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## Note

### **Insufficient Government Protection: The Inescapable Element in Domestic Violence Asylum Cases**

*Elsa M. Bullard\**

After years of abuse including beatings, the burning of her bed while she slept, and rape at gunpoint, a Mexican woman identified as L.R. sought refuge in the United States.<sup>1</sup> L.R. requested assistance from police in her small Mexican village on several occasions, but due to her common-law husband's clout in the community, her attempts for protection failed.<sup>2</sup> She suffered abuse until her tormentor left with the couple's three small children.<sup>3</sup> L.R. eventually won custody and a protection order through the Mexican court system, and in the midst of continued threats to her and her family, L.R. departed with her children to the United States.<sup>4</sup>

In April 2009 the Department of Homeland Security (DHS) indicated that the Obama Administration may be open to altering or defining the United States' policy for victims of domestic violence applying for asylum.<sup>5</sup> In a supplemental brief opposing asylum to the Board of Immigration Appeals (BIA) in L.R.'s case, the DHS suggested two acceptable formulations of a key

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1. Amended Declaration of L.R. in Support of Application for Asylum at 7–9, *L.R. v. United States* (B.I.A. Dec. 30, 2005) [hereinafter Declaration of L.R.], available at <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-support.pdf>.

2. *Id.* at 9.

3. *Id.* at 13.

4. *Id.* at 18.

5. See Julia Preston, *New Policy Permits Asylum for Battered Women*, N.Y. TIMES, July 16, 2009, at A1, available at 2009 WLNR 13548496.

asylum eligibility element, persecution on account of a “particular social group,” and recommended remand of the case, but did not discuss the government’s inability to protect the victim in detail.<sup>6</sup> The severity of L.R.’s abuse and the large amount of supporting country-condition information proving the prevalence of domestic abuse in rural Mexico led the DHS attorney to stipulate to asylum in L.R.’s case.<sup>7</sup> In August 2010 an immigration judge granted L.R. asylum in a short unpublished opinion.<sup>8</sup> Even with a clear definition of an acceptable “social group,” demonstrating that the Mexican government is unable or unwilling to protect a domestic violence victim poses another significant hurdle to meeting the requirements for asylum eligibility under 8 U.S.C. § 1101(a)(42)(A).<sup>9</sup> In the future, the pivotal element for domestic violence asylum applicants may be demonstrating that their home country governments are unable or unwilling to protect them from their persecutors.<sup>10</sup>

The definition of “refugee” lays out the elements for asylum eligibility.<sup>11</sup> These elements require that an applicant be “unable or unwilling to return to . . . [or] avail himself or herself of the protection of” his or her native country due to “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>12</sup> Membership in a “particular social group” offers the only applicable category for a domestic violence situation.<sup>13</sup> In its supplemental brief for L.R.’s case, DHS lawyers

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6. Supplemental Brief of the Department of Homeland Security at 14, *L.R. v. United States* (B.I.A. Apr. 13, 2009) [hereinafter Supplemental Brief in L.R.], available at <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf> (recommending the particular social group be defined as either “Mexican women in domestic relationships who are unable to leave” or “Mexican women who are viewed as property by virtue of their position within a domestic relationship”).

7. See Julia Preston, *Asylum Granted to Mexican Woman in Case Setting Standard on Domestic Abuse*, N.Y. TIMES, Aug. 13, 2010, at A14, available at 2010 WLNR 16141188.

8. *Matter of L.R.*, CENTER FOR GENDER & REFUGEE STUD., <http://cgrs.uchastings.edu/campaigns/Matter%20of%20LR.php> (last visited Apr. 8, 2011).

9. See Supplemental Brief in L.R., *supra* note 6, at 27 (noting the requisite factor of proving that “Mexican authorities were unwilling or unable to protect” the asylum seeker).

10. See *id.* at 21–22.

11. See 8 U.S.C. § 1101(a)(42)(A) (2006).

12. *Id.*

13. See Laura S. Adams, *Beyond Gender: State Failure to Protect Domestic Violence Victims as a Basis for Granting Refugee Status*, 24 T. JEFFERSON L. REV. 239, 242 (2002).

recognized that the “unable or unwilling” government element may be the most difficult element to prove for future domestic violence victims seeking asylum.<sup>14</sup> They neglected, however, to suggest a test or threshold requirement for this element, instead leaving it to the review and discretion of the asylum officers.<sup>15</sup>

After years of focus on defining a particular social group for domestic violence asylum applicants, DHS statements in *In re L.R.* and *In re R-A* remove the issue from the center of these asylum claims.<sup>16</sup> That does not mean applications based on domestic violence will sail through the immigration system. The examples of the United Kingdom and Canadian courts indicate that decisionmakers’ focus will shift to the ability and willingness of governments to protect domestic violence victims.<sup>17</sup> Examining decisions in the United Kingdom and Canada is instructive as both countries, like the United States, adhere to the United Nations Convention relating to the Status of Refugees.<sup>18</sup> The United Kingdom and Canada expanded the definition of particular social group to include gender-based applicants several years ago.<sup>19</sup> The examples of the United

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14. Supplemental Brief in *L.R.*, *supra* note 6, at 21–22.

15. *See id.*

16. *See* Department of Homeland Security Response to the Respondent’s Supplemental Filing of August 18, 2009, Alvarado-Pena (Exec. Office for Immigration Review Oct. 28, 2009) (No. A073 753 922) [hereinafter *DHS Response in Alvarado-Pena*], available at [http://graphics8.nytimes.com/packages/pdf/national/20091030asylum\\_brief.pdf](http://graphics8.nytimes.com/packages/pdf/national/20091030asylum_brief.pdf) (granting asylum as a matter of discretion); Supplemental Brief in *L.R.*, *supra* note 6, at 14; *see also* Preston, *supra* note 7, at A14 (discussing the final outcome in *In re L.R.*).

17. *See infra* notes 96–107 and accompanying text (discussing an altered focus in cases in the United Kingdom and Canada after the acceptance of domestic violence victims as an eligible social group).

18. The United Nations Convention defines a refugee as a person with a “well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion . . . [who is] unable or, by reason of that fear, unwilling to avail [themselves] of the protection of each of those [countries of nationality or habitual residence].” *See* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 150; *see also* 8 U.S.C. § 1101(a)(42)(A) (2006) (adopting a nearly identical definition as that of the United Nations Convention); Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.) (defining a refugee as a person with a “well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion . . . who [are] unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those [countries of nationality or habitual residence]”).

19. *See* *Ward v. Canada*, [1993] 2 S.C.R. 689, para. 78 (Can.) (finding asylum possible for “individuals fearing persecution on such bases as gender”); *Ex*

Kingdom and Canada indicate a shift in focus to the availability of state protection for domestic violence victims and away from the definition of particular social group.<sup>20</sup> An unwilling and unable government is likely to become an ever-more important element for asylum applicants to argue in future applications for asylum in the United States as well.<sup>21</sup>

Although discretion is important in asylum to ensure consideration of the facts of each individual applicant's situation, asylum officers should apply discretion within a regulatory framework in order to provide some consistency between cases.<sup>22</sup> This Note examines thresholds set in the past to establish a government's inability or unwillingness to protect its citizens, and continues by suggesting factors the Obama Administration should incorporate into any new asylum policies regarding domestic violence applicants. Part I explains the development and current state of asylum law as it relates to victims of domestic violence, focusing on the governmental protection element. Part II examines case law interpretations indicating the central importance of the governmental protection element, describes challenges facing domestic violence asylum applicants, and analyzes various approaches to the element of government protection. In Part III, this Note suggests a standard and accompanying factors for determining whether an applicant's country is unable or unwilling to protect the applicant from domestic violence. This Note argues that in addition to defining acceptable social groups, DHS should outline the threshold requirements to prove an applicant's home country government is unable or unwilling to protect the applicant from an abuser.

### I. GENDER-BASED ASYLUM CLAIMS: HISTORY AND DEVELOPMENT OF ASYLUM LAW

In order to appreciate the challenges domestic violence victims face seeking asylum in the United States, scholars, practitioners, and advocates must understand the overall legal framework of asylum. This Part first explains asylum law in

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*parte* Shah, [1999] 2 A.C. 629 (H.L.) [647] (appeal taken from Immigration Appeal Tribunal) (Eng.).

20. See *infra* notes 96–107 and accompanying text.

21. See Supplemental Brief in L.R., *supra* note 6, at 21–22.

22. See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (offering statistical data on asylum officer decisions over more than a four-year time period to demonstrate and denounce the inconsistency in the officers' discretionary grants of asylum).

the United States, then discusses the history of gender-based asylum law, and finally examines the development of asylum law in the area of domestic violence.

#### A. AN OVERVIEW OF ASYLUM LAW IN THE UNITED STATES

For successful applicants, asylum provides protection within the United States, an opportunity for employment,<sup>23</sup> and the chance to bring family members to the United States.<sup>24</sup> This section focuses on the statutory requirements,<sup>25</sup> which many applicants struggle to overcome in order to receive a discretionary grant of asylum.<sup>26</sup>

The 1951 United Nations Convention Relating to the Status of Refugees forms the basis for U.S. asylum law.<sup>27</sup> To receive asylum, an applicant must meet the definition of refugee<sup>28</sup> and must not be barred for any other statutory reason.<sup>29</sup> The burden of proof lies solely with the applicant to demonstrate that these statutory requirements are met.<sup>30</sup> A refugee is defined as:

[A]ny 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 . . . .<sup>31</sup>

In order to satisfy the definition, an applicant must demonstrate that her well-founded fear of persecution, from which her government is unwilling or unable to provide protection, is "on account of" her membership in one of the five protected categories.<sup>32</sup>

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23. 8 U.S.C. § 1158(c)(1)(B).

24. *Id.* § 1158(b)(3)(A).

25. *Id.* § 1158(b)(1).

26. *See, e.g.,* Fauziya Kasinga, 21 I. & N. Dec. 357, 358–68 (B.I.A. 1996) (finding credibility easily, but engaging in an in-depth analysis as to the eligibility requirements).

27. *See* Convention Relating to the Status of Refugees, *supra* note 18, at 150.

28. 8 U.S.C. § 1101 (a)(42)(A).

29. *See id.* § 1158 (b)(2)(A) (listing examples of other statutory bars including filing outside of the one-year deadline, aggravated felony convictions, being firmly resettled in another country, and persecuting others based on a protected ground).

30. *Id.* § 1158(b)(1)(B)(i).

31. *Id.* § 1101(a)(42)(A).

32. *Id.*

The applicant's well-founded fear of persecution can be based on either past persecution or a well-founded fear of future persecution.<sup>33</sup> A finding of past persecution creates a presumption of future persecution.<sup>34</sup> The government can rebut this presumption by showing either a change in conditions such that a well-founded fear is no longer reasonable or demonstrate that reasonable relocation within the country of origin ends a fear of persecution.<sup>35</sup> A change in conditions includes changes in either the applicant's situation or the country's conditions.<sup>36</sup> For example, a woman who filed an asylum application under the protected grounds of religion, but who has since converted to a different sect accepted within her country of origin, would no longer qualify for the presumption based on past persecution.<sup>37</sup> The reasonableness of relocation depends on consideration of several factors offered in the regulation.<sup>38</sup>

A well-founded fear of future persecution must be both objectively and subjectively reasonable.<sup>39</sup> If a reasonable person in the applicant's situation would fear persecution if made to return to the applicant's country of origin, a court would find that that fear is objectively reasonable.<sup>40</sup> The applicant's fear must be subjectively reasonable as demonstrated by her credible testimony.<sup>41</sup> When the persecutor is an individual or group separate from the government, the applicant has to demon-

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33. Establishing Asylum Eligibility, 8 C.F.R. § 208.13(b) (2010).

34. *Id.* § 208.13(b)(1).

35. *Id.*

36. *Id.*

37. Case law regarding changed conditions varies somewhat among circuit courts. Compare *Hoxhallari v. Gonzales*, 468 F.3d 179, 187 (2d Cir. 2006) (holding that when changed circumstances "evidently prevail" in a country, an immigration judge need not make specific findings of these changes in the record), and *Menendez-Donis v. Ashcroft*, 360 F.3d 915, 917 (8th Cir. 2004) (basing a finding of changed country conditions on State Department and human rights reports), with *Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002) (stating that when past persecution has been established, a State Department report alone is not sufficient to demonstrate changed country conditions). This Note merely provides a general description of law in this area.

38. See 8 C.F.R. § 1208.13(b)(3). In determining the reasonableness of relocation an adjudicator should consider "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." *Id.*

39. See, e.g., *Hassan v. Ashcroft*, 388 F.3d 661, 666 (8th Cir. 2004).

40. See, e.g., *Miranda v. INS*, 139 F.3d 624, 627 (8th Cir. 1998).

41. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

strate that she is unable or unwilling to avail herself of her government's protection.<sup>42</sup>

In order to demonstrate that persecution is “on account of” one of the protected grounds, the applicant must first establish membership in one of the protected classes.<sup>43</sup> Of the five protected classes—race, religion, nationality, membership in a particular social group, and political opinion—the particular social group is the most controversial and the grounds under which many domestic violence victims file for asylum.<sup>44</sup> People who share an immutable characteristic, or some characteristic so fundamental that a person should not be asked to alter it, form a particular social group.<sup>45</sup> The group cannot be defined, however, by the persecution itself.<sup>46</sup> Once the applicant establishes that one of the protected classes applies to her, she must demonstrate that her persecution was “on account of” the protected ground.<sup>47</sup> An applicant must satisfy all elements in the definition of “refugee” in order to be eligible for asylum.<sup>48</sup> The next section discusses specific interpretations of this statutory language as it relates to gender.

#### B. THE HISTORY OF GENDER-BASED ASYLUM CLAIMS

Women seeking asylum based on a gender-related<sup>49</sup> issue face significant obstacles. First, gender violence is often not

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42. See Adams, *supra* note 13, at 242 (outlining the current state of asylum law in regard to nongovernmental persecutors).

43. 8 U.S.C. § 1101(a)(42)(A) (2006).

44. See Deborah Anker et al., *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 742 (1997) (explaining the difficulty of separating the social-group definition from the political-opinion definition for victims of domestic violence).

45. See *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993); *Acosta*, 19 I. & N. Dec. 211, 212 (B.I.A. 1985) (defining an “immutable characteristic” as one that is “beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed”).

46. See *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005) (“[A] social group may not be circularly defined by the fact that it suffers persecution.”).

47. 8 U.S.C. § 1101(a)(42)(A).

48. *Id.*

49. See Karen Musalo & Stephen Knight, *Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions*, IMMIGR. BRIEFINGS, Dec. 2003, at 1, 1 (defining “gender asylum” as when “(1) the feared harm is gender-specific or disproportionately impacts women, and/or (2) the reason (i.e., nexus) the harm is imposed is related to, or ‘on account of’ gender”).

viewed as persecution when the applicant's society accepts or requires the behavior (as in the case of female genital mutilation (FGM)).<sup>50</sup> Second, violence against women is often committed by private actors and not the government.<sup>51</sup> Third, gender is not one of the five protected grounds in the definition of refugee.<sup>52</sup> Gender-specific human rights cases frequently involve rape, FGM,<sup>53</sup> or domestic violence.<sup>54</sup> This section looks at the chronological development of international and U.S. asylum law on gender-based claims.

International humanitarian law first addressed violence against women as a human rights issue in the Convention on the Elimination of All Forms of Discrimination Against Women, which was intended to further the human rights of women around the globe.<sup>55</sup> The early 1990s brought the promulgation of various sets of guidelines regarding women's gender-based asylum claims. In 1991, the United Nations High Commissioner for Refugees (UNHCR) issued guidelines stating that gender may serve as grounds for asylum.<sup>56</sup> Canada<sup>57</sup> and the United States led with similar guidelines in 1993 and 1995, respective-

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50. See Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781–82 (2003).

51. See *id.* at 782.

52. See *id.*

53. Female genital mutilation is a cultural practice of removing all or a portion of a woman's external genitalia, usually with rudimentary instruments and without anesthesia. *Female Genital Mutilation*, WORLD HEALTH ORG. (Feb. 2010), <http://www.who.int/mediacentre/factsheets/fs241/en/>. The procedure is classified into four types ranging from merely pricking the genitals to complete removal and narrowing of the vaginal opening. *Id.* FGM is performed throughout the world, but predominantly in Africa, Asia, and the Middle East, usually between infancy and age fifteen. *Id.*

54. See Musalo, *supra* note 50, at 782.

55. Convention on the Elimination of All Forms of Discrimination Against Women, Mar. 1, 1980, 1249 U.N.T.S. 13; see also Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994) (strengthening protections for women).

56. U.N. High Commissioner for Refugees, Guidelines on the Protection of Refugee Women, U.N. Doc. EC/SCP/67 (July 22, 1991).

57. IMMIGRATION & REFUGEE BD. OF CAN., WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT (1996) [hereinafter CANADIAN GUIDELINES], available at <http://www.irb.gc.ca/eng/brdcom/references/pol/guidir/Pages/women.aspx>.

ly.<sup>58</sup> Several other countries followed, including the United Kingdom in 2000.<sup>59</sup> The Immigration and Naturalization Service (INS) Guidelines, promulgated in the United States, do not dictate the decisions of immigration judges or asylum officers, but they form part of the asylum officers' required reading.<sup>60</sup> These guidelines created optimism that women seeking asylum on gender-based claims could look ahead to increased success.<sup>61</sup> In practice, however, the jurisprudence following the guidelines indicated that many obstacles continued to exist for gender-based asylum applicants.<sup>62</sup>

Early gender-based cases relied on various aspects of asylum law. Mostly unsuccessfully, applicants pled that their governments could not protect them, or they pled persecution on account of religion or political opinion.<sup>63</sup> In an early deportation-withholding case involving a gender-based claim, *In re Pierre*, the Haitian applicant experienced violence at the hands of her husband who served in a position equivalent to a senator in the United States.<sup>64</sup> She failed to plead membership in one of the five protected groups and instead relied on her husband's high position, arguing it foreclosed any protection for her from the Haitian government.<sup>65</sup> The court dismissed the case based on her failure to demonstrate how her persecution at the hands of her husband was "on account of" one of the protected grounds, and because she failed to present evidence showing that the government could or would not protect her, stating "[n]ot every unlawful act of individual harassment will amount to persecution."<sup>66</sup> The court recognized that persecution could

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58. Memorandum from Phyllis Coven, Office of Internal Affairs, to all INS Asylum Office/rs (May 26, 1995), available at [http://cgrs.uchastings.edu/documents/legal/guidelines\\_us.pdf](http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf).

59. IMMIGRATION APPELLATE AUTH., ASYLUM GENDER GUIDELINES (2000) [hereinafter U.K. GUIDELINES], available at [http://cgrs.uchastings.edu/documents/legal/gender\\_guidelines/UK\\_guidelines.pdf](http://cgrs.uchastings.edu/documents/legal/gender_guidelines/UK_guidelines.pdf).

60. See Patricia A. Seith, Note, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1830 (1997).

61. See Deborah E. Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771, 778 (1995) (describing the INS guidelines as opening "the possibility of a new era for women refugees").

62. See Mark von Sternberg, *Outline of United States Asylum Law: Substantive Criteria and Procedural Concerns*, in DEFENDING IMMIGRATION REMOVAL PROCEEDINGS 2009, at 39, 68 (PLI N.Y. Practice Skills, Course Handbook Ser. No. 21,451, 2009).

63. See Anker et al., *supra* note 44, at 741–44.

64. *Pierre*, 15 I. & N. Dec. 461, 461–62 (B.I.A. 1975).

65. *Id.* at 462.

66. *Id.* at 463.

occur at the hands of a nongovernmental actor for the purposes of asylum, but set a high evidentiary threshold.<sup>67</sup> This case set the stage for the focus in later gender-based asylum cases on defining a particular social group.

*In re Fauziya Kasinga*, decided in 1996, was the first case that resulted in a woman gaining asylum based on a gender-defined social group.<sup>68</sup> In *Kasinga*, the seventeen-year-old applicant feared that she would be forced to undergo FGM in her native Togo.<sup>69</sup> The court found persecution on account of her membership in the particular social group defined as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>70</sup> Since *Kasinga*, courts have found broader gender-based particular social groups acceptable such as “Somali females.”<sup>71</sup> Most gender-based asylum cases focus on defining the particular social group and demonstrating that the persecution is on account of that group.<sup>72</sup> Generally, in FGM cases, courts have found government protection unavailable where there are no laws prohibiting the practice, where FGM is viewed as engrained in the culture, and where the practice is prevalent within the applicant’s country.<sup>73</sup>

The development of gender-based asylum law focused on the definition of a particular social group. As the next section discusses, the acceptance of gender as a way to define a particular social group in FGM cases, however, did not immediate-

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67. *See id.* at 462 (citations omitted).

68. Fauziya Kasinga, 21 I. & N. Dec. 357, 368 (B.I.A. 1996).

69. *Id.* at 358.

70. *Id.* at 365.

71. *See, e.g., Hassan v. Gonzales*, 484 F.3d 513, 515, 518 (8th Cir. 2007) (finding that in Somalia, where ninety-eight percent of the female population undergoes FGM, a well-founded fear of persecution is reasonable for any Somali woman).

72. *See* Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1250–61 (2009) (focusing on the need for regulation, but only discussing that need in reference to the particular social group and nexus requirements). *But see* Adams, *supra* note 13, at 240 (arguing that commentators have spent too much time focusing on gender groups and not enough on the state’s action or lack of action).

73. *See, e.g., Hassan*, 484 F.3d at 515, 518 (using State Department reports to establish the prevalence of FGM at ninety-eight percent of women); *Kasinga*, 21 I. & N. Dec. at 362 (relying on reports from the State Department establishing the widespread practice of FGM in Togo and the general acceptance of the procedure).

ly extend to women whose claims were based on domestic violence.

C. DEVELOPMENT OF ASYLUM LAW FOR DOMESTIC VIOLENCE VICTIMS IN THE UNITED STATES, CANADA, AND THE UNITED KINGDOM

There is no binding U.S. precedent granting asylum to a domestic violence claimant.<sup>74</sup> Recent decisions, however, offer greater hope to domestic violence applicants.<sup>75</sup> Moreover, individual asylum officers and immigration judges have permitted asylum under domestic violence conditions in some cases.<sup>76</sup> Canada and the United Kingdom have more clearly defined case law on domestic violence asylum than the United States.<sup>77</sup> The United Nations Convention relating to the Status of Refugees governs the United States, Canada, and the United Kingdom, thereby making a comparison of foreign case law relevant to U.S. asylum law.<sup>78</sup> Thus, this section will discuss U.S. as well as Canadian and British case law developments in the area of domestic violence asylum law.

The United States defines domestic violence as a violent crime where the victim is the “spouse, former spouse, intimate partner, former intimate partner, child, or former child . . . or any other relative” of the perpetrator.<sup>79</sup> This Note focuses only on female domestic violence victims whose persecutor is a male

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74. See von Sternberg, *supra* note 62, at 68 (“No circuit or Board decision has articulated application of the statutory standard in [the domestic violence] setting.”); *Matter of L.R.*, CENTER FOR GENDER & REFUGEE STUDIES, *supra* note 8 (explaining that the BIA decision in *L.R.* is not binding on courts but only on asylum officers).

75. See, e.g., Paul Elias, *Domestic Violence Victim Granted Asylum in US*, ASSOCIATED PRESS, Dec. 18, 2009, available at [http://cgrs.uchastings.edu/pdfs/photos%20%20Domestic%20Violence%20Victim%20Granted%20Asylum%20In%20US%20\\_%20NPR.pdf](http://cgrs.uchastings.edu/pdfs/photos%20%20Domestic%20Violence%20Victim%20Granted%20Asylum%20In%20US%20_%20NPR.pdf); Preston, *supra* note 7, at A14.

76. Musalo & Knight, *supra* note 49, at 1 (conducting a survey of forty-five unpublished decisions of immigration judges showing many cases where asylum was granted).

77. Musalo, *supra* note 50, at 777–78 (noting that unlike in the United Kingdom, the jurisprudence in the United States has been contradictory); cf. Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 145 n.133 (2009) (noting that there have been more successful gender-based claims in Canada than the United States).

78. See 8 U.S.C. § 1101(a)(42)(A) (2006) (defining refugee status); Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.) (same); see also Convention Relating to the Status of Refugees, *supra* note 18, at 150.

79. 18 U.S.C. § 3561 (2006).

intimate partner, because this is the most prevalent type of domestic violence.<sup>80</sup> Although same-sex and female-on-male domestic abuse occurs, these applicants face additional challenges in seeking asylum requiring more in-depth discussion than can be provided here.<sup>81</sup>

The key U.S. domestic abuse asylum case, *In re R-A-*, involved a Guatemalan woman seeking asylum after suffering ten years of severe and repeated abuse by her husband before she finally fled the country.<sup>82</sup> In that decision, Attorney General Reno vacated the BIA's denial of asylum.<sup>83</sup> She remanded and stayed the case for reconsideration after the approval of a proposed set of federal rules to be issued by the INS.<sup>84</sup> The agency never issued the rules, and *In re R-A-* continued under the stay for seven years until Attorney General Mukasey ordered the case remanded to the BIA for decision.<sup>85</sup> Due to the stay and failure to enact the proposed federal rules, a backlog of cases involving gender-based social groups developed, and the Attorney General remanded the case in an attempt to force the BIA to solidify the law in domestic violence asylum claims.<sup>86</sup> The BIA remanded to the immigration judge, and on October 28, 2009, DHS argued that the applicant qualified for asylum under the statute.<sup>87</sup> An immigration judge granted asy-

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80. See SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipvus.pdf>.

81. See Nicole LaViolette, *Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines*, 19 INT'L J. REFUGEE L. 169, 204 (2007) (discussing the difficulties men experience when claiming asylum based on domestic violence under the Canadian Guidelines); 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, 86 (2008) (describing some of the challenges faced by lesbians seeking asylum based on the lack of social visibility of sexual orientation in many cultures).

82. R-A-, 22 I. & N. Dec. 906, 908-09 (B.I.A. 2001).

83. *Id.* at 906.

84. *Id.* The proposed rule would have provided guidance for gender-based claims, including incorporating language from the UNHCR handbook regarding the court's determination of when a government is unable or unwilling to protect a victim. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,591 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). The court would have to consider "whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the state protection that exists." *Id.*

85. R-A-, 24 I. & N. Dec. 629, 630-32 (A.G. 2008).

86. *Id.* at 630.

87. DHS Response in *Alvarado-Pena*, *supra* note 16.

lum on December 16, 2009, ending the most publicized domestic violence asylum case favorably for the applicant and potentially paving the way for others.<sup>88</sup> The focus in U.S. domestic violence asylum cases up to this point has been on the applicant's particular social group.

In other countries, courts move beyond discussion of a domestic violence applicant's particular social group to examine the government's role in the alleged persecution. Some foreign courts have used a "bifurcated approach," where the legal theory acknowledges that an applicant's persecutor is an individual not abusing her based on her particular social group, but rather that the government fails to protect her based on a gender-defined social group.<sup>89</sup> Great Britain's House of Lords introduced this approach in *Ex parte Shah* where the court granted asylum to Pakistani victims of domestic violence.<sup>90</sup> The Lords found the appropriate test to be "Persecution = Serious Harm + The Failure of State Protection," where the state's failure to protect could serve as the nexus to the particular social group rather than the individual abuser.<sup>91</sup> This approach resulted in successful claims in other foreign courts as well.<sup>92</sup> In the United States, however, the BIA rejected the use of a bifurcated approach in the appeal of *In re R-A-*, and instead emphasized that the nexus must be between the actual persecutor and the particular social group.<sup>93</sup> Although the Attorney General vacated the earlier decision in *In re R-A-*, no U.S. court has explicitly adopted the bifurcated approach.<sup>94</sup>

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88. Elias, *supra* note 75; Julia Preston, *Officials Endorse Asylum for Abuse*, N.Y. TIMES, Oct. 30, 2009, at A14, available at 2009 WLNR 21654842.

89. Musalo, *supra* note 50, at 788.

90. *Ex Parte Shah*, [1999] 2 A.C. 629 (H.L.) [647] (appeal taken from Immigration Appeal Tribunal) (Eng.).

91. *Id.* at 653.

92. See, e.g., *Minister for Immigration & Multicultural Affairs v Khawar* [2002] HCA 14, ¶ 33 (Austl.) (demonstrating how an Australian court used a bifurcated analysis to find asylum appropriate for a Pakistani domestic violence victim); REFUGEE STATUS APPEALS AUTHORITY: NEW ZEALAND, REFUGEE APPEAL NO. 76512 (2000), available at <http://www.unhcr.org/refworld/pdfid/4c3adf5b2.pdf> (adopting the House of Lords test from *Ex parte Shah* to grant asylum to a victim of domestic violence from Iran).

93. *R-A-*, 22 I. & N. Dec. 906, 922 (B.I.A. 2001) ("But governmental inaction is not a reliable indicator of the motivations behind the actions of private parties. And this is not a case in which it has been shown that the Government of Guatemala encourages its male citizens to abuse its female citizens . . .").

94. See Lori A. Nessel, "Willful Blindness" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 108-11 (2004); cf. Karen

In the United Kingdom, *Ex parte Shah* remains the controlling case on domestic violence asylum.<sup>95</sup> Subsequent cases followed the *Ex parte Shah* model, holding that “domestic violence, if coupled with a lack of state protection that is discriminatory, is capable of constituting persecution.”<sup>96</sup> Since *Ex parte Shah*, many cases on appeal have centered on relocation in the applicant’s home country.<sup>97</sup> Analysis of relocation to a safer part of the applicant’s home country necessarily considers the government’s ability to better protect the applicant in a different part of the country.<sup>98</sup> The bifurcated analysis in *Ex parte Shah* makes the applicant’s burden of proving persecution on account of a particular social group fairly clear, thereby leaving difficult fact-specific questions surrounding the reasonableness of relocation.<sup>99</sup> In British courts, the test for relocation is whether relocation would be unreasonable and unduly harsh.<sup>100</sup> In determining reasonableness, courts consider several factors from the Home Office in the context of human rights claims, including the position of women in society, the education and lit-

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Musalo, *Claims for Protection Based on Religion or Belief*, 16 INT’L J. REFUGEE L. 165, 208 (2004) (stating, in relation to an asylum claim on religious grounds, that the bifurcated test has fared poorly in the United States).

95. See *Shah*, [1999] 2 A.C. at 653.

96. *P v. Sec’y of State for the Home Dep’t*, [2004] EWCA (Civ) 1640, [31] (Eng.).

97. See, e.g., *AB (Jamaica) v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 784 (Eng.); *CM (Cameroon) v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 125 (Eng.); *AA (Sudan) v. Sec’y of State for the Home Dep’t*, [2007] EWCA (Civ) 95 (Eng.); *VNM v. Sec’y of State for the Home Dep’t*, [2006] EWCA (Civ) 47 (Eng.).

98. See *R (on the application of M) v. Sec’y of State for the Home Dep’t*, [2010] EWHC (Admin) 1560, [19] (Eng.) (considering the general conditions for women in Pakistan in regard to reasonable relocation); see also *AA (Sudan)*, [2007] EWCA (Civ) at [13] (stating that based on the position of women in Pakistani society relocation is not reasonable); *RG (Ethiopia) v. Sec’y of State for the Home Dep’t*, [2006] EWCA (Civ) 339, [41] (Eng.) (remanding for analysis on whether relocation would be safe).

99. See, e.g., *AB (Jamaica)*, [2008] EWCA (Civ) at [6]; *VNM*, [2006] EWCA (Civ) at [15, 25] (considering whether expecting a domestic violence victim to relocate within Kenya and live the remainder of her life under a false story regarding her history and the paternity of her children was reasonable); *R (on the application of Umar) v. Sec’y of State for the Home Dep’t*, [2008] EWHC (Admin) 2385, [4] (Eng.).

100. *AB (Jamaica)*, [2008] EWCA (Civ) at [34]; *Hamid v. Sec’y of State for the Home Dep’t*, [2005] EWCA (Civ) 1219, [32] (Eng.) (affirming the “unduly harsh” test for relocation in asylum claims).

eracy of women, and the woman's economic self-sufficiency.<sup>101</sup> Thus, domestic violence asylum applicants in the United Kingdom still face evidentiary challenges centered on the government's ability to protect the applicant and reasonable relocation despite the expansive social group language in *Ex parte Shah*.

The seminal case in Canada on the government protection element, *Ward v. Canada*, recognized gender as a basis for a particular social group, but emphasized that asylum is a substitute for the protection of an applicant's country of origin.<sup>102</sup> The court found a presumption of state protection,<sup>103</sup> which an applicant must rebut with "relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate."<sup>104</sup> Courts selected "adequacy" over "effectiveness" as the test for state protection because "requiring effectiveness of other countries' authorities would be to ask of them what our own country is not always able to provide."<sup>105</sup> Case law indicates that although 100 percent effectiveness is not required, a state must demonstrate more than "good intentions" regarding protection of domestic violence victims.<sup>106</sup> The Canadian appellate courts encouraged using multiple factors or pieces of evidence to make decisions about a government's ability and willingness to protect an applicant.<sup>107</sup> Although gender can form the basis of a particular social group in Canadian courts, asylum applicants still face difficult obstacles in demonstrating inadequacy of state protection.

United States asylum law surrounding domestic violence victims may be moving closer to that of Canada and the United Kingdom with statements by DHS in its supplemental brief in

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101. See *Hamid*, [2005] EWCA (Civ) at [2] (distinguishing these factors as relevant in human rights claims but not when considering relocation in asylum cases); cf. *AA (Sudan)*, [2007] EWCA (Civ) at [13].

102. *Ward v. Canada*, [1993] 2 S.C.R. 689, paras. 25, 78 (Can.).

103. *Id.* at para. 59.

104. *Carrillo v. Canada*, [2008] 4 F.C.R. 636, para. 30 (Can.).

105. *Flores v. Canada*, 2008 CarswellNat 1702, para. 11 (Can. F.C.) (WL).

106. *Hooper v. Canada*, 2007 CarswellNat 4578, para. 30 (Can. F.C.) (WL); see also *Vidhani v. Canada*, [1995] 3 F.C. 60, paras. 13–14 (Can.) (finding adequate government protection in Kenya where there are laws prohibiting domestic violence, advocacy groups are present, there are documented cases of recourse for victims of domestic violence, and the applicant failed to seek assistance from the Kenyan government prior to applying for asylum relief).

107. See, e.g., *Hooper*, 2007 CarswellNat 4578, paras. 19, 29; *Mitchell v. Canada*, 2006 CarswellNat 262, paras. 9–10 (Can. F.C.) (WL).

*In re L.R.*<sup>108</sup> DHS stated that acceptable social groups for domestic violence applicants include “[nationality] women in domestic relationships who are unable to leave” or “[nationality] women who are viewed as property by virtue of their positions within a domestic relationship.”<sup>109</sup> DHS recognized that removing the formation of the particular social group from the analysis still leaves significant hurdles for applicants, especially in showing that a state is unable or unwilling to protect the applicant and in showing the reasonableness of relocation.<sup>110</sup> Since the positive decision for R-A-, courts have already begun to focus on the government’s role in the persecution. The Ninth Circuit has denied a Honduran domestic violence victim based on her inability to prove the government was unable and unwilling to protect her with no discussion of her social group.<sup>111</sup> The remainder of this Note examines these other obstacles that will most likely be the new focus of judicial analysis in domestic violence based asylum claims.

## II. DOMESTIC VIOLENCE ASYLUM TURNS ON A LACK OF GOVERNMENT PROTECTION

Despite the focus in the past twenty years on fitting domestic violence asylum applicants into a particular social group acceptable under U.S. asylum law, the element upon which asylum hinges for most applicants will become the lack of government protection. This element is likely to emerge in the forefront of the discussion on asylum now that DHS has made clear that the Obama Administration considers domestic violence grounds for asylum.<sup>112</sup> This Part demonstrates that the government protection element, although less discussed, is the key to asylum and illustrates the problems applicants encounter in proving an “unable and unwilling government.” This Part also evaluates the INS proposed rule considered in 2000, the Canadian Guidelines, and the U.K. Guidelines as potential models for future DHS guidelines.

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108. See Supplemental Brief in L.R., *supra* note 6, at 14.

109. *Id.* at 14.

110. *Id.* at 21–22.

111. *Maldonado-Chinchilla v. Holder*, 388 F. App’x 598, 598 (9th Cir. 2010) (“Maldonado-Chinchilla did not establish the abuse she suffered constituted persecution because she failed to show the government was unwilling or unable to protect her from her boyfriend.”).

112. See Supplemental Brief in L.R., *supra* note 6, at 11 (indicating that DHS believes there are formulations of particular social groups that would make asylum permissible for domestic violence victims).

A. THE LURKING ELEMENT: AN UNABLE OR UNWILLING GOVERNMENT

The United Kingdom and Canada created a path for domestic violence applicants under the particular social group provisions in their statutes, but the result has not been a marked increase in domestic violence asylees.<sup>113</sup> This lack of increased asylum for domestic violence victims is due in part to the heavy emphasis the British and Canadian courts place on the governmental protection element. In cases where asylum was denied or the case was remanded, the courts' decisions now often hinge on the governmental protection element.<sup>114</sup> The practical example of the courts of the United Kingdom and Canada indicate that U.S. courts will also likely shift their emphasis to governmental protection now that DHS created room in the particular social group for domestic violence victims.<sup>115</sup> Even eliminating a requirement for persecution "on account of" one of the five statutory grounds entirely will not assist a domestic violence asylum applicant in proving a lack of government protection.<sup>116</sup> The requirement that an applicant prove her government is unable or unwilling to offer protection from domestic violence quells fears that DHS's acceptance of gender as grounds for a particular social group will open the floodgates

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113. Helen P. Grant, *The Floodgates Are Not Going to Open, but Will the U.S. Border?*, 29 HOUS. J. INT'L L. 1, 53 (2006) (stating that other countries, including the United Kingdom, created a path to asylum despite the fear of a floodgates issue); Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 133 (2007) (noting that Canadian statistics do not indicate a significant increase in gender-based asylum claims since the issuance of the Guidelines).

114. See, e.g., *Carrillo v. Canada*, [2008] 4 F.C.R. 636, para. 36 (Can.) (denying asylum where the applicant failed to establish inadequate state protection); *Flores v. Canada*, 2008 CarswellNat 1702, paras. 8–11 (Can. F.C.) (WL) (upholding a lower court decision denying asylum where the applicants did not demonstrate a lack of adequate government protection); *AB (Jamaica) v. Sec'y of State for the Home Dep't*, [2008] EWCA (Civ) 784, [34] (Eng.) (denying asylum where the applicant failed to show that the government could not offer her protection anywhere in her country); *AA (Sudan) v. Sec'y of State for the Home Dep't*, [2007] EWCA (Civ) 95, [13] (Eng.) (remanding the case for the lower court to consider the lack of governmental protection throughout the country).

115. Supplemental Brief in L.R., *supra* note 6, at 21–22.

116. See Crystal Doyle, Note, *Isn't "Persecution" Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 519, 558 (2009) (discussing two potential downsides to eliminating the five statutory grounds for asylum).

of asylum seekers.<sup>117</sup> Indeed, applicants will continue to face obstacles in proving inadequate government protection, because their persecutors are individual actors. In asylum cases where U.S. courts accepted the proffered particular social group, such as honor killings and HIV positive applicants, proving the government is the persecutor or is at least unwilling to intervene has been the pivotal element.<sup>118</sup> Although always present and discussed in a cursory manner, the element of government protection is likely to become the key to most domestic violence applicant's claims in U.S. courts.

#### B. THE CHALLENGES OF PROVING AN UNABLE OR UNWILLING GOVERNMENT

An applicant faces many difficulties in proving that her government is unable or unwilling to protect her. Some of these difficulties arise from balancing a victim's attempts to receive assistance with her hesitancy to take action, the private nature of domestic abuse, and the relative lack of power of the abuser as compared to the government. This section focuses on these three significant obstacles.

Victims frequently hesitate in reporting violence due to embarrassment and fears that the violence will increase if their partner learns the victim reported the abuse.<sup>119</sup> In countries where the cultural perception reflects a lack of governmental support to domestic violence victims, abused women are likely to refrain from reporting the abuse, assuming a report would be futile.<sup>120</sup> Although courts recognize the potential obstacles to

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117. See Musalo, *supra* note 113, at 133. *But see The Abrams Report* (MSNBC television broadcast Mar. 11, 2004) (hosting Pat Buchanan, who argued that domestic violence asylum seekers can go to Canada and should be kept out of the United States for fear of a floodgates problem).

118. *Paredes v. U.S. Att'y Gen.*, 219 F. App'x 879, 884, 887 (11th Cir. 2007) (upholding the BIA and Immigration judge decisions regarding the HIV-positive applicant's failure to prove government involvement or support of his persecution); *Yaylacicegi v. Gonzales*, 175 F. App'x 33, 36 (7th Cir. 2006) (denying asylum to a woman due to her failure to prove the government would not protect her from an honor killing).

119. WORLD HEALTH ORG., MULTI-COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN 75-77 (2005) [hereinafter WHO STUDY], available at [http://www.who.int/gender/violence/who\\_multicountry\\_study/en/index.html](http://www.who.int/gender/violence/who_multicountry_study/en/index.html).

120. *Ex Parte Shah*, [1999] 2 A.C. 629 (H.L.) [635-36] (appeal taken from Immigration Appeal Tribunal) (Eng.) (stating that reporting domestic abuse in Pakistan would be futile); WHO STUDY, *supra* note 119, at 87 (reporting frequent responses of "nobody will believe me" or "they will not be able to help" to the question why not seek government services for domestic violence posed to

victims in reporting, most courts prefer a domestic violence asylum applicant to have at least attempted to obtain state aid.<sup>121</sup> Although there is no official requirement that an applicant attempt to utilize government assistance in her country of origin,<sup>122</sup> she gains credibility in alleging unavailable government protection if she attempted to receive services to no avail.

Domestic abuse, by its very name, occurs primarily in the home.<sup>123</sup> In most countries, the home is a private sphere where governmental influence is muted.<sup>124</sup> Due to this lack of government influence, the likelihood of the government discovering domestic violence is very low unless the victim reports it.<sup>125</sup> Nongovernmental aid agencies confront difficulties in determining the scope of the domestic abuse problem in countries where there is little reporting.<sup>126</sup> This expectation of privacy in the home exists in the United States, and it would be hypocritical for the United States to require governments of other countries to breach the privacy of their citizens to ensure protection from domestic violence when the home is given special consideration in the United States.<sup>127</sup> The United States combats the problem of private domestic violence through public education, the availability of victim support programs, and responsive law

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24,000 women from various countries in a study, thus “highlight[ing] the credibility gap of many services”).

121. See, e.g., *Lopez v. U.S. Att’y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007) (requiring an attempt to obtain state aide absent exceptional circumstances); *Kere v. Gonzales*, 252 F. App’x 708, 712 (6th Cir. 2007) (requiring the asylum seeker to show the government either condoned or was helpless to prevent the persecution); *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (stating that government agents must either commit the persecution or be unwilling or unable to prevent it); *Roman v. INS*, 233 F.3d 1027, 1034 (7th Cir. 2000) (requiring that local government either condone or be unable to prevent persecution of the victim).

122. S-A-, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000) (“Although she did not request protection from the government, the evidence convinces us that even if the respondent had turned to the government for help, Moroccan authorities would have been unable or unwilling to control her father’s conduct.”); *Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588, 76,591 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

123. 18 U.S.C. § 3561(b) (2006) (defining domestic abuse as a violent crime against spouses, children, or others who are likely to live in or frequently visit the home of the abuser).

124. See *Musalo & Knight*, *supra* note 49, at 2.

125. See WHO STUDY, *supra* note 119, at vii (noting that a lack of reporting makes it difficult to document “the magnitude of violence against women”).

126. *Id.*

127. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding a constitutional right to privacy in the marital home).

enforcement and courts.<sup>128</sup> Even in the United States, however, there are areas of the country where these support programs do not function and women remain in abusive relationships.<sup>129</sup> This implies that it is unrealistic to expect a foreign government to have a 100 percent success rate in protecting domestic violence victims.<sup>130</sup> In many countries the private nature of domestic violence causes victims to feel embarrassment and risk cultural ostracization by reporting the abuse.<sup>131</sup> Thus, the private nature of domestic violence crimes makes it difficult for an applicant to demonstrate a pattern of failure by her native country in responding to these crimes.<sup>132</sup>

Lastly, applicants face problems in overcoming the commonsense notion that the government, with overwhelming power compared to an individual persecutor, should be able to control that persecutor. A domestic violence applicant's argument that the government is unable to control her persecutor is much more challenging than that of an asylum applicant arguing a militant faction or influential cultural or social group is uncontrolled by the government.<sup>133</sup> Controlling a single individual in a country where any type of law enforcement exists

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128. See Laura Dugan et al., *Do Domestic Violence Services Save Lives?*, NIJ J., Nov. 2003, at 20, 21 (describing various domestic violence resources available to victims in the United States).

129. See Sofia Peralta & Henry F. Fradella, *Variations in Suggestions for Improving the Justice Systems' Response to Intimate Partner Violence Cases*, 44 CRIM. L. BULL. 442, 448 (2008) (noting several of the psychological reasons why victims of domestic violence remain in abusive relationships).

130. See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,591 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (“[N]o government is able to guarantee the safety of each of its citizens at all times.”).

131. See WHO STUDY, *supra* note 119, at 75–77; see also CAROL BOHMER & AMY SHUMAN, REJECTING REFUGEES: POLITICAL ASYLUM IN THE 21ST CENTURY 227 (2008) (discussing the “personal,” rather than “political,” nature of domestic violence); DAVID HOLLENBACH, REFUGEE RIGHTS: ETHICS, ADVOCACY, AND AFRICA 131 (2008) (stating that asylum adjudicators often view gender-specific persecution as “personal” or “cultural”).

132. See WHO STUDY, *supra* note 119, at 75–77.

133. See, e.g., *Korablina v. INS*, 158 F.3d 1038, 1044–46 (9th Cir. 1998) (granting asylum where the Ukrainian government was not able to control ultra nationalists who persecuted Jews); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (granting asylum where the government could not control ethnic-Fijian attacks against Indo-Fijians); *Fauziya Kasinga*, 21 I. & N. Dec. 357, 362 (B.I.A. 1996) (finding the government of Togo made no efforts to prevent the practice of FGM by tribal elder women); *H-*, 21 I. & N. Dec. 337, 345 (B.I.A. 1996) (recognizing that there was no effective government protection in Somalia amidst warring clans).

seems a reasonable expectation.<sup>134</sup> Significant crime or strife would need to exist within a country to imagine a situation where law enforcement resources were entirely consumed such that a single individual could not be controlled.<sup>135</sup> Country condition reports<sup>136</sup> alone will usually be insufficient to demonstrate that a functioning government is incapable of controlling an individual.<sup>137</sup> An applicant will need to supplement general country condition information with her own personal experience where it will be difficult to demonstrate law enforcement inability if she has not reported her abuse.<sup>138</sup>

New DHS regulations should address these three challenges to domestic violence asylum applicants. The following sections assess potential tests and factors for inclusion in a standard for identifying an unable or unwilling government.

### C. A RULE PROPOSED AND NEVER ADOPTED

The Department of Justice proposed a rule in 2000, but it was never enacted.<sup>139</sup> The proposed rule addressed the element of government protection, suggesting a two-part inquiry to determine a government's inability or unwillingness to protect its citizens. First, a judge or asylum officer should look at whether the government took "reasonable steps to control the infliction

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134. See, e.g., Supplemental Brief in L.R., *supra* note 6, at 26 (stating that the applicant will have a difficult time demonstrating there is no government protection in Mexico where a functional police force and legal system exist from which the applicant did receive assistance).

135. See *H-*, 21 I. & N. Dec. at 345 (discussing how widespread, intraclan fighting placed many Somalis "beyond the rule and protection of recognized law and social order").

136. Courts rely on country-condition reports by the State Department, humanitarian organizations, and other sources to corroborate or determine whether an applicant is likely to suffer persecution in her home country. See, e.g., *Sugiarto v. Holder*, 586 F.3d 90, 98 (1st Cir. 2009); *Fauziya Kasinga*, 21 I. & N. Dec. at 362.

137. Susan K. Kerns, Note, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEGAL STUD. 197, 201 (2000) ("Evidence of generally oppressive conditions in the country of origin is by itself insufficient to show that the individual applicant is at particular risk on account of a protected characteristic or belief."); Krishna C. Parsad, Note, *Illegal Renditions and Improper Treatment: An Obligation to Provide Refugee Remedies Pursuant to the Convention Against Torture*, 37 DENV. J. INT'L L. & POL'Y 681, 697 (2009) (noting that country-condition information produced by the State Department may not be accurate).

138. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

139. See *id.* at 76,588 (noting that the rule still retains its "proposed" status).

of harm or suffering.”<sup>140</sup> Second, the court or asylum officer must determine if “the applicant has reasonable access to the state protection that exists.”<sup>141</sup> The rule goes on to suggest evidence that may support these inquiries, including government complicity toward the harm, attempts by the applicant to get government assistance, the government’s response, obligatory official action, a pattern of unresponsiveness, denial of services, general country conditions, government policies regarding the suffering, and prevention steps by the government.<sup>142</sup> The proposed rule in its 2000 formulation does not provide the kind of guidance or focus helpful to courts and practitioners.

The proposed rule does not go far enough because it fails to clarify whether an applicant must show both that the government has not taken reasonable steps to control the abuse and that she does not have reasonable access to protection. It is unclear if proof of just one of these elements would suffice to meet the applicant’s burden as to a lack of government protection. The comments to the rules indicate that an applicant’s failure to seek governmental protection is not dispositive of a state’s inability or unwillingness to protect the applicant.<sup>143</sup> This implies that the second prong of the test is more complex than merely showing an applicant did not report her abuse to the police and should therefore be denied asylum. This lack of clarity and focus results in an only moderately helpful framework, and since the proposed rule was never adopted, litigants and courts continue with insufficient guidance.

#### D. CANADIAN AND U.K GUIDELINES

Other countries address the problem of domestic violence asylum seekers by issuing guidelines for their immigration courts and applicants.<sup>144</sup> Canada and the United Kingdom serve as examples of approaches by other countries with asylum statutes similar to those of the United States.<sup>145</sup> Although both Canada and the United Kingdom are viewed as more welcoming to domestic violence asylum applicants than the United

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140. *Id.* at 76,591.

141. *Id.*

142. *Id.* These evidentiary factors come primarily from case law where the various factors were found persuasive or at least considered by a court hearing a gender-based asylum claim. *See id.*

143. *Id.*

144. *See, e.g.,* CANADIAN GUIDELINES, *supra* note 57; U.K. GUIDELINES, *supra* note 59.

145. *See supra* note 78 and accompanying text.

States,<sup>146</sup> they both maintain fairly rigid guidelines on the element of government protection leading to case decisions centered on governmental protection.<sup>147</sup>

The Canadian Guidelines allow for gender-based asylum claims despite the lack of gender as a protected category in the Canadian Immigration Act.<sup>148</sup> They focus on the individual woman's situation and spend time addressing the evidentiary problems associated with proving an unwilling or unable government.<sup>149</sup> The guidelines require the applicant to prove it was "objectively unreasonable for her to seek the protection of her state."<sup>150</sup> In order to determine objective reasonableness, a court should consider social, cultural, religious, and economic factors influencing the applicant's environment.<sup>151</sup> The guidelines even suggest that being ostracized from one's community due to reporting domestic violence may be a sufficient factor to show it is unreasonable for the applicant to seek government protection.<sup>152</sup> They also recognize the scarcity of evidence of gender-related persecution, and, therefore, state that testimony of the applicant or women in similar situations may be all a court has to consider in making a decision.<sup>153</sup>

On their face, the Canadian Guidelines appear to be more deferential to the individual than the proposed U.S. rule. The

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146. See M. Beth Morales Singh, Note, *To Rescue, Not Return: An International Human Rights Approach to Protecting Child Economic Migrants Seeking Refuge in the United States*, 41 COLUM. J.L. & SOC. PROBS. 511, 537–38 (2008) (discussing how courts in Canada and the United Kingdom, among other countries, have "linked refugee law to international human rights law," but how U.S. courts lag behind in this respect).

147. See *Flores v. Canada*, 2008 CarswellNat 1702, para. 11 (Can. F.C.) (WL); *Hooper v. Canada*, 2007 CarswellNat 4578, para. 30 (Can. F.C.) (WL); *AB (Jamaica) v. Sec'y of State for the Home Dep't*, [2008] EWCA (Civ) 784 (Eng.); *CM (Cameroon) v. Sec'y of State for the Home Dep't*, [2008] EWCA (Civ) 125 (Eng.); *AA (Sudan) v. Sec'y of State for the Home Dep't*, [2007] EWCA (Civ) 95 (Eng.).

148. CANADIAN GUIDELINES, *supra* note 57, pmbl. ("The definition of Convention refugee in the *Immigration Act* does not include gender as an independent enumerated ground for a well-founded fear of persecution warranting the recognition of Convention refugee status. . . . [I]t has been more widely recognized that gender-related persecution is a form of persecution which can and should be assessed by the Refugee Division panel hearing the claim.").

149. See *id.* at C(2).

150. *Id.* The Guidelines explicitly differentiate between state protection and protection from a nongovernmental organization. *Id.* The Guidelines deem the availability of the latter to be irrelevant. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

standard of proof for the applicant in Canada, however, is clear and convincing evidence,<sup>154</sup> and in practice, this has been a fairly difficult obstacle for applicants to overcome. For example, an applicant failed to meet her burden of proof that the government's protection was inadequate where she only reported abuse to the police one time in four years and did not utilize any of the state human rights programs or seek legal recourse.<sup>155</sup> In another case, the court held that the applicant provided sufficient evidence of the inadequacy of state protection where an applicant reported her abuse to the police after two brutal beatings, her husband was released from arrest after only an hour detention, neighbors and friends also reported the abuse to the police with no subsequent law enforcement action, and official reports on poor police response in the country existed.<sup>156</sup> The premier Canadian case on persecution by non-state actors stated that, other than states that are in complete breakdown, a state is presumed capable of protecting its citizens.<sup>157</sup> Thus, an applicant to Canada must overcome a fairly significant burden in order to demonstrate her country cannot offer protection.

In the United Kingdom, the 2000 Asylum Gender Guidelines support a "practical standard" that examines actual practices and states that the protection must be "meaningful, accessible, effective, and available to a woman regardless of her culture and position."<sup>158</sup> The United Kingdom offers a nonexhaustive list of possible ways a government could fail to provide protection: official legislation; legal provisions or lack of legal provisions; access to justice and police protection; police response; reluctance or refusal to investigate, prosecute, or punish persecutors; and encouragement or toleration of social, religious, or customary practices and behavioral norms.<sup>159</sup> These guidelines match the court's reasoning in the *Ex parte Shah* case, where the House of Lords explained that the domestic violence suffered by the applicant in Pakistan would not be per-

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154. *Id.*

155. Carrillo v. Canada, [2008] 4 F.C.R. 636, para. 30 (Can.). Additionally, the court stated that the burden of showing inadequate state protection will be harder to meet where the country from which an applicant is seeking asylum is a democracy. *Id.* para. 32.

156. Hooper v. Canada, 2007 CarswellNat 4578, paras. 2-5, 20, 32 (Can. F.C.) (WL).

157. Ward v. Canada, [1993] 2 S.C.R. 689, para. 57 (Can.).

158. U.K. GUIDELINES, *supra* note 59, at 2B.2-3.

159. *Id.* at 2B.

secution if it occurred in the United Kingdom,<sup>160</sup> because in the United Kingdom, state protection is available to the victim, the persecutor could be prosecuted, and the victim could obtain a restraining order.<sup>161</sup> The analysis in the *Ex parte Shah* case focused on the individual applicant's access to services rather than the government's purported program.<sup>162</sup>

Both the Canadian Guidelines and the U.K. Guidelines focus on the applicant's access to government protection.<sup>163</sup> This is seen as the factor that differentiates a country that is unable or unwilling to protect domestic violence victims from, for example, the United States, Canada, or the United Kingdom, where some women will be victims of domestic violence, but the abuse will not be considered persecution.<sup>164</sup> In the case of domestic violence, focusing the analysis on the availability of government protection in relation to the individual applicant's circumstances is wise. The persecutor in a domestic violence situation is unique to the applicant; therefore, the applicant's ability to access government protection rather than the mere existence of government systems should weigh more heavily in the analysis. Emphasis on the individual applicant's access is further discussed in the following Part providing recommendations for DHS policy.

### III. DHS SHOULD PROVIDE GUIDANCE ON THE GOVERNMENTAL PROTECTION ELEMENT OF ASYLUM

Although scholars have not focused on the importance of proving an unable and unwilling government,<sup>165</sup> practitioners and advocates should not ignore this element. As demonstrated in Part II, courts focus on availability of government protection. When the actual persecutor is an individual, proving an inability or unwillingness of the government to protect the domestic violence victim is difficult. Practitioners would benefit from

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160. *Ex Parte Shah*, [1999] 2 A.C. 629 (H.L.) [648] (appeal taken from Immigration Appeal Tribunal) (Eng.).

161. *Id.*

162. *See id.* at 653–54.

163. *See Ward v. Canada*, [1993] 2 S.C.R. 689, paras. 56–59 (Can.) (finding that state complicity is not a necessary component of persecution, and it must be reasonable for the individual to seek state protection); *Shah*, [1999] 2 A.C. at 648 (noting that “[w]hat makes it persecution” is the state being “unwilling or unable to offer her any protection”).

164. *See Shah*, [1999] 2 A.C. at 648.

165. *See Anker*, *supra* note 61, at 778; *Grant*, *supra* note 113, at 53; *Musalo*, *supra* note 94, at 208; *Musalo*, *supra* note 50, at 781–82.

guidance from DHS on this highly discretionary, fact-specific, and until now neglected element of asylum. This Part recommends the test and factors DHS should encourage applicants to focus on in meeting their burden of proof in this area.

A. THE TEST AND FACTORS TO APPLY TO DETERMINE AN UNWILLING OR UNABLE GOVERNMENT

The Department of Justice and courts' cursory treatment of this element will likely come to an end with the acceptance of a social group formulation for domestic violence victims. A test is needed to ensure uniform analysis of this now important element. The single-prong test should be whether the domestic violence applicant has reasonable access to government protection. This simplifies the test suggested in the Department of Justice's 2000 proposed rule,<sup>166</sup> and factors should accompany this test to assist in its application. A combination of the proposed U.S. rule, the Canadian and U.K. Guidelines' emphasis on the individual applicant, and other factors found in Canadian and U.K. case law provide a helpful guide to immigration judges, applicants, practitioners, and advocates.

Of the two-part analysis suggested in the Department of Justice's 2000 proposed rule,<sup>167</sup> an ideal rule need only include the second prong. The second part of the inquiry, asking whether the particular applicant has reasonable access to state protection, is the type of individualized inquiry that is essential in domestic violence asylum cases.<sup>168</sup> The first prong, inquiring about the reasonable steps taken by the government to control the harm,<sup>169</sup> may be illustrative of the country's general condition, but that should not suffice to determine availability of government protection to a particular victim. The government's reasonable steps toward controlling the infliction of harm can

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166. *Cf.* Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,591 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (requiring a court to assess both a state's efforts to control the infliction of domestic violence and also the individual applicant's access to any such government protections).

167. *Id.*

168. *See* R-A-, 22 I. & N. Dec. 906, 929-30 (B.I.A. 2001) (Guendelsberger, Bd. Member, dissenting) (using the specific facts of R-A-'s situation to demonstrate the inadequacy of her accessibility to government protection); *Hooper v. Canada*, 2007 CarswellNat 4578, paras. 29-30 (Can. F.C.) (WL) (finding that even though a restraining order would have been available, it would have been ineffective in the applicant's circumstances); CANADIAN GUIDELINES, *supra* note 57, at C ("The central factor in such an assessment is, of course, the claimant's particular circumstances . . .").

169. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,591.

be included as a factor but should not be determinative. For example, a government could be taking steps to enforce domestic violence laws and these efforts may be effective in urban areas. An applicant from a rural area, with less police presence or corrupt police and a tight-knit community, still may not have reasonable access to government protection. An individual applicant's reasonable access to government protection should be the controlling question in this analysis.

In determining reasonable access to government protection, courts should weigh several factors noted in the proposed rule, foreign guidelines, and case law. Drawing from all three sources of law provides a more complete list of potential factors for U.S. courts to consider. In order to assess the reasonableness of an applicant's access to government protection, a court should consider the following key factors: the government's encouragement or toleration of social, religious, and customary practices, and behavioral norms;<sup>170</sup> attempts by the applicant to get government assistance;<sup>171</sup> police or government response to reports of domestic violence;<sup>172</sup> reluctance or refusal to investigate, prosecute, or punish persecutors;<sup>173</sup> status or position of the persecutor;<sup>174</sup> general country conditions including the testimony of similarly situated women;<sup>175</sup> social, cultural, religious, and economic factors influencing the applicant's environment;<sup>176</sup> the structure of the country's legal system;<sup>177</sup>

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170. U.K. GUIDELINES, *supra* note 59, at 2B.9.

171. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,591.

172. *Id.*; U.K. GUIDELINES, *supra* note 59, at 2B.8.

173. U.K. GUIDELINES, *supra* note 59, at 2B.8.

174. *See* R-A-, 22 I. & N. Dec. 906, 909 (B.I.A. 2001) (using former military service by the persecutor to convince the court that complaining to the police would be futile); Carrillo v. Canada, [2008] 4 F.C.R. 636, para. 3 (Can.) (arguing that she could not escape her abuser because his brother was a federal judicial police officer); AB v. Sec'y of State for the Home Dep't, [2008] EWCA (Civ) 784, [10] (Eng.) (finding the threat to the applicant was greater based on her persecutor's position as a gang leader in Jamaica); Declaration of L.R., *supra* note 1, at 4 (discussing persecutor's position as a wealthy restaurant owner in the small Mexican village where applicant lived).

175. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,591; CANADIAN GUIDELINES, *supra* note 57, at C(2).

176. CANADIAN GUIDELINES, *supra* note 57, at C(2). Social factors can include the size of the applicant's community and the status of the persecutor in that community. *See* Supplemental Brief in L.R., *supra* note 6, at 26 (stating that issues dealing with an applicant's "particular social group" remain germane to the asylum-granting inquiry).

177. U.K. GUIDELINES, *supra* note 59, at 2B.8.

official government policies or legislation;<sup>178</sup> and preventive actions taken by the government.<sup>179</sup> Domestic violence applicants have different circumstances and there could be additional factors relevant in particular cases.

Conversely, some other potential factors are irrelevant to the inquiry into whether an applicant's government is able to provide adequate protection. For example, whether the victim of domestic violence could have sought protection with her extended family has nothing to do with the government's responsibility to offer reasonable protection.<sup>180</sup> Parents who are capable of protecting their daughter from her abuser are valuable; however, a capable and supportive family should not relieve the government of its responsibility to protect victims of domestic violence. Similarly, the existence of nongovernmental organizations dealing with issues of domestic violence in the applicant's country of origin does not excuse the government from accountability for protection of its citizens.<sup>181</sup> Courts should only consider factors relating to the applicant's relationship to her state.

#### B. APPLICATION OF THE PROPOSED TEST TO THE CHALLENGES OF ASYLUM APPLICANTS

The proposed test, with its focus on the individual applicant's relationship to her government, eliminates some of the evidentiary challenges a domestic violence asylum seeker faces. The three significant obstacles to demonstrating eligibility for asylum—the victim's hesitancy to report, the private nature of domestic violence, and the government's overwhelming power when compared to an individual persecutor—are all remedied by the proposed test and the suggested accompanying factors.<sup>182</sup>

The proposed test accounts for a victim's hesitancy to seek assistance. Since the burden of proof in asylum cases lies with the applicant,<sup>183</sup> the above-suggested factors rely on demon-

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178. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,591; U.K. GUIDELINES, *supra* note 59, at 2B.8.

179. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,591.

180. *But see id.* (noting that the presence or absence of family support may factor into the determination of whether an applicant has adequate access to government protections).

181. CANADIAN GUIDELINES, *supra* note 57, at C(2).

182. *See supra* notes 119–38 and accompanying text.

183. Establishing Asylum Eligibility, 8 C.F.R. § 208.13(a) (2010).

strating her own actions will be easier to prove than the factors that require explaining action or inaction on the part of the government or her abuser. For example, an applicant can credibly testify to the fact that she called the police and they did not respond. Her testimony, however, carries less weight when she claims the government does not respond to domestic violence claims generally, so she never attempted to receive assistance personally. The weighing of many factors in the suggested test dilutes the necessity for a domestic violence victim to report her abuse to the police. A failed attempt to receive government assistance should not be a required element of an applicant's claim.<sup>184</sup> Case law suggests, however, that this is a very persuasive piece of evidence.<sup>185</sup> The applicant's burden becomes more challenging when the state was never given an opportunity to fail in its response to the harm.<sup>186</sup> A court's inclusion of the following factors in its analysis will help to combat the perception that a victim hesitant to report does not deserve asylum: the government's encouragement or toleration of social, religious, and customary practices and behavioral norms; the social, cultural, religious, and economic factors influencing the applicant's environment; the position and status of the persecutor; and the effectiveness of a government's preventative steps to curb domestic violence.<sup>187</sup>

Given that domestic violence is generally a private form of persecution, a test focused on the individual victim's experiences is logical. The applicant's credible testimony may pro-

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184. See *Ex Parte Shah*, [1999] 2 A.C. 629 (H.L.) [648] (appeal taken from Immigration Appeal Tribunal) (Eng.); Asylum and Withholding Definitions, 65 Fed. Reg. at 76,591; see generally Sharon Donovan, Note, *No Where to Run . . . No Where to Hide: Battered Women Seeking Asylum in the United States Find Protection Hard to Come By*: Matter of R-A-, 11 GEO. MASON U. C.R. L.J. 301, 333 (2001) (stating that women in the United States only report half of the violent "incidents inflicted by their intimate partners to the police").

185. See, e.g., *Flores v. Canada*, 2008 CarswellNat 1702, para. 5 (Can. F.C.) (WL) (holding that the applicant failed to make diligent efforts to seek government protection); *Espinosa v. Canada*, 2005 CarswellNat 5991, para. 5 (Can. F.C.) (WL) (holding that the applicant did not meet her burden of proving the government's inability to protect her, as she never complained of the abuse); *AA (Sudan) v. Sec'y of State for the Home Dep't*, [2007] EWCA (Civ) 95, [4] (Eng.) (placing weight on the fact that the applicant sought police protection to no avail).

186. See Supplemental Brief in L.R., *supra* note 6, at 26–27 (placing emphasis on the fact that, when given the opportunity, a judge did assist L.R. through a custody order in her favor).

187. See *supra* notes 170, 174, 176, 179 and accompanying text.

vide the only evidence in some cases.<sup>188</sup> Of the factors suggested to accompany the proposed test, the following factors recognize the private nature of domestic violence: social, cultural, religious, and economic factors influencing the applicant's environment; and the structure of the country's legal system.<sup>189</sup> By examining the applicant's environment an asylum officer or court can gain an understanding of the severity of the persecution and the potential difficulties the applicant may face in reporting or gaining access to the legal system.

The government, in most cases, wields significant power compared to an individual abuser. Unfortunately, this does not mean that the government is capable of protecting the individual applicant from her persecutor.<sup>190</sup> A domestic violence applicant will most likely need to argue that the government is unwilling, for cultural or other reasons, to protect her, and the individualized reasonable access approach addresses this problem directly. Country condition information from the state department or nongovernmental organizations working in the region may provide some evidence that a government is unwilling to address the particular harm, but courts should consider the applicant's individual situation and not rely solely on general country information in their assessment of this element.<sup>191</sup> Factors that consider attempts by the applicant to get government assistance; police or government response; reluctance or refusal to investigate, prosecute, or punish persecutors; status or position of the persecutor; country conditions; and official government policies all address this power disparity between the government and the applicant's persecutor.<sup>192</sup> Looking at this wide array of factors gives asylum officers and courts a sense of the government's actual relationship with the persecutor beyond the inference that the sheer size and resources of a government should afford it the ability to control an individual persecutor.

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188. Establishing Asylum Eligibility, 8 C.F.R. § 208.13(a) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.").

189. See *supra* notes 176–77 and accompanying text.

190. See, e.g., R-A-, 22 I. & N. Dec. 906, 909 (B.I.A. 2001) (explaining that, although R-A- reported to police on multiple occasions, she never received protection because the police failed to follow through on a summons for her husband).

191. See *id.* at 910–11 (examining the poor record of the Guatemalan government regarding spousal-abuse response); Fauziya Kasinga, 21 I. & N. Dec. 357, 362 (B.I.A. 1996) (relying on State Department reports to demonstrate Togo's tolerance for FGM).

192. See *supra* notes 160–62, 175, 178 and accompanying text.

If DHS had not stipulated to asylum in *In re L.R.*, the suggested test and factors could have been applied to assist in assessing L.R.'s individual circumstances. As an illustration of the application of the proposed test and factors to an actual case, the following is a brief discussion of L.R.'s access to government protection; The Mexican government in rural areas has a history of tolerating domestic violence and there is a general societal acceptance of the practice.<sup>193</sup> L.R. reported her abuse to police more than once, resulting in inadequate law enforcement response and statements from officers that it was a private matter.<sup>194</sup> This reluctance to investigate or prosecute L.R.'s abuser was partially due to his status as a wealthy member of their village.<sup>195</sup> She did receive assistance through the legal system on her third to attempt gain custody of her children based on child abuse and received a protective order against her abuser, but he was not punished for assaulting and threatening her.<sup>196</sup> L.R. was a licensed teacher with the potential to financially support herself, but she was economically controlled by her husband.<sup>197</sup> These factors may indicate that even if the Mexican government as a whole does not tolerate domestic abuse, L.R.'s personal experience in her town depicts a government unwilling to protect her. A focus on the reasonableness of L.R. obtaining government protection in her individual situation through examination of the suggested factors allows evidence particular to the applicant's situation rather than general country condition information to control the outcome.

Approaching the element of government protection with a focus on the individual applicant's ability to access protection allows for consideration of factors specific to that applicant. This approach helps to alleviate the significant obstacles in the path of asylum for domestic violence victims.

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193. See Supplemental Brief in L.R., *supra* note 6, at 15 (noting that "social expectations in Mexico do little to disabuse" men of the view that they have a right to abuse their female partners); Declaration of L.R., *supra* note 1, at 9 (describing how people in L.R.'s village did nothing to help her when she was beaten in public).

194. Declaration of L.R., *supra* note 1, at 9.

195. *Id.*

196. *Id.* at 14–17.

197. *Id.* at 8, 11, 21.

## CONCLUSION

DHS's statements in *In re L.R.* removed the issue of fitting domestic violence asylum applicants into a "particular social group," which has been the focus of discussion in this area of asylum law for the past twenty years. Courts, practitioners, and advocates must now focus on another central element in domestic violence asylum cases—proving a government unable or unwilling to protect the applicant. DHS can aid this shift in focus by including in new rules or guidance a framework for analyzing this element. The department should adopt a test inquiring as to the applicant's reasonable access to government protection by emphasizing the ten factors discussed above. Encouraging an applicant-centered approach to the element of governmental protection is reasonable where an applicant has the opportunity to obtain and present a variety of evidence. Any forthcoming rules from DHS should focus on the governmental protection element of asylum as it relates to domestic violence applicants.