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## Critiquing *Matter of A-B-*: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence

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## CRITIQUING *MATTER OF A-B*: AN UNCERTAIN FUTURE IN ASYLUM PROCEEDINGS FOR WOMEN FLEEING INTIMATE PARTNER VIOLENCE

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Theresa A. Vogel\*

### ABSTRACT

*The #MeToo movement has brought renewed attention to the impact of gender inequality on our society's ability to provide protection to women from physical and sexual violence, including intimate partner violence. Despite advances in legal protections and increased resources to prevent, prosecute, and bring an end to intimate partner violence, in the absence of true efforts to combat gender inequality as a whole, intimate partner violence will continue to pervade our society. The discussion of gender inequality's impact on the treatment of intimate partner violence must expand beyond the violence that occurs in the United States to gender inequality's impact on the protection afforded to women who have suffered this violence in other countries and seek protection from the United States. This is because U.S. asylum law trails decades behind even our flawed federal and state protections for victims of intimate partner violence. The male-centric lens through which the refugee definition was drafted and is interpreted continues to inhibit any progress in recognizing women's asylum claims involving intimate partner violence.*

*This Article finds that Matter of A-B- returns to the perception that intimate partner violence is a personal matter outside the scope of asylum protections. The decision demonstrates continued ignorance regarding the underlying reasons for intimate partner violence against women—gender and subordination. The failure to recognize that intimate partner violence occurs because of a woman's gender is one of the primary obstacles to improvements in the treatment of asylum claims involving intimate partner violence. This Article contrasts the lack of progress in U.S. asylum law to provide protection to women who suffer intimate partner violence outside the United States with the advancements made in federal and state efforts to combat intimate partner violence occurring inside the United States. As a remedy, this Article recommends new legislation and regulations recognizing and guiding adjudication of these asylum claims, combined with judicial training and the development of a tracking mechanism for determinations in these types of cases. The current commitment to eradicating gender inequality within the United States is the perfect moment for reforming how we treat gender inequality when it occurs outside the United States.*

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## INTRODUCTION

In the era of #MeToo and #KeepFamiliesTogether, the momentum exists now for real reform to happen in United States asylum law to protect victims seeking asylum due to gender-based violence. The #MeToo movement spotlights the inequalities and sexual harassment and assault faced by women in our society; #KeepFamiliesTogether advocates for ending family separation and more compassionate treatment for families who seek the safety and protections of our country. The American people reject a culture and political agenda that perpetuate inequality, abuse, and violence and demand that policymakers effect change. Despite this environment of enlightenment and reform, Attorney General Jeff Sessions issued a decision in *Matter of A-B-* that directly contradicts the calls to protect victims of gender-based violence and those fleeing to the United States for a safer life.

In June 2018, Sessions overturned an immigration judge’s decision to grant asylum status to a woman fleeing intimate partner violence.<sup>1</sup> The Attorney General’s analysis regenerates the perception that intimate partner violence is a personal, private matter outside the scope of the “refugee” definition.<sup>2</sup> The decision entirely ignores the importance of social and cultural views of gender and subordination as the underlying reasons for the abuse and a coun-

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1. *In re A-B-*, 27 I. & N. Dec. 316, 317, 346 (A.G. 2018), *abrogated by* Grace v. Whitaker, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018).

2. *See id.* at 316–46.

try's inability or unwillingness to provide protection. Legal scholars recognize that intimate partner violence is inflicted by non-governmental actors against women because of their gender, an immutable characteristic forming a particular social group by itself.<sup>3</sup> The abuser or non-governmental actor inflicts the abuse on account of the belief that because the victim is a woman, she is, therefore, subordinate.<sup>4</sup>

The Attorney General also used this opportunity to overturn a 2014 precedent, *Matter of A-R-C-G*.<sup>5</sup> In that case, the United States Board of Immigration Appeals (BIA) recognized that a woman from Guatemala who suffered intimate partner violence-related persecution may meet the requirements for asylum. Specifically, the BIA found that she was a member of the particular social group comprised of "married women in Guatemala who are unable to leave their relationship."<sup>6</sup> The decision appeared to demonstrate movement forward in these cases. The Attorney General's decision to overrule *Matter of A-R-C-G* in *Matter of A-B*<sup>7</sup> quashed any hope for fairer and more consistent determinations in asylum cases involving intimate partner violence until new legislation or regulations are put in place to provide guidance.

There is a stark contrast between the protections afforded women who are victims of intimate partner violence<sup>8</sup> in the United States under U.S. federal and state law and the protections afforded women fleeing intimate partner violence in other countries under U.S. asylum law.<sup>9</sup> The #MeToo movement has breathed new life into the discussion of physical and sexual violence against women and the continued gender inequality that impedes adequate protections for women. Likewise, the #KeepFamiliesTogether trend forced the Trump Administration to retreat on a policy of

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3. See, e.g., Jessica Marsden, *Domestic Violence Asylum After Matter of L-R*, 123 YALE L.J. 2512, 2525 (2014); Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781–83 (2003).

4. Musalo, *supra* note 3, at 781–82; see also Marsden, *supra* note 3.

5. *In re A-B*, 27 I. & N. Dec. at 316, 346.

6. *In re A-R-C-G*, 26 I. & N. Dec. 388, 392–94 (B.I.A. 2014), *overruled by In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018).

7. *In re A-B*, 27 I. & N. Dec. at 346.

8. Since some adjudicators have taken an overly narrow interpretation of the term "domestic violence," particularly in regard to whether a relationship constitutes a "domestic" relationship, this Article will use the term "intimate partner violence" wherever possible.

9. Nina Rabin, *At the Border Between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 L. & ETHICS HUM. RTS. 109, 111–12 (2013) (arguing that state and federal support for the eradication of domestic violence is now commonplace while the treatment of women who flee domestic violence at the U.S.–Mexico border face a justice system that is fifty years behind due to its treatment of domestic violence as a private matter).

treating families who seek the protections of our country inhumanely. The issue of asylees escaping intimate partner violence exists at the intersection of these two movements. True reform cannot be effected until policymakers develop a comprehensive approach to protecting victims of intimate partner violence in the United States regardless of whether the violence occurred in the United States or in another country.<sup>10</sup>

This Article uses *Matter of A-B-*, past U.S. asylum cases, and other aspects of U.S. domestic violence law to call for a reform in U.S. asylum law; namely, a congressional act and new regulations to reject the Attorney General's ruling, recognize the viability of gender-based asylum claims involving intimate partner violence, and provide guidance in their adjudication. Asylum claims by women involving intimate partner violence should no longer be at the mercy of the whims of an administration or the adjudicator. Accordingly, this Article argues that the barriers to asylum claims based on intimate partner violence can be overcome only by (1) providing new legislation and regulations definitively acknowledging that gender-based persecution is encompassed in the refugee definition and guiding adjudication of these claims; (2) instituting judicial training on gender-based asylum claims; and (3) developing a tracking mechanism on the adjudicative outcomes of asylum claims based on gender.

Part I discusses the background of U.S. asylum law as it pertains to gender-based asylum claims. Part II discusses *Matter of A-B-* and its impact on asylum claims involving intimate partner violence. Part III contrasts the lack of forward-thinking on the issue of intimate partner violence within the sea of reform that has occurred outside of the asylum context in U.S. criminal and civil remedies

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10. This Article focuses on male-perpetrated intimate partner violence against females. Undoubtedly, females may perpetrate intimate partner violence on males and intimate partner violence may occur between same-sex couples. However, the majority of intimate partner violence perpetrated on the basis of one's gender is male-on-female. See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 303 (1994) (noting that domestic violence is "overwhelmingly initiated by men and inflicted upon women"); see also U.N. High Comm'r for Refugees, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, pt. 1, ¶ 3, at 2, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR Gender Guidelines] ("Gender-related claims may be brought by either women or men, although due to particular types of persecution, they are more commonly brought by women."); CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NCJ 197838, BUREAU OF JUSTICE STATISTICS, CRIME DATA BRIEF: INTIMATE PARTNER VIOLENCE, 1993–2001 (2003), <https://www.bjs.gov/content/pub/pdf/ipv01.pdf> (finding that eighty-five percent of victimizations by intimate partners in the United States were against women).

currently addressing intimate partner violence. Part IV suggests a new framework incorporating the principles of these civil and criminal reforms, as well as solutions to the primary barriers to asylum claims involving intimate partner violence, to provide guidance to adjudicators and consistency and predictability in the U.S. approach.

## I. BACKGROUND OF UNITED STATES ASYLUM LAW

### A. *The Structure of the U.S. Asylum Law System*

The United States system governing immigration and asylum is more convoluted than an ordinary judicial or executive system. The U.S. immigration system as it exists today has its foundations in the creation of the Immigration and Naturalization Service (INS).<sup>11</sup> The INS was established in 1933 by executive order to administer and enforce federal immigration laws and regulations.<sup>12</sup> The Homeland Security Act of 2002 dissolved the INS Service and created the Department of Homeland Security (DHS).<sup>13</sup> This reorganization resulted in the division of jurisdiction over asylum claims between two agencies: DHS and the Department of Justice (DOJ).<sup>14</sup> Each agency has the power to promulgate asylum regulations, which are duplicated at 8 C.F.R. § 208 (DHS) and 8 C.F.R. § 1208 (DOJ).<sup>15</sup> DHS oversees U.S. Citizenship and Immigration Services (USCIS), where affirmative asylum claims are adjudicated, and represents the government in removal cases, including those before immigration courts and the Board of Immigration Appeals (BIA).<sup>16</sup> The DOJ, through the Executive Office for Immigration

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11. See U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS HISTORY OFFICE AND LIBRARY, OVERVIEW OF INS HISTORY 7, 11 (2012), <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf>.

12. The INS was originally an agency of the Department of Labor but later reorganized as an agency of the Department of Justice in 1940. *Id.* at 7–8.

13. *Id.* at 11.

14. See Marsden, *supra* note 3, at 2548; see also Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 355–56 (2009) (discussing the creation and reorganization of agencies with jurisdiction over asylum and their regulations).

15. See Marsden, *supra* note 3, at 2548; see also Cianciarulo & David, *supra* note 14.

16. See 8 C.F.R. §§ 2.1, 100.1, 208.2, 1103.3, .4, .7 (2018); 8 C.F.R. § 100.1 (2009); Cianciarulo & David, *supra* note 14 (2009).

Review, oversees immigration courts and the BIA.<sup>17</sup> The Attorney General appoints immigration judges to preside over immigration court proceedings.<sup>18</sup> In immigration court, an immigration judge may adjudicate asylum claims denied by USCIS *de novo* or asylum claims asserted in defense to removal.<sup>19</sup>

The BIA is the highest administrative body, comprised of up to twenty-one board members appointed by the Attorney General, which interprets and applies immigration laws.<sup>20</sup> In this capacity, the BIA has jurisdiction to hear appeals from decisions of immigration judges, including asylum determinations, and must exercise independent judgment in hearing those appeals.<sup>21</sup> The BIA's decisions are binding on immigration judges as well as officers of the DHS.<sup>22</sup> However, the Attorney General has the power to modify or overrule decisions of the BIA through certification.<sup>23</sup> The U.S. circuit courts may review BIA decisions as an administrative body as well as the determinations of the Attorney General as an agency head.<sup>24</sup>

An asylum application may be made affirmatively with USCIS if the person is not in removal proceedings.<sup>25</sup> These cases are adjudicated by asylum officers within the USCIS. If a person is in removal proceedings, she may file a defensive asylum application with the immigration court in removal proceedings.<sup>26</sup> An asylum applicant

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17. 8 C.F.R. §§ 208.14, 1003.0 (2018); Cianciarulo & David, *supra* note 14; *see also About the Office*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/about-office> (last updated Aug. 14, 2018).

18. *Immigration Judge*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/tools/glossary/immigration-judge> (last visited Jan. 21, 2019).

19. *See* Marsden, *supra* note 3, at 2548.

20. *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last visited Oct. 29, 2018).

21. *Id.*

22. *Id.*

23. *See* 8 C.F.R. § 1003.1(h)(1) (2018).

24. *See In re M-E-V-G-*, 26 I. & N. Dec. 227, 230 (B.I.A. 2014) (citing *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

25. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last updated Oct. 19, 2015). If USCIS denies the application, the applicant may make an asylum application with the immigration court in removal proceedings. *Id.*

26. *Id.* An expedited removal process exists for individuals arriving in the United States who are inadmissible. INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2018). This process allows for the removal of the individual from the United States without hearing or review. However, in the expedited removal process, an individual who indicates an intention to seek asylum or fear of persecution must be given a "credible fear" interview with a USCIS asylum officer. INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii) (2018). Under this process, an immigration officer from USCIS is allowed to conduct a preliminary interview of an asylum applicant to determine whether the applicant has a "credible fear" of persecution



may appeal the decisions of the immigration judge to the BIA and the decisions of the BIA to the U.S. circuit court in which the immigration judge sits.<sup>27</sup>

The standard of review for determinations of the Attorney General and administrative bodies, such as the BIA, is highly deferential. The U.S. circuit courts are required to give deference to the agency's interpretations of ambiguous provisions of the Immigration and Nationality Act, including its definition of membership in a particular social group set forth in *Matter of M-E-V-G*.<sup>28</sup> However, the Attorney General and the BIA cannot "adjudicate claims of social group status inconsistently, or irrationally" or "generate erratic, irreconcilable interpretations of their governing statutes."<sup>29</sup> In determining whether the interpretation is "reasonable," "consistency over time and across subjects is a relevant factor."<sup>30</sup>

Although U.S. circuit courts may conduct a *de novo* review of issues of law, issues of fact are reviewed under the substantial-evidence test.<sup>31</sup> A decision by the BIA or the Attorney General will be upheld if, considering the record as a whole, it is supported by

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or torture. INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii) (2018). A credible fear is defined as a "significant possibility" that the applicant "could establish eligibility for asylum." INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v). If the asylum officer finds that the applicant does not have a credible fear, the applicant may seek review of the determination by an immigration judge, but the immigration judge's decision in general cannot be appealed with limited exceptions. INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2018); 8 C.F.R. § 1208.30(g)(2)(iv)(A) (2018); INA § 242(e), 8 U.S.C. § 1252(e) (2018). If the asylum officer determines the applicant has such a credible fear, he or she may present their asylum claim to an immigration judge in the standard removal process. INA § 235(b)(1)(B)(ii), (iv), 8 U.S.C. § 1225(b)(1)(B)(ii), (iv) (2018).

27. See AMERICAN IMMIGRATION COUNCIL, PRACTICE ADVISORY: HOW TO FILE A PETITION FOR REVIEW 2 (2015), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/how\\_to\\_file\\_a\\_petition\\_for\\_review\\_2015\\_update.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_for_review_2015_update.pdf).

28. See *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (finding that under *Chevron* if a statute is ambiguous, and if the agency's interpretation of the statute is reasonable, the court must accept the agency's interpretation, but "unexplained inconsistency" in an agency's interpretation is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (finding that if the intent of Congress on an issue is unambiguous, an agency must follow that intent, but if a statute is ambiguous on an issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *In re M-E-V-G*, 26 I. & N. Dec. at 230 (recognizing that a reviewing court must respect an agency's "reasonable interpretation" of the law).

29. *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 604 (3d Cir. 2011) (quoting *Marmolejo-Campos v. Holder*, 558 F.3d 903, 920 (9th Cir. 2009) (Berzon, J., dissenting), and citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30).

30. *Id.*

31. *Cece v. Holder*, 733 F.3d 662, 668-69 (7th Cir. 2013) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43; *Escobar v. Holder*, 657 F.3d 537, 542 (7th Cir. 2011)).

reasonable, substantial and probative evidence.<sup>32</sup> The record must compel reversal for the U.S. circuit courts to reverse factual findings of the BIA meaning “a reasonable fact finder would have to conclude that the requisite fear of persecution existed.”<sup>33</sup>

### B. *Definition of Refugee in U.S. and International Law*<sup>34</sup>

The United States’ definition of refugee is largely based on the international law definition, derived from the 1951 Convention Relating to the Status of Refugees (1951 Convention) and 1967 Protocol Relating to the Status of Refugees (1967 Protocol). The 1951 Convention is a United Nations treaty,<sup>35</sup> which provided the first internationally accepted definition of a refugee. Drawn in the aftermath of World War II, the 1951 Convention’s definition was influenced by the politically, racially, and religiously motivated persecution inflicted by Nazi Germany and the Soviet Union.<sup>36</sup> The 1951 Convention refugee definition limited its protection to European refugees after World War II; the 1967 Protocol removed the time and geographical limitations contained in the 1951 Convention and expanded its scope.<sup>37</sup>

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32. *Cece*, 733 F.3d at 669 (quoting *Escobar*, 657 F.3d at 545).

33. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)).

34. This Article focuses on asylum as a path for relief, which may provide protection for women who flee intimate partner violence in their countries. However, other paths for relief may include withholding of removal under section 241(b)(3)(B) of the Immigration and Nationality Act and withholding of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). 8 C.F.R. §§ 208.16, 1208.16 (2018); see INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2018). Withholding of removal requires a higher standard demonstrating that an applicant would “more likely than not” suffer persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion” in the proposed country of removal. 8 C.F.R. §§ 208.16(b), 1208.16(b). In contrast, asylum requires a “well-founded fear” of future persecution on account of these same grounds. 8 C.F.R. §§ 208.13(b), 1208.13(b) (2013). The Convention Against Torture requires the applicant to show that it is “more likely than not” that she would be tortured if removed to the proposed country of removal. 8 C.F.R. §§ 208.16(c), 1205.16(c) (2000). Further, while these withholding of removal paths may provide temporary relief, unlike asylum, they do not make an individual eligible for permanent residency or citizenship.

35. The 1951 Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

36. See, e.g., Karen Musalo & Stephen Knight, *Unequal Protection*, 58 BULL. ATOMIC SCIENTISTS 56, 59 (2002); Stephanie Robins, Note, *Backing It Up: Real ID’s Impact on the Corroboration Standard in Women’s Private Asylum Claims*, 35 WOMEN’S RTS. L. REP. 435, 442–43 (2014).

37. The 1967 Protocol defines the term “refugee” as a person who:

The United States became a party to the 1967 Protocol in 1968. Congress then passed the Refugee Act of 1980 and incorporated the provisions—including the definition of a refugee—of the 1951 Convention and 1967 Protocol into the Immigration and Nationality Act in order to bring the country into compliance with its obligations under the 1967 Protocol.<sup>38</sup> Under the Act, a refugee is defined as a person with a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>39</sup> Race, religion, nationality, membership in a particular social group, or political opinion are commonly referred to as “Convention reasons,” “Convention grounds,” or “the five categories/grounds” for asylum or refugee status.<sup>40</sup> The United States refers to persons who meet the definition of refugee who are *outside* the United States as “refugees” and persons who meet the definition of refugee who are *inside* the United States as “asylees.”<sup>41</sup>

The 1951 Convention and 1967 Protocol have historically been interpreted without regard to the unique protection needs of

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owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Protocol Relating to the Status of Refugees, art. I, Jan. 31, 1967, 606 U.N.T.S. 267 (incorporating in part the 1951 Convention’s definition of “refugee”); see 1951 Convention *supra* note 35, ch. 1, art. 1A(2), at 152.

38. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427–29, 436–37 (1987).

39. Section 101(a)(42)(A) of the Immigration and Nationality Act states that a “refugee” is:

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

INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2018); see also 8 C.F.R. §§ 208.13(b), 1208.13(b) (2018).

40. See, e.g., Marsden, *supra* note 3, at 2518 (referring to “five protected grounds”); Musalo, *supra* note 3, at 783 (referencing “Convention reason,” “five . . . grounds,” and “Convention grounds”); Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States*, 23 AM. U.J. GENDER SOC. POL’Y & L. 529, 531, 542 (2015) (referring to “five protected grounds” and “convention ground”).

41. *Refugees & Asylum*, U.S. CITIZENSHIP & IMMIGRATIONS SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum> (last updated Nov. 12, 2015).

women asylum seekers.<sup>42</sup> The United Nations High Commissioner for Refugees (UNHCR), in its *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, has also acknowledged that traditionally “the refugee definition has been interpreted through a framework of male experiences.”<sup>43</sup> In response, the United Nations, individual countries, non-governmental organizations, academics, and practitioners, among others, have made significant efforts in the last thirty years to address gender-based asylum, including asylum claims based on intimate partner violence.<sup>44</sup>

Even before Attorney General Jeff Sessions’s recent decision questioning the viability of asylum claims involving intimate partner violence, many women asylum seekers who have experienced intimate partner violence historically encountered specific barriers to obtaining asylum status in the United States. This difficulty can be attributed to a combination of interpretive issues related to the refugee definition,<sup>45</sup> fears of opening the floodgates,<sup>46</sup> and a lack of training for adjudicators on asylum claims related to intimate partner violence.<sup>47</sup>

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42. See, e.g., Musalo, *supra* note 3, at 780.

43. UNHCR Gender Guidelines, *supra* note 10, at 2.

44. See, e.g., Musalo, *supra* note 3, at 777–79, 781–82 (referring to the progress made on women’s claims in the United Kingdom, New Zealand, and Australia); 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 SURV. Q. 46, 49 (2010) reprinted in U.C. HASTINGS SCHOLARSHIP REPOSITORY (2010) [hereinafter Musalo, *A Short History*] (stating that in 1985, the UNHCR and its Executive Committee began issuing guidance on the interpretive barriers to the protection of refugee women); Musalo & Knight, *supra* note 36, at 57–59 (recognizing that advocates have made significant progress toward the recognition of women’s rights and momentum for the protection of women refugees is growing); Randall, *supra* note 40, at 532 (acknowledging advancements in the reception of women’s asylum claims).

45. See Musalo, *supra* note 3, at 781–82.

46. 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.”); see also Marsden, *supra* note 3, at 2553–55 (“One criticism that has been leveled at proposals to make it easier for women to seek asylum on the basis of domestic violence is that doing so will open a “floodgate” of female asylum-seekers to the United States.”).

47. See Barbara R. Barreno, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 266–68 (2011) (asserting that training for adjudicators, requiring the review of Department of State Human Rights Reports and updates on the status of intimate partner asylum claims are “small steps” that should be taken to ensure intimate partner violence asylum claims are properly adjudicated); Cianciarulo & David, *supra* note 14, at 372–73 (arguing that if adjudicators do not understand the complex dynamics of abusive relationships, new regulations cannot assist adjudicators in the assessment of asylum claims involving intimate partner violence).

Three primary interpretative issues regularly arise for women asylum seekers in satisfying the threshold requirements in asylum proceedings.<sup>48</sup> First, women may be persecuted on the basis of their gender, which is not included as one of the five categories in the 1951 Convention to be protected from targeted persecution (race, religion, nationality, membership in a particular social group, and political opinion).<sup>49</sup> Rather, immigration judges' recognition of gender-based claims has followed a disturbing pattern of "particularization"<sup>50</sup> under the "particular social group" category. This means rather than using a more general common characteristic which may define a group, the group is further divided in to several subsets of common characteristics. For example, rather than refer to "women," an immigration judge might refer to "[i]ndigenous Guatemalan women perceived as the property of and suffering domestic violence at the hands of their intimate partners, and who are unable to safely leave the relationship."<sup>51</sup> This particularization ignores the fact that the persecution is carried out because of gender itself as opposed to gender plus other characteristics.<sup>52</sup>

Second, although the refugee definition was formed recognizing public acts of persecution inflicted by the state, it did not make any specific considerations for persecution that occurs in private and is perpetrated by private actors.<sup>53</sup> While male asylum seekers' claims often involve a state actor, such as a government entity or police, women asylum seekers' claims more regularly involve private or non-state actors including intimate partners, fathers, or other male relatives.<sup>54</sup> Under U.S. law, an asylum applicant who suffers persecution inflicted by a non-state actor must also demonstrate that the state is unable and unwilling to provide protection.<sup>55</sup> This makes

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48. Musalo, *supra* note 3, at 781–82.

49. *Id.*; see also Randall, *supra* note 40, at 531.

50. Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281, 292 (2002).

51. See *Jeronimo v. Att'y Gen.*, 678 F. App'x 796, 799 (11th Cir. 2017).

52. Randall, *supra* note 50.

53. *Id.* at 305–06; see also Catharine A. MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L L.J. 1, 9 (2006) ("The threshold legal barrier to addressing male violence against women internationally has been that both the perpetrators and the victims are private persons, termed nonstate actors.").

54. See *Robins*, *supra* note 36, at 436–37; Musalo, *A Short History*, *supra* note 44, at 49.

55. *In re A-B-*, 27 I. & N. Dec. 316, 316 (A.G. 2018), *abrogated by* *Grace v. Whitaker*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018).

corroboration of persecution in non-state actor asylum cases much more difficult.<sup>56</sup>

Third, the harms suffered by women are often different from those suffered by men.<sup>57</sup> These harms may be accepted by the society or culture.<sup>58</sup> For instance, intimate partner violence is a harm that primarily is inflicted on women rather than men.<sup>59</sup> That women are disproportionately affected by this harm has impacted determinations as to whether women who suffer this harm fall under one of the five categories to be protected from persecution, in particular political opinion and particular social group categories.<sup>60</sup> Further, because women experience intimate partner violence in every country, this fosters the view of intimate partner violence as a private criminal matter outside the scope of the refugee definition.<sup>61</sup> However, this perception ignores the fact that many societies and cultures accept intimate partner violence against women because of their gender and, for this reason, these women may meet the requirements of the refugee definition.<sup>62</sup> These interpretive issues significantly and negatively impact the adjudication of women's asylum claims involving intimate partner violence.

Gender is the most critical aspect of an asylum claim based on intimate partner violence in that it is at once the immutable characteristic forming a particular social group,<sup>63</sup> the nexus between

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56. Robins, *supra* note 36 (asserting that persecution occurs in private places where government actors are not present and governments may not be motivated to interfere in private, family matters, so it can be difficult for women to corroborate their asylum claims).

57. Musalo, *supra* note 3, at 781–82.

58. *Id.*

59. *Id.*; see UNHCR Gender Guidelines, *supra* note 10.

60. *In re A-B*, 27 I. & N. Dec. at 335 (“Social groups defined by their vulnerability to private criminal activity likely lack the particularity required under *M-E-V-G*, given that broad swaths of society may be susceptible to victimization.”); *In re R-A*, 22 I. & N. Dec. 906, 916 (A.G. 2001) (“As we understand the respondent’s rationale, it would seem that virtually any victim of repeated violence who offers some resistance could qualify for asylum, particularly where the government did not control the assailant.”); Musalo, *supra* note 3, at 781–82, 782 n.32.

61. *In re A-B*, 27 I. & N. Dec. at 335; *In re R-A*, 22 I. & N. Dec. at 916; UNHCR Gender Guidelines, *supra* note 10.

62. See *In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996); *In re R-A*, 22 I. & N. Dec. at 929–46 (Guendelsberger, Board Member, dissenting); Supplemental Brief for Dep’t of Homeland Sec. at 14–15, *In re L-R* (B.I.A. 2009), [https://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf) [hereinafter DHS Supplemental *L-R* Brief] (certain docket information redacted); Brief for Dep’t of Homeland Sec.’s Position on Respondent’s Eligibility for Relief at 5, 26–28, *In re R-A*, 23 I. & N. Dec. 694 (A.G. 2005) (No. A 73 753 922), <https://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf> [hereinafter DHS *R-A* Brief].

63. *In re A-R-C-G*, 26 I. & N. Dec. 388, 392 (B.I.A. 2014) *overruled by In re A-B*, 27 I. & N. Dec. 316; see also *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (recognizing that the shared characteristic of “sex” may form the basis for a particular social group and persecu-

the harm (intimate partner violence) and the particular social group (namely, women),<sup>64</sup> and the basis for the government's inability or unwillingness to protect the victim (entrenched misogyny and systemic sexism).<sup>65</sup> In particular, asylum claims by women involving intimate partner violence have issues arising out of three key elements of this refugee definition: (1) past persecution or a well-founded fear of future persecution, (2) on account of ("nexus"), (3) membership in a particular social group. The following is a description of these elements.

### 1. Persecution

Neither U.S. law nor the 1951 Refugee Convention and 1967 Protocol provide a definition of persecution.<sup>66</sup> However, the BIA has recognized two aspects of the term "persecution":

- (1) harm or suffering is inflicted upon the individual in order to punish her for possessing a belief or characteristic a persecutor sought to overcome; and
- (2) harm or suffering was inflicted either by government actors or by persons or an organization that the government was unable or unwilling to control.<sup>67</sup>

When government actors inflict the persecution, the applicant need not demonstrate that she reported the harm to the police or other state actors.<sup>68</sup> However, if non-governmental actors are the persecutors, the applicant must demonstrate that the government

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tion may be directed towards an individual because of her membership in such a group), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

64. See Marsden, *supra* note 3. See generally Musalo, *supra* note 3, at 781–82 (describing, in the context of gender asylum claims, the nexus requirement between the particular social group and the harm at issue).

65. See Musalo, *supra* note 3, at 797–806 (discussing several jurisdictions that have recognized the causal link between gender-related persecution and the inability or unwillingness of the state to offer protection).

66. See, e.g., Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In re Fauziya Kasinga and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375, 378 (1997); E. Dana Neacsu, *Gender Based Persecution as a Basis for Asylum: An Annotated Bibliography, 1993–2002*, 95 L. LIBR. J. 191, 193 (2003); U.N. High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* at 13, U.N. Doc. HCR/IP/4/ENG/REV. 3 (2011).

67. *In re Acosta*, 19 I. & N. Dec. at 222.

68. Joline Doedens, *The Politics of Domestic Violence-Based Asylum Claims*, 22 DUKE J. GENDER L. & POL'Y 111, 114 (2014) (citing 8 C.F.R. § 208.13(b)(3)(ii) (2013); Baballah v. Ashcroft, 367 F.3d 1067, 1078 (9th Cir. 2004)).

was unable or unwilling to protect her after reporting the persecution or that reporting the persecution would be “futile” because the government has failed to protect others who have made similar reports.<sup>69</sup>

If a person has shown that she has been persecuted in the past, a presumption exists that she also has a well-founded fear of persecution if returned to her country of nationality or habitual residence.<sup>70</sup> Thus, the DHS will then bear the burden to overcome the presumption by proving either a “fundamental change of circumstances” eliminating the person’s well-founded fear or that it is reasonable for the person to escape persecution by relocating in her country of nationality or habitual residence.<sup>71</sup> Nevertheless, an applicant need not have suffered past persecution if she can establish that she has a well-founded fear of persecution in the future.<sup>72</sup>

## 2. Nexus

Once an applicant has established a well-founded fear of persecution, she must show that it is on account of one of the five enumerated grounds of race, religion, nationality, political opinion, or membership in a particular social group.<sup>73</sup> This is referred to as the “nexus” between persecution and one of the five protected

69. *Id.* at 113–15 (citing IMMIGRANT LEGAL RESOURCE CENTER, ESSENTIALS OF ASYLUM LAW 1-1 (2d ed. 2013); *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010)); *see also In re S-A-*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000); *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (recognizing that “persecution can consist of the infliction of harm or suffering by . . . persons a government is unwilling or unable to control.”); Memorandum from Phyllis Coven, Director, INS Office of International Affairs, to all INS Asylum Officers and HQASM Coordinators 17 (May 26, 1995), *reprinted in* 72 INTERPRETER RELEASES 781 (1995) [hereinafter Coven Memorandum]; Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1230–31 (2009) (citing *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006)).

70. 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1) (2018).

71. 8 C.F.R. §§ 208.13(b)(1)(i), 1208.13(b)(1)(i) (2018).

72. 8 C.F.R. §§ 208.13(b)(2), 1208.13(b)(2) (2018). In order to establish a “well-founded” fear of persecution:

the evidence must demonstrate that (1) the [individual] possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the [individual] possesses this belief or characteristic; (3) the persecutor has the capability of punishing the [individual]; and (4) the persecutor has the inclination to punish the [individual].

*In re Acosta*, 19 I. & N. Dec. 211, 226 (B.I.A. 1985), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

73. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2018); 8 C.F.R. §§ 208.13(b)(1)–(2), 1208.13(b)(1)–(2); *see Musalo, supra* note 3, at 781.



grounds.<sup>74</sup> In 2005, Congress passed the REAL ID Act, which required that the applicant demonstrate that one of the five protected grounds is “at least one central reason for persecuting the applicant.”<sup>75</sup>

### 3. Particular Social Group as One of the Five Enumerated Grounds

The “particular social group” category was created in order to include groups of persons who may not fall under one of other grounds for asylum but are deserving of protection.<sup>76</sup> Yet, its drafters did not define particular social group at its inception.<sup>77</sup> As a result, confusing interpretations of the particular social group category and applications of those interpretations to the facts of each case has plagued asylum claims based on membership in a particular social group. This is particularly true in asylum claims involving persecution based on gender, such as intimate partner violence. The Attorney General’s determination in *Matter of A-B* is one of the most recent demonstrations of the confusing interpretation of the particular social group category and its application in a gender-based asylum case involving intimate partner violence. As gender is not one of the five enumerated grounds for asylum, it has primarily been considered under the particular social group ground. In early interpretations of the particular social group category, gender constituted an immutable characteristic, which could form a particular social group.<sup>78</sup>

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74. Musalo, *supra* note 3, at 781.

75. Doedens, *supra* note 68, at 116–17 (citing REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified in scattered sections of 8 U.S.C.); INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2018)); Robins, *supra* note 36, at 441–42.

76. Marsden, *supra* note 3, at 2517.

77. See *In re Acosta*, 19 I. & N. Dec. at 232 (“Congress did not indicate what it understood [membership in a particular social group] to mean, nor is its meaning clear.”).

78. See *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (finding that women in Iran could constitute a particular social group); see also *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (Cameroonian widows); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (Somali females); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (female tribe members). For a discussion of cases recognizing that gender or sex may constitute a social group, see Brief of The Harvard Immigration and Refugee Clinical Program et al. as Amici Curiae, at 7–8, *In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018), <https://uchastings.app.box.com/s/t1ydlq5tum1i2zxlz4rname4bk29s7/file/291242765358>.

C. Interpretation of “Particular Social Group” as  
One of the Five Convention Grounds

Using the doctrine of *ejusdem generis*<sup>79</sup> in 1985, the BIA initially interpreted the particular social group category in *Matter of Acosta* as

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.<sup>80</sup>

The determination is made on a case-by-case basis, but the characteristic must be either “beyond the power of an individual to change or . . . so fundamental to individual identity or conscience that it ought not be required to be changed.”<sup>81</sup> Since *Matter of Acosta*, the definition of the particular social group category has undergone a significant evolution.<sup>82</sup>

In 2008, the BIA formally added the requirements of “particularity” and “social visibility” to its interpretation of a particular social group in *Matter of S-E-G* and *Matter of E-A-G*.<sup>83</sup> The Third and Seventh Circuits refused to recognize the BIA’s new “particularity” and “social visibility” requirements, finding them to be inconsistent with prior BIA determinations, confusing, and an unnecessary addition to the social group test set forth in *Acosta*.<sup>84</sup> In *Matter of M-E-*

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79. See *In re Acosta*, 19 I. & N. Dec. at 233 (“[G]eneral words used in an enumeration with specific words should be construed in a manner consistent with the specific words.”).

80. *Id.*

81. *Id.* at 233–34.

82. See generally Nicholas R. Bednar, Note, *Social Group Semantics: The Evidentiary Requirements of “Particularity” and “Social Distinction” in Pro Se Asylum Adjudications*, 100 MINN. L. REV. 355, 367–379 (2015) (discussing the judicial treatment of the *Acosta* standard in the years following the decision); Kenneth Ludlum, Note, *Defining Membership in a Particular Social Group: The Search for a Uniform Approach to Adjudicating Asylum Applications in the United States*, 77 U. PITT. L. REV. 115, 119–24 (2015) (discussing the history of interpretation of the particular social group category since *Acosta*).

83. *In re E-A-G*, 24 I. & N. Dec. 591 (B.I.A. 2008); *In re S-E-G*, 24 I. & N. Dec. 579 (B.I.A. 2008).

84. See *Cece v. Holder*, 733 F.3d 662, 674, 677 (7th Cir. 2013) (stating that “the breadth of category has never been a per se bar to protected status” and finding the BIA’s decision inconsistent with its own precedent following *Matter of Acosta*, which had established the test for whether a social group is cognizable); *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 603–06 (3d Cir. 2011) (directing the BIA to clarify the requirements of “particularity” and

V-G-, the BIA attempted to provide further explanation of its interpretation of the particular social group category.<sup>85</sup> Although the BIA included *Matter of Acosta*'s common, immutable characteristic requirement in its definition, it clarified two additional requirements in establishing a particular social group.<sup>86</sup> As explained by the BIA in *Matter of M-E-V-G*, a particular social group must be: (1) composed of members who share a common immutable characteristic (*Matter of Acosta* test), (2) defined with particularity, and (3) socially distinct within the society in question.<sup>87</sup>

Regarding particularity, the BIA expounded that a particular social group “must be defined by characteristics that provide a clear benchmark for determining who falls within the group” and must have “discrete” and “definable boundaries.”<sup>88</sup> The BIA renamed “social visibility” as “social distinction” and clarified that it signifies that a society considers the members to comprise a group regardless of whether the group’s members can be identified by sight.<sup>89</sup> Although the BIA recognized that these requirements might overlap, it argued that “particularity” is focused on the outer limits of the group’s boundaries and “social visibility” on whether a society would perceive a proposed group as separate or distinct.<sup>90</sup> At the same time, it acknowledged that societal considerations were important to both requirements.<sup>91</sup>

Scholars have argued that the addition of the requirements of “particularity” and “social distinction” to the interpretation of a particular social group is inconsistent with the principle of *ejusdem*

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“social visibility” after finding their usage was inconsistent with prior BIA precedent and not entitled to *Chevron* deference); *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009) (“We just don’t see what work ‘social visibility’ does.”).

85. On remand, the BIA defended its decision by asserting that it had not created new requirements to its interpretation of “particular social groups”; rather, it had simply provided the term with more “concrete meaning through a process of case-by-case adjudication.” *In re M-E-V-G*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)); see also *In re W-G-R*, 26 I. & N. Dec. 208 (B.I.A. 2014).

86. *Id.*

87. *Id.*

88. *Id.* at 239 (citing *In re A-M-E- & J-G-U*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007)).

89. *Id.* at 240.

90. *Id.* at 241.

91. *Id.* The Third Circuit has found that the BIA adequately articulated why it understood “social visibility” and “particularity” to be separate requirements for establishing a cognizable social group. *S.E.R.L. v. Att’y Gen.*, 894 F.3d 535, 553 (3d Cir. 2018) (citing *In re M-E-V-G*, 26 I. & N. Dec. 227, 239–41, 244). Notably, the Seventh Circuit has not accepted these articulations of “particularity” and “social distinction” and thus far has declined to determine whether these requirements are entitled to *Chevron* deference. See, e.g., *Cece v. Holder*, 733 F.3d 662, 674 (7th Cir. 2013); *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

*generis* as they compel consideration of more than common immutable characteristics required by race, religion, nationality, and political opinion.<sup>92</sup> Further, the BIA's "particularity" and "social distinction" requisites for demonstrating the existence of a particular social group have been one of the causes of the inconsistent determinations in asylum cases of women who have suffered persecution in the form of intimate partner violence.<sup>93</sup> This is because societal considerations and perceptions are essential to both requirements of particularity and social distinction.<sup>94</sup> A society may not recognize intimate partner violence as a problem in their country due to its hidden nature within the society, its social acceptability, or its insignificance in the society due to the subordination of women.<sup>95</sup>

That women from certain countries who suffer intimate partner violence may have a viable asylum claim is not new to the U.S. immigration system. In fact, the INS recognized it as early as 1995. In her May 26, 1995, memorandum to INS asylum officials, the Director of the INS Office of International Affairs, Phyllis Coven, explained that domestic violence is a form of harm "primarily directed" at women and "may serve as evidence of past persecution on account of one or more of the five grounds" for asylum.<sup>96</sup>

The following sections discuss the seminal cases that provide interpretations of a particular social group as applied to gender-based claims, including those involving intimate partner violence.

#### D. Matter of Kasinga: *Interpretation of Particular Social Group as Applied to Gender-Based Claims*

One of the most important BIA decisions analyzing the particular social group category in a gender-based asylum claim is *Matter of Kasinga*, decided in 1996.<sup>97</sup> In *Matter of Kasinga*, the nineteen-year-

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92. Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 105 (2008); Liliya Paraketsova, Note, *Why Guidance from the Supreme Court is Required in Redefining the Particular Social Group Definition in Refugee Law*, 51 U. MICH. J.L. REFORM 437, 449-50 (2018).

93. Elizabeth Zambrana, *The Social Distinction of "Invisible" Harms: How Recent Developments in the Particular Social Group Standard Fall Short for Victims of Gender-Based Harms Committed by Private Actors*, 36 WOMEN'S RTS. L. REP. 236, 259-64 (2015).

94. *Id.*

95. *Id.*

96. Coven Memorandum, *supra* note 69, § II(a).

97. *In re Kasinga*, 21 I. & N. Dec. 357, 367 (B.I.A. 1996).

old applicant was a member of the Tchamba-Kunsuntu Tribe in northern Togo. Women in her tribe were forced to undergo female genital mutilation (FGM) at around fifteen years old. Ms. Kasinga, however, had not been subjected to FGM because her father had protected her from the practice. Her father later died. Following his death, Ms. Kasinga's mother was forced to leave Togo, and Ms. Kasinga went to live with her father's sister. Her aunt forced her to marry a man with three other wives when she was seventeen. Her husband and her aunt then made plans for her to undergo FGM according to tribal custom.

The applicant, fearing that she would be forced to undergo FGM, eventually fled to the United States asking for asylum once she reached the airport.<sup>98</sup> She claimed a well-founded fear of persecution on the grounds of her membership in a particular social group made up of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."<sup>99</sup> Using the BIA's interpretation of "particular social group" in *Matter of Acosta*, the BIA found that the "characteristics of being a 'young woman' and a 'member of the Tchamba-Kunsuntu Tribe' cannot be changed. 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>100</sup>

The BIA found that FGM is practiced on account of sexual characteristics of young women of the tribe who do not want to be subjected to FGM.<sup>101</sup> FGM constituted "sexual oppression" derived from society's purpose in promoting "male dominance and exploitation."<sup>102</sup> Her fear of persecution was countrywide as her husband was a friend of the police, FGM was widely practiced, police tolerated violence towards women, Togo had a poor human rights record, and "most African women [could] expect little government protection from FGM."<sup>103</sup> Kasinga was found to have a well-founded fear of persecution on account of a particular social group, her fear was determined to be countrywide, and thus, she was granted asylum.<sup>104</sup>

Although not identified as such in *Kasinga*, Karen Musalo has pointed out that the BIA employed the bifurcated analysis used by

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98. *Id.* at 359.

99. *Id.* at 365.

100. *Id.* at 366.

101. *Id.* at 367.

102. *Id.*

103. *Id.*

104. *Id.* at 368.

the British House of Lords and the UNHCR.<sup>105</sup> The bifurcated analysis recognizes that persecution on account of a particular social group, or nexus, may be evidenced if: (1) the non-state actor persecutes the woman based on her membership in a particular social group or (2) the state is unwilling or unable to offer protection from the persecution based on her membership in a particular social group.<sup>106</sup> Since the problem for women who are persecuted is finding a nexus between the non-state actor's persecution and the particular social group ground, the bifurcated analysis has allowed the United Kingdom and other countries<sup>107</sup> to give protection to women despite the nexus problem. The approach allows the consideration of not only the motives of the persecutor, but also takes into account the state's or society's involvement in the persecution by establishing the "causal connection" between the particular social group ground and the non-state perpetrator or the state/society.<sup>108</sup> This bifurcated analysis is especially important as it provides "an analytical path around the barrier created by the characterization of family violence as 'personal' rather than as a Convention reason."<sup>109</sup>

Although the social group identified by the BIA included "gender, ethnicity, and opposition to FGM," no decision was made as to whether the social group could be comprised of gender alone. Nevertheless, *Kasinga* continues to be one of the most important

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105. Musalo, *supra* note 3, at 781–87. In *Islam v. Sec'y of State for the Home Dep't* [1999] 2 AC 629 (HL) (appeal taken from Eng.), the applicants were citizens of Pakistan and risked being falsely accused of adultery in Pakistan. They fled to the United Kingdom and applied for asylum claiming that the state would not provide protection and, if returned, they would be subjected to criminal proceedings for sexual immorality. The House of Lords found that the women were members of a gender-related social group and, while their husbands did not abuse them on the grounds of their membership in this group, the State was unwilling to protect them due to their gender. Through this approach, the nexus between the persecution and the particular social group was established. Three of the four Lords of the majority defined the social group as "women in Pakistan" while the fourth described it as Pakistani women who are accused of adultery and have no State protection. The State's failure to provide protection to these women from persecution by their husbands fulfilled the required nexus to the ground of a particular social group. *Id.* at 787–89.

In *Matter of Kasinga*, the BIA found that there was a nexus between FGM and a particular social group based on gender. Karen Musalo analogizes the finding in *Kasinga* that FGM constituted "sexual oppression" derived from society's purpose in promoting "male dominance and exploitation" to the findings in *Islam v. Sec'y of State for the Home Dep't* [1999] 2 AC 629 (HL) (appeal taken from Eng.). Musalo, *supra* note 3, at 800–01. The BIA in *Kasinga* recognized that the nexus between persecution and particular social group status could be established "not solely by reference to the individual perpetrators of [the harm], but within a broader societal context." *Id.*

106. Musalo, *supra* note 3, at 783–87.

107. *See id.* at 777.

108. *Id.* at 777–79.

109. *Id.* at 790.

authorities analyzing a gender-based asylum claim.<sup>110</sup> The decision in *Kasinga* has continued to be validated by the BIA, including under the new three-part test required to establish a particular social group clarified in *Matter of M-E-V-G*.<sup>111</sup>

As discussed further below, the Attorney General's recent determination in *Matter of A-B* is void of any substantive discussion of *Matter of Kasinga*. If the analysis of the Attorney General were to be employed in *Kasinga* today, it is uncertain whether Ms. Kasinga could establish that she was a member of a cognizable social group, a nexus between the persecution and the social group, that the government was unable or unwilling to provide protection to her, or that her fear of persecution was countrywide. The possibility that gender-based asylum claims involving FGM may not meet the Attorney General's interpretation of the refugee definition is alarming and further evidences his confusing and flawed analysis of a gender-based asylum claim.

#### E. *Interpretation of the Particular Social Group Category as Applied to Victims of Intimate Partner Violence*

##### 1. *Matter of R-A*<sup>112</sup>

The history of inconsistent and even erratic adjudications in asylum cases based on gender and intimate partner relationships as particular social groups is well documented.<sup>113</sup> Particularly, in 2000, the BIA's decision in *Matter of R-A* roused significant controversy and impeded progress in gender-related asylum claims.<sup>114</sup> In that case, the applicant, Ms. Alvarado, a citizen of Guatemala who was married, claimed abhorrent physical and sexual abuse.<sup>115</sup>

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110. *Id.* at 798 ("Significant for purposes of this analysis, however, is the fact that the vacating of *Matter of R-A* leaves *Matter of Kasinga* as the most relevant authority on gender asylum claims. It is on this basis that the unifying rationale of a bifurcated nexus analysis can be reinvigorated.")

111. *In re M-E-V-G*, 26 I. & N. Dec. 227, 238 (B.I.A. 2014).

112. *In re R-A*, 22 I. & N. Dec. 906 (A.G. 2001).

113. *See, e.g.*, Barreno, *supra* note 47, at 231–50; Musalo, *supra* note 3.

114. *See* Marsden, *supra* note 3, at 2529.

115. The immigration judge found that the applicant was persecuted by her husband on account of her membership in a particular social group, and the Immigration and Naturalization Service subsequently appealed the decision to the BIA. *In re R-A*, 22 I. & N. Dec. at 906–09.

Although the BIA acknowledged that Ms. Alvarado had established that the harm she had suffered amounted to persecution, it found that she failed to establish her membership in a particular social group comprised of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe women are to live under male domination.”<sup>116</sup> The BIA reasoned that the interpretation of what forms a particular social group in *Matter of Acosta* is only a starting point.<sup>117</sup> “Shared descriptive characteristics” are not enough to constitute a particular social group. If that were all that needed to be shown, “the social group concept would virtually swallow the entire refugee definition.”<sup>118</sup> In an early formulation of the “social visibility”/“social distinction” requirement discussed above, the BIA explained that the applicant had not shown that the identified particular social group was a recognized segment of the society, that the society expected women to be abused, or the “prominence or importance” of the characteristics of the proposed particular social group within the society.<sup>119</sup>

Further, the BIA found that Ms. Alvarado failed to demonstrate the requisite nexus, meaning that her husband abused her on account of her membership in the particular social group.<sup>120</sup> Rather, he targeted her because she was his wife and not because he recognized that she was a part of the social group.<sup>121</sup> In particular, the BIA rejected the argument that a government’s failure to provide effective protection is a “reliable indicator of the motivations behind the actions of private parties.”<sup>122</sup> Although the government may have tolerated the abuse inflicted upon the applicant by her husband, this did not prove that the Guatemalan government supports domestic violence and abuse.<sup>123</sup> In addition, the BIA stated that by equating “private acts of violence” with “governmental persecution” when protection is ineffective would render the “on account of” requirement meaningless.<sup>124</sup>

The BIA’s decision in *Matter of R-A-* was widely criticized, which led the INS to draft amended regulations on the particular social

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116. *Id.* at 917–18.

117. *Id.* at 919.

118. *Id.*

119. *Id.*

120. *Id.* at 920–21.

121. *Id.* at 921.

122. *Id.* at 922.

123. *Id.*

124. *Id.* at 923.



group category that specifically addressed gender-related issues.<sup>125</sup> The INS published the proposed rule that would amend the regulations in 2000.<sup>126</sup> In 2001, Attorney General Janet Reno vacated the BIA's decision in *R-A*- and remanded the case back to the BIA for reconsideration after the regulations were finalized.<sup>127</sup> In 2004, Attorney General John Ashcroft certified *Matter of R-A*- to himself, and DHS filed a brief supporting a grant of asylum.<sup>128</sup> In DHS's 2004 brief, it argued that the BIA's decision in *R-A*—rejecting the existence of a particular social group and the nexus between the persecution and the particular social group—to be “flawed and, if reinstated as precedent, would impede rational, coherent development of particular social group law.”<sup>129</sup>

DHS acknowledged that women who fear domestic violence may meet the requirements for asylum.<sup>130</sup> In particular, DHS recognized that “married women in Guatemala who are unable to leave the relationship” would meet the requirements for a particular social group.<sup>131</sup> Ms. Alvarado's husband abused her on account of her membership in this group because he believed, as his wife, she was subordinate to him.<sup>132</sup> Social norms in Guatemala supported this belief and, as such, his abuse was tolerated by the Guatemalan government and society.<sup>133</sup>

125. See, e.g., Barreno, *supra* note 47, at 238 (discussing the drafting of amended regulations by the INS); Marsden, *supra* note 3, at 2529 (explaining that the holding was “immediately criticized”).

126. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

127. *In re R-A*-, 22 I. & N. Dec at 906.

128. See generally DHS *R-A*- Brief, *supra* note 62.

129. *Id.* at 15.

130. See generally *id.*

131. *Id.* at 26–28.

132. *Id.* at 36.

133. *Id.* at 40–42. Additionally, the dissent in *Matter of R-A*- is particularly instructive in addressing the flawed analysis of the BIA majority opinion. See *In re R-A*-, 22 I. & N. Dec. 906, 929–946 (A.G. 2001) (Guendelsberger, Board Member, dissenting).

The applicant suffered harm in part due to the government's inaction and refusal to intervene. The dissent highlighted the findings of the immigration judge that the institutional biases in Guatemala derive from “a pervasive belief, common in patriarchal societies, that a man should be able to control a wife or female companion by any means he sees fit: including rape, torture, and beatings.” *Id.* at 930. On account of this societal belief that men should control their wife or female companion coupled with the fact that domestic abuse is considered a family matter, abusive husbands or partners are not brought to justice and protection is unavailable to victims. *Id.* The dissent argued that the applicant has a “fundamental right” to protection from abuse on account of her gender. *Id.* at 931. In the situation that domestic abuse occurs in combination with state acquiescence, the victim should be protected under asylum law.

Concerning the nexus between the persecution and one of the five protected grounds, the dissent appeared to support the bifurcated analysis put forth in *Islam v. Sec'y of State for*

Ultimately, in 2005, Attorney General Ashcroft, like Attorney General Reno, remanded the case to the BIA for consideration when the regulations were finalized. The regulations were, in fact, never finalized and the case remained stayed by the BIA.<sup>134</sup> A third attorney general, Michael Mukasey, in 2008, remanded the case to the BIA again to reconsider specific issues related to asylum claims stemming from domestic violence.<sup>135</sup> After ten years and no reconsideration on remand, the DHS finally stipulated to Ms. Alvarado's eligibility for asylum, and her application was granted by an immigration judge in December 2009.<sup>136</sup>

Although the BIA's decision in *Matter of R-A-* was vacated, and its analysis was determined to be flawed even by DHS, Attorney General Sessions utilized much of the analysis of the BIA in *Matter of R-A-* in support of his decision in *Matter of A-B-*. His decision appears to be an attempt to return to the rejected analysis of the BIA in 2000.

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*the Home Dep't* [1999] 2 AC 629 (HL) (appeal taken from Eng.), which had been rejected by the majority. Compare *In re R-A-*, 22 I. & N. Dec. at 935–937 (Guendelsberger, Board Member, dissenting) (citing the case with approval), *with id.* at 920 n.2 (majority opinion) (indicating disapproval of the case's nexus analysis). The facts clearly provided proof that the husband targeted the applicant on the basis of her gender when he used abuse in order to affirm his domination over her. The dissent believed that, when addressing nexus, it is important to consider the "factual circumstances surrounding the violence." *Id.* at 938 (Guendelsberger, Board Member, dissenting). In addition, the dissent, unlike the majority, recognized that the difficulty in determining the husband's motives only "supports the respondent's claim that the harm is 'on account of' a protected ground." Compare *id.*, *with id.* at 916 (majority opinion). The majority, according to the dissent, missed the point that no "good reason" actually exists for the husband's abuse. *Id.* at 938 (Guendelsberger, Board Member, dissenting). The dissent went further to say that "[i]llegitimate motives can give rise to an inference that the harm has occurred on account of a statutorily protected characteristic," such as the applicant's membership in a particular social group. *Id.* Finally, the dissent asserted that the BIA should consider the reasons behind this violence. *Id.* at 939. The BIA found that FGM aims to control "women's sexuality." *Id.* Like FGM, domestic violence is also a means used by men to subordinate women. *Id.* The husband in this case acted on account of the applicant's gender, their relationship, and the fact that he knew, "as a woman subject to his subordination, the respondent would receive no protection from the authorities if she resisted his abuse and persecution." *Id.* Applying the bifurcated approach, the dissent would have found that the applicant had a well-founded fear of persecution on account of her membership in the identified social group.

134. See, e.g., Musalo & Knight, *supra* note 36, at 60 (describing Attorney General Janet Reno's actions in 2001); Barreno, *supra* note 47, at 237 (describing Attorney General John Ashcroft's actions in 2005).

135. See *In re R-A-*, 24 I. & N. Dec. 629, 629 (A.G. 2008); see also Musalo & Knight, *supra* note 36, at 59; Barreno, *supra* note 47, at 237.

136. See Musalo & Knight, *supra* note 36, at 60; Barreno, *supra* note 47, at 248.

## 2. *Matter of L-R*

In 2004, Ms. L-R fled Mexico to escape twenty years of physical, sexual, and mental abuse from her partner.<sup>137</sup> He beat and raped her repeatedly. In one circumstance after she tried to flee, he found her and attempted to burn her alive. Ms. L-R's abuser further threatened violence against their children to prevent her escape. The police refused to help her, and even a judge asserted that he would not help Ms. L-R unless she had sex with him, which she refused to do. When she fled to the United States, she applied for asylum. An immigration judge denied her application.

She appealed to the BIA and, similar to its 2004 brief in *Matter of R-A*, DHS acknowledged that asylum claims involving domestic violence could be viable.<sup>138</sup> In particular, DHS recognized that particular social groups, such as "Mexican women in domestic relationships who are unable to leave" and "Mexican women who are viewed as property by virtue of their positions within a domestic relationship" may be cognizable because they meet the immutability, particularity, and visibility requirements.<sup>139</sup> DHS explained that Ms. L-R's particular social group is "best defined in light of the evidence about how the respondent's abuser and her society perceive her role within the domestic relationship."<sup>140</sup> DHS found that Ms. L-R's abuser and surrounding society perceived her role in a domestic relationship as subordinate. The case was remanded to the immigration judge, and DHS stipulated that Ms. L-R was eligible for asylum. The immigration judge granted asylum in a summary order stating that the grant was a result of the parties' stipulation.

Both *Matter of R-A* and *Matter of L-R* represented progress in the position taken by DHS recognizing the viability of asylum claims of women involving intimate partner violence. However, because

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137. In fact, Ms. L-R had fled to the U.S. earlier, in 1991, but her partner found her and forced her to return, threatening to take away her children and kill her. *Matter of L-R*, CTR. FOR GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/our-work/matter-l-r> (last visited Jan. 21, 2019); see also Natalie Nanasi, *Domestic Violence Asylum and the Perpetuation of the Victimization Narrative*, 78 OHIO ST. L.J. 733, 749–51 (2017).

138. DHS Supplemental *L-R* Brief, *supra* note 62, at 13 n.10; DHS *R-A* Brief, *supra* note 62.

139. DHS Supplemental *L-R* Brief, *supra* note 62; DHS *R-A* Brief, *supra* note 62, at 26–28. DHS explained "This evidence may reflect a societal view, applicable at least in parts of Mexico, that the status of a woman in a domestic relationship places the woman into a segment of society that will not be accorded protection from harm inflicted by a domestic partner. In this light, the female respondent's status by virtue of her relationship . . . could indeed be the kind of important characteristic that results in a significant social distinction being drawn in terms of who will receive protection from serious physical harm." *Id.* at 18.

140. Nanasi, *supra* note 137, at 746–51.

these women were granted asylum in a summary order based on the stipulation of the parties, the decisions granting asylum in these cases did not provide any precedent for future asylum cases based on intimate partner violence.<sup>141</sup>

### 3. *Matter of A-R-C-G*

In 2014, the BIA, for the first time in a published case, recognized that a woman who feared persecution in the form of intimate partner violence may meet the requirements of asylum.<sup>142</sup> In the case, *Matter of A-R-C-G*, the BIA found that the applicant, Ms. Cifuentes, was a member of a particular social group composed of “married women in Guatemala who are unable to leave their relationship.”<sup>143</sup> The applicant suffered considerable abuse at the hands of her husband; he beat her weekly, broke her nose, burned her breast with paint thinner, and raped her.<sup>144</sup> She sought protection from the police many times, but the police told her that they would not interfere in a marital relationship.<sup>145</sup> Ms. Cifuentes tried to leave on a number of occasions, hiding at her father’s house.<sup>146</sup> However, each time her husband found her and threatened to kill her if she did not return to him.<sup>147</sup>

The immigration judge denied Ms. Cifuentes’s asylum claim, finding that she failed to demonstrate a nexus between her persecution and particular social group. In particular, the immigration judge found that she had failed to provide sufficient evidence to demonstrate that her husband abused her on account of the fact

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141. See *id.* at 749, 751.

142. Unpublished decisions of the BIA are generally unavailable to the public. This is a basis of a recent lawsuit filed by the New York Legal Assistance Group against the BIA, Executive Office for Immigration Review (EOIR), and DOJ. The BIA provides a hard copy of a small percentage of its unpublished decisions in a reading room at the EOIR Law Library and Immigration Research Center. See Complaint at 5, N.Y. Legal Assistance Grp. v. BIA, No. 18-cv-9495 (S.D.N.Y. Oct. 17, 2018), ECF No. 1 (citing EOIR, *Library information and FAQs*, <https://www.justice.gov/eoir/library-faqs> (last visited Oct. 15, 2018)); 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, 109–11 (2013); U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 9 (2017), <https://www.justice.gov/eoir/page/file/1103051/download> [hereinafter IMMIGRATION COURT PRACTICE MANUAL].

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

144. *Id.* at 389.

145. *Id.*

146. *Id.*

147. *Id.*

that she was a “married woman in Guatemala who was unable to leave the relationship.”<sup>148</sup> Rather, the immigration judge determined, the abuse constituted arbitrary criminal acts.<sup>149</sup> In Ms. Cifuentes’s appeal to the BIA, the DHS conceded that she had suffered persecution on account of her membership in a particular social group comprised of “married women in Guatemala who are unable to leave their relationship.”<sup>150</sup> Nevertheless, the BIA applied its immutability,<sup>151</sup> particularity,<sup>152</sup> and social distinction<sup>153</sup> requirements to determine if such a particular social group existed.<sup>154</sup>

As to “immutability,” the BIA recognized that gender is an immutable characteristic and the group in Ms. Cifuentes’s case shared gender as an immutable characteristic.<sup>155</sup> The BIA further recognized that marital status, when the individual is unable to leave the relationship, could constitute an immutable characteristic.<sup>156</sup> But, such a determination would be dependent upon the facts and evidence in a particular case.<sup>157</sup> The BIA went on to list some of the factors which would be relevant to this analysis, such as whether dissolution of the marriage is possible in light of religious, cultural, moral, or legal constraints; background country information; and the applicant’s own experiences.<sup>158</sup>

In regard to “particularity,” the BIA acknowledged that the terms of “married,” “women” and “unable to leave the relationship” have “commonly accepted definitions within Guatemalan society.”<sup>159</sup> The BIA found that the terms could be combined to create a group with discrete and definable boundaries acknowledging that a married woman’s inability to leave a relationship may be informed by societal expectations about gender, subordination, and legal constraints on divorce and separation.<sup>160</sup> In particular, the

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148. *Id.* at 389–90.

149. *Id.*

150. *Id.* at 390.

151. *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *overruled in part by In re Mogharabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

152. *In re M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014); *In re W-G-R*, 26 I. & N. Dec. 208 (B.I.A. 2014).

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

154. *In re A-R-C-G*, 26 I. & N. Dec. at 390–95.

155. *Id.* at 392.

156. *Id.* at 392–93.

157. *Id.* at 393.

158. *Id.*

159. *Id.*

160. *Id.*

applicant sought protection from the police, but they refused to help her because of her marital relationship.<sup>161</sup>

In its application of the “social distinction” requirement, the BIA found 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>162</sup> Specifically, evidence in Ms. Cifuentes’s case demonstrated a culture of “machismo and family violence” in Guatemala.<sup>163</sup> Guatemala’s laws for prosecution of domestic violence crimes were not regularly enforced because the police often failed to respond to domestic violence disturbances.<sup>164</sup> Again, the BIA provided examples of evidence that could be offered in support of social distinction in a domestic violence-related asylum claim. These included: “whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other socio-political factors.”<sup>165</sup> An applicant can demonstrate this evidence through documented country conditions, law enforcement statistics, expert witnesses, an applicant’s past experiences, and other credible sources of information.<sup>166</sup> Accordingly, the BIA determined that its own analysis was in accord with the DHS’s concession that Ms. Cifuentes had suffered past persecution on account of her particular social group comprised of married women in Guatemala who are unable to leave their relationship.

Although the BIA’s favorable determination of an asylum claim involving domestic violence in a published decision was significant, the BIA’s analysis and holding in *Matter of A-R-C-G-* was narrow.<sup>167</sup> In *Matter of A-B-*, discussed below, Attorney General Sessions asserted that *Matter of A-R-C-G-* recognized an expansive new category of asylum claims based on private violence. In reality, the particular social group category—“married women in Guatemala who are unable to leave their relationship”—was restrictive. The BIA rec-

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161. *Id.*

162. *Id.* at 394.

163. *Id.*

164. *See id.*

165. *Id.*

166. *Id.* at 395.

167. 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 L. 1, 4 (2016) (asserting that the legal holding in the case is “narrow and fact-specific,” continuing to allow immigration judges significant discretion).

ognized that “gender” is an immutable characteristic, but the addition of “married women” and “unable to leave their relationship” to define the particular social group in *A-R-C-G* ignored that women in general, unmarried or married, may suffer harm from male intimate partners or family members and a government may fail to protect them.<sup>168</sup> Gender alone could have formed this particular social group.

Further, the BIA’s opinion put substantial emphasis on DHS’s concessions in the case.<sup>169</sup> The BIA asserted repeatedly that when “concessions are not made and accepted as binding,” immigration judges would decide the issues in asylum claims, including those involving domestic violence, depending on the facts and circumstances of each case.<sup>170</sup> In asylum claims involving a proposed particular social group, similar to that in *Matter of A-R-C-G*, the relevant considerations may include: (a) whether inability to leave a marriage constitutes an immutable characteristic, and (b) whether the group of married women in a domestic relationship who are unable to leave has discrete and definable boundaries and is socially distinct.<sup>171</sup>

Although *Matter of A-R-C-G* recognized an asylum claim involving intimate partner violence, it did not ultimately resolve the primary interpretive barriers to gender-based asylum claims:

(1) that persecution of women is often inflicted because of their gender, which is not one of the five grounds for asylum; . . .

(2) that women are often persecuted by non-state actors or private persons, rather than by their country’s government, but the government is unable or unwilling to provide protection for these women from such persecution[; and]

(3) that women suffer harms which are often different from the harms suffered by men, they are disproportionately affected by these harms, and societies and cultures often condone or acquiesce to these harms.<sup>172</sup>

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168. *In re A-R-C-G*, 26 I. & N. Dec. at 392–93; see Gabriela Corrales, *Justice Delayed is Justice Denied: The Real Significance of Matter of A-R-C-G*, 26 BERKELEY LA RAZA L.J. 70, 84–85 (2016).

169. *In re A-R-C-G*, 26 I. & N. Dec. at 392–93.

170. *Id.* at 393.

171. *Id.* at 388, 390, 393–95.

172. Musalo, *supra* note 3, at 781–82. These barriers continue to directly impact determinations about whether a cognizable particular social group was identified, whether the

Unfortunately, the narrow holding of *Matter of A-R-C-G* allowed adjudicators in subsequent cases to disregard any guidance the BIA provided in evaluating gender-based asylum claims, in particular those involving intimate partner violence.<sup>173</sup> The BIA did not publish subsequent determinations citing *Matter of A-R-C-G*.<sup>174</sup> However, a number of U.S. circuit courts, in published and unpublished decisions, analyzed *Matter of A-R-C-G*, as well as the interpretations and applications of the case by immigration judges and the BIA. Contrary to Attorney General Sessions's assertion in his decision that *Matter of A-R-C-G* created confusion, the U.S. circuit courts, the BIA, and immigration judges predominantly distinguished *Matter of A-R-C-G*, and few adjudicators favorably applied the case for the asylum applicant.<sup>175</sup>

Nevertheless, due to the Attorney General's recent decision in *Matter of A-B*, gender-based asylum claims, including those involving intimate partner violence, have suffered a significant blow to any limited progress that *Matter of A-R-C-G* achieved.

## II. MATTER OF A-B: A RETURN TO THE "PRIVATE MATTER" PERCEPTION

On June 11, 2018, in *Matter of A-B*, Attorney General Jeff Sessions issued a decision overruling and vacating the BIA's decision in *Matter of A-R-C-G*.<sup>176</sup> Sessions's decision returned to a rejected understanding of intimate partner violence inflicted against a fe-

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non-state actor's persecution occurred on account of the applicant's membership in that group, whether the applicant suffered past-persecution or has a well-founded fear of future persecution, and the applicant's credibility.

173. Zambrana, *supra* note 93, at 264 (arguing that *Matter of A-R-C-G* has done little to resolve the issues stemming from the fact that gender is not a protected category, such as the inconsistencies of "piecemeal adjudication of gender-based claims"); *see generally* Booksey, *supra* note 167 (discussing immigration judges' and BIA's decisions post-*A-R-C-G*).

174. Additionally, unpublished BIA determinations are not publicly available, which makes the BIA's application and interpretations of *Matter of A-R-C-G* difficult to track. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 142; Bookey, *supra* note 142, at 109–11.

175. *See, e.g.*, Guzman-Alvarez v. Sessions, 701 F. App'x 54, 56–57 (2d Cir. 2017); Cardona v. Sessions, 848 F.3d 519, 520–21 (1st Cir. 2017); Fuentes-Eraza v. Sessions, 848 F.3d 847, 853 (8th Cir. 2017); Jeronimo v. Att'y Gen., 678 F. App'x 796, 800–01 (11th Cir. 2017); Marikasi v. Lynch, 840 F.3d 281, 285–86 (6th Cir. 2016); Vega-Ayala v. Lynch, 833 F.3d 34, 36 (1st Cir. 2016); *see also* Maldonado v. Lynch, 646 F. App'x 129, 131 (2d Cir. 2016) (denying petition for review of the BIA's denial of a motion to reopen a woman's case based on the intervening *Matter of A-R-C-G* decision because a change in the law did not entitle her to a reopening and any change in the law would not resolve her failure to establish past domestic violence as determined by the BIA).

176. *In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018), *abrogated by* Grace v. Whitaker, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018).



male partner as a “private” or “personal” matter resulting solely from the relationship of the parties. More specifically, Sessions revived the flawed analysis reflecting this perception in the BIA’s vacated decision in *Matter of R-A*.<sup>177</sup> He ignored entirely the underlying cause of intimate partner violence inflicted against female partners: gender and subordination, or the abuser’s view that the woman is subordinate to him in the relationship and the acceptance or reinforcement of that view by the society and culture.<sup>178</sup> Sessions further completely disregarded over thirty years of progress in U.S. domestic violence laws and training designed to address the issues arising out of misconceptions and dynamics of intimate partner violence.

The Attorney General justified his decision to overrule *Matter of A-R-C-G* by asserting that the BIA’s examination of the legal questions “lacked rigor and broke with the Board’s own precedents” and, thus, the case was wrongly decided.<sup>179</sup> Further, he argued that the BIA should not have issued *Matter of A-R-C-G* as a precedential decision because DHS conceded most of the legal requirements necessary to qualify for asylum. DHS concessions “should not set precedential rules,” Sessions wrote.<sup>180</sup>

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177. *Id.* at 339.

178. *See In re R-A*, 22 I. & N. Dec. 906, 929 (A.G. 2001) (Guendelsberger, Board Member, dissenting); *Islam v. Sec’y of State for the Home Dep’t* [1999] 2 AC 629 (HL) (appeal taken from Eng.); DHS Supplemental *L-R* Brief, *supra* note 62, at 13 n.10., 14–16; DHS *R-A* Brief, *supra* note 62, at 26–28; Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 58–59 (1998) (“[D]omestic violence is not about what a woman believes, but about her gender identity—and the sexist beliefs of the man who abuses her. This cannot be captured under the rubric of political opinion because . . . political opinion refers to the victim’s beliefs, and not those of the persecutor.”); Suzanne Sidun, *An End to the Violence: Justifying Gender as a Particular Social Group*, 28 PEPP. L. REV. 103, 138–39 (2000) (“The majority of women abroad are not raped or beaten because of a political opinion that they hold. Women are raped and beaten because they are women.”).

179. *In re A-B*, 27 I. & N. Dec. at 333.

180. The Attorney General went even further to state that parties are not permitted to stipulate to legal conclusions reserved for the court. While a court may not be bound by the stipulations of the parties on questions of law, there is no prohibition against accepting such stipulations in the court’s determination.

To state that parties cannot stipulate to issues for litigation is not only contrary to the regulations, but entirely inefficient. In fact, 8 C.F.R. § 1003.21(a) (2018) provides: “Pre-hearing conferences may be scheduled at the discretion of the Immigration Judge. The conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding.” The Immigration Court Practice Manual also provides that “the parties are strongly encouraged to confer prior to a hearing in order to narrow issues for litigation.” IMMIGRATION COURT PRACTICE MANUAL, *supra* note 142, § 4.18(a), at 90. Cases are often decided using the stipulations of the parties. Any agreement between the parties would be useless because they would still need to present evidence and argument on that legal issue. Further, if a lawyer, such as a DHS attorney, believes that the law and facts support acknowledging that an

The Attorney General further claimed that the *Matter of A-R-C-G* opinion “caused confusion because it recognized an expansive new category of particular social groups based on private violence.”<sup>181</sup> He cited no decisions to support this “confusion” or the recognition of “an expansive new category of particular social groups.” In addition, Sessions explained that the BIA’s decision in *Matter of A-B* and two other opinions treated *A-R-C-G* as establishing a new category of cognizable, particular social groups, specifically encompassing Central American domestic violence victims.<sup>182</sup> While adjudicators have not recognized a social group comprised of “Central American domestic violence victims,” adjudicators, DHS, and the international community have affirmed that women who have suffered domestic violence in their countries may be able to assert a viable claim for asylum.<sup>183</sup>

Sessions further explained that several U.S. circuit courts have expressed “skepticism” about *Matter of A-R-C-G*. However, Sessions misinterpreted the U.S. circuit courts’ analyses distinguishing *A-R-C-G*; the various opinions did not demonstrate the courts’ “skepticism” but, rather, showed the narrow holding of *A-R-C-G*. For example, *A-R-C-G* is often distinguished because DHS conceded the cognizability of the particular social group and the persecution on account of that particular social group in the case.<sup>184</sup> These appellate court cases actually supported the view that *A-R-C-G* did

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asylum applicant has proven a particular issue in her case, it may contravene the rules of professional conduct for that lawyer to continue to assert that issue. See MODEL RULES OF PROF’L CONDUCT TR. 3.1, 3.3, 3.4 (AM. BAR ASS’N 2018). There is no requirement that the BIA “write an exegesis on every contention. What is required is merely that it consider the issues raised and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.” *Casalena v. INS*, 984 F.2d 105, 107 (4th Cir. 1993) (quoting *Becerra-Jimenez v. INS*, 829 F.2d 996, 1000 (10th Cir. 1987)).

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

182. *In re A-B*, 27 I. & N. Dec. at 332; (citing *In re D-M-R* (B.I.A. June 9, 2015); *In re E-M* (B.I.A. Feb. 18, 2015), <https://www.scribd.com/document/271353122/E-M-BIA-Feb-18-2015> (certain docket information redacted)).

183. *In re R-A*, 22 I. & N. Dec. 906, 929 (A.G. 2001) (Guendelsberger, Board Member, dissenting); *Islam v. Sec’y of State for the Home Dep’t* [1999] 2 AC 629 (HL) (appeal taken from Eng.); UNHCR Gender Guidelines, *supra* note 10; DHS Supplemental *L-R* Brief, *supra* note 62, at 13 n.10, 14–16; DHS *R-A* Brief, *supra* note 62, at 26–28; Bookey, *supra* note 142; Coven Memorandum, *supra* note 69.

184. See, e.g., *Menjivar-Sibrian v. Att’y Gen.*, No. 17-12207, 2018 WL 1415126, at \*1 (11th Cir. Mar. 22, 2018); *Solorzano-De Maldonado v. Sessions*, No. 16-60153, 2018 WL 1192988, at \*1 (5th Cir. Mar. 7, 2018); *Perez-Rabanales v. Sessions*, 881 F.3d 61, 66 (1st Cir. 2018); *Guzman-Alvarez v. Sessions*, No. 16-904, 701 F. App’x 54, 56–57 (2d Cir. 2017); *Velasquez v. Sessions*, 866 F.3d 188, 194 (4th Cir. 2017); *Cardona v. Sessions*, 848 F.3d 519, 520–21 (1st Cir. 2017); *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 849 (8th Cir. 2017); *Jeronimo v. Att’y Gen.*, 678 F. App’x 796, 800–01 (11th Cir. 2017); *Vega-Ayala v. Lynch*, 833 F.3d 34, 36 (1st Cir. 2016); *Marikasi v. Lynch*, 840 F.3d 281, 285 (6th Cir. 2016).

not establish “an expansive new category of particular social groups,” whether based on “private violence,” “Central American domestic violence victims,” “Guatemalan women in domestic relationships who are unable to leave,” or any other particular social group. In contradiction to Sessions’s view, the U.S. court of appeals cases demonstrated that adjudicators continued to analyze asylum claims on a case-by-case basis.<sup>185</sup>

*Matter of A-R-C-G* provided no change in the standards governing asylum or “rule of general applicability.”<sup>186</sup> In *Matter of A-B*, Sessions cited no case in which adjudicators questioned or even challenged the determination in *Matter of A-R-C-G*. His determination to overrule the case is in stark contrast to his reliance on the BIA’s determinations that have been vacated by an attorney general (*Matter of R-A*) or questioned by U.S. circuit courts (*Matters of M-E-V-G* and *W-R-G*).

Despite Sessions’s generalized statements on the viability of hypothetical asylum claims, these claims must be adjudicated based on the facts and circumstances of each case, as opposed to a complete rejection of such claims.<sup>187</sup> As such, Sessions’s decision does not preclude asylum claims involving intimate partner violence.<sup>188</sup> Nevertheless, the Attorney General’s reliance on hypothetical characterizations of particular social groups in the *Matter of A-B* decision creates more confusion in the adjudication of gender-based asylum claims, in particular those involving intimate partner violence.

Notwithstanding the Attorney General’s assertions to the contrary, his decision provides no clarity on the adjudication of asylum claims involving “a victim of private criminal activity” or any asylum

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185. See cases cited in notes 175, 185.

186. The BIA noted that “in cases where concessions are not made and accepted as binding, these issues will be decided based on the particular facts and evidence on a case-by-case basis as addressed by the Immigration Judge in the first instance.” *In re A-R-C-G*, 26 I. & N. Dec. 388, 395 (B.I.A. 2014), *overruled by In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018). Furthermore, “[i]n particular, the issue of nexus will depend on the facts and circumstances of an individual claim.” *Id.*

187. *In re M-E-V-G*, 26 I. & N. Dec. 227, 251 (B.I.A. 2014); *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); CTR. FOR GENDER & REFUGEE STUDIES, *MATTER OF A-B*: CGRS PRACTICE ADVISORY 6, 13 (2018) [hereinafter CGRS PRACTICE ADVISORY] (on file with the *University of Michigan Journal of Law Reform*); NATIONAL IMMIGRANT JUSTICE CTR., ASYLUM PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B* 14 (2018), <https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%202018.06.21.18.pdf> [hereinafter NIJC PRACTICE ADVISORY].

188. NIJC PRACTICE ADVISORY, *supra* note 187.

claim involving persecution by a non-state actor. In fact, Sessions's decision raises issues arising out of three key elements of the refugee definition: (1) membership in a particular social group; (2) nexus; and (3) past persecution or a well-founded fear of future persecution.<sup>189</sup> The ambiguities in Sessions' decision will also negatively impact credibility determinations in gender-based asylum claims.

Moreover, the policies established by the Attorney General in the *Matter of A-B* decision are likely to be contested in the future.<sup>190</sup> Additional challenges are further likely to be made based on the Attorney General's lack of authority to issue this decision and a violation of Ms. A-B's due process rights.<sup>191</sup>

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189. On July 11, 2018, shortly after the *Matter of A-B* decision, the USCIS issued a Policy Memorandum titled, "Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B*." (DHS Policy Memorandum). The DHS Policy Memorandum is intended to provide guidance to USCIS officers in determining who is eligible for asylum and refugee status based on *Matter of A-B* and applies to asylum and refugee officers processing reasonable fear, credible fear, asylum, and refugee claims. Since this policy memo primarily follows the policies established in *Matter of A-B*, it also raises issues regarding the three key elements of the refugee definition. Additionally, as discussed in further detail below, at least one court has recently found that aspects of this memo go beyond the policies set forth in *Matter of A-B* decision and incorrectly interpret and apply the decision. See *Grace v. Whitaker*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018), *appeal docketed*, No. 19-501 (D.C. Cir. Jan. 30, 2019).

190. See e.g., *Grace*, 2018 WL 6628081, at \*36.

191. In addition to the issues raised in the Attorney General's opinion related to the refugee definition, the decision disregards procedural regulations and violates due process. This may call into question the precedential value and even the validity of the decision. See CGRS PRACTICE ADVISORY, *supra* note 187, at 4 n.7. Ms. A-B's brief, as well as a brief from sixteen former immigration judges and members of the BIA, informed the Attorney General that the BIA could not refer *Matter of A-B* because the case was not under the jurisdiction of the BIA in the absence of an order from the immigration judge. Rather, they urged the Attorney General to remand the case to the BIA to respond to the immigration judge's order. See Brief for Respondent, *In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018), <https://uchastings.app.box.com/s/tt1ydlq5ttm1i2zxlz4rname4bk29s7/file/291241595459> [hereinafter Brief for Respondent A-B-] (certain docket information redacted); Brief of Sixteen Former Immigration Judges and Members of the Board of Immigration Appeals as Amici Curiae Supporting Respondent, *In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018) [hereinafter "IJ and BIA Amicus Brief"], <https://uchastings.app.box.com/s/tt1ydlq5ttm1i2zxlz4rname4bk29s7/file/291245779320>.

Although the Attorney General acknowledged that the immigration judge's certification order was procedurally defective, he rejected this request. Sessions argued that there is nothing in the federal regulation that prevents him from referring a case for review "simply because the Board has remanded the case for further processing before an immigration judge," and his authority to review was not restricted to "final" decisions of the BIA. *In re A-B*, 27 I. & N. Dec. at 324. However, Attorney General Sessions ignored the issue that the BIA must refer the decision to the attorney general upon his direction, and if the BIA does not have jurisdiction over the decision, it lacks the power to refer the case to the Attorney General. See Brief for Respondent A-B-, *supra*, at 18-20 (citing 8 C.F.R. § 1003.1(h)(1)(i) (2018), which requires the Board to "refer to the Attorney General for review of its decision all cases that [t]he Attorney General directs the Board to refer to him."); *North Carolina Growers' Ass'n v. UFW*, 702 F.3d 755, 764 (4th Cir. 2012) ("[W]e must be strict in reviewing

Indeed, in the recent decision, *Grace v. Whitaker*, the U.S. District Court for the District of Columbia addressed challenges to the policies established in *Matter of A-B* and the DHS Policy Memorandum.<sup>192</sup> The plaintiffs—twelve adults and children from Central American countries—gave accounts of domestic and gang violence in their countries, including sexual abuse, kidnappings, and beatings. The plaintiffs were placed in the expedited removal process, and asylum officers conducted credible fear interviews. The asylum officers found their stories to be credible but issued negative credible fear determinations for each plaintiff, applying the policies set forth in *Matter of A-B* and the DHS Policy Memorandum. Upon review, an immigration judge affirmed the asylum officers' findings. Final orders of removal were entered against the plaintiffs, and they sought the district court's review of the expedited removal orders issued because of the negative credible fear determinations.

The court, exercising its jurisdiction pursuant to 8 U.S.C. § 1252(e)(3)(A)(ii), found certain policies for expedited review of credible fear determinations contained in *Matter of A-B* and the DHS Policy Memorandum to be arbitrary, capricious, and contrary to the INA and the Administrative Procedure Act (APA).<sup>193</sup> First, it rejected the general rule against finding credible fear in cases based on domestic violence victims' and gang-related victims' membership in a particular social group.<sup>194</sup> Second, it rejected the heightened standard of "condoned" or "complete helplessness" to establish non-state actor persecution instead of the "unable or unwilling" standard.<sup>195</sup> Third, it rejected the DHS Policy Memorandum's circularity standard, prohibiting recognition of domestic-violence-based social groups, which include the characteristic of "inability to leave."<sup>196</sup> Fourth, it rejected the delineation requirement in a credible fear interview established in the DHS Policy Memorandum.<sup>197</sup> Finally, it rejected the DHS Policy Memorandum's requirement that adjudicators disregard any U.S. circuit court law that is inconsistent with *Matter of A-B* and apply only the law of the U.S. circuit court in which the credible fear interview is

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an agency's compliance with procedural rules."); see also IJ and BIA Amicus Brief, *supra*, at 10.

192. *Grace*, 2018 WL 6628081, at \*36.

193. *Id.* at \*13–14, \*19–21, \*27.

194. *Id.* at \*20.

195. *Id.* at \*21–23.

196. *Id.* at \*24–25.

197. *Id.* at \*26–27.

held.<sup>198</sup> The court further entered a permanent injunction preventing the government from applying these policies to credible fear determinations, vacated plaintiffs' credible fear determinations and removal orders, and ordered the government to return the removed plaintiffs to the United States and provide new credible fear proceedings, applying the correct legal standards, for all plaintiffs.<sup>199</sup>

Although *Grace v. Whitaker* is limited to the application of these policies in the context of credible fear determinations prior to an asylum adjudication, similar challenges may be successful in the context of affirmative and defensive asylum adjudications. In other words, *Grace v. Whitaker* dealt the first blow to Attorney General Sessions's decision in *Matter of A-B-*, but the decision is in the appeal process. Therefore, *Matter of A-B-* still requires critical examination.

#### A. *The Facts of Matter of A-B-*

In his decision, the Attorney General referenced the facts asserted by Ms. A-B- in one sentence: "The respondent asserted that her ex-husband, with whom she shares three children, repeatedly abused her physically, emotionally, and sexually during and after their marriage."<sup>200</sup> The Attorney General made no mention of hundreds of pages of evidence of Ms. A-B-'s abuse and the lack of protection from the government.<sup>201</sup>

Ms. A-B-, a citizen of El Salvador, applied for asylum to escape a man—her husband and father of her three children—who had abused her for the past fifteen years.<sup>202</sup> He beat and raped her on a constant basis. He threatened to kill her with a loaded gun and a knife. In one instance, while she was pregnant, he threatened to hang her. He forced her to serve him as a slave. In order to ensure her fidelity to him, he would order her to show him her genitals so he could examine whether she had been with another man.

Ms. A-B- attempted to obtain protection from the police. Notably, her husband's brother was a police officer. Although she secured two restraining orders against her husband, the police made

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198. *Id.* at \*27–31.

199. *Id.* at \*36.

200. *In re A-B-*, 27 I. & N. Dec. 316 at 321.

201. CGRS PRACTICE ADVISORY, *supra* note 187, at 8.

202. Brief for Respondent A-B-, *supra* note 190, at 2–3.

no effort to enforce them. In fact, the police required her to serve the restraining orders on her husband herself, exposing her to severe risk of physical harm and death. The abuse continued. Ms. A-B's husband came after her with a knife and, when she sought protection from the police, they refused to help, informing her instead that she should leave the town. She moved to a town two hours away from her husband. The abuse continued once her husband found her. Despite constant threats to her life from her husband, Ms. A-B secured a divorce. Even after the divorce, her ex-husband and his brother, the police officer, confronted her and threatened her life. Shortly before she fled to the United States, her husband found her again and beat her.<sup>203</sup>

Regardless, the Attorney General vacated the BIA's decision in *Matter of A-B* and remanded the case to the immigration judge for further proceedings consistent with his determination.<sup>204</sup> The next sections analyze the Attorney General's decision and its impact regarding three key elements of the refugee definition: membership in a particular social group, nexus, and past persecution or a well-founded fear of future persecution in conjunction with the applicant's credibility.

### B. Particular Social Group

The Attorney General's opinion sought to address the question of whether "a victim of private criminal activity constitutes persecution on account of membership in a particular social group."<sup>205</sup> Neither *Matter of A-R-C-G* nor *Matter of A-B* identified a social group comprised of "victims of private criminal activity," "victims of domestic violence," or "victims of intimate partner violence."<sup>206</sup> Nevertheless, the Attorney General analyzed whether these conceptions of social groups met the definition of a particular social group.

Despite the Attorney General's unsubstantiated statement that, in general, asylum claims based on domestic violence perpetrated

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203. *Id.* at 6.

204. *In re A-B*, 27 I. & N. Dec. at 317.

205. *Id.* at 325.

206. Brief of Sixteen Former Immigration Judges and Members of the Board of Immigration Appeals as Amici Curiae Supporting Respondent at 15, *In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018), <https://uchastings.app.box.com/s/tt1ydlq5tm1i2zxlz4rname4bk29s7/file/291245779320>; see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 325 (1936) (courts cannot issue "an advisory decree upon a hypothetical state of facts").

by non-state actors will not qualify for asylum, he did not state that domestic violence *may never* serve as a basis for an asylum claim.<sup>207</sup> Any such statement would have been contrary to BIA precedent including *Matter of M-E-V-G* and *Matter of Acosta*, which provide that whether an applicant has established her membership in a particular social group is a determination made on a case-by-case basis.<sup>208</sup> Rather, Sessions took issue with *Matter of A-R-C-G* because of the BIA's lack of deep analysis due to DHS's concessions. In particular, Sessions faulted the BIA's failure to explain how the evidence presented in the case met the three elements that define a particular social group—immutability, particularity, and social distinction.<sup>209</sup>

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207. *Ashwander*, 297 U.S. at 320. Since *Matter of A-B*, U.S. circuit courts have recognized both that the overruling of *Matter of A-R-C-G* does not necessarily prevent the recognition of a particular social group based on nationality, gender, relationship status, and inability to leave as cognizable, and that the overruling of *Matter of A-R-C-G* in general means such groups are not cognizable. See e.g., *Padilla-Maldonado v. Att'y Gen.*, No. 17-3097, 2018 WL 4896385, at \*5 (3d Cir. Oct. 9, 2018) (finding the overruling of *Matter of A-R-C-G* in *Matter of A-B* does not automatically defeat applicant's claim that she is a member of a cognizable particular social group); *Najera v. Whitaker*, 745 Fed. App'x 670, 671 (8th Cir. 2018) (finding that under *Matter of A-B*, the group identified as "Salvadorean females unable to leave a domestic relationship" may not be cognizable); *Martinez-Martinez v. Sessions*, 743 F. App'x 629, 633-34 (6th Cir. 2018) (citing *Matter of A-B* and finding that although the facts "supported" that applicant was able to safely leave her husband and live in another village in this case, "[w]e would not agree that every woman who is able to escape her husband thereby removes herself from the social group of women who are unable to leave their relationship, or thereby severs the nexus between her group and the persecution she suffers."); *Ticas-Guillen v. Whitaker*, 744 F. App'x 410, 411 (9th Cir. 2018) (finding that remand to the BIA is required to consider whether the proposed social group is cognizable in light of *Matter of A-B*, but stating that the immigration judge's denial finding the proposed social group was "just too broad" . . . cannot stand" and recognizing that gender and nationality can form a particular social group under the law).

In *Grace v. Whitaker*, the United States District Court for the District of Columbia found that *Matter of A-B* and the DHS Policy Memorandum established a general rule against finding credible fear in cases based on domestic violence and gang-related claims. No. 18-cv-01853 (EGS), 2018 WL 6628081, at \*11 (D.D.C. Dec. 19, 2018), *appeal docketed*, No. 19-501 (D.C. Cir. Jan. 30, 2019). Interestingly, the government argued that there was no such general rule established by *Matter of A-B* and the *Matter of A-B* decision only prohibited a party's concession to satisfy an element of an asylum claim while the remaining statements were mere commentary. *Id.* at \*19. Nevertheless, the court in *Grace* found that a general rule was articulated and this general rule "effectively bar[ring] the claims based on certain categories of persecutors" constituted an arbitrary and capricious interpretation of the term "particular social group" because it is inconsistent with Congress's intent to bring U.S. law into conformance with the 1967 Protocol and the requirement of case-by-case adjudication of credible fear determinations. *Id.* at \*20.

208. *In re M-E-V-G*, 26 I. & N. Dec. 227, 251 (B.I.A. 2014); *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

209. *In re A-B*, 27 I. & N. Dec. at 318-20.



### 1. The BIA's Definition of a Particular Social Group Remains Unchanged

The Attorney General recognized the BIA's immutable characteristic definition of membership in a particular social group set forth in *Matter of Acosta*. However, he relied on the BIA's articulation of the three elements for establishing membership in a particular social group in *Matter of M-E-V-G* and *Matter of W-G-R*: membership in a group, (1) whose members share a common immutable characteristic, (2) that is defined with particularity and (3) that is socially distinct within the society in question.<sup>210</sup> This definition includes *Matter of Acosta*'s immutable characteristic requirement as an element, but adds the two additional elements of particularity and social distinction. The Attorney General made no change in the requirements set forth in these cases but asserted that because "particular social group" is ambiguous, the Attorney General and the BIA have "primary responsibility for construing" this provision.<sup>211</sup>

The Attorney General and the BIA, however, do not have unrestricted power to construe the definition of "particular social group." In fact, the U.S. circuit courts must determine if an agency's interpretation of an "ambiguous" statutory provision is a "permissible construction of the statute."<sup>212</sup> The BIA cannot adjudicate asylum claims based on a particular social group "inconsistently" or "irrationally."<sup>213</sup> Although the BIA may add new requirements to its definition of a particular social group, it must provide a "principled reason" for its departure from its precedent in *Matter of Acosta*.<sup>214</sup>

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210. *Id.* at 330–31.

211. *Id.* at 326–27.

212. *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 603, 612 (3d Cir. 2011) (quoting *Chevron, USA, Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). In *Grace v. Whitaker*, the court found that although the term "particular social group" was ambiguous, *Matter of A-B*'s and the DHS Policy Memorandum's interpretation of this term was not a permissible construction of the statute and was arbitrary and capricious. *Grace*, 2018 WL 6628081, at \*20.

213. *Valdiviezo-Galdamez*, 663 F.3d at 604 ("Although we afforded the BIA's interpretation of 'particular social group' *Chevron* deference in *Fatin*, this did not give the agency license to thereafter adjudicate claims of social group status inconsistently, or irrationally. Agencies are *not* free, under *Chevron*, to generate erratic, irreconcilable interpretations of their governing statutes . . . Consistency over time and across subjects is a relevant factor [under *Chevron*] when deciding whether the agency's current interpretation is 'reasonable.'") (emphasis in original) (citations omitted).

214. *Id.* at 608. The court in *Grace v. Whitaker* further provided extensive discussion rejecting the DHS Policy Memorandum's instruction to asylum officers to ignore inconsistent U.S. circuit court decisions. The court explained that an agency's interpretation of a provi-

Nevertheless, the Attorney General made no mention of the decisions in the Seventh Circuit<sup>215</sup> on whether the requirements established by the BIA in these cases of “particularity” and “social distinction” is a permissible construction of “particular social group.” These requirements are repetitive and confusing.<sup>216</sup> As described below, the definition of a particular social group should more closely follow *Acosta* and UNHCR guidelines, which are in accordance with the principle of *ejusdem generis*.<sup>217</sup>

## 2. The Particular Social Groups Exist Independently from the Harm

Attorney General Sessions wrote in his *A-B* decision that had the BIA applied the *M-E-V-G* social group requirements with the appropriate analysis, the social group would not have been cognizable. Sessions determined that a particular social group “must ‘exist independently’ of the harm asserted” in the asylum claim.<sup>218</sup> The risk of being persecuted cannot be the characteristic shared by the

sion may only replace a prior court interpretation if the interpretation is entitled to *Chevron* deference and the agency interpretation is reasonable. *Grace*, 2018 WL 6628081, at \*28 (citing *Nat'l Cable & Telecomm's Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)). If an interpretation is not afforded deference, the agency is bound by the court's interpretation even if the agency's interpretation is contrary to that of the court. *Id.* at \*29.

215. The Seventh Circuit has refused to apply the requirements of “particularity” and “social visibility/distinction.” *See Cece v. Holder*, 733 F.3d 662, 674, 677 (7th Cir. 2013); *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009).

216. *See also S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 553 (3d Cir. 2018) (acknowledging that the requirements of “social distinction” and “particularity” overlap); *Cece*, 733 F.3d at 674, 677 (finding the “breadth of the social group says nothing about the requirements for asylum”); *Gatimi*, 578 F.3d at 615 (noting the “social visibility” criterion “makes no sense”); *In re W-G-R*, 26 I. & N. Dec. 208, 214 (B.I.A. 2014) (noting that there is some degree of overlap between the particularity and social distinction requirements because both take societal context into account), *vacated in part on other grounds sub nom. Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); *In re M-E-V-G*, 26 I. & N. Dec. 227, 241 (B.I.A. 2014) (recognizing they “overlap because the overall definition is applied in the fact-specific context of an applicant's claim for relief”); *Zambrana*, *supra* note 93.

217. *See Castillo Arias v. Att'y Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) (“*Acosta* strikes an acceptable balance between (1) rendering ‘particular social group’ a catch-all for all groups who might claim persecution, which would render the other four categories meaningless, and (2) rendering ‘particular social group’ a nullity by making its requirements too stringent or too specific.”); *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); *Paraketsova*, *supra* note 92; *Zambrana*, *supra* note 93.

218. *In re A-B*, 27 I. & N. Dec. 316, 334–35 (A.G. 2018) (citing *In re M-E-V-G*, 26 I. & N. Dec. 227, 236 n.11, 243 (B.I.A. 2014)), *abrogated by Grace v. Whitaker*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018); *see also Perez-Rabanales v. Sessions*, 881 F.3d 61, 67 (1st Cir. 2018); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003); *In re W-G-R*, 26 I. & N. Dec. 208, 215 (B.I.A. 2014).

group.<sup>219</sup> He stated that the particular social group identified in *A-R-C-G*, “married women in Guatemala who are unable to leave their relationship,” failed because such a group is “effectively defined” as “women in Guatemala who are victims of domestic abuse.”<sup>220</sup> Specifically, the group was defined by the risk of persecution as a woman’s inability to leave was created by the harm or threatened harm.<sup>221</sup>

Contrary to the Attorney General’s categorization, the “inability to leave” does not constitute “persecution.” The subjugation of women in society or culture creates the situation in which a woman may be unable to leave a relationship.<sup>222</sup> The BIA in *Matter of A-R-C-G* specifically recognized that “a married woman’s inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation,” and cited to numerous U.S. government sources supporting this conclusion.<sup>223</sup> The Attorney General ignored this explanation provided by the BIA. Rather, he dismissed *A-R-C-G*, finding that it failed to consider whether the group identified “was effectively defined” as women in Guatemala who are victims of domestic abuse because their inability to leave was created by the harm. The BIA had no reason to consider this question because it found that inability to leave might result from societal expectations about gender and subordination.

Regardless, the definition of a particular social group does not require “complete independence” from the characteristic of the persecution suffered.<sup>224</sup> Although members of a group may all

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219. See *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005).

220. *In re A-B*, 27 I. & N. Dec. at 335.

221. *Id.*

222. Brief of Respondent A-B, *supra* note 190, at 31–32; DHS Supplemental *L-R* Brief, *supra* note 62, at 14–15; DHS *R-A* Brief, *supra* note 62; Nanasi, *supra* note 137, at 746–51.

223. *In re A-R-C-G*, 26 I. & N. Dec. 388, 393–95 (B.I.A. 2014) (citing *In re W-G-R*, 26 I. & N. Dec. at 214) (observing that, in evaluating a group’s particularity, it may be necessary to take into account the social and cultural context of the alien’s country of citizenship or nationality), *overruled by In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018); U.S. DEP’T OF STATE, 111TH CONG., Country Reports on Human Rights Practices for 2008 2598 (Joint Comm. Print 2010), <https://www.gpo.gov/fdsys/pkg/CPRT-111JPRT62931/pdf/CPRT-111JPRT62931.pdf>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Guatemala – 2008 Country Reports on Human Rights Practices (Feb. 25, 2009), <http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119161.htm>.

224. *Cece v. Holder*, 733 F.3d 662, 671 (7th Cir. 2013); CGRS PRACTICE ADVISORY, *supra* note 187, at 12 (citing *In re A-M-E- & J-G-U*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007); *In re W-G-R*, 26 I. & N. Dec. 208, 215 (B.I.A. 2014); *Cece*, 733 F.3d at 671)); NIJC PRACTICE ADVISORY, *supra* note 187, at 13, 17 (citing *Cece*, 733 F.3d at 671; *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003)). The court in *Grace v. Whitaker* found that the DHS Policy Memorandum went “well beyond the Attorney General’s explanation” of circularity in *Matter of A-B*. No. 18-cv-

share the characteristic of suffering persecution, this does not prevent the recognition of a particular social group. This is because other components of the group's characteristics may establish the existence of a particular social group.<sup>225</sup> If only particular social groups that have complete independence from the persecution suffered could be considered cognizable, many previously granted asylum claims would no longer meet the requirements of a cognizable social group.<sup>226</sup> For instance, in *Matter of Kasinga*, women who fear or have experienced female genital mutilation comprised the social group of "[y]oung women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice."<sup>227</sup> Moreover, in *Matter of M-E-V-G*, the BIA specifically recognized that *Matter of Kasinga*, which involved an applicant who was opposed to the practice of FGM, illustrated that a group may be socially distinct without ocular visibility. The BIA explained that a society could still perceive such women to comprise a particular social group for many reasons including, the sociopolitical or cultural conditions of the country.<sup>228</sup>

As explained by the Seventh Circuit in *Cece v. Holder*, "it is not fair to conclude that the group is defined by the harm or potential harm inflicted merely by the language used rather than determining what underlying characteristics account for the fear and vul-

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01853 (EGS), 2018 WL 6628081, at \*25 (D.D.C. Dec. 19, 2018), *appeal docketed*, No. 19-501 (D.C. Cir. Jan. 30, 2019). The court found that the DHS Policy Memorandum's statement that "a particular social group defined solely by the ability to leave a relationship" would not be "sufficiently particular" to be to be an incorrect interpretation of the circularity standard and analysis of *Matter of A-B*. It also found that it was an incorrect interpretation of the circularity standard and analysis of *Matter of A-B* to argue that, "even if 'unable to leave' were particular, the applicant must show something more than the danger of harm from an abuser if the applicant tried to leave because that would amount to circularly defining the particular social group by the harm on which the asylum claim is based." *Id.* The court explained that such a "general circularity rule foreclosing such claims" is arbitrary, capricious and contrary to immigration law as it fails to consider the facts presented in each case. *Id.* Moreover, it changes settled law, which recognizes that if a group contains characteristics independent of the persecution, it may be recognized as a particular social group, but fails to provide a reasoned explanation for the change. *Id.*

225. *Cece*, 733 F.3d at 671.

226. *Id.* (citing *Agbor v. Gonzales*, 487 F.3d 499, 502 (7th Cir. 2007); *Sarhan v. Holder*, 658 F.3d 649, 654-55 (7th Cir. 2011)) (noting other recognized particular social groups that included the shared trait of suffering persecution) (explanatory parentheticals omitted); Reply Brief for Respondent at 15, *In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018), <https://uchastings.app.box.com/s/tlYdliq5tm1i2zxlz4rname4bk29s7/file/291288954047> [hereinafter Reply Brief for Respondent A-B] (arguing that if a particular social group that is defined in part by the harm feared is never cognizable, "it would throw into doubt the availability of asylum to applicants who suffered or fear female genital mutilation.").

227. *In re Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996).

228. *In re M-E-V-G*, 26 I. & N. Dec. 227, 240-41 (B.I.A. 2014).

nerability.”<sup>229</sup> Attorney General Sessions failed to consider the “underlying characteristics” that cause the group’s fear and vulnerability. The group holds the common, immutable characteristics of being “married,” “women,” “in Guatemala,” “unable to leave their relationship.”<sup>230</sup> This group’s fear and vulnerability stems from the subordination of women in Guatemala and the view of married women as “property.”<sup>231</sup> Further, even assuming the Attorney General was correct that the inability to leave a relationship is a situation created by the harm or threat of harm, he cannot “tease out one component of a group’s characteristics to defeat the definition of a social group.”<sup>232</sup>

A particular social group defined by nationality, gender, relationship status, and the inability to leave is not new and is a conception that has been offered and accepted as cognizable by DHS itself.<sup>233</sup> In *Matter of L-R*, DHS asserted that “the particular social group in asylum and withholding of removal claims based on domestic violence is best defined in light of the evidence about how the respondent’s abuser and her society perceive her role within the domestic relationship.”<sup>234</sup> DHS further proposed potential articulations of a particular social group in an asylum case based on intimate partner violence, which may meet the requirements for a particular social group if adequately established in the record. These include: “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.”<sup>235</sup>

229. *Cece*, 733 F.3d at 672.

230. *Id.* at 673 (“Neither their age, gender, nationality, or living situation are alterable.”).

231. *See In re A-R-C-G*, 26 I. & N. Dec. 388, 393 (B.I.A. 2014) (“[A] married woman’s inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation.”), *overruled by In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018); DHS Supplemental *L-R* Brief, *supra* note 62, at 14 (recognizing that a group articulated as “Mexican women who are viewed as property by virtue of their positions within a domestic relationship” may meet the requirements for a particular social group.); Brief for Respondent A-B, *supra* note 190, at 37–38 (asserting that “Salvadoran women who are treated as property by virtue of their positions in their domestic relationships” constitutes a particular social group); *see also In re R-A*, 22 I. & N. Dec. 906, 929 (A.G. 2001) (Guendelsberger, Board Member, dissenting); *Islam v. Sec’y of State for the Home Dep’t* [1999] 2 AC 629 (HL) (appeal taken from Eng.); DHS *R-A* Brief, *supra* note 62.

232. *Cece*, 733 F.3d at 673 (citing *Escobar v. Holder*, 657 F.3d 537, 547 (7th Cir. 2011)).

233. CGRS PRACTICE ADVISORY, *supra* note 187, at 7 n.21 (noting that since 2004, DHS has recognized that gender, nationality, and relationship status may form a particular social group); *see* DHS Supplemental *L-R* Brief, *supra* note 62, at 13 n.10, 14; DHS *R-A* Brief, *supra* note 62.

234. DHS Supplemental *L-R* Brief, *supra* note 62, at 14.

235. *Id.*

In regard to “social visibility/distinction,” DHS recognized that social distinction might be demonstrated if evidence reflects a societal view that “the status of a woman in a domestic relationship places the woman into a segment of society that will not be accorded protection from harm inflicted by a domestic partner.”<sup>236</sup> Further, such a social group may be sufficiently “particular” based on how a domestic relationship is defined within the society, such as through laws criminalizing domestic violence.<sup>237</sup>

Moreover, the facts of *A-R-C-G* and *A-B* both support cognizable social groups applying the three-element analysis.

#### a. Immutability

The Attorney General’s only argument regarding immutability appeared to be that a particular social group cannot be defined by the persecution of its members. As discussed above, the group “women in domestic relationships who are unable to leave” is not defined by the persecution of its members. Moreover, gender, nationality, relationship status, perception as property, and living situation are immutable characteristics.<sup>238</sup>

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236. *Id.* at 18.

237. *Id.* at 18–19.

238. *See, e.g.,* *Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2013) (recognizing gender, nationality, and youth as immutable characteristics); *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (acknowledging that women in a particular country can constitute a particular social group, regardless of ethnicity or clan membership); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (finding that widowed Cameroonian women constitute a particular social group); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (stating that Iranian women who refuse to conform to their government’s gender-specific laws and social norms may satisfy the *Acosta* standard); *In re R-A-*, 22 I. & N. Dec. 906, 929 (B.I.A. 2000) (Guendelsberger, Board Member, dissenting); *In re Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) (treating gender and tribal identity as immutable characteristics); *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (establishing that “membership in a particular social group” refers to common immutable characteristics), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); *Islam v. Sec’y of State for the Home Dep’t* [1999] 2 AC 629 (HL) (appeal taken from Eng.); *see also* UNHCR Gender Guidelines, *supra* note 10, ¶ 30. DHS Supplemental *L-R* Brief, *supra* note 62, at 14 (recognizing that a group articulated as “Mexican women who are viewed as property by virtue of their positions within a domestic relationship” may meet the requirements for a particular social group); Brief for Respondent A-B, *supra* note 190, at 37–38 (asserting that “Salvadoran women who are treated as property by virtue of their positions in their domestic relationships” constitutes a particular social group); DHS *R-A* Brief, *supra* note 62.

## b. Particularity

The Attorney General asserted that the BIA in *Matter of A-R-C-G* failed to consider whether the terms “married,” “women,” and “unable to leave the relationship” considered together constitute a discrete social group. Principally, he claimed that the BIA did not provide an analysis to show that the proposed group was “defined by characteristics that provide a clear benchmark for determining who falls within the group.”<sup>239</sup> He then made the conclusory assertion that “[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required under *M-E-V-G*, given that broad swaths of society may be susceptible to victimization.”<sup>240</sup> In dicta, he cited the example of those who are victims of gang violence.<sup>241</sup>

Women who suffer persecution in the form of intimate partner violence are not victims of “private criminal activity” any more than women who are subjected to or refuse to be subjected to FGM.<sup>242</sup> The Attorney General missed the underlying reasons for this group’s vulnerability: the subordinate position of women in the society, the subordinate position of women in domestic relationships in the society, the treatment of women in domestic relationships as beneath government protection. Persecution by a private person, or non-state actor, still may constitute persecution if the government is unwilling or unable to provide protection to the targeted group.<sup>243</sup>

As explained in *Matters of M-E-V-G* and *W-G-R*, “the terms used to describe the group” must have “commonly accepted definitions in the society of which the group is a part.”<sup>244</sup> Evidence that supports legal definitions of the terms used to describe the social group, such as “domestic relationship,” “married,” “women,” “unable to leave the relationship,” and “children in common,” would presumably also support the argument that they have “commonly

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

240. *Id.*

241. *Id.*

242. *In re M-E-V-G*, 26 I. & N. Dec. at 246; *In re Kasinga*, 21 I. & N. Dec. at 365–66.

243. Brief for Respondent A-B, *supra* note 190, at 22 (“If the Attorney General is asking whether criminal acts committed by private (non-State) actors may constitute persecution, a contrary ruling would fly in the face of decades of precedent, the plain language of the statute, and the clear intent of Congress.”).

244. *In re M-E-V-G*, 26 I. & N. Dec. at 239; *In re W-G-R*, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).

accepted definitions in the society.”<sup>245</sup> Further, the social and cultural context of the applicant’s country may be taken into account in evaluating a group’s particularity. The inability of a married woman or a woman in a domestic/intimate partner relationship to leave may be defined by “societal expectations about gender and subordination,” legal constraints on divorce and separation, child custody, and a lack of protections for women and their children who want to leave a relationship.<sup>246</sup>

Even if there are legal protections, police often refuse to assist women experiencing intimate partner violence because of societal expectations about gender, subordination, and interference with marital relationships.<sup>247</sup> This evidences that a group defined by nationality, gender, relationship status, and inability to leave the relationship is accepted by the society as a clearly defined group, which is subordinate to men and outside of the government’s protection.<sup>248</sup> There is nothing amorphous, overbroad, diffuse, or subjective about these groups. The Attorney General provided no reasonable explanation why such groups are amorphous, overbroad, diffuse, or subjective.

### c. Social Distinction

Attorney General Sessions asserted that these social group constructs “will often lack sufficient social distinction to be cognizable as a distinct social group.”<sup>249</sup> In support of his conclusion, Sessions cited the BIA’s vacated decision in *Matter of R-A-* as holding that the applicant failed to show that her social group was a segment of the population that was recognized by the

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245. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 392–93 (B.I.A. 2014), *overruled by In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018); see Brief for Respondent A-B-, *supra* note 190, at 37–38.

246. *In re A-R-C-G-*, 26 I. & N. Dec. at 392–93. *Matter of A-B-* involved social groups identified as “El Salvadoran women in domestic relationships they are unable to leave,” “El Salvadoran women who are unable to leave their domestic relationships where they have children in common,” or “Salvadoran women.” *In re A-B-*, 27 I. & N. Dec. 316, 320, 343 (A.G. 2018), *abrogated by* Grace v. Whitaker, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018); see Brief for Respondent A-B-, *supra* note 190, at 32, 37–38.

247. *In re A-R-C-G-*, 26 I. & N. Dec. at 392–93; see Brief for Respondent A-B-, *supra* note 190, at 37–38, see DHS Supplemental L-R-Brief, *supra* note 62, at 17.

248. See *In re A-R-C-G-*, 26 I. & N. Dec. at 392–93. In regard to particularity, the BIA requires that a particular social group “be defined by characteristics that provide a clear benchmark for determining who falls within the group.” *In re M-E-V-G-*, 26 I. & N. Dec. at 239.

249. *In re A-B-*, 27 I. & N. Dec. at 336.



society.<sup>250</sup> The Attorney General's reliance on a case that was vacated by a previous Attorney General is problematic. Although *Matter of R-A-* may represent the BIA's position in one instance, a previous Attorney General determined that the position was erroneous and vacated it. In fact, in the final remand of the case, the immigration judge actually granted asylum.<sup>251</sup> Moreover, the BIA's analysis is contrary to DHS's later position taken in the same case that she did qualify for asylum. DHS took similar positions in subsequent cases, and the issue became the impetus for drafting new proposed regulations addressing gender-based asylum.<sup>252</sup>

Sessions further stated, "there is significant room for doubt" that a society would view these women as a distinct group as opposed to a victim of private abuse.<sup>253</sup> He claimed that the BIA in *Matter of A-R-C-G-* failed to explain why the evidence established that Guatemalan society perceives "married women in Guatemala who are unable to leave their relationship" as a group distinct in the society.<sup>254</sup> The Attorney General argued that evidence demonstrating social distinction must include that the society "perceives, considers or recognizes [persons sharing the particular characteristic] to be a distinct group."<sup>255</sup> He ignored that the BIA in *M-E-V-G-* recognized that it may not be possible to identify women who are opposed to FGM, but a society could still perceive them as a group based on "sociopolitical or cultural conditions in the country."<sup>256</sup> Likewise, the sociopolitical and cultural conditions in a country may demonstrate the society's perception of women who are in domestic relationships and unable to leave as a group. The society perceives the status of the woman in the relationship as subordinate to that of the man even if she attempts to physically separate from him. As such, societal expectations are that abuse against the

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250. *Id.* The Attorney General asserted that the BIA's decision was "thorough" and "well-reasoned" and that "the Board and federal courts have continued to treat [the BIA's analysis in *Matter of R-A-*] as persuasive." *Id.* at 319, 328.

251. Nanasi, *supra* note 137, at 746–51 (describing the series of events leading DHS to reverse its position in *Matter of R-A-*).

252. *Id.*; see DHS Supplemental *L-R-* Brief, *supra* note 62, at 13 n.10, 14; DHS *R-A-* Brief, *supra* note 62.

253. *In re A-B-*, 27 I. & N. Dec. at 336.

254. *Id.*

255. *Id.* (citing *In re W-G-R-*, 26 I. & N. Dec. 208, 217 (B.I.A. 2014)). This does not mean ocular visibility. To the extent the Attorney General applied the social distinction requirement set forth in *Matter of M-E-V-G-* in such a manner, it was contrary to the BIA's articulation of this requirement. See *In re M-E-V-G-*, 26 I. & N. Dec. 227, 240–41 (B.I.A. 2014).

256. *In re M-E-V-G-*, 26 I. & N. Dec. at 238–40.

group is tolerated.<sup>257</sup> The fear and vulnerability of this group stems from the subordination of women in the country and the view of married women as “property.”

As further recognized by the BIA in *M-E-V-G*, evidence supporting the prevalence of FGM in the society and the expectation that women of the tribe would undergo FGM demonstrated the social distinction of the group.<sup>258</sup> Similarly, evidence supporting the prevalence of intimate partner violence in the society and the acceptance of the abuse of women in the society demonstrates the social distinction of the group. Women understand that they are a part of this group, as they know the government or police will not provide protection. The BIA in *M-E-V-G* further provided an instructive list of evidence that may establish that a group is perceived by society as distinct including “country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like.”<sup>259</sup> Such evidence was presented in *Matter of A-R-C-G* and *Matter of A-B*, including country conditions reports from U.S. congressional committees and the U.S. State Department and press accounts of the culture of family violence and *machismo*. Further, experts provided testimony on the prevalence of domestic violence, sexual offenses against women, and the failure of police to enforce laws against domestic violence in the women’s respective countries.<sup>260</sup>

Unsurprisingly, the Attorney General ignored both the respondent’s articulation of the particular social group in *Matter of A-B* as “Salvadoran women” and the respondent’s argument that gender alone may establish a particular social group. The BIA and U.S. circuit courts have recognized particular social groups comprised of women, including the BIA’s recognition of “sex” in *Matter of Acosta*<sup>261</sup> as an immutable characteristic forming a social group. U.S. circuit courts have recognized Iranian women, Somali women, female members of a tribe, and widows in Cameroon as particular

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257. For an illustration of DHS’s prior position on social visibility/distinction, see DHS Supplemental *L-R* Brief, *supra* note 62, at 8, 14.

258. *In re M-E-V-G*, 26 I. & N. Dec. at 246.

259. *Id.* at 244.

260. *In re A-B*, 27 I. & N. Dec. at 331–32; *In re A-R-C-G*, 26 I. & N. Dec. 388, 394 (B.I.A. 2014), *overruled by In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018); see Brief for Respondent A-B, *supra* note 190, at 36–37.

261. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (recognizing that the shared characteristic of sex may form a particular social group and persecution may be directed toward an individual who is a member of such a particular social group), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

social groups.<sup>262</sup> Jeff Sessions took extraordinary measures to analyze the applicant's membership in a particular social group utilizing the narrowest interpretations possible.<sup>263</sup>

### C. Nexus

The Attorney General asserted that DHS's concession in *Matter of A-R-C-G* that the applicant was persecuted on account of her particular social group comprised of "married women in Guatemala who are unable to leave their relationship" was contrary to the facts of the case and other cases. In support of this conclusion, he relied on the analysis in a vacated BIA decision, *Matter of R-A*, and ignored actual precedent on the issue. Relying on *Matter of R-A*, he argued that the abuser in *Matter of A-R-C-G* attacked the applicant because of a "preexisting personal relationship" and not because "he was aware of, and hostile to," her particular social group. Sessions cited the BIA's explanation in *Matter of R-A* that evidence did not demonstrate that the applicant's husband had animosity towards the group as a whole or that the persecutor was aware of the existence of the group.<sup>264</sup>

First, the Attorney General attempted to return the understanding of intimate partner violence against women to one based on a motive that is personal to the relationship.<sup>265</sup> Experts have discredited the idea that a man beats his female partner simply because they are in a relationship.<sup>266</sup> Intimate partner violence against

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262. See cases cited *supra* note 78 and accompanying text.

263. The Attorney General further instructed that the BIA, immigration judges, and all asylum officers must require an applicant seeking asylum or withholding of removal based on membership in a particular social group to provide, "on the record and before the immigration judge, the exact delineation of any proposed particular social group." The Attorney General instructed that the BIA cannot consider a social group articulation that was not first presented to or analyzed by the immigration judge. See *In re A-B*, 27 I. & N. Dec. at 344. In *Grace v. Whitaker*, the court recognized that although *Matter of A-B* does not apply this exact delineation requirement to a credible fear determination, the DHS Policy Memorandum does apply such a requirement to a credible fear determination. No. 18-cv-01853 (EGS), 2018 WL 6628081, at \*20 (D.D.C. Dec. 19, 2018), *appeal docketed*, No. 19-501 (D.C. Cir. Jan. 30, 2019). The court found the DHS Policy Memorandum's exact delineation requirement in the context of a credible fear determination to be contrary to immigration law, arbitrary and capricious. *Id.*

264. *In re A-B*, 27 I. & N. Dec. at 338–39.

265. *Id.*

266. See note 178 *supra*; Brief for Respondent A-B, *supra* note 190, at 39–40; Reply Brief for Respondent A-B, *supra* note 226, at 8 (quoting Expert Declaration of Nancy Lemon ¶¶ 2, 81) (opining that "gender is one of the main motivating factors, if not the primary factor, for domestic violence" and that the specific facts in this case establish that "gender was the primary motivating factor of [the] batterer's abuse"). While the Reply Brief is publicly

women occurs because of the abuser's perception that the woman is subordinate to him, and this perception is reinforced by the society's acceptance of her subordinate status in the relationship.<sup>267</sup> The requisite nexus can still be established where there is a preexisting personal relationship.<sup>268</sup> Concluding otherwise would prevent eligibility for asylum for women who have suffered or refused FGM imposed by family members or women who flee honor killings by family members.<sup>269</sup> A blanket assertion that a preexisting relationship prevents nexus is in conflict with the requirements that asylum determinations be made based on the context in which the persecution occurred and rely on the evidence presented.<sup>270</sup>

There is no requirement that a persecutor must seek to harm all group members in order to establish nexus. The question of nexus

available, the appended Expert Declaration does not appear to be publicly available besides the excerpts in the Reply Brief. *See also* NIJL PRACTICE ADVISORY, *supra* note 187, at 21 ("it is well established that domestic violence is rooted in power and control."); Robins, *supra* note 36, at 436–37; Marsden, *supra* note 3, at 2524–25; Musalo, *A Short History*, *supra* note 44, at 49; *see also* Taylor Markey, Comment, *Westernized Women?: The Construction of Muslim Women's Dissent in U.S. Asylum Law*, 64 UCLA L. REV. 1302, 1322 (2017) (stating that in asylum law and international human rights law, "gender has been historically depoliticized—cast as private, personal, and cultural").

267. *See* sources cited *supra* note 252.

268. Reply Brief for Respondent A-B, *supra* note 226, at 8 n.4 (citing *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004)) ("There is no exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it."); Brief of Tahirih Justice Center, the Asian Pacific Institute on Gender-Based Violence, ASISTA Immigration Assistance, and Casa de Esperanza as Amici Curiae Supporting Respondent at 21, *In re A-B*, 27 I. & N. Dec. 316 (B.I.A. 2018) (quoting *Bi Xia Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010)) ("[If] there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus."), *abrogated by* *Grace v. Whitaker*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018); CGRS PRACTICE ADVISORY, *supra* note 187, at 17–18, 21; NIJL PRACTICE ADVISORY, *supra* note 187, at 20 (asserting that Sessions's analysis of the persecution suffered by A-R-C-G- as harm occurring exclusively in the context of a personal relationship "ignores established sociological evidence regarding domestic violence and country condition evidence regarding gender violence in Central America.").

269. *See* *Sarhan v. Holder*, 658 F.3d 649, 656 (7th Cir. 2011) (finding that the threat of honor killing against Ms. Sarhan by her brother was not based on a "personal dispute," but on "a widely-held social norm in Jordan" entitling "male members of families dishonored by perceived bad acts of female relatives to kill those women."); *In re Kasinga*, 21 I. & N. Dec. 357, 366–67 (B.I.A. 1996) (finding that nexus was established because aunt and husband planned to force Ms. Kasinga to undergo FGM to overcome sexual characteristics of young women in order to assure male dominance and exploitation); Reply Brief for Respondent A-B, *supra* note 226, at 8, n.4.

270. *Id.*; CGRS PRACTICE ADVISORY, *supra* note 187, at 20; NIJC PRACTICE ADVISORY, *supra* note 187, at 20; *see* *Martinez-Perez v. Sessions*, 897 F.3d 33, 40 n.6 (1st Cir. 2018) (finding that the applicant's comparison to *Matter of A-R-C-G-* "does her no favors" because *Matter of A-B* overruled *A-R-C-G-* and interpreted "the 'causal connection' and 'government nexus' prongs of persecution analysis to exclude most domestic violence harms from satisfying that definition.").

concerns the abuser's motives in harming his spouse or partner.<sup>271</sup> This is a fact acknowledged by U.S. circuit courts and DHS.<sup>272</sup> Further, such a requirement is illogical. If a society allows members of one race to hold members of another race in slavery and a slave owner beats his own slave, but not other slaves, this does not prevent a finding that the slave owner was motivated by his slave's race in beating him.<sup>273</sup> Nor does a neo-Nazi burning down the house of only one African-American prevent a finding that he was motivated by the person's race in burning down the house.<sup>274</sup>

Moreover, there is no requirement that a persecutor must be aware of the legally defined particular social group, "married women in Guatemala who are unable to leave their relationship."<sup>275</sup>

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271. Reply Brief for Respondent A-B, *supra* note 226, at 8; CGRS PRACTICE ADVISORY, *supra* note 187, at 19; NIJL PRACTICE ADVISORY, *supra* note 187, at 22.

272. *Sarhan*, 658 F.3d at 656–57 (explaining that the fact that Ms. Sarhan's brother had not killed others had no impact on whether his persecution of Ms. Sarhan was on account of her membership in a particular social group); DHS R-A- Brief, *supra* note 62, at 34.

273. As explained in the proposed regulations:

In some cases, a persecutor may in fact target an individual victim because of a shared characteristic, even though the persecutor does not act against others who possess the same characteristic. For example, in a society in which members of one race hold members of another race in slavery, that society may expect that a slaveowner who beats his own slave would not beat the slave of his neighbor. It would nevertheless be reasonable to conclude that the beating is centrally motivated by the victim's race. Similarly, in some cases involving domestic violence, an applicant may be able to establish that the abuser is motivated to harm her because of her gender or because of her status in a domestic relationship. This may be a characteristic that she shares with other women in her society, some of whom are also at risk of harm from their partners on account of this shared characteristic. Thus, it may be possible in some cases for a victim of domestic violence to satisfy the "on account of" requirement, even though social limitations and other factors result in the abuser having the opportunity, and indeed the motivation, to harm only one of the women who share this characteristic, because only one of these women is in a domestic relationship with the abuser.

Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208); *see also* DHS R-A- Brief, *supra* note 62, at 34; CGRS PRACTICE ADVISORY, *supra* note 187, at 19.

274. *Sarhan*, 658 F.3d at 656–57 ("Imagine the neo-Nazi who burns down the house of an African-American family. We would never say that this was a personal dispute because the neo-Nazi did not burn down all of the houses belonging to African-Americans in the town.").

275. Brief for Respondent A-B, *supra* note 190, at 39 (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)); DHS R-A- Brief, *supra* note 62 (stating that direct and circumstantial evidence of the persecutor's motive may establish nexus); NIJL PRACTICE ADVISORY, *supra* note 187, at 12 (citing *Elias-Zacarias*, 502 U.S. at 483; *Martinez-Buendia v. Holder*, 616 F.3d 711, 715 (7th Cir. 2010)) (noting that a requirement to provide evidence that the persecutor is aware of the specific particular social group would be contrary to "well-established case law finding that nexus can be proven through direct *and* circumstantial evidence."); *see also* CGRS PRACTICE ADVISORY, *supra* note 187, at 18 ("Requiring each modifier [in the group definition] to be an independent, central reason for the persecution could make it nearly

The applicant is not required to establish the persecutor's motivation in relation to each term included in the identified particular social group or even the persecutor's exact motivation, as such evidence would be nearly impossible to obtain from a persecutor.<sup>276</sup>

The Attorney General appeared to imply that an applicant must establish that her membership in the group is the abuser's central, or even sole, motivation. The Real ID Act unambiguously provides:

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>277</sup>

Any interpretation to the contrary would conflict with the plain language of the statute.<sup>278</sup> Membership in the particular social group does not need to be even a "dominant central reason for persecution."<sup>279</sup> Rather, it must only play "more than a minor role in motivating the persecutor."<sup>280</sup>

In the context of *Matter of A-R-C-G* and *Matter of A-B*, the motivation of the abuser was the woman's subordinate status in their relationship and society's acceptance of that view. This motivation was established by evidence of the abusers' statements and actions seeking to control them, exert his domination over them, and the belief that he had a right to do so to a woman in a relationship

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impossible for petitioners to successfully navigate the legal requirements for asylum and withholding of removal.") (citing *Oliva v. Lynch*, 807 F.3d 53, 61 n.4 (4th Cir. 2015)).

276. NIJL PRACTICE ADVISORY, *supra* note 187, at 12; CGRS PRACTICE ADVISORY, *supra* note 187, at 18 (citing *Mustafa v. Holder*, 707 F.3d 743, 752 (7th Cir. 2013); *Ali v. Ashcroft*, 394 F.3d 780, 787 (9th Cir. 2005); *Osorio v. INS*, 18 F.3d 1017, 1030 (2d Cir. 1994); *Temu v. Holder*, 740 F.3d 887, 892 (4th Cir. 2014); *Parussimova v. Mukasey*, 555 F.3d 734, 742 (9th Cir. 2009); *Elias-Zacarias*, 502 U.S. at 483; *Espinosa-Cortez v. Att'y Gen.*, 607 F.3d 101, 108–09 (3d Cir. 2010)).

277. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2018) (emphasis added).

278. In *Grace v. Whitaker*, the court found that the Attorney General in *Matter of A-B* had not established a new standard for the nexus requirement in the context of credible fear determinations and had articulated the correct "at least one central reason" standard. No. 18-cv-01853 (EGS), 2018 WL 6628081, at \*24 (D.D.C. Dec. 19, 2018), *appeal docketed*, No. 19-501 (D.C. Cir. Jan. 30, 2019).

279. Brief for Respondent A-B, *supra* note 190, at 39 (quoting *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009)).

280. *Cece v. Holder*, 733 F.3d 662, 688 n.6 (7th Cir. 2013) (citing *Shaikh v. Holder*, 702 F.3d 897, 902 (7th Cir. 2012)).

with him, and evidence of society's treatment of violence against women by intimate partners.<sup>281</sup>

#### D. Persecution

The Attorney General asserted that the BIA defines persecution using three elements: (1) "'Persecution' involves an intent to target a belief or characteristic,"<sup>282</sup> (2) "[T]he level of harm must be 'severe,'"<sup>283</sup> (3) "[T]he harm or suffering must be 'inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.'"<sup>284</sup>

Regarding the first element, relying on *Matter of Kasinga*, Sessions explained that "private criminals are motivated more often by greed or vendettas than by an intent to 'overcome [the protected] characteristic of the victim.'"<sup>285</sup> Although the BIA in *Matter of Kasinga* provided that "persecution can consist of 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," the BIA did not suggest that "private criminals are motivated more often by greed or vendettas."<sup>286</sup> In support of his assertion, Attorney General Sessions further relied on the BIA's vacated decision in *Matter of R-A*, in which the BIA found that the applicant's husband was motivated to abuse her because she was his wife, not because she was "a member of some broader collection of women."<sup>287</sup> Here, the Attorney General confused the issue of "persecution" with the issue of "nexus," or whether the persecution is "on account of" the particular social group identified.<sup>288</sup> Regardless, Sessions wholly disregarded the reasons for the husband's abuse of

281. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208); Brief for Respondent A-B, *supra* note 190, at 39–40; DHS Supplemental L-R Brief, *supra* note 62, at 8; DHS R-A Brief, *supra* note 62, at 26–28, 35–36.

282. *In re A-B*, 27 I. & N. Dec. 316, 337–38 (A.G. 2018) (citing *In re L-E-A*, 27 I. & N. Dec. 40, 44 n.2 (B.I.A. 2017)), *abrogated by* Grace v. Whitaker, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018).

283. *In re A-B*, 27 I. & N. Dec. at 337–38 (citing *In re T-Z*, 24 I. & N. Dec. 163, 172–73 (B.I.A. 2007)).

284. *Id.* (citing *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985)).

285. *In re A-B*, 27 I. & N. Dec. at 337.

286. *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (citing *In re Acosta*, 19 I. & N. Dec. at 222–23).

287. *In re A-B*, 27 I. & N. Dec. at 337 (quoting *In re R-A*, 22 I. & N. Dec. 906, 920 (B.I.A. 2001)).

288. *In re R-A*, 22 I. & N. Dec. at 921.

his wife: that she was a woman subject to his subordination.<sup>289</sup> The husband targeted the wife because she was a woman, and he used the abuse “to affirm his dominance over her.”<sup>290</sup>

As to the second element, the Attorney General recognized that “private violence” may be “severe.”<sup>291</sup> He further recognized that the applicant in *Matter of A-R-C-G* suffered abuse that was “sufficiently severe.”<sup>292</sup> As to the third element, the Attorney General correctly stated the requirement throughout his decision that if persons other than the government inflict the harm, the government must be unable or unwilling to control them. However, Sessions appeared to raise the standard of “unable or unwilling” to a much higher, and possibly impossible to meet, standard.<sup>293</sup> He asserted, “[t]he applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims.”<sup>294</sup>

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289. *In re R-A*, 22 I. & N. Dec. at 939 (Guendelsberger, Board Member, dissenting) (citing *Islam v. Sec’y of State for the Home Dep’t* [1999] 2 AC 629 (HL) (appeal taken from Eng.)) (asserting that the husband acted on account of the applicant’s gender, their relationship, and the fact that he knew “as a woman subject to his subordination, the respondent would receive no protection from the authorities if she resisted his abuse and persecution”); see *supra* note 268.

290. *In re R-A*, 22 I. & N. Dec. 906, 941 (B.I.A. 2001) (Guendelsberger, Board Member, dissenting) (citing *Islam v. Sec’y of State for the Home Dep’t* [1999] 2 AC 629 (HL) (appeal taken from Eng.)); see *supra* note 268.

291. *In re A-B*, 27 I. & N. Dec. at 337.

292. *Id.*

293. In fact, in *Grace v. Whitaker*, the court found that *Matter of A-B* created a new heightened requirement for establishing “persecution” in the context of non-state actor persecution. Specifically, the Attorney General established a requirement that the government “condone” the persecution or be completely helpless to protect the victims, as opposed to the “unable or unwilling” requirement established in *Matter of Acosta*. *Grace v. Whitaker*, No. 18-cv-01853 (EGS), 2018 WL 6628081, at \*22 (D.D.C. Dec. 19, 2018), *appeal docketed*, No. 19-501 (D.C. Cir. Jan. 30, 2019). The court recognized that under this new construction of “persecution,” “no asylum applicant who received assistance from the government, regardless of how ineffective that assistance was, could meet the persecution requirement when the persecutor is a non-government actor.” The court found that the term “persecution” was not ambiguous, that the new heightened standard established in *Matter of A-B* was inconsistent with immigration laws, and that the *Matter of A-B* standard cannot be applied in credible fear determinations. *Id.* at \*21. Further, the Court rejected the government’s reliance on U.S. circuit court cases that used the words “condone” or “complete helplessness” because the courts in those cases did not actually apply such a heightened standard. *Id.* at \*22. Rather, the courts applied the unable and unwilling standard, and the court in *Grace v. Whitaker* was not required to defer to the government’s interpretation of U.S. circuit court precedent. *Id.* at \*23.

294. *In re A-B*, 27 I. & N. Dec. at 337–38 (citing *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000); *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005)); see also Dara Lind, *Exclusive: How Asylum Officers are Being Told to Implement Sessions’s New Rules*, VOX (June 19, 2018, 9:00 AM), <https://www.vox.com/policy-and-politics/2018/6/19/17476662/asylum-border-sessions> (reporting on a new USCIS memo directing asylum officers to use a “complete helplessness” standard).



### 1. An Unable or Unwilling Government

To the extent the Attorney General attempted to elevate the requirement that the government was “unable or unwilling” to protect to a requirement that the government “condoned” or was “completely helpless,” it is inconsistent with *Matter of Acosta*, the standard applied in *Matter of M-E-V-G* and *Matter of W-G-R* upon which he so emphatically relied.<sup>295</sup> Such a heightened standard is also inconsistent with the requirement of well-founded fear of persecution. Further, the cases upon which he relies do not actually support the recognition of such a standard.<sup>296</sup>

The BIA in *Matter of Acosta* found that the interpretation of “persecution” by the BIA and U.S. circuit courts prior to the 1980 Refugee Act should apply to the term in section 101(a)(42)(A) of the Act. This interpretation includes the requirement that the “harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”<sup>297</sup> The Attorney General cited to no subsequent BIA precedent for such a heightened standard.<sup>298</sup> In fact, the BIA in both *Matter of M-E-V-G* and *Matter of W-G-R* recognized the “unable or unwilling” standard.<sup>299</sup>

Further, a heightened standard would require a different result in cases such as *Matter of Kasinga*.<sup>300</sup> The evidence presented in that

295. *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011) (“Whether a government is ‘unable or unwilling to control’ private actors . . . is a factual question that must be resolved based on the record.”) (quoting *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005)).

296. See CGRS PRACTICE ADVISORY, *supra* note 187, at 21–22; NIJL PRACTICE ADVISORY, *supra* note 187, at 24.

297. *In re Acosta*, 19 I. & N. Dec. 211, 222–23 (B.I.A. 1985) (citing *McMullen v. INS*, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981)), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971), *In re McMullen*, 17 I. & N. Dec. 542, 544–45 (B.I.A. 1980), *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975)).

298. *In re A-B*, 27 I. & N. Dec. at 337–38.

299. *In re M-E-V-G*, 26 I. & N. Dec. 227, 252 (B.I.A. 2014); see *In re W-G-R*, 26 I. & N. Dec. 208, 224 n.8 (B.I.A. 2014). U.S. circuit court cases citing *Matter of A-B* in regard to the standard in non-state-actor persecution cases have continued to apply the “unable or unwilling” standard. See *Rosales Justo v. Sessions*, 895 F.3d 154, 164 (1st Cir. 2018) (finding that evidence of a police investigation did not demonstrate that a government was able to provide protection); *Tacam-Garcia v. Whitaker*, 744 F. App’x 226, 227 (5th Cir. 2018) (finding that there were several instances where the authorities and the court helped the applicant and as such, she failed to demonstrate that the government was unable or unwilling to control the alleged persecution by her husband).

300. Notably, both *Matter of M-E-V-G* and *Matter of W-G-R* analyzed *Matter of Kasinga* in regard to the requirements of membership in a particular social group to evidence that the result would not be different. See *In re M-E-V-G*, 26 I. & N. Dec. at 238, 240, 245–46; *In re W-G-R*, 26 I. & N. Dec. at 217–18.

case, similar to *Matter of A-R-C-G* and *Matter of A-B*, showed that FGM was widely practiced by the police, the government of Togo had a poor human rights record, and most African women could expect little governmental protection from FGM.<sup>301</sup> Such evidence may not meet a standard that the government “condoned” FGM or was “completely helpless.”

The BIA and U.S. circuit courts have recognized that even when an applicant does not report harm to the police, this does not prevent a finding that the government was unable or unwilling to protect her if she can establish that such reporting would be futile.<sup>302</sup> Further, other bases for a victim’s failure to report abuse may exist, such as fear of retribution, shame, or financial, religious, cultural, moral, or legal constraints.<sup>303</sup> An applicant may be putting her life at risk by reporting abuse to the police.<sup>304</sup> If she is already aware that the police will do nothing to respond to her complaints of abuse, presumably there would be no incentive to endanger herself further by making a futile report. Additionally, there may be well-founded concerns about losing any societal or financial support or even custody of her children.<sup>305</sup>

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301. *In re Kasinga*, 21 I. & N. Dec. 357, 367 (B.I.A. 1996).

302. *See Lopez v. Att’y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007); *In re S-A*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000) (finding that although the applicant did not seek protection from the government, if she had done so the Moroccan authorities would have been unable or unwilling to protect her); DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 4:11 (Thompson Reuters 2018); *see also Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950–54 (4th Cir. 2015) (finding that the applicant might be eligible for asylum even though she did not report the persecution to government authorities); Brief for Respondent A-B, *supra* note 190, at 41; Coven Memorandum, *supra* note 69 (“Breaching social mores . . . may result in harm, abuse or harsh treatment that is distinguishable from the treatment given the general population, frequently without meaningful recourse to state protection.”).

303. Factors that influence a battered woman’s behavior include:

- (1) fear of retaliation; (2) the economic (and other tangible) resources available to her; (3) her concern for her children; (4) her emotional attachment to her partner; (5) her personal emotional strengths, such as hope or optimism; (6) her race, ethnicity, and culture; (7) her emotional, mental, and physical vulnerabilities; and (8) her perception of the availability of social support.

Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1232 (1993).

304. In fact, it is widely recognized in the United States that victims are in the most danger at the moment they make a decision to separate. This issue is termed “separation assault,” which describes an attack that seeks to block a woman from leaving, retaliate for her leaving, or end the separation by force. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6 (1991). The existence of protective orders and shelters is recognition of the extreme danger of separation assault. *Id.* at 68.

305. Dutton, *supra* note 303, at 1233 (discussing why abused women may fear leaving their partner or taking legal action); *see also In re A-R-C-G*, 26 I. & N. Dec. 388, 393 (B.I.A. 2014) (identifying some of these challenges), *overruled by In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018); Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81

Nevertheless, in both *Matter of A-R-C-G* and *Matter of A-B*, the applicants reported the abuse to the police who were unable and unwilling to provide protection. In *Matter of A-R-C-G*, the applicant made many attempts to obtain protection from police, but they told her that they would not interfere in a marital relationship.<sup>306</sup> In *Matter of A-B*, the police required the applicant to personally deliver a protection order to the abuser.<sup>307</sup> Not only did this put her life at risk, but it further supported the abuser's belief that he could abuse her and nothing would be done about his actions. The police never enforced the restraining orders. After her abuser attacked her with a knife, the police told her they could not help her.<sup>308</sup>

The Attorney General's statements that domestic violence is a difficult crime to prosecute and "complete security" and "perfect protection" are not required ignore the underlying basis for a government's failure to provide protection.<sup>309</sup> A government may be unable or unwilling to enact laws to provide protections to women who are being abused by their partners or enforce any laws actually enacted because of the government's and society's perception that women are subordinate to men or women in domestic relationships are considered subordinate to men and undeserving of protection.<sup>310</sup> If the police and prosecutors will not enforce the protections available to protect against domestic violence, no protections exist.

Even assuming that the police attempt to provide protection to a victim, but are unable to do so because of insufficient resources, this would demonstrate a government's inability to provide protection. It could also potentially demonstrate an unwillingness to provide protection, to the extent the government refuses to provide sufficient resources.<sup>311</sup> While the "persistence" of domestic violence

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FORDHAM L. REV. 837, 857, 878 (2012) (recognizing that barriers to a victim separating from an abusive partner may include the victim's fear that the abuser will physically retaliate or a belief that custody of their children, money, housing, or other factors are at stake).

306. *In re A-R-C-G*, 26 I. & N. Dec. at 389.

307. Brief for Respondent A-B, *supra* note 190, at 41.

308. *Id.* at 4.

309. *In re A-B*, 27 I. & N. Dec. 316, 343–44 (A.G. 2018), *abrogated by* Grace v. Whitaker, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018).

310. *See supra* notes 133, 291.

311. The law does not require an applicant to demonstrate that a government is *both* "unable" and "unwilling" to provide protection—if either is true, an applicant can meet the requirement of non-state actor persecution. *See In re A-B*, 27 I. & N. Dec. at 316; CGRS PRACTICE ADVISORY, *supra* note 187, at 25 nn.106–07 (citing *Valdiviezo-Galdamez v. Att'y Gen.*, 502 F.3d 285, 289 n.2 (3d Cir. 2007) ("If anything, the evidence that gang violence is a serious problem in Honduras provides additional support for Galdamez's claims [of gov-

in a country or a government's "difficulty" policing domestic violence may not necessarily demonstrate a government's unwillingness to protect,<sup>312</sup> it does support the government's inability to provide protection.<sup>313</sup>

By relying on the example of the "persistence" of domestic violence in the United States, the Attorney General further ignored the United States' history of treating intimate partner violence as a private matter outside the scope of government protection. As discussed in more detail below, it is only in the last thirty years that state and federal laws in the United States have made efforts to strengthen and ensure the enforcement of intimate partner violence laws. Given U.S. history, it is entirely conceivable that other countries are unable or unwilling to provide protections to victims of intimate partner violence.

Requiring a government's "complete helplessness" to establish persecution by a non-state actor conflicts with the INA's "well-founded fear" provision.<sup>314</sup> An individual would have to demonstrate that her government would be completely helpless to protect her from persecution by a non-state actor. The U.S. Supreme Court has rejected the argument that well-founded fear requires a showing of "clear probability" of the persecution, finding that a well-founded fear can be based on a less than fifty percent chance of the persecution happening.<sup>315</sup> Moreover, the Supreme Court recognized that even a ten percent chance of persecution might establish a well-founded fear.<sup>316</sup> A requirement that the govern-

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ernment inability to protect]."); *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010) ("Even if Afriyie's ability to file a police report suggests that the police were *willing* to protect Afriyie, that says little if anything about whether they were *able* to do so."); *Gathungu v. Holder*, 725 F.3d 900, 909 (8th Cir. 2013) ("[T]he very fact that the Mungiki have continued to create significant violence over the last decade *despite* repeated assertions by the Kenyan government that it is cracking down . . . show the Kenyan government is unable to control the Mungiki.")).

312. *In re A-B*, 27 I. & N. Dec at 316, 344.

313. *See supra* note 311.

314. CGRS PRACTICE ADVISORY, *supra* note 187, at 22.

315. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *see also* CGRS PRACTICE ADVISORY, *supra* note 187, at 22. *Compare* 8 C.F.R. §§ 208.13(b), 1208.13(b) (2018), *with* 8 C.F.R. §§ 208.16(b), 1208.16(b) (2018) (showing that withholding of removal under the relevant sections requires a higher burden of proof than is required for asylum).

316. That the fear must be "well-founded" does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a "more likely than not" one. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). One can certainly have a well-founded fear of an event happening when there is less than a fifty percent chance of the occurrence taking place. As one leading authority has pointed out:

Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp . . . . In such a case it would be only too apparent that anyone who has man-

ment is completely helpless or has no chance of being able to provide protection conflicts with the acknowledgement that even less than a fifty percent chance of persecution happening can establish a well-founded fear of persecution.

Moreover, to the extent the Attorney General asserted a higher “complete helplessness” standard, it exceeds even the standard required in cases under the Convention Against Torture (CAT). An applicant applying for protection under CAT must demonstrate that the state inflicted or would consent to or acquiesce to the applicant’s torture, a standard that is considered higher than that required for asylum.<sup>317</sup> Acquiescence is defined under the regulations as requiring that the “public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”<sup>318</sup> As such, even under CAT, there is no requirement that a government “condone” or be “completely helpless.” The government only needs to be “aware that torture of the sort feared by the applicant occurs and remain willfully blind to it.”<sup>319</sup> U.S. circuit courts, even in cases where the government has made attempts to provide protection to the victim, have found that the government met CAT’s higher standard of “consent” and “acquiescence.”<sup>320</sup>

## 2. Relocation

Asylum regulations already provide a distinction between persecution by state actors and non-state actors in the required analysis related to relocation.<sup>321</sup> An applicant who fears persecution by a state actor is presumed to be unable to relocate despite a lack of

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aged to escape from the country in question will have “well-founded fear of being persecuted’ upon his eventual return.”

ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 180 (1966); *see also* CGRS PRACTICE ADVISORY, *supra* note 187, at 22.

317. 8 C.F.R. § 208.18(a)(1) (2018); NIJC PRACTICE ADVISORY, *supra* note 187, at 24–25 n.21 (citing *In re S-V*, 22 I. & N. Dec. 1306, 1312–13 (B.I.A. 2000); *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138–39 (7th Cir. 2015)); *see also* CGRS PRACTICE ADVISORY, *supra* note 187, at 23 n.94.

318. 8 C.F.R. §§ 208.18, 1208.18 (2018).

319. *Madrigal v. Holder*, 716 F.3d 499, 509 (9th Cir. 2013); *see* CGRS PRACTICE ADVISORY, *supra* note 187, at 23 n.96.

320. CGRS PRACTICE ADVISORY, *supra* note 187, at 23 n.95 (citing *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138–39 (7th Cir. 2015); *De La Rosa v. Holder*, 598 F.3d 103, 109–11 (2d Cir. 2010)).

321. 8 C.F.R. §§ 208.13(b)(3)(ii), 1208.13(b)(3)(ii) (2018); CGRS PRACTICE ADVISORY, *supra* note 187, at 27; NIJC PRACTICE ADVISORY, *supra* note 187, at 26.

past persecution.<sup>322</sup> When the applicant has established past persecution by a non-state actor on account of one of the five grounds for asylum, including particular social group, she is presumed to have a well-founded fear of persecution on the same basis.<sup>323</sup> DHS bears the burden to demonstrate by a preponderance of the evidence that she does not have a well-founded fear of future persecution because she could avoid persecution and it would be reasonable to expect the applicant to relocate under all the circumstances.<sup>324</sup>

The Attorney General stated, in dicta, that “[w]hen the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country’s government.”<sup>325</sup> Sessions provided no opinion specifically as to whether it would be reasonable for Ms. A-B- to relocate. Nevertheless, his speculation on relocation when an applicant has suffered harm from only a few individuals has no basis in the INA or regulations. Regardless of the number of individuals perpetrating the harm or threatening the harm, relocation must allow her to successfully avoid persecution and be reasonable under the totality of the circumstances.<sup>326</sup>

Even when only one individual perpetrates the harm, an applicant may not successfully and safely relocate. For instance, in both *Matter of A-R-C-G* and *Matter of A-B-*, the abusers were able to find the applicants when they fled to other areas.<sup>327</sup> Further, asylum regulations provide a “non-exhaustive list of factors” to consider in determining whether relocation is reasonable, including “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,

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322. 8 C.F.R. §§ 208.13(b)(3)(ii), 1208.13(b)(3)(ii) (2018).

323. *Id.* § 208.13(b)(1)(i)–(ii), (b)(3)(ii); *id.* § 1208.13(b)(1)(i)–(ii), (b)(3)(ii).

324. *Id.* §§ 208.13(b)(1)(i)–(ii), 1208.13(b)(1)(i)–(ii).

325. *In re A-B-*, 27 I. & N. Dec. 316, 345 (A.G. 2018), *abrogated by* *Grace v. Whitaker*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018).

326. *See* INA § 208, 8 U.S.C. § 1158 (2018) (mentioning no criterion for the number of potential persecutors necessary to seek asylum); 8 C.F.R. §§ 208.13(b), 1203.13(b) (2018) (describing the eligibility requirements for asylum seekers without making any mention of a minimum number of potential persecutors); *see also* CGRS PRACTICE ADVISORY, *supra* note 187, at 26; NIJC PRACTICE ADVISORY, *supra* note 187, at 26.

327. *In re A-R-C-G*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014), *overruled by* *In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018); Brief for Respondent A-B-, *supra* note 190, at 42–43.

health, and social and familial ties.”<sup>328</sup> An analysis based solely on the fact that there is only one individual perpetrating the harm would entirely ignore the reasonableness consideration of the relocation inquiry.

### E. Credibility

The Attorney General concluded that the BIA erred in finding the immigration judge’s credibility determinations in *Matter of A-B* to be clearly erroneous because the BIA failed “to give adequate deference to the credibility determinations and improperly substituted its own assessment of the evidence.”<sup>329</sup> While a credibility determination allows the adjudicator significant latitude in her analysis of credibility, the REAL ID Act requires the determination to be made under “the totality of circumstances,” considering the applicant’s “demeanor, candor, or responsiveness”; “the inherent plausibility” of the account; “the consistency” of the applicant’s statements; and “any inaccuracies or falsehoods” in those statements, regardless of whether the “inconsistency, inaccuracy, or falsehood goes to the heart” of the claim.<sup>330</sup> This does not give the adjudicator unrestricted discretion to make an adverse credibility determination.

Any such determination must be made “considering the totality of the circumstances.” The adjudicator must “present a reasoned analysis of the evidence as a whole.”<sup>331</sup> An adjudicator cannot rely solely on facts supporting an adverse credibility determination and ignore the facts that do not support an adverse credibility determination.<sup>332</sup> A failure to engage in a reasoned analysis of the totality

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328. 8 C.F.R. §§ 208.13(B)(3), 1208.13(b)(3) (2018); NIJC PRACTICE ADVISORY, *supra* note 187, at 26.

329. *In re A-B*, 27 I. & N. Dec. at 341.

330. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2018); *see also* CGRS PRACTICE ADVISORY *supra* note 187, at 28 (“[A]djudicators cannot ‘cherry pick solely facts favoring an adverse credibility determination while ignoring facts that undermine that result.’”) (quoting *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010)).

331. *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1091 (9th Cir. 2014) (quoting *Tamang v. Holder*, 598 F.3d 1083, 1093 (9th Cir. 2010)); *see also* *Hanaj v. Gonzales*, 446 F.3d 694, 700 (7th Cir. 2006).

332. *See* *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010); *Hanaj v. Gonzales*, 446 F.3d at 700; *Shah v. Att’y Gen.*, 446 F.3d 429, 437 (3d Cir. 2006); CGRS PRACTICE ADVISORY *supra* note 187, at 28 n.122 (suggesting that adjudicators must allow an applicant to explain discrepancies, and citing *Ming Shi Xue v. BIA*, 439 F.3d 111, 121 (2d Cir. 2006); *Soto-Olarte v. Holder*, 555 F.3d 1089, 1091–93 (9th Cir. 2009); *Pang v. USCIS*, 448 F.3d 102, 109–11 (2d Cir. 2006)); *see also* *Tang v. Att’y Gen.*, 578 F.3d 1270, 1280 (11th Cir. 2009); *Ai Jun Zhi*, 751 F.3d at 1091.

of the evidence would support a clearly erroneous finding on credibility by the adjudicator.<sup>333</sup> Further, an adjudicator's failure to allow an applicant to explain any inconsistencies or omissions before an adverse credibility determination would likewise support a clearly erroneous finding on credibility by the adjudicator.<sup>334</sup> There are many reasons for inconsistencies or omissions by an applicant during the process of her case, including fear of the process, linguistic and cultural barriers, trauma, and lack of familiarity with the law on asylum.<sup>335</sup>

Moreover, intimate partner violence-based asylum claims face significant evidentiary hurdles because of the fact that a private actor inflicts the persecution within a home.<sup>336</sup> There are rarely police reports because such reports are likely to have been futile and potentially endanger the victim.<sup>337</sup> The victim is likely to be unable to obtain any letters or assistance in obtaining evidence from family members with the most knowledge about the abuse for fear of retribution from the abusive partner.<sup>338</sup> Hospital records indicating any injuries is rare.<sup>339</sup> Yet, as demonstrated in *Matter of A-B*, a victim's confusion related to the timeline and details of events can trump the significance of any evidence corroborating her story.<sup>340</sup>

The failure to resolve the primary interpretative barriers to gender-based asylum claims in any meaningful way—through precedent, legislation, regulation, or otherwise—has allowed the flawed analysis in *Matter of R-A* to reemerge in *Matter of A-B*. The Attorney General's decision is rooted in *Matter of R-A*'s misconception that intimate partner violence against a female partner is a private matter which occurs because of the relationship between the parties. As such, it is impossible for a government to provide "complete security" from such a private harm. By returning to this private matter perception, he ignored the true source of intimate partner violence and a government's inability or unwillingness to provide protection: societal expectations of gender and subordination. Sessions further ignored the efforts made in U.S. domestic violence

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333. See *Ai Jun Zhi*, 751 F.3d at 1091; *Shrestha*, 590 F.3d at 1040.

334. See cases cited *supra* note 332.

335. Robins, *supra* note 36, at 460–62; CGRS PRACTICE ADVISORY, *supra* note 187, at 28.

336. See Robins, *supra* note 36, at 457–63 (discussing the barriers to corroboration in private claims); see also Gender Related Asylum Claims in Europe, EURO. PARL. DOC. (PE 462.481) 60–69 (2012) (acknowledging that gender-related persecution is difficult to prove and analyzing issues of credibility and evidence in gender-related asylum claims in Europe).

337. See Robins, *supra* note 36, at 454, 462–63.

338. *Id.* at 451, 465.

339. *Id.* at 462–63.

340. See, e.g., *Marikasi v. Lynch*, 840 F.3d 281, 288–89 (6th Cir. 2016).



laws to combat this erroneous perception and ensure that safeguards are provided to prevent this perception from exposing women who are victims of intimate partner violence to further harm.

The future of asylum claims based on intimate partner violence once again looks bleak. The determinations and reasoning of asylum officers, immigration judges, and the BIA in these cases will continue to be unpredictable and disconnected.<sup>341</sup>

### III. THE TREATMENT OF ASYLUM CLAIMS BASED ON INTIMATE PARTNER VIOLENCE DIVERGES FROM HOW INTIMATE PARTNER VIOLENCE IS TREATED IN THE UNITED STATES

Historically, many countries, including the United States, accepted the abuse of women by their husbands or intimate partners as a private matter that did not warrant state intervention.<sup>342</sup> While U.S. state and federal domestic violence laws and judicial training have made some progress in rectifying this “private matter” percep-

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341. See Marsden, *supra* note 3, at 2525; Bookey, *supra* note 142, at 109–10. In a footnote to the *Matter of A-B* decision, the Attorney General encouraged asylum adjudicators to consider negative discretionary considerations before making an asylum determination, even when the statutory eligibility for asylum has been established. *In re A-B*, 27 I. & N. Dec. 316, 345 n.12 (A.G. 2018), *abrogated by* *Grace v. Whitaker*, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018). He relied on *Matter of Pula* to support his list of negative discretionary considerations. *In re Pula*, 19 I. & N. Dec. 467 (B.I.A. 1987), *superseded in part by regulation on other grounds*, 8 C.F.R. § 208.14(e) (1995), *as recognized in* *Andriasian v. INS*, 180 F.3d 1033, 1043–44, 1044 n.17 (9th Cir. 1999). However, *Matter of Pula* specifically provided additional positive considerations for determining whether a favorable exercise of discretion is warranted, including “general humanitarian considerations.” *Id.* at 474. Additionally, the BIA explained that “the discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors.” *Id.*; see also NAT’L IMMIGRANT JUSTICE CTR., PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B* 30 n.35 (2019), <https://immigrantjustice.org/sites/default/files/content-type/page/documents/2019-01/Matter%20of%20A-B-%20Practice%20Advisory%20-%201.2019%20Update%20-%20Final.pdf>. In *Grace v. Whitaker*, the court determined that *Matter of A-B* did not allow for the exercise of discretion in the context of credible fear determinations. No. 18-cv-0183 (EGS), 2018 WL 6628081, at \*26 (D.D.C. Dec. 19, 2018), *appeal docketed*, No. 19-501 (D.C. Cir. Jan. 30, 2019).

342. Marsden, *supra* note 3, at 2524–25; Leigh Goodmark, *Law is the Answer? Do We Know that for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 13 (2004); see also Rabin, *supra* note 9, at 111–112 (discussing the history of legal protection for domestic violence victims); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (discussing the history of legal treatment of domestic abuse in the United States).

tion,<sup>343</sup> *Matter of A-B* demonstrates that this perception remains alive and well in the context of asylum. The Attorney General's decision reflects a lack of understanding of the impact that social and cultural norms of gender inequality have on the treatment of victims of intimate partner violence in a country.<sup>344</sup> Even if this fact was arguably acknowledged in the case, it is disregarded in Sessions's ultimate determination.

Notwithstanding the more recent awareness and drive for legal reform to combat intimate partner violence internationally,<sup>345</sup> countries' ability to institute and enforce laws to protect women from violence by their intimate partners has proven to be a tremendous challenge. In many instances, countries may have laws in place for prosecution of intimate partner violence crimes, but they are unable to enforce these laws through police or the judiciary or lack the political will to do so.

The refusal of the Attorney General and adjudicators in asylum cases to consider barriers to enforcement of domestic violence laws and seeking police protection in other countries is in stark contrast to the attention given to these issues in the context of intimate partner violence crimes that are committed in the United States. Since the 1970s, the federal and state legal systems' response to intimate partner violence has changed dramatically.<sup>346</sup> Prior to 1970, the criminal justice system treated intimate partner violence as a private matter with few options to protect victims.<sup>347</sup>

The Department of Justice's 1984 Report of the Attorney General's Task Force on Family Violence<sup>348</sup> was one of the first steps towards a significant advancement in the response to intimate partner violence in the criminal justice system in the United States.<sup>349</sup> This report identified the criminal justice system's issues

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343. See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3 (1999); Jonathan Lippman, *Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence*, 76 ALB. L. REV. 1417 (2012); Rabin, *supra* note 9; Siegel, *supra* note 342. See generally Goodmark, *supra* note 342 (discussing federal, state and community responses to domestic violence since the 1970s).

344. Marsden, *supra* note 3, at 2524–25; Rabin, *supra* note 9, at 111–12; Randall, *supra* note 40, at 531.

345. See, e.g., Musalo & Knight, *supra* note 36, at 57–58.

346. See Goodmark, *supra* note 342; Rabin, *supra* note 9, at 113–18; Siegel, *supra* note 342.

347. See Goodmark, *supra* note 342; Rabin, *supra* note 9, at 113–18; Siegel, *supra* note 342.

348. U.S. DEP'T OF JUSTICE, ATT'Y GEN.'S TASK FORCE ON FAMILY VIOLENCE, CG017891, FAMILY VIOLENCE: FINAL REPORT 10–16 (1984).

349. See Goodmark, *supra* note 342, at 13–14.

in intimate partner violence cases and provided recommendations for change.<sup>350</sup> Since the 1984 Report, significant progress has been made in the protection of victims of intimate partner violence which occurs inside the United States.<sup>351</sup> States passed new mandatory arrest laws and “no-drop policies.”<sup>352</sup> Through mandatory arrest laws, police are required to make an arrest when there is probable cause to support that an intimate partner violence crime was committed.<sup>353</sup> These laws were intended to ensure that police respond to intimate partner violence crimes and provide protection to the victim, thereby increasing victims’ trust in the police.<sup>354</sup> These laws have had an important impact on increased arrest rates in intimate partner violence cases.<sup>355</sup>

At the same time, in response to victim reluctance to support charges against their abuser or to testify against their abuser, prosecutors’ offices began instituting “no-drop” policies that required prosecutors to move forward with intimate partner violence cases when sufficient evidence existed.<sup>356</sup> The reluctance of victims to support charges against their abusive partner, or even report abuse, may stem from fear of retribution by the abuser, the abuser’s continued psychological control over the victim, concerns about the loss of financial support from the abuser, loss of child custody, religious and cultural reasons, issues of self-esteem, and lack of education, among many others.<sup>357</sup> States passed civil protection order statutes to protect the victim from the abuser so that the victim is able to leave.<sup>358</sup> In further efforts to alleviate these fears, states enacted laws on child custody and visitation protections for victims and created community resources for victims to receive support.<sup>359</sup>

In addition to state protections for victims of intimate partner violence, in 1994, Congress passed the Violence Against Women Act (VAWA).<sup>360</sup> VAWA provides funding and support for police departments that institute pro-arrest policies in intimate partner vio-

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350. *See id.*

351. *See generally* Goodmark, *supra* note 342 (discussing federal, state and community responses to domestic violence since the 1970s).

352. *See id.* at 15–19; Rabin, *supra* note 9, at 115.

353. *See* Goodmark, *supra* note 342, at 15–19.

354. *See id.*

355. *See id.*

356. *See id.*

357. Dutton, *supra* note 303, at 1232–33; *see also* Kuennen, *supra* note 305, at 857, 878.

358. *See* Goodmark, *supra* note 342, at 10–11; Rabin, *supra* note 9, at 115.

359. *See* Goodmark, *supra* note 342, at 11–13; Rabin, *supra* note 9, at 114–15.

360. Goodmark, *supra* note 342, at 8–9; Rabin, *supra* note 9, at 116.

lence cases and provide training for police officers, judges, and prosecutors on violence against women. It also created federal penalties related to violence against women and required states to enforce protection orders entered in other state courts.<sup>361</sup> As a part of VAWA, Congress provided undocumented women who have suffered intimate partner violence by U.S. citizens or permanent residents, as well as the undocumented women's children, with a path towards permanent residency. It also provided for cancellation of removal without the assistance or knowledge of the abuser in an effort to prevent abusers from using the victim's undocumented status to continue his control over the victim.<sup>362</sup> VAWA also created the U-visa, which allows non-citizen victims of serious crimes in the United States who are assisting in the investigation or prosecution of the crime to obtain non-immigrant status and a path towards permanent residency.<sup>363</sup>

Many states and jurisdictions have instituted training programs for judges who handle intimate partner violence-related matters.<sup>364</sup> These education and training programs work to eliminate judicial bias and foster neutrality and understanding in intimate partner violence cases.<sup>365</sup> Training may include sessions on the misconceptions of the dynamics of intimate partner violence and its effect on victims, psychology of intimate partner violence victims, applicable law and procedure, and cultural and linguistic issues.<sup>366</sup>

In contrast to the numerous protection avenues available to women, including undocumented women, who suffer intimate partner violence in the United States, women who flee intimate partner violence that occurs in a foreign country are limited to the antiquated constraints of asylum law to obtain protection.<sup>367</sup> Despite public awareness in the United States of the problem of intimate partner violence and substantial progress in federal and state law combating it, asylum law trails behind by almost fifty years. The male-centric lens through which refugee/asylum law developed continues to hamper progress in U.S. asylum law relating to intimate partner violence.

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361. See Goodmark, *supra* note 342, at 9; Rabin, *supra* note 9, at 116.

362. Lianna E. Donovan, *The Violence Against Women Act's Protection of Immigrant Victims: Past, Present, and Proposals for the Future*, 66 RUTGERS L. REV. 745, 758–62 (2014); Rabin, *supra* note 9, at 116–17.

363. Donovan, *supra* note 361, at 745, 758–62; Rabin, *supra* note 9, at 116–17.

364. See, e.g., Epstein, *supra* note 343; Lippman, *supra* note 343, at 1427–31.

365. See Epstein, *supra* note 343; Lippman, *supra* note 343, at 1430.

366. See Epstein, *supra* note 343; Lippman, *supra* note 343, at 1430.

367. Rabin, *supra* note 9, at 125.

Further, U.S. legal responses to intimate partner violence have acknowledged that victims often may not report abuse, support criminal charges, or attempt to leave the abuser, and have sought to remedy these issues.<sup>368</sup> In contrast, it is these precise issues that support the denial of an asylum claim because the victim failed to report the abuse to the police or demonstrate their inability to leave the relationship prior to fleeing to the United States. These issues can only be combated through new legislation or regulations for asylum adjudications involving intimate partner violence, judicial training and education, and tracking mechanisms for gender-related asylum cases.

#### IV. PROVIDING GUIDANCE IN ASYLUM ADJUDICATIONS INVOLVING INTIMATE PARTNER VIOLENCE

U.S. asylum law provides no clear guidance on key aspects of the refugee definition. This is demonstrated by the well-documented history of U.S. jurisprudence on the particular social group category in regard to gender and intimate partner violence victims. Guidance is lacking, particularly related to the definition of a particular social group as it pertains to these victims, non-state actor persecution when a state is unable or unwilling to provide protection, and the nexus between the non-state actor persecution and the particular social group ground. The Attorney General's decision in *Matter of A-B* provided no clarification or guidance on these issues for adjudicators.

Moreover, although he acknowledged that asylum claims based on intimate partner violence must be examined on a case-by-case basis, Sessions made a series of generalized statements about why these claims are "unlikely" to meet the refugee definition. As a result, his decision will serve to prejudice adjudicators in their analysis of these claims. Adjudicators will continue to be left to their own discretion, leading to drastically different results in asylum cases based on intimate partner violence. New legislation or regulations, adjudicator training, and tracking of outcomes of gender-based asylum claims are essential to creating an environment where more consistent and fair adjudications of women's asylum

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368. Goodmark, *supra* note 342, at 10–19; Rabin, *supra* note 9, at 115.

claims, including those who have suffered intimate partner violence, are possible.<sup>369</sup>

#### A. *New Legislation or Regulations*

In 2000, before DHS took over asylum adjudications, the INS published a proposed rule to amend the regulations establishing asylum and withholding eligibility.<sup>370</sup> The proposed rules aimed to provide “generally applicable principles that will allow for case-by-case adjudication of claims based on domestic violence or other serious harm inflicted by individual non-state actors.”<sup>371</sup> In setting out these principles, the proposed rule directly addressed the BIA’s *Matter of R-A-* decision.<sup>372</sup> It removed “certain barriers,” created by the *Matter of R-A-* decision, to claims that domestic violence amounts to persecution based on membership in a particular social group when a government proves to be unwilling or unable to give protection.<sup>373</sup>

The proposed rules highlighted the immutability requirement as a key part of its definition of a particular social group.<sup>374</sup> In order for a characteristic to be immutable, it must be “unchangeable” or “fundamental to an applicant’s identity.”<sup>375</sup> Gender was considered an immutable characteristic within this definition.<sup>376</sup> While the proposed rules provided a list of additional factors that “may” be taken into account in considering whether “a particular social group exists,” they are not considered “requirements” in the particular social group determination.<sup>377</sup>

Recognizing that the BIA’s conclusion in *Matter of R-A-* seemed to eliminate the possibility that the “on account of” requirement

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369. See Marsden, *supra* note 3, at 2515, 2539 (calling for new regulations to provide guidance in intimate partner violence-based asylum claims and noting that “creative arguments based on existing law will not overcome the innate hostility of some adjudicators to this type of claim”); see also Bookey, *supra* note 167, at 11 (asserting that the limitations of *Matter of A-R-C-G-* demonstrate the need for “comprehensive, clear, and binding guidance” either from the Board or in the form of new regulations).

370. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

371. *Id.* at 76,589.

372. *In re R-A-*, 22 I. & N. Dec. 906 (A.G. 2001).

373. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,589 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

374. *Id.*

375. *Id.* at 76,593.

376. *Id.*

377. *Id.* at 76,594–95.

would be met when the persecutor did not harm other members of the particular social group, the proposed rules stated that this should not be “required as a matter of law . . . in order for an applicant to satisfy the ‘on account of’ requirement.”<sup>378</sup> The proposed rules explicitly permitted the possibility that victims of domestic violence may fulfill the “on account of” requirement despite the fact that the persecutor had the opportunity and motivation to abuse “only one of the women who share this characteristic, because only one of these women is in a domestic relationship with the abuser.”<sup>379</sup>

Although these rules represented considerable progress at the time in describing the relationship between gender and the particular social group ground, they were never finalized. Since that time, the issues presented in *Matter of R-A* remain and progression away from these proposed rules have become even more evident in *Matter of A-B*. The Attorney General’s analysis in *Matter of A-B* has only further highlighted the need for legislation and regulations to combat the continuing challenges to asylum claims based on gender involving intimate partner violence. In conjunction with similar legislative changes, these proposed rules should be amended and finalized by DHS to provide guidance to adjudicators and consistency in the asylum process.<sup>380</sup> While these rules may not eliminate all inconsistency in asylum claims based on intimate partner violence, they can resolve key issues in this type of case.

Scholars have also debated an amendment to the refugee definition under the INA, but concluded that, while an amendment may provide more certainty, new or amended regulations could be passed more quickly and easily than an amendment to the Act.<sup>381</sup> Given the positions of the current administration, it is unlikely that new or amended regulations favorable to asylum claims from women fleeing intimate partner violence will be passed in the near

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378. *Id.* at 76,592.

379. *Id.* at 76,593.

380. Such regulations promulgated by DHS at 8 C.F.R. § 208 should also be duplicated and adopted by the DOJ at 8 C.F.R. § 1208. As a result, asylum officers within USCIS under DHS and immigration judges and the BIA under the DOJ would be bound by the regulations. Marsden, *supra* note 3, at 2549–50; Robins, *supra* note 36, at 442–43.

381. See Marsden, *supra* note 3, at 2539–44 (arguing there is precedent for legislative action to amend the INA, but such action is unlikely and difficult, while regulatory reform would be easier and more effective in resolving the difficulties faced by asylum claims based on intimate partner violence); see also Natalie Rodriguez, Note, *Give Us Your Weary but Not Your Battered: The Department of Homeland Security, Politics and Asylum for Victims of Domestic Violence*, 18 SW. J. INT’L. L. 317, 334 (2011) (arguing that legislative action to amend the INA is the best solution to the issues presented in asylum claims based on intimate partner violence but, until an amendment can be achieved, regulations should be promulgated).

future. An amendment to the refugee definition under the INA may be more probable, although still unlikely, and would provide the added benefit of certainty. Further, there is precedent for an amendment to the INA to provide protections to certain types of asylum claims. In 1996, Congress passed the Illegal Immigrant Reform and Immigrant Responsibility Act to provide protections for persons fleeing coercive family planning measures in China. This Act amended the definition of “refugee” in the INA to recognize that:

For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.<sup>382</sup>

Similar to new regulations, amendments to the INA could also provide definitions and guidance particular to gender-based asylum claims, including those involving intimate partner violence. These amendments may be related to the particular social group ground, the nexus between the persecution and the particular social group, persecution by non-state actors when the government is unable or unwilling to provide protection, and the proper analysis of the viability of relocation, as well as credibility determinations. As such, the following recommendations refer both to new legislation and regulations.

### 1. Incorporate Gender as a Particular Social Group into the Refugee Definition

A new piece of legislation and/or updated regulations should define “particular social group” and specifically list gender as an identified “particular social group.” The definition of a particular

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382. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2018).



social group in the proposed regulations from 2000 is taken from *Matter of Acosta*.<sup>383</sup> The proposed rules stated,

“A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.”<sup>384</sup>

Not only did these rules recognize sex as an immutable characteristic, but they also acknowledged that circumstances may exist under which marital status or any intimate relationship could be considered an immutable trait when there is evidence that the victim could not reasonably be expected to leave the relationship.<sup>385</sup>

When the rules were proposed, the BIA had not yet fully articulated its additional requirements of particularity and social distinction to demonstrate a particular social group. Since 2000, the BIA has solidified these two additional requirements in *Matter of M-E-V-G*, *Matter of W-G-R*, and subsequent cases, including *Matter of A-B*.<sup>386</sup> The requirements of particularity and social distinction are confusing, repetitive, and superfluous. When set forth as absolute requirements for demonstrating a particular social group, they have served and will continue to serve as an impediment to the recognition of gender-based asylum claims, in particular those involving intimate partner violence. This is clearly demonstrated in the Attorney General’s flawed analysis in *Matter of A-B*.<sup>387</sup>

New legislation and regulations should return to the *Matter of Acosta* definition of particular social group, as this definition closely follows that of the United Nations High Commissioner for Refugees (UNHCR) guidelines, which has rejected any additional requirement of social distinction or perception to demonstrate a particular social group. Rather, similar to the UNHCR’s guidelines, the definition should include social perception as an *alternative* element in establishing the existence of a particular social group.

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383. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

384. *Id.*

385. *Id.*

386. *In re A-R-C-G*, 26 I. & N. Dec. 388 (B.I.A. 2014), *overruled by In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018); *In re M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014); *In re W-G-R*, 26 I. & N. Dec. 208 (B.I.A. 2014).

387. *See Vega-Ayala v. Lynch*, 833 F.3d 34, 37 (1st Cir. 2016).

The UNHCR's Social Group Guidelines incorporate the two dominant approaches to determining what constitutes a social group.<sup>388</sup>

The first approach, called the "protected characteristics" approach, as in *Matter of Acosta*, involves examining whether a group is comprised of persons sharing an immutable characteristic, or one that is so fundamental to individual identity a person "should not be compelled to forsake it."<sup>389</sup>

The second approach, called the "social protection" approach, which has similarities to the BIA's social distinction and particularity requirements, looks at "whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large."<sup>390</sup> The UNHCR recognized that sometimes the application of these two approaches to a similar case may bring about different results, and the guidelines provided a definition that incorporates both approaches<sup>391</sup>:

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>392</sup>

Accordingly, new proposed legislation and regulations could define a particular social group as:

composed of members who share a common, immutable characteristic, such as sex, gender, color, kinship ties, or past experience, or who are perceived as a group by society. The characteristic is one which the member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.

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388. U.N. High Commissioner for Refugees, Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees ¶¶ 5–10, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR Social Group Guidelines].

389. *Id.* ¶ 6.

390. *Id.* ¶ 7.

391. *Id.* ¶ 10.

392. *See id.* ¶¶ 9–10

Similar to the UNHCR definition in its Social Group Guidelines, this definition includes both those “who share a common characteristic” and those “who are perceived as a group by society,” but does not require both approaches to be met.<sup>393</sup> Moreover, this definition includes recognition of gender<sup>394</sup> as an immutable trait. This will eliminate any further confusion for adjudicators about whether gender alone constitutes a particular social group.

The recognition of gender alone as a particular social group will remove the extensive and confusing analysis required in defining gender-based social groups as persons who are married or in domestic relationships and are unable to leave the relationship.<sup>395</sup> It will eliminate the need for an overly narrow identification of a gender-related particular social group, which limits a case’s applicability as a source of precedent in future cases.<sup>396</sup> The immutable characteristic of the social group in an asylum claim based on intimate partner violence is gender. Whether or not an asylum seeker has the ability to leave the relationship is best examined in the context of whether the applicant has a well-founded fear of persecution and in considerations of the viability of relocation, as discussed below.<sup>397</sup>

#### a. Other Strategies for the Incorporation of Gender into the Refugee Definition

The identification of gender as a particular social group through new legislation or regulations would be the most effective way to eliminate the inconsistencies and ambiguity in asylum claims based on intimate partner violence. However, adjudicators and scholars

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393. *Id.* ¶ 10.

394. Although distinctions have been made between the meanings of the words “sex” and “gender,” that discussion is outside the scope of this Article. For instance, sex is a biological determination and “[g]ender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another. . . .” UNHCR Gender Guidelines, *supra* note 10, ¶ 3. In recognition of this distinction and the potential confusion that could result, this Article recommends the inclusion of both “sex” and “gender” in the definition.

395. Other scholars support the recognition of sex or gender as a particular social group. *See, e.g.*, Deborah E. Anker et al., *Defining “Particular Social Group” in Terms of Gender: The Shah Decision and U.S. Law*, 76 INTERPRETER RELEASES 1005, 1006 (1999); Corrales, *supra* note 168, at 90; Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213, 261–62 (1995); Marsden, *supra* note 3, at 2544; Reimann, *supra* note 69, at 1254–55; Sidun, *supra* note 178, at 141.

396. Bookey, *supra* note 167, at 13–15.

397. *See, e.g.*, *In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

have used or proposed a number of other approaches for analyzing asylum claims based on intimate partner violence.

First, scholars have proposed that gender should be a sixth ground for asylum in addition to race, religion, nationality, political opinion, and particular social group.<sup>398</sup> As a separate ground, gender can be interpreted outside the construct of the particular social group category.<sup>399</sup> Similar to identifying gender as a particular social group, gender as a sixth ground for asylum would eliminate the need to narrow particular social groups of women identified in gender-related asylum cases.<sup>400</sup> However, creating an entirely new category such as gender will require developing a whole new framework for interpretation and analysis.

In contrast, the “particular social group” category has an existing history of interpretation and analysis that can be used.<sup>401</sup> As proposed above, new legislation and regulations may incorporate aspects of that history including *Matter of Acosta*’s common immutable characteristic requirement and a societal perception requirement that has a relationship to the BIA’s *Matter of M-E-V-G* social visibility and particularity tests. The societal perception requirement could follow the UNHCR’s approach, rather than the BIA’s confusing social visibility and particularity tests, and could be used in the alternative to the common immutable characteristic requirement—not as an additional requirement.<sup>402</sup> Moreover, the addition of gender as a sixth ground for asylum would set apart the refugee definition in U.S. asylum law from other countries in a very important way.<sup>403</sup> Internationally, the push has been centered on

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398. See, e.g., Elizabeth A. Hueben, *Domestic Violence and Asylum Law: The United States Takes Several Remedial Steps in Recognizing Gender-Based Persecution*, 70 UMKC L. REV. 453, 466 (2001) (arguing that by adding gender as a ground for asylum, women would only have to prove persecution on account of gender); Randall, *supra* note 40, at 566 (arguing that gender must be “legally recognized as its own ground of persecution”); Mattie L. Stevens, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL’Y 179 (1993) (arguing that only a sixth refugee category, gender, can ensure that the refugee definition will address the harms particular to women).

399. Barreno, *supra* note 47, at 254–55; Hueben, *supra* note 397.

400. See Hueben, *supra* note 397.

401. See Andrea Binder, *Gender and the “Membership in a Particular Social Group” Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 193 (2001) (asserting that while a “reformulation of the refugee definition would be desirable,” a focus on “improving the administrative and judicial practices with regard to the existing conventional and statutory framework” may be more promising).

402. See Barreno, *supra* note 47, at 261–62 (acknowledging that if the UNHCR definition is adopted in the U.S., adjudicators would have to choose whether to apply UNHCR’s social perception approach).

403. See Macklin, *supra* note 394, at 262.

gender as a particular social group and guidelines have been developed around this strategy.<sup>404</sup>

Second, some scholars have advocated for consideration of asylum claims based on intimate partner violence in the context of other grounds for asylum, such as political opinion.<sup>405</sup> The belief that women are entitled to be treated as human beings is a political opinion,<sup>406</sup> and leaving an intimate partner relationship where the woman is abused and the state sponsors or is complicit in the subjugation of women is an expression of that political opinion.<sup>407</sup> However, in the context of intimate partner violence, the victim is not being persecuted because of her “belief,” but because she is a woman and the abuser believes that she is subordinate.<sup>408</sup>

This approach could be an effective basis for an asylum claim when a woman resisted the abuse in some way prior to fleeing to the United States, such as leaving the relationship, and the state has supported or been complicit in the subjugation of women. Yet, when the applicant has not attempted to leave the relationship prior to fleeing to the United States, this strategy fails to establish that the abuser persecuted the victim on account of her belief that women are entitled to be treated as human beings and, therefore, to be free from abuse. Further, this approach would not help asylum claims based on intimate partner violence move away from an overemphasis on the victim’s attempts to leave the relationship.

Third, some adjudicators who are reluctant to accept gender alone as forming the particular social group rely on the “gender plus” strategy, which creates particular social groups based on gender plus other immutable characteristics. In *Matter of A-B-*, the Attorney General focused on the proposed social groups defined by

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404. See UNHCR Gender Guidelines, *supra* note 10; UNHCR Social Group Guidelines, *supra* note 387.

405. See, e.g., Marisa Silenzi Cianciarulo, *Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims*, 35 HARV. J.L. & GENDER 117, 156–59 (2012) (arguing that intimate partner violence may be inflicted on account of a woman’s political opinion); Alice Edwards, *Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010*, 29 REFUGEE SURV. Q. 21, 28 (2010) (asserting that reliance only on the particular social group ground for women’s asylum claims ignores women’s role as political actors); see also Randall, *supra* note 50, at 298–99 (discussing the argument for consideration of gender persecution in the context of political opinion).

406. Cianciarulo, *supra* note 404, at 155; see also Randall, *supra* note 50, at 298–99.

407. Cianciarulo, *supra* note 404, at 158.

408. See Macklin, *supra* note 178, at 58–59 (“[D]omestic violence is not about what a woman believes, but about her gender identity—and the sexist beliefs of the man who abuses her.”); Sidun, *supra* note 178, at 138–39 (“The majority of women abroad are not raped or beaten because of a political opinion that they hold. Women are raped and beaten because they are women.”).

the gender-plus approach and ignored the social group proposed by *Matter of A-B*, which defined particular social group by gender alone. The gender-plus approach was also used frequently in cases prior to *Matter of A-B* including in *Matter of A-R-C-G*. Adjudicators' analyses of social groups based on gender plus, as exhibited in *Matter of A-B*, are often confusing and lead to piecemeal and inconsistent results in these cases. Even when such an asylum claim is approved, the determination based on a narrowly defined particular social group may have little precedential value.<sup>409</sup> Undoubtedly, the failure to recognize that gender alone is the basis for the persecution and forms the particular social group deprives victims of intimate partner violence of protection.<sup>410</sup>

The idea that gender may form a particular social group is not a new concept. Adjudicators in the United States, the UNHCR, and other countries have acknowledged this.<sup>411</sup> Nevertheless, many adjudicators continue to resist granting asylum based on gender alone for fear of opening the floodgates to women asylum seekers.<sup>412</sup>

#### b. Opening the Floodgates

The primary argument against creating gender as a particular social group is that it would create a "flood" of women asylum seekers.<sup>413</sup> Such arguments fail to recognize that race, religion, nationality, and political opinion all have the potential to incorporate

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409. See Barreno, *supra* note 47, at 261–63; see also Bookey, *supra* note 167.

410. See Barreno, *supra* note 47, at 261–63.

411. *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985) *overruled in part by In re Mogharabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); UNHCR Gender Guidelines, *supra* note 10; UNHCR Social Group Guidelines, *supra* note 387; Reimann, *supra* note 69, at 1240 (noting that Canada, New Zealand, the United Kingdom, and some other European nations have recognized gender as a particular social group); Rodriguez, *supra* note 380, at 340–43 (finding that Canada, the United Kingdom, Australia, and New Zealand have recognized gender-based asylum and have not had a flood of such applications).

412. See Marsden, *supra* note 10, at 2526–27 (asserting that while U.S. courts have acknowledged in dicta that gender may be a basis for an asylum claim, "in practice, courts have been reluctant to grant asylum on the basis of a particular social group defined solely or primarily by gender"); Randall, *supra* note 40, at 563 (recognizing that some U.S. adjudicators in asylum cases have expressed concern that "gender is an over-broad category on which to define a social group").

413. UNHCR Gender Guidelines, *supra* note 10, at 7 ("The size of the group has sometimes been used as a basis for refusing to recognize 'women' generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size.").

large numbers of people.<sup>414</sup> The refugee definition incorporates many other elements that must be met in order to qualify for asylum in addition to demonstrating that an asylum seeker falls under one of the five grounds for asylum. These elements include a well-founded fear of persecution and proof that the state is unable or unwilling to provide protection when a non-state actor inflicts persecution.<sup>415</sup> For example, while intimate partner abuse happens throughout the world, many countries are able and willing to provide protection to victims.<sup>416</sup> In such circumstances, an asylum claim based on intimate partner violence would fail to meet the refugee definition. The asylum process in the United States is complex and difficult to complete successfully without (and even with) representation, and many cases are withdrawn or abandoned in the process.<sup>417</sup> The recognition of gender as a particular social group would not lead to the grant of asylum in every gender-based asylum claim.<sup>418</sup>

Further, countries that recognize gender as a basis for persecution have not experienced a flood of women asylum seekers.<sup>419</sup> In fact, as reported by a number of scholars and acknowledged by the Department of Homeland Security, Canada recognizes that gender may form a particular social group in intimate partner violence-based asylum cases, but has not experienced an increase in gender-based claims.<sup>420</sup> Many women who have an asylum claim based on intimate partner violence may not want to risk leaving their abusive relationship due to fear of the abuser or family or cultural impediments.<sup>421</sup> Not all of these women have the resources to flee to the United States and make an application for asylum.<sup>422</sup>

Moreover, the size of an applicant's social group is not a valid basis for rejecting their asylum claim based on gender.<sup>423</sup> The U.S.

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414. *Id.*; see also UNHCR Social Group Guidelines, *supra* note 387, at 5 (explaining that the size of a social group is not relevant to whether it can be recognized for asylum purposes); Randall, *supra* note 50, at 299; Anker et al., *supra* note 394, at 1010.

415. Randall, *supra* note 40, at 564; Megan Galicia, Comment, *Fits and Starts: Towards Recognizing Gender as a Basis for Asylum in the Eighth Circuit Court of Appeals*, 85 UMKC L. REV. 1013, 1031 (2017).

416. See Cianciarulo, *supra* note 404, at 160.

417. Corrales, *supra* note 168, at 88–89.

418. Galicia, *supra* note 414.

419. Rodriguez, *supra* note 380, at 340–42.

420. See, e.g., Musalo, *supra* note 46, at 132; Corrales, *supra* note 168, at 88–89; Barreno, *supra* note 47, at 263; DHS Supplemental *L-R* Brief, *supra* note 62, at 13 n.10.

421. See Cianciarulo, *supra* note 404, at 160–61.

422. See *id.* at 161.

423. Anker et al., *supra* note 394, at 1010 (“Fear of opening the ‘floodgates,’ however, is not an appropriate or necessary reason for subverting this branch of asylum law.”); Randall,

asylum law's reluctance to acknowledge gender as a particular social group has forced female asylum seekers to create particular social groups that incorporate gender plus other characteristics, including marital status and inability to leave, among many others. These have become unnecessarily narrow and complicated. The true immutable characteristic is gender.<sup>424</sup>

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*supra* note 50, at 299 (arguing that concern about “floodgates” ignores “the essential nature of the refugee remedy” as a “case-by-case individual one”). As explained in detail by the Seventh Circuit in *Cece v. Holder*:

In any event, the breadth of category has never been a per se bar to protected status. As was noted in *Iao v. Gonzales*,

The number of followers of Falun Gong in China is estimated to be in the tens of millions, all of them subject to persecution . . . . [Because] [a]nyone, we suppose, can get hold of a book of [Falun Gong] teachings, start doing the exercises, and truthfully declare himself or herself a bona fide adherent to Falun Gong[,] [t]he implications for potential Chinese immigration to the United States may be significant . . . . But Congress has not authorized the immigration services to [control Chinese immigration] by denying asylum applications in unreasoned decisions.

Many of the groups recognized by the Board and courts are indeed quite broad. These include: women in tribes that practice female genital mutilation; persons who are opposed to involuntary sterilization; members of the Darood clan and Marehan subclan in Somalia (1% of the population of Somalia are members of the Marehan subclan); homosexuals in Cuba; Filipinos of Chinese ancestry living in the Philippines (approximately 1.5% of the Philippines population has an identifiable Chinese background). The ethnic Tutsis of Rwanda numbered close to 700,000 before the genocide of 1994, and yet a Tutsi singled out for murder who managed to escape to the United States could surely qualify for asylum in this country. And undoubtedly any of the six million Jews ultimately killed in concentration camps in Nazi-controlled Europe could have made valid claims for asylum, if only they had had that opportunity. Many of our asylum laws originated out of a need to address just such refugees from World War II. It would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims. For this reason, we also reject the Sixth Circuit's reasoning that the group of young-looking, attractive Albanian women who are forced into prostitution is not a cognizable social group because it is too broad and sweeping of a classification.

The safeguard against potentially innumerable asylum claims is found in the stringent statutory requirements for all asylum seekers which require that the applicant prove (1) that she has suffered or has a well-founded fear of suffering harm that rises to the level of persecution, (2) on account of race, religion, nationality, membership in a particular social group, or political opinion, and (3) is unable or unwilling to return to her country because of the persecution or a well-founded fear of persecution.

*Cece v. Holder*, 733 F.3d 662, 674–75 (7th Cir. 2013) (citations omitted).

424. *Robins*, *supra* note 36, at 446–47.



## 2. Persecution by Non-State Actor— Unwilling or Unable to Protect

Non-state actors are the primary perpetrators of persecution in gender-based asylum claims, particularly those involving intimate partner violence.<sup>425</sup> The historic cultural acceptance and legal treatment of intimate partner violence as a private family matter has continually been an impediment to the success of asylum cases based on intimate partner violence.<sup>426</sup> This is no more evident than in the Attorney General's determination in *Matter of A-B*. While police reporting may be relevant and supportive of a state's inability or unwillingness to protect women from domestic abuse, this evidence may be difficult to obtain. A failure to report the crime may be due to the victim's fear of retaliation from the abuser, the victim's shame, or the victim's view that the state will not provide any protection and reporting abuse would be useless.<sup>427</sup> These are consequences of cultural and legal acceptance of intimate partner violence as a private matter.

The proposed regulations from 2000 adopted a two-element approach to analyze whether a state is unwilling or unable to protect<sup>428</sup>: First, did the state take reasonable steps to control the infliction of harm or suffering?<sup>429</sup> Second, did the victim have reasonable access to state protection that exists?<sup>430</sup> As argued by Elsa Bullard, this proposed rule fails to explain whether both elements or only one element must be met to establish a state's unwillingness or inability to protect the victim.<sup>431</sup> Moreover, the first element should not be a determining factor in the analysis.<sup>432</sup> A state may have taken reasonable steps to control the infliction of harm, but that does not mean that the steps have been effective. Rather, as proposed by Ms. Bullard, the inquiry in new legislation

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425. *Id.*; Musalo *supra* note 44, at 49.

426. *Id.*; Marsden, *supra* note 3, at 2524–25; *see also* Markey, *supra* note 265, at 1322 (stating that in asylum law and international human rights law, “gender has been historically depoliticized—cast as private, personal, and cultural”); Musalo, *A Short History*, *supra* note 44.

427. *See* Dutton, *supra* note 303, at 1232 (describing the factors that influence women's responses to domestic violence); *see also, e.g., In re A-R-C-G-*, 26 I. & N. Dec. 388, 393 (B.I.A. 2014) (describing Guatemalan police's refusal to interfere in a marital relationship), *overruled by In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018); Kuennen, *supra* note 305, at 857, 878.

428. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,591 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

429. *Id.*

430. *Id.*

431. Elsa M. Bullard, Note, *Insufficient Government Protection: The Inescapable Element in Domestic Violence Asylum Cases*, 95 MINN. L. REV. 1867, 1888 (2011).

432. *Id.* at 1892–93.

and regulations should focus solely on the second element of whether the victim has reasonable access to state protection.<sup>433</sup>

The proposed regulations included a non-exhaustive list of factors that may be helpful in determining this issue. These included: government complicity, attempts by the applicant to obtain protection from the government and the government's response, official action that is perfunctory, pattern of government unresponsiveness, general country conditions and denial of services, the nature of the government's policies with respect to the harm, and steps taken by the government to prevent the harm.<sup>434</sup> Likewise, the BIA in *Matter of A-R-C-G* provided an instructive list of evidence pertinent to a state's inability or unwillingness to provide protection, albeit confusingly addressed in regard to part of its "social distinction" requirement. The list of potential evidence included: country reports, law enforcement statistics, expert witnesses, an applicant's past experiences, and other credible sources of information.<sup>435</sup>

Even country reports and law enforcement statistics may not provide an accurate picture of the protection available for intimate partner violence victims in a country.<sup>436</sup> This may be due to victims' under-reporting or a failure to adequately track crimes affecting women.<sup>437</sup> As such, expert reports addressing the treatment of women in the country and the protections afforded to women who suffer violence, if any exist, may present one of the most critical sources of evidence to document the inability or unwillingness of a state to protect victims of intimate partner violence.

Similar to the list of factors in the proposed regulations from 2000 and the BIA's examples of evidence related to its "social distinction" requirement in *Matter of A-R-C-G*, new legislation and regulations should include a similar non-exhaustive list of factors and evidence that could be used to establish that the state is unable or unwilling to protect domestic abuse victims. These factors could include whether there are criminal and civil laws designed to protect domestic abuse victims and, if so, whether those laws are enforced; cultural and societal perceptions on intimate partner vio-

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433. *Id.*

434. *Id.*; Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,591 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

435. *In re A-R-C-G*, 26 I. & N. Dec. 388, 395 (B.I.A. 2014), *overruled by In re A-B*, 27 I. & N. Dec. 316 (A.G. 2018).

436. Gender Related Asylum Claims in Europe, *supra* note 336, at 60, 69; Bullard, *supra* note 431, at 1896.

437. Gender Related Asylum Claims in Europe, *supra* note 336, at 60, 69; Bullard, *supra* note 431, at 1896.

lence; other state actions or inaction on issues of intimate partner violence; country conditions; the relationship of the abuser to the state; and if the victim reported the abuse, any state responsiveness or lack of responsiveness. Further, credible sources of this information may include, but are not limited to, an applicant's past experiences, expert witnesses, country reports, and law enforcement statistics.

New legislation and regulations should explain that due to underreporting of intimate partner violence occurrences or a focus on male-perpetuated crime, country reports and law enforcement statistics might not always provide an accurate depiction of a state's ability and willingness to protect victims of intimate partner violence. New law should further stress that a state's "aspirations" should not be considered dispositive of its actual ability or willingness to protect. This is critical when using country reports as evidence on this issue as country reports can sometimes focus on the state's aspirations. However, this does not mean that the state actually provides meaningful protection or would even be able to provide meaningful protection in the future.

Finally, new legislation and regulations should state outright that an asylum seeker's failure to report intimate partner violence is not "fatal" to her claim. As demonstrated in many federal circuit court cases, whether the asylum seekers reported the abuse to the police was essential to the courts' determinations that the asylum seekers failed to demonstrate that the state was unable or unwilling to protect them. In complete disregard of the issues of retaliation, shame, cultural norms, and the futility of reporting intimate partner violence to police in many of these circumstances, courts found that the asylum seekers did not give the state an "opportunity" to protect them. Any new law should explain that a failure to report abuse to the police is not a reason to deny an asylum claim. If there is evidence of police protection available to women and the asylum seeker did not seek such protection, the adjudicator may ask for reasons why she did not seek police protection, but the asylum seeker's failure to report to police alone cannot be the basis for the denial.<sup>438</sup>

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438. Gender Related Asylum Claims in Europe, *supra* note 336, at 60, 74 (citing a similar practice in Italy that is identified in this report as "good practice").

### 3. Nexus—The “On Account Of” Requirement

In *Matter of A-B*, nexus once again emerged as a barrier to the approval of asylum claims based on intimate partner violence.<sup>439</sup> Nexus will continue to be problematic in asylum claims involving intimate partner violence. This is because the private motivations of the abuser to harm the victim are difficult to demonstrate, in particular, when the abuser targets the victim based on gender and subordination, but does not seek to persecute other women.<sup>440</sup> In order to resolve this issue, new legislation and regulations should adopt the bifurcated approach of UNHCR.<sup>441</sup> The language provided in the UNHCR Gender Guidelines is a promising example of how the bifurcated approach could be added to legislation and regulations. The guidelines provide:

In cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.<sup>442</sup>

UNHCR’s approach forms the causal link between persecution and a Convention ground (race, religion, nationality, political opinion, and particular social group).<sup>443</sup>

This bifurcated approach is not new to U.S. asylum adjudications. In fact, the BIA used it in 1996 in *Matter of Kasinga*,<sup>444</sup> but it has not been applied consistently, largely due to its narrow identification of the particular social group.<sup>445</sup> In that case, the BIA approved a woman’s asylum application based on her well-founded

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439. See *Vega-Ayala v. Lynch*, 833 F.3d 34, 38 (1st Cir. 2016).

440. Marsden, *supra* note 3, at 2524 (“Women should not lose asylum’s protections merely because they are persecuted in isolation rather than in a group.”).

441. See UNHCR Gender Guidelines, *supra* note 10, at 6.

442. *Id.*

443. Musalo, *supra* note 3, at 787–90 (analyzing the bifurcated approach).

444. *In re Kasinga*, 21 I. & N. Dec. 357, 367 (B.I.A. 1996).

445. Musalo, *A Short History*, *supra* note 45, at 56; Shanyn Gillespie, Note, *Terror in the Home: The Failure of U.S. Asylum Law to Protect Battered Women and a Proposal to Right the Wrong of In re R-A*, 71 GEO. WASH. L. REV. 131, 139–147 (2003).

fear of persecution on account of her membership in the particular social group comprised of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.” The BIA’s decision recognized that the nexus between persecution and particular social group could be established in regard to non-state actors and the state or society.<sup>446</sup>

Yet, the BIA’s conclusion just three years later, in *Matter of R-A*, appeared to eliminate the possibility that the “on account of” requirement would be met when the persecutor did not harm other members of the particular social group.<sup>447</sup> In direct response, the INS’s proposed regulations in 2000 specifically permitted the possibility that victims of domestic violence may fulfill the “on account of” requirement despite the fact that the persecutor had the opportunity and motivation to abuse “only one of the women who share this characteristic, because only one of these women [wa]s in a domestic relationship with the abuser.”<sup>448</sup> However, the proposed regulations did not incorporate the bifurcated approach of *Kasinga* and, therefore, would not have resolved the recurring issue of the persecutor’s motivations.

Since the problem for women who are persecuted is finding a nexus between the persecution and the particular social group ground, the bifurcated analysis has allowed the United Kingdom and other countries<sup>449</sup> to give protection to women despite the nexus problem. The approach allows decision makers to consider not only the motives of the persecutor, but also to take into account the State’s or society’s involvement in the persecution.<sup>450</sup> This bifurcated analysis establishes the “causal connection” between the persecution and the particular social group based on the “non-State perpetrator or the State/society.”<sup>451</sup>

The bifurcated approach may be the least controversial solution to resolve the nexus issue in gender-based asylum claims as well as asylum claims based on other grounds, given that it has already been recognized in *Kasinga* and adopted by UNHCR guidelines

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446. Musalo, *supra* note 3, at 799.

447. Musalo, *A Short History*, *supra* note 45, at 56.

448. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

449. See Musalo, *supra* note 3, at 787–97 (discussing the bifurcated approach adopted in the United Kingdom, New Zealand, and Australia).

450. *Id.* at 777–79.

451. *Id.* at 785–87.

and other countries. However, this solution has limitations.<sup>452</sup> For instance, adjudicators would still have significant discretion in determining whether the persecution occurred on account of gender or if the state is unable or unwilling to provide protection based on gender. Adjudicators would still need to consider whether gender was one central reason for the persecution.

Further, the issue of whether the state is unable or unwilling to protect the asylum applicant could be addressed twice in intimate partner violence cases, both in the context of non-state actor persecution and then again in the context of nexus. In the nexus context, if the applicant cannot establish intimate partner violence on account of her gender, not only would she need to demonstrate that the state is unable or unwilling to protect her, but also that the lack of protection occurs on account of gender. Simply demonstrating that a state is unable or unwilling to provide protection alone can be difficult. This may open asylum claims based on intimate partner violence to a whole new set of confusing and incongruous determinations.

Jessica Marsden suggests that the “historical and sociological evidence tying domestic violence to gender warrants drawing the connection” between intimate partner violence and gender as a matter of law.<sup>453</sup> In order to resolve the issue of nexus between intimate partner violence and gender, she strongly advocates for new regulations to specifically state, “where a woman has experienced intimate-partner violence that otherwise meets the standard for persecution, the victim’s gender shall be deemed to be one central reason for the persecution.”<sup>454</sup> As Ms. Marsden explains, there is precedent for acknowledging that certain elements of the refugee definition are met as a matter of law, particularly in regard to the one-child policy amendment to the Immigration and Nationality Act of 1996.<sup>455</sup> As a result of that legislative amendment, the definition of a refugee now recognizes that a person who has been persecuted or fears persecution related to a coercive population control program has a well-founded fear of persecution on account of political opinion.<sup>456</sup>

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452. See Marsden, *supra* note 3, at 2541 (“Requiring adjudicators to assess the motives behind the government’s failure to act will not resolve the inconsistencies that we now see in the outcomes of domestic violence asylum claims, which stem from a more fundamental disbelief by some adjudicators that asylum covers domestic violence claims at all.”).

453. *Id.*

454. *Id.* at 2544.

455. See *id.* at 2542–43.

456. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2018).

While Ms. Marsden's intelligent and thoughtful proposal addresses the limitations of the nexus issue in intimate partner violence-based asylum claims by going beyond the bifurcated approach, it does not address many other types of gender-based persecution. The one child policy amendment was an optimistic sign in that it provided a clear path towards asylum for those individuals. However, the practice of piecemeal incorporation of very specific types of asylum claims to acknowledge that these claims meet certain elements of the refugee definition may not foster a positive, consistent progression in the interpretation of the refugee definition as it applies to gender-based claims.

One solution may be for new legislation and regulations to provide a non-exhaustive list of the types of persecution that may be inflicted on account of a woman's gender and from which a state may be unable or unwilling to provide protection on account of a woman's gender. These illustrations could include: intimate partner violence, sexual violence, family/domestic violence, coerced family planning, female genital mutilation, honor crimes, and violence or punishment for transgression of social mores, sexual orientation, or gender identity.<sup>457</sup> By providing such a non-exhaustive list in combination with recognizing gender as forming a particular social group, the nexus or causal link between the persecution or a state's inability or unwillingness to provide protection and a woman's gender may be more comprehensively recognized in asylum law.

#### 4. Relocation

If an asylum seeker demonstrates past persecution, she is entitled to the presumption that she also has a well-founded fear of persecution if returned to her country of nationality or habitual residence.<sup>458</sup> The burden then shifts to DHS to overcome the presumption by proving either a "fundamental change of circumstances," eliminating the asylum seeker's well-founded fear, or that it is reasonable for the person to escape persecution by relocating in her country of nationality or habitual residence.<sup>459</sup>

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457. See UNHCR Gender Guidelines, *supra* note 10, at 2 ("Gender-related claims have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.").

458. 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1) (2018).

459. *Id.* §§ 208.13(b)(1), 1208.13(b)(1).

*Matter of A-B* provided further confusion about what is required to determine whether asylum seekers can relocate within their country.<sup>460</sup> Attorney General Sessions failed to allow for any substantive evaluation of the safety and reasonableness of relocation considering the individual's family situation, social vulnerabilities, education or work background and opportunities, or the psychological effects of past persecution. New legislation and regulations should require that, in order for the presumption to be overcome, DHS must demonstrate *no* risk of persecution or harm in the area of relocation, the availability of state protection, the existence of family relationships in that area, the availability of basic subsistence and accommodation, and that health, social, religious, and cultural circumstances would not impede the viability of relocation.<sup>461</sup>

## 5. Credibility and Corroboration

As *Matter of A-B* demonstrates, credibility determinations and the requirement of corroboration in asylum cases based on intimate partner violence cases continue to be problematic.<sup>462</sup> The REAL ID Act passed by Congress in 2005<sup>463</sup> provides that an asylum seeker's testimony, which is credible, may be sufficient to establish the asylum seeker's burden without corroborating evidence.<sup>464</sup> In order to rely on the applicant's testimony alone, the testimony must be credible and persuasive, and refer to specific facts "sufficient to demonstrate that the applicant is a refugee."<sup>465</sup> While the REAL ID Act on its face may appear to be liberal, in practice it is

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460. See, e.g., *Fuentes-Erao v. Sessions*, 848 F.3d 847, 851 (8th Cir. 2017) (finding that Ms. Fuentes-Erao could safely relocate within Honduras because she had successfully avoided her abuser for five years and he had no interest in locating her, disregarding her testimony regarding financial hardship); *Marikasi v. Lynch*, 840 F.3d 281, 290–91 (6th Cir. 2016) (finding that Ms. Marikasi failed to "substantiate any religious, cultural, or legal constraints that prevented her from" leaving the relationship or relocating to another part of Zimbabwe); *Jeronimo v. Att'y Gen.*, 678 F. App'x at 800 (11th Cir. 2017) (finding that Ms. Jeronimo failed to show she could not relocate to another area of Guatemala).

461. See *Gender Related Asylum Claims in Europe*, *supra* note 336, at 60, 73; Lauren N. Kostas, *Domestic Violence and American Asylum Law: The Complicated and Convoluted Road Post Matter of A-R-C-G*, 30 CONN. J. INT'L L. 211, 236–37 (2015) (explaining the current standard).

462. See, e.g., *Marikasi*, 840 F.3d at 286 (upholding the immigration judge's adverse credibility determination, finding that Ms. Marikasi's inconsistent statements provided substantial evidence that "plausibly could be viewed as incredible" or "could be viewed as inconsistent").

463. See INA § 208(b)(1)(B), 8 U.S.C. § 1158(b)(1)(B) (2018).

464. Robins, *supra* note 36, at 460–61.

465. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2018).



burdensome to some women asylum seekers because it places too much focus on the asylum seeker's ability to articulate her accounts of abuse with consistency in order to establish credibility.<sup>466</sup>

Trauma can have a dramatic impact on an asylum seeker's ability to provide consistency in her statements.<sup>467</sup> Asylum seekers who have suffered intimate partner violence may also have difficulty disclosing all information surrounding the persecution due to embarrassment, culture, language barriers, fear of retribution, or simply a lack of understanding as to what is important to their case.<sup>468</sup> Under the REAL ID Act, credibility determinations must consider the "totality of the circumstances."<sup>469</sup> Adjudicators may base a credibility determination on assessments of the asylum seeker's "demeanor, candor, or responsiveness," "the inherent plausibility of the account," and the consistency of the applicant's statements.<sup>470</sup> In regard to the consistency of statements, the adjudicator assess consistency between written and oral statements, internal consistency of statements, and the consistency of statements with other evidence in the record, and any inaccuracies or falsehoods in these statements.<sup>471</sup> The REAL ID Act fails to consider how trauma stemming from abuse, or any other factors, such as embarrassment, culture, language, fear of retribution, or lack of understanding, may impact demeanor or consistency.<sup>472</sup>

Inconsistencies in the applicant's statements may increase the burden on the applicant to produce corroborating evidence.<sup>473</sup> Further, even if the adjudicator finds her to be credible, she may require further corroboration from the applicant unless the applicant can demonstrate that she "does not have the evidence and cannot reasonably obtain the evidence."<sup>474</sup> Yet, the fact that a non-state actor inflicts the persecution in intimate partner violence-based asylum cases makes them more difficult to corroborate than asylum claims involving a state actor.<sup>475</sup>

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466. Robins, *supra* note 36, at 460–61.

467. Gender Related Asylum Claims in Europe, *supra* note 336, at 60, 67; Doedens, *supra* note 68, at 121–22.

468. Robins, *supra* note 36, at 460–62.

469. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2018).

470. *Id.*

471. *Id.*

472. Robins, *supra* note 36, at 460–62.

473. *Id.*

474. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2018).

475. Gender Related Asylum Claims in Europe, *supra* note 336, at 43–45.

Evidence of intimate partner violence-related persecution is difficult to gather and present given the private nature of the harm.<sup>476</sup> As discussed previously, the applicant must demonstrate that the government is unwilling or unable to control the non-state actor. In assessing whether this has been demonstrated, adjudicators place significant emphasis on whether the applicant reported the abuse to police. An applicant may provide evidence to support the futility of reporting the abuse to the police, but such evidence is difficult to obtain.<sup>477</sup> Intimate partner violence-related persecution may be hidden and significantly underreported in a country.<sup>478</sup> As such, country conditions reports may not be able to accurately detail the prevalence of intimate partner violence in a country and the extent to which the state enforces any protections for victims of intimate partner violence.<sup>479</sup>

Second, the asylum seeker must present information about the intimate partner violence-related persecution. There may not be any documentation demonstrating the abuse because the asylum seeker could not seek the help of family members or the community or seek treatment from a hospital either due to cultural reasons or fear of retribution. She may have even been prevented from seeking help by others.<sup>480</sup> Even assuming there are medical records corroborating any abuse, she may not have anyone in her country who can obtain them for her.<sup>481</sup> Further, family members or the community in the applicant's country may not know of the abuse or may fear retribution from the abuser, as well, thereby preventing them from providing affidavits supporting the applicant's testimony.<sup>482</sup>

New legislation and regulations should provide that only material inconsistencies may support an adverse credibility determination; identify the types of inconsistencies that may be material to an asylum case; incorporate the requirement of assessing how trauma and other personal and cultural factors may impact an asylum seeker's demeanor and her the ability to recall events and

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476. Robins, *supra* note 36, at 462.

477. *Id.* at 462–63.

478. *Id.* at 457.

479. Gender Related Asylum Claims in Europe, *supra* note 336, at 60, 69; Bullard, *supra* note 431, at 1887–88, 1896.

480. Robins, *supra* note 36, at 457, 462.

481. *Id.*

482. *Id.*

provide consistency in testimony and statements.<sup>483</sup> The asylum seeker should be given the opportunity to explain any material inconsistencies and present expert analysis or other evidence in support of her explanation. Inconsistencies that are not material should not be considered in an assessment of credibility.<sup>484</sup>

### B. *Training and Mechanisms for Tracking and Review of Gender-Related Asylum Claims*

New legislation and regulations addressing gender-related asylum cases alone, particularly in the context of persecution in the form of intimate partner violence, will not provide the changes needed to foster fair, consistent, and predictable determinations in these cases.<sup>485</sup> Education and training for adjudicators are essential.<sup>486</sup> In fact, judicial education and training on has been a critical part of the improvements made in federal and state systems in the treatment of intimate partner violence claims.<sup>487</sup>

While training on gender issues has been, at times, compulsory for asylum officers,<sup>488</sup> training on gender issues—in particular intimate partner violence-based asylum claims—should be compulsory for all adjudicators of asylum claims, including immigration judges, the BIA, and circuit court judges.<sup>489</sup> This training should include discussion of the gender perspective in asylum claims, the fact that gender alone may form a particular social group, and the types of persecution, such as intimate partner violence, that occur on account of gender.<sup>490</sup> Additionally, the training should address

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483. Doedens, *supra* note 68, at 121–22 (stating that asylum law should “place the memory loss in the context of the trauma suffered”).

484. While “material” is a subjective characterization and therefore, not ideal in a legal landscape in which adjudicators already have too much discretion, the term is one used throughout U.S. criminal, civil, and procedural law and, albeit imperfect, would be a significant step in the right direction.

485. See Barreno, *supra* note 47, at 266–68.

486. Cianciarulo & David, *supra* note 14, at 372–73 (asserting that new regulations cannot aid in the assessment of asylum claims made by victims of domestic violence if adjudicators do not understand the dynamics and psychology of abusive relationships).

487. See, e.g., Epstein, *supra* note 343; Lippman, *supra* note 343.

488. In 1995, the Immigration and Nationality Service adopted guidelines for asylum officers on asylum claims involving gender-related persecution. See Coven Memorandum, *supra* note 69, at 17; see also *USCIS Asylum Division Training Programs*, USCIS, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs> (last updated Dec. 19, 2016).

489. Barreno, *supra* note 47, at 265.

490. Adjudicators in asylum cases often misunderstand the reasons for intimate partner violence. As explained by Professor Anjum Gupta,

how gender-related persecution may support grounds for asylum other than the particular social group category.<sup>491</sup>

Training should also include sessions on the impact of culture, society, economics, individual trauma, and patterns and psychology of abusive relationships on asylum applicants.<sup>492</sup> Understanding these factors could affect adjudicators' approach to credibility determinations in gender-based asylum claims.<sup>493</sup> Adjudicators should further understand the common reasons behind a woman's decision not to report abuse to the police, which may be based on these factors along with the futility of reporting gender-based claims in many countries, fear of retribution, and the position of women before the law.<sup>494</sup>

Further, the DOJ should develop a mechanism for tracking and compiling data on the outcome of gender-related asylum claims, including the gender-related claims that involve intimate partner violence, in order to combat the impact of judicial bias and heavy caseloads on gender-related claims.<sup>495</sup> At this time, only a very small percentage of BIA decisions are precedent, and only decisions designated as precedent are published.<sup>496</sup> This transparency issue could be combated by creating a process for developing gender-

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In asylum cases based on fear of domestic violence, immigration judges have routinely refused to find nexus to a protected ground, finding instead that the abuse occurred because the abuser was a "despicable person," because of his "inherent meanness," because of his alcohol abuse, because of his jealousy, or because of other "personal" or "criminal" reasons. This is the case despite the fact that, in many countries, it is clear that the vast majority of victims of domestic violence are women.

Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1, 3 (2016); see also Barreno, *supra* note 47, at 266 (asserting that the DHS and DOJ should provide training to adjudicators on the nature of intimate partner violence and the claims that arise out of this violence in order to promote consistency).

491. See Alice Edwards, *Age and Gender Dimensions in International Refugee Law*, in REFUGEE PROTECTION INT'L L. 46, 67–71 (Erika Feller et al. eds., 2003).

492. See, e.g., Gender Related Asylum Claims in Europe, *supra* note 336, at 60, 67 (recommending that decision makers are informed of the consequences of gender-related violence, including trauma, and trained on how these consequences of violence affect an asylum seeker's ability to give a consistent account of events); Cianciarulo & David, *supra* note 14, at 372–73.

493. Gender Related Asylum Claims in Europe, *supra* note 336, at 60, 67.

494. Cianciarulo & David, *supra* note 14, at 372–73.

495. Barreno, *supra* note 47, at 268.

496. Ange-Marie Hancock, *When is Fear for One's Life Race-Gendered? An Intersectional Analysis of the Bureau of Immigration Appeals's In re A-R-C-G- Decision*, 83 FORDHAM L. REV. 2977, 2998 (2015); see also Bookey, *supra* note 142, at 109–10 (noting the lack of transparency resulting from the fact that many BIA decisions are not published or available on a searchable database).

disaggregated statistics on asylum applications and outcomes.<sup>497</sup> Countries such as the United Kingdom and Sweden already employ this mechanism.<sup>498</sup>

The data compiled could be separated into specific types of gender-related asylum claims, including intimate partner violence. This will allow immigration judges, the BIA, federal circuit court judges, asylum officers, and governmental and non-governmental organizations to assess how gender-related claims involving intimate partner violence and other forms of persecution are adjudicated. In the absence of a tracking mechanism, there is no method for accurately assessing the impact of new legislation, regulations, and adjudicator training on asylum claims based on gender, particularly, those involving intimate partner violence.

#### CONCLUSION

*Matter of A-B* demonstrates that the flawed analysis, confusion, and inconsistencies in the adjudications of asylum claims based on intimate partner violence persist. New legislation and regulations, combined with judicial training and a process for tracking and compiling data on gender-based asylum claims, will provide necessary guidance to asylum adjudicators to more consistently evaluate claims based on gender and gender-based violence.

However, the recommendations made in this Article cannot resolve all issues with the interpretation and application of the refugee definition to asylum claims involving intimate partner violence. Even with new legislation and regulations providing direction in asylum claims involving intimate partner violence, adjudicators would still have some discretion in these cases. For instance, these proposed changes would not include a finding of nexus between the persecution and the victim's gender as a matter of law in all asylum claims involving intimate partner violence persecution. Nor do these proposed changes specifically address intimate partner violence against men or same sex partners.

Nevertheless, no progress can be made in intimate partner violence-based asylum claims without new legislation or regulations

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497. Gender Related Asylum Claims in Europe, *supra* note 336, at 21 (stating that all member states should be required to provide gender-disaggregated statistical information on asylum cases); Hancock, *supra* note 496, at 2998 (advocating for tracking of asylum claims to include information on gender-based claims and other immutable and fundamental characteristics).

498. Gender Related Asylum Claims in Europe, *supra* note 336, at 22.

that recognizes that gender may form a particular social group and provides guidance for adjudicating intimate partner violence-based asylum claims. If adjudicators continue to consider intimate partner violence-based asylum claims without new legislation and regulations, future determinations in these cases will continue to lack fairness, consistency, and predictability. Congress has the power and the responsibility to provide the reforms critical for these claims. Congress, through legislation, is able to provide the strongest and most consistent guidance in the adjudication of these claims. Alternatively, the present administration or a new administration must provide this guidance through regulation.

Further, even with new legislation and regulations, as long as the United States continues to adjudicate asylum cases from the perspective that intimate partner violence is a personal matter unrelated to gender, there will be little progress in protecting women asylum seekers.<sup>499</sup> These perceptions can only be eradicated through training and identifying ongoing issues in these cases, through tracking and data compilation, so that they can be addressed. In order to demonstrate the United States' commitment to gender equality, our legal system must remove the impediments to recognition of women's asylum claims involving intimate partner violence.

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499. Gillespie, *supra* note 445, at 131–135.

