

American Immigration Lawyers Association  
1331 G Street, N.W., Suite 300  
Washington, D.C. 20005

**NON-DETAINED**

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS**

---

**In the Matters of:**

**M.J.V.;  
R.D.C.P-G; and  
A.R.C-G et. al.**

**In Removal Proceedings**

---

**File Nos.:**

**A089 697 034  
A094 793 472  
A099 528 680**

**BRIEF OF *AMICUS CURIAE* OF AMERICAN IMMIGRATION LAWYERS  
ASSOCIATION**

*Attorneys for Amicus Curiae*

**Philip L. Torrey**

Clinical Instructor

**Deborah E. Anker**

Clinical Professor of Law and Director

**Sabrineh Ardalan**

Lecturer on Law and Assistant Director

Harvard Immigration and Refugee Clinical Program  
Harvard Law School

6 Everett Street; Suite 3105

Cambridge, MA 02138

**Fatma E. Marouf**

Associate Professor of Law and Director  
Immigration Clinic

William S. Boyd School of Law

University of Nevada, Las Vegas

4505 S. Maryland Parkway, Box 451003

Las Vegas, Nevada 89154

**Benjamin Casper**

Casper & Evans, P.A.

1518 East Lake St., Ste 206B

Minneapolis, MN 55407

*Of counsel on brief*

**Robin Goldfaden**

Lawyers' Committee for Civil Rights of the  
San Francisco Bay Area  
131 Steuart Street, Suite 400  
San Francisco, CA 94105

**Nancy Kelly**

Co-Managing Attorney

**John Wilshire Carrera**

Co-Managing Attorney  
Harvard Immigration and Refugee Clinical Program  
of Greater Boston Legal Services  
197 Friend Street  
Boston, MA 02114

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	5
I. GENDER-DEFINED PSGS AND GENDER-RELATED POLITICAL OPINIONS ARE BOTH VIABLE PROTECTED GROUNDS IN ASYLUM CLAIMS BASED ON DOMESTIC VIOLENCE. ....	5
A. Domestic and international authorities have long recognized that gender can define a PSG based on the BIA's innate or immutable characteristic test. ....	6
B. "Social Visibility" and "Particularity" have been improperly imposed upon the well-defined <i>Acosta</i> test as additional criteria. ....	12
C. Concerns that broadly defined PSGs will greatly increase the number of asylum eligible applicants are meritless because the current statutory and regulatory framework filters out applicants who do not qualify for asylum.....	17
D. Asylum claims based on domestic violence may also include other protected grounds, such as an applicant's gender-related political opinion.....	20
II. DOMESTIC VIOLENCE MAY CONSTITUTE PERSECUTION. ....	22
A. Domestic violence includes severe forms of harm that amount to persecution. ....	23
B. Domestic violence based asylum claims require proof that the state is unable or unwilling to protect the asylum-seeker, <i>i.e.</i> , reduce the risk below a well-founded fear. ....	26
C. The persecutor's motive is irrelevant in determining what constitutes persecution.....	28
III. DOMESTIC VIOLENCE BASED ASYLUM CLAIMS REQUIRE EVIDENCE THAT THE PERSECUTION EXPERIENCED OR FEARED IS "ON ACCOUNT OF" OR "FOR REASONS OF" A PROTECTED GROUND. ....	31
A. A protected ground need only be "at least one central reason" for the persecution to satisfy the nexus element of the refugee definition. ....	31

B. Numerous experts on domestic violence and international authorities have recognized that violence within a domestic relationship is typically inflicted by a domestic partner for reasons of gender.....	37
CONCLUSION.....	40

## TABLE OF AUTHORITIES

### Cases

<i>Abay v. Ashcroft</i> , 368 F.3d 634 (6th Cir. 2004).....	8
<i>Ahmed v. Holder</i> , 611 F.3d 90 (1st Cir. 2010).....	15
<i>Al Ghorbani v. Holder</i> , 585 F.3d 980 (6th Cir. 2009) .....	16, 26
<i>Ali v. Ashcroft</i> , 394 F.3d 780 (9th Cir. 2005) .....	25
<i>Garcia-Martinez v. Ashcroft</i> , 371 F.3d 1066 (9th Cir. 2004).....	23
<i>Ayele v. Holder</i> , 564 F.3d 862 (7th Cir. 2009) .....	16
<i>Bace v. Ashcroft</i> , 352 F.3d 1133 (7th Cir. 2003) .....	36
<i>Bah v. Mukasey</i> , 529 F.3d 99 (2d Cir. 2008).....	8, 24, 28
<i>Benitez Ramos v. Holder</i> , 589 F.3d 426 (7th Cir. 2009).....	14
<i>Bi Xia Qu v. Holder</i> , 618 F.3d 602 (6th Cir. 2010) .....	34
<i>Castellano-Chacon v. INS</i> , 341 F.3d 533 (6th Cir. 2003).....	8
<i>Castillo-Arias v. Att’y Gen.</i> , 446 F.3d 1190 (11th Cir. 2006).....	8
<i>Chen v. Holder</i> , 604 F.3d 324 (7th Cir. 2010).....	24
<i>Cleveland v. United States</i> , 329 U.S. 14 (1946) .....	6
<i>Crespin-Valladares v. Holder</i> , 632 F.3d 117 (4th Cir. 2011).....	16
<i>Dallakoti v. Holder</i> , 619 F.3d 1264 (10th Cir. 2010) .....	34
<i>Faruk v. Ashcroft</i> , 378 F.3d 940 (9th Cir. 2004) .....	27
<i>Fatin v. INS</i> , 12F.3d 1233 (3d Cir. 1993).....	8
<i>Fisher v. INS</i> , 79 F.3d 955 (9th Cir. 1996) .....	23
<i>Gao v. Gonzales</i> , 440 F.3d 62 (2d Cir. 2006).....	18
<i>Garcia-Martinez v. Ashcroft</i> , 371 F.3d 1066 (9th Cir. 2004).....	25
<i>Gatimi v. Holder</i> , 578 F.3d 611 (7th Cir. 2009) .....	13
<i>Gomez-Zuluaga v. Attorney General of U.S.</i> , 527 F.3d 330 (3d Cir. 2008) .....	8
<i>Hassan v. Gonzales</i> , 484 F.3d 513 (8th Cir. 2007).....	8, 28
<i>Henriquez-Rivas v. Holder</i> , 449 Fed. Appx. 626 (9th Cir. 2011).....	14, 15
<i>Henriquez-Rivas v. Holder</i> , 670 F.3d 1033 (9th Cir. 2012) .....	13
<i>Hernandez-Montiel v. I.N.S.</i> , 225 F.3d 1084 (9th Cir. 2000) .....	6
<i>INS v. Stevic</i> , 467 U.S. 407 (1984) .....	1
<i>Kone v. Holder</i> , 596 F.3d 141 (2d Cir. 2010).....	23
<i>Lazo-Majano v. INS</i> , 813 F.2d 1432 (9th Cir. 1987) .....	23, 25
<i>Lopez-Galarza v. INS</i> , 99 F.3d 954 (9th Cir. 1996).....	23
<i>Lopez-Soto v. Ashcroft</i> , 383 F.3d 228 (4th Cir. 2004) .....	8
<i>Malonga v. Mukasey</i> , 546 F.3d 546 (8th Cir. 2008).....	18
<i>Marroquin-Ochoma v. Holder</i> , 574 F.3d 574 (8th Cir. 2009).....	35
<i>Matter of Acosta</i> , 19 I. & N. Dec. 211 (BIA 1985) .....	passim
<i>Matter of A-M-E- &amp; J-G-U</i> , 24 I. & N. Dec. 69 (BIA 2007).....	15, 17
<i>Matter of C-A-</i> , 23 I. & N. Dec. 951 (BIA 2006) .....	12, 15, 16
<i>Matter of Chen</i> , 20 I. & N. Dec. 16 (BIA 1989).....	3
<i>Matter of D-R-</i> , 25 I. & N. Dec. 445 (BIA 2011) .....	36
<i>Matter of D-V-</i> , 21 I. & N. Dec. 77 (BIA 1993) .....	24
<i>Matter of Fuentes</i> , 19 I. & N. Dec. 658 (BIA 1988).....	28, 35
<i>Matter of H-</i> , 21 I. & N. Dec. 337 (BIA 1996) .....	19
<i>Matter of J-B-N- &amp; S-M-</i> , 24 I. & N. Dec. 208 (BIA 2007) .....	33

<i>Matter of Kasinga</i> , 21 I. & N. Dec. 357 (BIA 1996).....	29, 30
<i>Matter of Mogharrabi</i> , 19 I. & N. Dec. 439 (BIA 1987).....	6
<i>Matter of N-M-A-</i> , 22 I. & N. Dec. 312 (BIA 1998).....	3
<i>Matter of R-A-</i> , 24 I. & N. Dec. 629 (A.G. 2008).....	9
<i>Matter of S-A-</i> , 22 I. & N. Dec. 1328 (B.I.A. 2000).....	21, 23
<i>Matter of S-E-G-</i> , 24 I. & N. Dec. 579 (BIA 2008).....	12, 14, 15
<i>Matter of S-P-</i> , 21 I. & N. Dec. 486 (BIA 1996).....	29, 33, 36
<i>Matter of Y-T-L-</i> , 23 I. & N. Dec. 601 (BIA 2003).....	24
<i>Mohammed v. Gonzales</i> , 400 F.3d 785 (9th Cir. 2005).....	8, 26, 30
<i>Nabulwala v. Gonzales</i> , 481 F.3d 1115 (8th Cir. 2007).....	26
<i>Ndayshimiye v. Att'y Gen.</i> , 557 F.3d 124 (3d Cir. 2009).....	33, 34
<i>Ndonyi v. Mukasey</i> , 541 F.3d 702 (7th Cir. 2008).....	36
<i>Ngengwe v. Mukasey</i> , 543 F.3d 1029 (8th Cir. 2008).....	8, 24, 28
<i>Niang v. Gonzales</i> , 422 F.3d 1187 (10th Cir. 2005).....	8, 19, 20, 26, 30
<i>Ontunez-Tursios v. Ashcroft</i> , 303 F.3d 341 (5th Cir. 2002) .....	8
<i>Parussimova v. Mukasey</i> , 533 F.3d 1128 (9th Cir. 2008).....	34
<i>Perdomo v. Holder</i> , 611 F.3d 662 (9th Cir. 2010).....	19
<i>Pitcherskaia v. INS</i> , 118 F.3d 641 (9th Cir. 1997) .....	29, 31
<i>Quinteros-Mendoza v. Holder</i> , 556 F.3d 159 (4th Cir. 2009) .....	34
<i>Rivera-Barrientos v. Holder</i> , 658 F.3d 1222 (10th Cir. 2010) .....	15
<i>Rizal v. Gonzales</i> , 442 F.3d 84 (2d Cir. 2006).....	27
<i>Rojas-Perez v. Holder</i> , --F.3d--, 2012 WL 5383261 (1st Cir. Nov. 5, 2012).....	13
<i>Safaie v. I.N.S.</i> , 25 F.3d 636 (8th Cir. 1994).....	21
<i>Sarhan v. Holder</i> , 658 F.3d 649 (7th Cir. 2011).....	8, 28, 34, 37
<i>Sepulveda v Gonzales</i> , 464 F.3d 770 (7th Cir. 2006) .....	8
<i>Shaikh v. Holder</i> , 588 F.3d 861 (5th Cir. 2009) .....	34
<i>Siewe v. Gonzales</i> , 480 F.3d 160 (2d Cir. 2007).....	36
<i>Silaya v. Mukasey</i> , 524 F.3d 1066 (9th Cir. 2008) .....	23
<i>Singh v. INS</i> , 94 F.3d 1353 (9th Cir. 1996).....	19
<i>Singh v. Mukasey</i> , 543 F.3d 1 (1st Cir. 2008).....	34
<i>Smolniakova v. Gonzales</i> , 422 F.3d 1037 (9th Cir. 2005) .....	27
<i>Stanojkova v. Holder</i> , 645 F.3d 943 (7th Cir. 2011).....	24
<i>Tadesse v. Gonzales</i> , 492 F.3d 905 (7th Cir. 2007) .....	23
<i>Tchoukhrova v. Gonzales</i> , 404 F.3d 1181 (9th Cir. 2005).....	30
<i>Ucelo-Gomez v. Mukasey</i> , 509 F.3d 70 (2d Cir. 2007).....	15, 18
<i>Valdiviezo-Galdamez v. U.S. Att'y Gen.</i> , 663 F.3d 582 (3d Cir. 2011).....	13, 14, 15
<i>Vata v. Gonzalez</i> , 243 Fed. Appx. 930 (6th Cir. 2007).....	35
<i>Velihaj v. Attorney General of U.S.</i> , 336 Fed. Appx. 193 (3d Cir. 2009).....	32
<i>Zubeda v. Ashcroft</i> , 333 F.3d 463 (3d Cir. 2003) .....	24

## Statutes

8 U.S.C. § 1101(a)(42).....	24
8 U.S.C. § 1158(a)(2)(B) .....	20
8 U.S.C. § 1158(b)(1)(A).....	20
8 U.S.C. § 1158(b)(2)(A).....	20

8 U.S.C. § 1231(b)(3)(B) .....	20
REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 302 (May 11, 2005).....	33, 34, 35, 42

## Legislative History

H.R. 10, 108th Cong. § 3007 (2004).....	33
H.R. Rep. No. 109-72 (2005) (Conf. Rep.).....	33, 35

## Regulations

8 C.F.R. § 208.13(b)(1)(i)(A) .....	3, 20
8 C.F.R. § 208.13(b)(1)(i)(B).....	3
8 C.F.R. § 208.13(b)(3)(i).....	20
8 C.F.R. § 208.13(b)(3)(ii).....	20

## United Nations Documents

<i>Refugee Women and International Protection</i> , UNHCR Programme Executive Committee, 36th Sess., No. 39 (Oct. 18, 1985) .....	10
UNHCR, <i>Guidance Note on Refugee Claims Relating to Female Genital Mutilation</i> (May 2009) .....	12
UNHCR, <i>Guidance Note on Refugee Claims Relating to Victims of Organized Gangs</i> (2010) .	12
UNHCR, <i>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</i> HCR/GIP/02/01 (May 7, 2002) .....	11, 21
UNHCR, <i>Guidelines on International Protection: 'Membership of a Particular Social Group' within the context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees</i> , U.N. Doc. HCR/GIP/02/02 (2002) .....	18, 32
UNHCR, <i>Handbook on Procedures and Criteria for Determining Refugee Status</i> (Geneva 1992) .....	18
UNHCR, <i>Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences</i> , Radhika Coomaraswamy, U.N. Doc. E/CN.4/1998/54 (Jan. 26, 1998).....	12
UNHCR, <i>Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences</i> , Radhika Coomaraswamy, submitted in Accordance with Commission on Human Rights Resolution 1995/85, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996).....	39
UNHCR, <i>Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences</i> , Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85, U.N. Doc. E/CN.4/1999/68 (Mar. 10, 1999) .....	39
United Nations Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48 <sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/48/49 (Dec. 20, 1993).....	39
United Nations Convention Relating to the Status of Refugees, July 28, 1951, 10 U.S.T. 6259, 189 U.N.T.S. 150 .....	2, 10, 18, 19
United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577 (1968) .....	2, 18

Violence Against Women in the Family, U.N. Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV. (1989) .....	37
---	----

## Agency Documents

Asylum Officer Basic Training Course: <i>Eligibility Part I: Definitions of Persecution; Eligibility Based on Past Persecution</i> 32 (Mar. 6, 2009).....	23, 25
Asylum Officer Basic Training Course, <i>Asylum Eligibility Part III: Nexus and the Five Protected Characteristics</i> 7 (Mar. 12, 2009) .....	6, 31, 35
Asylum Officer Basic Training Course, <i>Female Asylum Applicants and Gender-Related Claims</i> 6 (Mar. 12, 2009).....	passim
DHS Brief, submitted in <i>Matter of R-A-</i> (Feb. 19, 2004) .....	9, 18, 36
DHS, <i>Written Clarification Regarding the Definition of "Particular Social Group,"</i> submitted to the Executive Office for Immigration Review, L.A. California (July 13, 2010) .....	10
DHS Supplemental Brief, submitted in <i>Matter of L-R-</i> (Apr. 13, 2009) .....	9, 16, 17, 19
Exec. Order No. 13623, 77 Fed. Reg. 159, 49345 (Aug. 10, 2012) .....	41
Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, <i>Considerations For Asylum Officers Adjudicating Asylum Claims From Women</i> (May 26, 1995).....	7, 21, 22, 24
U.S. Department of State, <i>Gender Guidelines for Overseas Refugee Processing</i> 6 (2000) .....	7
USCIS: RAIO Directorate – Officer Training, <i>Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims</i> (Dec. 28, 2011). 31	

## Treatises and Law Review Articles

Deborah Anker, Lauren Gilbert & Nancy Kelly, <i>Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify As Refugees Under United States Asylum Law</i> , 11 Geo. Immigr. L.J. 709 (1997).....	40
Deborah Anker, <i>Membership in a Particular Social Group: Developments in U.S. Law</i> , 1566 PLI/Corp 195 (2006) .....	18
Deborah E. Anker, <i>Refugee Law, Gender, and the Human Rights Paradigm</i> , 15 Harv. Hum. Rts. J. 133 (2002).....	6, 37
Deborah E. Anker, <i>Law of Asylum in the United States</i> (5th ed. 2012).....	passim
Fatma E. Marouf, <i>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</i> , 27 Yale L. & Pol'y Rev. 47 (2008).....	13
Heaven Crawley, <i>Refugees and Gender: Law and Process</i> 6-7 (2001) .....	6
<i>Intimate Partner Violence in LGBTQ Lives</i> (Janice L. Ristock, ed., 2011) .....	37
Isabel Marcus, <i>Reframing "Domestic Violence": Terrorism in the Home, The Public Nature of Violence</i> 11 (1994).....	38



Jacqueline Greatbatch, <i>The Gender Difference: Feminist Critiques of Refugee Discourse</i> , 1 Int'l J. Refugee L. 518 (1989).....	40
James C. Hathaway & Michelle Foster, <i>Development: Membership of a Particular Social Group</i> , 15 Int'l J. Refugee L. 477 (2003) .....	19
James Ptacek, <i>Why Do Men Batter Their Wives</i> , Feminist Perspectives on Wife Abuse 133 (Kersti Yllö & Michelle Bograd eds., 1988).....	39
Jesse Imbriano, <i>Opening the Floodgates or filling the Gap?: Perdomo v. Holder Advances the Ninth Circuit One Step Closer to Recognizing Gender-Based Asylum Claims</i> , 56 Vill. L. Rev. 327 (2011) .....	19
Kerry Healey, et al., <i>Batterer Intervention: Program Approaches and Criminal Justice Strategies</i> (1998) .....	38
Michael G. Heyman, <i>Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligation</i> , 17 Int'l J. Refugee L. 729 (2005) .....	5
Nancy Kelly, <i>Gender-Related Persecution: Assessing the Asylum Claims of Women</i> , 26 Cornell Int'l L. J. 625 (1993).....	40
Natalie Nanasi, <i>Lesson from Matter of A-T-: Guidance for Practitioners Litigating Asylum Cases Involving a Spectrum of Gender-Based Harms, From Female Genital Mutilation to Forced Marriage and Beyond</i> , 12-02 Immigr. Briefings 1 (2012).....	40
Nitzan Sternberg, <i>Do I Need to Pin a Target to My Back?: The Definition of "Particular Social Group" in U.S. Asylum Law</i> , 39 Fordham Urb. L.J. 245 (2011).....	19
Pamela Goldberg, <i>Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence</i> , 26 Cornell Int'l L.J. 565 (1993).....	40
Rodger Haines QC, <i>Gender-Related Persecution</i> , in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection 319 (Erika Feller et al., eds. 2003) .....	27
<i>Sutherland on Statutory Construction</i> (7th ed. 2009).....	7

## Other Authorities

Alien Act (Svenskförfattningssamling [SFS] 2005:716) (Swed.) .....	11
American Psychological Association, <i>Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family</i> 19 (1996) .....	5, 38
<i>Applicant S v. Minister for Immigration &amp; Multicultural Affairs</i> , [2004] HCA 25, 217 C.L.R. 387 ¶ 16 (H.C. Austl. 2004); .....	10, 17
<i>Canada (Attorney General) v. Ward</i> , [1993] 2 S.C.R. 689 (Can.) .....	7, 10
<i>E1-248.714/2008 v. Federal Asylum Authority</i> , High Court for Asylum, Austria (2011) .....	10
Immigration & Refugee Board of Canada, <i>Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution</i> (Mar. 9, 1993) .....	7

Immigration & Refugee Board of Canada, <i>Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution, Update</i> (Nov. 13, 1996) .....	7
Immigration and Refugee Board of Canada, Guideline 4, Women Refugee Claimants Fearing Gender-Related Persecution (Nov. 13, 1996) .....	25
Immigration Appellate Authority of the United Kingdom, <i>Asylum Gender Guidelines</i> (Nov. 2000).....	11
<i>Islam (A.P.) v. Sec'y of State for the Home Dep't</i> , (1999) 2 All E.R. 545 (H.L.) (U.K.) .....	33
<i>Islam and Shah v. Home Dept.</i> , [1999] 2 A.C. 629 (U.K.).....	10
<i>Matter of MN, Refugee Appeal No 2039/93</i> (1996) (N.Z.S.A.A.); <i>Refugee Appeal No. 71427/99</i> , [1999] N.Z.A.R. 545 (New Zealand) .....	10, 25
Miami-Dade, Fla., Res. 121380, Ref. No. R-644-12 (July 17, 2012).....	41
<i>Minister for Immigration &amp; Multicultural Affairs v. Khawar</i> , (2002) HCA 14; 210 CLR 1; 187 ALR 574, ¶ 23 (Austl.).....	32
<i>Minister for Immigration &amp; Multicultural Affairs v. Khawar</i> , [2002] H.C.A. 14, 210 C.L.R. 1, 187 A.L.R. 574 (Austl.).....	10, 25
Refugee Act §1(1) 1996 (Act. No. 17/1996) (Ir.) .....	11
<i>Refugee Appeal No. 74665/03</i> , [2004] NZAR 60, ¶53 (RSAA).....	23
<i>Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah</i> , (1999) 2 All E.R. 545 (H.L.) (U.K.) .....	33
<i>Re ZWD</i> , Refugee Appeal No. 3/91 (New Zealand Refugee Review Board).....	10
<i>Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)</i> , [2006] UKHL 55. 33	
<i>Shah and Islam v. Secretary of State for the Home Department</i> , [1999] 2 A.C. 629 (U.K.) .....	25

The American Immigration Lawyers Association ("AILA") respectfully submits this brief in response to the Board of Immigration Appeals' ("BIA" or "Board") requests for supplemental briefing dated July 19, 2012 in the *Matters of E.M.C., M.J.V., L.G.P-C, R.D.C.P-G, and A.R.C-G et. al.* (hereinafter "Briefing Requests").<sup>1</sup> The Briefing Requests direct *amici* to address "whether domestic violence can, in some instances, form the basis of an asylum or withholding of removal claim."<sup>2</sup>

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

Domestic violence may form the basis of an asylum claim or withholding of removal claim under section 241(b)(3) of the Immigration and Nationality Act ("INA") because (1) domestic violence often involves harm that may be serious enough to be considered persecutory, (2) the home country may be unable or unwilling to protect the applicant from domestic violence, (3) at least one central reason for inflicting domestic violence, or a state's failure to protect an individual from domestic violence, is gender, and (4) gender can be the basis of a protected ground, for example a gender-defined particular social group or gender-related political opinion, which may form the basis of a domestic violence based asylum claim.<sup>3</sup>

Of course, not all applicants whose claims are based on domestic violence will be eligible for asylum. Every asylum claim, regardless of the type of harm experienced or feared, requires

---

<sup>1</sup> On September 11, 2012, the Board granted a filing deadline extension for responding to the Briefing Requests until November 13, 2012. The respondent in *Matter of L.G.P-C* agreed to a stipulation of asylum from the Department of Homeland Security, and the Department withdrew its appeal in *Matter of E-M-C-*. Those cases are no longer before the BIA.

<sup>2</sup> The issue of whether domestic violence can, in certain circumstances, form the basis for an asylum claim is currently pending before the Board in *Matter of K-C-*. *Matter of K-C-*, I.J. Durling (York, PA Mar. 21, 2008) (unpublished) (on file with author). AILA submitted an *amicus* brief in *Matter of K-C-*, in response to the Board's request, addressing the same issue presented in the Briefing Requests at issue here. Letter from the Board of Immigration Appeals, to American Immigration Lawyers Association requesting supplemental briefing in *Matter of K-C-* and *Matter of N-S-*, I.J. Walsh (Los Angeles, CA Oct. 23, 2007) (on file with author); Brief of *Amicus*, American Immigration Lawyers Association in *Matter of K-C-* (Oct. 18, 2011) (on file with author). This *amicus* brief presents similar arguments as those presented in AILA's *amicus* brief in *Matter of K-C-*.

<sup>3</sup> This *amicus* brief focuses only on asylum, but the arguments within are equally applicable to withholding of removal claims. The burden of proof is higher in withholding of removal claims, but eligibility requires proof of the same elements as asylum claims. See *INS v. Stevic*, 467 U.S. 407, 424, 430 (1984).

an individualized, case-by-case analysis. Every asylum applicant must satisfy each element of the refugee definition contained in the Refugee Act of 1980, incorporating the 1951 United Nations Convention relating to the Status of Refugees and the 1967 United Nations Protocol relating to the Status of Refugees (collectively "UN Refugee Convention"): (1) a well-founded fear of future persecution, either based on past persecution or a reasonable fear of future persecution; (2) membership in a statutorily protected group; and (3) persecution "on account of" a protected ground, which in the context of a domestic violence based asylum claim may be a gender-defined particular social group or gender-related political opinion. Each element of the refugee definition requires a distinct inquiry that must not be conflated with other elements of the refugee definition.

Victims of domestic violence may be members of a protected group defined by their gender, or claim protection based on a gender-related political opinion. Based on longstanding BIA precedent, gender is the type of innate characteristic that can define a particular social group ("PSG"). The BIA's innate or immutable characteristic PSG test, set forth in *Matter of Acosta*, has been accepted and applied by both domestic and international authorities to recognize gender-defined PSGs. U.S. federal courts of appeals and the U.S. Department of Homeland Security ("DHS") have recognized gender-defined PSGs in asylum cases based on domestic violence. Gender also satisfies the social visibility and particularity criteria imposed by the Board.

Allowing women to obtain protection for reasons of their gender is not an expansion of asylum law, but simply an honoring of principles of fair treatment, equality, and non-discrimination fundamental to U.S. law and international law. A PSG defined by gender *per se* is the most appropriate PSG formulation in the context of an asylum claim based on domestic

violence because gender is the characteristic that gives rise to a differential risk of harm.

Concerns about overwhelming numbers of asylum eligible members within a gender-defined PSG are unfounded. Protected groups, such as race, religion, and nationality, often contain many members. Also, not every member of a large PSG will be able to meet all of the statutory and regulatory requirements of asylum.

Victims of domestic violence may also be members of a protected group based on their gender-related political opinions. Such political opinions may include, for example, a belief that women should not be subjected to gender-discriminatory laws, or a belief that women should not be forced to conform to societal norms concerning male dominance.

The kind of harm inflicted on domestic violence victims may also satisfy the persecution element of the refugee definition. Persecution is comprised of serious harm and a failure of state protection. A state need not eliminate all risk of harm, "but it has a duty to reduce the risk of serious harm to 'the point where the fear of persecution could be said to be no longer well-founded.'" Deborah E. Anker, *Law of Asylum in the United States* § 4:7 (5th ed. 2012) (hereinafter "Anker § x:xx"); *See infra* Part II.B. An applicant must establish that harm, either experienced in the past or feared in the future, is serious enough to be considered persecutory.<sup>4</sup> In many circumstances, domestic violence includes the type of serious harm that is persecutory. As elaborated on *infra* Part II, severe mental abuse, physical beatings, and sexual assault are common forms of domestic violence that are considered persecutory. But, proof of serious harm is not enough. An applicant must also demonstrate that she is unable or unwilling to avail herself

---

<sup>4</sup> The well-founded fear of future persecution can be rebutted by the government in instances where a fundamental change in circumstances affects the applicant's risk of persecution, which no longer makes the applicant's fear reasonable, or when internal relocation is reasonable. 8 C.F.R. §§ 208.13(b)(1)(i)(A), (B). For example, a formal change of regime in the applicant's home country may constitute changed circumstances. *See Matter of N-M-A-*, 22 I. & N. Dec. 312, 321 (BIA 1998). The Board has held that the removal of a persecuting government and substantial changes in underlying human rights conditions are necessary for finding a fundamental change in circumstances. *See Matter of Chen*, 20 I. & N. Dec. 16, 19-21 (BIA 1989).

of the protection of her home state. Proof of a persecutor's malignant intent is not required.

Domestic violence victims may also meet the "on account of" element of the refugee definition, which requires a linkage between the persecution and a statutorily protected ground. The protected ground need only be "at least one central reason" for inflicting the harm or the home state's failure to protect from the harm. The nexus element may be satisfied if: (1) the state is the agent of harm and the harm was, or will be, inflicted for reasons of a gender-related protected ground; (2) a non-state actor harmed, or will harm, the applicant for reasons of a gender-related protected ground, and the state is unwilling or unable to protect the applicant from that harm; or (3) a non-state actor harmed, or will harm, the applicant regardless of the reason for that harm, and the state is unwilling or unable to protect the applicant from that harm for reasons of a gender-related protected ground. Expert research shows that gender is "at least one central reason" for domestic violence.

In support of the assertion that domestic violence is a proper basis for an asylum claim, this brief advances three central arguments: (1) longstanding PSG jurisprudence supports the principle that gender *per se* can define a PSG, and a gender-defined PSG or a gender-related political opinion is a viable protected ground in an asylum case based on domestic violence;<sup>5</sup> (2) violence in a domestic relationship may constitute persecution; and (3) domestic violence is perpetrated for reasons of the victim's gender. Part I of this brief will address how protected grounds in the context of a domestic violence asylum claim may include a gender-defined PSG or a gender-related political opinion. Part II will show that domestic violence may constitute persecution because it often involves harm that rises to the requisite level of seriousness and such

---

<sup>5</sup> In the alternative, the Board may consider PSG definitions based on DHS's analysis, which is further described below, as "[nationality] women who are unable to leave the relationship" or "[nationality] women who are viewed as property by virtue of that relationship." See DHS's Supplemental Brief, submitted in *Matter of L-R-*, 17-18 (Apr. 13, 2009). While these PSGs may fit within the jurisprudence, defining PSGs based on numerous characteristics is unnecessary and often leads to confusing PSG formulations.

harm may occur in states that fail to provide meaningful protection to the applicant. Part III will describe why gender is "at least one central reason" for violence in a domestic relationship or for the lack of state protection from violence in a domestic relationship.<sup>6</sup> Ultimately, the Board should issue a precedential decision recognizing domestic violence as a proper basis for an asylum claim.

#### Argument

### **I. GENDER-DEFINED PSGS AND GENDER-RELATED POLITICAL OPINIONS ARE BOTH VIABLE PROTECTED GROUNDS IN ASYLUM CLAIMS BASED ON DOMESTIC VIOLENCE.**

"[D]omestic violence is inextricably linked to gender and many domestic violence claims can and should be analyzed under the PSG ground, with gender *per se* as the defining characteristic."<sup>7</sup> Anker § 5:52; *see also* APA, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 19 (1996) (finding that being a woman is the biggest factor in domestic violence). Asylum claims based on domestic violence can also be analyzed under the political opinion ground. An applicant's gender-related political opinion may be evident by the applicant's express or implied opposition to gender-discriminatory laws or traditional expectations of male dominance in society. This section of the brief will first discuss the PSG test announced in *Matter of Acosta* and then the

---

<sup>6</sup> AILA also recognizes that men and children may also be victims of domestic violence, and may also be eligible for asylum based on domestic violence, but these types of claims are beyond the scope of this brief. Similarly, other fundamental characteristics, such as race and nationality combined with gender, may also form the basis of a domestic violence related asylum claim.

<sup>7</sup> *See also* Michael G. Heyman, *Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligation*, 17 Int'l J. Refugee L. 729, 740 (2005) ("[I]f we are talking about something that truly counts as domestic violence, it has the . . . concomitant of being gender-based. Although the violence grows out of a number of factors, when inflicted on their partners, it expresses the view that they can vent these feelings on women with impunity. That is persecution 'on account of' gender and thus falls within the category of membership within a particular social group").

evolution of gender-defined PSGs based on the *Acosta* test; gender alone can define a PSG.<sup>8</sup>

This section will next address the imposition of the Board's problematic "social visibility" and "particularity" criteria. This section will then demonstrate that the belief that broadly defined PSGs, such as those defined by gender, will lead to a massive influx of eligible asylum-seekers is misguided. Finally, this section of the brief will show that a gender-related political opinion may also be a protected ground in asylum claims based on domestic violence.

**A. Domestic and international authorities have long recognized that gender can define a PSG based on the BIA's innate or immutable characteristic test.**

Federal courts of appeals, the Board, DHS, and international tribunals have all stated that a PSG can be defined by gender in combination with nationality, status in a relationship, and or inability to leave a relationship. But, gender alone can also define a PSG.

On March 1, 1985, the BIA issued the landmark decision of *Matter of Acosta*, which not only introduced the PSG test that remains the standard today, but also specifically recognized "sex" as a prototypical protected characteristic that can define a PSG. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), overruled in part on other grounds by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). In *Acosta*, the Board held that a PSG is defined by a shared "common, immutable characteristic" members of a group cannot, or should not be required to change. *Id.* The Board reasoned that immutability was the key to defining a PSG based on the

---

<sup>8</sup> "'Gender' refers to socially contingent divisions of roles between men and women, socially constructed notions of femininity and masculinity and resulting power disparities that implicate women's identities and status within societies." Deborah Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 Harv. Hum. Rts. J. 133, 138 n.27 (2002); see also Heaven Crawley, *Refugees and Gender: Law and Process* 6-7 (2001) (suggesting avoidance of the term "sex" when discussing gendered distinctions). Male gender may also be an element of a PSG claim. See Asylum Officer Basic Training Course, Asylum Eligibility Part III: Nexus and the Five Protected Characteristics 7 (Mar. 12, 2009) (hereinafter "AOBTC: Nexus"); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000) (PSG of gay men with female sexual identities). "In many cases [the PSG ground] is appropriate where a claimant fears persecution because she is a woman, where gender is the trait that gives rise to a differential risk of harm." Anker § 5:48.



doctrine of *ejusdem generis* ("of the same kind").<sup>9</sup> *Id.* Examining the refugee definition, the Board interpreted the meaning of "particular social group" in comparison with the other protected grounds (*i.e.*, race, religion, nationality, and political opinion) and concluded that all of the protected grounds encompass either innate characteristics or characteristics one cannot or should not be required to change.<sup>10</sup> *Id.*

In 1995, the United States became the second country, after Canada,<sup>11</sup> to issue gender asylum guidelines. *See generally* Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women* (May 26, 1995) (hereinafter "U.S. Gender Guidelines") (elaborating on substantive law and procedures for determining gender-based asylum claims). With the U.S. Gender Guidelines, the legacy Immigration and Naturalization Service ("INS") recognized that gender can define a PSG in asylum claims based on domestic violence. *See id.* at 4, 13-15 (stating that domestic violence is a type of persecution that is "particular to . . . gender" and can serve as a basis for asylum); *see also* U.S. Department of State, Gender Guidelines for Overseas Refugee Processing 6, 8-9 (2000) (acknowledging that "gender alone may form the basis for membership in a particular social group" and noting that a

---

<sup>9</sup> The doctrine, *ejusdem generis*, states that the specific words in a statute must be construed "consistent with" the general words. *Matter of Acosta*, 19 I. & N. at 233 (citing *Cleveland v. United States*, 329 U.S. 14 (1946) and 2 1A C. Sands, *Sutherland on Statutory Construction* § 47.17 (4th ed. 1972)); *see also* *Sutherland on Statutory Construction* § 46.16 (7th ed. 2009) ("If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases.").

<sup>10</sup> The Supreme Court of Canada explained that "[i]n distilling the contents of . . . 'particular social group,' account should be taken of the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative." *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at 696-97 (Can.).

<sup>11</sup> In 1993, Canada developed and adopted the first guidelines concerning female asylum-seekers. *See* Immigration & Refugee Board of Canada, *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Mar. 9, 1993). Those guidelines, which were subsequently updated, explain that gender is the type of innate characteristic that may define a PSG. *See* Immigration & Refugee Board of Canada, *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution, Update* (Nov. 13, 1996).

domestic violence victim may be able to show that she was harmed "because of her gender or because of her status in a domestic relationship").

U.S. federal courts of appeals have recognized gender as a characteristic that can define a PSG based on the *Acosta* test.<sup>12</sup> For example, in *Fatin v. INS*, the Third Circuit recognized gender as a characteristic that can define a PSG.<sup>13</sup> See 12 F.3d 1233, 1240 (3d Cir. 1993) (reasoning that gender alone could define a PSG, but holding that respondent failed to show a well-founded fear of persecution based on her gender).

---

<sup>12</sup> See, e.g., *Sarhan v. Holder*, 658 F.3d 649, 654, 662 (7th Cir. 2011) (rejecting social visibility requirement as "inconsistent with the Board's and our own past cases" and finding that "women whose behavior violates that society's moral norms (and who thus may suffer this consequence) form a coherent social group"); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1033-34 (8th Cir. 2008) (finding that "Cameroonian widows" shared immutable characteristics including gender and past experience); *Gomez-Zuluaga v. Attorney General of U.S.*, 527 F.3d 330, 345 (3d Cir. 2008) (recognizing social group of "women who have escaped involuntary servitude after being abducted and confined by the FARC"); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (determining that "Hassan was persecuted on account of her membership in a particular social group, Somali females"); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (recognizing that gender is an immutable characteristic); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004) (finding that female genital mutilation "involves the infliction of grave harm constituting persecution on account of membership in a [PSG]"); *Fatin*, 12 F.3d 1233, 1240 (3d Cir. 1993) (recognizing that a woman who had a well-founded fear of being persecuted in Iran because she was a woman who could meet the requirements of membership in a gender-defined PSG); see also *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (recognizing gender is a "prototypical immutable characteristic" in the meaning of *Matter of Acosta*) (emphasis added); Anker §§ 5:48, 5:55. All U.S. federal courts of appeals that have analyzed PSGs in the asylum context, have accepted the *Acosta* test. See, e.g., *Bah v. Mukasey*, 529 F.3d 99, 112-13 (2d Cir. 2008) (suggesting that "gender—combined with their ethnicity, nationality, or tribal membership—satisfies the social group requirement" but remanding for the Board "to define the parameters of the social group in the first instance"); *Sepulveda v. Gonzales*, 464 F.3d 770, 771-72 (7th Cir. 2006); *Niang*, 422 F.3d at 1198-1200; *Mohammed v. Gonzales*, 400 F.3d at 797-98; *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir. 2003); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Fatin*, 12 F.3d at 1240. Some courts have deferred to the Board and also applied its social visibility test. See, e.g., *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) ("A group's visibility—the extent to which members of the applicant's society perceive those with the characteristics as members of a social group—is relevant."); *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190, 1196-97 (11th Cir. 2006).

<sup>13</sup> In *Fatin*, the court upheld the denial of an asylum claim because the applicant failed to demonstrate that her fear of future harm was based on her membership in a PSG defined as Iranian women. 12 F.3d 1233, 1240 (3d Cir. 1993). Interpreting *Acosta*, then Circuit Judge Alito reasoned that:

[T]he Board specifically mentioned "sex" as an innate characteristic that could link the members of a "particular social group." Thus, to the extent that the Respondent in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted [*i.e.*, membership in a cognizable PSG].

*Id.* The court held that the applicant failed to show "that she would suffer or that she has a well-founded fear of suffering 'persecution' based solely on her gender." *Id.*

DHS's United States Citizenship and Immigration Services ("USCIS") and Immigration and Customs Enforcement ("ICE") also recognize gender-defined PSGs. USCIS's Asylum Officer Basic Training Course ("AOBTC") materials state that "[w]omen may suffer harm solely because of their gender" and that gender can form the basis of a PSG pursuant to *Acosta*. See AOBTC: *Nexus*, at 35-37; AOBTC: *Female Asylum Applicants and Gender-Related Claims* 6 (Mar. 12, 2009) (hereinafter "AOBTC: *Female Asylum Applicants*").

ICE likewise recognizes gender-defined PSGs within the context of domestic violence. See DHS Brief at 19, 22 (Feb. 19, 2004), submitted in *Matter of R-A-*, 24 I. & N. Dec. 629 (A.G. 2008, BIA 2005, A.G. 2001, BIA 1999) (hereinafter "DHS Brief in *Matter of R-A-*"). In a 2004 brief, ICE took the position that a PSG may be defined by gender combined with status in a domestic relationship. *Id.* at 26-28. In 2009, ICE further argued that gender combined with nationality and status in a domestic relationship or inability to leave a domestic relationship may define a PSG. See DHS's Supplemental Brief, submitted in *Matter of L-R-*, 14 (Apr. 13, 2009) (hereinafter "DHS Supp. Brief in *Matter of L-R-*") (suggesting PSG formulations 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"). ICE's brief in that case recognized that in circumstances of domestic violence, the persecutor may target his female partner because of his belief about gender roles (*e.g.*, a belief that a woman should occupy a subordinate position in a domestic relationship). See *id.* at 15. This belief may be bolstered by societal expectations that allow or even endorse a gender hierarchy. See *id.* An asylum-seeker's domestic relationship status can be considered an immutable characteristic in circumstances where the asylum-seeker cannot leave the abusive relationship because of "economic, social, physical or other constraints" or because the abuser simply will not let her

leave. *Id.* at 16, 20-21.

In 2010, ICE reaffirmed its acceptance of gender-defined PSGs in asylum claims based on domestic violence. In a written clarification to the Executive Office for Immigration Review in Los Angeles, California, ICE stated that a PSG can be defined as "Peruvian women in domestic relationships who are viewed as property by virtue of their positions within a domestic relationship, and who are unable to leave." DHS, *Written Clarification Regarding the Definition of "Particular Social Group,"* submitted to the Executive Office for Immigration Review, L.A. California (July 13, 2010).

Many high tribunals of states parties to the UN Refugee Convention have since adopted the *Acosta* test and recognize gender as a characteristic that can define, in whole or in part, a PSG. *See* Anker § 5:48. For example, the Supreme Court of Canada followed the Board's lead in *Acosta* by listing "gender" as a prototypical characteristic that can define a PSG.<sup>14</sup> *See Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can.). Shortly after the Board's decision in *Acosta*, the United Nations High Commissioner for Refugees' ("UNHCR") Executive Committee recognized that women may qualify for asylum based on their membership in gender-based PSGs. *See Refugee Women and International Protection*, UNHCR Programme Executive Committee, 36th Sess., No. 39 ¶ (k) (Oct. 18, 1985).<sup>15</sup>

---

<sup>14</sup> Similarly, courts in the United Kingdom, Australia, New Zealand, and Austria have recognized that gender may form the basis of a PSG. *See, e.g., El-248.714/2008 v. Federal Asylum Authority*, High Court for Asylum, Austria (2011) (finding that women may be seen as a PSG within the meaning of the Refugee Convention); *Re ZWD*, Refugee Appeal No. 3/91 (New Zealand Refugee Review Board); *Applicant S v. Minister for Immigration & Multicultural Affairs*, [2004] HCA 25, 217 C.L.R. 387 ¶ 16 (H.C. Austl. 2004); *Minister for Immigration and Multicultural Affairs v. Khawa*, [2002] 79 A.L.J.R. 667 ¶ 32, 35 (Austl.); *Islam and Shah v. Home Dept.*, [1999] 2 A.C. 629, 644-45 (U.K.) (finding that the recognition of "women in Pakistan" as a particular social group "is simply a logical application of the seminal reasoning in *Acosta's* case"); *Re MN*, Refugee Status Appeals Authority, No. 2039/93, [1996] ¶ 108, 119 (N.Z.).

<sup>15</sup> "[States] are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention." *Id.* The U.S. Supreme Court acknowledged the importance of consulting UNHCR on refugee law, among others, when construing the asylum statute. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (stating that the UNHCR

Throughout the late 1980s and early 1990s, UNHCR adopted a series of resolutions aimed at affording more meaningful protection to women fleeing gender-based persecution in their home countries. *See Conclusion on Refugee Protection and Sexual Violence*, UNHCR Programme Executive Committee, 44th Sess., No. 73 (Oct. 3, 1993); UNHCR, ¶ 54, U.N. Doc. ES/SCP/67 (1991); *Refugee Women*, UNHCR Programme Executive Committee, 39th Sess., No. 54 (Oct. 10, 1988); *General Conclusion on International Protection*, UNHCR Programme Executive Committee, 38th Sess., No. 46 (Oct. 12, 1987). UNHCR also encouraged states parties to the UN Refugee Convention to develop and adopt their own "guidelines on women asylum-seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men." *See* UNHCR Programme Executive Committee, 44th Sess., No. 73, ¶ (e) (Oct. 3, 1993).

UNHCR and other countries (*e.g.*, United Kingdom, Ireland, Australia and Sweden) have also adopted gender guidelines or enacted legislation recognizing that gender may define a PSG.<sup>16</sup> In 2002, UNHCR issued its gender guidelines, which clearly state that sex can define a social group that may qualify for refugee protection. *See* 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* ¶ 30 HCR/GIP/02/01 (May 7, 2002) (hereinafter "UNHCR Gender Guidelines") ("Sex can properly be within the

---

Handbook provides instructive guidance on claims for protection in accordance with the United Nations Protocol Relating to the Status of Refugees, "which provided the motivation for the enactment of the Refugee Act of 1980").

<sup>16</sup> *See generally* Anker §§ 5:44, 5:48. *See* Australian Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996). *See also* Immigration Appellate Authority of the United Kingdom, *Asylum Gender Guidelines* (Nov. 2000). Some states parties also enacted legislation, recognizing gender harm and gendered reasons as bases for refugee claims. *See* Refugee Act §1(1) 1996 (Act. No. 17/1996) (Ir.); *see also* Alien Act (Svenskförfattningssamling [SFS] 2005:716) (Swed.). A comprehensive list of other countries and jurisdictions that have adopted legislation and/or guidelines recognizing gender-based persecution and gender-defined PSGs, including Germany, the Netherlands, Norway, South Africa, Spain, Switzerland, and the European Union can be found at the Center for Gender & Refugee Studies' website. *See* Center for Gender & Refugee Studies, *Gender Guidelines*, [http://cgrrs.uchastings.edu/law/gender\\_guidelines.php#EU](http://cgrrs.uchastings.edu/law/gender_guidelines.php#EU) (last visited Oct. 23, 2012).

ambit of the social group category . . . defined by innate and immutable characteristics.").

UNHCR reiterated its position that sex can define a PSG in its 2009 guidelines on female genital mutilation ("FGM"). See UNHCR, *Guidance Note on Refugee Claims Relating to Female Genital Mutilation* ¶¶ 23-24 (May 2009); see also UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 36 (2010) ("Individuals who resist forced recruitment into gangs or oppose gang practices may share innate or immutable characteristics, such as their age, gender and social status."); UNHCR, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, ¶ 38 HCR/GIP/06/07 (Apr. 7, 2006) ("Women are an example of a social subset of individuals who are defined by innate and immutable characteristics and are frequently treated differently to men. As such, they may constitute a particular social group."). The UNHCR Special Rapporteur on Violence Against Women likewise agreed that gender should be recognized as a characteristic that can define a cognizable PSG in asylum claims. UNHCR, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Radhika Coomaraswamy, § III.B.1, U.N. Doc. E/CN.4/1998/54 (Jan. 26, 1998).

**B. "Social Visibility" and "Particularity" have been improperly imposed upon the well-defined *Acosta* test as additional criteria.**

During the past several years, the Board has improperly imposed the additional criteria of "social visibility" and "particularity" on the *Acosta* test. See *Matter of C-A-*, 23 I. & N. Dec. 951 (BIA 2006); *Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008). "Social visibility" and "particularity," are inconsistent with the well-established *Acosta* test and have been subject to

heavy criticism by commentators and federal courts, resulting in a circuit split.<sup>17</sup> These criteria add nothing to *Acosta*'s long-standing PSG test except confusion and inconsistent PSG formulations; they serve no valid purpose and should be dropped from the PSG analysis.

**i. "Social Visibility"**

The Seventh and Third Circuits have rejected the social visibility requirement as vague and unjustified, and the Ninth Circuit is currently reconsidering the issue *en banc*. See *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009) (finding that the social visibility criterion "makes no sense" and reasoning that "the Board has found groups to be 'particular social groups' without reference to social visibility"); *Valdiviezo-Galdamez v. U.S. Att'y Gen.*, 663 F.3d 582, 604 (3d Cir. 2011) (stating that the court was "hard-pressed to understand how the 'social visibility' requirement was satisfied in prior cases using the *Acosta* standard"); *Henriquez-Rivas v. Holder*, 670 F.3d 1033 (9th Cir. 2012) (granting petition for rehearing *en banc*). The First Circuit also recently called into question the social visibility requirement. *Rojas-Perez v. Holder*, --F.3d--, 2012 WL 5383261, \*6-\*7 (1st Cir. Nov. 5, 2012) (noting that "if an 'immutable' characteristic is one that an individual possesses but either cannot change or should not be required to change, it is not clear why an individual with a hidden characteristic need make that characteristic known for it to be deemed immutable" and highlighting the court's concern "with whether the BIA's social visibility requirement so excludes such groups in its inconsistent interpretation and application of the INA"). These cases emphasize not only the tensions between the new social

---

<sup>17</sup> See e.g., Anker § 5:45; 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, 66-68 (2008) (criticizing the social visibility standard as inconsistent with domestic and international authorities, including the UNHCR's test for PSGs). Even if the social visibility and particularity criteria are viewed as something other than add-ons to the *Acosta* test, such as an alternative to the *Acosta* test, they remain inconsistent with U.S. law.

visibility requirement and previously recognized PSGs, but also the practical difficulties involved in assessing social visibility.

Disagreement and confusion persists about whether social visibility should be defined subjectively or objectively; whether the whole community or some subset of the community must perceive the group as a group, and what that subset should be; whether literal visibility is required or whether more abstract recognition of the group is permissible; and whether social visibility differs from social distinction in the sense of requiring that the group be "set apart" from the rest of society. *See, e.g., Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) ("Often it is unclear whether the Board is using the term 'social visibility' in the literal sense or in the 'external criterion' sense"); *Henriquez-Rivas v. Holder*, 449 Fed. Appx. 626, 630 (9th Cir. 2011) (Bea, J., joined by Ripple, J., concurring) (questioning whether social visibility should be interpreted literally and how to define the scope of the community that must perceive the group), *reh'g en banc* granted by *Henriquez-Rivas v. Holder*, 670 F.3d 1033 (9th Cir. 2012); DHS brief on remand to the Board in *Valdiviezo-Galdamez v. U.S. Att'y Gen.*, 663 F.3d 582, 604 (3d Cir. 2011) (arguing for a "social distinction" requirement in lieu of "social visibility"). Given this lack of clarity about the meaning of social visibility, the concept is inherently more susceptible to subjective and inconsistent interpretations than *Acosta's* protected characteristic approach.

## **ii. "Particularity"**

Federal courts of appeals have found that the Board's particularity requirement lacks clarity and "suffers from the same infirmity" as the "social visibility" requirement, leading to confused, unprincipled decision-making. *Valdiviezo-Galdamez*, 663 F.3d at 608. With respect to the particularity requirement, the BIA has explained that a proposed group should "have particular and well-defined boundaries." *Matter of S-E-G-*, 24 I. & N. Dec. at 582 (holding that



Salvadoran youths who resist membership in the MS-13 gang do not constitute a group defined with particularity). According to the Board, to provide an "adequate benchmark for determining group membership," the proposed group should not be "too amorphous" or involve qualities whose "mean[ings] can vary." *Id.* at 584-85. "The essence of the particularity requirement, therefore, is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."<sup>18</sup> *Id.*

The BIA's particularity requirement "must not mean that a group's size can itself be a sound reason for finding a lack of particularity." *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 n.2 (2d Cir. 2007). Rather, the focus remains on whether the group is "indeterminate." *Id.* Applying this reasoning, federal courts of appeals have rejected proposed group characteristics such as "secularized" and "Westernized" as insufficiently particular because they "reflect matters of degree" and "call for subjective value judgments." *See, e.g., Ahmed v. Holder*, 611 F.3d 90, 95 (1st Cir. 2010).

The "particularity" criterion is unclear, inconsistently applied, and largely duplicative of the "social visibility" criterion. *See, e.g., Henriquez-Rivas*, 449 Fed. Appx. at 630 (Bea, J., joined by Ripple, J., concurring) ("Given the current confusion in our law, there is no discernible basis for these divergent outcomes—other than, perhaps, a given panel's sympathy for the characteristics of the group at issue."); *Valdiviezo-Galdamez*, 663 F.3d at 608 ("Indeed, 'Particularity' appears to be little more than a reworked definition of 'social visibility . . . .'").

---

<sup>18</sup> For example, the BIA has held that a proposed group of "noncriminal informants" was "too loosely defined to meet the requirement of particularity." *Matter of C-A-*, 23 I. & N. Dec. at 957. Similarly, the BIA has rejected terms such as "wealth" and "affluence" as "too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group." *Matter of A-M-E- & J-G-U*, 24 I. & N. Dec. 24 I. & N. Dec. 69, 76 (BIA 2007). By contrast, *"the characteristics of gender and age are . . . susceptible to easy definition."* *Rivera-Barrientos*, 658 F.3d at 1231 (finding that "El Salvadoran women between the ages of 12 and 25 who have resisted gang recruitment" satisfy the particularity requirement) (emphasis added).

iii. ***"Social visibility" and "particularity" in domestic violence based asylum claims***

The "social visibility" and "particularity" criteria, however defined and applied, would be satisfied in domestic violence cases by a gender-defined PSG.<sup>19</sup> To begin, women are a recognizable and distinct social group. In *Matter of C-A-*, the Board explicitly recognized that "[s]ocial groups based on innate characteristics *such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.*" *Matter of C-A-*, 23 I. & N. Dec. at 958 (emphasis added). DHS has also recognized that women who are not afforded police protection from domestic violence may be visible within society because they are socially distinct. See DHS Supp. Brief in *Matter of L-R-*, at 17-18.

Insofar as the proposed social group in a domestic violence based case may be defined, in part, by involvement in a domestic relationship, this aspect of the social group also satisfies the particularity requirement. A domestic partnership is a form of family relationship, which the BIA and federal courts of appeals recognize as sufficiently particular to constitute a PSG, as well as socially visible.<sup>20</sup> See, e.g., *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) ("The family unit – centered here around the relationship between an uncle and his nephew – possesses boundaries that are at least as 'particular and well-defined' as other groups whose members have qualified for asylum."); *Al Ghorbani v. Holder*, 585 F.3d 980, 994-95 (6th Cir. 2009) (holding that "the Al Ghorbani family possesses several common, immutable characteristics that establish it as a particular social group"); *Ayele v. Holder*, 564 F.3d 862, 869-70 (7th Cir. 2009) ("Our circuit recognizes a family as a cognizable social group under the INA, as do our sister circuits."); *Matter of C-A-*, 23 I. & N. Dec. at 959 (affirming that family ties can

---

<sup>19</sup> A gender-defined PSG would meet the social visibility and particularity criteria regardless of how the unclear criteria are defined and whether they are viewed as add-ons to the *Acosta* test or as an alternative PSG test.

<sup>20</sup> ICE has specifically recognized "domestic relationship" as a sufficiently specific term to define a PSG. See DHS Supp. Brief in *Matter of L-R-*, at 19.

form the basis of a particular social group).

Moreover, the Board has explained that while "a social group cannot be defined exclusively by the fact that its members have been subjected to harm . . . this may be a relevant factor in considering the group's visibility in society."<sup>21</sup> *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74. In countries where domestic violence against women is widespread, the sheer prevalence of this type of harm helps show that women are socially distinct. Inadequate legal protection from domestic violence and other legal, social, and cultural factors showing widespread sex discrimination in a given society would further establish that women in that society are socially distinct.<sup>22</sup> See DHS Supp. Brief in *Matter of L-R-*, at 17-18.

**C. Concerns that broadly defined PSGs will greatly increase the number of asylum eligible applicants are meritless because the current statutory and regulatory framework filters out applicants who do not qualify for asylum.**

The argument that recognizing a PSG defined by gender *per se* will automatically bestow refugee status upon every female asylum-seeker—or every female asylum-seeker who expresses a fear of domestic violence—is illogical and fails to account for the limiting effect of the other elements of the refugee definition. See generally Anker §§ 5:43, 5:48. As discussed throughout, applicants must prove each element of the refugee definition (*e.g.*, well-founded fear, nexus, membership in a group defined by a protected ground, etc.). The acceptance of a broadly defined PSG containing many members does not mean that every member of that group will be able to successfully advance an asylum claim.

---

<sup>21</sup> A PSG defined, in part, by the harm experienced or feared conflates multiple elements of the refugee definition—namely grounds and persecution. A PSG defined by gender alone or gender and status in a domestic relationship avoids that problem.

<sup>22</sup> This reasoning is consistent with the High Court of Australia's approach in *Applicant S v. Minister for Immigration and Multicultural Affairs*, [2004] HCA 25, ¶ 30 (Gleeson CJ, Gummow J and Kirby J), where the High Court clarified that "one way" to distinguish a PSG from society at large is by examining whether the society in question perceives there to be such a group, but the court recognized that other evidence relevant to distinguishing the group could be cultural, social, religious, and legal factors that reflect the position of group members in the society.

All five statutorily protected grounds are broadly defined and, consequently, may encompass large numbers of members.<sup>23</sup> See DHS Brief in *Matter of R-A-*, at 23 ("Clearly, not all Catholics are at risk of persecution, but Catholicism is undoubtedly a religion" within the meaning of the refugee definition). The Board should not construe membership in a PSG differently than the other protected grounds, which may also encompass large numbers of individuals. See *Acosta*, 19 I. & N. Dec. at 233 (calling for the consistent interpretation of all statutorily protected grounds); Anker § 5:43; Deborah Anker, *Membership in a Particular Social Group: Developments in U.S. Law*, 1566 PLI/Corp 195 (2006). As noted above, by embracing the principle of *ejusdem generis*, the Board called for analysis of membership in a PSG consistent with the analyses of the other protected grounds. See *Acosta*, 19 I. & N. Dec. at 233; Anker § 5:43.

Federal courts of appeals have likewise recognized that PSGs should not be rejected based on the size of the proposed group. See, e.g., *Malonga v. Mukasey*, 546 F.3d 546, 553 (8th Cir. 2008) (reversing the Immigration Judge's finding that the Lari ethnic group of the Kongo tribe could not be a PSG because the Kongo tribe constituted 48 percent of the population of Congo; the court held that the Immigration Judge erred in basing his conclusion solely on the numerical size of the group); *Ucelo-Gomez*, 509 F.3d at 73 n.2 (2d Cir. 2007) (affirming that "a large group can be a 'particular social group,'" and interpreting the Board's objections to the proposed group of "affluent Guatemalans" as necessarily referring to the group's indeterminacy,

---

<sup>23</sup> Indeed, there is no requirement that a PSG be narrowly defined. Nothing in the international treaties, recognized as the basis of U.S. asylum law or in the history of their negotiation supports a requirement that a particular social group be defined narrowly. See 1951 Convention Relating to the Status of Refugees, July 28, 1951, 10 U.S.T. 6259, 189 U.N.T.S. 150; United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577 (1968); UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1992); UNHCR, *Guidelines on International Protection: 'Membership of a Particular Social Group' within the context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* ¶ 18, U.N. Doc. HCR/GIP/02/02 (2002) ("The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2).").

rather than its size); *Gao v. Gonzales*, 440 F.3d 62, 67 (2d Cir. 2006) (noting acceptance of *Acosta's* interpretation that a particular social group, "however populous," is defined by immutable characteristics), *vacated on other grounds*, 128 S. Ct. 345 (2007); James C. Hathaway & Michelle Foster, *Development: Membership of a Particular Social Group*, 15 Int'l J. Refugee L. 477, 478-79 (2003) (identifying as an international "point[] of consensus" that a particular social group "may include large numbers of persons" and that "[t]he size of the purported social group is not a relevant criterion in determining whether a particular social group exists").<sup>24</sup>

Although PSGs may contain many members, not every member of a cognizable PSG is eligible for asylum. Asylum eligibility under the PSG ground is limited, as it is under all protected grounds, to those who can satisfy the other elements of the refugee definition and meet the additional statutory and regulatory requirements.<sup>25</sup> Anker § 5:43 ("Other criteria in the refugee definition serve a filtering function; the recognition of a particular social group is only one of the elements required for establishing asylum eligibility."). As the Board has held, "the fact that almost all Somalis can claim clan membership and that interclan conflict is prevalent should not create undue concern that virtually all Somalis would qualify for refugee status, as an

---

<sup>24</sup> See also *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) ("[T]he size and breadth of a group alone does not preclude a group from qualifying as such a social group.") (citing *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996)).

<sup>25</sup> As the UNHCR has advised, "[a]dopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the connect of 1A(2) of the 1951 Convention and/or its 1967 Protocol relating at the Status of Refugees* ¶ 4, U.N. Doc HCR/GIP/02/02 (May 7, 2002); see also Nitzan Sternberg, *Do I Need to Pin a Target to My Back?: The Definition of "Particular Social Group" in U.S. Asylum Law*, 39 Fordham Urb. L.J. 245, 296 (2011) ("The floodgates argument has been raised at numerous points in American history and has proved to be an unsubstantiated argument. . . . [C]oncerns about floodgates should be alleviated by the fact that applicants still need to establish the other elements of an asylum claim."); Jesse Imbriano, *Opening the Floodgates or filling the Gap?: Perdomo v. Holder Advances the Ninth Circuit One Step Closer to Recognizing Gender-Based Asylum Claims*, 56 Vill. L. Rev. 327, 361 (2011) (arguing that "[t]here is a general trend throughout the circuit courts towards affirming the pure *Acosta* framework and making way to allow gender alone to define a particular social group"). Indeed, in its Supplemental Brief in *Matter of L-R-*, DHS noted that in the years following Canada's recognition of asylum claims based on domestic violence Canada did not see a large increase in gender-related asylum claims. See DHS Supp. Brief in *Matter of L-R* at 13 n.10 ("Canada received a total of 315 gender-related asylum claims in 1995 . . . 270 such claims in 1996, 182 in 1997, 218 in 1998, and 175 in 1999.").

applicant must establish he is being persecuted on account of that membership."<sup>26</sup> *Matter of H-*, 21 I. & N. Dec. 337, 343-44 (BIA 1996).

Moreover, other statutory and regulatory requirements necessarily limit the number of individuals eligible for asylum protection in the United States. *See* Anker § 5:48. Even where a claim triggers a presumption of future persecution based on the past persecution suffered, the presumption may be overcome if relocation within the country of feared persecution is reasonable and the past persecution was not committed by a state actor. *See* 8 C.F.R. § 208.13(b)(3)(i), (ii). The presumption may also be overcome where there has been a fundamental change in circumstances "such that the applicant no longer has a well-founded fear," for example when the persecutor in a domestic violence based claim dies. *See* 8 C.F.R. § 208.13(b)(1)(i)(A). The INA also bars individuals from asylum based on national security concerns or individuals with certain criminal convictions. 8 U.S.C. § 1158(b)(2)(A); 8 U.S.C. § 1231(b)(3)(B). Unless an asylum applicant can meet one of the limited exceptions, she must apply for asylum within one year of entering the United States, or she will be required to meet the heightened withholding of removal standard. 8 U.S.C. § 1158(a)(2)(B). Finally, even if an applicant clears all these hurdles, he or she must warrant a grant of asylum as a matter of discretion. 8 U.S.C. § 1158(b)(1)(A).

**D. Asylum claims based on domestic violence may also include other protected grounds, such as an applicant's gender-related political opinion.**

---

<sup>26</sup> In *Niang v. Gonzales* the Tenth Circuit addressed why fears of "overbroad" gender-based particular social groups are without merit:

One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there. But the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted 'on account of' their membership. It may well be that only certain women—say, those who protest inequities—suffer harm severe enough to be considered persecution.

422 F.3d at 1199-1200 (10th Cir. 2005) (internal citations omitted).

Gender-related political opinions can also form the basis of an asylum claim.<sup>27</sup> See UNHCR Gender Guidelines, at ¶¶ 23, 26 ("[A gender-related] claim for refugee status based on transgression of social or religious norms may be analysed in terms of religion, political opinion or membership of a particular social group.") Violations of gender-discriminatory laws or social norms within a society can be considered an expression of a political opinion. See, e.g., *id.* ("While religious tenets require certain kinds of behaviour from a woman, contrary behavior may be perceived as evidence of an unacceptable political opinion. . . . [F]ailure to conform could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows."); *Fatin v. I.N.S.*, 12 F.3d 1233, 1241-43 (3d Cir. 1993) (holding that an expression of women's rights in violation of a law that imposes sanctions on women for not wearing a head covering in public is a cognizable political opinion); see also *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994) (agreeing with the *Fatin* court that "a group of women . . . who refuse to conform [to social mores directed at women] and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance" may establish asylum eligibility).

"Beliefs related to the status, treatment, conditions or appropriate behavior of women are forms of political opinion." Anker § 5:40; see also U.S. Gender Guidelines, at 11 (noting that the *Fatin* case made clear "that an applicant who could demonstrate a well-founded fear of persecution on account of her (or his) beliefs about the role and status of women in society could be eligible for refugee status on account of political opinion"). The USCIS Asylum Office has

---

<sup>27</sup> Gender may also factor into other statutorily protected grounds, such as religion. See *Matter of S-A-*, 22 I. & N. Dec. 1328, 1336 (BIA 2000) (finding that "the persecution suffered by the respondent was on account of her religious beliefs, as they differed from those of her father concerning the proper role of women in Moroccan society. The record clearly establishes that, because of his orthodox Muslim beliefs regarding women and his daughter's refusal to share or submit to his religion-inspired restrictions and demands, the respondent's father treated her differently from her brothers."); Anker §§ 5:48, 5:80. This *amicus* brief only focuses on gender as it relates to PSG formulation and political opinion.

explained that, "opposition to institutionalized discrimination of women, expressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior associated with gender . . . may all be expressions of political opinion." AOBTC: *Female Asylum Applicants*, at 29. Women may be at a greater risk of serious harm if they resist violence in a domestic relationship in violation of gender-discriminatory laws or societal beliefs. *See* U.S. Gender Guidelines, at 8 ("[An applicant] might . . . assert that her alleged persecutors seek to harm her on account of a political or religious belief concerning gender. . . . [I]t is important that United States asylum adjudicators understand those complexities and give proper consideration to gender-related claims."). Beliefs such as equality in a relationship or a right to bodily autonomy are also forms of political opinion. *See id.*

For these reasons, an asylum applicant whose claim is based on domestic violence may be able to advance a claim based on her political opinion that women should be treated equally and should not have to conform to their partners' beliefs that they are inferior or that they are their partners' property.

## **II. DOMESTIC VIOLENCE MAY CONSTITUTE PERSECUTION.**

This section of the brief will explain that (1) harm in the domestic context may be serious enough to be considered persecutory; (2) claims based on domestic violence, as with all asylum claims, require proof that the applicant cannot seek protection in her home state because the government is unable or unwilling to protect her, *i.e.*, lower her risk below the well-founded fear threshold;<sup>28</sup> and (3) the persecutor's motive for inflicting harm should be irrelevant in evaluating whether the harm constitutes persecution.

---

<sup>28</sup> The persecution element of the refugee definition is bifurcated, comprised of both serious harm and a failure of state protection. State complicity is not required; rather, persecution includes human rights abuses perpetrated by



**A. Domestic violence includes severe forms of harm that amount to persecution.**

"Domestic violence" includes serious physical and non-physical harms that may rise to the level of persecution. *See, e.g., Kone v. Holder*, 596 F.3d 141, 149 (2d Cir. 2010) (remanding for Board or IJ to consider whether petitioner, who had been subjected to FGM, had a well-founded fear of other forms of persecution, including rape and domestic violence related to her gender); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987), overruled on other grounds by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (recognizing rape in the context of an intimate relationship as a harm that can constitute persecution); *Matter of S-A-*, 22 I. & N. Dec. 1328, 1335, 1337 (B.I.A. 2000) (granting asylum to Moroccan woman subjected to "repeated physical assaults, imposed isolation, and deprivation of education" by her father).

Women in abusive relationships may be subjected to rape, beatings, assaults, mutilations, threats, forced abortion, and psychological torture, harms that U.S. courts and the Board have long recognized as persecutory.<sup>29</sup> *See, e.g., Silaya v. Mukasey*, 524 F.3d 1066, 1070 (9th Cir. 2008) (finding that repeated rapes and beatings that petitioner suffered, along with burns and death threats, constituted past persecution); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036-37 (8th

---

both state and non-state actors that the state is either unable or unwilling to control. *See, e.g., Refugee Appeal No. 74665/03*, [2004] NZAR 60, ¶53 (RSAA) (explaining that "[b]eing persecuted" is the construct of two separate but essential elements, namely risk of serious harm and a failure of state protection"). The failure of state protection is thus met under two different scenarios (1) where the state is willing but unable to protect against abuses inflicted either by state or non-state actors; and (2) where the state is unwilling to protect against harm by state or non-state actors because of a discriminatory reason, *i.e.*, gender. *See* Anker § 4:1. As USCIS explains, "[t]here may be situations in which the government is unwilling to control the persecutor for reasons enumerated in the refugee definition [*i.e.*,] the government shares, or does not wish to oppose, the persecutor's opinion about the applicant's race, religion, etc." AOBTC, *Eligibility Part I: Definitions, Past Persecution* at 46-47; *see also infra* Part III of this brief addressing nexus.

<sup>29</sup> In some cases, courts have found that, in the absence of a well-founded fear of future persecution, victims of rape or sexual assault may be eligible for humanitarian asylum based on the atrocious nature of the harm. *See, e.g., Tadesse v. Gonzales*, 492 F.3d 905, 912 (7th Cir. 2007) (finding that petitioner who "suffered a gang rape that caused lasting psychological damage and essentially lost her entire family in the war" could be eligible for "humanitarian asylum"); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (citing *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996) (observing that "rape at the hands of the government . . . can be an atrocious form of punishment indeed")); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (noting that "rape can support a finding of persecution" and remanding for Board to determine whether harm suffered, including rape and beating, qualified petitioner for humanitarian asylum).

Cir. 2008) (remanding for IJ and BIA to consider "non-physical" harm, including threats to take the widow-applicant's children and demands from family that a widow-applicant marry her brother-in-law and pay back a "bride's price," in assessing whether applicant suffered past persecution); *Zubeda v. Ashcroft*, 333 F.3d 463, 472-73 (3d Cir. 2003) (highlighting the psychologically "scarring effects" of rape and noting that rape has been "recognized under the law of nations as torture" and "can constitute sufficient persecution to support a claim for asylum"); *Matter of D-V-*, 21 I. & N. Dec. 77, 78-79 (BIA 1993) (granting asylum to Haitian woman subjected to "grievous harm" including gang rape and severe beating); *see also Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011) (providing examples of "nonphysical harm" that may constitute persecution); *Bah v. Mukasey*, 529 F.3d 99, 112 (2d Cir. 2008), *opinion issued*, 281 Fed. Appx. 26 (2d Cir. 2008) (collecting cases and observing that "[t]hose of our sister circuits to have addressed the issue have agreed that female genital mutilation can constitute persecution for purposes of determining eligibility for asylum and withholding of removal"); *Matter of Y-T-L-*, 23 I. & N. Dec. 601, 605, 611 (B.I.A. 2003) (citing 8 U.S.C. § 1101(a)(42) and finding that forced sterilization constitutes persecution); *Chen v. Holder*, 604 F.3d 324, 333-35 (7th Cir. 2010) (remanding for Board to consider whether economic and non-economic harm suffered, including deprivations of health care, education, and employment, constituted persecution); Anker §§ 4:14-17.

The 1995 U.S. Gender Guidelines specifically cite rape, sexual abuse, and domestic violence as among the types of gender-specific harms that may be considered persecutory. *See U.S. Gender Guidelines* 4, 9. In addition, USCIS has recognized that "sexual assault does not differ analytically from other beatings, torture or other forms of physical violence that are commonly considered" persecutory harm. AOBTC: *Female Asylum Applicants*, at 10, 22.

USCIS instructs asylum officers to weigh the psychological effects of sexual violence, as well as "the social or cultural perceptions of the applicant as a victim of the sexual harm, and other effects on the particular applicant resulting from the harm" in determining whether the harm is persecutory. AOBTC: *Eligibility Part I: Definitions of Persecution; Eligibility Based on Past Persecution* 32 (Mar. 6, 2009).

Other states parties to the U.N. Refugee Convention, including Canada, the United Kingdom, Australia, and New Zealand, have also recognized that spousal or intimate partner violence may constitute persecutory harm. See, e.g., *Minister for Immigration & Multicultural Affairs v. Khawar*, [2002] H.C.A. 14, 210 C.L.R. 1, 187 A.L.R. 574 (Austl.); *Shah and Islam v. Secretary of State for the Home Department*, [1999] 2 A.C. 629 (U.K.) (analyzing claims of Pakistani women who fled their abusive spouses and feared harsh punishments); *Matter of MN*, *Refugee Appeal No 2039/93* (1996) (N.Z.S.A.A.); *Refugee Appeal No. 71427/99*, [1999] N.Z.A.R. 545 (New Zealand); Immigration and Refugee Board of Canada, Guideline 4, Women Refugee Claimants Fearing Gender-Related Persecution (Nov. 13, 1996).

Even though such harm occurs in the domestic context and is inflicted by non-state actors, it is nonetheless encompassed within the definition of persecution. Indeed, as discussed further below, persecutory harm "need not be directly at the hands of the government; private individuals that the government is unable or unwilling to control can persecute someone." *Ali v. Ashcroft*, 394 F.3d 780, 785-87 (9th Cir. 2005) (internal quotation marks omitted). In addition, courts have repeatedly explained that rape and domestic violence are driven by the attacker's need for power, "domination and control," not by a desire for personal or sexual gratification. *Ali*, 394 F.3d at 787; *Lazo-Majano*, 813 F.2d at 1434; see also *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076-77 (9th Cir. 2004) (rejecting government's argument that soldiers raped

petitioner to "satisfy their unlawful, violent, carnal desire" and emphasizing that "rape is not about sex; it is about power and control") (internal quotations and alterations omitted).

**B. Domestic violence based asylum claims require proof that the state is unable or unwilling to protect the asylum-seeker, i.e., reduce the risk below a well-founded fear.**

U.S. courts of appeals have repeatedly found that a state fails in its duty to protect if it is unwilling or unable, despite willingness, to respond to a risk to core human rights by state or non-state ("private") actors, including family members. *See, e.g., Nabulwala v. Gonzales*, 481 F.3d 1115, 116-18 (8th Cir. 2007) (finding that the Immigration Judge erred in concluding that family-arranged rape of Ugandan lesbian constituted "private family mistreatment," and emphasizing that persecutory harm may "be inflicted . . . by persons or an organization that the government was unable or unwilling to control"); *see also Mohammed v. Gonzales*, 400 F.3d 785, 798 n.19 (9th Cir. 2005) (finding that mutilation by "family members or fellow clan members" constitutes persecution and that "[t]here is no exception to the asylum statute for violence from family members"); *Niang v. Gonzales*, 422 F.3d 1187, 1194-95 (10th Cir. 2005) (noting that persecution may be at the hands of "groups which the government is unwilling or unable to control" and finding past persecution based on FGM) (internal quotation marks omitted); *Al-Ghorbani v. Holder*, 585 F.3d 980, 998-99 (6th Cir. 2009) (finding Yemeni government unwilling or unable to protect petitioners against death threats made by senior military officer who acted without fear of governmental sanction).

The relevant question is not whether a state acts in good faith, or eliminates all risk, but whether the state has taken "reasonable steps" to "reduce the risk of claimed harm below the well-founded fear threshold." AOBTC: *Female Asylum Applicants*, at 25; Rodger Haines QC, *Gender-Related Persecution, in Refugee Protection in International Law: UNHCR's Global*

Consultations on International Protection 319, 333 (Erika Feller et al., eds. 2003) (explaining that the state has a duty to reduce the risk of serious harm to "the point where the fear of persecution could be said to be no longer well-founded"); Anker § 4:7.

The failure of state authorities to respond to requests for protection is "a strong indication that state protection is unavailable." AOBTC: *Female Asylum Applicants*, at 25; *see also Smolniakova v. Gonzales*, 422 F.3d 1037, 1048 (9th Cir. 2005) ("[Petitioner's] testimony compels the conclusion that the government turned a blind eye to her persecution, refusing to intervene in any meaningful way to stop it.") (citations omitted); *Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004) (holding that the attacks on the Faruks by their own family members constituted "past persecution on account of their mixed-race, mixed-religion marriage," where police refused to help or investigate the attacks).

Yet, authorities need not have "refused" protection or been complicit in the harm to support a finding of persecution. *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006) ("[P]ersecution can certainly be found when the government, although not itself conducting the persecution, is unable or unwilling to control it, just as Rizal had alleged here"). Indeed, where the evidence presented reveals that seeking protection from state authorities would be futile or dangerous, "an applicant may establish that state protection is unavailable even when she did not actually seek protection." AOBTC: *Female Asylum Applicants*, at 25.<sup>30</sup>

---

<sup>30</sup> *See also Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000) ("[T]he evidence convinces us that even if the respondent had turned to the government for help, Moroccan authorities would have been unable or unwilling to control her father's conduct. . . . In view of these facts, we conclude that the respondent established that she suffered past persecution in Morocco at the hands of her father and could not rely on the authorities to protect her."); *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010) ("[R]eporting persecution to government authorities is not essential to demonstrating that the government is unable or unwilling to protect him from private actors."); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006) (finding that an applicant "need not have reported that persecution to the authorities if he can convincingly establish that doing so would have been futile or have subjected him to further abuse").

In some countries, state authorities view violence inflicted by family members as a "private" matter in which the government will not intervene. *See, e.g., Sarhan v. Holder*, 658 F.3d 649, 650-51, 660 (7th Cir. 2011) (finding Jordanian government complicit in harm petitioner would suffer at the hands of her brother, where "significant evidence" revealed that government failed to protect women against honor killings by family members); *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008) (citing State Department reports, ineffective penalties for domestic violence, widespread violence against women and discriminatory customs in Cameroon as evidence that the government failed in its duty to protect victims of domestic violence); *Bah v. Mukasey*, 529 F.3d 99, 116 (2d Cir. 2008) (quoting State Department report stating that '[d]omestic violence against women [is] common' and that 'police rarely intervene[] in domestic disputes'); *Hassan v. Gonzales*, 484 F.3d 513, 519 n.2 (8th Cir. 2007) (remanding for IJ to consider whether victim of FGM had well-founded fear of persecution, where evidence showed that "societal discrimination and violence against women . . . continued to be serious problems" in Somalia, spousal rape was not outlawed, and rape cases were not prosecuted); *see also* AOBTC: *Female Asylum Applicants*, at 15, 25.

**C. The persecutor's motive is irrelevant in determining what constitutes persecution.**

The Board has held that a persecutor's subjective feelings or intentions should not factor into whether harm is persecutory. *See Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988) ("[A]n applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for action are possible."). As discussed further below, the Board, federal courts of appeal, and USCIS all now agree that a persecutor's motive or intent to punish is irrelevant in evaluating whether the harm inflicted or feared is persecutory.

In *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996), the Board recognized explicitly that "subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution." 21 I. & N. Dec. at 365. The Board found that the FGM feared by a Togolese girl constituted persecution, even though the persons performing or requiring FGM may have believed it was beneficial to the victim. *Id.* at 366, 371 (Filppu, Board Mem., concurring). The Board's analysis focused on the effect of persecution on the victim rather than on the subjective intentions of the persecutory agent. *Id.*; see also *Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996) ("Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases. . . . [Requiring such proof] would largely render nugatory . . . *INS v. Cardoza-Fonseca* and would be inconsistent with the 'well-founded fear' standard embodied in the 'refugee' definition.") (citation omitted).

Following the Board's decision in *Kasinga*, the Ninth Circuit in *Pitcherskaia v. I.N.S.* similarly concluded that the detention, beating and psychiatric treatment forced upon an applicant because of her sexual orientation constituted persecution, even though authorities intended to "cure," not "punish" her. 118 F.3d 641, 646-47 (9th Cir 1997). The Ninth Circuit emphasized that "[t]he fact that a persecutor believes the harm he is inflicting is 'good for' his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution." *Id.* ("Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as 'curing' or 'treating' the victims."). The Ninth Circuit explained in *Pitcherskaia* that punishment "is neither a mandatory nor a sufficient aspect of persecution;" rather, "persecution simply requires that the perpetrator cause the victim suffering or harm." *Id.*

Since *Pitcherskaia*, federal courts have reiterated that a persecutor's subjective motives need not be considered in determining whether harm constitutes persecution. In *Mohammed v. Gonzales*, for example, the Ninth Circuit noted that persecution "simply requires that the perpetrator cause the victim suffering or harm and does not require that the perpetrator believe[] the victim has committed a crime or some wrong." 400 F.3d 785, 796 n.15 (9th Cir. 2005) (citations and internal quotation marks omitted). The *Mohammed* court "reject[ed] the government's suggestion that female genital mutilation cannot be a basis for a claim of past persecution because it is widely-accepted and widely-practiced." *Id.* at n.15. The court emphasized that "[w]hether an act is or is not persecution cannot depend on whether it is rational . . . from the point of view of the persecutors." *Id.* (citations and internal quotation marks omitted); see also *Niang v. Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005) (finding the question of whether the applicant was subjected to FGM at age 25 in an attack by her family or at age 10 as was customary for her tribe "irrelevant" in determining whether the FGM she suffered constituted persecution and emphasizing that "[a]lthough many cases construing persecution involve persecutors who had the subjective intent to punish their victims, this subjective punishment or malignant intent is not required for harm to constitute persecution") (internal quotation marks omitted); see also *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005) ("[W]hile we do not assume the Russian government had Evgueni's best interests at heart when it institutionalized him—indeed, the evidence supports the opposite conclusion—the lack of malicious intent on the part of the persecutor is irrelevant to this aspect of our inquiry."), *vacated on other grounds*, 549 U.S. 801 (2006).

In addition, USCIS instructs asylum officers that "[n]o punitive or malignant intent [is] required" for harm to constitute persecution. AOBTC: *Nexus*, at 10. Citing *Kasinga* and



*Pitcherskaia*, USCIS explains that "[t]he relevant inquiry . . . is whether the persecutor has committed an intentional action, or intends to commit an action that is seriously harmful to the applicant, because of a characteristic (or perceived characteristic) of the victim, regardless [of] whether the persecutor intends the victim to experience the harm as harm." AOBTC: *Nexus*, at 11; see also USCIS: RAIO Directorate – Officer Training, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* 18-19 (Dec. 28, 2011) ("As with other types of refugee or asylum claims, there is no malignant intent required on the part of the persecutor, as long as the applicant experiences the abuse as harm.").

This reasoning—that a persecutor's motive for harming an asylum applicant is not relevant in evaluating what constitutes persecution—comports with the purpose of refugee law: protection of individuals who fear or have experienced serious harm where there has been a failure of state protection, not punishment of malevolent actors or states. *See generally* Anker § 5:9.

### **III. DOMESTIC VIOLENCE BASED ASYLUM CLAIMS REQUIRE EVIDENCE THAT THE PERSECUTION EXPERIENCED OR FEARED IS "ON ACCOUNT OF" OR "FOR REASONS OF" A PROTECTED GROUND.**

This section of the brief will first address the codification of the well-established mixed motives, or "at least one central reason" nexus test; even if there are other central non-protected reasons for inflicting harm in the domestic context the nexus requirement will be met. Second, this section of the brief will discuss the movement of nexus jurisprudence away from the flawed "motives" test to the more appropriate "for reasons of" test. Third, this section of the brief will explain why gender, generally, is at least one central reason for domestic violence.

#### **A A protected ground need only be "at least one central reason" for the persecution to satisfy the nexus element of the refugee definition.**

A woman applying for asylum based on domestic violence must establish a nexus

between a protected ground, such as membership in a gender-defined PSG or belief in a gender-related political opinion, and the persecution experienced or feared. This nexus element is met when gender is "at least one central reason" for the severe harm imposed or the failure of state protection.

Nexus is a bifurcated inquiry that requires the linkage of a protected ground to *either* element of the persecution analysis—the serious harm *or* the lack of state protection. *See* UNHCR, *Guidelines on International Protection: 'Membership of a Particular Social Group' within the context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (2002) (providing that "where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason," the nexus element is met); Anker, § 5:15. Pursuant to the bifurcated nexus analysis, an applicant whose claim is based on domestic violence can satisfy the nexus requirement if a protected ground is "at least one central reason" for either (1) the harm inflicted (as noted *infra* Part III.B, domestic violence is usually inflicted for reasons of a protected ground), or (2) the failure of state protection.<sup>31</sup> *See* *Minister for Immigration & Multicultural Affairs v. Khawar*, (2002) HCA 14; 210 CLR 1; 187 ALR 574, ¶ 23 (Austl.) (Kirby, J.) (finding that "the reason for the failure of state protection is the fact that the respondent is a woman in conflict with her husband[,] . . . [t]he causal nexus required by the Convention definition between the persecution propounded and the respondent's membership of the particular social group, as suggested by her, would be established"); *see also* *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant); Fornah (FC)*

---

<sup>31</sup> Recent U.S. federal courts of appeal decisions suggest a movement toward accepting the more logical and objective bifurcated analysis. *See, e.g., Velihaj v. Attorney General of U.S.*, 336 Fed. Appx. 193 (3d Cir. 2009) (noting that persecution of the petitioner based on his journalistic work exposing the identities of Albanian mafia was not on account of a protected characteristic, but noting that the state's failure to protect petitioner because of his political opinions was on account of a protected ground).

(Appellant) v. Secretary of State for the Home Department (Respondent), [2006] UKHL 55 (appeal taken from E.W.C.A. Civ.) (quoting the UNHCR Guidelines on Gender-Related Persecution, concluding that the nexus element requires a causal link between the protected ground and *either* the harm inflicted *or* the lack of state protection); *Islam (A.P.) v. Sec'y of State for the Home Dep't*, (1999) 2 All E.R. 545 (H.L.) (U.K.); *Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, (1999) 2 All E.R. 545 (H.L.) (U.K.).

In 2005, the REAL ID Act codified the "at least one central reason" nexus test, which the Board reasoned did not drastically alter the established "mixed motives" nexus test.<sup>32</sup> *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (BIA 2007) ("Having considered the conference report and the language of the REAL ID Act, we find that our standard in mixed motives cases has not been radically altered by the [REAL ID Act]."), *pet. denied Ndayshimiye v. Att'y Gen.*, 557 F.3d 124, 129-30 (3d Cir. 2009) (endorsing the Board's continued recognition of the mixed motives test, and noting that there was no requirement that the protected ground be the "dominant" reason for the persecution anticipated or suffered); *see also* Anker § 5:13 ("The REAL ID [Act] Conference report similarly emphasized that the protected ground must be a reason of some significance, but it could be one among many."). Accordingly, an asylum applicant need only show that her membership in a protected group was one of the "central reasons" for the harm inflicted or lack of state protection—she need not prove that it was the dominant reason for

---

<sup>32</sup> In 2004, the 108th Congress first introduced a version of the asylum provisions that would later be amended and codified with the passage of the REAL ID Act of 2005. H.R. 10, 108th Cong. § 3007 (2004). Those provisions, as originally proposed, required an asylum applicant to demonstrate that a protected ground "was or will be *the* central motive for persecuting the applicant." H.R. 10, 108th Cong. § 3007 (2004) (emphasis added). The following year, Congress reintroduced the asylum provisions as part of the REAL ID Act, but it scrapped "the central motive" language and replaced it with "*a* central reason." H.R. 418, 109th Cong. § 101(a)(3) (2005) (emphasis added). By replacing "the" with "a" Congress codified the previously established mixed motives test for nexus. *See* H.R. Rep. No. 109-72, at 165 (2005) (Conf. Rep.); *Matter of S-P-*, 21 I. & N. Dec. 486, 495 (BIA 1996) ("In some fact situations, the evidence may reasonably suggest mixed motives, at least one or more of which is related to a protected ground.").

inflicting the harm.<sup>33</sup> *Ndayshimiye v. Att'y Gen.*, 557 F.3d at 129.

In the context of domestic violence based asylum claims, adjudicators may misapply the "at least one central reason" nexus test and find that the existence of "personal reasons" for inflicting the harm prevents a linkage of the harm to a protected ground. The existence of so-called "personal reasons" for inflicting harm does not, however, prevent an applicant from satisfying the nexus element of the refugee definition as long as "at least one central reason" for the harm inflicted is a protected ground. *See, e.g., Bi Xia Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010) ("[I]f there is a nexus between the persecution and the membership in a particular social group, the simultaneous existence of a personal dispute does not eliminate that nexus."); *Sarhan v. Holder*, 658 F.3d 649, 655-57 (7th Cir. 2011) (noting that brother's honor killing of his sister "may have a personal motivation " but finding that honor killings also have "broader social significance" meaning that the killing "would be on account of her membership in the particular social group" of "women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing"). Furthermore, as noted above, even if a protected ground is not "at least one central reason" for the harm inflicted, nexus may be satisfied if the lack of state protection is for reasons of a protected ground. Gender is often "at least one central reason" for the failure to protect domestic violence victims in some states, which further emboldens abusers to perpetrate the harm. *See supra* Part II.B. An abuser's knowledge that he can act with impunity is an additional reason why batterers abuse and can be considered circumstantial evidence that gender is "at least one central reason" why the harm is inflicted.

---

<sup>33</sup> *See also Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) ("[W]e join those circuits that have accepted the BIA's interpretation of § 1158(b)(1)(B)(i) set forth in *In re J-B-N & S-M*, 24 I. & N. Dec. 208, 214 (BIA 2007).") (citing, *inter alia*, *Shaikh v. Holder*, 588 F.3d 861, 864 (5th Cir. 2009); *Singh v. Mukasey*, 543 F.3d 1, 5 (1st Cir. 2008); *Parussimova v. Mukasey*, 533 F.3d 1128, 1134 (9th Cir. 2008), opinion amended and superseded on denial of reh'g, 555 F.3d 734, 741 (9th Cir. 2009)); *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009) (quoting *J-B-N* and noting that "the REAL ID Act did not 'radically alter[]' the standard in mixed motive cases like *Quinteros-Mendoza*'s").

The REAL ID Act's "at least one central reason" test established an objective, reason-based nexus inquiry that focuses on the effect of the persecution on the applicant.<sup>34</sup> See H.R. Rep. No. 109-72, at 165 (2005) (Conf. Rep.) (The nexus element is met "where there is more than one motive for mistreatment, as long as at least one central reason for the mistreatment is on account of [a protected ground]."); Anker § 5:14. With the passage of the REAL ID Act, USCIS now instructs its asylum officers to consider objective criteria when analyzing nexus rather than motive *per se*.<sup>35</sup> See AOBTC: *Nexus*, at 7-12.

Some courts have described the mixed motives test as requiring an examination of the "totality of the circumstances." To establish the required nexus between the persecution and a protected ground, the applicant "need not disprove every [other] possible motive" for the persecution. *Vata v. Gonzalez*, 243 Fed. Appx. 930, 940-41 (6th Cir. 2007) (unpublished) (holding that a finding that the respondent failed to establish nexus was unreasonable because the Immigration Judge and the Board failed to examine all of the circumstances surrounding an attack on the respondent); see also *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988) (holding that it is sufficient to establish facts "on which a reasonable person would fear that the danger arises on account of" one of the protected grounds); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 (8th Cir. 2009) ("It is the political opinion attributed to the victim, not the political opinion of the persecutor, that is ultimately relevant. . . . But the persecution need not be solely, or even predominantly, on account of the imputed political opinion. . . . It would be error to require a 'single motive' for the persecution.").

---

<sup>34</sup> The "for reasons of" language also comports with the 1951 U.N. Refugee Convention and its 1967 Protocol. See UNHCR, *Guidelines on International Protection: 'Membership of a Particular Social Group' within the context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (2002). The REAL ID Act's shift from *Elias-Zacarias*'s motives-based nexus inquiry to a reasons-based nexus inquiry arguably supersedes U.S. Supreme Court jurisprudence on that point.

<sup>35</sup> Even when focus is improperly on motive, abusers are clearly motivated by gender and the lack of state protection for victims. See *infra* Part III.B.

The nexus element may be established by direct or circumstantial evidence. *See Matter of S-P-*, 21 I. & N. Dec. 486, 489 (BIA 1996). Persecutors rarely tell their victims the precise reason for the abuse, and the law does not require direct proof of the persecutor's reasons. *See id*; Anker §§ 5:5, 5:7. The Board recently restated the importance of drawing inferences and conclusions from evidence, including circumstantial evidence, when analyzing nexus. *Matter of D-R-*, 25 I. & N. Dec. 445 (BIA 2011) ("Drawing inferences from direct and circumstantial evidence is a routine and necessary task of any [Immigration Judge]." (quoting *Siewe v. Gonzales*, 480 F.3d 160, 167 (2d Cir. 2007))); *see also Bace v. Ashcroft*, 352 F.3d 1133 (7th Cir. 2003), as modified on denial of reh'g, (Apr. 9, 2004) (despite the petitioner's inability to identify his attackers, the court held that circumstantial evidence showed that the attack was likely retaliation for petitioner's political activity); DHS Brief in *Matter of R-A-* at 35-36 (reasoning that circumstantial evidence related to a persecutor's reasons for inflicting harm in the domestic context may include evidence of impunity in the home country for such harm and social norms that condone such harm). Where adjudicators have failed to consider the context of persecution when conducting a nexus analysis, federal courts of appeal have found legal error and cause for remand. *See, e.g., Ndonyi v. Mukasey*, 541 F.3d 702, 711 (7th Cir. 2008) (vacating the removal order of an asylum-seeker after finding that the Immigration Judge and the Board "utterly fail[ed] to consider the context of [the asylum-seeker's] arrest").

**B. Numerous experts on domestic violence and international authorities have recognized that violence within a domestic relationship is typically inflicted by a domestic partner for reasons of gender.**

Numerous expert bodies have concluded that violence in the domestic context is gender-related.<sup>36</sup> See Anker § 5:52. "Despite the apparent neutrality of the term, domestic violence is nearly always a gender-specific crime, perpetrated by men against women . . . [and] . . . is directed primarily at women with the intention of depriving them of a range of rights and maintaining their subordination as a group." *See Violence Against Women in the Family*, U.N. Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV.5, ¶¶ 23, 53 (1989) (hereinafter the "U.N. Report"). Some adjudicators wrongly find that domestic violence is perpetrated solely for personal reasons, but domestic violence experts agree that domestic violence is based on gender and state tolerance of subordination of women. *Cf. Sarhan v. Holder*, 658 F.3d at 655-57; *see also* Prof. Nancy K. D. Lemon, Affidavit (May 12, 2004) (on file with author) ("Based on my experience representing hundreds of battered women and my extensive reading of the legal and other academic literature on domestic violence, it is my opinion that gender is one of the main factors, if not the primary motivating factor, for domestic violence."). As discussed above, gender need only be "at least one central reason" for the persecution. *See supra* Part III.A.

As an American Psychological Association study notes, "[e]xperts generally agree that in an abusive family situation, the abuser uses physical, sexual, or psychological coercion or

---

<sup>36</sup> Although domestic violence is largely directed at women in intimate or marital relationships with men, the targeting of women is based on their gender; gender relates to a male or female's role or status in a society or relationship, while sex simply refers to a biological trait. *See* UNHCR Gender Guidelines, ¶ 1 ("Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination."). Therefore, domestic violence may likewise occur in same-sex relationships in which the victim of domestic violence may be a member of a PSG that is not defined by the victim's sex, but by his or her gender role or another immutable or fundamental characteristic, such as sexual orientation. *See* Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 Harv. Hum. Rts. J. 133, 138 n.27 (2002); *see generally Intimate Partner Violence in LGBTQ Lives* (Janice L. Ristock, ed., 2011) (recognizing multiple layers of oppression that contribute to violence in same-sex relationships, including sexism and homophobia).

intimidation for the purpose of achieving power and control over family members or to punish them for not meeting the abuser's needs." APA, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* 11 (1996) (hereinafter "APA Report"). The APA Report discusses the relationship between gender subordination and family violence. It states that "[m]en, for example, receive the false message that they have a right and a mandate to control the women and children in their families. That belief contributes significantly to men's continued use of violence to maintain power and control." APA Report, at 112. Therefore, the actions of a typical abuser may be fueled by stereotypical gender expectations of "his woman." APA Report, at 82. The APA Report goes so far as to conclude that "[t]he strongest risk factor for being a victim of partner violence is being female." APA Report, at 19 (emphasis in original).

Similarly, a study by the National Institute of Justice on batterer intervention programs opined that batterers feel a "the sense of *entitlement* . . . in controlling their partners' behavior and in justifying violence if these women deviate from the female sex role," and that "[i]n practice, regardless of their primary perspective, most [batterer intervention] programs . . . view sexual inequality and masculine role expectations of dominance as core issues to address." Kerry Healey, et al., *Batterer Intervention: Program Approaches and Criminal Justice Strategies* 18-19, 28 (1998) (emphasis in original). Experts in programs aimed at intervening to combat domestic violence recognize the importance of socially and culturally reinforced beliefs such as the "cultural expectation that men should be dominant and successful, . . . and the role of sexism in the media and in society [in] provid[ing] models of social support for abusing and degrading women." *Id.* at 21, 26.<sup>37</sup> USCIS similarly instructs asylum officers that "violence

---

<sup>37</sup> See also Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, The Public Nature of Violence 11, 23 (1994) (describing statements made by batterers in court-mandated educational programs that "speak to well



against mothers, sisters and daughters, like other forms of violence against women, is often related to the historically more powerful position of men in the family and in society, the perceived inferiority of women and unequal status granted by laws and societal norms."

AOBTC: *Female Asylum Applicants*, at 15; *see also* Anker § 5:52.

International authorities have also addressed the gendered nature of domestic violence. For example, the U.N. Declaration on the Elimination of Violence Against Women, which was unanimously adopted by the U.N. General Assembly, recognizes domestic violence as a "manifestation of historically unequal power relationships between men and women," and condemns it as one of the "crucial social mechanisms by which women are forced into a subordinate position compared with men." G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49, at 217 (Dec. 20, 1993). In the same vein, the U.N. Special Rapporteur on Violence Against Women ("Special Rapporteur") has commented on the use of domestic violence as a tool of oppression against women:

At its most complex, domestic violence exists as a powerful tool of oppression. Violence against women in general, and domestic violence in particular, serve as essential components in societies which oppress women, since violence against women not only derives from but also sustains the dominant gender stereotypes and is used to control women in the one space traditionally dominated by women, the home.

UNHCR, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Radhika Coomaraswamy, submitted in Accordance with Commission on Human Rights Resolution 1995/85, ¶ 27, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996).<sup>38</sup>

---

developed notions of sex-based power, control, and hierarchy"); James Ptacek, *Why Do Men Batter Their Wives*, Feminist Perspectives on Wife Abuse 133, 147-49 (Kersti Yllö & Michelle Bograd eds., 1988) (describing how batterers who had participated in a counseling program often justified their violence by seeing themselves as "punishing the woman for her failure to be a good wife").

<sup>38</sup> *See also* UNHCR, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85, ¶ 9, U.N. Doc. E/CN.4/1999/68 (Mar. 10, 1999) ("The culturally-specific, ideologically dominant family form in any

The United Nations has addressed in detail how domestic violence is a means for subordinating women. See "Violence Against Women in the Family," U.N. Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV.5 (1989) (hereinafter the "U.N. Report"). In discussing the limitations of various theories or explanations concerning the causes of violence against women in the home, the report states that "it is perhaps best to conclude that violence against wives is a function of the belief . . . that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate." *Id.* at 33. The U.N. Report continues: "Any explanation [of violence against women in the home] must, however, be seen against a background of gender inequality . . . wherein the structures of society—be they economic, political or legal—act to confirm this inequality. *Id.* at 33, 105 ("Violence against women is the product of the subordination of women.").

## CONCLUSION

Allowing women to obtain protection for reasons of their gender is not an expansion of asylum law, but simply an honoring of principles of fair treatment, equality, and non-discrimination fundamental to U.S. law and international law.<sup>39</sup> The recognition of gender-based asylum claims reflects growing awareness over the past two decades that, as stated in the U.S.

---

given society . . . serves as the standard against which individual women are judged and, in many cases, demonized for failing to ascribe to moral and legal dictates with respect to family and sexuality" and "legitimizes violence against women in the form of sexual harassment, rape, domestic violence, female genital mutilation, forced marriages, honor killings and other forms of femicide.").

<sup>39</sup> A critical element in the development of women's human rights has been the acknowledgement that the serious harms women typically suffer are the result of cultural or customary practices and that these harms are often imposed by the hands of members of the woman's family or community. See generally Anker §§ 4:14, 4:15, 4:23; Natalie Nanasi, *Lesson from Matter of A-T-: Guidance for Practitioners Litigating Asylum Cases Involving a Spectrum of Gender-Based Harms, From Female Genital Mutilation to Forced Marriage and Beyond*, 12-02 Immigr. Briefings 1 (2012) ("In countries where women are regularly oppressed, gender-based harms rarely occur in isolation; an overarching structure of gender inequality leads to subjugation throughout a woman's life."); Deborah Anker, Lauren Gilbert & Nancy Kelly, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify As Refugees Under United States Asylum Law*, 11 Geo. Immigr. L.J. 709 (1997); Pamela Goldberg, *Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 Cornell Int'l L.J. 565 (1993); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 Cornell Int'l L.J. 625 (1993); Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 Int'l J. Refugee L. 518 (1989).

Gender Asylum Guidelines, "women's rights are human rights and that women's rights are universal." U.S. Gender Guidelines, at 2. In a recent Executive Order, the United States reiterated its belief that "gender-based violence undermines . . . the safety, dignity, and human rights of millions individuals."<sup>40</sup> Exec. Order No. 13623, 77 Fed. Reg. 159, 49345 (Aug. 10, 2012). The U.S. government also stated that advancing gender equality by combating gender violence is a "cornerstone" of current U.S. policy. *Id.*

Experts agree that domestic violence is inflicted for reasons of gender, and gender is the type of innate characteristic that can define a protected ground. A gender-defined PSG not only meets the well-established *Acosta* test, but it also satisfies the problematic social visibility and particularity criteria imposed by the Board. Concerns that a gender-defined PSG would drastically increase the number of asylum eligible individuals are unfounded because the remaining elements of the refugee definition act as filtering agents. Furthermore, those concerns are not grounded in legal principle and would result in the inconsistent treatment of PSGs compared to other protected grounds. In addition, an applicant's beliefs concerning gender roles in society and in the household may be considered a political opinion, which is also a viable protected ground in the context of a domestic violence based asylum claim.

Victims of domestic violence may satisfy the persecution element of the refugee definition because domestic violence frequently includes harm (*e.g.*, rape, physical beatings, threats, psychological abuse, etc.) that rises to the requisite level of seriousness to be considered persecutory. If the applicant's home country is unwilling or unable to protect the applicant from such harm then the applicant may satisfy the persecution element of the refugee definition.

---

<sup>40</sup> Even U.S. county legislative bodies have formally recognized domestic violence as a human rights violation. *See, e.g.*, Miami-Dade, Fla., Res. 121380, Ref. No. R-644-12 (July 17, 2012), *available at* <http://www.miamidade.gov/govaction/matter.asp?matter=121380&file=true&yearFolder=Y2012> ("This Board expresses its intent to join world leaders and leaders within the United States in recognition of domestic violence as a human rights concern and declares that the freedom from domestic violence is a fundamental human right.").

When analyzing whether the persecution element has been satisfied, the Board and courts agree that the agent of harm need not possess a malignant intent for inflicting the harm.

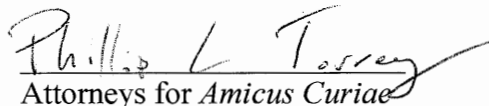
Proof of subjective intent is also not required to demonstrate nexus. With the passage of the REAL ID Act the nexus inquiry requires an applicant to demonstrate that "at least one central reason" for either the harm inflicted or the lack of state protection is the applicant's membership in a protected group or the applicant's protected beliefs. As noted, domestic violence is about gender and opinions about gender roles. Even if harm is inflicted, in part, for personal reasons, "at least one central reason" for the infliction of harm is gender. Some states do not protect victims of domestic violence because of the state's endorsement of social norms that women hold a subordinate position to men within a household. In that context, a state's unwillingness to protect domestic violence victims also satisfies the nexus requirement.

For the reasons stated above, the Board should issue a precedential decision that recognizes domestic violence as a basis for asylum.

November 14, 2012

Respectfully submitted,

By:

  
Attorneys for *Amicus Curiae*

On Brief:  
Kendall J. Bass (Law Student)  
Valérie Duchesneau (Law Student)

**Philip L. Torrey**  
Clinical Instructor  
**Deborah E. Anker**  
Clinical Professor of Law and Director  
**Sabrineh Ardalan**  
Lecturer on Law and Assistant Director  
Harvard Immigration and Refugee Clinical Program  
Harvard Law School  
6 Everett Street; Suite 3105  
Cambridge, MA 02138

**Fatma E. Marouf**

Associate Professor of Law and Co-Director  
Immigration Clinic  
William S. Boyd School of Law  
University of Nevada, Las Vegas  
4505 S. Maryland Parkway, Box 451003  
Las Vegas, Nevada 89154

**Benjamin Casper**

Casper & Evans, P.A.  
1518 East Lake St., Ste 206B  
Minneapolis, MN 55407