NOTE

DOES *MATTER OF A-R-C-G-* MATTER THAT MUCH?: WHY DOMESTIC VIOLENCE VICTIMS SEEKING ASYLUM NEED BETTER PROTECTION

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INTRODUCTION

The United States has recently faced an unprecedented influx of Central Americans seeking asylum within its borders. Between 2011 and 2014 alone, hundreds of thousands of people, including many children from El Salvador, Guatemala, and Honduras, fled their home countries in hopes of gaining asylum.[1] A variety of factors led to this rush of immi-

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[1] MARC R. ROSENBLUM, UNACCOMPANIED CHILD MIGRATION TO THE UNITED STATES: THE TENSION BETWEEN PROTECTION AND PREVENTION 2 (2015).

gration, including a rise in violence (the homicide rate in Honduras is the highest in the world, and those of El Salvador and Guatemala follow closely behind), extreme poverty, and widespread corruption in government and police.[2]

U.S. immigration detention centers and the immigration adjudication system have been left reeling from the surge. The Obama administration has worked to address this immigration crisis by increasing detention space for families, adding a separate docket for children and families in order to lessen delays, as well as reaching out to Latin American governments to try to curb the influx of asylum-seekers through deterrence and increased border security.[3] These measures were successful in decreasing the flow of asylum-seekers arriving at the border.[4] Nevertheless, the crisis remains ongoing as adults and children languish in inhumane, prison-like detention centers for months and years while their asylum cases are processed.[5] Many of the Central American asylum-seekers have fled due to domestic violence that is largely ignored by authorities in their home countries.[6] While the United States decides what to do with them, domestic violence victims[7] risk being re-traumatized and abused while detained.[8]

This Note concerns itself with how best to ensure that women seeking asylum on the grounds of domestic violence are able to gain protection from the United States. Pro-immigrant rights groups have advocated for improved conditions for detained women; the American Civil Liberties Union (ACLU) has sued the United States for detaining women and children with legitimate and credible asylum claims as a deterrence strategy.[9] Women at the Karnes family detention center in Texas have taken matters into their own hands and launched a hunger strike to protest their

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2 *Id.* at 11–12.

3 *Id.* at 2.

4 *Id.*

5 Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?_r=0.

6 *Case Examples of Families in Detention and Subject to Rapid Deportation*, AM. IMMIGRATION LAWYERS ASS'N (Sept. 22, 2014), http://www.aila.org/infonet/family-detention-case-examples.

7 For some, "victim" carries negative connotations: the term implies weakness or lack of agency. Others find "victim" to be more descriptive of the abuse suffered and find that "survivor" glosses over these experiences. I recognize and respect both points of view. For purposes of this Note, however, I have elected to use "victim" because it is a broader term, including those who were killed by their abuser or who ended their own lives as result of domestic violence-related trauma.

8 *Domestic Violence Advocates Call for End of Family Detention*, AM. IMMIGRATION LAWYERS ASS'N 1 (Oct. 16, 2014), http://www.aila.org/infonet/domestic-violence-advos-end-of-family-detention.

9 *Federal Court Blocks Government from Detaining Asylum Seekers as Tactic to Deter Others from Coming to U.S.*, AM. CIVIL LIBERTIES UNION (Feb. 20, 2015), https://www.aclu

inhumane treatment.[10] Perhaps the most important component to adequate protection of these women, however, is securing stable legal footing for domestic violence as a basis for asylum. To do so, the United States must clarify its policy regarding domestic violence as persecution. Recent developments have taken small steps towards this goal, but more sweeping measures are needed.

On August 26, 2014, the Board of Immigration Appeals (BIA), the highest administrative immigration appeals board in the United States, decided *Matter of A-R-C-G-*.[11] The controversial decision addressed for the first time the question of granting asylum to domestic violence victims on the basis that domestic violence is a form of persecution. The BIA held that the respondents, a Guatemalan woman and her three minor children who entered the United States illegally to escape her abusive husband, were eligible for asylum based on past persecution or a well-founded fear of future persecution on account of their belonging to a "particular social group."[12] The BIA's decision found that the particular social group in question was comprised of "married women in Guatemala who are unable to leave their relationship."[13] While narrowly held, this decision expanded the "particular social group" category of asylum eligibility. *Matter of A-R-C-G-* opened the door to the inclusion of certain victims of domestic violence, giving rise to the possibility of an even more expansive application of the "particular social group" category in future asylum cases.

While human rights advocates and women's groups have hailed the decision as a major victory for women's rights and domestic violence victims,[14] this Note argues that the decision's long-term impact is overstated. The immediate outcome is positive—a vulnerable family now has the possibility to escape further violence and abuse—and the BIA's decision certainly has important symbolic significance. In the long run, however, the decision expands the already confusing and muddy "particular social group" category of asylum, which will reduce predictability

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.org/news/federal-court-blocks-government-detaining-asylum-seekers-tactic-deter-others-coming-us.

10 Oliver Laughland & Alan Yuhas, *Mothers Held at Texas Detention Centre Go on Hunger Strike to Demand Release*, THE GUARDIAN (Apr. 2, 2015), http://www.theguardian.com/us-news/2015/apr/01/mothers-texas-karnes-detention-center-hunger-strike.

11 Matter of A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014).

12 *Id.* at 388–89.

13 *Id.*

14 *See, e.g.*, Amy Grenier, *Landmark Decision on Asylum Claims Recognizes Domestic Violence Victims*, IMMIGRATION IMPACT (Sept. 2, 2014), http://immigrationimpact.com/2014/09/02/landmark-decision-on-asylum-claims-recognizes-domestic-violence-victims/; *CGRS Applauds Decision that Could Help Women and Children at Artesia Detention Center*, UNIV. OF CAL., HASTINGS CENTER FOR GENDER & REFUGEE STUDIES (Aug. 26, 2014), http://www.icontact-archive.com/QFS-zoj1ul57i8PSf-6LKzKZmjJEO7j3?w=3.

about how the category is interpreted and leave victims of domestic violence exposed to court subjectivity. Further, because the decision was framed narrowly, immigration judges who are unsympathetic to the plight of domestic violence victims and immigrants in general are free to interpret the decision narrowly. *Matter of A-R-C-G-* represents progress towards greater protection for domestic violence victims, but it does not eliminate the confusion and inconsistency surrounding domestic violence as a basis for asylum. Without further action by the United States government, domestic violence victims' fate remains precarious.

Part I of this Note discusses the general framework for granting asylum in the United States and describes how courts and the BIA have historically interpreted persecution stemming from membership to a "particular social group" as a basis for asylum. Part II analyzes the case law building up to *Matter of A-R-C-G-* and how victims of domestic violence have come to be considered to belong to a "particular social group." Part III argues that domestic violence is best understood as a form of gender-based violence, placing it on equal ground with the other bases of persecution within the U.S. definition of a refugee. Part IV discusses the possible consequences of continuing to rely on the "particular social group" framework as a basis for asylum in the context of domestic violence and discusses three alternative approaches to achieving the goal of protecting victims of domestic violence.

I. BACKGROUND

A. *Brief History of U.S. Asylum Law*

Until Congress passed the Refugee Act of 1980 (the Act), the Immigration and Nationality Act of 1965 (the INA) governed the United States' refugee policy. Until 1980, the definition of a refugee was extremely narrow: only those fleeing natural calamity or escaping from the Middle East or Communist areas were entitled to enter the United States as refugees.[15] The Refugee Act of 1980 greatly expanded the United States' definition of a refugee to match the definition established by the 1951 United Nations Convention relating to the Status of Refugees.[16] The Act instituted a new definition that allowed refugees from any country, including refugees who had not yet fled their home country, who could demonstrate past persecution or a well-founded fear of future per-

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15 Act of Oct. 3, 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (containing restrictions).

16 Convention Relating to the Status of Refugees, art. I, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Doris Meissner, *Thirty Years of the Refugee Act of 1980*, IIP DIGITAL (Sept. 21, 2010), http://iipdigital.usembassy.gov/st/english/publication/2010/09/20100921144657aidan0.8100397.html#axzz3GXf4twJZ.

secution. The Act also created a pathway to legal immigrant status to those already present in the United States, also known as asylum.[17] In the three decades since the Act's passage, more than three million immigrants have been granted protection as refugees or asylees.[18] In fiscal year 2012 alone, nearly 30,000 individuals were granted asylum.[19]

B. Framework for Granting Asylum

Under current U.S. law, to be granted asylum, a noncitizen must meet the definition of a refugee set forth in 8 U.S.C. § 1101(a)(42). The provision states in pertinent part:

> (A) Any person who is outside any country of such person's nationality[20] . . . 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*.[21]

The framework for granting asylum is deceptively complex, with the precise definition of each term and element being primarily determined on a case-by-case basis. The term "persecution," for example, is not expressly defined in the statute, regulations, or by the BIA, but through case law has come to mean physical or emotional suffering or harm inflicted "without legitimate reason."[22] Another example of ambiguity within the statutory definition of a refugee is what constitutes a "well-founded fear" of persecution. Because neither the BIA nor Congress defined the phrase, this element also developed through case law.[23] Eventually the Supreme Court held that "well-founded fear" of persecution is

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17 Meissner, *supra* note 16.

18 *Id.*

19 *Asylum in the United States*, AM. IMMIGRATION COUNCIL (Aug. 27, 2014), http://www.immigrationpolicy.org/just-facts/asylum-united-states.

20 The definition of a refugee also allows people outside their home country to qualify as refugees if the President carves out an exception for them. Immigration and Nationality Act (INA) § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2012).

21 INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); INA § 208, 8 U.S.C. § 1158 (emphasis added).

22 *See* Sahi v. Gonzales, 416 F.3d 587, 588–89 (7th Cir. 2005) (stating that the BIA has failed to define "persecution"); Topalli v. Gonzales, 417 F.3d 128 (1st Cir. 2005) (stating that because there is no statutory definition of "persecution," the BIA determines "what amounts to past persecution on a case-by-case basis"); Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 341 (2d Cir. 2006) ("[P]ersecution is the infliction of suffering of harm upon those who differ on the basis of a protected statutory ground."); De Souza v. INS, 999 F.2d 1156, 1158 (7th Cir. 1993) ("'[P]ersecution' . . . [is the] punishment of infliction of harm for . . . reasons that this country does not recognize as legitimate.").

23 *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (acknowledging that the Court must engage in gap filling where Congress has left a gap).

a lower standard than "clear probability" of persecution—the standard applied in a similar kind of relief known as "withholding of deportation."[24] The Court, however, acknowledged that the phrase is inherently ambiguous and that the standard should be further clarified on a case-by-case basis.[25]

To be granted asylum, the asylum seeker must have suffered persecution "on account of" one of five enumerated categories: (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, or (5) political opinion.[26] The REAL ID Act of 2005 clarified that the protected ground must be "at least one central reason" for the persecution, allowing the possibility of a persecutor with mixed motives.[27] The BIA and the statute left the five protected grounds to be defined on a case-by-case basis.

C. BIA Framework for "Particular Social Group"

The category of "membership in a particular social group," perhaps the most amorphous and controversial of the five protected grounds,[28] is of particular importance in this Note. As with the other enumerated grounds, "particular social group" is not defined in the statute by the BIA or by legislative history.[29] Congress included the category to conform to the definition of a refugee outlined in the U.N. Convention and Protocol Relating to the Status of Refugees, although the U.N. also left "particular social group" undefined.[30] Further, the category's inclusion even in the U.N. Protocol has been described as an "afterthought," added in as a catch-all provision.[31]

The definition of a "particular social group" that is currently employed by the BIA has developed through case law.[32] The definition has

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24 *Id.* at 431–32.

25 *Id.* at 448 ("There is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication.").

26 INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

27 INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

28 *See, e.g.*, Fatin v. INS, 12 F.3d 1233, 1238 (3d Cir. 1993) ("Both courts and commentators have struggled to define 'particular social group.' Read in its broadest literal sense, the phrase is almost completely open-ended."); U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 1, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter *UNHCR Guidelines*].

29 *Fatin*, 12 F.3d at 1238–39 (discussing the ambiguity of the phrase and the lack of clarifying legislative history).

30 *UNHCR Guidelines*, *supra* note 28, ¶ 1.

31 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 219 (1966).

32 *See, e.g.*, Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985) (stating that the group members must "share a common, immutable characteristic," meaning something "beyond the power of an individual to change, or . . . so fundamental to individual identity or conscience that it ought not be required to be changed."); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576

solidified into a three-part test: to form the basis of an asylum claim, the social group must be: (1) "composed of members who share a common immutable characteristic," (2) "socially distinct," and (3) "defined with particularity."[33]

First, a particular social group's members must "share a common, immutable characteristic."[34] In this context, "immutable" refers to a characteristic that is either "beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[35] A voluntary relationship or association between members is not considered to be immutable.[36] In *Matter of Acosta*, for example, the BIA held that members of a taxi driver's association who refused to participate in an anti-government work stoppage, and who were targets of violence as a result, did not suffer persecution on account of membership in a particular social group. The BIA found that the proposed group did not rest on an immutable characteristic[37] because neither being a taxi driver nor refusing to participate in a guerrilla-sponsored work stoppage "is immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages."[38] The BIA found that an occupation is not so fundamental to a person's identity that it "ought not be required to be changed."[39] The BIA determined that a particular social group required immutability in order to form the basis of an asylum claim by applying the doctrine of *ejusdem generis*: where general words are listed with specific words, courts should interpret the general words to be consistent with the specific words.[40] Because race, religion, nationality, and political opinion all describe immutable characteristics, membership in a particular social group must also be an immutable characteristic.[41]

Second, in order to form the basis of an asylum claim, the particular social group must be "socially distinct."[42] This second element was originally conceived of as "social visibility," which required that the society in which the group existed perceive the individuals as members of the

(9th Cir. 1986) ("[T[he phrase 'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.").

33 Matter of A-R-C-G-, 26 I. & N. Dec. 388, 392 (B.I.A. 2014).

34 *Acosta*, 19 I. & N. Dec. at 233.

35 *Id.* at 233–34.

36 Matter of C-A-, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006).

37 *Acosta*, 19 I. & N. Dec. at 217.

38 *Id.* at 234.

39 *Id.*

40 *Id.* at 233.

41 *Id.*

42 Matter of W-G-R-, 26 I. & N. Dec. 208, 216 (B.I.A. 2014).

group.[43] The BIA found that wealthy Guatemalans, for example, lacked social visibility because non-wealthy Guatemalans were also targeted for extortion, the form of persecution the asylum applicants alleged.[44] The BIA has held, however, that Filipinos of mixed Filipino-Chinese ancestry, former landowners, and people recorded as homosexual by the government are all sufficiently visible to others in society to constitute a particular social group.[45] In February 2014, however, the BIA renamed the "social visibility" requirement to the now-used "social distinction" requirement.[46] The BIA renamed this element to correct the misinterpretation that social visibility required literal or "ocular" visibility, and to establish that social distinction is about *perception* by society rather than identification on sight.[47] To be socially distinct, the BIA held, an asylum applicant must demonstrate that the society in which the group exists "perceives, considers, or recognizes persons sharing the particular characteristic to be a group."[48] Society need not, however, be able to identify which specific individuals belong to the group.[49] In clarifying this point, the BIA reaffirmed that individuals such as lesbian, gay, bisexual, or transgender (LGBT)-identified people or women who oppose female genital mutilation, for example, constitute social groups even though it would take effort to determine their status as group members.[50] Further, a social group must be perceived and recognized as such by the society in which the group exists, and not just by the persecutors, since a social group may not be defined based solely on the fact that the members have been targeted or harmed.[51]

Lastly, particular social groups must be "particular." The BIA has defined particularity as "whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[52] The group must be discrete, have definable boundaries, and may not be subjective, overbroad, or diffuse.[53] The BIA and courts may consider the size of the proposed social group to determine whether it is sufficiently discrete.[54] In determining particularity, the terms used to describe the

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43 Matter of C-A-, 23 I. & N. Dec. 951, 959-61 (B.I.A. 2006).

44 Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 75 (B.I.A. 2007).

45 *C-A-*, 23 I. & N. Dec. at 960.

46 *W-G-R-*, 26 I. & N. Dec. at 212 (B.I.A. 2014); Matter of M-E-V-G-, 26 I. & N. Dec. 227, 239 (B.I.A. 2014).

47 *W-G-R-*, 26 I. & N. Dec. at 216.

48 *Id.* at 217.

49 *Id.*

50 *Id.*

51 *Id.* at 218.

52 Matter of S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008).

53 *Id.*

54 *Id.* at 584.

group must have commonly accepted definitions within the society where the group exists.[55] In *Matter of S-E-G-*, for example, the BIA held that one of the respondents failed to demonstrate membership in a particular social group because he could not concretely describe the group without resorting to terms about which reasonable minds could differ: "male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment."[56] The BIA also held that the other respondent in *Matter of S-E-G-* belonged to a social group that was too amorphous to be defined with sufficient particularity: "'family members' of Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang."[57] In this case, the BIA found the language of "family member" to be overbroad and amorphous because it was not clear if the term could encompass more distant relatives, such as grandparents, aunts and uncles, cousins, or nieces and nephews.[58]

D. UNHCR Framework for "Particular Social Group"

The United Nations High Commissioner for Refugees (UNHCR) employs a framework similar to that developed by the BIA, with several important distinctions. First, the UNHCR definition attempts to reconcile the requirement of immutability and the requirement of social perception, acknowledging that the two approaches can lead to different results when applied to the same facts.[59] For example, a society might recognize a social group based on social class or professional occupation, which are not immutable characteristics in the sense of being unchangeable or fundamental to human identity.[60] As such, requiring immutability in order to find a particular social group would not allow asylum to persons perceived as members of a group rooted in social class or occupation. By contrast, requiring only social perception to define a particular social group would allow such persons to be granted asylum based on their membership. The BIA requires that a particular social group be both socially distinct as well as rooted in an immutable shared characteristic. By contrast, the UNHCR definition only requires that the particular social group be *either* comprised of persons who share a common characteristic *or* be perceived as a particular group by society.[61] The UNHCR does not mandate that the shared characteristic be immutable,

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55 Matter of M-E-V-G-, 26 I. & N. Dec. 227, 239 (B.I.A. 2014).
56 *S-E-G-*, 24 I. & N. at 585.
57 *Id.*
58 *Id.*
59 *UNHCR Guidelines*, *supra* note 28, ¶ 10.
60 *Id.* ¶ 9.
61 *Id.* ¶ 11.

though the definition admits that the characteristic will often be "innate, unchangeable, or . . . otherwise fundamental to identity, conscience or the exercise of one's human rights."[62] Second, unlike the BIA definition, the UNHCR definition does not require a claimant to allege a social group with sufficient particularity. The UNHCR definition could also be interpreted as rejecting the requirement of particularity, given that it expressly states that the size of the proposed social group is not a relevant factor when determining if a particular social group exists.[63] Conversely, the BIA definition does consider the relative size of the proposed social group when determining if a particular social group exists.[64]

The UNHCR definition sets a lower threshold for demonstrating persecution based on membership in a particular social group. A claimant need only propose a social group that is rooted in immutability or societal perception, and need not address particularity. This means that many asylum seekers who would qualify for asylum under the UNHCR definition would be denied asylum in the United States. For example, under the UNHCR definition, a person's occupation could form the basis of a particular social group if society perceives that occupation as a social group, whereas it would fail under the BIA's definition for lack of immutability.[65] From a humanitarian perspective, the UNHCR definition is better because of its expansive nature. From an anti-immigration perspective, however, the BIA's definition is preferable in that it requires asylum-seekers to meet more stringent requirements, and will permit fewer people to claim asylum under the amorphous definition of a particular social group.

II. DOMESTIC VIOLENCE AS A SOCIAL GROUP

A. Early Treatment of Domestic Violence As a Social Group

Before Congress passed the Refugee Act of 1980, the United States' definition of a refugee was so narrow that claiming asylum status based on being a victim of domestic violence would have been inconceivable.[66] The United States lacked any policy regarding domestic violence as a basis for claiming asylum until 1995, when the Immigration and Naturalization Service (INS) issued guidelines addressing the issue of gender violence.[67] The guidelines were directed towards the INS Asylum Of-

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62 *Id.*

63 *Id.* ¶ 18.

64 Matter of S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008).

65 *Compare* Matter of Acosta, 19 I. & N. Dec. 211, 217 (B.I.A. 1985), *with UNHCR Guidelines*, *supra* note 28, ¶ 13.

66 *Compare* Act of Oct. 3, 1965, Pub. L. No. 89-236, §?3, 79 Stat. 911, 913 (containing restrictions), *with* Immigration Act of 1990, 101 Pub. L. No. 649, 104 Stat. 4978.

67 Phyllis Coven, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, U.S. DEP'T OF JUSTICE (May 26, 1995), http://www.state.gov/s/l/65633.htm.

ficer Corps and attempted to improve "uniformity and consistency in procedures and decisions."[68] The guidelines stated that although gender alone could not constitute membership in a particular social group, women who have experienced domestic violence might have an asylum claim based on those experiences.[69] These guidelines, however, did not bind the BIA or any court.[70]

The BIA decided *Matter of Kasinga* in 1996, a year after the INS issued its gender guidelines. The decision officially opened the door to allowing domestic violence to form the basis of a particular social group.[71] However, *Matter of Kasinga* did not specifically address the issue of domestic violence as a basis for an asylum claim. Rather, the case concerned a Togolese woman who fled her home country to escape being forced to undergo female genital mutilation (FGM).[72] Once in the United States, the woman claimed asylum on the basis that she faced persecution on account of her membership in a particular social group.[73] The BIA framed the particular social group as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."[74] The BIA interpreted *Matter of Acosta*, which held that a characteristic defining a particular social group must be immutable or fundamental, to mean that a particular social group could be formed around gender, so long as the group was defined by gender along with another characteristic.[75] In this case, the BIA held that the characteristics of being a young woman who is also a member of the Tchamba-Kunsuntu Tribe and who has intact genitalia were immutable.[76] The BIA also found that the woman met the other requirements for claiming asylum, and officially granted asylum based on her membership in a particular social group.[77]

B. Matter of R-A-

In 1999, the BIA decided *Matter of R-A-*,[78] which changed the trajectory of how the United States considers asylum applicants whose per-

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68 *Id.*

69 *Id.*

70 Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 112 (2013).

71 *Id.* at 112–13.

72 Matter of Kasinga, 21 I. & N. Dec. 357, 358–59 (B.I.A. 1996).

73 *Id.* at 359.

74 *Id.* at 365.

75 *Id.* at 365–66; Bookey, *supra* note 70, at 112–13.

76 *Kasinga*, 21 I. & N. Dec. at 366.

77 *Id.* at 370.

78 Matter of R-A-, 22 I. & N. Dec. 906 (B.I.A. 2001).

secution takes the form of domestic violence.[79] The BIA denied asylum to a Guatemalan woman who had suffered severe abuse at the hands of her former-military husband, and who had been denied assistance by the Guatemalan legal system. The BIA held that the asylum applicant, Rodi Alvarado, had not met her burden of proof to show that her persecution was based on one of the statutorily protected grounds.[80] Specifically, the BIA held that although the circumstances surrounding Alvarado's abuse rose to the level of persecution, Alvarado was not persecuted because of her membership in a particular social group.[81]

The facts of the case are disturbing. Alvarado described in great detail the constant and severe sexual and physical abuse she suffered at the hands of her husband, beginning almost immediately after she and her husband married.[82] Her husband justified the abuse by saying that because she was his wife, she was his property and he could treat her however he wished.[83] Alvarado made several attempts to escape from her husband, even including fleeing to another city.[84] Nevertheless, her husband always found her and brought her back home, where he continued to abuse her.[85] On several different occasions, the Guatemalan police failed to intervene after Alvarado reported the abuse.[86] On one occasion, a Guatemalan judge expressly told Alvarado that he would not interfere in a domestic dispute because it was a private matter.[87] In May 1995, Alvarado fled Guatemala to Brownsville, Texas, where she filed an asylum application.[88]

An immigration judge found that Alvarado had suffered harm rising to the level of persecution and that the Guatemalan government was unwilling or unable to prevent the persecution.[89] The immigration judge further held that Alvarado's persecution was on account of her membership in the particular social group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[90] The immigration judge then found that the social group, as defined, met the required level of cohesion, immutability, and particularity.

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79 *Id.*
80 *Id.*
81 *Id.* at 925.
82 *Id.* at 908.
83 *Id.* at 908–09.
84 *Id.* at 908–09.
85 *Id.* at 909.
86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.* at 911.
90 *Id.*

On review, the BIA agreed that the severity of the harm inflicted on Alvarado was sufficient to constitute persecution, and that the Guatemalan government had demonstrated itself to be unwilling or unable to prevent her persecution.[91] The BIA also held, however, that the immigration judge had erred in concluding that Alvarado was harmed *on account of* her membership in a particular social group.[92] The BIA stated that it seemed the social group Alvarado presented had been defined for the purposes of the asylum case and not because Guatemalan society actually perceived the group, as defined, to exist.[93] The BIA conceded it was possible to show immutability, but held the group lacked social distinction because the group was not perceived as such by Guatemalan society, by the members themselves, or by the persecutors.[94] The BIA further held that, even assuming for the sake of argument that Alvarado belonged to a particular social group of abused Guatemalan women, her claim failed for lack of nexus.[95] As the BIA interpreted the facts, Alvarado's husband was violent towards her because she was his wife, not because Alvarado belonged to a class of women that were intimate with abusive partners.[96]

The BIA also rejected the immigration judge's finding that the Guatemalan police's failure to protect her constituted state-sanctioned spousal abuse, since there was no evidence suggesting that spousal abuse was considered desirable in Guatemala or that the government actively condoned such abuse.[97] The BIA denied Alvarado's asylum claim, finding that she failed to meet the required criteria of a refugee because she did not belong to a particular social group and if she had, that she was not persecuted on account of her membership in that group.[98]

Matter of R-A- was not groundbreaking in the sense that the BIA's analysis of particular social groups in the context of domestic violence changed course from that of previous BIA decisions. Rather, what is significant about *Matter of R-A-* is the aftermath, which marked a clear shift in U.S. policy regarding asylum applicants fleeing from domestic violence. Because the facts in *Matter of R-A-* were so shocking, the decision to deny Alvarado asylum caused public outrage and calls by politicians to overturn the BIA decision.[99] In 2001, Attorney General Janet

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91 *Id.* at 914.

92 *Id.* at 914, 918.

93 *Id.* at 918.

94 *Id.*

95 *Id.* at 920.

96 *Id.* at 921.

97 *Id.* at 922–23.

98 *Id.* at 925.

99 Bookey, *supra* note 70, at 114; *Congresswoman Lucille Roybal-Allard Urges Attorney General Ashcroft to Help Women Who Are Victims of Domestic Violence Obtain Asylum in the*

Reno vacated the decision and then proposed regulations to officially include certain victims of domestic violence in the definition of a particular social group.[100] Attorney General Reno remanded the case to the BIA to reconsider it once the INS finalized the regulations.[101] By 2003, however, the regulations still had not been finalized, and Attorney General John Ashcroft re-certified *Matter of R-A-* to himself, requesting briefing on the subject.[102] Women's rights groups and pro-immigrant advocates feared Attorney General Ashcroft would reject the proposed regulations.[103] The Department of Homeland Security (DHS) submitted a comprehensive 43-page brief arguing that "married women in Guatemala who are unable to leave the relationship" constitutes a particular social group, and satisfies all three required elements.[104] Despite these steps, in 2005, the Attorney General again remanded the case pending finalization of the regulations.[105] Ultimately, the regulations were never finalized.

In 2008, Attorney General Michael Mukasey issued an opinion lifting the stay and remanding the case for further proceedings in accordance with the guidelines laid out in the opinion.[106] Mukasey granted the BIA permission to rule on *Matter of R-A-* and similar pending cases involving domestic violence without waiting for the finalized regulations as guidance, and expressly granted the BIA permission to exercise its discretion in setting a national standard regarding domestic violence as the basis for forming a particular social group.[107] On remand, the immigration judge granted Alvarado asylum, but the decision applied only to her case and was not precedential.[108]

C. Matter of L-R-

While *Matter of R-A-* awaited the immigration judge's determination, the BIA considered another domestic violence case: *Matter of L-R-*. In response to the BIA's request for briefing, DHS filed another brief

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United States, LUCILLE ROYBAL-ALLARD (Nov. 5, 2003), http://roybal-allard.house.gov/news/documentsingle.aspx?DocumentID=129871.

100 Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208); *R-A-*, 22 I. & N. Dec. at 906.

101 *R-A-*, 22 I. & N. Dec. at 906.

102 Dep't of Homeland Security's Position on Respondent's Eligibility for Relief at 437, Matter of Rodi Alvarado-Pena, 23 I. & N. Dec. 694 (B.I.A. 2004) (No. A 73 753 922) [hereinafter DHS Brief on *R-A-*].

103 See Patrick J. McDonnell, *Domestic Abuse Reviewed as Basis for Political Asylum*, L.A. TIMES, Feb. 28, 2004, at A16.

104 DHS Brief on *R-A-*, *supra* note 102, at 27.

105 *Id.*

106 Matter of R-A-, 24 I. & N. Dec. 629, 630 (B.I.A. 2008).

107 *Id.* at 631.

108 Bookey, *supra* note 70, at 117; *Fleeing Abuse*, WASH. POST (Nov. 10, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/11/09/AR2009110903163_pf.html.

supporting domestic violence as a basis for membership in a particular social group.[109] *Matter of L-R-* involved a young Mexican woman, raped by her school's sports coach and forced into a nearly twenty-year-long relationship with him marked by repeated rape, beatings, and mental torment.[110] When L-R- turned to the state for protection, she faced further victimization: the judge assigned to her case refused to help her unless she had sex with him, and when she rejected his offer, he told her she was a bad mother for not being willing to do anything to protect her children.[111] Like Rodi Alvarado, L-R- made several unsuccessful attempts to flee her abuser before finally escaping to the United States with her children. The DHS rejected the proposed social group ("Mexican women in an *abusive* domestic relationship who are unable to leave") as circular,[112] instead suggesting either "Mexican women in domestic relationships who are unable to leave" or "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."[113] As in *Matter of R-A-*, the immigration judge granted L-R- asylum in a non-precedential decision.[114]

D. Matter of A-R-C-G-

In August 2014, the BIA finally issued a precedential decision addressing the question of domestic violence victims as a particular social group: *Matter of A-R-C-G-*. The facts are nearly identical to those in *Matter of R-A-*. In both cases, the respondent was a Guatemalan mother who fled to the United States to escape horrific domestic abuse.[115] Like Rodi Alvarado, the respondent in *Matter of A-R-C-G-* endured sexual violence and regular beatings at the hands of her husband. Although she made several attempts to flee to other cities in Guatemala, her husband always found her and brought her back home, where the abuse continued.[116]

The immigration judge denied the respondent's asylum claim, finding that she did not demonstrate that her abuse was *because of* her belonging to any particular social group."[117] On appeal, the BIA reversed and remanded the case. In doing so, the BIA held that the abuse the

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109 Dep't of Homeland Security's Supplemental Brief, Matter of L-R- (B.I.A. Apr. 13, 2009), http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [hereinafter DHS Brief on *L-R-*].

110 *Impact Litigation:* Matter of L-R-, CTR. FOR REFUGEE STUDIES, http://cgrs.uchastings.edu/our-work/matter-l-r (last visited Feb. 28, 2016).

111 *Id.*

112 DHS Brief on *L-R-*, *supra* note 109, at 10.

113 *Id.* at 14–15.

114 *See Impact Litigation:* Matter of L-R-, *supra* note 110.

115 *See* Matter of A-R-C-G-, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).

116 *Id.*

117 *Id.* at 389–90.

respondent suffered did, in fact, rise to the level of persecution and that the particular social group she asserted as a basis for persecution was valid.[118] In this case, the proposed particular social group comprised of "married women in Guatemala who are unable to leave their relationship."[119] In making the determination that the proposed particular social group was valid, the BIA applied the three-part framework developed in *Matter of W-G-R-* and *Matter of M-E-V-G-*: "[A]n applicant seeking asylum based on his or her membership in a 'particular social group' must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[120]

The BIA established that the respondent had met her burden of establishing all three elements of the test, but remanded for the immigration judge to consider if the respondent met her burden of showing that the Guatemalan government was unable or unwilling to protect her from persecution.[121]

First, the BIA found that the proposed particular social group that formed the basis of the respondent's claim was comprised of members who share a common immutable characteristic—gender.[122] The BIA opinion was remarkably terse in developing its reasoning, and merely stated that both sex and marital status when the person is not able to leave the relationship are immutable characteristics, citing *Matter of Acosta* and *Matter of W-G-R-* without more.[123] The opinion also gave little guidance for how other judges should analyze these issues in the future. The BIA stated that a "range of factors" ought to be considered in light of the country-specific circumstances and the asylum-seeker's own subjective experiences.[124] The only example given in the opinion, however, was how realistically possible divorce would be, given the country and the respondent's "religious, cultural, or legal restraints."[125] Besides this one example, the BIA did not further develop its reasoning for determining that the characteristics at issue in this case were sufficiently immutable.

Second, the BIA found that the proposed group was defined with sufficient particularity. This part of the opinion was similarly thin, and appeared to turn largely on the fact that the Department of Homeland

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118 *Id.* at 390.
119 *Id.* at 392.
120 *Id.*
121 *Id.* at 395.
122 *Id.* at 392.
123 *Id.* at 392–93.
124 *Id.* at 393.
125 *Id.*

Security (DHS) conceded this point.[126] The BIA stated that the terms used to define the group ("married," "women," and "unable to leave the relationship") "have commonly accepted definitions within Guatemalan society based on the facts in this case."[127] To support this assertion, the BIA cited as support only *Matter of M-E-V-G-* and *Matter of W-G-R-*, neither of which involve domestic violence or gender-based violence.[128] The opinion again did not offer much guidance for future domestic violence-based asylum claims on the question of particularity. The BIA offers that "in some circumstances," being a married woman unable to leave the relationship "can combine to create a group with discrete and definable boundaries."[129] The BIA failed, however, to describe what circumstances might give rise to sufficient particularity beyond acknowledging that the BIA found significant that the police refused to intervene to protect the respondent from spousal abuse.[130]

Third, the BIA found that the group was sufficiently "socially distinct" within Guatemalan society.[131] In support of this finding, the BIA considered evidence that, although Guatemala has laws in place to protect victims of domestic violence, the police often do not intervene in domestic disputes to enforce those laws.[132] The opinion especially referred to the DHS report that conceded that Guatemala has a culture of "machismo and family violence" and that spousal rape and abuse are serious problems that are not being adequately addressed by the National Civilian Police.[133] The BIA then offered some guidance for future cases, stating that social distinction turns on the specific facts and evidence in each country's conditions, including law enforcement practices in the domestic violence context, as well as the statistics and expert witnesses offered.[134] While the opinion purports to shed light on how immigration judges should assess domestic violence-based claims, this guidance is vague. The BIA appears to rely heavily on the DHS's own report conceding these points, so it remains unclear what other types of "statistics and expert witnesses,"[135] short of the DHS itself, would be sufficiently credible and persuasive support of granting asylum in the domestic violence context.

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126 *Id.* ("The DHS concedes that the group in this case is defined with particularity.").
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.* at 394.
133 *Id.*
134 *Id.* at 394–95.
135 *Id.*

On the issue of nexus, the DHS also conceded that the abuse the respondent suffered rose to the level of persecution and that her membership in a particular social group "was at least one central reason" for the abuse.[136] Again, the BIA rested its conclusion on the DHS's concession, and did not further develop its reasoning for how the respondent's abuse was *on account of* her being a part of a class of "married women in Guatemala who are unable to leave their relationship."[137] The BIA also stated that where the DHS has not made a binding concession, such as in *Matter of A-R-C-G-*, the immigration judge would need to assess the facts and evidence on a case-by-case basis. The BIA did not, however, offer any guidance about which points the BIA found persuasive in this case. Further, the opinion did not address which factors immigration judges should consider important, merely stating that the "issue of nexus will depend on the facts and circumstances of an individual claim."[138]

III. DOMESTIC VIOLENCE AS GENDER PERSECUTION

Thus far, this Note has discussed how domestic violence as a basis for an asylum claim has developed in the United States since Congress passed the Refugee Act of 1980. In particular, this Note has analyzed how victims of domestic violence have come to be considered as falling under the umbrella category of a particular social group. What must also be considered, as a question of public policy, is whether victims of domestic violence should be protected as persecuted members of a particular social group.

This Note argues that victims of domestic violence should be protected under current asylum law following the logic and principles behind the U.S. asylum policy. First, as a general point, victims of domestic violence are a vulnerable population and the United States has a moral obligation to provide a safe haven for people who are being victimized in their home country. Second, and perhaps more importantly, both the UNHCR and U.S. refugee law share the same common goal of protecting vulnerable populations who are targeted for possessing an immutable or socially-recognized characteristic.[139] This Note argues that domestic violence is best understood as a form of gender-based violence. That is, that victims of domestic violence are persecuted because of their gender, and should therefore fall under the shared goal of the UNHCR and U.S. definitions of a refugee: to shelter those persecuted for

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136 *Id.*

137 *Id.* at 392.

138 *Id.* at 395.

139 *See* Immigration and Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012); INA § 208, 8 U.S.C. § 1158; *UNHCR Guidelines*, *supra* note 28, ¶ 11.

possessing a socially recognized and[140] immutable trait such as race, religion, nationality, membership in a particular social group, or political opinion.[141]

Studies completed by feminist scholars and international human rights organizations support this Note's assertion that domestic violence should be understood as a form of gender-based violence. Feminist scholarship understands domestic violence not as an isolated act between private actors, but rather as part of a broader societal conception of appropriate gender roles. Gloria Steinem famously discussed the necessary role of violence and threat of violence in the perpetuation of patriarchic systems, stating that "the most dangerous situation for a woman is not an unknown man in the street, or even the enemy in wartime, but a husband or lover in the isolation of their own home."[142] Feminist scholars assert that domestic violence is consistently used as a tool to subordinate and control women due to a desire to maintain male dominance within society.[143] Meaning, more generally, domestic violence is a tool to maintain patriarchy on a large scale. For example, Rhonda Copelon has described how domestic violence is born out of a systemic problem of patriarchy within society, with domestic violence arising out of "a mechanism of patriarchal control of women that is built upon male superiority and female inferiority, sex-stereotyped roles and expectations, and the economic, social and political predominance of men and dependency of women."[144]

To support these claims, feminist scholars draw on studies conducted by organizations like the United Nations and the World Health Organization (WHO). For example, the United Nations has found a connection between domestic violence and women being viewed as subordinate within a society.[145] An extensive, multinational study completed by the WHO in 2005 further supports this connection. For example, the WHO study found a link between high rates of domestic violence and communities where traditional beliefs encouraged the idea that sub-

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140 In the case of the UNHCR definition, this should read "socially recognized or immutable." *See UNHCR Guidelines*, *supra* note 28, ¶ 11.

141 INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); INA § 208, 8 U.S.C. § 1158.

142 GLORIA STEINEM, REVOLUTION FROM WITHIN: A BOOK OF SELF-ESTEEM 259–61 (1993).

143 Jessica Marsden, *Domestic Violence Asylum After* Matter of L-R-, 123 YALE L.J. 2512, 2519 (2014) (synthesizing in great detail the body of feminist scholarship portraying domestic violence as a tool of perpetuating patriarchy).

144 Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 305 (1994).

145 Women 2000: Gender Equality, Development and Peace for the Twenty-First Century, June 5–9, 2000, *Report of the Ad Hoc Committee of the Whole of the Twenty-Third Special Session of the General Assembly*, ¶ 14, U.N. Doc. A/S-23/10/Rev.1 (2000).

ordination of women is normal.[146] As such, the WHO study advocates for the promotion of gender equality as a way to directly reduce the incidence of domestic violence within a society: "Improving women's legal and socioeconomic status is likely to be, in the long term, a key intervention in reducing women's vulnerability to violence."[147]

While domestic violence occurs in same-sex partnerships and domestic violence can be perpetrated by women against their male partners,[148] it is still helpful to think of domestic violence as being gender-based persecution. Although men can and do suffer abuse from female partners, according to the WHO study cited above, the vast majority of domestic violence cases involve men abusing their female partners.[149] The discussion of this point is not meant to diminish the experiences of domestic violence suffered by men or by women in same-sex partnerships. Factors besides entrenched misogyny may contribute to domestic violence, especially when suffered by men or by female-partnered women; for example, one study suggests that stress or tension may lead to partner violence.[150] Acknowledging these important nuances, this Note draws attention to the overwhelming trend of male-on-female violence in order to clarify that while there are other reasons for partner violence, female victimization by their male partners is likely rooted in gender hierarchy. Given the high rates of male-on-female partner violence, for asylum purposes, there should be a presumption that male-on-female partner violence is perpetrated within a system of gender hierarchy.

Because of the connection between domestic violence and a systemic attempt to maintain female subordination, male-on-female domestic violence should be presumed to be persecution on account of gender. U.S. asylum law is meant to protect people from persecution based on their possession of immutable and socially perceived traits.[151] Gender should be considered on par with the currently enumerated traits of race, religion, nationality, membership in a particular social group, and political opinion. As defined through U.S. case law, immutability has come to mean a characteristic that is "either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it

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146 Claudia García-Moreno et al., *WHO Multi-Country Study on Women's Health and Domestic Violence Against Women*, WORLD HEALTH ORG. 84–85 (2005), http://www.who.int/reproductivehealth/publications/violence/24159358X/en/.

147 *Id.* at 90.

148 NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2013, at 17 (2014), http://www.avp.org/storage/documents/ncavp2013ipvreport_webfinal.pdf.

149 García-Moreno et al., *supra* note 146, at 36–39.

150 ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT, at xi (2004).

151 Immigration and Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012); INA § 208, 8 U.S.C. § 1158.

ought not to be required to be changed."[152] Although medical advancements now allow for physical transition, gender should be considered an immutable trait because it is fundamental to individual identity, such that it ought not to be *required* to be changed, as held in *Matter of Acosta*.[153] Gender is also a socially perceived characteristic. Across societies, gender is recognized and humans are categorized based on their perceived gender identity. Even cultures that do not subscribe to the male-female gender binary found in Western cultures, and instead recognize more than two genders, still categorize humans based on gender.[154] As such, because gender is an immutable and socially perceived trait, and because domestic violence is inextricably linked to gender, U.S. asylum law should protect victims of domestic violence who can demonstrate the other required elements of an asylum claim.

IV. RECOMMENDATIONS

As discussed above, this Note asserts that domestic violence should be considered a form of gender-based persecution, and therefore victims of domestic violence that meet the additional required criteria should be protected by U.S. asylum law. Part IV addresses various methods for how the United States can best protect victims of domestic violence seeking asylum. Specifically, this Note addresses how the United States should rectify the confusion discussed above if it hopes to achieve the important goal of protecting women and children from domestic violence. While women's advocacy groups and human rights activists celebrated the BIA's decision in *Matter of A-R-C-G-* as a step forward towards this end,[155] this Note argues that the decision left much to clarify regarding the BIA's position on domestic violence-based asylum claims. This Note also argues that confusion and inconsistency will continue to reign in this area of asylum law without legislative or regulatory intervention to resolve the tensions inherent to domestic violence as an asylum claim under the current U.S. system.

Section A addresses the consequences of maintaining the status quo and discusses why *Matter of A-R-C-G-*'s impact is not as far-reaching as some hoped. Section B explores a regulatory approach to resolving these issues, analyzing the probably limited impact of finalizing the 2001 proposed regulations and discussing Jessica Marsden's proposed change to the regulations. Section C discusses a legislative approach, and advo-

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152 Matter of Acosta, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985).

153 *Id.* at 233.

154 Evan B. Towle & Lynn Marie Morgan, *Romancing the Transgender Native: Rethinking the Use of the "Third Gender" Concept*, 8 GLQ 469, 469–70 (2002) (criticizing Western anthropologists' understanding and interpretation of third genders, but providing overview of cultures with non-binary gender structures).

155 *See, e.g.*, Grenier, *supra* note 14.

cates for adding gender as a standalone basis of persecution under the U.S. definition of a refugee.

A. Consequences of Status Quo

Matter of A-R-C-G- represents a small step forward because the decision officially recognizes domestic violence as a basis for asylum and binds all DHS officers and immigration judges. The decision serves to legitimize domestic violence as a basis for asylum and formally opens the possibility for more women to be eligible to seek protection within U.S. borders. Despite this progress, however, the scope and impact of the decision is not likely to be as dramatic as some hoped.

First, the BIA's narrow holding is unlikely to open the floodgates to all victims of domestic violence. Because *Matter of A-R-C-G-*'s facts closely mirror those of *Matter of R-A-*, the scope of the decision so far only narrowly applies to married women from Guatemala who experienced domestic abuse so severe it approaches the level of torture. As case law develops, immigration judges could continue to expand the holding to include women from other countries, unmarried women, and women whose abuse does not exactly parallel the abuse suffered by Rodi Alvarado and the asylum-seeker in *Matter of A-R-C-G-*. Just as easily, however, immigration judges could interpret the holding narrowly and refuse to extend asylum to victims of domestic violence whose circumstances differ from the facts in *Matter of A-R-C-G-*.

Disparities in how immigration judges treat asylum cases are well-documented.[156] Because many immigration judges were hesitant to grant asylum to victims of domestic violence prior to the BIA's decision, those same judges are not likely to interpret *Matter of A-R-C-G-* broadly.[157] For example, in 2011, one immigration judge found that domestic violence victims, as a group, are not visible in India because most Indian victims do not seek assistance from the government.[158] While a binding BIA decision could override reservations about whether marital status can be immutable, *Matter of A-R-C-G-* does not bind immigration judges to grant asylum to women from other countries, who are unmarried, or who experience different kinds of abuse. In fact, since August, immigration judges across the country have been divided in their interpretation of the decision's scope and reach. While some immigration judges have granted asylum in cases involving non-marital unions and

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156 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 7 (2008) (analyzing nearly 200,000 asylum decisions between 1994 and 2007).

157 Bookey, *supra* note 70, at 141–42 (describing immigration judges' reasoning for denying domestic violence-based asylum claims).

158 *Id.* at 142.

countries besides Guatemala,[159] many other immigration judges have attempted to limit the impact of *Matter of A-R-C-G-* through extremely narrow application.[160] For example, based on a sample of cases[161] reviewed by the Center for Gender and Refugee Studies at the University of California, Hastings, some immigration judges have denied asylum based on immaterial factual distinctions: finding that women abused by a domestic partner are ineligible for asylum because they are not married, relying on unrealistic views of an abused woman's ability to leave her relationship, or even finding that domestic abuse lacks sufficient nexus to membership in a particular social group.[162] Thus, the limitations of the decision are already becoming apparent.

Second, *Matter of A-R-C-G-* is only binding if not disturbed by the Attorney General. Although the facts of the case are sympathetic and a decision to overturn the BIA would likely cause outrage among pro-immigration and women's rights advocates, anti-immigration advocates who have voiced concern over perceived leniency regarding immigrants and border protection might applaud a decision to reverse *Matter of A-R-C-G-*. A conservative Attorney General, coming into office as early as 2017, could succumb to pressure to overturn the decision. Given the current political climate, a binding BIA decision is not a solid promise of future expansion of asylum to all victims of domestic violence or even a promise that domestic violence will remain a legitimate ground for seeking asylum.

Third, *Matter of A-R-C-G-* is vulnerable to being overturned in federal court. Although the BIA's decision is binding, it is still subject to judicial review. Although the BIA's decision will be given *Chevron* deference,[163] a federal court could find the BIA's interpretation of the law to be unreasonable for relying on circular logic that is contrary to prior understanding of particular social groups. *Matter of A-R-C-G-* relies on circular logic in that it defines a particular social group in terms of its persecution. The BIA's thin analysis does little to resolve the problem of circularity, and in fact, the BIA does not acknowledge the problem at all.

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159 Blaine Bookey, *Gender-Based Asylum Post-*Matter of A-R-C-G-*: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L LAW (forthcoming) (noting a non-precedential immigration judge decision in Cleveland, OH granting asylum to an abused Guatemalan woman who was in a common law marriage).

160 *See id.*

161 The cases on file at the CGRS are only a subset of domestic violence asylum cases in the United States, and are not necessarily representative of national trends. Nevertheless, the Center has already seen cases illustrating both types of interpretation of *A-R-C-G-* at an immigration judge level.

162 *See* Bookey, *supra* note 159.

163 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (holding that when a court reviews an agency's statutory interpretation, an agency's attempt at gap-filling will be overturned only if found to be unreasonable).

The BIA's analysis appears to rest almost exclusively on concessions made by the DHS.

The BIA has consistently resisted this type of circular analysis. In *Matter of A-M-E- & J-G-U-*, the BIA expressly held that "[A] social group cannot be defined exclusively by the fact that its members have been subjected to harm."[164] In *Matter of R-A-*, for example, the BIA reasoned that Alvarado's husband abused her because he was a cruel man with a history of trauma and not because he actively sought to punish her for *being an abused woman*.[165] Even the UNHCR definition of a refugee, expansive as it is, expressly states that the particular social group may not be formed around the fact that the group faces persecution, though persecution can illustrate social perception.[166]

If some federal courts overturned *Matter of A-R-C-G-* and a circuit split developed, some asylum officers would no longer be bound by the BIA's decision. Where a federal circuit conflicts with the BIA, the asylum officer is bound by the law the circuit court applies.[167] Thus, victims of domestic violence in those circuits would not be able to seek asylum on those grounds in those circuits until the U.S. Supreme Court intervened to resolve the split.

Because *Matter of A-R-C-G-* is narrowly held and vulnerable to being overruled, women who hope to base their asylum claims on domestic violence cannot adequately predict how their claims will be treated. While many people who hope to claim asylum in the United States face uncertainty, victims of domestic violence face unique risks. Women who leave their abusive partners are much more likely to be killed or severely punished for attempting to leave.[168] Further, because domestic violence as a grounds for asylum has such limited case law, the level of unpredictability for these women is higher than for a political dissident or an ethnic minority, who can rely on more established case law.

B. Regulatory Approach

As discussed above, due to the public outcry following *Matter of R-A-*, Attorney General Janet Reno vacated the BIA's decision, drafted regulations clarifying that domestic violence can serve as a basis for asylum, and remanded *Matter of R-A-* for reconsideration pending the regula-

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164 Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 74 (B.I.A. 2007).

165 Matter of R-A-, 22 I. & N. Dec. 906, 921 (B.I.A. 2001).

166 *UNHCR Guidelines*, *supra* note 28, ¶ 14.

167 *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE (Feb. 6, 2015), http://www.justice.gov/eoir/biainfo.htm.

168 *See* Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 348–51 (2009) (describing the increased likelihood of spousal murder where the woman no longer resides with her abusive husband).

tions' finalization.[169] The proposed regulations, however, were never finalized. One possible solution for clarifying the question of how to treat domestic violence-based asylum claims is to finalize the proposed regulations. As this section explains, however, finalization of the proposed regulations would be a step in the direction of more clarity and predictability, but would not resolve the broader problems of applying the particular social group framework to domestic violence in this way.

The proposed regulations aim to provide guidance on what can be considered persecution and membership in a particular social group, and in particular, attempt to clarify the United States' position on domestic abuse and gender violence in the asylum context.[170] The proposed regulations admit that the category of membership in a particular social group is the murkiest of the bases for asylum, and acknowledge that this confusion has led to inconsistent outcomes.[171] To clarify this point, the proposed regulations expressly allow for "case-by-case adjudication of claims based on domestic violence and other serious harm" and unequivocally state that gender may form the basis of a particular social group.[172] The regulations decline to take a bright-line stance on when domestic violence can give rise to asylum claims, leaving judges to evaluate the facts in each case, relying on their own experiences and interpretation of the facts at issue.[173] In fact, the proposed regulations expressly state that the DOJ was not "announcing a categorical rule that a victim of domestic violence is or can be a refugee on account of that experience of fear, or that persons presenting such claims may be found eligible for relief or granted relief as a matter of discretion."[174]

Aside from attempting to clarify that domestic violence and gender can serve as a basis for membership in a particular social group, the proposed regulations also try to resolve the issue of nexus. First, the regulations state that a persecutor may only have one target, and need not harm other members belonging to the same particular social group: "evidence that the persecutor seeks to act against other individuals who share the applicant's protected characteristic is relevant and may be considered but shall not be required."[175] This language is specifically meant to accommodate domestic violence and the problem that individual abusers typically only target their partner and not other women with whom they

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169 Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208); *R-A-*, 22 I. & N. Dec. at 906.

170 Asylum and Withholding Definitions, 65 Fed. Reg. at 76,589.

171 *Id.* (referring to membership as "the least well-defined of the five grounds within the refugee definition").

172 *Id.*

173 *Id.*

174 *Id.* at 76,595.

175 *Id.* at 76,598.

have no relationship.[176] The proposed regulations would also allow "patterns of violence" to satisfy the nexus requirement.[177] These clarifications, however, do not actually address the issue of circularity—that victims of domestic violence are not abused *because* they are abused. In effect, the regulations merely function as permission for judges to set aside the fact that persecutors do not abuse their victims *on account of* their victims being "married Guatemalan women who are unable to leave the relationship."[178]

Although the proposed regulations do not resolve the issue of circular logic, finalizing the regulations would be another small step in the right direction, and would protect more women than *Matter of A-R-C-G-* would alone. First, the proposed regulations have a broader and more general application than the BIA decision. For example, *Matter of A-R-C-G-* only expressly applies to married women, but the proposed regulations contemplate how any intimate relationship could become an immutable trait if the victim could not reasonably be expected to leave.[179] The proposed regulations also expand the possibility of granting asylum where the details of the abuse or the context in which the abuse takes place differs from that of *Matter of R-A-* or *Matter of A-R-C-G-* by expressly leaving room for broad interpretation.[180] The proposed regulations also take an expansive approach to determining whether a government has shown it is unable or unwilling to protect the victims,[181] while the BIA decision would only expressly protect women whose circumstances parallel those detailed in *Matter of R-A-* or *Matter of A-R-C-G-*. Because of the more expansive language and clear intent to allow asylum to be granted to women who suffer from domestic abuse, even where the facts depart from those in *Matter of A-R-C-G-* and *Matter of R-A-*, the proposed regulations are more stable and allow for more predictability. By codifying an expansive approach to interpreting particular social group membership in a domestic violence context, the regulations are more likely to result in immigration judges and DHS officials applying an expansive approach. A narrow BIA holding is easier to distinguish than a broad regulation.

Second, the proposed regulations are more difficult to change than a rule hinged on a single BIA decision. A hostile Attorney General, federal judge, or future BIA is unlikely to overturn a BIA decision outright, just as a hostile Attorney General is unlikely to amend finalized regula-

176 *Id.*

177 *Id.*

178 Matter of A-R-C-G-, 26 I. & N. Dec. 388, 392 (B.I.A. 2014).

179 Asylum and Withholding Definitions, 65 Fed. Reg. at 76,593.

180 *Id.* at 76,589.

181 *Id.* at 76,591 (stating that a variety of factors should be considered to determine if the government is "unable or unwilling to protect" the victim).

tions. However, because the BIA's decision in *Matter of A-R-C-G-* is narrow and hinges on the particular facts of the case, subsequent rulings by immigration judges, federal judges, or the BIA itself could effectively gut *Matter of A-R-C-G-* and prevent other victims of domestic violence from claiming asylum. The language in the proposed regulations expresses a clear intent to take an expansive approach to domestic violence as a basis for asylum.[182] Once finalized, restricting the scope of the regulations would require more purposeful action than a narrow holding applying *Matter of A-R-C-G-,* which leaves open the question of how broadly the BIA intended the holding to be applied.

While finalizing Attorney General Reno's proposed regulations would expand the scope and permanence of the BIA's holding in *Matter of A-R-C-G-*, more drastic measures would be necessary to firmly cement domestic violence into the U.S. asylum framework. A giant leap that eliminates the circular logic built into both the BIA's decision and the proposed regulations could improve predictability and stability. A solution explored by Jessica Marsden is to amend the regulations to expressly state that when determining eligibility for asylum:

> (a) a social group defined solely by the gender of its members is cognizable as a particular social group; and (b) where a woman has experienced intimate-partner violence that otherwise meets the standard for persecution, the victim's gender shall be deemed to be one central reason for the persecution.[183]

This proposal would root domestic violence-based asylum claims in gender, eliminating the need for circular logic while at the same time expanding protection to women facing gender-related persecution.[184] Because gender is expressly allowed to serve as the basis for an asylum claim, and domestic violence is expressly considered to be gender-based persecution, there requires no logical leap to grant asylum. As defined in Marsden's proposal, the persecution suffered is, as a matter of law, on account of gender, which is now an acceptable basis to claim membership in a particular social group. Marsden's proposal differs from Attorney General Reno's proposed regulations because while the proposed regulations refused to "announce a categorical rule that a victim of domestic violence is or can be a refugee on account of that experience,"[185] Marsden's proposed regulation would codify such a rule.

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182 *Id.* at 76,589 ("This proposed rule removes certain barriers . . . to claims that domestic violence . . . rises to the level of persecution of a person on account of membership in a particular social group.").

183 Marsden, *supra* note 143, at 2544.

184 *Id.* at 2546.

185 Asylum and Withholding Definitions, 65 Fed. Reg. at 76,595.

Marsden advocates for a regulatory approach over a legislative approach, arguing that regulatory changes are easier to pass than are legislative changes. Marsden cites the success of the amendment made in 1996 in response to the one-child rule in China, which expressly added forced abortions and sterilizations to fit under the category of persecution on account of a political opinion.[186] The 1996 amendment expressly states that forced abortions and sterilizations are considered persecution, and that forced abortions and sterilizations are considered on account of a political opinion for the purposes of asylum determinations.[187] Marsden asserts that this amendment was able to be passed due to the widespread support from the anti-abortion movement and the political climate at the time that galvanized Congress to act together to make the change.[188] By contrast, Marsden expresses doubt that in the current political climate it would be possible to unite Congress around the issue of domestic violence. This is because, Marsden argues, domestic violence is less likely to galvanize a united front to advocate for the issue, especially when the proposed change would allow for more immigrants to enter the United States. While recent polls may suggest that Americans are warming to the idea of more immigration, the fact remains that there is a significant portion of the United States that is staunchly anti-immigration.[189] Therefore, it is unlikely, Marsden asserts, that a campaign to pass legislation in favor of altering the current definition of a refugee to officially include gender as an acceptable basis of a particular social group and domestic violence officially as a form of persecution on account of gender would be successful.[190]

Marsden published her proposed method of resolving the issues discussed above revolving around domestic violence as the basis of an asylum claim long before the BIA issued its opinion in *Matter of A-R-C-G-*. However, the solution for which she advocates remains both relevant and persuasive.

C. Amending Definition of Refugee to Include Gender

Another approach would be to amend the definition of a refugee to include gender as its own standalone category alongside race, religion, ethnicity, particular social group, and political opinion. For the sake of

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186 Marsden, *supra* note 143, at 2544–45.

187 Immigration and Nationality Act (INA) § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2012).

188 Marsden, *supra* note 143, at 2542–43 (citing especially the importance of the Tiananmen Square massacre in 1989).

189 Philip Bump, *Americans Turn Against Immigration—But, As Always, It's Complicated*, WASH. POST (June 27, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/27/americans-turn-against-immigration-but-as-always-its-complicated/.

190 Marsden, *supra* note 143, at 2543.

simplicity, this change would clarify the United States' recognition of gender as on equal footing as with the other enumerated bases of asylum. The change would also have symbolic importance because gender would be expressly enumerated as opposed to being shoe-horned into the category of a particular social group. Further, a legislative amendment would have the same effect as Marsden's proposal, in that both would codify the position that gender can form a basis of asylum and that domestic violence is expressly considered to be perpetrated on account of the victim's gender. Both solutions would eliminate the logical problem of circularity, as discussed above, and would offer relatively permanent solutions to the problem of domestic violence as a basis for asylum. As Marsden points out, however, the likelihood of passing a pro-immigration piece of legislation in the current climate, where immigration reform is controversial and domestic violence is taboo in many parts of the United States,[191] remains low. As such, although ideally a change to the legal definition of a refugee[192] would be possible, Marsden's regulatory approach that works within the existing framework of asylum law is the best option currently available.

CONCLUSION

Matter of A-R-C-G- is a small, but positive, step towards allowing more persecuted women to claim asylum in the United States. There are, however, significant gaps in the decision's scope and staying-power. To resolve these gaps, either Marsden's proposed regulatory amendment or a legislative amendment that officially allows gender to form the basis of an asylum claim and that expressly considers domestic violence as gender-based persecution is necessary. Both solutions would resolve the problems of circularity, as well as the risk of impermanence, should immigration judges choose to read *Matter of A-R-C-G-* narrowly or should a BIA comprised of different judges choose to overturn or further narrow the decision.

Both solutions would also represent an important and positive step towards protecting victims of gender violence more broadly. By expressly allowing gender either to form the basis of a particular social group or to stand as a separate basis of persecution, victims of other forms of gender violence besides domestic violence will have an increased likelihood of being granted asylum on the basis of those experiences. For example, women in Juarez fleeing from high rates of

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191 Katie Haas, *ACLU Seeks Accountability for Police Violation of the Rights of Domestic Violence Victims*, AM. CIVIL LIBERTIES UNION (May 28, 2013), https://www.aclu.org/blog/aclu-seeks-accountability-police-violation-rights-domestic-violence-victims.

192 INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

femicide[193] or women in Kyrgyzstan who fear being kidnapped into marriage[194] can derive more certainty from language that clearly protects against persecution on the basis of gender. Because the purpose of granting asylum is to protect groups of people who are victimized on account of traits that cannot be changed, altering the current statute or regulations to include women who are victims of violence because they are women is both morally right and necessary if the United States hopes to continue to be a safe haven for the vulnerable.

193 *See, e.g.*, John Burnett, *Who's Killing the Women of Juarez?: Mexican City Haunted by Decade of Vicious Sex Crimes*, NAT'L PUB. RADIO (Feb. 22, 2003), http://www.npr.org/templates/story/story.php?storyId=1171962; Damien Cave, *Wave of Violence Swallows More Women in Juárez*, N.Y. TIMES (June 23, 2012), http://www.nytimes.com/2012/06/24/world/americas/wave-of-violence-swallows-more-women-in-juarez-mexico.html?pagewanted=all.

194 Acacia Shields et al., *Reconciled to Violence: State Failure to Stop Domestic Abuse and Abduction of Women in Kyrgyzstan*, HUMAN RIGHTS WATCH (Sept. 26, 2006), http://www.hrw.org/en/reports/2006/09/26/reconciled-violence.