

“Build Back Better”: Domestic Violence-Based Asylum After the “Death to Asylum” Rule

Minha Jutt*

I. INTRODUCTION

Laila was married off at 13 and abused by her husband . . . [He] “used to grab me by the neck and strangle me. He’d throw whatever he had in his hand at me. I’ve still got the scars from stitches and open gashes” . . . [She] made a vow to flee this life of brutality for her son’s sake . . . She is convinced that if she goes back to Karachi, her husband will kill her.¹

The duty of non-refoulement lies at the core of asylum law. This duty prohibits adjudicators from returning asylum seekers to conditions that threaten their life and liberty, regardless of who inflicted the persecution. Yet, over its four years, the Trump administration markedly ignored this duty to asylum seekers. In particular, it continuously targeted domestic violence-based asylum,² increasing rejection rates by nearly 20%.³ To build the coffin for domestic violence-based asylum, the Trump administration framed domestic violence as a private matter, unworthy of public protection.⁴

The Trump administration hit the “final nail in the coffin” with

* J.D. Candidate, 2022, University of Kansas School of Law; B.A. Economics and Political Science, 2019, University of Missouri- Kansas City. I would like to thank my parents, Kausar and Muhammad Akram Jutt, for supporting me through my every endeavor. I would also like to thank Professor Lua Yuille and the members of the *Kansas Law Review* for their thoughtful review of this Comment.

1. Cathleen Miller, *From child bride to domestic abuse survivor to refugee*, AL JAZEERA (June 18, 2019), <https://www.aljazeera.com/features/2019/6/18/from-child-bride-to-domestic-abuse-survivor-to-refugee> [https://perma.cc/3H94-XE2R].

2. See generally *Matter of A-B- (A-B- I)*, 27 I. & N. Dec. 316 (A.G. 2018); *Matter of A-B- (A-B- II)*, 28 I. & N. Dec. 199 (A.G. 2021). For a discussion of A-B-’s impact on domestic violence-based asylum claims, see Kate Jastram & Sayoni Maitra, *Matter of A-B- One Year Later: Winning Back Gender-Based Asylum through Litigation and Legislation*, 18 SANTA CLARA J. INT’L L. 48 (2020).

3. Joel Rose, *As More Migrants Are Denied Asylum, An Abuse Survivor Is Turned Away*, NPR (Jan. 18, 2019, 7:22 AM), <https://www.npr.org/2019/01/18/686466207/its-getting-harder-for-migrants-to-win-asylum-cases-lawyers-say> [https://perma.cc/KFK9-KQ4K]; *Fact Sheet: January 2019, HUM. RTS. FIRST* (2019), https://www.humanrightsfirst.org/sites/default/files/Asylum_Grant_Rates.pdf [https://perma.cc/2KAR-PKF9].

4. See, e.g., *Matter of A-B- (A-B- I)*, 27 I. & N. Dec. 316 (A.G. 2018); *Matter of A-B- (A-B- II)*, 28 I. & N. Dec. 199 (A.G. 2021).

omnibus asylum rules (“Rules”).⁵ While no longer in effect, the Rules serve as a useful model to analyze public/private framing in domestic violence-based asylum. The Rules prohibited particular social groups based on acts in which government authorities are uninvolved or of which they are unaware. By framing non-state actor claims as merely private violence, the Rules foreclosed domestic violence-based claims. Yet, domestic violence exceeds private violence. It is the cause and consequence of systemic inequality in countries that demarcate survivors as unworthy of protection or value. Because domestic violence is precisely the type of persecution that merits international protection, survivors should qualify for asylum.

With this premise in mind, this Comment proceeds as follows. Part II of this Comment outlines the United States’ current requirements to seek asylum. It then details the doctrinal framework for the “particular social group” protected ground and reviews its evolution regarding domestic violence-based claims. Finally, it describes the Rules’ restrictions on this ground. Part III analyzes the Rules’ impact on domestic violence-based asylum. Section III.A argues the Rules categorically foreclosed domestic violence claims, violating well-established asylum law. Section III.B begins with the following premise: whenever a government authority tolerates or permits domestic violence, the government is involved in domestic violence.

This Comment articulates a workable framework for strengthening domestic violence-based asylum claims had the Rules taken effect. Given its affirmative duty to address domestic violence, government inaction amounts to involvement in domestic violence. It then describes three routes to establish government involvement in domestic violence: (1) failure to exercise due diligence to “prevent, investigate, and punish” incidents of domestic violence, (2) failure to enact domestic legislation to punish and redress domestic violence, and (3) failure to ensure the protection and healing of survivors. In so doing, this Comment demonstrates that governments’ failure to act contributes to domestic violence just as significantly as direct involvement. This framework more accurately captures domestic violence’s nature, without “opening the floodgates” for asylum-seekers.

This Comment then concludes by arguing the Rules demonstrate the importance of recognizing domestic violence’s systemic nature. Though

5. *Tahirih Condemns New Proposed Regulations That Aim to End Asylum*, TAHIRIH JUST. CTR. (June 10, 2020), <https://www.tahirih.org/news/tahirih-condemns-new-proposed-regulations-that-aim-to-end-asylum/> [https://perma.cc/ZBC2-ZNN7].

the Rules are no longer in effect, they demonstrate the prevalence of public/private framing and its consequences for domestic violence-based asylum. Finally, as the Biden administration considers further rulemaking to answer these now-open questions of law, this Comment stresses the United States’ international obligations to asylum-seekers fleeing domestic violence. As this Comment demonstrates, domestic violence merits asylum because it is a state-sponsored, human rights violation. To fulfill international obligations, the Biden administration must—once and for all—abandon public/private distinctions in asylum law.

II. BACKGROUND

International obligations require the United States to provide asylum to refugees. Domestic statutes codify these obligations and judges interpret statutes according to international obligations.

A. *An Overview of United States Asylum Law*

Asylum law codifies the international obligations the United States assumed by ratifying the United Nations Refugee Convention in 1968.⁶ Its most significant duty, codified in Article 33(1), provides that,

[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁷

This provision is known as the duty of non-refoulement. It prohibits parties to the Convention from returning refugees to a country that threatens their life or liberty.⁸

The provision binds parties to the Convention. While each party to the Convention develops its own asylum law to administer its obligations, the parties must do so in accordance with the Convention’s principles.⁹

6. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]; UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, <http://www.unhcr.org/3b73b0d63.html> [<https://perma.cc/Y6VP-JD84>].

7. 1951 Convention, *supra* note 6, at art. 33(1).

8. *Id.*

9. See Vienna Convention on the Law of Treaties, art. 26, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); see also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 426, 429 (1987); Rachel Gonzalez Settlege, *Rejecting the Children of Violence: Why U.S. Asylum Law should Return to the Acosta Definition of “A Particular Social Group”*, 30 GEO. IMMIGR. L.J. 287, 295 (2016).

The duty arose in part from the United States' refusal to shelter refugees fleeing the Holocaust.¹⁰ By rejecting refugees, the United States sent thousands back to their death.¹¹ This "moral stain on the nation's conscience" led the United States and other countries to incur international obligations to persecuted individuals.¹²

In 1980, Congress passed the Refugee Act, 8 U.S.C. § 1101, to codify international obligations. The Act adopts the Protocol's refugee definition nearly verbatim.¹³ In relevant part, the Act defines a refugee as:

[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁴

To qualify for asylum in the United States, a person must experience persecution or a "well-founded fear of persecution." While the statute does not define "persecution," courts define the term to encompass "the credible threat of death, torture, or injury to one's person or liberty on account of a protected ground."¹⁵

Moreover, the applicant must prove that either the government or actors that the government is "unable or unwilling to control" inflicted the harm.¹⁶ Asylum seekers may meet the "unable or unwilling to control" standard by demonstrating that the government failed to protect other individuals who reported similar harm.¹⁷ If the past reports of other individuals proved futile, then applicants need not report their specific instance of persecution to the government.¹⁸ This option ensures

10. Dara Lind, *How America's Rejection of Jews fleeing Nazi Germany haunts our refugee policy today*, VOX (Jan. 27, 2017, 8:12 AM), <https://www.vox.com/policy-and-politics/2017/1/27/14412082/refugees-history-holocaust>.

11. *Id.*

12. *Id.*

13. 1951 Convention, *supra* note 6; 1967 Protocol, *supra* note 6; 8 U.S.C. § 1101.

14. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); INA § 208, 8 U.S.C. § 1158.

15. *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732 (8th Cir. 2013) (quoting *Matul-Hernandez v. Holder*, 685 F.3d 707, 711 (8th Cir. 2012)); *accord Tairou v. Whitaker*, 909 F.3d 702, 707 (4th Cir. 2018) ("Persecution involves the infliction or threat of death, torture, or injury to one's person or freedom, on account of one of the enumerated grounds in the refugee definition.") (quoting *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005)).

16. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *overruled in part as stated in Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446-47 (1987).

17. 8 C.F.R. § 208.13(b)(3)(ii) (2013).

18. *In re S-A-*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000); *In re Kasinga*, 21 I. & N. Dec. 357,

individuals fleeing persecution inflicted by non-state actors may seek asylum, even if they did not seek police protection.¹⁹

Furthermore, the alleged persecution must satisfy the nexus requirement. This requires applicants to have experienced persecution “on account of” one of five enumerated protected grounds. These protected grounds include: (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, and (5) political opinion.²⁰ No codified definitions of the five protected grounds exist; immigration judges apply them on a case-by-case basis. The protected ground must be “at least one central reason” for the alleged persecution, which gives rise to the potential for a persecutor with multiple purposes.²¹ Due to the severity of harm that causes survivors to flee their homes and seek asylum, this Comment presumes that domestic violence satisfies persecution’s requirements and primarily focuses on the nexus requirement.²²

B. The Particular Social Group Protected Ground

Because the United States does not recognize gender as an independent ground for asylum, individuals fleeing domestic violence claim asylum under the particular social group ground. However, caselaw imposes distinctively narrow requirements upon this ground, curbing survivors’ asylum claims.²³

365 (B.I.A. 1996) (holding that “persecution can consist of the infliction of harm or suffering by . . . persons a government is unwilling or unable to control”); Memorandum from Phyllis Coven, Director, INS Office of International Affairs, to all INS Asylum Officers and HQASM Coordinators 17 (May 26, 1995) [hereinafter INS Memorandum].

19. See, e.g., *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389–90 (B.I.A. 2014) (describing that the survivor was persecuted by her partner rather than directly by a government actor), *overruled by Matter of A-B-*, 27 I. & N. Dec. 316 (Op. Att’y Gen. 2018), *abrogated by Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *rev’d in part sub nom. Grace v. Barr*, No. 19-5013 (D.C. Cir. July 17, 2020).

20. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

21. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

22. See, e.g., *In re S-A-*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000) (finding that “repeated physical assaults, imposed isolation, and deprivation of education” constitute persecution); *Shoaf v. I.N.S.*, 228 F.3d 1070, 1074 (9th Cir. 2000) (finding that rape constitutes persecution); *Voci v. Gonzales*, 409 F.3d 607, 614 (3d Cir. 2000) (finding that repeated severe beatings that caused serious physical injuries amounted to persecution); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036–37 (8th Cir. 2008) (reasoning that “non-physical” harms, like pressure from a widowed applicant’s former in-laws to marry her brother-in-law, demands to return a “bride’s price” after marriage, or threats to take the applicant’s children may constitute persecution).

23. While this Section describes the ground’s substantive requirements, the Trump administration also imposed uniquely strict procedural requirements. See *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189, 191 (B.I.A. 2018); see also Fatma Marouf, *Becoming Unconventional: Constricting the ‘Particular Social Group’ Ground for Asylum*, 44 N.C. J. INT’L L. 487, 493–503 (2019) [hereinafter Marouf, *Constricting Particular Social Group*].

1. The Current Particular Social Group Framework

Particular social group remains an especially complicated protected ground.²⁴ Its open-ended nature was intentional, as the Refugee Convention and subsequent United Nations High Commissioner for Refugees (UNHCR) guidelines intended that the category remain broad enough to encompass people not protected by other protected grounds.²⁵ While the Board of Immigration Appeals (BIA) initially recognized all types of particular social groups based on immutable characteristics, it began to narrow the ground in 2006.

Currently, courts employ a three-part test to determine if an applicant's particular social group presents a cognizable asylum claim. The applicant must establish that the proposed social group is: (1) comprised of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct in the society in question.²⁶ Throughout the ground's evolution, however, the BIA maintained that courts must determine whether a group is cognizable on a case-by-case basis.²⁷ A court may not reject a group simply because it "found a similar group in a different society to lack social distinction or particularity."²⁸

A group's members must share a common, immutable characteristic. While courts determine whether a certain characteristic is immutable on a case-by-case basis, it must either be (a) "beyond the power of an individual to change" or (b) "so fundamental to [individual] identity or conscience that it ought not be required to be changed."²⁹ Immutable characteristics include both innate characteristics "such as sex, color, or kinship ties," as well as shared experiences.³⁰ Voluntary associations do not constitute

24. See, e.g., *Cordoba v. Holder*, 726 F.3d 1106, 1114 (9th Cir. 2013); *Fatin v. I.N.S.*, 12 F.3d 1233, 1238–39 (3d Cir. 1993).

25. See 1951 Convention, *supra* note 6, at art. 1; see also United Nations, High Comm'r for Refugees, Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, ¶ 1, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UN, Guidelines on International Protection]; GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 47, 74–76 (3d ed. 2007); Jessica Marsden, Note, *Domestic Violence Asylum After Matter of L-R-*, 123 *YALE L.J.* 2512, 2517 (2014).

26. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part as stated in Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446–47 (1987).

27. *Id.*; *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (B.I.A. 2014).

28. See, e.g., *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

29. See *Matter of C-A*, 23 I. & N. Dec. 951, 955 (B.I.A. 2006); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008); *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239.

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

immutable characteristics.³¹ For example, the BIA has held individuals’ occupations are not immutable characteristics because they may pursue other occupations.³² By contrast, the BIA has held a familial relation may constitute an immutable characteristic when legal restraints, societal culture, and power dynamics prevent an individual from leaving their family.³³

Next, a group must be defined with particularity.³⁴ This element focuses on defining the group’s outer limits.³⁵ Particular groups “must be defined by characteristics that provide a clear benchmark for determining who falls within the group.”³⁶ The society the group belongs to must describe the group with commonly accepted definitions.³⁷ Furthermore, the group must “accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”³⁸ For example, the BIA has held affluency is “too amorphous to provide an adequate benchmark” because wealth is “so indeterminate” that it may vary from the top one percent of an income bracket to include small business owners.³⁹

Finally, the society in which the group belongs must view it as socially distinct.⁴⁰ To satisfy this element, the applicant’s society must perceive, consider, or recognize the “persons sharing the particular characteristic to be a group.”⁴¹ This element does not require literal or ocular visibility.⁴² Rather, while the applicants’ society must perceive the group as distinct, it need not be able to identify the group’s members on sight.⁴³ Furthermore, the society or the group itself need not be able to enumerate the specific individuals that claim membership in the group.⁴⁴ For

31. *Matter of C-A-*, 23 I. & N. Dec. at 956–57.

32. *Matter of Acosta*, 19 I. & N. Dec. at 233–34.

33. See *Matter of L-E-A-I*, 27 I. & N. Dec. 40 (BIA 2017). This decision was initially overruled by *Matter of L-E-A-II*, 27 I. & N. Dec. 581 (A.G. 2019), but *L-E-A-I* is now good law because *L-E-A-II* was vacated by *Matter of L-E-A-III*, 28 I. & N. Dec. 304 (AG 2021).

34. *Matter of C-A*, 23 I. & N. Dec. at 951; *Matter of S-E-G-*, 24 I. & N. Dec. at 584; *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239.

35. *Matter of M-E-V-G-*, 26 I. & N. at 239 (citing *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007)).

36. *Id.*

37. *Matter of S-E-G-*, 24 I. & N. at 584; *Matter of M-E-V-G-*, 26 I. & N. at 239.

38. *Matter of S-E-G-*, 24 I. & N. at 584; *Matter of M-E-V-G-*, 26 I. & N. at 239.

39. *In re A-M-E- & J-G-U-*, 24 I. & N. at 76.

40. *Matter of S-E-G-*, 24 I. & N. at 584; *Matter of M-E-V-G-*, 26 I. & N. at 239.

41. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (B.I.A. 2014).

42. *Id.* at 216.

43. *Id.*; *Matter of M-E-V-G-*, 26 I. & N. Dec. at 238–399.

44. *Matter of C-A*, 23 I. & N. Dec. 951, 951 (B.I.A. 2006).

example, individuals who identify as lesbian, gay, bisexual, or transgender (LGBT) and women who oppose female genital mutilation both constitute socially distinct groups.⁴⁵

2. A Brief History of Domestic Violence-Based Particular Social Groups

Asylum protections remain notably elusive for domestic violence survivors. Survivors must claim protection under a particular social group—a narrow ground—because courts do not recognize gender as an independent protected ground.⁴⁶ In 1995, the Immigration and Naturalization Service first considered the possibility of domestic violence-based asylum claims in a set of guidelines.⁴⁷ However, the guidelines did not govern claim adjudication.

Four years later, in *Matter of R-A*, the BIA first considered whether domestic violence may form a particular social group. On appeal, the BIA denied asylum to Rody Alvarado Peña.⁴⁸ It noted that, while the violence amounted to persecution, her claim did not meet 8 U.S.C. § 1101(a)(42)'s nexus requirement.⁴⁹ The opinion framed domestic violence as a private, interpersonal matter.⁵⁰ The BIA determined her proposed social group, “abused Guatemalan women,” was not a distinct group; her abuse was unrelated to the abuse of other Guatemalan women. Furthermore, the BIA determined she was not persecuted “on account of” her membership in the group; her husband abused her because she was his wife.⁵¹

In 2014, the BIA decided the first precedential case that approved a domestic violence-based asylum claim. In *Matter of A-R-C-G-*, the BIA approved an asylum claim based on membership in the particular social group of “married women in Guatemala who are unable to leave their

45. *Matter of W-G-R-*, 26 I. & N. Dec. at 217.

46. Marisa Silenzi Cianciarulo, *Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims*, 35 HARV. J.L. & GENDER 117, 120 (2012); Gonzalez Settlege, *supra* note 9, at 291; Nina Rabin, *At the Border between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 L. & ETHICS HUM. RTS. 109, 109 (2013).

47. See INS Memorandum, *supra* note 18; Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States*, 23 AM. U.J. GENDER SOC. POL'Y & L. 529, 533, 552 (2014).

48. *Matter of R-A-*, 22 I. & N. Dec. 906, 928 (B.I.A. 1999) (en banc).

49. *Id.* at 920.

50. Karen Musalo, *Matter of R-A-: An Analysis of the Decision and Its Implications*, 76 INTERPRETER RELEASES 1177, 1185 (1999).

51. *Matter of R-A-*, 22 I. & N. Dec. at 920–24.

relationship.”⁵² The BIA applied the three-part particular social group test but this time its application reflected domestic violence’s systemic nature. First, the BIA determined gender and sex are immutable characteristics.⁵³ It further reasoned that marital status may independently be an immutable characteristic when it prevents an individual from leaving the relationship.⁵⁴ Here, marital status was an immutable characteristic because religious, cultural, familial, and legal circumstances prevented Ms. Alvarado-Pena from leaving her relationships.⁵⁵

Furthermore, the BIA determined Ms. Alvarado-Pena’s social group met the particularity and social distinctness requirements. Because the terms “married,” “women,” and “unable to leave the relationship” “have commonly accepted definitions within Guatemalan society,” they are particular.⁵⁶ The BIA explained that a society may consider such domestic violence survivors a distinct group when it recognizes the need to protect them.⁵⁷ Courts may determine whether the particular society “has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors.”⁵⁸ In this case, the BIA reasoned Guatemalan society considers survivors a distinct group because laws addressing domestic violence exist.⁵⁹ Yet, since “machismo and family violence” underwrite Guatemalan culture, Guatemalan law and law enforcement do not adequately address domestic violence.⁶⁰ Accordingly, through recognizing domestic violence’s systemic nature, the BIA approved a domestic violence-based asylum claim.

In 2018, then-Attorney General Jeff Sessions vacated *Matter of A-R-C-G-* in *Matter of A-B-*.⁶¹ In his opinion, Sessions reversed the BIA’s grant of asylum to Ms. A-B- and reframed domestic violence as a private matter. He wrote that while victims of “private criminal activity” may meet particular social group’s requirements in “exceptional circumstances,”⁶² they generally do not satisfy its statutory requirements.⁶³ Accordingly, he prescribed that “[g]enerally, claims by aliens pertaining to domestic

52. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 388 (B.I.A. 2014).

53. *Id.* at 392, 394.

54. *Id.* at 392–93.

55. *Id.*

56. *Id.* at 393.

57. *Id.* at 394–95.

58. *Id.* at 394.

59. *Id.*

60. *Id.*

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

62. *Id.* at 317.

63. *Id.* at 320.

violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”⁶⁴ Furthermore, he wrote that the government must have either “*condoned the . . . actions* or at least demonstrated a *complete helplessness* to protect the victim[.]”⁶⁵

Just two days after Sessions issued this opinion, the U.S. Customs and Immigration Service (USCIS) released a policy memorandum providing guidance for its officers in conducting credible fear interviews. The memorandum instructed USCIS officers that:

In general . . . claims based on membership in a putative particular social group defined by the members’ vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.⁶⁶

By instructing its officers to conduct interviews according to *Matter of A-B-*, the USCIS used Sessions’ dicta to categorically foreclose domestic violence-based asylum claims. Furthermore, the memorandum bound officers by stating it supersedes previous asylum guidance inconsistent with its terms.⁶⁷

Three months later, a federal judge struck down the memorandum in *Grace v. Whitaker*. The judge wrote that due to the society-specific nature of asylum claims, adjudicators must individually analyze whether a particular social group is distinct.⁶⁸ They may not dismiss a claim on the grounds that the group generally is not distinct because the possibility remains that “under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society.”⁶⁹ The judge reasoned:

[T]here *cannot be a general rule* when it comes to determining whether a group is distinct . . . Thus, to the extent the Policy Memorandum imposes a general circularity rule foreclosing such claims *without taking into account the independent characteristics presented in each case*, the

64. *Id.*

65. *Id.* at 337 (emphasis added) (internal quotations omitted).

66. Joshua Breisblatt, *USCIS Is Redefining Who Qualifies For Asylum in This New Guidance*, IMMIGR. IMPACT (July 18, 2018), <https://immigrationimpact.com/2018/07/18/uscis-redefining-qualifies-asylum-guidance/#.X6C-T1NKhQI> [<https://perma.cc/R9KK-5E3Q>] (citing Policy Memorandum from USCIS 6 (July 11, 2018), <https://www.uscis.gov/sites/default/files/document/memos/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF> [<https://perma.cc/3ANK-VPLP>]).

67. *Id.*

68. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 133 (D.D.C. 2018).

69. *Id.* (citing *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 242 (B.I.A. 2014)).

rule is arbitrary, capricious, and contrary to immigration law.⁷⁰

Accordingly, the judge issued a permanent injunction prohibiting the USCIS from using the memorandum to guide credible fear interviews.⁷¹ While limited to an early stage of proceedings, *Grace v. Whitaker* proved that domestic violence may generally constitute a cognizable asylum claim.

Since *Grace*, two more significant developments have occurred—albeit in opposite directions. Six days before the Trump administration left office, then-Acting Attorney General Jeffrey Rosen issued another decision on *Matter of A-B-* (“*Matter of A-B- II*”). This decision reaffirmed *Matter of A-B-*’s initial holdings and attempted to rebut conflicting circuit court opinions applying *Matter of A-B- I*. In June 2021, now-Attorney General Merrick Garland vacated both *Matter of A-B- I* and *II* in their entirety. These decisions, he wrote, were legally flawed and wrongly denied claims. The decisions’ “broad language” could create “a strong presumption” against non-state actor claims, which discouraged case-by-case adjudication.⁷² However, he left open the questions of law *A-B-* sought to address. Pending forthcoming rulemaking, he instructed immigration judges and BIA to follow pre-*A-B-* precedent, including *Matter of A-R-C-G*.⁷³

Ultimately, though the United States currently recognizes that domestic violence forms a cognizable asylum claim, the process remains difficult for survivors. While courts have recognized domestic violence claims since 2014, asylum seekers must meet the narrowly-prescribed definition of particular social group. Judges lack regulatory guidance for assessing domestic violence-based claims. Critical questions of law remain unsettled. This complicated law has caused wide variation in grant rates for survivors, suggesting a survivor’s fate depends “not on the consistent application of objective principles, but rather on the view of her individual judge.”⁷⁴ Moreover, while *Matter of A-B-* no longer binds adjudicators, it markedly reflects a pervasive belief that domestic violence constitutes a private matter, unworthy of asylum.⁷⁵

70. *Id.* (emphasis added).

71. *Id.* at 146.

72. *Matter of A-B-*, 28 I. & N. Dec. 307, 309 (A.G. 2021).

73. *Id.*

74. Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN’S L.J. 107, 148 (2013).

75. See, e.g., Marouf, *Constricting Particular Social Groups*, *supra* note 23, at 512–15; Nora Snyder, Note, *Matter of A-B-*, *LGBTQ Asylum Claims, and the Rule of Law in the U.S. Asylum System*,

C. *The Trump Administration's New Rules*

On June 15th, 2020, the Department of Justice and Department of Homeland Security proposed a rule titled *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review* and provided Notice of Proposed Rulemaking.⁷⁶ The departments' rules seek to facilitate efficient review of claims and aid those "in true need of protection from harm."⁷⁷ The Rules suggest widespread changes across the system, including the standards for application adjudication of asylum and statutory withholding of claims. The Rules were finalized on December 11, 2020.⁷⁸ While the departments claim to have accounted for the nearly 90,000 comments⁷⁹ submitted by the public before finalizing the Rules, the final version has "few substantive changes" from the original.⁸⁰ The Rules were scheduled to take effect on January 11, 2021,⁸¹ numbered 8 C.F.R. Parts 1003, 1208, and 1235.

The Rules would have replaced certain past interpretations of asylum law.⁸² The departments sought to further define "particular social group" because it remained undefined by Congress, the Convention, and the subsequent Refugee Protocol.⁸³ Among other changes, the Rules outline nine non-exhaustive bases for particular social groups that the Secretary of Homeland Security and the Attorney General "in general, would not favorably adjudicate claims of aliens who claim membership in."⁸⁴ The bases include: "interpersonal disputes of which governmental authorities

114 NW. U. L. REV. 809, 837–52 (2019) (analyzing Matter of A-B-'s current and potential effects on LGBTQ asylum claims). To date, federal courts varied in the extent to which they adopted, if at all, Sessions' opinion. See Jastram & Maitra, *supra* note 2, at 59–68 (describing federal courts' treatment of Matter of A-B-).

76. *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36264 (proposed June 15, 2020) (to be codified at 8 C.F.R. pts. 1003, 1208, 1235) [hereinafter Finalized Rule].

77. *Id.* at 36265 (emphasis added) (internal citation omitted).

78. *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80274, 80274 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 1003, 1208, 1235).

79. For a compilation of public comments, see *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, REGULATION.GOV, <https://www.regulations.gov/document/EOIR-2020-0003-0001> [<https://perma.cc/R9BB-Y2AT>] (last visited Feb. 10, 2022).

80. *DHS and DOJ Final Rule on Procedures for Asylum, Withholding of Removal, and CAT Protection*, AM. IMMIGR. LAWS. ASS'N (Dec. 11, 2020), <https://www.aila.org/infonet/joint-eoir-and-uscis-final-rule-on-procedures> [<https://perma.cc/8PC3-5AGA>].

81. *Id.*

82. Finalized Rule, *supra* note 76, at 36265.

83. *Id.* at 36277–78 (citing *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) ("Thus, neither the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase 'particular social group.'").

84. *Id.* at 36279.

were unaware or uninvolved”⁸⁵ and “private criminal acts of which governmental authorities were unaware or uninvolved.”⁸⁶ However, the Rules left open the possibility that “in rare circumstances,” such facts may form a particular social group.⁸⁷

The Rules lived a short life. On December 21, 2020, a group of plaintiffs challenged the Rules under the Administrative Procedure Act.⁸⁸ On January 8, 2021, a federal judge issued a preliminary injunction enjoining the Rules from going into effect.⁸⁹ The Biden administration took office shortly after and did not appeal.

III. ANALYSIS

Section III.A.1 argues that the Rules foreclose domestic violence-based claims by imposing an insurmountable standard. Section III.A.2 argues that this foreclosure impermissibly constricts the particular social ground. Finally, Section III.B proposes a workable framework for practitioners and judges to strengthen domestic violence-based claims.

A. *The Rules Foreclose Domestic Violence-Based Asylum*

1. Domestic Violence Cannot Meet the Standard of Government Involvement or Awareness

While the departments did not define the phrase “unaware or uninvolved,” a narrow definition forecloses domestic violence claims. These claims generally concern non-state persecutors—such as intimate partners—rather than the military or police.⁹⁰ Government authorities are not directly involved in domestic violence. They do not threaten, batter, assault, rape, coerce, or control domestic violence survivors. Individual abusers, rather than government authorities in their official capacity, commit acts of domestic violence. Likewise, government authorities are unaware of specific instances of domestic violence. Government

85. *Id.* (citing *Matter of Pierre*, 15 I. & N. Dec. 461, 462–63 (B.I.A. 1975); *see also* *Gonzalez-Posadas v. Att’y Gen. of U.S.*, 781 F.3d 677, 685 (3d Cir. 2015)).

86. *Id.* (citing *Matter of A-B-*, 27 I. & N. Dec. 316, 343–44 (A.G. 2018)); *see also* *Gonzales-Veliz v. Barr*, 938 F.3d 219, 230–31 (5th Cir. 2019).

87. *Id.*

88. *Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec.*, 512 F. Supp. 3d 966, 971 (N.D. Cal. 2021).

89. *Id.* at 977.

90. Even when an abuser holds a government office and exercises his political authority to perpetuate domestic abuse and evade its legal consequences, courts still categorize the persecution as non-state actor persecution. *See, e.g.*, *Matter of Pierre*, 15 I. & N. Dec. 461, 461–63 (B.I.A. 1975).

authorities typically are aware that domestic violence occurs in their countries. Yet, because domestic violence occurs in the home, authorities are generally unaware of specific instances of domestic violence unless survivors report them.

However, survivors should not be denied asylum because they did not file police reports. While the departments do not specify which level of government authority the standard requires, the standard is high regardless. In countries with ineffective criminal justice systems, police officers may not take reports. Without police reports, the government will be unaware of a specific crime. Accordingly, under this rule, no criminal acts will qualify survivors for asylum in countries with ineffective criminal justice systems because governments are unaware of most criminal acts. Furthermore, many asylum seekers did not report incidents of domestic violence to their local police stations.⁹¹ Underreporting of domestic violence occurs for many reasons. Police stations may not answer calls for help.⁹² Survivors may lack the resources necessary to report their abuse to police stations.⁹³ Survivors may live in remote areas, unable to reach distant police stations.⁹⁴

Some survivors may not attempt to report domestic violence. Many countries do not criminalize domestic violence.⁹⁵ In countries that do, cultural and familial pressures or stigmas may discourage survivors from involving police in “family matters.”⁹⁶ Due to their past experiences with police corruption and lack of police responsiveness, survivors may believe

91. WORLD HEALTH ORG., GLOBAL STATUS REPORT ON VIOLENCE PREVENTION 2014, at 13 (2014) (stating that underreporting impedes documenting the prevalence of violence against women) [hereinafter WHO REPORT], <https://www.who.int/publications/i/item/9789241564793> [<https://perma.cc/BLV7-JSCQ>].

92. See, e.g., *Antonio v. Barr*, 959 F.3d 778, 785 (6th Cir. 2020) (finding that the applicant called the police for help on two separate occasions but they never came); *Matter of R-A-*, 22 I. & N. Dec. 906, 909 (B.I.A. 1999), *vacated*, 22 I. & N. Dec. 906 (Op. Att’y Gen. 2001) (“Twice, [Alvarado] called the police, but they never responded.”); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 394 (B.I.A. 2014) (noting that while Guatemalan law prohibits domestic violence, “enforcement can be problematic because the National Civilian Police often failed to respond to requests for assistance related to domestic violence”) (internal quotations omitted).

93. See, e.g., *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1089 (9th Cir. 2020) (noting that the applicant could not report her abuse because “she lacked the resources to do so”).

94. See, e.g., *id.* (noting that the applicant could not report her abuse because “[h]er mountain village was quite remote, with the nearest police station two hours away by car”); see also, e.g., Tara Urs, *Coercive Feminism*, 46 COLUM. HUM. RTS. L. REV. 85, 121 (2014) (“Given the nature of rural life, the nearest police office is likely to be far from the village and accessible only by unpaved roads.”).

95. See *infra* notes 187–92, 197 and accompanying text.

96. UN WOMEN, PROGRESS OF THE WORLD’S WOMEN 2019–2020: FAMILIES IN A CHANGING WORLD 191 (2020) [hereinafter UN WOMEN, PROGRESS OF THE WORLD’S WOMEN].

police officers will not assist them.⁹⁷ Abusers may cause survivors to believe police officers will not believe their allegations.⁹⁸ Abusers may intimidate or threaten survivors into not reporting.⁹⁹ Sometimes, survivors may face life-threatening retaliation for attempting to report.¹⁰⁰ In nations with authoritarian regimes, survivors may distrust police officers.

97. See, e.g., WORLD HEALTH ORG., MULTI-COUNTRY STUDY ON WOMEN’S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN 87 (2005) (citing a survey of 24,000 women from various countries and specifying that when asked why they did not report domestic abuse to the police women commonly responded “‘nobody will believe me’ or ‘they will not be able to help,’” thus “highlighting the credibility gap of many services”); *Alonzo-Rivera v. U.S. Att’y Gen.*, 649 F. App’x 983, 985–86 (11th Cir. 2016) (noting that the applicant had “lost confidence in the police as a child, while living in a neighborhood known for gang violence. It appeared to her the police were complicit with gang activities, and terrible things happened in the neighborhood despite the presence of a police station”); *Davila v. Barr*, 968 F.3d 1136, 1142 (9th Cir. 2020) (“Davila testified that she did not make additional attempts to contact the police because her first one had so utterly failed, and because she reasonably believed any further calls would have the same result: ‘I called the police once, and from then on I just resigned to keep taking it because they didn’t help me.’”); *Alonzo-Rivera*, 649 F. App’x at 988 (“Because of the lack of response to domestic-violence issues, many Honduran women do not report instances of domestic abuse; they believe it would offer no relief and only inflame their abusers.”); *Alvarado v. Barr*, 832 F. App’x 181, 183 (4th Cir. 2020) (“[D]ue to frequent cooperation between police and gangs, law enforcement in El Salvador likely would not provide Alvarado with protection if she returned.”); *Ortez-Cruz v. Barr*, 951 F.3d 190, 194 (4th Cir. 2020) (“Ortez-Cruz didn’t report the attack to the police because she thought they would do nothing.”).

98. See, e.g., *Alonzo-Rivera*, 649 F. App’x at 986 (noting that the applicant had not previously reported her abuser because he “had told her no one would believe her if she tried to report him”); *Rodriguez de Ayala v. Barr*, 819 F. App’x 487, 489 (9th Cir. 2020) (“Rodriguez credibly testified that when her husband threatened to kill her, he warned her that she ‘shouldn’t even dare to call the police because he was the police,’ and the police would not pay attention to her . . . that the police in her community ‘help each other’ and ‘wouldn’t listen’ to her reports about her husband’s domestic violence . . . that the police would not protect her, specifically because [her husband] was a police officer.”); *Alvarado v. U.S. Att’y Gen.*, 829 F. App’x 492, 495 (11th Cir. 2020) (“Alvarado said she never reported Menjivar to Honduran police because . . . Menjivar said he was friends with the police and paid them off.”).

99. See, e.g., *Sicaran v. Barr*, 979 F.3d 210, 213 (4th Cir. 2020) (“Sicaran testified that she wanted to file a complaint with the police but feared doing so because she knew [her abuser] was watching her.”); *Velasquez-Gaspar v. Barr*, 976 F.3d 1062, 1063–64 (9th Cir. 2020) (“Fearing retaliation from Gonzales, Velasquez-Gaspar declined [to report the abuse].”); *Juarez-Lopez v. Gonzales*, 235 F. App’x 361, 363 (7th Cir. 2020) (“[S]he did not report the rape to the police or to her parents because de la Pena threatened to kill her parents if she did.”); *Ortez-Cruz*, 951 F.3d at 194 (noting that the applicant did not report the incident because she feared her husband would “retaliate by harming her family”).

100. *Alvarado*, 829 F. App’x at 495 (“Alvarado said she never reported Menjivar to Honduran police because (1) he had hurt her with a knife when she tried to file a complaint against him before, (2) she knew he had previously killed two people.”); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014) (“On one occasion, the police came to her home after her husband hit her on the head, but he was not arrested. Subsequently, he threatened the respondent with death if she called the police again.”).

Particularly, racial minorities,¹⁰¹ religious minorities,¹⁰² and LGBTQ people¹⁰³ may fear bringing the police into their homes will endanger their family and community. As many survivors do not report domestic violence, even local government authorities often lack knowledge of specific instances of domestic violence.

However, the standard may require a government authority higher than local police officers. The departments cite *Matter of A-B-* as support for the Rule. Yet, the local police were aware of Ms. A-B-'s abuse.¹⁰⁴ Ms. A-B- told them “everything that had happened to [her].”¹⁰⁵ After one incident, the police detained her ex-husband for several days.¹⁰⁶ Her neighbors called the police “at least [ten] times” on subsequent

101. See, e.g., *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1075, 1077, 1084–85 (9th Cir. 2020). Minorities often feel hesitant to request police protection against violence. As minorities often experience ruthless police brutality, survivors may fear bringing the police into their homes will further marginalize their family and community. This phenomenon persists globally. See, e.g., Amelia Cheatham & Lindsay Maizland, *How Police Compare in Different Democracies*, COUNCIL ON FOREIGN RELS. (Apr. 21, 2021, 1:04 PM), <https://www.cfr.org/backgrounder/how-police-compare-different-democracies#chapter-title-0-7>; see also Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 149 (2003) (“[T]he South African state is often the perpetrator of violence against black South Africans. As such, it is axiomatic that black South African women would be reluctant to involve the police in domestic violence situations when contact with the police could expose their families and themselves to violence at the hands of the state.”).

102. See, e.g., Reuters Staff, *Indian minorities panel faults police role in Delhi riots targeting Muslims*, REUTERS (July 17, 2020, 6:46 AM), <https://www.reuters.com/article/us-india-citizenship-report/indian-minorities-panel-faults-police-role-in-delhi-riots-targeting-muslims-idUSKCN2411JA> [<https://perma.cc/4VQM-9ASU>] (noting that police officers refused to intervene in hate crimes against Muslims); see also Ajai Singh, *Footage of Indian police brutality against Sikh causes outrage*, SIKH PRESS ASS'N (Aug. 14, 2020), <https://www.sikhpa.com/footage-of-police-brutality-against-sikh-in-india-causes-outrage/> [<https://perma.cc/9VGJ-PG9A>].

103. See generally U.N. HUMAN RIGHTS COUNCIL, REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS ON DISCRIMINATORY LAWS AND PRACTICES AND ACTS OF VIOLENCE AGAINST INDIVIDUALS BASED ON THEIR SEXUAL ORIENTATION AND GENDER IDENTITY 9–10 (2011), https://www.ohchr.org/documents/issues/discrimination/a.hrc.19.41_english.pdf [<https://perma.cc/44F2-XFT9>] (detailing incidents in which (1) LGBTQ individuals claimed to distrust police, (2) police “failed to take reasonable measures to prevent violence” against LGBTQ individuals, and (3) police “reportedly participated” in acts of violence against LGBTQ individuals).

104. The departments also cite several other cases as support for the rule. While this Comment only discusses *Matter of A-B-* because it was the most high-profile case cited, the police were also aware of the applicants' abuse in the other cases cited. See *Matter of Pierre*, 15 I. & N. Dec. 461, 462–63 (B.I.A. 1975); *Gonzalez-Posadas v. Att’y Gen. of U.S.*, 781 F.3d 677, 685–86 (3d Cir. 2015); *Gonzales-Veliz v. Barr*, 938 F.3d 219, 225 (5th Cir. 2019).

105. Human Rights Watch, *She Escaped Brutal Domestic Violence—Now the US Government Wants to Send Her Back* at 1:49–:53, YOUTUBE (Jan. 28, 2019), <https://www.youtube.com/watch?v=QRQpXRWlQL0>.

106. *Matter of A-B-*, at *3 (B.I.A. Dec. 8, 2016), <https://drive.google.com/file/d/1omC8I1KHLk-77hqqOY2XuLZqjmICVHLZ/edit> [<https://perma.cc/NF48-2LAP>] (unpublished opinion, redacted, and published by counsel).

occasions.¹⁰⁷ Her ex-husband’s brother, a local police officer, threatened her if she attempted to leave his brother.¹⁰⁸ While the police did not prevent the abuse or protect Ms. A-B-, they certainly were aware of the abuse. These facts suggest even police awareness, the most-accessible government authority, may not meet the Rule’s standard. As domestic violence typically cannot meet the Rule’s higher standard, the Rules accomplish their goal: foreclosing domestic violence-based asylum.

Accordingly, the Rule renders often severe cases ineligible for asylum. For example, in one reported case, Laila’s husband abused her for 30 years.¹⁰⁹ He grabbed her by the neck and strangled her.¹¹⁰ He beat her with a pipe.¹¹¹ He threw whatever he was holding at her, cutting her veins, and leaving “scars from stitches and open gashes.”¹¹² He forced her to have back-alley abortions until her doctor warned “that in another week she would have been dead.”¹¹³ She knew if she sought police protection, they would say “[i]t’s a personal matter.”¹¹⁴ Societal stigmas ruled out divorce. While she worried she would not survive much longer, societal norms prescribed that “when the girl gets married, you don’t come out of your husband’s house until you’re dead.”¹¹⁵ Thankfully, Laila fled and sought asylum. Yet the Rules would deny Laila’s claim, even though her husband would kill her if she returned. She cannot meet the Rules’ standard because government authorities remained unaware and uninvolved in the abuse. Accordingly, the Rules would dismiss Laila’s claim as an “interpersonal dispute,” ignoring the societal norms and legal permission that underwrite it.

2. The Rules Impermissibly Constrict the Particular Social Group Ground

Domestic violence is precisely the type of persecution that merits international protection. By foreclosing domestic violence-based claims, the Rules diverge from decades of research, legal precedent, and international obligations.

107. *Id.*

108. *Id.*

109. Miller, *supra* note 1.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

a. Domestic Violence Merits Asylum

While every domestic violence survivor does not qualify for asylum, domestic violence should form a particular social group in certain instances. Domestic violence exceeds interpersonal or private violence. Decades of research has identified societal and cultural factors that increase domestic violence's likelihood.¹¹⁶ These factors include: women's economic and social disempowerment, traditional customary gender roles, community attitudes that promote male entitlement and dominance, and lack of social services for survivors.¹¹⁷ In many countries with these factors, societal norms inculcate beliefs that men should dominate and control women.¹¹⁸ This belief, the highest risk-factor for domestic violence, inhibits women from reporting domestic violence and seeking support.¹¹⁹

Many governments institutionalize these hierarchical relations.¹²⁰ In countries where societal norms promote domestic violence, political authorities likewise view it as "a legitimate reprisal rather than as violence."¹²¹ Even in countries that criminalize domestic violence, authorities do not enforce laws against it.¹²² Accordingly, gender subordination¹²³ underwrites domestic violence and the state's subsequent

116. See, e.g., UN WOMEN, PROGRESS OF THE WORLD'S WOMEN, *supra* note 96, at 184–87, 192; U.N. SECRETARY-GENERAL, IN-DEPTH STUDY ON ALL FORMS OF VIOLENCE AGAINST WOMEN, U.N. Doc A/61/122/Add. 1, 27–36 (July 6, 2006) [hereinafter UN, IN-DEPTH STUDY]; *The Geneva Declaration, Chapter 3: Lethal Violence Against Women and Girls* 93, in *Global Burden of Armed Violence* (2015), http://www.genevadeclaration.org/fileadmin/docs/GBAV3/GBAV3_Ch3_pp87-120.pdf [<https://perma.cc/UW9M-GV7L>]; Lori Heise & Andreas Kotsadam, *Cross-National and Multilevel Correlates of Partner Violence: An Analysis of Data from Population-Based Surveys*, 3 *Lancet Glob. Health* 2015 E332–40 (2015).

117. UN WOMEN, PROGRESS OF THE WORLD'S WOMEN, *supra* note 96, at 184–87; Heise & Kotsadam, *supra* note 116; UN, IN-DEPTH STUDY, *supra* note 116, at 27–36.

118. UN WOMEN, PROGRESS OF THE WORLD'S WOMEN, *supra* note 96, at 186, 188.

119. See *id.* at 186; see also Heise & Kotsadam, *supra* note 116.

120. See Marouf, *Constricting Particular Social Group*, *supra* note 23, at 513; see also CATHARINE A. MACKINNON, *SEX EQUALITY* 2 (2d ed. 2007) ("The second-class status of women as a group is widely documented to be socially and legally institutionalized, cumulatively and systematically shaping access to life chances on the basis of sex."); Robert A. Dahl, *Equality Versus Inequality*, 29 *PS: POL. SCI. & POL.* 639, 643 (1996) ("[T]he subordination of women . . . [is] institutionalized and enforced by an overwhelming array of the most powerful forces available [including] individual and collective terror and violence, official and unofficial; law, custom, and convention; and social and economic structures . . . [and is] backed up by the state itself.").

121. UN WOMEN, PROGRESS OF THE WORLD'S WOMEN, *supra* note 96, at 186; see also *infra* notes 166–70 and accompanying text.

122. See *infra* notes 171–75 and accompanying text.

123. While gender is a factor that contributes to domestic violence, "[s]uffering is not necessarily a fixed and universal experience that can be measured by a single rod." BENJAMIN R. BARBER,

unwillingness to prevent domestic violence.¹²⁴ Because societal norms and legal permission—rather than individual family dynamics—perpetuate domestic violence, it exceeds private violence and should merit asylum.

Furthermore, public/private distinctions reproduce gender subordination.¹²⁵ By excluding harm occurring in the home from state responsibility, these distinctions exempt abusers from legal responsibility for domestic violence.¹²⁶ U.S. criminal law has abandoned distinctions between public and private harm by expanding state protections for domestic violence survivors.¹²⁷ Likewise, asylum law should not exempt domestic violence from the realm of state protection simply because non-state actors perpetuate it. Rather, asylum law should reflect that state failure to protect survivors constitutes a state-sanctioned human rights violation, even when government authorities are not directly involved.

LIBERATING FEMINISM 30 (1975). Factors such as race, class, religion, and sexual orientation

create a diversity of experience that determines the extent to which sexism will be an oppressive force in the lives of individual women. Sexism as a system of domination is institutionalized, but it has never determined in an absolute way the fate of all women in this society. Being oppressed means the absence of choices Many women in this society do have choices Many women do not join organized resistance against sexism precisely because sexism has not meant an absolute lack of choices.

Id. at 5; see also UN WOMEN, PROGRESS OF THE WORLD’S WOMEN, *supra* note 96, at 185.

124. See, e.g., Marouf, *Constricting Particular Social Group*, *supra* note 23, at 513; see also Cianciarulo, *supra* note 46, at 137.

125. Feminist scholars argue that public and private distinctions presume violence occurring in the public sphere is more egregious than violence in the home. This presumption denies legal protection or redress to harm occurring in “the zone marked ‘private’ where the state may not tread and where a good deal of women’s subordination and violation transpires.” Wendy Brown, *Finding the Man in the State*, 18 FEMINIST STUD. 7, 23 (1992); see also, e.g., Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y.U.J. INT’L L. & POL. 201, 228 (1994); Margareth Etienne, *Addressing Gender-Based Violence in an International Context*, 18 HARV. WOMEN’S L.J. 139, 158 (1995).

126. See generally Brown, *supra* note 125, at 18 (describing “the difficulties of establishing marital rape as rape, wife battering as battery, or child abuse as abuse” that arise from public and private distinctions); see also Elizabeth M. Schneider, *Domestic Violence, Citizenship, and Equality*, in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP, 378–89 (Linda C. McClain & Joanna L. Grossman eds., 2009).

127. See generally Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343, 407–11 (2019); Rabin, *supra* note 46, at 111–12.

b. Decades of International Obligations and Legal Precedent Require Case-By-Case Adjudication

The Rules depart from the well-established practice of adjudicating particular social groups on a case-by-case basis. This approach risks denying meritorious claims. UNCHR, INA, and BIA precedent all demonstrate that, because each society is unique, a valid claim from one society does not necessarily constitute a valid claim from another society.¹²⁸ For this reason, the UNHCR proscribes establishing “a general rule as to what cumulative reasons can give rise to a valid claim to refugee status.”¹²⁹ Adjudicators must instead evaluate applications on a case-by-case basis, considering “all the circumstances, including the particular geographical, historical and ethnological context.”¹³⁰ U.S. asylum law reflects these principals.¹³¹

Yet, the departments impose near-blanket Rules that exclude categories of groups without requisite case-by-case analysis. This approach cannot accurately distinguish meritorious claims from frivolous ones. Domestic violence may present a cognizable claim in some societies, but not others. Societal and cultural misogyny increases domestic violence’s likelihood.¹³² In societies where such misogyny is pervasive, governments may not protect domestic violence survivors.¹³³ Because each society yields unique norms, general rules cannot determine whether domestic violence constitutes grounds for asylum. Rather, adjudicators must determine, through individual analysis, whether domestic violence presents a cognizable claim in the applicant’s society.

While the departments claim the Rules do not “entirely foreclose the possibility of establishing an asylum claim on those bases,”¹³⁴ the

128. *See, e.g.*, UNHCR Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees 3 (2002) [hereinafter UNHCR, Gender Guidelines], <https://www.refworld.org/docid/3d36f1c64.html>; 8 U.S.C. § 1158; *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251 (B.I.A. 2014); *see also, e.g.*, *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (“To be consistent with its own precedent, the BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity.”).

129. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 53 (1979) [hereinafter UNHCR Handbook], <https://www.unhcr.org/4d93528a9.pdf> [<https://perma.cc/X9XU-JJ8Y>].

130. *Id.*

131. *See supra* notes 29–42, 74–76 and accompanying text.

132. *See supra* notes 116–26 and accompanying text.

133. *Id.*

134. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274, 80314 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 1003, 1208, 1235).

possibility appears likely. First, a federal judge in *Grace v. Whitaker* determined a similarly-worded rule imposed a near-blanket, general rule at the credible fear stage.¹³⁵ The same reasoning suggests the Rules would impose a near-blanket, general rule at the claim adjudication stage. Second, the departments do not enumerate any exceptions to the Rules. Furthermore, they provide no guidance on when to grant exceptions beyond stating that “rare circumstances” may warrant them. Yet, by definition, if adjudicators may only rarely grant exceptions, the Rules foreclose the overwhelming majority of claims.

Moreover, if the Rules require adjudicators to continue to individually analyze each claim, then the additional list should serve no purpose. Rather, since the departments included it, the list likely promotes categorically denying claims in lieu of individual analysis. The Rules’ purported justification supports this likelihood. The departments claim the rules promote efficiency and reduces the time spent adjudicating claims. Yet, the departments will not preserve resources by conducting the same analysis as prior practice. Instead, the Rules likely would preserve time and resources by permitting adjudicators to surpass case-by-case analysis.

B. A Framework to Strengthen Domestic Violence-Based Claims Under the New Rule

This Comment argues that a government authority involves itself in domestic violence whenever it tolerates, permits, or promotes domestic violence. Accordingly, asylum judges should attribute involvement upon foreign governments for failing to prevent persecution.

1. The Framework: Elements and Policy Considerations

a. Elements: A Framework to Establish Government Involvement in Domestic Violence

This Framework¹³⁶ argues that government authorities have an

135. 344 F. Supp. 3d 96, 133 (D.D.C. 2018); *see supra* notes 68–71 and accompanying text.

136. This Comment bases its framework on the 1995 and 2020 declarations by the Commission on the Status of Women (CSW), a United Nations women’s agency under the Economic and Social Council. The Council adopted the 2020 declaration for the 25th anniversary of the Fourth World Conference on Women. *See* UN, POLITICAL DECLARATION ON THE OCCASION OF THE TWENTY-FIFTH ANNIVERSARY OF THE FOURTH WORLD CONFERENCE ON WOMEN E/CN.6/2020/L.1 (2020) [hereinafter UN WOMEN, DECLARATION 2020], <https://undocs.org/en/E/CN.6/2020/L.1>. Furthermore, it reaffirmed the declarations of United Nations Fourth World Conference on Women,

affirmative duty to prevent and respond to domestic violence in the public and private spheres.¹³⁷ In light of this affirmative duty, a government's failure to act may constitute an action.¹³⁸ Aside from direct involvement,¹³⁹ this Framework describes three routes to impute responsibility upon government authorities for their failure to fulfill this duty: (1) failure to exercise due diligence to “prevent, investigate, and punish” incidents of domestic violence,¹⁴⁰ (2) failure to enact domestic legislation to punish and redress domestic violence,¹⁴¹ and (3) failure to ensure the protection and healing of survivors.¹⁴²

including the 1995 Beijing Declaration and Platform for Action. See UN, REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN E.96.IV.13, 180–208 (1995) [hereinafter UN WOMEN, DECLARATION 1995],

<https://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf> [https://perma.cc/Z46U-YUFT]. Declarations adopted by CSW must be adopted first by the UN Economic and Social Council. If implemented, the declarations operate at the UN General Assembly level. However, such declarations generally enjoy broad international support. For a detailed description of CSW's impact and enforcement potential, see Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 529–30 (1993).

137. UN WOMEN, DECLARATION 2020, *supra* note 136.

138. Lack of protection from serious abuse may amount to involvement:

If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution. Particular cases of domestic violence, or of abuse for reasons of one's differing sexual orientation, could, for example, be analysed in this context.

UNHCR, GENDER GUIDELINES, *supra* note 128, ¶ 15; see also OHCHR, GENERAL RECOMMENDATION NO. 35 ON GENDER-BASED VIOLENCE AGAINST WOMEN, UPDATING GENERAL RECOMMENDATION NO. 19 (2017), <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhslDcrOIUTvLRFDjh6%2fx1pWAeqJn4T68N1uqnZjLbtFua2OBKh3UEqIB%2fCyQIq86A6bUD6S2nt0Ii%2bndbh67tt1%2bO99yEEGWYpmnzM8vDxmwt> [https://perma.cc/PZA7-7K2M]. See generally CARIN BENNINGER-BUDEL, DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE (2008); see also Joanna Bourke-Martignoni, *The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence*, in DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 47, 48–51 (2008); see also generally Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 MICH. J. INT'L L. 312 (1991).

139. UN WOMEN, DECLARATION 1995, *supra* note 136.

140. *Id.* at 51 (stating that states must “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”).

141. *Id.* (stating that states must “enact and/or reinforce . . . domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence”).

142. *Id.* (stating that states must “take measures to ensure the protection of women subjected to violence, access to just and effective remedies, including . . . healing of victims, and rehabilitation of perpetrators”). While beyond the scope of this Comment, this argument would be remiss not to acknowledge decades of Black feminist scholarship regarding restorative justice. Advocates for

Furthermore, this Framework overcomes the argument that domestic violence exceeds asylum law’s scope because it is a “private issue.” Governments must protect individuals from domestic violence in both the public and private spheres. Procedurally, government authorities should not invoke “any custom, tradition or religious consideration to avoid their obligations with respect to [domestic violence’s] elimination.”¹⁴³ Substantively, governmental duties encompass all domestic violence, regardless of whether it occurs in “the home, the workplace, the community or society.”¹⁴⁴ Furthermore, these duties to domestic violence survivors exist regardless of “whether those acts are perpetrated by the State or by private persons.”¹⁴⁵

b. Opening the Floodgates?

Concerns that domestic violence survivors will flood the United States¹⁴⁶ should not justify categorically foreclosing domestic violence-based claims. The Refugee Convention obligates the United States to provide asylum to individuals fleeing threats to their life and liberty. It did not intend “floodgate concerns” to bar international protection when it

restorative justice have long argued that rehabilitation of perpetrators is essential to comprehensive efforts against domestic violence. Such strategies may provide more relief to the survivors than punitive measures. See generally ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT (2015) (questioning “whether incarcerating individual perpetrators does anything more than reproduce the very violence the perpetrators have allegedly committed” and recommending that strategies prioritize reparation and reconciliation over imprisonment). Furthermore, if strategies against domestic violence ought to provide redress to all survivors, they must not fuel the very structures that oppress the most marginalized among them. See, e.g., Kimberlé Williams Crenshaw, Andrea Ritchie, Rachel Anspach, Rachel Gilmer & Luke Harris, *Say Her Name: Resisting Police Brutality against Black Women*, AFR. AM. POL’Y F. (2015), <https://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/v/5edc95fba357687217b08fb8/1591514635487/SHNReportJuly2015.pdf> [<https://perma.cc/U8NG-X2PQ>]; see also Kimberlé Williams Crenshaw, *The Curious Resurrection of First Wave Feminism in the U.S. Elections: An Intersectional Critique of the Rhetoric of Solidarity and Betrayal*, in 3 GEXCEL WORK IN PROGRESS REPORT 27, 27–39 (2008), <https://www.diva-portal.org/smash/get/diva2:905649/FULLTEXT01.pdf#page=27> [<https://perma.cc/AS9D-P7Z6>]; see also generally Kimberly D. Bailey, *Criminal Law: Lost in Translation: Domestic Violence, “The Personal is Political,” and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255 (2010) (arguing that domestic violence strategies that seek redress exclusively through the criminal justice system undermine victim autonomy).

143. UN WOMEN, DECLARATION 1995, *supra* note 136, at 51.

144. *Id.*

145. *Id.*

146. See e.g., Kaitlin Ann Coyle, Note, *Particularly Abused: Closing the Backdoor on Certifiably Deniable Particular Social Group Asylum Claims*, 19 AVE MARIA L. REV. 179, 179 (2021) (“But what happens when the flock of people entering the U.S. becomes too much for the immigration courts to handle?”) (footnote omitted).

was otherwise due.¹⁴⁷ The accompanying guidelines stress that the purported group's size "is not a relevant criterion in determining whether a particular social group exists."¹⁴⁸

Furthermore, floodgate concerns arbitrarily discriminate against domestic violence survivors. Asylum law does not deny protection to other characteristics common among members of a particular society. The United States did not bar, for example, Russian Orthodox congregants fleeing religious persecution because they practiced the dominant religion in the former Soviet Union.¹⁴⁹ Opponents of the current Venezuelan dictator, Nicholas Maduro, may still claim asylum despite sharing their political opinion with a majority of Venezuelans.¹⁵⁰ Likewise, the United States should not bar domestic violence survivors simply because they comprise a numerous group.

Furthermore, for legal and practical reasons, individuals fleeing domestic violence will not flood the United States. While domestic violence remains rampant across the world, every survivor cannot meet legal burdens to qualify for asylum. Establishing membership in a particular social group is only one of several requirements that applicants must satisfy. Applicants must also demonstrate a well-founded fear of severe harm that amounts to persecution, a nexus between the persecution and the particular social group, and that their home country is unable or unwilling to protect them.¹⁵¹ Therefore, recognizing domestic violence-based particular social groups will not qualify all survivors for asylum.

Practically, few eligible survivors will seek asylum in the United

147. UNHCR HANDBOOK, *supra* note 129, at ¶ 42. While this Handbook does not have a binding "force of law," the Supreme Court maintains that it "provides significant guidance in construing [the 1951 Convention and the 1967] Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438–39 n.22 (1987); *see also McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981); *Matter of Frentescu*, 18 I. & N. Dec. 244, 245–47 (B.I.A. 1982); *Matter of Rodriguez-Palma*, 17 I. & N. Dec. 465, 468–69 (B.I.A. 1980).

148. UN, GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 25.

149. *Revelations from the Russian Archives: Anti-Religious Campaigns*, LIBR. OF CONG. <https://www.loc.gov/exhibits/archives/intn.html> [<https://perma.cc/FF8U-YLFC>] (last visited Jan. 19, 2022).

150. Philip Reeves, *Maduro Allies Set to Win Back Venezuela's Congress in Vote Boycotted by Opposition*, NPR (Dec. 5, 2020, 8:00 AM), <https://www.npr.org/2020/12/05/943106907/maduro-allies-set-to-win-back-venezuelas-congress-in-vote-boycotted-by-opposition> [<https://perma.cc/B92Z-K5ZB>].

151. *See supra* notes 16–20 and accompanying text. Every survivor cannot meet these requirements. *See generally* Elsa M. Bullard, Note, *Insufficient Government Protection: The Inescapable Element in Domestic Violence Asylum Cases*, 95 MINN. L. REV. 1867, 1883–88 (2011) (describing the challenges applicants face in proving government unwillingness or inability to control perpetrators).

States. Familial pressures and cultural stigmas may shame survivors into remaining in abusive relationships.¹⁵² Even when survivors attempt to flee, their abusers may prevent them from leaving. Abusive partners may limit the survivors’ access to communication, ability to leave the house, or control of finances.¹⁵³ Consequentially, only a small percentage of qualified survivors actually seek asylum. Of those that do, only a fraction flee to the United States instead of another country. Due to these legal and practical limitations, Canada has not seen an appreciable increase in domestic violence-based claims since it began recognizing them in 1993.¹⁵⁴ So too, the United States should not refool survivors to life-threatening conditions due to unfounded “floodgate” concerns.

2. Application of the Framework to Domestic Violence-Based Claims

A government’s failure to act contributes to domestic violence just as significantly as direct involvement. This significance demonstrates that even without direct government involvement, domestic violence constitutes a state-sponsored human rights violation.

a. Failure to Prevent, Investigate, and Punish Domestic Violence Incidents

By failing to exercise due diligence to prevent and punish acts of domestic violence, government authorities perpetuate domestic violence. Applicants may demonstrate such government failure to prevent domestic violence by describing the police’s failure to assist them. Police may fail to assist a survivor by refusing to provide requested protection¹⁵⁵ or by

152. UN WOMEN, *PROGRESS OF THE WORLD’S WOMEN*, *supra* note 96, at 188.

153. Cianciarulo, *supra* note 46, at 160–61; Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA.J. SOC. POL’Y & L. 119, 133 (2007) [hereinafter Musalo, *Fear of Floodgates*]; Marsden, *supra* note 25, at 2555.

154. Stephen Legomsky, *Gender-related violence should be grounds for asylum. Congress must fix this for women*, USA TODAY (Jan. 2, 2019, 4:00 AM), <https://www.usatoday.com/story/opinion/2019/01/02/gender-related-violence-grounds-asylum-refugee-women-congress-column/2415093002/> [<https://perma.cc/43JC-T6S5>]; Musalo, *Fear of Floodgates*, *supra* note 153, at 133.

155. *See, e.g.*, Cruz v. Barr, 830 F. App’x 827, 829 (9th Cir. 2020) (describing that the applicant twice sought help from police officers but on both instances they refused to assist her); Gonzales-Veliz v. Barr, 938 F.3d 219, 225 (5th Cir. 2019) (“Gonzales-Veliz testified that the police also told her that they could not help her as they lacked the personnel . . . points to a lack of resources and funding . . . on the part of the police force.”); Davila v. Barr, 968 F.3d 1136, 1138 (9th Cir. 2020) (finding that when a victim called the Nicaraguan police requesting protection, “police officers arrived at the house, took a bribe from Cevilla, and left without speaking to her”); Amended Declaration of L.R. in Support of Application for Asylum at 8, L.R. v. United States, 9 (B.I.A. Dec. 30, 2005), <http://graphics8>.

refusing to take further action when initial attempts fail.¹⁵⁶ In Bosnia and Herzegovina, for example, police refuse to intervene in domestic violence incidents involving the Romani minority.¹⁵⁷ Officers may refuse to document a report or intervene unless survivors pay them a bribe.¹⁵⁸ Likewise, police may inadequately enforce domestic violence law, thus permitting abuse to continue.¹⁵⁹ This conduct contributes to domestic violence and violates the government's duty to exercise due diligence to prevent and punish domestic violence.

Police officers may fail to exercise due diligence to investigate domestic violence. This duty encompasses both outright refusal to investigate and the protocol used to investigate. Some police officers refuse to believe survivors and thus do not investigate domestic violence.¹⁶⁰ Many police officers place high burdens on women to demonstrate they experienced abuse.¹⁶¹ One survivor stated she “felt like they would have to see me lying dead in the street to believe me—and even then they wouldn’t care.”¹⁶² Furthermore, police protocol may

nytimes.com/packages/pdf/us/20090716-asylum-support.pdf [https://perma.cc/T2VB-AFRY] (noting that, on several occasions, the police refused to protect applicant due to her husband's influence in the community); *Orellana v. Barr*, 925 F.3d 145, 148 (4th Cir. 2019) (“[Orellana] would wait for the police in a locked room with their two children and a sanitation bucket, while Garcia would pace outside with a machete. The police would not ‘show up to [her] house for hours,’ or sometimes not ‘show up’ at all.”) (second alteration in original); *Rivera-Geronimo v. U. S. Att’y Gen.*, 783 F. App’x. 941, 943 (11th Cir. 2019) (“She ‘tried to file a denunciation but [the police] laughed at [her] and . . . simply told [her] that [domestic abuse] was not a crime for them.’”) (alterations in original); *Matter of A-B-*, at *3 (B.I.A. Dec. 8, 2016), <https://drive.google.com/file/d/1omC8I1KHLk-77hqqOY2XuLZqjmICVHLZ/edit> [https://perma.cc/NF48-2LAP] (unpublished opinion, redacted, and published by counsel) (finding that Ms. A-B-'s neighbors called the police on nearly ten occasions, but they refused to intervene unless they “caught the ex-husband in the act or saw blood”).

156. *See, e.g.*, *Matter of R-A-*, 22 I. & N. Dec. 906, 909 (B.I.A. 2001) (“On three occasions, the police issued summons for her husband to appear, but he ignored them, and the police did not take further action.”).

157. U.S. DEP’T OF STATE, BOSNIA AND HERZEGOVINA 2018 HUMAN RIGHTS REPORT 1 (2018), <https://ba.usembassy.gov/wp-content/uploads/sites/270/2018-Human-Rights-Report-for-Bosnia-and-Herzegovina.pdf> [https://perma.cc/5XSJ-G3X9].

158. *See, e.g.*, Urs, *supra* note 94, at 121.

159. *Vasquez-Galdamez v. Barr*, 830 F. App’x 97, 98 (4th Cir. 2020) (“Petitioner filed a police report against Amaya-Alvarez. As a result, Amaya-Alvarez was arrested and detained for one day before being released.”); *see infra* notes 182–83 and accompanying text.

160. *See, e.g.*, U.S. DEP’T OF STATE, BRAZIL 2018 HUMAN RIGHTS REPORT 15 (2018), <https://www.state.gov/wp-content/uploads/2019/03/BRAZIL-2018.pdf> [https://perma.cc/CY62-LCHR] (“[A]llegations of domestic violence were not always treated as credible by police; a study in the state of Rio Grande do Sul found 40 percent of femicide victims had previously sought police protection.”); *see also* Gina Martinez, ‘I Don’t Live in Fear Anymore.’ 2 Women Granted Asylum in the U.S. for Domestic Abuse on Why They Risked Coming Here, TIME (June 20, 2018, 4:10 PM), <https://time.com/5313802/sessions-asylum-domestic-violence/>.

161. Martinez, *supra* note 160.

162. *Id.*

unreasonably delay investigations. Activists in Saudi Arabia allege that investigators “were hesitant to enter a home without permission from the male head of household,” even if he is the perpetrator.¹⁶³ In Guatemala, police “routinely wait twenty-four to seventy-two hours” to begin investigating reports of missing women.¹⁶⁴ This protocol delays prevention, risking survivors’ lives and violating the duty to exercise due diligence to protect individuals from domestic violence.

Alternatively, if applicants did not report the abuse to police,¹⁶⁵ they may establish government involvement by demonstrating the government systemically violates its duty. The applicant may demonstrate that the police would not have prevented, investigated, or punished the abuser had they reported the abuse. Some police departments lack the resources to investigate or prosecute domestic violence.¹⁶⁶ Many police officers categorically believe domestic violence is a personal, private matter and refuse to intervene in it.¹⁶⁷ Many police officers victim-blame and shame women for the abuse they suffered.¹⁶⁸ Furthermore, many police officers believe husbands have a right to abuse their partners. For example, one

163. U.S. DEP’T OF STATE, SAUDI ARABIA 2018 HUMAN RIGHTS REPORT 43 (2018), <https://www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf> [<https://perma.cc/65DF-NCT8>].

164. Karen Musalo, Elisabeth Pellegrin & S. Shawn Roberts, *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN’S L.J. 161, 185 (2010) [hereinafter Musalo, *Crimes Without Punishment*].

165. Providing this alternative is important because some survivors cannot report abuse to officers. See Bullard, *supra* note 151, at 1884–88; see also *supra* notes 96–108 and accompanying text.

166. *Ortez-Cruz v. Barr*, 951 F.3d 190, 195 (4th Cir. 2020) (“Victims generally do not report domestic violence because they are intimidated, and the police lack resources to prosecute abusers.”).

167. See, e.g., U.S. DEP’T OF STATE, KENYA 2018 HUMAN RIGHTS REPORT 34 (2018), <https://www.state.gov/wp-content/uploads/2019/03/Kenya-2018.pdf> [<https://perma.cc/R4PK-JDAW>] (“Except in cases of death, police officers generally refrained from investigating domestic violence, which they considered a private family matter.”); see, e.g., U.S. DEP’T OF STATE, PAKISTAN 2018 HUMAN RIGHTS REPORT 39 (2018), <https://pk.usembassy.gov/wp-content/uploads/sites/76/2018HumanRights.pdf> [<https://perma.cc/L4Z6-GFUA>] (“Police and judges were sometimes reluctant to take action in domestic violence cases, viewing them as family problems.”); U.S. DEP’T OF STATE, TAJIKISTAN 2018 HUMAN RIGHTS REPORT 22 (2018), <https://www.state.gov/wp-content/uploads/2019/03/TAJIKISTAN-2018.pdf> [<https://perma.cc/ZTH4-UKFX>] (“Authorities wishing to promote traditional gender roles widely dismissed domestic violence as a ‘family matter.’”); *Matter of R-A-*, 22 I. & N. Dec. 906, 909 (B.I.A. 1999); *In re A-R-C-G-*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014) (finding that the respondent contacted the police several times but was told that they would not interfere in a marital relationship); *Alonzo-Rivera v. U.S. Att’y Gen.*, 649 F. App’x 983, 988 (11th Cir. 2016) (“Police often view domestic violence as a purely private matter in which they should not intervene and ignore threats made against women.”).

168. Martinez, *supra* note 160 (“The police don’t do anything if you tell them that you’re being abused—especially if you’re a young woman. We’re blamed instead of believed. The police will interrogate you, and ask, ‘What were you doing there?’ It’s very clear that if you’re assaulted, the authorities will think that it’s your fault. So after my rape, I was scared and decided not to go to the police. I knew it would be a waste of time.”).

survivor stated that “police likewise subscribe to the view that women are second-class citizens; they often tell women who seek help they should go home and seek forgiveness or stop disobeying their husbands.”¹⁶⁹ Moreover, since many abusers have connections in local police departments, the police refuse to assist their victims.¹⁷⁰

Additionally, applicants may establish government failure to prevent, investigate, and punish domestic violence through demonstrating the government’s failure to enforce domestic violence laws. Legislation addressing domestic violence is insufficient; governments must also enforce the legislation, including its preventative, investigative, and punitive measures. While 87% of countries have enacted laws against domestic violence, only 44% report enforcing the laws.¹⁷¹ For example, while 78% of countries have enacted legislation allowing removal of a violent spouse from the home, only 38% enforce them.¹⁷²

Furthermore, incongruence between domestic violence law and family law may perpetuate domestic violence by preserving the abuser’s connection to the survivor. Restrictions on women’s rights to initiate divorce and limits on post-divorce rights inhibit women from leaving abusive relationships.¹⁷³ Similarly, judges may grant custody or visitation rights to abusive partners.¹⁷⁴ For example, an El Salvador court invalidated one survivor’s protection order and granted her abuser child custody.¹⁷⁵ Her abuser continued to abuse her children and continued to abuse her when she visited them. Accordingly, these legislative failures violate the governments’ duty to prevent domestic violence.

b. Failure to Enact Domestic Legislation to Punish and Redress Domestic Violence

Legislative failure to punish and redress domestic violence amounts to government involvement in domestic violence. By punishing perpetrators and redressing instances, legislation breaks the cycle of abuse.¹⁷⁶ By contrast, legislative failure to punish or redress domestic violence does not

169. See, e.g., *Alonzo-Rivera*, 649 F. App’x at 987–88.

170. See, e.g., *id.*; *Matter of Pierre*, 15 I. & N. Dec. 461, 461–62 (B.I.A. 1975); see also *W.M.V.C. v. Barr*, 926 F.3d 202, 206 (5th Cir. 2019) (“[T]he police, many of whom were close friends with Perez . . . observed Perez locking W.M.V.C. and the children in a backroom yet failed to intervene.”).

171. WHO REPORT, *supra* note 91, at 39.

172. *Id.*

173. UN WOMEN, PROGRESS OF THE WORLD’S WOMEN, *supra* note 96, at 86.

174. *Id.*

175. *Rodriguez de Ayala v. Barr*, 819 F. App’x 487, 489 (9th Cir. 2020).

176. UN WOMEN, PROGRESS OF THE WORLD’S WOMEN, *supra* note 96, at 190.

hold abusers accountable or redress instances of violence. For example, a survey of 185 countries worldwide notes that 58% countries do not criminalize marital rape.¹⁷⁷ Among these 108 countries, 74 have implemented provisions permitting survivors to file marital rape complaints.¹⁷⁸ Additionally, 34 countries neither criminalize nor permit criminal complaints regarding marital rape.¹⁷⁹ Furthermore, 12 countries provide exemptions in criminal rape statutes for perpetrators that marry the victims.¹⁸⁰ Some countries excuse domestic violence or femicide for women who committed adultery.¹⁸¹ These legislative failures to punish domestic violence violate governmental duties and permit domestic violence to occur.¹⁸²

Even when a country enacts legislation to address domestic violence, it may fail to adequately punish and redress domestic violence. Some legislation defines domestic violence too narrowly. For example, some legislation only addresses individual acts of domestic violence, rather than “a pattern of power and control.”¹⁸³ These definitions limit redress to extreme incidents while leaving quotidian, ongoing incidents that harm survivors unaddressed.¹⁸⁴ To adequately address domestic violence, legislation should define domestic violence to include coercive and controlling behavior.¹⁸⁵

c. Failure to Ensure the Protection and Healing of Survivors

By failing to ensure survivors receive adequate protection and healing, governments perpetuate domestic violence. Without adequate protection, abusers may continue to perpetuate violence. Without adequate healing, survivors may continue to feel the abuse’s effects. Applicants may demonstrate government failure to ensure protection and healing of survivors by testifying regarding their personal experiences or by

177. *Id.* at 26.

178. *Id.* at 27.

179. *Id.*

180. *Id.*

181. *See, e.g.*, U.S. DEP’T OF STATE, HAITI 2018 HUMAN RIGHTS REPORT 19 (2018), <https://www.justice.gov/eoir/page/file/1159756/download> [<https://perma.cc/LV56-9A9Q>]; *see also, e.g.*, U.S. DEP’T OF STATE, IRAQ 2018 HUMAN RIGHTS REPORT 48 (2018), <https://www.state.gov/wp-content/uploads/2019/03/IRAQ-2018.pdf> [<https://perma.cc/H94H-A2M9>]; U.S. DEP’T OF STATE, SYRIA 2018 HUMAN RIGHTS REPORT 60 (2018), <https://www.justice.gov/eoir/page/file/1153976/download> [<https://perma.cc/L6UN-L9TT>].

182. UN WOMEN, PROGRESS OF THE WORLD’S WOMEN, *supra* note 96, at 27.

183. *Id.* at 190.

184. *Id.*

185. *Id.*

demonstrating widespread systemic failure.¹⁸⁶ For example, in a survey of 189 countries, 45 countries have no laws protecting domestic violence survivors.¹⁸⁷ In Bosnia and Herzegovina, police often return abusers to their homes less than 24 hours after a violent incident.¹⁸⁸ Over 25% of countries do not have protection orders for domestic violence survivors.¹⁸⁹ Such civil protection or restraining orders control perpetrators' abusive behavior or remove them from a shared place of residence.¹⁹⁰ These orders effectively break the cycle of domestic violence, notably in cases where survivors feel unsafe around the perpetrator but do not want the perpetrator incarcerated.¹⁹¹

To ensure survivors' protection and healing, governments should ensure survivors can easily obtain protection orders with little assistance and lower burden of proof.¹⁹² Moreover, while some countries permit issuance of protection orders, they nonetheless remain inaccessible for domestic violence survivors. Courts may be distant and overburdened.¹⁹³ Some judges refuse to issue protection orders against domestic abusers because they believe the law should not interfere in "domestic disputes."¹⁹⁴ Due to its financial cost, some survivors cannot afford to bring their cases before judges at all.¹⁹⁵

Furthermore, in many countries police do not properly enforce protection orders. In some Honduran cities, women must personally deliver the protection order to their abusers because police fear entering dangerous neighborhoods.¹⁹⁶ One woman who had to serve her abuser did not survive the encounter. The woman "disappeared that day and was later found burned, inside a bag" on a riverbank.¹⁹⁷ Moreover, systems that

186. Matter of R-A-, 22 I. & N. Dec. 906, 910 (B.I.A. 1999) (citing expert witness testimony that "spouse abuse is common in Latin America and that she was not aware of social or legal resources for battered women in Guatemala").

187. UN WOMEN, PROGRESS OF THE WORLD'S WOMEN, *supra* note 96, at 150.

188. Bosnia and Herzegovina 2018 Human Rights Report, *supra* note 157, at 23.

189. UN WOMEN, PROGRESS OF THE WORLD'S WOMEN, *supra* note 96, at 192.

190. *Id.*

191. *Id.*

192. *Id.*

193. *See, e.g.,* Orellana v. Barr, 925 F.3d 145, 149 (4th Cir. 2019) (finding that Orellana travelled an hour to request a protective order but the court employees were too busy to assist her).

194. Musalo, *Crimes Without Punishment*, *supra* note 164, at 162.

195. Martinez, *supra* note 160.

196. Sonia Nazario, Opinion, "Someone Is Always Trying to Kill You," N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/interactive/2019/04/05/opinion/honduras-women-murders.html> [<https://perma.cc/RJU3-Q8MG>]; *see also, e.g.,* Grace v. Whitaker, 344 F. Supp. 3d 96, 146 (D.D.C. 2018).

197. Nazario, *supra* note 196.

operate too slowly or require burdensome processes risk survivors' lives. In Papua New Guinea, survivors must frequently travel between police stations and district courts for protection orders.¹⁹⁸ These locations often require survivors to walk for hours, risking their lives and delaying obtaining the order.¹⁹⁹ Accordingly, government failure to properly train, staff, and fund police and justice institutions constitutes a failure to protect survivors.

Access to protection and healing remains uniquely stratified for women living in rural, remote, or minority areas. In Brazil, while over 450 police stations exist, women living in indigent areas or distant from metropolitan areas cannot access them.²⁰⁰ In Cambodia, rural areas entirely lack domestic violence shelters, even though they house most of the population.²⁰¹ In the Israel-Palestine area, only two out of the states' fourteen shelters accept Palestinian survivors.²⁰² In Syria, no domestic violence centers exist outside of the nation's capital.²⁰³ As many survivors cannot afford public transportation, they cannot access metropolitan services.²⁰⁴

Moreover, an individual with marginalized identities may experience compounded barriers to accessing services.²⁰⁵ Elderly women, disabled women, Indigenous women,²⁰⁶ lesbian women, transgender men and women,²⁰⁷ ethnic minority women, and migrant women each experience unique barriers to accessing services.²⁰⁸ These barriers may include

198. UN Women, PROGRESS OF THE WORLD'S WOMEN, *supra* note 96, at 192.

199. *Id.*

200. *Id.* at 193.

201. Urs, *supra* note 94 (“[T]here are effectively no domestic violence shelters for women outside of metropolitan areas, despite the fact that the vast majority of the population lives in rural communities.”).

202. U.S. DEP'T OF STATE, ISRAEL, GOLAN HEIGHTS, WEST BANK, AND GAZA 2018 HUMAN RIGHTS REPORT 37 (2018), <https://www.state.gov/wp-content/uploads/2019/03/ISRAEL-AND-THE-GOLAN-HEIGHTS-2018.pdf> [<https://perma.cc/VGQ7-8DX6>].

203. SYRIA 2018 HUMAN RIGHTS REPORT, *supra* note 181, at 59.

204. UN Women, PROGRESS OF THE WORLD'S WOMEN, *supra* note 96, at 193.

205. *Id.*

206. Karen Musalo & Blaine Bookey, *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala*, 10 HASTINGS RACE & POVERTY L.J. 265, 290 (2013).

207. See, e.g., Rishita Apsani, Note, *Are Women's Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause*, 106 CALIF. L. REV. 1689, 1693–1702 (2018); Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51, 64–71 (2013).

208. *Id.*; see also Bond, *supra* note 101, at 110–18. While little international research exists regarding specific gaps in domestic violence services for various marginalized women, general scholarship provides some insight. See, e.g., *Submission to the UN special rapporteur on violence against women, its causes and consequences regarding COVID-19 and the increase of domestic*

language disparities, cultural or racial discrimination, physical difficulties, and lack of awareness or competency regarding services.²⁰⁹ Governments that do not make protection and healing services accessible to individual, marginalized applicants violate their duties and are involved in domestic violence.

IV. CONCLUSION

As analyzing the Rules demonstrates, public/private framing reflects a fundamental misunderstanding of domestic violence's nature. Domestic violence is a state-sponsored human rights violation. The public and private spheres are intertwined; public authorities tolerate, permit, and promote domestic violence in the "private sphere." This mutually-reinforced violence is precisely the type of persecution that merits asylum. Attempts to frame domestic violence as private violence arbitrarily deny relief to meritorious claims, violating domestic law and international obligations.

Ultimately, to protect asylum-seekers fleeing domestic violence, asylum law must reflect domestic violence's systemic nature. As the Biden administration reviews and rolls back certain Trump-era asylum policies, this Comment cautions against a return to Obama-era status quo. While reversing Trump administration policies is a necessary step, Obama-era precedent provided only weak protection for survivors. It left the coffin door open to public/private framing. Rather, we should "build back better," by re-envisioning²¹⁰ stronger asylum protections for domestic violence survivors. The Rules did not stand alone; nor were they limited to the Trump administration. The Rules represented broader efforts to relegate domestic violence to the private sphere, outside the realm of state protection. To ensure survivors receive the protection they deserve, irrespective of administration, asylum law must reflect that domestic violence is a state-sponsored human rights violation.

violence against women, HUM. RTS. WATCH (July 3, 2020, 9:24 AM), <https://www.hrw.org/news/2020/07/03/submission-un-special-rapporteur-violence-against-women-its-causes-and-consequences> [<https://perma.cc/S37U-668G>]; Katie Gregory, Nkiru Nnawulezi & Cris M. Sullivan, *Understanding How Domestic Violence Shelter Rules May Influence Survivor Empowerment*, 36 J. OF INTERPERSONAL VIOLENCE NP402, NP402–NP423 (2021).

209. UN WOMEN, PROGRESS OF THE WORLD'S WOMEN, *supra* note 96, at 192–93.

210. Numerous scholars and activists have proposed egalitarian proposals for the Biden administration to consider. *See, e.g.*, Jastram & Maitra, *supra* note 2, at 81–91; *see also, e.g.*, Comment Letter on Promulgation of Regulations relating to the Particular Social Group ground of Asylum (May 6, 2021), <https://1t1s613brj137btxk4eg60v-wpengine.netdna-ssl.com/wp-content/uploads/2021/05/USCIS-EOIR-PSG-Rule-letter-5.6.21.pdf> [<https://perma.cc/C6KF-75JY>].