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**WHEN IS FEAR FOR ONE'S LIFE
RACE-GENDERED?
AN INTERSECTIONAL ANALYSIS
OF THE BUREAU OF IMMIGRATION APPEALS'S
IN RE A-R-C-G- DECISION**

*Ange-Marie Hancock**

INTRODUCTION

In August 2014, the U.S. Board of Immigration Appeals (BIA) handed down a breakthrough decision, *In re A-R-C-G*,¹ permitting courts to consider domestic violence as a gendered form of persecution in a home country and thus grounds for asylum in the United States. Along with two other 2014 decisions, *In re W-G-R*² and *In re M-E-V-G*,³ this case represented a marked shift from prior BIA decisions, which for fifteen years had interpreted sections 208(a) and 241(b)(3) of the Immigration and Naturalization Act more narrowly, thus excluding claims of home country abuse as reasonable grounds to grant asylum. Specifically, in *A-R-C-G*, the BIA found that Guatemalan women fleeing domestic violence can be considered a “particular social group” (PSG).⁴ Its decision has been celebrated as a step forward in resolving contradictory and arbitrary outcomes that persisted in a vacuum of jurisprudential norms about the issue.⁵

The definition of a “particular social group” is key to understanding the possible ramifications of the decision. While legal theorists have a specific

* Associate Professor of Political Science and Gender Studies, University of Southern California. This Article is part of a larger symposium entitled *Critical Race Theory and Empirical Methods Conference* held at Fordham University School of Law. For an overview of the symposium, see Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 *FORDHAM L. REV.* 2953 (2015).

1. 26 I. & N. Dec. 388 (B.I.A. 2014).

2. 26 I. & N. Dec. 208 (B.I.A. 2014).

3. 26 I. & N. Dec. 227 (B.I.A. 2014).

4. *A-R-C-G*, 26 I. & N. Dec. at 388.

5. A press release from the Hastings Center for Refugee and Gender Studies specifically states: “This ruling has the potential to affect immigrant women survivors of domestic violence across the country The Board’s decision signals a move away from restrictive interpretations of the law that have made it difficult for domestic violence survivors to receive protection in the United States.” Press Release, Ctr. for Gen. & Refugee Studies, CGRS Applauds Decision That Could Help Women and Children at Artesia Detention Center (Aug. 26, 2014), available at <http://www.icontact-archive.com/QFS-zoj1ul57i8PSf-6LKzKZmjJEO7j3?w=3>.

definition of how PSGs are constituted, a wide body of literature on the social construction of target populations shapes how societal groups are perceived and their ability to gain relief from government institutions to address the challenges they face, whether the fact of their group membership is accepted or contested. Much of the law and society literature that addresses racial and gendered perceptions of respondents has focused on two areas: (1) civil rights claims (such as equal protection, antidiscrimination, etc.) where legal logic has focused on PSGs already named by legislative authorities; and (2) criminal contexts where a wide swath of studies have examined how racial and gendered norms shape the way juries or judges perceive defendants and how these norms impact conviction rates and sentencing.

It is not clear, however, that either approach fits the administrative mission of the BIA or its logic in constructing a PSG. In this Article, I conduct a paradigm intersectionality analysis of *In re A-R-C-G-* to better understand its possible ramifications for future asylum seekers fleeing domestic violence. In doing so, I also examine the decision's impact upon immigrant women of color fleeing domestic violence.

Much of the work in representing women seeking asylum has proceeded from a gender perspective. Centers like the U.C. Hastings Center for Gender and Refugee Studies have provided critical legal discourse, asking courts to rethink what it means to be a member of a PSG and to look beyond the traditional reliance on legislative authority to provide such definitions. It is easy to see that these arguments have benefited, even if narrowly, from the logic of intersectionality, which has long contended that there is a strong connection between the diversity among women and a meaningful realistic opportunity for relief from domestic violence.

One of the most widely cited articles on intersectionality, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color* by Kimberlé Williams Crenshaw,⁶ has garnered the most attention for the “new” approach Crenshaw called intersectionality. Yet, equally important is Crenshaw's choice to address violence against women, the component of domestic violence that has received the lion's share of attention in activism, case law, and policy reform. Later authors, like G. Chezia Carraway and Celeste Montoya, built on Crenshaw's attention to violence against women in both the legal and the transnational activism domains.

The most widely attributed, if not precisely accurate, insight of intersectionality—the vast diversity existing within a pervasiveness of gendered oppression—is usually the takeaway from statements like this one by Carraway:

The accepted practice of wife burning in India, the epidemic of wife beatings and murders in Brazil, the maiming and murder of children in the Angolan war for independence, the wholesale prostitution of women and

6. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

children in the Philippines as a means of familial economic survival, the bombings of reproductive health clinics in the United States, and the failure to develop coalitions that address the needs of women of color all continue to reflect the belief that violence against women is culturally acceptable, and therefore not a human rights abuse. Our struggle must be a collective struggle . . . in order to have any formidable impact on violence in the lives of women.⁷

Here, I want to focus on the substance of the pervasiveness of violence against women instead. Montoya contends that even in the twenty-first century, countries with high “objective” scores in gender equality like those countries in Northern Europe still face issues with violence against women.⁸ In this vein, Montoya agrees with Carraway across what is now a twenty-year time frame: while activism and policy reform efforts focus on protection, prosecution and prevention, tension persists between legislation passed and on-the-ground effectiveness. Covering a similar time frame, Blaine Bookey delineates seven distinct jurisprudential shifts that range from circa 1994 through 2012, arguing that similar tensions persist in the United States due to: (1) the wide variation in immigration judges’ interpretations of ruling precedent; and (2) a lack of transparency about BIA decisions due to their inaccessibility through public searchable databases, which both contribute to the limited impact of any pro-survivor decisions.⁹

Thus, violence against women constitutes a large subset of the cases that fall under the definition of “domestic violence” and is also a multivalent issue ripe for intersectional analysis. There is ample evidence from the literature to support this second claim. First, a long line of critical race and feminist legal studies literature has argued for the utility of intersectionality in understanding the specific challenges faced by women in target populations like African American or immigrant groups when they attempt to obtain legal relief or policy reform.¹⁰ Second, as Bookey, Montoya, and Crenshaw all note in different ways, the lack of transparency and available data for understanding the precise challenges and obstacles to relief continues to constrain the questions that can be asked and the reforms that can be proposed by activists in this space.

A particularly transnational dimension of this second point merits elaboration. As lack of understanding and attention to intersectional dimensions of the issue persist, so too do our limited imaginations about

7. G. Chezia Carraway, *Violence Against Women of Color*, 43 STAN. L. REV. 1301, 1308 (1991).

8. CELESTE MONTOYA, FROM GLOBAL TO GRASSROOTS: THE EUROPEAN UNION, TRANSNATIONAL ADVOCACY AND COMBATING VIOLENCE AGAINST WOMEN 4 (2013).

9. Blaine Bookey, *Domestic Violence As a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN’S L.J. 107, 109–10 (2013). Bookey analyzed 206 cases from a database privately maintained by the Center for Gender and Refugee Studies at the U.C. Hastings College of Law. *Id.* at 110–11. The database includes 6000 gender-based asylum cases including those involving children and LGBT status. *Id.* at 110. All 206 cases involved male perpetrators and female survivors. *Id.* at 111.

10. See generally Crenshaw, *supra* note 6.

policy interventions and legal remedies,¹¹ which has a disparate impact on the ability of immigrant women of color to gain relief in the United States. I return to this point about data availability regarding both those who are affected by domestic violence as well as the policy solutions that might work in my later analysis of the BIA decision.

The arguments made by Crenshaw, Anannya Bhattacharjee, and others have contributed greatly to the part of intersectionality's intellectual project that focuses on rendering previously invisible target populations' needs for relief visible to activists, legal advocates, and policy makers alike.¹² However, relatively little attention has been paid to precisely how to apply intersectionality analysis to the challenges of survivors who have been made visible. One result of this inattention to proper methodologies has been an uncritical embrace of positivist empirical strategies that actually violate the terms of the second part of intersectionality's intellectual project, which focuses on reshaping the articulation of relationships among categories like race, ethnicity, gender, class, and nationality. Writing in the same year as Crenshaw, Chela Sandoval articulates this part of intersectionality's project: "[N]o [categorical] enactment is privileged over any other, and the recognition that each [categorical] site is as potentially effective in opposition as any other makes possible another mode of consciousness which is particularly effective under late capitalist and post-modern cultural conditions in the United States."¹³ Crenshaw and Sandoval both argue for equal if not identical attention to multiple categories. However, again, the issue of how to do this in a way that does not violate the additional tenet of intersectionality—that such categories co-construct and mutually reinforce each other—has been generally set aside in favor of standard social scientific approaches. These approaches include multivariate regression that explicitly assume mutual exclusivity among variables like race and gender, particularly at the data collection stage.¹⁴

In this Article, I use a paradigm intersectionality approach to understand A-R-C-G- from a 360-degree perspective that takes up all dimensions of

11. Anannya Bhattacharjee, *A Slippery Path: Organizing Resistance to Violence Against Women*, in *DRAGON LADIES: FEMINISTS BREATHE FIRE* 36–37 (Sonia Shah ed., 1997) (discussing the 1989 founding of Sakhi, a New York-based advocacy and support group for South Asian immigrant domestic violence survivors: “We have asserted the existence of Asian women and refused to be statistically invisible”).

12. See generally *id.*; Crenshaw, *supra* note 6.

13. Chela Sandoval, *U.S. Third World Feminism: The Theory and Method of Oppositional Consciousness in the Postmodern World*, 10 *GENDERS* 1, 12 (1991).

14. For legal examples of this strategy, see Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 *LAW & SOC'Y REV.* 991, 991–1015 (2011), and Tanya Kateri Hernandez, *A Critical Race Feminism Empirical Research Project: Sexual Harassment and the Internal Complaints Black Box*, 39 *U.C. DAVIS L. REV.* 1235, 1246–48 (2006). The approach used in both articles assumes the possibility of mutually exclusive categorical memberships, an interpretation of intersectionality explicitly rejected by Mitu Gulati and Devon Carbado. See generally MITU GULATI & DEVON CARBADO, *ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA* (2014). This approach also explains how the use of an interaction term as a way of “setting aside” this assumption is insufficient. See Ange-Marie Hancock, *Empirical Intersectionality: A Tale of Two Approaches*, 3 *U.C. IRVINE L. REV.* 259, 277 (2013).

intersectionality's longstanding intellectual project—the visibility aspect, the commensurability of attention to multiple categories, and the explicit incorporation of the relationships that exist among categories—into a single empirical analysis. Rather than focus on specific types of intersectionality,¹⁵ the paradigm intersectionality approach requires the analysis of five dimensions common to intersectional analyses of complex social problems like domestic violence.¹⁶

I. PARADIGM INTERSECTIONALITY

A. Framing the Question

Paradigm intersectionality features five distinct, intimately connected dimensions that seek to comprehensively analyze a complex question like the significance of *In re A-R-C-G-*: categorical multiplicity, categorical intersections, diversity within, time dynamics, and individual-institutional relationships. Successful examination of each of these categories in relation to each other, however, requires the creation of an explicitly accurate analytical frame. In other words, we must explicitly and reflectively frame the question in a manner that is not simply a derivation of either standard empirical social science or standard legal logic.¹⁷ In this way, paradigm intersectional analysis hews to the definition of what a paradigm shift intends to achieve: developing new ways to ask, as well as answer, questions left unanswerable by prior analytical approaches.

This goal derives directly from the dual intellectual project of intersectionality. In answering questions left unanswerable by prior approaches, paradigm intersectionality builds on the arguments of Crenshaw and others, who claimed that advocates on both sides of an issue debate—for example, both domestic violence advocates and those who would leave the matter as an issue of private privilege—render the policy needs of women of color invisible. Remedies for such invisibility have

15. Crenshaw focuses on three distinct types of intersectionality—political, structural, and representational—that have been interpreted to be mutually distinct. *See* Crenshaw, *supra* note 6. These types are not replaced by the paradigm intersectionality approach. Rather, paradigm intersectionality illuminates the kinds of analytical questions that are relevant to the analysis of the problem rather than a categorization strategy. Thus, one can, for example, analyze an issue that is categorized as “political intersectionality” using a paradigm intersectionality approach.

16. Further explications of paradigm intersectionality's five dimensions can be found in: ANGE-MARIE HANCOCK, *SOLIDARITY POLITICS FOR MILLENNIALS: A GUIDE TO ENDING THE OPPRESSION OLYMPICS* (2011); Hancock, *supra* note 14; and Ange-Marie Hancock, *Trayvon Martin, Intersectionality, and the Politics of Disgust*, 15 *THEORY & EVENT*, no. 3, 2012, available at http://muse.jhu.edu/journals/theory_and_event/v015/15.3.hancock.html. The paradigm intersectionality approach is a theory that undergirds the intersectionality-based policy analysis framework recently developed in Canada, which posits several procedural steps that require explicit attention. *See generally* AN INTERSECTIONALITY-BASED POLICY ANALYSIS FRAMEWORK (Olena Hankivsky ed., 2012); RITA DHAMOON, *IDENTITY/DIFFERENCE POLITICS: HOW DIFFERENCE IS PRODUCED, AND WHY IT MATTERS* (2010).

17. I have argued elsewhere that the logic of intersectionality diverges from both the standard legal and standard positivist story. *See supra* note 16.

been at the heart of most intersectional analyses. For example, Olena Hankivsky and Renée Cormier argue that framing an analytical question requires explicit attention to the question—“Is the research framed within the current cultural, political, economic, societal, and/or situational context, and where possible, does it reflect self-identified needs of affected communities?”—as one way of rendering invisible communities visible in policy analysis.¹⁸

The BIA’s decision in *In re A-R-C-G-* is part of a long history of inconsistent case law¹⁹ that depends in part on the matter of social visibility, a requirement imposed in 2006 to further define the relevant requirements for a PSG. The members of a PSG must be visible to society at large, and have particularity—that is, they must constitute a group with precise boundaries.²⁰ Intersectionality has the potential to intervene in this discussion and expand the notion of social visibility and concise boundaries by forcing us to think about the relationships among the numerous “immutable and fundamental characteristics”²¹ the immigration court system imposes upon seekers of asylum.

As Hankivsky and many others note elsewhere, the intellectual project of rendering previously invisible community needs visible is only one half of the intellectual project of intersectionality.²² A paradigm intersectionality approach also offers a concrete method of including the second half of intersectionality’s intellectual project—reshaping the ontological relationships between classifications like race and gender, as well as other classifications mentioned by the BIA that in combination create a PSG. For paradigm intersectionality, the empirical operationalization of this second intellectual project requires that analytical questions be framed in such a way as to recognize that such classifications exist ontologically and that relationships among enactments of said classifications in legislation, administrative rules, or judicial decisions explicitly address the mutually constitutive nature of such classifications. In other words, paradigm intersectionality frames questions in a way that recognizes that classifications like race, sex, sexuality, class, and citizenship status are not

18. Olena Hankivsky, *Women’s Health, Men’s Health, and Gender and Health: Implications of Intersectionality*, 74 *SOC. SCI. & MED.* 1712, 1716 (2012) (quoting OLENA HANKIVSKY & RENÉE CORMIER, *INTERSECTIONALITY: MOVING WOMEN’S HEALTH RESEARCH AND POLICY FORWARD* (2009), available at http://bccewh.bc.ca/wp-content/uploads/2012/05/2009_IntersectionalityMovingwomenshealthresearchandpolicyforward.pdf).

19. See Bookey, *supra* note 9, at 109. Bookey draws upon two prior studies that analyze 198,000 and 400,000 immigration cases, respectively, to conclude that there is wide variation among cases taken up and disparate outcomes in asylum cases both by individual judges and by particular immigration courts. *Id.* at 109 n.10.

20. *Id.* at 115 n.35.

21. I consider such immigration court–defined characteristics like the gender, national status, marital status, and domestic violence survivor classifications below, to be consistent with intersectionality’s longstanding history in antidiscrimination doctrine, while recognizing that important differences may emerge.

22. See generally AN INTERSECTIONALITY-BASED POLICY ANALYSIS FRAMEWORK, *supra* note 16; DHAMOON, *supra* note 16.

severable; therefore all are equally worthy of consideration in a case like *In re A-R-C-G*.

*B. Distinction Between Paradigm Intersectionality
and Critical Race Feminist Formulations*

While critical race feminism and intersectionality theory have much in common normatively, they have varied in their attempts to empirically analyze and understand the normative tenets they both embrace. The paradigm intersectionality formulation is distinct from a critical race feminist formulation,²³ which still might include an additional element which is excluded here. This distinction between critical race feminist formulations and paradigm intersectionality formulations of empirical questions is often overlooked; the difference primarily concerns at which points in the research process the analytical insights of intersectionality are applied and to what degree. Prior critical race feminist formulations have focused on empirical operationalizations of intersectionality that apply standard positivist methods like multivariate regression while focusing their intersectional analyses in two areas: the identity of the target population (such as women of color) and the normative assessment of any empirical results. Thus, one critical race feminist analysis of *In re A-R-C-G* might inquire: Did the gender, ethnicity and national status of the respondents together affect the outcome of *In re A-R-C-G* in support of domestic violence survivors?

This critical race feminism formulation marks a priori an additive (as evidenced by the word “together”) and a causal relationship among gender, ethnicity and national status variables (as evidenced by the phrase “affect the outcome”). This approach to analyzing the outcome also easily maps onto an empirical analysis that collects data disaggregable by ethnicity, gender, and national status—data collected in a manner that violates intersectionality’s claim that ethnicity, gender, and other categories are impossible to disaggregate.²⁴

Paradigm intersectionality, in contrast, weaves the insights of intersectionality throughout the research project. Indian political theorist Rita Dhamoon suggests that we think of a “matrix of meaning-making” to capture movement across multiple processes of racialization, gendering, et cetera, and the structures of power which discipline them across time and space.²⁵ Moreover, sociologists Patricia Hill Collins and Bonnie Thornton

23. See, e.g., Hernandez, *supra* note 14.

24. See GULATI & CARBADO, *supra* note 14, at 130–43; Crenshaw, *supra* note 6, at 1242; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139. See generally Chela Sandoval, *U.S. Third World Feminism: The Theory and Method of Oppositional Consciousness in the Postmodern World*, 18 *GENDERS* 1 (1991).

25. Rita Kaur Dhamoon, *Considerations on Mainstreaming Intersectionality*, 64 *POL. RES. Q.* 230, 238 (2011). Dhamoon also contends that starting with such a conceptualization of intersectionality in mind, it is also impossible to simply focus on any target population as homogenously oppressed. *Id.* at 233.

Dill agree that a different epistemological orientation is required for such target populations. Writing in 1983, Dill explicitly talks about intersections and argues for new frameworks:

I would ask: How might these frameworks be revised if they took full account of black women's position in the home, family, and marketplace at various historical moments? In other words, the analysis of the interaction of race, gender, and class must not be stretched to fit the procrustean [sic] bed of any other burgeoning set of theories.²⁶

More recently, Israeli-British sociologist Nira Yuval-Davis rejected feminist human rights formulations of intersectionality that preserve what she terms a "fragmented, additive model of oppression [that] essentialize[s] specific social identities."²⁷ Yuval-Davis and Dhamoon each contend that the point of intersectionality is to examine ways in which social visibility and invisibility have an impact on PSGs based on how social divisions are "concretely enmeshed and constructed by each other."²⁸

Thus, a paradigm intersectionality formulation of a research question would ask something very different from critical race feminist formulation: How do the enactments of ethnic, gender, and national status-based classifications in *In re A-R-C-G-* interact and emerge in our understanding of the meaning of *In re A-R-C-G-* for future undocumented women fleeing domestic violence?²⁹

Both the critical race feminist and paradigm intersectionality formulations clearly focus on ethnicity, gender, and national status as relevant classifications worthy of attention. Building on Dhamoon's articulation of "meaning-making," the paradigm intersectionality formulation builds in contingencies through the use of the word "enactments" and denaturalizes the privilege of a "causal" relationship among the patterns of ethnic, gender, and national status solely as markers of disadvantage. To reiterate my earlier point: both formulations can be normatively focused on socially just outcomes. The paradigm intersectionality approach, however, more critically utilizes positivist social science approaches to frame the question, collect and analyze data, and arrive at conclusions. In other words, paradigm intersectionality frames questions in a way that recognizes that classifications like race, gender, marital status, and citizenship status are not severable and all can be worthy of consideration regarding *In re A-R-C-G-*. Thus, the following analysis of

26. Bonnie Thornton Dill, *Race, Class and Gender: Prospects for an All-Inclusive Sisterhood*, 9 FEMINIST STUD. 131, 137–38 (1983); see also PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 252 (1990).

27. Nira Yuval-Davis, *Intersectionality and Feminist Politics*, 13 EUR. J. WOMEN'S STUD. 193, 205 (2006).

28. *Id.*

29. For more about how this formulation is uniquely intersectional, see DHAMOON, *supra* note 16, HANKIVSKY & CORMIER, *supra* note 18, and Lynn Weber & Deborah Parra-Medina, *Intersectionality and Women's Health: Charting a Path to Eliminating Health Disparities*, in GENDER PERSPECTIVES ON HEALTH AND MEDICINE (Marcia Texler Segal et al. eds., 2003).

the decision's impact proceeds with the paradigm intersectionality formulation. This approach is not only the more accurate operationalization of intersectionality's normative claims, it is also more comprehensive.

C. Categorical Multiplicity

The first dimension of the paradigm intersectionality approach embodies the widely accepted intersectional argument that multiple legal classifications are relevant to our understanding of a particular case or social problem. Here, paradigm intersectionality corrects for the common criticism that a full embrace of multiple classifications has no a priori endpoint (thus violating the positivist rule of parsimony)³⁰ by offering three criteria to guide categorical selection. In answering the question, "which classifications might we consider relevant to our understanding of *In re A-R-C-G-*," we go beyond the "plain language" of the trial transcripts, the briefs, or the decision itself. Instead, we turn to a broad understanding of the signs of injury, social stigma, or lack of access that are present. Clearly the social stigma of being undocumented, the material threat of deportation, and survival of severe spousal abuse are the markers of injury literally and figuratively. While the decision and many of the frames of the legal arguments that preceded it used gender as the primary lens, it is clear that enactments of undocumented citizenship status, transnationality, and marital bonds are also relevant to the case. Moreover, as we shall see in the rest of the analysis, instead of thinking of gender as the primary factor with citizenship status, transnationality, and marital status as secondary factors that "diversify the experiences of women," the paradigm intersectionality analysis gives each of these classifications equal ontological status.

The second criterion permits us to confirm enactments of gender, citizenship status, transnational ethnic identity, and marital status as relevant classifications for the target population subject to *In re A-R-C-G-*. The question surrounding this standard is: What is the substantive issue of social justice?

Many advocates and scholars working in this area acknowledge that important human rights are at stake. Gender-based claims are grounded in a long history of international human rights that date explicitly to the United Nations Refugee Convention in 1951.³¹ Although that convention did not specifically mention gender as one of the five convention grounds for persecution, certainly gendered forms of each ground persist,³² including violence against women. Two additional pronouncements have clarified and cemented the connection between the original grounds for persecution

30. The positivist "rule of parsimony" has a postmodern counterpart in Judith Butler's 1990 critique of the "etc." that feminists use when they list relevant social divisions. See Yuval-Davis, *supra* note 27, at 202–04. She contends it creates a never-ending process of resignification. See *id.* Yuval-Davis and others have cogently addressed this concern. See *id.*

31. See Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURV. Q. 46, 49 (2010).

32. See *id.* at 48.

and gendered forms of such persecution: Conclusion No. 39 on Refugee Women and International Protection (1985)³³ and the Office of the United Nations High Commissioner for Refugees (UNHCR) Guidelines on the Protection of Refugee Women (1991).³⁴ The latter set of guidelines established legal grounds for the analytical approach discussed in *In re A-R-C-G-*: connecting petitioners' application for asylum to their membership in a PSG.³⁵ Both the United States (in 1995) and Canada (in 1993) developed their own national guidelines in accordance with a third pronouncement, the United Nations Executive Committee of the High Commissioner's Programme Conclusion No. 73 (1993),³⁶ which encouraged state-specific guidelines. If we think about the arguments against inclusion of gendered practices of persecution (like domestic violence) as grounds for asylum because they are "family oriented" and private matters, rather than politically motivated because of a person's gender status, then the substantive issue of social justice in this context centers upon women's rights to live in a context free of domestic violence.

The international right of women to live in a violence-free context has proceeded in a state-specific fashion, which cuts both ways for immigrant women survivors and their advocates. On the one hand, the PSG approach is both more flexible and more nuanced than U.S.-based attempts to causally prove intent to discriminate on the basis of a "suspect" category, of which there are an extremely limited number (race, sex, color, national origin, religion, etc.) with even greater limitations on scope. On the other hand, the liberal framework of the United States curtails the expansive potential of the PSG approach by hewing to the "state-specific" mandate and translating the PSG standards into standards created by and for the United States—focused on civil liberties like free speech and association as evidence, which reduces the liberatory potential of the broader standard. Second, it also places the United States in routinized judgment of other states' practices. Seeing this specifically in relationship to *In re A-R-C-G-*, the United States is compelled by its own procedures to sit in judgment of those states as it decides whether to accept a claim that a petitioner is a member of a PSG.

This background information regarding the substantive issue of social justice provides a window through which to analyze not simply immutable/fundamental statuses like those explicitly identified by the BIA's decision in 2014, but also to identify similarly defined statuses left out. For example, by including "married" as a key element of the PSG at issue, the BIA creates a window for continued invisibility and/or discrimination against LGBT people migrating from states where they are

33. U.N. Exec. Comm. of the High Comm'r's Programme, Refugee Women and International Protection Conclusion No. 39 (Oct. 18, 1985), <http://www.unhcr.org/3ae68c43a8.html>.

34. OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN (1991), available at <http://www.unhcr.org/3d4f915e4.pdf>.

35. See Musalo, *supra* note 31, at 50.

36. U.N. Exec. Comm. of the High Comm'r's Programme, Refugee Protection and Sexual Violence Conclusion No. 73 (Oct. 8, 1993), <http://www.unhcr.org/3ae68c6810.html>.

neither granted marriage rights nor even domestic partnership rights. Thus an additional justifiable group membership emerges as legitimately relevant to both progress on the issue of social justice and the impact of *In re A-R-C-G-*: sexual orientation.³⁷

At this point gender, marital status, citizenship status, national origin, and sexuality are possible categories for inclusion in the analysis using two criteria. The third criterion allows us to select among them based upon what would traditionally be a fairly narrow question of legal analysis—the potential impact of *In re A-R-C-G-*. However, the third criterion—the scope and target of critique—can be applied in both narrow and broad terms.

Although there are scholars who have argued precisely for a narrow consideration of landmark cases' impact,³⁸ both critical race theory and intersectionality theory see the scope and target of critique in far broader terms. Bookey's analysis of asylum denials points us in multiple directions for the scope and target of critique. The wide variation in outcomes prior to 2014 provides one specific target for policy change—the pursuit of direct doctrinal direction from the BIA regarding precedential standards for adjudication of asylum petitions of women fleeing domestic violence in their countries of origin. Now that *In re A-R-C-G-* has been handed down, however, what might remain as obstacles requiring our attention and possible critique?

From 1994 to 2012, most denials of asylum did not primarily dispute that the domestic abuse suffered by the petitioners constituted persecution. Instead, they denied asylum primarily based on evidentiary grounds, including: (1) failure to show that the country of origin's government was unwilling or unable to protect the petitioner from the abuse; (2) overall lack of evidence; (3) flight to the United States from the abuse did not constitute an expression of a "political opinion" as grounds for asylum; (4) internal country of original relocation alternatives existed; (5) no well-founded fear of future persecution existed; and (6) failure to establish membership in a PSG.³⁹ But we also must consider the qualities of the denials that persisted in the 2001–2004 period, when baldly erroneous interpretations of Attorney General Reno's decision to vacate and remand *In re R-A*⁴⁰ (which had precedential potential prior to its consolidation) and later Attorney General Ashcroft's stay of the proceedings. From a policy perspective, two alternatives are possible. First, previous denials—whether clearly erroneous or based in evidentiary failures of the petitioner—might be a

37. While this Article is a priori focused on violence against women, men are also at this point excluded from this analysis, although *In re A-R-C-G-* could be interpreted to include men.

38. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

39. Bookey, *supra* note 9, at 121.

40. 21 I. & N. Dec. 629 (B.I.A. 2008).

matter of implicit judicial bias, specifically intersectional biases.⁴¹ The policy prescription here falls in the area of judicial training and education.

Second, previous denials—again whether clearly erroneous or based in the supposed evidentiary failures of the petitioner—might be a matter of specific evidentiary rules with transnational implications that have a disparate impact on one region or one country of origin or another. For example, ability to gain reliable and, where necessary, counter-stereotypical information about a country's government resources can be extremely difficult to obtain, though clearly relevant to all six of the evidentiary reasons for denial found in the Bookey analysis.⁴² This critique would produce policy prescriptions regarding changing the rules of evidence. Not surprisingly, determining a target of critique is a choice of the researcher and one that must be made explicit. For the purposes of this Article, the second scope and target of critique, analysis of the evidentiary requirements, has been selected because of the recent timing of the decision. It is too soon to rigorously examine at this juncture *In re A-R-C-G-*'s impact on subsequent immigration court decisions.

D. *Categorical Intersections and Diversity Within*

So far this Article has identified an intersectional frame for the research question and a guide to determine which social groups might be relevant for further analysis of *In re A-R-C-G-*. The second and third dimensions of paradigm intersectionality, categorical intersections and diversity within, push us to further rethink the standard additive formulas for constituting PSGs. Instead of creating a checklist form of PSG, like “married women from Guatemala fleeing severe spousal abuse,”⁴³ which produces a narrow benefit to women (or men) who might closely resemble that fixed PSG, categorical intersections and diversity within instead work to identify points of intersection that include but are not limited to identity-driven (“women”) or experiential (“fleeing severe spousal abuse”) characteristics. Categorical intersections function holistically to identify sets of vulnerable populations across multiple levels of analysis due to shared vulnerabilities, while diversity within seeks markers of difference that render individuals susceptible to harassment, discrimination, or deportation. These dimensions work in tandem with the other three dimensions of paradigm intersectionality.

In the current analysis, examining categorical intersections and diversity within turns on the social visibility element of the PSG standard. Analyzing the impact of *In re A-R-C-G-* requires attention to the limits of social visibility among intersectionally situated PSG members. Four procedural standards have emerged to further ensure that a particular social group located at the intersections of the multiple characteristics is socially visible:

41. See SHERENE H. RAZACK, *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS* 57, 83–84 (1998).

42. See *supra* note 39 and accompanying text.

43. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 393 (B.I.A. 2014).

1. Procedures must safeguard the voices and interests of the less powerful. To do so they must include representation from all key stakeholder groups, including policy makers, grassroots activists, and multiple oppressed communities.⁴⁴
2. Human commonalities and differences must be recognized without resorting to false essentialism, false universalism, or obliviousness to historical and contemporary patterns of inequality.⁴⁵
3. Differential positionings and perspectives in policy dialogues should be acknowledged without treating them as fixed representations of a PSG.⁴⁶
4. "Tactical and strategic priorities should be led by those whose needs are judged by the participants of the dialogue to be the most urgent."⁴⁷

These four standards will comprise the criteria by which we evaluate *In re A-R-C-G*'s impact. It is notable that there is no mandated attention to one or more specific classifications—there is no mandate of attention to gender or race/ethnicity, or citizenship status, for example. These characteristics are relevant to the BIA decision at hand based on the previous exploration under categorical multiplicity. However, the attention to commonalities and differences, as noted in standard number two, take into account the particular historical moment and those that preceded it, which may include moments where enactments of these characteristics have changed over time or emerged as salient in different ways.

E. Time Dynamics and Individual-Institutional Relationships

Scholars and advocates focusing on how asylum is granted in the United States and elsewhere provide a wealth of historical information at multiple levels of analysis. In each case that falls under the purview of *In re A-R-C-G*-, a petitioner's history of fleeing violence and the country in which the violence originated is certainly provided to the immigration court. A paradigm intersectionality analysis, however, expands our attention beyond the facts of the case and the role of historical precedent towards a more systematic attention to social constructions and visibility of PSGs and the ontological relationships between the enactments of enumerated characteristics that co-construct them.

Bookey and Musalo's separate analyses of U.S. asylum case law since *In re Kasinga*⁴⁸ provide excellent information regarding the historical challenges faced by immigrants and their advocates seeking to use gender-based justifications to qualify for asylum. When the BIA granted a teenage Fauziya Kasinga asylum to avoid the practice of female genital mutilation in her home country of Togo, advocates generated additional claims to

44. See HANKIVSKY & CORMIER, *supra* note 18, at 22.

45. See generally Elizabeth Cole, *Coalitions As a Model for Intersectionality: From Practice to Theory*, 59 *SEX ROLES* 443 (2008).

46. Yuval-Davis, *supra* note 27, at 205.

47. *Id.* at 206.

48. *In re Fauziy Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

explore the reach of the decision for claims of other gender-based forms of persecution, including domestic violence.⁴⁹ While relief for child survivors of abuse has appeared to be acceptable to immigration courts during the nearly twenty years since the *Kasinga* decision, both reviews of case law illustrate several core problems with the final dimension of the paradigm intersectionality approach: individual-institutional relationships.

The primary problem with using gender-based claims of persecution under the PSG doctrine established by *In re Acosta*⁵⁰ and later *In re Kasinga* has been the wide variation in asylum case dispositions, a finding agreed upon by the U.S. government and independent researchers alike.⁵¹ In the period between *Kasinga* and *In re A-C-R-G-* the cause of such wide variation stems from three separate problems: (1) an absence of regulatory guidance; (2) explicit misinterpretation of precedent by immigration judges; and (3) advocacy for extremely narrow interpretations of gender-based persecution by external policy actors. The role that *In re A-C-R-G-* can play in shifting outcomes for immigrants fleeing gender-based domestic violence in particular, and gender persecution more generally, is necessarily tied to how it will be interpreted in the future and how individuals and their advocates frame their claims for asylum following the BIA's rather detailed decision. The interaction between judicial interpretations and how claimants argue their cases is one example of individual-institutional dynamics. Of course this dynamic alone would not necessarily be unique to paradigm intersectionality.

What paradigm intersectionality contributes to analysis of the individual-institutional dynamics is attention to the social constructions of the claimants themselves and judicial complicity in these social constructions that lead to outcomes that perpetuate perceptions of women survivors only qualifying as survivors in a very narrow context, like requiring evidence of severe physical abuse while minimizing emotional or financial abuse. Such a context fits the mainstream female survivor in the United States but may not fit that of a woman arriving as a survivor from another country.⁵² Similarly, in cases where the country of origin has a different religious background than the United States, pro-asylum decisions rely on religious

49. *Id.* at 362.

50. *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

51. Bookey cites a report from the U.S. Government Accounting Office, which analyzed 198,000 cases and an academic analysis of 400,000 cases. *See* Bookey, *supra* note 9, at 109 n.10; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 4 (2008), available at <http://www.gao.gov/new.items/d08940.pdf>; Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (analyzing "databases of decision from all four levels of the asylum adjudication process").

52. Crenshaw's original analysis in *Mapping the Margins* follows the argument made about black female rape survivors by Jennifer Wriggins to make the point about women of color who are either U.S. citizens or immigrants contending with domestic violence. *See generally* Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983). Sherene Razack notes similar outcomes in the Canadian context for Aboriginal women survivors of domestic violence, who are members of nations within the Canadian nation. *See* RAZACK, *supra* note 41, at 69.

persecution to grant asylum rather than a gendered definition of that persecution. Prior to *In re A-R-C-G-*, neither previous approaches to understanding the interaction between judicial interpretations and how claimants argue their case and gendered analyses of asylum law in the United States have been forced to deal with the role of diplomatic relations between countries and its varied roles in the social construction of asylum-seeking immigrants. This Article specifically explores this aspect of individual-institutional relationships in the analysis of *In re A-R-C-G-* that follows.

II. A PARADIGM INTERSECTIONALITY ANALYSIS OF *IN RE A-R-C-G-*

A. *Relevant Standards for Asylum Seekers*

The BIA decision answered the broader question of whether domestic violence can be grounds for gender-based asylum under sections 208(a) and 241(b)(3) of the Immigration and Naturalization Act by identifying three elements that require clarification: the meaning of “persecution,” what constitutes a PSG, and what evidence is required to establish the persecution is occurring “on account of” a particular characteristic.⁵³ The decision established a three-part test to determine the relevance of a PSG and redefined the “social visibility” requirement to mean “social distinction.”⁵⁴ Both elements are discussed in some detail as part of the analysis.⁵⁵

The BIA made both changes in two earlier 2014 decisions, *In re W-G-R*⁵⁶ and *In re M-E-V-G-*,⁵⁷ noting that the test was a clarification and not a departure from prior case law. First, asylum seekers on the basis of membership in a PSG must establish that the group is composed of people who share an immutable characteristic.⁵⁸ The BIA defined “immutable” more broadly than a plain language interpretation might suggest in *In re W-G-R-* and applied it to this case: “The critical requirement is that the defining characteristic of the group must be something that either cannot be changed or that the group members should not be required to change in order to avoid persecution.”⁵⁹ It further illustrated that even characteristics commonly assumed in the United States to be mutable, like marital status, could in effect be immutable elsewhere in the world.⁶⁰

The second part of the three-part test requires that the group be defined with “particularity.”⁶¹ While a group can be identified in the multiple ways or “characterized”—in *In re A-R-C-G-* the multiple characteristics are

53. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 390 (B.I.A. 2014).

54. *Id.* at 392.

55. *Id.* at 392–95.

56. 26 I. & N. Dec. 208 (B.I.A. 2014).

57. 26 I. & N. Dec. 227 (B.I.A. 2014).

58. *A-R-C-G-*, 26 I. & N. Dec. at 392.

59. *W-G-R-*, 26 I. & N. Dec. at 213.

60. *A-R-C-G-*, 26 I. & N. Dec. at 393.

61. *Id.*

“married,” “women,” “from Guatemala,” and “unable to leave the relationship”—the BIA explicitly locates particularity in the home country context according to “commonly accepted definitions.”⁶² This particularity standard also applied in *In re W-G-R-*, where the BIA decided that it is permissible and in fact may be necessary to consider the social and cultural context of the petitioner’s home country.⁶³ What might be of particular relevance for a paradigm intersectionality analysis is the BIA’s reliance on evidence of the survivor’s attempts to gain relief in the home country. This case notes the significance of the respondent’s appeal for help from the police as an antecedent to the more compelling piece of evidence: the police’s failure to provide relief.

Third, and finally, the group must be socially distinct, a standard that replaces the prior “social visibility” requirement.⁶⁴ Instead of requiring the perceptions of the individual persecutor—in this case, the abusive husband—to recognize the social distinction of the group “married women unable to leave the relationship in Guatemala,” the BIA instead shifts to relying on the perceptions of the home society regarding the social distinction of the group.⁶⁵ Specifically, the standard turns on whether a home society makes meaningful distinctions between the PSG and other groups.⁶⁶

B. Analysis

As noted in the discussion regarding the paradigm intersectionality dimension of categorical multiplicity, the PSG approach can be flexible and nuanced. The three cases decided in 2014 clearly attempted to clarify use of the PSG standard of documenting persecution, sending what many hoped would be a clear message to advocates and immigration judges alike that had long been missing. Considering the multiple categories of gender, national origin, citizenship status, and sexuality, what might remain as obstacles requiring our attention and possible critique?

From an intersectional approach, a broader definition of gender as an “immutable” characteristic that should not have to be changed to obtain relief from persecution allows for enactments of gender that empower undocumented women fleeing domestic violence in the future to make gender-based claims for asylum in the United States. Indeed, the BIA explicitly set aside the question of whether presenting evidence solely on the basis of gender is sufficient, suggesting that PSG claims that involve multiple categories of difference might find some level of success. However, one particular enactment exists in the decision that can limit its reach in ways that have been long criticized by intersectionality research. It is also contained in *In re W-G-R-* and applied to *In re A-R-C-G-*, suggesting that it will gain wider acceptance due to its repeated articulation by the

62. *Id.*

63. *W-G-R-*, 26 I. & N. Dec. at 221–22.

64. *Id.* at 212.

65. *Id.* at 217–18.

66. *Id.* at 217.

BIA: a reliance on “the *defining* characteristic” of the PSG. What precisely constitutes “the *defining*” characteristic?

Traditionally a “defining” characteristic in U.S. jurisprudence has been sex/gender or another characteristic such as race, ethnicity, national origin, or sexuality. It is possible that women who are unable to obtain relief in their home countries due to multiple defining characteristics may again be rendered invisible if judges interpret defining characteristic to mean only “gender.” For example, Afro-Peruvian women experience particular forms of discrimination that are explicitly due to the social constructions associated with their African descent and their gender.⁶⁷ U.S. immigration court judges’ perceptions of racial, ethnic, and gendered descent of women fleeing domestic violence from this particular context may have little direct social construction to rely on (for example, judges may be fairly ignorant about Afro-Peruvian women’s experiences), which often means that respondents compete for credibility in court with other longstanding narratives about race, gender, and crime.⁶⁸ Judges may also deem themselves knowledgeable by analogy or association about how particular women fleeing domestic violence should behave.⁶⁹ In either context, judges have specific ideas about both the “defining characteristic” and how particular women fleeing domestic violence should behave, both of which are partly now enshrined in the BIA decision, as noted above. These considerations limit the reach of *In re A-R-C-G-* in important ways and, just as importantly, suggest further directions for asylum-based advocates to consider as they seek to expand what constitutes persecution as a justification for asylum.

In a similar vein, the BIA’s suggestion that marriage is “immutable”⁷⁰ does not change the hegemonic social construction of marriage as a relationship between a male and a female. Thus, thinking through the categorical intersections of “married” and “unable to leave the relationship” still potentially obscures access to asylum due to gendered persecution in the context of domestic violence for those in same-sex partnerships, particularly in countries where such relationships lack access to civil or legal marriage status. While the BIA encourages consideration of the constraints against dissolution, it does not consider constraints against marital formation.⁷¹ Considerations of how to litigate for a person in a same-sex relationship would require critical decisions about whether a

67. Sylvia Falcon, *Mestiza Double Consciousness: The Voices of Afro-Peruvian Women on Gendered Racism*, 22 GENDER & SOC’Y 660, 666 (2008).

68. RAZACK, *supra* note 41, at 86–87; *see also* Crenshaw, *supra* note 6, at 1242.

69. Razack notes this phenomenon among white liberal male judges in Canada, who fancy themselves “progressives” who understand the criminal justice struggles of Aboriginal men, all of which has the impact of rendering the situations of Aboriginal female survivors of domestic violence and sexual assault invisible or less legible because they are perceived to be less susceptible to victimization (because, for example, they are strong and silent). RAZACK, *supra* note 41, at 74–80. Judges’ resistance to acknowledging this bias and the lack of procedural accommodations such as inclusion of additional evidence or increased judicial training regarding such biases remain. *Id.*

70. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 393 (B.I.A. 2014).

71. *See generally id.*

gendered persecution approach or another form of persecution (like religion) would be more effective despite the three-part test established in *In re A-R-C-G-*.

Public opinion data can provide some limited insight into the changing social constructions of undocumented immigrants in a way that also can shed light on the kinds of narratives that compete with the individual case narratives presented in court. Numerous studies indicate that despite claims to the contrary, the idea of “pure objectivity” about the facts of cases remains largely inaccessible to judges and juries alike.⁷² Thus, understanding the competing intersectional narratives at work about undocumented immigrants illuminates what judges who aspire to such objectivity must contend with.

The Collaborative Multi-Racial Post-Election Survey was conducted following both the 2008 and 2012 presidential elections in the United States.⁷³ Each survey asked eight domestic policy questions, three of which concerned immigrants, and requested that respondents indicate on a five-point scale from whether they strongly agree to whether they disagree with the statement. The survey randomly rotated the order of questions asked, including one regarding the respondents’ opinion regarding the proposed path to citizenship for undocumented immigrants,⁷⁴ whether respondents agree or disagree that immigration has an overall positive impact on their state’s economy,⁷⁵ and whether DREAM-qualified high school students should receive in-state tuition benefits at the college/university level.⁷⁶ Tables 1 and 2 illustrate the distribution of responses from strongly agree with any of these policy proposals to strongly disagree.

72. This is essentially the argument of the attitudinal model of judicial decision making, a nearly fifty-year body of work produced by Harold Spaeth, Jeffrey Segal, and a host of other scholars. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

73. *See Collaborative Multi-Racial Post-Election Survey (CMPS)*, RESOURCE CENTER FOR MINORITY DATA, <http://www.icpsr.umich.edu/icpsrweb/RCMD/studies/35163> (last visited Apr. 23, 2015).

74. This question was worded “[Illegal/Undocumented—they split the sample with each half using one word] immigrants should qualify for citizenship if they meet certain requirements, like paying back taxes and fines, learning English and passing a background check.” *See id.*

75. This question was worded “Immigration has an overall positive impact on the [state] economy.” *Id.*

76. This question was worded “[Illegal/Undocumented—they split the sample with each half using one word] immigrants who grew up in the U.S. and who graduated from high school here, should qualify for in-state college tuition.” *Id.*

Table 1: 2008 Comparative Multiracial Political Survey (n=4278)

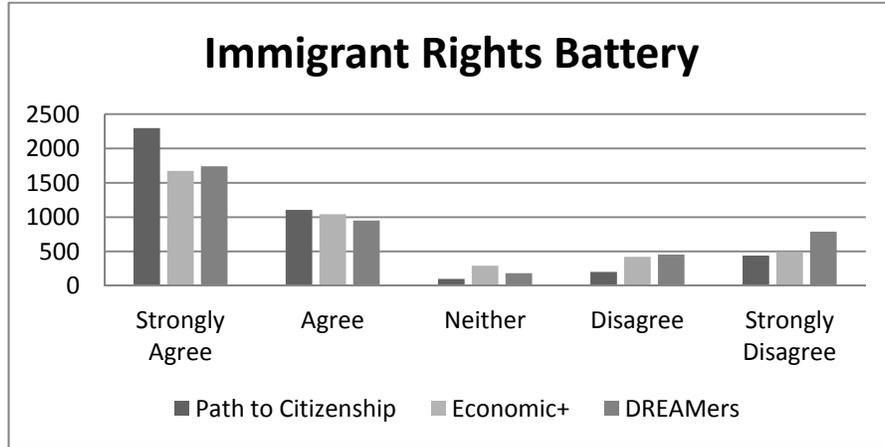
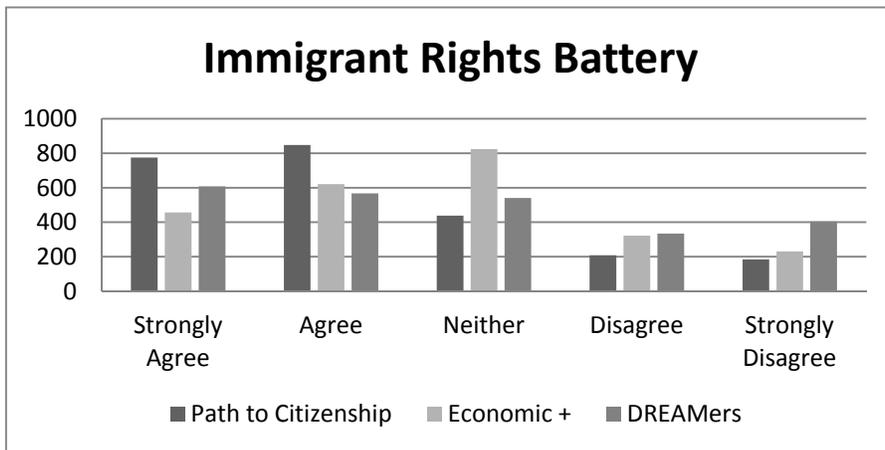


Table 2: 2012 Comparative Multiracial Political Survey (n=2453)



In each of these tables, the samples of U.S. citizens who agree with a path to citizenship and that DREAM-qualified students should get in-state college tuition benefits are relatively robust. The only major difference between the 2008 and 2012 results appears to be a strong indication that respondents in 2012 neither agree nor disagree with the idea that immigration itself has a positive impact on their state's economy. Although this finding is from snapshot data, it is worthy of mention because it could be an early indication of shifting public opinion regarding immigration's value more broadly. This trend could influence elections in a way that connects to individual-institutional relationships in the reach of *In re A-R-C-G-*.

With regard to time dynamics and individual-institutional relationships, *In re A-R-C-G* potentially continues the pattern of wide variation of possible outcomes in asylum cases despite the clarity provided regarding standards of evidence for understanding the domestic society in which the persecution is claimed to occur. The expanded evidence, which includes the respondent's personal experiences and background country information on marriage in addition to other traditional sources of information,⁷⁷ clearly acknowledges that other nations' responses to domestic violence or other forms of gendered persecution are relevant in adjudicating asylum requests. In justifying a third form of evidence, background country information on marriage regarding the possibility of marital dissolution is formulated in a way that potentially holds survivors responsible for seeking help from hostile authorities prior to departure, while not accounting explicitly for access to legal services due to characteristics shaped by poverty (whether personal resources of the respondent, like income, or structural contexts, like residential segregation that produce lack of access). While advocates may be able to claim that the possibility of marital dissolution does not exist (either de jure or de facto) in certain countries, what are judges to make of women fleeing abusive marriages in countries where the possibility of marital dissolution does exist?

The BIA provided a large loophole for judges to reject applications for asylum where they conclude a domestic divorce would have sufficed. While this might be a parsimonious solution, to use the language of positivism, it could hardly be considered a normatively just solution, to use the language of intersectionality. Members of the BIA are appointed by the Attorney General, who herself is appointed by the President of the United States. Thus, to the degree that public opinion might shift regarding the values of immigration in general, elections and the presidential appointments that inevitably follow will continue to shape how the BIA upholds or further clarifies the standards for gender-based persecution and grants of asylum.

Finally, in considering the role of time dynamics, the BIA's dictum to consider the entire evidentiary record, and more specifically to ensure "updated information," also potentially limits the number of asylum requests that will be granted. Although the average processing time for immigration courts in the United States is 521 days, or over a year and a half, courts in jurisdictions with high immigrant populations (both those with strict anti-immigrant laws and those without) are closer to an average processing time of two years or more (for example, 2.9 years in Phoenix, 2.5 years in Los Angeles, and 2.3 years in New York).⁷⁸ Indeed, *In re R-A* lasted for fourteen years.⁷⁹

77. *In re A-R-C-G*-, 26 I. & N. Dec. 388, 394 (B.I.A. 2014).

78. *Immigration Court Processing Time by Charge*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_charge.php (last visited Apr. 23, 2015).

79. *In re R-A*-, 24 I. & N. Dec. 629, 629 (A.G. 2008).

Ensuring updated information over a two- or three-year period introduces a host of political concerns into the information gathered about a country as well as the facts of a specific case. First, the reliability of the host information upon which many cases rely comes from the U.S. Department of State, which has shifting allegiances and of course responds to shifting situations of unrest in various parts of the world. While much of the original refugee jurisprudence attended to asylum granted in contexts of political unrest or war, in this case, the installment of a new government in the country of origin may change the State Department's assessment of the local context, particularly over a two- to three-year period. Similarly, changes in the State Department as presidential administrations change hands can also introduce updated information that may expedite deportations rather than expand the granting of asylum in ways that purportedly serve U.S. geopolitical interests but almost certainly do not serve the interests of "married women fleeing domestic abuse." To wit: *In re R-A-* dragged across the presidencies of Bill Clinton, George W. Bush, and Barack Obama due to the actions of Attorneys General Janet Reno, John Ashcroft, and Michael Mukasey.⁸⁰

Moreover, the personal circumstances of the respondent also can change, if evidence is provided of the spouse's death or other incapacitation, leading to the eradication of the persecution itself or threat of persecution. Developments such as these may seem far-fetched, but awareness of these possible ramifications can encourage tracking of outcomes going forward to determine whether additional action (legal or political) is necessary.

CONCLUSION: PROVIDING A HAMMER AND A SAW

This Article has attempted to provide a sort of "rapid response" analysis of *In re A-R-C-G-* using a paradigm intersectionality approach. Paradigm intersectionality allows us to identify future actions regarding tactical and strategic priorities, suggesting that determinations of next steps should be led by those whose needs are judged by participants in the dialogue to be most urgent. One intersectional activist attorney describes her work fighting violence against women in Native American communities:

I don't have all the answers, but I have a few tools that I can bring them that they can use to build their own community back up. So it's like I'm bringing them a hammer and a saw but I'm not building it for them, and I love that.⁸¹

This is a particular form of solidarity that can be practiced by attorneys working with clients with significantly less power than them. However it is a conscious strategy and not identical to standard "public service" or "pro

80. Reno's action, Ashcroft's reaction, and Mukasey's push for a decision without the issuing of final guidelines for said adjudication are chronicled by Bookey. *See* Bookey, *supra* note 9, at 114–16.

81. This quote is attributed to Sarah Reed, a pseudonym, in SHARON DOESTCH-KIDDER, SOCIAL CHANGE AND INTERSECTIONAL ACTIVISM: THE SPIRIT OF SOCIAL MOVEMENT 148 (2012).

bono” work, which is clearly tied to intersectional praxis developed by the many intersectionality theorists cited in this Article.

The paradigm intersectionality approach is valuable for three reasons. First, it allows for a 360-degree interrogation of the possible ramifications following the BIA’s decision, crystallizing decision points for future litigation and advocacy. Second, its operationalization of intersectionality’s broader theoretical insights corrects for prior, uncritical embraces of positivist social science approaches to critical race theory questions of meaningful access to justice. Third and finally, paradigm intersectionality identifies what is still missing in the pursuit of meaningful access to just outcomes.

In re A-R-C-G- greatly clarified PSG standards. However, the previously identified challenge of limited public access to proceedings and decisions remains. In addition to regulatory guidelines from the Department of Homeland Security that would incorporate *In re A-R-C-G-* administratively, it may be time for a concerted effort to obtain better access to the data surrounding asylum cases. Because only precedential decisions are officially published by the BIA, a wealth of understanding regarding indexed and unpublished decisions, in addition to the primarily oral decisions made by lower immigration court judges, makes tracking differential treatment much more difficult. For example, the BIA publishes asylum statistics for every fiscal year, listing how many applications were received per country as well as how many were granted, denied, abandoned, or withdrawn. This publication offers no information about gender or other immutable and fundamental characteristics, which would shed light on how well the system is functioning under *In re A-R-C-G-*. Moreover, we cannot decipher why, in 2009, 38 percent of asylum requests from China and 29 percent of requests from Haiti were granted, as opposed to low approval percentages from Mexico (2.2 percent), El Salvador (4.8 percent), and Guatemala (7.3 percent).⁸² Perhaps what is needed is a litigation or lobbying strategy using the Freedom of Information Act to expand the information made available to researchers regarding these administrative decisions. This strategy would accompany any increased advocacy for gendered forms of persecution.

Tracking the impact of *In re A-R-C-G-* is vitally important for undocumented survivors of domestic violence, advocates, and activists alike. A paradigm intersectionality analysis such as the one conducted here encourages all involved to engage in litigation and policy reform that simultaneously expands the boundaries of traditional positivist social science and conventional legal logic.

82. OFFICE OF PLANNING, ANALYSIS, AND TECH. IMMIGRATION COURTS, EXEC. OFFICE FOR IMMIGRATION REVIEW, ASYLUM STATISTICS FY 2009–2013, at 2–4 (2014), available at <http://www.rcusa.org/uploads/pdfs/FY2009-FY2013AsylumStatisticsbyNationality.pdf>.