

# SEEKING PROTECTION FROM THE LAW? EXPLORING CHANGING ARGUMENTS FOR U.S. DOMESTIC VIOLENCE ASYLUM CLAIMS AND GENDERED RESISTANCE BY COURTS

By  
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## I. INTRODUCTION

In July 2009, the Department of Homeland Security (“DHS”) argued in a supplemental Board of Immigration Appeals (“BIA”) brief that under certain circumstances, female domestic violence (“DV”) survivors may have a cognizable asylum claim in the United States.<sup>1</sup> The DHS brief breaks nine years of executive level silence on the issue,<sup>2</sup> as the Obama administration ignites advocates’ imaginations about the future of domestic, gender-based asylum.

The administration’s new position is significant on two levels. First, domestic violence has become the miner’s canary issue for gender-based asylum. Gender-based claims occupy an ambivalent area in United States asylum law but in recent years, female genitalia mutilation (“FGM”), also known as female circumcision,<sup>3</sup> has been the basis under which women bring successful asylum claims.<sup>4</sup> The BIA’s treatment of the DHS brief has the potential to clarify the gender question, marking its relevance and meaning in asylum law today.

Second, the BIA’s response is a potential turning point for women’s issues within international law. The United States, like many other countries, is conflicted on the gender question because it is still influenced by historical tensions between male-centered norms and modern challenges to them. Domestic violence, as a quintessential women’s issue on one hand, exposes the human rights law evolution that is beginning to fully embrace violence against women as an issue, and on the other hand, exposes its shortcomings as an area that still fails to adequately protect women from gendered persecution. Thus, a successful effort to recognize DV claims may align emerging values with ancient practices to further legitimize women’s issues within human rights law.

This essay intends to offer context to the executive branch’s new position, and to evaluate proposed ideas in order to better establish gender-based asylum claims. Part One of this essay briefly provides a background for the development of international human rights law related to women’s issues. Part Two observes the ways in which embedded male bias within United States common law creates persistent barriers for domestic violence claims. Part Three evaluates the executive’s position and alternative proposals for reform under governing law. Finally, Part Four concludes by arguing that at this stage, devising comprehensive strategies for systemic reform is the most important contribution that human rights scholars can make to strengthen future DV and other gender-based claims.

## II. FREEDOM FROM GENDERED VIOLENCE AS A HUMAN RIGHT

Women’s citizenship within international human rights law is a new phenomenon. International human rights law is the culmination of evolved shared values and aspirations by the world community that “corresponds only partially to the historical reality: the rights of women and of non-white persons, in fact, arose relatively late in history.”<sup>5</sup> This area of law is humanizing its treatment toward women to meet a “standard of citizenship,”<sup>6</sup> as conditions surrounding women are increasingly recognized as inhumane. More recently, feminism and human rights have formed a rich dialectical relationship. This relationship relies on each field’s strengths to fill in theoretical gaps to develop more inclusive and relief-driven principles.<sup>7</sup> The result is tangible improvements in legal citizenship for some poor women, women of color, and women living in the global south.

Refugee law must be viewed within this broader international human rights history and legal framework. The Universal Declaration of Human Rights, the basis of international human rights, is often criticized for excluding social and economic rights, such as the right to work, right to control one’s possessions, and the right to be free from violence. Women are disproportionately impacted by these fatal exclusions,<sup>8</sup> but a multitude of conventions and agreements now expressly recognize women’s legal citizenship. The most notable international commitment is the 1979 Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”).<sup>9</sup>

CEDAW is generally hailed as a pivotal international law effort to enfranchise women. One Latina feminist scholar claims that CEDAW “takes a holistic approach towards women from all walks of life attaining full personhood by recognizing the importance not only of civil and political rights but also of social, economic, cultural and solidarity rights.”<sup>10</sup> She further argues that “[t]his treaty, along with other gender specific documents and perspectives recently embraced by the global community as well as the recognition of the need for gender perspectives in general documents (such as the International Criminal Court statute), are (can be) the foundation for making women’s equality an accessible reality.”<sup>11</sup> Other feminist scholars, however, criticize what they view as CEDAW’s practical futility with the consideration that “rights only exist to the extent states recognize and enforce them.”<sup>12</sup> The area of asylum law uniquely feels the absence of accountability mechanisms to enforce CEDAW.

United States asylum law is based on the Immigration and Nationality Act revision after adoption of the 1951 United

Nations Convention Relating to the Status of Refugees (“Refugees Convention”) and the corresponding 1967 United Nations protocol.<sup>13</sup> Gender is not an enumerated asylum ground under the Refugees Convention, which includes race, religion, nationality, political opinion or a “particular social group.”<sup>14</sup> In 1991, the Office of the United Nations High Commissioner for Refugees (“UNHCR”) attempted to address this omission by issuing Guidelines on the Protection of Refugee Women that explained “women refugees who are persecuted on account of their opposition to social traditions need protection and therefore should qualify as members of a [particular social group].”<sup>15</sup> Several countries, including the United States, issued their own guidelines to further clarify the role of gender in refugee cases.

The Immigration and Naturalization Service (“INS”) issued *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (“INS Guidelines”) in 1995.<sup>16</sup> Domestic advocates heralded the INS Guidelines as a “significant step forward for women in asylum law[.]”<sup>17</sup> In terms of DV claims, the INS Guidelines are helpful because they affirm that “private” persecution in which the government is unwilling or unable to intervene is a cognizable asylum claim.<sup>18</sup> At the same time, however, the INS Guidelines failed to establish domestic violence itself as a form of persecution and instead regarded it merely as evidence of *past* persecution.<sup>19</sup> Most importantly, the INS Guidelines do not assume the force of law.<sup>20</sup> This essential issue will be discussed more in the final section.

Efforts by international law-making bodies to establish violence against women as a cognizable asylum claim within its member-states clearly fall short. The United States (“U.S.”) rarely grants asylum for gender-based violence against women, even though 80% of the world’s 27 million refugees are women and children.<sup>21</sup> The legal authority around domestic violence is clear, yet “its operation still depends on the political will of those who interpret it.”<sup>22</sup> Simply put, U.S. immigration courts and executive officers lack the political will to enforce the law.

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asylum describes its legal framework as heavily reliant on male-centered experiences.<sup>25</sup> Specifically, many of these critiques appropriately point out that certain persecution-defined harms, such as domestic violence, are often regarded as “private” issues that are unworthy of foreign intervention.<sup>26</sup> Beyond this specific observation, male bias also appears within the common law tests for defining persecution. These tests premise “rational” presumptions about violence on a limited set of realities faced by a minority of applicants. For this reason DV is an exceedingly difficult claim to prove within the governing law.

It is worth noting that gender violence is not synonymous with violence against women. Historically, among feminist writers, domestic violence had been conceptualized as spousal or heterosexual partner violence.<sup>27</sup> Contemporary feminist writers and advocates prefer the term, “intimate-partner violence,” to capture abuse within non-legally recognized relationships (such as relationships between non-married people or between lesbian, gay, or transgender-identified individuals).<sup>28</sup> Others prefer “gender-based violence” to broaden this perspective even more because gender non-conformity (sometimes perceived as homosexuality) and other gender-related human rights abuses occur outside the law’s current scope.<sup>29</sup> This discussion is framed within the context of domestic violence for analytical purposes.<sup>30</sup> Generally speaking, relationship violence, regardless of form, remains on the outskirts of the law because male-centered perspectives continue to dominate asylum law.<sup>31</sup>

It is also important to understand DV as a social, political, and moral pandemic. The international statistics are staggering. One-quarter to one-half of all women are abused by intimate partners, and 40 to 70% of all female murder victims are killed by intimate partners.<sup>32</sup> Sadly, U.S. statistics reflect similar trends. A 1995-1996 survey found that nearly 25% of women, and 7.6% of men, were raped or physically assaulted by an intimate partner in their lifetime.<sup>33</sup> Intimate partner violence constituted 20% of all non-fatal violence against women in 2001, and 3% of all non-fatal violence toward men.<sup>34</sup> Almost half of all 3.5 million crimes committed against

family members were spousal abuse between 1998 and 2002.<sup>35</sup> DV exhibits a pattern of violence and oppression that is inherent in any reasonable notion of persecution. The international community’s impression of persecution in the 1950’s, however, does not reflect our modern realities, and those seeking to expand the definition of DV have faced a decades-long legal challenge that has proven more difficult than ever imagined.

Domestic violence does not fit neatly into the current refugee legal regime. In order to be eligible for a discretionary grant of relief, a petitioner must show a well-founded fear of persecution based on a protected status and must meet three criteria: 1) the pervasiveness of the act in the individual’s home country; 2) a lack of existing refuge within the individual’s home country; and 3) the government’s unwillingness or inability to intervene. Two requirements specifically pose challenges for domestic violence claims: proving persecution (clear probability that one’s life or freedom is threatened)<sup>36</sup> and demonstrating that such persecution is attributed to a statutorily protected status, such as race, religion, nationality, political opinion, or a PSG.<sup>37</sup> Many DV petitioners argue that they will suffer persecution based on

### **III. READING BETWEEN THE LINES: CRITICAL GENDER PERSPECTIVE IN ASYLUM COMMON LAW AND PRECEDENT CASES**

Feminist legal scholars have long-argued that DV survivors deserve asylum protection as a “particular social group”<sup>23</sup> (“PSG”). These analyses generate explanatory force behind arguments that violence against women is tolerated within asylum law throughout the world.<sup>24</sup> Interestingly, however, even though gendered violence remains a rare basis on which to grant asylum, two new trends have emerged. First, DV claims tied to religious or political persecution are increasingly successful. Second, “uncivilized” violence against women, specifically FGM, is gaining favor within courts as a basis for asylum. I argue that these two patterns do not reflect significant improvement in attitudes toward female survivors; rather, these patterns reveal systemic male bias within the asylum legal framework in its common law and interpretative rationale.

Scholars address male bias within asylum law in both a general and a specific context. Generally, scholarship on DV

their membership in a PSG or based on their political opinion against women and girl violence.<sup>38</sup>

Ironically, without gender as an enumerated ground, PSG DV claims are not viable at all because “defining what constitutes such a group for purposes of the INA remains elusive and inconsistent.”<sup>39</sup> The PSG category is sometimes referred to as a Refugee Convention drafting “afterthought,”<sup>40</sup> only added on a whim by a single delegation wishing to have a miscellany category. One scholar described the Refugee Convention’s provisions, which he believes mirrors post-World War II era politics, as “frozen in time.”<sup>41</sup> U.S. immigration judges and the United Nations have construed this category to mean selective persecution,<sup>42</sup> meaning that a PSG cannot be significantly defined by its past or future persecution. For instance, the Sixth Circuit Court found that young, attractive Albanian women who fear being forced into prostitution are not a PSG because they constitute a self-defined or “impermissibly circular” (IC) group.<sup>43</sup> DV claims are arguably most vulnerable on this point because “domestic violence survivors” are interpreted as an “impermissibly circular” social group that is defined by its membership. The IC application discussed in the next section will address how the three PSG tests pose distinct barriers for DV claims.

## MALE BIAS EMBEDDED WITHIN LEGAL TESTS

There are three PSG tests: immutability, visibility, and particularity. Each test contains subtle, insidious male-bias in its common law construction that leads to an unnecessarily narrow interpretation. The outcome is that legitimate DV claims are rejected almost per se because PSG tests are construed narrowly and heighten the burden of proof for petitioners.

The first test is the *Acosta* standard, which establishes that a social group must share a common, immutable “characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.”<sup>44</sup> Some courts have slightly expanded this definition to include an innate characteristic or shared past experience.<sup>45</sup> The *Acosta* standard is favorable to DV claims. For example, a female DV survivor who suffers persecution at the hands of a male lover who hurts her because of his belief that women are subordinate to men, and because he has the physical ability to do so, may easily meet the *Acosta* standard on account of her identity as female or her history of abuse.<sup>46</sup> Overall, the flexibility around the *Acosta* standard accommodates DV claims. It is the other two requirements—visibility and particularity—that are the most difficult to meet.

Social visibility is the second PSG test. This test is particularly context-dependent<sup>47</sup> since petitioners must provide evidence that they are at greater risk due to their membership in an identifiable PSG.<sup>48</sup> This test clearly excludes less visible forms of persecution like DV or rape. Other scholars have examined the exclusion of privatized violence in detail, and this will be addressed briefly later in the essay. More significant, however,

is that this test presents a pernicious epistemological dilemma when considered with the non-PSG standards. As noted before, there are three criteria for the persecution threshold, including a “pervasive” standard and “inability to escape” standard. DV survivors who may experience “private” violence that is nonetheless pervasive, normalized, or honored, face a disadvantage to prove

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that their persecution is visible when it is systemically ignored, rationalized, or ritualized. Thus, the “substantial evidence” bar<sup>49</sup> is heightened for DV survivors who must show that DV has a *high occurrence rate and is visible* in their home country. Such a proposition is counter-intuitive because any “rational” state government would address widely known harms against its citizens, but this presumption is inaccurate when applied to DV and other gendered violence. The internal tensions built into the visibility test and other standards starkly contrast with the realities of violence faced by a

large number of women. Further, this dilemma demonstrates a narrow common law construction that favors male-experienced persecution.

The final PSG test is “particularity” which requires a social group to be discerned “in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”<sup>50</sup> The “particularity” test is intended to create a benchmark for objectively determining group membership.<sup>51</sup> Yet its interpretation, like the visibility test, reveals implicit male bias. An opinion from the Third Circuit, *Fatin v. Immigration & Naturalization Service*,<sup>52</sup> characterizes this bias, stating:

“Limited in this way, the ‘particular social group’ identified by the petitioner may well satisfy the BIA’s definition of that concept, for if a woman’s opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as ‘so fundamental to [her] identity or conscience that [they] ought not be required to be changed’ (internal citation omitted). The petitioner’s difficulty, however, is that the administrative record does not establish that she is a member of this tightly defined group, for there is no evidence in that record showing that her opposition to the Iranian laws at issue is of the depth and importance required.”<sup>53</sup>

The Circuit Court rejected Fatin’s petition despite ample evidence that she was doubly at risk as a female member of a politically targeted family in Iran.<sup>54</sup> Moreover, the Court relied on an admittedly sparse record to conclude that a reasonable fact-finder could not find that the petitioner would face a threat amounting to persecution “simply” because she is a woman.<sup>55</sup> The opinion ignored her family’s political status when relevant, and her status as a politically-vulnerable woman when important to determine that she was at risk for *neither* reason. This case demonstrates that the visibility and particularity tests interlock to

reinforce male bias by privileging male-experienced persecution over other types of meritorious persecution.

The three “particular social group” tests create numerous barriers for proving persecution outside traditional male norms. Perhaps worse than rejecting legitimate DV claims vis-à-vis PSG tests, the courts have adopted the facially-neutral rule of “impermissibly circular,” which adversely impacts gender-based claims. Worse still, courts inconsistently apply the rule based on culturally-loaded, paternalistic beliefs about “deserving exceptions.”

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## THE “IMPERMISSIBLY CIRCULAR” ARGUMENT AND ITS OPPORTUNISTIC RATIONALITY

The “impermissibly circular” (“IC”) rule derives from the rationale that a PSG must exist independently of the persecution suffered by the applicant for asylum.<sup>56</sup> In other words, a PSG must exist before the alleged persecution to avoid defining a group within its own “contours.”<sup>57</sup> Past persecution, under some circumstances, may demonstrate a well-founded fear of future persecution; it cannot, however, constitute the substantive claim for protection.<sup>58</sup> In some cases, previously discussed PSG tests are interwoven together to form an IC analysis. For instance, at-risk youth within a certain country are unlikely to meet the persecution threshold because their membership is based on a self-defining, mutable characteristic—age.<sup>59</sup> IC, therefore, refers to the ways by which a PSG is narrowed in the common law to necessarily exclude claims.<sup>60</sup> Otherwise, supporters fear that the law would “sanction an illogical, circular ‘nexus’ construct, i.e., individuals are targeted for persecution because they belong to a group of individuals who are targeted for persecution.”<sup>61</sup> This fear seems to contradict the fundamental purposes for asylum to provide refuge to individuals who are persecuted for particularly iniquitable reasons.

Many gender-based claims, especially DV claims, are dismissed for being “impermissibly circular.”<sup>62</sup> U.S. courts consistently apply the IC rule, despite international consensus urging judges to include women as a PSG when appropriate.<sup>63</sup> Not only is it peculiar that federal courts apply a non-discrimination human rights treaty to exclude legitimate claims by women,<sup>64</sup> but it is even more unsettling when the U.S. is one of the four countries (out of 41) with a domestic policy that recognizes “women” as a PSG.<sup>65</sup> If arguably U.S. courts have become more gender-sensitive in response to the 1995 INS Guidelines, courts still embrace IC derivatives to deny DV claims, and to say that battered women are too large of a social group for the purposes of statutory construction.<sup>66</sup> Recent cases continue to show a reluctance to recognize freedom from gendered violence as a civil or political human right.

While there are indications that gender-based claims are receiving more serious treatment, adjudicators continue to perpetuate male bias and, in certain instances, substitute cultural bias for gender bias. It appears that the classic “worthy refugee” dilemma is only further strained with gender, race, and cultural complexities.

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Judges choose to find sympathetic exceptions among cases rather than choosing to embrace gender-based persecution into the law. This approach inevitably undermines future domestic violence claims. There are three primary areas of analysis ripe for inconsistent, biased discretion, which are appropriate to call “opportunistic rationality”: private/public persecution, state/non-governmental actors, and violent experiences. Opportunistic rationality reinforces that “reason” goes as far as the logician in gender-based asylum cases.

The first area of analysis is the distinction between “private” and “public” persecution. Domestic violence is essentially a misnomer as violence against partners takes place in both private and public view. Its description relates more to an antiquated conception of the relationship between perpetrator and survivor. Nevertheless, “[t]raditional human rights law (and virtually all other discourses except feminism) has separated out acts that occur in the public sector from those that transpire in the private sphere.”<sup>67</sup> As a result, courts have rejected otherwise legitimate asylum claims on the basis that there is no justification for state intervention. Over time, “private act” justifications have become less accepted, but remarkably it continues to have a menacing presence in U.S. asylum domestic violence claims, exemplified by a feminist BIA favorite: *The Matter of R-A-*.

*The Matter of R-A-*<sup>68</sup> is an archetypal example of the enduring belief that domestic violence is essentially a private matter. In this case, Rodi Alvarado, a native Guatemalan, sought refugee status after suffering years of violent physical, sexual, and emotional abuse from her husband, which included: her dislocated jaw for a late period, spinal injuries from a kicking attack after refusing an abortion and near physical disability when a thrown machete barely missed her fingers.<sup>69</sup> Alvarado demonstrated that domestic violence in Guatemala remains prevalent<sup>70</sup> and that few if any legal organizations could have helped her.<sup>71</sup> She was successful in the lower immigration court in arguing that her political opinion, opposing male domination, culminated in her well-founded fear of persecution, with which the BIA partially agreed.<sup>72</sup> The BIA ruled that the case turned on whether Alvarado’s husband had knowledge of her views and abused her *but for* her views.<sup>73</sup> In its determination, the BIA refused to apply the imputed political doctrine,<sup>74</sup> a device that allows the court to affirmatively impute a political opinion through evidentiary inferences, such as acts of resistance.<sup>75</sup> The imputed political doctrine is recommended by the INS Guidelines for cases such as this one. Instead, almost in defiance, the BIA dismissed INS Guidelines as “not controlling on us”<sup>76</sup> and found that “it is difficult to conclude on the actual record before us that there is any ‘opinion’ the respondent could have held, or convinced her husband she held, that would have prevented the abuse she experienced.”<sup>77</sup>

The BIA’s opinion in *The Matter of R-A-* rendered the petitioner’s belief that she deserves to live free from domestic violence as an apolitical viewpoint. In other words, although governing law does not require political opinions to be articulated in a certain way or venue,<sup>78</sup> the court was unwilling to recognize her claim as

worthy of intervention because it was not an *effective* opinion. The de-politicization of Alvarado's views reinforces the belief that domestic violence is not a public matter—it is simply another unfortunate private situation over which the state has no power.

The second area of analysis relates to non-state persecutors. DV claims reveal the historic reluctance of judges to view non-governmental actors as potential persecutors in the “safe haven” standard (among the three persecution criteria). Opponents to broadening the standard maintain a misguided belief that “construing private acts of violence to be qualifying governmental persecution, by virtue of inadequacy of protection, would obviate, perhaps entirely, the ‘on account of’ requirement of the statute.”<sup>79</sup> This is a slippery-slope argument that posits that updating the standard to reflect present-day realities will somehow validate any asylum claim. On the contrary, broadening the standard does not wash away state sovereignty; instead, it more accurately captures the complex violence patterns that we see today. There is a real distinction between inadequate state protection and unwillingness from the state to protect a class. Fortunately, the current U.S. jurisprudential trend is to acknowledge negative governmental action as rising to the standard. It remains to be seen whether this trend will widely apply to gender-based cases, in which petitioners usually do not have any practical protection at home. Equally worrisome, the modern “safe haven” standard is subject to high levels of discretion without codification. One example is Canada, which treats its gender guidelines more seriously, arguing that pain and suffering may result from willful government acquiescence.<sup>80</sup> The future of the modern “safe haven” standard will appreciably depend on the outcomes of current DV cases.

The final “opportunistic rationality” area of analysis is seen in violent experiences for which courts have created exceptions. Over the last decade, only one area of gender-based asylum claims has seen almost universal success: FGM cases.<sup>81</sup> These cases typify the “worthy refugee” dilemma where adjudicators choose to recognize the brutality of gender-related violence in one context while choosing to rationalize it in another. Half of the federal circuit courts and the BIA have found FGM as an act of persecution rising to the level of asylum protection during the last several years. Successful FGM cases will expose domestic violence claims to increased biased scrutiny at best.

FGM is not qualitatively distinct from DV but cultural bigotry and racism color the issues differently in some judges' eyes. Courts' treatment of domestic violence in relation to FGM exposes Western feminists' failure to incorporate strong racial and cultural analysis into its advocacy surrounding the issue. Prominent issue scholar Pamela Goldberg's three-case comparison in the Second Circuit found race to be a key distinction among the gender-based asylum claims that she studied.<sup>82</sup> Notably, in one case she describes that a black petitioner's “exotic ‘otherness’” did not reflect negatively against her as much as it supported her

claim against her black persecutors.<sup>83</sup> The problem with characterizing FGM cases as exceptionally violent is that it obscures urgency around violent experiences, such as domestic violence, that are more familiar to U.S. judges. “Uncivilized” violence against women and girls “over there” does not force courts to confront gender-based violence as a widespread, complex phenomenon. In actuality, it exacerbates cultural and racial stereotypes in a way that isolates and distances them from the issue. Inconsistent application of the law creates the potential for a racialized, tiered system by which violence is evaluated in the asylum law in a way that ultimately does not serve human rights law.

Opportunistic rationality is defined by false notions about the nature of violence, and it is reinforced by legal rationalizations about distinctions among these false notions. In addition to the PSG test interpretations, male bias plays a more subtle role in decision-making through arbitrary application that is ironically justified by North American feminist paradigms.

#### IV. NEW FORMULATIONS, NEW PROSPECTS?

The DHS supplemental brief submitted to the BIA on behalf of a domestic violence asylum-seeker seems to be a positive outcome for gender-based asylum cases. The brief presents “alternative particular social group formulations” to the respondent's claim: “Mexican women in an abusive domestic relationship who are unable to leave.”<sup>84</sup> DHS concedes that the respondent's argument fails under governing legal principles because the “central common characteristic” is circular.<sup>85</sup> In addition to the alternative formulations, the brief proposes that if either of its formulations meets the criteria for a cognizable claim, then remand is an appropriate mechanism to consider where “significant legal developments intervene.”<sup>86</sup> The last caveat outlined by the brief is that some, but not all, domestic violence survivors are eligible for asylum. However, like any other asylum claim, every applicable requirement must be satisfied for asylum to be granted.<sup>87</sup>

There are discernable signs of broader advocacy in the brief. In its general requirement discussion, the brief stated that the applicant may satisfy the safe haven standard by showing that government acquiescence is contributing to the respondent's persecution.<sup>88</sup> This position reinforces the authority of the INS Guidelines despite higher courts' attempts to dismiss their importance. Moreover, before laying out the formulations, the brief opined “especially given the uneven development of the standards governing cases like this one, it is important to articulate how a social group in such cases might be defined.”<sup>89</sup> Both of these statements are restrained, yet are striking examples that likely foreshadow the new administration's more liberal treatment of gender-based asylum cases.

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DHS articulates its formulations as “Mexican women in domestic relationships who are unable to leave” or “Mexican women who are viewed as property by virtue of their positions within a domestic relationship.”<sup>90</sup> DHS argues that a PSG claim is “best defined in light of the evidence about how the respondent’s abuser and her society perceive her role within the domestic relationship.”<sup>91</sup> The brief goes on to detail the evidence on record that supports the formulation, including her testimony that her husband “used to tell her that he could do anything he wanted to her because she belonged to him,” and it suggests that further fact-finding may substantiate that “social expectations in Mexico do little to disabuse [him] of his views in this regard.”<sup>92</sup> These formulations, DHS argues, satisfy the immutability, visibility, and particularity requirements, in which “complex and subtle” fact-finding may be required, and existing statutory definitions may be evoked, to reasonably interpret the claims.<sup>93</sup>

Interestingly, the DHS formulations are identical to some feminist scholars’ proposals over the last decade to transform DV into a cognizable asylum. The primary, though not exclusive, project by feminists during this time has been to find ways to narrow domestic violence claims so that they better fit into the three PSG factor tests. Feminists’ proposals can be generally categorized into three groups: 1) traditional approach: reformulating arguments to fit within existing legal interpretations; 2) feminist approach: arguing that existing interpretations are inaccurate or biased against legitimate claims, thus urging new rule construction and 3) reform approach: advocating for international and domestic statutory revisions to more clearly include “gender” into refugee law. DHS adopted a traditional approach that attempts to narrow the “domestic violence survivor” class by combining several elements: geography, political opinion, and case-specific facts.

The DHS formulations will test scholars’ proposals that were argued to meet judicial scrutiny when initially proposed—all other factors remaining consistent. One proposal, written by Patricia Seith in 1997, argues that domestic violence is analogous to FGM because both practices attempt to “control [ ] women’s sexuality,”<sup>94</sup> and that “[w]omen living in a particular country who are subject to domestic violence, are unable to get government protection, and oppose the practice” meet the BIA requirements under the seminal decision in *Kasigna*.<sup>95</sup> Another prominent scholar on domestic violence asylum, Laura Adams, made an argument for a doctrinal re-orientation that takes two views related to government acquiescence. One view is similar to the DHS formulation suggesting that a DV claim itself may implicate a foreign government’s failure to protect its citizen from persecution.<sup>96</sup> Adams takes the position that shifting the focus from the individual batterer to the state’s relationship to the harm is the necessary ingredient for a successful DV claim.<sup>97</sup> It will be interesting to see whether the BIA embraces any of these aspects, as both scholars introduced these ideas at least five years ago.

The fundamental belief that guides the traditional approach is that the current legal PSG construction is based on an honest, intellectual disagreement about proper interpretation. The consistent denial of DV claims is not a legal issue—it is a

political one. Many immigration judges may have a good faith belief that DV survivors simply do not meet the existing statutory requirements. However, it is clear that there are systemic impediments that influence the confines within which judges are able to interpret important legal considerations like statutory intent, case-specific facts, and policy issues. There is not much optimism for the successful outcome of the DV survivor in this particular case, considering the case law trend against DV claims and the absence of any significant changes to PSG construction, but there is optimism that the DHS brief will create opportunities for institutional change on a case-advocacy level.

Ultimately, institutional change is the best assurance that DV claims will be fairly adjudicated. There are a variety of ways to affect institutional change, even through notoriously conservative institutions, such as immigration courts. Attorneys who challenge prevailing norms and assumptions in asylum advocacy play an important role. Theorists, especially feminist scholars, have fulfilled a vital need by forming the basis by which some advocates have advanced alternative frames. Policy advocates (many of whom fall into the latter categories as well) also target the underpinnings that limit future progress for DV claims. Each approach, in its persistence and originality, promises that gender-based asylum claims, in time, will be treated more seriously by courts.

## V. CONCLUSION

I suggest that scholars concerned about gender-based asylum may want to shift their focus from re-thinking legitimate arguments about why gendered violence is deserving of asylum protection, to discussing systemic changes that can more directly affect decision-making. I believe in particular that strengthening the INS Guidelines can prove to be enormously beneficial. At least one persuasive feminist scholar credits the INS Guidelines with successful rape and FGM claims, in which the guidance established “a valuable legal framework for asylum claims based on domestic violence.”<sup>98</sup>

Since this assessment was over a decade ago, there are questions yet to be re-visited about the INS Guidelines. Should they be codified or at least be required reading for judges? If they remain nonbinding, is there additional authority that can make them even more persuasive? Based on its success, can gender-based violence be considered an independent basis (within PSG) upon which future persecution will be determined? With vast opportunity in a human rights era, thinkers can move away from defending its values to implementing its force.

The political climate toward human rights is ideal for engineering fine-tuned legal and policy reform strategies. It is a matter of catching up U.S. asylum law with its international commitments which is by no means easy, but it is possible given the strong framework outlined by scholars and advocates alike. DV survivors deserve asylum protection, as do other gender-based violence survivors. Human rights advocates’ chief test is to make this area a priority.

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## ENDNOTES

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<sup>1</sup> Jennifer Ludden, *Battered Asylum Seekers May Find U.S. Relief*, NATIONAL PUBLIC RADIO, July 22, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=106829943>.

<sup>2</sup> DEP'T OF HOMELAND SECURITY'S SUPPLEMENTAL BRIEF 3-4 (2009), <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf> [hereinafter *DHS brief*].

<sup>3</sup> Some feminists have embraced the term FGM over female circumcision for political reasons that are beyond the scope of this paper. I use FGM in this essay because it is the adopted terminology by other theorists in this field. My use of this term is not an endorsement of the political values embodied by it.

<sup>4</sup> See, e.g., *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (granting petition for a Somali woman who underwent female circumcision and feared future persecution); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (ruling in favor of female Somalian woman who feared forced female circumcision, and determining that such a procedure is a permanent and continuing act of persecution); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004) (holding that an Ethiopian mother had shown a derivative claim that established a well-founded fear that her daughter would be subjected to female circumcision if they were returned to her home country); *In re A-T*, 24 I. & N. Dec. 617 (A.G. 2008) (reversing the lower board's decision rejecting a Mali woman's petition for asylum on account of her female circumcision).

<sup>5</sup> Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT'L & COMP. L. 219, 219 (2006).

<sup>6</sup> Dana Neacsu, *The Red Booklet on Feminist Equality. Instead of a Manifesto*, 30 WOMEN'S RTS. L. REP. 106, 173 (2008) [hereinafter *The Red Booklet*] (quoting Catharine MacKinnon, *Points Against Postmodernism*, 75 CHI-KENT. L. REV. 687, 692 (2000)) ("As women's actual conditions are recognized as inhuman, those conditions are being changed by requiring that they meet a standard of citizenship and humanity that previously did not apply because they were women . . .").

<sup>7</sup> *Id.* at 171 ("[F]eminists have imprinted their content-based criticism of international law and helped its revitalization by forcing it to take into account women's perspectives and concerns. . . . Some feminists have tried to use international law as a way of revitalizing feminism, too").

<sup>8</sup> Amanda Blanck, *Domestic Violence as a Basis for Asylum Status: A Human Rights Based Approach*, 22 WOMEN'S RTS. L. REP. 47, 58 (2000) [hereinafter *Human Rights Based Approach*].

<sup>9</sup> G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193 U.N. Doc. A/RES/34/180 (1979).

<sup>10</sup> Berta Esperanza Hernandez-Truyol, *Latinas, Culture and Human Rights: A Model for Making Change, Saving Soul*, 23 WOMEN'S RTS. L. REP. 21, 26 (2001) (internal citations omitted).

<sup>11</sup> *Id.* (internal citations omitted).

<sup>12</sup> *The Red Booklet*, *supra* note 6, at 175.

<sup>13</sup> Jessika Johnson, *Rreshpja v. Gonzales: The Sixth Circuit's Failure to Consider Gender's Place in Asylum Claims*, 14 TUL. J. INT'L & COMP. L. 623, 625 (2006) [hereinafter *Sixth Circuit's Failure to Consider Gender*].

<sup>14</sup> See *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 150 (1951); *Protocol Relating to the Status of Refugees*, Oct 4, 1967, 606 U.N.T.S. 267, available at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>.

<sup>15</sup> *Sixth Circuit's Failure to Consider Gender*, *supra* note 13, at 627.

<sup>16</sup> Phyllis Coven, Office of International Affairs, Department of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women, Memorandum for Asylum Officers (May 26, 1995), available at [http://cgcs.uchastings.edu/documents/legal/guidelines\\_us.pdf](http://cgcs.uchastings.edu/documents/legal/guidelines_us.pdf).

<sup>17</sup> Patricia Seith, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1830 (1997) [hereinafter *Escaping Domestic Violence*].

<sup>18</sup> *Id.* at 1833.

<sup>19</sup> *Id.* at 1806-07.

<sup>20</sup> *Id.* at 1832.

<sup>21</sup> Danette Gomez, *Last in Line – The United States Trails behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 959 (2003-2004) (internal citations omitted).

<sup>22</sup> *Human Rights Based Approach*, *supra* note 8, at 56.

<sup>23</sup> Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT'L L. 49, 53 (2006) ("There is a rich feminist academic literature within refugee law that has analyzed how many domestic refugee decision-makers have failed to understand the meaning of 'gender'; the link between gender, discrimination, and persecution; and how acts that may appear to some decision-makers to be 'private,' and therefore not persecutory acts, are actually acts of gender-related persecution."). See also Laura Adams, *Beyond Gender: State Failure to Protect Domestic Violence Victims as a Basis for Granting Refugee Status*, 24 THOMAS JEFFERSON L. REV. 239 (2002) [hereinafter *Beyond Gender*]; Sharon Donovan, *No Where to Run...No Where to Hide: Battered Women Seeking Asylum in the United States Find Protection Hard to Come By: Matter of R-A-*, 11 GEO. MASON U. CIV. RTS. L.J. 301 (2000-2001) [hereinafter *Nowhere to Run*]; Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565 (1993) [hereinafter *Anyplace but Home*].

<sup>24</sup> *Sixth Circuit's Failure to Consider Gender*, *supra* note 13, at 626 ("The judiciary's treatment of gender-based asylum claims has been an ongoing problem internationally. The narrow drafting of the Refugees Convention (and similarly the INA) results in many women being denied asylum because their gender-based persecution does not qualify as an enumerated ground for refugee status.") (internal citations omitted).

<sup>25</sup> See, e.g., Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625 (1993).

<sup>26</sup> See, e.g., Allison Reimann, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1217 (2009) ("Harms such as rape and domestic violence have often been viewed as 'private,' not 'public,' and thus are seen as categorically different than persecution of, for example, a (male) political leader.") (internal citations omitted).

<sup>27</sup> See generally, Elizabeth P. Cramer, *Errata: Unintended Consequences of Constructing Criminal Justice as a Dominant Paradigm in Understanding and Intervening in Intimate Partner Violence*, 33 WOMEN'S STUDIES QUARTERLY 272, 274-75 (2005) ("The feminist paradigm, coming from the early activists who sensitized the nation about battered women, emphasized the role of gender socialization and patriarchy (male power and privilege) in understanding IPV.") (internal citations omitted).

<sup>28</sup> Research over the last decade is revealing two important trends leading to new domestic violence terminology. First, men, who are traditionally viewed as perpetrators, are also relationship violence survivors. Joseph H. Michalski, *Explaining Intimate Partner Violence: The Sociological Limitations of Victimization Studies*, 20 SOC. F. 613, 616 (2005). Second, same-gender violence is becoming increasingly visible. See Michael P. Johnson and Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. OF MARRIAGE AND FAM. 948, 951 (2000). It is also worth noting that intimate partner violence or IPV is the prevailing lexicon among health researchers, as studies find that men and women experience similar physical, mental, and emotional traumas from relationship abuse. See generally Kristin Carbone-López, Candace Kruttschnitt & Ross Macmillan, *Patterns of Intimate Partner Violence and Their Associations with Physical Health, Psychological Distress, and Substance Use*, 121 PUB. HEALTH REP. 382 (2006).

<sup>29</sup> See *Queer Law 2000: Current Issues in Lesbian, Gay, Bisexual, and Transgender Law Symposium Proceedings*, 26 N.Y.U. REV. L. & SOC. CHANGE 169, 187 (2000) ("Sexual orientation and gender identity may be characteristics that are conflated in the minds of the persecutor, or they just as easily may not be. In some societies a gay man is more likely to be the victim of persecution if he is viewed as the passive participant in a homosexual relationship or as effeminate. In other places, regardless of an individual's perceived 'effeminacy' or 'masculinity,' persecution of homosexuals is applied with merciless uniformity.")

<sup>30</sup> Other articles discuss the procedural aspects of asylum seeking in more detail. See generally *Escaping Domestic Violence*, *supra* note 17.

<sup>31</sup> I agree with radical feminist critiques that argue for a "substantive human rights" approach and that emphasize the obligation of the state to protect all people from exploitation. See generally *The Red Booklet*, *supra* note 6, at 175 (proposing a move away from identity-based protections to the universalized state protection system that is being developed by prominent feminist theory scholars, like Martha Fineman).

## ENDNOTES CONTINUED

- <sup>32</sup> Stop Violence Against Women, *Prevalence of Domestic Violence*, available at [http://www.stopvaw.org/Prevalence\\_of\\_Domestic\\_Violence.html](http://www.stopvaw.org/Prevalence_of_Domestic_Violence.html) (Feb. 1, 2006).
- <sup>33</sup> PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE iii (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.
- <sup>34</sup> CALLIE MARIE RENNISON, INTIMATE PARTNER VIOLENCE, 1993-2001, 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>.
- <sup>35</sup> MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 8 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.
- <sup>36</sup> *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977).
- <sup>37</sup> Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42).
- <sup>38</sup> *Escaping Domestic Violence*, *supra* note 17, at 1819.
- <sup>39</sup> *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir. 2003).
- <sup>40</sup> *See Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (offering a descriptive history of the origins of “particular social group” in the United Nations Convention Relating to the Status of Refugees).
- <sup>41</sup> *Human Rights Based Approach*, *supra* note 8, at 56.
- <sup>42</sup> *DHS brief*, *supra* note 2, at 6.
- <sup>43</sup> *See Rreshpja v. Gonzales*, 420 F.3d 551, 555-56 (6th Cir. 2005).
- <sup>44</sup> *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).
- <sup>45</sup> *Id.* Federal circuit courts have more recently adopted the *Acosta* standard, previously relying on the “voluntary association” standard and “close affiliation” standard. *See Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).
- <sup>46</sup> *DHS brief*, *supra* note 2, at 8 (“Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.”) (internal citations omitted).
- <sup>47</sup> *See In re A-M-E & J-G-U*, 24 I. & N. Dec. 69, 74 (BIA 2007) (“Whether a proposed group has a shared characteristic with the requisite ‘social visibility’ must be considered in the context of the country of concern and the persecution feared.”).
- <sup>48</sup> *See id.* (holding respondents failed to provide background evidence that they were at risk of criminal extortion because they were among a wealthy class in Guatemala).
- <sup>49</sup> *See Melendez v. U.S. Dep’t of Justice*, 926 F.2d 211, 218 (2d Cir. 1991) (stating that the prevailing evidentiary standard for asylum cases is “substantial evidence” of a well-founded fear for future persecution).
- <sup>50</sup> *Matter of S-E-G*, 24 I. & N. Dec. 579, 584 (BIA 2008).
- <sup>51</sup> *Id.*
- <sup>52</sup> *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).
- <sup>53</sup> *Id.* at 1241.
- <sup>54</sup> *Id.* at 1235.
- <sup>55</sup> *Id.* at 1241.
- <sup>56</sup> *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) (holding that “children from Northern Uganda who are abducted and enslaved by the LRA and oppose their involuntary servitude” do not constitute a “particular social group” under federal statute).
- <sup>57</sup> *Id.* at 170.
- <sup>58</sup> *Id.* at 172.
- <sup>59</sup> Circuit courts have met youth cases with notable hostility. *See, e.g.*, *Escobar v. Gonzales*, 417 F.3d 363, 367 (3d Cir. 2005) (denying petitioner’s claim that a homeless, Honduran youth constituted a particular social group in part because age is not a sufficient permanent characteristic).
- <sup>60</sup> The BIA and circuit courts have narrowly construed the term, “particular social group,” to distinguish among claimants. *See Fatin*, 12 F.3d at 1238 (“Both courts and commentators have struggled to define ‘particular social group.’ Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a ‘particular social group.’ Thus, the statutory language standing alone is not very instructive.”) (internal citations omitted).
- <sup>61</sup> *DHS brief*, *supra* note 2, at 10 (internal citations omitted).
- <sup>62</sup> *See Ludden*, *supra* note 1 (explaining that Kris Kobach, former counsel to Attorney General John Ashcroft, believes that domestic violence survivors are inherently outside protection); *id.* (“Basically the battered woman is saying, ‘I’m being persecuted, that is to say, I’m being battered, because I’m a member of a group.’ What’s the group? People who are being battered.”).
- <sup>63</sup> *See Human Rights Based Approach*, *supra* note 8, at 55 (“Commenting on the *Alvarado* decision, Deborah Anker, head of Harvard University’s Immigration and Refugee Clinic, indicated that the decision ran counter to ‘a growing body of international authority.’”) (internal citations omitted).
- <sup>64</sup> United Nations High Commissioner for Refugees, *Gender-related persecution and refugees*, at 8 (2005), available at <http://unhcr.org.au/pdfs/webdiscussionpaperjan05.pdf>.
- <sup>65</sup> *Id.* at 9.
- <sup>66</sup> *Rreshpja v. Gonzales*, 420 F.3d 551, 555-56 (6th Cir. 2005) (distinguishing petitioner’s case from a female circumcision case for the reason that the latter is culturally embedded and therefore more pervasive).
- <sup>67</sup> *Anyplace but Home*, *supra* note 23, at 573-74 (internal citations omitted).
- <sup>68</sup> 22 I. & N. Dec. 906 (BIA 1999).
- <sup>69</sup> *Nowhere to Run*, *supra* note 23, at 306.
- <sup>70</sup> *Id.* at 307.
- <sup>71</sup> *Id.* at 309.
- <sup>72</sup> *In re R-A-*, 22 I. & N. at 914.
- <sup>73</sup> *Id.*
- <sup>74</sup> *Escaping Domestic Violence*, *supra* note 17, at 1840 (pointing to the INS Guidelines’ emphasis on the availability of the “imputed political opinion” doctrine).
- <sup>75</sup> *Nowhere to Run*, *supra* note 23, at 312.
- <sup>76</sup> *In re R-A*, 22 I. & N. at 913.
- <sup>77</sup> *Id.* at 917.
- <sup>78</sup> *Nowhere to Run*, *supra* note 23, at 313.
- <sup>79</sup> Laura Adams, *Fleeing the Family: A Domestic Violence Victim’s Particular Social Group*, 49 LOY. L. REV. 287, 296 (2003) (quoting *In re R-A-*, Dec. 906, at 41-42).
- <sup>80</sup> *Escaping Domestic Violence*, *supra* note 17, at 1830, n.174.
- <sup>81</sup> *See Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007); *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005); *Barry v. Gonzales*, 445 F.3d 741 (4th Cir. 2006); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004); *Balogun v. Ashcroft*, 374 F.3d 492 (7th Cir. 2004); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2004); *In re A-T-*, 24 I. & N. Dec. 617 (A.G. 2008); *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); *In re D-V-*, 21 I. & N. Dec. 77 (BIA 1993).
- <sup>82</sup> Pamela Goldberg, *Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law*, 66 BROOK. L. REV. 309, 359 (2000).
- <sup>83</sup> *Id.*
- <sup>84</sup> *DHS brief*, *supra* note 2, at 11, 10.
- <sup>85</sup> *Id.* at 11.
- <sup>86</sup> *Id.*
- <sup>87</sup> *Id.* at 12.
- <sup>88</sup> *Id.* at 12-13.
- <sup>89</sup> *Id.* at 14.
- <sup>90</sup> *DHS brief*, *supra* note 2, at 14.
- <sup>91</sup> *Id.*
- <sup>92</sup> *Id.* at 15 (internal citations omitted).
- <sup>93</sup> *Id.* at 19 (explaining that the fact-finding and statutory guidance mostly refer to the latter two PSG tests, visibility and particularity, pointing to the respondent’s physical injuries shown to police as evidence of visibility, and referring to U.S. immigration law for statutory definitions for “domestic violence”).
- <sup>94</sup> *Escaping Domestic Violence*, *supra* note 17, at 1836.
- <sup>95</sup> *Id.* at 1837.
- <sup>96</sup> Adams, *supra* note 79, at 296-97.
- <sup>97</sup> *Beyond Gender*, *supra* note 23, at 246 (“Recent decisions by courts in three countries suggest a way out of the dilemma posed by the search for a causal nexus between an individual batterer and victim. . . . Thus, under this approach, we should ask why the state fails to protect the domestic violence victim, not why her partner or parent beats her.”).
- <sup>98</sup> *Escaping Domestic Violence*, *supra* note 17, at 1828.