FROM CARAVAN TO THE COURTS: A PRACTICAL GUIDE TO *MATTER OF A-B-*'S IMPLICATION FOR TRANSGENDER WOMEN ON THE NORTHERN TRIANGLE

"If it is dangerous to be gay, it is almost always more dangerous to be transgender. Transgender women are uniquely vulnerable and subject to gender and racial profiling. They need decision-makers in our immigration system to understand their distinct struggles."

– *Aaron Morris, Legal Director, Immigration Equality*

Working Paper

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Abstract

On June 11, 2018, former Attorney General Jeff Sessions overruled the 2014 precedent decision, *Matter of A-R-C-G-*, which had opened the door to asylum claims based on domestic violence as a product of deeply entrenched patriarchal norms. In *Matter of A-B-*, Session's held that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." This decision may affect transgender cases in a less obvious manner than women fleeing gender-based violence, such that advocates may not directly defend against A-B- as thoroughly.

This paper is a practical guide for attorneys representing transgender asylum seekers from the Northern Triangle after *Matter of A-B-*. In order to understand and address the new obstacles facing transgender women seeking safety in the U.S., I first examine the history of transgender asylum claims in the U.S. and the systemic violence facing transgender women in Honduras, Guatemala, and El Salvador. In the second section of this paper, I qualify the legal hurdles that this decision introduced while presenting the alternative arguments available for overcoming *A-B-*'s heightened standard.

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I. Introduction: The Caravan of New Identity

In August of 2017, the first Trans-Gay Migrant Caravan reached the U.S. border in Arizona, made up of 17 transgender[1] and gay asylum seekers who have come to be known as the "Rainbow 17."[2] The Rainbow 17 met in Mexico, where they began to organize collectively as a response to not only the persecution they had endured in their home countries of Guatemala, Honduras, and El Salvador, but their subsequent denial of protection from Mexican authorities. When they crossed into the U.S., LGBTQ+ activists and social justice organizations such as Transgender Law Center met them with open arms and banners, offering support to the women as they turned themselves over to Immigration and Customs Enforcement Agency (ICE). Groups on both sides of the border waited for news from authorities about their confinement, concerned that the women were being placed in a men's detention center.[3] When several of the transgender women were released from custody on parole six weeks later, they were hopeful that they would be able to establish a successful asylum claim based on the past psychological and physical abuse they had faced.

Starting in the 1990's, immigration judges (IJs) began to use their discretion to recognize gender-based violence and gang violence claims as a cognizable foundation for asylum. Central Americans from Guatemala, Honduras, and El Salvador have increasingly organized caravans to

[1] For the purposes of this paper, I adopt Wayne's definition of transgender as "all people who do not exclusively identify with the sex that society assigned to them at birth." Adena L. Wayne, *Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum,* 102 CORNELL L. REV 241, 270 (2016).
[2] Sarah Aziza, *The First Trans-Gay Migrant Caravan Arrives at US Border Seeking Asylum*, Waging Nonviolence (Aug., 11, 2017), https://wagingnonviolence.org/2017/08/trans-gay-migrant-caravan-rainbow-16/.
[3] The women were placed in Cibola Detention Center, which is currently being sued for the wrongful death of another transgender woman, Roxsana Hernandez Rodriguez. Eli Rosenberg, *Transgender Asylum Seeker Was Beaten Before Her Death, According to New Autopsy*, THE WASHINGTON POST (Nov. 26, 2018). For transgender women, the likelihood of abuse during detainment is much higher. A recent report from the Center for American Progress (CEP) found that LGBTQ+ people are 97 times more likely to be sexually victimized while in ICE custody. Sharita Gruberg, *ICE's Rejection of Its Own Rules Is Placing LGBT Immigrants at Severe Risk of Sexual Abuse*, CEP (May 2018); A 2014 Fusion investigation found that about 1 in 500 people in detention are transgender, but they accounted for 20% of victims of sexual abuse in detention in 2013. Zsea Bowmani, *Queer Refugee: The Impacts of Homoantagonism and Racism in U.S. Asylum,* 18 GEO J. GENDER & L. 1 (May 2017).

flee gang and domestic violence, relying on claims based on gender identity. But for so many non-conforming individuals who crossed into the U.S. as a result of severe abuse directed at them because of their gender identity, including the transgender women of Rainbow 17 who have now all been released on parole, their once valid asylum claims were called into question after Attorney General (AG) Jeff Sessions's precedent setting decision in *Matter of A-B-*.[4]

On June 11, 2018, Sessions issued his opinion in *Matter of A-B-* (*A-B*), vacating the Board of Immigration's (BIA) decision to grant asylum to a Salvadorian woman who was a victim of unrelenting brutality at the hands of her husband. Sessions rejected the respondent's claim based on her membership in the particular social group (PSG) "El Salvadoran women who are unable to leave their domestic relationships where they have children in common," holding that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[5] The AG overruled the 2014 precedent decision, *Matter of A-R-C-G- (A-R-C-G-),* which opened the door to asylum claims based on domestic violence that were a product of deeply entrenched patriarchal norms.[6]

As an increasing number of transgender women from Central America cross the border as a result of humanitarian crises in the Northern Triangle,[7] they face a higher threshold for asylum since Sessions's precedent setting opinion. Before *A-B-*, transgender asylum seekers already faced the significant obstacle of establishing membership in a PSG based on their gender minority status without established precedent for such a distinction. However, because such a

[4] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). (Hereinafter *A-B-*).
[5] *Id.* at 320.
[6] *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014). (Hereinafter *A-R-C-G-*).
[7] El Salvador, Guatemala, and Honduras form the region known as "the Northern Triangle," which dealt with a series of civil wars in the 1980s that left the region plagued by corruption, gangs, and drug trafficking. Rocio Cara Labrador & Danielle Renwick, *Central America's Violent Northern Triangle*, Council on Foreign Relations (CFR)(June 2018).

large proportion of transgender claims are based on gender based and gang violence, *A-B-* makes it even more difficult for transgender women to meet the burden of a well-founded fear.[8]

Sessions's decision may affect transgender cases in a less obvious manner than women fleeing gender-based violence, such that advocates may not directly defend against *A-B-* as thoroughly.[9] In order to understand and address the new obstacles facing transgender women seeking safety in the U.S., I first examine the history of transgender asylum claims in the U.S. and the systemic violence facing transgender women in the Northern Triangle. In the second part of the paper, I qualify the legal hurdles that this decision introduced while presenting the alternative arguments available for overcoming *A-B-*'s heightened standard.

To best represent transgender women from the Northern Triangle, our system must distinguish sexual orientation from gender identity in asylum law, but how shall attorneys do this while being the best advocates for their clients? This practical guide for immigration lawyers argues that it is more important than ever for practitioners to offer both a strong offense and defense. Offensively, advocates should push forward novel conceptions of the PSG and social visibility requirements that more accurately represent transgender women's lived experiences, but defensively, they must argue widely recognized claims in the alternative while differentiating each of the facts in their case from *A-R-C-G-*.

I. History: Transgender Identity Misunderstood

a. Particular Social Group Mischaracterization

[8] UNHCR, *Women on the Run: First Hand Accounts of Women Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015), https://www.unhcr.org/5630f24c6.pdf. (88% of LGBTI asylum seekers and refugees from the Northern Triangle… reported having suffered sexual and gender-based violence in their countries of origin).
[9] Transgender applicants, unlike women, can argue they are part of a PSG based on their sexual identity if their gender claim is denied, which may cause some to discount the threat that *A-B-* represents for their claim.

In 1990, US asylum law first recognized "sexual orientation" as a PSG for LGBTQ+ asylum seekers.[10] In *In re Toboso-Alfonso*, the BIA rejected the INS's argument that the gay respondent should not be granted withholding of removal because his sexually deviant behavior violated US law, clarifying that the respondent was subject to persecution because of his identity as a gay Cuban man and not because of this behavior.[11] Since then, numerous federal circuit and immigration courts have held that gay men can constitute a PSG.[12]

Courts have been much more hesitant to recognize transgender identities under the U.S. asylum system. IJs have routinely conflated sexual orientation and gender identity, often categorizing transgender asylum seekers as "gay men with female sexual identities."[13] In *Hernandez-Montiel*, the Ninth Circuit rejected the word 'transgender' to describe the respondent even though she was taking hormones and had dressed in women's clothing from a young age.[14] Instead, the court chose to accept "gay men with female sexual identities" as the basis for her claim. This PSG became the standard that courts employed when analyzing all transgender claims, referring to them by male pronouns even though their gender identity was female.[15] It was not until 2015 in *Avendano-Hernandez* that a circuit court explicitly recognized the difference between sexual orientation and gender identity.[16] Unfortunately, although the decision referred to the petitioner as a transgender woman from Mexico, the court did not have the

[10] Before 1990, gay and lesbian individuals were not legally allowed to immigrate to the US. *See* INA § 212(a)(4); 8 U.S.C. 1182(a)(4) (1988) (repealed 1990).
[11] *In re Toboso-Alfonso*, 20 I&N Dec. 819, 823 (B.I.A. 1990).
[12] *See, e.g*., *Nabulwala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007); *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005).
[13] *See* Wayne, *supra* note 1, at 248.
[14] *Hernandez-Montiel v. I.N.S.* 225 F.3d 1084 (9th Cir. 2000).
[15] *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004). (Although the Court held that transgender woman from El Salvador exhibited "transsexual behavior," they referred to Reyes as a homosexual male, used male pronouns, and spoke of her "female sexual identity"); *see also Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1054 (9th Cir. 2006).
[16] *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015); Wayne, *supra* note 1, at 250. (The earlier case of *Morales v. Gonzales* was the first to use "transsexual" to describe the petitioner, but ignored the discrepancy between sexual identity and gender when the IJ cited the acceptance of a gay pride parade in Mexico City as evidence that she did not have a well-founded fear).

opportunity to decide if transgender people could constitute a cognizable PSG.[17] No court has specifically recognized transgender people as a PSG since.[18]

This gap in asylum case law is a consequence of the entrenched biases within the US immigration system that institutionalize a particular view of homosexuality and race within the system, encouraging judges to use these stereotypical categories when making decisions while perpetuating rigid doctrinal obstacles that strengthen these stereotypes.[19] Deborah Morgan finds that the "facially neutral asylum process conceals the fact that immigration officials and IJs make decisions based on racialized sexual stereotypes and culturally specific notions of homosexuality."[20] In the aftermath of WWII as countless Europeans from Cold War countries fled, the drafters of the 1951 UN Convention Relating to the Status of Refugees designed protection laws with white, heterosexual, cisgender males in mind.[21] The laws did not address the layered, multidimensional forms of racial, sexual, and gender oppression experienced by those outside the European context.[22] Judges unconsciously imbue their own "culturally specific white constructs of sexuality [as they] attempt to mold the various expressions of sexuality into a gay identity" that Americans are familiar with.[23] The American "substitutive model" of LGBTQ+ identity perpetuates a dangerous and fixed idea of sexual minority status based on upper-class white male norms that is supplanted onto transgender women, requiring public

[17] *Id*. Avendano-Hernandez had been convicted of the serious offense of drunk driving, which made her ineligible for asylum. Instead, she was granted relief under CAT, which did not require any inquiry into PSG.
[18] Wayne, *supra* note 1.
[19] Bowmani, *supra* note 3, at 5. ("Since the early colonial period, the boundaries of "proper" and "deviant" expressions of sexuality and gender have been deeply intertwined with race.")
[20] Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 Law & Sex. 135 (2006).
[21] Bowmani, *supra* note 3, at 15.
[22] Morgan, *supra* note 17, at 149. (In America, "white supremacist culture has assigned a battery of sexual stereotypes to each marginalized racial group [in the United States]" which has led to entrenched racialized heterosexist subordination. If a person of color is also a sexual or gender minority, their identity is rejected if it isn't in line with the dominant stereotypes that American society has placed on that immigrant group.)
[23] *Id.*

expression of private actions and ignoring the complex relationship between identity and conduct.[24] This model discounts the spectrum of ways transgender women express their "performative identity" at different stages in their transition process when immutable biological traits are in flux.[25] It also ignores the reality that gender minorities are treated differently, and often more harshly, than gay men in patriarchal cultures such as the ones in the Northern Triangle because they represent an assault on the binaries that uphold the patriarchy. These essentialist biases effectively force transgender people into an artificially constrained "sexual minorities" box that they can never fit, allowing IJs to conduct superficial analysis of their claim by erasing their true identity.

But even if applicants have evidence of overt sexual acts that are in-line with IJs biases, it is often not enough. Courts have created an artificial distinction between LGBTQ+ activity and identity in their nexus analysis, denying relief to sexual and gender minority applicants based on a higher standard than other asylum applicants. This status versus acts distinction allows courts to conclude that there is no nexus between the PSG and the persecution even in light of systematic oppression by the government.[26] Courts find that this oppression is caused by the applicant's acts, not their identity. In *Maldonado v. U.S. Att'y Gen.*, the Third Circuit held that the applicant was persecuted not because of his membership in a PSG, but because he frequented gay clubs. Although he was detained over twenty times by the Argentinian police who told him

[24] *Id.*at 152. (The substitutive model is based on the idea that homosexual identity is proven through homosexual conduct, ignoring that different cultures don't assign the same meanings to certain conduct as the U.S. Social commentators around the world have identified the "export" of the U.S. model of homosexuality as an identity as a form of cultural imperialism and have identified the concept of homosexuality as a "white disease.")
[25] Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 849 (2002). The performative theory "suggests that identity has a performative aspect, such that one's identity will be formed in part through one's acts and social situation, rather than being entirely guaranteed by some prediscursive substrate" such as sex organs or chromosomes. Courts are hesitant to extend protection to these characteristics.
[26] Paul O'Dwyer, *A Well-Founded Fear of Having my Sexual Orientation Claims Hear in the Wrong Court*, 52 N.Y.L. SCH. L. REV. 185 (2007).

that "faggots need to die," the court concluded that this persecution was not brought on because of his gay identity.[27] In *Kimumwe v. Gonzales*, the respondent was detained and expelled from school after he had sexual relations with another boy in his class. Even though he was told he was being detained because he was gay, the lower court concluded the imprisonment was the result of specific homosexual acts in which he "lured" another boy of the same age into a consensual same-sex encounter, not on account of his membership in a PSG.[28] It did not matter that local police chased him, his neighbors beat him and shocked him with electrical wires, or that President Mugabe had outlawed homosexuality. The BIA and Eighth Circuit upheld this denial of protection, ignoring the strong indicator that the respondent's partner, who identified as straight, was never detained.

These two cases illustrate the obstacles transgender clients face when they are forced to fit their identity into artificial homosexual categories such as "gay men with female tendencies." The malleable and discretionary nature of the distinction between acts and identity allow IJs to use their wide discretion and personal subjectivity in rejecting sexual minority claims. Paul O'Dwyer argues that although the wide-spread view that federal courts are a more sympathetic venue for asylum claimants is usually true, "the lack of prescribed, objective standards allows judges to indulge their own prejudices and stereotypes regarding LGBT applicants," making them a hostile forum in which to bring sexual minority claims.[29] The wide divergence between circuits is evident when one compares the Ninth Circuit's flexible social group test, which considers "voluntary associational relationships" in the PSG analysis, to the requirements in less

[27] *Maldonado v. U.S. Att'y Gen.*, 188 F. App'x 101 (3d Cir. 2006).
[28] *Kimumwe v. Gonzales*, 431 F.3d 319 (8th Cir. 2005).
[29] See Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, 52 N.Y.L SCH. L. REV. 185, 210 (2007).

friendly arenas.[30] This lack of uniformity disfavors transgender clients by allowing adjudicators' subjective opinions about sexual minorities, including whether some of the most intimate aspects of one's life are an important indicator of this identity, to color their decision about gender minorities without acknowledging the fundamental differences between the two categories.

Furthermore, wider understanding of transgender identities outside of the courts is a relatively new phenomenon that is in flux. U.S. society has only recently come to accept and discuss transgender identity, and an applicant's country of nationality may not distinguish between gay men who are passive or feminine and men who have transitioned to women.[31] Recent developments under President Trump signal a step back in regards to the recognition and broader understanding of transgender identities in the US. In October 2018, reports that the Department of Health and Human Services (DHHS) was spearheading an effort to narrowly define gender "on a biological basis that is clear, grounded in science, objective and administrable" for government agencies would make it even more difficult for attorneys representing transgender individuals to successfully argue transgender women as a PSG.[32] If this proposed change to define gender as unchangeable and solely based on sex at birth is adopted, it will pull back many of the Obama-era reforms that signaled a normalization of transgender civil rights. It makes sense that lawyers have strategically categorized their transgender clients as gay men in order to fit within already established legal categories.[33] It is always safer to base your arguments on precedent, especially in cases that put people's lives on the line. But at what cost?

[30] *Id.* at 199.
[31] Wayne, *supra* note 1, at 252.
[32] Erica L. Green, Katie Benner & Robert Pear, *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES, Oct. 21, 2018, https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.
[33] Wayne, *supra* note 1. (For example, "the attorney for *Reyes in Reyes-Reyes v. Ashcroft*, has explained that his client did actually identify as transgender…Nevertheless, he and his colleagues chose to base Reyes's claim on her uncontested membership in a previously established particular social group").

These stifling legal confines may be denying certain groups the protection that they deserve under the law.

b. **Social Visibility and Particularity in Sexual Minority Claims**

There has been considerable debate over the requirements of particularity and social visibility in PSG asylum applications of sexuality minorities. Between 1985 and 2006, courts applied the internationally recognized *Acosta* "protected characteristic" test when deciding if an applicant was a member of a PSG, ignoring external perceptions of the group.[34] In 2002, UNHCR put forward guidelines that embraced both the U.S.'s protected characteristic and Australia's social perception tests as alternatives, recommending that the court first ask if the trait is immutable and if it is not, ask how society actually or probably perceives the group and if they perceive the applicant as a member. In 2007, the BIA purported to adopt the UNHCR guidelines, but replaced "social perception" with "social visibility" without acknowledging this "sudden, significant departure" in PSG precedent.[35] The social visibility test asks if the society perceives those with the characteristic in question as members of a social group.[36]

This heightened standard ignores the fact that for members of the most marginalized groups, keeping their minority traits invisible from society may be the key to survival. Many transgender or gay victims of abuse will take great pains to seem invisible within society as a protection mechanism, especially because it is often easier to mask sexual orientation or gender

[34] *Matter of Acosta*, 19 I. & N. Dec. 211, 233, 1985 WL 56042 (B.I.A. 1985). The *Acosta* test requires members of a PSG share characteristics that are innate (cannot be changed) or that are so fundamental to individual identity that such a change should not be required.

[35] Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Poly Rev. 47, 87 (2008); Later decisions have challenged this heightened visibility standard. *See Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (After the BIA rejected PSGs because there was no proof they were highly visible in *In re A-M-E-& J-G-U-* and *In re C-A-*, the Seventh Circuit held that the "social visibility" approach "makes no sense" and has criticized the BIA for its failure "to explain the reasoning behind the criterion of social visibility."); *see also Matter of M-E-V-G*, 26 I&N Dec. 227, 237 (BIA 2014) (Literal visibility is not needed for a group to be socially distinct).

[36] *In Re C-A-*, 23 I. & N. Dec. 951, 961 (B.I.A.).

than traits such as race or ethnicity. Furthermore, those in power will often purposefully negate the existence of socially unpopular groups to keep their power and preserve the existing social structure. The assumption underlying the social visibility requirement ignores "the ways in which power relations directly shape social identities and influence the relative visibility or invisibility of various groups."[37] In high conflict settings, such as those in gang-run areas of the Northern Triangle, "socially marginalized groups often are stripped of social agency and denied the ability to define their own identities" because those in power view negating the minorities' existence as intrinsically linked to keeping the dominant group intact. Because those in power decide if and when transgender and LGBTQ+ communities are seen, the social visibility test may not be the best indicator of asylum eligibility.[38]

With the shift to the social visibility test, adjudicators required actual visibility in society and began to conflate their understanding of LGBTQ+ communities in the U.S. with that of the home country, supplementing their own understanding of what membership in this subgroup should look like. The Ninth Circuit has warned against courts' propensity to insert "conjecture" when dealing with other cultures, stating that "[n]on-evidence based assumptions about conduct in the context of other cultures must be closely scrutinized," concluding that "it [is] highly advisable to avoid assumptions regarding the way other societies operate."[39] Different cultures constrain fringe identities in various ways, making it much more difficult in some countries for a person to show any outward indications of group membership. But because the American system focuses on public displays of group membership and "malleable physical characteristics …

[37] Marouf, *supra* note 35, at 105.; The USCIS Asylum Officer Training Manual tracks the social visibility test, stating that visibility is established when "members of the group possess a trait that make the members recognizable or distinct in the society."
[38] *Id.*
[39] *Lopez-Reyes v. INA,* 79F.3d 908, 912 (9th Cir. 1996).

[rather] than [on] testimony about same-sex relationships and persecution by government officials," transgender women who are from communities that do not recognize 'transgender' as a real identity marker will have an insurmountable task when trying to prove social visibility. When your culture does not recognize your gender in language or in law, it is easy for society to ignore your membership in that gender group. Not enough is done to account for these nuances in asylum proceedings.

Even if IJs do focus on the cultural perceptions in the petitioner's home country, they tend to require proof of knowledge of gay culture and participation in the applicant's country of origin. When deciding if an individual established membership, courts "focus more on knowledge of gay trivia than on actual experiences and culturally relevant identity markers."[40] This penalizes applicants who have actively decided not to participate in the community for fear violence, ostracization, and death.[41] For applicants who cover their identity to survive or whose outward appearance does not fully match their true gender, they are not likely to meet the heightened standard of social distinction. As a result, "an applicant's inability to produce evidence of participation in the LGBT community leaves adjudicators to rely instead on evidence of harm, conflating the separate elements of persecution-based petitions."[42] This flawed mixed analysis ignores the fact that a fear of future persecution does not vanish when someone avoids the outward appearance of being a member of a PSG. The BIA and the federal courts have not established a bright line rule for what constitutes social visibility for trans and gay applicants, reflecting the larger theoretical issue of what it means to be a member of a PSG.[43] An applicant's

[40] Morgan, *supra* note 17, at 154-55.
[41] Keith Southam, *Who am I and Who Do You Want Me to Be - Effectively Defining a Lesbian, Gay, Bisexual, and Transgender Social Group in Asylum Applications*, 86 CHI.-KENT L. REV. 1363, 1375 (2011).
[42] *Id.* at 1376.
[43] In 2014, the BIA clarified that the social visibility test did not require ocular visibility by re-naming it the "social distinction test." This new test opens up the possibility of protection for those who try to hide their membership, but there have been inconsistencies in its application as courts continue to reject *Acosta* reasoning and advocates have

credibility, and ultimate success, should not be based on a judge's level of comfort with non-binary notions of gender. Better guidance on the social visibility and social distinction tests for gender non-conforming asylum seekers would protect against some of the underlying biases IJs may hold. It is with these current legal discrepancies in mind that I now offer a short analysis of the violence directed at gender minorities in the Northern Triangle region.

II. Conceptualizing Persecution in the Northern Triangle: Statistics and Reports

Transgender women in Central America are particularly vulnerable to sexual abuse and targeted gang violence. The Northern Triangle Countries of Guatemala, Honduras, and El Salvador, have some of the highest murder and impunity rates in the world.[44] Non-conforming LGBTQ+ and transgender individuals are particularly exposed to these high rates of violence in light of patriarchal social norms. These norms produce targeted gang violence and employment discrimination, which forces many transgender women to turn to sex work, placing them in nightlife environments that breed crime and violence.[45] The Department of State's 2017 Human Rights Reports for all three countries concluded that transgender individuals were particularly subjugated in the employment and education spheres, faced targeted gang-member and police violence, and were unable to obtain identification documents displaying their self-identifying gender.[46]

criticized it as only confusing PSG analysis even more. It is unclear how this test would be applied to gender minorities. Benjamin Casper *et. al., Matter of M-E-V-G- and the BIA's Confounding Legal Standard for "Membership in a Particular Social Group*" Immigration Briefings (June 2014).

[44] The 2017 Global Impunity Index, which ranks countries by their inability to bring perpetrators to justice, ranked Honduras as 12th, El Salvador as 13th, and Guatemala as 19th in the world. Center of Studies on Impunity and Justice, *Global Impunity Dimensions* (2017), https://www.udlap.mx/cesij/files/IGI-2017_eng.pdf.

[45] Amnesty Int'l, *No Safe Place* (Nov 2017), *available at* https://www.amnestyusa.org/wp-content/uploads/2017/11/No-Safe-Place-Briefing-ENG-1.pdf. ("They also face harassment and intimidation by the police and authorities because of their gender identity and/or their sexual orientation and, when crimes occur, they face serious obstacles to access justice from law enforcement officials who discriminate against them").

[46] U.S. Dept. of State, Bureau of Democracy Human Rights, and Labor, *Country Reports on Human Rights Practices for 2017*, Washington: Government Printing Office, 2017.

The last decade has been marked by a dramatic increase in this directed violence. In 2015, El Salvador was named the murder capital of the world, with over 6,600 registered homicides for a population of only 6.3 million.[47] From 2003 to 2015, the number of transgender women murdered annually in El Salvador increased 400 percent.[48] In 2015, the Salvadoran human rights organization Asociación Salvadoreña de Mujeres Trans (ASTRANS) found that of the 42 LGBTQ+ victims reported murdered in 2015, 32 were transgender women.[49] It is often the government who perpetuates the violence and harassment against non-conforming individuals. In Honduras, there were 174 reported violent deaths of sexual and gender non-conforming individuals between 2009-2014, and a majority of these deaths were at the hands of official police and security forces.[50] A report by Inter-American Commission on Human Rights (IACHR) found that state police were the most frequent perpetrators of violence against the LGBTQ+ community, with trans women most vulnerable to abuse and arbitrary detention as a result of the laws of "morals and good customs," including the 2001 Police and Social Coexistence Act.[51]

Even when transgender women flee the rocketing levels of discrimination and gender-based violence in their home countries, they often cannot find safety in neighboring countries. In

[47] James Carr, *Kill the Snitch: How Henriquez-Rivas Affects Asylum Eligibility for People Who Report Serious Gang Crimes to Law Enforcement*. 91 WASH. L. REV. 1313 (Oct. 2015).
[48] Kids in Need of Defense, Latin America Working Group, & Women's Refugee Commission, *Sexual and Gender Based Violence (SGBV) & Migration Fact Sheet* (April 2018), available at https://supportkind.org/wp-content/uploads/2018/05/SGBV-Fact-sheet.-April-2018.pdf.
[49] Inter-American Commission on Human Rights, Violencia contra Personas Lesbianas, Gay, Bisexuales, Trans e Intersex en América, 172-3 (Nov. 12, 2015), available at www.oas.org/es/cidh/informes/pdfs/ViolenciaPersonasLGBTI.pdf.
[50] IACHR, Violence, Inequality, and Impunity in Honduras (2015), http://www.oas.org/en/iachr/reports/pdfs/Honduras-en-2015.pdf; *see also* La Prensa, *Policías y bandas criminales, principales agresores de la comunidad LGTBI en Honduras* (August 2014), http://www.laprensa.hn/honduras/tegucigalpa/740655-98/polic%C3%ADas-y-bandas-criminales-principales-agresores-de-la-comunidad-lgtbi-en-honduras.
[51] *Id.* at 60. Honduras' 2001 Police and Social Coexistence Act gives police the power to arrest anyone who "violates modesty, decency and public morals" or who "by their immoral behavior disturbs the tranquility of the neighbors." This law is used to beat and arrest trans women inside and outside the sex work industry.

2016, Amnesty International released *No Safe Place*, a report which illuminated the systematic and interlocking abuses awaiting the large portion of persecuted women who make the difficult decision to seek refuge in Mexico.[52] During the perilous journey and once in Mexico, non-conforming individuals are subjected to human rights abuses by Mexican Migration services and police in processing and detention centers, where they are placed in communal cells reserved for men.[53] The risk of persecution from the gangs that threatened, attacked, and kidnapped them in their home countries does not disappear either, as these gangs have established integrated networks in Mexico.[54] In 2016-17, UNHCR found that two thirds of LGBTI immigrants they spoke to had faced sexual and gender-based violence in Mexico after they crossed the border.[55] The Mexican Government refuses to protect this defenseless population, as an estimated 99% of reports of abuse by security forces and Mexican migration services go unpunished.[56] Unable to find protection in what they thought would be a country of refuge, transgender women have begun to organize collectively by creating their own protection units or joining larger groups of asylum seekers trying to get to the U.S. border safely.

Transgender individuals in the Northern Triangle experience multiple forms of discrimination that intersect and are intrinsically linked to the patriarchal and highly religious cultures that prevail in the three countries. The Central American "machismo" culture that legitimizes men's dominance over women and those with feminine characteristics is embedded in state institutions and wider society, resulting in "human rights abuses against lesbian and bisexual women [that] are shaped and determined by particular gender prescriptions and

[52] Amnesty Int'l, *supra* note 45.
[53] *Id.* at 20.
[54] *Id.* at 21.
[55] *Id.* at 20.
[56] Ximena Suárez *et al.*, El acceso a la Justicia para Personas Migrantes en México (July 2017), WOLA, https://www.wola.org/wp-content/uploads/2017/07/Accesoalajusticia_Versionweb_Julio20172.pdf.

standards."[57] The acute transphobia in Central America is apparent when you compare it to larger trends. Transgender Europe (TGEU) determined that between 2008-2016 an estimated 2,264 trans people were murdered in the Americas, but noted that "78% of homicides of transgender people were concentrated in Latin America, making evident the calcification of patriarchy and machismo in those societies."

Furthermore, the prevailing emphasis on religious values within Central American homes presents a justification for the discrimination trans women face. According to Asociación LGTB Arcoíris, sexual minority asylum seekers in Honduras reported wide spread mistreatment and abuse from their families, which has led a disproportionate number to leave home at an early age.[58] This is often a result of purported Christian values that mark gender non-conformity as immoral.[59] For young transgender women who leave their homes with nowhere to go, they experience heightened risks of sexual abuse because of the intersectionality of oppression as women and as sexual minorities. The patriarchal norms described above are often most apparent when one examines the gangs that control large territories within the region.

III. Gang Related Claims: PSGs in Light of Widespread Extortion and Violence

According to UNHCR, a gang is defined as to "relatively durable, predominantly street-based groups of young people for whom crime and violence is integral to the group's identity."[60] Most gang claims coming from the Northern Triangle stem from persecution by Mara Salvatrucha (MS-13) and Calle 18, which have over 85,000 members in the region that allow the

[57] Carsten Balzer, Carla LaGata, & Lukas Berredo, *TMM Annual Report* (2016), TGEU, https://transrespect.org/wp-content/uploads/2016/11/TvT-PS-Vol14-2016.pdf.
[58] Immigration & Refugee Board of Canada, *Honduras: Information Gathering Mission Report* (Feb. 2018) https://www.irb-cisr.gc.ca/en/country-information/research/Pages/Honduras-2018P1.aspx.
[59] Duncan Tucker, *Homophobia in Honduras: Growing Attacks on LGBT Activists,* Index on Censorship (Apr. 2016) https://www.indexoncensorship.org/2016/04/magazine-honduras-rainbow-warriors-the-dangers-ofbeing-an-lgbt-activist/.
[60] UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 46 (Mar. 2010), http://www.refworld.org/docid/4bb21fa02.html.

groups to thrive off of highly complicated and dispersed networks.[61] Because "Las Maras" survive off of respect and reputation, any resistance to recruitment or extortion usually "trigger[s] a violent and/or punitive response," especially towards non-conforming individuals who are viewed as a direct threat to the gang's machismo ethos.[62] Gangs use threats and intimidation to control government actors and those who might testify against, creating an environment in which convictions were achieved in only 5% of reported homicides in the Northern Triangle region.[63] Human Rights Watch produced several reports chronicling the failure of the Honduran Government to investigate or bring to justice for transgender women who were shot, burned, and violently murdered in major cities.[64] In Guatemala, there are no laws in place that explicitly prohibit discrimination on the basis of gender or sexual orientation.[65] This makes it even more difficult for the government, even if they have the motivation, to prosecute gang members.

a. The BIA's Treatment of Gang Claims

The BIA chose gang claim cases as the vehicle through which to add the requirements of social distinction and particularity to the well-established *Acosta* test for PSGs. This legislative history has made it very difficult to establish cognizable PSGs for gang-based claims,[66] and many have criticized the social visibility and particularity requirements as arbitrarily narrowing

[61] Clare Ribando Seelke, *Gangs in Central America* (2014), Congressional Research Service (CRS), available at https://fas.org/sgp/crs/row/RL34112.pdf. (They are often referred to as "Las Maras.")
[62] UNHCR, *supra* note 60, at 1.
[63] InSightCrime, *The Northern Triangle: The Countries That Don't Cry for Their Dead*, Apr. 23, 2014, http://www.insightcrime.org/news-analysis/the-northern-triangle-the-countries-that-dont-cry-for-their-dead.
[64] Human Rights Watch (HRW), *Honduras: Investigar asesinatos de mujeres transgénero* (Jan. 2011), https://www.hrw.org/es/news/2011/01/31/honduras-investigar-asesinatos-de-mujeres-transgenero.
[65] OTRANS, *Human Rights Violations Against Transgender Women in Guatemala* (2018), Human Rights Committee, available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/GTM/INT_CCPR_CSS_GTM_30350_E.pdf.
[66] UC Hastings, *Gang Claims Practice Advisory* (2017) (available upon request)(The requirements for PSGs remains in flux, with the BIA split against several federal court of appeals).

"the 'particular social group' definition to such an extent that it will stifle the development of future gang-based asylum social group claims and other social group claims as well."[67] Because so many Central Americans are targeted indiscriminately by gangs in this region, the court requires substantial evidence that the gang specifically targeted the respondent because of their membership in a PSG, not just because they sought to preserve or increase their control of the area. In *Matter of S-E-G-*, the Board denied the petitioners' claims because they believed the motivation behind the gang's persecution was solely to increase their numbers, not because the applicants were part of the group "Salvadoran youths resisting gang recruitment."[68] When a petitioner cannot clearly show why they are different from the huge numbers of people targeted by gangs, it is usually a losing battle. Arguments that someone was targeted because of their political opinion against the gang will be heavily scrutinized, and without a showing that they made public anti-gang statements or were very involved in highly visible political activities, it will most likely fail.

But just because gangs inflict or threaten violence on a large segment of the population, this doesn't mean transgender applicants cannot still bring strong claims. Sessions offered a faulty premise when he opined gang claims are not cognizable because "victims of gang violence often come from all segments of society, and they possess no distinguishing characteristics or concrete trait."[69] This blanketed denial on account of the large number of victims is a departure from precedent. Indeed, the Seventh Circuit noted that "although the category of protected persons may be large, the number of those who can demonstrate nexus is likely not"[70] and later

[67] Elyse Wilkinson, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME L. REV. 387, 413 (2010).
[68] *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).
[69] *A-B-, supra* note 4, at 335.
[70] *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013).

stated that it would be "antithetical to asylum law to deny refuge to a group…merely because too many [individuals] have valid claims."[71] Furthermore, transgender women will often have a stronger claim than other women targeted by MS-13 because they are a smaller and more discrete group.

Recent decisions show promising flexibility in this area of asylum law. For example, some federal courts have accepted PSGs based on a respondent's connection to someone else targeted by a gang. In *Crespin-Valladares,* the Fourth Circuit accepted the PSG of "family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses."[72] It is also now clear that a gang does not need to target and persecute someone based centrally on the PSG, so long as the transgender identity is more than "an 'incidental, tangential, superficial, or subordinate' reason" for his persecution.[73] Increased monitoring and data collection from NGOs and watchdog groups would give transgender women a stronger foundation on which to bring these claims.

IV. Recommendations and Alternative Arguments to Fight Against *Matter of A-B-*

After analyzing legal inequities in U.S. asylum law and the targeted violence transgender women experience at the hands of government actors and gang members, it is necessary to chart a path forward so that transgender women from the Northern Triangle preserve their right to protection in U.S. courts. This section offers suggestions and pertinent case law that can act as a starting point for attorneys filing claims post-*A-B-*. I first offer some overarching considerations on fact-specific argumentation, precedent, and discretion. Then, I organize specific

[71] *NLA v. Holder*, No. 11-2706 (7th Cir. 2014).
[72] *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *see also Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005) (the "threat of death" qualifies as persecution).
[73] *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009) (quoting *In re J-B-N-*, 24 I. & N. Dec. 208, 214 (BIA 2007)).

recommendations based on the three elements of an asylum claim--PSG, persecution, and nexus--to ensure Session's blending of these elements does not confuse practitioners.

While the AG's decision has cast doubt on gang and domestic violence (DV) claims generally, Sessions did not categorically foreclose these types of cases because asylum claims are always supposed to be adjudicated on a case-by-case basis.[74] Attorneys should first emphasize this case-by-case adjudication requirement, highlighting the unique importance of fact and record-based inquiry for PSG claims in the U.S. Immigration system. By applying the system's long-standing procedure for what constitutes binding precedent, it is evident that *A-B-* only bars claims based on the PSG in *A-R-C-G-*, "married women in Guatemala who are unable to leave their relationship."[75]

Once an attorney establishes the importance of case-specific adjudications, they must throughout the application and in court take great measure to distinguish every piece of the record from that in *A-R-C-G-*. Reading Sessions's opinion closely, it stands for the idea that the BIA did not thoroughly analyze the record or fully present its reasoning when rejecting the lower court's assessment.[76] The AG relies on specific omissions or missteps by the court to craft a blanketed narrative that tries to simplify a very complex area of law that is under the purview of the BIA and federal courts.[77] The *A-B-* decision does place lawyers back to pre-*A-R-C-G-* law, but contrary to a superficial reading of the opinion, it does not place a full bar on these claims. Instead, it creates a legal world in which there is no definitive precedent. In this new world,

[74] *Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017) ("A determination whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis"). *see also Crespin-Valladares*, *supra* note 71.
[75] In immigration courts, precedent is only established when the AG or BIA designates its decisions as such. Precedent is also meant to be read narrowly, applying only to similar cases.; *See A-B-*, s*upra* note 4, at 319.
[76] Sessions rejected the way the BIA came to its conclusion, without fact findings from the record and by stipulation. Immigrant Legal Resource Center (ILRC), *Matter of AB Considerations: Practice Advisory* (Oct. 2018), https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf.
[77] Jason Boyd & Greg Chen, *AILA Policy Brief: USCIS Guidance on Matter of A-B- Blocks Protections for Vulnerable Asylum Seekers and Refugees*, AILA 1 (July 2018).

immigration lawyers must view every case as a blank canvas, pushing for fair, fact-specific due process hearings that are not muddied by pure dicta.

a. Point to Precedent

As noted above, the U.S. has a long history of accepting claims based on gender-based violence that must be called upon and applied in the alternative for transgender victims of domestic or gang violence. From 1999-2004, there was a period after *Matter of R-A-* but before *A-R-C-G-* when no case law existed for those who sought protection specifically based on domestic abuse. However, several DV survivors brought successful cases by applying other gender-based claims that had a stronger foundation in the courts. Creative lawyering from this period is helpful in challenging Sessions's opinion because it highlights how attorneys can establish asylum claims by analogizing to other types of gender-based persecution besides domestic or gang violence. Since *A-R-C-G-* is no longer "good law," attorneys may strategically apply other gender-based cases that have recognized sex trafficking, forced prostitution, gang rape, or imposition of repressive cultural norms as a basis for asylum.[78] By analogizing to case law that might not initially be the most obvious or applicable to the instant case, an attorney can bolster the novel legal claims they are trying to put forward.

Since 2004, the Department of Homeland Security (DHS) has consistently agreed that domestic and gender-based violence claims can constitute a cognizable foundation for asylum. The acceptance of DV as a basis for a PSG in *A-R-C-G-* was further developed and defined in DHS's 2009 brief to the court in *Matter of L-R-*.[79] DHS reminded Sessions of this view in its'

[78] Karen Musalo and Stephen Knight, *Gender Based Asylum: Recent Trends*, 77 No. 42 Interpreter Releases 1533 (Oct. 2000). The CGRS database tracked 443 asylum cases between 1995-2000, and found that of the 107 sexual violence and rape cases tracked, 45 were granted. For forced prostitution, only 4 of the 9 were granted asylum; Better data collection is necessary to gain a clearer picture of what gender claims are most successful (The CGRS' sample was not random as data was provided by attorneys willing to share).
[79] DHS's Supplemental Brief, *Matter of L-R-* (BIA Apr. 13, 2009), available at

2017 brief for *A-B-*, writing that it "generally supports the legal framework set out by the Board in Matter of *A-R-C-G-*." DHS specifically stated that like the BIA, it "understands 'unable to leave a relationship' to signify an inability to do so based on a potential range of 'religious, cultural, or legal constraints...'".[80] Practitioners should remind the court and its adversary that they themselves have repeatedly embraced these DV and gender-based arguments. With these overarching consideration in mind, I will now present specific suggestions for each of the three elements of an asylum claim.

b. The Elements of the Claim

Particular Social Group (PSG)

First, when articulating a PSG claim, it is imperative to argue that the social perception test is applicable and to distinguish the rejection of the PSG in *A-R-C-G-* from your own. Session's rejection of *A-R-C-G-*'s social group was premised on insufficiency of analysis and is not a categorical bar to victims of private violence. The AG concluded that the BIA, when it accepted DHS's concession that DV can be a basis for a PSG, did not require sufficient evidence of particularity or social distinction.[81] This does not change the established three-prong PSG framework of immutability, particularity, and social visibility and attorneys should closely adhere to this structure.[82] For attorneys deciding what evidence is necessary to show particularity and social distinction, *Matter of M-E-V-G- (M-E-V-G-),* which replaced the "social visibility" standard with the more expansive "social distinction" test, is instructive. *M-E-V-G-* provides a

http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf. ("DHS accepts that in some cases, a victim of domestic violence may be a member of a cognizable particular social group")

[80] See Jeffrey S. Chase, *Matter of A-B- Amicus Brief Exposes Sessions' Lawlessness*, LexisNexis Legal Newsroom (May 8, 2018).

[81] UC Hastings Center, *Matter of A-B-: Analysis and Strategies for Success Webinar* (June 20, 2018)(available upon request) (Sessions merely rejected particular pieces of evidence as opposed to the larger idea that private victims of violence cannot meet the particularity requirement).

[82] Practitioners should still use the *Acosta* test to show that transgender women "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Acosta*, supra note 34.

list of evidence that will establish group cognizability, including country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies. This evidence will establish that a group exists and is perceived as "distinct" or "other" in a particular society.[83]

When selecting evidence, it is important to offer extensive documentation from the country of origin about how transgender women are viewed by society and if the women recognize this group themselves.[84] Attorneys should offer reports, such as the ones presented in the statistics section above, to demonstrate that transgender women are recognized as "other" and actively recognize their own membership in this othered group even as they try to hide it. Although transgender populations are actively "invisibilized" and re-pressed in South America, evidence that the government knows of abuses and does nothing will be instrumental. Once practitioners obtain the necessary evidence, they must ensure that each piece of the record is linked to the elements of immutability, particularity, or social distinction. *A-B-* rejected the PSG analysis because the Board did not explicitly link particular pieces of evidence to the legal standard. Avoiding this mistake is dispositive for a successful asylum claim.

In the alternative, a transgender applicant may be able to argue that they have a PSG imputed on them.[85] Courts have held that persecution still occurs when a persecutor attributes a certain identity marker, such as membership in a PSG, to the victim even if the victim is not in fact within that group.[86] Transgender women are often viewed by society as gay men with female tendencies or in some cases as lesbian women with masculine tendencies. These women often

[83] *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014). The "social distinction" test focuses on the extent to which the group is understood to exist as a recognized component of the society in question. This covers those who try to hide their membership and not actually "seen," which may be applicable to transgender women.
[84] *Id.* at 242. ("We clarify that a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor… The members of a [PSG] will generally understand their own affiliation with the grouping, as will other people in the particular society").
[85] Carr, *supra* note 47, at 1321. ("If the claim is based on a characteristic the applicant does not actually possess, so long as the persecutor believes the applicant possesses, the applicant can still prove a well-founded fear").
[86] *See Singh v. Gonzales*, 406 F.3d 191, 196-97 (3d Cir. 2005).

suffer persecution based on this artificial gay or lesbian identity because gangs and police officers incorrectly assume they are sexual minorities. What matters in this analysis is the subjective belief of the persecutor at the time and if they act on that belief. IJs apply a reasonableness test, asking if the persecutor's belief that the applicant possessed that characteristic was reasonable.[87] Any verbal evidence of the persecutor's view, such as anti-gay slurs hurled against clients, is particularly helpful.[88] Instead of fighting the prevailing narrative rejecting transgender PSGs, attorneys may use it to their advantage while still being true to the client's identity through an imputed characteristic argument.[89]

Persecution

Second, the AG attempted to increase the difficulty of proving persecution by private actors when he conflated the elements of asylum analysis and introduced a new "complete helplessness" standard. However, persecution analysis has not been altered by the opinion, and should still be measured by the severity of the harm requirement.[90] For transgender clients, it is helpful to use cumulative harm theory in court to meet this severity of the harm test. It is often more challenging for transgender applicants to show that the government is "unable or unwilling" to protect the victim, as "[t]he added layer of sexual orientation and gender identity, identities routinely targeted in the private sphere and subject to culturally specific understanding, makes it all the more difficult for LGBTQ asylum-seekers to successfully gain refuge."[91] But

[87] Carr, *supra* note 89.
[88] Joseph Landau, "*Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual Orientation-Based Asylum Law*, 32 FORDHAM L. REV. 101, 124 (2005) (arguing that "[m]any persecutors use slang terminology for transgender persons synonymous with derogatory terms like "fag" or "dyke," demonstrating that, from the persecutor's perspective, transgender identity and homosexual identity are synonymous").
[89] Even if the imputed argument is not accepted, attorneys can always argue both gender and sex discrimination together. The Eleventh Circuit enunciated in *Glenn v. Brumby* that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination."
[90] In defining "persecution," Session confusingly meshed severity of harm, nexus, and government protection analysis into this one inquiry. *A-B-*, *supra* note 3, at 337.
[91] Bowmani, *supra* note 3, at 16.

cumulative harm theory establishes that when a client experiences repeated acts of physical and psychological violence, these series of acts should be viewed in the aggregate to decide if the respondent meets the persecution bar. In *In re O-Z- & I-Z-*, the BIA held that several smaller acts of violence towards a Jewish Ukrainian man and his son was enough, when cumulatively added together, to "constitute more than mere discrimination and harassment."[92] This idea of cumulative harm will be particularly helpful for transgender women who are forced into sex work or gang activities that subject them to daily instances of physical and psychological abuse.[93]

Even after proving that a client has met the severity of the harm requirement, they must establish that the government was "unable or unwilling" to protect them. Before *A-B-*, transgender clients had a stronger footing to argue claims based on persecution by private actors such as MS-13 members without having to argue that the government was directly involved in the persecution. The Fourth Circuit routinely recognized private actors as persecutors, and the BIA has long held that it is not necessary to show that actions against an applicant were either directed or condoned by the government.[94] All that was required was a showing that the home government could not or refused to control the persecutors. Evidence that the respondent reported a crime to the police and nothing was done was sufficient to establish this unwillingness.[95] Sessions himself concluded that "Private violence may well satisfy the [severity of the harm required], and I do not question that *A-R-C-G-*'s claims of repugnant abuse by her ex-husband were sufficiently severe."

[92] *In re O-Z- & I-Z-*, 22 I. & 9 N. Dec. 23, 25-26 (B.I.A. 1998).
[93] If your case relies on gang violence, you must emphasize that *A-B-* had no analysis of a gang-based PSG and any mention of gangs in the opinion was pure dicta. Circuit courts have been split on gang claims, but there is no indication that any have concluded that a blanket rejection is warranted.
[94] *See Hernandez-Avalos v. Lynch*, 784 F. 3d 944 (4th Cir. 2015).
[95] *Id.* (Respondent was successful in establishing that Ukrainian government was unwilling and unable to assist him by offering evidence that he reported three incidents to police and they did nothing but write a report).

But instead of adhering to well-established unwilling or unable standards, the AG introduced a heightened "complete helplessness" test without foundation. Under this new standard, the government must outright condone or be completely helplessness to stop the actions against the applicant.[96] This standard makes it much more difficult for the applicant to show government unwillingness based on police unresponsiveness, as a refusal to assist isn't enough unless there is evidence of active support from law enforcement. Attorneys should cite the plain language of the INA to re-iterate that proof that the asylum seeker is "unable or unwilling to avail himself or herself of the protection of that country" is enough.[97] As early as 1964, in *Matter of Eusaph*, the BIA recognized that private acts a government was unwilling to control could constitute persecution.[98] Sessions's standard would be akin to requiring a certainty of persecution, going against the Supreme Court's decision in *Cardoza-Fonseca*, which interpreted the unwilling and unable test broadly and declined to require a high probability or persecution.[99]

Furthermore, the fact that both applicants under asylum and Convention Against Torture (CAT) have met the recognized standard even when there was evidence that the government did try to respond further bolsters the argument that complete helplessness is not the prevailing standard.[100] The requirement has never been complete helplessness, and Sessions bases his elevated test on one Seventh Circuit case that has rarely been cited by other courts and does not

[96] *Matter of AB*, at 337 ("The applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims.").
[97] INA § 101(a)(42)(A).
[98] 10 I&N Dec. 453 (BIA 1964).
[99] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (The Supreme Court stated that "there is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening.").
[100] This is especially convincing under CAT case law because the CAT standard, which requires higher government consent or acquiescence in torture, is more rigorous than the asylum protection paradigm.

use "complete helplessness" to supplant the existing standard.[101] Moving forward, practitioners must first argue that this new standard is legally unsound and cannot supplant the long-held INA test. Then, to ensure coverage of both prongs of the original test, lawyers should offer separate documentation of the police's unwillingness to respond to reports from transgender clients and the government's inability to fully protect them.[102] By clearly delineating the inability and unwillingness prongs of the test, attorneys can more effectively prove persecution.

Nexus

Transgender claimants are often persecuted for multiple reasons, so it is imperative to emphasize the permissibility of mixed motives in a client's nexus analysis. To have a successful nexus claim, transgender women must prove that they were persecuted on account of their non-conforming gender identity, but other factors that make them particularly vulnerable, such as their employment as sex workers or homeless status, do not hurt the causation claim. So long as an applicant's membership in the gender minority or imputed sexual minority PSG is "one central reason" for the persecution, the applicant will meet the nexus requirement.[103] The Fourth Circuit has produced several recent decisions that uphold the mixed motives reasoning, including *Zavaleta-Policiano v. Sessions*, in which the court upheld the petitioner's gang claim even though the gang's threats were not "exclusively" motivated by her membership in a PSG.[104] Attorneys should cite these recent Fourth Circuit cases on nexus whenever possible.

To defend against any implications that the gang or gender-based violence against the transgender client is motivated by a personal vendetta and amounts to no more than private

101 *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000).
102 *Supra* Part II (documenting police's inability or unwillingness to respond).
103 *Velasquez v. Sessions*, 866 F.3d 188 (2017).
104 *Zavaleta-Policiano v. Sessions*, 873 F.3d 241 (4th Cir. 2017); *see also Oliva v. Lynch*, 807 F.3d 53 (4th Cir. 2015); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 947 (4th Cir. 2015).

criminal activity, lawyers must develop a record that shows how the deeply entrenched patriarchal culture in the Northern Triangle targets transgender individuals because they represent an existential threat to the gender binaries that allow machismo to thrive. This record should include laws from the home country that prove both the complete lack of recognition for transgender human rights and the privileging of patriarchal norms through morality laws.[105] NGO and Governmental reports that document the systematic targeting of gender and sexual minorities will also bolster the argument that the violence a client suffers is not random private criminality, but conscious instrumental violence. No matter what type of persecution a client is facing, it is imperative to couch the persecutor's motivation to overcome the client's non-conforming gender or imputed sexual identity in the context of wide spread, deeply entrenched patriarchal norms.

c. Challenging the Heightened Discretionary Standard

One area that is harder to predict is how the courts will use their discretion after the AG suggested a more expansive approach to weighing negative factors. It has been generally accepted that IJs must do a full balancing test of negative and positive factors in a case, and should not deny an applicant solely based on a finding of one negative factor unless it overcomes all other factors.[106] Departing from this tradition, Sessions seemed to be pushing IJs to deny asylum when he wrote that the discretion requirement "should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum," emphasizing the importance of considering negative factors such as manner of entry, circumvention of orderly refugee procedures, and passage through third countries. This impermissibly heightens the existing standards for exercising discretion.

[105] IACHR, *supra* note 50.
[106] See *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *see also Matter of Pula*, 19 I&N 467, 473 (BIA 1987).

To defend against Session's new discretionary standard, practitioners must argue that the facts involved in *A-B-* raised no issue about the exercise of discretion and nowhere in his opinion did Sessions explicitly overrule the foundational discretion framework in *Matter of Kasigna* and *Matter of Pula (Pula)*. The AG erroneously cites *Pula* as his basis for an expansive discretion that refuses to mandate a full balancing test. In reality, the court in *Pula* rejected the argument that an applicant's use of fraudulent documents to illegally enter the country should bar them in all cases, mandating a totality of the circumstances analysis that required balancing all positive and negative factors.[107] Practitioners should cite this and emphasize the totality of the circumstances aspect of the discretion test.

If issues of credibility arise within a transgender claim, there is a risk that courts will choose to adopt Sessions's view on credibility that "[t]he existence of 'only a few' [omissions or inconsistent statements] can be sufficient to make an adverse credibility determination as to the applicant's entire testimony regarding past persecution." Attorneys should argue that the congressional mandate under 8 U.S. Code § 1158 requires that IJs make credibility determinations by consider all relevant factors and circumstances.[108] Advocates must also ensure that their client has an opportunity to explain any inconsistencies, which may arise as a result of their transition and their own society's unwillingness to recognize transgender identities.

Manner of entry is a common issue for transgender women who do not have access to accurate documentation that reflects their gender.[109] If an IJ seems to focus on an applicant's

[107] *Id.* (Holding that fraudulent documents cannot be dispositive and "should not be considered in such a way that the practical effect is to deny relief in virtually all cases."); *see* AILA, *Practice Pointer: Matter of A-B- and Discretion* (Oct. 2018), Doc. No. 18101631.
[108] 8 U.S. Code § 1158(b)(1)(iii) ("Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness").
[109] Wayne, *supra* note 1, at 262. Transgender clients are disproportionately burdened by the new requirements set forth in the REAL ID Act because their home country refuses to provide them with IDs that reflect their true gender and most do not have medical records documenting any changes. IJs may view this lack of documentation as an indication that their claims are not credible.

illegal manner of entry and use of fraudulent documents, advocates should focus on whether an applicant's entry "demonstrates ulterior motives for the illegal entry that are inconsistent with a valid asylum claim …." and whether the entry was necessary to escape imminent harm.[110] Only the most egregious factors rise to the level that they can outweigh a severe risk of persecution. Practitioners should strongly emphasize positive elements, such as ties to US citizens, evidence of good character, and special humanitarian concerns and tie those to past cases that similarly consider those factors. Practitioners should also continuously check for new case law in this area to bolster their arguments as to why illegal entry should not discredit their client.[111]

Finally, lawyers whose clients will not meet the credibility bar for asylum should always put forward strong Withholding of Removal (WOR) and CAT claims in the alternative. WOR and CAT act as an important safety net for those who are deemed ineligible for asylum. These two forms of protection have a higher burden of proof and offer less protection, but they may be the only option available for those who have credibility issues or miss the one-year asylum filing deadline.[112] Because transgender women very rarely report abuses by the government, lawyers should emphasize that the U.S.'s codification of CAT allows for both knowledge or "willful blindness" from the government to meet the bar.[113] Although WOR and CAT claims are usually a last effort after asylum is denied, they should be fully developed to ensure that the applicant is not forced to return to the violence in her country or origin.

[110] Tahirih Justice Center, *USCIS Policy Guidance For Adjudicating Asylum Claims in Accordance with Matter of A-B-* 2 (July 2019), available at https://www.tahirih.org/pubs/.
[111] *See Hussam F. v. Sessions*, 897 Fed. 3d 707 (6th Cir. 2018).
[112] Sexual and gender minority applicants often have a harder time meeting this one-year deadline than other asylum applicants. *See* Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. CITY LAW REV. 233 (2006).
[113] *Zheng v. Ashcroft*, 332 F.3d 1186 (9th C. 2003). The Congressional record surrounding the 1998 ratification of CAT with new conditions makes it "clear that both actual knowledge and willful blindness fall into the definition."

V. Conclusion: *Matter of A-B-* as an Opportunity

It is the job of immigration lawyers who are committed to advancing the rights of their transgender clients to push the law forward. It is not mandated by any job description or legal responsibility, but by a shared belief among immigration advocates that the U.S. asylum system was created to offer protection to those who need it most.[114] As ideas about gender and sexual orientation change, it is up to progressive lawyers to ensure that the laws change with them.[115] Some may argue that Sessions's goal in *A-B-* was to make it harder for victims of gender oppression to offer cognizable claims. Whether this is true or not, *A-B-* sparked a backlash in the legal community as advocates began to produce practice advisories and webinars, host panels, and mobilize in order to preserve the rights of victims of DV and gang violence. If viewed from this angle, *A-B-* is an opportunity; an opportunity to present new and creative PSGs, to strengthen the analytical arguments as to why gender should be a basis in asylum law, to convince IJs that Sessions' opinion did not categorically foreclose specific types of claims.

This paper is meant to be a tool for creative lawyering.[116] The first section provides the necessary background by unveiling a judicial history that has routinely squeezed transgender women into a "gay men with female tendencies" box without acknowledging that transgender women experience intersectional forms of oppression that are distinct from gay men.[117] This discrepancy is made even more clear by the statistics and reports offered in the second section

[114] Cyrus Mehta, *The Role Of The Immigration Lawyer In The Age Of Trump*, The Insightful Immigration Blog (Nov. 12, 2017), http://blog.cyrusmehta.com/2016/11/the-role-of-the-immigration-lawyer-in-the-age-of-trump.html
[115] This is in line with the "legal instrumentalist" theory, which argues the law is capable of being used as a tool for social change. It views the law as a "means," not as an "ends." Leslie Green, *Law as a Means*, University of Oxford Legal Research Paper Series, Paper No. 8 (March 2009).
[116] I define "creative lawyering" here as synonymous with "rebellious lawyering," which purports the theory that lawyers have an obligation to empower their indigent clients. Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L. J. 947 (1992); *see also* Alan K. Chen & Scott L. Cummings, Public Interest Lawyering: A Contemporary Perspective (Vicki Been et al. eds., 2013)(Documenting rebellious lawyering tactics for public interest lawyers).
[117] Wayne, *supra* note 1, at 248.

that document the targeted violence against transgender at the hands of the police and gangs. Finally, the third section offers a way forward by clarifying Sessions's sweeping dicta and recommending key cases and arguments to ensure that lawyers cover all the bases. No matter what innovative arguments advocates choose to use, they must always protect their client by offering well-established claims in the alternative whenever possible. *A-B-* has created a world where lawyers must play offense and defense simultaneously. This piece adds to the body of immigration literature that facilitates lawyering to meet this challenge.

As the U.S. tightens its asylum procedures in an attempt to deny protection to the influx of groups coming to the southern border, some advocates may be pessimistic about the future. However, there are recent indications that re-affirm the instrumental power of the law as a tool for social change. On December 19, 2018, U.S. District Judge Emmet G. Sullivan blocked several Trump policies that made it much harder for victims of DV and gang violence to seek asylum, concluding that these policies were "arbitrary and capricious and contrary to law."[118]

But such decisions are only possible when lawyers fight against misconceptions surrounding minority groups. This is the moment for lawyers to step up, by utilizing their creative analytical skills and working together in solidarity, for they are in the best position to ensure that asylum seekers like the members of Rainbow 17 are finally recognized for who they truly are: transgender women who deserve protection.

[118] Matt Zopotsky, *Judge strikes down Trump administration effort to deny asylum for migrants fleeing gang violence, domestic abuse*, THE WASHINGTON POST, Dec. 19, 2018.