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Justice Delayed is Justice Denied: The Real Significance of Matter of A-R-C-G-

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JUSTICE DELAYED IS JUSTICE DENIED: THE REAL SIGNIFICANCE OF *MATTER OF A-R-C-G-*

“It is a startling fact that one of the most dangerous places for a woman is her own home.”¹

Gabriela Corrales*

Introduction	71
I. The Particular Social Group Requirement	73
II. The Board’s Evolving Treatment of Women as a Particular Social Group	74
A. The Complexities of the Particular Social Group Requirement	74
B. The Board’s New Treatment of Women as a Particular Social Group in Matter of A-R-C-G-	76
III. A Critique of the Board’s New Treatment of Domestic Violence Asylum Claims	78
A. Inconsistency with Domestic and International Legal Norms	78
1. The Federal Courts	78
2. The Department of Justice	80
3. Other Countries: Canada and the United Kingdom	80
4. Other International Sources	81
a. 1951 Convention, the 1967 Protocol, and the Refugee Act of 1980	81
b. UNHCR Interpretive Guidance for a Gendered “Particular Social Group”	82
B. Insensitivity to Domestic Realities	84
C. Irrelevance of “Floodgate” Concern	86
1. Asylum Law was Designed for Massive Groups of People	86
2. What About the Other Requirements to Receive Asylum?	87
3. Where is the Flood?	88
D. The IJ Inconsistency Problem—Adjudicating Domestic Violence Asylum Fails Domestic-Violence Victims	89
E. Recommendations for the Future	90
Conclusion	91

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1. Charlotte Alfred, *These 20 Countries Have No Law Against Domestic Violence*, THE HUFFINGTON POST (Mar. 08, 2014), http://www.huffingtonpost.com/2014/03/08/countries-no-domestic-violence-law_n_4918784.html.

* Arizona Law, J.D. expected 2016. To my partner Eric, I could not have done this without your love, your patience, your brilliance, and insight. A heartfelt thank you to my friends and professors: Dave Marcus, Matthew Johnson, Nina Rabin, Lynn Marcus, and Raymundo Reyes. Thanks also to Imogene Mankin, Kevin Castillo, Andrea Obando, and the editors of the *Berkeley La Raza Law Journal*. Finalmente, a mi mama, “voy a seguirte... ve tú delante que dándome el ejemplo, lo haré al instante.”

INTRODUCTION

For ten years, Ms. C-G- endured heinous beatings every week.² Her husband's abuse started with punching and kicking but did not end there.³ He broke her nose and caused permanent damage to her breathing.⁴ If she refused sex, he raped her.⁵ He set her on fire with paint thinner, causing scarring to her chest and permanent damage to her hearing.⁶ When she was eight-months pregnant he beat her so badly that her baby was born prematurely and with a bruised leg.⁷ He mocked her about calling the police, telling her that it would be pointless because "even the police and the judges beat their wives."⁸ Despite the taunting, Ms. C-G- went to the police on several occasions. But the police refused to intervene every time.⁹ The police dismissed her husband's violence as a marital issue.¹⁰ When Ms. C-G- fled to other Guatemalan cities, he found her.¹¹ When Ms. C-G- finally sought refuge in the United States, an Immigration Judge ("IJ") denied her asylum application. According to the IJ, Ms. C-G- had not suffered past persecution, nor did she have a well-founded fear of future persecution on account of membership in a particular social group because her husband's actions were arbitrary and without reason.¹²

Intimate partner violence accounts for approximately 40 percent of all femicides.¹³ Although most countries criminalize violence against women,¹⁴ twenty countries have not yet outlawed intimate-partner violence.¹⁵ And even many of those countries with laws that aim to protect women from domestic violence fail to implement their laws effectively or to devote adequate resources to enforcement.¹⁶ For example, out of the 133 reporting countries in the World Health Organization's Global Status Report on Violence Prevention, only 57 percent enforce domestic violence laws.¹⁷ Because the legal framework protecting women is inadequate in many countries, hundreds of women seek refuge elsewhere. When domestic violence victims seek refuge in the United States, however, they are met with an ambiguous and complex asylum process.

2. A-R-C-G-, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).

3. Brief of the Ctr. for Gender & Refugee Studies as Amicus Curiae in Support of the Respondent at 18, A-R-C-G-, 26 I. & N. Dec. 388, 393 (B.I.A. 2014) (No. A099 528 680) [hereinafter CGRS Amicus Curiae in A-R-C-G-].

4. A-R-C-G-, 26 I. & N. Dec. at 389; CGRS Amicus Curiae in A-R-C-G-, *supra* note 3, at 11.

5. A-R-C-G-, 26 I. & N. Dec. at 389.

6. *Id.*

7. *Id.*

8. Amicus Curiae in A-R-C-G-, *supra* note 3, at 11.

9. A-R-C-G-, 26 I. & N. Dec. at 389; CGRS Amicus Curiae in A-R-C-G-, *supra* note 3, at 11.

10. A-R-C-G-, 26 I. & N. Dec. at 389.

11. *Id.*

12. *Id.* at 390.

13. *Violence Against Women, Intimate Partner and Sexual Violence Against Women*, WHO, <http://www.who.int/mediacentre/factsheets/fs239/en/> (last updated Jan. 2016); *Global Study on Homicide 2013*, UN OFF. OF DRUGS & CRIME 10 (2013), https://www.unodc.org/documents/data-and-analysis/statistics/GSH2013/2014_GLOBAL_HOMICIDE_BOOK_web.pdf.

14. *Global Status Report on Violence Prevention 2014*, WHO (2014), at 39, http://www.who.int/violence_injury_prevention/violence/status_report/2014/en/.

15. Alfred, *supra* note 1.

16. UNICEF, *Domestic Violence Against Women and Girls*, INNOCENTI DIG., June 2000, at 2, <http://www.unicef-irc.org/publications/pdf/digest6e.pdf>.

17. WHO, *supra* note 14, at 39.

When the United States ratified the United Nations' 1967 Protocol, which incorporated the 1951 Refugee Convention, it agreed to protect refugees whose "freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁸ The 1951 Convention was created after World War II in order to recognize the fundamental right for persons to seek asylum from persecution in other countries. The 1967 Protocol, the 1951 Convention's only amendment, fully incorporated the 1951 Convention but removed its temporal and geographic limitations. The United States formally ratified the 1967 Protocol and later passed legislation with nearly identical language to the 1967 Protocol in the Refugee Act of 1980, as well as in the Immigration and Nationality Act.¹⁹ Notably, as expressed by the United Nations High Commissioner for Refugees (UNHCR), the drafters of the 1967 Protocol never even considered gender as a protected ground because their priority was to protect the hundreds of thousands of European refugees who were fleeing violence in their home countries following World War II.²⁰

For decades, the limits imposed by the statutory categories prevented case law from developing regarding whether survivors of domestic violence were eligible for asylum in the United States.²¹ Because gender is not an enumerated ground for asylum²²—those grounds are race, religion, nationality, political opinion, or particular social group—the particular social group category has been the most helpful to domestic violence victims seeking asylum. The United States' highest immigration court, the Board of Immigration Appeals (Board), first addressed domestic violence asylum claims for a gender-based particular social group in *Matter of R-A-*, holding that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" do not form a cognizable particular social group.²³ Precedential cases following *R-A-* continued to confuse the particular social group requirement.²⁴

But in 2014, fifteen years after *Matter of R-A-*,²⁵ the Board held in *Matter of A-R-C-G-* that "married women in Guatemala who are unable to leave their relationship" constitute a particular social group.²⁶ Through *Matter of A-R-C-G-*, the

18. Protocol Relating to the Status of Refugees, art. XXXIII, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]; Convention Relating to the Status of Refugees, art. I, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter 1951 Convention].

19. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2012); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.); *see also* 8 C.F.R. § 1208.13(b)(1) (2013).

20. Jenny-Brooke Condon, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 214 (2002); Judith Kumin, *Gender: Persecution in the Spotlight*, 2 REFUGEES 12, 12 (2001), <http://www.unhcr.org/3b5e90ea0.pdf>.

21. *See* Jessica Mardsen, Note, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2517-18 (2014).

22. *See infra* Part II.

23. *R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999) (en banc), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001).

24. *See infra* Part II; Barbara R. Barreno, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 250 (2011) ("Despite the recent grants of asylum to R-A- and L-R- and the emergence of the DHS's new particular social group formulations, there is no consistent approach for asylum adjudicators to assess the claims of domestic violence victims.")

25. *R-A-* first came to the Board in 1999.

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

Board unequivocally reversed the position it held in the *Matter of R-A-*. Despite the Board's progress, the Board's particular social group framework continues to lag behind the rest of the Western world, which allows women to seek asylum-based claims for gender-based particular social groups in a more equitable manner.²⁷

So, although the Board has come a long way, the progress is not enough, as it failed—once again—to classify gender as a particular social group in the *Matter of A-R-C-G-*. Failing to recognize gender as a particular social group is: (1) inconsistent with international norms; (2) insensitive to the domestic realities of gender violence victims; (3) far too deferential to the floodgate concerns made by critics; and (4) unresponsive to the inconsistent adjudication of asylum cases. For these reasons, this Note urges a simpler particular social group formulation for women victims of domestic violence, regulatory reform, and mandatory reporting mechanisms for adjudicators and IJs.

This Note is organized in three parts. First, it reviews the particular social group requirement and applies these requirements to the domestic violence asylum context. Second, it addresses the Board's evolving view of the particular social group analysis in domestic-violence asylum and discusses the new view in the *Matter of A-R-C-G-*. Finally, this Note critiques the Board's particular social group analysis in *Matter of A-R-C-G-* and proposes solutions to these domestic-violence asylum concerns.

I. THE PARTICULAR SOCIAL GROUP REQUIREMENT

In order to qualify for asylum²⁸ in the United States, a person must meet the statutory definition of a refugee in one of two ways:²⁹ a refugee is someone who is unable or unwilling to return to their home country because of (1) past persecution; or because of (2) a well-founded fear of future persecution.³⁰ To establish a well-founded fear of persecution, an individual must satisfy three elements. First, the person must fear persecution on account of one of the protected grounds—race, religion, nationality, political opinion, or particular social group.³¹ Second, the applicant must demonstrate a nexus between the protected ground and the

27. See, e.g., 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, 365 (2015); IMMIGRATION & REFUGEE BD. OF CAN., GUIDELINE 4 WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: UPDATE (1993), <http://www.refworld.org/docid/4713831e2.html>; *Chapter 4 - Grounds of Persecution*, IMMIGR. & REFUGEE BOARD OF CAN. (Nov. 24, 2015), <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef04.aspx>.

28. "Asylum status is a form of protection available to people who: [m]eet the definition of refugee, [a]re already in the United States, [and] [a]re seeking admission at a port of entry." *Refugees & Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC. (Nov. 12, 2015), <http://www.uscis.gov/humanitarian/refugees-asylum>.

29. "[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2012).

30. *Id.*; 8 C.F.R. § 1208.13(b)(1).

31. 8 U.S.C. § 1101(a)(42)(A).

persecution.³² Third, the applicant must show that the persecution is by a government actor, or an actor the government is unable or unwilling to control.³³ If the applicant demonstrates past persecution, then a presumption exists that the asylum-seeker has a well-founded fear of future persecution.³⁴

Of the five protected grounds for receiving asylum, the “particular social group” ground has developed the most complex jurisprudence. This is because in order to show that a particular social group exists, one must also prove that the group is: (1) composed of individuals who share a common immutable characteristic; (2) socially distinct; and (3) defined with particularity.³⁵

The immutability standard, set in *Matter of Acosta*, is well established, well respected, and still applied in the United States and the rest of the world.³⁶ The second and third requirements in the particular social group analysis, however, are fairly new and far more controversial.³⁷ In *Acosta*, the Board defined a particular social group as persons who share a “common immutable characteristic,”³⁸ which could be “sex, color, or kinship ties.”³⁹ These are characteristics that cannot be changed, and are fundamental to the individual’s identity or conscience.⁴⁰ The “social distinction” and “particularity” requirements are still debated internationally because they limit the particular social group framework substantially and overlap with each other.⁴¹

II. THE BOARD’S EVOLVING TREATMENT OF WOMEN AS A PARTICULAR SOCIAL GROUP

A. *The Complexities of the Particular Social Group Requirement*

Although not a domestic-violence case, *Matter of Kasinga* introduced the critical idea that a particular social group can be defined with reference to gender.⁴² In *Kasinga*, the Board relied on *Acosta* to allow a young woman who was “a member of the Tchamba-Kunsuntu Tribe” to obtain asylum to escape female genital mutilation.⁴³ The Board determined that Ms. Kassindja’s particular social group was indicated by her gender and the immutable characteristic of being a member of the Tchamba-Kunsuntu Tribe.⁴⁴

32. *Id.*

33. *Id.*

34. 8 C.F.R. § 1208.13(b)(1); *Asylum/Statutory Eligibility*, EXEC. OFFICE FOR IMMIGR. REV., U.S. DEP’T OF JUST., IMMIGRATION JUDGE BENCHMARK, <http://www.justice.gov/eoir/immigration-judge-benchmark-section-241b>.

35. *Domestic Violence-Based Asylum Claims: CGRS Practice Advisory*, CENTER FOR REFUGEE STUDIES 1, 10–16 (2014) [hereinafter DV Asylum Guide].

36. CGRS Amicus Curiae in A-R-C-G-, *supra* note 3, at 18.

37. *Acosta*, 19 I. & N. Dec. 211, 233 (1985).

38. *Id.* at 233.

39. *Id.* at 393–94.

40. *Id.*; *See, e.g.*, Dep’t of Homeland Security’s Supplemental Brief at 7, L-R- (B.I.A. Apr. 13, 2009), http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [hereinafter DHS Brief in L-R-].

41. *See* C-A-, 23 I. & N. Dec. 951, 956 (B.I.A. 2006).

42. Fauziya Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

43. *Id.* at 366.

44. *Id.*

Despite the modest success of *Matter of Kasinga*, in *Matter of R-A-*, the Board declined to identify a gender-based particular social group for victims of domestic violence. The Board held that a Guatemalan woman who was a victim of severe domestic violence could not establish her membership in a particular social group.⁴⁵ Rather than relying solely on the immutability criterion announced in *Acosta*, the Board instead implemented new requirements to the particular social group framework that later became known as the particularity and social distinction requirements.⁴⁶ The Board stated that the immutability requirement was merely a threshold requirement for the particular social group analysis. The Board then indicated that Ms. Alvarado also had to show that her group was recognized and understood as a societal faction.⁴⁷ Under this new framework, the Board ruled that “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination,” was not a cognizable social group.⁴⁸

The controversy that followed the *Matter of R-A-* caused various Attorneys General to intervene in Ms. R-A-’s case.⁴⁹ Eventually, the controversy caused the Department of Homeland Security (DHS) to shift its position and support a simpler particular social group framework.⁵⁰ DHS supported Ms. R-A-’s claim and argued that *Acosta* was the precedent to be used to define particular social groups because the social distinction and particularity requirements deviated from an otherwise sound doctrine.⁵¹ In 2009, while *Matter of R-A-* was still pending, DHS filed a supplemental brief in a different case, *Matter of L-R-*.⁵² This DHS supplemental brief indicated that women could be considered a particular social group, gave example social group formulations for domestic violence asylum claims, and recognized that the requirements for social distinction and particularity had been problematic.⁵³ The DHS brief in *Matter of L-R-* also accepted international guidance on the particular

45. R-A-, 22 I. & N. Dec. 906, 927 (B.I.A. 1999).

46. *Id.* at 918–22.

47. *Id.* at 918.

48. *Id.*

49. Board decisions are binding on all Department of Homeland Security officers and immigration judges unless overruled by the Attorney General or a federal court.

50. Attorney General Janet Reno vacated the Board decision and certified the case to herself. She remanded the case to the Board and proposed new regulations, but the proposed regulations were not finalized. When Attorney General John Ashcroft was appointed, he decided to certify the case to himself. This required new briefs from the government and Ms. Alvarado. To everyone’s surprise, the government filed a brief supporting Ms. Alvarado’s eligibility for asylum. Despite receiving new briefs, Ashcroft did not take action on the case. When Attorney General Michael Mukasey took jurisdiction on the case, he ruled it not necessary for the Board to await new regulations and sent it to the Board for a decision. The Board ruled in favor of Ms. Alvarado, but the decision holds no precedential value. Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s Claims*, 29 REFUGEE SURV. Q. 46, 46–63 (2010) (discussing the history of gender asylum in the United States) [hereinafter *A Short History of Gender Asylum*].

51. “Thus, the Board applies these ‘factors’ as requirements, without relating them in any way to the *Acosta* immutable characteristic standard. This departs from the sound doctrine the Board established nearly 20 years ago in *Acosta*, and there is no reason for such a departure.” Dep’t of Homeland Security’s Position on Respondent’s Eligibility for Relief at 25, R-A-, 23 I. & N. Dec. 694 (B.I.A. Feb. 19, 2004) (No. A 73 753 922), http://cgrs.uchastings.edu/sites/default/files/Matter_of_RA_DHS_Brief_02_19_2004.pdf [hereinafter DHS Brief in R-A-].

52. DHS Brief in L-R-, *supra* note 40, at 1.

53. *Id.* at 7–11.

social group framework.⁵⁴

By 2009, the Board finally issued a precedential decision that required social visibility for the particular social group requirement in the *Matter of C-A*.⁵⁵ Two years later, in the *Matter of S-E-G*, the Board held that to be recognized as a particular social group, the group must be socially visible and particular, by having well-defined boundaries.⁵⁶ These constraints to the particular-social-group analysis have, for the most part, remained in effect. For example, in *Matter of M-E-V-G* and *Matter of W-G-R*, the Board found that the social distinction and particularity requirements apply, and are analyzed on a case-by-case basis.⁵⁷

In *W-G-R* and *M-E-V-G*, the Board held that asylum should only be granted if membership in the particular social group comprises individuals who share an immutable characteristic and is defined with particularity, and if members are socially visible (i.e., distinct) within the society in question.⁵⁸ The particularity requirement sets the “outer limits” on the particular-social-group analysis.⁵⁹ As such, to satisfy particularity, the group must have “discrete” and “definable boundaries.”⁶⁰ A group cannot have distinct boundaries if it is too amorphous, overbroad, or subjective.⁶¹ In order for the group to be “socially distinct,” it must be set apart from those in the society, but this does not require an actual “ocular visibility”⁶²—the group need only be perceived as a group by society.⁶³ The social distinction and particularity requirements can be even more problematic due to their overlap with one another.⁶⁴ The Board, however, has determined this overlap can easily be addressed on a fact-specific, case-by-case basis.⁶⁵

B. The Board’s New Treatment of Women as a Particular Social Group in Matter of A-R-C-G-

The Board’s evolving treatment of the particular-social-group requirement culminated in *Matter of A-R-C-G*. In that case, the Board unanimously overturned the IJ’s decision that married women in Guatemala who are unable to leave their relationship do not constitute a particular social group.⁶⁶ The Board held that “[d]epending on the facts and evidence in an individual case, married women in Guatemala who are unable to leave their relationship can constitute a cognizable

54. *Id.* at 6.

55. *C-A*, 23 I. & N. Dec. 951, 958–59 (B.I.A. 2006).

56. 24 I. & N. Dec. 579, 583–84 (B.I.A. 2008).

57. *M-E-V-G*, 26 I. & N. Dec. 227, 240–41 (B.I.A. 2014); *W-G-R*, 26 I. & N. Dec. 208, 210–14 (B.I.A. 2014).

58. *A-R-C-G*, 26 I. & N. Dec. 388, 394 (2014). *See M-E-V-G*, 26 I. & N. Dec. 227, 237–42 (2014); *W-G-R*, 26 I. & N. Dec. 208, 210–14 (2014).

59. *M-E-V-G*, 26 I. & N. Dec. at 238.

60. *Id.* at 239.

61. *Id.*

62. *Id.* at 236.

63. *Id.*

64. For instance, the Third Circuit has said “they appear to be different articulations of the same concept and the government’s attempt to distinguish the two oscillates between confusion and obfuscation, while at times both confusing and obfuscating.” *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 608 (3d Cir. 2011).

65. *M-E-V-G*, 26 I. & N. Dec. at 241.

66. *A-R-C-G*, 26 I. & N. Dec. 388, 393 (B.I.A. 2014).

particular social group that forms the basis of a claim for asylum.”⁶⁷ In its analysis, the Board discussed the three main components required in a particular social group analysis: (1) a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society.⁶⁸

First, the Board relied on *Acosta* and *Matter of W-G-R-* to hold that the applicant’s gender and marital status were immutable characteristics.⁶⁹ The Board cited *Matter of W-G-R-*, which defined an immutable characteristic as a distinguishing trait that cannot be changed by group members or should not be changed to avoid persecution.⁷⁰ The Board indicated that marital status can be immutable in countries where an individual is unable to leave the relationship due to moral beliefs, cultural values, or legal or religious constraints.⁷¹ The Board did not cite which cultural, legal, or religious factors it relied on in that case, but it indicated that adjudicators must consider an applicant’s experiences and objective evidence—like country information—when determining the immutability of marital status.⁷²

Second, the test for particularity requires that (1) there be a clear benchmark for determining who is in the group; and that (2) the terms have a commonly accepted definition in the society the group is a part of.⁷³ In addition, when analyzing particularity it may also be necessary to analyze the social and cultural context of the applicant’s country of citizenship.⁷⁴ Here, the Board found that each definition in the group—“married,” “women,” “unable to leave the relationship”—was particularized, meaning it was a commonly recognized definition within Guatemalan society.⁷⁵ In addition to the terms analysis, the Board examined the social and cultural context of the applicant’s country. The Board supported its particularized group finding by pointing out that although Ms. C-G- sought help from the police, the police refused to assist her because Guatemala’s criminal justice system refused to interfere in marital relationships.⁷⁶

Third, the Board found that Ms. C-G-’s group was “socially distinct” because the society generally recognizes, perceives, or considers persons sharing the particular characteristic of the group as distinct.⁷⁷ The Board noted that the societal-context evidence for the distinction and particularity requirements often overlap.⁷⁸ To prove the social-distinction requirement, Ms. C-G- needed to show that Guatemalan society recognized a need to protect the group by law or by other sociopolitical factors, regardless of whether the laws were enforced.⁷⁹ Ms. C-G- showed that family violence and machismo were commonplace in Guatemalan culture and that law enforcement failed to protect women.⁸⁰

67. *Id.* at 388 (internal quotations omitted).

68. *Id.* at 392.

69. *Id.*

70. *Id.*

71. *Id.* at 392–93.

72. *Id.*

73. M-E-V-G-, 26 I. & N. Dec. 227, 239 (B.I.A. 2014).

74. W-G-R-, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).

75. *Id.*

76. A-R-C-G-, 26 I. & N. Dec. at 393.

77. *Id.* at 394.

78. *Id.*

79. *Id.*

80. *Id.*; Machismo is a term used to describe a type of masculine ideology. It involves a callous sexuality towards women, perceives violence as manly, and views danger as exciting. See Jose M.

Outside the particular-social-group elements analysis, the Board indicated that the particular-social-group analysis in domestic-violence situations is unique when compared to other particular social groups.⁸¹ The Board stated that each case would vary due to “country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent’s past experiences; and other reliable and credible sources of information.”⁸²

III. A CRITIQUE OF THE BOARD’S NEW TREATMENT OF DOMESTIC VIOLENCE ASYLUM CLAIMS

Matter of A-R-C-G- was a landmark decision for domestic violence victims, but its holding poses four major problems. First, *A-R-C-G-* is inconsistent with international precedents as well as domestic law. Second, the holding, which is limited to married women, is underinclusive for women living in societies where domestic violence is rampant. Third, the decision exaggerates the floodgate concern in the domestic-violence- asylum context. Lastly, IJs’ inconsistent application of the Board’s precedents continues to serve injustice on domestic violence asylum applicants despite the favorable *Matter of A-R-C-G-* ruling.

A. Inconsistency with Domestic and International Legal Norms

Other legal sources interpret the particular-social-group requirements more favorably towards gender-based domestic-violence claims. The U.S. federal courts, the Department of Justice, and other countries have all discussed the particular social group framework in a simpler and less burdensome manner.

1. The Federal Courts⁸³

The U.S. federal courts of appeals have recognized gender as a characteristic that can define a particular social group under the *Acosta* immutability standard. For instance, the Eighth Circuit recognized a particular social group of Cameroonian widows because they share a common experience, as well as their gender.⁸⁴ In *Fatin*, the Third Circuit also recognized gender as a characteristic that can define a particular social group.⁸⁵ The Ninth Circuit has also recognized the particular social group of gender with other defining characteristics because gender

Fragoso & Susan Kashubeck, *Machismo, Gender Role Conflict, and Mental Health in Mexican American Men*, 1 PSYCHOL. MEN & MASCULINITY 87 (2000) (discussing the machismo and gender roles of Mexican American men).

81. *A-R-C-G-*, 26 I. & N. Dec. at 394.

82. *Id.* at 395.

83. The Board is not required to follow federal court decisions. The federal courts do, however, have the power to review the Board’s decisions. The federal courts are to give greater deference to precedent decisions, as designated by the Board. *See, e.g., Precedent Decisions*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP’T OF HOMELAND SEC., <http://www.uscis.gov/laws/precedent-decisions> (last updated Sept. 10, 2013).

84. *Ngengwe v. Mukasey*, 543 F.3d 1029, 1033 (8th Cir. 2008); *see also Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (finding Somali females have a well-founded fear of persecution solely based on gender) (“Here, however, we hold that a factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of [female genital mutilation].”).

85. *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993).

is such an innate characteristic that is so fundamental to the identity of its members that they should not and cannot change it.⁸⁶ Several circuits have analyzed the gendered analysis and held that gender can provide a basis for a social group.⁸⁷

Meanwhile, the Seventh and Third Circuits have questioned the controversial addition of the social-distinction requirement in the particular-social-group framework due to the burdens it places on asylum applicants. In *Sarhan*, the Seventh Circuit rejected the social-distinction requirement because it was confusing and inconsistent with the Board's and the Circuit's past cases.⁸⁸ For instance, in *Gatimi*, the court indicated that the only way a woman could have social distinction is by pinning a target on her back.⁸⁹ Judge Posner's opinion questioned the social visibility requirement, stating that it "makes no sense" because "[w]omen who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else."⁹⁰ For example, a member of a targeted group may work to avoid being socially visible at all costs.⁹¹ This need for self-protection makes it difficult to meet the social-distinction requirement, because members of the target group that are successful in remaining invisible may be unsuccessful in being socially distinct.⁹² In *Valdiviezo-Galdamez*, the Third Circuit also rejected the social distinction because it conflicts with prior Board precedent and promotes an insurmountable obstacle to pro se applicants.⁹³

The social-distinction requirement in the particular-social-group framework creates a problem for women who lack social visibility due to societal constraints. The Board tried to remedy these social distinction criticisms in *Matter of A-R-C-G-* by holding that the social-distinction requirement only necessitates that society consider, perceive, or recognize the group. The Board stipulated, however, that it will look to see if the society makes meaningful distinctions towards the immutable trait, such as whether there are laws to protect women, or to look at other sociopolitical factors. This definition is too convoluted and permits subjective value judgments by judges and adjudicators, creating obstacles to relief for pro se applications.

Some circuits have also called into question the particularity requirement of the particular-social-group analysis. For instance, the Third Circuit has indicated that its analysis lacks clarity.⁹⁴ The Second Circuit has said that the particularity requirement cannot mean that a group large in size lacks particularity.⁹⁵ Similarly, the First Circuit has held that the particularity requirement should not be narrowed by adjectives that call for subjective value judgments, or through methods not discernibly objective.⁹⁶

86. *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010).

87. For cases that have analyzed the gender analysis, see Brief of Amicus Curiae of Am. Immigration Lawyers Ass'n at 8 n. 12, *A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014) (No. A099 528 680) [hereinafter *AILA Amicus Curiae in A-R-C-G-*].

88. 658 F.3d at 654.

89. *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 604 (3d Cir. 2011).

94. *Id.* at 608.

95. *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007).

96. *Ahmed v. Holder*, 611 F.3d 90, 95 (1st Cir. 2010).

This brief analysis of the federal circuit case law for the particularity requirement reveals that some circuits do not understand this requirement. *Matter of A-R-C-G-* tried to remedy the confusion by explaining that the terms “married,” “women,” and “unable to leave” are particularized because they have commonly accepted definitions. But almost every term in a particular-social-group framework can have a commonly accepted definition. Again, this raises the question of why such a requirement exists in the first place. Overall, the courts’ commentaries make it clear that the social distinction and particularity requirements (as an addition to the well-respected immutability framework) create discord and uncertainty for adjudicating the particular social group framework as a whole.

2. The Department of Justice⁹⁷

The Department of Justice (“DOJ”) also interjected in the particular-social-group debate by creating guidelines for asylum officers.⁹⁸ The DOJ Guidelines indicate that women’s rights are universal.⁹⁹ The guidelines provide that “rape . . . sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds.”¹⁰⁰ The DOJ Guidelines also provide that gender-based claims should be viewed in the framework provided by international human rights instruments.¹⁰¹ This acknowledgement of the international framework was a leap forward, because international legal norms were not fully acknowledged as a precedential framework at that time.

3. Other Countries: Canada and the United Kingdom

Canada’s Immigration and Refugee Board recognizes that women together with an additional factor can be a particular social group.¹⁰² Adopting the *Acosta* immutability standard, the Canadian Immigration and Refugee Board held that women subjected to domestic abuse, forced into marriage, subjected to exploitation where the individual was tried and convicted, or subject to circumcision are all particular social groups.¹⁰³

Canada does not have a particularity or social-distinction requirement.¹⁰⁴ According to the Canadian Gender Guidelines, gender can be used to demonstrate a well-founded fear of gender related persecution, even if gender was not listed as one

97. The United States Immigration and Naturalization Service was formerly an agency of the U.S. Department of Justice.

98. See PHYLLIS COVEN, OFFICE OF INT’L AFFAIRS, U.S. DEP’T OF STATE, GUIDELINES REGARDING ADJUDICATING CLAIMS ON THE BASIS OF GENDER (1995), <http://www.state.gov/s/l/65633.htm> [hereinafter DOJ GUIDELINES].

99. *Id.*

100. *Id.*

101. *Id.*

102. *Grounds of Persecution*, IMMIGR. & REFUGEE BD. OF CAN., <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef04.aspx> (last visited Mar. 30, 2016); IMMIGR. & REFUGEE BD. OF CAN., WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (1993), <http://www.refworld.org/docid/4713831e2.html>.

103. *Grounds of Persecution*, IMMIGR. & REFUGEE BD. OF CAN., <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef04.aspx> (last visited Mar. 30, 2016) (internal citations omitted).

104. *See id.*

of the grounds established in the 1967 Convention for asylees.¹⁰⁵ The Canadian Gender Guidelines also indicate that a sub-group of women can be identified due to “their exposure or vulnerability for physical, cultural, or other reasons, to violence, *including domestic violence*, in an environment that denies them protection.”¹⁰⁶ The Supreme Court of Canada has recognized that gender can define a particular social group as well.¹⁰⁷ It has held that a particular social group exists when there is a group with innate and unchangeable characteristics who fear persecution; and that persecution can occur on the basis of gender.¹⁰⁸

Following Canada, the United Kingdom also adopted its own set of Gendered Guidelines—with gender as a particular social group.¹⁰⁹ Specifically, the Immigration Appellate Authority indicated that a particular social group could either be “voluntary and self-generating” or could be created when the “norms or customs” of a society set individuals with shared characteristics apart and marginalizes them.¹¹⁰ The UK Gender Guidelines also recognize gender specific forms of harm such as sexual violence, marriage-related harm, family violence, legal discrimination, forced marriage, and female genital mutilation.¹¹¹ The House of Lords, which shares the task of making laws in the United Kingdom, has also cited gender as a characteristic that is immutable, unchangeable and exemplifies a type of particular social group.¹¹² It has also held that women can be a particular social group when society sets them apart due to its norms and customs.¹¹³

4. Other International Sources

a. 1951 Convention, the 1967 Protocol, and the Refugee Act of 1980

The 1951 Convention is grounded in Article 14 of the 1948 Universal Declaration of Human Rights¹¹⁴ and was created to recognize the right to asylum.¹¹⁵ The 1967 Protocol amended the temporal and geographic limitations of the 1951 Convention.¹¹⁶ Both the 1951 Convention and the 1967 Protocol universalized the

105. IMMIGR. & REFUGEE BD. OF CAN., GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT, GUIDELINE 4, WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: UPDATE (Nov. 13, 1996), <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx> [hereinafter CANADIAN GENDER GUIDELINES].

106. *Id.* at A2 (emphasis added).

107. *Canada (Att’y Gen.) v. Ward*, [1993] 2 S.C.R. 689, 739 (Can.).

108. *Id.*

109. IMMIGR. APPELLATE AUTHORITY (IAA), ASYLUM GENDER GUIDELINES (Nov. 1, 2000), <http://www.refworld.org/docid/3ae6b3414.html> [hereinafter UK GENDER GUIDELINES].

110. *Id.* at § 3.35.

111. *Id.* at § 2A.17; *see also* THE COMM. ON IMMIGR. & NATIONALITY LAW OF ASS’N OF THE BAR OF N.Y., GENDER-RELATED ASYLUM CLAIMS AND THE SOCIAL GROUP CALCULUS: RECOGNIZING WOMEN AS A “PARTICULAR SOCIAL GROUP” PER SE (2003), <http://www.nycbar.org/pdf/report/FINAL%20%20Gender%20Related%20Asylum%20Claims.pdf>.

112. UK GENDER GUIDELINES, *supra* note 109, at ¶¶ 3.35–38, 3.41–3.43.

113. *Islam v. Sec’y of State for the Home Dep’t* (House of Lords) [1999] 1 NLR 144, [1999] Imm AR 283.

114. THE UN REFUGEE AGENCY, CONVENTION & PROTOCOL RELATING TO THE STATUS OF REFUGEES, at 2, (2010), <http://www.unhcr.org/3b66c2aa10.html>.

115. *Id.*

116. The 1967 Protocol removed the geographic and temporal limits of the 1951 Convention.

definition of “refugee.”¹¹⁷ Specifically, the Preamble and Article 35 of the 1951 Convention require the United Nations High Commissioner for Refugees (UNHCR) to supervise the Convention.¹¹⁸ Since the 1967 Protocol, the United Nations High Commissioner for Refugees has supplemented the meaning of the 1967 Protocol with various interpretive guides.¹¹⁹

Given that the United States ratified the 1967 Protocol and later adopted the 1980 Refugee Act, it should interpret the Protocol in a manner consistent with UNHCR interpretive guides. Years after the inception of the 1967 Protocol and the 1980 Refugee Act,¹²⁰ however, it became evident to the UNHCR that many countries, including the United States, gravely misunderstood the particular-social-group requirement enumerated in Article 1(A)(2) of the 1951 Convention.¹²¹ For that reason, the UNHCR published several guides interpreting the 1951 Convention and 1967 Protocol.¹²² The purpose of the 1980 Refugee Act was to bring the United States into compliance with its obligations under the 1951 Convention and 1967 Protocol. The UNHCR documents indicate gender should be a particular social group, and that domestic violence can amount to persecution on account of membership in the particular social group. Still, the United States has failed to interpret the 1967 Protocol in a manner consistent with UNHCR interpretive guides.¹²³

*b. UNHCR Interpretive Guidance for a Gendered
“Particular Social Group”*

The UNHCR has issued several interpretive guides—all affirming that gender can be a particular social group. The UN General Assembly and the Executive Committee on UNHCR’s Programme both affirm that the term “refugee” should be interpreted with awareness of possible “gender dimensions.”¹²⁴ These dimensions are “[g]ender related claims [that] have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, [and]

See 1967 Protocol, *supra* note 18, art. I. Because the 1951 Convention was created after the Second World War, the scope of the 1951 Convention was limited to persons fleeing events that occurred before 1951 within the geographical boundaries of Europe. See 1951 Convention, *supra* note 18, at art. I.

117. 1967 Protocol, *supra* note 18.

118. Brief for UN High Comm’r for Refugees as Amicus Curiae in Support of Respondents at 1, A-R-C-G-, 26 I. & N. Dec. 388, 393 (B.I.A. 2014) (No. A099 528 680) [hereinafter UNHCR Amicus Curiae in A-R-C-G-]; 1967 Protocol, *supra* note 18, at art. 2.

119. UN HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES & CRITERIA FOR DETERMINING REFUGEE STATUS, at 92, U.N. Doc. HCR/1P/4/ENG/REV.3 (1979, reissued 1992 and 2011) [hereinafter REFUGEE HANDBOOK].

120. Article 1(A)(2) of the 1951 Convention was incorporated into U.S. law. See Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

121. See U.N. HIGH COMM’R FOR REFUGEES, GUIDELINES ON INT’L 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, U.N. Doc. HCR/GIP/02/02 (2002) [hereinafter GENDER GUIDELINES ON INT’L PROTECTION 2].

122. UNHCR Amicus Curiae in A-R-C-G-, *supra* note 118, at 2.

123. *Id.* at 5.

124. U.N. HIGH COMM’R FOR REFUGEES, GUIDELINES ON INT’L PROTECTION NO. 1: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶ 4, U.N. Doc. HCR/GIP/02/01 (May 7, 2002), <http://www.refworld.org/docid/3d36f1c64.html> [hereinafter UNHCR GENDER GUIDELINES ON INT’L PROTECTION 1].

coerced family planning”¹²⁵ Meanwhile, the UNHCR’s Refugee Handbook provides that the particular-social-group framework includes women because they are an example of a social subset with immutable characteristics often treated differently than men.¹²⁶ In addition, the Refugee Handbook indicates that the size of the group should not be used to refuse women as a particular social group because the argument has “no basis in fact or reason.”¹²⁷ The United States has recognized the Refugee Handbook as “an important source of interpretation of international refugee law,”¹²⁸ yet it has failed to implement its recommendations.

In addition to its statement that women can be a particular social group, the UNHCR has issued gender-based guidelines for different gender-based claims that all affirm that gender may be a particular social group. The UNHCR Gender and Social Group Guidelines on International Protection clarify that a gender-based particular social group can exist even though gender is not specifically referenced in the refugee definition because gender influences the type of persecution or harm suffered by a woman.¹²⁹ Like the Handbook, the UNHCR Gender Guidelines on International Protection No. 2 specify that gender falls within the sphere of the particular-social-group category because women are “a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.”¹³⁰ Furthermore, the UNHCR Guidelines on International Protection Nos. 7 and 9 also provide that women are an example of those carrying an innate and immutable characteristic, and as such may be considered a particular social group.¹³¹

In addition to the UNHCR guidelines, the UNHCR has an Executive Committee (EXCOM) that issues guidance and interpretation that consider women to comprise a particular social group.¹³² EXCOM has addressed the issue of refugee women in two salient documents. EXCOM’s *Conclusion No. 39* indicated that countries may consider women as a particular social group within the meaning of Article 1 A(2) of the 1967 Protocol and urges that countries exercise their

125. *Id.* at 2.

126. See REFUGEE HANDBOOK, *supra* note 119.

127. See REFUGEE HANDBOOK, *supra* note 119, at 85.

128. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 427 (1987); see also *Rodriguez-Roman v. I.N.S.*, 98 F.3d 416, 425 (9th Cir. 1996); cf. *S-P-*, 21 I. & N. Dec. 486, 489 (B.I.A. 1996).

129. GENDER GUIDELINES ON INT’L PROTECTION 2, *supra* note 121, at 2–3.

130. *Id.* at 3.

131. U.N. HIGH COMM’R FOR REFUGEES, GUIDELINES ON INT’L PROTECTION NO. 7: THE APPLICATION OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES TO VICTIMS OF TRAFFICKING AND PERSONS AT RISK OF BEING TRAFFICKED, ¶ 28, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006), <http://www.refworld.org/docid/443679fa4.html>; U.N. HIGH COMM’R FOR REFUGEES, GUIDELINES ON INT’L PROTECTION NO. 9: CLAIMS TO REFUGEE STATUS BASED ON SEXUAL ORIENTATION AND/OR GENDER IDENTITY, ¶ 47, U.N. Doc. HCR/GIP/12/01 (Oct. 23, 2012), <http://www.refworld.org/docid/50348afe2.html>.

132. “The UN’s Economic and Social Council (ECOSOC) established the Executive Committee of the High Commissioner’s Programme (ExCom) in 1958 ExCom functions as a subsidiary organ of the General Assembly and its documentation is issued in a General Assembly series. ExCom’s report is submitted directly to the General Assembly ExCom does not substitute for the policy-making functions of the General Assembly or ECOSOC but has its own executive and advisory functions. These include: [T]o advise the High Commissioner in the exercise of his/her functions[.] to review funds and programmes[.] to authorize the High Commissioner to make appeals for funds[; and] to approve proposed biennial budget targets.” U.N. HIGH COMM’R FOR REFUGEES, THE EXEC. COMM.’S ORIGINS & MANDATE (Mar. 01, 2015), <http://www.unhcr.org/pages/49c3646c86.html>.

sovereignty to accept gender-related social groups.¹³³ Later in 1993, EXCOM's *Conclusion No. 73* indicated that women refugees often experience persecution different than men, and recommended States develop appropriate guidelines for women.¹³⁴

The UNHCR also submitted an amicus brief to the Board in *Matter of A-R-C-G-*, arguing for a particular social group of gender; or in the alternative, a social group with gender combined with another characteristic like relationship status.¹³⁵ UNHCR argues that, based on over sixty years of supervising international application of the 1951 Convention, the UNHCR has determined that domestic violence against women may constitute persecution due to membership in a particular social group of gender.¹³⁶

Despite extensive international guidance that allows for gender as a particular social group, the United States has failed to categorically define gender as a particular social group.

B. *Insensitivity to Domestic Realities*

In addition to the Board's failure to follow international conventions, the particular social group of "married women unable to leave their relationship" is also problematic because it fails to consider the realities of familial relationships in countries around the world. In cultures where domestic violence is prevalent, the abuser does not necessarily need to be a spouse. The abuser can be a sibling, parent,¹³⁷ close relative, community member,¹³⁸ or partner. By focusing so heavily on the words "married," "women," and "unable to leave the relationship" the Board's precedent may ignore unmarried women or women abused by family members.

In *Matter of A-R-C-G-*, the Board indicated that "married," "women," and "unable to leave" were particularized because the words comport with commonly accepted definitions in Guatemalan society. However, in defining these terms, the Board emphasized that Ms. C-G-'s particular social group was particularized and distinct because she sought help from the police, and the police refused to interfere with a marital relationship.¹³⁹ This narrow holding fails to consider that a society may refuse to protect *all* women from male perpetrated violence, not simply those in

133. *Id.*

134. EXCOM, CONCLUSION ON REFUGEE PROTECTION AND SEXUAL VIOLENCE, EXCOM Conclusion No. 73 (XLIV), at ¶ e (Oct. 8, 1993) [hereinafter EXCOM CONCLUSION 73].

135. UNHCR Amicus Curiae in *A-R-C-G-*, *supra* note 118.

136. *Id.* at 3.

137. *S-A-*, 22 I. & N. Dec. 1328, 1328 (B.I.A. 2000). Although *S-A-* discusses some protections from family members, the social group in that case had no relation to the applicant's gender, but was instead closely tied to her and her father's religion. "A woman with liberal Muslim beliefs established by credible evidence that she suffered past persecution and has a well-founded fear of future persecution at the hands of her father on account of her religious beliefs, which differ from her father's orthodox Muslim views concerning the proper role of women in Moroccan society." *Id.* This is problematic because it does not protect all women, but only a very small subset of women.

138. *See, e.g., Juarez-Lopez v. Gonzales*, 235 F. App'x 361 (7th Cir. 2007). In *Juarez-Lopez*, the victim's abuser was her neighbor. *Id.* He first began to rape her around the age of twelve and continued to hold her hostage by threatening her life. *Id.* The victim's family insisted she should not report the abuse to the police because the abuser was wealthy. *Id.* The Board denied the victim asylum in part because she could not present extrinsic evidence and had received an adverse credibility finding. *See id.*

139. *A-R-C-G-*, 26 I. & N. Dec. 388, 394 (B.I.A. 2014).

marital relationships.¹⁴⁰ Although it is possible that the Board will uphold a decision for unmarried women in the future, currently, unmarried women with viable claims are subject to the IJ inconsistency problem.¹⁴¹

Another problem with *Matter of A-R-C-G-* is that it relies too much on police reporting to meet the particularity and social-distinction requirements. In the particular-social-group analysis, the courts and adjudicators examine whether state actors committed the offense. This analysis is essentially part of the “government actor” asylum requirement that requires the harm come from a government actor or an actor the government is unwilling or unable to control. By justifying particularity and social distinction with Ms. C-G-’s various calls to the police, the Board appeared to address issues it typically reserves for the “unable or unwilling to control” asylum requirement in the particular social group analysis. While the applicant would have to prove this element later in the asylum process, making the analysis in the particular-social-group framework creates ambiguity, circularity, and complexities for applicants and adjudicators alike. In addition, this creates another level of unnecessary subjective discretion for adjudicators and judges.

To analyze the particularity requirement, the Board in *Matter of A-R-C-G-* said it would look at the social and cultural context of the applicant’s country—but it only considered police inaction.¹⁴² The Board listed several factors that would help analyze particularity, but in its application to the facts, the Board cited to the police’s inability to protect Ms. C-G- as the societal factor.¹⁴³

To discuss the social-distinction requirement, the Board again noted the lack of response from the police and the government’s refusal to protect Ms. C-G-.¹⁴⁴ Although in the social distinction analysis, the Board considered other factors in analyzing the social distinction requirement—such as whether laws exist to protect domestic violence victims, whether the laws are effectively enforced, and other sociopolitical factors—it relied far too heavily on Ms. C-G-’s various calls to the police. But, in some societies, law enforcement authorities do refuse to help.¹⁴⁵ Thus, in those countries where inaction is the status quo, the police’s inaction will not create the necessary “social distinction.”

In Ms. C-G-’s case, her husband taunted her when she threatened to call the police and even encouraged her to do so because police and judges beat their wives too. This exemplifies the reality for women in domestic-violence situations where male offenders have social impunity. In situations such as these, it is troubling that *Matter of A-R-C-G-* uses police inaction as a central example of the social-distinction and particularity requirements. Though in many respects the Board’s example is helpful for many women, it also shuns women who fear calling the police and may eliminate them from the category of a particular social group altogether.

Rather than use police inaction as evidence of social distinction or

140. Jason Dzubow, *One Giant Leap for a Woman; One Small Step for Womankind*, THE ASYLUMIST (Sept. 4, 2014), <http://www.asylumist.com/2014/09/04/one-giant-leap-for-a-woman-one-small-step-for-womankind/>.

141. See *infra* Part III(D).

142. 26 I. & N. Dec. at 393.

143. *Id.*

144. *Id.* at 393–94.

145. Adriana Beltrán & Laurie Freeman, *Hidden in Plain Sight Violence Against Women in Mexico and Guatemala*, WASHINGTON OFFICE OF LATIN AMERICA, at 1 (Mar. 2007), <http://www.wola.org/sites/default/files/downloadable/Central%20America/past/ViolenceAWomen.pdf>.

particularity, the Board should urge adjudicators and judges to review the police's or government's inability or unwillingness to control abusers in the "government action" requirement. Adjudicators should consider whether the government tried to control the nongovernment actor, even if a woman does not request government protection. For example, a woman could show the government is unable or unwilling to control the persecutor through country's conditions, experts, country reports and corroborating evidence from the respondent.¹⁴⁶

C. Irrelevance of "Floodgate" Concern

A third problem with the holding in *Matter of A-R-C-G-* is that it largely overstates its concern that a gender-based social group would open the asylum "floodgates."¹⁴⁷ A gender-based social group would not cause an inundation of asylum claims for several reasons. First, asylum law is designed to protect massive groups of people during times of great persecution, so size alone should never constrain good policy. Second, the other requirements—the applicant must demonstrate a nexus between the protected ground and the persecution and must show that the persecution is by a government actor, or an actor the government is unable or unwilling to control—effectively narrow the category of people who could claim a gender-based social group. Third, the asylum process is so cumbersome and difficult that expanding one category would not change the stringency of the asylum process as a whole, but it would make it more accessible in some respects to pro se applicants.

1. Asylum Law was Designed for Massive Groups of People

Religion, political opinion, and nationality are accepted social groups that may allow massive groups of people to seek asylum, yet these groups are not subject to either floodgate arguments or constraints that narrow the categories. Meanwhile, the particular-social-group category is scrutinized in a manner that promotes injustice. The "well-founded fear of persecution" construct was developed on the heels of distress concerning massive groups of people, including Jews and other targeted groups, during the Third Reich; the very concept of asylum law developed after victims of Nazi persecution could not fall into tidy and small categories.¹⁴⁸ Comparing the particular-social-group analysis to the other threshold requirements established by law today—such as race, nationality, and religion—reveals that the Board severely scrutinizes the particular social group in terms of size due to exaggerated floodgate concerns.¹⁴⁹

146. S-A-, 22 I. & N Dec. 1328, 1335 (B.I.A. 2000).

147. 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), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1560&context=faculty_scholarship [hereinafter *Protecting Victims of Gendered Persecution*]; see also Anna Quindlen, *Torture Based on Sex Alone*, TIME (Sept. 09, 2001), <http://www.newsweek.com/torture-based-sex-alone-152025>.

148. 1951 Convention, *supra* note 18. "The contemporary U.S. and international refugee protection regime has its origins in the post-World War II period. The international community, which had failed to extend protection to Jews and other targeted groups fleeing Nazi genocide and persecution, came together in the wake of World War II to draft those instruments which would establish the norms of protection." *Protecting Victims of Gendered Persecution*, *supra* note 147, at 121.

149. 8 U.S.C. § 1101(a)(42)(A) (2006).

2. What About the Other Requirements to Receive Asylum?

That large groups of people can, in theory, be eligible for asylum based on their past experiences does not mean that they all meet the other criteria required by law. Even if the particular-social-group construct were analyzed in the most generous fashion, the rest of the asylum requirements remain stringent.¹⁵⁰ Applicants must show a well-founded fear of past or future persecution on account of one of the protected grounds. In addition, the applicant must show a nexus between the protected ground and the persecution. Finally, the applicant must show that the persecution is by a government actor, or by an actor the government is unable or unwilling to control.¹⁵¹

This requires that the applicant show that the particular social group is the central reason for their persecution.¹⁵² Reasoning in *Fatin* suggests that the proper balance to strike is to interpret the particular social group broadly because the strict nexus requirement to persecution is burdensome.¹⁵³ The applicants must also show that their home government is unable or unwilling to protect them. As stated previously, in domestic-violence asylum cases, the particularity and social-distinction components of the particular-social-group analysis usually discuss whether the police and government were willing to protect the individual.¹⁵⁴ Requiring the applicant to prove certain societal factors in the particular-social-group requirement, and then having the applicant prove—again—that the government is unwilling or unable to protect them, is both redundant and burdensome.

The 1980 Refugee Act also requires adjudicators to assess the applicant's credibility to succeed with an asylum claim.¹⁵⁵ This credibility assessment is often left to the discretion of the IJ or adjudicator. For some women, especially domestic-violence victims, it can be difficult to recall information, let alone describe it persuasively. Yet to succeed, the applicant must also show a well-founded fear of past persecution or future persecution. And because fear is felt subjectively by the applicant, it can often be difficult for the applicant to adequately convey her fears to IJs and adjudicators.¹⁵⁶

Even if an applicant could prove all these factors, the type of harm an applicant must prove in domestic-violence asylum claims is also difficult to establish.¹⁵⁷ The Gender Guidelines, drafted by the Board for asylum officers evaluating asylum claims, indicate that only severe sexual abuse constitutes a

150. Brianna Lee, *Why Aren't Central Americans Getting Asylum In The US?*, INT'L BUS. TIMES (Aug. 08, 2014 04:32 AM), <http://www.ibtimes.com/why-arent-central-americans-getting-asylum-us-1653494>.

151. 8 U.S.C. § 1101(a)(42)(A) (2012).

152. See generally *Fatin*, 12 F.3d 1233; *Gao v. Gonzales*, 440 F.3d 62 (2d. Cir. 2006) (vacated).

153. *Fatin*, 12 F.3d 1233 at 1240-41.

154. *Supra* Part III(A)(1).

155. The acceptance of domestic-violence victims as bona fide asylees will not open the borders to all female applicants who suffer the fate of domestic violence. Helen P. Grant, *The Floodgates Are Not Going to Open, but Will the U.S. Border?*, 29 HOUS. J. INT'L L. 1, 9 (2006). An applicant's testimony standing alone must be assessed for credibility. 8 USC § 1158(b)(1)(B)(ii).

156. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987).

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

sufficient level of persecution.¹⁵⁸ The Board has defined this abuse as threats to life, confinement, torture, and economic threats to life or freedom.¹⁵⁹ And, while international instruments overwhelmingly support a gender based particular social group, they remain silent as to the extent of the harm required.¹⁶⁰ Thus, the Board guidelines create a high threshold for any domestic-violence victim. The abuse in the *Matter of A-R-C-G-* was heinous—the floodgates cannot open when there is such a high threshold for domestic abuse.

3. Where is the Flood?

All available data shows the rate of asylum claims has not risen significantly over the last few years despite daily changes in the law.¹⁶¹ Even if the number does grow, because asylum claims are not tracked by type, it will be difficult to tell whether the number grew due to domestic-violence claims or other asylum claims. For that reason, it is helpful to look at other countries with similar policies.

Canada already considers women a particular social group for domestic violence, but it has not experienced a large influx of domestic violence asylees. In an email to renowned asylum expert Karen Musalo, Canadian officials reported that asylum claims did not explode after the gender-based decision in Canada.¹⁶² Two years after Canada's domestic-violence precedent and the Canadian Gender Guidelines, only 2 percent of the forty thousand refugee claims were gender-based.¹⁶³

Further, even if an applicant has a strong claim, the asylum process is very unfriendly to asylum applicants. Asylum applicants may be successful if applying for affirmative asylum, as the grant rate was 74 percent in 2013.¹⁶⁴ However, the grant rate for defensive asylum was only 30 percent in 2013.¹⁶⁵ And only “a relatively small percentage” of IJ decisions ever get appealed to the Board.¹⁶⁶ This is because the asylum application process is a complex legal procedure. For an asylee, navigating the complex particular-social-group requirements can be nearly impossible. For example, the statistics show that in 2013, there were more claims abandoned, withdrawn, or in the category of “other”¹⁶⁷ than there were those that

158. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN, at 9 (May 26, 1995), <http://www.refworld.org/docid/3ae6b31e7.html> [hereinafter INS GENDER GUIDELINES].

159. *Id.*

160. G.A. Res. 48/104, Declaration on the Elimination of Violence against Women, U.N. Doc. A/RES/48/104 (Feb. 23, 1994); Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, June 9, 1994, 33 I.L.M. 1535; Convention on the Eliminations of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

161. OFFICE OF PLANNING, ANALYSIS, & TECH., U.S. DEP'T OF JUST., ASYLUM STATISTICS: FY 2010–2013 (Apr. 2014), <http://www.justice.gov/eoir/efoia/FY2009-FY2013AsylumStatisticsbyNationality.pdf>.

162. *Protecting Victims of Gendered Persecution*, *supra* note 147, at 135.

163. Patricia A. Seith, *Escaping Domestic Violence: Asylum As a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1838 (1997).

164. OFFICE OF PLANNING, ANALYSIS, & TECH., U.S. DEP'T OF JUST., STATISTICS YEARBOOK K3 (2014), <http://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf>.

165. *Id.* Defensive asylum occurs when an application for asylum occurs as defense against removal. *Id.* at 5.

166. *Id.* at V1.

167. “A decision type that indicates that an immigration judge’s decision and the facts of the

were granted or denied.¹⁶⁸ The difficulties in the application process may push women to remain here illegally without pursuing a legal claim. For these women, the consequences can be grave. If a woman is detained, the government must pay approximately \$159 per daily bed, and immigration officials confirm that the cost of detention can be higher than the figure reported.¹⁶⁹ This is money that could be spent to help pay for representation. Instead, the complex legal battles continue after a woman has been caught here without authorization.

D. The IJ Inconsistency Problem—Adjudicating Domestic Violence Asylum Fails Domestic-Violence Victims

More specifically, the particularity and social-distinction requirements in the particular-social-group framework create a path for varying degrees of harshness or ambiguity in real life applications. The *Matter of A-R-C-G-* holds that some women are considered a particular social group when an adjudicator finds that they meet the asylum and added particular-social-group requirements. These requirements allow IJs to analyze asylum claims on a case-by-case basis with varying degrees of harshness. As discussed previously, the particular-social-group analysis has a heavy burden of proof that creates a great deal of uncertainty.¹⁷⁰ Individual judges require varying levels of proof, and varying levels of abuse in order to grant asylum claims. This creates judge-dependent disparities. For instance, one Miami judge accepts asylum applicants 5 percent of the time, while another Miami judge accepts applicants 88 percent of the time.¹⁷¹

These inconsistencies exist outside of Miami as well. A recent study conducted in Eloy, Arizona, found that judges typically deny all domestic-violence asylum claims.¹⁷² In Eloy, a judge rarely grants asylum, even when the particular social group is identical to the one in the *Matter of L-R-*.¹⁷³ This inconsistency is further fueled by the fact that judges can make decisions that may never be subject to review as most immigration decisions are unpublished.¹⁷⁴ For example, in one case, the IJ in Eloy denied the proposed social group formulations, which were identical to *L-R-*, because they “lacked particularity, social visibility, and suffered from circularity.”¹⁷⁵

case do not fall within the list of codes provided in the Executive Office for Immigration Review’s computerized case management database.” *Id.* at 9.

168. *Id.* at K4.

169. *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, NAT’L IMMIGR. FORUM (Aug. 2013), <http://immigrationforum.org/blog/themathofimmigrationdetention/>.

170. Rebecca Hamlin, *A Recent Shift in Immigration Law Will Change Less Than You Think*, THE WASH. POST (Nov. 7, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/11/07/a-recent-shift-in-immigration-law-will-change-less-than-you-think/>.

171. *Id.*

172. Nina Rabin, *At the Border Between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 LAW & ETHICS HUM. RTS. 109, 132–33 (2013) (describing the inconsistent use of credible-fear screening questions, which aim to elicit viable asylum claims in expedited removal processes).

173. *Id.*

174. See EXEC. OFFICE FOR IMMIGR. REV., U.S. DEP’T OF JUST., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL (2015), https://www.justice.gov/sites/default/files/pages/attachments/2015/10/30/biapracticemanual_fy2016.pdf.

175. Rabin, *supra* note 172, at 127–28.

Some scholars suggest that regulatory reform can curb these inconsistencies, as the IJs do not follow precedential decisions closely.¹⁷⁶ The decisions in *Matter of L-R-* and *Matter of R-A-* did not create consistency within immigration courts in applying the particular-social-group analysis. Statistics show that despite the two decisions, IJs continue to have contradictory outcomes.¹⁷⁷ The particular social group three-step analysis allows judges or adjudicators to easily cite the group as circular, lacking particularity, or simply not visible enough. IJs are unwilling to grant asylum, even after the Board decides certain groups should be protected. The IJs' unwillingness to grant asylum in certain instances, like domestic-violence asylum, makes it clear they will probably continue to reject claims after *A-R-C-G-* on the basis of the particular social group framework.

E. Recommendations for the Future

For the reasons discussed above, I suggest both a return to the *Acosta* standard, as well as new, streamlined regulatory reforms. The Board needs to comply with international norms and return to the immutability standard announced in *Acosta*. Inconsistencies in asylum adjudication reveal the need for more guidance on applying the particular-social-group framework.¹⁷⁸ The inconsistent rulings, coupled with the Board's backlogged docket, further support streamlining the asylum process.¹⁷⁹ A return to the *Acosta* standard would simplify the analysis required for domestic-violence asylum as it pertains to the particular-social-group component. The *Acosta* case acknowledged a particular social group based on sex.¹⁸⁰

The complexities of the asylum application process force women to live in fear and to apply defensively, after they are in deportation proceedings. This creates unnecessary expenditures for courts and detention centers. A return to the *Acosta* standard would simplify the application process, which might then allow women to apply on their own and to apply affirmatively—before they find themselves in deportation proceedings. Affirmative applications do not require a hearing, which would reduce the burden on the immigration courts.

Additionally, other scholarship suggests that new regulation be created to support a systematic and impartial approach to the asylum review process.¹⁸¹ If a return to *Acosta* is infeasible, then the regulatory reforms should include examples of particular social groups spelled out in list format. In this way, regulatory reform could clarify inconsistencies and allow for a streamlined asylum application process.

Any regulatory reform must provide a mandatory reporting mechanism for IJs and adjudicators. This reporting system could be as simple as having IJs and adjudicators fill out a simple form with their holding. These forms could be made public record, so future research and scholarship could be conducted. Judges and clerks could simply fill in boxes describing the type of asylum case, the holding, and

176. Mardsen, *supra* note 21, at 2544.

177. 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. 108, 109 (2012).

178. See *supra* Part III.D.

179. Amy Grenier, *Landmark Decision on Asylum Claims Recognizes Domestic Violence Victims*, IMMIGR. IMPACT (Sept. 2, 2014), <http://immigrationimpact.com/2014/09/02/landmark-decision-on-asylum-claims-recognizes-domestic-violence-victims/>.

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

181. Mardsen, *supra* note 21, at 2544.

write in the particular social group. This would keep IJs and adjudicators accountable. It would also help applicants and attorneys understand the requirements for different asylum cases. Finally, this reform would expose the prohibitive rulings of certain judges, but also provide an opportunity for real adjudication.

CONCLUSION

In many respects, *Matter of A-R-C-G-* does not go far enough. It fails to consider domestic realities of victims. It fails to adhere to federal or international law. It does not clear up inconsistencies in the adjudication of asylum cases. The critics of a gender-based social group argue that the floodgates will open if we allow an immutability standard for particular social groups. These assertions, however, are unfounded and unrealistic when looking at the asylum process as a whole. If anything, *Matter of A-R-C-G-* illustrates that there is a great demand for consistent adjudicatory practices in U.S. immigration courts. It should not take an appeal to the Board for IJs to recognize that women like Ms. C-G—who was beaten, raped, forced to have her baby prematurely, and burned alive while police turned a blind eye—should qualify for asylum. Finally, our society should not idly sit by while these female victims who flee heinous violence arrive to find a complex immigration system that delays—and effectively denies—justice.