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Cover Page Footnote

J.D., The Catholic University of America, Columbus School of Law, 2016; B.S., Georgetown University, 2008. Thank you to Professor David Koelsch for your editing and advice on this Comment. Thank you to all members of *Catholic University Law Review* for their editing, particularly to Shannon McGovern. Mom, Dad, Leo, Vero, Alex, and Jeff: thank you for your support during the writing of this Comment, and always.

A-R-C-G- IS NOT THE SOLUTION FOR DOMESTIC VIOLENCE VICTIMS

Lizbeth M. Chow⁺

Sometimes love hurts. In fact, research shows that thirty percent of women worldwide will experience domestic violence at some time in their lives.¹ National studies in the United States and Britain show that men also experience domestic violence at high levels.² Even more disturbing is the cultural acceptance that domestic violence receives throughout the world.³ This acceptance has left far too many people unprotected and has forced them to seek refuge outside of their home countries.⁴

⁺ J.D., The Catholic University of America, Columbus School of Law, 2016; B.S., Georgetown University, 2008. Thank you to Professor David Koelsch for your editing and advice on this Comment. Thank you to all members of *Catholic University Law Review* for their editing, particularly to Shannon McGovern. Mom, Dad, Leo, Vero, Alex, and Jeff: thank you for your support during the writing of this Comment, and always.

1. *Violence against women: a 'global health problem of epidemic proportions'*, WORLD HEALTH ORG. (June 20, 2013), http://www.who.int/mediacentre/news/releases/2013/violence_against_women_20130620/en/.

2. According to a study by the Centers for Disease Control and Prevention (CDC), 22.3% of American women and 14.0% of American men aged eighteen and older “have been the victim of severe physical violence by an intimate partner in their lifetime.” *Intimate Partner Violence: Consequences*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 3, 2015), <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html>. “More than 1 in 3 women (35.6%) and more than 1 in 4 men (28.5%) in the United States have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.” MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2 (Nov. 2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf. Additionally, a survey of British criminal statistics found “that men made up about 40% of domestic violence victims each year between 2004-05 and 2008-09,” and 48.6% of men were subjected to severe force in an incident with their partner in 2006-07. Denis Campbell, *More than 40% of domestic violence victims are male, report reveals*, THE GUARDIAN (Sept. 4, 2010, 7:07 PM), <http://www.theguardian.com/society/2010/sep/05/men-victims-domestic-violence>.

3. One study found that “in 29 countries around the world, one-third or more of men say it can be acceptable for a husband to ‘beat his wife.’” Additionally, the study found that “in 19 countries, one-third or more of women agree that a husband who beats his wife may be justified, at least some of the time.” Nurith Aizenman, *Alarming Number of Women Think Spousal Abuse is Sometimes OK*, NPR (Mar. 18, 2015, 12:16 PM), <http://www.npr.org/sections/goatsand soda/2015/03/18/392860281/alarming-number-of-women-think-spousal-abuse-is-sometimes-ok>.

4. See, e.g., *In re R-A-*, 22 I. & N. Dec. 906, 928 (B.I.A. 1999) (reviewing a Guatemalan domestic violence victim’s asylum claim, but ultimately ordering her voluntary departure in lieu of deportation back to her home country); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 388–89 (B.I.A. 2014) (reviewing an Immigration Judge’s decision to deport a Guatemalan domestic violence victim and her three children); *Matter of L-R-*, UNIV. OF CAL., HASTINGS COLL. OF THE LAW, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/our-work/matter-l-r> (last visited Aug. 19, 2016) (detailing a Mexican asylum-seekers experiences with domestic violence).

In the United States, an asylum claim⁵ requires that the applicant be a refugee—that is, a person fleeing persecution based on race, religion, nationality, political opinion, or membership in a particular social group (PSG).⁶ For a claim that does not fall into one of the first four enumerated forms of persecution, a person's only option for obtaining refugee status is to establish membership in a PSG. The problem is that guidance about what does or does not constitute a PSG has been generated on a case-by-case basis,⁷ leading to confusing and inconsistent decision-making.⁸ This has been particularly consequential for domestic violence victims seeking asylum.⁹ Such persons cannot neatly claim membership in a PSG because it is difficult to show: (1) the existence of a group when only two individuals are involved, (2) that the persecution stems from membership in that group, and (3) that the government in the home country is unable or unwilling to protect the victim.¹⁰ As a result, victims are left with an unclear strategy.

Recently, however, the Board of Immigration Appeals (BIA) held that victims fleeing domestic violence might qualify for PSG-based asylum.¹¹ But the decision was only a nominal victory for these refugees because it did not clarify when domestic violence rises to the level of persecution and provided no analysis on the nexus requirement (the requirement that the applicant

5. An application for asylum can be made in two ways. First, individuals who have been placed in removal proceedings may apply for asylum as a defense to removal by filing with the Immigration Court. NAT'L IMMIGRATION JUSTICE CTR., BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS 9 (May 2016), http://immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Asylum%20Manual_05%202016_final.pdf. Second, asylum-seekers who are not in removal proceedings may apply for asylum with the U.S. Citizenship and Immigration Services (USCIS). *Id.* If an applicant is denied asylum, removal proceedings start and the asylum application is forwarded to an Immigration Court for review. *Id.* An Immigration Judge (IJ) will make a final decision on whether asylum is granted or denied. U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 8 (last revised June 10, 2013), http://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf. If denied, the applicant can appeal the IJ's decision to the BIA. *Id.* at 8–9. However, the BIA's decisions may be reviewable by the U.S. Attorney General (AG). *Id.* at 9. The AG may request review (and issue a decision) of the specific case *sua sponte*, or the Department of Homeland Security (DHS) or the BIA may make a request to the AG for review of the case. *Id.* The asylum-seeker can appeal the BIA decision to a federal court of appeal. *Id.* That decision, of course, may then be appealed to the United States Supreme Court.

6. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C., ch. 12).

7. See *infra* Sections I.D.3.b.i–I.D.3.b.iii (explaining the three elements of membership in a particular social group and describing several cases from which those elements derived).

8. 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 & n.9 (2013).

9. See *id.*

10. See Lynn Bayes-Weiner, Note, "Family Broils" and Private Terror: A Gender-Neutral, Psychologically-Based Approach to Domestic Violence and Asylum Law, 79 UMKC L. REV. 1047, 1054–55 (2011).

11. Matter of A-R-C-G-, 26 I. & N. Dec. 388, 388–89 (B.I.A. 2014).

demonstrate the persecution was “on account of” one of the enumerated grounds).¹² The BIA failed to provide a predictable rule for both future asylum applicants and adjudicators.

This Comment will assess the BIA’s most recent decision on asylum for domestic violence victims and suggest that it is ultimately ineffective. This Comment further suggests that the only practical solution is for Congress to intervene. This Comment first provides a brief historical overview of asylum law to help elucidate the purpose of asylum law. It also provides an in-depth review of the elements needed to establish a successful asylum claim and surveys how previous domestic violence-based claims have fared. Next, this Comment examines and appraises various existing proposals for addressing the issue of domestic violence-based asylum. Finally, this Comment proposes two possible changes to the refugee definition that would more adequately address the issue of domestic violence-based asylum. This Comment also anticipatorily rebuts the argument that granting asylum to domestic violence victims, as a matter of law, would lead to a drastic increase in this type of asylum application. This Comment will conclude that the decision in *In re A-R-C-G-* does not provide an adequate solution for domestic violence victims seeking asylum. Moreover, it is time for the United States to amend its refugee definition to explicitly extend protection (via asylum) to domestic violence victims.

I. ASYLUM LAW: ITS PURPOSE, HISTORY, AND MECHANICS

A. A Brief History of International Asylum Law

Faced with eleven million displaced Europeans¹³ and immense “postwar shame”¹⁴ following the end of World War II, the international community began to draft refugee law.¹⁵ In 1948, the United Nations (UN) adopted the Universal Declaration of Human Rights (UNDHR)¹⁶—the first international recognition of an obligation to protect people outside a country’s own borders.¹⁷

12. *Asylum Law—Membership in a Particular Social Group—Board of Immigration Appeals Holds that Guatemalan Woman Fleeing Domestic Violence Meets Threshold Asylum Requirement.*—Matter of A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014), 128 HARV. L. REV. 2090, 2095 (2015) [hereinafter *Asylum Law*].

13. Liisa H. Malkki, *Refugees and Exile: From “Refugee Studies” to the National Order of Things*, 24 ANN. REV. OF ANTHROPOLOGY 495, 497 & n.1 (1995).

14. *Id.* at 500 (describing the sense of shame throughout Europe that stemmed from the knowledge that so many who had sought asylum during the Holocaust were turned away and knowingly returned to face death in their home countries).

15. *Id.* (“The Universal Declaration of Human Rights was adopted in 1948, as was the Genocide Convention.”).

16. *Id.*

17. Article 14.1 of the Declaration stated that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.” G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), www.un.org/en/documents/udhr.

Three years later, the UN adopted the Convention Relating to the Status of Refugees (1951 Convention),¹⁸ which provided the international community with the first definition of a refugee¹⁹ and established the non-refoulement principle.²⁰ The 1951 Convention was monumental because it was the first time the international community recognized a duty to protect people against their own government.²¹ But it was limited in scope because it was only intended to deal with those displaced as a result of the Holocaust.²² To remedy these limitations, the UN developed the 1967 Protocol Relating to the Status of Refugees (1967 Protocol),²³ which incorporated the previous refugee definition and “removed the Eurocentric geographical restriction and the war-linked time restriction.”²⁴

B. Reluctant Adoption of Asylum Law in the United States

Like most countries, the concept of asylum law had not been developed in the United States prior to World War II.²⁵ Furthermore, the United States did not make itself party to the 1951 Convention.²⁶ Instead, Congress quietly addressed the refugee issue in the 1952 Immigration and Nationality Act (INA) by including a provision that gave the Attorney General discretionary authority to “withhold deportation of any alien . . . [who] would be subject to physical persecution”²⁷

In 1968, the United States acceded to the 1967 Protocol, but Congress did not enact legislation to implement the policies of the 1967 Protocol.²⁸ It was not

18. Malkki, *supra* note 13, at 501.

19. The 1951 Convention defined a refugee as

[A]ny person who . . . 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

Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 152, <http://www.refworld.org/docid/3be01b964.html>.

20. *Id.* at 176. The non-refoulement principle requires that refugees should not be returned to their home country if they would be subject to persecution. REGINA GERMAIN, AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE § 1.1.1 (6th ed. 2010).

21. See Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 734–35 (1998).

22. Malkki, *supra* note 13, at 501. The 1951 Convention was “only intended to address the European refugee situation (covering events occurring before January 1, 1951) and not refugees as a universal phenomenon.” *Id.*

23. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 268, <http://www.refworld.org/docid/3ae6b3ae4.html>.

24. Malkki, *supra* note 13, at 501; see also GERMAIN, *supra* note 20, at § 1.1.1.

25. Katherine E. Melloy, *Telling Truths: How the REAL ID Act’s Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 643 (2007).

26. *Id.* at 644.

27. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214.

28. Melloy, *supra* note 25, at 644.

until 1980, that Congress passed the Refugee Act²⁹ to bring U.S. law into conformity with the 1967 Protocol.³⁰ The Refugee Act adopted a definition of refugee similar to that used by the UN:³¹

The term ‘refugee’ means any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion³²

Notably, the U.S. refugee definition expanded the 1951 Convention definition by allowing refugee status on the basis of past persecution as well as potential future persecution.³³ Problematically, though, additional guidance was not provided as to exactly what circumstances would permit protection on the basis of future persecution.

C. Expansion of Asylum Law in the United States

American asylum law underwent two major changes in 1996 that expanded its scope and allowed for an increase of applicants. First, Congress passed the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA)³⁴ in response to the influx of Chinese nationals claiming to be fleeing coercive domestic population control measures.³⁵ The IIRIRA added a sentence to the end of the definition of “refugee”³⁶ that specifically dictates what constitutes past and future persecution for Chinese nationals fleeing on the basis of domestic

29. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C., ch. 12).

30. GERMAIN, *supra* note 20, at § 1.2.1.

31. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 152, <http://www.refworld.org/docid/3be01b964.html>.

32. § 201(a), 94 Stat. at 102. (codified at 8 U.S.C. § 1101(a)(42)(A) (2000)).

33. See Melloy, *supra* note 25, at 644.

34. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601, 110 Stat. 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42) (2012)).

35. Kyle R. Rabkin, Comment, *The Zero-Child Policy: How the Board of Immigration Appeals Discriminates Against Unmarried Asylum-Seekers Fleeing Coercive Family Planning Measures*, 101 NW. U. L. REV. 965, 974–75 (2007).

36. The sentence added to the refugee definition reads:

For the purposes of determination under this Act, 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.

§ 601, 110 Stat. at 3009-689.

population control.³⁷ Second, the BIA held that female genital mutilation (FGM) could form the basis for a claim of persecution.³⁸

D. Elements to Construct an Asylum Application

To make a valid asylum claim, an applicant must show that (1) he or she has been or will be subject to persecution, (2) his or her fear of persecution is well-founded, (3) the persecution was on account of membership in a protected class, and (4) he or she is outside his or her home country and is unable or unwilling to return to his or her home country because of a well-founded fear of persecution.³⁹

1. Past or Future Persecution

The definition of “persecution” is ambiguous under U.S. law.⁴⁰ However, in *In re Acosta*,⁴¹ the BIA defined persecution as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”⁴² The BIA also specified that “a government, or persons a government is unwilling or unable to control” must inflict the harm.⁴³ Thus, an asylum applicant must prove that the government failed to adequately protect him or her and that he or she suffered harm beyond some unspecified threshold level.⁴⁴

37. “The amendment was driven in part by the controversy in the U.S. over abortion rights . . . anti-abortion groups successfully pressed Congress to oppose coercive family planning.” Michelle Chen, *Leaving One-Child Behind: Chinese immigrants seek asylum in America from China’s one-child policy*, LEGALAFFAIRS, http://www.legalaffairs.org/issues/November-December-2005/scene_chen_novdec05.msp (last visited Aug. 11, 2016). There appears to be no such movement behind domestic violence.

38. *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

39. *Matter of Acosta*, 19 I. & N. Dec. 211, 218–19 (B.I.A. 1985) (“A grant of asylum is a matter of discretion. However, an alien is eligible for a favorable exercise of discretion only if he qualifies as a ‘refugee’ under section 101(a)(42)(A) of the Act.” (citations omitted)), *overruled in part by* *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 441 (B.I.A. 1987).

40. See Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 283–84 (2013) (“Persecution . . . remains largely undefined. The vagueness is at least partially intentional. Both the Immigration and Nationality Act (INA) and the immigration regulations purposefully omit any explanation of the meaning of persecution, thus leaving the task to the Board of Immigration Appeals (Board) and the federal courts of appeals.”).

41. 19 I. & N. Dec. 211 (B.I.A. 1985).

42. *Id.* at 222.

43. *Kasinga*, 21 I. & N. Dec. at 365 (citing *Matter of Acosta*, 19 I. & N. Dec. at 222–23).

44. *In re O-Z- & I-Z-*, 22 I. & N. Dec. 23, 25–26 (B.I.A. 1998). Through subsequent cases, the BIA and the federal courts have attempted to delineate the boundaries of what may constitute persecution, though they have avoided bright line rules. See Rempell, *supra* note 40, at 284. Accordingly, persecution “encompasses a variety of forms of adverse treatment, including ‘non-life threatening violence and physical abuse or non-physical forms of harm’” *Ivanishvili v. U.S. Dep’t of Justice*, 433 F.3d 332, 340–41 (2d Cir. 2006) (citations omitted). But it “does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional.” *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997). Finally, the BIA has held that the harm

2. Well-Founded Fear

Another element to be proven in an asylum application is a “well-founded fear” of persecution⁴⁵—that is, there must be a rationally identifiable basis for the fear.⁴⁶ Applicants that are found to have suffered past persecution are afforded a rebuttable presumption of the existence of a well-founded fear of further or future persecution.⁴⁷

3. Persecution “on Account of” Membership in a Protected Class

a. The Nexus Requirement

Once an asylum applicant establishes that he or she was subjected to persecution or has a well-founded fear of persecution, he or she must then demonstrate that the persecution is “on account of” one of the five enumerated grounds.⁴⁸ This is known as the nexus requirement. The Real ID Act of 2005⁴⁹ requires that an applicant show that one of the enumerated categories “was or will be at least one central reason” for the persecution.⁵⁰

b. The Five Enumerated Categories

Lastly, the applicant must establish that the persecution was due to “race, religion, nationality, membership in a particular social group, or political opinion.”⁵¹ In the case of domestic violence victims, the only realistic option is membership in a PSG.⁵² Congress has not addressed the grounds for establishing membership of a PSG.⁵³ Rather, they have been developed through

suffered must constitute more than “mere discrimination and harassment” for persecution to be found. *O-Z- & I-Z-*, 22 I. & N. Dec. at 25.

45. *Matter of Acosta*, 19 I. & N. Dec. at 219.

46. GERMAIN, *supra* note 20, at § 2.4.4 (“To establish a ‘well-founded fear of persecution,’ an asylum applicant must show that a reasonable person in the same circumstances would fear persecution if removed to his or her home country.”).

47. *Matter of Chen*, 20 I. & N. Dec. 16, 18 (B.I.A. 1989); 8 C.F.R. § 208.13(b)(1) (2013).

48. 8 U.S.C. § 1101(a)(42) (2012); *see also* *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481–82 (1992).

49. Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

50. 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

51. 8 C.F.R. § 208.13(b)(1) (2013).

52. Although some have made asylum claims based on the political opinion ground, and some Immigration Judges have imputed one of the other four grounds as the basis for granting asylum, the vast majority of the applicants claiming domestic violence as persecution use the particular social group category. Bayes-Weiner, *supra* note 10, at 1055.

53. The United Nations High Commissioner for Human Rights (UNHCR) has defined a “particular social group” as:

[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.

BIA decisions,⁵⁴ which have generated three elements of membership in a PSG: (1) a common immutable characteristic, (2) particularity, and (3) social distinction.⁵⁵

i. Common Immutable Characteristic

The first element was initially introduced in *In re Acosta*,⁵⁶ in which the BIA used the “well-established doctrine of *ejusdem generis*” to limit the scope of the PSG category in order to maintain the integrity of the refugee definition.⁵⁷ Applying that doctrine, the BIA determined: “[W]e interpret the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic.”⁵⁸ Further, the BIA stated that such a “characteristic might be an innate one such as sex, color, or kinship ties, or . . . a shared past experience.”⁵⁹

ii. Particularity of Group

In the 2006 case *In re C-A*,⁶⁰ the BIA officially recognized the “particularity” requirement for PSG first mentioned in *In re Acosta*.⁶¹ And in 2014, it clarified that particularity is a separate and distinct requirement to the common immutable characteristic requirement.⁶² Further, it explained that the particularity requirement refers to the “group’s boundaries” or “outer limits”

U.N. High Comm’r for Refugees, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002). Additionally, the UNHCR has provided that “[p]ersecution is normally related to action by the authorities of a country.” U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 65, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992). However, “[i]t may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned.” *Id.*

54. See *infra* Sections I.D.3.b.i–I.D.3.b.iii.

55. Matter of M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

56. 19 I. & N. Dec. 211, 213 (B.I.A. 1985).

57. *Id.* at 233. “Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution [I]n this manner, we preserve the concept that refuge is restricted to individuals who are . . . unable . . . to avoid persecution.” *Id.* at 233–34.

58. *Id.* at 233.

59. *Id.* Although determination of which types of characteristics would be made on a case-by-case basis, “whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” *Id.*

60. 23 I. & N. Dec. 951 (B.I.A. 2006).

61. *Id.* at 955, 961 (holding that noncriminal drug informants working against the Cali drug cartel in Colombia were not members of a particular social group).

62. See Matter of M-E-V-G-, 26 I. & N. Dec. 227, 232 (B.I.A. 2014).

because a group cannot comprise an entire society nor consist of an individual with no one else.⁶³

iii. Social Visibility to Social Distinction

In *In re C-A-*, the BIA held that “[t]he social visibility of the members of a claimed social group is an important consideration in identifying the existence of a particular social group for the purpose of determining whether a person qualifies as a refugee.”⁶⁴ One year later, in *In re A-M-E- & J-G-U-*,⁶⁵ it reaffirmed and explained that “[w]hether a proposed group has a shared characteristic with the requisite ‘social visibility’ must be considered in the context of the country of concern and the persecution feared.”⁶⁶ In other words, a claimed PSG must be recognized as such a group within the asylum-seeker’s country.⁶⁷ Following significant confusion about this factor, the BIA renamed the “social visibility” requirement as “social distinction.”⁶⁸ Moreover, it clarified that “literal or ‘ocular’ visibility” was not necessary.⁶⁹ Rather, the “‘social distinction’ requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society”⁷⁰

iv. Elements of a PSG Summarized

In summary, an applicant that claims asylum on account of membership in a PSG “must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”⁷¹ Domestic violence asylum applicants have struggled to satisfy these requirements and have scarcely received guidance from the BIA regarding how to successfully bring a domestic violence-based claim.⁷²

4. Inability or Unwillingness to Return to the Home Country

In order to meet the statutory definition of refugee, an asylum applicant must also be “unable or unwilling to return to” their home country due to fear of

63. *Id.* at 238.

64. *In re C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006).

65. 24 I. & N. Dec. 69 (B.I.A. 2007).

66. *Id.* at 74.

67. *Id.*

68. *See* *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 228 (B.I.A. 2014); *see also* *Matter of W-G-R-*, 26 I. & N. Dec. 208, 212 (B.I.A. 2014) (“By renaming this requirement, we intend to clarify that the criteria of particularity and social distinction are consistent with both the language of the Act and our earlier precedent decisions.”).

69. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 228.

70. *Id.* at 238.

71. *Id.* at 237.

72. *See* discussion *infra* Sections I.E.1–I.E.3.

persecution.⁷³ This element arises from the non-refoulement principle, which protects an asylum seeker from being removed to a country where “his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”⁷⁴ Such fears must be “well-founded,” meaning that a reasonable person in the asylum seeker’s circumstances would also fear persecution if he or she returned to the home country.⁷⁵ Although it is more common for applicants to be “unwilling” to return, applicants can be “unable” to return if their countries refuse to issue passports, or if they are denied re-entry.⁷⁶

E. Two Non-Precedential and a Third Useless BIA Decision

The BIA has infrequently taken up the issue of domestic violence-based applications.⁷⁷ The first two times the BIA addressed the matter were fruitless.⁷⁸ And the BIA’s most recent decision,⁷⁹ which some argue settles the matter,⁸⁰ seems to be an unreliable source of guidance for future applicants.⁸¹

1. First Failed Opportunity to Provide Direction

In the highly controversial case *In re R-A*,⁸² the BIA reversed the grant of asylum to a Guatemalan woman who had endured over ten years of physical⁸³ and verbal violence.⁸⁴ On two occasions, the police failed to respond to R-A’s

73. 8 U.S.C. § 1101(a)(42) (2012).

74. GERMAIN, *supra* note 20, § 1.1.1 (alteration in original).

75. *Id.* § 2.2.

76. Regina Germain, *Seeking Refuge: The U.S. Asylum Process*, COLO. LAW., Oct. 2006, at 71, 72.

77. See Bookey, *supra* note 8, at 108–09 (stating that “no BIA or U.S. Federal Court of Appeals decision has squarely held that domestic violence is (or is not) a basis for asylum in the United States”).

78. See *Matter of L-R*, *supra* note 4 (“[The] absence of applicable jurisprudential or regulatory norms have resulted in contradictory and arbitrary outcomes and the failure of protection for women victims of intimate partner violence.” (alteration in original)); see also discussion *infra* Sections I.E.1–I.E.2.

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

80. See *Asylum Law*, *supra* note 12, at 2090 (“[*In re A-R-C-G*-] unambiguously establishes that women fleeing domestic violence can be eligible for particular social group-based asylum, and it will prove to be a boon to future asylum applicants.” (alteration in original)).

81. See discussion *infra* Section I.E.3.

82. 22 I. & N. Dec. 906 (B.I.A. 1999).

83. See *id.* at 908–09. R-A- married at the age of sixteen and was almost immediately subjected to physical and sexual abuse by her husband. *Id.* While in the relationship, R-A- suffered a dislocated jaw when her menstrual period was late, violent kicking in her spine after she refused to have an abortion, rape on a near-daily basis, kicking in the genitalia, sodomization, whippings with an electrical cord, threats to chop her limbs off so that she could never leave, pistol whippings, use of her head to break mirrors and windows, and blows to her head with fists and furniture. *Id.*

84. See *id.* at 908–10. R-A-’s husband often threatened that “calling the police would be futile” because he was well-connected due to his previous military service. *Id.* at 909. He would

phone calls; and three times, police took no action when her husband failed to appear pursuant to a summons.⁸⁵ Moreover, when R-A- had the opportunity to be heard in court, a Guatemalan judge told her “he would not interfere in domestic disputes.”⁸⁶ In May 1995, R-A- fled to the United States in search of protection.⁸⁷ It took her fourteen years of litigation to get a final decision.

Initially, R-A-’s application for asylum was granted.⁸⁸ The Immigration Judge (IJ) concluded that asylum was warranted because “of her membership in the particular social group of ‘Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.’”⁸⁹ The then-Immigration and Naturalization Service (INS) appealed the IJ’s decision, arguing that R-A- had not claimed a valid PSG and that she was not subjected to harm *on account of* her membership in that group.⁹⁰ Although the BIA found that R-A- was the “victim of tragic and severe spouse abuse,” it refused to find that the abuse “occurred because of her membership in a particular social group,” and thus, denied R-A- asylum.⁹¹

The BIA found that R-A- failed to prove that her claimed PSG was “recognized and understood to be a societal faction, or . . . otherwise a recognized segment of the population, within Guatemala.”⁹² The BIA also found that R-A- did not show that “spouse abuse is itself an important societal attribute, or, in other words, that the characteristic of being abused is one that is important within Guatemalan society.”⁹³ Additionally, even if a PSG could be found, R-A- had not established the nexus requirement as she did not show that “her husband ha[d] targeted and harmed [her] because he perceived her to be a member of this particular social group.”⁹⁴ Also, she had failed “to show how other members of the group may be at risk of harm from him.”⁹⁵ Finally, the

also tell stories of killing babies and elderly people during his tenure in the army, and declare that she would never be able to leave. *Id.*

85. *Id.* at 909.

86. *Id.*

87. *Id.*

88. The Immigration Judge:

[F]ound that such a group was cognizable and cohesive, as members shared the common and immutable characteristics of gender and the experience of having been intimately involved with a male companion who practices male domination through violence . . . [and had] held that members of such a group are targeted for persecution by the men who seek to dominate and control them.

Id. at 911 (alteration in original) (Board of Immigration Appeals reviewing Immigration Judge’s unpublished findings).

89. *Id.*

90. *Id.*

91. *Id.* at 927.

92. *Id.* at 918.

93. *Id.* at 919.

94. *Id.* at 920 (alteration in original).

95. *Id.*

BIA determined that the husband's actions did not "represent desired behavior within Guatemala or that the Guatemalan Government encourages domestic abuse."⁹⁶

In direct response to the controversial BIA decision, proposed regulations were issued for public comment in December 2000,⁹⁷ clarifying what constitutes a PSG and setting out a number of factors that could be added to claim review.⁹⁸ In addition, Attorney General (AG) Janet Reno vacated the BIA's decision pending the issuance of final regulations.⁹⁹ However, final regulations were never adopted.¹⁰⁰

In the next administration, AG John Ashcroft certified *In re R-A-* to himself, and accepted new briefs in February 2004.¹⁰¹ The Department of Homeland Security (DHS) argued that R-A- should be granted asylum based on her membership in the PSG of "married women in Guatemala who are unable to leave the relationship."¹⁰² Ashcroft eventually remanded the case to the BIA with instructions to decide the case once the final regulations were issued.¹⁰³ In 2008, AG Michael Mukasey also certified *In re R-A-* to himself.¹⁰⁴ He ultimately remanded the case back to the BIA, instructing it not to await final regulations, but to decide the case based on other precedent¹⁰⁵ that had developed in the interim.¹⁰⁶

Finally, in December 2009, R-A- was granted asylum.¹⁰⁷ The IJ's decision, which was one sentence, was based on the fact that the parties essentially agreed to grant asylum.¹⁰⁸ Thus, after fourteen years of litigation and wavering positions by the government and the BIA, domestic violence victims were left with no additional guidance as to how to prepare a successful asylum claim.

2. *DHS Intervenes and a Resolution is Dodged Again*

A second unpublished case provided a potential solution but ultimately did not result in any concrete rules.¹⁰⁹ In May 2004, L-R- and her three children

96. *Id.* at 923.

97. DREE K. COLLOPY, AILA'S ASYLUM PRIMER 393 (7th ed. 2015).

98. *Id.*

99. *Id.*

100. *Id.* at 394.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 394–95.

105. See discussion *supra* Sections I.D.3.b.ii–I.D.3.b.iii.

106. COLLOPY, *supra* note 97, at 395.

107. *Matter of L-R-*, *supra* note 4.

108. See Natalie Rodriguez, *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, 333 (2011).

109. *Matter of L-R-*, *supra* note 4.

arrived in the United States seeking refuge after almost two decades of domestic violence.¹¹⁰ In her application, L-R- told numerous stories of substantial abuse perpetrated by her common-law husband for more than a decade.¹¹¹ L-R- also explained that the police refused to assist her several times because it was a “private matter.”¹¹² In 1991, L-R- fled to California to escape the abuse, but even then, he exerted control over her.¹¹³ He sent threats and forced her to send him money.¹¹⁴ Eventually, he forced L-R- to return to Mexico, and the beatings became even more violent.¹¹⁵ Following years of physical and mental abuse, L-R- and her children once again fled to California in 2004.¹¹⁶

The IJ denied L-R-’s asylum application, finding that the type of persecution she had suffered did not qualify her for asylum and that the abuse was not on account of membership in a PSG.¹¹⁷ L-R- appealed that decision to the BIA.¹¹⁸ Though DHS initially filed a brief in support of the IJ’s decision,¹¹⁹ in 2009, it filed a supplemental brief that was more in line with its position in the R-A-case.¹²⁰ DHS proposed two new alternative groups: “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.”¹²¹ DHS also suggested that the case be remanded to the IJ so that L-R- could refine her claim according to the new proposed groups.¹²² After reviewing the additional evidence, DHS stipulated that L-R-’s application was eligible for

110. *Id.*

111. Amended Declaration of L-R- in Support of Application for Asylum at 2 (B.I.A. Dec. 30, 2005), <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-support.pdf> [hereinafter Amended Declaration of L-R-]. L-R- was a 19-year old college student when her 33-year old basketball coach began to abuse her. *Id.* at 4. The first time he raped her was at gunpoint, following her school graduation. *Id.* at 5. When L-R- tried to leave the next day, he found her at the bus stop and forced her back to his house where he held her captive for several years. *Id.* at 7–8. He continued to rape L-R- and eventually she became pregnant. *Id.* at 8. When she was about two months pregnant, L-R- tried to escape, but he found her and forced her back to his house. *Id.* That night, while she was sleeping, he poured a flammable liquid all over the bed, and lit it and her on fire. *Id.* After the child was born, he continued to rape her, yell at her, and hit her—in private and in public. *Id.* at 9.

112. *Id.* at 9.

113. *Id.* at 10.

114. *Id.*

115. *Id.* at 11. One day, as she was walking home from her bus, he accused her of infidelity and hit her until he had dislocated her nose. *Id.* at 12. On another day, L-R- had threatened to go to the police after he had hit her, and in response, he took out a machete and threatened to kill her with it if she went to the police. *Id.*

116. *Id.* at 22.

117. See *Matter of L-R-*, *supra* note 4.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Supplemental Brief for DHS at 29, *Matter of L-R-* (2009), http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf.

asylum, and soon thereafter, the IJ ordered the grant of asylum.¹²³ However, because the BIA, AG, and federal circuit courts are the only entities capable of creating binding precedential decisions, the IJ's grant of asylum did not create any binding law that could help other domestic violence claimants.

3. *An Ineffective, but Precedential, Decision is Issued*

In the landmark 2014 decision, *In re A-R-C-G-*,¹²⁴ the BIA held that “women fleeing domestic violence can be members of a particular social group.”¹²⁵ This decision marked the first time a binding decision had been issued on the matter of domestic violence. The case involved a Guatemalan woman who faced “weekly beatings” and “suffered repugnant abuse by her husband.”¹²⁶ She contacted the police for help on several occasions, but was repeatedly told that they “would not interfere in a marital relationship.”¹²⁷ And when she tried to leave numerous times, he always found her.¹²⁸ In December 2005, C-G- left Guatemala and sought asylum in the United States.¹²⁹ The IJ determined that C-G- failed to demonstrate eligibility for asylum, deciding that she had not suffered past persecution and that she did not have a well-founded fear of future persecution on account of membership in a PSG.¹³⁰ Instead, she was simply the victim of arbitrary criminality.¹³¹ Thus, the IJ denied C-G-'s asylum application.¹³² On appeal, C-G- argued that she was eligible for asylum based on the domestic violence she had suffered.¹³³ However, DHS opined that the IJ's decision should be upheld.¹³⁴ As a result, the BIA sought out supplemental briefing and amici curiae “to address the issue whether domestic violence can, in some instances, form the basis for a claim of asylum”¹³⁵ In response, DHS conceded that C-G- suffered past persecution and “that the persecution was on account of a particular social group comprised of ‘married women in Guatemala who are unable to leave their relationship.’”¹³⁶

123. See *Matter of L-R-*, *supra* note 4.

124. 26 I. & N. Dec. 388 (B.I.A. 2014).

125. COLLOPY, *supra* note 97, at 396.

126. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 389. Throughout the relationship, her husband had broken her nose, burned her breast with paint thinner, and raped her. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 389–90.

131. *Id.* at 390.

132. *Id.* at 388.

133. *Id.* at 390.

134. *Id.*

135. *Id.*

136. *Id.*

The BIA used the three-part test¹³⁷ for establishing membership in a PSG (immutability, social distinction, and particularity) to review the case.¹³⁸ With regard to immutability, the BIA held that gender is an immutable characteristic and that marital status could be deemed immutable if an individual is “unable to leave the relationship.”¹³⁹ The BIA also advised that it was necessary for adjudicators to “consider a respondent’s own experiences, as well as . . . background country information.”¹⁴⁰ Regarding the second element, DHS conceded that “the group in this case is defined with particularity”¹⁴¹ because of its composition of terms with commonly accepted definitions that, when combined, created “a group with discrete and definable boundaries.”¹⁴² Finally, the BIA held that the group was “socially distinct within the society in question.”¹⁴³ In making this determination, the BIA recognized that it must “look to the evidence to determine whether a society . . . makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave.”¹⁴⁴ Such evidence may consider “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 sociopolitical factors.”¹⁴⁵ In this case, the BIA found “unrebutted evidence that Guatemala has a culture of ‘machismo and family violence,’” and that laws against domestic violence were frequently not enforced.¹⁴⁶ Finally, the BIA pointed out that the issue of social distinction is to be determined on a case-by-case basis.¹⁴⁷

As compared to the two previous decisions, *In re A-R-C-G-* made huge strides to set out a workable framework for future applicants.¹⁴⁸ However, it still failed to rule that domestic violence is a type of persecution for which the United States

137. See *Matter of M-E-V-G-*, 26 I. & N. 227, 237 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. 208, 212–13 (B.I.A. 2014).

138. *Matter of A-R-C-G-*, 26 I. & N. at 392.

139. *Id.* at 392–93.

140. *Id.* at 393.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 394.

145. *Id.*

146. *Id.*

147. *Id.* at 395. In making this determination, adjudicators should consider the facts and evidence, “including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent’s past experiences; and other reliable and credible sources of information.” *Id.* at 394–95.

148. *Asylum Law*, *supra* note 12, at 2090 (“[*A-R-C-G-*] unambiguously establishes that women fleeing domestic violence can be eligible for particular social group-based asylum, and it will prove to be a boon to future asylum applicants.” (alteration in original)).

will give consistent protection.¹⁴⁹ Moreover, it still left much of the determination up to the reviewing officer's discretion.¹⁵⁰ Progress was made, but *A-R-C-G-* was not a solution.

II. PREVIOUS PROPOSALS FOR DOMESTIC VIOLENCE BASED ASYLUM

Because there has been little legislative guidance, and case law has been vague with respect to domestic violence-based asylum claims, a great deal of scholarship has developed regarding the best path forward. Generally, these proposals can be sorted into two broad categories: gender-based and gender-neutral approaches.

A. Gender-Based Solutions

The vast majority of the solutions proposed for domestic violence victims seeking asylum look to employ an analysis that uses gender as the basis for the persecution. Gender-based persecution "refers to those asylum applications made by women which are premised on issues that pertain specifically to their gender."¹⁵¹ In other words, women are persecuted for the simple fact that they are women. Three gender-based solutions are commonly proposed.

1. Adding Gender as the Sixth Ground for Asylum

One proposal is that persecution based on gender, and more specifically, the persecution of women, should be added as the sixth ground for asylum.¹⁵² Under this approach, women would no longer have to try to shoehorn their claims into the PSG definition.¹⁵³ Accordingly, this would ease the burden for a woman because she would only need to prove "persecution and that the persecution was

149. *Id.* at 2095 ("The Board declined to analyze whether (1) the harm C.G. suffered amounted to persecution or (2) her membership in the particular social group was 'at least one central reason' for her persecution; the Board . . . explicitly affirmed that they will continue to be fact-dependent determinations.").

150. *Id.* at 2093 ("While *A-R-C-G-* provides definitive answers to some questions that have split immigration judges, it provides less guidance on others; accordingly, it leaves open important questions about *which* victims of domestic violence will qualify for asylum.").

151. Anjana Bahl, *Home is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution*, 4 *CARDOZO WOMEN'S L.J.* 33, 35 (1997).

152. See Leonard Birdsong, *A Legislative Rejoinder to "Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution . . ."*, 35 *WM. MITCHELL L. REV.* 197, 222 (2008); Elizabeth A. Hueben, Note, *Domestic Violence and Asylum Law: The United States Takes Several Remedial Steps in Recognizing Gender-Based Persecution*, 70 *UMKC L. REV.* 453, 454 (2001); Sarah Siddiqui, Note, *Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify*, 52 *ARIZ. L. REV.* 505, 524 (2010).

153. Crystal Doyle, Note, *Isn't "Persecution" Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution*, 15 *WASH. & LEE J. CIVIL RTS. & SOC. JUST.* 519, 548 (2009).

on account of her gender”¹⁵⁴ along with a “well-founded fear of persecution and that her home government was unable or unwilling to control her persecutor.”¹⁵⁵ Additionally, this would bring American law “in line with existing international and current U.S. guidelines for adjudicating women’s claims.”¹⁵⁶

However, this approach would require showing that the persecution was “on account of” gender and not derived from one of the many other reasons for domestic violence, which would be very difficult to prove.¹⁵⁷ Moreover, because adjudicators have broad discretion in determining the “on account of” factor, the approach could lead to inconsistent applications.

2. Allowing Gender to be a PSG

The most frequently proposed rule suggests allowing gender to comprise a PSG. Two variations of this proposal exist: one in which “women” is the PSG, and another in which “women plus” forms the PSG.

Proponents of the women-as-PSG theory base their proposals on the fact that *In re Acosta* “expressly acknowledged that sex may form a particular social group.”¹⁵⁸ They argue that “if women can form a particular social group in [female genital mutilation] cases, there is no reason why this should not apply to women persecuted in other manners.”¹⁵⁹ This standard classification has already received broad support in the international community.¹⁶⁰ By including “women” within the definition of a PSG, more victims will benefit from protection.¹⁶¹

However, some have criticized this formulation by arguing that a group cannot be “particular” if it “comprise[s] about half of society.”¹⁶² Furthermore, defining the PSG “as ‘women’ fails to address the complexity of [domestic violence] and thus renders refugees’ claims on this basis vulnerable to rejection.”¹⁶³ Moreover, using “women” as the PSG does not address the nexus issue—the applicant must show that the persecutor was motivated by the fact that the victim is a woman.¹⁶⁴

154. Hueben, *supra* note 152, at 468.

155. *Id.*

156. Birdsong, *supra* note 152, at 222.

157. Doyle, *supra* note 153, at 554.

158. Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1238 (2009).

159. *Id.* (alteration in original).

160. *Id.* at 1239–40.

161. See Doyle, *supra* note 153, at 548–49.

162. *Id.* at 548 (alteration in original); Helen P. Grant, *The Floodgates Are Not Going to Open, but Will the U.S. Border?*, 29 HOUS. J. INT’L L. 1, 43 (2006) (“Size of the social group is . . . an important issue in determining whether a particular social group has been recognized.”).

163. Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim’s Particular Social Group*, 49 LOY. L. REV. 287, 294 (2003) (alteration in original).

164. Doyle, *supra* note 153, at 551 (“[A]sylum is only available to individuals persecuted on account of one of the five grounds.”); Michael G. Heyman, *Protecting Foreign Victims of Domestic*

Another theory proposes that the PSG should be defined as gender (women) “plus” some specific characteristic.¹⁶⁵ One suggestion classifies “women who have fled severely abusive relationships” as a PSG.¹⁶⁶ In this formulation, leaving an abusive relationship is considered an immutable characteristic because the woman would not be able to “change the fact that she took the actual step of leaving” the relationship.¹⁶⁷ Even if she returns, once she has challenged her abuser’s power by leaving, there is a risk the abuser will increase the volume or severity of his or her violent behavior to reestablish dominance.¹⁶⁸ Thus, the woman can likely show that she is being (or will be) persecuted on account of the fact that she tried to flee the relationship.¹⁶⁹

A second variation of the “gender plus” test recommends the use of nationality as the “plus” factor.¹⁷⁰ Under this approach, “domestic violence . . . occur[s] on account of the victim’s gender and their nationality or tribal membership, which allows for women to be harmed with impunity.”¹⁷¹ Accordingly, this formulation “gets to the heart of the issue: that women from these countries have fled to the United States because their home country perpetuates sexist and abusive behavior and allows for women to be so abused.”¹⁷²

The gender plus formulation has garnered support in the Second, Ninth, and Tenth Circuits.¹⁷³ Yet, some have criticized it for over-defining the PSG by

Violence: An Analysis of Asylum Regulations, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 115, 133 (2008) (“The refugee definition still requires the applicant to show that she fears persecution *because of her gender*.”).

165. Lauren N. Kostas, Note, *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, 232 (2015); 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, 362 (2009) (explaining that gender can be considered a viable social group when combined with other refugee protection criteria).

166. Cianciarulo & David, *supra* note 165, at 378.

167. *Id.* at 379 (“The most fundamental concept of a valid social group is a characteristic of belief that a member cannot change, or one that is so fundamental to her identity that she should not be required to change it.”).

168. *Id.*

169. See *id.* at 378–79 (“The punishable characteristic is the applicant’s ability and willingness to challenge her abuser’s authority by leaving the relationship.”).

170. Kostas, *supra* note 165, at 232.

171. *Id.* at 233–34 (alteration in original) (“In some countries, the idea of ‘wife-beating’ is a ‘corrective’ measure to punish women for any transgression her husband or partner sees fit is acceptable, normal, and held by both genders.”).

172. *Id.* at 233.

173. *Id.*; see also *Perdomo v. Holder*, 611 F.3d 662, 663–64, 667 (9th Cir. 2010) (finding that the BIA erred in concluding that a social group consisting of all young women in Guatemala was overly broad and not a PSG); *Bah v. Mukasey*, 529 F.3d 99, 112 (2d Cir. 2008) (finding that a petitioner’s gender combined with her ethnicity, nationality, or tribal membership was sufficient to satisfy the PSG requirement); *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005) (rejecting the BIA’s argument that petitioners must prove more than gender plus tribal membership for PSG classification).

adding descriptors to the “women” group, causing the potential exclusion of some women seeking protection from the same form of persecution.¹⁷⁴ Additionally, while the gender plus formulation seems to be favored by asylum adjudicators and has had some sporadic success, it has also “caused serious jurisprudential problems . . . that have limited the capacity of this method to provide asylum protection to all victims”¹⁷⁵ These narrowly defined classifications also “create new hurdles for refugee applicants, who generally struggle to prove that this shared characteristic is identifiable by would-be persecutors or that their past persecution makes them a target for future persecution.”¹⁷⁶

3. *Modifying the Nexus Analysis*

The third prominent gender-based solution derives from international standards and calls for a bifurcated nexus approach to the PSG analysis.¹⁷⁷ Under this approach, an asylum applicant has two routes for establishing that persecution was on account of her gender.¹⁷⁸ The applicant could argue that the persecution occurred on account of her gender and that the state is unable or

174. See Stacey Kounelias, Comment, *Asylum Law and Female Genital Mutilation: “Membership in a Particular Social Group” Inadequately Protecting Persecuted Women*, 11 SCHOLAR 577, 582 (2009) (explaining that women who fear they may undergo female genital mutilation can be considered a PSG but only if the woman can prove female genital mutilation is an established practice in a tribe or clan).

175. Doyle, *supra* note 153, at 549; see also *id.* at 537 (recognizing that the international community has accepted that persecution based on gender can form the foundation for an asylum claim, but that approaches incorporating gender into a PSG have been unsatisfactory).

176. Siddiqui, *supra* note 152, at 517 (emphasizing that victimized women who may attempt to seek asylum will continue to encounter insurmountable hurdles until gender is recognized as a PSG because gender plus formulations create PSG definitions that are too narrow and under-inclusive).

177. See, e.g., Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 807–08 (2003) (discussing how the BIA had wavered in utilizing a bifurcated nexus approach and suggesting that it adopt the approach in *In re R-A-* to bring the United States in line with international standards); Reimann, *supra* note 158, at 1257 (suggesting that the United States should adopt a bifurcated nexus analysis in gender persecution asylum cases in order to bring its jurisprudence in line with the international community); Siddiqui, *supra* note 152, at 523 (explaining that a bifurcated nexus approach would create a causal link between a non-state abuser and the State’s inability or unwillingness to protect the victim from abuse). It should be noted that the BIA rejected the use of a bifurcated approach in the appeal of *In re R-A-*. *In re R-A-*, 22 I. & N. Dec. 906, 923 (B.I.A. 2001).

178. Musalo, *supra* note 177, at 806. In this analysis, the “on account of” element would be satisfied:

- (1) where there is a real risk of being persecuted at the hands of a non-state actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) 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 a Convention reason.

Id.

unwilling to provide protection against the abuser.¹⁷⁹ Or, the applicant could argue that “whatever the reasons for her husband’s actions, the state is unwilling to protect her because of her gender.”¹⁸⁰ This analysis would ease the burden of the applicant because it would remove the requirement that applicants prove the persecutor’s motivations and would refocus the inquiry on the government’s refusal to provide protection.¹⁸¹ The bifurcated nexus has been utilized in the United Kingdom, New Zealand, and Australia, and has been explicitly adopted by The Office of the United Nations High Commissioner for Refugees (UNHCR) guidelines.¹⁸²

4. General Criticism of Gender-Based Approaches

The overarching problem with a gender-based approach is that it ignores that domestic violence victims can be male¹⁸³ or female, and that domestic violence can occur in heterosexual or homosexual relationships.¹⁸⁴ While women may be most willing to seek asylum based on domestic violence, there is no need to close the door to men equally in need of protection. Some argue that men are better protected around the world, but in countries where men are largely in power and a “machismo” attitude prevails, men are unlikely to receive protection for domestic violence because their cultures generally expect that they should be able to protect themselves.¹⁸⁵ Others may want to argue that men are better equipped to deal with domestic violence because of their inherent strength, but this is not true of a physically disabled man who is abused by his spouse and

179. Siddiqui, *supra* note 152, at 523.

180. *Id.* at 524.

181. See Musalo, *supra* note 177, at 779, 786 (asserting that when non-state actors are involved, women have substantial difficulty showing a causal connection between their abuser’s conduct and their gender because there is a presumption that the motivation underlying the abuse is personal rather than related to the woman’s gender).

182. *Id.* at 779.

183. There exists some debate regarding whether men are, or can be, victims of domestic violence. See Mary Z. Silverzweig, *Domestic Terrorism: The Debate and Gender Divides*, 12 J. L. & FAM. STUD. 251, 251–52 (2010) (reviewing MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE (2008)); see also discussion *supra* note 2 and accompanying text (discussing the findings of several studies regarding domestic violence against women and men).

184. See Shannon Little, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 HASTINGS WOMEN’S L.J. 259, 260–61 (2008) (finding that some studies suggest that domestic violence occurs in lesbian, gay, bisexual, and transgendered (LGBT) relationships at a rate comparable to heterosexual relationships, and that men in same-sex relationships are twice as likely to experience domestic violence than men in heterosexual relationships).

185. Campbell, *supra* note 2 (“Men are reluctant to say that they’ve been abused by women, because it’s seen as unmanly and weak.”). British men’s rights campaign organization, Parity, claims that “men are often treated as ‘second-class victims’ and that many police forces and councils do not take them seriously.” *Id.*

may not even be able to try to protect himself.¹⁸⁶ Similarly, a person in a same-sex relationship may already be subject to prejudice due to the nature of the relationship and is unlikely to receive protection.¹⁸⁷ Ultimately, “gender does not explain why domestic violence . . . is also perpetrated against men by women, and occurs in same-sex relationships.”¹⁸⁸

B. Gender-Neutral Solutions

A second category of proposals presents gender-neutral solutions to the domestic violence-based asylum issue. The solutions that are put forth in this category seek to modernize the asylum process more generally.

1. Eliminating the Grounds for Asylum

One radical gender-neutral solution that has been put forth is the elimination of the five enumerated protected grounds, which would also eliminate the problematic “on account of” requirement.¹⁸⁹ This proposal is based on the fact that the current grounds for asylum are “no longer appropriate,” because the original law had been drafted to protect war refugees, and was “not necessarily concerned with developing criteria that would be applicable to all people in all places for all times.”¹⁹⁰

2. Defining Family as a PSG

A second proposal aims to shift the focus from the reason underlying the abuse to the state’s failure to protect the victim.¹⁹¹ Accordingly, under this approach, the law would “provide international protection where a state fails to protect its own citizens from harm,”¹⁹² and the PSG would be defined as “the family.”¹⁹³ This PSG would challenge the assertion that asylum law cannot protect domestic

186. See Bayes-Weiner, *supra* note 10, at 1060 (providing that the Obama administration’s asylum plan would preclude disabled men on the basis of domestic violence because of their gender).

187. It is not difficult to picture a scenario where a man in a same sex relationship is not given assistance because men are considered to be of equal strength and therefore capable of protecting themselves. See Maya Shwayder, *A Same-Sex Domestic Violence Epidemic Is Silent*, THE ATLANTIC (Nov. 5, 2013), <http://www.theatlantic.com/health/archive/2013/11/a-same-sex-domestic-violence-epidemic-is-silent/281131/> (suggesting that a police officer may tell two men to “work it out between yourselves”). Similarly, it is easy to imagine a scenario in which women are considered incapable of committing domestic violence, and therefore another woman complaining of domestic abuse is ignored. See Britni de la Cretaz, *When Women Abuse Other Women*, GOOD HOUSEKEEPING (Feb. 25, 2016), <http://www.goodhousekeeping.com/life/relationships/a37015/intimate-partner-violence-in-lesbian-relationships/>.

188. Adams, *supra* note 163, at 288.

189. Doyle, *supra* note 153, at 554.

190. *Id.* at 556.

191. Adams, *supra* note 163, at 295–96.

192. *Id.* at 296.

193. *Id.* at 298.

violence victims because domestic violence is a matter of private harm.¹⁹⁴ As one commenter described, such an argument would be foreclosed because:

[A] state makes a political choice when it relegates the issue of domestic violence to the private realm. That choice generates the potential basis for a refugee claim, in that the state is now singling out a particular group within society—the family—for differential treatment that may lead to serious harm to members of the group.¹⁹⁵

3. *Family + Psychology as a PSG*

Building off of the previous theory and employing a psychological understanding of domestic violence, one scholar has recommended the inclusion of a PSG defined as “Family Whose Member Violates and Controls Them Without Government Intercession.”¹⁹⁶ In this model, “Intimate Terrorism or Coercive Controlling Violence”¹⁹⁷ is pinpointed as the specific type of domestic violence that is most likely to rise to the level of persecution that would render an applicant eligible for asylum.¹⁹⁸ This type of abuse includes severe physical abuse, but also employs a “pattern of power, intimidation, and control.”¹⁹⁹ Additionally, this PSG identifies “the country of origin’s failure to protect the victim as [the] causal nexus.”²⁰⁰ This approach has three benefits. First, it would recognize “all victims, not just women, who meet the criteria for asylum as domestic violence victims, no matter how rare the circumstances.”²⁰¹ Second, it would specify the type of domestic violence that the United States is willing to recognize and for which it will provide protection.²⁰² And third, this approach would place the focus on the government’s failure to protect, and not force the victim to explain and present evidence regarding why he or she was persecuted.²⁰³

194. *See id.* (“Domestic violence is more than a private harm because the state fails to protect victims of violence within families for the reason that these victims are members of a particular social group . . .”).

195. *Id.*

196. Bayes-Weiner, *supra* note 10, at 1058.

197. *Id.* at 1049.

198. *Id.* at 1049–50.

199. *Id.* at 1050. (“Control is perpetrated by any of the following means in varying combinations based on the abuser’s preference: ‘intimidation; emotional abuse; isolation; minimizing, denying and blaming; use of children; asserting male privilege; economic abuse; and coercion and threats.’” (quoting Joan B. Kelly & Michael P. Johnson, *Domestic Violence: Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 *FAM. CT. REV.* 476 (2008))).

200. Bayes-Weiner, *supra* note 10, at 1058 (alteration in original).

201. *Id.* at 1059.

202. *Id.* This would also ease fears of opening the floodgate to excessive immigration, since only eleven percent of cases consist of this type of violence. *Id.*

203. *Id.*

C. Current Proposals Do Not Provide Consistent Protection

A significant amount of scholarship has been dedicated to improving the current asylum system. Some have built upon prior case law while others have looked to psychology or sociology for a solution.²⁰⁴ But in the end, most fail to articulate the ideal solution—Congressional acknowledgement that domestic violence is a form of persecution that the United States is willing to protect against.

III. BOLD ACTION IS NECESSARY FOR A SATISFACTORY SOLUTION

At first glance, the BIA's decision in *In re A-R-C-G-* appears to solve many of the problems that plagued domestic violence asylum applicants in the past. The decision (finally) created the binding precedent that “women fleeing domestic violence can be eligible” for asylum based on membership in a PSG.²⁰⁵ However, it left open two important questions. First, the BIA did not address whether the harm suffered would amount to persecution, and second, because the DHS conceded the nexus requirement, the Board did not give any guidance regarding how the nexus requirement could be fulfilled in future cases.²⁰⁶ Thus, *In re A-R-C-G-* only nominally clarified whether asylum may be predicated on domestic violence grounds. As a result, it is again left up to the IJs and the courts to determine when domestic violence is a suitable ground for asylum. This is problematic because it leaves too much discretion to adjudicators and reinforces the system of inconsistent decision-making that preceded *In re A-R-C-G-*.²⁰⁷ Legislative action is needed to remedy the problems that have afflicted the adjudication of domestic violence-based asylum claims. An amendment to the definition of “refugee” and the creation of a new PSG are two methods by which the issue may be resolved.

A. Appending Domestic Violence to the Refugee Definition

One potential solution is to append a sentence to the definition of “refugee” identifying the circumstances by which domestic violence would qualify for

204. See, e.g., Cianciarulo & David, *supra* note 165, at 379 (“Leaving an abusive relationship is an immutable characteristic. . . . The psychology of abusive relationships is such that the abuser continues the physical and emotional abuse specifically to establish and maintain control over his partner, and to punish any challenge to that control.”); Kostas, *supra* note 165, at 233–34 (advocating for nationality as a “plus” factor on the basis that in some cultures women are presumed to be the property of men); Musalo, *supra* note 177, at 797–98 (advocating for the reinvigoration of the bifurcated nexus approach in light of the precedential authority of a pair of BIA decisions—*In re Kasinga* and *In re R-A-*).

205. *Asylum Law*, *supra* note 12, at 2090.

206. *Id.* at 2095.

207. *Id.* at 2093. One study of 206 asylum cases based on domestic violence found that “whether a woman fleeing domestic violence will receive protection in the United States seems to depend not on the consistent application of objective principles, but rather on the view of her individual judge, often untethered to any legal principles at all.” Bookey, *supra* note 8, at 147–48.

asylum.²⁰⁸ While this may sound like a radical approach, it is premised on previous congressional action. Again, Congress amended the definition of “refugee” in 1996 to address the grave needs of a particular group being persecuted.²⁰⁹ Like the issues that prompted Congress to act in 1996, domestic violence is similarly grave. Thus, Congress should make a similar change to INA section 1101(a)(42).²¹⁰ Specifically, a satisfactory definition would state:

For the purposes of determination under this Act, a person who has been subjected to abuse of the ‘Intimate Terrorism or Coercive Controlling Violence’²¹¹ type, and who can show that the home government is unable or unwilling to provide protection from the abuse, shall be deemed to have been persecuted on account of their membership in a particular social group.

Such an amendment would serve two important purposes: (1) Congress would define the precise type of domestic violence that rises to the level of persecution, and (2) it would reorient the focus of the analysis to the home government’s inaction. This proposed solution clearly delineates the PSG for an asylum claim to be based on domestic violence. Although “Intimate Terrorism or Coercive Controlling Violence” is potentially burdensome to prove, it still provides an unambiguous standard.²¹² In any case, this appears to be the type of domestic violence that has warranted asylum in the past.²¹³

B. Adding Domestic Relationship Status as Sixth Basis for Asylum

An alternate adequate solution would be to amend the definition of “refugee” to incorporate “domestic relationship status” as the sixth ground for asylum. This would allow an asylum applicant to claim persecution (the domestic violence) on account of domestic relationship status.²¹⁴ The addition of this new

208. Other scholars have made similar proposals. See Rodriguez, *supra* note 108, at 338; Spencer Kyle, *Safety Over Semantics: The Case for Statutory Protection for Domestic Violence Asylum Applicants*, 16 SCHOLAR 505, 543–44 (2014). However, this Comment is more forceful and direct in its proposed changes.

209. See *supra* notes 34–37 and accompanying text.

210. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601, 110 Stat. 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42) (2012)).

211. See Bayes-Weiner, *supra* note 10, at 1049–50.

212. See *id.* at 1059–60.

213. *Id.* at 1050.

214. This proposal differs from others because it takes the domestic violence victim entirely out of the PSG configuration. Instead, domestic violence would be a new basis of asylum, in addition to the current grounds of “race, religion, nationality, membership in a particular social group, [and] political opinion.” Refugee Act of 1980, Pub. L. 96-212, § 201(a), 94 Stat. 102, 102 (codified at 8 U.S.C. § 1101(a)(42)(A) (2000)). Additionally, this proposal is different from previous PSG configuration proposals that employed the “domestic relationship” language because it does not make use of any qualifiers. See, e.g., CTR. FOR GENDER & REFUGEE STUDIES, DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS: CGRS PRACTICE ADVISORY 11 (2014), [https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Domestic%20Violence-Based%20Asylum%20Claims%20\(Sept%202012,%202014\).pdf](https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Domestic%20Violence-Based%20Asylum%20Claims%20(Sept%202012,%202014).pdf) (“Specific to Ms. L.R., DHS advanced two

ground would be premised on the “well-established doctrine of ejusdem generis”²¹⁵ because individuals in a domestic relationship are arguably unable to avoid persecution, because governments are unwilling to interfere in the “private affairs” of a relationship. Additionally, although the BIA did not make this finding in *In re Acosta*, another shared characteristic is that this type of persecution occurs at high levels around the world.²¹⁶ Similarly, domestic violence on account of status in a domestic relationship is a problem that plagues all countries and sexes, and at extraordinary rates.²¹⁷ Thus, “domestic relationship status” could rationally be added as the sixth ground of persecution.

This approach would have several substantial benefits. First, by using “domestic relationship status,” the ground remains gender-neutral and affords protection to both women and men. Although it is difficult to determine how many men have attempted to use domestic violence as a basis for asylum because such detailed statistics are not made available, the statistics do make clear that men *are* subject to domestic violence, and thus, they should not be foreclosed from protection simply because the numbers are relatively small.²¹⁸ Second, it allows domestic violence victims to bypass the difficult test of proving membership in a PSG.²¹⁹ Third, this new ground should more easily meet the “on account of” element than the proposal to add gender as a sixth basis for asylum.²²⁰ Specifically, adding “domestic relationship status” would comport with the BIA’s finding in *In re R-A-* that “the husband’s focus was on the respondent because she was *his* wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the

formulations of a social group that it argued could meet the immutability, visibility, and particularity requirements, depending on the facts in the record: Mexican women in domestic relationships who are unable to leave; or (2) Mexican women who are viewed as property by virtue of their positions within a domestic relationship.”); *see also* Supplemental Brief for DHS at 14, Matter of L-R (2009), http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf.

215. Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (“[The] doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.” (alteration in original)).

216. *Facts and Figures: Ending Violence against Women*, UN WOMEN (last updated Feb. 2016), <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes> (“It is estimated that 35 percent of women worldwide have experienced either physical and/or sexual intimate partner violence or sexual violence by a non-partner at some point in their lives.”); *see Matter of Acosta*, 19 I. & N. Dec. at 233 (“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.”).

217. *See supra* notes 2–3 and accompanying text.

218. For instance, a commenter to an article about the *Matter of A-R-C-G-* decision claims to “have a number of cases in which the victims are men and boys.” Comment by username S K Williams to article by, Amy Grenier, *Landmark Decision on Asylum Claims Recognizes Domestic Violence Victims*, IMMIGRATION IMPACT (Sept. 2, 2014), <http://immigrationimpact.com/2014/09/02/landmark-decision-on-asylum-claims-recognizes-domestic-violence-victims/>.

219. *Id.*

220. *See supra* note 157 and accompanying text.

infliction of harm.”²²¹ Finally, by singling out domestic violence as a unique form of persecution, it accords the proper level of scrutiny that domestic violence deserves. It creates a universal awareness that domestic violence will not be tolerated and also puts pressure on other countries to follow suit.

C. The “Floodgates” Argument Rebutted

Many scholars have asserted that the reason Congress has not yet stepped in to resolve the domestic violence-based asylum issue is that there are fears that once a precise rule is produced, it “will open the floodgates.”²²² In other words, “the borders would open beyond all reason,” risking “American economic and social well-being.”²²³ The fear is intensified by the fact that statistics show that domestic violence is endemic in Central American countries.²²⁴ Such high levels of domestic violence coupled with Central America’s proximity to the United States may incite the (irrational) fear that too many victims will head for the American border.²²⁵ However, concerns over the supposed floodgates effect are overstated because (1) the refugee definition inherently limits asylum applications, and (2) such an effect has not been experienced in other countries that have made such a transition.²²⁶

221. *In re R-A-*, 22 I. & N. Dec. 906, 921 (B.I.A. 1999). The Board relied on a series of statements by R-A- and her recollection of statements made by her husband that explained the abuse. *Id.* at 914–15. He told her “You’re my woman and I can do whatever I want” and “You’re my woman, you do what I say.” *Id.* at 915. She testified that “he saw her ‘as something that belonged to him and he could do anything he wanted’ with her” and that “as time went on, he hit [her] for no reason at all” and he “would hit or kick [her] whenever he felt like it.” *Id.* at 909, 915.

222. Grant, *supra* note 162, at 5; see Jessica Marsden, Note, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2553 (2014) (contending that the floodgates argument is unprincipled); 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) [hereinafter Musalo, *Protecting Victims*]; Reimann, *supra* note 158, at 1258; Rodriguez, *supra* note 108, at 340.

223. Grant, *supra* note 162, at 5.

224. In Guatemala, “36% of all Guatemalan women who live with a male partner suffer domestic abuse.” Comm’n on Human Rights, Rep. of the Special Rapporteur on Violence Against Women, its Causes and Consequences: Mission to Guatemala, U.N. Doc. E/CN.4/2005/72/Add.3, at 11 (2005). In El Salvador, a 2008 national survey found that “44% of women who had been married or lived with a partner had suffered psychological violence, 24% physical violence, and 12% sexual violence.” Human Rights Council, Rep. of the Special Rapporteur on Violence Against Women, its Causes and Consequences: Follow-Up Mission to El Salvador, U.N. Doc. A/HRC/17/26/Add.2, at 7 (2011). In Honduras, 74.6% of 16,000 complaints lodged in 2012 related to domestic violence. Human Rights Council, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences: Mission to Honduras, U.N. Doc. A/HRC/29/27/Add.1, at 1 (2015).

225. In 2014, roughly thirty three percent of the total asylum applicants in the United States derived from El Salvador, Guatemala, and Honduras (13,847 of 41,920). See *Asylum Statistics FY 2010-2014*, U.S. DEP’T OF JUSTICE (Mar. 2015), <https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy2010-fy2014-asylum-statistics-by-nationality.pdf>.

226. See Grant, *supra* note 162, at 5–7, 53 (providing a more in-depth discussion on the “floodgates” topic).

First, the refugee definition has built-in safeguards to avoid the floodgates problem.²²⁷ Even if domestic violence is deemed to be a form of persecution, applicants would still need to meet the other preconditions for asylum: the domestic violence must rise to the adequate level of persecution, the fear of persecution is well-founded, the applicant must prove nexus, and that he or she is outside his or her country of nationality and is unable or unwilling to return because of the persecution.²²⁸ By its nature, the “outside country of nationality” element is one of the largest hurdles faced by potential asylum seekers.²²⁹ Specifically, leaving one’s home country can be an extremely difficult task because it requires significant resources,²³⁰ and, as is often the case in an abusive relationship, the victim may not have access to the financial resources needed to make the trip.²³¹ Also, if the victim has children, he or she must make the difficult choice of either “leaving family behind, or exposing them to the risks of travel to the potential country of refuge.”²³² This is further complicated because many countries require that the non-travelling parent provide permission to the travelling parent to move a child internationally.²³³ Thus, the victim could be charged with kidnapping if he or she tries to move the kids to safety without first obtaining permission from his or her abuser.

Furthermore, past experience has proven that the floodgates theory should not be a concern. In 1993, Canada accepted gender-based persecution claims as a legitimate ground for asylum.²³⁴ In the two years following, Canada received 40,000 refugee claims, of which only two percent were identified as gender-based.²³⁵ Similarly, in 1996, when the BIA recognized that female genital mutilation (FGM) could form the basis for a claim of persecution,²³⁶ no substantial changes in applicant volume occurred.²³⁷ Accordingly, at the time

227. *Id.* at 5–6.

228. *See* Refugee Act of 1980, Pub. L. 96-212, §201, 94 Stat. 102, 102 (codified at 8 U.S.C. § 1101(a)(42)(A) (2000)); *supra* Section I.D.3.a (defining the nexus requirement); *see also* Grant, *supra* note 162, at 52 (“[I]f they do flee and enter the border of the United States, they will only be entitled to asylum after establishing all of the requirements of the refugee definition, which . . . is not any easy task.”).

229. Grant, *supra* note 162, at 51 (“[B]efore she is able to seek asylum from the United States, she must reach or enter the U.S. border.”).

230. *Id.* at 52.

231. Musalo, *Protecting Victims*, *supra* note 222, at 133.

232. *Id.*

233. Marsden, *supra* note 222, at 2555.

234. *See* Grant, *supra* note 162, at 53; Musalo, *Protecting Victims*, *supra* note 222, at 133; *see also* Reimann, *supra* note 158, at 1217–18.

235. Grant, *supra* note 162, at 53 (“The [two percent] figure has not been broken down into cases of domestic violence, but these would only represent a portion of the two percent.” (alteration in original)).

236. *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

237. *See Questions and Answers: The R-A- Rule*, U.S. DEP’T OF JUSTICE, IMMIGRATION & NATURALIZATION SERVS. (Dec. 7, 2000), <http://iwp.legalmomentum.org/reference/additional-materials/immigration/asylum/government-documents/R-A->

the *In re R-A* decision was made, the INS stated that it did not anticipate “a large number of claims based on domestic violence.”²³⁸ And, as one commenter pointed out, even when the “potential beneficiaries [of American asylum policy] included almost the entire adult female population of China,”²³⁹ the United States did not shy away from intervening on behalf of the victims of China’s one-child policy.²⁴⁰

Finally, the potential size of the applicant pool should not bar the United States from taking action on domestic violence. Asylum is currently allowed for anyone who can base his or her claim of persecution on account of race, religion, nationality, or political opinion—grounds that are broad and relatively unrestricted, and grounds that *did* open up the United States to a flood of applicants.²⁴¹ Yet, asylum is permitted upon these grounds because we believe that such persecution is so fundamentally wrong that it requires intervention. Accordingly, by protecting the victims of such persecution, we send a message to the world that these actions will not be tolerated. As the United States has done time and time again, it should officially recognize domestic violence as a viable grounds for asylum claims, to demonstrate to the world that domestic violence is similarly intolerable.

IV. CONCLUSION

For more than fifteen years, IJs have grappled with the domestic violence asylum applicant. The results have been pathetic—decisions are inconsistent and fueled by personal beliefs and judgments. This has put many victims at risk of continued persecution. In 1996, Congress took the extraordinary step of changing the refugee definition to provide Chinese victims of coercive population control methods a systematic route to asylum. Now, it is time for Congress to acknowledge that domestic violence is a form of persecution that requires similar action. The United States must demonstrate to other countries that domestic violence will no longer be dismissed as a private matter or a mere by-product of cultural norms. By amending the refugee definition and promulgating specific standards, the domestic violence issue could be addressed definitively and victims could finally be afforded the protection that the refugee laws are meant to deliver.

Rule_120700Q%20and%20A.pdf/view; see also Musalo, *Protecting Victims*, *supra* note 222, at 132–33; Reimann, *supra* note 158, at 1259.

238. U.S. Dep’t of Justice, Immigration & Naturalization Serv., *supra* note 237.

239. Marsden, *supra* note 222, at 2553 (alteration in original).

240. *Id.*

241. Reimann, *supra* note 158, at 1260.