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Gender is an organizing principle, not a simple variable, in migration.[1]

I. Introduction

The Office of the United Nations High Commissioner for Refugees (hereinafter "UNHCR") estimates that 80 percent of the approximately 40 million refugees and internally displaced persons are women and children.[2] In 2002, the United States received approximately 81,100 new applications for asylum.[3] If these were to follow the demographics of refugees as a whole, nearly 65,000 of those applications would involve women and children. In light of such striking numbers, the UNHCR has asserted that "ensuring equal treatment of refugee women and men may require specific action in favour of the former."[4]

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[1] Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J. L. & FEMINISM 23, 24 (1997).

[2] Women's Commission for Refugee Women and Children, *2001 Consolidated Inter-Agency Appeals: Women and War* ¶ 1 (Feb. 2001), *available at* http://www.reliefweb.int/library/GHARkit/FilesFeb2001/woman&war.html (last visited April 30, 2004). *See also* Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 625 n.1 (1993) (surveying statistics from various sources indicating that, while precise numbers of female refugees are unknown, reliable sources indicate that women account for well over half of all refugees).

[3] In addition, about 26,800 refugees resettled in the United States in 2002. UNHCR, REFUGEES BY NUMBERS 11 (2003), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/basics (last visited May 19, 2004).

[4] United Nations High Commissioner for Refugees Executive Committee Conclusion No. 64 (1990), *available at* http://www.uchastings.edu/cgrs/law/unhcr.html (last visited February 22, 2004).

The U.S. administrative and federal courts adjudicating asylum petitions have evinced a desire to make asylum determinations without consideration of the applicant's gender,[5] but this has not translated into equal treatment of applicants. In what may be interpreted more benevolently as a well-intentioned effort to ensure gender equality by not overtly "favoring" one gender over the other, the courts are actually falling prey to what one commentator labeled a "gender paradox."[6] In other words, courts are discriminating against one gender by refusing to acknowledge that issues unique to one gender require treating its members differently in the legal context. Despite global advances in the status of women over the last century, there still exists a power differential rooted in culture and gender, which must be taken into account in asylum decisions if women's asylum applications are to be adjudicated fairly.[7]

This Article contends that the only way to achieve gender parity in asylum adjudication is to recognize that there are certain inherent differences in the experiences of women and men seeking asylum. Furthermore, it is imperative that U.S. governmental authorities recognize that certain types of violence that are disproportionately

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[5] *See, e.g.,* In re Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996). The court notes, "The only distinguishing characteristic about this case that I can perceive to set it apart from others we already have decided is that it involves a woman. Reliance upon such a distinction to support a separate category for treatment of women's asylum claims, to my mind, would be impermissible." *Id.* at 377.

[6] Jenny-Brooke Condon, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207 (2002).

[7] For a more detailed discussion of the character and implications of this power differential, *see infra* Part III.B.

committed against women can be cognized in the terms of the asylum statute as currently written, thereby entitling victims of such violence to protection under our current asylum laws.[8]

To gain asylum under U.S. law, an applicant must demonstrate her eligibility by demonstrating several elements outlined in the Immigration and Nationality Act of 1952 ("INA").[9] She must demonstrate that she is unwilling or unable to return to her home country because she has been persecuted or has a well-founded fear of future persecution.[10] She must also show that she was

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[8] Although *Desir v. Ilchert*, 840 F.2d 723, 726-27 (9th Cir. 1988), held that it is not necessary for asylum that women have suffered "bodily harm or a threat to life or liberty," violence against women is a recurring theme in asylum applications, and therefore should be defined. For the purposes of this Article, "violence against women" is defined in the same way as it is by the UNHCR. In its publication *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response* 10 (May 1, 2003), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/+PwwBmeMUiECwwwwnwwwwwwhFqA72ZR0gRfZNtFqrpGdBnqBAFqA72ZR0gRfZNcFqewXhcnL1wcawDmaHnDmnGe2Rxw5nmaUodcnDqnawtwoD5Ba2nh1tnn5Ca2nB1GDnn5awDmafDBnGDwccOayo5pcwqnma7nG5dD5Dzmxwwwwwww1FqmRbZ/opendoc.pdf (last visited April 6, 2004) (hereinafter "UNHCR Gender-Based Violence Guidelines"), the UNHCR defines "gender-based violence" as "violence that targets individuals or groups of individuals on the basis of their gender . . . . [or] violence that is directed at a person on the basis of gender or sex" and "violence against women" as gender-based violence that "results in, or is likely to result in, physical, sexual and psychological harm to women and girls." UNHCR Gender-Based Violence Guidelines at 10.

[9] Immigration and Nationality Act § 101(a)(42)(A) (codified as amended at 8 U.S.C. § 1101(a)(42)(A) (2004)).

[10] *Id.*

targeted for that persecution on account of at least one of five statutorily protected factors: (1) race, (2) religion, (3) nationality, (4) political opinion, or (5) membership in a particular social group.[11] Finally, she must prove that she was unable or unwilling to seek protection from the government of her home country.[12]

Under the current scheme, many women deserving of asylum are denied relief because their cases do not to fit within the parameters of the law. Typically, it is claimed that they do not fit within a cognizable social group or that they were not persecuted because of another statutorily recognized ground for asylum. An exemplary case that has received a great deal of attention in recent years is that of Rodi Alvarado.

Alvarado, a Guatemalan, applied for asylum in the United States after suffering years of continual, horrific physical and sexual abuse at the hands of her husband.[13] Among many other abuses, he threatened to cut off her limbs and face with a machete if she ever attempted to leave him, kicked her repeatedly in an attempt to abort their second child, and kicked her genitals with enough force to cause her to bleed for eight days.[14] The Board of Immigration Appeals ("BIA") acknowledged that "a woman [who] chooses the wrong husband" has few options in Guatemala, where the government

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[11] *Id.*

[12] *Id. See also* discussion *infra* Part II.

[13] *In re* R-A-, 22 I. & N. Dec. 906, 908 (B.I.A. 1999).

[14] *Id.* at 908-10. Her husband committed countless offenses against her catalogued by the BIA, including: raping her "almost daily," using her head to break mirrors and beat against furniture, and pistol-whipping her. *Id.*

has failed to provide resources to deal with the problem of domestic violence.[15]

Nonetheless, in its 1999 decision, the BIA reversed the decision of an immigration judge and denied asylum to Alvarado. The 10-5 majority reasoned that Alvarado was ineligible for protection because her situation was essentially personal rather than political,[16] thus precluding her from fitting into a social group cognizable under the statute.[17] Deeming that Alvarado's husband's behavior was "senseless . . . and irrational . . . ,"[18] the court attributed Alvarado's abuse to the husband's "warped perception of and reaction to her behavior . . . psychological disorder, pure meanness, or no apparent reason at all."[19] In so doing, the BIA effectively held that, as regrettable as the courts may find Alvarado's history of abuse, the violence directed toward Alvarado was ultimately random.

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[15] *Id.* at 910.

[16] *Id.* at 916-17. The court reasoned that "there has been no showing that the respondent's husband targeted any other women in Guatemala, even though we may reasonably presume that they, too, did not all share his view of male domination." *Id.* at 917.

[17] *Id.* at 917-20. In holding that Alvarado did not fit into any cognizable social group, the court explained:

> [T]he respondent has shown that women living with abusive partners face a variety of . . . problems in obtaining protection or in leaving the abusive relationship. But the respondent has not shown that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" is . . . a recognized segment of the population, within Guatemala.

Id. at 918.

[18] *Id.* at 908.

[19] *Id.* at 927.

In effect, the courts told Alvarado and other women fleeing situations of "private" violence that their cases are simultaneously too narrow and too broad to fit within the courts' interpretation of the INA.[20] Their situations are too narrow because they are considered to be the victims of random violence, placing them outside the scope of asylum law. The cases are too broad in the sense that women suffering domestic abuse fail to fit within a discrete social group, since domestic violence is framed as a problem for all women generally. The text of the INA itself, however, is flexible enough that it does not have to be interpreted so as to exclude asylum seekers fleeing this type of violence. As Anita Sinha put it, "the problem for asylum claims involving gender-related persecution is in the

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[20] *See, e.g.*, *In re* M-S-M- (Immigr. Ct. July 1999), *available at* http://www.uchastings.edu/cgrs/summaries/100-199/summary126.html (holding that because a domestic abuser had no connection with the Mexican government or law enforcement, his wife was not "persecuted" for purposes of the INA); *In re* D-K- (Immigr. Ct. Dec. 8, 1998), *available at* http://www.uchastings.edu/cgrs/law/ij/117.html (rejecting a battered woman's asylum petition for failing to show "that the violence against her is related to anything more than evil in the heart of her husband"); *In re* F-L-, *available at* 31 (Immigr. Ct. July 24, 1998), at http://www.uchastings.edu/cgrs/law/ij/216.pdf (ruling that forced prostitution did not constitute persecution); *In re* A-, at 13 (Immigr. Ct. Jan. 8, 1998), *available at* http://www.uchastings.edu/chrs/law/ij/263.pdf (finding that the situation of a woman applying for asylum on the basis that she feared "a violent attack by the male members of her family based on her defiance of their wishes that she not marry her husband" was a "personal family dispute" not covered by the INA); *In re* G-R- (Immigr. Ct. Oct. 20, 1997), *available at* http://www.uchastings.edu/cgrs/summaries/1-50/summary37.html (finding no nexus between domestic abuse and any enumerated ground for asylum).

interpretation and not the letter of the law."[21] Ultimately, even if an asylum applicant demonstrates all of the elements required under the INA, asylum is an essentially discretionary remedy,[22] and it should remain so in order to maintain the flexibility required to respond to the complex realities of refugees' situations.

Following the controversial ruling in the case of *In re* R-A-, the Department of Justice (hereinafter "DOJ") proposed a regulation attempting to provide guidance to asylum adjudicators confronted with issues of gender-based persecution.[23] Unfortunately, the proposed regulation, as currently written, is deeply flawed.[24] Indeed, it may be better for the cause of women asylum-seekers if that regulation, which has languished in a pending state for nearly four years, is never codified. Nonetheless, the fact that women such as Rodi Alvarado are not being granted asylum demonstrates the need to provide clearer guidance to asylum adjudicators and judges, who must be informed about the realities of gender discrimination and how the existing law can address them. This Article contends that such guidance should come in the form of clearer regulations interpreting the existing law, rather than statutory amendment or any other proposed solutions.

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[21] Anita Sinha, Note, *Domestic Violence and U.S. Asylum Law: Eliminating the "Cultural Hook" for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1562, 1591 (2001).

[22] *See* CHARLES GORDON ET AL., 3-33 IMMIGRATION LAW AND PROCEDURE §§ 33.05[3][b][iii], 34.02[11], 34.02[12][d].

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

[24] The specific flaws in the DOJ regulation are discussed in more depth in another part of this Article. *See infra* Part II.C.

Part II of this Article surveys the current state of U.S. asylum law and identifies the sources of problems for women seeking asylum on gender-based grounds. Part III investigates the theoretical underpinnings of power and gender. Part III concludes that, if redrafted statutory or administrative materials are to advance the position of women refugees, they must take into account the most current understanding of issues underlying the inequitable treatment of women seeking asylum. Domestic or personal violence must be understood as essentially political because of the power relations implicated between men and women in patriarchal societies. Part IV considers proposed solutions to the problem of gender disparity in asylum decisions and evaluates their potential to create a more egalitarian system of asylum adjudication.

II. Asylum Law in the United States

In order to understand the quandary of women making gender-based asylum claims, it is necessary to understand, in some detail, the underpinnings and mechanics of asylum law. Asylum and refugee law must incorporate aspects of international law into domestic law in a manner that adheres to the mandates of each. The BIA described the essential purpose of this body of law as "provid[ing] surrogate international protection where there is a fundamental breakdown in state protection."[25] The federal courts are, in a sense, standing in for an international tribunal.[26]

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[25] In re *R-A-*, 22 I. & N. Dec. at 912.

[26] Of course, wherever international law informs, or attempts to inform, domestic law, a jurisdictional tension is created

Generally, U.S. asylum law could benefit from a re-examination of the principles of international law from which it arose, as well as how those principles

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between the two. *See generally* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW (4th ed. 2003); LORI F. DAMROSCH ET AL., INTERNATIONAL LAW (4th ed. 2001). *See also* Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237, 1248 n.63 (1998) (quoting Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)) ("[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains."); Lisa Cox, Comment, *The Legal Limbo of Indefinite Detention: How Low Can You Go?*, 50 AM. U. L. REV. 725, 753 n.164 (2001) (noting that a properly-enacted, constitutional domestic law will displace a conflicting international law if the purpose of enacting the new domestic law is specifically to supersede the international law); W. Fletcher Fairey, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U.L. REV. 1289 (1997).

The charge upon the immigration courts, then, is to adjudicate asylum petitions with regard to both domestic and international mandates by giving appropriate consideration to each. According to some scholars, this relative independence of U.S. federal and international law can be beneficial for refugees. For example, Deborah Anker, described the relationship between the international and domestic law characteristics of refugee law as uniquely suited to "avoid[] controversies that have been most sensitive and divisive in debates concerning . . . cultural relativism in general." Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 146 (2002). Professor Anker lauds the fact that refugee law "does not attempt to set a corrective agenda, tell another country how to act, or propose plans for eradicating particular practices," thereby avoiding "debates within the [international] human rights community [that] have been, at times, almost immobilizing, reflecting an unresolved theoretical standoff." *Id.*

have been fleshed out in case law in a manner that has perpetuated some of the gender biases inherent in the underlying international instruments[27] and the cases themselves.[28] First, though, it is necessary to understand how the law of asylum operates.

A. History of Refugee Status Based on Gender

The first step toward a grant of asylum is proving that one meets the legal criteria of a refugee. Although proving refugee status by itself is an insufficient basis for asylum, establishing such status is a prerequisite for a successful asylum application. The Refugee Convention of 1951[29] was the first international treaty to include a definition of "refugee." According to Article 1A(2) of the Refugee Convention, the term "refugee" applies to:

> [Any person who] owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that

[27] *See supra* note 2.

[28] Nancy Kelly points out that the development of asylum law has taken place primarily through the cases of male applicants, meaning that most existing case law involves the examination of activities traditionally dominated by males. Kelly, *supra* note 2, at 636.

[29] The Refugee Convention of 1951, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (hereinafter "Refugee Convention").

> country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[30]

It is important to note that, despite comprising the majority of refugees in the world,[31] women are not mentioned anywhere in this definition. Not only do they not appear as a protected class, reference to gender does not even merit inclusion as a pronoun. This oversight was not unusual for the 1950s, a time during which patriarchal culture was well entrenched and little questioned in most of the world.[32] Nonetheless, many of the current problems women face during the asylum process can be attributed, at least in part, to the fact that a definition created without regard for the gendered reality of refugee situations has become the model for so many others.[33]

Although the United States is not a signatory to the Refugee Convention, the United States did sign the 1967 Protocol Relating to the Status of Refugees, which required the implementation of the

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[30] *Id.* at Art. 1A(2). The 1951 Convention applied only to people affected by events taking place before January 1, 1951.

[31] *See supra* note 2.

[32] "[The drafters of the Refugee Convention] did not deliberately omit persecution based on gender—it was not even considered." Judith Kumin, *Gender: Persecution in the Spotlight*, 2:123 REFUGEES 12 (2001), *available at* http://www.unhcr.ch/1951convention/gender.html (last visited May 19, 2004).

[33] Andrea Binder, *Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 170 (2001); Condon, *supra* note 6, at 214; Kelly, *supra* note 2, at 627.

language of the Refugee Convention in U.S. domestic laws.[34] It was not until thirteen years later, when Congress was in the process of revising the procedure of admitting refugees into the United States, that language resembling the Refugee Convention's definition of "refugee" was incorporated into the Immigration and Nationality Act[35] via the Refugee Act of 1980 (hereinafter "Refugee Act").[36]

B. The Current Landscape of U.S. Asylum Law

The language used in the Refugee Act is similar to that used in the Refugee Convention,[37] meaning

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[34] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 8791 (hereinafter "Protocol"). The Protocol was drafted in response to the Refugee Convention's failure to protect people who became refugees as a result of events taking place after January 1, 1951. It made the Convention's provisions applicable to displaced persons regardless of the date of the displacing events. *Cf.* note 29.

[35] § 101(a)(42)(A) (codified as amended at 8 U.S.C. §§ 1101(a)(42)(A)(2004)).

[36] The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in various sections of 8 U.S.C.).

[37] The term "refugee" is defined in the Refugee Act as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or

that the U.S. standard conforms with the international standard and shares in its benefits as well as its shortcomings. Having an asylum decisionmaker determine that an asylum applicant fits within the definition of "refugee" is only a preliminary step toward attaining asylum under U.S. law.[38] Successful applicants must also prove that they are unwilling or unable to return to their home country because they have suffered past persecution or have a well-founded fear of future persecution on account of one of the five protected characteristics, race, religion, nationality, political beliefs, or membership in a particular social group.[39] Further, applicants must show that their persecution was either directly caused or indirectly condoned by the government of that country.[40]

1. Persecution requirement

To gain asylum, it is not sufficient to demonstrate that conditions in the applicant's country of origin are generally oppressive. An applicant must also demonstrate that she has been persecuted in the past or that she has a "well-

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political opinion.

INA § 101(a)(42)(A). The resemblance to the language of the Refugee Convention was a deliberate decision of Congress, which explicitly stated its intent to adopt the Convention's definition. *See* H.R. CONF. REP. No. 96-781, at 19 (1980).

[38] *See* INS v. Cardoza-Fonesca, 480 U.S. 421, 443 (1987) (stating that "an alien who satisfies the applicable standard under § 208(a) does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in his discretion, chooses to grant it") (emphasis in original).

[39] INA § 101(a)(42)(A).

[40] *Id.*

founded fear of persecution" for the future.[41] If an applicant bases her claim on past persecution, she may still have to demonstrate that she would be in danger if she returned to her home country.[42] This breaks down into two elements that must be proven in order to meet eligibility requirements: (a) a "well-founded fear" and (b) "persecution."

a. Well-founded Fear

The United States Supreme Court has set out a two-pronged test for the "well-foundedness" of an applicant's fear, which involves both an objective and subjective component.[43] The subjective component requires the applicant to establish to the adjudicator's satisfaction that the applicant actually experienced fear. If actual fear is established, the objective component requires that the adjudicator assess the reasonableness, or well-foundedness, of

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[41] *Id. See also* 8 C.F.R. § 208.13(b)(1). When an applicant demonstrates past persecution, she is eligible for asylum. Asylum may still be denied as a matter of the adjudicator's discretion, however, if it does not appear that the applicant is very likely to suffer further persecution if she returns to her home country. The B.I.A. held in *In re Chen*, 20 I. & N. Dec. 16 (1989), that an asylum adjudicator can be justified in exercising a favorable grant of discretion for humanitarian reasons even when the likelihood of future persecution is slim.

[42] The regulations interpreting the INA indicate that an applicant who has suffered persecution in the past will be presumed to have a fear of future persecution "unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country . . . have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return." Aliens and Nationality, 8 C.F.R. § 208.13(b)(1)(i) (2003).

[43] *Cardoza-Fonesca*, 480 U.S. at 431.

the applicant's fear. An applicant's petition may be granted only when she has adequately demonstrated both components.

The objective component involves an inquiry as to the essential rationality of the applicant's fear[44] based on evidence presented by the applicant.[45] The adjudicator must find that a reasonable person would be fearful in similar circumstances.[46] Acknowledging the difficulties applicants may encounter in attempting to provide objective, corroborative evidence, several courts have held that it is not necessary to demonstrate actual persecution in order to show objectively rational fear.[47] If the applicant can demonstrate that she is

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[44] *Id.*

[45] The applicant's proof must show that:

> - the applicant possesses a characteristic or belief that a persecutor seeks to overcome in others by means of punishment (the evidence need not show that the persecutor actually harbors "punitive" or "malignant" intent);
> - the persecutor is already aware, or could become aware that the applicant possesses this belief or characteristic;
> - the persecutor has the capability of punishing the applicant; and
> - the persecutor has the inclination to punish the applicant.

GORDON ET AL., *supra* note 21, at § 33.04[1][b][ii][B][II] (citations omitted).

[46] *In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

[47] *See, e.g.*, INS v. Stevic, 467 U.S. 407, 425 (1984) ("The well-founded-fear standard is more generous than the clear-probability-of-persecution standard."); Cordon-Garcia v. INS, 204 F.3d 985, 990 (9th Cir. 2000) ("A well-founded fear may be based on no more than a ten percent chance of actual persecution.") (citing Velarde v. INS, 140 F.3d 1305, 1310 (9th Cir.1998)); Aguilera-Cota v. INS, 914 F.2d 1375, 1383-

similarly situated to others who are "routinely subject to persecution," her fear can be deemed objectively rational.[48]

If the applicant's fear is found to be objectively rational, the adjudicator then must move to the subjective prong of the Supreme Court's test and determine whether the applicant actually experienced fear related to her persecution.[49] Because discerning an applicant's subjective state of mind is necessarily a more speculative endeavor than determining the facts of country conditions, the courts have given some guidance on what does and does not qualify as a subjective experience of fear. For example, the United States Supreme Court has held that failing to apply for asylum in countries through which an applicant has passed–or even in which an applicant has resided and worked–on the

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84 (9th Cir.1990) (holding that the petitioner's testimony of a threat of persecution is sufficient to establish a well-founded fear of persecution). *See also* M.A. v. U.S. INS, 858 F.2d 210 (4th Cir. 1988), *rev'd on other grounds*, 899 F.2d 304 (4th Cir. 1990).

[48] *M.A.*, 858 F.2d at 214. The Ninth Circuit also observed that proof of a well-founded fear is not necessarily precluded by:

> (1) the absence of a showing that either the applicant or any family member has actually been harmed or harassed for political activities; (2) the fact that he or she was able to obtain a passport or exit visa; or (3) the fact that in fleeing persecution, the applicant has sought sanctuary in a country where he or she believes the opportunities will be best.

GORDON ET AL., *supra* note 21, at § 33.04[1][b][ii][B][II] (citing *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374-75 (9th Cir. 1985)).

[49] *Cardoza-Fonesca*, 480 U.S. at 431.

way to the United States does not conclusively prove an applicant's lack of fear.[50]

b. Persecution

The INA contains no definition of "persecution," but rather leaves the meaning of that term to be determined on a case by case basis. Not surprisingly, courts have formulated somewhat conflicting definitions of what constitutes persecution. The Board of Immigration Appeals has held that a punitive or malicious intent is not required for an act to constitute persecution.[51] The Ninth Circuit found that cumulative experiences may add up to persecution.[52] In one of the more precise definitions, the Seventh Circuit deemed persecution to be "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate."[53]

Several courts have agreed that one of the characteristics distinguishing persecution from merely annoying or harassing conduct is its egregiousness. The Seventh Circuit wrote that "the conduct in question need not necessarily threaten the petitioner's life or freedom; however, it must rise above the level of mere harassment to constitute persecution."[54] The Ninth and Third Circuits

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[50] Sale v. Haitian Centers Council, 509 U.S. 155 (1993).
[51] *Kasinga*, 21 I. & N. Dec. at 365.
[52] Korablina v. INS, 158 F.3d 1038, 1045 (9th Cir. 1998).
[53] Mitev v. INS, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting DeSouza v. INS, 999 F.2d. 1156, 1158 (7th Cir. 1993)).
[54] Sofinet v. INS, 196 F.3d 742, 746 (7th Cir. 1999) (internal quotations omitted). The Ninth Circuit Court of Appeals similarly opined that "persecution does not require bodily harm or a threat to life or liberty." Singh v. INS, 134 F.3d

similarly noted that "[p]ersecution is an extreme concept that does not include every sort of treatment our society regards as offensive."[55]

2. The "On Account Of" Requirement

Even if an applicant makes a sufficient showing of well-founded fear, the applicant's petition can succeed only when she can prove that she was targeted for persecution "on account of" her race, religion, nationality, political opinion, or membership in a particular social group.[56] If an applicant is unable to demonstrate that the persecution was directed toward her because she possessed or was perceived to possess[57] one of the

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962, 967 (9th Cir. 1998) (citing Desir v. Ilchert, 840 F.2d 723, 726-27 (9th Cir. 1988)).

[55] Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995); Fatin v. INS, 12 F.3d 1233, 1243 (3d. Cir. 1993).

[56] These five categories together constitute the so-called "protected categories." Although the meaning of each of these five categories has been litigated, the "social group" category has been the subject of far more attention than the others. *See* discussion *infra* Part II.B.4.

[57] Because the prevailing concern is whether the asylum applicant was actually in fear, the Supreme Court suggested in *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992), that protection may be warranted even when a persecutor has falsely or mistakenly imputed a political opinion to the asylum applicant. Numerous Circuit Courts of Appeals have subsequently affirmed the "imputed political opinion" doctrine. *See, e.g.*, Ravindran v. I.N.S., 976 F.2d 754, 760 (1st Cir. 1992) ("An imputed political opinion, whether correctly or incorrectly attributed, may constitute a reason for political persecution within the meaning of the Act.") (quoting Alvarez-Flores v. INS, 909 F.2d 1 (1st Cir. 1990)); DeBrenner v. Ashcroft, 388 F.3d 629, 635-36,(8th Cir. 2004) (considering that "the political views the persecutor rightly or in error attributes to [a] victim[ ]. If the persecutor attributed a

five characteristics explicitly set forth in the statute, she is ineligible for asylum.[58] The causal relationship required between the protected characteristic and persecution has frequently been referred to as the "nexus" requirement, and the problems inherent in attempting to demonstrate a persecutor's state of mind have been the subject of much scholarly attention.[59]

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political opinion to the victim, and acted upon the attribution, this imputed view becomes the applicant's political opinion as required under the Act.") (quoting Sangha v. I.N.S., 103 F.3d 1482, 1489 (9th Cir. 1997)). *See generally* Joseph J. Bassano et al., *Political Opinion Imputed to Alien by Persecutor*, AM. JUR. ALIENS § 1248 (2004).

[58] Some courts have recognized that even when an applicant is unable to demonstrate a nexus between one of the protected characteristics and the persecution, she may still be entitled to some protection under the United Nations' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85, art. 3, *available at* http://ohcr.org/english/law.cat.htm [hereinafter "Torture Convention"]. *See, e.g.,* Kamalthas v. INS, 251 F.3d 1279, 1280 (9th Cir. 2001) ("The inability to state a cognizable asylum claim does not necessarily preclude relief under the Convention Against Torture."). *See also* the INS application of the Torture Convention at 8 C.F.R. § 208.16(c) (2005).

[59] *See, e.g.*, Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT'L L. 265 (2002) (examining different standards of causation in refugee law; comparing them to those in tort, equity, and anti-discrimination law; and concluding that the standard's inadequate definition has led to inconsistent asylum determinations); James C. Hathaway, *International Refugee Law: The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT'L L. 207 (2002) (proposing rules by which to interpret the nexus requirement); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1182 (1994) (contending that the nexus requirement "places an

The nexus test first set forth by the United States Supreme Court in *INS v. Elias-Zacarias*[60] has been called "one of the most demanding" in the world for the burden it places on asylum applicants.[61] The two-part test first requires the applicant to show that she actually possesses the protected characteristic on account of which she alleges she was harmed.[62] Next, the asylum applicant herself must establish that her persecutor was motivated by that characteristic.[63] This second

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unrealistic evidentiary burden on the applicant, who must divine the motivation of her persecutor and then carry the burden of proof on this issue").

[60] 502 U.S. 478 (1992).

[61] Karen Musalo, *Beyond Belonging: Challenging the Boundaries of Nationality: Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 786 (2003). Numerous countries have had to contend with this requirement because of language in the Refugee Convention defining refugees as those persecuted "for reasons of race, nationality, religion, membership of a particular social group or political opinion." Refugee Convention, *supra* note 29, Art. 1A(2). In interpreting the Convention's language, courts in other countries have developed tests that leave room for the meaning of "nexus" to differ based on circumstances of the case. These range from "sole cause" to "but-for" to "contributing cause." Still other nations have left the term's definition open entirely. Musalo, *Beyond Belonging, supra* at 789, n.68.

[62] *Elias-Zacarias*, 502 U.S. at 483.

[63] *Id.* Elias-Zacarias was a young Guatemalan man who feared he would be killed by anti-government guerrillas because he had refused to join and fight with them. The Supreme Court rejected his claim on grounds that he had not proven that he would be killed or otherwise harmed by the guerrillas on account of his political beliefs rather than his refusal to participate in their fight. In effect, the court required Elias-Zacarias to offer proof of his persecutor's state of mind, a requirement that has been criticized for its unrealistic

part of the *Elias-Zacarias* test effectively limits the court's analysis to the relationship between the individual perpetrator and the applicant.

Although the regulation proposed in the wake of Rodi Alvarado's case has not been approved, its implications for the nexus requirement bear mention.[64] The proposed regulation would require applicants whose persecutors may have had mixed motivations in persecuting them (such as domestic abusers) to demonstrate that the persecutor was primarily motivated by one of the enumerated grounds under the INA.[65] Trying to prove the of the state of mind of a domestic abuser would create numerous complications for an applicant's case.[66]

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expectation that an asylum applicant can mobilize such proof. *See* Shayna S. Cook, *Repairing the Legacy of* INS v. Elias-Zacarias, 23 MICH. J. INT'L L. 223 (2002); Musalo, *Irreconcilable Differences*, *supra* note 61, at 1182.

[64] *See* 65 Fed. Reg. 76588 (Dec. 7, 2000). Attorney General John Ashcroft did state in testimony before the Senate in March of 2003 that he would personally be reviewing this regulation, so it may be enacted or rejected in the near future.

[65] *Id.* at 76592. The commentary accompanying the rule describes the mixed motives requirement as follows:

> [The proposed regulation] allows for the possibility that a persecutor may have mixed motives. It does not require that the persecutor be motivated solely by the victim's possession of a protected characteristic. It does, however, require that the victim's protected characteristic be central to the persecutor's decision to act against the victim. For example, under this definition it clearly would not be sufficient if the protected characteristic was incidental or tangential to the persecutor's motivation.

Id.

[66] For discussion of these potential complications, *see* Condon, *supra* note 6, at 235-38; Christina Glezakos, *Domestic*

3. The State Action Requirement

In order to meet the "state action" requirement, an applicant must demonstrate that agents of her country's government, or a person or group the government is unwilling or unable to control, actually persecuted or threatened her with persecution.[67] The requirement of state involvement is thus directly bound up with the definition of persecution. A government is said to be "unable or unwilling to control" actions taken against a citizen when, among other things, an asylum applicant can demonstrate a pattern of

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Violence and Asylum: Is the Department of Justice Providing Adequate Guidance for Adjudicators?, 43 SANTA CLARA L. REV. 539, 562-63 (2003).

[67] *See, e.g.*, *In re* Villalta, 20 I. & N. Dec. 142, 147 (B.I.A. 1990); *In re* H-, 21 I. & N. Dec. 337 (B.I.A. 1996); *Kasinga*, 21 I. & N. Dec. at 365; *In re* Acosta, 19 I. & N. Dec. 211, 222-23 (B.I.A. 1985). These decisions are consistent with the position taken by the Handbook for determining refugee status under the Refugee Convention and Protocol, written by the United Nations High Commissioner for Refugees, as well as with the discussions that took place in Congress before passage of the Refugee Act. *See* Office of the United Nations High Commissioner for Refugees, *The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 65 (Geneva, 1979), *available at* http://www.asylumsupport.info/publications/unhcr/handbook.htm [hereinafter "UNHCR Handbook" or "Handbook"]; H.R. REP. 95-1452 at 5 (1980), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4704 (defining "persecution" as "the infliction of suffering or harm, under government sanction"). Note that the House Report includes the state action requirement as a necessary element of persecution.

governmental unresponsiveness to her situation.[68] Although governments are not expected to safeguard each citizen from all harms at all times, they are expected "to take reasonable steps to control the infliction of harm or suffering," as reflected in their policies.[69]

4. The Social Group Requirement

The language "membership in a particular social group" was added to the INA in 1980 along with the rest of the definition of "refugee" from the Refugee Convention.[70] Social group is not defined in the INA itself, and the legislative history of the statute does not shed any light on what the legislature intended the term to mean.[71] The courts, therefore, have been left to determine the legal contours of the

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[68] Mgoian v. INS, 184 F.3d 1029, 1036 (9th Cir. 1999). *See also In re* S-A-, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000) (holding that attempts to seek protection from the government were unnecessary to a successful petition for asylum where applicant demonstrated that such attempts would be not only futile, but also potentially dangerous).

[69] 65 Fed. Reg. 76588, 76591 (Dec. 7, 2000) (quoting § 208.15(a)(1) of proposed rule). Country conditions and applicants' circumstances may bear on what constitutes adequate access to government protection. In some countries, for example, a woman who is abused by her husband may be able to gain state protection when she has the support of other family members, whereas a woman without such support would be able to obtain only more limited protections. Asylum adjudicators are instructed to consider such circumstances in their evaluations of whether a state is complicit in the persecution. *Id.*

[70] INA § 208(a)(1), 8 U.S.C. § 1158(a)(1).

[71] *See Fatin*, 12 F.3d at 1239 (discussing the lack of legislative history on social group).

term on a case-by-case basis, resulting in somewhat incongruent definitions of "particular social group."

For example, the Seventh Circuit case of *Bastanipour v. INS* defined a social group as a people targeted because of their disloyalty to the ruling regime.[72] The First Circuit, however, adopted a broader definition and held that social groups are comprised of people sharing "a characteristic that either is beyond the power of an individual to change or . . . that it ought not be required to [change]."[73]

The size or potential size of a social group has been given some attention as a basis for defining the group. The Ninth Circuit, for example, concluded that "[m]ajor segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct 'social group' for the purpose of establishing refugee status."[74] Some jurists argue that a group ceases to be a "social group" if it is comprised of too large a segment of the population.[75]

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[72] Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992). Note that this definition resembles that in the UNHCR Handbook, *supra* note 67, at¶¶ 77-78, which states that social group membership may be the reason for persecution when the group's ideology conflicts with that of the government.

[73] Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985).

[74] Sanchez-Trujillo v. INS, 801 F.2d 1571, 1577 (9th Cir. 1986).

[75] *See, e.g., In re H-*, 21 I. & N. Dec. at 350 (Board Member Heilman, dissenting) ("For all intents and purposes, the majority has concluded that all persons who have been harmed or who fear harm due to civil war will be entitled to asylum in the United States . . . . Indeed, if one pursues the majority's logic, all warring sides persecute one another, and this means that all civil wars are nothing more than acts of persecution.").

The most concerted effort to define "social group" occurred in *In re Acosta*.[76] The *Acosta* court examined the other four bases of persecution in the INA, and found that each of them was either impossible for the individual to change or "so fundamental to individual identity or conscience that it ought not to be changed or required to be changed."[77] Using the doctrine of *ejusdem generis*,[78] the Board of Immigration Appeals held:

> [The social group category encompasses] 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

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See also Fatin, 12 F.3d at 1242-43 ; Safie v. INS, 25 F.3d 636, 640 (8th Cir. 1994). In both *Fatin* and *Safie*, the courts rejected asylum applications from Iranian women at least in part on grounds that the social group comprised of Iranian women persecuted under the ruling regime was too broad a group definition.

However, it is worth nothing that the majority opinion in In re *H-* rejected the position that a social group cannot be defined so as potentially to render enormous numbers of people eligible for asylum, noting that every member of a social group, no matter how large, must individually prove his eligibility for asylum. 21 I. & N. Dec. at 343.

[76] 19 I. & N. Dec. 211. The case involved a Salvadoran taxi driver who claimed he was a member of a taxi cooperative targeted for violence by guerrillas after he and his fellow drivers refused to participate in a strike.

[77] *Id.* at 233.

[78] *Ejusdem generis* is a canon of statutory construction defined as follows: "When a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." BLACK'S LAW DICTIONARY 535 (7th ed. 1999).

> 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 military leadership or land ownership.[79]

In 1996 the BIA explicitly recognized that gender may constitute an element of a social group with *In re Kasinga*.[80] In that case, the INS agreed with the applicant's characterization of female genital mutilation (hereinafter "FGM") as "'based on the manipulation of women's sexuality in order to assure male dominance and exploitation,'"[81] even though the practice could be construed from one perspective as having "subjectively benign intent."[82] The court held that FGM was a form of persecution

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[79] *Acosta*, 19 I. & N. Dec. at 233.

[80] 21 I. & N. Dec. at 365-66. *See* B.J. Chisholm, Comment, *Credible Definitions: A Critique of U.S. Asylum Law's Treatment of Gender-Related Claims*, 44 HOW. L.J. 427, 432 n.19 (2001) (citing FAUZIYA KASSINDJA, DO THEY HEAR YOU WHEN YOU CRY (1998)). The Chisholm Article refers to the woman by the proper spelling of her name, Fauziya Kassindja (which was misspelled by the immigration judge and the BIA), but to the case by its codified misspelling. Kassindja was a young woman who fled her native Togo because she was afraid she would soon be subjected to the female genital mutilation (FGM) common to the women of her tribe. The perpetrators of the feared harm in this case were the tribal elders who would perform the rite, which posed a problem vis-à-vis the *Elias-Zacarias* nexus test insofar as the elders ostensibly did not intend to harm Kassindja, per se. Instead, they believed that they were helping her take part in a culturally important rite of passage.

[81] *Kasinga*, 21 I. & N. Dec. at 366 (quoting Nahid Toubia, *Female Genital Mutilation: A Call for Global Action* 9, 42 (Gloria Jacobs, ed. 1993) (quoting Raqiya Haji Dualeh Abdalla, Somali Women's Democratic Organization)).

[82] *Id.* at 367.

directed at Kassindja on account of her membership in a social group comprised of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."[83]

Despite the fact that FGM is imposed on all the girls in the Tchamba-Kunsutu tribe precisely because they are female, the BIA declined to find that the social group targeted for persecution was comprised simply of the tribe's female members. This is another example of the courts' enforced gender-blindness which has compelled asylum litigators to craft ever more intricate descriptions of persecuted groups to attempt to fit persecution against women into the statutory requirements.[84] It is the same error the court would later repeat in the case of Rodi Alvarado. But a recent case from the Ninth Circuit may signal broader recognition of gender-based persecution as grounds for asylum. The case of *Mohammed v. Gonzales*[85] was the first to expressly recognize that *all* female citizens of a country can comprise a particular social group under U.S. law, at least when persecution against females is "deeply imbedded in the culture throughout the nation and performed on approximately 98 percent of all females."[86] The

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[83] *Id.* at 368. The Ninth Circuit recently rejected the requirement that an applicant demonstrate opposition to FGM in order to be eligible for asylum, writing that FGM is inflicted on women not because of women's opposition to the practice, but because of their femaleness. *See* Mohammed v. Gonzales, 400 F.3d 785, 797 n.16 (9th Cir. 2005).

[84] *See infra* note 86.

[85] 400 F.3d 785 (9th Cir. 2005).

[86] Somali national Khadija Mohamed applied for asylum on the basis that she had been forced to undergo FGM. Her attorneys crafted a definition of social group based on the

Ninth Circuit's reasoning in this recent decision may herald a shift toward broader recognition of gender-based persecution as grounds for asylum, and at the least will permit more realistic descriptions of groups of persecuted women.

C. Limitations of Gender as a "Particular Social Group"

Once they have overcome the hurdle of proving persecution, most refugees seeking asylum on gender-based grounds have argued that the treatment to which they were subjected was directed at them on account of their gender. To be able to bring a claim under the INA, an asylum seeker must show that the perpetrators of the mistreatment would direct their actions toward anyone in the group of which she is a member. This means that such asylum seekers have had to argue that women comprise a social group, usually within certain social or political confines.[87]

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definition from *Kasinga* involving her status as a female member of her particular tribe, but the court explicitly rejected the narrower description, favoring a social group defined simply as females from Somalia. "Although we have not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law." *Id.* at 797 (footnote omitted).

[87] *See, e.g.*, *In re* R-A-, 22 I. & N. Dec. 906, 918 (BIA 2001) (holding that the group comprised of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" is not a legitimate social group under the INA); *Kasinga*, 21 I. & N. Dec. at 368 (holding viable the social group comprised of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and

The inconsistent results engendered by this approach prompted the Director of the INS Office of International Affairs to issue a memorandum to Asylum Officers in 1995 "to provide the INS Asylum Officer Corps with guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender."[88] These guidelines do acknowledge that women "may . . . have had experiences particular to their gender," and directly state that "rape (including mass rape in, for example, Bosnia), sexual abuse and domestic violence, infanticide and genital mutilation . . . may serve as evidence of past persecution on account of one or more of the five grounds."[89] However, they do not give any substantial guidance on how adjudicators should frame gender-specific violence in terms of the protected categories, nor do they give any guidance for avoiding stereotyping of gender-based claims.[90]

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who oppose the practice"); *Fatin*, 12 F.3d at 1241 (suggesting that the group comprised of "Iranian women who refuse to conform to the government's gender-specific laws and social norms" may constitute a social group). *But see In re* D-K-, at § V. ¶ 7, *available at* http://www.uchastings.edu/cgrs/law/ij/117.html (interpreting the *Fatin* case to contain dicta that "gender, in and of itself, may be the defining characteristic of a particular social group").

[88] Memorandum from Phyllis Coven, Office of International Affairs, U.S. Dep't of Justice, to All INS Asylum Office/rs *Considerations for Asylum Officers Adjudicating Claims from Women* 1 (May 26, 1995), *available at* http://www.uchastings.edu/cgrs/law/guidelines/us.pdf (last visited on May 21, 2004) [hereinafter "DOJ Guidelines"].

[89] *Id.* at 4.

[90] *See* Diana Saso, *The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines*, 8 HASTINGS WOMEN'S L.J. 263, 282 (1997) (contending that the DOJ

Perhaps the most important aspect of the DOJ Guidelines, however, is the fact that they are non-binding against any court or adjudicator. The memorandum's author subsequently testified before the House Committee on International Relations that the Guidelines "do not enlarge or expand the grounds for asylum that were specified by Congress and the understanding the courts have reached about those grounds."[91]

Also problematic is the courts' focus on the size of the group implicated in particular definitions of "social group."[92] The courts' decision to reject definitions of social groups which, in their view, include too many people has been especially burdensome to women fleeing domestic abuse or other violence because of their gender.[93] Women in those types of situations have the most difficulty meeting the evidentiary requirements to prove they qualify for asylum under the INA due to the nature of the crimes committed against them.

While the courts' reluctance to open the proverbial floodgates is understandable, the concern that acknowledging gender-based violence as a ground for asylum would result in a flood of

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Guidelines fail to educate officers as to why women's gender-based claims are susceptible to unfair stereotyping, such as the assumption that sexual violence against a woman is caused by the woman); Condon, *supra* note 6, at 217.

[91] *Victims of Torture: Hearing Before the House Comm. on Int'l Relations, Subcomm. on Int'l Operations and Human Rights*, 104th Cong. (May 8, 1996) (testimony of Phyllis A. Coven, Director of International Affairs, Immigration and Naturalization Service). *Available at* 1996 WL 10164383.

[92] *See supra* notes 76-77 and accompanying text.

[93] For discussion of the different forms of violence against women, *see infra* Part III.

immigrants is misplaced.[94] As discussed above, even when an asylum applicant meets all criteria for a grant of asylum, asylum remains a discretionary remedy under U.S. immigration law.[95] Moreover, courts should be evaluating cases based on their individual merit, not on the total number of people potentially affected. If the evidence shows that men in a particular country abuse their wives on account of their gender, the courts should recognize that conclusion.[96] Ignoring such a fact would mean adjudicating asylum cases based on the number of refugees implicated rather than on legitimate interpretation of the INA.[97] If, despite current trends, an increase in the number of asylees becomes a legitimate concern, Congress should address the issue by enacting new measures applicable to all asylum applicants, rather than immigration judges on a case-by-case basis.[98]

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[94] Canada, for example, recognizes gender-based persecution as sufficient for membership in a particular social group, yet it has not experienced a surge of asylees claiming such. *See* Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of* In re Fauziya Kasinga *and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375, 387 (1997).

[95] *See supra* note 22, at 34.02[12][d].

[96] *See* Condon, *supra* note 6, at 232.

[97] *See* Rex D. Khan, *Why Refugee Status Should Be Beyond Judicial Review*, 35 U.S.F. L. REV. 57, 71-74 (2000) (arguing that the United States justifies the number of refugees it admits based on political interests rather than humanitarian concerns).

[98] *See* Condon, *supra* note 6, at 233-34 ("Allowing judges to turn a blind eye to valuable evidence of motive is not a fair solution to fears of opening the refugee floodgates and would deny women with significant motive evidence equal access to refuge.").

III. Linking Gender and Persecution

In perhaps every human society, social status equates to power. Social standing is derived from a complex combination of factors that may include, *inter alia*, length of time or "establishment" in a community, wealth, family, religious preference, or political opinion. By any such measure, most women refugees arriving in the United States fall at the bottom of the social pile—among the most disempowered of the disempowered. Observing the workings of immigration courtrooms, one study concluded that power differences can account for bias in immigration courts and law.[99] The following discussion of gender and power theory will shed light on why certain women who are fleeing situations of gender-based violence are being denied asylum, and also why the decision to deny them the protections of U.S. asylum law is illogical and unacceptable.

A. Categories of Violence

In all parts of the globe, women are subjected to gender-based violence, but different types of violence against women have potentially different ramifications for the law. The most important distinction to understand is that "'[t]he concept of women being persecuted as women is not the same as women being persecuted because they are

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[99] Nancy Ann Root & Sharyn A. Tejani, Note, *Undocumented: The Roles of Women in Immigration Law*, 83 GEO. L.J. 605, 607 (1994).

women.'"[100] To put it another way, some acts of violence may be specific (if not exclusive) to one gender without being inspired by the victim's gender. Such violence fits into one of a few basic categories: harm that can be done only to women,[101] harm that is more commonly inflicted on women than on men,[102] and harm inflicted on women because they are women.[103] Legislatures and courts address each category of violence somewhat differently.

The first type of violence, which involves harm that can be done only to women's bodies, is relatively easy to recognize as being committed based on gender. The U.S. government

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[100] Binder, *supra* note 32, at 167 (quoting the Refugee Women's Legal Group, *Gender Guidelines for the Determination of Asylum Claims in the UK* § 1.11 (1998)). *See also* Lawyers' Committee for Human Rights, *Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers* (2002) ("Around the world women often suffer persecution just because they are female, and experience persecution differently because they are women.").

[101] Examples of harms that can only be inflicted upon women are practices such as female genital mutilation and forced abortion. Also included would be domestic violence directed against uniquely female parts of the body, such as the abuse to the genitalia suffered by Rodi Alvarado. *See supra* note 13 and accompanying text.

[102] Types of violence that are more common, but not exclusive to, women include domestic violence, trafficking, rape, and other forms of sexual assault.

[103] This sort of violence includes the overt enactment and enforcement of state policies directed toward gender subjugation such as those formerly practiced by the Taliban in Afghanistan. However, this category also includes the subtle acceptance of unwritten social policies or traditions that demand gender dominance and submission, such as the practice of honor killing or the routine killing of female infants.

acknowledges acts such as forced abortion and FGM as problematic for women. However, this recognition was given only once the U.S. culture became more familiar with these practices.[104] Both FGM and forced abortion have been addressed in the INA, but the attention that these practices have received has been insufficient to substantively impact asylum seekers.[105]

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[104] While cultural unfamiliarity with certain practices against women has sometimes been used to justify grants of asylum, *see* Sinha, *supra* note 21, at 1565-66, such unfamiliarity has at other times meant an uphill battle in getting U.S. law to recognize these practices as persecution. Female genital mutilation is such an example. Until the case of Fauziya Kassindja, fear of FGM was not considered a basis for asylum. *Kasinga*, 21 I. & N. Dec. 357. While it is difficult to speculate as to why a defacing practice that is by no means a recent development would take so long to be widely recognized, scholarly debates over the relativism of cultural mores certainly played a role. Some have advanced the argument that the fact that because FGM is accepted by the dominant factions within the cultures in which it is practiced, it ought not necessarily be construed as persecutory against members of that culture. For an evaluation of such arguments, including the tension between imposing international human rights standards and respecting the cultural implications of FGM, *see* Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); Sinha, *supra* note 20, at 1585.

[105] FGM was incorporated into the INA by means of Pub. L. 106-386, Div. B, Title V, § 1513(a) (Oct. 28, 2000), which allows for illegal immigrants to obtain legal status at the Attorney General's discretion if they were victims of FGM. This law only applies, however, if the act was committed on U.S. soil and if the victim agreed to help prosecute the perpetrator. *Id.* Such a provision obviously has no impact on applicants for asylum who are subjected to or threatened with FGM in their home countries, and who have to rely on the *Kasinga* decision.

The second type of violence involves harms that are inflicted more frequently against women, but which also can be done upon men. U.S. law has criminalized many of these forms of violence, but the law has not always recognized them as being gender motivated. Acts of this type, such as rape, are not always gender motivated, but it is generally agreed that they spring at least in part from the exercise of a power differential.[106] The fact that men may be victimized in similar ways demonstrates that gender cannot be isolated as the motivation for such violence. In societies that are still largely patriarchal, however, the power

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Forced abortion was included in the INA via Executive Order No. 12,711, 55 Fed. Reg. 13897 (April 11, 1990), *codified as* 8 U.S.C. § 1101, Note, which directed the Secretary of State and the Attorney General to give special consideration to any alien who expressed fear of forced abortion or coerced sterilization in her home country. However, the case of *Dong v. Slattery*, 84 F.3d 82 (2d Cir. 1996), held that the Order did not have the force of law, thus precluding its enforcement in the courts.

[106] *See, e.g.*, Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 666-67 (arguing that lawmakers must recognize the dynamic of power and control in domestic violence to enact effective solutions to it); Nancy Kelly, *supra* note 2, at 640-41, 641 n.75 (identifying two of the most pervasive problems in women's asylum cases as adjudicators' difficulty conceptualizing forms of sexual abuse as violence and their propensity to attribute personal motivations to perpetrators of sexual persecution); Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 868, 892-96 (1996) ("Rape as power refers to the ways men use sex and sexuality to establish dominance."). *See also* Special Rapporteur's Violence Against Women Report, 1995/85, *at* 7 PP 23, 14, 53 UN Doc. E/CN.4/1996/53.

differential may frequently translate into violence committed by men against women.

The third type of violence, harm caused to women *because* they are women, refers to embedded cultural practices of violence against women by which patriarchal structures are reinforced. These types of situations, such as the pervasive hostility toward Afghani women created by the Taliban, are perhaps the most easily conceived of as political for purposes of the INA. Violence of this sort is, however, susceptible to arguments of cultural relativism,[107] and its pervasiveness sometimes makes it more difficult to combat. The practice of systematic, mass rape in the context of armed conflicts of recent decades is another example.[108]

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[107] *See* Lewis, *supra* note 104.

[108] Much has been written on the use of mass rape as gender-based persecution (and even as a form of attempted genocide) in times of armed conflict. For more on this subject, *see, e.g.*, Anker, *Refugee Law, Gender*, *supra* note 26, at 142 (arguing that rape was systematically carried out against women during Haiti's 1991 coup d'etat because women "played an important role in the formation of democratic institutions, because of their status and role in helping civil society, because of involvement in activities to improve local communities, because of the political activities of male relatives—and because they were left behind"); Binder, *supra* note 33, at 174 n.35 ("Forced pregnancy was part of the pervasive pattern of gender crimes in the Bosnian war."); Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277 (2002) (advocating the prosecution of mass rape as a crime against humanity); Krishna R. Patel, *Recognizing the Rape of Bosnian Women as Gender-Based Persecution*, 60 BROOK. L. REV. 929, 930 (1994) (arguing that "systematic rape has become a tool of genocide and torture" in the Bosnian conflict); Mattie L. Stevens, Student Article, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179,

B. Categories of Power

Scholars have increasingly looked to the connection between violence and power for answers to the fundamental questions of why certain types of violence persist. Even international legal documents have begun to recognize the connection between the degree of women's empowerment and the violence committed against them.[109] However, the term "power" is deployed with various meanings in various contexts, so defining it is

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197-98 (1993) (quoting from a European Community investigation into the Bosnian conflict which found that rape was a "policy of terror" which could not be viewed as "incidental to the main purpose of the aggression, but as serving a strategic purpose in itself.").

For a discussion of other examples of culturally embedded and sanctioned violence, including female genital mutilation, honor killing, and gender slavery, *see* Allen White, *Female Genital Mutilation in America: The Federal Dilemma*, 10 TEX. J. WOMEN & L. 129, 151-53 (2001).

[109] Although the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (Dec. 18, 1979) (entered into force Sept. 3, 1981) [hereinafter "CEDAW"], contained no language about power, the Declaration on the Elimination of Violence Against Women, drafted by the UN General Assembly in 1993, recognized:

> [V]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.

G.A. Res. 48/104 (Dec. 20, 1993) *available at* http://www.un.org/documents/ga/res/48/a48r104.htm.

critical to understanding what a particular author intends or legal document implies. Numerous useful definitions have been formulated, so it is worthwhile to examine several of them that are relevant to asylum law.

1. Dominance-Subjugation and Patriarchy

Both individual and political power can be wielded in ways that advance egalitarian ideals just as much as they can be wielded to others' detriment. To the extent that feminist jurisprudence has been concerned with power relations, it has largely focused on the type of power typical of patriarchy: power used to dominate or subjugate another or others.[110] When men have power and dominance by virtue of societal convention, this often translates into men utilizing their power to subjugate women as a class.

One of the primary ways in which domination is enforced is through various forms of violence against women. Such violence, according to Charlotte Bunch, reinforces messages of domination:

> [S]tay in your place or be afraid. Contrary to the argument that such

[110] For discussion of the development of feminist jurisprudence, *see generally* Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Deborah Rhode, *Gender and Jurisprudence: An Agenda for Research*, 56 U. CIN. L. REV. 521 (1987); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). For discussion of feminist jurisprudence as specifically applied to asylum law, *see* Musalo, *supra* note 60.

> violence is only personal or cultural, it is profoundly political. It results from the structural relationships of power, domination, and privilege between men and women in society. Violence against women is central to maintaining those political relations at home, at work, and in all public spheres.[111]

The pervasive problem of domestic violence against women is frequently cited as a paradigmatic expression of male dominance and female submission.[112]

2. Relational Power

One envisioned alternative to dominance-type power focuses on the relationship between the

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[111] Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-vision of Human Rights*, 12 HUM. RTS. Q. 486, 490-91 (1990).

[112] *See, e.g.*, Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crime Statistics Act*, 17 HARV. WOMEN'S L.J. 157 (1994) (noting many attempts to reconstrue gender-motivated violence committed against women as having causes other than gender); Patricia A. Seith, Note, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1843 (1997) (identifying pervasive domestic violence as a "form of social control"); Kristin L. Taylor, Note, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. REV. 575, 594 (1996) (remarking that violence against women is often utilized as a punishment for deviation from gender stereotypes). *See generally* R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY (1979); RICHARD A. STORDEUR & RICHARD STILLE, ENDING MEN'S VIOLENCE AGAINST THEIR PARTNERS (1989).

people involved in the power relation. The work of psychologist Carol Gilligan has demonstrated that the act of problem-solving is itself a gendered process.[113] Gilligan's work with children indicates that, in solving hypothetical moral dilemmas, girls tend to employ an "ethic of care,"[114] whereas boys tend to use an "ethic of rights."[115] Although psychological theory traditionally privileged the type of reasoning used by the boys, some legal scholars argue that no system of law can be truly objective if it does so. It will simply reproduce traditional, male reasoning without accounting for the factors considered in "feminine" reasoning. That system will fail to reflect and regulate reality as we expect of a legal system.[116]

Philosopher Sara Ruddick, one proponent of a relational mode of thinking, states in way of definition, "To be powerful is to have the individual

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[113] *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

[114] *Id.* at 164. Girls in these experiments tended to explain their analyses in terms evocative of relationships, communication, responsibility, and context.

[115] *Id.* at 164, 174. The boys' explanations of their analyses tended to focus more on abstract terms of fairness, logic, rationality, and winning, and less on relationships.

[116] Gilligan herself writes, "The failure to see the different reality of women's lives and to hear the differences in their voices stems in part from the assumption that there is a single mode of social experience and interpretation." GILLIGAN, *supra* note 113, at 174. For an examination of the myriad ways in which feminism has informed the law, including critiques of Gilligan's position, *see generally* Charlesworth et al., *supra* note 110. *See also* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

strength or collective resources to pursue one's pleasures and projects."[117] For Ruddick, the ideal alternative to the dominance-subjugation paradigm is to be found in the power a mother has over her children.[118] In illustration of her point, she notes how mothers' primary objectives for their children revolve around nurturance and protection rather than dominance and subjugation.[119] Reconceiving our notions of what power entails to reflect the nurturing power relation, argues Ruddick, is a necessary precursor to realizing equality—not only with regard to gender, but also to race, economic standing, and other factors.

This relational understanding of power is useful for its emphasis of both the social and individual aspects of power. It also hearkens to the aim of individual empowerment as the end of positive power relations. Such an aim is consistent with the goals of the basic international documents affirming human rights, including the Universal Declaration of Human Rights,[120] the International Covenant on Civil and Political Rights,[121] the International

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[117] SARA RUDDICK, MATERNAL THINKING 37 (1989).

[118] For these purposes, Ruddick is focused on the function of the relationship rather than the gender of the caretaker, defining a "mother" as "a person who takes on responsibility for children's lives and for whom providing child care is a significant part of her or his working life." *Id.* at 40.

[119] Obviously, this is an idealized portrait of motherhood, a fact Ruddick candidly admits. She is careful to acknowledge the disparity between mothers' wishes for themselves and their children, and what they actually accomplish, but ultimately focuses on the nature of the relationship rather than the result of the childrearing as most important. *Id.*

[120] G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948).

[121] *Opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N.

Covenant on Economic, Social and Cultural Rights,[122] but, perhaps foremost, the Convention on the Elimination of All Forms of Discrimination Against Women.[123]

3. Legal or Collective Empowerment

Lawyer and scholar Patricia Williams sees rights conferred by law as "islands of empowerment."[124] Those who fall outside (or between the lines) of legal definitions conferring rights are the disempowered, according to this way of thinking. Williams argues:

> [T]he line between rights and no rights is most often the line between dominators and oppressors. Rights contain images of power, and manipulating those images, either visually or linguistically, is central in the making and maintenance of rights. In principle, therefore, the more dizzyingly diverse the images that are propagated, the more empowered we will be as a society.[125]

Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[122] *Opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc A/6316 (1966), 999 U.N.T.S. 3 (entered into force Jan. 3, 1976).

[123] CEDAW, *supra* note 109.

[124] Patricia J. Williams, *On Being the Object of Property (a gift of intelligent rage), in* THE ALCHEMY OF RACE AND RIGHTS 216, 233 (1991).

[125] *Id.* at 233-34.

Williams' focus on a type of collective empowerment provides a compelling contrast to the rhetoric of individualism that pervades much discussion of power. It also comports well with the stated goals of international organizations and treaties concerned with the advancement of women.[126] In the framework suggested by Professor Williams, the goal of the legislator should be to ensure that the law, as written, accounts for the greatest number of voices possible in order to further empowerment of as many people as possible. Immigration judges in such a system would, ideally, be more conscious of the interface between generally applicable laws and individuals with their unique stories. They would be, perhaps, more conscious of how each case was contributing to a larger tapestry of case law and less moved by the potential number of people implicated by their decisions.

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[126] *See, e.g.*, United Nations Fourth World Conference on Women: Declaration and Platform for Action, *reprinted in* 35 I.L.M. 401, 407 (1996) ("Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development, and peace."); United Nations Inter-Agency Network on Women and Gender Equality, *Women's Empowerment in the Context of Human Security* (1999) (last visited April 18, 2004), *at* http://www.un.org/womenwatch/ianwge/collaboration/finalcomm1999.htm (recommending a general strategy of empowerment of women in order to improve human security); United Nations Office of the Secretary General, *Agenda for Development: Empowerment of Women* ¶ 124 (1997) (last visited on March 3, 2004) *at* http://www.un.org/Docs/SG/women.htm ("Empowering women is essential for achieving the goals of sustainable development centered on human beings.").

4. Other Relevant Definitions

The UNHCR has chosen to define power in terms of its effects on individuals. In its Guidelines on Gender-Based Violence, the UNHCR succinctly defines power as "the capacity to make decisions."[127] The Guidelines go on to frame positive uses of power as those that "affirm . . . self-acceptance and self-respect [and], in turn, foster[] respect and acceptance of others as equals."[128] The use of power to dominate "imposes obligations on, restricts, prohibits and makes decisions about the lives of others."[129] Focusing on effects upon individual people may diminish, to some degree, the collective aspect of domination. This oversight is understandable, however, insofar as it facilitates quantification of the effects of power relations, an end which is vital to the UNHCR's mission of monitoring refugee statistics and helping remedy refugee situations around the globe.

IV. Understanding and Utilizing Power Theory in Asylum Adjudication

If adjudicators properly understood the power dynamics inherent in many forms of persecution of women, asylum applicants fleeing forms of persecution considered to be more personal than political, and therefore outside the scope of the protection of asylum, would benefit. If stereotypes of domestic violence and rape as merely private

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[127] *See* UNHCR Gender-Based Violence Guidelines, *supra* note 8, at 13.
[128] *Id.*
[129] *Id.*

violence were eliminated, the burden of proving the causal nexus between persecution and a protected ground would be significantly lowered for many women. If adjudicators recognized that "the context of a relationship between a man and a woman, in a patriarchal culture"[130] can, in itself, be politically charged, then courts would have no choice but to interpret certain forms of persecution that are currently deemed personal as being politically based.

To accomplish this end, some advocate adding gender to the INA as a sixth protected ground. Then, women demonstrating they had been persecuted on account of their gender would meet the criteria for asylum.[131] However, the costs of pushing such an amendment through Congress would be significant, as would be the effort to adequately educate legislators for whom immigration is but one of many issues competing for attention. Furthermore, adding sex or gender as

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[130] Sinha, *supra* note 21, at 1594 (quoting a letter from Karen Musalo & Stephen Knight, Center for Gender and Refugee Studies, to Director of Policy Directives and Instructions Branch, INS, at 8 (Jan. 18, 2001)) (hereinafter "CGRS comments") (on file with the New York University Law Review).

[131] For a sampling of arguments for adding gender as a sixth protected category to the INA, *see* Condon, *supra* note 6, at 250 (arguing that adding gender as a sixth category would eliminate definitional barriers of social group, have a psychological impact on adjudicators, and resolve the reliance on the social group category for a variety of gender-based claims); Emily Love, *Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution*, 17 HARV. WOMEN'S L.J. 133, 152 (1994); Mary M. Sheridan, Comment, *In Re Fauziya Kasinga: The United States has Opened its Doors to Victims of Female Genital Mutilation*, 71 ST. JOHN'S L. REV. 433, 463 (1997).

a sixth enumerated ground would not immediately eliminate the source of the problem: the underlying gender bias in the law and its adjudicators.[132] Adjudicators could still potentially apply stereotyped conceptions of gender-based violence to deny asylum to women even if gender were in the statute.

A more efficient and satisfactory solution would be for the Department of Homeland Security to enact a regulation, binding upon adjudicators, interpreting the existing statute to account for the fact that "private" violence can be politically motivated. Because the regulation proposed in the wake of Alvarado's case is so deeply flawed, an entirely new directive should be drafted. That directive should eliminate the additional burdens imposed by the Alvarado regulation.[133] Sinha suggests that a new regulation should directly state that "opinions concerning treatment or rights based on gender, such as feminism, will be considered a political opinion."[134] This language is a good start, but the new regulation should also educate adjudicators about how to recognize and supersede stereotypes in asylum cases involving violence against women. It should specify that violence against women is not merely a private matter but also a political one implicating power relations within a culture or society. The new regulation should also give substantive guidance on how this type of violence can qualify as political persecution.

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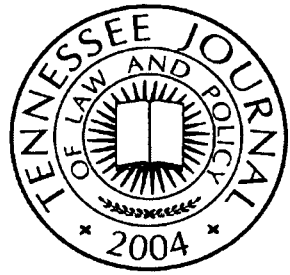
[132] *See* Anker, *supra* note 26, at 139.

[133] *See supra* notes 64-66 and accompanying text.

[134] Sinha, *supra* note 21, at 1594 n.176 (quoting from CGRS comments at 9).

V. Conclusion

Asylum case law contains numerous examples of how courts have failed refugee women because of their stereotyping and misconceptions about the nature of violence against women. With the benefit of regulations that account for the realities of violence committed against women, the current statutory scheme could more fairly adjudicate the cases of women who seek refuge in the United States from what has been considered "private" violence that is outside the scope of the INA. Women who risk everything to flee abusive situations deserve to have their suffering acknowledged as persecution, regardless of whether it is race, religion, or their gender, in combination with their cultural provenance, that caused them to be targeted for persecution.



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