From the beginning of the marriage, her husband abused her. He raped her almost daily, beating her before and during each rape. He once dislocated her jawbone because her menstrual period was fifteen days late. When she refused to abort a pregnancy, he kicked her violently in her spine. Once, he kicked her in her genitalia, causing her severe pain and eight days of bleeding. She fled the city with their children, but he tracked them down and beat her unconscious. He broke windows and mirrors with her head. He told her that if she left him, he would find her, cut off her arms and legs with a machete and leave her in a wheelchair. She attempted suicide, but was unsuccessful. She contacted the police three times, but they did not respond. A judge denied her protection, saying that the court "would not interfere in domestic disputes."

She finally left him, fled to the United States, and applied for political asylum.

Should women like Rodi Alvarado Peña, described above, be eligible to receive political asylum in the United States? To be

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* J.D. Candidate 2005, University of Pennsylvania Law School. B.A. History, cum laude, Yale University 1999. The author wishes to express his gratitude to Professors Fernando Chang-Muy, Louis S. Rulli and Catherine Struve for their patience, guidance, enthusiasm, and inspiration.


2 Ms. Alvarado was granted political asylum by an immigration judge in 1996, but the Board of Immigration Appeals ("BIA," "Board") reversed the asylum grant in 1999. Id. at 927-28. Attorney General Janet Reno vacated the BIA holding in January 2001 and remanded the case for reconsideration in light of her Proposed Rule of December 7, 2000. Id. at 906; see also infra note 8 and accompanying text. In February 2003, then Attorney General John Ashcroft certified Ms. Alvarado’s case to himself for a legal decision pursuant to 8 U.S.C. § 1103(a)(1). Amid great political controversy and under pressure from Congress, see infra note 84 and accompanying text, Ashcroft ultimately declined to take action on Ms. Alvarado’s case. See Press Release, Center for Gender & Refugee Studies, University of California, Hastings College of the Law, Landmark Decision Delayed Once Again (Jan. 21, 2005) at http://www.uchastings.edu/cgrs/documents/media/cgrs_release_1-05.pdf
eligible for political asylum, an applicant must meet the definition of refugee.3 Ms. Alvarado faces brutal violence—perhaps death—at the hands of a known abuser that the state refuses to control.4 But she does not fear persecution on account of the four traditional grounds for political asylum: race, religion, nationality or political opinion.5 To bring Ms. Alvarado within the purview of the fifth enumerated ground for political asylum, "membership in a particular social group," the immigration judge found that Ms. Alvarado belonged to a class of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."6 As of the time of this writing, roughly nine years after the Immigration Judge initially granted political asylum to Rodi Alvarado, the question of whether the United States will grant refuge to women

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3 Federal law defines a refugee as one "who is unable or unwilling to avail himself or herself of the protection of [her home] 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." 8 U.S.C. § 1101(a)(42)(A) (2004 Supp.).


5 The bulk of Ms. Alvarado's claim is centered on her claim of belonging to a "particular social group," although she raised imputed political opinion elements in her original claim. Indeed, the immigration judge granted asylum on both the social group and political opinion theory. However, as this paper will focus on the social group category generally and not Ms. Alvarado's claim, imputed political opinion related to domestic violence cases will be left for other works. See generally, Karen Musalo, Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence, 52 DePaul L. Rev. 777 (2003); Andrea Binder, Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention, 10 Colum. J. Gender & L. 167 (2001).

6 In re R-A-, 22 I. & N. Dec. 906 at 911. This creative usage of the "social group" ground for political asylum follows an expansive trend over the past fifteen years during which time the "social group" construction has grown to encompass sexual orientation-based asylum, gender-based asylum in the form of Female Genital Mutilation, and others. See generally Kathleen Anderson, Expanding and Redefining "Membership within a Particular Social Group": Gender and Sexual Orientation Based Asylum, 7 New Eng. Int'l & Comp. L. Ann. 243 (2001); Peter C. Godfrey, Note, Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees, 3 J.L. & Pol'y 257 (1994).
who suffer severe domestic violence by uncontrolled abusers remains unanswered.

In re R-A- illustrates a difficulty posed by "particular social group" jurisprudence: the absence of a clear legal framework defining cognizable "social groups" has resulted in inconsistent and unpredictable interpretations of the law. In December 2000, amid the conflict surrounding In re R-A-, outgoing Attorney General Janet Reno published a Proposed Rule that would codify a regulatory definition of "social group" and would enumerate six guiding factors designed to achieve a consistent application of the law. In February 2004, after more than three years of delay during which a new Administration took office and the Immigration and Naturalization Service (INS) was legislatively eliminated, the Department of Homeland Security (DHS) expressed its intention to finalize the Proposed Rule. At the time of this writing the DHS has not taken action.

7 BIA decisions on social group matters tend towards uniformity, but appeals from the BIA go to Federal Courts of Appeal having jurisdiction over the applicant. The Courts of Appeal have disagreed in many social group cases, issuing conflicting guidance on legitimate groups and the proper standard for analysis. Compare Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) (relying on Acosta immutable characteristic test to uphold particular social group of Iranian women with well-founded fear of persecution based solely on gender) with Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994) (relying on Sanchez-Trujillo voluntary associational test to determine that no group of Iranian women could have a well-founded fear of persecution based solely on gender).

8 Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76598 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. §§ 208.13, 208.15, 208.16) [hereinafter "Proposed Rule"]; the regulation also defines "persecution," clarifies "changed circumstances" procedural application, provides guidance on a government's unwillingness or inability to control a non-state actor, codifies imputation doctrine, clarifies the applicable standard to mixed motive cases, and implicitly provides foundation for domestic violence-based political asylum as in Rodi Alvarado's case. These vital developments are beyond the scope of this paper.

9 See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2205, sec. 471(a) (codified as amended at 6 U.S.C. § 291(a)) ("Upon completion of all transfers from the Immigration and Naturalization Service as provided for by this Act, the Immigration and Naturalization Service of the Department of Justice is abolished.")

This paper will argue that, if finalized as proposed, the Proposed Rule will: (1) expand social group jurisprudence to include a narrow class of domestic violence-based political asylum claims as intended but will not produce the "flood" of domestic violence-based claimants as feared by some commentators; (2) maintain and slightly expand the social group category in general, preserving this critical flexibility in U.S. asylum law that allows the law to respond to unprecedented forms of persecution; and (3) fail to achieve the intended goal of uniform jurisprudence because the proposed rule does not adequately resolve pre-existing interpretational disputes.

Part I of this paper examines emerging social group jurisprudence in the U.S., focusing on the inconsistent interpretations amongst the Courts of Appeal. Part II examines the specifics of the Proposed Rule and the changes that it would make to the Code of Federal Regulations (CFR) relative to social group jurisprudence. Part III assesses the anticipated actual impact of the Rule on domestic violence-based asylum seekers, other social group claimants, and on the inconsistent interpretations by the Courts of Appeal. The Conclusion in Part IV advances the proposition that, although the Rule will not achieve all of its objectives, it is the appropriate development for the current political-economic moment.

I. TWENTY-FIVE YEARS OF SOCIAL GROUP JURISPRUDENCE: CONFLICTING INTERPRETATIONS

a. Introduction

The "social group" category—in spite of its long history dating to the Refugee Convention of 1951—does not rest on solid conceptual footing as do its counterparts (race, religion, nationality, and political opinion). The literal dictionary meaning of "social group" does little to assist in defining the scope of the category for purposes of political asylum, whereas the dictionary sheds some light on all other categories.11 The dearth of legislative

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https://scholarship.law.upenn.edu/jlasc/vol8/iss1/4
history on the social group category fails to clarify the meaning, and courts have expressed their frustration. As the Seventh Circuit stated in *Lwin v. INS*, "the meaning of 'social group' remains elusive. The legislative history behind the term . . . is uninformative, and judicial and agency interpretations are vague and sometimes divergent. As a result, courts have applied the term reluctantly and inconsistently."!

While courts are frustrated by lack of guidance, advocates have increasingly utilized the "social group" category for new kinds of political asylum claims. In the cases cited in this section, the following are among the "social groups" suggested: Iranian women, Cuban homosexuals, women brutalized by guerrillas, gay Mexican men with female sexual identities, former child soldiers who escaped a rebel group, former policemen, drug traffickers, immediate family members of a target of persecution, parents of Burmese dissident students, and young women from a particular tribe in Togo who have not been subjected to Female Genital Mutilation and oppose that practice. In adjudicating so diverse a pool of social group-based political

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12 See id. at 763-74 (commenting that a search for the intent of the drafters of the definition of "refugee" in the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, leads one back to the travaux preparatoires of the Refugee Convention of 1951); see also Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. GAOR, 6th Sess., Agenda Item 6, U.N. Doc. A/Conf.2/19 (1951), reprinted in 3 THE COLLECTED TRAVAUX PRÉPARATOIRES OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES 371, 377 (Alex Takkenberg & Christopher L. Tahbaz eds., 1989) (noting that the proposal for the inclusion of a "particular social group" category came as an amendment proposed by a Swedish delegate with little fanfare and that the proposal received little response).

13 *Lwin v. INS*, 144 F.3d 505, 510-11 (7th Cir. 1998).

14 Not all of these formulations were found to be legitimate "social groups."

15 Fatin, 12 F.3d at 1241.


17 *Gomez v. INS*, 947 F.2d 660, 663 (2nd Cir. 1991).

18 Hernandez-Montiel v. INS, 225 F.3d 1084, 1087 (9th Cir. 2000).


21 Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992).

22 Gebremichael v. INS, 10 F.3d 28, 35-36 (1st Cir. 1993).

23 Lwin, 144 F.3d at 507.

asylum claims—many of which allege quite severe abuse—it is unsurprising that courts have produced differing interpretations of the term “social group.” Courts have relied on different factors to test the validity of a postulated social group, resulting in inconsistent outcomes on similar claims as a result of jurisdiction. The remainder of Part I will compare and contrast the competing frameworks for social group analysis that have emerged from the Courts of Appeal and the Board of Immigration Appeals and will close by analyzing the courts’ treatment claims on the basis of gender or familial relationships.

a. The Acosta Decision and the Immutable Characteristic Standard

In 1985, the Board heard an appeal on an application for political asylum by a Salvadoran male who claimed fear at the hands of the guerrillas on account of his membership in a particular social group.25 He defined his social group as taxi drivers who were members of a cooperative known as COTAXI, and other persons engaged in the transportation industry.26 Acosta alleged that the guerrillas targeted him and his group because of his refusal to participate in guerrilla-mandated work stoppages.27 The Board, noting that the Refugee Convention added “social group” as an afterthought28 and that the legislative history of the provision was scant, devised its own interpretation of “social group” that remains at the core of social group jurisprudence today.

The Board applied the doctrine of *ejusdem generis*, which suggests that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.29 The Board noted that persecution on account of race, religion, nationality or political opinion was aimed at immutable

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26 *Id.* at 232.; Acosta also raised an unsuccessful “political opinion” claim.
27 *Id.* at 216-17 (describing the threats received by Acosta for refusing to comply with the stoppages.)
28 *Id.* at 232; see also supra note 12.
29 *Id.* at 233-34; see also BLACK’S LAW DICTIONARY 556 (8th ed. 2004) (defining *ejusdem generis* literally as “of the same kind or class”).
characteristics—characteristics that an individual cannot change or should not be required to change. As such, the Board stated:

[W]e interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. . . . [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. 

Applying its interpretation of the law to the facts, the Board held that neither the trade of "taxi driver" nor refusing to participate in a work stoppage were "immutable" characteristics under its analysis. Accordingly, it found the appellant's suggested social group invalid.31

The Board's immutability test from Acosta set the standard for social group jurisprudence and, indeed, is cited in most asylum cases premised on membership in a particular social group.32 Although other courts have purported to follow the immutability test, its application to other social group claims has not always produced consistent results. "The Acosta-based line of reasoning is sound and well supported. Other aspects of social group law, however, have developed unevenly and sometimes inconsistently."33

30 Id. at 233.
31 Id. at 234.
32 See, e.g., cases cited in notes 15-24 supra.
33 DHS's R-A- Brief, supra note 10, at 19.
b. **Consistent Aspects of Social Group Jurisprudence**

Following the *Acosta* decision, several concepts relating to proposed social groups emerged that are widely accepted in American jurisprudence. These concepts emerged not directly from the statute or the legislative history, but rather were derived from case law of both the Board and the Courts of Appeal. The bulk of this paper focuses on the areas where courts have found inconsistency, but this section will discuss a few consistent interpretations that are necessary for a complete understanding of the current posture of social group jurisprudence.

Perhaps the most obvious prohibition on the formulation of a valid social group is that the group cannot be defined solely by criminal or anti-social behavior. In *Bastanipour*, an Iranian national who was convicted of a drug trafficking crime in the United States said that he would likely be sentenced to death in Iran for his U.S. drug conviction, and that the death sentence would issue from a summary proceeding at which he would have little opportunity to defend himself. The Court of Appeals found that Bastanipour could not obtain political asylum on this ground alone because “Iranian nationals convicted of drug crimes in the United States”—a group defined by criminal activity—was not a valid social group.

A second rule that has been widely accepted is that the harm claimed as persecution cannot alone define the social group. Carmen Gomez, a Salvadoran woman, was repeatedly raped and beaten by the guerrillas when she was twelve to fourteen years old. The Second Circuit Court of Appeals upheld the Board’s determination that the only commonality to women previously abused by guerrillas was gender and youth, and that those factors taken alone do not define an adequately narrow social

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34 Bastanipour, 980 F.2d at 1132 (noting that the term particular social group should not encompass classes of criminals because such a conclusion would intertwine persecution on the one hand and the prosecution of nonpolitical crimes on the other).
35 *Id.*
36 *Id.*; the Seventh Circuit vacated and remanded the case to the BIA on other grounds—that petitioner might have grounds for relief under INA § 212(c), 8 U.S.C. § 1182(c), *id.* at 1133-34.
37 Gomez, 947 F.2d at 664.
38 *Id.* at 662.
group for political asylum purposes. Youth, gender, and past sexual assault, the court continued, do not make Ms. Gomez more likely to be targeted for assault in the future. Other cases have supported this same proposition.

Although the harm cannot define the contours of the social group, past experience can—in some conditions—define a social group. The Board held in In re Fuentes that former policemen could, in some circumstances, have a subjective well-founded fear of persecution on account of their membership in a particular social group. Merely being a policeman, even at a time when the police and the guerrilla are engaged in active combat, is vocational and, like Acosta, is not an immutable characteristic for purposes of defining a social group. However, having formerly been a member of the national police may carry attendant assumptions about political sympathies and may constitute a particular social group for purposes of political asylum.

While the courts have largely agreed on the propositions suggested in this subsection as to formulation of particular social groups, these areas of agreement apply only to a narrow class of social group claims. The application of the immutability test from Acosta has proven far more problematic.

c. Departing From Acosta: Sanchez-Trujillo, the Voluntary Associational Test, and Its Progeny

The year after the Board’s decision in Acosta, the Ninth Circuit heard a case that suggested a social group of working-class Salvadoran males who had not served in the military. Both an Immigration Judge and the Board denied the claim, holding that the social group did not pass muster under the Acosta-based

39 Id. at 664.
40 Id.
41 See Lukwago, 329 F.3d at 172 (noting in the case of a Ugandan national who was a former child soldier that a particular social group must exist independently of the persecution endured by the applicant and that the particular social group must have pre-dated the persecution for said persecution to be “on account of” membership in a particular social group).
42 In re Fuentes, 19 I. & N. Dec. at 662.
43 Id.
44 Id.
45 Sanchez-Trujillo v. INS, 801 F.2d 1571, 1573 (9th Cir. 1986).
interpretation of the statute. The Ninth Circuit Court of Appeals affirmed the holding below, but rather than follow the Acosta framework, it fashioned its own new test.

In the Ninth Circuit’s discussion about the cognizability of the social group suggested by Sanchez-Trujillo, it noted that the Refugee Convention’s social group category was unclear—the legislative history of the Convention and Protocol was “generally uninformative” relative to the definition of social group, and the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status similarly “provide[d] little assistance in arriving at a workable definition of ‘particular social group.’” The Ninth Circuit decided, therefore, to simply interpret the words of the statute in their context, with a goal of placing some outward limit upon the social group category.

The court noted that “particular” and “social” modify the word “group,” suggesting that they function to narrow the breadth of a “group,” standing alone. Without citing additional interpretational tools, the Ninth Circuit concluded that a particular social group is a group of people: (1) closely affiliated with each other; (2) who are actuated by some common impulse or interest; and (3) amongst whom exists a voluntary associational relationship which imparts some common characteristic that is fundamental to their identity. This three-prong test came to be known as the voluntary associational test. The Ninth Circuit only twice cited Acosta in this decision—neither relating to the definition of social group, but rather to the statutory meaning of well-founded fear.

The Ninth Circuit stood by its voluntary associational test for over a decade, and then modified it in a case that arose in 2000.

46 Id.
47 Id. at 1575-76.
48 Id. at 1576.
49 Id.; the proposition is that a “group” is broadly construed; a “social group” is narrow, excluding all groups that aren’t “social,” and finally that a “particular social group” must necessarily be even more narrow.
50 Id.
51 Id. at 1578. Bearing in mind the subsequent history of reliance on the Acosta framework, the Ninth Circuit’s failure to address it appears to be erroneous. Yet, considered in light of the fact that Sanchez-Trujillo followed only one year after Acosta and that the decisions of the Board are not binding precedent on the Courts of Appeal, the Ninth Circuit’s recognition of an alternative framework is perhaps more understandable.
In Hernandez-Montiel, the Ninth Circuit employed the voluntary associational test in overturning the Board’s decision denying asylum to a gay Mexican man with a female sexual identity. The Ninth Circuit relied on Acosta this time, and noted that the First, Third, and Seventh Circuits had adopted the Acosta framework as the appropriate standard to test the cognizability of a particular social group.\(^{52}\) It further noted that no other Circuit Court of Appeals had accepted the voluntary associational test\(^ {53}\) and that the Seventh Circuit had noted in Lwin that the Ninth Circuit’s test, read literally, conflicts with Acosta’s “immutability” requirement.\(^ {54}\) As such, the Ninth Circuit adopted a new understanding of “social group” as one that may be based \textit{either} on the existence of a voluntary associational relationship \textit{or} on the Acosta-based immutability test.\(^ {55}\) Rather than abandon the voluntary associational test that it fashioned in 1986 in favor of the widely-accepted Acosta framework, the Ninth Circuit simply concluded that a social group could be defined under either standard—neither would stand as the authoritative test.

d. \textbf{The Board’s Departure from Acosta in In re R-A-}

Immediately prior to the Ninth Circuit’s decision in Hernandez-Montiel, the BIA further confused the issue in its 1999 decision in \textit{In re R-A-}. As discussed in the introduction to this paper, Rodi Alvarado sought political asylum on the ground that she feared persecution in the form of severe domestic violence at the hands of her husband if she were forced to return to Guatemala.\(^ {56}\) In reversing the Immigration Judge’s grant of

\(^{52}\) Hernandez-Monteil, 225 F.3d at 1092 (\textit{citing} Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985), Fatin, 12 F.3d at 1239-41, and Lwin, 144 F.3d at 511-12).

\(^{53}\) \textit{Id.} The Eighth Circuit Court of Appeals actually accepted the Sanchez-Trujillo definition in Safaie, 25 F.3d at 640, where it cites both the voluntary associational test and the Acosta immutable characteristic test, in a sense anticipating the “combined” definition that the Ninth Circuit contrived six years later in Hernandez-Monteil.

\(^{54}\) Lwin, 144 F.3d at 512.

\(^{55}\) Hernandez-Monteil, 225 F.3d at 1093.

\(^{56}\) \textit{In re R-A-}, 22 I. & N. Dec. at 911.
political asylum, the Board did not rely on Acosta—instead it relied on factors that were new to social group jurisprudence.57

The Board said that a social group would likely exist if the applicant could show that: (1) the group "is recognized and understood to be a societal faction"58 and (2) that, because of the shared trait of group members, "it is more likely that distinctions will be drawn within that society between those who share and those who do not share the characteristic."59 The Board noted that the Ninth Circuit's voluntary associational test (upon which the Immigration Judge had relied) was not supported by Board precedent.60 It further noted that, although Acosta's immutability test was the appropriate starting point, the Board could consider additional factors if it desired.61

While the Board's authority to consider additional probative factors is not in dispute, Acosta's precedential value should at least mandate the consideration of its "immutability test." Instead, after identifying the newly fashioned factors as non-determinative, the In re R-A- Board did not conduct an Acosta analysis. Indeed, its decision to deny Rodi Alvarado's social group rested completely on the fact that the new factors were not satisfied. "This departs from the sound doctrine the Board established nearly 20 years ago in Acosta, and there is no reason for such a departure."62 Although it appears that the Board was not intentionally abandoning the Acosta framework, the Board's reasoning in In re R-A- further complicated an issue already muddled by the Courts of Appeal.

e. Handling of Family- and Gender-Based Social Groups in the Federal Circuits

Much of the recent controversy over "social group" expansion surrounds claims on the basis of domestic violence and other forms of gender-based discrimination. Some have framed social groups in relation to the nuclear family (i.e., the victim's

57 For a detailed discussion of the In re R-A- decision, see Musalo supra note 5.
58 In re R-A-, 22 I. & N. Dec. at 918.
59 Id.
60 Id.
61 Id. at 919.
relation to the abuser), and others have focused on the subjugated state of a particular gender—generally women—in certain countries. Indeed, in Acosta, the Board suggested that some shared characteristics defining a cognizable social group would include "sex, color, or kinship ties," setting the stage for social group claims based on family (kinship) or gender (sex).

The Sanchez-Trujillo court stated in dicta, "[p]erhaps a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people." But when confronted with a claim that was actually based upon a family-membership social group five years later, the Ninth Circuit held that the concept of persecution of a social group does not extend to persecution of a family. The court did not so much as make reference to its conflict with the Sanchez-Trujillo statement.

Other circuits have found persuasive the Sanchez-Trujillo proposition that a family constitutes a particular social group. The First Circuit cited the Sanchez-Trujillo language in a 1992 decision that, in dicta, agreed that a family would constitute a particular social group. The following year, the First Circuit again cited Sanchez-Trujillo (not in dicta this time around) in recognizing a social group formulation in which the applicant feared persecution because of the familial relationship that he shared with his brother, who was wanted by Ethiopian security forces. In that case, the record supported the proposition that Ethiopian security forces practiced the tradition of "cherchez la famille ('look for the family'), the terrorization of one family member to extract information about the location of another family member or to force the missing family member to come forward."

The Seventh Circuit agreed that its case law suggested, with some certainty, that a family constitutes a cognizable "particular social group" in Iliev v. INS. In that case, however,
the applicant had failed to raise a "social group" claim at the administrative level and could not support the claim that his family was the target of Bulgarian authorities. There is, thus, a circuit split as to whether a family may constitute a particular social group for purposes of political asylum.

The rulings relating to gender-based claims are similarly in conflict. In Fatin, the Third Circuit relied on the Acosta formulation of "sex" as an immutable characteristic in holding that "Iranian women" would constitute a valid social group. The court refused to overturn the Board's holding that Fatin had not qualified for political asylum, however, because she had not shown a well-founded fear of persecution based solely upon that social group.

Although the Acosta and Fatin opinions support the proposition that gender, standing alone, may constitute a cognizable "particular social group," decisions from other jurisdictions do not concur. The First, Second, Eighth and Ninth Circuits have all addressed cases that concern "modified gender groups" and all have rejected such formulations. The inference follows that if courts will not recognize a gender-based social group that is narrowed by a modifier, it is highly unlikely that a purely gender-based social group will be cognizable. The First Circuit rejected a group of Tamil men aged 15 to 45 years old, the Second Circuit rejected a group of Salvadoran women who were brutalized by guerrillas, the Eighth Circuit rejected a group of Iranian women who suffered harsh gender-based restrictions, and the Ninth Circuit, in dictum, said that "men over six feet tall" would not comprise a valid social group.

Regardless of the specific contours of claims based on family or gender, confusion abounds regarding the appropriate

70 Id.
71 12 F.3d at 1240.
72 Id.
73 A social group based solely on gender might be "women from country X." The modifications to which I refer, narrow those groups to be, for example, "women from country X who were brutalized by guerrillas." I borrow this framework from the Ninth Circuit in Sanchez-Trujillo, 801 F.2d at 1576.
74 Ravindran, 976 F.2d at 761 n.5.
75 Gomez, 947 F.2d at 664.
76 Safaie, 25 F.3d at 640.
77 Sanchez-Trujillo, 801 F.2d at 1576.
standard for evaluating the cognizability of a particular social group. The confusion has raised major problems for applicants and advocates because an applicant's success may depend on: (1) the jurisdiction into which the applicant falls; (2) the eventual outcome of In re R-A- or action taken on the Proposed Rule; and (3) arbitrary factors such as which asylum officer or immigration judge is assigned to hear a case.\textsuperscript{78}

Recognizing that the definition of "membership in a particular social group" was problematic,\textsuperscript{79} then-Attorney General Janet Reno proposed a rule designed to set "out a number of generally applicable principles to promote uniform interpretation of the relevant statutory provisions."\textsuperscript{80} The next Part will examine the Proposed Rule and the principles that it crafted as interpretational tools to clarify the refugee definition of "particular social group."

\section*{III. THE PROPOSED RULE: ESTABLISHING UNIFORM FACTORS TO CLARIFY SOCIAL GROUP JURISPRUDENCE}

The Department of Justice (DOJ) under then-Attorney General Janet Reno promulgated a Proposed Rule on December 7, 2000, that would amend the Asylum and Withholding Definitions codified at 8 C.F.R. §§ 208.13, 208.15, and 208.16.\textsuperscript{81} The DOJ established a comment period that would end on January 22, 2001, and the finalized rule was to follow. Although the comment period ran in accordance with the proposal, the new administration that took office on January 20, 2001 (particularly Attorney General John Ashcroft) took no action to finalize the proposed rule.

The amended definitions were intended to broaden social group political asylum to include a narrow swath of domestic

\textsuperscript{78} The dilemma is critical because, given that claimants must apply for asylum within one year of entering the U.S., 8 U.S.C. § 1158(a)(2)(B) (2004); 8 C.F.R. § 208.4(a)(2)(i)(A) (2004), an applicant is often faced with a decision between submitting an asylum application that might trigger removal proceedings or not making the application, preventing her (in most cases) from ever applying for asylum due to the one year bar.

\textsuperscript{79} Proposed Rule, 65 Fed. Reg. at 76589 (calling the social group category the "least well-defined of the five grounds within the refugee definition.").

\textsuperscript{80} Id.

\textsuperscript{81} Id. at 76588.
violence-based political asylum claimants, including Rodi Alvarado. The Rule would not have made domestic violence an explicitly enumerated ground of political asylum. Rather than finalize the Proposed Rule, however, Attorney General John Ashcroft expressed an intention in February 2003 to promulgate a new proposed rule that would have precisely the opposite effect: it would have explicitly precluded domestic violence claims from the refugee definition and, accordingly, would have denied political asylum to Rodi Alvarado. Members of Congress pressured Ashcroft against that course of action, and he ultimately took no action. The Proposed Rule remains on the books, under the jurisdiction of the Secretary of Homeland Security, at the time of this writing.

With the elimination of the INS, the immigration-related regulatory power passed from the Attorney General to the Secretary of Homeland Security (the Secretary). Although the Secretary did not address the status of Janet Reno’s Proposed Rule or the disposition of Rodi Alvarado’s case at the outset, John Ashcroft’s recent request for renewed briefing on In re Rodi Alvarado-Pena prompted a response from the Secretary. The DHS produced a brief relating to its position on Rodi Alvarado’s application for political asylum. The brief cites the Proposed Rule of December 7, 2000 and says, “This rule is now under DHS jurisdiction, and DHS plans to finalize it promptly, in cooperation with DOJ.” DHS maintained that it expected the Rule to clarify the definitional aspect of “particular social group” in such a way

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82 Id. at 76589, 76592-93.
83 Such a change would have to be made statutorily, which falls within the purview of Congress, not of the Attorney General.
85 Letter from forty-nine members of Congress, to John Ashcroft, Attorney General, Department of Justice (Feb. 27, 2003), at http://w3.uchastings.edu/cgrs/documents/advocacy/house_2-03.pdf.
86 8 U.S.C. § 1103(a)(3) (2004); note, however, that the Attorney General retains control of determinations and rulings concerning questions of law, § 1103(a)(1).
89 Id. at 5.
that some, but not all, victims of domestic violence would be eligible for social group-based political asylum.\(^90\)

Subsection (c)(1) of the Rule\(^91\) would define a social group using the “immutable characteristic test” from *Acosta*, including the language identifying “sex, color, kinship ties, or past experience” as examples. This subsection would track the *Acosta* language, stating that immutable characteristics are of the type that a member of the group cannot change, or that are so fundamental to the identity or conscience of the member that she should not be required to change them. The subsection then adds the proposition from *Gomez* – that the social group must exist independently of the fact of persecution (i.e., the harm cannot define the group).\(^92\)

Subsection (c)(2) of the Rule elaborates on the situation where certain past experiences may define a particular social group. The member either must have been unable to change that past experience at the time it occurred, or the past experience must have been so fundamental to her identity that the member could not have been expected to change it.\(^93\)

Subsection (c)(3) enumerates six factors that “may be considered in addition to” subsections (1) and (2), but that are “not necessarily determinative in deciding whether a particular social group exists.”\(^94\) Factors (i)–(iii) are taken from the Ninth Circuit’s decision in *Sanchez-Trujillo*\(^95\) and factors (iv)–(vi) come from the Board’s decision in *In re R-A*-.\(^96\)

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90 *Id.*
91 The Proposed Rule is reproduced in its entirety as an appendix to this article.
92 See *supra* note 37 and accompanying text.
93 This section addresses a concern raised in *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003), where the Sixth Circuit denied a social group claim of a young Honduran man who advanced a fear of persecution on account of his former membership in a street gang, and also denied his claim of a social group as a “tattooed youth.” Note, again, that the language in the Rule tracks the *Acosta* language.
95 Whether: (i) the members of a group are closely affiliated, (ii) they are driven by a common motive or interest, and (iii) a voluntary associational relationship exists amongst the members; see *supra* note 50 and accompanying text.
96 Whether: (iv) the group is recognized to be a societal faction or segment of the population; (v) the members view themselves as members of the group; and (vi) the society in which they exist distinguishes group members for different treatment or status than non-group members of society; see *supra* note 58 and 59 and accompanying text.
In summary, the Proposed Rule suggests following the standard set forth in *Acosta*, carefully avoiding invalid social groups such as those discussed in *Gomez* and *Castellano-Chacon*, and considering as probative (but non-determinative) factors set forth in both the voluntary associational test of *Sanchez-Trujillo* and the Board’s decision in *In re R-A*. The extent to which the Proposed Rule might further complicate—rather than clarify—social group jurisprudence will be discussed in the next section.

IV. ANALYSIS: WHAT IMPACT WILL THE RULE HAVE IF FINALIZED AS PROPOSED?

a. Introduction

If DHS finalizes the Rule as it was proposed in 2000, what impact will it have on the U.S. immigration system? Many think that it would make the United States a place of refuge for women who are severely abused and given no protection in their home countries. Some celebrate that outcome, while others fear that a flood of asylum seekers will further burden an already strained U.S. immigration system. Former Attorney General Janet Reno thought it would “promote uniform interpretation” of the statute in a way that would bring clarity to a clouded jurisprudential past. This part will argue that, if the Rule were finalized as proposed: (1) a narrow class of domestic violence victims would qualify for political asylum on account of membership in a particular social group but there would be no flood of asylum seekers that would strain the system; (2) the Rule would not function to the detriment of social group claimants – it would either provide some clarity and have a slightly broadening effect or simply maintain the status quo; and (3) the Rule would not achieve its stated purpose of achieving a more uniform interpretation of the statute. In spite of this third argument, the Conclusion of this paper will posit that the Rule is appropriate to the present political-economic moment and that the Rule effects incremental change towards a more open political asylum system that would accommodate a greater number of those who have suffered persecution.

b. **A Narrow Class of Victims of Domestic Violence Will Receive Asylum, but the Fear of a “Flood” is Unsubstantiated**

The proposed rule will not allow all women who suffer from severe domestic violence to seek refuge in the United States. A very specific factual scenario must occur if a woman can plausibly raise a colorable claim for political asylum under the Rule, partially because of pre-existing and unchanged aspects of the statute that prevent would-be applicants from claiming asylum and partially because the new Rule does not explicitly state that domestic violence is a ground for asylum. A good deal of advocacy and creative lawyering will be necessary for each successful claim.

As reflected in the definition of refugee from the Convention, incorporated into U.S. asylum law through the Refugee Act of 1980, a social group applicant must show that she is “unable or unwilling to return to . . . [her home] country because of persecution or a well-founded fear of persecution on account of . . . membership in a particular social group.” When the constituent elements of the definition are examined, satisfying all of them will be quite difficult for any applicant.

The applicant must show either a well-founded fear of future persecution, or the existence of past persecution that creates a rebuttable presumption of a well-founded fear. “Well-founded” fear will have to meet the threshold established in previous case law, the “persecution” will have to be “extreme,” and the applicant will bear the burden of showing that the alleged facts are true. Claims will have to satisfy the new definition in the Rule relating to the “severity” of the persecution, the identity of the “actor,” and will have to demonstrate the government’s “inability

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98 It is worthy of note that the rule would likely also support the unusual case where a man has been subjected to extreme abuse at the hands of his wife if all factors were satisfied. The fascinating legal question of the applicability of the Rule to abuse within same-sex relationships, though of great import, will be left to another article.


101 See Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996).
or unwillingness to control” a non-state actor. Additionally, if the applicant could escape the abuse by relocating within the home country, asylum will be denied.

Furthermore, the Rule does not make domestic violence an enumerated ground for political asylum in the U.S.; indeed, the Rule does not, in broad terms, substantially change the law. Applicants seeking asylum under the domestic violence aspect of “membership in a particular social group” will need to present their cases persuasively and—a sad reality—will need experienced legal assistance to prevail.

Other countries that have opened their political asylum systems to victims of domestic violence have not experienced floods of claimants. In 1995, Canada issued gender guidelines that made domestic violence part of their political asylum program. That year, they had 315 applicants for domestic violence-based political asylum, and the number of applicants has decreased annually since that time.

Even if the Rule were to generate an increase in asylum applicants, it would likely be a small increase that, systemically speaking, would not strain the immigration system at large. During fiscal year 2002, there were 46,272 applications made for political asylum in the U.S. Even a substantial increase of that figure, say 5% (under 3,200 applications) would represent a small increase to an immigration system that allots 140,000 permanent employment-based visas and 480,000 permanent family-based visas per annum, not to speak of temporary visas.

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102 Proposed Rule, 65 Fed. Reg. at 76597-98; see also Llana-Castellon v. INS, 16 F.3d 1093, 1097-98 (10th Cir. 1994); Navas v. INS, 217 F.3d 646, 655-56 (9th Cir. 2000).
103 See Cardenas v. INS, 294 F.3d 1062, 1066 (9th Cir. 2002); 8 C.F.R. § 208.13(b)(3) (2004).
104 As previously mentioned, it does not in any way change applicable statutory law. See supra note 83 and accompanying text.
106 Id.
c. A Gender-Based Example Under the New Rule

The Rule itself will allow broad discretion to adjudicators with regard to which factors are appropriate to a given case. Subsection (c)(1) of the Rule mandates an Acosta immutability analysis, which is a proposition that had been in dispute for some time. But beyond the Acosta analysis, the Rule merely codifies several propositions that had been established by case law: prohibiting certain invalid social group formulations and laying out factors that may be considered in other social group analyses. It does not appear that the Rule will function to exclude particular classes that previously have qualified for “membership in a particular social group,” and the Rule may open the door for other types of claims raised in this article.

It is illustrative to briefly consider a gender-based example under the new rule. Two previous cases had formulated the social group of “Iranian women” in their claims for political asylum. Prior to the promulgation of this Rule, the Third Circuit in Fatin held that “Iranian women” constituted a valid social group, but that the applicant in that case had not shown that she had a well-founded fear of persecution as a member of that group. The court was not convinced that she was so passionately opposed to Iranian law that she would choose noncompliance and suffer the consequences. The Eighth Circuit in Safaie, on the other hand, held that a social group of Iranian women was overbroad—that there was no possibility that “all Iranian women had a well-founded fear of persecution based solely on their gender.”

Under the Proposed Rule, the “Iranian women” social group would be subjected to an Acosta analysis. An Acosta analysis would favor this social group, granted that it focuses on “immutable” characteristics, such as “sex.” But an adjudicator may also consider the six factors in subsection (c)(3) of the

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109 Such broad discretion may be a double-edged sword. An extended discussion of its implication is in the following subsection.
110 See Fatin, 12 F.3d 1233; Safaie, 25 F.3d 636.
111 Fatin, 12 F.3d at 1241.
112 Id. at 1242.
113 Safaie, 25 F.3d at 640.
114 Proposed Rule, 65 Fed. Reg. at 76598; see also supra notes 95 and 96 and accompanying text.
Proposed Rule to analyze this sort of social group. Iranian women, as a whole, are probably not "closely affiliated," but may be "driven by a common motive or interest." They probably, on the whole, do not have a voluntary "associational relationship," but are certainly recognized as a "societal faction" or "segment of the population." Some, but not all, may "view themselves as members of the group" and most would agree that the society "distinguishes members of the group for different treatment or status" than that accorded to men. Of the six criteria mentioned, it appears that arguably three would militate in favor of this social group formulation and three against. Does that mean that the Rule recognizes this social group, or not?

d. The Proposed Rule Will Not Achieve the Goal of Promoting Uniform Interpretation to Create a More Predictable Social Group Jurisprudence

The Iranian women social group example that ended the previous section illustrates the dilemma: the situation in which an adjudicator feels that a particular social group formulation has satisfied the Acosta immutability standard (and does not run afoul of the avoidable past experience or defined by the harm prohibitions), but feels that the subsection (c)(3) factors don't clearly militate either in favor of—or against—a suggested social group. Even if the factors were not evenly split, should a particular factor be more dispositive than others, if so which one, and what weight should the factors have relative to the Acosta analysis?

The lack of guidance in this area is precisely why I argue that the Proposed Rule will do little to achieve its object—to "promote uniform interpretation of the relevant statutory regulations that define legal terms and problems of similarity, and to create a more predictable social group jurisprudence.”

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115 It is not clear in the Rule if the Acosta analysis should be dispositive under any circumstances or if the adjudicator should always consider the permissive factors in subsection (3).

116 Castellano-Chacon, 341 F.3d at 549.

117 Gomez, 947 F.2d at 664.

118 There is a strong argument for certain factors being more important that others: the first three factors (the voluntary associational test from Sanchez-Trujillo) were originally not to be given equal weight: the first two factors were generally afforded less weight than the third "voluntary associational" factor. See Sanchez-Trujillo, 801 F.2d at 1576 (describing the third factor as being “[o]f central concern.”).
provisions.” The lack of guidance provided by the Rule will promote exercises of discretionary grants or denials that may appear arbitrary and may be explained by an adjudicator’s personal interpretation of the rule. Some adjudicators may not even have discernable interpretational trends and will appear, rather, to determine outcomes on the basis of a visceral, inexplicable assessment of the applicant’s credibility or, worse, on the adjudicator’s own beliefs or prejudices regarding the applicant or the applicant’s race or culture.

It is not, however, fair to reject the Rule entirely for its failure to achieve uniformity. It is helpful that the Rule clarifies that the Acosta immutability test must be applied in all circumstances, and that appropriate factors to consider are those from Sanchez-Trujillo and In re R-A-. Furthermore, other aspects of the rule—including codifying the imputation doctrine, defining persecution, and exploring to what extent a non-state actor must be “uncontrolled”—will have a clarifying effect.

Despite its strengths, ultimately the Rule will encourage adjudicators to pick and choose factors from subsection (c)(3) that support their subjectively desired outcome. Where the adjudicator selects which optional subsection (c)(3) factors to apply and how to accord weight to each factor, the appellate courts will have little legal foundation for reversal under the applicable standards of review. Janet Reno had the right idea when she attempted to clear up social group jurisprudence with this Proposed Rule, but seldom if ever does a multi-factor, permissive, six-part balancing test result in a more consistent jurisprudence.

V. CONCLUSION: THE RIGHT RULE, FOR NOW

In spite of the interpretational concerns raised in the previous section regarding continued unpredictability under the Proposed Rule, the Rule is roughly the correct path for the DOJ/DHS to take in the current political-economic moment. The Rule addresses the most pressing concern, one that is graphically demonstrated in In re R-A-: that there are women suffering severe persecution at the hands of their husbands who desperately need a place of refuge. The Rule does a good job of staking out a position

in the middle of the road: it neither explicitly rejects or creates a "domestic violence" ground of political asylum. This is critical because taking one course or the other would likely trigger a partisan backlash against the Rule; by contrast, this Rule looks as though it might be politically acceptable on both sides of the aisle.

A moderate approach to political asylum reform is also the correct approach because of the current historic moment. During the current "War on Terrorism," the simple fact is that the pendulum of American public opinion has swung to assume a distinctly xenophobic position. Although some would argue that a more permissive rule would not compromise national security, others would retort that such a rule would facilitate terrorist entry into the United States. While this author believes that the latter argument is specious, its political ramifications could be significant.

Furthermore, during periods of economic difficulty, pro-immigration measures tend to receive little support from the American people, and have unfavorable political ramifications. Many Americans believe, rightly or wrongly, that immigrants take jobs away from U.S. workers. 120 Regardless of the truth of that belief, again, it could carry significant political implications.

Although this Rule may be the correct Rule for the moment, disparate interpretation of "membership in a particular social group" will continue, and the DHS—or perhaps even Congress—will revisit the "social group" controversy in the not-too-distant future. Unpredictable jurisprudence in the social group category does not, after all, merely cause intellectual dissent; rather, it has very real consequences for those who are fleeing persecution and need to know if an application for refuge in the U.S. will deliver them directly back into the hands of their persecutors. The DHS should finalize the proposed rule without further delay and should instruct the Board of Immigration Appeals to grant political asylum to Rodi Alvarado as the first aslyee under the new Rule.

APPENDIX

TEXT OF THE "SOCIAL GROUP" SUBSECTION OF THE PROPOSED RULE


Proposed 8 C.F.R. § 208.15

(c) Membership in a particular social group.

(1) A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. The group must exist independently of the fact of persecution. In determining whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence should be considered, including the applicant’s individual circumstances and information country conditions information [sic] about the applicant’s society.

(2) When past experience defines a particular social group, the past experience must be an experience that, at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it.

(3) Factors that may be considered in addition to the required factors set forth in paragraph (b)(2)(i) of this section, but are not necessarily determinative, in deciding whether a particular social group exists include whether:

(i) The members of the group are closely affiliated with each other;

(ii) The members are driven by a common motive or interest;

(iii) A voluntary associational relationship exists among the members;
(iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;

(v) Members view themselves as members of the group; and

(vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.