

Creeping Towards Justice: Domestic Violence and the Sovereign State in Asylum Law

by

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A thesis submitted in partial fulfillment of the requirements
for graduation with Honors in Politics.

Whitman College
2016

Certificate of Approval

This is to certify that the accompanying thesis by Joshua Y. R. Rubenstein has been accepted in partial fulfillment of the requirements for graduation with Honors in Politics.

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April 15th, 2016

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Abstract

In 2014 the United States Board of Immigration Appeals published the decision *Matter of A-R-C-G-*, which sets precedent recognizing domestic violence as potential grounds for asylum. Lawyers and immigrant advocates celebrated this recognition of gendered violence in U.S. asylum law but criticized its narrow scope. The thesis argues that the logic used in the *Matter of A-R-C-G-* decision would better support an expansive recognition of gender-based violence through a gender-plus-nationality particular social group rather than the articulated group “married women in Guatemala who are unable to leave their relationship.” Furthermore, the asylum apparatus struggles to understand non-state persecutors, mischaracterizing domestic violence as a private issue. Even when recognizing domestic violence as a political problem the analysis focuses on the state as persecutor by emphasizing the action/inaction of the police. This gaze on the state emphasizes nation-states as the center of analysis in asylum, reinforcing sovereign immigration control and limiting the nature of what persecutions are visible to asylum. However, the expansion of asylum to include domestic violence demonstrates the possibility of incorporating currently unrecognized forms of persecution in asylum and re-envisioning to whom the state is responsible.

Acknowledgements

This thesis could not have happened without the help of many people. Thank you to my parents for a lifetime of love and support, putting me through college, and encouraging me to challenge myself.

I would like to thank my first reader Professor Aaron Bobrow-Strain for his feedback and advice throughout the thesis process, including “reading me the riot act” when I was struggling to narrow down my topic and make progress on the thesis. Professor Bobrow-Strain was also instrumental in inspiring my thesis as he facilitated my interest in borders and migration during his US-Mexico Border class and the experiential learning trip to the Borderlands that he organizes. I would also like to thank my second readers, Professor Melissa Casumbal-Salazar and Professor Jack Jackson for the time they dedicated to reading about the intricacies of asylum law and providing feedback on my thesis.

A further thank you to immigration lawyers Tania Linares Garcia with Northwest Immigrant Rights Project, Elizabeth Hawkins with Hawkins Law Group, and Jessica Binzoni with the National Immigrant Justice Center. They generously shared their time with me in their willingness to help me understand the intricacies of immigration and asylum law, and pushed me towards areas of interest within the field.

In addition to those who worked with me directly on my thesis many other professors have had a profound impact on my thinking and academic experience at Whitman. Specifically, Professor Apostolidis’s State of the State for Washington

Latinos program pushed me to learn deeply in many ways. Thesis was a smoother process for it.

I would also like to acknowledge the friends that helped me through the thesis process. Ari Kaufman and Aviv Caspi, your years of friendship and critical thinking in the mountains shape my thoughts. Travis Wheeler, you kept my spirits up for the last year and put up with my thesis funks as only the best housemate can. Finally, thank you to Alex Brott, Lian Caspi, Ryan Nesbitt, Nevin Schaeffer, Jack Bynum, Sam Traylor, Dessie Weigel, Lish Riley, Kevin Wallin, the Whitman Cycling Team, and many others for sharing in the adventures, food, and joy in life that keep me sane and happy. I owe the capacity to write this thesis to all of you.

Introduction

On November 19, 2015 the U.S. House of Representatives voted to “effectively halt” the resettlement of Syrian refugees in the United States (DeBonis 2015). Days earlier twenty-five governors refused to accept refugees resettling in their states (Healy and Bosman 2015). Coming out of the reaction to the bombings in Paris and President Obama’s pledge to allow 10,000 Syrian refugees into the U.S., this move continues an alarming history of the U.S. refusing to acknowledge and accept refugees, people recognized as having no other options but to flee their homes. During WWII the United States refused to accept the 937 Jewish refugees aboard the ship the *St. Louis*, many of whom later died in Nazi concentration camps. Immigration scholars Carol Bohmer and Amy Shuman point out “In retrospect, the plight of the *St. Louis* has come to represent a moment of national shame. Nevertheless, we continue to do similar things every day” (Bohmer and Shuman 2008, 1).

Asylum cases for domestic violence survivors demonstrate both the daily failure of United States asylum law and its potential to overcome those failures. In 2014 the landmark asylum case *Matter of A-R-C-G-* set a precedent recognizing domestic violence as potential grounds for asylum in the United States (Musalo 2014). The inclusion of domestic violence in asylum law represents a step towards recognition of the ways gender shapes persecution. Women “encounter particularized forms of persecution on the basis of their gender identities even during times of peace and relative stability” and “have been excluded from protection precisely because of a refusal to fairly apply the refugee definition in an unbiased and neutral fashion” (Casey

2012, 989; Musalo 2014, 48). Though asylum law historically focused on persecution at the hands of the asylee's home state, new developments in the law begin to recognize violence by non-state actors such as domestic partners. These efforts politicize persecutions that have historically been excluded from asylum due to the mischaracterization of domestic violence as a private problem. However, the legal precedents for asylum remain limiting for women fleeing gender-based violence. Despite current imperfections, domestic violence asylum law is expanding the possibilities for asylum and legal status for migrants in this time of restrictive immigration policies. Therefore, examining the ways gender-based asylum expansion occurs and the legal arguments grounding gender-based asylum decisions can illuminate the responsibilities taken up by the United States, its current failings, and the potential for inclusion of other categories of asylum seekers.

After WWII, the United Nations created the 1951 Convention relating to the Status of Refugees (here on referred to as the Refugee Convention) to provide a framework for the international community to help stateless people and those fleeing persecution (Foster 2007, 1). The convention defines the term refugee, and based on this countries have developed their own refugee and asylum laws. Though the categories of refugee and asylee stem from the same body of laws, refugees are recognized as such outside the borders of the host country, while asylees apply for protection either at the border or once they are already within the host country. Scholars often use the term refugee for both groups because location is the primary difference between them and the law that defines both stems from the 1951 Refugee Convention. To meet the definition of refugee individuals must demonstrate that:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (Convention 1951, 14).

Meeting this definition requires 1) suffering persecution, 2) belonging to one of the groups listed, 3) suffering persecution *due to* this group membership (also known as nexus), and 4) being unwilling or unable to find protection in the home country's government. Many asylum applicants find difficulty in arguing their case in the nexus clause ("for reasons of"), which connects persecution with belonging to a particular social group (PSG). Those seeking asylum must represent themselves within the refugee definition to the immigration judge deciding their case. Some persecutions, such as domestic violence, may not easily fit into the legal frameworks that have developed around asylum, even if one can argue that they fit the refugee definition as written in the Refugee Convention.

In August 2015 the United Nations High Commissioner for Refugees published a news article explaining the importance of distinguishing refugees and migrants, because nations have responsibilities toward refugees that they do not have towards migrants. This distinction rests on the difference between forced migration due to persecution and unforced migration by people "mainly to improve their lives by finding work" (Edwards 2015). The difference between a wealthy migrant who

voluntarily moves from Mexico to the U.S. to work a high paying job at a well established corporation, and a political dissenter fleeing the violence of the Mexican government may seem relatively clear. However, this distinction does not always appear so cleanly. For example, fleeing domestic violence may or may not provide grounds for asylum in the United States and until 2014 it never did. In these cases the line between migrant and refugee becomes blurred, as some domestic violence survivors begin to receive limited recognition as potential asylees. The efforts of immigrant advocates to force the United States asylum apparatus to grapple with gender-based violence and non-state actor persecution keeps the boundaries of asylum in flux and distinction between migrant and refugee uncertain.

Despite limitations of asylum for individual migrants and its reification of states' sovereign authority, asylum law provides an incredibly useful tool for migrants who can get legal status in a host state. The difference between asylum on the one hand, and detention and deportation on the other can be as drastic as life or death. Therefore, efforts to expand understandings of asylum law to recognize domestic violence are important for individuals now and for future applicants who will then qualify for the protections of asylum. These efforts politicize and bring into the realm of government responsibility persecution that was previously considered private. By recognizing previously ignored persecutions as political problems, the movement to recognize non-state actors as persecutors in domestic violence asylum cases provides insight into logics to expand asylum for other groups who do not fit the traditional notion of asylum, such as those categorized as economic migrants or climate refugees.

Literature Review

As Hannah Arendt articulates in “The Decline of the Nation State and the End of the Rights of Man,” the “right to have rights” remains tied to nation-states (Arendt 1951, 296). She says “before this what we must call a ‘human right’ today would have been thought of as a general characteristic of the human condition, which no tyrant could take away” (Arendt 1951, 297). In response to the mass statelessness during WWII that exposed the “right to have rights” as non-universal, the international community gave the concept of asylum a legal framework. Asylum law stems from the 1951 Refugee Convention, “the key instrument in international law for the protection of refugees” (Foster 2007, 1). Now, popular and scholarly discourse on migration often highlights the distinction between refugees and migrants, the former understood as *forced* to flee their country for “legitimate” reasons of persecution, while the latter are seen as *voluntarily* leaving home to better their conditions. Thanks to international law, countries have ethical and legal obligations to people forced to flee their countries for reasons of persecution. As a result, asylum law has become an important avenue for immigrants to gain legal status in western countries. These states often tightly control and limit the opportunities for legal migration so migrants have few other options besides asylum. In theory states are required to welcome all migrants who meet the definition of asylee. In legal terms, refugees and asylees are people eligible for refugee status or asylum under the Refugee Convention *and* the asylum law that individual nation-states have written stemming from international law. However, new cases provide regular opportunities to reinterpret asylum law, making even the legal

definitions of refugee dynamic. In recent years, scholars have begun to highlight the gender persecutions excluded from refugee law and the blurry boundary between economic migrants and political refugees. Musalo argues that “historically, the violation of women's rights was not seen as an issue of concern within the international human rights framework” leading asylum law to ignore gender-based violence (Musalo 2015, 46). Discussing a similar scenario of asylum exclusion, Bohmer and Shuman argue, “the conditions that drive people from their homes do not necessarily create a distinction between economics and the need for asylum” (Bohmer and Shuman 2008, 3). Given the fact that the United States has a history of mischaracterizing asylum, “the questions we ask, as well as the way we ask them, about the identity of the applicants, the credibility of their stories, and the possibility that they will face persecution should they return to their countries, may not be the most necessary or useful means for determining who is a genuine asylum seeker” (Bohmer and Shuman 2008, 3). This points to a need to alter the definitions of asylee and the mechanisms for determining who deserves asylum.

Recent domestic violence asylum cases in the U.S. demonstrate asylum law’s capacity for change, albeit slowly and within certain bounds (Musalo 2014). In fact, the area of gender based asylum claims has recently expanded in American asylum law. Examining approaches to the definition of asylum in scholarship and the granting of legal status with regards to domestic violence cases will inform how the U.S. frames people as deserving protection, what responsibilities the government identifies, and the broader implications of possible logics to expand asylum for domestic violence

survivors. In addition, as the next section will show, this also helps us rethink the relationship between sovereignty and migrants.

Asylum and the State

Put bluntly, “asylum is dying the death of a thousand cuts” (Bohmer and Shuman 2008, 265). While immigration law falls under the domain of national sovereignty, refugee law stems from a state’s international treaty obligations and thus states may not exclude refugees in the same manner a state might restrict immigration (Nathwani 2003, 2). Responsibility to international law overrules nation-state sovereignty, implying the need for a “generous refugee policy” that prevents states from unduly restricting asylum (Nathwani 2003, 85).

Understanding the implications of developments in gender-based asylum claims requires an understanding of the relationships among states and individuals. As scholar Nick Gill points out, “there is a strong association between the notion of a refugee and the notion of states” (Gill 2010, 626). Typical understandings of sovereignty suggest that each nation-state functions as a sort of sealable container. In this model, states have the sovereign right to seal their borders making the state impermeable to non-citizens, but within the sphere of social relations inside the sovereign shell the state has obligations to protect its members (Bosniak 2008, 38). Such an understanding of a hard boundary around the state and the sovereign right to exclude non-citizens is needed to justify exclusive and violent immigration policies such as border militarization, and detention and deportation. However, this understanding of the bounded state also

provides a productive identifier in asylum law. The container-like nature of states in this understanding of the world not only marks those outside as excludable, but also marks those within as belonging to a specific state. Thus, when people cross borders, even if they are effectively stateless, they carry with them the identifier of their previous home state. As Gill says, “The notion of refugees is, from the outset, therefore a contingent one: it rests upon the Westphalian ideal of a system of interlocking nation states that traverse the globe, implying that the experience of not being under any state’s authority and protection is both absurd in theory and unusual in practice” (Gill 2010, 626). Clearly, this belief in the clean nature of states and the unusual nature of refugees does not reflect reality, as various refugee crises at the borders of the U.S. and elsewhere become focal points of national attention on a regular basis, and immigration has always been a focus of United States politics and policy.

In contrast to the notion of impermeable and bounded nation-states, transnational theorists suggest that in the current political landscape the nation-state is no longer an isolatable center of analysis. “In their view, the transnationalization of migratory patterns has served to undermine the nation state as a discrete destination or container of migrant experiences, communities and networks” (Gill 2010, 629-630). Understanding the experiences of migration and state power as always dynamic and contested allows for a malleable notion of the state that can capture its contradictions and multiplicity of motivations and actors.

Given the close connection between the notions of the sovereign state and refugees, and their reliance on a clearly flawed model of world political order, asylum, the policy designed to rectify the problems facing refugees, in fact strengthens the need

for state sovereignty in ways that helps produce the condition for refugees in the first place. As Gill puts it, “Popular and policy discourse depicts refugees as lacking something that only a state can provide. What better way to recommend the worldwide system of nation states than through the abjection of those outside it?” (Gill 2010, 626). In fact, the legal standard to get asylum requires that asylees prove statelessness, because their home state was “unable or unwilling” to protect them, and seeks to remedy their persecution by offering state protection. Though asylum appears to be a breach in sovereignty in service to humanity, breaking down sovereignty would render the notion of a state offering special protection to refugees even while excluding migrants nonsensical.

Connecting asylum to human rights and international law can change who gets asylum recognition, but the underlying structure of sovereignty remains. If there were no nation-state-based restriction on immigration, asylum would not be necessary. Foster challenges the current legal understanding of refugees by connecting asylum to human rights. Focusing on breaches to human rights emphasizes state obligations to international human rights law. This seems to imply a responsibility to human plurality as greater than the power of the sovereign state. In reality, asylum cases focus on state failure, so that instead of challenging sovereignty asylum becomes a recognition that another state has simply failed in its sovereign duties and the asylum granting state steps in, reinforcing its state-ness by providing sovereign protection to the asylee. Scholars who seek to expand asylum shift the discourse and lived realities of refugees through the direct impacts of the most relevant legal apparatus. In doing so they implicitly remain caught in the binary they work to complicate, that of the refugee as

acknowledged by asylum granting nation-states and the migrant excluded from asylum, again defined by the nation-states. This approach, vitally important for real people in a legal sense, leaves the categories morphed but retains state sovereignty as a definitive determinant of migration.

The contradiction of asylum taking priority over sovereignty yet also reinforcing sovereignty via its implementation raises questions around both sovereignty and asylum. Embracing asylum policies inclusive of all types of asylum claims that meet Refugee Convention requirements provides an opportunity to reshape sovereign authority and responsibility around the people present within a territory rather than reinforcing static notions of state sovereignty. That is, a democratic state would represent all citizens, as well as others within the national territory that have no other state representing them. Sovereignty, the authority to control, would then stem from the citizens and the stateless, redefining who belongs within the state and to whom the state belongs. However, even this reimagining of sovereignty focuses on people who can invoke asylum by fleeing across international borders and telling their stories in ways recognizable to asylum decision makers.

Challenging the Category of “Refugee/Asylee”

Where those focused on refugees often seek to rehabilitate the legal apparatus of asylum, other thinkers challenge the notion of the refugee as a focal point. Patricia Tuitt posits, “with the increased awareness that many are ‘displaced’ from mainstream refugee discourses” there comes an imperative to recognize that refugee discourse “presents all [human rights] abuses as having an endemic mobilizing force” (Tuitt

1999, 106). In legal definitions displacement across international borders “characterizes the legal refugee above all other social constructions” (Tuitt 1999, 108). Though the supposed purpose of asylum is to overcome persecution by providing a new space to the refugee, its focus on territorial space privileges those who cross borders rather than those suffering from persecution. It in fact defines refugees not through their persecution but through their exile. The persecution becomes secondary to movement across borders. In this way asylum law again reinforces states as cognizable categories to strengthen. Legal theorists such as Nathwani and Foster hope to expand the definitions of persecution but do not fundamentally challenge it. In contrast, Tuitt describes the gendered production of asylum seekers as predominantly male because “women, after all, are rendered less mobile by structural conditions, cultural patterns and above all by a ‘broader universe’ which privileges the public sphere over the private sphere in terms of the general recognition of and thus by extension access to, human rights” (Tuitt 1999, 113). In the case of gender, asylum falls into the trap of omission. In an asylum claim “persecution may be characterized by a government’s *failure to act*” or “omission” as well as its direct actions (Foster 2003, 202). By this logic, asylum-granting countries continue the persecution of migrant women by omitting recognition of gender-based persecution. The institution of asylum funnels resources and sympathy to sectors of persecuted populations who cross borders and can tell their story in the way the system recognizes. This implicitly casts as undeserving of state protection those who cannot appear to asylum law because they flee gender-based, economic, or other unrecognized persecutions. Even if asylum encompassed all these groups it must remain one tool among many to overcome

persecution, because a focus on refugees serves to hide persecutions that continue to take place both in the U.S. and elsewhere. Noting these limitations to asylum, this thesis will primarily engage with the possibilities in asylum expansion.

Making the Personal Political: Changes to Gender-based Asylum Law

Accepting that asylum law does have material benefits for those recognized as asylees, that the law can and does change over time, and that controlled borders and a role for asylum will not disappear immediately raises questions about potential opportunities to shape the legal structures of asylum. As demonstrated by the progression of several cases dealing with gender-based persecution, the definition of refugee does change and can expand and the way it does so has direct implications for future asylum applicants (Musalo 2014).

The definition of refugee in the 1951 Refugee Convention requires that asylum seekers and refugees prove they were persecuted on account of “race, religion, nationality, membership in a particular social group or political opinion” (Convention 1951). Notice that gender was not included in the Refugee Convention as grounds for asylum. In gender based asylum claims the claimant tends to argue they belong to a particular social group beyond the groups listed in the definition (Kostes 2015, 225). For example, in *Matter of Kasinga* the Board of Immigration Appeals (BIA) determined that “Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a “particular social group” within the definition of the term “refugee” (*Matter of Kasinga* 1996). In

this instance the BIA recognized a social group defined around gender discrimination, but rather than just saying women at risk of being subjected to female genital mutilation the BIA focused on one particular tribe. Narrowly defined particular social groups make it difficult for women suffering similar abuse in other settings to use previous cases as precedents.

In addition, though female genital mutilation was recognized as grounds for asylum, the 1999 case *Matter of R-A-* set precedent against granting asylum to domestic violence survivors. In the initial case Ms. Alvarado was granted asylum after fleeing horrific domestic violence in her home country of Guatemala. However, the U.S. government appealed and the BIA overturned the immigration judge, rejecting Alvarado's asylum claim (Musalo 2014, 47). In the words of scholar Michael Heyman, "The majority of the Board of Immigration Appeals simply could not grasp the fit of domestic violence within asylum law" (Heyman 2005, 730). The BIA acknowledges that the domestic violence Alvarado suffered meets the definition of persecution, and that she sought government protection that never materialized. However, they find that 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"—does not fit asylum requirements in a way that makes sense and therefore the persecution does not occur *on account of* Alvarado belonging to that group (Kostes 2015, 227). Heyman scathingly criticizes the BIA's failure to recognize the private sphere as a site of government responsibility (Heyman 2005, 733). In *Matter of R-A-* the BIA set a precedent defining domestic violence as outside the realm

of the state and therefore domestic violence survivors as undeserving of the protection of asylum.

Distinguishing harm as political rather than private is crucial to making successful asylum claims. Asylum deals with political situations involving the failure of state government. For violence that exists outside the realm of the state's obligation there cannot be state failure, and thus no asylum. Even in *Matter of A-R-C-G-* in 2009 the immigration judge dismissed horrific domestic abuse and police inaction as a private crime (*Matter of A-R-C-G-389*). However, as the feminist mantra "the personal is political" emphasizes, the deeply personal nature of domestic abuse and rape and the fact that it often occurs outside the public eye does not remove it from the realm of politics and the state. Treating these persecutions as private is itself a political move that reinforces persecution. The historical societal indifference towards gender-based violence due to its nature as supposedly private issue is one of the reasons that asylum law has failed to recognize gender-based violence (Musalo 2015, 246). Framing instances of domestic violence as disconnected private problems makes it impossible to claim a unified PSG and connect it to persecution for asylum purposes. As advocates for women's rights have integrated women's rights within the politicizing discourse of human rights, gender-based violence has gained recognition as a political problem (Musalo 2015, 46). Making asylum fully functional as a mechanism for dealing with persecution and statelessness means accepting all political persecution as grounds for asylum. This begins with recognizing gender-based violence as a realm of public responsibility. By acknowledging that "serious harm rising to the level of persecution" is a political harm even when committed by non-state actors, and that systemic

violence demonstrates a state's failure to protect its people, asylum can better fulfill its role as humanitarian policy.

In response to the limited understanding of state failure demonstrated in *Matter of R-A*- scholars propose using human rights as a framework to expand state responsibility and asylum (Heyman 2005, 738; Foster 2007). Since government persecution can occur through omission as well as positive action, the omission of domestic violence from the sphere of asylum constitutes a persecution by the U.S. against asylum seeking domestic violence survivors. Heyman finds an “emerging norm” from various legal cases discussing what makes a “failed state” and posits “state obligations should not merely be expressed negatively; rather, states must undertake positive measures to protect their entire populations. Thus under the evolving norm, failure consists in not footing these positive obligations effectively” (Heyman 2005, 736-737). Nations have a positive obligation to protect basic human rights, which “imposes the further obligation on the state to prevent abuses in the first place” (Heyman 738). In the case of domestic violence, the fact that a non-state actor commits harm does not remove the violence from the purview of the state. Gill asserts that asylum discourse falsely conceives of states as separate from society (Gill 2010 628). Embracing the mutually constitutive nature of society and state leads to the conclusion that the state and society together engage with domestic violence, and as a common personal and societal problem in Guatemalan society and elsewhere it must also be a common problem for the state. In cases of domestic violence immigration judges should use this view to find persecution and fulfillment of the nexus clause

(persecution *on account of* particular social group) in the systemic failure of the state to protect positive rights enacted through the behavior of the non-state actor.

Understanding states as having positive responsibility implicates new visions for asylum law and the meaning of nation-states. As Heyman says, “an asylum grant does not punish the failed state, but protects the asylum seeker who, for whatever reason, could not turn to her home country for protection” (Heyman 734). In this case nation-states have a responsibility to protect human rights within their jurisdiction as part of sovereign control over territory. The responsibility to grant asylum stems from international agreements, but is actualized in relation to those fleeing persecution as a result of failed states. In asylum, the host nation-state becomes defined by its duty to protect human rights within a territory. Generous asylum policies make the state responsible to all people present within the nation’s territorial boundaries who do not have a state to stand for them, not only citizens.

In 2014, jurisprudence on domestic violence and asylum took an unexpected turn with the case *Matter of A-R-C-G-* when the BIA granted asylum in a case with many similarities to *Matter of R-A-*. Again a Guatemalan woman comes to the U.S. to escape horrific domestic violence, but this time the BIA accepts the PSG “married women in Guatemala who are unable to leave their relationship” (*Matter of A-R-C-G-* 2015). For the first time in the U.S. a precedent setting decision explicitly acknowledges domestic violence as grounds for asylum. However, the narrowness of the PSG defined in this case again brings into question which future gender based asylum claims will succeed.

The narrow definitions of particular social groups serve to limit the responsibilities of the state, because states can reject asylum claims despite recognizing persecution. Defining accepted particular social groups around gender-based persecution has proven difficult. Kostas argues that though *Matter of A-R-C-G* sets an important precedent in the recognition of domestic violence as grounds for asylum, the particular social group recognized remains far too narrow. She argues for a “gender plus formulation” that identifies particular social groups by “gender plus some sort of geographic or tribal identity (for example, gender plus nationality)” (Kostas 2015, 232). This formulation recognizes gender-based violence as the result of social norms and state negligence, rather than focusing on women’s inability to leave relationships, which often stems from the abusive nature of the relationship (Kostas 215, 232).

Musalo points to the “other forms of gender violence that frequently arise in claims for protection raised by female asylum seekers” in her call to interpret *Matter of A-R-C-G* in coordination with *Matter of Kasinga* as “legal principles... [that] chart an analytical approach for gender claims in general” rather than narrow precedents for FGM and domestic violence cases (Musalo 2014, 48). Musalo aligns herself with Kostas and Heyman, saying “an unbiased application of the law - particularly of the terms ‘persecution’ and ‘particular social group’ - will result in protection for women who fear grave harms because of their gender in situations where their government cannot or will not protect them” (Musalo 2014, 48). Though *Matter of A-R-C-G* represents an important step in making domestic violence legible to asylum law, its narrow definition of the claimant’s particular social group has the potential to maintain the persecution

that results from the United States' refusal to fully recognize gender-based violence in asylum law.

The legal institution of asylum represents nation-states' responsibilities to an international community of people via the international community of nation-states. A vibrant asylum policy can recast nation states as protectors of human rights, lessening the injustices of exclusion based on notions of sovereignty. As such asylum law must exist outside sovereign control over who enters the territory of nation states. Though some scholars critique asylum for its privileging of people who can cross international borders, asylum can bring material benefit to the lives of asylees. However, asylum law requires that claimants tell their story in a very specific way, one that currently severely limits the ways that women can claim asylum for gender-based persecution. Over the last two decades the BIA has haltingly opened the possibility for domestic violence and gender-based asylum claims, but has yet to fully affirm gendered violence as solid grounds for asylum. The progression demonstrates the possibility of asylum law to expand its benefits to previously excluded groups of persecuted people, especially by recognizing the political nature of what has historically been deemed private violence. Examining the expansions of status provided to survivors of gender-based persecution can inform the ways that asylum law can incorporate other depoliticized persecutions to recognize groups such as economic migrants. Furthermore, embedded within the structure and logic of *Matter of A-R-C-G-* as well as the alternative gender-plus framing of PSG lies evidence that asylum concurrently reinforces state sovereignties and also provides a potential for reenvisioning state responsibility to all people within the bounds of sovereignty rather than merely citizens.

Breaking Down the Logic of *Matter of A-R-C-G-*

In the 2014 decision *Matter of A-R-C-G-* the BIA sets a limited precedent acknowledging domestic violence as persecution and potential grounds for asylum. In doing so, the BIA overturns the decision of an immigration judge who recognizes limitations to the PSG that the BIA accepts, but then ignores the social factors that lead to violence against women. Section I of the decision examines of the case’s “factual and procedural history” including the immigration judge’s decision. Section II encompasses the BIA’s analysis in three parts. Section II. A. discusses the requirements for “particular social group,” and Section II. B. analyzes the specifics of the respondent’s PSG claim. Section II. B. contains the bulk of the analysis, and application of legal precedent to the specifics of the *Matter of A-R-C-G-* case. Having reached a decision, the BIA announces in Section II. C. that it will remand the case and explains the remaining issues for the immigration judge to decide, including whether “the Guatemalan Government was unwilling or unable to control the ‘private’ actor” (*Matter of A-R-C-G-* 2014, 395). In other words, the BIA accepts the PSG and nexus claims, and remands to the immigration judge to determine whether the serious harm amounts to persecution due to failure of the Guatemalan state. Furthermore, state failure plays a significant role in the PSG analysis. This illuminates the ways that asylum reinforces the state even as it deals with new forms of non-state persecution.

Case History: Immigration Judge Denies Asylum

Prior to the BIA taking the case an immigration judge ruled that the persecution suffered by Ms. C-G-, the woman applying for asylum, was not shown to have occurred “‘in order to overcome’ the fact that she was a ‘married woman in Guatemala who was unable to leave the relationship.’ He found that the respondent’s abuse was the result of ‘criminal acts, not persecution’ which were perpetrated ‘arbitrarily’ and ‘without reason’” (Matter of A-R-C-G- 389-390). In this argument the judge accurately identifies the logical disconnect between the stated PSG and the abuse perpetrated against Ms. C-G-. One key difficulty in asylum cases is demonstrating that persecution happens “on account of” belonging to a PSG. The PSG must exist independent of the persecution, and then the persecution must occur because the persecuted individual belongs to the PSG (Kostes 231). As Kostes points out in her critique of the BIA’s social group definition in *Matter of A-R-C-G-*, abuse is in and of itself a crucial factor in making it difficult or impossible for domestic violence survivors to leave their relationship (Kostes 2015, 230). In *Matter of A-R-C-G-* the judge’s unwillingness to recognize a PSG defined by “married women in Guatemala who are unable to leave their relationships” evidences recognition of the connection between domestic violence and the inability to leave a relationship. The gender plus nationality formulation of PSG provides a logical way to overcome this by removing the persecution from the PSG formulation.

However, the judge’s following comments declaring the domestic violence perpetrated against Ms. C-G- “‘criminal acts, not persecution’ which were perpetrated ‘arbitrarily’ and ‘without reason’” eliminates the possibility of asylum by erasing the

structural factors at play. Calling the violence criminal and not persecution, the judge fails to recognize the state's inaction when Ms. C-G- went to the police (*Matter of A-R-C-G-* 389-390). Labeling it "arbitrary" and "without reason" ignores the cultural and political acceptance of violence against women in Guatemala. By ignoring the failures of the Guatemalan state to protect its citizens and making domestic violence an individualized crime the judge fails to recognize the positive obligations of the state to protect its entire population (Heyman 2005, 736-737).

A better understanding of domestic violence recognizes that "the notion of the perpetrator of domestic violence as a private actor in this context is ambiguous, even incoherent" (Heyman 2005, 739). The BIA acknowledges in *Matter of A-R-C-G-* that a woman's inability to leave a relationship "may be informed by societal expectations about gender subordination," and much of the case focuses on the lack of police response to reports of domestic violence (*Matter of A-R-C-G-* 393). Gender power imbalance results from a coalescing of socio-political factors such as these, and "domestic violence inevitably partakes of a form of domination and suppression founded on gender" (Heyman 740). Therefore the conditions that enable widespread domestic violence are public in nature even if the violence takes place in private spaces. Musalo's article title "Personal Violence, Public Matter" recognizes that the deeply personal nature of domestic violence does not remove it from the realm of society and the state (Musalo 2014). The lack of diligent preventative efforts against gendered violence in addition to police apathy constitutes state acceptance of domestic violence. Furthermore, as Gill points out, asylum discourse "bring[s] into being a notion of the state that stands apart from society and intervenes in it relatively

unproblematically (Gill 2010, 628). Recognizing that gender norms and oppression in society will permeate government and vice versa, systematic patterns of violence against women in society point to social and state failure.

Particular Social Group as Outlined in *Matter of A-R-C-G-*

Though the *Matter of A-R-C-G-* decision sets a precedent that recognizes domestic violence as possible grounds for asylum, a strict interpretation of the decision could result in asylum denial to many domestic violence survivors and others who have experienced gender violence (Musalo 2015, 48). This makes it vital to understand not just the outcome of the decision, that is the accepted PSG, but also the reasoning by which the BIA accepts it. The following close examination of Section II of the *Matter of A-R-C-G-* decision explores how the BIA supports “married women in Guatemala who cannot leave their relationships” as the PSG. It also examines how their reasoning in fact better supports the gender-plus PSG formulation. Though scholars and legal activists widely support a gender-plus PSG, a precedent setting asylum case also supporting such a framing would inject it with the authority necessary to expand the categories of asylum.

To begin with, the BIA simply evaluates the proffered social group in *Matter of A-R-C-G-* without attempting to find a PSG best suited to the facts of the case. Opening their analysis by outlining their authority to determine PSG, the BIA states “the question whether a group is a ‘particular social group’ within the meaning of the Act is a question of law that we review de novo” (*Matter of A-R-C-G-* 390). The Department of Homeland Security conceded Ms. C-G-’s definition of PSG prior to their decision

on the case (but only after it was appealed to the BIA). As such, the BIA chooses to simply evaluate the proffered social group under legal precedent to determine if it meets PSG requirements (*Matter of A-R-C-G-390*). However, under their *de novo* review the BIA should evaluate not only the proffered social group but also determine the best possible PSG. As demonstrated below, if they had done this well in *Matter of A-R-C-G-* the BIA would have found that the group “Guatemalan women” forms a better PSG for the facts of the case presented. This matters because setting precedent supporting the gender-plus framing of PSG is necessary to help the United States fulfill its international obligations to the Refugee Convention and human rights law.

The BIA outlines that a PSG must meet three requirements: “that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question” (*Matter of A-R-C-G- 392*). The A-R-C-G- decision finds multiple immutable characteristics in the PSG “married women in Guatemala who cannot leave their marriage.” “The group is composed of members who share the common immutable characteristic of gender... Moreover, marital status can be an immutable characteristic where the individual is unable to leave the relationship” (*Matter of A-R-C-G- 393*). This recognizes gender as an immutable characteristic for asylum purposes. In describing why marital status is immutable the BIA claims, “A range of factors could be relevant, including whether dissolution of a marriage could be contrary to religious or other deeply held moral beliefs or if dissolution is possible when viewed in light of religious, cultural or legal constraints.” The case does not refer to gender roles, power imbalance, and potential for gendered economic dependency when discussing why marital status might be

immutable. In addition, gender and marital status are cast as equivalently immutable characteristics, so asylum could be claimed on either alone if the other requirements were met. Furthermore, nationality is already recognized in the Refugee Convention as grounds for asylum, and so should pass the immutable characteristic test. Nationality is also the basis by which the asylum apparatus defines persecution, and so must be considered immutable for asylum to function, as it connects individuals to a responsible state. Ms. C-G-'s PSG contains three immutable characteristics: gender, nationality, and marital status, any of which can provide the basis for a PSG.

The next hurdle for a PSG lies in particularity. In terms of a gender-plus formulation of PSG, the particularity requirement may be the site of the most legal resistance from the BIA. The BIA claims that the terms "married," "women," and "unable to leave the relationship" "have commonly accepted definitions within Guatemalan society based on the facts in this case, including the respondent's experience with the police" (Matter of A-R-C-G- 393). Note that particularity is defined in reference to Ms. C-G-'s interactions with the state. Having a commonly accepted definition in Guatemalan society apparently does not achieve particularity, because the BIA follows with "in some circumstances, the terms can combine to create a group with discrete and definable boundaries" (Matter of A-R-C-G- 393). This implies that any of these groups alone may not have discrete and definable boundaries, though the notion of commonly accepted definitions seems to imply discreteness. The BIA fails to explain why the term "women" does not establish a group with discrete and definable boundaries within Guatemalan society after accepting that women have a commonly accepted definition.

Having specified that only in some combinations can women, married people, and those unable to leave their relationship form a group with particularity the BIA blurs the clear boundaries of the groups. The BIA goes on to “point out that a married woman’s inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation” (*Matter of A-R-C-G* 393). The BIA recognizes that social context influences particularity, and specifically cites a congressional human rights report “discussing sexual offenses against women as a serious societal problem in Guatemala” (*Matter of A-R-C-G- 393*). Notice that women, not married women, are the harmed group cited. In the analysis of particularity gender is recognized as an independent societal force that influences the ability to leave a relationship. The existence of societal expectations about gender and subordination coupled with the fact that the BIA recognizes the category of woman as immutable and commonly accepted within Guatemalan society should qualify “Guatemalan women” as particular. The decision in *Matter of A-R-C-G-* fails to discuss whether the group “Guatemalan women” has particularity, despite providing the same level of evidence for the particularity of “Guatemalan women” as for “married women who cannot leave their relationship.”

In contrast to this unacknowledged reliance on gender as the primary determinant of particularity, the BIA explicitly emphasizes marriage in conjunction with official state inaction. The BIA claims “in this case it is significant that the respondent sought protection from her spouse’s abuse and that the police refused to assist her because they would not interfere in a marital relationship” (*Matter of A-R-C-G- 393*). This suggests that the police would have acted to protect a woman in a non-

marital romantic relationship. A more recent, unpublished BIA case overturned an immigration judge's denial of asylum that cited *Matter of A-R-C-G* on this reasoning. That decision determines that women who are unable to leave domestic relationships form a PSG even if the women are unmarried, but does not set precedent because the BIA has not published the case (Kowalski 2016). Already flaws in *Matter of A-R-C-G* have created inconsistencies within the asylum legal apparatus.

The final test for establishing a PSG requires an evaluation of "social distinction" which is "determined by the perception of the society in question rather than by the perception of the persecutor" (*Matter of A-R-C-G- 394*). In *Matter of A-R-C-G-* the BIA claims that "whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors" (*Matter of A-R-C-G-394*). Once again, the BIA turns to the government of the home country to define particular social group. In the finding "married women who cannot leave their relationship" form a group with social distinction lies the implicit finding that women also have social distinction, unless the BIA would argue that the category of women only becomes recognized by society through marriage. Though the BIA cites from a report that "Guatemala has a culture of 'machismo and family violence,'" the complete report focuses on violence against women, not married women or families (Guatemala 2006). While the specific four-word quote they choose does support the claim that married women in Guatemala who cannot leave their relationships constitute a particular social group, the article as a whole supports the understanding that women in Guatemala face rising levels of

violence and persecution regardless of marital status. Furthermore, the Department of State's *Country Conditions Report* on human rights in Guatemala, cited by the BIA in their PSG determination, focuses an entire section on violence against women in Guatemala. The State Department report describes violence against women, not married women who cannot leave their relationship. In fact, the report emphasizes, "violence against women, including domestic violence, remained a common and serious problem" (U.S. Department of State 2009). Taking into account the BIA's emphasis on considering "the facts and evidence in each individual case, including documented country conditions," the BIA's own sources point to the need to recognize social distinction for women as the main PSG through which to understand domestic violence in Guatemala (*Matter of A-R-C-G-* 394-395).

Though the BIA identifies that "married women in Guatemala who cannot leave their relationship" constitutes a PSG under the three-pronged test of immutable characteristic, particularity, and social distinction, the logic with which the BIA accepts this PSG would more readily apply to a group defined as Guatemalan women. Furthermore, the BIA realizes this possibility and ignores it anyway. In the 2010 case *Perdomo v. Holder* the Ninth Circuit Court of Appeals found that the BIA had improperly rejected the PSG "Guatemalan women" and affirmed "the principle that the size and breadth of a group alone does not preclude a group from qualifying as such a social group" (*Perdomo v. Holder* 9935). The case was remanded to the BIA to determine if Guatemalan women could form a PSG, and so held no precedent over the BIA when deciding *Matter of A-R-C-G-*. In addition the BIA acknowledges in a footnote to *Matter of A-R-C-G-* that "Amici for the American Immigration Lawyers

Association, the United Nations High Commissioner for Refugees, and the Center for Gender & Refugee Studies argue that gender alone should be enough to constitute a particular social group in this matter. Since the respondent's membership in a particular social group is established under the aforementioned group, we need not reach this issue" (*Matter of A-R-C-G-* 395). The BIA consciously avoided taking up its responsibility to consider gender as foundational to a social group. Furthermore, in order to find a nexus between the PSG and the specific persecution in a case the PSG must be identified to fit with the facts of the case. The gender-plus formulation recognizes that marital domestic violence likely does not occur because of the perpetrator and survivor's marital status but rather because of the ways individuals, government, and society view and treat women. If asylum law recognized the gendered nature of persecution it would be a key step in bringing the reality of asylum law in line with international law and its goals of protecting the stateless.

Ultimately, the significance in *Matter of A-R-C-G-* lies in the outcomes of future asylum claims and whether or not the U.S. consistently grants asylum to domestic violence survivors. Due to the limited social group finding in *Matter of A-R-C-G-* the U.S. can continue to deport those who have legitimate asylum claims under international law.

State Legitimation in Gender-Based Asylum Law

In order to maintain sovereign border control while extending asylum to certain domestic violence survivors the BIA reinforces the centrality of states and sovereignty in *Matter of A-R-C-G-*. Because states have an international treaty commitment to the refugee convention, the obligation to grant asylum has the potential to soften sovereign borders and loosen state control of who belongs within the nation. Asylum can represent recognition of state responsibility to humanity, not just citizens. However, the way in which *Matter of A-R-C-G-* focuses on the Guatemalan state serves to limit the scope of asylum. This occurs even as *Matter of A-R-C-G-* expands asylum to include domestic violence, demonstrating the contested nature of asylum. As practiced in *Matter of A-R-C-G-*, asylum's focus on states misunderstands the way states fail to protect against gender-based violence, continuing to exclude from asylum people who meet the Refugee Convention definition of asylum but not the United States' limited interpretation.

Throughout the *Matter of A-R-C-G-* decision the BIA leans its analysis on the Guatemalan state, implying that the state must fail spectacularly to make asylum an appropriate response. Gill critiques many scholars of asylum in their reification of the state as distinct from society, claiming "in general, the state is assumed to occupy a separate position to society and to regulate it from a position of exteriority, usually at the national level" (Gill 2010, 632). Neither societies nor states are homogenous or distinct from each other, but asylum discourse and law often treat them as such. This critique applies to the *Matter of A-R-C-G-* decision as well. The BIA analysis discusses

laws, policies and their implementation, and police actions. According to the BIA, “any claim regarding the existence of a particular social group in a country must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question” (*Matter of A-R-C-G-* 392). This demonstrates the asylum apparatus’s constant focus on the foreign nation as much as the individual applying for asylum. Recognition of society extends to and is bounded at national borders, and the entity recognized as responsible for that society is the corresponding government. If that government fails in invisible ways, resulting individual asylum claims will also fail.

Domestic violence was historically considered a non-political, private matter, and therefore not grounds for asylum. *Matter of A-R-C-G-*’s recognition of domestic violence as potential grounds for asylum takes the first step in bringing to light the so-called private sphere as a realm of state responsibility. However, *Matter of A-R-C-G-* maintains a public-private divide in asylum jurisprudence. In the eyes of the U.S. government, the persecutor in successful domestic violence asylum claims is effectively the state rather than the abuser. In this case I refer to the persecutor not as the purveyor of violence, but the actor visible to the U.S. asylum apparatus that enables asylum eligibility. Thus, in *Matter of Kasinga* and *Matter of A-R-C-G-* the BIA highlights the role of the police. In fact, the analysis in these cases rests on identifying state failure through action. In *Matter of A-R-C-G-* the BIA states “it is significant that the respondent sought protection from her spouse’s abuse and that the police refused to assist her because they would not interfere in a marital relationship” (*Matter of A-R-C-G-* 393). In their refusal the police actively engage with Ms. C-G- and this action

constitutes the BIA's understanding of state failure. Thus the Guatemalan state participates in the persecution of Ms. C-G- in a way that the United States chooses to recognize. When the BIA remands the case saying Ms. C-G- "must demonstrate that the Guatemalan Government was unwilling or unable to control the 'private' actor" they continue to emphasize the explicit role of the state as crucial to persecution in asylum. By paying attention to the ways the Guatemalan government *responds* to Ms. C-G-'s abuse, *Matter of A-R-C-G-* ignores the failures of society and the state that *enable* gender-based violence in the first place.

Finding persecution in an asylum case recognizes the home state's failure to protect an asylee. Finding nexus between persecution and PSG demonstrates that this failure occurs in a particular manner that requires another state to step in, bringing an individual's persecution into the realm of the state viewing other states, and thus into asylum law. The nexus is supposed to show that the individual suffers due to an immutable characteristic, so they should not have the responsibility to change. Therefore, government has the responsibility to protect them from harm. Yet with gender-based violence not cleanly recognized as grounds for asylum the basic structure of asylum law fails women experiencing gender-based violence.

Furthermore, even when it does exist state protection is not unquestionably positive. In her book *In An Abusive State*, scholar Kristin Bumiller critiques governmental responses to sexual violence that have lead to "criminalization and social control" at the expense of the women and communities the government supposedly helps. This illustrates that "injustices... are brought about not only by the persistence of sexual violence, but by the unfortunate conditions under which women seek help."

Furthermore, as Bumiller points out “both domestic violence and sexual assault persist as significant threats to women’s health and safety in the United States” (Bumiller 2008, 156). Asylum as a response to domestic violence relies on the very state as protector understanding that Bumiller critiques. Furthermore, the supposedly protective state not only fails to protect many of its own citizens from sexual violence but also perpetuates violence against women in its attempts to protect them. While it is undeniable that women such as Ms. C-G- who come to the United States for asylum to escape domestic violence can improve their lives by leaving their abuse behind, the protection of the United States may extend only as far as withholding of removal. Asylum’s emphasis on the home state’s interactions with the asylee, in addition to obscuring indirect persecution, also obscures that the host state may fail in equivalent ways to that of the home state even as it grants asylum. Still, despite its limited success in addressing gender persecution within its own borders, the United States has a responsibility to open its borders to those who have nowhere else to go; otherwise asylum fails. The fact that asylum does not address the root persecutions in either the home country or the host country means that asylum cannot operate alone. It treats the symptoms of deeper problems, and when treating the symptoms saves lives it is important to do that as well as addressing the problems in systemic ways. Ideally, asylum could create powerful opportunities to reshape systemic issues, such as spreading understanding of the political nature of gender-based violence, while also protecting people fleeing persecution.

Consequences of Asylum Failure

When the BIA fleetingly outlines the arguments necessary to claim a PSG defined by Guatemalan women but fails to link them together it shows not only the logical inadequacy of the BIA's *Matter of A-R-C-G-* decision, but also represents an ethical and legal failing on the part of the U.S. in regards to international asylum law. By emphasizing the police's expressed reasons to not intervene for Ms. C-G- the BIA focuses on the role of the state, pointing to police inaction due to marital status. The assumption that the state's actions towards Ms. C-G- were determined by marital status, despite evidence from the Department of State and other cited sources pointing to gender, demonstrates the extent to which the BIA twists the PSG requirements in ways that effectively limit who can receive asylum. Thus gender-based asylum applicants often live with the failure of two sovereign states: their home state and asylum denying host-state.

To preserve everybody's right to have rights, states must protect the people within their jurisdiction regardless of citizenship, especially non-citizens who have no other state protecting them. This leads to a principle of state responsibility to human rights for all who reside within the state's territory, rather than solely to citizens. The assumption that the state's baseline level of protection for all residents effectively prevents persecution underlies this notion that state recognized belonging amounts to protection.

However, under restrictive asylum policies the state does not serve the entire population present within its borders. The BIA's artificially narrow PSG in *Matter of*

A-R-C-G- serves to limit asylum eligibility in the eyes of the U.S. government, excluding women suffering persecution and state failure. Whether they make sense or not, government decisions carry the weight of determinacy for asylum applicants' futures. Under international refugee and human rights laws the state has an obligation to make sound and consistent asylum decisions. The BIA's refusal to examine the PSG "Guatemalan women" in the *Matter of A-R-C-G-* case, especially after being told to do so in *Perdomo v. Holder*, demonstrates a lack of state dedication to an asylum policy that encompasses as wide a scope as possible under the foundational Refugee Convention.

In order to shape an asylum law capable of recognizing persecution that does not fit the traditional state-persecutor model, Heyman suggests the occurrence of domestic violence is itself the failure of the state to fulfill its positive obligations any time the state has not practiced due diligence in gender-violence prevention (Heyman 2005, 740-741). Under this understanding domestic violence constitutes state failure on account of gender even if the police or other state apparatus have no interaction with the victim. For the law to function with this principle it must first accept an inclusive understanding of gender-based persecution in asylum law with acceptance of the gender-plus PSG formulation. It also requires an understanding of society-state interconnectedness, so that societal failings can demonstrate state failing. Rather than looking to state involvement in the actual instance of persecution the asylum granting state must recognize that non-state actors can persecute as long as the state has not effectively acted to prevent persecution prior to its occurrence. Even if the police responded positively to protect a domestic violence survivor after the fact, she still

would have experienced gender-based persecution as long as the government did not do its part to prevent the violence. In such a case the asylum difficulty should lie in proving continuing fear. Unfortunately, based on the language of *Matter of A-R-C-G-* any positive state intervention would likely be interpreted by the BIA as evidence against state failure, and thus against asylum. This ongoing misrecognition of what constitutes state failure in asylum law for a long time led to the complete lack of gender-based asylum recognition, and continues to make it difficult for women fleeing gender persecution to successfully claim asylum.

Conclusion

Gender based violence and domestic violence did not suddenly appear as issues to consider in 2014. The fact that it has taken sixty-three years to reach the current imperfect understanding of domestic violence in asylum law demonstrates the apathy with which the U.S. asylum apparatus addresses gender violence and asylum eligible persecution survivors. First, limited acceptance of PSGs excludes people who cannot tell their life narrative with the correct framing for the restrictive asylum apparatus. Accepting a gender-plus formulation of PSG would open asylum to more survivors of gender-based violence. The BIA has already used the logic supporting such a formulation, but continues to delay acknowledging it. This failure of asylum, besides its illegality, perpetuates systems of violence against women at the international and transnational levels. Even when the United States does recognize gender persecution for asylum, it does so in ways that highlight the need for a state to act as protector. The failure of another state and the prioritizing of human rights over sovereignty becomes the exception that proves the need for sovereignty in the logic of the state. This both reinforces state sovereignty but also provides the opportunity to reshape sovereignty to include the stateless residing within the host state. It also provides the chance to redefine the state as deeply interconnected with society.

Gender violence asylum cases such as *Matter of A-R-C-G-* recognize that non-state actors play a role in persecution but *Matter of A-R-C-G-* does not go so far as to say that states can fail without directly engaging the asylee, which would require embracing the connection between society and the state. Societal patterns of domestic

violence condoned, tolerated, or ineffectively contested by the state represent state failure when states and society are understood as integrated. Even if it built from this understanding, current asylum jurisprudence still focuses on the non-state actor, an explicit entity who enacts persecution. As of now asylum law cannot begin to comprehend the possibility of a nebulous or unidentifiable persecutor, such as might be necessary to make further forms of persecution such as poverty or trauma due to climate change legible to asylum

In *International Refugee Law and Socio-Economic Rights* Michelle Foster seeks to break down the notion that economic migrants cannot be refugees by analyzing the 1951 Refugee Convention in the context of modern case law and international human rights law. She points out that because the terms refugee and asylum traditionally refer to political persecution while migrant refers to people who freely choose to move, the term economic migrant serves to depoliticize the economic realm. She adds, “Indeed, the terms ‘economic refugees’ and ‘economic migrants’ continue to pervade contemporary refugee jurisprudence,” often in ways that diminish their asylum claims (Foster 2007, 3). Foster wants to defend the institution of asylum as a viable tool for protecting migrants. By claiming that the economic is political she collapses the category of economic migrant into that of potential refugee. This move parallels the scholarly rejection of the notion that domestic violence perpetrators are “private actors” (Heyman 2005, 739). In cases of domestic violence survivors and economic migrants scholars make political that excluded through categorization as private. Foster then argues for the use of international human rights law to shape the definition of refugee in a way that includes so-called economic migrants.

In contrast to asylum expansion efforts, scholars Ho and Loucky claim that only by acknowledging freedom of movement as a human right, “freedom of movement for people across international borders equal to that of global capital,” can the international community handle the near certain future migrations with justice (Ho and Loucky 2012, 165). Such free movement directly challenges the possibility for locating state sovereignty in migration control. While those working to expand refugee law see it as outside of sovereignty, Ho and Loucky want to remove the entire phenomenon of migration from the realm of state sovereignty. As seen even from the comparatively small number of migrants entering Germany from Syria, large scale global migration has the potential to dramatically destabilize current notions of society, especially those formed around nationality.

While it is clear that immigration policies will have to adapt to changing migration patterns, the potential usefulness of current institutions surrounding asylum remain hotly debated. Understanding the problems, limits, and possibilities of asylum situates it as a tool for bettering peoples’ lives, rather than as the extent of state obligations to potentially unwanted foreigners. Critiques of asylum that make their way into changing understandings of the law and sovereignty more broadly speaking may also create space for further expansion or change. Scholarly analysis of asylum law should thus continue with an eye towards incorporating critiques of the very notion of asylum and refugee into the practice of the law.

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