).

85. *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003). See *Matter of A-B-*, 27 I&N Dec. 316, 333 (A.G. 2018).

86. See *A-B-*, 27 I&N Dec. at 318 (citing *Matter of R-A-*, 22 I&N Dec. 906, 917–23 (BIA 2001) (en banc) (emphasis added)).

C. Nexus Requirement

Applicants must “demonstrate that their persecutors harmed them on account of their membership in the [particular social] group rather than for personal reasons.”⁸⁷ This is typically referred to as the “nexus” requirement.⁸⁸ If the applicant can demonstrate past or future persecution, the applicant must further establish that they were persecuted “on account of”⁸⁹ of their race, religion, nationality, membership in a particular social group, and/or political opinion.⁹⁰ In other words, there must be a “causal nexus” between the protected ground(s) and the persecution alleged.⁹¹ The persecution need *not* have happened “but for” the protected ground(s), but the ground(s) must have been, “or will be[,] at least one central reason for persecuting the applicant.”⁹² Establishing the requisite nexus relationship between the persecution and the protected ground(s) is often a major obstacle for those seeking grants of asylum based on domestic and other forms of gender-based violence.⁹³

D. “Unable or Unwilling to Control” Non-State Actors

The final requirement relevant to this discussion is that the government of the asylum seeker’s home country be “unable or unwilling” to protect the identified group or class of persons from the alleged persecution by non-government perpetrators, or the state itself perpetrated the alleged persecution.⁹⁴ (The inquiry into whether the home government is “unwilling or unable to control” private actors is obviated where the state itself is the perpetrator of the alleged persecution.⁹⁵) In contrast to the previous requirements discussed, the

87. *Id.* at 317.

88. *E.g.*, *Establishing Nexus in Asylum Cases After Matter of A-B-*, NAT’L IMMIGRANT JUST. CTR. (Nov. 2018), https://immigrantjustice.org/sites/default/files/content-type/page/documents/2018-12/Establishing%20Nexus%20in%20Asylum%20Cases%20After%20Matter%20of%20A-B-_11.30.18.pdf.

89. *See generally* *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

90. Immigration and Nationality Act § 208(b)(1)(B)(i); 8 U.S.C. § 1158.

91. Adams, *supra* note 73, at 291. *See also generally* *Elias-Zacarias*, 502 U.S. at 478.

92. Immigration and Nationality Act § 208(b)(1)(B)(i); 8 U.S.C. § 1158.

93. Adams, *supra* note 73, at 291. *See also generally* *Elias-Zacarias*, 502 U.S. at 478.

94. *See* *Matter of Acosta*, 19 I&N Dec. 211, 222–23 (BIA 1985) (interpreting the Refugee Act of 1980 to require that the alleged “harm or suffering . . . be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control”).

95. *See* *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (recognizing “that persecution can consist of the infliction of harm or suffering by a government, or a persons a government

“unable or unwilling” provision does not appear in the statutory text of the INA, but rather is attendant to the definition of “refugee” under the Refugee Act of 1980 and as a matter of case law.⁹⁶

This disjunctive provision, which requires only that the home government be unable *or* unwilling, may include situations in which the state is complicit or simply sufficiently acquiescent in the perpetration of violence by non-state actors.⁹⁷ Prior to *Matter of A-B-*, there had historically been some disagreement among circuit courts as to this point, though some courts, such as the Eighth Circuit, had suggested that asylum applicants must prove that the “failure to control a private persecutor . . . is indicative of” something akin to “complicity” or “complete helplessness” to stop the persecution.⁹⁸

Multiple circuit courts, including the Ninth and Seventh Circuits, have previously found that not all government inaction constitutes the requisite inability or unwillingness to control a private persecutor, particularly where there is “reasonable basis for government inaction on a particular report of criminal activity,”⁹⁹ or where authorities are

is unwilling or unable to control . . .”) (emphasis added). In *Kasinga*, the BIA established that non-government actors may *also* perpetrate actions rising to the level of persecution and provided that those asylum seekers alleging persecution by non-state actors must prove that their home government was “unwilling or unable to control” the non-state actor(s). *Id.* See also *Acosta*, 19 I&N Dec. at 222. The “unwilling or unable” inquiry is obviated where the persecution was allegedly perpetrated by the state or by state actors because the government’s (un)willingness or (in)ability to control private actors is irrelevant in such cases. Cf. Joseph Hassell, *Prosecutor or Common Criminal? Assessing a Government’s Inability or Unwillingness to Control Private Persecution*, 8 IMMIGR. L. ADVISOR 1 (2014), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/10/03/vol8no7.pdf> (emphasizing the applicability of the “unwilling or unable” requirement to the “control [of] private conduct”).

96. See Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable?: The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUM. RTS. L. REV. 441, 453 (2021). See also, e.g., *Matter of W-G-R-*, 26 I&N Dec. 208, 224 n.8 (2014) (citing *Acosta* and reiterating its interpretation of the “unable or unwilling to control” requirement).

97. Hassell, *supra* note 95, at 8. See, e.g., *Aldana-Ramos v. Holder*, 757 F.3d 9 (1st Cir. 2014).

98. Hassell, *supra* note 95, at 4. See *Gutierrez-Vidal v. Holder*, 709 F.3d 728 (8th Cir. 2013). But see Geoffrey A. Hoffman, *The “Complete Helplessness” of Matter of A-B- and One More Last Ditch Effort to Torpedo Asylum*, YALE J. REG. NOTICE & COMMENT BLOG (Jan. 19, 2021),

<https://www.yalejreg.com/nc/the-complete-helplessness-of-matter-of-a-b-and-one-more-last-ditch-effort-to-torpedo-asylum-by-geoffrey-a-hoffman/> (stating that the “complete helplessness” language “derives from *dicta*” in the Seventh Circuit’s ruling in *Galina v. INS* that “ignores the plain language of the [INA] itself, as well as the attendant regulations” spelling out the “unable or unwilling” requirement).

99. See Hassell, *supra* note 95, at 4 (citing *Jonaitiene v. Holder*, 660 F.3d 267, 271 (7th Cir. 2011)).

simply “unable to solve the crimes.”¹⁰⁰ Additionally, the Eighth Circuit has held that this burden will not be carried where the applicant furnishes only “generalized evidence of ‘ineffectiveness and corruption’” and there is contrary “evidence of the government’s actual response,” which may include even perfunctory or performative police interventions that fail to adequately address the underlying problem.¹⁰¹ On the other hand, the Ninth Circuit held in 2017 in *Bringas-Rodriguez v. Sessions* that “credible written and oral testimony that reporting was futile and potentially dangerous,” including evidence that other members of the identified particular social group “had reported their abuse to the . . . police to no avail,” and which was supported by “country reports and news articles,” was sufficient to meet the applicant’s burden of proof with respect to this requirement.¹⁰² Specifically, the *Bringas-Rodriguez* court found that “plausible, unrefuted testimony that Mexican police [had] laughed at [the gay applicant’s] gay friends who attempted to report rape and other abuse” provided compelling support that the Mexican government was “unable or unwilling” to control homophobic violence rising to the level of persecution where the applicant had not reported the incidents to law enforcement.¹⁰³

IV. THE MYTHOLOGY OF “PRIVATE VIOLENCE” AND OTHER POLITICALLY CONVENIENT FICTIONS: *MATTER OF A-B-*’S INTENTIONAL MISUNDERSTANDING OF GENDER-BASED, DOMESTIC, AND SEXUAL VIOLENCE AND THE OBSCURING OF STRUCTURAL VIOLENCE

Matter of A-B- purportedly overruled the precedent established in *Matter of A-R-C-G-* on the grounds that the BIA had failed to analyze whether an applicant “could establish the existence of a cognizable particular social group without defining the group by the fact of persecution.”¹⁰⁴ In *Matter of A-R-C-G-*, the BIA recognized “married women in Guatemala who are unable to leave their relationship[s]” as a particular social group.¹⁰⁵ According to then-Attorney General Jefferson Sessions, this particular social group was “contrary” to Board

100. *See id.* (citing *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005)).

101. Hassell, *supra* note 95, at 4. *See, e.g., Gutierrez-Vidal*, 709 F.3d at 732.

102. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1055 (9th Cir. 2017).

103. *Id.* at 1055–56.

104. *Matter of A-B-*, 27 I&N Dec. 316, 334 (A.G. 2018) (explaining that in the lower court’s decision giving rise to *Matter of A-R-C-G-*, DHS conceded that the particular social group advanced was sufficiently particular and distinct, and thus the adjudicator did not consider the group’s cognizability).

105. *Matter of A-R-C-G-*, 26 I&N Dec. 388, 388–89 (BIA 2014).

precedent,¹⁰⁶ and the BIA had thus erred in recognizing “an expansive new category of particular social groups based on private violence.”¹⁰⁷ In addition to the fact that the *A-B-* opinion variously misconstrues, misapplies, and fails to adequately parse several technical elements of relevant immigration law, the underlying rationale displays a clear and deliberate misunderstanding of domestic violence as a form of structural violence with both private *and* public dimensions.

A. *Matter of A-B-’s Blindness to the Public Dimensions of “Private Violence”*

Throughout, *Matter of A-B-* refers to domestic violence as a “private criminal activity” that occurs between interpersonal actors.¹⁰⁸ The opinion inaccurately presumes that intimate partner violence occurs only under “highly individualized circumstances” based on reasons unique to the interpersonal relationship between a victim and their abuser.¹⁰⁹ In his opinion, Sessions distinguishes *A-B-* from the ostensibly similar case of *Matter of R-A-* on the grounds that in *R-A-*, the asylum seeker’s “husband targeted her ‘because she was his wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm.’”¹¹⁰

In fact, both in general and in the NTCA context specifically, hegemonic masculinity *does* broadly generate and sanction violence against girls and women based precisely on a belief that such harm is merited or justifiable under various rubrics of patriarchal supremacy and social control. This is particularly true where entrenched gender inequality functions to sanction “social and state tolerance of . . . everyday forms of violence” against women.¹¹¹ These forms of violence ultimately “undermine the autonomy of girls . . . and women over different areas of their life.”¹¹²

Moreover, feminist social theory holds that “the public/private divide . . . function[s] as a ‘shifting’ gendered mechanism of exclusion that intersects with other axes of difference to prevent women from

106. *A-B-*, 27 I&N Dec. at 334.

107. *Id.* at 319.

108. *Id.*

109. *Id.* at 336–37.

110. *Id.* at 329 (citing *Matter of R-A-*, 22 I&N Dec. 906, 921 (BIA 2001)).

111. Gherardi, *supra* note 54, at 132.

112. *Id.* at 133.

becoming full subjects of citizenship and human rights.”¹¹³ The accompanying “depoliticization” of the domestic sphere functions to privatize and personalize the violence inflicted on women within the home by sharply separating acts of “private violence” from the kind of public acts of political persecution U.S. asylum laws were designed to favor.¹¹⁴ In other words, depoliticizing the domestic space and the violence that occurs within it obscures the reality of these forms of violence against women and facilitates the justification of categorical non-intervention in matters occurring in the so-called private sphere.¹¹⁵

Although gender-based asylum cases, in general, are often “rife with evidentiary connections to the state itself, to state actors, and to non-state political actors as the agents of violence in these women’s lives,” adjudicators nevertheless frequently “interpret these agents as either non-state actors or privately motivated state actors” to find ineligibility for asylum.¹¹⁶ Sara McKinnon has argued that under U.S. asylum jurisprudence, “women are recognized first as private and relational subjects” and commonly “face the discursive positioning as private subjects with personal interests.”¹¹⁷ Thus, scholars have argued that it is imperative to recognize the “various interactive contexts” giving rise to gender-based violence—namely, the intersection between “the family and societal institutions in which there are unequal divisions of labor, resources, and power between men and women” and the role of the state in “exacerbate[ing] and often legitimiz[ing] violence against women.”¹¹⁸

Within the Northern Triangle context, any “interpersonal” experience of intimate partner or sexual violence is heightened and compounded by a crushing structural investment in gender-based violence that is publicly visible as a daily facet of life.¹¹⁹ The line between public and private violence is in some sense nonexistent in the NTCA. Indeed, Sarah Knopp has argued that in this setting, it is

113. See Paulina García-Del Moral & Megan Alexandra Dersnah, *A Feminist Challenge to the Gendered Politics of the Public/Private Divide: On Due Diligence, Domestic Violence, and Citizenship*, 18 *CITIZENSHIP STUD.* 661, 662 (2014).

114. See *id.* See also MCKINNON, *supra* note 8, at 25–26.

115. See Hall, *supra* note 53, at 680.

116. MCKINNON, *supra* note 8, at 25.

117. *Id.* at 26.

118. Hall, *supra* note 53, at 683.

119. Cf., e.g., DOCTORS WITHOUT BORDERS, *supra* note 15, at 4 (discussing Northern Triangle gangs’ programmatic, widespread, and public use of sexual violence and intimidation as a social control tactic to maintain gender oppression and other hierarchies); KIDS IN NEED OF DEFENSE, *supra* note 7, at 2 (describing the frequent, intentional staging of acts of gang violence in public spaces).

“inaccurate to see any act of violence as a ‘private’ act.”¹²⁰ In other words, violence against women always has a public dimension, even where it occurs in private and/or in an interpersonal relational context.

i. Central American Gangs as Perpetrators of Hybridized Private-Public Violence as a Social Control Mechanism

Women and girls living in gang-controlled areas of the Northern Triangle region “face extreme levels of violence on a near-daily basis.”¹²¹ The *A-B-* opinion underscores that a chief problem with “private” crime is that “private criminals are motivated more often by greed or vendettas than by an intent to ‘overcome [the protected] characteristic of the victim.’”¹²² But gangs are not traditional private actors: For example, experts have emphasized that gangs operate as a “social organization first, and a criminal organization second” in the sense that they are centrally concerned with a “collective identity that is constructed and reinforced by shared, often criminal experiences, especially acts of violence and expressions of social control.”¹²³

Notably, gangs utilize sexual violence against women and girls as a social control mechanism in a way that invalidates *A-B-*’s underlying presumptions about the nature and context of domestic and intimate partner violence in the NTCA. According to Tristan Lynch, gangs exert influence and control over a wide range of public spaces, including stores, office buildings, and public transit,¹²⁴ and violence often occurs in the open: A 2005 study of homicide data from Guatemala found that 13% of the femicides were committed “in broad daylight.”¹²⁵ But even where acts of physical or sexual violence occur in non-public spaces, reports have noted that “[i]n many cases, victims of sexual violence are tortured, killed, and dismembered, and their bodies left in . . . public areas to provoke fear in other women and girls,” adding a public dimension to this category of violence.¹²⁶

Indeed, experts have observed that gangs weaponize sexual violence against women and girls as a mechanism for control,

120. Knopp, *supra* note 18. See generally LEIBY, *supra* note 20.

121. UNITED NATIONS HIGH COMM’R FOR REFUGEES, *supra* note 17, at 4.

122. Matter of *A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (quoting Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996)).

123. INSIGHT CRIME, *supra* note 26, at 3.

124. See LYNCH, *supra* note 21, at 65 (“The evidence suggesting gang presence in these horrific Honduran cities is evident on trains, corporate buildings, shops, and other forms of transport and facilities, even the police are afraid and have been for quite some time.”).

125. *Id.* at 55.

126. See KIDS IN NEED OF DEFENSE, *supra* note 7, at 2.

retribution, and punishment. The fact that young women are frequently kidnapped, detained by their assailants, “subjected to sexual abuse and torture, and then killed and abandoned in public places” highlights the hybridized public-private nature of this form of sexual violence.¹²⁷ The acts of sexual violence themselves typically occur in private settings, but they reflect and consolidate deep-seated notions of misogyny and gender-based oppression that play out on a broader societal level. Moreover, physically bringing female bodies brutalized in private into the public sphere collapses the boundaries between the parallel forms of violence that are committed against women and girls in the home and on the proverbial streets. Such actions serve as powerful threats to instill fear and compel silence in female victims.¹²⁸ Thus, even where the applicant’s assailant is not a gang member, girls and women living under these social conditions are inured to a state of constant fear of sexual and gender violence such that all forms of violence against women come to be appropriated under a cohesive pattern of lived experiential oppression.

ii. *Historical Entanglements of Private, Public, and State-Perpetrated/State-Sanctioned Violence in the Central American Context*

There is also particular difficulty in these societies as a result of deep linkages between state, public, private, domestic, and sexual violence. Sexual violence is often deployed “in a strategic or tactical way” in conflict settings, where it is typically used “to overwhelm and weaken the adversary.”¹²⁹ Sexual violence was, in recent history, employed and encouraged on a structural level in the NTCA. For example, during the civil war period, Guatemalan soldiers “were trained to think of gang rape as a bonding exercise.”¹³⁰ Present-day Central American gangs have exhibited similar intragroup male homosocial bonding patterns: For example, in the gang context, “[r]ape is . . . employed by gang members to discipline girls, women, and their

127. CENTRO DE DERECHOS DE MUJERES, STATUS OF VIOLENCE AGAINST WOMEN IN HONDURAS 2 (2014), <https://www.protectioninternational.org/wp-content/uploads/2014/07/Violence-Women-Honduras-RapporteurONU-June2014final.pdf>.

128. See KIDS IN NEED OF DEFENSE, *supra* note 7, at 2.

129. Gaggioli, *supra* note 44, at 505, 516.

130. Victoria Sanford, Sofía Duyos Álvarez-Arenas & Kathleen Dill, *Sexual Violence as a Weapon During the Guatemalan Genocide*, in GENDER VIOLENCE IN PEACE AND WAR: STATES OF COMPLICITY 34, 39 (Victoria Sanford, Katerina Steaftos & Cecilia M. Salvi eds., 2016).

family members for failure to comply with the gang's demand and to demonstrate the gang's dominance over the community."¹³¹

Additionally, the boundary between public and private has to some extent been destabilized as a result of the history and character of conflict in the region. According to Michele Leiby, during the Salvadoran civil war, victims' homes were "[a]mong the most common sites of state violence."¹³² Leiby notes that "[u]nlike other forms of political violence, sexual violence was largely committed in private spaces where it is less likely that the crime would be witnessed by a third party."¹³³ Death squads were useful because they removed violence from the public sphere and distanced the state from persecution, in both a literal and symbolic sense. In general, the domestic space facilitates broader social violence by providing a "context in which political violence can be placed, isolated, and contained."¹³⁴ The UNHCR reports that "the increasing violence from criminal armed groups [has] occurred alongside repeated physical and sexual violence at home."¹³⁵

NTCA governments have also "largely neglected to properly document and name the violence that has plagued women" and, as a result, have left deep tensions un(der)addressed and unresolved.¹³⁶ Indeed, the evidence suggests that both state and non-state actors continue to "rape women with impunity."¹³⁷ According to Lauren Gilbert, the violence playing out in the NTCA today "involves many of the same actors who have reorganized themselves into new structures of repression." These actors now operate "outside the context of war" but nevertheless retain "the private-state collaboration or acquiescence that characterized repression in wartime."¹³⁸ Gilbert argues that the "the climate of fear and instability that plagues the region" arises directly from "gaping holes in the historical record, moral consciousness, and the legal and social structures required to address the problem" of widespread sexual violence during the civil war period.¹³⁹

131. See KIDS IN NEED OF DEFENSE, *supra* note 7, at 1.

132. LEIBY, *supra* note 20, at 214.

133. *Id.* at 217.

134. MCKINNON, *supra* note 8, at 36.

135. UNITED NATIONS HIGH COMM'R FOR REFUGEES, *supra* note 17, at 4.

136. Gilbert, *supra* note 22, at 257.

137. Knopp, *supra* note 18.

138. Gilbert, *supra* note 22, at 260.

139. *Id.* at 257.

B. Navigating the Aftermath of Matter of A-B- 's Misapplication of the "Unable or Unwilling" Requirement

Although *A-B-* claimed that applicants alleging persecution by non-state actors must “establish that the government protection from such harm in their home country is so lacking that their persecutors’ actions can be *attributed to the government*,”¹⁴⁰ this in fact misconstrued the actual requirement, which is only that the home government be “unable or unwilling to control” non-state perpetrators of persecution.¹⁴¹ Although the opinion correctly stated that an asylum applicant is required to demonstrate “more than ‘difficulty . . . controlling’ private behavior,”¹⁴² Sessions attempted to improperly heighten the legal standard to mandate proof that the state either “condoned” or demonstrated “complete helplessness” with respect to the alleged persecution.¹⁴³ Although this standard had previously been accepted in some circuits, the U.S. District Court for the District of Columbia enjoined this portion of *Matter of A-B*, ruling in 2018 that Sessions’ opinion had erred in interpreting the “unable or unwilling” requirement in a manner that was directly contrary to law.¹⁴⁴

Under the correct, clarified standard, asylum applicants seeking protection from domestic violence in the NTCA face a more manageable burden of proof and may be able to buttress their cases with multiple types of evidence of government unwillingness and/or inability to control gang violence rising to the level of persecution. First, Northern Triangle countries generally do not provide survivors of sexual and domestic violence with adequate resources, including, notably, domestic violence shelters. According to the U.N. Special Rapporteur’s Report, Honduras, for example, “lacks centers of attention for women victims of violence and is incapable of assuring their well-being.”¹⁴⁵ There is just one NGO-operated domestic violence shelter in the capital city of Tegucigalpa, and no government-run

140. *Matter of A-B-*, 27 I&N Dec. 316, 317 (A.G. 2018) (emphasis added).

141. *See Matter of Acosta*, 19 I&N Dec. 211, 222–23 (BIA 1985).

142. *A-B-*, 27 I&N Dec. at 337 (quoting *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005)).

143. *See id.* (quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)). *See also Hoffman*, *supra* note 98 (observing that Sessions’ own opinion “ignores the plain language of the [INA] itself, as well as the attendant regulations”).

144. *See Practice Advisory: Grace v. Whitaker*, CTR. FOR GENDER & REFUGEE STUD., ACLU (Mar. 7, 2019),

https://www.aclu.org/sites/default/files/field_document/grace_practice_advisory_combined.pdf (citing *Grace v. Whitaker*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. 2018)).

145. CENTRO DE DERECHOS DE MUJERES, *supra* note 127, at 4.

services.¹⁴⁶ There are no government-run shelters in Guatemala at all: The entire country is served by a small number of “civil society-run” facilities with “very limited capacity.”¹⁴⁷ El Salvador is home to single government-operated domestic violence shelter, which can house just 35 at a time.¹⁴⁸ Even where there are shelters, the living conditions are often so poor that survivors do not consider them a viable option.¹⁴⁹

Moreover, even the limited services provided in the region are often undermined or rendered ineffective by gangs’ deep social, political, and other community ties, including to state and local governments and law enforcement—a fact that may be used to further demonstrate unwillingness or inability to protect victims against persecution. In NTCA countries, the unavailability of services makes it especially hard for victims of violence at the hands of gang members to obtain shelter and access other resources. Citing safety concerns, shelters often refuse to provide services to survivors whose abusers are gang members or whose families are gang-affiliated.¹⁵⁰ These fears are not unfounded: It is not uncommon for gang members to track down their victims and “attempt[] to force them to leave the shelter by threatening shelter staff.”¹⁵¹ At least one report described a gang member firing gunshots at a domestic violence shelter in one such attempt.¹⁵²

V. A PATH FORWARD: WORKING WITHIN EXISTING LEGAL FRAMEWORKS TO CRAFT LEGALLY COGNIZABLE PARTICULAR SOCIAL GROUPS IN THE POST-*MATTER OF A-B*- ERA

A. *Machista Culture and Gender-Based Violence*

Machista culture and, more specifically, the *machismo/marianismo* identity binary serves an apt structural framework around which to build viable particular social groups. *Machista* culture does not exclusively involve the victimization of women, but *marianismo* explicitly refers to a set of cultural standards and values defining and circumscribing female roles, conduct, and identity within the boundaries of dominant hypermasculinity.

146. KIDS IN NEED OF DEFENSE [NEITHER SECURITY NOR JUSTICE], *supra* note 30, at 10.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* Some civil society-run shelters in Honduras prohibit, by regulation, victims with ties to gangs.

151. *Id.* at 11.

152. *Id.*

Moreover, noting the identities it systematically privileges and excludes is helpful in this context, as the framework operates on both an individual and broader cultural level, and there is ample evidence that it is identifiable within Central American cultures.¹⁵³

The weight of the scholarship recognizes that sexual violence is linked to “gendered cultural factors,” including a “belief in traditional sex roles; a gender hierarchy; patriarchal ideology; . . . male control of women; male sexual entitlement; and adversarial attitudes towards women.”¹⁵⁴ At least one study has shown that “rape-prone societies” are characterized by high levels of “interpersonal violence, male social dominance, and the subordination of women.”¹⁵⁵ Indeed, some scholars assert that masculinity is frequently “construct[ed] . . . through the practice of violence,” particularly domestic, intimate partner, sexual, and gender-based violence.¹⁵⁶

Marianismo is generated and strengthened by other structural forces, including Catholicism, that may be mapped onto it. In Central America, gender roles are “heavily influenced by the Catholic precepts and faith.”¹⁵⁷ The Catholic Church wields significant influence over the social and political lives of Central Americans.¹⁵⁸ These cultures derive their paradigms of femininity directly from the Virgin Mother, a central religious figure who plays a particularly prominent role in Central American Catholicism and who embodies idealized qualities of self-sacrifice, stoicism, chastity, purity, obedience, and submissiveness.¹⁵⁹ This framework simultaneously encodes violence against women as both duty and punishment by assigning women responsibility for “facilitat[ing] the existence of the men.”¹⁶⁰ Women become receptacles for male violence as a function of “the submissive role [they] are assigned in patriarchal culture” and as a result of a system that registers their abuse as a failure of duty.¹⁶¹

153. E.g., Julia Zulver, *El Salvador: Crisis of Masculinity in a Machista Society*, OPEN DEMOCRACY (Oct. 23, 2014), <https://www.opendemocracy.net/en/el-salvador-crisis-of-masculinity-in-machista-society/>.

154. McPhail, *supra* note 34, at 317.

155. *Id.*

156. Kristin L. Anderson & Debra Umberson, *Gendering Violence: Masculinity and Power in Men’s Accounts of Domestic Violence*, 15 GENDER & SOC’Y 358, 359 (2001).

157. Hernandez, *supra* note 31, at 862.

158. See Quiñones Mayo & Resnick, *supra* note 37, at 262.

159. Hernandez, *supra* note 31, at 864–65.

160. *See id.* at 867.

161. *See id.* at 866.

According to Patricia Hernandez, “when a Latin American woman is a victim of domestic violence, the lack of state aid she receives makes her accept her plight as the [sic] ‘the cross that God has sent [her].’”¹⁶² Girls in *machista* culture are taught that they bear responsibility for the “original sin” and that “[t]heir position in the world . . . is partially driven by an ‘imposed’ obligation to pay for these sins.”¹⁶³ In some sense, gender-based violence “is simply part of the submissive role women are assigned in patriarchal culture.”¹⁶⁴

Indeed, Victoria Colbert contends that “domestic violence and abuse are behaviors so commonly associated with *machismo* that in circumstances where men do *not* use physical force to exude dominance upon their wives, other men will chastise them as not ‘macho’ enough.”¹⁶⁵ Research has generally observed that, in some cases, men engage in sexual violence against women in order to prove their masculinity.¹⁶⁶ According to Michele Leiby, group members enact sexual violence “in order to signal to others that they are *real* members of the group and can be trusted.”¹⁶⁷ Leiby explains that “in societies with deeply held social mores about women’s honor and purity, sexual violence may be a particularly ‘effective’ repressive and demoralizing weapon.”¹⁶⁸ She further notes the use of sexual violence as an “effective method of neutralizing political opponents without killing them.”¹⁶⁹ In fact, the U.N. has identified “*machista* culture” as a primary factor contributing to “a generalized state of violence” in Northern Triangle countries.¹⁷⁰

Machista may be a helpful ordering mechanism for PSGs for other reasons as well. Many adjudicators may be more receptive to claims that position women “as vulnerable, endangered (voiceless) bodies.”¹⁷¹

162. *Id.* at 865 (quoting RED DE INFORMACIÓN DE LOS DERECHOS DE LA MUJER, INVESTIGACIÓN VIOLENCIA DOMÉSTICA EN MUJERES DE POBLACIONES DE SANTIAGO 6, 7 (1992)).

163. *Id.*

164. *Id.* at 866.

165. COLBERT, *supra* note 40, at 31.

166. McPhail, *supra* note 34, at 320.

167. LEIBY, *supra* note 20, at 8–9.

168. *Id.* at 34.

169. *Id.* at 35.

170. See Gilbert, *supra* note 22, at 259 (quoting UNITED NATIONS, *Follow Up Mission to El Salvador*, Rep. of Special Rapporteur on Violence Against Women, Its Causes and Consequences, A/HRC/17/26/Add.2 (Feb. 14, 2011)) (citing also to UNITED NATIONS, *Human Rights Commission, Special Rapporteur on Violence Against Women Finalizes Country Mission to Honduras and Calls for Urgent Action to Address the Culture of Impunity for Crimes Against Women and Girls* (July 7, 2014), which revealed similar findings).

171. MCKINNON, *supra* note 8, at 47.

Sara McKinnon asserts that courts exhibit the best understanding of women as “corporeal subjects” who are viewed first and foremost through the lens of “what [ha]s [been] done . . . to their bodies.”¹⁷²

Using *machista* as a building block in this way, it is possible to add other identity factors that compound the targeting of certain girls and women within a broader culture of sexual violence. For example, virginity and loss of virginity are both inscribed with significant social meaning within this system, and the evidence suggests that gangs sometimes target girls and young women on this basis, which could provide an avenue for asylum claims where that is at issue in individual cases.¹⁷³ Moreover, experts have noted that young women as a demographic are more susceptible to and targeted by gang violence.¹⁷⁴

B. Intersectional Identities: Indigenous Maya Women, Genocide, and Gender-Based Violence

By linking current violence to its historical and structural roots, practitioners may be able form stronger particular social groups, especially around indigenous identity, which intersects with the more concrete statutory asylum ground of race or ethnicity. As an initial matter, providers of humanitarian-based immigration legal services serving Central American client populations should strongly consider incorporating explicit questions about indigenous ancestry and culture as a standard client intake and consultation practice. The impact of this shift in best practices could have significant impact. To contextualize the potential scope: Approximately 60% of Guatemalans are indigenous Maya.¹⁷⁵

Guatemala’s indigenous population, for example, has long been subjugated by *ladinos*, or settlers of European descent.¹⁷⁶ During the

172. *See id.* at 48.

173. Cf. JUAN MANUEL CONTRERAS ET AL., SEXUAL VIOLENCE IN LATIN AMERICA AND THE CARIBBEAN: A DESK REVIEW 42–43 (2010), <https://www.svri.org/sites/default/files/attachments/2016-04-13/SexualViolenceLACaribbean.pdf> (noting the substantial “value placed on female virginity [that] is deeply rooted in [Latin American culture]” and observing that “girls and women who are known to have had premarital sexual relations are often stigmatized, considered ‘not worthy’ by traditional communities, and are sometimes even considered ‘fair game’ for assault,” and furthermore, that loss of virginity through rape may not absolve victims from being faulted for the resulting “impurity” and degradation of value).

174. *See* CENTRO DE DERECHOS DE MUJERES, *supra* note 127, at 2.

175. Melissa Vida, *Herstory: 10 Guatemalan Women Who Changed the Course of History*, REMEZCLA (Mar. 30, 2020), <https://remezcla.com/lists/culture/womens-history-month-guatemala-women-who-changed-history/>.

176. Gilbert, *supra* note 22, at 266–67.

civil war period, sexual violence was “systematically used as a genocide strategy” against the indigenous Maya population.¹⁷⁷ Rape, and particularly gang rape, was used specifically “to terrorize, subjugate, debilitate, and demoralize” indigenous populations.¹⁷⁸ Indigenous women living in rural areas comprised 90% of the victims of the sexual violence in the Guatemalan Civil War.¹⁷⁹ Advocates should consider citing these, as well as other primary and secondary sources that likewise patently establish these targeted activities as historical fact and demonstrate the clear linkage between the past and present persecution of indigenous women.

Considering indigenous identity in the PSG context extends beyond gender-based sexual violence. Of the roughly 200,000 Guatemalans who were killed or who disappeared during the Guatemalan Civil War, 83% were indigenous Maya.¹⁸⁰ While the K’iche’, Q’anjob’al, Mam, Q’eqchi, Ixil, Kaqchikel, and Chuj were most severely impacted by mass rape and sexual violence—and as such may support the strongest asylum claims—all indigenous Maya suffered genocidal violence, including but not limited to sexual violence, during civil war conflicts.¹⁸¹

With respect to male asylum seekers from the NTCA, advocates may find it helpful to note that the Guatemalan national army “manipulated and indoctrinated” indigenous men to engage in sexual violence within their own communities.¹⁸² Additionally, the use of sexual violence in the broader context of genocide functioned to “reinscribe racialized socioeconomic hierarchies” that had existed prior to the civil war period and thus constitutes a form of cultural, structural, and actual violence committed against indigenous Maya peoples of all genders.¹⁸³

Although the 2013 conviction of former Guatemalan dictator José Efraín Ríos Montt for genocide and other crimes against humanity appeared, briefly, to “offer[] a modicum of justice for the [indigenous] survivors [of state-sponsored sexual violence],” the ruling was overturned within just 10 days.¹⁸⁴ Guatemalan courts have found members of the former Guatemalan national army guilty of crimes

177. Sanford, Álvarez-Arenas & Dill, *supra* note 130, at 35.

178. *Id.*

179. Knopp, *supra* note 18.

180. Gilbert, *supra* note 22, at 264.

181. Sanford, Álvarez-Arenas & Dill, *supra* note 130, at 41–42.

182. *Id.* at 41.

183. *Id.* at 43.

184. *Id.*

against humanity in the past,¹⁸⁵ and several high-ranking officers who were allegedly responsible for overseeing the Maya Ixil genocide are currently on trial for genocide and other crimes against humanity.¹⁸⁶ In 2018, a Guatemalan court ruled that the Guatemalan army had committed genocide against the indigenous Maya Ixil; however, the court refused to hold the only defendant in the case accountable for the genocide.¹⁸⁷

Furthermore, as recently as 2019, the Guatemalan legislature attempted to exonerate presumptive war criminals under a “blanket amnesty” proposal designed to reverse earlier gains made to prosecute army officials for their participation in gender and other crimes against humanity.¹⁸⁸ This latest attempt to “legislate impunity” reveals how deeply divided Guatemala remains in the aftermath of genocide and civil war.¹⁸⁹ This information can all be used to construct an indigenous identity-informed PSG.

VI. CONCLUSION

Ultimately, U.S. asylum law was not designed to accommodate refugees like the women and girls seeking asylum in large numbers at the southern border and has generally been hostile to their legitimate need for protection. The law continues to envision the “prototypical” asylum seeker of yesteryear and remains preoccupied with searching for evidence of traditional political state violence committed between and among men. The myopia of recent jurisprudence, crystallized by Sessions’ opinion in *Matter of A-B-*, has harmful effects on women and other victims of domestic and gender-based violence globally. Ideally, U.S. asylum law would be reformed in a more substantial and transformative manner than this Note proposes. However, this Note has intentionally sought to work within the confines of existing law and

185. Sofia Menchu & Frank Jack Daniel, *Guatemala Amnesty Would Free War Criminals, Soldiers Who Held Women as Sex Slaves*, REUTERS (Mar. 27, 2019), <https://www.reuters.com/article/us-guatemala-rights/guatemala-amnesty-would-free-war-criminals-soldiers-who-held-women-as-sex-slaves-idUSKCN1R82K4>.

186. Jo-Marie Burt & Paulo Estrada, *Guatemala to Begin Evidentiary Phase of Genocide Trial Against Senior Military Officials*, WOLA (Mar. 6, 2020), <https://www.wola.org/analysis/guatemala-genocide-trial-begins-senior-military-officials/>.

187. *Id.*

188. Nina Lakhani, “A Drastic Step Backwards”: *Guatemala Considers Amnesty for War Crimes*, THE GUARDIAN (Feb. 7, 2019), <https://www.theguardian.com/world/2019/feb/07/guatemala-war-criminals-crimes-against-humanity-amnesty>.

189. Menchu & Daniel, *supra* note 185.

practice to offer a viewpoint to help anchor viable particular social groups in the post-*Matter of A-B-* era, identifying dominant social structural frameworks that render visible the hybridized public-private nature of sexual violence in the Northern Triangle and exposing *A-B*'s problematic formulae that deliberately misunderstand gender-based violence.

Although the Biden Administration made it an early priority to reverse many of the prior administration's restrictive anti-immigration policies, and *Matter of A-B-* may eventually be fully overruled, the broader problem endures, and these dialogues remain relevant. So long as gender remains excluded as a statutory basis for asylum, gender-based and sexual violence will remain inherently unstable grounds for claims, subject to fluctuations in political agendas and vacillating views on judicial interpretation with respect to the particular social group category. There continues to be a profound and urgent need for the U.S. immigration system to better recognize gender-based and sexual violence as valid bases for asylum seekers to establish claims.