

# The Politics of Domestic Violence-Based Asylum Claims

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## INTRODUCTION

The enduring difficulty of practicing asylum law is its discretionary nature. It is not an inalienable right, guaranteed in the face of any infringement of state sovereignty. Rather, it is legally and practically an international right realized in a domestic space, under domestic law. International human rights law affirms an individual's right to seek refuge and asylum in another country in order to escape persecution in his or her home country,<sup>1</sup> and further ensures that a receiving country cannot send an individual back to the country of his or her persecution.<sup>2</sup> The domestic legal systems of individual nations have the discretion to define the criteria for obtaining such protection from persecution, with the exception of general guidelines set out in the United Nations Handbook on Procedures and Criteria for Determining Refugee Status. As a result of this domestic application of international human rights standards, the United States is able to define the right, as it has with many international human rights standards, as narrowly as it sees fit. The narrowed definition is further limited by the discretion of the government officials charged with enforcing the human rights standards. This is particularly true in the case of domestic violence-based asylum claims. Not only do the he-said, she-said cases typical of domestic violence incidents dominate domestic-violence based asylum claims, but the

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1. *See generally*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (providing that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution”); Convention Relating to the Status of Refugees, July 28, 1951, 1951 U.S.T. 563 (specifying the rights of asylees and refugees in a unified international instrument, and defining a refugee as anyone who, as a result of persecution suffered before January 1, 1951, is outside his or her country of origin); Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223 (expanding the definition of “refugee” by removing the temporal limitation); Declaration on Territorial Asylum, G.A. Res. 2312 (XXII) A, U.N. Doc. A/RES/2312(XXII) (Dec. 14, 1967) (specifying that the receiving state has the authority to evaluate an individual applicant’s eligibility for asylum); and, U.N. High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) (providing guidance to government officials charged with determining refugee and asylee status).

2. *See* Convention Relating to the Status of Refugees, art. 33, Apr. 22, 1954, 1951 U.S.T. 563 (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”); *see also* Protocol Relating to the Status of Refugees, art. 1, Oct. 4, 1967, 19 U.S.T. 6223, (incorporating articles 2 through 34 of the 1951 Convention, including the principle of non-refoulement in article 33 of the Convention).

aggressor, as with most asylum claims, is also necessarily absent from the proceedings. Instead, an Immigration Judge charged with enforcing the United States' immigration law must determine whether an individual's experience of domestic violence in an entirely separate country was neither too personal to the individual perpetrator and victim, nor too universal an expression of (primarily male) aggression.

My aim in this article is to demonstrate that the individual's fundamental right to be free from persecution is hardly fundamental at all in the case of asylum law because it is subject to both a discretionary legal standard intended to comply with international law standards and the discretionary application of that standard in an individual case. Domestic violence as a ground for asylum is particularly likely to fail under this dual discretionary framework because of where such a claim falls within the legal framework. Unlike claims for asylum based on race, religion, classic political opinion, or nationality, domestic violence-based asylum claims must demonstrate that the feared or experienced persecution occurred on account of either the individual applicant's membership in a particular social group, or an imputed political opinion of opposition to female subjugation. Naturally, finding that such a particular social group exists, or finding that an individual possesses such a circumscribed political opinion is in itself subject to significant discretion, and can create a political conundrum.

In order to demonstrate the nullification of the asylum right in the case of a victim of domestic violence, I will proceed first with a description of each of the levels of discretion: the general requirements for a claim of asylum in the United States, the discretionary application of such a standard in the various federal circuits (particularly the Ninth Circuit, whose rule is separate and distinct from its sister circuits), and the general requirements and application of those requirements for an asylum claim based on membership in a particular social group. I will then outline the development of domestic violence-based asylum claims, starting with the Ninth Circuit case of *Lazo-Majano v. I.N.S.* in 1987, the Board of Immigration Appeals (BIA) decision in *In re R-A-* in 2001, and the BIA's recent decision in *Matter of A-R-C-G-* in August of 2014. Finally, I will compare domestic violence-based asylum claims with other gender- and sex-based asylum claims, such as those based on a fear of female genital mutilation and persecution based on sexual orientation or transgender identity.

## I. THE LEGAL FRAMEWORK: ASYLUM LAW IN THE UNITED STATES

The foundational document defining refugees and outlining their basic rights under international human rights law is the 1951 Convention Relating to the Status of Refugees.<sup>3</sup> Although the Convention was originally intended to deal only with the refugee crises caused by World War II, and was therefore limited to individuals who had become refugees because of events occurring before January 1, 1951, the drafters hoped the standards outlined in the Convention would endure beyond this deadline.<sup>4</sup> This was accomplished with the 1967

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3. *The 1951 Refugee Convention*, U.N. REFUGEE AGENCY, <http://www.unhcr.org/pages/49da0e466.html> (last visited Nov. 14, 2014).

4. U.N. High Comm'r for Refugees, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* by Dr. Paul Weiss 4 (1990), available at

Protocol to the Status of Refugees, which removed the Convention's temporal and geographic restrictions.<sup>5</sup>

Although the United States acceded to the 1967 Protocol on November 1, 1968, it was not until 1980 that Congress actually brought domestic law into conformity with the country's international obligations through the passage of the Refugee Act of 1980.<sup>6</sup> As a result, the 1951 Convention's definition of a refugee was codified in U.S. law as any person who "is unable or unwilling to avail himself or herself of the protection of [his or her country of origin] 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>7</sup> Although one would expect the codification of an internationally recognized definition of a refugee to lead to uniform application of the law, in reality, the United States initially granted asylum claims primarily when such an action favored the country's foreign policy interests.<sup>8</sup> In the early 1990s, the Immigration Naturalization Service (INS) divorced the adjudication of affirmative asylum cases (i.e. those where applicants brought a claim of asylum without first being charged with deportability) from the regular Examinations Branch, creating a group of agents who specialized in asylum case review and thereby decreasing the influence of ideological and foreign policy concerns in asylum law.<sup>9</sup>

Even with the increased "neutrality" applied to the evaluation of asylum applications, there is still plenty of opportunity for discretion, most notably through the interpretation of the codified definition of a refugee by Immigration Judges (IJs), the Board of Immigration Appeals (BIA), and federal appeals court judges. Under the statutory definition of a refugee, an applicant must show (1) a well-founded fear (2) of persecution (3) on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>10</sup> Before proceeding with a discussion of what this definition of refugee means for victims of domestic violence who wish to apply for asylum, it is first necessary to examine how this definition has evolved through case law.

#### A. How Afraid Are You? Establishing a Well-Founded Fear of Persecution

Under the statutory definition of a refugee, an asylum applicant must have a well-founded fear of *persecution*.<sup>11</sup> However, what constitutes "persecution" is not statutorily defined, and has only been developed through the case law of the Board of Immigration Appeals. In the seminal case of *Matter of Acosta*, the BIA noted that "persecution" has generally been construed to mean "either a threat to

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<http://www.unhcr.org/4ca34be29.html> (citing Recommendation E. of the Convention, in which the Conference "[e]xpressed the hope that the Convention would have value as an example exceeding its contractual scope . . .").

5. Protocol Relating to the Status of Refugees, art. I, *concluded* Jan. 31, 1967, 19 U.S.T. 6223.

6. *Id.*; Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980).

7. 8 U.S.C. § 1101(a)(42)(A) (2012).

8. IMMIGRANT LEGAL RESOURCE CENTER, ESSENTIALS OF ASYLUM LAW 1-1 (2d ed. 2013).

9. *Id.*

10. 8 U.S.C. § 1101(a)(42)(A) (2012).

11. *Id.*

the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”<sup>12</sup> Since the federal courts of appeals must generally apply *Chevron* deference to any agency interpretation of a governing statute that is reasonable, this understanding of what constitutes “persecution” also applies on appeal from the BIA.<sup>13</sup> However, persecution may arise out of the cumulative effect of harm resulting from incidents that would not independently amount to persecution, such as discrimination under conditions of insecurity in the country of origin, according to the *Handbook on Procedures and Criteria for Determining Refugees Status*, which is published by the Office of the High Commissioner for Refugees and considered a relevant source for interpreting U.S. asylum law.<sup>14</sup>

A further complication in finding a well-founded fear of persecution is that such a fear is necessarily subjective and objective. That is, the applicant must both experience the persecution as such, and a reasonable individual under his or her circumstances must also experience the conduct at issue as persecution.<sup>15</sup> Interestingly, the BIA has held that the perpetrator of the allegedly persecutory conduct need not intend to harm or to persecute the applicant for his or her conduct to qualify as persecution.<sup>16</sup> By broadening the definition of persecution in this way, the BIA has created room for asylum claims based on cultural practices, such as female genital mutilation.

Further room for asylum claims based on “private,” superficially apolitical persecution is evident in the possibility of persecution by both state and non-state actors. Where an applicant believes she has suffered persecution at the hands of a state actor (i.e. a member of the government or a government-sponsored organization), she does not need to show that she attempted to report the suffered harm (or the fear of such harm) to the local police.<sup>17</sup> However, when

12. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985).

13. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding that, on review of an agency’s construction of its governing statute, a court must first determine whether the agency has contradicted Congress’s clearly expressed intent; if Congress has not expressed any clear intent, then the court must determine “whether the agency’s answer is based on a permissible construction of the statute”). See *Taing v. Napolitano*, 567 F.3d 19, 23 (1st Cir. 2009) (outlining the two-step analysis from *Chevron* in an immigration context); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“The weight accorded to an administrative judgment will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control . . .”) (internal quotations omitted).

14. Office of the U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 53 (1992), available at [http://www.hrea.org/learn/tutorials/refugees/Handbook/hbpart1.htm#Handbook Chapter One](http://www.hrea.org/learn/tutorials/refugees/Handbook/hbpart1.htm#Handbook%20Chapter%20One) [hereinafter U.N. Handbook]; *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 438–39 (1987) (finding the Handbook an appropriate source for interpreting asylum law, given that the entire purpose of the Refugee Act of 1980 was to bring U.S. domestic law into conformity with its international obligations).

15. U.N. Handbook, *supra* note 14, ¶ 52.

16. *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (holding that a subjective “punitive” or “malignant” intent is not required for the harm to constitute persecution in the context of the common cultural practice of female genital cutting).

17. 8 C.F.R. § 208.13(b)(3)(ii) (2013) (“In cases in which the persecutor is a government or is government sponsored . . . it shall be presumed that internal relocation would not be reasonable . . .”); *Baballah v. Ashcroft*, 359 F.3d 1067, 1078 (9th Cir. 2004) (holding that “when the government is

the applicant has suffered harm that she believes amounts to persecution from a non-state actor, she must show that the government is unwilling or unable to control the violence, either by showing that the government tried and failed to protect her, or by showing the government refused to take action to protect her.<sup>18</sup> Although the easiest way for an applicant to show that her government is unwilling or unable to protect her is by showing a record (or lack thereof) of police action taken after she filed a report, she can also demonstrate the futility of making a police report by providing evidence that others have “made reports of similar incidents to no avail,” or by showing that “private persecution of a particular sort is widespread and well-known but not controlled by the government.”<sup>19</sup>

Case law and relevant regulations have also limited the types of harm that amount to persecution. For example, while multiple beatings and non-life threatening violence can be sufficient in some cases, in other cases, courts have refused to recognize even multiple beatings as persecution.<sup>20</sup> However, there are certain gender-based inflictions of violence that usually qualify as persecution. For example, in *Ochave v. Immigration and Naturalization Service*, the Ninth Circuit held that “[r]ape is the kind of infliction of suffering or harm that may support a finding of past persecution, provided that the applicant demonstrates that the rape was on account of a statutorily protected ground, such as an imputed political opinion.”<sup>21</sup> Similarly, the BIA has held that female genital mutilation can constitute persecution.<sup>22</sup> The Department of Justice emphasizes, however, that a victim must experience the treatment as harm in order to have suffered persecution.<sup>23</sup>

An applicant may also, in some cases, establish persecution based on mental, emotional, and psychological harm. For example, in *Kovac v. Immigration and Naturalization Service*, the Ninth Circuit held that persecution could result from both physical and mental harm.<sup>24</sup> Similarly, in *Abay v. Ashcroft*, the Sixth Circuit held that a mother could establish persecution based on her “fear that her daughter [would] be subjected to the torture of female genital mutilation.”<sup>25</sup> In the domestic violence context, these precedents, despite coming from the federal courts instead of the BIA, are useful for the proposition that persecution is not necessarily limited to physical harm, but could be supplemented by psychological harm, which in fact often increases the total trauma experienced by the victim.<sup>26</sup>

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responsible for persecution . . . no inquiry into whether a petitioner reported the persecution to police is necessary”).

18. ESSENTIALS OF ASYLUM LAW, *supra* note 8, at 2-4 to 2-5.

19. *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010) (citing *Afriye v. Holder*, 613 F.3d, 924, 932–33 (9th Cir. 2010) and *Avetova-Elisseva v. Immigration & Naturalization Serv.*, 213 F.3d 1192, 1198 (9th Cir. 2000)).

20. ESSENTIALS OF ASYLUM LAW, *supra* note 8, at 2-8.

21. *Ochave v. Immigration & Naturalization Serv.*, 254 F.3d 859, 864 (9th Cir. 2001).

22. *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

23. *Asylum and Withholding Definitions*, 65 Fed. Reg. 76588, 76590 (proposed Dec. 7, 2000).

24. *Kovac v. Immigration & Naturalization Serv.*, 407 F.2d 102, 106–07 (9th Cir. 1969).

25. *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004).

26. NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, PSYCHOLOGICAL ABUSE 1–2, *available at* <http://www.ncadv.org/files/PsychologicalAbuse.pdf>.

It is also important to note the difference between having a well-founded fear based on past persecution, and a well-founded fear of *future* persecution. Under the regulations governing asylum applications, if an applicant can demonstrate past persecution, she is entitled to the presumption that she will have a well-founded fear of persecution in the future.<sup>27</sup> With this presumption, the burden shifts to the government to show either that there has been a “fundamental change in circumstance such that the applicant no longer has a well-founded fear of persecution,” or that the applicant could reasonably relocate within her country of origin in order to avoid persecution.<sup>28</sup> In the case of domestic and other family violence, it may often be possible for the government to argue that it would be reasonable for an asylum applicant to relocate within her home country and thereby escape the violence.

Finally, the refugee definition also requires that an applicant’s fear of persecution be well founded. This does not mean that the applicant has a greater than 50% chance of suffering persecution upon return to her country of origin. Rather, the applicant must demonstrate a subjectively genuine and objectively reasonable fear of returning to her country of origin.<sup>29</sup> In determining whether the applicant’s fear of persecution is objectively reasonable, courts consider various factors, including: (1) whether the applicant was individually targeted;<sup>30</sup> (2) whether any of the applicant’s family members have suffered violence at the hands of alleged persecutors;<sup>31</sup> (3) whether there is a pattern or practice of persecution of similarly situated individuals in the applicant’s country of origin;<sup>32</sup> and (4) whether the threat of persecution for the applicant is country-wide.<sup>33</sup>

#### B. Does Your Fear Qualify You as a Refugee?: Establishing the Nexus Between a Well-Founded Fear of Persecution and the Protected Ground

An applicant does not qualify for asylum merely by showing that he or she has a well-founded fear of persecution. No matter how terrible the harm suffered, an applicant cannot qualify for asylum unless she can also show that the persecution occurred *on account of* one of the five enumerated grounds – (1) race, (2) religion, (3) national original, (4) membership in a particular social group, or (5) political opinion – by showing some evidence of the persecutor’s motives.<sup>34</sup> The problem in practice, of course, is that persecutors are not purists.

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27. 8 C.F.R. § 208.13(b)(1) (2013).

28. 8 C.F.R. § 208.13(b)(1)(i)(A)–(B) (2013).

29. *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987).

30. *Salari v. Ashcroft*, 114 F. App’x 815, 816 (9th Cir. 2004) (“Even if this past harm were not sufficient to demonstrate past persecution, it does demonstrate the reasonableness of [the applicant’s] fear of future persecution.”)

31. *Korablina v. Immigration & Naturalization Serv.*, 158 F.3d 1038, 1044 (9th Cir. 1998) (“Persecution may be found by cumulative, specific instances of violence and harassment toward an individual or her family members . . . .”)

32. 8 C.F.R. § 208.13(b)(2)(iii) (2013).

33. 8 C.F.R. § 208.13(b)(2)(ii) (2013).

34. *Immigration & Naturalization Serv. v. Elias-Zacarias*, 502 U.S. 478, 483–84 (1992) (holding that an asylum applicant must show at least some proof the alleged persecutor’s motivation in order to fulfill the “on the account of” requirement).

In many cases, an alleged persecutor harms an asylum applicant for several reasons, only one of which may constitute an enumerated grounds.<sup>35</sup> Under the REAL ID Act of 2005, Congress dictated that race, religion, national origin, membership in a particular social group, or political opinion “was or will be at least one central reason for persecuting the applicant.”<sup>36</sup>

Race, religion, and national origin are not used as enumerated grounds in domestic violence-based asylum claims, and are therefore outside the scope of this paper, but membership in a particular social group and political opinion are applicable in the case of domestic violence.

### 1. Take a Stand. . . or Don't: How Political Do You Need to Be?

A political opinion, for the purposes of the refugee definition, need not be expressed through participation in organized political activities.<sup>37</sup> Further, a qualifying political opinion may be expressed non-verbally or only in private.<sup>38</sup> There is no requirement that an asylum applicant act on her political opinion in order to be subject to persecution on account of that political opinion.<sup>39</sup> A political opinion can actually include the view that certain rights, such as the right to privacy, the right to bodily integrity, the right to have a family, and the right to have unfettered reproductive choice, are fundamental and that “the election to exercise them should be respected and not trampled.”<sup>40</sup>

Furthermore, a political opinion may be imputed when through legally cognizable inferences or otherwise, “an alien establishes a *prima facie* case that he is likely to be persecuted because of the government’s belief about his views or loyalties, his actual political conduct, be it silence or affirmative advocacy, and his actual political views, be they neutrality or partisanship, are irrelevant; False”<sup>41</sup> As such, even if an individual does not himself or herself hold a particular political opinion that a persecutor opposes, that political opinion may be imputed to the asylum applicant if the persecutor was motivated by that political opinion to persecute the applicant. For example, in *Hernandez-Ortiz v. Immigration and Naturalization Service*, the Board of Immigration Appeals

35. See *Gafoor v. Immigration & Naturalization Serv.*, 231 F.3d 645, 650 (9th Cir. 2000) (“[M]otives can be difficult to pin down . . . Persecutors do not always take the time to tell their victims all the reasons they are being beaten or kidnaped or killed.”)

36. REAL ID Act of 2005, 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

37. *Meza-Menay v. Immigration & Naturalization Serv.*, 139 F.3d 759, 763 (9th Cir. 1998).

38. *Rivas-Martinez v. Immigration & Naturalization Serv.*, 997 F.2d 1143, 1147 (5th Cir. 1993) (rejecting the BIA’s reasoning that, since the applicant gave a non-political excuse for not assisting her alleged persecutors, she necessarily was not persecuted on account of her political opinion because (1) it would be absurd to require asylum applicants to “foolhardily court death by informed armed guerrillas to their faces that she detests them or their actions or their ideologies,” and (2) it is wrong to assume that the persecutors believed the applicant’s proffered non-political reason for her refusal to comply with their demands).

39. ESSENTIALS OF ASYLUM LAW, *supra* note 8, at 3-8 (citing DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 297 (Paul T. Lufkin ed., 3d ed. 1999)).

40. In re C-Y-Z-, 21 I. & N. Dec. 915, 921–22 (B.I.A. 1997) (concurring opinion) *overruled on other grounds* by Att’y Gen. Order No. 2964-2008 (May 15, 2008).

41. *Hernandez-Ortiz v. Immigration & Naturalization Serv.*, 777 F.2d 509, 517 (9th Cir. 1985), *superseded by statute on other grounds as stated in Parussimova v. Mukasey*, 533 F.3d 1128 (9th Cir. 2008).

considered evidence of the government of El Salvador killing, kidnapping, beating, threatening, robbing, and harassing the applicant's family members to find that she had established a prima facie case of persecution on account of her imputed political opinion, even though the applicant herself had not suffered such violence.<sup>42</sup>

## 2. To Which Clique Do You Belong?: Define Your Particular Social Group

In order to establish membership in a particular social group as a ground for persecution, an asylum applicant must meet a high standard subject to the discretion of the IJ. First, the applicant must demonstrate that membership in his or her particular social group is based on an immutable characteristic, judicially defined as "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 not be required to be changed."<sup>43</sup> Such a characteristic could be innate, such as sex, color, or kinship ties, or a shared experience, such as former military leadership or land ownership.<sup>44</sup>

Second, an applicant must show that his or her proposed particular social group has sufficient "particularity"—that the group is "sufficiently distinct that it would constitute a discrete class of persons."<sup>45</sup> In other words, the applicant must be able to show that the immutable characteristics "provide a clear benchmark for determining who falls within the group."<sup>46</sup>

Last, the applicant must supply a particular social group that has sufficient "social distinction" or "social visibility." In essence, the proposed group must be perceived as a group by the society in which it is situated; members of the relevant society need not be able to identify the group's members on sight.<sup>47</sup> Examples of groups that satisfy these three requirements include family ties, clan membership, sexual orientation, and former gang membership.<sup>48</sup> Gender, as a relevant immutable characteristic that applicants either cannot change or should not be required to change, qualifies as a defining characteristic of a social group, along with other "immutable/fundamental characteristics", including bodily integrity and refusal to conform or submit.<sup>49</sup>

## II. WORKING WITHIN THE FRAMEWORK?: DOMESTIC VIOLENCE-BASED ASYLUM

When the refugee definition was first codified in 1951, domestic violence was not understood as a punishable offense in many countries, let alone as grounds for claiming asylum. In the United States, from the 1920s through the 1970s, victims of domestic abuse (i.e. wife beating and child abuse) were seen as part of the problem, and "domestic trouble cases" were seen as an opportunity to

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42. *Id.* at 516–17.

43. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

44. *Id.*

45. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 210 (B.I.A. 2014) (internal quotations omitted).

46. *Id.* at 214.

47. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 240 (B.I.A. 2014).

48. *ESSENTIALS OF ASYLUM LAW*, *supra* note 8, at 3-25 to 3-29.

49. *Id.* at 3-32.

help women “master the habits of cleanliness, nutrition, and childcare.”<sup>50</sup> Thus, the concept of domestic violence was considered a private issue, to be solved only by ensuring that the victims of violence stopped causing their batterers to get angry and attack. If an applicant had proposed, even after the signing of the 1967 Protocol, that domestic violence could be a basis for asylum, adjudicators likely would have ridiculed those lawyers radical enough to bring such a claim.

Nevertheless, ever since the Board of Immigration Appeals first held in *Matter of Acosta* that sex was among the immutable characteristics that could define a particular social group, two legal theories have evolved for treating domestic violence as a qualifying form of persecution.<sup>51</sup>

#### A. Are You Feminist Enough?: Political Opinion as a Basis For Gender-Based Asylum

First, the doctrine of imputed political opinion can be used where the victim opposed laws that discriminate against her on the basis of gender, or where she fears persecution on the basis of her feminist beliefs. Iranian women seem to be the most compelling case for an imputed political opinion, although the courts are reluctant to actually grant these women’s asylum applications. For example, in *Fatin v. Immigration and Naturalization Service*, the Third Circuit held that an Iranian woman who opposed Iran’s gender-specific laws was not entitled to asylum because she did not show that she was a member of her proposed particular social group (women who would prefer to suffer the consequences of noncompliance with the discriminatory laws).<sup>52</sup> In addition, the applicant never showed that she would refuse to comply with the gender-specific laws.<sup>53</sup>

Similarly, in *Sharif v. Immigration and Naturalization Service*, the Seventh Circuit found that even if “Westernized women” in Iran constituted a particular social group, the applicant failed to show that she would be “either unable or unwilling to comply with Iranian law when she return[ed] to Iran.”<sup>54</sup> The applicant further failed to prove that she would voice her Western notions when she returned to Iran, since she had no history of objecting to Iran’s discriminatory laws.<sup>55</sup> The Court sympathized with the applicant because it understood that a woman who did not agree with the prevailing gender hierarchy in Iran would not enjoy living there, but it found that a preference for an American lifestyle was not sufficient for a successful asylum claim.<sup>56</sup>

Finally, in *Safaie v. Immigration and Naturalization Service*, the Eighth Circuit held that an Iranian woman who advocated women’s rights and opposed Iranian dress and behavior codes for women was not entitled to asylum because the applicant wore the required dress and was not actually harmed or mistreated for

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50. KATHARINE T. BARTLETT, ET AL., *GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY* 386 (6th ed. 2013) (citing Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 992–93 (1995)).

51. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

52. *Fatin v. Immigration & Naturalization Serv.*, 12 F.3d 1233, 1240 (3d Cir. 1993).

53. *Id.*

54. *Sharif v. Immigration & Naturalization Serv.*, 87 F.3d 932, 936 (7th Cir. 1996).

55. *Id.*

56. *Id.*

participating in the taboo activities of smoking and wearing makeup.<sup>57</sup> Further, the Court found that the applicant did not have some “missionary fever to defy the law,” and could in fact avoid any danger of persecution by refraining from expressing her opposition to the restrictions on women’s activities in Iranian law.<sup>58</sup>

The question of whether an Iranian woman should be required to risk subjecting herself to corporal punishment in Iran in order to establish her membership in a women’s rights-minded, particular social group is a matter outside the scope of this paper, but demonstrates another instance in which the requirements for a successful asylum claim can seem unreasonable. These gender-based political opinion cases are themselves highly political. In all three cases, the federal court is reluctant to condone the discriminatory laws in force in Iran, but the judges are also hesitant to find that opposition to those laws qualifies an individual woman for asylum. In *Fatin*, the Third Circuit held that the applicant did not qualify for asylum because she did not actually express her opposition to the discriminatory laws.<sup>59</sup> This seems to contradict the standard enumerated in *Rivas-Martinez*, where the Fifth Circuit pointed out that it would be ridiculous to require political opponents to express their disfavored opinions to their possible persecutors;<sup>60</sup> the essential requirement is that the persecutor must have persecuted the applicant, or will likely persecute the applicant in the future on his or her return to his or her country of origin on account of that political opinion.

The Seventh Circuit made a similar erroneous distinction in *Sharif*, when it found that the applicant did not qualify for asylum in part because she was not likely to express her western point of view about a woman’s role in society upon her return to Iran.<sup>61</sup> The Eighth Circuit departed even further from the *Rivas-Martinez* standard in *Safaie* when it acknowledged that the applicant would continue to engage in taboo activities upon her return to Iran, and thereby would express her political opposition, but that the applicant did not qualify for asylum because she did not possess the requisite missionary zeal to fight the discriminatory laws, and would be willing to refrain from expressing her opinions in order to avoid persecution.<sup>62</sup>

## B. Are You Unique Enough?: Membership in a Particular Social Group as a Basis for Gender-Based Asylum Claims

As is apparent from the discussion of the Iranian cases in the previous subsection, the federal courts and the BIA have a tendency to mingle the standards for membership in a particular social group and political opinion, finding that an individual who held feminist beliefs did not express them clearly, loudly, and consistently enough to qualify for membership in the relevant

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57. *Safaie v. Immigration & Naturalization Serv.*, 25 F.3d 636, 640 (8th Cir. 1994), *superseded by statute on other grounds as stated in* *Ngengwe v. Mukasey*, 543 F.3d 1029, 1035 (8th Cir. 2008).

58. *Id.*

59. *Fatin v. Immigration & Naturalization Serv.*, 12 F.3d 1233, 1240 (3d Cir. 1993).

60. *Rivas-Martinez v. Immigration & Naturalization Serv.*, 997 F.2d 1143, 1147 (5th Cir. 1993).

61. *Sharif*, 87 F.3d at 936.

62. *Safaie*, 25 F.3d at 640.

particular social group. As a result, it is important not only to ensure that the applicant actually fits into the proposed particular social group, but also that the proposed group is defined by immutable characteristics that make the group sufficiently particular and socially distinct.

For example, in *Kante v. Holder*, the Sixth Circuit found that the particular social group of “women subjected to rape as a method of government control” did not qualify as a group for the purposes of an asylum claim because they were circularly defined by the persecution suffered—the members (women subjected to rape as a method of government control) suffered persecution on account of such membership because they were raped as a method of government control, or were at risk of such treatment (i.e. the persecution).<sup>63</sup> In addition, the Court found that the broader social group of just women (defined by the immutable characteristic of sex) did not qualify because the applicant did not show that the Guinean government or society “viewed females as a group specifically targeted for mistreatment.”<sup>64</sup>

An example of a successful asylum claim based on membership in a particular social group is in the Third Circuit case of *Gomez-Zuluaga v. Attorney General of the United States*. In that case, the Court denied the applicant’s claims that her abduction and involuntary confinement by a guerilla group, and her subsequent surveillance by the group to determine whether she was dating any government officers, qualified her for asylum because the applicant’s political opinion was not “one central reason” for her persecution.<sup>65</sup> Thus, she was not entitled to the presumption of a well-founded fear of future persecution based on her past persecution. However, the Court *did* find that the applicant had a well-founded fear of persecution based on her membership in the particular social group of Colombian women who escaped involuntary servitude after being abducted and confined by a guerrilla group.<sup>66</sup> The defined social group was not circular because the feared persecution was death, not abduction or confinement. Further, the Court found that this fear was subjectively genuine—the applicant feared she would be killed if she did not go back to work for the guerrilla group.<sup>67</sup> In addition, the applicant’s fear was objectively reasonable because several of her family members had been harmed or threatened by the guerrilla group, the applicant herself had been receiving threatening phone calls and messages since her abduction, and state department reports supported her argument that the guerrilla group practiced “systemic and pervasive” forced conscription and violence.<sup>68</sup>

The principal difference between *Kante* and *Gomez-Zuluaga* is one of degree as well as credibility of the witness. The applicant in *Kante* had been attacked in the past, but the Court found that she failed to establish that the attack was caused by Guinean government forces motivated by retribution for her father’s political activity, and was hesitant to trust her description of the past attack

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63. *Kante v. Holder*, 634 F.3d 321, 326–27 (6th Cir. 2011).

64. *Id.* at 327.

65. *Gomez-Zuluaga v. Att’y Gen. of U.S.*, 527 F.3d 330, 341 (3d Cir. 2008).

66. *Id.* at 346–48.

67. *Id.* at 347.

68. *Id.* at 347–48.

because she changed the description of her attackers between her first and second asylum applications.<sup>69</sup> Of course, it is well established that one symptom of rape trauma syndrome is an inability to recall the specific events of the trauma, so it is not at all surprising that an asylum applicant, faced with the ominous task of describing her attackers for the purposes of avoiding deportation to the country where she was attacked, would have confused memories of what her attackers looked like.<sup>70</sup> This is not to say that all asylum applicants who claim memory loss on account of rape trauma syndrome are necessarily credible and should automatically be granted asylum on account of an appropriately defined particular social group. Rather, asylum law and immigration law in general should at least place the memory loss in the context of the trauma suffered, as is done in domestic U.S. criminal law.<sup>71</sup>

By contrast, in *Gomez-Zuluaga*, the applicant suffered a considerably less gendered form of past persecution (abduction and confinement), even though this past persecution did not qualify her for asylum because it was not on account of an enumerated ground. Further, she was able to identify a particular social group that was not defined by a gendered harm (such as rape), and did not suffer from the problem of circularity. In *Gomez-Zuluaga*, the inclusion of “women” in the definition of the proposed particular social group was nothing more than a limiting characteristic. It had very little bearing on the type of persecution that would be suffered. Sex in this case was nothing more than a benchmark that helped to define who was in the group and who was not. Further, the applicant did not suffer from the unfortunate possible memory loss that the applicant in *Kante* could have experienced as a result of her past attack.

### C. The Legal Basis for Domestic Violence as a Basis for Asylum

The first successful domestic violence-based asylum case was the Ninth Circuit decision in *Lazo-Majano v. Immigration and Naturalization Service*. There, an army sergeant physically and sexually abused a female applicant, compelling her to leave the country.<sup>72</sup> The Court found that persecution was “stamped on every page” of the record, and that the applicant had been “singled out to be bullied, beaten, injured, raped, and enslaved.”<sup>73</sup> The Court determined that the sergeant had “assert[ed] the political opinion that a man has a right to dominate,” and

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69. *Kante*, 634 F.3d at 325.

70. *Rape Trauma Syndrome*, CMTY. CRISIS CTR., INC., <http://www.crisiscenter.org/images/SAINDoc7.pdf> (last visited Nov. 14, 2014). See also Holly Hogan, *The False Dichotomy of Rape Trauma Syndrome*, 12 CARDOZO J. L. & GEND. 529, 533 (2005-2006) (citing several studies supporting the proposition that “rape victims may have trouble remembering and may even give inconsistent statements about the rape, which may be counterintuitive behavior responses to some who believe that one would never forget such a traumatic experience”).

71. BARTLETT, ET AL., *supra* note 50, at 631–32 (noting that “[s]ome courts have approved use of expert testimony about rape trauma syndrome to help prove that a forcible assault, rather than consensual sex, occurred . . .”).

72. *Lazo-Majano v. Immigration & Naturalization Serv.*, 813 F.2d 1432, 1433 (9th Cir. 1987) *overruled on other grounds by* *Fisher v. Immigration & Naturalization Serv.*, 79 F.3d 955, 963 (9th Cir. 1996) (holding that the Court of Appeals’ review is limited to the administrative record on which the deportation order is based and the Attorney General’s findings of fact).

73. *Id.* at 1434.

that the applicant showed her opposition to that political opinion by fleeing the country.<sup>74</sup> The applicant was not allowed to hold an opinion contrary to that of the sergeant—“[w]hen by flight, she asserted one, she became exposed to persecution for her assertion. Persecution threatened her because of her political opinion.”<sup>75</sup> Once again, the Court had trouble basing its decision on the gendered violence that the applicant suffered at the hands of her persecutor. Instead, the Court imagined both the persecutor and the victim to have a political opinion about the appropriate power relation between the sexes. Further, given the persecutor’s position in the Armed Forces, “a military power that exercises domination over much of El Salvador despite the staunchest efforts of the Duarte government to restrain it,” the Court easily got around the issue of whether the applicant’s fear of persecution would be country-wide—she reasonably believed that the sergeant would be able to use his connections to find her if she escaped within El Salvador.<sup>76</sup>

The *Lazo-Majano* approach of using a domestic violence victim’s political beliefs for a claim of asylum stood alone in immigration case law until 1999, when the Board of Immigration Appeals tackled the case of Rody Alvarado. Rody’s husband spent the entirety of their marriage mistreating her.<sup>77</sup> He had to know what she was doing at every moment of every day and accompanied her everywhere except for her workplace.<sup>78</sup> He threatened her with stories of killing babies and the elderly while he was in the army, and often got drunk.<sup>79</sup> When Rody complained about her husband’s drinking he would yell at her, and once clenched her hand and continued drinking until he passed out.<sup>80</sup> Over the course of the marriage, the violence increased, as Rody’s husband dislocated her jaw when her period was 15 days late, and beat her before and after he raped her.<sup>81</sup> If she resisted, her husband would accuse her of cheating and threaten to kill her.<sup>82</sup>

Rody tried to escape her husband’s wrath by running away to the homes of family members, but he always found her.<sup>83</sup> When she tried to flee the city with her children, her husband found them again, and beat her unconscious.<sup>84</sup> During the trial, Rody at first maintained that she did not know why her husband treated her so badly, but she guessed it had something to do with his own mistreatment during his time in the army.<sup>85</sup> Rody also tried to report her husband’s abusive behavior to the police and to the courts. Her husband ignored the police’s summons to appear and the police failed to take further action. A judge told Rody that he “would not interfere in domestic disputes.”<sup>86</sup> The BIA,

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74. *Id.* at 1435.

75. *Id.*

76. *Id.* at 1434.

77. *In re R-A-*, 22 I. & N. Dec 906, 908 (B.I.A. 1999).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *In re R-A-*, 22 I. & N. Dec. 906, 909 (B.I.A. 1999).

84. *Id.*

85. *Id.*

86. *Id.*

upon hearing the horrific tales of Rody's abuse, "struggle[d] to describe how deplorable [the court] find[s] the husband's conduct to have been."<sup>87</sup> Neither the Immigration Judge nor the BIA had much trouble finding that the beatings and rapes Rody suffered constituted past persecution, and that the Guatemalan government was unwilling or unable to control Rody's husband.<sup>88</sup> The IJ found that Rody was persecuted both on account of her imputed political opinion "that women should not be dominated by men," and 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."<sup>89</sup>

On the first hearing of the case, however, the Board of Immigration Appeals struggled to find a ground for a domestic violence-based asylum claim. Reviewing the record, the BIA found no indication of any political opinion of the applicant, and inferred from the duration and the persistence of the abuse, despite Rody's many attempts to appease her husband, that the abuse was completely unrelated to any political opinion, imputed or actual.<sup>90</sup> Further, the BIA found that Rody's proposed particular social group ("Guatemalan women who have been intimately involved with Guatemalan male companions who believe that women are to live under male domination") did not qualify because it was defined for the purposes of the asylum case, and it seemed unlikely that any Guatemalan might recognize such a social group within their own society.<sup>91</sup> Moreover, the BIA failed to see how Rody's husband's behavior occurred on account of her membership in such a social group, since he did not "show[] an interest in any member of the group other than [Rody] herself."<sup>92</sup> Finding that Congress did not intend "social group" to provide a legal basis for domestic violence-based asylum claims, the Court punted the case back to the parties and to Congress, noting that the district director could grant Rody relief on humanitarian grounds, and that Congress could amend the asylum law to include an asylum claim for abused women.<sup>93</sup>

In the nine years after the initial BIA decision, Attorney General Reno vacated the decision, the Department of Homeland Security issued a brief that conceded Rody's eligibility for asylum based on her membership in the particular social group of "married women in Guatemala who are unable to leave their relationship," and the DHS issued proposed regulations that have never been finalized. Finally, in 2008, Attorney General Mukasey directed the BIA to revisit the case in light of the new criteria of social visibility and

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87. *Id.* at 910.

88. *Id.* at 911.

89. *In re R-A-*, 22 I. & N. Dec. 906, 911 (B.I.A. 1999).

90. *Id.* at 916 ("The respondent's husband, it seems, must have had some reason or reasons for treating the respondent as he did. And it is possible that his own view of men and women played a role in his brutality, as may have been the case with the brutality that he himself experienced and witnessed. What we find lacking in the respondent's showing, however, is any meaningful evidence that her husband's behavior was influenced at all by his perception of the respondent's opinion.").

91. *Id.* at 918.

92. *Id.* at 920.

93. *Id.* at 928.

particularity of particular social groups.<sup>94</sup> However, the original reasoning of the first BIA decision still applied, since Rody was granted asylum by the IJ in a one-sentence unpublished opinion.<sup>95</sup> As such, the heightened (and confusing) standards for what constitutes membership in a particular social group continued to apply: a victim of spousal abuse had to see herself (or himself) as a member of the defined social group, the abusers themselves also had to see their victims as a member of this group, and society itself had to consider the characteristic of being abused important.<sup>96</sup> The stringency of these factors had the effect of making domestic violence-based asylum claims a very fact-intensive process that involved the recruitment of experts to testify on the perception of domestic violence in the applicant's country of origin, and extensive preparation of the applicant herself (or himself), to ensure that she effectively portrayed her perception of herself as a member of the relevant social group, and that her abuser identified her as a group member as well.

Running almost parallel with Rody Alvarado's case was the case of Ms. L-R-<sup>97</sup> who was raped at gunpoint by her 33-year-old sports coach when she was just nineteen years old, and subsequently suffered almost two decades of "unrelenting physical, sexual and emotional torment" from her attacker, who became her common-law husband.<sup>98</sup> When L-R- became pregnant, she attempted to escape her abuser's wrath and fled through a window, but her abuser found her at the bus stop, brought her home, locked her in their bedroom, and tried to kill her by burning her alive when she fell asleep that night.<sup>99</sup> Luckily, she managed to put out the fire with wet towels.<sup>100</sup> Although it was very difficult for L-R- to report her abuser's behavior to the police due to his constant supervision, she managed to sneak out and file police reports on about eight occasions. However, every time she made a report, "the officer in charge made her show him her bruises, and touched her, before telling [her] that there was nothing the police could do because [her husband's] abuse was a private matter and her life was not in danger."<sup>101</sup> Moreover, whenever L-R- went to the police, her abuser immediately found out about it because he was friendly with several police officers, and he would beat her even more as punishment.<sup>102</sup>

In April 1995, L-R- returned home from work to find an empty house—all of her belongings and her children were gone, taken by her husband.<sup>103</sup> She tried to

94. ESSENTIALS OF ASYLUM LAW, *supra* note 8, at 3-36.

95. Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURVEY QUARTERLY 46, 47 (2010).

96. ESSENTIALS OF ASYLUM LAW, *supra* note 8, at 3-37.

97. Unlike Rody Alvarado, Ms. L-R-'s name has not been made public, as all asylum cases are confidential.

98. Brief for Respondents in Support of Applications 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) [hereinafter CGRS Brief].

99. *Id.* at 19.

100. *Id.*

101. *Id.* at 20-21.

102. *Id.* at 21.

103. *Id.* at 23.

get help from the Desarrollo Integral de la Familia (DIF), an organization in the Mexican government that assists individuals with domestic violence problems, but the DIF attorney refused to help L-R- because her sister was president of DIF in a different town.<sup>104</sup> L-R- also tried to go to court to get custody of her children, but the first judge awarded custody to her abuser, despite his knowledge of the abuse.<sup>105</sup> The second judge informed L-R- that he would award her custody of her kids if she had sex with him.<sup>106</sup> L-R- refused, and the judge accused her of being a bad mother, because “a good mother would do anything to get back her children.”<sup>107</sup>

As a result of the extensive trauma she suffered, L-R- developed debilitating post-traumatic stress disorder (PTSD), which prevented her from applying for asylum within the one-year deadline upon her arrival in the United States.<sup>108</sup> The Immigration Judge consequently denied her claim, noting that she was perfectly capable of caring for her children, and further held that her abuser did not abuse her on account of any political opinion or membership in a particular social group, but merely because he was a violent man.<sup>109</sup> Although the Department of Homeland Security initially defended the IJ’s ruling, the Department changed its position once President Obama took office, recommending that L-R- and her children redefine their proposed social group in order to avoid circularity problems and comply with the particularity and social visibility requirements that emerged in the case law during the pendency of the case.<sup>110</sup> Originally, L-R- argued that she suffered persecution on account of her membership in the particular social group of “Mexican women in an *abusive* domestic relationship who are unable to leave.”<sup>111</sup> The inclusion of “abusive” in the definition of the group rendered the definition impermissibly circular, as the persecution suffered was a condition of group membership. The Department of Homeland Security proposed two alternative groups that would meet the legal requirements—“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”—and proposed that the case be remanded for additional fact-finding.<sup>112</sup> On remand, the Center for Gender and Refugee Studies, who represented Ms. L-R-, submitted country condition reports demonstrating the atmosphere of indifference toward gender-based violence in Mexico, the *machismo* culture, and the widespread tolerance for domestic violence, as well as two affidavits from experts evidencing these same

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104. *Id.* at 24–25.

105. *Id.* at 25.

106. *Id.* at 26.

107. *Id.*

108. *Matter of L-R-*, CTR. FOR GEND. & REFUGEE STUDIES, <http://cgrs.uchastings.edu/our-work/matter-l-r> (last visited Nov. 14, 2014).

109. *Id.*

110. Dep’t of Homeland Security’s Supplemental Brief, *Matter of L-R-* at 6 (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) [hereinafter DHS Brief in L-R-].

111. *Id.* at 10 (internal quotations omitted) (emphasis in original).

112. *Id.* at 14, 29.

findings.<sup>113</sup> In light of the additional evidence, the Department of Homeland Security stipulated that L-R- should be granted asylum, and an IJ granted the asylum in a summary order in August of 2010.<sup>114</sup>

Against the backdrop of *Matter of L-R-* and *Matter of R-A-*, the recent decision in *Matter of A-R-C-G-* represents a groundbreaking achievement after nearly fifteen years of advocacy, as the Board of Immigration Appeals finally rendered a binding decision in which domestic violence served as the basis for an asylum claim.<sup>115</sup> The respondents in the case, the lead respondent (“A-R-C-G”) and her three minor children, were all natives of Guatemala who entered the United States without inspection.<sup>116</sup> The lead respondent, as a credible witness, told the Immigration Judge of how she suffered weekly beatings at the hands of her husband after her first child was born, and of how one of those beatings resulted in a broken nose and another resulted in chemical burns when her husband threw paint thinner on her.<sup>117</sup> The respondent testified that she contacted the local police several times in an effort to stop the violence, which included rape, but the police maintained that they would not interfere in marital conflicts.<sup>118</sup> When the police came to the family home after the respondent’s husband hit her on the head, the husband threatened to kill the respondent if she tried to get the police involved again.<sup>119</sup> Furthermore, the respondent attempted to escape her abusive relationship by moving within Guatemala’s borders to stay with her father and by moving to Guatemala City, but her husband always found her and the abuse always continued when she returned.<sup>120</sup> The respondent believed that this pattern will repeat or worsen if she returned to Guatemala.<sup>121</sup>

A-R-C-G-’s asylum claim was initially unsuccessful because of the requirement that her persecution be suffered *on account of* her membership in the particular social group of “married wom[en] in Guatemala who [were] unable to leave the relationship.”<sup>122</sup> The Immigration Judge found that the husband’s actions were merely the arbitrary criminal acts of a husband against his wife, rather than a rational pattern of persecutory conduct.<sup>123</sup> Naturally, the respondent appealed the Immigration Judge’s decision, and the BIA requested supplemental briefing on the issue of whether “domestic violence can, in some instances, form the basis for a claim of asylum or withholding of removal under sections 208(a) and 241(b)(3) of the [Immigration Nationality] Act.”<sup>124</sup> Thus pressured, the Department of Homeland Security was forced to concede that (1)

113. *Matter of L-R-*, CTR. FOR GEND. & REFUGEE STUDIES, <http://cgrrs.uchastings.edu/our-work/matter-l-r> (last visited Nov. 14, 2014).

114. *Id.*

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

116. *Id.* at 389. The minor respondents were derivatives of their mother’s asylum application, so the BIA did not address their individual claims for asylum.

117. *Id.*

118. *Id.*

119. *Id.*

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

121. *Id.*

122. *Id.* at 389–90.

123. *Id.*

124. *Id.*

the harm the respondent suffered rose to the level of past persecution, and (2) that this persecution occurred on account of her membership in the particular social group of “married women in Guatemala who are unable to leave their relationship.”<sup>125</sup> The only issue on which the DHS was unwilling to concede defeat was whether the “Guatemalan Government was unwilling or unable to control the “private” actor” (i.e. the respondent’s husband).<sup>126</sup>

The Board of Immigration Appeals easily agreed with both parties that the lead respondent had shown that she was a member of a particular social group and suffered persecution on account of that status. The BIA pointed to the recent precedents of *Matter of W-G-R*- and *Matter of M-E-V-G*- for the three requirements for any asylum claim based on membership in a particular social group—the asylum applicant “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.”<sup>127</sup> According to the BIA, the lead respondent’s particular social group was defined by two common immutable characteristics: gender and marital status.<sup>128</sup> While gender has been established as an immutable characteristic since *Matter of Acosta*,<sup>129</sup> the qualification of marital status as an immutable characteristic “where the individual is unable to leave the relationship”<sup>130</sup> is an important concession for domestic violence-based asylum claims. The BIA qualified this development on the consideration of a “range of factors,” many of which are dependent on local religious, cultural, and legal customs.<sup>131</sup>

With the immutable characteristics thus established, the BIA found that the lead respondent’s proffered particular social group had sufficient particularity because “married,” “women,” and “unable to leave the relationship” are easily and commonly defined in Guatemalan society, and that the combination of the terms to define a single particular social group in this case “create[s] a group with discrete and definable boundaries.”<sup>132</sup> Furthermore, in order to find that the lead respondent’s particular social group has sufficient social distinction, the BIA cites both the DHS’s agreement that the group exists,<sup>133</sup> as well as the evidence in the record of Guatemala’s culture of “machismo and family violence”<sup>134</sup> and Guatemala’s documented difficulty dealing with sexual offenses, including spousal rape and domestic violence crimes.<sup>135</sup>

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125. *Matter of A-R-C-G-*, 26 I & N Dec. 388, 390 (B.I.A. 2014).

126. *Id.* at 395.

127. *Id.* at 392.

128. *Id.* at 392–93.

129. See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (finding that sex is an immutable characteristic).

130. *Matter of A-R-C-G-*, 26 I & N Dec. at 392–93.

131. *Id.* at 393.

132. *Id.*

133. *Id.* at 394.

134. *Id.* at 388 (citing *Guatemala Failing Its Murdered Women: Report*, CANADA BROAD. CORP. NEWS (July 18, 2006, 11:06 AM), <http://www.cbc.ca/news/world/guatemala-failing-its-murdered-women-report-1.627240>).

135. *Matter of A-R-C-G-*, 26 I & N Dec. 388, 394 (B.I.A. 2014) (citing BUREAU OF HUMAN RIGHTS, DEMOCRACY, AND LABOR, U.S. DEPARTMENT OF STATE, 2008 HUMAN RIGHTS REPORTS: GUATEMALA (2009), available at <http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119161.htm>).

Even though the lead respondent successfully showed that she was a member of a particular social group, and that she suffered persecution on account of her membership in that particular social group, the Board of Immigration Appeals was not able to grant her asylum on these grounds.<sup>136</sup> Rather, she was still required to submit additional evidence to demonstrate that the Guatemalan police's failure to take any sort of action in response to her complaints meant that the "government was unwilling or unable to control her husband."<sup>137</sup> Upon such a showing, the burden of proof would shift to the Department of State, who would then be required to show either that there had been a "fundamental change in circumstances such that the respondent no longer has a well-founded fear of persecution"<sup>138</sup> or that "internal relocation is possible and is not unreasonable."<sup>139</sup> Missing from the BIA's opinion was an admission that the respondent's multiple unsuccessful attempts to leave her husband by staying with her father and moving to Guatemala City probably demonstrated that internal relocation would not be possible for her and would in fact be unreasonable.

#### D. Where We Are Now: The Implications of *Matter of R-A-* and *Matter of L-R-* in Light of *Matter of A-R-C-G-*

The introduction of *Matter of A-R-C-G-* into the legal landscape is a significant step forward in the development of a concrete and dependable legal basis for domestic violence-based asylum claims. However, the highly political discretion that pervaded the pre-*Matter of A-R-C-G-* landscape continues today. The legal and practical problems that underpinned the use of *Matter of R-A-* and *Matter of L-R-* as the basis for domestic violence-based asylum claims survive in large part, and it is therefore important to examine those problems as they existed before the most recent decision, and how *Matter of A-R-C-G-* may affect those issues in the future.

Even a cursory review of *Matter of R-A-* and *Matter of L-R-* reveals a number of legal and practical problems for bringing domestic violence-based asylum claims. First, neither *Matter of R-A-* nor *Matter of L-R-* is binding precedent. Although the initial BIA decision and the Attorney General's decision in Rody Alvarado's case have been published, the final BIA decision and the Immigration Judge's order granting asylum after ten years of litigation are not published and therefore are not binding precedent. Further, none of the opinions in *Matter of L-R-* are published. As a result, the most that an asylum lawyer can gain from these two cases, where a woman was granted asylum based on her membership in a particular social group and the persecution she suffered in her abusive marriage, is an opportunity to push the Department of Homeland Security to remain consistent in its requirements for a successful asylum claim.

Second, the success of these two cases was heavily dependent on many, many hours of legal work. The countless hours of research to find the necessary

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136. *Id.* at 395.

137. *Id.*

138. *Id.* (citing 8 C.F.R. § 1208.13(b)(1)(i)(A), (ii) (2014)).

139. *Id.* (citing 8 C.F.R. § 1208.13(b)(1)(i)(B), (ii) (2014)).

legal theory and the appropriate experts would have been almost impossible for an individual asylum applicant to do by him or herself. Even if the legal theory were fairly self-explanatory, the effort to find the necessary evidence and fulfill the complicated requirements of any asylum claim is practically impossible for anyone without a legal education (or at least for anyone not in the process of getting such an education). The difficulty of presenting a domestic violence-based asylum case would not be a problem if all applicants had a right to free legal representation upon a showing of indigence. However, since Immigration Court is an administrative court and since immigration law is not considered equivalent to criminal law, individuals in immigration proceedings are *allowed*, but not *entitled*, to have legal representation, even though they are often strongly advised at their initial hearing to procure representation.<sup>140</sup> TRAC Immigration, an independent organization at Syracuse University that collects data on immigration case law, found that although asylum seekers are becoming more and more successful, this increase in approval rates is attributable in part to a concurrent increase in legal representation—in 2010, 91% of all asylum seekers were represented, compared to 52% in 1986.<sup>141</sup> Further, during FY 2010, 54% of asylum seekers with legal representation were actually granted asylum, compared to only 11% of those without legal representation.<sup>142</sup>

This significance of legal representation becomes even more significant in light of the strained budgets of free immigration legal services organizations. According to data from the National Center for Charitable Statistics (NCCS), there are about 864 immigration nonprofits scattered across the country.<sup>143</sup> A quarter of those have an annual budget of less than \$250,000, another quarter have budgets of less than \$999,999, a little over another quarter have budgets of less than \$5 million, and a quarter have budgets of more than \$5 million.<sup>144</sup> In addition to these limited budgets, “the ratio of nonprofits that provide legal aid to immigrants to potential undocumented clients is considerable....”<sup>145</sup> As such, it is apparent that not all qualified immigrants can even obtain access to free legal services, and may therefore be forced to defend their asylum (as well as other immigration relief) cases pro se, thus risking a far higher rate of failure. For the population of domestic violence victims, the prospect of failure and the danger of being sent back to a country where his or her abuser can easily find him or her weighs heavily against even trying to apply for asylum, and weighs in favor of living instead in the shadows as an undocumented immigrant.

Further, when one examines the rate of denial of asylum applications, it is

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140. Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 HUMAN RIGHTS 14 (2013) (arguing that the right to counsel found in *Gideon v. Wainwright* should be extended to individuals in deportation proceedings, given the abundance of similarities between immigration law and criminal law).

141. *Asylum Denial Rate Reaches All Time Low: FY 2010 Results, A Twenty-Five Year Perspective*, TRAC IMMIGRATION (Sept. 2, 2010), <http://trac.syr.edu/immigration/reports/240/> (last visited Nov. 14, 2014).

142. *Id.*

143. Erwin de Leon & Robert Roach, *Immigrant Legal-Aid Organizations in the United States*, URBAN INST. (Oct. 2013), <http://www.urban.org/UploadedPDF/412928-Immigrant-Legal-Aid-Organizations-in-the-United-States.pdf> (last visited Nov. 14, 2014).

144. *Id.*

145. *Id.*

apparent that there are certain political preconceptions at play in the minds of the Immigration Judges and the Board of Immigration Appeals. Countries with the highest denial rates include El Salvador, Guatemala, Nicaragua, the Dominican Republic, Honduras, Mexico, Ecuador, Vietnam, and the Philippines.<sup>146</sup> Interestingly, these countries are also high on the list of the countries of origin for undocumented immigrants in the United States.<sup>147</sup> Among the countries with the lowest rate of asylum denial are Iraq, the former Soviet Union, Yugoslavia, Somalia, China, Iran, and Afghanistan.<sup>148</sup> As such, if a victim of domestic violence (or any other sort of persecution) comes from a country that the United States sees as a significant source of undocumented immigrants, he or she will also have to fight to show that they will not be part of the flood across the border.

When one looks specifically at the rate at which domestic violence-based asylum claims are granted and denied, it becomes apparent that the lack of clarity and binding precedent in the case law and regulations, and the resulting increased degree of discretion on the part of Immigration Judges, has resulted in disparate outcomes across the United States. For example, Blaine Bookey conducted an analysis of 206 case outcomes in domestic violence-based asylum claims in the United States from 1994 to 2012, and found that “the absence of applicable norms and the shifting policy positions on the part of [the Department of Homeland Security] have continued to produce contradictory and arbitrary outcomes in domestic violence asylum cases.”<sup>149</sup> While some IJs choose to follow the precedent of *Matter of R-A-* and *Matter of L-R-* and grant applicants who have suffered serious domestic violence asylum, other IJs refuse to grant asylum because they consider domestic violence to be a purely personal dispute, beyond the reach of asylum law.<sup>150</sup> According to Bookey, “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.”<sup>151</sup>

A woman fleeing domestic violence in the era before the most recent BIA decision of *Matter of A-R-C-G-* therefore had her right to be free from persecution nullified on several fronts. First, she could not know what the appropriate legal framework would be, since the final decisions in both *Matter of R-A-* and *Matter of L-R-* are unpublished, and provide little information other than to find that, based on the stipulated agreement of the Department of Homeland Security with

146. *Asylum Denial Rates by Nationality Before and After the Attorney General’s Directive (by denial rate)*, TRAC IMMIGRATION (2010), [http://trac.syr.edu/immigration/reports/240/include/nationality\\_denial.html](http://trac.syr.edu/immigration/reports/240/include/nationality_denial.html) (last visited Nov. 14, 2014) [hereinafter *Asylum Denial Rates*].

147. Michael Hofer, et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, POPULATION ESTIMATES (Mar. 2012) (listing, in order of estimated undocumented population, Mexico, El Salvador, Guatemala, Honduras, China, Philippines, India, Korea, Ecuador, and Vietnam), available at [https://www.dhs.gov/sites/default/files/publications/ois\\_ill\\_pe\\_2011.pdf](https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2011.pdf).

148. *Asylum Denial Rates*, *supra* note 146.

149. Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN’S L. J. 107, 147 (2013).

150. *Id.*

151. *Id.* at 147–48.

the applicant that she has suffered persecution on account of her membership in a particular social group, the applicant's application for asylum will actually be granted. Second, it was (and continues to be) nearly impossible for anyone to win any asylum case without legal representation, let alone a complicated asylum case based on domestic violence, and the financial resources of legal aid organizations were (and continue to be) extremely limited. This disfavors women who do not have the ideal case for impact litigation and are unable to finance paid legal representation. Finally, even if an individual applicant managed to do all necessary legal work and procure representation, the success of her claim still depended on the opinion of the individual Immigration Judge.

In light of *Matter of A-R-C-G-*, the most significant change is that there is now a binding decision establishing that domestic violence *can* be the basis for an asylum claim, where the particular social group is Guatemalan women who are unable to leave their marriage. There are, however, three enduring limitations on the ability of domestic violence to serve as a basis for asylum. First, the lead respondent in *Matter of A-R-C-G-* did not actually receive asylum based on this decision – she still had to show that the Guatemalan government was unable or unwilling to control her husband (the private actor), and the Department of Homeland Security would most likely argue that it would have been both reasonable and practicable for her to move within Guatemala, rather than enter the United States without inspection, along with her three minor children.

Second, the Department of Homeland Security made an essential concession in this case, as it did in *Matter of L-R-*, that the lead respondent both suffered persecution and this persecution was on account of her membership in the particular social group. With this concession, the BIA can more easily overcome the Immigration Judge's initial finding that the respondent had not demonstrated that her husband "abused her in order to *overcome* the fact that she was a married woman in Guatemala who was unable to leave the relationship."<sup>152</sup> Essentially, the Board of Immigration Appeals decided issues that had already been agreed upon by both sides, and merely made that concession binding on itself in the future.

Third, this binding decision can only go so far, since it is subject to the same financial and knowledge constraints in place before the decision was issued. This is still only a single decision with fairly atrocious facts, where the lead respondent managed to gain both representation and the attention of prominent immigration law organizations.<sup>153</sup> The BIA decision is limited to an extremely fact-specific analysis that still leaves significant discretion to Immigration Judges to determine whether the persecution suffered by an applicant was actually on account of a particular social group defined by the requisite immutable characteristics with sufficient particularity and social distinction. The Federal Regulations continue to provide that "the question whether a person is a member of a particular social group is a finding of fact that [the BIA] review[s]

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152. *Matter of A-R-C-G-*, 26 I & N Dec. 388, 389–90 (B.I.A. 2014) (internal quotations omitted) (emphasis added).

153. Several prominent organizations filed amici curiae in this case, including the American Immigration Lawyers Association, the Center for Gender and Refugee Studies, the Federation for American Immigration Reform, the National Immigrant Justice Center, the United Nations High Commissioner for Refugees, and Williams & Connolly, LLP. *Id.* at 388.

for clear error.”<sup>154</sup>

### III. OTHER GENDER-BASED ASYLUM CLAIMS: WHY ARE THEY DIFFERENT?

Other gender-based and sex-based asylum claims are more successful than domestic violence-based asylum claims for two reasons. First, the particular social group itself more easily satisfies the conditions of being defined by immutable characteristics, with sufficient particularity and social distinction or social visibility. Second, the persecution is more likely to be understood as “foreign” to the United States, and therefore more likely to be considered political rather than simply personal.

For example, consider the case of female genital mutilation (FGM). The practice is defined by the World Health Organization as “the partial or total removal of the female external genitalia or other injury to the female genital organs for non-medical reasons.”<sup>155</sup> Any mention of the practice gets Western feminists and human rights activists up in arms, but it is widely believed that any form of the practice occurs mostly outside of the United States.<sup>156</sup> The practice is associated with countries and cultures perceived as underdeveloped, making it easier to denounce the practice as an atrocious human rights violation. This stands in stark contrast to domestic violence, which occurs frequently in the United States—in 2008, an intimate partner was responsible for one in five rapes or sexual assaults committed against females.<sup>157</sup>

Given this distinction between domestic violence and FGM, it is not surprising that the BIA found persecution on account of membership in a particular social group in *Matter of Kasinga* in 1996, and the BIA felt the need in *Matter of R-A-* to distinguish Rody’s situation from that of the applicant in the earlier case.<sup>158</sup> In *Matter of Kasinga*, the court recognized first that FGM could

154. *Id.* at 391 (citing 8 C.F.R. § 1003.1(d)(3)(i) (2014)).

155. SANCTUARY FOR FAMILIES, FEMALE GENITAL MUTILATION IN THE UNITED STATES: PROTECTING GIRLS AND WOMEN IN THE U.S. FROM FGM AND VACATION CUTTING 1 (2013), available at [http://www.sanctuaryforfamilies.org/storage/sanctuary/documents/report\\_onfgm\\_w\\_cover.pdf](http://www.sanctuaryforfamilies.org/storage/sanctuary/documents/report_onfgm_w_cover.pdf) (internal citations omitted). WHO divides the practice into four categories:

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| Type I   | Clitorodectomy, or the partial or total removal of the clitoris and/or clitoral hood.  |
| Type II  | The partial or total removal of the clitoris and inner labia, with or without the removal of the outer labia.  |
| Type III | Infibulation, or the removal of the external female genitalia and the sealing or narrowing of the vaginal opening using stitches or glue. The clitoris may or may not be removed. A small hole is left for urination and menstruation and women subjected to this procedure are later cut open for intercourse and childbirth. |
| Type IV  | All other harmful procedures to the female genitalia for non-medical purposes, such as pricking, piercing, incising, scraping, and cauterization.  |

*Id.*

156. Jodie Gummow, *Evidence Shows That Illegal Female Genital Cutting Is a Growing Phenomenon in US*, ALTERNET (June 21, 2013), <http://www.alternet.org/gender/evidence-shows-illegal-female-genital-cutting-growing-phenomenon-us> (last visited Nov. 14, 2014).

157. *10 Facts on Female Victims of Violence*, U.S. DEP’T OF JUSTICE (Oct. 21, 2009), <http://blogs.justice.gov/main/archives/220> (last visited Nov. 14, 2014).

158. In re R-A-, 22 I. & N. Dec 906, 919 (B.I.A. 1999) (finding that one of the reasons that Rody’s social group fails to qualify is that Rody “has not shown that spouse abuse is itself an important

constitute persecution for the purposes of the refugee definition.<sup>159</sup> The court further found that the group of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice” qualified as a particular social group because it was defined by immutable characteristics.<sup>160</sup> In particular, the BIA found that 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>161</sup> Finally, the BIA was able to find that the persecution the applicant suffered was on account of her membership in the particular social group because the record demonstrated that “FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM.”<sup>162</sup> By making this decision, the BIA was able to fulfill its desire to “save the women” from the barbaric practice, while not compromising the integrity of its own society’s dark underbelly.

A similar pattern is evident in the case of asylum claims based on sexual orientation. For example, in *Matter of Toboso-Alfonso*, the Board of Immigration Appeals found that homosexuals in Cuba constituted a particular social group for the purposes of asylum law, where the Cuban government classified homosexuals as a group, criminalized homosexuality, maintained files on alleged homosexuals, and required registration and periodic exams.<sup>163</sup> The Cuban applicant could therefore easily show that he was classified as a homosexual by the Cuban government (i.e. considered a member of the alleged particular social group by his alleged persecutors), and that he suffered persecution on account of that membership. Importantly, the BIA noted the uncontroverted nature of the IJ’s finding that homosexuality is an immutable characteristic, despite the Immigration and Naturalization Service’s argument that homosexual activity “...is not a basis for finding a social group within the contemplation of the Act” as such a conclusion “would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well.”<sup>164</sup> The BIA’s refusal to entertain the Service’s proposal that homosexuality did not qualify because it would be analogous to encouraging general lawlessness indicates the political underpinnings of its decision. Even though homosexuality was still frowned upon in many parts of the United States when *Matter of Toboso-Alfonso* was decided in 1990, there was still a prevailing attitude that the constant surveillance and invasive medical examinations required in Cuba would not be tolerated in the United States.<sup>165</sup> The applicant was of course also helped by the fact that he

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societal attribute, or, in other words, that the characteristic of being abused is one that is important within Guatemalan society,” contrary to *Matter of Kasinga*, where the fact of not yet being “cut” was an important attribute in the relevant society).

159. *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

160. *Id.* at 365–66.

161. *Id.* at 366.

162. *Id.* at 367.

163. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 820–21 (B.I.A. 1990).

164. *Id.* at 822 (internal quotations omitted).

165. *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (holding that a Georgia sodomy statute did not violate the fundamental rights of homosexuals because at least twenty-five states still had such

claimed persecution not by a non-state actor but by the Cuban government, an entity out of favor with the U.S. federal government since the 1960s.

As American positions toward homosexuality evolve and the belief that individuals should not be persecuted on account of their sexual orientation gains more traction in the United States,<sup>166</sup> the view of the BIA in *Matter of Toboso-Alfonso* will become the “civilized” one, and the United States could develop a need to “save the (stereotypically effeminate or biologically female) homosexuals” from their “uncivilized” countries and cultures of origin.

## CONCLUSION

By first outlining the basics of asylum law and then proceeding to focus on how gender-based asylum claims in general and domestic violence, female genital mutilation, and sexual orientation-based asylum claims are legally possible and are actually granted, I have shown that the degree of discretion and disparity between the legal possibilities and the actual rate at which asylum claims are granted is truly astonishing. If, as was the initial impetus for the 1951 Convention Relating to the Status of Refugees, every individual is entitled to be free from persecution, then the fact that individual asylum applicants so often have difficulty demonstrating that the horrors they have suffered occurred on account of an enumerated ground should be cause for concern.

A skeptic might ask why the United States has to be the one to take in these asylum seekers and recognize their persecution. The answer is fairly simple. If we are serious about enforcing human rights and protecting every individual’s right to be free from persecution, then it does not matter why these asylum seekers picked the U.S. Instead of sending asylum seekers back to their lives of violence and persecution, the United States needs to do more to treat the symptom. We cannot just build a wall of border patrol agents and barbed wire while we look south to a country embroiled in a de facto civil war and further south to countries struggling under the dominance of gangs.

In the case of domestic violence-based asylum claims, the effective nullification of the right to be free from persecution due to the uncertain legal standards, the simultaneous importance and difficulty of procuring legal representation, and the unpredictability of an Immigration Judge’s perception of an individual applicant’s domestic violence as purely personal or somehow political or based on membership in a qualifying particular social group is even more troubling. Perhaps there is a need to amend the original definition of what constitutes a refugee or asylee to accommodate modern understandings of formerly “private” violence. Perhaps the United States needs to develop a new visa specifically for undocumented victims of domestic violence, in the same way that the Violence Against Women Act allows abused spouses of U.S. citizens and legal permanent residents to apply for their own legal permanent residency independently of their abusive spouses, or the U-Visa creates a pathway to

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laws on the books, and states had the ability to legislate for the purpose of enforcing certain notions of morality).

166. *United States v. Windsor*, 133 S.Ct. 2675, 2689 (2013) (outlining the expansion of the right to marry to same-sex couples, as notions of equality have changed).

citizenship for victims of domestic violence who report the crime to the police and help bring their abusers to justice.<sup>167</sup> However, given the current reluctance of Congress to pass comprehensive immigration reform, and the difficulties Congress had in even reauthorizing the Violence Against Women Act in the summer of 2013,<sup>168</sup> it seems unlikely that such legislative remedies will come to pass. As such, immigration attorneys and advocates, as well as their clients and those who are unable to obtain representation but may have an actionable claim for asylum based on domestic violence, are left in limbo. The most one can do is put the system to the test, force it to enunciate its rationale for denying (or granting) asylum to a particular individual, while doing one's best to comply with the complicated legal standards promulgated under *Matter of R-A-* and *Matter of L-R-* and developing the binding precedent of *Matter of A-R-C-G-*. In short, the players must play the politics, let adjudicators hear the stories in the terms they want to hear, and hope that their story fits the requirements for relief.

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167. *Fact Sheet: USCIS Issues Guidance for Approved Violence Against Women Act (VAWA) Self-Petitioners*, U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS. (APR. 11, 2008), <http://www.uscis.gov/archive/archive-news/fact-sheet-uscis-issues-guidance-approved-violence-against-women-act-vawa-self-petitioners> (last visited Nov. 14, 2014); *Victims of Criminal Activity, U Nonimmigrant Status*, U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS. (Jan. 9, 2014), <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last visited Nov. 14, 2014).

168. Kate Pickert, *What's Wrong with the Violence Against Women Act?*, TIME (Feb. 27, 2013), <http://nation.time.com/2013/02/27/whats-wrong-with-the-violence-against-women-act/> (last visited Nov. 14, 2014) (reporting on the political fight surrounding the reauthorization of VAWA).