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Cover Page Footnote

I am deeply grateful for the support of my husband and children, passionate community advocates themselves, who have encouraged and supported me as I followed my dream of pursuing my J.D. I would also like to thank Kathleen Kersh for mentoring me and deepening my understanding of immigrant advocacy, as well as providing advice throughout this writing process. And finally, I extend a heartfelt thank you to my colleagues in the Human Rights Awareness and Advocacy group, and to Professor Adam Todd, Professor Andrea Seielstad, Professor Thaddeus Hoffmeister, Matt Currie, and Shelley Inglis at the University of Dayton, who have challenged me, collaborated with me, and inspired me to deepen my thirst for human rights and social justice law.

VIOLATING THE VIOLATED: HOW THE DECISION BY FORMER ATTORNEY GENERAL SESSIONS IN *MATTER OF A-B-* AFFECTS DOMESTIC VIOLENCE PERSECUTION ASYLUM CLAIMS WITHIN THE SIXTH CIRCUIT

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INTRODUCTION

Florentina, a migrant from El Salvador, finally arrived on the soil of the United States of America after risking life and limb to make the dangerous journey across a few countries with her young baby and two older children.[1] She and her children already suffered much, tattered and torn from the journey through Central America, where they were mistreated by government officials, scarred by extortion and violence perpetrated by criminal gangs, and humiliated by vocal Central-American locals who despised their presence in their communities.[2] This journey became increasingly difficult as she and her children traveled atop the moving cargo train, La Bestia ("the Beast"), with hopes of arriving to the United States.[3] Despite the hardships experienced during their migration, Florentina kept her mind unilaterally focused on the end goal: the possibility of asylum in the United States, a future which signified freedom from the terrible abuses she suffered at the hands of her husband.[4]

For years, Florentina suffered repeated beatings and rapes by her spouse, yet the local authorities never investigated, refusing to interfere in the

[1] Although this account is a fictionalized hypothetical account conceived by the Comment author, it is based on the real-life experiences of countless migrants from Central America who have sought asylum in the United States. *See* Federica Valabrega, *"I'm a Survivor of Violence": Portraits of Women Waiting in Mexico for U.S. Asylum*, NPR (Jan. 16, 2019, 5:51 PM), https://www.npr.org/sections/pictureshow/2019/01/16/684812592/i-m-a-survivor-of-violence-portraits-of-women-waiting-in-mexico-for-u-s-asylum (providing more information on the real stories of women or men fleeing domestic violence and other private crime).

[2] Salil Shetty, *Most Dangerous Journey: What Central American Migrants Face When They Try to Cross the Border*, AMNESTY INT'L, https://www.amnestyusa.org/most-dangerous-journey-what-central-american-migrants-face-when-they-try-to-cross-the-border/ (last visited Mar. 24, 2019); *9 Questions (and Answers) About the Central American Migrant Caravan*, WASH. OFFICE ON LATIN AMERICA, https://www.wola.org/analysis/9-questions-answers-central-american-migrant-caravan/ (last updated Oct. 25, 2018); James Fredrick, *Shouting 'Mexico First,' Hundreds in Tijuana March Against Migrant Caravan*, NPR (Nov. 19, 2018, 2:47 PM), https://www.npr.org/2018/11/19/669193788/shouting-mexico-first-hundreds-in -tijuana-march-against-migrant-caravan.

[3] Rodrigo Dominguez Villegas, *Central American Migrants and "La Bestia": The Route, Dangers, and Government Responses*, MIGRATION POLICY INST. (Sept. 10, 2014), https://www.migrationpolicy.org/article/central-american-migrants-and-"la-bestia"-route-dangers-and-government-responses.

[4] Jazmin Ulloa, *Beaten and Raped in El Salvador, a Domestic Violence Survivor Finds Little Hope for Asylum in U.S.*, L.A. TIMES (Aug. 10, 2018, 3:00 AM), https://www.latimes.com/politics/la-na-pol-sessions-asylum-decision-20180810-story.html.

personal affairs between married partners.[5] Florentina also attempted to leave her husband, once relocating to her hometown, but he soon found her and threatened to kill her and their children if she did not return to him.[6] With no escape and no help from the authorities, Florentina once again found herself subjected to continued abuse at his hands. Finally, Florentina made the decision to save herself and her children by fleeing to the United States in hopes that she would be granted asylum—the permission to stay—so that they would no longer suffer his constant abuse. Although it broke her heart to leave behind everything she knew, it seemed a small price to pay in exchange for a chance at survival. After a long, arduous journey, Florentina arrived at a United States port of entry and immediately turned herself over to immigration authorities to claim asylum.[7]

Florentina soon discovered that her right to seek asylum and safety in the United States was recently attacked by an administrative decision by former Attorney General ("AG") Jeff Sessions.[8] Instead, what she hoped would be a safe haven from her constant abuse turned into a heartbreaking nightmare. While she waited for her credible fear interview ("CFI"), her children were taken from her and detained in separate, distant immigration detention centers.[9] When she presented her case during her CFI, the asylum officer denied the finding of "credible fear," thereby ending Florentina's opportunity to seek asylum in the United States.[10]

Florentina was broken; her last hope to escape her abuser through asylum in the United States had failed. Unfortunately, Florentina was not alone.[11] On June 11, 2018, former AG Jeff Sessions issued a devastating decision in *Matter of A-B-*.[12] Immigration lawyers contend that this decision greatly limits the ability of survivors of persecution by private criminal actors

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[5] Liz Creel, Sara Lovera & Miriam Ruiz, *Domestic Violence: An Ongoing Threat to Women in Latin America and the Caribbean*, POPULATION REFERENCE BUREAU (Oct. 1, 2001), https://www.prb.org/domesticviolenceanongoingthreattowomeninlatinamericaandthecaribbean/#.

[6] To qualify for their claims, domestic violence survivors must often prove that they have attempted to leave their abuser to no avail. *See infra* Section II.A.

[7] Joel Rose, *As More Migrants Are Denied Asylum, an Abuse Survivor is Turned Away*, NPR (Jan. 18, 2019, 7:22 AM), https://www.npr.org/2019/01/18/686466207/its-getting-harder-for-migrants-to-win-asylum-cases-lawyers-say.

[8] *Id.*

[9] Laura Gottesdiener & John Washington, *They're Refugees, Fleeing Gang Violence and Domestic Abuse. Why Won't the Trump Administration Let Them in?*, THE NATION (Nov. 28, 2018), https://www.thenation.com/article/trump-asylum-gangs-domestic-violence/. The credible fear interview is the first step in the asylum process after a migrant arrives either to a port-of-entry or immediately seeks border patrol's help after crossing the Mexico-U.S. border.

[10] *Id.* Sessions's decision in the *Matter of A-B-*, U.S. Customs and immigration Services ("USCIS") reported a steep decline in the granting of CFIs. In December of 2018, a judge in the U.S. District Court of D.C. heard the case of *Grace v. Whitaker*, where plaintiffs sought an injunction to permanently block the application of the government rule categorically denying credible fear interviews relating to domestic violence or gang violence claims. *Issues: Grace v. Barr*, ACLU, https://www.aclu.org/cases/grace-v-barr (last updated Jan. 10, 2019).

[11] *See* Rose, *supra* note 7; Gottesdiener & Washington, *supra* note 9.

[12] *See generally* 27 I. & N. Dec. 316 (Att'y Gen. 2018).

in foreign countries to seek asylum under United States immigration law.[13] More specifically, Sessions's opinion directly attacked the ability of domestic and gang violence survivors to escape their persecutors through the legal pathways presented by United States asylum jurisprudence.[14] In the decision, the AG announced that asylum claims will generally not be approved, if they involve primarily domestic violence or gang violence perpetrated by private, non-governmental actors.[15]

Both immigration advocates and political commentators have long agreed that Sessions was one of the most vitriolic, anti-immigrant voices during his twenty-year career in the United States Senate.[16] When Sessions assumed the role of AG in the administration of President Donald Trump in February of 2017, he prioritized curbing legal immigration streams through an outright assault on asylum law.[17] Attorneys and immigrant rights advocates denounced his decision in *A-B-* as a direct assault on the viability of asylum claims for Central American domestic violence survivors, running contrary to both Board of Immigration Appeals ("BIA") case law and various circuit court decisions.[18] Additionally, advocates asserted that this decision would impede the due process afforded to asylum seekers by preventing potentially legitimate claims from even coming before an immigration judge ("IJ") to be heard on their merits.[19]

Furthermore, advocates claimed that the AG's highly-contested decision demonstrated his hostility toward immigrants and asylum seekers, especially evidenced by his disparaging remarks to IJs surrounding the announcement of his decision.[20] During these remarks, Sessions defended his

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[13] *See* Gottesdiener & Washington, *supra* note 9.

[14] Reade Levinson & Kristina Cooke, *Thousands of U.S. Asylum Claims in Doubt After Sessions' Decision*, REUTERS (June 12, 2018, 5:00 PM), https://www.reuters.com/article/us-usa-immigration-asylum/thousands-of-u-s-asylum-claims-in-doubt-after-sessions-decision-idUSKBN1J82RZ.

[15] *A-B-*, 27 I. & N. Dec. at 320.

[16] *The Facts on Senator Jeff Sessions: Proposed Nominee for Attorney General is Dangerous to Civil Rights and Unfit for the Job*, ASIAN AMERICANS ADVANCING JUSTICE, https://advancingjustice-aajc.org/sites/default/files/2017-01/Sessions%20Fact%20Sheet%20Affiliation%20-%20Final.pdf (last visited May 24, 2019); Seung Min Kim & Josh Gerstein, *What Jeff Sessions Thinks About Immigration, Police and Terrorism*, POLITICA (Jan. 10, 2017, 5:13 AM), https://www.politico.com/story/2017/01/jeff-sessions-views-attorney-general-233383.

[17] Christal Hayes, *A Look Back at Jeff Sessions' Tenure in the Trump Administration*, USA TODAY (Nov. 7, 2018, 5:21 PM), https://www.usatoday.com/story/news/politics/2018/11/07/jeff-sessions-look-his-tenure-attorney-general/1922326002/; Stuart Anderson, *The Sessions Asylum Decision: What Are Its Implications?*, FORBES (June 13, 2018, 12:26 AM), https://www.forbes.com/sites/stuartanderson/2018/06/13/the-sessions-asylum-decision-what-are-its-implications/#71f9a53f776b; *Senator Elizabeth Warren Criticizes Attorney General Jeff Sessions' Immigration Record*, C-SPAN (Feb. 7, 2018), https://www.c-span.org/video/?c4713522/senator-elizabeth-warren-criticizes-attorney-general-jeff-sessions-immigration-record.

[18] *See* Anderson, *supra* note 17.

[19] *Id.*

[20] *See* C-SPAN, *supra* note 17; Katie Benner, *Immigration Judges Express Fear That Sessions's Policies Will Impede Their Work*, N.Y. TIMES (June 12, 2018), https://www.nytimes.com/2018/06/12/us/politics/immigration-judges-jeff-sessions.html; Tal Kopan, *Trump Admin Drops Asylum Protections for Domestic Violence Victims*, CNN, https://www.cnn.com/2018/06/11/politics/jeff-sessions-asylum-decision/index.html (last updated June 11, 2018, 5:57 PM).

decision, alluding to the "lawlessness" of the current immigration system and touting his "zero tolerance" policy to curb illegal entries on the southwest border.[21] Sessions contended that the asylum system was being "abused to the detriment of the rule of law, sound public policy, and public safety—and to the detriment of people with just claims," notwithstanding the fact that under asylum law, it is not illegal for an applicant to arrive on United States soil (either through a port of entry or other means) and assert a fear of persecution in order to start an asylum claim.[22]

While defending his interpretation of asylum law in *A-B-*, Sessions also mandated that these IJs should expedite asylum cases.[23] Former AG Sessions added, "[v]olume is critical. . . . We ask you to evaluate your processes and [case] disposition rates . . . [so as] to complete at least 700 cases a year."[24] These statements struck chords of concern in judges and advocates alike, who pointed to Sessions's preoccupation with rushing immigration cases, including asylum claims, through the judicial process rather than requiring that those claims be adjudicated with care.[25] This expedition mandate was deemed especially dangerous in asylum claims, as the applicants sought protection from threats of violence or even death if returned to their home countries.[26] Furthermore, these statements were dangerous from an official who had significant responsibilities over addressing civil rights abuses within immigration claims, leading advocates to denounce Sessions's lack of concern about upholding the individual rights of migrants.[27]

While the full implications of this decision are still being played out, the dangers of limiting the ability of survivors of gang or domestic violence to bring valid claims before an IJ have begun to have serious implications for families like Florentina's.[28] Many advocates believe that this decision "will undoubtedly result in significant numbers of bona fide refugees being returned to the hands of their persecutors."[29] This decision threatens to reverse decades of gains made toward protecting vulnerable groups who

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[21] Jeffrey Sessions, Att'y Gen., Remarks to the Executive Office for Immigration Review Legal Training Program (June 11, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal.

[22] *Id.*; *see infra* notes 35–39 and accompanying text.

[23] *See* Jeffrey Sessions, *supra* note 21.

[24] *Id.* This quota would require IJs to complete at least three cases per day. Joshua Breisblatt, *Immigration Judge Quotas Could Result in Assembly Line Justice*, IMMIGRATION IMPACT (Apr. 4, 2018), http://immigrationimpact.com/2018/04/04/immigration-judge-quotas.

[25] Laura Meckle, *New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations*, THE WALL ST. J. (Apr. 2, 2018, 4:50 PM), https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158; Press Release, American Immigration Lawyers Association, The NAIJ "Strenuously Opposes" Proposed Quotas and Completion Deadlines Announced by DOJ (Apr. 3, 2018), https://www.aila.org/infonet/naij-strenuously-opposes-proposed-quotas.

[26] *See* Anderson, *supra* note 17; *see also* ASIAN AMERICANS ADVANCING JUSTICE, *supra* note 16.

[27] Anderson, *supra* note 17.

[28] *See* Levinson & Cooke, *supra* note 14.

[29] *See* Anderson, *supra* note 17.

suffer violence and persecution at the hands of private actors in foreign countries.[30]

The precedential effect of prior grants of asylum to survivors of private crime, including victims of domestic violence, has left the circuit courts and IJs throughout the nation riddled with doubts about how to apply the AG's decision.[31] This Comment will delve deeper into the decision of AG Jeff Sessions in *A-B-* and analyze whether the decision has the precedential effect that Sessions intended on the jurisprudence of Sixth Circuit case law. This Comment establishes a bifurcated attack on Sessions's decision—both that he misinterpreted critical elements of asylum law and conflated elements with regard to particular social group membership, and introduced overbroad, sweeping language in the form of dicta.

Despite these problems with the decision, Sixth Circuit case law overrides these errors, invalidating Sessions's conclusion that victims of domestic violence are generally excluded from qualifying for asylum and restoring their right to have their cases adjudicated on their merits. First, this Comment will discuss the elements of asylum required under the Immigration and Nationality Act ("INA") and the history of BIA decisions, especially as related to particular social group claims within the last two decades. Second, this Comment will examine the specific application of asylum law to particular social group claims by domestic violence survivors under *Matter of A-R-C-G-* and the BIA's original decision in *A-B-*.[32] Lastly, this Comment will analyze the problems associated with Sessions's interpretations on the principal elements in *A-B-*, when compared to BIA decisions and the effect of the last decade of Sixth Circuit pre-*A-R-C-G-* precedent, which nullifies the attempt by Sessions in *A-B-* to exclude domestic violence survivors from applying for asylum cases.

BACKGROUND

I. The Definition of Asylum under the INA and Related Historical Developments from BIA Precedents

Under the INA, an individual must establish that they qualify as a refugee as defined by the statute in an asylum petition.[33] In order to establish

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[30] *Id.*

[31] Dara Lind, *Jeff Sessions Just All But Slammed the Door on Survivors of Domestic Violence and Gang Violence*, VOX (June 11, 2018, 6:00 PM), https://www.vox.com/2018/6/11/17450374/sessions-asylum-domestic-gang-violence.

[32] A-R-C-G-, 26 I. & N. Dec. 388, 393 (B.I.A. 2014); Daniel Kowalski, *Due Process, Asylum Protections for Women Under Attack:* Matter of A-B- *Revealed*, IMMIGRATION LAW BLOG (Mar. 28, 2018), https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/posts/due-process-asylum-protections-for-women-under-attack-matter-of-a-b-revealed (follow first "here" hyperlink for redacted decision) [hereinafter 2016 Decision of B.I.A. in *A-B-*].

[33] 8 U.S.C. § 1158(b)(1)(A) (2012).

oneself as a "refugee," an individual must prove that: (1) they are outside the country of their nationality; (2) they are unable or unwilling to return to, or are unable or unwilling to avail themselves of the protection of, their country of nationality because of persecution or a well-founded fear of persecution; and (3) the persecution is on account of their race, religion, nationality, political opinion, or membership in a particular social group.[34]

Because an asylum applicant differs from a traditional refugee in that they must have either relocated to another country outside of their home country or must be already present in the United States before filing their asylum petition, it is common for those fleeing their homelands in search of asylum to enter the United States at the border, both by crossing at a port of entry or through a non-designated border crossing.[35] Instead of being immediately deported, these candidates, who establish that they have a fear of returning to their home country, are detained and interviewed by a Department of Homeland Security ("DHS") asylum officer.[36] The purpose of this interview is to determine if the applicant has a "credible fear" of returning to their home country.[37] If the individual fails the Credible Fear Interview ("CFI"), they will be immediately deported through expedited removal laws.[38] If the individual passes the CFI, they will be placed in removal proceedings through the immigration court, allowing them to assert a claim for asylum.[39] Establishing that an applicant has credible fear of returning to their home country is a much lower bar than proving the higher persecution standards required for the more complex process of asylum.[40]

A. Well-Founded Fear of Persecution

In the next step of the process of establishing an asylum claim, the applicant must show that they meet the statutory definition of a refugee.[41] Here, part of that applicant's burden includes proving a well-founded fear of persecution in their home country based on a number of protected statuses.[42] Congress defined a refugee as "any person . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution . . . on account of race, religion, nationality, membership in a particular social group, or political

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[34] 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A), 1231(b)(3)(A) (2012).

[35] *See FAQ About Asylum and the Border*, HUMAN RIGHTS FIRST (Dec. 2013), http://www.humanrightsfirst.org/sites/default/files/FAQAsylum-Border.pdf.

[36] *Id.*; *Migrants, Asylum Seekers, Refugees and Immigrants: What's the Difference?*, INT'L RESCUE COMM., https://www.rescue.org/article/migrants-asylum-seekers-refugees-and-immigrants-whats-difference (last updated Dec. 11, 2018).

[37] HUMAN RIGHTS FIRST, *supra* note 35.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A), 1231(b)(3)(A).

[42] *Id.*; *see also* 8 C.F.R. § 208.13(a) (2019).

opinion."[43] Yet, the INA fails to define what constitutes persecution, leaving the courts to fill in the gaps.[44]

In *Matter of Acosta*, the BIA adopted the definition of "persecution" based off the meaning within "the pre-Refugee Act," holding that the court should follow the prior meaning of the word because of the long-established rule of statutory interpretation that encourages words present in similar statutes to be endowed with the same meaning.[45] Therefore, persecution was determined to include: "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[46] The court went on to define persecution as harm or suffering caused by confinement, torture, economic deprivation, or restrictions so severe that they threaten an individual's life or freedom.[47] The persecution must be severe and can include "detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture."[48] Therefore, the bar for proving persecution on account of a protected status must rise to more than just harassment, adding that isolated incidents of verbal harassment or intimidation were not sufficient.[49]

According to the Code of Federal Regulations ("CFR"), an equally important consideration within this prong of the asylum test is whether the applicant can prove that they have suffered past persecution or have a well-founded fear of future persecution based on their particular social group membership.[50] In this determination, the courts and the BIA will evaluate whether the applicant: (1) can establish past persecution; (2) on account of a protected ground (race, nationality, political opinion, or particular social group); (3) by either the government or a non-state actor that the government is unwilling or unable to control.[51] A presumption of future fear is established when the applicant proves all three sub-elements, "but this presumption may be rebutted by the government if it shows by a preponderance of the evidence that conditions in the country have changed so fundamentally that the

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[43] 8 U.S.C. § 1101(a)(42).

[44] 8 U.S.C. § 1101(a)(42)(A).

[45] Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (drawing on the rule of statutory construction interpreting similar language in subsequent legislation with the same meaning as the prior legislation).

[46] *Id.*

[47] *Id.* (citations omitted).

[48] De Leon v. INS, 99 F. App'x 597, 599 (6th Cir. 2004) (quoting Begzatowski v. INS, 278 F.3d 665, 669 (7th Cir. 2002)).

[49] Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1231 (11th Cir. 2005) (holding that menacing phone calls and death threats did not rise to the level of persecution); *see also* U.N. HIGH COMM'R FOR REFUGEES, *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protocol*, ¶¶ 51–53, U.N. Doc. HCR/1P/4/ENG/REV.4 (Feb. 2019), https://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html [hereinafter UNHCR Handbook].

[50] 8 C.F.R. § 208.13(b)(1) (2019).

[51] *NIJC Asylum Practice Advisory: Applying for Asylum After* Matter of A-B-, NAT'L IMMIGRANT JUSTICE CTR. 10 (June 2018), https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%206.21.18.pdf [hereinafter NIJC ASYLUM PRACTICE ADVISORY].

applicant no longer has a well-founded fear of persecution."[52] Additionally, the government cannot rebut this well-founded fear of future persecution presumption by merely showing that the persecutory act will not reoccur.[53]

B. Particular Social Group Membership

In establishing a claim of persecution by private criminal actors, often applicants must define the basis of their persecution on account of their membership in a particular social group ("PSG").[54] The term "particular social group" is not expressly defined within the INA, the 1951 Convention Relating to the Status of Refugees ("Refugee Convention"), nor within its implementing regulations.[55] Because of the phrase's ambiguity, the BIA and the courts of appeal have articulated refined standards through decisions regarding asylum claims on account of membership in a PSG spanning nearly thirty years of asylum law.[56] The court has declined to recognize categorical rules about who may qualify for PSG membership under asylum law and instead makes these determinations on a case-by-case basis.[57]

The majority of the circuit courts—including the Sixth Circuit—rely on a three-part test for defining a cognizable PSG, including that the group must be: (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question.[58] Although this test was developed through numerous BIA cases, which clarify the necessary elements required to prove persecution based on a PSG membership, advocates continue to criticize these requirements, stating that they only confuse and complicate interpretation of the law.[59] A split has developed among circuit courts in the application of these standards, with some circuits outright rejecting the "social distinction"

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[52] Singh v. Ashcroft, 398 F.3d 396, 401 (6th Cir. 2005) (citing Pilica v. Ashcroft, 388 F.3d 941, 950 (6th Cir. 2004)).

[53] Stserba v. Holder, 646 F.3d 964, 976 (6th Cir. 2011) (quoting Bah v. Mukasey, 529 F.3d 99, 115 (2d Cir. 2008)).

[54] 8 U.S.C. § 1101(a)(42) (2012).

[55] A-B-, 27 I. & N. Dec. 316, 326 (Att'y Gen. 2018). Because the statutory definition of PSG membership is vague, this Comment will discuss cases involving a variety of situations in which the applicant's persecution was at the hands of private actors (many times family members or close acquaintances), such as female genital mutilation, human trafficking, domestic violence, gang violence, rape, and incest. These claims form a body of asylum case law in which the applicant claims that the persecutory actions were on account of membership in a PSG.

[56] *Id.* at 326–27; *see* Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 110 (2013); Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURV. Q. 46, 52–62 (2010).

[57] INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (finding that with ambiguous terms in the statutory definition of "refugee" like "well-founded fear," concrete meanings are only achieved through a process of case-by-case adjudication).

[58] Matter of M-E-V-G, 26 I. & N. 227, 237 (B.I.A. 2014); Zaldana Menijar v. Lynch, 812 F.3d 491, 498 (6th Cir. 2015).

[59] Blaine Bookey, *Gender-Based Asylum Post*-Matter of A-R-C-G-*: Evolving Standards and Fair Application of the Law*, 22 S.W. J. INT'L L. 1, 9 (2016).

prong and further limiting the "particularity" prong.[60] Despite these legitimate concerns, this Comment will address all three aspects of the purported test.

1. Composed of Members who Share a Common Immutable Characteristic

A seminal BIA case defining the necessary standards for determining whether an asylum applicant qualified for asylee status under a PSG membership was *Acosta*, decided in 1985.[61] In *Acosta*, a taxi driver from El Salvador applied for asylum due to continued threats and attacks made by Salvadorian terrorist groups against himself and other taxi cab drivers.[62] The applicant claimed that his protected ground under the INA was a PSG defined as "taxi drivers and others employed in the transportation industry of El Salvador."[63] The BIA held, under the doctrine of *ejusdem generis*, that the phrase "membership in a particular social group" from the INA should be construed in a manner consistent with the other words in the list, including "race, religion, nationality, [and] political opinion."[64] The shared association between these words was their description of an "immutable" characteristic—a characteristic impossible for that individual to change or so fundamental to the identity or conscience of that individual that they should not be required to change it.[65] Applying this test, the court then held that the respondent's PSG membership was not immutable because it was based on a characteristic that he had the power to change.[66] Therefore, his asylum petition was denied.[67]

The *Acosta* decision established the first test of "immutability" required to define a valid PSG membership.[68] This "immutability" test formed the sole element of PSG determinations for the next twenty years.[69] The *Acosta* decision further clarified that immutability could either be based on a shared characteristic between members of a group that cannot be changed, such as gender, or a characteristic that the members should not be forced or required to change, such as being an uncircumcised woman.[70] Subsequent decisions also clarified that membership in a PSG can be based

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[60] *See infra* note 88 and accompanying text.
[61] *See generally* Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985).
[62] *Id.* at 216–17, 232.
[63] *Id.* at 232.
[64] *Id.* at 233 (quoting 8 U.S.C. §§ 1101(a)(42)(A), 1231(b)(3)(A)).
[65] *Id.*
[66] *Id.* at 234.
[67] *Id.*
[68] *Id.*; *see also* Bookey, *supra* note 59, at 9 n.23.
[69] *See* Bookey, *supra* note 59, at 9.
[70] *Acosta*, 19 I. & N. Dec. at 233; *see also Particular Social Group Practice Advisory: Applying for Asylum After* Matter of M-E-V-G- *and* Matter of W-G-R-, NAT'L IMMIGRANT JUSTICE CTR., at 1 (Jan. 2016), http://immigrantjustice.org/sites/immigrantjustice.org/files/PSG%20Practice%20Advisory%20and%20Appendices-Final-1.22.16.pdf [hereinafter NIJC PSG PRACTICE ADVISORY].

on "shared past experience," which can include being the victim of a similar crime.[71] Courts have overwhelmingly agreed that the determination of PSG membership is highly fact-sensitive, and therefore such determinations should be made on a case-by-case basis.[72]

2. Defined with Particularity

After the *Acosta* test, no further elements were added to the standard defining PSG membership until 2008, when two important but controversial cases were decided: *Matter of S-E-G-* and *Matter of E-A-G-*.[73] After these cases, the BIA adopted a new test for defining PSG membership, requiring a finding that the PSG also be "particularly defined" and "socially visible."[74] The particularity element of a PSG designation "requires that the group have particular and well-defined boundaries."[75] The court further asserted that the particularity element could not be defined as to include membership so large or amorphous that it could potentially make up a significant segment of society.[76]

S-E-G- involved three siblings who had fled their country due to the pervasive threat of violence from a criminal gang called the Mara Salvatrucha ("MS-13").[77] MS-13 gang members beat, harassed, and stole from the brothers for refusing to join the gang.[78] The gang also threatened to rape or harm the siblings' sister if they refused to join.[79] In asserting their asylum claim, the respondents defined their PSG membership as "Salvadoran youth who ha[d] been subjected to recruitment efforts by MS-13 and who ha[d] rejected [those efforts] based on their . . . personal . . . opposition to the gang's values and activities."[80] Despite credible testimony given by the applicants, the courts ruled that the respondents had failed to establish a persecution claim under their defined PSG membership.[81] In defining the reasons for the denial, the court reasoned that the respondents had failed to limit their proposed

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[71] Valdiviezo-Galdamez v. Att'y Gen. of U.S., 663 F.3d 582, 595–596 (3d Cir. 2011). *See also* Lukwago v. Ashcroft, 329 F.3d 157, 178–79 (3d Cir. 2003) (holding that "the past experience of abduction, torture, and escape with other former child soldiers" was sufficient to constitute a PSG membership for asylum purposes).

[72] *Acosta*, 19 I. & N. Dec. at 233; Henriquez-Rivas v. Holder, 707 F.3d 1081, 1083 (9th Cir. 2013); S.E.R.L. v. Att'y Gen. of U.S., 894 F.3d 535, 555 (3d Cir. 2018); Bi Xia Qu v. Holder, 618 F.3d 602, 606 (6th Cir. 2010); *see also infra* notes 261–62 and accompanying text.

[73] *See generally* S-E-G-, 24 I. & N. Dec. 579 (B.I.A. 2008); E-A-G-, 24 I. & N. Dec. 591 (B.I.A. 2008).

[74] *S-E-G-*, 24 I. & N. Dec. at 582. Although the BIA had alluded to the elements of particularity and social visibility in prior decisions such as *Matter of C-A-*, the BIA did not formally adopt these new requirements until after their *S-E-G-* decision. C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006); *see also* NILC PSG PRACTICE ADVISORY, *supra* note 70, at 2 n.1.

[75] *S-E-G-*, 24 I. & N. Dec. at 582 (citing *A-M-E-*, 24 I. & N. Dec. 69 (B.I.A. 2007)).

[76] *Id.* at 585.

[77] *Id.* at 579.

[78] *Id.* at 580.

[79] *Id.*

[80] *Id.* at 581.

[81] *Id.* at 588.

group, as the characteristics of children from "middle and low income classes, who live[d] in the territories controlled by the MS-13 gang, and who refuse[d] recruitment" to the gang were not sufficiently particularly defined because these groups make up "potentially large and diffuse segment[s] of society."[82]

3. Socially Distinct / Social Visibility

The BIA released another decision on the same day as *S-E-G-* in *E-A-G-*, a factually similar case where the court further defined the social visibility prong of the newly amended test.[83] In *E-A-G-*, a young man from Honduras sought asylum based on threats of gang violence under a PSG membership defined as "young persons who are perceived to be affiliated with gangs" and "persons resistant to gang membership."[84] The court rejected the respondent's asylum petition, focusing on the "social visibility" aspect of the respondent's defined PSG membership—in other words, whether society perceives individuals with that particular characteristic as members of a social group.[85] The court reasoned that the PSG, as defined by the petitioner, was not a socially visible group in Honduran society.[86] Furthermore, the court held that the characteristic defining the group must be important to the group members themselves.[87] Despite the BIA's attempt to define the PSG membership with more clarity, these two decisions further muddied the waters of interpretation, leading to varied outcomes for applicants both in the circuit courts and within BIA decisions, especially regarding the social visibility prong.[88]

Due to these inconsistent applications, the BIA revisited the definition of PSG membership in 2014 in another formative case, *Matter of M-E-V-G-*.[89] Here, the BIA considered a claim in which the respondent suffered past persecution in Honduras because he had been beaten, kidnapped, and threatened with death by the Guatemalan branch of MS-13 for his refusal to join the gang.[90] The respondent defined his PSG membership as

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[82] *Id.* at 585.

[83] *See* E-A-G-, 24 I. & N. Dec. 591, 594 (B.I.A. 2008).

[84] *Id.* at 593.

[85] *Id.* at 594.

[86] *Id.*; *see infra* note 95 and accompanying text.

[87] *E-A-G-*, 24 I. & N. Dec. at 595.

[88] *See* NILC PSG PRACTICE ADVISORY, *supra* note 70, at 2 & app. A. *Compare* Orellana-Monson v. Holder, 685 F.3d 511, 520 (5th Cir. 2012); Al-Ghorbani v. Holder, 585 F.3d 980, 997 (6th Cir. 2009); Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008); Rivera-Barrientos v. Holder, 666 F.3d 641, 652–53 (10th Cir. 2012); Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1197 (11th Cir. 2006) (accepting social visibility), *with* Rojas-Perez v. Holder, 699 F.3d 74, 80 (1st Cir. 2012) (accepting social visibility but questioning the rationality of the BIA's application of the new rule); Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007) (stating PSGs must have social visibility but defining visibility as that relating to the persecutor); Valdiviezo-Galdamez v. Att'y Gen. of U.S., 663 F.3d 582, 607 (3d Cir. 2011) (rejecting social visibility) (on remand to BIA this became *Matter of M-E-V-G-*); Lizama v. Holder, 629 F.3d 440, 446–47 (4th Cir. 2011) (declining to address social visibility); Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009) (rejecting social visibility and limiting particularity).

[89] *See* M-E-V-G-, 26 I. & N. Dec. 227, 236 (B.I.A. 2014).

[90] *Id.* at 228.

"Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs."[91] The BIA declined to resolve the individual respondent's claim, instead remanding the case for redetermination by the IJ, while spending the rest of the decision clarifying the "social visibility" element required to prove membership in a PSG.[92] In an attempt to clarify prior precedent, the court chose to redefine the "social visibility" requirement by explaining it through "social distinction."[93] The court reasoned that the social visibility requirement had created confusion about whether literal visibility was a prerequisite for PSG definitions; the court instead clarified that it was unnecessary for an immutable characteristic to be visible to the naked eye.[94] Instead, social distinction requires only that the society in question understand the group as a recognizable component of that society.[95] The courts also rejected the previous requirement in *E-A-G-* that the group must demonstrate self-awareness to prove social visibility.[96]

C. The Element of Nexus

As a final consideration in proving persecution through PSG membership, the applicant also has the burden of proof for the nexus element—establishing persecution "on account of" their membership in their stated, protected PSG.[97] This nexus element must be proven by corroborating evidence as a separate element from establishing the applicant's membership in the protected PSG.[98] Although under the nexus standard the reasons for persecution can be mixed (including both protected and non-protected grounds), the applicant must prove that the established PSG was a central reason that the governmental or non-state actor persecuted the petitioner, not just "incidental, tangential, superficial, or subordinate to another reason."[99]

An example of the courts applying the nexus element is in *Matter of W-G-R-*, where a respondent seeking asylum claimed a well-founded fear of persecution based on the respondent's former membership in the Mara 18

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[91] *Id.*

[92] *Id.* at 227, 237–41.

[93] *Id.* at 236.

[94] *Id.* at 238; *see also id.* at 240 (clarifying that "[t]o be socially distinct, . . . [the PSG] must be perceived as a group by society. Society can consider persons to comprise a group without being able to identify the group's members on sight.").

[95] E-A-G-, 24 I. & N. Dec. 591, 595 (B.I.A. 2008) (defining social visibility as "the extent to which members of a society perceive those with the characteristic in question as members of a social group").

[96] *M-E-V-G-*, 26 I. & N. Dec. at 238 n.12.

[97] 8 U.S.C. § 1101(a)(42)(A).

[98] 8 U.S.C. § 1158(b)(1)(B)(i) (2012); R-A-, 22 I. & N. Dec. 906, 920 (Att'y Gen. 2001) (citing INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992)). In PSG asylum claims, asylum has often been denied on the basis of a lack of corroboration in proving a nexus between the persecution and the protected grounds. *See, e.g.*, Umaña-Ramos v. Holder, 724 F.3d 667, 674 (6th Cir. 2013); *infra* notes 189–97 and accompanying text.

[99] The protected grounds, once again, include race, nationality, religion, political opinion, and membership in a particular social group; non-protected grounds are anything falling outside of these five categories. *See, e.g.*, J-B-N- & S-M-, 24 I. & N. Dec. 208, 214 (B.I.A. 2007).

gang in El Salvador.[100] The respondent in the case alleged that he had been attacked twice after leaving the gang and, on one occasion, was shot in the leg by the gang members.[101] He asserted that he feared retaliation and persecution by the gang members for having renounced his membership in the gang.[102] Although the respondent's testimony was found to be credible by both the initial adjudicator and on appeal, he was denied asylum, in part, for failing to show "nexus" or proof that he was persecuted *on account* of his PSG membership.[103] The BIA claimed in their holding that, even assuming that the respondent was part of a PSG defined by former gang membership, "the record does not show that the retributive harm the respondent fears would bear a nexus to his status as a former gang member, as opposed to his acts in leaving the gang."[104] Decisions such as this only further confused the issue of nexus by failing to adequately pinpoint where the connection between the harm suffered or feared and the protected ground had failed.

In PSG asylum claims, the evidence must show that the persecutor did harm or will harm the asylum seeker because of their PSG characteristic.[105] Yet, in cases of crimes by private actors, it can be difficult for applicants to prove the motivations of their persecutors with hard evidence, since persecutors rarely fully explain their motives to their victims.[106] Therefore, despite the textual and historical inclusion of claims of asylum against private criminal actors, individual applicants often still face a high bar to gather the required evidence to prove the nexus element of their claim.[107] Taking this into consideration, courts have held that the persecution faced by the individual applicant must be understood in the overall context of the country in which it takes place.[108] The applicant may prove the purported reasons for persecution through both direct and circumstantial evidence, including (but not limited to) testimonial evidence, supporting documentation, and corroborative background evidence.[109] Courts will consider the full societal context, including the sociological, cultural, legal, and political aspects of the country in question.[110] Specifically, in cases involving domestic violence, the BIA held that, when considering the nexus element, it is proper to take into consideration the broader context of societal

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[100] *See generally* W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014).
[101] *Id.* at 209.
[102] *Id.*
[103] *Id.* at 209, 224.
[104] *Id.* at 224.
[105] 8 U.S.C. § 1158(b)(1)(B)(i) (2012); *see* Lopez-Zeron v. U.S. Dep't of Justice, 8 F.3d 636, 638 (8th Cir. 1993).
[106] Christian Cameron, Article: *Why do you Persecute Me? Proving the Nexus Requirement for Asylum*, 18 U. MIAMI INT'L & COMP. L. REV. 179, 180 (2011).
[107] 8 U.S.C. § 1158(b)(1)(B)(i); *see* Cameron, *supra* note 106, at 184.
[108] Al-Ghorbani v. Holder, 585 F.3d 980, 998 (6th Cir. 2009).
[109] *Id.* at 997.
[110] *See* A-R-C-G-, 26 I. & N. Dec. 388, 393 (B.I.A. 2014); *see* Bookey, *supra* note 59, at 7.

norms and whether the woman is able to leave her relationship.[111]

D. Final Requirements that the Government be Unwilling or Unable to Protect the Private Crime Victim or Inability to Relocate

Claims against government or government-sponsored acts are expressly included in the statutory definition of a "refugee," but the statute did not expressly limit the definition purely to victims of government or government-sponsored acts.[112] Because the statutory definition does not place specific requirements on who the persecutor must be, case law from the circuit courts and the BIA has filled in the gaps, repeatedly affirming that asylum law protects individuals against private criminal actors that the government in the applicant's home country cannot control.[113] Furthermore, circuit courts affirm that asylum law also protects individuals from private criminal acts when governments are unwilling to protect the victims of those crimes.[114]

This definition is further supported by looking into international sources of law and treatises. Asylum law is derived from the 1951 Refugee Convention to which the United States became a signatory in 1968.[115] Because the law is based on the Refugee Convention, the courts sometimes look beyond the text of the Convention, taking into consideration international sources of law to define the critical terms.[116] Similarly, courts often consult the United Nations Refugee Agency Handbook ("UNHCR Handbook") for guidance in defining aspects of refugee and asylum law.[117] Regarding persecution of a refugee, the UNHCR Handbook states that:

> Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. . . . Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they

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[111] *A-R-C-G-*, 26 I. & N. Dec. at 393; *see* Bookey, *supra* note 59, at 16.

[112] Brief Amici Curiae of Sixteen Former Immigration Judges and Members of the Board of Immigration Appeals Urging Vacatur of Referral Order and in Support of Respondent, at 16, A-B-, 27 I. & N. Dec. 316 (B.I.A. 2018) (No. 18043060), https://www.aila.org/infonet/amicus-brief-matter-of-a-b-.

[113] *See* Fauziya Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996); Kamar v. Sessions, 875 F.3d 811, 820 (6th Cir. 2017) (holding that the Jordanian government was unwilling or unable to protect the petitioner from a potential honor killing); Hor v. Gonzales, 421 F.3d 497, 501–02 (7th Cir. 2005) (holding that the threat of violence from a non-governmental guerrilla, militaristic group could constitute persecution).

[114] *See* Abay v. Ashcroft, 368 F.3d 634, 638–39 (6th Cir. 2004) (finding that "[f]orced female genital mutilation" by a woman's "relatives or future husband or her husband's relatives" constitutes persecution on account of PSG membership despite the country's laws against the practice because those laws were not enforced).

[115] *See* Cameron, *supra* note 106, at 180, 182.

[116] Abbott v. Abbott, 560 U.S. 1, 16–18 (2010).

[117] *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999) (holding that although the UNHCR Handbook is not binding authority over the Attorney General, the BIA, or United States courts, it is a useful interpretive aid); *see, e.g.*, Negusie v. Holder, 555 U.S. 511, 536–37 (2009).

> are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.[118]

Therefore, the standard suggested by international law, and that is mirrored in the INA, is a disjunctive test, requiring the applicant to prove either that the government is unwilling or unable to protect the victim from the private criminal actor.[119]

In addition to proving that the government of their home country is unwilling or unable to protect them from the private criminal actor, the applicant must prove that they are unable to relocate to another area in their home country.[120] These two requirements are demonstrated in an early BIA case, *In re Fauziya Kasinga*, in which the applicant sought asylum based on her fear that she would be subjected to female genital mutilation ("FGM") by her polygamous husband if she were returned to her home country of Togo, Africa.[121] The applicant testified that Togo was a small country and that her husband and other family members would be able to find her anywhere she went.[122] Additionally, she claimed that her husband was well-known in her country and had contacts and friends who were police.[123] The applicant was able to prove by affidavits from other relatives, country reports, and the testimony of a cultural anthropologist that Togo had a history of widespread human rights violations, especially regarding a high percentage of Togolese women who had been subjected to FGM (more than 50% of the female population), and that the police often do not intervene to stop acts of violence against women in Togo.[124] Based on this evidence, the BIA held that the applicant had met her burden of proof that the government was unwilling or unable to control her persecutors and that relocation within the country would expose the applicant to risk of persecution.[125]

II. The BIA Applies the Framework to Asylum Applicants Fleeing Domestic Violence

A. *Matter of A-R-C-G-*

In 2014, the BIA decided a seminal case, *A-R-C-G-*, involving a domestic violence claim where a married woman suffered abuse at the hands

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[118] *See* UNHCR HANDBOOK, *supra* note 49, at ¶ 65.

[119] *Id.*

[120] Abay v. Ashcroft, 368 F.3d 634, 636 (6th Cir. 2004) (finding the government unwilling or unable to control the private criminal actor despite the country's laws against FGM because those laws were intentionally not enforced as a practical matter).

[121] Fauziya Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

[122] *Id.* at 359.

[123] *Id.*

[124] *Id.* at 362.

[125] *Id.* at 367.

of her husband.[126] In this claim, the applicant defined the PSG as "married women in Guatemala who are unable to leave their relationship."[127] The respondent offered evidence showing severe incidents of abuse, beginning after the birth of the couple's first child and continuing on a weekly basis throughout the marriage.[128] The abuse of the respondent included repeated beatings (one of which broke her nose), brutal rapes, and an incident in which her husband doused her in paint thinner, burning the skin on her breasts.[129] Despite repeated calls to the police, the respondent was told by the officers that they would not interfere in marital relationships.[130] Furthermore, when the respondent tried to flee the abuse twice by relocating to other towns, her husband always found her and forced her to return home.[131] Despite her credible testimony, the IJ held that the respondent did not meet her burden of demonstrating eligibility for asylum because she lacked a showing of nexus to the PSG membership.[132] The IJ reasoned that there was inadequate evidence that her spouse abused her because of her PSG membership, instead ruling that he did so "arbitrarily" and "without reason."[133]

On appeal, the BIA addressed each element of the PSG membership analysis.[134] First, the court noted that the PSG group was composed of members sharing the common immutable characteristic of gender, referring to the *Acosta* court's holding that sex is an immutable characteristic.[135] Furthermore, the BIA stated that marital status could also be an immutable characteristic in the situation where an individual is unable to leave that relationship due to the particular facts and evidence relating to the society in question.[136] The court went on to espouse various factors that could be relevant to whether being married and unable to leave the relationship would qualify as immutable, such as religious, cultural, or legal constraints, as well as the respondent's own experiences and information regarding the specific country conditions.[137] In conclusion, the courts held that the applicant's PSG membership was based on the immutable characteristics of gender, in combination with marital status and being unable to leave her relationship.[138]

Second, the BIA addressed the particularity element of the

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[126] *See generally* A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014).
[127] *Id.* at 389.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at 389–90.
[133] *Id.* at 390.
[134] *Id.* at 392–95.
[135] *Id.* at 392; *see also* Fauziya Kasinga, 21 I. & N. Dec. 357, 376-77 (B.I.A. 1996) (holding that an applicant can establish membership in a PSG defined by gender in combination with other characteristics).
[136] *A-R-C-G-*, 26 I. & N. Dec. at 392–93.
[137] *Id.* at 393.
[138] *Id.* at 392–93.

respondent's PSG membership.[139] On appeal, even the DHS attorneys had conceded that the respondent had defined her PSG membership with particularity.[140] Yet, in addition to accepting DHS's concession, the BIA also evaluated the particularity element commenting that "[t]he terms used to describe the group—'married,' 'women,' and 'unable to leave the relationship'—have commonly accepted definitions within Guatemalan society based on the facts in this case, including the respondent's experience with the police."[141] The court went on to explain that, although those terms may not show particularity in isolation, when combined to create a group, the terms create "discrete and definable boundaries."[142] Furthermore, the court noted that the respondent correctly defined the PSG membership non-circularly—or without including the risk of persecution as a limiting characteristic—in other words, by not defining the PSG as *married women who are victims of domestic violence*.[143] The court further restated that in evaluating the particularity element, it was necessary to take into consideration the social and cultural context of the respondent's country of nationality, looking to the relevant country reports about Guatemalan societal problems in which sexual offenses against women and lack of police intervention formed major human rights concerns.[144]

Lastly, the BIA determined that the PSG group, as defined, was socially distinct.[145] The BIA reasoned that, to have social distinction, the group must be recognizable under the perception of the society in question.[146] The court reasoned that both the particularity element and social distinction element will have "some degree of overlap . . . because both take societal context into account."[147] For the social distinction element, the respondent offered proof that the Guatemalan government recognized (1) the societal problems with gender-based violence, (2) the need to provide both stronger victim protection as well as enhanced criminal penalties for perpetrators, and (3) the ineffective enforcement of current Guatemalan laws against gender-based violence.[148] This lack of enforcement stemmed from various sources, including a lack of prosecution of these domestic violence crimes and a lack of response from the civilian police and others tasked to investigate and respond to these crimes.[149] Based on the evidence presented, the court concluded that the "culture of 'machismo and family violence'" including

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[139] *Id.* at 393.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.* at 393 n.14.
[144] *Id.* at 393.
[145] *Id.* at 394.
[146] *Id.* (citing M-E-V-G-, 26 I. & N. Dec. 227, 242 (B.I.A. 2014)).
[147] *Id.*
[148] *Id.* at 394 (citing Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008)).
[149] *Id.* (citation omitted).

"[s]exual offenses, [such as] spousal rape, remain a serious problem."[150] Although the case was remanded on other grounds, the BIA held conclusively that the "respondent, a victim of domestic violence in her native country, is a member of a particular social group composed of 'married women in Guatemala who are unable to leave their relationship.'"[151]

B. Post *Matter of A-R-C-G-*

The decision in *A-R-C-G-* was the first published decision in which a PSG membership was approved for a domestic violence survivor and constituted binding precedent for IJs and asylum officers.[152] Advocates hoped that this decision would open the doors of asylum to other domestic violence survivors who had similar PSG membership designations, as well as create more consistency in adjudication of these claims amongst IJs.[153] Unfortunately, asylum adjudications continued to be plagued with arbitrary and inconsistent outcomes as the decision still left a significant amount of discretion to individual IJs.[154] The inconsistencies in application of *A-R-C-G-* were deepened by the fact that many subsequent BIA decisions regarding domestic violence survivors went unpublished, making it difficult for IJs to see how other IJs applied the standards.[155] IJs also differed in their conclusions about whether the principles of *A-R-C-G-* applied to unmarried women or to victims applying for asylum from countries other than Guatemala.[156] Therefore, despite the legal principle communicated through the decision in *A-R-C-G-* that domestic violence may serve as a basis for PSG asylum claims, the application of this principle remained muddled and highly dependent on which jurisdiction heard the claim.[157] In courtrooms where the IJ was notoriously harsh toward asylum applications, claims based on domestic violence still faced an uphill battle.[158]

Such was the case in the early adjudication of *A-B-*, which was originally heard in the courtroom of Judge V. Stuart Couch in the Charlotte Immigration Court.[159] Judge Couch's record on asylum adjudications included the denial of eighty-five percent of asylum cases appearing in his

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[150] *Id.*

[151] *Id.* at 388–89.

[152] *See* Bookey, *supra* note 59, at 6.

[153] *Id.* at 2.

[154] *Id.* at 19.

[155] *Id.* at 10.

[156] *See* Johanna K. Bachmair, Note, *Asylum at Last?:* Matter of A-R-C-G-*'s Impact on Domestic Violence Victims Seeking Asylum*, 101 CORNELL L. REV. 1053, 1078 (2016).

[157] *See* Bookey, *supra* note 59, at 4.

[158] *See, e.g.*, Tal Kopan, *Judge in Case Sessions Picked for Immigrant Domestic Violence Asylum Review Issued 'Clearly Erroneous' Decisions, Says Appellate Court*, CNN (Apr. 28, 2018, 9:44 AM), https://www.cnn.com/2018/04/28/politics/jeff-sessions-immigration-courts-domestic-violence-asylum/index.html.

[159] *See* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 7.

courtroom.[160] In December of 2015, Judge Couch first heard the case for A-B- and denied the petition for asylum, making adverse findings in nearly all elements of A-B-'s claim.[161] On December 8, 2016, the BIA reversed Judge Couch's denial of asylum to A-B-, concluding that her definition of PSG was substantially similar to the PSG approved in *A-R-C-G-* and determining A-B- was eligible for asylum based on that past precedent.[162] The case was then remanded to Judge Couch for completion of background checks for A-B- and final judgment in the case.[163]

Ignoring the mandate from the BIA, Judge Couch instead certified the case back to the BIA, expressing concern about the validity of *A-R-C-G-*'s application based on the possible effects of another decision in *Velasquez v. Sessions*, especially in regards to the nexus element.[164] Yet, this concern had no basis since the nexus element was never at issue in *A-R-C-G-* because the government conceded that nexus between the PSG group and the persecution did exist.[165] At some point during this exchange between Judge Couch and the BIA, former AG Sessions learned of the decision and certified the case of *A-B-* to himself for further review, asking for briefings from amici about whether victims of private criminal activity can constitute cognizable PSGs for petitions of asylum and withholding of removal.[166]

Three months later, Sessions released his decision in *A-B-*, overruling *A-R-C-G-* on the premise that the decision in *A-R-C-G-* was a product of concessions by DHS and that the BIA had failed to complete a thorough evaluation of each element as required by law.[167] Yet, the decision in *A-B-* was riddled with misguided analysis regarding the individual elements of asylum law and troublesome dicta, further casting doubt and confusion on the courts regarding how to deal with domestic violence based PSG claims, as well as other claims based on persecution by private criminal actors.[168]

ANALYSIS

III. The Former AG's decision in Matter of A-B- *and its Effect on the Sixth Circuit*

Former AG Jeff Sessions certified *A-B-* for his own adjudication after

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[160] *See* Kopan, *supra* note 158; *see also* Bryan Johnson, *A Look Behind the Curtain at V. Stuart Couch, the Immigration Judge at the Heart of* Matter of A-B-, LEXISNEXIS LEGAL NEWS ROOM (Apr. 20, 2018), https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/posts/a-look-behind-the-curtain-at-v-stuart-couch-the-immigration-judge-at-the-heart-of-matter-of-a-b.

[161] *See* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 7.

[162] *See* 2016 Decision of B.I.A. in *A-B-*, *supra* note 32, at 1.

[163] *Id.* at 4.

[164] *See* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 7 n.5.

[165] *Id.*

[166] A-B-, 27 I. & N. Dec. 227, 227 (Att'y Gen. Mar. 7, 2018).

[167] A-B-, 27 I. & N. Dec. 316, 317 (B.I.A. June 11, 2018).

[168] *See* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 8.

many IJs and circuit courts had begun to find domestic violence survivors eligible for asylum based on the ruling in *A-R-C-G-*.[169] Despite the fact that an AG's certification of a BIA case is typically meant to clarify the process of analysis for immigration claims, the former AG's decision in *A-B-* only complicated the evaluation of asylum claims through a combination of flawed analysis, conflation of elements of an asylum claim, and harmful dicta.

Sessions's use of flawed and contradictory reasoning imposed impermissibly high standards for domestic violence survivor asylum applicants that violate Sixth Circuit precedent. In order to evaluate the effect of *A-B-* in the Sixth Circuit, courts must revert back to the pre-*A-R-C-G-* case law to analyze whether *A-B-*'s holdings are consistent with prior precedent and thus able to be upheld. Many of Sessions's statements as to the evaluation of some elements in an asylum claim conflict with Sixth Circuit precedent including: (1) the persecution element and the definition of a PSG membership; (2) the nexus element; and (3) the unwilling or unable to control standard.[170] Through this comparative analysis, this Comment will show that the precedential effect of more than a decade's worth of decisions within the Sixth Circuit restores the right of domestic violence survivors to bring their claims before IJs to be adjudicated on their own merit and thereby mitigates the harmful effects of Sessions's decision in *A-B-*.

A. Definition of the Applicant's PSG Membership and the Element of Persecution in *Matter of A-B-*

1. Social Distinction in *Matter of A-B-*

In *A-B-*, Sessions stressed that the courts should evaluate an asylum applicant's PSG claim, not by applying a new test, but by vigorously evaluating the PSG sub-elements of the current test—immutability, particularity, and social distinction—the same analysis that the courts had used for the last decade.[171] Although the definition of the PSG membership must conform to all three requirements, Sessions focused his analysis of *A-R-C-G-*'s PSG membership on the elements of particularity and social distinction.[172]

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[169] A-B-, 27 I. & N. Dec. 227, 227 (Att'y Gen. Mar. 7, 2018).

[170] When an element is not expressly discussed by Sessions in *A-B-*, the Comment highlights the omission of the analysis on that particular element in an explanatory footnote in the corresponding section.

[171] *See generally* S-E-G-, 24 I. & N. Dec. 579 (B.I.A. 2008); E-A-G-, 24 I. & N. Dec. 591 (B.I.A. 2008); M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014).

[172] Because the AG's decision is silent regarding whether marital status or the inability of a woman to leave her relationship can qualify as immutable characteristics, this Comment will not spend time analyzing these elements. *See* A-B-, 27 I. & N. Dec. 316, 331 (B.I.A. 2018) (citing A-R-C-G-, 26 I. & N. Dec. 388, 392–93 (B.I.A. 2014)). The BIA's conclusion in *A-R-C-G-* was that the applicant's PSG was immutable because the women shared the common characteristics of gender and marital status; gender has long been considered an immutable characteristic both by the BIA and the Sixth Circuit. *See* Acosta, 19 I. & N. Dec. 211, 232 (B.I.A. 1985); Bi Xia Qu v. Holder, 618 F.3d 602, 607 (6th Cir. 2010) ("The term 'particular

However, Sessions relied on flawed reasoning when attacking the BIA's assessment of the social distinction element in the decision of *A-R-C-G-* by stating that the BIA engaged in a cursory analysis of the social distinction prong, despite the court's lengthy discussion of the relevant evidence.[173] Sessions criticized the caliber of the evidence analyzed by the BIA in *A-R-C-G-*, suggesting that the following evidence was inconclusive regarding the social distinction evaluation: (1) that Guatemala has a "culture of machismo and family violence;" and (2) that although criminal offenses have been established in Guatemalan law to help prohibit domestic violence, the enforcement of these laws is often ineffective, as evidenced by the fact that the Guatemalan police routinely fail to respond to requests for assistance from victims of domestic violence.[174]

Furthermore, Sessions's criticism of the evidence used by the court in *A-R-C-G-* is baseless, as the BIA prescribed the use of these same types of evidence in *M-E-V-G-*, the defining social distinction case.[175] The BIA held in *M-E-V-G-* that evidence admitted to establish both particularity and social distinction can include: "country condition[] reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like."[176] The BIA reiterated in *A-R-C-G-* that the element of social distinction should be analyzed under the specific facts and evidence on a case-by-case basis and that the above evidence should be assessed along with the victim's individual experiences.[177]

The BIA added that various socio-political factors can be used to determine social distinction, as well as an analysis of whether the laws of the society both reflect an attempt to protect victims of domestic violence and "whether those laws are effectively enforced."[178] Applying these evidentiary standards, the BIA then evaluated all the country report information in *A-R-C-G-*, as well as the unrebutted evidence that, despite an attempt by the laws enacted in the victim's home country, high rates of sexual violence, spousal rape, and domestic violence in Guatemala still existed.[179] The BIA concluded that based on this unrebutted evidence, PSG membership based on domestic violence against women and the inability to leave the relationship was cognizable due to country conditions stemming from Guatemalan cultural

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social group' is broad enough to encompass groups whose main shared trait is a common one, such as gender, at least so long as the group shares a further characteristic that is identifiable to would-be persecutors and is immutable or fundamental."). Additionally, marital status becomes an immutable characteristic when the applicant is unable to leave the relationship based on social, economic, cultural, or other factors. *See supra* notes 135–38 and accompanying text.

[173] *A-B-*, 27 I. & N. Dec. at 331–32 (citing *A-R-C-G-*, 26 I. & N. Dec. at 394).

[174] *Id.* at 331–32, 336.

[175] *Id.* at 336; M-E-V-G- 26 I. & N. Dec. 227, 244 (B.I.A. 2014); *see* discussion *supra* Section I.B.3.

[176] *M-E-V-G-*, 26 I. & N. Dec. at 244.

[177] *A-R-C-G-*, 26 I. & N. Dec. at 394–95.

[178] *Id.* at 394.

[179] *Id.*

norms and societal acquiescence to domestic violence.[180]

Because Sessions's criticism of the use of reports detailing country conditions in *A-R-C-G-* contradicts BIA precedent, the same criticism of the use of these country reports to establish social distinction in *A-B-* is similarly deeply flawed. The former AG claimed that the BIA's statement concluding that the PSG was "substantially similar to that which [the BIA] addressed in *Matter of A-R-C-G-*" was conclusory.[181] He further added that because of DHS's concessions to two of the three elements to establish the PSG, the BIA did not offer a full analysis of the elements needed to establish the proposed group.[182] Yet, Sessions ignored the statements by the BIA that pointed to their evaluation of the totality of the evidence in the case, specifically to the *2014 El Salvador Human Rights Report*.[183] In the BIA decision, the adjudicators address specific information in the 2014 Report that "violence against women, including domestic violence, is a 'widespread and serious problem,' and that the government's efforts to combat it were 'minimally effective.'"[184] There was substantial evidence in the report lending to the fact that the PSG group described by the respondent was recognized and identified by the Salvadoran government as being one that is individually vulnerable to private criminal acts.[185] The reports detailed the ways that the violence was individualized toward this demographic.[186] The report further detailed that, although laws have been established to protect these types of victims, the laws were essentially ineffective.[187] Therefore, because the BIA relied on the exact type of evidence established in *M-E-V-G-* to prove this prong of the test and that evidence was substantial in detailing the problems of domestic violence toward women in El Salvador, Sessions's generalized conclusion that the evidentiary support of A-B-'s claim was somehow lacking in substance—which subsequently led him to assert an adverse finding on the social distinction prong of her claim—was erroneous.[188]

Furthermore, the Sixth Circuit often relies on this type of evidence when evaluating the social distinction element in these asylum claims. In *Umaña-Ramos*, the Sixth Circuit dealt in depth with the social distinction

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[180] *Id.* at 394–95 (citing *Guatemala Failing Its Murdered Women: Report*, CANADIAN BROAD. CORP. NEWS (July 18, 2006, 11:22 AM), https://www.cbc.ca/news/world/guatemala-failing-its-murdered-women-report-1.627240).

[181] Matter of A-B-, 27 I. & N. Dec. 316, 332 (B.I.A. 2018).

[182] *See id.* at 331; 2016 Decision of B.I.A. in *A-B-*, *supra* note 32, at 4.

[183] *A-B-*, 27 I. & N. Dec. at 332 (citing U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2014, https://www.state.gov/documents/organization/236900.pdf).

[184] 2016 Decision of B.I.A. in *A-B-*, *supra* note 32, at 4 (citing U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2014, EL SALVADOR 2014 HUMAN RIGHTS REPORT, https://2009-2017.state.gov/documents/organization/236900.pdf).

[185] 2016 Decision of B.I.A. in *A-B-*, *supra* note 32, at 4; *see also* U.S. DEP'T OF STATE, *supra* note 184.

[186] 2016 Decision of B.I.A. in *A-B-*, *supra* note 32, at 4.

[187] *Id.*

[188] *A-B-*, 27 I. & N. Dec. at 331.

element in a case based on a PSG membership defined by "young Salvadoran men who have refused to join the Maras."[189] The petitioner in this case had been consistently recruited by this gang while in El Salvador under threat of beatings and possible death if he continued to refuse.[190] He sought relief based on a fear that upon returning to El Salvador, he would be immediately visually recognizable as someone who had refused to join the gang.[191] In their holding, the Sixth Circuit found that this PSG membership was not cognizable under the INA.[192] First, the Sixth Circuit rejected the on-sight social visibility standard that the applicant stated, which was only used in cases prior to *S-E-G-* and *E-A-G-*.[193] The court clarified that the evaluation of this element in this circuit is based on whether society perceives the group as a distinct segment of society, not whether the petitioner would be recognized on-sight.[194]

Moreover, the Sixth Circuit rejected the evidence supplied by the petitioner suggesting that the group of gang-threatened youths are a distinct segment of Salvadoran society.[195] The court ruled that although this evidence, in the form of country reports, newspaper articles, and a human rights report, was admissible to evaluate this element, these specific reports tended to support the fact that gang violence and crime were widespread and thereby not limited to young men who have resisted recruitment.[196] The court reasoned that this evidence failed to suggest that the PSG would be perceived by others as a distinct segment of the Salvadoran population.[197]

Yet, in *Bi Xia Qu v. Holder*, the Sixth Circuit found that evidence, in the form of a 2005 Department of State's country report on China, supported the social distinction element of the petitioner's PSG membership because it proved that women who were victims of involuntary servitude and forced marriage were an identifiable and visible group in China.[198] Therefore, these holdings show that the Sixth Circuit regularly accepts country condition reports and other human rights related evidence, as long as that evidence

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[189] Umaña-Ramos v. Holder, 724 F.3d 667, 669 (6th Cir. 2013). "Maras" refers to the Mara Salvatrucha gang which started in the United States and has spread to various locations within Central America. Don Winslow, *MS-13 Was Born in the USA*, DAILY BEAST (Feb. 28, 2019, 11:57 PM), https://www.thedailybeast.com/ms-13-was-born-in-the-usa.

[190] *Umaña-Ramos*, 724 F.3d at 669.

[191] *Id.* at 669, 672.

[192] *Id.* at 674. *See also* Palokaj v. Holder, 510 F. App'x 464, 468 (6th Cir. 2013) (holding that perceived wealth cannot establish the social distinction of a PSG). *See also* Diaz-Hernandez v. Holder, 635 F. App'x 159, 161 (6th Cir. 2015) (holding that perceived wealth does not meet the social visibility/distinction prong of the PSG test).

[193] *Umaña-Ramos*, 724 F.3d at 673. *See* discussion *supra* Section I.B.2–3.

[194] *Umaña-Ramos*, 724 F.3d at 672.

[195] *Id.* at 674.

[196] *Id.*

[197] *Id.*; *see also* Menijar v. Lynch, 812 F.3d 491, 499 (6th Cir. 2015) (holding that the evidence on record only established El Salvador as one of the most dangerous countries in the world, not that the PSG was socially distinct in Salvadoran society). *But see* Bi Xia Qu v. Holder, 618 F.3d 602, 607 (6th Cir. 2010).

[198] *Bi Xia Qu*, 618 F.3d at 607.

establishes the necessary standards required to fulfill the social distinction analysis.

2. Particularity in *Matter of A-B-*

Sessions also conflated the element of particularity and social distinction improperly in *A-B-*, by applying the standards of social distinction within his analysis of the particularity element. Sessions's conflation of these two elements was similar to the confusion in some circuit courts, which was introduced when the BIA first included these two elements in the PSG analysis in the cases *S-E-G-* and *E-A-G-*.[199] To support his argument, Sessions cited three BIA decisions to challenge the determination of the particularity element in *A-R-C-G-*: *Matter of R-A-*, *S-E-G-*, and *E-A-G-*.[200] Regarding the particularity element, Sessions summarizes that the main conclusion from these three cases is the notion that a cognizable PSG will be a "discrete class of persons" recognized within the society in question.[201] This definition is particularly troublesome as it conflates particularity (describing the size and boundaries of the group) with the social distinction of the group (whether the group is recognized by the society). This definition is problematic because in *R-A-* and *E-A-G-*, the particularity element was not extensively analyzed, and in *S-E-G-*, particularity was analyzed but only together with the social visibility element.[202] Decisions such as these have caused some IJs to conflate the two concepts over time.[203] This confusion between the two elements of particularity and social distinction/visibility is the prime reason that some jurisdictions have declined to evaluate these elements in a separate analysis.[204]

Furthermore, it is troubling that Sessions focused a significant part of his analysis in *A-B-* on the flawed analysis in *R-A-*, a decision vacated under prior AGs Janet Reno and Michael Mulasky, which resulted in the applicant

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[199] *See* A-B-, 27 I. & N. Dec. 316, 330 (B.I.A. 2018). As discussed earlier, the particularity element goes to establishing the boundaries of the group, whereas the social distinction element goes to establishing whether the group is recognizable and understood by others in the society as a social group. *See* discussion *supra* Section I.B.2.

[200] *A-B-*, 27 I. & N. Dec. at 330–31.

[201] For example, in *S-E-G-*, the BIA determined that the petitioner's PSG must be described in a manner sufficiently particular such that the size of the PSG cannot be "too amorphous . . . to create a benchmark for determining group membership." S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (citing A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 76 (B.I.A. 2007); C-A-, 23 I. & N. Dec. 951, 960 (B.I.A. 2006), *aff'd sub nom.* Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006)).

[202] For example, in the first case cited, *Matter of R-A-*, the BIA decision failed to specifically address the particularity element, only generally stating that the PSG was "defined largely in the abstract," and instead spoke more to the lack of social distinction as the principal reason the BIA claimed that the petitioner's asylum claim had failed. 22 I. & N. Dec. 906, 917-18 (B.I.A. 1999). Furthermore, in *E-A-G-*, the BIA specifically sought to clarify and define the social visibility element (the prior concept which was refined later by the BIA into the social distinction element) of defining the PSG—and did not address particularity. 24 I. & N. Dec. 591, 594 (B.I.A. 2008); *see* discussion *supra* Section I.B.2–3.

[203] *See* NIJC PSG PRACTICE ADVISORY, *supra* note 70, at 2–3; Henriquez-Rivas v. Holder, 707 F.3d 1081, 1090–91 (9th Cir. 2013) (acknowledging the conflation of the social visibility and particularity tests in certain decisions).

[204] *See supra* note 59, 87–88 and accompanying text.

being granted asylum in 2009.[205] Applying the flawed reasoning in *R-A-* and similar cases conflating the particularity element with social distinction, Sessions questioned whether the BIA's finding that the terms, "married," "women," and "unable to leave the relationship," which defined the PSG both in *A-R-C-G-* and *A-B-*, had commonly accepted definitions within either Guatemalan or El Salvadoran society.[206] Sessions's criticism here addressed elements of the *social distinction* element, yet led him to conclude that the BIA determination was likely insufficient to prove the element of *particularity*.[207]

While admitting the fact that the evidentiary proof used to establish these two separate elements has a tendency to overlap at times, the BIA has insisted that the particularity and social distinction elements are distinguishable and that each element must be proven independently by the applicant to qualify for PSG membership.[208] So how should the courts evaluate domestic violence claims based on the particularity element? In the Sixth Circuit, two considerations have emerged in the analysis of these claims. First, the PSG membership cannot be overly broad or amorphous.[209] Second, the PSG must not be circularly defined, but instead the group must share a limiting characteristic that does not include the persecution itself.[210]

In *Rreshpja*, an applicant petitioned for asylum based on the persecution that she suffered under the PSG membership defined as "young (or those who appear to be young), attractive Albanian women who are forced into prostitution."[211] Her fear of persecution was based on an incident in Albania in which an unknown assailant had attempted to kidnap her while she was walking home from school.[212] As she narrowly escaped from the attack, the assailant reportedly threatened the applicant that he would be back to complete the kidnapping and force her into prostitution in Italy.[213] Soon after, she fled for the U.S.[214] Here, the Sixth Circuit held that the applicant's claim for asylum failed both because the PSG was defined too broadly with a

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[205] In the opinion, AG Sessions concedes that *Matter of R-A-* was vacated but adds that some courts continue to rely on its analysis. A-B-, 27 I. & N. Dec. 316, 329 (B.I.A. 2018) (citing *Henriquez-Rivas*, 707 F.3d at 1090 n.11). As a result of decisions by AG Reno and AG Mukasey, the applicant from *R-A-* was granted asylum under her PSG membership of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" in December 2009, fifteen years after her initial petition was filed. R-A-, 24 I. & N. Dec. 629, 629 (Att'y Gen. 2008); *see also* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 3, 12.

[206] *A-B-*, 27 I. & N. Dec. at 331 (citing A-R-C-G-, 26 I. & N. Dec. 388, 393 (B.I.A. 2014)).

[207] *Id.*

[208] *See generally* M-E-V-G-, 26 I. & N. Dec. 227, 240–41 (B.I.A. 2014); W-G-R-, 26 I. & N. Dec. 20 (B.I.A. 2014); NIJC PSG PRACTICE ADVISORY, *supra* note 70.

[209] Escobas-Batres v. Holder, 385 F. App'x 445, 447 (6th Cir. 2010).

[210] Rreshpja v. Gonzalez, 420 F.3d 551, 556 (6th Cir. 2005).

[211] *Id.* at 553, 555.

[212] *Id.* at 553.

[213] *Id.*

[214] *Id.*

"generalized, sweeping classification[]" and the PSG's circular definition.[215] The court held that the limiting characteristic of the PSG membership cannot be narrowed only by the fact that the members of the proposed PSG suffered persecution.[216] The court reasoned that to remove the circularity from this particular PSG definition, the group would be defined as "young, attractive Albanian women[,]" and this PSG definition would be overbroad.[217]

This circularity argument was adopted by the former AG in his criticism of the PSG designation in *A-R-C-G-*.[218] Sessions adduced that the PSG "married women in Guatemala who are unable to leave their relationship" was equivalent to a circular definition, as it implied that the women were victims of domestic abuse, on account of the fact that the inability to leave was connected to the threat of further violence at the hands of their abuser.[219] In the same vein as other characteristically overbroad statements of dicta that are haphazardly spread throughout the bulk of the opinion, Sessions then asserted that PSGs that are defined by their "vulnerability to private criminal activity likely lack the particularity required under *M-E-V-G-*, given that broad swaths of society may be susceptible to victimization."[220]

This flawed circularity argument fails under well-established Sixth Circuit precedent. A decision showing the Sixth Circuit's willingness to include some aspect of the persecution in the PSG definition is *Kamar v. Sessions*.[221] Although the court declined to make a formal ruling as the BIA had not yet made an initial decision on whether the applicant's PSG was properly defined, the court assumed that the PSG was proper.[222] Here, the court compared the applicant's PSG to the one defined in *Sarhan v. Holder*, where an applicant petitioned for asylum based on her well-founded fear of persecution due to membership in the PSG defined as "women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing."[223] In *Sarhan*, the Seventh Circuit rejected the BIA assessment that the PSG membership was circularly defined because the limiting characteristic that narrowed the PSG included the persecution they

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[215] *Id.* at 555–56.

[216] *Id.* at 556.

[217] *Id.*

[218] A-B-, 27 I. & N. Dec. 316, 334–35 (B.I.A. 2018) (quoting M-E-V-G-, 26 I. & N. Dec. 227, 236 n.11, 243 (B.I.A. 2008)).

[219] *A-B-*, 27 I. & N. Dec. at 334–35.

[220] *Id.* at 334–35.

[221] Kamar v. Sessions, 875 F.3d 811, 818 (6th Cir. 2017).

[222] *Id.* (citing Gonzales v. Thomas, 547 U.S. 183, 185–86 (2006) (holding that the BIA must make an initial determination about whether the PSG is cognizable)).

[223] *Id.* (citing Sarhan v. Holder, 658 F.3d 649, 655 (7th Cir. 2011)). The PSG as defined by the BIA in *Kamar* was "women who, in accordance with social and religious norms in Jordan, are accused of being immoral criminals and, as a consequence, face the prospect of being killed or persecuted without any protection from the Jordanian government." *Id.* (quoting *Sarhan*, 658 F.3d 654).

faced—that the women were targets for honor killings.[224] The court reasoned that this PSG definition did survive the scrutiny of particularity because the violence against these women resulted from social stigma, in which the society itself finds the violence carried out by family members to be acceptable as an appropriate punishment for the woman's aberrant, deviant behavior.[225] Although a formal ruling on the PSG membership in *Kamar* was not made, the Sixth Circuit relied heavily on similar reasoning throughout its decision to grant review of her petition.[226]

Furthermore, the Sixth Circuit has previously upheld memberships in which the PSG group was defined by some aspect of the future fear of retaliation: women who feared future female genital mutilation, former gang members who face persecution after quitting the gang, and women who are at risk of involuntary servitude and forced marriage.[227] These precedents foreclose Sessions's overbroad statement against the PSG designation in *A-R-C-G-* that survivors of private criminal actors, such as domestic violence victims, cannot overcome the circularity argument. Therefore, through the willingness to entertain the PSG defined in *Kamar* and the previously mentioned Sixth Circuit decisions above, the Sixth Circuit has recognized PSG designations in the past that include some amount of the persecution in their definition, especially when the applicant can show that the type of violence against the victim is socially or culturally accepted by the society in question.[228] Therefore, through analogy, the Sixth Circuit could very well recognize that domestic violence-based PSG memberships could be partially defined by the persecution suffered under similar circumstances of social acquiescence.

3. Well-Established Fear of Past Persecution or Fear of Future Persecution in *Matter of A-B-*

In his discussion of the persecution element of an asylum claim, Sessions conflated asylum elements into the definition of persecution, a mistake which could cause confusion and misapplication in the courts.[229] This portion of the former AG's decision is amongst the most confusing sections in his opinion. Here, AG Sessions confused different asylum elements, suggesting that "persecution" can be established by proving: (1) intent to target a protected belief or characteristic (nexus/PSG); (2) persecution at a level of harm that is sufficiently severe; and (3) harm to the victim either

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[224] *Sarhan*, 658 F.3d at 655–56.

[225] *Id.* at 656.

[226] *Kamar*, 875 F.3d at 817–20.

[227] Fauziya Kasinga, 21 I. & N. Dec 357, 368 (B.I.A. 1996) (holding on FGM); Urbina-Mejia v. Holder, 597 F.3d 360, 366–67 (6th Cir. 2010) (holding on former gang membership); Bi Xia Qu v. Holder, 618 F.3d 602, 607–08 (6th Cir. 2010) (holding on women in forced marriages).

[228] *Kamar*, 875 F.3d at 818 (citing *Sarhan*, 658 F.3d at 655).

[229] *See* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 10.

caused by the government of a country or by an actor that the government is unwilling or unable to control.[230] The problem with this delineation of elements is that the definition of persecution then becomes circularly defined with the inclusion of persecution as one of the elements to prove persecution.[231] Instead, these three elements all require a separate evaluation by the courts, based on the proof presented by each asylum applicant in order to successfully assert their claim.[232] The AG's conflation of the elements into the definition of persecution may be caused by the way various circuit courts of appeal have used shorthanded references to "past persecution" when discussing the need for a petitioner to establish that they have a "presumed fear of future persecution based on 'past persecution.'"[233]

To clarify this point, the INA and Sixth Circuit case law both state that the petitioner can qualify as a refugee if the petitioner can establish that "either . . . he has suffered *actual past persecution* or because he has a *well-founded fear of future persecution*."[234] To establish past persecution, a petitioner can prove that the harm they experienced was related to their PSG membership, on account of that membership, and that the government was unwilling and unable to control the private actor's criminality toward the victim. Proving past persecution creates a presumption of well-founded fear of future persecution.[235] The government may then rebut this presumption of well-founded fear by establishing by a preponderance of the evidence that the petitioner's country conditions have significantly improved, and the persecution no longer occurs or that the applicant can relocate to another area of the country to avoid the persecution.[236] If the applicant shows past persecution, but that persecution does not relate to the PSG or nexus, the applicant is not eligible for asylum.

On the other hand, the petitioner can also establish persecution under the statute by showing a well-founded fear of future persecution without having to establish incidents of past persecution.[237] Here, the petitioner must establish: (1) that he has a fear of persecution on account of his PSG membership; (2) there is a reasonable possibility that he will suffer such persecution if he were to return to his country; and (3) he is unwilling or unable to return to the country because of that fear.[238] The petitioner must show both subjective and objective components of future fear, but the future

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[230] A-B-, 27 I. & N. Dec. 316, 337 (B.I.A. 2018).

[231] *Id.*

[232] *See* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 10.

[233] *Id.*

[234] Mikhailevitch v. INS, 146 F.3d 384, 389 (6th Cir. 1998) (citing 8 C.F.R. § 208.13(a)–(b) (1997)) (emphasis added).

[235] *Id.*

[236] *Id.* Since the AG did not address the internal relocation element in *Matter of A-B-*, this Comment will not analyze how the Sixth Circuit has chosen to treat this element either. *See* Martinez-Martinez v. Sessions, 2018 U.S. App. LEXIS 20513 *1, *11–13 (B.I.A. July 24, 2018).

[237] 8 C.F.R. § 208.13(b)(2).

[238] *Mikhailevitch*, 146 F.3d at 389.

fear can be established even if the petitioner has less than a 50% chance of the violence against him taking place.[239] By relying on well-founded fear of future persecution, the applicant does not need to establish specific incidents of past persecution, only fear that future persecution will occur.

BIA precedent and circuit court case law state that past or future persecution must include severe levels of harm.[240] Also, past and future persecution under the asylum statute "does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional."[241] Although in *A-B-* Sessions conceded that the level of "repugnant abuse by her ex-husband [was] sufficiently severe," he questioned the ability of victims of private violence to effectively establish the past persecution element because it would be difficult for them to prove that the government was unwilling or unable to control the private misconduct.[242]

Yet, the Sixth Circuit and the BIA have consistently expressed preference that the individual's "well-founded fear of persecution" be adjudicated on a case-by-case basis in accordance with prior precedent.[243] In *Melaj v. Mukasey*, the Sixth Circuit discussed in-depth the applicant's burden in establishing the element of persecution.[244] In this case, an Albanian former police officer was seeking asylum based on a fear of future persecution due to the past infliction of beatings and torture on the victim by his fellow police officers after he refused to shoot into a crowd during a political protest.[245] The Sixth Circuit rejected the adoption of a rigid, bright-line rule to define "persecution," concluding that such a definition would exclude certain types of oppression falling outside the bright-line rule's scope.[246]

Instead, the Sixth Circuit preferred evaluating persecution case-by-case to determine whether the alleged persecution that each individual applicant suffered was sufficiently harmful.[247] The court referenced the legislative intent of Congress to leave a bit of ambiguity in the term "persecution" so as to allow individualized determinations based on the facts of each case.[248] The *Melaj* court reiterated that Sixth Circuit precedent

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[239] Perkovic v. INS, 33 F.3d 615, 621 (6th Cir. 1994) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987)); Daneshvar v. Ashcroft, 355 F.3d 615, 623–24 (6th Cir. 2004) (holding that well-founded fear must be both "subjectively genuine and objectively reasonable").

[240] A-B-, 27 I. & N. Dec. 316, 337 (B.I.A. 2018) (quoting T-Z-, 24 I. & N. Dec. 163, 172–73 (B.I.A. 2007)).

[241] *Id.* (citing Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993)).

[242] *Id.* (citing Hor v. Gonzales, 400 F.3d 482, 485 (7th Cir. 2005)); *see infra* Section III.C. This dicta will be addressed under the element of unwilling or unable to control. *See infra* Section III.C.

[243] Melaj v. Mukasey, 282 F. App'x 354, 359 (6th Cir. 2008) (referencing H.R. REP. NO. 95-1452, at 7 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4700, 4706).

[244] *Id.* at 358–60.

[245] *Id.* at 355.

[246] *Id.* at 359 (referencing H.R. REP. NO. 95-1452, at 7).

[247] *Id.*

[248] *Id.* "It is the intention of the committee that determinations be made on a case-by-case basis in accordance with the case law . . . . When a member of a protected class suffers officially sanctioned harm

requires that, although applicants must prove more than "a few isolated incidents of verbal harassment or intimidation" (especially when not accompanied by any infliction of harm), even isolated single events can constitute persecution if sufficiently severe.[249] The court went on to suggest that punishment involving suffering or harm can both qualify as persecution.[250] Consequently, the Sixth Circuit overturned the BIA's adverse finding on persecution, explaining that the applicant's beating and two days of torture at the hands of government-sanctioned police officers qualified as severe enough to be condemned by "civilized governments" and therefore amounted to persecution.[251] The holding in *Melaj*, among other similar decisions, demonstrates the Sixth Circuit's case-by-case evaluation of whether the applicant has shown sufficiently severe persecution and forecloses Sessions's statement of dicta, claiming that generally victims of private violence would not be able to establish the persecution element.

4. Dicta Negating Case-by-Case Analysis for PSG Memberships in *Matter of A-B-*

The National Immigration Justice Center suggests that Sessions's decision in *A-B-* is riddled with "copious, mean-spirited, non sequitur dicta" that attempts to cast a generalized doubt on the viability of domestic violence-based PSG claims and other similar claims involving violence by private, non-state criminal actors.[252] An example of this troublesome dicta appears at the beginning of the decision when Sessions stated that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[253] This categorical rejection of the validity of claims based on domestic violence, gang violence, and various other forms of private actor persecution goes against the intent of Congress in the INA, BIA precedent, and circuit court case law.[254] Furthermore, this dicta, in the form of a cursory rejection of private-actor asylum claims, categorically denies an adjudicator's ability to vigorously analyze each element of the claim. This dicta is especially contradictory given that Sessions's own justification for overturning *A-R-C-G-* and, by extension, invalidating the private actor claim in *A-B-*, centered around the BIA's alleged failure to complete a vigorous analysis on every legal issue.[255]

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which is of the severity widely condemned by the international community, such harm falls within the INA's definition of the word 'persecution.'" *Id.*

[249] *Id.* at 358 (citing Mohammed v. Keisler, 507 F.3d 369, 371 (6th Cir. 2007)).

[250] *Id.* at 358 (citing Mikhailevitch v. INS, 146 F.3d 384, 389 (6th Cir. 1998); Lumaj v. Gonzales, 462 F.3d 574, 577 (6th Cir. 2006)).

[251] *Id.* at 359.

[252] *See* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 8.

[253] A-B-, 27 I. & N. Dec. 316, 320 (B.I.A. June 11, 2018).

[254] *Melaj*, 282 F. App'x 354, 359 (referencing H.R. REP. NO. 95-1452, at 7 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4700, 4706); Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *see infra* Section III.B.

[255] *A-B-*, 27 I. & N. Dec. at 339.

Sessions concluded that the DHS lawyer's multiple concessions in the case led the BIA to complete only a cursory analysis of the three factors required to establish membership in a particular social group: immutability, particularity, and social distinction.[256] Sessions claimed that the decision incorrectly recognized a new category of asylum claims based on the PSG of Guatemalan women in a domestic partnership who are unable to leave, without satisfying the rigorous requirements of case-by-case analysis set forth by the BIA, dating back all the way to the *Acosta* decision.[257] He then claimed that subsequent BIA and circuit court decisions relied on *A-R-C-G-*'s PSG definition and had categorically extended the definition of this particular PSG to include most victims of domestic violence from Central America, thereby abandoning the detailed analysis required on the PSG membership.[258]

Sessions's criticism of the BIA's decision in *A-R-C-G-* was that it created a dangerous precedent of categorically accepting domestic violence survivorship as a PSG, without giving the needed rigorous analysis required by case-by-case adjudication.[259] Yet, Sessions himself then went on to categorically deny domestic violence survivorship as a PSG with no rigorous analysis of his own.[260] The result is a decision that attempts to override the BIA's and circuit courts' long-standing precedent of interpreting the cognizability of each individual's PSG membership by a thorough case-by-case analysis. Because the precedent of case-by-case analysis of cognizable PSG memberships is well documented within Sixth Circuit and BIA case law, the overruling of *A-R-C-G-* does not negate the mandate for rigorous evaluation on these individual claims.[261] Instead of sweeping, categorical approvals or denials, each case must be given the proper analysis on all elements according to the definitions formulated by BIA precedent.[262]

B. Nexus in *Matter of A-B-*: "where the rubber meets the road"[263]

Although Sessions further criticized the BIA for failing to adequately address the nexus element in *A-R-C-G-*, he did not announce a new standard for the nexus requirement of domestic violence asylum claims but instead

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[256] *Id.* at 331.

[257] *Id.* at 339.

[258] *Id.* at 332.

[259] *See id.*

[260] *See id.* at 320.

[261] Castellano-Chacon v. INS, 341 F.3d 533, 547 (6th Cir. 2003). "The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis." *Id.* (quoting Acosta, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985)); *see also supra* note 72 and accompanying text.

[262] *Castellano-Chacon*, 341 F.3d at 547. In *Negusie v. Holder*, the Supreme Court reaffirmed that the BIA's interpretations of ambiguous statutory terms formulated through the process of case-by-case adjudication should be given *Chevron* deference. 555 U.S. 511, 517 (2009) (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)).

[263] *A-B-*, 27 I. & N. Dec. at 338. The nexus requirement is "where the rubber meets the road" because it is critically important to whether the asylum applicant established the claim and therefore cannot be overlooked or glossed over. *Id.* (quoting Cece v. Holder, 733 F.3d 662, 673 (7th Cir. 2013)).

reinforced the old standard.[264] The nexus element of an asylum claim is one of the most stringent requirements and is ultimately where many asylum claims fail.[265] Sessions stated, "[a]lthough the category of protected persons [within a particular group] may be large, the number of those who can demonstrate the required nexus likely is not."[266] In this manner, the nexus requirement essentially acts as a filter to the claims that victims of private crime may bring for asylum.[267] In order to prove the element of nexus, the applicant must show that "one central reason" for the persecution is based on the applicant's protected ground or PSG membership.[268] The applicant can establish nexus through the introduction of either direct or circumstantial evidence of the persecutors' motive.[269]

In criticizing this element in *A-B-*, the former AG once again made generalized, sweeping conclusions in the form of dicta that domestic violence victims in personal relationships with their abusers are effectively disqualified from using this personal dispute as the basis of their central reason for the persecution.[270] To support his statements, Sessions went on to imply that if a private criminal actor directs harm at only a single victim, then this essentially defeats any claim to nexus based on the PSG.[271] However, this suggestion goes against well-established circuit precedents which have consistently awarded asylum based on PSG designations in which only one solitary victim has been targeted by the abuser.[272]

For example in *Bi Xia Qu v. Holder*, the petitioner sought asylum from persecution based on a PSG membership defined by "women in China who have been subjected to forced marriage and involuntary servitude."[273] The petitioner's family had been forced to agree to allow her marriage to a Chinese gangster, Zhang, as repayment of a debt that her parents owed to

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[264] *Id.*; *see also* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 11. A further, separate rationale exists for the reason that the nexus element was not addressed by the BIA in *Matter of A-R-C-G-*. 26 I. & N. Dec. 388, 395 (B.I.A. 2014) (citations omitted). In *A-R-C-G-*, the Board remanded the case to the IJ specifically to determine, as a matter in the first instance, whether the nexus element had been satisfied. *Id.* Therefore, the lack of analysis on nexus in the opinion in *A-R-C-G-* was not caused by a failure on the party of the BIA to properly analyze the element, but instead to maintain procedural standards of remanding cases to the IJ to allow adjudication in the first instance at the trial court level. *Id.* The practice of remanding a case to the trial level for an initial assessment on the issues is common practice in the BIA and circuit courts. *See id.*

[265] *A-B-*, 27 I. & N. Dec. at 338; *see also* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 11.

[266] *A-B-*, 27 I. & N. Dec. at 338.

[267] *See id.*

[268] 8 U.S.C. § 1158(b)(1)(B)(i) (2012); *see also* Bonilla-Morales v. Holder, 607 F.3d 1132, 1137 (6th Cir. 2010) (holding that there must be a causal connection between the PSG and the harm); Menijar v. Lynch, 812 F.3d 491, 500–01 (B.I.A. 2015) (holding that the persecution took place while petitioner was still a gang member and not while he was a "former long-term gang member" as stated in the PSG; therefore, the persecution was not on account of the PSG, so the nexus element failed).

[269] *A-B-*, 27 I. & N. Dec. at 338 (quoting INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992)).

[270] *Id.* at 338–39; *see, e.g.*, Zoarab v. Mukasey, 524 F.3d 777, 781 (6th Cir. 2008) ("Courts have routinely rejected asylum applications grounded in personal disputes . . . .").

[271] *See also* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 20.

[272] *Id.*

[273] Bi Xia Qu v. Holder, 618 F.3d 602, 607 (6th Cir. 2010).

him.[274] Before the marriage took place, Zhang abducted the petitioner and imprisoned her in a guarded home where he beat her and attempted to rape her, but she successfully fought him off.[275] In *Bi Xia Qu*, the persecution that the applicant suffered was on the basis of two motives: (1) she was targeted by Zhang as a form of repayment of her father's debt; and (2) "she was a woman whom [Zhang] could force into marriage in a place where forced marriages are accepted."[276] The Sixth Circuit reaffirmed that for a showing on the nexus element, the petitioner must prove that one of the central motives of her abuser was to persecute her on account of her membership in the PSG.[277] The Sixth Circuit found the petitioner had fulfilled the nexus requirement, holding that the personal nature of the dispute did not undermine proof of the nexus element.[278] Therefore, the fact that she was the singular victim of Zhang's persecution did not defeat the claim.

A second implication of Sessions's statement is the claim that domestic violence victims will have difficulty proving that the abuser was motivated to attack the victim because of the defined PSG instead of simply his personal relationship to the victim.[279] Here, Sessions adopted dicta from the vacated decision in *R-A-*, claiming that these victims were targeted solely on their personal relationships, not because of their membership in a PSG or "some broader collection of women, however defined, whom [the abuser] believed warranted the infliction of harm."[280] Sessions then opined that, in general, the motivations of private criminals are based more likely on greed or personal vendettas, not on account of the PSG membership.[281]

This somehow led Sessions to categorically disregard the possibility that victims of private criminal actors could demonstrate that their persecutors harmed them on account of their PSG membership because their dispute is personal in nature.[282] But in fact, this belief is repudiated by the government's own brief prepared by DHS during the course of adjudication in *R-A-*, in which DHS acknowledged the cognizability of a PSG defined by "Mexican women in domestic relationships who are unable to leave."[283] The 2009 DHS brief concedes that a domestic partner who believes that his partner is

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[274] *Id.* at 604.

[275] *Id.* at 605.

[276] *Id.* at 608.

[277] *Id.*; *see also* Al-Ghorbani v. Holder, 585 F.3d 980, 997 (6th Cir. 2009) (holding that applicants with mixed motive cases in which the persecution was on the basis of more than one factor, the applicant must show that at least one of the motives was on account of the protected ground or PSG membership).

[278] *Bi Xia Qu*, 618 F.3d at 608 (citing Hong Ying Gao v. Gonzales, 440 F.3d 62, 70 (2d Cir. 2006)).

[279] A-B-, 27 I. & N. Dec. 316, 339 (Att'y Gen. June 11, 2018).

[280] *Id.* at 337 (citing *R-A-*, 22 I. & N. Dec. 906, 920–21 (B.I.A. 2001) (holding the evidence did not show that the abusive husband had animosity toward all women living with abusive partners or even all women living in Guatemala)).

[281] *Id.* (citing Fauziya Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996)).

[282] *A-B-*, 27 I. & N. Dec. at 317.

[283] Supplemental Brief for Petitioner at 14, L-R- (B.I.A. Apr. 13, 2009), https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf.

subordinate to him, in combination with social expectations in one's home country that reinforce this view, can establish that the persecution is on account of the PSG membership.[284] This logic contained in the DHS brief has been used in various courts in cases involving private criminal actors.[285] Therefore, well-established precedents in various circuits require that adjudicators evaluate the nexus element by considering the actions of the private actor within the societal context in which the violence occurred.[286]

The Sixth Circuit has acknowledged that asylum and withholding of removal are not available in cases where the persecution is based solely on a personal matter, but that nexus can be established when the applicant can prove the persecution is accompanied by a societal expectation or normalization of the abusive action, or that the persecution is based on several factors.[287] For example, in *Kamar v. Sessions*, a petitioner based her fear of persecution on the threat that she would be subject to an honor killing by her cousin because of her divorce from her first husband and the conception of a child out of wedlock.[288] The petitioner's PSG was defined as "women who, in accordance with social and religious norms in Jordan, are accused of being immoral criminals and . . . face the prospect of being killed."[289] Here, the court reasoned the personal retribution was supported and condoned by societal norms and cultural traditions, as was the case in *Sarhan*.[290] The Sixth Circuit held that the nexus element was met because, while the motivation of a family member to restore honor to the family may be personal in nature, the person who carries out the honor killing can only do so because the general society permits that type of violence toward the victim.[291] Therefore, Sessions's decision in *A-B-* does not alter the strongly established precedent of the Sixth Circuit, which supports both the notion that personal disputes can serve as the basis of an asylum claim when paired with societal acquiescence and that the nexus element requires that the victim's PSG membership be one central reason for the persecution.

C. Government is Unwilling or Unable to Control the Private Actor

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[284] *Id.* at 14–15.

[285] *Id.* An IJ granted asylum to Ms. L-R- in a summary order. *Matter of L-R-*, CENTER FOR GENDER AND REFUGEE STUDIES, https://cgrs.uchastings.edu/our-work/matter-l-r (last visited July 13, 2020); *see also* Kamar v. Sessions, 875 F.3d 811, 818 (6th Cir. 2017) (holding that social acquiescence to honor killings establishes nexus); Sarhan v. Holder, 658 F.3d 649, 655 (7th Cir. 2011) (same); *see* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 3.

[286] *See* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 20.

[287] *Kamar*, 875 F.3d at 818 (6th Cir. 2017) (citing Al-Ghorbani v. Holder, 585 F.3d 980, 997 (6th Cir. 2009)).

[288] *Id.* at 818–19.

[289] *Id.*

[290] *Id.*; *Sarhan*, 658 F.3d at 655 (holding that "[s]ocial stigma causes the violence. Society as a whole brands women who flout its norms as outcasts, and it delegates to family members the task of meting out the appropriate punishment—in this case, death."); *see also Al-Ghorbani*, 583 F.3d at 997–98.

[291] *Kamar*, 875 F.3d at 818.

Standard in *Matter of A-B-*

Sessions imposed an impermissibly high standard and, once again, introduced harmful dicta into his analysis regarding the element of whether the government is unwilling or unable to control the applicant's persecutor. Under Sessions's analysis, the government of the victim must either "condone" the non-state actor's crime or be "helpless to protect the victims" of that crime.[292] Sessions then said that the applicant must prove that the protections in their country are so "lacking that their persecutors' actions can be attributed to the government."[293] This heightened standard was adopted from another circuit court but is contrary to Sixth Circuit precedent, as this court has never adopted the heightened standard as binding in its decisions.[294]

Instead, Sixth Circuit precedent states that private criminal activity only amounts to persecution when the petitioner shows: (1) it is committed by the government or those aligned with the government; or (2) the government is unwilling or unable to control it.[295] The petitioner must submit evidence to establish that they sought protection from some government official or police.[296] Alternatively, if the petitioner did not seek protection from such officials, the petitioner must present evidence that having attempted to seek help from their government: (1) would have put them in greater danger; or (2) would have been futile.[297] The Sixth Circuit has used a variety of evidence to establish the unwillingness or inability of a government to protect a victim of private crime including: country reports, human rights reports, law review articles, newspaper accounts, and personal affidavits.[298] Therefore, although Sessions referenced this heightened language in his decision, the former AG's statements amount to dicta and are non-binding to the Sixth Circuit. The standard for asylum adjudications in the Sixth Circuit continues to be that the government is "unwilling or unable" to protect the victim.

Additionally, Sessions made sweeping statements at the beginning of

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[292] A-B-, 27 I. & N. Dec. 316, 337 (B.I.A. 2018) (citing Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000)); *see also* Hor v. Gonzales, 400 F.3d 482, 485 (7th Cir. 2005).

[293] *A-B-*, 27 I. & N. Dec. at 317 (quoting *Galina*, 213 F.3d at 958).

[294] *See* Kere v. Gonzales, 252 F. App'x 708 (6th Cir. 2007) (unpublished decision and therefore non-binding); Elias v. Gonzales, 490 F.3d 444 (6th Cir. 2007) (language used in concurrence only); *see generally* Gomez-Romero v. Holder, 475 F. App'x 621 (6th Cir. 2012); Al-Ghorbani v. Holder, 585 F.3d 980 (6th Cir. 2009); Hamdi Al Khalili v. Holder, 557 F.3d 429 (6th Cir. 2009); El Ghorbi v. Mukasey, 281 F. App'x 514, 17 (6th Cir. 2008); Vata v. Gonzalez, 243 F. App'x 930, 943 (6th Cir. 2007).

[295] *Hamdi Al Khalili*, 557 F.3d at 436 (quoting *Fauziya Kasinga*, 21 I. & N. Dec. at 365).

[296] *El Ghorbi*, 281 F. App'x at 517 (prong failed as the petitioner never introduced evidence that she had sought government or police protection).

[297] *Al-Ghorbani*, 585 F.3d at 999 (holding that involving the government officials would not have helped the petitioners because the police had sided with and were helping the persecutor); Keita v. Gonzales, 175 F. App'x 711, 713 (6th Cir. 2006) (holding that an applicant failed to introduce evidence to support her testimony that seeking police protection would have been futile).

[298] *See, e.g.*, *El Ghorbi*, 281 F. App'x at 517; *Al-Ghorbani*, 585 F.3d at 999; *Kamar*, 875 F.3d at 819; *Sarhan*, 658 F.3d at 658–60 (holding that there was ample evidence on record to conclude that the government was ineffective in protecting women that are in danger of honor killings).

his opinion that, regarding the unwilling or unable to control prong of the asylum test, the fact that many countries may have problems policing certain crimes, such as domestic violence or gang violence, or that certain demographic populations may be more likely victims of crime, is insufficient to establish a claim.[299] Sessions added that the non-enforcement of laws by police in a particular case does not necessarily signify that the police are not willing or able to control the crime because there may be various reasons that the prosecution of that particular case is dropped.[300] Based on this premise, Sessions alluded to the difficulties that all countries face in prosecuting crimes of domestic violence, including prosecutions in the United States.[301] These statements are no more than harmful dicta. This comparison between difficulties in U.S. prosecutions versus prosecutions of domestic violence in other countries is improper because it fails to take into account societal and cultural norms in individual countries, norms that underlie the victim's experience of gender-based violence.[302] Depending on the country conditions at issue in each case, domestic violence and rape (including spousal rape) can be based in "deep-rooted machismo and the belief that women are subordinate to men and, significantly, [are] of a different level and severity than domestic violence in the United States."[303] This desire to exercise power and control over their partner happens in a social and cultural context in which men are entitled to do so due to the idea that they are superior over their wives.[304] Furthermore, courts have held that evidence of the repeated failure to enforce laws against domestic violence can be circumstantial evidence that government officials are also entrenched in that societal or cultural norm.[305]

CONCLUSION

In conclusion, Sessions's confusion of key issues, flawed reasoning, and over-broad statements of dicta resulted in a decision which neither clarifies asylum law nor creates binding precedent within the Sixth Circuit. The Sixth Circuit and other circuit courts must return to the pre-*A-R-C-G-* case law in order to determine what standards and requirements must be fulfilled for a private crime victim to establish a valid claim through asylum. Yet, pre-*A-R-C-G-* case law within the Sixth Circuit has paved the way for survivors of persecution by private criminal actors, including domestic violence survivors, to apply for asylum, based in sound principles which evaluate those claims on a case-by-case basis.

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[299] A-B-, 27 I. & N. Dec. 316, 320 (Att'y Gen. June 11, 2018).

[300] *Id.* at 337–38.

[301] *Id.* at 343–44.

[302] *See* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 25; THE MISSOURI COALITION, UNDERSTANDING THE NATURE AND DYNAMICS OF DOMESTIC VIOLENCE 17–18 (Mar. 2012), https://www.mocadsv.org/FileStream.aspx?FileID=2.

[303] *See* NIJC ASYLUM PRACTICE ADVISORY, *supra* note 51, at 21.

[304] *Id.*

[305] *See* Bookey, *supra* note 59, at 115 n.32.

Although precedents supporting the availability of asylum for private crime survivors, such as domestic violence survivors or victims of gang violence, do exist, as outlined in this Comment, there is still much concern amongst immigration lawyers that the Sixth Circuit's application of these principles will not be consistently applied by individual judges. With the mandate that IJs rush adjudications of these claims, there is substantial risk of miscarriages of justice and lack of due process, leading to dangerous and disastrous results in terms of safety and protection for domestic violence applicants from being returned to extreme violence in their home countries. Instead of rushing through adjudication on these cases, IJs and courts should be encouraged to give the time and energy to properly hear each case, in order to deliver sound and reasoned analysis of each element in these complicated asylum claims. Sadly, the propensity for individual IJs to deny the valid asylum claims of domestic violence survivors will remain quite high if judges categorically apply the harmful proponents of *A-B-* without completing a rigorous analysis of Sixth Circuit precedent, as presented in this Comment. Yet, if courts focus on the standards that developed both under BIA and Sixth Circuit precedent over the last fifteen years of asylum adjudications, ignoring the distracting, misplaced dicta within Sessions's decision, circuit courts can realign asylum law with precedent and begin to chip away at the barriers impeding victims of private crimes in order to make asylum adjudications the life-saving process that they should truly be.

An example of the Sixth Circuit's reasoned approach of applying pre-*A-R-C-G-* law in order to restore cognizability of PSG membership for survivors of private crime comes from an unpublished decision that was recently adjudicated in June of 2018 in the Sixth Circuit: *Juan-Pedro v. Sessions*.[306] Released subsequent to the AG's decision in *A-B-*, it relies on established case law prior to the overturning of *A-R-C-G-* by Sessions. Although the petition for asylum in this case was based on persecutory actions, including rape and gang violence, the case is analogous to show that the standards of analysis for establishing a PSG membership based on private criminal persecution have not been substantially altered after *A-B-* and to demonstrate the court's ability to similarly apply these principles to gang-based or domestic violence claims.

In *Juan-Pedro*, the Sixth Circuit overturned a BIA denial of asylum to an applicant based on the claim that the applicant's PSG membership was not a central reason for the persecution the family had faced in Guatemala.[307] In the case, the applicant had shown that she had fled her village in Guatemala after a brutal attack on her home by MS-13 members, who raped and robbed

[306] *See* 740 Fed. App'x 467 (6th Cir. 2018) (unpublished decision).

[307] *Id.* at 468 (6th Cir. 2018) (holding by the BIA that the applicant failed to prove the nexus element of her claim).

her, promising to return to kill her and her children.[308] The Akatek-speaking applicant was of Mayan ancestry, and she claimed that the brutal attack and persecution of her and her family was based on her PSG membership in that indigenous group, which had been long persecuted "by the government and MS 13 because of tribal land holdings in Guatemala."[309]

The applicant claimed that the gangs targeted members of the Akateko people because they were aware that indigenous Guatemalans are unlikely to raise a report with the police, especially because Guatemalan police often ignored or denied assistance to indigenous peoples.[310] After reviewing the country reports, news articles, and affidavits in the case, the Sixth Circuit found that there was substantial evidence to conclude that the applicant was persecuted on account of her membership in the proposed PSG.[311] The court held that the applicant's proposed PSG membership and the nexus element of the asylum claim were valid; the case was only then remanded to the BIA for further adjudication on whether the attack on the family rose to the level of past persecution and whether the applicant could relocate to another area in Guatemala to escape the persecution.[312]

This case was not discussed previously in this Comment as the courts decided not to publish the decision, foregoing its mandatory effect as binding precedent within the Sixth Circuit.[313] Unfortunately, this relegates the decision to serve only as persuasive authority on the court, informing other judges and courts about the application of these principles within the Sixth Circuit. Yet, this decision can still inform attorneys about the application of asylum principles in the Sixth Circuit post-*A-B-*, helping these advocates build even stronger cases for their clients in this jurisdiction. Most importantly, the resolution of this case in the Sixth Circuit demonstrates the continued cognizability of PSGs based on persecution by private criminal actors and restores hope for future domestic violence claims or gang-based violence claims through the demonstration of full evaluation of each claim by the court on a case-by-case basis.

The road ahead for victims of domestic and gender-based violence continues to be long and plagued by many difficulties. Immigration attorneys and advocates must continue to develop well-supported asylum claims for domestic violence survivors, finding creative ways to once again break the barriers impeding these clients from favorable adjudications in order to assure that the "long arc of the moral universe" bends toward justice for Florentina

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[308] *Id.*

[309] *Id.* at 469.

[310] *Id.* at 471.

[311] *Id.* at 471–72.

[312] *Id.* at 473.

[313] Both the BIA and the circuit courts of appeal should make a consistent effort to publish more decisions in the area of granting asylum based on PSG designations so that there is transparency within the asylum process and precedent to follow in adjudicating claims.

and other domestic violence survivors.[314]

[314] This quote, popularized by Barack Obama, is often attributed to Dr. Martin Luther King, Jr., but truly comes to us through MLK as a "clever paraphrasing of a portion of a sermon delivered in 1853 by the abolitionist minister Theodore Parker." Mychal Denzel Smith, *Opinion: The Truth About 'The Arc of the Moral Universe,'* HUFFPOST (Jan. 18, 2018, 5:49 AM), https://www.huffingtonpost.com/entry/opinion-smith-obama-king_us_5a5903e0e4b04f3c55a252a4.