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## From Family, They Flee: Asylum for Victims of Forced Marriage

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# From Family, They Flee

## ASYLUM FOR VICTIMS OF FORCED MARRIAGE

### INTRODUCTION

*A young woman from the Congo lives in Brooklyn and studies chemistry at a college in Queens. As she approaches the completion of her chemistry degree, her father informs her he has promised her hand in marriage to his fifty-year-old, wealthy friend. Upon return to the Congo, she would be forced into a life she could not control; where her life would be traded to increase her family's wealth. Extending her student visa, which has given her legal status for her entire presence in the United States, seems like her best and perhaps only option to remain in the United States. Though she has been a science nerd her entire life, to maintain her freedom, she switches her major to journalism, requiring her to enroll in another year of classes, and her student visa can be extended. If she returns to her home country her control over her own destiny will be completely stolen. Yet, her claim to asylum in the United States is weak. Why?*

The Universal Declaration of Human Rights states that “[m]arriage shall be entered into only with the free and full consent of the intending spouses,”<sup>1</sup> and yet, forced marriage-based asylum claims hold an unfortunate narrative within U.S. immigration law. Just when a step forward seems to occur, an error in standard of review brings judicial progress to a standstill.<sup>2</sup> Though forced marriage is an obvious harm worth fleeing, American law does not recognize it as such. This is a conceptual absurdity<sup>3</sup>: a “confrontation between the human need and the unreasonable silence of the world.”<sup>4</sup> There is a human need for asylum from forced marriage not recognized by U.S.

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<sup>1</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>2</sup> See, e.g., Gao v. Gonzales, 440 F.3d 62 (2d Cir. 2006), vacated sub nom. Keisler v. Hong Yin Gao, 552 U.S. 801 (2007).

<sup>3</sup> Natalie Nanasi, *An “I Do” I Choose: How the Fight for Marriage Access Supports a Per Se Finding of Persecution for Asylum Cases Based on Forced Marriage*, 28 COLUM. J. GENDER & L. 48, 50–51 (2014).

<sup>4</sup> ALBERT CAMUS, THE MYTH OF SISYPHUS AND OTHER ESSAYS 28 (Justin O’Brien trans., Vintage Books 1st ed. 1991) (1955).

asylum law. This note will confront this unreasonable silence within American jurisprudence and explain how the nature of forced marriage, considered in light of a recent Board of Immigration Appeals (BIA) decision, allows the United States Citizenship and Immigration Services (USCIS) and Immigration Judges alike<sup>5</sup> to grant forced marriage-based asylum applications.

Forced marriage, by definition, is a marriage that occurs without the complete consent of one or both people in the marriage. Child marriage is a form of forced marriage, as those under 18 are *per se* unable to consent to the union.<sup>6</sup> The State Department specifically recognizes that often family members are the ones forcing the marriage, through physical violence, threats of violence, or both.<sup>7</sup> Approximately 15.4 million people were slaves to forced marriage in 2016 alone.<sup>8</sup> In Africa, nearly five people out of every thousand are victims of forced marriage.<sup>9</sup>

The barriers to forced marriage-based asylum claims in the United States are numerous. First, courts have not held that forced marriage is a stand-alone form of persecution;<sup>10</sup> second, attorneys struggle to identify a legally cognizable “protected ground”<sup>11</sup> as the reason for the forced marriage persecution; and third, judges and attorneys fail to determine the “nexus” between forced marriage and a “protected ground.”<sup>12</sup> Asylum seekers also struggle to prove that the persecutor, if a private

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<sup>5</sup> United States Citizenship and Immigration Services (USCIS) is the administrative agency that reviews asylum applications. An applicant for asylum whose claim is denied and is currently present in the United States without lawful status is automatically referred to immigration court. If an immigration judge denies his or her asylum claim, the applicant can then appeal to the Board of Immigration Appeals (B.I.A.). If the claim is denied again, the applicant may appeal to a federal circuit court of appeals. *Appeals*, JUSTIA, <https://www.justia.com/immigration/appeals/> [<https://perma.cc/3GDG-PUJE>]; *Asylum Law and Procedure*, HUMAN RIGHTS FIRST, <https://www.humanrightsfirst.org/asylum/asylum-law-and-procedure> [<https://perma.cc/8F62-E8DW>].

<sup>6</sup> ALLISON M. GLINSKI, MAGNOLIA SEXTON, & LIS MEYERS, CHILD, EARLY, AND FORCED MARRIAGE RESOURCE GUIDE, U.S. AGENCY OF INT’L DEVELOPMENT at v(2015).

<sup>7</sup> *Forced Marriage*, U.S. DEPT. OF STATE (July 31, 2018), <https://travel.state.gov/content/travel/en/international-travel/emergencies/forced-marriage.html> [<https://perma.cc/8K3R-YFN9>].

<sup>8</sup> INT’L LABOUR OFFICE, GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 43 (2017).

<sup>9</sup> *Id.* at 44.

<sup>10</sup> Forced marriage, on its own, has yet to be held as a form of persecution under U.S. asylum law. Nanasi, *supra* note 3, at 61, 63–64; *see also infra* Section II.B.1.

<sup>11</sup> The “protected ground” requirement is laid out in the Immigration and Nationality Act (INA) as “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101 (a)(42) (2012 & Supp. II 2014) (emphasis added). Attorneys have attempted to define “particular social groups” that forced marriage-based asylum claims could be connected to. *See infra* Section II.B.2.

<sup>12</sup> The “nexus” requirement is seen in the statutory language of the INA through the “on account of” portion of the statute. 8 U.S.C. § 1101 (a)(42) (emphasis added); *see infra* Section II.A.

actor, is outside of government control, or that the government is unwilling to control the actor.<sup>13</sup>

The United States Supreme Court has held marriage to be “one of the vital personal rights essential to the orderly pursuit of happiness by free men [and women].”<sup>14</sup> The freedom to marry has not only been consistently upheld by the Supreme Court, but has also been expanded through the Court’s recent recognitions of the right to marry among homosexual couples.<sup>15</sup> The violation of a right held so dear to the United States as a nation should qualify as persecution for asylum applications, and yet, unfortunately, this is still not the case.<sup>16</sup>

Changing mores should translate to changing jurisprudence. As the world becomes slowly more cognizant of the severe harm of forced marriage on an individual, and on the sanctity of marriage itself, it is difficult to imagine a judge ruling that forced marriage is not a form of persecution.<sup>17</sup> Illustratively, in 2006, the United States Court of Appeals for the Second Circuit recognized forced marriage as a form of persecution.<sup>18</sup> Unfortunately, the Supreme Court vacated the decision due to an error in the standard of review.<sup>19</sup> This lack of legal recognition of forced marriage as persecution, however, is not the basis of many courts’ denials of forced marriage-based asylum claims. They often deny the claims solely due to a supposed lack of the nexus requirement.<sup>20</sup>

At the essence of U.S. asylum claims lies the nexus between the claimed act or acts of persecution suffered, or to be

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<sup>13</sup> See *infra* Section II.A.

<sup>14</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>15</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015); *United States v. Windsor*, 570 U.S. 744, 769 (2013).

<sup>16</sup> For example, courts have held that a mere threat of forced marriage does not constitute past persecution, or demonstrate a well-founded fear of future persecution. See, e.g., *Li Rong Zhang v. Att’y Gen. of U.S.*, 494 F. App’x 255, 257–58 (3d Cir. 2012) (holding a threat of forced marriage did not constitute persecution); *Shao Lan Yan v. Holder*, 489 F. App’x 733, 738 (4th Cir. 2012) (holding threat of forced marriage from a village chief’s nephew did not constitute persecution); *Xiu Xia Huang v. Att’y Gen. of U.S.*, 286 F. App’x 604, 605–06 (11th Cir. 2008) (holding fear of forced marriage due to harassment from town leader’s son did not constitute persecution).

<sup>17</sup> See *Nanasi*, *supra* note 3, at 4950; see *infra* Section II.B.1.

<sup>18</sup> *Gao v. Gonzales*, 440 F.3d 62, 64 (2d Cir. 2006), *vacated sub nom.* *Keisler v. Hong Yin Gao*, 552 U.S. 801 (2007).

<sup>19</sup> *Id.*; see also Section II.B.4 (explaining that the Supreme Court vacated the judgment of the Second Circuit due to the court improperly conducting a *de novo* inquiry into whether a person belongs to a “particular social group”).

<sup>20</sup> See, e.g., *Mei Y. Liu v. Holder*, 492 F. App’x 196, 198 (2d Cir. 2012) (holding the harm petitioner suffered during her forced marriage “did not bear nexus to a protected ground”); *Feng Ming Lin v. Holder*, 339 F. App’x 102, 103 (2d Cir. 2009) (holding petitioner failed to prove forced marriage was connected to the particular social group asserted); *Lin v. Gonzales*, 148 F. App’x 38, 39 (2d Cir. 2005) (holding arranged marriage did not occur on account of a protected ground); see *supra* note 11 (explaining the statutory basis for the nexus requirement).

suffered, in one's home country and the "protected ground" the persecution is targeting.<sup>21</sup> An asylum applicant must present "evidence that an alleged persecutor is motivated by a victim's protected trait."<sup>22</sup> Asylum claims often fall short through failure to prove this nexus.<sup>23</sup> Consequently, for an asylum case based solely on persecution in the form of forced marriage, a clear nexus must be drawn between a protected ground and the forced marriage itself.<sup>24</sup> To prove this connection, an asylum seeker must determine a protected ground that the forced marriage infringes upon and that motivates the persecutor.

A victim should not have to suffer the consequences of the marriage to find safe harbor from the marriage itself. Yet with forced marriage-based asylum claims, the forced marriage is often grouped together with other forms of persecution, such as domestic violence, spousal rape, or female genital cutting (FGC).<sup>25</sup> This treatment complicates a solely forced marriage-based claim, especially one based on fear of future persecution, as these other harms often occur *after* the forced marriage has begun. Additionally, the persecutors themselves are different: the spouse often perpetuates the other forms of persecution, while the victim's family are often the ones initially forcing the victim into the marriage.<sup>26</sup>

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<sup>21</sup> See *supra* note 11 (explaining the statutory basis for the nexus requirement); see, e.g., *Mei Y. Liu*, 492 F. App'x at 198 ("The agency did not err in determining that the harm . . . asserted . . . did not bear a nexus to a protected ground. In addition to showing past persecution or a well-founded fear, asylum eligibility requires that the persecution an individual alleges be on account of the applicant's race, religion, nationality, political opinion, or membership in a particular social group.").

<sup>22</sup> *In re N-M-*, 25 I. & N. Dec. 526, 530 (B.I.A. 2011).

<sup>23</sup> See, e.g., *Gilca v. Holder*, 680 F.3d 109, 115 (1st Cir. 2012) (holding asylum seeker presented no evidence random assailants attacked him due to his Roma descent or political opinions); *Sompotan v. Mukasey* 533 F.3d 63, 70–71 (1st Cir. 2008) (holding store robbery was not motivated by any protected ground, and respondent was poisoned due to a personal dispute with his neighbor, not due to his protected ground).

<sup>24</sup> See *supra* note 11 (explaining the statutory basis for the nexus requirement); see *supra* note 20 (providing an example of case law interpretation of the statute).

<sup>25</sup> See *In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) (the BIA granted an asylum claim where the persecution was FGC and recognized the central role a forced marriage had in the FGC); *Forced Marriage*, ASIAN PAC. INST. ON GENDER-BASED VIOLENCE (2017), <https://www.api-gbv.org/about-gbv/types-of-gbv/forced-marriage/> [<https://perma.cc/5LA4-P3HB>] ("Forced marriage is gender-based violence . . . that can lead to increased vulnerability to abuses including coerced sexual initiation, marital rape, statutory rape, suppression of sexual orientation or gender identity, interrupted education, domestic violence by husbands and in-laws, transnational abandonment, reproductive coercion resulting in early and/or multiple pregnancies, and femicide."); see also *Female Genital Mutilation*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs241/en/> [<https://perma.cc/D6HG-U92N>] ("FGM is often considered a necessary part of raising a girl, and a way to prepare her for adulthood and marriage."); *infra* Section II.B.1.

<sup>26</sup> See Brief for the Respondent, at 27, *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1995) (No. A73-476-695), <https://www.justice.gov/sites/default/files/eoir/legacy/2000/03/28/kasinga2.pdf> [<https://perma.cc/RGT7-ST6Z>] (Kasindja stated that now that she was married, her husband could force her to have her genitals mutilated); *Female Genital Mutilation*, *supra* note 25 ("The practice [of FGC] is mostly carried out by traditional circumcisers, who often

Courts continue to deny forced marriage-based asylum claims, despite the harm the asylum seekers would face if they were to return to their country of origin.<sup>27</sup> Currently, forced marriage-based asylum claims attempt to attach themselves to a “mixed” protected ground of “particular social group” (PSG), “nationality,” and (albeit rarely) “political opinion.”<sup>28</sup> These approaches fall short of satisfying the nexus requirement.<sup>29</sup> Therefore, a new avenue to forced marriage-based claims is needed. A 2017 BIA decision, *Matter of L-E-A-*, might hold the answer.<sup>30</sup> In *Matter of L-E-A-*, the BIA fully defined how asylum seekers must satisfy the nexus requirement when they assert family membership as their “particular social group,” a protected ground for purposes of asylum claims.<sup>31</sup> This note will refrain from arguing too fervently as to why forced marriage is a harm, and instead will focus on proving the nexus between the protected ground of the family unit and the harm of forced marriage.

Although *Matter of L-E-A-* did not involve a forced marriage-based claim, its reasoning is relevant.<sup>32</sup> Membership within a particular family unit is often why a young person is forced into marriage. Typically, older, more powerful family members force the family’s younger generation into marriages to confer a benefit on the family as a whole.<sup>33</sup> Families use forced marriage to alleviate themselves from poverty, increase their wealth, forge new family alliances, or to preserve family honor.<sup>34</sup> The persecution—the forced marriage—is motivated by the victim’s place within the family and forces the victim to join another family, thus infringing upon the victim’s “protected ground” of family membership.<sup>35</sup> Therefore, asylum applicants who fear being forced into marriage by their families, or have already been forced into marriage by their

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play other central roles in communities, such as attending childbirths.”); ASIAN PAC. INST. ON GENDER-BASED VIOLENCE, *supra* note 25; *see also infra* Section II.B.1.

<sup>27</sup> *See supra* note 20 (providing examples of cases where forced marriage asylum cases failed due to failure to prove the nexus requirement).

<sup>28</sup> *See infra* Section II.B.2.

<sup>29</sup> *See supra* note 20 (providing examples of cases where forced marriage asylum cases failed due to failure to prove the nexus requirement).

<sup>30</sup> *See infra* Part III.

<sup>31</sup> *In re L-E-A-*, 27 I. & N. Dec. 40, 43–46 (B.I.A. 2017).

<sup>32</sup> *Id.* at 41.

<sup>33</sup> *See infra* Part I. *See generally* NAÏMA BENDRISS, REPORT ON THE PRACTICE OF FORCED MARRIAGE IN CANADA: INTERVIEWS WITH FRONTLINE WORKERS (2008), [https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/fm-mf/fm\\_eng.pdf](https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/fm-mf/fm_eng.pdf) [<https://perma.cc/NC2B-VZZY>] (reporting on the varying reasons why families force their younger members into marriage).

<sup>34</sup> BENDRISS, *supra* note 33, at 12, 14, 18.

<sup>35</sup> *See L-E-A-*, 27 I. & N. Dec. at 3–5 (explaining how the nexus requirement of asylum claims must be met where the particular social group asserted is membership in a particular family unit).

families, should assert their protected ground as the PSG of membership within their family unit.

Part I of this note discusses why many forced marriages occur and argues that family ties motivate many of these marriages. Part II discusses asylum requirements, how they have been applied to forced marriage-based asylum claims, how courts currently treat these claims, and problems with current approaches. Part III outlines how *Matter of L-E-A-* defined the nexus requirement in family unit-based asylum claims. Part IV asserts that, in light of *Matter of L-E-A-*, many forced marriage-based asylum claims can be attached to the protected ground of family membership, thus solving the nexus requirement of the claims due to the primarily family-based motivations behind many forced marriages. Ultimately, this note answers the question of how, in light of this new decision, and due to the nature of these abuses, forced marriage-based asylum claims can find a new and more secure place within American jurisprudence.

## I. THE FORCE OF FAMILY

Family-based motivations fuel many forced marriages.<sup>36</sup> A family may force a daughter or a son into marriage to gain more

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<sup>36</sup> See BENDRISS, *supra* note 33, at 12, 14, 18, 20 (reporting on the varying reasons why families force their younger members into marriage); RACHEL CLAWSON, FORCED MARRIAGE AND LEARNING DISABILITIES: MULTI-AGENCY PRACTICE GUIDELINES 13 (2010) (reporting on the motivations behind forced marriages specifically involving people with learning disabilities, and noting that “[p]arents who force their children to marry often justify their action as . . . building stronger family ties”); FREE THE SLAVES, WIVES IN SLAVERY: FORCED MARRIAGE IN THE CONGO, 17–20 (2013) (“[F]orced marriages [can] allow[] forgiveness of a debt owed by a bride’s family. Forgiving a debt in these cases is viewed by the families as equivalent to paying a dowry. This can be a very strong incentive for forcing a daughter to marry, especially for a family that is otherwise unable to pay its debt, notably if the family faces legal action or violence if the debt goes unpaid. . . . In some parts of the DRC, there is a ritual where a family arranges a marriage, but the girl or woman involved is not aware, and she is actually ‘captured’ or kidnapped by her husband. This ritual in some communities is customary and considered normal. . . . In many cases the kidnapping ritual also involves a bride-price or other financial gain paid to the bride’s family, or includes debt forgiveness. . . . [Child] marriage is more frequent among financially desperate families. Because of poverty, if it means he will have one less mouth to feed, a father will give his daughter away.”); GLINSKI, SEXTON, & MEYERS, *supra* note 6, at 11–12. (“[P]arents may marry their daughters early because girls are seen as economic burdens that can be relieved through marriage. Marriage-related financial transactions can contribute to such perceptions: in contexts where bride wealth or bride price is practiced (that is, a groom or groom’s family provides assets to the bride’s family in exchange for marriage), families may reap immediate economic benefits from marrying off their daughters.” (footnote omitted)); Aisha K. Gill & Heather Harvey, *Examining the Impact of Gender on Young People’s Views of Forced Marriage in Britain*, 12 FEMINIST CRIMINOLOGY 72, 94 (2017) (study listing alleviating familial poverty as one of the motivations behind forced marriages); Laura Stark, *Motives and Agency in Forced Marriage Among the Urban Poor in Tanzania*, ETHNOS 6 (Jan. 2, 2019) (“In [one] type of forced marriage, daughters are pressured by parents to marry a man not chosen by or necessarily known to them. He may be an older, wealthier man willing to pay to her parents the customary brideprice. . . . Both male and female interviewees mentioned

wealth for the family, to bolster the social status of the family, or to create an official alliance between two families.<sup>37</sup> Simply put, in many cases of forced marriage, a family is saying to their younger generation: because of your place within our family, you must marry. While marriage should be grounded in love,<sup>38</sup> it is instead often a family's necessity of escaping poverty, or more depressingly, it is "the sour, stifled smell of greed, which is the opposite of love,"<sup>39</sup> that fuels the practice of forced marriage.<sup>40</sup>

#### A. *Family Matters, and Marriage Is a "Family Matter"*<sup>41</sup>

Widespread reporting emphasizes the existence of familial motivations behind many forced marriages across the globe.<sup>42</sup> Illustratively, a 2008 Canadian study delving into the motivations behind forced marriage listed nine main reasons for the practice.<sup>43</sup> All nine suggested a motivating familial benefit,

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daughters being 'forced to marry' or 'giving in' to their parents' plans for them to marry a man who could help support the family."); *Being Forced to Marry*, CHILDLINE, <https://www.childline.org.uk/info-advice/bullying-abuse-safety/crime-law/forced-marriage/> [<https://perma.cc/V9DT-KQS9>] (listing reasons families force their younger members to marry); Fiona David, *Why Forced Marriage?*, THOMSON REUTERS FOUND. NEWS (Sept. 19, 2017), <https://news.trust.org/item/20170918115342-4ztc2> [<https://perma.cc/RU75-P2JK>] ("[Y]oung girls and women are forced to marry in exchange for payment to their families, the cancellation of debt, or to settle family disputes."); *Forced Marriages*, TEES CHILD PROTECTION, <http://www.teescpp.org.uk/forced-marriages> [<https://perma.cc/2BP8-Z67E>] (listing various reasons a parent or family might force a young person into marriage); *Forced Marriages*, SHEFFIELD SAFEGUARDING CHILDREN BOARD, [https://sheffieldscb.proceduresonline.com/chapters/p\\_forced.html#motives](https://sheffieldscb.proceduresonline.com/chapters/p_forced.html#motives) [<https://perma.cc/NY77-EJ75>] (listing the various reasons families forced their children into marriage); *Forced Marriage*, IRANIAN & KURDISH HUMAN RIGHTS ORG. (2019), <http://ikwro.org.uk/forced-marriage/> [<https://perma.cc/H9WN-NZXF>] ("Families may force marriage due to pressure from their own relatives, to keep control over young people, to build links with their families in their countries of origin, among other motivations."); André Leslie & Samantha Early, *Forced Marriage Is Not Culture, It's Abuse*, DW (Sept. 9, 2013), <https://www.dw.com/en/forced-marriage-is-not-culture-its-abuse/a-17075444> [<https://perma.cc/TT92-RDEP>] (Forced marriages "happen because families are motivated to ensure that these marriages take place within their families. . . . [T]hey want to maintain . . . cultural links. . . . Families think they know best for their child."); Mariah Long, *Reasons for Forced Marriage*, END SLAVERY NOW (Apr. 14, 2016) <https://www.endslaverynow.org/blog/articles/reasons-for-forced-marriage> [<https://perma.cc/Q7C3-RMSE>] (listing reasons families force their members into marriage); see also Simin Montazari et al., *Determinants of Early Marriage from Married Girls' Perspectives in Iranian Setting: A Qualitative Study*, J ENVTL. PUB. HEALTH 3–4 (Mar. 30, 2016) (listing "family structure," meaning the "socioeconomic difficulties, cultural family values, and religious beliefs," as the first category of determinants of "early" marriage in Iran).

<sup>37</sup> See sources cited *supra* note 36.

<sup>38</sup> D'Vera Cohn, *Love and Marriage*, PEW RES. CTR. (Feb 13, 2013), <http://www.pewsocialtrends.org/2013/02/13/love-and-marriage/> [<https://perma.cc/82AH-8E2D>] (2010 survey determined that eighty-four percent of unmarried persons and ninety-three percent of married persons believe marriage should be based in love).

<sup>39</sup> GREGORY DAVID ROBERTS, SHANTARAM 4 (St. Martin's Press 2004) (2003).

<sup>40</sup> BENDRISS, *supra* note 33, at 14–15.

<sup>41</sup> *Id.* at 11.

<sup>42</sup> See sources cited *supra* note 36.

<sup>43</sup> See BENDRISS, *supra* note 33, at 11–16.

and seven of them were *primarily* family-based reasons.<sup>44</sup> While forced marriage is often a “mixed motive”<sup>45</sup> form of persecution, with the reasons being “complicated and intertwined,”<sup>46</sup> often the central, motivating factor behind this type of persecution is a family-based objective.<sup>47</sup> In many cases the younger generation’s place in the family is being traded, sold, or given away to benefit the family as a whole, while forcing a particular young person into a life they never desired.<sup>48</sup>

Poverty is arguably the prevailing motivation behind families forcing their younger members into marriage.<sup>49</sup> A marriage to a wealthy spouse can be “[a] guarantee against poverty,”<sup>50</sup> through an alliance to a wealthy family, or from the windfall from a “brideprice.”<sup>51</sup> The grip of poverty has led such a large number of families to sell their daughters into marriages that “brideprice” traditions have become a norm in many cultures,<sup>52</sup> particularly in certain regions such as “Afghanistan, sub-Saharan Africa, Iraq and rural China.”<sup>53</sup>

For impoverished families, marriage can be used as currency.<sup>54</sup> An African woman in a focus group for a qualitative, empirical study on forced marriage noted:

Poverty is the major thing . . . if she [prospective in-laws] gives money, the family won’t ask [for the young woman’s consent] . . . the money will buy rice for them . . . Because of money, they will send their kids [for marriage]. . . . Your father possesses you then your husband possesses you there is nowhere to go . . . Women are money . . . they say the more girls you have the more you will get richer . . . .<sup>55</sup>

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<sup>44</sup> *Id.* at 11–17. “Pregnancy out-of-wedlock” and “to protect young women” are motivations that do not, on their face, implicate a familial benefit, but in both scenarios, the study states that protecting family reputation and upholding family honor are nevertheless underlying motivations.

<sup>45</sup> *Aldana-Ramos v. Holder*, 757 F.3d 9, 18 (1st Cir. 2014) (“[A]sylum is still proper in mixed-motive cases even where one motive would not be the basis for asylum, so long as one of the statutory protected grounds is ‘at least one central reason’ for the persecution.”(citing 8 U.S.C. § 1158(b)(1)(B)(i) (2009))).

<sup>46</sup> *About Forced Marriage*, TAHIRIH JUST. CTR. (2019), <http://preventforcedmarriage.org/about-forced-marriage/> [https://perma.cc/3MK8-BXW5].

<sup>47</sup> Nanasi, *supra* note 3, at 67.

<sup>48</sup> BENDRISS, *supra* note 33, at 11–16.

<sup>49</sup> Khatidja Chantler et al., *Forced Marriage in the UK: Religious, Cultural, Economic or State Violence?*, 29 CRITICAL SOC. POL’Y 587, 603 (2009); *see also* BENDRISS, *supra* note 33, at 14–15.

<sup>50</sup> BENDRISS, *supra* note 33, at 14.

<sup>51</sup> Aisha K. Gill & Sunari Anitha, *Introduction: Framing Forced Marriage as a Form of Violence Against Women*, in FORCED MARRIAGE: INTRODUCING A SOCIAL JUSTICE AND HUMAN RIGHTS PERSPECTIVE 1, 10 (AISHA K. GILL & SUNDARI ANITHA eds., 2011).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *See* Chantler et al., *supra* note 49, at 603.

<sup>55</sup> *Id.* (alteration in original) (internal quotation marks omitted).

When the economic incentive in forcing children into marriage is high,<sup>56</sup> having children in the first place becomes even more desirable.<sup>57</sup> In some situations, families are procreating for the sole purpose to sell off their female daughters,<sup>58</sup> who have little to no means of escaping this sale.<sup>59</sup> The class structures that govern a young person's life essentially hold them hostage to the will of their families, who then pass them along into a new hostage situation: the forced marriage.<sup>60</sup>

A family might have good intentions in forcing their children to marry. For example, a family might feel the marriage protects their son or daughter, by giving them economic security for their future, or by ensuring that they will be under the care of someone the family knows.<sup>61</sup> Additionally, a family might be using the marriage “[t]o save family honor.”<sup>62</sup> Marriage, in some cultures, is seen as a “matter of identity,”<sup>63</sup> and is used as a means to ensure that the younger generation stays firmly rooted within the family's culture, religion, or nationality, and upholds their family's legacy.<sup>64</sup> In an increasingly global society, marriage is being used as a defense against the westernization of a family's younger generation.<sup>65</sup> Despite any good intentions, these marriages are often against the young person's will.

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<sup>56</sup> *About Forced Marriage*, *supra* note 46.

<sup>57</sup> See Chantler et al., *supra* note 49, at 603.

<sup>58</sup> A member of a focus group conducted with members of different African communities and Ugandan professionals noted:

Because if a father thinks, believes, that he can get so many manner of cattle or dowry, out of this one girl, and he can use that for three of his sons, to marry, to get them wives, then he's going to get that girl out of school at thirteen.

*Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See REFUGE, FORCED MARRIAGE IN THE UK: A SCOPING STUDY ON THE EXPERIENCE OF WOMEN FROM MIDDLE EASTERN AND NORTH EAST AFRICAN COMMUNITIES 10–12, <http://www.refuge.org.uk/files/1001-Forced-Marriage-Middle-East-North-East-Africa.pdf> [<https://perma.cc/U8L2-954D>].

<sup>61</sup> BENDRISS, *supra* note 33, at 12 (“[Families] seek to ensure a solid future for their daughters by marrying them to men whom they consider to be best for them as knowledge of the suitor's family or relatives gives them the feeling that their daughter will be protected. In fact, they entrust their daughter to a husband and in-laws whom they trust and with whom they have a ties of honour, which they see as a guarantee of security and proper treatment for the young wife among in-laws who will not treat her as an outsider.”).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 12–13.

<sup>65</sup> See *About Forced Marriage*, *supra* note 46; Sally Howard, *Forced Marriage: The Survivors' Tales*, TELEGRAPH (June 21, 2014), <http://www.telegraph.co.uk/women/womens-life/10909788/Forced-marriage-the-survivors-ales.html> [<https://perma.cc/ZK49-8XA2>]. In the same vein as preserving family honor, forced marriage might be used to deal with pregnancy out of wedlock. The Canadian study asserts:

Cases of families who force their young girls into an undesired marriage to repair the “mistake” of pregnancy out of wedlock and thereby avoid losing face

The myriad of reasons families force their members into marriage all have one thing in common: but-for the young person's place within the particular family unit, the young person would not be a victim of the forced marriage. While the means, the forced marriage, provides different families with different ends, these ends all specifically benefit the original family unit through the young person's original kinship ties. Families are motivated by the place of the victim within the family unit and how that place may be traded, and thus changed, to confer a benefit on the family as a whole.

*B. The Difficulty of Fleeing from Family*

The difficulty of escape from these forced marriages further demonstrates the strength of the family-based motivations behind the practice. Upon refusing to go through with a forced marriage, a person may be subjected to myriad of abuses, such as physical abuse, death threats, emotional abuse, false imprisonment, rape, and preventing access to money, perpetuated by both the potential spouse, and family members involved.<sup>66</sup> In escaping a forced marriage, a young person could be faced with the choice: go through with the marriage, or abandon one's family.<sup>67</sup> Sometimes this choice is non-existent, as young people in poverty, or communities run by strict cultural expectations, cannot escape their families.<sup>68</sup> A person might lack the economic means to escape, or might fear death or severe injury for refusing the marriage.<sup>69</sup>

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are also mentioned. Several women who fled to battered women's shelters hoping to find protection from conjugal violence told social workers that they had been forced by their parents to marry the father of the child conceived out of wedlock. Those marriages took place in Latin American countries where the young women had had sexual relations with men with whom they were not planning to spend their lives. When they found they were pregnant, they told their parents, who compelled them, despite their protests, to marry the father of the child they were expecting so that their reputation would not be damaged.

BENDRISS, *supra* note 33, at 16.

<sup>66</sup> REFUGE, *supra* note 60, at 10. For example, uncles threatened to kill their niece after she tried to run away from her controlling family. Fearing for her life and safety, she returned and consequently, was forced, against her will, into a marriage to a distant family member. Howard, *supra* note 65.

<sup>67</sup> BENDRISS, *supra* note 33, at 20.

<sup>68</sup> *Id.* at 20–21.

<sup>69</sup> Catherine Deveney, *Without Consent: The Truth About Forced Marriage*, GUARDIAN (Mar. 10, 2012), <https://www.theguardian.com/world/2012/mar/11/forced-marriage-pakistan-matrimony-laws> [<https://perma.cc/86AX-F9J4>].

Furthermore, the pressures of family and culture blur the line as to where consent ends and coercion begins.<sup>70</sup> Engrained from birth to follow certain familial or cultural practices, a young person might not outwardly oppose being forced into a marriage.<sup>71</sup> Thus consent, in terms of a forced marriage, should be viewed on a spectrum that takes into account factors such as a victim's age, economic means, culture, and place of birth.<sup>72</sup> Failure to account for such a spectrum is particularly troubling legally, especially if one is claiming an instance of past persecution.<sup>73</sup> In *In re Kasinga*, the seminal BIA case dealing with the harm of forced marriage, the Immigration and Nationality Service (INS)<sup>74</sup> argued that if a woman had "consented" or "acquiesced" to FGC, she should not be eligible for asylum.<sup>75</sup> If the government were to extend that reasoning to forced marriage-based claims, all applicants who married "willingly" to please their family, or because they felt they had no other choice, would be barred from achieving asylum.<sup>76</sup>

The family pressure to marry can be so high that victims consider suicide as their only option out.<sup>77</sup> By refusing to go through with a family-arranged forced marriage, a young person could essentially isolate themselves from their entire family.<sup>78</sup> Pressure from family is high enough, even without the strain of poverty.<sup>79</sup> These marriages are often a family's only ticket to their next meal; thus poverty, combined with cultural expectations and familial pressures, often render many of these marriages inescapable.<sup>80</sup>

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<sup>70</sup> Sunari Anitha & Aisha K. Gill., *Reconceptualising Consent and Coercion Within an Intersectional Understanding of Forced Marriage*, in FORCED MARRIAGE, *supra* note 51, at 47, 53.

<sup>71</sup> *Id.* at 52–54.

<sup>72</sup> *Id.*

<sup>73</sup> *See In re Kasinga*, 21 I. & N. Dec. 357, 371 (B.I.A. 1996).

<sup>74</sup> The Immigration and Nationality Service (INS) was abolished in 2003. Its functions are now carried out by USCIS, Customs and Border Patrol (CBP), and Immigration and Customs Enforcement (ICE), which are all components of the Department of Homeland Security (DHS). *Our History*, USCIS, DEP'T OF HOMELAND SEC., <https://www.uscis.gov/about-us/our-history> [<https://perma.cc/G93J-QTMC>].

<sup>75</sup> *Kasinga*, 21 I. & N. Dec. at 371.

<sup>76</sup> Jenni Millbank & Catherine Dauvergne, *Forced Marriage and the Exoticization of Gendered Harms in United States Asylum Law*, 19 COLUM. J. GENDER & L. 898, 927 (2010).

<sup>77</sup> Deveney, *supra* note 69.

<sup>78</sup> BENDRISS, *supra* note 33, at 17–20.

<sup>79</sup> *See* MARIANNE HESTER ET AL., FORCED MARRIAGE: THE RISK FACTORS AND THE EFFECT OF RAISING THE MINIMUM AGE FOR A SPONSOR AND OF LEAVE TO ENTER THE UK AS A SPOUSE OR FIANCÉ(E) 30–32 (2007).

<sup>80</sup> *See* BENDRISS, *supra* note 33, at 14–16; Chantler et al., *supra* note 49, at 603.

## II. ASYLUM AND THE PRACTICE OF FORCED MARRIAGE

### A. *An Overview of Asylum*

To file for asylum, a person must be present in the United States and must file their application within one-year of entry into the United States, with certain exceptions.<sup>81</sup> For a person to be eligible for asylum they must be “unable or unwilling to return to, and . . . unable or unwilling to avail himself or herself” of his or her home country due to “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>82</sup> For the purposes of this note, this can be synthesized into three *prima facie* requirements: (1) past persecution, or a well-founded fear of future persecution; (2) membership in one of the five enumerated protected grounds; and (3) a nexus between the protected ground and the persecution.<sup>83</sup>

The first requirement of asylum, persecution, has not been formally defined in the INA. The BIA has vaguely opined that persecution is “a threat to . . . life or freedom” or an “infliction of suffering or harm,” perhaps consisting of

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<sup>81</sup> Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2012). These exceptions include “changed circumstances” and “extraordinary circumstances.” 8 U.S.C. § 1158(a)(2)(D). Changed circumstances include changed country conditions and other “circumstances materially affecting the applicant’s eligibility for asylum.” DHS Immigration Regulations, 8 C.F.R. § 208.4(a)(4) (2018). Extraordinary circumstances include events or factors such as physical, mental, and legal disabilities and ineffective assistance of counsel. 8 C.F.R. § 208.4(a)(5).

<sup>82</sup> Governing U.S. asylum law is the definition of the term “refugee” under section 1101(a)(42)(A) of the Immigration and Nationality Act, which states:

The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A) (2012 & Supp. II 2014). This definition governs asylum applications because the only difference between a refugee and someone applying for asylum is that the refugee is *outside* of the United States when they apply for asylum, while an asylum seeker is *already present* in the U.S. at time of application. An asylum seeker may already have lawful status, or may not. *Refugees & Asylum*, USCIS, DEPT OF HOMELAND SEC., <https://www.uscis.gov/humanitarian/refugees-asylum> [<https://perma.cc/RM3X-UARS>].

<sup>83</sup> There are numerous bars to asylum such as firm resettlement in another country prior to arrival in the United States, a conviction for a serious crime, engagement in terrorist activity, and previously persecuting others. See Immigration and Nationality Act § 208, 8 U.S.C. § 1158(b)(2)(A) (2012); *Asylum Bars*, USCIS, DEPT OF HOMELAND SEC., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-bars> [<https://perma.cc/VB85-W9BK>].

confinement, torture, or economic deprivation<sup>84</sup> and that “[t]he harm or suffering need not [only] be physical, but may take other forms, such as . . . the deprivation of liberty, food, housing, employment or other essentials of life.”<sup>85</sup> The BIA has avoided placing strict guidelines on what forms of mistreatment constitute persecution, and instead, has emphasized that whether a harm amounts to persecution should be determined on a case-by-case basis.<sup>86</sup> In *Matter of Acosta*, the seminal BIA decision on asylum claims where the protected ground asserted is membership in a particular social group, the BIA defined persecution as “harm or suffering . . . inflicted upon an individual in order to *punish* him for possessing a belief or characteristic a persecutor sought to overcome.”<sup>87</sup> Following the BIA’s decision in *Acosta*, the United States Court of Appeals for the Ninth Circuit held that the punitive intent was, in fact, not required and that courts should focus solely on the intent of a persecutor to “overcome a characteristic of the victim.”<sup>88</sup> In other words, the persecutor need not believe that they are punishing or harming their victim for their actions to amount to persecution, but they must intend to infringe upon the protected characteristic of the asylum seeker. This requirement of intent bleeds into the nexus factor, discussed subsequently.

Under asylum law, the persecutor may be either a public or private actor. In forced marriage-based asylum claims, the persecutor is typically a private actor, often the victim’s own family.<sup>89</sup> If the persecutor is a private actor, the individual or group must be one that the government of the applicant’s home country is “unable or unwilling” to control.<sup>90</sup> The BIA has held that persecution perpetuated within a family unit can be outside of a government’s control.<sup>91</sup> An applicant’s failure to report the persecution to the government or law enforcement is not “outcome determinative” as long as the applicant can prove a systemic reluctance to punish those engaged in the particular form of persecution.<sup>92</sup>

The INA defines the second requirement, the “protected ground,” as “race, religion, nationality, membership in a

<sup>84</sup> *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

<sup>85</sup> *In re T-Z-*, 24 I. & N. Dec. 163, 171 (B.I.A. 2007).

<sup>86</sup> *See, e.g., In re L-K*, 23 I. & N. Dec. 677, 682–83 (B.I.A. 2004); *In re O-Z- & I-Z-*, 22 I. & N. Dec. 23, 25–26 (B.I.A. 1998).

<sup>87</sup> *Acosta*, 19 I. & N. Dec. at 222 (emphasis added).

<sup>88</sup> *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir. 1997).

<sup>89</sup> *Nanasi*, *supra* note 3, at 66–68.

<sup>90</sup> 8 U.S.C. § 1101(a)(42)(A) (2012 & Supp. 2014).

<sup>91</sup> *See In re S-A-*, 22 I. & N. Dec. 1328, 1333–35 (B.I.A. 2000) (holding an abusive father in Morocco to be outside of government control).

<sup>92</sup> *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1069 (9th Cir. 2017) (en banc).

particular social group, or political opinion.”<sup>93</sup> The protected ground of particular social group (PSG) can be particularly hard to define. In *Acosta*, the BIA defined a PSG as those who “share a common, immutable characteristic,” including “sex, color, or kinship ties, or in some circumstances . . . a shared past experience such as former military leadership or land ownership.”<sup>94</sup> The BIA further opined that courts may determine on a case-by-case basis whether commonly held characteristics satisfy the definition of a PSG, but clarified that the characteristics must be those that are unable to be changed, or should not be required to change as they are “fundamental to individual identity.”<sup>95</sup> The PSGs asserted in asylum claims are often very specific and tailored to a particular claim.<sup>96</sup> Therefore, PSG-based asylum claims often pose problems for asylum applicants. If there is no relevant precedent asserting the PSG to which the applicant is claiming membership, an applicant will not know whether the group will be recognized until the applicant’s claim is adjudicated.

The third requirement is that the “persecution or [the] well-founded fear of persecution [must be] on account of [the] protected ground[.]”<sup>97</sup> This is the “nexus” requirement:<sup>98</sup> the persecution claimed must have occurred *due* to an applicant’s protected ground.<sup>99</sup> If the asylum seeker was persecuted for a “facially neutral” reason, asylum officers and immigration judges will deny the claim.<sup>100</sup> The asylum applicant must produce evidence that allows a fact-finder to reasonably conclude “that the harm was *motivated* by a protected ground.”<sup>101</sup>

Considering the recent history of courts denying forced marriage-based asylum claims, it is important to note, that if a

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<sup>93</sup> 8 U.S.C. § 1101(a)(42).

<sup>94</sup> *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).

<sup>95</sup> *Id.*

<sup>96</sup> *See, e.g.,* *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (PSG asserted was “[f]emale widows in Cameroon”); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (court recognized the PSG of “Iranian women who advocate [for] women’s rights or . . . oppose Iranian customs relating to dress and behavior”); *In re Kasinga*, 21 I. & N. Dec. 357, 368 (B.I.A. 1996) (young women of the Tchamba-Kunsuntu tribe of northern Togo who did not undergo “[f]emale genital mutilation], as practiced by that tribe, and who oppose the practice”); *In re H-*, 21 I. & N. Dec. 337, 343 (B.I.A. 1996) (members of the Marehan subclan of Somalia who “share ties of kinship . . . [and] are identifiable as a group based upon linguistic commonalities”).

<sup>97</sup> 8 U.S.C. § 1101(a)(42) (2012 & Supp. II 2014).

<sup>98</sup> *In re L-E-A-*, 27 I. & N. Dec. 40, 43–44 (B.I.A. 2017).

<sup>99</sup> *See generally* *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (describing the nexus requirement of asylum claims).

<sup>100</sup> *See, e.g.,* *Gilca v. Holder*, 680 F.3d 109, 116 (1st Cir. 2012).

<sup>101</sup> *In re S-P-*, 21 I. & N. Dec. 486, 490 (B.I.A. 1996) (emphasis added).

connection is required, the objects on either side of the connection must be different from one another—the protected ground cannot be the same as the persecution.<sup>102</sup> To provide a clear example, imagine a government official imprisoning a member of an opposition party for organizing a peaceful protest against the government. In that case, the persecution is the imprisonment, and the protected ground is the person’s political opinion. Nexus between the two exists as the victim’s political opinion, and expression of such opinion, motivated the government official to throw the asylum seeker in prison. The political opinion is different than, and separate from, the act of imprisonment, allowing the persecution to be motivated by the protected ground.

While the need to define a protected ground *separate* from the alleged persecution is not necessarily a hard requirement, immigrant advocacy groups recommend that attorneys refrain from alleging particular social groups that are based on the persecution itself.<sup>103</sup> In fact, several courts have denied asylum

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<sup>102</sup> See, e.g., *Juarez Chilel v. Holder*, 779 F.3d 850, 855 (8th Cir. 2015) (holding that the social group asserted was based upon a circular reasoning where suffering violence was a defining characteristic of the group). *Rreshpja v. Ashcroft*, 420 F.3d 551, 556 (6th Cir. 2005) (rejecting the PSG of young, attractive Albanian women who are forced into prostitution as circularly defined by persecution); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) (“We agree that under the statute a ‘particular social group’ must exist independently of the persecution suffered by the applicant for asylum.”).

<sup>103</sup> *Practice Advisory: Matter of A-B- Considerations*, IMMIGRANT LEGAL RES. CTR. 3 (2018), [https://www.ilrc.org/sites/default/files/resources/matter\\_a\\_b\\_considerations-20180927.pdf](https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf) [<https://perma.cc/54KL-F3N6>] (“We advise applicants to refrain from defining their social group(s) solely by the harm they faced to avoid an accusation of circular reasoning.”); *Asylum Practice Advisory: Applying for Asylum After Matter of A-B*, NAT’L IMMIGRANT JUSTICE CTR. 17 (2018), <https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%2006.21.18.pdf> [<https://perma.cc/7LWV-87CW>] (“Do NOT define the PSG by the harm suffered or feared . . . [R]eferring the harm suffered does not necessarily invalidate the social group . . . . However, it will make the nexus element almost impossible to prove because of the circularity problem.”); *CGRS Advice—Female Genital Cutting Asylum Cases*, CTR. FOR GENDER & REFUGEE STUD. 7 (Apr. 2012) (“The attorney should avoid defining the social group solely by the harm the client has experienced or will likely experience . . . because this is circular reasoning. . . . This reasoning is unsound; consequently, circular social groups are not cognizable. . . . Even if a circular social group is recognized by the Immigration Judge (IJ), a grant of asylum on this basis will likely be reversed on appeal.”); *Children’s Asylum Claims: CGRS Practice Advisory*, CTR FOR GENDER & REFUGEE STUD. 12 (Mar. 2015) (“Attorneys should generally avoid defining the social group solely or primarily by the harm suffered or feared. For example ‘abused children,’ which is defined by past harm, and ‘children at risk of child abuse,’ which is defined by risk of future harm are not cognizable groups. They are circularly defined; that is, rather than setting out the characteristics targeted (e.g. childhood and lack of parental protection, childhood and status in the family, etc.), they focus on the fact that the child was or will be targeted. A child may be abused because of the child’s status in a family or because of societal views regarding children, but s/he is not abused because s/he is abused.”); see also Christopher C. Malwitz, *Particular Social Groups: Vague Definitions and an Indeterminate Future for Asylum Seekers*, 83 BROOK. L. REV. 1149, 1156 (2018) (“[T]here can be no circularly defined groups—a group that has been persecuted cannot be defined by such persecution. Instead, there must be some underlying, unifying (and now visible) reasoning for that persecution, and which is the basis for such targeted mistreatment.”).

claims due to this “circular” reasoning.<sup>104</sup> While there are some instances where particular social groups alleged may reference the harm itself, they are limited to “continuing harms.” Currently, courts only apply the “continuing harm” analysis to a narrow set of harms: FGC and forced sterilization, both physically irreversible procedures.<sup>105</sup> Additionally, recent decisions from the Trump administration highlight the need to define a protected ground separate from the harm of forced marriage. In *Matter of A-B-*, the decision stripping eligibility for asylum from victims of domestic violence from the Northern Triangle, former Attorney General Jeff Sessions based his holding, in part, on the fact that the social group defined in these claims often referenced the persecution itself.<sup>106</sup>

## B. *Forced Marriage and its Forced Place Within American Asylum Jurisprudence*

### 1. Forced Marriage as a Form of Persecution

As an initial matter, forced marriage, on its own, has not been expressly recognized as a harm great enough to constitute persecution.<sup>107</sup> This lack of recognition directly opposes the large amount of published research on the extreme physical, mental, and emotional harms forced marriage brings upon its victims.<sup>108</sup> Further, the Supreme Court emphasizes the importance of the legal right to choose a spouse.<sup>109</sup> Domestically, the U.S. Department of State recognizes forced marriage as a human rights abuse—it warns those travelling of the harm and suggests available

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<sup>104</sup> See *supra* note 102 (citing cases where claims were denied due to this circular form of reasoning).

<sup>105</sup> *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) (holding forced sterilization to be a “continuing harm”); *Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005) (extending the continuing harm analysis to FGM). Other circuits, however, have declined to extend the continuing harm analysis to FGM. *Diallo v. Mukasey*, 268 F. App’x 373, 380 (6th Cir. 2008); see also Zsaleh E. Harivandi, Note, *Female Genital Mutilation as a Basis for Asylum*, 95 CORNELL L. REV. 599, 620 (2010).

<sup>106</sup> *In re A-B-*, 27 I. & N. Dec. 316, 334–35 (A.G. 2018).

<sup>107</sup> Nanasi, *supra* note 3, at 50.

<sup>108</sup> See, e.g., BENDRISS, *supra* note 33, at 22–23; Nanasi, *supra* note 3, at 50–51; Valerie Oosterveld, *The Special Court for Sierra Leone, Child Soldiers, and Forced Marriage: Providing Clarity or Confusion?*, 45 CAN. Y.B. INT’L L. 131, 133 (2007); *Forced Marriage*, *supra* note 25; see also Gill & Anitha, *supra* note 51, at 14 (discussing forced marriage from a social justice and human rights perspective); see also *supra* note 36 (various reports on the practice of forced marriage, its motivations, and resulting harms).

<sup>109</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (holding the Constitution protects the right of same-sex couples to marry); *United States v. Windsor*, 570 U.S. 744, 774 (2013) (striking down DOMA, which exempted same-sex couples from being recognized as spouses under federal law).

remedies to those who are victims.<sup>110</sup> Internationally, UN treaties recognize forced marriage as a human rights violation and in 2007, an international criminal tribunal in Sierra Leone recognized forced marriage as an inhumane act.<sup>111</sup> Even linguistically, the act of forced marriage suggests harm: “the term ‘violence’ refers to the Latin word for ‘forced.’”<sup>112</sup> And yet, despite this overwhelming recognition, U.S. asylum law has still not accepted forced marriage as persecution in its own right.<sup>113</sup>

U.S. asylum decisions recognize that the harms stemming from forced marriage, such as domestic violence, rape, and FGC, are enough to constitute persecution.<sup>114</sup> Currently, forced marriage-based asylum claims often “hinge more on risk of [these] related harms which have already been found to constitute persecution.”<sup>115</sup> In *In Re Kasinga*, the BIA did not substantively deal with forced marriage as a harm on its own, but recognized forced marriage as a central component to the applicant’s claim of FGC.<sup>116</sup> In her brief, Kassindja<sup>117</sup> wrote, “[n]ow that I am married, my husband has the right to demand . . . that I be circumcised according to tradition. The rest of the community will not protect me since a husband has a right to say what will happen to his wife.”<sup>118</sup> The BIA’s recognition of the centrality of the marriage to Kassindja’s subjection to FGC laid the groundwork for proving that forced marriage is a harm that should be considered a form of persecution.<sup>119</sup> Since forced marriage is the root cause of many harms recognized as persecution, forced marriage should also constitute persecution.<sup>120</sup>

<sup>110</sup> *Forced Marriage*, *supra* note 7.

<sup>111</sup> See G.A. Res. 1763 (XVII) A, Convention on Consent to Marriage, Minimum Age for Marriage, art.1 (Dec. 9, 1964), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/MinimumAgeForMarriage.aspx> [<https://perma.cc/HNA6-VPPE>]; Gill & Anitha, *supra* note 51, at 7; Rachel Slater, *Gender Violence or Violence against Women? The Treatment of Forced Marriage in the Special Court for Sierra Leone*, 13 MELB. J. INT’L L. 732, 740 (2012).

<sup>112</sup> Gill & Anitha, *supra* note 51, at 2.

<sup>113</sup> Nanasi, *supra* note 3, at 53.

<sup>114</sup> See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357, 374 (B.I.A. 1996) (granting asylum claim based on fear of FGC rather than fear of impending forced marriage).

<sup>115</sup> Kim Thuy Seelinger, *Forced Marriage and Asylum: Perceiving the Invisible Harm*, 42 COLUM. HUM. RTS. L. REV. 55, 57 (2010); see also *Mohammed v. Gonzales*, 400 F.3d 785, 799 (9th Cir. 2005) (holding that FGC is an act of persecution).

<sup>116</sup> *Kasinga*, 21 I. & N. Dec. at 374.

<sup>117</sup> The first immigration officer misspelt Kasinndja’s name as “Kasinga,” thus the discrepancy between her name and the case name. Millbank & Dauvergne, *supra* note 76, at 922 n.74.

<sup>118</sup> See Brief for the Respondent, at 10, *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1995) (No. A73-476-695), <https://www.justice.gov/sites/default/files/eoir/legacy/2000/03/28/kasinga2.pdf> [<https://perma.cc/RGT7-ST6Z>].

<sup>119</sup> See Millbank & Dauvergne, *supra* note 76, at 923.

<sup>120</sup> See *id.*

Forced marriage should be a stand-alone form of persecution for purposes of U.S. asylum claims, but given that the INA does not define persecution, proving *why* is better left to psychologists and sociologists. Recent BIA and federal court decisions demonstrate a trend towards the United States eventually recognizing forced marriage as a form of persecution for asylum claims<sup>121</sup> and extensive research concerning the harm of forced marriage is easily accessible. Thus, the pressing legal issue facing these claims lies in determining the nexus, and accordingly, a “protected ground” that the harm of forced marriage is infringing upon.<sup>122</sup>

## 2. The Difficulty in Defining a PSG for a Forced Marriage-Based Claim

Currently, PSGs asserted in forced marriage-based asylum claims often consist of a combination of characteristics, including gender, age, religion, nationality, and ethnic membership.<sup>123</sup> In *Ying Lin v. U.S. Attorney General*, the United States Court of Appeals for the Eleventh Circuit denied a forced marriage-based asylum claim.<sup>124</sup> The applicant asserted membership to a PSG of “unmarried women in a lower social class or in a rural area.”<sup>125</sup> The court reasoned that no nexus existed between the protected ground and the harm as the central reason the petitioner was forced into the marriage was to repay her mother’s gambling debt, which was not connected to the characteristics asserted in the PSG.<sup>126</sup> In *Kasinga*, the court recognized the following PSG: young women of the Tchamba-Kunsuntu Tribe on whom FGC has not yet been forced and who

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<sup>121</sup> See, e.g., *Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006), *vacated sub nom.* *Keisler v. Hong Yin Gao*, 552 U.S. 801 (2007); see also Brief for Center for Gender and Refugee Studies as Amici Curiae Supporting Respondent, *In re S-F*, B.I.A. (2008) (unpublished decision), [https://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_SF\\_CGRS\\_Amicus\\_08\\_2011\\_redacted\\_combined.pdf](https://cgrs.uchastings.edu/sites/default/files/Matter_of_SF_CGRS_Amicus_08_2011_redacted_combined.pdf) [<https://perma.cc/7LGF-E8KB>].

<sup>122</sup> See *supra* note 20 (providing examples of cases where forced marriage asylum cases failed due to failure to prove the nexus requirement).

<sup>123</sup> See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (social group asserted was “young women of the Tchamba-Kunsuntu Tribe who have not had FGM . . . and who oppose the practice”); *Ying Lin v. U.S. Att’y. Gen.*, 319 F. App’x 777, 779 (11th Cir. 2009) (the social group asserted was “unmarried women in a lower social class or in a rural area”); Brief for Center for Gender and Refugee Studies as Amici Curiae Supporting Respondent, *supra* note 121, at 34 (social group asserted was “young, single daughters from the [Woloff] ethnic group in Senegal who oppose forced marriage”); *Feng Ming Lin v. Holder*, 339 F. App’x 102, 103 (2d Cir. 2009) (social group asserted was “young women in remote villages in the People’s Republic of China”); *Lin v. Gonzales*, 148 F. App’x 38, 39 (2d Cir. 2005) (social group asserted was “young, unmarried Chinese woman living in a rural part of China”).

<sup>124</sup> *Ying Lin*, 319 F. App’x at 780–81.

<sup>125</sup> *Id.* at 779.

<sup>126</sup> *Id.* at 780–81.

oppose FGC.<sup>127</sup> *Ying Lin* demonstrated how a broad PSG can fail, due to a lack of a clear nexus, while *Kasinga* demonstrated how a PSG whose specifics created a clear nexus to the harm, was successful.<sup>128</sup> But, the challenge of asserting a group specific enough to be “socially distinct” while still outlining a “common immutable characteristic” is not a simple feat.<sup>129</sup>

Prior federal decisions have made it difficult for judges to recognize combinations of gender and age as PSGs. In 1991 the Second Circuit opined that “[p]ossession of broadly-based characteristics such as youth and gender” does not allow an individual to claim membership to a PSG.<sup>130</sup> Although asylum applications are adjudicated on a case-by-case basis, asking an asylum officer or judge to recognize a social group made up of several different characteristics is risky. With no legal precedent recognizing the group as a PSG, it is difficult to predict whether a court or asylum officer will grant or deny a claim. A denial could have disastrous consequences: if USCIS denies an immigrant without lawful status asylum, they could be ordered to appear in removal proceedings, and eventually be deported.<sup>131</sup> Meaning, for some immigrants unlawfully present in the United States, who are genuinely fearful of returning to their home country, yet have a legally weak claim to asylum, their best option might be to not apply at all.<sup>132</sup> Ideally, to maximize a person’s chances at gaining asylum, the PSG asserted would be simple, obvious, and previously recognized.

There are many challenges to asserting a PSG based on mixed characteristics. First, placing marriage in a PSG connected to youth is limiting.<sup>133</sup> In the introductory example to this note, the young woman was old enough to be in college, and thus, could

<sup>127</sup> *Kasinga*, 21 I. & N. Dec. at 365.

<sup>128</sup> See *Ying Lin*, 319 F. App’x at 779; *Kasinga*, 21 I. & N. Dec. at 365.

<sup>129</sup> See *In re M-E-V-G-*, 26 I. & N. Dec. 227, 240 (B.I.A. 2014); *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

<sup>130</sup> *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

<sup>131</sup> *How Refugees Get to the U.S.*, U.N. HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/en-us/58599d054.pdf> [<https://perma.cc/F2SZ-5LCP>].

<sup>132</sup> See Keith Southam, *Risks and Benefits to Affirmatively Applying for Asylum*, NOLO, <https://www.nolo.com/legal-encyclopedia/risks-and-benefits-to-affirmatively-applying-for-asylum.html> [<https://perma.cc/9Y62-NZ4E>].

<sup>133</sup> The United States has taken legislative action against child marriage through the International Protecting Girls by Preventing Child Marriage Act. While the Act is important and well-intentioned, there might be an argument that the legislative action harms potential forced marriage-based asylum claims, as there is language in the act that conflates child marriage with forced marriage. The bill states that “child marriage, also known as ‘forced marriage’ or ‘early marriage,’ is a harmful traditional practice.” International Protecting Girls by Preventing Child Marriage Act of 2010, S. 987, 111th Cong. § 2 (2010) (introduced May 6, 2009, passed in a vote by the Senate Dec. 1, 2010, failed in the House of Representatives on Dec. 16, 2010, and reintroduced on May 24, 2012).

be considered by some to no longer be a child.<sup>134</sup> And yet, the pressures that force a woman into marriage do not suddenly disappear when she reaches the age of eighteen.<sup>135</sup> Particularly if the victim comes from a small community with deeply entrenched cultural values, or who falls beneath the poverty line, the pressure is just as strong, and the means of escape from the marriage are extremely limited.<sup>136</sup>

Second, placing forced marriage within a gender group is also problematic. Although the majority of forced marriages are inflicted on young girls or women,<sup>137</sup> forced marriages can victimize men and boys as well.<sup>138</sup> In recent years, the British government reported a sixty-five percent increase in calls from male victims to their Forced Marriage Unit<sup>139</sup> and the U.S. Department of State reported in 2018 that fifteen percent of forced marriages abroad involve male victims.<sup>140</sup>

Nevertheless, forced marriage does primarily affect young women and girls.<sup>141</sup> Thus the problem should be viewed in the broader context of a manifestation of a general, wide-spread, global issue of violence against women.<sup>142</sup> Alternatively, removing the harm of forced marriage from the gender category could result in the blame for the harm being placed solely on the practices or cultural norms of non-western communities.<sup>143</sup> The patriarchal norm of general male superiority might get a free pass, while the fault for the practice of forced marriage would be attributed to cultural practices born from poverty.<sup>144</sup> Fitting forced marriage into U.S. asylum law does not aim to suggest any sort of cultural

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<sup>134</sup> See *supra* Introduction. The INA defines a child as an “unmarried person under twenty-one years of age.” 8 U.S.C.A. 1101(b)(1) (2014).

<sup>135</sup> See *supra* Part I.

<sup>136</sup> See *supra* Part I.

<sup>137</sup> In 2016, young girls and women represented eighty-four percent of all victims of forced marriage, and over one third of the victims were children at the time the marriage took place. Ninety-six percent of child victims were girls. INT’L LABOUR OFFICE, *supra* note 8, at 45–46.

<sup>138</sup> See generally Yunas Samad, *Forced Marriage Among Men: An Unrecognized Problem*, 30 CRITICAL SOC. POL’Y 189 (2010) (exploring factors that lead to forced marriages among men and boys); see also REFUGE, *supra* note 60, at 6 (acknowledging briefly that men and boys are affected by forced marriage). A study conducted in the UK gave several examples of men they had interviewed who had been forced into marriage. One included a British Bangladeshi man who was taken to Bangladesh twice to be married. He escaped both marriages, but suffered increased mental health issues as a result. Hester, *supra* note 79, at 31.

<sup>139</sup> Amelia Hill, *More Men Seek Help with Forced Marriages*, GUARDIAN (June 30 2010), <https://www.theguardian.com/world/2010/jul/01/men-help-forced-marriages-rise> [<https://perma.cc/AG3S-3MWU>].

<sup>140</sup> *Forced Marriage*, *supra* note 7.

<sup>141</sup> INT’L LABOUR OFFICE, *supra* note 8, at 11.

<sup>142</sup> See Gill & Anitha, *supra* note 51, at 7–8.

<sup>143</sup> See *id.* at 10–11.

<sup>144</sup> *Id.*

superiority, or demonstrate a lack of sensitivity to practices born out of a basic human need to escape poverty.<sup>145</sup> But, for the purposes of asylum claims, “gender” is too broad of a category.<sup>146</sup> And in narrowing a gender-based asylum claim, specific cultures or ethnic groups would most likely be asserted.<sup>147</sup> Removing forced marriage from the protected group of gender, and arguably, from a feminist vocabulary, is simply to fit the harm within the statutory requirements of U.S. asylum law.

### 3. Other Insufficient Approaches to Forced Marriage-Based Claims

Various scholars and advocates have attempted to find new solutions to forced marriage-based asylum claims by connecting them to other “protected grounds.” One U.K. scholar has advocated for removing forced marriage-based claims from the gender category within a PSG and placing the claims, instead, into the “underused” political opinion category.<sup>148</sup> Many of the pressures forcing women and men into marriage stem from political norms compelling women and men to fill certain gender roles that the women and men might themselves oppose.<sup>149</sup> Courts have opined that believing in “equal rights for women” constitutes a “political opinion” for purposes of asylum.<sup>150</sup>

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<sup>145</sup> See BENDRISS, *supra* note 33, at 14–15.

<sup>146</sup> “Possession of broadly-based characteristics such as youth and gender” does not allow an individual to claim membership to a “particular social group.” *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

<sup>147</sup> For example, the social group of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.” *In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

<sup>148</sup> See Nora Honkala, ‘*She, of Course, Holds No Political Opinions*’: Gendered Political Opinion Ground in Women’s Forced Marriage Asylum Claims, 26 SOC. & LEGAL STUD. 166, 168 (2017) (arguing that forced marriage-based asylum claims could connect themselves to the protected ground of political opinion).

<sup>149</sup> *Id.* at 9–10, 16–17. There could be an argument that forced marriage infringes on the political opinion of belief in monogamy. Of course, forced marriages are not necessarily polyamorous ones, but some are. One Canadian study notes:

An additional emotional layer that is sometimes added to the painful ordeal of an undesired marriage is the discovery that their husbands already have another wife and family. They then unwittingly end up in a bigamous or polygamous relationship, which increases their vulnerability. The psychological and emotional consequences for these individuals are simply devastating. This is what happened to the young woman, mentioned above, who was forced by her aunt to marry a much older man. [TRANSLATION] “Yes they live together and they have children but she is unhappy because she found out later that the man had another wife and that his children by that other woman were practically her own age.”

BENDRISS, *supra* note 33, at 23 (alteration in original).

<sup>150</sup> See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1237, 1242 (3d Cir. 1993).

The problem with the political opinion approach, however, lies within the nexus requirement. While the persecutor forcing the marriage onto the individual might hold a different political opinion than the victim, the determining question is *why* the persecutor is forcing this particular individual into marriage.<sup>151</sup> Reports confirm that enforcing certain gender norms can be a motivation behind forced marriage,<sup>152</sup> and in these limited circumstances, political opinion as the protected ground could be recognized. Still, changing someone's political opinion—though it might be a part of the motivation—is not overwhelmingly one of the central reasons the practice of forced marriage exists.<sup>153</sup> The consequence of changing or forcing a political opinion might exist within the practice of forced marriage, but consequence does not a motivation make. More often the person, or the family, who is the “forcer” of the marriage, is centrally motivated by the benefits the forced marriage will confer onto the family.<sup>154</sup>

Forced marriage-based asylum applicants have also attempted to claim religion as their protected ground; in fact, one unpublished BIA decision represents a success for forced marriage claims in this regard.<sup>155</sup> In *Matter of S-F*, the petitioner asserted several different protected grounds: feminist political opinion, moderate Islamic religion, and “membership in the [PSG] of Senegalese women from the [Wolof] ethnic group who have been sold into marriage (whether or not the marriage

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<sup>151</sup> See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that the persecutor's motive is crucial to asylum claims).

<sup>152</sup> See, e.g., BENDRISS, *supra* note 33, at 14 (“Forced marriage is also a way of controlling women's sexuality. Some parents see forced marriage as a way of protecting their daughters against the risk of romantic relationships, and most importantly against sexual relations outside marriage. Above all, they are seeking to avoid pregnancies considered to be illegitimate that could result from this type of relationship. As far as many families are concerned, their reputation depends on the proper sexual behaviour of their members, especially the females. The patriarchal standards that are still valued in these families are reproduced in the society in which they settle. One of those standards is the duty to preserve virginity, which arises out of the desire to control women's bodies in order to preserve family honour, and thus patriarchal power. Vigilance on this point of honour is strict and a forced marriage, preferably an early one, is the best defence against any challenge to that honour.”).

<sup>153</sup> See generally BENDRISS, *supra* note 33 (political opinion not listed as one of the motivations behind the practice of forced marriage). While the study mentions that political context may help explain the practices of forced marriage, the political situation of a certain region differs from a desire to change someone's political view, which in the context of forced marriage would be the political view of equal rights for women. See Section II.B.3 (describing the political opinion approach to forced marriage-based asylum claims); see *supra* note 36 (various reports, studies, articles discussing the motivations behind forced marriage and none including the desire to change the victims political opinion).

<sup>154</sup> See *supra* Part I.

<sup>155</sup> See *Matter of S-F*, CTR FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/our-work/matter-s-f> [<https://perma.cc/M4XZ-B8AJ>].

has taken place).”<sup>156</sup> The BIA held that the petitioner feared persecution on account of her religious beliefs, but because the decision is unpublished, the court’s reasoning is unavailable.<sup>157</sup>

Although the BIA’s holding in *Matter of S-F-* is unique, religion-based forced marriage asylum claims could present similar issues to the political opinion-based claims. While the norms of a certain sect of a religion might encourage, or be one motivation for the persecutor to force someone into marriage,<sup>158</sup> the protected ground asserted must be the “central reason” for the persecution.<sup>159</sup> This determination would need to come from a case-specific, factual inquiry into the motives behind the forced marriage of the specific asylum seeker.<sup>160</sup>

While forcing someone into marriage could very likely force them to conform to religious standards they do not believe in, the “on account of” language of the nexus requirement makes the motive behind the persecution “critical.”<sup>161</sup> Therefore, if a persecutor, in forcing the marriage to occur, is not *primarily* motivated by the wish to change or infringe upon the victim’s religious beliefs, a forced marriage-based asylum claim connected to the protected ground of religion would fail.

#### 4. Finding a Particular Social Group: *Gao* and Beyond

After the Second Circuit granted a forced marriage-based asylum claim in 2006, a light shone brightly for those pushing for forced marriage as persecution. An overruling due to an error in standard of review, however, dimmed the excitement before the holding was put into practice.<sup>162</sup> The asylum applicant in *Gao v. Gonzales* was a twenty-year-old woman from a rural village in China, an area with a pervasive cultural practice of selling daughters into marriage.<sup>163</sup> Gao’s parents tried forcing her into a marriage with a man who, in return, would pay her family a

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<sup>156</sup> Brief for Center for Gender and Refugee Studies as Amici Curiae Supporting Respondent, *supra* note 121, at 1–2.

<sup>157</sup> See *Matter of S-F-*, *supra* note 155.

<sup>158</sup> BENDRISS, *supra* note 33, at 13. (“Some Muslim families erroneously believe that marrying their children even without their consent is a religious precept. Because of a literal reading and rigid interpretation of the Koran and the Hadith, certain segments of the Muslim population consider arranged and forced marriage a religious duty, thereby betraying the very essence of the message. That belief arises out of their confusion of cultural practices with religious principles.”).

<sup>159</sup> 8 U.S.C. § 1158(b)(1)(B)(i) (2009).

<sup>160</sup> See *INS v. Elias-Zacarias*, 502 U.S. 478, 483–84 (1992).

<sup>161</sup> See *id.* at 482–83.

<sup>162</sup> See *Gao v. Gonzales*, 440 F.3d 62, 64 (2d Cir. 2006), *vacated sub nom.* Keisler v. Hong Yin Gao, 552 U.S. 801 (2007).

<sup>163</sup> *Gao*, 440 F.3d at 64.

large sum of money.<sup>164</sup> When Gao tried to break off the engagement due to the abuse she suffered at the hands of her future spouse, she was threatened with physical violence, and arrested by a powerful government official, who was an uncle of the man she was being forced to marry.<sup>165</sup> Gao fled to the United States. Initially, an immigration judge determined that “Gao’s predicament did not arise from a protected ground such as membership in a particular social group but was simply ‘a dispute between two families.’”<sup>166</sup> Gao appealed the decision.

On appeal, the Second Circuit conducted a *de novo* inquiry of the immigration judge’s determinations of mixed questions of law and fact and recognized the PSG of “women who have been sold into marriage (whether or not the marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable.”<sup>167</sup> The Supreme Court vacated this judgment<sup>168</sup> in light of *Gonzales v. Thomas*, where the Court determined that failure to remand the ‘social group’ question to the BIA was legally erroneous.<sup>169</sup> Although the Second Circuit recognized a PSG encompassing future victims of forced marriage, the court erred in employing a *de novo* standard of review over the ‘social group’ question, preventing the Supreme Court from ruling on the validity of the PSG recognized by the appellate court.<sup>170</sup>

Even if the Supreme Court had recognized the PSG asserted in *Gao*, the holding would nevertheless be problematic. The defined “protected ground,” the PSG of “women who have been sold into marriage,” does not fully comply with the nexus requirement of asylum claims, because it does away with the nexus all together.<sup>171</sup> The protected ground in *Gao* was the *forced marriage itself* and the form of persecution claimed was also the forced marriage.<sup>172</sup> The persecution and the protected ground were the same, thus making it difficult to prove a “nexus.”<sup>173</sup>

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 64–65.

<sup>167</sup> *Id.* at 65, 70.

<sup>168</sup> *Keisler v. Hong Yin Gao*, 552 U.S. 801, 801 (2007).

<sup>169</sup> *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006).

<sup>170</sup> *See Keisler*, 552 U.S. at 801; *Gonzales*, 547 U.S. at 185.

<sup>171</sup> *Gao*, 440 F.3d at 70; *see supra* note 102 (providing an example to outline why the persecution and protected ground must be separate factors).

<sup>172</sup> Gao asserted her protected ground as her membership in the PSG “women who have been sold into marriage.” *Gao*, 440 F.3d at 70.

<sup>173</sup> *See supra* Section II.A; *see supra* note 103 (listing advisory memos from immigration advocacy groups advising attorneys to not conflate persecution with the protected ground); *see supra* note 102 (courts denying asylum claims due to this form of circular reasoning).

In *Bi Xia Qu v. Holder*, the United States Court of Appeals for the Sixth Circuit found a nexus in a forced marriage-based asylum claim, but its holding cannot be applied to a claim similar to the one discussed in the introductory hypothetical of this note.<sup>174</sup> First, similar to *Gao*, the court's reasoning was circular: the persecution and the PSG were the same.<sup>175</sup> The court recognized the PSG of "women in China who have been subjected to forced marriage and involuntary servitude."<sup>176</sup> The court reasoned that Bi Xia Qu was forced into marriage because she lived in a region accepting of the practice of forced marriage.<sup>177</sup> Later, the BIA confused its holding, first stating Bi Xia Qu's immutable characteristic "of being a woman who has been abducted by a man trying to force her into marriage in an area where forced marriages are [culturally] recognized."<sup>178</sup> It is unclear *which* PSG was actually accepted in *Bi Xia Qu*, but nevertheless, this circular reasoning seems to have worked for Bi Xia Qu's claim because it was not her own family forcing her into marriage.<sup>179</sup>

Second, motivations behind the particular forced marriage in *Bi Xia Qu* were different than many typical forced marriage situations. Interestingly, the central reason the powerful "thug" kidnapped Bi Xia Qu was because her father owed him money.<sup>180</sup> Luckily, the court recognized that this was a "mixed-motive" case and found that the thug was also motivated by the fact that Bi Xia Qu was a woman living in an area where forced marriages are common.<sup>181</sup> In cases similar to *Bi Xia Qu*, the asylum claim would not fit into a PSG based on membership to a particular family unit, as the sole forcer of the marriage came from outside the control of the victim's family, and the central motivating factor could certainly be the existence of a pervasive cultural practice of forced marriages and human trafficking. But for an asylum claim based on a forced marriage perpetuated by someone within the victim's family unit, the reasoning in *Bi Xia Qu* would be more difficult to apply.

Furthermore, the PSG in *Bi Xia Qu* hinged on the idea that the act of the forced marriage was in progress.<sup>182</sup> The questions then become: if someone is seeking asylum because of the certainty that if they return to their country of origin that

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<sup>174</sup> *Bi Xia Qu v. Holder*, 618 F.3d 602, 608, 610 (6th Cir. 2010).

<sup>175</sup> *Id.* at 607–08.

<sup>176</sup> *Id.* at 607.

<sup>177</sup> *Id.* at 607–08.

<sup>178</sup> *Id.* at 607.

<sup>179</sup> *Id.* at 607–08.

<sup>180</sup> *Id.* 604–05.

<sup>181</sup> *Id.* at 607.

<sup>182</sup> *Id.* at 607.

they *will* be subjected to forced marriage, how could their PSG be defined? Should these applicants assert a PSG similar to the one in *Gao*, as the PSG was initially accepted by the Second Circuit, or is there a more cognizable option?

The PSG in *Gao* does not represent the best option for many forced marriage-based claims. Simply put, to firmly establish the nexus requirement of U.S. asylum claims, forced marriage should not be the protected ground if it is also the persecution.<sup>183</sup> Usually, to prove nexus, a “protected ground” must be *separate* from the harm.<sup>184</sup> The BIA’s reasoning in *Bi Xia Qu* and the Second Circuit’s reasoning in *Gao* demonstrate that adjudicators are willing to grant forced marriage-based asylum claims, if a nexus exists. The last sections of this note argue that in a situation similar to the hypothetical at the beginning of the note, where a family is forcing its younger member into a marriage, a nexus between the forced marriage and the protected ground of the family unit exists.

### III. *MATTER OF L-E-A-* AND THE PROTECTED GROUND OF FAMILY

In 2017, in *Matter of L-E-A-*, the BIA held that family membership could qualify as a PSG for the purpose of asylum claims.<sup>185</sup> The BIA stated that the “cognizable” nature of the family unit depends on “the nature and degree of the relationships involved and how those relationships are regarded

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<sup>183</sup> See *supra* Section II.A.

<sup>184</sup> See *supra* Section II.A.

<sup>185</sup> *In re L-E-A-*, 27 I. & N. Dec. 40, 43–44 (B.I.A. 2017) (interim decision). Several circuit courts have held that family membership could be considered a PSG. See, e.g., *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949–50 (4th Cir. 2015) (mother’s relationship to her son was a central reason for persecution); *Rios v. Lynch*, 807 F.3d 1123, 1126 (9th Cir. 2015) (holding the BIA erred in not considering the asylum seeker’s family as a PSG); *Crespin-Valladares v. Holder*, 632 F.3d 117, 121–23 (4th Cir. 2011) (holding “family members of those who actively oppose gangs in El Salvador” was a PSG). Prior to *In re L-E-A-*, the BIA had recognized that family ties could, depending on the facts and circumstances, constitute a PSG. See, e.g., *In re C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006). This is the first BIA decision, however, to fully define the nexus requirement if the PSG is a family unit. The BIA usually defers to circuit court decisions for an asylum case appearing in a relevant jurisdiction, however, if a circuit court has not ruled on the issue, the BIA uses its own discretion, or relevant precedent. See *In re Anselmo*, 20 I. & N. Dec. 25, 31–32 (B.I.A. 1989); Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decision*, 85 N.Y.U. L. REV. 1766, 1772 (2010) (“[T]he BIA . . . follows the law of a given circuit in cases arising within that circuit.”). Therefore, *In re L-E-A-* is notable because it creates a precedent that could apply to all jurisdictions, whether a governing circuit court has ruled on the issue or not. See generally Jillian Blake, *Protection for Families: New Standards Developing in Asylum Law*, 111 NW. U. L. REV. 49 (2016) (explaining how circuits differ in considering asylum claims with family-based particular social groups and arguing for a BIA ruling on the issue).

by the society in question.”<sup>186</sup> Like all asylum claims, proving membership in a “cognizable”<sup>187</sup> family unit is only the first step. As outlined in *Matter of L-E-A-*, to satisfy this nexus requirement in a family unit-based asylum claim, the asylum seeker “must demonstrate that the family relationship is at least *one central reason* for the claimed harm.”<sup>188</sup>

In *Matter of L-E-A-*, the respondent, a Mexican citizen, sought asylum due to fear of persecution from a Mexican cartel.<sup>189</sup> The Mexican cartel had asked the respondent’s father if they could sell drugs from the family’s grocery store.<sup>190</sup> His father refused.<sup>191</sup> Later, the cartel attempted, and failed, to kidnap the respondent and consequently, his father started paying the cartel a “rent” on the store.<sup>192</sup> The respondent claimed fear of persecution on account of his membership in the PSG of his immediate family unit.<sup>193</sup> The court found that the Mexican cartel’s primary motivations were general profit increase, rather than “other features unique to that family unit.”<sup>194</sup> Although the respondent’s claim to asylum on the family unit ground failed, the decision notably determined how an asylum seeker must prove nexus in a claim where the PSG asserted is membership in a particular family unit.<sup>195</sup>

In defining the nexus requirement, the BIA in *Matter of L-E-A-* expressly laid out that family membership must be “one central reason” for the persecution.<sup>196</sup> The BIA provided a “classic” example of where the persecutor was “seeking to harm the family members because of an animus against the family itself”: the Bolshevik assassination of the family of Czar Nicholas II, where their deaths were, by large part, due to their ties to the Czar.<sup>197</sup> The BIA further opined, however, that if animus is not *per se* implicated, the controlling question becomes: what is the persecutor’s primary motive?<sup>198</sup> If the motive is kinship itself, then the claim satisfies the nexus requirement.<sup>199</sup>

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<sup>186</sup> *L-E-A-*, 27 I. & N. Dec. at 43; *see also In re M-E-V-G-*, 26 I. & N. Dec. 227, 240 (B.I.A. 2014).

<sup>187</sup> *L-E-A-*, 27 I. & N. Dec. at 43.

<sup>188</sup> *Id.* at 40 (emphasis added).

<sup>189</sup> *Id.* at 41.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 41.

<sup>194</sup> *Id.* at 46–47.

<sup>195</sup> *Id.* at 42–44.

<sup>196</sup> *Id.* at 44.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 45.

<sup>199</sup> *Id.*

The BIA also stated that the persecution against common family members in a family unit-based asylum claim cannot be used as a means to a different end.<sup>200</sup> This is where the respondent's asylum claim in *Matter of L-E-A-* failed.<sup>201</sup> Citing to an Eighth Circuit Court of Appeals case, the BIA stated businessmen *in general* were common targets of extortionate demands from gangs and criminal syndicates, therefore the family tie was merely incidental and the respondent did not prove that the Cartel targeted him primarily *because of* his family relationship.<sup>202</sup> "If the persecutor would have treated the applicant the same if the protected characteristic of the family did not exist, then the applicant has not established a claim on this ground."<sup>203</sup>

#### IV. A NEXUS CREATED: FORCED MARRIAGE IS "ON ACCOUNT OF" FAMILY

In light of *Matter of L-E-A-*, many asylum seekers basing their claims on a past, or threat of a future, forced marriage can connect their persecution to the PSG of the family unit.<sup>204</sup> The harm of forced marriage often is perpetuated by someone within the victim's family, and occurs *on account of* the victim's place within that particular family. Further, forced marriage infringes on the protected ground of family membership because it forces its victims to join another family. Connecting the persecution of forced marriage to the recognized PSG of the family unit, in many cases, solves the all-important nexus issue.

First, and perhaps most obvious, the act of forced marriage infringes on the victim's protected ground of their family unit by requiring them to join a new family. Even the simple act of changing one's last name demonstrates how marriage changes family ties and familial identity. Women who are forced into a marriage often are subsequently considered the property of their new husband and their new husband's family.<sup>205</sup> In some cases, these girls are carted off, far away from their original homes, never to see their families again.<sup>206</sup>

Second, as outlined in Part I, the family benefits resulting from the forced marriage are often a central motivation

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 46.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 43–44.

<sup>204</sup> *Id.*

<sup>205</sup> See Chantler et al., *supra* note 49, at 603.

<sup>206</sup> See Deveney, *supra* note 69; Samra Zafar, *The Good Wife*, TORONTO LIFE (Feb. 17, 2017), <https://torontolife.com/city/life/forced-marriage-samra-zafar/> [<https://perma.cc/56W8-QXJ6>].

behind the forced marriage itself.<sup>207</sup> The persecutor, the forcer of the marriage, is often motivated by a desire to use the younger persons' place within the family unit as a tool to benefit the family. But-for their membership to their particular family, many victims of forced marriage would not experience this harm.<sup>208</sup> Therefore, forced marriage-based asylum claims, where the persecutor is primarily motivated by future family benefit, should be connected to the PSG of the "family unit," as the nexus requirement will be satisfied, falling in line with the BIA's reasoning in *Matter of L-E-A*.<sup>209</sup>

The persecutor forcing marriage is often within the family of the victim, which contrasts to the alleged persecutors in *Matter of L-E-A*, who were outside of the victim's family unit.<sup>210</sup> Nowhere in *Matter of L-E-A*, however, does the BIA state that the persecutor must come from outside the family unit.<sup>211</sup> While odd to imagine someone from within the protected class persecuting other members of the class *on account of* their membership to the class, this reasoning is not so left-field as it may seem. Often PSGs asserted in asylum claims directly apply to the persecutors themselves, or perhaps only need modification in gender or age. For example, courts recognize membership in a particular tribe as a protected ground for asylum claims.<sup>212</sup> One might imagine an older leader of a tribe harming a younger member of the tribe specifically due to their membership in the tribe. In that case, the persecutor would also belong to the same protected class as the asylum seeker.

Although animus against a family unit is not *per se* implicated in a forced marriage-based case, which under *Matter of L-E-A* would result in a clear satisfaction of the nexus requirement, the underlying motive still satisfies the nexus requirement.<sup>213</sup> Falling directly in line with the BIA's reasoning in *Matter of L-E-A*, it is often the kinship ties between the victim and their family which causes them to be forced into marriage.<sup>214</sup> Despite the seemingly opposite motives—in animus cases a motive being to harm the family, and in forced marriage cases, a motive being to benefit the

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<sup>207</sup> See *supra* Part I. See generally BENDRISS, *supra* note 33 (describing the various family-based motivations behind many forced marriages).

<sup>208</sup> See *supra* Part I.

<sup>209</sup> *L-E-A*, 27 I. & N. Dec. at 43–47.

<sup>210</sup> *Id.* at 41.

<sup>211</sup> *Id.* 40–47.

<sup>212</sup> See, e.g., *Niang v. Gonzales*, 422 F.3d 1187, 1199–1200 (10th Cir. 2005) (concluding that gender or membership in a tribe is sufficient to constitute a social group).

<sup>213</sup> *L-E-A*, 27 I. & N. Dec. at 44.

<sup>214</sup> *Id.*; see *supra* Part I.

family—in both cases, the PSG of being a part of a particular family unit is the central reason for the persecution.<sup>215</sup>

A counterargument could be made that the forced marriage is simply a means to a different end, the end being one of the family-based motivations, such as money or preserving family honor, as outlined in the first part of this note.<sup>216</sup> Notably, this is where respondent's claims to asylum in *Matter of L-E-A* failed.<sup>217</sup> Forced marriage differs from the claim in *Matter of L-E-A*, however, because the cartel in *Matter of L-E-A*, as noted by the BIA, generally targeted all businessmen.<sup>218</sup> In contrast, perpetrators of forced marriage are only targeting younger members of their specific family unit.<sup>219</sup> They are not generally targeting anyone outside of their family unit who might be able to generate the family wealth by forcing them into marriage. They are forcing the younger generation into marriage first and foremost because they are their family. Additionally, these other motivations, like increasing family wealth, all tie themselves back, as well, to the protected class. Therefore, a central, motivating factor behind these forced marriages is the victim's protected ground of their kinship ties.

To be clear, if family is the asserted “protected ground” in a forced marriage-based asylum claim, forced marriage *itself* must be the persecution. Despite the United States' legally recognized right to marry and right to choose one's spouse,<sup>220</sup> U.S. asylum law still treats forced marriage as persecution only when combined with other crimes.<sup>221</sup> Other harms associated with forced marriage may seem more violent on their face but claiming the inhumane nature of forced marriage solely due to those harms is a mistake. Crimes are not “watertight compartment[s].”<sup>222</sup> Forced marriage is a precursor and an umbrella cause of many crimes—such as sexual slavery, forced domestic labor, forced pregnancy, rape, and FGC—and thus, should be considered, on its face, a form of persecution.<sup>223</sup>

In order for adjudicators to grant solely forced marriage-based asylum claims, forced marriage needs to have its own nexus

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<sup>215</sup> *L-E-A*, 27 I. & N. Dec. at 44; see *supra* Part I.

<sup>216</sup> *L-E-A*, 27 I. & N. Dec. at 45–46; see *supra* Part I.

<sup>217</sup> *L-E-A*, 27 I. & N. Dec. at 45–46.

<sup>218</sup> *Id.* at 45–47.

<sup>219</sup> See *supra* Part I.

<sup>220</sup> See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding the Constitution protects the right of same-sex couples to marry); *United States v. Windsor*, 570 U.S. 744, 745 (2013) (striking down DOMA, which exempted same-sex couples from being recognized as spouses under federal law).

<sup>221</sup> Nanasi, *supra* note 3, at 49–50.

<sup>222</sup> Oosterveld, *supra* note 108, at 156.

<sup>223</sup> *Id.* at 156–57.

to a legally recognized protected ground.<sup>224</sup> If forced marriage is viewed as the harm, the asylum claim must be based within the central motives of the persecutor forcing the marriage.<sup>225</sup> As these motives are reported to often be primarily influenced by family ties, forced marriage-based asylum claims should be connected to the PSG of the family unit.<sup>226</sup> Furthermore, the family member who sells the victim off could not have a hand in the other crimes connected with forced marriage; those other forms of persecution usually come from the new spouse or the new spouse's family.<sup>227</sup> Therefore, recognizing forced marriage as its own crime helps to firmly establish the nexus.

## CONCLUSION

Individuals seeking asylum from forced marriage are having trouble proving their claims. It is hard to fit a harm that stems from a variety of motives into the specific, statutory requirements of asylum law. But one primary motive behind forced marriage is clear: families are targeting their own members to benefit the family itself. Further, forced marriage infringes upon a protected ground that has been expressly recognized by case law as a PSG: the family unit.

Applying the reasoning in *Matter of L-E-A-* to a form of family-based persecution, where the persecutor is a member of the family unit, may seem to be a game of judicial gymnastics. Yet, asylum applicants must frame the harm they have faced or will face if returned to their own country in a very particular way, even if overwhelming proof exists of said harm. An arguably stretched form of reasoning aligns perfectly with how the case law around asylum claims operates.

Forced marriage is a form of persecution that comes from within one's family unit. But it is an act that occurs *because* of one's place within a certain family unit. The persecutor is normally a family member, acting with specific family-based motivations, only realized due to the victim's place within the family. Further, forced marriage violates upon and tries to change its victims' family ties. It forces its victims to join a new family and to create a new family with someone they did not choose. Therefore, force marriage should be viewed as

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<sup>224</sup> See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that the persecutor's motive is crucial to asylum claims).

<sup>225</sup> *Id.*

<sup>226</sup> See *supra* Part I.

<sup>227</sup> *Forced Marriage*, ASIAN PAC. INST. ON GENDER-BASED VIOLENCE, *supra* note 25.

persecution against one's place within their family unit and recognized as such by U.S. asylum adjudicators.

Forced marriage is essentially a form of slavery.<sup>228</sup> People's lives are not chattels. People's family ties should not be used as currency. As this form of persecution fits into U.S. asylum law through the PSG of a "family unit," the United States must recognize forced marriage-based asylum claims so these young people can live brilliantly, free from a life of oppression.

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<sup>228</sup> David, *supra* note 36.

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