

2011

## From the Border to the Bench: The Barriers to Freedom for Victims of Domestic Violence Seeking Asylum in the United States and Why a Favorable Decision in the Case of R-A- is Necessary But Not Sufficient Protection for Future Claimants

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### Recommended Citation

Peter, Chelsea M. (2011) "From the Border to the Bench: The Barriers to Freedom for Victims of Domestic Violence Seeking Asylum in the United States and Why a Favorable Decision in the Case of R-A- is Necessary But Not Sufficient Protection for Future Claimants," *Saint Louis University Law Journal*: Vol. 55 : No. 2 , Article 19.

Available at: <https://scholarship.law.slu.edu/lj/vol55/iss2/19>

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**FROM THE BORDER TO THE BENCH: THE BARRIERS TO  
FREEDOM FOR VICTIMS OF DOMESTIC VIOLENCE SEEKING  
ASYLUM IN THE UNITED STATES AND WHY A FAVORABLE  
DECISION IN THE CASE OF R-A- IS NECESSARY BUT NOT  
SUFFICIENT PROTECTION FOR FUTURE CLAIMANTS**

INTRODUCTION

Aracelis Gonzalez fled to the United States after being repeatedly raped and beaten by her husband in the Dominican Republic.<sup>1</sup> Upon arrival in the United States, Immigration and Natural Service (INS) officers interviewed her and ordered her deported under the expedited removal process.<sup>2</sup> The INS officers did not believe she would be able to articulate a claim based on gender-related persecution.<sup>3</sup>

Karyna Sanchez fled to the United States to escape years of “beatings, stalking, kidnapping, death threats, and rape at the hands of her politically powerful husband” in Ecuador.<sup>4</sup> She arrived in the United States in 1999 and was subsequently detained at a jail in Texas for over five months while her case was reviewed and transferred to New York.<sup>5</sup> Once she was transferred to New York, Sanchez applied for parole from detention, telling officials that her three-year-old U.S. daughter was living nearby with friends.<sup>6</sup> Sanchez’s request for parole was denied and she remained in detention for over a year.<sup>7</sup> When her daughter was brought to the detention center to visit, thick glass windows separated Sanchez from her daughter in the visiting area.<sup>8</sup> The visits were so upsetting to her daughter that Sanchez decided to abandon her asylum

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1. LAWYERS COMM’N FOR HUMAN RIGHTS, REFUGEE WOMEN AT RISK: UNFAIR U.S. LAWS HURT ASYLUM SEEKERS 8 (2002) [hereinafter REFUGEE WOMEN AT RISK], *available at* [http://www.humanrightsfirst.org/wp-content/uploads/pdf/refugee\\_women.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/refugee_women.pdf).

2. *Id.* The expedited removal process was created under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302, 110 Stat. 3009, 3579 (1996) (codified at 8 U.S.C. § 1225). It provides a process whereby INS inspectors at airports and borders are able to order immediate deportation of an individual who arrives without proper documentation. *See id.*

3. REFUGEE WOMEN AT RISK, *supra* note 1, at 8.

4. *Id.* at 12.

5. *Id.*

6. *Id.*

7. *Id.*

8. REFUGEE WOMEN AT RISK, *supra* note 1, at 12.

case and return to Ecuador with her daughter, even though doing so made her fear for her safety.<sup>9</sup>

Aruna Vallabhaneni came to the United States in March 1997 on a tourist visa.<sup>10</sup> She was fleeing a husband in India who regularly demanded that she request money from her parents to support his gambling addiction and who would beat her when she refused.<sup>11</sup> On one occasion, Vallabhaneni was hit so hard by her husband that she lost her sense of smell.<sup>12</sup> On another occasion, she was kicked so hard by him that she experienced vaginal bleeding.<sup>13</sup> After reporting her husband to the police in her home country, Vallabhaneni was beaten by him so severely that she had to be hospitalized for two days.<sup>14</sup> After this, she left her two children with her parents in India and fled to the United States, planning to send for them once she received asylum.<sup>15</sup> Vallabhaneni's asylum claim was denied.<sup>16</sup> She appealed her case, but the judge put off deciding it until there are clearer guidelines for how to treat domestic violence cases such as hers.<sup>17</sup> In the meantime, Vallabhaneni has spent over a decade in legal limbo in the United States, while her children have grown up without their mother in India.<sup>18</sup>

Aracelis Gonzalez, Karyna Sanchez, and Aruna Vallabhaneni constitute only a few domestic violence based asylum seekers in the United States, but they are a fortunate few in that their struggles within the U.S. immigration system have been made public to the world. Because of the secrecy surrounding many of the immigration processes in the United States, the number of women actually sent back to their countries to live in the fear they fled from is completely unknown.<sup>19</sup> The denial of refugee status for abused

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9. *Id.* at 12–13 (“At the end of the visit, she did not want to leave. She was crying and clinging to the shelf in front of the little window. They had to tear her away. Recently she seemed sick, and my friends took her to the doctor. The doctor told them she could not find anything medically wrong, but perhaps the child was simply very sad.”).

10. Alex Kotlowitz, *Asylum for the World's Battered Women*, N.Y. TIMES MAG., Feb. 11, 2007, at 32, available at <http://www.nytimes.com/2007/02/11/magazine/11wwlnidealab.t.html>.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Kotlowitz, *supra* note 10, at 32.

16. *Id.*

17. *Id.*

18. *Id.* at 32, 35.

19. See Karen Musalo, *Expedited Removal*, HUM. RTS., Winter 2001, at 12, 13 (“The expedited removal process is totally closed to the public; . . . [c]onsequently, the public has very little information regarding how the law is being applied, or how it impacts people seeking admission.”).

women may occur at many steps throughout the application process. Abused women may be denied refugee status through the expedited removal process, such as Aracelis Gonzalez;<sup>20</sup> detained for months or years at a time, as was Karyna Sanchez;<sup>21</sup> or may have their cases put on hold while moving slowly through the judicial system, as Aruna Vallabhane experienced.<sup>22</sup> Due to a lack of guidance in the form of case law, regulations, or legislation, immigration judges often deny these women protection based on their “membership in a particular social group,” which in many cases is the only grounds for admittance applicable to them.<sup>23</sup>

In recent years, the case of Rodi Alvarado has been critical in shedding some light on the inherent problems with the current U.S. immigration system. Rodi Alvarado is a native of Guatemala, who escaped to the United States in 1995 after suffering over a decade of abuse at the hands of her husband in her home country.<sup>24</sup> From the beginning of her marriage, her husband was extremely controlling and abused her both physically and sexually almost every day.<sup>25</sup> She reported her husband drug her by the hair, nearly pushed out one of her eyes, broke windows and mirrors with her head, and whipped her with pistols and electric cords, among many other acts of abuse.<sup>26</sup> Both the immigration judge who originally heard her case and the Board of Immigration Appeals (BIA) found that Alvarado’s testimony was credible and neither questioned her veracity, the atrociousness of abuse she had suffered, or the reasonableness of her fear if she were to return to Guatemala.<sup>27</sup> However, it took over fourteen years for a favorable ruling to be had in her case.<sup>28</sup> In 2004,

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One commentator stated:

Because asylum cases are confidential, there is no way of knowing how many applications by battered women have been denied or held up over the last decade. The issue is further complicated by the peculiarities of the United States immigration system, in which asylum cases are heard in courts that are not part of the federal judiciary, but are run by an agency of the Justice Department, with Homeland Security officials representing the government.

Julia Preston, *New Policy Permits Asylum for Battered Women*, N.Y. TIMES, July 16, 2009, at A1, A20.

20. *See infra* Part I.A.

21. *See infra* Part I.A.

22. *See infra* Part I.B–C.

23. Lisa Frydman, *Recent Developments in Domestic-Violence-Based Asylum Claims*, LEXISNEXIS EMERGING ISSUES ANALYSIS 4075, July 2009, at 1, 8, available at 2009 Emerging Issues 4075 (LEXIS); UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION 2 (2002).

24. Department of Homeland Security’s Position on Respondent’s Eligibility for Relief at 8, R-A-, 23 I. & N. Dec. 694 (BIA 2005) (No. A073-753-922) [hereinafter DHS 2004 Brief R-A-].

25. *Id.* at 10.

26. *Id.* at 9.

27. *Id.* at 12–13.

28. Julia Preston, *Officials Endorse Asylum for Abuse*, N.Y. TIMES, Oct. 30, 2009, at A14.

the Department of Homeland Security (DHS) filed a brief in her then pending case, calling for guidance to be provided in similar cases through the rule-making process.<sup>29</sup> In support, they said “[t]he facts of this case . . . do not offer an appropriate vehicle for developing the kind of comprehensive administrative interpretative approach needed for the adjudication of particular social group cases.”<sup>30</sup> It has been seven years since DHS called for rules to apply in these cases and fourteen years since Rodi Alvarado attempted to start a new life in the United States.<sup>31</sup> Yet, the regulatory guidance for a victim of domestic violence applying for asylum based on his or her membership in a social group is still lacking.<sup>32</sup>

According to the United Nations High Commission on Refugees (UNHCR) Guidelines on International Protection, “membership of a particular social group” is one of five enumerated grounds for asylum under Article 1A(2) of the 1951 Convention Relating to the Status of Refugees.<sup>33</sup> The guidelines explain there is no “closed list” of social groups which may be able to meet this standard in order to be eligible for asylum.<sup>34</sup> Rather, the idea of being classified as a member in “a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”<sup>35</sup>

In recent years, headlines have highlighted acts of violence against women on a large scale throughout the globe, evidencing the need for an overhaul of the U.S. immigration system to protect female victims of domestic violence.<sup>36</sup> While a well-established definition of “membership in a particular social group” would be a huge step forward, many other safeguards need to be implemented throughout the process to protect those seeking gender-based asylum claims generally and domestic-violence based asylum claims in particular.<sup>37</sup>

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29. DHS 2004 Brief R-A-, *supra* note 24, at 3–4.

30. *Id.* at 2–3.

31. *Id.* at 43; Frydman, *supra* note 23, at 1.

32. Frydman, *supra* note 23, at 16.

33. UNHCR, *supra* note 23, at 2.

34. *Id.*

35. *Id.*

36. See Ayyan Hirsi Ali, *Time to Stop Gendercide*, NEW PERSPECTIVES Q., Spring 2006, at 72, 72; Adam Nossiter, *In a Guinea Seized by Violence, Women as Prey*, N.Y. TIMES, Oct. 6, 2009, at A1 (“Cellphone snapshots, ugly and hard to refute, are circulating [in Guinea] and feeding rage: they show that women were the particular targets of the Guinean soldiers who suppressed a political demonstration at a stadium here last week, with victims and witnesses describing rapes, beatings and acts of intentional humiliation.”).

37. Frydman, *supra* note 23, at 1 (“The past thirteen years have been marked by inconsistent decisions in, and changes in policy with regard to, claims for refugee protection based on gender-related harm . . .”).

This Comment will first outline the obstacles victims of domestic violence seeking asylum face the moment they arrive in the United States. It will address the many problems that stem from the use of expedited removal at the border, improper detainments, secret interviews, and limited rights of judicial review. In doing so, it will call for the legislature to re-evaluate the use of these procedures and implement congressional safeguards in order to protect asylum seekers such as Aracelis Gonzalez and Karyna Sanchez. Next, this Comment will engage in a critical analysis of the recent case law, or the lack thereof, which is providing guidance for many pending domestic violence claims for asylum in the United States. It will establish why case law is not the appropriate vehicle for ensuring victims of domestic violence have a chance to establish a new life in the United States through the asylum laws. Finally, this Comment will show that the only way to avoid the years of struggle and uncertainty victims such as Aruna Vallabhaneni and Rodi Alvarado have faced since arriving in the United States is by implementing binding legislative guidelines that will ensure uniform judicial protections to victims fleeing from abuse in their home countries.

## I. THE ROADBLOCKS VICTIMS OF DOMESTIC VIOLENCE FACE AT EVERY STEP OF THE ASYLUM-SEEKING PROCESS

### A. *Border Patrol and Detainment Procedures*

From the treatment of some immigration officers at the border to the conditions at detainment centers, a recent statement from a refugee addresses the fear and confusion one experiences when arriving in the United States for the first time:

When I set foot on American soil, I had finally reached the land of liberty, the land of peace, and I had a strong feeling of gratitude toward the Most High who had allowed me to escape death and to reach a life of freedom. . . . After completing my statement [at the airport] . . . [an] officer arrived with handcuffs. Then he handcuffed my wrists, but I sincerely thought this was a case of mistaken identity. Later on he explained to me that this was the established procedure. We left for [a county] prison. They put me in a cell where it was really cold, and I had no blanket with me. The idea of a land of liberty was beginning to be cast into serious doubt in my mind.

After spending two days in this prison, I was transferred to another prison, and before leaving they not only handcuffed my wrists but also put shackles on my feet. Then they brought me to [an immigration] Detention Center, where I am presently detained. My hope of a land of liberty has been transformed into a nightmare. To this is added moral suffering due to detention, for I do not know how long I will spend in this detention center. It is as if I am living

through a bad dream, and soon will wake and finally reach this land of freedom that I still seek.<sup>38</sup>

The Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides the procedure for expedited removal of aliens arriving in the United States. Section 302 of IIRIRA states as follows:

If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible . . . the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.<sup>39</sup>

Under this expedited removal process, immigrants arriving in the United States may be denied entry by U.S. Customs and Border Protection Officers or removed from the country with no opportunity to appear in front of an immigration judge.<sup>40</sup> This creates a huge obstacle for a victim of domestic violence. Oftentimes, these individuals arrive in the United States after escaping from a man who threatened to find them and kill them if they spoke to any law enforcement officers. They are faced with the fear of speaking to a law enforcement officer and being tracked down by their abusive husband or not speaking and being sent back to him. A further complication is often present in the form of a language barrier, so that the asylum seekers are not able understand what the officers are asking of them. Under the process set forth in IIRIRA, “asylum seekers are screened, and only those with sufficiently legitimate or ‘credible’ fear of persecution are admitted and permitted to apply for asylum.”<sup>41</sup>

If the person is able to articulate a request for asylum or otherwise indicates a fear of persecution, they have passed the first hurdle, and the immigration officer refers them to an asylum officer who conducts a second interview.<sup>42</sup> The asylum officer conducts a screening to determine whether there is a “credible fear of persecution.”<sup>43</sup> Although there is little guidance on what it takes to show “credible fear,”<sup>44</sup> once this finding is made the person has gotten over the second hurdle, and they are detained while their application for asylum is further considered.<sup>45</sup> If the asylum officer conducting the interview

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38. HUMAN RIGHTS FIRST, IN LIBERTY’S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 1 (2004) [hereinafter IN LIBERTY’S SHADOW] (alterations in original) (quoting a Rwandan refugee who was eventually given asylum), available at [www.humanrightsfirst.org/wp-content/uploads/pdf/Libertys\\_Shadow.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/Libertys_Shadow.pdf).

39. 8 U.S.C. § 1225(b)(1)(A)(i) (2006).

40. *See id.*

41. Musalo, *supra* note 19, at 12.

42. 8 U.S.C. § 1225(b)(1)(B)(i).

43. *Id.* § 1225(b)(1)(B)(ii).

44. *See id.* § 1225(b)(1)(B)(v) (defining “credible fear of persecution”).

45. *Id.* § 1225(b)(1)(B)(ii).

finds the victim lacks credibility, he or she is ordered removed, and the finding of no credible fear is only reviewed by an immigration judge at the asylum seeker's request.<sup>46</sup> The applicant has no right to any further administrative or judicial review unless they claim under penalty of perjury that they have already been admitted to the United States as a legal permanent resident, a refugee, or an asylee.<sup>47</sup>

Prior to the passage of IIRIRA and the expedited removal process codified therein, asylum seekers were allowed to challenge an immigration officer's decision and "defend their admissibility at an exclusion hearing before an immigration judge."<sup>48</sup> Often more importantly, aliens were allowed to have counsel at the hearings and were able to appeal an adverse decision to the BIA or to a federal court.<sup>49</sup>

Under current law, administrative appeals are extremely limited, making many officials' decisions at the border final orders resulting in deportation.<sup>50</sup> Furthermore, the proceedings are completely private, often resulting in a one-on-one interview between a uniformed guard and a frightened applicant with a limited comprehension of the English language at best and likely no understanding of U.S. immigration law at worst.<sup>51</sup>

Although asylum seekers are supposed to be exempt from the expedited removal process,<sup>52</sup> a number of obstacles stand in their way. The first is the secrecy of the expedited removal process.<sup>53</sup> With no opportunity to speak with family members or obtain counsel to advise them of their rights, many aliens may not make it clear to officers at the border that they intend to apply for asylum or have a fear of persecution, and therefore are never referred for an asylum interview.<sup>54</sup>

The second issue which must be addressed is the conduct, or misconduct, of some of the officers at the border. Because of the privacy and secrecy surrounding the entire expedited removal process, outsiders have very little

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46. *Id.* § 1225(b)(1)(B)(iii)(I–III).

47. 8 U.S.C. § 1255(b)(1)(C).

48. Ebba Gebisa, Comment, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 566.

49. *Id.* at 568–69 (noting that "[t]he hearing and the opportunity to appeal afforded the alien some judicial protections against invalid and discriminatory removal orders").

50. 8 U.S.C. § 1225(b)(1)(C) ("Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal . . .").

51. See Musalo, *supra* note 19, at 13 (explaining that "[t]he expedited removal process is totally closed to the public; there is no opportunity for attorneys, family members, or other interested persons to be present at the 'secondary inspection' interrogation between the immigration officer and the individual seeking admission").

52. 8 U.S.C. § 1225(b)(1)(A)(ii).

53. See Musalo, *supra* note 19, at 13; see also *supra* notes 19, 51 and accompanying text.

54. Musalo, *supra* note 19, at 13.



knowledge of “how the law is being applied, or how it impacts people seeking admission.”<sup>55</sup> For many years, when researchers and NGOs concerned with the process requested access to monitor proceedings, the former INS was consistent in denying them permission to observe.<sup>56</sup> The former INS referenced “concerns of personal privacy” in refusing to grant access to statistical data or files or allow observers to view the process.<sup>57</sup>

Finally, even when a victim of domestic violence is identified as an asylum seeker, and thus initially exempt from the expedited removal process, she may be detained for an indeterminate amount of time in a jail or detention center while her request filters through the system.<sup>58</sup> Whether these detainment procedures meet the obligations of the United States under the 1951 Convention Relating to the Status of Refugees has been increasingly questioned.<sup>59</sup> Under Article 26, the United States agreed that “[e]ach Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”<sup>60</sup> In support of detainments, Immigration and Customs Enforcement (ICE) has asserted that 85% of noncitizens who are released rather than detained fail to appear at ordered hearings.<sup>61</sup> However, the U.S. Commission on Immigration Reform has refuted these findings with data showing that only 22% of asylum claimants who had demonstrated credible fear and who had been released pending their hearings did not appear.<sup>62</sup>

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55. *Id.*

56. *See id.* (“The only entity with extensive access to the process is the General Accounting Office (GAO), which has conducted studies . . . [that] did not focus on aspects of expedited removal that could determine whether the process adequately protects the rights of persons subject to it. . . . [N]either study utilized on-site observers sufficiently to determine whether INS officer misconduct . . . is a commonly occurring problem. It did not evaluate essential aspects of the process such as the availability and quality of interpreters for non-English speaking people who were subject to expedited removal. Nor did it examine any aspect of the legal decision making to determine whether the unreviewable decisions are consistent with controlling legal standards.”).

57. STEPHEN H. LEGOMSKY & CHRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1053 (Univ. Casebook Ser., 5th ed. 2009). However, the former INS did release some data to researchers in 2000. *Id.*

58. IN LIBERTY’S SHADOW, *supra* note 38, at 14 (“Neither U.S. laws nor regulations set a limit on the length of time an asylum seeker may be detained while his or her asylum proceedings are pending. In fact, human rights organizations and news reports have documented cases of asylum seekers who have been detained for three, four, and even five years.”).

59. LEGOMSKY & RODRIGUEZ, *supra* note 57, at 1056.

60. Convention Relating to the Status of Refugees, art. 26, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, *as amended by* 1967 Protocol Relating to the Status of Refugees [hereinafter Refugee Convention].

61. LEGOMSKY & RODRIGUEZ, *supra* note 57, at 1058.

62. *Id.*

Women detainees are especially at risk of experiencing abuse during detentions, and many have reported both physical and sexual abuse during their detentions.<sup>63</sup> Women detainees are much more likely than male detainees to be housed with criminal inmates and share living quarters.<sup>64</sup> Because they are housed together, they are given the same treatment as criminal inmates and are subject to the same disciplinary procedures.<sup>65</sup> Adding to the detainees' sense of isolation is the lack of translation services available to women inmates.<sup>66</sup> When asked about the availability of Spanish interpreters to assist a Guatemalan asylum seeker, an INS officer at one detention facility answered, "She can communicate with the universal language—sign language. . . . She's Hispanic, right? If she needs to tell us something, there are plenty of Hispanics back there who can help her. And anyway, she'll learn English quick enough."<sup>67</sup>

Safeguards must be implemented to ensure victims of domestic violence are not pushed out of the United States before they even get a chance to make their case for asylum. Most importantly, Congress must limit, if not completely discontinue, the use of expedited removal procedures at the border. Decisions to deport an individual arriving in the United States should not be made by immigration officers at the border. If the decision is made that an individual should be subject to the expedited removal procedures, an immigration judge should be required to independently review the file. This is the only way to ensure that an applicant with a valid claim for asylum is not sent back to her country by mistake.

Second, asylum seekers arriving in the United States should be allowed to contact family members or counsel immediately upon arrival in the country, in order to receive guidance and support throughout what is most certainly a new and confusing process. Domestic violence based asylum seekers should be interviewed by a female officer, with a translator present. Before any period of

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63. Musalo, *supra* note 19, at 13 ("[T]here have been numerous allegations of physical and sexual abuse of detainees, as well as complaints about the overall poor conditions in detention facilities."); *see also* IN LIBERTY'S SHADOW, *supra* note 38, at 37 ("When refugee women are detained, they are often faced with particular difficulties—including lack of privacy, separation from children and vulnerability to abuse in detention. . . . [This has been confirmed by a] report that an asylum seeker at the detention facility in Elizabeth, New Jersey was sexually assaulted by a guard at the facility. Women who were detained at [another facility] reported incidents of sexual harassment and molestation by male trustees.").

64. WOMEN'S COMM'N FOR REFUGEE WOMEN & CHILDREN, LIBERTY DENIED: WOMEN SEEKING ASYLUM IMPRISONED IN THE UNITED STATES 14 (1997), *available at* <http://www.womensrefugeecommission.org/docs/liberty.pdf>.

65. *See id.* at 15 ("Detainees reported physical and verbal abuse, frequent strip searches, and excessive use of prolonged isolation for minor infractions.").

66. *Id.* at 17.

67. *Id.* (quoting the statement of an INS officer posted at Maryland's Wicomico County Detention Center).

detainment, each applicant should be allowed to appear before an immigration judge and argue her case with the assistance of legal counsel.

In addition, detentions of domestic violence based asylum seekers should be limited in length. These women should not be detained at jails or prisons with criminal inmates. Once screened to determine that they pose no risk to the American public, domestic violence applicants should be taken to an alternative, low security facility where they are not kept in handcuffs and shackles, or they should be released pending their hearing date. If housed, the detention facilities should offer counseling and guidance services to help women adjust and increase their chances of making a smooth transition into a new life.

Finally, the secrecy shrouding the interview and removal process must give way to a system of disclosure and regulation. Congress must form an independent regulatory agency that is in charge of monitoring and reviewing interviews at the border, to ensure that the appropriate safeguards are being followed. One of the most effective regulatory bodies present in the United States is administered as a system of checks and balances, which comes from public knowledge coupled with public outrage or respect. With such limited information currently available to the public, the removal process loses the respect it may seek, the asylum seekers lose the hope of due process protections, and members of the public lose the ability to use their knowledge of the system as a means for regulation and change.

*B. Precedent-Setting Case Law and the Application of Less Than Clear Standards*

Should an asylum seeker make it through the obstacles set forth above without abandoning her claim for asylum altogether, the very difficult hurdle of obtaining a judicial decision in her favor is still ahead. The 2009 decision in favor of Rodi Alvarado's<sup>68</sup> claim for asylum is a good start, and it is precisely what many other cases pending during the last decade were waiting for, but it may not be enough to clear up years of misinterpretation and misapplication of law and provide solid guidance to decision makers in the future.<sup>69</sup> Over the last fifteen years, cases similar to Rodi Alvarado's have not only been put on hold, but other cases have also been decided in the interim, imposing additional requirements such as social visibility and particularity to be proven in domestic violence based asylum cases.<sup>70</sup>

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68. Department of Homeland Security Response to the Respondent's Supplemental Filing of August 18, 2009, R-A-, No. A073-753-922 (Oct. 28, 2009); Preston, *supra* note 28, at A14.

69. See Frydman, *supra* note 23, at 12, 16.

70. E-A-G-, 24 I. & N. Dec. 591, 593-95 (BIA 2008).

### 1. Setting the Stage for Asylum Claims Based on One's Membership in a Particular Social Group

The 1951 U.N. Refugee Convention called for the implementation of uniform standards in asylum cases by establishing a set of guidelines to determine who should be eligible for asylum.<sup>71</sup> The United States, along with a majority of other countries, adopted these guidelines.<sup>72</sup> In essence, the convention says that individuals with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” should be granted asylum.<sup>73</sup> However, the definition of membership in a “particular social group” was not made clear from the convention, and it has been left up to judicial decision makers in the United States to set the boundaries for this group of claimants.<sup>74</sup> Unfortunately for asylum seekers claiming eligibility under this category, the meaning of the term as it has evolved in U.S. case law has been less than clear over the years.

In 1985, the BIA set out the statutory standard for granting asylum in *Acosta*.<sup>75</sup> In determining that “[a] grant of asylum is a matter of discretion,” the court found that an alien could only be considered for asylum if he or she first qualifies as a refugee under the Immigration and Nationality Act.<sup>76</sup> The court cited Section 101(a)(42)(A) of the Act as requiring:

[F]our separate elements that must be satisfied before an alien qualifies as a refugee: (1) the alien must have a ‘fear’ of ‘persecution’; (2) the fear must be ‘well-founded’; (3) the persecution feared must be ‘on account of race, religion, nationality, membership in a particular social group, or political opinion’; and (4) the alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.<sup>77</sup>

The court went on to provide guidance regarding what it takes to establish “membership in a particular social group.”<sup>78</sup> In *Acosta*, the respondent was applying for asylum on the grounds that he was a member of a social group made up of COTAXI drivers and others working in the public transportation sector of El Salvador.<sup>79</sup> He left El Salvador after many of his colleagues were killed and after he was assaulted and had received death threats on multiple

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71. Refugee Convention, *supra* note 60, preamble. See Kotlowitz, *supra* note 10, at 32.

72. UNHCR, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL I (2011).

73. Refugee Convention *supra* note 60, art. 1.

74. Kotlowitz, *supra* note 10, at 32.

75. *Acosta*, 19 I. & N. Dec. 211, 218–19 (BIA 1985).

76. *Id.* at 218. The Immigration and Naturalization Act is codified in various Sections of 8 U.S.C. §§ 1101–1701 (2006).

77. *Id.* at 219 (citing 8 U.S.C. § 1101(a)(42)(A) (2006)).

78. *Id.* at 232–34.

79. *Id.* at 232.

occasions.<sup>80</sup> Noting that there was little guidance in applying the “social group” ground for asylum, the *Acosta* Court set out to establish a means of interpretation in this fairly new and uncharted territory.<sup>81</sup> The court found that whether or not a characteristic qualifies would have to be determined on a case-by-case basis, but no matter what the characteristic is, “it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>82</sup>

In 1996 the BIA applied the standard set forth in *Acosta* in the Matter of *Kasinga*.<sup>83</sup> Fauziya Kasinga was fleeing her native country of Togo to avoid genital cutting, which was a cultural practice of her tribe.<sup>84</sup> In granting the nineteen-year-old Togo native asylum, the Board found that female genital mutilation (FGM) constituted persecution and went on to define the applicable social group as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>85</sup> The Board ruled that having intact genitalia “is so fundamental to the individual identity of a young woman that she should not be required to change it.”<sup>86</sup>

While many commentators saw *Kasinga* as a positive step forward in recognizing gender-related asylum claims,<sup>87</sup> others questioned how helpful it might be due to its narrow holding.<sup>88</sup> The difficulty of succeeding in asylum claims for victims of domestic violence lies not in recognizing gender-related claims, but in determining how to define one’s social group in such a way that

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80. *Acosta*, 19 I. & N. Dec. at 218 (“The respondent described in specific detail the circumstances surrounding the deaths of his three friends shortly after they received threatening notes, the threats he received, and the facts surrounding his assault. His testimony as to these matters was logically consistent with his testimony about the threats made to COTAXI and its members for failing to participate in guerilla-sponsored work stoppages.”).

81. *Id.* at 232–33.

82. *Id.* at 233.

83. *Kasinga*, 21 I. & N. Dec. 357, 365–66 (BIA 1996).

84. *Id.* at 358.

85. *Id.* In granting asylum, it is important to note that the Board also found the applicant credible, that she had a well-founded fear of persecution, that this fear was on account of her membership in a social group, and that the fear of persecution was country-wide. *Id.*

86. *Id.* at 366.

87. *E.g.*, Connie M. Ericson, Casenote, In re *Kasinga: An Expansion of the Grounds for Asylum for Women*, 20 HOUS. J. INT’L. L. 671, 693 (1998) (“In granting asylum to Fauziya Kasinga on the basis of her fear of having to undergo FGM if she was returned to Togo, the BIA expanded the reach of asylum law for women by defining extreme FGM as persecution.”).

88. *E.g.*, Jennifer A. des Groseilliers, Comment, In re *Kasinga: “When the axe came into the forest, the trees said the handle is one of us.”*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 89, 91 (1998) (“As a result of the narrow ruling, which fails to recognize gender as a social group, future claims by women in slightly differing circumstances may fail.”).

it is not overly broad or circular.<sup>89</sup> A brief filed by DHS in a domestic violence seeker's case early in 2009 emphasized "that a particular social group cannot be significantly defined by the persecution suffered or feared."<sup>90</sup> DHS went on to give examples, saying that a victim of domestic violence may not define her social group as "Mexican women in an *abusive* domestic relationship who are unable to leave," as that would be impermissibly circular; however, other options might be available to her, such as "Mexican women in domestic relationships who are unable to leave," or "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."<sup>91</sup>

The 2009 DHS Brief has been seen as a positive step forward under the Obama administration, as it tends to show that the administration is at least entertaining the idea of allowing victims of domestic violence to make their case for asylum under the category "membership in a particular social group."<sup>92</sup> However, supplemental briefs are not law, and they certainly are not binding on future administrations and immigration judges who are not as sympathetic to these types of claims. Due to the fact-specific determinations made in cases involving victims of domestic violence and the "social group" category, even the final decision in the case of Rodi Alvarado may prove to be a rocky, rather than solid, step forward for future asylum-seekers.<sup>93</sup>

#### 1. The Development and Misapplication of the "Social Visibility" Test

Due to the lack of clear case law precedent, during the fourteen years in which Rodi Alvarado awaited a decision in her case, the BIA developed further requirements which had to be met in her case and by others relying on their membership in a particular social group as their basis for asylum.<sup>94</sup> The

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89. See Department of Homeland Security's Supplemental Brief at 10, L-R-, (Apr. 13, 2009), available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf> ("The Female Respondent Has Posited An Impermissibly 'Circular' Particular Social Group.").

90. *Id.* ("To do otherwise would sanction an illogical, circular 'nexus' construct, i.e., individuals are targeted for persecution because they belong to a group of individuals who are targeted for persecution.").

91. *Id.* at 10, 14.

92. Preston, *supra* note 28 ("[T]he Obama administration has recommended political asylum for a Guatemalan woman fleeing horrific abuse by her husband, the strongest signal yet that the administration is open to a variety of asylum claims from foreign women facing domestic abuse.").

93. *Id.* ("Homeland Security Department officials were cautious in assessing the implications of the administration's recommendation. The department 'continues to view domestic violence as a possible basis for asylum,' a department spokesman, Matthew Chandler, said. But such cases . . . continue to depend on the specific abuse.").

94. Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 63 (2008) ("Although the BIA has relied

“social visibility” test developed through case law has been the subject of much debate in domestic-violence cases.<sup>95</sup> It was first applied by the BIA in the Matter of *C-A-*, and later affirmed in 2006.<sup>96</sup> In determining whether noncriminal informants constituted a particular social group, the BIA cited guidelines from the UNHCR, which defined a particular social group as:

[A] group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.<sup>97</sup>

The BIA claimed that it was adhering to the *Acosta* formulation in determining what constituted a “social group,” and considered both immutability and social visibility in its analysis.<sup>98</sup> In addressing the “social visibility” of the social group, the BIA emphasized that its “other decisions recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question.”<sup>99</sup> In *C-A-*, it concluded that confidential informants are by their very nature confidential, i.e., unknown to the public.<sup>100</sup> Therefore, confidential informants lacked the necessary “social visibility” to be recognized as members of a particular social group.<sup>101</sup>

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on *Acosta*’s ‘protected characteristic’ approach for over two decades as virtually the sole method for determining whether a particular social group exists, its recent decisions in *C-A-* and *A-M-E* emphasize the additional importance of ‘social visibility.’ Prior to these decisions, neither the BIA nor the federal courts mentioned ‘social visibility’ as relevant to the particular social group analysis, yet the BIA did not acknowledge any departure from precedent.”).

95. *E.g., id.* at 64 (criticizing the social visibility test).

96. *C-A-*, 23 I. & N. Dec. 951, 959–61 (BIA 2006), *aff’d* *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1198 (11th Cir. 2006).

97. *C-A-*, 23 I. & N. Dec. at 956 (quoting U.N. High Commissioner 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*, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter *UNHCR Guidelines*]).

98. *Id.* at 958–61 (regarding immutability, the BIA noted “[a] past experience is, by its very nature, immutable, as it has already occurred and cannot be undone”).

99. *Id.* at 960. *But see* Marouf, *supra* note 94, at 64–65 (quoting *Kasinga*, 21 I. & N. Dec. 357, 365–66 (BIA 1996)) (“All of [the decisions cited by the BIA] turned on an *Acosta* analysis based on immutable characteristics, not social perception or visibility. For example, in *Kasinga*, the BIA found that ‘[t]he characteristics of being a “young woman” and a “member of the Tchamba-Kunsuntu Tribe” cannot be changed’ and that ‘[t]he characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she *should not be required to change it.*’ . . . The mere fact that these groups may be recognizable does not support the BIA’s suggestion that it has always examined social visibility or social perception in analyzing claims based on membership of a particular social group.”) (emphasis in original).

100. *C-A-*, 23 I. & N. Dec. at 960.

101. *Id.* at 961.

In upholding the decision, the United States Court of Appeals for the Eleventh Circuit found that the BIA's decision that noncriminal informants lacked the social visibility required to be considered a social group was reasonable.<sup>102</sup> They reiterated the policy behind limiting social group claims to those who could show social visibility, stating that membership in a "particular social group" should not be a "catch all" for all persons alleging persecution who do not fit elsewhere."<sup>103</sup> The court's decision in *C-A-* and the requirement of "social visibility" in asylum claims is now seen as a precedent-setting opinion and has been followed by courts throughout the United States.<sup>104</sup>

Prior to the decisions handed down in *C-A-* and cases following it, the U.N. Refugee Agency attempted to clear up confusion surrounding one's "membership in a particular social group" by publishing guidelines to act as a reference for decision-makers in the field.<sup>105</sup> Although cases have referenced these guidelines,<sup>106</sup> courts do not seem to be applying them in their entirety.

The guidelines first discuss the two approaches which have been applied in common law jurisdictions when defining what constitutes a social group.<sup>107</sup> The guidelines refer to the first approach as the "protected characteristics" or "immutability" approach and find that this approach "examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it."<sup>108</sup> The guidelines refer to the second approach as the "social perception" approach and find that this approach "examines whether or not a group shares

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102. *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1198 (11th Cir. 2006).

103. *Id.* ("In restricting the grounds for asylum and withholding of deportation based on persecution to five enumerated grounds, Congress could not have intended that all individuals seeking this relief would qualify in some form by defining their own 'particular social group.'").

104. *See, e.g., Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009) (quoting *C-A-*, 23 I. & N. Dec. at 960) ("In addition to immutability, the BIA requires that a 'particular social group' . . . have 'social visibility,' meaning that members possess 'characteristics . . . visible and recognizable by others in the [native] country.'"); *Koudriachova v. Gonzales*, 490 F.3d 255, 261 (2d Cir. 2007) (quoting *C-A-*, 23 I. & N. Dec. at 957, 959–60) ("[A] group's 'visibility'—meaning the extent to which members of society perceive those with the relevant characteristic as members of a social group—is a factor in determining whether it constitutes a particular social group under the INA.").

105. UNHCR Guidelines, *supra* note 97, at 1 ("These Guidelines are intended to provide legal interpretive guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field.").

106. *See, e.g., supra* note 97 and accompanying text.

107. UNHCR Guidelines, *supra* note 97, at 3.

108. *Id.* ("Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1(A)(2) [of the 1951 Convention relating to the Status of Refugees].").



a common characteristic which makes them a cognizable group or sets them apart from society at large.”<sup>109</sup>

The guidelines sought to reconcile the two approaches and in so doing adopted one standard to incorporate both approaches:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.<sup>110</sup>

While the guidelines seem to set forth a disjunctive test, requiring the sharing of a common characteristic *or* social visibility to constitute a social group, the cases seem to read it as a conjunctive test, which fails due to a lack of social visibility alone.<sup>111</sup>

The UNHCR has recognized the continued misapplication of the UNCHR Guidelines, and stepped in to provide clear guidance for the BIA, filing a Brief as Amicus Curiae in Support of the Petitioner in a case being reviewed by the BIA in 2009.<sup>112</sup> In summarizing its argument, UNHCR stated:

The holding of this case and those upon which it relies are inconsistent with the purpose and intent of the 1951 Convention and the 1967 Protocol and misconstrue the *UNHCR Guidelines*. In this case the Board required that, in order to satisfy the “particular social group” ground of the refugee definition, a group must be both “socially visible” and defined with sufficient “particularity.” . . . [T]he line of decisions the Board relied on in the instant case inaccurately cite the *UNHCR Social Group Guidelines* in support of the “social visibility” requirement. This interpretation of the *UNHCR Guidelines* is incorrect.

As articulated in the *UNHCR Guidelines*, there are two separate, alternative tests for defining a particular social group . . . . Neither approach requires that members of a particular social group be “socially visible” or, in other words, visible to society at large.<sup>113</sup>

UNHCR’s interpretation of the 1951 Convention and the guidelines interpreting it are authoritative, meaning U.S. courts are obliged to follow

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109. *Id.* (finding similar groups of people being recognized under this analysis as under the protected characteristics/immutability analysis, “depending on the circumstances of the society in which they exist”).

110. *Id.* at 3–4 (emphasis added).

111. *E.g.*, *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1198 (11th Cir. 2006) (finding that non-criminal informants were not visible enough to be considered a social group).

112. Brief of the United Nations High Comm’r for Refugees as Amicus Curiae in Support of the Petitioner, *Valdiviezo-Galdamez v. Holder*, No. 08-4564 (3d Cir. Apr. 14, 2009) [hereinafter UNHCR Galdamez Brief].

113. *Id.* at 3–4 (citations omitted).

them.<sup>114</sup> The recognition of this misapplication of “law” by U.S. courts is a positive step forward, but it does not change the outcome of many cases decided in the last seven years, and has yet to be recognized in pending cases. For example, the case of *R-A-*, which so many commentators saw as the next precedent-setting case in domestic violence based asylum claims, was originally sent back for a determination of whether the “social visibility” and “particularity” elements had been met in the case.<sup>115</sup>

Due to the misinterpretation of controlling guidelines, resulting in the misapplication and formation of case law, thousands of women have been sent back to their countries to face the harm they fled from in the first place. It took three years from the time the social visibility requirement was established in *C-A-* until the UNHRC was able to step in and refute it.<sup>116</sup> This is but one example of why a controlling decision in *R-A-* is not enough to protect women fleeing domestic violence. Controlling case law is helpful, but is also easily misinterpreted and applied. Further guidance is needed for the United States to protect women fleeing domestic violence and looking for shelter under U.S. asylum law. Rather than continuing to decide cases involving fact-specific interpretations of law, which are easily distinguishable, judicial guidance must take the form of binding legal analysis at the highest judicial level. The requirements for domestic violence victims to make their case for asylum must be set out in judicial opinions in such a way that all courts apply the same standard, so that those seeking asylum have knowledge of the burdens they must overcome at the judicial level. Until this standard is established, lower level courts should not decide these cases by interpreting the guidelines any way they see fit, as this results in inconsistent decisions and arbitrary determinations, which are often difficult to anticipate.

### C. *The Call for Legislation or Administrative Regulations*

In addition to regulating the procedures in place at the border, and ensuring that case law is providing appropriate guidance in its precedent-setting opinions, protecting victims of domestic violence who are seeking asylum in the United States has to begin at the rule-making level. Clear, meaningful rules must come in the form of administrative or legislative guidance, and must be in place soon to enable immigration judges and government officials to protect these victims.

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114. *Id.* at 2 (citing *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)) (“United States courts have an obligation to construe United States statutes in a manner consistent with United States international obligations whenever possible.”).

115. See *R-A-*, 24 I. & N. Dec. 629, 630 (BIA 2008); Legal Memorandum and Supporting Documentation at 2–3, *R-A-*, No. A073-753-922 (Aug. 19, 2009).

116. See UNHCR Galdamez Brief, *supra* note 112, at 6–7.

In December of 2000, the Department of Justice proposed a number of amendments to the INS regulations that govern the establishment of asylum and withholding eligibility requirements.<sup>117</sup> The proposed rule set out to provide guidance to those interpreting and applying the statutory definition of “refugee,” in relation to asylum claims made by victims of domestic violence.<sup>118</sup> The INS addressed the fact that judicial decisions involving claims based on an applicant’s “membership in a social group” were not uniform and that further statutory guidance was necessary.<sup>119</sup> In coming up with a list of factors to consider, the proposed rule referenced the BIA’s 1999 decision denying Rodi Alvarado’s claim for asylum:

[T]he next three factors in this proposed section are drawn from the Board’s decision in *In re R-A-*. In that case, the Board found it highly significant for “particular social group” analysis that the applicant had not shown that the group she asserted “is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala,” or that “the victims of spouse abuse view themselves as members of this group.” The Board also focused on whether “it is more likely that distinctions will be drawn within the society between those who share and those who do not share the characteristic” at issue. This, of course, could be an important inquiry in asylum and withholding cases. *The Board did not characterize these elements as requirements, however. This rule incorporates them as factors*, but confirms that they are considerations, which, while they may be relevant in some cases, are not determinative of the question of whether a particular social group exists.<sup>120</sup>

The Department stated its goal through the proposed rule was to eliminate certain obstacles the 1999 *R-A-* decision appeared to pose to future domestic-violence based asylum seekers.<sup>121</sup> However, almost a decade has passed and the proposed rule has yet to go into effect.

In January 2001, in light of the proposed rule, the Attorney General vacated the earlier decision of the BIA in the case of *R-A-* and remanded the

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

118. *Id.* (“This rule . . . restates that gender can form the basis of a particular social group . . . and, in particular, will aid in the assessment of claims made by applicants who have suffered or fear domestic violence.”).

119. *Id.* at 76,589 (quoting *Lwin v. INS*, 144 F.3d 505, 510 (7th Cir. 1998) (“Many [new asylum] claims are based on the ground of ‘membership in a particular social group,’ which is the least well-defined of the five grounds within the refugee definition. As the Court of Appeals for the Seventh Circuit noted in *Lwin v. INS*, ‘[t]he legislative history behind the term \* \* \* is uninformative, and judicial and agency interpretations are vague and sometimes divergent. As a result, courts have applied the term reluctantly and inconsistently.’”).

120. *Id.* at 76,594 (emphasis added) (citation omitted) (quoting *R-A-*, 22 I. & N. Dec. 906 (BIA 1999)).

121. *Id.* at 76,589.

case to the Board, instructing that it be decided after the rule was finalized.<sup>122</sup> In 2003, the Attorney General certified the case to himself and asked for additional briefing on Alvarado's eligibility for relief.<sup>123</sup> In response, DHS filed a supplemental brief, summarizing their analysis of the case in the absence of a final rule.<sup>124</sup> According to the DHS:

[a] final rule is the best vehicle for providing much needed guidance on the adjudication of social group asylum claims, including those based on domestic violence. The legal standards governing this case and others like it have been obscured by the uneven development of case law and by the need for a coherent administrative framework for interpretation on these issues.<sup>125</sup>

In 2005, the case was again sent back to the Board to be considered once the proposed rule was finalized,<sup>126</sup> and in 2008, Attorney General Mukasey referred the case to himself for review and again remanded the matter for reconsideration of the issues.<sup>127</sup> In remanding the case once again, Attorney General Mukasey noted that since 2001 "both the Board and courts of appeals have issued numerous decisions" which may be helpful in making a final decision in the case.<sup>128</sup>

In 2000, the Department of Justice proposed statutory rules to be used in place of case law in deciding asylum cases based on domestic violence, due to the misinterpretation of law in recent cases.<sup>129</sup> In 2004, the DHS took the same position, finding that a final rule was necessary in deciding cases such as *R-A-*.<sup>130</sup> Yet in 2008, with no final rule in place, *R-A-* was sent back to the Board to be decided on what could be nothing more than the spotty case law of the recent decade. In a brief filed by the DHS in 2009, the Department noted they "[had] not abandoned the effort to produce regulations that address the issues covered by the December 7, 2000, notice of proposed rulemaking; [their] new leadership is considering the best way forward in view of administrative and case law developments during the intervening years."<sup>131</sup>

In light of the support for administrative or legislative rulemaking in this area and in the face of many admonitions that the case law in this area has not been well-developed, it should no longer be relied upon in handing down decisions that determine the fate of future applicants. Without some form of

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122. *R-A-*, 22 I. & N. Dec. 906, 906 (BIA 2001).

123. *R-A-*, 24 I. & N. Dec. 629, 629 (BIA 2008).

124. DHS 2004 Brief *R-A-*, *supra* note 24, at 4.

125. *Id.*

126. *R-A-*, 23 I. & N. Dec. 694, 694 (BIA 2005).

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

128. *Id.* at 630.

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

130. DHS 2004 Brief *R-A-*, *supra* note 24, at 4.

131. Department of Homeland Security's Supplemental Brief, *supra* note 89, at 4 n.5.

the proposed rules in place, the waters continue to be muddied by inconsistent, misinformed opinions, which are justified using earlier inconsistent, misinformed opinions. The administrative rule makers must push forward in establishing and implementing a final rule to ensure that asylum claims from victims of domestic violence are given fair consideration under the laws of the United States.

#### CONCLUSION

Women fleeing from domestic violence have traveled a long, arduous path by the time they arrive in the United States seeking the protections of this country's asylum laws. For many, their arrival in this country marks only the beginning of another long and painful struggle. The expedited removal and interview procedures currently in place in the United States are easily susceptible to error when dealing with a frightened noncitizen who is not fluent in the English language. The detention centers are housing units for criminals and are in no way appropriate vessels for educating asylum seekers arriving in the United States for the first time. Rather than preparing asylum seekers for the successful start of a new life in the United States, the detention centers set victims of domestic violence up for failure. If one is fortunate enough to have her case heard by an immigration judge, the outcome of her case is determined as much by the assignment of the immigration judge as it is by the law. Although a final rule applicable in all cases is much needed and has been called for by numerous agencies, no one has taken the initiative to push it through. The immigration system in the United States is in need of dire changes if this country is going to protect the strong, determined women arriving in this country after escaping death at the hands of their abusers. As posed throughout this comment, these changes must come in the form of increased safeguards and less secrecy at the border, clear case law applying uniform standards, and administrative or legislative guidance setting forth these standards. Only after these changes are implemented will victims of domestic violence have a fighting chance at winning their battle for asylum in the United States.

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