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Returning to *Acosta*: How *In re A-B* Exemplifies the Need to Abolish the “Socially Distinct” and “Particularity” Requirements for a Particular Social Group

Lauren Cherney†

Introduction

Ms. A.B. suffered abuse at the hands of those nearest to her for the majority of her life.¹ She lost her parents at a young age and was then put in the care of a family who abused her, both physically and verbally.² She left their “care” in her twenties to marry.³ Soon after, her husband began abusing her as well.⁴ For the next fifteen years, Ms. A.B. suffered through physical, sexual, and emotional abuse from her husband.⁵ Her pleas for help to the Salvadoran authorities, her attempts to relocate within El Salvador, and even a divorce failed to keep her safe.⁶ Seeing no other choice, Ms. A.B. fled to the United States in hopes of gaining asylum.⁷ In December of 2016, the Board of Immigration Appeals (BIA or “the Board”) granted Ms. A.B. asylum.⁸ Two years later, this decision was vacated.⁹

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1. *Backgrounder and Briefing on Matter of A-B*, CTR. FOR GENDER & REFUGEE STUDIES, <https://cgrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b> [<https://perma.cc/P6MS-TLW5>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *In re A-B*, 27 I. & N. Dec. 316, 340 (A.G. 2018).

9. *Id.*

After running a campaign largely focused on restricting immigration and strengthening border control, Donald Trump entered office and began to implement policies in furtherance of those ends.¹⁰ Anti-immigration sentiment was also propagated by the officials appointed to leadership positions by the Trump Administration, including former Attorney General Jeff Sessions.¹¹ To further this anti-immigration agenda, in the summer of 2018, Sessions issued a groundbreaking policy decision in *In re A-B*-, narrowing the interpretation of a particular social group (PSG), particularly for survivors of “private crimes,” namely domestic and gang violence.¹² This ruling reversed the grant of Ms. A.B.’s asylum because of perceived error in the Board’s standard of review.¹³ On a larger scale, this ruling reversed a more lenient interpretation of PSGs for survivors of domestic violence.¹⁴ Since this ruling, there has been much uncertainty about whether and how survivors of domestic violence can obtain asylum status in the United States.¹⁵

The 1951 Convention Relating to the Status of Refugees created an international obligation to assist those who fit the

10. See generally David D. Sussman, *Immigration, Trump, and Agenda-Setting in the 2016 Election*, 41 FLETCHER F. WORLD AFF. 75 (2017) (examining Donald Trump’s immigration policy strategy in the 2016 election).

11. Ryan T. Beckwith, ‘We Cannot Admit Everyone.’ *Read a Transcript of Jeff Sessions’ Remarks on Ending the DACA Program*, TIME (Sept. 5, 2017), <http://time.com/4927426/daca-dreamers-jeff-sessions-transcript/> [<https://perma.cc/3U98-S8NF>].

12. *In re A-B*-, 27 I. & N. Dec. at 343–44. In this Note, I choose to refer to individuals who have faced domestic violence as ‘survivors.’ However, at times this Note will refer to the same group as ‘victims,’ primarily when quoting other sources. These terms should be understood interchangeably.

13. Dree K. Collopy et al., *Matter of A-B-: Case Updates, Current Trends, and Suggested Strategies*, AM. IMMIGRATION LAW ASS’N (Feb. 8, 2019), <https://www.aila.org/infonet/matter-of-a-b-case-updates-current-trends> [<https://perma.cc/RV3P-7GC4>].

14. Nolan Rappaport, *Domestic Abuse Decision Doesn’t Change Asylum Law, Just Applies It Correctly*, HILL (June 15, 2018, 7:00 AM), <https://thehill.com/opinion/immigration/392409-sessions-domestic-abuse-decision-didnt-change-asylum-law-just-applied-it> [<https://perma.cc/59K7-4K75>].

15. See, e.g., NAT’L IMMIGRANT JUSTICE CTR., ASYLUM PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B-* (2018), http://immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-09/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%202006.18_2.pdf [<https://perma.cc/22DQ-6JEB>]; BLAINE BOOKEY, *MATTER OF A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), CTR. FOR GENDER & REFUGEE STUDIES (June 22, 2018), https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/matter-of-a-b-webinar_6-22-2018.authcheckdam.pdf [<https://perma.cc/58F4-AWSY>]; Reena Arya, *DHS Clarifies Its Guidance on Matter of A-B-*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (July 30, 2018, 8:00 PM), <https://cliniclegal.org/resources/dhs-clarifies-its-guidance-matter-b> [<https://perma.cc/GZH2-RSE2>].

definition of a “refugee.”¹⁶ The relationship between this obligation and the treatment of survivors of domestic violence has proven to be complicated.¹⁷ Asylum is not meant to be an option for anyone in a difficult situation, but rather, an option for people who have been persecuted on account of their membership of a particular category outlined in the U.S. Code, such as race, religion, or PSG.¹⁸ Survivors of domestic violence have fit the definition of “refugee” through the PSG category. However, the standard for analyzing this category has shifted repeatedly, resulting in uncertainty for survivors seeking asylum.¹⁹

This dilemma likely resulted, in part, because of the evolution of this category. Historically, PSGs related to “private crimes” typically involved individuals associated with gangs.²⁰ Because these individuals were often seen as unsavory characters, a narrower interpretation of the PSG standard as opposed to the asylum categories faced little backlash. However, as more claims were made by survivors of domestic violence under the PSG category, this narrow interpretation started to appear cruel. Balancing the views toward these groups and the relationship between the obligation to refugees and the treatment of survivors of domestic violence has resulted in complications due to the moral obligation felt towards survivors.²¹ The backlash following *In re A-B-*, for example, has shown that there is a general idea, among the public, that survivors of domestic violence should have the opportunity to enter the United States through the asylum system.²² However, balancing this moral mindset with the standard set forth to determine asylum eligibility has resulted in

16. Convention Relating to the Status of Refugees art. I, July 28, 1951, 189 U.N.T.S. 150.

17. Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 147–48 (2013) (noting that “whether a woman fleeing domestic violence will receive protection in the United States seems to depend not on the consistent application of objective principles, but rather on the view of her individual judge, often untethered to any legal principles at all”).

18. 8 U.S.C. § 1101(a)(42) (2018).

19. Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2537 (2014).

20. See Christopher C. Malwitz, *Particular Social Groups: Vague Definitions and an Indeterminate Future for Asylum Seekers*, 83 BROOK. L. REV. 1149, 1150 (2018).

21. Marsden, *supra* note 19.

22. Ted Hesson & Josh Gerstein, *Sessions Moves to Block Asylum for Most Victims of Domestic, Gang Violence*, POLITICO (June 11, 2018, 4:18 PM), <https://www.politico.com/story/2018/06/11/jeff-sessions-asylum-standards-domestic-violence-614158> [<https://perma.cc/65EA-3NN2>].

unpredictable treatment of this group.²³ *In re A-B-* exemplifies a recent narrowing of this standard.²⁴ This restructuring resulted in immigration judges applying a narrower standard to claims involving PSGs than to the other categories eligible for asylum.

The shaping of this standard began with *In re Acosta*, the first case to examine PSGs.²⁵ *Acosta*, which set out a broad standard to determine PSG eligibility, simply required that the PSG be defined by an “immutable” characteristic.²⁶ However, this standard was narrowed over time, and a three-part test was eventually implemented to determine asylum eligibility within the PSG category.²⁷ This test requires that an applicant “establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”²⁸ These elements, particularly the elements of “socially distinct” and “particularity,” have caused confusion in various courts and have often resulted in overly harsh rulings.²⁹ These rulings have been especially apparent with regard to survivors of gang violence.³⁰ Survivors of domestic violence, on the other hand, had, until recently, received a more lenient interpretation, as showcased in *In re A-R-C-G-*.³¹ However, Sessions’ ruling in *In re A-B-* overrules this lenient standard.³² Sessions, like many arbiters before him, confused and conflated the elements necessary to satisfy a PSG and consequently instituted an incorrect and overly harsh standard for survivors of private crimes.

23. Compare *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987), with *In re M-E-V-G-*, 26 I. & N. Dec. 227, 227 (B.I.A. 2014).

24. *In re A-B-*, 27 I. & N. Dec. 316, 340 (A.G. 2018).

25. *In re Acosta*, 19 I. & N. Dec. at 233.

26. *Id.*

27. Malwitz, *supra* note 20 (explaining how the three-element test for PSG was established in the cases *In re W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014), and *In re M-E-V-G-*, 26 I. & N. Dec. 227).

28. *In re W-G-R-*, 26 I. & N. Dec. at 208; *In re M-E-V-G-*, 26 I. & N. Dec. at 227.

29. Nicholas R. Bednar, *Social Group Semantics: The Evidentiary Requirements of “Particularity” and “Social Distinction” in Pro Se Asylum Adjudications*, 100 MINN. L. REV. 355 (2015); Clay Venetis, *A Catch-22? The Social Distinction Requirement for Asylum*, PROCEEDINGS (Mar. 21, 2017), <https://proceedings.nyumoo.tcourt.org/2017/03/a-catch-22-the-social-distinction-requirement-for-asylum/> [https://perma.cc/CN5M-3L57].

30. Tina Zedginidze, *Domestic Abuse and Gang Violence Against Women: Expanding the Particular Social Group Finding in Matter of A-R-C-G- to Grant Asylum to Women Persecuted by Gangs*, 34 LAW & INEQ. 221, 236 (2016).

31. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014) (recognizing “married women in Guatemala who are unable to leave their relationship” as a particular social group).

32. *Id.*; *In re A-B-*, 27 I. & N. Dec. 316, 340 (A.G. 2018).

Part I of this Note considers the requirements for falling under the PSG category when making an asylum claim, including the shift from the *Acosta* standard to the three-part test. Part II looks at the history of PSG interpretations regarding asylum claims made by survivors of domestic violence. Part III then considers the three main portions in the recent *In re A-B-* ruling. Finally, Part IV contends that *In re A-B-* conflated the factors necessary to prove a PSG and therefore exemplifies that the requirements of “socially distinct” and “particularity” have done more to confuse, rather than clarify, the requirements necessary to establish a PSG. Using this contention, this Note then argues that these two requirements should be abolished and that the *Acosta* standard should be reinstated.

Sessions’ ruling in *In re A-B-* creates a harsh standard for survivors of domestic violence coming to the United States in hopes of gaining asylum status. This ruling was a misapplication of the analysis for the PSG category due to confusion and conflation caused by the “particularity” and “socially distinct” factors. Furthermore, this Note uses *In re A-B-* to demonstrate why these two requirements should be abolished and explains how a reversion to the *Acosta* standard will lead to a more consistent and correct implementation of the PSG category, as it will afford applicants in the PSG category the same process rights as individuals seeking asylum under other categories.

I. A Brief History of the “Particular Social Group” Category for Asylum Claims

A. *The Requirements for an Asylum Claim and the Acosta Standard*

A non-citizen refugee qualifies for asylum in the United States.³³ The Immigration and Nationality Act defines a “refugee” as “any person . . . who is unable or unwilling to return to, and is unable or unwilling to avail themselves of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]”³⁴ Though each category has its blurred edges and exceptions, there has been much debate and confusion as to what constitutes a PSG in particular.

33. 8 U.S.C. § 1101(a)(42) (2018).

34. *Id.*

In 1985, the BIA addressed the category of PSG for the first time in its decision *In re Acosta*.³⁵ The BIA created a standard that stood until around the turn of the century.³⁶ In the *Acosta* case, the asylee claimed to be a member of the PSG of taxi drivers who refused to take part in guerrilla-sponsored work stoppages.³⁷ The BIA implemented the interpretive canon of *eiusdem generis* (“of the same kind”) and consequently construed PSG in relation to, and consistent with, the other four categories eligible for asylum.³⁸ It found each other category to be a type of immutable characteristic, meaning the characteristic is “either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”³⁹ Applying that idea to PSG, the BIA found it meant “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”⁴⁰ The BIA noted that shared past experiences or innate characteristics, even specifically pointing to “sex” as such a characteristic, could define a PSG.⁴¹ The BIA found this definition to be sufficient as it ensured equality between the categories of individuals seeking asylum and ensured that a “refugee is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.”⁴²

B. *The Three-Element Test*

The creation of a category which potentially allows broad groups, such as those based on gender alone, created a fear of an opening of a floodgate of asylum claims for members of PSGs.⁴³ Though the other groups eligible for asylum were not narrowed, courts responded to this fear and began to narrow the PSG

35. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

36. Benjamin Casper et al., *Matter of M-E-V-G and the BIA's Confounding Legal Standard for "Membership in a Particular Social Group"*, 14-06 IMMIGR. BRIEFINGS 1, 4 (2014).

37. *In re Acosta*, 19 I. & N. Dec. at 216–17.

38. *Id.* at 233.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 234.

43. See generally Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119 (2007) (arguing that this fear is unfounded because acceptance of gender asylum has historically not given rise to a dramatic increase in the number of asylum claims).

category.⁴⁴ In *In re R-A-*, the BIA denied asylum to an individual with a strong claim of domestic abuse.⁴⁵ Though this case was eventually vacated, it signaled a shift in the BIA's attitude and its initial distancing from *Acosta*.⁴⁶

Attempting to clarify the PSG standard, *In re C-A-* introduced the idea of "social visibility."⁴⁷ *In re C-A-* equated "social visibility" with recognizability, noting that "[s]ocial groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups."⁴⁸ The Board claimed this idea was consistent with the *Acosta* standard.⁴⁹ But confusion persisted, so the BIA again attempted to clarify the standard through *In re A-M-E- & J-G-U-* in which the BIA implemented both the "social visibility" and the "particularity" requirements into the PSG analysis.⁵⁰ It created and interpreted the "particularity" requirement standard to necessitate an "adequate benchmark for determining group membership."⁵¹ For example, the BIA found "wealthy" too "subjective, inchoate, and variable" to meet that standard.⁵² In 2008, the BIA ruled in *In re S-E-G-* and in *In re E-A-G-*, officially adding "social visibility" and "particularity" to the *Acosta* standard of a "common immutable characteristic" and creating a three-part test to determine a PSG.⁵³ The Board claimed that such requirements would provide specificity and clarification to the *Acosta* standard, though it failed to address that this heightened standard created a narrower standard than the standard applied to other categories eligible for asylum.⁵⁴

44. Helen P. Grant, *The Floodgates Are Not Going to Open, but Will the U.S. Border?*, 29 HOUS. J. INT'L L. 1, 36 (2006).

45. *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 2001) (vacating the BIA's 1999 decision).

46. Casper et al., *supra* note 36.

47. *In re C-A-*, 23 I. & N. Dec. 951, 961 (B.I.A. 2006) (rejecting "noncriminal drug informants working against the Cali drug cartel" as a particular social group).

48. *Id.* at 959.

49. *Id.* at 956.

50. *In re A-M-E- & J-G-U-*, 4 I. & N. Dec. 69, 76 (B.I.A. 2007) (denying "wealthy Guatemalans" as a particular social group).

51. *Id.*

52. *Id.*

53. *Id.* This test requires that an applicant "establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." Malwitz, *supra* note 20, at 1150.

54. *Id.*

Though many Circuits fully adopted this three-part test,⁵⁵ in other courts it resulted in skepticism and varying implementations.⁵⁶ The Seventh Circuit rejected the “social visibility” requirement, as it found such a requirement arbitrary and inconsistent with its earlier decisions.⁵⁷ The Third Circuit also failed to see how the idea of “social visibility” would be consistent with the Board’s prior decisions and, seeing no rationale for such a requirement, refused to adopt this requirement.⁵⁸ The Third Circuit viewed “particularity” as just another way of requiring “social visibility” and subsequently refused to adopt that requirement as well.⁵⁹ These circuit splits demonstrate that these requirements are unnecessary and confusing. The three-part standard and split of authority has thus left a gap for further clarification.

C. *In re M-E-V-G- Attempted to Clarify the Socially Visible Requirement*

In 2014, the Board again hoped to clarify the area of PSG with its opinion in *In re M-E-V-G*.⁶⁰ This case involved the PSG of “Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.”⁶¹ In attempting to clarify the requirements of a PSG, this case renamed the “socially visible” requirement to “socially distinct,” as the group need not be actually visible.⁶² To meet this requirement, the PSG must be perceived as a group by society, rather than by the persecutor.⁶³ The Board made this distinction because it found that considering the persecutor’s perception would conflate the PSG membership requirement with the nexus requirement.⁶⁴ Looking at “particularity,” the Board considered whether the group had discrete boundaries, as the group should not be “amorphous, overbroad, diffuse, or subjective.”⁶⁵ The Board never issued a final

55. Casper et al., *supra* note 36 (noting that the First, Fifth, Sixth, and Tenth Circuits deferred to the three-part test “in full.”).

56. *In re A-M-E- & J-G-U*, 4 I. & N. Dec. 69.

57. *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009).

58. *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 603–07 (3d Cir. 2011).

59. *Id.*

60. *In re M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014).

61. *Id.* at 228.

62. *Id.* at 236.

63. *Id.* at 242.

64. *Id.* at 242.

65. *Id.* at 239.

decision on M-E-V-G's status.⁶⁶ Instead, it once again attempted to clarify the interpretation standard and then remanded the case to the immigration judge.⁶⁷ The standard set forth in *In re M-E-V-G*- (that perception by society, not the persecutor, is what matters) was specifically referenced in *In re A-B*.⁶⁸ However, despite the court's decision in *In re M-E-V-G*- attempt to prevent it, Sessions ignored that distinction and instead focused on the perception of the persecutor.⁶⁹

From *Acosta* to *In re M-E-V-G*-, the standard used to determine a PSG has shifted repeatedly over time. This has resulted in uncertainty for survivors of domestic violence seeking asylum in the United States. This shifting has also resulted in a narrower interpretation of the PSG category as compared to the other categories eligible for asylum, making it more difficult for victims of domestic violence to gain asylum compared to the other eligible groups.⁷⁰ Returning to the *Acosta* standard would provide stability and certainty to applicants under the PSG and ensure that they are given the same opportunity for asylum as those applying under other categories.

II. The Interpretation of a Particular Social Group in Relation to Domestic Violence Claims

A. *In re R-A- Begins a Movement of Stricter Scrutiny of Domestic Violence Survivors as Refugees*

First considered in 1999, *In re R-A-* created an uproar after denying asylum to an individual, despite evidence showing that she had endured severe domestic abuse, as she had not shown "that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group."⁷¹ Eventually vacated, this decision led to an intense scrutinization of when survivors of domestic violence could satisfy the requirements of PSG.⁷² When considering this new case, the Department of Homeland Security

66. *Id.* at 253.

67. *Id.*

68. *In re A-B*-, 27 I. & N. Dec. 316, 330 (A.G. 2018).

69. *Id.* at 339.

70. *See id.* at 339–40.

71. *In re R-A-*, 22 I. & N. Dec. 906, 918 (B.I.A. 2001) (vacating the BIA's 1999 decision).

72. Casper et al., *supra* note 36.

(DHS) looked at immutability as the key factor, but also considered a variety of other factors.⁷³ The DHS found that “married women in Guatemala who are unable to leave the relationship”⁷⁴ met the *Acosta* standard because the group was united by two immutable characteristics, gender and relationship status (immutable due to cultural constraints).⁷⁵ The DHS also noted that the size of a group was irrelevant when deciding whether it was cognizable, but that size should be considered when contemplating the nexus.⁷⁶ The applicant was denied asylum in *In re R-A-*, but she did eventually receive asylum status with the agreement of DHS in 2010.⁷⁷ In the meantime, however, *In re R-A-* had led to widespread uncertainty and criticism of the PSG standards.⁷⁸ In hopes of reducing this uncertainty, the idea of “social visibility” was introduced in the *In re C-A-* decision in 2006.⁷⁹ Soon after, the “social visibility” and “particularity” requirements were added to the *Acosta* standard of a “common immutable characteristic,” creating the three-part test for a PSG.⁸⁰

B. DHS’s Brief in In re L-R- Allowed More Labels to Successfully Define a PSG

Decided in 2009, in *In re L-R-*, DHS’s brief rejected the PSG of “Mexican women in an abusive domestic relationship who are unable to leave” because it was “impermissibly ‘circular.’”⁸¹ However, DHS’s brief noted that the PSGs of “Mexican women in domestic relationships who are unable to leave” and “Mexican women who are viewed as property by virtue of their positions within a domestic relationship” would be sufficient.⁸² First, DHS allowed that gender and a woman’s status in a relationship may be “immutable.”⁸³ Next, considering the “socially visible” prong, DHS suggested an objective perception standard, which could be evidenced by a societal view that “the status of a woman in a

73. *In re R-A-*, 22 I. & N. Dec. at 917–19; see also Casper *supra* note 36.

74. Casper et al., *supra* note 36.

75. *In re R-A-*, 22 I. & N. Dec. at 911.

76. Casper et al., *supra* note 36, at 7.

77. *Id.*

78. *Id.*

79. *In re C-A-*, 23 I. & N. Dec. 951, 959–61 (B.I.A. 2006).

80. See *infra* text accompanying note 105.

81. Dep’t of Homeland Sec.’s Supplemental Brief at 10–11, *In re L-R-* (B.I.A. 2009).

82. *Id.* at 14.

83. *Id.* at 16.

domestic relationship places the woman into a segment of society that will not be accorded protection from harm inflicted by a domestic partner.”⁸⁴ Finally, looking at “particularity,” DHS saw it could be met if the record showed the group of persons in domestic relationships was adequately defined.⁸⁵ DHS recognized a sufficient nexus if the persecutor understood that the survivor was unable to escape or receive protection from the government.⁸⁶ “[G]ender and status in a relationship, status in the family, and/or status in society can define a social group that fulfills all the current social group requirements.”⁸⁷ As long as applicants met the three factors, this brief required that DHS representatives find that survivors of domestic violence could meet the necessary standard to show membership in a PSG.⁸⁸

C. *Cece v. Holder*⁸⁹ *Marked Triumph for Gender-Based Asylum Claims*

The idea that survivors of domestic violence could make successful asylum claims was exhibited again in *Cece v. Holder*. Decided by the Seventh Circuit in 2013, *Cece v. Holder* recognized “young Albanian women living alone” as a PSG.⁹⁰ In this case, Cece feared being kidnapped by an infamous prostitution ring after being followed around town, offered rides, and invited on dates by a leader of the ring.⁹¹ As the Seventh Circuit had not adopted the “particularity” and “socially distinct” requirements, the court applied the *Acosta* standard rather than the three-part test.⁹² The court found Cece’s age, gender, nationality, and living status to be immutable characteristics, therefore meeting the *Acosta* standard.⁹³ In its analysis, the court explained how a group can be defined in part by persecution, as long as that is not the group’s sole defining characteristic.⁹⁴ The court also addressed the fear of the

84. *Id.* at 17–18.

85. *Id.* at 18–19 (considering how a country’s laws may define a domestic relationship).

86. *Id.* at 20–22.

87. Matter of L-R-, CTR. FOR GENDER & REFUGEE STUDIES, <https://cgrs.uchastings.edu/our-work/matter-l-r> [<https://perma.cc/RL8B-XE5N>].

88. *Id.*

89. *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013).

90. *Id.*

91. *Id.* at 666.

92. *Id.* at 669.

93. *Id.* at 672.

94. *Id.*

floodgates opening due to an over-broad PSG interpretation.⁹⁵ The court astutely noted that group membership is only one step in a series of requirements for gaining asylum status and, therefore, the definition of PSG itself need not be overly burdensome.⁹⁶ This case applied the asylum category of PSG consistently with the standards used for the other categories eligible for asylum and allowed for fair and straightforward analysis.

D. *In re A-R-C-G- Appeared to Recognize Once and for All that Survivors of Domestic Violence Can Qualify for Asylum*

Decided in 2014, *In re A-R-C-G-* recognized “married women in Guatemala who are unable to leave their relationship” as a PSG.⁹⁷ The Board, remaining consistent with *Acosta*, found gender to be a common immutable characteristic sufficient to create a PSG.⁹⁸ It also found marital status to be an immutable characteristic where the individual is “unable to leave the relationship.”⁹⁹ The “particularity” requirement was also met, as the terms defining the group “have commonly accepted definition[s] within Guatemalan society.”¹⁰⁰ The PSG was found to meet the requirement of “socially distinct” as the country has a “culture of ‘machismo and family violence’” and because, although there were laws prohibiting such violence, enforcement of those laws was “problematic.”¹⁰¹ The Board found that the respondent had suffered harm rising to the level of past persecution, that she was a member of a qualifying PSG, and that her membership was a central reason for her persecution.¹⁰² This case is viewed as unambiguously establishing that survivors of domestic violence could qualify for asylum in the United States.¹⁰³ However, this view was soon challenged, resulting in inconsistent applications of the asylum standard and continuing uncertainty for survivors of domestic violence.

95. *Id.* at 675.

96. *Id.*

97. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 388 (B.I.A. 2014), *overruled by In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018).

98. *Id.* at 392–93.

99. *Id.*

100. *Id.* at 393.

101. *Id.* at 394.

102. *Id.* at 394–95.

103. *Matter of A-R-C-G-*, 128 HARV. L. REV.: IMMIGR. 2090, 2090 (2015) <https://harvardlawreview.org/2015/05/matter-of-a-r-c-g/> [https://perma.cc/EB7J-95F4].

III. *In re A-B*- Limited the Ability of Domestic Violence Survivors to Gain Asylum

On June 11, 2018, former Attorney General Jeff Sessions made a precedential ruling in *In re A-B*-, overruling *In re A-R-C-G*- and narrowing the interpretation of a PSG, making it more difficult for survivors of private crimes, like domestic violence, to gain asylum.¹⁰⁴ In his ruling, Sessions applied the three-part test for identifying a PSG.¹⁰⁵ Sessions' focus in this decision was on "whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."¹⁰⁶ Sessions stated that applicants seeking to fit within such a group

must establish membership in a particular and socially distinct group that exists independently of the alleged underlying harm, demonstrate that their persecutors harmed them on account of their membership in that group rather than for personal reasons, and 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.¹⁰⁷

A. *Overruling In re A-R-C-G*-

In re A-B- overruled *In re A-R-C-G*-, claiming that *In re A-R-C-G*- had failed to undertake the necessary legal and factual analyses and created confusion because of its expansive recognition of PSG based on private violence.¹⁰⁸ In overruling *In re A-R-C-G*-, Sessions emphasized the idea that a PSG cannot be defined by its persecution.¹⁰⁹ In doing so, he viewed the group of "married women in Guatemala who are unable to leave their relationship" as "effectively defined to consist of women in Guatemala who are victims of domestic abuse because the inability 'to leave' was created by harm or threatened harm."¹¹⁰ The Board's "particularity"

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

105. *Id.* at 317 (stating that the applicant must demonstrate "membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question.").

106. *Id.*

107. *Id.*

108. *Id.* at 319.

109. *Id.* at 335.

110. *In re A-B*-, 27 I. & N. Dec. 316, 335 (A.G. 2018).

standard was also questioned by Sessions, who argued a commonly understood definition was insufficient, as not every characteristic is precise enough to define a PSG.¹¹¹ In the analysis used to overrule *In re A-R-C-G-*, Sessions conflated the factors used to determine a PSG and further narrowed the PSG standard.

B. Looking at the Facts

Sessions then looked at the facts brought by Ms. A.B., who presented the PSG of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common’ with their partners.”¹¹² This description seemed to mirror the standard brought forth in *In re R-A-* (“married women in Guatemala who are unable to leave the relationship”) and the standard noted in *In re L-R-* (“Mexican women in domestic relationships who are unable to leave”) both of which were found sufficient to meet the *Acosta* standard by the BIA.¹¹³ When considering the requirements, Sessions noted that a fine line must be walked between defining narrow classes as to meet the “particularity” requirement while still providing sufficient social distinction to be cognizable as a “socially distinct” group.¹¹⁴ He stated, “[a] particular social group must avoid . . . being too broad to have definable boundaries and too narrow to have larger significance in society.”¹¹⁵ This response represents a notably stricter standard than those necessary for other categories eligible for asylum.

Sessions found that the Board had erred in finding a nexus between Ms. A.B.’s harm and her group membership, as Ms. A.B. failed to point to any evidence of her husband’s abuse on account of her membership in the claimed group.¹¹⁶ He stated further, “[t]he Board cited no evidence that her husband knew any such social group existed, or that he persecuted wife [sic] for reasons unrelated to their relationship.”¹¹⁷ Sessions also found that the Board had

111. *Id.* (finding that *In re A-R-C-G-* held the particularity standard was met because the group had “commonly accepted definitions within Guatemalan society,” and that *In re A-R-C-G-*’s analysis was insufficient).

112. *Id.* at 321.

113. Dep’t of Homeland Sec.’s Supplemental Brief at 4, 14–15, *In re L-R-* (B.I.A. 2009) (quoting language from *In re A-B-*).

114. *In re A-B-*, 27 I. & N. Dec. 316, 336.

115. *Id.*

116. *Id.* at 343.

117. *Id.*

erred in finding that the government was unwilling or unable to protect Ms. A.B.¹¹⁸

C. *Moving Forward*

Sessions then set out a framework by which to present PSG claims moving forward, stating that, “an applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate . . . the exact delineation of any proposed particular social group.”¹¹⁹ In concluding his opinion, Sessions noted that the previous interpretations of PSG put the category at risk of becoming too lax and creating a catch-all category for individuals who failed to fit into another group.¹²⁰ He then remanded the case to the immigration judge for further proceedings.¹²¹

The consequences of this recent opinion are still being worked out. Many have expressed deep concern for its impact. A group of former immigration judges claim that this case was not properly before the Attorney General and therefore should have never been decided in the first place.¹²² A group of religious organizations filed an amicus brief sharing its concern that such a ruling could have disastrous effects on survivors of religious persecution, as such individuals could be seen as survivors of “private criminal activity.”¹²³ A third amicus brief argued that this ruling unnecessarily narrowed the category of PSG, when such a category should actually be expanded.¹²⁴

Courts’ applications of this analysis have varied.¹²⁵ Several courts have continued to issue decisions accepting asylum claims by survivors of gang or domestic violence.¹²⁶ The Ninth Circuit has determined that this ruling is not a categorical foreclosure of

118. *Id.*

119. *In re A-B-*, 27 I. & N. Dec. at 344.

120. *Id.* at 346.

121. *Id.*

122. Brief for Former Immigration Judges et al. as Amicus Curiae Supporting Respondent, *supra* note 104, at 9–12.

123. Brief for Catholic Legal Immigration Network, Inc. et al. as Amicus Curiae, *supra* note 107, at 4.

124. Brief for Harvard Immigration & Refugee Clinical Program et al. as Amicus Curiae, *supra* note 107, at 6 (arguing that gender alone should satisfy a particular social group).

125. Ctr. for Gender & Refugee Studies, *Post-Matter of A-B- Litigation Update: CGRS Practice Advisory* (Dec. 2018) (on file with author).

126. *Id.* at 3.

gender-based asylum claims.¹²⁷ In August of 2018, the ACLU filed a claim in *Grace v. Whitaker*, successfully challenging the application of *In re A-B-* in credible fear proceedings.¹²⁸ *Grace v. Whitaker*, though primarily focused on the credible fear proceedings, signaled that *In re A-B-* should not be used as a blanket denial of asylum claims for survivors of domestic violence and signals that harsh applications of the PSG standard will be challenged.¹²⁹ Furthermore, in the public eye, *In re A-B-* created a morality crisis as it failed to protect a vulnerable group.¹³⁰

In re A-B- still stands and its meaning continues to be elaborated upon and shaped by each asylum claim brought forward. But slight variations and reinterpretations here and there will not fix the issue. Instead, the standard used to determine a PSG should be overhauled by returning to *Acosta*. By simplifying the standard and applying it consistently with the standard used for other categories of asylum eligibility, the courts can promote consistency and certainty in the asylum system.

IV. The *In re A-B-* Decision Exemplifies How the Requirements of “Socially Distinct” and “Particularity” Confuse, Rather than Clarify, What Constitutes a Particular Social Group

The analysis brought forward by former Attorney General Jeff Sessions dealt with a variety of issues, the most impactful being its

127. *Id.* at 3–4.

128. Dree K. Collopy et al., *Matter of A-B-: Case Updates, Current Trends, and Suggested Strategies*, AM. IMMIGRATION LAWYERS ASS’N, (Feb. 8, 2019), <https://www.aila.org/infonet/matter-of-a-b-case-updates-current-trends> [<https://perma.cc/Y4C6-UEBV>]. Credible fear interviews are conducted by United States Citizenship and Immigration Services (USCIS) for individuals in expedited removal proceedings. In these interviews, the applicant attempts to establish that they have been persecuted or have a well-founded fear of persecution based on the previously mentioned categories (race, religion, PSG, etc.). If an applicant are found to have a credible fear, they may seek asylum before an immigration judge. If an applicant is not not found to have a credible fear, they can either seek review by an immigration judge or Immigration and Customs Enforcement (ICE) may remove you from the United States. *Questions & Answers: Credible Fear Screening*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> [<https://perma.cc/YF3D-Q8WX>].

129. Collopy et al., *supra* note 128.

130. Joel Rose, *As More Migrants Are Denied Asylum, an Abuse Survivor Is Turned Away*, NPR, (Jan. 18, 2019) <https://www.npr.org/2019/01/18/686466207/its-getting-harder-for-migrants-to-win-asylum-cases-lawyers-say> [<https://perma.cc/357Q-9J3H>].

analysis of a PSG in an asylum claim by a survivor of domestic violence. In his analysis, Sessions elucidated the history of interpretations regarding what constitutes a PSG.¹³¹ He recognized there was uncertainty regarding this standard and sought to clarify it by overruling a case he believed to be inconsistent with the accepted standard and by promoting guidelines to apply to the interpretation of a PSG.¹³² His application of these guidelines and the standards he believed to be correct were also meant to guide PSG determinations moving forward.¹³³

This analysis made asylum prospects for survivors of private crimes, namely gang violence and domestic violence, much grimmer. It was also incorrect. Sessions' application of the requirements of "particularity" and "socially distinct" conflated various standards, making his ruling arbitrarily contrary to prior cases and thus improper. Therefore, this case should be viewed as an example of the confusion caused by these additional standards and this case serves as an argument as to why the *Acosta* standard should be re-implemented as the leading standard for determining a PSG.

- A. *Where the "Socially Distinct" and "Particularity" Requirements Led to Conflation Rather than Clarification in In re A-B-*
 - i. *Conflating How Society Views a PSG with How the Persecutor Views a PSG*

When determining a PSG, the analysis requires a clear distinction between how the persecutor views the group and how society perceives the group.¹³⁴ As noted above, this distinction was made clear in *In re M-E-V-G-*, which stated that the PSG must be perceived as a group by society, rather than by the persecutor, as considering the perception of the persecutor would conflate the PSG membership requirement with the nexus requirement.¹³⁵ This consideration would also risk defining the group by the harm caused. *In re M-E-V-G-* anticipated the risk of conflating these two perceptions and made it clear that the focus should be on how the

131. *In re A-B-*, 27 I. & N. Dec. 316, 317 (A.G. 2018).

132. *Id.* at 317, 344.

133. *Id.* at 344.

134. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 236 (B.I.A. 2014) (explaining that the PSG must be perceived as a group by society, rather than by the persecutor).

135. *Id.*

group is perceived by society.¹³⁶ Yet, Sessions ignored this distinction and considered the PSG through the lens of the persecutor rather than through the lens of society.

Sessions recognized the correct standard in his analysis, yet continued to focus on the perspective of the persecutor: “The Board cited no evidence that her husband knew any such social group existed”¹³⁷ He also relied heavily on the case of *In re R-A-*, which was erroneous for two main reasons.¹³⁸ First, this case was vacated by the Attorney General in 2001 and should therefore not be relied on as precedent.¹³⁹ Second, this case relied heavily on the persecutor’s perception of the group, which, as stated in *In re M-E-V-G-*, is the incorrect lens through which to consider asylum claims.¹⁴⁰ When determining if a PSG is valid, it is unnecessary to consider the perspective of the persecutor. Rather, that factor is considered when analyzing the “on account of” standard.¹⁴¹ By considering the PSG from the perspective of the persecutor, Sessions conflated the factors of PSG and “on account of” and inaccurately applied the multi-part test.

ii. Defining the PSG by the Persecution Suffered

The second crucial mistake made by Sessions was the conflation of the persecution with the label of the PSG. A PSG cannot be defined solely by the persecution suffered.¹⁴² Sessions specifically notes this rule in his analysis.¹⁴³ However, he ignores this rule in the application of Ms. A.B.’s facts and conflates the ideas. This ignorance is made apparent through the phrasing of his goal for his analysis: “whether, and under what circumstances, being a *victim* of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.”¹⁴⁴ As the rule above states, the PSG cannot

136. *Id.*

137. *In re A-B-*, 27 I. & N. Dec. at 343.

138. *Id.* at 329 (discussing the details of *In re R-A-*, which argued that the victim had “not established that her husband has targeted and harmed [R-A-] because he perceived her to be a member of this particular social group”) (quoting *In re R-A-*, 22 I. & N. Dec. 906, 920 (B.I.A. 2001) (alteration in original)).

139. *In re R-A-*, 22 I. & N. Dec. at 918.

140. *Id.* at 917.

141. 8 U.S.C. § 1101(a)(42) (2018).

142. *Cece v. Holder*, 733 F.3d 662, 671 (7th Cir. 2013).

143. *In re A-B-*, 27 I. & N. Dec. at 319.

144. *Id.* at 317 (emphasis added).

be defined solely by the persecution suffered.¹⁴⁵ Therefore, the PSG cannot be defined as ‘victims’ of anything. The issue, as framed here, has no chance of success, as he frames the PSG brought as victims. This reasoning misrepresents the actual PSG brought in the case (“married women in Guatemala who are unable to leave their relationship”).¹⁴⁶

This PSG label is not as unambiguous as Sessions claims it to be, as it is not clearly defined by the harm suffered. Hypothetically, individuals could be unable to leave their marriage for various reasons other than their status as survivors of a criminal activity. For example, cultural norms, familial pressures, or financial reasons could all make an individual feel they are unable to leave a relationship, while not being directly related to any crime. Further, as the PSG is not defined by the harm suffered, the question Sessions poses is inapplicable and attempts to undercut the applicant’s claim, rather than apply the correct standard for such a claim. Therefore, Sessions’ analysis conflates the factors necessary for a PSG and leads to a misapplication of the standard.

iii. A Misapplication of the ‘Central Reason’ Idea

Sessions also misapplies the idea that the applicant’s membership in the PSG must be a central reason for their persecution. Looking at this standard, it is clear that the membership in a PSG must be a reason for the persecution. However, shown by using the indefinite article “a” and by not using a definite article, “the,” or “only” in the standard, the membership in a particular group need not be the *only* reason for persecution.

In his analysis, Sessions conflates these ideas and thus propagates an incorrect standard. This misapplication is made clear when he says, “[s]uch applicants must . . . demonstrate that their persecutors harmed them on account of their membership in that group rather than for personal reasons”¹⁴⁷ The individual must demonstrate a nexus between the persecution and the membership in a group. However, the standard does not necessitate that the membership be the *only* reason for persecution. This standard ignores years of case law and arbitrarily narrows the standard, so it is unattainable for many valid asylum claims.¹⁴⁸

145. *Cece*, 733 F.3d at 673.

146. *In re A-B-*, 27 I. & N. Dec. at 321.

147. *Id.* at 317.

148. *See, e.g., Cece*, 733 F.3d at 662; *In re A-B-*, 27 I. & N. Dec. at 316.

This standard particularly affects the potential for successful asylum claims by survivors of private crimes. Many successful claims have come out of persecution caused not only by someone targeting a particular group, but by someone who knows the individual personally and may even have personal reasons for attacking that individual, in addition to that individual's membership in a group. For example, in *Cece v. Holder*, the court found that Cece was being persecuted on account of her membership in the PSG of "young Albanian women who live alone."¹⁴⁹ The persecutor had asked Cece out on dates which could indicate a personal relationship.¹⁵⁰ In fact, the persecutor, during an attack, demanded to know why Cece would not go on a date with him.¹⁵¹ Despite this potential personal relationship to the persecutor, the court granted asylum to Cece.¹⁵² This case exemplifies how the persecution can be based on both the membership in a PSG and personal relations and how personal relations should not moot claims for a member of a PSG.

In many cases, it is almost essential that the persecutor have some personal ties to the individual they are persecuting, otherwise they could likely not know that the person is a member of that PSG. There are, of course, some exceptions to this idea. For example, if a persecutor is attacking someone on the basis of the color of their skin alone, they may have no prior knowledge of the person before attacking them. However, most traits are not so clearly evident. For example, in *In re L-R-*, the court determined PSGs of "Mexican women in domestic relationships who are unable to leave" and "Mexican women who are viewed as property by virtue of their positions within a domestic relationship" to be sufficient PSGs.¹⁵³ A member of either of these groups would not be clearly identifiable as such a member when walking down the street, yet the Board found both groups to meet the necessary standards for PSG.¹⁵⁴ This result is also exemplified by two well-accepted categories of traits for which a person can be persecuted outside of PSG, specifically, religion and political belief.¹⁵⁵ Though such characteristics may be made obvious through appearance, for example, by the wearing of a cross or the wearing of a particular red hat, not every individual

149. *Cece*, 733 F.3d at 673.

150. *Id.* at 666.

151. *Id.* at 667.

152. *Id.* at 683.

153. See Brief for DHS as supplement, *supra* note 82, at 143.

154. *Id.*

155. 8 U.S.C. § 1101 (a)(42)(A) (2018).

with a successful claim has been attacked solely while wearing such a symbol. Rather, a persecutor likely has some prior experience with the individual, allowing the persecutor to understand the persecuted's beliefs, thus leading to the persecution on account of such a belief. This prior meeting makes the attack fundamentally personal.

iv. Pervasiveness Need Not Exclude Persecution

In his analysis, Sessions pointed to the idea that if a persecution is widespread or felt by various portions of society, it is invalid. This implication was made clear through the idea that individuals who are affected by gang violence cannot make successful asylum claims as “victims of gang violence come from all segments of society.”¹⁵⁶ And again, “[t]he pervasive nature of this violent criminality . . . suggested that membership in a purported particular social group ‘is often not a central reason for the threats received . . .’”¹⁵⁷ This analysis propagates the idea that if persecution is too widely experienced, it can invalidate an asylum claim.

However, the fact that a wide variety of people face a certain persecution should not render their experience of that persecution invalid. This misunderstanding oversimplifies what it means to be human. An individual is not defined by a single demographic characteristic. Looking at some of the more seemingly clear categories, characteristics can clearly cross borders. There are Christians of every age, Democrats in various tax brackets, and LGBTQ+ individuals from a variety of nationalities. It is well recognized that an individual is not limited to associate with only those exactly like them. For example, individuals from other categories eligible for asylum, like those with a particular religious or political belief, are still eligible for asylum even though they come from a variety of backgrounds or social settings. This same level of acceptance should also be available for members of a PSG. The inclusion in one category should not disqualify an individual from another. When determining eligibility for asylum, the PSG brought forward for the claim should be noted as just one characteristic of who that person is, and not the basis of their entire identity.

156. *In re A-B-*, 27 I. & N. Dec. 316, 322 (2018).

157. *Id.* at 323 (quoting *Velasquez v. Sessions*, 866 F.3d 188, 199 (4th Cir. 2017)).

V. Avoiding Conflation and Preserving Independence: Why *Acosta* Is the Correct Standard

A. *How the Acosta Standard Avoids the Conflation Risks Faced under the Three-Part Test*

Though the three-part test used to determine a valid PSG was created with the intent to clarify the *Acosta* standard, in reality, it only further complicated the standard and resulted in inconsistent and incorrect rulings. It also made the PSG category demand a stricter standard than the other categories, as it added additional qualifications to the ejusdem generis interpretation. Therefore, to ensure a level playing field and create more certainty in the asylum field, the *Acosta* standard should be reinstated.

To exemplify the clarity the *Acosta* standard would provide, it is helpful to consider the analysis in *In re A-R-C-G-*. The PSG brought forward in *In re A-R-C-G-* was “married women in Guatemala who are unable to leave their relationship.”¹⁵⁸ In the analysis, the Board found that “marital status can be an immutable characteristic where the individual is unable to leave the relationship.”¹⁵⁹ Applying the *Acosta* standard, this group would therefore meet the immutable characteristic standard and be deemed a valid PSG.

However, more analysis was deemed necessary, which is where the confusion began. The Board in *In re A-R-C-G-* found the PSG to be valid under the three-part test as well, but Sessions disagreed as he found the PSG to be “amorphous, overbroad, diffuse, or subjective.”¹⁶⁰ This split exemplifies how the three-part standard can lead to inconsistent decisions.

Sessions also stated that “not every ‘immutable characteristic’ is sufficiently precise to define a particular social group.”¹⁶¹ This response appears to contradict the *Acosta* standard, which simply requires that the characteristic be immutable and allows the characteristic to be as broad as an individual’s sex.¹⁶² Though the three-part test claims to be consistent with the *Acosta* standard, it is not. Instead, it arbitrarily heightens the standard by creating additional guidelines not present in the other categories. This

158. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 388 (B.I.A. 2014), *overruled by In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

159. *Id.* at 392–93.

160. *In re A-B-*, 27 I. & N. Dec. at 335 (quoting *In re M-E-V-G-*, 26 I. & N. Dec. 227, 239 (B.I.A. 2014)).

161. *In re A-B-*, I. & N. Dec. at 335 (quoting *In re M-E-V-G-*, 26 I. & N. at 239).

162. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

arbitrarily fortifies the PSG category as compared to the other groups and leads to inconsistent analyses and rulings. To resolve these inconsistencies, the *Acosta* standard should be reinstated.

B. How In re A-B- Would Result Under the Acosta Standard

Though not all of the specific facts from *In re A-B-* are known, an application of the known facts considered under the *Acosta* standard is a helpful exercise. As noted above, the PSG proposed was “El Salvadoran women who are unable to leave their domestic relationships where they have children in common.”¹⁶³ Applying the *Acosta* standard, it must be determined whether this PSG qualifies as an immutable characteristic, meaning that it “either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”¹⁶⁴ Both innate characteristics as well as shared past experiences were sufficient to meet the PSG standard in *Acosta*.¹⁶⁵ Ms. A-B-’s PSG would therefore be sufficient as it is based on gender, an accepted characteristic, and it involves a characteristic beyond the individual’s ability to change. The PSG itself makes this clear as the label itself involves an inability to change (“unable to leave”). Therefore, this PSG meets the *Acosta* standard for PSG.

Prior cases involving similar PSGs support that Ms. A.B. meets the *Acosta* standard. In *In re R-A-* “married women in Guatemala who are unable to leave the relationship” was deemed sufficient under the *Acosta* standard.¹⁶⁶ In *In re L-R-*, “Mexican women in domestic relationships who are unable to leave” was also found to be sufficient under the *Acosta* standard.¹⁶⁷ As the PSG put forth in Ms. A.B.’s case strongly mirrors previously accepted PSGs, it should be deemed sufficient.

However, it is important to note that the wording of the PSG in *In re A-B-* was likely artificially framed because the three-part test was the standard at the time it was created. This arbitrary standard challenged those bringing PSG claims to create a group that was broad enough to fulfill the “socially distinct” requirement while also being specific enough to fulfill the “particularity” requirement. Whereas the Board in *Acosta* stated that “sex” alone

163. *In re A-B-*, 27 I. & N. Dec. at 343.

164. *In re Acosta*, 19 I. & N. Dec. at 233.

165. *Id.*

166. *In re R-A-*, 22 I. & N. Dec. 906, 918 (B.I.A. 2001) (vacating the BIA’s 1999 decision).

167. See Dep’t of Homeland Sec.’s Supplemental Brief, *supra* note 81, at 14.

was enough to satisfy a PSG,¹⁶⁸ further attempts to clarify this standard and narrow the meaning of PSG resulted in applicants being forced to make up almost incoherent PSGs in order to satisfy a standard that was not necessary in the first place. So, too, in Ms. A.B.'s case, the PSG was likely worded more unnaturally than it would have been under the *Acosta* standard in order to meet the fine balance between the narrowness needed to meet the particularity standard and the breadth necessary to reach the social visibility standard. If the *Acosta* standard had been in place at the time of this case, it is likely the PSG label would have been framed differently; for example, just by the individual's sex. According to *Acosta*, such a label would be valid. Ms. A-B- would still have had to meet the other factors necessary for asylum, but her claim would not have been prematurely denied because of uncertainties and balancing acts done to appease arbitrary and unnecessary rules.

C. *The Risk of Opening the Floodgates to Asylum Claims with the Acosta Standard Is No Real Risk at All*

Various courts and policymakers have expressed concerns regarding a floodgates issue if a broader standard like *Acosta* is implemented regarding asylum claims.¹⁶⁹ However, this worry is unsubstantiated. In this analogy, the floodgates are the last restraint before the water is allowed to gush in. However, a different standard of PSG is not enough to create such a flooding of applicants into the asylum system.

First, the *Acosta* standard is not a total lack of a standard, but rather, a simpler and more reasonable standard. As stated in the *Acosta* decision, this standard was created using the interpretation tool of *eiusdem generis* ("of the same kind") meaning it is held to the same strictness as the other categories for obtaining an asylum claim.¹⁷⁰ Therefore, such a standard allows the same level of scrutiny for a PSG as is allowed for the other categories. Such a standard would also avoid a prioritization of certain groups over others, as is currently the case.

Second, the PSG standard is just one factor in a multi-part test. The individual must be "unable or unwilling to return to, and

168. *In re Acosta*, 19 I. & N. Dec. at 233.

169. See Musalo, *supra* note 43.

170. *In re Acosta*, 19 I. & N. Dec. at 233.

is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of . . .” a category such as a PSG.¹⁷¹ Therefore, an overly strict standard for the PSG factor is not only unnecessary but it conflates, and therefore moots, the other factors of this test. The application of the *Acosta* standard, on the other hand, maintains each factor as a separate category, giving each factor a purpose and creates a sufficiently strict and functional test for asylum.

Under the *Acosta* standard, a PSG could be defined by sex alone. However, this definition would by no means entitle every male or female to obtain asylum in the United States. This standard could still be difficult to meet as a survivor of domestic violence. Proving a nexus related to this group could be difficult, but it would not be impossible. For example, in *In re A-R-C-G-*, the court found that the individual came from a country that had a “culture of ‘machismo and family violence.’”¹⁷² In *In re L-R-*, the court noted that “Mexican women who are viewed as property by virtue of their positions within a domestic relationship” would be an eligible PSG.¹⁷³ Both of these cases recognized that a certain sex could be seen as lesser than based on cultural norms. The existence of these norms and the acts of an individual towards someone of a certain sex because of these norms should be seen as satisfying the “on account of” requirement. The framework set forth in the Immigration and Nationality Act ensures that an individual must meet multiple factors before receiving asylum status, thus mitigating the fears of an opening of the floodgates.¹⁷⁴

In addition to the standard set out in the Immigration and Nationality Act, there are additional barriers to meeting the definition of a “refugee.” For example, the idea of internal relocation as a defense creates a strong checks and balances system on asylum claims regarding “private crimes.”¹⁷⁵ If an individual is able to relocate within their own country and avoid persecution, they are not eligible for asylum.¹⁷⁶ If an individual is facing persecution at the hands of a small group or a single individual, internal relocation would appear to provide a simple solution. For asylum claims, all

171. 8 U.S.C. § 1101(a)(42) (2018).

172. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 394 (B.I.A. 2014) (citation omitted), *overruled by In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

173. *See supra* note 81, at 14.

174. *See supra* text accompanying footnotes 33–34.

175. *In re A-B-*, 27 I. & N. Dec. at 343–44.

176. 8 C.F.R. § 1208.13(b)(1)(i)(B).

factors must be considered and the test as a whole, rather than the individual factor of PSG. Considering all factors and the test as a whole will sufficiently prevent a floodgates issue.

D. The Acosta Standard Interprets PSGs Consistently with the Other Eligible Categories

Sessions' reasoning in *In re A-B* narrowed the definition of a PSG as compared to other groups. Instead of interpreting PSG consistently, he made it more difficult for those applying under the PSG category to make a successful claim. Sessions argued that this narrowing is not unfair as asylum claims are just one of many options for those fleeing harm.¹⁷⁷ He referenced the opinion of Judge Wilkinson, who noted that the "Board's recent treatment of [PSG] is 'at risk of lacking rigor.'"¹⁷⁸ However, this argument hints at the idea that those seeking asylum under the category of PSG should be treated differently than those seeking it under another category. The standard put forward in *Acosta* was specifically created as a comparison to the other categories, using the interpretive canon of *eiusdem generis* in order to put all those seeking asylum on a level playing field.¹⁷⁹ The subsequent cases added additional qualifications, heightening the standard for a PSG as compared to the other categories. As each category is listed in the statute, with no other qualifications listed for a specific group, these categories should not be implemented using varying levels of scrutiny. Rather, the individuals applying under each category should be treated equally. This framework was not implemented with an idea of a prioritization between religion versus political belief versus any other category. Rather, those categories allow individuals from a variety of backgrounds and situations to receive asylum. In order that this framework is implemented with the equality that was intended, the *Acosta* standard should be reinstated.

E. Asylum to a Country where the Problem Persists

As mentioned above, there has been significant backlash following the ruling in *In re A-B*.¹⁸⁰ Not only is Sessions' legal analysis concerning, but so too are the effects of this decision. This decision has led to increased uncertainty for applicants and individuals being deported from a place where they feel safe.

177. *In re A-B*, 27 I. & N. Dec. at 345.

178. *Id.* at 346 (quoting *Velasquez v. Sessions*, 866 F.3d 188, 198 (4th Cir. 2017)).

179. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

180. *Hesson & Gerstein*, *supra* note 22.

Sympathy and a sense of moral obligation towards this group persists in the wake of *In re A-B-*. However, these scenarios pose an interesting dilemma to Americans that may not be as prevalent with other individuals applying for asylum. Often, refugees are viewed as survivors of horrible crimes and are welcomed to the United States in order to escape such crimes. Underlying this concept is the idea that such horrendous acts do not happen in the United States. With domestic violence claims, however, this argument weakens. Domestic violence is unfortunately prevalent in the United States.¹⁸¹ In fact, a relatively large portion of violent crime in the United States is committed by the survivor's intimate partner.¹⁸² Should any less sympathy be felt for asylum applicants because individuals are facing similar horrors in our own country? Of course not. Rather, these individuals should be provided with the opportunity to receive an equal level of protection as that provided to individuals who are facing crimes less common in the United States.

Additionally, a factor necessary for a successful asylum claim is that the government in the applicant's country is unwilling or unable to help the individual. In the United States, though the problem of domestic violence persists, the government attempts to provide recourse in ways potentially not available in the country from which the applicant is fleeing.¹⁸³ By providing an applicant asylum, the United States would be allowing the individual to escape their persecutor and find a home in a place that is taking steps, albeit slowly, to overcome the problem of domestic violence.

Conclusion

In his analysis in *In re A-B-*, former Attorney General Jeff Sessions overruled important precedent regarding gender-based asylum claims and narrowed the interpretation of such claims, making it more difficult for survivors of private crimes, namely gang and domestic violence, to seek asylum in the United States. However, Sessions' analysis, when determining if the PSG met the

181. National Coalition Against Domestic Violence, Statistics, NCADV.org <https://ncadv.org/statistics> [<https://perma.cc/W74V-56E6>] (stating that “[i]n the United States, an average of [twenty] people experience intimate partner physical violence every minute.”).

182. *Id.* (stating that “[i]ntimate partner violence accounts for 15% of all violent crime.”).

183. Alisha Haridasani Gupta, *Across the Globe, a 'Serious Backlash Against Women's Rights'*, N.Y. TIMES: IN HER WORDS (Dec. 4, 2019) <https://www.nytimes.com/2019/12/04/us/domestic-violence-international.html> [<https://perma.cc/6MUB-265P>].

three-part test of 1) immutability, 2) particularity, and 3) social visibility, conflated various factors. This conflation arbitrarily discounted prior case law and created further confusion regarding the standard to be applied for such claims. Therefore, *In re A-B* serves as a strong example of the confusion these additional requirements cause and makes a strong case as to why this three-part test should be abolished and the *Acosta* standard should be reinstated for determining PSG claims. The *Acosta* standard would ensure that the category of PSG is interpreted consistently with the other groups, avoid conflation, prevent individuals from creating overly complex groups to fulfill an arbitrary standard, and provide certainty and stability to applicants going through the asylum system. The courts should reinstate the *Acosta* standard to give those with legitimate and satisfactory asylum claims, like Ms. A.B., the status they rightfully deserve.