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**PULLING THE TRIGGER:  
SEPARATION VIOLENCE AS A BASIS FOR  
REFUGEE PROTECTION FOR  
BATTERED WOMEN**

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#### INTRODUCTION

Maria Elena fears for her life. For years she has lived under the rule of a despot intent on maintaining absolute control of his realm. As a member of a historically oppressed tribe with few political rights, Maria Elena is a prime target for the dictator's calculated methods of maintaining control. He has randomly imprisoned, tortured, beaten, and threatened to kill Maria Elena over a period of several years. The torture is worse when Maria Elena takes any action that challenges the despot's absolute authority. Maria Elena tried to flee once, but people with whom she sought shelter turned out to be agents of the despot and alerted him to her whereabouts. When he found her, he nearly killed her. Maria Elena has now accepted the reality that there is no safe place for her in her country. She has left her children with her parents and is going to flee to the United States.

In this scenario, the classic refugee described above would apply for refugee protection in the form of asylum after reaching safety in the United States. She would claim asylum on the basis that she fears persecution in the form of torture and possible death. There would be little question as to the basis of her claim. Research on the country and its tyrannical ruler would clearly document the abuses suffered by members of Maria Elena's tribe, particularly when those members had challenged the ruler's authority. If she were credible, and if she met her burden of proof, the United States, a country of refuge, would welcome Maria Elena with open arms.

Maria Elena, however, is not a classic refugee. The tyrant is her husband. His realm is their home. Her tribe consists of women in general, and more particularly, women with whom her husband is in a relationship. The agents who sent her back to him are his family, her family, or members of her government who are unable or unwilling to issue or enforce a protective order. The beatings, torture, and threats against her life are the same, as is the reason for the abuse: the retention of absolute power. Nevertheless, it is likely that Maria Elena will not be entitled to the same protection as the classic refugee.

In 1999, the Board of Immigration Appeals (the “Board”) held in *Matter of R-A*<sup>1</sup> that a woman who had fled severe domestic violence did not qualify as a refugee, and was thus ineligible for asylum protection in the United States. The basis for the Board’s denial of asylum was that the applicant, a Guatemalan national named Rodi Alvarado, could not prove that the persecution she suffered occurred on account of one of the five protected grounds listed in the refugee definition: race, religion, nationality, political opinion, or membership in a particular social group.<sup>2</sup> Alvarado argued that “her husband necessarily imputed to her the view that she believed women should not be controlled and dominated by men.”<sup>3</sup> She also argued that she was a member of a particular social group consisting of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>4</sup> Nevertheless, the Board decided that Alvarado had failed to establish that her husband persecuted her “on account of . . . [her] political opinion or [her] membership in a particular social group.”<sup>5</sup>

Despite this ruling in *Matter of R-A*, people fleeing domestic violence have continued to apply for asylum, sometimes successfully.<sup>6</sup>

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1. 22 I. & N. Dec. 906 (BIA 1999), *vacated and remanded to stay reconsideration* (A.G. 2001), *remanded for reconsideration* 23 I. & N. Dec. 694 (A.G. 2005), *lifted stay and remanded for reconsideration* 24 I. & N. Dec. 629 (A.G. 2008).

2. *Id.* at 912, 914 (citing 8 U.S.C. § 1101(a)(42) (1994)).

3. *Id.* at 916.

4. *Id.* at 911.

5. *Id.* at 914.

6. *See, e.g.,* *Gonzalez v. Gutierrez*, 311 F.3d 942, 947 n.9 (9th Cir. 2002) (noting that an immigration judge granted asylum to Rosa Gutierrez, a defendant in a Hague Convention case, on June 25, 2002, “on the basis of her status as a victim of domestic violence”). In a subsequent, unpublished California Court of Appeals case, *Gonzalez v. Gutierrez*, the court noted that Ms. Gutierrez was granted asylum based on her membership in the particular social group, “Mexican women who have suffered domestic violence,” and that the grant of asylum became final when Immigration and Naturalization Service withdrew its appeal on December 18, 2002. No. D040063, 2003 WL 22236051, \*4 (Cal. Ct. App. Sept. 30, 2003); *see also* Aguirre-Cervantes v. INS, 242 F.3d 1169 (9th Cir. 2001) (granting asylum to a Mexican child who had suffered physical abuse at the hands of her father on account of her membership in the social group of her nuclear family); *Matter of S-A*, 22 I. & N. Dec. 1328 (BIA 2000) (granting asylum to a woman who suffered physical abuse at the hands of her orthodox Muslim father on account of her liberal Muslim beliefs); KAREN MUSALO, JENNIFER MOORE & RICHARD BOSWELL, *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 817 (3d ed. 2007) (citing *Matter of A-N*, No. A73 506 840, Decision of the Court (Philadelphia Immigration Court, Dec. 22, 2000) (granting asylum to a Jordanian woman who feared persecution by her husband and his family)); *id.* (citing *Matter of J-J*, Decision of the Court (York Immigration Court, Apr. 10, 2001) (granting asylum to a Spanish Roma woman who feared being returned “to an abusive marriage . . . by elders of the Roma ethnic community”). *See generally* Karen Musalo & Stephen Knight, *Asylum for Victims*

The agencies responsible for adjudicating asylum claims, the U.S. Department of Justice and the U.S. Department of Homeland Security, have struggled with how to adjudicate domestic violence-based asylum claims. For example, the Department of Justice stayed the Board's ruling in *Matter of R-A*- and proposed regulations for adjudicating gender-based asylum claims.<sup>7</sup> Attorneys for the Department of Homeland Security and attorneys for Alvarado re-briefed the case per the request of Attorney General John Ashcroft in 2004.<sup>8</sup> In its new brief, the Department of Homeland Security conceded that Alvarado, because of her particular circumstances, qualified for asylum.<sup>9</sup> Nevertheless, Alvarado still has not received a final grant of asylum, and the Department of Justice has still not issued final regulations governing the adjudication of gender-based asylum claims.<sup>10</sup>

One of the obstacles preventing the resolution of Alvarado's case and others like it is the lingering inability of U.S. jurists and policymakers to fully understand the nature of domestic violence. The Board's majority opinion in *Matter of R-A*- and its proposed regulations demonstrate a fundamental misunderstanding of a number of factors pertaining to domestic violence—factors involving psychology, economics, culture, law, and philosophy. One of the most glaring misunderstandings concerns the psychology of domestic violence, especially the theory of separation violence.<sup>11</sup>

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*of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions*, 2003 IMMIGR. BRIEFINGS 1 (2003) (conducting a study on the impact of *Matter of R-A*- on women's claims before the Board and individual immigration judges and concluding that some adjudicators view the vacation of the decision as broadening the possibilities for gender-related claims).

7. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,588–98 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

8. *Matter of R-A*-, 23 I. & N. Dec. 694 (A.G. 2005), *remanding for reconsideration* 22 I. & N. Dec. 906 (A.G. 2001) & 22 I. & N. Dec. 906 (BIA 1999). Attorney General Ashcroft's decision remanded the case to the Board and required the Board to postpone hearing the case until the final version of the proposed regulations were published. *Id.*

9. See Department of Homeland Security's Position on Resp't's Eligibility for Relief at 2, *Matter of R-A*-, 22 I. & N. Dec. 906 (BIA Feb. 19, 2004) [hereinafter "DHS Brief 2004"] (arguing that "under some limited circumstances a victim of domestic violence can establish eligibility for asylum on this basis, and that the applicant in this case has established such eligibility").

10. *Matter of R-A*-, 24 I. & N. Dec. 629 (A.G. 2008), *lifting stay imposed in* 23 I. & N. Dec. 694 (A.G. 2005), *remanding for reconsideration* 22 I. & N. Dec. 906 (A.G. 2001) & 22 I. & N. Dec. 906 (BIA 1999). Attorney General Mukasey's decision lifted the stay that required the Board to await publication of the final regulations. *Id.* at 630–31.

11. See *infra* notes 57–75 and accompanying text (explaining the phenomenon known as "separation violence").

In the scenario described above, Maria Elena suffered the worst abuse when she tried to flee the country and was then caught. By leaving the relationship, the battered woman is engaging in the ultimate challenge to her abuser's power, authority, and control. She is, in effect, pulling the trigger by committing an act that she cannot take back. Regardless of whether the abuser forces her to return or whether she returns on her own, the abuser now knows that she is capable of leaving him, and he escalates his abuse in order to punish her for her challenge to his authority and to ensure that such a challenge does not happen again.<sup>12</sup>

An understanding of the theory of separation violence is crucial to any legal analysis of a battered woman's claim for refugee protection. The Board declined to grant Alvarado's claim because the Board failed to see a nexus between the abuse that Alvarado suffered and her membership in a particular social group.<sup>13</sup> Part of the basis for this failure was the Board's perception that Alvarado's situation was a random, private one, characterized by bad luck and a poor choice of spouse on her part.<sup>14</sup> This perception is evidence of the Board's ignorance of the psychology of domestic violence, particularly the effects of leaving an abusive relationship. Had the Board been aware of the theory of separation violence, and had it understood the theory's statistically based underpinnings, it would have identified Alvarado's fear of future persecution as having developed on account

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12. See Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 258 (2003) ("Not only can fleeing fail to stop the criminal behavior, it may incite an escalation of the violence, sometimes even leading to murder of the battered partner.").

13. Matter of R-A-, 22 I. & N. Dec. 906, 920-23 (BIA 1999), *vacated and remanded to stay reconsideration* (A.G. 2001), *remanded for reconsideration* 23 I. & N. Dec. 694 (A.G. 2005), *lifted stay and remanded for reconsideration* 24 I. & N. Dec. 629 (A.G. 2008).

14. The Board recounted the testimony of Dr. Bersing, an expert on the conditions of Rodi Alvarado's native country of Guatemala, as follows:

[Dr. Bersing] testified that husbands are supposed to honor, respect, and take care of their wives, and that spouse abuse is something that is present "underground" or "underneath in the culture." But *if a woman chooses the wrong husband* her options are few in countries such as Guatemala, which lack effective methods for dealing with the problem.

*Id.* (emphasis added).

[T]he arbitrary nature of the attacks further suggests it was not the respondent's claimed social group characteristics that he sought to overcome. The record indicates that there is nothing the respondent could have done to have satisfied her husband and prevented further abuse.

*Id.* at 921.

of a clear, recognizable, and narrow social group: “women who have left severely abusive relationships.”<sup>15</sup>

This Article seeks to (1) explain that the persecution suffered by domestic violence victims is neither random, nor limited to the victims’ particular circumstances, and (2) demonstrate that a fuller understanding of the psychology of domestic violence—and the theory of separation violence in particular—provides a clear framework for finding that survivors of severe domestic violence are eligible for asylum. Part I describes the psychology of domestic violence: the Cycle of Violence that keeps battered women trapped in abusive relationships and the separation violence that is likely to occur after a battered woman leaves an abusive relationship. Part II provides an overview of international refugee law and U.S. asylum law, and discusses the formulation of battered women’s asylum claims in the United States. Part III explains and analyzes “membership in a particular social group,” one of the five grounds upon which an individual may seek asylum. Part IV proposes a new social group upon which battered women may successfully claim asylum: membership in the particular social group of “women who have left severely abusive relationships.”

### I. THE PSYCHOLOGY OF DOMESTIC VIOLENCE

This Article contends that domestic violence is a legitimate basis for refugee protection because the psychology of domestic violence

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15. The Authors of this Article acknowledge that battering occurs against men and that battering occurs in both homosexual and heterosexual relationships. This Article, and the social group proposed in this Article, focus only on women for two reasons. First, a 2003 study found that the vast majority of intimate partner violence—eighty-five percent—is committed against women. Callie Marie Rennison, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF, INTIMATE PARTNER VIOLENCE, 1993–2001, at 1 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>. The study also found that intimate partner violence comprised twenty percent of violence committed against women, whereas intimate partner violence comprised only three percent of violence committed against men. *Id.*; see also Ronet Bachman, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, OFFICE OF JUSTICE PROGRAMS, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 6 (1994) (finding that women experienced ten times as many incidents of violence by an intimate partner than did men, and that most acts of spousal abuse are repeated an average of six times a year and escalate in severity and intensity over time). Second, the domestic violence addressed in this Article—that which occurs against women in countries where governments are unable or unwilling to protect domestic violence victims—is virtually inextricable from patriarchal notions of male domination over women. See R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 24 (1979) (discussing how “men who assault their wives are actually living up to cultural prescriptions that are cherished in Western society—aggressiveness, male dominance, and female subordination”).

reveals that batterers neither choose nor abuse their victims at random. This Part first discusses Dr. Lenore Walker's identification of the "Cycle of Violence" that occurs in domestic abuse relationships in order to demonstrate that abusers are motivated by a need to obtain dominance and control similar to the dominance and control exhibited in more traditional refugee cases, such as the oppressive dictator seeking to dominate and control the citizens of a country. This Part then explains that because abusers act within the privacy of their homes rather than within the public sphere, as classic despots act, they target their victims differently, but with no more or less randomness than a despot's security forces target perceived and actual dissidents. Finally, this Part addresses the theory of "separation violence," which explains why the risk of violence and death increases exponentially when an individual flees an abusive relationship.

#### A. *Definition of Terms*

According to the Department of Justice's Office on Violence Against Women, domestic violence is "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner."<sup>16</sup> The Department of Justice further explains that "[d]omestic violence [includes] physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person."<sup>17</sup> Physical abuse is invariably coupled with nonphysical abuse, including verbal acts of intimidation, manipulation, humiliation, isolation, and coercion toward the victim, economic exploitation, and terrorizing behaviors.<sup>18</sup> As the term is used in this Article, the term "domestic violence" refers to physical and nonphysical abuse that rises to the level of persecution. Generally, the term "persecution" refers to severe abuse that threatens an individual's life or well-being.<sup>19</sup>

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16. U.S. Department of Justice, Office on Violence Against Women: About Domestic Violence, <http://www.ovw.usdoj.gov/domviolence.htm> (last visited Dec. 1, 2009).

17. *Id.*

18. *Id.*

19. The Immigration and Nationality Act (INA) does not define the term "persecution." Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (2006)). Its definition has been left to court interpretation. *See, e.g.,* Torres v. Mukasey, 551 F.3d 616, 625 (7th Cir. 2008) (defining persecution as acts that "rise above mere harassment," such as "detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture" (internal quotation marks omitted)); *Eta-Ndu v. Gonzales*, 411 F.3d 977, 983 (8th Cir. 2005) (defining persecution as harm "involv[ing] a threat to one's life or freedom" (internal quotation marks omitted)); *Lie v. Ashcroft*,

Physical abuse is “any behavior that involves the intentional use of one’s body against the body of another person in such a way that there is risk of physical injury, regardless of whether the behavior results in actual injury.”<sup>20</sup> Some examples of physical abuse include “hitting, pushing, shoving, punching, pounding, slapping, or [using] a weapon or object to injure.”<sup>21</sup>

Psychological abuse by itself can also be an insidious form of abuse. It is often difficult to detect, but can be even more difficult for the woman to bear than the physical abuse.<sup>22</sup> Such abuse includes: taunts; verbal put-downs of the victim’s appearance, intelligence, or competence as a wife, lover, or mother; threats of harm; and other degrading language.<sup>23</sup>

*B. Understanding the “Cycle of Violence”: Dr. Lenore Walker’s Groundbreaking Work*

Dr. Lenore Walker was the first scholar to identify the “battering cycle,”<sup>24</sup> now commonly known as the “Cycle of Violence.” Dr. Walker theorizes that it is a misconception that battered women are abused constantly, or abused totally at random; instead, she suggests that there is a distinguishable cycle of violence.<sup>25</sup> Dr. Walker’s research reveals that most battered women experience a similar cycle of violence even though the women have distinct relationships.<sup>26</sup> This cycle is critical to understanding patterns that occur within violent relationships and the reasons why battered women so often remain in, or return to, their abusive relationships.<sup>27</sup>

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396 F.3d 530, 536 (3d Cir. 2005) (defining persecution as “threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom”); *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir. 1997) (defining persecution as “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive” (internal quotation marks omitted)).

20. MARY ANN DUTTON, *EMPOWERING AND HEALING THE BATTERED WOMAN* 22 (1992).

21. *Id.*

22. LENORE E. WALKER, *THE BATTERED WOMAN* 59 (1979) [hereinafter WALKER, *BATTERED WOMAN*]. See generally LENORE E. WALKER, *TERRIFYING LOVE* (1989) [hereinafter WALKER, *TERRIFYING LOVE*] (discussing her interviews with battered women and her finding that psychological abuse through attacks on self-esteem had the most hurtful and debilitating effects).

23. DUTTON, *supra* note 20, at 25–27.

24. WALKER, *BATTERED WOMAN*, *supra* note 22, at 55.

25. *Id.*

26. See WALKER, *TERRIFYING LOVE*, *supra* note 22, at 42 (reporting that, even though the “Cycle of Violence” does not occur in all abusive relationships, it did occur in approximately two-thirds of the 1,600 incidents that Dr. Walker studied).

27. WALKER, *BATTERED WOMAN*, *supra* note 22, at 55.

The Cycle of Violence has three distinct phases: (1) the “tension-building phase,” (2) the “explosion or acute battering incident,” and (3) the “calm, loving respite.”<sup>28</sup> As discussed below, this cycle ensures that the abuser achieves and maintains his primary goal: control over and domination of his spouse.

1. *Phase one: tension-building*

The tension-building phase is characterized by an environment in which the woman feels the need to walk on eggshells.<sup>29</sup> As Dr. Walker describes, the woman “usually attempts to calm the batterer through the use of techniques that have proved previously successful.”<sup>30</sup> She may “become nurturing [or] compliant,”<sup>31</sup> anticipating his moods, or she may attempt to avoid him.<sup>32</sup> Despite her attempts, the batterer may engage in “minor battering incidents.”<sup>33</sup>

During this phase, the woman tends to conceal or deny her own anger toward the abuser and feels responsible for any abuse that occurs.<sup>34</sup> She will “often identify[] with the batterer’s faulty reasoning” for the battering, and she may begin to “rationalize[] that perhaps she did deserve the abuse.”<sup>35</sup> At other times, she may minimize the abuse and blame it on the situation, stress, or alcohol and drug abuse.<sup>36</sup>

The tension-building phase may continue at a constant level for months or years because neither partner wants the next phase—the acute battering phase—to occur.<sup>37</sup> In order to prevent the situation from escalating into the next phase, the woman may endeavor “to control as many external factors as possible” and to conceal the abusive behavior from family and friends.<sup>38</sup>

Despite the efforts to avoid a battering incident, however, the situation begins to spiral out of control. The abuser’s verbal humiliation and abuse increase along with his physical abuse.<sup>39</sup>

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28. *Id.*

29. *Id.* at 56–59.

30. *Id.* at 56.

31. *Id.*

32. *Id.*

33. *Id.* at 56–57.

34. *Id.* at 56.

35. *Id.*

36. *Id.* at 56–57.

37. *See id.* at 58 (describing a situation in which ten years passed before the batterer returned to the acute battering phase because the couple’s child was killed in a car accident).

38. *Id.*

39. *Id.* at 59.

As the woman becomes exhausted from her efforts to deny her anger and prevent further abuse, she becomes more fragile and tends to withdraw.<sup>40</sup> As the abuser senses her withdrawal, he becomes more anxious, and “[t]ension between the two becomes unbearable.”<sup>41</sup> At the end of the tension-building phase, control is lost, and the second phase begins.

2. *Phase two: acute battering*

The acute battering phase is the culmination of the tension that has been building during the first phase.<sup>42</sup> Sometimes the woman herself provokes the attack because she can no longer endure what Dr. Walker describes as “her terror, her anger, or anxiety.”<sup>43</sup> The battering that occurs during this phase is distinguishable from the minor battering that may have occurred during the first phase because of the batterer’s increased rage, destructiveness, and intensity.<sup>44</sup>

Even after the abuse occurs, the acute battering phase may not be entirely over.<sup>45</sup> Women often delay seeking help immediately after the acute battering because they fear further battering.<sup>46</sup> Dr. Walker explains that “the battered woman knows that when the police leave she will be left alone with the batterer again, and she is terrified of being further abused.”<sup>47</sup>

3. *Phase three: calm respite*

The post-battering calm respite “is characterized by extremely loving, kind, and contrite behavior by the batterer.”<sup>48</sup> The tension and abuse from the first and second phases have disappeared, and the abuser enters a period of contrition and remorse.<sup>49</sup> However, it is important to note that the abuser also believes that the woman has

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 60–61. Dr. Walker lists some of the “psychophysiological symptoms” that battered women experience: “sleepless nights, loss of appetite, . . . overeating, oversleeping, and constant fatigue” as well as “tension headaches, stomach ailments, high blood pressure, allergic skin reactions, and heart palpitations.” *Id.* at 61.

44. *Id.* at 59–60.

45. *Id.* at 60 (noting that the battering phase “lasts from two to twenty-four hours, although some women have reported a steady reign of terror for a week or more”).

46. *Id.* at 64–65.

47. *Id.* at 65.

48. *Id.*

49. *Id.*

learned her lesson and will never “provoke” him again.<sup>50</sup> The calm respite is the point in an abusive relationship that makes leaving so difficult.<sup>51</sup> The batterer’s kindness, love, and sometimes his genuine interest in reforming during this phase support her belief that he will never batter her again.<sup>52</sup> He—and his family and friends—will also remind her of how much he needs her and how hurt he will be if she leaves.<sup>53</sup> After the calm respite, however, the relationship inevitably cycles back to the tension-building phase, and the acute battering phase will follow unless the woman can manage to break the Cycle of Violence.<sup>54</sup>

Breaking the Cycle of Violence is an extremely difficult endeavor.<sup>55</sup> Severe physical, sexual, and emotional abuse, lack of self-esteem, financial interdependency, guilt, family obligations, societal or cultural factors, the abuser’s relentless quest for control, and the victim’s hope for change are all interwoven into the abusive relationship, creating a virtual prison from which escape is difficult at best, and deadly at worst.<sup>56</sup>

### C. Separation Violence

It is a common misperception that leaving the abusive relationship will result in increased safety for the victim. Empirical research shows, however, that a woman is at greater risk of injury or death when she leaves an abusive relationship.<sup>57</sup> Thus, even when a woman

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50. *Id.* at 65–66. Dr. Walker also notes that although it was the batterer who was at fault for the abuse, he makes the woman feel guilty and responsible during the honeymoon phase. *Id.* at 66–67.

51. *See id.* at 66–70.

52. *Id.*

53. *Id.* at 66–67.

54. *Id.* at 69–70.

55. *Id.* at 68–69.

56. *Id.* at 66–70.

57. *See, e.g.,* Deborah K. Anderson & Daniel G. Saunders, *Leaving an Abusive Partner: An Empirical Review of Predictors, the Process of Leaving, and Psychological Well-Being*, 4 TRAUMA, VIOLENCE & ABUSE 163, 179 (2003) (reporting that twenty-four to thirty-five percent of women who leave abusive relationships experience more severe abuse after separation); Walter S. DeKeseredy, *Separation/Divorce Sexual Assault*, in 2 ENCYCLOPEDIA OF INTERPERSONAL VIOLENCE 637, 637–38 (Claire M. Renzetti & Jeffrey L. Edleson eds., 2008) [hereinafter DeKeseredy, *Sexual Assault*] (“Other key findings include the fact that seventy-four percent of the sample were sexually abused when they expressed a desire to leave a relationship.”); Walter S. DeKeseredy et al., *Separation/Divorce Sexual Assault: The Contribution of Male Support*, 1 FEMINIST CRIMINOLOGY 228, 237–38 (2006) (finding that married women experience more intense separation violence than women who were cohabitating with their batterers); Walter S. DeKeseredy, McKenzie Rogness & Martin D. Schwartz, *Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge*, 9 AGGRESSION & VIOLENT BEHAV. 675, 677–84 (2004) [hereinafter DeKeseredy,

is emotionally ready to leave an abusive relationship, the very real fear of escalated violence—commonly known as “separation violence”<sup>58</sup>—or even death may prevent her from doing so.<sup>59</sup>

In their 1993 study of spousal homicide, Margo Wilson and Martin Daly analyzed spousal homicide statistics from Canada, New South Wales (Australia), and Chicago.<sup>60</sup> The statistical data showed that, in Canada and New South Wales, the number of wives killed by their husbands was approximately three times higher than the number of husbands killed by their wives.<sup>61</sup> Those figures increased significantly when the partners were separated or divorced: women were victims nine times more frequently than men in Canada, fifteen times more frequently in New South Wales, and nearly three times more frequently in Chicago.<sup>62</sup> Based on their analysis of this data, Wilson and Daly arrived at the following conclusion:

Recognizing that women incur risk of severe violence at separation necessitates action to guarantee their safety, but the coercive use of such violence and threats implies more. Husbands threaten and use violence to constrain women’s options, and continued failure to attend to these utilitarian aspects of violence against wives constitutes a denial of women’s entitlement to autonomy.<sup>63</sup>

Wilson and Daly found that “wives are much more likely to be slain by their husbands when separated from them than when co-residing.”<sup>64</sup> This finding and other studies confirm that separation

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Rogness & Schwartz, *Scientific Knowledge*] (reviewing studies of separation sexual assault, which all point to the conclusion that separation sexual assault poses a major risk to the health and safety of women trying to leave abusive relationships); Robert Walker, TK Logan, Carol E. Jordan & Jacquelyn C. Campbell, *An Integrative Review of Separation in the Context of Victimization: Consequences and Implications for Women*, 5 *TRAUMA, VIOLENCE & ABUSE* 143, 158–60 (2004) (reporting that psychological abuse was experienced by ninety-five percent of women after separating from their abusive relationships while thirty-nine percent experienced continued physical abuse).

58. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 *MICH. L. REV.* 1, 6 (1991) (coining the term “separation assault” to define the higher rate of assault on women following separation from violent relationships).

59. See Anderson & Saunders, *supra* note 57, at 179 (noting that women who leave abusive relationships “are about 25 times more likely to be assaulted by ex-mates . . . and 5 times more likely to be murdered”).

60. Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 *VIOLENCE & VICTIMS* 3, 5 (1993).

61. *Id.*

62. *Id.* at 7.

63. *Id.* at 13.

64. *Id.* at 8.

from the abusive relationship results in the woman's increased risk of harm and even death.<sup>65</sup>

Two dominant theories that seek to explain separation violence are Robert Bornstein's "dependency-possessiveness model"<sup>66</sup> and Wilson and Daly's theory of "male sexual proprietariness."<sup>67</sup> According to the dependency-possessiveness model, "the dependent person's insecurity and abandonment fears may lead him to become abusive when he believes his partner will reject them."<sup>68</sup> Similarly, the theory

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65. See JUDITH A. ALLEN, *SEX AND SECRETS: CRIMES INVOLVING AUSTRALIAN WOMEN SINCE 1880*, at 52 (1990) (stating that in late nineteenth-century Australia, nearly half of murders, manslaughters, or attempted murders committed by husbands against their wives took place while they were separated); ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 73 (1987) (noting a study that showed that up to fifty percent of wives who left abusive husbands were found by their husbands and were terrorized or abused); PETER D. CHIMBOS, *MARITAL VIOLENCE: A STUDY OF INTERSPOUSE HOMICIDE* 47-48 (1978) (noting the results of a study in which sixty-five percent of the study participants, each of which had committed interspouse homicide, stated that they had separated from their spouse at least once); ALLISON WALLACE, *HOMICIDE: THE SOCIAL REALITY* 98 (1986) (stating that thirty-nine percent of male subjects in a study killed their wives while they were separated); MARGO WILSON & MARTIN DALY, *HOMICIDE* 196-98 (1988) [hereinafter WILSON & DALY, *HOMICIDE*] (explaining that when a wife leaves a relationship, her husband may feel jealous and may fear losing control over his wife's reproductive ability, and that these feelings may lead to homicide); G.W. Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 *BULL. AM. ASS'N OF PSYCHIATRY & L.* 271, 279 (1982) (noting that threat of separation is usually a trigger for violence); Irene Hanson Frieze & Angela Browne, *Violence in Marriage*, in *FAMILY VIOLENCE* 207 (Lloyd Ohlin & Michael Torny eds., 1989) (noting that battered wives who leave their husbands are often followed, harassed, and sometimes killed).

66. Robert F. Bornstein, *The Complex Relationship Between Dependency and Domestic Violence: Converging Psychological Factors and Social Forces*, 61 *AM. PSYCHOLOGIST* 595, 598 (2006).

67. Margo Wilson & Martin Daly, *The Man Who Mistook His Wife for a Chattel*, *THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE* 289 (1992) [hereinafter Wilson & Daly, *Man Who Mistook His Wife*].

68. Bornstein, *supra* note 66, at 598; see DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 143 (1995) ("[A] fundamental principle of attachment research is that *anger follows unmet attachment needs*"); see also *id.* (citing Myriam Mongrain et al., *Perceptual Biases, Affect, and Behavior in the Relationships of Dependents and Self-Critics*, 75 *J. PERSONALITY & SOC. PSYCHOL.* 230, 237 (1998)) (finding an increase in hostile behavior on the part of the boyfriends of dependent women during conflict resolution); Hardeo Ojha & Rajiv R. Singh, *Relationship of Marriage-Role Attitude with Dependence Proneness and Insecurity in University Students*, 28 *PSYCHOLOGIA* 249, 252 (1985) (finding a strong correlation between dependent personality traits and traditional beliefs about marriage roles). *But see* NEIL S. JACOBSON & JOHN M. GOTTMAN, *WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS* 37 (1998) (identifying a second type of batterer who is not emotionally dependent on his wife but is "incapable of forming truly intimate relationships with others"). Doctors Jacobsen and Gottman nicknamed this group of batterers "cobras," describing them as follows:

Cobras taunt their wives by pushing them away. Yet they want their wives to be there for them when they need something: sex, companionship, money, or someone to get high with. Cobras are very frightening to their wives, and yet at the same time captivating. This combination makes Cobras very hard

of male proprietariness indicates that “men take a proprietary view of women’s sexuality and reproductive capacity,”<sup>69</sup> an indication borne out by such phenomena as the purchasing of wives<sup>70</sup> and the high value placed on female chastity.<sup>71</sup> Wilson and Daly cite to spousal homicide studies finding that “the leading identified substantive [motive for spousal homicide] is invariably ‘jealousy.’”<sup>72</sup>

The dependency-possessiveness model, male proprietariness, and the undeniable frequency of separation violence demonstrate that domestic violence is not random; rather, it is a pattern of systematic abuse by which the abuser seeks to dominate his partner through the use of power and control tactics including emotional, sexual, and physical violence.<sup>73</sup> If the fragile sense of power and control the batterer derives from his abusive relationship is threatened, he will often increase the abuse.<sup>74</sup> Once the violence has started, it not only continues, but it often escalates in frequency and in lethality.<sup>75</sup>

#### D. Escaping Separation Violence

Statistically, those women who ultimately succeed in leaving their partners “have had approximately five previous separations prior to their ultimate and final dissolution of the relationship.”<sup>76</sup> Research also suggests that, while many women in abusive relationships make multiple attempts to leave, half of those women ultimately stay.<sup>77</sup> The cycles of leaving and returning “reflect not indecision per se but a complex pattern of behavior that involves not only the effect of the

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to escape from. Their tactics of control and intimidation are remarkably effective in terrifying their wives into submission.

*Id.* at 84.

69. Wilson & Daly, *The Man Who Mistook His Wife*, *supra* note 67, at 303.

70. WILSON & DALY, HOMICIDE, *supra* note 65, at 188.

71. Wilson & Daly, *The Man Who Mistook His Wife*, *supra* note 67, at 313.

72. Martin Daly & Margo Wilson, *Evolutionary Social Psychology and Family Homicide*, 242 SCIENCE 519, 521 (1988).

73. West Virginia Coalition Against Domestic Violence, Brief Amicus Curiae, *Thomas v. Morris*, Clay County Civil Action No. 08-DV-66, at 2–3 (Sept. 18, 2009), available at <http://www.state.wv.us/wvscabriefs/oct09/35141Amicus.pdf>.

74. See Hallie Bongar White & James G. White, Testifying About Lethality Risk Factors, Sw. Center for Law and Policy & U.S. Dept. of Justice Office on Violence Against Women, 2005, at 2, available at <http://www.swclap.org/pdfs/LETHALITYRISKFACTORS.pdf> (stating that a batterer who believes that his partner is “undermining his power and control” is more likely to kill his partner).

75. See *id.* (“The most dangerous time for victims is at the time of separation.”).

76. LINDA G. MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE 60 (2003).

77. *Id.* at 60 & n.27 (citing Douglas K. Snyder & Nancy S. Scheer, *Predicting Disposition Following Brief Residence at a Shelter for Battered Women*, 9 AM. J. CMTY. PSYCHOL. 559, 559–65 (1981)).

violence and the partner's influence but also other psychological and sociocultural factors."<sup>78</sup>

Women who do permanently leave have finally arrived at a point in their lives where they can break the Cycle of Violence for good. Because this irrevocable break with the abuser creates, in many cases, a risk of increased harm or death for the woman, she must seek protection from the state. If she lives in a country that does not offer protection, she must seek that protection abroad, often in the form of political asylum. However, as the next Part discusses, that avenue is often not available to her.

## II. REFUGEE LAW

### A. *The Classic Refugee in International Law*

International law protecting refugees was written with a discrete group of people in mind: the survivors of World War II atrocities who were scattered throughout Europe at the end of the war.<sup>79</sup> To address the post-World War II refugee situation, the United Nations promulgated the 1951 Convention Relating to the Status of Refugees.<sup>80</sup> The 1951 Convention provided an official definition 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 [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>81</sup>

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78. *Id.*; see also BROWNE, *supra* note 65, at 110 (listing many factors—such as common property, children, and mutual friends—that make it hard for women to leave an abusive relationship).

79. See U.N. High Comm'r for Refugees, AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF REFUGEES 3–10 (June 1992), available at <http://www.unhcr.org/3ae6bd5a0.pdf> [hereinafter UNHCR Introduction] (tracing the history of post-World War II refugee protection from the establishment of the International Refugee Organization in 1947, to the adoption of the 1951 Convention Relating to the Status of Refugees and the establishment of the U.N. High Commissioner for Refugees).

80. July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

81. *Id.* at 6261, 189 U.N.T.S. at 152. The 1951 Convention also permitted signatories to restrict protection geographically, specifically, to people who were

The 1951 Convention prohibited signatory states from returning persons meeting this definition to countries where they would face future harm.<sup>82</sup>

In the decade following the 1951 Convention, it became evident that the end of World War II had not brought about an end to the flow of refugees. New conflicts were producing new refugees, and the 1951 Convention was updated to respond to the situation.<sup>83</sup> The result was the adoption of the 1967 Protocol to the 1951 Convention,<sup>84</sup> which modified the 1951 Convention's definition of a refugee by eliminating the date restrictions so that persons fleeing from events occurring after January 1, 1951 could be considered refugees.<sup>85</sup>

The United States acceded to the 1951 Convention when it signed the 1967 Protocol in 1968.<sup>86</sup> In 1980, the United States codified the 1967 Protocol's definition of a refugee in domestic law when it passed the Refugee Act of 1980.<sup>87</sup> Under current U.S. law, individuals applying for refugee protection in the United States must prove four elements in order to establish *prima facie* eligibility for refugee protection: (a) being outside one's country and unable or unwilling to return to it; (b) fearing harm severe enough to constitute persecution; (c) possessing a well-founded fear of future persecution; and (d) being a target for persecution on account of one of the five protected grounds: (1) race, (2) religion, (3) nationality, (4) political opinion, or (5) membership in a particular social group.<sup>88</sup>

Conspicuously absent from the grounds for protection is sex or gender. The possible reasons for this omission are many and varied,

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refugees as a result of "events occurring in Europe before 1 January 1951." *Id.* at 6262, 189 U.N.T.S. at 154.

82. *Id.* at 6276, 189 U.N.T.S. at 176.

83. UNHCR Introduction, *supra* note 79, at 10.

84. 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

85. The 1967 Protocol states,

[T]he term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 . . ." and the words ". . . as a result of such events," in article 1 A (2) were omitted.

*Id.* at 6225, 606 U.N.T.S. at 268. The Protocol also eliminated the geographic restrictions. *Id.*

86. *See* 19 U.S.T. at 6223. The Senate ratified the Protocol on October 4, 1968, and the President signed it on October 15, 1968. *Id.*

87. Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. § 1101(a)(42) (2006).

88. 8 U.S.C. § 1101(a)(42).

and not the focus of this Article.<sup>89</sup> Suffice it to say that there is currently no official refugee protection for women on account of fear of harm relating to their societal status as women or to their female anatomy.<sup>90</sup> That is not to suggest that women cannot or do not receive asylum on account of their societal status as women or on account of their female anatomy—they can and do<sup>91</sup>—but only that

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89. See generally E. Dana Neacsu, *Gender-Based Persecution as a Basis for Asylum: An Annotated Bibliography, 1993–2002*, 95 LAW LIBR. J. 191 (2003) (presenting a bibliography of articles that address gender-based persecution as a basis for asylum). For in-depth discussions regarding the addition of gender as a protected ground, see generally Deborah E. Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771 (1995) (examining the attempt to use gender to define a social group for protected-grounds purposes); Anjana Bahl, *Home Is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution*, 4 CARDOZO WOMEN'S L.J. 33 (1997) (recommending that grounds for persecution need to be expanded to include victims of gender-based persecution); Arthur C. Helton, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467 (1998) (noting that there is increased debate whether refugee protections should be extended to include gender and sexual orientation); Emily Love, *Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution*, 17 HARV. WOMEN'S L.J. 133 (1994) (suggesting that Congress should amend the Refugee Act of 1980 to add gender-based abuse as a protected ground); Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119 (2007) [hereinafter Musalo, *Floodgates*] (explaining that people should not be concerned that allowing asylum based on gender will result in a flood of claims, but should focus on solving the violence that causes the claims); Maddie L. Stevens, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179 (1993) (suggesting that the United States should add a refugee category specifically for gender); Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN'S L.J. 221 (2000) (arguing that a gender category needs to be added to the definition of refugee); David L. Neal, Note, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203 (1988) (arguing that women who are persecuted based on their sex should be granted asylum because they fulfill the requirements of a social group).

90. See Bahl, *supra* note 89, at 38 (“Human rights laws have traditionally provided inadequate protection for women.”); Helton, *supra* note 89, at 471 (“In terms of the five bases of refugee status, at least one of which would have to be established to warrant refugee protection, there is an absence of any terms concerning gender or sexual orientation.”); Neal, *supra* note 89, at 203 (noting that historically there has been no explicit recognition of sex-based persecution).

91. See, e.g., *Mohammed v. Gonzales*, 400 F.3d 785, 800–03 (9th Cir. 2005) (permitting the reopening of reconsideration of a denial of asylum for a Somali woman who had been subjected to female genital mutilation (“FGM”) and holding that FGM is a “particularly severe form of past persecution” and a “‘permanent and continuing’ act of persecution”); *Abay v. Ashcroft*, 368 F.3d 634, 636, 643 (6th Cir. 2004) (granting petition for review of a BIA determination of ineligibility for asylum to an Ethiopian woman based in part on her fear of her minor daughter being subjected to FGM); *Shoafera v. INS*, 228 F.3d 1070, 1076 (9th Cir. 2000) (reversing a denial of asylum for an Ethiopian woman of Amharic ethnicity who was raped by her supervisor, a man of Tigrean ethnicity); *Matter of Kasinga*, 21 I. & N. Dec. 357, 368 (BIA 1996) (granting asylum to a Togolese woman who feared FGM); *Matter of D-V*, 21 I. & N. Dec. 77, 79–80 (BIA 1993) (granting asylum to a Haitian woman who had been raped by government soldiers). But see *Fisher v. INS*, 79 F.3d 955, 962–63 (9th Cir. 1996) (denying petition for review of denial of asylum to an Iranian woman

there is no official category of “sex” or “gender” under which to apply for refugee protection.<sup>92</sup> This void leaves it up to advocates and adjudicators to tie gender-based asylum claims to one of the five protected grounds.

Arguably, however, the 1951 Convention and the 1967 Protocol were designed to allow for the gradual broadening of protection. Neither document defines the term “persecution.”<sup>93</sup> Refugee-providing countries are thus free to interpret that term according to their own values, and to revise their definition over time.<sup>94</sup> As discussed below, however, the lack of specific protection has proven detrimental in cases involving battered women.

### B. *Battered Women’s Asylum Claims in the United States*

#### 1. *U.S. asylum law*

In 1990, the U.S. government implemented new regulations governing the adjudication of asylum claims.<sup>95</sup> Asylum claims fall under the jurisdiction of two federal agencies. The Department of

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because the oppressive gender-specific laws from which she sought asylum applied to all women in Iran and not solely to the applicant); *Fatin v. INS*, 12 F.3d 1233, 1241–42, 1244 (3d Cir. 1993) (denying petition for review of denial of asylum to an Iranian woman because her willingness to comply with oppressive gender-specific laws in order to avoid “74 lashes, a year’s imprisonment, and in many cases brutal rapes and death” indicated that she did not possess sufficient abhorrence of the laws to render their application to her persecution); *Gomez v. INS*, 947 F.2d 660, 662 (2d Cir. 1991) (dismissing a petition for review of a denial of asylum to a Salvadoran woman who was raped and beaten on several occasions by guerilla forces).

92. See Thiele, *supra* note 89, at 235 (noting that although the UNHCR has increasingly recognized the realities of gender-based persecution, “the Commission only stressed that States must exercise due diligence to prevent violence against refugee and internally displaced women, without addressing the issue of refugee status *on account of* gender persecution”).

93. See 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, ¶ 51, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992), available at <http://www.unhcr.org/3d58e1364.html> [hereinafter UNHCR Handbook] (stating that “[t]here is no universally accepted definition of “persecution,” and various attempts to formulate such a definition have met with little success”).

94. The UNHCR Handbook provides the following guidance for determining whether harm rises to the level of persecution:

From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.

*Id.*

95. Aliens and Nationality, Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674-01 (July 27, 1990). The current regulations governing asylum are codified at 8 C.F.R. § 208 (2009).

Justice oversees the immigration courts and the Board of Immigration Appeals.<sup>96</sup> The Department of Homeland Security adjudicates asylum cases for applicants who are not in removal proceedings<sup>97</sup> and prosecutes removal cases before immigration courts and the Board.<sup>98</sup>

Battered women seeking asylum bring their claims in one of three ways. First, if they are present in the United States and not in removal proceedings, they may file an application with the Department of Homeland Security's Bureau of Citizenship and Immigration Services (USCIS).<sup>99</sup> Second, battered women who are in removal proceedings may apply for asylum as a defense to removal by filing an application with the immigration court.<sup>100</sup> If they are in removal proceedings as the result of a failed affirmative asylum application, they may renew their claim in immigration court.<sup>101</sup> Finally, if they are present at a port of entry and do not have the documents necessary to be admitted to the United States, but they indicate a fear of returning to their home country, the Department of Homeland Security Bureau of Immigration and Customs Enforcement may refer them to USCIS for a preliminary assessment of their asylum claim, called a "credible fear interview."<sup>102</sup> Those who

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96. 8 C.F.R. § 1003.0-1 (2009).

97. *Id.* § 208.14. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 replaced the term "deportation" with the term "removal." Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Div. C, § 308(e)(1), 110 Stat. 3009-546 (1996) (codified at 8 U.S.C. § 1252).

98. 8 C.F.R. § 1240.2.

99. *Id.* §§ 208.2(a), 208.4(b). The U.S. Citizenship and Immigration Service's regional service center will perform initial processing and will then forward the application to the applicant's local asylum office. *Id.* § 208.4(b)(1). An asylum officer will then interview the applicant in a non-adversarial proceeding. *Id.* § 208.9(b). If the asylum officer deems the applicant eligible for asylum, the officer has the authority to grant asylum to the applicant. *Id.* § 208.14(b). If the asylum officer decides that the applicant is not eligible for asylum, and the applicant does not have lawful immigration status, the officer must forward the case to an immigration judge. *Id.* § 208.14(c)(1).

100. *Id.* § 208.2(b).

101. *Id.* § 208.14(c)(1); *see also id.* § 208.2 (vesting in immigration judges the exclusive jurisdiction to adjudicate asylum claims for individuals in removal proceedings). An older version of the regulations specified that an immigration judge's review of asylum claims shall be "*de novo* regardless of whether or not a previous application was filed and adjudicated . . . prior to the initiation of exclusion or deportation proceedings." 8 C.F.R. § 208.2(b) (1991) (cited in *Matter of B-*, 20 I. & N. Dec. 427, 429 (BIA 1991)). Immigration judges continue to review claims referred to them by the Asylum Office *de novo* even though this standard of review is no longer specified in the regulations. *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STANFORD L. REV. 295, 308, 326 (2007).

102. 8 C.F.R. § 235.3(b)(4).

are found to have a credible fear of persecution are placed in removal proceedings, where they may file an application for asylum with the immigration court.<sup>103</sup>

## 2. *Legal bases for battered women's asylum claims*

Battered women from countries that do not provide adequate protection against domestic violence generally face few hurdles in establishing the first three elements of a successful asylum claim: demonstrating unwillingness to return to their country,<sup>104</sup> having experienced harm severe enough to rise to the level of persecution,<sup>105</sup> and possessing a well-founded fear of future persecution.<sup>106</sup> It is the fourth element, the “on account of a protected ground” requirement, where battered women’s asylum claims tend to fail. A discussion of each element of a battered woman’s asylum claim follows.

### a. *Unwilling or unable to return to the home country*

In discussing a battered woman’s unwillingness or inability to return to her country, it is essential to understand, as a preliminary matter, that many abuse victims do not leave their relationships, and that those who do often return to their relationships.<sup>107</sup> As discussed in Part I of this Article, the Cycle of Violence that entraps and then imprisons women in abusive relationships is difficult, and in many cases impossible, to break. Those women who do leave permanently often do so only after making several attempts to leave over a period of years.<sup>108</sup> The assertiveness inherent in the decision to leave sends a strong signal to the abuser that his power over his partner is waning, and in most cases, the decision to leave results in increased violence toward the victim, possibly resulting in her murder.<sup>109</sup>

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103. *Id.* § 208.30(f). If a potential asylum applicant fails to prove to the asylum officer that she has a credible fear of persecution, she may have the negative credible fear determination reviewed by an immigration judge. *Id.* § 208.30(g)(1)–(2). If the applicant declines review, or the immigration judge also finds that the applicant does not have a credible fear, she may be removed from the United States. *Id.* § 208.30(g)(1)(ii).

104. 8 U.S.C. § 1101(a)(42)(A) (2006); 8 C.F.R. § 208.13(b)(2)(C).

105. 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(1).

106. 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(2).

107. *See supra* notes 76–78 and accompanying text (explaining and citing statistics that show that women do not generally leave abusive relationships).

108. *See* WALKER, BATTERED WOMAN, *supra* note 22, at 66–67, 199 (noting that battered women are most likely to flee during the third phase, but many go back to their husbands as often as five times before they leave permanently).

109. *See* discussion *supra* notes 42–44 and accompanying text (detailing the abuse suffered by women who leave their abusive relationships).

By the time a battered woman has fled not only her abuser, but also her country, and by the time she has sought asylum protection, she usually has arrived at a place in the Cycle of Violence, and a place in her own psyche, where return is no longer an option.<sup>110</sup> She has made a number of decisions that were difficult and dangerous to implement—decisions that, in many respects, are irreversible. Like Rodi Alvarado and most women fleeing abusive relationships, she has made and carried out an escape plan to avoid the increased violence that tends to accompany a decision to leave. If she has children, she has taken them with her, or if unable to do so, has arranged for their care. Her inability and unwillingness to return are therefore established, and generally are not in dispute in an asylum claim.<sup>111</sup>

*b. Whether the harm suffered or feared rises to the level of persecution*

Persecution is not defined in the 1951 Convention or the 1967 Protocol, nor is it defined in the Immigration and Nationality Act. Rather, it has been left to individual countries and courts to determine when harm rises to the level of persecution.<sup>112</sup> Generally, U.S. courts have defined persecution as severe harm, and have provided examples of harm that does and does not constitute persecution.<sup>113</sup> Detention,<sup>114</sup> severe beatings,<sup>115</sup> credible threats

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110. See WALKER, BATTERED WOMAN, *supra* note 22, at 198 (explaining that women who go to safe houses take about three to four weeks to adjust to the idea that they are not going back home).

111. It is critical that legal professionals working with domestic violence-based asylum cases—adjudicators, counsel for the refugee applicant, and counsel for the government—do not confuse multiple returns to the relationship or a lengthy relationship with lack of subjective fear. As discussed in this Article, the viciousness of the Cycle of Violence and the reality of separation violence often prevent a woman from leaving an abusive relationship despite the woman's terror.

112. See cases and sources cited *supra* notes 19, 93–94 and accompanying text. The Board has defined persecution as “the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim.” Matter of Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996) (citing Matter of Acosta, 19 I. & N. Dec. 211, 222–23 (BIA 1985)), *modified on other grounds* by Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

113. Compare Torres v. Mukasey, 551 F.3d 616, 625 (7th Cir. 2008) (articulating that “detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings or torture” may rise to the level of persecution), and Ouda v. INS, 324 F.3d 445, 454 (6th Cir. 2003) (finding that threats and beatings combined with deprivation of livelihood and the inability to escape amount to persecution), with Faddoul v. INS, 37 F.3d 185, 189–90 (5th Cir. 1994) (holding that the denial of citizenship is not persecution even when it results in statelessness), Sadeghi v. INS, 40 F.3d 1139, 1142 (10th Cir. 1994) (holding that prosecution for counseling a child not to fight in Iran's war against Iraq is not persecution), and De Souza v. INS, 999 F.2d 1156, 1158–59 (7th Cir. 1993) (holding that a denial of citizenship and education on the basis of race and nationality was not persecution).

against a person's life,<sup>116</sup> extreme deprivation of the ability to make a living,<sup>117</sup> and witnessing the death, torture, or rape of a loved one<sup>118</sup> are all examples of harm that courts have considered serious enough to rise to the level of persecution.

Battered women experience the types of harm recognized as persecution by U.S. courts in asylum cases. Therefore, this is an area where the case of a battered woman is similar in nature to that of the classic refugee—both are subjected to severe physical and psychological harm by an entity seeking to control the behavior of the individual. Because of this similarity, the issue of persecution was not in dispute in Rodi Alvarado's case,<sup>119</sup> and would not likely be in dispute in cases of other battered women. Alvarado established through testimony and corroborating evidence that the frequency and severity of the abuse she had endured over the years at the hands of her husband,<sup>120</sup> as well as the harm she would likely suffer upon her return to Guatemala,<sup>121</sup> was severe enough to rise to the level of persecution. If other battered woman can establish through their own testimony and corroborating evidence that they have endured multiple severe beatings at the hands of their abusive partners, they too are not likely to encounter difficulty in establishing that they have suffered harm rising to the level of persecution.<sup>122</sup>

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114. See, e.g., *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004) (holding that detention for ten days accompanied by daily beatings and hard labor constitutes persecution, even in the absence of serious physical injury).

115. See, e.g., *Korablina v. INS*, 158 F.3d 1038, 1044–45 (9th Cir. 1998) (holding that the cumulative effects of “specific instances of violence and harassment” constitute persecution).

116. See, e.g., *Andriasian v. INS*, 180 F.3d 1033, 1042 (9th Cir. 1999) (holding that persistent death threats and assaults against one's family constitute persecution).

117. See, e.g., *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) (holding that “deliberate imposition of substantial economic disadvantage . . . for reasons of race, religion, or political opinion” may rise to the level of persecution).

118. See, e.g., *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004) (approving a principle that being forced to witness the torture of a child constitutes persecution).

119. See *Matter of R-A-*, 22 I. & N. Dec. 906, 914 (BIA 1999), *vacated and remanded to stay reconsideration* (A.G. 2001), *remanded for reconsideration*, 23 I. & N. Dec. 694 (A.G. 2005), *lifted stay and remanded for reconsideration*, 24 I. & N. Dec. 629 (A.G. 2008) (stating that “we agree with the Immigration Judge that the severe injuries sustained by the respondent rise to the level of harm sufficient (and more than sufficient) to constitute ‘persecution’”).

120. See *id.* at 908–10 (detailing the severe abuse that Alvarado's husband inflicted on her).

121. See *id.* at 910 (noting that a witness had heard from Alvarado's sister that Alvarado's husband was “going to hunt her down and kill her if she comes back to Guatemala”).

122. Alvarado's case, for example, included her own testimony, witness testimony, expert testimony, and numerous reports and articles on violence against women in Guatemala. See *id.* at 908–11.

c. *Well-founded fear of future persecution*

Proving past persecution, however, is only part of the refugee protection equation. Courts also evaluate whether an applicant has a well-founded fear of continued persecution if she were to return to her country.<sup>123</sup> Courts evaluate several factors, discussed below, to determine whether an applicant's fear is well-founded.

The inquiry into whether an asylum applicant possesses a well-founded fear of future persecution contains a two-part analysis: (1) whether the applicant has a subjective fear of persecution, and (2) whether the applicant's fear is objectively reasonable.<sup>124</sup> The first part of the inquiry is usually established fairly simply with the applicant's own testimony that she is fearful of returning to her country.<sup>125</sup> In establishing the second part of the inquiry, however, the applicant must prove that: (1) she possesses a characteristic or belief that her "persecutor seeks to overcome" through the infliction of harm; (2) that the persecutor is "aware or could [easily] become aware" of the belief or characteristic; (3) that the persecutor is capable of inflicting harm on the applicant; and (4) that the persecutor is inclined to inflict harm on the applicant.<sup>126</sup>

Under this formulation, a battered woman who can prove past persecution and government inability or unwillingness to protect her from future abuse would have little difficulty establishing that her

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123. See 8 C.F.R. § 208.13(b)(1) (2009) (establishing that past persecution creates a presumption that the applicant will suffer future persecution if returned to her country); see also *Matter of Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989) (holding that an applicant who has suffered "atrocious forms of persecution" may be entitled to asylum as a humanitarian matter even if there is no fear of future persecution (quoting UNCHR Handbook, *supra* note 93, at ¶ 136)). The U.S. Department of Homeland Security may rebut the presumption of future persecution if they show by a preponderance of the evidence that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution" or that the applicant could reasonably relocate to another part of the country in order to avoid future persecution. 8 C.F.R. §§ 208.13(b)(1)(i), (1)(ii). Even in the absence of a well-founded fear of persecution, an applicant may still qualify for asylum if she "has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution," or "has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. § 208.13(b)(1)(iii).

124. *Matter of Acosta*, 19 I. & N. Dec. 211, 213 (BIA 1985), *overruled in part by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

125. *But see* Bridgette A. Carr, *We Don't Need to See Them Cry: Eliminating the Subjective Apprehension Element of the Well-Founded Fear Analysis for Child Refugee Applicants*, 33 PEPP. L. REV. 535, 544-45 (2006) (pointing out that children may lack the capacity to understand their situations sufficiently to feel fearful, or may lack the capacity to articulate their objective fear).

126. *Matter of Mogharrabi*, 19 I. & N. at 446 (citing *Matter of Acosta*, 19 I. & N. Dec. at 226), *abrogated by Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

fear is objectively reasonable. With respect to the first element, the characteristic she possesses is fairly obvious: she is a woman and she is the persecutor's spouse or partner.<sup>127</sup> With respect to the remaining three elements, it is self-evident that the persecutor is aware that his victim is a woman and that she is his spouse; if he has subjected her to abuse previously, then it is also clear that he is capable of inflicting and inclined to inflict harm on her.

*d. On account of race, religion, nationality, political opinion, or membership in a particular social group*

In the case of a battered woman, the determination of whether a fear is well-founded is closely tied to whether the persecution will occur on account of one of the five protected grounds: (1) race, (2) religion, (3) nationality, (4) political opinion, or (5) membership in a particular social group.<sup>128</sup> It is this final element of the refugee definition, the nexus to a protected ground, upon which so many domestic violence-based claims fail.

In domestic violence-based asylum cases, race and nationality are typically irrelevant. In a few cases, applicants successfully claim religion or political opinion as the nexus. For example, in *Matter of S-A*,<sup>129</sup> the applicant applied for asylum on the basis that her religious beliefs, specifically her liberal interpretation of Islam, conflicted with her father's orthodox interpretation of Islam.<sup>130</sup> The Board found that the applicant's father persecuted her by beating her in an attempt to overcome her different religious beliefs.<sup>131</sup> However, applications for asylum based on domestic violence persecution on account of religious beliefs are rare. Instead, most survivors of domestic violence apply for asylum based on their membership in a particular social group.

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127. See Brief of Amici Curiae in Support of Request for Certification and Reversal of the Decision of the Board of Immigration Appeals, *In re R-A*- (Interim Decision No. 3403) at 10, *Matter of R-A*, 22 I. & N. Dec. 906 (BIA 1999) (No. A 73-753-922) (arguing that "gender is an appropriate characteristic defining 'particular social group' for asylum purposes"); *id.* at 20-22 (asserting that "the status of being a wife or female intimate partner is fundamental to the identity of the individual, and often immutable"); *cf. id.* at 9 n.10 (listing a number of cases from foreign courts in which gender and status as a battered woman were found to be legitimate social groups for purposes of refugee protection).

128. See, e.g., *Matter of R-A*, 22 I. & N. Dec. at 914 (agreeing with the immigration judge that the determinative issue for persecution "is whether the harm experienced by the respondent was, or in the future may be, inflicted 'on account of' a statutorily protected ground").

129. 22 I. & N. Dec. 1328 (BIA 2000).

130. *Id.* at 1329.

131. *Id.* at 1336.

Like “persecution,” the term “particular social group” is not defined in the Refugee Convention or in the U.S. Refugee Act. The Board of Immigration Appeals provided guidance as to what constitutes a particular social group in 1985 in the precedential *Matter of Acosta* case:

[W]e interpret the phrase “persecution on account of membership in a particular social group” to mean persecution 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.<sup>132</sup>

Examples of social groups considered valid include sexual orientation,<sup>133</sup> kinship and family,<sup>134</sup> and former military leadership.<sup>135</sup> Gender, too, has qualified as a particular social group.<sup>136</sup> However, even if gender were universally accepted as a viable particular social group, battered women would still not find universal acceptance as refugees.

It is indisputable that women suffer various levels of harm on account of their sex. Gender-based harm includes employment discrimination, domestic violence, and rape, as well as forced

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132. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part by* *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

133. *See, e.g.*, *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (allowing sexual orientation to be the basis for a persecution claim); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that alien homosexuals are members of a particular social group for purpose of the asylum statute); *Amanfi v. Ashcroft*, 328 F.3d 719, 724 (3d Cir. 2003) (holding that alien homosexuals are members of a particular social group for purpose of the asylum statute).

134. *See, e.g.*, *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (accepting nuclear family membership as a particular social group); *Matter of H-*, 21 I. & N. Dec. 337, 343 (BIA 1996) (accepting clan membership as a particular social group).

135. *See, e.g.*, *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (describing former military leadership as an innate characteristic), *overruled in part by* *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

136. *See id.* (noting that the determination of whether sex should be considered a particular social group should be made on a case-by-case basis); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (considering sex as an innate characteristic that may allow for membership in a particular social group).

marriage, female genital mutilation, and “honor crimes.”<sup>137</sup> Gender as a social group, when combined with the other criteria for refugee protection—unwillingness to return due to a well-founded fear of persecution, and the inability or unwillingness of the applicant’s country to protect her from persecution—is a viable social group.<sup>138</sup> Nevertheless, refugee protection is often elusive for women who do not combine their claims with some other ground for refugee protection or with a narrower social group claim.<sup>139</sup> Despite the proposal of several potentially viable social groups, a particular social group that is viable for all battered women seeking asylum has not emerged.

### III. ATTEMPTED AND PROPOSED SOCIAL GROUPS FOR BATTERED WOMEN

The challenge faced by adjudicators, advocates, and the government has been to articulate a social group that not only recognizes the realities of domestic violence but also fits within the confines of a refugee definition that makes no mention of gender-based persecution.<sup>140</sup> Each approach discussed below attempts to attain this delicate balance, but each ultimately falls short.

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137. See *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women and “Honor” Crimes*, HUMAN RIGHTS WATCH, Apr. 5, 2001, <http://www.hrw.org/en/news/2001/04/05/item-12-integration-human-rights-women-and-gender-perspective-violence-against-women> (defining honor crimes as “acts of violence, usually murder, committed by male family members against female family members who are perceived to have brought dishonor upon the family”).

138. See Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 63 (1998) (“The anti-discrimination orientation of the refugee definition implies that like other grounds of persecution, a particular social group is also characterized by a marginalized or disadvantaged status in society which makes members vulnerable to oppression, including (but not limited to) the actual persecution feared by the claimant.”).

139. See Linda Kelly, *Republican Mothers, Bastards’ Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 590–91 (2000) (asserting that “sex could be sufficient to define a social group” but women have needed additional characteristics due to the difficulty in arguing that violence against women is based on gender); Lori Nessel, “Willful Blindness” to Gender-Based Violence Abroad: *United States’ Implementation of Article Three of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71, 76 (2004) (noting that “the United States excludes social groups based solely on sex and requires strong evidence that the claimant’s membership in a ‘gender-plus’ protected group served as the primary motivation for the persecutor’s conduct”); see also Deborah Anker et al., *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 745 (1997) (noting that the gender-plus requirement “violates the United States’ international and domestic legal duties to apply all its laws without discrimination”).

140. See *supra* notes 89–92 and accompanying text.

A. Matter of R-A-: “*Women Who Have Been Involved Intimately with Male Companions Who Believe that Women Are to Live Under Male Domination*”

The immigration judge who heard Rodi Alvarado’s case granted her application for asylum on the basis of political opinion and membership in a particular social group: “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>141</sup> The Board of Immigration Appeals 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.<sup>142</sup>

The Board then proceeded to reject that social group for reasons discussed below and reversed the grant of asylum.<sup>143</sup> On the one hand, the Board’s reversal of the grant represents a colossal failure to understand the dynamics of domestic violence. Its decision is rife with domestic violence myths and is pervaded by an overall misperception of domestic violence as solely a “private” matter not influenced by the state, and thus not worthy of the protection afforded to *bona fide* refugees. On the other hand, the Board’s reasoning is sound in some respects given the narrow confines of asylum law, particularly with regard to social group formulation.

1. *Rejection of the social group due to the Board’s failure to understand the dynamics of domestic violence*

The Board’s majority opinion demonstrates a profound ignorance of the dynamics of domestic violence relationships, the motivations of an abuser, and the role of the state in perpetuating domestic violence. The Board laments domestic violence but pointedly refuses to acknowledge that it is anything more than an unfortunate private occurrence, random in nature, and completely separate from the

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141. See Matter of R-A-, 22 I. & N. Dec. 906, 911 (BIA 1999), *vacated and remanded to stay reconsideration* (A.G. 2001), *remanded for reconsideration*, 23 I. & N. Dec. 694 (A.G. 2005), *lifted stay and remanded for reconsideration*, 24 I. & N. Dec. 629 (A.G. 2008).

142. *Id.*

143. *Id.* at 927–28.

types of state-sponsored forms of persecution for which refugee protection was designed.<sup>144</sup> The Board also mischaracterizes the role that society plays in perpetuating domestic violence by failing to recognize spousal abuse as an important societal attribute.<sup>145</sup>

*a. Mischaracterization of domestic violence as random*

The Board, intent on reinforcing the randomness and private nature of domestic violence, peppers its decision with frequent references to the lack of coherent motivation on the part of the persecutor. For example, the Board notes the “seeming senselessness and irrationality of his motives.”<sup>146</sup> The Board also states that “the respondent’s husband harmed the respondent regardless of what she actually believed or what he thought she believed.”<sup>147</sup>

The Board’s perception of domestic violence as an unfortunate but random occurrence is obvious in its interpretation of Ms. Alvarado’s testimony:

The respondent testified that the abuse began “from the moment [they] were married.” Even after the respondent “learned through experience” to acquiesce to his demands, he still abused her. The abuse took place before she left him initially, and it continued after she returned to him. In fact, he said he “didn’t care” what she did to escape because he would find her. He also hurt her before her first call to the police and after her last plea for help.<sup>148</sup>

....

The respondent stated that “[a]s time went on, he hit me for no reason at all.”<sup>149</sup>

....

When she asked for his motivation, he broke into a familiar refrain, “I can do it if I want to.”<sup>150</sup>

....

[T]he arbitrary nature of the attacks further suggests it was not the respondent’s claimed social group characteristics that he sought to overcome. The record indicates that there is nothing the

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144. *See id.* at 914 (acknowledging the respondent’s situation with “great sympathy” and holding “extreme contempt” for the actions of her husband, but questioning if refugee law should supply the remedy).

145. *Id.* at 918.

146. *Id.* at 908.

147. *Id.* at 914.

148. *Id.*

149. *Id.* at 908.

150. *Id.* at 909.

respondent could have done to have satisfied her husband and prevented further abuse.<sup>151</sup>

....

When asked on cross-examination, the respondent at first indicated that she had no opinion of why her husband acted the way he did. She supposed, however, that it was because he had been mistreated when he was in the army . . . . *The respondent believed he would abuse any woman who was his wife.*<sup>152</sup>

The misdirected emphasis on the seeming randomness of the abuse ignores one of the most fundamental realities of domestic violence discussed in Part I of this Article: abusers never abuse randomly. Each incident of abuse—whether physical, emotional, or directed at a loved one of the actual target—is designed to forge and maintain a wheel of control from which the Cycle of Violence gains its momentum. Rodi Alvarado’s husband’s abuse was not random, though it may have occurred at random intervals. On the contrary, Alvarado’s husband abused her for two clearly identifiable reasons: (1) to remind her of his control over her, and (2) to punish her when she challenged that control.

*b. Failure to recognize the state’s complicity in the proliferation of domestic violence*

The Board also dismissed Rodi Alvarado’s claim for failure to state a particular social group that represents an “important societal attribute.”<sup>153</sup> Specifically, the Board stated:

[Alvarado] has not shown that spouse abuse is itself an important societal attribute, or, in other words, that the characteristic of being abused is one that is important within Guatemalan society . . . . [S]he has not shown that women are expected by society to be abused, or that there are any adverse societal consequences to women or their husbands if the women are not abused.<sup>154</sup>

This assertion is disingenuous at best. Clearly, Alvarado was not arguing that Guatemalan society expects women to be abused by their husbands. Rather, the social group she proposed suggests that if women are abused, the Guatemalan government will fail to protect them. The basis of this failure to protect is not a *per se* expectation that women should and will be abused, but may reflect, perhaps, a

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151. *Id.* at 921.

152. *Id.* at 909 (emphasis added).

153. *Id.* at 919.

154. *Id.*

societal belief that a male's treatment of his spouse is his prerogative. That is, a man can decide to beat or not beat his wife; the state will not interfere with that decision just as it will not interfere with the man's decision to buy or not buy property, to relocate or remain in the same domicile, or to seek new employment.<sup>155</sup>

The state's refusal to protect abused women is consistent with the state's perception of women as a particular social group of beings subordinate to men. The important societal attribute is women's subordination and subjugation to men's will. As the dissent in *Matter of R-A* noted:

The record confirms the Immigration Judge's finding that in Guatemala there are "institutional biases against women that prevent female victims of domestic violence from receiving protection from their male companions or spouses." The Immigration Judge found that these institutional biases "appear to stem from a pervasive belief, common in patriarchal societies, that a man should be able to control a wife or female companion by any means he sees fit: including rape, torture, and beatings."<sup>156</sup>

*c. Blaming the victim*

Another example of the Board's failure to understand the dynamics of domestic violence is its characterization of Rodi Alvarado's situation as one that she could have avoided by exercising better judgment. In referencing the testimony of Dr. Doris Bersing, an expert witness who testified regarding the prevalence of domestic violence in Latin America, the Board stated that "if a woman chooses the wrong husband [i.e., one who does not 'honor, respect and take

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155. See *id.* at 909. The Board described Alvarado's interaction with the police in Guatemala as follows:

The respondent's pleas to Guatemalan police did not gain her protection. On three occasions, the police issued summons [sic] for her husband to appear, but he ignored them, and the police did not take further action. Twice, the respondent called the police, but they never responded. When the respondent appeared before a judge, he told her that he would not interfere in domestic disputes.

*Id.*

156. *Id.* at 930 (Guendelsberger, Board Member, dissenting); USAID, *The Women's Legal Rights Initiative Final Report 71* (2007) (asserting that not all Guatemalan women know their rights because of certain Guatemalan social norms); see also AMNESTY INTERNATIONAL, *Guatemala: No Protection, No Justice: Killings of Women* (2006), <http://www.amnestyusa.org/document.php?id=ENGAMR340192006&lang=e> ("[T]he persistence of discriminatory legislation continues to mean that many forms of gender-based violence against women—in particular violence against women in the family and sexual harassment—go undetected. It also perpetuates violence against women and fosters a climate of impunity for crimes committed against women and girls.").

care of her but rather abuses her], her options are few in a country like Guatemala . . . .”<sup>157</sup> The Board’s blithe reference to domestic violence as a result of a poor choice of a spouse fails to recognize the insidious nature of abusive relationships and inappropriately minimizes the realities of domestic violence.

Using its flawed perception of abusive relationships, the Board articulated two characteristics of Alvarado’s claim that doom it to failure under the Board’s erroneous “classic refugee” analysis. First, the Board noted that neither the members of the proposed particular social group, nor the persecutors, view themselves as part of that group.<sup>158</sup> Second, the Board held that even if Alvarado’s persecutor had viewed her as part of that group, it was not clear that he would harm her because she was a member of that group.<sup>159</sup>

## 2. *Rejection of the social group due to flawed legal theories*

As discussed above in Part II of this Article, a particular social group must meet strict requirements in order to qualify for refugee protection. The social group proposed by Alvarado—“women who have been involved intimately with male companions who believe that women are to live under male domination”—would be a viable social group if gender were more readily accepted as a particular social group in general. However, the Board rejected the asylum claim on grounds that are likely to continue to plague domestic violence-based asylum claims until there is a significant change in how gender-based claims are viewed overall. First, the Board found that the lack of recognition of the social group by its alleged members, by their persecutors, and by their society in general defeated the possibility that the group exists.<sup>160</sup> Second, the Board found no nexus between the proposed social group and the abuse.<sup>161</sup> As discussed below, both of these findings, to some degree, are correct.

### a. *Lack of recognition of social group*

The Board found that Alvarado’s claimed social group failed because Alvarado did not show that “victims of spouse abuse view themselves as members of this group, [or], most importantly, that their male oppressors see their victimized companions as part of this

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157. *Matter of R-A*, 22 I. & N. Dec. at 910.

158. *Id.* at 918.

159. *Id.* at 920.

160. *Id.* at 918–19.

161. *Id.* at 923.

group.”<sup>162</sup> In other words, unlike the ethnic tribe referenced in the Introduction of this Article, women in abusive relationships do not necessarily identify with a group of other women who share that characteristic. According to the Board, there is no cohesive sense of common identity, shared kinship, or shared history to bind the women together, other than the fact that they are battered spouses.<sup>163</sup>

To support its assertion, the Board 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.<sup>164</sup>

However, the Board failed to articulate why this is relevant or consistent with the Refugee Convention. Neither the Convention nor U.S. asylum law requires that an asylum applicant prove that her particular persecutor is targeting other members of her social group. Such a showing may support the applicant’s claim, but is not determinative in and of itself.<sup>165</sup>

Moreover, the Board’s insistence that a valid social group is necessarily comprised of members fully cognizant of their membership in the group further highlights the Board’s lack of understanding of domestic violence as a societal problem. Domestic violence, particularly in countries that are unable or unwilling to

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162. *Id.* at 918.

163. *See id.* at 912 (requiring a “voluntary associational relationship among the purported members” of a particular social group (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986))).

164. *Id.* at 920.

165. In *Matter of R-A*, the Board based this portion of its social group analysis in part on *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1574 (9th Cir. 1986), which involved a particular social group consisting of “young, urban, working class males of military age who have never served in the military or otherwise expressed support for the government [of El Salvador].” *See* 22 I. & N. Dec. at 920. However, as the dissent points out, the facts of *Sanchez-Trujillo* differ significantly from those of *Matter of R-A*:

[Alvarado’s] case does not involve the type of all-encompassing grouping posited in *Sanchez-Trujillo*, which arose in the context of countrywide civil strife and anarchy. Here, the circumstances of group members who share the immutable traits of gender and a relationship to an abusive partner are distinct from those of other members of society who may fear general civil strife, criminal assault or other social disorder.

*Id.* at 933 (Guendelsberger, Board Member, dissenting).

protect victims, is the manifestation of a state belief in male dominance.<sup>166</sup> As part of the effort to control, marginalize and subjugate women, domestic violence is relegated to the private sphere and is not openly discussed and attacked as a societal issue.<sup>167</sup> Resources for its victims are scarce, state protection from it is virtually nonexistent, and blame for it falls on its victims rather than on its perpetrators.<sup>168</sup> In this environment, the fact that the members of the particular social group are not identifying each other and rallying together under a visible banner is hardly surprising.

The Board also took an overly narrow approach toward social group formulation by holding that, in order to be valid, a particular social group must be “recognized and understood to be a societal faction, or . . . otherwise [be] a recognized segment of the population, within [the applicant’s home country].”<sup>169</sup> Given that one tactic of persecution is to force a subjugated group to remain invisible,<sup>170</sup> this requirement is unrealistic and inconsistent with the principles of refugee protection.

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166. See *Matter of R-A*, 22 I. & N. Dec. at 939 (Guendelsberg, Board Member, dissenting). The dissent stated,

[D]omestic violence exist[s] as a means by which men may systematically destroy the power of women, a form of violence rooted in the economic, social, and cultural subordination of women. The fundamental purpose of domestic violence is to punish, humiliate, and exercise power over the victim on account of her gender . . . .

*Id.* (internal citation omitted); see also *id.* (defining domestic violence as a “powerful tool of oppression” against women that is “used to control women in . . . the home” (quoting U.N. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women*, 47th Sess., Supp. No. 38, ¶ 26, at 8, U.N. Doc. A/47/38 (1992))).

167. See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 296 (1994) (arguing that the consequences of private gender-based violence need to be viewed legally on the same level as “other forms of inhumane subordinating official violence”).

168. See *Matter of R-A*, 22 I. & N. Dec. at 942 (suggesting that the Department of Justice Guidelines should not distinguish between private forms of persecution, such as the “heinous abuse” suffered by the respondent, and “public forms of persecution, typically suffered by men”) (citing Kristin E. Kandt, *United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison*, 9 GEO. IMMIGR. L.J. 137, 144–45 (1995)); see also Pamela Goldberg, *Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT’L L.J. 565, 591–92 (1993) (expressing concern about the lack of clarity of the definition of a “particular social group” in the United States); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L.J. 625 (1993) (presenting an improved system for considering asylum for women through a multifaceted test).

169. *Matter of R-A*, 22 I. & N. Dec. at 918.

170. See generally 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, 51 (2008) (explaining that “[t]he new ‘social visibility’ requirement raises the specter of the private/public distinction by requiring members of a particular social group to have a public face.”

In countries where protection from the batterer is not available, battered women may feel compelled to remain invisible. The psychology of abusive relationships is again illustrative. Battered women usually blame themselves for the abuse, and they are ashamed of the pity that their situation tends to evoke.<sup>171</sup> In a society that implicitly condones domestic violence by failing to provide adequate protection to the victim, the victim's shame combines with a fear of retribution, thereby intensifying the compulsion to remain silent and invisible.<sup>172</sup>

Even if one were to accept the assertion that a particular social group must be a "recognized segment of the population," the Board's approach toward the inquiry was still too narrow. In essence, the Board failed to clarify who exactly must recognize the segment of the population. The persecutors and the victims may not articulate the social group; however, the existence of agencies and other resources for domestic violence victims demonstrates that people within a particular society do indeed consider battered women as a recognized segment of the population.

*b. The lack of a nexus between the persecution and the proposed social group*

The Board pointed out that, even if there were a social group of "women who have been involved intimately with male companions who believe that women are to live under male domination," membership in such a social group, in and of itself, would not motivate the persecutor to abuse his intimate partner.<sup>173</sup> The Board's assertion is correct. The persecutor acts because he believes in male domination and he seeks to achieve it through abuse. He does not act because his intimate partner is in a relationship with him or because he seeks to punish her for being in a relationship with him.

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and that the requirement "may well result in the denial of asylum claims brought by some of the most vulnerable individuals, notwithstanding the existence of a 'protected characteristic'").

171. WALKER, BATTERED WOMAN, *supra* note 22, at 63.

172. See Marouf, *supra* note 170, at 94–95 (explaining that a woman's inclination to maintain the secrecy of her domestic victimization may stem from both individual level factors, including "fear that their children may also become victims, financial or psychological dependence on the abuser, lack of social support, fear of being blamed by society, or general feelings of helplessness," as well as societal level factors, including the "widespread social tolerance and the social prominence of an idealized view of the home and family life," "social stigma," "social norms that legitimate or even glorify domestic violence against women," "social isolation," and "[d]eep-rooted ideas about the privacy of the family").

173. *Matter of R-A*, 22 I. & N. Dec. at 918–19.

Alvarado's claimed social group does not fully capture the reason for the persecution. A batterer does not abuse a woman who has been involved intimately with him merely because she has been involved intimately with him or because the abuser believes in male domination. Rather, the batterer abuses the woman because she has challenged the batterer's closely held belief in male domination by leaving the relationship. This challenge fuels the batterer's motivation to persecute the woman.

*B. The Department of Justice's Proposed Regulations*

On December 7, 2000, the Department of Justice issued proposed regulations intended to provide "generally applicable principles that will allow for case-by-case adjudication of claims based on domestic violence or other serious harm inflicted by individual non-state actors."<sup>174</sup> One of the Department's stated reasons for issuing the proposed regulations was to "address analytical issues that have arisen in the context of some claims based on domestic violence, and in particular in the Board's decision in *In re R-A* . . . ."<sup>175</sup> The Department also sought to clarify and homogenize some of the various approaches to social group formulation. Although it is useful that the Department rejected the Board's strict approach, the proposed regulations fall short of guaranteeing refugee protection for battered women.

*1. Rejection of the Board's restrictions on establishing a valid particular social group*

The preamble to the proposed regulations confirms that two particular factors upon which the Board relied to deny asylum in *Matter of R-A*—whether the social group is "a recognized segment of the population"<sup>176</sup> and whether the applicant's society draws distinctions "between those who share and those who do not share the characteristic"<sup>177</sup>—are factors which the Board may consider but "are not determinative of the question of whether a valid social group exists."<sup>178</sup> The proposed regulations state that the following factors must be considered: (1) sharing a "common, immutable characteristic . . . that a member either cannot change or that is so

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174. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,589 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

175. *Id.* at 76,592.

176. *Matter of R-A*, 22 I. & N. Dec. at 918.

177. *Id.* at 919.

178. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,594.

fundamental to the identity or conscience of the member that he or she should not be required to change it,”<sup>179</sup> and (2) having a past experience—if it defines the group—that, when it occurred, “the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it.”<sup>180</sup>

If an adjudicator understands the dynamics and psychology of abusive relationships, the proposed regulatory language may be sufficient to ensure a grant of asylum based on several social group formulations, including that of “women who have fled severely abusive relationships.” The past experience of having left the relationship defines the social group and represents an immutable characteristic. Even if a woman is forced to return to her abuser, the fact that she left is immutable, or at least is fundamental to her identity or conscience once she leaves the relationship.<sup>181</sup> An adjudicator who understands the danger of separation violence would likely have little difficulty finding that the applicant fits within the definition of a refugee.

The problem demonstrated so clearly by the majority opinion in *Matter of R-A-*, however, is that too many adjudicators do not understand the complex dynamics of abusive relationships. If this continues to be true, the proposed regulatory language would therefore fail to achieve its stated goal of “aid[ing] in the assessment of claims made by applicants who have suffered or fear domestic violence.”<sup>182</sup>

2. *Failure to articulate a specific basis for asylum claims based on domestic violence*

Although the proposed regulations attempt to create a viable framework for adjudicating domestic violence-based asylum claims, they do not specifically refer to domestic violence claims except in the preamble.<sup>183</sup> In fact, the Department of Justice specifically declined to articulate a rule for deciding domestic violence-based asylum claims in favor of “broadly applicable principles to guide adjudicators in applying the refugee definition and other statutory and regulatory provisions generally”<sup>184</sup>:

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179. *Id.* at 76,598.

180. *Id.*

181. See discussion *infra* Part IV.B.

182. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,588.

183. *Id.* at 76,595.

184. *Id.*

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The Department [of Justice] has tentatively concluded that this approach would be more useful than simply announcing a categorical rule that a victim of domestic violence is or can be a refugee on account of that experience or fear . . . . The current proposal of the Department would encourage development of the law in the area of domestic violence as well as in other new claims that may arise.<sup>185</sup>

The Department of Justice's failure to articulate a specific basis upon which battered women can qualify for asylum, however, leaves such applicants vulnerable to erroneous adjudication by fact-finders who are not familiar with the psychology of domestic violence. Moreover, the Department's "broadly applicable principles" are nothing more than a codification of case law existing long before the Board denied Alvarado asylum. For example, the regulations state that an asylum applicant must establish:

that the persecutor acted, or that there is a reasonable possibility that the persecutor would act, against the applicant on account of the applicant's race, religion, nationality, membership in a particular social group, or political opinion, or on account of what the persecutor perceives to be the applicant's race, religion, nationality, membership in a particular social group, or political opinion.<sup>186</sup>

This rule merely restates U.S. asylum law as it has existed for decades. It does not provide any clarification, beyond what is stated in the preamble, as to how an adjudicator should apply this rule to battered women.

The same problem arises with respect to the section of the proposed rule dealing with membership in a particular social group. That section states:

A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.<sup>187</sup>

This is a mere restatement of *Matter of Acosta*,<sup>188</sup> a precedential decision of the Board issued in 1985.<sup>189</sup> The preamble emphasizes

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185. *Id.*

186. *Id.* at 76,597-98.

187. *Id.* at 76,598.

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

189. *See Asylum and Withholding Definitions*, 65 Fed. Reg. at 76,593 (declaring that the proposed regulation codifies the reasoning of *Matter of Acosta*, "[t]he key

that gender is an immutable trait and that marriage and other intimate relationships may be considered immutable traits.<sup>190</sup> However, without a clear directive, an adjudicator might still fail to recognize that a battered woman is being persecuted on account of her membership in a particular social group.

The preamble to the proposed regulations attempts to provide a reasonable framework for granting asylum to battered women. The preamble also corrects and clarifies several errors that the Board made in *Matter of R-A*. However, by failing to articulate a clear basis for granting refugee protection, and by failing to address domestic violence specifically in the regulations themselves, the proposed regulations fail to ensure that women who have fled from severely abusive relationships will receive refugee protection.

*C. The Department of Homeland Security's 2004 Proposed Social Group: "Married Women in Guatemala Who are Unable to Leave the Relationship"*

As a result of the Board's rejection of Alvarado's claimed social group, the Board sustained the appeal of the Immigration and Naturalization Service (INS) and reversed the grant of asylum.<sup>191</sup> As discussed above, this appeal was not the end of the Alvarado case. Three different U.S. Attorneys General have certified the case for review, and each side has had the opportunity to re-litigate its position.<sup>192</sup>

In a somewhat surprising turn of events (given that it originated from the party that initially opposed a grant of asylum for Rodi Alvarado), the Department of Homeland Security stated, in a brief submitted to Attorney General John Ashcroft in 2004, that it believed that Rodi Alvarado was eligible for asylum.<sup>193</sup> However, the definition of the social group upon which the Department of Homeland Security based this eligibility was critically flawed.

The Department asserted that Alvarado was eligible for asylum as a member of the particular social group, "married women in Guatemala who are unable to leave the relationship."<sup>194</sup> This social

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Board decision on the meaning of a 'particular social group' [which] requires that members of the group share a 'common, immutable' trait").

190. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,593.

191. *Id.* at 928. The INS prosecuted immigration cases before the Department of Homeland Security was created.

192. Recently, the case was remanded to a local immigration judge in San Francisco. See E-mail from Karen Musalo to Author (Apr. 16, 2009) (on file with Author).

193. DHS Brief 2004, *supra* note 9, at 43.

194. *Id.* at 36.

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group must fail because it does not accurately describe the individuals it seeks to encompass and too narrowly characterizes the social group of battered women.

The proposed social group mischaracterizes its members as individuals who are unable to leave their relationships. To state the obvious, however, it is clear that if they were unable to leave their relationships, they would not be in the United States applying for asylum. The assumption implicit in this proposed social group is that, if the applicants were to return to their countries, they would be unable to escape their abusers. But the proposed social group fails to encapsulate one of the most important aspects of an abusive relationship: the abuser is not motivated to persecute because the woman *cannot* leave the relationship; rather, the abuser is motivated to persecute because the woman *can and did* leave the relationship.

Moreover, the phrase “unable to leave the relationship” is vague and vulnerable to misconstruction. A battered spouse, for example, may be *able* to leave the relationship by obtaining a civil divorce, but she may decline to do so because the state lacks the capacity and willingness to protect her once she does. The fact that she has a means of officially leaving the relationship by securing a divorce should not prevent her from obtaining asylum in the United States.

Furthermore, the Department of Homeland Security improperly narrowed the social group by including the applicant’s marital status in its social group formulation. Alvarado’s status as a married woman certainly may have contributed to both the state’s unwillingness to protect her as well as her personal reasons for staying in the relationship for any length of time. However, a woman who is being persecuted by a family member on account of her membership in a particular social group defined by her defiance of the persecutor’s authority should not be denied asylum just because there was no valid marriage. If the state is just as unwilling to protect an unmarried woman as it is a married woman, U.S. asylum law should not discriminate against unmarried women whose lives are in danger.

Finally, the Department limited the effectiveness of its proposed social group by making the proposal dependent on the finalization of proposed regulations governing the adjudication of gender based claims.<sup>195</sup> While admitting that the proposed regulations “do[] not address domestic violence *per se*,”<sup>196</sup> the Department nevertheless

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195. *Id.* at 6.

196. *Id.* at 5.

“urge[d] the Attorney General to order the Board to grant asylum without an opinion, or to wait for promulgation of the final rule before deciding this case.”<sup>197</sup> As discussed below, however, the regulations to which the Department of Homeland Security referred are not sufficient to protect battered women from adjudicators who are not familiar with the dynamics and the psychology of abusive relationships.

*D. The Department of Homeland Security’s 2009 Proposed Social Group: “Women Who Are Viewed as Property by Virtue of Their Positions Within a Domestic Relationship”*

In a promising development, the Department of Homeland Security under the Obama administration has articulated a favorable stance toward the asylum claims of domestic violence survivors—a stance even more accepting of battered women’s claims than that put forward in 2004. In a brief for a case involving a Mexican domestic violence survivor,<sup>198</sup> the Department posited two particular social groups under which domestic violence survivors may prove eligibility for asylum. The first social group is similar to that which the Department put forward in *Matter of R-A*, “women in domestic relationships who are unable to leave,”<sup>199</sup> and thus suffers from the same flaw discussed above. The second is “women who are viewed as property by virtue of their positions within a domestic relationship.”<sup>200</sup>

The second proposed social group does not contain the same basic flaw present in the first social group. It does, however, present other concerns. The first is that the social group relies entirely on the persecutor’s perception of the asylum applicant, a fact that may raise significant evidentiary problems for the applicant. Unless an abuser specifically makes a statement or acts in a way that leads an adjudicator to find that the asylum applicant was viewed as property,

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197. *Id.* at 6. The Department of Homeland Security also urged that the decision to grant asylum be “limited as much as possible to the particular facts of this case.” *Id.* at 4.

198. Department of Homeland Security’s Supplemental Brief at 14, *Matter of L-R* (BIA Apr. 13, 2009) [hereinafter “DHS Brief 2009”], available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>. The Obama Administration also recently filed a brief in support of Rodi Alvarado’s asylum claim. See Department of Homeland Security Response to the Resp’t’s Supplemental Filing of August 18, 2009, *Matter of Rodi Alvarado-Pena* (San Francisco Immigration Court, Oct. 28, 2009) (stating that the Department of Homeland Security “maintains that the respondent . . . is eligible for asylum and merits a grant of asylum as a matter of discretion”).

199. *Id.*

200. *Id.*

the asylum claim may fail. It is the burden of the asylum applicant to sustain her claim,<sup>201</sup> and presenting testimony and other evidence sufficient to establish that the persecutor viewed her as property may prove difficult.

The evidentiary issue raises a second concern, which is that the proposed social group relies on a subjective determination that the actions of the persecutor amount to viewing the asylum-seeker as property. Some adjudicators may equate physical abuse, jealousy, possessiveness, and other abusive behavior with viewing the object of the abuse as property, but other adjudicators may not. Such a subjective determination is not feasible in light of the fact that the asylum-seeker must prove that her membership in the social group was “one central reason” for the persecution she suffered.<sup>202</sup> Even if the asylum applicant provides testimony and other evidence proving that her husband abused her, if the adjudicator does not believe that she was abused because of the central reason that the persecutor viewed her as property, the asylum claim may fail.

Given these flaws in the proposed social groups, one cannot conclude that battered women’s asylum claims will necessarily find widespread acceptance. Nevertheless, it is indeed promising that the Department of Homeland Security appears receptive to domestic violence-based asylum in the United States. The social group posited below may prove effective in utilizing the Department’s willingness to recognize domestic violence as a basis for asylum.

#### IV. NEW SOCIAL GROUP: “WOMEN WHO HAVE FLED SEVERELY ABUSIVE RELATIONSHIPS”

Refugee protection should be available to applicants who can prove that they have a well-founded fear of future persecution on account of their membership in the particular social group of “women who have fled severely abusive relationships.” Such an individual possesses an immutable trait in that she has left the abusive relationship and has thereby irrevocably challenged the abuser’s power and control. The applicant must prove that, if she is sent back to her country, there is at least a reasonable possibility that the abuser will find her and inflict even greater harm on her, or possibly even kill her, on account of her membership in the particular social group. She must prove that her government is unwilling or unable to protect

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201. 8 U.S.C. § 1158(b)(1)(B).

202. *Id.* § 1158(b)(1)(B)(i).

her from the abuse. If she proves these elements, the applicant possesses a well-founded fear of future persecution based on her membership in a valid social group, and qualifies for refugee protection.

*A. Past Persecution and Well-Founded Fear of Future Persecution*

An applicant may establish a rebuttable presumption of future persecution if she suffered persecution in the past.<sup>203</sup> An asylum applicant who has fled an abusive relationship may rely on past persecution if she had previously attempted to flee the relationship and consequently suffered separation violence at the hands of her abuser.<sup>204</sup> Such past persecution would raise a rebuttable presumption that she will again suffer separation violence if she is sent back to her home country.<sup>205</sup>

If the applicant had not previously fled the relationship, she must independently establish a well-founded fear of future persecution. In order to prove that her fear of persecution upon return is well-founded, she must prove that her subjective fear of future persecution is objectively reasonable by meeting the test set forth in *Matter of Mogharrabi*<sup>206</sup> and discussed in Part II above: (1) she must possess a characteristic or belief that the persecutor seeks to overcome by punishing her; (2) the persecutor must be aware or could become aware of the characteristic or belief; (3) the persecutor must be capable of punishing her; and (4) the persecutor must be inclined to punish her.<sup>207</sup> The punishable characteristic is the applicant's ability and willingness to challenge her abuser's authority by leaving the relationship. The persecutor becomes aware of this characteristic as soon as the applicant leaves the relationship. The persecutor's physical, mental, and emotional capability to inflict punishment is established by the abusive dynamics of the relationship. The persecutor's inclination to inflict punishment is also established by the abusive nature of the relationship as well as by the reality of separation violence. The characteristic of being able and willing to leave the relationship also operates as the central reason for the persecution.

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203. 8 C.F.R. § 1208.13(b)(1) & (2) (2009).

204. *Id.*

205. *Id.*

206. 19 I. & N. Dec. 439 (BIA 1987).

207. *Id.* at 446 (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 226 (BIA 1985)).

This leads to the inquiry of whether the persecution feared is based on a protected ground, namely, membership in a particular social group. Here, the relevant analysis is whether the particular social group of “women who have fled abusive relationships” withstands the various restrictions governing social group formulations.

*B. Immutability of the Trait of Having Left an Abusive Relationship*

The most fundamental component of a valid social group is a characteristic or belief that a member cannot change, or one that is so fundamental to her identity that she should not be required to change it.<sup>208</sup> Leaving an abusive relationship is an immutable characteristic. The abused woman can return to the relationship voluntarily or forcibly, but she cannot change the fact that she took the actual step of leaving. The psychology of abusive relationships is such that the abuser continues the physical and emotional abuse specifically to establish and maintain control over his partner, and to punish any challenge to that control. Once a battered woman has left the relationship, she has irrevocably challenged her abuser’s power. If she returns or is forcibly returned, she runs the risk of a significant increase in violence.

If the abuser perceives the woman’s leaving as final, he may even go so far as to kill her. His aim, again, is control. Killing his intimate partner, who has defied him by leaving, is the ultimate exercise of control over his partner.<sup>209</sup>

*C. Flood of Battered Women?*

Introduction of the social group “women who have fled severely abusive relationships” might lead to concerns that a flood of battered women from around the world will seek refugee protection in the United States. Although this is a practical rather than a legal question,<sup>210</sup> given the fear of “opening the floodgates” to an overwhelming number of refugees by approving an overly broad social group, it is nevertheless an important consideration.<sup>211</sup>

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208. Matter of Acosta, 19 I. & N. Dec. at 233.

209. WILSON & DALY, HOMICIDE, *supra* note 65, at 208.

210. There is nothing in the Refugee Convention or in U.S. asylum law that limits the number of asylum seekers who may receive asylum status in the United States.

211. Compare Musalo, *Floodgates*, *supra* note 89, at 120 (discounting the fear of floodgates by emphasizing contrary historical trends and by addressing underlying causes of human rights violations rather than turning away victims), with Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005) (“There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation’s residents to obtain asylum on the ground that

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In addressing the “floodgates” concern, it is important to recall that asylum is only available to “women who have fled severely abusive relationships” if the members of that particular social group also meet the other elements of the refugee definition. Domestic violence occurs in the United States and other Western and developed countries, as well as across all ethnic and socioeconomic groups. As discussed above, however, a member of this group must prove that her country does not have the resources or willingness to protect her from separation violence. A citizen of a country that does have the resources and willingness to protect her would not meet the definition of a refugee and thus would not qualify for asylum in the United States.

Even in cases involving countries that cannot or will not protect battered women, it is unlikely that battered women seeking asylum will overwhelm the United States in record-high numbers. First, the unique dynamics of abusive relationships prevent many women from leaving their abusive relationships at all. Second, even if a woman succeeds in breaking the Cycle of Violence and flees the abusive relationship, she may not necessarily desire to flee her country and family.

As discussed above, the Cycle of Violence can be an extremely powerful barrier to a woman’s escape from an abusive relationship even in situations where support and resources are available. Possessiveness, isolation, and other controlling behavior masquerade as protectiveness and love; demeaning remarks and humiliating incidents shatter the victim’s self-esteem; threats to harm the victim or her children, or threats to self-inflict harm or commit suicide intimidate the victim; the threats escalate to beatings and other violent behavior that keeps the victim in a constant state of terror; and finally the calm respite brings back into focus the abusive behavior masquerading as affection. In far too many cases, even in countries like the United States that provide resources and protection to battered women, women are never fully able to break free of the Cycle of Violence.

Even if a woman does manage to break free of the Cycle of Violence, this does not necessarily mean that she will take the drastic

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women are persecuted there.”), *and* *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (dismissing the applicant’s assertion that “Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group” by declaring that “this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender”).

step of leaving her country to seek asylum abroad. Fleeing to another country can be prohibitively expensive and risky. This is especially true if the woman is unable to obtain a visa to enter a safe country legally and must rely on smugglers or other illegal channels to reach safety. Fleeing to another country often requires leaving behind children and other loved ones, particularly if the woman needs to obtain the abuser's permission to leave the country with their children.

Battered women who manage to flee to the United States in order to seek asylum will thus have to have overcome two powerful obstacles: (1) the strong emotional and psychological factors that compel battered women to remain with their abusers, and (2) the excruciating decision to leave behind their country and family. The formidability of these obstacles minimizes the likelihood that a flood of battered women will descend upon the United States to seek asylum.

The Board's recognition of a social group based on vulnerability to another form of physical abuse, female genital mutilation ("FGM"), also called female genital cutting ("FGC"), met with similar fears, but a flood of FGM refugees has not materialized. In *Matter of Kasinga*<sup>212</sup> (a misspelling of the applicant's last name, Kassindja), the Board held that a young woman who feared being forced by her aunt and husband to undergo FGC was eligible for asylum.<sup>213</sup> Karen Musalo has described the effects of the *Kasinga* decision as follows:

[M]any who opposed a grant of asylum pointed to the fact that millions of women a year are subject to FGC [female genital cutting], and predicted that the U.S. would be overwhelmed with asylum seekers if it recognized fear of FGC as a basis of asylum. Fauziya Kassindja was granted asylum, but the dire predictions of a flood of women seeking asylum never materialized. In fact an INS publication explicitly noted that "[a]lthough genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on FGM" after the *Kasinga* decision. In this same publication, INS stated that it did not expect to see a large number of claims if the U.S. recognized domestic violence as a basis of asylum.<sup>214</sup>

The similarity between domestic violence and FGM is striking. The oppression and manipulation of women in order to assure male

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212. 21 I. & N. Dec. 357 (BIA 1996).

213. *Id.* at 367.

214. Musalo, *Floodgates*, *supra* note 89, at 132-33.

dominance and exploitation are common to both forms of persecution, as is the fact that both forms of persecution constitute severe bodily invasions. One significant difference is that FGM may be perceived to be performed with benign intent,<sup>215</sup> whereas domestic violence cannot, under any circumstances, be perceived as benign—a difference which only highlights the peculiar disparity in how the Board treats these two forms of gender-based persecution.

Another important similarity between FGM and domestic violence is the degree of state complicity in, or helplessness to prevent, the persecution. The cultural, religious, and social customs of a particular society influence governmental responses to FGM and domestic violence to a much greater degree than they do in other claims involving private actors.<sup>216</sup> For example, a country may be beleaguered by drug cartels to such a degree that the government is unable to protect citizens who defy a powerful cartel. In that situation, however, the cartel is viewed universally—by the government and by the citizens—as a plague on society. In the situation of domestic violence, however, in countries unwilling or unable to protect its citizens from abusers, domestic violence is a long-existing, long-condoned means of maintaining what that society has long considered to be the proper order of society: men as dominant and women as subordinate, particularly within the family.<sup>217</sup>

In light of these striking similarities, the difference in the Board's treatment of FGM claims versus domestic violence claims is unfathomable. The Board's fear that granting asylum to women who have fled severely abusive relationships will open the floodgates to

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215. See *id.* at 365 (affirming that “subjective ‘punitive’ or ‘malignant’ intent is not required for harm to constitute persecution”).

216. See, e.g., J. Patrick Kelly, *Naturalism in International Adjudication*, 18 DUKE J. COMP. & INT'L L. 395, 416 (2008). Kelly argues,

Even though female genital mutilation (FGM) or female circumcision may be abhorrent and injurious to health, it is not clear that it is a form of discrimination that violates the Convention when the participants (women and young girls) believe that this traditional practice is a constituent part of their culture.

*Id.* Additionally, see L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 284 (1997). Obiora explains,

Female circumcision does not easily fall within the traditional definition of a gender-specific human rights violation, nor does it seem completely analogous to violent coercion of women by men. It is usually performed for socio-cultural reasons by predominantly female private actors with the apparent consent of the circumcised or her proxy.

217. See DHS Brief 2004, *supra* note 9, at 27 (acknowledging that Rodi Alvarado's husband persecuted her because of “his perception that subordination is created through the marital bond,” a perception bolstered by societal expectations).

vast numbers of individuals seeking asylum on the basis of improper grounds is unfounded at best and disingenuous at worst. It again points to the deep misunderstanding of the psychology of domestic violence that led to the *Matter of R-A*-decision.

#### CONCLUSION

The decision of the Board of Immigration Appeals in *Matter of R-A*, and the failure of the INS and its successor agency, the Citizenship and Immigration Services, to issue appropriate final regulations have resulted in an unconscionable delay of nearly ten years in the case of Rodi Alvarado and other survivors of severe domestic violence. For many applicants, this delay has resulted in separation from their children and other loved ones, precarious immigration status, and the return of despondent applicants to countries where they face severe harm and even death at the hands of their abusers.

The particular social group of “women who have fled severely abusive relationships” provides adjudicators with the key to ending this deplorable stalemate. In light of the psychological realities of abusive relationships, the social group is sufficiently narrow. It is comprised of women who possess the immutable characteristic of having irrevocably challenged the authority of their abusers. Although state action is not required for an applicant to meet the definition of a refugee, the persecution of the members of the particular social group carries with it the imprimatur of centuries of state-sponsored and society-sponsored male domination over women and the ongoing desire to preserve that dynamic. It is therefore the legal obligation of the United States to provide asylum to members of the social group of “women who have fled severely abusive relationships.”