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Stop Victimizing the Victimized: Establishing an Effective Pathway to Asylum for Domestic Violence Victims After Matter of A-R-C-G-

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Stop Victimizing the Victimized:
Establishing an Effective Pathway to Asylum for Domestic Violence Victims
After Matter of A-R-C-G-

Colleen E. King
Gender and the Law
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Part I: Introduction

Arriving in the United States, with no documentation and the hope of seeking asylum, or protection from the United States, can be a terrifying experience. As one woman recounts:

It was 8 p.m. at night. They took me and my kids to a cell . . . They started to ask us to sign a lot of papers. The problem was I didn't understand anything he was asking me. Since he saw that I didn't understand, [the officer] would just write and write and just tell me, "Sign."... He would just put [the form] in front of me and say "Sign, next one, sign."... I was bleeding when I arrived. I was afraid [to ask for help]. Everyone there was afraid. [The officers] don't let you even talk to them... The fear they instill in you doesn't let you ask for help... I needed help and it just felt horrible to be rejected like that.¹

This was the experience of Hilda, a thirty-five year old Honduran woman, who was apprehended while attempting to cross the river into the United States.² She took her two children, age two and fourteen, and fled to the United States after a miscarriage that was the result of a severe beating she had received at the hands of her husband.³ Even as she crossed the border, she was still bleeding from her miscarriage daily.⁴ This family was given expedited removal orders despite the fact that Hilda feared being sent back because, as she put it, "all you're going to find in Honduras is death."⁵

Many of those arriving at the border today experience similar treatment and do not have the means or opportunity to dispute their expedited removal.⁶ It was not until August 2014 that

¹ Am. Civil Liberties Union, *American Exile: Rapid Deportations that Bypass the Courtroom*, 35 (December 2014) [hereinafter *ACLU Report*] (This interview occurred as part of a report done by the American Civil Liberties Union about the experience of migrants put through expedited removal at the border.).

² *Id.* at 34.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 35. (Hilda was fleeing death threats from gangs and domestic violence.).

⁶ Human Rights Watch, *You Don't Have Rights Here": US Border Screening and Returns of Central Americans to Risk of Serious Harm* (2014) [hereinafter *HRW Report*] (This report documented the experience of 35 migrants from Honduras when arriving at the border and seeking asylum without documentation. While the report only spoke of Honduran migrants, Human Rights Watch concluded that the experiences documented have far-reaching implications about the treatment all migrants receive at the border.).

there was recognition of the ability of a victim of domestic violence to be awarded asylum because she was a member of particular social group and was persecuted because of that membership.⁷ Before this decision, the law regarding asylum and domestic violence was a gray area.⁸ This decision provided the opportunity for women to claim asylum

This paper proceeds as follows. Part II describes the asylum process that an applicant must go through in order to be granted asylum in the United States. Asylum is granted to someone who has been persecuted or fears persecution in his or her home country because of one of the protected grounds.⁹ Part II will examine the ways in which the Board of Immigration Appeals (BIA) and the Circuit Court describes the two protected grounds that are not defined by the statute and are not self-evident—particular social group and political opinion. Additionally, Part II will conclude with an examination of the defensive removal process, as well as the expedited removal process. Part II will conclude with a section that examines the issues that accompany the expedited removal process and why those issues pose a barrier for women seeking asylum on the basis of domestic violence.

Part III will examine the evolution of gender-based asylum claims in the United States. This part will start off with the context and history of gender based asylum beginning with the first successful gender-based asylum claim, *Matter of Kasinga*. To show the evolution of domestic violence and asylum claims, Part III will follow the line of cases that culminated with the decision in *Matter of A-R-C-G*. The extent of the decision and its implications for women seeking asylum on the basis of domestic violence will be examined. Part II will then conclude by showing an international perspective through the Guidelines on International Protection: Gender-

⁷ See *infra* Part IV.B.

⁸ See *infra* Part IV.A.

⁹ See *infra* Part II.A. (The protected grounds are race, religion, nationality, membership in a particular social group, and political opinion.)

Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees provided by the United Nations High Commissioner for Refugees (UNHCR) that interpret the United Nation's Convention and Protocol on Refugees, which is the source of the United States' own refugee and asylum laws.

Finally, Part IV concludes that although both the BIA and the Department of Homeland Security (DHS) have formally recognized the ability of applying for asylum on the basis of domestic violence, the recognition is not enough to address the problems that result in the denial of asylum to victims of domestic violence. Part IV proposes that the guidelines that should be passed inform those that will be using them, Immigration and Asylum officers, as well as DHS attorneys, not only of how to interpret the law but also of the context of claims based on domestic violence. This paper posits the use of statistics and studies from international organizations to training manuals for police officers interviewing domestic violence victims to guide the development of the guidelines. Without clear regulations or guidelines, which set out eligibility for asylum in the domestic violence context and recognize and address the specific evidentiary and testimonial issues that may accompany these claims, there can be no assurance that women seeking asylum from domestic violence will not be summarily turned away at the border before they are given a chance to have their claims fairly heard and adjudicated.

Part II: Seeking Asylum

Asylum is the term used to describe the protection that the United States extends to refugees fleeing their home country because they have been persecuted, or fear persecution, and their life and liberty would be threatened if they were to return because of one or more of the

protected grounds.¹⁰ The protected grounds enumerated in the Immigration and Nationality Act are race, religion, nationality, membership in a particular social group, and political opinion.¹¹ The BIA and the Circuit Courts have provided judicial guidance in the interpretation of the categories of membership in a particular social group and political opinion through various cases.¹² This paper focuses mainly on the with the defensive asylum process, which occurs when women are placed in removal proceedings or arrive at the borders without documentation and are placed in expedited removal.¹³ The expedited removal process has received considerable criticism from several organizations, including Human Rights Watch and the American Civil Liberties Union (ACLU).¹⁴

A. What is Asylum?

In the United States, the Secretary of Homeland Security or the Attorney General can grant asylum.¹⁵ Immigration status does not preclude an alien from applying for asylum status, which means that asylum can be granted regardless of arriving without documentation or overstaying a valid visa.¹⁶ The applicant must be unable or unwilling to return to his or her country because he or she has been persecuted, or has a well-founded fear of persecution, upon return on account of their race, religion, nationality, membership in a particular social group, or political opinion.¹⁷ The standard of well-founded fear has been defined by the Department of Homeland Security (DHS) to be the fear of persecution, with a reasonable possibility of actually

¹⁰ 8 USC § 1101(a)(42)(A) (2013).

¹¹ *Id.*

¹² *See infra* Part II.B.

¹³ 8 USC § 1229a (2013); 8 USC § 1225 (2013).

¹⁴ *See infra* Part II.C.2.

¹⁵ 8 USC § 1158(b)(1)(A) (2013).

¹⁶ *Id.*

¹⁷ 8 USC § 1101 (a)(42)(A).

suffering persecution.¹⁸ Additionally, he or she must be unable to avail himself or herself of protection from his or her country because of that fear.¹⁹

To be granted asylum, an applicant must prove through testimony that he or she is both credible and persuasive.²⁰ The testimony must include specific facts that determine the applicant's refugee status.²¹ The statute includes exceptions to the grant of asylum including the option to flee to a safe third country, a one-year time limit on filing, previous asylum applications, and changed circumstances.²² The trier of fact determines whether or not the testimony is credible based on the totality of the circumstances, which includes a decision as to whether the testimony must be accompanied by corroborating evidence.²³ If there is no adverse credibility determination made by the trier of fact, the asylum applicant and any witnesses are given a rebuttable presumption of credibility on appeal.²⁴ Even if it is established that persecution did occur, or there is a well-founded fear that it would occur, it must be based on a protected ground in order to be granted asylum.²⁵

B. Protected Grounds

Race, religion, nationality, membership in a particular social group, and political opinion are the five grounds enumerated by the statute as the protected grounds.²⁶ Defining race, religion, and nationality is fairly easy and self-evident in the asylum context. However, both the courts

¹⁸ 8 CFR §208.13(b)(1); *See also* *INS v. Cardoza-Fonesca*, 480 U.S. 421 (1987) ("[S]o long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) ("[E]ven a ten percent chance of persecution may establish a well founded fear.").

¹⁹ 8 CFR §208.13(b)(1); *See also* *INS v. Cardoza*, 480 U.S. 421 (1987).

²⁰ 8 USC §1158 (b)(1)(i-ii).

²¹ *Id.* (The term "refugee" is defined in the Immigration and Nationality Act as any person who is outside of their country of nationality, or if they do not have a nationality, outside of the last country where they habitually resided, and are unable or unwilling to return and seek protection from that country.).

²² 8 USC §1158(a)(2)(A-D).

²³ 8 USC §1158 (b)(1)(B)(ii-iii).

²⁴ 8 USC §1158(b)(1)(B)(iii).

²⁵ 8 USC §1101(a)(42)(A).

²⁶ 8 USC §1101(a)(42)(A).

and the BIA have struggled in defining membership in a particular social group and political opinion. In *Matter of Acosta*, the BIA determined that to be considered a member of a particular social group, members of the claimed group must share characteristics that are common and immutable.²⁷ The Fourth Circuit is the highest court to address the requirements for establishing that a particular person has been persecuted for their political opinion in *Saldarriaga v. Gonzales*.²⁸ The court determined that in order for something to be a political opinion "whatever behavior an applicant seeks to advance as political, it must be motivated by an ideal or conviction of sorts before it will constitute grounds for asylum."²⁹ In cases in which there are multiple motives for persecution, a protected ground must serve at least one central reason for the persecution in order to obtain asylum.³⁰

1. Particular Social Group

The Board of Immigration Appeals has acknowledged that because "membership in a particular social group" is not defined in the Immigration and Naturalization Act, or any relevant United Nations materials, it is not only difficult to define, but also ambiguous.³¹ In order for persecution to be on account of a membership in a particular social group, the BIA, in *Matter of Acosta*, determined the persecution must be "directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."³² In order for the characteristic to be considered immutable, it must be fundamental, so much so that someone

²⁷ *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) (The BIA denied the asylum claim of the respondent who argued that he faced persecution if returned to El Salvador on account of his membership in a cooperative organization of taxi drivers, which the BIA determined was not a particular social group.)

²⁸ *Saldarriaga v. Gonzales*, 402 F. 3d 461, 466 (4th Cir. 2005) (The court upheld the BIA's denial of asylum because the respondent could not link his activities as an informant for the Drug Enforcement Agency with any particular political opinion he espoused in opposition on the drug cartels that would be the basis for persecution if he were returned to Colombia.)

²⁹ *Id.* at 466.

³⁰ 8 USC § 1158(b)(1)(B)(i).

³¹ *Matter of Acosta*, *supra* note 26, at 232-33.

³² *Id.* at 233.

being persecuted either cannot or should not be forced into changing the characteristic because of its connection to their identities or consciences.³³

Matter of Acosta left the courts with a flexible definition resulting in a lack of consistency and confusion in the various claims that came before the court.³⁴ Over time several cases added requirements of social visibility and particularly into the analysis of a particular social group.³⁵ Eventually, the BIA clarified the definition of membership in a particular social group in *Matter of M-E-V-G*.³⁶ The definition provided that an asylum applicant must establish that the particular social group of which they claim membership is: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."³⁷ The analysis as to whether or not a group is recognized focuses, not on the perception by the persecutor, but rather on the perception of society at large.³⁸ This is in order to separate the issue of nexus from membership in a particular social group and to ensure that the particular social group is not described by the persecution they face and for the immutable characteristics that are the cause of the persecution.³⁹

2. Political Opinion

Neither the BIA nor the statute has provided a definition for political opinion. However, one expert explained it to mean "any opinion on any matter in which the machinery of state, government, and police may be engaged."⁴⁰ The definition is purposefully broad in order to

³³ *Id.*

³⁴ *See generally* Sepulveda v. Gonzales 464 F.3d 770 (7th Cir. 2006); Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013); Rojas-Perez v. Holder, 699 F.3d 74 (1st Cir. 2012); Sanchez-Trujillo v. INS, 801 F. 2d 1571 (9th Cir. 1986)

³⁵ *See* Orellana-Monson v. Holder, 685 F.3d 511, 521 (5th Cir. 2012); *see also* Matter of C-A-, 23 I&N Dec. 951, 957, 959-61 (BIA 2006)

³⁶ Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014).

³⁷ *Id.* at 237.

³⁸ *Id.* at 242.

³⁹ *Id.*

⁴⁰ Guy Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1983).

avoid limitations.⁴¹ The Fourth Circuit court attempted to explain, without defining, political opinion in such a way that an opinion must be "motivated by an ideal or conviction of sorts before it will constitute grounds for asylum."⁴² The court has recognized the expression of feminist beliefs to be an expression of a political opinion.⁴³ The Supreme Court, without defining the political opinion ground for asylum, determined that when examining a claim of persecution based on political opinion, the opinion must be that of the person who is claiming persecution not the actors whom are persecuting.⁴⁴

The doctrine of imputed opinion has also been established in political opinion asylum claims.⁴⁵ The court has accepted that there should be protection for refugees seeking asylum from persecution based on political opinion even when the persecutor has attributed that political opinion to them.⁴⁶ In order to prove the likelihood of persecution that will result from the imputed political opinion the persecutor has given the applicant, the applicant "can establish that [the] alleged persecutor is likely to accuse her falsely of holding certain political beliefs or engaging in certain political acts and that [the] persecutor is likely to harm her on the basis of that accusation."⁴⁷

C. Defensive Asylum Process

There are two types of defensive asylum proceedings that may occur—removal proceedings pursuant to 8 USC 1229a or expedited removal proceedings pursuant to 8 USC

⁴¹ *Id.* at 30.

⁴² *Saldarriaga v. Gonzales*, *supra* note 27, at 466.

⁴³ *See Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 2005).

⁴⁴ *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

⁴⁵ *See Hernandez-Ortiz v. INS*, 777 F.2d 509, 516-17 (9th Cir. 1985); *see also Ramirez Rivas v. INS*, 899 F.2d 864 (9th Cir. 1990).

⁴⁶ *Hernandez-Ortiz*, *supra* note 44, at 517.

⁴⁷ *Ramirez Rivas*, *supra* note 44, at 867.

1225.⁴⁸ Immigration Judges conduct removal proceedings in the Immigration Court in order to render a decision regarding the inadmissibility or deportability of the respondent.⁴⁹ Immigration officers have the authority to order expedited removal after making a determination that an alien is inadmissible.⁵⁰

1. Removal Proceedings and Expedited Removal Proceedings

Asylum can be initiated as a defense in removal proceedings in Immigration Court with the EOIR after apprehension within the United States, or at a port of entry, with no proper documentation or in violation of immigration status.⁵¹ Alternatively, defensive asylum processing occurs when an applicant is apprehended trying to enter the country without proper documentation and as a result is placed into expedited removal proceedings, but an Asylum Officer finds the applicant to have a credible fear of persecution or torture.⁵²

An Asylum Officer is a type of immigration officer with comparable training of a full-time adjudicator of asylum claims, or is supervised by such officer.⁵³ These officers conduct fear interviews to assess if the asylum applicant has a credible fear of persecution.⁵⁴ If the Officer finds that there is no credible fear, the alien is removed with no further hearings or review.⁵⁵ Each officer must prepare a record of determination, which can be reviewed by the Attorney General by request from the applicant.⁵⁶ The review must be conducted within twenty-four

⁴⁸ 8 USC § 1229a; 8 USC 1225.

⁴⁹ 8 USC § 1229a(a)(1).

⁵⁰ 8 USC § 1225 (b)(1)(A)(i).

⁵¹ 8 USC § 1158.

⁵² *Id.*

⁵³ 8 USC § 1225 (b)(1)(E) (An asylum officer's training includes interviewing techniques, relevant asylum law, and country conditions.)

⁵⁴ 8 USC § 1225(b)(1)(B)(i-ii).

⁵⁵ 8 USC § 1225(b)(1)(B)(iii)(I).

⁵⁶ 8 USC § 1225(b)(1)(B)(iii)(II-III) (The record of determination includes a summary of facts, any additional facts the Asylum Officer relied on, and analysis of the determination that credible fear has not been established.)

hours, where possible, or alternatively, no later than seven days after the determination has been made.⁵⁷

The interview and the credible fear standard function as a broad pre-screening standard that is easier to meet than the standard of well-founded fear that is required for a successful asylum grant.⁵⁸ Credible fear merely requires a significant possibility that the interviewee could establish their eligibility for asylum based on the statements made in the interview, and the facts known to the officer.⁵⁹ The questions the Asylum Officer asks inquire into why the interviewee left the country they last resided in, if he or she has a fear to return to his or her country, and if he or she feels they might be harmed if they do return.⁶⁰ In addition, there is an opportunity for the interviewee to give the officer any more information he or she feels might be relevant.⁶¹ In order to have an asylum claim considered by an Asylum Officer in a credible fear interview, an Immigration Officer must first refer an applicant to the interview.

2. Issues Surrounding Expedited Removal

The mere fact that credible fear interviews exist does not guarantee that someone arriving at the border, who expresses fear of returning, will be given an adequate opportunity to have their claim heard. A report from Human Rights Watch revealed that less than half of those interviewed for the report had been referred to a credible fear interview, in spite of the fact that many of them had told the officers of their fear of returning.⁶² The interviewees recounted the various problems they faced during the entire summary removal process including being pressured to abandon their claims by officials or being ignored when they did express fear to

⁵⁷ 8 USC §1225(b)(1)(B)(iii)(III).

⁵⁸Ruth Ellen Wasem, CONG. RESEARCH SERV., R41753, *Asylum and "Credible Fear" Issues in U.S. Immigration Policy*, 9-10 (2011)

⁵⁹ INA §235(b)(1)(B)(v)

⁶⁰ Wasem, *supra* note 57, at 10.

⁶¹ *Id.*

⁶² *HRW Report, supra* note 5.

officials and not given an opportunity for their claims to be examined.⁶³ Without legal assistance, between the interview and the complicated immigration laws, those who were referred to credible fear interviews were left feeling intimidated and consumed by the process.⁶⁴ These interviews were conducted by uniformed officers and often occurred in crowded settings, with no confidentiality, hours or days after apprehension.⁶⁵ While the officers are not armed during the interviews, as they are during apprehension, their empty holsters are still visible.⁶⁶ The report concluded that the officer's ability to distinguish the migrants that need additional in-depth screenings was hampered by the conditions that the interviews take place in.⁶⁷

The same or similar treatment and problems were the basis of a suit filed by the ACLU, American Immigration Council, National Immigration Project of the National Lawyers Guild, and National Immigration Law Center.⁶⁸ This suit was challenging the "detain and deport" policies in effect at the immigration detention center in Artesia, New Mexico.⁶⁹ This is significant in examining women seeking asylum from domestic violence because the suit was filed on behalf of a group of mothers and their children who were being held in the detention center after arriving in the United States without documentation.⁷⁰ The complaint alleged that as a result of the policy decision that asylum claims from Central American women and children are not meritorious, the claims of those women and children arriving at the border were not given a fair opportunity to present their claims and individual facts.⁷¹ Importantly, the complaint described conditions inside the detention center in which detainees' communication both with the

⁶³ *Id.* at 3

⁶⁴ *Id.* at 9.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 3, 19-20.

⁶⁸ Complaint for Plaintiffs, *M-S-P-C- v. Johnson* (2014) (No. 14-1437 ABJ).

⁶⁹ *Id.* at 1-3.

⁷⁰ *Id.* at 3

⁷¹ *Id.* at 4-5

outside world in general and specifically with legal help was precluded.⁷² The complaint detailed a lack of legal information available to detainees, a law library that has no books and access to Lexis exclusively in English, the detainee's inability to physically access the library altogether, and the lack of a legal rights orientation, even a shortened version.⁷³ The remote location of Artesia, New Mexico also affected the dearth of legal representation available, while the policies restricted the ability of a detainee to meet with a lawyer or the ability of volunteer lawyers to give information about legal rights to detainees.⁷⁴ The complaint documented instances in which those lawyers who were representing detainees had to wait two hours before speaking to their clients, the lack of confidentiality, from other detainees as well as officers, in the room where lawyers and clients were permitted to speak, and the unavailability of childcare resulting in the need for women to detail claims about death threats and other sensitive information while their children were on their laps or close by.⁷⁵

While this case did bring national attention to conditions surrounding detention and expedited removal, the case was voluntarily dismissed in January 2015.⁷⁶ The dismissal was a result of a November 2014 announcement from Immigrations and Customs Enforcement (ICE) that the facility would be transitioned back to its former use as a Federal Law Enforcement Training Campus.⁷⁷ Although the Artesia facility is now closed, the DHS still maintains several family detention centers to accommodate for the influx of women with children who are crossing the Southwest border and the expedited removal process continues.⁷⁸

⁷² *Id.* at 34

⁷³ *Id.* at 34-35.

⁷⁴ *Id.* at 37-38 (The facility is more than a three hour drive from the nearest city.)

⁷⁵ *Id.* at 40-41.

⁷⁶ Voluntary Dismissal for Plaintiffs, *M-S-P-C- v. Johnson* (2014) (No. 14-1437 ABJ).

⁷⁷ News Release, U.S. Immigration and Customs Enforcement, Enforcement and Removal, *ICE's new family detention center in Dilley, Texas to open in December* (November 17, 2014), accessed at <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december>

⁷⁸ *Id.*

Part III: Recognition of Domestic Violence in Asylum

A. Context and History of Gender-Based Claims for Asylum

Gender is absent from the grounds on which one can seek asylum and therefore there is no statutory support for seeking asylum from persecution, such as domestic violence, on the basis of gender. In order to understand how the law has opened up to claims relating out domestic violence, it is important to look back to the history and treatment of gender-based claims for asylum in the United States as well as international guidance on the subject. There are three things to be kept in mind when reading the literature about gender-based claims being fit into one of the five enumerated categories for asylum: (1) in many cases, the actions from which an asylum applicant is fleeing may be either required by the culture, or at least condoned; (2) the action may be predicated primarily on gender and not one of the categories listed by the statute; and (3) the perpetrator of these actions is more likely than not a private actor instead of a state actor.⁷⁹

Matter of Kasinga was the first time the United States recognized a gender-based claim for asylum.⁸⁰ The decision by the BIA granted asylum to a woman who had fled her country due to female genital mutilation (FGM), which the court determined constituted a form of persecution that falls within the statutory definition.⁸¹ The court relied on the applicant's testimony, her asylum application, other documentation regarding FGM, and state department reports on the conditions in her home country.⁸² The court found that Kasinga was a member of a particular social group, requirements of which include common immutable or fundamental characteristics, of "young women of Tchamba-Kunsuntu Tribe who have not had FGM, as

⁷⁹ 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, 48-49 (2010).

⁸⁰ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

⁸¹ *Id.* at 358, 365.

⁸² *Id.* at 358-62.

practiced by that tribe, and who oppose the practice."⁸³ The court granted asylum in an exercise of discretion based on her membership in a particular social group, which included her gender.⁸⁴

The next landmark for gender-based claims, and domestic violence based claims, came from *Matter of R-A-*.⁸⁵ The BIA decision detailed a long history of physical abuse and death threats by Ms. Alvarado's husband towards her and several unsuccessful attempts to flee the abuse.⁸⁶ The BIA initially denied asylum to Ms. Alvarado because the claim had failed to establish that she was persecuted because of her membership in a particular social group.⁸⁷ Due to the level of criticism the final decision received, interventions by several Attorney Generals occurred in the years after the decision.⁸⁸ While *Matter of R-A-* was a landmark because the respondent was granted asylum and her claim was on the basis of domestic violence, it provided little precedential value because the final decision was merely one sentence.⁸⁹ The entirety of the decision stated, "Inasmuch as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the parties [to grant asylum]."⁹⁰

The regulations that were proposed, but never finalized, during the pendency of *Matter of R-A-* included a preamble, which viewed gender-based claims for asylum based on domestic

⁸³ *Id.* at 365.

⁸⁴ *Id.* at 368.

⁸⁵ *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) (The case used initials to protect the identity of the respondent, Ms. Alvarado, but her name has since been released.)

⁸⁶ *Id.*

⁸⁷ *Matter of R-A-*, *supra* note 84, at 923. (Ms. Alvarado had shown immutable and fundamental requirements of her group but the BIA determined that that was merely a threshold and she had failed to establish that the group she proposed was "recognized and understood to be a societal faction.")

⁸⁸ Musalo, *supra* note 78, at 47. (Attorney General Janet Reno certified the case to herself and vacated the decision by the BIA. The case was then remanded while awaiting the finalization of regulations proposed by the Department of Justice that would address cases such as Ms. Alvarado's. The regulations were never passed and both AG John Ashcroft and Michael Mukasey also certified the case and remanded it back to the BIA. Finally, the filing of the Brief in the *Matter of L-R-*, in which the DHS took a position that would support Ms. Alvarado's claim, signaled the end of Ms. Alvarado's case prompting a decision by the IJ.)

⁸⁹ *Id.*

⁹⁰ *Id.* at 47, n.7.

violence in a favorable light. This was an attempt to eliminate some of the barriers that *Matter of R-A-* had brought to the attention of the legal community.⁹¹ Without the finalization of the regulations, and given the one sentence decision in *Matter of R-A-*, gender-based persecution claims for asylum were still on uneasy footing in the United States.

B. Turning of the Tides and *Matter of A-R-C-G-*

Although the potential regulations were never finalized, the DHS, under the Obama Administration, in 2009 signaled a change in position in the supplemental brief submitted in *Matter of L-R-*.⁹² The position taken by the DHS is significant because it is binding on Asylum Officers and DHS trial attorneys may not take an inconsistent position because the brief is a representation of the agency's position.⁹³ The DHS offered their own interpretation of particular social group that would allow women who are victims of domestic violence to gain asylum.⁹⁴ The DHS brief asserts that it is illogical and impermissible under the case law regarding asylum for a particular social group to be defined by the persecution that the members suffer or fear suffering.⁹⁵

However, the brief sets forth two different formulations of a particular social group, which would allow a victim of domestic violence to make a cognizable claim for asylum.⁹⁶ The first formulation focuses on the way in which the abuser and society views a respondent's role in the relationship.⁹⁷ If a woman is viewed as subordinate to her husband by virtue of her marriage

⁹¹ *Id.* at 58.

⁹² Dep't of Homeland Security's Supplemental Brief, *Matter of L-R-* (BIA Apr. 13, 2009), http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [hereinafter DHS Supp. Br., *Matter of L-R-*].

⁹³ Center for Gender and Refugee Studies, *Domestic Violence: Matter of L-R-*, <http://cgrs.uchastings.edu/our-work/matter-l-r> (last visited April 28, 2015).

⁹⁴ DHS's Supp. Br., *Matter of L-R-*, *supra* note 91, at 4-5.

⁹⁵ *Id.* at 10.

⁹⁶ *Id.* at 11.

⁹⁷ *Id.* at 14.

and her womanhood, she will not be able to change those characteristics while in the relationship and will not be able to leave the relationship, therefore those characteristics are immutable.⁹⁸ Additionally, if the evidence shows that society either supports or does not interfere with this view, a respondent will have established membership in a particular social group.⁹⁹

The DHS also supported the view that a respondent could argue membership in a particular social group if the specific characteristic that triggers the persecution is the status of a woman, which is gained upon entering a domestic relationship, or based upon the perception that upon entering a relationship, that a woman becomes the property of the man.¹⁰⁰ Additionally there should be a showing that that view is supported by societal expectations and values.¹⁰¹ Unfortunately, in addressing the alternate argument that persecution was based on the expression of a political opinion, of both feminism and defiance of male domination, the DHS argued that in order to be eligible for asylum on that ground the abuse would have had to have been a result of the political opinion and not regardless of the opinion.¹⁰²

Finally in 2014, the BIA issued a monumental decision regarding asylum based on domestic violence in *Matter of A-R-C-G*.¹⁰³ The decision granted asylum to the respondent and held that "depending on the facts and evidence in an individual case, 'married women in Guatemala who are unable to leave their relationship' can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal[.]"¹⁰⁴ The court detailed the respondent's long and detailed history with domestic violence including weekly

⁹⁸ *Id.*

⁹⁹ *Id.* at 14-15.

¹⁰⁰ *Id.* at 15-16.

¹⁰¹ *Id.*

¹⁰² *Id.* at 22.

¹⁰³ *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014).

¹⁰⁴ *Id.* at 388

beatings, broken bones, burning, rape, and death threats.¹⁰⁵ This history additionally included allegations of the police's failure to intervene and the respondent's attempts to leave her abusive husband.¹⁰⁶ After more than eight years of litigation, the DHS did concede that it was possible for domestic violence victims to be classified as a particular group.¹⁰⁷ The case was remanded for an Immigration Judge to determine if the respondent fit into the particular social group in regards to domestic violence that the court delineated in the decision.¹⁰⁸

The case the particular social group, in this case, was first defined by the immutable characteristics of gender.¹⁰⁹ Secondly the group was defined by their immutable characteristic of marital status, particularly because of the inability to leave the relationship.¹¹⁰ When evaluating whether or not a group is particular terms may be combined in order to create the discrete and definable boundaries of the group.¹¹¹ The BIA emphasized that societal expectations regarding gender and subordination can influence a woman's ability to leave her relationship, in addition to the legal restrictions imposed.¹¹² The BIA looked to reports from the Committees on Foreign Relations and Foreign Affairs, as well as the Bureau of Human Rights, Democracy, and Labor's Country Reports of Human Rights Practices in order to evaluate the social and cultural context of Guatemala in defining this particular social group.¹¹³ The court found it significant

¹⁰⁵ *Id.* at 389

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 390.

¹⁰⁸ *Id.* at 396.

¹⁰⁹ *Id.* at 992; *See also* Matter of Acosta, *supra* note 26, at 233 (Determining sex is an immutable characteristic); Matter of W-G-R-, 36 I&N at 213 ("The critical requirement is that the defining characteristic of the group must be something that either cannot be changed or that the group members should not be required to change in order to avoid persecution.").

¹¹⁰ *Id.* at 392-393. (A determination of whether an individual is unable to leave a relationship "will be dependent upon the particular facts and evidence of the case. A range of factors could be relevant, including whether dissolution of a marriage could be contrary to religious or other deeply held moral beliefs or if dissolution is possible when viewed in light of religious, cultural, or legal constraints.")

¹¹¹ *Id.* at 393.

¹¹² *Id.*

¹¹³ *Id.*

that the respondent had previously gone to the police and not received any assistance.¹¹⁴ In order to determine if the group is recognized by the society the BIA looked to laws, their effectiveness, and other sociopolitical factors.¹¹⁵ The documented culture of "machismo and family violence" in Guatemala in the record coupled with the Country Reports documenting both the prevalence of sexual offenses, of which spousal rape was a subset, and the ineffectiveness of the police response to domestic violence supported the finding of a social distinction for this group.¹¹⁶ The BIA emphasized that in order for the court to accept a social distinction of a particular social group regarding domestic violence the respondent would have to provide "facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information."¹¹⁷

Matter of A-R-C-G- a large victory for advocates of recognizing domestic violence asylum claims after a long and uphill battle from the decision in *Matter of Kasinga*. However, there is much growth possible in this field that would open up asylum as an option for many women who have taken the brave step of leaving their abuser and seeking protection in the United States.

C. International Perspective: UNHCR Guidelines on Gender-Related Persecution

The United Nation's High Commissioner for Refugees (UNHCR) is an agency of the United Nations that is the designated guardian over the cornerstone of international refugee law, the 1951 Convention relating to the Status of Refugees.¹¹⁸ The agency is responsible for being a

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 394.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 394-95

¹¹⁸ U.N. Brussels, *United Nations High Commissioner for Refugees*, <http://www.unbrussels.org/agencies/unhcr.html> [herein after *UN Brussels Agencies*] (last visited April 28, 2015).

leader and coordinator of international action as it relates to refugees.¹¹⁹ The UNHCR guidelines have established fundamental international law principles, such as the definition of refugee and non-refoulement principles.¹²⁰ The UNHCR's mission statement explains that the agency's "primary purpose is to safeguard the rights and well-being of refugees."¹²¹ In order to achieve this goal, the "UNHCR works in partnership with governments, regional organizations, international and non-governmental organizations."¹²² The UNHCR guidelines can provide guidance for the United States by documenting the way in which the agency interprets the Convention regarding gender-related persecution.

The UNHCR has created guidelines used by UNHCR staff, and recommended governments and the legal field, from lawyers to the judiciary, use the guidelines to interpret refugee law.¹²³ These guidelines supplement Article 1A(2) of the 1951 Convention Relating to the Status of Refugees as well as its 1967 Protocol.¹²⁴ The Convention and Protocol, which was the basis for the United States' statute defining refugee and status and eligibility for asylum, requires a well-founded fear of persecution based on race, religion, nationality, membership of a particular so group or political opinion.¹²⁵ For the UNHCR, gender-based persecution encompasses various types of claims in which gender is a relevant consideration and thus does not have a single legal meaning.¹²⁶ Most commonly gender-based claims are brought by women and include claims based on family/domestic violence, as well as sexual violence, female genital

¹¹⁹ U.N. High Comm'r for Refugees, *UNHCR Global Appeal 2012-2013: Mission Statement*, <http://www.unhcr.org/4ec230e8e.html> [herein after *Mission Statement*] (last visited April 28, 2015).

¹²⁰ *UN Brussels Agencies*, *supra* note 117. (Non-refoulement is the principle that someone who flees persecution or fears persecution should not be sent back to the country from which, or in which, they fear persecution.)

¹²¹ *Mission Statement*, *supra* note 118.

¹²² *Id.*

¹²³ U.N. High Comm'r for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01 [hereinafter UNHCR Guidelines] (May 7, 2002).

¹²⁴ *Id.* at ¶ I(4).

¹²⁵ U.N. High Comm'r for Refugees, *Convention and Protocol Relating to the Status of Refugees*, Art. 1A(2), available at <http://www.unhcr.org/3b66c2aa10.html>

¹²⁶ UNHCR Guidelines, *supra* note 122 at ¶ I(1).

mutilation, and punishment as the result of a transgression of social mores, among others.¹²⁷ According to the UNHCR, in order for claims to be accurately determined the refugee definition needs to be interpreted with an awareness of the gendered aspects of claims.¹²⁸ In addition, the guidelines argue that if the refugee definition is to be properly interpreted, gender must be considered because it can have an influence on the type of persecution suffered or be the reason why the person was persecuted.¹²⁹ The guidelines examining the gendered dimensions of the refugee definition are necessary because many claims have gone unrecognized historically because the refugee definition has been interpreted through the male experience, not a gender-neutral experience.¹³⁰ Because gender or sex is not explicitly included in the categories, the guidelines posit how gender or sex can satisfy the qualifications for the other categories.

The UNHCR advances the view that political opinion should be interpreted broadly to include opinions about gender roles that are related to any matter in which a State, government, society, or policy may be engaged.¹³¹ In cases in which the political expression had been made only upon leaving the country, an assessment of well-founded fear should be made as to the consequences if the claimant returned to their country having expressed this opinion.¹³² Although the normative model of a refugee who is fleeing persecution based on a political opinion is that of a man who is fleeing because of dangers based on his outward political activity, this model does not correspond with the experiences of women in some countries.¹³³

The guidelines do not discount the fact that men and women can experience the same forms of persecution. Rather the guidelines recognize that in addition to gender-neutral forms of

¹²⁷ *Id.* at ¶I(3).

¹²⁸ *Id.* at ¶I(2).

¹²⁹ *Id.* at ¶I(3).

¹³⁰ *Id.* at ¶II(A)(5).

¹³¹ *Id.* at ¶II(C)(32).

¹³² *Id.*

¹³³ *Id.* at ¶II(C)(33).

persecution, there are certain forms of persecution that are sex-specific.¹³⁴ The guidelines point to instances of gender-related violence, such as rape, domestic violence, dowry-related violence, and trafficking, which have been used as forms of persecution through their infliction of severe pain and suffering both by State and private actors.¹³⁵ The Guidelines recognize that the type of evidence that is commonly used to support other refugee claims may not be available in gender-based claims.¹³⁶ For example, statistics may be unavailable for various reasons including the lack of reports, under-reporting, and the lack of prosecution for those crimes.¹³⁷

The guidelines recognized the considerable developments that had occurred in the previous decade, but also addressed some of the outstanding problems.¹³⁸ The guidelines stressed the importance of a fact-sensitive individual analysis of an asylee's claim that is contextualized by the history, geography, and culture of the country they are fleeing.¹³⁹ These guidelines stress that simply because a law exists that prohibits any certain persecutory actions, such as domestic violence, that does not preclude that action from being persecutory.¹⁴⁰ If the state does not interfere with the activity, either because they condone or tolerate the acts or because they are unable to take action in a way that would effectively interfere with the action, the action may still be persecutory.¹⁴¹ These guidelines provide a comprehensive review of the Convention and Protocol and incorporate gender into the aspects of the refugee definition and asylum requirements.

¹³⁴ *Id.* at ¶II(B)(9).

¹³⁵ *Id.*

¹³⁶ *Id.* at ¶III(37).

¹³⁷ *Id.*

¹³⁸ *Id.* at ¶II(A)(5).

¹³⁹ *Id.* at ¶II(A)(7).

¹⁴⁰ *Id.* at ¶II(B)(11-12).

¹⁴¹ *Id.*

Part IV: Adoption of Guidelines Relating to Asylum and Domestic Violence

The Matter of A-R-C-G determined that it is possible for a woman fleeing persecution in the form of domestic violence to be granted asylum in the United States, under certain circumstances.¹⁴² However, given the documentation of the conditions surrounding detain-and-deport practices used at the border, a BIA decision recognizing the possibility of a successful asylum claim based on domestic violence is merely the first step.¹⁴³ Although expedited removal does allow for an appeal to the attorney general, in removal proceedings, an immigrant has the privilege, but not the right, to be represented by an attorney.¹⁴⁴ Importantly, this means that any representation comes at no expense to the government.¹⁴⁵

Without guidelines that explicitly spell out the availability of asylum for victims of domestic violence to immigration and asylum officers, there will be little effective change in the detaining and deporting of women seeking asylum on the basis of domestic violence during the expedited removal process. In order to offer an effective pathway to asylum for victims of domestic violence, USCIS must promulgate guidelines along with the Department of Homeland Security in order to effect defensive asylum applications in expedited removal and removal proceedings.

A. Preamble to the Guidelines

As an initial matter, the guidelines should begin with recognition of the impact of gender on claims and its connection to the protected grounds using the UNHCR Guidelines as a starting point.¹⁴⁶ The preamble to the guidelines should include language that emphasizes the importance

¹⁴² Matter of A-R-C-G, *supra* note 102.

¹⁴³ *HRW Report*, *supra* note 5; *ACLU Report*, *supra* note 1.

¹⁴⁴ 8 USC §1229a (b)(4)(A).

¹⁴⁵ *Id.*

¹⁴⁶ UNHCR Guidelines, *supra* note 122.

of understanding the gendered dimensions of claims as well as general gender-related persecution.¹⁴⁷

Although it is important that all gender-related persecution claims are considered, these guidelines will serve as the explicit recognition of the way in which domestic can satisfy the requirements for asylum. The preamble to the guidelines should be focused on why the guidelines are needed. The guidelines are needed namely because domestic violence is a global problem with Amnesty International estimating that one in three women will experience domestic violence in their life, while the World Health Organization puts the estimate at thirty seven percent.¹⁴⁸ There is no greater risk of violence to a woman than by someone that she knows.¹⁴⁹ The World Health Organization estimates that 42% of women who are the victims of domestic violence have reported an injury that is a consequence of that violence.¹⁵⁰ Many women, who are victims of domestic violence and other forms of gender-based violence, often cannot find help from their government because of existing discriminatory practices or the influence of gender biases in their culture.¹⁵¹ Often times, domestic violence does not cause outrage by the public because it is deeply embedded in society and occurs daily, with impunity, because of this global culture of discrimination.¹⁵² The World Health Organization has linked intimate partner violence to various health issues such as suicide, eating disorders, emotional

¹⁴⁷ UNHCR Guidelines, *supra* note 122. (Persecution that is gender-related includes actions such as domestic violence, female genital mutilation, rape, and dowry-related violence.)

¹⁴⁸ Amnesty International, Violence Against Women: A Fact Sheet (July 2005), available at http://www.amnestyusa.org/sites/default/files/pdfs/vaw_fact_sheet.pdf; World Health Organization, Media Centre, Violence Against Women, Fact Sheet No.239 (November 2014) available at <http://www.who.int/mediacentre/factsheets/fs239/en/>

¹⁴⁹ Amnesty International, Fact Sheet, *supra* note 147.

¹⁵⁰ World Health Organization, Fact Sheet No. 239, *supra* note 147.

¹⁵¹ Amnesty International, Fact Sheet, *supra* note 147.

¹⁵² *Id.*

distress, and sleep difficulties among others.¹⁵³ Additionally, depression and problem drinking are twice as likely to occur in women who were victims of intimate partner violence.¹⁵⁴

The guidelines need to recognize that domestic violence, which may result in intimate partner and family-based homicide, is a global problem that disproportionately affects women.¹⁵⁵ The United Nations Office on Drug and Crime performed a global study examining the trends, contexts, and data regarding homicide, which found that intimate partner and family-related homicide was both persistent and prevalent, unlike the various other forms of violence that tend to vary both geographically and yearly.¹⁵⁶ An intimate partner or a family member killed nearly half of all female homicide victims, compared to only six percent of all male homicide victims. Importantly, women constituted two-thirds of the victims of intimate partner and family-related homicide.¹⁵⁷

The guidelines should also reflect that the study documented not only that this type of homicide disproportionately affected women, but also that it is both persistent and prevalent yearly and geographically.¹⁵⁸ The annual rate of this type of homicide has remained stable globally even as the total homicide rate has decreased.¹⁵⁹ The relationship between the perpetrator and the victim is the fundamental feature of this type of homicide coupled with concomitant factors such as alcohol abuse and gender-based power relations.¹⁶⁰ It is in the domestic environment where the significant portion of the violence against women occurs.¹⁶¹ Intimate partner and family-related homicide occurs in every country and makes up fourteen

¹⁵³ World Health Organization, Fact Sheet No. 239, *supra* note 147.

¹⁵⁴ *Id.*

¹⁵⁵ U.N. Office on Drugs and Crime, *Global Study on Homicide 2013*, U.N. Doc. Sales No. 14.IV.1 (March 2014), available at http://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf

¹⁵⁶ *Id.* at 5.

¹⁵⁷ *Id.* at 14.

¹⁵⁸ *Id.* at 49.

¹⁵⁹ *Id.* at 49.

¹⁶⁰ *Id.* at 40.

¹⁶¹ *Id.* at 52.

percent of global homicides, regardless of economics, development, and the presence of both risk and mitigating factors.¹⁶² The study emphasizes that one potential outcome of domestic violence is the relationship culminating in the death of the abused partner and through these types of homicides unequal power relationships between men and women are reinforced and sustained.¹⁶³

In addition, the guidelines should reflect the opinion found in the UNHCR International Protection Guidelines that the mere existence of a law against domestic violence does not preclude the existence of persecution.¹⁶⁴ First, there needs to be recognition of the possibility that the state may tolerate or condone domestic violence despite the fact that there is a law regarding domestic violence.¹⁶⁵ This can be proven by evidence showing that the state does not effectively interfere with the occurrence of domestic violence—for example, this could be shown by the failure of police intervention or failure to prosecute domestic violence. Alternatively, it may be the case that the state attempts to take effective action against domestic violence but is unable to do so.¹⁶⁶

The preamble of the guidelines should be designed to educate Immigration and Asylum Officers, as well as DHS attorneys, about the impact of domestic violence. In order to do so, it should incorporate the statistics from Amnesty International and the World Health Organization, as well as the results of the UN Study in order to show the very real and serious dangers of domestic violence globally.

B. Guidance Regarding the Protected Grounds and the Well-Founded Fear Standard

One important focus of the guidelines should be on the ways in which victims of domestic violence can define their membership in a particular social group or political opinion,

¹⁶² *Id.* at 15.

¹⁶³ *Id.* at 52.

¹⁶⁴ UNHCR Guidelines, *supra* note 122.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

which was the reason for their persecution. Additionally, the guidelines should look to the ways in which domestic violence can satisfy the well-founded fear standard. For guidance on these matters, BIA cases, DHS precedent, the UNHCR guidelines and the Center for Gender and Refugee Studies (CRGS) practice advisory are useful materials.

1. Domestic Violence and Particular Social Group

The guidelines should explain the ways in which a particular social group can be formulated for victims of domestic violence. Guidance provided by *Matter of A-R-C-G*, the DHS supplemental brief in *Matter of L-R-*, and the practice advisory published by the CRGS. In *Matter of A-R-C-G*, the particular social group that was recognized was comprised of marital status, geographic location, and the inability to leave the relationship.¹⁶⁷ The social group recognized in *Matter of A-R-C-G* should serve as an example of merely one formulation of particular social group that can be recognized. The guidelines should also include the additional factors of forming a particular social group that were outlined by the DHS in the supplemental brief for *Matter of L-R-*. These factors include the way in which society views the role of a woman in a relationship and the resulting status a woman gains when she enters into a relationship.¹⁶⁸

The guidelines should also incorporate the advice from the Center of Gender and Refugee Studies (CGRS) provided in their Practice Advisory regarding domestic violence-based asylum claims.¹⁶⁹ The CGRS is an internationally recognized resource that focuses on the protection of "the fundamental human rights of women, children, LGBT, and other refugees who flee

¹⁶⁷ *Matter of A-R-C-G*, *supra* note 102.

¹⁶⁸ DHS Supp. Br., *Matter of L-R-*, *supra* note 91.

¹⁶⁹ Center for Gender and Refugee Studies, *Domestic Violence-Based Asylum Claims: CRGS Practice Advisory* [hereinafter *CRGS Practice Advisory*] (September 12, 2014), http://cgrs.uchastings.edu/sites/default/files/DV_Advisory_9-12-2014_FINAL_1.pdf

persecution through legal expertise and training, impact litigation, policy development, research, and in-country fact-finding."¹⁷⁰

Based on the influence of all three above mentioned sources, the guidelines should outline the way in which a social group should be construed by using specific information about why a victim is a target for her abuser, but to do so in a way that does not incorporate the abuse or harm as a part of the definition.¹⁷¹ In determining the nexus between the protected ground and the persecution in domestic violence claims both direct and circumstantial evidence should be introduced in order to establish that membership in the particular social group was a motivator for the persecution.¹⁷² In these situations direct evidence would consist of comments made by the abuser connecting the particular social group to the reasons why the abuse occurs and circumstantial evidence would include information such as the domestic violence conditions in the country the asylum applicant is fleeing, the impunity of the abuser, and the lack of protection for abused partners in domestic relationships.¹⁷³ In addition, laws granting protection to the social group being defined in the asylum application, in particular, can evidence social distinction, in this context.¹⁷⁴

2. Domestic Violence and Political Opinion

As asylum law in the United States currently stands, asylum has not been granted for a victim of domestic violence on the basis of persecution because of political opinion. As discussed *supra*, the DHS has argued that in order to be eligible for asylum on the ground of

¹⁷⁰ Center for Gender and Refugee Studies, *Our Work*, <http://cgrs.uchastings.edu/our-work>.

¹⁷¹ CGRS Practice Advisory, *supra* note 168, at 10; *See also* DHS's Supp. Br., Matter of L-R-, *supra* note 91, at 10 (It is the position of the DHS and the BIA that a particular social group cannot be defined by the persecution that either suffered or feared because it is "an illogical, circular 'nexus' construct[.]").

¹⁷² CGRS Practice Advisory, *supra* note 168, at 17.

¹⁷³ *Id.* at 17-18.

¹⁷⁴ *Id.* at 14; *See also* Henriquez-Rivas, 707 F.3d 1081 (9th Cir. 2013) (en banc) ("[I]t is difficult to imagine better evidence that a society recognizes a particular class of individuals as uniquely vulnerable, because of their group protection by [their persecutors], than a special . . . protection law has been tailored to its characteristics[.]")

political opinion, the abuse would have to be a result of the political opinion and not regardless of the opinion.¹⁷⁵ While that position can be maintained, these guidelines should also incorporate the International Protection Guidelines from the UNHCR regarding political opinion.¹⁷⁶ This would allow for political opinion to be interpreted broadly including opinions about gender roles that are related to any matter in which a State, government, society, or policy may be engaged.¹⁷⁷ In order to evaluate this, much like with particular social group, one form of evidence could be the existence of laws related to the cessation of domestic violence. These guidelines should recognize political opinion as an additional pathway through which a woman fleeing domestic violence can attain asylum. In this category, it is necessary that the guidelines recognize that the consequences of having expressed any political opinion in opposition of the abuse or domestic violence be examined when determining the fear of persecution upon return.

3. Domestic Violence and Well-Founded Fear

These guidelines should require contemplation regarding assessment of well-founded fear looking to the consequences if the claimant returned to their country having left her abuser to seek asylum.¹⁷⁸ Studies have documented that one of the most dangerous and lethal times for a woman is when she leaves or attempts to leave her abusive partner.¹⁷⁹ Legal Scholar Martha Mahoney coined the term "separation assault" to describe "the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return."¹⁸⁰ One of the key features of separation assault is that "it is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the

¹⁷⁵ DHS's Supp. Br., Matter of L-R-, *supra* note 91, at 22.

¹⁷⁶ UNHCR Guidelines, *supra* note 122.

¹⁷⁷ *Id.* at ¶II(C)(32).

¹⁷⁸ *Id.* at ¶II(C)(32).

¹⁷⁹ Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich L. Rev. 1, 5-6 (1991).

¹⁸⁰ *Id.* at 65.

relationship."¹⁸¹ An American Journal of Public Health study examined abusive relationships and the risk factors that would lead to femicide by an intimate partner.¹⁸² This study showed that both separating from an abusive partner and the act of either leaving or asking a partner to leave resulted in a higher risk of femicide.¹⁸³ If the abuser could be classified as highly controlling and the couple had separated, "the risk of intimate partner femicide was increased 9-fold."¹⁸⁴ Given these statistics, the guidelines should reflect that well-founded fear standard, a one-in-ten chance of persecution, can clearly be met regarding domestic violence when the risk of separation assault is examined.

C. Guidance Regarding Evidentiary Issues in Evaluating Domestic Violence Claims

There are many ways in which the experience of domestic violence will affect the type and availability of evidence in showing particular social group or even the type of harm that was caused by the persecution. The guidelines need to not only recognize these difficulties and complications, but also address ways in which they can be overcome.

1. Presentation of Evidence Regarding Domestic Violence

As an initial matter, the guidelines should direct anyone evaluating a claim to look to outside sources in order to contextualize a claim from a certain country or part of the world, in addition to testimony, which will be addressed in the next section. Much like the UNHCR Guidelines suggest, each claim should be examined with a consideration of the history,

¹⁸¹ *Id.* at 65-66

¹⁸² Jacquelyn C. Campbell, *Risk Factors for Femicide in Abusive Relationships: Results from a Multistate Case Control Study*; 93 *Am. Journal of Pub. Health* 1089 (2003). (The authors performed this study across 11 cities, with proxies of 220 intimate partner femicide victims identified from police or medical examiner records, along with 343 abused control women who were interviewed to identify risk factors for femicide in abusive relationships.)

¹⁸³ *Id.* at 1090.

¹⁸⁴ *Id.*

geography, and culture of the place from which someone seeking asylum has fled.¹⁸⁵ Although *Matter of A-R-C-G-* addressed the issue of presentation of country conditions as a facet of the analysis for social distinction, the types of evidence that the BIA discusses can be used in multiple areas of the analysis regarding the presentation of evidence about domestic violence.¹⁸⁶ The guidelines should reflect that there are many types of evidence that can be used to show the conditions in the country including, but not limited to, evidence of the culture, problematic enforcement of laws about domestic violence, documented country conditions, expert testimony, and statistics from law enforcement.¹⁸⁷ Yearly, the State Department publishes Human Rights Reports for various countries, which use reports from embassies and posts around the world that chronicle the human rights conditions across the globe.¹⁸⁸ Domestic violence may be one of the conditions that the report for any given country may include.¹⁸⁹ These reports are available for the public and the guidelines should recommend their use in the inquiry into the conditions of the country, along with any other relevant evidence to show country conditions in regards to domestic violence.

¹⁸⁵ UNHCR Guidelines, *supra* note 122, at ¶II(A)(7) ("It is essential to have both a full picture of the asylum-seeker's personality, background and personal experiences as well as an analysis and up-to-date knowledge of historically, geographically and culturally specific circumstances in the country of origin.")

¹⁸⁶ *Matter of A-R-C-G-*, *supra* note 102, at 394. ("When evaluating the issue of social distinction, we look to the evidence to determine whether a society, such as Guatemalan society in this case, makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave.")

¹⁸⁷ *Id.* at 394-95. ("However even within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information.")

¹⁸⁸ *Secretary's Preface: Country Reports on Human Rights Practices for 2013*, U.S. Dep't of State, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> (last visited April 28, 2015).

¹⁸⁹ A search of Google on state.gov of the terms "country reports on human rights practices" and "domestic violence" turned up responses of several country reports that discussed domestic violence from the 2013 Reports, including Mexico, El Salvador, Dominican Republic, Afghanistan, Guatemala, and Macedonia, only on the first page of results.

2. Testimony and Evidentiary Issues

One additional focus of the guidelines should be focused on evidentiary and testimonial difficulties that one may be faced with when examining the evidence of an asylum claim based on domestic violence. These guidelines should follow the example of the UNHCR guidelines with an acknowledgement that in gender-related claims, some evidence that would be used in other types of refugee claims will not be available.¹⁹⁰ The guidelines, like the UNHCR guidelines, should emphasize that while it is the adjudicator who makes any final determinations about credibility, that determination should not be affected by the emotions of the victim when recounting her story.¹⁹¹

These guidelines should also include techniques for immigration and asylum officers to use when they are interviewing victims of domestic violence. Guidance in forming these guidelines can be found in the In-Service Training Manual provided by the New Jersey Division of Criminal Justice.¹⁹² The manual stresses the important of overcoming a victim's reluctance to talk about the abuse by using special interviewing techniques.¹⁹³ The manual suggests that officers use specific and direct questions and avoid questions that may sound hostile or imply that blame rests with the victim.¹⁹⁴ Officers should maintain a calm and patient attitude in order to earn both the confidence and cooperation of the victim.¹⁹⁵ In addition, officers must be aware that they are asking personal questions of the victim, who may be afraid, embarrassed, or

¹⁹⁰ UNHCR Guidelines, *supra* note 122. ("It is important to recognize that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available.")

¹⁹¹ UNHCR Guidelines, *supra* note 122. ("The type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility.")

¹⁹² Interviewing Techniques in Domestic Violence Cases; In-Service Training for Police officers, Student Manual, New Jersey Division of Criminal Justice. available at <http://www.nj.gov/oag/dcj/njpdresources/dom-violence/module-four-student.pdf> ("This training program addresses techniques for conducting an interview with the victim of domestic violence to effectively obtain the most information that may be useful at trial.")

¹⁹³ *Id.* at 1.

¹⁹⁴ *Id.* at 2-3.

¹⁹⁵ *Id.* at 3-4.

confused as a result of the abuse.¹⁹⁶ In an effort to combat the feelings of helplessness and hopelessness, guilt, shame, or embarrassment, the manual emphasizes that officers should assure the victim that they are not responsible for the abuse, they are safe when speaking to the officers, and they are not alone.¹⁹⁷ While the training manual was meant for use by police officers and is related to prosecution for domestic violence in the criminal court, they can be used as guidelines for the behavior of immigration and asylum officers in their interactions with victims of domestic violence during the asylum process.

The guidelines must also reflect the notion that domestic violence is not merely about physical abuse but rather the physical abuse is merely a part of a pattern of abuse displayed by the abuser towards the victim.¹⁹⁸ Understanding the intricacies of patterns of abuse may provide explanations for the many questions that arise in the minds of immigration and asylum officers, judges, and others involved with the adjudication of an asylum claim. It is common that one or more of other types of abuse that can be found on the Power and Control will accompany physical abuse.¹⁹⁹ It is not uncommon for a victim of domestic violence to be isolated both physically and economically.²⁰⁰ Economic abuse ranges from prevention of the victim from entering into or maintaining employment to prevention of the victim from accessing the couple's

¹⁹⁶ *Id.* at 5.

¹⁹⁷ *Id.* at 5-6.

¹⁹⁸ *Power and Control Wheel*, Nat'l Ctr. on Domestic and Sexual Violence, <http://www.ncdsv.org/images/powercontrolwheelnoshading.pdf> (last visited April 28, 2015). (The Power and Control Wheel was developed by the Domestic Abuse Intervention Project and is produced and distributed by the National Center on Domestic and Sexual Violence. "The National Center on Domestic and Sexual Violence designs, provides, and customizes training and consultation; influences policy, promotes collaboration; and enhances diversity with the goal of ending domestic and sexual violence.")

¹⁹⁹ *Id.* ("Very often, one or more violent incidents are accompanied by an array of these other types of abuse.")

²⁰⁰ *Id.* ("Economic Abuse" and "Isolation" are listed as two types of abuse on the Wheel.)

financials.²⁰¹ Physical isolation comes in the form of separating the victim from freely communicating or travelling, often under the guise of jealousy.²⁰²

Additionally, the abuser may engage in forms of verbal abuse by putting down the victim, making her feel as though the abuse is her fault, and playing other mind games in an attempt to control the victim or exert power over her.²⁰³ Other forms of verbal abuse include the abuser using coercion and threats or intimidating the victim with looks or gestures, the display of weapons, or even destroying property or abusing a pet.²⁰⁴ It is also common for an abuser to minimize the abuse, deny that the abuse even occurred, or blame the victim and make her feel as though the abuse was her fault.²⁰⁵ Male privilege is another form of power and control that an abuser often exerts over his or her victim defining the roles in the relationship and taking on the attitude of the "master of the castle."²⁰⁶ The guidelines need to reflect the ways in which these factors of power and control affect the availability of evidence, the reluctance of the victim to talk about their abuse, and the overall pattern of abuse that the victim was subjected to.

Part V: Conclusion

The law regarding asylum in the United States is a complex and ever changing subject. Legislative opinions, administrative decisions, and judicial decisions are constantly changing this

²⁰¹ *Id.* ("Economic Abuse: Preventing her from getting or keeping a job. Making her ask for money. Giving her an allowance. Taking her money. Not letting her know about or have access to family income.")

²⁰² *Id.* ("Isolation: Controlling what she does, who she sees and talks to, what she reads, and where she goes. Limiting her outside involvement. Using jealousy to justify actions.")

²⁰³ *Id.* ("Emotional Abuse: Putting her down. Making her feel bad about herself. Calling her names. Making her think she's crazy. Playing mind games. Humiliating her. Making her feel guilty.")

²⁰⁴ *Id.* ("Coercion and Threats: Making and/or carrying out threats to do something to hurt her. Threatening to leave her, commit suicide, or report her to welfare. Making her drop charges. Making her do illegal things. Intimidation: making her afraid by using looking, actions, and gestures. Smashing things. Destroying her property. Abusing pets. Displaying weapons.")

²⁰⁵ *Id.* ("Minimizing, Denying, and Blaming: Making light of the abuse and not taking her concerns about it seriously. Saying the abuse didn't happen. Shifting responsibility for abusive behavior. Saying she caused it.")

²⁰⁶ *Id.* (Male Privilege: Treating her like a servant: making all the big decisions, acting like the 'master of the castle,' being the one to define men's and women's roles.")

are of the law. Starting in the 1990s, asylum has been granted on the basis of gender-related persecution. After litigation over the next twenty years, pathways to asylum for women suffering or fearing persecution have opened up. *Matter of A-R-C-G-* made it clear, for the first time, that a woman fleeing domestic violence could be granted asylum. However, this decision came after ten years of litigation in the Immigration Court and at the Board of Immigration Appeals. Many women fleeing domestic violence, and other types of persecution, arrive at the border each year and are placed in expedited removal. The conditions and policies surrounding the process make it difficult, if not impossible, for many valid claims to be recognized. Many women who fear returning to their country are not referred to credible fear interviews and are deported, with little chance to appeal the decision.

In order to effectuate change in removal proceedings, in the Immigration Court and expedited removal proceedings with Immigration Officers, extensive guidelines on domestic violence and asylum need to be promulgated by the USCIS and the DHS. The guidelines proposed in this paper cover a broad range of issues that relate to the many issues that arise when examining a claim for asylum on the basis of domestic violence ranging from testimony and evidentiary concerns to specific guidance relating to interpretation of the protected grounds for asylum. With these guidelines and the precedent from *Matter of A-R-C-G-*, victims of domestic violence will not be summarily turned away at the border with a valid claim and sent back for their partners to victimize them further, but rather granted the protection they seek in the United States.