

SAFE HARBOR: REFORMING THE U.S. ASYLUM SYSTEM TO BETTER PROTECT DOMESTIC VIOLENCE SURVIVORS

IVA PETKOVA[∞]

ABSTRACT

The world is facing a growing epidemic of violence against women, with millions of women and girls facing physical, sexual, and psychological harm by their intimate partners. Often, women have no legal recourse or avenues for protection in their home countries, so every year, thousands of domestic violence survivors flee to seek shelter in the United States. Upon their arrival, they are greeted by the opaque and convoluted web of rules and regulations that makes up the U.S. asylum system. In order to prove that they are refugees, asylum seekers must show, among other things, that they faced persecution on account of a protected ground: their race, religion, nationality, membership in a particular social group, or political opinion. Because no discrete ground exists for claiming asylum on the basis of gender or a history of domestic violence, survivors must make their claims under the flexible “particular social group” (“PSG”) ground. This requires them to not only make out all the other elements of an asylum claim, but also to craft a PSG definition that courts will accept. The uncertainty around this PSG ground has led to decades of inconsistent case law and barriers for survivors.

This Article uses the Northern Triangle countries of Guatemala, Honduras, and El Salvador as a paradigmatic lens through which to examine the significant scope of migration motivated by domestic violence and the urgency of developing a more accessible asylum system. It traces the evolution of the PSG ground in domestic violence asylum case law from the 1990s to today, highlighting the ways in which its highly politicized, inaccessible, and constantly fluctuating nature imposes barriers on survivors seeking shelter in the United States. The Article then proposes and evaluates two sorely needed reforms: issuing regulations clearly identifying domestic violence survivors as members of a cognizable PSG and amending the Immigration and Nationality Act (“INA”) to include “gender” as an independent ground for asylum. Until advocates can successfully reform the INA, the first proposal will ensure that survivors can continue to use the PSG ground, as imperfect as it may be. Both reforms are necessary to ensure that the United States lives up to its human rights ideals by offering a safe harbor to those in need of protection.

[∞] Immigration Staff Attorney at Catholic Charities Community Services in New York City. J.D., New York University Law School 2022. I am grateful to Professor Emily Sack for her support and guidance in developing this article and to the editors of the N.Y.U. Review of Law & Social Change for their hard work and thoughtful contributions!

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INTRODUCTION

In 1995, Rody Alvarado Peña desperately fled Guatemala to seek asylum in the United States.¹ After she married her husband at age 16, he physically and sexually abused her for a decade.² Ms. Peña repeatedly sought help from the Guatemalan police in vain, contacted “a judge who refused to ‘get involved in domestic disputes,’ and even fled to another part of Guatemala, ‘only to be hunted down and beaten unconscious by [her husband] for her attempt to move away.’”³ With no other options, she finally fled to the United States to save her life.⁴ Though her asylum claim was initially granted, it was reversed on appeal.⁵ The reversal was vacated in the face of public backlash, and she faced over a decade in legal limbo.⁶ Ultimately, Ms. Peña was lucky compared to many other asylum seekers: her asylum claim was finally granted in 2009, nearly 15 years after she initially applied.⁷

1. See Matter of R-A-, 22 I. & N. Dec. 906, 907, 909 (B.I.A. 1999).

2. *Id.* at 908; see also Anne Weis, *Fleeing for Their Lives: Domestic Violence Asylum and Matter of A-B-*, 108 CALIF. L. REV. 1319, 1333 (2020).

3. Weis, *supra* note 2, at 1333.

4. *Matter of R-A-*, 22 I. & N. Dec. at 908–09.

5. *Id.* at 907, 928.

6. Weis, *supra* note 2, at 1333–34.

7. *Id.*

Thousands of women and girls like Ms. Peña flee domestic violence in countries around the world to seek safety in the United States.⁸ Instead of finding a safe harbor, those who successfully complete the arduous and dangerous journey are faced with a U.S. immigration system that is heavily politicized, inaccessible, and constantly changing.⁹ Because domestic and gender-based violence are not explicitly listed as grounds for asylum under the U.S. Immigration and Nationality Act (“INA”),¹⁰ survivors of domestic violence must attempt to make out a claim using a workaround, the opaque “particular social group” ground,¹¹ in many cases without an attorney.¹² In effect, this system fails survivors of domestic violence. Though they are eligible for protection under international law,¹³ the United States enacts and upholds systemic barriers that re-traumatize survivors of domestic and gender-based violence and denies them equal access to asylum.¹⁴ Ms. Peña’s case epitomizes that of a person suffering violence at the hands of a private actor because of her membership in a particular social group whose government is unable or unwilling to help her, clearly meeting the definition of a refugee.¹⁵ So why did

8. See *infra* notes 38–39 and accompanying text; see also UNHCR, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 15–30 (Chiara Cardoletti-Carroll, Alice Farmer & Leslie E. Vélez eds., 2015) [hereinafter WOMEN ON THE RUN], <https://www.unhcr.org/us/media/women-run-full-report> [<https://perma.cc/ZSR9-SEVP>] (describing a study of 160 women seeking asylum in the United States which found they fled their home countries of El Salvador, Guatemala, Honduras, and Mexico due to severe violence from criminal armed groups and brutal domestic violence from which their home governments did not protect them). This Article focuses on women and girls because they are disproportionately affected by domestic violence. See *infra* note 172. For more information on how men and gender non-conforming individuals are impacted, as well as the unique challenges faced by trans women, see *infra* note 16.

9. See *infra* Part II.

10. Immigration and Nationality Act of 1965, 8 U.S.C. § 1101(a)(42)(A) (listing “persecution on account of race, religion, nationality, membership in a particular social group, or political opinion” as grounds for asylum).

11. *Id.*; TAHIRIH JUST. CTR., ENSURING EQUAL AND ENDURING ACCESS TO ASYLUM: WHY ‘GENDER’ MUST BE A PROTECTED GROUND 8 (2021) [hereinafter TAHIRIH REPORT], <https://www.tahirih.org/wp-content/uploads/2021/09/Ensuring-Equal-and-Enduring-Access-to-Asylum-Tahirih-Justice-Center.pdf> [<https://perma.cc/84ZE-G8XW>] (“Most gender-based claims are brought under the *particular social group* ground of asylum.”).

12. Immigration courts do not give defendants the right to government-funded representation, so immigrants must find and pay for their own lawyer or else appear pro se. A 2016 study by the American Immigration Council found that only 37% of all immigrants and 14% of detained immigrants secured legal representation. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [<https://perma.cc/U49Q-HFVZ>]. Statistics show that immigrants without legal representation have worse outcomes. See *infra* note 139 and accompanying text.

13. See *infra* notes 148–158.

14. See *infra* Section II.C.

15. The INA defines a “refugee” as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and

it take 15 years for Ms. Peña's case to finally succeed, and why are so many other similarly situated domestic violence survivors denied asylum?

This Article will trace the legal evolution of domestic violence survivors as a particular social group ("PSG") within the U.S. asylum system, highlighting some of the major challenges they face. It will provide recommendations for how the system must be reformed to ensure that survivors fleeing domestic violence are able to make a cognizable asylum claim. Two urgently needed reforms include issuing regulations clearly identifying domestic violence survivors as members of a cognizable PSG and amending the INA to include "gender" as an independent ground for asylum.

Part I of this Article will use the Northern Triangle countries of Guatemala, Honduras, and El Salvador to illustrate the significant scope of migration motivated by domestic violence and the urgency of developing a more accessible asylum system. Part II will provide an overview of the current U.S. asylum system and take an in-depth look at the uneven evolution of domestic violence as a PSG in order to identify the challenges facing domestic violence asylum seekers. Finally, Part III will evaluate the feasibility and potential impacts of two proposed changes: issuing regulations clearly identifying domestic violence survivors as members of a cognizable PSG and amending the INA to include "gender" as an independent ground for asylum. Though these proposals do not present a perfect or definitive solution, the government must urgently implement them to ensure that the United States upholds its human rights obligations and offers a safe harbor to those fleeing domestic violence.

is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act of 1965, 8 U.S.C. § 1101(a)(42)(A).

I.

A GLOBAL EPIDEMIC OF VIOLENCE AGAINST WOMEN

Violence against women is a global epidemic affecting millions of women and girls.¹⁶ The United Nations defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life.”¹⁷ Gender-based violence occurs when harmful acts are directed at an individual because of their gender and, as such, is rooted in gender inequality and harmful gender norms.¹⁸ Such abuse often takes the form of domestic violence or intimate partner violence, in which the harm “manifests as a pattern of abusive behavior toward an intimate partner in a dating or family relationship, where the abuser exerts power and control over the victim.”¹⁹

The World Health Organization (“WHO”) estimates that 30% of women worldwide have experienced physical and/or sexual violence in their lifetime.²⁰ Most of this violence is perpetrated by intimate partners: worldwide, 27% of women between ages 15 and 49 who have been in a relationship report that they have been subjected to some form of physical and/or sexual violence by an

16. See *infra* notes 20–21 and accompanying text. It should be noted that men and gender non-conforming individuals also experience domestic violence, but a detailed discussion of this important issue is beyond the scope of this Article. For more on this issue, see, for example, MANKIND INITIATIVE, <https://www.mankind.org.uk/> [<https://perma.cc/5V3U-GFC4>] (last visited Feb. 20, 2023); Laura Schneider, *In Latin America, Gender-Based Violence Against Men Is Little Talked About*, GLOB. VOICES (Mar. 1, 2015), <https://globalvoices.org/2015/03/01/in-latin-america-gender-based-violence-against-men-is-little-talked-about/> [<https://perma.cc/7KRQ-TVRY>]. This Article focuses on domestic violence against women, as they are disproportionately impacted. Women make up the majority of victims and are more likely than men to be injured or killed by intimate partners. See Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL’Y & L. 229, 231 (2009). Trans women are women and face this disproportionate risk of domestic violence. They also experience the additional risk of abuse as a result of their identity as transgender individuals. As such, a specific discussion of the challenges faced by trans women is also outside the scope of this Article. For more on this issue, see HUM. RTS. WATCH, “EVERY DAY I LIVE IN FEAR”: VIOLENCE AND DISCRIMINATION AGAINST LGBT PEOPLE IN EL SALVADOR, GUATEMALA, AND HONDURAS, AND OBSTACLES TO ASYLUM IN THE UNITED STATES (2020), https://www.hrw.org/sites/default/files/media_2020/10/centralamerica_lgbt1020_web_0.pdf [<https://perma.cc/QA76-M38Y>].

17. G.A. Res 48/104, Declaration on the Elimination of Violence Against Women, art. 1 (Feb. 23, 1994), <https://undocs.org/en/A/RES/48/104> [<https://perma.cc/F28E-FRFK>].

18. *Gender-Based Violence*, UNHCR, <https://www.unhcr.org/en-us/gender-based-violence.html> [<https://perma.cc/WAU8-4RN3>] (last visited Apr. 5, 2023).

19. *What is Domestic Abuse?*, UNITED NATIONS, <https://www.un.org/en/coronavirus/what-is-domestic-abuse> [<https://perma.cc/EZV5-2BA8>] (last visited Apr. 5, 2023).

20. *Violence Against Women*, WORLD HEALTH ORG. (Mar. 9, 2021), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> [<https://perma.cc/6SDN-585Y>].

intimate partner.²¹ Women face high risks of serious injury or death as a result of domestic violence: the WHO notes that 42% of women who experience intimate partner violence report injuries, and that intimate partners are responsible for as many as 38% of all murders of women worldwide.²² Other sources predict that as many as 40 to 70% of murders of women globally are attributable to intimate partners.²³ Additionally, women are at greatest risk while in the process of leaving their partner, a phenomenon known as separation assault.²⁴ A California study revealed that 45% of women killed in domestic homicides were killed while attempting to separate from their partner.²⁵

The Northern Triangle countries of Guatemala, Honduras, and El Salvador provide a paradigmatic example of the drivers that lead women to flee domestic violence in their home countries and seek shelter in the United States.²⁶ Ironically, despite the U.S. government's reluctance to accept such asylum seekers, it was decades of U.S. military and economic intervention in Latin America that helped undermine democracy and destabilize the region, contributing to the conditions that drive migrants to the border.²⁷ Today, the Northern Triangle is a particularly dangerous place for women as a result of bloody civil wars and conflicts, as well as the realities of patriarchal societies and impunity for perpetrators of violence against women.²⁸ In recent years, El Salvador, Honduras, and Guatemala have been ranked first, second, and fourth in the world, respectively, for rates of female homicides.²⁹ The forms of violence women face in these countries are intersectional: alongside extreme daily violence from criminal armed groups, they also

21. *Id.*

22. *Id.*

23. CLAUDIA GARCIA-MORENO, ALESSANDRA GUEDES & WENDY KNERR, WORLD HEALTH ORG., INTIMATE PARTNER VIOLENCE 1, 7 (Sarah Ramsey ed., 2012), https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf [<https://perma.cc/GLQ5-FPFQ>].

24. Dragiewicz & Lindgren, *supra* note 16, at 255–57 (finding a clear risk to women of domestic violence and abuse during separation).

25. *Id.*

26. Domestic violence and violence against women are not unique to these countries, nor is this region the only one in which women experience a patriarchal culture and impunity for their aggressors. These issues are also present in other countries, including the United States, to varying degrees. *See, e.g., Domestic Violence Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/stakeholders/domestic-violence-statistics/> (last visited Aug. 29, 2023) [<https://perma.cc/5FLQ-W86X>]. The Article provides the Northern Triangle as an example because large numbers of asylum seekers come from there, including many of the women in the cases that will be discussed in Section II.B. *See Weis, supra* note 2, at 1321.

27. Mark Tseng-Putterman, *A Century of U.S. Intervention Created the Immigration Crisis*, MEDIUM (June 20, 2018), <https://medium.com/s/story/timeline-us-intervention-central-america-a9bea9ebc148> [<https://perma.cc/J4P5-9Z3S>].

28. Weis, *supra* note 2, at 1321.

29. Mihaela Racovita, *Lethal Violence Against Women and Girls*, in GENEVA DECLARATION SECRETARIAT, GLOBAL BURDEN OF ARMED VIOLENCE 2015: EVERY BODY COUNTS 87, 94 (Anna Alvazzi del Frate, Keith Krause & Matthias Nowak eds., 2015), http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3_Ch3_pp87-120.pdf [<https://perma.cc/GUL8-6JUV>].

suffer from physical and sexual violence at home.³⁰ In 2015, the United Nations High Commissioner for Refugees (“UNHCR”) interviewed 160 Central American refugee women in the United States, who described life-threatening and degrading forms of domestic violence, including repeated rapes, sexual assaults, and violent physical abuse.³¹ The women emphasized that the police in their home countries could not protect them from harm; many of their abusive partners were members of criminal armed groups who often worked closely with corrupt police forces, making it effectively impossible for the abused women to seek protection.³²

National statistics corroborate these anecdotes. According to the National Violence Observatory in Honduras, there has been a 90% impunity rate for femicides over the past 15 years.³³ In El Salvador, the Salvadoran Organization of Women for Peace (“ORMUSA”) has noted that only five percent of the 6,326 reported crimes against women went to trial in 2016 and 2017.³⁴ This lack of justice, combined with fear or economic dependence on the aggressor, leads women to avoid reporting domestic violence altogether or to withdraw charges in the rare instances when they do report.³⁵

The COVID-19 pandemic has further exacerbated the risks of domestic and gender-based violence around the world. The Honduran Secretariat of Human Rights “noted an exponential increase in gender-based violence and domestic violence” during the national COVID-19-related curfew.³⁶ Similarly, the Mutual Support Group in Guatemala estimated that domestic violence cases increased by nearly 200% during pandemic lockdowns.³⁷ Likewise, in El Salvador, ORMUSA reported a 70% increase in domestic violence cases during the COVID-19 stay-at-home order in April 2020.³⁸

Increasing numbers of migrants from the Northern Triangle are fleeing to the United States and applying for asylum. In 2019, Guatemala, Honduras, and El

30. WOMEN ON THE RUN, *supra* note 8, at 4.

31. *Id.* at 3–4.

32. *Id.* at 23–25.

33. U.S. DEP’T OF STATE, HONDURAS 2020 HUMAN RIGHTS REPORT 18 (2020) [hereinafter HONDURAS HUMAN RIGHTS REPORT], <https://www.state.gov/wp-content/uploads/2021/03/HONDURAS-2020-HUMAN-RIGHTS-REPORT.pdf> [https://perma.cc/B24L-PB29].

34. U.S. DEP’T OF STATE, EL SALVADOR 2020 HUMAN RIGHTS REPORT 19 (2020) [hereinafter EL SALVADOR HUMAN RIGHTS REPORT], <https://www.state.gov/wp-content/uploads/2021/03/EL-SALVADOR-2020-HUMAN-RIGHTS-REPORT.pdf> [https://perma.cc/D3K5-2ZMR].

35. HONDURAS HUMAN RIGHTS REPORT, *supra* note 33, at 18.

36. *Id.*

37. U.S. DEP’T OF STATE, GUATEMALA 2020 HUMAN RIGHTS REPORT 21 (2020), <https://www.state.gov/wp-content/uploads/2021/10/GUATEMALA-2020-HUMAN-RIGHTS-REPORT.pdf> [https://perma.cc/VK75-D6Q8].

38. EL SALVADOR HUMAN RIGHTS REPORT, *supra* note 34, at 19 (2020).

Salvador were among the top origin countries of asylees in the United States.³⁹ Data from the UNHCR shows that asylum requests from the Northern Triangle countries increased by 370% between 2008 and 2014.⁴⁰ The gendered nature of domestic violence plays a large role in survivors' attempts to seek asylum in the United States. As discussed in Part II, asylum seekers must show that they are part of a persecuted group. Since domestic violence victims are disproportionately women, and such a high proportion of women are victims of domestic violence, some commentators argue that gender is a sufficient basis for claiming refugee status.⁴¹

Women seeking shelter from domestic violence across international borders not only face the deadly reality of separation assault, but also, as asylum seekers, encounter a convoluted U.S. asylum system,⁴² re-traumatizing court proceedings,⁴³ language barriers,⁴⁴ and challenges in finding employment, housing, and

39. U.S. DEP'T OF HOMELAND SEC., 2019 YEARBOOK OF IMMIGRATION STATISTICS 44–45, 47–48 (2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/yearbook_immigration_statistics_2019.pdf [<https://perma.cc/SZ5V-KNNJ>].

40. The number of Salvadorans, Hondurans, and Guatemalans requesting asylum in the neighboring countries of Belize, Costa Rica, Mexico, Nicaragua, and Panama also increased by 1,179% during the same time period, showing how many were desperately fleeing to seek safety elsewhere. Silva Mathema, *They Are Refugees: An Increasing Number of People Are Fleeing Violence in the Northern Triangle*, CTR. FOR AM. PROGRESS (Feb. 24, 2016), <https://americanprogress.org/article/they-are-refugees-an-increasing-number-of-people-are-fleeing-violence-in-the-northern-triangle/> [<https://perma.cc/G6JK-94FW>].

41. See Weis, *supra* note 2, at 1323.

42. See *infra* Part II.

43. See, e.g., Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 460 (2016) (arguing that the adversarial court system stacks the deck against traumatized asylum seekers, whose stories are often inconsistent, vague, or disjointed as a result of their trauma); see also Katrin Schock, Rita Rosner & Christine Knaevelsrud, *Impact of Asylum Interviews on the Mental Health of Traumatized Asylum Seekers*, 6 EUR. J. PSYCHOTRAUMATOLOGY 1, 6 (2015) (finding that asylum interviews can be re-traumatizing for asylum seekers).

44. See, e.g., Pooja Dadhania, *Language Access and Due Process in Asylum Interviews*, 97 DENV. L. REV. 707, 707 (2020) (arguing that the Department of Homeland Security's failure to provide interpreters to asylum applicants during their asylum interviews can silence asylum seekers with limited English proficiency by depriving them of the opportunity to meaningfully present their claims).

social services,⁴⁵ all of which hinder their attempts to seek safety and stability. Therefore, state protection mechanisms and an objective and empathetic immigration system are particularly important to keep women facing domestic violence safe. Unfortunately, the reality such women face upon arrival in the United States is far bleaker.

II.

BARRIERS TO MAKING SUCCESSFUL DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS

A. Overview of the U.S. Asylum System

When domestic violence survivors arrive in the United States to seek shelter, they are greeted by the opaque and convoluted web of rules and regulations that makes up the U.S. asylum system. An asylum seeker must demonstrate three things: “[T]hat [they are] a ‘refugee,’ that [they are] not barred from asylum for any of the reasons listed in our immigration laws, and that the decision-maker should grant asylum as a matter of discretion.”⁴⁶ This Article focuses on the first requirement, that is, on how a survivor of domestic violence can demonstrate that they meet the definition of a refugee. According to the INA, a refugee is:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁴⁷

45. See KRISTA M. PERREIRA, ROBERT CROSNOE, KARINA FORTUNY, JUAN PEDROZA, KJERSTI ULVESTAD, CHRISTINA WEILAND, HIROKAZU YOSHIKAWA & AJAY CHAUDRY, U.S. DEP’T OF HEALTH & HUM. SERVS., BARRIERS TO IMMIGRANTS’ ACCESS TO HEALTH AND HUMAN SERVICES PROGRAMS 4, 13 (2012), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/43821/rb.pdf [<https://perma.cc/TZU9-TSZY>] (describing refugees’ barriers to accessing health and human services programs, including language barriers, refugees’ reluctance to seek government help due to past trauma, and social service providers’ lack of knowledge and skills necessary to assist refugees); see also Miriam Jordan, *A Refugee Crisis Runs into a Housing Crisis*, N.Y. TIMES (Dec. 16, 2021), <https://www.nytimes.com/2021/12/15/us/afghan-refugees-housing.html> [<https://perma.cc/YC4X-UQXF>] (describing refugees’ struggles to find housing due to discrimination, the coronavirus pandemic, and housing shortages); Hikmet Jamil, Samer S. Kanno, Rami Abo-Shasha, Mazen M. Al-Saqa, Monty Fakhouri, & Bengt B. Arnetz, *Promoters and Barriers to Work: A Comparative Study of Refugees Versus Immigrants in the United States*, 8 NEW IRAQI J. MED. 19 (2012).

46. *Asylum Law: How it Works*, HUM. RTS. FIRST, <https://www.humanrightsfirst.org/asylum/asylum-law-and-procedure> [<https://perma.cc/6MR3-K299>] (last visited Feb. 23, 2023).

47. Immigration and Nationality Act of 1965, 8 U.S.C. § 1101(a)(42)(A). This definition is substantially similar to that in the United Nations Convention Relating to the Status of Refugees. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

To meet this definition, an asylum seeker must prove four elements: (1) persecutory harm or a well-founded fear of persecutory harm, (2) that the persecution was on account of a protected ground (race, religion, nationality, membership in a particular social group, or political opinion), (3) that there was a nexus between the persecution and the protected ground, and (4) that the state was unwilling or unable to protect them.⁴⁸

An asylum seeker must apply for asylum within one year of entering the United States.⁴⁹ Those who have entered the United States, regardless of whether or not they were inspected at the border, can submit an affirmative asylum application directly with the Department of Homeland Security (“DHS”) as long as they are not in removal proceedings.⁵⁰ They are then interviewed by an asylum officer to determine their eligibility.⁵¹ After the interview, the officer decides whether to grant their asylum claim at this stage.⁵² If the officer denies the claim, the government may initiate removal proceedings, in which case the asylum application will be referred to an immigration court, where an immigration judge will either grant or deny the application.⁵³

Asylum seekers apprehended at the border or within the United States face a slightly different process. They first undergo a credible fear interview before an asylum officer, during which the officer asks them questions about their experiences to determine whether there is a “significant possibility” that the asylum seeker can establish past persecution or a well-founded fear of future persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion if returned to their home country.⁵⁴ Individuals who are apprehended when re-entering after a previous deportation receive a reasonable fear interview instead, with a higher bar to meet: they must establish a “reasonable

48. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (discussing the definition of a refugee and holding that an asylum seeker must establish both a “well-founded fear” of persecution and that the persecution was “because of” a protected ground, such as political opinion (quoting 8 U.S.C. § 1101(a)(42)(A))); 8 U.S.C. § 1101(a)(42)(A).

49. *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 15, 2023), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process> [<https://perma.cc/NT4T-TLW9>].

50. *Asylum Law: How it Works*, *supra* note 46.

51. *The Affirmative Asylum Process*, *supra* note 49.

52. *Id.*

53. U.S. DEP’T OF JUST., IMMIGRATION COURT PRACTICE MANUAL § 3.1(b)(3), at 40–41 (2023) [hereinafter IMMIGRATION COURT PRACTICE MANUAL], <https://www.justice.gov/eoir/book/file/1528921/download> [<https://perma.cc/8XW6-UH DU>]; 8 C.F.R. § 1208.4(a)(3) (2022) (“[A]n asylum application has not been denied unless denied by an immigration judge or the Board of Immigration Appeals.”).

54. *Credible Fear Screenings*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 26, 2008), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/credible-fear-screenings> [<https://perma.cc/JSK5-P5M2>]; *Questions and Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 31, 2022), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening> [<https://perma.cc/GE7E-2PFV>].

possibility” that they will be persecuted on account of a protected ground if they return to their home country.⁵⁵

Asylum seekers who establish credible fear or reasonable fear based on their interview are permitted to remain in the United States pending the outcome of their asylum proceedings before an immigration judge.⁵⁶ Those who fail to establish credible or reasonable fear of persecution will be deported unless they request review by an immigration judge.⁵⁷ Asylum claims denied in immigration court can be appealed to the Board of Immigration Appeals (“BIA”).⁵⁸ Some BIA rulings constitute precedential decisions that are binding on immigration judges.⁵⁹ If the BIA denies the claim as well, the asylum seeker can file a petition for review in federal court.⁶⁰

The complexity of this system, along with the rising number of asylum applications in response to global instability, contributes to a growing backlog of cases that often requires asylum seekers to wait years before receiving a decision.⁶¹ Migrants with pending asylum applications are legally authorized to temporarily remain in the United States, but the lack of permanent status leaves them in a state of limbo that harms their mental health, leaves them vulnerable to exploitation by employers, and interferes with their ability to access financial aid, continue their education, and build lives in their new communities.⁶²

It is important to distinguish immigration courts from Article III federal courts. Immigration courts and the BIA are administrative bodies governed by the U.S. Attorney General, who is appointed by the President.⁶³ Because they are part

55. *Questions and Answers: Reasonable Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 18, 2013), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-reasonable-fear-screenings> [<https://perma.cc/R2GL-JFFE>].

56. Those with pending asylum applications do not have legal status in the United States, but they cannot be deported and do not accrue time unlawfully present in the country. *See In re* 5924482, at 4 (U.S. Citizenship & Immigr. Servs. Admin. Appeals Off. July 15, 2021) (non-precedent decision), https://www.uscis.gov/sites/default/files/err/A1%20-%20Certification/Decisions_Issued_in_2021/JUL152021_01A1245.pdf [<https://perma.cc/43FQ-CQSU>] (“[C]ertain noncitizens, including those who have a pending bona fide asylum application, do not accrue ‘unlawful presence’ even if they are in unlawful status.”); *Immigration Court Process, Including Appeals and Deportation Orders*, ASYLUM SEEKER ADVOC. PROJECT, <https://help.asylumadvocacy.org/faqs-immigration-court/> [<https://perma.cc/68MS-FDCD>] (last visited May 23, 2023).

57. *Questions and Answers: Credible Fear Screening*, *supra* note 54.

58. *Board of Immigration Appeals*, U.S. DEP’T OF JUST. (Sept. 14, 2021), <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/QBG6-8XWJ>].

59. *Id.*

60. *See id.*

61. *A Sober Assessment of the Growing U.S. Asylum Backlog*, TRAC IMMIGR. (Dec. 22, 2022), <https://trac.syr.edu/reports/705/> [<https://perma.cc/M8R6-BGS9>] (“The latest available data reveal that the number of asylum seekers waiting for asylum hearings in the U.S. has now reached at least 1,565,966 individuals . . . [T]he largest total number of pending asylum applications on record.”).

62. Cora Wright, *Asylum Office Delays Continue to Cause Harm*, HUM. RTS. FIRST (Oct. 3, 2022), <https://humanrightsfirst.org/library/barriers-and-backlog-asylum-office-delays-continue-to-cause-harm/> [<https://perma.cc/VE3H-T5FE>].

63. Weis, *supra* note 2, at 1332.

of the executive branch, as opposed to the judicial branch, immigration judges are not independent or politically neutral, and, in fact, play an important role in implementing the executive's immigration priorities.⁶⁴ The Attorney General even has the power to direct any immigration case to themselves for review.⁶⁵ Only after the BIA denies their claim may an asylum seeker petition for review before a federal judicial court.⁶⁶ As discussed in more detail in Section II.B below, this feature makes the immigration system particularly vulnerable to politically motivated decision-making and instability caused by administration changes.

B. Unstable Evolution of Domestic Violence Survivors as a “Particular Social Group”

1. Early Evolution

Because no discrete ground exists for claiming asylum on the basis of gender or a history of domestic violence, domestic violence survivors must make their claims under the flexible PSG ground.⁶⁷ Relative to other protected grounds like race or religion, a PSG asylum claim must meet a higher and more precise bar: in addition to making out the other elements of an asylum claim, individuals must also craft a PSG that will be accepted by courts.⁶⁸ A cognizable PSG must have three characteristics. First, it must be comprised of members who share a common immutable characteristic they cannot change or that is so “fundamental to the individual's identity or conscience” that the person should not have to change it in

64. *Id.*; SARAH PIERCE, MIGRATION POL'Y INST., OBSCURE BUT POWERFUL: SHAPING U.S. IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW (2021), https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf [<https://perma.cc/GP6S-MRAF>].

65. PIERCE, *supra* note 64; 8 C.F.R. § 1003.1(h) (2022) (“The [BIA] shall refer to the Attorney General for review of its decision all cases that: (i) The Attorney General directs the Board to refer to him.”); *Id.* § 1003.1(d)(7) (“The decision of the [BIA] shall be final except in those cases reviewed by the Attorney General . . .”).

66. *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 53, § 6.1, at 101 (“[A]ppeals of immigration judge decisions should be made to the [BIA].”); *Board of Immigration Appeals*, *supra* note 58 (“Most BIA decisions are subject to judicial review in the federal courts.”).

67. TAHIRIH REPORT, *supra* note 11, at 8.

68. *Matter of W-Y-C-*, 27 I. & N. Dec. 189, 191–92 (B.I.A. 2018) (“[I]t is an applicant's burden to specifically delineate her proposed social group . . .”); NAT'L IMMIGRANT JUST. CTR., PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP 8 (2021) [hereinafter PSG PRACTICE ADVISORY], <https://immigrant-justice.org/for-attorneys/legal-resources/file/practice-advisory-applying-asylum-based-membership-particular> [<https://perma.cc/ZV6P-A4WK>] (“The BIA's tests purport to tie the hands of adjudicators, forcing them to determine asylum eligibility based on whether an applicant can craft a sufficient PSG . . .”).

order to avoid persecution.⁶⁹ Second, the group must be socially distinct in that it “should generally be recognizable by others in the community.”⁷⁰ Lastly, it must be defined with particularity, meaning “in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”⁷¹

In 1995, the Immigration and Naturalization Service (the precursor to today’s U.S. Citizenship and Immigration Services) released guidelines on adjudicating asylum claims from women, in which it noted that rape, sexual abuse, and domestic violence are abuses directed primarily at women and girls that cause serious stigma in many societies and that may serve as evidence of past persecution on account of protected grounds.⁷² It also noted that the presence of sexual violence in a claim should not lead adjudicators to automatically conclude that the claim consists of purely personal harm, thereby making the claimant ineligible for asylum.⁷³ Though the guidelines were developed for asylum officers, they nevertheless had a persuasive effect on many immigration and federal court judges.⁷⁴ Despite this, the lack of a precedential ruling in the 1990s on whether domestic violence, or indeed gender, could serve as a basis for asylum led to inconsistent case law on this question: adjudicators rejected gender-based PSGs for being too broad, based on findings that the asylum seeker was persecuted for “personal reasons” rather than due to her gender, and on concerns about “opening the floodgates” to waves of domestic violence asylum claims.⁷⁵

Though not framed as a domestic violence case, the 1996 BIA decision in *Matter of Kasinga* provided some practical guidance for making out gender violence-based claims. A young woman fled a polygamous marriage and female genital cutting in Togo.⁷⁶ The BIA granted her asylum predicated on her membership in the PSG of “young women of the Tchamba-Kunsuntu Tribe who have not had [female genital cutting], as practiced by that tribe, and who oppose the practice.”⁷⁷

69. See, e.g., *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237–43 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 210–18 (B.I.A. 2014), *vacated in part*, *Garay Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); *Matter of Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985), *overruled in part by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987), *disapproved of by Valle-Zometa v. INS*, 921 F.2d 282 (9th Cir. 1990) (unpublished table decision).

70. *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586 (B.I.A. 2008).

71. *Id.* at 584.

72. Off. of Int’l Affs., Immigr. & Naturalization Serv., Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995), *as reprinted in* OFF. OF THE LEGAL ADVISOR, U.S. DEP’T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1991–1999, at 215, 216–17, 218 (Sally J. Cummins & David P. Stewart eds., 2005), <https://2009-2017.state.gov/documents/organization/139394.pdf> [<https://perma.cc/7TBN-W22W>].

73. *Id.* at 9.

74. PSG PRACTICE ADVISORY, *supra* note 68, at 3 (citing, e.g., *Cece v. Holder*, 773 F.3d 662, 676 (7th Cir. 2013); *Fiadjoe v. Att’y Gen. of U.S.*, 411 F.3d 135, 158 (3d Cir. 2005); *Mohammed v. Gonzales*, 400 F.3d 785, 797–98 (9th Cir. 2005)).

75. *Id.* at 2–3.

76. *Matter of Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

77. *Id.*

This early victory provided a roadmap for asylum lawyers and asylum seekers of how to word the specific and narrowly tailored PSGs required to make out gender-based asylum claims.⁷⁸ However, subsequent cases were not as straightforward.

The BIA's first precedential opinion in a domestic violence asylum case was the seminal *Matter of R-A-*, discussed in this Article's introduction.⁷⁹ Rody Alvarado Peña, a Guatemalan woman, futilely sought help in her home country after suffering a decade of brutal physical and sexual abuse at the hands of her husband before finally seeking asylum in the United States.⁸⁰ She used a PSG following a similar format to *Kasinga*—'X women who have experienced Y, and who hold opposing beliefs'—in this case, "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."⁸¹ Though her asylum claim was initially granted by an immigration judge, the BIA reversed on appeal, holding that the PSG did not meet the requirements of being "socially distinct" and described with "particularity" because it was "defined largely in the abstract" and had "little or no relation to the way in which Guatemalans might identify subdivisions within their own society."⁸² This was the first time the BIA had issued a precedential opinion in a domestic violence asylum case, and it represented a major setback for asylum seekers and advocates.⁸³ However, the public controversy surrounding the decision led then-Attorney General Janet Reno to vacate the decision, with a promise that the government would issue new regulations for domestic violence asylum cases.⁸⁴ These regulations were never implemented, so Ms. Peña remained in legal limbo until finally receiving asylum in 2009, nearly 15 years after filing her initial application.⁸⁵ Her asylum claim was granted by an immigration judge, not the BIA, so the decision was not binding on future asylum cases; as a result, immigration judges continued to deny domestic violence asylum claims for various reasons.⁸⁶

Matter of L-R- was briefed while the decision in *Matter of R-A-* was pending on remand to an immigration judge.⁸⁷ L.R. sought asylum from an abusive partner in Mexico who had violently raped her and then subjected her to two decades of

78. Weis, *supra* note 2, at 1333.

79. *Id.* at 1334.

80. *Matter of R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999).

81. *Id.* at 907.

82. *Id.* at 918.

83. PSG PRACTICE ADVISORY, *supra* note 68, at 3 ("When the BIA issued its precedential decision in *Matter of R-A-*, advocates were sorely disappointed." (citation omitted)).

84. Weis, *supra* note 2, at 1334.

85. *Id.*

86. *Id.*

87. In 2008, the BIA remanded *Matter of R-A-* to an immigration judge. *Matter of R-A-*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/our-work/matter-r-a-> [<https://perma.cc/P7VC-2DQU>] (last visited Apr. 7, 2023). While that was still pending, *Matter of L-R-* was briefed in the spring of 2009. *See id.* *Matter of R-A-* was finally decided in December 2009, granting asylum to Rody Alvarado Peña. *Id.* An immigration judge granted L.R. asylum in July 2010. *Id.*

captivity, physical force, death threats, and other horrendous abuse from which the police did nothing to protect her.⁸⁸ The immigration judge denied L.R.’s claim, finding that her abuser did not beat her because of her gender or lack of power within the relationship, but due to his own violent tendencies.⁸⁹ DHS issued a brief agreeing that L.R.’s proffered PSG—“Mexican women in abusive domestic relationships who are unable to leave”—did not meet the standard because it was “centrally defined by the existence of the abuse” and therefore was “impermissibly circular.”⁹⁰ In other words, they reasoned that an asylum seeker cannot claim asylum because she suffered abuse on account of being in an abusive relationship.⁹¹ They noted that it might have constituted an acceptable PSG if she had instead worded it 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.”⁹² By their logic, simply rewording the PSG to remove reference to the abuse eliminates the issue of circularity. Though unfavorable to L.R., the DHS brief was significant in that it clarified that domestic violence could be a ground for asylum and provided guidance for crafting a successful PSG.

2. Matter of A-R-C-G-

In 2014’s *Matter of A-R-C-G-*, the applicant and her three minor children fled her husband’s prolonged physical and sexual abuse in Guatemala, which she had futilely attempted to escape on numerous occasions.⁹³ The BIA granted her asylum on the basis of her membership in the PSG “married women in Guatemala who are unable to leave their relationship.”⁹⁴ It reasoned that when women cannot leave their marriages, gender and marital status can both be immutable characteristics sufficient to make out an asylum claim.⁹⁵ It also found the group to be socially distinct because “Guatemalan society . . . makes meaningful distinctions based on” the characteristics of the group.⁹⁶ Crucially, the BIA noted that the immutability, social distinction, and nexus requirements are heavily fact-specific and dependent on the circumstances in an applicant’s home country.⁹⁷

88. *Matter of L-R-*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/our-work/matter-l-r> [<https://perma.cc/VZU8-A98A>] (last visited Apr. 7, 2023). *Matter of L-R-* is an unpublished decision.

89. *Id.*

90. Dep’t of Homeland Sec.’s Supplemental Brief at 5–6, *Matter of L-R-* (B.I.A. Apr. 13, 2009), https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [<https://perma.cc/2NGR-JH8Z>].

91. *Id.* at 14.

92. *Id.*

93. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014), *overruled by* *Matter of A-B- (A-B- I)*, 27 I. & N. Dec. 316 (A.G. 2018), *abrogated by* *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

94. *Id.* at 388–89.

95. *Id.* at 392–93.

96. *Id.* at 393–94.

97. *Id.* at 394–95.

Though groundbreaking, *A-R-C-G*'s narrow holding and unclear reasoning limited the extent of its impact. Blaine Bookey, one of the attorneys in the case, noted that “[n]otwithstanding the undeniable contribution of *Matter of A-R-C-G* for the broader legal principle it contains (that domestic violence may serve as a basis for asylum), the legal holding in the case is narrow and fact-specific, leaving immigration judges a great deal of discretion.”⁹⁸ Indeed, immigration judges applied the holding differently, yielding opposite outcomes in cases with similar fact patterns.⁹⁹ The opacity stems partly from *A-R-C-G*'s incomplete explanation of how each element of the asylum case was established; because DHS had conceded several elements, the BIA did not fully explain its reasoning.¹⁰⁰ This made it difficult for immigration judges to apply the decision consistently in other contexts.¹⁰¹ Though the holding was a clear and positive development for asylum seekers reflective of the generally pro-asylum Obama administration, the BIA's failure to explain its reasoning left other domestic violence asylum seekers “vulnerable to the whims” of future administrations.¹⁰²

3. *Matter of A-B- and Matter of L-E-A-*

The confusion was further compounded beginning in 2018 by the involvement of the U.S. Attorney General's (“AG”) office in two lines of cases: *Matter of A-B-* and *Matter of L-E-A-*.¹⁰³ The AG's decisions in these cases exemplify the politics-induced volatility of the asylum system.¹⁰⁴ In addition to instability caused by the differing interpretations of subsequent AGs,¹⁰⁵ there is also a marked lack of “legal basis or evidentiary support” in much of their anti-asylum dicta,¹⁰⁶ laying bare the extralegal motivations guiding their decision making.

98. Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1, 4 (2016).

99. *Id.* at 13–14 (describing how some immigration judges “recognize[d] that *A-R-C-G* does not require existence of a formal marriage, but rather, the inquiry centers on the existence and nature of the relationship and whether it is immutable and recognized by society,” whereas others “distinguished *A-R-C-G* on this same ground” or “declined to apply *A-R-C-G* even in cases where women were in long-standing relationships with their abusers, had children together, and held themselves out as husband and wife in the community”).

100. See *Matter of A-R-C-G*, 26 I. & N. Dec. at 393, 395; Bookey, *supra* note 98, at 16.

101. See Bookey, *supra* note 98, at 12–19 (describing divergent analysis and jurisprudence post-*A-R-C-G* about whether the *A-R-C-G* precedent should be extended to cases involving women who never formally married their abusers, “the parameters of the ‘unable to leave’” their abuser requirement for establishing membership in the social group, the framework for evaluating whether a woman showed that her government was “unable or unwilling” to protect her, and the extent to which the court considers the woman's attempts at relocation, as well as judges' application of “personal views about the nature of domestic relationships”).

102. Weis, *supra* note 2, at 1338.

103. See *infra* notes 109–132 and accompanying text.

104. *Id.*

105. *Id.*

106. PSG PRACTICE ADVISORY, *supra* note 68, at 14.

In *Matter of A-B-*, a woman fleeing physical, emotional, and sexual abuse by her ex-husband in El Salvador claimed asylum on the basis of her membership in the PSG of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common” with their partners.¹⁰⁷ The immigration judge denied all relief.¹⁰⁸ Though the BIA reversed and granted asylum, the case was afterward referred to then-AG Jeff Sessions in 2018, who issued *A-B-I*, a decision with significant anti-asylum dicta that severely restricted the feasibility of domestic violence-based asylum claims.¹⁰⁹ The decision first overruled *Matter of A-R-C-G-* on procedural grounds, claiming that the decision was the product of concessions by DHS and not the application of law by the BIA.¹¹⁰ More broadly, Sessions reasoned that a claim of domestic violence perpetrated by non-governmental actors “generally” will not qualify a person for asylum in the United States.¹¹¹ He found that domestic violence is a “private” harm related to a “personal relationship” and therefore cannot be harm based on a protected ground,¹¹² and that gender-based PSGs are impermissibly defined by the harm suffered and so do not exist independently of the persecution.¹¹³ The decision ambiguously employed two different standards for how an asylum claim must show government action: it interchangeably described the bar as the government being “unable or unwilling to control” a non-state persecutor, and the government “condon[ing] [the behavior] ‘or at least demonstrat[ing] a complete helplessness to protect the victims.’”¹¹⁴

In 2019, AG William Barr issued another decision attempting to limit asylum, *L-E-A-II*, this time dealing with family-based PSGs.¹¹⁵ In the previous 2017 *L-E-A-I* ruling, the BIA had accepted the respondent’s claims that he was a member of the PSG of “his father’s immediate family,” finding that this qualified as a cognizable social group.¹¹⁶ In *L-E-A-II*, Barr overruled a portion of this holding, finding that the BIA failed to conduct a proper analysis of the PSG and reiterating the idea that PSGs must meet the three requirements of immutability, particularity, and social distinction.¹¹⁷ Despite his insistence on the importance of case-by-case

107. *Matter of A-B- (A-B-I)*, 27 I. & N. Dec. 316, 321 (A.G. 2018).

108. *Id.*

109. *Id.* at 320.

110. *Id.* at 316, 331 (“Because of DHS’s multiple concessions, the Board performed only a cursory analysis of the three factors required to establish a particular social group.”).

111. *Id.* at 320.

112. *Id.* at 338–39.

113. *Id.* at 335. See *supra* notes 89–90 and accompanying text for more discussion of PSG definitions that reference the abuse suffered.

114. See *id.* at 337 (quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)) (using both phrases interchangeably).

115. *Matter of L-E-A- (L-E-A-II)*, 27 I. & N. Dec. 581 (A.G. 2019); see also *Matter of L-E-A- (L-E-A-I)*, 27 I. & N. Dec. 40, 43 (B.I.A. 2017) (avoiding addressing the circumstances regarding family status that determine whether or not a family is a PSG).

116. *L-E-A-I*, 27 I. & N. Dec. at 43.

117. *L-E-A-II*, 27 I. & N. Dec. at 581–82.

analysis,¹¹⁸ Barr asserted that individuals claiming family-based PSGs will find it difficult to establish the social visibility element,¹¹⁹ and so most such claims will fail.¹²⁰

In January 2021, Acting AG Jeffrey Rosen issued a follow-up opinion in *Matter of A-B-*, referred to as *A-B- II*, claiming a need to give additional guidance on issues raised in *A-B- I*.¹²¹ *A-B- II* did not directly address the definition of a PSG, but it did “impl[y] that asylum claims based on PSG membership . . . require different standards than asylum claims based on other grounds.”¹²² This exacerbated the confusion caused by *A-B- I*.¹²³ Rosen claimed that *A-B- I* had not intended to create a new standard for the government’s “unable or unwilling to control” element, though no explanation was given for the inconsistent usage of “condoned” or “complete helplessness” in that decision.¹²⁴ Rosen also inexplicably held that *L-E-A- I* “refined” the existing standard and created a two-prong test for determining the nexus element, even though no such test existed in any *L-E-A-* decision.¹²⁵

After President Biden took office, Merrick Garland was appointed as AG in March 2021.¹²⁶ Within months, he issued *A-B- III* and *L-E-A- III*, reinstating the possibility of domestic violence-based asylum claims by vacating previous decisions that held otherwise.¹²⁷ In *A-B- III*, Garland vacated *A-B- I* and *A-B- II*, holding that immigration judges and the BIA “should follow pre-*A-B- I* precedent,

118. *Id.* at 584.

119. This element requires that the group defined in the PSG must be recognizable by others in the community as a distinct group. *See supra* note 70 and accompanying text.

120. *Id.* at 586.

121. The decision stated:

I am referring and reviewing this matter to provide additional guidance concerning three recurring issues in asylum cases involving applicants who claim persecution by non-governmental actors on account of the applicant’s membership in a particular social group: (1) whether Attorney General Sessions’s 2018 opinion altered the existing standard for determining whether a government is “unwilling or unable” to prevent persecution by non-governmental actors; (2) whether a government that makes efforts to stop the harm in third-party persecution cases is “unable or unwilling” to prevent persecution; and (3) whether a protected ground must be more than a but-for cause in order to be at least “one central reason” for persecuting an asylum applicant.

Matter of A-B- (A-B- II), 28 I. & N. Dec. 199, 200 (A.G. 2021).

122. PSG PRACTICE ADVISORY, *supra* note 68, at 15.

123. *Id.*

124. *A-B- II*, 28 I. & N. Dec. at 199 (stating that the “complete helplessness” language and the “unable or unwilling” standard are “interchangeable formulations”).

125. *Id.* at 208; PSG PRACTICE ADVISORY, *supra* note 68, at 15.

126. *Attorney General: Merrick B. Garland*, U.S. DEP’T OF JUST. (Nov. 28, 2022), <https://www.justice.gov/ag/bio/attorney-general-merrick-b-garland> [https://perma.cc/C6VC-3HY3].

127. *Matter of A-B- (A-B- III)*, 28 I. & N. Dec. 307, 307 (A.G. 2021) (vacating *A-B- I* and *A-B- II* and holding that “harm may qualify as ‘persecution’ if it is inflicted . . . by non-governmental actors”); *Matter of L-E-A- (L-E-A- III)*, 28 I. & N. Dec. 304, 305 (A.G. 2021) (vacating *L-E-A- II* “so as to return the immigration system to its preexisting state of affairs”).

including *Matter of A-R-C-G*.¹²⁸ He was critical of *A-B- I*, noting that its broad language created “a strong presumption against asylum claims based on private conduct” that caused confusion and threatened to discourage case-by-case adjudications.¹²⁹ He highlighted other portions of the decision that “spawned confusion,” including whether the decision changed the “unable or unwilling to control” standard for government action.¹³⁰ In *L-E-A- III*, Garland vacated *L-E-A- II* and returned the family-based PSG case law to its “preexisting state of affairs.”¹³¹ He noted that *L-E-A- II*’s reasoning was inconsistent with that of several courts of appeals that recognize family-based PSGs, and he criticized its PSG analysis as unnecessary, given that the asylum claim was rejected on other grounds.¹³²

C. Summary of the Challenges Facing Domestic Violence Survivors

AG Garland’s decisions are undoubtedly positive developments for survivors of domestic violence and other groups seeking asylum under the PSG ground. Not only do they open a path for domestic violence-based PSG claims, but they also acknowledge and seek to rectify the inconsistency of decisions by immigration judges and the BIA.¹³³ Garland unequivocally states that rulemaking, not agency adjudication, is a preferable method for clarifying PSG standards.¹³⁴ His actions in support of domestic violence survivors seeking asylum seem to be aligned with the Biden administration’s overall position. On February 2, 2021, President Biden issued an Executive Order calling for the AG and DHS to “conduct a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims and determinations of refugee status to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards.”¹³⁵ These developments bring hope that guidance may be forthcoming in the form of a rule clarifying PSG standards.

However, this hope alone is insufficient for domestic violence asylum seekers relying on the PSG ground for protection. The above survey of the last three decades of asylum case law reveals two concerning realities. First, because of the

128. *A-B- III*, 28 I. & N. Dec. at 307.

129. *Id.* at 309.

130. *Id.*

131. *L-E-A- III*, 28 I. & N. Dec. at 305.

132. *Id.* at 305 & n.2.

133. See *A-B- III*, 28 I. & N. Dec. at 309 (“*A-B- I* threatens to create confusion and discourage careful case-by-case-adjudication of asylum claims. . . . [T]he issues should instead be left to the forthcoming rulemaking, where they can be resolved with the benefit of a full record and public comment.”); see also *L-E-A- III*, 28 I. & N. Dec. at 305 (“As *L-E-A- II* acknowledged, its analysis is inconsistent with the decisions of several courts of appeals I conclude that *L-E-A- II* should be vacated in its entirety so as to return the immigration system to the preexisting state of affairs pending . . . the issuance of a final rule”).

134. *A-B- III*, 28 I. & N. Dec. at 308; *L-E-A- III*, 28 I. & N. Dec. at 305.

135. Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

administrative nature of immigration law, the fate of asylum seekers is often tied to the priorities of the administration in power and the AG in office at the time.¹³⁶ This leads to disruptive fluctuations within the system as new administrations potentially take office every four years, leading to instability for asylum seekers who likely lack the political and legal knowledge to navigate the current state of the law.¹³⁷

Second, the outcome of an asylum case depends heavily on a particular judge's interpretation of the facts. Attorney Blaine Bookey explained: “[W]hether a woman fleeing domestic violence will receive protection in the United States seems to depend not on the consistent application of objective principles, but rather on the view of her individual judge, often untethered to any legal principles at all.”¹³⁸ Asylum decision statistics support this claim: in the same immigration court in New York, denial rates between 2015 and 2020 ranged from 95% to three percent depending on the judge.¹³⁹ Relatedly, asylum seekers with access to a lawyer have an advantage in framing their PSG and their case in a way more likely to be accepted by a judge. In 2020, the odds of being successful were much lower for unrepresented asylum seekers (17.7%) than for those with legal representation (31.1%).¹⁴⁰ Pro se applicants, LGBTQ applicants, and others from particularly vulnerable groups who do not fit a “standard” fact pattern face greater difficulties in obtaining asylum.¹⁴¹

It can be difficult to quantify the exact degree to which these factors hinder domestic violence survivors from receiving asylum in the United States. A comprehensive picture of the asylum landscape remains elusive because many immigration court decisions are unpublished and not publicly available.¹⁴² The

136. See *supra* Section II.B.3.

137. See *id.*

138. Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 147–48 (2013).

139. *Judge-by-Judge Asylum Decisions in Immigration Courts: FY 2015–2020*, TRAC IMMIGR., <https://trac.syr.edu/immigration/reports/judge2020/denialrates.html> [<https://perma.cc/MZ25-5E4K>] (last visited Feb. 20, 2023).

140. *Asylum Denial Rates Continue to Climb*, TRAC IMMIGR. (Oct. 28, 2020), <https://trac.syr.edu/immigration/reports/630/> [<https://perma.cc/H4K9-A442>].

141. See, e.g., *Quintero v. Garland*, 998 F.3d 612, 632 (4th Cir. 2021) (“[W]e deem it unreasonable and fundamentally unfair to expect *pro se* asylum seekers—many of whom suffer from the effects of trauma and lack literacy, English proficiency, formal education, and relevant legal knowledge—to even understand what a particular social group is, let alone fully appreciate which facts may be relevant to their claims and articulate a legally cognizable group.”); ARI SHAW & NAMRATA VERGHESE, UCLA SCH. OF L., WILLIAMS INST., LGBTQI+ REFUGEES AND ASYLUM SEEKERS: A REVIEW OF RESEARCH AND DATA NEEDS 2–3 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQI-Refugee-Review-Jul-2022.pdf> [<https://perma.cc/5VJG-PLG7>] (describing barriers to claiming asylum for LGBTQI+ migrants, such as migrants' lack of awareness that sexual orientation and gender identity can constitute viable grounds for an asylum claim, adjudicators' reliance on outdated and incorrect notions of gender identity and sexual orientation, and a necessity that migrants “come out” as a sexual or gender minority in a way that is believable, credible, and legible to adjudicators).

142. Weis, *supra* note 2, at 1336 (citing Bookey, *supra* note 98, at 10).

previous Section outlined trends from high-profile domestic violence asylum cases, but other individuals continued to be granted and denied asylum during the same period. In a Center for Gender and Refugee Studies database of domestic violence asylum cases decided between 1994 and 2012, asylum was granted in 140 cases and denied in 63.¹⁴³ This would seem to indicate that the majority of domestic violence asylum seekers do not struggle to obtain asylum. However, Bookey has cautioned that domestic violence asylum data is “skewed toward positive outcomes precisely because [the Center] learns of these cases from attorneys—thus, these cases concern asylum seekers who had legal representation, and whose legal counsel sought expert assistance.”¹⁴⁴ Indeed, statistics show that overall denials of asylum claims climbed to a record high of nearly 72% in 2020.¹⁴⁵

These realities reveal why recent developments—AG Garland vacating former AG Sessions’ harmful interpretations or President Biden promising to review and clarify the law around domestic violence-based asylum—are insufficient to ensure stability and clarity for domestic violence asylum seekers. More comprehensive reforms are needed.

III.

PROPOSAL FOR REFORMING THE SYSTEM

This Article focuses on two necessary reforms: issuing regulations to definitively identify domestic violence survivors as members of a cognizable PSG and amending the INA to include “gender” as a sixth independent ground for asylum. The Sections that follow will lay out the opportunities and challenges that these approaches present.

A. Issuing Regulations Identifying Domestic Violence Survivors as a Particular Social Group

Given the significant level of confusion and instability caused by recent domestic violence asylum jurisprudence, the United States must formally investigate and recognize the major barriers within the current system for domestic violence survivors, particularly those summarized in Section II.C of this Article. DHS must then issue regulations clarifying that domestic violence can form the basis of cognizable PSGs. “Domestic violence victim” would not currently work as a successful PSG, mainly because PSGs cannot be circularly defined by the persecutory harm.¹⁴⁶ The INA requires individuals to show persecution on account of their membership in the PSG;¹⁴⁷ victims are not being targeted for persecution *because*

143. Bookey, *supra* note 138, at 119–20. The court granted motions to reopen in the other three cases. *Id.* at 120.

144. *Id.* at 119.

145. *Asylum Denial Rates Continue to Climb*, *supra* note 140.

146. *See supra* note 90 and accompanying text.

147. Immigration and Nationality Act of 1965, 8 U.S.C. § 1101(a)(42)(A).

they are domestic violence victims, but rather on account of their gender or other similar characteristics. Therefore, DHS should explicitly state that PSGs based on gender, or gender together with relationship status, are cognizable and can support a successful asylum claim. Crucially, these regulations must be developed in collaboration with experts in gender-based asylum and migration and must center the voices and experiences of survivors. Though not a perfect solution, such guidelines would remove some of the arbitrary barriers preventing domestic violence survivors from obtaining asylum and would help the United States conform with its international refugee obligations.

International legal instruments that the United States is obligated to follow make clear that domestic violence constitutes a basis for asylum. The 1951 Refugee Convention and its 1967 Protocol are the key instruments governing the international protection of refugees.¹⁴⁸ These instruments underscore governments' obligation to provide protection to refugees and safeguard the principle of *non-refoulement*: not returning refugees to any country where they would face threats to their lives or freedom.¹⁴⁹ The United States joined this legal regime by acceding to the Protocol in 1968 and subsequently enacting the U.S. Refugee Act of 1980 to "bring United States refugee law into conformance with the [1967 Protocol]."¹⁵⁰ More generally, U.S. courts are obligated, to the fullest extent possible, to interpret and apply federal statutes consistently with U.S. treaty obligations under international law.¹⁵¹ Therefore, the United States' refugee definition must be construed consistently with the Protocol and interpretations thereof. In particular, the U.S. Supreme Court has determined that UNHCR guidelines, while not legally binding on U.S. officials, do provide "significant guidance" in applying the obligations of the Protocol.¹⁵²

UNHCR interpretations of refugee law make clear that domestic violence is a form of persecution that can form the basis for a PSG asylum claim. The UNHCR notes that "[t]here is no doubt that . . . domestic violence . . . ha[s] been

148. Refugee Convention, *supra* note 47; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

149. Refugee Convention, *supra* note 47, art. 33; Protocol Relating to the Status of Refugees, *supra* note 148, art. 1.

150. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (first citing H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.); then citing H.R. REP. NO. 96-608, at 9 (1979); and then citing S. REP. NO. 96-256, at 4 (1979)).

151. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."); *The Paquete Habana*, 175 U.S. 677, 701 (1900) ("International law is part of our law, and must be ascertained . . . by the courts of justice . . .").

152. *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005); *Cardoza-Fonseca*, 480 U.S. at 439 n.22; *see also* *Rodriguez-Roman v. INS*, 98 F.3d 416, 425 (9th Cir. 1996) ("Both the Supreme Court and this court have looked to the [UNHCR Handbook on Procedures and Criteria for Determining Refugee Status] in determining refugee status, and consider it to be authoritative on the subject." (quoting *Canas-Segovia v. INS*, 902 F.2d 717, 724 (9th Cir. 1990), *vacated*, 502 U.S. 1086 (1992))); *cf.* *Matter of S-P-*, 21 I. & N. Dec. 486, 489 (B.I.A. 1996) (citing with favor the UNHCR Handbook).

used as [a] form[] of persecution” and that gender-related claims, which include domestic violence, can be linked to any of the protected grounds, including membership in a PSG.¹⁵³ They find that “women [are] a clear example of a social subset defined by innate and immutable characteristics . . . and who are frequently treated differently than men.”¹⁵⁴ Other state parties to the 1967 Protocol have relied upon the UNHCR interpretation and recognized the validity of asylum claims based on domestic violence, including Canada, the United Kingdom, and Australia.¹⁵⁵

Consistent with these interpretations, the United States should issue guidelines definitively recognizing PSGs based on domestic violence as cognizable. The guidelines should make clear that domestic violence PSGs can be formulated in two ways: by using gender alone or by using a combination of gender and relationship status. First, the PSG can be formulated on the basis of gender alone, such as “women in Guatemala.” Such a formulation would satisfy the three PSG criteria set out by the BIA: immutability, particularity, and social distinction.¹⁵⁶ The BIA has already explicitly identified sex as an immutable characteristic by which a PSG could be defined.¹⁵⁷ Additionally, according to the UNHCR, gender is “based on socially and culturally constructed and defined identities, statuses, roles and responsibilities that are assigned to one sex or another,” which in turn determine social status and standing in the community.¹⁵⁸ Women are a distinct and recognizable group in society, defined by visible and unique attributes and characteristics separate from the manner in which they are treated.¹⁵⁹ Therefore, in addition to being immutable, gender can also be viewed as socially distinct and particular. Second, gender combined with relationship status can also form a

153. U.N. High Comm’r for Refugees [UNHCR], Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/01, ¶¶ 3, 9, 30 (May 7, 2002) [hereinafter UNHCR 2002 Gender Guidelines], <https://www.unhcr.org/media/guidelines-international-protection-no-1-gender-related-persecution-within-context-article> [https://perma.cc/DG7E-8KGG].

154. *Id.* ¶ 30.

155. Brief of Amicus Curiae UNHCR in Support of Respondents at 9, Matter of A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014) (citing, e.g., C.R.D.D. T98-02494, [1999] RefLex Issue 129, Dec. 22, 1999, Refugee Div. (Can. Immig. App. Div.); *Islam (A.P.) v. Sec’y of State for the Home Dep’t, Regina v. Immig. App. Tribunal & Another Ex Parte Shah (A.P.)* [1999] UKHL 20, [1999] 2 AC 629 (HL) (conjoined appeals); *Minister for Immigr & Multicultural Affs v Khawar* (2002) 210 CLR 1 (Austl.); Refugee Appeal No. 71427/99 [2000] NZAR 545 (N.Z. Refugee Status App. Auth.)), <https://www.refworld.org/pdfid/50b5c2a22.pdf> [https://perma.cc/JTL5-MS3U].

156. *See supra* notes 69–71 and accompanying text.

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

158. UNHCR 2002 Gender Guidelines, *supra* note 153, ¶ 3.

159. *Khawar*, 210 CLR 1, ¶ 35; *see* U.N. High Comm’r for Refugees [UNHCR], Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02, ¶ 7 (May 7, 2002) [hereinafter UNHCR 2002 PSG Guidelines], <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html> [https://perma.cc/NAE9-ZUQ4].

cognizable PSG, such as “women in domestic relationships in El Salvador who are unable to end those relationships.” DHS has recognized that relationship status can be immutable in some instances, such as when a woman’s religious or moral convictions dictate that marital status is fundamental to her identity or when a woman cannot reasonably be expected to end the relationship “because of [external] religious, cultural, or legal constraints.”¹⁶⁰ This includes situations in which a woman’s partner would not recognize a separation as altering his authority over her or where a woman could not reasonably be expected to leave due to her partner’s threats to her life or freedom if she were to do so.¹⁶¹ The BIA and appellate courts have previously recognized that PSGs defined using a combination of gender and other factors are cognizable under U.S. law.¹⁶²

Critics will raise concerns that explicitly allowing such broad PSGs based on gender would burden the U.S. asylum system by allowing overwhelming numbers of women to make out asylum claims.¹⁶³ However, this concern has been raised and disproven in the past: opponents of *Matter of Kasinga*’s recognition of female genital cutting as a basis for a PSG predicted waves of female genital cutting survivors seeking asylum that never materialized.¹⁶⁴ Moreover, the size of a proposed social group is not relevant to determining whether the group exists, and “the fact that large numbers of persons risk persecution cannot be a ground for refusing to

160. U.S. CITIZENSHIP & IMMIGR. SERVS., DEP’T OF HOMELAND SEC., ASYLUM OFFICER BASIC TRAINING COURSE, FEMALE ASYLUM APPLICANTS AND GENDER-RELATED CLAIMS 30 (Mar. 12, 2009), <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf> [<https://perma.cc/NL5R-DAE7>].

161. *Id.* at 30–31; Bookey, *supra* note 98, at 15.

162. *See, e.g.*, *Matter of Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) (recognizing social group defined by gender and opposition of female genital cutting); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (recognizing social group defined by gender and tribal membership).

163. Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y & L. 119, 132 (2007) (“The spectre of thousands—or tens of thousands—of women arriving at the borders of the United States to request asylum is raised as a reason to not recognize their legitimate claims to protection.”); *see also* George Lardner Jr., *Ashcroft May Reverse Asylum for Battered Women*, STARNEWS (Mar. 2, 2003, 11:01 PM), <https://www.starnewsonline.com/story/news/2003/03/03/ashcroft-may-reverse-asylum-for-battered-woman/30510014007/> [<https://perma.cc/6667-MJ5W>] (“‘You can’t just say I’m in a bad situation and therefore I’m a member of some new social group,’ said [Federation for American Immigration Reform] spokesman David Ray. ‘If the categories grow so large as to include millions of people, asylum policy is going to crumble.’”).

164. As Karen Musalo described:

[M]any who opposed a grant of asylum pointed to the fact that millions of women a year are subject to [female genital cutting, or] FGC, and predicted that the U.S. would be overwhelmed with asylum seekers if it recognized fear of FGC as a basis of asylum. . . . [A]n INS [Immigration and Naturalization Service] 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 [FGC]” after the *Kasinga* decision.

Musalo, *supra* note 163, at 132–33 (citation omitted).

extend international protection where it is otherwise appropriate.”¹⁶⁵ For example, race and religion are readily accepted as grounds for an asylum claim, despite the large numbers of people fitting within these categories.¹⁶⁶

These guidelines would help bring domestic violence survivors’ experiences seeking asylum in line with the experiences of people seeking asylum based on more straightforward, non-PSG grounds. Additionally, not every member of a PSG will be entitled to asylum, as each applicant must still make out the other elements: they must show that they have a well-founded fear of persecution, that there was a nexus between the persecution and the protected ground, and that the government was unwilling or unable to protect them, in addition to showing that they are not barred from asylum and that the decision-maker should use their discretion to grant asylum.¹⁶⁷ These guidelines will not grant asylum to all “women in Guatemala,” but rather will help to remove a barrier that prohibits individuals who otherwise easily meet the definition of a refugee from seeking asylum.

B. Amending the INA to Add “Gender” as an Independent Ground for Asylum

A second critical component is amending INA section 101(a)(42)(A) to include a sixth protected ground with an explicit pathway for domestic violence-based asylum. The nonprofit immigrant advocacy organization Tahirih Justice Center¹⁶⁸ has proposed simply adding “gender” to the list of protected grounds: “[R]ace, religion, nationality, membership in a particular social group, political opinion, or gender.”¹⁶⁹ They offer the following definition of gender to include in the statute: “The term ‘gender’ includes, but is not limited to, concepts such as sex, sexual orientation, gender identity, gender expression, and sex characteristics.”¹⁷⁰

Using the PSG ground for domestic violence asylum claims is merely a work-around measure in response to the lack of other avenues for survivors to seek asylum. Given the large scope of violence against women and resulting migration, an amendment is necessary to ensure that domestic violence survivors have a clear pathway to seeking asylum. Because legislative amendments involve a heavily

165. UNHCR 2002 PSG Guidelines, *supra* note 159, ¶ 18; *see also* UNHCR 2002 Gender Guidelines, *supra* note 153, ¶ 31.

166. The refugee definition in the INA includes any person who is unable or unwilling to return to their home country “because of persecution or a well-founded fear of persecution on account of race [or] religion” Immigration and Nationality Act of 1965, 8 U.S.C. § 1101(a)(42)(A).

167. *See supra* notes 46–48 and accompanying text.

168. *See* TAHIRIH JUST. CTR., <https://www.tahirih.org/> [<https://perma.cc/9Q74-QQ6C>] (last visited May 24, 2023).

169. TAHIRIH JUST. CTR., PROPOSED AMENDMENT TO THE IMMIGRATION & NATIONALITY ACT (INA) TO ADD “GENDER” AS A 6TH GROUND OF ASYLUM 1 (2021) [hereinafter TAHIRIH PROPOSED AMENDMENT], <https://www.tahirih.org/wp-content/uploads/2021/04/Tahirih-6th-ground-4-pages-2.23.21.pdf> [<https://perma.cc/RKS4-UAGB>].

170. *Id.*

politicized process requiring the passage of a bill,¹⁷¹ this approach will take more time and political coordination than the issuance of PSG guidelines. Both are necessary to achieving systemic change. Until advocates can successfully reform the INA, the first proposal will ensure that survivors can continue to use the PSG ground, as imperfect as it is.

The PSG framework is insufficient for asylum seekers fleeing domestic violence. Asylum claims must be built around persecution. Given that survivors of domestic violence are disproportionately women,¹⁷² it can be argued that gender is a sufficient ground on which to build an asylum claim. Though gender can be used to define a PSG, the PSG process is imperfect: not only does it place an additional burden on survivors to articulate an acceptable PSG definition, but it is inherently unstable and subject to changes by administrations.¹⁷³ The process risks retraumatizing survivors¹⁷⁴ and disadvantages particularly vulnerable individuals.¹⁷⁵ The current system, as the Tahirih Justice Center puts it, denies the “rightful place of gender alongside the other protected grounds—like race and religion—as an attribute equally worthy of protection.”¹⁷⁶ Ultimately, the experiences of domestic violence survivors do not fit neatly into the PSG framework. Rather, it serves as a workaround. Survivors are forced to contort their experiences into a cognizable PSG because no alternative exists.¹⁷⁷ Therefore, the best long-term solution is to simply acknowledge gender as an additional protected ground within U.S. asylum law.

A common counterargument to this approach is that the INA’s definition need not be amended because it is already consistent with international standards. Critics argue that any amendment to the INA definition would “undermine” Congress’s goal in passing the 1980 Refugee Act to bring U.S. refugee law into

171. See H.R. DOC. NO. 110-49 (2007).

172. Women make up the majority of victims and are more likely than men to be injured or killed by intimate partners. See Dragiewicz & Lindgren, *supra* note 16, at 231. About one in three women and one in four men have experienced severe physical intimate partner violence (“IPV”). CTRS. FOR DISEASE CONTROL & PREVENTION, FAST FACTS: PREVENTING INTIMATE PARTNER VIOLENCE 1 (2022), https://www.cdc.gov/violenceprevention/pdf/ipv/IPV-factsheet_2022.pdf [<https://perma.cc/B3KM-WK6U>]. One in five women and one in 13 men have experienced contact sexual violence. *Id.* “75% of female IPV survivors and 48% of male IPV survivors experience some form of injury related to IPV. . . . The cost of IPV over a victim’s lifetime was \$103,767 for women and \$23,414 for men.” *Id.* at 2.

173. See *supra* Sections II.B. and II.C.

174. See, e.g., CTR. FOR VICTIMS OF TORTURE, DESIGNING A TRAUMA-INFORMED ASYLUM SYSTEM IN THE UNITED STATES 4–7 (2021), https://www.cvt.org/wp-content/uploads/2023/06/2.4.designing_a_trauma_informed_asylum_report.feb42021.pdf [<https://perma.cc/GDY3-CU6U>] (describing how features of the asylum system, including immigration court proceedings, exacerbate trauma or cause trauma independently).

175. See *supra* note 141 and accompanying text.

176. TAHIRIH REPORT, *supra* note 11, at 5.

177. See *supra* notes 67–71 and accompanying text.

conformity with international refugee law.¹⁷⁸ After all, the INA definition is taken nearly verbatim from the definition in the Refugee Convention and Protocol.¹⁷⁹ Therefore, the argument goes, only those who are able to make out an asylum claim under the existing system should obtain asylum. Because the UNHCR and adjudicators have reasoned that sex and gender are already implicitly encompassed in the Convention’s definition of a refugee,¹⁸⁰ some scholars are concerned that adding gender as a distinct sixth ground would suggest that the Convention should not already be interpreted through a gender-sensitive lens.¹⁸¹ However, this argument fails to account for the evolution of global refugee protection systems. Simply put, the Refugee Convention offers an outdated definition. The Convention came into force in 1951 and the Protocol in 1967, “when the scope and

178. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (“If one thing is clear from . . . the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees”); Sabrineh Ardalan & Deborah Anker, *Re-Setting Gender-Based Asylum Law*, HARV. L. REV. BLOG (Dec. 30, 2021), <https://blog.harvardlawreview.org/re-setting-gender-based-asylum-law/> [<https://perma.cc/VZK8-BKB4>] (“Diverging from the five grounds set forth in the Convention would undermine Congress’s intent to bring U.S. law into conformity with international refugee law when it enacted the 1980 Refugee Act.”).

179. The 1951 Convention Relating to the Status of Refugees states:

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:

. . . .
 . . . (2) . . . [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Refugee Convention, *supra* note 47, art. 1(A). The INA defines a refugee as:

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

Immigration and Nationality Act of 1965, 8 U.S.C. § 1101(a)(42)(A).

180. See, e.g., Rodger Haines, *Gender-Related Persecution*, in UNHCR, REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 319, 326 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003), <https://www.refworld.org/docid/470a33b50.html> [<https://perma.cc/2LF8-ZM6G>] (“The text, object, and purpose of the 1951 Convention require a gender-inclusive and gender-sensitive interpretation. Sex and gender are already included in the refugee definition.”); UNHCR, INTERPRETING ARTICLE 1 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES ¶¶ 29–30 (2001), <https://www.refworld.org/docid/3b20a3914.html> [<https://perma.cc/Q3H7-DGCX>] (describing that forms of gender-related persecution like rape may be committed on account of protected grounds like a person’s nationality or religion).

181. Ardalan & Anker, *supra* note 178.

societal impact of gender-based violence were not well accepted.”¹⁸² Over the past few decades, there have even been calls to amend the language of the Convention itself to add “gender” as a sixth protected ground.¹⁸³

The UNHCR has deemed it unnecessary to add gender to the Convention as an additional protected ground because recognizing gender-based components of asylum claims is “an established principle” that is “widely accepted.”¹⁸⁴ International guidance and interpretations of the Convention over the past two decades have consistently made it clear that survivors of domestic violence and other gender-based crimes are eligible to receive asylum through the PSG ground.¹⁸⁵ However, as the evolution of the law described in Section II.B of this Article shows, this principle has not been successfully established in practice in the United States. Though AG Garland has now reopened a pathway for domestic violence survivors to obtain asylum, as recently as 2018, former AG Sessions wrote in a ruling that domestic violence is a private matter, that “claims by aliens pertaining to domestic violence . . . perpetrated by nongovernmental actors will not qualify for asylum,” and that such claims may not even reach the minimum credible fear standard required in order to have the claim heard by a judge.¹⁸⁶ The politicization of the immigration system makes it unlikely that a consistent principle in favor of gender-based asylum claims will become firmly established in the United States anytime soon.¹⁸⁷ Therefore, the UNHCR’s view of the redundancy of adding “gender” to the refugee definition does not apply in the U.S. context.

Though not a party to the Refugee Convention, the United States is a party to the 1967 Protocol and therefore has an obligation to operationalize its provisions

182. TAHIRIH PROPOSED AMENDMENT, *supra* note 169, at 1.

183. See, e.g., Todd Stewart Schenk, *A Proposal to Improve the Treatment of Women in Asylum Law: Adding a “Gender” Category to the International Definition of “Refugee”*, 2 IND. J. GLOB. LEGAL STUD. 301 (1994); Michelle Shapiro, *Revitalizing and Reforming International Asylum Law: A Proposal to Add Gender to the Refugee Definition*, 36 GEO. IMMIGR. L.J. 795 (2022).

184. TAHIRIH PROPOSED AMENDMENT, *supra* note 169, at 1; UNHCR 2002 Gender Guidelines, *supra* note 153, ¶ 2 (“It is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions . . .”); *id.* ¶ 6 (“Even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment.”).

185. See, e.g., UNHCR 2002 Gender Guidelines, *supra* note 153, ¶ 6 (“Even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims.”); *id.* ¶ 30 (“[S]ex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men.”).

186. See *A-B-I*, 27 I. & N. Dec. 316, 320 (A.G. 2018); see also *supra* notes 54–57 and accompanying text.

187. See *supra* notes 136–137 and accompanying text; see also Claire Klobucista, Amelia Cheatham & Diane Roy, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELS. (Aug. 3, 2022), <https://www.cfr.org/backgrounders/us-immigration-debate-0> [<https://perma.cc/E5G3-AY3V>] (describing how U.S. immigration policy has fluctuated throughout the Obama, Trump, and Biden administrations).

through domestic legislation.¹⁸⁸ The United States has codified the Convention's outdated language, but not the UNHCR guidance interpreting it to apply to gender-based claims, which is not binding and can easily be ignored by governments.¹⁸⁹ Codifying Convention language verbatim is often sufficient to meet the implementation obligation, but deviation from the language is permissible as long as it does not diminish protection, but rather conforms domestic practice with the Convention's framework.¹⁹⁰ Such deviation, in the form of adding "gender" as a sixth protected ground, is necessary in the U.S. context to align domestic legislation with the spirit of the Convention's guidance.

The Convention's definition is a floor for protection, not a ceiling. Over 20 other nations have passed domestic legislation explicitly protecting individuals fleeing gender-based persecution.¹⁹¹ Some have added "gender," "sex," and/or "sexual orientation" to their domestic refugee definition,¹⁹² while others have added gender-specific considerations to provisions defining persecution and other elements of asylum claims.¹⁹³ The United States must follow suit to ensure equal access to asylum for domestic violence survivors. This is also in line with the general trend in U.S. law toward treating sex and gender like other historically marginalized identities.¹⁹⁴ For example, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, and national origin.¹⁹⁵

As with the previous proposal, critics will argue that adding gender to the INA would provide a "free pass" for women anywhere in the world to obtain asylum

188. Article 1 of the 1967 Protocol includes a universal definition of a "refugee" and binds parties to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention with respect to "refugees" as defined in Article 1(A)(2) of the 1951 Convention. Protocol Relating to the Status of Refugees, *supra* note 148, art. 1. The United States acceded to the 1967 Protocol in 1968, thereby binding itself to the international refugee protection regime and the definition of a refugee. H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 160, 160; H.R. REP. NO. 96-608, at 9 (1979).

189. TAHIRIH PROPOSED AMENDMENT, *supra* note 169, at 2 (finding that "UNHCR guidance interprets the Convention as unequivocally protecting survivors under PSG or any other ground").

190. *Id.* (noting that the US Terrorism-Related Inadmissibility Grounds are an example of domestic deviation from Convention language).

191. *See* TAHIRIH JUST. CTR., COUNTRIES WITH ASYLUM/REFUGEE LAWS THAT EXPLICITLY PROTECT THOSE FLEEING GENDER-BASED PERSECUTION (2021), <https://www.tahirih.org/wp-content/uploads/2021/03/Appendix-1-List-of-other-countries-with-gender-listed-in-asylum-laws.pdf> [<https://perma.cc/6GDW-7J7H>].

192. This includes Costa Rica, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Venezuela, Uruguay, Panama, Paraguay, Spain, Sweden, Kenya, South Sudan, and Uganda. *Id.*

193. This includes Argentina, Chile, the European Union, France, Macedonia, and Moldova. *Id.*

194. TAHIRIH REPORT, *supra* note 11, at 3.

195. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

in the United States.¹⁹⁶ This fear is unlikely to materialize. Survivors of domestic violence are often “disenfranchised by pervasive violence and systemic discrimination,” so they are among the groups least able to successfully flee, undertake a dangerous cross-border journey to another country, and apply for asylum.¹⁹⁷ Even those able to do so still face the uphill battle of producing credible evidence to prove each element of their claim and to show a “well-founded fear of persecution on account of a protected ground.”¹⁹⁸ Relatedly, some critics have also advanced the “slippery slope” argument that such an approach will diminish the distinction between gender-based persecution and acts of personal violence, such that any violence committed against a woman would become a basis for asylum.¹⁹⁹ However, adding “gender” as a protected ground would not automatically allow every woman who has survived violence to obtain asylum any more than, for example, having “religion” as a protected ground allows all Muslim survivors of violence to obtain asylum. All asylum claims present definitional uncertainties—race and political opinion as protected grounds are no clearer than gender—and require case-by-case analysis. Adding gender as a protected ground would not eliminate the asylum requirements. Individuals would still have to prove, among other things, that the harm rose to the level of persecution, that it can be imputed to the government, and that there was a nexus between the harm and the protected ground.²⁰⁰

This Article has focused on asylum claims brought by women fleeing domestic violence perpetrated by men. But in evaluating this proposal, it is also important to consider its impact on male survivors, survivors in same-sex relationships, and other survivors who are part of the LGBTQ community.²⁰¹ A concern is that reforming the system by adding gender as a ground for asylum risks excluding these individuals.²⁰² Though women are undoubtedly disproportionately impacted,²⁰³ research has shown that men and boys also suffer from domestic and gender-based

196. TAHIRIH REPORT, *supra* note 11, at 25; *see, e.g.*, Press Release, House of Representatives, Judiciary Comm., Chaffetz and Goodlatte Introduce Bill to Stop the Border Crisis (July 17, 2014), <https://judiciary.house.gov/media/press-releases/chaffetz-and-goodlatte-introduce-bill-to-stop-the-border-crisis> [<https://perma.cc/FDH2-XYVA>] (“95% of those arriving at our border are coming because they think they will get a free pass to stay.”).

197. TAHIRIH REPORT, *supra* note 11, at 25.

198. *Id.*

199. Marian Kennady, *Gender-Related Persecution and the Adjudication of Asylum Claims: Is a Sixth Category Needed?*, 12 FLA. J. INT’L L. 317, 339 (1998).

200. *See supra* Section II.A.

201. This paragraph and the following paragraph provide a brief explanation of why the proposed reforms will not exclude claims by men or victims in same-sex relationships, but this important topic deserves further examination that is beyond the scope of this Article. *See supra* note 16.

202. Connor Cory, *The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities*, 20 GEO. J. GENDER & L. 577, 578 (2019) (finding that “if the statute listed ‘gender’ as a protected ground it is not clear whether courts would interpret that to include gender identity and transgender applicants”).

203. *See supra* note 172 and accompanying text.

violence, and that “gay male couples experience domestic partner violence at rates comparable to . . . heterosexual couples.”²⁰⁴ Because men who report such violations often face skepticism, “social prejudice and humiliation,” such abuse remains largely hidden.²⁰⁵

However, many instances of domestic violence against men or those in same-sex relationships can be explained through a gender lens, and the United States should make clear that these are accepted forms of gender-based persecution eligible for asylum. Gender-based asylum claims are usually brought by women, but the UNHCR has noted that “[g]ender-related claims may be brought by either women or men.”²⁰⁶ Traditional gender roles depict men as strong protectors and women as vulnerable and nurturing.²⁰⁷ Researchers have noted instances in which female abusers of men have utilized these norms to hide the extent and longevity of abuse within the relationship.²⁰⁸ Violence and domination against such stereotypically strong men can be strategically used to destabilizing and emasculating effect.²⁰⁹ Additionally, in countries where same-sex relationships are stigmatized, one partner’s internalized homophobia can contribute to their abusive behavior.²¹⁰ In short, many instances of violence against men and partners in a same-sex relationship can be viewed as gender-based. Consequently, the proposed amendments to the asylum system need not be interpreted to exclude the domestic violence asylum claims of individuals who are not women being abused by men. On the contrary, both proposals together will enable more domestic violence survivors to access the asylum to which they are entitled under international law.

CONCLUSION

The United States positions itself as a global human rights leader, and even pressures other nations to improve their human rights records.²¹¹ Yet, through its asylum system, the United States repeatedly fails to uphold its own human rights obligations. Just as individuals can suffer persecution based on their race or religion, so too can their suffering arise on account of their gender, marital status, or other related characteristics. International law and the legislation of numerous

204. Rob Hamilton, ‘Hidden Traumas’—When Men Are Victims of Gender-Based and Sexual Violence, GENDER JUST. (Feb. 5, 2019), <https://www.justgender.org/hidden-traumas-when-men-are-victims-of-gender-based-and-sexual-violence/> [<https://perma.cc/C32M-6FNG>].

205. *Id.*

206. UNHCR 2002 Gender Guidelines, *supra* note 153, ¶ 3.

207. Hamilton, *supra* note 204.

208. *Id.*

209. UNHCR, WORKING WITH MEN AND BOY SURVIVORS OF SEXUAL AND GENDER-BASED VIOLENCE IN FORCED DISPLACEMENT 3–4 (2012), <https://www.refworld.org/pdfid/5006aa262.pdf> [<https://perma.cc/76ZJ-D2XZ>].

210. Hamilton, *supra* note 204.

211. *See, e.g.*, Marie Wilken, *U.S. Aversion to International Human Rights Treaties*, GLOB. JUST. CTR. BLOG (June 22, 2017), <https://globaljusticecenter.net/blog/773-u-s-aversion-to-international-human-rights-treaties> [<https://perma.cc/STA3-L242>].

countries have recognized that domestic violence and other forms of gender-based violence can form the basis of a successful asylum claim, but the United States fails to follow suit. The United States must stop relying on an outdated 1950s-era asylum framework. Rather, it must recognize the global epidemic of domestic violence and enact guidelines and a statutory amendment that will explicitly offer safe harbor to those seeking protection. The current system must be reformed to ensure that the thousands of survivors fleeing to the United States from the Northern Triangle countries and beyond can access shelter, whether or not they have counsel and regardless of which judge they are assigned or who is in the White House.