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ARTICLES

SAFETY OVER SEMANTICS: THE CASE FOR STATUTORY PROTECTION FOR DOMESTIC VIOLENCE ASYLUM APPLICANTS

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I. INTRODUCTION

The international community considers refugees "among the world's most desperate people."[1] Scholars and human rights advocates estimate that women and children make up the overwhelming majority of the worldwide refugee population.[2] However, the majority of successful asylum applicants in the United States are men.[3] The United Nations High Commissioner for Refugees (UNHCR) Executive Committee has acknowledged that:

> [W]hile forcibly displaced men and boys also face protection problems, women and girls can be exposed to particular protection problems related to their gender, their cultural and socio-economic position, and their legal status, which mean that they may be less likely than men and boys to be able to exercise their rights.[4]

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1. GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT, at xiii (1986).

2. *See* Deborah Anker et al., *Women Whose Governments are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under Untied States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 712 (1997) (stating as many as eighty percent of the twenty-seven million refugees worldwide are women and children); Nancy Kelly, *Gender-Related Persecution: Assessing Claims of Women*, 26 CORNELL INT'L L.J. 625, 625 n.1 (1993) (noting seventy-five percent of refugees and displaced persons are women and children).

3. Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation as Grounds for Asylum in the United States: The Recent Case of* In Re Fauziya Kasinga *and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375, 375 (1997).

4. U.N. High Comm'r for Refugees, UNHCR Handbook for the Protection of Women and Girls, at i (Jan. 2008).

Gender-related abuses that men do not face, like genital mutilation, sexual assault, and domestic violence, often force women to flee their homelands because they are left with little recourse.[5] However, asylum applicants in the United States asserting claims based on gender-related violence, especially those asserting claims based on domestic violence, have been largely unsuccessful under both the 1951 United Nations Convention Relating to the Status of Refugees and the United States Immigration and Nationality Act (INA).[6]

Domestic violence is a worldwide epidemic.[7] Even though most societies criminalize domestic violence, "the reality is that violations against women's rights are often sanctioned under the garb of cultural practices and norms, or through misinterpretation of religious tenets."[8] The United Nations asserts, "[V]iolence against women is a manifestation of historically unequal power relations between men and women."[9] The United Nations more specifically condemns violence against women as one of the "crucial social mechanisms by which women are forced into a subordinate position compared with men."[10] Thus, violence against women is "neither random nor individual," rather it is "systematic and group-based."[11] The United Nations Report on violence against women in the family concluded:

> [A]ny explanation [for domestic violence] must go beyond the individual characteristics of the man, the woman and the family and look to the structure of relationships and the role of society underpinning that structure. In the end analysis, it is perhaps best to conclude that

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5. *See* Nicole LaViolette, *Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines*, 19 INT'L J. REFUGEE L. 169, 173 (2007) (listing several abuses inflicted only upon women because they are women).

6. Kelly, *supra* note 2, at 626–27 (relating until recently, claims by women refugees have been mostly ignored).

7. *See* Purna Sen, *Development Practice and Violence Against Women*, *in* VIOLENCE AGAINST WOMEN 8 (Caroline Sweetman ed., 1998) ("Women across all regions, ages, religions, classes, and political affiliations are vulnerable to violence . . . .").

8. Olalekan A. Uthman et al., *Factors Associated with Attitudes Towards Intimate Partner Violence Against Women: A Comparative Analysis of 17 Sub-Saharan Countries*, BMC INT'L HEALTH & HUM. RTS., July 20, 2009, http://www.biomedcentral.com/content/pdf/1472-698x-9-14.pdf.

9. U.N. Econ. & Soc. Council, Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994).

10. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993) [hereinafter Declaration].

11. CATHARINE A. MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 22 (2006).

> violence against wives is a function of the belief, fostered in all cultures, that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.[12]

Even though the treatment of women in many societies clearly violates international human rights standards, "persistent ambivalence" characterizes the U.S. position on domestic violence asylum claims and leads to "contradictory measures at the administrative level and inconsistent" decisions in immigration courts across the country.[13] Adjudicators are reluctant to grant asylum in cases where the alleged gender-related violence appears similar to forms of gender-related violence that are pervasive in the United States.[14] The misconception that domestic violence is a private issue, unconnected to the political and social structures that serve to perpetuate the subjugation of women, underlies these decisions.[15] The pervasiveness of this public/private dichotomy indicates that violence against women is viewed as somehow "less severe and less deserving" of government protection.[16]

Modern scholarship connects the stereotypes and misperceptions that plague asylum claims involving gender-related persecution to the doctrine of coverture.[17] This doctrine, which places the wife in a legally subordinate position to her husband, has been an important background

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12. Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 120 (Rebecca J. Cook ed., 1994) (quoting the U.N. Report).

13. Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 123 (2007).

14. *See* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 296 (1994) (advocating for a torture definition including domestic violence practices).

15. *See* DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 239–41 (1989) (explaining how past and present "inadequacies in legal response" reflect "misconceptions" about nature of domestic violence *including* perpetuation of the idea of domestic violence as a private issue); Copelon, *supra* note 14 ("[W]hen stripped of privatization, sexism and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence that have been prohibited by treaty and customary law . . . .").

16. Copelon, *supra* note 12, at 116.

17. *See generally* Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 593 (1991) (analyzing the coverture doctrine's legacy in modern immigration law); Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 667 (1998) ("By incorporating the doctrines of coverture and chastisement, immigration law has been recognized to perpetuate the no longer viable assumption that a wife belongs to her husband.").

principle in U.S. immigration law.[18] Additionally, courts hesitate to grant the claims of women facing society-wide persecution due to fears of setting a precedent that will create far more claims from women across the globe than the system could possibly accommodate.[19] This argument is particularly troublesome since "[c]oncern over the size of the group sharing the protected characteristic has generally not been a barrier for persons persecuted on account of their race or religion."[20]

Congress passed the Refugee Act of 1980 (Refugee Act) to create a uniform procedure to respond to the urgent needs of people who fear persecution in their homelands.[21] However, there is inconsistent and inefficient application of the law for domestic violence victims seeking asylum protection under the Act because they do not fit neatly into one of the five protected grounds established by the Act.[22] Two recent non-precedential immigration decisions, *In re* R–A–[23] and *In re* L–R–,[24] have further complicated the framework for adjudicating domestic violence asylum claims and have left domestic violence victims in the untenable position of arguing semantics to establish their safety.

This Article explains why the current approach to adjudicating domestic violence asylum claims in the United States advances neither the national security interest nor the humanitarian policy of the country and explains why this problem necessitates an immediate statutory solution. To do so, Part II of this Article outlines the historical foundation of U.S. asylum law and the current requirements for successful asylum claim under the Refugee Act. Part III discusses the treacherous history of gender-related asylum claims in the United States. Part IV highlights two preeminent non-precedential domestic violence asylum cases, *In re* R–A– and *In re* L–R–, and points out the dysfunctional state of the current adjudication system. In conclusion, Part V urges the President and Con-

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18. Calvo, *supra* note 17, at 595.

19. *See* Musalo, *supra* note 13, at 120 (identifying floodgate fear as a prime reason for opposition to gender-based asylum).

20. Jenny-Brooke Condon, Comment, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 252 (2002).

21. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

22. *See* Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim's Particular Social Group*, 49 LOY. L. REV. 287, 291 (2003) (stating the majority of domestic violence victims are unable to establish a refugee claim on the basis of race, religion, nationality, or political opinion).

23. *In re* R–A–, 22 I. & N. Dec. 906 (BIA 2001).

24. *See generally* Amended Declaration of L–R– in Support of Application for Asylum (BIA Dec. 30, 2005), *available at* http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-support.pdf (redacted) (detailing L–R–'s persecution as a Mexican citizen).

gress to work in unison to pass the International Violence Against Women Act with an amendment to the Refugee Act that establishes state-tolerated domestic violence as a ground for asylum in the United States.

II. History of Asylum Law in the United States

In order to appreciate the challenges domestic violence victims face while seeking asylum in the United States and why a statutory solution to the problem is necessary, scholars, practitioners, and advocates must fully understand the history of U.S. asylum law. This Part discusses the evolution of U.S. asylum law from its origins in the United Nations to the codification of the current statutory framework in the Refugee Act of 1980.

A. *The Origin of Asylum Law in the United States*

In 1945, the United States signed the United Nations Charter with forty-nine other nations[25] "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, *sex*, language, or religion."[26] The Charter clearly indicates that member nations must advance human rights and fundamental freedoms without distinction for gender.[27] In the wake of the humanitarian crisis of World War II, the United Nations promulgated the 1951 Convention Relating to the Status of Refugees, which has served as the foundation of international refugee law.[28] The 1951 Convention provided one of the first official definitions of a "refugee":

> [A]ny person who . . . [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owning to such fear, is unwilling to avail himself of

25. *History of the United Nations*, United Nations, http://www.un.org/en/aboutun/history/index.shtml (last visited Dec. 29, 2013).

26. U.N. Charter art. 1, para. 3 (emphasis added), *available at* https://treaties.un.org/doc/Publication/CTC/uncharter.pdf.

27. *Compare id.* at art. 2, para. 2 ("All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter."), *with id.* at art. 1, para. 3 (including sex as distinction not to be considered in application of human rights and fundamental freedoms).

28. *See* U.N. High Comm'r for Refugees, An Introduction to International Protection 6–10 (Aug. 1, 2005), http://www.unhcr.org/3ae6bd5a0.pdf (tracing the history of post-World War II refugee protection to the adoption of the 1951 Convention relating to the Status of Refugees and the establishment of the U.N. High Commissioner for Refugees).

> the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[29]

The terms of the 1951 Convention prohibited member nations from returning those who qualified as a refugee under this definition to the country from which they fled.[30] The 1951 Convention, however, did not delineate gender as a ground for refugee protection.[31] In the years following the 1951 Convention, it became evident to the international community that refugee crises were continuing and were not confined to the European continent.[32] A 1967 Protocol amended the 1951 Convention to eliminate the date restrictions so that persons fleeing from events occurring after January 1, 1951, could be considered refugees.[33] However, the 1967 Protocol failed to establish gender as a ground for refugee protection.[34]

Congress incorporated the 1967 Protocol's definition of a refugee into U.S. law when it passed the Refugee Act of 1980.[35] The Refugee Act symbolized U.S. "commitment to . . . refugees around the world"[36] and embodied language similar to the language used by the 1951 Convention.[37] The Refugee Act also established the first statutory asylum procedure in the United States.[38] Even though Congress intended the Refugee Act to mirror the protections afforded to refugees under the 1951 Convention, adjudicators have viewed the Convention merely as a "policy backdrop" and restrictively interpreted the provisions of the Act.[39]

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29. Convention and Protocol Relating to the Status of Refugees, art. 1, July 28 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, *available at* http://www.unhcr.org/3b66c2aa10.html.

30. *Id.* at art. 33.

31. *See id.* at art. 1 para. 2 (omitting gender as basis for a refugee to seek protection).

32. U.N. High Comm'r for Refugees, *supra* note 28, at 9.

33. Protocol Relating to the Status of Refugees, art. 1, para. 2, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

34. *See id.* (excluding gender as a factor in establishing refugee protection).

35. *See* Refugee Act of 1980, Pub. L. No. 96-212, § 202, 94 Stat. 102 (codified at 8 U.S.C. § 1101(a)(42)) (integrating the 1967 Protocol's definition by eliminating requisite date restrictions for refugee status).

36. Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 142 (1981).

37. *Id.* at 150.

38. *Id.*

39. Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 388 (1985) (internal quotations omitted).

B. *Asylum Law Under the Refugee Act of 1980*

Even though the United States acceded to the 1967 Protocol and ratified it in 1968,[40] U.S. asylum policy remained inconsistent in the years that followed because most inquiries focused on the country of origin of an asylum applicant, as opposed to an individualized inquiry focused on the particular harmed or persecution suffered.[41] The Refugee Act of 1980 brought the United States into line with international law by amending the INA and the Migration and Refugee Assistance Act of 1962 to include a more systematic statutory basis for asylum.[42] INA section 208(b) currently gives the Secretary of Homeland Security discretion to grant asylum to an alien who qualifies as a "refugee" under INA section 101(a)(42)(A).[43] That section of the INA defines a refugee as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.][44]

Scholars suggest the conspicuous absence of gender from the list merely reflects the pre-1970s ignorance to gender-related issues of the 1951 Convention and the 1967 Protocol, but the U.S. asylum adjudication system has interpreted the absence to indicate a deliberate unwillingness to extend the classic definition of refugee to include gender-related violence.[45]

In 1990, the U.S. government implemented new regulations governing the adjudication of asylum claims.[46] Asylum claims now fall under the jurisdiction of two federal agencies. The Department of Justice oversees the nation's immigration courts and the Board of Immigration Appeals

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40. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 n.7 (1981).

41. *See generally id.* at 9 (discussing inadequacy of a system focused on geographic qualifications).

42. *See generally* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.) (codifying the often dispositive key term "refugee" and creating structure and process for asylum claims).

43. 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

44. *Id.* § 1101(a)(42)(A).

45. Marisa Silenzi Cianciarulo, *Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims*, 35 HARV. J.L. & GENDER 117, 139 (2012).

46. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,680–86 (July 27, 1990) (codified at 8 C.F.R. § 208.1–.24 (2013)).

(BIA).[47] Noncitizens who are already in removal proceedings may apply for asylum as a defense to removal by filing an application with the immigration court.[48] The Department of Homeland Security adjudicates affirmatively filed asylum claims for applicants who are not in removal proceedings.[49] The Secretary of Homeland Security delegates initial asylum determinations to asylum officers in the United States Customs and Immigration Service (USCIS), who have authority to administer oaths, verify the identity of the applicant, verify the identity of any interpreter, present and receive evidence, and question the applicant and any witnesses.[50]

If an asylum officer denies the request for asylum, USCIS refers the applicant to an immigration judge for a full hearing on the merits of the application.[51] If an immigration judge does not grant asylum, the applicant can appeal the decision to the BIA, which will make an independent judgment on the merits of the asylum application.[52] Published decisions of the BIA are binding precedent on all asylum officers and immigration judges.[53] The administrative review process has given the BIA numerous opportunities to expound upon the requirements of an asylum claim. Additionally, many asylum officers and immigration judges misapply BIA precedent to deny asylum protection to domestic violence victims. The following subsections outline the four basic elements of a successful asylum claim.

i. Persecution

The BIA defines persecution as a "threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way that is regarded as offensive."[54] The BIA also requires the harm or suffering be inflicted "by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim."[55] Persecution, however, does "not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional."[56] Harm and suffering

47. 8 C.F.R. § 1003.0–.1 (2013).
48. *See id.* § 208.1–.24 (outlining noncitizen asylum application process).
49. *Id.* § 208.14.
50. *Id.* § 208.9(b)–(e).
51. *Id.* § 208.14(c)(1).
52. *Id.* § 1003.1(a)(1).
53. 8 C.F.R. § 1003.1(g) (2013).
54. *In re* Acosta, 19 I. & N. Dec. 211, 222 (BIA 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).
55. *In re* Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996) (citing *In re* Acosta, 19 I. & N. 211, 222–23 (BIA 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987)).
56. *In re* V–T–S–, 21 I. & N. Dec. 792, 792, 798 (BIA 1997).

must rise above mere discrimination, harassment, and even basic suffering in order to constitute persecution.[57] Therefore, to receive asylum protection, an asylum applicant must show that: (1) she suffered the requisite level of harm; and (2) the government of her native country failed to protect her. Most domestic violence victims easily satisfy this requirement because they suffer physical harm that the BIA identifies as persecution in asylum cases.[58]

ii. Well-Founded Fear

Proving past persecution is only the first step in an asylum claim. Asylum adjudicators, therefore, must next evaluate whether an applicant has a well-founded fear of continued persecution if she were to return to her country.[59] Suffering past persecution merely gives rise to a rebuttable presumption of a well-founded fear of persecution in the future.[60] A "well founded fear of persecution" requires that "an individual's fear of persecution must have its basis in external, or objective, facts that show there is a reasonable likelihood [s]he will be persecuted upon [her] return to a particular country."[61]

Thus, the inquiry into whether an asylum applicant has a well-founded fear of future persecution requires a two-part analysis: (1) whether the applicant has a subjective fear of persecution, and (2) whether the applicant's fear is objectively reasonable.[62] The applicant's testimony that she is afraid to return to her country usually satisfies the subjective part of this analysis.[63] To satisfy the objective requirement of the analysis, an applicant must prove that: (1) she possesses a characteristic or belief that her "persecutor seeks to overcome" through the infliction of harm;

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57. *See In re* O-Z- & I-Z-, 22 I. & N. Dec. 23, 26 (BIA 1998) (finding past persecution where harm constituted more than "mere discrimination and harassment").

58. 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, 358 (2009).

59. *See* 8 C.F.R. § 208.13(b)(2) (2013) (delineating the requirements of "a well-founded fear of persecution").

60. *In re* Chen, 20 I. & N. Dec. 16, 18 (BIA 1989).

61. *In re* Acosta, 19 I. & N. Dec. 211, 225 (BIA 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

62. *See id.* at 225–26 (describing the test for persecution in terms of the alleged victim's personal fear of violence, with a reasonableness standard).

63. *See* 8 C.F.R. § 1208.13(a) (2013) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."); *In re* Dass, 20 I. & N. Dec. 120, 124 (BIA 1989) ("[A]n alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his alleged fear.") .

(2) "the persecutor is already aware, or could easily become aware" of the belief or characteristic possessed by the applicant; (3) the persecutor is capable of inflicting harm on the applicant; and (4) the persecutor is inclined to inflict harm on the applicant.[64]

iii. The Nexus Requirement

The mere fear of persecution, no matter how well founded, does not establish eligibility for asylum standing alone. There must be some connection between the persecution the applicant fears and one of the five protected categories.[65] The U.S. Supreme Court termed this connection the "nexus" requirement.[66] Since the enactment of the Real ID Act of 2005,[67] an applicant must show that the protected ground was "at least one central reason for [the] persecuti[on]" to satisfy this requirement.[68] This change places a heavy burden on domestic violence victims, who already struggle to fit their experience into one of the five protected categories, because adjudicators insist on viewing domestic violence as personally motivated.[69]

iv. The Five Enumerated Categories

The INA requires the persecution an asylum applicant faces to be "on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."[70] As stated earlier, gender is noticeably absent from this list.[71] Because gender is not one of the INA's protected grounds, domestic violence victims often claim refugee status under the

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64. *In re* Mogharrabi, 19 I. & N. Dec. 439, 446 (BIA 1987) (citing Acosta, 19 I. & N. Dec. at 226).

65. *See* I.N.S. v. Elias-Zacarias, 502 U.S. 478, 482 (1992) (identifying an underlying requirement that the harmful behavior be "*on account of*" the protected category) (emphasis original).

66. *See* I.N.S. v. Elias-Zacarias, 502 U.S. 478, 482 (1992) (expounding the nexus requirement); *In re* N–M–, 25 I. & N. Dec. 526, 529 (BIA 2011) ("The United States Supreme Court has held that to satisfy the nexus requirement for asylum and withholding of removal, it is not sufficient that the persecutor act from 'a generalized political motive.'").

67. Real ID Act of 2005, Pub. L. No. 109–13, Div. B, 119 Stat 231 (codified as amended in scattered sections of 8 U.S.C.).

68. 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

69. Shanyn Gillespie, Note, *Terror in the Home: The Failure of U.S. Asylum Law to Protect Battered Women and a Proposal to Right the Wrong of* In re R–A–, 71 GEO. WASH. L. REV. 131, 155 (2003).

70. 8 U.S.C § 1101(a)(42)(A) (2006).

71. *See* Andrea Binder, *Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 169–71 (2001) (suggesting the refugee definition was originally drafted to protect persons targeted in the public sphere on racial, religious, and political grounds, while failing to recognize persons targeted in the private sphere, at the time predominately women).

amorphous "membership in a particular social group" ground.[72] According to the UNHCR, a "particular social group" is:

> [A] group of persons who share a common characteristic other than the risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one that is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[73]

The UNHCR's view, that a particular social group may be defined by an innate characteristic alone, is the dominant view in the international community.[74]

A UNHCR handbook interpreting the 1951 Convention, as amended by the 1967 Protocol, states that though "[p]ersecution is normally related to action by the authorities of the of a country[,]" "[i]t may . . . emanate from sections of the population that do not respect the standards established by the laws of the country concerned."[75] However, international instruments have struggled to create a definition of a particular social group that adequately accommodates both state-initiated persecution as well as persecution at the hands of a non-state actor.[76]

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72. *See* Andrea Binder, *Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 167 (2001) ("The criteria of 'membership in a particular social group' . . . is an element of the universally recognized refugee definition which has become a critical point for many women seeking asylum in the United States and elsewhere."). *Cf.* Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 509–10 (1993) (illuminating the limited record regarding the meaning of membership in a particular social group during the 1951 Convention).

73. 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, 3, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), http://www.unhcr.org/3d58de2da.html.

74. *See* 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, 48 (2008) (stressing the BIA's decision in *In re* Acosta takes the same position).

75. U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992), http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf. The Handbook has frequently been regarded as authoritative in asylum decisions throughout the world and, though not binding, has been enormously influential among the countries adhering to the Convention.

76. Michael G. Heyman, *Protecting Foreign Victims of Domestic Violence: An Analysis of Asylum Regulations*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 119 (2008).

In the precedential decision *In re* Acosta,[77] the BIA established a framework for analyzing asylum claims based on membership in a particular social group and seemed to establish a substantive role for gender in process.[78] Scholars and human rights advocates hailed the decision as a positive step for the future success of gender-related claims.[79] However, domestic violence victims continue to struggle to fit their claims into the evolving BIA analytical framework for establishing membership in a particular social group.

C. *In re* Acosta *and the Amorphous Membership in a Particular Social Group*

In a 1985 decision, the BIA denied the asylum claim of a taxi driver from El Salvador who said he feared persecution by both the government and guerilla groups in his native country because he refused to join in guerilla-sponsored work stoppages.[80] Acosta argued that "[taxi] drivers and persons engaged in the transportation industry of El Salvador" comprise a particular social group.[81] The BIA dismissed Acosta's assertions about the government's persecution, but it was receptive to his claims of susceptibility to guerilla persecution, because guerillas had a well-established practice of harming those who refused to join in work stoppages.[82] Although the BIA recognized that Acosta faced punishment for his refusal to join in the stoppages, it said that he could have avoided that possibility by either joining in the stoppages or changing jobs.[83] The BIA stated that because Acosta "had the power to change" his occupation he did not fall into the "internationally accepted concept of a refugee[.]"[84]

In the *Acosta* decision, the BIA applied "the well-established doctrine of *ejusdem generis*" to the "membership in a particular social group"

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77. *In re* Acosta, 19 I. & N. Dec. 211 (BIA 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

78. *See id.* at 233 (establishing an immutable characteristic, such as sex, may qualify as membership in a particular social group under a case-by-case evaluation).

79. *See, e.g.*, Helton & Nicoll, *supra* note 3, at 389–90 (recognizing the BIA's narrow interpretation of *In re* Acosta in the *Kasinga* case); Karen Musalo, *Ruminations on* In re Kasinga*: The Decision's Legacy*, 7 S. CAL. REV. L. & WOMEN'S STUD. 357, 366 (1998) (highlighting *Acosta's* effect on future arguments for protection based on gender); Mary M. Sheridan, Comment, *In re* Kasinga*: The United States has Opened its Doors to Victims of Female Genital Mutilation*, 71 ST. JOHN'S L. REV. 433, 453 (1997) (applying the *Acosta* test of an immutable characteristic to female genital mutilation victims).

80. *Acosta*, 19 I. & N. Dec. at 234.

81. *Id.* at 232.

82. *Id.* at 234–35.

83. *Id.* at 234.

84. *Id.*

grounds in the refugee definition.[85] The BIA explained that under the doctrine of *ejusdem generis* "general words used in an enumeration with specific words should be construed in a manner consistent with the specific words."[86] Using this doctrine, the BIA held that in order for the particular social group ground to be comparable to the other four grounds of persecution it should be limited to characteristics that are "immutable" and "fundamental."[87] The BIA interpreted the phrase "persecution on account of membership in a particular social group" to mean:

> [P]ersecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one 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.[88]

In its interpretation, the BIA clearly indicated an applicant may establish membership in a particular social group based on gender because it is an innate characteristic.[89] The reasoning in *Acosta* has been persuasive in foreign courts because it fits well with the fundamental norms of human rights.[90] However, despite frequent citations to *Acosta*, neither the BIA nor the U.S. Courts of Appeals have adopted the plain meaning of the holding.[91] Unfortunately, this inconsistent application and the ongoing lack of a clearly defined standard result in many failed asylum claims.[92] In more recent precedent, the BIA has added to the requirements to establish membership in a particular social group.

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85. *Id.* at 233.

86. *In re* Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

87. *Id.*

88. *Id.*

89. *See id.* (establishing sex, which generally includes the concept of gender, in its list of possible immutable characteristics).

90. *See* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 161 (Charmian Harvey & Anne Lynas Shah eds., 1991) (lauding the applicability of the *Acosta* test for immutability in the international arena).

91. *See* Binder, *supra* note 71, at 179–80 (citing "contradictory court rulings" regarding gender as a "particular social group").

92. *See* Heyman, *supra* note 76, at 121 (highlighting failed asylum claims as a result of an unclear definition of group members).

D. *The Additional Hurdle of Social Distinction*

After establishing its definition for a particular social group in *Acosta*, the BIA added a new test to the particular social group analysis. In *In re* C-A-,[93] the BIA indicated that "[t]he social visibility of the members of a claimed social group is an important consideration in identifying the existence of a 'particular social group' for the purpose of determining whether a person qualifies as a refugee."[94] The BIA's "social visibility" test looks not only for an immutable characteristic, but also asks whether society perceives the members of the proposed group as a societal faction because of the immutable characteristic.[95]

In *In re* A-M-E- & J-G-U-,[96] the BIA reinforced "social visibility" as a "requirement that the shared characteristic of the group should generally be recognizable by others in the community . . . ."[97] This language suggests that social visibility is more than one factor in the BIA's particular social group analysis because applicants who claim membership in a particular social group must satisfy the requirement.[98] The BIA's emphasis on "social visibility" will likely interfere with the success of future domestic violence asylum claims "[g]iven the invisibility of domestic violence as a phenomenon . . . ."[99] The test also contradicts two decades of immigration jurisprudence without either statutory justification or interpretive analysis.[100]

In a pair of recent decisions addressing particular social group analysis, the BIA recast the "social visibility" test—renaming it "social distinction."[101] The BIA stated the change clarified that "social visibility" was never intended to mean literal or "ocular visibility" as interpreted by some adjudicators.[102] The BIA explained "[the] new name more accurately describes the function of the requirement."[103] The BIA, however,

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93. *In re* C-A-, 23 I. & N. Dec. 951 (BIA 2006).

94. *Id.* at 951.

95. *See id.* at 959-60 (discussing visibility in conjunction with innateness of the group characteristic).

96. *In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 74 (BIA 2007).

97. *Id.* at 74. "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." *Id.*

98. Barbara R. Barreno, Note, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 242 (2011).

99. Fatma, *supra* note 74, at 94.

100. *Id.*

101. *In re* W-G-R-, 26 I. & N. Dec. 208 (BIA 2014); *In re* M-E-V-G-, 26 I. & N. Dec. 227 (BIA 2014).

102. *W-G-R-*, 26 I. & N. Dec. at 211; *M-E-V-G-*, 26 I. & N. Dec. at 234.

103. *M-E-V-G-*, 26 I. & N. Dec. at 236.

failed to give any clear indication of how the change may affect women pursuing domestic violence asylum claims.[104]

III. History of Gender-Related Asylum Claims in the United States

In recent years, the international community has been quick to respond to general human rights violations.[105] However, "[h]uman rights have not been women's rights—not in theory or in reality, not legally or socially, not domestically or internationally."[106] Unfortunately, "[w]hat is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women."[107] Scholars argue women receive less protection because the founding interests of asylum law—to protect educated elite male applicants who fled communism[108]—constrain its application. More specifically, the U.S. asylum adjudication system produces inconsistent judgments regarding gender-related claims that "have fostered a lack of predictability and efficiency in administering [future] claims."[109] Even though "asylum adjudicators have [recently] extended protections to [some] women asserting gender-related persecution, they have denied similar protection to others."[110] This Part traces the history of gender-related claims in the United States from their treacherous beginning in the 1970s to the more recent breakthrough in *In re* Kasinga in the mid-1990s.

A. *Early Gender-Related Asylum Decisions*

An analysis of early gender-related asylum claims in the United States reveals a disturbing tendency of the courts to view domestic violence and rape as private actions that do not qualify as persecution. Until the 1970s, "female-specific violence within most countries was considered part of the private sphere beyond state responsibility" and "little to no discussion

104. *See generally W-G-R-*, 26 I. & N. Dec. at 208; *M-E-V-G-*, 26 I. & N. Dec. at 227.

105. Hannah R. Shapiro, Note and Comment, *The Future of Spousal Abuse as a Gender-Based Asylum Claim: The Implications of the Recent Case of In re* R-A-, 14 Temp. Int'l & Comp. L.J. 463, 467 (2000).

106. Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 Harv. Women's L.J. 5, 5 (1994).

107. *Id.* at 6.

108. *See* Harold Hongju Koh, *Who Are the Archetypal "Good" Aliens?*, 88 Am. Soc'y Int'l L. 450, 451 (1994) (describing the United States' version of a "'good' alien" in these terms).

109. Lucy Akinyi Orinda, Note, *Securing Gender-Based Persecution Claims: A Proposed Amendment to Asylum Law*, 17 Wm. & Mary J. Women & L. 665, 674 (2011).

110. *Id.*

of violence against women as an interstate responsibility" existed until the end of the 1990s.[111] The following subsections present some of the more notorious failures of the U.S. asylum adjudication system regarding gender-related violence.

i. *In re* Pierre[112]

In a 1975 decision, the BIA dismissed the appeal of a Haitian woman who was seeking withholding of deportation based on years of abuse that she suffered at the hands of her husband, a deputy in Haitian Government.[113] Ms. Pierre testified that her husband threatened to kill her on numerous occasions and attempted to kill her on one occasion by burning down her home.[114] Ms. Pierre hid with relatives and eventually escaped Haiti for the United States, out of fear of her husband.[115] Ms. Pierre's cousin, who appeared as witness, confirmed Ms. Pierre's claims of abuse and a letter from the Department of State confirmed that her husband was a deputy in the Haitian Government (a position analogous to a U.S. Senator).[116] Ms. Pierre argued, "because of the high political position held by her husband, she would effectively be foreclosed from receiving adequate legal or physical protection in Haiti," which amounts to government persecution.[117] The BIA held that Ms. Pierre was not entitled to protection because she "[did] not allege that her husband [sought] to persecute her on account of her race, religion, or political beliefs."[118] The BIA further stated "[t]he motivation behind his alleged actions appear[ed] to be strictly personal."[119]

ii. *Campos-Guardado v. INS*[120]

In a 1987 decision, the Fifth Circuit affirmed the BIA's denial of asylum in a case in which the facts were particularly appalling.[121] Ms. Campos, the asylum applicant, testified that while she was visiting her uncle, the leader of a local agricultural cooperative that was formed

111. LISA S. ALFREDSON, CREATING HUMAN RIGHTS: HOW NONCITIZENS MADE SEX PERSECUTION MATTER TO THE WORLD 85 (2009).

112. *In re* Pierre. 15 I. & N. Dec. 461 (BIA 1975).

113. *Id.*

114. *Id.* at 462.

115. *Id.*

116. *Id.* at 461–62.

117. *Id.* at 462.

118. *In re* Pierre, 15 I. & N. Dec. 461, 463 (BIA 1975).

119. *Id.*

120. Campos-Guardado v. I.N.S., 809 F.2d 285 (5th Cir. 1987).

121. *See id.* at 286–87 (denying deportation withholding for Sofia Campos-Guardado of El Salvador).

through a controversial agrarian land reform, a group of armed guerillas attacked his house.[122] The assailants tied the hands and feet of everyone that was in the house and dragged them to the rim of the farm's waste pit.[123] Ms. Campos further testified that the guerillas "forc[ed] the women to watch[ ] [as] they hacked the flesh from the men's bodies with machetes, finally shooting them to death."[124] The guerillas then raped Ms. Campos and her female cousins as they chanted political slogans.[125] Later, Ms. Campos recognized a local boy as one of her assailants, and he threatened to kill her if she broke her silence.[126] The Fifth Circuit stated Ms. Campos was not entitled to asylum because she had not proven persecution based on political opinion or membership in a particular social group.[127] The court acknowledged that the attack on the uncle's home was politically motivated, but it determined the rape and the subsequent threats of reprisal were personally motivated.[128]

iii. *Gomez v. INS*[129]

In 1991, the Second Circuit denied an asylum claim of an applicant who asserted that she was a member in particular social group defined as "women who have been previously battered and raped by Salvadoran guerillas."[130] The Second Circuit determined that Ms. Gomez failed to "produce evidence that women who have previously been abused by the guerillas possess common characteristics–other than gender and youth–such that would-be persecutors could identify them as members of the purported group."[131] The court stated the "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."[132]

B. *Seeds of Change in the View of Gender-Related Claims in the United States*

In the 1990s, the U.S. stance on gender-related persecution began to change, due in large part to pressure from international organizations and

122. *Id.* at 287.
123. *Id.*
124. *Id.*
125. *Id.*
126. Campos-Guardado v. I.N.S., 809 F.2d 285, 287 (5th Cir. 1987).
127. *Id.* at 291.
128. *Id.* at 288.
129. Gomez v. I.N.S., 947 F.2d 660 (2d Cir. 1991).
130. *Id.* at 663.
131. *Id.* at 664.
132. *Id.*

changed perspectives on women's rights.[133] In 1991, the UNHCR recommended that certain women qualified as a particular social group and urged countries to create their own guidelines for providing protection for these groups.[134] The 1993 United Nations General Assembly Declaration on the Elimination of Violence Against Women condemned domestic violence as one of the "crucial social mechanisms by which women are forced into a subordinate position compared with men."[135] Soon after, Canada became the first country to recognize gender as a basis for a grant of asylum.[136]

In 1995, the INS Office of International Affairs issued a memorandum to assist asylum officers with adjudicating gender-related asylum claims, including those based on domestic violence, entitled "Considerations for Asylum Officers Adjudicating Asylum Claims for Women."[137] It highlighted the recent international development that had "contributed directly to the formulation of the U.S. guidelines."[138] The memorandum also set forth guidelines designed to increase gender-sensitivity in the assessment, to provide a legal framework for the analysis of such claims, and to promote consistency in the adjudication of such claims.[139] It stated both rape and domestic violence may serve as evidence of past persecution.[140] The document referred to domestic violence as a form of "private action" in contrast to "public acts" committed by or attributed to a foreign government.[141] It directed asylum officers analyzing claims involving domestic violence and other private actions, which the home country does not protect against, to do the following:

> In such situations, the officer must explore the extent to which the government can or does offer protection or redress [to victims], and

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133. *But see* Alfredson, *supra* note 111, at 92–102 (indicating it is not clear whether such global change changed the United States' practice or if the United States' view only became apparent after international interest).

134. *Id.* at 101–02.

135. Declaration, *supra* note 10.

136. *See* ALFREDSON, *supra* note 111, at 4 (recognizing Canada as the first country to recognize gender as basis for granting asylum); *see generally Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*, CAN. IMMIGR. AND REFUGEE BOARD, http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx (last visited Dec. 29, 2013) (describing the way in which gender qualifies for refugee status in Canada).

137. Memorandum from Phyllis Coven, INS Office of Int'l Affairs, to all INS Asylum Officers and HQASM Coordinators, Consideration for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995), *available at* http://www.state.gov/s/l/65633.htm.

138. *Id.* at 2–4.

139. *Id.* at 1.

140. *See id.* at 4 (listing gender specific asylum claims for women "serv[ing] as evidence of past persecution on account of one or more of the five grounds").

141. *Id.* at 18.

> 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 circumstances, it would be reasonable to expect a woman to seek residency elsewhere in her country.[142]

However, the guidelines failed to provide a cohesive framework for the analysis of gender-related asylum claims and were not binding on asylum officers or immigration courts.[143] Therefore, victims of gender-related violence were left waiting for a more substantial change in U.S. asylum law and policy.

C. *In re* Kasinga: *A Breakthrough for Gender-Related Claims*

One year after the INS issued the INS memorandum for adjudicating gender-related asylum claims, the BIA paved the way for successful gender-related asylum claims with the decision in *In re* Kasigna.[144] The BIA decided to grant asylum to a woman from Togo based on her membership in particular social group comprised of women in a Togalese tribe expected to undergo female genital mutilation.[145] The INS memorandum was clearly influential, and the BIA quoted the statement that "rape . . . , sexual abuse and domestic violence, infanticide and *genital mutilation* . . . may serve as evidence of past persecution."[146] The BIA also stated that "gender-based, or gender-related, asylum claims within the 'membership in a particular social group' construct . . . [are] entirely appropriate and consistent with the developing trend of jurisprudence in the United States and Canada as well as with international norms."[147] The BIA noted that this particular type persecution satisfies the nexus requirement because female genital mutilation is "characterized as a form of 'sexual oppression' that is 'based on the manipulation of women's sexuality in order to assure male dominance and exploitation.'"[148]

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142. *Id.* at 18.

143. *See id.* at 4 (explaining only "some countries" contain gender-discriminatory provisions and the recommended procedures are no more than "considerations" officers should "bear in mind").

144. *See In re* Kasinga, 21 I. & N. Dec. 357, 377 (BIA 1996) (citing U.N. interpretations and U.S. case law in concluding asylum claims may be reviewed on a gender-specific basis).

145. *Id.* at 368.

146. *Id.* at 362 (emphasis added).

147. *Id.* at 377.

148. *Id.* at 366.

Even though the BIA explicitly recognized gender as part of the determination of one's membership in a particular social group in *Kasigna*, the holding was severely limited because the BIA included characteristics of (1) not having been mutilated, (2) being a member of the Tchamba-Kunsuntu Tribe of northern Togo, and (3) opposing the practice of female genital mutilation in the group's definition.[149] This narrow construction has limited the holding's precedential value.[150] As the following stories R–A– and L–R– will illustrate, the narrow scope has become especially troublesome in adjudicating gender-related claims for domestic violence victims.[151]

IV. The Broken System for Adjudicating Domestic Violence Asylum Claims

Domestic violence asylum claims are a new and emerging type of asylum claim. Domestic violence did not receive societal and legal recognition in the United States until the second half of the twentieth century.[152] Due to the recent nature of this shift, remnants of a patriarchal system continue to plague the U.S. asylum adjudication system and the inaccurate view that domestic violence is private matter continues to influence many decisions.[153]

As stated earlier, most domestic violence asylum applicants seek protection because of their membership in a particular social group.[154] Recent decisions like *Kasinga* illustrate that the difficulty in asserting domestic violence asylum claims does not lie in the recognition of gender-related claims, but in determining how to define one's social group in such a way that is not overly broad or circular.[155] This Part reveals the fundamental flaws in the U.S. asylum adjudication system that produce the inconsistent and inefficient results in adjudicating domestic violence asylum claims.

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149. *See In re* Kasinga, 21 I. & N. Dec. 357, 357 (BIA 1996) (describing the three defining characteristics of the case and their specific bearing on the decision).

150. *See* Helton & Nicoll, *supra* note 3, at 378 (explaining *Kasinga* did not expand beyond the facts presented).

151. *See In re* R–A–, 22 I. & N. Dec. 906, 924–25 (BIA 1999) (distinguishing *R–A–*'s case from *Kasinga*).

152. Cianciarulo, *supra* note 45, at 133.

153. *See id.* at 134–36, 155 (addressing asylum barriers such as the historic "private issue" view of domestic violence).

154. *See* Binder, *supra* note 71, at 167 (identifying membership in a particular social group as a critical issue for women seeking asylum).

155. *See* Department of Homeland Security's Supplemental Brief at 6, *In re* L–R– (April 13, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf (redacted) (agreeing a social group must be narrowly tailored as a group described only as "persecuted" is too overly broad for application of UN guidelines).

A. *In re* R–A– *and the Emergence of the Particular Social Group Category*

Following the decision in *Kasigna*, the BIA did not address gender-related asylum claims for three years until it published its controversial *In re* R–A– decision.[156] In a sharply divided ten-to-five vote, the BIA reversed the grant of asylum to a Guatemalan woman who had been severely beaten and psychologically abused by her husband for more than a decade.[157] The decision in *R–A–* sparked an outcry from both scholars and legislators due to the shocking facts of the case.[158] R–A–'s testimony revealed that her husband abused her in a variety of ways, including: dislocating her jaw because her menstrual period was late, kicking her violently in her spine when she would not submit to an abortion, raping and sodomizing her repeatedly, passing sexually transmitted diseases to her as a result of his extramarital affairs, pulling her by the hair, knocking her unconscious, whipping her with electric cords, threatening to deface and decapitate her with a machete, pistol-whipping her, and breaking windows and a mirror with her head.[159]

The physical and mental abuse was so severe that R–A– eventually tried to commit suicide.[160] R–A–'s husband fostered her fear by telling her about the babies and elderly persons he had murdered while serving in the Guatemalan Army.[161] R–A–'s husband further leveraged his military service by constantly reminding her that "calling the police would be futile" because of his military connections.[162] Her husband's claims of futility proved true because she contacted the police on two separate occasions to assist her at her home with no response.[163] On three occasions, police issued summons for R–A–'s husband to appear in court, which he simply ignored.[164] When she was finally given the opportunity to appear before a local judge, the judge "told her that he would not interfere in

156. *See generally In re* R–A–, 22 I. & N. Dec. 906 (BIA 1999) (finding R–A– ineligible for asylum status despite enduring severe spousal abuse).

157. *See id.* at 927–28 (explaining BIA's finding the woman in question did not meet the UN qualifications of a social group for asylum).

158. *See* Haley Schaffer, Note and Comment, *Domestic Violence and Asylum in the United States:* In re R–A–, 95 Nw. U.L. REV. 779, 781 (2001) (noting several members of Congress wrote letters to then Attorney General Janet Reno expressing concern about the outcome of the case and urging her to overturn the decision); Shapiro, *supra* note 105, at 463 (asserting the decision struck a "severe blow to international women's rights").

159. *R–A–*, 22 I. & N. Dec. at 908–09.

160. *Id.* at 909.

161. *Id.* at 908.

162. *Id.* at 909.

163. *Id.*

164. *See id.* (highlighting lack of accountability in domestic abuse proceedings).

domestic disputes."[165] As a result, the inaction by the Guatemalan government forced R–A– to flee Guatemala and seek protection in the United States.[166]

The Immigration Judge who heard R–A–'s case granted her application for asylum on the basis of membership in a particular social group defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male dominion."[167] The BIA paraphrased the Immigration Judge's holding as follows:

> [S]uch a group was cognizable and cohesive, as members shared the common and immutable characteristics of gender and the experience of having been intimately involved with a male companion who practices male domination through violence. The Immigration Judge then held that members of such a group are targeted for persecution by the men who seek to dominate and control them.[168]

R–A–'s victory was short lived because the then-INS immediately appealed the decision and argued that the Immigration Judge incorrectly interpreted the term "particular social group."[169] The government contended that R–A– was not abused as part of a larger social group, but rather was abused because her husband was a violent man.[170] Although the BIA went to great lengths to convey that it found R–A–'s husband's conduct "deplorable," it ultimately agreed with the government's position that R–A– failed to establish herself as a member of a particular social group as recognized under the INA.[171]

The BIA found that R–A–'s proposed social group failed for two reasons: (1) it was not a "group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala" and (2) there was no evidence "that the characteristic of being abused is one that is important within Guatemalan society."[172] The BIA characterized R–A–'s proposed social group as "a legally crafted description of some attributes of her tragic personal circum-

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165. *In re* R–A–, 22 I. & N. Dec. 906, 909 (BIA 2001).

166. *Id.* at 909.

167. *Id.* at 911 (internal quotation marks omitted).

168. *Id.*

169. *See, e.g.*, Karen Musalo, *In re* R-A-*: An Analysis of the Decision and its Implications*, 76 INTERPRETER RELEASES 1177, 1181 (1999) (explaining how INS believed R–A– neither demonstrated harm nor feared persecution because of her membership in a particular social group).

170. *See In re* R-A-, 22 I. & N. Dec. 906, 914-15 (BIA 1999) (stating the record did not show R–A–'s husband abused her because of what she believed in or her political views).

171. *Id.* at 910, 927–28.

172. *Id.* at 918-19.

stances."[173] In addition, the BIA stated that even if R–A–'s proposed social group was acceptable, she failed to establish a proper nexus between the group and her husband'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."[174] To support its assertion, the BIA noted that the persecutor targeted only his wife and did not target other members of the proposed social group:

> The record indicates that [the respondent's husband] has targeted only the respondent. The respondent's husband has not shown an interest in any member of this group other than the respondent herself. The respondent fails to show how other members of the group may be at risk of harm from him. If group membership were the motivation behind his abuse, one would expect to see some evidence of it manifested in actions toward other members of the same group.[175]

The BIA went as far as stating that R–A–'s husband's violence was due to "his warped perception of and reaction to her behavior, . . . [a] psychological disorder, pure meanness, or no apparent reason at all."[176] The BIA also stated 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 [INA]."[177] The BIA did acknowledge that "societal attitudes and the concomitant effectiveness (or lack thereof) of governmental intervention very well may have contributed to the ability of the respondent's husband to carry out his abusive actions over a period of many years."[178] Ultimately, the BIA determined that because R–A–'s husband's actions were not "desired" or "encouraged" within Guatemala she was not entitled to refugee protection.[179]

However, this was not the end of the road for R–A–. In late 2000, as a direct response to the decision in *R–A–*, President Bill Clinton directed the Department of Justice to submit new regulations that would modify the INS guidelines in an effort to alleviate inconsistences in the case law for interpreting the term "particular social group" as well as create asy-

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173. *Id.* at 919.
174. *Id.* at 920.
175. *Id.*
176. *Id.* at 927.
177. *In re* R-A-, 22 I. & N. Dec. 906, 923 (BIA 1999).
178. *Id.* at 922.
179. *Id.* at 923–24.

lum eligibility in the context of gender-related claims.[180] In January 2001, just weeks before the change in presidential administrations, Attorney General Janet Reno vacated the decision in *R–A–* and remanded the case to the BIA for reconsideration upon final issuance of the new regulations.[181] Although the regulations were initially published in 2000, the U.S. government has not issued the guidelines in a final form.[182]

In February 2003, Attorney General John Ashcroft lifted the stay in R–A– and referred the case to his office for a final decision.[183] However, DHS submitted a brief to the Attorney General's office supporting a grant of asylum in *R–A–* and requested that Attorney General Ashcroft wait for final publication of the proposed regulations before issuing a decision in the case.[184] In January 2005, Ashcroft remanded *R–A–* to the BIA for reconsideration once the final regulations were published.[185]

In 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 finalized regulations.[186] The BIA's inability to act in *R–A–* and many similar cases by domestic violence asylum applicants was a substantial reason for Attorney General Mukasey to lift the stay.[187] In October 2009, DHS wrote a letter to the Executive Office of Immigration Review explaining the Department "had reviewed addi-

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180. Natalie Rodriguez, *Give Us Your Weary But Not Your Battered: The Department of Homeland Security, Politics and Asylum for Victims of Domestic Violence*, 18 SW. J. INT'L LAW 317, 328 (2011); *see generally* Asylum and Withholding Definitions, 65 Fed. Reg. 76,588-01 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (establishing what adjustments should be made to the U.S. asylum system and laws).

181. *In re* R-A-, 22 I. & N. Dec. 906, 906 (A. G. 2001); Rodriguez, *supra* note 180, at 328.

182. *See* Rodriguez, *supra* note 180, at 345 (stating the proposed regulations of 2000 did not lead to a final judgment on battered women who seek asylum). *See generally* Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (failing to become a federal regulation).

183. Musalo, *supra* note 13, at 126; *see generally* 8 C.F.R. § 1003.1(h)(1)(i) (2013) (providing the Attorney General authority to refer any case before the BIA to his office).

184. Heyman, *supra* note 76, at 127–28 (reporting the DHS's brief in support of R–A– was a "surprise to many").

185. *In re* R–A– (R–A– II), 23 I. & N. Dec. 694, 694 (BIA 2005); *see* Heyman, *supra* note 76, at 128 (affirming Attorney General Ashcroft's remand of the case).

186. *In re* R-A- (R-A- III), 24 I. & N. Dec. 629 (BIA 2008); *see also* Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1205 (2009) (describing Mukasey's decision to remand the case to the BIA which allows them the discretion to "issue a precedent decision establishing a uniform standard nationwide").

187. *See In re* R-A- (R-A- III), 24 I. & N. Dec. 629, 630-31 (BIA 2008) (reviewing the history of R–A–'s case and other developments in asylum adjudication during that time).

tional evidence provided by R.A." and "found that she was 'eligible for asylum and merits . . . asylum as a matter of discretion.'"[188]

In December 2009, an immigration judge finally granted asylum to R–A– after a fourteen-year-long legal battle.[189] "The immigration judge's decision simply read, '[i]nasmuch 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].'"[190]

B. *In re* L–R– *and New Proposed Social Group Definitions*

During the same period of time as R–A–'s administrative nightmare, another domestic violence victim, L–R–, fled Mexico to the United States, seeking protection from her common-law husband after enduring almost two decades of abuse at his hands.[191] L–R– and her three children arrived in United States in 2004 and applied for asylum in 2005.[192] USCIS immediately referred her asylum application to an Immigration Judge because she filed for asylum past the one-year deadline after entering the United States.[193]

In her asylum application, L–R– presented facts similar to those of R–A–. L–R– was only a teenager when her basketball coach began to sexually abuse her.[194] He was fourteen years her senior and a physical education teacher at her boarding school when the abuse started.[195] When L–R– was set to leave the boarding school after graduation, he abducted her at gunpoint and held her captive for several years.[196] Over the years, he violently and repeatedly raped her, eventually impregnating her.[197] L–R– attempted to escape during her pregnancy, but he caught her and beat her.[198] When she fell asleep that evening, he poured a flammable liquid all over her bed and set the bed on fire while she was sleep-

188. Rodriguez, *supra* note 180, at 333.

189. *In re R–A–*, CENTER FOR GENDER & REFUGEE STUD., http://cgrs.uchastings.edu/our-work/matter-r (last visited Dec. 29, 2013).

190. Rodriguez, *supra* note 180, at 333.

191. Amended Declaration of L–R– in Support of Application for Asylum at ¶¶ 1–2 (BIA Dec. 30, 2005), *available at* http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-support.pdf [hereinafter Amended Declaration of L–R–] (redacted).

192. *Id.* at ¶ 2.

193. *In re L–R–*, CENTER FOR GENDER & REFUGEE STUD., http://cgrs.uchastings.edu/our-work/matter-l-r (last visited Dec. 28, 2013); *see also* 8 U.S.C. § 1158(a)(2)(B) (2012) (articulating the one year deadline for filing for asylum).

194. Amended Declaration of L–R–, *supra* note 191, at ¶ 8.

195. *Id.*

196. *Id.* at ¶ 17.

197. *Id.* at ¶¶ 18, 20.

198. *Id.* at ¶ 20.

ing.[199] L–R– eventually gave birth to a son a few months after the child's father tried to kill her.[200] L–R– attempted to use an intra uterine contraceptive device after the birth of her son to avoid a second pregnancy by her abuser.[201] However, the contraceptive device cut her and caused her to bleed when he continued to violently rape her.[202] After she removed the contraceptive device, she became pregnant and gave birth to a second child, and later, a third.[203] Eventually, L–R– and her abuser were considered common-law husband and wife in Mexican society because of their children and the years of forced cohabitation.[204]

On the multiple occasions L–R– reported the abuse to the police, they told her that her situation was a private matter and refused to take action despite her visible injuries.[205] On another occasion, a judge told her that he would assist her, but only if she "had sex with him" first.[206] After her attempts to seek protection from her common-law husband failed, the violence escalated.[207] On one occasion, he found her walking home alone from the bus stop and accused her of seeing other men.[208] After accusing her, he violently attacked L–R– and hit her so hard he dislocated her nose, causing permanent numbness and paralysis on the left side of her face and partial numbness on the right.[209] During another episode of violence, he threatened to kill her with a machete.[210] L–R– eventually escaped and paid a smuggler who facilitates the migration of people across the U.S. border to smuggle her and her three children into the country.[211]

On October 15, 2007, an immigration judge denied L–R–'s application for asylum because she claimed membership in a particular social group defined as "'Mexican women in an abusive relationship who are unable to leave.'"[212] L–R– subsequently appealed the decision in early 2008.[213]

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199. *Id.*

200. Amended Declaration of L–R–, *supra* note 1981, at ¶ 22.

201. *Id.*

202. *Id.*

203. *Id.* at ¶¶ 22, 24.

204. *Id.* at ¶ 18.

205. *Id.* at ¶ 24.

206. Amended Declaration of L–R–, *supra* note 191, at ¶ 37.

207. *Id.* at ¶ 28.

208. *Id.* at ¶ 30.

209. *Id.* at ¶¶ 30–31.

210. *Id.* at ¶ 30.

211. *Id.* at ¶ 62.

212. Department of Homeland Security's Supplemental Brief at 2, 5, *In re* L–R– (Apr. 13, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf (redacted) [hereinafter Supplemental Brief].

213. *Id.* at 2–3.

In December 2008, the BIA requested supplemental briefing from the parties involved in the case.[214] In April 2009, DHS submitted a supplemental brief to the BIA that "represent[ed] the Department's current position as to whether victims of domestic violence . . . are members of a particular social group . . . and can otherwise establish eligibility for asylum."[215] DHS recommended that the BIA remand L–R–'s case back to the immigration judge to take into account "alternative formulations" of L–R–'s particular social group.[216] The brief explained that in order to show membership in a particular social group, an applicant must demonstrate that its members "share a common immutable or fundamental trait, [that is] socially distinct or 'visible,' and . . . defined with sufficient particularity to allow reliable determinations about who comes within the group definition."[217]

DHS also "depart[ed] from [its] normal practice" of focusing its arguments solely on the claims raised by the applicant by suggesting two alternative formulations of a particular social group that could apply to L–R–'s case.[218] The first social group formulation offered by DHS was nearly identical to L–R–'s original formulation, except that DHS removed the word "abusive" to eliminate circularity: "Mexican women in domestic relationships who are unable to leave."[219] The second formulation was a much narrower formulation: "Mexican women who are viewed as property by virtue of their position within a domestic relationship."[220] In August 2010, an immigration judge granted L–R– asylum after DHS made a "favorable recommendation" on her behalf.[221] While the grants of asylum in *In re* R–A– and *In re* L–R– demonstrate that domestic violence asylum claims are legitimate, inconsistency plagues the adjudication process because there is no clear precedent or regulations addressing how asylum officers and immigration judges should handle these claims.[222]

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214. *Id.* at 1, 3.

215. *Id.* at 4.

216. *Id.* at 5.

217. Supplemental Brief, *supra* note 212, at 16.

218. *Id.* at 4–5.

219. *Id.* at 14 (internal quotation marks omitted).

220. *Id.*

221. Julia Peterson, *Asylum Granted to Mexican Women in Case Setting Standard on Domestic Abuse*, N.Y. TIMES, Aug. 12, 2010, http://nytimes.com/2010/08/13/us/politics/13asylum.html.

222. *See* Anker et al., *supra* note 2, at 710 (comparing disparate outcomes in asylum cases based on domestic violence beginning in the mid-1990s).

C. *Possibility of Future Inconsistencies*

Future domestic violence asylum applicants have an inconsistent and inefficient system waiting to adjudicate their claims.[223] They cannot rely on the grant of asylum in *R–A–* and *L–R–* as precedent to establish their claims.[224] In both cases, the immigration judge did not have to make an independent determination regarding the proposed social groups because the judge accepted DHS's suggestion that the women receive a grant of asylum.[225] R–A– and L–R– are the only two domestic violence asylum applicants whose claims have been granted in this manner.[226] This lack of precedent presents a problem for future "applicants who have cognizable claims . . . but who do not have experiences similar to L–R– and R–A–" because the applicants "may not know how to articulate their particular social group or otherwise proceed with their claims."[227]

Additionally, there is no consensus among asylum adjudicators regarding the relevant framework for particular social group analysis.[228] The most frequently used analysis mirrors the "'immutability framework'" of *Acosta*, which defines a particular social group by an "immutable, unchangeable characteristic or a past or present voluntary association entered into for reasons protected by basic human rights principles that are considered 'fundamental to human dignity.'"[229] However, asylum adjudicators do not agree as to whether gender falls within the refugee definition regardless of the applied analytical framework.[230]

The myriad of approaches used by asylum adjudicators to analyze particular social group definitions has frustrated efforts of applicants to formulate particular social group definitions that will establish their eligibility for asylum.[231] Even though the factual presentations of their claims remain unchanged, the current analytical framework forces asylum

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223. *See* Barreno, *supra* note 98, at 250 (discussing the failure of the INS to define key terms like "refugee" and recognizing difficulties facing asylum seekers because of the inability to predict future outcomes absent clarification from the BIA).

224. *See id.* (indicating an important question remains after *R–A–* and *L–R–*: "Should all current and future domestic violence asylum applicants now attempt to fit their cases into the particular groups suggested by DHS, or are there other ways that they can succeed with their claims?").

225. *Id.*

226. *Id.* at 251; *see* Sarah Siddiqui, Note, *Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify*, 52 ARIZ. L. REV. 505, 517–18 n.119 (2010) ("[T]he [BIA]'s decision applies only to [R–A–]'s case and does not officially grant license for all domestic violence applicants to qualify.").

227. Barreno, *supra* note 98, at 252.

228. *See* Siddiqui, *supra* note 226, at 516 (advocating for such consensus).

229. *Id.*

230. *Id.*

231. *Id.*

applicants and those advocating on their behalf to argue semantically and craft unique definitions to fit their claims into the particular social group category.[232] Therefore, particular social group definitions vary wildly and are vulnerable to the perception that they are self-serving legal theories tailored to fit the applicant's individual claim.[233] This vulnerability has proven fatal to numerous legitimate domestic violence asylum claims because "the acceptance of a proposed social group . . . often depend[s] on the subjective determination of the adjudicator . . . ."[234]

A 2007 study analyzed databases from four levels of the asylum adjudication process, including decisions administered by 884 asylum officers over a period of seven years, 225 immigration judges over a period of four years, 126,000 decisions of the BIA over a period of six years, and 4,215 decisions by the by the U.S. Courts of Appeals over a period of two years.[235] The study revealed that "[i]n many cases, the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge."[236] The study also revealed that an asylum applicant's potential for success is affected not only by one's assignment to a particular immigration judge, but also by the gender of the immigration judge and his or her past work experience.[237] This gender bias is especially alarming in the context of gender-related claims because asylum adjudicators apply the INA's gender-neutral refugee definition more liberally to persecution commonly affecting men than to persecution like domestic violence and rape that are unique to, or concentrated against, women.[238] As the study's authors indicate: "the outcome of a refugee's quest for safety in America should be influenced more by law and less by a spin of the wheel of fate that assigns her case to a particular government official."[239]

The reluctance by the United States to recognize domestic violence asylum claims is largely a result of the unfounded fear that establishing domestic violence as grounds for asylum will immediately inundate the

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232. *See* Heyman, *supra* note 76, at 149 (recognizing this as a pitfall for many domestic violence victims seeking asylum).

233. Cianciarulo, *supra* note 45, at 120–21.

234. *Id.* at 121.

235. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007).

236. *Id.*

237. *Id.*

238. *See* Binder, *supra* note 71 (arguing asylum law developed a split between masculine and feminine persecution, allowing men to be protected but preventing women from seeking relief).

239. Ramji-Nogales, *supra* note 235, at 305.

United States with women seeking asylum.[240] This fear has resulted in a higher burden of proof for domestic violence asylum applicants because they usually have to link their abuse and particular social group to an additional protected ground, such as religion.[241] Scholars argue that "[t]his reality suggests that asylum law, both inherently and in its implementation, currently may operate in a discriminatory manner and may fail to offer women the same level of protection it offers male asylum seekers."[242] Scholars agree that such treatment discounts the current trend recognizing violence against women as a human rights violation.[243]

An analysis of Canada's experience following a positive domestic violence precedent and the adoption of the Canadian Gender Guidelines in 1993 mitigates concerns raised by the floodgate argument.[244] During the two-year period following these developments, "there were 40,000 refugee claims filed in Canada, of which only two percent were gender-based[,]" presumably encompassing all gender related claims not only domestic violence.[245] The unfortunate reality is few women have the resources to flee their country of origin to seek protection because such a departure is difficult, expensive, and traumatic.[246]

Canada's recognition of gender-related claims also reveals another unfortunate flaw that plagues the current system for adjudicating domestic violence asylum claims in the United States. On December 5, 2002, the United States and Canada entered into an agreement that forecloses the possibility of applying for asylum in both countries after the effective date of the agreement.[247] The agreement "'allocates responsibility between the United States and Canada whereby one or the other country (but not

240. *See* Sheridan, *supra* note 79, at 457 (identifying several reasons why the fear of "opening the floodgates" is unwarranted and noting this fear serves as a pretext for rejecting gender-based claims in the United States).

241. *See In re* S-A-, 22 I. & N. Dec. 1328, 1336 (BIA 2000) (holding a Moroccan woman who was physically, verbally, and emotionally abused by her father suffered persecution on account of her religious beliefs); Cianciarulo, *supra* note 45, at 121 ("The acceptance of a proposed social group may often depend . . . whether another protected ground—race, religion, nationality, or political opinion—is implicated.").

242. Helton & Nicoll, *supra* note 3.

243. Shapiro, *supra* note 105, at 486.

244. *See* Patricia A. Seith, Note, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1838–39 (1997) (refuting the floodgate argument by comparing United States' asylum law standards to Canada's).

245. *Id.* at 1838.

246. *Id.* at 1839.

247. Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, U.S.-Can., Dec. 5, 2002, T.I.A.S. No. 04-1229 (entered into force Dec. 29, 2004), *available at* http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp.

both) will assume responsibility for processing the claims of certain asylum seekers . . . .'"[248] The agreement also requires refugees to apply for asylum in the country that they arrive in first.[249] Since Canada has a well-established acceptance of gender-related claims on the basis of domestic violence, critics of the agreement assert that women will lose asylum claims in the United States that they would have otherwise won in Canada, without maintaining an opportunity to later assert the claim in Canada.[250] This result is especially alarming considering most domestic violence victims fleeing Central and South America arrive in the United States first due to the geography of the North American continent.[251]

The flaws and inconsistencies that plague the current system necessitate a fundamental change to the current approach for adjudicating domestic violence asylum claims in the United States. Prospective domestic violence asylum applicants and adjudicators of these claims have limited guidance going forward, and little is expected to change without a precedent-setting decision by the BIA or modified DHS regulations.[252] According to DHS:

> A final rule is the best vehicle for providing much needed guidance on the adjudication of social group asylum claims, including those based on domestic violence. The legal standards governing [domestic violence asylum claims] have been obscured by the uneven development of case law and by the need for a coherent administrative framework for interpretation on these issues.[253]

Thus, a final rule, like the following proposal, is the proper solution to the administrative mess that prevents domestic violence victims from receiving asylum protection in the United States.

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248. Andrew F. Moore, *Unsafe in America: A Review of the U.S.–Canada Safe Third Country Agreement*, 47 SANTA CLARA L. REV. 201, 202 (2007).

249. *See* Audrey Macklin, *Disappearing Refugees: Reflections on the Canada–U.S. Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV. 365, 381 (2005) ("The Agreement is premised on the idea that refugee claimants ought to apply for protection in the first country of arrival (as between Canada and the United States), rather than choose their preferred destination. This selectivity is disparaged in the expression 'forum-shopping.'").

250. Moore, *supra* note 248, at 241–42.

251. *See id.* at 252, 284 (addressing the impact of the U.S.-Canadian agreement on the migration of refugees).

252. *See generally* Barreno, *supra* note 98, at 225 (discussing "the present limitations placed on the adjudications of domestic violence asylum claims" while assessing proposed solutions).

253. Department of Homeland Security's Position on Respondent's Eligibility for Relief at 4, *In re* R–A–, 23 I. & N. Dec. 694 (BIA 2005), *available at* http://cgrs.uchastings.edu/sites/default/files/Matter_of_RA_DHS_Brief_02_19_2004.pdf .

V. Solution for Domestic Violence Asylum Applicants

Congress should address the inconsistent outcomes of domestic violence asylum claims and ensure the fundamentally fair and humane application of U.S. immigration law by passing the proposed International Violence Against Women Act[254] with a special provision for domestic violence victims seeking asylum in the United States. Congress has addressed the issue of immigrant domestic violence victims in the past. The Violence Against Women Act of 1994 (VAWA) allows victims of domestic violence who are married to legal permanent residents or U.S. citizens to self-petition for immigration status in the United Status.[255] In 2000, Congress passed the Battered Immigrant Women Protection Act of 2000.[256] The Act expanded the protection provided by VAWA by extending the U-Visa to immigrant victims of domestic violence that occurred in the United States who did not have a path to lawful immigration status when the crime occurred.[257] During the first U.S. Report to the Human Rights Committee of the International Covenant on Civil and Political Rights, the U.S. government pointed to these measures as steps the government has taken to comply with and execute international human rights treaty obligations.[258]

A. *The Blueprint for Change: The U.S. Response to China's "One Child Policy"*

Congress has stepped in to address inconsistent and inefficient outcomes in the U.S. asylum adjudication system in the past. In 1979, China implemented a coercive family planning policy in an effort to control the country's expanding population.[259] China forced compliance with the "One-Child Policy" by imposing penalties that ranged from mere economic sanctions to more extreme measures like abortions or forced sterilizations in some cases.[260] Many individuals fled China fearing the

254. *E.g.*, International Violence Against Women Act of 2007, S. 2279, 110th Cong. (2007); International Violence Against Women Act of 2013, H.R. 3571, 113th Cong. (2013).

255. 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(bbb) (2013).

256. Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, §§ 1501–13, 114 Stat. 1464 (2000).

257. *See id.* §§ 1501–13 (setting out the provisions for battered immigrant women and children to gain residency and naturalization).

258. *See* Jordan J. Paust, *Human Rights Purposes of the Violence Against Women Act and International Law's Enhancement of Congressional Power*, 22 Hous. J. Int'l L. 209, 211–13 (2000) (identifying heavy reliance on the Violence Against Women Act).

259. Charles E. Schulman, Note, *The Grant of Asylum to Chinese Citizens Who Oppose China's One-Child Policy: A Policy of Persecution or Population Control?*, 16 B.C. Third World L.J. 313, 316–17 (1996).

260. *See id.* at 317 (discussing ways in which China enforced their harsh One-Child Policy).

severity of the more extreme measures and sought asylum in the United States.[261] For more than a decade, asylum adjudicators issued inconsistent decisions regarding the claims due to the controversial nature of the subject matter.[262]

In *In re* Chang,[263] the BIA finally addressed the issue by denying asylum to an applicant who claimed that he would be forced to undergo involuntary sterilization as a result of China's repressive policy.[264] The BIA found that the applicant could not establish a well-founded fear of persecution because the Chinese policy did not constitute persecution on its face.[265] As a direct response to *Chang*, President George H. W. Bush issued an executive order "granting asylum to refugees from the One Child Policy."[266] However, when the INS subsequently issued its final asylum regulations, the INS did not include language regarding coercive family planning.[267] Thus, due to the omission, the BIA refused to recognize that *Chang* was overruled.[268]

On September 30, 1996, President Bill Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[269] With this Act, Congress sought to create consistency in the adjudication of asylum claims involving forced abortion and sterilization by addressing this "longstanding legal gray."[270] Among its many provisions,[271] "[o]ne

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261. *Id.* at 320.

262. *See* Kimberly Sicard, Note, *Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 933–36 (2000) (tracing the ever-changing political activity surrounding the One Child Policy from 1985 to 1994).

263. *In re* Chang, 20 I. & N. Dec. 38 (BIA 1989).

264. *Id.* at 47.

265. *Id.* at 43.

266. Sicard, *supra* note 262, at 934; *see generally* Exec. Order No. 12,711, § 4, 55 Fed. Reg. 13,897, 13,897 (Apr. 11, 1990) ("The Secretary of State and the Attorney General are directed to provide for enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization, as implemented by the Attorney General's regulation effective January 29, 1990.").

267. Sicard, *supra* note 262, at 934.

268. *Id.* "[B]ecause the Attorney General omitted the interim rule from the final regulations, the Order did not have the force of law." *Id.*

269. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, tit. VI, § 601, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1101(a)(42)); *see* Kyle R. Rabkin, Comment, *The Zero-Child Policy: How the Board of Immigration Appeals Discriminates Against Unmarried Asylum-Seekers Fleeing Coercive Family Planning Measures*, 101 NW. U.L. REV. 965, 974–75 (2007) (providing background on IIRIRA).

270. *See* Michelle Chen, *Leaving One-Child Behind: Chinese Immigrants Seek Asylum in America from China's One-Child Policy*, LEGAL AFF., Nov.–Dec. 2005, *available at* http://www.legalaffairs.org/issues/November-December-2005/scene_chen_novdec05.msp (detailing the impact of classifying persons fleeing population control schemes as refugees).

sentence at the end of section 601(a) [of IIRIRA]—defining 'refugee' for the purposes of the Act—dramatically changed judicial treatment of asylum seekers fleeing coercive family-planning measures":

> For purposes of determination under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have persecuted on account of political opinion, and a person who has well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.[272]

Section 601(a) of IIRIRA specifically enumerates that a person forced to abort a pregnancy or undergo involuntary sterilization establishes per se persecution.[273] It also establishes asylum protection for those who reasonably fear they will be subjected to coercive family planning measures if they return to their country.[274] This amendment has facilitated more consistent adjudication for asylum claims based on coercive Chinese family planning measures, which has afforded greater protection to those who oppose the practice.[275] Clear and decisive action by Congress, such as IIRIRA, is the only solution that ensures fair adjudication of domestic violence asylum claims under the laws of the United States.

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271. Congress designed IIRIRA to "improve border control by imposing criminal penalties for racketeering, alien smuggling, and the use or creation of fraudulent immigration-related documents and increasing interior enforcement by agencies charged with monitoring visa applications and visa abusers." *Illegal Immigration Reform and Immigration Responsibility Act, Legal Information Institute*, CORNELL U. LAW SCH., http://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act (last visited Dec. 29, 2013). Congress also incorporated employment eligibility verification into the Act, "including sanctions for employers who fail to comply with the regulations and restrictions on unfair immigration-related employment practices, as well as provisions governing the disbursement of government aid to aliens." *Id.*

272. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, tit. VI, § 601, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1101(a)(42)); Rabkin, *supra* note 269, at 974.

273. *See* Chen, *supra* note 270 (identifying the Act as official recognition of form of persecution).

274. *Id.*

275. *See id.* (highlighting the increase in claims from Chinese refugees and their success rate).

B. *The Vehicle for Change: The International Violence Against Women Act*

As it did with IIRIRA, Congress should use politically expedient legislation to amend the Immigration and Nationality Act's definition of refugee so that the Act offers protection for victims of extreme cases of domestic violence in foreign countries. The International Violence Against Women Act (I-VAWA) has gained momentum and bipartisan support as it works its way through the legislative process.[276] I-VAWA focuses on "streamlin[ing] existing efforts by the U.S. government to end violence against women [internationally] and fund[ing] new efforts by [non-governmental organizations] and the U.S. government to prevent violence and provide survivor services" worldwide.[277] "The text of the bill begins with congressional findings on the importance of ending violence against women"[278] stating, "[A]pproximately [one] in [three] women in the world will experience violence in her lifetime, with rates of up to [seventy] percent in some countries . . . ."[279] The bill also notes the acute violence that plagues women who are forced to flee their homelands seeking protection. It asserts, "Displaced, refugee, and stateless women and girls in humanitarian emergencies, conflict settings, and natural disasters face extreme violence and threats because of power inequities, including being forced to exchange sex for food and humanitarian supplies, and being at increased risk of rape, sexual exploitation, and abuse."[280] The bill states it is the policy of the United States "to systematically integrate and coordinate efforts to prevent and respond to violence against women and girls into United States foreign policy and foreign assistance programs" and "to enhance training and other programs to prevent and respond to violence against women and girls in humanitarian relief, conflict, and post-conflict operations . . . ."[281]

On October 31, 2007, then-Senator Joseph Biden (D-Delaware) and Senator Richard Lugar (R-Indiana) first introduced I-VAWA to the Sen-

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276. *See, e.g.*, International Violence Against Women Act of 2007, S. 2279, 110th Cong. (2007) (introducing the first legislation regarding international application of the Violence Against Women Act); International Violence Against Women Act of 2013, H.R. 3571, 113th Cong. (2013) (proposing legislation to address global issues faced by women and girls).

277. Nissa Thompson, *Does the International Violence Against Women Act Respond to Lessons from the Iraq War?*, 23 BERKLEY J. GENDER L. & JUST. 1, 7 (2008).

278. *Id.* at 8.

279. International Violence Against Women Act of 2007, S. 2279, 110th Cong. § 2(2)(A) (2007).

280. *Id.* § 2(8).

281. *Id.* §§ 3(5), 3(12).

ate.[282] The bill garnered bipartisan support from twenty cosponsoring senators.[283] On April 30, 2008, Representative Howard Berman (D-California) introduced I-VAWA to the House of Representatives, where the bill received bipartisan support from thirty cosponsoring representatives.[284] Although I-VAWA received substantial bipartisan support in both houses, Congress did not vote on the bill during the 110th Congress.[285] However, a 2009 poll found that eighty-two percent of Americans supported the passage of I-VAWA.[286] "This public display of support is of great importance because it adds legitimacy" to the campaign for women's rights and places political pressure on U.S. lawmakers to support women's rights internationally.[287]

On February 4, 2010, in a rare show of bipartisan support, Senators John Kerry (D-Massachusetts) and Barbara Boxer (D-California) of the Senate Foreign Relations Committee, along with Senators Susan Collins (R-Maine) and Olympia Snowe (R-Maine), reintroduced I-VAWA to the 111th Congress.[288] More than thirty senators cosponsored the bill and the Senate Foreign Relations Committee recommended the bill for enactment.[289]

Similarly, Representative William Delahunt (D-Massachusetts) and 134 bipartisan cosponsors reintroduced I-VAWA to the House of Representatives during the 111th Congress.[290] Representative Delahunt focused on the bill's importance to national security in his statement supporting the bill: "Nations with the worst track record in preventing violence against women are also the most unstable and are breeding grounds for terrorism. It is crucial for our own national security that we be a global leader in addressing this epidemic of gender violence . . . ."[291]

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282. *Id.*

283. *Id.*

284. International Violence Against Women Act of 2008, H.R. 5927, 110th Cong. (2008).

285. *See* International Violence Against Women Act of 2007, S. 2279, 110th Cong. (2007) (dying in committee); International Violence Against Women Act of 2008, H.R. 5927, 110th Cong. (2008) (dying in committee).

286. Ritu Sharma & Humaira Shahid, *Standing up to Violence Against Women Worldwide*, HUFFINGTON POST (Feb. 4, 2010, 10:19 AM), http://www.huffingtonpost.com/ritu-sharma/standing-up-to-violence-a_b_448728.html.

287. Adrien K. Wing & Peter P. Nadimi, *Women's Rights in the Muslim World and the Age of Obama*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 431, 453 (2011).

288. International Violence Against Women Act of 2010, S. 2982, 111th Cong. (2010).

289. *Id.*

290. International Violence Against Women Act of 2010, H.R. 4594, 111th Cong. (2010).

291. Press Release, Office of Senator Tom Harkin, Members of House and Senate Stand in Support of Landmark Legislation to Combat Violence Against Women (Feb. 4, 2010), *available at* http://www.harkin.senate.gov/press/release.cfm?i=322101.

Senator Kerry echoed Rep. Delahunt's statement in his statement supporting the bill: "This bill will protect women everywhere, and it turns out that championing these values is also an extremely effective and cost-efficient way to advance America's foreign assistance goals and strengthen our national security."[292] Senator Benjamin Cardin (D-Maryland) also noted the strategic importance of the initiative in a statement after the Senate Foreign Relations Committee approved I-VAWA: "The Joint Chiefs of Staff stated that one of the most effective forces for defeating extremism is female safety and education. Violence against women undermines the effectiveness of existing U.S. investments in global development and stability, whether fighting HIV/AIDS, increasing basic education, or creating stability . . . ."[293]

Recently reintroduced to the 113th Congress by Rep. Janice Schakowsky (D-Illinois), I-VAWA awaits approval from the House Committee on Foreign Affairs before it can be sent to the entire House for a vote.[294] Congress should expand the current version of I-VAWA to include statutory protection for domestic violence asylum applicants to demonstrate the United States' commitment to addressing what the original version of I-VAWA deemed a "human rights problem of epidemic proportions."[295]

C. *The Change: Proposed Amendment to the Immigration and Nationality Act*

Scholars note an important theme that shapes contemporary American history: "concern for the beneficial impact of American policies on the lives of vulnerable populations . . . ."[296] This theme revolves around which obligations, if any, super power nations owe to ethical considerations.[297] In the case of the United States in particular, the nation's strategic concerns have tended to align with policies aimed at aid for the needy.[298] Scholars refer to this effect as "strategic humanitarianism."[299]

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292. *Id.*

293. Press Release, Office of Senator Benjamin Cardin, Cardin Hails Committee Passage of International Violence Against Women Act (Dec. 14, 2010), *available at* http://www.cardin.senate.gov/newsroom/press/release/cardin-hails-committee-passage-of-international-violence-against-women-act.

294. International Violence Against Women Act of 2013, H.R. 3571, 113th Cong. (2013).

295. International Violence Against Women Act of 2007, S. 2279, 110th Cong. § 2(1) (2007).

296. Mariano-Florentino Cuéllar, *The Limits of the Limits of Idealism: Rethinking American Refugee Policy in an Insecure World*, 1 HARV. L. & POL'Y REV. 401, 416 (2007).

297. *Id.*

298. *See id.* at 417 ("[T]hough it is tempting to think of humanitarian policy as primarily a means of engaging in acts of charity for globally marginalized constituencies, history

This particular foreign policy agenda focuses on over-arching goals of international humanitarianism while attempting to limit the waste of both American lives and capital on a global scale.[300] Humanitarian protection through immigration law is inextricably linked to our foreign policy.[301] As Sen. Kerry, Sen. Cardin, Rep. Delahunt, and other members of Congress point out, the promotion of women's rights internationally is the most effective method for ensuring our national security and global stability.

Because the well-being of refugees and displaced persons affects assumptions about what makes the world a stable and predictable place, Congress should use I-VAWA to amend the definition of refugee found in INA Section 101(a)(42)[302] in the same manner that it did with IIRIRA[303] to address coercive family planning practices.

For example, the legislation could include language that establishes domestic violence victims as a particular social group in certain circumstances:

> *For purposes of determination under this Act, a person who has been subjected to severe domestic abuse at the hands of an intimate partner which rises to the level of persecution, and who can show that the government in the country of origin is unable or unwilling to provide protection from the abuse because the abuse is tolerated within the society or is viewed as a private matter beyond the jurisdiction of the laws of that country, shall be deemed to have been persecuted on account of their membership in a particular social group.*

This expansion of the definition of refugee to include domestic violence victims will eliminate the applicant's burden of "crafting a hyper-detailed description of [a particular] social group that seems patently unrealistic . . . ."[304] The proposed definition also eliminates the applicant's burden of proving the subjective intent of her abuser by using the causal connec-

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has shown that American concern for the less fortunate around the planet can play an important role in advancing the nation's strategic interests.").

299. *Id.*

300. *See id.* (identifying balancing that must occur in the face of any American international action).

301. *See* Carolyn Waller & Linda M. Hoffman, *United States Immigration Law as a Foreign Policy Tool: The Beijing Crisis and the United States Response*, 3 GEO. IMMIGR. L.J. 313, 329 (1989) (listing the determinative factors used to decided if a refugee can be considered a "special humanitarian concern" and including among those factors "the foreign policy consequences of finding the refugee(s) to be of special humanitarian concern").

302. 8 U.S.C. § 1101(a)(42) (2012).

303. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, tit. VI, § 601, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1101(a)(42)).

304. Heyman, *supra* note 76, at 149.

tion between societal attitudes in the country of origin and government inaction to establish the nexus requirement of an asylum claim. However, this definition still requires domestic violence asylum applicants to meet the heavy burden of proving the other elements of an asylum claim.[305] The applicant must prove that the abuse is severe enough to rise to the level of persecution under current BIA precedent.[306] The applicant must also show that she has a subjective fear of future persecution that is objectively reasonable.[307]

This proposed solution balances the national security interests related to more lenient refugee protection with the humanitarian policies and foreign policy goals of the country. This amendment also provides much needed guidance to asylum adjudicators to end the inconsistent and inefficient adjudication of domestic violence asylum claims.

VI. CONCLUSION

In 1999, Former United Nations Secretary General Kofi Annan stated, "Violence against women is perhaps the most shameful human rights violation."[308] He added, "As long as it continues, we cannot claim to be making real progress towards equality, development, and peace."[309] Unfortunately, more than a decade later, "women around the world continue to face human rights abuses" at alarming rates, "condoned in part by deeply held patriarchal customs and religious practices, as well as insufficient resources and lack of political will."[310] In many countries, "cultural beliefs and norms . . . inadvertently legitimize, obscure, or deny domestic violence."[311] As long as this trend continues, we will never achieve global peace and security.

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305. *See* Supplemental Brief, *supra* note 155, at 12 (acknowledging a victim would still have other requirements to prove such as "the harm feared must be enough to constitute persecution" and "the fear of future harm must be well-founded").

306. *See In re* O-Z- & I-Z-, 22 I. & N. Dec. 23, 26 (BIA 1998) (showing more than "mere discrimination and harassment" is enough to meet the level of persecution under the BIA).

307. *See In re* Acosta, 19 I. & N. Dec. 211, 225–26 (BIA 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987) (stating a well-founded fear of persecution has to be more than "subjective or conjectural," but also based on "objective facts").

308. Press Release, United Nations, Violence Against Women 'Most Shameful,' Pervasive Human Rights Violation, Says Secretary-General in Remarks on International Women's Day (Mar. 8, 1999), *available at* http://www.un.org/News/Press/docs/1999/19990308.sgsm6919.html.

309. *Id.*.

310. Wing & Nadimi, *supra* note 287, at 431.

311. Deanna Kwong, Recent Development, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN'S L. J. 137, 140 (2002).

The United States is in a critical position to make a lasting impact on international women's rights issues, especially in the realm of domestic violence.[312] However, the U.S. asylum adjudication system lags behind the international community in offering protection to the victims of domestic violence.[313] U.S. asylum adjudicators have failed to expand refugee protection to domestic violence victims because "gender stereotypes and misperceptions about [the nature of] domestic violence" pollute the decision-making process.[314] Current efforts to incorporate domestic violence into the existing definitional framework are innately flawed because they require the victim to prove the intent of their abuser.[315] Congress cannot continue to wait for case law to evolve to accommodate domestic violence victims because the attitudes toward women and domestic violence that underlie the current decisions do not appear to be fading.[316] Therefore, an alternative solution is necessary to achieve consistent, straightforward results for domestic violence asylum applicants.[317]

The United States must take a stand, to create an example for other countries that any type of violence, especially those targeting women, regardless of the capacity of the attacker, is unacceptable.[318] Women's rights advocates agree that granting asylum to the victims of domestic violence will send a clear message to foreign governments that they can "no longer allow violence against women with impunity to continue."[319] "[D]omestic violence will continue to plague [the development of] societies throughout the world until state actors . . . reform their legal systems"

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312. *See* HUMAN RIGHTS FIRST, HOW TO REPAIR THE U.S. ASYLUM SYSTEM: BLUEPRINT FOR THE NEXT ADMINISTRATION 1 (2008), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/081204-ASY-asylum-blueprint.pdf ("The United States has long been recognized as a beacon of hope and safety for the persecuted around the world.").

313. *See generally* Danette Gómez, Note and Comment, *Last in Line – The United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959 (2004) (comparing U.S. asylum policy to other countries).

314. Gillespie, *supra* note 69, at 150.

315. *See* 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, 559 (2009) ("[N]one of [the implemented] solutions [to integrate gender-based asylum claims] has been entirely satisfactory, as even the best ones still require victims of gender-based persecution to prove the intent of their attacker(s).").

316. *See* Gillespie, *supra* note 69, at 150 (identifying "gender stereotypes and misperceptions about domestic violence" as barriers to changes in judicial decision making and calling for a statutory change to address the problem).

317. Doyle, *supra* note 315, at 520–21.

318. Gómez, *supra* note 313, at 986–87.

319. Musalo, *supra* note 13, at 119 (quoting Guatemalan women's rights attorney and activist Hilda Morales Trujillo).

to recognize the fundamental importance of women's rights.[320] The United States must rise to this challenge and once again become the world leader in protecting human rights by establishing a statutory protection for domestic violence asylum applicants. This step will not only advance both the national security interest and humanitarian policies of the United States, it will also send a clear message to the international community that the United States will not tolerate domestic violence domestically or abroad.

320. Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence*, 20 N.Y. INT'L L. REV. 57, 128 (2007).