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## ***Matter of A-R-C-G- and Domestic Violence Asylum: A Glimmer of Hope Amidst a Continuing Need for Reform***

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# ***Matter of A-R-C-G-* and Domestic Violence Asylum: A Glimmer of Hope Amidst a Continuing Need for Reform**

CAROLINE MCGEE\*

*In August 2014, the Board of Immigration Appeals (“BIA”) issued its first published decision recognizing domestic violence as a basis for asylum. In Matter of A-R-C-G-, the BIA held that a woman who had suffered horrific abuse at the hands of her husband in her native Guatemala qualified for asylum as a member of a particular social group. The landmark decision came after years of uncertainty regarding the viability of domestic violence asylum claims and fourteen years after the BIA had rejected domestic violence as a basis for asylum in Matter of R-A-. Parts I and II of this Comment provide an overview of asylum law and the development of domestic violence asylum prior to A-R-C-G-. Part III discusses the BIA’s holding in A-R-C-G- and Part IV argues that, despite the BIA’s promising holding in A-R-C-G-, amendments to the asylum regulations are still needed to guarantee the adequate adjudication of domestic violence asylum claims.*

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#### INTRODUCTION

Before its August 26, 2014 decision in *Matter of A-R-C-G-*, the Board of Immigration Appeals (“BIA”) had been silent on the controversial issue of domestic violence asylum for fourteen years.<sup>1</sup> While other countries, such as Canada and the United Kingdom, began to recognize asylum claims from women who were fleeing persecution at the hands of their spouses and domestic partners in the early 1990s,<sup>2</sup> the United States lagged behind with inconsistent and arbitrary decisions. In 1999, however, the BIA dealt a huge blow to domestic violence victims who hoped to seek refuge in the United States.<sup>3</sup> In *Matter of R-A-*, the BIA held that Rody Alvarado, who had been repeatedly raped and abused by her husband, failed to show that she was a member of a particular social group in order to

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<sup>1</sup> Molly Redden, *Top Immigration Court Hands Huge Win to Battered Women Seeking Asylum. Conservatives Freak Out.*, MOTHER JONES (Aug. 28, 2014, 10:29 AM), <http://www.motherjones.com/politics/2014/08/doj-immigration-court-domestic-violence-asylum-conservative-backlash> (last visited Mar. 30, 2016).

<sup>2</sup> See, e.g., *Ward v. Canada*, [1993] 2 S.C.R. 689, paras. 25, 78 (Can.); *Ex Parte Shah*, [1999] 2 A.C. 629 (H.L.) [647, 653] (appeal taken from Immigration Appeal Tribunal) (Eng.).

<sup>3</sup> See *Matter of R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999).

establish eligibility for asylum.<sup>4</sup> The decision caused outrage, leading then Attorney General Janet Reno to vacate it and propose amendments to the asylum regulations.<sup>5</sup> Although Ms. Alvarado was ultimately granted asylum in 2009 after a fourteen-year legal battle, the BIA's decision denying her asylum continued to influence adjudicators for years to come.<sup>6</sup>

After the BIA's decision in *R-A-* and the saga that followed, inconsistency from immigration judges created a patchwork of unpublished decisions that set no standard for adjudicating domestic violence asylum claims.<sup>7</sup> Further complicating the issue, Janet Reno's proposed amendments to the asylum regulations were never passed.<sup>8</sup> As a result, asylum applicants were left with very little guidance on how to best argue their claims.

In August 2014, when the BIA published *A-R-C-G-*, many hoped the court would clarify its position and set standards providing guidance for domestic violence asylum applicants. This Comment discusses the BIA's holding in *A-R-C-G-* and argues that, despite the promising decision, amendments to the asylum regulations are still needed to guarantee the adequate adjudication of domestic violence asylum claims. Part I outlines the legal requirements for asylum in the United States and discusses the development of claims of gender-based persecution. Part II analyzes important domestic violence asylum claims prior to *A-R-C-G-*. Part III examines the BIA's holding in *A-R-C-G-*. Part IV rebuts the primary argument against

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<sup>4</sup> *Id.* at 918.

<sup>5</sup> Asylum and Withholding Definitions, 65 Fed. Reg. 76,588–98 (proposed Dec. 7, 2000).

<sup>6</sup> *Matter of R-A-*, CENTER FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/our-work/matter-r> (last visited Mar. 30, 2016).

<sup>7</sup> See 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, 125–48 (2013). Because many asylum decisions are unpublished, it is difficult to obtain information on domestic violence asylum cases. To address this issue, the Center for Gender & Refugee Studies at University of California Hastings College of the Law has created an asylum database with information on over 9,000 asylum cases at all levels of adjudication. See CENTER FOR GENDER & REFUGEE STUDIES, CGRS Asylum Records, <http://cgrs.uchastings.edu/search-materials/search-our-resources> (last visited Mar. 30, 2016).

<sup>8</sup> See Gerald Seipp, *A Year in Review—Federal Courts Serving as “Gatekeeper” To Assure that Legitimate Claims of Persecution are Recognized by the Department of Justice*, 92 No. 39 Interpreter Releases 1821, 1822 (Oct. 12, 2015).

the BIA's holding in *A-R-C-G-*, but argues that regulatory reform should nevertheless be implemented. Finally, this Comment concludes that, while *A-R-C-G-* is laudable for finding that victims of domestic violence may qualify for asylum, the decision itself is not sufficient to clarify ambiguities in the law and ensure relief will be available for those who need it most.

## I. ASYLUM LAW AND THE DEVELOPMENT OF GENDER-BASED PERSECUTION AS GROUNDS FOR ASYLUM

### A. *What Constitutes a Refugee?*

The Immigration and Nationality Act ("INA") governs a noncitizen's eligibility for asylum. A noncitizen may qualify for asylum if the Department of Homeland Security ("DHS") or the Attorney General determines that she is a refugee.<sup>9</sup> The current definition of a refugee is found in the Refugee Act of 1980, and mirrors the language of the United Nations refugee treaty.<sup>10</sup> The Refugee Act states that a refugee is

any person who is outside any country of such person's nationality . . . 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.<sup>11</sup>

Based on the refugee definition, an asylum applicant must show that (1) she has suffered persecution or she has a well-founded fear of persecution (2) by the state or by an entity the government is un-

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<sup>9</sup> 8 U.S.C. § 1158(b)(1)(A) (2012).

<sup>10</sup> Convention Relating to the Status of Refugees, art. 1, opened for signature July 28, 1951, 189 U.N.T.S. 150.

<sup>11</sup> 8 U.S.C. § 1101(a)(42)(A).

willing or unable to control (3) “on account” of (4) a protected characteristic.<sup>12</sup> The applicant has the burden of proof in demonstrating that she meets the definition of a refugee and that she is not barred from asylum relief for any other reason.<sup>13</sup>

### B. *Persecution on Account of a Protected Ground*

Because the INA does not define what constitutes persecution, asylum applicants must look to precedent to interpret the specific types of harms that will be considered persecution.<sup>14</sup> The BIA has defined persecution as “the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim.”<sup>15</sup> The U.S. courts of appeals have also set forth definitions of persecution. The Ninth Circuit has defined persecution as “the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive,”<sup>16</sup> while the Third Circuit has noted that persecution “is an extreme concept that does not include every sort of treatment our society regards as offensive.”<sup>17</sup> The Eleventh Circuit has found that persecution “requir[es] more than a few isolated incidents of verbal harassment or intimidation.”<sup>18</sup>

If an applicant can establish that the harm she suffered amounts to persecution, she “shall be presumed to have a well-founded fear of future persecution on the basis of the original claim.”<sup>19</sup> If an applicant has not suffered persecution, but fears she will if she returns to her country of origin, then she must demonstrate that her fear is

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<sup>12</sup> Rebekah Morrissey, *Avoiding the Rabbit Hole: Formulating Better Requirements for Domestic Violence-Based Asylum Claims*, 43 MCGEORGE L. REV. 1121, 1127–28 (2012).

<sup>13</sup> See 8 C.F.R. § 208.13(a) (2013); see also Elsa M. Bullard, *Insufficient Government Protection: The Inescapable Element in Domestic Violence Asylum Cases*, 95 MINN. L. REV. 1867, 1871 (2011).

<sup>14</sup> Ilona Bray, *What Counts as “Persecution” when Applying for Asylum or Refugee Status*, NOLO, <http://www.nolo.com/legal-encyclopedia/what-counts-persecution-when-applying-asylum-refugee-status.html> (last visited Mar. 26, 2016).

<sup>15</sup> *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

<sup>16</sup> *Cordon-Garcia v. I.N.S.*, 204 F.3d 985, 991 (9th Cir. 2000).

<sup>17</sup> *Fatin v. I.N.S.*, 12 F.3d 1223, 1243 (3d Cir. 1993).

<sup>18</sup> *De Santamaria v. U.S. Att’y Gen.*, 525 F.3d 999, 1008 (11th Cir. 2008).

<sup>19</sup> 8 C.F.R. § 208.13(b)(1) (2013).

well-founded.<sup>20</sup> An applicant's fear is well-founded if (1) she has a fear of persecution in her home country on account of a protected characteristic; (2) there is a "reasonable possibility" of suffering such persecution if she were to return to that country; and (3) she is unable or unwilling to return to, or avail herself of the protection of, that country because of such fear.<sup>21</sup> In determining whether an applicant's fear of persecution is well-founded, a court will likely analyze the subjective and objective components of the applicant's claim.<sup>22</sup> An applicant may establish a subjectively reasonable fear of persecution through credible testimony and an objectively reasonable fear of persecution if a reasonable person in the applicant's situation would fear persecution if made to return to the applicant's country of origin.<sup>23</sup>

Establishing past persecution or a well-founded fear of future persecution is not the end of the inquiry. An applicant must also show that the persecution is "on account of" race, religion, nationality, membership in a particular social group, or political opinion.<sup>24</sup> In order to establish the required "nexus" between the persecutor's motive and a protected ground, the applicant must show that her protected characteristic is "at least one central reason" for the persecutor's motivation.<sup>25</sup>

Once the applicant has established either past persecution or a well-founded fear of future persecution, she must also show that relocating within her country of origin will not negate her fear of persecution.<sup>26</sup> To determine whether internal relocation is reasonable,

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<sup>20</sup> *Id.* at § 208.13(b)(2).

<sup>21</sup> *Id.* at § 208.13(b)(2)(i)(A)–(C).

<sup>22</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987) ("[T]he very language of the term 'well-founded fear' demands a particular type of analysis—an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear.") (Blackmun, J., Concurring).

<sup>23</sup> *See id.* at 456–57. *See also* Bullard, *supra* note 13, at 1872.

<sup>24</sup> 8 U.S.C. § 1101(a)(42)(A) (2012).

<sup>25</sup> *Id.* at § 1158(b)(1)(B)(i) ("To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.")

<sup>26</sup> *See* 8 C.F.R. § 208.13(b)(1)(i)(B); *see also* 8 C.F.R. § 208.13 (b)(2)(ii) (applicants who "could avoid persecution by relocating to another part of the applicant's country of nationality" are not eligible for asylum).

the asylum regulations outline various factors that adjudicators should consider, such as geographical limitations, social and cultural constraints, and ongoing civil strife within the country.<sup>27</sup> Additionally, if the applicant has established past persecution, DHS can rebut the presumption of a fear of future persecution by showing that “[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant’s country of nationality.”<sup>28</sup> A fundamental change in circumstances could include a change in country conditions or a fundamental change in the applicant’s personal circumstances.<sup>29</sup>

### C. *Membership in a Particular Social Group*

Of the five statutorily protected grounds enumerated in the refugee definition, the “membership in a particular social group” category is the most controversial.<sup>30</sup> Some scholars have suggested that the social group ground was included because the drafters of the 1951 Refugee Convention “recognized that no list could possibly encompass all of the reasons for which a deserving asylee might be persecuted.”<sup>31</sup> The social group category therefore encompasses other distinct groups that might be targeted for persecution.<sup>32</sup>

Part of the controversy surrounding the social group category arises due to the fact that the circuit courts of appeals use different

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<sup>27</sup> See 8 C.F.R. § 208.13(b)(3) (“[A]djudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.”).

<sup>28</sup> 8 C.F.R. § 208.13(b)(1)(i)(A).

<sup>29</sup> Dina Sewell Finkell, *Changed Circumstances and Country Conditions with Respect to Asylum*, IMMIGRATION LAW ADVISOR, at \*5, <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202009/vol3no8.pdf>.

<sup>30</sup> See Bullard, *supra* note 13, at 1873.

<sup>31</sup> Jessica Marsden, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2517 (2014).

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

standards to decide what constitutes a social group.<sup>33</sup> The BIA, however, has established a two-prong test to evaluate whether a group meets the requirements for a particular social group. First, the group must be comprised of individuals who share a common, immutable characteristic that they cannot change or that is so fundamental to their identity that they should not be required to change it.<sup>34</sup> Second, the group must be recognizable and distinct in society.<sup>35</sup>

In 1985, the BIA attempted to clarify the requirements for “membership in a particular social group.”<sup>36</sup> In *Matter of Acosta*, a Salvadoran taxi driver who was a founding member of a cooperative organization of taxi drivers (“COTAXI”) filed for asylum on the grounds that he feared persecution from Salvadoran guerillas “on account of his membership in a particular social group comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador.”<sup>37</sup> The applicant testified that he had received death threats and that three of his friends had been killed shortly after receiving death threats.<sup>38</sup> He also testified that he was assaulted in his taxi by three men who warned him not to call the police.<sup>39</sup>

To interpret the meaning of “membership in a particular social group,” the *Acosta* court applied the doctrine of *ejusdem generis*, meaning “of the same kind.”<sup>40</sup> The other grounds of persecution—race, religion, nationality, and political opinion—describe a characteristic “that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought

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<sup>33</sup> See, e.g., *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that a “‘particular social group’ is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it”); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (“Like the traits which distinguish the other four enumerated categories—race, religion, nationality and political opinion—the attributes of a particular social group must be recognizable and discrete.”).

<sup>34</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

<sup>35</sup> *Matter of C-A-*, 23 I. & N. Dec. 951, 959–61 (B.I.A. 2006).

<sup>36</sup> *Matter of Acosta*, 19 I. & N. Dec. at 232–35.

<sup>37</sup> *Id.* at 232.

<sup>38</sup> *Id.* at 216–17.

<sup>39</sup> *Id.* at 217.

<sup>40</sup> *Id.* at 233.

not be required to be changed.”<sup>41</sup> Therefore, the court found the social group category can be established where the persecution “is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”<sup>42</sup> The immutable characteristic “must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>43</sup> In *Acosta*, the characteristics defining the social group of which the applicant was a member were “being a taxi driver in San Salvador and refusing to participate in guerilla-sponsored work stoppages.”<sup>44</sup> The court found that neither of these characteristics was immutable “because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages.”<sup>45</sup> Construing the social group category in this manner allowed the court to “preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.”<sup>46</sup>

In 2006, the BIA identified another consideration applicable to determining eligibility as a member of a particular social group. In *Matter of C-A-*, the asylum applicant operated a bakery, where he became acquainted with the chief of security for the Cali drug cartel.<sup>47</sup> Between 1990 and 1994, the chief of security visited the applicant’s bakery and talked openly about his involvement with the Cali cartel, including events relating to the cartel’s exportation of narcotics.<sup>48</sup> The applicant passed along the information he learned to a friend who, as the General Counsel for the city of Cali, was responsible for investigating and prosecuting drug traffickers.<sup>49</sup> In 1995, the applicant was outside with his son when a car blocked their path.<sup>50</sup> Three men with guns attempted to force the applicant into

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 234.

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

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

<sup>47</sup> *Matter of C-A-*, 23 I. & N. Dec. 951, 952 (B.I.A. 2006).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

the car, but he refused.<sup>51</sup> They beat him and hit his son in the face with a gun.<sup>52</sup> Before leaving, they told him that things would get worse for him and that they would also go after the General Counsel.<sup>53</sup>

The applicant sought asylum on the grounds that he was a member of the particular social group of noncriminal drug informants working against the Cali drug cartel.<sup>54</sup> The court first determined that having informed on the Cali cartel was not an immutable characteristic under the *Acosta* test because “a person who agrees to work as a government informant . . . takes a calculated risk and is not in a position to claim refugee status should such risks materialize.”<sup>55</sup> The court then addressed the “recognizability, i.e., the social visibility”<sup>56</sup> of the purported social group. To emphasize the importance of the social visibility component, the court looked to United Nations guidelines and confirmed that “‘visibility’ is an important element in identifying the existence of a particular social group.”<sup>57</sup> While the court recognized the applicant’s sympathetic circumstances, it held that “informants are not in a substantially different situation from anyone who has crossed the Cali cartel or who is perceived to be a threat to the cartel’s interests.”<sup>58</sup> Because the purported social group was not sufficiently distinct from the general population of Colombia, the group lacked the requisite social visibility.<sup>59</sup>

Since *C-A-*, the BIA has attempted to clarify the social visibility requirement. In *Matter of W-G-R-*, a former gang member from El Salvador filed for asylum and withholding of removal<sup>60</sup> on the grounds that he feared persecution on account of his membership in a particular social group consisting of “former members of the Mara

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<sup>51</sup> *Id.*

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

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

<sup>54</sup> *Id.* at 957.

<sup>55</sup> *Id.* at 958.

<sup>56</sup> *Id.* at 959.

<sup>57</sup> *Id.* at 960.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 961.

<sup>60</sup> While this Comment focuses on asylum, *W-G-R-* is relevant because much of the same analysis applies to withholding of removal claims.

18 gang in El Salvador who have renounced their gang membership.”<sup>61</sup> The applicant testified that he was in the gang for less than a year, but was confronted and attacked by members of the gang after he renounced his membership.<sup>62</sup> He was shot in the leg during one of the two attacks he suffered as a result of leaving the gang.<sup>63</sup> He later fled to the United States.<sup>64</sup>

The immigration judge pretermitted the applicant’s application for asylum as untimely filed and denied him withholding of removal on the grounds that he did not establish that he was persecuted on account of his membership in a particular social group.<sup>65</sup> The applicant appealed the denial of withholding to the BIA, arguing that the social visibility and particularity requirements were inconsistent with BIA precedent and the standards of international refugee law.<sup>66</sup> The BIA affirmed its prior holdings that “both particularity and social visibility are critical elements in determining whether a group is cognizable as a particular social group.”<sup>67</sup> However, the court recognized that the term “visibility” created confusion surrounding the requirement of whether or not a group needed to be *seen* by society.<sup>68</sup> To clarify, the court renamed the social visibility element the “social distinction” element “to clarify that social visibility does not mean ‘ocular visibility.’”<sup>69</sup> Rather, the element requires that the group be *perceived* by society.<sup>70</sup> The court then dismissed the applicant’s appeal, finding that he did not establish that former gang members in El Salvador who had renounced their membership were “perceived, considered, or recognized in Salvadoran society as a distinct group.”<sup>71</sup>

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<sup>61</sup> Matter of W-G-R-, 26 I. & N. Dec. 208, 209 (B.I.A. 2014).

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

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

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 211.

<sup>67</sup> *Id.* at 212.

<sup>68</sup> *Id.* at 216.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 222. The court did not reach the issue of whether the Salvadoran government was unable or unwilling to control Mara 18 members because the immigration judge made no findings on that issue. *Id.* at 224.

#### D. *The Origins of Gender-Based Asylum*

Historically, adjudicators in the United States have generally denied gender-based asylum claims.<sup>72</sup> Because the law does not recognize such claims in and of themselves, women who have suffered persecution based on their gender must file under one of the five statutorily protected grounds in the refugee definition.<sup>73</sup> An early gender-based claim from 1975 demonstrates the obstacles women face when applying for asylum or withholding of removal based on gender-specific persecution. In *Matter of Pierre*, a Haitian woman filed for withholding of removal on the grounds that she feared persecution from her husband who held a position of power in the Haitian government.<sup>74</sup> The applicant testified that, before leaving Haiti, her husband “threatened her life and attempted to kill her by burning down the house in which she lived.”<sup>75</sup> She did not argue that she feared persecution on account of one of the statutorily protected grounds required for withholding of removal, but that her husband’s position in the government would foreclose her from receiving protection in Haiti, “and that this in turn amounts to persecution which the government of Haiti would do nothing to restrain.”<sup>76</sup>

The BIA denied her withholding claim on the grounds that the persecution she suffered was not on account of her membership in one of the statutorily protected classes.<sup>77</sup> Instead, the court found that the motivation behind her husband’s actions appeared to be “strictly personal,” and therefore her claim did not merit protection under the law.<sup>78</sup>

Beginning in the 1990s, however, the United States began to take steps toward recognizing some gender-specific asylum claims.<sup>79</sup> In 1995, the Immigration and Naturalization Service

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<sup>72</sup> T.S. Twibell, *The Development of Gender as a Basis for Asylum in United States Immigration Law and Under the United Nations Refugee Convention: Case Studies of Female Asylum Seekers from Cameroon, Eritrea, Iraq, and Somalia*, 24 GEO. IMMIGR. L.J. 189, 196 (2010).

<sup>73</sup> See 8 U.S.C. § 1101(a)(42)(A) (2012).

<sup>74</sup> *Matter of Pierre*, 15 I. & N. Dec. 461, 461–62 (B.I.A. 1975).

<sup>75</sup> *Id.* at 462.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 462–63.

<sup>78</sup> *Id.* at 463.

<sup>79</sup> See Twibell, *supra* note 72, at 197.

(“INS”)<sup>80</sup> issued a memorandum to asylum officers on adjudicating asylum claims for women.<sup>81</sup> Although the memorandum was written only to provide “guidance and background,” the INS issued it as required reading for all interviewing and supervising asylum officers.<sup>82</sup> The memorandum stated that “gender-related claims can raise issues of particular complexity, and it is important that United States asylum adjudicators understand those complexities and give proper consideration to gender-related claims.”<sup>83</sup>

Two years later, in 1996, the BIA issued its first precedential decision establishing that women fleeing gender-based persecution could be eligible for asylum in the United States.<sup>84</sup> In *Matter of Kasinga*, a Togolese asylum applicant was forced into a polygamous marriage at the age of seventeen, and, under tribal custom, would have been forced to submit to female genital mutilation (“FGM”) before the marriage was consummated.<sup>85</sup> With the help of her sister, the applicant fled Togo and ultimately reached the United States, where she immediately requested asylum.<sup>86</sup>

After an immigration judge denied her asylum, the applicant appealed to the BIA.<sup>87</sup> On appeal, she argued that she belonged to the particular 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.”<sup>88</sup> The BIA applied the *Acosta* criteria and recognized a social group defined in part by gender.<sup>89</sup> The court found

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<sup>80</sup> The Homeland Security Act of 2002 (Pub. L. No. 107-296, 116 Stat. 2135) dismantled the former Immigration and Naturalization Service (“INS”). The Act separated the former agency into three components within DHS: U.S. Citizenship and Immigration Services (“USCIS”), Immigration and Customs Enforcement (“ICE”), and Customs and Border Protection (“CBP”).

<sup>81</sup> Phyllis Coven, U.S. Dep’t of Justice, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (May 26, 1995), <http://www.state.gov/s/l/65633.htm>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *Matter of Kasinga* (1996), CENTER FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/our-work/matter-kasinga-1996> (last visited Mar. 27, 2016).

<sup>85</sup> *Matter of Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

<sup>86</sup> *Id.* at 358–59.

<sup>87</sup> *Id.* at 357.

<sup>88</sup> *Id.* at 365.

<sup>89</sup> *Id.* at 365–66.

that “[t]he characteristics of being a ‘young woman’ and a ‘member of the Tchamba-Kunsuntu Tribe’ cannot be changed.”<sup>90</sup> The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.”<sup>91</sup> The court therefore granted the applicant asylum, finding that she had a well-founded fear of persecution by or with the acquiescence of the government on account of her membership in the defined social group.<sup>92</sup>

*Kasinga* was praised as a crucial and momentous ruling.<sup>93</sup> Although the decision persuaded some immigration judges to begin granting asylum in gender-based claims,<sup>94</sup> a decision from the BIA three years later would create conflicting interpretations for domestic violence claims.

## II. DOMESTIC VIOLENCE ASYLUM BEFORE *A-R-C-G-*

### A. Matter of R-A-

On June 11, 1999, the BIA issued its first precedential decision on domestic violence asylum.<sup>95</sup> The applicant, Rody Alvarado, married her husband at sixteen years old in her native Guatemala.<sup>96</sup> From the beginning of their marriage, Ms. Alvarado suffered repugnant physical and sexual abuse at the hands of her husband:

[Ms. Alvarado’s husband] dislocated [her] jaw bone when her menstrual period was 15 days late. When she refused to abort her 3-to 4-month-old fetus, he kicked her violently in her spine . . . [He] raped her repeatedly. He would beat her before and during the

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<sup>90</sup> *See id.* at 366.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 367.

<sup>93</sup> *See U.S. Ruling on Genital Mutilation Hailed*, CHI. TRIB. (June 15, 1996), [http://articles.chicagotribune.com/1996-06-15/news/9606150074\\_1\\_mutilation-board-of-immigration-appeals-immigration-judges](http://articles.chicagotribune.com/1996-06-15/news/9606150074_1_mutilation-board-of-immigration-appeals-immigration-judges).

<sup>94</sup> 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, 123–124 (2013).

<sup>95</sup> *Id.* at 113.

<sup>96</sup> Matter of R-A-, 22 I. & N. Dec. 906, 908 (B.I.A. 1999).

unwanted sex . . . Once, he kicked the respondent in her genitalia, apparently for no reason, causing the respondent to bleed severely for 8 days. The respondent suffered the most pain when he forcefully sodomized her . . . One night, he woke the respondent, struck her face, whipped her with an electrical cord, pulled out a machete and threatened to deface her, to cut off her arms and legs, and to leave her in a wheelchair if she ever tried to leave him . . . Whenever he could not find something, he would grab her head and strike furniture with it.<sup>97</sup>

The immigration judge granted Ms. Alvarado asylum, finding that she had been persecuted 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 dominion.”<sup>98</sup> On appeal, the BIA reversed the immigration judge’s decision, finding that Ms. Alvarado’s proffered social group was “described largely in the abstract” and bore “little or no relation to the way in which Guatemalans might identify subdivisions within their own society.”<sup>99</sup> Even if the proposed social group met *Acosta*’s “immutability” requirement, Ms. Alvarado failed to show that the group was a cognizable one, meaning that the victims of spousal abuse in Guatemala view themselves as members of such a group or that the male oppressors view their victims as part of this group.<sup>100</sup>

Adding further confusion to its holding, the BIA attempted to differentiate *R-A-* from *Matter of Kasinga*, finding that Ms. Alvarado had not shown that spousal abuse is itself “an important societal attribute.”<sup>101</sup> Unlike the applicant in *Matter of Kasinga*, who had shown that women of her tribe were expected by society to undergo female genital mutilation, Ms. Alvarado did not show that

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<sup>97</sup> *Id.* at 908–10.

<sup>98</sup> *Id.* at 911. The immigration judge also found that Ms. Alvarado qualified for asylum on account of an imputed political opinion. *See id.* This Comment, however, focuses on Ms. Alvarado’s claim for asylum on account of her membership in a particular social group.

<sup>99</sup> *Id.* at 918.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 919.

women in Guatemala were expected by society to be abused, “or that there are any adverse societal consequences to women or their husbands if the women are not abused.”<sup>102</sup>

The BIA also addressed Ms. Alvarado’s argument that governments can be responsible for private actors when they fail to afford protection.<sup>103</sup> The court rejected the argument, however, because the record did not establish that the actions of Ms. Alvarado’s husband “represent[ed] desired behavior within Guatemala or that the Guatemalan government encourages domestic abuse.”<sup>104</sup> The BIA was cautious to note that it found the conduct of Ms. Alvarado’s husband “deplorable,”<sup>105</sup> but ultimately it concluded that her proposed social group was merely a “legally crafted description of some attributes of her tragic personal circumstances.”<sup>106</sup> Because Ms. Alvarado had not established a cognizable social group or a nexus between the group and her well-founded fear of persecution, the BIA found her ineligible for asylum.<sup>107</sup>

A year after the BIA’s controversial decision in *Matter of R-A-*, Attorney General Janet Reno proposed new regulations regarding asylum and withholding of removal claims.<sup>108</sup> Ms. Alvarado’s case was stayed pending the finalized regulations.<sup>109</sup> Her case was then reopened in 2004 when Attorney General John Ashcroft certified the case to himself.<sup>110</sup> At that time, DHS also filed a brief stating that the respondent’s claim warranted asylum.<sup>111</sup> In 2005, Ashcroft remanded the case to the BIA with order to decide the case when the regulations were finalized.<sup>112</sup> Ms. Alvarado waited another three years in limbo until 2008, when Attorney General Michael Mukasey

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 922.

<sup>104</sup> *Id.* at 923.

<sup>105</sup> *Id.* at 910.

<sup>106</sup> *Id.* at 919.

<sup>107</sup> *Id.* at 927.

<sup>108</sup> Asylum and Withholding Definitions, 65 Fed. Reg. 76,588–98 (proposed Dec. 7, 2000); see also Marsden, *supra* note 31, at 2529; *Developments in Domestic Violence Asylum Timeline (1985-2010)*, CENTER FOR GENDER & REFUGEE STUDIES, [http://cgrs.uchastings.edu/sites/default/files/Timeline\\_Domestic\\_Violence\\_Asylum.pdf](http://cgrs.uchastings.edu/sites/default/files/Timeline_Domestic_Violence_Asylum.pdf) (last visited Mar. 30, 2016) [hereinafter *Timeline*].

<sup>109</sup> Marsden, *supra* note 31, at 2529.

<sup>110</sup> See *id.* See also *Timeline*, *supra* note 108.

<sup>111</sup> See Marsden, *supra* note 31, at 2529. See also *Timeline*, *supra* note 108.

<sup>112</sup> See *Timeline*, *supra* note 108.

certified the case to himself, with order to decide the case without waiting for the finalization of the regulations.<sup>113</sup> The BIA then remanded the case back to the immigration judge, who granted the respondent asylum in 2009, fourteen years after she first applied in 1995.<sup>114</sup> Unfortunately, the final grant of asylum was made by a San Francisco immigration judge, and therefore did not produce any binding precedent for future domestic violence asylum claims.<sup>115</sup>

### B. Matter of L-R-

While *R-A-* was still pending on remand to the immigration judge, another notable domestic violence asylum case was underway. In *Matter of L-R-*, Ms. L-R- “suffered nearly two decades of unrelenting physical, sexual and emotional torment at the hands of her common law husband” in Mexico.<sup>116</sup> After abducting her at gunpoint and forcing her to live with him, he abused her on a daily basis.<sup>117</sup> The abuse consisted of rape, public beatings, threats, and an attempt to burn her alive.<sup>118</sup> After “numerous futile attempts” to get help from the Mexican authorities, she fled to the United States.<sup>119</sup>

The immigration judge denied Ms. L-R-’s claim, concluding that the persecution she suffered did not make her eligible for asylum because her husband “beat her simply because he was a violent man, not because of her gender or status in the relationship.”<sup>120</sup> On appeal, the BIA requested additional briefing in light of the recent developments in *Matter of R-A-*.<sup>121</sup> As a result, DHS filed a brief stating its

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<sup>113</sup> *See id.*

<sup>114</sup> *See* Marsden, *supra* note 31, at 2530. *See also* *Timeline*, *supra* note 108; *Matter of R-A-*, CENTER FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/our-work/matter-r> (last visited Mar. 30, 2016).

<sup>115</sup> *See* Marsden, *supra* note 31, at 2530.

<sup>116</sup> Brief of Respondents in Support of Application for Asylum, Withholding of Removal and CAT Relief at 10, *Matter of L-R-* (B.I.A. Mar. 10, 2010), [http://cgrs.uchastings.edu/sites/default/files/L-R-\\_brief\\_immigration\\_court\\_03\\_10\\_2010.pdf](http://cgrs.uchastings.edu/sites/default/files/L-R-_brief_immigration_court_03_10_2010.pdf) (last visited Mar. 30, 2016).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Matter of L-R-*, CENTER FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/our-work/matter-l-r> (last visited Mar. 30, 2016).

<sup>121</sup> Dep’t of Homeland Security’s Supplemental Brief, *Matter of L-R-*, at \*3 (B.I.A. Apr. 13, 2009), [http://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf) (last visited Mar. 30, 2016).

official position on domestic violence asylum: “DHS accepts that in some cases, a victim of domestic violence may be a member of a cognizable particular social group and may be able to show that her abuse was or would be persecution on account of such membership.”<sup>122</sup> Ultimately Ms. L-R-’s case was remanded and DHS agreed to stipulate that she was eligible for asylum.<sup>123</sup> Although her grant of asylum did not create binding precedent, DHS’s position itself is binding on asylum officers and DHS trial attorneys.<sup>124</sup> As such, DHS trial attorneys are effectively precluded from making arguments that are inconsistent with the agency’s official position in the brief.<sup>125</sup>

Despite DHS’s official position that asylum claims based on domestic violence may be viable, many immigration judges continued to deny victims’ claims.<sup>126</sup> Some denials were based on the applicants’ failure to satisfy other eligibility criteria, others were the result of general skepticism regarding “the viability of domestic violence as a basis for asylum under any circumstances,” and others were due to a lack of clear guidance from the BIA.<sup>127</sup> Whatever the reasoning, decisions after *L-R-* appeared to create even more confusion for victims of domestic violence hoping to seek refuge in the United States.

### III. THE BIA CHANGES COURSE IN *MATTER OF A-R-C-G-*

On August 26, 2014, fourteen years after denying Ms. Alvarado asylum in *Matter of R-A-*, the BIA issued its first published decision recognizing domestic violence as a basis for asylum. In *Matter of A-R-C-G-*, Aminta Cifuentes suffered heinous abuse by her husband

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<sup>122</sup> *Id.* at \*12.

<sup>123</sup> *Matter of L-R-*, CENTER FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/our-work/matter-l-r> (last visited Mar. 30, 2016).

<sup>124</sup> *Id.*

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

<sup>126</sup> See Bookey, *supra* note 94, at 138–40. See also, e.g., CGRS Database Case #3353 (2009) (on file with the Center for Gender & Refugee Studies); CGRS Database Case #8747 (2009) (on file with the Center for Gender & Refugee Studies); CGRS Database Case #8767 (2009) (on file with the Center for Gender & Refugee Studies).

<sup>127</sup> Bookey, *supra* note 94, at 141–43.

in her native Guatemala.<sup>128</sup> Ms. Cifuentes' husband broke her nose, burned her breast with paint thinner, and raped her.<sup>129</sup> He also hit her in the stomach so hard that she gave birth prematurely.<sup>130</sup> Ms. Cifuentes contacted the police, but they refused to interfere in a marital relationship.<sup>131</sup> When she tried to leave her husband and stay with her father, her husband found her and threatened to kill her if she did not return to him.<sup>132</sup> She attempted to escape the abuse by moving to Guatemala City, but her husband found her and convinced her to return with him by promising he would stop the abuse.<sup>133</sup> The abuse did not stop, however, so Ms. Cifuentes fled Guatemala for the United States.<sup>134</sup>

Ms. Cifuentes applied for asylum on the grounds that she feared persecution in her native Guatemala on account of her membership in the particular social group of "married women in Guatemala who are unable to leave their relationship."<sup>135</sup> The immigration judge rejected her claim, finding that her husband abused her "arbitrarily and without reason," not in order to overcome the fact that Ms. Cifuentes was a member in the described social group.<sup>136</sup>

On appeal, the BIA disagreed with the immigration judge, finding that Ms. Cifuentes had established past persecution on account of a particular social group.<sup>137</sup> The court analyzed the facts of Ms. Cifuentes' claim under the recent precedents interpreting the meaning of the term "particular social group."<sup>138</sup> First, the court held that Ms. Cifuentes' defined social group was "composed of members who share the common immutable characteristic of gender."<sup>139</sup> Next, the BIA found that the social group met the particularity requirements because the terms "women," "married," and "unable to

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<sup>128</sup> 26 I. & N. Dec. 388, 389 (B.I.A. 2014).

<sup>129</sup> *Id.*

<sup>130</sup> 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 1, 5 (2016).

<sup>131</sup> Matter of A-R-C-G-, 26 I. & N. Dec. at 389.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 388–89.

<sup>136</sup> *Id.* at 389–90.

<sup>137</sup> *Id.* at 390.

<sup>138</sup> *Id.* at 392–93.

<sup>139</sup> *Id.* at 392.

leave” “have commonly accepted definitions within Guatemalan society,” which “can combine to create a group with discrete and definable boundaries.”<sup>140</sup> Finally, the court found that the group was socially distinct because evidence showed that Guatemalan society has a culture of family violence and that sexual offenses remain “a serious problem.”<sup>141</sup> These factors, along with evidence of the Guatemalan authorities’ failure to assist victims of domestic violence, were sufficient to establish that Guatemalan society “makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave.”<sup>142</sup> After finding Ms. Cifuentes’ social group cognizable, the BIA remanded the case to the immigration judge to determine Ms. Cifuentes’ eligibility for asylum.<sup>143</sup> On remand, the immigration judge granted asylum to Ms. Cifuentes.<sup>144</sup>

#### IV. *A-R-C-G-*: CONTROVERSY, CRITICISM, AND A CALL FOR CLARITY

##### A. *Controversy and Criticism*

While *A-R-C-G-* has the potential to afford protection to women that have escaped domestic abuse, it has sparked criticism from anti-

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<sup>140</sup> *Id.* at 393.

<sup>141</sup> *Id.* at 394.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 395.

<sup>144</sup> *See Bookey*, *supra* note 130, at 9.

immigration activists.<sup>145</sup> These activists most often base their concerns on the “floodgates” theory,<sup>146</sup> arguing that opening our doors to victims of domestic violence will overwhelm the system by inciting a flood of female immigrants to seek refuge in the United States.<sup>147</sup> In the context of domestic violence asylum, the “floodgates” argument is both unsubstantiated and unrealistic. First, the critics of *A-R-C-G-* fail to recognize that domestic violence asylum applicants face a multitude of other obstacles, both personal and legal, that prevent them from obtaining asylum. Second, neither the United States nor other countries have experienced a dramatic increase in asylum applications after recognizing certain large groups as potentially eligible for asylum.

### 1. THE FLOODGATES ARGUMENT IS UNREALISTIC

Even with the benefit of *A-R-C-G-*, it is unrealistic to expect that victims of domestic violence will now travel to the United States in “floods” to obtain asylum. The unfortunate reality is that most of those who would be eligible for domestic violence asylum will not be lucky enough to even reach the United States.<sup>148</sup> Refugee expert Karen Musalo explains the obstacles that domestic violence asylum victims must overcome in order to escape their countries of origin:

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<sup>145</sup> See Redden, *supra* note 1 (“Fox News host Brian Kilmeade fumed that the decision would allow Guatemalan women to ‘get instant US citizenship as well as our benefits.’”); *id.* (“Steven Camarota . . . implied that the ruling would entice ‘tens or hundreds of millions’ of women to enter the US illegally.”). See also The Times Editorial Board, *In a World Full of Persecution, How Many People Can the U.S. Protect?*, L.A. TIMES (Sept. 15, 2014, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-guatemala-20140915-story.html> (last visited Mar. 30, 2016) (“Still, the United States can’t protect everyone who needs protection.”); Julia Preston, *In First for Court, Woman is Ruled Eligible for Asylum in U.S. on Basis of Domestic Abuse*, N.Y. TIMES (Aug. 29, 2014), [http://www.nytimes.com/2014/08/30/us/victim-of-domestic-violence-in-guatemala-is-ruled-eligible-for-asylum-in-us.html?\\_r=0](http://www.nytimes.com/2014/08/30/us/victim-of-domestic-violence-in-guatemala-is-ruled-eligible-for-asylum-in-us.html?_r=0) (last visited Mar. 30, 2016) (“Some critics predicted the numbers of foreign women seeking asylum could soon overwhelm the system.”).

<sup>146</sup> See Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y & L. 119, 132 (2007) (“Perhaps the overarching basis for the opposition to gender claims is the fear that acceptance of these cases will result in the floodgates.”).

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* at 133.

Women who would have legitimate claims for gender asylum often come from countries where they have [few] or no rights, which limits their ability to leave their countries in search of protection . . . . [T]hey are frequently—if not always—primary caretakers for their children and extended family. Thus they often have to choose between leaving family behind, or exposing them to the risks of travel to the potential country of refuge . . . . [W]omen asylum seekers often have little control over family resources, making it impossible for them to have the means to travel to a country where they might seek asylum.<sup>149</sup>

In addition to the personal challenges, victims of domestic violence that are lucky enough to escape their abusers must also navigate the complex immigration system in the United States. As detailed in Part I of this Note, to have a viable claim for asylum, an applicant must establish that she suffered past persecution or that she fears future persecution on account of her membership in a particular social group.<sup>150</sup> She must also show that the government in her native country was unwilling or unable to control her abuser.<sup>151</sup> These evidentiary standards are high, considering that many women who flee their native countries in fear for their lives likely do so without first acquiring documentary evidence to support an asylum claim.<sup>152</sup>

The vague and inconsistent administrative framework in place for adjudicating asylum claims often creates another uphill battle for victims of domestic violence seeking refuge in the United States.<sup>153</sup>

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<sup>149</sup> *See id.*

<sup>150</sup> *See* 8 U.S.C. § 1101(a)(42)(A) (2012).

<sup>151</sup> *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 395 (B.I.A. 2014).

<sup>152</sup> *See* Allison W. Reimann, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1259 (2009).

<sup>153</sup> *See* Morrissey, *supra* note 12, at 1143 (“The vague nature of asylum law forces applicants to exist in limbo and undertake long and costly legal battles to gain asylum.”); Marsden, *supra* note 31, at 2514 (“The odds of this particular form of ‘refugee roulette’ vary wildly from jurisdiction to jurisdiction, immigration

While asylum officers can grant asylum, immigration judges, who are appointed by the Attorney General, are responsible for deciding the majority of asylum cases.<sup>154</sup> Immigration judges are often appointed based on their political connections rather than their qualifications or experience in immigration law,<sup>155</sup> and they are given wide discretion when deciding asylum claims.<sup>156</sup> A study conducted by three law professors that analyzed 140,000 decisions by immigration judges over the course of four years found that the outcome of immigration cases is often influenced by factors such as the location of the court and the sex and background of the judge.<sup>157</sup> The study found that female immigration judges grant asylum at a forty-four percent higher rate than their male colleagues.<sup>158</sup> The study also found that a Haitian seeking refuge from political violence is almost twice as likely to obtain asylum in New York as in Miami.<sup>159</sup> The inconsistencies in the judges' decisions are troubling because of the potential impact they could have on refugees' lives. As one of the authors of the study noted, "these decisions can mean life or death,

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judge to immigration judge, and asylum officer to asylum officer."); Bookey, *supra* note 94, at 147–48 ("To put it plainly, whether a woman fleeing domestic violence will receive protection in the United States seems to depend not on the consistent application of objective principles, but rather on the view of her individual judge, often untethered to any legal principles at all."); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 302 (2007) ("[I]n the world of asylum adjudication, there is remarkable variation in decision making from one official to the next, from one office to the next, from one region to the next, from one Court of Appeals to the next, and from one year to the next, even during periods when there has been no intervening change in the law.).

<sup>154</sup> See Julia Preston, *Big Disparities in Judging of Asylum Cases*, N.Y. TIMES (May 31, 2007), <http://www.nytimes.com/2007/05/31/washington/31asylum.html?pagewanted=all> (last visited Mar. 27, 2016).

<sup>155</sup> Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST (June 11, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/10/AR2007061001229.html>.

<sup>156</sup> Preston, *supra* note 154 ("The wide discretion exercised by immigration judges can be disheartening to lawyers and disastrous for immigrants facing threats to their lives if they are forced to return home, immigration lawyers said.").

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

and they seem to a large extent to be the result of a clerk's random assignment of a case to a particular judge."<sup>160</sup>

Statutory exceptions also create barriers for asylum applicants.<sup>161</sup> The exceptions include a one-year filing deadline, a bar for those previously denied asylum by an immigration judge or the BIA, and a bar for those who can be removed to a safe third party country.<sup>162</sup> The one-year filing deadline, which requires an applicant seeking asylum to apply within one year of entering the United States, can be particularly problematic for victims of domestic abuse. Although regulatory exceptions to the one-year deadline may apply in "extraordinary" circumstances,<sup>163</sup> such as post-traumatic stress disorder, they are narrowly construed.<sup>164</sup> Other compelling circumstances, such as difficulty accessing legal counsel or a lack of knowledge of the relief available, would most likely not be considered "extraordinary" enough for an adjudicator to waive the deadline.<sup>165</sup>

## 2. THE FLOODGATES ARGUMENT IS NOT SUPPORTED BY PAST EXPERIENCE

The floodgates argument is further weakened by statistics from other countries and the United States showing that increased approval of gender-related claims does not result in a surge of such claims. In 1993, Canada was the first country in the world to issue "Gender Guidelines" and give protection to women that had fled gender-related violence and persecution.<sup>166</sup> Since then, Canada has maintained statistics on gender-based asylum claims and reported no increase in claims in the seven years following the adoption of

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<sup>160</sup> *Id.*

<sup>161</sup> See 8 U.S.C. § 1158(a)(2)(A)–(C) (2012).

<sup>162</sup> *Id.* at § 1158(a)(2)(A)–(C).

<sup>163</sup> *Id.* at § 1158(a)(2)(D).

<sup>164</sup> National Immigrant Justice Center, *The One-Year Asylum Filing Deadline Delays or Denies Protection to Women Fleeing Persecution*, <http://immigrantjustice.org/sites/immigrantjustice.org/files/FINAL%20One%20Year%20Asylum%20Filing%20Deadline%20-%20Women%20Case%20Stories%2006%2015%2013.pdf> (last visited Mar. 30, 2016).

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

<sup>166</sup> Musalo, *supra* note 146, at 133.

the Gender Guidelines.<sup>167</sup> In fact, gender-based claims consistently constituted “only a miniscule fraction” of Canada’s total claims.<sup>168</sup>

Even in the United States, statistics have not shown a dramatic increase in asylum claims from purported members of a particular social group after the group has been recognized as such. One scholar has labeled the floodgates argument “absurd,” noting that “[t]he BIA and US federal courts . . . have recognized many broad groups as eligible for asylum, including any Coptic Christian living in Egypt, any Filipino of Chinese ancestry living in the Philippines, or any gay or lesbian person living in Cuba.”<sup>169</sup> Many of those who opposed the decision in *Matter of Kasinga* predicted that millions of women are subject to female genital mutilation every year, and that the U.S. “would be overwhelmed with asylum seekers if it recognized fear of FGC as a basis for asylum.”<sup>170</sup> Statistics showed, however, that INS did not see a dramatic increase in the number of asylum claims based on female genital mutilation after the BIA issued its decision.<sup>171</sup>

A closer look at the floodgates theory shows that the argument has little, if any, merit. It nevertheless raises an important question: should the fear of a flood of arriving immigrants justify closing our doors to women facing life-threatening situations? While speaking at a recent symposium, Justice John Paul Stevens noted that “the fair administration of justice is never cost-free.”<sup>172</sup> In the case of domestic violence asylum, sending applicants back to countries that cannot protect them would be unreasonable even if granting them asylum would result in an increase in the number of asylum applications

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Redden, *supra* note 1.

<sup>170</sup> Musalo, *supra* note 146, at 132.

<sup>171</sup> *Id.* at 132–33 (“[A]n INS publication explicitly noted that ‘although genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on FGM’ after the Kasinga decision.”).

<sup>172</sup> The Honorable John Paul Stevens, Justice of the Supreme Court of the United States (Ret.), Keynote Address at the *University of Miami Law Review* Symposium: Criminalized Justice: Consequences of Punitive Policy (Feb. 7, 2015).

filed in the United States. The cost of the fair administration of justice for those fleeing domestic abuse is surely outweighed by the benefit of a life saved.

B. *A Call for Clarity: Continuing Need for Regulatory Reform*

The BIA's decision in *Matter of A-R-C-G-* should be celebrated for providing victims of domestic abuse with a potential path for obtaining asylum in the United States. The decision itself, however, is a narrow one, and it does not clarify many of the underlying ambiguities in domestic violence asylum law.<sup>173</sup> In order to provide clarity and generate more consistent decisions, DHS should implement the asylum regulations that were proposed by Janet Reno following the *R-A-* decision.

Although *Matter of A-R-C-G-* is an important initial step in recognizing domestic violence asylum claims, DHS should nonetheless implement the proposed amendments to the asylum regulations to clarify lingering ambiguities in the law.<sup>174</sup> "The best way to solidify the legal foundation for domestic violence asylum, reduce inconsistency in asylum adjudications, and make domestic violence asylum permanent is through the regulatory process."<sup>175</sup> The primary benefit of Reno's proposed regulations is that they provide more uniform definitions of the terms used in asylum law, such as "particular social group" and "social visibility."<sup>176</sup> Importantly, the amendments were "developed with an awareness of the circumstances surrounding persecution against women and recognize[] that domestic violence is not only a private matter and may, under certain circumstances, qualify the victim for a grant of asylum."<sup>177</sup>

While the proposed amendments do not carve out any special categories for domestic violence asylum claims,<sup>178</sup> they do include

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<sup>173</sup> For further discussion on the scope of the ruling and how it has affected recent decision-making in immigration courts, see Bookey, *supra* note 130.

<sup>174</sup> Morrissey, *supra* note 12, at 1145 ("The lack of clarity creates a system of ad hoc and inconsistent decisions that unfairly deprive deserving domestic violence-based asylum seekers of necessary guidance.").

<sup>175</sup> Marsden, *supra* note 31, at 2539.

<sup>176</sup> See Morrissey, *supra* note 12, at 1144.

<sup>177</sup> Press Release, U.S. Dep't of Justice, Questions and Answers: The *R-A-* Rule, at \*1 (Dec. 7, 2000), [https://www.uscis.gov/sites/default/files/files/pressrelease/R-A-Rule\\_120700.pdf](https://www.uscis.gov/sites/default/files/files/pressrelease/R-A-Rule_120700.pdf).

<sup>178</sup> *Id.* at 2.

several important changes: (1) the amendments clarify that sex can constitute a particular social group; (2) the amendments provide that an applicant need not prove that her persecutor was subjectively motivated to harm her; and (3) the amendments suggest that the nexus element may be established by a showing of societal norms and customs.<sup>179</sup> For domestic violence survivors seeking asylum, these changes could be significant. While the *A-R-C-G-* court found that Ms. Cifuentes' proffered gender-based social group was cognizable, the court limited its holding by noting that "in the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case."<sup>180</sup> According to the court, supporting evidence might include "documented country conditions; law enforcement statistics and expert witnesses, if proffered; the [applicant's] past experiences; and other reliable and credible sources of information."<sup>181</sup> Many domestic violence asylum applicants may appear pro se, however, which would limit their ability to obtain documented country conditions, statistics, and expert witnesses. The amended regulations are therefore needed to clarify that, despite evidentiary requirements, sex can constitute a particular social group.

The amendments are also beneficial to domestic violence asylum seekers because they loosen the nexus requirements in the particular social group analysis. In *A-R-C-G-*, DHS conceded that the abuse Ms. Cifuentes endured was, "for at least one central reason, on account of her membership in a cognizable particular social group."<sup>182</sup> The court accepted DHS's concession and did not address the issue other than to note that "the issue of nexus will depend on the facts and circumstances of an individual claim."<sup>183</sup> As such, implementing the proposed amendments would help provide guidance on the nexus requirement where *A-R-C-G-* does not.

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<sup>179</sup> Reimann, *supra* note 152, at 1253–56.

<sup>180</sup> Matter of A-R-C-G-, 26 I. & N. Dec. 388, 394–95 (B.I.A. 2014).

<sup>181</sup> *Id.* at 395.

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

<sup>183</sup> *Id.*

## CONCLUSION

*Matter of A-R-C-G-* is a landmark decision and an important step toward recognizing the viability of domestic violence asylum claims. The binding precedent from the highest administrative tribunal in the United States is encouraging and will undoubtedly have positive implications for victims of domestic abuse that seek refuge in the United States. Nevertheless, *A-R-C-G-*'s narrow holding rests against the backdrop of a confusing and inconsistent history of domestic violence asylum adjudication. The BIA's (limited) endorsement of domestic violence as a possible basis for asylum suggests that regulatory reform is still needed to clarify lingering ambiguities in the law. As such, the United States should implement amendments to the asylum regulations to ensure more consistent decision-making in the cases of women fleeing domestic violence. Regulatory reform, coupled with the BIA's groundbreaking holding in *A-R-C-G-*, would provide victims of domestic abuse with meaningful protection under United States immigration law.