

CURING WHAT AILS U.S. (ASYLUM LAW):

MATTER OF A-B-

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Abstract

This Note examines and critiques former Attorney General Matter of A-B- and the Trump - and sexual violence-based asylum claims. Within the past decade, migration from Central

large part to an epidemic of gang violence effectuated across public and private spheres. Powerful transnational gangs MS-13 and Barrio 18 have gained control of the region, and in most areas, their power is augmented by varying levels of state acquiescence or complicity. The gangs draw from and perpetuate historical legacies of violence against women and other marginalized groups as a means of social control.

Yet, U.S. immigration laws and policies have restricted the workability of asylum as a tool for responding to this international human rights crisis creating the conditions of violence that have plagued the Northern Triangle region. This Note demonstrates the disastrous consequences

of Central American gang violence and more broadly, to victims of domestic, sexual, and gender-based violence seeking asylum in the United States.

Applying a conceptual framework of structural violence theory provides critical context for understanding the hybridized public-private nature of gender-based and sexual violence in the present-day Northern Triangle. Using this lens to bring these issues into focus, this Note identifies and subsequently dismantles the central mythology undergirding the rationale and ultimate decision in Matter of A-B-. It demonstrates how the opinion disingenuously relies on outmoded formulations of domestic

occurring in this format as categorically falling beyond the ambit of U.S. asylum law protections. After referencing the overall challenge of shoehorning gender-

possibilities for formulating legally cognizable particular social groups that may better withstand judicial interpretations in a post-A-B- era and other periods of political hostility.

Whether Matter of A-B- holding survives the Biden fully will remain relevant due to the

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

I. INTRODUCTION

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

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

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

II. FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

34. Beverly A. McPhail, *Feminist Framework Plus: Knitting Feminist The re0.00000912 0 0Tm0 g009rTQq0.0000091*

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

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

ii. *Structural Violence Theory*

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

III. U.S. ASYLUM LAW

A. *Statutory Requirements*

The Immigration and Nationality Act (“INA”) § 208 defines the

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

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

C.

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

This disjunctive provision, which requires only that the home government be unable *or* unwilling, may include situations in which the state is complicit or simply sufficiently acquiescent in the perpetration of violence by non-state actors.⁹⁷ Prior to *Matter of A-B-*

simply “unable to solve the crimes.”¹⁰⁰ Additionally, the Eighth Circuit has held that this burden will not be carried where the applicant furnishes only “generalized evidence of ‘ineffectiveness and corruption’” and there is contrary “evidence of the government’s actual response,” which may include even perfunctory or performative police interventions that fail to adequately address the underlying problem.¹⁰¹ On the other hand, the Ninth Circuit held in 2017 in *Bringas*

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

Although gender-based asylum cases, in general, are often “rife with evidentiary connections to the state itself, to state actors, and to non-

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

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

Women and girls living in gang-controlled areas of the Northern

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

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

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

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

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

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

133. *Id.* at 217.

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

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

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

137. Knopp, *supra* note 18.

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

139. *Id.* at 257.

B. Navigating the Aftermath of Matter of A-B- s Misapplication of the

Although *A-B-* claimed that applicants alleging persecution by non-state actors must “establish that the government protection from such harm in their home country is so lacking that their persecutors’ actions can be *attributed to the government*,”¹⁴⁰ this in fact misconstrued the actual requirement, which is only that the home government be “unable or unwilling to control” non-state perpetrators of persecution.¹⁴¹ Although the opinion correctly stated that an t an ty s5o(l)-2(y s)4(F)] TJETQq[()]

services.¹⁴⁶ There are no government-run shelters in Guatemala at all: The entire country is served by a small number of “civil society-run” facilities with “very limited capacity.”¹⁴⁷

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

Indeed, Victoria Colbert contends that “domestic violence and abuse are behaviors so commonly associated with *machismo* that in circumstances where men do *not* use physical force to exude dominance upon their wives, other men will chastise them as not ‘macho’ enough.”¹⁶⁵ Research has generally observed that, in some cases, men engage in sexual violence against women in order to prove their masculinity.¹⁶⁶ According to Michele Leiby, group members enact sexual violence “in order to signal to others that they are *real* members of the group and can be trusted.”¹⁶⁷ Leiby explains that “in societies with deeply held social mores about women’s honor and purity, sexual violence may be a particularly ‘effective’ repressive and demoralizing weapon.”¹⁶⁸ She further notes the use of sexual violence as an “effective method of neudod of real

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

Furthermore, as recently as 2019, the Guatemalan legislature

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

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