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Jordan Cotleur

*University of Cincinnati College of Law*

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## **Grounds for Asylum: How Victims' Rights Laws Confer Particular Social Group Status to Domestic Violence Victims**

Jordan Cotleur<sup>1</sup>

### **I. INTRODUCTION**

Eliza,<sup>2</sup> a native of El Salvador, is seeking asylum in the United States. She sought refuge by swimming across the Rio Grande River with her six-year-old son and two nephews. I first met Eliza while preparing for her credible fear interview, where the government decides whether she has a reasonable prima facie case that makes it plausible she could be granted asylum. Eliza insisted she left El Salvador because of firsthand gang violence and extortion. Knowing that anti-gang political opinion does not fare well in U.S. asylum cases, I pressed Eliza to tell me more about her life in El Salvador. When I offered to call home, Eliza became incredibly emotional. It became clear that, like many married women in El Salvador, Eliza was most fearful of returning home because of the violence she would suffer at the hands of her ex-husband.

Despite an uptake in legislation criminalizing domestic violence since the 1990's, women in Latin America still face the highest rates of gender-based and domestic violence of any region in the world.<sup>3</sup> In Central America, two-thirds of female homicide victims are killed because of their status as a woman (also known as “femicide”) and half of women face this fate at the hands of a current or former partner.<sup>4</sup> The violence perpetuates at such an alarming rate

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<sup>1</sup> Associate Member (2020), *Immigration and Human Rights Law Review*

<sup>2</sup> Name has been changed to maintain privacy and confidentiality.

<sup>3</sup> Leonie Rauls & Tamar Ziff, *High Rates of Violence Against Women in Latin America Despite Femicide Legislation: Possible Steps Forward*, THE DIALOGUE (Oct. 15, 2018), <https://www.thedialogue.org/blogs/2018/10/high-rates-of-violence-against-women-in-latin-america-despite-femicide-legislation-possible-steps-forward/>.

<sup>4</sup> Sebastián Essayag (Regional Coordinator of Violence Against Women and Girls, Femicide and Citizen Security Projects at UNDP RBLAC), *From Commitment to Action: Policies to End Violence Against Women in Latin America and the Caribbean*, at 11(2017).

because investigations into gender-based violence are nearly non-existent in the region.<sup>5</sup> In 2016, it was reported that up to ninety-eight percent of cases involving femicide and violence against women and girls in Latin America went unpunished.<sup>6</sup>

Despite the prevalence of gender-based persecution, or maybe in spite of it, in 2018, Attorney General Jeff Sessions (“Sessions”) explicitly held that victims of domestic violence do not qualify for asylum because they are not considered to be members of a “particular social group.”<sup>7</sup> Despite Sessions’ ruling in *Matter of A-B-*, the question of whether or not victims of domestic violence constitute members of a particular social group for purposes of asylum continues to invoke legal debate. This article attempts to navigate domestic violence’s place in asylum law by comparing the emergence and scope of victims’ rights laws to that of asylum law. The language, structure, and scope of victims’ rights laws in the United States and international legal institutions support the idea that “[v]ictims of crime and victims of human rights abuses are recognized in this instrument as *sharing similar needs and requiring similar protections*.”<sup>8</sup>

International norms now acknowledge that victims’ rights are considered human rights.<sup>9</sup> Based on the intersection of human rights and victims’ rights movements, I posit that victims’ rights laws are a quintessential consideration in determining whether a class of people constitutes a particular social group. Victims’ rights laws themselves offer the requisite clarity, visibility and particularity needed to validate domestic violence victims as members of a particular social group.

Part II of this article will define domestic violence and asylum in the United States, focusing on what groups qualify as a “particular social group” and how courts have responded to the

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<sup>5</sup> RAULS & ZIFF, *supra* note 3.

<sup>6</sup>*Id.*

<sup>7</sup> *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

<sup>8</sup> VERÓNICA MICHEL, PROSECUTORIAL ACCOUNTABILITY AND VICTIMS’ RIGHTS IN LATIN AMERICA 41 (2018). [emphasis added]

<sup>9</sup> *Id.*

narrow definition articulated in *Matter of A-B-*. Part III explores the victims' rights movement by defining victims' rights law, analyzing how they emerged, and discussing what these laws look like across international, regional, and national platforms. Drawing on ways that victims' rights laws emerged and normalized, Part IV identifies how the existence of victims' rights laws is a sufficient basis for granting domestic violence victims "particular social group" status. This analysis explores both the normative similarities between asylum and victims' rights, as well as legal requirements of social distinction, particularity, and immutability necessary to establish membership in a particular social group. Additionally, Part V will address some of the counterarguments that arise from this discussion.

## II. BACKGROUND

### A. *Defining Domestic Violence*

The National Domestic Violence Hotline defines domestic violence as "a pattern of behaviors used by one partner to maintain power and control over another partner in an intimate relationship."<sup>10</sup> The criminalization of domestic violence is a relatively modern policy in the United States that emerged in the 1970's, and it remains non-existent as a criminal matter in many countries around the world.<sup>11</sup> Victims of domestic violence have historically faced difficulty obtaining protection from the criminal legal system because it was long viewed as a "private family matter."<sup>12</sup> Unsurprisingly, Sessions relies on the categorization of this type of crime as "private criminal activity" to justify his ruling

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<sup>10</sup> *What is Domestic Violence?* NATIONAL DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/is-this-abuse/abuse-defined/> (last visited Nov. 4, 2019).

<sup>11</sup> U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 3* (1996) [hereinafter "DOJ Report"], <https://www.ncjrs.gov/pdffiles/crimdom.pdf>.

<sup>12</sup> *Id.* at 7.

in *Matter of A-B*.<sup>13</sup> Indeed, the private nature of domestic violence makes it significantly more dangerous and difficult to escape than stranger-based private criminal activity because victims and offenders often “occupy the same space, share and compete for resources, and have emotional ties,” and the threats of violence are “real, immediate, and ongoing.”<sup>14</sup>

Definitions of domestic violence have also changed over the years and continue to vary between countries and even within different jurisdictions in the United States. States impose different restrictions on what type of abuse, i.e. emotional, financial, psychological, or physical, may qualify as domestic violence, and states also require varying degrees of evidence to bring charges.<sup>15</sup> Immigration, however, is regulated by the federal government so, for purposes of this article, the federal definition is relevant and controlling. The federal government defines domestic violence as “a pattern of behaviors used by one partner to maintain power and control over another partner in an intimate relationship.”<sup>16</sup> The federal government recognizes qualifying behaviors as those carried out through physical, sexual, emotional, economic, and/or psychological abuse, and/or threats, stalking, and cyberstalking.<sup>17</sup> Victims of domestic violence can include spouses, intimate partners, family members, children, and cohabitants.<sup>18</sup> In reaching this comprehensive definition, the U.S. government has developed various governmental agencies and federal legislation to address the dangers domestic violence poses to individuals and society at large. The U.S. Department of Justice has an Office on Violence Against Women (OVW) which leads the national effort to reduce violence against women and “administer justice for and strengthen services

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<sup>13</sup> *Matter of A-B*, *supra* note 7, at 343.

<sup>14</sup> DOJ Report, *supra* note 11, at 29.

<sup>15</sup> *State Domestic Violence Laws*, FINDLAW, <https://family.findlaw.com/domestic-violence/what-is-domestic-violence.html> (last visited Nov. 4, 2019).

<sup>16</sup> *What Is Domestic Violence?* *supra* note 10.

<sup>17</sup> *State Domestic Violence Laws*, *supra* note 15.

<sup>18</sup> *Id.*

to victims.”<sup>19</sup> In 1994, Congress passed the Violence Against Women Act (“VAWA”) making certain domestic violence offenses a federal crime.<sup>20</sup> Additionally, VAWA provides undocumented immigrants who are the victims of domestic violence in the United States a path to apply for legal permanent residency, or a “green card.”<sup>21</sup> While this provision signifies an attempt to provide comprehensive coverage to domestic violence victims, many have found shortcomings in the bifurcation that is based on whether the abuse occurred inside or outside the United States.

“Intimate partner violence” is the United Nations’ preferred terminology for domestic violence, and it is defined by the World Health Organization as “behavior by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviors.”<sup>22</sup> Albeit discrepancies in the details of what type of behavior may be considered “controlling,” most jurisdictions recognize domestic violence broadly as an abuse of power, beyond just physical aggression, that exists within an intimate or formerly intimate relationship. Further, gender-neutral language such as “partner” and “spouse” supports the widely accepted fact that domestic violence is perpetuated by men and women, and that it occurs across both homosexual and heterosexual relationships.<sup>23</sup> Although this article specifically focuses on domestic violence perpetrated against women, this is not intended to discount or minimize the experiences of male victims of domestic violence. Rather, this distinction is necessary to underscore the societal norms that make women inherently vulnerable to domestic violence because of their status as women.

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<sup>19</sup> *Office on Violence Against Women*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/ovw> (last visited Nov. 24, 2019).

<sup>20</sup> Violence Against Women Act, 42 U.S.C. §§ 13925-14045 (1994) [hereinafter “VAWA”].

<sup>21</sup> *Id.*

<sup>22</sup> *Violence against women*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> (last visited Nov. 24, 2019).

<sup>23</sup> *Id.*

## B. Defining Asylum

Per the United States Citizenship and Immigration Services (USCIS), asylum status is available to individuals who (1) meet the definition of a refugee, (2) are already in the United States, and (3) are seeking admission at a port of entry.<sup>24</sup> For all intents and purposes, an asylee is a refugee who is already in the United States. The Immigration and Nationality Act (INA) defines a refugee as someone who is unwilling or unable to return to their home country based on fear of past persecution or a well-founded fear of future persecution on account of “race, religion, nationality, membership in a particular social group, or political opinion.”<sup>25</sup> Four of the protected classes (race, religion, nationality and political opinion) are relatively identifiable and do not require substantial litigation to define them. “Membership in a particular social group,” on the other hand, serves as a “catch all” for other immutable characteristics that do not fit neatly into one of the other categories. “Particular social group” is thus, the crux upon which domestic violence victims’ claims for asylum rely. Notably, “[t]he INA does not define ‘persecution on account of. . . membership in a particular social group.’”<sup>26</sup>

A progeny of disheveled cases led Sessions in *Matter of A-B-* to articulate a standard for what an applicant must demonstrate to establish persecution on account of membership in a particular social group.<sup>27</sup> The respondent in *Matter of A-B-* is an El Salvadoran woman who sought asylum in the United States as a member of the particular social group “El Salvadoran women who are unable to leave their domestic relationships where they have children in

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<sup>24</sup> *Refugees & Asylum*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/humanitarian/refugees-asylum> (last visited Nov. 24, 2019).

<sup>25</sup> 8 U.S. Code §1101(a)(42).

<sup>26</sup> *Matter of A-B-*, *supra* note 7, at 318.

<sup>27</sup> *Id.*

common.”<sup>28</sup> *A-B-* fled her home in El Salvador after years of physical, emotional, and sexual abuse at the hands of her ex-husband, whom she could not escape from even after securing a divorce.<sup>29</sup> In reaching his decision, Sessions reiterated that an applicant must show that the requisite group is “composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question.”<sup>30</sup> Despite the addition of the particularity and social distinction requirements, Sessions did not relinquish the assertion that a shared characteristic could be “an innate one such as sex, color, or kinship ties. . . or it might be a shared past experience.”<sup>31</sup> However, Sessions did assert that “a particular social group must ‘exist independently’ of the harm asserted in an application for asylum. . . .”<sup>32</sup> The remaining guidelines promulgated by this decision seem to simply reiterate fundamental provisions of the INA, such as the fact that applicants must demonstrate that membership in the group is a central reason for the persecution, and that when the alleged persecutor is unaffiliated with the government, the applicant must show that her home government is unwilling or unable to protect her.<sup>33</sup>

Prior to Sessions’ decision, *Matter of A-R-C-G-* was the seminal case governing domestic violence as grounds for asylum. There, the Board of Immigration Appeals (“BIA”) held “‘married women in Guatemala who are unable to leave their relationship’ can constitute a cognizable social group” for purposes of being granted asylum in the U.S.<sup>34</sup> Sessions explicitly overruled *Matter of A-R-C-G-*, finding that victims of domestic violence do not qualify as members of a particular social group.<sup>35</sup>

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<sup>28</sup> *Id.* at 321.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 317.

<sup>31</sup> *Id.* at 318 (citing *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)).

<sup>32</sup> *Id.* at 334 (citing *Matter of M-E-V-G-*, 26 I&N Dec. 227, 236 (BIA 2014)).

<sup>33</sup> *Id.* Much of the remainder of the decision in *A-B-* is criticized as dicta. See *Grace v. Whitaker*, 344 F.Supp.3d 96, 116 (D.C. 2018).

<sup>34</sup> *Matter of A-R-C-G-*, 26 I&N Dec. 388, 388 (BIA 2014).

<sup>35</sup> *Matter of A-B-*, *supra* note 7, at 317.



While *Matter of A-B-* arguably offered some clarity on what constitutes a “particular social group,” it may have done so in an unconstitutional manner. In the relatively short time since *Matter of A-B-* was handed down, there has been little in the way of substantive case law discussing its implications. The most notable discussion of *A-B-* takes place in the D.C. District Court decision of *Grace v. Whitaker*, which theoretically abrogated *Matter of A-B-*.<sup>36</sup> Although *Grace* challenges the application of *Matter of A-B-* to the credible fear stage of proceedings rather than the asylum context, the decision nevertheless provides some insight into how courts may apply *Matter of A-B-* going forward.<sup>37</sup>

Grace, a native of Guatemala, fled her country after having been raped, beaten, and threatened for over two years by her domestic partner.<sup>38</sup> Grace’s children were also subject to beatings, sexual assault, and death threats by her persecuting partner.<sup>39</sup> Like many women in her position, Grace had no protection in the authorities in her country as they worked in concert with her persecutor to evict her from her home when she sought help.<sup>40</sup> While Grace was the named plaintiff, there were a total of twelve plaintiffs, adults and children, with painfully similar experiences.<sup>41</sup>

According to the court in *Grace*, “[a] general rule that effectively bars [] claims based on the category of abusers (i.e. domestic abusers or gang members). . . is inconsistent with Congress’ intent to bring the United States refugee law into conformance with the [Refugee Protocol].”<sup>42</sup> The Court found that a categorical ban on domestic violence claims at the credible fear stage is “arbitrary and capricious” and “contrary to the individualized analysis required by the INA.”<sup>43</sup> Although the

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<sup>36</sup> *Grace*, *supra* note 33.

<sup>37</sup> *Id.* at 105.

<sup>38</sup> *Id.* at 111-12.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 126.

<sup>43</sup> *Id.*

holding in *Grace* is only binding over the credible fear stage, the decision nevertheless provides over one hundred pages of legal criticism of the decision in *A-B-*, which likely will be taken note of by federal courts going forward. Moreover, the credible fear stage functions to give individuals with potential asylum claims a chance to remain in the United States to fight their asylum claims. This decision effectively allows asylum-seekers with domestic violence claims to “pass” the credible fear stage, indicating that there must be some chance for such claims to be viable in an actual asylum case down the road.

### III. VICTIMS’ RIGHTS LAWS

Victims’ rights laws provide tangible legal rights to victims of crime. Domestic violence victims have both implicit and explicit rights embedded in victims’ rights law.<sup>44</sup> While the purpose of this article is to analyze the scope of victims’ rights laws afforded specifically to victims of domestic violence, it is necessary to first analyze the movement as a whole to understand the purpose, scope, and clarity of the victims’ rights laws afforded specifically to domestic violence victims.

#### A. *Historical Emergence of International Norms*

Victims’ rights laws emerged in tandem with the human rights movement and the international norms governing refugees and asylees. Moreover, victims’ rights laws reflect a domestic and international movement to better understand the victim as a “person with interests and needs beyond restitution.”<sup>45</sup> Such laws emerged, in part, to prevent cases from falling into impunity where the state has failed, “either by commission or by omission,” to adequately prosecute the crime.<sup>46</sup>

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<sup>44</sup> VAWA, *supra* note 20.

<sup>45</sup> MICHEL, *supra* note 8, at 41.

<sup>46</sup> *Id.* at 3.

A historical dive into this movement reveals that the victims' rights movement and the human rights movement are far from mutually exclusive. The widespread trauma brought to light by the Second World War is credited with triggering the expansion of both victims' rights and human rights' laws.<sup>47</sup> In the second half of the twentieth century, the world saw a need to protect victims from evil acts committed, or at the very least ignored, by state actors. The result was an international human rights movement focused on liberalism and state compliance with international human rights laws, supplemented by a victims' rights movement to normalize the recognition and protection of victims.<sup>48</sup>

The Second World War brought state facilitated persecution on the basis of race, religion, and nationality. In the wake of these atrocities, international agreements were quickly adopted to address the globalized outrage, including the Universal Declaration of Human Rights ("UDHR") in 1948 and the Convention Relating to the Status of Refugees in 1951.<sup>49</sup> The UDHR was the first legislation of its kind to recognize the human right to be free from various capacities of victimhood. The fundamental overlap between the two aforementioned international agreements supports the conclusion that victims' rights emerged from an effort to protect those populations that were the intended beneficiaries of international asylum and refugee laws. Today the umbrella of the international victims' rights movement encompasses the facets of the women's rights movement that are fighting injustices such as domestic violence.<sup>50</sup>

Although the victims' rights movement has moved simultaneously with human rights movements since the 1950's, it finally landed on international codification in 1985 through the

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<sup>47</sup> *Id.* at 39.

<sup>48</sup> *Id.* at 39-40.

<sup>49</sup> Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/RES/3/217A (1948); Convention Relating to the Status of Refugees, adopted 28 July 1951, U.N. Doc. A/CONF.2/108 (1951), 189 U.N.T.S. 150 (entered into force 22 April 1954).

<sup>50</sup> MICHEL, *supra* note 8, at 37.

enactment of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereafter, Basic Principles).<sup>51</sup> The Basic Principles' broad interpretation of what constitutes a victim underscores the fact that victims of crime and victims of human rights abuses by the state "shar[e] similar needs and requir[e] similar protections."<sup>52</sup> The United Nations has adopted multiple measures since 1985 to further expand victims' rights.<sup>53</sup> The practical applicability of these norms is evident when one compares the absence of participatory rights for victims at the International Criminal Tribunals for Yugoslavia and Rwanda in the mid 1990's to the 2002 Rome Statute, which allows victims to actively participate in criminal proceedings through independent legal representation at the International Criminal Court.<sup>54</sup>

International law categorizes victims' rights laws into protection rights, reparation rights, and participation rights, each of which may vary in scope and implementation across and within different jurisdictions.<sup>55</sup> The next two sections will explore the specific intricacies of how the victims' rights movement has developed in the United States and Latin America.

### *B. U.S. Victims' Rights Laws*

The United States has seemingly embraced the victims' rights movement since the beginning of the twenty-first century. In 2004, the federal government adopted the Crime Victims' Rights Act ("CVRA") which articulates a standard set of rights for federal

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<sup>51</sup> *Id.* at 40; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, adopted 29 Nov. 1985, U.N. GAOR, 40th Sess., Annex, U.N. Doc. A/RES/40/34(1985).

<sup>52</sup> MICHEL, *supra* note 8, at 41.

<sup>53</sup> *Id.* These measures include The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (1997); A Handbook on Justice for Victims by the UN Commission on Crime Prevention and Criminal Justice (1999); and The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (2006).

<sup>54</sup> MICHEL, *supra* note 8, at 42.

<sup>55</sup> *Id.*

crime victims including access to information, protection, and participation in the criminal justice process.<sup>56</sup> But by 2004, VAWA, the victims' rights measure specifically for domestic violence victims, had already been in effect for nearly ten years.<sup>57</sup> VAWA grants federal domestic violence victims the right (a) to be treated with fairness and with respect for the victim's dignity and privacy; (b) to be reasonably protected from the accused offender; (c) to be notified of court proceedings; (d) to be present at all public court proceedings; (e) to confer with the attorney for the Government in the case; (f) to seek restitution; and (g) to obtain information about the conviction, sentencing, imprisonment, and release of the offender.<sup>58</sup> All states and the District of Columbia have a statutory provision that provides rights and protection for victims of domestic violence, and many states have provisions that are nearly synonymous with the federal statute.<sup>59</sup>

Notably, most state victims' rights laws include a provision denoting victims as having the right to protection in criminal proceedings. This caveat will serve as an important distinction in the analysis of how domestic violence victims are a sufficiently particularized social group.

Many states are currently working to expand victims' rights laws even further through the implementation of "Marsy's Law."<sup>60</sup> The law's mission is to pass "constitutionally guaranteed crime victims' rights."<sup>61</sup> Marsy's Law is named after Marsalee (Marsy) Ann Nicholas, who was stalked and killed by her ex-boyfriend in 1983.<sup>62</sup> On the day of Marsy's funeral, her mother was

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<sup>56</sup> Crime Victims' Rights Act, 18 U.S.C. §3771 (2004).

<sup>57</sup> VAWA, *supra* note 20.

<sup>58</sup> *Id.*

<sup>59</sup> *About Victims' Rights*, VICTIMLAW, <https://victimlaw.org/victimlaw/pages/victimsRight.jsp> (last visited Nov. 24, 2019).

<sup>60</sup> *State Efforts*, MARSY'S LAW, <https://www.marsyslaw.us/states> (last visited Nov. 24, 2019).

<sup>61</sup> *Id.*

<sup>62</sup> *About Marsy's Law*, MARSY'S LAW, [https://www.marsyslaw.us/about\\_marsys\\_law](https://www.marsyslaw.us/about_marsys_law) (last visited Nov. 24, 2019). It is

confronted at the supermarket by the murderer.<sup>63</sup> As they received no notification from the justice system, Marsy's family had no idea that her murderer had been released on bail just days after her murder.<sup>64</sup> From this experience, Marsy's family became advocates for victims' rights, championing the comprehensive Marsy's Law in states across the nation. Currently, Marsy's Law is in the works in seven states "with more on the horizon."<sup>65</sup> While the constitutionality of Marsy's Law remains to be litigated, the effort itself is indicative of the value that Americans see in protecting victims' rights, specifically for domestic violence victims.

### *C. Victims' Rights Laws in Latin America*

Despite "weakening democratic institutions, increasing violence, and eroding rule of law," the victims' rights movement has had a surprising impact in Latin America.<sup>66</sup> In 1994, states adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará") in a monumental move to generate greater state responsibility for violence against women in Latin America and the Caribbean.<sup>67</sup> As of 2019, the Convention of Belém do Pará has been adopted and ratified by nearly every Latin American and Caribbean State, with Cuba being the only exception.<sup>68</sup> The Convention of Belém do Pará calls on states to "condemn all forms of violence against women and agree to adopt. . . policies to prevent, punish and end the mentioned

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worth noting that, although Marsy's law is a bill for crime victims *generally*, Marsy was the victim of domestic violence as she was killed by a former intimate partner.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *State Efforts*, *supra* note 60.

<sup>66</sup> MICHEL, *supra* note 8, at 3.

<sup>67</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belém do Pará," adopted 9 June 1994, OAS/Ser.L.V/II.92/doc.31 rev.3 (1994) (not in force), reprinted in 33 I.L.M. 1534 (1994).

<sup>68</sup> ESSAYAG, *supra* note 4, at 15.

violence. . .”<sup>69</sup> A number of Latin American countries have attempted to bring themselves into compliance with their obligations by adopting “private prosecution” measures.<sup>70</sup> The right to private prosecution is a criminal procedure right granted to victims which essentially allows the victim’s lawyer to intervene during the hearings and trial and challenge the prosecutor when he or she is acting against the interests of the victim.<sup>71</sup>

In her book, “Prosecutorial Accountability and Victims’ Rights in Latin America,” Verónica Michel theorizes that while victims of crime or victims of state abuse continue to deal with perpetrator impunity in many Latin American countries, the unique statutory right to “private prosecution” in this region provides a “legal opportunity structure” for crime victims to assert their rights.<sup>72</sup> Private prosecution allows the victim to actively participate in the criminal prosecution, “either as an autonomous private prosecutor. . . or as an auxiliary private prosecutor.”<sup>73</sup> The definition of a victim may vary across jurisdictions, but it is minimally defined to broadly encompass all “person(s) directly offended by the crime.”<sup>74</sup> Although Latin America is one of the most dangerous regions in the world for violence against women, fourteen out of the seventeen countries in the region have codified “private prosecution” and recognize victims of crime as “rights bearers.”<sup>75</sup> The widespread statutory right to private prosecution is reflective of the value that Latin America gives to crime victims. Therefore, even in a region where impunity from the law is rampant, the fact that there is even a law on the books for victims to overcome this impunity through “self-help” measures is indicative of the power of victims’ rights laws as an international norm.

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<sup>69</sup> Convention of Belé, do Pará, *supra* note 67, art. 7.

<sup>70</sup> MICHEL, *supra* note 8.

<sup>71</sup> *Id.* at 4-5.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 51.

<sup>74</sup> *Id.* at 52.

<sup>75</sup> RAULS & ZIFF, *supra* note 3; MICHEL, *supra* note 8, at 33.

Further, a “second generation” of laws in Latin America has materialized out of the Convention of Belém do Pará to “typify the various forms of violence against women.”<sup>76</sup> While accounting for the inherent diversity among the “social group of women,” these laws are significant because they identify and particularize the different societal circumstances that make women vulnerable to violence in different ways.<sup>77</sup> These laws take into account characteristics such as socioeconomic status, ethnicity, marital status, age group, education, and deprivations of liberty, to name a few, that increase the likelihood of violence when coupled with gender.<sup>78</sup> The second generation laws recognize that gender-based violence is perpetuated by a variety of patriarchal norms that subordinate women to a second-class citizenry. Moreover, the second-generation laws increasingly emphasize the value of the victims’ rights, particularly through comprehensive care initiatives and access to justice.<sup>79</sup>

Finally, victims’ rights have expanded at the same time that many Latin American countries have shifted from criminal procedure models that are entirely inquisitorial to “mixed models” that have some elements of both the inquisitorial and adversarial systems.<sup>80</sup> The inquisitorial model relies on an extensive pre-trial inquiry by officials of the judicial system to ascertain the truth whereas the adversarial model rests on the presumption that the competition between the prosecution and the defense will generate the truth. Although inquisitorial systems tend to provide greater reparation and participation rights to victims than their adversarial counterparts, the newly crafted “mixed models” have proven to maintain the higher degree of victims’ rights that accompany an inquisitorial system while also benefiting from the efficiency of the adversarial process.<sup>81</sup> The resulting model is European in nature,

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<sup>76</sup> ESSAYAG, *supra* note 4, at 15.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 15-16.

<sup>79</sup> *Id.*

<sup>80</sup> MICHEL, *supra* note 8, at 46.

<sup>81</sup> *Id.* at 46-47.



giving rise to victims' rights laws in the region that are heavily influenced by international legal and human rights norms.<sup>82</sup>

#### **IV. HOW VICTIMS' RIGHTS LAWS CONFER "PARTICULAR SOCIAL GROUP" STATUS TO DOMESTIC VIOLENCE VICTIMS**

##### *A. Common Intent and Purpose*

Asylum law is a direct result of the human rights movement, which emerged simultaneously with the victims' rights movement. Accordingly, this three-dimensional intersection reflects the need for domestic violence victims to be granted substantive asylum protections as victims of human rights abuses who have tangible rights. Not only were victims' rights and human rights-inspired asylum laws born in response to a common theme of injustice following World War II, they were also adopted with the common purposes of criminalizing abusers and bringing justice and protection to victims. The United States specifically adopted asylum laws to bring the United States' domestic laws in line with international standards.<sup>83</sup> Congress enacted the Refugee Act in order to codify the "national commitment to human rights and humanitarian concerns," and "to afford a generous standard for protection in cases of doubt."<sup>84</sup> Victims' rights laws aim to prevent "secondary victimization," or "any additional suffering incurred by victims caused by the institutional response of the offense."<sup>85</sup> Indeed, the Refugee Act of 1980 explicitly states that the purpose is to "respond to the urgent needs of persons subject to persecution in their homelands, including. . . humanitarian assistance for their care and maintenance in asylum areas."<sup>86</sup> With these two principal purposes in mind, it logically follows that victims' rights laws and

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<sup>82</sup> *Id.* at 48.

<sup>83</sup> *Grace*, *supra* note 33, at 104.

<sup>84</sup> *Id.* at 106 (citing *In Re S-P-*, 21 I&N Dec. 486, 492 (BIA 1998)).

<sup>85</sup> MICHEL, *supra* note 8, at 48.

<sup>86</sup> The Refugee Act, 8 U.S.C. §§1101, 1157-1159, 1521 (1980).

asylum law have the same fundamental foundation and ultimate objectives.

Moreover, the victims' rights movement exemplifies a societal shift in classifying domestic violence as a public concern, like human rights violations, not just a private issue. Former U.S. Attorney General Sessions relies on the private nature of domestic violence, in part, to justify the decision in *Matter of A-B*.<sup>87</sup> However, the United States and many countries in Latin America have adopted specific legislation to contradict this assertion. In Latin America, the second-generation laws recognize that violence against women in the private sphere is perpetuated in the public domain as well through the pressures of armed conflict and gang-related operations.<sup>88</sup> In the United States, VAWA signifies an attempt by the federal government to bring "what was [once] a private experience into the public realm."<sup>89</sup> Under VAWA, domestic violence is unequivocally recognized as a public sphere issue that "our society will not tolerate."<sup>90</sup> The decision to bring the crime of domestic violence into the public sphere parallels the move to publicly condemn human rights violations in the international sphere following WWII.

Where two movements are unequivocally intertwined in origin, purpose, and intent, it generates pause in the legal sphere when the two movements diverge in scope after decades of conformity. In the United States, federal legislation bifurcated asylum law and victims' rights laws just prior to the turn of the century. Despite the passage of VAWA in 1994, in 1996, Congress revised portions of the original Immigration and Nationality Act ("INA") under the Illegal Immigrant Reform and Immigrant

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<sup>87</sup> *Matter of A-B*, *supra* note 7.

<sup>88</sup> ESSAYAG, *supra* note 4, at 15.

<sup>89</sup> Nina Rabin, *At the Border between Public and Private: U. S. Immigration Policy for Victims of Domestic Violence*, 7 L. & ETHICS HUM. RTS. 109, 118 (2013).

<sup>90</sup> *Id.* at 116.

Responsibility Act (“IIRAIRA”).<sup>91</sup> The revisions, in part, sought to deter candidates for asylum from utilizing asylum as a means of entry into the United States.<sup>92</sup> This policy shift was triggered in part by growing fears of terrorism after the 1993 World Trade Center Bombings and the increase in the number of Latin-American immigrants fleeing civil wars in the 80’s and 90’s.<sup>93</sup> The 1996 INA revisions demonstrate a divergence between U.S. asylum law and the fundamental objective of the refugee protocol. Furthermore, the passage of VAWA exemplifies how the United States treats domestic violence victims differently based on whether their abuse occurred in the United States or outside the borders.<sup>94</sup> This distinction is at odds with international obligations to protect under the Refugee Act and the UN Declaration of Human Rights. Therefore, since the current trajectory of asylum law in the United States is running contradictory to congressional intent, intense scrutiny is necessary to ensure that such laws are accomplishing their original purpose and objective.

### *B. Victims’ Rights Laws Create “Social Distinction”*

Victims’ rights laws allow domestic violence victims to satisfy the social visibility requirement for “particular social group” because “a special protection law” tailored to the characteristics of a particular class of individuals is the most compelling evidence that such a class is uniquely and identifiably vulnerable.<sup>95</sup> In *Matter of A-B-*, Sessions held that asylum applicants claiming membership in a particular social group must show, as one prerequisite, that the group is “socially distinct within the society in question.”<sup>96</sup> Sessions

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<sup>91</sup> Chelsea Mullarkey, Note, *Si, Tengo Miedo – Yes, I Am Afraid: How the Current Interpretation of Asylum Law Is Contrary to Legislative Intent and What the Courts Should Do About It*, 64 CLEV. ST. L. REV. 747, 753 (2016).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> RABIN, *supra* note 89, at 109.

<sup>95</sup> *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2012).

<sup>96</sup> *Matter of A-B-*, *supra* note 7, at 317.

rejected the classification of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common” as members of a particular social group, in part, because this group “lack[ed] sufficient social distinction to be cognizable as a distinct social group.”<sup>97</sup> In reaching this conclusion, Sessions wrongfully rejected the fact that there are laws in place in El Salvador criminalizing domestic violence as indicative of cognizable recognition of this group by society at large.<sup>98</sup>

The Ninth Circuit Court of Appeals in *Henriquez-Rivas v. Holder* found that the BIA “misapplied its own precedent” in finding that the group “Salvadoran witnesses who testified against gang members” did not satisfy the social distinction requirement for particular social group status.<sup>99</sup> In holding, on rehearing en banc, that Salvadoran witnesses who testified against gang members did constitute a particular social group, the Court articulated two important principles for social distinctiveness.<sup>100</sup>

First, the Court held that “on-sight visibility” (meaning the common characteristic of the group must be visible to the naked eye) is not required to establish social distinction.<sup>101</sup> The Court reasoned, in part, that witnesses who testify against the cartel are inherently incentivized to stay out of public view for fear of reprisal from the gangs.<sup>102</sup> Furthermore, the Court noted that anti-cartel informants might not have on-sight visibility to the public, but they would be socially visible, “particularly to the revenge seeking cartel members” from whom they fear persecution.<sup>103</sup>

Second, the Court pointed out the pertinence of the fact that “Salvadoran society recognizes the unique vulnerability of people who testify against gang members.”<sup>104</sup> Most notably, the Court

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<sup>97</sup> *Id.* at 323.

<sup>98</sup> *Id.*

<sup>99</sup> *Henriquez-Rivas, supra* note 95, at 1088.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1092.

relies on the fact that the Salvadoran government enacted a specific law in 2006 to protect witnesses who testify against gangs and other violent criminal activity.<sup>105</sup> El Salvador’s special witness protection law provides concrete evidence that society at large viewed this group as uniquely vulnerable and thus, they had social distinction. The law states, “the current El Salvadoran reality evidences the necessity that victims, witnesses and others who are involved in... judicial proceedings. . . should be protected to avoid violations of their rights. . .”<sup>106</sup>

Much like the testifying witness in El Salvador, the victim of domestic violence is now recognized by most Latin American states as a “rights bearing subject who possesses explicit rights that are protected by statute.”<sup>107</sup> Therefore, where a country has domestic laws in place that go beyond just criminalizing domestic violence to actually protect and offer substantial rights to victims, these victims have cognizable rights that are socially distinct in the society in which they live. As discussed in the previous section, most countries in Latin America (with the minor exceptions of Colombia, Peru and Uruguay) have enacted laws that protect victims of domestic violence and theoretically give such victims access to private prosecution.<sup>108</sup> Therefore, under the precedent established by *Henriquez-Rivas v. Holder, Matter of A-B-* was wrongly decided as it pertains to the lack of social distinctiveness that victims of domestic violence hold in Salvadoran society.

Although addressed more thoroughly in upcoming sections, it is necessary at this point to address the requirement that the persecution must exist independently of the harm inflicted. To clarify, the proposed social group is not “victims of domestic violence,” but rather women who are inherently vulnerable to abuse

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<sup>105</sup> *Id.*

<sup>106</sup> Decreto No. 1029/2006, Ley Especial para la Proteccion de Victimas y Testigos [“Special Law for Victim and Witness Protection”], (May 11, 2006). The decree provides for ordinary and extraordinary protection measures, which include changes of identity and residence, even to foreign countries.

<sup>107</sup> MICHEL, *supra* note 8, at 48.

<sup>108</sup> *Id.* at 51.

at the hands of an intimate partner because of deeply embedded societal norms. The second-generation laws in Latin America underscore the fact that women in general are more vulnerable to abuse because a number of social conditions exist to “exacerbate violence against them.”<sup>109</sup> In short, laws codifying victim rights and protections give female domestic violence victims the social distinction required for particular social group status because such laws are proof that society recognizes the “unique vulnerability” of women to suffer violence at the hands of a current or former intimate partner.<sup>110</sup>

### *C. Victims’ Rights Laws Reinforce Immutability*

Victims’ rights laws serve to reinforce the requirement that applicants for asylum based on membership in a particular social group must show that members of that group share a common “immutable” characteristic.<sup>111</sup> An immutable characteristic is that which an individual cannot, or at least should not be forced to, change.<sup>112</sup> Gender is immutable because the characteristic of being a woman cannot be changed.<sup>113</sup> Many victims’ rights laws serve to reinforce the immutability of gender and the accompanying vulnerabilities that make women more susceptible to persecution on account of their gender. In particular, the victims’ rights laws criminalizing Female Genital Mutilation or Cutting (FGM/C) underscore many of the inevitable vulnerabilities that women and girls face. FGM/C is defined as “any partial or total removal of the external female genitalia or any other injury of the female genital

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<sup>109</sup> ESSAYAG, *supra* note 4, at 15.

<sup>110</sup> *Id.*

<sup>111</sup> *Matter of A-B-*, *supra* note 7, at 317.

<sup>112</sup> *Matter of Acosta*, *supra* note 31, at 233.

<sup>113</sup> *Gender- Related Asylum Claims and The Social Group Calculus: Recognizing Women as a “Particular Social Group” Per Se*, COMM. ON IMMIGR. & NAT’LITY L. OF ASS’N. OF THE BAR OF THE CITY OF NY (2003).

organs for nonmedical reasons.”<sup>114</sup> The United States, along with many other countries, consider FGM/C a violation of women’s rights because of the physical and psychological trauma it produces on women and girls.<sup>115</sup> In 1996, the United States enacted a special provision as part of the IIRAIRA, making it a federal crime to perform FGM/C in the United States on girls under the age of eighteen.<sup>116</sup> The legislation specifically recognized that there is no exception for performing FGM/C because of tradition or culture.<sup>117</sup> In addition, at least thirty-five states have adopted legislation criminalizing FGM/C.<sup>118</sup>

In 2004, the 6th Circuit granted asylum to a victim of FGM/C based on her membership in a particular social group defined as “young women of the Tchamba-Kunsunte tribe who have not had FGM/C, as practiced by that tribe, and who oppose the practice.”<sup>119</sup> In the years since *Abay v. Ashcroft*, many courts have declined to follow this decision. Despite this pushback, in 2016, USCIS issued a policy memorandum recognizing FGM/C as a potential ground for asylum based on membership in a particular social group.<sup>120</sup> Considering this new policy initiative, several implications come to

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<sup>114</sup> *Female genital mutilation or cutting*, OFFICE ON WOMEN’S HEALTH, <https://www.womenshealth.gov/a-z-topics/female-genital-cutting> (last visited Nov. 25, 2019).

<sup>115</sup> *Id.*

<sup>116</sup> 18 U.S.C.A. at § 116(a).

<sup>117</sup> *Id.* at 116(c). It is worth noting that in 2018, a Federal District Court Judge declared the Female Genital Mutilation Act of 1996 to be unconstitutional under the commerce clause, *see United States v. Nagarwala*, 350 F.Supp.3d 613 (E.D. Mich. 2018). However, in January of 2019, the U.S. House of Representatives filed an appeal to this decision that has not yet been adjudicated, *see United States v. Nagarwala et al.*, No. 19-1015 (6th Cir. filed Jan. 3, 2019).

<sup>118</sup> *Female Genital Mutilation by State*, AHA FOUNDATION, <https://www.theahafoundation.org/female-genital-mutilation/fgm-legislation-by-state/> (last visited Nov. 25, 2019).

<sup>119</sup> *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004).

<sup>120</sup> *Female Genital Mutilation or Cutting (FGM/C) Outreach Strategy*, DEP’T HOMELAND SECURITY (Jan. 2017), [https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/DHS\\_FGM\\_Outreach\\_Plan\\_-\\_Final\\_-\\_1-17-17.pdf](https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/DHS_FGM_Outreach_Plan_-_Final_-_1-17-17.pdf).

mind for asylum-seeking victims of domestic violence. First, this policy memorandum indicates a potential pattern in asylum law whereby the federal government enacts federal legislation criminalizing the harm (The Female Genital Mutilation Act) and then several decades later, upon realizing the broader human rights concerns related to that harm, the government expands the scope of protection to refugees who have suffered that same harm (i.e., the policy memorandum). The natural parallel that comes to mind is the enactment of VAWA, recognizing the public and private depravity of domestic violence. The natural progression is for the United States to expand the scope of asylum law to protect domestic violence victims. Likewise, the exponential growth of the victims' rights movement through the passage of Marsy's Law and the like will have an inevitable impact on views of domestic violence as a serious human rights violation.

Additionally, FGM/C laws support the idea that "women" should be recognized as a particular social group. FGM/C in particular is a practice of extreme discrimination that only affects women, and therefore, victims merely belong to the particular social group of "women."<sup>121</sup> While the immutability of "gender" is hardly in dispute, the idea of conferring particular social group status to the entire social group of "women" raises concerns about the third and final requirement for particular social group status, which mandates that the social group in question be defined with sufficient "particularity." With social distinction and immutability satisfied, this article now turns to address the particularity requirement.

#### *D. Victims' Rights Laws Create "Particularity"*

Victims' rights laws encapsulate the vulnerabilities inherent in being a woman that make women a sufficiently particularized social group eligible for asylum. The now infamous dicta of *Matter*

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<sup>121</sup> Dr. Charlotte Proudman, *Female Genital Mutilation/Cutting: Asylum Claims and Appeals*, REFUGEE LEGAL AID INFO. FOR LAW. REPRESENTING REFUGEES GLOBALLY (May 20, 2018), <http://www.refugeelaidinformation.org/female-genital-mutilationcutting-asylum-claims-and-appeals>.



*of A-B-* declared that a particular social group must not be “too broad to have definable boundaries and too narrow to have larger significance in society.”<sup>122</sup> While the Attorney General does not provide clarity on how to meet this ambiguous standard, he does assert that “[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity requirement” for asylum as “broad swaths of society may be susceptible to victimization.”<sup>123</sup> Here, Sessions seems to indicate that domestic violence victims do not meet the particularity requirement because they fall within the social group of “private crime victims.”<sup>124</sup> However, victims of domestic violence, particularly women protected by victims’ rights laws and possessing some additional immutable vulnerability, represent a social group beyond their status as victims of private crime. Most notably, Sessions fails to address the plausible argument that gender is a sufficiently particularized social group.<sup>125</sup> Although *A-B-* reiterates that “not every ‘immutable characteristic’ is sufficiently precise to define a particular social group,” it does not explicitly address whether gender or sex are sufficiently precise immutable characteristics.<sup>126</sup> It is not clear whether this omission is because Sessions rejects the factual reality that women can be the targets of domestic violence *on account of* their gender, or because the attorney general believes that women as a population is too broad on its face to meet this standard. Nevertheless, the special protection needs of women and girls, indicated by the wave of victims’ rights legislation described above, weigh in favor of gender or sex being a sufficiently particularized immutable characteristic.

First, victims’ rights laws are proof that women are often persecuted because of the fact that they are women. This reality is

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<sup>122</sup> *Matter of A-B-*, *supra* note 7, at 336.

<sup>123</sup> *Id.* at 335.

<sup>124</sup> *Id.*

<sup>125</sup> For the sake of simplicity, I use gender and sex interchangeably in this section.

<sup>126</sup> *Matter of A-B-*, *supra* note 7, at 335 [internal quotations and citations omitted].

demonstrated in the emergence of laws criminalizing “femicide,” which is the murder of a woman or girl *because of the fact that she is a woman*.<sup>127</sup> Nearly every country in Latin America (with the exceptions of Cuba and Haiti) has adopted legislation criminalizing femicide.<sup>128</sup> Therefore, Latin American culture recognizes not only that women *can* be persecuted and targeted because of their gender, but they *are* targeted at an alarming rate. Additionally, one need not look beyond the rampant culture of “machismo” that permeates Latin American culture and inspired the victims’ rights movement in the region to accept the fact that women, particularly in Latin American society, are the targets of persecution because of their gender.<sup>129</sup> “Machismo” is a culture of male dominance that exacerbates violence against women and defines male sexual culture in terms of dominion and control.<sup>130</sup> In a machismo society, men often exercise their status as the dominant figures in society through violence against women.<sup>131</sup> Men are then able to target women because, as women, they lack control over their own sexuality.<sup>132</sup> Therefore, most female victims of violence in a machismo society are persecuted because of the fact that they are women and, therefore, seen as lesser. It is worth noting that in Footnote 9 of *Matter of A-B-*, Sessions explicitly declined to recognize the value of “conclusory assertions of countrywide negative cultural stereotypes” such as cultures of machismo, specifically as they

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<sup>127</sup> RAULS & ZIFF, *supra* note 3.

<sup>128</sup> Alicia Deus & Diana Gonzalez, *Analysis of Femicide/Femicide Legislation in Latin America and the Caribbean and a Proposal for a Model Law*, UN WOMEN 32, <https://www2.unwomen.org/-/media/field%20office%20americas/documentos/publicaciones/2019/05/1final%20analysis%20of%20femicide%20legislation%20in%20latin%20america%20and%20the%20caribbean-compressed.pdf?la=en&vs=409>.

<sup>129</sup> *Machismo Sexual Identity*, HUMBIO129, [https://web.stanford.edu/group/womenscourage/Repro\\_Latin/ekobash\\_HIVmachismo\\_Latin.html](https://web.stanford.edu/group/womenscourage/Repro_Latin/ekobash_HIVmachismo_Latin.html) (last visited Dec. 1, 2019).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

pertain to the particularity requirement.<sup>133</sup> Sessions criticized *Matter of A-R-C-G* for basing its analysis of machismo culture on an “unsourced partial quotation from a news article eight years ago.”<sup>134</sup> However, the extensive research that has been conducted into machismo culture in the years since *A-R-C-G* was handed down serves to debunk Sessions’ lack of appropriate evidence argument on this topic.

Once it is accepted that women are often targeted because of the fact that they are women, it becomes clear that the social group of women is sufficiently particularized by the existence of victims’ rights laws. The United Nations High Commissioner for Refugees (UNHCR) Handbook “explicitly identif[ies] ‘sex’ as an ‘innate characteristic’ on which a social group claim might be based.”<sup>135</sup> Moreover, UNHCR recognizes women as a “clear example of a social subset defined by innate and immutable characteristics. . . and who are frequently treated differently than men.”<sup>136</sup> The argument that “women” as a social group is not particularized enough to constitute a cognizable social group merely reflects a lack of understanding of the centuries of gender norms that have confined women, particularly in Latin America, to a consistently persecuted social group.

The second-generation laws that emerged out of the Convention of Belém do Pará typify vulnerable classes of women based on other immutable characteristics such as ethnicity, sexual orientation, national origin, age group, socioeconomic status, marital status, or disability.<sup>137</sup> Such laws evidence society’s understanding that even within the diverse social group of “women,” there are distinct particularities that make most women targets for

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<sup>133</sup> *Matter of A-B-*, *supra* note 7, at 336.

<sup>134</sup> *Id.*

<sup>135</sup> *UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender*, UNHCR ASYLUM LAWYERS PROJECT (Oct. 2016).

<sup>136</sup> *Id.*; *Guidelines on Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (2002), HCR/GIP/02/01.

<sup>137</sup> *ESSAYAG*, *supra* note 4, at 15.

persecution based on their gender.<sup>138</sup> Moreover, *Grace v. Whitaker* reiterates that the nexus standard allows for “mixed motives” of persecution, “so long as the one central reason for persecution is a protected ground.”<sup>139</sup> Therefore in the context of these second-generation laws which foresee the intersection of gender and other circumstances contributing to an increased likelihood of persecution, the asylum-seeker who was targeted because she was a woman, albeit a poor or married woman, meets the nexus requirement.

While this argument is often rejected as too broadly expanding the scope of the Refugee Convention so as to impose upon states obligations to which they did not consent, I posit that expanding the scope of the refugee convention to include women as a protected class is not without merit. The world has seen numerous instances of grave human rights violations where victims were targeted because of their race, religion or nationality, and nevertheless the victims held the majority population in the country or region. For example, the South African Apartheid of the 1950’s involved country-wide persecution against black South Africans, who held the majority population by a landslide.<sup>140</sup> Under the convention, the United States would not refuse the black victims of apartheid asylum because their classification as black South Africans was not particularized enough. For the many reasons put forth in this section, gender is a sufficiently particularized social group that satisfies the particularity pillar of the asylum criteria.

## V. ADDRESSING COUNTER-ARGUMENTS

### A. Government Must Be “Unwilling or Unable” To Protect

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<sup>138</sup> *Id.*

<sup>139</sup> *Grace*, *supra* note 33, at 130.

<sup>140</sup> Chimere-dan, O., *Apartheid and demography in South Africa*, 7 PUBMED 26 (1992).

Even where victims' rights laws are present, governments may still prove unwilling or unable to protect victims of domestic violence. Where the alleged persecutor in an asylum claim is unaffiliated with the government, the applicant must show that her government is "unwilling or unable to protect her."<sup>141</sup> The applicant cannot rely solely on the fact that the government "[has] difficulty controlling the behavior," but rather they must show that the government has "a complete helplessness to protect the victim."<sup>142</sup> Therefore, a fundamental flaw arises if countries have laws in place that effectively protect domestic violence victims because then the government may be willing and able to protect that individual. The reality though, is that these laws, although demonstrative of particularity and social distinction, lack the efficacy and implementation needed to impale an otherwise viable asylum claim. Victims of domestic violence should not be precluded from qualifying for asylum merely because there are laws in place that recognize them as rights bearers, where the government has proven it is unwilling or unable to effectuate these protections.

Despite the wave of legislation that has hit Latin America in an attempt to combat gender-based violence, enforcement of these laws remains obsolete.<sup>143</sup> Although there may be "legal stock" available to citizens in Latin America to achieve justice through private prosecution or other means, the region has nevertheless "become known for lacking institutions that uphold the rule of law and protect human rights."<sup>144</sup> Even where international, regional, and domestic legislation is in place to champion victims' rights, cultural norms such as machismo pose a significant barrier to protection, safety, justice, and enforcement for women. Author Verónica Michel eloquently describes the balance between widespread impunity and how having "rights on the books" still matters in countries where enforcement is ineffective or obsolete.<sup>145</sup>

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<sup>141</sup> *Matter of A-B-*, *supra* note 7, at 317.

<sup>142</sup> *Id.* at 336-37 (quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)).

<sup>143</sup> RAULS & ZIFF, *supra* note 3.

<sup>144</sup> MICHEL, *supra* note 8, at 4, 169.

<sup>145</sup> *Id.* at 63.

In analyzing the role of private prosecution in Guatemala, Chile, and Mexico, Michel never strays from the reality that these states, and many states in Latin America, have a high degree of structural impunity that makes access to justice for victims *nearly* unattainable.<sup>146</sup> Nevertheless, Michel posits that with the appropriate resources and support, the existence of private prosecution on the books is a means by which victims may have improved access to justice.<sup>147</sup>

The uniquely intimate nature of domestic violence and the inevitably high rates of underreporting make it difficult to determine both the prevalence and the rates of investigation and prosecution. Anecdotally, many women like Eliza, that I encountered at the U.S. southern border, reported they either went to the police themselves, or knew someone who did, and the police did not do anything to help them. One comprehensive study of violence against women in Latin America found that the percentage of women who reported physical or sexual violence by a partner ranged from 17% in the Dominican Republic up to 53.3% in Bolivia.<sup>148</sup> The same study conducted an analysis of women who sought help and asked women why they did not seek help for intimate partner violence. The study shows that the percentage of women who sought help from the police, court, or other protection agency ranged from 6.5% in Ecuador in 2004 to 27.1% in Jamaica in 2008/9.<sup>149</sup> For women who experienced intimate partner violence in the past 12 months, the most common reasons that women gave for not seeking help included: the belief that they could solve it on their own; belief that help was “unnecessary” or violence was “normal”; fear of retaliation

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<sup>146</sup> *Id.* [emphasis added].

<sup>147</sup> *Id.*

<sup>148</sup> This specific statistic was among women who were ever married or in union aged 15-49. Thus, this does not include non-married women who have experienced domestic violence. Sarah Bott, et al., *Violence Against Women in Latin America and the Caribbean: A comparative analysis of population-based data from 12 countries*, WASHINGTON, DC: PAN AMERICAN HEALTH ORGANIZATION 26 (2012).

<sup>149</sup> *Id.* at 59.

from their partner; shame; and lack of trust of anyone else.<sup>150</sup> Although these numbers are not necessarily indicative of the exact percentages of domestic violence cases that go unreported or uninvestigated by local governments, these studies and anecdotal experiences underscore the cultural reality of machismo that renders government protection nonexistent. Furthermore, although thirty-two out of thirty-three Latin American and Caribbean countries have made a commitment to protect victims of gender-based violence through the ratification of the Convention of Belém do Par, only two countries have enacted specific national action plans on domestic violence as of 2016.<sup>151</sup> A national action plan is a policy instrument that “seeks to regulate and operationalize merely declarative laws.”<sup>152</sup> In other words, national action plans give substantive enforcement power to the existing laws that otherwise operate merely as a means of identifying and grouping a common class of victims.

Therefore, it is the *existence* of victims’ rights laws that indicate society recognizes a certain population of people as socially distinct and particularized, but the lack of enforcement of such laws within the criminal justice system overcomes the argument that the government in these countries is willing and able to protect such social groups.

*B. Particular Social Group Must Exist Independently of the Harm Inflicted*

In *Matter of A-B-*, Sessions found that “El Salvadoran women who are unable to leave their domestic relationships where they have children in common” was not a particular social group, in part, because the particular social group “must exist independently of the harm asserted” in the asylum application.<sup>153</sup> Thus, crime victims cannot define their particular social group based on the

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<sup>150</sup> *Id.* at 62.

<sup>151</sup> ESSAYAG, *supra* note 4.

<sup>152</sup> *Id.*

<sup>153</sup> *Matter of A-B-*, *supra* note 7, at 321.

crime that has been executed against them. Sessions reasons that in domestic violence cases, the abuser does not target his partner *because of* the fact that she is a married woman unable to leave her relationship, rather, he targets her “because of his preexisting personal relationship with the victim.”<sup>154</sup> This reading of domestic violence claims neglects the fact that male abusers do in fact target their partners *because* they are women and *because* they are trying to reinforce the patriarchal power structure of their relationship.<sup>155</sup> Therefore, social groups for gender-based violence need not be defined in terms of the harm experienced. Gender alone is a sufficiently particularized and cognizable group that is recognized in many societies, particularly in Latin America, as a group that is inherently vulnerable to certain acts of violence. In fact, in a rare moment of concession, Sessions recognizes that “there may be exceptional circumstances when victims of private criminal activity could meet [the nexus] requirements.”<sup>156</sup> Therefore, although domestic violence is arguably considered “private criminal activity,” it is also a form of persecution based on the woman’s gender that independently meets the nexus requirement.

## VI. CONCLUSION

In the United States, intimate partner violence is responsible for 15% of all violent crime.<sup>157</sup> That is a staggering statistic in a nation that purportedly values gender equality. To categorically deny all victims of domestic violence from seeking asylum in the United States is to deny that there is a gendered power disparity in society which causes women to disproportionately experience violence on account of their gender. Women face power disparities all around the world that make them inherently vulnerable to abuse. The World Health Organization estimates that nearly a third of all

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<sup>154</sup> *Id.* at 339.

<sup>155</sup> *Machismo Sexual Identity*, *supra* note 129.

<sup>156</sup> *Id.* at 317.

<sup>157</sup> *Statistics*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/statistics> (last visited Nov. 26, 2019).



women worldwide who have been in a relationship have experienced some form of intimate partner violence.<sup>158</sup> Without discounting the experiences of men who also experience domestic violence at the hands of women, the fact is that women experience such abuse at a much higher rate than men.<sup>159</sup>

The Refugee Act extends asylum protection to members of a “particular social group” because the drafters knew they could not predict every form of persecution that would inevitably exist in the decades to come. In the middle of the twentieth century, domestic corporal punishment was still recognized as socially acceptable in many developed countries around the world. At that time, the drafters could not have predicted that gender-based domestic violence would lead to such widespread persecution against women. The “particular social group” provision was designed to offer asylum to newly emerging persecuted populations who remain unprotected by their own government. The existence of victims’ rights laws coupled with their lack of efficacy, particularly in Latin America, indicates that domestic violence victims are a recognized social group that governments are unwilling and unable to protect.

Recognizing the need to analyze cases on an individual basis, the existence of victims’ rights laws is just one of many arguments to be made in favor of granting victims of domestic violence particular social group status. Nevertheless, the emergence of the victims’ rights movement and the particularity with which such laws protect victims of domestic and gender-based violence is an astounding testament to the social distinction, immutability, and particularity of this social group of women who are uniquely vulnerable to domestic abuse.

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<sup>158</sup> *Violence against women*, *supra* note 22.

<sup>159</sup> *Id.* One in four women versus one in nine men experience severe intimate partner physical violence while one in seven women and one in twenty-five men have been injured by a partner.