ABUSED AND CONFUSED: A CALL FOR ASYLUM LAW'S TREATMENT OF DOMESTIC VIOLENCE VICTIMS TO CATCH UP WITH THE REST OF THE AMERICAN LEGAL SYSTEM

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ABSTRACT

For years, domestic violence victims have fled their home countries, seeking asylum in the United States. The governments in the countries from which they ran were either unable or unwilling to control their abusers, leaving no choice but to seek refuge in America. But despite the ability of these women to prove they have been persecuted, they have still struggled to meet the threshold to qualify for asylum; it has remained uncertain whether victims of domestic abuse can fulfill the asylum requirement of demonstrating membership in a particular social group. In 2014, a decision by the Board of Immigration Appeals gave hope that finally this burden on abused victims had been lightened. A fleeing woman would still have to prove her case of persecution and need for asylum, but she would be far more likely to fulfill the particular social group requirement. However, the acting Attorney General in 2018 stepped in to reverse the headway that had been made. Despite some recovery of hope for domestic violence asylum-seekers after a federal court decision, the situation remains precarious and uncertain. Abused women are waiting this very moment in the U.S., not knowing if they have a reasonable likelihood of succeeding in their asylum claims.

This Note argues that it is time for such uncertainty to be lifted, rather than waiting on the courts to do something further. The American legal system has already spoken, recognizing domestically abused

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women, and even abused immigrant women, as deserving special recognition and protection under the law. The policy of asylum law specifically must catch up to this standard, to recognize female victims of domestic violence as a particular social group.

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INTRODUCTION

In 2016, at age twenty-three, Xiomara escaped from El Salvador with her four-year-old daughter in tow.[1] She was not fleeing political persecution, nor persecution based on race; Xiomara was fleeing from the boyfriend she met at age seventeen, who became the man that would wake her up some mornings just so that he could beat her; the same man who threatened her life, raped her, and berated her.[2] So why didn't she just go to the police and ask for help rather than running away to another country and seeking refuge there? In Xiomara's own words, "Are you kidding? . . . I would go to the police department and wouldn't come back alive—if I came back at all."[3] Though she may be "safely" in the United States now, Xiomara's fate is far from secure; as of August 2018, she was awaiting her asylum hearing, still another year away.[4]

Xiomara is one of many women currently seeking asylum in the United States as a means to escape domestic violence suffered at the hands of a partner in her home country, and just one of hundreds who have sought refuge over many years.[5]

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1. Jazmine Ulloa, *Beaten and Raped in El Salvador, a Domestic Violence Survivor Finds Little Hope for Asylum in U.S.*, L.A. TIMES (Aug. 10, 2018, 3:00 AM), https://www.latimes.com/politics/la-na-pol-sessions-asylum-decision-20180810-story.html.
2. *Id.*
3. *Id.*
4. *Id.*
5. *See* Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 117 (2013) (explaining that "[n]o official statistics exist regarding the number of asylum cases adjudicated in the United States that involve domestic violence as a basis for protection," though the article gathered more than 200 cases for its analysis) [hereinafter *Domestic Violence as a Basis for Asylum*].

Unfortunately for Xiomara—and the others in her domestically-abused shoes—the American legal system provides no certainty as to whether a claim for domestic violence will secure the protection of asylum in the United States. In fact, recent developments in the law have clashed, swayed by influences including immigration judges, federal judges, and even an Attorney General with an arguably anti-immigration policy.[6]

These legal developments happened primarily through three significant cases and their respective procedural ramifications that occurred relatively recently: *Matter of A-R-C-G-*,[7] *Matter of A-B-*,[8] and *Grace v. Whitaker*.[9] While *Matter of A-R-C-G-* may not have been a revolutionary, landmark case, it is was groundbreaking to a certain extent. Through *Matter of A-R-C-G-* in 2014, the Board of Immigration Appeals (BIA), for the first time, officially recognized domestic violence as a cause for asylum.[10] In 2018, however, the acting Attorney General used *Matter of A-B-*

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6. *See* Bea Bischoff, *Jeff Sessions Is Hijacking Immigration Law*, SLATE (June 13, 2018, 2:27 PM), https://slate.com/news-and-politics/2018/06/in-matter-of-a-b-jeff-sessions-hijacked-immigration-law-by-abusing-a-rarely-used-provision.html ("The cases that Sessions has chosen to decide and the procedural leaps he's taken to adjudicate them show that his goal is to ensure that fewer people are permitted to remain in the United States, Congress be damned."); Paul Wickham Schmidt, Former Chairman of the Bd. of Immigration Appeals, Address at The New York City Bar Association: Winning Asylum & Saving Lives in the "Era of A-B-"—Seven Steps to Success 1 (Dec. 4, 2018) (describing former Attorney General Jeff Sessions as a "biased, xenophobic, misinformed, and glaringly unqualified individual" who "was in charge of our U.S. Immigration Court system"); Press Release, Ctr. for Gender & Refugee Studies, Attorney General Sessions Attempts to Close the Door to Women Refugees (June 11, 2018) (on file with author, at https://cgrs.uchastings.edu/A-B-Press-Statement) ("Long before he issued his decision in *Matter of A-B-*, the Attorney General's hostile, anti-immigrant rhetoric revealed his deep-seated bias against asylum seekers.").

7. 26 I. & N. Dec. 388 (B.I.A. 2014), *overruled by* A-B-, 27 I. & N. Dec. 316 (Op. Att'y Gen. 2018), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal docketed sub nom*. Grace v. Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

8. 27 I. & N. Dec. 316 (Op. Att'y Gen. 2018), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal docketed sub nom*. Grace v. Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

9. 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal docketed sub nom*. Grace v. Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

10. *See* Tina Zedginidze, *Domestic Abuse and Gang Violence Against Women: Expanding the Particular Social Group Finding in* Matter of A-R-C-G- *to Grant Asylum to Women Persecuted by Gangs*, 34 Law & Ineq. 221, 223 (2016) ("[*A-R-C-G-*] was the first BIA decision to recognize domestic violence as potential grounds for seeking asylum in the United States." (footnote omitted)).

to largely abrogate the decision in *Matter of A-R-C-G-*.[11] Then, about six months later, a federal court interjected, partially overturning the ruling in *Matter of A-B-* and enjoining certain policies it put in place.[12] This Note will discuss each of these cases in much greater detail, but this broad context—a recognition of domestic violence as a claim for asylum in the first case, followed by an attempted crackdown against this recognition in the second case, followed up with resistance to that crackdown in the third case—serves as a general frame of reference.

The legal tug-of-war in these decisions demonstrates a fundamental problem with the United States' current approach to domestic violence in the context of asylum.[13] A lack of consistency, coupled with a high degree of uncertainty as to whether a victim of domestic abuse can claim asylum conflicts with the way American legal culture treats both domestic violence in general, as well as domestic violence pertaining to noncitizens.[14] A review of state and federal domestic violence law, on both criminal and civil levels, and current immigration law, reveals that the United States has already demanded fair treatment of and protection for abused women.[15] It is time for asylum law, specifically, to catch up with this standard through either judicial or legislative action, by recognizing that female victims of domestic violence should qualify as a PSG within asylum procedure.

Part I of this Note will first introduce basic relevant legal principles of immigration, explaining the requirements a petitioner

11. *Backgrounder and Briefing on* Matter of A-B-, CENTER FOR GENDER & REFUGEE STUD., https://cgrs.uchastings.edu/our-work/matter-b (last updated Aug. 2018) ("As feared . . . the Attorney General abrogated *A-R-C-G-*, using Ms. A.B.'s case as a political vehicle to undermine asylum protections for women.").

12. Nicole Narea, *Asylum Ruling Erodes Ex-AG Sessions' Immigration Vision*, LAW 360 (Dec. 20, 2018, 9:18 PM), https://www.law360.com/immigration/articles/1113821 ("Judge Sullivan permanently enjoined Sessions' policy, ruling he had created an impermissible 'general rule' that precludes findings of credible fear . . . on the basis of domestic or gang violence.").

13. *See infra* Part II (exemplifying the "legal tug of war" the author speaks of through three sections).

14. *See infra* Part III (walking the reader through U.S. federal and state approaches to violence against women).

15. *See infra* Part III.

must prove before she can be granted asylum. It will then highlight the conditions in certain countries where treatment of women is especially poor as examples of why escape from domestic violence is so relevant to consider as a cause for asylum. It will next provide a succinct overview of legal immigration history leading up to *Matter of A-R-C-G-*, showing the previous journey of women who tried to claim asylum based on domestic violence. Lastly, Part I will briefly explain immigration structure to show how the Attorney General had the ability to unilaterally overturn a decision by the BIA. Part II will discuss, in more detail, the three above-referenced cases, which have most recently had a significant impact on considering domestic violence as a ground for asylum. Part III will outline how the law of the United States has sought to combat the problem of domestic violence, including consideration of the Violence Against Women Act (VAWA), as evidence of how abused women have been recognized as a unique group. It will then connect the treatment of domestic abuse victims by American law with how these women should be treated under asylum law, specifically as a particular social group (PSG). Finally, Part IV will call for action to provide protection to domestic violence victims through asylum, having recognized the victims as deserving the status of members of a PSG.

I. SETTING THE SCENE

A. *When Domestic Violence Issues and Immigration Collide 101*

Under the Immigration and Nationality Act (INA),[16] for a person to prove she is a refugee, and thus eligible for asylum, she must establish that her "race, religion, nationality, membership in a PSG, or political opinion was or will be at least one central reason" for her persecution.[17] Courts have defined

16. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/legal-resources/immigration-and-nationality-act (last updated July 10, 2019) (explaining that the INA, as our basic body of immigration law, stands alone but is contained also in the United States Code).

17. 8 U.S.C. § 1158(b)(1)(B)(i) (2018).

"persecution" as including "the credible threat of death, torture, or injury to one's person or liberty on account of a protected ground."[18] Given the severity of the domestic abuse suffered by asylum-seeking women, for the purposes of this Note, it will be assumed that oftentimes the level of harm inflicted by their partners would fulfill the definition of persecution.

The BIA also requires that asylum applicants who allege past persecution "show that the harm was inflicted by the government or by others whom the government is unable or unwilling to control."[19] Since the abusive partner of a domestic violence victim is oftentimes not a government official,[20] the more common application of this principle is that the victim must show her persecution was inflicted by a private actor the government cannot or will not control.[21]

But demonstrating persecution and the inefficacy of governmental control are just two components of a successful asylum claim. As the INA asylum definition also makes evident, there are several "categories" through which an individual may

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18. Gutierrez-Vidal v. Holder, 709 F.3d 728, 732 (8th Cir. 2013) (quoting Matul-Hernandez v. Holder, 685 F.3d 707, 711 (2012)); *accord* Tairou v. Whitaker, 909 F.3d 702, 707 (4th Cir. 2018) ("Persecution involves the infliction or threat of death, torture, or injury to one's person or freedom, on account of one of the enumerated grounds in the refugee definition." (quoting Li v. Gonzales, 405 F.3d 171, 177 (4th Cir. 2005))); Gabuniya v. Att'y Gen. of United States, 463 F.3d 316, 321 (3d Cir. 2006) ("We have defined persecution as 'threats of life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.'" (quoting Li v. Att'y Gen of United States, 400 F.3d 157, 167 (3d Cir 2005))).

19. Mulyani v. Holder, 771 F.3d 190, 197–98 (4th Cir. 2014); *accord* Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005) (providing that asylum applicants must show that their persecution was "inflicted either by the government of [their home country] or by persons or an organization that the government was unable or unwilling to control" (quoting Valioukevitch v. INS, 251 F.3d 747, 749 (8th Cir. 2001))).

20. *Cf.* Rebecca Dennis & Shilpa Kothari, *El Salvador: One of the Most Dangerous Places in the Western Hemisphere for Women and Girls*, PAI: ALL ACCESS (Jan. 18, 2018), https://pai.org/blog/el-salvador-one-dangerous-places-western-hemisphere-women-girls/ (noting that "10 percent of women fleeing from violence in El Salvador, Guatemala and Honduras cited the police and other state agents as their aggressors" in a 2015 survey, which shows that though government actors do perpetrate violence against women, statistically government officials comprise the minority of perpetrators).

21. *See, e.g.*, A-R-C-G-, 26 I. & N. Dec. 388, 389–90 (B.I.A. 2014) (giving just one example of the many cases when a woman is persecuted by her partner rather than directly by a government actor), *overruled by* A-B-, 27 I. & N. Dec. 316 (Op. Att'y Gen. 2018), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal docketed sub nom*. Grace v. Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

qualify for asylum, one of which must apply to the applicant.[22] Victims of domestic violence almost exclusively argue that the grounds for their persecution fall within the fourth category noted in this immigration statute: that the abused woman is a member of a PSG.[23] This concept of membership in a PSG has developed its definition through interpretation by the BIA, as it is not specifically defined in the INA.[24] The BIA has held that an applicant seeking asylum based on such membership in a PSG "must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[25] Unless this PSG membership is established per these parameters, a petitioner for asylum, based on claims of domestic abuse, would not succeed in her claim.

In summary, a woman seeking asylum in the United States to escape domestic violence must demonstrate not only that her country's government was unwilling or unable to control her abuser, but she must also pass the high bar of meeting a BIA-created definition of membership in a PSG.

B. *The Context of Necessity: Realizing the Harsh Realities of Domestic Violence as They Now Exist Outside of the United States*

It is one thing to read a statute talking about what a refugee must prove to seek asylum; it is another to grasp why a woman would be seeking asylum in the first place. This Note will provide a brief glimpse into the climates of abuse in Guatemala and

22. *See supra* note 17 and accompanying text (quoting 8 U.S.C. § 1158(b)(1)(B)(i) (2018) to describe the categories an applicant can fall into when applying for asylum).

23. *See, e.g.*, R-A-, 22 I. & N. Dec. 906, 907 (B.I.A. 1999) ("Specifically, we address whether the repeated spouse abuse inflicted on the respondent makes her eligible for asylum as an alien who has been persecuted on account of her membership in a particular social group . . . ."), *vacated*, 22 I. & N. Dec. 906 (Op. Att'y Gen 2001).

24. M-E-V-G-, 26 I. & N. Dec. 227, 230 (B.I.A. 2014) ("The phrase 'membership in a particular social group,' which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define. . . . Congress has assigned the Attorney General the primary responsibility of construing ambiguous provisions in the immigration laws, and this responsibility has been delegated to the Board.").

25. *Id.* at 237.

El Salvador,[26] though domestic violence is by no means limited to two countries. These countries are particularly relevant as they are two of three countries that make up the "Northern Triangle" from which the volume of asylum seekers has increased dramatically in recent years.[27] These two countries will serve as context, to give a sense of the domestic violence situation for women around the world. An understanding of domestic violence and government response—or lack thereof—in these countries directly portrays the urgency of need for relief, in the form of asylum, for women fleeing for safety. Such an understanding also shows the need for and legal appropriateness of granting asylum.

Human rights offices and commissions have remarked on the deeply rooted discrimination against women, as well as an environment conducive to repeated violence against women, in Guatemala.[28] In 2011, there were 20,398 complaints of violence against women, which is almost certainly lower than the actual incident number, considering many experts working in Guatemala believe violent crimes against women are underreported.[29] Notably, this very high incident rate of reported complaints—roughly three times higher than that of Paraguay, which is similar in many respects to Guatemala—occurred three years after the country's passage of the Law Against Femicide and Other Forms of Violence Against Women.[30] Even the U.S. Department of State addressed the situation in Guatemala in an annual

26. *See Violence Against Women*, WORLD HEALTH ORG. (Nov. 29, 2017), https://www.who.int/news-room/fact-sheets/detail/violence-against-women (highlighting the global nature of domestic violence against women, including reference to study of over 80 countries).

27. *See* Amelia Cheatham, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle (last updated Oct. 1, 2019).

28. Karen Musalo & Blaine Bookey, *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala*, 10 HASTINGS RACE & POVERTY L.J. 265, 266 (2013) ("The Guatemala Office of the United Nations High Commissioner for Human Rights stated in its latest report that femicide and gender-based violence are 'of utmost concern' and that 'the cruelty with which some of these crimes have been perpetrated in Guatemala shows how deeply rooted patterns of discrimination are in society.'" (alterations in original) (footnote omitted)).

29. *Id.* at 269–70.

30. *Id.* at 269.

report stating that "[v]iolence against women, including domestic violence, remained a serious problem."[31] Such violence is even more alarming considering that three of every ten women killed in Guatemala had reported being victims of domestic violence.[32]

Further study, approximately within the last year, reveals that the most current statistical data available from the agency tasked with "gather[ing] and generat[ing] statistical information regarding violence against women" in Guatemala comes from 2013.[33] These most current statistics point to an "unremitting impunity" for the perpetrators of domestic violence in Guatemala, partially demonstrated by an "extremely low" resolution of cases in which violence against women are prosecuted.[34] When called with complaints of domestic violence, police are "slow" to respond, if they come at all, and the police view the domestic violence as a "private matter," that is not seen as a "serious crime."[35] This lack of case resolution and police action are very significant, as they demonstrate an inability of the government to control the commission of domestic violence. Such lack of private actor control should precisely meet the asylum requirement that persecution was "inflicted . . . by persons that the government was unable or unwilling to control" to allow a finding that asylum can be granted.[36]

In addition to its close geographical proximity to Guatemala, the country of El Salvador also shares Guatemala's problem of violence inflicted on women. The news and organizations promoting human rights tell a grim story of the violence inflicted on females in El Salvador—a country that is about .002 percent

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31. *Id.* at 272 (citation omitted).

32. *Id.* at 273.

33. Hector Ruiz, Note, *No Justice for Guatemalan Women: An Update Twenty Years After Guatemala's First Violence Against Women Law*, 29 HASTINGS WOMEN'S L.J. 101, 105–06 (2018).

34. Musalo & Bookey, *supra* note 28, at 281.

35. *See* RESEARCH DIRECTORATE, IMMIGRATION AND REFUGEE BOARD OF CANADA, OTTAWA, *Response to Information Requests, Guatemala: Domestic Violence, Including Legislation, State Protection, and Services Available to Victims* 3 (2013), https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/07/GTM104067.E.pdf.

36. *See* Gutierrez-Vidal v. Holder, 709 F.3d 728, 733 (8th Cir. 2013) (citation omitted).

of the size of the United States[37]—calling it "one of the most dangerous places in the western hemisphere for women and girls due to high rates of physical and sexual violence."[38] More than a quarter of the women in El Salvador have experienced domestic violence, specifically at the hands of an intimate partner, and again—like the situation in Guatemala—crimes of gender-based violence rarely result in conviction.[39]

The story of Graciela Eugenia Ramírez Chávez illustrates the lack of response from El Salvadorian police, who failed to show up despite neighbors repeatedly reporting violence against Graciela at the hands of her partner.[40] Graciela's story ended when she was found dead, stabbed fifty-six times, and her fiancé was charged with the murder.[41] While she had fled to another part of the country earlier in the abusive relationship and also reached out to the police to report the attacks against her, the police simply advised that she "take justice into her own hands."[42] Even though they were government actors, police did not take the action needed to protect Graciela from her private actor husband; her abuse ended in her death at twenty-two years of age.[43] Clearly, Graciela's "own hands"—even with her attempt to escape to another part of El Salvador—were not enough to save her.

These statistics and stories are just a tiny taste of the situation in Guatemala, El Salvador, and so many other countries around the world where women face domestic violence, while their governments fail to take the action to aid and protect these

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37. *See United States is About 467 Times Bigger than El Salvador*, MY LIFE ELSEWHERE, http://www.mylifeelsewhere.com/country-size-comparison/united-states/el-salvador (last visited Jan. 5, 2020).

38. Dennis & Kothari, *supra* note 20.

39. *Id.*

40. Jo Griffin, *"Police Never Turned Up": El Salvador's Devastating Epidemic of Femicide*, GUARDIAN (June 6, 2018, 2:00 PM), https://www.theguardian.com/global-development/2018/jun/06/el-salvador-devastating-epidemic-femicide.

41. *Id.*

42. *Id.*

43. *Id.*

victims.[44] The story of a woman in Peru provides just one more example: she "was hit in the face with a metal typewriter by her partner and left permanently scarred."[45] Despite what seems an obvious example of severe abuse, the medical examiner reported these injuries as requiring "fewer than 10 days of treatment," so the crime was classified as a misdemeanor.[46] This yet again demonstrates the inadequate governmental response to significant domestic violence. It is natural and understandable that these desperate women decide they have no choice but to protect themselves by fleeing from the very country that is the source of their abuse.

C. *Fleeing Women and the American Legal System's Response: A Slow Road Toward Meaningful Precedent in Considering Domestic Violence Claims for Asylum*

In the decades before *Matter of A-R-C-G-* was decided by the BIA, battered women sought asylum in the United States, regularly being rejected because they did not meet all stipulations to qualify for this status.[47] Though the BIA had made decisions that came close to specifically recognizing that domestic violence could be a cause for asylum, they always somewhat skirted around the issue, with those decisions that came closest still remaining unpublished or not precedential.[48] To understand the impact of *Matter of A-R-C-G-*, it is useful to have a sense of these earlier cases that display the theme of special

44. *See, e.g.*, Clare Sebastian & Antonia Mortensen, *Putin Signs Law Reducing Punishment for Domestic Battery*, CNN (Feb. 7, 2017, 4:15 PM), https://www.cnn.com/2017/02/07/europe/russia-domestic-violence-bill-putin/ (providing an example of steps taken in 2017 in Russia to decriminalize domestic violence, making a "first offense of domestic violence that does not seriously injure the person . . . a less serious administrative offense").

45. Liz Creel et al., *Domestic Violence: An Ongoing Threat to Women in Latin America and the Caribbean*, PRB (Oct. 1, 2001), https://www.prb.org/domesticviolenceanongoingthreattowomen-inlatinamericaandthecaribbean/.

46. *Id.*

47. *See Domestic Violence as a Basis for Asylum*, *supra* note 5, at 110 (mentioning a research study analyzing over 200 domestic violence asylum cases between 1994 and 2012, providing a sense of the volume of this type of asylum claim over the years).

48. *Id.* at 109–10.

consideration of how the female petitioners did, or did not, establish their membership in a PSG.

Matter of Kasinga is cited as an important initial step on the legal immigration road to recognizing domestic violence as a ground for asylum by recognizing such a thing as gender-based persecution.[49] The decision held that an applicant for asylum could "establish membership in a PSG defined by gender in combination with other characteristics."[50] In the case the young woman was a "member of a social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM [female genital mutilation], as practiced by that tribe, and who oppose the practice."[51] The BIA reasoned that a PSG is defined "by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities," and that "the characteristics of being a 'young woman' and a 'member of the Tchamba-Kunsuntu Tribe'" could not be changed.[52]

Matter of R-A- was another significant immigration decision in this vein. The petitioner for asylum, Ms. Rody Alvarado, was a native of Guatemala, married at sixteen to a former soldier.[53] The domestic abuse she suffered was extreme, leading even the BIA to "struggle to describe how deplorable we find the husband's conduct to have been."[54] This conduct involved significant physical abuse, almost daily rape, and numerous highlights of especially extreme violence, including kicking Ms. Rody Alvarado in the spine when she refused to abort her approximately three-month-old fetus.[55] Though she reached out

49. *See, e.g.*, *id.* at 112–13 (explaining that *Matter of Kasinga* laid the foundation for domestic violence asylum claims); Kristen Shively Johnson, *Paving the Way to Better Protection:* Matter of A-R-C-G-, 24 TEX. J. WOMEN, GENDER & L. 151, 159–60 (2015) (explaining that *Matter of Kasinga* created a precedent for the application of the PSG analysis to an asylum seekers' gender).

50. *Domestic Violence as a Basis for Asylum*, *supra* note 5, at 113.

51. Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

52. *Id.* at 366.

53. R-A-, 22 I. & N. Dec. 906, 908 (B.I.A. 2001).

54. *Id.* at 910.

55. *Id.* at 908–09.

for help, her attempts to receive any aid from the government were for naught: the police twice did not even respond to her calls and when she appeared before a judge, "he told her that he would not interfere in domestic disputes."[56] Finally, she fled to the United States, the threat looming over her that her husband would hunt her down to kill her if she returned to Guatemala.[57]

The legal journey of Ms. Rody Alvarado as she fought to secure asylum in America was a complicated one, and one that this Note will not take the time to describe in full detail. As means of a brief summary: though an immigration judge granted her asylum, the BIA reversed, "rejecting the gender-defined social group of 'Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination.'"[58] Three attorneys general, over a ten year period, considered the case and finally asylum was granted by stipulation of the parties in 2009.[59] Ms. Rody Alvarado was granted the relief of asylum she sought.

This outcome, however, did not create a precedential decision establishing that a woman who experienced domestic violence could be considered a member of a PSG, and thus eligible for asylum.[60] On the contrary, the BIA was not persuaded that Ms. Rody Alvarado's abuse occurred because of her membership in the PSG of "Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination."[61] Rather, the BIA found that though the "proposed group may satisfy the basic requirement of containing an immutable or fundamental

56. *Id.* at 909.

57. *Id.* at 909–10.

58. Blaine Bookey, *Gender-Based Asylum Post-*Matter of A-R-C-G-*: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1, 2 n.5 (2016) [hereinafter *Gender-Based Asylum*].

59. *Id.* (noting that the government changed its position such that it was willing to stipulate its agreement to granting asylum).

60. *See Domestic Violence as a Basis for Asylum*, *supra* note 5, at 117.

61. *R-A-*, 22 I. & N. Dec. at 917, 927.

individual characteristic," Ms. Rody Alvarado did not show that the group was "a recognized segment of the population" in the country.[62]

Because "[n]o official statistics exist regarding the number of asylum cases . . . that involve domestic violence as a basis for protection,"[63] it is essentially impossible to know how many domestic violence victims have plead with immigration judges to grant them asylum. Research does suggest, however, that even following *Matter of R-A-*, decisions by judges "continued to produce contradictory and arbitrary outcomes in domestic violence asylum cases."[64] This fact and the preceding cases illustrate why there was—and still is—a need for better law or precedent recognizing domestic violence as a ground for an asylum claim. Though the precedential decision hoped for by advocates for these asylum claims would finally arrive in 2014, its erosion and rebound in the following years still call for further action by the law.[65]

D. *Power Above Immigration Judges and the BIA: How the Attorney General Can Overturn an Immigration Precedent and the Impact Thereafter*

As very briefly implied in the previous section of this Note, the Attorney General can play a surprisingly significant role in immigration proceedings. A last piece of background essential to this Note is understanding how the important precedent of *Matter of A-R-C-G-* was overturned. To do so it is necessary to have a basic grasp of the decision-making hierarchy in immigration law. This knowledge will illuminate just how great an

62. *Id.* at 918.

63. *Domestic Violence as a Basis for Asylum*, *supra* note 5, at 117.

64. *Id.* at 147.

65. *See* A-R-C-G-, 26 I. & N. Dec. 388, 394–95 (B.I.A. 2014) (detailing the case creating precedent in which the Board of Immigration Appeals recognized domestic violence as a ground for asylum), *overruled by* A-B-, 27 I. & N. Dec. 316 (Op. Att'y Gen. 2018), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal docketed sub nom*. Grace v. Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

impact such an exercise of the Attorney General's authority can cause.

The Attorney General has unique power to review any case that comes before the BIA by several methods, one of which is simply that he or she decides to do so.[66] Meaning one person can make the decision about whether a previously decided case will be reviewed, and then further decide to overturn a settled decision. Though the power is statutorily granted, it is rarely exercised; of the roughly 40,000 cases appealed to the BIA every year, "a mere handful are certified by the Attorney General for review."[67] This power, however, was indeed exercised and exemplified when Jeff Sessions, the then-acting Attorney General, selected *Matter of A-B-* to review even though it had already been settled by the BIA that the domestic abuse victim petitioner be granted asylum.[68] Although, the Attorney General formally resigned from his position about five months after he vacated the decision in *Matter of A-B-*,[69]asylum applicants remain burdened.

The overturning of a decision by the Attorney General does not end with one written opinion; it is then up to the various agencies that enforce immigration law to ensure the decision's intended consequences are realized. It is standard practice for memoranda to be issued to agencies like United States Immigration and Customs Enforcement ("ICE") and United States

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66. *See* 8 C.F.R. § 1003.1(h)(1) (2019) (detailing other means by which cases may come before the Attorney General, including the chairman or majority of the Board of Immigration Appeals believing the case should be referred to the Attorney General for review); *see also* Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1767–68 (2010) ("The Attorney General's authority on review is extraordinarily broad, and it is almost wholly unconstrained by procedural safeguards. The regulations governing certification require only that the Attorney General's decision be stated in writing and transmitted to the BIA or the Department of Homeland Security (DHS) for service upon the party affected.").

67. Trice, *supra* note 66, at 1767.

68. *See* A-B-, 27 I. & N. Dec. 247, 247–48 (Op. Att'y Gen. 2018) (denying the request by the Department of Homeland Security to suspend the briefing schedules and clarify the questions presented).

69. *See* Peter Baker et al., *Jeff Sessions is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html.

Citizenship and Immigration Services (USCIS) detailing any changes to their actions and procedures that are necessary to enact in order to follow the Attorney General's decision.[70]

II. A TASTE OF THE RECENT LEGAL ROLLER COASTER FOR DOMESTIC VIOLENCE VICTIMS SEEKING ASYLUM IN THE UNITED STATES

The decisions in *Matter of Kasinga* and *Matter of R-A-*, discussed above,[71] showed a progression toward recognizing domestic violence as a cause for asylum. However, the BIA had not spoken with a clearly precedential decision to send a message to all immigration judges that this ground for asylum was a legitimate one.[72] The notion was there, but by no means fully—and more important legally—established. *Matter of A-R-C-G-* changed this.

A. *A Step in the Right Direction: Matter of A-R-C-G-*

Weekly Beatings. Rape. A broken nose. Thrown paint thinner, causing burns to her breast. These phrases provide a glimpse into the life of Ms. Aminta Cifuentes, married at age seventeen,

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70. *See, e.g.*, Memorandum from Tracy Short, Principal Legal Advisor for I.C.E., to all OPLA Attorneys, on Litigating Domestic Violence-Based Persecution Claims following *Matter of A-B*, 6–7 (July 11, 2018), http://www.documentcloud.org/documents/4597904-OPLA-Memo-on-Matter-of-A-B.html) (advising attorneys on how to handle the increased volume in application materials, and directing them to share information regarding country-specific application materials between departments. Additionally, the memo outlines ways law distinguishing *A-R-C-G-* may still be useful, even though it has been overruled); Memorandum from U.S. Citizenship and Immigration Services on Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-* (July 11, 2018), http://www.documentcloud.org/documents/4597904-OPLA-Memo-on-Matter-of-A-B.html
(providing examples of memos sent following the decision of the Attorney General in *Matter of A-B-*) [hereinafter Memo from U.S. Citizenship & Immigration Services].

71. *See supra* notes 49–62 and accompanying text.

72. *See Board of Immigration Appeals*, U.S. DEP'T JUST., https://www.justice.gov/eoir/board-of-immigration-appeals (last updated Oct. 15, 2018) ("The Board of Immigration Appeals (BIA) is the highest administrative body for interpreting and applying immigration laws. . . . BIA decisions are binding on all DHS officers and immigration judges unless modified or overruled by the Attorney General or a federal court.").

while she lived in Guatemala.[73] Her attempts to get help from the government and to escape her husband while living in the country were succinctly described by the BIA when it considered her case upon appeal:

> The respondent contacted the police several times but was told that they would not interfere in a marital relationship. On one occasion, the police came to her home after her husband hit her on the head, but he was not arrested. Subsequently, he threatened the respondent with death if she called the police again. The respondent repeatedly tried to leave the relationship by staying with her father, but her husband found her and threatened to kill her if she did not return to him. Once she went to Guatemala City for about 3 months, but he followed her and convinced her to come home with promises that he would discontinue the abuse. The abuse continued when she returned.[74]

Ms. Aminta Cifuentes finally fled Guatemala to escape abuse. Her claim for asylum in the U.S. was based on the premise that she had suffered persecution "on account of a [PSG] comprised of 'married women in Guatemala who are unable to leave their relationship.'"[75]

After the immigration judge denied her petition for relief,[76] the BIA reconsidered the issue and decided that this proposed social group did meet immigration standards to qualify under the definitional requirements for asylum.[77] Applying the three-

73. *See* A-R-C-G-, 26 I. & N. Dec. 388, 389 (B.I.A. 2014), *overruled by* A-B-, 27 I. & N. Dec. 316 (Op. Att'y Gen. 2018), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal docketed sub nom*. Grace v. Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019); Meaghan L. McGinnis, Comment, *Post* Matter of A-R-C-G-*: An Expansion of American Compassion for International Domestic Violence Victims*, 121 PENN ST. L. REV. 555, 569 (2016).

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

75. *Id.*

76. *See id.* at 388.

77. *See id.* at 392–94.

pronged standard adopted in a previous case,[78] the BIA found the group claimed by Ms. Aminta Cifuentes shared the "common immutable characteristic of gender," was defined with particularity, and was also "socially distinct within the society in question."[79] It is important to note, however, that in this case the government specifically conceded that the group was defined with particularity, [80] a concession that aided the BIA in recognizing the PSG that Ms. Aminta Cifuentes was attempting to establish.

Still, with its ultimate classification and holding, the BIA did what had not been done before: it made a decision that "expanded the boundaries of prior cognizable social groups to encompass narrowly defined claims brought by victims of domestic violence."[81] As a federal court—while deciding the appeal of a woman seeking asylum whom the BIA had denied—put it: "the BIA reviewed the issue of whether spouses escaping an abusive domestic relationship can obtain asylum on refugee grounds and concluded in the affirmative."[82]

It is significant to recognize, however, that *Matter of A-R-C-G-* did not create a golden ticket that would guarantee a grant of asylum to any woman who experienced domestic violence in her home country. It did not say that any domestic abuse victim will always be considered a member of a PSG. Immigration judges still analyze the specific facts of every claim for asylum on a case-by-case basis, and evaluate whether every legal requirement—including membership in a PSG—to qualify for asylum is met.[83] The recognition of "married women in

78. *See* M-E-V-G-, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (clarifying that an asylum-seeker claiming that she is a member of a PSG must establish that "the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question").

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

80. *Id.* at 393.

81. McGinnis, *supra* note 73, at 568.

82. Marikasi v. Lynch, 840 F.3d 281, 290 (6th Cir. 2016).

83. *See* Gabriela Corrales, Article, *Justice Delayed is Justice Denied: The Real Significance of* Matter of A-R-C-G-, 26 BERKELEY LA RAZA L.J. 70, 89 (2016).

Guatemala who are unable to leave their relationship"[84] was very narrow, and it would be left to the discretion of immigration judges to decide if the group proposed by a domestic violence victim from another country would qualify as well.[85] The decision in *Matter of A-R-C-G-* certainly did not indicate that any woman who was a victim of domestic violence would be characterized as a member of a PSG, thus fulfilling that component of the asylum claim requirements.

B. *Backstepping from the Ground that Was Gained: Matter of A-B-*

While *Matter of A-R-C-G-* then may not have been a hugely landmark case, it was groundbreaking to a certain extent given that the BIA officially recognized domestic violence as a cause for asylum.[86] Considering the ongoing and deeply significant problem of violence against women worldwide, such a step in protecting the victims of domestic violence did matter. Though it is difficult to know just how many times it was referenced,[87] *Matter of A-R-C-G-* was certainly applied to several cases after its decision[88] and presumably had an impact on numerous asylum petitioners. Then, *Matter of A-B-* happened.

The victim seeking asylum from El Salvador in *Matter of A-B-* had been married for fifteen years to an extremely abusive husband.[89] The record of abuse would require paragraphs of space to fully detail, and included Ms. A-B- being raped and beaten so many times "that she lost count."[90] Like many examples

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

85. *See* Corrales, *supra* note 83, at 89.

86. *See supra* Section II.A. (explaining how the *Matter of A-R-C-G-* holding expanded the boundaries of asylum to include claims for domestic violence).

87. *See Gender-Based Asylum*, *supra* note 58, at 10 (explaining that most non-precedential BIA decisions and immigration judge decisions are not made available by the government).

88. *See, e.g.*, Marikasi v. Lynch, 840 F.3d 281, 290 (6th Cir. 2016) (ordering removal where Marikasi's asylum application contained inconsistent statements regarding her domestic violence claims); Guzman-Alvarez v. Sessions, 701 F. App'x 54, 56 (2d Cir. 2017) (holding the *Matter of A-R-C-G-* does not apply here because Guzman-Alverez was unmarried and was able to leave her husband).

89. *Backgrounder and Briefing on Matter of A-B-*, *supra* note 11.

90. *Id.*

already provided in this Note of governmental failure to intervene in such situations, "she repeatedly sought protection from the Salvadorian authorities to no avail."[91] It was in fact the police who told this suffering woman she should get out—when she went to them after her husband attacked her with a knife—as evidently they did not intend to help her.[92] She did indeed flee to the United States, likely having no idea that hers would be the case used by the Attorney General to overturn a precedent far more favorable to women like her.[93]

Though denied relief by the immigration judge on her first hearing, upon appeal the BIA granted Ms. A-B- asylum based on the domestic violence she experienced.[94] However, the Attorney General, Jeff Sessions, directed the BIA to refer its decision to him for review.[95] As discussed previously, this power to review and reconsider an already settled case is rarely exercised, though it is statutorily permissible.[96] The Attorney General issued a new opinion with significant consequences;[97] he vacated the BIA's decision providing asylum to Ms. A-B-[98]and overruled the holding in *Matter of A-R-C-G-*, which was already four years old at the time.[99] The Attorney General's opinion specifically criticized the *A-R-C-G-* decision saying it "decided significant legal issues on consent, and such concessions should not set precedential rules."[100] He highlighted that the government's concession to recognizing the petitioner's PSG was a way of stipulating to, rather than the BIA deciding, a "key legal

91. *Id.*

92. *See id.*

93. *See id.*

94. *Id.*

95. A-B-, 27 I. & N. Dec. 247, 247 (Op. Att'y Gen. 2018).

96. *See* Trice, *supra* note 66, at 1767.

97. *See generally* A-B-, 27 I. & N. Dec. 316 (Op. Att'y Gen. 2018) (providing the Attorney General's response and new decision in the case of Ms. A-B-), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal docketed sub nom*. Grace v. Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

98. *Id.* at 317.

99. *Id.*

100. *Id.* at 333.

question[]."[101] The Attorney General then used the existence of such concession and stipulation to undermine the decision as a whole in recognizing the PSG and using it as part of the reason to grant asylum.[102]

The impact of the Attorney General's decision caused serious ripples throughout the immigration community, from the government providing new direction to officers of the law to immigration attorneys lamenting the holding as "a return to the dark ages of refugee law."[103] Perhaps most significantly, though, was the further instability created for victims of domestic abuse awaiting their asylum hearings. As one attorney described the reactions of would-be asylum seekers fleeing domestic abuse: "Women are terrified and confused . . . They come and tell us: 'I don't understand the decision. I don't understand why he [the judge] didn't believe me.'"[104]

As a specific means of implementing the new *Matter of A-B-* decision, policy memoranda were sent by both ICE and USCIS.[105] The stated purpose in the memorandum sent by ICE was to guide government attorneys "litigating asylum and statutory withholding of removal claims in the wake of" the decision in *Matter of A-B-*.[106] It further explained that "[m]uch of the AG's decision in A-B- was dedicated to reminding adjudicators that they must rigorously analyze claims to ensure that each required element is satisfied by the applicant."[107] Read in light of the Attorney General's opinion, this could be interpreted as an encouragement to government attorneys to try as hard as possible to fight each component that an applicant must establish

101. *Id.*
102. *See id.* at 334–36.
103. Ulloa, *supra* note 1.
104. *Id.*
105. *See supra* note 71 and accompanying text.
106. Memorandum from Tracy Short, *supra* note 70, at 1.
107. *Id.* at 5.

to prevail on her asylum claim.[108] The implicit suggested goal is to fight against the grant of asylum to such women.

The memorandum sent by USCIS mirrored the purpose and intent of the memorandum sent by ICE. This memorandum first gave examples—as provided by the Attorney General in his opinion—of how the requirements to qualify for asylum function under membership in a PSG.[109] It then stated that "[i]n general, in light of the [*Matter of A-B-*] standards, claims based on membership in a putative [PSG] defined by the members' vulnerability to harm of domestic violence . . . committed by non-government actors will not establish the basis for asylum . . . ."[110] The goal, communicated to USCIS officers for determining whether a petitioner is eligible for asylum, was to make it much less likely that relief would be available to battered women.

The full effects of these memoranda will likely not be realized because of the *Grace v. Whitaker* decision, discussed below.[111] Still, the overturning of *Matter of A-R-C-G-* and subsequent direction about its "enforcement" were arguably designed to limit the number of people that would be granted asylum.[112] Tragically, the group most likely to suffer from this outcome is the one in such acute need of protection: women who have been terribly abused by their male partners and are seeking sanctuary in the United States.

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108. *See* A-B-, 27 I. & N. Dec. 316, 320 (Op. Att'y Gen. 2018) (demonstrating the implicit disfavor in the decision toward granting asylum in a domestic violence-based claim. After the Attorney General emphasizes the high burden on an applicant to prove each component of her claim he states "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum"), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal docketed sub nom*. Grace v. Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

109. Memo from U.S. Citizen and Immigration Services, *supra* note 70, at 4.

110. *Id.* at 6.

111. *See generally* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018) (creating a holding that enjoins certain directions given by the USCIS policy memorandum released after the *Matter of A-B-* decision), *appeal docketed sub nom*. Grace v. Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

112. *See* Schmidt, *supra* note 6, at 2 (commenting on the overturning of *Matter of A-R-C-G-* and stating: "*Matter of A-R-C-G-* was one of the few parts of our dysfunctional Immigration Court system that actually worked and provided a way of consistently granting much needed protection to some of the most vulnerable and most deserving refugees in the world.").

C. *A Federal Response to the Realm of Immigration: Grace v. Whitaker*

Shortly after the Attorney General issued his *Matter of A-B-* opinion, advocates responded, filing suit to challenge the ruling in federal court. [113] Their petition specifically sought to enjoin the application of both the *Matter of A-B-* decision and all government-issued guidance for how to apply this decision.[114]

The federal response to this petition arrived before the end of that same year, when the District Court of the District of Columbia issued a decision in *Grace v. Whitaker*. The district court judge—in a whopping fourty-two page decision—found that "the general rule [established by *Matter of A-B-*] is arbitrary and capricious because there is no legal basis for an effective categorical ban on domestic violence . . . claims."[115] Specifically, the opinion questioned the way in which *Matter of A-B-* had interpreted the meaning of "particular social group."[116] The opinion went as far as to say "[i]n interpreting 'particular social group' in a way that results in a general rule, in violation of the requirements of the statute, the Attorney General has failed to 'stay[] within the bounds' of his statutory authority."[117] The decision also enjoined USCIS from continuing to apply the new directions promulgated in the post-*Matter of A-B-* policy memorandum, which directed immigration agents to act in a manner that would enforce the Attorney General's new decision.[118]

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113. Eunice Lee, *Grace v. Sessions—Suing to Stop Shutting Down Asylum Claims at the Border*, JUST SECURITY (Aug. 7, 2018), https://www.justsecurity.org/60169/grace-v-sessions-suing-stop-shutting-asylum-claims-border/.

114. Complaint for Declaratory and Injunctive Relief at 33, Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018) (No. 18-01853).

115. Grace v. Whitaker, 344 F. Supp. 3d 96, 126 (D.D.C. 2018), *appeal docketed sub nom.* Grace. V. Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

116. *Id.* at 123–27.

117. *Id.* at 126 (quoting District of Columbia v. Dep't of Labor, 819 F.3d 444, 449 (D.C. Cir. 2016)).

118. JEFFREY S. CHASE, *HOW FAR REACHING IS THE IMPACT OF* GRACE V. WHITAKER*?* Jeffrey S. Chase: Opinions/Analysis on Immigration Law (DEC. 24, 2018), https://www.jeffreyschase.com/blog/2018/12/24/how-far-reaching-is-the-impact-of-grace-v-whitaker.

In response to *Grace v. Whitaker*, USCIS and the Executive Office for Immigration Review (EOIR) issued new guidance to ensure that government agents would act in compliance with the decision. The memorandum released by EOIR directed that immigration judges not rely on certain aspects of the *Matter of A-B-* opinion, including the requirement it set for the foreign country's governmental response to the asylum seeker's alleged persecution.[119] The USCIS-issued memorandum acknowledged that while certain parts of *Matter of A-B-* remained as binding precedent, certain immediate policy changes would need to take effect as a result of *Grace v. Whitaker*.[120] The majority of the memorandum consisted of a re-issuing of the guidance distributed on July 11, 2018, with portions of the document redacted; those portions previously gave instructions that now could no longer be carried out, as they had been enjoined by the district court.[121]

Despite this agency response and the rejection of key parts of the holding, *Grace v. Whitaker* did not erase the full effect of *Matter of A-B-*. As explained by an immigration lawyer and former immigration judge, "[t]he BIA and Immigration Judges generally maintain that they are not bound by decisions of district courts."[122] Even though the policy memorandum issued post-*Grace* did advise immigration judges not to violate the injunction issued in *Grace v. Whitaker*,[123] this does not unequivocally mean that the BIA will apply all parts of the decision if and

119. OFFICE OF GEN. COUNSEL, EOIR, GUIDANCE ON GRACE V. WHITAKER 2 (2018) (https://www.aclu.org/sites/default/files/field_document/eoir_guidance_re_grace_v._whitaker.pdf) (highlighting the interim policy and procedure changes for compliance with the court order issued in *Grace v. Whitaker*) [hereinafter GUIDANCE ON GRACE V. WHITAKER].

120. Email from John Lafferty, Head of Asylum, USCIS, to RAIO Asylum Headquarters, Field Office Managers, and Office Staff on How Grace v. Whitaker Impact CF Processing (Dec. 19, 2018, 11:12 PM), (on file at https://www.aclu.org/legal-document/grace-v-whitaker-uscis-guidance-re-grace-injunction).

121. *See supra* note 119 (showing the previous policy memorandum sent with various portions redacted).

122. Chase, *supra* note 118.

123. GUIDANCE ON GRACE V. WHITAKER, *supra* note 119, at 1.

when cases come before it on appeal. Again, the common refrain resounds: uncertainty. After *Grace v. Whitaker*, just as it was after *Matter of A-R-C-G-*, and just as it was after *Matter of A-B-*, it is still not clear how an immigration court will respond to a plea for asylum based on domestic abuse. In fact, some immigration judges have granted asylum to victims of domestic violence since *Matter of A-B-* without even trying to rely on *Grace v. Whitaker*.[124] This does not by any means, indicate that other immigration judges would decide the same, as the judges are subject to the authority of the BIA, not the opinions of other immigration judges.[125]

The three preceding cases demonstrate that the way in which a victim of domestic violence can meet the criterion of membership in a PSG is uncertain. While *Grace v. Whitaker* seemed to indicate that these victims cannot be categorically excluded,[126] it did not explicitly say that domestic abuse victims *could* always establish PSG membership to qualify for asylum.

III. ANALYSIS: THE AMERICAN LEGAL SYSTEM HAS ALREADY SPOKEN ON THE NEED FOR PROTECTION OF DOMESTIC VIOLENCE VICTIMS AND THIS SHOULD EXTEND TO ASYLUM LAW

Violence against women is a "massive social problem" globally,[127] and one that rightfully has begun to attract more media and legal attention in recent years.[128] Domestic violence is "[o]ne of the most common forms of violence against women,"

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124. *See* Daniel M. Kowalski, *Post-Matter of A-B- Victories*, LEXISNEXIS: IMMIGR. LAW (Jan. 18, 2018), https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/post-matter-of-a-b--victories [hereinafter *Post-Matter of A-B- Victories*] (noting "two redacted 'post-*Matter of A-B-*' decisions" which granted relief to women from Central America who were seeking asylum).

125. *See Board of Immigration Appeals*, *supra* note 72.

126. Grace v. Whitaker, 344 F. Supp. 3d 96, 125–27 (D.D.C. 2018), *appeal docketed sub nom*. Grace v. Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

127. Sandra Horley, *Opinion: Why Domestic Violence Is Never a Private Issue*, CNN (June 19, 2013, 10:50 AM), https://www.cnn.com/2013/06/19/opinion/opinion-domestic-violence-not-private-issue/index.html.

128. *See* Charlotte Watts & Cathy Zimmerman, *Violence Against Women: Global Scope and Magnitude*, 359 LANCET 1232, 1232 (2002) ("An increasing amount of research is beginning to offer a global overview of the extent of violence against women.").

and includes various types of physical violence, emotionally abusive behavior, and sexual assault.[129]

In response to the gravity of the problem of domestic violence, both American law and society have responded. This part of the Note will analyze how criminal and civil law—both on the federal and state levels—as well as immigration law already reflect the realization that victims of domestic violence require protection and aid from the government. In other words, the law has recognized these victims as a distinct social group. The legal protection should be extended to victims of domestic abuse who have fled to the United States and are trying to find safety here by gaining asylum. Asylum law should recognize these women as a PSG.

A. *State Law: A Blend of Criminal and Civil Law to Recognize and Address Domestic Violence Locally*

Most states have expanded their laws to better protect victims of domestic violence over the past two decades by increasing or adapting criminal and civil law to inflict consequences for abuse.[130] Even those states that do not have criminal definitions for domestic violence *do* "include definitions of domestic violence or domestic abuse in the domestic relations or family law areas of their codes."[131] State legislative practice thus shows that even though the method for classifying domestic violence may vary by state, there is still consistent recognition that domestic violence is a problem which must be addressed by the law. This Note will discuss a sampling of state law regarding domestic violence to give examples of the many statutes existing to combat this major problem.

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129. *Id.* at 1233.

130. *See* Thompson Reuters, *Domestic Violence*, 50 STATE SURVEYS: CRIMINAL LAW: CRIMES (Oct. 2018), https://1.next.westlaw.com/Document/I6399b1145b3311de9b8c850332338889/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default).

131. *Id.*

Mandatory arrest laws are one way that states have sought to take domestic violence more seriously.[132] States instituted these laws that require "police to arrest domestic violence suspects upon probable cause" for several domestic abuse-addressing reasons.[133] One reason for mandatory arrest laws was to counter resistance from police in making arrests during situations involving domestic violence.[134] Rather than leaving the decision about whether an arrest should be made to an individual officer's discretion, the new law eliminated the discretionary element of whether to arrest a batterer in order to better protect the abused.[135] Another reason was in the hopes that requiring mandatory arrest would diminish the likelihood of abusers pressuring victims to not press charges against them.[136] Considering these justifications for mandatory arrest laws, it is fitting that all fifty states allow police officers to make warrantless arrests with probable cause that domestic violence has occurred.[137]

Outside of domestic violence being defined by and combated with methods solely in the criminal law context, Civil Protective Order (CPO) laws exist in all states.[138] A CPO allows the victim of domestic violence to address the abuse in her relationship through a variety of means including injunctive relief—ordering that the abuse cease or creating limitations on contact with the abuser—as well as monetary relief for resulting medical treatment.[139] If an abuser violates a CPO, the petitioning abused woman may ask the court to hold the abuser in civil or criminal contempt.[140] CPOs show that states have established legal

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132. Jessica Klarfeld, Note, *A Striking Disconnect: Marital Rape Law's Failure to Keep up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1821 (2011).

133. *Id.*

134. *Id.*

135. *Id.* at 1821–22.

136. *Id.*

137. *See id.*

138. Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1111 (2009).

139. *Id.*

140. *Id.* at 1131.

recourse for an abused woman to obtain protection from her abuser.

These examples exemplify states' effort to address domestic violence demonstrate both criminally and civilly. Through mandatory arrest laws, police officers are spurred to action when an abused victim calls for help. Through CPOs, a victim has the opportunity to engage the court in ordering methods for her protection. These measures demonstrate the American ideal that a victim should be able to reach out and access relief from domestic abuse.

B. *Federal Law Part 1: The Violence Against Women Act—Seeking to Address Domestic Violence Happening to Any Woman*

Inherent in federalism and the ability of fifty different sovereign states to make their own local laws is the issue of wide variation in how each state defines and addresses domestic violence.[141] In 1994, the U.S. took a major federal step toward addressing the problem of violence targeted toward the female population, aptly suggested by the very title of the act itself: The Violence Against Women Act (VAWA).[142] VAWA was a piece of major legislation, described as the first national approach to domestic violence, which included provisions to strengthen services provided to domestic violence victims and enhance criminal sentences for those in violation of the Act.[143] The Act has gone through several iterations since its inception twenty-five years ago.[144]

The original Act (VAWA I) included criminal provisions to respond to domestic violence, including enhanced sentences for

141. *See, e.g.*, Thompson Reuters, *supra* note 130 (explaining that "[a]bout half of the jurisdictions do not contain criminal statutes specifically outlawing the act of 'domestic violence,' but rather rely on other criminal statutory definitions such as assault and menacing" which shows the varying approach different states have in classifying domestic violence issues).

142. *See History of VAWA*, LEGAL MOMENTUM, https://www.legalmomentum.org/history-vawa (last visited Jan. 21, 2020).

143. *See* Summer H. Carlisle & Shana Tabak, eds., *Federal Domestic Violence Law*, 9 GEO. J. GENDER & L. 661, 666 (2008).

144. *See History of VAWA*, *supra* note 142.

domestic abusers convicted under terms in the Act.[145] In 2000, Congress passed a revised version of VAWA (VAWA II) where the provisions under VAWA I were "expanded and improved."[146] The section titles in VAWA II demonstrate its purpose of "Strengthening Service to Victims of Domestic Violence" and "Strengthening Education and Training to Combat Violence Against Women."[147] Five years later, the president signed into law The Violence Against Women Reauthorization Act of 2005 (VAWA III).[148] This VAWA update further improved upon VAWA II, "providing an increased focus on access to services for communities of color, immigrant women, and tribal and Native communities."[149]

While certainly not a perfect or complete solution to the problem of violence against women, VAWA has improved protection for domestically abused women.[150] Congress reported that "VAWA funded programs have resulted in increased arrests of perpetrators, further training for professionals, and greater access to aid . . . ."[151] But the actual efficacy of VAWA is not its only significance. Rather, the mere fact that VAWA was not only established but renewed and improved twice shows strong evidence of a federal initiative and its underlying intent. It is evident that VAWA intended to better protect and assist victims of domestic violence, and its efforts had an impact; not only did VAWA significantly recognize and highlight the problem of vast abuse perpetrated on women, but took steps to correct it. Such legislative action in the form of VAWA is a powerful demonstration that the federal government takes domestic violence seriously. Further, it shows that the government recognizes that women who are victims of domestic violence need

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145. *See* Carlisle & Tabak, *supra* note 143, at 666–67.

146. *History of VAWA*, *supra* note 142.

147. Carlisle & Tabak, *supra* note 143, at 676–77.

148. *Id.* at 685.

149. *History of VAWA*, *supra* note 142.

150. Kaitlin O'Neil, Note, *The 2012 Battle for the Reauthorization of the Violence Against Women Act: Lessons Learned and Questions Left Unanswered*, 35 WOMEN'S RTS. L. REP. 243, 255 (2014).

151. *Id.*

and deserve special protection under the law. Though never stated as such in the Act, the provisions of VAWA implicitly send the message that the U.S. government is recognizing this group and that it needs unique treatment; in other words, this is a PSG of importance. If such recognition exists for women in the U.S., it should extend to *all* women in the U.S., including those seeking asylum as a way to legally remain within the safety of this country.

C. *Federal Law Part 2: Seeking to Address Domestic Violence Happening Specifically to Noncitizen Women*

Given that VAWA was passed by Congress, with provisions affecting the actions of American agencies and law enforcement, it necessarily focused on the plight of women abused in the U.S. However, the Act in all its iterations, though most extensively in its second and third versions, also directly addressed domestic violence against noncitizen women.[152]

While this group could have been assumed to be represented within the general female population, it was specifically isolated and recognized in numerous provisions throughout the passing of VAWA. Title V of VAWA II contained a specific section entitled "Battered Women Immigrant Protection Act of 2000."[153] It would be almost difficult to make it clearer than this title did that immigrant women were a unique group to be protected in the midst of addressing violence against women. In a congressional hearing discussing VAWA II, a member of the Senate stated, "Title V continues the work of the Violence Against Women Act of 1994 ("VAWA") in removing obstacles inadvertently interposed by our immigration laws that [may] hinder or prevent battered immigrants from fleeing domestic violence safely and prosecuting their abusers."[154]

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152. *See History of VAWA*, *supra* note 142 ("VAWA 2000 improved protections for battered immigrants . . . VAWA 2005 continued to improve upon these laws by providing an increased focus on access to services for . . . immigrant women . . . .").

153. Carlisle & Tabak, *supra* note 143, at 678.

154. 146 Cong. Rec. 22066 (2000) (statement of Sen. Hatch).

The Battered Women Immigrant Protection Act was not the first time that VAWA addressed the struggle of noncitizen women with domestic violence. VAWA I had already contained provisions seeking to aid, and had indeed accomplished this goal of aiding, battered immigrant women.[155] As one example, VAWA I provided for a self-petitioning process[156] allowing a battered noncitizen to apply for legal permanent residency, even if her abusive husband would not agree to petition on her behalf.[157] VAWA II took further steps to address problems that existed in the self-petitioning process in order to make this tool a more effective aid to women suffering domestic abuse at the hands of their partners in the US.[158] The newer version of the Act removed the requirement that the woman still be married to her abuser at the time she petitioned, and adapted a previous requirement that the woman petitioner have good moral character, making it such that good moral character was now generally presumed.[159]

In addition to easing the self-petitioning process for abused women seeking to attain legal permanent residence, the Battered Women Immigrant Protection Act of 2000 included other provisions which "grant[ed] improved access to legal protection for battered immigrants."[160] One provision eased the level of proof required for an abused woman to show she would suffer extreme hardship if she were deported; this lessened burden

155. Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 J. GENDER SOC. POL'Y & L. 95, 143 (2002).

156. *See* Carlisle & Tabak, *supra* note 143, at 678; *see also Family of Green Card Holders (Permanent Residents)*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/family/family-green-card-holders-permanent-residents (last updated July 14, 2015) (providing overview of typical process through which a legal permanent resident may petition for a noncitizen to become a legal permanent resident, in contrast to what would occur through the self-petitioning process).

157. *See* Carlisle & Tabak, *supra* note 143, at 678–79; *Green Card for VAWA Self-Petitioner*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/green-card/green-card-vawa-self-petitioner (last updated July 26, 2018).

158. Carlisle & Tabak, *supra* note 143, at 679.

159. *Id.*

160. Orloff & Kaguyutan, *supra* note 155, at 144–45.

made it easier to win approval of self-petitions.[161] Another provision improved access to public benefits for abused immigrant women, diminishing the risk that seeking public benefits would later highly impede their ability to gain legal permanent resident status.[162]

These are just a sample of the provisions specifically designed to address the situation of domestically abused women who were residing in the U.S., but were noncitizens. These provisions, however, do not extend to address the plight of a woman fleeing an abuser in another country, but rather apply to immigrant women who have experienced the actual abuse from a person within the U.S.[163] Still, the fact that there was a whole section of VAWA II specifically named for its intent to assist battered noncitizens is a definite statement that Congress cared about this population, and recognized it as a particular group in American society.

VAWA III continued the theme of providing for abused immigrant women by specifically addressing "Protection of Battered and Trafficked Immigrants" through its Title VIII.[164] Again, this title makes Congress's concern evident that this group of women continue to need protecting, even though VAWA III came 5 years after VAWA II.[165] The passage of time did not change federal legislative intent to react to the problem of domestic violence toward noncitizen women in the U.S.

161. *Id.* at 145.

162. *Id.* at 152–53.

163. *See* Carlisle & Tabak, *supra* note 143, at 678–79 (indicating that the Battered Women Immigrant Protection Act of 2000 related to nonimmigrant women who were being abused in the U.S.).

164. *Id.* at 691.

165. *See id.* at 691–92 (explaining that Title VIII addressed certain challenges for domestic violence victims by removing certain hurdles, such as removing the requirement of their family members to demonstrate an "extreme hardship" to be able to accompany them to the U.S.).

D. *Immigration Law: Already Recognizing that Domestic Violence Victims—and the Acts of Domestic Violence—Should Be Treated Uniquely*

Specific statutes in the INA already give particular attention to the issue of domestic violence, showing an implicit recognition for the need to set apart these victims as unique and deserving of special treatment. Related to issues of how and when a noncitizen may be deported, one statute stipulates that committing a crime of domestic violence is grounds for deportation.[166] Another statute ensures there is a waiver of deportability if a party that was the *victim* of domestic violence may have been convicted of a crime for domestic violence herself, as could occur if a criminal act was technically committed while the victim was acting in self-defense.[167] The INA, thus, acknowledges the severity of domestic violence in making the criminal commission of domestic abuse a deportable offense. It then goes a step further to clarify that it is not the victims of domestic violence who should suffer the threat of possible deportation because their lives have been touched by such abuse.

IV. CONFIRMING THE CONNECTION BETWEEN AMERICAN TREATMENT OF DOMESTIC VIOLENCE AND THE CURRENT TREATMENT OF WOMEN FLEEING DOMESTIC ABUSE – AND A CALL FOR ACTION

This Note considered the recent case law as it pertains to women who have been domestically abused, and are seeking asylum in the U.S. to finally be free from this persecution by their intimate partner.[168] The three cases discussed—*Matter of A-R-C-G-*, *Matter of A-B-*, and *Grace v. Whitaker*—showed a back-and-forth mentality that changed from creating a premise that domestic violence was a ground for asylum, to saying it wasn't after all, to saying that the door to this type of asylum claimed

166. *See* 8 U.S.C. § 1227(a)(2)(E)(i) (2018).
167. *See id.* at § 1227(a)(7).
168. *See supra* Parts I & II.

was not shut tight. A strong underlying issue in these cases was whether the abuse victim could show that she was a member of a PSG. Ultimately, the fate of a woman who has fled to the U.S. because of her abuse is still unclear, just as it is unclear whether a domestic violence victim will be able to show her PSG membership. Stories like those of Xiomara demonstrate that domestic abuse persecution is very real, and foreign governments do not seem to be willing or able to control it.[169]

This Note then analyzed how the American legal system has responded to domestic violence.[170] Overall, "[d]omestic violence law [in the U.S.] has seen huge advances over the past few decades."[171] State laws seek to address domestic abuse from multiple angles, and the federal government has clearly prioritized the issue as demonstrated by the passing and renewal of VAWA. Furthermore, and especially significantly, U.S. law by no means has been silent about abuse specifically targeted toward noncitizen women. Instead, their plight has been recognized as well, and targeted by federal law provisions. It is as if the U.S. legal system has said that domestically abused women are a recognized PSG.

The basic question still stands: should the granting of asylum be another way that the U.S. uses its law to protect a particular class of women from domestic abuse? The answer suggested by existing American law is yes. If such significant measures have already been taken to recognize the severity of domestic violence and seek to correct, address, and prevent it for the sake of American and nonimmigrant women in the U.S., the next intuitive step is to allow victims the protection of U.S. law when their own countries cannot protect them from an abusive partner. A current provision in the INA has already provided the route for establishing a reason for persecution that qualifies under the asylum statute: being part of a PSG.[172] Because American

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169. *See supra* notes 73–80 and accompanying text.

170. *See supra* Sections III.A.–D.

171. Klarfeld, *supra* note 132, at 1820.

172. *See* 8 U.S.C. § 1158(b)(1)(B).

law clearly recognizes domestically abused women as a group requiring specific legal protection, asylum law should make this recognition as well, and do it without wavering either through regulatory or legislative action.

As the decisions in *Matter of A-R-C-G-*, *Matter of A-B-*, and *Grace v. Whitaker* showed, the courts do not seem able to confirm whether domestic violence victims should be granted asylum. Even if the BIA issued a new opinion recognizing abused women as members of a PSG and granted asylum, or another Attorney General selected and reversed a decision that did *not* recognize this group and thus did not grant asylum, a later decision could just flip things again. This Note will suggest two ways that this problem of legal caprice and uncertainty can finally be addressed, and clarity can be achieved in domestic abuse victims' petitions for asylum.

One possible way that the issue of lack of clarity and uncertainty in whether a domestic violence victim can attain asylum can be addressed is by amendment to the regulatory protocol connected with the existing immigration law: an amendment that would allow for domestically abused women to be established as a PSG. This suggested potential change relates back to a proposal that occurred almost twenty years ago. When the *Matter of R-A-* case was unfolding, the Attorney General and the Commissioner of the Immigration and Naturalization Service[173] at the time proposed a new rule recognizing that "victims of domestic violence may, under certain circumstances, qualify for asylum under the Immigration and Nationality Act (INA)."[174] The rule proposed to amend regulations used by the Immigration and Naturalization Service to provide guidance on the

173. The Immigration and Naturalization Service no longer exists, and instead has been replaced by three components within the Department of Homeland Security: USCIS, ICE, and U.S. Customs and Border Protection (CBP). *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/about-us/our-history (last updated May 25, 2011).

174. News Release, U.S. Dep't of Justice, Immigration and Naturalization Service on the Proposed Rule Issued for Gender-Based Asylum Claims (Dec. 7, 2000), (on file with U.S. Citizenship & Immigr. Services, at https://www.uscis.gov/sites/default/files/files/pressrelease/Gender-BasedAsylumClaims_120700.pdf).

definition of membership in a PSG.[175] Unfortunately, the proposed rule was never finalized.[176] Nonetheless, the fact that such a rule was proposed at all shows that both the Attorney General and the government agency, largely in charge of immigration, realized the need to clarify the PSG definition. Not only was there a need to clarify this definition generally but also to clarify this definition specifically as it pertained to domestic-violence-related claims for asylum.

The previous existence of this proposed rule, specifically recognizing that victims of domestic violence may qualify for asylum, also shows a potentially effective way to designate that female victims of domestic abuse should be recognized as a PSG. USCIS could, and should, propose a rule that would define domestically abused women as a cognizable PSG. Such a rule would be in line with the rest of American law that recognizes battered woman as a class deserving of legal protection. The rule would likely be most effective not only by recognizing that domestic abuse victims *can* be granted asylum but that they *are eligible* for the grant of asylum *because* they represent a PSG. This regulatory measure would shift the way in which immigration authorities interpret the INA so that the qualifications to establish asylum would be more certainly met by a woman fleeing domestic violence.

Another possible way to address the problem of uncertainty in whether a domestic violence victim can gain asylum is through direct legislative action that would designate these abused women as qualifying for asylum, either by broadening the definition of a PSG to include gender or by specifically naming abused women as being their own PSG. An expansion of the newest version of VAWA—which could occur in 2020[177]—

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

176. *See* Carolyn M. Wald, Note, *Does* Matter of A-R-C-G- *Matter that Much?: Why Domestic Violence Victims Seeking Asylum Need Better Protection*, 25 CORNELL J.L. & PUB. POL'Y 527, 550–51 (2015).

177. VAWA officially expired at the very end of 2018. Kate Thayer, *The Violence Against Women Act Has Expired*, CHI. TRIB. (Feb. 21, 2019, 11:05 AM), https://www.chicagotribune.com

would be the perfect opportunity to provide significant additional protection for immigrant victims of domestic violence. One possibility is that Congress could use the Act to amend the INA to further define what qualifies an asylum petitioner for membership in a PSG, with a revised definition allowing gender alone to be a basis for membership, thereby extending protections to battered women.[178]

Alternatively, a much narrower exception could be added by Congress to the INA's definition of the qualifications to establish asylum, which would directly recognize female victims of domestic abuse as qualifying as a PSG. Previous versions of VAWA have already proven that Congress has made specific provisions to provide better support and protection to battered immigrant women in the past.[179] Enacting changes to the INA through the next version of VAWA could be Congress's chance to make an even greater impact which this time would extend to women seeking asylum, rather than only trying to aid victims of domestic violence when abuse occurs within the U.S.[180] In April 2019, the House of Representatives passed a VAWA reauthorization and awaits possible change and approval by the Senate.[181] This bill for VAWA's reauthorization unfortunately does not appear to have provisions that suggest any amendments to the INA to address the situation of abused immigrant women seeking asylum.[182] Still, if it is to remain in line with the legal standards exemplified elsewhere in American law, Congress could, and should, make clear that domestic violence does

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/lifestyles/ct-life-violence-against-women-act-expired-20190220-story.html. The House of Representatives voted to reauthorize VAWA on April 4, 2019. As of the publication of this Note, the reauthorization bill is pending in the Senate. Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. (2019).

178. *See* Wald, *supra* note 176, at 554–55.

179. *See supra* notes 156–59 and accompanying text.

180. *See supra* note 152 and accompanying text.

181. Brett Mattson, *U.S. House Passes Five-Year Reauthorization of the Violence Against Women Act*, NACO BLOG (Apr. 9, 2019), https://www.naco.org/blog/us-house-passes-five-year-reauthorization-violence-against-women-act.

182. *See* H.R. 1585, https://www.congress.gov/bill/116th-congress/house-bill/1585/text (showing that new VAWA bill proposed to Senate contains no apparent provisions related to immigrant women).

qualify as a ground for asylum through legislative action. The Senate may still suggest additional changes to this effect in this newest VAWA iteration. If a change to the INA is neither attempted nor achieved through the newest version of VAWA, separate congressional action should be enacted, ideally following one of the proposed means outlined above, to alter the definition of a PSG to recognize domestically abused women seeking asylum.

Lastly, to briefly address a concern about expanding the definition of a PSG to include battered women: even if one of the proposed changes above were made or enacted, this would not result in an automatic grant of asylum to every woman who claimed she was domestically abused. Per the asylum statute in the INA, the applicant for asylum bears the burden of convincing the trier of fact with credible and persuasive evidence.[183] Being able to qualify as a member of a PSG is just one part of a person proving she has sufficient grounds for asylum. The trier of fact will still weigh evidence to determine whether a claim is valid and warrants a grant of asylum.[184] This is to say that changing the definition of what qualifies someone to be a member of a PSG will not open the floodgates, such that any woman who says "I was domestically abused" is granted asylum. It is only one step in empowering women who have suffered domestic abuse to have hope of gaining asylum in the US. Though it is a very vital step, it does not suggest an overly radical change to existing law.

CONCLUSION

In an unpublished decision back in 2012 the BIA "acknowledged that whether domestic violence may be the basis for an asylum claim 'remains unresolved.'"[185] Still now, despite the passage of about seven years' time, this sentiment remains true. The decision about whether a domestic violence victim should

183. 8 U.S.C. § 1158(b)(1)(B) (2018).

184. *See id.*

185. *Domestic Violence as a Basis for Asylum*, *supra* note 5, at 145–46.

have grounds for asylum should not be wracked with uncertainty and inconsistent precedent, further complicated by dueling opinions between immigration and federal courts. This is to say, things should not remain the way they are now. Victims of domestic abuse should know they could almost certainly be granted asylum in the U.S., assuming of course, as would be required with any legal proceeding, that they can prove the facts of their case as required by immigration law. This potential asylum grant should never be dependent on the whims of a single person, even if that person is the Attorney General. The ability to shut off an entire group from asylum protection is too much power for one individual to potentially execute.

The grant of asylum protection for women persecuted by domestic violence abusers should be established more clearly and firmly by law, by recognizing battered women as a PSG. The American legal system has already spoken on the significance of domestic violence and the need to aid its victims. It is only fitting that the laws of the United States finally and fully extend this protection to domestic violence victims seeking asylum. Whether this clarity results from regulatory or legislative action, it should occur, and soon.