

Post *Matter of A-R-C-G-*: An Expansion of American Compassion For International Domestic Violence Victims

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ABSTRACT

Asylum law was enacted in the United States as a social policy to assist and protect deserving international refugees. In a recent decision, *Matter of A-R-C-G-*, the Board of Immigration Appeals acknowledged for the first time in a precedential decision that at least *some* domestic violence victims are eligible for asylum relief through “particular social group” constructions. The Board held that “married women in Guatemala who are unable to leave their relationships” constitute a “particular social group” within the meaning of the Immigration and Nationality Act. Through this decision, the Board recognized a narrowly defined social group claim brought by a domestic violence victim. However, the precedential value of *Matter of A-R-C-G-* causes confusion in its practical application, as the boundaries for a cognizable social group relating to domestic violence are not defined in the decision.

This Comment first explores the evolving legislative and administrative history of “particular social group” requirements within asylum law, specifically with respect to domestic violence-related claims. In addition, this Comment explores the various interpretations of *Matter of A-R-C-G-*’s precedential value. This Comment then evaluates the adequacy of alternative forms of immigration relief for domestic violence victims already present within the United States. Finally, this Comment will recommend that adjudicators should broadly interpret *Matter of A-R-C-G-*’s precedential value when analyzing future domestic violence-related social group claims to include victims of various

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I. INTRODUCTION

In a recent precedential decision, *Matter of A-R-C-G-*,¹ the Board of Immigration Appeals (“Board”)² held that “married women in Guatemala who are unable to leave their relationships” constitute a “particular social group” within the meaning of the Immigration and Nationality Act (“the Act”).³ Through this decision, the Board embraced a narrowly defined “particular social group” claim brought by a domestic violence victim for the first time.⁴ The Board, however, failed to define the boundaries of the decision and questions remain unanswered as to which individuals with what types of experiences will qualify for relief.⁵ Although *Matter*

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

2. *See infra* note 19.

3. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 388–89; Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2012) (providing the asylum provision).

4. *See* Julia Preston, *In First for Court, Woman is Ruled Eligible for Asylum in U.S. on Basis of Domestic Abuse*, N.Y. TIMES (Aug. 29, 2014), http://www.nytimes.com/2014/08/30/us/victim-of-domestic-violence-in-guatemala-is-ruled-eligible-for-asylum-in-us.html?emc=edit_tnt_20140830&nlid=69662781&tntemail0=y&r=2.

5. *Recent Adjudication: Asylum Law – Membership in a Particular Social Group – Board of Immigration Appeals Holds that Guatemalan Woman Fleeing Domestic Violence Meets the Threshold Asylum Requirement*, 128 HARV. L. REV. 2090, 2090–97

of *A-R-C-G-* altered the scope of asylum law by concluding that *some* international domestic violence victims are eligible for asylum relief under “particular social group” constructions, the case has uncertain precedential value regarding the *type* of domestic violence-related victim that is eligible for relief.⁶

Given the importance of this decision to international domestic violence victims, *Matter of A-R-C-G-*’s precedential value should be broadly interpreted in future domestic violence-related social group decisions. Specifically, the Board should expand its recognition of social groups relating to domestic violence beyond the facts of *Matter of A-R-C-G-* to include victims of other nationalities, genders, marital statuses, and similar domestic abuse situations if they can meet the high burden of proof required.⁷

Part I of this Comment explores the evolving legislative and administrative history of “particular social group” requirements within asylum law, specifically with respect to domestic violence-related claims.⁸ Part II of this Comment examines the various interpretations of *Matter of A-R-C-G-*’s uncertain precedential value.⁹ Part III of this Comment evaluates the inadequacy of alternative forms of immigration relief for international domestic violence victims provided by United States immigration law.¹⁰ Finally, Part IV of this Comment recommends that adjudicators should broadly interpret the Board’s decision in *Matter of A-R-C-G-* as encompassing claims by future domestic violence victims of other nationalities, genders, marital statuses, and involving similar domestic abuse situations.¹¹

II. BACKGROUND

A. *A Brief History of Asylum Law and Refugee Status*

Asylum law was enacted in the United States as a social policy to assist deserving international refugees.¹² The international refugee protection regime began after World War II when government representatives drafted the 1951 United Nations Convention Relating to

(2015) (hereinafter *Recent Adjudication*); see *Matter of A-R-C-G-*, 26 I. & N. Dec. at 388–96.

6. *Recent Adjudication*, *supra* note 5, at 2097.

7. See *infra* note 162.

8. See *infra* Part II.A, II.B, II.C.

9. See *infra* Part III.A.

10. See *infra* Part III.B.

11. See *infra* Part III.C.

12. Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, in 36(2) HARV. INT’L REV. (2015), <http://hir.harvard.edu/personal-violence-public-matter-evolving-standards-in-gender-based-asylum-law/>.

the Status of Refugees¹³ and the 1967 United Nations Protocol Relating to the Status of Refugees (“Protocol”).¹⁴ The Protocol defined the term “refugee” as an individual with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group[,] or political opinion.”¹⁵ The United States, a party to the Protocol,¹⁶ has ratified and adopted (with slight variation) the international refugee definition in its domestic legislation.¹⁷ Specifically, the Act’s phrase “membership in a particular social group” originated in the internationally accepted Refugee Convention and Protocol.¹⁸

Recently, the Board of Immigration Appeals¹⁹ approved a narrowly defined domestic violence-related asylum claim for relief.²⁰ However, statutory asylum law does not explicitly include domestic violence-based claims within its scope.²¹ In order to circumvent a denial of an asylum request based on a domestic violence claim, an applicant may propose a “particular social group” of related individuals similarly situated that have been subject to domestic violence.²² The applicant must prove that the proposed social group is: (1) comprised of individual members who share a common immutable characteristic; (2) defined with particularity;

13. U.N. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150.

14. U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. Article 1 contains the refugee definition. *Id.*

15. Musalo, *supra* note 12.

16. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 n.21 (1987) (“Although the United States has never been a party to the 1951 Convention, it is a party to the Protocol, which incorporates the Convention’s definition in relevant part.”).

17. See Musalo, *supra* note 12; *Developments in the Law Immigration — Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1352–53 (1983) (noting the Refugee Act of 1980 was enacted by Congress due to the continuing “plight of refugees” and expanding on the definition of “refugee”).

18. See *Matter of Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985); see also 8 U.S.C. § 1158 (2012).

19. The Board is an administrative body within the Department of Justice that is responsible for reviewing U.S. immigration court decisions. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 3.05 (Matthew Bender rev. ed., 2015) (describing that after Congress transferred the administration of immigration to the Department of Justice in 1940, the Board of Immigration Appeals “was given the power to make final decisions, subject only to possible review by the Attorney General”); Stephen H. Legomsky, *Forum Choices for Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1307 (1986) (explaining that the Board is now located within the Department of Justice’s Executive Office for Immigration Review which decides cases based on the administrative record and selects certain precedential decisions for publication that bind immigration judges and the Department of Homeland Security).

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

21. See 8 U.S.C. § 1158 (2012).

22. See *id.*

and (3) socially distinct within the society in question.²³ Victims of domestic violence may then attempt to qualify for asylum relief and protection under the enumerated “particular social group” avenue provided within the Act’s statutory language.²⁴

The following decisions by the Board interpreting the statutory term “particular social group” indicate that asylum law is expanding and witnessing greater acceptance of various asylum claims through this enumerated ground.²⁵ Most recently, this trend was depicted through the Board’s interpretation of social group requirements with respect to domestic violence-related claims in *Matter of A-R-C-G*.²⁶ In order to understand the Board’s current position, it is important to understand the evolution of Board decisions contributing to the development of the current “particular social group” requirements that a domestic violence victim must demonstrate in order to be eligible for asylum relief.

1. Matter of Acosta

First, in *Matter of Acosta*,²⁷ the Board began the task of interpreting and clarifying the meaning of the term “particular social group” pursuant to statutory asylum law.²⁸ The Board indicated that an asylum applicant bears the burden of proof and the burden of persuasion in requests for relief by a preponderance of the evidence.²⁹ In order to establish eligibility for asylum relief, the applicant must satisfy the elements of the definition of “refugee” as provided in the Act.³⁰ The refugee provision requires that the applicant: (a) have a fear of persecution, (b) prove that

23. See *Matter of Acosta*, 19 I. & N. Dec. at 233; see also *Matter of W-G-R*, 26 I. & N. Dec. 208, 213, 216 (B.I.A. 2014).

24. See generally 8 U.S.C. § 1158 (2012) (providing the authority for any noncitizen to apply for asylum while physically present in the United States).

25. See generally *Matter of A-R-C-G*, 26 I. & N. Dec. 388 (B.I.A. 2014); *Matter of W-G-R*, 26 I. & N. Dec. 208; *Matter of M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014); *Matter of R-A*, 22 I. & N. Dec. 906 (B.I.A. 1999) (en banc), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008); *Matter of Acosta*, 19 I. & N. Dec. 211 (discussing Board decisions that interpret the meaning of “particular social group”).

26. *Matter of A-R-C-G*, 26 I. & N. Dec. at 388–96.

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

28. *Id.* at 211–37.

29. *Id.* at 215; 8 U.S.C. § 1158(b)(1)(B) (2012) (defining the burden of proof).

30. See 8 U.S.C. § 1101(a)(42)(A) (2012) (defining “refugee”); see also *Matter of Acosta*, 19 I. & N. Dec. at 213. A “refugee” is “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable and 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” 8 U.S.C. § 1101(a)(42)(A) (2012).

the fear is “well-founded,”³¹ (c) persuade the court that the persecution feared is “on account of race, religion, nationality, membership in a particular social group, or political opinion,”³² and (d) be unwilling to return to his or her home country or country of last habitual residence due to a well-founded fear of persecution.³³ Specifically, the Board reasoned that an applicant may qualify as a refugee when there is evidence presented that the persecution was directed at the applicant because of his or her membership in a group of persons sharing a common immutable characteristic.³⁴

Even though the Board did not precisely address domestic violence-related social group claims in this decision, *Matter of Acosta* began the trend of interpreting the meaning of the ambiguous statutory term “particular social group.”³⁵ The Board took a broad approach when interpreting this term, as illustrated by their decision that an immutable trait must be a characteristic that is “fundamental to [] individual identities [of group members].”³⁶ This reading of the immutability requirement allowed domestic violence victims seeking asylum relief to take advantage of social group formulations based on characteristics beyond the traditional immutable traits provided in the statute.³⁷

2. Matter of R-A-

Over ten years later, in *Matter of R-A-*,³⁸ the Board determined for the first time that victims of domestic violence could establish

31. See *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (B.I.A. 1987) (finding that the applicant must establish he or she “possesses a belief or characteristic the persecutor wants to overcome,” the persecutor is aware, or could become aware, that he or she possesses this belief or characteristic, and the persecutor has the “capability of punishing” and the “inclination to punish” the applicant).

32. 8 U.S.C. § 1158(b)(1)(B)(i) (2012) (“To establish that the applicant is a refugee within the meaning of [section 1101(a)(42)(A)], 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.”).

33. 8 U.S.C. § 1101(a)(42)(A) (2012); *Matter of Acosta*, 19 I. & N. Dec. at 219.

34. See *Matter of Acosta*, 19 I. & N. Dec. at 233 (defining “common immutable characteristic” as a characteristic that is beyond the power of the members of the group to change or is so fundamental to their identities that it should not be required to change).

35. *Id.*

36. *Id.* (“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.”).

37. *Id.* at 231; see also 8 U.S.C. § 1158(b)(1)(B)(i) (2012) (listing the protected grounds for refugee status).

38. *Matter of R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999) (en banc), *vacated*, 22 I. & N. Dec. 906 (AG 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I. & N. Dec. 629 (A.G. 2008).

membership in a particular social group for purposes of asylum relief.³⁹ However, the Board also restricted this interpretation by providing that the social group could not be constructed solely upon the members' domestic abuse.⁴⁰

Matter of R-A- concerned the asylum application of Ms. Alvarado, a native and citizen of Guatemala.⁴¹ From the start of her young marriage, Ms. Alvarado's husband subjected her to violent physical and sexual abuse.⁴² Almost daily, her husband would rape and forcibly sodomize her, while on numerous occasions beating her into unconsciousness.⁴³

When Ms. Alvarado called for police assistance, the police failed to respond.⁴⁴ When she appeared before a Guatemalan judge, she was informed that the law "would not interfere in domestic disputes."⁴⁵ With no legal means of recourse or protection, Ms. Alvarado escaped to her family members' homes in Guatemala and tried fleeing Guatemala City with her children, but her husband always found her.⁴⁶ With assistance, Ms. Alvarado finally fled Guatemala without her children and applied for asylum in the United States under the proposed social group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."⁴⁷

In evaluating whether Ms. Alvarado's social group claim was cognizable, the Board announced that an applicant must show how the chosen immutable characteristic is "understood in the [applicant's] society," such that persecutors would identify the group members as "warranting suppression or infliction of harm."⁴⁸ Further, the Board indicated that the proposed group must be understood in the specific society as a faction or recognized part of the population.⁴⁹ The Board suggested that Ms. Alvarado failed to demonstrate that victims of spousal abuse viewed *themselves* as members of the proposed group.⁵⁰ In

39. *Id.* at 917.

40. *Id.*

41. *Id.* at 908; see generally *Domestic Violence-Based Asylum Claims: CGRS Practice Advisory*, CTR. FOR GENDER & REFUGEE STUDIES 3 (Sept. 12, 2014), [https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Domestic%20Violence-Based%20Asylum%20Claims%20\(Sept%2012,%202014\).pdf](https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Domestic%20Violence-Based%20Asylum%20Claims%20(Sept%2012,%202014).pdf) (hereinafter *Practice Advisory*).

42. *Matter of R-A-*, 22 I. & N. Dec. at 908.

43. *Id.* at 908–09.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 909, 911.

48. *Id.* at 918.

49. *Id.*

50. *Id.*

addition, the Board found that Ms. Alvarado failed to establish the victims' spouses were motivated to inflict harm based on the victims' membership in the group.⁵¹ Because the Board determined that an applicant must establish both a common immutable trait and "social visibility"⁵² to form a particular social group, and Ms. Alvarado did not prove either of those elements, the Board concluded that Ms. Alvarado's claim did not warrant asylum relief.⁵³

Regarding the social visibility requirement in the domestic violence context, the Board noted that an applicant must prove the prominence of spousal abuse within the society in question.⁵⁴ Despite the spousal abuse suffered by Ms. Alvarado and other Guatemalan women, the Board reasoned that Ms. Alvarado failed to prove that spousal abuse was a common and recognized societal attribute in Guatemala.⁵⁵ Thus, the Board determined that "the mere existence of shared descriptive characteristics is insufficient to qualify those possessing the common characteristics as members of a particular social group."⁵⁶

In sum, the Board held that even if Ms. Alvarado's proposed social group was cognizable, she did not establish that her husband harmed her "on account of" her membership in such a group.⁵⁷ Although Ms. Alvarado was unsuccessful with her asylum application before the Board, the Attorney General remanded her case on appeal.⁵⁸ The Attorney General's discretionary act ordered the Board to revisit domestic violence-related asylum claims and encouraged the production of a uniform standard.⁵⁹ Though *Matter of R-A-* lacked precedential value⁶⁰ for domestic violence victims to base future social group claims, this decision was not the end for domestic violence-related social group

51. *Id.* at 918–19.

52. This concept will be discussed more fully in the next paragraph.

53. See *Matter of R-A-*, 22 I. & N. Dec. at 927 ("We are not persuaded that the abuse occurred because of her membership in a particular social group or because of an actual or imputed political opinion.").

54. *Id.* at 919.

55. *Id.*

56. *Id.*

57. *Id.* at 920.

58. See *Matter of R-A-*, 24 I. & N. Dec. 629, 632 (A.G. 2008).

59. See *id.* at 631–32 (remanding to the Board for reconsideration of the issues presented with respect to asylum claims based on domestic violence).

60. See *Practice Advisory*, *supra* note 41, at 4–5 ("[I]n December 2009, after enduring more than a decade of legal limbo, Ms. Alvarado was granted asylum. Because the grant was by [the Department of Homeland Security's] stipulation, there is no extensive [immigration judge] decision; the judge's order, which is less than a sentence long, simply refers to the agreement of the parties. Because the *R-A-* case had become the battleground on which the issue of domestic violence as a basis for asylum had been fought for more than a decade, the victory had great symbolic significance. However, it has no binding precedential value.").

cases. Before reaching the Board's recent precedential domestic violence-related decision, it is important to fully understand the "particular social group" requirements discussed in *Matter of R-A*.

B. "Particular Social Group" Requirements

1. Social Distinction and Particularity⁶¹

In *Matter of W-G-R*⁶² and *Matter of M-E-V-G*,⁶³ the Board further unpacked the particular social group requirements of "social distinction" and "particularity," which asylum applicants must satisfy in order to qualify for relief.⁶⁴ In *Matter of W-G-R*, the Board noted its continued deference to its immutability standard provided in *Matter of Acosta* and to the Act, which defines the prerequisite elements for an applicant to obtain refugee status.⁶⁵ The Board, however, clarified its interpretation of the term "particular social group" by holding that particularity and social distinction are also prerequisites for constructing a cognizable social group claim.⁶⁶

Adjudicators of social group cases often encountered confusion and differing understandings of how the Board interpreted the social distinction, formerly known as social visibility, requirement.⁶⁷ This requirement exemplifies the importance of society's perception or recognition of a particular social group.⁶⁸ However, the term "social visibility" implied an ocular view of a social group, which the Board indicated was not its intention.⁶⁹ Thus, the Board renamed the term

61. Although the following decisions involve different forms of persecution, they are important in understanding domestic violence-related asylum claims because they further clarify the social distinction and particularity standards.

62. *Matter of W-G-R*, 26 I. & N. Dec. 208 (B.I.A. 2014) (discussing former gang members who renounced gang membership).

63. *Matter of M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014) (discussing young people who resisted gang membership).

64. *Matter of W-G-R*, 26 I. & N. Dec. at 208–226; *Matter of M-E-V-G*, 26 I. & N. Dec. at 227–253. The social distinction requirement was formerly known as "social visibility." See *Matter of W-G-R*, 26 I. & N. Dec. at 211.

65. *Matter of W-G-R*, 26 I. & N. Dec. at 212; see generally *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985) (providing the immutability standard); 8 U.S.C. § 1101(a)(42) (2012) (defining "refugee").

66. *Matter of W-G-R*, 26 I. & N. Dec. at 212.

67. *Id.* at 211 (citing *Umaña-Ramos v. Holder*, 724 F.3d 667, 672–73 (6th Cir. 2013) and *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087 (9th Cir. 2013) as examples).

68. *Id.* at 216.

69. *Id.* ("[S]ocial visibility does not mean 'ocular' visibility—either of the group as a whole or of individuals within the group—any more than a person holding a protected religious or political belief must be 'ocularly' visible to others in society.").

“social distinction” to avoid further confusion in the adjudication of social group cases.⁷⁰

Despite this clarification, a central question remained regarding the Board’s interpretation of a related term—“perception.”⁷¹ The Board reasoned in *Matter of W-G-R-* that to be perceived as a social group, the society in question does not necessarily need to be able to identify individual group members, but the common immutable trait must be such that defines the group within the society.⁷² The Board also explicitly rejected any finding of social distinction based on a persecutor’s perception.⁷³ As a result, this element has a significant impact on a domestic violence victim’s ability to establish a particular social group, especially if the victim’s society does not recognize or identify their membership in the proposed social group because the common immutable trait is non-physical.⁷⁴

To further clarify the elements necessary to establish a social group, *Matter of M-E-V-G-* sought to illuminate the continued overlap between the social distinction and particularity requirements.⁷⁵ Courts, and the Board itself, have improperly blended these two elements in past decisions, despite the fact that these elements serve very different roles in particular social group construction.⁷⁶

In an attempt to dissect the differences between particularity and social distinction, *Matter of M-E-V-G-* noted several decisions where proposed social groups were defined with particularity, but would not be considered socially distinct within a literal, ocular interpretation of the requirement.⁷⁷ Groups that have been accepted by the Board as cognizable social groups include homosexuals targeted for their societal status as homosexuals and young tribal women opposed to female genital mutilation that was a common practice within their tribe.⁷⁸ The

70. *Id.*

71. *See id.* at 216–17.

72. *Id.* at 217.

73. *Id.* at 216–17. With respect to domestic violence victims, the persecutor’s perception may still be relevant. *See id.* at 218; *see also* *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1089–90 (9th Cir. 2013) (reasoning that the perception of the persecutor is relevant in determining the existence of a particular social group).

74. *See, e.g.,* *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 228 (B.I.A. 2014) (discussing the resistance of gang membership); *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997) (discussing Filipinos of mixed ancestry); *see also* Jillian Blake, *Getting to Group Under U.S. Asylum Law*, 90 NOTRE DAME L. REV. ONLINE 167, 167–81 (2015).

75. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 240–41.

76. *Id.*

77. *Id.* at 238.

78. *Id.* at 238–39 (citing *Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) (discussing female genital mutilation) and *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990) (concerning homosexuals)).

immutable characteristics at issue in these decisions are not literally visible, yet societies can still meaningfully distinguish the groups' members.⁷⁹

As both *Matter of W-G-R-* and *Matter of M-E-V-G-* reveal, the Board has recognized social distinction as a requirement for cognizable social group formation.⁸⁰ The Board's non-ocular interpretation of this element is valuable to domestic violence victims seeking refuge because ocular visibility would be difficult, if not impossible, to prove if spousal abuse is not evident from physical injuries or if these injuries have disappeared over time.⁸¹

2. Constructing a Cognizable Social Group

As a result of the Board's decisions interpreting the statutory asylum provision, an applicant must now establish that three different elements exist in order to qualify for asylum relief based on his or her membership in a "particular social group."⁸² An applicant must prove that the proposed social group is: (1) comprised of individual members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question.⁸³

First, regarding the common immutable characteristic requirement,⁸⁴ this characteristic must be something that defines the social group, and the group either cannot change it or should not be required to change it to avoid persecution.⁸⁵ Second, regarding the particularity requirement, the proposed group must be "sufficiently distinct" such that it provides a clear standard for determining who falls within the group.⁸⁶ Many asylum applicants fail to adequately establish this element because not every immutable characteristic is sufficiently precise to define a social group within the applicant's community.⁸⁷ Third, regarding the social distinction requirement,⁸⁸ the proposed group

79. See generally *Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

80. But see *Practice Advisory*, supra note 41, at 13 (noting the Third and Seventh Circuits continue to follow the *Acosta* immutability standard only).

81. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 211 (B.I.A. 2014); *Matter of M-E-V-G-*, 26 I. & N. Dec. at 228.

82. See generally *Matter of W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014); *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985) (explaining particular social group precedential Board decisions).

83. See *Matter of W-G-R-*, 26 I. & N. Dec. at 213, 216; see also *Matter of Acosta*, 19 I. & N. Dec. at 233.

84. See *Matter of Acosta*, 19 I. & N. Dec. at 233.

85. *Matter of W-G-R-*, 26 I. & N. Dec. at 213.

86. *Id.* at 210–15.

87. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239.

88. See *Matter of W-G-R-*, 26 I. & N. Dec. at 216.

must be perceived and recognized as a group by the society in question, although not necessarily seen by society in the ocular sense of this concept.⁸⁹

Finally, for any claim regarding the existence of a particular social group, the fact finder must evaluate the evidence presented by the applicant in the context of the applicant's home country.⁹⁰ All these elements evolved in social group decisions outside of the domestic violence context, but have also had an important impact on decisions within the domestic violence context.⁹¹ The Board's continued development and interpretation of these requirements provided a basis for their recent decision recognizing a "particular social group" constructed by a domestic violence victim.⁹²

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

In *Matter of A-R-C-G-*,⁹³ the Board interpreted the statutory term "particular social group" to encompass narrowly defined asylum claims relating to domestic violence by concluding that "married women in Guatemala who are unable to leave their relationships" constituted a particular social group.⁹⁴ In this decision, the Board delineated various justifications for its interpretation that cognizable social groups can embrace domestic violence-related claims.⁹⁵

Under the *Matter of Acosta* framework, the Board recognized the immutable characteristic of gender for the first time in the domestic violence context.⁹⁶ In addition, the Board reasoned that where the applicant is unable to leave a marital relationship, marital status itself might constitute an immutable characteristic depending on the facts of the case.⁹⁷ Notably, the social group at issue in this decision was not defined solely by the fact that the applicant had suffered domestic

89. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 240.

90. *See Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 392 (B.I.A. 2014) (explaining that the fact finder is typically an immigration judge).

91. *See, e.g.*, *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008); *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (B.I.A. 2007); *Matter of C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006).

92. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 388–96.

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

94. *Id.* at 388–96.

95. *Id.* at 392–96.

96. *See id.* at 392; *see also Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *Recent Adjudication*, *supra* note 5, at 2093.

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

violence, as social groups must be defined by a characteristic other than the risk of being persecuted.⁹⁸

The Board determined that the proposed social group was defined with particularity because the traits used to establish membership in the group were commonly accepted and widely recognized in Guatemalan society.⁹⁹ The social distinction requirement was met with evidence that Guatemalan society makes meaningful distinctions based on the immutable characteristic of being a married woman in a domestic relationship that she cannot leave.¹⁰⁰

In contrast to the proposed social group in *Matter of R-A-* that failed to meet the social distinction requirement,¹⁰¹ *Matter of A-R-C-G-* involved a social group defined by “commonly accepted definitions within Guatemalan society” due to “societal expectations about gender and subordination” as well as legal constraints on victims’ freedom to leave relationships.¹⁰² The Board in *Matter of A-R-C-G-* emphasized that the Guatemalan police refused to interfere in a marital relationship when the applicant sought protection.¹⁰³ In addition, the applicant’s evidence revealed that Guatemala maintains a culture of “machismo and family violence” that perpetuates violent domestic relations even though Guatemala has enacted laws to prosecute such crimes.¹⁰⁴ Thus, the Board established that within the context of domestic violence, a finding of social distinction turns on the facts and evidence provided in each case.¹⁰⁵

In *Matter of A-R-C-G-*, the Board acknowledged that cases arising out of domestic violence or spousal abuse “involve unique and discrete

98. *Id.* at 393 n.14 (citing *Matter of W-G-R-*, 26 I. & N. Dec. 208, 215 (B.I.A. 2014)).

99. *Id.* at 393.

100. *Id.*

101. As previously noted, *Matter of R-A-* involved the proposed social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.” *Matter of R-A-*, 22 I. & N. Dec. 906, 909, 911 (B.I.A. 1999) (en banc).

102. Compare *Matter of R-A-*, 22 I. & N. Dec. 906, with *Matter of A-R-C-G-*, 26 I. & N. Dec. at 393–94 (indicating that even the Department of Homeland Security conceded that a cognizable particular social group existed).

103. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 393.

104. *Id.* (citing U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Country Reports on Human Rights Practices for 2008: Guatemala* (Feb. 25, 2009), <http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119161.htm> (determining that the Guatemalan “police had minimal training or capacity for investigating sexual crimes or assisting victims of sexual crimes”)); see generally Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199 (2009).

105. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 394–95 (noting that the Board would consider documented country conditions, law enforcement statistics, expert witnesses, the applicant’s past experiences, and other credible sources of information).

issues not present in other particular social group determinations.”¹⁰⁶ The Board recognized that in some cases involving such abuse, the victim will be unable to escape the abuse not only due to her relationship status, but also because her country will not protect her.¹⁰⁷ Accordingly, the main purposes and social policies behind United States asylum law are arguably satisfied when relief is granted in narrow circumstances for individuals requesting refugee status whose countries will not protect them from persecution.¹⁰⁸

In sum, the Board expanded the boundaries of prior cognizable social groups to encompass narrowly defined claims brought by victims of domestic violence.¹⁰⁹ The Board extended its decision in this case to a claim brought by a Guatemalan domestic violence victim, but did not go beyond this concept to decide whether domestic violence-*based* claims would be sufficient, or even acceptable, in a later case.¹¹⁰ Nevertheless, it is clear that domestic violence rises to the level of persecution in certain cases.¹¹¹

III. ANALYSIS

In *Matter of A-R-C-G-*, the latest in a line of domestic violence-related asylum cases,¹¹² the Board left room in its interpretation of particular social groups to encompass domestic violence-related asylum claims in situations other than the narrow facts of *Matter of A-R-C-G-*.¹¹³ Significantly, the Board left open the question of whether other international domestic violence victims may qualify for asylum relief under similar “particular social group” constructions comprised of different nationalities, genders, marital statuses, and domestic abuse situations.¹¹⁴ By clarifying this uncertainty, the Board could

106. *Id.*

107. *Id.* at 393–94.

108. *See* Musalo, *supra* note 12.

109. *Practice Advisory*, *supra* note 41, at 6.

110. *Recent Adjudication*, *supra* note 5, at 2097 (“*A-R-C-G-* meaningfully moves the law of asylum toward more consistent and expansive recognition of domestic violence-based asylum claims.”). Notably, the Board did not provide a general rule that all domestic violence-based particular social groups are cognizable. *See id.* at 2095–96; *see also Matter of A-R-C-G-*, 26 I. & N. Dec. at 393–95 (stating that “even within the domestic violence context” social distinction, particularity, and nexus will “depend on the facts and evidence in each individual case”).

111. *Recent Adjudication*, *supra* note 5, at 2097.

112. *See generally* *Matter of R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999) (en banc); DHS’s Supplemental Brief at 1–31, *Matter of L-R-* (B.I.A. 2009) (unpublished), <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf> (hereinafter Supplemental Brief).

113. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 395–96; Musalo, *supra* note 12; *Recent Adjudication*, *supra* note 5, at 2097.

114. *Recent Adjudication*, *supra* note 5, at 2096–97.

conclusively open asylum relief to a greater number of domestic violence victims worldwide.

A. *Interpretations of Matter of A-R-C-G- 's Precedential Value*

In order to understand *Matter of A-R-C-G-*'s precedential value, it is important to look to the facts of the case. *Matter of A-R-C-G-* involved a noncitizen named Ms. Aminta Cifuentes and her three minor children, all natives and citizens of Guatemala who entered the United States without inspection in 2005.¹¹⁵ Once physically present within the United States, Ms. Cifuentes filed a timely application for asylum and withholding of removal under the Act.¹¹⁶ Ms. Cifuentes' application provided various accounts of repugnant abuse by her spouse that she suffered throughout her life in Guatemala.¹¹⁷

Beginning at age seventeen, Ms. Cifuentes suffered both physical and sexual abuse at the hands of her husband, including rape and weekly beatings after she gave birth to their first child.¹¹⁸ On one occasion, Ms. Cifuentes' husband broke her nose and on another, he threw paint thinner on her, resulting in severe burns on her breast.¹¹⁹

Despite numerous pleas to the Guatemalan police for assistance, Ms. Cifuentes was told the police would not interfere in her marital relationship.¹²⁰ Without assistance from the police or the Guatemalan government, Ms. Cifuentes resorted to finding a way to escape with her three minor children.¹²¹ She repeatedly attempted to leave the relationship and stay with her father, but each time she left, her husband found her and threatened to kill her if she did not return to him.¹²² As a result, Ms. Cifuentes left Guatemala in 2005 with her children to seek asylum in the United States, believing that if she ever returned to her native country, her husband would find and kill her.¹²³

On appeal from the immigration judge's decision, the Department of Homeland Security conceded that Ms. Cifuentes had established past persecution on account of her membership in a "particular social group" comprised of "married women in Guatemala who are unable to leave their relationship."¹²⁴ Accordingly, *Matter of A-R-C-G-* indicates that

115. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 389.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* This fact is similar to Ms. Alvarado's account in *Matter of R-A-*. See *Matter of R-A-*, 22 I. & N. Dec. 906, 908–09 (B.I.A. 1999) (en banc).

121. *Recent Adjudication*, *supra* note 5, at 2090–91.

122. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 389.

123. *Id.*

124. *Id.* at 392.

some domestic violence victims can be eligible for asylum.¹²⁵ However, the ambiguity encompassed in this decision's holding will provide a basis for different interpretations of the decision's application to asylum claims and situations unlike that in *Matter of A-R-C-G-*.¹²⁶

If *Matter of A-R-C-G-*'s holding is interpreted as limited to the facts of the decision, domestic violence-related asylum will only be available to applicants who can establish they are "Guatemalan women who cannot leave their abusive relationships."¹²⁷ Such a narrow reading would restrict individuals of other nationalities, genders, and marital statuses, who suffered similar forms of domestic abuse from utilizing analogous social group constructions to support their claims for asylum relief in the United States.¹²⁸ Advocates of this interpretation *Matter of A-R-C-G-*'s holding predict that otherwise, "the numbers of foreign women seeking asylum could soon overwhelm the system."¹²⁹

However, without an asylum opportunity for victims of domestic violence from countries other than Guatemala, whose governments will not protect them from abuse, it is likely that victims will be encouraged to unlawfully enter the United States as a means of escape and recourse.¹³⁰ This results in a political, social, and practical dichotomy: either read *Matter of A-R-C-G-* as broadening the means for domestic violence victims to obtain lawful presence or add persecuted individuals to the millions of undocumented migrants already illegally present within the United States.

B. *Alternative Forms of Immigration Relief for Domestic Violence Victims Present in the United States*

In order to understand the importance of reading *Matter of A-R-C-G-* as providing a broad basis for domestic violence victims to establish cognizable asylum claims, it is necessary to unpack the reasons why other forms of immigration relief for domestic violence victims are insufficient or inapplicable. Other potential remedies for domestic

125. *Recent Adjudication*, *supra* note 5, at 2097.

126. *See Matter of A-R-C-G-*, 26 I. & N. Dec. at 392, 395 (involving married women, located in Guatemala, who are unable to leave their abusive relationships); *see also Recent Adjudication*, *supra* note 5, at 2097.

127. Preston, *supra* note 4.

128. *Id.* ("[T]he decision would be seized by many women whose cases are already in court, including from other countries where domestic violence is rampant, and by women who crossed the Southwest border recently.").

129. *Id.*

130. *See* Cindy Carcamo, *Domestic violence ruling may help thousands of immigrants get asylum*, L.A. TIMES (Sept. 5, 2014), <http://www.latimes.com/nation/la-na-ff-immig-domestic-20140906-story.html> (describing an asylum applicant's unlawful entry into the United States in order to escape domestic abuse).

violence victims physically present in the United States include, among others, self-petitions for immigrant status under the Violence Against Women Act (“VAWA”),¹³¹ VAWA cancellation of removal as a defense to removal proceedings,¹³² U-visas,¹³³ the family or employment-based immigrant preference groups,¹³⁴ humanitarian asylum,¹³⁵ withholding of removal,¹³⁶ and protection under the Convention Against Torture (“CAT”).¹³⁷ Still, many of these remedies will not assist individuals when they have suffered domestic abuse outside the United States, their abuser is not a U.S. citizen or lawful permanent resident, they are not placed in removal proceedings, they have insufficient family ties in the United States or employment qualifications to apply for an immigrant visa, or the harm they suffered does not amount to torture.¹³⁸ Thus, in some cases asylum is likely the only viable avenue for domestic violence victims to lawfully and indefinitely remain in the United States.

First, under the VAWA, abused individuals can self-petition for lawful permanent resident status or seek cancellation of removal if in removal proceedings.¹³⁹ In order to obtain relief, the individual must meet various criteria, including a qualifying spousal relationship, meaning the individual is married to or intended to marry an abuser who is a U.S. citizen or lawful permanent resident.¹⁴⁰ Yet, domestic violence victims, such as Ms. Alvarado and Ms. Cifuentes, would be unable to utilize the VAWA remedies if their spouses do not lawfully reside in the United States.¹⁴¹ Therefore, these remedies do not reach a large subset of international domestic violence victims that would likely be encompassed under a more expansive interpretation of the Board’s holding in *Matter of A-R-C-G-*.

Pursuant to § 101(a)(15)(U) of the Act, those who suffer substantial physical or mental abuse as a result of violence, including domestic

131. 8 U.S.C. § 1154(a)(1) (2012) (providing the VAWA provisions).

132. 8 U.S.C. § 1229b(b)(2) (2012) (providing the VAWA special rule cancellation provision).

133. 8 U.S.C. § 1101(a)(15)(U) (2012) (providing the U-visa provision).

134. 8 U.S.C. § 1153(a) (2012) (providing the family-based provision); 8 U.S.C. § 1153(b) (2012) (providing the employment-based provision).

135. Humanitarian Asylum Regulation, 8 C.F.R. § 1208.13(b)(1)(iii) (2016); *see also* *Matter of L-S-*, 25 I. & N. Dec. 705, 710 (B.I.A. 2011).

136. 8 U.S.C. § 1231(b)(3)(A) (2012).

137. *See* 8 C.F.R. §§ 1208.16, 1208.18 (2016).

138. *See generally* 8 U.S.C. § 1154(a)(1)(A) (2012); 8 U.S.C. § 1101(a)(15)(U) (2012); 8 U.S.C. § 1153(a) (2012); 8 U.S.C. § 1153(b) (2012); 8 C.F.R. §§ 1208.16, 1208.18 (2016).

139. *See* 8 U.S.C. §§ 1154(a)(1), 1229b(b)(2) (2012).

140. *See* 8 U.S.C. §§ 1154(a)(1), 1229b(b)(2)(A)(i) (2012).

141. *See* 8 U.S.C. §§ 1154(a)(1), 1229b(b)(2) (2012); *see also* *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389–90 (B.I.A. 2014); *Matter of R-A-*, 22 I. & N. Dec. 906, 908–10 (B.I.A. 1999) (en banc).

violence and sexual assault, may apply for a nonimmigrant U-visa that would confer temporary lawful status.¹⁴² However, the violence inflicted upon the victim must occur in the United States or violate U.S. law, and the victim must be able to provide assistance to law enforcement in the investigation or prosecution of criminal activity.¹⁴³ As a result, victims like Ms. Alvarado, Ms. Cifuentes, and a similar subset of international domestic violence victims would be unable to meet the requirements necessary to obtain this nonimmigrant visa because law enforcement would likely lack jurisdiction to investigate or prosecute criminal activity that occurred outside the United States.¹⁴⁴

Domestic violence victims that have certain family members in the United States may be able to take advantage of the family-based preference program.¹⁴⁵ This immigration program provides visas for applicants who have certain family members in the United States, including applicants who are children and siblings of U.S. citizens or lawful permanent residents.¹⁴⁶ Even if a domestic violence victim possesses a qualifying family member, the immigrant visa is still subject to a quota, and wait times can be extraordinary depending on the applicant's native country and priority date.¹⁴⁷ Moreover, under the employment-based preference program, a domestic violence victim must possess one of the enumerated forms of employment or degrees in order to qualify.¹⁴⁸ For either of these preference categories, the familial ties or employment circumstances of the specific individual are crucial to obtaining relief.¹⁴⁹ However, many victims that suffer domestic violence-related persecution may not have the requisite family connections or employment history necessary for relief under these options.

Humanitarian asylum is granted in the absence of a well-founded fear of persecution and may be granted to an applicant who suffered past

142. See 8 U.S.C. § 1101(a)(15)(U) (2012).

143. See *id.*; *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. Citizenship and Immigr. Services, <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last updated July 28, 2016).

144. See *Matter of A-R-C-G-*, 26 I. & N. Dec. at 389–40; *Matter of R-A-*, 22 I. & N. Dec. at 908–10.

145. See 8 U.S.C. § 1153(a) (2012).

146. *Id.*

147. *Visa Bulletin For February 2016*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-february-2016.html> (last visited Oct. 28, 2016) (citing family-based immigrant visa applicants from China, India, Mexico, and the Philippines with the longest wait times due to the quotas or numerical caps).

148. See generally 8 U.S.C. § 1153(b) (2012).

149. See 8 U.S.C. § 1153 (2012).

persecution when the applicant has demonstrated: (a) “compelling reasons” for being unable to return to their home country arising out of the severity of the past persecution, or (b) “a reasonable possibility that he or she may suffer other serious harm upon removal to that country.”¹⁵⁰ Despite these seemingly favorable requirements for domestic violence victims, humanitarian asylum is warranted only if the victim is first able to successfully demonstrate past persecution on account of one of the five protected grounds, including “membership in a particular social group.”¹⁵¹ The complex burden-shifting requirements of humanitarian asylum are beyond the scope of this Comment, yet it is important to note that in order for an asylum applicant to establish eligibility for humanitarian asylum, the applicant must still demonstrate refugee status.¹⁵² Therefore, like an asylum applicant, a domestic violence victim would likely still need to establish membership in a cognizable social group to qualify for humanitarian asylum relief.

The withholding of removal provision provides that the Attorney General may not remove a person to a country where his or her “life or freedom would be threatened” because of any of the five protected grounds.¹⁵³ If an applicant demonstrates it is more likely than not that he or she would be subject to persecution on account of a protected ground, withholding of removal must be granted.¹⁵⁴ As this burden of proof is higher than for asylum, an applicant who fails to establish asylum eligibility necessarily fails to establish eligibility for withholding of removal.¹⁵⁵ Thus, a domestic violence victim will be ineligible for withholding of removal if he or she is unable to demonstrate membership in a cognizable social group or a nexus between the abuse suffered and one of the other protected grounds.¹⁵⁶

150. Humanitarian Asylum Regulation, 8 C.F.R. § 1208.13(b)(1)(iii) (2016); *see also* Matter of L-S-, 25 I. & N. Dec. 705, 710 (B.I.A. 2011).

151. *See Matter of L-S-*, 25 I. & N. Dec. at 710; *see also* Sarah Sherman-Stokes, *Other Serious Harm: The Neglected Stepchild of Humanitarian-Asylum Law*, 17-16 BENDER’S IMMIGR. BULL. 2 (2012).

152. *Matter of L-S-*, 25 I. & N. Dec. at 710; *see* 8 U.S.C. § 1101(a)(42)(A) (2012) (defining “refugee”).

153. *See* 8 U.S.C. § 1231(b)(3)(A) (2012).

154. *See* Matter of C-T-L-, 25 I. & N. Dec. 341, 343–44, 350 (B.I.A. 2010). If an applicant demonstrates past persecution on account of a protected ground, the applicant is entitled to a presumption of a future threat to his or her life or freedom and the Department of Homeland Security may rebut this presumption. *See* 8 C.F.R. § 1208.16(b)(1) (2016).

155. *See Asylum, Withholding of Removal, CAT, Immigration Judge Benchbook*, U.S. Dep’t of Justice, <https://www.justice.gov/eoir/immigration-judge-benchbook-section-241b> (last updated Feb. 4, 2015).

156. *See id.*

Under international law, if a domestic violence victim is able to demonstrate that the harm they suffered amounted to torture, as that term is defined in the CAT,¹⁵⁷ he or she may be able to establish eligibility for protection under the CAT without showing a nexus between the harm suffered and a protected ground. To carry his or her burden of proof for CAT protection, a domestic violence victim must show it is more likely than not that he or she would be tortured if removed.¹⁵⁸ Thus, CAT protection will likely only reach the fraction of domestic violence victims who can demonstrate a clear probability that torture, such as prolonged mental or physical harm, would occur despite efforts to avoid their abuser in the country of removal.¹⁵⁹

For the foregoing reasons, the provisions in the Act, including those intended to provide relief for domestic violence victims, may not aid individuals that would be encompassed by a broad reading of the Board's decision in *Matter of A-R-C-G-*. Accordingly, this precedential domestic violence-related decision should be interpreted expansively to include those victims that are not covered by other forms of immigration relief.

C. *A Call for Expanding Matter of A-R-C-G- for International Domestic Violence Victims*

1. *Matter of A-R-C-G-*

In order to combat the lack of relief options for domestic violence victims who suffer abuse outside the United States, the proper interpretation of *Matter of A-R-C-G-* would apply the social group analysis in a broad sense to all nationalities, genders, marital statuses, and other abuse situations so long as the harm inflicted rose to the level of persecution on account of "membership in the particular social group."¹⁶⁰ For example, immigration judges could utilize a broad social group construction parallel to the one recognized by the Board in *Matter of A-R-C-G-*: an individual (male or female) from a country (any country) who was subjected to a form of qualifying domestic abuse and

157. U.N. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (defining torture in Article I as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in[,] or incidental to lawful sanctions."); see 8 C.F.R. § 1208.18(a)(1) (2016).

158. See 8 C.F.R. § 1208.16(c)(2) (2016).

159. See generally 8 C.F.R. § 1208.18 (2016).

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

was unable to leave their harmful marriage, partnership, or domestic relationship.¹⁶¹

In expanding the concept of domestic violence-related social groups beyond married Guatemalan women, the Board's decision would encompass individuals similarly situated in other countries that have suffered similar levels of harm and whose governments are either unable or unwilling to protect them.¹⁶² With respect to domestic violence and spousal abuse, there is no reason to believe Guatemala is unique.¹⁶³ Accordingly, the elements needed to establish a particular social group, including particularity, social distinction, and a common immutable characteristic, apply with equal force to other nationalities, genders, marital statuses, and forms of domestic abuse. In fact, the Board in *Matter of A-R-C-G-* indicated that marital status could itself be a common immutable characteristic.¹⁶⁴

Although Ms. Cifuentes was in a marital relationship with her abuser and subsequently included the qualifier of "married" in her social group construction,¹⁶⁵ the Board has recently downplayed the significance of marriage in an unpublished decision, *Matter of D-M-R-*.¹⁶⁶ In this decision the applicant was barred from seeking asylum relief due to the one-year filing deadline, but she constructed a particular social group of "El Salvadoran women in relationships who are unable to leave" for withholding of removal purposes.¹⁶⁷ Specifically, the

161. *See id.* at 392.

162. For additional scholarship beyond the scope of this Comment discussing expanding *Matter of A-R-C-G-* to domestic violence victims from countries other than Guatemala, see Johanna K. Bachmair, Note, *Asylum at Last?: Matter of A-R-C-G-'s Impact on Domestic Violence Victims Seeking Asylum*, 101 CORNELL L. REV. 1053 (2016).

163. Domestic situations in other countries, such as El Salvador, Sudan, and Afghanistan, for example, are well documented. *See* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *Country Reports on Human Rights Practices for 2015: El Salvador* (Apr. 13, 2016), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#section6women> (finding violence against women to be socially acceptable); U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *Country Reports on Human Rights Practices for 2015: Sudan* (Apr. 13, 2016), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#section6women> (stating that the law does not specifically prohibit domestic violence); U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *Country Reports on Human Rights Practices for 2015: Afghanistan* (Apr. 13, 2016), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (noting targeted violence against women).

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

165. *Id.* at 389–90.

166. *Matter of D-M-R-*, A 095 008 524 (B.I.A. June 9, 2015); *see* Harvard Immigration and Refugee Clinical Program of Harvard Law School, *Designating as Precedent the Board Decisions in D-M-R- and E-M-* 1 (2015), <http://legalactioncenter.org/sites/default/files/docs/lac/2015%20Litigation%20Meeting/Request%20for%20Publication%20of%20D-M-R-.pdf> (hereinafter *Designating as Precedent*)

167. *Designating as Precedent*, *supra* note 166, at 7.

applicant based her claim on the common immutable characteristic of being a woman who is unable to leave a domestic relationship.¹⁶⁸ Unlike Ms. Cifuentes, the applicant in *Matter of D-M-R-* was not married, but was subjected to violence in a domestic relationship.¹⁶⁹ The Board explained in *Matter of D-M-R-* that its decision in *Matter of A-R-C-G-* does not require an applicant seeking asylum based on domestic violence to be married to his or her abuser, but that it will look to the “characteristics of the relationship to determine its nature.”¹⁷⁰

Despite the significance of this decision for domestic violence victims who were not in marital relationships, the Board failed to publish or designate *Matter of D-M-R-* as a precedential decision.¹⁷¹ Notably, however, the Board’s position in this decision regarding the inconsequential nature of a domestic violence victim’s marital status is consistent with the Department of Homeland Security’s position in its 2009 supplemental brief in *Matter of L-R-*.¹⁷²

As a framework for determining the boundaries of a domestic relationship, the Department of Homeland Security cited to the definition of “domestic relationship”¹⁷³ in a section of the Act regarding deportation for crimes of violence.¹⁷⁴ Under the Act, individuals in cohabiting relationships can commit crimes of domestic violence.¹⁷⁵ As both the Board and the Department of Homeland Security have recognized the

168. *Designating as Precedent*, *supra* note 166, at 7 (reasoning that the qualifiers of “women,” “domestic relationship,” and “unable to leave” can be sufficiently particular in El Salvador and that the applicant’s inability to leave her relationship in the broader context of the society in question sufficiently established persecution “on account of membership” in a particular social group).

169. *Designating as Precedent*, *supra* note 166, at 5.

170. *Designating as Precedent*, *supra* note 166, at 7.

171. *Designating as Precedent*, *supra* note 166, at 2 (noting that the Board’s holding in *D-M-R-* was “principled, coherent, consistent with prior law, and provide[d] much needed guidance”).

172. Supplemental Brief, *supra* note 112, at 15–16 (“[The Department of Homeland Security] believes that there are circumstances in which an applicant’s status within a domestic relationship is immutable, within the meaning of *Acosta*, for purposes of particular social group analysis.”).

173. See 8 U.S.C. § 1227(a)(2)(E)(I) (2012) (providing that the term “crime of domestic violence” means any crime of violence . . . against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.”).

174. Supplemental Brief, *supra* note 112, at 19 (citing Immigration and Nationality Act § 237(a)(2)(E)(I), 8 U.S.C. § 1227(a)(2)(E)(I) (2012)).

175. Supplemental Brief, *supra* note 112, at 19; see 8 U.S.C. § 1227(a)(2)(E)(I) (2012) (discussing domestic relationships for deportation grounds).

sufficiency of domestic relationships beyond marriage in domestic violence-related social group cases, as well as defined the scope of these relationships, *Matter of A-R-C-G*'s holding should be read to incorporate this interpretation in future decisions.¹⁷⁶

In this regard, it is also essential for the Board to designate a decision defining its analysis as precedential. The Board should act quickly because a recent opinion by the Third Circuit Court of Appeals reached an opposite interpretation that other courts may follow. On June 23, 2016, the Third Circuit Court of Appeals in *Ordonez-Tevalan v. Attorney General of the United States*¹⁷⁷ noted the following:

[T]here is a further reason why we must [deny Ordonez's petition for review], in that she has not demonstrated that any alleged abuse that she had suffered or feared resulted or would result from her membership in a particularized social group. The IJ noted that in *Matter of A-R-C-G*, the [Board] "held that depending on the facts and evidence in an individual case[,] . . . married women in Guatemala who are unable to leave a relationship can constitute a cognizable social group[.]" But Ordonez is not a member of this group, as she acknowledges that she was never married to [her abuser].¹⁷⁸

After this precedential decision, it is likely that other judges may become concerned that the legal distinction of marriage was required for Ms. Cifuentes's victory in *Matter of A-R-C-G*. Therefore, it is critical that the Board designates as precedential their interpretation that marriage is not required so other courts can follow it when making decisions on this important issue.

With respect to other genders, the trend of domestic violence throughout the world is male-on-female partner violence, even though it is undisputed that women inflict domestic abuse against their male partners.¹⁷⁹ Social distinction and particularity, elements that a domestic violence victim must prove to establish eligibility for asylum, would likely be difficult for male victims to prove.¹⁸⁰ For example, it may be

176. *But see, e.g.*, *Sutac v. Att'y Gen. of the U.S.*, No. 15-2425, 2016 U.S. App. LEXIS 2362, at *4 (3d Cir. Jan. 26, 2016) (distinguishing the applicant's claim from the claim in *Matter of A-R-C-G* because the applicant was never legally married to her abusive partner).

177. *Ordonez-Tevalan v. Att'y Gen. of the U.S.*, No. 15-2187, 2016 U.S. App. LEXIS 11429 (3d Cir. June 23, 2016).

178. *Id.* at *25 (internal citations omitted).

179. Claudia Garcia-Moreno et al., *Understanding and Addressing Violence Against Women*, WORLD HEALTH ORG. 1 (2012), http://apps.who.int/iris/bitstream/10665/77432/1/WHO_RHR_12.36_eng.pdf (hereinafter Garcia-Moreno et al.).

180. *See* Caitlin Steinke, *Male Asylum Applicants Who Fear Becoming the Victims of Honor Killings: The Case for Gender Equality*, 17 N.Y. CITY L. REV. 233, 235-62

difficult for a male victim to demonstrate that the domestic abuse he suffered was based on his membership in a social group possessing the immutable trait of being male, as it is unlikely many societies would make meaningful distinctions about “being a married man in a domestic relationship that he cannot leave.”¹⁸¹ In other words, many societies may not recognize a male victim’s inability to leave a relationship due to traditional, male dominant gender roles.¹⁸² Where a male domestic violence victim is unable to prove social distinction or particularity, his claim for asylum must fail.¹⁸³ Even though a broad reading may not help many male victims, the Board’s holding in *Matter of A-R-C-G-* leaves room for domestic violence victims of other genders, such as transgender or bigender,¹⁸⁴ to establish social groups based on the common immutable characteristic of their gender if they can demonstrate social distinction and particularity.

Finally, the repeated domestic abuse suffered by Ms. Cifuentes in *Matter A-R-C-G-* is common among domestic violence victims.¹⁸⁵ In addition to the rape and weekly beatings inflicted on Ms. Cifuentes at the hands of her husband, it is possible that other forms of domestic abuse could also qualify for refugee protection under the *Matter of A-R-C-G-* analysis, such as severe emotional or psychological abuse.¹⁸⁶ Although not all forms of domestic abuse will reach the level of persecution as defined,¹⁸⁷ harm that amounts to “a threat to the life or freedom of, or the infliction or suffering or harm upon”¹⁸⁸ a domestic violence victim could encompass a wide range of domestic abuse beyond that seen in *Matter of A-R-C-G-*.

(2014) (noting that the way the form of persecution is framed “can place male applicants at a severe disadvantage at having their . . . asylum claims recognized” and arguing that “courts should not limit the definition of ‘membership in a particular social group’ to women who are threatened”).

181. Cf. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 393–94 (B.I.A. 2014).

182. Cf. *id.*

183. See generally *Matter of W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014).

184. However, it is also possible that transgender or bigender individuals could construct cognizable social groups solely based on their gender in the Third and Seventh Circuits, which continue to adopt only the *Acosta* immutability standard. See *Practice Advisory*, *supra* note 41, at 13.

185. See *Garcia-Moreno et al.*, *supra* note 179, at 1–2; see also *Matter of R-A-*, 22 I. & N. Dec. 906, 908 (B.I.A. 1999) (en banc) (concerning violent physical and sexual abuse).

186. *Garcia-Moreno et al.*, *supra* note 179, at 1–2.

187. See, e.g., *Lirio-Biscocho v. INS*, No. 95-70820, 1997 U.S. App. LEXIS 8654, at *4 (9th Cir. Apr. 24, 1997) (reasoning that the harm inflicted upon the petitioner, namely one threat to hit her with a belt and one slap, did not amount to persecution).

188. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (interpreting the term “persecution”).

2. Policy Considerations

In addition to *Matter of A-R-C-G*'s impact on domestic violence victims, further expansion of asylum law under the Board's groundbreaking decision also implicates important practical, political, and social policy considerations. Given the Board's lack of clarity with respect to *Matter of A-R-C-G*'s precedential value, many policy considerations still carry great weight in today's immigration law discourse. First, *Matter of A-R-C-G* and its progeny may have negative practical consequences in the country's immigration courts because these courts are already overburdened with large dockets, few immigration judges, and increasing numbers of cases each year.¹⁸⁹ Depending on the prevailing interpretation of *Matter of A-R-C-G*'s precedential value, the decision could permit domestic violence victims to argue forcefully in favor of relief and recognition of particular social groups beyond the precise social group at issue in that decision.¹⁹⁰

Still, this argument presupposes that most international domestic violence victims will be able to satisfy all the requirements necessary to construct cognizable social groups. As illustrated by the convoluted and complex history of the many requirements necessary for such constructions, this burden of proof is difficult to carry, making the "floodgates" theory seemingly implausible. Even with an expanded social group interpretation that would provide a foundation for similar domestic violence-related claims, applicants must still satisfy the high standards for constructing particular social groups, which alone will filter out many potential applicants.¹⁹¹ Moreover, without an attorney, an asylum applicant is unlikely to know of these complex requirements, much less meet the burden of demonstrating that these requirements are present in his or her case and warrant asylum as a matter of discretion.¹⁹² Consequently, the fear that more asylum claims may be brought in an already overburdened United States immigration system is valid, yet other considerations alleviate these practical concerns.

189. See Luis Arias, *Fixing the EOIR: our immigration courts are desperately overburdened*, 21 MICH. J. RACE & L., <http://mjrl.org/2015/10/30/fixing-the-eoir-our-immigration-courts-are-desperately-overburdened/> ("[T]he country's 58 immigration courts currently have about 445,000 cases in their backlog.").

190. *Recent Adjudication*, *supra* note 5, at 2096–97.

191. See *Matter of W-G-R*, 26 I. & N. Dec. 208, 213–16 (B.I.A. 2014); *Matter of Acosta*, 19 I. & N. Dec. at 233 (explaining that the applicant must prove the proposed social group is: (1) comprised of individual members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question).

192. 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, 362–63 (2015).

Second, *Matter of A-R-C-G-* may cause adverse political consequences by granting asylum relief to social groups without subjecting these individuals to the yearly quotas imposed in alternative immigration relief options, including family and employment-based preference groups as well as various immigrant and nonimmigrant visas.¹⁹³ In current immigration reform discourse, there is a point of contention between preserving national security and providing protection for asylum-seekers and refugees.¹⁹⁴ One solution to this concern would be to simply implement a cap for “particular social group” claims.¹⁹⁵ However, it is important to note that asylum is a discretionary form of relief.¹⁹⁶ An asylum applicant may meet his or her burden of proof and burden of persuasion for establishing refugee status, including the complex requirements for a cognizable social group, yet may be denied relief by an immigration judge as a matter of discretion.¹⁹⁷ This discretionary component guards against mass migration as the adjudicator retains the authority to deny asylum based on adverse factors or simply “as a matter of discretion.”¹⁹⁸

In any event, additional action signifying that the United States considers international victims of domestic violence to be deserving of protection could greatly influence social policy throughout the country. When humanitarian concern envelopes individuals suffering egregious persecution, like the persecution suffered by the applicants in *Matter of R-A-* and *Matter of A-R-C-G-*, courts should aim to protect these international domestic violence victims.¹⁹⁹ As such, the best solution in accordance with the purposes of United States asylum law and policy is for the Board to expand its interpretation of a cognizable “particular

193. STEPHEN LEGOMSKY & CRISTINA RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 260–77 (Foundation Press, 6th ed. 2015).

194. Michael Cutler, *Political Asylum: How America's Compassion Creates National Security Nightmares*, DAILY CALLER (Feb. 25, 2015), <http://dailycaller.com/2015/02/25/political-asylum-how-americas-compassion-creates-national-security-nightmares/> (“America has traditionally been a place of refuge for the downtrodden of the world. That was the message in Emma Lazarus’ famous poem fastened to the base of the Statue of Liberty, and serves as the basis for our beliefs as Americans.”).

195. Benjamin H. Harville, *Ensuring Protection or Opening Floodgates?: Refugee Law and its Application to Those Fleeing Drug Violence in Mexico*, 27 GEO. IMMIGR. L.J. 135, 184 (2012) (“Congress has responded to floodgates concerns in the past by placing a yearly cap on the amount of asylum seekers admitted under certain asylum provisions contained in the statute.”).

196. See 8 U.S.C. § 1158(b)(1)(A) (2012) (providing that the Attorney General “may grant asylum”).

197. *Matter of Acosta*, 19 I. & N. Dec. 211, 230 (B.I.A. 1985).

198. *Id.* at 230–31.

199. See *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014) (involving weekly beatings and rape); *Matter of R-A-*, 22 I. & N. Dec. 906, 908 (B.I.A. 1999) (en banc) (concerning violent physical and sexual abuse).

social group” with respect to domestic violence beyond the facts of *Matter of A-R-C-G-*. This “particular social group” construction should encompass domestic violence victims of other nationalities, genders, marital statuses, and similar domestic abuse situations that can meet the high burden of proof required.

IV. CONCLUSION

Because asylum and refugee law was enacted in the United States as a social policy to assist and protect deserving refugees, our immigration system should provide international domestic violence victims with asylum relief when their country is either unable or unwilling to protect them and the victims meet the high burden of proof required in constructing a cognizable social group. “[M]arried women in Guatemala who are unable to leave their relationships” should not be the only international domestic violence victims that America protects within the meaning of the term “particular social group” provided in the Act. In accordance with international humanitarian obligations, American compassion for domestic violence victims should not be confined.

An analysis of legislative and administrative history, the evolution of cognizable “particular social group” requirements, and policy concerns weigh in favor of a broad interpretation of *Matter of A-R-C-G-*’s precedential value in future domestic violence-related social group cases. For an international domestic violence victim, forced to seek another country’s protection from egregious abuse at the hands of a former lover, this reading of the decision’s precedential value is essential to his or her ability to construct a cognizable social group as a vehicle for potential asylum relief. While other forms of immigration relief exist, it is less likely that such a victim would qualify. Therefore, it is imperative that adjudicators throughout the United States read the Board’s decision in *Matter of A-R-C-G-* as encompassing claims by future domestic violence victims of other nationalities, genders, marital statuses, and involving similar domestic abuse situations.