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# Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012

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## I. INTRODUCTION

At age fourteen, Ms. N, a Salvadoran national, met her boyfriend, who was five years her senior. After Ms. N moved in with him, the abuse and controlling behavior started including physical violence as well as emotional abuse and threats. Her boyfriend prevented Ms. N from leaving the house and having contact with relatives and friends. After Ms. N gave birth to their son, the abuse worsened. Her boyfriend beat her with his fists, his feet, and his belt. Ms. N's grandmother attempted to intervene to no avail, including seeking help from the Salvadoran judicial system. Her attempts produced only threats on her life from Ms. N's boyfriend and his family. On one occasion, Ms. N felt so desperate and alone, she tried to commit suicide. She feared reporting the abuse to the police, because she knew stories of other women who had tried to report abuse—instead of receiving help, they faced retaliation from their abusers. After enduring two years of horrific violence and intimidation, Ms. N left El Salvador in 2010 to save her life.<sup>1</sup>

After Ms. P, a native of Kenya, gave birth to their third son, her husband began to control all aspects of her life, forcing her to quit her job and inflicting severe and routine physical and sexual abuse. He beat her in public and at home, leaving scars and, on at least one occasion, permanent injuries. When Ms. P's husband became involved with another woman, the beatings intensified, and he infected Ms. P with syphilis and gonorrhea. The medication Ms. P took to cure the infections caused a miscarriage of their fourth child. Ms. P's husband also threatened to kill her. When Ms. P went to her parents' town, her husband came looking for her. Although the

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1. CGRS Database Case #7571 (2012). All CGRS database case numbers referenced throughout the article are on file with the Center.

police became involved on more than one occasion during her marriage, they did little to protect Ms. P. Finally, Ms. P made the heart-wrenching decision to leave her children in the care of her brother, and she fled Kenya in desperation.<sup>2</sup>

These two women came to the United States in search of protection that their own governments had failed to provide. Only one was successful in her quest. The key difference rested on the immigration judges (IJ) assigned to hear these claims. In both cases, the judges agreed that the women testified credibly, that the harm they suffered rose to the level of persecution, and that their governments had failed to protect them.<sup>3</sup> But while the judge in Ms. N's case found that the abuse she suffered was inflicted on account of her membership in a particular social group (PSG) of "Salvadoran women in domestic relationships who are unable to leave," a group defined by her gender, nationality, and status in a domestic relationship, the judge in Ms. P's case did not believe that there was a relationship between the abuse she suffered and any protected ground, finding that a group defined by gender, nationality, and status in a domestic relationship is not cognizable under the law.<sup>4</sup> Ms. N received a grant of asylum, but Ms. P's case is currently pending before the U.S. Board of Immigration Appeals (BIA or the Board), which has yet to provide guidance to the lower courts for how to handle asylum cases involving domestic violence (DV). Similar facts thus yield very different outcomes for asylum seekers.

In 2003, the Center for Gender & Refugee Studies (CGRS or the Center) at the University of California, Hastings College of the Law published an article examining the state of gender asylum claims in the United States.<sup>5</sup> In that article, CGRS analyzed forty-five decisions by immigration judges and the BIA in gender asylum cases, including twenty-two cases involving women who fled domestic violence. The analysis

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2. CGRS Database Case #8491 (2011).

3. This article assumes that the reader has some familiarity with basic asylum principles related to gender claims. For a more robust overview of the law and development of gender claims in the United States, see 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*, 29 REFUGEE SURV. Q. 46 (2010) [hereinafter "Musalo, A Short History of Gender Asylum"].

4. To qualify for asylum an applicant must satisfy the immigration statute's definition of a "refugee"—a person who is unwilling or unable to return to her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42).

5. See Karen Musalo & Stephen Knight, *Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions*, 2003 IMMIGR. BRIEFINGS 1 (2003) [hereinafter "Musalo & Knight, *Asylum for Victims of Gender Violence*"]. Gender asylum is used to describe claims for protection of asylum and withholding of removal in which the feared harm is gender-specific or disproportionately impacts women and/or the reason the harm is imposed (that is, nexus) is related to or "on account of" gender.

demonstrated that a number of adjudicators viewed developments in the United States—namely the issuance of proposed regulations on gender-based asylum<sup>6</sup> and the *vacatur* of the BIA’s precedential decision denying asylum to a domestic violence survivor in *Matter of R-A*<sup>7</sup>—as removing obstacles to granting relief in gender asylum cases. However, other adjudicators continued to perceive *R-A*-, despite *vacatur*-, as posing obstacles to granting asylum protection to women fleeing a broad range of gender-based harms. Given these inconsistent outcomes, adjudicators clearly needed additional guidance from the government and the courts, in particular with respect to the treatment of domestic violence asylum claims. Despite positive developments over the last decade, the disparity in the treatment of Ms. N and Ms. P shows the continued and urgent need for guidance.

The proposed gender regulations have not been issued in their final form,<sup>8</sup> and no BIA or U.S. Federal Court of Appeals decision has squarely held that domestic violence is (or is not) a basis for asylum in the United States. Nevertheless, the Department of Homeland Security (DHS) has taken the position in the landmark *Matter of R-A*- case, as well as a similar, highly publicized asylum case known as *Matter of L-R*- that women who have suffered domestic violence may establish eligibility for asylum and withholding of removal based on, *inter alia*, membership in a PSG. The granting of asylum to the women in *R-A*- and *L-R*- by stipulation of the parties in 2009 and 2010, respectively, has opened doors for other women. Still, the absence of applicable jurisprudential or regulatory norms and shifting policy positions by DHS on a case-by-case basis has led to contradictory and arbitrary outcomes.<sup>9</sup>

Disparities in asylum adjudication in the United States have been well documented.<sup>10</sup> However, exposing failures in the administrative system has had minimal impact on creating accountability, in part due to the continued lack of transparency in decision making. IJ decisions as well as Asylum Office (AO) and many BIA decisions are not published or

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6. See Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) [hereinafter “Proposed Regulations”].

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

8. The Obama Administration indicated its intention to issue the proposed regulations in 2010, but this never happened. The Regulatory Plan, 74 Fed. Reg. 64137, 64220-21 (Dec. 7, 2009) [hereinafter “The Regulatory Plan”].

9. The government itself has noted that the piecemeal approach taken so far in gender cases “has resulted in inconsistent and confusing standards.” *Id.* at 64221.

10. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 7 (2008) (analyzing more than 198,000 asylum decisions rendered by immigration judges in from Oct. 1, 1994 through Apr. 30, 2007) [hereinafter “GAO, U.S. ASYLUM SYSTEM”]; Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (analyzing more than 400,000 decisions from all levels of the asylum adjudication process in the United States).

available in any publicly searchable database.<sup>11</sup> This lack of transparency and accountability extends to the actions of DHS attorneys across the country who present arguments to IJs and the Board in domestic violence asylum cases that are at times inconsistent with the agency's position in *R-A-* and *L-R-*. This deficit of information is particularly pronounced in the domestic violence context, because IJ and BIA decisions have received scant review by the Courts of Appeals—the result of a decade-long halt on the adjudication of domestic violence claims at the lower levels—whose decisions are publicly available.

This article analyzes 206 outcomes<sup>12</sup> in domestic violence asylum cases before the immigration courts and the Board dating from December 1994 to May 2012 in order to shed light on decision-making trends and provide greater transparency to the asylum system. Part II provides the methodology and Part III provides the findings and analysis. The analysis focuses on how PSGs based on domestic violence are formulated and treated, grouping adjudications collected by CGRS into time periods marked by significant events in the *Matter of R-A-* and *L-R-* cases. This analysis clearly demonstrates that whereas some immigration judges have begun to accept asylum claims involving domestic violence in light of developments in *R-A-*, *L-R-*, and related cases, the absence of binding norms remains a major impediment to fair and consistent outcomes for women who fear return to countries where they confront unimaginable harms, or worse, death. Without clear guidance, the United States will continue to shirk its international obligations to protect women who present bona fide claims for relief.

## II. METHODOLOGY

### A. COLLECTION OF CASE OUTCOMES BY CGRS

CGRS maintains an extensive database with information on more than 6,000 gender-based, child, and lesbian, gay, bisexual, and transgender (LGBT) asylum claims. Attorneys provide the information to the Center with the consent of their clients. Some or all of the following information is contained in individual case records in the Center's database: country of origin; key facts; type of persecution; applicable bars to asylum or withholding; legal theory; evidence or experts used in the case; procedural history and posture of the case, including the jurisdiction and assigned IJ; and rationale for the decision to grant or deny relief. In addition to the

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11. See Sydenham B. Alexander, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1 (2006).

12. This article includes analysis of 206 outcomes, but only 198 distinct cases. This is the result of some cases having had multiple decisions rendered during the time periods studied. The *Matter of R-A-* and *Matter of L-R-* cases are not included in the total.

information included in the individual case records, CGRS also keeps on file unpublished IJ or BIA decisions in hundreds of cases. The database contains written opinions for 118 of the 206 case outcomes analyzed for this article. The information for eighty-eight case outcomes derives from notes, briefs, and other documents submitted to the immigration courts that the attorneys shared with CGRS.

The Center collects this information through its Technical Assistance Program, which provides attorneys who request assistance from CGRS with legal consultation, expert affidavits, and country conditions documentation. After providing assistance, CGRS maintains contact with attorneys to learn about developments and outcomes in their cases. The Center also collects information from attorneys who do not seek assistance but otherwise learn that CGRS tracks this type of information, as well as through the Center's involvement in some cases as counsel of record or amicus counsel.<sup>13</sup> The information collected in the database is unique and unavailable from any other source. Numerous researchers have used the CGRS database to analyze trends in asylum adjudication across the country in a variety of areas.<sup>14</sup>

#### B. SCOPE OF SAMPLE CASE OUTCOMES IN THE CGRS DATABASE

For present purposes, the definition of domestic violence-based asylum claims has been limited to those predicated on relief sought from "intimate partner" violence. Therefore, the analysis excluded cases in the database coded as "domestic violence" that involve claims of child abuse, threats of forced marriage, or sale into human trafficking by family members other than an intimate partner. Similarly excluded were cases that involve other types of persecution on account of gender, such as female genital cutting (FGC), where no other intimate partner violence was present. All of the cases analyzed involve male aggressors and female victims.<sup>15</sup>

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13. Attorneys can submit requests for assistance or amicus support by visiting the CGRS website, available at <http://cgrs.uchastings.edu/assistance/>.

14. See, e.g., Kim Thuy Seelinger, *Forced Marriage and Asylum: Perceiving the Invisible Harm*, 42 COLUM. HUM. RTS. L. REV. 55 (2010) (analyzing unpublished decisions in asylum cases involving forced marriage); Lisa Frydman & Kim Seelinger, *Kasinga's Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence*, 18 BENDER'S IMMIGR. BULL. 1073 (2008) (analyzing treatment of asylum claims involving female genital cutting); Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693 (2008) (analyzing decisions regarding application of the one-year bar to asylum); Musalo & Knight, *Asylum for Victims of Gender Violence*, supra note 5 (analyzing the treatment of gender asylum claims generally). See also Sarah Rogerson, *Waiting for Alvarado: How Administrative Delay Harms Victims of Gender-Based Violence Seeking Asylum*, 55 WAYNE L. REV. 1811 (2009) (analyzing impact of proposed gender regulations on decision making from 2001-2009 in gender asylum cases based in large part on outcomes published by CGRS).

15. This is not to say there are no male victims of domestic violence or that domestic violence does not occur in same-sex relationships, but rather merely reflects the case information collected by CGRS and analyzed in this article.

Moreover, information in the database regarding case outcomes at the Asylum Office has not been included, because the AO does not provide extensive legal analysis, which impedes the Center's ability to track how developments in the law have affected asylum officer adjudications.<sup>16</sup>

### C. ORGANIZATION OF CGRS DATABASE CASE OUTCOMES FOR ANALYSIS

The cases chosen for analysis were grouped chronologically by the date of the IJ or BIA decision, in order to analyze how adjudicators responded to external events. Seven distinct time periods were identified using important markers in the evolution of domestic violence asylum claims in the U.S. The chosen markers track developments in the *Matter of R-A-* and *Matter of L-R-* cases. Understanding the analysis of case outcomes requires basic knowledge of the developments in domestic violence asylum, and of these two cases specifically. A brief overview is provided here.

#### 1. Prior to June 11, 1999: pre-*Matter of R-A-*

Prior to the BIA's decision in *Matter of R-A-*, issued on June 11, 1999, no precedent decisions by the BIA or the Courts of Appeals, nor binding regulatory guidance existed regarding domestic violence as a basis for asylum. In 1995, the United States issued gender guidelines that provided examples of gendered harms that could constitute persecution, including domestic violence, but the guidelines did not bind IJs, the BIA, or the Courts of Appeals.<sup>17</sup> In addition, although the Board broke new ground in gender-related claims in a decision the following year, *Matter of Kasinga*,<sup>18</sup> granting asylum to a Togolese woman who fled her country to escape female genital cutting, the decision was not directly on point in domestic violence cases.<sup>19</sup> The *Kasinga* decision was (and remains), important to the domestic violence context because it applied the BIA's seminal social group decision, *Matter of Acosta*,<sup>20</sup> holding that a social group is defined by characteristics that are immutable or fundamental, to hold that an applicant

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16. As of July 5, 2012, CGRS had on file 287 grants and 129 denials in DV asylum cases from Asylum Offices across the country over the last seventeen years.

17. Memorandum from Phyllis Coven, U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995), published in 72, No. 22 INTERPRETER RELEASES 771, 771 (June 1995).

18. *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

19. The BIA's *Kasinga* decision overcame interpretive barriers that often stand in the way of relief in gender-based asylum claims. For example, it found FGC to be persecution, notwithstanding the fact that it is a widely condoned cultural practice. It recognized that social groups could be defined in reference to gender and it did so in a case involving non-state actors—namely the family and community that sought to impose genital cutting. In addition, the BIA had no difficulty finding a nexus between the persecution and social group membership by taking the societal context into consideration.

20. *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

can establish membership in a PSG defined by gender in combination with other characteristics.<sup>21</sup>

2. June 12, 1999 –January 19, 2001: BIA issued a precedential opinion on domestic violence asylum in *Matter of R-A-*

In the BIA's precedent-setting domestic violence asylum decision, *Matter of R-A-*, delivered June 11, 1999, the Board held that the horrific abuse suffered by the applicant, Ms. Rody Alvarado, constituted persecution, but concluded that it was not inflicted by her husband on account of her membership in a PSG or any other protected ground. The BIA rejected the social group formulation accepted by the IJ, "Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination," because even if joined by immutable or fundamental characteristics in line with *Acosta*, it said, the group was not "recognized and understood to be a societal faction."<sup>22</sup> The BIA also rejected the relevance of societal context in determining nexus between the harm and Ms. Alvarado's group membership.<sup>23</sup> The Board's PSG and nexus analyses in *R-A-* thus stood in contrast to its prior *Acosta* and *Kasinga* decisions, confusing the jurisprudence.<sup>24</sup> In addition, the Board found that Ms. Alvarado did not establish that her husband's behavior was motivated by her actual or imputed political opinion. During this period, the BIA issued another notable precedential domestic violence decision in *Matter of S-A-*.<sup>25</sup> However, *S-A-* involved parental, not spousal, abuse and was based on religion, not PSG.

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21. The particular social group was defined in *Kasinga* as "[y]oung women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by the tribe, and who oppose the practice."

22. This language regarding the recognition of a group as a societal faction was the forerunner to the BIA's ruling that not all groups that share an immutable or fundamental characteristic are cognizable. In addition to the *Acosta* factors, the BIA has since required that "social visibility" and "particularity" of the groups be established.

23. The Board's approach was out of step with the recommendations of the United Nations High Commissioner for Refugees (UNHCR) that societal context is relevant in determining the motivation for persecution. Musalo, *A Short History of Gender Asylum*, *supra* note 3, at 56.

24. In December 2000, while the *R-A-* decision was in effect, the Department of Justice issued proposed regulations to promote uniform interpretation of gender asylum claims that include a substantial amount of guidance favorable to claims based on domestic violence. The preamble states that the regulation serves to remove "certain barriers that the *In re R-A-* decision seems to pose" to domestic violence claims, that gender is an immutable characteristic, and that marital status may be considered immutable in appropriate circumstances. Proposed Regulations, *supra* note 6. The proposed regulations also firmly establish *Acosta* as the standard for PSGs. However, the regulations were not finalized during this period, so were not binding on IJs or the BIA.

25. *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000) (holding that father persecuted daughter on account of her liberal Muslim beliefs concerning the proper role of women in Moroccan society).

3. January 20, 2001 – February 19, 2004: *Matter of R-A-* vacated by the U.S. Attorney General with no further guidance provided

The Board's 1999 decision in *Matter of R-A-* provoked a firestorm of criticism. Sustained pressure from various constituencies across the country, including several members of the U.S. Congress, led then U.S. Attorney General (AG) Janet Reno to become directly involved in the case in a process that allows the AG to "certify" a case to herself for a decision.<sup>26</sup> After she accorded herself jurisdiction over the case, on January 19, 2001, AG Reno vacated the BIA's *R-A-* decision and remanded it to the Board to decide at such time as the proposed gender regulations became final. Therefore, after January 19, 2001, *R-A-* no longer bound immigration judges or the Board. However, AG Reno's remand order hamstrung the BIA from issuing a new decision in *R-A-* until the proposed gender regulations became final (which has yet to occur). Adjudicators at the lower levels were again left without clear guidance regarding the treatment of domestic violence asylum cases.<sup>27</sup>

4. February 20, 2004 – September 25, 2008: DHS announced its position in DV asylum cases in *Matter of R-A-*, at that time pending at the Board

On February 19, 2004, DHS submitted a brief to AG John Ashcroft, who had recertified the *Matter of R-A-* case to his authority. Notable was the fact that DHS reversed course from its previous position and argued that Ms. Alvarado had established eligibility for asylum on account of her membership in a PSG.<sup>28</sup> DHS defined the social group as "married women in Guatemala who are unable to leave the relationship."<sup>29</sup> Of particular importance, DHS affirmed the BIA's seminal *Acosta* decision as the touchstone for defining social groups. Using *Acosta* as the framework, DHS argued that gender is immutable and that marital status may be immutable or fundamental where factors make it so, for example, "if a woman could not reasonably be expected to divorce because of religious, cultural or legal constraints, or because evidence indicates that her husband would not recognize a divorce or separation as ending the relationship."<sup>30</sup> DHS further argued that a group need not "be small in order to qualify as a

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26. In the United States, the Attorney General has the authority to certify cases to him- or herself for decision. See 8 C.F.R. § 1003.1(h)(1)(i). Any decision issued by the AG is binding on the BIA and immigration courts in every jurisdiction where there is no contravening federal court of appeals decision.

27. See Proposed Regulations, *supra* note 6.

28. DHS's Position on Respondent's Eligibility for Relief, *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005) (A 73 753 922), available at [http://cgrs.uchastings.edu/documents/legal/dhs\\_brief\\_ra.pdf](http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf) [hereinafter "DHS R-A- Br."].

29. *Id.* at 15.

30. *Id.* at 20.



particular social group.”<sup>31</sup> The brief also addressed nexus in domestic violence cases in a manner that incorporated circumstantial evidence of the societal context in which the violence occurs. In addition, DHS disavowed as “fundamentally flawed” the Board’s finding in *R-A-* that lack of evidence that Ms. Alvarado’s husband sought to harm other group members indicated that he was not motivated by group membership.<sup>32</sup> Rather than rule on the case, AG Ashcroft sent it back to the BIA and imposed a stay. The BIA was again ordered to refrain from reconsidering the case until the proposed regulations were in final form. This fourth time period includes cases decided after DHS set forth its framework for domestic violence cases in the *R-A-* brief until the Executive took further action in *R-A-* in 2008.<sup>33</sup>

5. September 26, 2008 – July 16, 2009: AG lifted the stay in *Matter of R-A-*

On September 25, 2008, AG Michael Mukasey lifted the stay imposed on the BIA and remanded *Matter of R-A-* for immediate reconsideration of the issues presented with respect to asylum claims based on domestic violence notwithstanding that regulations had yet to be finalized. This next time period includes cases decided after AG Mukasey’s order until DHS clarified its position in domestic violence cases the following year. Although no new precedent was issued, this period was significant because many women were left in legal limbo while the prior AG stay orders had been in effect.<sup>34</sup> After the stay was lifted, the Board remanded some domestic violence cases, including *R-A-*, to the immigration court and requested supplemental briefing in other cases in light of the BIA’s imposition of “social visibility” and “particularity” into the PSG analysis.<sup>35</sup>

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31. DHS *R-A-* Br. at 22.

32. *Id.* at 32. Circumstantial evidence of the persecutor’s motive to harm his partner on account of her status in the relationship could include “evidence that such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society, that cannot be deduced simply by evidence of random acts within that society.” *Id.* at 36.

33. *Id.* at 36; DHS’s Supplemental Brief, *Matter of L-R-* (BIA Apr. 13, 2009), available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf> [hereinafter “DHS *L-R-* Br.”].

34. While the stay was in effect, asylum offices sent DV asylum cases to headquarters in Washington, D.C., immigration judges administratively closed the cases or continued them indefinitely, and the BIA sat on appeals for years, waiting for direction. See Lisa Frydman, *Recent Developments in Domestic-Violence-Based Asylum Claims*, 2009 LEXISNEXIS EMERGING ISSUES ANALYSIS 4075 (2009) [hereinafter “Frydman, *Recent Developments*”].

35. The new requirements were imposed by the BIA in 2006 during the protracted battle in *R-A-*. See *Matter of C-A-*, 23 I. & N. Dec. 951 (BIA 2006), *aff’d* *Castillo-Arias v. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006). Social visibility requires that the members of the group be visible to the society at large, while particularity requires that the group be clearly defined with concise boundaries. Not all courts of appeals have accepted these requirements. See *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (rejecting BIA’s requirement of social visibility and remanding for consideration of social group claim);

The Board did not issue a precedential decision in *R-A-* or in any of the other cases to guide the lower courts.

6. July 17, 2009 – December 10, 2009: DHS updated its position in DV cases in *Matter of L-R-*

While *R-A-* was pending on remand before the immigration judge, DHS filed a supplemental brief to the BIA in the related *Matter of L-R-* case. The brief became public on July 16, 2009.<sup>36</sup> The agency's approach in its supplemental brief in *L-R-*, a case involving a Mexican woman who fled more than two decades of atrocious abuse at the hands of her common-law husband, builds on the position it articulated in its *R-A-* brief. Together, the briefs set forth DHS's official position regarding domestic violence claims. The significant difference between the 2004 and 2009 briefs is that the latter includes the agency's position on how the BIA's new social group requirements of "social visibility" and "particularity" can be met in such cases. Specific to the asylum seeker in *L-R-*, DHS advanced two formulations of a social group that it argued could meet the immutability, visibility, and particularity requirements, depending on the facts in the record: (1) Mexican women in domestic relationships who are unable to leave; or (2) Mexican women who are viewed as property by virtue of their position in a domestic relationship.<sup>37</sup> The brief also noted that, in appropriate cases, the social group can be based on family. DHS explained that social visibility refers to the fact that society (including government) perceives the defined group in a certain way and accords group members different treatment on that basis, which can be shown by prevailing laws, application of laws including impunity for violations, and broad societal attitudes.<sup>38</sup> With respect to particularity, DHS explained that the group must be defined with sufficient specificity to delimit membership, and that characteristics of the group, such as a "domestic relationship," are susceptible to clear definition.<sup>39</sup> The BIA heeded DHS's request to remand *L-R-* to the immigration judge for additional fact-finding but, as in *R-A-*, it did so without issuing a precedential opinion clarifying the doctrine. In addition to *L-R-*, the Board started remanding other DV asylum cases to the immigration courts for record development as a matter of course.

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*Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 608 (3d Cir. 2011) (declining to defer to the BIA's requirements of social visibility and particularity and affording the BIA the opportunity to provide a reasoned explanation as to their meaning on remand); *Henriquez-Rivas v. Holder*, 449 F. App'x 626 (9th Cir. 2011), *rehearing en banc ordered by* 670 F.3d 1033 (9th Cir. 2012) (at the time of writing, reconsidering the issue en banc).

36. DHS *L-R-* Br., *supra* note 33, at 23.

37. *Id.* at 14.

38. *Id.* at 17–18.

39. *Id.* at 19.

7. December 11, 2009 – present: asylum was granted by the IJ in *Matter of R-A-*

On December 10, 2009, an immigration judge in San Francisco finally granted asylum to Ms. Alvarado. Although the IJ's order was less than a sentence long and had no precedential value,<sup>40</sup> the victory had great symbolic significance. The case had become the battleground on which the issue of domestic violence as a basis of asylum had been fought for more than a decade, and the case in which DHS first set forth a framework for asylum eligibility in domestic violence cases. The final group of cases analyzed includes IJ and BIA decisions issued since the *R-A-* grant; the most recent decision was rendered on May 17, 2012. While several women fleeing domestic violence have experienced victories in the wake of *R-A-*, including the applicant in *L-R-*,<sup>41</sup> the Board still has not issued a precedential decision on the viability of domestic violence asylum, and the Executive has yet to finalize regulations.

D. LIMITATIONS OF ANALYSIS OF CGRS DATABASE CASES

No official statistics exist regarding the number of asylum cases adjudicated in the United States that involve domestic violence as a basis for protection.<sup>42</sup> Therefore, it is impossible to know if the information in the CGRS database provides a representative sample. Consequently, the analysis does not provide any statistical analysis or draw any conclusions regarding probable outcomes. Moreover, the sample outcomes originate primarily from attorneys who contacted CGRS for assistance, and thus do not represent random case outcomes. The dataset, however, represents a diversity of jurisdictions across the country, with cases concentrated in states with high levels of migration: California, Florida, New York, and Texas.<sup>43</sup> IJs located in those four states heard 111 of the 206 cases, or

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40. The IJ's decision stated: "Inasmuch as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the parties [to grant asylum]." CGRS Database Case #59 (2009).

41. Like the decision in *R-A-*, the IJ decision in *L-R-* may be symbolic, but it too holds no precedential value. The IJ's summary order simply states that asylum is granted and includes a notation that it was a result of "stipulation of the parties." CGRS Database Case #5363 (2010).

42. In Fiscal Year 2008, more than 47,000 claims for asylum were adjudicated in removal proceedings (a figure that does not include claims by individuals not in removal proceedings, which are processed by the Secretary of Homeland Security). See OFFICE OF PLANNING, ANALYSIS, AND TECHNOLOGY, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURTS FY 2008 ASYLUM STATISTICS (2009). The statistics are divided by country only, however, and there are no statistics available regarding the number of gender claims advanced in proceedings, let alone statistics regarding the number of claims that involve domestic violence.

43. The Executive Office for Immigration Review (EOIR) of the U.S. Department of Justice operates immigration courts in fifty-nine cities in twenty-nine states. See Dep't of Justice, EOIR Immigration Court Listing, <http://www.justice.gov/eoir/sibpages/ICadr.htm> (last visited Oct. 15, 2012).

about fifty-four percent. San Francisco (forty-five cases), New York City (eighteen), and San Antonio (fourteen) produced the largest representation in the data sample (*see* Table 1 below).<sup>44</sup> Other jurisdictions produced between one and twelve outcomes over the studied time period.<sup>45</sup>

TABLE 1: GRANT RATES BY IMMIGRATION COURTS FOR COURTS WITH AT LEAST FIVE DECISIONS IN THE CGRS DATABASE

JURISDICTION	TOTAL GRANTS	TOTAL DENIALS	TOTAL DECISIONS
San Francisco, California	35	10	45
New York, New York	13	5	18
San Antonio, Texas	10	4	14
Miami, Florida	6	5	11
Seattle, Washington	7	3	10
Arlington, Virginia	7	1	8
Los Angeles, California	3	5	8
Baltimore, Maryland	8	1	9
San Diego, California	4	3	7
Boston, Massachusetts	6	1	7
Chicago, Illinois	2	3	5

The CGRS database drew domestic violence asylum outcomes from 117 different immigration judges across the country. The sample includes multiple decisions from thirty-three different IJs, both male and female (*see* Table 2 below), which allowed for an analysis of the individual adjudicator's response to the external events over time. Where the sample produced only one decision from a particular IJ, by contrast, it was not possible to track that particular judge's decision making over time.

44. These courts are among the courts that receive the highest volume of asylum cases generally. *See* GAO, U.S. ASYLUM SYSTEM, *supra* note 10.

45. The cities where the cases recorded in the CGRS database were heard include the following in alphabetical order: Anchorage, Alaska (1 case outcome); Arlington, Virginia (8); Atlanta, Georgia (1); Baltimore, Maryland (7); Bloomington, Minnesota (3); Boston, Massachusetts (7); Bradenton, Florida (1); Charlotte, North Carolina (1); Chicago, Illinois (5); Dallas, Texas (1); Denver, Colorado (4); El Paso, Texas (3); Elizabeth, New Jersey (4); Eloy, Arizona (1); Harlingen, Texas (1); Hartford, Connecticut (3); Houston, Texas (3); Kansas City, Missouri (1); Los Angeles, California (8); Memphis, Tennessee (2); Miami, Florida (12); Newark, New Jersey (2); Oakdale, Louisiana (1); Omaha, Nebraska (2); Orlando, Florida (1); Portland, Oregon (4); Puerto Rico (1); San Antonio, Texas (14); San Diego, California (6); Seattle, Washington (10); Tacoma, Washington (2); Tucson, Arizona (1); York, Pennsylvania (5). The precise jurisdiction is unknown for four cases for which CGRS does not have written decisions on file.

TABLE 2: GRANT RATES BY GENDER OF ADJUDICATOR FOR  
CASES IN THE CGRS DATABASE

GENDER OF IJ	TOTAL GRANTS	TOTAL DENIALS	TOTAL DECISIONS BY GENDER
Male	66 (63.5%)	38 (36.5%)	104
Female	55 (73%)	20 (27%)	75
Unknown	16	2	18

Some case reports in the CGRS database remain incomplete; in some instances, for example, the database indicates that an appeal was filed with the BIA or the Courts of Appeals, but CGRS has not been able to track the case's ultimate resolution.<sup>46</sup> In other instances, it is possible that an appeal was filed, but CGRS was not made privy to this information. In any event, lack of complete information concerning appeals and final outcomes does not affect the analysis of the correlation between external events and decision making.

Finally, the CGRS dataset of domestic violence asylum cases is skewed towards positive outcomes precisely because CGRS learns of these cases from attorneys—thus, these cases concern asylum seekers who had legal representation, and whose legal counsel sought expert assistance. The dataset includes 126 grants of asylum, ten grants of withholding of removal, and four grants of relief under the Convention Against Torture (CAT), or sixty-eight percent positive outcomes. By comparison, there are only sixty-three recorded denials of any form of relief, representing thirty-one percent of the sample. This approximate ratio of 2.2 grants for every denial probably does not accurately reflect the success of domestic violence-based asylum claims nationwide. It more likely shows a stronger desire or willingness from attorneys to report positive rather than negative outcomes. And attorneys who request technical assistance from CGRS may have a higher rate of success than those who do not; certainly this success rate is higher than the rate for asylum seekers who do not have legal representation.

### III. FINDINGS AND ANALYSIS

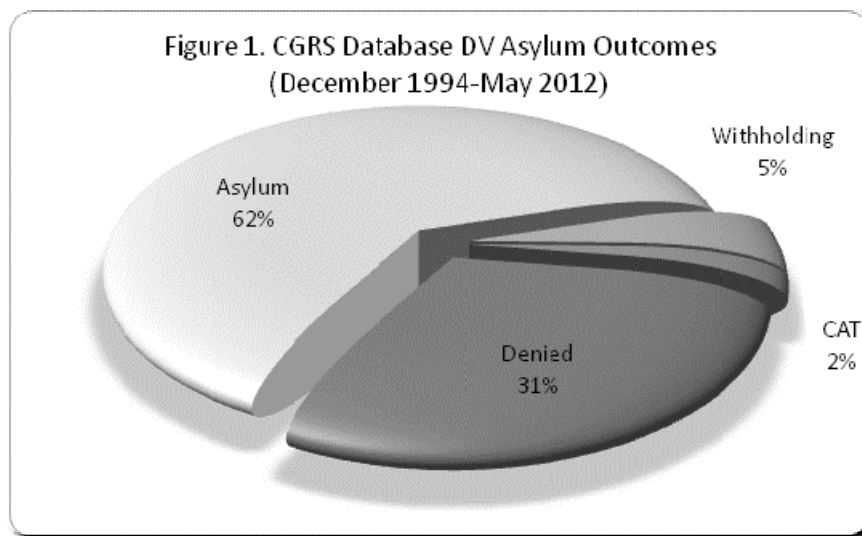
#### A. OVERVIEW OF CGRS DATABASE CASE OUTCOMES ANALYZED

This article analyzes 206 outcomes in domestic violence asylum cases decided in the United States between December 1994 and May 2012. The

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46. CGRS attempts to track outcomes periodically by following up with attorneys, but attorneys change firms or leave the profession, and it can be difficult to track down a final outcome for some cases.

sample includes 140 grants of relief and sixty-three denials (see Figure 1 below). The sample also includes three grants of motions to reopen (MTR) to apply for asylum on the basis of DV. Immigration judges issued the majority of the decisions; only eight of the decisions came from the BIA.<sup>47</sup>



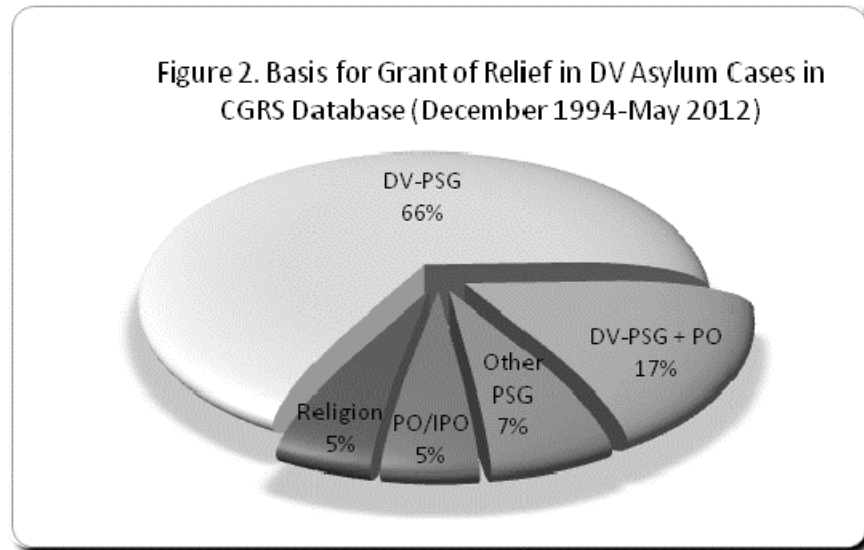
The following legal rationales form the basis of the grants of asylum or withholding of removal:

- Particular social group based on domestic violence (DV-PSG)
- DV-PSG + political opinion (PO) or imputed political opinion (IPO) based on resistance to domestic violence (DV-PO)
- DV-PO only
- PSG based on other factors (such as FGC)
- Religion only

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47. As explained earlier, the BIA held domestic violence asylum cases from the time that *Matter of R-A-* was vacated in 2001 until AG Mukasey lifted the stay in 2008. After the stay was lifted, the Board remanded many cases that had been on appeal, so these cases are only now returning to the Board for adjudication. CGRS knows of several domestic violence asylum cases pending at the Board.

The majority, 118 out of 136, of the grants of asylum and withholding were based on the domestic violence related rationales (DV-PSG, DV-PSG + DV-PO, or DV-PO) (*see* Figure 2 below).



The most common reasons given for denial were the lack of a cognizable social group or the failure to demonstrate nexus to a protected ground (*see* Table 3 below).<sup>48</sup> In any given decision, a judge may have presented several alternative bases for denial, so the following numbers reflect the frequency of the alternative bases in the sixty-three rejected cases. They do not reflect separate decisions, and therefore they total a number greater than sixty-three. In addition to lack of PSG or nexus (fifty decisions), denials were also most frequently based on:

- Failure to show the government's inability or unwillingness to protect (nineteen)
- Lack of credibility or sufficient evidence (eleven)
- Lack of political opinion (fifteen)
- Internal relocation alternative (six)
- No well-founded fear of future persecution (five)
- Failure to establish membership in a PSG, assuming *arguendo* a PSG exists (four)
- Lack of religion (one)

Notably, many of the judges who denied relief had no trouble finding that the harm the applicants suffered—often involving severe physical,

48. IJs often conflated the PSG (cognizability) and the nexus (motive of persecutor) inquiries; for example, the decision to reject a proffered DV-PSG was often expressed as the failure to establish nexus to a protected ground.

sexual, and psychological violence—constituted persecution, or even that the fear of future harm was well-founded.<sup>49</sup>

The women in these cases hail from countries around the world. But most of the domestic violence cases in the CGRS database involve women fleeing from countries in Latin America (136 cases), in particular, Guatemala (thirty-two cases), Honduras (twenty-nine), Mexico (twenty-three), and El Salvador (twenty-three).<sup>50</sup> No distinct patterns emerge with respect to the applicant's country of origin and the case outcome.

B. CHRONOLOGICAL ANALYSIS OF THE TREATMENT OF DV ASYLUM CLAIMS IN UNPUBLISHED AGENCY DECISIONS: THE INFLUENCE OF EXTERNAL EVENTS

The formulation and treatment of domestic violence asylum claims that advance a PSG as the principal basis for relief provides the focus for this analysis. PSG is the stated rationale in most of the grants and lack of PSG the stated fatal flaw in most of the denials captured by the CGRS database. An analysis with this focus, therefore, can highlight the types of PSGs accepted and rejected by adjudicators as well as identify other trends in legal reasoning in relation to developments in domestic violence asylum law and asylum law more generally in the United States, using particular time periods (see Table 3 below).

49. See, e.g., CGRS Database Cases #8002 (2007); #8491 (2011).

50. Other countries of origin include the following:

- *Africa* (twenty-nine total): Cameroon (5); Congo (1); Gambia (3); Ghana (2); Guinea (5); Ivory Coast (1); Kenya (3); Liberia (1); Mali (1); Nigeria (2); Sierra Leone (1); Uganda (3); and Zimbabwe (1).
- *Asia* (eighteen total): Bangladesh (4); Cambodia (1); India (3); Indonesia (2); Malaysia (1); and Mongolia (7).
- *Europe* (sixteen total): Albania (1); Armenia (2); Croatia (1); France (1); Lithuania (1); Moldova (1); Poland (1); Slovenia (1); Spain (1); Turkey (1); and Ukraine (5).
- *Middle East* (six total): Egypt (1); Jordan (4); and Lebanon (1).
- *Latin America and the Caribbean* (136 total): Barbados (1); Bolivia (1); Brazil (2); Costa Rica (1); Dominican Republic (6); Ecuador (2); El Salvador (23); Guatemala (32); Haiti (1); Honduras (29); Mexico (23); Nicaragua (10); Panama (1); and Peru (4).

This distribution of cases does not purport to paint an accurate picture of the prevalence of domestic violence globally, but rather reflects the number of cases that appear in the CGRS database.



TABLE 3: CASE OUTCOMES FROM THE CGRS DATABASE  
(DECEMBER 1994- MAY 2012)

TIME PERIOD/ RESULT	1: Pre- R-A-	2: R-A- in Effect	3: R-A- Vacated	4: DHS Brief in R-A-	5: AG lifted stay in R-A-	6: DHS Brief in L-R-	7: Post- R-A- grant	TOTAL: BY RATIONALE
Granted: DV- PSG/DV -PO	8	5	27	34	1	4	38	117
Granted: Other	2	2	3	9	0	3	4	23
Denied: PSG or Nexus	0	5	18	11	2	4	13	53
Denied: Other	0	0	4	5	0	1	0	10
TOTAL: BY TIME PERIOD	10	12	52	59	3	12	55	203 <sup>51</sup>

1. Prior to June 11, 1999: CGRS database case outcomes decided before the BIA's decision in *Matter of R-A-*

The CGRS database recorded ten grants (nine asylum and one withholding) in domestic violence cases during the time period prior to the Board's decision in *Matter of R-A-*.<sup>52</sup> CGRS recorded no denials during this period. All of the claims in the CGRS database prior to June 11, 1999, reflect persecution on account of DV-PSG or DV-PSG + DV-PO. The fact that the social group in *Kasinga* included the applicant's opinion about female genital cutting and resistance to gender norms seemed to influence judges during this period, as several of the PSGs deemed cognizable for domestic violence applicants after *Kasinga* mirrored this formulation. Gender, nationality, other characteristics related to the applicant's status in a domestic relationship, and feminist opinion generally defined the social groups.<sup>53</sup> The IJs recognized political opinions that also related to the

51. The three decisions granting motions to reopen did not involve an analysis of the merits of the underlying claim for relief and these decisions are therefore not included in this table.

52. The CGRS database produced written decisions for eight of the cases.

53. Accepted PSGs during this period include:

- Guatemalan women who are or have been affiliated with men who believe it is their right to dominate "their women" by force or violence. CGRS Database Case #35 (1996).
- Jordanian women who espouse western values and who are unwilling to live their lives at the mercy of their husbands, their society, and their government and/or women who are challenging the traditions of Jordanian society and government. CGRS Database Case #42 (1994).

PSGs, such as a woman's opposition and resistance to gender norms. In one case, the IJ concluded that the PSG and the PO were "interchangeable" because the applicant challenged traditions in the society and it was precisely because of her views that she was "beaten to achieve her submission into the society's mores" and that she "should not be required to dispose of her beliefs."<sup>54</sup>

The written opinions in the CGRS database from this time provide detailed legal reasoning. In support of their holdings, the IJs cite most frequently to the 1995 guidelines, the BIA's decision in *Kasinga*, and decisions from the Courts of Appeals recognizing family-based and gender-based persecution,<sup>55</sup> including *Fatin v. INS*, recognizing that gender is a characteristic that can link the members of a PSG, and that women or women who refuse to conform to the government's gender-specific laws and social norms are cognizable groups,<sup>56</sup> and *Lazo-Majano v. INS*, holding that flight from abuser constituted an assertion of political opinion.<sup>57</sup>

Noteworthy from this period is the degree to which judges looked to opinions from their colleagues as persuasive precedent in light of a lack of other binding precedent or guidance. Judges looked to the opinions of fellow IJs both within the same court as well as across jurisdictions. For example, the first recorded domestic violence case available in the CGRS database comes from a judge in Arlington, Virginia, granting asylum to a woman from Jordan in December 1994.<sup>58</sup> Predating the issuance of gender guidelines and the BIA's opinion in *Kasinga*, the opinion includes robust analysis of the cognizability of a gender-related social group under *Acosta* and *Fatin*. The same judge also issued a positive opinion the following year tracking the same legal analysis in a case involving a woman from Sierra Leone.<sup>59</sup> In 1998, a Boston-based IJ cited to his Arlington colleague's analysis in the Jordanian and Sierra Leonean cases as

- Fartalen (without anyone to protect her rights, or orphan) Malinke women who refuse to conform to gender-specific societal norms. CGRS Database Case #58 (1998).
- Young, Westernized, Muslim wives in Bangladesh with a feminist political opinion and women of Bangladesh who have been victims of spousal abuse, especially by spouses who were in significant positions with the government of that particular country. CGRS Database Case #373 (1996).
- Guatemalan women who are intimately involved with a male companion who believes that women are to live under male domination. CGRS Database Case #59; *Matter of R-A-* (1996).
- Ghanaian women who have been intimate with men who believe it is their right to practice force or violence on their female companions. CGRS Database Case #47 (1997).

54. CGRS Database Case #42 (1994).

55. CGRS Database Cases #42 (1994); #41 (1995); #845 (1995); #59 (1996); #373 (1996); #35 (1996); #47 (1997); #58 (1998).

56. *Fatin v. INS*, 12 F.3d 1233, 1240-41 (3d Cir. 1993).

57. *Lato-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987).

58. CGRS Database Case #42 (1994).

59. CGRS Database Case #41(1995).

persuasive authority and granted relief to a Guinean woman on similar grounds.<sup>60</sup> The CGRS database also includes opinions from this period authored by three different San Francisco immigration court judges setting forth virtually identical PSG frameworks and analyses.<sup>61</sup>

One judge expressed the sentiment of many during this period: “The dearth of case law available to me in reaching . . . a decision regarding this particular situation is certainly problematic.”<sup>62</sup> The lack of precedent on point, while frustrating, may have boded well for asylum seekers at this time, because IJs were forced to grapple with relevant existing precedent that was generally positive towards the asylum seeker.

2. June 12, 1999 – January 19, 2001: CGRS database case outcomes after the BIA issues a precedential opinion on DV asylum in *Matter of R-A-*

The CGRS database recorded twelve outcomes during this period (five denials and seven grants). In all of the written opinions recorded in the database,<sup>63</sup> denials and grants alike, the judges acknowledge as binding the Board’s decision in *Matter of R-A-*. But the IJs reached different results in applying this precedent.

- a. Denials

With respect to the denials, four of the five opinions cited the applicant’s failure to proffer a cognizable social group as the basis for the denial.<sup>64</sup> The judges determined that the Board’s decision foreclosed a domestic violence asylum claim because it was not fundamentally different from the claim presented in *R-A-*.<sup>65</sup> As one IJ stated, “this Court finds the abuse suffered by the Respondent to be deplorable beyond words. However, Congress, in its wisdom, has not deigned to make abusive personal relationships, no matter how disturbing, one of the grounds upon which asylum may be granted.”<sup>66</sup>

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60. CGRS Database Case #58 (1998).

61. CGRS Database Cases #35 (1996); #59 (1996); #47 (1997).

62. CGRS Database Case #845 (1995).

63. Written decisions were on file for seven of the twelve cases (four denials and three grants).

64. CGRS Database Cases #132 (1999); #313(1999); #491 (2000); #3487 (2000). The fifth case was denied on evidentiary grounds: the IJ held the applicant failed to establish that her husband harmed her because of her political opinion and failed to demonstrate well-founded fear because she had returned to Guatemala to visit her children on more than one occasion. The applicant also advanced a PSG argument, but the IJ’s treatment of this claim is not clear from the database information. CGRS Database Case #3413 (2000).

65. CGRS Database Cases #132 (1999); #3487 (2000).

66. CGRS Database Case #132 (1999).

b. Grants

Notwithstanding the Board's opinion in *R-A-*, however, six asylum seekers received grants of asylum in domestic violence cases during this period. The outcomes were based on DV-PO (two cases), DV-PSG + DV-PO (two), DV-PSG (one), and religion (one). In one case where CGRS has a written opinion, the judge rejected the Board's PSG analysis in *R-A-* and held that the group "Mexican women married to and domestically abused by Mexican public officials or those charged with protecting the public" was cognizable.<sup>67</sup> The IJ reached this conclusion by determining that the BIA's decision in *Matter of S-A-*<sup>68</sup> (holding that the father persecuted the daughter on account of her liberal Muslim beliefs concerning the proper role of women in Moroccan society) conflicted with the Board's nexus analysis in *R-A-* and therefore controlled because it was later in time.<sup>69</sup> In another case, the IJ followed the Board with respect to its PSG analysis in *R-A-*, but granted on the basis of political opinion by distinguishing the cases on the facts. The judge distinguished from the PO analysis in *R-A-*, reasoning that, unlike Ms. Alvarado, the applicant established that her boyfriend beat her in response to her assertions of independence, establishing an imputed political opinion motive for the persecution.<sup>70</sup>

The CGRS database also includes one grant of CAT relief in a domestic violence case while *R-A-* was in effect. In that case, the applicant's husband was a high-ranking military official in the Democratic Republic of the Congo.<sup>71</sup> The IJ originally denied asylum, rejecting the PSG "Congolese women who are abused by their spouses in a society that condones DV" as well as the domestic violence-related political opinion. The BIA affirmed, but later granted the applicant's motion to reopen to apply for Convention relief. On remand, the IJ held that the abuse she had suffered rose to the level of torture—her husband raped her and infected her with a sexually transmitted disease, broke and knocked out her teeth, and caused several other injuries during beatings—and held that her husband had been "cloaked" with immunity by the government. Of note,

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67. CGRS Database Case #494 (2000).

68. *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000).

69. The IJ reasoned that if the Board's reasoning in its *R-A-* decision—that the husband beat her because she was his wife, not on account of social group—had been applied to the facts in *S-A-*, "the respondent in [*S-A-*] would have been denied relief because it is just as logical to argue that her father abused her because she was his daughter as it was that he did so on account of her religious beliefs." CGRS Database Case #494 (2000).

70. The immigration service appealed to the BIA in that case assailing the applicant's credibility and challenging the IJ's conclusion that the Guatemalan government was unable or unwilling to protect her. The BIA dismissed the service's appeal finding "no error in the Immigration Judge's grant of asylum." CGRS Database Case #503 (1999).

71. CGRS Database Case #117 (2000).

the Board thereafter dismissed the immigration service's appeal and affirmed the immigration judge's decision.<sup>72</sup>

3. January 20, 2001 – February 19, 2004: CGRS database case outcomes decided after *Matter of R-A-* was vacated

After AG Reno vacated the BIA's decision in *R-A-*, the CGRS database recorded significantly more case outcomes: twenty-two denials and thirty grants.<sup>73</sup>

a. Denials

In contrast to the decisions issued between 1999 and 2001, the decisions denying relief in domestic violence cases on file with CGRS during this period largely lack legal analysis and fail to recognize the significance of the action taken by the AG in *Matter of R-A-*.<sup>74</sup> The most frequently cited reasons for denials issued during this period were lack of a cognizable social group (twelve occurrences), failure to demonstrate nexus (seven), no political opinion (seven), and no showing of government inability or unwillingness to protect (six).

Some judges who denied relief did so with very little reasoning, simply stating that they do not believe domestic violence is a basis for asylum. One IJ merely listed the general elements asylum applicants must show and then, without further explanation, concluded that "the Court does not find that the respondent has met the burden of showing that the problem that she faces would be one of the five reasons given in the Act [sic]."<sup>75</sup> Similarly,

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72. CGRS Database Case #117 (2000).

73. Written opinions were on file for the majority of the cases (thirty-eight out of the fifty-two).

74. Groups rejected during this period included:

- Women from [country X]. CGRS Database Cases #1114 (2001) (Albania); #1290 (2003) (Honduras).
- Women in an abusive relationship. CGRS Database Case #1274 (2002).
- Women opposed to male dominance. CGRS Database Case #818 (2002).
- Women from Guinea who have been abused by their husband and oppose such practice. CGRS Database Case #713 (2002).
- Women who are violently abused by their partners; and women who would not submit to their partner's control. CGRS Database Case #889 (2002).
- Mexican women and children who experience domestic violence. CGRS Database Case #1223 (2004).
- Women married to Guatemalan men with powerful connections in the government. CGRS Database Case #1195 (2003).
- Women who have cohabitated and share a child with powerfully connected members of drug cartels in Mexico; and battered female in Mexico who is not protected in that country. CGRS Database Case #3191 (2003).

75. CGRS Database Case #723 (2001); *see also* CGRS Database Case #3346 (2003) (holding the applicant did not establish the violence she suffered was on account of her membership in a PSG because "[i]t looks like the violence [the applicant] suffered was on account of the fact that her husband was an abusive individual who was an alcoholic and for whatever reasons that only God knows he was abusive of her and violent with her and other people").

without citing any case law or providing any clear reasoning, a judge held that, although the applicant “may have been in an abusive relationship” in Mexico, “this does not constitute one of the five previously enumerated grounds on which relief may be granted.”<sup>76</sup> Another IJ took note of the existence of proposed regulations on point, but then rejected them with little basis, holding:

domestic violence is private in nature and is not the type of politically motivated harm entitled to international protection under the Refugee Law. While the United States has recognized the possibility that women such as the respondent [a Honduran woman whose partner raped and battered her severely, infecting her with HIV], could be refugees, it has not granted refugee status to such women in any currently valid published opinion or decision.<sup>77</sup>

The IJ could have turned to analogous case law (such as *Kasinga*, *Acosta*, or *Fatin*), as some judges had done prior to the BIA's 1999 decision in *R-A-*, but instead cited only to the absence of precedent directly on point. In another case, the judge correctly cited to *Kasinga* as relevant authority for evaluating a claim based on a gender-related social group. But the IJ denied asylum, baldly stating that “[i]t is the opinion of the Court that the respondent has failed to meet the criteria set forth by the [BIA] to be qualified for relief in this regard.”<sup>78</sup>

Where more rigorous legal analysis appears in denying relief, judges demonstrate an erroneous understanding of precedent or ignorance of the law to the detriment of the asylum seeker. For example, one judge incorrectly reads the BIA's decision in *R-A-* as briefly establishing “an opportunity for domestic violence to be a viable claim” before it was vacated. As such, the IJ concludes that, since *R-A-* is no longer binding, domestic violence “is no longer a basis upon which a claim can lie.”<sup>79</sup> The opposite is in fact true: *R-A-* briefly established a period when the viability of DV claims was called into doubt, but that negative decision had been vacated, leaving a void for how to treat these cases. In another case, an IJ found that the Board's reasoning in *R-A-* still held persuasive authority, despite *vacatur*, because the proposed regulations of the Department of Justice (DOJ) “closely examine” the *R-A-* opinion and “incorporate the Board's considerations as factors that may be relevant in some cases.”<sup>80</sup> This IJ, however, failed to mention or consider that the stated purpose of the DOJ's proposed rule was precisely to overcome the barriers posed by *R-A-* to granting relief in DV cases.

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76. CGRS Database Case #1274 (2001).

77. CGRS Database Case #1290 (2003).

78. CGRS Database Case #1114 (2001).

79. CGRS Database Case #1258 (2003).

80. CGRS Database Case #818 (2002).

To reject gender-defined social groups, some immigration judges relied on the Second Circuit's opinion in *Gomez v. INS*, which states that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group."<sup>81</sup> In so doing, the IJs chose the most restrictive reading of *Gomez*.<sup>82</sup> Moreover, these IJs cited to *Gomez* with no discussion of the developments in *R-A-* or the proposed gender regulations that are more on point in DV cases, even if nonbinding.<sup>83</sup>

Other judges looked to a 1975 Board opinion, *Matter of Pierre*,<sup>84</sup> affirming denial of withholding to Haitian woman who feared persecution at the hands of her husband, to support their rejection of domestic violence claims as persecution based on personal motives.<sup>85</sup> Although *Pierre* is relevant to other domestic violence claims because it involves intimate partner violence, IJs looked to this opinion to the exclusion of intervening developments in gender-asylum and asylum law more generally, most notably the enactment of the 1980 Refugee Act and the *Acosta* and *Kasinga* decisions. Moreover, judges glossed over a significant distinguishing factor from *Pierre*. In *Pierre*, the Board found that the applicant did not establish that she would be persecuted on account of race, religion, political opinion or membership in a particular social group and that the applicant presented no evidence that the Haitian government "would not intervene to prevent or punish" her husband's acts.<sup>86</sup> In contrast, the applicants in the cases recorded in the CGRS database proffer PSGs defined by nationality, gender, and marital status consistent with *Acosta* and *Kasinga*.

A more reasoned denial from this period involved a woman from Jordan.<sup>87</sup> The IJ recognized that both the BIA's opinion in *R-A-* and the

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81. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

82. The sweeping pronouncement in *Gomez* about gender-defined PSGs has been viewed as dicta and criticized for departing from *Acosta* without appropriate deference to the agency as required under principles of U.S. administrative law. See *Gao v. Gonzales*, 440 F.3d 62, 69-70 (2d Cir. 2006), *vacated on other grounds*; see also *Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007) ("we have recently clarified that the best reading of *Gomez* is one that is consistent with *Acosta*"); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 75 n.7 (BIA 2007) (recognizing that the Second Circuit has distanced itself from *Gomez* and affirmed *Acosta*). An IJ based in a jurisdiction outside of the Second Circuit similarly relied on *Gomez* to foreclose all PSGs defined by broad characteristics such as age and gender. CGRS Database Case #1074 (2004). *Gomez* is now properly read as having to do more with the likelihood of persecution than the cognizability of the social group at issue. See *Koudriachova*, 490 F.3d at 262.

83. A New York immigration judge relied on *Gomez* to reject a social group defined in part by gender, "women violently abused by partners." The IJ also took issue with the circularity of the proffered social group, in that it was in part defined by the harm suffered, and concluded that the harm was "interpersonal, and, although lamentable, not cognizable under principles of asylum law." CGRS Database Case #889 (2002).

84. *Matter of Pierre*, 15 I. & N. Dec. 461 (BIA 1975).

85. CGRS Database Cases #1223 (2003); #1279 (2003).

86. *Pierre*, 15 I. & N. Dec. at 462.

87. CGRS Database Case #1271 (2002).

Ninth Circuit's opinion in *Aguirre-Cervantes v. INS*, holding that family could constitute a cognizable social group,<sup>88</sup> had been vacated, leaving a void of applicable standards in domestic violence cases. To fill the void, the IJ looked to the Ninth Circuit's opinion in *Rodas-Mendoza v. INS*,<sup>89</sup> holding that substantial evidence supported the BIA's finding that rape was an isolated, random act of violence "untethered" to the government.<sup>90</sup> In another case, a judge rejected as circular the applicant's PSG—defined by the IJ as "women in Nicaragua who are considered chattels by their husbands and ex-husbands and subjugated"—because it was defined in part by the persecution.<sup>91</sup>

b. Grants

By contrast, the IJs who granted relief during this period employed sophisticated analyses of existing precedent and secondary authorities to recognize domestic violence-related social groups and political opinions. The majority of the grants, twenty-four out of thirty, rested on DV-PSG or DV-PSG + DV-PO.<sup>92</sup> Judges generally looked to some combination of the

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88. *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001).

89. *Rodas-Mendoza v. INS*, 246 F.3d 1237 (9th Cir. 2001).

90. Significantly, this IJ has later granted relief in DV cases. See CGRS Database Cases #2487 (2004); #3064 (2005); #5369 (2008).

91. The IJ also rejected political opinion reasoning that the applicant's political opinion—a belief in gender equality—did not start until after the abuse had already begun. CGRS Database Case #8747 (2003). As mentioned below, the applicant appealed and, in June 2009, the Board remanded the case to the IJ in light of *R-A-*. The IJ recertified his 2003 denial and the case is again pending before the Board.

92. Groups accepted during this period included:

- Mexican women who hold beliefs contrary to established social norms; women who seek to divorce their abusive spouses; women who seek protection from the government from their abusive spouses; and female member of her own family, headed by a man whose goal is to control and dominate its members. CGRS Database Case #222 (2002).
- Ivorian Muslim women who have suffered spousal abuse at the hands of their husbands and who are perceived as having disgraced their husbands by obtaining a divorce and failing to conform to the subservient role of women in the Ivory Coast. CGRS Database Case #614.
- Women in Guatemalan society who resist male domination by living independently and self-sufficiently. CGRS Database Case #813 (2003).
- Women in Peru who try to escape domestic violence, but are unable to receive official protection. CGRS Database Case #2572 (2004).
- Women suffering domestic violence in Costa Rica who have chosen to resist that violence by various means, including resort to government protection. CGRS Database Case #2528 (2003).
- Honduran women who believe that marriage is an equal partnership, and whose husbands are Honduran men who believe they have a right to dominate their wives through any means, including violence. CGRS Database Case #1204 (2003).
- Husband's immediate family, and Guatemalan women who have been intimately involved with Guatemalan male companions who believe that women are to live under male domination. CGRS Database Case #1193 (2003).



DOJ proposed regulations, the Board's opinions in *Kasinga* and *Acosta*, and other precedent from the Courts of Appeals, including *Fatin*, to recognize groups defined by gender, nationality, family membership, and/or opposition to a social practice or beliefs about women's role in society.<sup>93</sup> At least one IJ reversed course from her previous position in domestic violence cases to grant asylum.<sup>94</sup> While *R-A-* was in effect, the IJ had denied asylum to a Mexican woman fleeing domestic violence for failure to demonstrate nexus to a protected ground (though the IJ had granted CAT relief given the likelihood of severe harm without State protection). The applicant appealed the denial of asylum. After *R-A-* was vacated, the Board remanded the case and, in 2003, the IJ granted asylum to the applicant on grounds of DV-PSG.

In two cases, judges granted asylum on religious grounds without considering the applicants' PSG arguments.<sup>95</sup> Both cases involved women from Muslim countries, Uganda and Indonesia, whose partners held fundamentalist beliefs regarding the role of women. The IJs analogized their decisions to the Board's opinion in *Matter of S-A*, where the Board found religious persecution in the context of a father/daughter family relationship.

In addition, some IJs found that the record supported feminist PO as a ground for asylum.<sup>96</sup> The judges found that the applicants demonstrated their political opinion against male dominance through their actions—engaging in physical resistance of abuse, filing for protective orders, and seeking help—and that the motive of the persecutor was established by the fact that the abuse escalated after a woman asserted such resistance.<sup>97</sup>

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- Women in Mexico, and women who try to escape domestic violence, but are unable to receive official protection in Mexico. CGRS Database Case #1194 (2002). Immediate family members of the applicant's abuser. CGRS Database Case #2700 (2003).

93. Other precedent included *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (recognizing gender defined social group, "gay men with female sexual identities in Mexico" as cognizable), *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986) (defining a PSG as "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest" and recognizing family defined PSG), and *Chen v. INS*, 289 F.3d 1113, 1115 (9th Cir. 2002) (holding that a nuclear family is a "prototypical example" of a PSG). See also CGRS Database Cases #813 (2003); #222 (2002); #614 (2001); #2700 (2003); #990 (2002); #1043 (2001).

94. CGRS Database Case #313 (2003).

95. CGRS Database Cases #792 (2001); #789 (2002).

96. CGRS Database Cases #1043 (2001); #222 (2002).

97. Such actions, one IJ explained, are "counter to cultural traditions of male dominance and third-party non-involvement in the personal affairs of couples." This IJ also concluded that legislation attempting to address domestic violence in Costa Rica did not render the applicant ineligible for asylum. Rather, the IJ considered the legislation as evidence in support of the existence of the applicant's political opinion. By taking advantage of the protective measures theoretically available to DV victims under the law, the IJ reasoned that she had asserted her support for such measures recognizing women as equals. CGRS Database Case #2528 (2003); see also CGRS Database Cases #222 (2002); #195 (2002).

This period highlights the disparities in outcomes in cases presenting very similar facts and legal theories where no guidance is available. While some judges accepted social groups defined in part by domestic violence or characteristics of the persecutor relying on precedent from gender-related cases, other IJs rejected the same, relying on precedent that had been vacated such as *R-A-* that was issued prior to enactment of the Refugee Act such as *Pierre*, or that included harmful dicta such as *Gomez*.

c. BIA

The Board recognized the viability of domestic violence asylum cases in an unpublished opinion on file with CGRS during this period.<sup>98</sup> In that case, the BIA overturned an IJ's adverse credibility finding, determining that the judge could not fault the applicant for failing to raise domestic violence in her initial application filed in 1993, as domestic violence was not recognized as a basis for asylum at the time. The Board ultimately granted asylum on a ground unrelated to domestic violence,<sup>99</sup> but its analysis seems to suggest that applicants can (and should) raise domestic violence as a basis for relief. The importance of this decision is limited, however, given that it was not published.

4. February 20, 2004 – September 25, 2008: CGRS database case outcomes after DHS announced its position in DV asylum cases in *Matter of R-A-*

After DHS submitted its 2004 brief in *R-A-*, the CGRS database recorded increasing numbers of case outcomes: sixteen denials and forty-three grants of relief (thirty-nine asylum and four withholding).<sup>100</sup> CGRS also observed cases where IJs administratively closed or continued domestic violence asylum cases during this period pending the issuance of regulations or a precedential decision in *R-A-*.<sup>101</sup>

a. Denials

Interestingly, some of the IJs who denied relief during this period recognized social groups similar to that advanced by DHS in *R-A-* as a basis for asylum (though not always citing to DHS's brief), but denied the claims on other grounds.<sup>102</sup> One judge moved from a categorical rejection

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98. CGRS Database Case #1289 (2003).

99. The applicant had also raised an antigovernment political opinion claim for relief.

100. Written decisions were on file for thirty-three of the cases.

101. Frydman, *Recent Developments*, *supra* note 34, at 9.

102. For example, one IJ found that a PSG based on gender, nationality and status in the relationship, "Salvadorian women in intimate relationships who cannot leave the relationship," was cognizable. But the IJ determined that the applicant was not a member of the group because the applicant only lived with her partner for about three months and "[h]er alleged relationship with him does not appear to have the same characteristics of a marriage, which would under other circumstances have been an immutable characteristic because of cultural and societal constraints." CGRS Database Case #2918 (2007). Other

of domestic violence asylum claims in 2003, when he held that domestic violence is a private matter and is not “entitled to international protection,”<sup>103</sup> to a basic recognition in 2008 that the group “married Mexican women who resist their abusers but are unable to leave their husbands” might be cognizable.<sup>104</sup> This trend represented a shift from previous periods in which denials depended almost entirely on a failure to recognize domestic violence asylum as a more general matter.

Other judges continued to reject domestic violence-related social groups, at times ignoring the DHS position in *R-A-*, and at others misinterpreting the position.<sup>105</sup> For example, in one case the judge held that the proffered social group, “married or previously married women in Croatia who are unable to leave the relationship,” was not cognizable because it did not exist independently of the persecution.<sup>106</sup> The IJ refused to consider as relevant the DHS brief in *R-A-*, stating that “[t]he brief has not been adopted by any agency as authoritative and the Court will not use it now to support a finding that [the applicant] has established membership in a particular social group.”<sup>107</sup>

In another case, the IJ held that the PSG “married Haitian women unable to leave the relationship” was not cognizable because it did not share a common immutable characteristic given that Haitian women could “divorce with relative ease.”<sup>108</sup> The IJ erroneously cited to the DHS brief in *R-A-* for this holding, failing to grapple with the agency’s statement in its

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judges denied for failure to demonstrate membership in the group or failure to show government inability or unwillingness to protect. *See* CGRS Database Cases #2953 (2004), #4087 (2007), #4802 (2008).

103. CGRS Database Case #1290 (2003).

104. Although the IJ stated that he did not need to reach the question of the validity of the applicant’s asserted social group in the 2008 decision, denying on other grounds, the judge’s analysis shows at least some progress from his previous position rejecting DV claims categorically. CGRS Database Case #5513 (2008).

105. The following PSGs were also rejected during this period:

- Women who refuse to acquiesce to sex in a domestic relationship. CGRS Database Case #2957 (2005).
- Women in Nicaragua; and women who are victims of abuse both in society at large and within the home. CGRS Database Case #4231 (2005).
- Domestic partners/common-law wives in Guatemala who are unable to leave the relationship. CGRS Database Case #8002 (2007).
- Battered/abused women. CGRS Database Cases #3040 (2006); #3837 (2005).

106. CGRS Database Case #3688 (2006). The applicant appealed, and the Board remanded the case. At the time of writing, the case was pending trial.

107. In any event, the judge found that the arguments made in the *R-A-* brief were inapplicable because the applicant in the case at hand obtained a divorce. The IJ also held that the applicant failed to show the government was unable or unwilling to protect her in part because the government had prosecuted her husband for the rape and murder of another woman. *Id.*; *see also* CGRS Database Case #2957 (2005) (the IJ did not consider the applicant’s PSG arguments, and with respect to the political opinion arguments, held that “no Court has found that a refusal to acquiesce in sexual relationships is a political opinion,” without looking to *R-A-*).

108. CGRS Database Case #3029 (2006).

brief that, even if a woman obtains a divorce, her relationship may still be immutable “if the abuser would not recognize a divorce or separation as ending the abuser’s right to abuse the victim.”<sup>109</sup> Another IJ held that while “[i]t is clear that DV is a very significant problem in the [applicant’s home country], . . . it does not appear that the respondent’s boyfriend harmed her on account of her attempts to leave him or on account of any other characteristic . . . other than the fact that she was female and his girlfriend.”<sup>110</sup> In other words, the judge found that the applicant’s gender and status in the relationship, precisely two of the characteristics that defined the proffered social group, provided the motive for the persecution, but still inexplicably concluded that the applicant failed to demonstrate nexus to a protected ground.<sup>111</sup>

One case in particular highlighted the refusal of some judges to interpret legal developments in favor of applicants. There, the judge held that “[t]he law today regarding gender and domestic violence based asylum remains unclear, thus, this Court is unwilling to recognize ‘domestic partners/common-law wives in Guatemala who are unable to leave the relationship’ as a social group presently cognizable under the Act.”<sup>112</sup> Notably, DHS took a position in that case inconsistent with its position in *R-A-*, arguing that the applicant failed to set forth a cognizable social group or establish nexus, even though the proffered group was virtually identical to the group recognized by DHS in its 2004 brief. Judges who were reticent to recognize DV-PSG claims as a basis for asylum, however, seemed to have no trouble granting domestic violence claims based on religion involving women who resisted Islamic traditions relying on *Matter of S-A-*.<sup>113</sup>

#### b. Grants

Grants during this period were based on DV-PSG (twenty-eight cases), DV-PSG +PO (four), and DV-PO (two). Many judges who granted relief followed the DHS framework, although some did so with confusion. Other IJs granted relief without following the framework at all.

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109. DHS R-A- Br., *supra* note 28, at 28.

110. CGRS Database Case #4201 (2005).

111. Another opinion provides even more incomprehensible reasoning for denying relief. The IJ stated: “there was little or no evidence demonstrating that that [sic] what the situation is, but accepting that this is what the respondent and her spouse have testified to, the fact is that the lack of a nexus to any of the, any of the factors which could be relied upon with evidence, or otherwise, is quite dispositive, the respondent’s case failing from an evidentiary standpoint.” CGRS Database Case #3377 (2005).

112. CGRS Database Case #8002 (2007).

113. Compare CGRS Database Case #4630 (2007) (granting on religious grounds), with CGRS Database Case #3837 (denying on PSG grounds) (2005). Compare CGRS Database Case #416 (2002) (granting on religious grounds), with CGRS Database Case #1074 (2004) (denying on PSG grounds).

Most of the groups that were approved during this period followed the *R-A-* approach and included gender, nationality, and relationship status as immutable/fundamental characteristics that define the group.<sup>114</sup> In addition to the guidance provided by DHS's *R-A-* brief, IJs granting relief also relied on related precedent from the Board and the Courts of Appeals recognizing groups defined by gender in different circumstances, including *Kasinga*, *Acosta*, *Fatin*, *Hernandez-Montiel v. INS*, recognizing groups defined by gender, there "gay men with female sexual identities" in the country of origin,<sup>115</sup> and *Mohammed v. Gonzales*, recognizing group defined by gender, there females of a certain clan.<sup>116</sup> At least one IJ reversed course from his previous position of rejecting domestic violence asylum claims.<sup>117</sup>

114. The following groups were deemed cognizable:

- Married women in [country X] who are unable to leave the relationship. CGRS Database Cases #3408 (2006) (Guatemala); #3474 (2006) (Peru); #3587 (2006) (Mongolia).
- Women in Peru who are unable to leave their intimate relationships. CGRS Database Case #3033 (2005).
- Women in Cambodia who have been raped and abused domestically and whose governments are unable or unwilling to protect them. CGRS Database Case #641 (2004).
- Married or formerly married Chinese (Christian) women in Indonesia who are unable to avail themselves of the protection of Indonesian law. CGRS Database Case #3186 (2005).
- Women in Mexico who are married to abusive husbands, are opposed to such treatment and are unable to leave the relationship. CGRS Database Case #4133 (2005).
- Honduran women who are abused by their spouses, who think of them as property, and who are unable to leave the relationship. CGRS Database Case #2532 (2006).
- Honduran women who are abused by their spouses, who think of the women as their property, and who are unable to leave the relationship. CGRS Database Case #2532 (2006).
- Honduran women who have been in an intimate relationship with a man who believes in imposing domination over women by force. CGRS Database Case #4081 (2007).
- Honduran women unable to leave their husbands who exercise domination over their lives. CGRS Database Case #5477 (2008).
- Married women in a culture that implicitly condones violence against women. CGRS Database Case #2978 (2008).
- Mexican women unable to leave an abusive (marital) partnership due to familial relationship. CGRS Database Case #5145 (2008).

In addition, judges granted relief based on religion (three cases), FGC (five), and non-DV political opinion (one); however, CGRS does not have written opinions on file so it was not possible to understand why or how the IJs disposed of the DV arguments advanced by the applicants, so they will not be discussed in detail. *See* CGRS Database Cases #2625 (2004) (FGC); #2857 (2004) (FGC); #4031 (2006) (FGC); #3163 (2007) (FGC); #5338 (2008) (FGC); #3773 (2006) (religion); #4630 (2007) (religion); #4673 (2007) (religion); #4200 (2005) (political opinion).

115. *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

116. *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005).

117. *Compare* CGRS Database Case #1271 (2002), *with* CGRS Database Cases #2487 (2004) (granting relief on joint remand from the Board), #3064 (2005) (giving "considerable

Another judge, who had granted asylum in a domestic violence case before DHS filed its 2004 brief on the basis of a family-defined social group, changed her analysis during this period to focus on the DHS formulation.<sup>118</sup>

IJs who followed *R-A-*, however, did not escape confusion. For example, one judge explicitly recognized in his opinion that a social group “must exist independently of the persecution suffered by the applicant for asylum” and that under existing case law, gender and “domestic status” may constitute immutable characteristics that define a group in a domestic violence case.<sup>119</sup> Nevertheless, in the concluding paragraph of his opinion, the IJ stated that the applicant should be granted asylum as a member of a PSG comprised of “women who suffer domestic violence,” rather than a group, as outlined elsewhere in the opinion, defined by gender, nationality, and status in the relationship. DHS appealed the grant, arguing that “[t]he respondent and the IJ essentially defined the group by the harm that the respondent fears,” and that “domestic violence victims” do not constitute a cognizable social group. The case was still pending at the time of writing.<sup>120</sup>

Not all judges who granted relief, however, followed *R-A-*. In one case, the DHS attorney argued that the law related to domestic violence asylum is “in flux,” and that the applicant’s claim under the CAT was “much stronger” than under asylum law.<sup>121</sup> The IJ declined to follow the DHS attorney’s argument in that case and also declined to follow the agency’s position in *R-A-*. Relying on precedent recognizing family-defined groups, the IJ concluded that the DV context should be treated no differently from other instances when family members are targeted for persecution; the fact that the persecution came from within the family rather than without did not change the analysis. In other cases, IJs recognized groups that, unlike the group proffered by DHS in *R-A-*, included a reference to the abuse experienced in the relationship.<sup>122</sup> While the outcomes were ultimately positive for the applicants in those cases at

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deference” to the DHS position in the *R-A-* brief), and #5369 (2008) (recognizing that the definition of the particular social group term has expanded).

118. Compare CGRS Database Case #881 (2002), with #3825 (2007).

119. CGRS Database Case #5256 (2008).

120. CGRS filed an amicus brief to the Board in this case urging the Board to reformulate the PSG and affirm the IJ’s grant without remand. Under well-settled law, the brief argues that the BIA reviews *de novo* the formulation of PSGs and may affirm the grant of asylum on the basis of a formulation that varies from the group articulated by the IJ. Once the Board articulates a cognizable group, it may conclude without remand that the applicant is a member of that group because all of the facts necessary for making that determination are in the record and undisputed and the applicant properly raised the PSG issue. CGRS Database Case #5256 (CGRS Br. 2011).

121. CGRS Database Case #4133 (2005).

122. See CGRS Database Case #641 (2004) (finding that the past abuse the applicant suffered in her domestic relationship was a “shared past experience,” that is now immutable).

the level of the immigration court, the social groups may have been untenable at the appellate level (if DHS contested the grant), because the groups recognized by the IJs were in tension with precedent requiring that PSGs exist independent of persecution.<sup>123</sup> It is unclear from the CGRS database whether the IJs in those cases were aware of the DHS position in *R-A-*. In any event, these cases highlight the marked absence of uniform guidance.

c. BIA

The database included only one decision from the Board during this period.<sup>124</sup> Relying on *Kasinga*, the Board reversed the IJ's denial of relief and granted asylum based on the applicant's well-founded fear of female genital cutting. The Board did not address the applicant's claim based on domestic violence other than the threat of genital cutting.

5. September 26, 2008 – July 16, 2009: CGRS database case outcomes decided after the U.S. Attorney General lifted the stay in *Matter of R-A-*

The CGRS database recorded only two denials, one at the IJ level and one at the Board, and only one new grant of relief during this period. The CGRS database also included some IJ orders to administratively close or continue domestic violence cases pending guidance as well as some BIA orders remanding cases to the immigration courts.

a. Denial

The immigration judge who denied relief during this period held that the applicant's proffered social group was not cognizable.<sup>125</sup> Although the judge recognized that the group was defined by gender, an immutable characteristic, the IJ determined that the group, "Zimbabwean women who assert their independence from domineering and abusive male partners, including former spouses" lacked "social visibility" and "particularity." The IJ did not cite to the proposed regulations or any of the documents associated with the developments in *Matter of R-A-*.

b. Grant

One applicant was granted asylum during this period on the basis of her membership in a PSG.<sup>126</sup> CGRS did not have the opinion on file, so the precise contours of the group accepted by the IJ were unknown. DHS waived appeal.

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123. See *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003).

124. CGRS Database Case #927 (2004).

125. The IJ also found that the applicant failed to provide sufficient corroboration of her claim. CGRS Database Case #5807 (2008).

126. CGRS Database Case #5922 (2009).

c. BIA

In an unpublished opinion, the Board rejected a social group defined by gender, nationality, and status in the relationship on grounds that “such a group lacks the elements of ‘social visibility’ and ‘particularity’ . . . , and because membership in such a group is not a ‘fundamental’ or immutable characteristic.”<sup>127</sup> In so doing, as argued by the attorney in the case on appeal, the BIA appears to have treated this case differently from the broader class of domestic violence cases remanded to IJs for additional fact gathering after AG Mukasey lifted the stay during this and the following period.<sup>128</sup> Moreover, the Board’s reasoning was significant in that it rejected the claim in part for failure of the proffered group to meet the immutable/fundamental PSG test rather than for the reasons the Board rejected Ms. Alvarado’s claim discussed above,<sup>129</sup> or for other resistance to domestic violence asylum on the basis that domestic violence is personal and undeserving of protection as a categorical matter.

6. July 16, 2009 – December 10, 2009: CGRS database case outcomes after DHS clarified its position in *Matter of L-R*- regarding the viability of DV asylum

In the six months after the DHS brief in *L-R*- became public, the CGRS database recorded five denials and seven grants (six asylum and one CAT).<sup>130</sup>

a. Denials

IJs who denied relief during this period did so as a result of a misunderstanding of the status of *R-A*- and other related developments as well as a lack of guidance on how to treat domestic violence asylum cases. Of the denials, one decision especially demonstrates the confusion regarding the social group analytical framework for domestic violence cases. The judge, even while recognizing that *R-A*- had been vacated, still relied on the analysis in the *R-A*- decision to support his reasoning that the group, “wom[e]n who have suffered severe domestic abuse at the hands of

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127. The Board cited other reasons for denial, including credibility and insufficient evidence to show real or imputed political opinion as a basis for the persecution. CGRS Database Case #6655 (2009).

128. Notably, the government initially took the position that only in the context of a formal marriage could a particular social group exist in a DV case. However, the government later switched its position and joined the applicant in a motion to remand to the IJ, which the Board granted.

129. In *R-A*-, the Board held that even if the PSG was joined by immutable or fundamental characteristics in line with *Acosta*, the group was not “recognized and understood to be a societal faction.”

130. The database includes three written opinions for the denials, but it did not produce any written decisions for the grants during this period.



a known drug trafficker,” was not sufficiently “particular” or “visible.”<sup>131</sup> The judge also found that, even if the PSG is cognizable, the applicant failed to demonstrate nexus because her persecutor only harmed her because he believed that “she is a woman whom . . . ‘belonged’ to him.” The IJ failed to explain how a man’s belief that a woman “belongs” to him is anything other than persecution on account of that women’s gender and status in a domestic relationship, precisely what DHS argued is sufficient to show eligibility for asylum in *L-R-* and *R-A-*.<sup>132</sup>

In another case on remand from the Board, the IJ reinstated his previous order denying relief.<sup>133</sup> Although the applicant submitted DHS’s briefs from *L-R-* and *R-A-* to the court and DHS did not contest the existence of a PSG in that case,<sup>134</sup> the judge made no mention of these intervening developments. Rather, the IJ concluded that even if the applicant were a member of a cognizable PSG, “she has not established a nexus between her membership in that group, and the mistreatment she received at the hands of her husband. Neither party has cited to any controlling court decisions that articulate this nexus has been established in similar cases.”<sup>135</sup>

Another opinion issued during this period further evinces the continued resistance to domestic violence claims for asylum. In that case, the judge found that the applicant was credible, but then also found that she had not established a nexus between the harm she suffered and her membership in a PSG, defined as “married women in Guatemala who are unable to leave their relationship,” but rather that her abuser “was simply a horrible

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131. The case involved horrific facts; the applicant was kidnapped at age twenty-one, gang raped repeatedly over the course of several days, and then forced into a relationship with one of her rapists as a result of threats to kill her family. CGRS Database Case #3353 (2009).

132. The Board also denied relief in another case during this period that presents somewhat different factual circumstances. There, a woman was tricked into marrying a man who forced her into prostitution. In an unpublished opinion, the Board found there was no nexus because the persecutor mistreated and threatened the applicant not on account of any protected ground, but rather because she refused to engage in and exposed his criminal activities. Moreover, the Board rejected the social group, “Mongolian women who are forced or sold into prostitution,” finding that the PSG lacked social visibility and particularity. The Board did not discuss the relationship between the applicant and her husband and it does not appear that the relationship was argued by the applicant as a defining characteristic. CGRS Database Case #6473 (2009). In the other case from this period, an IJ denied relief based on an adverse credibility determination, but did not engage in a PSG or PO analysis. CGRS Database Case #6503 (2009).

133. The IJ denied relief in 2003 and the applicant appealed. The case was held in abeyance for several years. In 2009, the Board remanded the case in light of the AG’s order lifting the stay in *Matter of R-A-* for “further factual development, including the submission of new evidence, and for the parties to present argument regarding applicable asylum law to those facts, and for the entry of a new decision by the [IJ].” CGRS Database Case #8747 (2009).

134. The DHS in that case argued against a grant of relief by distinguishing the facts from that of Ms. Alvarado’s case.

135. CGRS Database Case #8747 (2009).

husband who lacked a basic sense of morality” and that she was just a “victim of crime which was perpetrated without reason.”<sup>136</sup> This case is currently pending before the Board.

b. Grants

Most of the grants during this period were based on DV-PSG (four cases). The other grants were based on FGC-PSG (one case) and religion (one).<sup>137</sup> The grants based on PSG followed, at least in part, the groups approved by DHS, such as “married women in Nicaragua who are unable to leave the relationship.”<sup>138</sup> As before, however, not all IJs who granted relief accepted the government’s *L-R-/R-A-* formulation. For example, in one case, the judge rejected the applicant’s proffered groups, including “Cameroonian women who are viewed as property within domestic relationships by virtue of their gender” and “Cameroonian women who have been forced into marriage.” The judge expressed concern that the former was circular, and that the latter did not accurately describe the applicant’s experience because her relationship was more akin to “sex slavery” than marriage, which the judge considered to be “worse.”<sup>139</sup> In the end, the IJ determined that the applicant “must” fall within some cognizable PSG, based on the abhorrent treatment she suffered, but he granted relief without explicitly defining the group.

An IJ granted CAT relief in another case, but denied asylum and withholding, rejecting the group, “Honduran women who are unable to leave a relationship with the fathers of their children.”<sup>140</sup> Without referring to any of the developments in *R-A-* or *L-R-*, the IJ found that the group lacked “particularity” and “social visibility” and that the applicant’s status in the relationship was not immutable because she “did eventually leave [her abuser]” to flee to the United States, which “terminat[ed] the relationship.” In the alternative, the judge held that the applicant failed to establish nexus: “She was not abused because she was unable to leave the relationship. Rather, she was unable to leave the relationship because she

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136. CGRS Database Case #8767 (2009).

137. CGRS Database Cases #6392 (2009) (religion); #6463 (2009) (FGC). In the case where the grant rested on past FGC alone, the applicant suffered severe domestic violence as well, but the DV was not the basis for the IJ’s reasoning. It is not clear whether the IJ considered the DV-PSG arguments, or rather considered them extraneous because the grant based on FGC was sufficient and held more analytical clarity under *Kasinga*.

138. CGRS Database Case #6178 (2009). In addition, the following PSGs were deemed cognizable:

- Guatemalan women in an intimate relationship who have been subjected to violence and who assert through their actions their right to be free of violence. CGRS Database Case #5146 (2009).
- Guatemalan women in intimate relationships with police officers who have been subjected to violence. CGRS Database Case #5146 (2009).

139. CGRS Database Case #6519 (2009).

140. CGRS Database Case #6649 (2009).

was being abused. It appears that the abuse suffered by Respondent, although tragic, was the result of [her abuser's] efforts to exert power and control over her, not her membership in any particular social group.”

7. Post-December 11, 2009: CGRS database case outcomes decided after the IJ granted asylum to *Matter of R-A-* on remand from the Board

Since the IJ's decision granting asylum to Ms. Alvarado,<sup>141</sup> as of May 17, 2012, the CGRS database recorded fifty-eight case outcomes, including forty grants of asylum or withholding, two grants of CAT relief, and thirteen denials. The database also recorded three grants of motions to reopen to allow women the opportunity to apply for relief in domestic violence cases.<sup>142</sup>

- a. Denials

In cases denying relief since *R-A-*, some judges have accepted the DHS social group framework, but denied asylum or withholding because of the applicant's failure to satisfy the other eligibility criteria such as establishing membership in the group.<sup>143</sup> At the same time, however, many judges have rejected DHS's approach, expressing skepticism regarding the viability of domestic violence as a basis for asylum under any circumstances.<sup>144</sup> Some judges have also denied relief with no reference to developments in the *L-R-* and *R-A-* cases.<sup>145</sup> Other judges have referred to the *L-R-* and/or *R-A-*

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141. The most recent decision analyzed for this article was issued on May 17, 2012. Since then, CGRS has continued to receive information about outcomes in DV cases on a regular basis.

142. Written opinions were on file for twenty-six of the cases.

143. CGRS Database Cases #7436 (2010) (recognizing group defined by gender, nationality and status in the relationship, but finding that applicant was not a member of the group because she did not live with her abuser); #8644 (2011) (recognizing group defined by gender, nationality and status in an abusive relationship, but finding that the applicant was not a member of the group because she did not try to leave the relationship prior to leaving the country).

144. CGRS Database Cases #3110 (2010) (denying relief reasoning that all countries are “not as good” as the United States’ on women’s rights, but “that doesn’t mean that the United States should grant asylum to all women of the world”); #6550 (2010) (denying relief again on remand, concluding that nothing had changed since *R-A-* and continuing to refuse to recognize PSG asylum in the DV context); #8282 (2012) (rejecting group, “Honduran women unable to leave a domestic relationship,” and denying relief in part based on conclusion that “[h]arm resulting from a social problem” does not constitute harm because of an enumerated ground).

145. The following DV-PSGs were among those rejected during this period:

- Indian women in a domestic relationship and unable to free themselves from their partners and viewed as property by nature of their position in a domestic relationship. CGRS Database Case #7607 (2011).
- Kenyan women in a domestic relationship who are unable to leave. CGRS Database Case #8491 (2011).
- Married women in Mongolia who cannot leave marriage. CGRS Database Case #6626 (2010).

developments, but nevertheless concluded that groups defined by gender, nationality, and status in the relationship lack the requisite social visibility and particularity.<sup>146</sup> One judge, for example, found that while relationship status can be immutable, because the plight of women is generally ignored by the society, the applicant's group lacked visibility.<sup>147</sup> Similarly, a judge rejected the *L-R*- social group formulations, finding that the group is not visible in India because only thirty percent of domestic violence victims there seek assistance.<sup>148</sup> The IJ's nexus analysis in that case further demonstrates a deep misunderstanding of the context and motivations of abusers in the domestic sphere. There, the applicant argued that her partner "attempted to control [her] sexual and reproductive rights by raping her and causing a miscarriage" on account of her group membership. The IJ found that the applicant failed to demonstrate nexus, reasoning that "there is nothing to indicate that the miscarriage occurred on account of [the applicant's] membership in a particular social group as opposed to dissatisfaction with the unpaid dowry, [the persecutor's] poor character, or another unwanted mouth to feed similar to [the applicant's son]," and "it would appear that the alleged rape was part of [the persecutor's] alleged attempt to force [the applicant's] family into giving him custody of his son."<sup>149</sup> Another IJ found that the group "married women in Guatemala who are unable to leave the relationship" is impermissibly circular.<sup>150</sup>

Some judges have expressed a desire to provide protection for applicants in domestic violence cases but conclude that the current state of the law constrains them.<sup>151</sup> One judge rejected the *L-R*- social group formulations as circular, but stated that if he were writing on a blank slate, he would find women in the particular country to be a cognizable group. The judge claimed that he could not do so in that case, because he had been

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- Women in abusive relationships in El Salvador who escape the country in order to flee their abuser. CGRS Database Case #8644 (2011).
  - Salvadoran women unable to leave domestic relationship. CGRS Database Case #6667 (2011).

In addition to PSG, denials during this period have also been based on no political opinion (3 occurrences), no nexus (3), changed country conditions (1), and credibility (2).

146. CGRS Database Cases #6626 (2010) (rejecting "married women in Mongolia who cannot leave the marriage"); #7186 (2010).

147. CGRS Database Case #8491 (2011).

148. CGRS Database Case #7607 (2011).

149. *Id.*

150. This IJ also found that even if the PSG was cognizable, the applicant had not established she was a member of the group because, contrary to DHS's position in *R-A-*, she could not show that she was unable to leave, reasoning that she had left three times before, including her flight to the United States, despite her husband's refusal to divorce her. CGRS Database Case #7186 (2010).

151. *See* CGRS Database Case #7186 (2010) ("Although the respondent presents a sympathetic case for expansion of current law regarding asylum, the Court holds that, based upon the facts in this case, the prevailing law in the Eighth Circuit Court of Appeals does not recognize as a basis for asylum the respondent's claim based upon domestic abuse by a spouse or former spouse in the respondent's country of origin.").

rebuffed by the Board in other cases where he had taken the gender plus nationality approach. As such, the IJ stated that he would continue to deny relief in the current state of the law cases until further guidance came back from the Board.<sup>152</sup> In another case, the IJ rejected a gender-defined group in a DV case, but explicitly urged the attorney to appeal the decision, hoping that it would result in a precedential decision from the Board.<sup>153</sup> The judge indicated that he was sympathetic towards the plight of the applicant, but stated that he “did not believe the action of one man on his own” equated to persecution deserving of asylum protection.<sup>154</sup>

b. Grants

Despite lingering resistance, it is clear that the developments in *R-A*- and *L-R*- have made a significant impact on decision-making in domestic violence asylum cases across the country. In many cases, judges have accepted the DHS framework and recognized groups that include some combination of the *L-R*- characteristics of gender, nationality, and status in the relationship, and have moved away from groups defined by the persecution suffered.<sup>155</sup> The majority of the asylum and withholding grants during this period were based on DV-PSG (thirty-six out of the forty). The remaining cases were based on DV-PSG + DV-PO (two cases). Of considerable importance, the CGRS database contains a grant of asylum in a case that advanced DV-PSG as the basis for asylum before an IJ in the Eloy, Arizona immigration court.<sup>156</sup> This is believed to be the first ever

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152. CGRS Database Case #6667 (2011).

153. The case is still pending. CGRS Database Case #8541 (2012).

154. *Id.*

155. The following PSGs were accepted during this period:

- Women in [country X] who are unable to leave a domestic relationship. CGRS Database Cases #8683 (2012); #8370 (2012); #8203 (2012); #7571 (2012); #7548 (2011); 6269 (2011); #8054 (2011); #7668 (2011); #6291 (2010); #5562 (2011); #6161 (2010); #6127 (2010); #7074 (2010); #6748 (2010).
- Women in [country X] in domestic relationships who are viewed as property by virtue of their positions within a domestic relationship. CGRS Database Cases #7661 (2011); #6161 (2010); #7484 (2011); #7668 (2011); #6748 (2010); #8054 (2011).
- Nicaraguan women whose domestic partners view them as property and refuse to let them leave the relationship. CGRS Case #6142 (2010).
- Married Guatemalan women and/or women who are in a domestic relationship who resist their abusers but are unable to leave the relationship. CGRS Database Case #7520 (2011).
- Women in Honduras who are in a domestic relationship with a police officer. CGRS Database Case #8517 (2012).
- Female members of the Bulu tribe who oppose polygamy. CGRS Database Case #5204.
- Family relationship. CGRS Database Case #5326 (2010).

156. CGRS Database Case #6394 (2010).

domestic violence case granted in that jurisdiction, which had heretofore been particularly resistant to these cases.<sup>157</sup>

Nevertheless, there are still some judges who have granted relief on rationales independent from the DHS approach. In one case, for example, the applicant and DHS stipulated to the *L-R*- “unable to leave” and “viewed as property” formulations of the social group. However, to grant relief the judge reformulated the group based on gender, nationality, and the applicant’s shared experiences of having been used as sex slave in Liberia, having borne children as a result of rape, and having escaped from enslavement.<sup>158</sup> One IJ has been willing to grant CAT relief in domestic violence cases, but has denied asylum or withholding, rejecting social groups proffered by applicants who follow the *R-A/L-R*- framework. The IJ has rejected DV-PSGs with little analysis, simply stating in one case that the group was not cognizable because the Board’s *R-A*- decision was vacated and there was no binding precedent from the Board or the Court of Appeals,<sup>159</sup> and stating in another case that “the particular social group of which the [applicant] claims to be a member . . . is overly broad and is undeserving of relief under the INA.”<sup>160</sup>

### c. DHS position

In some cases, DHS trial attorneys have followed the agency’s approach in *L-R*- and *R-A*-, filing joint motions to remand from the Board and then declining to contest a grant of relief for the applicant.<sup>161</sup> In other cases, DHS attorneys have made arguments to immigration judges and the Board that are inconsistent with the agency’s position in *L-R*- and *R-A*-.<sup>162</sup> For example, a DHS attorney in Pennsylvania argued against a grant of relief in the immigration court, stating that domestic violence can never give rise to a cognizable PSG for asylum. The IJ in that case rejected the DHS attorney’s argument and directed the attorney to revisit the agency’s position set forth in its 2009 brief in *L-R*-.<sup>163</sup> A DHS attorney in Texas appealed a grant of asylum, contesting the IJ’s holding that the abuse suffered by the applicant at the hands of her common-law husband was on account of her membership in a PSG identical to the *L-R/R-A*- groups,

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157. For example, in another Eloy case, the IJ denied asylum and the applicant appealed. While the matter was pending before the Board, the attorney and DHS filed a joint motion stipulating to a grant of asylum and seeking a remand to the IJ on that basis. On remand, the DHS attorney explained that the agency believed that the applicant was a member of a PSG and qualified for asylum, but the IJ stated that nothing had changed in the law and denied the case again. CGRS Database Case #8350 (2012).

158. CGRS Database Case #7535 (2012).

159. CGRS Database Case #8787 (2012). This IJ has granted asylum in DV cases, but only where based on FGC or relief. See CGRS Database Case #7485 (2012); #6392 (2009).

160. CGRS Database Case #8823 (2012).

161. CGRS Database Case #7758 (2011).

162. CGRS Database Case #7186 (2010).

163. CGRS Database Case #6127 (2010).

“Honduran women who are unable to leave their domestic relationship.”<sup>164</sup> The case is still pending. In another case pending before the BIA,<sup>165</sup> the attorney for the applicant contacted DHS in San Francisco to see if the agency would consider withdrawing its opposition to the applicant’s appeal in light of its position in *L-R-*. The DHS attorney declined withdrawal, stating that DHS was “not estopped” from taking a position that differs from the *L-R-* brief because the brief was filed by a different branch of the agency.

Although many DHS attorneys have not objected to an applicant’s submission of the agency’s *L-R-* and *R-A-* briefs,<sup>166</sup> some have objected, citing confidentiality concerns.<sup>167</sup> For example, in one case, DHS argued that the *L-R-* brief attached to an applicant’s motion to reopen had not been redacted of identifying information and therefore declined to “remark upon the document further as to do so could constitute a violation of the asylum confidentiality regulations.”<sup>168</sup> DHS attorneys have objected to the inclusion of the *L-R-* materials in some cases notwithstanding a letter sent from Ms. L.R.’s counsel to the agency indicating that Ms. L.R. “authorized the disclosure” of the redacted briefs and other materials submitted in her case.<sup>169</sup>

#### d. BIA

The Board has had several opportunities to clarify the law of domestic violence asylum, but it has repeatedly dodged the issue. In an unpublished decision issued in January 2012, the Board acknowledged that whether domestic violence may be the basis for an asylum claim “remains

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164. CGRS Database Case #7074 (2010).

165. In that case, the IJ initially denied asylum in 2008 on the basis that the applicant had failed to show the government of Nicaragua was unable or unwilling to protect her, though the IJ did recognize the proffered social group as cognizable. The applicant had appealed the unable/unwilling ruling; and the government opposed arguing, among other things, that even if the unable/unwilling ruling was overturned, the applicant was not a member of a cognizable social group. CGRS Database Case #4802 (2008).

166. CGRS Database Case #6161 (2010).

167. CGRS Database Case #6731 (2011).

168. CGRS Database Case #6473 (2010).

169. Letter from Karen Musalo, CGRS Director and U.C. Hastings Clinical Professor of Law, to David A. Martin, Principal Deputy General Counsel, Office of the General Counsel, DHS (Aug. 9, 2010) (on file with author). The agency responded to this letter, stating that the letter had been forwarded to leadership within the agency to make sure that DHS attorneys in field offices understand DHS’s “legal policy and the importance of taking litigation positions consistent with that legal policy.” Letter from David A. Martin to Karen Musalo (Sept. 30, 2010) (on file with author). However, in the response letter, DHS also stated that it “discourage[s]” the submission of briefs in unrelated cases “[b]ecause each case should be argued on its own merits.” *Id.* But, it should be noted that the regulations governing disclosure of information pertaining to an asylum application, like the briefs in *R-A-* and *L-R-*, do not apply to instances where a U.S. government official “need[s] to examine information in connection with . . . adjudication of asylum applications.” 8 C.F.R. § 1208.6(c)(1)(i).

unresolved.”<sup>170</sup> Rather than issue a decision setting forth its interpretation of the statute, the Board determined that even if domestic violence could be the basis for asylum, the applicant had no well-founded fear, because the evidence in the case indicated that her abuser was living in the United States. The Board also granted asylum in a domestic violence case in which DHS had stipulated to a grant, but it did so in a one-sentence order with no analysis.<sup>171</sup>

Significantly, however, the Board granted two motions to reopen during this period to afford women the opportunity to apply for asylum on the basis of domestic violence.<sup>172</sup> In one case, the Board had previously denied an applicant's motion to reopen, holding that there had been no ineffective assistance of counsel, one of the potential bases for reopening, where the applicant failed to raise the domestic violence asylum claim during her court proceedings in 1999 because domestic violence was not legally viable at that time.<sup>173</sup> Then, in 2011, the Board granted the applicant's second motion to reopen *sua sponte*, using its powers to overcome the time and numerical limitations imposed on such motions.<sup>174</sup> The BIA also utilized its *sua sponte* powers to reopen one other case on file during this period. There, the applicant had not initially filed for asylum based on domestic violence because she was in immigration proceedings with her husband, so she later sought to have her case reopened after her husband was deported.<sup>175</sup>

CGRS is aware of several domestic violence asylum cases that, as of the date of writing, have been fully briefed and are pending before the Board awaiting decision. In one pending case, the Board sought supplemental briefing from the parties and amicus curiae briefs to address “whether domestic violence can, in some instances, form the basis of an asylum or withholding of removal claim.”<sup>176</sup> Although it is possible that a published decision on domestic violence asylum may be forthcoming from the BIA in this case, the briefs were filed in 2011, and at the time of

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170. CGRS Database Case #8389 (2012).

171. The order stated: “In consideration of the joint motion, as well as the totality of the circumstances presented in this case, the respondent's application for asylum ... is granted.” CGRS Database Case #8350 (2012). Although of minimal precedential or persuasive value, the Board's decision is significant because it is a grant in a DV case even after the imposition of the social visibility and particularity requirements.

172. CGRS Database Cases #6778 (2011); #7453 (2011). At least one IJ also granted a motion to reopen in a DV case as well. CGRS Database Case #7821 (2011).

173. This decision was upheld by the Ninth Circuit. CGRS Database Case #6778 (2011).

174. Under 8 C.F.R. § 1003.2(c), an applicant can only file one motion to reopen and it must be filed “no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be opened.” However, under subsection (a), the Board retains discretion to “at any time reopen or reconsider on its own motion any case in which it has rendered a decision.”

175. CGRS Database Case #7453 (2011).

176. CGRS Database Case #5256 (2011).



writing, such a decision had yet to be issued. CGRS is also aware of at least two other domestic violence cases for which the Board has requested supplemental briefing from the parties and amici curiae to answer similar questions.<sup>177</sup> The Board also has before it the validity of the social visibility and particularity requirements, which were recently rejected by the Third Circuit Court of Appeals.<sup>178</sup> Although the Third Circuit case does not involve domestic violence or other gender persecution, if the Board refines its approach to social group analysis, this could affect the analysis in domestic violence cases. The briefs were submitted in May 2012, but the Board is under no obligation to timely resolve the matter.<sup>179</sup>

#### IV. CONCLUSION

There has been some movement towards consistent decision making since the grants of asylum in *Matter of R-A* and *Matter of L-R*. However, the information in the CGRS database demonstrates that the absence of applicable norms and the shifting policy positions on the part of DHS have continued to produce contradictory and arbitrary outcomes in domestic violence asylum cases. Some IJs grant relief in domestic violence cases following the official DHS approach in *R-A* and *L-R* or related precedent, whereas other IJs deny relief based on a refusal to see domestic violence as anything other than a personal dispute despite external developments in this area, and still others deny relief by relying on inapplicable or faulty understanding of precedent. As many women wait in limbo and many judges remain resistant, the Courts of Appeals have advanced gender-based social groups in other contexts—for example, in the context of female genital cutting, forced marriage, and opposition to social mores, recognizing social groups such as “Somalian females” or “young girls in the Benadiri clan,”<sup>180</sup> “women in China who have been subjected to forced marriage and involuntary servitude,”<sup>181</sup> “women who have escaped involuntary servitude after being abducted and confined by [a guerrilla organization],”<sup>182</sup> “Christian women in Iran who do not wish to adhere to the Islamic female dress code,”<sup>183</sup> and “women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing.”<sup>184</sup>

But, these decisions have not been sufficient to persuade in many instances. To put it plainly, whether a woman fleeing domestic violence

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177. CGRS Database Cases #8767 (2012); #7186 (2010).

178. *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 608 (3d Cir. 2011).

179. *See* 8 C.F.R. § 1003.1(e)(8).

180. *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005); *see also* *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007).

181. *Bi Xia Qu v. Holder*, 618 F.3d 602 (6th Cir. 2010).

182. *Gomez Zuluaga v. Att’y Gen.*, 527 F.3d 330 (3d Cir. 2008).

183. *Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002).

184. *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011).

will receive protection in the United States seems to depend not on the consistent application of objective principles, but rather on the view of her individual judge, often untethered to any legal principles at all. The U.S. government has stated that regulations are “being worked on” by DHS and DOJ.<sup>185</sup> If the last twelve years are any indication, little confidence can be placed in such pronouncements. The United States should adjudicate domestic violence asylum cases consistent with international norms, guidance from the United Nations Human Commissioner for Refugees, and a growing body of jurisprudence in U.S. Federal Courts of Appeals that readily recognize gender-defined social groups, and clearly establish that persecution by intimate partners is a basis for asylum.

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185. The Regulatory Plan, *supra* note 8, at 64221 (recognizing that “[t]he failure to promulgate a final rule in this area presents significant risks of further inconsistency and confusion in the law. The government’s interests in fair, efficient and consistent adjudications would be compromised”).