University of Arkansas at Little Rock Law Review

Volume 44
Issue 2 *The Ben J. Altheimer Symposium: Protecting the Ballot: Today's Election Law and Voting Rights Issues*

Article 4

2021

Immigration Law—Creating Consistency in Domestic Violence Asylum Cases

Zoya Miller

IMMIGRATION LAW—CREATING CONSISTENCY IN DOMESTIC VIOLENCE ASYLUM CASES

I. INTRODUCTION

Sontos Maudilia Diaz-Reynoso, an indigenous woman from Guatemala, moved in with Arnoldo Vasquez-Juarez when she was nineteen years old.[1] Vasquez-Juarez and Diaz-Reynoso lived together long enough to establish a common-law marriage in Guatemala, but during this time Vasquez-Juarez refused to let Diaz-Reynoso leave, forcing her to work the coffee fields, raping her, and beating her.[2] Diaz-Reynoso sought help from officials in her village, but they denied her aid.[3] Whenever she tried to escape, Vasquez-Juarez found her and threatened her life and the life of her daughter.[4] She attempted to flee to the United States twice.[5] Both times she was apprehended for being an undocumented immigrant.[6] The first time, she returned to Guatemala after a month in detention.[7] The second time, while she was in detention, an asylum officer interviewed her and recognized that she was fleeing out of fear of persecution.[8] As a result, he referred her to removal proceedings.[9]

The Board of Immigration Appeals ("BIA") initially held that Diaz-Reynoso was ineligible for asylum.[10] It based its decision on *Matter of A-B-*, an opinion issued by Attorney General Jeff Sessions ("Sessions") on June 11, 2018.[11] The BIA decided this because it interpreted *Matter of A-B-* to hold that those fleeing domestic violence could never be part of a particular social group.[12] On appeal, the Ninth Circuit in *Diaz-Reynoso v. Barr* rejected this interpretation, establishing that the BIA may accept domestic violence asylum cases on a case-by-case basis under *Matter of A-B-*, so it remanded the case to the BIA for further consideration.[13] Shortly after the Ninth Circuit remanded *Diaz-Reynoso v. Barr*, on June 16, 2021, Attorney General Merrick Garland ("Garland"), a successor of Sessions, vacated *Matter of A-B-*,

1. Diaz-Reynoso v. Barr, 968 F.3d 1070, 1074 (9th Cir. 2020).
2. *Id.*
3. *Id.* at 1089.
4. *Id.* at 1074–75.
5. *Id.*
6. *Id.*
7. *Diaz-Reynoso*, 968 F.3d at 1074.
8. *Id.* at 1075.
9. *Id.*
10. *See id.* at 1087.
11. Matter of A-B-, 27 I. & N. Dec. 316, 317 (2018).
12. *Diaz-Reynoso*, 968 F.3d at 1075, 1079, 1087.
13. *Id.* at 1080, 1090.

announcing that immigration courts are now bound only to pre-*A-B-* precedent.[14] As follows, *Diaz-Reynoso v. Barr* is no longer good law.

On February 2, 2021, President Joe Biden issued Executive Order No. 14010, directing the Department of Justice ("DOJ") and the Department of Homeland Security ("DHS") to define a "particular social group."[15] In response to this executive order, Garland decided to vacate *Matter of A-B-*, reasoning that it would inhibit flexibility in rulemaking.[16] Although that opinion, in turn, also vacates *Diaz-Reynoso v. Barr*, *Diaz-Reynoso* still pinpoints the problems immigration courts have faced thus far in defining particular social groups in asylum cases. Specifically, it establishes a well-informed method of analyzing cases involving domestic violence. For the DOJ and DHS to create balanced, effective rules concerning particular social groups in the context of domestic violence asylum cases, these agencies should understand the rationale of the decisions vacated under *Matter of A-B-*, all of which are summarized, analyzed, and narrowed effectively by *Diaz-Reynoso v. Barr*.

This Note uses *Diaz-Reynoso v. Barr* to suggest a framework to balance the rights of women seeking asylum from domestic violence with the prevention of an influx of asylum seekers. It also compares immigration courts to family law courts, which require experts to inform judges and juries of the implications of domestic violence.[17] Considering that the United States legal system has historically failed to understand the implications of domestic violence thoroughly,[18] the DOJ and DHS must consider everything that has inhibited consistency in domestic violence asylum cases in the past. In addition, it is unlikely that this is the last time the DOJ and DHS will reinterpret and readjust the laws pertaining to domestic violence asylum cases. If a new administration decides again to alter the rules concerning particular social groups, the considerations indicated in this paper should be vital points of reference.

The purpose of this Note is to encourage the DOJ and DHS to create rules governing domestic violence asylum cases that (1) require that an asylum seeker's social group be separate from the harm asserted and (2) have a narrowing characteristic other than the risk of being persecuted, but also (3)

14. Matter of A-B-, 28 I.&N. Dec. 307, 309 (A.G. 2021). Attorneys General may unilaterally overrule precedent decisions of both their predecessors and the BIA. *See* Julie Menke, *Abuse of Power: Immigration Courts and the Attorney General's Referral Power*, 52 CASE W. RES. J. INT'L L. 599, 608–09 (2020); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129, 130 (2017).

15. Exec. Order No. 14010, 86 Fed. Reg. 8267, 8271 (Feb. 5, 2021) (internal quotations omitted).

16. *Matter of A-B-*, 28 I.& N. Dec. at 308.

17. *See* Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1304–05 (1993).

18. *See id.* at 1297.

do not strictly bar those who merely mention the feared harm in the social group. To accomplish this, this Note advocates for requiring and funding expert witnesses informed in psychology or sociology in domestic violence asylum cases and directing these experts to adhere to a consistent scientific analysis. In Section II, this Note summarizes the history of domestic violence cases in the legal system of the United States, discussing how developments in psychological research have influenced the approaches of domestic courts to these cases. In Section II.B, it then focuses on the history of domestic violence asylum cases in the United States immigration courts. Next, Section III analyzes how the court in *Diaz-Reynoso v. Barr* interpreted *Matter of A-B-* to establish more consistency in how immigration courts approach domestic violence asylum cases. After the analysis of *Diaz-Reynoso v. Barr*, Section III.C advocates for creating additional consistency in domestic violence asylum cases through the use of court-appointed experts and consistent evidentiary and scientific standards. By defining a particular social group using an analysis similar to that in *Diaz-Reynoso v. Barr* and mandating the use of expert witnesses who abide by specific scientific standards, the DOJ and DHS can establish consistent rules that protect those seeking asylum from domestic violence without prompting an influx of asylum seekers.

II. BACKGROUND

This Section presents a general historical overview of the United States legal system's approach to domestic violence cases. First, Section II.A summarizes the historical approaches of courts to domestic violence in the United States. Following that summary, Section II.B discusses psychological advancements that have informed court approaches to domestic violence. Lastly, Section II.C compares the history of court approaches to domestic violence to the history of asylum law and domestic violence asylum cases in immigration courts.

A. Broad Overview of the History of Domestic Violence and the Law

Domestic violence has been a persistent issue for centuries across many cultures.[19] Typically, perpetrators of domestic violence abuse their spouses to dominate, punish, or control them to meet marital, social, and personal needs.[20] In early fifteenth-century European communities, the earliest recorded manner of remedying domestic violence occurred through community

19. *See* Russel P. Dobash & R. Emerson Dobash, *Community Response to Violence Against Wives: Charivari, Abstract Justice and Patriarchy*, 28 SOC. PROBS. 563, 564 (1981).

20. *Id.* at 564–65.

regulation.[21] These communities punished the couple as a whole rather than solely punishing the perpetrator of the violence.[22]

In the late nineteenth century, United States legislators began developing more legal remedies for domestic violence.[23] By 1871, in *Fulgham v. State*, an Alabama court revoked for the first time a man's right to physically harm his spouse, and other states followed suit.[24] As the twentieth century began, a sharp increase in psychological theory prompted some courts to focus on psychiatric treatment rather than jail time.[25] During this time, domestic violence was considered a misdemeanor offense until the mid-1960s when states gave civil courts, rather than criminal courts, jurisdiction over domestic violence cases.[26] Around the 1980s, the United States focused more on criminalizing domestic violence, and forty-eight states enacted stronger laws to protect victims of domestic violence by 1990.[27]

B. Psychological Explanations for Domestic Violence and How These Explanations Impact the Legal System's Approach to Domestic Violence

Psychological thought has helped shape domestic violence laws since the early 1900s.[28] Around the 1930s, the Freudian theory of "female masochism" proliferated as a popular justification for domestic violence in society and courts.[29] In the 1940s, in response to domestic violence, a therapeutic practice called Family Systems Therapy treated families as a whole, further shifting societal and legal blame away from the abuser.[30] As the women's rights movement gained momentum, law and psychology began to reinterpret domestic violence.[31] These reinterpretations, paired with preconceived

---

21. *Id.* at 565–66.
22. *Id.* at 566.
23. John R. Barner & Michelle Mohr Carney, *Interventions for Intimate Partner Violence: A Historical Review*, 26 J. FAM. VIOLENCE 235, 235 (2011).
24. *Id.* (citing Fulgham v. State, 46 Ala. 143, 235 (1871)). George Fulgham faced criminal charges for alleged assault on his wife Matilda Fulgham. *Fulgham*, 46 Ala. at 145. Mr. Fulgham argued that it is permissible to give a wife "moderate correction . . . to secure her obedience." *Id.* The court refers to "the age of Judge Blackstone," when the authority "to chastise the wife with rudeness and blows" was permissible for only "the lower rank of the people," calling it an "ancient privilege." *Id.* at 145–46 (internal quotations omitted). The court determined that modern law should not acknowledge this ancient privilege, and physically abusing a wife may justify an indictment for assault and battery. *Id.* at 147–48.
25. Barner & Carney, *supra* note 23, at 235.
26. *Id*. at 235–36.
27. *Id.* at 236.
28. *See* Meier, *supra* note 17, at 1301.
29. *Id.*
30. *Id.* at 1301–02.
31. *Id*. at 1303.

societal notions of domestic violence, complicated legal issues involving domestic violence.[32]

In the late 1970s, psychologists began studying women's reactions and shifting blame back onto the abuser.[33] In 1979, psychologist Leonore Walker coined the theory "battered woman syndrome."[34] This theory stated that women, after a long history of abuse, remain in a state of "psychological paralysis" that keeps them from leaving or seeking help.[35] In addition, Post-Traumatic Stress Disorder ("PTSD") diagnoses became more prevalent in domestic violence cases, reshaping how courts viewed women during legal proceedings.[36] Nonetheless, though these theories helped courts understand women's behavior in abusive relationships, they still left room for courtroom misinterpretation of the implications of domestic violence.[37]

In 1992, Mary Ann Dutton, a professor in the Department of Psychiatry at Georgetown University and a clinical psychologist, revised the traditional battered woman syndrome for legal contexts.[38] She redefined this syndrome to foster "a more informed understanding of the relevance of domestic violence to numerous legal issues."[39] The model requires expert witnesses with experience in psychology or sociology to examine four components of domestic violence:

> (1) The cumulative history of violence and abuse experienced by the victim in the relationship at issue, including, where relevant, the nature and extent of violence or abuse in a specific episode; (2) The psychological reactions of the battered woman to the batterer's violence; (3) The strategies used (or not used) by the battered woman in response to prior violence and abuse, and the consequences of (or the expectations that arise from) those strategies; and (4) The contextual factors that influenced both the battered woman's strategies for responding to prior violence, and her psychological reactions to that violence.[40]

This redefinition provides a comprehensive view of domestic violence cases "framed by the issues in the legal case."[41] Still, it is not without limitations. First, it does not articulate a particular theory, and therefore, offers less guidance for counsel and juries; therefore, this guidance is more suitable for

---

32. *Id.* at 1303–04.
33. *Id.* at 1304–05.
34. *See* Meier, *supra* note 17, at 1305.
35. *Id.*
36. *Id.* at 1312–14.
37. *See id.* at 1305–06.
38. *Id.* at 1314–15.
39. Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1195 (1993).
40. *Id.* at 1202.
41. Meier, *supra* note 17, at 1315.

an expert.[42] Applying this theory without expert analysis, a jury or judge may not wholly understand the reasonableness of a psychological response.[43]

Over time, family courts have adjusted their approach towards domestic violence cases. By integrating psychosocial research with the practice of law, courts have created a more consistent system to analyze cases involving domestic violence.[44] Though family courts have advanced in understanding domestic violence, immigration courts have not seen the same progress or consistency in their approaches to domestic violence asylum cases.[45]

C. The History of Domestic Violence Asylum Cases in Immigration Court

1. *Brief History of Asylum Law*

Asylum policy in the United States originated during World War II when European refugees fled to the United States.[46] Throughout the late 1940s and into the late 1960s, the United States began recognizing its responsibility to assist refugees. It began developing more laws related to asylum, and eventually, in response to the Cold War geopolitics of the time, it passed the United States Refugee Act of 1980.[47] This act developed this definition of a refugee:

> [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.[48]

After the Cold War, the United States reevaluated its role in providing international aid.[49] By 2016, the total number of refugees and displaced persons had reached 59.5 million worldwide, so the United States began considering the implications of accepting too many refugees.[50] Some of these implications were the political and economic destabilization of the United States, competition for scarce resources with host populations, and refugees

42. *Id.* at 1316.
43. *Id.* at 1316–17.
44. *See supra* text accompanying notes 28–43.
45. *See infra* notes 132–51.
46. MARÍA CRISTINA GARCÍA, THE REFUGEE CHALLENGE IN POST-COLD WAR AMERICA 3 (2017).
47. *Id.* at 4–5.
48. 8 U.S.C. § 1101(a)(42).
49. GARCÍA, *supra* note 46, at 7–8.
50. *Id.* at 8.

becoming scapegoats for societal problems.[51] As asylum petitions increased and Congress passed legislation to hasten the process of approving them, frivolous petitions began to backlog any systemic progress.[52]

2. *Domestic Violence in Asylum Cases*

For a court to grant asylum to a petitioner fleeing from domestic violence, the petitioner must prove that they are a member of a "particular social group."[53] Immigration courts have litigated this category the most because court interpretations of what constitutes a "particular social group" have been historically vague.[54] *Diaz-Reynoso v. Barr* details the original construction of a particular social group in *Matter of Acosta*.[55] Then, it explores the development of the test established in *Matter of Acosta*.[56] Afterward, it mentions *Matter of C-A-*, which established the criteria of social visibility and particularity in defining cognizable social groups.[57] To conclude the summary of these historical developments, the court focused on *Matter of A-R-C-G*, which recognized the social group "married women in Guatemala who are unable to leave their relationship."[58]

In 1985, *Matter of Acosta* initially interpreted the phrase "particular social group."[59] This case establishes that, for one to qualify as a refugee, there must be a "clear probability of persecution" for any one of the five grounds within the United States Refugee Act of 1980.[60] To establish a clear probability of persecution, asylum applicants must prove that they are more likely than not to be persecuted.[61]

The court recognized that the social group category was significantly broader than the racial, ethnic, and religious group categories.[62] The court

51. *See id.*
52. *Id.* at 9.
53. 8 U.S.C. § 1101(a)(42).
54. The Refugee Act of 1980 expanded the bases of persecution to include membership in a particular social group to more closely reflect the definition of persecution put in place by the UN convention. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, SAN DIEGO L. REV. 9, 45 (1981). The original legislative intent behind the Refugee Act of 1980 was to "implement a broad, nondiscriminatory refugee policy." *Id.* at 46. By creating such broad categories, this left the immigration courts to determine what exactly constituted a particular social group. Lwin v. Immigr. & Naturalization Serv., 144 F.3d 505, 510–11 (7th Cir. 1998).
55. Diaz-Reynoso v. Barr, 968 F.3d 1070, 1076 (9th Cir. 2020).
56. *Id.* at 1076–77.
57. *Id.*
58. *Id.* at 1077.
59. Matter of Acosta, 19 I. & N. Dec. 211, 212 (B.I.A. 1985).
60. *Id.* at 213 (citing INS v. Stevic, 467 U.S. 407 (1984)) (internal quotations omitted).
61. *Id.* (citing *Stevic*, 467 U.S. at 424).
62. *Id.* at 232–34.

ultimately determined that the doctrine of ejusdem generis applies.[63] This doctrine establishes that "general words used in an enumeration with specific words should be construed in a manner consistent with the specific words."[64] Using the doctrine of ejusdem,[65] the court ultimately interpreted a particular social group to be "a group of persons all of whom share a common, immutable characteristic."[66] The court stated that this characteristic may be "sex, color . . . kinship ties . . . [or] shared past experience[s]."[67] Therefore, immigration courts made social group determinations on a case-by-case basis.[68]

The test in *Matter of Acosta* ultimately led to inconsistent results in asylum cases.[69] To narrow what constituted a social group, *Matter of C-A-* focused on the particularity and the social visibility of a particular social group.[70] This court was asked to analyze whether "noncriminal drug informants working against the Cali drug cartel" was a cognizable social group.[71] The first thing the court did was establish a particularity requirement. Though *Matter of C-A-* applied the *Matter of Acosta* formulation of a particular social group, this court determined that group was "too loosely defined to meet the requirement of particularity."[72] It reasoned that informing on a cartel is indeed an immutable characteristic, under *Matter of Acosta*, because past experiences cannot be undone.[73] Nevertheless, the court determined that not all immutable characteristics create a particular social group for the purposes of asylum.[74]

Next, *Matter of C-A-* established a social visibility requirement.[75] To be socially visible, a social group must be "highly visible and recognizable by others in the country in question."[76] The court reasoned that "a social group cannot be defined *exclusively* by the fact that it is targeted for persecution."[77] Nevertheless, "persecutory action toward a group may be a relevant factor in

63. *Id.* at 233.
64. *Id.*
65. The doctrine of ejusdem holds that "general words used in an enumeration with specific words should be construed in a manner consistent with the specific words." Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *see*, *e.g.*, Cleveland v. United States, 329 U.S. 14, 18 (1946).
66. Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).
67. *Id.*
68. *Id.*
69. Diaz-Reynoso v. Barr, 968 F.3d 1070, 1076 (9th Cir. 2020) (internal quotations omitted).
70. Matter of C-A-, 23 I. & N. Dec. 951, 957, 959–60 (B.I.A. 2006).
71. *Id.* at 957.
72. *Id.*
73. *Id.* at 958.
74. *Id.*
75. *Id.* at 959.
76. Matter of C-A-, 23 I. & N. Dec. at 960.
77. *Id.* (emphasis in original).

determining the *visibility* of a group in a particular society."[78] In conclusion, the court stated that the proposed social group, in this case, was not socially visible because the nature of an informant's conduct is out of the public view.[79] Therefore, because the social group was neither particular nor socially visible, the court found that the informants did not fit the definition of refugees.[80] The concept of social visibility, later named "social distinction," was consistently affirmed and refined by the BIA.[81]

The first case to consider domestic violence victims as members of a particular social group was *Matter of R-A-*.[82] In this case, the respondent married a man who physically and sexually abused her daily.[83] The respondent attempted to secure assistance from the police, but the police would not assist her because her husband was previously in the military.[84] As a result, she fled to the United States.[85] The main question for the court was "whether the harm experienced by the respondent was, or in the future may be, inflicted on account of a statutorily protected ground."[86] This court determined that the social group in this situation—"Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination"—was not cognizable.[87] The court reasoned that though the proposed social group contains an immutable characteristic, the characteristic was not socially distinct nor particular.[88]

Pursuant to the rules established in prior domestic violence asylum cases, *Matter of A-R-C-G-* analyzed a case involving a native of Guatemala who illegally entered the United States.[89] This woman, married at seventeen, endured abuse and rape at the hands of her husband.[90] Despite having contacted authorities multiple times, she was unable to secure assistance.[91] Whenever she tried to flee, her husband would find her and convince her that he would not harm her anymore, but the cycle of abuse would continue.[92] The court considered whether "married women in Guatemala who are unable to leave

78. *Id.* (emphasis in original).
79. *Id.*
80. *Id.* at 961.
81. Diaz-Reynoso v. Barr, 968 F.3d 1070, 1077 (9th Cir. 2020).
82. Matter of R-A-, 22 I. & N. Dec. 906 (B.I.A. 2001).
83. *Id.* at 908.
84. *Id.* at 909.
85. *Id.*
86. *Id.* at 914 (internal quotations omitted).
87. *Id.* at 918.
88. *See Matter of R-A-*, 22 I. & N. Dec. at 918–19.
89. Matter of A-R-C-G-, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).
90. *Id.* at 389.
91. *Id.*
92. *Id.*

their relationship" is a cognizable social group.[93] The court noted that the immutable characteristic here was gender.[94] It reasoned that the particularity requirement was satisfied because the terms "married," "women," and "unable to leave the relationship" were definitions accepted within Guatemalan society.[95] The court then considered whether the social group was societally distinct by analyzing whether communities in Guatemala can make "meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave."[96] The court remanded the case for further proceedings based on these observations, permitting the parties to update the evidentiary record.[97]

In *Matter of A-B-*, Sessions reversed *Matter of A-R-C-G-* and its reinterpreting the definition of a cognizable social group.[98] He stated that a cognizable social group "must exist independently of the harm asserted."[99] This opinion emphasized that not all immutable characteristics define a social group. If a court defines a social group by vulnerability to a criminal act, it likely lacks particularity, since anyone can be a victim.[100] Sessions did observe that those who are victims of private criminal activity might meet the criteria for asylum, but generally, domestic violence claims did not qualify for asylum under *Matter of A-B-*.[101] Because of the impact *Matter of A-B-* had on domestic violence-related asylum cases, many critics called for congressional clarification on the definition of a particular social group.[102]

In response to the criticism and confusion generated by *Matter of A-B-*, on February 2, 2021, President Joe Biden issued an executive order calling for the creation of a regional framework to increase the safety and consistency of processing asylum seekers.[103] This order establishes that within 180 days after its issuance, the Attorney General and Secretary of Homeland Security must examine "current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims."[104] The purpose of

93. *Id.* at 388–89.
94. *Id.* at 392.
95. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 393.
96. *Id.* at 394.
97. *Id.* at 396.
98. *See* Matter of A-B-, 27 I. & N. Dec. 316, 334 (2018).
99. *Id.* at 334.
100. *Id.* at 335.
101. *Id.* at 320.
102. *See* Kate Jastram & Sayoni Maitra, *Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*, 18 SANTA CLARA J. OF INT'L L. 48, 90–91 (2020); *see also* Anne Weis, *Fleeing for Their Lives: Domestic Violence Asylum and Matter of A-B-*, 108 CAL. L. REV. 1319, 1353–54 (2020); Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343, 434–35 (2019).
103. Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 5, 2021).
104. *Id.* at 8270.

this examination is to determine whether the United States is on par with international standards in relation to asylum responses to domestic or gang violence.[105] After this examination period, the order states that within 270 days from the date of the order, the Attorney General and Secretary of Homeland Security then must "promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a particular social group."[106]

On June 16, 2021, in response to President Biden's executive order, Garland vacated *Matter of A-B-*.[107] In his decision, he noted that rulemaking involves a thorough consideration of all the issues involved in immigration law, allowing all interested parties to participate in the dialogue of rule formation.[108] Since defining cognizable social groups has been a historically complex issue, Garland reasoned that vacating *Matter of A-B-* allows for the flexibility of rulemaking that needs to occur to consider all complexities.[109] He stated that *Matter of A-B-* does not allow for this flexibility, as it created a strong presumption against asylum claims based on private conduct, creating confusion among courts.[110] After vacating *Matter of A-B-*, Garland announced that immigration courts "should follow [pre-*A-B-*] precedent, including *Matter of A-R-C-G-*."[111]

Though Sessions attempted to create consistency by narrowing the definition of a particular social group, Immigration Judges ("IJ") and the BIA still struggled to interpret the holding of *Matter of A-B-*.[112] Now that Garland has vacated Sessions' opinion for being too constrictive, any new rules pertaining to domestic violence asylum cases should be sufficiently balanced to create a definition of cognizable social group that is neither too lenient nor too constrictive. Though Garland announced that immigration courts should no longer follow precedent based on *Matter of A-B-*, he also established the importance of understanding all the factors relevant to rulemaking. *Diaz-Reynoso v. Barr*, despite no longer being valid case law, contains the history of defining a cognizable social group and advocates for analyzing an asylum seeker's economic, societal, and cultural status, which are all critical factors for the DOJ and DHS to consider.

105. *Id.*
106. *Id.* (internal quotations omitted).
107. Matter of A-B-, 28 I. & N. Dec. 307, 307 (A.G. 2021).
108. *Id.* at 308.
109. *Id.*
110. *Id.* at 309.
111. *Id.*
112. *See infra* text accompanying notes 127–32.

III. APPLICATION: HOW *DIAZ-REYNOSO V. BARR* ESTABLISHED FURTHER CONSISTENCY IN DOMESTIC VIOLENCE ASYLUM CLAIMS AND HOW TO EXPAND CONSISTENT OUTCOMES

This Section states the factual and procedural history of *Diaz-Reynoso v. Barr*, discussing how it created more consistency in the way immigration courts approached domestic violence asylum cases under *Matter of A-B-*. After reviewing this case, this Section analyzes ways to create additional consistency in analyzing the economic, societal, and cultural factors in domestic violence cases, beyond narrowing the definition of a cognizable social group. In particular, it advocates for the use of court-appointed expert witnesses and stricter evidentiary standards in all domestic violence asylum cases. In addition, it suggests that experts consistently should use the Revised Battered Woman syndrome method of psychosocial analysis in domestic violence asylum cases.[113]

A. Facts and Procedural History in *Diaz-Reynoso v. Barr*

Sontos Diaz-Reynoso, a member of an indigenous group in the rural town of Yamoj, Guatemala, moved in with Arnoldo Vasquez-Juarez at nineteen years old and stayed with him long enough to establish a common-law marriage.[114] Vasquez-Juarez put Diaz-Reynoso to work without pay in his coffee fields and beat her if she refused to work.[115] These beatings occurred weekly.[116]

After four years of abuse, Diaz-Reynoso tried to flee to the United States but was arrested for being undocumented.[117] When she returned to Guatemala, she attempted to move back in with her family in her village,[118] but Vasquez-Juarez immediately found her and threatened her life and the life of her child.[119] Out of fear, she returned to his home, but the abuse became more severe.[120] Diaz-Reynoso attempted to flee again, but this time to a friend's

113. *See infra* text accompanying notes 235–60.

114. Diaz-Reynoso v. Barr, 968 F.3d 1070, 1074 (9th Cir. 2020). In Guatemala, individuals may enter a "de facto" union, which is essentially the equivalent to the concept of a common-law marriage. To establish a de facto union, a man and woman must live together continuously for three years and declare the union before a mayor or notary. *Guatemala: Information on Common Law Marriages*, U.S. BUREAU OF CITIZENSHIP AND IMMIGR. SERVICES, (Jan. 20, 2000), https://www.refworld.org/docid/3ae6a6a340.html.

115. *Diaz-Reynoso*, 968 F.3d at 1074.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1075.

house in her village, where she hid indoors for a year.[121] Eventually, hoping Vasquez-Juarez had forgotten about her, she returned to her family, but he immediately found her and ordered her to return to his home.[122] Diaz-Reynoso's mother urged her to flee from the country again, so Diaz-Reynoso fled to the United States for a second time.[123]

Shortly after, she was apprehended again.[124] She pled guilty to illegal entry and was sentenced to imprisonment.[125] While imprisoned, she was interviewed by an asylum officer, who recognized that "she had established a credible fear of persecution."[126] Diaz Reynoso filed a petition for asylum, stating that her social group was "Guatemalan indigenous women who are unable to leave their relationship."[127]

First, the Immigration Judge ("IJ") denied her application.[128] Though finding that Diaz-Reynoso had a credible case, the IJ concluded that she had given testimony inconsistent with other evidence.[129] The IJ also did not analyze "whether Diaz-Reynoso established the existence of a cognizable particular social group."[130] Instead, the IJ concluded that she was not able to establish membership in her social group because she could not "show that she would more likely than not suffer persecution" and also could not establish that "the Guatemalan government would be unable or unwilling to protect her."[131] When Diaz-Reynoso appealed, the BIA dismissed her case on different grounds.[132] It found that Diaz-Reynoso's proposed social group was not cognizable, based on the decision in *Matter of A-B-*.[133]

B. Combatting Inconsistent Outcomes in Domestic Violence Asylum Cases

Such variance among judicial bodies' reasoning is not unique to *Diaz-Reynoso*. In the past, asylum cases involving domestic violence with similar

121. *Diaz-Reynoso*, 968 F.3d at 1075.
122. *Id*.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Diaz-Reynoso*, 968 F3d at 1075.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. The IJ and the BIA came to use two completely different rationales for denying Diaz-Reynoso's petition for asylum, further exemplifying the issues with consistent application of the law in domestic violence asylum cases. *Id.*
133. *Id.*

fact patterns have produced dissimilar results.[134] In 2012, a fourteen-year-old girl from El Salvador moved in with her boyfriend, who emotionally and physically abused her.[135] She attempted to seek help from the justice system of El Salvador, but the more she sought help, the more her boyfriend threatened her life.[136] She attempted suicide, fearing her boyfriend's retaliation should she report the abuse.[137] After two years of enduring abuse, she fled to the United States.[138] Similarly, a woman in Kenya was physically and sexually abused by her husband.[139] Her husband, who was involved with other women, infected her with sexual diseases.[140] She tried to involve the police, to no avail.[141] As a result, she fled to the United States.[142] Within both of these cases, the roots of domestic violence are present—one spouse's desire to dominate, punish, or control the other to meet marital, social, and personal needs.[143] Nevertheless, only one of these women was granted asylum status.[144]

The main difference between these two cases was that two different IJs decided them with broad discretion in admitting and understanding evidence.[145] These two judges respectively thought each woman's testimony was credible.[146] Both respectively agreed that the harm the women faced rose to the level of persecution.[147] In addition, both acknowledged that these women's governments had failed to protect them.[148] In the first case in El Salvador, the judge decided that the abuse the woman endured resulted from her membership in a domestic violence-related social group.[149] On the other hand, the judge for the Kenya case ruled that her domestic violence-related social group was not legally cognizable.[150] Therefore, only one of the women was granted asylum.[151]

---

134. *See generally* Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107 (demonstrating inconsistent outcomes in domestic violence asylum cases).
135. *Id*. at 107.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. Bookey, *supra* note 134, at 107.
141. *Id.* at 107–08.
142. *Id.* at 108.
143. *See supra* text accompanying note 20.
144. Bookey, *supra* note 134, at 108.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. Bookey, *supra* note 134, at 108.
151. *Id*.

To remedy inconsistencies in domestic violence asylum cases, courts have attempted to narrow what qualifies as a particular social group over the years.[152] Despite these attempts to clarify this test, misinterpretations frequently occurred, especially after *Matter of A-B-*.[153] Sessions tried to prevent these dissimilar results but ultimately created more confusion.[154] He argued that cases involving domestic violence are often "unlikely" to establish group persecution because it is not perpetrated by a governmental actor.[155] Sessions also established that even if the government of a certain country ineffectively polices domestic violence, that by itself cannot establish an asylum claim, though it is useful evidence.[156] As follows, the stringent test created by Sessions typically would invalidate domestic violence asylum cases.[157]

Though Sessions established that most domestic violence cases do not generally qualify for asylum, he did not announce a categorical ban on asylum cases involving domestic violence.[158] As long as the criteria for establishing a cognizable social group were met, domestic violence could have been the basis of asylum under this case.[159] The rule pertaining to establishing cognizable social groups, as clarified by *Matter of A-B-*, was that a particular social group must exist independently of the harm asserted.[160] In addition, the harm must have been caused not because of personal reasons but because of one's membership within a particular social group.[161] By itself, without reference to the facts of persecution, a social group must be cognizable.[162] In summary, if a social group was defined exclusively by persecution, it could not have been a cognizable social group.[163] Nevertheless, merely mentioning the persecution faced would not categorically bar the group from being a cognizable social group,[164] but if the only immutable characteristic of a proposed social group was the harm it faced, then it could not be a cognizable social group.[165]

Diaz-Reynoso v. Barr reanalyzed Session's interpretation of a cognizable social group and clarified that some references to an applicant's claimed persecution may be appropriate.[166] The BIA erroneously concluded that

152. *See supra* text accompanying notes 53–111.
153. *See supra* text accompanying notes 53–111.
154. *See* Matter of A-B-, 27 I. & N. Dec. 316, 320 (2018).
155. *Id*.
156. *Id.*
157. *See id.*
158. *See id.*
159. *See id.*
160. *Matter of A-B-*, 27 I. & N. at 317.
161. *Id.*
162. *See id.*
163. *Id.* at 330–31.
164. Diaz-Reynoso v. Barr, 968 F.3d 1070, 1085 (9th Cir. 2020).
165. *Id.* at 1087.
166. *Id.* at 1082–83.

"Guatemalan indigenous women who are unable to leave their relationship" could not be a cognizable social group.[167] The Ninth Circuit corrected the BIA.[168] It noted that Sessions only required a rigorous analysis on a case-by-case basis, not a categorical bar for domestic violence cases.[169] It reasoned that domestic violence was not the sole factor that kept Diaz-Reynoso from leaving her relationship.[170] If the sole reason for Diaz-Reynoso's inability to leave her relationship had been the abuse she suffered at the hands of her husband, this would have indicated that the harm she faced was the exclusive defining factor of her social group—but this was not the case.

After analyzing the BIA's reasoning based on *Matter of A-B-*, the Ninth Circuit Court of Appeals noticed that the BIA had misunderstood the holding in *Matter of A-B-* to categorically bar domestic violence, assuming that domestic violence was the sole reason Diaz-Reynoso could not leave her relationship.[171] As follows, the court decided that the BIA's reasoning was flawed.[172] Even in *Matter of A-B-*, Sessions remanded the matter to the lower courts to determine whether "El Salvadoran women who are unable to leave their domestic relationships where they have children in common" was a cognizable social group, instead of immediately determining that the social group was invalid.[173] This indicated that *Matter of A-B-* required a strict analysis, not a categorical bar.[174] In Diaz-Reynoso's case, the Ninth Circuit reasoned that an in-depth analysis was needed because many factors apply to one's inability to leave one's relationship that go beyond mere domestic violence.[175] Diaz-Reynoso faced abuse perpetrated by her husband, but this was not the exclusive reason she could not leave her relationship.[176] In addition, she faced "economic, societal, and cultural factors" that prevented her from leaving.[177] These factors contributed tremendously to her inability to leave her relationship, seeing that she was confined to a rural area, could not access law enforcement, and was unable to hide from her spouse, who would find her whenever she left.[178] The court noted that she also may have faced many other factors, including financial dependence and lack of education.[179] The totality of her circumstances prevented her from leaving her relationship, and not just

167. *See id.* at 1075.
168. *Id.* at 1079–80.
169. *Id.*
170. *Diaz-Reynoso*, 968 F.3d at 1087.
171. *Id.* at 1087–88.
172. *Id.* at 1087.
173. *Id*. at 1088.
174. *Id.*
175. *Id.* at 1087.
176. *Diaz-Reynoso,* 968 F.3d at 1087.
177. *Id.*
178. *See generally id.*
179. *Id.* at 1087.

the abuse she faced, as evidenced by her various attempts to flee her husband.[180] Through this analysis, the court in *Diaz-Reynoso v. Barr* reframed *Matter of A-B-*, arguing that Sessions merely intended to remand *Matter of A-R-G-C-* because it did not follow the clear precedent before it and that it did not change this precedent itself by announcing a categorical ban on domestic violence asylum cases.[181]

By interpreting *Matter of A-B-*, the court in *Diaz-Reynoso v. Barr* presented an alternative option of reviewing domestic violence asylum cases in a way that does not create a categorical bar but also does not create a catch-all definition.[182] It reasserted that courts must determine whether a proposed social group can exist independently of the harm asserted in the asylum application and also established that if the harm is merely mentioned in the social group description, this does not mean the harm is the exclusive defining factor of the social group.[183] Striving for balance, the court also reaffirmed that individuals in a social group must share a "narrowing characteristic" other than their risk of being persecuted.[184] Nonetheless, it established that the mention of feared harm does not disqualify an otherwise cognizable group. This case shows that immigration courts must examine the totality of the circumstances that prevent a domestic violence victim from leaving a relationship.[185] The DOJ and DHS should use a similar analysis to define a particular social group, requiring first that the group to which the asylum applicant belongs be separate from the harm asserted, and second that the asylum seeker must have a narrowing characteristic other than the risk of persecution, but also not barring those who merely mention the harm in the social group description.

The court in *Diaz-Reynoso v. Barr* also suggested that immigration courts examine "economic, societal, and cultural factors" in domestic violence asylum cases,[186] but it did not clarify how lower courts should do this. The court merely established that there were many reasons Diaz-Reynoso could not leave her relationship,[187] arguing that because of these reasons, the social group was not exclusively defined by the harm done.[188] Throughout the history of asylum proceedings, domestic violence cases with similar facts have had inconsistent results based on an individual IJ's interpretation of whether the circumstances outside of the domestic violence warrant a finding

180. *See id.*
181. *Id.* at 1080, 1087.
182. *See Diaz-Reynoso*, 968 F.3d at 1084–85, 1088.
183. *Id.* at 1082–83.
184. *Id.* at 1083.
185. *See id.* at 1084.
186. *See id* at 1087; *see generally* Matter of A-B-, 27 I. & N. Dec. 316, 318 (2018).
187. *Diaz-Reynoso*, 968 F.3d at 1087.
188. *See id.*

that one qualifies for asylum.[189] Though *Diaz-Reynoso* created a common-sense test for a particular social group, it did not state how courts should interpret the facts of domestic violence cases. As follows, the DOJ and DHS should counter this issue by requiring immigration courts to use expert witnesses, specializing in either psychology or sociology, to properly analyze the totality of the circumstances in domestic violence asylum cases.

C. Expanding Consistency: Analyzing Domestic Violence Asylum Cases Through the Use of Expert Witnesses and Informed Psychological Understandings

Since immigration courts have produced vastly different outcomes for similar fact patterns in the past, despite efforts to narrow the law, the DOJ and DHS must look both inside and outside of precedent and procedure. If consistency and ease of litigation are the goals, not only must the law be narrowed, but judicial interpretations of the fact patterns should also be narrowed accordingly. How courts interpret evidence influences judicial interpretations of fact patterns. IJs have broad discretion concerning the admission of evidence, as they are not required to follow the Federal Rules of Evidence.[190] In addition, though expert witnesses are permitted in domestic violence asylum cases, the asylum seeker must cover the costs.[191] If immigration courts uniformly required and provided experts in domestic violence asylum cases, they would generate more consistent outcomes.

1. *Overcoming Barriers in Immigration Courts Concerning Expert Witnesses*

Though involving expert witnesses is practical in cases where it is difficult to understand the context of an asylum seeker's situation, immigration courts must consider monetary and procedural constraints.[192] Currently, asylum applicants have the burden of proof and must secure their own experts.[193] Though this lessens the burden on the immigration courts, most applicants do

189. *See* Barbara Berreno, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 250 (2011).

190. *See generally* 8 U.S.C. § 1229; *see also* Yusupov v. Attorney General of U.S., 518 F.3d 185, 200 (3d Cir. 2008) (recognizing that the Federal Rules of Evidence are inapplicable to immigration proceedings).

191. Lan Mei, *Increasing Reliance on Expert Witnesses in Immigration Cases: A Catch-22?*, EXPERT INST. (updated Feb. 20, 2020), https://www.expertinstitute.com/resources/insights/increasing-reliance-expert-witnesses-immigration-cases-catch-22.

192. *See id.*

193. *Id.*

not have the resources to secure an expert witness even when it is crucial to understanding the particular case.[194]

In *Matter of Y-S-L-C-*, an IJ suggested that asylum applicants needed to be qualified as expert witnesses in order to testify.[195] The appellate court disagreed, reiterating that the Federal Rules of Evidence do not bind immigration proceedings.[196] Instead, it announced that the test for admissibility of evidence is solely whether the evidence is probative and if its admission is fundamentally fair.[197] Though this situation demonstrates why the Federal Rules of Evidence do not bind immigration courts, this is a low bar for the admission of evidence. Immigration courts should not need to adhere to the entirety of the Federal Rules of Evidence. Nonetheless, they should narrow their own evidentiary rules.

Since IJs have broad discretion in adhering to evidentiary rules, this fundamentally results in inconsistent and unfair outcomes. In *Lopez-Umanzor v. Gonzales*, the petitioner was a native of Honduras.[198] She entered the United States without inspection but was removed nine years later.[199] She applied for cancellation of removal, and the BIA affirmed.[200] The petitioner attempted to corroborate her allegation of domestic violence with statements from social service providers and a psychologist who worked with her.[201] The IJ presiding over the case doubted the petitioner's credibility.[202] In particular, he doubted that the petitioner would return to her abuser if she were actually being abused and believed that the abuser would not want to follow and would not be able to find the petitioner.[203] The petitioner also said that after being treated for her injuries from abuse at the emergency room, she returned to her apartment because she did not have anywhere else to go.[204] In response, the petitioner offered the testimony of an expert witness to explain the psychological implications of domestic violence.[205] The judge refused to hear the expert's testimony, stating, "I don't believe that I want to hear any testimony from the experts . . . mainly because of the lateness of the hour."[206]

The Ninth Circuit Court of Appeals remanded the case, finding that making a predetermination of the utility of expert testimony deprives the asylum

194. *Id.*
195. Matter of Y-S-L-C-, 26 I. & N. Dec. 688, 690 (B.I.A. 2015).
196. *Id.*
197. *Id.*
198. Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1050 (2005).
199. *Id.*
200. *Id.*
201. *Id.* at 1051.
202. *Id.* at 1054.
203. *Id.*
204. *Lopez-Umanzor*, 405 F.3d at 1054–55.
205. *Id.* at 1052.
206. *Id.* at 1056.

seeker of adequate due process.[207] Despite this remand, *Lopez-Umanzor v. Gonzalez* demonstrates that some IJs may believe that psychology cannot inform their decisions and that a cursory look at the facts is enough to understand the depths of a situation. This shows that IJs are at risk of misunderstanding, misjudging, and generating a lack of consistency involving domestic violence asylum cases, despite the narrowing of the definition of a cognizable social group.

Experts play important roles in generating consistency in domestic violence asylum cases. There are direct correlations between asylum applicants' success and the use of expert witnesses.[208] In fact, many jurisdictions require evidence from expert testimony as "a functional requirement for a successful asylum application."[209] This is because the behavior of those facing domestic violence may be difficult to understand for an IJ who has no formal training on the implications of domestic violence. An asylum claimant's testimony about harm is often influenced by stress, so an expert's evaluation of one's mental health can help explain the applicant's own testimony.[210] Those seeking asylum often have "[b]ehavioral and mental complications caused by traumatic experiences."[211] Mental health experts can explain the context for asylum applicants' difficulties recalling dates and providing consistent narratives.[212] Many judges require asylum seekers to provide specific details, but the nature of trauma makes it so that it may be difficult for these asylum seekers to remember details.[213] In addition, one experiencing trauma symptoms may recount an event with little to no emotional reaction, causing them to appear less credible, but this is a symptom of PTSD.[214]

It is difficult to estimate the costs of providing expert witnesses. Some experts will take on a case pro bono, while others have set fees, and some may even need guidance determining their fees.[215] Nonetheless, fees for experts in the realm of domestic violence asylum cases are not astronomical. The bar for one to qualify as an expert in domestic violence asylum cases need not be high, as long as they have specialized knowledge in psychology and sociology.[216] Because expert witnesses are crucial in many domestic violence asylum cases, yet asylum seekers often cannot pay the costs for an expert witness,

207. *Id.* at 1059–60.

208. KELCEY BAKER, KATHERINE FREEMAN, GIGI WARNER & DEBORAH M. WEISSMAN, EXPERT WITNESSES IN U.S. ASYLUM CASES: A HANDBOOK 33 (2018), https://law.unc.edu/wp-content/uploads/2019/10/expertwitnesshandbook.pdf.

209. *Id.*

210. *Id.* at 38.

211. *Id.* at 39.

212. *Id.*

213. *Id.*

214. BAKER ET AL., *supra* note 208, at 39.

215. *Id.* at 64.

216. *See* FED. R. EVID. 702.

the DOJ and DHS should budget to cover the costs of immigration courts' retaining general experts in psychology and sociology. This expense would not be overwhelming in light of the reduced costs from reducing issues with consistency, increasing efficiency, and decreasing appeals in immigration courts.

2. *Overcoming Barriers in Immigration Courts' Using Consistent Scientific Standards*

When expert witnesses are appointed in domestic violence asylum cases, another way to increase consistency is requiring both experts, judges, and attorneys to reference standardized psychosocial science data and research. Since family courts often depend on modern social science data for domestic violence cases,[217] immigration courts dealing with domestic violence asylum claims should do the same. The 2006 Family Law Education Reform Project emphasized that new lawyers should prepare to navigate through a profession that is becoming widely interdisciplinary, involving psychologists and social workers.[218] In addition, the Carnegie Report urged that beginning in law school, students should learn to collaborate across curricula to establish "disparate kinds of knowledge and skills, including ethical-social issues."[219] The same expectations should apply to immigration courts litigating domestic violence cases pertaining to foreign individuals, seeing that domestic violence in itself is historically misunderstood.[220]

The benefits of applying consistent psychosocial understandings to domestic violence cases are grounded in science.[221] Science eliminates the guesswork from understanding complex social situations.[222] As law fundamentally requires adherence to set rules that create consistent outcomes, science has a similar effect, making it wholly compatible with the judicial system of the United States. If immigration courts continue to operate with inconsistency related to expert opinions and their application of evidentiary rules, it will further burden the legal system through the appellate process, often

---

217. *See generally* Robert F. Kelly & Sarah H. Ramsey, *Perspectives on Family Law & Social Science Research: Assessing and Communicating Social Science Information in Family and Child Judicial Settings: Standards for Judges and Allied Professionals*, 45 FAM. CT. REV. 22 (2007).

218. Amy G. Applegate, Brian M. D'Onofrio, & Amy Holtzworth-Munroe, *Training and Transforming Students through Interdisciplinary Education: The Intersection of Law and Psychology*, 47 FAM. CT. REV. 468, 469 (2009).

219. *Id.* at 469–70.

220. *See, e.g.*, Lopez-Umanzor v. Gonzales, 405 F.3d 1049 (9th Cir. 2005).

221. *See generally* Kelly & Ramsey, *supra* note 217.

222. *See generally id.*

requiring additional litigation.[223] Inconsistency in legal approaches generates uncertainty in a system that relies on consistent results.

Science in itself is inherently narrowing.[224] When science approaches a claim, that claim proceeds through three separate filters:

> (1) a system of logic based on empirical testing by which scientific inferences are made; (2) a system of standards by which research designs and analyses may be judged; and (3) a system of social practices through which the scientific community socializes its members, judges new knowledge, and communicates and integrates this knowledge.[225]

All claims pass through these filtration levels and ultimately establish consistency when confirming the validity of claims. Family courts often consider two types of social science claims: (1) direct research claims and (2) science-based practice claims.[226] The claims most relevant to asylum courts would be science-based practice claims, which involve an expert conveying information formed from his or her "use of an assessment or clinical strategy that is based in scientific literature" to the court.[227]

In addition, immigration court judges must also make informed decisions regarding the scientific information experts present to them. As follows, the DOJ and DHS should apply to domestic violence asylum cases the standards set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., a case that instructs judges of the standards with which they should analyze social science information.[228] *Daubert* requires trial judges to make a preliminary judgment on the validity of scientific testimony to the facts at issue.[229] To make this decision, judges must determine (1) if the theory can be tested, (2) if it has been published and peer-reviewed, (3) if it has an error rate, (4) what standards must be used to control the theory's operation, and (5) whether it is widely accepted in the scientific community.[230] Though immigration proceedings involve time and monetary pressures, the tools established in *Daubert* take these considerations into mind.[231]

Psychology and sociology have become crucial in advising judicial decisions.[232] For matters involving complex social and cultural dynamics, the

---

223. *See generally id.*
224. *See generally id.*
225. *Id.* at 23.
226. *Id.* at 25.
227. Kelly & Ramsey, *supra* note 217, at 25.
228. *Id.* at 22–23. This article provides tools based on the *Daubert* decision for improving multidisciplinary communication, providing a "common set of standards" to apply in judicial settings. *Id.* at 22, 37.
229. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–94 (1993).
230. *Id.*
231. *See generally* Kelly, *supra* note 217.
232. *See supra* notes 28–45 and accompanying text.

use of social sciences prevents misunderstandings and misapplications of law.[233] As follows, it is crucial for immigration courts to have a thorough grasp of the psychological and cultural implications affecting those involved, as the outcome of the case rests on their understanding of the circumstances. By having an all-encompassing understanding of these psychosocial implications, immigration courts can create more consistency in their decisions. Therefore, the DOJ and DHS should mandate that immigration courts apply the strict standards set out in *Daubert v. Merrell Dow Pharmaceuticals* to all domestic violence asylum cases.

3. *Recommended Standard of Analysis for Domestic Violence Asylum Cases*

To create further consistency in domestic violence asylum cases, when experts are appointed in these cases, they should use uniform standards. An immigration court can understand the context of a domestic violence situation by conducting a carefully framed psychological inquiry. This involves having an expert, preferably a sociologist or a psychologist, assess the domestic violence situation and inform the court of their findings.[234] Since immigration courts need to resolve cases quickly, it is crucial to establish a uniform system. The DOJ and DHS, to increase consistency, should mandate that experts in domestic violence asylum cases adhere to the Revised Battered Woman Syndrome analysis set out by Mary Ann Dutton.

In any legal situation where domestic violence is an issue, it is important to understand the context behind a woman's response to domestic violence. Mary Ann Dutton has acknowledged the importance of having expert witnesses in domestic violence cases. In her article,[235] Dutton proposes a scientifically informed framework called the Revised Battered Woman Syndrome analysis, which courts may use in understanding the full context of one's reaction to domestic violence.[236]

If a woman's situation involving domestic violence ever pertains to the issues in a legal action, Dutton recommends analyzing the experience in its entirety using the Redefined Battered Woman Syndrome analysis.[237] An expert should conduct this analysis by completing an individualized assessment for each case involving the four components of the analysis:

> (1) The cumulative history of violence and abuse experienced by the victim in the relationship at issue, including, where relevant, the nature and

233. *See supra* notes 28–45 and accompanying text.
234. *See supra* notes 28–45 and accompanying text.
235. *See generally* Dutton, *supra* note 39, at 1193–94.
236. *Id.*
237. *Id.*

> extent of violence or abuse in a specific episode; (2) The psychological reactions of the battered woman to the batterer's violence; (3) The strategies used (or not used) by the battered woman in response to prior violence and abuse, and the consequences of (or the expectations that arise from) those strategies; and (4) The contextual factors that influenced both the battered woman's strategies for responding to prior violence, and her psychological reactions to that violence.[238]

Individualized assessments allow experts to explain a woman's specific reaction and response to violence within the society in which the woman lives. The expert then can use this personalized information to assist the judge in making sense of the particular situation.[239] These individualized assessments, which follow the Revised Battered Woman Syndrome analysis, may facilitate understanding of domestic violence asylum cases in immigration courts.

The first component involves analyzing the nature of the violence.[240] Understanding the complete history of the abuse is essential, seeing that there are multiple ways for domestic violence to occur. A qualified expert will be able to apply the nature and extent of the violence to psychological models, such as the cycle of violence, power dynamics, and intermediate periods of siege where active violence is not present, all of which are often noted in domestic violence cases.[241] An expert's responsibility, in this first component, is to (1) describe all violence and abuse incidents and patterns over time; (2) gauge the battered woman's perception of the severity of these incidents; and (3) document the physical and psychological injury that had resulted from these incidents."[242]

The second component considers the battered woman's psychological reactions to domestic violence.[243] This is an important consideration in legal matters because it can explain the reasonableness of a victim's perception of danger and reasons for engaging in behavior that may seem strange to a judge or jury.[244] An expert's responsibility for this component would be to rely on current psychological knowledge to fully understand and identify the battered woman's trauma.[245] With this understanding, the expert may then link these findings to relevant legal issues.[246] In addition, because there is no consistent

238. *Id.* at 1202.
239. *Id.*
240. *Id.* at 1203.
241. Dutton, *supra* note 39, at 1204–1208.
242. *Id.* at 1209–10.
243. *Id*. at 1202.
244. *Id.* at 1216.
245. *Id.*at 1217–1218.
246. *See id.* at 1218–19. A woman who believes she lacks alternatives may tolerate the abuse for a period of time. In addition, a woman may also become tolerant of abuse until it becomes life-threatening. Also, identifying psychological reactions such as Post Traumatic Stress Disorder ("PTSD") can explain a woman's abnormal behavior in a courtroom, especially

standard for psychological responses to abuse, it is crucial for IJs to have a qualified expert analyze each individualized case.[247]

The third component asks what strategies the battered woman used in responding to the violence.[248] Often, a judge or jury will misunderstand the reactions of women involved in abusive situations.[249] The judicial system has misunderstood domestic violence for centuries until recent studies quashed the misconceptions about the psychology of abused women.[250] In a judicial setting, an expert would be responsible for analyzing a woman's actions and determining the consequences of particular strategies.[251] The expert should consider both the strategy's effectiveness and whether it increased or decreased the violence and levels of danger.[252]

The strategies women use to combat domestic violence could directly inform immigration courts of whether they qualify for asylum. Women cope with violence in three ways: personal, informal, and formal.[253] The most relevant here are formal strategies, which "include efforts that involve the legal system, such as calling the police, seeking protective orders, initiating contact with a state attorney's office . . . or seeking help from a divorce lawyer."[254] Understanding formal strategies in domestic violence asylum cases is crucial, seeing that for asylum cases involving domestic violence, applicants must demonstrate that the violence was not the sole reason for being unable to leave their relationships.[255] Applicants can demonstrate this by showing that local governments and authorities disregarded the situation.[256] Though formal strategies are not frequently used, most laypeople expect battered women to use this strategy the most.[257] Again, each case is different, and it is essential to analyze each situation on an individual basis.

---

around judges and attorneys, who assume positions of authority, dominance, and control. These aspects may be difficult for a layperson to understand, without insight into the psychological intricacies of abuse. *Id.*

247. Dutton, *supra* note 39, at 1226.

248. *Id.*

249. *See id.* at 1227. Often, a layperson may assume if a battered woman returns to a relationship that she was falsely claiming abuse, or that she was responsible for the violence. *Id.*

250. *See supra* notes 28–45 and accompanying text.

251. Dutton, *supra* note 39, at 1227.

252. *Id.* at 1229.

253. *Id.* at 1227. For personal strategies, women "comply[ ] with the batterer's demands (or anticipated demands) in order to keep the peace." *Id.* (internal quotations omitted). "Informal strategies include soliciting help from neighbors, family, and friends." *Id.* at 1228.

254. *Id.* at 1228.

255. *See supra* text accompanying notes 169–70.

256. *See supra* text accompanying note 156.

257. Dutton, *supra* note 39, at 1229. Studies show that most battered women do not call police for help with domestic violence, and when they do, they may risk more violence. *Id.* Twenty percent of women who reported calling the police indicated that afterwards, they endured increased violence by the batterer, a rate higher than any other help-seeking strategy. *Id.*

The fourth component of the Revised Battered Woman Syndrome analysis involves the contextual factors that influenced both the battered woman's psychological reactions to the violence and her strategies for responding.[258] A judge must have an adequate understanding of the victim, and to have that, they must understand the context of her situation, especially if she is from a different country. The most important factors for experts to consider are as follows:

> (1) fear of retaliation; (2) the economic . . . resources available to her; (3) her concern for her children; (4) her emotional attachment to her partner; (5) her personal emotional strengths, such as hope or optimism; (6) her race, ethnicity, and culture; (7) her emotional, mental, and physical vulnerabilities; and (8) her perception of the availability of social support.[259]

Considering economic resources is especially crucial, as economic resources may make it very difficult for a woman to establish a residence or provide for her child if she is to flee.[260] Racial, ethnic, and cultural values, beliefs, and attitudes can contribute to a woman's decision to remain within an abusive relationship or leaving.[261] An expert will be able to analyze the contextual influences of a woman's situation and culture to inform an IJ of the specific implications of a particularized domestic violence asylum case. As follows, the DOJ and DHS should require experts to follow the Revised Battered Woman Syndrome analysis set out by Mary Ann Dutton.

IV. CONCLUSION

To analyze asylum cases involving domestic violence, the DOJ and DHS need to develop a streamlined method to assist immigration courts in understanding domestic violence asylum petitions on a case-by-case basis that creates consistent results. To do this, first, these agencies should examine all case interpretations of a cognizable social group, even in cases vacated by Garland. *Diaz-Reynoso v. Barr* created a helpful framework that can help reconcile the interests of those facing persecutory domestic violence with the

---

In another study of women who called the police, "an arrest was made only twenty-eight percent of the time, even though [sixty percent] of the women reported having asked to have their partners arrested." *Id.* This sheds light on the urgency of the situation of a woman reporting battering to local authorities but not receiving help, therefore putting herself at more risk. *See id.*

258. *Id.* at 1231.

259. *Id.* at 1232.

260. *Id.* at 1233–34.

261. *Id.* at 1236–37. In some cultures, marriage vows may be interpreted as a license to abuse women, or some battered women might believe that being married and "preserving cohesion . . . is more important than seeking help." *Id.* at 1237.

Government's interest in limiting an influx of domestic violence asylum cases.[262] In addition, the DOJ and DHS should mandate the appointment of experts in asylum cases to inform the courts of the intricacies involving asylum cases pertaining to domestic violence. Next, if courts use experts, the Revised Battered Woman Syndrome analysis proposed by Mary Ann Dutton provides a simple analysis for experts to use to inform IJs of the full spectrum of cognitive, emotional, behavioral, and physiological reactions to domestic violence. Combined, these suggestions will prevent a standard so vague that it creates a catch-all for domestic violence asylum cases while also preventing a standard so narrow that it bars women who are deserving of asylum based on their unique situations.

*Zoya Miller**

262. *See supra* text accompanying notes at 166–89.

*J.D. Candidate at the University of Arkansas at Little Rock, William H. Bowen School of Law; B.A. in English Language and Literature from Lyon College. First, I would like to thank my mom, a domestic violence survivor. You are the reason I fight for change. I would also like to thank Professor Ranko Oliver for her guidance and insights pertaining to this Note. Finally, I would like to thank every member of the UA Little Rock Law Review.