WAITING FOR *ALVARADO*: HOW ADMINISTRATIVE DELAY HARMS VICTIMS OF GENDER-BASED VIOLENCE SEEKING ASYLUM

SARAH ROGERSON[†]

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"Well? Shall we go? Yes, let's go. (They do not move)."[1]

Over the course of their ten-year marriage in Guatemala, Ms. Rody Alvarado Peña's[2] husband brutally and violently abused her.[3] Ms. Alvarado managed to escape to America, but once she arrived, she discovered that the most intimate details of her life would be scrutinized in an administrative immigration system that re-victimized her and protracted her suffering for another fourteen years.[4] She has not seen her children since she arrived, and until she was granted asylum in December 2009,[5] she had no way to bring them to the United States. Her case is one of the most illustrative and modern examples of administrative malfunction and delay in the American immigration system.

After her claim for asylum was granted by a San Francisco immigration judge in 1996, the United States government appealed the ruling and it was ultimately overturned.[6] Subsequently, three presidential administrations, three immigration courts, three attorneys general, and both the Department of Homeland Security (DHS) and the Department of Justice (DOJ) have articulated confusing, indeterminate and at times, conflicting opinions on the validity of asylum claims rooted in gender-

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† Teaching Fellow, Immigrant Rights Clinic, University of Baltimore School of Law. B.A., 2000, Hillsdale College; M.A., 2004, Seton Hall University John C. Whitehead School of Diplomacy; J.D., 2004, Seton Hall University School of Law; LL.M., 2007, Southern Methodist University Dedman School of Law. Thank you to the attendees of the Emerging Immigration Law Scholars and Teachers Conference hosted by Professor Rose Cuison Villazor and Hofstra University School of Law for their input at the conceptual stage of this article, particularly Professor Jonathan Weinberg. Thank you also to Professors Michele Gilman, Leigh Goodmark and Erika Woods for their edits, comments and advice on an earlier draft. All errors are my own.

1. SAMUEL BECKETT, WAITING FOR GODOT 109 (Grove Press, Inc. 1954).

2. Ms. Alvarado's first name is spelled in legal documents and in the media as either "Rody" or "Rodi." Many of the court documents list her first name as "Rodi." This paper will use whatever spelling is most accurate for citation purposes.

3. Ms. Alvarado's husband raped her almost daily, kicked her in the genitals, pistol-whipped her, whipped her with an electrical cord, threatened to deface her and cut off her arms and legs with his machete, and broke windows and a mirror with her head. *In re* R-A-, 22 I. & N. Dec. 906, 908-909 (2001). When he discovered that she was pregnant he dislocated her jawbone and "when she refused to abort her 3- to 4-month-old fetus, he kicked her violently in her spine." *Id.* at 908. At one point, she attempted to commit suicide; her husband's response was, "If you want to die, go ahead. But from here, you are not going to leave." *Id.* at 909. Her multiple pleas for protection of the Guatemalan police and courts were ignored. *Id.*

4. Press Release, Office of U.S. Sen. Patrick Leahy (D-Vt.), Leahy Praises Resolution In Alvarado Asylum Case, Pushes Administration to Issue Regulations (Dec. 15, 2009), *available at* http://leahy.senate.gov/press/200912/121509b.html.

5. *Id.*

6. *In re R-A-*, 22 I. & N. Dec. 906.

based violence, specifically domestic violence.[7] When the controversy surrounding Ms. Alvarado's case first began in the late 1990s, the Clinton administration proposed regulations in 2000 providing legal standards for deciding pending gender-based asylum cases (Proposed Rule or Rule).[8] The Rule would have, among other things, definitively confirmed that gender-based asylum cases are permitted under immigration law and would have set for the parameters for deciding such cases.[9] Despite rigorous debate and numerous promises from immigration agencies, the Rule stalled indefinitely.[10] The administrative delays at each level of the *In re R-A-* case and the failure of the resulting Proposed Rule illustrate the inability of the current immigration system to satisfy the well-established criteria for measuring American administrative law systems: "accuracy, efficiency and acceptability."[11]

Immigration and administrative law scholars have identified "a gap in the existing literature on agency power, judicial review, and the consequences of administrative breakdown"[12] in the immigration context. The damaging developments in these three areas over the last decade are responsible for the major injustices of the American immigration system today. This article will discuss the particular

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7. *See* Press Release, Office of U.S. Sen. Patrick Leahy, *supra* note 4. For the purposes of this article, the term "domestic abuse" encompasses all forms of abuse at the hands of someone in the same family and/or household in an asylum seeker's country of origin. *See generally* Margaret E. Johnson, *Redefining Harm, Reimagining Remedies and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1115-1124 (2009) (providing a modern and complete definition of domestic abuse, including abusive physical and psychological conduct). The terms "domestic abuse" and "domestic violence" are used interchangeably. Neither term includes domestic abuse that has taken place within the borders of the United States, for which other avenues of immigration relief are available. Finally, I use the pronoun "she" to refer to claimants asserting such claims because the overwhelming majority of individuals suffering gender-based persecution are women. *Id.* at n. 4.

8. Asylum and Withholding Definitions, 65 Fed. Reg. 76588-01 (Dec. 7, 2000) [hereinafter *Proposed Rule*].

9. *Id.*

10. A detailed discussion of the failure of the Rule and the events leading up to it is found in Part II of this Article.

11. Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 633-639 (2009) (discussing the three evaluative measures of administrative procedure as developed by administrative scholars) (citing Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 112 (1963)).

12. Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 837 (2009). *See also* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 477-80 (2007).

administrative failures effecting immigrants seeking asylum in the United States. Specifically, this article will discuss how the lack of timely and clear regulatory standards from the Department of Homeland Security (DHS) and the Department of Justice (DOJ), paired with flawed administrative immigration policy decisions by Congress and numerous presidential administrations have resulted in inconsistent judicial opinions for similarly situated individuals seeking gender-based asylum in immigration courts.

The U.S. government does not track the success rates of gender-based asylum cases; in fact, statistics on asylum decisions in general are scant.[13] However, a recent statistical analysis of a group of asylum-seekers in Texas concluded that "[b]eing a female asylum seeker decreases the cumulative odds of an asylum grant by 472%."[14] Although the study was based on a limited sample in one region of the country, such a shocking disparity suggests that similar disparities may exist elsewhere in the United States.[15] Because gender-based claims involve a large number of asylum seekers in cases involving sexual preference,[16] forced marriage[17] and targeted rape by private actors[18]—to name a few, the disparities will only widen unless the administrative deficiencies in the American immigration system that cause them are resolved.

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13. The government provides limited statistics on asylum cases that have been granted, but does not provide specific statistical data on cases that have been denied. Furthermore, the government does not release any information relating to the gender of asylum applicants whose cases were decided by an Immigration Judge. For asylum cases filed affirmatively and therefore decided by the DHS rather than the Immigration Courts, the gender of successful applicants is reported, but not the particular basis on which the case was granted. Obviously, not all female applicants seek asylum because of gender-related persecution. *See* OFFICE OF IMMIGRATION STATISTICS, DEPARTMENT OF HOMELAND SECURITY, 2008 YEARBOOK OF IMMIGRATION STATISTICS, Tables 16-19 (August 2009).

14. Linda Camp Keith & Jennifer S. Holmes, *A Rare Examination of Typically Unobservable Factors in US Asylum Decisions*, 22 J. REFUGEE STUD. 224, 237 (2009).

15. *See id.*

16. *See* Victoria Neilson, *Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims*, 32 FORDHAM URB. L.J. 265 (2005) (analyzing the related issues in asserting social group claims related to sexuality); *see also* Stuart Grider, *Sexual Orientation as Grounds for Asylum in the United States – In re* Tenorio, *No. A72 093 558 (EOIR Immigration Court, July 26, 1993)*, 35 HARV. INT'L L.J. 213 (1994); Victoria Neilson, *Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL'Y REV. 417 (2005).

17. *See* Cara Goeller, *Forced Marriage and the Granting of Asylum: A Reason to Hope After* Gao v. Gonzales, 14 WM. & MARY J. WOMEN & L. 173 (2007).

18. *See* Lindsay Peterson, *Shared Dilemmas: Justice for Rape Victims Under International Law and Protection for Rape Victims Seeking Asylum*, 31 HASTINGS INT'L. & COMP. L. REV. 509 (2008).

Part I of this Article provides an overview of the various administrative and adjudicative entities involved in determining asylum claims to explain the resulting procedural disaster that occurred in the *Alvarado* case. Part II discusses the reasons why the Proposed Rule stalled within the context of the additional administrative complications resulting from post-September 11 regulations, which adversely impacted domestic violence asylum seekers. Part III discusses the impact of the Proposed Rule on these types of cases over the past ten years and the resulting disparate outcomes. Part IV discusses of the leading, large-scale reform proposals tackling the administrative woes of immigration adjudication and offers alternate, incremental, and therefore more politically viable solutions: finalizing regulations regarding gender-based asylum claims and removing the power to influence immigration policy and procedure from the attorney general's office. These incremental solutions draw on administrative law solutions to repair the immigration system for domestic violence asylum seekers.

I. ASYLEES IN THE ADMINISTRATIVE CONTEXT

The process of creating, enforcing and adjudicating immigration laws has long been identified as unique among administrative government functions in the American legal system.[19] "Part of the complexity of immigration law is mechanical; it lies in the arrangement of provisions within the many-layered statute, and in the distribution of other legal materials issued by various agencies that share in the responsibility of administering the immigration law."[20] In order to understand how administrative manipulation in immigration matters became customary, it is essential to understand the basic agency functions; because the system is so complex, I will discuss only those relating to asylum law.

19. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1, 3 (1984) ("Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system. The growth of the modern administrative state has magnified its isolation from the dominant developments in American law, throwing its distinctive features into even sharper relief.").

20. CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 1.01 (rev. ed. 2003).

A. The Immigration Agencies Involved in Asylum Cases

Congress exercises plenary power over substantive immigration law.[21] While some have argued that the plenary power doctrine is in decline and a number of exceptions have emerged,[22] it is the current and historical status of the majority of immigration legislation. After September 11, Congress enacted an impressively vast swath of anti-terror statutes containing provisions that have had a serious and dramatic impact on the immigration system in the name of national security.[23] As part of this legislation, the Immigration and Nationality Service (INS) was abolished and the power to craft regulations interpreting federal immigration law was split between the DOJ and the DHS (which replaced the INS).[24] Scholars have demonstrated the particularly detrimental effect of these laws on asylum seekers, who are specifically targeted by the legislation.[25] Whether intended or not, the effect on female asylum-seekers was especially harsh.[26]

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21. The power of Congress to regulate immigration and the rights of non-citizens can be found in four places in the Constitution: the Commerce Clause, the Naturalization Clause, the Migration and Importation Clause, and the Congressional War Power. U.S. CONST. art. I, § 8, cl. 3, 4, 11; *see also* Ira J. Kurzban, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 29 (11th ed. 2008).

22. The plenary power doctrine has been extensively studied and is well beyond the scope of this article. *See, e.g.*, Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995) and Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1 (2010) (providing a historical analysis of the plenary power doctrine and its exceptions); *see also* Brian G. Slocum, *Canons, The Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV., 363, 385-88 (2007) (discussing the current status of the plenary power doctrine in the immigration context).

23. Michael L. Culotta & Aimee J. Frederickson, *Holes in the Fence: Immigration Reform and Border Security in the United States*, 59 ADMIN. L. REV. 521, 522 (2007) ("Legislative responses to the perceived crisis in immigration have included the USA PATRIOT Act, the Homeland Security Act, the Intelligence Reform and Terrorism Prevention Act, and the REAL ID Act.") (footnotes omitted).

24. The Homeland Security Act of 2002, passed on Nov. 25, 2002, created the DHS, abolished the INS and established the new immigration administration: the Bureau of Citizenship and Immigration Services (BCIS or USCIS); the Executive Office for Immigration Review (EOIR), the judicial piece of immigration administration, was kept in the DOJ. *See* Homeland Security Act of 2002, 5 U.S.C.A. §§ 101, 451, 471, 1101 (West 2002).

25. Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101 (2006) (highlighting the various areas where the REAL ID Act villainizes asylum-seekers as potential terror threats and excludes bona fide applicants with over inclusive language and poor drafting). *See also* Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT'L L.J. 61 (2009) (discussing how the

In many cases, the first agencies involved in asylum claims are the Asylum Office or Customs and Border Protection (CBP). Both are sub-agencies of the DHS. Asylum officers hear cases that are filed affirmatively by the applicant, that is to say, the applicant arrives in the United States and is in the country on a non-immigrant visa (one that expires) or has overstayed his or her visa and is voluntarily seeking asylum protection. The CBP is involved when a person enters the United States with or without documentation, and asserts an asylum claim immediately upon arrival or, in the case of an undocumented person, as a defense to expedited removal from the United States.[27] Asylum cases that are unsuccessful at the affirmative administrative stage, that are referred by a CBP officer, or those that are asserted as a defense to removal in deportation or removal proceedings or while the applicant is detained, are handled by the Executive Office for Immigration Review (EOIR), the main adjudicative arm of the immigration system, which supervises the Board of Immigration Appeals (the primary appellate court) (BIA), the Chief Immigration Judge, and Immigration Judges (IJs) across the country.[28] The EOIR is not contained in the DHS, but is directly within the purview of the DOJ, more specifically, the Attorney General's Office.[29]

If an asylum seeker is unsuccessful before an IJ, the next level of appeal is the BIA.[30] If the applicant is unsuccessful before the BIA, he or she may appeal to the appropriate U.S. Court of Appeal and after that, the U.S. Supreme Court.[31] The Board of Immigration Appeals and the

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REAL ID Act has specifically affected affirmative asylum seekers by placing additional burdens on asylum officers who adjudicate the applications, and expanding the credibility analysis beyond facts related to the heart of the applicant's claim).

26. *See* Katherine E. Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637 (2007) (providing specific details regarding how the credibility provisions of the REAL ID Act have disproportionately effected female asylum-seekers).

27. *See* 8 C.F.R. § 1003.1(d)(1) (2009); GORDON ET AL., *supra* note 20, §§ 1.03[5][d] (regarding the basic procedural avenues for affirmative and defensive asylum claims), § 1.02[3][d][i] (regarding the powers and duties of the EOIR) and § 34.02 (regarding the general requirements for filing an asylum application affirmatively or defensively).

28. *Id.*

29. *See* GORDON ET AL., *supra* note 20, § 3.02[2].

30. Taylor, *supra* note 12, at 488. ("In the asylum context, the party that loses before an IJ . . . can appeal to the BIA. The Board uses a 'clearly erroneous' standard to review IJs' finding of facts, and a de novo standard for questions of law, discretion and judgment. Asylum applicants who lose before the BIA can petition for review in the circuit courts of appeals.") (footnotes omitted).

31. *Id.*

Supreme Court decisions are binding on all IJs, but the courts of appeal decisions are only binding on IJs within that particular circuit.[32]

Additionally, and this is perhaps one of the most distinct aspects of immigration administration, the attorney general possesses unique, statutorily-delegated administrative powers, including the power to review BIA decisions sua sponte.[33] The State Department can also comment on pending asylum claims and the State Department's Country Reports on Human Rights Practices are often submitted by DHS attorneys to provide the government's position on the types of persecution taking place in the country.[34] Because these reports respect the U.S. government's official position on the human rights practices of another country, they are often under-inclusive of human rights abuses if the United States has a foreign relations interest in giving that country a favorable report.[35] It is important to note that there are often instances of abuse reported by credible non-governmental institutions in these countries that are either ignored by State Department officials or otherwise omitted from the State Department's Human Rights Reports.[36]

These are the main agencies involved in asylum decisions, and there are a host of additional agency offices charged with various complex administrative tasks for other types of immigration cases. Thus, it is easy to see why administrative reorganization of any kind seems daunting. These agencies' relationship to the Administrative Procedures Act (APA), the Act governing administrative governmental functions,[37] further complicates how asylum regulations are established and reviewed. But it is the interplay between immigration agencies and the APA (or lack thereof) that leaves the system open to political manipulation and abuse. Therefore, we turn to the framework for the development of asylum law within the administrative immigration system.

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32. *See* GORDON ET AL., *supra* note 20, §§ 3.05[2], 3.07[b][i].

33. The attorney general can direct the Board to refer cases to him for his review. The Board, or the DHS, on their own initiative can also refer cases to the Attorney General for review. 8 C.F.R. § 1003.1(h)(1)(i)-(iii) (2009).

34. *See* 8 U.S.C.A. § 1104(a) (West 2009); 8 C.F.R. § 1208.11 (2010).

35. One scholar posits that the U.S. Foreign Assistance Act incentivizes the United States, "to manipulate asylum and refugee status in accordance with its foreign policy needs." Robert M. Cannon, *A Reevaluation of the Relationship of the Administrative Procedure Act to Asylum Hearings: The Ramifications of the American Baptist Churches' Settlement*, 5 ADMIN. L. J. 713, 736-47 (1991).

36. *Id.*

37. *See* Administrative Procedures Act, 5 U.S.C.A. §§ 551-559 (West 2009).

B. Limited Applicability of the Administrative Procedures Act

The applicability of the APA in the immigration context is becoming a highly debated issue.[38] Some areas of immigration regulation are subject to the APA and some are completely exempt.[39] For example, the procedures for the promulgation of asylum regulations are subject to the APA rule-making procedures.[40] In general, the APA rule-making procedures require that notice and comment requirements be met for the creation of regulations that are legislative in nature (as opposed to "interpretive" or "statements of policy");[41] this is because legislative regulations are "explicitly authorized by statute" and "have the force of law" unlike other types of interpretive statements by immigration agencies, which are non-binding.[42] Immigration regulations are legislative because Congress has specifically delegated regulation-making authority to the DHS and the DOJ by statute.[43] In the asylum context, this is especially important because it gives practitioners, scholars and advocates time to review new asylum regulations and

38. *See* Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals' Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481 (2005) (discussing the applicability of the APA to the BIA's much-debated "streamlining" procedures); *see also* Charles H. Kuck & Danielle M. Conley, *Administrative Procedure Act and Mandamus Actions over Background Checks*, 2008 EMERGING ISSUES 2128 (LEXIS 2008).

39. Anna Marie Gallagher, *Actions Brought Under the Administrative Procedures Act – Actions Subject to Review Under the APA*, 3 IMMIGR. L. SERV. 2d § 15:30 (West 2009) ("Actions which may be reviewed under the Administrative Procedures Act include the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof or failure to act.").

40. 5 U.S.C.A. § 553(b)(A) (West 2010). *See also* Sannon v. United States, 460 F.Supp. 458, 459 (S. D. Fla. 1978), *vacated and remanded by* Sannon v. United States, 631 F.2d 1247 (5th Cir. 1980).

41. Jacob A. Stein et al., ADMINISTRATIVE LAW, § 15.05[3] (2009) ("The Administrative Procedures Act excludes interpretive rules from notice and comment requirements. In general, an interpretive rule is an important but nonbinding agency opinion of how a statute should be viewed. Unlike a substantive rule, which sets out rights and obligations, an interpretive rule merely advises the public of a statute's meaning or the manner in which it is to be applied.").

42. *See* GORDON ET AL., *supra* note 20, § 3.24[2][b][i].

43. 8 U.S.C.A. § 1103(a)(1) (West 2010) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, that determination and ruling by the Attorney General with respect to all questions of law shall be controlling.").

comment on any troubling issues found in the practical application of the rule that the DOJ may have overlooked.

The APA also provides judicial standards of review for administrative decisions. It requires that the reviewing court find that the agency's conclusion is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law" in order to set aside an adjudicative decision of an agency.[44] However, the applicability of the APA to immigration courts is very limited. Immigration proceedings have historically been exempt from the oversight of the APA.[45] After the Supreme Court ruled in 1950 that the APA applied to deportation proceedings,[46] Congress responded by amending the Immigration and Nationality Act to specifically exclude deportation cases from the reach of the APA.[47] The Supreme Court later affirmed this exclusion.[48] Because many asylum claims arise in the context of deportation proceedings, asylum-seekers are largely unprotected by the judicial review protections of the APA.

Additionally, federal courts of appeal must give *Chevron* deference to agency determinations, including those of IJs and the BIA.[49] The highly publicized case of Cuban-born toddler Elian Gonzalez in 2000 reinforced the long-standing view that the courts must defer to the executive branch when issues of immigration policy are at stake, specifically in the asylum context.[50] The policy at issue was whether a six-year-old child could file for asylum in the United States, contrary to his parents' wishes, or whether his father was in the better position to file on his behalf.[51] The asylum statute at issue was silent on this point.[52] The court, citing *Chevron*, found that "as a matter of law, it is not for the

44. *See* Administrative Procedures Act, 5 U.S.C.A. § 706(2)(A) (West 2009).

45. For a history of the debate regarding the exemption of immigration law from the Administrative Procedure Act up to 1991 and the policy underpinnings of the arguments for and against, see Cannon, *supra* note 35, at 734-47. For a more recent statement of this principle as it exists today, see Gallagher, *supra* note 37, § 15:26 ("A challenge to an unlawful agency decision or action in immigration cases *outside of the removal context* may be brought under the Administrative Procedures Act (APA). . . . The remedy sought must be for non-monetary relief, such as an injunction. Courts are barred from considering any action which is committed to agency discretion by law.") (emphasis added) (footnotes omitted).

46. Wong Yang Sung v. McGrath, 339 U.S. 33, 51-53 (1950).

47. Supplemental Appropriations Act of 1951, 8 U.S.C.A. § 155a (repealed 1952).

48. *See* Marcello v. Bonds, 349 U.S. 302 (1955).

49. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); *see also* INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (holding the analysis in *Chevron* is applicable to immigration statutes).

50. Gonzalez v. Reno, 212 F.3d 1338, 1348-49 (11th Cir. 2000).

51. *Id.* at 1344.

52. *Id.* at 1347.

courts, but for the executive agency charged with enforcing the statute (here, the INS), to choose how to fill such gaps."[53] There are numerous examples of varying degrees of *Chevron* deference afforded to immigration agency decisions, but as will be discussed later in this article, nearly absolute deference to agency determinations in the asylum context has been reinforced by the administrative reorganization of the immigration courts in recent years.

C. Administrative Avoidance in Alvarado *and the Obama Administration's "New" Position*

The *Alvarado* case is a study in administrative avoidance; the DOJ, the DHS and the immigration courts have all refused to make a final, precedential determination on the validity of asylum claims asserting a basis in domestic violence. The first brief that DHS submitted in the *Alvarado* case in 2004 urged Attorney General John Ashcroft to dispose of the case "without issuing an opinion" or to "postpone issuing his decision in this case until the final regulation is published" because a final rule would be "the best vehicle for providing much needed guidance on the adjudication of particular group asylum claims including those based on domestic violence."[54] Yet for reasons that will be discussed in detail later, the Proposed Rule was never finalized.

In 2008, Attorney General Michael Mukasey certified the case to himself in order to remand it to the BIA with instruction to decide the case without waiting for the Proposed Rule to be passed, rewritten, or otherwise given any legitimacy.[55] In his opinion, Mr. Mukasey suggested that, "[g]iven the passage of time, the Board may choose to request additional briefing in the pending cases or to remand cases to Immigration Judges for further factual development."[56] Shortly after Mr. Mukasey's decision, Ms. Alvarado's attorneys at the Center for Gender and Refugee Studies (CGRS) at the University of California-Hastings received word that attorneys representing domestic violence asylum-seekers at the BIA received orders from the Board to submit supplemental briefs in domestic violence cases.[57] In a joint motion with the DHS, CGRS requested that the case be returned to the original

53. *Id.* at 1348.

54. Department of Homeland Security's Position on Respondent's Eligibility for Relief at 3-4, *In re* R-A-, No. A 73 753 922 (Feb. 19, 2004), *available at* http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf [hereinafter *DHS Brief*].

55. *In re* R-A-, 24 I. & N. Dec. 629 (2008).

56. *Id.* at 631.

57. E-mail from Lisa Frydman, Managing Attorney at CGRS, to author (February 13, 2009) (on file with author).

immigration court that decided it in the first place nearly a decade before so that Ms. Alvarado could present additional evidence of the "social visibility" of her claim, a recent development in asylum case law. On December 4, 2008, the BIA granted the motion.[58]

Popular interest in Ms. Alvarado's case, as well as the status of the Proposed Rule, was reinvigorated on July 16, 2009, when The New York Times announced that President Barack Obama's administration had embraced a "new policy" permitting asylum for battered women.[59] The Administration communicated the favorable position in a brief filed by the DHS[60] in another domestic abuse asylum case pending before the Board of Immigration Appeals in Falls Church, Virginia.[61] The case concerned a Mexican woman and her two sons who sought asylum in the United States from the boys' abusive father.[62] Although the announcement encouraged asylum advocates that final guidance on this topic may be imminent, skeptics have considered the Administration's statement as yet another voice in the disjointed chorus of ineffectual administrative declarations issued on this subject over the last decade.[63] In fact, when asked to clarify what steps were being taken to implement the Obama administration's position, the DHS tempered the announcement and reiterated its position originally articulated in the 2004 brief filed in the *Alvarado* case.[64] That brief fell far short of any

58. Center for Gender & Refugee Studies, *Documents and Information on Rody Alvarado's Claim for Asylum in the U.S.: Current Update, available at* http://cgrs.uchastings.edu/campaigns/alvarado.php (last visited May 6, 2010).

59. Julia Preston, *New Policy Permits Asylum for Battered Women*, N.Y. TIMES, July 16, 2009, *available at* www.nytimes.com/2009/07/16/us/16asylum.html.

60. Dep't of Homeland Security's Supplemental Brief, *In re* (name redacted) (Apr. 13, 2009) (Executive Officer for Immigration Review Board of Immigration Appeals April 12, 2009) at 11-21, *available at* http://graphics8.nytimes.com/packages-/pdf/us/20090716-asylum-brief.pdf (last visited May 6, 2010) [hereinafter *Martin Brief*] ("Such factors would work in concert to create the trait which accounts for [the abuser's] inclination to target her for abuse, whether that trait is interpreted as relating to her being perceived as property by virtue of her status in the domestic relationship, or as relating to her presence in a domestic relationship that she is unable to leave.").

61. *Id.*

62. *Id.* at 2.

63. This skepticism was confirmed in a September 8, 2009 "Question and Answer" session with the U.S. Citizenship and Immigration Services (USCIS) Asylum Headquarters Liaison. When asked, "What training are Asylum Officers receiving in light of the apparent shift in policy to ensure that females who may qualify for asylum under the new standard are not turned away at the border?" USCIS responded, "The New York Times exaggerated the brief filed by DHS. . . . There has been no shift in position within DHS." *Asylum HQ Liaison, Minutes 09-08-09 Meeting*, AILA INFONET Doc. No. 09100220 (posted Oct. 2, 2009).

64. *See id.*

definitive guidance, urging the issuance of a non-precedential and limited opinion, allowing the development of law through the rule-making process.[65]

Two months after the Obama administration's shift was reported in the media, DHS filed a one-paragraph brief representing to the immigration court that Ms. Alvarado was eligible to receive asylum "as a matter of discretion."[66] This meant that the DHS had decided to recommend asylum for Ms. Alvarado in an attempt to avoid a ruling on the issue. The short brief did not outline a standard for future claims.[67] Again, The New York Times followed the briefing with a story that reflected the optimism of asylum advocates who insisted that the case established "pretty solid guidelines," but these comments were paired in the article with a more cautionary statement from DHS that future opinions will depend upon, "the specific abuse" involved in the case.[68]

Not surprisingly, when the San Francisco IJ granted asylum in December 2009, he did so without issuing a precedent-setting opinion, per the request of the DHS.[69] In fact, he did not issue an opinion whatsoever; the decision in the case consisted of a checkbox form, granting asylum and indicating that all side waived appeal.[70] While this symbolic and hard-fought victory is commendable, the decision is virtually meaningless for other applicants in the absence of a final rule articulating a clear standard for asylum applicants nationwide. Asylum law scholars, advocates and even DHS itself, all agree that a final, definitive rule articulating the appropriate basis for domestic abuse asylum claims is preferable to ad hoc judicial decision-making.[71]

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65. DHS Brief, *supra* note 54, at 2-4.

66. Department of Homeland Security Response to Respondent's Supplemental Filing of August 18, 2009 at 1, *In re* R-A-, No. A073 753 922 (Oct. 28, 2009) *available at* http://graphics8.nytimes.com/packages/pdf/national/20091030asylum_brief.pdf (last visited May 6, 2010) [hereinafter Fiorentino Brief].

67. *See id.*

68. Julia Preston, *U.S. May Be Open to Asylum for Spouse Abuse*, N.Y. TIMES, October 29, 2009, at A14, *available at* http://www.nytimes.com/2009/10/30/us-/30asylum.html?_r=1&hp (quoting Matthew Chandler, the spokesman for DHS, who further indicated that the department, "continues to view domestic violence as a *possible* basis for asylum."). These statements stand in stark contrast to the statement made by Jayne Fleming, Pro Bono Council at Reed, Smith, LLP's San Francisco office, who stated that immigration judges, "now have some pretty solid guidelines from D.H.S." *Id.*

69. *See* Fiorentino Brief, *supra* note 66, at 3-4.

70. E-mail from Pamela Goldberg, U.N. High Commissioner for Refugees, to author (Dec. 17, 2009) (on file with author) (describing the format of the opinion).

71. Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 HOFSTRA L. REV. 85, 93 (2007) ("The insufficiency, inadequacy, and at times, impropriety, of administrative measures leaves the judiciary as the last refuge for ensuring procedural protection is provided to individuals in our immigration courts."); *see also* Esta Soler &

Whether regulations are truly forthcoming as DHS suggested in its most recent statement to The New York Times remains indefinite.[72] However, even if a rule is finalized, it will not resolve the larger administrative issues exposed by the tortured history of the *Alvarado* case.

II. A REGULATORY HOUSE IN DISARRAY: FAILURE OF THE PROPOSED RULE AND THE DAMAGING EFFECT OF FAILED REFORMS OF THE JUDICIARY

The complex organization of immigration agencies governing asylum, paired with recent disputes regarding the applicability of APA protections and standards of review results in an underdeveloped and inconsistent body of law regarding gender-based asylum claims and leaves asylum applicants vulnerable to abuse of discretion. The delay surrounding any consensus on domestic abuse asylum claims, evident most poignantly in Ms. Alvarado's case, continues to illustrate a perplexing administrative and judicial vortex: immigration courts across the country are entertaining arguments on claims nearly identical to Ms. Alvarado and issuing rulings in most cases without any specific guidance from DHS or binding precedent. Some of these claims have been successful and some unsuccessful because IJs are making decisions on a case-by-case basis.[73] In the anecdotal data captured by scholars as well as

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Karen Musalo, Editorial, *Time to End an Asylum Limbo for Abused Women*, WASH. POST, July 18, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content-/article/2009/07/17/AR2009071702960.html ("the filing of one brief is no substitute for clear national policy. It's time we put our regulatory house in order and assure victims of gender-based violence that they can count on justice in the United States."). DHS Brief, *supra* note 54, at 3 ("Thus, the law would be best developed by setting out guidance in a generally applicable rule, rather than by issuing a precedent decision analyzing the facts of a specific case.").

72. Preston, *supra* note 68 ("The department is writing regulations to govern claims based on domestic violence [Matthew Chandler, DHS Spokesperson] said.").

73. *See* Tresa Baldas, *Waiting for Asylum: Battered Women Stuck in a Legal Limbo*, NAT'L L.J, Mar. 13, 2006, at 4 ("Nancy Paik, a pro-bono asylum lawyer with the San Francisco office of Philadelphia's Schnader Harrison Segal & Lewis, secured asylum for a Nicaraguan woman who was allegedly beaten and raped routinely by her common law husband of 15 years."); David L. Cleveland, *A Victim of Domestic Violence is Granted Asylum*, AILA Doc. No. 08062061, *available at* http://www.tindallfoster.com/-immigrationresources/immigrationinthenews/AVictimOfDomesticViolenceIsGrantedAsylum.pdf (last visited May 6, 2010) ("An Immigration Judge in Orlando, FL granted asylum to a woman from Honduras, who was beaten by her boyfriend."); Alex Kotlowitz, *Asylum for the World's Battered Women,* N.Y. TIMES MAGAZINE, Feb. 11, 2007, *available at* http://www.nytimes.com (accessed from homepage by entering article title in search) ("Should victims of domestic violence be eligible for asylum . . . ? At times we've said yes; at other times we've said no. And in some cases, as with Aruna Vallabhaneni, we've just said, hold on until we make up our mind."); Karen Lee Ziner,

in the media coverage of the experiences of these claimants, it is evident that IJs are utilizing the standards set forth in the Proposed Rule and the briefs filed by DHS in subsequent cases to decide similar cases, despite the fact that neither the Proposed Rule nor DHS positions are binding precedent. Thus emerges a tangled mess of largely unpublished decisions nationwide that offer little to no reliable precedent or persuasive authority for other domestic abuse asylum seekers.

A. The Proposed Rule Fails: Substantive Critiques and Regulatory Delays

When the Proposed Rule was originally announced in 2000, the DOJ stated that its purpose was "to promote uniform interpretation of the relevant statutory provisions"[74] regarding asylum eligibility. Although it could be argued that the Proposed Rule interpreted and provided guidance on various statutory terms, it also proposed fundamental alterations to the asylum regulations in a manner that would create new rights.[75] As previously noted, "[i]f a regulation is legislative, the APA requires the agency to provide notice and an opportunity for public comment when proposing the regulation."[76] Because the Proposed Rule sought to amend the regulations interpreting statutes governing asylum-seekers, specifically those asserting gender-based social group claims, it was subject to the mandatory notice and comment period mandated by the APA.[77] The comments submitted during the 45-day notice and

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Ex-Court Janitor Granted Asylum Due to Domestic Abuse, THE PROVIDENCE J., Feb. 2, 2009, *available at* http://newsblog.projo.com/2009/02/former-courthou.html ("Maira Farfán Maldonado, one of 31 janitors arrested during immigration raids on Rhode Island courthouses last July, has been granted asylum based on domestic abuse in her home country of Guatemala.").

74. Press Release, U.S. Department of Justice, Questions & Answers: The R-A- Rule, (Dec. 7, 2000), *available at* http://www.uscis.gov/files/pressrelease/R-A-Rule_120700.pdf.

75. Proposed Rule, *supra* note 8 ("SUMMARY: This rule proposes to amend the Immigration and Naturalization Service (Service) regulations that govern establishing asylum and withholding eligibility. This rule provides guidance on the definitions of 'persecution' and 'membership in a particular social group,' as well as what it means for persecution to be 'on account of' a protected characteristic in the definition of a refugee. It restates that gender can form the basis of a particular social group. It also establishes principles for interpretation and application of the various components of the statutory definition of 'refugee' for asylum and withholding cases generally, and, in particular, will aid in the assessment of claims made by applicants who have suffered or fear domestic violence.").

76. GORDON ET AL., *supra* note 20, § 3.24[2][b][i].

77. *Id.* ("Legislative regulations are those that are explicitly authorized by statute. This type of regulation, similar to statute, creates new rights, duties, or obligations.

comment period were never made public by the DOJ, but some who submitted comments self-published their letters to the DOJ.[78] Additionally, there is no public information regarding the discussions between DOJ and DHS officials following the comment period. This leaves very little insight as to why the Proposed Rule has been stalled for so long.

Some scholars have speculated that the Proposed Rule was not finalized because of the post-September 11 reorganization of the former INS (now the Bureau of Citizenship and Immigration Services or U.S. Citizenship and Immigration Services (USCIS)), which shifted regulatory authority from the DOJ to joint administration with the DHS.[79] Undoubtedly, the reorganization of the former INS and creation of the DHS delayed further consideration of the Proposed Rule, but upon further analysis, three additional factors are evident: (i) the Proposed Rule was substantively problematic, (ii) the Attorney General's Office itself demonstrated administrative lethargy while navigating and reinforcing a post-September 11th anti-asylee legislative mentality, and (iii) administrative reorganization of the immigration courts and political appointments to the immigration bench further impaired development of precedent-setting opinions to inform the Rule.

1. Scholarly Critiques of the Proposed Rule

One factor that may have stalled the Proposed Rule's passage through the DOJ was that it received detailed criticism upon release by asylum scholars who provided the DOJ and the DHS with constructive feedback on how the Proposed Rule could be improved. The analyses focused on how the Proposed Rule might upset established precedent in a way that would negatively impact domestic violence asylum seekers, rather than improve the viability of their claims. These valid critiques

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Rather than interpreting a statute, legislative regulations have effects completely independent of any statute.") (footnotes omitted).

78. *See* Michael G. Heyman, *Protecting Foreign Victims of Domestic Violence: An Analysis of Asylum Regulations*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 131 nn. 82-83 (2008) (citing a letter written by Jeanne A. Butterfield, Executive Director, American Immigration Lawyers Association and comments of the Lawyers' Committee for Human Rights in response to the Proposed Rule).

79. "Whereas prior to the reorganization, the regulations were within the sole jurisdiction of the DOJ, they are now within the joint jurisdiction of the DOJ and the DHS, which means that both agencies will need to reach some consensus on the regulations before they can be finalized." Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call To (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 128 (2007).

could have slowed the DOJ's ability to enact the Proposed Rule as written.

It is important to understand the basic elements of a claim for asylum based on domestic violence in order to properly appreciate the critiques offered. Essentially, an asylum-seeker must fit the definition of "refugee," as defined by the Immigration and Nationality Act, which mirrors the definition set forth in the 1951 United Nations Convention Relating to the Status of Refugees. [80] In order to fit within the definition, the applicant must demonstrate a nexus between the persecution suffered or feared and one of the five protected grounds articulated in the definition: race, religion, nationality, membership in a particular social group or political opinion; this is known as the "nexus requirement."[81]

Most of the arguments presented in domestic violence asylum claims assert that the persecution suffered at the hands of the abuser bears a nexus to the claimant's political opinion (opposition to domestic violence) or membership in a particular social group (defined at the moment on a case-by-case basis). The leading cases have interpreted "membership in a particular social group" to mean "an individual who is a member of a group of persons all of whom share a common, immutable characteristic . . . such as *sex*, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership."[82] The applicant must show that the common characteristic that defines their social group, "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[83] These elements are often referred to as the "*Acosta* test."

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80. The term "refugee" is defined in the Immigration and Nationality Act as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, 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.

Immigration & Nationality Act, 8 U.S.C.A. § 1101(a)(42)(A) (West 2009).

81. *Id.*

82. *In re* Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) (emphasis added), *modified by*, *In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987); *see also* Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1196 (11th Cir. 2006) ("Acosta strikes an acceptable balance between (1) rendering 'particular social group' a catch-all for all groups who might claim persecution, which would render the other four categories meaningless, and (2) rendering 'particular social group' a nullity by making its requirements too stringent or too specific."), *cert. denied sub nom.* Castillo-Arias v. Gonzales, 549 U.S. 1115 (2007).

83. *In re* Acosta, 19 I. & N. Dec. at 233.

Two additional requirements were recently added to the assertion of a social group claim: "social visibility" or ease of recognition of the group in question[84] and whether the group is "particular" (i.e. "whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.").[85] The social visibility and particularity requirements have combined in recent jurisprudence in a manner that is uniquely detrimental for gender-based asylum claims, "where not only the harm is hidden in the private sphere, but the group members themselves may be veiled from sight."[86] It is in the unsettled nature of social group precedent that makes the articulation of a social group so difficult, and its manipulation by adjudicators so easy.[87]

These tensions are evident in the critiques offered in response to the Proposed Rule. Some scholars felt that it was under-inclusive, allowing only for a social group asylum claim and ruling out a claim that would categorize domestic violence as a political form of persecution deserving of relief.[88] Another critique was that the Proposed Rule created an unfairly high burden of proof for women seeking protection because they would have to prove that their protected status was *central* to the

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84. *In re* C-A-, 23 I. & N. Dec. 951 (BIA 2006), *aff'd,* Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006).

85. *In re* S-E-G-, 24 I. & N. Dec. 579, 584 (BIA 2008).

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

87. There are a number of other factors considered by adjudicators in asylum claims in addition to the requirements for asserting a cognizable social group. For example, applicants are required to file the application within one year of arrival. *See* 8 U.S.C.A. § 1158(a)(2)(B) (West 2010); 8 C.F.R. § 1208.4(a)(5) (2010). This requirement was imposed by the REAL ID Act and can pose a significant problem for women whose abusers came with them to the United States. Their ability to leave the abusive relationship, much less discover that asylum protection is available for them, find representation or prepare the application themselves and then appear for the asylum interview, all within one year of arriving in the United States is unrealistic, at best. Additionally, the judge must make a determination as to whether or not the applicant resettled in another country before arriving in the United States. *See* 8 U.S.C.A. § 1158(a)(2)(A); 8 C.F.R. § 1208.15 (2010). Most importantly, the judge is entitled to make a highly discretionary determination of whether he finds that applicant to be credible. *See* 8 U.S.C.A. § 1158(b)(1)(B)(iii). There is an impressive array of scholarship devoted to intricate analysis and critique of all of these facets of asserting a domestic violence asylum claim, which is beyond the scope of this article. *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 388-94 (3d ed. 1999).

88. Anita Sinha, *Domestic Violence and U.S. Asylum Law: Eliminating the "Cultural Hook" for Claims Involving Gender-Related Persecution,* 76 N.Y.U. L. REV. 1562, 1593 (2001).

abuser's motive to act;[89] typically, asylum-seekers are only required that the abuser was motivated *in part* by the victim's social group membership.[90] Others felt that the Proposed Rule would significantly alter the definition of "social group" for asylum purposes by adding factors to the *Acosta* test including that the members view themselves as part of the group and that the society in which the group exists distinguishes members of the group for disparate treatment.[91] Additional critiques suggested that the Proposed Rule fell short of international law standards articulated in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) because it failed to acknowledge the culpability of the government in the applicant's home country for failing to prosecute domestic violence within its borders, or at least failing to do so in a meaningful way.[92] To acknowledge the duty of the state to provide protections for women suffering from domestic violence would arguably elevate the abuse suffered by the applicant at the hands of a private actor to abuse done at the acquiescence of or even with the assistance of the State, thus lowering the burden of proving state action in order to obtain asylum protection in the United States.

These valid critiques have been overshadowed by the political rhetoric on both sides of the issue. Despite the overwhelming evidence

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89. *Id.* at 1595. ("An applicant, under the amendments, 'must' show that the protected characteristic is 'central to' the persecutor's motivation to act.") (citations omitted); Leonard Birdsong, *A Legislative Rejoinder to "Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution. . . "*, 35 WM. MITCHELL L. REV. 197, 218 (2008) ("The main problem with the proposed regulations appears to be that they make it more difficult for women like Rodi Alvarado to obtain asylum than under the current case law."); Jenny-Brooke Condon, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 222 (2002) ("Although all asylum applicants have the burden of proving motive to satisfy the asylum statue's 'on account of' requirement, the proposal would alter the current analysis by adding an inquiry into the centrality of the motive.") (footnote omitted); Heyman, *supra* note 78, at 133. ("The motive requirement should be satisfied by demonstrating that the actor was at least in part motivated to persecute the victim because of her social group membership.").

90. *See* Uwais v. U.S. Att'y Gen., 478 F.3d 513, 517 (2d Cir. 2007) ("Where there are mixed motives for a persecutor's actions, an asylum applicant need not show with absolute certainty why the events occurred, but rather, only that the harm was motivated, in part, by an actual or imputed protected ground."); *see also* INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992) (superseded by statute on other grounds) ("Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial.").

91. Heyman, *supra* note 78, at 130-31.

92. *See id.* (arguing for inclusion of the "due diligence" standard set forth in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which requires states to protect victims of domestic violence and to exercise due diligence to prevent, investigate, and punish non-State abusers).

presented by leading scholars that allowing asylum for victims of domestic violence would not "open the floodgates" to victims worldwide, anti-immigrant groups continue to stoke those fears.[93] If a new rule is proposed, as the Obama Administration has promised, it must address the concerns raised by academics since the Proposed Rule was first published, independent of the political rhetoric that has followed.

2. Attorneys General Stall and Congress Creates Additional Legislative Hurdles to Asylum-Seekers

Both the Clinton administration and the Bush administration added procedural hurdles to the success of the Proposed Rule. It is perplexing that the Clinton Administration failed to get the Rule together in time to exhaust the notice and comment requirements before the Bush Administration was in place.[94] The case triggering the Rule was decided on June 11, 1999, but it took over a year for the Proposed Rule to be finalized and announced on December 7, 2000.[95] One of Attorney General Reno's last acts in office was to vacate the Board's decision overturning the *Alvarado* case and remanding it to the Board for reconsideration once the Proposed Rule was finalized; in fact, she stayed the Board's opinion pending the completion of the Rule.[96] So while she was unable to finalize the Proposed Rule herself, she erased the negative precedent set by the Board while providing incentive for the next Administration to resolve the issue.

After surveying the reports in the media and other secondary sources, it appears that while the DOJ was handling the transition of presidential administrations, the Proposed Rule may have become a political

93. Musalo, *Protecting Victims*, *supra* note 79, at 133 ("Since 1993, when Canada became the first country in the world to issue Gender Guidelines and accept that women fleeing gender-related persecution qualified for refugee protection, it has maintained statistics on gender asylum. Canada reported that there was no explosion of claims; to the contrary, gender claims consistently constituted only a miniscule fraction of Canada's total claims, and had actually declined in the seven-year period following the adoption of the Gender Guidelines."); *see also id.* n. 36 (providing several quotes from David Ray of the anti-immigrant group Federation for American Immigration Reform (FAIR) expressing floodgate concerns.

94. President William Clinton's last day and President George W. Bush's first day in office was Inauguration Day, Jan. 20, 2001, less than a month after the release of the Proposed Rule.

95. *See* Proposed Rule, *supra* note 8; *see also In re R-A-*, 22 I. & N. Dec. 906.

96. The order was issued the day before President Bush was sworn into office. Office of the Att'y Gen., Order No. 2379-2001, *In re Rodi Alvarado Pena (A73 753 922)*, *available at* http://cgrs.uchastings.edu/documents/legal/ag_ra_order.pdf (last visited May 6, 2010).

casualty. Before the notice and comment period ran, President Bush appointed the new chief of the DOJ: Attorney General John Ashcroft,[97] who was reportedly opposed to extending asylum protection to victims of domestic violence.[98] In fact, an e-mail provided to Ms. Alvarado's attorneys at the Center for Gender and Refugee Studies at University of California–Hastings School of Law (CGRS), "indicated that the Attorney General intended to 'delete large sections of the proposed rule's supplemental language [commentary] . . . '"; CGRS argued that the deletion of those provisions would render the Proposed Rule virtually meaningless.[99] Eight months passed between Mr. Ashcroft's appointment on February 2, 2001, and the September 11, 2001, terrorist attacks to consider the Proposed Rule and the comments received during the notice and comment period. If the Clinton or Bush Administrations had the political will to formalize the Proposed Rule, either could have.

Between September 11, 2001, and March 2004, the DOJ did not issue a single press release or announcement on the Proposed Rule. After the terrorist attacks, the priorities of the nation shifted to anti-terrorism and asylum-seekers were labeled as the prime target for anti-terror legislation, making any asylee-friendly regulations politically treacherous for the next several years.[100] In 2003, forty-nine members of the House of Representatives urged Attorney General Ashcroft to

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97. *Id.*

98. Rachel L. Swarns, *Ashcroft Weighs Granting of Political Asylum to Abused Women*, N.Y. TIMES, Mar. 11, 2004, at A1. ("Some Justice Department officials indicated that Mr. Ashcroft had initially opposed such rules.").

99. Karen Musalo and Stephen Knight, *Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions*, 03-12 IMMIGR. BRIEFINGS 1 (2003).

100. Scholars have repeatedly cited the statements of Former House Judiciary Committee Chairman James Sensenbrenner(R-Wis.), the author of the restrictionist asylum provisions of the 2005 REAL ID Act, asserting a link between terrorism and asylum-seekers:

> There is no one who is lying through their teeth that should be able to get relief from the courts, and I would just point out that this bill would give immigration judges the tool to get at the Blind Sheikh who wanted to blow up landmarks in New York, the man who plotted and executed the bombing of the World Trade Center in New York, the man who shot up the entrance to the CIA headquarters in north Virginia, and the man who shot up the El Al counter at Los Angeles International Airport. Every one of these non-9/11 terrorists who tried to kill or did kill honest, law-abiding Americans was an asylum applicant. We ought to give our judges the opportunity to tell these people no and to pass the bill.

Won Kidane, *The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination*, 41 U. MICH. J.L. REFORM 669, 713 (2008) (citing 151 Cong. Rec. H460 (daily ed. Feb. 10, 2005) (statement of Chairman Sensenbrenner)); *see also* Cianciarulo, *supra* note 25, at 102.

"refrain from issuing regulations that would reject gender-related violence as a basis for asylum claims in the United States."[101] When the DHS finally filed its first brief in the *Alvarado* case in 2004, urging the DOJ to sign off on the Rule, Attorney General Ashcroft appeared to abandon his opposition. Apparently he had good reason to reconsider his position. The New York Times reported that he did so after receiving pressure from conservative women's groups as well as the DHS.[102] A subsequent news article reported that a spokesman for the DHS was under the impression that a final decision from Mr. Ashcroft "was expected soon."[103] However, these media reports signaled a false hope. Nearly a year passed before it was finally announced that Mr. Ashcroft would neither enact the Proposed Rule, nor provide new rules, nor recommend a grant of asylum to Ms. Alvarado;[104] he made the announcement less than a month prior to the end of his term.[105] Instead, Mr. Ashcroft sent the case back to the BIA for further consideration without the definitive guidance of a final rule.[106] While the exact reasons for Mr. Ashcroft's decisions remain unknown, it is clear that the political climate for asylum reform was not favorable.

Later in 2005, Congress enacted the REAL ID Act, placing additional limitations on asylum seekers in the name of national

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101. Letter from the Congress of the United States to the Office of the Attorney General (February 27, 2003), *available at* http://cgrs.uchastings.edu/documents-/advocacy/house_2-03.pdf.

102. Swarns, *supra* note 98 ("More than 36 Democrats in Congress, as well as leaders of conservative-minded groups like Concerned Women for America, and World Relief, an arm of the National Association of Evangelicals, have urged government officials to rule in favor of Mrs. Alvarado and women like her.").

103. Rachel L. Swarns, *National Briefing; Washington: Department Recommends Asylum for Woman*, N.Y. TIMES, Feb. 20, 2004, at A20.

104. Letter from the Office of the Attorney General, remanding *In re* R-A-, 22 I. & N. Dec. 906 (BIA 1999), *vacated and remanded,* 22 I. & N. 906 (A.G. 2001) back to "the Board of Immigration Appeals for reconsideration following final publication of the [Proposed Rule]," [hereinafter *Ashcroft Letter*]; Bob Egelko, *Ashcroft Will Pass Asylum Case to Successor/Abused Woman from Guatemala in Limbo for Years*, SAN. FRAN. CHRON., Jan. 22, 2005, at B3; *see also* John Files, *National Briefing; Washington: Ashcroft Won't Aid Asylum Seeker*, N.Y. TIMES, Jan. 22, 2005, *available at* http://www.nytimes.com (accessed from homepage by entering article title into search box).

105. Mr. Ashcroft's last day in office was Feb. 13, 2005; his successor, Alberto Gonzales, was sworn in on Feb. 14, 2005. Stephanie Rosenbloom, *Gonzales is Sworn in as Attorney General*, N.Y. TIMES, Feb. 14, 2005, *available at* http://www.nytimes.com (accessed from homepage by entering article title into search box).

106. Ashcroft Letter, *supra* note 106.

security.[107] REAL ID expanded the discretion of the IJs to deny an asylum-seeker's claim for minor inconsistencies.[108] It also increased the burdens placed on asylum seekers to prove their case in immigration court and IJs were given discretion to require additional corroboration of the applicant's claim.[109] As will be discussed in later in this article, the limited reviewability of IJ opinions, paired with the wide discretion granted in REAL ID left all asylum applicants vulnerable to the whims of the IJ assigned to their case.

Mr. Ashcroft's successor, Alberto Gonzales, ignored both the Proposed Rules and the *Alvarado* case, despite heavy pressure from both sides of the aisle to get something accomplished.[110] This came as no surprise since Mr. Gonzales, "avoided Senators' questions on the issue of protecting women refugees during his confirmation hearings."[111] It appears that the Bush administration was, at the very least, taking advantage of the political vulnerability of domestic violence asylum-seekers by not issuing guidance during its eight years in office. At worst, the lack of guidance was a sign of intentional disregard for gender-based asylum claims. Today, we await direction from the Obama administration after over a year in office. Rather than re-issue the guidelines, the Obama administration has continued the policy of making unofficial statements in pending cases, even asserting an apparent favorable attitude in yet another case pending before the Board.[112] The ineptitude of the Attorney General's Office in promulgating asylum regulations, whether politically motivated or not, does not bode well for women seeking asylum through other unsettled or controversial gender-based categories.

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107. Marisa Silenzi Cianciarulo, *Counterproductive and Counterintuitive Counterterrorism: The Post-September 11 Treatment of Refugees and Asylum-Seekers*, 84 DENV. U. L. REV. 1121, 1135 (2007).

108. *See id.* at 1136-38.

109. *See id.* at 1138-42.

110. Kotlowitz, *supra* note 73 ("These administrative regulations – despite their support from an unlikely coalition of politicians, from Sam Brownback on the right to Hillary Clinton on the left – have still not been approved. At a recent gathering with Attorney General Gonzales, immigration judges reiterated their longstanding request for clear regulations so that they'd have some guidance. But there appears to be an impasse. Three years ago, the Department of Homeland Security came out in support of Alvarado's bid for asylum but it's apparent that there has since emerged internal disagreement over how to handle domestic-violence claims.").

111. Shoshanna Malett, *Gender as a Ground for an Asylum Claim: Can You? Should You?*, 07-05 IMMIGR. BRIEFINGS 1 (2007).

112. *See supra* notes 60 and 61.

B. "Streamlining" Procedures Limit the Board's Ability to Issue Precedential Opinions and Political Appointments to the Immigration Bench Result in Lower Grants of Asylum

Between 1999 and 2002, Attorney General Janet Reno, and subsequently John Ashcroft, reorganized the BIA and implemented "streamlining procedures" that allowed for a number of procedural shortcuts to more efficiently rule on cases.[113] The first round of regulations promulgated by Attorney General Reno allowed for one BIA member to issue an opinion, rather than the traditional three-member panel, and allowed the single member to affirm an IJ's decision without issuing an opinion on appeal (also known as "Affirmance Without Opinion," or AWO).[114] The second set of streamlining regulations implemented by Attorney General John Ashcroft was much more aggressive.

The first wave of regulations allowed the Board to exercise discretion in referring cases to a full panel for review.[115] However, this discretion was removed by Mr. Ashcroft who made AWO determinations mandatory and implemented strict timelines for completion of appellate cases.[116] Additionally, the second round of regulations bolstered BIA deference to IJ decisions, "[e]liminating de novo review of judicial fact finding and substituting it with clearly erroneous review."[117] Although the procedures were justified as necessary to resolve the backlog of cases before the BIA,[118] they were widely criticized as an attempt by the attorney general to usurp traditional administrative law protections through "an instrumentalist manipulation of the law that is corroding the rule of law in our judicial system."[119]

Most egregiously, the Ashcroft streamlining procedures shrunk the number of members of the BIA from twenty-three to eleven; scholars have since reported that those invited to stay were chosen based on their

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113. Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 671-72 (2008).

114. *Id.* at 672, 674.

115. *Id.* at 673.

116. *Id.* at 673-74.

117. *Id.* at 674.

118. Press Release, Department of Justice, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002), *available at* http://www.justice.gov/eoir/press/02/BIARestruct.pdf; *see also* John D. Ashcroft & Kris W. Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L.J. 1991 (2009) (articulating a defense of the policy from former Attorney General Ashcroft and the former White House Fellow and Counsel to the Attorney General).

119. Rana, *supra* note 12, at 837.

loyalty to the Bush administration and their willingness to deny relief to noncitizens.[120] This particular clause faced a number of legal challenges, including an assertion that reducing the number of Board members violated the APA.[121] However, because "neither the APA nor any other act of Congress limited the authority of the Attorney General to structure the immigration courts" the U.S. Court of Appeals for the District of Columbia Circuit held that the DOJ "had met its minimal obligation to articulate reasons for its action" and the APA challenge failed.[122]

Although the BIA was able to more quickly dispense of its backlog through streamlining, the substantive quality of the opinions suffered[123] resulting in a massive flood of appeals to federal circuit courts.[124] Consequently, circuit splits arose with respect to the appropriate level of deference owed to the BIA.[125] These circuit splits persist today, most notably in the Second and the Ninth, the two circuits that hear the majority of immigration appeals nationwide. They are in direct conflict regarding whether federal courts have the power to review the BIA's decision to streamline.[126] The streamlining procedures and their disastrous results illustrate how the immigration policies of the Attorney General's Office have resulted in administrative inefficiency, inconsistency and confusion, even among the federal judiciary. While the specific effect on domestic violence asylum cases is unclear, these actions further limited the ability of the BIA to provide any clear guidance for such cases, even if specifically empowered to do so by the Attorney General.

Attorney General Gonzales did not overturn streamlining, rather, he responded to the criticism of the BIA and immigration judges by

120. *Id.* at 850 ("It has been repeatedly pointed out that 'the axe fell entirely on the most 'liberal' members of the [Board], as measured by the percentages of their rulings in favor of noncitizens.' It has also been argued that the manner in which the Attorney General conducted this 'purge' reflected a highly politicized and dramatic assault on the decisional independence of Board members.") (internal citations omitted).

121. Sydenham B. Alexander, III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 42 (2006).

122. *Id.* (citing CAIR v. Dep't of Justice, 264 F. Supp. 2d 14 (D.C. Cir. 2003)).

123. *Id.* at 20-21. ("[In fiscal year 2005-2006] the BIA heard 46,355 appeals. As a result of the the 2002 streamlining reforms, these appeals were heard by eleven Board members, averaging more than sixteen appeals per member per workday.") (internal citations omitted).

124. Alexander, *supra* note 121, at 10 ("During a four-year period, immigration appeals septupled from 1,760 to 12,349 per year. The increase in appeals is so large that it qualifies as one of the most important changes in all of federal appellate practice.").

125. Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 530-35 (2003) (discussing the circuit splits that have arisen over the applicability and scope of *Chevron* deference in the immigration context).

126. Rana, *supra* note 12, at 862-63.

conducting an internal review in 2006 that resulted in performance evaluations for immigration and Board members without publicly disclosing the procedures or criteria for the evaluation.[127] His tenure would eventually be plagued by additional allegations of additional political hiring and termination decisions in the DOJ under his watch, including IJs hired by the EOIR.[128] Therefore, not only was progress at a complete halt on the *Alvarado* case and the Proposed Rules, but the DOJ was actively stacking the odds against immigrants and their advocates by making political appointments to the immigration bench and the BIA. The detrimental effect of these political appointments has been disproportionately shouldered by asylum-seekers who have since been far less successful at asserting relief in immigration courts.[129] In fact, the New York Times reported in August 2008 that, "[o]f the 31 politically selected judges, 16 compiled enough of a record to allow statistical analysis. . . . Together these 16 judges handled 5,031 cases and had a combined denial rate of 66.3 percent–6.6 percentage points greater than their collective peers."[130]

The failure of the Proposed Rule and the lack of clear guidance for women seeking protection from domestic violence through asylum are less attributable to the reorganization of administrative immigration agencies and more likely a result of the inability of the Attorney General to reconcile substantive scholarly critiques of the Rule, the subsequent politicization of the Attorney General's Office, the flawed streamlining procedures (and the resulting inefficiencies and gaps in substantive law), the negative attitude of Congress toward asylum-seekers post-September 11th, and the political appointment of immigration judges' anti-asylum inclinations. Measuring these failures against the guideposts of administrative efficacy, accuracy, efficiency and acceptability,[131] it is

127. Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context*, *in* REFUGEE ROULETTE, DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 237 (2009).

128. For an exhaustive study of the events during this time period, including the testimony of Monica Goodling, former DOJ White House Liaison, see THE CENTER FOR IMMIGRANTS' RIGHTS AT PENN STATE UNIVERSITY, THE DICKINSON SCHOOL OF LAW ON BEHALF OF THE NATIONAL LAWYERS GUILD NATIONAL IMMIGRATION PROJECT, *PLAYING POLITICS AT THE BENCH: A WHITE PAPER ON THE JUSTICE DEPARTMENT'S INVESTIGATION INTO THE HIRING PRACTICES OF IMMIGRATION JUDGES*, (2009), *available at* http://law.psu.edu/_file/Playing%20Politics%20at%20the%20Bench%20101209.pdf.

129. Rana, *supra* note 12, at 851-52 (citing Charlie Savage, *Vetted Judges More Likely to Reject Bids for Asylum*, N.Y. TIMES, Aug. 24, 2008, at A17, *available at* http://www.nytimes.com/2008/08/24/washington/24judges.html.

130. Savage, *supra* note 129, at A17.

131. Family, *supra* note 11.

clear that systemic reform is necessary to correct the inaccuracy, inefficiency and unacceptability of these outcomes.

III. LITIGATION STRATEGY IN DOMESTIC VIOLENCE ASYLUM CASES FROM 2001 - 2009: DISPARATE RULINGS AND THE INFLUENCE OF THE PROPOSED RULE

While definitive guidance on domestic violence asylum cases remains pending, victims continue to plead their cases before the U.S. immigration courts. It is well-documented that trends in immigration decisions are hard to identify, due in part to the lack of published opinions.[132] But scholars and practitioners have attempted to unearth trends in domestic violence and other gender-related asylum applications. As a result, there are a few sources from which to view basic developments in how the cases have been litigated over the last ten years. Interestingly, it appears that while there is no precedent, IJs are relying, in part, on the legal values articulated in the Proposed Rule when making their determinations.

As noted previously, the two main arguments set forth in domestic violence asylum cases are that: (1) the claimant fits within a social group targeted for persecution, and that (2) her opposition to domestic violence constitutes a political opinion for which she was persecuted. Because the stories of these women are so diverse, both of these strategies have been used since the first cases were filed in the 1990s. However, the trend in IJ opinions regarding domestic violence asylum claims over the last ten years has been to shift toward the social group claim and away from the political claim. Many of the social group claims articulated since the *Alvarado* case mirror that of Ms. Alvarado: "Guatemalan women who have been intimately involved with Guatemalan male companions, who believe that women are to live under male domination."[133] However, in

132. Birdsong, *supra* note 89, at 212-13 ("The lack of published decisions by United States IJs tends to make any analysis of trends within the system problematic [. . .] Because we have no substantial body of published opinions and few precedential decisions, lawyers for asylum claimants are seldom able to establish, prior to trial, how and why their clients' asylum claims may be decided."); Grider, *supra* note 16, at 215 ("EOIR decisions at the trial level, like the Tenorio decision, are recorded but not published. . . . The EOIR is authorized to publish its decisions selectively and thereby establish precedential value for individual BIA level rulings at its discretion. Few BIA decisions are released; one scholar has reported that only about fifty of the four thousand decisions made each year by the BIA are actually published.") (internal citations omitted).

133. Brief on Behalf of Rodi Alvarado Peña to the Attorney General of the United States, 1, *In re* Rodi Alvarado Peña, A 73 753 922 (Feb. 19, 2004), *available at* http://cgrs.uchastings.edu/documents/legal/ra_brief_final.pdf.

most of those cases, the part of the social group relating to Ms. Alvarado's political opinion was not articulated. Thus, there is evidence of a shift toward arguing social group claims based on gender and not claims relating to political opinion.

It is conceivable that this shift is due to the language of the Proposed Rule, despite its non-law status. The Proposed Rule states in its "Summary" section that it intends to establish that, "gender can form the basis of a particular social group," while other parts of the Proposed Rule affirm the BIA's determination that political opinion is not a basis for a domestic violence asylum claim.[134] Not coincidentally then, most of the successful cases that have been published or discussed in the media, asserted a social group claim as the main argument, political opinion being argued in the alternative.[135] The shift may also be attributed to the trend in IJ rulings on the subject, regardless of whether those rulings are technically precedential, since IJs have been referencing these cases and the briefs filed by DHS in support of the *Alvarado* case, as persuasive authority.[136]

In 2003, the CGRS published a report summarizing forty-five unpublished decisions of gender-based asylum that they had collected in their research.[137] While not all of the cases were rooted in domestic violence asylum, all of the cases involved some sort of gender persecution: "domestic violence, female genital mutilation, forced marriage, rape, and trafficking for sexual exploitation."[138] The report found that two-thirds of the cases reported to CGRS for the study were granted asylum.[139] Upon first glance, these appear to be favorable odds, however, the study only looked at cases that were shared with CGRS by practitioners in the field, which means that all of the women in the study were represented by counsel; a vast majority of asylum-seekers are unrepresented and their anecdotal data is impossible to capture.[140]

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134. Proposed Rule, *supra* note 8.

135. Musalo & Knight, *supra* note 99.

136. *Id.* ("From a review of these decisions, it is clear that a significant number of adjudicators understand that existing case law provides a firm framework for grants of asylum in cases based on gender persecution. These adjudicators rely on long-standing landmark cases, such as *Acosta* and *Kasinga*, and they understand that the vacating of *R-A-* is just as significant a development as was the issuance of the original decision itself. These adjudicators who grant relief in gender cases are often likely to inform their analysis by reference to the proposed rule with its helpful commentary, or even to international developments, including UNHCR's gender and social group guidelines.").

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* ("These unpublished decisions were provided to the authors by the attorneys in the cases and provide a unique body of written opinions in gender asylum cases. Because

However, the study did reveal important trends in the decision-making process of the IJs. For example:

> Eleven of the 15 decisions granting relief in domestic violence claims included a social group rationale; in seven of these 11 cases, the decision was based *solely* on PSG [particular social group], while in the remaining four, the decisions were based on both social group and political opinion. Other grants in these domestic violence cases were based solely on political opinion, while a few rested on religion, alone or in combination with political opinion.[141]

In addition, seven of the domestic violence claims were denied.[142] What the authors of the study found most striking, was that IJs reached "diametrically opposed conclusions" about the severity and cause of domestic violence in the applicants' home countries.[143] Essentially, asserting a domestic violence asylum claim was a gamble with unpredictable odds.

As the numbers above indicate, judges seemed to be favoring the social group analysis over political opinion, not just in the United States, but also in other countries grappling with domestic violence asylum claims.[144] This trend was affirmed and perpetuated in the United States by the 2004 DHS brief in the *Alvarado* case. In the brief, the DHS began by rearticulating that it supported the Proposed Rule and acknowledged the "piecemeal" development of the law in absence of a final rule. The DHS further affirmed in the brief that, "gender is clearly an immutable trait," and that "it would be fundamentally inaccurate to characterize Alvarado's abuse as motivated by her husband's perception of her

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this is a self-selected group, the decisions do not represent a random sample, and they may not be representative of decisions nationwide. Furthermore, although they are illustrative of decision-making trends, they should not be seen as comprising the basis for any statistically-based conclusions regarding types of claims and probable outcomes.").

141. Musalo & Knight, *supra* note 99.

142. *Id.*

143. *Id.* The authors cite two particular cases from Honduras in which two Judges rendered opposite decisions, within six months of one another, on whether the Honduran authorities were willing to control the persecutors.

144. *See id.; see also* Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 778 (2003) (presenting a comparative analysis of cases in the United States, Australia, New Zealand and Canada, revealing a "unifying rationale" in the interpretation of "particular social group" and also the "nexus analysis necessary to establish the causal connection between social group membership and the feared persecution in cases involving persecution by non-State actors").

political opinions about male dominance."[145] Thus, the DHS provided their opinion of how these types of cases should be argued and at the very least, provided guidance as to the types of claims that they would be willing to support for relief in immigration court.

The CGRS has not published another study of unpublished decisions since 2003, but as the media interest around this issue builds, and practitioners share more of their experiences, there are several cases that have received media coverage that demonstrate the continued success of the social group claim over the political opinion argument. On May 6, 2008, a Florida IJ granted asylum in an unpublished opinion to a Honduran woman seeking asylum from the father of four of her children, who abused both her and her children.[146] The judge acknowledged gender as a basis for a social group, citing *Acosta* and further acknowledged the language of the Proposed Rule and the Alvarado case, with the caveat that it "no longer constitutes good law."[147] Notably, the attorney in that case did not argue a political opinion claim; even more interestingly, he did not articulate a social group.[148] The judge then defined a social group strikingly similar to that of Rody Alvarado, but without the political component: "Honduran women in intimate relationships who are unable to leave the relationships."[149] It would seem that in the cases released to the public in the last few years, practitioners have all but abandoned the political opinion claim. In the successful case of Maira Falfán Maldonado, decided by the Boston Immigration Court in February 2009, the judge focused almost exclusively on the social group argument, which was specifically articulated to mirror the social group argued in the *Alvarado* case.[150]

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145. DHS Brief, *supra* note 54, at 3; *see also* Proposed Rule, *supra* note 8 ("The Board reasoned that the abuse in this case was not on account of the applicant's political opinion because there was no evidence that the applicant's husband was aware of the applicant's opposition to male dominance, or even that he cared what her opinions on this matter were.").

146. Immigration Judge, U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court, Orlando, Florida [name and A# redacted] at 4-6 (2008), *available at* http://aila.org (doc. No. 08062061) (last visited May 6, 2010).

147. *Id.* at 12-13.

148. *Id.* at 12 ("In the present case, the Respondent argues that she is a member of a particular social group involving women in violent relationships, but the Respondent's counsel did not offer a specific definition of that social group.").

149. *Id.* at 14.

150. The decision of the immigration judge in this case was issued orally, but the attorney in the case shared her recollection of his ruling with the author. E-mail from Andrea Saenz, Equal Justice Works Fellow at the Political Asylum/Immigration Representation (PAIR) Project, to author (on file with the author).

The case that has received the most press recently is the case of *Matter of L-R-*, currently pending before the Board of Immigration Appeals wherein the DHS filed a brief on April 13, 2009, asserting the Obama administration's current position on domestic violence asylum claims. While the DHS ultimately concluded that the respondent in that case had not met her burden of proving a cognizable social group, it laid out suggestions for doing so and supported a remand to the San Francisco Immigration Court where the case was originally decided so that she could "refine [her] claims and evidentiary presentations in light of the alternative particular social group formulations" described in the brief.[151] The DHS specifically rejected the political opinion argument, stating that, "there is no record evidence to reflect that, even if [the abuser] was aware of the female respondent's feminist views and opposition to dominance, his abuse was related to her opinions on this matter. Rather, it appears that he continued to abuse her regardless of what she said or did."[152] The DHS offered two social group formulations instead. The first is nearly identical to the first half of Rody Alvarado's: "Mexican women in domestic relationships who are unable to leave"; the second reflects the motive of the abuser: "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."[153] The second is more reflective of the notion that women asserting this social group would be required to prove their abuser's perception of their role in the relationship–an issue that received a fair amount of scholarly critique after the publication of the Proposed Rule.

In each of these cases, while the attorneys and IJs could not rely on the Proposed Rule as precedential, the attorneys on both sides referenced the Rule in their social group analysis. Respondent's counsel added analogies from the *Alvarado* case to support their client's particular social group and in some cases, even articulated the exact same social group when applicable. This signals a development of some kind of precedential value to the Proposed Rule and the *Alvarado* case, despite their non-law, non-precedential status. Yet these are but a smattering of the domestic violence cases decided over the last decade. Very little is known about the unsuccessful cases and there is no information on those that have never been reported to academics, a bar association or the news media, which in all likelihood, constitute the majority. Because asylum proceedings are confidential,[154] there is no way to do the empirical study necessary to determine whether this trend is credible, and there is

151. Martin Brief, *supra* note 60, at 29.
152. *Id.* at 22.
153. *Id.* at 14.
154. *See* 8 C.F.R. § 1208.6 (2010).

certainly no basis to suggest that arguing an *Alvarado* social group will consistently lead to success. While the most recent brief from the DHS gives us a glimpse into the Obama administration's seemingly favorable position, it is not law. And, while patterns are emerging in IJ opinions on the subject, they are not precedent-setting.

Thus, as a result of the last ten years of undisclosed jurisprudence, practitioners and their clients are left with a hodge-podge of anecdotal evidence regarding successful domestic violence cases nationwide, and a brief from the DHS in a pending matter articulating the social groups du jour for women fleeing domestic violence. While a trend of arguing the *Alvarado* social group has emerged in the successful cases, and even the unpopular political opinion claims have succeeded from time to time, these cases remain unpublished, non-precedential, and hardly even persuasive authority for those seeking relief in immigration court. The likelihood of success appears to depend more on the intellectual disposition of the IJ toward domestic violence claims or on the discretion of the particular DHS trial attorney (and their willingness to craft a brief supporting the claim) than on any tangible precedent. Additionally, without definitive guidance, the IJs have a tremendous amount of discretion to deny the case on some other ground if they so choose, such as credibility, the motive of the persecutor or the lack of state action.

IV. LEADING ADMINISTRATIVE REFORM EFFORTS AND INCREMENTAL REFORM PROPOSALS TO AID CLAIMANTS SEEKING ASYLUM BASED ON DOMESTIC VIOLENCE

The *Alvarado* case illustrates administrative failures in both the regulation and adjudication of gender-based asylum claims and demonstrates the ability of the Attorney General's Office to manipulate immigration policy, largely without the checks and balances afforded by the APA. The actions of immigration agencies with respect to domestic violence asylum claims vastly depart from traditional American legal values of due process, judicial efficiency, and fundamental fairness as well as the administrative goals of "accuracy, efficiency and acceptability."[155] Widespread, multi-agency and judicial reforms are needed. However, with enforcement and legalization concerns dominating the political debate regarding immigration reform, incremental changes (rather than systemic overhaul) are more likely to pass through Congress in the upcoming reform effort.

155. Family, *supra* note 11.

A. Rejected Reforms

An initial reaction to the administrative problems in the immigration system might be to advocate for restriction of IJ discretion while providing incentives to the DOJ and DHS to engage in robust rulemaking. Because the APA arguably governs regulations promulgated by the DOJ and DHS, it seems that rulemaking is the key to consistency in gender-based asylum decisions. However, these are a few of several reforms that leading scholars have cautioned against.

Prominent immigration scholar and Professor Stephen Legomsky advises against placing additional restrictions on the adjudicators, such as "terminating or demoting the outliers, or subjecting all adjudicators to performance evaluations, or making vastly increased use of agency head review of adjudicators' decisions, or even imposing mandatory minimum and maximum approval rates"[156] because it would limit decisional independence, the benefits of which, he maintains, are procedural fairness or minimal adjudicative bias.[157] Other immigration scholars have noted that preserving judicial independence in the immigration context and encouraging IJs to make law through adjudication has even more benefits when favored in lieu of legislative rulemaking by the DHS or DOJ.[158]

Additionally, scholars advocate similar independence among the members of the immigration appellate body–the BIA. A recent empirical study of BIA opinions concluded that agency lawmaking through adjudication, "(1) creat[es] significant numbers of legal rules, (2) limit[s] government discretion, and (3) enhance[s] predictability for regulated entities through legal gap filling."[159] Additional benefits of BIA independence would include, "(1) promoting consistency in the development of immigration law and (2) assisting in the notice or publicity of such law."[160] Of course, these outcomes assume that BIA opinions would be detailed, published and widely available, which they currently are not. Deference to agency adjudications therefore would need to be accompanied by additional legislative rules to ensure transparency.

It seems logical that the reason why these reforms have been rejected is because they both would involve increasing the power of the Attorney

156. Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 469 (2007).

157. *Id.* at 470-71.

158. *See* Eyer, *supra* note 113.

159. *Id.* at 700.

160. *Id.*

General's Office. Clamping down on the immigration adjudicators would likely be a function of the DOJ and their supervisory authority. Robust rulemaking, under the current statutory structure, would be shared by the DOJ and DHS. Thus, scholars are trending toward reform efforts that avoid or remove the powers of the DOJ and the Attorney General's Office with respect to both adjudicative and regulatory functions. Indeed, as one scholar aptly concluded, "The Department of Justice has so thoroughly undermined the integrity of EOIR adjudication in recent years that a 'divorce' between the two agencies is perhaps the only route to a healthy bureaucratic culture of professional adjudication."[161]

B. Large-Scale Proposals for Systemic Reform

In lieu of these reforms, immigration scholars have made a number of proposals to reorganize the immigration courts in a way that would encourage their independence from the DOJ. A recent groundbreaking study on the disparities in the adjudication of asylum claims suggests an aggressive solution to problem of administrative management in conflict with judicial independence: that IJs "be separated from DOJ . . . and at the same time could be subject to greater supervisory oversight from the head of a newly independent agency."[162] One of the authors of the study, Georgetown Professor Phil Schrag, in partnership with Marshall Fitz, Director of Immigration Policy at the Center for American Progress, is currently drafting and circulating model legislation proposing an Article I Immigration Court.[163] This has been a very popular area of discussion for immigration reform advocates and scholars. The legislation seeks to implement the judicial reforms outlined in the Asylum Study.

Professor Legomsky has suggested that IJs could be made into administrative law judges (ALJs), because under the APA, "the agencies have very little control over ALJs' selection, performance, or duration of employment, which approaches life tenure."[164] He has also been an advocate of an Article I immigration court and is currently circulating legislation that would go a step further, proposing that Congress create

161. Taylor, *supra* note 127, at 240.

162. *Id.* at 239-40.

163. The legislation is under review by immigration scholars nationwide and will likely undergo numerous revisions before it is formally proposed for presentation to members of Congress. Posting of Professor Phil Schrag to Immigration Law Professors List (Nov. 30, 2009) (on file with the author).

164. Legomsky, *supra* note 156, at 472.

an Article III Court of Immigration Appeals that would replace both the BIA and the regional courts of appeals.[165]

While adjudicative reform would resolve a majority of the administrative failures that occurred in the *Alvarado* case, they would require a dramatic reorganization of immigration adjudication and appeals processes. Since upcoming reform efforts appear more likely to focus on enforcement objectives rather than an overhaul of the adjudicative system,[166] a more modest proposal may be more politically viable, at least for the specific problem of gender-based asylum claims. Rather than focusing on the larger adjudicative framework, I offer two incremental changes that could remedy some of the administrative issues raised in the *Alvarado* case without completely reorganizing the agencies involved.

C. Incremental Proposal No. 1: Finalize Regulations Regarding Gender-Based Asylum Claims and Place Time Limits on the Pendency of Proposed Rules

The first and most obvious incremental solution would be for the DOJ and DHS to finalize the Proposed Rule or create a new one articulating the basic requirements for asserting an asylum claim based on domestic violence and conclusively including gender-based persecution as a ground for asylum. This reform does not require the intervention of Congress, rather it accepts the status quo of DOJ regulatory authority and codifies the trend among IJs to grant domestic violence asylum cases on the basis of a cognizable social group. Those in favor of this course of action argue that, "[c]odification of clear standards would guide decision makers and protect . . . victims of gender-based persecution."[167]

The authors of the Asylum Study have suggested that such measures would be futile[168] "not because they identified any affirmative harms, but

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165. Posting of Professor Stephen Legomsky to Immigration Law Professors List (Jan. 14, 2010) (on file with the author).

166. Secretary of Homeland Security Janet Napolitano recently delivered a speech at the Center for American Progress expressing the Obama Administration's support for immigration reform. The speech focused almost exclusively on enforcement. Janet Napolitano, Sec. of Homeland Security, Speech at the Center for American Progress (Nov. 13, 2009) (transcript *available at* http://www.americanprogress.org-events/2009/11/inf/napolitano_speech.pdf.

167. Heyman, *supra* note 78, at 117.

168. *See* JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE, DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 227 (N.Y. Univ. Press 2009) *originally published, in part*, as Jaya Ramji-Nogales,

because of the lack of 'evidence that disagreements about substantive law account for the disparities in grant rates.'"[169] I do not agree, at least in domestic violence asylum cases, that more specific regulations would be ineffectual, particularly when the DHS is demanding the same from the DOJ and the Obama administration seems willing to actually finalize them. Additionally, as noted in the analysis of the sampling of favorable cases that have been issued on the subject, *infra,* it appears that IJs are relying on the Proposed Rule and the policies articulated by the DOJ in the *Alvarado* case to grant relief. The Proposed Rule has effectively served as substantive precedent in some courts. Therefore, the suggestion that the formal adoption of substantive law would be ineffectual because IJs pay little attention to the legal substance of claims appears to be incorrect in the domestic violence asylum context. The IJs issuing written opinions in the cases discussed in this article gave substantial weight to the development of the substantive law regarding gender-based claims.

The real concern is whether the new regulations will account for the critiques and suggestions offered by practitioners and academics. The DOJ and Attorney General Eric Holder would be wise to consider carefully the feedback from practitioners and academics during the notice and comment period that would follow a new rule or a revival of the Proposed Rule. Because the DHS and adjudicators are seeking guidance specifically on domestic violence claims, those claims are much more likely to be decided consistently and dependably if attorneys and judges have definitive guidance. Therefore, it is essential that the rule be drafted in a manner that respects the scholarly critiques offered and that addresses any developments in the law that have subsequently effected asylum-seekers, such as the "social visibility" requirement, which has been rejected by the Court of Appeals for the Seventh Circuit and called into question by a number of scholars and advocates.[170]

Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

169. Legomsky, *supra* note 156, at 446.

170. The Seventh Circuit has rejected the "social visibility" analysis articulated in *Matter of* S-E-G-, *supra* note 85, as "illogical." *See* Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009). The Immigrant Law Center of Minnesota is requesting that Attorney General Holder certify the case to himself in order to clarify its effect on established social group precedent. *See* Request for Attorney General Certification of *Matter of* S-E-G-, 24 I. & N. Dec. 579 (BIA 2008), *available at* http://www.immigrantlawcentermn.org/-Litigation/Resources/SEG-AG_Certification_request_final.pdf. Finally, Professor Deborah Anker, Director of the Harvard Immigration and Refugee Clinical Program is drafting an amicus letter in support of certification of *In re* S-E-G-, *supra* note 85, and encouraging the attorney general to adopt instead the social group analysis articulated in

Depending on the manner in which it is drafted, this measure could have a fairly limited effect and would not necessarily provide adequate guidance for other gender-based asylum claims. Because "gender" as a basis for a social group encompasses such a wide variety of claims, a more comprehensive regulatory framework is necessary to guide adjudicators, particularly at the affirmative asylum stage where asylum officers are not necessarily aware of the informal development of precedent for a particular gender-based claim. If a more comprehensive definitive rule for all gender-based asylum claims becomes a reality, DHS must provide additional training to asylum officers and border patrol agents who are often the first immigration authorities to encounter this particular group of immigrants. Such training should reduce costs in the long-run since asylum officers will have authority to grant domestic violence asylum cases, thereby reducing the number of cases referred to IJs and appealed to the BIA.

In order for a new rule to ever take effect, it should be paired with another minor reform: the statutes governing the rulemaking procedures for immigration regulations should mandate that DOJ and the DHS issue a final, written decision regarding the implementation of a proposed rule after the expiration of the notice and comment period. This administrative mandate would limit the time that a proposed rule is pending, forcing the agencies to make a final determination on whether or not to adopt the rule. This could avoid some political manipulation of the rule's underlying policies by eliminating the ability to stall a final determination on the rule due to changes in the political climate regarding the particular issue that the rule seeks to address. This proposal would also provide greater transparency regarding the reasons why the rule failed, creating a "legislative history" for failed regulations. While it is likely that the DOJ or DHS would never be completely transparent on the reasons for rejecting a proposed rule addressing a politically sensitive issue, any other justifications provided by the agencies could provide a glimpse into the policy considerations weighed in the decision-making process.

D. Incremental Proposal No.2: Eliminate the Adjudicative Discretion of the Attorney General or Place Limits on the Time Allowed for the Exercise of Such Discretion

As is demonstrated by the *Alvarado* case, the Attorney General's power to review determinations of the BIA can create significant delays

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Acosta, *supra* note 82. Posting of Professor Deborah Anker to Immigration Law Professors List (Jan. 15, 2010) (on file with the author).

in cases where the DOJ is interested in the underlying policy issue at stake, particularly in cases pending before IJs in removal proceedings. Asylum cases and particularly domestic-violence asylum cases are largely decided within the context of removal proceedings since it is rare that a woman who is abused in her home country would be able to secure the necessary papers required to immigrate lawfully. "The Attorney General and his predecessors have always had broad residual power to make final determinations in exclusion, deportation, and removal cases."[171] Although this power was conferred on the Attorney General by agency regulation, Congress has the ultimate authority to determine the role of the Attorney General in immigration matters.

A second reform proposal would remedy this delay completely by amending the Immigration and Nationality Act to eliminate the power of the Attorney General to review cases at his/her direction or at the direction of the BIA or DHS. A more aggressive approach, such a reform would eliminate the possibility of the Attorney General stepping in to a policy-laden immigration case without issuing any actual guidance. There is a risk that stripping the Attorney General of this power may prove to be a double-edged sword. Because the scope of the BIA's authority exists subject to the Attorney General's mandate,[172] eliminating his or her power to weigh in on cases pending before the Board may have unintended consequences. For example, in the *Alvarado* case, there were several instances when the Attorney General's ability to step in actually prevented damaging precedent from taking hold and excluding domestic violence victims from asylum relief. Attorney General Janet Reno overturned the BIA's adverse ruling in Ms. Alvarado's case in the final hour of the Clinton administration.[173] Attorney General Mukasey likewise issued an Order permitting the Board to issue an opinion in the *Alvarado* case that, had the Board issued an opinion, could have served as precedent for future claims.[174] However, the damage of the administrative delays created by the Attorney General exercising this power outweigh the potential benefits to litigators of being able to request that the Attorney General take action in a pending case.

As an alternative, Congress could place limits on the amount of time that the attorney general is permitted to exercise his or her discretion before either issuing a final order or remanding to the appropriate agency with appropriate policy guidance in cases pending in removal proceedings. This would reduce the types of delays seen in the *Alvarado*

171. GORDON ET AL., *supra* note 20, § 3.05[1].
172. *Id.* § 3.05[2].
173. *See supra* note 96 and accompanying text.
174. *See supra* note 57 and accompanying text.

case without limiting the attorney general's power. Such a measure would merely require that he or she dispose of the issue taken under that power within a reasonable time. There is no reason why Attorney General Ashcroft should have been allowed to hold the *Alvarado* case hostage for over a year before relinquishing jurisdiction without further guidance. In fact, attorneys general have suffered an apparent bout of procrastination or befuddlement after certifying the *Alvarado* case to themselves for review.

A limit of ninety days would not be unreasonable for the attorney general to consider a case in removal proceedings. Theoretically, asylum cases must be decided within 180 days from the date that the application is originally filed before CIS or the immigration court.[175] Currently, the statute specifically excludes the time for administrative appeal from the 180 day requirement.[176] Since the attorney general typically certifies cases to him/herself that are pending appeal, there is no time limit. For a case that is already in proceedings, the attorney general should be able to make a determination within half the amount of time that is statutorily mandated for the disposition of asylum cases. Ideally, this measure would force the Office of the Attorney General to carefully consider whether to take up an issue well in advance of doing so, keeping in mind that as soon as it takes up review of a case, the time begins toll for a final disposition. Rather than encouraging rushed deliberations, this proposal seeks to encourage the attorney general to refrain from interfering in the adjudication of immigration cases unless he/she can make a final determination in less time than it would take for the immigration court in which the case is pending to do so.

V. CONCLUSION

Even if the Obama administration fulfills its promise to issue determinative guidance on the issue of domestic violence asylum cases, it serves as a quick fix rather than true reform of the broken administrative immigration functions of the DOJ and DHS. The fact that the *Alvarado* case could be stalled for so long due to unspecified delay in the Attorney General's Office gives those with other gender-based social group asylum claims reason for concern. These types of claims are often politically sensitive, particularly with respect to cases that implicate

175. 8 U.S.C.A. § 1158(d)(5)(A)(iii) (West 2010) ("[I]n the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.").

176. *Id.*

moral issues, such as sexual preference. While a final rule is vastly preferred to the status quo of case-by-case determinations, the reforms required to remedy the piecemeal development of this area of the law are more fundamental than an absurdly tardy regulation articulating the guidelines for engendered social group claims.

Rather, there ought to be a more permanent solution to be found in administrative law that could provide safeguards against political manipulation of immigration agencies and ensure the consistency, reliability and stability of the adjudication of asylum claims. Immigration scholars and advocates must infuse their reform efforts with reasonable and viable proposals that serve the administrative balance "between the oversight that promotes consistency and accuracy and the decisional independence of agency adjudicators."[177] Curtailing the attorney general's power to interfere with the timely adjudication of asylum cases and demanding justifications for the lack of regulatory guidance are incremental changes, but they may provide a significant starting point for women seeking asylum protection from domestic violence, particularly if adjudicative restructuring becomes a casualty in upcoming immigration reform efforts.

177. Taylor, *supra* note 127, at 229.