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Understanding the Legal Framework of Gender-Based Asylum

A Guide for Expert Witnesses

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Domestic violence is a global issue. It is well known that survivors of gender-based violence in the U.S. face obstacles to their safety. But for all those obstacles—lack of resources, apathy of law enforcement, and antiquated misogynist views on violence in the home, to name but a few—a woman seeking protection in a domestic violence shelter is not asked to prove that she needs protection by providing a sociological analysis of the practices of, motivations for, and social attitudes toward domestic violence in the United States.[1] Yet that is precisely what U.S. immigration courts demand of asylum seekers with gender-based violence claims. For a gender-based asylum claim to be successful, applicants must have the legal sophistication to know that their experience makes them part of a gender-based particular social group (PSG), have the capacity to prove to a judge that this group is clearly defined in the applicants' country of origin, and be able to explain how their society regards this group as special or different. This is impossible for most applicants to show, unless they have a lawyer to guide them through the asylum process and an expert witness to explain to the court the societal patterns and motivations for violence against women that exist in their country of origin.

This chapter explains the role experts play in asylum proceedings, with a focus on domestic violence claims. Expert testimony is vitally important to all gender-based asylum claims, but domestic violence claims have greater complexity as this form of violence is often—just as in the U.S.—both ubiquitous and invisible. Because domestic violence is perpetrated by private actors against other family members, courts regularly classify such violence as a private, interpersonal crime that is ineligible as a basis for asylum, unless expert witnesses have the opportunity

to present research on cultural, societal, and legal norms that identifies motivations and causal factors for domestic violence. This chapter is organized in three parts. First, I explain the legal requirements and the procedural steps for asylum. Second, I review the development of gender-based and domestic violence asylum law since 1985 by analyzing decisions made by the Board of Immigration Appeals (BIA) and attorneys general. And third, I discuss the critical role of expert testimony for successful domestic violence claims and explain the particular issues that experts should be prepared to address in their written reports and oral testimony.

CURRENT STATE OF ASYLUM LAW AND PROCEDURE

The legal eligibility requirements for asylum in U.S. law derive from the United Nations 1951 Refugee Convention and the 1967 Protocol, which define "a refugee" as any person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country."[2] This definition was incorporated into U.S. law in the Refugee Act of 1980 and slightly expanded to allow asylum for people who either feared persecution or had experienced past persecution.[3] To be granted asylum, an asylum seeker needs to demonstrate that she meets this definition of a refugee.[4]

Persecution, a central concept in the definition of a refugee, is unfortunately ill defined in asylum law, with neither statute nor regulation delineating its boundaries.[5] Generally, persecution includes severe physical, psychological, emotional, or—sometimes—economic harm. Whether an applicant with a specific set of experiences has suffered persecution can only be determined through a case-by-case analysis of the cumulative suffering of the applicant.[6] The asylum seeker must show either that she was persecuted in the past or that she has a "well-founded fear" of harm in the future.[7] In order to demonstrate a sufficient risk of future harm, an applicant must show that she faces a "reasonable possibility" of persecution, at least a 10 percent chance of harm.[8]

The immigration court must also consider the role of the government of an applicant's country of origin in protecting the applicant from persecution. An applicant must show that she was persecuted at the hands of a government actor or that the government of her home county was or would be unable or unwilling to protect her.[9] A government-actor persecutor can include national or local authorities, as well as agents of a de facto government, that is, a group that takes on some roles normally carried out by a government like collecting taxes or enforcing the law.[10] An applicant persecuted by a nongovernment actor only needs to show that her government is *either* unable *or* unwilling to protect, not both. A government can be willing but unable to protect its citizen, and that is sufficient to meet the asylum eligibility requirement. Furthermore, if an applicant can demonstrate that

it would have been futile or dangerous to seek government protection, she does not need to show that she sought this protection from the state.[11]

A key element of any asylum case is the demonstration that the harm experienced by the applicant occurred due to specific motivations on the part of the perpetrator. An applicant needs to demonstrate that one of the five listed motives for persecution—race, religion, nationality, membership in a PSG, or political opinion—is at least "one central reason" for her harm, either in the past or likely to occur in the future.[12] This language, added to the Immigration and Nationality Act in 2005 by the REAL ID Act, indicates clearly that Congress felt that an act of persecution could have more than one motivation, and so long as one of the central reasons was one of those listed in the refugee definition—known as a "protected ground"—that element of asylum eligibility would be satisfied.[13] In a 2007 decision, the BIA further emphasized that the protected ground must be a *substantial* cause of the persecution, ruling that "the protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment"—that is, "it cannot be incidental or tangential to" another reason for harm.[14]

These "protected grounds" are themselves subject to legal interpretation. The grounds frequently overlap and are meant to be broadly interpreted. For instance, a person who was persecuted because of her political opinion need not be a member of an established political party but need only express herself on a subject in which "the machinery of State, government or policy may be engaged."[15] An applicant can be eligible for asylum even if her persecutor believes that she possesses one of the protected grounds that she does not, that is, that he imputes the characteristic to her. An applicant also may be eligible for asylum if she is persecuted for *not* being a member of a particular social category—for example, where an atheist is subjected to harm in a society dominated by religious participation.[16]

Many gender-based violence (GBV) claims are based on the ground of the applicant's "membership in a particular social group."[17] While the definitions for the other protected grounds—race, religion, nationality, and political opinion—are largely commonsense ones, membership in a particular social group has been more difficult to characterize legally. In 1985, a BIA case called *Matter of Acosta* determined that in order to make the term "particular social group" consistent with the other protected grounds in the refugee definition, a PSG must be defined by an immutable characteristic, that is, "a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[18] PSGs accepted by federal appeals courts have included groups based on characteristics such as family, sexual orientation or gender identity, childhood, past experiences or associations, mental or physical disabilities, AIDS/HIV status, and gender.[19] In fact, *Matter of Acosta* explicitly lists "sex" as an immutable characteristic on which a viable PSG can be established.[20]

The "protected characteristic" rubric laid out in *Acosta* was widely accepted by other countries and the United Nations High Commissioner for Refugees

(UNHCR).[21] Though *Matter of Acosta*'s interpretation of "particular social group" garnered international approval, between 2006 and 2014 the BIA added two further requirements to particular social groups that narrowed how GBV claims might be recognized by the courts. In addition to referencing immutable characteristics, under current U.S. law a PSG must be "particular," in that it must have clear boundaries, and "socially distinct," in that the society or community where the persecution occurred must regard people within the PSG as a societal grouping.[22] Rather than clarifying the definition of a PSG, as the BIA claimed, the new requirements have caused serious confusion among adjudicators and made asylum claims based on PSG much more difficult for applicants to argue, especially when they do not have legal counsel.

Once an applicant has demonstrated that she was persecuted in the past on account of one of the protected grounds and that her government failed to protect her, she is presumed to have a well-founded fear of future persecution.[23] At that point in the proceedings, the government has the chance to rebut the finding of future fear—usually leading to a denial of asylum—by showing either that the applicant can relocate safely and reasonably within her country or that the conditions in the applicant's country of origin have changed and she would no longer be in danger were she to return.[24] In terms of relocation, the government has to show not only that the applicant would be safe in a certain area of her home country but also that her relocation there would be reasonable in light of "ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties."[25] If an applicant has not suffered past persecution but has established a well-founded fear of future persecution, it is up to her to show that it would be either unsafe or unreasonable for her to relocate.

For applicants who have suffered past persecution but for whom the U.S. government has been able to rebut the presumption of a well-founded fear of future persecution, relief may still be granted if the harm they experienced was extremely severe or if they can show that they would suffer other persecution, unrelated to past persecution, if they were returned.[26] This is called "humanitarian asylum." For instance, if an applicant was subjected to serious sexual violence by an older relative when she was a child, but that relative has since died, she would not have a well-founded fear of future persecution from that same source, but she may be eligible for this additional category of protection if her persecution was particularly severe or she faced other serious harm.[27]

Finally, even if an applicant meets the eligibility requirements described above, she may still be denied asylum, either because she is legally precluded by an asylum bar or the judge exercises their discretion to deny because they believe she is undeserving of asylum. Bars to asylum include the commission of certain criminal acts, persecution of another person, support for terrorism, having been resettled in another country, and missing the one-year filing deadline.[28] An immigration

judge or asylum officer also has discretionary power to deny asylum when considering such factors as attempts to seek asylum elsewhere, length of stay in or ties to a third country, and use of fraud to enter the U.S., among others.[29]

Significantly, even if an applicant is barred from being granted asylum or the immigration judge denies asylum due to a negative discretionary finding, she may still be eligible for either "withholding of removal" or protection under the Convention Against Torture (CAT). Withholding of removal has standards very similar to those of asylum but fewer bars; for example, there is no filing deadline.[30] Protection under CAT requires a finding of a likelihood of future torture—a more severe form of harm than persecution—and greater government involvement in the torture but does not require that torture to be motivated by a protected ground.[31] On the other hand, both withholding of removal and CAT protection have fewer benefits than a successful asylum claim, including no path to legal permanent residence and citizenship.[32] These options are usually considered secondary alternatives when asylum is not available to an applicant.

Now we turn to the procedure for an applicant to attain asylum or one of the corresponding forms of relief. There are two pathways for asylum adjudication: the affirmative asylum system and the defensive asylum system. The dividing line between the two systems is whether the U.S. government has already notified the immigration court of its intent to try to deport or remove the applicant before she has filed her asylum application. If the applicant has a valid visa or if the applicant is undocumented but as yet undiscovered by the government, she is not in removal proceedings, and if she applies for asylum, her application will be processed through the affirmative process. If an applicant is already in removal proceedings—if, for instance, she was living in the U.S. and was caught in an immigration enforcement action or she came to the border and requested asylum—she will go through the defensive asylum process.

In the affirmative process, the applicant submits her application to the Asylum Office—a subdivision of the Department of Homeland Security (DHS)—and then is scheduled for an interview.[33] It is Asylum Office practice to schedule the interview twenty-one days in advance and to inform the applicant by mail, so the applicant and her attorney, if she has one, may in reality only have little over a week's notice.[34] In addition, it is very difficult, especially now, to predict even roughly when an asylum interview will be scheduled in most cases. Over the years, the Asylum Office has switched between a policy whereby the most recent applications get scheduling priority and a policy whereby the applications are scheduled on a first-come, first-served basis and back again.[35] Under the first regime, an applicant might be scheduled within a month of filing her application; in the second, she is likely to be caught in the backlog, which is hundreds of thousands of applications, and may have to wait for years.[36]

The asylum interview itself is nonadversarial. The participants include the applicant, an interpreter who must be provided by the applicant if necessary, a legal representative if the applicant has one, and the asylum officer.[37] Importantly,

there is no one at the asylum interview who is openly opposing the interests of the applicant.[38] The asylum officer is an employee of the DHS but is in the role of a neutral fact-finder and adjudicator.[39] As such, the asylum officer's interests do not conflict with the applicant's; according to DHS policy, the asylum officer must maintain a professional demeanor, and "it is inappropriate" to interrogate or argue with any interviewee.[40] The role of a legal representative during the asylum interview is very limited. The representative may provide additional documentation and a written legal brief before the interview but is present during the interview only to ask some clarifying questions—if the officer allows—and may give a closing statement. The role of an expert in an asylum interview is largely restricted to written material. Witnesses are almost never called during asylum interviews, and on the rare occasions they are invited, they are usually family members of minor applicants who may provide critical information. Experts rarely attend asylum interviews. Instead, experts working on Asylum Office cases generally draft a written report and do not testify. If the asylum officer does not grant asylum and if the applicant does not have other immigration status in the U.S., the applicant will be referred to the immigration court, where she has another chance to prove her case and can present new evidence.

The defensive asylum process, on the other hand, looks very different, and the role of an expert in defensive asylum proceeding is much more involved than in affirmative cases. The expert will need to draft a written report (an affidavit or declaration) but also will usually, though not always, be called on to give testimony in court and be cross-examined. Testimony is not required if the DHS attorney will agree not to challenge the contents of the written report. If the DHS attorney does not stipulate to the written report, it is critical for an expert to be prepared and available to testify. The expert's written report may be given less weight by the judge if the DHS attorney does not have the opportunity to cross-examine the expert, even if the DHS attorney chooses not to do so in the hearing.

When an applicant first files her application in the defensive asylum process, she is already in removal proceedings and is appearing before an immigration judge (IJ). Immigration courts are administrative law adjudicative bodies. Although the rules and procedures for immigration courts have been modified over time, immigration courts follow the basic outlines of the popular understanding of an adversarial court. Each hearing includes an IJ, who is an employee of the U.S. Department of Justice (DOJ); the applicant; an interpreter hired by the immigration court; a legal representative if the applicant has one; any witnesses the applicant wants to present; and a government attorney representing the interests of DHS. Like prosecutors in criminal courts, the DHS attorney is responsible, along with the IJ, for "ensuring that refugee protection is provided where [it] is warranted."[41] In reality, however, DHS attorneys frequently demonstrate that the interest of DHS is to deport as many people as possible rather than fairly enforce immigration laws.

Usually, over the course of an asylum adjudication in immigration court, there will be a series of master calendar hearings (MCHs) where the IJ will advise the applicant of her rights and the applicant will file pleadings and her asylum application.[42] The series of MCHs culminates in a merits hearing or individual calendar hearing, an evidentiary hearing where the IJ will determine whether the applicant is eligible for and deserving of asylum. At each hearing, the next hearing is scheduled, so the applicat is better able to plan for the adjudication; however, it is very difficult to predict how long the process will take in total. Across the U.S. in 2020, there were over 1.2 million cases pending at immigration courts.[43] As a consequence, cases spent an average of 759 days in immigration court before resolution, with some courts averaging over a thousand days.[44] Merits hearings—evidentiary hearings at which the applicant gets the opportunity to prove her case—can be scheduled years in advance and may be bumped to later dates with little warning. This can create difficulty for experts who change jobs or whose reports are out of date by the time of the final hearing.

During the merits hearing, both the applicant's representative (if she has one) and the DHS attorney will have the opportunity to present evidence, including the testimony of witnesses, and cross-examine the other side's witnesses. Both sides can make objections to evidence or testimony and give opening and closing statements. In reality, the DHS attorney does not often present evidence and almost never provides witnesses, because the burden is on the applicant to prove asylum eligibility.

After the IJ issues a decision, either the applicant or the DHS can appeal the decision to the BIA and thereafter to the federal courts of appeals and the Supreme Court.

THE EVOLUTION OF GENDER-BASED ASYLUM

Here I review the development of gender-based asylum claims in the U.S. This review touches on the major cases defining gender-based asylum but does not go into great detail.[45] As indicated in the previous section, "gender" was mentioned as a potential basis for an asylum claim as early as 1985, in *Matter of Acosta*.[46] *Acosta* was the first case to interpret the meaning of "particular social group." The BIA held that persons forming a PSG must share common immutable or fundamental traits such as "sex, color, [or] kinship ties," or in some circumstances, "a shared past experience such as former military leadership or land ownership."[47] The facts of the case, however, show that it was not a gender-based claim.[48] Instead, the respondent claimed that he feared persecution at the hands of guerrillas because of his membership in the particular social group "COTAXI drivers and person engaged in the transportation industry."[49]

The first time the BIA supported a gender-based claim was in 1996 in *Matter of Kasinga*.[50] The BIA granted asylum to a woman from Togo fleeing female genital cutting (FGC).[51] The BIA held both that the practice of FGC where committed

against the will of the applicant constituted persecution and that Ms. Kasinga's proffered PSG, which was based on gender, nationality, tribal membership, and opposition to FGC, was viable.[52] *Matter of Kasinga* was a landmark decision as it was the first time that the BIA found that a woman fleeing violence because of her gender could be eligible for asylum. Despite the decision's appearance as a watershed moment, asylum claims based on GBV, especially those that did not involve FGC, were still very difficult to win. Three years later, in *Matter of R-A-*, the BIA seemed to reverse course and denied asylum to Rody Alvarado Peña, a Guatemalan woman who had been subject to severe domestic violence. Ms. Alvarado also articulated a gender-based claim, and while the immigration judge granted her asylum, the BIA reversed that decision.[53] The BIA acknowledged the extremity of Ms. Alvarado's suffering but denied her claim, rejecting the proposed group, "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination," because the group was not "recognized and understood to be a societal faction."[54]

Matter of R-A- faced immediate criticism and long-term procedural chaos.[55] The next year, in 2000, Attorney General Janet Reno issued proposed regulations in order to "remove certain barriers that the [*Matter of*] *R-A-* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group."[56] Attorney General Reno then certified the BIA's decision to herself and vacated it, sending it back to the BIA with instructions to stay the case until proposed regulations were made final and could guide its decision.[57] The regulations, however, were never finalized during her term as attorney general, and in 2003, Attorney General John Ashcroft again certified the decision to himself and again remanded to the BIA to reconsider under the anticipated final regulations, which also were never issued.[58] In 2008, Attorney General Michael Mukasey vacated the stay and ordered the BIA to issue a decision on the case without the guidance of regulations.[59] The BIA then remanded the case to the immigration judge, who again granted asylum in 2009.[60] Though this case—thankfully, from the point of view of Ms. Alvarado—concluded with an asylum grant, it created no positive new case law or guidance from the DOJ.

In 2004, an immigration judge denied asylum to Ms. L-R-, who also suffered severe domestic violence at the hands of her partner, who held her in virtual captivity for years.[61] Ms. L-R- appealed the adverse decision to the BIA, where the government initially opposed granting asylum but changed position under the Obama administration.[62] DHS submitted a supplemental brief in 2009 arguing that Ms. L-R-'s proposed group, "Mexican women in an abusive domestic relationship who are unable to leave," was circular since it was centrally defined by the existence of the abuse feared by members of the group.[63] However, DHS then proposed alternative groups that could be the basis of successful asylum claims for

survivors of domestic violence: "Mexican women in domestic relationships who are unable to leave" and "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."[64] Whether a domestic violence (DV) asylum claim with either of those groups would be granted depended, DHS asserted, on whether applicants presented evidence that their proposed groups were particular and socially distinct, otherwise they would not automatically be viable.[65] DHS suggested that the BIA remand Ms. L-R-'s case to the immigration judge for findings regarding these alternative groups, and the BIA remanded without a precedential decision. The immigration judge again granted asylum.

Since the BIA did not issue any published decisions—published BIA decisions are binding on all immigration courts and asylum offices—as a result of *Matters of R-A-* and *L-R-*, immigration judges and adjudicators were still deciding domestic violence asylum cases without guidance from the DOJ until 2014. At that point, the BIA issued its first precedential opinion, granting asylum to a survivor of domestic violence in *Matter of A-R-C-G-*.[66] In it, the BIA recognized that the social group "married women in Guatemala who are unable to leave their relationship" could be a viable PSG if certain evidence was provided.[67] The BIA considered the three requirements for a PSG—immutability, particularity, and social distinction—and found that the group satisfied these elements considering the "societal expectations about gender and subordination" and a culture of "machismo and family violence" in Guatemala.[68]

Matter of A-R-C-G- was very significant, though far from ideal. It formed a basis for victims of domestic violence to be eligible for asylum, but the solution—using PSGs similar to "married women in Guatemala who are unable to leave their relationship"—is not logical or common sense, especially to unrepresented applicants; leaves loopholes for adjudicators who do not want to grant asylum for DV survivors; and requires significant and sometimes difficult-to-obtain evidence to prove. Advocates have long pushed for courts to accept PSGs defined by nationality and gender—for example, Guatemalan women—because in certain national contexts gender norms legitimate misogyny and discrimination against women that generally promote and enable gender-based violence against women, specifically domestic violence. The decision in *Matter of A-R-C-G-* and the position articulated in the DHS brief in *Matter of L-R-*, however, both indicate that the government would prefer to narrow the gender plus nationality group with further restrictions. In the next section I discuss the kinds of evidence needed to bolster gender-based claims and the role that experts can play given these restrictions.

Matter of A-R-C-G-, even with all its flaws, was at least far preferable to what followed, when the Trump administration's DOJ actively sought to eliminate domestic violence as a component of the PSG. In late 2015, an IJ in Charlotte, North Carolina, notorious for denying the vast majority of all asylum claims before him, denied the asylum case of Ms. A-B-, a Salvadoran woman and survivor of more than a decade of domestic violence.[69] The IJ disregarded *Matter of A-R-C-G-*,

though it was binding precedent at the time. Ms. A-B- appealed to the BIA, which took the unusual step of reversing the IJ's denial and directing the IJ to grant asylum if the background security checks cleared.[70] Instead of granting asylum, the IJ dawdled and tried to get the BIA to take the case again without issuing a decision. While the IJ delayed granting Ms. A-B- asylum, Attorney General Jeff Sessions personally intervened and referred Ms. A-B-'s case to himself.[71]

On June 11, 2018, Sessions overruled both the prior BIA precedent of *Matter of A-R-C-G-* and the BIA's grant of asylum to Ms. A-B-.[72] Sessions went much further than the facts of Ms. A-B-'s case, concluding that "generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-government actors will not qualify for asylum"—despite the fact that Ms. A-B-'s case presented no gang claim.[73] For over three years, this decision caused chaos for GBV asylum claims. Many judges stopped granting them altogether. Some IJs approved them based on PSGs including nationality plus gender, nationality plus gender plus race/Indigenous status, and nationality plus gender plus relationship status/viewed as property.[74] Some IJs even granted cases based on the political opinion of feminism or opposition to male domination. Ultimately, many survivors of domestic violence were denied asylum because of this ruling. Advocates fought pitched battles with the administration at the BIA and federal courts and had some success, and on June 16, 2021, Attorney General Merrick Garland vacated *Matter of A-B-*, restoring *Matter of A-R-C-G-* as the BIA's most recent ruling on gender-based asylum claims.[75]

The state of domestic violence asylum claims remains precarious, however. Already, *Matter of A-R-C-G-* has been rejected (in October 2021, since *Matter of A-B-* was vacated) by the Fifth Circuit, which held that the group "Honduran women unable to leave their relationship" was impermissibly circular.[76]

EXPERT WITNESS TESTIMONY IN ASYLUM PROCEEDINGS

Now I turn to the important role that country conditions experts can play in asylum proceedings, explaining why they are particularly vital in gender-based and domestic violence cases. In spite of *Matter of A-R-C-G-* paving a path for asylum claims based on domestic violence, each case needs to be proven anew. Just because the respondent in *Matter of A-R-C-G-* was granted asylum based on the group "married women in Guatemala who are unable to leave their relationship," the next woman who applies for asylum, claiming persecution under the identical group, has to establish the group's viability—including particularity and social distinction—all over again.

This section explains the various legal elements of asylum based on domestic violence for which experts are especially necessary. Experts are so valuable because of their detailed knowledge and nuanced understanding of various aspects of society, and they are being called on to explain how this complex knowledge

answers relatively simplistic legal questions. Adjudicators and even the lawyers representing the applicant may try to push experts to oversimplify or cut their explanations short, and experts must push back against that kind of influence. Ultimately, misrepresenting the facts to suit the process will backfire, as the experts may be seen as biased or lacking the requisite expertise.

As discussed above, the applicant needs to show (1) that she is a member of the PSG she proposes; (2) that the group is viable or "cognizable" under the law by being immutable, particular, and socially distinct; and (3) that her past persecution or feared future persecution is on account of that group membership. The second point, whether the proposed PSG is acceptable or cognizable, is a fact-intensive analysis that often requires significant information about the applicant's home country. Showing particularity and social distinction depends on an expert's ability to demonstrate the values, beliefs, and perceptions of the society from which the applicant comes. For instance, a domestic violence survivor applying for asylum using a PSG like the one in *A-R-C-G-* would have to prove the society in their country of origin regards married women unable to leave their relationship as a distinct societal grouping. She might also need to demonstrate that domestic violence is criminalized but that the laws are not effectively enforced, that women in those situations face more danger when they seek police protection, or that the country of origin acknowledges the problem but does not allocate nearly enough resources.

Frequently advocates propose gender plus nationality social groups as less complex to prove than *A-R-C-G-* groups—groups that involve the inability to leave a marriage or relationship. It is easier to establish that "Guatemalan women" is a group that has distinct societal boundaries and is seen as a group by Guatemalan society. Though usually gender plus nationality groups face less of a challenge establishing particularity and social distinction, some adjudicators mistakenly think that large groups—like "Guatemalan women," who represent half a population—are not particular. PSGs that incorporate relationship status—like "Single Guatemalan women" or "Married Salvadoran women unable to leave their relationship"—or groups that incorporate being viewed as property—like "Ecuadoran women viewed as property" or "Ecuadoran women viewed as property by virtue of their domestic relationship"—require extensive evidence.

Demonstrating the cognizability or viability of a particular social group is complex. An applicant must demonstrate that her proposed group is particular by showing that in the eyes of the society she comes from, her group's membership is easily defined—that it has clear boundaries. An applicant must also demonstrate that her proposed group is socially distinct by showing that it is "significantly distinct" within society—that it is "perceived of as a group by society."[77] While an applicant's testimony is critical to an asylum application and she can testify to her own understanding of the group's boundaries or how the group is viewed, she is generally restricted from opining on the general perception of her society except anecdotally, based on experiences she has had or is aware of.[78] For the majority of

applicants, especially those who are not involved in women's rights organizations, testimony regarding the particularity and social distinction of their own proposed PSG will be limited and in some cases insufficient. Experts, on the other hand, are allowed to speak to these issues, and their scholarly credentials can give their words weight and legitimacy. An expert, through country conditions analysis, can demonstrate the cognizability of the PSG in ways that most applicants are not equipped to do.

Consider the example of the group "Salvadoran women viewed as property by virtue of their domestic relationship." Experts can help bolster the cognizability of this PSG by addressing a variety of questions and explaining how they have reached their answers: What is a domestic relationship in El Salvador? What does it look like? Is it common to have domestic relationships between people who are not legally married? Are there special terms used for those relationships, or are all domestic relationships generally referred to as "marriage"? Are those types of relationships treated similarly to marital relationships? Do they have any legal protections? Are some women in domestic relationships viewed as property? Is it a common phenomenon? What are typical indicators or treatment, and how do they differ from the treatment of women not viewed as property? What is the source of this phenomenon? Has it been long-standing? Is there a cultural understanding of this phenomenon? Is the behavior of the perpetrator officially prohibited, through anti–domestic violence laws, for example? If so, how does it persist? Are Salvadorans aware of this phenomenon generally? Do elements of society, like the judiciary or the police or a government agency, treat this group as special, either in a positive or a negative way?

Immigration adjudicators have sometimes pushed back against the PSG formulation that includes "viewed as property," claiming that the phrase is amorphous and has no ready societal definition, so it is very important to be able to explain exactly how this group is perceived in a specific social and historical context. Clearly, as much as legal representatives might wish it, these questions do not have simple or absolute answers. One of the strengths of experts is their ability to make nuanced explanations of complex ideas and realities, and it is the duty of experts to be as accurate as possible and not oversimplify.

As previously discussed, another persistent requirement of a viable social group is that the group must not be exclusively defined by the harm that the applicant suffered: in other words, the definition of the PSG cannot be circular.[79] If, for instance, the applicant defined her group exclusively by the harm she suffered and proposed the group "domestic violence victims," she would then have to prove that she was subject to harm—domestic violence—because she was a victim of domestic violence. In many cases that would be a tautology, and the applicant would fail to establish the nexus prong.[80]

Adjudicators, especially while *Matter of A-B-* was binding, have asserted that groups that involve the inability to leave a relationship are not valid because they are circular.[81] As the First Circuit and the D.C. Circuit have pointed out, this

ignores the fact that a woman may be prevented from leaving her relationship by a number of factors not involving the harm she suffered, including "cultural, societal, religious, economic, or other factors."[82] Expert testimony can be critical to describe those external circumstances that would imprison a woman in a domestic relationship, aside from the violence by her partner.

In addition, though establishing that the applicant is actually a member of her proposed group—the first prong of PSG claims—is usually the least controversial and requires the least support by expert testimony, in "inability to leave" groups, adjudicators sometimes determine that the applicant is not a member of that group because she has, by virtue of being in the United States, left the relationship. This argument is seductive to adjudicators who want to deny asylum claims but does not consider the applicant's situation should she return to her home country. For example, though her persecutor might not be able to reach the applicant in the U.S., he might still believe that she is his possession and might harm her again if she returns. She may, in fact, be at increased risk of harm due to retaliation by her perpetrator on account of her attempt to flee the relationship by coming to the U.S. Or an applicant might be from a country where divorce is not possible and be forced to return to her husband. An expert can help explain the cultural norms relating to a woman's ability to leave a relationship of her own accord and thus help demonstrate that she has not effectively or permanently left the relationship.

Once membership in and validity of a PSG is established, the applicant must show that she was or would be persecuted because of her membership in that group. This can be particularly problematic for survivors of domestic violence. In the U.S., domestic violence has long been seen as private, as harm done by a husband to his wife because of their personal relationship.[83] Adjudicators, therefore, commonly apply those assumptions to persecutors in domestic violence asylum claims and deny that there is a nexus to a protected ground. The adjudicator may view the motives for the abuse as being criminal or deranged but may not be aware of the societal norms that allow and even encourage domestic violence against women on a broad scale. Experts can help establish the connections (if they exist) between societal norms like patriarchy or misogyny and discrimination and violence against women, especially in domestic relationships. If the applicant articulates a group that includes race, ethnicity, or Indigenous status, the expert may be able to explain how levels of violence or cultural norms differ within certain groups.

The final element of persecution itself is the question of government protection: Is the government either unable or unwilling to protect the applicant.[84] An expert's testimony can be critical to meet this threshold, especially for the majority of DV cases where the persecutor is a private actor, not a government agent. Many countries have legislation to protect survivors of domestic violence, and some have government programs to provide shelter or assistance. While that is positive in many circumstances, adjudicators tend to view the existence of those laws and programs as evidence of a willingness or ability to protect women from violence.

Experts can speak to the how those laws and programs are implemented on the ground and to what extent they offer protection to those they claim to protect. In addition, an applicant can show that the government is unwilling or unable to protect her, even if she did not seek protection from them, if she can show that that effort would have been futile or dangerous.[85] Expert testimony can help support this argument by documenting the result of other women seeking protection in circumstances similar to the applicant's.

An applicant's otherwise successful asylum claim will be derailed if the IJ determines that she can safely or reasonably relocate within her country. Sometimes it is the applicant's burden to show that she cannot relocate, and sometimes it is the government's burden to show that she can, but regardless a legal representative will want to make the strongest case possible for why relocation would not be safe or reasonable. The safety of relocation for a domestic violence claim often comes under severe scrutiny because, again, frequently the persecutor is a single person, not connected to the government. An adjudicator may, given the size and relative anonymity of living in the U.S., assume that the applicant could return to her home and, so long as she did not return to her old neighborhood, be able to safely avoid her persecutor. Societies with interconnected communities, with easily identifiable names or ethnic markers, or that use family connections or identity documents for simple tasks, among other characteristics, may make it impossible for an applicant to return to her home country without attracting the attention of her persecutor. Experts are well positioned to explain these differing societal situations.

Even if an applicant *could* be safe from her persecutor if she returned to a different part of the country, it still may not be reasonable for her to do so. Adjudicators must take into account "ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties."[86] Again, adjudicators may erroneously impute the relative ease of relocating within the U.S. to applicants within their own countries or may baselessly view an applicant's ability to relocate to the U.S. as evidence that she could reasonably relocate within her home country. Those comparisons are irrelevant, but it may require the affirmative description by an expert of the social and cultural difficulties of relocation to dispel those assumptions.

CONCLUSION

Despite Attorney General Garland vacating *Matter of A-B-*, gender-based asylum claims, especially those involving domestic violence, remain challenging from a legal and evidentiary perspective. Many of the legal elements of an asylum case are more challenging to prove for a victim of GBV, as discussed above. Unlike asylum seekers claiming persecution based on one of the other four grounds, particular social group claims require proof that the group is particular, has clear

boundaries, is socially distinct, and is viewed as a distinct group by society. The applicant generally cannot speak to the attitudes of her society, and even the most diligent lawyers may not be able to find articles and other documents that fully prove these points in the specific context of their clients. Experts not only have highly specialized knowledge; they are also able to explain it to the adjudicator and bridge the gap between the complexities of a society and the relative simplicity of a legal standard. In a drastically imbalanced system where one side, the government, has all the resources, and the other, the applicant, has the burden of proof, experts are crucial to redressing this injustice and combating adjudicators' ignorance and prejudice.

NOTES

1. National Domestic Violence Hotline, "50 Obstacles to Leaving."

2. UNHCR, 1951 Refugee Convention.

3. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.A.); INA § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A).

4. INA § 208(b), 8 U.S.C.A. § 1158(b).

5. Panoto v. Holder, 770 F.3d 43, 46 (1st Cir. 2014); see, e.g., Mei Fun Wong v. Holder, 633 F.3d 64, 71–72 (2d Cir. 2011) ("[Persecution] is not statutorily defined and courts have not settled on a single, uniform definition" [internal quotation marks omitted]); Karim v. Holder, 596 F.3d 893, 896 (8th Cir. 2010) (stating that "persecution is a 'fluid concept'" [citations omitted]).

6. Hernandez-Lima v. Lynch, 836 F.3d 109, 114 (1st Cir. 2016) ("An applicant . . . is not obliged to show the infliction of physical harm in order to carry her burden of proving past persecution," although "the absence of physical harm weighs against a finding that threats amounted to persecution" [citations omitted]); Mendoza-Pablo v. Holder, 667 F.3d 1308, 1313 (9th Cir. 2012) (holding that persecution can take many forms, including physical, economic, and emotional); Sanchez Jimenez v. U.S. Atty. Gen., 492 F.3d 1223, 1233 (11th Cir. 2007) (finding that intentionally being shot at constitutes persecution, even where the applicant manages to escape physical harm); Tarraf v. Gonzales, 495 F.3d 525, 534–35 (7th Cir. 2007) ("Physical abuse causing serious injuries is not the sine qua non of persecution"); Fatin v. I.N.S., 12 F.3d 1233, 1242 (3d Cir. 1993) ("The concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs"); Mendoza-Pablo v. Holder, 667 F.3d 1308, 1313 (9th Cir. 2012) (recognizing that persecution can come in many forms, including physical, economic, and emotional); Vincent v. Holder, 632 F.3d 351, 355 (6th Cir. 2011) ("Economic deprivation [in the form of a house burning] may constitute persecution"); Mei Fun Wong v. Holder, 633 F.3d 64, 72 (2d Cir. 2011) ("[Persecution] is sufficiently general to encompass 'a variety of forms of adverse treatment, including non-life-threatening violence and physical abuse, or non-physical forms of harm such as the deliberate imposition of a substantial economic disadvantage'" [quoting Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 341 (2d Cir. 2006)]; Crespin-Valladares v. Holder, 632 F.3d 117, 126 (4th Cir. 2011) (finding that a "'threat of death' qualifies as persecution"); Shan Zhu Qiu v. Holder, 611 F.3d 403, 405 (7th Cir. 2010) ("We have defined persecution to include 'detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, torture, behavior that threatens the same, and non-life-threatening behavior such as torture and economic deprivation if the resulting conditions are sufficiently severe'" [citations omitted]); Matter of T-Z-, 24 I&N Dec. 163, 171, 2007 WL 1371944 (B.I.A. 2007) ("The harm or suffering need not [only] be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life").

7. See INA § 101(a)(42).

8. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

9. Matter of Acosta, 19 I&N Dec. at 222.

10. See, e.g., Ai Hua Chen v. Holder, 742 F.3d 171, 177 n.1 (4th Cir. 2014), as amended (May 30, 2014) (noting that although Chinese law prohibited official abuses relating to population control, "the relevant question for asylum purposes is not what local authorities are *authorized* to do; the question . . . is what they *actually* do" [emphasis in original]); Ruqiang Yu v. Holder, 693 F.3d 294, 299 (2d Cir. 2012) (remanding where the applicant suffered past persecution "by an organ of the state—the police"); Zheng v. Mukasey, 552 F.3d 277, 287 (2d Cir. 2009) ("It is simply not the case that an applicant for asylum may be denied relief if his claim focuses upon persecution at the hands of local, as opposed to national, political authorities"). "A foreign State, although not recognized by the political arm of the United States Government to be de jure, may nevertheless have a de facto existence which is judicially cognizable. A government de facto in firm possession of any country is clothed, while it exists, with the same rights, powers, and duties, both at home and abroad, as a government de jure. Any government, however violent and wrongful in its origin, must be considered a 'de facto government' if it is in full and actual exercise of sovereignty over a territory and has people large enough for a nation" (citations omitted).

11. Matter of S-A-, 22 I&N Dec. at 1330–31 (accepting testimony that reporting would have been futile because Moroccan law gives fathers "unfettered" power over daughters and dangerous where harm to respondent would likely escalate after a report); Korablina v. I.N.S., 158 F.3d 1038, 1045 (9th Cir. 1998) (accepting petitioner's testimony that she did not report because the police had ties to the persecutory group); Bringas-Rodriguez, 850 F.3d at 1069; Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1056–57 (9th Cir. 2006).

12. Pub. L. No. 109-13, 119 Stat. 302 (2005), codified at INA § 208(b)(1)(B)(i), 8 U.S.C.A. § 1158(b)(1)(B)(i).

13. Matter of S-P-, 21 I&N Dec. 486 (B.I.A. 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").

14. Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 214 (B.I.A. 2007).

15. Chang v. I.N.S., 119 F.3d 1055, 1063 n.5 (3d Cir. 1997) (defining "political" as "pertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state, as political theories; of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its public policy" [quoting *Black's Law Dictionary*, 5th ed. (1979)]).

16. See Matter of S-P-, 21 I &N Dec. 486, 489 (B.I.A. 1996) ("Persecution for 'imputed' grounds [e.g., where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a religious sect] can satisfy the 'refugee' definition").

17. See generally Blaine Bookey, "Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012," *Hastings Women's Law Journal* 24:107 (2013).

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

19. See generally National Immigration Project, Immigration Law and Defense § 13:40 (providing an overview of different U.S. circuit court approaches to analyzing social group claims).

20. Matter of Acosta, 19 I &N Dec. at 222.

21. See Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 (adopting a similar immutability formulation and noting *Acosta*'s application of *ejusdem generis* reflects "classic discrimination analysis"); Islam v. Sec'y of State for the Home Dep't, [1998] 2 W.L.R. 1015, and Regina v. Immigration Appeal Tribunal and Another, ex parte Shah, 2 All E.R. 545 (1999) (H.L.) (finding women in Pakistan are a particular social group, adopting *Acosta*'s approach, and relying on *ejusdem generis* approach); *Re ZWD*, Refugee Appeal No. 3/91, 92 (N.Z. R.S.A.A. 1992); *Re GJ*, Refugee Appeal No. 1312/93 (N.Z. R.S.A.A. 1995) (same); Applicant S v. Minister for Immigration & Multicultural Affairs, [2004]

217 C 387 ¶ 16 (Austl.) ("The question is not whether some undefined section of, or minority, or majority, or leaders of a country regard and recognise a particular group as a social group. . . . The correct question is simply whether an identifiable group or class of persons constitutes a particular social group"); UNHCR, Guidelines on International Protection No. 2: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees ¶¶ 1, 11–12 (HCR/GIP/02/02) (May 7, 2002), available at http://www.unhcr.org/3d58de2da.html [perma.cc/YGV3-CL5Q].

22. See Matter of C-A-, 23 I&N Dec. 951, 959 (B.I.A. 2006); Matter of S-E-G-, 24 I&N Dec. 579, 582 (B.I.A. 2008); Matter of E-A-G-, 24 I&N Dec. 591, 593–94 (B.I.A. 2008); Matter of W-G-R-, 26 I&N Dec. 208, 212 (B.I.A. 2014); Matter of M-E-V-G-, 26 I&N Dec. 227, 237 (B.I.A. 2014). All of these decisions implicated Central American gang violence claims, and the introduction of the restrictive additional requirements is widely seen not as a legitimate outgrowth of prior case law but instead a covert method of discriminating against Central American asylum seekers. All of the federal circuit courts of appeals have adopted these additional requirements except for the Seventh Circuit. Amaya v. Rosen, 986 F.3d 424, 434-35 (4th Cir. 2021).

23. 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1).

24. 8 C.F.R. §§ 208.13(b)(1)(i)(A), 1208.13(b)(1)(i)(A).

25. 8 C.F.R. § 1208.13(b)(3).

26. 8 C.F.R. §§ 208.13(b)(1)(iii)(B), 1208.13(b)(1)(iii)(B).

27. Matter of L-S-, 25 I&N Dec. 705 (BIA 2012).

28. INA § 208(b)(2), 8 U.S.C.A. § 1158(b)(2); 8 C.F.R. §§ 208.13(c)(2), 1208.13(c)(2); INA § 208(a)(2), 8 U.S.C.A. § 1158(a)(2).

29. Matter of Pula, 19 I&N Dec. 467, 473–74 (B.I.A. 1987). For more information on the use of discretion in asylum claims, see Kate Aschenbrenner, "Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum," *University of Michigan Journal of Law Reform* 45:3 (2012): 595–633.

30. INA § 241(b)(3)(A), 8 U.S.C.A. § 1231(b)(3)(A); see 8 C.F.R. §§ 208.16(b), 1208.16(b).

31. 8 C.F.R. §§ 208.16(c), 1208.16(c).

32. U.S. EOIR Fact Sheet, Asylum and Withholding of Removal Relief, Convention Against Torture Protections, available at https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf.

33. U.S. Citizenship and Immigration Services, Asylum Division, Affirmative Asylum Procedures Manual (AAPM), November 2013, Sections II.B., G., available at https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf.

34. Id. at Section II.G.

35. USCIS, "Affirmative Asylum Interview Scheduling."

36. TRAC Immigration, "A Mounting Asylum Backlog and Growing Wait Times," Dec. 22, 2021.

37. AAPM at II.J.

38. USCIS RAIO Directorate, "Interviewing: Introduction to the Non-Adversarial Interview," Dec. 20, 2019.

39. Id.

40. Id.

41. Matter of S-M-J-, 21 I&N Dec. 722, 723–27 (B.I.A. 1997) (finding that "the government wins when justice is done").

42. U.S. Department of Justice, "Immigration Court Practice Manual," Dec. 31, 2020.

43. Transactional Records Access Clearinghouse, "Immigration Court Backlog Tool," Syracuse University.

44. Id.

45. For a more detailed overview of the history of gender-based asylum in the United States, see, e.g., Karen Musalo, "Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law," *Harvard International Review* 45 (Fall 2014–Winter 2015); Deborah E. Anker, "Legal Change

from the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States," in *Gender in Refugee Law: From the Margins to the Centre*, ed. Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (New York: Routledge, 2014), 46; Karen Musalo, "A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching towards Recognition of Women's Claims," *Refugee Survey Quarterly* 29:46 (2010).

46. Matter of Acosta, 19 I&N Dec. at 222.

47. Id. at 233.

48. Id. at 232.

49. Id.

50. 21 I&N Dec. 357 (B.I.A. 1996).

51. Id. at 358.

52. Id. at 365–68.

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

54. Id. at 918–19.

55. See Musalo, "A Short History of Gender Asylum in the United States," discussing the development of DV-based asylum in the United States.

56. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 at 76,589 (Dec. 7, 2000).

57. Matter of R-A-, 22 I&N Dec. at 906.

58. Matter of R-A-, 24 I&N Dec. 629, 629 (A.G. 2008) ("On February 21, 2003, Attorney General Ashcroft certified the Board's decision for review but remanded the case on January 19, 2005, again directing the Board to reconsider its decision 'in light of the final rule'" (quoting Matter of R-A-, 23 I&N Dec. 694 (A.G. 2005)).

59. Matter of R-A-, 24 I&N at 629.

60. See Matter of A-R-C-G-, 26 I&N Dec. 388, 391–92 n.12 (B.I.A. 2014) ("In remanded proceedings, the parties stipulated that [Ms. Alvarado] was eligible for asylum. Her application was granted on December 10, 2009").

61. Center for Gender and Refugee Studies, "Brief Filed by CGRS in *Matter of L-R-*," Mar. 10, 2010.

62. See generally id.

63. See id. at 10–11.

64. Id. at 14.

65. Id. at 14–15.

66. 26 I&N Dec. 388 (B.I.A. 2014).

67. Id. at 389.

68. Id. at 393–94 (noting that "married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation," and that "the record in this case includes unrebutted evidence that Guatemala has a culture of 'machismo and family violence'").

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

70. Id.

71. Matter of A-B-, 27 I&N Dec. 227 (A.G. 2018) (certification order).

72. See generally Matter of A-B-, 27 I&N Dec. 316.

73. Id. at 320.

74. *Post-Matter of A-B- Litigation Update*, CGRS Practice Advisory at 14, Dec. 2018, available through the CGRS Technical Assistance program.

75. Matter of A-B-, 28 I&N Dec. 307 (A.G. 2021). See also "Matter of A-B- Attorney General Garland Vacates Matter of A-B-," *Harvard Law Review*, Feb. 10, 2022.

76. See Jaco v. Garland, 16 F.4th 1169, 1178 (5th Cir. 2021). For a discussion of the continuing fragility of gender-based PSGs, see Sabrineh Ardalan and Deborah Anker, "Re-setting Gender-Based Asylum Law," *Harvard Law Review Blog*, Dec. 30, 2021.

77. Matter of M-E-V-G-, 26 I&N Dec. at 240–41.

78. In an Article 3 court in the U.S., a witness is prevented from testifying on what she has not directly experienced by hearsay rules, but those rules do not apply in immigration court because of the difficulty of obtaining evidence or witnesses from abroad.

79. Matter of M-E-V-G-, 26 I&N Dec. at 232.

80. There are situations in which a group could be defined by harm but would not present circularity issues because the persecution at issue in the asylum claim is different. For instance, an applicant could be a member of a group of "girls kidnapped by rebels during the civil war," but this would not necessarily be problematic if the applicant was claiming that she was persecuted by her community at the end of the war because she had been kidnapped by the rebels. In a case like that, the group would not be impermissibly circular.

81. Kate Jastram and Sayoni Maitra, "*Matter of A-B-* One Year Later: Winning Back Gender-Based Asylum through Litigation and Legislation," 18 *Santa Clara Journal of International Law* 48 (2020): 74–75.

82. *Grace, et al. v. Barr, et al.*, USCA Case #19–5013, Doc. #1852194, Decided July 17, 2020, at 36 ("If A.B.'s inability to leave her relationship stems from circumstances independent of the alleged harm—for example, legal constraints on divorce—then the group would not be circular because the 'inability to leave' does not refer to harm at all. See De Pena-Paniagua, 957 F.3d at 93–94 [explaining that the 'inability to leave a relationship may be the product of forces other than physical abuse,' such as 'cultural, societal, religious, economic, or other factors']").

83. Throughout this chapter, I almost exclusively refer to domestic violence in opposite-sex couples where the man is the perpetrator. This is not to say that the reverse situation does not occur or that domestic violence does not occur in same-sex couples, but in the context of asylum, this is overwhelmingly the most common situation. See chapters 2 and 5 of this volume for discussion of the limitations of considering gender-based violence as private crime.

84. See Matter of Acosta, 19 I&N Dec. at 222.

85. Matter of S-A-, 22 I&N Dec. at 1330–31 (accepting testimony that reporting would have been futile because Moroccan law gives fathers "unfettered" power over daughters, and dangerous where harm to respondent would likely escalate after a report); Korablina v. I.N.S., 158 F.3d at 1045 (accepting petitioner's testimony that she did not report because the police had ties to the persecutory group); Bringas-Rodriguez, 850 F.3d at 1069; Ornelas-Chavez v. Gonzales, 458 F.3d at 1056–57.

86. 8 C.F.R. § 1208.13(b)(3).