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## In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims

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# NOTES

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## I. INTRODUCTION

For eighteen years, L-R- lived with a man who physically and emotionally abused her and her children and who constantly threatened to harm her family if she disobeyed him.<sup>1</sup> When she was pregnant and tried to escape his abuse, he set her bed on fire, nearly killing her.<sup>2</sup> He repeatedly raped and hit her, and at one point dislocated her nose so badly that the left side of her face and her mouth are still numb.<sup>3</sup> Even when she managed to leave him, he made multiple death threats and instilled such fear in her that she sent him money when she was away and then went back to live with him.<sup>4</sup> Finally, after several more years of suffering, L-R- fled with her children to the United States.<sup>5</sup>

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1. Amended Declaration of [L-R-] in Support of Application for Asylum at 2, 22 (Dec. 30, 2005) [hereinafter L-R- Affidavit], available at <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-support.pdf>.

2. *Id.* at 8.

3. *Id.* at 12.

4. *Id.* at 2, 10–11.

5. *Id.* at 19.

L-R- is a Mexican woman who applied for asylum in the United States in 2005.<sup>6</sup> She is one of countless victims of gender-based violence, which in recent decades has become a matter of international concern and which policymakers around the world have taken steps to combat.<sup>7</sup> The United States has been among the nations that have made eliminating gender-based violence a priority by passing such legislation as the Violence Against Women Act (“VAWA”)<sup>8</sup> and by creating two special forms of visas<sup>9</sup> for victims of domestic violence.

While great strides have been taken to protect immigrant women who are already in the United States, in the area of U.S.

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6. Brief of Respondents in Support of Applications for Asylum, Withholding of Removal and CAT Relief at 1, Matter of [L-R-, redacted] (Mar. 10, 2010) [hereinafter L-R- 2010 Brief].

7. One prominent example of action taken to end gender-based violence is the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, which “prohibits actions by States which are discriminatory and requires States to take affirmative steps to eradicate discriminatory treatment of women.” Memorandum from Phyllis Coven, INS Office of Int’l Affairs, U.S. Dep’t of Justice, to all INS Asylum Officers and HQASM Coordinators, Considerations for Asylum Officers Adjudicating Asylum Claims from Women 2 (May 26, 1995) [hereinafter DOJ Memorandum], available at [http://cgrs.uchastings.edu/documents/legal/guidelines\\_us.pdf](http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf). Another example is the United Nations Special Rapporteur on Violence Against Women, who is responsible for obtaining information on violence against women from governments, agencies, and treaty bodies and recommending ways to both eliminate its causes and provide remedies to victims. Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Introduction*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/issues/women/rapporteur> (last visited Dec. 26, 2010).

8. Congress passed VAWA in 1994 and has renewed it twice, in 2000 and again in 2005. In addition to providing training and resources to law enforcement officers to end violence against women and enhancing services for battered women, VAWA enables immigrants who married either legal permanent residents or U.S. citizens and who were victims of domestic assault to self-petition for immigration status. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (codified in scattered sections of 42 U.S.C. (2006)); see Micaela Schuneman, Note, *Seven Years of Bad Luck: How the Government’s Delay in Issuing U-Visa Regulations Further Victimized Immigrant Crime Victims*, 12 J. GENDER RACE & JUST. 465, 470–71 (2009) (describing the relief VAWA provides to domestic abuse victims).

9. The Victims of Trafficking and Violence Protection Act of 2000 provides a “T Visa” to victims of “severe forms of trafficking.” Valerie S. Payne, Note, *On the Road to Victory in America’s War on Human Trafficking: Landmarks, Landmines, and the Need for Centralized Strategy*, 21 REGENT U. L. REV. 435, 438 n.14 (2009). This Act protects both male and female victims of trafficking, but often the focus is on women and children, who comprise fifty-six percent of the victims of “forced labor, bonded labor, and forced prostitution.” Bureau of Pub. Affairs, U.S. Dep’t of State, Fact Sheet: Trafficking in Persons: Ten Years of Partnering to Combat Modern Slavery (June 14, 2010), <http://www.america.gov/st/texttransenglish/2010/June/20100614175403ptellivremos0.1033594.html>. Through the Battered Immigrant Women Protection Act of 2000 Congress created the “U Visa,” which protects victims of crimes such as domestic violence and sexual assault who assist in the investigation or prosecution of those crimes. See Schuneman, *supra* note 8, at 471–72 (discussing how the U Visa was created); Tahja L. Jensen, Comment, *U Visa “Certification”: Overcoming the Local Hurdle in Response to a Federal Statute*, 45 IDAHO L. REV. 691, 696 (2009) (describing the statutory language of the U Visa).

asylum (or refugee) law<sup>10</sup> domestic violence has yet to be fully accepted by immigration courts and the Board of Immigration Appeals (“BIA”)<sup>11</sup> as a basis for a successful asylum claim. When the United States passed the Refugee Act of 1980, it codified the definition of “refugee” as modified in the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees.<sup>12</sup> The Act also “provided, for the first time, a U.S. refugee policy stating that persecuted aliens who are present in the United States and who meet the definition of a refugee can apply for asylum protection in the United States.”<sup>13</sup>

The purpose of asylum is to grant protection from persecution to individuals whose governments (1) fail or are otherwise unable to protect them or (2) engage in persecution.<sup>14</sup> In order to qualify as a refugee and be granted asylum in the United States, an individual must have a “well-founded fear of persecution on account of” one of five grounds, which are (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, and (5) political opinion.<sup>15</sup>

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10. The U.S. government has distinguished between “refugee” and “asylee” on the basis of whether individuals applying for relief are inside or outside the United States, and this Note will discuss these terms accordingly when referring to government statistics. DANIEL C. MARTIN, OFFICE OF IMMIGRATION STATISTICS, DEPT OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2009, at 1 (2010) [hereinafter DHS 2009 ANNUAL FLOW REPORT], available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_rfa\\_fr\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2009.pdf) (“The United States provides refuge to persons who have been persecuted or have a well-founded fear of persecution through two programs: one for refugees (persons outside the U.S.) and one for asylees (persons in the U.S.).”). Scholars, however, have generally used “asylum law” and “refugee law” interchangeably, and both terms will be used in this Note.

11. The BIA, which is part of the DOJ’s Executive Office of Immigration Review, is “the highest administrative body for interpreting and applying immigration laws” and most of its decisions are “subject to judicial review in the Federal courts.” *Board of Immigration Appeals*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/eoir/biainfo.htm> (last visited Dec. 26, 2010).

12. See Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 352–53 (2009) (describing the evolution of codified refugee law).

13. U.S. GOV’T ACCOUNTABILITY OFFICE, NO. GAO-08-940, REPORT TO CONGRESSIONAL REQUESTERS, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 1 n.1 (2008) [hereinafter GAO REPORT ON VARIATION IN ASYLUM OUTCOMES].

14. See, e.g., Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim’s Particular Social Group*, 49 LOY. L. REV. 287, 289 (2003) (“[T]he overriding purpose of refugee law [is] to provide international protection to certain persons whose governments fail to protect them.”); Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 771 (2003) (“Asylum affords safety to those left unprotected by their home countries.”).

15. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2006) (defining the term “refugee”). An asylum applicant may qualify as a refugee either because he or she “has suffered past persecution” or “has a well-founded fear of future persecution.” 8 C.F.R. § 1208.13(b) (2010). If an applicant has suffered past persecution, he or she “shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.” *Id.* § 1208.13(b)(1). However, the burden is on the applicant to establish that his or her fear is well-

The individual must be “unable or unwilling to avail himself or herself of the protection of [the country from which he or she arrived].”<sup>16</sup> In addition, to demonstrate a well-founded fear of persecution, the harm feared must be “inflicted either by the government . . . or by persons or an organization that the government was unable or unwilling to control.”<sup>17</sup>

Individuals seeking asylum may do so affirmatively by filing an application with the Department of Homeland Security (“DHS”) or defensively by “requesting asylum before an immigration judge” (“IJ”) within the Department of Justice’s (“DOJ”) Executive Office for Immigration Review after removal proceedings have begun.<sup>18</sup> For the fiscal year of 2009,<sup>19</sup> the U.S. government granted asylum to a total of 22,199 individuals—11,933 individuals who applied affirmatively and 10,186 individuals who requested it defensively.<sup>20</sup>

Domestic violence victims regularly base their asylum claims on “membership in a particular social group”<sup>21</sup> because their claims do not directly fall under the other statutorily protected grounds of race, religion, nationality, or political opinion.<sup>22</sup> Formulating a cognizable social group and demonstrating that an applicant was harmed “on account of” group membership, however, can be frustrating for both domestic violence asylum applicants and other gender-based asylum applicants.<sup>23</sup> In addition, the U.S. government has yet to promulgate

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founded if that fear “is unrelated to the past persecution.” *Id.* For information from the current federal regulations on establishing asylum eligibility, see 8 C.F.R. § 208.13 (2010).

16. Immigration and Nationality Act § 101(a)(42)(A).

17. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985).

18. OFFICE OF PLANNING, ANALYSIS & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEPT OF JUSTICE, FY 2009: STATISTICAL YEAR BOOK I1 (2010) [hereinafter EOIR FY 2009 STATISTICAL YEARBOOK]. Immigration courts also review affirmative asylum cases that are not granted by DHS asylum officers. *Id.* at L1. In the 2009 fiscal year, immigration courts received 29,479 affirmative asylum and 9,800 defensive asylum cases. *Id.* at I1.

19. The fiscal year of 2009 here refers to the period from October 1, 2008 to September 30, 2009. DHS 2009 ANNUAL FLOW REPORT, *supra* note 10, at 1.

20. *Id.*

21. See Stacey Kounelias, Comment, *Asylum Law and Female Genital Mutilation: “Membership in a Particular Social Group” Inadequately Protecting Persecuted Women*, 11 SCHOLAR 578, 582 (2009) (“Women and children regularly use the ‘membership in a particular social group’ ground when seeking asylum for gender-based claims.”).

22. See Adams, *supra* note 14, at 291 (stating that the majority of domestic violence victims are unable to establish a refugee claim on the basis of race, religion, nationality, or political opinion).

23. See Cianciarulo & David, *supra* note 12, at 361–63, 367–68 (describing the difficulty that domestic violence asylum applicants have with articulating a social group and satisfying the nexus or “on account of” requirement and relating this to *Matter of R-A-*, see *infra* note 44); Sarah Siddiqui, Note, *Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify*, 52 ARIZ. L. REV. 505, 506 (2010) (“Qualifying under [a particular social group]

regulations that would lead to a uniform and consistent policy toward these asylum applicants.<sup>24</sup>

Since 2009, the DHS has suggested two formulations of a “particular social group” that would enable domestic violence asylum applicants to succeed on an asylum claim and has recommended asylum for two such applicants, R-A- and L-R-.<sup>25</sup> In addition, two different IJs granted asylum to R-A- and L-R-, respectively, which may indicate a trend toward the U.S. government granting more domestic violence asylum claims.<sup>26</sup>

However, it is uncertain how immigration courts and the BIA will adjudicate domestic violence asylum claims going forward, because they have not formally adopted the DHS’s position regarding such claims or issued a published decision that can guide their analysis. The manner in which asylum claims on the basis of domestic violence are adjudicated is critical both to the U.S. government and to these asylum applicants. Unsuccessful applicants may be harmed or killed upon their return to the countries from which they came.<sup>27</sup> Furthermore, given that two government agencies, the DHS and the DOJ, handle these asylum claims, it is imperative that adjudicators adopt a uniform approach so that any variation between the rates at which the agencies grant asylum to these applicants is minimized, if not eliminated.<sup>28</sup>

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. . . has proven difficult for many female asylum seekers because both courts and the Department of Homeland Security are reluctant to recognize such a broad-based claim.”).

24. See *infra* Part II.E. This is a problem that affects asylum applicants generally and that the U.S. government has discussed in at least one report to Congress. GAO REPORT ON VARIATION IN ASYLUM OUTCOMES, *supra* note 13, at 7 (“The likelihood of being granted asylum varied considerably across immigration courts and judges [for decisions rendered by IJs from October 1, 1994, through April 30, 2007, that involved asylum seekers from the twenty countries that produced the most asylum cases and the nineteen immigration courts that handled the largest numbers of asylum cases].”).

25. Department of Homeland Security’s Supplemental Brief at 2, 5, Matter of [L-R-, redacted] (Apr. 13, 2009) [hereinafter DHS 2009 Brief], available at [http://cgrs.uchastings.edu/pdfs/Redacted DHS brief on PSG.pdf](http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf).

26. Julia Preston, *Asylum Granted to Mexican Woman in Case Setting Standard on Domestic Abuse*, N.Y. TIMES, Aug. 13, 2010, at A14, available at <http://www.nytimes.com/2010/08/13/us/politics/13asylum.html>; Paul Elias, *Domestic Violence Victim Granted Asylum in the U.S.*, ASSOCIATED PRESS, Dec. 18, 2009, available at [http://www.boston.com/news/nation/articles/2009/12/18/domestic\\_violence\\_victim\\_granted\\_asylum\\_in\\_us/](http://www.boston.com/news/nation/articles/2009/12/18/domestic_violence_victim_granted_asylum_in_us/).

27. See GAO REPORT ON VARIATION IN ASYLUM OUTCOMES, *supra* note 13, at 2 (“The accuracy of an asylum decision is critical because of the decision’s potential impact on the safety of the asylum seeker . . . [because] [a]n incorrect denial may result in an applicant being returned to a country where he or she had been persecuted or where future persecution might occur.”).

28. See Jenny Woodson, Note, *Sanctioned Indifference: Addressing Domestic Violence in the Courts and Beyond*, 10 GEO. J. GENDER & L. 1037, 1049 (2009) (quoting Jennifer Podkul, *Domestic Violence in the United States and its Effect on U.S. Asylum Law*, 12 HUM. RTS. BRIEF

This Note discusses how immigration courts and the BIA have addressed asylum claims based on domestic violence and analyzes the possible changes that can be made to facilitate more uniform and consistent adjudications of such claims. Part II traces the history of domestic violence as a basis for asylum from the mid-1990s to 2008 and the developments that have occurred in two applicants' claims since 2009. Part III discusses the present limitations placed on the adjudications of domestic violence asylum claims and analyzes different recommendations for changing the manner in which immigration courts and the BIA assess these claims. Finally, Part IV discusses two steps that the U.S. government can take to eliminate the inconsistency in adjudicating these claims. First, it should adopt the United Nations High Commissioner for Refugees' ("UNHCR") definition of "particular social group" and its corresponding nexus analysis. Second, regardless of whether it maintains the current definition of "refugee" under the asylum regulations or adopts a new definition, the U.S. government should strengthen its internal mechanisms for analyzing domestic violence asylum claims by providing training to adjudicators on the nature of domestic violence asylum claims, requiring that adjudicators consult the State Department's Human Rights Reports when assessing these claims, and providing regular updates on how IJs and agency officials have decided such claims.

## II. DOMESTIC VIOLENCE AND U.S. REFUGEE LAW: 1995–2010

In the mid-1990s, U.S. government officials recognized that foreign victims of domestic violence may have successful claims for asylum, but in the past fifteen years the adjudication of domestic violence asylum claims, and of gender-based claims generally, has been inconsistent at best.<sup>29</sup> While this inconsistency is due in part to changing political administrations<sup>30</sup> and the reorganization of immigration services in the past decade,<sup>31</sup> it is also the result of the

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16, 17 (2005)) ("Without clear guidelines for how to treat domestic violence applicants, the possibility for varied treatment is high, and 'the results of these cases tend to depend more on the personal views of the adjudicator than on the actual merits of the case.'").

29. See Siddiqui, *supra* note 23, at 511 ("[G]ender-related claims in U.S. courts continue to suffer from inconsistent judicial interpretation, even when the claim is granted.").

30. See *infra* notes 68–72 and accompanying text.

31. Leonard Birdsong, *A Legislative Rejoinder to "Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution . . ."*, 35 WM. MITCHELL L. REV. 197, 218 (2008) (discussing how the Homeland Security Act led to a "reorganization of immigration functions"); Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 125



BIA's shift in its approach toward analyzing claims involving a particular social group.<sup>32</sup> This Part traces the history of the U.S. government's acknowledgement and treatment of domestic violence asylum claims, with a focus on the paradigmatic case *Matter of R-A*. It also describes both the recent changes made to analyzing the "particular social group" category on which the majority of domestic violence asylum applicants base their claims and actions taken by the DHS and IJs that suggest that the government may grant more of these asylum claims.

*A. The U.S. Government's Acknowledgement of Domestic Violence  
Asylum Claims, 1995*

On September 5, 1995, at the United Nations ("U.N.") Fourth World Conference on Women in Beijing, then-First Lady Hillary Rodham Clinton famously remarked that "women's rights are human rights."<sup>33</sup> Earlier that year, the DOJ used the same phrase in a memorandum<sup>34</sup> designed to assist asylum officers<sup>35</sup> with adjudicating gender-based asylum claims, including those based on domestic violence.

This memorandum, addressed to all Immigration and Naturalization Service ("INS") asylum officers, highlighted several recent international developments that had "contributed directly to the formulation of the U.S. guidelines."<sup>36</sup> In addition to providing

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n.21, 128 (2007) (noting that the Homeland Security Act "effectuated a massive reorganization of the federal government" and that "the finalization of . . . regulations [on gender-based asylum] has become more complicated with the reorganization of immigration functions").

32. See *infra* Part II.B, D.

33. Hillary Rodham Clinton, First Lady, Remarks to the U.N. Fourth World Conference on Women Plenary Session 4 (Sept. 5, 1995), available at [http://www.americanrhetoric.com/speeches/PDFFiles/Hillary Clinton - Womens Rights.pdf](http://www.americanrhetoric.com/speeches/PDFFiles/Hillary%20Clinton%20-%20Womens%20Rights.pdf).

34. DOJ Memorandum, *supra* note 7, at 2.

35. Asylum officers (also called immigration officers) are responsible for making the initial determination of whether an applicant should be granted asylum. Megan Anitto, Comment, *Asylum for Victims of Domestic Violence: Is Protection Possible After In re R-A?*, 49 CATH. U. L. REV. 785, 791 (2000). Such officers interview asylum applicants and the cases that they deny are referred to IJs for purposes of removal. *Id.* Applicants may appeal decisions by IJs to the BIA and afterward to the United States Court of Appeals. *Id.* For information about the asylum interview process, see 8 C.F.R. § 208.9 (2010).

36. DOJ Memorandum, *supra* note 7, at 2–4. These included the U.N.'s Declaration on the Elimination of Violence Against Women, the U.N. Office of the High Commissioner for Refugees' Guidelines on the Protection of Refugee Women, and the Canadian Immigration and Refugee Board's "Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution." *Id.* at 2–3. The DOJ Memorandum stated that "[these] international instruments and documents contain gender-related provisions that recognize and promote the principle that women's rights are human rights, and that women's rights are universal." *Id.* at 2. In addition, these

procedural guidelines to asylum officers interviewing female asylum applicants, the DOJ memorandum acknowledged that there may be complex issues involved with gender-based asylum claims and that adjudicators should “understand those complexities and give proper consideration to [these] claims.”<sup>37</sup>

Domestic violence was included among the forms of harm that women may suffer and that women may present as evidence of past persecution.<sup>38</sup> In contrast to “public acts” committed by or attributed to a foreign government, domestic violence was referred to as a form of “private action” because it is not known to be committed on behalf of a government.<sup>39</sup> The DOJ memorandum directed asylum officers analyzing claims involving domestic violence and other private actions to do the following:

The officer must explore the extent to which the government can or does offer protection or redress [to victims], and the extent to which the risk of harm extends nationwide . . . . Asylum adjudicators should carefully explore the circumstances giving rise to the harm or risk of harm, as well as the extent to which government protection would have been available in other parts of the country. The adjudicator must consider whether protection was available as a factual matter as well as in the law of the country and whether, under all the circumstances, it would be reasonable to expect a woman to seek residency elsewhere in her country.<sup>40</sup>

The guidance discussed in the DOJ memorandum was mandatory reading and part of the training for all INS asylum officers.<sup>41</sup> In addition, such guidance would be revised “as caselaw on gender-related persecution evolves,”<sup>42</sup> which suggests that the DOJ would defer to judges’ decisions before issuing further guidance to asylum officers on this issue. While advocates and scholars praised the guidelines as a positive step toward recognizing gender-based asylum claims,<sup>43</sup> the guidelines’ primary drawback was that they were and continue to be nonbinding on IJs, who adjudicate cases referred by

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instruments and documents “underscored and contributed to the development of international human rights and humanitarian law relating to women refugee claimants.” *Id.* at 3.

37. *Id.* at 4, 8.

38. *Id.* at 4, 9.

39. *Id.* at 18.

40. *Id.*

41. *Id.*

42. *Id.* at 18–19.

43. See *INS Publishes Gender Persecution Guidelines*, 72 INTERPRETER RELEASES 771, 771 (1995) (describing the guidelines as having a “major impact” and representing “a huge shift in the commitment of the INS to gender-based cases”); Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1220 (2009) (“The publication of the U.S. Gender Guidelines was an important step forward in addressing the challenges of gender-based asylum claims . . .”).

asylum officers.<sup>44</sup> But since asylum officers are the first government officials to hear these claims and have the power to recommend grants of asylum, the DOJ memorandum nevertheless was an important development for domestic violence asylum applicants.<sup>45</sup>

*B. Matter of R-A- and the Particular Social Group Category,  
1999–2008*

Not long after the DOJ memorandum acknowledged that domestic violence victims and other gender-based claimants may successfully apply for asylum, the BIA granted asylum to a Togolese woman fleeing the practice of female genital mutilation in *Matter of Kasinga*.<sup>46</sup> In 1999, however, the BIA in *Matter of R-A-* limited the extent to which such claims, and particularly those involving domestic violence, would succeed. This case is well known for the time it spent before the BIA and in the Office of the U.S. Attorney General. In addition, *Matter of R-A-* is known for the manner in which the BIA analyzed and rejected the “particular social group” on which the applicant, R-A-, based her claim.<sup>47</sup> This Subpart tracks the case’s development from 1999 to 2008.

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44. See *R-A- I*, 22 I. & N. Dec. 906, 913 (B.I.A. 1999) (“The DOJ Guidelines . . . provide no definitive answers for a case such as [*Matter of R-A-*] . . . [and] are instructive but not controlling on us.”); Immigration Officer Academy, Asylum Officer Basic Training Course: Female Asylum Applicants and Gender-Related Claims, Mar. 12, 2009, available at <http://www.uscis.gov/files/article/AOBTCLesson26FemaleAsylumApplicationsandGenderRelatedClaims.pdf>; Birdsong, *supra* note 31, at 213 (arguing that “the few evidentiary and other standards that have been established clearly by published precedent or recent administrative guidelines are sometimes ignored by immigration judges”); Crystal Doyle, Note, *Isn’t “Persecution” Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 519, 539 (2009) (stating that “the American ‘Considerations’ truly just are considerations” which “leave it to the judges to decide”); Reimann, *supra* note 43, at 1218 n.122 (“The Gender Guidelines were only directed at asylum officers—not IJs, the BIA, or the circuit courts—and they do not have the force of law.”).

45. Musalo, *supra* note 31, at 123.

46. *Matter of Kasinga* is often referred to as a “landmark case” that “established the right to asylum for individuals who fear future subjection to [female genital mutilation] if returned to their country of origin.” Carrie Acus Love, Note, *Unrepeatable Harms: Female Genital Mutilation and Involuntary Sterilization in U.S. Asylum Law*, 40 COLUM. HUM. RTS. L. REV. 173, 192 (2008) (emphasis omitted). The BIA held that Ms. Kasinga’s social group, “young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice,” was an acceptable group and that her “well-founded fear of persecution” was “on account of” this group, thus satisfying the nexus requirement. *Matter of Kasinga*, 21 I. & N. Dec. 357, 365–67 (B.I.A. 1996).

47. R-A- also applied for asylum on the ground of political opinion, but this Note will focus on the BIA’s holding regarding the particular social group category on which she also based her claim.

R-A-, or Rodi Alvarado-Peña<sup>48</sup>, is a Guatemalan woman who was the victim of severe physical and sexual abuse by her husband.<sup>49</sup> He raped and beat her repeatedly from the start of their marriage, dislocating her jawbone, kicking her in the spine while she was pregnant, whipping her with an electrical cord, and threatening her with a machete.<sup>50</sup> The police issued a summons for her husband but took no further action when he did not respond. The police also did not respond to R-A-'s calls.<sup>51</sup> In addition, a local judge who heard R-A-'s complaint "told her that he would not interfere in domestic disputes."<sup>52</sup>

An IJ granted R-A- asylum in 1996 but the BIA reversed the IJ's decision in 1999.<sup>53</sup> A majority of the BIA found that R-A- had suffered harm amounting to persecution and did not receive the protection of her government after making several attempts to obtain assistance.<sup>54</sup> R-A-'s claim ultimately failed, however, because the BIA held that the group in which she claimed membership was not a "particular social group" for the purposes of asylum:

[T]he respondent has not shown that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala. The respondent has shown neither that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group.<sup>55</sup>

The majority acknowledged a previous ruling<sup>56</sup> by the BIA that membership in a particular social group was based on "the existence of an immutable or fundamental individual characteristic."<sup>57</sup> However, while immutability remains a key component of a particular social

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48. This Note refers to Rodi Alvarado-Peña as R-A-, given that her case is referred to in connection with L-R-, whose full name has not been released by counsel.

49. *R-A- I*, 22 I. & N. Dec. 906, 908 (B.I.A. 1999).

50. *Id.* at 908–09.

51. *Id.* at 909.

52. *Id.*

53. *Id.* at 907.

54. *Id.* at 914.

55. *Id.* at 918.

56. In *Matter of Acosta*, the BIA denied asylum to a Salvadoran taxi driver because he failed to show that "the conduct he feared was 'persecution on account of membership in a particular social group.'" 19 I. & N. Dec. 211, 234 (B.I.A. 1985).

57. *R-A- I*, 22 I. & N. Dec. at 919. The complete language defining a particular social group from *Matter of Acosta* is cited in several BIA opinions as follows: "[a particular social group is defined by a] common immutable characteristic . . . that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." 19 I. & N. Dec. at 233.

group, the majority stated that it is only "the starting point" for judges determining whether applicants' articulated social groups will be recognized.<sup>58</sup> Other factors,<sup>59</sup> such as whether those individuals inflicting harm on victims see them as part of a particular social group, may also be considered because they are "consistent with the operation of the other four grounds for asylum."<sup>60</sup>

In addition, the majority held that even if R-A's articulated group was an acceptable "particular social group," she did not establish a proper nexus between this group and the abuser's actions toward her: "[T]he respondent has not established that her husband has targeted and harmed [her] because he perceived her to be a member of this particular social group."<sup>61</sup> In making this determination, the majority focused on R-A's testimony that the abuser harmed her for other reasons,<sup>62</sup> "none [of which were] . . . 'on account of' a protected ground."<sup>63</sup>

Finally, the majority dismissed R-A's claim that the Guatemalan government's failure to provide protection to victims like her made it responsible for such private acts, stating that "the record does not show that [R-A's husband's] actions represent desired behavior within Guatemala or that the Guatemalan Government encourages domestic abuse."<sup>64</sup> In addition, the majority was concerned that "construing private acts of violence to be qualifying governmental persecution, by virtue of the inadequacy of protection, would obviate, perhaps entirely, the 'on account of' requirement in the statute."<sup>65</sup> For example, the analysis of claims involving private acts could shift the focus on the motivation of the persecutor to that of the government

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58. *R-A-1*, 22 I. & N. Dec. at 919.

59. The BIA considered the following factors for determining whether a particular social group should be recognized: "how members of the grouping are perceived by [1] the potential persecutor, [2] by the asylum applicant, and [3] by other members of the society." *Id.* at 907.

60. *Id.* at 919.

61. *Id.* at 920. The majority acknowledged the possibility of mixed motives by stating that R-A had to "make a showing . . . that her husband was motivated to harm her, at least in part, by her asserted group membership," but did not find that he was motivated *at all* by the fact that she was in this group. *Id.* at 921, 923.

62. The BIA listed the following from the record as reasons why R-A's husband harmed her:

[F]or not getting an abortion, for his belief that she was seeing other men, for not having her family get money for him, for not being able to find something in the house, for leaving a cantina before him, for leaving him, for reasons related to his mistreatment in the army, and "for no reason at all."

*Id.* at 921.

63. *Id.*

64. *Id.* at 922-23.

65. *Id.*

“for not intervening and affording real protection.”<sup>66</sup> The majority did not wish to change the analysis of these types of asylum claims, and therefore rejected R-A’s claim for her failure to “show a sufficient nexus between her husband’s abuse of her and [her] particular social group.”<sup>67</sup>

In January 2001, just weeks before the change in presidential administrations, Attorney General Janet Reno vacated the 1999 *Matter of R-A-* decision and remanded it to the BIA to be stayed for reconsideration after the INS finalized a proposed rule amending the asylum definitions.<sup>68</sup> In February 2003, Attorney General John Ashcroft lifted the stay and referred the case to his office.<sup>69</sup> One year later, the DHS issued a brief in support of granting R-A- asylum and requested that Attorney General Ashcroft wait for publication of the final rule before issuing a decision on the case.<sup>70</sup> In January 2005, Ashcroft remanded *Matter of R-A-* to the BIA for reconsideration once the final rule was published.<sup>71</sup>

No such rule was issued, however, and *Matter of R-A-* remained pending until September 2008. Attorney General Michael Mukasey certified the case to himself and lifted the stay so that the BIA could reconsider the case without waiting for the proposed rule to be finalized.<sup>72</sup> Mukasey’s rationale was that, due to the long delay in issuing new asylum regulations since Attorney General Reno’s stay order in 2001, the BIA had been unable to act on “a growing number of similar cases” by domestic violence asylum applicants.<sup>73</sup> By 2008, there had been no indication that the proposed regulations from 2000

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66. *Id.*

67. *Id.*

68. See *R-A- I*, 22 I. & N. Dec. 906 (B.I.A. 1999), *vacated*, 22 I. & N. Dec. 906 (Att’y Gen. 2001). For a discussion of the proposed rule, see *infra* Part II.C.

69. *Matter of R-A- (R-A- II)*, 24 I. & N. Dec. 629, 629 (B.I.A. 2008). See also 8 C.F.R. § 1003.1(h)(1)(i) (2010) (“The [BIA] shall refer to the Attorney General for review of its decision all cases that . . . [t]he Attorney General directs the Board to refer to him.”); Musalo, *supra* note 31, at 126 (“Attorney General Ashcroft assigned the case of Rodi Alvarado to himself, with the apparent intent of deciding it during his term in office, but then decided not to decide it—and instead sent it back to the BIA for its decision.”).

70. Department of Homeland Security’s Position on Respondent’s Eligibility for Relief at 3, *Matter of R-A-*, 22 I. & N. Dec. 906 (Feb. 19, 2004) (File No. A 73 753 922) [hereinafter DHS 2004 Brief], available at [http://cgrs.uchastings.edu/documents/legal/dhs\\_brief\\_ra.pdf](http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf); see also Michael G. Heyman, *Protecting Foreign Victims of Domestic Violence: An Analysis of Asylum Regulations*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 115, 127 (2008) (noting that the position the DHS asserted in its brief was “to the surprise of many”).

71. *R-A- II*, 24 I. & N. Dec. at 629.

72. *Id.* at 629–31; see also Reimann, *supra* note 43, at 1205 (describing Mukasey’s decision).

73. *R-A- II*, 24 I. & N. Dec. at 630.

would be made final, so the BIA was directed to refer to the present regulations in its review of *Matter of R-A-* and similar cases.<sup>74</sup>

*C. The INS's Proposed Rule to Amend the Asylum Regulations, 2000*

In December 2000, one year after *Matter of R-A-* was decided and shortly before Attorney General Reno vacated and remanded the BIA's decision, the INS announced a proposed rule to amend the "asylum" and "withholding"<sup>75</sup> definitions in the Federal Register.<sup>76</sup> The regulations<sup>77</sup> were amended partly in response to the BIA's findings in *Matter of R-A-* and to "aid in the assessment of claims made by applicants who have suffered or fear domestic violence."<sup>78</sup> In addressing the definition of refugee, the amendments focus specifically on the terms "persecution" and "membership in a particular social group," and on the nexus or "on account of" requirement.<sup>79</sup> These regulations are not currently in effect, as the DHS has not issued a final rule or proposed a new rule on the refugee definition that addresses these issues.

The INS identified the extent to which domestic violence constitutes persecution under asylum law as one of the "novel issues" seen in recent asylum claims.<sup>80</sup> The regulations were not intended to provide a "universal model for persecution claims based on domestic violence."<sup>81</sup> Nor were they supposed to establish "what the precise

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74. *Id.* at 631.

75. Withholding of removal is another option available to asylum applicants, but it is governed by a higher standard. While asylum applicants must demonstrate a "well-founded fear of persecution," applicants seeking withholding of removal must establish a "clear probability of persecution" by showing that their "life or freedom would be threatened" if they returned to the "[their] country of origin or last habitual residence." *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 820 (B.I.A. 1990) (citing *INS v. Stevic*, 467 U.S. 407, 430 (1984)); 8 C.F.R. § 208.16 (2010); see also DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 14–15 (3d ed. 1999) (same).

76. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) [hereinafter INS 2000 Regulations].

77. The INS's proposed rule has been referred to generally as "proposed regulations" and will be described as such in this Note. See Birdsong, *supra* note 31, at 200 (discussing proposed regulations); Heyman, *supra* note 70, at 116 (same).

78. INS 2000 Regulations, *supra* note 76, at 76,588. The summary of the proposed rule indicates that domestic violence claims were a particular focus of the overarching objective of "establish[ing] principles for interpretation and application of the various components of the statutory definition of 'refugee' for asylum and withholding cases generally." *Id.*

79. *Id.*

80. *Id.* at 76,589. The regulations describe the recent claims as ones with "more varied bases, related, for example, to an applicant's gender or sexual orientation" and state that many implicate the particular social group category. *Id.*

81. *Id.*

characteristics of the particular social group might be.”<sup>82</sup> Rather, the regulations were meant to “remove[] certain barriers that the [*Matter of*] *R-A*- decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group.”<sup>83</sup>

Contrary to the majority’s reasoning in *Matter of R-A*-, the drafters of the regulations stated that applicants are not required to show that the persecutor sought to act against others who “share the applicant’s protected characteristic,” though it is “relevant and may be considered.”<sup>84</sup> Moreover, under the regulations, applicants can provide both direct and circumstantial evidence to show that the persecutors were motivated to harm them on account of this characteristic.<sup>85</sup> Such evidence includes “the persecutor’s statements and actions” and “patterns of violence in the society against individuals similarly situated to the applicant.”<sup>86</sup>

The proposed regulations retain the definition of “particular social group” from *Matter of Acosta* concerning the existence of a “common, immutable characteristic” and indicate that gender and marital status may fall under this definition, based on the immutability of these traits.<sup>87</sup> Intimate relationships, including marriage, may also be immutable if the applicant can show that she “could not reasonably be expected to leave.”<sup>88</sup> In addition, the basis for an applicant’s membership in a particular social group cannot be “defined by the harm which the applicant claims as persecution.”<sup>89</sup> For example, “domestic violence victims” would not suffice as a particular social group because an applicant cannot be harmed solely on account of being a victim.<sup>90</sup>

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82. *Id.*

83. *Id.*

84. *Id.* at 76,593.

85. *Id.*

86. *Id.*

87. *Id.* (“Gender is clearly such an immutable trait . . . [and] there may be circumstances in which an applicant’s marital status could be considered immutable. This would be the case, for example, if a woman could not reasonably be expected to divorce because of religious, cultural, or legal constraints.”).

88. *Id.*

89. *Id.* at 76,594.

90. See Adams, *supra* note 14, at 294–95 (stating that Canada has accepted “domestic violence victims” as a particular social group but that this practice is not accepted in U.S. courts because of the definition’s circular nature); Jillian Blake, Commentary, *Welcoming Women: Recent Changes in U.S. Asylum Law*, 108 MICH. L. REV. FIRST IMPRESSIONS 71, 73 (2010), <http://www.michiganlawreview.org/assets/fi/108/blake.pdf> (“‘Women who suffer domestic violence in country X’ would be an impermissibly circular social group. Battered women don’t



In addition, the proposed regulations state that adjudicators of asylum claims may consider a new list of factors in assessing the validity of a particular social group,<sup>91</sup> three of which were derived from *Sanchez-Trujillo v. INS*<sup>92</sup> and three from *Matter of R-A*.<sup>93</sup> Concerning one of the factors from *Matter of R-A*, “whether members of a given group are distinguished for different treatment,” adjudicators may assess an applicant’s evidence about “societal attitudes toward group members or about harm to group members” and evidence regarding the relevant country conditions.<sup>94</sup> For instance, if data from a domestic violence asylum applicant’s country indicated that members of her particular social group were ostracized or ignored, especially after they had been harmed by their persecutors, it may help demonstrate the legitimacy of the applicant’s social group.<sup>95</sup> Data regarding the extent to which acts of domestic violence are tolerated by the government in an applicant’s country could also help demonstrate that an applicant had a well-founded fear of persecution on account of her particular social group.<sup>96</sup>

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suffer persecution because they are battered women—rather, the group is defined by a type of persecution.”).

91. The regulations emphasize that these factors are just considerations and are not required for determining whether the articulated group is an acceptable particular social group. INS 2000 Regulations, *supra* note 76, at 76,594.

92. This was a case decided by the Ninth Circuit that required members of a particular social group to have a “voluntary associational relationship.” *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (“[T]he phrase ‘particular social group’ implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.”).

93. INS 2000 Regulations, *supra* note 76, at 76,594. The following are the six suggested factors for the revised portion of section 208.15(C)(3): “(i) The members of the group are closely affiliated with each other; (ii) The members are driven by a common motive or interest; (iii) A voluntary associational relationship exists among the members; (iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question; (v) Members view themselves as members of the group; and (vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.” *Id.* at 76,598.

94. *Id.* at 76,594.

95. *See id.* at 76,594–95.

96. *See id.* For example, the Guatemalan government “has done virtually nothing to educate those involved in the judicial system or the public about the [1996 Intra-Family Violence Law],” which was “intended to address domestic violence.” Karen Musalo et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN’S L.J. 161, 194–95 (2010). Moreover, some judges have refused enforcing provisions of this law on the grounds that “they violate property rights, are unconstitutional, are in conflict with other existing laws, or disregard judicial process.” *Id.* at 195.

*D. The BIA's Adoption of Social Visibility and Particularity as Additional Factors for Analyzing Asylum Claims Involving Membership in a Particular Social Group, 2006–2008*

In determining whether asylum applicants have successfully articulated a particular social group, the BIA has applied the immutability standard<sup>97</sup> described in *Matter of Acosta* and considered factors such as those that are “consistent with the operation of the other four grounds for asylum.”<sup>98</sup> In the past five years, the BIA has added two factors to this analysis: social visibility and particularity. *Matter of S-E-G-*, one of the BIA’s most recent cases discussing the requirements for a particular social group, states that these factors “give greater specificity to the definition of a social group.”<sup>99</sup> Nonetheless, *Matter of Acosta* continues to be the “starting point” for defining this phrase.<sup>100</sup>

### 1. Social Visibility

Beginning with the BIA’s decision in *Matter of C-A-*, where it found that “noncriminal informants” was not a cognizable particular social group, the BIA indicated it will consider social visibility, which is a form of “recognizability” of the particular social group, as one of the factors for determining whether a particular social group exists.<sup>101</sup>

In *Matter of C-A-*, the BIA cited decisions from the 1990s such as *Matter of Kasinga*, where the groups were “highly visible,” and discussed the Second Circuit’s determination in *Gomez v. INS* that “the attributes of a particular social group must be recognizable and discrete.”<sup>102</sup> In addition, the BIA referred to the 2002 guidelines from the UNHCR discussing membership of a particular social group, which “confirm that ‘visibility’ is an important element in identifying

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97. *Matter of C-A-*, 23 I. & N. Dec. 951, 955 (B.I.A. 2006); see also *supra* notes 56–58 and accompanying text (describing the BIA’s ruling in *Matter of Acosta*).

98. *R-A-I*, 22 I. & N. Dec. 906, 919 (B.I.A. 1999).

99. 24 I. & N. Dec. 579, 582 (B.I.A. 2008).

100. *Matter of C-A-*, 23 I. & N. Dec. at 955.

101. *Id.* at 959–61. The BIA stated that it continues to “adhere to the *Acosta* formulation” that requires the group members to share a “common, immutable characteristic,” and that it does not require a “voluntary associational relationship” as articulated in *Sanchez-Trujillo v. INS* or an “element of ‘cohesiveness’ or homogeneity among group members.” *Id.* at 955–57.

102. *Id.* at 956, 960.

the existence of a particular social group.”<sup>103</sup> The group “noncriminal informants” was not socially visible because “the very nature of the conduct at issue is . . . generally out of the public view” and “members of society in general [would not] recognize a social group based on informants who act out of a sense of civic duty rather than for compensation.”<sup>104</sup>

The BIA referred to its decision in *Matter of C-A-* the following year when it held in *Matter of A-M-E- & J-G-U-* that “wealthy Guatemalans” were not a particular social group.<sup>105</sup> Both the “context of the country of concern and the persecution feared” were important factors in determining whether the asylum applicant’s group was socially visible.<sup>106</sup> In addition, because crime was “pervasive at all socio-economic levels” in Guatemala, society was unlikely to perceive wealthy Guatemalans as being at a higher risk of crime than less affluent individuals.<sup>107</sup>

While the BIA in *Matter of A-M-E- & J-G-U-* referred to social visibility as “a *factor* in the particular social group determination,” it mentioned in the same paragraph the “*requirement* that the shared characteristic of the group should generally be recognizable by others in the community.”<sup>108</sup> It also used the word “requisite” when discussing social visibility later in the decision.<sup>109</sup> Such language suggests that social visibility was more than just one factor for the BIA to consider in its analysis—it was something that the BIA expected applicants who claim membership in a particular social group to demonstrate. Domestic violence asylum applicants would have difficulty satisfying the social visibility criterion because acts of domestic violence typically occur in private and the members of communities in which domestic violence victims live probably are unaware of what the victims are experiencing.<sup>110</sup>

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103. *Id.* These guidelines linked persecution to visibility by stating that “persecutory action toward a group may be a relevant factor in determining the visibility of the group in a particular society.” *Id.* (citing U.N. High Comm’r for Refugees, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 14, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR Particular Social Group Guidelines], available at <http://www.unhcr.org/refworld/docid/3d36f23f4.html>).

104. *Id.* at 960.

105. *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74–75 (B.I.A. 2007).

106. *Id.* at 74.

107. *Id.* at 75.

108. *Id.* at 74 (emphasis added).

109. *See id.* (“Whether a proposed group has a shared characteristic with the requisite ‘social visibility’ must be considered in the context of the country of concern and the persecution feared.”).

110. *See Heyman, supra* note 70, at 122–23.

In 2009, the Seventh Circuit rejected the BIA's social visibility criterion in *Gatimi v. Holder* by vacating and remanding the BIA's decision that "defectors from the Mungiki" was not a particular social group.<sup>111</sup> The court stated that the BIA's requirement that groups be socially visible "makes no sense" because members of certain social groups who have been targeted for persecution "take pains to avoid being socially visible."<sup>112</sup> In addition, the BIA has been inconsistent in "refusing to classify socially invisible groups as particular social groups" without repudiating previous cases where it did not consider social visibility yet found that certain particular social groups were valid.<sup>113</sup> The Seventh Circuit acknowledged, however, that other circuits still consider social visibility as one of the factors in determining whether an asylum applicant faced persecution on account of a particular social group.<sup>114</sup>

In her 2008 article on the relationship between social visibility and the particular social group category, immigration attorney Fatma Marouf expressed concern that the social visibility factor will make it much more difficult for domestic violence asylum applicants to succeed on their claims.<sup>115</sup> Domestic violence is viewed as a "hidden problem," and its victims are often "invisible" to society because they choose not to disclose their situations for such reasons as fear, shame, and the social stigma attached to abuse.<sup>116</sup> Moreover, because domestic violence is considered a private matter, victims are less likely to be socially visible because there is less of a "sense of community responsibility."<sup>117</sup>

## 2. Particularity

While "membership in a particular social group" has existed as one of the five grounds for asylum since the drafting of the U.N. Refugee Convention in 1951,<sup>118</sup> the BIA has only recently focused on the actual "particularity" of the social group. In *Matter of C-A*, the

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111. 578 F.3d 611, 615–16, 618 (7th Cir. 2009).

112. *Id.* at 615.

113. *Id.* at 616.

114. *Id.*

115. Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 94 (2008).

116. *Id.* at 94–95.

117. *Id.* at 95. Marouf asserts that the social visibility test should not be applied to victims of domestic violence because "such violence, by definition, occurs in the private sphere." *Id.*

118. See Doyle, *supra* note 44, at 527 (noting that "membership in a particular social group" was added in the last stage of the drafting process).

group “noncriminal informants” was “too loosely defined” to constitute a particular social group because many people in Colombia could potentially fit into this category.<sup>119</sup> Similarly, the group “affluent Guatemalans” from *Matter of A-M-E- & J-G-U-* failed the particularity test, as the relative and “amorphous” nature of the terms “wealthy” and “affluent” made a group defined on these grounds vary “from as little as 1 percent to as much as 20 percent of the population.”<sup>120</sup>

The BIA further described what is necessary for an applicant’s articulated group to satisfy the particularity test in *Matter of S-E-G-*:

The essence of the “particularity” requirement . . . is whether the proposed group can accurately be described in a manner *sufficiently distinct* that the group would be recognized, in the society in question, as a *discrete class of persons*. While the size of the proposed group may be an important factor in determining whether the group can be so recognized, the key question is whether the proposed description is sufficiently “particular,” or is “too amorphous . . . to create a benchmark for determining group membership.”<sup>121</sup>

The applicant’s group in *Matter of S-E-G-* was more difficult to define than groups from the previous cases: “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities.”<sup>122</sup> However, the BIA found that this group, too, had “amorphous” characteristics, such as “male children who lack stable families and meaningful adult protection” and who “live in the territories controlled by the MS-13 gang.”<sup>123</sup>

Because these children comprise a “potentially large and diffuse segment of society” and gang members may be motivated to recruit them for reasons apart from the fact that they were “members of a class,” the applicant’s group lacked particularity.<sup>124</sup> Depending on the formulation of their social groups, domestic violence asylum applicants may also have difficulty satisfying the particularity requirement if their group members share few common characteristics.

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119. *Matter of C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006). The BIA mentioned that with regard to informants, more information such as “the persons between whom the information is being provided” and “the nature of the information passed along” was needed to determine if this was a particular social group. *Id.*

120. *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007). The opinion added that “[t]he characteristic of wealth or affluence is simply too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group.” *Id.*

121. 24 I. & N. Dec. 579, 584 (B.I.A. 2008) (emphasis added).

122. *Id.* at 581.

123. *Id.* at 584–85.

124. *Id.* at 585.

As discussed in the following Subpart, at least two applicants were granted asylum by immigration courts since 2009 on the basis of domestic violence when social visibility and particularity were factors considered in the analysis of a particular social group.<sup>125</sup> The BIA, however, has yet to issue a precedent-setting opinion regarding domestic violence asylum applicants and the extent to which their particular social groups satisfy these factors.

*E. The DHS's New Particular Social Group Formulations and IJs' Grants of Asylum, 2009–2010*

In the beginning of 2009, few could have predicted that the DHS would recommend or that IJs would grant asylum to applicants on the basis of domestic violence given the recent emergence of the social visibility and particularity factors in the BIA's analysis of cases involving membership in a particular social group. The door to accepting domestic violence asylum claims opened when the DHS submitted a brief in *Matter of L-R*-, a case involving an asylum applicant from Mexico,<sup>126</sup> and when IJs later granted asylum to both R-A- and L-R-. This Subpart discusses the DHS's and IJs' actions, which may signal a shift toward the U.S. government granting asylum to many more domestic violence victims going forward.

1. The DHS's Brief in *Matter of L-R*-

L-R- and her two children arrived in the United States in 2004 from Mexico and applied for asylum in 2005.<sup>127</sup> She defined her particular social group as "Mexican women in an abusive domestic relationship who are unable to leave."<sup>128</sup> In October 2007, an IJ denied L-R-<sup>129</sup> asylum because her proposed social group lacked visibility and particularity. L-R- appealed the decision in 2008.<sup>130</sup> In December 2008,

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125. See *infra* Part II.E for a discussion of the particular social groups advanced by these applicants.

126. Court filings regarding L-R-'s case were redacted, but the Center for Gender & Refugee Studies ("CGRS") refers to her case on its website as *Matter of L-R*-, and this case name will be used throughout this Note. Ctr. for Gender & Refugee Studies, *Matter of L.R.*, [http://cgrs.uchastings.edu/campaigns/Matter of LR.php](http://cgrs.uchastings.edu/campaigns/Matter%20of%20LR.php) (last visited Jan. 12, 2011).

127. L-R- Affidavit, *supra* note 1, at 2, 25.

128. DHS 2009 Brief, *supra* note 25, at 2, 5.

129. L-R- applied for asylum together with her two children, and they are referred to collectively as the respondents by the DHS. This Note, however, will refer only to L-R- when discussing her case.

130. DHS 2009 Brief, *supra* note 25, at 2–3; Lisa Frydman, *Lisa Frydman on Recent Developments in Domestic-Violence-Based Asylum Claims*, LEXISNEXIS EMERGING ISSUES ANALYSIS, July 27, 2009, at 11 n.64, available at 2009 Emerging Issues 4075 (LexisNexis).

the BIA requested supplemental briefing from the parties involved in the case, and in April 2009 the parties filed a joint motion to remand L-R's case to the immigration court.<sup>131</sup> Later that month, the DHS submitted a supplemental brief to the BIA that "represent[ed] the Department's current position as to whether victims of domestic violence, in circumstances like those faced by the respondents, are members of a particular social group . . . and can otherwise establish eligibility for asylum."<sup>132</sup>

In its brief, the DHS "depart[ed] from normal practice" by suggesting "alternative formulations" of particular social groups which could apply to L-R's case instead of merely "critiquing" the groups she included in her application.<sup>133</sup> The first social group formulation was nearly identical to L-R's original formulation, except that the DHS removed the word "abusive" to eliminate circularity:<sup>134</sup> "Mexican women in domestic relationships who are unable to leave."<sup>135</sup> The second was a narrower formulation: "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."<sup>136</sup> While both suggested group formulations require that there be a domestic relationship, the second formulation contains a separate requirement that the persons from whom the victim fears harm consider her to be their property.

These two social groups, according to the DHS, "may . . . both accurately identify the reason why [L-R's abuser] chose the female respondent as his victim and continued to mistreat her," which was what the BIA held in *Matter of R-A-* was missing from R-A's

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131. DHS 2009 Brief, *supra* note 25, at 1; L-R- 2010 Brief, *supra* note 6, at 2.

132. DHS 2009 Brief, *supra* note 25, at 4.

133. *Id.* at 4-5. In its 2004 brief for R-A's case, the DHS suggested as a "cognizable particular social group" "married women in Guatemala who are unable to leave the relationship," *id.* at 4, and R-A's attorneys used this formulation in subsequent court filings to demonstrate that R-A- qualified as a refugee. See *infra* note 147 and accompanying text.

134. L-R's original formulation was "Mexican women in an abusive domestic relationship who are unable to leave," and the DHS explained why this group and others similar to it were not valid particular social groups: "To allow such circularity in defining a particular social group—individuals are targeted for persecution because they belong to a group of individuals who are targeted for persecution—would not be true to the refugee definition in U.S. law . . . ." DHS 2009 Brief, *supra* note 25, at 5-6.

135. *Id.* at 14. The language in this formulation regarding the applicant's inability to leave was discussed in the INS's proposed asylum regulations in 2000 concerning the extent to which intimate relationships may be immutable: "Any intimate relationship, including marriage, could also be immutable if the evidence indicates that the relationship is one that the victim could not reasonably be expected to leave." INS 2000 Regulations, *supra* note 76, at 76,593.

136. DHS 2009 Brief, *supra* note 25, at 14.

application.<sup>137</sup> Moreover, the DHS noted that the phrase “inability to leave the domestic relationship” from the first formulation can help determine whether other requirements for asylum have been met, such as whether “a fear of future abuse is *well-founded*” or “the harm amounts to *persecution*.”<sup>138</sup>

The DHS also incorporated the BIA’s recent considerations of social visibility and particularity in formulating the two possibilities for L-R’s particular social group. Concerning social visibility, the DHS suggested that additional evidence submitted on L-R’s behalf may show that by virtue of being in a domestic relationship, a woman is placed into “a segment of society that will not be accorded protection from harm inflicted by a domestic partner.”<sup>139</sup> This status, in turn, may<sup>140</sup> lead to “a significant social distinction being drawn in terms of who will receive protection from serious physical harm.”<sup>141</sup>

In the case of particularity, the DHS stated that its two suggested formulations may require “complex and subtle fact inquiries” to show that the articulated group “clearly delineates who [are members of] the group and accurately identifies the [group members] shared trait.”<sup>142</sup> The DHS also acknowledged the concern that “domestic relationship” would fail the particularity test because it might be considered “amorphous.”<sup>143</sup> It concluded, however, that the term “domestic relationship” should satisfy this requirement because it is expected to have a “similar level of specificity” under U.S. immigration law as such accepted terms as “crimes of domestic violence.”<sup>144</sup> At the same time, the term must also be “tailored to the unique situation of an asylum applicant’s own society,”<sup>145</sup> which the

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137. *Id.* at 15; *see also R-A- I*, 22 I. & N. Dec. 906, 920 (B.I.A. 1999) (“[T]he respondent has not established that her husband has targeted and harmed the respondent because he perceived her to be a member of this particular social group.”).

138. DHS 2009 Brief, *supra* note 25, at 21 (emphasis added). The brief further discussed this point:

[I]f a victim is seriously harmed when she tries to leave a relationship, those facts would relate both to the persecution analysis and to the assessment of her ability to leave. . . . [I]n some cases, the persecutor’s perception that his victim cannot leave the relationship can play a central role in that persecutor’s choice of the domestic partner as his victim.

*Id.*

139. *Id.* at 18.

140. The DHS noted that the record was “inconclusive” on whether L-R’s groups would generate the social visibility or “distinction” necessary to constitute a valid particular social group and that “further inquiry” was necessary. *Id.*

141. *Id.*

142. *Id.* at 18–19.

143. *Id.* at 19.

144. *Id.*

145. *Id.*



BIA and other adjudicators can determine from the applicant's statements and country condition information.

## 2. Grants of Asylum in *Matter of R-A-* and *Matter of L-R-*

In August 2009, after reading the DHS's brief in *Matter of L-R-*, R-A-'s attorneys<sup>146</sup> submitted a memorandum to an IJ in San Francisco Immigration Court and argued that R-A-'s particular social group, "married women in Guatemala who are unable to leave the relationship," satisfied the social visibility and particularity requirements.<sup>147</sup> In October 2009, less than one year after Attorney General Mukasey lifted the stay on *Matter of R-A-*, the DHS issued a response to R-A-'s supplemental filing and stated that she "is eligible for asylum and merits a grant of asylum as a matter of discretion."<sup>148</sup> R-A- was finally granted asylum by an IJ in December 2009.<sup>149</sup> In his decision, the judge stated, "Inasmuch as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the parties [to grant asylum]."<sup>150</sup>

Three months after R-A- was granted asylum, counsel for L-R- submitted a brief that "applie[d] the factual background of [L-R-'s] case to the legal framework articulated by the DHS."<sup>151</sup> L-R-'s counsel asserted that she was a member of the particular social group "Mexican women in domestic relationships who are unable to leave," which the DHS had suggested in its 2009 brief, and that this group was "defined by immutable characteristics," "socially visible," and "described with sufficient particularity."<sup>152</sup> In addition, L-R-'s counsel

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146. Attorneys from CGRS represented both R-A- and L-R- in their asylum claims. See *Documents and Information on Rody Alvarado's Claim for Asylum in the U.S., Current Update*, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/campaigns/alvarado.php> (last visited Dec. 26, 2010) [hereinafter *Alvarado Update*]; *Matter of L-R-*, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/campaigns/Matter of LR.php> (last visited Dec. 26, 2010).

147. *Alvarado Update*, *supra* note 146.

148. Department of Homeland Security Response to the Respondent's Supplemental Filing of August 18, 2009, *Matter of R-A-*, 24 I. & N. Dec. 629 (Oct. 28, 2009) (File No. A 73 753 922); see also Julia Preston, *U.S. May Be Open to Asylum for Spouse Abuse*, N.Y. TIMES, Oct. 30, 2009, at A14, available at [http://www.nytimes.com/2009/10/30/us/30asylum.html?\\_r=1&hp](http://www.nytimes.com/2009/10/30/us/30asylum.html?_r=1&hp) (discussing the DHS's response).

149. Elias, *supra* note 26.

150. *Alvarado Update*, *supra* note 146.

151. L-R- 2010 Brief, *supra* note 6, at 12–13.

152. *Id.* at 57. L-R-'s counsel described the manner in which L-R-'s abuser "intimidate[d]" her and "forced [her] to enter into and remain in a domestic relationship with him" and presented evidence regarding country conditions in Mexico to "demonstrate that, in Mexico, women in domestic relationships are not accorded governmental protection." *Id.* at 58–59.

stated that she was persecuted on account of her membership in this group and presented evidence to that effect.<sup>153</sup> L-R-'s counsel also presented evidence to demonstrate that L-R-'s individual circumstances had not changed since she left Mexico and that it would not be safe or reasonable for her to relocate within Mexico.<sup>154</sup>

In August 2010, an IJ granted L-R- asylum after the DHS made a "favorable recommendation" on her behalf.<sup>155</sup> Karen Musalo, one of L-R-'s attorneys, asserted that with this decision, "The point has been made, very loud and clear, that cases such as these involving domestic violence, and even more broadly, gender-based violence against women, are valid cases."<sup>156</sup> She also noted that granting asylum to R-A- and L-R- "shows [that] these are legitimate cases and there is a recognized guideline for proving them."<sup>157</sup>

While *Matter of R-A-* and *Matter of L-R-* have both resulted in grants of asylum, the INS's proposed regulations amending the asylum definitions from December 2000 have yet to be issued. DHS Deputy Press Secretary Matthew Chandler has stated that the DHS "continues to view domestic violence as a possible basis for asylum."<sup>158</sup> Chandler has also acknowledged that "the issue [of domestic violence victims qualifying for asylum] is highly complex and [the DHS is] moving ahead to develop regulations that will address these cases."<sup>159</sup> The DHS made similar statements in its 2004 brief for *Matter of R-A-* and its 2009 brief for *Matter of L-R-*.<sup>160</sup> There is currently no indication of when these regulations will be issued.

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153. *Id.* at 35, 37, 63–64. The evidence consisted of expert testimony on country conditions in Mexico and a report on violence against women in Mexico and Guatemala in addition to L-R-'s amended affidavit. *Id.*

154. *Id.* at 65, 68–69. For example, L-R-'s abuser "forced [her] to give him her new telephone number and continued to call and threaten [her]" until she changed her number. *Id.* at 65. In addition, if L-R- returned to Mexico and tried to work as a teacher, her information would be available "through teacher registration databases" online and her abuser could easily locate her. *Id.* at 68. L-R- would also have to go to "a region of Mexico where she has never lived before" and would have no job or support from family members. *Id.* at 70.

155. Preston, *supra* note 26.

156. Juliana Barbassa, *Mexican Woman Granted Asylum for Domestic Abuse*, ASSOCIATED PRESS, Aug. 13, 2010, available at <http://cgrs.uchastings.edu/pdfs/SFChron>, Mexican woman granted asylum for domestic abuse, 08-13-10.pdf.

157. *Id.*

158. Preston, *supra* note 26; Preston, *supra* note 148; Julia Preston, *New Policy Permits Asylum for Battered Women*, N.Y. TIMES, July 16, 2009, at A1, available at <http://www.nytimes.com/2009/07/16/us/16asylum.html>.

159. Elias, *supra* note 26.

160. In 2004, the DHS wrote that it was working alongside the Department of Justice and "plan[ned] to finalize promptly the proposed regulations that would govern the analysis of these types of cases." DHS 2004 Brief, *supra* note 70, at 3. In 2009, the DHS stated in a footnote that "[t]he Department has not abandoned the effort to produce regulations that address the issues

### III. ANALYSIS: WHY INCONSISTENCY REMAINS AND WHAT CAN BE DONE ABOUT IT

Despite the recent grants of asylum to R-A- and L-R- and the emergence of the DHS's new particular social group formulations, there is no consistent approach for asylum adjudicators to assess the claims of domestic violence victims. First, the regulations proposed by the INS in 2000 that were intended to "promote uniform interpretation of the relevant statutory provisions" regarding the definition of "refugee" have yet to be finalized.<sup>161</sup> Second, the additional considerations of social visibility and particularity for defining a particular social group make it difficult to determine if future domestic violence asylum applicants will succeed with their claims, because the BIA has not issued a recent published opinion involving a domestic violence asylum applicant.<sup>162</sup>

For example, concerning the asylum grants, an IJ granted R-A- asylum because the DHS and R-A-'s counsel agreed to this outcome.<sup>163</sup> As a result, the IJ did not have to make an independent determination as to whether R-A-'s particular social group satisfied the requirements for asylum and the new considerations of social visibility and particularity.<sup>164</sup> Likewise, in L-R-'s case the DHS recommended a grant of asylum to the IJ reviewing her case, and the judge responded accordingly.<sup>165</sup>

An important question remains: Should all current and future domestic violence asylum applicants now attempt to fit their cases into the particular social groups suggested by the DHS, or are there other ways that they can succeed with their claims? As shown below, in spite of the DHS's two suggested social group formulations, domestic violence asylum applicants may still experience difficulty in applying for asylum on the ground of "membership in a particular social group." However, there are several possible steps that the U.S. government can take to resolve the uncertainty regarding the adjudication of the asylum claims of domestic violence victims.

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covered by the December 7, 2000 notice of proposed rulemaking" and that "its new leadership is considering the best way forward in view of administrative and case law developments during the intervening years." DHS 2009 Brief, *supra* note 25, at 4 n.5.

161. INS 2000 Regulations, *supra* note 76, at 76,589.

162. Given that the IJ's decision to grant R-A- asylum was only one page long, it is uncertain how other IJs or the BIA will decide future domestic violence claims of a similar nature. See Elias, *supra* note 26.

163. See *supra* notes 149–50 and accompanying text.

164. See *supra* notes 149–50 and accompanying text.

165. Preston, *supra* note 26.

*A. Domestic Violence Asylum Applicants and Adjudicators Still Have Limited Guidance*

The national media first reported on the DHS's brief for L-R's case in July 2009 and described it as representing a national policy shift toward granting asylum to foreign victims of domestic violence.<sup>166</sup> Advocates and scholars viewed the DHS's two formulations for an acceptable particular social group, (1) "Mexican women in domestic relationships who are unable to leave" and (2) "Mexican women who are viewed as property by virtue of their positions within a domestic relationship,"<sup>167</sup> as promising developments<sup>168</sup> because prospective applicants may now have confidence that their asylum claims would be accepted if their facts fit the DHS's social group formulations.<sup>169</sup> Moreover, the DHS acknowledged that domestic violence asylum applicants are not limited to using these two formulations because decisions regarding asylum are made on a case-by-case basis, and other formulations may suit these applicants better.<sup>170</sup>

The problem, however, with relying on the DHS's suggested particular social group formulations and the recent grants of asylum for L-R- and R-A- as an indication that the U.S. government's policy toward domestic violence asylum applicants is changing is two-fold. First, L-R- and R-A- are the only two known examples of applicants whose claims have recently been granted on the basis of domestic violence.<sup>171</sup> In 2000 and 2001, the BIA,<sup>172</sup> the Ninth Circuit,<sup>173</sup> and a handful of immigration courts<sup>174</sup> granted asylum to victims of

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166. The first line of the July 16, 2009 article in *The New York Times* stated, "The Obama administration has opened the way for foreign women who are victims of severe domestic beatings and sexual abuse to receive asylum in the United States." Preston, *supra* note 158.

167. DHS 2009 Brief, *supra* note 25, at 14.

168. See Cianciarulo & David, *supra* note 12, at 377 ("[I]t is indeed promising that the Department of Homeland Security appears receptive to domestic violence-based asylum in the United States."); Frydman, *supra* note 130, at 12 ("The brief marks a significant change in policy toward domestic-violence cases . . .").

169. While the word "Mexican" was included in these formulations to correspond with L-R's nationality, the DHS did not state that the formulations were limited to Mexican women. Rather, the DHS asserted they "outline a framework under which victims of domestic violence might be able to advance cognizable asylum claims." DHS 2009 Brief, *supra* note 25, at 5, 11.

170. *Id.* at 11 n.9.

171. See Siddiqui, *supra* note 23, at 517 n.119 (stating that DHS's endorsement of asylum for R-A- "applies only to R-A's case and does not officially grant license for all domestic violence applicants to qualify").

172. Matter of S-A-, 22 I. & N. Dec. 1328, 1334 (B.I.A. 2000).

173. *Aguirre-Cervantes v. INS*, 242 F.3d 1169, 1172 (9th Cir. 2001).

174. KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 817 (3d ed. 2007) (citing decisions by immigration courts in Philadelphia and York, Pennsylvania).

domestic violence, but in at least two cases the applicants were children of their abusers, unlike L-R- and R-A-.<sup>175</sup> Additionally, in *Matter of S-A-*, a BIA case, the fact that the applicant refused to follow her father's "religion-inspired restrictions and demands" bolstered her claim and thus distinguished it from R-A-'s case.<sup>176</sup>

Second, future domestic violence asylum applicants who have cognizable claims for asylum but who do not have experiences similar to L-R- and R-A-<sup>177</sup> may not know how to articulate their particular social groups or otherwise proceed with their claims. In its brief for *Matter of L-R-*, the DHS articulated two specific groups that applicants such as L-R- can use when making asylum claims. While the DHS indicated that other formulations were possible, there is no indication that adjudicators would accept them if they were not similar to the two that the DHS suggested.<sup>178</sup>

In addition, adjudicators frequently rely on country condition information to assess asylum claims, and the State Department's Human Rights Reports for Mexico and Guatemala, the countries of nationality for L-R- and R-A-, respectively, have detailed information

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175. See *Aguirre-Cervantes*, 242 F.3d at 1172, 1177 (holding that a nineteen-year-old Mexican woman who was abused by her father and whose particular social group was her immediate family was eligible for asylum); *Matter of S-A-*, 22 I. & N. Dec. at 1334, 1336 (holding that a Moroccan woman who was abused by her father on account of her religious beliefs was eligible for asylum).

176. *Matter of S-A-*, 22 I. & N. Dec. at 1336.

177. The experiences of L-R- and R-A- have several similarities. First, L-R- and R-A- are both from Latin American countries with similar social perceptions about outsiders being involved in domestic violence cases. See DHS 2009 Brief, *supra* note 25, at 17 (discussing an IJ's reference to "country conditions evidence in the record" that "police and prosecutors [in Mexico] are reluctant to take action when they receive a domestic violence complaint"); *R-A- I*, 22 I. & N. Dec. 906, 909 (B.I.A. 1999) ("Twice, [R-A-] called the police, but they never responded. When the respondent appeared before a judge, he told her that he would not interfere in domestic disputes."). Second, both of their abusers had connections to law enforcement or other government officials, which would prevent the women from receiving adequate assistance from them. See *id.* ("[R-A-'s] husband told [her] that, because of his former military service, calling the police would be futile as he was familiar with law enforcement officials."); L-R- Affidavit, *supra* note 1, at 4 (stating that her husband's family "had connections to friends at the police and friends in local government . . . and in other parts of Mexico"). Third, the abusers both intended to harm L-R- and R-A- while they were pregnant. See *id.* at 8 (describing an incident when her abuser set her bed on fire when she was two months pregnant after she tried to escape from him); *R-A- I*, 22 I. & N. Dec. at 908 ("When [R-A-] refused to abort her three- to four-month-old fetus, [her husband] kicked her violently in her spine.").

178. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (stating that particular social groups satisfying the immutability standard will be determined on a case-by-case basis); see also *Matter of C-A-*, 23 I. & N. Dec. 951, 955 (B.I.A. 2006) (same); *R-A- I*, 22 I. & N. Dec. at 931 (same). However, the extent to which the BIA refers to previous decisions in determining a new case or relies on recommendations by DHS is uncertain. As a result, if DHS were to not recommend an applicant for asylum on the basis of her particular social group, it is uncertain whether the IJ or BIA panel would disagree and grant asylum.

on women and domestic violence.<sup>179</sup> Although the State Department reports for most countries include a section on domestic violence, such information is not universally available.<sup>180</sup> As a result, women who apply from countries for which the State Department does not have an extensive record on domestic violence may be at a disadvantage if there is not much information for adjudicators to compare to the applicants' testimony and documentation.

Therefore, prospective domestic violence asylum applicants and adjudicators of these claims still have limited guidance for how to proceed when the claims are based on membership of a particular social group, and little is expected to change without a precedent-setting decision by the BIA or modified DHS regulations. Currently, domestic violence asylum applicants may either wait until an opinion comes out or new regulations are issued before applying, or submit their applications and see if they meet the current requirements for asylum. Adjudicators must either wait for the DHS to issue a new version of the 2000 INS proposed regulations or take action themselves by issuing an opinion.

### *B. Different Approaches to Reducing Uncertainty in Adjudicating Domestic Violence Asylum Claims*

Scholars have proposed several possible solutions to bring consistency to the adjudication process for claims by domestic violence asylum applicants in the United States. These solutions include modifying different parts of the definition of "refugee," adding new parts, or removing others. Given the frequency with which these applicants base their claims on "membership in a particular social group," scholars' recommendations have often focused on this aspect of the definition of "refugee" in two ways. First, scholars directly address

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179. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: GUATEMALA § 6 (Mar. 11, 2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136114.htm> (providing information about violence against women in Guatemala); BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: MEXICO § 6 (Mar. 11, 2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136119.htm> (discussing the pervasiveness of domestic violence in Mexico, despite laws prohibiting it).

180. For example, in the State Department's Human Rights Report for Guinea, "estimates of [the prevalence of domestic violence] were unavailable." BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: GUINEA § 6 (Mar. 11, 2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135957.htm>. Similarly, the Report for Burundi stated that domestic violence "was common, although no statistics were available." BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: BURUNDI § 6 (Mar. 11, 2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135941.htm>.

this category by suggesting that the U.S. government should modify the definition of “particular social group.” Second, scholars address it indirectly by recommending that the nexus or “on account of” requirement be revised. Because many of these solutions involve amending the definition of “refugee” under the Immigration and Nationality Act, the DHS would likely be required to issue new regulations in order for the solutions to come into effect.

### 1. Add Gender as a Sixth Basis for Asylum

Given the prevalence of domestic violence<sup>181</sup> and other forms of gender-based violence (such as female genital mutilation),<sup>182</sup> one possible solution is to add gender as a sixth basis for an applicant’s asylum claim.<sup>183</sup> This would mean that instead of having to formulate a particular social group that has an immutability characteristic and satisfies the social visibility and particularity tests, an asylum applicant would only need to show that the persecution she feared was on account of her gender, and adjudicators would have an easier time determining whether the applicant satisfied this requirement.<sup>184</sup>

The major difficulty with this approach, however, is that domestic violence cases often involve mixed motives on the part of the abuser. If adjudicators believe that circumstances in an applicant’s

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181. WORLD HEALTH ORG., WHO MULTI-COUNTRY STUDY ON WOMEN’S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN: INITIAL RESULTS ON PREVALENCE, HEALTH OUTCOMES AND WOMEN’S RESPONSES, at vii (2005), available at [http://www.who.int/gender/violence/who\\_multicountry\\_study/Introduction-Chapter1-Chapter2.pdf](http://www.who.int/gender/violence/who_multicountry_study/Introduction-Chapter1-Chapter2.pdf) (“Violence against women is a universal phenomenon that persists in all countries of the world, and the perpetrators of that violence are often well known to their victims. Domestic violence, in particular, continues to be frighteningly common and to be accepted as ‘normal’ within too many societies.”).

182. See Kounelias, *supra* note 21, at 579 (citing statistics from WORLD HEALTH ORG., ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT 1 (2008), [http://whqlibdoc.who.int/publications/2008/9789241596442\\_eng.pdf](http://whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf), that “currently 100 to 140 million women worldwide have undergone female genital mutilation with approximately 3 million girls in Africa at risk annually”); *Ending Widespread Violence Against Women*, UNITED NATIONS POPULATION FUND, <http://www.unfpa.org/gender/violence.htm> (last visited Dec. 29, 2010) (“Around the world, as many as one in every three women has been beaten, coerced into sex, or abused in some other way—most often by someone she knows, including by her husband or another male family member; one woman in four has been abused during pregnancy.”).

183. See Birdsong, *supra* note 31, at 215 (stating that adding gender as a sixth basis would “benefit women seeking asylum from persecution from non-state sponsored situations such as sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, extreme domestic violence, honor killings, and forced prostitution”); Elizabeth A. Hueben, Note, *Domestic Violence and Asylum Law: The United States Takes Several Remedial Steps in Recognizing Gender-Based Persecution*, 70 UMKC L. REV. 453, 468–69 (2001) (proposing that adding gender as an independent ground for asylum can help “bring men and women to equality” and “recognize the violence women face the world over”).

184. See Hueben, *supra* note 183, at 466 (“A woman would only have to prove that she was persecuted on account of her gender.”).

record other than gender better account for why she was harmed, as the BIA concluded in *Matter of R-A*,<sup>185</sup> then the applicant will not satisfy the nexus requirement.<sup>186</sup> Therefore, while gender may be an important reason why many women are victims of domestic violence, if it is not the sole or central reason for the abuse, some of these applicants may have a difficult time qualifying as refugees.

## 2. Allow Gender to Be a Particular Social Group

An alternative to adding gender as a sixth ground for asylum is to allow applicants to claim gender as their particular social group or as “the defining characteristic” of that group.<sup>187</sup> *Matter of Acosta* recognized that an applicant’s sex may constitute a “common, immutable characteristic,”<sup>188</sup> and the 2002 UNHCR guidelines concerning particular social groups acknowledged that “sex can properly be within the ambit of the social group category.”<sup>189</sup> In addition, other nations such as Canada and New Zealand<sup>190</sup> permit asylum applicants to use gender as a particular social group.

In July 2010, the Ninth Circuit in *Perdomo v. Holder* remanded an asylum applicant’s case to the BIA to determine whether “women in Guatemala constitute a particular social group” and if the applicant “ha[d] demonstrated a fear of persecution ‘on account of’ her membership in such a group.”<sup>191</sup> Media outlets described the ruling as one that could lead to a rise in asylum applications by individuals

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185. See *supra* notes 61–63 and accompanying text. Current asylum law requires applicants to demonstrate that one of the grounds on which they base their asylum claims is “at least one central reason for persecuting the applicant.” 8 U.S.C. § 1158(b)(1)(B)(i) (2009). Here, provided that gender is not “tangential to persecution,” applicants with gender as the only basis for their asylum claim likely will satisfy the nexus requirement. See Frydman, *supra* note 130, at 12 (“Even under this higher [nexus] standard, the statutory ground does not have to be the only motivation, and mixed motives for persecution are still acceptable, as long as the protected ground is not tangential to persecution.”).

186. See Doyle, *supra* note 44, at 554 (arguing that applicants would face an “insurmountable barrier of proving their persecutor’s intent to harm them based on their gender and not for some other private, more individual reason”).

187. See Reimann, *supra* note 43, at 1234–40 (discussing the case law surrounding the use of gender as a particular social group and the reasons for and against this approach); Siddiqui, *supra* note 23, at 524 (arguing that courts’ various approaches “all allow for the same inference—women should qualify as a [particular social group]”).

188. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

189. UNHCR Particular Social Group Guidelines, *supra* note 103, ¶ 12.

190. See Doyle, *supra* note 44, at 542–48 (identifying Canada, New Zealand, South Africa, Ireland, Germany, Sweden, and Spain as countries where asylum applicants may use gender as a particular social group); Marouf, *supra* note 115, at 89–90 (“[T]he High Court of Australia, the Supreme Court of Canada, and the House of Lords now all recognize particular social groups defined by gender.”).

191. 611 F.3d 662, 669 (9th Cir. 2010).



from countries “such as El Salvador, Honduras and others with history of widespread gender abuse,” but noted that “[t]he timeline for resolving the issue is unclear.”<sup>192</sup> Indeed, the BIA’s decision on remand could have a significant impact on domestic violence asylum claims if women can successfully claim membership in a group based only on their gender and nationality, as there would no longer be a need for these applicants to formulate particular social groups such as those recommended by the DHS in L-R-’s case.

Some of the drawbacks to allowing gender to be a particular social group are the same as those to making gender an independent ground for asylum, such as the difficulty that applicants may have with fulfilling the nexus requirement under the current asylum regulations.<sup>193</sup> Other problems with this solution include the potential breadth of the social group’s membership<sup>194</sup> and its contradiction with the “particularity” consideration<sup>195</sup> that has become a key part of adjudicators’ assessments of these claims. For example, Professor Marisa Cianciarulo and Dr. Claudia David acknowledge the fear that recognition of their proposed particular social group, “women who have fled severely abusive relationships,” and similar groups would lead to “a flood of battered women from around the world [seeking] refugee protection.”<sup>196</sup>

Allison Reimann recommends that the DHS modify the INS’s proposed regulations from 2000 and define “particular social group” in a way that serves as a compromise between the arguments for and against including gender:

A particular social group is composed of members who share a common, immutable characteristic. This includes, but is not limited to, sex, color, kinship ties, or past experience, *either alone or in combination with other factors*. The characteristic must be

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192. Paul Elias, *Federal Court Opens Door for Guatemalan Asylum Claim*, ASSOCIATED PRESS, July 12, 2010, available at <http://www.awid.org/eng/Issues-and-Analysis/Library/Federal-court-opens-door-for-Guatemalan-asylum-claim>; *Accord Ruling on Women May Spur Asylum Claims*, N.Y. TIMES, July 15, 2010, at A10, available at <http://www.nytimes.com/2010/07/16/world/americas/16guatemala.html> (describing how the ruling in *Perdomo v. Holder* could open the door to many more political asylum claims from Central American women).

193. See *supra* notes 185–86 and accompanying text.

194. See Kounelias, *supra* note 21, at 602–03 (stating that the BIA should not expand the term “particular social group” so much that it “forces the social group to become meaningless as a protected ground” and that the “reluctance [of using sex or gender as a particular social group] stems from sex being too broad of a category”).

195. See Doyle, *supra* note 44, at 548 (“[D]efining a group of people who comprise about half of society . . . as a ‘particular social group’ would seem to defy the addition of the modifier ‘particular.’”).

196. Cianciarulo & David, *supra* note 12, at 380. For a discussion on why the floodgates argument should not be a concern, see *infra* Part IV.A.1.

one that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.<sup>197</sup>

Reimann's definition of "particular social group" would not only enable domestic violence victims to use groups such as "Guatemalan women" in their asylum applications, but it also would encompass many other groups that include women, such as Professor Cianciarulo and Dr. David's recommended group, "women who have fled severely abusive relationships." Depending on the circumstances of each case, applicants may or may not have better success with Reimann's proposed language. For some applicants, gender alone may constitute a strong enough particular social group to satisfy the BIA's recent considerations of social visibility and particularity. The BIA and other adjudicators can then compare the information the applicant provides with such sources as the State Department's Human Rights Reports. The group "Guatemalan women," for instance, would likely succeed because of the extensive accounts of violence against women in that country.<sup>198</sup>

Other applicants, however, would need to include additional characteristics in their particular social groups, especially if there is little to no evidence that members of the applicants' society harm or otherwise treat individuals differently solely because of gender.<sup>199</sup> If some immigration courts (or federal courts that disagree with the Ninth Circuit's reasoning in *Perdomo*) are reluctant to grant asylum claims where gender alone is the applicants' particular social group,<sup>200</sup> Reimann's recommendation for the particular social group definition will not change how these cases are adjudicated because applicants must still use other factors to succeed on claims based on domestic violence or other forms of gender-based violence.

Another alternative, suggested by Professor Michael Heyman, is to amend the proposed asylum regulations by adopting the UNHCR's definition of "particular social group," which would permit applicants to use gender, instead of a "hyper-specific subset," as a social group:

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197. Reimann, *supra* note 43, at 1255.

198. See Musalo et al., *supra* note 96, at 163 (describing the "alarming increases in the murders of women" in Guatemala and the "widespread impunity" in the country); Reimann, *supra* note 43, at 1207–10 (discussing statistics from several reports on violence against women in Guatemala).

199. This may be due largely to the fact that, as Marouf argues, "[domestic] violence, by definition, occurs in the private sphere." Marouf, *supra* note 115, at 95.

200. See *id.* at 90, 95 (noting that "decisions by the Second, Sixth, and Eighth Circuits have rejected particular social groups defined, in part, by gender" and that "U.S. adjudicators generally eschew groups defined solely based on gender").

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>201</sup>

What distinguishes the UNHCR's definition from other definitions of "particular social group" is that it combines two separate approaches to determining what "particular social group" means, thus forming a single standard for adjudicators to apply. The first is the "protected characteristics" or "immutability" approach that is similar to the approach advanced in *Matter of Acosta*.<sup>202</sup> The second is the "social perception" approach, which "examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large."<sup>203</sup>

The UNHCR's definition would maintain the concept of the common, immutable characteristic from *Matter of Acosta*, remove the circularity concern expressed in past opinions and DHS briefs, and address the social visibility consideration.<sup>204</sup> There may still be questions, however, regarding the particularity of certain social groups and the nexus between the harm inflicted on the applicant and her particular social group. Moreover, the adoption of the UNHCR's definition would not eliminate each applicant's responsibility to submit documentation to show that she meets all of the requirements for qualifying as a refugee.

### 3. Modify the Nexus Requirement

The nexus or "on account of" requirement prevents the two recommendations above from being implemented and often frustrates the efforts of domestic violence asylum applicants.<sup>205</sup> As a result, several scholars' suggestions for streamlining the adjudication of domestic violence and other gender-based asylum claims involve modifying the nexus requirement in a way that would give greater flexibility to these applicants and simplify this part of the adjudicators' analysis.

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201. Heyman, *supra* note 70, at 132 (citing UNHCR Particular Social Group Guidelines, *supra* note 103, ¶ 8 (emphasis omitted)).

202. UNHCR Particular Social Group Guidelines, *supra* note 103, ¶ 6.

203. *Id.* ¶ 7.

204. See *supra* Part II.D.1.

205. See Helen P. Grant, *The Floodgates Are Not Going to Open, But Will the U.S. Border?*, 29 HOUS. J. INT'L L. 1, 23 (2006) ("Domestic violence victims have experienced extreme difficulty in convincing asylum adjudicators that the abuse they suffered at the hands of their spouses is because the spouses are seeking to overcome a protected characteristic that the female applicants possess.").

At least two authors recommend that the U.S. government adopt a “bifurcated nexus analysis” that has been endorsed by the UNHCR and other nations.<sup>206</sup> This analysis would enable asylum applicants to “establish a causal connection between the persecution and the protected characteristic either through the motivation of the persecutor or through government inaction that is itself attributable to a protected characteristic.”<sup>207</sup> The BIA applied a form of this analysis in *Matter of Kasinga* by assessing both the motives of the individuals who performed female genital mutilation and the Togolese government’s failure to protect women from violence and abuse.<sup>208</sup> In *Matter of R-A-*, however, the BIA focused almost exclusively on the persecutor’s motivation, and found that it was not related to R-A’s social group membership.<sup>209</sup>

Given that more than a decade has passed since *Matter of R-A-* was originally decided by the BIA and that R-A- was recently granted asylum, the new asylum regulations may consist of a change in how adjudicators will assess the nexus requirement. Such a change, however, must correspond with any modified definitions for “particular social group” and “persecution” because of the connection between the nexus requirement and these two terms.

#### 4. Remove the Grounds for Asylum

Rather than add gender as a ground for asylum or modify the definition of “particular social group,” Crystal Doyle suggests that the U.S. government should eliminate all five grounds from consideration, thereby removing the nexus requirement.<sup>210</sup> A primary reason for removing the grounds on which asylum applicants must base their claims is that they are “no longer appropriate”—the individuals seeking asylum today are not those whom the drafters of the 1951

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206. See Reimann, *supra* note 43, at 1246–47 (naming Australia, New Zealand, and the United Kingdom as nations whose courts have adopted this analysis); Siddiqui, *supra* note 23, at 523 (endorsing the bifurcated nexus analysis); see generally Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 799 (2003) (discussing decisions in different countries that used the bifurcated approach). For a critique of this analysis, see Michael G. Heyman, *Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations*, 17 INT’L J. REFUGEE L. 729, 739–40 (2005).

207. Reimann, *supra* note 43, at 1257.

208. *Matter of Kasinga*, 21 I. & N. Dec. 357, 366–67 (B.I.A. 1996); Musalo, *supra* note 206, at 799; Siddiqui, *supra* note 23, at 522.

209. Musalo, *supra* note 206, at 803; Reimann, *supra* note 43, at 1249 (noting that the BIA “rejected [this] theory,” concluding that “the issue of state action simply distracted from the focus on the husband’s motivation”).

210. Doyle, *supra* note 44, at 554–55.

Refugee Convention sought to protect, such as the refugees of the two World Wars.<sup>211</sup> Doyle argues that if these grounds did not exist, the remaining requirements to qualify for asylum, such as showing that the applicant cannot resettle in another area of the country, are sufficient to limit the number of potential asylum claims and keep the “floodgates” from opening.<sup>212</sup>

Due to the fact that the definition of “refugee” from 1951 has endured for more than fifty years and other nations have continued to use this definition in its core form,<sup>213</sup> U.S. government officials would likely not want to remove the five grounds on which it is based. The particular social group category is the one most likely to be removed because it has been more difficult for adjudicators to assess than have the other four grounds.<sup>214</sup> However, the removal of this category is also unlikely because so many cases involving gender-based persecution are based on membership in a particular social group<sup>215</sup> and its removal would result in the displacement and possible invalidation of several non-gender-based asylum claims.<sup>216</sup>

#### IV. SOLUTION: HOW THE U.S. GOVERNMENT CAN BRING CONSISTENCY TO THE ADJUDICATION PROCESS

The current definition of “membership in a particular social group” and its relationship with the nexus or “on account of” requirement inhibit the consistent adjudication of domestic violence asylum claims and provide little guidance to prospective applicants. The DHS recognizes that it has taken far longer than anticipated to issue regulations on gender-based asylum claims, including those involving domestic violence.<sup>217</sup> Moreover, the INS’s proposed

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211. *Id.* at 556.

212. *Id.* at 556–57.

213. *See id.* at 542–48 (describing the recent practices of several nations that have kept the core parts of the 1951 Convention definition of “refugee”).

214. *See* Musalo, *supra* note 206, at 777 (“The meaning of the term ‘particular social group’ . . . may be among the most thorny interpretive issues in refugee law.”).

215. *See* Heyman, *supra* note 70, at 118 (“[M]ost [domestic violence asylum] claims [have been] sounding in social group in recent years.”).

216. *See* Heyman, *supra* note 14, at 769 (“Cases [involving membership in a particular social group] have dealt with an exceptional range of matters, including domestic violence, persecution based on disabilities, and various forms of persecution based on sexual orientation.”); Kounelias, *supra* note 21, at 597 (“Some of the groups that qualify as a social group in various other asylum claims include the educated, landowning class of Colombian cattle farmers, former child soldiers, families, persons with disabilities, members of a Somali clan, and homosexuals.”).

217. *See* DHS 2009 Brief, *supra* note 25, at 4 (“We note that the application of the provisions for asylum and withholding of removal in the domestic violence setting raises difficult issues and presents significant challenges, as reflected in the delay of over nine years in producing either

regulations from 2000 were guided by BIA decisions such as *Matter of R-A-* and *Sanchez-Trujillo v. INS*,<sup>218</sup> which were decided over a decade ago. Given the emergence of the social visibility and particularity considerations, DHS officials must take a different approach in crafting new asylum regulations. One such approach is for the DHS to adopt the UNHCR's definition of "particular social group" and its bifurcated nexus analysis. In addition, the DHS and the DOJ should provide training to adjudicators on the nature of domestic violence asylum claims, require them to review the State Department's Human Rights Reports, particularly the sections discussing domestic violence, and give periodic updates on how asylum officers, IJs, and the BIA have decided these claims.

*A. The DHS Should Adopt the UNHCR's Guidelines on the Particular Social Group Category and Nexus Requirement*

Just as the DOJ in 1995 based its guidelines for asylum officers on international developments from the U.N. and other nations,<sup>219</sup> the DHS, when drafting new asylum regulations, should adopt the UNHCR's guidelines for defining a "particular social group" and for applying the nexus or "on account of" requirement.<sup>220</sup>

1. The UNHCR's Definition of "Particular Social Group"

One of the most persuasive reasons for the DHS to adopt the definition of "particular social group" as set forth in the UNHCR guidelines is that it would enable domestic violence asylum applicants to use gender<sup>221</sup> as a basis for their claims. Allowing applicants to use particular social groups that include gender such as "Guatemalan women" would both eliminate the need for applicants to formulate overly narrow particular social groups and reduce the time spent by adjudicators determining whether such groups are acceptable.

An obstacle associated with adopting these guidelines and modifying the particular social group definition is the social visibility consideration<sup>222</sup> that has become a central factor in the BIA's analysis of recent cases. First, if the DHS were to adopt the UNHCR's

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regulations or an authoritative administrative precedent governing the issues first addressed by the Board in its vacated decision in *Matter of R-A-* . . .").

218. INS 2000 Regulations, *supra* note 76, at 76,592, 76,594.

219. *See supra* Part II.A.

220. *See supra* Part III.B.2-3.

221. *See supra* notes 201-04 and accompanying text.

222. *See supra* Part II.D.1.

definition for “particular social group,” adjudicators of asylum claims would not need to assess whether a particular social group is socially visible for all domestic violence asylum claims. For example, the group “Guatemalan women” would not need to be a socially visible group because its members “share a common characteristic other than the risk of being persecuted.”<sup>223</sup> Second, for domestic violence asylum applicants whose social groups include factors in addition to gender, there may be a conflict between the phrase “perceived as a group by society” in the UNHCR definition and the BIA’s social visibility test. Immigration attorney Fatma Marouf argues that while the BIA referred to the UNHCR guidelines for a particular social group in *Matter of C-A-* and *Matter of A-M-E-*, its test for social visibility “departs from the ‘social perception’ approach” by “focusing on the visibility of group *members* and examining only the *subjective* perceptions of the relevant society to determine whether a group is recognizable.”<sup>224</sup> Consequently, if the UNHCR definition is adopted into the U.S. government’s current analytical framework for asylum cases, adjudicators would be forced to choose between applying the UNHCR’s social perception approach and the BIA’s social visibility test.<sup>225</sup>

Given that the BIA has yet to issue a published decision that applies the social visibility test in the context of domestic violence asylum claims, adjudicators could decide not to consider social visibility when reviewing these specific claims.<sup>226</sup> Or, instead of having a separate analysis for claims involving domestic violence, the BIA could modify its social visibility test so that it corresponds with the UNHCR’s social perception approach. One concern with modifying this test is the effect the new test would have on non-gender-based asylum claims. As a result, the BIA and DOJ officials should collaborate with

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223. See Reimann, *supra* note 43, at 1238 (referring to immutability as one of the reasons why “Guatemalan women” is an acceptable particular social group); UNHCR Particular Social Group Guidelines, *supra* note 103, ¶ 8.

224. Marouf, *supra* note 115, at 64.

225. This would not occur if other circuits followed the Seventh Circuit’s lead in *Gatimi v. Holder* and rejected the BIA’s social visibility test, though many circuits have already incorporated social visibility into their analysis of applicants’ particular social groups. *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009).

226. Marouf suggests that federal courts should not defer to the BIA’s decisions regarding social visibility and the definition of a particular social group. Marouf, *supra* note 115, at 68. If the courts were to do this, however, adjudicators such as IJs would not know whether they should apply the social visibility analysis in assessing domestic violence asylum claims. Thus, carving out domestic violence cases so IJs need not address the social visibility factor is a preferred alternative.

the DHS to determine what exactly these effects would be before changing the BIA's analytical approach.

Another obstacle to the adoption of the UNHCR's definition of "particular social group" is the concern that by allowing women to claim gender as a social group, there would be far more asylum applications than before and hence far more grants of asylum.<sup>227</sup> Authors who have addressed this concern have concluded that it would not be a problem for gender to be a particular social group because the remaining requirements to apply for asylum are difficult to meet.<sup>228</sup> In addition, the DHS addressed this argument in its brief for L-R's case by noting that "most victims of domestic violence abroad would not have the resources or ability to leave their situations and come to the United States."<sup>229</sup> Further, the DHS asserted that Canada has not seen a large increase in the number of asylum applications since domestic violence victims became eligible to apply for asylum in 1993.<sup>230</sup> If the DHS does not anticipate a surge in domestic violence asylum claims, then the floodgates argument should not be of serious concern.

## 2. The UNHCR's "Causal Link" or Nexus Requirement

By adopting the UNHCR's nexus analysis, adjudicators of domestic violence asylum claims would assess two alternatives: (1) whether individual persecutors harmed domestic violence asylum applicants on account of their particular social group, or (2) whether

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227. The vast majority of legal scholarship on domestic violence asylum claims has discussed this concern to varying degrees. See Birdsong, *supra* note 31, at 213–14 (arguing that a flood of domestic violence asylum claims is unlikely because most abused women lack the resources to file an asylum claim); Cianciarulo & David, *supra* note 12, at 380–83 (discussing a number of factors that make a flood of domestic violence asylum claims improbable); Heyman, *supra* note 70, at 132 n.92 (noting that according to the UNHCR, a floodgate problem is unlikely because applicants must still make out all other elements of the asylum claim); Marouf, *supra* note 115, at 90–91 (emphasizing that fear of a flood of domestic violence claims is overblown because applicants must still meet all statutory requirements for asylum). See generally Grant, *supra* note 205 (discussing structural and other barriers to a flood of domestic violence asylum claims).

228. See Doyle, *supra* note 44, at 558 (noting that nations have "develop[ed] other limitations on asylum applications"); Siddiqui, *supra* note 23, at 528–29 (describing several reasons why the recognition of gender-based persecution will not result in a dramatic increase in the number of female asylum applicants); Reimann, *supra* note 43, at 1258 (stating that "the asylum framework provides assurances against this scenario").

229. DHS 2009 Brief, *supra* note 25, at 13 n.10.

230. *Id.* One response to this might be that more people would prefer to come to the United States than Canada and that there could still be a surge in applications for asylum. While it is possible that there will be more applications, there are still several other requirements for asylum that such applications may fail to satisfy, such as the one-year deadline for filing an asylum application. *Id.* at 5 n.6, 12 (discussing these requirements).



the applicants' governments refused or failed to act for that reason.<sup>231</sup> *Matter of R-A-* and the INS's proposed regulations from 2000 focused heavily on the persecutor's motive for harming the applicant. This should not be removed from consideration, particularly because the persecutor in most domestic violence asylum cases is not a state actor.<sup>232</sup> However, the typical reason why individuals seek asylum in the United States is that they have been unable to obtain relief from their home governments,<sup>233</sup> and returning them to these countries may subject them to persecution. As a result, there must also be a strong focus on the governments from which the domestic violence asylum applicants are fleeing.

It should not be difficult for adjudicators to consistently apply this nexus analysis, as they can refer to country condition information to determine the extent to which asylum applicants' governments have failed to protect them on account of the applicants' membership in their respective social groups. Because each asylum applicant's case is different, adjudicators would still need to compare the evidence on domestic violence in the applicant's country and the government's response to this violence to the applicant's specific experiences with state authorities.

A key difference between this inquiry into home government protection and assessing persecutors' motives for harming the applicants, however, is that there is less of a chance of variation. For every Mexican woman's asylum claim, the adjudicator would have to look at only one set of documents on file regarding country conditions to determine what the government has done or failed to do. But in cases where there is no indication that the government refused or failed to act in an applicant's case on account of her particular social group, adjudicators would need to assess each persecutor's motive to figure out whether the nexus requirement has been satisfied.

One potential concern is that more domestic violence asylum claims will be granted as a result of the government's failure to protect the applicants rather than on the basis of the persecutor's motives for harming the applicants. However, if country condition evidence

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231. See *supra* note 207 and accompanying text. Currently, the extent to which government action or inaction has been addressed in asylum cases concerns the persecution that the applicant suffered or believes she may suffer, as articulated in *Matter of Acosta*, and not the nexus between the persecution and the ground on which the applicant bases her claim. See *supra* note 17 and accompanying text.

232. Heyman, *supra* note 70, at 122–23. See generally Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391 (2001) (discussing how violence against women is often carried out by non-state actors).

233. See *supra* note 14 and accompanying text.

demonstrates that applicants' governments are unwilling or unable to grant relief to them and to other individuals suffering from domestic violence, it should not matter to U.S. adjudicators which part of the nexus analysis is applied as long as the applicants fulfill all requirements to qualify as refugees.

*B. Additional Steps That the DHS and the DOJ Should Take*

If the DHS continues to delay issuing new regulations,<sup>234</sup> it is likely that future domestic violence asylum applicants will attempt to fit their cases into the particular social groups that the DHS recommended and accepted in L-R-'s case. As a result, asylum officers and IJs will start to see particular social groups where the only difference in wording is the name of the country. This would also be true if the DHS were to adopt the UNHCR's bifurcated nexus approach or if the BIA decides that "women in Guatemala" is an acceptable particular social group, as women from dozens of countries who suffered from domestic violence or other forms of harm would tailor their groups accordingly to succeed on their asylum claims.<sup>235</sup>

Previous BIA opinions<sup>236</sup> and the DHS's brief<sup>237</sup> in L-R-'s case have referred to reports on country conditions from the State Department, also known as Human Rights Reports, which are updated annually by the Bureau of Democracy, Human Rights, and Labor and submitted to Congress.<sup>238</sup> The BIA may take administrative notice<sup>239</sup> of the State Department reports when they are not introduced by the parties, and federal appellate courts have stated that the BIA is "entitled to rely heavily on [the State Department's Human Rights Reports because] . . . the State Department 'is the most appropriate and perhaps the best resource the Board could look to in order to obtain information on political situations in foreign

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234. See *supra* note 217 and accompanying text.

235. See *supra* notes 191–92, 206–207 and accompanying text.

236. *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74–75 (B.I.A. 2007); *R-A- I*, 22 I. & N. Dec. 906, 910 (B.I.A. 1999); *Matter of Kasinga*, 21 I. & N. Dec. 357, 362 (B.I.A. 1996).

237. DHS 2009 Brief, *supra* note 25, at 17–18.

238. *Human Rights Reports*, U.S. DEPT OF STATE, <http://www.state.gov/g/drl/rls/hrrpt> (last visited Dec. 26, 2010).

239. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEPT OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 69 (last updated July 30, 2004), available at <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap4.pdf> ("The Board may, at its discretion, take administrative notice of commonly known facts not appearing in the record. For example, the Board may take administrative notice of current events and contents of official documents, such as country condition reports prepared by the State Department.").

nations.’”<sup>240</sup> However, it is not mandatory for IJs or the BIA to review these reports, and as a result there may be several cases where these adjudicators do not consult the reports in making their decisions.<sup>241</sup> There are also other factors that may affect the manner in which IJs adjudicate these types of asylum claims, including asylum applicants’ nationalities and the IJs’ gender and length of experience.<sup>242</sup>

To promote consistency, the DHS and the DOJ should provide training to adjudicators on the nature of domestic violence—and the claims that arise out of this violence<sup>243</sup>—and highlight differences between domestic violence asylum applicants and (1) other asylum applicants and (2) domestic violence applicants from different nations. The information that the agencies use for this training could be similar to what is used by the DHS to train its asylum officers,<sup>244</sup> and there could be different levels of training based on several factors, such as the IJs’ length of experience with asylum claims and the frequency with which the asylum claims in their courts involve domestic violence.

The DHS and the DOJ should also require adjudicators to consult the State Department’s Human Rights Reports when they assess claims involving domestic violence. One option is to require review in all decisions involving domestic violence.<sup>245</sup> In the

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240. *Reyes-Sanchez v. U.S. Att’y Gen.*, 369 F.3d 1239, 1243 (11th Cir. 2004) (quoting *Rojas v. INS*, 937 F.2d 186, 190 n.1 (5th Cir. 1991)).

241. In contrast, the DHS’s asylum regional offices conduct training on “new legal issues” and “country conditions” on a weekly basis and “the Asylum Office headquarters maintains staff dedicated to quality assurance, training, and country-conditions research to provide support to the field.” Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 311 (2007).

242. These were among several factors that were found to have “statistically significant effects on the variability of asylum outcomes” as reflected in GAO’s 2008 report to Members of Congress on this issue. GAO REPORT ON VARIATION IN ASYLUM OUTCOMES, *supra* note 13, at 7; see also Ramji-Nogales et al., *supra* note 240, at 376–77 (stating that “the chance of winning an asylum case varies significantly according to the gender of the immigration judge”).

243. This training could extend to gender-based claims generally if the reason for the inconsistency in adjudicating these claims is due in part to a lack of awareness of the issues these applicants face in their home countries.

244. See *Asylum Division Training Programs*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov> (follow “Humanitarian” hyperlink, then click on “Refugees & Asylum” and follow “Asylum” hyperlink) (last visited Dec. 29, 2010) (describing training provided to asylum officers).

245. Implementing this requirement would be as simple as providing a link to the State Department’s Human Rights Reports on the EOIR’s online IJ Benchbook, which “shares useful information with immigration judges to assist in the adjudication of immigration cases,” and including a copy of all Human Rights Reports for each year in the BIA’s Law Library and Immigration Research Center (“LLIRC”) and in each IJ’s chambers. *Immigration Judge Benchbook*, U.S. DEP’T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, <http://www.justice.gov/eoir/vll/benchbook/index.html> (last visited Dec. 29, 2010); EXEC. OFFICE

alternative, the DHS and the DOJ can mandate that adjudicators annually review the reports from the nations with the highest numbers of asylum claims involving domestic violence, such as Guatemala, so that IJs and the BIA may identify trends in these types of asylum applications. Requiring adjudicators to refer to a current record about the nature of domestic violence in these nations would be instrumental in verifying that the harm suffered by domestic violence asylum applicants rose to the level of persecution, and that such harm was inflicted on account of the applicants' particular social groups. This is equally useful whether the particular social groups used by these applicants are as specific as "Mexican women who are viewed as property by virtue of their positions within a domestic relationship" or as broad as "women in Mexico."

Human Rights Reports for some countries may contain more information regarding the level of domestic violence and the government's response to such violence than for others,<sup>246</sup> and inevitably there will be times when adjudicators will have to make determinations based primarily on the applicants' testimony. In providing training to adjudicators, the DHS should collaborate with the DOJ by sharing information on the types of characteristics that asylum officers are looking for when assessing such testimony, as there are thousands of defensive asylum cases each year that go directly before IJs without first being reviewed by a DHS asylum officer.<sup>247</sup> There should be little to no variation between the grant rates by asylum officers of affirmative applications and the grant rates by IJs of defensive requests and of affirmative applications they receive from the DHS. It is antithetical to the purposes of asylum in the United States for the government to deny some applicants asylum while granting asylum to other applicants who apply on the basis of similar or perhaps identical social groups.

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FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 5 (last updated Dec. 21, 2006), available at <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf> (discussing the LLIRC).

246. Guatemala's report, for example, contains approximately 1,000 words discussing domestic violence in the country while Cuba's report contained approximately 500 words on this issue. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, CUBA: 2009 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES § 6 (Mar. 11, 2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136108.htm>; BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, GUATEMALA: 2009 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES § 6 (Mar. 11, 2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136114.htm>.

247. In fiscal year 2009, immigration courts received 9,800 defensive asylum requests. EOIR FY 2009 STATISTICAL YEARBOOK, *supra* note 18, at 11.

Finally, the DHS and the DOJ should provide at least semiannual updates to adjudicators on cases that have been decided by their peers involving domestic violence. Such updates should also include decisions by federal appellate courts, such as the Ninth Circuit's decision in *Perdomo*.<sup>248</sup> While there is only one BIA with fifteen members,<sup>249</sup> there are over 230 IJs sitting in more than fifty-five immigration courts.<sup>250</sup> Given their large caseload,<sup>251</sup> the IJs do not have enough time to review decisions made by judges in other courts. As a result, a central body such as the DHS or the DOJ's Executive Office for Immigration Review is in the best position to track the developments in these cases and issue reports that include the rates at which these cases are granted or denied and the factors that influenced the adjudicators' decisions.

Providing training to adjudicators, requiring review of the State Department's Human Rights Reports, and providing updates on the status of domestic violence asylum claims are small steps that the DHS and the DOJ should take toward ensuring that domestic violence asylum claims are properly addressed. It is important for these agencies to take such steps now when there are no new asylum regulations so that the reasons for offering asylum as a form of relief to those who fear persecution abroad are preserved.

## V. CONCLUSION

R-A- had a long and difficult struggle to become an asylee, but "never lost hope"<sup>252</sup> during the process. Similarly, L-R- faced years of abuse before she fled to the United States and waited several more years for her claim to be granted. As Attorney General Mukasey noted, however, there are many other asylum applicants who have been waiting for the government to issue regulations or a precedent-

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248. See *supra* note 191 and accompanying text. The IJ Benchbook contains a link to the "Ninth Circuit Asylum Handbook by Country," and the agencies could adopt this as a model for reports on domestic violence and other gender-based asylum claims. This Handbook is available at [http://www.justice.gov/eoir/vll/benchbook/resources/Seattle Asylum Handbook.htm](http://www.justice.gov/eoir/vll/benchbook/resources/Seattle%20Asylum%20Handbook.htm).

249. *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/biainfo.htm> (last visited Dec. 26, 2010).

250. *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/ocijinfo.htm> (last visited Dec. 29, 2010).

251. For example, in fiscal year 2009 immigration courts received and completed over 350,000 matters. See EOIR FY 2009 STATISTICAL YEARBOOK, *supra* note 18, at B2-B3 (discussing immigration matters received by courts from fiscal year 2008 to 2009 and the total matters received by each immigration court for fiscal year 2009).

252. Elias, *supra* note 26.

setting decision to resolve their cases,<sup>253</sup> and now is the time to act. Given the passage of time and the evolution of case law on the definition of “particular social group,” the regulations as proposed by the INS in 2000 will no longer serve their purpose in guiding the adjudication of domestic violence asylum claims. If the DHS issues new regulations, it must strike a balance between the narrow holdings from recent BIA decisions and the policy interests in granting asylum to victims of domestic violence.

Adopting the UNHCR’s guidelines on the particular social group definition and its bifurcated nexus analysis is one way to strike this balance and would bring the United States in line with other nations who have enabled domestic violence victims to succeed on their asylum claims. Regardless of whether the DHS decides to issue new regulations, the DHS and the DOJ should provide training materials to adjudicators on the nature of domestic violence and the claims advanced by domestic violence victims. They should also require adjudicators to review the State Department’s Human Rights Reports when assessing these claims and provide updates of recent decisions involving domestic violence asylum claims. These steps would promote consistency between asylum officers, immigration courts, and the BIA. Domestic violence remains prevalent throughout the world, and having a system that effectively analyzes claims from victims of such violence will enable adjudicators to adhere to the purpose of asylum.

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253. *See supra* note 73 and accompanying text.

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