Center for Immigration Studies

Backgrounder

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Open-Border Asylum
Newfound Category of 'Spousal Abuse Asylum' Raises More Questions than It Answers

By Jon Feere

Giving shelter to those fleeing persecution abroad has always been part of America's welcoming immigration policy. Americans generally want to help people facing persecution overseas to the extent that they can, and our asylum system has been crafted to reflect this reality. Obviously there are practical limits and our laws require that certain thresholds be met before an individual claimant is granted asylum.

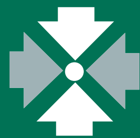
But for at least the past three decades, a number of activist-minded attorney groups have worked to expand opportunities for asylum, even if it means pushing analysis that contradicts the original intent and traditional interpretation of the law. For many of them, the battle over asylum seems to have less to do with giving shelter to persecuted individuals than with a larger quest to remake American legal norms, establish victim status for a number of officially recognized groups, and overhaul American society more generally.[1] For others, it is simply a matter of creating job security for immigration attorneys and "rights" groups via mass immigration.

One of the more significant recent efforts is to make alleged, individualized cases of spousal abuse qualify for asylum, an effort that has gained traction under the Obama administration. In October 2009, the administration granted asylum to Ms. Rodi Alvarado Peña, a Guatemalan woman who claims to have been the victim of spousal abuse in her home country starting in the mid-1980s. Since 1996, Alvarado's case has been heard by immigration judges, the Board of Immigration Appeals (BIA), and three different Attorneys General as the decision about how to handle the issue of spousal abuse in the asylum context was debated. Final rules on exactly how such claims should be handled remain elusive and controversy about how this decision may impact U.S. immigration policy continues.

This *Backgrounder* begins with a brief overview of the Alvarado case history and is followed by a basic explanation of the asylum law provisions at issue. It continues with a summary of the two most significant and detailed legal analyses in the case, namely the 1999 decision from the BIA (which denied Alvarado's asylum request) and a 2004 brief from the Department of Homeland Security (DHS, which argued in favor of asylum). The paper concludes with a series of questions that will have to be addressed by either Congress or the Obama administration if our asylum system is to maintain any credibility.

Overview

The case of Guatemalan native Rodi Alvarado has been one of the main vehicles used by advocates of a more liberal asylum system to push their agenda. Immigration agencies have taken Ms. Alvarado's story on face value, and if the allegations are accurate, Alvarado's history certainly is horrific.[2] According to testimony, in 1984 Alvarado married Francisco Osorio, a former soldier with the Guatemalan military who regularly abused Alvarado both physically and sexually. Osorio allegedly threatened Alvarado with death, dislocated her jaw, kicked her in the spine during pregnancy for refusing to get an abortion, routinely raped her, and engaged in a number of other violent acts. When Alvarado fled to a different Guatemalan town in 1994, her husband found her and beat her to unconsciousness. After returning to him, Alvarado was attacked again with a machete and electrical cord and threatened with disfigurement and dismemberment. Osorio also allegedly used Alvarado's head to break windows, mirrors, and pieces of furniture.



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In 1995, Alvarado fled to the United States and was granted asylum the following year. The ruling was quickly appealed by the Immigration and Naturalization Service and, in 1999, the Board of Immigration Appeals reversed the ruling. The BIA ruling did not last long as Attorney General Janet Reno vacated the ruling on President Clinton's last day in office, explaining that a rule on gender-based asylum claims was forthcoming and would result in a better outcome for Alvarado. However no agency rules were ever adopted. The way in which the White House should respond to the case and the need for new asylum rules continued to be debated throughout the Bush administration and into the Obama administration, culminating in a one-paragraph decision from the White House that granted Alvarado asylum in October 2009. Although beneficial to Alvarado, the decision has not added anything to the debate on how claims of domestic abuse should be addressed by immigration authorities in the future.

The following bullets provide a basic overview of the 14-year history of Alvarado's asylum case:

- In May 1995, Rodi Alvarado arrived in the United States, seeking asylum.

- In September 1996, an immigration judge in San Francisco granted Ms. Alvarado asylum. The decision was promptly appealed by the INS, the head immigration agency at the time.

- In June 1999, the Board of Immigration Appeals reversed the decision and held 10-5 that Ms. Alvarado did not qualify for asylum.

- In December 2000, the Department of Justice (DOJ) issued a lengthy proposed rule on domestic abuse in asylum claims.[3]

- On January 19, 2001, President Clinton's last day in office, then-Attorney General Janet Reno vacated and remanded the decision of the BIA and required the BIA to wait until the DOJ's proposed rule on the matter was finalized and published before authoring a new decision.[4] The DOJ's proposed rule was never adopted.

- In 2004, DHS authored a brief in favor of granting Alvarado asylum. Then-Attorney General John Ashcroft ordered a new review but did not reach a decision. No rule was ever written and the Bush administration did not put the DHS recommendations into practice.[5]

- In 2004, a number of U.S. senators wrote a letter to Ashcroft, urging him to "decide the Alvarado case in a manner consistent with forthcoming regulations." The signatories, which included Senators Clinton and Biden, suggested that asylum should be extended not only to anyone facing potential domestic abuse, but also to anyone facing potential honor killings or rape.[6]

- In September 2008, then-Attorney General Michael Mukasey ordered the case back to the BIA and encouraged the board to issue a precedent-setting ruling.[7] The Bush administration ultimately decided to send the case back to the original immigration judge, however, because a number of holdings had changed asylum policy since Alvarado's case was originally heard and a number of new issues had to be addressed.

- In October 2009, the Obama administration recommended asylum for Alvarado in a one-paragraph-long letter to the Executive Office of Immigration review (EOIR). An immigration judge will have to order the grant of asylum for it to take effect. No final rule that might clarify asylum in the context of domestic abuse has yet been written.

Ms. Alvarado's case is significant in that it is not only about the narrow issue of spousal abuse; it is part of a larger effort to lower the bar to asylum so that larger numbers of people can immigrate to the United States every year. While it is a significant case in that it represents the ongoing effort to clarify the asylum standard — particularly as to what it means to be a member of a "particular social group" and how "political opinion" should be defined, as discussed below — the case is also a catalyst with which open-border advocates seek to expand opportunities for asylum. It is part of an effort to bring open borders to our asylum system and to broaden the definition of humanitarianism itself.[8]

The Alvarado case also raises a number of questions that will have to be addressed by either Congress or the Obama administration if our asylum system is to remain credible. One issue is to what extent a non-governmental, individual actor who is not affiliated with any social group or movement qualifies as a "persecutor" under asylum law; traditionally, the persecution flows from the foreign government, or an entity operating with the consent (either express or implied) or acquiescence of that government. Advocates of a more liberal asylum system are increasingly

successful in imputing the violence of a private actor to the foreign government, thus qualifying the persecuted applicant for asylum.

Another issue revolves around the fact that there is no clear metric an immigration adjudicator must use in determining whether an asylum-seeker's homeland has contributed to, or conversely, sufficiently attempted to stop the alleged domestic abuse. How much effort should our country expect from a foreign government before granting one of its citizens asylum?

Still another issue is the low evidence standard found in all asylum cases. When the alleged persecution is part of a well-documented genocide, for example, an adjudicator may not need much evidence to conclude that the asylum-seeker would face persecution if returned home. But when the source of the alleged persecution is individualized and consequently not public knowledge, logic would suggest that more evidence would be necessary to prevent fraudulent claims. Advocates of spousal abuse asylum do not appear to have addressed this.[9]

Yet another issue involves inconsistent interpretation of legal terminology. Terms like "abuse" and "persecution" in the asylum context are without universally accepted definitions. Consequently, without some direction from the political branches, it is unclear how expansive a policy on spousal abuse asylum may become. Advocates of a liberal asylum system often point to cultural practices such as arranged marriages or attire standards as justifying grants of asylum. Here is what the *New York Times* editorial board had to say in 2004 in support of recognizing domestic abuse asylum, for example:

> *In an enlightened world, no society would force women to wear burkas against their will, or threaten them with death for daring to talk to a man. Mr. Ashcroft and the Department of Homeland Security should make certain that such persecuted women who flee to the United States have a chance to stay.*[10]

How many millions of burka-clad women in the "unenlightened world" might qualify for asylum under the *New York Times*' policy position? Will the United States legally declare that certain, non-violent social norms of specific countries are tantamount to abuse? The fine line between offering sanctuary and engaging in what some might call cultural imperialism does not appear to be fully debated by such advocates. The line between governmental or social practices that U.S. society generally disapproves of, on the one hand, and conduct so abhorrent that it creates special immigration rights for people who have no other options, is being blurred.[11]

These questions, along with many others, are addressed later in this paper.

The Law

Under asylum law, the United States can grant legal status to qualified individuals fleeing persecution in their homeland. Asylum seekers are already present in the United States, having entered either legally or illegally, and they either fear harm if returned to their homeland or have been harmed in the past. Asylum is one form of relief from deportation for people who are otherwise clearly deportable.

Asylum can be denied if the claimant is deemed not credible, if there has been a fundamental change in circumstances to the extent that the applicant no longer has a well-founded fear of persecution in her home country, or if the individual can avoid future persecution by relocating to another part of her home country.[12]

In 2008, asylum was granted to nearly 23,000 people. The number fluctuates from year to year and during the past decade it hit a peak of 39,145 grants in 2001.[13] In looking at the grant rate, however, the EOIR explains that the odds of gaining asylum have "significantly increased" over the last four years; in fiscal year 2005, 38 percent of applicants were granted asylum, while in fiscal year 2009, 47 percent of applicants were granted asylum.[14] Breaking it down further, one sees that for affirmative asylum requests the grant rate was 55 percent in 2009 (an 11 percentage-point increase from 2005), while defensive requests were successful 36 percent of the time in 2009 (an 8 percentage-point increase from 2005).[15] During fiscal year 2002 through 2007, the EOIR received over 360,000 new asylum cases.[16]

The law governing asylum policy is a convoluted mix of federal statutes, agency rules, immigration court holdings, judicial court holdings, and international treaties. A number of statutory elements remain debated within the court system, and the result has been inconsistent application from judge to judge.[17] A significant reason for the lack of standardization is that international conventions adopted by the United States contain ambiguous language that is not necessarily easily applied to individual cases. At the most basic level, asylum can be granted to any person:

> *…who is outside any country of such person's nationality…and who is unable or unwilling to return*

to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[18]

Both the "political opinion" clause and the definition of "membership in a particular social group" were central issues in the Alvarado case. Interpretation and application of these terms has varied from circuit to circuit, particularly in the context of spousal abuse asylum.

As for the "political opinion" clause, the person seeking asylum has the burden of providing evidence from which it is reasonable to conclude that her persecutor harmed her at least in part because of a protected ground. As the U.S. Supreme Court has explained, the persecution must be aimed at punishing a protected characteristic of the victim, and not simply the result of the persecutor's own generalized goals; the persecution is on account of the *victim's* political opinion, not the persecutor's.[19] The political opinion may be one that has been imputed to the victim by the persecutor. The individual seeking asylum must demonstrate that they have been persecuted in the past or that there is a reasonable possibility of future persecution.

As for the "social group" clause, the BIA has explained that members of a particular social group share a "common, immutable characteristic" that they either cannot change, or should not be required to change because such characteristic is fundamental to their individual identities.[20] The U.S. Court of Appeals for the Ninth Circuit — the circuit in which the Alvarado case arose — has used this definition:

a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which impart some common characteristic that is fundamental to their identity as a member of that discrete social group.[21]

One of the reasons Alvarado's case has persisted for so long is that the legal definitions of each element of asylum statutory law have varied from court to court. This is particularly true of the "social group" clause. Advocates of a more open asylum system have been working to expand these definitions as much as possible, and some courts have been willing to grant asylum more liberally than others. Relevant to this discussion is the movement to consider "women" or "men" a "particular social group." This interpretation has been accepted by some courts and agencies, as noted later, but there remains disagreement.

In a Second Circuit Court of Appeals case from 1991, for example, the court rejected a Salvadoran woman's request for asylum, upholding the decision by the original immigration judge and the BIA. Carmen Gomez claimed that 15 years prior to the court case she was raped and beaten by guerrilla forces in El Salvador, and that if she were deported (for a drug violation) the guerrillas were more likely to harm her because of her membership in a "particular social group" — i.e. "women." The Appeals Court denied the request for a number of reasons, but one section of the holding is quite revealing:

Here, Gomez' claim that she is a member of a particular social group was properly rejected. As the BIA noted, Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics — other than gender and youth — such that would-be persecutors could identify them as members of the purported group. Indeed, there is no indication that Gomez will be singled out for further brutalization on this basis. Certainly, we do not discount the physical and emotional pain that has been wantonly inflicted on these Salvadoran women. Moreover, we do not suggest that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well-founded fear of persecution. We cannot, however, find that Gomez has demonstrated that she is more likely to be persecuted than any other young woman. Accordingly, because Gomez has not presented evidence that she has a fear of persecution on account of her race, religion, nationality, political opinion, or membership in a particular social group, she has not proven her status as a refugee.[22]

The Second Circuit refused to consider "women" to be "a particular social group" for purposes of an asylum analysis. As one Harvard scholar explains, the court "indicated that a particular social group based exclusively on gender would not stand."[23] Other courts have come to different conclusions, however, and the Ninth Circuit, not surprisingly, has been more liberal in its analysis.

Immigration officials have promised the creation of new guidelines on the subject a number of times, but as of yet no such guidelines have been written. Many questions regarding definitions and regulations — some of which are raised later in this paper — will have

to be addressed by these guidelines if they are going to resolve the debate over spousal abuse asylum.

Finally, in analyzing asylum claims the source of the persecution has generally been understood to be a government, an entity operating on behalf of a government, or an entity operating with the consent (either express or implied) or acquiescence of a government. There is a subtle statutory language interpretation (or misinterpretation) in play here. The original statute allows for a grant of asylum if a person fleeing his or her home country "is unable or unwilling to avail himself or herself of the protection of that country because of persecution…." On its face, the requirement appears to be that the asylum seeker is unable to get protection from the home country government because that government is, in fact, the persecutor. The person cannot rely on the government to stop the persecution because the government is *the source* of the persecution. But in Alvarado's case, the alleged persecutor is clearly Alvarado's husband. From the record, Alvarado was "unable" to get protection from the Guatemalan government because the government considered the abuse a "domestic issue." In other words, it is not that Alvarado was unable to avail herself of the protection of Guatemala "because of persecution," but rather she was unable to avail herself of the government's protection because of social or political norms. Some might argue that she was unable to avail herself of the government's protection because the government was uncaring or because it lacked resources. But it is difficult, if not impossible to argue that Alvarado was unable to avail herself of the protection of the Guatemalan government "because of persecution" itself. Again, the language of the statute seems to require that the persecution come directly from the government itself; in a scenario where the government is directly persecuting an individual, that person clearly would be unable to avail himself of the protection of that country *because of persecution*.

Advocates of recognizing spousal abuse as a means to asylum seem to understand that this interpretation is correct. They understand that the original intent of the statute is not to resolve individualized cases of spousal abuse in foreign countries, but rather to provide shelter from persecuting governments. So how do they get around it? Immigration attorneys have imputed the violence of the individual to the foreign government. They have successfully argued that if a person abuses his spouse, and the government does not step in to stop it, that government becomes the de facto abuser — the source of persecution. It is not necessarily accurate at all — perhaps the government is incompetent or has some reason for not preventing all cases of individualized abuse. But with the logic advanced by some immigration attorneys, once the government becomes the entity legally responsible for any instance of domestic abuse, existing U.S. asylum law can be applied without difficulty, even if it means abandoning the original intent of the policy.

The BIA Denies Asylum

Although vacated by Attorney General Janet Reno in 2001, the most detailed judicial analysis of the Alvarado case remains the 1999 holding by the Board of Immigration Appeals. The BIA explained it found "great sympathy for the respondent and extreme contempt for the actions of her husband" and also found that Ms. Alvarado had adequately established that she was unable to avail herself of the protection of the Guatemalan government. However, the BIA did not find Alvarado eligible for asylum and reversed the lower immigration judge's decision, holding:

> *[W]e do not agree with the Immigration Judge that the respondent was harmed on account of either actual or imputed political opinion or membership in a particular social group.*[24]

In its analysis, the BIA asked two questions: (1) Did Alvarado hold a political opinion upon which Alvarado's husband acted; and (2) Did Alvarado belong to a cognizable, particular social group? While the BIA ultimately answered each of these inquiries in the negative, the Obama administration has completely dismissed the concerns raised by the board with very little explanation.

1. Political Opinion. This factor looks at whether the persecuted individual is being harmed on account of a political opinion. The BIA explained that the record indicated that Alvarado's husband harmed her "regardless of what she actually believed or what he thought she believed." The board noted that the record does not reflect that Alvarado's husband "had any understanding of [Alvarado's] perspective or that he even cared what [her] perspective may have been." Furthermore, the board noted, Alvarado herself testified that her husband "hit me for no reason at all." The record did not reveal anything about what Alvarado's husband believed her political views to be, nor did it include any evidence that the violence inflicted on her was attributable to her "actual or imputed beliefs." The board also noted that

the record was devoid of any evidence that Alvarado even professed any political belief.

Alvarado's lawyers made the argument that the act of resisting violence amounted to a political opinion. The BIA pointed out that the Supreme Court had already rejected such an analysis and explained the potential fallout of accepting such reasoning:

> *As we understand the respondent's rationale, it would seem that virtually any victim of repeated violence who offers some resistance could qualify for asylum, particularly where the government did not control the assailant …. It is certainly logical and only human to presume that no victim of violence desires to be such a victim and will resist in some manner. But it is another matter to presume that the perpetrator of the violence inflicts it because the perpetrator believes the victim opposes either the abuse or the authority of the abuser. We do not find that the second proposition necessarily follows from the first. Moreover, it seems to us that this approach ignores the question of what motivated the abuse at the outset, and it necessarily assumes that the original motivation is no longer the basis, at least not by itself, for the subsequent harm.*[25]

In other words, the idea of characterizing a negative response to abuse as "political opinion" is one that fails to address exactly what motivated the first instance of abuse. After all, everyone wants to live free from abuse, which means that everyone naturally has this "political opinion," which means, in turn, that Alvarado's husband could view the entire world as his target. If immigration adjudicators were to accept such an argument, any victim of any violence who attempts to resist such violence could qualify for asylum. It is very difficult to argue that the drafters of existing statutory language intended such a result.

The BIA noted that Alvarado's husband was likely not motivated by any imputed political opinion, explaining:

> *Put another way, it is difficult to conclude on the actual record before us that there is any "opinion" the respondent could have held, or convinced her husband she held, that would have prevented the abuse she experienced.*[26]

The BIA summed up their response to this argument, holding that Alvarado failed to establish that her husband "attributed to her a political view and then harmed her because of that view."[27]

2. Membership in a Particular Social Group. This factor requires the existence of some cognizable social group of which the person seeking asylum is a member. Alvarado argued that she is part of a social group defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."

The BIA found this alleged social group definition unacceptable, noting that it "fails under our own independent assessment of what constitutes a qualifying social group." But the BIA went further:

> *We find it questionable that the social group adopted by the Immigration Judge appears to have been defined principally, if not exclusively, for purposes of this asylum case, and without regard to the question of whether anyone in Guatemala perceives this group to exist in any form whatsoever.*[28]

The BIA noted that in accordance with earlier holdings the term "particular social group" is "to be construed in keeping with the other four statutory characteristics that are the focus of persecution: race, religion, nationality, and political opinion." The board noted that it is these characteristics that typically result in societal factions and that the members inside and outside these groups generally understand or at least perceive the affiliations. For the asylum claim to hold, the board explained that there must be "some showing of how the characteristic is understood in the alien's society, such that we, in turn, may understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm." The board could not find such a showing, holding:

> *[T]he respondent has not shown that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala. The respondent has shown neither that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group.*
>
> *The lack of a showing in this respect makes it much less likely that we will recognize the alleged group as a particular social group for asylum purposes, or that the respondent will be able to establish that it was her*

group characteristic which motivated her abuser's actions. Indeed, if the alleged persecutor is not even aware of the group's existence, it becomes harder to understand how the persecutor may have been motivated by the victim's "membership" in the group to inflict the harm on the victim.[29]

The BIA seemed to find the societal group definition pushed by Alvarado to be more of a creation of lawyers than a natural, social occurrence. Alvarado's definition would fit any person facing abuse, but the victims would not necessarily be united in any way (other than having been abused). The board hinted at how Alvarado's preferred definition could result in a significant increase in asylum claims by upsetting the standards set in place by Congress:

[T]he mere existence of shared descriptive characteristics is insufficient to qualify those possessing the common characteristics as members of a particular social group. The existence of shared attributes is certainly relevant, and indeed important, to a "social group" assessment… But the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown.[30]

In other words, the proposed analysis amounts to what some might call open-border asylum. Unfortunately, the BIA's concern has not been addressed by the Obama administration, even though the administration seems to be on the verge of accepting such a broad interpretation of the law.

The BIA then turned to a brief analysis of the alleged abuser's motives in this case, noting that Alvarado failed to establish that her husband targeted and harmed her because he perceived her to be a member of a social group. As the board explained:

The record indicates that he has targeted only the respondent. The respondent's husband has not shown an interest in any member of this group ["Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination"] other than the respondent herself. The respondent fails to show how other members of the group may be at risk of harm from him. If group membership were the motivation behind his abuse, one would expect to see some evidence of it manifested in actions toward other members of the same group.[31]

The board listed the facts of the case to illustrate that the abuse was not on account of membership in any group. Alvarado's statements indicate that her husband harmed her for many reasons, and the board explained that according to Alvarado's own testimony this happened "when he was drunk and when he was sober, for not getting an abortion, for his belief that she was seeing other men, for not having her family get money for him, for not being able to find something in the house, for leaving a cantina before him, for leaving him, for reasons related to his mistreatment in the army, and 'for no reason at all.'"

In contrasting this case with female genital mutilation cases (where asylum is often granted), the board explained that Alvarado had not demonstrated "that domestic violence is a practice encouraged and viewed as societally important in Guatemala. She has not shown that women are expected to undergo abuse from their husbands, or that husbands who do not abuse their wives, or the nonabused wives themselves, face social ostracization or other threats to make them conform to a societal expectation of abuse."

Finally, the board dismissed the holding of the lower immigration court, calling it "both too broad and too narrow" — in an analysis that really calls into question the validity of the claimed social group:

It is too broad in that [Alvarado's husband] did not target all (or indeed any other) Guatemalan women intimate with abusive Guatemalan men. It is too narrow in that the record strongly indicates that he would have abused any woman, regardless of nationality, to whom he was married… On the basis of this record, we perceive that the husband's focus was on the respondent because she was his *wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm.*[32]

Ultimately, the BIA ruled against the granting of asylum, overturning the lower court's decision. The board held:

We find that the group identified by the Immigration Judge has not adequately been shown to be a "particular social group" for asylum purposes. We further find that the respondent has failed to show that her husband was motivated to harm her, even in part, because of her membership in a particular social group or because of an actual or imputed political opinion.[33]

DHS Backs Asylum

The only other detailed legal analysis to come out of the Alvarado case is from the Department of Homeland Security.[34] Even though the BIA decision denying asylum was vacated by the Clinton administration, Alvarado remained in a legal limbo; the White House requested that the BIA wait to issue a decision until after rules could be written. But no rules were ever issued, prompting DHS to issue a brief in early 2004 in which it recommended two options to Attorney General John Ashcroft. DHS asked Ashcroft to either (1) "instruct the [BIA] to grant asylum in the case without issuing an opinion … so as not to prejudice the rulemaking process;" or (2) "to postpone issuing his decision … until the final regulation is published … [and then] grant asylum." Ultimately, Ashcroft instructed the BIA to wait on issuing a decision until the pending final rules were issued.[35]

In the brief, DHS stated that it believed Alvarado was eligible for relief, but acknowledged that "too expansive a reading of the term 'particular social group' could have a significant adverse operational impact." In other words, broad definitions could result in open-border asylum where very few are denied entry.

DHS also agreed with the BIA's determination on the political opinion claim, specifically that the abuse could not have been on account of the applicant's political opinion because there was no evidence that Alvarado's husband had any knowledge of Alvarado's political opinion, nor any evidence that he cared. DHS noted that it would be "fundamentally inaccurate to characterize Alvarado's abuse as motivated by her husband's perception of her political opinions about male dominance."

DHS did take issue with the BIA's analysis of the "membership in a particular social group" clause, however. DHS agreed that rejecting Alvarado's claimed social group — "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" — was the right thing to do. Instead, DHS recommended using the following definition: "married women in Guatemala who are unable to leave the relationship." This definition, argued DHS, would meet the statutory requirement for granting asylum. DHS did not address the possible fallout from such a broad definition, but it did suggest that difficulty in acquiring a divorce, for example, might make one eligible for asylum:

> *For many individuals, marital status is an integral and unchangeable aspect of their religious and moral identity. For example, many Catholics believe that marriage is a sacrament that cannot be dissolved… Can [Alvarado] reasonably be expected to divorce, or are there religious, cultural, legal, or circumstantial constraints that would render divorce an unreasonable expectation?*

With such reasoning, any person who seeks a divorce in a predominately Catholic society could be eligible for asylum. Because divorce is discouraged under Islamic law as well as under a number of other religions, there is a significant opening for asylum cases under such an analysis.

DHS noted that immigration adjudicators should take into account whether "such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society, that cannot be deduced simply by evidence of random acts within that society." DHS did not explain how officials should attempt such an analysis.

DHS also argued that the BIA's reasoning was "fundamentally flawed" for suggesting that the fact that Alvarado's husband only targeted her and no other women undermines proof of group membership. DHS explained that a persecutor "may in fact target an individual victim because of a characteristic the victim shares with others, even though the persecutor does not act against others who possess the same characteristic." As an example, DHS argued that "a slave owner who freely beats his own slave might not have the opportunity or inclination to beat his neighbor's slave. It would nevertheless be reasonable to conclude that the beating is motivated by the victim's status as a slave." This is simply an odd comparison, and one that arguably includes an analysis that presupposes the conclusion; is it absolutely clear in the hypothetical that the slave owner is beating the slave because of the slave's status? What if the slave owner beats his own wife with the same frequency? Furthermore, even if one were to accept DHS's analysis, can it even be applied to Alvarado's case? It is well accepted that slavery is wrong and that people treated as slaves face harsh circumstances. But the facts in Alvarado's case do not even begin to establish that all women in Guatemala face a strife-filled existence simply by nature of their gender. It seems that such a reality would have to be established for the slavery comparison to hold water and for the purpose of justifying a grant of asylum.

Ultimately DHS did conclude that each asylum case will vary depending on the facts, hence the need for carefully drafted rules. The agency also argued that a rule should be finalized before any decision is made. The Obama administration obviously did not take this suggestion.

As It Stands Today

As noted earlier, the Obama administration granted Ms. Alvarado asylum in October 2009. The administration has not yet issued any regulations or rules as to how spousal abuse asylum cases should be handled in the future, however. The *New York Times* explains that DHS officials remain "cautious in assessing the implications of the administration's recommendation."[36] A DHS spokesman told the *Times* that the agency "continues to view domestic violence as a possible basis for asylum" and that DHS is currently writing regulations to govern asylum claims based on domestic violence.[37] In other words, the Alvarado case remains somewhat of an anomaly in asylum law and has not yet resulted in any change to the nation's laws.

Nevertheless, immigration attorney groups are elated to hear that more business may be coming their way, prompting one attorney to claim that her colleagues "now have some pretty solid guidelines from DHS."[38]

Not quite. The decision to admit Alvarado was one paragraph long and offered no reasoning, no rules, and no explanation for the decision:

> *The Department of Homeland Security is in receipt of the respondent's Legal Memorandum and Supporting Documentation, dated August, 18, 2009. Based upon its review of the respondent's submission and the entirety of the record, the Department maintains that the respondent, subject to appropriate records and database checks … is eligible for asylum and merits a grant of asylum as a matter of discretion.*[39]

Until new rules are written, immigration attorneys will be relying on existing precedent that remains a mix of convoluted case law from immigration and Judicial Branch courts, agency rules, federal statutes, and international law. If Congress is concerned about the forthcoming rule or the evolution of asylum law, it could step in and provide the White House with some guidance. A number of questions, some of which are highlighted below, will have to be answered either by Congress or the agencies writing the new policies if our asylum system is to retain any credibility.

Remaining Questions

What About Fraud? One concern in all asylum cases is that the decision to grant asylum status often stands on flimsy or non-existent evidence. What burden does the applicant have? Potentially, not much:

> The testimony of the applicant may be sufficient *to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided* unless the applicant does not have the evidence and cannot reasonably obtain the evidence.[40] *(emphasis added)*

If an asylum-seeker's argument is that her homeland will not prosecute abusive husbands, what records are available to prove the husband was, in fact, abusive? Certainly no police records will be readily available. As for hospital records, if they were even available, they would be sufficient to show that medical care was received, but probably not sufficient for the purpose of proving *who* was responsible for causing the injuries or under what circumstances they occurred. Limited evidence may raise less of a concern about fraud when the granting of asylum is based on obvious, international events — say, war or genocide. But when it comes to individualized, unique, and potentially unverifiable cases of domestic abuse, the opportunity for fraud is much greater. Nevertheless, without a sufficient rule change, weak or nonexistent evidence may be sufficient in these cases.

According to law professor Raquel Aldana, a specialist on immigration matters:

> *Judges have heard so many sad stories, it's hard to say who's telling the truth and who's not… With tens of thousands of refugees asking for asylum every year, overworked judges often rely on gut instinct about the evidence presented. That evidence frequently consists of little more than the applicant's testimony.*[41]

According to Dana Leigh Marks, president of the National Association of Immigration Judges and a

veteran immigration judge, fraud is a very real possibility in asylum cases:

> *My colleagues have said it's very difficult to tell an asylum seeker with a good claim from a good liar… What makes asylum cases tricky for immigration judges is people don't get notes from their dictators. You're trying to decide cases without traditional documents that court cases often rely on. We usually get one story from one vantage point.*[42]

Similarly, immigration adjudicators do not receive letters from spouses acknowledging abuse, nor do they get letters from foreign governments explaining a refusal to protect victims of domestic abuse.

One eye-opening example came to light last summer as three attorneys and two interpreters of a California law firm were convicted of conspiracy to defraud the government. Reportedly around 700 asylum cases may have to be reopened because the asylum-seekers were coached by the firm's lawyers and interpreters to tell phony stories of torture and rape to immigration judges and asylum officers. As described in the *Sacramento Bee*:

> *Between 2000 and 2004, the defendants filed hundreds of claims for Romanians, Indians, Nepalis and Fijians. They made more than $1 million charging clients for bogus addresses, medical reports, notarized declarations and tales of rapes and beatings that never took place, court records show.*
>
> . . .
>
> *Lawyers and interpreters crafted fictional stories of persecution they thought would fly — in some cases even when their clients had true tales of persecution.*
>
> *The firm's statement on behalf of a 51-year-old Romanian Pentecostal claimed that when he tried to bury a member of his congregation he was arrested, cursed as a "devil," and beaten by police "until I lost consciousness."*
>
> *A 36-year-old Sikh from Punjab said she watched police beat her father, who had helped hide a member of the Punjabi independence movement. She claimed "police kicked me in my sides, stomach, back, buttocks and legs."*
>
> *Those stories were fabricated, prosecutors said, but the firm backed up its cases with phony medical records and government documents, which made the stories harder to reject.*[43]

Although fraudulent, these cases may nonetheless be setting precedent and establishing the "judicial norms" of what is acceptable grounds for asylum. It would not be the first time. In the late 1990s, a number of human rights and feminist organizations rallied in support of Adelaide Abankwah, a tribal queen from Ghana who claimed that she would face genital mutilation, if deported, for having lost her virginity in violation of her tribe's traditions. Gloria Steinem, actresses Julia Roberts and Vanessa Redgrave, Sen. Chuck Schumer and a number of other members of Congress, and First Lady Hillary Clinton all came to her aid and demanded that she be granted asylum. After two denials, Abankwah was granted asylum by a federal appeals court. Her advocates were elated. Soon after, however, it was discovered that "Abankwah" was actually Regina Norman Danson, a former Ghanaian hotel worker. She was not a tribal queen and she did not face any mutilation. Her former employer explained, "…she left because she wanted to go to the United States." The real Adelaide Abankwah was a former college student who had her passport stolen in Ghana.[44] Nevertheless, the case has been cited approvingly in six other asylum cases in three different circuits. It has also been cited in over 40 law review articles, many of which were authored by professors who regularly push for a more lenient asylum policy. Although the original holding in the Abankwah case was not necessarily dispositive to the holdings in the cases that cited it, it is arguable that any case that used the Abankwah case in its legal analysis should be reopened. It is a potential house of cards, however, as the subsequent cases have also been cited in more recent decisions.

Similarly, advocates of a more expansive asylum system consider Alvarado's case groundbreaking and precedent-setting; it gives them support for other asylum cases. But what if it were to be revealed years from now that the Alvarado case was itself fraudulent? From a policy perspective, it wouldn't matter much because the boulder was already set in motion. For those inclined to support a less liberal asylum system, it is important that claims of asylum be carefully adjudicated so as to prevent an unnecessary runaway landslide. This would require the creation of very detailed rules that immigration adjudicators would have to follow. It is also arguable that individualized, unique cases of alleged abuse should require a higher burden of proof than asylum cases that can be linked to verifiable political events or social upheaval.

There has been no absolute verification of Alvarado's abuse by any U.S. court, agency, or other governmental body. As the *New York Times* explains,

"immigration judges have not questioned the credibility of her story." If individualized spousal abuse is to qualify a person for asylum, the government must come up with a better way of validating these claims.

What About the Abuser? No discussion of an asylum policy aimed at rescuing domestic abuse victims is complete without a discussion of the legal consequences facing the alleged abuser. Since Alvarado is now allowed to remain in the United States, doesn't it necessarily follow that her husband should be forever banned from immigrating here? If he were to immigrate, Alvarado would presumably face the very same threats here that she faced in her homeland. The purpose for which asylum was granted might be completely eviscerated. Any individual-persecutor-based asylum system would seem to require the creation of an "abuser" database that immigration authorities could use to deny entry to alleged abusers. By contrast, when the persecutor is a foreign government, there obviously is no concern about the entire foreign government following the victim to the United States.

But is it fair to deny an alleged abuser admission to the United States based on unsubstantiated claims? Remember, a judge who grants asylum usually has very little evidence of persecution and often must make a decision based solely on the credibility of the asylum seeker. When the alleged persecuting entity is a foreign government, a judge may be able to confirm such persecution though simple awareness of world events. Private, individual-based persecution remains very difficult for a judge to confirm. If alleged abusers were denied entry, the lack of evidence on which the denial is based may render the decision unfair to the alleged abuser, particularly if he/she declares innocence.

And what if the asylum-seeker's story was a fabrication? When persecution is said to have been directed by a foreign government, that government is not harmed even if the claim turns out to be false. But when the persecutor is an individual, a false claim of persecution can be much more damaging to that individual, particularly if the United States were to deny him entry. Will the alleged abuser have a case against the United States for denying future entry based on little to no evidence if such a policy is put in place? What about defamation; are the statements privileged since they take place during an administrative hearing? Immigration courts could become the scene of evidence-free "he said, she said" hearings. In many ways, U.S. courts would be doing the very job the immigrants' homeland courts should be doing. And that's ultimately the argument proponents of spousal abuse asylum are making, that the United States should serve as an alternative forum for domestic abuse hearings when an immigrant's home country is unwilling to hold such hearings.

There is also the serious problem of victims returning to their abusers. Somehow, our immigration system might have to address this if the asylee decides to seek admission for her spouse. Can our government play a role here? Should it? On the other hand, if an asylee petitions to have her alleged abuser immigrate, should this be considered a sign that the claims of abuse were all a ruse? There's always the chance that the abuser has been "reformed," one supposes, but if it is determined that he no longer poses a threat, shouldn't the person originally granted asylum be returned to their homeland since the threat has subsided? These are serious questions that the government will have to address if spousal abuse asylum becomes routine.

Somewhat related is the question of what amounts to "abuse." Abuse takes many forms: some abuse includes physical violence, while some abuse may be psychological. What now amounts to the type of abuse warranting asylum, and where does the Obama administration draw the line? It is gruesome to ask, but will our immigration system now need to provide a legal analysis that differentiates between a yell and a punch, for example? Does use of deadly weapons change the analysis? How does time play a role; is abuse lasting six months different from abuse that lasts six years? Rather than provide a clear ruling, the Obama administration has made the waters much more murky and unpredictable. The immigration consequences of this decision have not yet begun to be analyzed.

Finally, in instances where the original filing was made a significant number of years ago, adjudicators should determine whether the alleged abuser remains a threat. As a Court of Appeals once noted, "asylum cases move so sluggishly through the administrative and judicial process that by the time they reach [the Appeals Courts], the relevant political circumstances may have significantly changed."[45] How have the political circumstances in Guatemala changed since Alvarado arrived in the United States in 1995? Is the Guatemalan government providing better protection of abuse victims today? Factual circumstances may have significantly changed as well. Is Alvarado's alleged abuser still residing in Guatemala? Is he even still alive? Any changes to these circumstances could render a grant of asylum unwarranted. It does not appear from the records available that the Obama administration or any court made an effort to determine the current location of Alvarado's alleged abuser, nor whether he continues to live or ever actually existed in the first place.

What About the Home Country? Proponents of domestic abuse asylum argue that the asylum-seeker is fleeing not just the abuser, but also the homeland government's inability or unwillingness to provide protection from the alleged abuser. They also argue, as did Alvarado, that such governments can be deemed responsible for private acts of violence against women by virtue of the failure to afford protection. But as the BIA explained in its holding, "construing private acts of violence to be qualifying governmental persecution, by virtue of the inadequacy of protection, would obviate, perhaps entirely, the 'on account of' requirement in the statute." What this means is that the various protected grounds written into the statute — "race, religion, nationality, membership in a particular social group, or political opinion" — may not even need to be addressed in an asylum hearing if Alvarado's reasoning were to become standard practice. One would only need to show that they feared persecution from some source, and the government — in failing to prevent the violence — would automatically become the de facto persecutor, i.e. the legal source of the violence. And the granting of asylum would be very easily legally justified. It is an open-border approach to asylum. Since the U.S. government appears to have concluded that the Guatemalan government is unable or unwilling to stop domestic abuse, nearly any person in Guatemala who experiences domestic abuse has a valid claim to asylum. But it goes further. As the BIA explained, such interpretation of the law would dramatically increase the number of valid asylum claims and extend far beyond the category of female abuse victims:

> *We see no principled basis for restricting such an approach to cases involving violence against women. The absence of adequate governmental protection, it would seem, should equally translate into refugee status for other categories of persons unable to protect themselves.*

But even if Alvarado's interpretation of asylum law does not become standard practice, the adequacy of state protection remains an important element of asylum cases. What then is the scale by which our government should judge the abilities and failings of another country in the realm of spousal abuse? Is there really any way to make the determination that a foreign country is completely unable or unwilling to help spousal abuse victims? How much protection is enough? Certainly the United States is not perfect at stopping all domestic abuse. How exactly will any such comparative analysis be accomplished? Judges are not experts on foreign policy matters, and no judge can be an expert on the unique intricacies of every country's public safety agencies.[46] But immigration judges will be facing these issues and the way in which they do so will have an impact on the credibility of our asylum system.

Individuals who can relocate safely within their home country ordinarily cannot qualify for asylum in the United States. The law states that asylum shall be denied if the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality. In determining whether such relocation is possible, immigration authorities should not be applying the same standard to both cases involving persecution by the government and cases involving persecution by an individual. Logically, fleeing an individual persecutor is easier than fleeing a government with a jurisdiction that extends to the nation's border. It is not clear that the immigration adjudicators in the Alvarado case made any such distinction.

As a comparison, a pivotal and oft-cited asylum case from 1985 resulted in the denial of asylum for a Salvadoran male who could not prove, among other things, that threats of violence from anti-government guerrillas "occurred throughout the country of El Salvador."[47] It is unclear what evidence Alvarado presented to prove that the threat of violence from her husband existed throughout the country of Guatemala.

After a very simplistic overview of Guatemalan society, immigration adjudicators concluded that Alvarado could not successfully relocate within her home country. How big is Guatemala? It is approximately 110,000 square kilometers with an estimated population of about 14 million. To put this in perspective, the country is larger in size (both geographically and population-wise) than Massachusetts, Connecticut, Rhode Island, Vermont, New Hampshire, and Delaware, combined (101,286 km^2 with a population of 13,860,178). One would think that Guatemala might be large enough to provide some refuge.

But again, advocates for her asylum argue that it is the Guatemalan government itself that serves as the persecutor by not stopping Alvarado's husband. If it is an issue of the availability of governmental protection, research on the police power and social services available in all municipalities would necessarily have to be conducted before U.S. authorities could come to a justifiable conclusion. From the available records, it does not appear either issue was adjudicated in any meaningful way.

Interestingly, the U.S. State Department noted in an advisory opinion on the Alvarado case that Guatemala is making efforts to reduce spousal

abuse through "nationwide educational programs" and that family court judges in that country "may issue injunctions against abusive spouses, which police are charged with enforcing." While domestic violence may remain a serious problem in Guatemala, the question is whether it is so insurmountable as to justify asylum in the United States.

Can the United States Provide Protection? The United States can provide protection from persecuting governments, for example, because once the alien gets here, the threatening government is obviously not going to follow the asylee to the United States. But when it comes to the issue of abuse at the hands of an individual, can the United States really provide a safe haven? According to the Centers for Disease Control and Prevention, every year approximately five million women in the United States experience physical assaults and rapes at the hands of their domestic partner.[48] A recent study of Latina immigrants in Washington, D.C., found that nearly half were in relationships abusive enough to qualify for a court's protective order.[49] While the U.S. legal system does provide an opportunity for restraining orders and other means of protection — protections that may not, in fact, be available in the asylee's homeland — such orders are not always sufficient. Extrapolating U.S. domestic abuse statistics globally reveals that the number of asylum claims worldwide could be very significant.

There is a more immediate reason the United States may not be able to provide quality asylum: lax border security. As explained in a Center for Immigration Studies blog post, granting asylum to people fleeing MS-13 gang activity in Central America makes little sense — the gang has a significant presence in the United States as a result of the federal government's unwillingness to secure our ports of entry.[50] Similarly, if an abusive husband can make his way into the United States undetected, what purpose does asylum serve? According to case documents, Alvarado's husband allegedly said he was "going to hunt her down and kill her." If we cannot control our own immigration system, an asylum policy aimed at protecting against individual persecutors may serve very little purpose.

Conclusion

Expanding the definition of asylum to include people alleging abuse at the hands of individual persecutors may have a profound effect on all asylum policies. Advocates of a liberal immigration system have been working to define each element of asylum law as broadly as possible, the goal being a system where very few asylum seekers are denied admission. The Obama administration may work to expand the definitions of "political opinion" and "social group" under the guise of helping victims of spousal abuse, but the impact of such changes will likely extend to a great number of categories of asylum seekers. Considering that the asylum grant rate has significantly increased over the last few years, open border advocates may be more successful at expanding asylum policy than most realize.

Many issues must be addressed before any rule changes are made. What evidence standards should immigration judges use? Will the alleged abuser be denied admission to the United States? What might be the consequences of a ruling against an alleged abuser's interests (and in his absence)? How much of an effort at preventing domestic abuse should we expect out of foreign countries, and what amount of insufficiency justifies a grant of asylum? How much effort at relocating within the homeland should we expect from the asylum seeker? In the least, any agency rules on these matters must address the differences between the act of fleeing a persecuting government and the act of fleeing a violent individual.

Ultimately, if the U.S. asylum system is to retain any credibility, the ability to regulate immigration is paramount. If a nation cannot control the flow of people into its own lands and, as a consequence, is unable to adequately differentiate between those who should be welcomed and those who should be denied entry, that nation simply cannot exist as a place of refuge for those fleeing persecution.

End Notes

[1] Mark Krikorian, *Who Deserves Asylum?*, Commentary Magazine, June 1996. Available at: http://www.cis.org/articles/1996/msk6-96.html.

[2] This paper uses the terms "allegations" and "alleged" when dealing with individuals as persecutors (as opposed to governments as persecutors) because considering the low, if not non-existent evidence standards in asylum cases, the lack of opportunity for an alleged abuser to defend him or herself in immigration court, and the real-world impact on an individual who is said to have perpetrated violence, it seems imprudent to apply labels so haphazardly. While a foreign government may not have a concern about reputation or defamation, the same cannot be said of an individual.

[3] Asylum and Withholding Definitions, Fed. Reg. Vol. 65, No. 236, Pgs. 76588-76598 (proposed Dec. 7, 2000).

[4] In re: Matter of Rodi Alvarado Pena, Op. Att'y Gen., Order No. 2379-2001 (Jan. 19, 2001). Available at: http://cgrs.uchastings.edu/documents/legal/ag_ra_order.pdf.

[5] In re: Rodi Alvarado-Pena, Dep't of Homeland Security's Position on Respondent's Eligibility for Relief, Op. Off. Gen. Counsel, U.S. Dep't of Justice (2004). Available at: http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf.

[6] Letter from Undersigned Members of Congress to A.G. John Ashcroft, *RE: Protecting Women Refugees and the Matter of R-A (Rodi Alvarado), A73 753 922* (June 16, 2004). Available at: http://cgrs.uchastings.edu/documents/advocacy/senate_6-04.pdf.

[7] *Matter of R-A-, Respondent*, Interim Decision #3624, 24 I&N Dec. 629 (A.G. 2008). Available at: http://cgrs.uchastings.edu/documents/legal/ag_mukasey_ra_order_sept2008.pdf.

[8] For example, the United States just granted asylum to a German family because Germany has prohibited homeschooling. As Mark Krikorian explains: "What we're not doing well is drawing the distinction between governmental or social practices that we disapprove of, on the one hand, and conduct so abhorrent that it creates special immigration rights for people who have no other options. Germany's ban on homeschooling is indeed stupid, but there are two factors weighing on the other side: First, Germany's a democracy and if the stupid laws of every democracy are a cause for asylum, then we're in trouble. In France, after all, you can't (or couldn't) work more than 35 hours a week—are we going to grant asylum to Frenchmen seeking overtime? Or how about the English butcher who couldn't sell his meat in pounds rather than kilos? Second, Germany is a member of the EU and of Schengen, and as such, its citizens have the right to travel and live in a wide variety of countries, almost all of which permit homeschooling." See, Mark Krikorian, *Homeschooling Asylum*, Center for Immigration Studies blog, Mar. 1, 2010. Available at: http://www.cis.org/krikorian/homeschooling-asylum. See also, Campbell Robertson, *Judge Grants Asylum to German Home Schoolers*, N.Y. Times, Feb. 28, 2010. Available at: http://www.nytimes.com/2010/03/01/us/01homeschool.html?pagewanted=all.

[9] Much of the terminology in this developing area of immigration law is somewhat muddled. Some advocates use the term "gender-related asylum" because they equate gender with "membership in a particular social group," a category found in asylum law. Others place this effort in the broader context of women's rights, although there is no reason the emerging protections could not be granted to men. Not only are supporters of extending this type of asylum protection using different terminology, they are also advancing different reasoning. This paper generally uses the term "spousal abuse asylum" because it most accurately describes the basis on which asylum is being granted, particularly in Alvarado's case.

[10] Editorial, *A Haven for Abused Women*, N.Y. Times, Apr. 29, 2004. Available at: http://www.nytimes.com/2004/04/29/opinion/a-haven-for-abused-women.html.

[11] *See*, *e.g.*, n.8.

[12] Although not relevant to the Alvarado case, asylum can also be denied on a number of other grounds. For example, if the asylum seeker is him/herself determined to be a persecutor, or if the individual has committed certain crimes, his or her petition could be denied.

[13] *Yearbook of Immigration Statistics: 2008*, Dep't of Homeland Security (2008). Available at: http://www.dhs.gov/files/statistics/publications/YrBk08RA.shtm

[14] *FY 2009 Statistical Year Book*, Dep't of Justice (Mar. 2010). Available at: http://www.justice.gov/eoir/statspub/fy09syb.pdf.

[15] *Id.* Note: An alien may request asylum either "affirmatively" by completing an asylum application and filing it with DHS, or "defensively," by requesting asylum before an immigration judge.

[16] *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*, U.S. Gov't Accountability Office (Sept. 2008). Available at: http://www.gao.gov/new.items/d08940.pdf.

[17] *See id.*

[18] 8 U.S.C. § 1101(a)(42)(A) (2010). *See also*, 8 U.S.C. §§ 1101, 1158.

[19] INS v. Elias-Zacarias, 502 U.S.478 (1992).

[20] Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996). *See also*, In re Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985).

[21] Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).

[22] Gomez v. INS, 947 F.2d 660 (2nd Cir. 1997).

[23] Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 Cornell Int'l L.J. 625 (1993).
[24] *In re R-A-, Respondent*, Interim Decision #3403 (BIA 1999). Available at: www.justice.gov/eoir/vll/intdec/vol22/3403.pdf.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *See*, n.5.
[35] *In re: R- A-, 22 I&N Dec. 906 (BIA 1999), vacated and remanded, 22 I. & N. Dec. 906 (A.G. 2001)*, Op. Att'y Gen. (Jan. 19, 2005). Available at: http://cgrs.uchastings.edu/documents/legal/ag_ra_order_1-05.pdf.
[36] Julia Preston, *U.S. May Be Open to Asylum for Spouse Abuse*, N.Y. Times, Oct. 29, 2009. Available at: http://www.nytimes.com/2009/10/30/us/30asylum.html.
[37] *Id.*
[38] *Id.*
[39] "Dep't of Homeland Security Response to the Respondent's Supplemental Filing of August 18, 2009." File No. A073 753 922. Op. Off. Chief Counsel, Dep't Homeland Security (Oct. 28, 2009). Available at: http://graphics8.nytimes.com/packages/pdf/national/20091030asylum_brief.pdf.
[40] 8 U.S.C. § 1158(b)(1)(B)(ii) (2010).
[41] Stephen Magagnini, *Law firm's scam reopens hundreds of asylum cases*, Sacramento Bee, Nov. 22, 2009.
[42] *Id.*
[43] *Id.*
[44] William Branigin and Douglas Farah, *Asylum Seeker Is Impostor, INS Says*, Wash. Post., Dec. 20, 2001. *See also*, Francie Grace, *Mutilation Horror, Or Hoax?*, Assoc. Press, Jan. 14, 2002.
[45] Balazoski v. INS, 932 F.2d 638, 643 (7th Cir. 1991).
[46] Article III judges are permitted to take "administrative notice" of certain facts without the presentation of evidence. Under Federal Rules of Evidence, such a fact is one that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* Fed. R. of Evid. 201. For example, a plaintiff may request a judge to take administrative notice that "Main Street directs traffic north and south, rather than east and west," since, in this hypothetical, the street's geography is well-known within the court's jurisdiction and could easily be confirmed by referring to any standard map. Similarly, an immigration judge may be asked to take administrative notice of "current events," a rule that comes into relevance if the asylum-seeker is fleeing from a well-documented, and widely-reported instance of persecution in the homeland. *See* 8 C.F.R. § 1003.1(d)(3)(iv). In cases of individualized persecution, it is less likely that such persecution will be documented to the extent that it becomes generally known by society and therefore is arguably less appropriate for administrative notice. Alternatively, proponents of granting asylum for individualized cases of abuse argue that a foreign government's unwillingness to prevent the abuse is appropriate for judicial notice. But because the administrative system of a foreign nation is intricate and open to interpretation, any rule change in this area must provide judges with some guidance. *See also*, *Administrative Notice*, Benchbook, Dep't of Justice, EOIR. Available at: http://www.justice.gov/eoir/vll/benchbook/resources/sfoutline/Administrative_Notice.htm.
[47] In re Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985).
[48] *Understanding Intimate Partner Violence; Fact Sheet*, Centers for Disease Control and Prevention (2009). Available at: http://www.cdc.gov/violenceprevention/pdf/IPV_factsheet-a.pdf.
[49] Don Barnett, *The Coming Conflict Over Asylum: Does America Need a New Asylum Policy?*, Center for Immigration Studies (March 2002). Available at: http://www.cis.org/ConflictOverAsylumPolicy. *See also*, Hass, Giselle Aguilar, Mary Ann Dutton, and Leslye Orloff, *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, Excerpted from Domestic Violence and Immigration, NOW Legal Defense and Education Fund (2000). Available at: http://www.legalmomentum.org/assets/pdfs/wwwr1lifetimeprevalence.pdf.
[50] Jon Feere, *Open Borders Undermine Asylum*, Center for Immigration Studies blog (Mar. 2009). Available at: http://www.cis.org/feere/underminingasylum.

Open-Border Asylum

Newfound Category of 'Spousal Abuse Asylum' Raises More Questions than It Answers

Giving shelter to those fleeing persecution abroad has always been part of America's welcoming immigration policy. Americans generally want to help people facing persecution overseas to the extent that they can, and our asylum system has been crafted to reflect this reality. Obviously there are practical limits and our laws require that certain thresholds be met before an individual claimant is granted asylum.

But for at least the past three decades, a number of activist-minded attorney groups have worked to expand opportunities for asylum, even if it means pushing analysis that contradicts the original intent and traditional interpretation of the law. For many of them, the battle over asylum seems to have less to do with giving shelter to persecuted individuals than with a larger quest to remake American legal norms, establish victim status for a number of officially recognized groups, and overhaul American society more generally. For others, it is simply a matter of creating job security for immigration attorneys and "rights" groups via mass immigration.

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