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Out of Options

THE OBSTRUCTIONS HINDERING VICTIMS OF NON-STATE ACTOR VIOLENCE UNDER CURRENT ASYLUM LAW

*“Legal scholars . . . have long argued that the credible fear process fails to adequately identify bona fide asylum seekers, and that the power vested in individual immigration officials is susceptible to abuse.”*¹

INTRODUCTION

In 2014, Yomara Rivas, a poor woman from a family of coffee pickers, fled her home in Guatemala with her four-year-old daughter in tow.² Rivas traveled from Guatemala through Mexico into the deserts of Arizona, and upon her arrival to the United States applied for asylum.³ In her application, Rivas claimed that she was a survivor of domestic violence, asserting that her boyfriend abused her and attempted to “strangle their daughter.”⁴

While Yomara Rivas’ story is tragic and difficult to comprehend, the nature of her abuse is far from uncommon.⁵ Each year, thousands of women and children flee Central American countries like Guatemala, Honduras, Mexico, and El Salvador in the hopes of entering the United States.⁶ Many of these migrants request asylum, like Rivas, because they are

¹ Katherine Shattuck, Comment, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 WASH. L. REV. 459, 463 (2018).

² Miriam Jordan & Simon Romero, *What It Takes to Get Asylum in the U.S.*, N.Y. TIMES (May 2, 2018), <https://www.nytimes.com/2018/05/02/us/what-it-takes-to-get-asylum-us.html> [<https://perma.cc/T9XU-FCZU>].

³ *Id.*

⁴ *Id.*

⁵ See generally KIDS IN NEED OF DEF., SEXUAL AND GENDER BASED VIOLENCE (SGBV) & MIGRATION FACT SHEET, <https://supportkind.org/wp-content/uploads/2018/08/SGBV-Fact-sheet.-July-2018.pdf> [<https://perma.cc/6P2C-5V63>] [hereinafter KIDS IN NEED OF DEF.] (highlighting the pervasive sexual, gender-based, and gang violence faced by Central Americans).

⁶ Anastasia Moloney, *Domestic Violence Pushes Central American Women to Flee for Their Lives: U.N.*, REUTERS (May 24, 2017), <https://www.reuters.com/article/us-latam-migrants-refugees/domestic-violence-pushes-central-american-women-to-flee-for-their-lives-u-n-idUSKBN18K2FJ> [<https://perma.cc/H6AH-B5FJ>].

survivors of domestic violence, they escaped persecution from gangs, or they are fleeing from immeasurable poverty.⁷

U.S. asylum law provides a humanitarian avenue for immigrants seeking this protection and freedom within the United States.⁸ Essentially, to succeed, an asylum applicant must prove that they cannot or will not avail themselves to their country of nationality, or country of last habitual residence, due to previous persecution or fear of future persecution under five protected grounds enumerated within the refugee definition.⁹ Out of the five protected grounds, the most fluid one is “membership in a particular social group” (PSG).¹⁰ This has been the primary basis for numerous asylum claims where the persecution in question has been either gender-based violence (e.g., domestic violence, rape, female genital mutilation) or more generally non-state actor violence (i.e., gang violence).¹¹

The Board of Immigration Appeals (BIA), the highest administrative authority for the application of immigration laws,¹² made it easier to advance non-state actor violence claims in its 2014 decision in *Matter of A-R-C-G*.¹³ In this case, the respondent was a Guatemalan mother of three who fled Guatemala and entered the United States without proper documentation on December 25, 2005.¹⁴ The respondent filed a timely asylum application asserting she “suffered repugnant abuse by her husband” and that she feared future harm should she be sent back to Guatemala.¹⁵ While the Immigration Judge (IJ) found her fear to be credible, he denied her asylum request because he did not believe there was sufficient evidence to prove that the abuse she suffered was because of her membership in a PSG¹⁶—in this case, the PSG of “married women in Guatemala who are unable to leave

⁷ *See id.*

⁸ *See* 8 U.S.C. § 1158(a)(1).

⁹ *See* 8 U.S.C. § 1101(a)(42)(A).

¹⁰ *Id.*

¹¹ One does not have to allege that they were persecuted on account of only one of the five protected bases. An asylum applicant can claim that they were persecuted on multiple grounds. For example, a gay, Christian woman from an Islamist state filing for asylum could possibly claim she has a well-founded fear of persecution due to her religion and membership in a PSG (the LGBTQ community). *See generally* Duarte de Guinac v. INS, 179 F.3d 1156 (9th Cir. 1999) (asylum case where Quiche applicant from Guatemala argued he was persecuted on the basis of his race, nationality (via ethnic characteristic), PSG, perceived ethnic religion, and perceived political opinion).

¹² *About the Office: Board of Immigration Appeals*, U.S. DEP'T JUST. (Oct. 15, 2018), justice.gov/eoir/board-of-immigration-appeals [<https://perma.cc/KWM7-EH9T>] [hereinafter *About the BIA*].

¹³ *See In re A-R-C-G-*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

their relationship.”¹⁷ The respondent then appealed the IJ’s decision to the BIA for subsequent review.¹⁸

In *Matter of A-R-C-G-*, the BIA reversed the decision of the IJ and recognized that “married women in Guatemala who are unable to leave their relationship” does constitute a PSG, as it contains certain immutable characteristics, is particular by nature, and is a socially distinct and recognizable group in Guatemala.¹⁹ This decision was incredibly important, as it provided a clear indication of how a survivor of gender-based or domestic violence could prove they meet the definition of a refugee and are thus eligible for asylum.²⁰ In fact, the American Immigration Lawyers Association (AILA) has recognized this case as “seminal,” and has cited it when urging practicing attorneys to “[present] . . . [PSGs] with creativity, cogency, and zeal.”²¹

The Trump Administration’s current immigration policies, however, stand in contrast to the *A-R-C-G* precedent and have made it increasingly difficult to obtain asylum.²² President Trump has been quite outspoken regarding his intentions to both undo much of the Obama Administration’s policies and to heighten enforcement of laws that have restricted the options available to immigrants.²³ For example, on April 6, 2018, former Attorney General (AG) Jeff Sessions announced President Trump’s “zero-tolerance” policy,²⁴ which has resulted in a significant increase in criminal prosecutions of asylum-seekers entering the United States along the southern border.²⁵ The implementation of the “zero-tolerance” policy has resulted in immediate prosecutions for

¹⁷ *Id.* at 388–89.

¹⁸ *Id.* at 388.

¹⁹ *Id.* at 392–95.

²⁰ *See id.*

²¹ AM. IMMIGRATION LAWYERS ASS’N, REPRESENTING CLIENTS IN IMMIGRATION COURT 347–48 (4th ed. 2016) [hereinafter AILA ASYLUM MATERIALS].

²² *See* Abigail Hauslohner & Andrew Ba Tran, *How Trump Is Changing the Face of Legal Immigration*, WASH. POST (July 2, 2018 7:53 PM), https://www.washingtonpost.com/national/how-trump-is-changing-the-face-of-legal-immigration/2018/07/02/477c78b2-65da-11e8-99d2-0d678ec08c2f_story.html?noredirect=on&utm_term=.cc22643efa04 [<https://perma.cc/H3XT-RAZ4>].

²³ *Id.*

²⁴ Q&A: *Trump Administration’s “Zero Tolerance” Immigration Policy*, HUM. RTS. WATCH (Aug. 16, 2018), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy#q1> [<https://perma.cc/AUR2-DLWY>].

²⁵ *See* HUMAN RIGHTS FIRST, ZERO-TOLERANCE CRIMINAL PROSECUTIONS: PUNISHING ASYLUM SEEKERS AND SEPARATING FAMILIES 1, https://www.humanrightsfirst.org/sites/default/files/Zero_Tolerance_Border_Report.pdf [<https://perma.cc/MQ7F-X6V4>] [hereinafter ZERO-TOLERANCE CRIMINAL PROSECUTIONS] (“[I]data from the federal public defender’s office in El Paso shows a 360% increase in prosecutions in April 2018 over April 2017, as well as a 75% increase in May, and a 206% increase in the first two weeks of June.”).

misdeemeanor illegal entry as well as the highly controversial separation of parents and children.²⁶

The Trump Administration then issued a devastating decision affecting asylum law.²⁷ On June 11, 2018, in *Matter of A-B-*, Jeff Sessions overruled the prior decision in *Matter of A-R-C-G-*,²⁸ stating “*A-R-C-G-* was wrongly decided and should not have been issued as a precedential decision.”²⁹ He determined that domestic violence, as well as other forms of private-actor violence (i.e., gang violence) will typically not succeed as the sole basis for an asylum claim, as they are not classified as a PSG.³⁰ Sessions reasoned that “[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required . . . , given that broad swaths of society may be susceptible to victimization.”³¹

Sessions’ decision in *Matter of A-B-* and subsequent administrative policies put those fleeing gender-based violence, gang violence, and other forms of private-actor abuse in a precarious situation.³² Specifically, when applied, this decision has a disproportionate gendered and regional impact against Central American women like Yomara Rivas,³³ who are fleeing countries with consistently high rates of domestic and gang violence.³⁴ In light of Sessions’ decision in *Matter of A-B-* and the horrific implications it has had on asylum seekers at the southern border, Congress should amend the refugee definition by adding a sixth protected ground of persecution. This additional ground should specifically include protection for “people with a well-founded fear of gross criminal activity conducted by private, non-state actors.” Adding a sixth protected ground to the refugee definition will provide the most security for those who either have

²⁶ See *id.* (“[S]eparations escalated tremendously in the wake of the zero-tolerance policy. Between May 5 and June 9, 2018, alone, the government separated at least 2,235 families.”).

²⁷ See *In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

²⁸ The Immigration and Nationality Act specifically gives the AG the power to certify and review any immigration case brought within the Department of Justice’s purview. See 8 U.S.C. § 1103(g)(2); see also discussion *infra* Section I.A.

²⁹ *In re A-B-*, 27 I. & N. Dec. at 333.

³⁰ *Id.* at 335.

³¹ *Id.*

³² See AILA Policy Brief: USCIS Guidance on *Matter of A-B- Blocks Protections for Vulnerable Asylum Seekers and Refugees*, AM. IMMIGR. LAW. ASS’N (July 23, 2018), <https://www.aila.org/infonet/uscis-matter-of-a-b-asylum-refugees> [<https://perma.cc/DLV9-PYKT>] [hereinafter AILA Policy Brief] (“The . . . memorandum, together with *Matter of A-B-*, will lead to widespread . . . denials of asylum cases in which the person is seeking protection from domestic violence or persecution by powerful transnational criminal organizations referred to as ‘gangs.’”).

³³ See Jordan & Romero, *supra* note 2, at 1–2.

³⁴ See KIDS IN NEED OF DEF., *supra* note 5 (fact sheet highlighting the ubiquitous, pervasive nature of domestic and gang violence in Central America).

endured horrific non-state actor harm or have a credible fear of such harm should they return to the country from which they fled.

Part I of this note will discuss the structure of the U.S. immigration system, as well as the history of asylum law prior to *Matter of A-B-*. Part II will examine the impact of Sessions' decision in *Matter of A-B-*, including how this decision affects victims of domestic abuse and gang violence. Part III examines methods of challenging *Matter of A-B-*'s interpretation of the PSG through creative lawyering, equal protection, and due process challenges. Finally, Part IV will conclude with proposed solutions to this issue, particularly focusing on the addition of a sixth protected ground to the refugee definition. The United States should not close its doors on those who validly fear returning to their country of origin.

I. AN OVERVIEW OF U.S. IMMIGRATION LAW

The executive branch typically handles immigration law.³⁵ In order to clearly understand the impact of Sessions' decision in *Matter of A-B-*, it is important to note how U.S. immigration law differs from other areas of U.S. law. This Part of the note will provide a general overview of the structure of the U.S. immigration legal system. It will then analyze the history and rationales behind U.S. asylum law, detailing how one qualifies for asylum in the United States.

A. *The Structure of the U.S. Immigration Legal System*

Congress has delegated the power to regulate immigration to the Department of Justice (DOJ) and the Department of Homeland Security (DHS). Through regulation, DOJ and DHS interpret, clarify, and apply the Immigration and Nationality Act (INA) as each department deems fit.³⁶ DHS houses several subsidiary agencies to which it delegates specific powers and responsibilities, specifically the U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE),

³⁵ See Graham Prichard, *DHS, USCIS, ICE, CBP, EOIR, BIA, and DOS—Who Are These People?*, PRICHARD L. FIRM, <http://prichardlawfirm.com/other-2/who-is-immigration/> [https://perma.cc/Y7UT-A9NP].

³⁶ See Exec. Office of Immigration Review, *About the Office*, U.S. DEP'T JUST. (Jan. 21, 2020), <https://www.justice.gov/eoir/about-office> [https://perma.cc/94ZJ-QRHJ] [hereinafter *EOIR About the Office*] (“The primary mission of the Executive Office for Immigration Review (EOIR) is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation’s immigration laws.”).

and Customs and Border Patrol (CBP).³⁷ USCIS primarily deals with the administrative processing of various applications for immigrant benefits, ranging from family petitions to naturalization, and the issuance of those benefits.³⁸ ICE performs investigations into federal trade law violations, immigration, and customs throughout the United States.³⁹ ICE is known to execute orders of removal issued by immigration courts.⁴⁰ CBP is responsible for “keeping terrorists, illegal weapons, illegal drugs, and unauthorized immigrants” from entering the United States, while simultaneously monitoring the goods and people that are granted access to the country.⁴¹

The DOJ houses the Executive Office of Immigration Review (EOIR), which is essentially the immigration court system.⁴² EOIR handles removal proceedings.⁴³ The EOIR houses the Office of the Chief Immigration Judge, which “provides overall program direction and establishes priorities for approximately [four hundred] [IJs] . . . throughout the Nation.”⁴⁴ Removal proceedings consist of an immigrant coming before an IJ, who then determines whether the respondent will be subject to deportation or if they should be granted some form of immigration relief;⁴⁵ IJs have immense discretion.⁴⁶

If the respondent receives an unfavorable decision from the IJ, they can appeal to the BIA, “the highest administrative body for interpreting and applying immigration laws.”⁴⁷ As the immigration court system is housed within the DOJ, the BIA is

³⁷ See *Topics*, U.S. DEP’T HOMELAND SECURITY, <https://www.dhs.gov/topics> [<https://perma.cc/NT5Q-SR4X>] (listing the various immigration agencies housed within DHS).

³⁸ See *Providing Immigration Benefits & Information*, U.S. DEP’T HOMELAND SECURITY, <https://www.dhs.gov/providing-immigration-benefits-information> [<https://perma.cc/WVM6-WYEL>].

³⁹ See *What We Do*, U.S. IMMIGR. CUSTOMS ENFORCEMENT, <https://www.ice.gov/overview> [<https://perma.cc/PT89-JTBB>].

⁴⁰ See *Removal*, U.S. IMMIGR. CUSTOMS ENFORCEMENT, <https://www.ice.gov/removal> [<https://perma.cc/8L76-KWBX>].

⁴¹ Prichard, *supra* note 35.

⁴² *Id.*

⁴³ See Exec. Office of Immigration Review, *List of Downloadable EOIR Forms*, U.S. DEP’T JUST. (Jan. 21, 2020), <https://www.justice.gov/eoir/list-downloadable-eoir-forms> [<https://perma.cc/H97C-WNJZ>] (listing among the downloadable forms the Form I-589, “Application for Asylum and for Withholding of Removal”).

⁴⁴ See Exec. Office of Immigration Review, *About the Office: Office of the Chief Immigration Judge*, U.S. DEP’T JUST. (Jan. 21, 2020), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> [<https://perma.cc/VAE6-FWD3>] [hereinafter *About the OCIJ*].

⁴⁵ See 8 U.S.C. § 1229a.

⁴⁶ Unlike Article III judges, IJs can actively question respondents in immigration court. See 8 U.S.C. § 1229a(b)(1). This can lead to potential bias as IJs are part of the DOJ and may have political priorities in line with both the ICE prosecutor and the incumbent administration.

⁴⁷ Prichard, *supra* note 35.

still under the direct supervision of the AG.⁴⁸ The AG has the discretion to decide any case brought before the immigration court, regardless of whether or not they heard the actual trial proceedings.⁴⁹ If the BIA also renders an unfavorable decision, the respondent can usually appeal to federal Article III courts that have jurisdiction over the issue and may hear the case.⁵⁰

B. *The History and Formation of U.S. Asylum Law*

In the wake of the horrific atrocities that occurred in the first half of the twentieth century—namely the Second World War and the Holocaust—people across the world were left seeking new homes to settle into, and countries worldwide believed it was necessary to recognize the rights of individual persons in international law.⁵¹ On December 10, 1948, the United Nations General Assembly (UNGA) proclaimed the Universal Declaration of Human Rights (UDHR).⁵² Article 14 of the UDHR specifically noted that people have “the right to seek and to enjoy in other countries asylum from persecution.”⁵³

Following adoption of the UDHR, UNGA members signed the Convention Relating to the Status of Refugees (1951 Refugee Convention).⁵⁴ The 1951 Refugee Convention defined the term “refugee” as anyone outside of their state of nationality or last habitual residence that is unable or unwilling to avail themselves

⁴⁸ See *EOIR About the Office*, *supra* note 36 (“Under delegated authority from the [AG], EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings.”); see *About the BIA*, *supra* note 12 (“BIA decisions are binding on all DHS officers and [Js] unless modified or overruled by the [AG] or a federal court.”).

⁴⁹ See 8 U.S.C. § 1103(g)(2).

⁵⁰ See *About the BIA*, *supra* note 12 (“Most BIA decisions are subject to judicial review in the federal courts.”).

⁵¹ See Andreas Kirchhof, *50 Years on in Germany, Eastern Europe’s Displaced Still Remember UNHCR*, U.N. HIGH COMMISSIONER FOR REFUGEES (Jan. 5, 2006), <https://www.unhcr.org/en-us/news/latest/2006/1/43bd42cb4/50-years-germany-eastern-europes-displaced-still-remember-unhcr.html> [<https://perma.cc/LA4K-2848>] (“The term ‘Displaced Persons’ was applied to millions of people who found themselves outside the borders of their countries as a result of World War II. Most were former slave labourers or those who had been imprisoned in concentration camps.”); see also *Universal Declaration of Human Rights: History of the Document*, U.N., <http://www.un.org/en/sections/universal-declaration/history-document/index.html> [<https://perma.cc/4QTV-PLSM>] (“With the end of [the Second World War], and the creation of the United Nations, the international community vowed never again to allow atrocities like those of that conflict happen again. World leaders decided to complement the UN Charter with a road map to guarantee the rights of every individual everywhere.”).

⁵² G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948); see also *Universal Declaration of Human Rights: History of the Document*, U.N., <http://www.un.org/en/sections/universal-declaration/history-document/index.html> [<https://perma.cc/4QTV-PLSM>].

⁵³ G.A. Res. 217 (III) A, *supra* note 52, at art. 14.

⁵⁴ See United Nations Convention Relating to the Status of Refugees, at pmbl., opened for signature July 28, 1951, 189 U.N.T.S. 150.

to that state's protection "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a [PSG] or political opinion."⁵⁵ These five protected grounds find their basis in the various articles of the UDHR.⁵⁶ The 1951 Refugee Convention was subsequently followed by the 1967 Protocol Relating to the Status of Refugees (1967 Protocol), which removed both the temporal deadline and territorial limitations of the 1951 Refugee Convention.⁵⁷

The 1951 Refugee Convention and its 1967 Protocol paved the way for U.S. asylum law.⁵⁸ On March 17, 1980, Congress enacted The Refugee Act of 1980 (Refugee Act), which amended the INA⁵⁹ by adding a new definition of the term "refugee".⁶⁰ This definition not only incorporated the five protected grounds enumerated in the 1951 Refugee Convention and its 1967 Protocol; it also provided a more uniform method for determining who qualified as refugees, while still allowing for presidential discretion.⁶¹

C. *Eligibility Under U.S. Asylum Law*

Current laws allow for migrants who are physically present within the United States, or who arrive at the U.S. border, to apply for asylum within one year of their initial arrival.⁶² For an applicant to qualify for asylum, the applicant

⁵⁵ United Nations Convention Relating to the Status of Refugees, at art. 1(A)(2), *opened for signature* July 28, 1951, 189 U.N.T.S. 150.

⁵⁶ See G.A. Res. 217 (III) A, *supra* note 52, at arts. 2-3, 5, 14.

⁵⁷ See Protocol Relating to the Status of Refugees, at art. I.(2)-(3), *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 267. The states that were party to the 1967 Protocol expressed clear concern in the Preamble that the limitations of the 1951 Refugee Convention did not adequately address the equally valid concerns of individuals who met the refugee definition but not the 1951 deadline. See Protocol Relating to the Status of Refugees, at pmb., *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 267.

⁵⁸ See Refugee Act of 1980, Pub. L. No. 96-212, sec. 101, § 1521, 94 Stat. 102, 102.

⁵⁹ Refugee Act of 1980, Pub. L. No. 96-212, sec. 201, § 1101(a), 94 Stat. 102, 102-03.

⁶⁰ 8 U.S.C. § 1101(a)(42)(A) ("The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and 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 or a well-founded fear of persecution on account of race, religion, nationality, membership in a [PSG], or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.").

⁶¹ See *id.*

⁶² 8 U.S.C. § 1158(a)(1), (a)(2)(B). There are two exceptions to the one-year time limit. First, if there were extraordinary circumstances limiting a person's ability to file the

must prove that they meet the definition of a refugee⁶³ as expressed in Section 101(a)(42)(A) of the INA.⁶⁴ While there might be other avenues to obtain legal status in the United States, a grant of asylum provides significant benefits (e.g., access to permanent residence, work eligibility, the ability to travel to other places outside the United States, derivative benefits for family members, etc.).⁶⁵

An asylum seeker can attempt to prove they meet this definition in one of two ways: affirmatively or defensively.⁶⁶ An affirmative asylum case is one where the asylum seeker applies by filling out a Form I-589 that is filed with and processed by USCIS,⁶⁷ unless you are currently in immigration court.⁶⁸ Once the petition is filed, the applicant will receive a date for an interview with an Asylum Officer (AO), who will ask questions geared towards discerning the validity of the applicant's assertion.⁶⁹ If the AO determines after the interview that the

application, then they might be able to file for asylum after the date it was due. 8 U.S.C. § 1158(a)(2)(D). For example, a person who is unable to timely file because they were injured in a severe accident and were hospitalized for an extended period of time could claim that this was an extraordinary circumstance and that the late filing should be processed as if it were filed on time. The other exception to the one-year filing deadline is a change in circumstances. *Id.* Consider the following hypothetical which illuminates the difference between the two exceptions: A is a foreign national from Turkey who works in the United States on a valid H-1B temporary work visa. A is a leading member of a liberal political party in Turkey, and while she still lived there, this political party was in power. Two and a half years after A entered the United States, a violent coup occurs in Turkey, and now an extremely conservative party is in power, and there is clear evidence that the new regime is detaining members of A's political party and subjecting them to various methods of torture. In this scenario, A would theoretically be able to file an asylum application even though she has been in the United States for more than two years, for there was a change in circumstances within the home country that could arguably qualify A for asylum.

⁶³ 8 U.S.C. § 1158(b)(1)(A). Note the difference between a refugee and an *asylee*. A refugee is a person who applies for protected status in accordance with the Refugee Act outside of the United States, is granted said status, and then enters the United States in legal refugee status. An *asylee* is a person who has entered the United States, either without legal status or with a different legal status, and then applies for asylum from within the United States. See *Refugees and Asylees*, U.S. DEP'T HOMELAND SECURITY, <https://www.dhs.gov/immigration-statistics/refugees-asylees> [<https://perma.cc/68VJ-HJAY>].

⁶⁴ See 8 U.S.C. § 1101(a)(42)(A).

⁶⁵ See *Benefits and Responsibilities of Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 8, 2018), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/benefits-and-responsibilities-asylees> [<https://perma.cc/SUT8-ZCD6>].

⁶⁶ AILA ASYLUM MATERIALS, *supra* note 21, at 319. If applying affirmatively, per the INA, a decision should be issued on the petition within 180 days after the application date, whereas a defensive asylum case can take years before a hearing date is set. For further information, see *Fact Sheet: U.S. Asylum Process*, NAT. IMMIGR. F. (Jan. 10, 2019), <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/> [<https://perma.cc/C63S-G73D>].

⁶⁷ AILA ASYLUM MATERIALS, *supra* note 21, at 325.

⁶⁸ See *I-589, Application for Asylum and for Withholding of Removal: Where to File*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/i-589> [<https://perma.cc/4AZV-34ZL>] ("If you are currently in immigration court: you must file your Form I-589 with the immigration court that has jurisdiction over your case." (emphasis omitted)).

⁶⁹ AILA ASYLUM MATERIALS, *supra* note 21, at 320–21.

applicant meets the legal requirements, the AO can recommend to the government that the applicant be granted asylum.⁷⁰

On the other hand, if the AO does not believe the applicant qualifies for asylum, they can deny the petition.⁷¹ If the applicant still holds valid status, they will receive a notice of intent to deny explaining why they do not qualify for asylum.⁷² They will then have sixteen days to appeal this decision. If the applicant does not respond timely, or their timely response is not accepted, the AO will issue a final denial, and the applicant can attempt to pursue other available forms of immigrant relief while they remain in legal status.⁷³ However, if the applicant filed the petition without valid status, or if they no longer had valid status at the time of the denial, the case is then referred to immigration court for removal proceedings.⁷⁴ When the applicant is subject to removal proceedings in immigration court, they can then defensively argue before the IJ that they meet the requirements for asylum, and that the court should grant them asylum as a matter of discretion independent of the decision made by USCIS.⁷⁵

In order to be granted asylum in the United States, an immigrant has to prove that they meet the definition of a refugee as established in the INA.⁷⁶ This means that the asylum seeker must show that they cannot or will not avail themselves to the protection of their former state of nationality or residence⁷⁷ due to past persecution or a well-founded fear of future persecution, the basis of which is one or more of the five protected grounds.⁷⁸ These protected grounds are (1) religion, (2) political opinion, (3) race, (4) nationality, and (5) membership in a PSG. If the asylum seeker provides clear evidence of past persecution, the burden shifts to DHS to prove that there is no well-founded fear of future persecution.⁷⁹ If past persecution cannot be shown, the asylum

⁷⁰ *Id.* at 322.

⁷¹ *Id.*

⁷² *See Types of Asylum Decisions: Notice of Intent to Deny*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions> [<https://perma.cc/92FQ-84B5>].

⁷³ *Id.*

⁷⁴ *Types of Asylum Decisions: Referral to an Immigration Court*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions> [<https://perma.cc/92FQ-84B5>].

⁷⁵ *Id.*

⁷⁶ 8 U.S.C. § 1101(a)(42)(A) (2012).

⁷⁷ AILA ASYLUM MATERIALS, *supra* note 21, at 326. For the most part, the fact that the applicant is applying for asylum is evidence that they are unable or unwilling to avail themselves to the protection of the country from which they fled. *See id.*

⁷⁸ AILA ASYLUM MATERIALS, *supra* note 21, at 319, 326.

⁷⁹ *Id.* at 319, 330-32; *see also* 8 C.F.R. § 208.13(b)(1)(ii). There are two ways DHS can prove that there is no well-founded fear of future persecution. First, they can establish by a preponderance of the evidence (more than fifty percent) that there was a *fundamental*

seeker can still qualify for asylum by proving they have a well-founded fear of future persecution.⁸⁰ For an asylum seeker to prove they have a well-founded fear, they would need to prove that their fear is credible; this has both subjective and objective elements.⁸¹

Subjectively speaking, the asylum seeker would need to prove to either the AO or the IJ that they have a genuine fear of persecution due to one of the five protected grounds.⁸² This does not necessarily mean that the fear has to be a rational one; the applicant solely needs to establish that the fear is “candid, credible, and sincere.”⁸³ Objectively speaking, an applicant needs to prove that anyone in their country in a similarly situated position would genuinely fear persecution.⁸⁴ If the asylum seeker satisfies these two elements, they will have established a well-founded fear of persecution.⁸⁵ If the asylum seeker however does not prove that the reason for the persecution is due to one of the five protected grounds, it is unlikely that they will obtain asylum, regardless of their past or well-founded fear of future persecution.⁸⁶

II. *MATTER OF A-B*’S IMPACT ON CURRENT ASYLUM LAW

Sessions’ decision in *Matter of A-B* essentially states that victims of non-state actor violence, particularly victims of domestic and/or gang violence, “would no longer generally qualify” for asylum, and that claims from victims of non-state actor violence along these lines would generally not be considered credible.⁸⁷ Practitioners have found that Sessions’ decision has unlawfully delayed immigrants’ right to seek asylum under U.S. law upon their arrival at the border.⁸⁸ In response, Sessions

change in circumstances that effectively eliminates the fear of future persecution. If the DHS cannot prove this, they can attempt to show that *internal relocation* to a safer area of the country the applicant fled from would not only be possible, but reasonable under the totality of the circumstances. See AILA ASYLUM MATERIALS, *supra* note 21, at 330–32.

⁸⁰ See 8 U.S.C. § 1101(a)(42)(A).

⁸¹ AILA ASYLUM MATERIALS, *supra* note 21, at 332–33.

⁸² See *id.* at 319, 333.

⁸³ *Id.* at 333. One can prove their fear is credible through testimony in immigration court. *In re Acosta*, 19 I. & N. Dec. 211, 214–15 (B.I.A. 1985), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

⁸⁴ *In re Mogharrabi*, 19 I. & N. Dec. 439, 444–46 (B.I.A. 1987).

⁸⁵ AILA ASYLUM MATERIALS, *supra* note 21, at 332–33.

⁸⁶ See *id.* at 334 (“The asylum-seeker must establish that persecutor was, or will be, motivated to persecute the applicant because of his or her race, religion, nationality, membership in a particular social group, or political opinion.”).

⁸⁷ *Trump Threatens to Cut Aid to Honduras Over Migrants*, BBC NEWS (Oct. 17, 2018), <https://www.bbc.com/news/world-us-canada-45880621> [<https://perma.cc/L5FA-UWRN>] [hereinafter *Honduras Aid Cuts*].

⁸⁸ See *id.* (“The ‘Turn-back Policy’ is currently subject to a lawsuit from the Southern Poverty Law Center, which accuses immigration officials of unlawfully delaying access to the asylum process.”).

asserted that the asylum laws in question have been “exploited” previously,⁸⁹ leading to “rampant fraud and abuse.”⁹⁰ What cannot be quantified, however, is the sheer impact Sessions’ decision has had on the administrative response to PSG analysis and on the possibilities available to Central American women seeking asylum in the United States.

A. *Administrative Impact*

On July 11, 2018, USCIS issued a policy memorandum regarding *Matter of A-B*.⁹¹ The memo provides AOs with guidelines when determining an applicant’s eligibility for asylum, stating that AOs are “directed to ensure consistent application of the reasoning in *Matter of A-B* in reasonable fear, credible fear, asylum, and refugee adjudications.”⁹² USCIS asserted that, in accordance with Section 103(a) of the INA and Sections 103.10(b) and 1003.1(g) of Title 8 of the Code of Federal Regulations, Sessions’ determination was authoritative, binding precedent in all future cases involving victims of domestic or gang violence.⁹³ Further, USCIS ordered that USCIS officers must now disregard *Matter of A-R-C-G*, while simultaneously adhering to prior precedent so long as it is consistent with the holding in *Matter of A-B*.⁹⁴

USCIS issued a directive to its officers stating that when determining what constitutes a PSG, they need to ask at least five essential questions:

1. Whether the applicant is a member of “a clearly-defined particular social group, which is composed of members who share a common immutable characteristic, is defined with particularity, is socially distinct within the society in question, and is not defined by the persecution on which the claim is based”;
2. Whether the applicant has shown that his or her membership in the group is a central reason for the alleged persecution;
3. If the persecutor is not affiliated with the government, whether the applicant can show that the government is unable or unwilling to protect him or her;

⁸⁹ *Id.*

⁹⁰ Ronald Shapiro, *USCIS: Redefining Asylum in America*, JDSUPRA (Oct. 29, 2018), <https://www.jdsupra.com/legalnews/uscis-redefining-asylum-in-america-62761> [<https://perma.cc/P55H-5RTD>].

⁹¹ U.S. CITIZEN & IMMIGRATION SERVS., PM-602-0162, POLICY MEMORANDUM (July 11, 2018), <https://www.aila.org/infonet/uscis-guidance-processing-fear-matter-of-a-b> [<https://perma.cc/JC7M-E224>] [hereinafter USCIS POLICY MEMO].

⁹² *Id.* at 1.

⁹³ *Id.* at 2.

⁹⁴ *Id.* at 1–2.

4. Whether internal relocation is possible, would protect the applicant from the persecution, and presents a reasonable alternative to asylum; and

5. Whether the applicant merits relief as a matter of discretion.⁹⁵

These five questions represent the precedential case holdings from, prior to, and including *Matter of A-B-*, and establish the method AOs must take when analyzing an asylum-seeker's case if it involves membership in a PSG.⁹⁶ However, rather than merely restating the standards set in those cases, the USCIS policy memo raises the bar for them;⁹⁷ a brief analysis of each question in turn will highlight the changes, as well as the increased difficulty for asylum-seekers to meet these standards.

An AO's first task is to assess whether or not the facts presented by the applicant indicate that they are a "member of a clearly-defined [PSG]."⁹⁸ A clearly-defined PSG has four components, all of which are pulled from the precedential cases: immutability, particularity, social distinction, and the group must be defined independently of the persecution at issue.⁹⁹ If the applicant claims that they are a member of a PSG, the other members of that PSG must share "a common immutable characteristic."¹⁰⁰ An example of this would be a gay HIV+ man. There are two immutable characteristics he has: he is a member of the LGBTQ community, and more specifically he has been previously diagnosed with HIV. There are many other people who share these same immutable traits, so his potential PSG of "gay HIV+ men" satisfies the first component of a clearly-defined PSG.

As the term PSG suggests, the social group an applicant purports to belong to must be particular enough to be described in a way that the group could actually be recognized in society.¹⁰¹ The group cannot be "amorphous, overbroad, diffuse, or subjective," and it is not likely that a group defined by its "vulnerability to private criminal activity" will succeed in communities with high crime

⁹⁵ HILLEL R. SMITH, CONG. RESEARCH SERV., LSB10207, ASYLUM AND RELATED PROTECTIONS FOR ALIENS WHO FEAR GANG AND DOMESTIC VIOLENCE 4–5 (2018), <https://fas.org/sgp/crs/homeseec/LSB10207.pdf> [<https://perma.cc/VZ3N-FHAR>]; see also USCIS POLICY MEMO, *supra* note 91, at 9.

⁹⁶ See USCIS POLICY MEMO, *supra* note 91, at 9.

⁹⁷ See AILA Policy Brief, *supra* note 32.

⁹⁸ USCIS POLICY MEMO, *supra* note 91, at 9.

⁹⁹ See *id.* at 3–5.

¹⁰⁰ *In re A-B-*, 27 I. & N. Dec. 316, 320 (A.G. 2018); see also *In re M-E-V-G-*, 26 I. & N. Dec. 227, 237–38 (B.I.A. 2014) ("Our interpretation of the phrase 'membership in a [PSG]' incorporates the common immutable characteristic standard set forth in *Matter of Acosta* . . . , because members of a [PSG] would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members' identities or consciences.")

¹⁰¹ See USCIS POLICY MEMO, *supra* note 91, at 3–4.

rates.¹⁰² It should be noted that both the particularity and social distinction components are interrelated.¹⁰³ Defining the PSG too narrowly will mean that the group is unlikely to be socially distinct, while defining it too broadly will result in amorphous boundaries, making the group unparticular.¹⁰⁴ In the example of the PSG “gay HIV+ men,” while there are several people who are members of the group, it would still satisfy the particularity and social distinction components. It would be likely that people in a society would be able to distinguish members of this PSG, as it is sufficiently large enough yet still has definable boundaries that would make it particular.

A clearly-defined PSG must also “‘exist independently’ of the harm asserted.”¹⁰⁵ According to Sessions’ reasoning in *Matter of A-B-*, if the persecution in question is a defining characteristic of the PSG, it would result in a circular definition because you are defining the PSG by the harm that is the basis of asylum claim.¹⁰⁶ The “gay HIV+ men” PSG does not suffer from this problem, as the group is not defined by any persecution they would suffer. Victims of domestic and gang violence, however, have immense difficulty satisfying this component of a clearly-defined PSG as defined in the USCIS policy memo. Victims of this kind of gross non-state actor violence tend to cover swaths of society, making it difficult to determine where the boundaries lie.¹⁰⁷ As seen in *Matter of A-B-*, these PSGs tend to be defined by the persecution that is the basis of the asylum claim, and accordingly do not satisfy the fourth component of a clearly-defined PSG.¹⁰⁸

As enumerated in the memo, an AO must next have the asylum-seeker prove that the nexus for their persecution is truly

¹⁰² *In re A-B-*, 27 I. & N. Dec. at 335 (citations omitted). “Victims of gang violence often come from all segments of society, and they possess no distinguishing characteristic or concrete trait that would readily identify them as members of such a group.” *Id.*

¹⁰³ See USCIS POLICY MEMO, *supra* note 91, at 4.

¹⁰⁴ *Id.* *Hernandez-Chacon v. Barr* is a recent example of a broadly defined PSG. There the court found that “the agency did not err in concluding that Hernandez-Chacon’s asserted social group—El Salvadoran women who have rejected the sexual advances of a gang member—was not cognizable,” as Hernandez-Chacon did not show how, among the widespread violence Salvadoran women face, “women who reject the sexual advances of gang members are perceived as a distinct group in society or are at greater risk than anyone else who refuses to comply with a gang member’s demands.” *Hernandez-Chacon v. Barr*, No. 17-3903-ag, 2020 WL 370241, at *5 (2d Cir. Jan. 23, 2020).

¹⁰⁵ *In re A-B-*, 27 I. & N. Dec. at 334 (quoting *In re M-E-V-G-*, 26 I. & N. Dec. at 236 n.11, 243).

¹⁰⁶ See USCIS POLICY MEMO, *supra* note 91, at 5.

¹⁰⁷ See KIDS IN NEED OF DEF., *supra* note 5, at 1. In 2017, there were over ten thousand reports of sexual violence against Guatemalan women. *Id.* Unfortunately, the actual number was probably much higher, as “intimate partner violence goes unreported in an estimated [ninety] percent of cases.” *Id.* at 3.

¹⁰⁸ *In re A-B-*, 27 I. & N. Dec. at 321 (noting how the respondent claimed to be a member of the PSG “El Salvadoran women who are unable to leave their domestic relationships where they have children in common”).

their membership in the proposed PSG.¹⁰⁹ USCIS asserts that, while many applicants may suffer threats of harm for social, economic, and personal reasons, these reasons are not protected by the asylum statute.¹¹⁰ Specifically, because victims of domestic and gang violence are generally harmed by private actors due to personal relationships, and not by the state directly, “the victim’s membership in a larger group often will not be ‘one central reason’ for the abuse.”¹¹¹ This extremely specific policy directive from USCIS quite clearly hinders the ability for victims of domestic and gang violence to qualify for asylum. This type of violence is by its very nature, personal. While an applicant has always needed to show that the basis for the persecution is due to one of the five protected grounds, the USCIS policy memo directs officers to arbitrarily focus on the relationship between the persecutor and persecuted so as to severely limit the amount of cognizable PSGs.¹¹²

The third inquiry requires the asylum-seeker to provide evidence that the government was either incapable or unwilling to protect them from persecution in cases of private-actor persecution.¹¹³ To do so, the applicant cannot merely show that the government had difficulty controlling the actions of the private persecutor. Instead, they must prove that the government in question allowed or encouraged the private actions, or was completely helpless with regards to protecting the victim.¹¹⁴ It will be practically impossible for victims of domestic and gang violence to provide the evidence necessary to satisfy USCIS’s requirements, especially at the credible fear stage.¹¹⁵ The purpose of the credible fear determination is to separate asylum seekers with frivolous claims from those who have a clear potential to establish eligibility.¹¹⁶ Having USCIS officers request this level of evidence elevates the credible fear standard from “significant possibility” to “reasonable possibility,” which is unfair to any would-be asylum seeker.¹¹⁷

The fourth inquiry requires USCIS officers to analyze the circumstances of the case and determine whether internal relocation to a safe area within the applicant’s home country is a

¹⁰⁹ USCIS POLICY MEMO, *supra* note 91, at 9.

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* (citing *In re A-B-*, 27 I. & N. Dec. at 338–39).

¹¹² *Id.*

¹¹³ *Id.* at 9.

¹¹⁴ *See id.* at 6.

¹¹⁵ AILA Policy Brief, *supra* note 32.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

possible and reasonable alternative to granting asylum.¹¹⁸ This directive does not truly deviate from the prior procedures, nor does it really increase the burden put upon the applicant.¹¹⁹ Finally, the fifth inquiry is perhaps the most dubious of them all. The final inquiry calls for USCIS officers to use their discretion to determine whether the asylum-seeker should be granted asylum.¹²⁰ This determination is to be made notwithstanding the eligibility standards established, and is to be made considering any and all relevant factors.¹²¹ Specifically, USCIS authorized its personnel to “find an applicant’s illegal entry . . . to weigh against a favorable exercise of discretion.”¹²² This has a clear negative impact on immigrants fleeing domestic and gang violence from Central America. Most of these individuals do not have the capability to enter the United States in valid status, as evidenced by the Migrant Caravan that formed in October of 2018.¹²³ By allowing illegal entry to count against favorable adjudication, even when illegal entry was the only viable option left to the applicant, USCIS is effectively foreclosing the asylum option to those most in need of its protection.

B. *Recent Changes in the Wake of Matter of A-B-*

An important shift in the applicability of *Matter of A-B-* occurred in December 2018, when, in *Grace v. Whitaker*, the U.S. District Court for the District of Columbia vacated large portions of Sessions’ decision.¹²⁴ The policies vacated were confirmed in an e-mail sent by John L. Lafferty, Asylum Division Chief of USCIS, to various asylum field office managers and staff members, where he stated “certain changes to USCIS policy must immediately

¹¹⁸ USCIS POLICY MEMO, *supra* note 91, at 9.

¹¹⁹ See AILA ASYLUM MATERIALS, *supra* note 21, at 331–32.

¹²⁰ USCIS POLICY MEMO, *supra* note 91, at 9.

¹²¹ See *id.* at 7, 9.

¹²² *Id.* at 8.

¹²³ See *Migrant Caravan: What Is It and Why Does It Matter?*, BBC NEWS (Nov. 26, 2018), <https://www.bbc.com/news/world-latin-america-45951782> [<https://perma.cc/6M> MR-NXME] (“More than [seven thousand] Central American migrants have arrived at the US-Mexico border after crossing Mexico and parts of Central America, according to official figures released by the Mexican Interior Ministry. . . . Those now in Tijuana are part of a migrant caravan which left the crime-ridden Honduran city of San Pedro Sula on 13 October [2018].”); see also *Honduras Aid Cuts*, *supra* note 87 (“Mr. Trump’s Attorney-General Jeff Sessions says the ‘credible fear’ asylum rule has been exploited in the past, and announced in June [2018] that victims of domestic abuse and gang violence would no longer generally qualify under it.”); ZERO-TOLERANCE CRIMINAL PROSECUTIONS, *supra* note 25, at 8 (“CBP agents are telling asylum seekers who attempt to approach these ports of entry that the port of entry is ‘full’ or ‘at capacity.’ These ‘capacity’ narratives cause asylum seekers to be unlawfully turned away or leave them stranded for days or weeks in dangerous or difficult conditions.”).

¹²⁴ *Grace v. Whitaker*, 334 F. Supp. 3d 96, 105 (D.D.C. 2018).

take effect as a result of the [c]ourt’s decision,” despite some elements of *Matter of A-B*- remaining “binding precedent.”¹²⁵ In regard to credible fear processing at the border, the e-mail stated that there was no general rule barring: 1) claims involving domestic and/or gang violence as potential bases for PSG membership; and 2) PSGs defined by an “inability to leave domestic relationships,” so long as the PSG is not “defined exclusively by the claimed persecution.”¹²⁶ Moreover, a stay of this court order was denied by the U.S. District Court for the District of Columbia in January, 2019,¹²⁷ meaning the more troubling aspects of *Matter of A-B*- cannot be implemented right now.

Setting aside the fact that the *Whitaker* decision could be overturned by the increasingly conservative U.S. Supreme Court,¹²⁸ *Matter of A-B*- still has had a profound impact on Central American migrants and will continue to despite the limitations established by the *Whitaker* court. Not only has it contributed to the anti-immigrant sentiment espoused by the Trump Administration, but it has also led to those with potentially valid claims being turned away at the border, and even an increase in illegal activity.

C. *Impact on Asylum Claims of Central American Migrants*

Proving that an applicant meets the definition of a refugee is exceedingly difficult, especially for people like Yomara Rivas.¹²⁹ Typically, asylum applicants who cite domestic violence as evidence of persecution cannot assert that their race, religion, nationality, or political opinion was the reason why they were persecuted.¹³⁰ Accordingly, the only way these applicants can prove they are refugees as defined by the INA is by claiming that the violence or abuse suffered is evidence of persecution due to their belonging to a PSG.¹³¹ This basis of persecution is considered “one of the most vital and flexible” of the protected

¹²⁵ E-mail from John L. Lafferty, Asylum Div. Chief, USCIS, to Asylum Div. Staff (Dec. 19, 2018) (on file with author) [hereinafter Lafferty e-mail].

¹²⁶ *Id.*

¹²⁷ *Grace v. Whitaker*, No. 18-1853, 2019 U.S. Dist. LEXIS 11853 at *4, (D.C. Jan. 25, 2019).

¹²⁸ *See, e.g., Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019). In a 7-2 decision without the majority’s opinion, the Supreme Court granted the Trump Administration’s request to stay a preliminary injunction issued by the District Court for the Northern District of California. *Id.* at 1. The injunction in question barred enforcement of a rule that did not allow applicants seeking entry through the southern border to apply for asylum in the U.S. “unless they were first denied asylum in Mexico or another third country.” *Id.* at 2 (Sotomayor, J., dissenting).

¹²⁹ *See Jordan & Romero, supra* note 2.

¹³⁰ *See id.*; *see also Moloney, supra* note 6.

¹³¹ *See Jordan & Romero, supra* note 2.

grounds for asylum, but is incredibly complex.¹³² It is therefore important to note that Sessions' decision in *Matter of A-B-* not only has a gendered effect,¹³³ but a regional one.¹³⁴ By asserting that victims of domestic and gang violence generally do not constitute members of PSGs, the options for Central American women have been significantly limited.

Overall, the Central American countries of Guatemala, El Salvador, and Honduras have incredibly high rates of domestic, sexual, gender, and gang violence.¹³⁵ A 2017 study showed that 67.4% of women and girls from El Salvador claim to have experienced gender-based violence during their lives, and approximately 40% of those women also reported having experienced sexual violence.¹³⁶ In Honduras, approximately 4,000 calls reporting domestic violence are made each month, while the overwhelming majority of abuse goes unreported.¹³⁷ In Guatemala, 51,742 reports of gender based violence and 10,963 reports of sexual violence against women and girls were received by the Guatemalan Public Ministry within the first ten months of 2017.¹³⁸ While there is also violence against men and members of the LGBTQ community, the overwhelming majority of people who are harmed in Central America are women who do not have the ability to stay in their home countries due to the horrendous conditions.¹³⁹

¹³² AILA ASYLUM MATERIALS, *supra* note 21, at 342.

¹³³ See *generally Violence Against Women*, WORLD HEALTH ORG. (Nov. 29, 2017), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> [<https://perma.cc/YNM7-WTJS>] (fact sheet detailing how women are significantly more prone to intimate partner violence worldwide, especially in communities where men are viewed to have a higher status than women and women have limited access to paid work.).

¹³⁴ See KIDS IN NEED OF DEF., *supra* note 5, at 1–3.

¹³⁵ See Rachel Dotson, *Why Do They Flee? Lack of Protection for Survivors of Violence Against Women and Girls in Central America*, KIDS IN NEED OF DEF. (Aug. 11, 2018), <https://supportkind.org/why-do-they-flee-lack-of-protection-for-survivors-of-violence-against-women-and-girls-in-central-america/> [<https://perma.cc/ND8S-AGWS>]; Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN REL. (Nov. 27, 2015), <https://www.files.ethz.ch/isn/195071/Violence%20and%20Gangs%20in%20Central%20America's.pdf> [<https://perma.cc/TQT5-TAHH>] (“El Salvador, Guatemala, and Honduras consistently rank among the most violent countries in the world.”).

¹³⁶ KIDS IN NEED OF DEF., *supra* note 5, at 1.

¹³⁷ *4,000 Llamadas de Violencia Doméstica Recibe en 911 al Mes* [4,000 Domestic Violence Calls Are Received by 911 a Month], LA PRENSA (Hond.) (Mar. 18, 2018 11:22 PM), https://www.laprensa.hn/honduras/1161130-410/honduras-abuso_domestico-violencia-domestica- [<https://perma.cc/JT6M-GUE5>]; see ENCUESTA NACIONAL DE DEMOGRAFÍA Y SALUD 2011-2012, at 283 [Nat'l Institute of Statistics and Secretary of Health, National Demographic and Health Survey 2011-2012] (Hond.) (2013), <http://dhsprogram.com/pubs/pdf/FR274/FR274.pdf> [<https://perma.cc/H4GF-89W7>].

¹³⁸ Saira Ramos, *Más de 51 mil Mujeres Viven una Situación de Violencia en el País* [More than 51,000 Women Live in a Violent Situation in Their Country], PUBLINEWS (Guat.) (Nov. 22, 2017, 8:22 AM), <https://www.publinews.gt/gt/noticias/2017/11/22/cifra-violencia-la-mujer-embarazos-menores-2017.html> [<https://perma.cc/5BD4-B7HX>].

¹³⁹ See KIDS IN NEED OF DEF., *supra* note 5, at 2 (“Honduras has the highest femicide rate per capita in the world; a woman is murdered every [sixteen] hours.” (citing

Some have argued that there is already an inherent bias against granting asylum to migrants from Central America out of fear that doing so will entice more people to try and enter the United States.¹⁴⁰ Even if this were not the case, many people fleeing from nations like El Salvador, Honduras, and Guatemala are fleeing from non-state actors who have subjected them to heinous violence or threatened that violence.¹⁴¹ This fact, coupled with the directives of President Trump's "zero-tolerance" policy, has resulted in the denial of applicants with apparently legitimate asylum claims, because the main or sole basis of their claim is fear of domestic and/or gang violence.¹⁴²

Furthermore, the CBP has made it exceedingly difficult for migrants from Central America to access asylum at official ports of entry, even though the Trump Administration touts this as the only way to do so correctly.¹⁴³ This has resulted in people being told that the ports are "at capacity," and sometimes having asylum seekers sent back to Mexico without hearing their requests, as is their right under the INA.¹⁴⁴ According to Human Rights First, the practice of turning asylum seekers away leaves immigrants "stranded in difficult and often dangerous conditions," and in fact forces some to perform illegal actions by trying to cross between ports of entry.¹⁴⁵

While the *Whitaker* decision requires DHS to provide new credible fear interviews consistent with the court's order to any immigrants present in the United States and any immigrants removed pursuant to an expedited removal order,¹⁴⁶ there is a clear problem: the U.S. immigration system is abhorrently inefficient. Despite the fact that ICE and CBP each have record high budgets,¹⁴⁷ border patrol detention centers often do not meet even basic humanitarian standards, such as providing basic hygiene,

Juju Chang et al., *Men Can Do Anything They Want to Women in Honduras: Inside One of the Most Dangerous Places on Earth to be a Woman*, ABC NEWS (May 3, 2017), <http://abcnews.go.com/International/men-women-honduras-inside-dangerousplaces-earth-woman/story?id=47135328> [<https://perma.cc/LE6W-5MR4>]).

¹⁴⁰ See, e.g., Jordan & Romero, *supra* note 2.

¹⁴¹ See *id.*

¹⁴² See ZERO-TOLERANCE CRIMINAL PROSECUTIONS, *supra* note 25, at 1.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1–2.

¹⁴⁶ Lafferty e-mail, *supra* note 125, at 1–2.

¹⁴⁷ See AM. IMMIGRATION COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 2–4 (May 2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf [<https://perma.cc/H4UC-99ZV>].

food, and housing to the thousands of migrants coming in.¹⁴⁸ Furthermore, the immigration courts are backlogged to arguably unacceptable levels, exacerbated by the 2019 government shutdown that put numerous IJs on furlough.¹⁴⁹ It is highly unlikely that the *Whitaker* court's order will have a meaningful impact on those who have already been turned away from the asylum process under the *Matter of A-B*-standards, as the DOJ is currently too inefficient and incapable of addressing their needs.¹⁵⁰

III. POSSIBLE CHALLENGES TO THE *MATTER OF A-B*-PROBLEM

One of the predominant issues with *Matter of A-B*- and subsequent decisions has been their novelty. Opponents to the increased restrictions on the asylum laws have struggled to develop any meaningful legal strategies to combat them. Many attorneys assert that Sessions' decision itself was not only unlawful, but also immoral, and that it has resulted in the unlawful deprivation of domestic and gang violence victims from having the opportunity to seek asylum.¹⁵¹

While it might be easy to claim that the decision lacked a fundamental sense of morality, it is difficult to state that the decision was an unlawful one. The INA specifically gives the AG the power to certify and review any immigration case brought within the DOJ's purview.¹⁵² Sessions, it is argued, had complete authority to make the decision he made in *Matter of A-B*.¹⁵³ Many opponents have had difficulty reconciling the broad powers the AG holds with the innate morality of the powers' use, and have advanced possible methods of challenging Sessions' decision. Thorough analysis of the various challenges that could be made shows, however, that none of the methods that have been advanced will be particularly helpful when it comes to protecting the interests of asylum-seekers fleeing domestic and/or gang violence.

¹⁴⁸ See, e.g., Arturo Rubio & Caitlin Dickerson, *'We're in a Dark Place': Children Returned to Troubled Texas Border Facility*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/us/john-sanders-cbp.html> [<https://perma.cc/2F9S-X8SL>].

¹⁴⁹ See, e.g., Michael D. Shear et al., *The U.S. Immigration System May Have Reached a Breaking Point*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/us/immigration-border-mexico.html> [<https://perma.cc/9AL9-5DFV>].

¹⁵⁰ See Priscilla Alvarez, *Immigration Court Backlog Exceeds 1 Million Cases, Data Group Says*, CNN (Sept. 18, 2019), <https://www.cnn.com/2019/09/18/politics/immigration-court-backlog/index.html> [<https://perma.cc/YWY9-UA6N>].

¹⁵¹ See *supra* Part II, note 88 and accompanying text.

¹⁵² See 8 U.S.C. § 1103(a).

¹⁵³ See HILLEL R. SMITH, CONG. RESEARCH SERV., LSB10207, ASYLUM AND RELATED PROTECTIONS FOR ALIENS WHO FEAR GANG AND DOMESTIC VIOLENCE 5 (2018), <https://fas.org/sgp/crs/homesecc/LSB10207.pdf> [<https://perma.cc/VZ3N-FHAR>].

A. *Creative Lawyering*

In light of the increased scrutiny regarding asylum applications, immigration attorneys throughout the United States are developing extremely creative arguments to help their clients obtain legal asylum status. For example, some guidance has suggested that lawyers should argue that survivors of domestic violence and other non-state actor violence are members of a persecuted political group, rather than a PSG.¹⁵⁴ While the arguments are significantly more complex in actuality, consider this example: a woman, “A”, is from El Salvador and is constantly abused by her husband. A is a feminist and believes in the concepts of bodily integrity and freedom of choice, while simultaneously standing against antiquated notions of female domesticity. Because A has these views, she is a member of a more liberal political group. A flees from her husband in El Salvador and enters the United States without documentation. In her asylum application, A argues that she has a credible fear that her husband, who does not agree with her political views, will abuse her for merely possessing them. Accordingly, A should qualify for asylum.¹⁵⁵

Asylum-seekers can also assert that they were persecuted on account of their membership in a PSG as long as it is not “defined by the members’ vulnerability to crime.”¹⁵⁶ For instance, if in the previous example A’s husband was killed by gang members, and A testified against those gang members in open court, she could argue that she was a member of a PSG defined as “witnesses who testified against gang members.”¹⁵⁷

While these arguments have resulted in some success,¹⁵⁸ their fatal flaw is that they are merely creative arguments. The

¹⁵⁴ See IMMIGRANT LEGAL RES. CTR., PRACTICE ADVISORY: *MATTER OF A-B-CONSIDERATIONS* 2–3 (Oct. 2018), https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf [<https://perma.cc/2Z4Z-AW24>].

¹⁵⁵ See HILLEL R. SMITH, CONG. RESEARCH SERV., LSB10207, *ASYLUM AND RELATED PROTECTIONS FOR ALIENS WHO FEAR GANG AND DOMESTIC VIOLENCE* 5. See also *Hernandez-Chacon v. Barr*, where an El Salvadoran woman made a similar argument regarding her political opinion, stating that “when she refused to submit to the violent advances of gang members, she was taking a stance against a culture of male-domination and her resistance was therefore a political act.” No. 17-3903-ag, 2020 WL 370241, at *6 (2d Cir. Jan. 23, 2020).

¹⁵⁶ See SMITH, *supra* note 153, at 5.

¹⁵⁷ *Id.*

¹⁵⁸ See *id.*; see also *Hernandez-Chacon*, 2020 WL 370241, at *6–8. In *Hernandez-Chacon*, the Court of Appeals for the Second Circuit granted the Salvadoran petitioner’s petition for review of her asylum application. *Id.* at *1. Noting that the IJ and the BIA only performed a cursory review of the political opinion claim, the court found that the asylum petition was prematurely dismissed with regard to that claim. This highlights that there was evidence to support petitioner’s claim of persecution in the record and sufficient precedent supporting the idea that resistance of corruption, “including non-governmental abuse of power[,] can be an expression of political opinion.” *Id.* at *7. To be clear, however, the court

simple reality of the American legal system and immigration law, as demonstrated by Sessions in *Matter of A-B-*, is that an argument's success is completely dependent on the person who hears it. IJs have an incredible amount of discretionary power vested in them, and such power is ripe for abuse.¹⁵⁹ Today's policies and actions toward immigrant peoples seeking protection seem to suggest that the current administration does not view immigrants as human beings in need of help, but merely as aliens undeserving of legal protection.¹⁶⁰

B. *Equal Protection and Due Process Challenges*

An applicant could suggest that an equal protection claim should be asserted, positing that Central American women are particularly negatively affected by Sessions' interpretations, thus violating the Equal Protection Clause (EPC).¹⁶¹ In presenting an equal protection claim, an applicant must account for the fact that those seeking asylum are not citizens or residents of the United States.¹⁶² While it could be argued that they are human beings that possess innate human rights as enumerated under international law, the INA does not recognize immigrants as people who should be granted the same protections as U.S. citizens.¹⁶³ To be clear, the EPC specifically states that equal protection be afforded by states to all persons within their jurisdiction,¹⁶⁴ and courts have found that statutes discriminating based on "alienage" warrant strict scrutiny.¹⁶⁵ However, this only goes so far as to protect those in similarly situated circumstances, or classes, from unequal treatment under the laws.¹⁶⁶ This means that a judge could interpret the treatment of Central American migrants fleeing non-state actor violence as equal, solely because all similarly situated migrants are subject to the same treatment.

did not opine on whether Hernandez-Chacon should be granted asylum based on her political opinion claim, but merely held that the agency failed to "adequately consider" this claim, meaning that the arguments she advance may ultimately fail upon remand. *Id.* at *8.

¹⁵⁹ See Shattuck, *supra* note 1, at 496 (noting how the Immigration Court Practice Manual grants IJs "unfettered discretion to allow or deny" attorney advocacy during IJ reviews of credible fear interviews, allowing vulnerable people to have no access to counsel).

¹⁶⁰ Note that the INA defines an "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). It could, and should, be argued that the INA itself fails to recognize the humanity in others that are not citizens of the U.S. and should itself be scrutinized as a document projecting an innate sense of "otherness."

¹⁶¹ See U.S. CONST. amend. XIV, § 1.

¹⁶² 8 U.S.C. § 1101(a)(3).

¹⁶³ See *id.*

¹⁶⁴ U.S. CONST. amend. XIV, § 1.

¹⁶⁵ See *Graham v. Richardson*, 403 U.S. 365, 372, 376 (1971).

¹⁶⁶ See Richard Fielding, Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 809–10 (1973).

A due process argument offers more potential to asylum-seekers; the INA grants foreign nationals the right to apply for asylum regardless of their status,¹⁶⁷ and turning people away without affording them the opportunity to be heard violates their rights to due process. Central American migrants fleeing extreme violence from their home countries are supposed to be able to request that the U.S. grant them asylum as soon as they get at the border or inside the country.¹⁶⁸ However, the presumption set by the *Matter of A-B-* decision has resulted in people being denied access to the asylum system because it is assumed they do not meet the incredibly high eligibility standards.¹⁶⁹ This being the case, there is clear evidence that these Central American migrants are being denied due process under U.S. laws because of the decisions of the former AG Sessions and the USCIS policy memorandum.¹⁷⁰

While a due process claim could likely be successful if argued in the federal court system, it falls into the same pitfall that all creative lawyering does. The success of a due process argument is directly tied to the openness and agreeability of the judge hearing it. One judge might find that the actions taken by the former AG, DHS, and USCIS, are clear indications of unlawful deprivation of rights and due process. Another, however, might find that the court does not have the authority to decide on the issue, and defer to the former AG's interpretations of the asylum statutes. Presenting a due process claim in federal court would be too risky, as its success is dependent on who hears it, and it might not succeed in helping asylum-seekers achieve their ultimate goals.

IV. POTENTIAL SOLUTIONS

While it is clear that creative lawyering in the defining of PSGs, equal protection, and due process arguments provide potential avenues for victims of non-state actor violence to obtain asylum, these challenges fall into the same issues that plague traditional jurisprudence. Namely, such challenges are only effective if the judge who hears them buys the arguments. In order to ensure those fleeing non-state actor violence have a proper opportunity to be heard, more permanent solutions are needed. This Part will analyze two potential solutions: (1) creating a separate immigration court; and (2) amending the INA's definition of "refugee." While it would be best for these

¹⁶⁷ See 8 U.S.C. § 1158(a)(1).

¹⁶⁸ See ZERO-TOLERANCE CRIMINAL PROSECUTIONS, *supra* note 25, at 1.

¹⁶⁹ See AILA Policy Brief, *supra* note 32.

¹⁷⁰ See *id.*

solutions to be implemented in tandem, amending the definition will be the best way to secure the interests of those directly impacted by non-state actor violence.

A. *Creating a Separate Immigration Court*

The formation of an independent immigration court that is not specifically housed within the DOJ has seen more and more support as of late.¹⁷¹ The immigration court system is unusual as it is not separated from the legislative and executive branches, but is rather housed within an executive agency that staffs the Court with its own employees.¹⁷² Furthermore, the AG has the authority to compel the BIA to direct any case they want for their review.¹⁷³ It has been reasonably argued that Sessions used his specific power significantly more than previous AGs so as to “implement the administration’s policy objectives.”¹⁷⁴ This capability for executive interference with immigration court proceedings has resulted in a “lack of adjudicative independence” and an inability to ensure immigrants’ rights to due process in the wake of *Matter of A-B*.¹⁷⁵

The potential structure for a separate immigration court, as recommended by the American Bar Association (ABA) is as follows: the court would be independent from the DOJ and would be staffed by IJs that cannot be selected by the AG.¹⁷⁶ The IJs would not serve under the direct supervision of the AG, giving them more judicial independence.¹⁷⁷ The IJs would be “given adequate resources to decide cases on the merits.”¹⁷⁸ Lastly, the cases would not be

¹⁷¹ See William Silverman, Proskauer for Good, *The Time Is Now for an Independent Immigration Court*, JDSUPRA (Oct. 24, 2018), <https://www.jdsupra.com/legalnews/the-time-is-now-for-an-independent-91833/> [<https://perma.cc/NWG5-7BTQ>].

¹⁷² See discussion *supra* Section I.A.

¹⁷³ See discussion *supra* Section I.A.

¹⁷⁴ Silverman, *supra* note 171.

¹⁷⁵ *Id.*

¹⁷⁶ *See id.*

¹⁷⁷ *See id.* It is not clear who would select the IJs in this independent model of the immigration court, but potentially they would be selected by either a different agency or the President.

¹⁷⁸ *Id.* Similar to Congress’ constitutional ability to limit the amount of federal courts, the DOJ can issue directives to either expand or limit the number of judges in the immigration court system at any given time. See, e.g., Exec. Office of Immigration Review, *Executive Office for Immigration Review to Swear in 28 Immigration Judges, Bringing Judge Corps to Highest Level in History*, U.S. DEP’T JUST. (Dec. 20, 2019), <https://www.justice.gov/opa/pr/executive-office-immigration-review-swear-28-immigration-judges-bringing-judge-corps-highest> [<https://perma.cc/P6BF-HKBA>] (indicating how the EOIR, through its powers granted by the AG and DOJ, can adjust the number of sitting IJs at its discretion). According to the EOIR’s website, there are approximately 400 IJs in the U.S. See *About the OCIJ*, *supra* note 44. As of September 2019, there was a backlog of over one million in the immigration courts. See Alvarez, *supra* note 150. With a backlog that disproportionate to the amount of people reviewing the cases, there is a greater risk of a bona fide asylum claim being summarily

reviewed by the AG, but instead appellate level immigration courts, and if necessary the Federal Courts of Appeals.¹⁷⁹

The creation of an independent immigration court is a critical step in the eyes of many, for “[a]n independent judiciary . . . is essential to a free society.”¹⁸⁰ The current system subverts fundamental notions of fairness in individual asylum cases, but also discredits the U.S. legal system on the whole.¹⁸¹ However, the issue with suggesting a separate immigration court as a way to challenge or undo the AG’s decision in *Matter of A-B* is quite simply a temporal one. While the blueprint developed by the ABA looks nice in a theoretical argument for separating the Court from the DOJ, it is highly unlikely that Congress would be willing to adopt such a blueprint without contesting several, if not all, components of the proposed system. It is more likely that the debate regarding the creation of a distinct immigration court would take months to years just to enact the relevant legislation to put the change into effect.¹⁸²

After that, the respective administrative and legislative bodies would have to begin the deconstruction of the current immigration court system while simultaneously establishing the new independent immigration court, which would take several years and a significant amount of resources. Congress would then need to allocate resources to the new immigration court so that the IJs could actually adjudicate cases on their merits. Then, and only then, IJs could vindicate the rights of Central American migrants fleeing domestic and gang violence by hearing—and granting—their asylum claims.

dismissed because the IJ in question did not have the time necessary to truly review the facts of the case and decide it on its merits. This backlog offers support for the creation of an independent immigration court.

¹⁷⁹ See Silverman, *supra* note 171.

¹⁸⁰ *Id.*

¹⁸¹ See *id.*

¹⁸² The 2018-2019 government shutdown demonstrated how political division has impeded both congressional action and compromise on immigration reform. President Trump’s insistence on the wall along the southern border, and his stated determination to allow the shutdown to continue for months to years, led to a standstill that not only increased tensions along the border, but also increased debt and suspended pay for federal workers. See, e.g., Michael Collins et al., *Fed-up Workers, Repairs Delayed, Missed Mortgage Payments: Why the Government Shutdown Never Ended for Some*, USA TODAY (July 27, 2019), <https://www.usatoday.com/story/news/politics/2019/07/27/government-shutdown-lingering-effects-reverberate-six-months-later/1807287001/> [<https://perma.cc/F8DG-FHZP>] (detailing how the shutdown lead to substantial delays and backlogs at CBP, and “forced some 800,000 federal employees to go on furlough or work without pay”); Daniella Silva, *Government Shutdown Leads to Nearly 43,000 Cancelled Immigration Hearings*, NBC NEWS (Jan. 15, 2019), <https://www.nbcnews.com/news/latino/government-shutdown-leads-nearly-43-000-canceled-immigration-hearings-n958906> [<https://perma.cc/BW7Y-CWYP>] (“Between Christmas Eve [2018] and January 11, [2019], an estimated 42,726 immigration court hearings have been canceled . . .”).

The separation of the immigration court system from the DOJ would be a vital development. Yet, to use a medical analogy, trying to separate the Court from the DOJ to undo the damage caused by the AG in *Matter of A-B* would be akin to planning a surgery months in advance for an open wound in desperate need of stitches. While surgery may be necessary to solve many problems in the end, the wound needs triage. Regarding the migrants fleeing domestic and gang violence in Central America, the damage inflicted upon them by the *Matter of A-B* decision completely limits their access to a safe haven in the U.S., and potentially forces them to return to their home countries where they face incredible danger and life threatening violence.¹⁸³ These people have urgent need of protection under U.S. law, and separating the immigration court system from the DOJ will not provide them with that protection in an acceptable timeframe.

B. Amending the INA's definition of "Refugee"

Amending the definition of refugee as it appears in the INA will provide the most secure avenue for Central American migrants fleeing domestic and gang violence in light of the problems that have arisen in the wake of *Matter of A-B*. There are three ways to do this, which will be explained in further detail below: adding a sixth protected ground¹⁸⁴, expanding the meaning of a PSG¹⁸⁵, and creating an exception for victims of gross private-actor violence.¹⁸⁶

There are two main counterarguments that can be made in response to the proposed alterations to the INA's refugee definition. It could first be argued that, like the AG and the executive agencies, Congress is filled with politicians who have their own agendas, and this could hinder the likelihood that the statute will be amended in any capacity.¹⁸⁷ While it is clear that

¹⁸³ See *supra* Section II.C.

¹⁸⁴ See discussion *infra* Section IV.B.1.

¹⁸⁵ See discussion *infra* Section IV.B.2.

¹⁸⁶ See discussion *infra* Section IV.B.3.

¹⁸⁷ A potential example of this is the 2019-2020 impeachment proceedings of President Trump, where members of both political parties consistently accused each other of acting in a way that merely benefitted their position at the expense of the people. Compare Richard Austen, Letter to the Editor, *Any Pro-Impeachment Republican Will Go Down in History as a Hero*, LA TIMES (Dec. 6, 2019), <https://www.latimes.com/opinion/story/2019-12-06/trump-impeachment-dear-republicans> [<https://perma.cc/4SBX-YMJN>] ("From the time Trump took office, the Democrats' biggest agenda item has been to get the president—never mind other important issues needing attention, such as our deteriorating infrastructure, immigration, prescription drug costs[,] and more."), with Maurice M. Garcia, Letter to the Editor, *Any Pro-Impeachment Republican Will Go Down in History as a Hero*, LA TIMES (Dec. 6, 2019), <https://www.latimes.com/opinion/story/2019-12-06/trump-impeachment-dear-republicans> [<https://perma.cc/4SBX-YMJN>] ("By

politicians may have an agenda they seek to promote, going through Congress to have the changes brought about makes it less susceptible to predatory interpretation in furtherance of that agenda. Unlike the AG, who is a high-ranking cabinet member of the Administration that has broad, unchecked powers, Congress is comprised of representatives elected by and subject to the wishes of the people.¹⁸⁸ By going through the political process, there is less potential for abuse of power.

The second counterargument centers on the amount of time it would take for any of the suggested alterations to be drafted and enacted by Congress. One could argue that this process would take just as long as creating an immigration court system independent of the DOJ, and accordingly the proposed amendments could take years to be made. While it is certainly possible that implementation of the suggested modifications could take a long time, it would be incorrect to state that separating immigration court will right the wrongs of Sessions' decision in a shorter amount of time. Even after this separation from the DOJ is authorized, it would take years to develop the system and it would not provide Central American migrants with a clear avenue to pursue asylum.¹⁸⁹ By contrast, amending the definition of "refugee" in one of the proposed ways would have immediate effect. Because the DOJ has to interpret and enforce the federal immigration laws, when Congress agrees to enact the drafted amendment, it would have binding force on all immigration law proceedings,¹⁹⁰ and would provide a clear avenue to asylum for Central American migrants fleeing domestic and gang violence upon the enactment.

1. Adding a Sixth Protected Ground to the Definition

The best way to correct the problems caused by Sessions' decision in *Matter of A-B-* is to enumerate a sixth protected ground. This ground could be along the lines of "victims or potential victims of gross private-actor violence." "Gross" violence should be defined as violence that is brutal, reprehensible, and

all accounts, Trump will stand trial in the Senate. By all accounts, the Senate will not convict Trump The Republicans will continue to attack the House's impeachment process. Having no real defense, they will simply pound the table.").

¹⁸⁸ See *Branches of Government*, USA.GOV (Jan. 12, 2019), <https://www.usa.gov/branches-of-government> [<https://perma.cc/ZK8D-J42P>].

¹⁸⁹ See discussion *supra* Section IV.A.

¹⁹⁰ See *EOIR About the Office*, *supra* note 36 ("EOIR interprets and administers federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings. EOIR is committed to providing fair, expeditious, and uniform application of the nation's immigration laws in all cases.").

having extreme physical, emotional, and/or psychological consequences (e.g., rape, physical brutalization, severe mental abuse, etc.).¹⁹¹ By keeping this ground defined by non-state actor violence, it allows for individuals who are not fleeing domestic or gang violence, but some other gross private-actor violence, to have the same protection under the law.

Creating this sixth protected ground will provide the clearest avenue for asylum relief for Central American migrants fleeing from the domestic and gang violence rampant in their home countries. Not only will this alteration guarantee that they have an opportunity to at least have their asylum claim heard, it will subject them to less predatory interpretation from immigration officials, asylum officers, and executive entities intending to push a political agenda.

2. Modifying the PSG Protected Ground to Include Victims of Non-State Actor Violence

While the addition of a sixth protected ground to the refugee definition would be the optimal choice, specifically modifying the enumerated ground of membership in a PSG could also provide asylum-seekers fleeing non-state actor violence with a better chance at obtaining asylum. Congress has the capability to clarify the meaning of a PSG by either expanding it or restricting it.¹⁹² If Congress were to expand the meaning of a PSG to include victims of domestic or gang violence, it would provide legal protection for Central American migrants fleeing these types of violence in a direct manner.

This modification is not as ideal as creating a sixth protected ground because modification would likely be restricted to specific types of non-state actor violence. The jurisprudence regarding PSGs establishes that a PSG needs to be particular.¹⁹³ If the meaning of PSG was expanded to include victims of any form of gross non-state actor violence, there is a risk that this specific protected ground would diminish in effectiveness. If

¹⁹¹ “[G]ross,” as defined by Black’s Law Dictionary, can mean “[r]epulsive in behavior or appearance; sickening” and “[b]eyond all reasonable measure; flagrant.” *Gross*, BLACK’S LAW DICTIONARY (11th ed. 2019). The concept espoused by the latter definition is seen particularly in tort law in the form of “gross negligence,” which itself highlights “[a] lack of even slight diligence or care,” or “willful and wanton misconduct.” *Negligence*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis omitted). Given the nature of domestic and gang violence, it seems that “gross” captures the lack of reason and repulsiveness of such actions, and accordingly works well here.

¹⁹² See *supra* Section IV.B.1.

¹⁹³ See USCIS POLICY MEMO, *supra* note 91, at 3–4; see also discussion *supra* Section I.C.

Congress expands the definition too far, there is a heightened probability of asylum-seekers who do not have bona fide claims abusing it. If this occurs, then it is likely that the IJs, the AG, and the DOJ would react harshly to the legislative expansion, and possibly interpret the statute in a light that would hinder applicants that have bona fide asylum claims due to their membership in a clearly-defined PSG.¹⁹⁴

3. Creating an Exception to the INA's Asylum Requirements to Accommodate Victims of Gross Non-State Actor Violence

Including an exception to the definition that allows victims of gross violence perpetrated by a non-state actor to bypass the incredibly high eligibility standards is the least feasible modification to the refugee definition, but is nonetheless essential for ensuring the rights of these victims. This exception could be drafted as follows:

In the event an asylum-seeker cannot establish one of the five enumerated grounds as the nexus of their past persecution or their well-founded fear of persecution, asylum may be granted by an asylum officer or IJ if the applicant can prove that they have suffered past persecution or have a well-founded fear of future persecution in the form of gross violence from a non-state actor.

This exception would provide an avenue for Central American migrants fleeing this type of gross non-state actor violence, whether it be domestic or gang violence.

The proposed exception would not be an ideal modification, as it provides the most piecemeal relief among the modifications presented. It would essentially be at the discretion of asylum officers and IJs to determine on a case-by-case basis whether the applicant has presented enough evidence or not, and it would be difficult to ascertain at this stage what constitutes enough evidence.¹⁹⁵ Furthermore, for Central American migrants fleeing gross non-state actor violence, it would not provide as secure of a legal theory as establishing a connection to a protected ground would. Yet, the proposed exception would at least give these migrants a chance to have their case heard in the court, and get their foot in the door, which is more opportunity than they have had in the wake of *Matter of A-B*.¹⁹⁶

¹⁹⁴ See USCIS POLICY MEMO, *supra* note 91, at 3–4; see also ZERO-TOLERANCE CRIMINAL PROSECUTIONS, *supra* note 25, at 1–2.

¹⁹⁵ See Shattuck, *supra* note 1, at 464.

¹⁹⁶ See ZERO-TOLERANCE CRIMINAL PROSECUTIONS, *supra* note 25, at 1–2; see also *supra* Parts II & III.

CONCLUSION

In light of the damaging effects of former AG Sessions' decision in the *Matter of A-B*, it is necessary to amend the INA's definition of refugee so that immigrants fleeing from actual or threatened domestic and gang violence have protection under U.S. asylum law. This method of protection provides the most secure avenue for these migrants and will allow them to access asylum courts as is their right under the INA. Any system of asylum should be guided by a moral compass and it is truly unjust to close our borders to those who validly fear living in their country of origin, knowing that returning will lead to severe harm or even death by a non-state actor like an abusive partner or a gang.¹⁹⁷

The "zero-tolerance" policy, the *Matter of A-B* decision, and the policies and anti-immigrant sentiments engendered by the decision have subjected innocent asylum seekers to rejection at ports of entry across the southern border,¹⁹⁸ arbitrary detention,¹⁹⁹ separation of families,²⁰⁰ violence—and specifically gassing—at the hands of border security,²⁰¹ and even death while in ICE or CBP custody.²⁰² Central American asylum seekers who could establish eligibility for asylum are too frequently turned away by the U.S. government, and the only way to protect their interests as immigrants is to expand the INA to include those who are currently out of options.

Kenneth D. Law, Jr.[†]

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*

¹⁹⁹ *See id.*

²⁰⁰ *See id.* at 1.

²⁰¹ *See* Rick Gladstone & Megan Specia, *Border Agents Shot Tear Gas into Mexico. Was It Legal?*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/world/americas/tear-gas-border.html> [<https://perma.cc/K2QT-9BSA>].

²⁰² *See* Nomaan Merchant, *Deaths of 2 Children Raise Doubts About US Border Agency*, AP NEWS (Dec. 26, 2018), <https://www.apnews.com/5e470e143dcc47bfac2354d1a2e4719> [<https://perma.cc/2THL-QSV3>].

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