

# Fleeing for Their Lives: Domestic Violence Asylum and *Matter of A-B-*

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## INTRODUCTION

In July 2014, A.B. crossed the border between Mexico and Texas and applied for asylum in the United States.<sup>1</sup> Her journey to America was long and arduous; it began in her home country, El Salvador, where she fled her abusive ex-husband.<sup>2</sup> For years, she had suffered brutal violence at his hands: he hit her with beer bottles, threatened her with guns, beat her while she was pregnant, and

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1. “A.B.” stands for the initials of the petitioner in the case *Matter of A-B-*. Her full name has not been released for privacy and safety reasons. Joel Rose, *This Salvadoran Woman Is at the Center of the Attorney General’s Asylum Crackdown*, NPR (May 22, 2018), <https://www.npr.org/2018/05/22/611920968/this-salvadoran-woman-is-at-the-center-of-the-attorney-generals-asylum-crackdown> [<http://perma.cc/NRH8-X2NP>].

2. *Id.*

sexually assaulted her.<sup>3</sup> After doing everything within her power to protect herself from him within El Salvador, such as obtaining a protective order and unsuccessfully asking the police to enforce it, A.B. feared for her life and left the country.<sup>4</sup>

A.B. is one of thousands of women and girls who have fled domestic violence in the Northern Triangle countries of Honduras, Guatemala, and El Salvador to seek asylum in the United States. Their fates are decided in American immigration courts and governed by an opaque, complex asylum process. Most are denied asylum.<sup>5</sup> A.B. was one of the lucky ones: the Board of Immigration Appeals (BIA) directed the lower court to grant her asylum claim based upon her victimization by her ex-husband.<sup>6</sup>

But in June 2018, Attorney General Jeff Sessions personally intervened in A.B.'s case, *Matter of A-B-*, and overruled the decision to grant her asylum.<sup>7</sup> As the Attorney General, Sessions had the power to direct any immigration case to himself for decision. This discretionary power is one of the many aspects of immigration law that is distinct from the Article III judicial system and that makes it more vulnerable to political influence. Sessions chose to intervene in A.B.'s case as part of his campaign to curtail the asylum process, which he believed had "become an easy ticket to illegal entry into the United States."<sup>8</sup> He used *Matter of A-B-* as a way to narrow the grounds upon which victims of domestic violence could apply for, and be granted, asylum. In *Matter of A-B-*, Sessions asserted that asylum claims based on domestic or gang-related violence would "[g]enerally" not be granted.<sup>9</sup> In so doing, he overturned a precedential BIA case that established domestic violence as grounds for asylum, *Matter of A-R-C-G-*.<sup>10</sup>

This Note argues that *Matter of A-B-* was wrongly decided. Sessions's opinion dismissed the dynamics of gender-based and intimate partner violence and ignored the cultural conditions in asylum seekers' home countries that leave them with few choices but to flee. The opinion wrongly characterized domestic violence as a private, interpersonal issue rather than a global epidemic that perpetuates gender inequality. Based on this mischaracterization, the opinion

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3. *Id.*

4. *Id.*

5. See Katie Benner & Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html> [<https://perma.cc/PQY7-8VA5>].

6. *Matter of A-B-*, 27 I. & N. Dec. 316, 321 (Att'y Gen. 2018), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018).

7. *Id.*

8. Jeff Sessions, Attorney Gen., U.S. Dep't of Justice, Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> [<https://perma.cc/RD5S-JAF8>].

9. *Matter of A-B-*, 27 I. & N. Dec. at 320.

10. *Id.* at 317 (abrogating *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014)).

asserted that victims of domestic violence are “[g]enerally” not refugees within the meaning of the governing statute because domestic violence is unrelated to state action, a prerequisite for claiming refugee status.<sup>11</sup> However, I argue that it is a mistake to classify domestic violence as a primarily “private” crime given its widespread and gendered nature. Further, in some cases, the infliction of domestic violence is ignored—if not condoned—by state actors, casting doubt upon Sessions’s claim in *Matter of A-B-* that such violence does not involve government action. While the holding in *Matter of A-B-* was narrow, the case nonetheless set a dangerous precedent that made it more difficult for victims of domestic violence to find asylum in the United States.

Part I explains the scope and severity of domestic violence worldwide and connects the infliction of domestic violence to patriarchal social, cultural, and legal structures. Domestic violence is a health and human rights crisis that affects millions of women and girls. Furthermore, domestic violence is caused by and reinforces traditional gender hierarchies. Women and girls will never be socially, politically, or economically equal while they remain unsafe from violence in their own homes.

Part II discusses violence against women in the Northern Triangle countries of Guatemala, Honduras, and El Salvador. A.B., like many asylum seekers in the United States with claims based upon domestic violence, is from the Northern Triangle. The combination of bloody civil wars, patriarchal cultural norms, and impunity for violent criminals has made the Northern Triangle a particularly deadly place to be a woman. The United States played a role in inciting the violence that has wreaked havoc on the region; now, women like A.B. flee, hoping to find refuge. In light of this history, the United States has not only a legal obligation but also a *moral* imperative to take seriously the plight of women like A.B. through the asylum process.

Part III describes the evolution of asylum law in the United States and how domestic violence became a basis for asylum in the years before *Matter of A-B-*. It discusses how the immigration law system—which governs asylum law—is different from the Article III judicial system and is susceptible to changing political priorities. Part III introduces the seminal domestic violence asylum cases that formed the foundation for the precedent overturned in *Matter of A-B-*.

Part IV analyzes Sessions’s decision in *Matter of A-B-* and argues that the case was wrongly decided. In *Matter of A-B-*, Sessions sought to create a general rule that precluded victims of domestic violence (and gang violence) from being granted asylum. However, I contend the opinion ignored the BIA’s precedential decisions and demonstrated a lack of understanding about the dynamics of gender-based violence. Based on this lack of understanding, the opinion misapplied asylum law in A.B.’s case, creating a dangerous and legally unsound precedent.

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11. *Id.* at 320.

Part V explores *Grace v. Whitaker*, an Article III case decided in December 2018 that limits the practical effect of the holding in *Matter of A-B-*. After Sessions decided *Matter of A-B-*, United States Citizenship and Immigration Services (USCIS) promulgated a Policy Memorandum directing asylum officers to deny asylum claims based on domestic violence at the credible fear interview stage.<sup>12</sup> However, a district court in Washington, D.C., held that the Memorandum was unlawful insofar as it created a blanket rule requiring asylum officers to deny asylum claims based on the type of harm suffered.<sup>13</sup>

Finally, Part VI discusses the potential implications of *Matter of A-B-* in the wake of *Grace v. Whitaker*. It asserts legal strategies that domestic violence and asylum advocates should use in the future. In using any of these strategies, it will be critical for attorneys representing victims of domestic violence to make explicit connections between the infliction of intimate partner violence (IPV) and the cultural, social, and legal structures that allow IPV to flourish. Additionally, I suggest that the Immigration and Nationality Act (INA) must be reformed to allow asylum seekers to claim asylum based on persecution because of their gender. Finally, Part VI posits that the immigration legal system is overdue for structural change.

## I.

### THE GENDERED NATURE OF DOMESTIC VIOLENCE

Violence against women is a global epidemic that undergirds and perpetuates gender inequality. The World Health Organization (WHO) estimates that 35 percent of women worldwide have experienced some form of gender-based violence, most of which was perpetrated by current or former intimate partners.<sup>14</sup> Almost one-third, or 30 percent, of women who have been in a relationship have experienced physical or sexual violence at the hands of a partner.<sup>15</sup> In this way, women's experience of violence differs starkly from that of men: rather than being assaulted by their intimate partners, men, according to WHO, "are far more likely to experience violent acts by strangers or acquaintances than by someone close to them."<sup>16</sup> This is not to suggest that men or nonbinary individuals cannot be the victims of IPV—they can and they are—

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12. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 109–11 (D.D.C. 2018).

13. *Id.* at 105.

14. *Violence Against Women*, WORLD HEALTH ORG. (Nov. 29, 2017), <http://www.who.int/news-room/fact-sheets/detail/violence-against-women> [<https://perma.cc/F8HS-5AYZ>].

15. *Id.* It is important to note that this percentage does not include emotional abuse or stalking, which are pervasive forms of domestic violence that can be just as damaging as, and often accompany, physical and sexual violence.

16. CLAUDIA GARCIA-MORENO ET AL., WORLD HEALTH ORG., INTIMATE PARTNER VIOLENCE 1 (2012), [https://www.who.int/iris/bitstream/10665/77432/1/WHO\\_RHR\\_12.36\\_eng.pdf?ua=1](https://www.who.int/iris/bitstream/10665/77432/1/WHO_RHR_12.36_eng.pdf?ua=1) [<https://perma.cc/5DJE-A5GP>].

but to emphasize that IPV disproportionately affects women and girls.<sup>17</sup> Women make up the vast majority of intimate partner victims and are more likely than men to be seriously injured or killed by intimate partners.<sup>18</sup> Understanding the pervasive and gendered nature of domestic violence is key to addressing violence against women more generally.<sup>19</sup>

Additionally, the gendered nature of domestic violence is relevant to how victims of domestic violence should be treated by United States asylum law. As this Note will discuss in Part III, to qualify for asylum, would-be refugees must show that they are part of a persecuted group.<sup>20</sup> Given that victims of IPV are disproportionately women and girls—and that such a high proportion of women and girls are victims of IPV—there is an argument to be made that gender is a sufficient basis upon which asylum seekers can claim refugee status. Because interpersonal violence against women is so pervasive, women facing such violence should be able to seek asylum based on their gender.

The most devastating risk that survivors of domestic violence face is death. The United Nations recently announced that 30,000 women were killed by a current or former intimate partner in 2017.<sup>21</sup> According to one WHO report, 38 percent of women who are killed globally are killed by a current or former partner.<sup>22</sup> Another suggests the number is higher and that “40-70% of female murder victims [are] killed by their husband or boyfriend.”<sup>23</sup> There is an important gender dimension to these figures: “While the majority of homicide victims are men, women are the primary victims of intimate partner homicide.”<sup>24</sup> Only about 5 percent of male homicide victims are killed by a current or former partner.<sup>25</sup> Murder, or the threat of murder, can be part of the cycle of violence

17. See Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER, SOC. POL'Y & L. 229, 231 (2009) (“Women are battered much more frequently, suffer much greater injuries, and are at much higher risk of being killed by their batterer than their male counterparts, particularly at separation.”).

18. *Id.*

19. I will be using the terms “intimate partner violence” (IPV) and “domestic violence” interchangeably throughout this Note.

20. Immigration and Nationality Act of 1965 § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2018).

21. U.N. OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE: GENDER-RELATED KILLING OF WOMEN AND GIRLS 10 (2018), [http://www.unodc.org/documents/data-and-analysis/GSH2018/GSH18\\_Gender-related\\_killing\\_of\\_women\\_and\\_girls.pdf](http://www.unodc.org/documents/data-and-analysis/GSH2018/GSH18_Gender-related_killing_of_women_and_girls.pdf) [<https://perma.cc/SSWC-TS97>].

22. *Violence Against Women*, *supra* note 14.

23. GARCIA-MORENO ET AL., INTIMATE PARTNER VIOLENCE, *supra* note 16, at 7.

24. Mihaela Racovita, *Lethal Violence Against Women and Girls*, in GENEVA DECLARATION SECRETARIAT, GLOBAL BURDEN OF ARMED VIOLENCE 2015: EVERY BODY COUNTS 87, 88 (Anna Alvazzi del Frate et al. eds., 2015), [http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3\\_Ch3\\_pp87-120.pdf](http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3_Ch3_pp87-120.pdf) [<http://perma.cc/CCK8-XYFA>]; see also GLOBAL STUDY ON HOMICIDE, *supra* note 21, at 11.

25. Jill Theresa Messing & Jacquelyn Campbell, *Informing Collaborative Interventions: Intimate Partner Violence Risk Assessment for Front Line Police Officers*, 10 POLICING 328, 329 (2016).

that women in abusive relationships experience.<sup>26</sup> Indeed, IPV is almost always a precursor to the murder of an intimate partner.<sup>27</sup>

Further, women are often in the greatest danger when they are in the process of leaving or have recently left their partner.<sup>28</sup> This phenomenon, called separation assault, can have lethal outcomes. One study in California revealed that 45 percent of women killed in domestic homicides were killed in separation assaults.<sup>29</sup> The substantial risks that women take when they separate or attempt to separate from an abusive partner help provide an answer to the oft-asked question: “Why didn’t she just leave?” The danger that accompanies separation reveals why state intervention may be necessary to protect women facing IPV.

The domestic violence epidemic deprives women and girls of their fundamental human rights. The United Nations Universal Declaration of Human Rights asserts that all people have “the right to life, liberty and security of person” and to be free from “cruel, inhuman or degrading treatment.”<sup>30</sup> Victims of IPV are often deprived of life, liberty, and security by their abusers. They are killed, kidnapped, surveilled, beaten, and condemned to live a life of fear. Furthermore, domestic violence itself routinely involves “cruel, inhuman or degrading treatment.”<sup>31</sup> Such abuse can include physical, sexual, or psychological violence. Because IPV can touch nearly every aspect of a survivor’s life, it also implicates other fundamental human rights: the right to work, to own property, to access healthcare and education, to dissolve a marriage, and to move freely, just to name a few.<sup>32</sup> As women and girls around the world are systematically abused by their intimate partners, they are deprived of the human rights with which every person is endowed.

The health and human rights crisis caused by the high rates of IPV and homicide that women face perpetuates global gender inequality. Women and girls cannot contribute equally to or participate equally in a society that renders them unsafe in their own homes and relationships. The mental and physical trauma caused by IPV can prevent women from accessing education, employment, and healthcare. It precludes them from realizing the full scope of their political and economic potential. The worldwide scourge of domestic violence is caused in part by deep-rooted misogyny and sexist stereotypes.<sup>33</sup> The way in which domestic violence prevents women from participating equally in

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26. *Id.*

27. *Id.* (“IPV is the single largest risk factor for intimate partner femicide . . .”).

28. *See, e.g.,* Dragiewicz & Lindgren, *supra* note 17, at 255.

29. *Id.*

30. G.A. Res. 217 (III) A, Universal Declaration of Human Rights arts. 3, 5 (Dec. 10, 1948).

31. *Id.* art. 5.

32. *Id.* arts. 13, 16, 17, 23, 25, 26.

33. *See* Declaration of Nancy K. D. Lemon, Matter of A-B-, 27 I. & N. Dec. 316 (Att’y Gen. 2018) (outlining the ways in which “[g]ender is one – if not *the* – primary motivating factor for domestic violence”).

our global society only serves to reinforce such patriarchal structures and entrench harmful gender norms.

Thus, IPV is both caused by and undergirds systems of patriarchal power. What is more, government actors and policies—most notably, the lack of viable recourse or protection for victims of domestic violence—at times contribute to, and often do not meaningfully ameliorate, the prevalence of IPV. Because of this, the legal system should not treat domestic violence as a primarily interpersonal or “domestic” issue. Rather, legal frameworks must acknowledge the ways in which current government policies, law enforcement practices, and cultural attitudes have failed to address the global epidemic of domestic and gender-based violence. The fact that the brunt of domestic violence is disproportionately born by women is also important to legal responses to it.

## II.

### VIOLENCE AGAINST WOMEN IN THE NORTHERN TRIANGLE

Violence against women is particularly severe and pervasive in the Northern Triangle countries of Honduras, Guatemala, and El Salvador. Many asylum seekers in the United States, including women fleeing domestic violence, come from the Northern Triangle. In recent decades, civil war and gang violence have ravaged all three of these countries. The trio share the distinction of being among the most dangerous places to live for women and girls, with all three in the top five countries in the world for rates of femicide.<sup>34</sup> The problem has worsened since the early 2000s, fueling migration to Mexico and the United States. In Honduras, “the number of violent deaths of women . . . increased by 263.4 percent” between 2005 and 2013.<sup>35</sup> In El Salvador, 469 women and girls were killed in 2017—an average of over nine each week.<sup>36</sup> Between 2014 and 2016, 2,264 Guatemalan women suffered violent deaths, 611 were formally reported as femicide, and just 59 of their perpetrators were imprisoned.<sup>37</sup> In each of these countries, women experience extreme and disproportionate levels of violence both inside and outside of the home. While this Note focuses on asylum seekers fleeing domestic violence specifically, it is impossible to completely

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34. See ALEXANDRA ARRIAGA & JOAN TIMONEY, U.S. CIVIL SOCIETY WORKING GRP. ON WOMEN, PEACE, & SEC., *VIOLENCE AND INSECURITY IN THE NORTHERN TRIANGLE OF CENTRAL AMERICA: DANGEROUS CHOICES FOR WOMEN AND GIRLS 2* (2016), <https://www.futureswithoutviolence.org/wp-content/uploads/US-CSWG-Policy-Brief-Violence-and-In...gerous-Choices-for-Women-and-Girls.pdf> [<http://perma.cc/HQU7-MGGE>].

35. *Id.*

36. SILVA MATHEMA, CTR. FOR AM. PROGRESS, *THEY ARE (STILL) REFUGEES: PEOPLE CONTINUE TO FLEE VIOLENCE IN LATIN AMERICAN COUNTRIES 2* (2018), <https://cdn.americanprogress.org/content/uploads/2018/05/31133207/They-Are-Still-Refugees-brief1.pdf> [<https://perma.cc/MML7-SSBC>].

37. Sarah Johnson, *Can Health Workers Stop Thousands of Women Being Killed in Guatemala?*, *GUARDIAN* (Mar. 7, 2018), <https://www.theguardian.com/healthcare-network/2018/mar/07/health-workers-stop-thousand-women-killed-guatemala-femicide> [<https://perma.cc/87UR-FRBQ>].

disentangle IPV from the culture of misogyny, gang violence, and impunity that enables IPV to flourish in these countries.<sup>38</sup>

It is difficult to discern how much of the violence that women experience is at the hands of current and former partners. This is because gender-based violence is ubiquitous in the Northern Triangle countries and because of the stigma associated with speaking about domestic violence. Guatemala's Public Prosecutor's Office provides one clue: more than 76 percent of the cases of violence against women received by the police in 2013 were perpetrated by a current or former partner.<sup>39</sup> Another reason is that gang members in these countries routinely force young women to be their "girlfriends" and assault or kill them if they don't comply.<sup>40</sup> The sexual and physical victimization of girls and women, many of whom are forced into coercive relationships with gang members, is weaponized as a tool of control and intimidation by the gangs that run rampant in some Northern Triangle neighborhoods.<sup>41</sup> In this way, the line between IPV and other forms of violence against women is blurred, but there can be no doubt that the two are interconnected. The high rates of IPV in the Northern Triangle countries may be a product of conditions—namely, a culture of violence and a lack of government protection—which render IPV more severe and more lethal in the region than in other countries.<sup>42</sup>

There are several factors that have led to the epidemic of violence against women, including domestic violence, in the Northern Triangle countries. To begin with, the "legacy of violence" from brutal civil wars that ravaged the region in the second half of the twentieth century contributed to a normalization of violence, and particularly violence against women.<sup>43</sup> Karen Musalo, an attorney at the Center for Gender and Refugee Studies at University of California, Hastings, noted that in Guatemala, "[v]iolence against women, including sexual violence, was a strategy of the [civil] war" that raged there

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38. It is important to note at the outset that domestic violence and violence against women more generally are not unique to the Northern Triangle, nor to any one culture or country. While I discuss the cultural, social, and historical forces that have led the Northern Triangle to be particularly deadly for women, I do not mean to assert that other places do not have similar issues or conditions. I focus on the Northern Triangle countries because many asylum seekers, including the woman in *Matter of A-B-*, come from there.

39. Adriana Beltrán, *Children and Families Fleeing Violence in Central America*, WASH. OFF. ON LATIN AM. (Feb. 21, 2017), <https://www.wola.org/analysis/people-leaving-central-americas-northern-triangle> [http://perma.cc/G8CH-TZ7G].

40. Jeffrey Hallock et al., *In Search of Safety, Growing Numbers of Women Flee Central America*, MIGRATION POLICY INST. (May 30, 2018), <https://www.migrationpolicy.org/article/search-safety-growing-numbers-women-flee-central-america> [http://perma.cc/8639-6GNW].

41. Karen Musalo et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L.J. 161, 188 (2010).

42. It is also possible that there has been better data collection on violence against women in the Northern Triangle than in other countries. Because of the connection between violence in the Northern Triangle and migration to the United States, such violence might be the focus of more research that reaches United States audiences.

43. See Musalo et al., *supra* note 41, at 181.



between 1960 and 1996.<sup>44</sup> During the conflict, women and girls were systematically raped, mutilated, forced into sexual slavery, and murdered.<sup>45</sup> Musalo further argued that “[t]he conflict made violence culturally acceptable; it led to a nation of people accustomed to extreme brutality . . . .”<sup>46</sup> In some ways, violence now manifests in every aspect of life—from intimate domestic spheres to public criminal activity. Similarly, armed conflict in El Salvador in the 1980s and 1990s also involved widespread violence, including “mass rape,” against civilians.<sup>47</sup>

As the United States struggles with how to handle asylum seekers fleeing violence in the Northern Triangle, it is important to be aware of its role in perpetuating and fostering such violence. The bloody legacy of these civil wars was exacerbated by the United States’ involvement in them.<sup>48</sup> The influx of American money, arms, and military training likely heightened the lethality and duration of the conflicts. For example, throughout the 1960s and 70s, the United States gave Guatemala over \$30 million in military aid, despite being “aware of the army’s dismal track record on human rights.”<sup>49</sup> Further, during the genocidal regime of Ríos Montt in the 1980s, the Reagan administration supplied “about \$15 million in spare parts and vehicles” directly to the Guatemalan military, which systematically murdered indigenous civilians.<sup>50</sup> Additionally, the United States sent military aid (to the tune of hundreds of millions of dollars) and advisors to the Salvadoran military.<sup>51</sup> American military officers trained a battalion that carried out the massacre of over 1,000 Salvadoran citizens.<sup>52</sup> The United States thus had a hand in the conflicts that inflicted trauma and normalized violence, including violence against women. Given this history, it

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44. *Id.*

45. *Id.*

46. *Id.*

47. *El Salvador*, CTR. FOR JUSTICE & ACCOUNTABILITY, <https://cja.org/where-we-work/el-salvador> [<https://perma.cc/AX8X-ME2H>].

48. *Id.*; *Guatemala*, CTR. FOR JUSTICE & ACCOUNTABILITY, <https://cja.org/where-we-work/guatemala> [<https://perma.cc/BZZ4-AFKB>].

49. Douglas Farah, *Papers Show U.S. Role in Guatemalan Abuses*, WASH. POST, Mar. 11, 1999, at A26.

50. Elisabeth Malkin, *Trial on Guatemalan Civil War Carnage Leaves Out U.S. Role*, N.Y. TIMES (May 16, 2013), <https://www.nytimes.com/2013/05/17/world/americas/trial-on-guatemalan-civil-war-carnage-leaves-out-us-role.html> [<https://perma.cc/M3CU-J38G>] (discussing the United States’ role in undergirding Montt’s regime and quoting a professor who described the Guatemalan military as “a monster that we created over which we had little leverage”); *see also* Greg Grandin, *Guatemalan Slaughter Was Part of Reagan’s Hard Line*, N.Y. TIMES (May 19, 2013), <https://www.nytimes.com/roomfordebate/2013/05/19/what-guilt-does-the-us-bear-in-guatemala/guatemalan-slaughter-was-part-of-reagans-hard-line> [<https://perma.cc/Z7B9-EUBU>] (arguing that the genocide of indigenous civilians in Guatemala was “supported materially and morally by Ronald Reagan’s White House”).

51. Raymond Bonner, *Time for a US Apology to El Salvador*, NATION (Apr. 15, 2016), <https://www.thenation.com/article/time-for-a-us-apology-to-el-salvador/> [<https://perma.cc/6RRV-4GPJ>].

52. *Id.*

seems that the United States has a moral imperative not to turn its back on innocent civilians fleeing the brutal conditions that it helped create.

The proliferation of gangs and drug cartels in the Northern Triangle has ensured that the wartime culture of brutality survived the conflict itself. Criminal gangs, like the armed forces before them, enjoy unprecedented levels of power and use violence against women to intimidate and control.<sup>53</sup> Not only do they assault, rape, and kill women who they force into nonconsensual relationships (or those who refuse to date them), but they also “exact vengeance on rivals via the rape and murder of daughters and sisters.”<sup>54</sup> Women are thus both victimized for their own sake and used as sacrificial, disposable pawns in feuds between gangs. An investigative report published by the *New York Times* in April 2019 quoted a Honduran women’s rights advocate who said of the gangs: “They see women as property.”<sup>55</sup> She described young girls telling her they are warned by gang members, “[i]f you don’t get into it, we will break you.”<sup>56</sup> Regardless of their response, gang members break the girls anyway, and kill them for failing to meet drug selling quotas, for failing to pay debts, for rejecting their romantic or sexual advances, or simply “because they are the girlfriends of criminals who tire of them.”<sup>57</sup>

In a disturbing trend, violence inflicted on women by gangs in the Northern Triangle—which often involves elements of IPV—has recently become more brazen, public, and sadistic.<sup>58</sup> It is not just that women are being beaten, raped, and killed at terrifying rates. It is “the ways they are being killed — shot in the vagina, cut to bits with their parts distributed among various public places, strangled in front of their children, skinned alive — [that] have women running for the border.”<sup>59</sup>

A deeply patriarchal culture contributes to the prevalence and severity of violence against women and IPV in the Northern Triangle. According to Musalo, “Women [in the Northern Triangle] occupy an inferior position within society and suffer discrimination and exclusion because of their gender.”<sup>60</sup> This oft-cited “culture of machismo” makes women more vulnerable to abuse because they are considered less valuable to society, and violence against them is widely accepted.<sup>61</sup> As a result, misogynistic societal values are reflected in the legal system. For example, Musalo asserted that “until 1998, the Guatemalan Civil

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53. Hallock et al., *supra* note 40.

54. *Id.*

55. Sonia Nazario, Opinion, ‘Someone Is Always Trying to Kill You,’ N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/interactive/2019/04/05/opinion/honduras-women-murders.html?action=click&module=Opinion&pgtype=Homepage> [<https://perma.cc/7L9U-ADPM>].

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Musalo et al., *supra* note 41, at 182.

61. Hallock et al., *supra* note 40.

Code accorded women a subordinate status to their husbands.”<sup>62</sup> Until recently, sexual violence was considered a “private” crime, and a perpetrator could be pardoned if the victim agreed.<sup>63</sup> While these laws are no longer in effect, the societal impacts of such state-sanctioned discrimination remain. In Honduras, a first offense for beating an intimate partner is a “fault,” not a crime, and often carries no legal consequences.<sup>64</sup> Domestic violence thrives in societies where women are oppressed and devalued; such conditions exist in the Northern Triangle.

Each of these factors is related to what is perhaps the most important contributor to lethal violence against women in the Northern Triangle: impunity. As one Honduran woman put it, “It’s almost like there’s a *carte blanche* for the assassination of women [in Honduras]. Anyone can murder a woman in Honduras and nothing will happen.”<sup>65</sup> Her perspective is supported by the data: in 2014, “95 percent of sexual violence and femicide cases [in Honduras] were never investigated, while only 2.5 percent of cases of domestic violence were settled.”<sup>66</sup> Similarly, in El Salvador, only 5 percent of female homicide cases between 2013 and 2016 led to convictions.<sup>67</sup> In 2013, only 2 percent of perpetrators in 50,000 cases of violence against women in Guatemala spent even a day in prison.<sup>68</sup>

This lack of government and law enforcement protection or accountability sends a message that men can brutalize women in the Northern Triangle and face little to no consequences. It extends from the police—who in Guatemala “routinely wait twenty-four to seventy-two hours to start an investigation into a report of a missing woman,” noting that “many young girls run off with boyfriends”—to judges, who often refuse to issue protective orders to abused women because they do not want to interfere in “domestic disputes.”<sup>69</sup> When women finally receive protective orders, they often go unenforced, either because their enforcement is a low priority in a crime-ridden country or because police officers don’t believe that domestic violence is a crime.<sup>70</sup> One advocate in Honduras described how police officers often mocked or berated women who reported domestic violence, saying things like, “You like getting hit, don’t you?”<sup>71</sup> In some cities in Honduras, police tell women to serve their abusers with the restraining order themselves because they are afraid to enter violent

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62. Musalo et al., *supra* note 41, at 183.

63. *Id.*

64. Nazario, *supra* note 55.

65. ARRIAGA & TIMONEY, *supra* note 34, at 2 (alteration in original) (citation omitted).

66. *Id.*

67. Hallock et al., *supra* note 40.

68. Beltrán, *supra* note 39.

69. Musalo et al., *supra* note 41, at 185, 162.

70. *See, e.g.,* Rose, *supra* note 1 (detailing how police officers didn’t do anything for A.B., and would laugh at her when she tried to report her husband).

71. Nazario, *supra* note 55.

neighborhoods.<sup>72</sup> One woman who got a restraining order and had to deliver it on her own did not survive the process. “She disappeared that day and was later found burned, inside a bag, on the banks of [a river].”<sup>73</sup> This culture of impunity spawns more violence.

Perhaps nothing illustrates the dire situation of women and girls in the Northern Triangle better than the lengths they will go, and the risks they will take, to escape. Each year, thousands of women and girls undertake the long and dangerous journey through Mexico to the United States to seek asylum.<sup>74</sup> They often face traumatic events along the way including “disproportionately high rates of sexual violence” and victimization at the hands of “smugglers (*coyotes*), gangs, cartels, and police.”<sup>75</sup> If they do make it across the border, their chances of being granted asylum are slim: in 2016, over 90 percent of such claims were denied.<sup>76</sup> The fact that women are willing to risk such a dangerous journey to pursue a promise of safety that has so little chance of being realized reveals much about the perils they face at home.

### III.

#### DOMESTIC VIOLENCE AS A BASIS FOR ASYLUM IN THE UNITED STATES

Women and girls fleeing domestic violence in the Northern Triangle sometimes seek asylum in the United States. When they do, they begin a process that can be complex, lengthy, and often heartbreaking given the low rate at which such claims are approved. In the past few decades, asylum law has evolved to recognize that gender-based violence can be grounds for asylum. At certain points, immigration judges have held that victims of domestic violence may be granted asylum. However, because of the political and inconsistent way that asylum claims are adjudicated, the law is constantly in flux. This Part will outline the basics of asylum law in the United States, discuss the evolution of domestic violence-based asylum claims, and explain the decision in *Matter of A-R-C-G-*, which established a framework for how domestic violence asylum claims could be won.

#### A. *Asylum Law in the United States*

A person may be eligible for asylum in the United States if she is within its borders and meets the definition of a refugee.<sup>77</sup> According to the INA, a refugee is

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72. *Id.*

73. *Id.*

74. Hallock et al., *supra* note 40.

75. *Id.*

76. Benner & Dickerson, *supra* note 5 (referring to data provided by the Department of Homeland Security).

77. ROBYN BARNARD ET AL., CTR. FOR GENDER & REFUGEE STUDIES, GENDER-BASED FEAR-OF-RETURN CLAIMS FOR WOMEN AND GIRLS 6 (2018). Because this Note focuses mostly on cisgender women fleeing domestic violence, I am using the pronoun ‘she’ to refer to a general asylum seeker.

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>78</sup>

The basic elements that an asylum seeker must prove are: (1) persecutory harm or a well-founded fear of persecutory harm, (2) that the persecution was on account of a protected ground, (3) that there was a nexus between the persecution and the protected ground, and (4) that there was a failure of state protection.<sup>79</sup> This legal standard is difficult to meet and requires asylum seekers to fit their unique stories into an inflexible framework. Overcoming the particular social group standard is a daunting task even with legal representation, but many asylum seekers have no representation at all.<sup>80</sup>

A refugee must apply for asylum within one year of entering the United States.<sup>81</sup> The next step in the asylum process is an interview by an asylum officer in which the officer determines whether the applicant is eligible for asylum.<sup>82</sup> The officer may grant the applicant asylum at this step.<sup>83</sup> If the officer does not grant asylum, the applicant goes before an immigration judge who hears the facts of the case and either grants or denies asylum based on the statutory factors described above.<sup>84</sup>

If an asylum seeker is apprehended at the border or within the United States, the process is slightly different. Then, the applicant first faces a "credible fear

However, transgender women, men (transgender and cisgender), and gender-nonconforming people all can be, and often are, asylum applicants as well.

78. Immigration and Nationality Act of 1965, 8 U.S.C. § 1101(a)(42)(A) (2018). This definition is substantially similar to that in the United Nations Convention Relating to the Status of Refugees (Refugee Convention). Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

79. BARNARD ET AL., *supra* note 77, at 6; *see also* INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (discussing the definition of a refugee and holding that an asylum seeker must establish both a "well-founded fear" of persecution and that the persecution was "*because of*" a protected ground, such as political opinion).

80. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 4-5 (2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf) [<https://perma.cc/2SXV-XVM9>].

81. *The Affirmative Asylum Process*, USCIS, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-process> [<https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-process>].

82. *Id.*

83. *Id.*

84. *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/3P68-AZS4>].

interview” conducted by an asylum officer.<sup>85</sup> The goal of the interview is for the officer to determine what circumstances the applicant is fleeing and whether she is in danger of persecution if she returns. If an applicant fails to establish that she has a credible fear of persecution or harm in her home country, she is deported unless she requests review by an immigration judge.<sup>86</sup> If she establishes credible fear, she is allowed to remain in the United States pending her asylum proceeding before an immigration judge.

If an applicant’s asylum claim is denied by the immigration judge, she may appeal the decision to the BIA.<sup>87</sup> The BIA sometimes issues precedential legal decisions which are binding on immigration judges.<sup>88</sup> If the BIA denies an applicant’s asylum claim, she may appeal that decision to a federal district court. One claim may take years to wind its way through this complex and under-resourced system.<sup>89</sup>

It is important to understand the difference between the immigration courts that hear asylum claims and other courts in our judicial system. Immigration courts are part of the executive, rather than judicial, branch of the federal government. As such, these courts are under the purview of the Attorney General, who is appointed by the President. The Attorney General and the courts they oversee play a crucial role in implementing the President’s immigration policy and priorities. Therefore, unlike Article III federal courts, immigration courts are neither politically neutral nor independent of the executive branch. They are subject to changing political policies, which makes asylum law particularly unpredictable.

#### *B. The Development of Domestic Violence Asylum Claims Before Matter of A-R-C-G-*

The definition of a refugee does not include gender as a protected ground.<sup>90</sup> As such, it is difficult for women fleeing domestic violence to establish a protected ground on which they have been persecuted. Attorneys who bring gender- and domestic violence-based asylum claims typically assert that their clients face persecution because of their membership in a particular social group.

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85. *Credible and Reasonable Fear Interviews*, IMMIGRATION JUSTICE CAMPAIGN, <https://immigrationjustice.us/get-trained/credible-and-reasonable-fear> [<http://perma.cc/Z3RQ-J3SR>].

86. *Credible Fear FAQ*, USCIS, <https://www.uscis.gov/faq-page/credible-fear-faq#t12831n40176> [<https://perma.cc/UR2H-Q6BM>]; see also CONCHITA CRUZ ET AL., VINDICATING THE RIGHTS OF ASYLUM SEEKERS AT THE BORDER AND BEYOND 7, ASYLUM SEEKER ADVOCACY PROJECT, URBAN JUSTICE CTR. (2018), <https://asylumadvocacy.org/wp-content/uploads/2018/06/ASAP-Expedited-Removal-Guide.pdf> [<https://perma.cc/WQ3M-X7V7>] (“Those who do not pass this preliminary interview are subject to swift and immediate deportation to the country from which they fled.”).

87. *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/3P68-AZS4>].

88. *Id.*

89. *Id.*

90. Immigration and Naturalization Act, 8 U.S.C. § 1101(a)(42)(A) (2018).

This strategy can be tricky. “According to the BIA, a particular social group must be (1) comprised of members who share a common immutable or fundamental characteristic, (2) socially distinct within the society in question, and (3) defined with particularity.”<sup>91</sup> The particular social group standard is, like so much of asylum law, a precise and high bar to meet. Satisfying the standard requires that immigration judges have a certain level of understanding of the dynamics of gender-based violence.

In the early 1990s, advocates began to have success in creating particular social groups that could provide the basis for asylum claims based on gender-motivated violence. *Matter of Kasinga*, decided by the BIA in 1996, represented a landmark victory and demonstrated a potential path forward.<sup>92</sup> The applicant in *Kasinga* was a young woman from Togo who fled a forced polygamous marriage and female genital mutilation (FGM).<sup>93</sup> She was granted asylum based on her membership in the particular social group “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>94</sup> This group exemplified the type of specific, narrowly tailored “particular social group” that would prove to (sometimes) be effective in subsequent gender-based asylum cases. *Kasinga* thus provided a blueprint for attorneys going forward.

In 1995, Rody Alvarado, a survivor of domestic violence from Guatemala, sought asylum based on a particular social group theory similar to that proposed in *Kasinga*.<sup>95</sup> Married at the age of sixteen, Alvarado suffered brutal physical and sexual abuse at the hands of her husband in Guatemala.<sup>96</sup> Ten years later, she fled to the United States because she had no options left in her home country.<sup>97</sup> Her attorney recounted that her attempts to improve her situation were all in vain: she went to unresponsive police, in front of a judge who refused to “get involved in domestic disputes,” and even fled to another part of Guatemala, “only to be hunted down and beaten unconscious by [her husband] for her attempt to move away.”<sup>98</sup>

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91. BARNARD ET AL., *supra* note 77, at 12 (footnotes omitted); *see also* *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237–43 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 210–18 (B.I.A. 2014), *vacated in part*, *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); *Matter of Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985), *overruled in part by* *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987), *disapproved of by* *Valle-Zometa v. INS*, 921 F.2d 282 (9th Cir. 1990) (unpublished table decision).

92. 21 I. & N. Dec. 357 (B.I.A. 1996). Asylum cases are named “*Matter of [Applicant’s Name]*.” Sometimes, just the applicant’s initials are used to protect her privacy.

93. *Id.*

94. *Id.* at 358.

95. *Matter of R-A-*, 22 I. & N. Dec. 906 (A.G. 2001, B.I.A. 1999); *see also* Caroline McGee, Comment, *Matter of A-R-C-G- and Domestic Violence Asylum: A Glimmer of Hope Amidst a Continuing Need for Reform*, 70 U. MIAMI L. REV. 1035, 1051 (2016) (describing factual background of *Matter of R-A-*).

96. *Matter of R-A-*, 22 I. & N. Dec. at 908; *see also* McGee, *supra* note 95, at 1048.

97. *Matter of R-A-*, 22 I. & N. Dec. at 908–09.

98. Musalo et al., *supra* note 41, at 162.

Alvarado typified the refugee who suffered violence at the hands of a private actor but whose government was “unable or unwilling” to protect her. Her plight was similar to that of many women who experience IPV in the Northern Triangle.

Alvarado claimed asylum based on her membership in the particular social group “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>99</sup> While her claim was granted by an immigration judge, the BIA reversed the decision when the Immigration and Naturalization Service (INS) appealed.<sup>100</sup> The BIA found that her purported particular social group did not meet the “socially distinct” and “particularity” requirements because it was “defined largely in the abstract” and had “little or no relation to the way in which Guatemalans might identify subdivisions within their own society.”<sup>101</sup> Furthermore, the BIA rejected Alvarado’s contention that the Guatemalan government was unable or unwilling to protect her. It reasoned that “the record did not establish that the actions of Ms. Alvarado’s husband ‘represent[ed] desired behavior within Guatemala or that the Guatemalan government encourages domestic abuse.’”<sup>102</sup>

*Matter of R-A-* was significant because it was the first time the BIA issued a precedential decision in a domestic violence asylum case.<sup>103</sup> It was a setback for advocates working on behalf of survivors of IPV seeking asylum. However, the denial of Alvarado’s claim caused a public controversy and Attorney General Janet Reno vacated the decision, promising that her office would promulgate new regulations for domestic violence asylum cases.<sup>104</sup> Those regulations were never finalized, and Alvarado remained in legal limbo until she was finally granted asylum in 2009 by an immigration judge in San Francisco.<sup>105</sup> Because an immigration judge, rather than the BIA, granted her claim, it had no precedential value and was not binding on future IPV asylum cases.<sup>106</sup> Thus, even after Alvarado was granted asylum, immigration judges continued to deny asylum claims made by victims of domestic violence for a variety of reasons.<sup>107</sup>

While the decision in *Matter of R-A-* was pending on remand to the immigration judge, *Matter of L-R-* was decided. L.R. sought asylum from her abusive partner in Mexico, a sports coach from L.R.’s school who raped her at

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99. *Matter of R-A-*, 22 I. & N. Dec. at 907. This was the particular social group crafted by Alvarado and her attorneys to describe her situation in Guatemala.

100. *Id.*

101. *Id.* at 918.

102. McGee, *supra* note 95, at 1050 (alteration in original) (quoting *Matter of R-A-*, 22 I. & N. Dec. at 923).

103. *Id.* at 1048.

104. *Id.* at 1037.

105. *Id.*

106. *Id.* at 1051.

107. *Id.* at 1052.



gunpoint when she was nineteen.<sup>108</sup> Over the next twenty years, the coach “kept her in virtual captivity, using physical force and beatings, and threatening death to her and her family members, to prevent her from leaving.”<sup>109</sup> L.R. went to the police, but they did nothing to prevent the abuse.<sup>110</sup> L.R. also sought help from a judge because her abuser kept their three children from her.<sup>111</sup> But the judge said that he would only help L.R. if she had sex with him.<sup>112</sup> L.R. refused, and the judge “told her she was a bad mother, because a good mother would do anything for her children.”<sup>113</sup> After decades of horrendous abuse, L.R. sought refuge in the United States—but her abuser followed her.<sup>114</sup>

The immigration judge denied L.R.’s asylum claim.<sup>115</sup> While recognizing her plight, the judge “found that [the abuser] beat her simply because he was a violent man, not because of her gender or status in the relationship.”<sup>116</sup> L.R. appealed the decision to the BIA. The Department of Homeland Security (DHS) submitted a brief agreeing with the immigration judge that the original particular social group put forth by L.R.—“Mexican women in an abusive domestic relationship who are unable to leave”—did not meet the INA standard.<sup>117</sup> Because the group was “centrally defined by the existence of the abuse [the asylum seekers] fear,” it was “impermissibly circular.”<sup>118</sup> However, the DHS wrote that domestic violence could be the basis for any asylum claim and that L.R. might qualify for asylum if she characterized her particular social group differently.<sup>119</sup> The DHS observed that for domestic violence asylum claims, the particular social group “is best defined in light of the evidence about how the respondent’s abuser and her society perceive her role within the domestic relationship.”<sup>120</sup>

In L.R.’s case, the DHS suggested two possible particular social group formulations that might lead to a successful asylum claim: “Mexican women in domestic relationships who are unable to leave” and “Mexican women who are

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108. *Matter of L-R*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/our-work/matter-l-r> [perma.cc/QTZ9-Z65T]. *Matter of L-R* is an unpublished decision.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Department of Homeland Security’s Supplemental Brief at 5–6, *Matter of L-R* (B.I.A. Apr. 13, 2009), [https://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf) [https://perma.cc/Q9VK-X4X7].

118. *Id.* at 6.

119. *Id.* (noting that while L.R.’s claimed particular social group was “impermissibly circular[,] [t]here may be other closely related conceptualizations . . . that would not suffer from this flaw and could possibly fit the facts of cases of the general type presented here”).

120. *Id.* at 14.

viewed as property by virtue of their positions within a domestic relationship.”<sup>121</sup> Despite the former being very close to the original group that L.R. had offered, it was not “centrally defined” by her abuse, and therefore the DHS asserted that it met the INA standard.<sup>122</sup>

On remand from the BIA, an immigration judge granted L.R.’s request for asylum.<sup>123</sup> The case was significant because of the DHS’s brief, which clarified that domestic violence could be a basis for asylum and provided guidance for how asylum seekers should frame their particular social groups to meet the INA standard. It was a victory not only for L.R. but for thousands of women like her who sought refuge from their abusive partners.

It can be difficult to write about the history and evolution of asylum law because so much of what moves the law forward happens behind closed doors. Most immigration court decisions are never published or made available to the public, making trends in immigration law nearly impossible to track.<sup>124</sup> While I have outlined the facts and circumstances of two important domestic violence asylum cases here, other applicants were granted and denied asylum during the period between 1994 and 2012.<sup>125</sup> According to a database compiled by the Center for Gender and Refugee Studies, of 260 domestic violence asylum cases they studied that were decided in this period, 140 resulted in asylum being granted and 63 resulted in denials.<sup>126</sup> However, Blaine Bookey, an attorney at the Center, noted that its “dataset of domestic violence asylum cases is skewed towards positive outcomes precisely because [the Center] learns of these cases from attorneys—thus, these cases concern asylum seekers who had legal representation, and whose legal counsel sought expert assistance.”<sup>127</sup> Because information about immigration court decisions is so hard to come by, it is hard to get an accurate picture of the asylum landscape.

I note these facts to underscore the fluid and opaque nature of asylum law as it relates to domestic violence. In the period described, asylum was granted very much on a case-by-case basis. The only precedential decision on domestic violence asylum was *Matter of R-A-*, but even its binding value was disputed because the case was vacated.<sup>128</sup> Therefore, the BIA’s position on domestic violence asylum was anything but clear. Bookey explained in 2012: “[W]hether a woman fleeing domestic violence will receive protection in the United States seems to depend not on the consistent application of objective principles, but

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121. *Id.*

122. *Id.* at 6.

123. *Matter of L-R-*, *supra* note 108.

124. 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, 10 (2016).

125. 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, 110 (2013).

126. *Id.* at 120.

127. *Id.* at 119.

128. See *supra* notes 103–104 and accompanying text.

rather on the view of her individual judge, often untethered to any legal principles at all.”<sup>129</sup> That changed two years later with *Matter of A-R-C-G-*.

C. *Official Recognition of Domestic Violence Asylum Claims in Matter of A-R-C-G-*

In *Matter of A-R-C-G-*, the BIA, for the first time, issued a precedential, binding decision that clearly asserted that domestic violence could be the basis for a successful asylum claim.<sup>130</sup> The BIA did *not* say that asylum would be granted to all, or even most, IPV victims who sought it. Rather, it held that petitioner Aminta Cifuentes met the criteria for asylum in her particular case, and that other applicants who could likewise meet this standard might also be granted asylum.<sup>131</sup> The case clearly laid out how a survivor of IPV could qualify for refugee status as defined by the INA.

Cifuentes and her three children fled Guatemala in 2005 and crossed into the United States on Christmas Day.<sup>132</sup> Cifuentes then filed for asylum based on her experience as a victim of domestic violence.<sup>133</sup> Cifuentes had been married to her husband since she was seventeen years old.<sup>134</sup> He subjected her to severe physical abuse which included beating her frequently, raping her, and dousing her with paint thinner to burn her.<sup>135</sup> Like Rody Alvarado, Cifuentes repeatedly sought help from the police in Guatemala, but they told her “that they would not interfere in a marital relationship.”<sup>136</sup> Her husband knew she would not receive help from the authorities because, in his words, “even the police and the judges beat their wives.”<sup>137</sup> She also tried to leave her husband and remain in Guatemala, seeking refuge with her father in a different city.<sup>138</sup> But her husband found her and “threatened to kill her if she did not return to him.”<sup>139</sup> Like many women in the Northern Triangle, the only way she could keep herself and her children safe was by seeking refuge in another country.

The BIA granted Cifuentes asylum based on her membership in the group “married women in Guatemala who are unable to leave their relationship.”<sup>140</sup> They reasoned that in cases where women cannot leave their marriages, both

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129. Bookey, *supra* note 125, at 147–48.

130. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), *overruled by* *Matter of A-B-*, 27 I. & N. Dec. 316 (Att’y Gen. 2018), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

131. See Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, HARV. INT’L REV., Fall 2014/Winter 2015, at 45, 45. Aminta Cifuentes was the petitioner in *Matter of A-R-C-G-*.

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

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Musalo, *supra* note 131, at 45 (citation omitted).

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

139. *Id.*

140. *Id.*

gender and marital status are immutable characteristics as required by the definition of a particular social group adequate to support an asylum claim.<sup>141</sup> Furthermore, the BIA found that the particular social group was socially distinct because “Guatemalan society . . . makes meaningful distinctions based on” the characteristics of the group by not responding to or taking seriously the epidemic of IPV.<sup>142</sup> The BIA recognized that both the “social distinction” and “nexus” requirements depend heavily on the facts of an individual case and the specific circumstances in an applicant’s home country.<sup>143</sup> Even so, it demonstrated in strong terms that domestic violence could, in cases like Cifuentes’s, be the basis for asylum in the United States.

While *Matter of A-R-C-G-* was fundamental in advancing gender-based asylum law, the case failed to offer full protection for victims of domestic violence. As Bookey, one of Cifuentes’s attorneys, remarked, “Notwithstanding the undeniable contribution of *Matter of A-R-C-G-* for the broader legal principle it contains (that domestic violence may serve as a basis for asylum), the legal holding in the case is narrow and fact-specific, leaving immigration judges a great deal of discretion.”<sup>144</sup> Bookey noted that, in the wake of *Matter of A-R-C-G-*, immigration judges across the country applied the case differently, reaching opposite outcomes in cases with similar fact patterns.<sup>145</sup> This was partially because, while the holding in *Matter of A-R-C-G-* was clear, the reasoning was less so. The BIA did not fully explain why Cifuentes established each element of her asylum claim because DHS, her opponent in the case, had conceded several of them.<sup>146</sup> This lack of specific guidance made it difficult for immigration judges to follow the decision consistently. DHS’s role in *Matter of A-R-C-G-* was thus important and reflected the more pro-asylum policies of the Obama administration. The political context in which it arose was critical to the manner in which *Matter of A-R-C-G-* was decided. Because it did not clearly explain its reasoning in asserting that Cifuentes qualified for asylum, the BIA left the decision vulnerable to the whims of a new political moment.

#### IV.

##### *MATTER OF A-B-*: A STEP BACKWARD IN DOMESTIC VIOLENCE ASYLUM

On January 20, 2017, Donald Trump was sworn in as the forty-fifth President of the United States.<sup>147</sup> During his campaign, President Trump espoused anti-immigrant rhetoric, equating migrants and refugees with

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141. *Id.* at 392–93.

142. *Id.* at 393–94.

143. *Id.* at 394–95.

144. Bookey, *supra* note 124, at 4.

145. *Id.* at 13.

146. See *Matter of A-R-C-G-*, 26 I. & N. Dec. at 393, 395; Bookey, *supra* note 124, at 16.

147. Peter Baker & Michael D. Shear, *Donald Trump Is Sworn in as President, Capping His Swift Ascent*, N.Y. TIMES (Jan. 20, 2017), <https://www.nytimes.com/2017/01/20/us/politics/trump-inauguration-day.html> [<https://perma.cc/P9BP-F2E8>].

criminals.<sup>148</sup> He vowed to “Make America Great Again” by building a wall along the southern border and prohibiting Muslims from entering the United States.<sup>149</sup> Since President Trump has been in office, his administration has prioritized reducing the number of refugees who are granted asylum, including women fleeing domestic violence.<sup>150</sup>

President Trump has reduced the asylum program primarily through the actions of his former Attorney General, Jeff Sessions. Sessions is a former senator from Alabama who is well known for his anti-immigration views, and who was once denied a federal judgeship “amid charges of racism.”<sup>151</sup> He was one of the first sitting senators to endorse Trump’s presidential campaign,<sup>152</sup> and was appointed Attorney General shortly after the inauguration.<sup>153</sup> Sessions made no secret of his disapproval of the Obama administration’s adjudication of asylum claims.<sup>154</sup> He thought that the previous administration had improperly applied the law and granted asylum to too many refugees.<sup>155</sup> It was unsurprising, then, that in June 2018, Attorney General Sessions intervened in a domestic

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148. See, for example, Trump’s speech announcing his run for President, where he said of Mexicans: “They’re bringing drugs. They’re bringing crime. They’re rapists.” *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015), <https://time.com/3923128/donald-trump-announcement-speech> [<https://perma.cc/KA64-GHG3>].

149. See Emma Margolin, ‘*Make America Great Again*’—*Who Said It First?*, NBC News (Sept. 9, 2016), <https://nbcnews.com/politics/2016-election/make-america-great-again-who-said-it-first-n645716> [<https://perma.cc/L4XZ-4T5T>]; Ron Nixon & Linda Qiu, *Trump’s Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html> [<https://perma.cc/H3M8-TXJ9>]; *Trump’s Campaign Promises - Has He Delivered on Them?*, BBC (Dec. 24, 2018), <https://www.bbc.com/news/world-us-canada-37982000> [<https://perma.cc/J5EC-QQLN>].

150. SARAH PIERCE, MIGRATION POL’Y INST., IMMIGRATION-RELATED POLICY CHANGES IN THE FIRST TWO YEARS OF THE TRUMP ADMINISTRATION 14–15 (2019), <https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationChangesTrumpAdministration-FinalWEB.pdf> [<https://perma.cc/97SH-CK9Q>].

151. Nina Totenberg, *Jeff Sessions Previously Denied Federal Judgeship Amid Racism Controversy*, NPR (Jan. 9, 2017), <https://www.npr.org/2017/01/09/509001314/jeff-sessions-previously-denied-federal-judgeship-amid-racism-controversy> [<https://perma.cc/8GEZ-H5EZ>].

152. Eli Stokols, *Sen. Jeff Sessions Endorses Trump*, POLITICO (Feb. 28, 2016), <https://www.politico.com/story/2016/02/sen-jeff-sessions-endorses-trump-219939> [[perma.cc/DX6Q-JBHS](https://perma.cc/DX6Q-JBHS)].

153. Eric Lichtblau, *Jeff Sessions Approved as Attorney General by Senate Committee*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/us/politics/jeff-sessions-approved-as-attorney-general-by-senate-committee.html> [[perma.cc/3KBK-9PVE](https://perma.cc/3KBK-9PVE)].

154. For example, in May 2018, Sessions said at a news conference in San Diego: “I have no doubt that many of those crossing our border illegally are leaving difficult situations. But we cannot take everyone on Earth who is in a difficult situation.” Jeff Sessions, Attorney Gen., U.S. Dep’t of Justice, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [<https://perma.cc/BNW2-UMDV>].

155. See Rose, *supra* note 1.

violence asylum case and overturned the precedent set in *Matter of A-R-C-G*.<sup>156</sup> That case was *Matter of A-B*.<sup>157</sup>

A.B. sought asylum based on her membership in the group “El Salvadoran women who are unable to leave their domestic relationships where they have children in common.”<sup>158</sup> In El Salvador, she had lived in fear of her ex-husband, who was the father of her children and whom she could not escape.<sup>159</sup> She said, “I remember when I was pregnant with my second child, he beat me a lot. . . . He threatened to hang me from the roof. And I got down and covered my stomach, and he started kicking me in the back.”<sup>160</sup> Like Rody Alvarado and Aminta Cifuentes, A.B. sought protection from law enforcement but, in her words, “they didn’t do anything.”<sup>161</sup> She tried to hide from her abuser by moving to a different part of El Salvador, but he found her and raped her.<sup>162</sup> Left with no other options, she applied for asylum in the United States.<sup>163</sup>

Immigration Judge V. Stuart Couch denied A.B.’s initial asylum claim.<sup>164</sup> He made four holdings: (1) A.B. was not credible; (2) El Salvadoran women unable to leave their domestic relationships are not a “particular social group” under the statute; (3) even if the group did qualify, A.B. did not demonstrate that her membership was a central reason for her persecution; and (4) A.B. did not establish that the local government was unable or unwilling to help her.<sup>165</sup> Judge Couch has a record of denying gender-based asylum claims and having his decisions overturned on appeal.<sup>166</sup>

In December 2016, the BIA overturned Judge Couch’s ruling in *Matter of A-B* and remanded the case with instructions that A.B. be granted asylum.<sup>167</sup> The BIA strongly disagreed with much of the immigration judge’s ruling. It held that Judge Couch was “clearly erroneous” in finding A.B. not credible.<sup>168</sup> It also

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156. *Backgrounder and Briefing on Matter of A-B*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b> [https://perma.cc/2USC-MUZ9].

157. *Id.*

158. *Matter of A-B*, 27 I. & N. Dec. 316, 321 (Att’y Gen. 2018) (citation omitted), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

159. *See* *Rose*, *supra* note 1.

160. *Id.* (quoting A.B.).

161. *Id.* (quoting A.B.).

162. *Id.*

163. *Id.*

164. *See* *Matter of A-B*, 27 I. & N. Dec. 316, 321 (Att’y Gen. 2018), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018); Tal Kopan, *Judge in Case Sessions Picked for Immigrant Domestic Violence Asylum Review Issued ‘Clearly Erroneous’ Decisions, Says Appellate Court*, CNN (Apr. 28, 2018), <https://www.cnn.com/2018/04/28/politics/jeff-sessions-immigration-courts-domestic-violence-asylum/index.html> [https://perma.cc/LU7P-XD93].

165. *Matter of A-B*, 27 I. & N. Dec. at 321.

166. A FOIA request revealed that, in 2017, in ten gender-based asylum cases, “Couch rejected those claims only to have the Board of Immigration Appeals find he was ‘clearly erroneous’ in his decisions.” Kopan, *supra* note 164.

167. *Matter of A-B*, 27 I. & N. Dec. at 321.

168. *Id.*

reasoned that A.B. had established her membership in a permissible particular social group because her group was “substantially similar” to that in *Matter of A-R-C-G-*, which was binding precedent.<sup>169</sup> It further held that the immigration judge erred in finding that A.B. could safely leave her ex-husband and that there was a nexus between the harm A.B. suffered and her membership in a particular social group.<sup>170</sup> Finally, the BIA asserted that the El Salvadoran government was unwilling or unable to protect A.B.<sup>171</sup>

In March 2018, Sessions intervened personally in A.B.’s case.<sup>172</sup> The Attorney General has the power to adjudicate any immigration case before the BIA.<sup>173</sup> On June 11, 2018, almost exactly four years after A.B. first applied for asylum, he denied her application.<sup>174</sup> He also went further, overruling the *Matter of A-R-C-G-* and asserting that the “decision was wrongly decided and should not have been issued as a precedential decision.”<sup>175</sup> In one move, Sessions cast the asylum prospects of thousands of women fleeing gender-based violence into doubt.

The basic thrust of Sessions’s opinion was that the BIA in *Matter of A-R-C-G-* misapplied the law and that *Matter of A-B-*, which followed its precedent, was therefore wrongly decided. Sessions found that in *Matter of A-B-*, “the [BIA] erred in finding several of the immigration judge’s factual and credibility determinations to be ‘clearly erroneous.’”<sup>176</sup> He argued that the immigration judge correctly found that A.B. was able to leave her husband because he “cited evidence that the respondent was able to divorce and move away from her ex-husband, and that she was able to obtain from the El Salvadoran government multiple protective orders against him.”<sup>177</sup> This analysis ignores the reality of separation assault, the phenomenon in which abused women are actually at the greatest safety risk right *after* they separate from their partners.<sup>178</sup> That A.B. was able to divorce her husband is not proof that she was safe from him. Indeed, A.B.’s ex-husband continued to stalk and assault her after they divorced and she moved away.<sup>179</sup> Further, the police refused to enforce A.B.’s protective orders, leaving her vulnerable to continued harm after she separated from and took legal

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169. *Id.*; see also *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/3P68-AZS4>] (“BIA decisions are binding on all DHS officers and immigration judges unless modified or overruled by the Attorney General or a federal court.”).

170. *Matter of A-B-*, 27 I. & N. Dec. at 321.

171. *Id.*

172. *Backgrounder and Briefing on Matter of A-B-*, *supra* note 156.

173. 8 C.F.R. § 1003.1(h)(1) (2020) (“The Board shall refer to the Attorney General for review of its decision all cases that . . . [t]he Attorney General directs the Board to refer to him.”).

174. *Matter of A-B-*, 27 I. & N. Dec. at 317.

175. *Id.* at 316.

176. *Id.* at 340.

177. *Id.* at 342.

178. See, e.g., Dragiewicz & Lindgren, *supra* note 17, at 255.

179. Rose, *supra* note 1.

action against her abuser.<sup>180</sup> But Sessions's opinion disregarded this factual record to conclude that A.B. was able to leave her abuser.<sup>181</sup>

Next, Sessions found that A.B.'s particular social group was impermissibly circular.<sup>182</sup> He argued that A.B.'s particular social group, "El Salvadoran women who are unable to leave their domestic relationships," was defined by the persecution of its members, which is not allowed under the INA. He wrote, "To be cognizable, a particular social group *must* 'exist independently' of the harm asserted in an application for asylum . . . ."<sup>183</sup> Therefore, under Sessions's interpretation, the central component of an asylum seeker's purported particular social group could not be the harm, persecution, or threat the asylum seeker is fleeing.

Similarly, Sessions held that the BIA erred in finding the required nexus between the harm A.B. endured and her group membership. He argued that A.B. was not persecuted by her husband *because* of her membership in the group "El Salvadoran women who are unable to leave their domestic relationships." He wrote that there was "no evidence that her husband knew any such social group existed, or that he persecuted [his] wife for reasons unrelated to their relationship."<sup>184</sup> Thus, in Sessions's opinion, A.B.'s asylum claim lacked a crucial element: a proven connection between the harm she suffered and her membership in the particular social group she asserted.

But this analysis does not account for the dynamics of abusive relationships or the societal acceptance of IPV in the Northern Triangle. First, Sessions's dismissal of A.B.'s particular social group as impermissibly circular ignores the factual record. A.B.'s particular social group, as defined in her asylum claim, encompassed more than just the harm that she suffered. She did not claim to be a member of the group, for example, "El Salvadoran women who are victims of domestic violence," which could be understood as relying only upon the harm she was fleeing. Rather, she was unable to leave her relationship not only because she was abused, but also because the government was unwilling to protect her from the abuse.<sup>185</sup> Her protection orders went unenforced, rendering her attempts to escape her ex-husband within El Salvador ineffective.<sup>186</sup> Thus, the particular social group is not defined solely by the harm she suffered.

Second, the fact that a woman is abused and is unable to leave due to the abuse undoubtedly contributes to her continued abuse.<sup>187</sup> Thus, there is a

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180. *Id.*

181. *Matter of A-B-*, 27 I. & N. Dec. at 342.

182. *See id.* at 343.

183. *Id.* at 334 (citation omitted).

184. *Id.* at 343.

185. *See Rose, supra* note 1.

186. *See id.*

187. *See, e.g.,* Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 242–



plausible nexus between the abuse A.B. endured and her particular social group. The infliction of domestic violence is about power, and abusers exploit the vulnerability of their partners to gain and exercise such power.<sup>188</sup> A woman's inability to leave a relationship—due to fear, financial hardship, or a lack of protection from law enforcement—can exacerbate abuse because an abuser knows he can inflict violence without consequence.

Further, A.B.'s husband was likely aware that IPV often went unpunished in El Salvador: despite abusing his wife for years and her getting a protective order against him, he was never arrested.<sup>189</sup> There is thus evidence that he knew the group "El Salvadoran women who are unable to leave their domestic relationships" existed (although he might not have thought of it in those exact terms) and that he abused A.B. at least in part because she belonged to it.<sup>190</sup> Sessions suggested that the idea that A.B.'s husband abused her because she was an El Salvadoran woman who could not leave their relationship strained credulity.<sup>191</sup> But it is conceivable that A.B.'s husband inflicted such vicious and prolonged violence upon her precisely because he knew he could do so with impunity. Like so much of Sessions's decision in *Matter of A-B-*, the analysis of A.B.'s particular social group revealed his willful ignorance of the plight of abused women.

Finally, Sessions found that A.B. "failed to demonstrate that the government of El Salvador was unable or unwilling to protect her from her ex-husband."<sup>192</sup> Sessions again cited the fact that A.B. had "received various restraining orders" from law enforcement to support this assertion.<sup>193</sup> He failed to mention that she continued to be abused after they were issued. He also stated that "[n]o country provides its citizens with complete security from private criminal activity, and perfect protection is not required."<sup>194</sup> Indeed, the protection offered to women and girls in El Salvador is *far* from perfect—between 2013 and 2016, the government convicted only 5 percent of individuals tried for the murder of women.<sup>195</sup>

Sessions's decision in *Matter of A-B-* reveals much about how he viewed, and the Trump administration continues to view, asylum and domestic violence. Sessions believed asylum should be granted sparingly and asserted that it is an

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43 (2014) (discussing Lenore Walker's 1979 study on battered women, as well as other feminist theories of IPV).

188. *Id.* at 245–46.

189. Rose, *supra* note 1.

190. *Contra* *Matter of A-B-*, 27 I. & N. Dec. 316, 343 (Att'y Gen. 2018) ("The Board cited no evidence that [A.B.'s] husband knew any such social group existed, or that he persecuted [his] wife for reasons unrelated to their relationship."), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

191. *See id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. Hallock et al., *supra* note 40.

inappropriate remedy for people who are fleeing “private” violence. In *Matter of A-B-*, he identified the “prototypical refugee” as one who “flees her home country because the government has persecuted her.”<sup>196</sup> For Sessions, gang and domestic violence perpetrated by non-governmental actors “[g]enerally” did not constitute a basis for asylum.<sup>197</sup> “An alien,” he wrote in his decision, “may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet the asylum statute does not provide redress for all misfortune.”<sup>198</sup> From Sessions’s perspective, asylum was an inappropriate solution to the brutality A.B. suffered.

But this dichotomy between private and state-sanctioned violence falls apart upon a closer look at the conditions in the Northern Triangle. The state may not explicitly carry out IPV, but it often implicitly condones it.<sup>199</sup> In each of the cases discussed above, the legal systems in the women’s native countries failed to protect them from their abusers. A.B. received protective orders but the police failed to enforce them, leading to her continued abuse and suffering at the hands of her husband.<sup>200</sup> In Guatemala, Rody Alvarado was told by a judge—an official tasked with upholding the law—“that he did not get involved in domestic disputes.”<sup>201</sup> The judge in L.R.’s domestic violence case refused to help her unless she had sex with him.<sup>202</sup> Aminta Cifuentes’s husband did not worry about facing consequences for his abuse because “even the police and judges beat their wives.”<sup>203</sup> These are cases in which the government is “unable or unwilling” to protect victims of domestic violence, thus allowing such violence to continue unchecked. In denying such victims asylum by claiming there is an insufficient connection between government action and the underlying harm, Sessions misapplied the law. The public-private distinction underlying Sessions’s entire asylum theory ignores the ways in which public officials, institutions, and norms enable private actors to commit violence with impunity.

Further, the view that domestic violence is “private” ignores how IPV both is caused by and contributes to women’s political, economic, and legal disempowerment. In Sessions’s view, domestic violence was not an appropriate basis for asylum because it happened between private parties and related to a

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196. *Matter of A-B-*, 27 I. & N. Dec. at 318.

197. *Id.* at 320.

198. *Id.* at 318.

199. See, e.g., ARRIAGA & TIMONEY, *supra* note 34, at 2 (“95 percent of sexual violence and femicide cases [in Honduras] were never investigated . . .”); Hallock et al., *supra* note 40 (asserting that between 2013 and 2016, 5 percent of femicides in El Salvador ended in convictions); Musalo et al., *supra* note 41, at 185–86 (discussing how police in Guatemala routinely stall searches for missing women and judges often refuse to issue protective orders).

200. Rose, *supra* note 1.

201. Musalo et al., *supra* note 41, at 162.

202. *Matter of L-R-*, *supra* note 108.

203. Jane Fonda & Karen Musalo, Opinion, *Her Husband Beat Her and Raped Her. Jeff Sessions Might Deport Her.*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/opinion/jeff-sessions-asylum-domestic-violence.html> [<https://perma.cc/VH6M-WKZB>].

private, intimate relationship.<sup>204</sup> He suggested that A.B. was abused by her husband because of “his preexisting personal relationship with the victim” and “reasons [related] to their relationship.”<sup>205</sup> But this idea—that domestic violence results from relationship problems between two people—disregards the cultural underpinnings of IPV. Domestic violence is a manifestation of misogyny perpetrated to maintain traditional gender hierarchies. As one scholar wrote, “[D]omestic violence is not a private relationship gone awry but rather a self-reinforcing expression of widespread social norms. Society communicates to men that they have the right and the power to abuse female partners.”<sup>206</sup> Domestic violence is almost always part of a greater culture of gender inequality and is inseparable from the societal structures that uphold it. It is this crucial connection between the public and the private that Sessions missed when he trivialized the violence that IPV survivors suffer as “private.”

Moreover, casting domestic violence as a private issue has historically allowed such violence to flourish. For decades in the United States, for example, IPV was not criminalized because the government did not want to intrude into the domestic sphere.<sup>207</sup> Indeed, society has long considered wife-beating a husband’s prerogative, leading to standards such as the rule of chastisement that allowed a man to legally beat his wife as long as he did so with a rod no wider than the width of a thumb.<sup>208</sup> This history reveals the dangers of characterizing domestic violence as a private matter instead of a global cultural phenomenon that reinforces traditional gender hierarchies. Such a characterization perpetuates abuse: “By excluding the state from the home, doctrines of privacy immunize men from legal responsibility for acts of violence against women.”<sup>209</sup>

*Matter of A-B-* was wrongly decided. In the opinion, Sessions minimized the fact that the El Salvadoran government repeatedly failed to protect A.B. from her abusive husband, leaving her with few options but to flee. Further, by characterizing the abuse A.B. suffered—and domestic violence more generally—as private criminal activity, the opinion ignored that domestic violence is inseparable from the legal and social structures that allow it to continue. Based on this flawed understanding of the dynamics of domestic abuse, *Matter of A-B-* wrongly concluded that victims of IPV are, in general, ineligible for asylum.

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204. *Matter of A-B-*, 27 I. & N. Dec. 316, 339, 343 (Att’y Gen. 2018), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018).

205. *Id.* at 339, 343.

206. Jessica Marsden, Note, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2519 (2014).

207. See Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U. L. REV. 433 (1998).

208. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2152 n.131 (1996).

209. Marsden, *supra* note 206, at 2525.

## V.

THE POTENTIAL OF *GRACE V. WHITAKER*

Sessions's decision in *Matter of A-B* represented a setback for survivors of gender-based violence and their advocates. But the holding itself is narrow. Much of what Sessions expressed in the opinion—about domestic violence “generally” not being a sound basis for asylum, for example—is merely dicta. The legally binding parts of *Matter of A-B* do not preclude victims from being granted asylum based on experiences of domestic violence. Rather, they return the state of asylum law to a pre-*Matter of A-R-C-G* legal landscape. There is no longer a clear precedent for how a victim of IPV may be granted asylum. But this does not mean that advocates should stop bringing such claims.

Two days after Sessions decided *Matter of A-B*, the USCIS issued new interim guidance for asylum officers conducting credible fear interviews with asylum seekers.<sup>210</sup> The guidance was finalized in a Policy Memorandum on July 11, 2018 (the “Memo”).<sup>211</sup> The Memo explicitly applied the *Matter of A-B* decision and its heightened requirements for asylum claims to credible fear interviews.<sup>212</sup> It instructed asylum officers that “[i]n general, . . . claims based on membership in a putative particular social group defined by the members’ vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.”<sup>213</sup> The Memo thus turned *Matter of A-B*’s flawed central premise—which should not have been legally binding, but merely dicta—into a practical directive to asylum officers. The Memo clarified the federal government’s position in the wake of *Matter of A-B*: asylum seekers fleeing domestic and gang-based violence likely did not qualify for asylum. It advised asylum officers that “few gang-based or domestic-violence claims . . . pass the ‘significant possibility’ test in credible-fear screenings.”<sup>214</sup>

Asylum officers began to incorporate the Memo’s directives into credible fear interviews and denied asylum hearings to asylum seekers if they were victims of domestic or gang violence.<sup>215</sup> Credible fear interviews had long been a part of the asylum process for asylum seekers who were apprehended at the border or within the United States; asylum seekers who expressed no credible fear of persecution in their home countries faced expedited removal—they did not get a hearing before an immigration judge.<sup>216</sup> Because expedited removal

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210. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 109 (D.D.C. 2018).

211. *Id.* at 110.

212. *Id.*

213. Policy Memorandum from USCIS 6 (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> [<https://perma.cc/2E5W-66M7>].

214. *Id.* at 10 (citation omitted).

215. *Grace*, 344 F. Supp. 3d at 111–12.

216. See CONCHITA CRUZ ET AL., *supra* note 86 (“Those who do not pass this preliminary interview are subject to swift and immediate deportation to the country from which they fled.”).

posed a risk of sending eligible asylum seekers back to their home countries, where they faced real danger, Congress “intended the credible fear determinations to be governed by a low screening standard.”<sup>217</sup> Thus, if an asylum officer found that an asylum seeker expressed credible fear during the interview, they were given the opportunity to be heard by an immigration judge.<sup>218</sup>

The Memo changed the credible fear process, with dire results for some asylum seekers fleeing domestic and gang violence. After the promulgation of the Memo, asylum officers denied the asylum claims of victims of domestic and gang violence even though “the asylum officers found that plaintiffs’ accounts were sincere.”<sup>219</sup> Twelve asylum seekers who alleged “sexual abuse, kidnappings, and beatings” but were denied asylum at the credible fear stage sued the acting Attorney General, Matthew Whitaker.<sup>220</sup> They claimed that the new credible fear guidelines established in *Matter of A-B-* and codified in the memo violated both the Administrative Procedure Act and the INA.<sup>221</sup> The asylum seekers argued that the new policies were “inconsistent with the intent of Congress as articulated in the INA” because they established a heightened standard for asylum seekers at the credible fear stage.<sup>222</sup> A district court in Washington, D.C., agreed. On December 19, 2018, the court granted the plaintiffs’ request for a preliminary injunction, effectively stopping implementation of the Memo’s directives.<sup>223</sup> *Grace v. Whitaker* dealt a blow to *Matter of A-B-*’s legacy and undermined its practical effect.

The plaintiffs in *Grace v. Whitaker*, like many of the asylum seekers discussed in this Note, fled grisly violence in their home countries and sought refuge in the United States because they had no other options. The named plaintiff, Grace, left Guatemala “after having been raped, beaten, and threatened for over twenty years by her partner who disparaged her because of her indigenous heritage.”<sup>224</sup> Rather than helping her, the local authorities to whom Grace reported the abuse conspired with her abuser to evict her from her home.<sup>225</sup> Another plaintiff, Carmen, fled her home country with her young child because her husband “sexually assaulted, stalked, and threatened her” even after she moved out of their home to try to escape him.<sup>226</sup> Yet another, Mina, was attacked not by an intimate partner but by gang members who beat her until she could not

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217. *Id.* at 107.

218. *See id.*

219. *Id.* at 105.

220. *Id.* at 104.

221. *Id.* at 105.

222. *Id.*

223. *See id.*

224. *Id.* at 111.

225. *Id.*

226. *Id.*

walk and put her on a “hit list.”<sup>227</sup> She believed seeking asylum in the United States was her only chance at survival.<sup>228</sup>

All of the plaintiffs were victims of domestic or gang-related violence and thus were the types of asylum seekers impacted by Sessions’s decision in *Matter of A-B-*. Their cases illuminated the human impact of *Matter of A-B-*: under the new rules, their claims lacked merit and so they could not credibly fear return to their countries of origin.<sup>229</sup> Having been denied at the credible fear stage, the plaintiffs faced imminent deportation and a return to the dangerous situations from which they had fled. They filed a motion for a preliminary injunction and an emergency motion for stay of removal, challenging *Matter of A-B-* as it was interpreted and applied in the Memo.

The plaintiffs argued against three aspects of Sessions’s decision and the Memo. First, the plaintiffs challenged the “general rule against credible fear claims related to domestic or gang-related violence” on the grounds that such a rule is in tension with the requirement that asylum claims be decided on a case-by-case basis.<sup>230</sup> Sessions wrote in *Matter of A-B-* that “[g]enerally” such claims would not be cognizable,<sup>231</sup> the Memo similarly directed asylum officers that the “harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum.”<sup>232</sup> The *Grace v. Whitaker* court agreed with the plaintiffs, holding that such a general rule was impermissible under the INA.<sup>233</sup> It found, “First, the general rule [wa]s arbitrary and capricious because there [wa]s no legal basis for an effective categorical ban on domestic violence and gang-related claims. Second, such a general rule r[an] contrary to the individualized analysis required by the INA.”<sup>234</sup>

Thus, the court found that in *Matter of A-B-*, Sessions had overstepped his rule; his reading of the INA was at odds with what Congress intended.<sup>235</sup> Congress mandated in the INA that asylum seekers could not be deported through the expedited removal process if they established a credible fear of persecution or harm.<sup>236</sup> Therefore, a blanket rule that denied asylum seekers’ claims at the credible fear interview stage based on the type of harm they suffered—especially the claims of asylum seekers who had *shown* credible fear—violated the statute.<sup>237</sup> The district court made clear that, as applied at the credible fear stage, any general prohibition on granting asylum to victims of

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227. *Id.*

228. *Id.*

229. *Id.* at 111–12.

230. *Id.* at 122.

231. 27 I. & N. Dec. 316, 320 (Att’y Gen. 2018), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

232. Policy Memorandum from USCIS, *supra* note 213, at 6.

233. 344 F. Supp. 3d at 126.

234. *Id.*

235. *Id.*

236. *Id.* at 139.

237. *Id.*

domestic or gang-related violence was “arbitrary and capricious and violates the immigration laws.”<sup>238</sup> The decision thus stripped *Matter of A-B-*’s dangerous dicta of much of its practical effect at the credible fear stage.

Second, the plaintiffs challenged what they perceived to be a “heightened standard for persecution involving non-governmental actors” required by *Matter of A-B-* and the Memo.<sup>239</sup> In *Matter of A-B-*, Sessions argued that domestic and gang-related violence-based asylum claims generally lacked a sufficient connection between the harm the asylum seeker suffered and government action (or inaction). He argued that in order for someone to qualify for asylum based on harm inflicted by private individuals, they had to “show that the government condoned the private actions ‘or at least demonstrated a *complete helplessness* to protect the victims.’”<sup>240</sup> This “condoned” or “complete helplessness” language was included in the Memo.<sup>241</sup> The plaintiffs argued that this standard departed from previous caselaw establishing that asylum seekers who suffered harm at the hands of private actors just had to show that the government was “unwilling or unable” to help them.

The district court agreed.<sup>242</sup> Again pointing to statutory intent, the court found that the “unwilling or unable” standard was “settled at the time the Refugee Act was codified, and therefore the Attorney General’s ‘condoned’ or ‘complete helplessness’ standard is not a permissible construction of the persecution requirement.”<sup>243</sup> In other words, Sessions did not have the authority to effectively change the standard required by the INA in a way that contradicted the underlying intent of the statute.

Third, the *Grace v. Whitaker* plaintiffs alleged that the Memo inappropriately asserted that all particular social groups based on claims of domestic violence were “impermissibly circular.”<sup>244</sup> In *Matter of A-B-*, Sessions found that A.B.’s particular social group was impermissibly circular because it rested in part on her inability to leave her relationship, which was related to her claimed persecution—the abuse she suffered at the hands of her husband.<sup>245</sup> The Memo took this analysis one step further by stating that some particular social groups, including one comprised of those unable to leave abusive relationships, could never be grounds for asylum.<sup>246</sup> But again, the court took issue with the federal government’s attempt to create a general rule governing domestic violence asylum claims. The court wrote, “to the extent the [Memo] imposes a

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238. *Id.* at 127.

239. *Id.* at 122.

240. *Matter of A-B-*, 27 I. & N. Dec. 316, 337 (Att’y Gen. 2018) (emphasis added) (citation omitted), *abrogated by Grace*, 344 F. Supp. 3d 96.

241. See Policy Memorandum from USCIS, *supra* note 213, at 6.

242. *Grace*, 344 F. Supp. 3d at 127.

243. *Id.* at 130.

244. *Id.* at 131.

245. *Matter of A-B-*, 27 I. & N. Dec. at 334.

246. Policy Memorandum, *supra* note 213, at 5.

general circularity rule foreclosing [domestic violence] claims without taking into account the independent characteristics presented in each case, the rule is arbitrary, capricious, and contrary to immigration law.”<sup>247</sup> The INA requires an individualized consideration of each asylum seeker’s claim at the credible fear stage.<sup>248</sup> Directives that undermine such fact-specific consideration are thus unacceptable.

The district court in *Grace v. Whitaker* granted a permanent injunction to the plaintiffs and forbade the federal government from using the Memo to guide credible fear interviews. It was, consequently, a major victory for domestic violence and asylum advocates in the wake of *Matter of A-B-*. Most importantly, the decision undermined Sessions’s attempt to create a general rule for asylum officers dealing with any asylum claims arising from domestic or gang-related violence. Following *Grace v. Whitaker*, each credible fear determination requires an individualized assessment of the merits of each asylum seeker’s claim. Rules that automatically deny asylum based on the type of harm suffered fail this standard. *Grace v. Whitaker* therefore struck an important blow to the most dangerous aspect of *Matter of A-B-*: the idea that “generally” domestic violence victims do not have viable asylum claims.

## VI.

### THE IMPLICATIONS OF *MATTER OF A-B-*

*Grace v. Whitaker*’s power to curtail *Matter of A-B-* has its limits. Most importantly, *Grace v. Whitaker* applies only to the credible fear stage. *Matter of A-B-* is still binding on immigration judges and the BIA. Thus, it is difficult to know exactly what impacts *Matter of A-B-* has had since it was decided in June 2018. So much of immigration adjudication is unpublished, making it difficult to discern how immigration judges have been interpreting and applying *Matter of A-B-*. It is also almost impossible to identify what type of deterrent effect, if any, *Matter of A-B-* has had or will have on asylum seekers fleeing domestic violence. But it is clear that Sessions’s decision in *Matter of A-B-* could have tragic human consequences.

Although the holding in *Matter of A-B-* was narrow, the media coverage of the case has largely suggested that Sessions stopped domestic violence asylum altogether.<sup>249</sup> This misinformation might lead asylum applicants and attorneys to not petition for asylum based on domestic violence. It also could affect the way

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247. *Grace*, 344 F. Supp. 3d at 133.

248. *Id.* at 126.

249. For example, on June 11, 2018, the *New York Times* ran an article with the headline, “Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum.” Benner & Dickerson, *supra* note 5. Other publications such as the *Guardian* published similar articles that same day. *See, e.g.*, Sabrina Siddiqui, *Trump Administration Moves to End Asylum for Victims of Domestic Abuse and Gangs*, *GUARDIAN* (June 11, 2018), <https://www.theguardian.com/us-news/2018/jun/11/trump-asylum-seekers-abuse-gang-violence-end-jeff-sessions> [<https://perma.cc/CM8C-YELP>].



that immigration judges decide domestic violence cases because they might interpret *Matter of A-B-* as being broader than it really is.

An important aspect of the legal strategy around *Matter of A-B-*, therefore, must be to educate attorneys, judges, asylum officers, asylum seekers, and the general public about what the law actually says. Additionally, it is imperative for lawyers to continue to bring domestic violence asylum cases and to hone the particular social group strategy. Sessions asserted in *Matter of A-B-* that a particular social group is impermissibly circular if it is defined by its members' shared persecution. While this argument has flaws, it might be wise for advocates to experiment with simpler, less specific particular social groups that do not rely on an aspect of shared harm.

For example, an asylum seeker fleeing domestic violence in the Northern Triangle might claim asylum based on her membership in the group "Guatemalan women." The benefit of this formulation is that the group is not defined by its members' persecution, and therefore holds up against Sessions's arguments about impermissible circularity in *Matter of A-B-*.<sup>250</sup> Even though it is a broad definition that would apply to millions of people—that is, every Guatemalan woman—particular social groups can still be cognizable even if they are broad.<sup>251</sup> To make this claim successful, an asylum seeker's attorney would need to offer evidence about why being a woman in Guatemala can be dangerous, such as statistics about high rates of femicide and examples of violence against women being committed with impunity. The key step when using a nationality-plus-gender social group would be establishing that the asylum seeker suffered harm *because of* her gender.<sup>252</sup> To do so, the attorney would need to discuss how domestic violence is related to patriarchal social structures, and show that those structures exist in the country in question. Beginning with *Kasinga*, creating specific particular social groups like those articulated in *Matter of A-R-C-G-* and *Matter of A-B-* seemed like a promising strategy. However, attorneys should rethink that strategy in the wake of *Matter of A-B-*. For asylum seekers fleeing countries that are particularly dangerous for women and girls, claiming asylum based simply on gender plus nationality might provide a viable alternative.

Further, there is some precedent for IPV victims to successfully claim asylum based on persecution because of their political opinion. In one 2014 case, a Guatemalan woman who had experienced domestic abuse was granted asylum based on her political belief "that women in Guatemala should be treated as equal partners in marriage."<sup>253</sup> Her attorneys argued that her husband brutalized her in

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250. See 27 I. & N. Dec. at 338–39.

251. See *Cece v. Holder*, 733 F.3d 662, 674 (7th Cir. 2013) (finding that "the breadth of [a] category has never been a per se bar to protected status.>").

252. See, e.g., *id.* at 673 (noting that for similar claims, "it is the nexus requirement where the rubber meets the road").

253. BARNARD ET AL., *supra* note 77, at 37 n.158.

part because she held feminist beliefs which dictated that she was equal to him in their relationship.<sup>254</sup> In another case, the Ninth Circuit held that a rape and domestic violence victim was eligible for asylum where her abuser believed “that a man has a right to dominate” and the abuser “persecuted [the victim] to force her to accept this opinion without rebellion.”<sup>255</sup> In its holding, the court emphasized that it did not matter whether the victim actually held a certain political opinion, as long as her abuser believed that she did.<sup>256</sup>

The political opinion framework thus accounts for theories of domestic violence that assert men batter their wives to preserve gender supremacy.<sup>257</sup> In contrast to the particular social group formulation, it shifts the focus from the harm the asylum seeker suffered to the causes of that harm, explicitly linking patriarchal beliefs about the role of women with the infliction of domestic violence. However, in the wake of *Matter of A-B-*, it might prove difficult to establish that an abuser abused a victim because of the victim’s political opinion. Dicta in *Matter of A-B-* instructed that domestic violence is generally rooted in personal animosity between two people in a relationship.<sup>258</sup> Based on this flawed understanding of the dynamics of domestic violence, immigration courts might be skeptical of political opinion claims absent explicit evidence that the infliction of abuse was linked to a perceived political belief. Therefore, using political opinion might not avoid one of the key issues with *Matter of A-B-*: the opinion’s minimization of the political, legal, and cultural context in which domestic violence flourishes.

In general, it will be important for attorneys to make explicit the conditions that survivors of domestic violence are fleeing in their home countries.<sup>259</sup> There is concrete evidence to support the argument that women who are abused and assaulted in places like the Northern Triangle cannot seek effective state protection and should therefore be eligible for asylum under the INA. Advocates must clearly illustrate the connection between the violence women experience and the greater societal forces that allow such violence to go unpunished. Sessions argued this connection did not exist in *Matter of A-B-*, but advocates can and should emphasize and support this connection with empirical evidence. In that same vein, attorneys who represent IPV survivors in asylum claims must educate immigration judges and opposing counsel about the dynamics of domestic violence and how it should never be considered a private crime. They

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254. *Id.*

255. *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

256. *Id.*

257. *See generally* Houston, *supra* note 187 (discussing Lenore Walker’s 1979 study on battered women, as well as other feminist theories of IPV).

258. 27 I. & N. Dec. 316, 339 (Att’y Gen. 2018), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

259. *See, e.g.*, BARNARD ET AL., *supra* note 77, at 41 (“Attorneys should gather evidence about conditions in the country-of-origin related to the type of persecution the applicant has either survived or fears will take place in the future.”).

should frame IPV as a global epidemic that is both caused by and perpetuates gender inequality.

Finally, the long-term strategy to ensure that domestic violence is a cognizable basis for asylum should include amending the INA definition of a refugee to name gender as a protected ground. Violence against women is a global crisis that affects, either directly or indirectly, every person on Earth. A third of the women in the world will be the victims of some type of gender-based violence in their lifetimes, and women are killed by their intimate partners at extremely high rates.<sup>260</sup> This violence is both a symptom and a cause of gender inequality; women will never be entirely equal until they can move safely through the world. Due to its prevalence and severity, persecution based on gender should be grounds for asylum in the United States.

*Matter of A-B*'s most important impact will be its human one. It is easy to talk about the complexities of and strategies for asylum law while forgetting its substantial human consequences. The stakes are high; often, quite literally, lives hang in the balance. For women like Rody Alvarado, Aminta Cifuentes, and A.B., asylum is their only viable choice to lead a safe, free life. Each of these women sought protection in her home country; each sought to separate herself from her abuser by leaving, hiding, or running away. And yet each had her government fail her, and each continued to experience severe abuse as punishment for the offense of being a woman. If any one of them had been deported from the United States, she would have been in life-threatening danger.

The former Attorney General and others who criticize a broad application of asylum law paint asylum seekers as people cheating the immigration system to fast-track their way to the American Dream. But the stories of these women belie this cynical perspective—they are not fabricating a tragic story to get into the United States. They are fleeing for their lives and making incredible sacrifices to do so. They have no good options, no easy choices. There is a moral and legal imperative to ensure that their asylum claims are heard before immigration judges who apply the law as it was meant to be applied—to provide refuge for the most vulnerable people in this world.

#### CONCLUSION

Asylum has become a fraught political issue. In comments referencing asylum seekers from Central America, President Trump has claimed that “[o]ur country is full.”<sup>261</sup> It is important to keep sight of whom asylum policies affect, of who is left out when we close our doors: women like Rody Alvarado, L.R., Aminta Cifuentes, A.B., and countless others fleeing for their lives. They have endured severe harm and abuse; many seek to escape near-certain death. Given

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260. *Violence Against Women*, *supra* note 14.

261. See, e.g., *President Trump Tells Asylum-Seekers that ‘Our Country Is Full.’ Is It?*, NPR (Apr. 15, 2019), <https://www.npr.org/2019/04/15/713387924/trump-tells-asylum-seekers-that-our-country-is-full-is-it> [<https://perma.cc/8M48-8VB6>].

the threats they face at home, it is unlikely that they will stop coming. What matters is whether they are heard, welcomed, and made safe. As one commentator put it, “The United States cannot erect a wall and expect women to resign themselves to stay put . . . and be slaughtered.”<sup>262</sup>

For these women and their advocates, *Matter of A-B-* and the broader national climate that made the decision possible represent a setback. The case narrows the grounds upon which asylum can be granted. But, importantly, it does not foreclose the possibility that asylum seekers may be granted asylum based on their experience of domestic violence. Indeed, in the months since *A-B-* was decided, judges have continued to grant asylum in such cases.

Recognizing that domestic violence both perpetuates and is perpetuated by political, social, and legal systems that disempower women, attorneys should continue to bring domestic violence asylum claims in the wake of *Matter of A-B-*. They should use this opportunity to think critically and creatively about the best ways to fit victims of domestic violence into the INA’s definition of a refugee, including by relying on broader particular social group classifications and shifting to a political opinion framework. Either of these strategies would require attorneys to educate courts on how domestic violence connects to political and legal systems that contribute to gender inequality. Given the high rates of gender-based violence, advocates and activists should also push to change the INA definition to include women as forming a protected group in their own right.

Finally, *Matter of A-B-* has exposed the ways in which asylum law is vulnerable to political pressure and change. Thus, attorneys and elected officials should contemplate structural changes to the system that would insulate asylum adjudication from shifting political winds while making the process more transparent and predictable. For example, Congress could pass legislation mandating that more immigration cases be published, thereby creating opportunities for more meaningful oversight of the process by the public and legislators. Additionally, Congress could change the federal regulations that currently allow the Attorney General to direct any case to himself or herself for decision.<sup>263</sup> This might help stabilize how immigration cases are decided from one presidential administration to another. In the months and years ahead, reforming the immigration court system may prove critical in securing the rights and futures of those who seek asylum in the United States.

In *Matter of A-B-* Sessions wrote,

The persistence of domestic violence in El Salvador . . . does not establish that El Salvador was unable or unwilling to protect A-B- from her husband, any more than the persistence of domestic violence in the United States means that our government is unwilling or unable to

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262. Nazario, *supra* note 55.

263. 8 C.F.R. § 1003.1(h)(1) (2020) (“The Board shall refer to the Attorney General for review of its decision all cases that: . . . [t]he Attorney General directs the Board to refer to him.”).

protect victims of domestic violence.<sup>264</sup>

The United States is not as dangerous as the Northern Triangle for women, but its rates of IPV are still dishearteningly high. Over one-third of American women have experienced sexual assault, physical violence, or stalking by an intimate partner.<sup>265</sup> From 2010 to 2017, approximately 78 percent of female homicide victims were killed by a current or former partner.<sup>266</sup> The Supreme Court has held that women have no constitutional right to police protection from their abusers.<sup>267</sup>

I include these statistics not to argue that asylum seekers should stop seeking refuge in the United States, but rather to suggest that there is work to be done to make this country safer both for refugees and for victims of domestic violence. There is a connection between the idea, expressed in *Matter of A-B-*, that domestic violence is primarily a private crime whose victims are not eligible for asylum and the persistent unwillingness of American law enforcement to take domestic violence claims seriously. In this way, perhaps the United States' current conception of domestic violence asylum reveals something about our own country and the way we value—or fail to value—the lives of women and girls. In the wake of *Matter of A-B-*, attorneys and advocates must seek to shift this conception to help the plight of women both at home and abroad.

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264. *Matter of A-B-*, 27 I. & N. Dec. 316, 344 (Att'y Gen. 2018), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

265. *Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/statistics> [<https://perma.cc/8VH3-PYQP>].

266. Emma E. Fridel & James Alan Fox, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976–2017*, 6 *VIOLENCE & GENDER* 27, 29 (2019).

267. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005); Max D. Siegel, *Surviving Castle Rock: The Human Rights of Domestic Violence*, 18 *CARDOZO J.L. & GENDER* 727, 738 (2012) (discussing the case of Jessica Gonzalez, who unsuccessfully sued the Castle Rock police department for not enforcing a restraining order against her estranged husband, who killed her three daughters).