

2-6-2017

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## Recommended Citation

Joanna J. Kallinosis, *Refugee Roulette: A Comparative Analysis of Gender-Related Persecution in Asylum Law*, 6 DePaul J. Women, Gender & L. (2017)

Available at: <https://via.library.depaul.edu/jwgl/vol6/iss1/2>

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## REFUGEE ROULETTE: A COMPARATIVE ANALYSIS OF GENDER-RELATED PERSECUTION IN ASYLUM LAW

Joanna J. Kallinosis<sup>1</sup>

### I. INTRODUCTION

From the moment Rodi Alvarado Pena married a Guatemalan army officer at the age of 16, she was subjected to intensive abuse, and all her efforts to get help were unsuccessful. Her husband raped and sodomized her repeatedly, attempted to abort their child by violently kicking her in the spine, dislocated her jaw, attempted to cut her hands off with a machete, kicked her in her genitals and used her head to break windows. He terrified her by bragging about his power to kill innocent civilians with impunity and all of Rodi's pleas for help from the Guatemalan government were ignored.<sup>2</sup>

In 1999, the United States denied asylum to the Guatemalan women who survived these torturous acts and escaped to Texas seeking refuge.<sup>3</sup> The panel of asylum judges in *In re R-A*<sup>4</sup> reasoned Rodi Alvarado Pena was ineligible for refuge because she had "not adequately established we should recognize, under our law, the particular social group" she sought to advance.<sup>5</sup>

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<sup>1</sup> Juris Doctor, May 2016, St. Thomas University School of Law, *St. Thomas Intercultural Human Rights Law Review*, Executive Editor; Criminal Justice M.Sc., Florida International University, 2012; Criminal Justice B.S., *magna Cum Laude*, Florida International University, 2011. I would like to thank Professor Roza Pati for her invaluable insight and guidance throughout the writing process of this comment, of which was written as part of her Comparative Law Seminar. I would also like to thank my good friends Jessica Smith and Evan Phoenix for their tremendous support, guidance, and editing assistance in preparation of this comment. Finally, I wish to express my deepest gratitude to my husband, Chris Kallinosis, and my Dad, Richard Simmon, for their unwavering support, and whose love and patience inspire me daily.

<sup>2</sup> *In re R-A*, 22 I. & N. Dec. 906, 908-09 (B.I.A. 1999).

<sup>3</sup> *Id.*

<sup>4</sup> 22 I. & N. Dec. 906 (BIA 1999).

<sup>5</sup> *Id.* at 917. (finding "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" is not a particular social group).

This essay examines the existing law regarding gender related persecution and the burden imposed on female asylum applicants to fit their claims within the circumscribed notion of a refugee within immigration law of the United States of America. Such difficulties are contrasted with the Canadian Immigration system, where women enjoy greater freedom in the interpretation of requisites necessary to be granted asylum. Section I of this essay explores the problems women face in gaining asylum in the United States. Section II of this essay will analyze the conflicting claims, and claimants. Section III of this essay will explore past trends in asylum law, discuss the framework for evaluating asylum claims under current US asylum law, analyze the competing judicial interpretations of asylum law and discuss the inconsistency of judicial decisions. Section IV of this essay will discuss the projection of future trends. Section V of this essay will propose an amendment to the Refugee Act to include a sixth category of gender or sexual persecution.

## II. DELINEATION OF THE PROBLEM

“Gender” is not the same as “sex,” rather, it is “a concept which is used to refer to those characteristics of men and women which are socially, rather than biologically, determined. The use of the term gender emphasizes that with the exception of their sexually distinct functions (childbearing and breastfeeding), everything that women and men do – and everything expected of them – can and does change over time and according to changing and varied political, economic, social and cultural factors. Gender differences are historically, geographically and culturally specific, so that what it means to be a woman or a man varies over place and time.”<sup>6</sup>

Gender based persecution addresses forms of persecution specific or more likely to happen to women. It takes

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<sup>6</sup> Heaven Crawley, *Gender-Related Persecution & Women's Claims to Asylum*, INTERNATIONAL REFUGEE RIGHTS INITIATIVE, <http://www.refugeelegalaidinformation.org/gender-related-persecution-and-women's-claims-asylum>. [hereinafter *Rights Initiative*].

many forms depending on the culture and context within which it occurs, including, for example, sexual violence,<sup>7</sup> female genital mutilation,<sup>8</sup> domestic violence,<sup>9</sup> honor killings, and etc.<sup>10</sup>

Asylum cases based on gender related persecution are coming before immigration judges throughout the United States more frequently. Although the United Nations (“UN”) estimates about half of all refugees are women,<sup>11</sup> asylum law is biased towards men.<sup>12</sup> “This is in part because of laws and social mores

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<sup>7</sup> See Sunny Kim, *Gender-Related Persecution: A Legal Analysis of Gender Bias in Asylum Law*, 2 AM. U. J. GENDER & L. 107, 121-122 (1994) (describing Japan’s historical use of “comfort women” by government order who are women conscripted for sexual service. They are often kidnapped, raped, beaten and tortured if they try to resist or escape. Also describing Bosnian “rape camps” where women are forced into sexual slavery).

<sup>8</sup> See Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 439, 440-41 (1988) (describing four types of increasing severity of physical and physiological trauma: 1) ritualistic circumcision, where the clitoris is merely nicked; 2) “sunna,” as Muslims call it, which involves the removal of the clitoral prepuce, but leaves the gland and the body of the clitoris intact; 3) excision or clitoridectomy, which is the removal of the gland of the clitoris; and 4) infibulation or “pharaonic” circumcision, where virtually all of the external female genitalia are removed).

<sup>9</sup> *In re R-A-*, 22 I. & N. Dec. 906, 908-09 (B.I.A. 1999) (describing the intense and violent torture of a wife by her husband for no other reason than she “belonged to him and he could do anything he wanted with her.”).

<sup>10</sup> See Valerie Plant, *Honor Killings and the Asylum Gender Gap*, 15 J. TRANSNAT’L L. & POL’Y 109, 110 (2005). (discussing how in many cultures, a family’s honor is sacred and aligned with each family members reputation. As a result, a family member whose actions are perceived to bring dishonor upon the family and community are often dealt with in the most extreme ways. Basis of honor killings include a female engaging in pre-marital sex; committing adultery; refusing an arranged marriage; socializing with males; refusing to dress modestly; cover her hair in public, or even failing to serve a meal quick enough. “The act might not have even occurred with the female’s consent, as there have been cases in which men killed women for being the victims of rape, or for her husband dreaming that his wife had betrayed him.”).

<sup>11</sup> United Nations, Resources for Speakers on Global Issues: Refugees, <http://www.un.org/en/globalissues/briefingpapers/refugees>.

<sup>12</sup> See generally Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L.J. 625 (1993) (explaining despite the fact there are more women suffering persecution worldwide, men

which dictate gender-specific behaviors and treatment.”<sup>13</sup> Women attempting to gain asylum in the United States are faced with asylum laws not sensitive to the unique persecution of women. Protection is often denied because the persecution women suffer does not fit perfectly into one of the five enumerated categories that presently define asylum status: persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>14</sup>

The definition of “refugee” as incorporated into the 1951 Convention Relating to the Status of Refugees (“1951 Convention”) and the United States Immigration and Nationality Act (“INA”) is gender neutral, making no distinction between male and female applicants.<sup>15</sup> Theoretically, women who fit into the current description of refugee may successfully claim asylum protection. However, “women are much less likely than men to be found to meet the eligibility criteria for refugee status because of the absence of explicit recognition of gender-based persecution.”<sup>16</sup> The fact is, “the roles of men and women in the societies from which asylum seekers originate are different from those in the countries in which they seek protection.”<sup>17</sup> The potential fear of gender persecution is based on a “cultural and societal practice so foreign to the American way of life” that denial of asylum claims based on such potential

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appear to gain asylum status with less difficulty than women. This is because the classifications and guidelines shaping the law were formulated by men with men in mind. Violating women’s basic rights involves a combination of gender-related physical, psychological and social factors, which reflects systems of gender oppression and gender social structuring).

<sup>13</sup> *Id.* at 626.

<sup>14</sup> Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101 (1988). [Hereinafter INA].

<sup>15</sup> Kelly, *supra* note 12, at 626-627.

<sup>16</sup> Kelly, *supra* note 12, at 626-627 (arguing women are less likely to meet eligibility criteria because of the social and political context in which the claims of women are adjudicated. The definition of “refugee” does not specify gender as one of the basis upon which asylum can be granted and in applying the refugee definition, adjudicators have traditionally neglected to incorporate the gender related claim of women in the interpretation of the grounds already enumerated).

<sup>17</sup> Crawley, *supra* note 6.

harm reflects “a deep ignorance regarding the severity and prevalence of gendered abuses abroad.”<sup>18</sup>

Female persecution is unique in the sense that women are often persecuted simply because they are women.<sup>19</sup> Women seeking asylum are often forced to fit their claim into the ambiguous category of “membership in a particular social group” (“PSG”).<sup>20</sup> Since no universal definition exists for what constitutes a PSG, courts are free to set their own standards, resulting in widely varying applications and results.<sup>21</sup>

Some women are subjected to human rights violations “merely because they are wives, mothers, daughters, or friends of people whom the authorities consider to be dangerous or undesirable.”<sup>22</sup> To illustrate the difference in the application of asylum law between men and women, consider the case of a Turkish wife illegally detained and violently tortured in an effort to force her husband to confess to membership in an illegal organization.<sup>23</sup> Although the husband might qualify for asylum on account of persecution for his membership in a PSG, the wife would not qualify under any of the enumerated categories despite being persecuted.<sup>24</sup>

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<sup>18</sup> Caitlin Steinke, *Male Asylum Applicants who Fear Becoming the Victims of Honor Killings: The Case for Gender Equality*, 17 CUNY L. REV. 233, 242 (2013).

<sup>19</sup> Plant, *supra* note 10, at 120.

<sup>20</sup> Plant, *supra* note 10, at 120.

<sup>21</sup> See Susanne J. Prochazka, *There is No Honor in Honor Killings: Why Women at Risk for Defying Socialsexual Norms must be Considered a “Particular Social Group” Under Asylum Law*, 34 T. JEFFERSON L. REV. 445, 454 (2012).

<sup>22</sup> Kim, *supra* note 7, at 121-22.

<sup>23</sup> Kim, *supra* note 7, at 122; (explaining the Communist party of Peru use violence against civilian women as a form of tactical warfare with soldiers and police routinely raping and murdering women).

<sup>24</sup> See Kim, *supra* note 7, at 122.

### III. CONFLICTING CLAIMS, CLAIMANTS, AND BASES OF POWER

#### A. Victims

Depending on the culture and context within which it occurs, gender-based persecution takes many forms. In many Middle-Eastern cultures, a family's honor is sacred and aligned with each family members' reputation.<sup>25</sup> As a result, a family member whose actions appear to bring dishonor upon the family and community are often dealt with in the most extreme ways. It is a widely held belief that killing the perpetrator of the alleged immoral conduct will "wash away the shame with blood and restore the tarnished honor."<sup>26</sup>

Amal, a seventeen-year-old Jordanian female was raped by a friend of her father and conceived a child.<sup>27</sup> Her family's attempt to obtain an abortion was futile.<sup>28</sup> In Jordan, pregnancy outside of marriage "carries an extremely negative stigma."<sup>29</sup> While Amal slept, her father and brother shot her eight times intending to kill her.<sup>30</sup> She survived and is currently being held in jail by the Jordanian government.<sup>31</sup>

Likewise, Samia Sarwar, a Pakistani woman, was subjected to ongoing and often severe physical abuse at the

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<sup>25</sup> See Plant, *supra* note 10, at 111. See also Lindsey N. Devers & Sarah Bacon, *Interpreting Honor Crimes: The Institutional Disregard Towards Female Victims of Family Violence in the Middle East*, 3 INT'L. J. OF CRIMINOLOGY & SOC. 359, 360 (2010) (explaining in Islamic communities, "family honor is directly linked to the purity and chastity of the daughters within the family unit).

<sup>26</sup> Prochazka, *supra* note 21, at 447.

<sup>27</sup> Kathryn C. Arnold, *Are the Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordanian Penal Code Analyzed Under the Convention of the Elimination of All Forms of Discrimination Against Women*, 23 PENN STATE INT'L L. REV. 1343, 1345 (2004) (explaining Amal informed her family a friend of her fathers who was staying with the family had raped her and she had become pregnant as a result).

<sup>28</sup> See *id.* (explaining Amal's family raised the funds for the abortion, however, the doctor Amal saw refused to administer the abortion as abortions are illegal in Jordan).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (explaining without protective custody Amal's father and brother will likely attempt to kill her again to restore honor to the family. The only viable way to protect her is to imprison her).

hands of her husband.<sup>32</sup> When Samia told her family she was getting a divorce, her parents, upset about the shame this would reflect on their family, hired a hit man.<sup>33</sup> Under a ruse, Samia's mother agreed to meet her at her lawyer's office.<sup>34</sup> Once there, the hit man shot and killed Samia and attempted to kill her lawyer as well.<sup>35</sup> Samia's mother witnessed her daughter's murder, calmly turned around and walked away, never looking back.<sup>36</sup>

Female genital mutilation ("FGM") is practiced in at least 26 regions worldwide, including Africa, Indonesia, Malaysia, and Yemen.<sup>37</sup> There are differing levels of FGM, but all result in irreversible damage both physically and psychologically.<sup>38</sup> FGM is recognized internationally as a violation of the human rights of women and children.<sup>39</sup> Not only does it reflect a "deep-rooted inequality between the sexes, and constitutes an extreme form of discrimination against women and girls," it violates a person's rights to "health, security and

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<sup>32</sup> See John A. Cohan, *Honor Killings and the Cultural Defense*, 40 CAL. W. INT'L L.J. 177, 195 (2010) (explaining Samira was in an arranged marriage. Her husband would often beat her and once threw her down the stairs while seven months pregnant).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (explaining how Samira's mother accompanied the hit man to the lawyers office. The hit man also attempted to kill Samira's lawyer, a prominent Pakistani Women's right lawyer. The lawyer has subsequently become the victim of several ongoing death threats, while authorities have done nothing to protect her).

<sup>36</sup> See *id.* (discussing honor crimes are often carried out by males with the aid of female family members. Even if the female family members do not agree, they must nevertheless participate or risk becoming victims themselves).

<sup>37</sup> See Shannon Nichols, *American Mutilations: The Effects of Gender-Biased Asylum Laws on the World's Women*, 6 KAN. J.L. & PUB. POL'Y 42, 42 (1996).

<sup>38</sup> See Slack, *supra* note 8 (describing four types of increasing severity of physical and physiological trauma).

<sup>39</sup> See *Sexual and reproductive health: Eliminating Female Genital Mutilation*, WORLD HEALTH ORG., <http://www.who.int/reproductivehealth/topics/fgm/about/en/>.

physical integrity, the right to be free from torture and cruel, inhuman or degrading treatment, and the right to life when the procedure results in death.”<sup>40</sup>

Victims of FGM are often held or tied down, cut with dull razors, kitchen knives, or broken glass, sewed back together with the thorns of catgut and the small opening preserved by the insertion of a tiny piece of wood or reed.<sup>41</sup> The wound is then covered in a “mixture of herbs, soil, and cow dung” to stem bleeding, followed by tightly binding the victims’ legs together to prevent ripping open the wound.<sup>42</sup> The physical consequences of FGM include the risk “of a series of infections from the retention of menstrual blood or urine, hemorrhaging, shock, or even death.”<sup>43</sup> Psychological consequences include “severe anxiety prior to mutilation, chronic irritability, sexual frustration and pain and depression associated with physical complications.”<sup>44</sup>

Due to the “intense shaming of women that accompanies gender-based violence, as well as women’s fears of retaliatory violence,” women who seek asylum in the United States are often further subjected to “judicial abuse,” both in their country of origin and the United States.<sup>45</sup> A victim of rape is unlikely to tell anyone what happened to her, as she may face severe punishment in her country, such as extreme ostracization, stoning, or even death.<sup>46</sup> She is unlikely to go to the police or to a hospital, as they may belittle her, publicize her rape, or report it to her husband.<sup>47</sup>

Once the asylum process has begun, the credibility of the female applicant is often questioned. A woman who fears an honor crime, for example, may have been taught to never speak about matters of sexuality or make eye contact with men.<sup>48</sup> The

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<sup>40</sup> *Id.*

<sup>41</sup> *See Nichols, supra note 37, at 43-44.*

<sup>42</sup> *See Nichols, supra note 37, at 44.*

<sup>43</sup> *See Nichols, supra note 37, at 44.*

<sup>44</sup> *See Nichols, supra note 37, at 44.*

<sup>45</sup> Irena Lieberman, *Women and Girls Facing Gender Based Violence, and Asylum Jurisprudence*, 29 HUM. RTS. 9, 10-11 (2002).

<sup>46</sup> *See id.* at 11.

<sup>47</sup> *See id.* (discussing women who do seek help from the government or medical care are often put in a worse position due to the stigma that accompanies such crimes and the obligation of the husband to act in accordance with social norms).

<sup>48</sup> *See id.*

victim is often suffering from posttraumatic stress resulting in “difficulty in recounting their ordeal confidently, coherently, and consistently.”<sup>49</sup> Indicators such as eye contact, memory retention and re-telling of the story are the same indicators judges use to assess creditability. The misunderstanding of cultural cues often leads to applicants appearing undependable.

Victims of such treatment are persecuted simply because they are female and share views in opposition of the culture and society in which they live. They have little power to make important decisions in a social context, are given little respect to have the freedom of choice and whose well-being suffers because their safety and health is often at stake. In direct contrast, perpetrators often exhibit great power and within society are highly respected because of their actions.

### **B. Perpetrators**

Perpetrators of gender-specific persecution are under the assumption their actions are permitted for several reasons: religious requirement, preserving group identity and maintaining cultural unity, protecting virginity and family honor by preventing immorality and furthering marriage goals, or simply because of the belief of male superiority.<sup>50</sup>

In certain cultures, a woman is considered the property of her father and brothers as male heads of the household; upon marriage, a woman becomes the property of their husband.<sup>51</sup> The men are obligated to provide shelter, food, and clothing and in return, women must strictly obey their male guardian(s) and refrain from any actual or perceived immoral conduct.<sup>52</sup> Perpetrators of honor crimes do not believe their acts are illegal, instead believing such acts are necessary to restore the family

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<sup>49</sup> *Id.*

<sup>50</sup> See Nicholas, *supra* note 37, at 44.

<sup>51</sup> See Rana Legr-Lehnardt, *Treat Your Women Well: Comparisons and Lessons from an Imperfect Example Across the Waters*, 26 S. ILL. U. L.J. 403, 408 (2002) (discussing the role of women in certain societies).

<sup>52</sup> See *id.*

honor.<sup>53</sup> Mohammed, an Economist who killed his wife, “was concerned with maintaining his job security, stating, ‘the only thing a man owns is his honor . . . .’”<sup>54</sup> The belief that honor killings are acceptable and required in such incidences of disobedience by their respective wife or sister is further compounded by the community perception the perpetrator is an innocent hero.<sup>55</sup>

Honor crimes are the product of a strict social system. Individuals are conditioned to “feed into [the] rigid understanding of what honor means.”<sup>56</sup> Family honor is crucial to the survival of the family. For this reason, “men are conditioned from a young age to cherish their honor and protect it through control over female relatives.”<sup>57</sup>

Perpetrators of FGM cite obedience to tradition and adherence to preservation of cultural identity.<sup>58</sup> “The ability to identify with one’s heritage and enjoy recognition as a full member of one’s ethnic group, with just claim to its social privileges and benefits,” is of utmost importance.<sup>59</sup> Therefore, “giving up the practice [of FGM] is viewed as a deviation from the social mores of community.”<sup>60</sup>

Similar to honor crimes, the practice of FGM is viewed as a way to “prevent promiscuity, preserve virginity, and as a result, preserve family honor.”<sup>61</sup> FGM is further justified because it increases a husband’s sexual pleasure.<sup>62</sup> In a society where women are considered subservient to men, perpetrators consider such a benefit as bestowing honor upon the wife.

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<sup>53</sup> See Arnold, *supra* note 27, at 1409 n. 1.

<sup>54</sup> See Arnold, *supra* note 27, at 1409 n. 1. (explaining Mohammed was afraid if he did not kill his wife to restore his honor, he would lose his job and reputation within the community. He was afraid if his wife remained alive, it would ruin his daughters and set a bad example).

<sup>55</sup> See Arnold, *supra* note 27, at 1409 n. 1.

<sup>56</sup> *Tamil girls too face the threat of ‘Honor’ killing*, HONOUR BASED VIOLENCE AWARENESS NETWORK, <http://hbv-awareness.com/tamil-girls-too-face-the-threat-of-honor-killing>.

<sup>57</sup> Clara Rubin, *Between Traditional Practice and Secular Law: Examining Honor Killings in Modern Turkey*, (Fall 2010) <http://middlab.middlebury.edu/files/2111/04/Honor-Killings-essay1.pdf>.

<sup>58</sup> See Nichols, *supra* note 37, at 43.

<sup>59</sup> See Nichols, *supra* note 37, at 43.

<sup>60</sup> See Nichols, *supra* note 37, at 43.

<sup>61</sup> See Nichols, *supra* note 37, at 43.

<sup>62</sup> See Nichols, *supra* note 37, at 43.

Perpetrators believe not only that they are entitled to behave in the manner in which they do, but in doing so, they are protecting their society from outside influence and preserving the culture and values on which societal norms rest.

### **C. Non-Government, Refugee, and Feminist Organizations**

Non-government, refugee, and feminist organizations (“NGOs”) are advocates for social change and campaign for such change vehemently around the globe. They are instrumental in achieving legal reform and lobby on both a national and international scale. NGOs play a vital role in “articulating and enforcing international human rights standards”<sup>63</sup> and “document and publicize violations of these standards”<sup>64</sup> to raise awareness and hold those in violation accountable.

There are several NGOs who advocate on behalf of female asylum applicants to address the gender-based challenges such applicants face in obtaining refugee status. Such organizations include: The Advocates for Human Rights,<sup>65</sup> Amnesty International,<sup>66</sup> Asylum Aid,<sup>67</sup> Center for Gender and

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<sup>63</sup> *Stop Violence Against Women, What is a Non-Governmental Organization?*, THE ADVO. FOR HUM. RTS., [http://www.stopvaw.org/What\\_Is\\_a\\_Non-Governmental\\_Organization](http://www.stopvaw.org/What_Is_a_Non-Governmental_Organization). (last visited Apr. 27, 2016).

<sup>64</sup> *Id.*

<sup>65</sup> *See Refugee & Immigration Rights*, THE ADVO. FOR HUM. RTS., [http://www.theadvocatesforhumanrights.org/refugees\\_and\\_immigrants](http://www.theadvocatesforhumanrights.org/refugees_and_immigrants). (last visited Apr. 27, 2016).

<sup>66</sup> *See Shiromi Pinto, 9 Ways You Defended Women’s Rights Worldwide*, AMNESTY INT’L, <https://www.amnesty.org/en/latest/campaigns/2016/03/9-ways-you-defended-womens-rights-worldwide/>. (last visited Apr. 26, 2016).

<sup>67</sup> *See Women’s Project, Promoting Fairness and Dignity*, ASYLUM AID, <http://www.asylumaid.org.uk/womens-project/>. (last visited Ap. 26, 2016).

Refugees Studies,<sup>68</sup> and Women's Refugee Commission.<sup>69</sup> Their collective goal is to promote women's human rights around the world and provide a forum for information and advocacy.

There is a three-fold reason as to why women are unable to equitably benefit from protection under the Refugee Convention. First, women's access to the asylum determination process is marred with procedural and evidential barriers.<sup>70</sup> Second, interpretations of the Refugee Convention have resulted in women's experiences being marginalized.<sup>71</sup> Third, decision-makers are often not sensitive to the cultural and social prohibitions placed on women, such as those discussed above.<sup>72</sup> In addition to NGOs working directly with female asylum seekers, NGOs have urged governments receiving asylum claims to create "specific procedural guidance in relation to adjudicating gender-based asylum cases"<sup>73</sup> to alleviate the procedural barriers female asylum seekers face. Furthermore, NGOs encourage those governments where a high numbers of gender related asylum cases originate to create and enforce legislature with the purpose of increasing the penalties and enforcement rates for gender-related crimes such as honor killings and FGM.<sup>74</sup> NGOs also provide advice and guidance on culturally sensitive training to educate decision makers and the public in general.<sup>75</sup>

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<sup>68</sup> See *Search Our Records, CGRS Asylum Records*, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/search-materials/search-our-resources>. (last visited Apr. 26, 2016).

<sup>69</sup> See *Women, Peace, & Security*, WOMEN'S REFUGEE COMM'N, <https://www.womensrefugeecommission.org/wps> (last visited Apr. 26, 2016).

<sup>70</sup> See *Crawley*, *supra* note 6.

<sup>71</sup> See *Crawley*, *supra* note 6.

<sup>72</sup> See *Crawley*, *supra* note 6.

<sup>73</sup> *Stop Violence Against Women, NGO Response*, THE ADVO. FOR HUM. RTS., [http://www.stopvaw.org/NGO\\_Response2](http://www.stopvaw.org/NGO_Response2). (last visited Apr. 27, 2016).

<sup>74</sup> See *Id.*

<sup>75</sup> *Aims and Objectives*, REFUGEE WOMENS ASS'N, <http://www.refugeewomen.org.uk/info/infom.htm>. (last visited Apr. 26, 2016).

#### D. Medical Bodies

Medical bodies such as the World Health Organization (“WHO”)<sup>76</sup> and the United Nations Children’s Fund (“Unicef”)<sup>77</sup> have long recognized the mental and physical impact women suffer as a result of the treatment they are subjected to because of cultural and societal norms. FGM, for example, has no known health benefits.<sup>78</sup> Instead, it causes both short term and long-term damage, and can even result in death.<sup>79</sup> FGM damages healthy tissue, comprises the physical integrity of the girl and interferes with natural functions of the body.<sup>80</sup> Aside from the severe pain experienced during and after the procedure, short term physical complications of FGM can include infection, hemorrhaging and swelling, urinary issues, damage to surrounding tissue, and death.<sup>81</sup> Long-term physical complications can include vaginal, menstrual, and sexual issues, increased risk of pregnancy related issues and fetal death, and the need for future surgeries.<sup>82</sup> Women often have to go through some form of repeated cutting and sewing during their lifetime, thereby further increasing their risk of short-term and long-term risks.<sup>83</sup> Physiological problems such as depression, posttraumatic stress disorder, and anxiety are very common.<sup>84</sup> Additionally, women and girls may suffer societal problems if they are unable to provide pleasure to their husbands or produce

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<sup>76</sup> *Female Genital Mutilation*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs241/en/>. (last visited Apr. 27, 2016).

<sup>77</sup> *Female Genital Mutilation/Cutting: A Global Concern*, UNICEF, [http://www.unicef.org/media/files/FGMC\\_2016\\_brochure\\_final\\_UNICEF\\_SPREAD.pdf](http://www.unicef.org/media/files/FGMC_2016_brochure_final_UNICEF_SPREAD.pdf) (last visited Apr. 27, 2016).

<sup>78</sup> See WORLD HEALTH ORG., *supra* note 39.

<sup>79</sup> See WORLD HEALTH ORG., *supra* note 39.

<sup>80</sup> See WORLD HEALTH ORG., *supra* note 39.

<sup>81</sup> See WORLD HEALTH ORG., *supra* note 76.

<sup>82</sup> See WORLD HEALTH ORG., *supra* note 76. (such as cutting open the stitching to allow sexual intercourse and childbirth).

<sup>83</sup> See WORLD HEALTH ORG., *supra* note 76.

<sup>84</sup> See WORLD HEALTH ORG., *supra* note 76.

children as a result of complications arising from the procedure.<sup>85</sup>

While the exact number is unknown, more than 200 million girls and women worldwide have been subjected to FGM in over 30 countries.<sup>86</sup> Although members of the community who have little medical training most often carry out FGM, some health care providers perform FGM because of the mistaken belief that the procedure is much safer when carried out by a trained medical provider.<sup>87</sup>

There have been substantial efforts made in the last three decades to counteract FGM.<sup>88</sup> The WHO, UNICEF, and the United Nations Population Fund (“UNFPA”) issued a joint statement against the practice of FGM. International response has included “international monitoring bodies and resolutions to condemn the practice and revised legal frameworks and growing political support to end FGM.”<sup>89</sup> While these efforts have resulted in an overall decline in the prevalence of FGM in the last three decades, the increasing population growth will likely see a significant rise in the number of FGM procedures performed.<sup>90</sup>

The WHO also details the often severe consequences of women who suffer repeated instances of domestic violence, such as Rodi Alvarado Pena mentioned earlier.<sup>91</sup> In addition to the immediate physical injuries abused women suffer, they may also suffer from the long term effects of chronic pain, eating problems, gastrointestinal disorders, and psychosomatic symptoms.<sup>92</sup> Abused women are at an increased risk of

<sup>85</sup> See Nichols, *supra* note 37, at 43.

<sup>86</sup> UNICEF, *supra* note 77 (FGM is concentrated in Africa, the Middle East and Asia. Of the 200 million, more than half of the victims live in Indonesia, Egypt, or Ethiopia).

<sup>87</sup> WORLD HEALTH ORG., *supra* note 76 (Traditional circumcisers in the community traditional carry out the procedure of FGM. Such persons also commonly carry out other central roles in the community such as attending childbirths.).

<sup>88</sup> WORLD HEALTH ORG., *supra* note 76.

<sup>89</sup> WORLD HEALTH ORG., *supra* note 76. (26 countries in Africa and the Middle East, as well as 33 countries worldwide have enacted laws against FGM).

<sup>90</sup> UNICEF, *supra* note 77.

<sup>91</sup> See *In re R-A-*, 22 I. & N. Dec. 906, 908-09 (B.I.A. 1999).

<sup>92</sup> *Stop Violence Against Women, Health Effects of Domestic Violence*, THE ADVO. FOR HUM. RTS.,

unplanned pregnancy and sexually transmitted diseases, such as HIV.<sup>93</sup> Research shows abused women generally have a history of vaginal and cervical infections, kidney infections, and often suffer pregnancy related complications.<sup>94</sup> In addition to the physical impact on abused women, physiological effects include depression, posttraumatic stress disorder, anxiety, low self-esteem, and greater risk of substance abuse problems and even suicide.<sup>95</sup> Statistics further show an estimated 38% of abused women are intentionally murdered by their partners, and 45% of abused women have been the victim of an attempted murder at least once.<sup>96</sup>

Violence against women is a growing public epidemic, “it pervades all corners of the globe, puts women’s health at risk, limits their participation in society, and causes great human suffering.”<sup>97</sup> Research shows health care providers need more education on the risk associated with domestic violence. They need training to take victims more seriously and respond appropriately to their needs.<sup>98</sup>

#### IV. IDENTIFY PAST TRENDS IN DECISIONS AND CONDITIONING FACTORS

##### A. Development of Asylum Law

Modern asylum law developed as a need to rehabilitate the millions of people displaced by World War II (“WWII”).<sup>99</sup> The UN adopted the *Convention and Protocol Relating to the*

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[http://www.stopvaw.org/health\\_effects\\_of\\_domestic\\_violence](http://www.stopvaw.org/health_effects_of_domestic_violence). (last visited Apr. 27, 2016).

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> *See id.*

<sup>97</sup> WORLD HEALTH ORG., *Global & Regional Estimates of Violence Against Women: Prevalence & Health Effects of Intimate Partner Violence & Non-Partner Sexual Violence* 35 (2013), [http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf)

<sup>98</sup> *See Id.*

<sup>99</sup> Prochazka, *supra* note 21, at 452.

*Status of Refugees* in 1951 to remedy this problem.<sup>100</sup> However, the Convention was restricted only to European refugees following WWII, and as such, the United States was not a party to the Convention.<sup>101</sup>

In 1967, the UN adopted *The Protocol Relating to the Status of Refugees* (“1967 Protocol”) removing “the geographic and temporal limits of the 1951 Convention . . . [and] also called for nations to apply the substantive provisions of the 1951 Convention.”<sup>102</sup> The United States accepted the Protocol and ratified it via the Refugee Act of 1980, which itself was an amendment to the Immigration and Nationality Act of 1965.<sup>103</sup> The Refugee Act sought to establish a uniform definition of “refugee” and establish a “uniform procedure for the admission and settlement of refugees into the United States.”<sup>104</sup>

### B. Mechanics of United States Asylum Law

To understand the reforms necessary to alleviate these problems, a general understanding of the current asylum system is necessary.

For women escaping the threat of gender-based persecution, asylum does not begin until she arrives in the United States.<sup>105</sup> To qualify, “the woman must establish she is a refugee within the meaning of the Immigration and Nationality Act section 101(a)(42)(A).” The INA defines a “refugees” as:

Any 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, or

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<sup>100</sup> Prochazka, *supra* note 21, at 453.

<sup>101</sup> Prochazka, *supra* note 21, at 453

<sup>102</sup> Prochazka, *supra* note 21, at 453-54.

<sup>103</sup> Prochazka, *supra* note 21, at 454.

<sup>104</sup> Prochazka, *supra* note 21, at 454.

<sup>105</sup> Prochazka, *supra* note 21, at 455.

membership into a particular social group, or political opinion.<sup>106</sup>

Therefore, to qualify as a refugee under this Act, women must establish either past persecution or a “well-founded fear” she will be persecuted in the future on account of a protected ground: race, religion, nationality, membership in a particular social group, or political opinion.<sup>107</sup> If successful, the woman “is entitled to remain in the United States indefinitely.”<sup>108</sup> The burden of proof to satisfy the INA elements remains with the applicant at all times.<sup>109</sup>

### ***1. Past Persecution or a Well Founded Fear of Future Persecution***

The INA does not define “persecution” and “no universal definition has been accepted for use in immigration proceedings.”<sup>110</sup> The Board of Immigration Appeals (“BIA”) interprets “persecution” as “harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”<sup>111</sup> The United Nations High Commission for Refugees’ (“UNHCR”) *Handbook of Procedures and Criteria for Determining Refugee Status* states persecution always includes a “threat to life” or “[o]ther serious violations of human rights.”<sup>112</sup> BIA further

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<sup>106</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101 (1988).

<sup>107</sup> *Id.*

<sup>108</sup> Prochazka, *supra* note 21, at 455.

<sup>109</sup> Prochazka, *supra* note 21, at 503, n. 29.

<sup>110</sup> Shira T. Shapiro, *She Can do No Wrong: Recent Failures in America’s immigration Courts to Provide Women Asylum From “Honor Crimes” Abroad*, 18 AM. U. J. GENDER SOC. POL’Y & L. 293, 302 (2010).

<sup>111</sup> Amy B. Kretkowski, *Continuing Persecution: An Argument for Doctrinal Codification in Light of In re A-T and Brand X*, 94 IOWA L. REV. 331, 338 (2008).

<sup>112</sup> U.N. High Comm’r for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶51,

recognizes “a government, or persons a government is unwilling or unable to control, can inflict persecution.”<sup>113</sup> Gender crimes mainly fall under private acts of violence; the UNHCR Office also provides “private acts of violence . . . can be considered persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection.”<sup>114</sup>

Since there is no universally accepted definition of persecution, determining what constitutes a “well-founded fear” of future prosecution is difficult. Certain jurisdictions and governmental entities apply the reasonable person standard: “the asylum seeker must show that a reasonable person in the alien’s position would fear persecution if returned to the alien’s native country.”<sup>115</sup> The difficulty in meeting this standard is exemplified by Rodi Alvarado Pena discussed earlier.

## ***2. Persecution on Account of a Protected Ground***

The alleged persecution must fit into one of the enumerated grounds. Gendered crimes do not fit into race, religion, nationality, or political opinion; therefore, “many of those seeking asylum because they have been persecuted or threatened with persecution in some way for their gender or violation of gender-based norms” are forced to fit their claim into the vague category of “membership in a particular social group.”<sup>116</sup> Neither the UN nor, Congress provides a definition for a PSG. Consequently, this has left courts free to set their own standards resulting in widely varying applications and results.<sup>117</sup>

According to the UNHCR *Handbook of Procedures and Criteria for Determining Refugee Status*, a particular social group “normally comprises persons of similar background, habits, or social status.”<sup>118</sup> The BIA has interpreted PSG to be “common characteristics that members of a group either cannot

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U.N. Doc. HCR/1P/4/Eng/Rev.1 (Dec. 2011). [hereinafter *UNHCR Handbook*].

<sup>113</sup> Shapiro, *supra* note 110, at 302.

<sup>114</sup> Shapiro, *supra* note 110, at 302.

<sup>115</sup> Shapiro, *supra* note 110, at 302.

<sup>116</sup> Plant, *supra* note 10, at 118.

<sup>117</sup> See Prochazka, *supra* note 21, at 454.

<sup>118</sup> *UNHCR Handbook*, *supra* note 112, at 13, ¶77.

change, or should not be required to change because such characteristics are fundamental to their individual identities.”<sup>119</sup> An applicant “cannot use the threat of a particular form of persecution as the characteristic that unites her with other individuals facing the same form of persecution.”<sup>120</sup> Furthermore, courts are prohibited from creating a PSG; the PSG “must be a group currently recognized in that country as a social subdivision in the culture.”<sup>121</sup>

According to precedent, all PSGs must meet a threshold standard: (1) it must be non-circular; (2) limited in scope; and (3) satisfy the causation element where the persecution of the applicant is on account of the applicant’s membership within a PSG.<sup>122</sup>

#### **i. A Viable PSG May Not be Circular**

This requirement dictates that a social group cannot be defined by mutual victimization.<sup>123</sup> “The social group may not be circularly defined by the fact its members suffer persecution. [Rather] individuals in the group must share a narrowing characteristic other than their risk of being persecuted.”<sup>124</sup>

Domestic violence often exemplifies the use of a circularly defined PSG where persecution defines the social group. In *Archaga-Ponce v. Attorney General*,<sup>125</sup> the applicant sought asylum on the basis of being a victim of domestic violence, claiming she and victims like her constitute a particular social group.<sup>126</sup> The court denied her application because her membership in the social group was “defined only

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<sup>119</sup> Steinke, *supra* note 18, at 245.

<sup>120</sup> Steinke, *supra* note 18, at 246.

<sup>121</sup> Steinke, *supra* note 18, at 246.

<sup>122</sup> Prochazka, *supra* note 21, at 458.

<sup>123</sup> Prochazka, *supra* note 21, at 458.

<sup>124</sup> *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6<sup>th</sup> Cir. 2005).

<sup>125</sup> See generally *Archaga-Ponce v. U.S. Atty. Gen.*, 432 Fed. Appx. 940 (11<sup>th</sup> Cir. 2011).

<sup>126</sup> See Prochazka, *supra* note 21, at 458.

by the harm she was attempting to flee.”<sup>127</sup> There was no narrowing characteristic present other than her risk of persecution.

The BIA has reasoned the policy behind prohibiting mutual victimization acting as a common characteristic for a particular social group is because the BIA has a “legitimate interest in resisting efforts to classify people who are targets of persecution as members of a particular social group when they have little or nothing in common beyond being targets.”<sup>128</sup> This rationale fits with the second threshold standard of prohibiting overly broad PSGs.

## ii. A Viable PSG Must be Limited in Scope

A PSG may not be unacceptably broad or sweeping in nature. The proposed PSG description must be sufficiently particular to create a benchmark for determining group membership.<sup>129</sup> Courts generally reject overly expansive social groups because “the attributes of a particular social group must be recognizable and discrete.”<sup>130</sup>

Courts further argue possession of broadly based characteristics such as gender, age, or other sweeping demographic division, “will not by itself endow individuals with membership in a particular group.”<sup>131</sup> However, an exception to the general rule against broad PSGs is “where the threat of harm is persuasive in a culture, a PSG may be created that is broad enough to include all possible victims.”<sup>132</sup> The Seventh Circuit in *Sarhan v. Holder*<sup>133</sup> and the Ninth Circuit in *Mohammed v. Gonzales*<sup>134</sup> have recognized the persuasiveness of cultural norms that may give rise to socio-norms that impose behavioral obligations on women and permit males to enforce such obligations in the most heinous ways.<sup>135</sup> In *Sarhan*, a Jordanian

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<sup>127</sup> See Prochazka, *supra* note 21, at 458.

<sup>128</sup> *Gatimi v. Holder*, 578 F.3d 611, 616 (7<sup>th</sup> Cir. 2009).

<sup>129</sup> See Prochazka, *supra* note 21, at 503 n. 90.

<sup>130</sup> *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

<sup>131</sup> *Id.*

<sup>132</sup> Prochazka, *supra* note 21, at 459-60.

<sup>133</sup> See generally *Sarhan v. Holder*, 658 F.3d 649 (7<sup>th</sup> Cir. 2011).

<sup>134</sup> See generally *Mohammed v. Gonzales*, 400 F.3d 785 (6<sup>th</sup> Cir. 2008).

<sup>135</sup> See *Sarhan*, 658 F.3d at 656 (reasoning the threat faced by women is a “piece of a complex cultural construct that entitles male members of families

wife was accused of committing adultery.<sup>136</sup> To restore honor to the family, she must be killed. Such killings are commonplace around the world and typically happen in countries where the moral code tightly restricts the behavior of women, government offers little protection for the victims, and killers receive light punishments, if charges are not dropped altogether.<sup>137</sup> In *Gonzales*, a young Somalian girl was the victim of genital mutilation.<sup>138</sup> In Somalia, where genital mutilation is deeply rooted in tradition, 98% of the female population is subjected to such mutilation.<sup>139</sup> Where the practice is deeply imbedded in the culture, acts such as honor killing and genital mutilation may be considered persuasive enough to constitute a PSG.<sup>140</sup>

### iii. A Viable PSG Must Satisfy the Causation Element

This requirement dictates that fear of persecution must be on account of the applicant's membership within a viable PSG.<sup>141</sup> The applicant's membership in a PSG need not be the sole or dominant cause of persecution, rather, must only be a relevant contributing factor.<sup>142</sup> Jurisdictions differ on whether the casual link between membership within a PSG and persecution must be explicitly established, or whether causation is subsumed into the analysis.<sup>143</sup>

The court in *Sarhan* reasoned women whose behavior violates socio-sexual norms form a coherent social group, whom

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dishonored by perceived bad acts of female relatives to kill those women.”), and *Mohammed*, 400 F.3d at 798 (reasoning given the condition of the region of Somalia, a PSG group could be defined as “Somalian females” because “female genital mutilation was deeply imbedded in the culture throughout the nation [of Somalia] and was performed on approximately 98% of females.”).

<sup>136</sup> *Sarhan*, 658 F.3d at 651.

<sup>137</sup> *Id.*

<sup>138</sup> *See Mohammed*, 400 F.3d at 785.

<sup>139</sup> *Id.* at 790

<sup>140</sup> *See Prochazka*, *supra* note 21, at 460-61.

<sup>141</sup> *See Prochazka*, *supra* note 21, at 457.

<sup>142</sup> *See Prochazka*, *supra* note 21, at 461.

<sup>143</sup> *See Prochazka*, *supra* note 21, at 461.

if killed, it is done so on account of their membership in that group.<sup>144</sup>

### C. Application of U.S. Asylum Law

Since there is no universal definition of a PSG, courts are free to set their own standards resulting in widely varying applications and results.<sup>145</sup> The lack of uniform definition of a PSG has led to great inconsistencies in the application of asylum law. In the context of gender-based persecution, the lack of guidance as to what definitively constitutes “persecution” has left the term open to different levels of interpretation. As a result, the core of viability of membership in a PSG depends on which of the five methods of interpretation is applied by the courts: (i.) the immutable characteristic approach; (ii.) the voluntary association approach; (iii.) the social perception approach; (iv.) the social viability approach; and (v) the “gender-plus” approach.<sup>146</sup>

#### i. The Immutable Characteristic Approach

The Immutable Characteristic Approach originated in *Matter of Acosta*,<sup>147</sup> where a taxicab driver applied for asylum because he received death threats from Guerillas due to his refusal to participate in Guerilla-ordered work stoppages. In deciding *Acosta*, the BIA applied the doctrine of *ejusdem generis*,<sup>148</sup> thereby establishing the seminal definition of a PSG.<sup>149</sup> The BIA reasoned “because each of the enumerated nexuses of “race,” “religion,” “nationality,” and “political opinion” have such an immutable characteristic, the more general term of “membership in a particular social group” ought to be interpreted in the same manner as the others.”<sup>150</sup> Thus, the BIA argued an immutable characteristic ought to define membership in a PSG. The BIA further distinguished two

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<sup>144</sup> See *Sarhan*, 658 F.3d at 662.

<sup>145</sup> See Prochazka, *supra* note 21, at 450.

<sup>146</sup> See Prochazka, *supra* note 21, at 463.

<sup>147</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 234 (B.I.A. 1985).

<sup>148</sup> Meaning literally “of the same kind.”

<sup>149</sup> See Prochazka, *supra* note 21, at 464.

<sup>150</sup> *Acosta*, 19 I. & N. Dec. 211 at 233.

categories of immutable characteristics which qualify under its definition of a PSG: “either an innate [characteristic] such as sex, color, or kinship ties, or a shared past experience.”<sup>151</sup> The policy rationale behind the BIA immutable characteristic approach is “preserving the concept that refuge is restricted to individuals who are unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.”<sup>152</sup>

In *Acosta*, the BIA denied the applicant’s claim because he could have avoided Guerilla death threats by simply changing jobs.<sup>153</sup> The applicant’s membership in a PSG was not based on an immutable characteristic. Many courts have applied *Acosta*’s immutable characteristic standard of “interpreting a PSG as encompassing any group persecuted because of shared characteristics that are either immutable or fundamental.”<sup>154</sup>

### **ii. The Voluntary Association Approach**

The Voluntary Association Approach was developed by the Ninth Circuit<sup>155</sup> in *Sanchez-Trujillo v. INS*<sup>156</sup> in a bid to carefully evaluate the statutory language of asylum law.<sup>157</sup> In *Sanchez-Trujillo*, the court determined a PSG “implies a collection of people closely affiliated with each other, who are actuated by some common interest,” thus establishing a PSG when there is a “voluntary association among group members.”<sup>158</sup>

In *Sanchez-Trujillo*, the court denied the applicant’s claim, finding a PSG consisting of “young, urban, working class males of military age who maintained political neutrality” failed

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 234.

<sup>153</sup> *Id.*

<sup>154</sup> See Prochazka, *supra* note 21, at 465.

<sup>155</sup> The Ninth Circuit is the only circuit to apply the voluntary association approach.

<sup>156</sup> *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9<sup>th</sup> Cir. 1986).

<sup>157</sup> See Prochazka, *supra* note 21, at 465.

<sup>158</sup> *Sanchez-Trujillo*, 801 F.2d at 1576.

to meet the voluntary association relationship standard because the proposed PSG would incorporate a “sweeping demographic division that would naturally manifest a plethora of different lifestyle . . . thereby constituting an unacceptably broad PSG.”<sup>159</sup>

### iii. The Social Perception Approach

The UNHCR defines the Social Perception Approach as a “standard that examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.”<sup>160</sup> The individuals of the social group must possess some fundamental characteristic common to all “which serves to distinguish them in the eyes of a persecutor or in the eyes of the outside world in general.”<sup>161</sup>

The Second Circuit applied this approach in *Gomez v. INS*,<sup>162</sup> where the applicant claimed membership in a PSG based on her status as a victim of repeated rapes and beatings by Guerilla rebel forces, arguing she was a member of a “group of women who have been previously battered and raped by Salvadoran Guerillas.”<sup>163</sup> The court denied her claim because a potential persecutor would not be able to identify a proposed group of past victims of Guerilla attacks.<sup>164</sup>

### iv. The Social Visibility Approach

The Social Visibility Approach evolved from the Social Perception Approach, but, alternatively, “requires that a member of a PSG be visible to society as a whole as a member of the PSG under which the applicant seeks asylum.”<sup>165</sup>

This approach is controversial due to the lack of definition of what constitutes sufficient social visibility. Some courts insist social visibility requires a discernable characteristic

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<sup>159</sup> *Id.* at 1577.

<sup>160</sup> U.N. High Comm’r for Refugees, *Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, United Nations High Commissioner for Refugees, ¶7, U.N. Doc. HCR/GIP/02/02 (May 7 2002).

<sup>161</sup> *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir.1991).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 663.

<sup>164</sup> *See id.* at 664.

<sup>165</sup> Prochazka, *supra* note 21, at 468.

such as appearance, gait, or speech pattern, which would allow a complete stranger to identify a group member on the street.<sup>166</sup> Of particular concern are marginalized subsets of society who often hide their discernable characteristics to avoid social stigmas and potential hate crimes.<sup>167</sup> Victims of human trafficking or domestic violence “are inherently invisible” due to the shame that often accompanies victimization, and thus would likely be unsuccessful with their asylum claim. As a result, some scholars have criticized this approach, suggesting “denial of asylum protection due to lack of social visibility when the applicant is forced to hide her distinguishable characteristic for fear of persecution may lead to the exclusion of some of the most vulnerable refugees.”<sup>168</sup>

#### v. The “Gender-Plus” Approach

Gender alone is generally considered too broad to form the basis of a PSG.<sup>169</sup> However, in *Cece v. Holder*, the en banc Seventh Circuit recognized that “the formulation of gender plus one or more narrowing characteristics is a legitimate method to form a cognizable social group.”<sup>170</sup> The “*plus one characteristic*” has been recognized to include nationality, ethnicity, religion, marital or relationship status, tribal affiliation, age, kinship ties, opposition of abuse, and transgression of social or cultural norms.<sup>171</sup>

The gender plus approach in construing a viable PSG is flexible, but still limits the granting of asylum to situations

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<sup>166</sup> See *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).

<sup>167</sup> See Prochazka, *supra* note 21, at 469 (using gay men and women as well as victims of domestic violence and the clandestine nature of human trafficking as examples).

<sup>168</sup> See Prochazka, *supra* note 21, at 469.

<sup>169</sup> See Prochazka, *supra* note 21, at 469.

<sup>170</sup> *Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013).

<sup>171</sup> Natalie Nanasi, *Lessons from Matter of A-T-: Guidance for Practitioners Litigating Asylum Cases Involving a Spectrum of Gender-Based Harms, From Female Genital Mutilation to Forced Marriage and Beyond*, 12-02 IMMIGR. BRIEFINGS 1 (Feb. 2012) (Other circuits and the BIA has found these to be the characteristics).

where the immutable character trait of gender is combined with another trait in order to limit the broadness of gender.<sup>172</sup>

#### **D. Case Study of the Inconsistent Application of US Asylum Law**

In all asylum cases, “an adjudicator must make a finding of ‘persecution or a well-founded fear of persecution.’”<sup>173</sup> Thus, relevant case law turns on how the immigration courts, the BIA, and the federal courts have interpreted this term.

The decisions that follow demonstrate that the standards employed to evaluate asylum claims have been applied inconsistently and have created a system that lacks cohesion and predictability.<sup>174</sup> Although both petitioners in *Lazo-Majano v. INS*<sup>175</sup> and *Gomez V. INS*<sup>176</sup> were from El Salvador, and both complained of repeated instances of beatings and rape by authoritarian figures, only Lazo-Majano was granted asylum.<sup>177</sup>

##### **1. Same Country, Same Persecution**

The Ninth Circuit in *Lazo-Majano* granted asylum to a Salvadoran woman who had been beaten and raped repeatedly by an army officer over a number of years.<sup>178</sup> Olimpia Lazo-Majano fled to the United States seeking asylum.<sup>179</sup> The immigration judge denied her claim on the grounds “the harm she feared was strictly personal and did not constitute persecution within the act.”<sup>180</sup> The Ninth Circuit reversed stating Lazo-Majano’s persecution was fervent throughout: “Olimpia has been singled out to be bullied, beaten, injured, raped, and enslaved. . . . conducted by a member of the Armed Forces, a

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<sup>172</sup> See Prochazka, *supra* note 21, at 469

<sup>173</sup> Lucy Akinyi Orinda, *Securing Gender-Based Persecution Claims: A Proposed Amendment to Asylum Law*, 17 WM. & MARY J. WOMEN & L. 665, 674 (2010).

<sup>174</sup> See *id.* at 682.

<sup>175</sup> *Lazo-Majano v. INS*, 814 F.2d 1432, 1433-34 (9th Cir. 1987).

<sup>176</sup> *Gomez*, 947 F.2d at 663.

<sup>177</sup> See *Lazo-Majano*, 814 F.2d at 1435. (The Ninth Circuit reversed the decision of the Immigration Judge denying respondent asylum).

<sup>178</sup> See *id.* at 1433-34.

<sup>179</sup> See *id.*

<sup>180</sup> Kelly, *supra* note 12, at 637.

military power that exercises domination over much of El Salvador.”<sup>181</sup>

Conversely, the Second Circuit in *Gomez*, upheld the denial of Salvadoran native Carmen Gomez, on the grounds she did not present sufficient evidence to establish fear of persecution on account of her membership in a particular social group.<sup>182</sup> Similar to Lazo-Majano, Gomez, had been repeatedly beaten and raped by Guerilla forces on several occasions.<sup>183</sup> The court in upholding the denial found Gomez had failed to show that future persecutors would not be able to identify members of the purported social group. The court stated, “like the traits which distinguish the other four enumerated categories, the attributes of a particular social groups must be recognizable and discrete . . . possession of broadly-based characteristics such as gender will not by itself endow individuals with membership in a particular group.”<sup>184</sup>

## 2. *Dependent of which officer or judge hears the case*

Which asylum officer or judge hears a case within a circuit further compounds the problem of inconsistency between Circuits.<sup>185</sup> The adjudication of asylum claims is often compared to that of a game of Russian roulette.<sup>186</sup> A petitioner’s potential for success on an asylum claim is affected not only by one’s assignment to a particular immigration judge, but also the gender of the immigration judge coupled with his or her past work experience.<sup>187</sup> A 2007 study analyzed seven years worth

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<sup>181</sup> *Lazo-Majano*, 814 F.2d at 1434.

<sup>182</sup> *See Gomez*, 947 F.2d at 662.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 663.

<sup>185</sup> *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (arguing the decision whether to grant a petitioner asylum relief may be determined by which court or official presides over the matter, as much as it is by the facts and law of the case).

<sup>186</sup> *See id.*

<sup>187</sup> *See id.*

of asylum decisions by asylum officers, immigration judges, the BIA, and the U.S. Courts of Appeals.<sup>188</sup> The study revealed, for example, “Columbian asylum applicants whose cases were adjudicated in the federal immigration court in Miami had a 5% chance of prevailing with one of that court’s judges and an 88% chance of prevailing before another judge in the same building.”<sup>189</sup> Similarly, “a Chinese asylum seeker unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of success on her claim, as compared to 47% nationwide.”<sup>190</sup>

These cases and statistics demonstrate the standards employed to evaluate asylum claims have been applied inconsistently, and have thus “created a system that lacks cohesion and predictability.”<sup>191</sup>

### **E. Mechanics and Application of Asylum Law in Canada**

While the UNHCR has published standards of how countries should handle refugees and asylum seekers, asylum guidelines vary from country to country, especially gender-based asylum.<sup>192</sup> In addition to the United States of America, Canada also handles a majority share of annual asylum claims worldwide and, therefore, has made efforts to “solidify their guidance on adjudicating gender based claims.”<sup>193</sup>

#### **1. Canada**

Canada became the first country to take steps to specifically recognize the adjudication of gender-based asylum claims.<sup>194</sup> The Immigration Act<sup>195</sup> of Canada governs “asylum

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<sup>188</sup> *See id.*

<sup>189</sup> *Id.* at 296.

<sup>190</sup> *Id.* at 329.

<sup>191</sup> Orinda, *supra* note 173, at 682.

<sup>192</sup> *See Law & Policy on Gender-Based Asylum*, THE ADVO. FOR HUM. RTS., (last visited Apr. 27, 2016), [http://www.stopvaw.org/Law\\_and\\_Policy4](http://www.stopvaw.org/Law_and_Policy4).

<sup>193</sup> *Id.*

<sup>194</sup> Daniel McLaughlin, *Recognizing Gender-Based Persecution as Grounds for Asylum*, 3 WIS. INT’L L.J. 217, 241 (1994-1995).

<sup>195</sup> *See* Immigration Act of 1976-77, R.S.C. 1985, c I-2, § 1-123.

procedures and immigration”<sup>196</sup> and The Immigration and Refugee Board<sup>197</sup> (hereinafter referred to as “IRB”) “determines the status of all refugees who enter Canada.” Section 2 of the Immigration Act provides a Convention Refugee is any person who:

- (a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, is
  - (i) outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail [her]self of the protection of that country, or
  - (ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by [reason] of that fear, is unwilling to return to that country.<sup>198</sup>

The definition of a “refugee” in the Immigration Act does not include gender as an independent enumerated ground. Therefore, in 1993, pursuant to section 65(3) of the Immigration Act,<sup>199</sup> Canada published “*Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*”<sup>200</sup> (“Guideline 4”).

Guideline 4 states, “women who are unable to obtain government protection from spousal abuse, who are subject to violence by public officials, or who fear persecution for violating discriminatory laws, traditions, or customs, will be

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<sup>196</sup> Gregory A. Kelson, *Gender-Based Persecution & Political Asylum: The International Debate for Equality Begins*, 6 TEX. J. WOMEN & L. 181, 201 (1996-1997).

<sup>197</sup> See Immigration Act of 1976-77, R.S.C. 1985, c I-2, § 57(1).

<sup>198</sup> Immigration Act of 1976-77, R.S.C. 1985, c 1-2, § 2.

<sup>199</sup> Immigration Act of 1976-77, R.S.C. 1985, c 1-2, § 65 (3).

<sup>200</sup> IMMIGRATION & REFUGEE BOARD, Ottawa, Canada, *Guidelines Issued by the Chair-person, Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution*, <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx>.

given special consideration for refugee status.”<sup>201</sup> Such violations can include a woman wearing make-up, wearing clothes of her choice, or choosing a spouse rather than accepting an arranged marriage.<sup>202</sup> Guideline 4 also recognizes the unique persecution women are subjected to, in the form of bride burning, compulsory sterilization, genital mutilation and infanticide.<sup>203</sup>

Despite this mandate, Guideline 4 does not enumerate gender as an independent ground on which a claim of persecution can rest.<sup>204</sup> Rather, Guideline 4 seeks to establish the need to determine “the linkage between gender, the feared persecution and one or more of the definition grounds.”<sup>205</sup> A refugee, whom an adjudicator determines does not qualify as a traditional “refugee” as defined in the Immigration Act, may appeal this decision directly to the IRB.<sup>206</sup> The IRB will hear the appeal and determine for itself if the persons qualifies by determining whether there is a linkage between gender and feared persecution, as iterated in Guideline 4.<sup>207</sup>

Canada has found there are four critical issues raised by gender related refugee claims, and therefore seeks to include discussion of these areas in determining refugee status, with the enactment of Guideline 4:

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<sup>201</sup> Kristine M. Fox, *Gender Persecution: Canadian Guidelines Offer a Model for Refugee Determination in the United States*, 11 ARIZ. J. INT’L & COMP. L.J. 117, 118 (1994) (citing ALAN THOMPSON, *Canada First in Recognizing Abused Women as Refugees*, 1993).

<sup>202</sup> *Third Circuit Recognizes Potential Asylum Claim Based on Gender*, 71 INTERPRETER RELEASES 164 (Jan. 24, 1994); see also Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L.J. 625, 662 (1993).

<sup>203</sup> Mattie L. Stevens, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL’Y 179, 197 (1993).

<sup>204</sup> Melanie Randall, *Refugee Law & State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN’S L. J. 281, 289 (2002).

<sup>205</sup> IMMIGRATION & REFUGEE BOARD, *supra* note 200.

<sup>206</sup> Randall, *supra* note 204.

<sup>207</sup> See IMMIGR. & REFUGEE BOARD, *supra* note 200 (stating if that person does not qualify, the person can make an appeal to the federal court of appeals “on any question of law, including a question on jurisdiction. This is the final course of appeal for a refugee).

(1) To what extent can women making a gender-related claim of fear of persecution successfully rely on any one, or a combination, of the five enumerated grounds of the Convention refugee definition?; (2) Under what circumstances does sexual violence, or a threat thereof, or any other prejudicial treatments of women constitute persecution, as that term is jurisprudentially understood?; (3) What are the key evidentiary elements, which decision-makers have to look at when considering a gender-related claim?; and (4) What special problems do women face when called upon to state their claim at refugee determination hearings, particularly when they have had experiences that are difficult and often humiliating to speak about?<sup>208</sup>

## 2. *Canadian Case Law*

Canada has dealt with several women seeking asylum based on gender persecution claims. Unlike the United States however, these women have been granted asylum based on their membership in a particular social group. Fear of persecution was identified in the Seminole Supreme Court case *Ward v. Canada Minister of Employment and Immigration*.<sup>209</sup> While this case involves a male claimant, its opinion molded the contours of “membership in a particular social group” and set the precedent for future cases. In this case, the claimant Mr. Ward had been a member of the Irish National Liberation Army (“INLA”).<sup>210</sup> While a member, he allowed an INLA hostage, who was awaiting execution, to escape.<sup>211</sup> When his role was discovered

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<sup>208</sup> *See id.*

<sup>209</sup> *See generally* *Ward v. Canada Minister of Employment and Immigration* (1993), 2 S.C.R. 689 (Can.).

<sup>210</sup> *See* Audrey Macklin, *Canada Attorney-General v. Ward: a Review Essay*, 6 INT’L J. REFUGEE L. 362, 363 (1994).

<sup>211</sup> *See id.*

by the INLA, Mr. Ward was detained, tortured, and sentenced to death.<sup>212</sup> Mr. Ward was able to escape and sought protection from the Irish Police.<sup>213</sup> The Irish Police however, charged Mr. Ward for his role in the initial hostage-taking and was eventually sentenced to three years in prison.<sup>214</sup> Upon his release, Mr. Ward obtained assistance from a prison Chaplin in arranging for his flight to Canada, where he claimed refugee status.<sup>215</sup> Mr. Ward's claim was initially successful but it was overturned. The appeal eventually made its way to the Supreme Court of Canada.<sup>216</sup>

In outlining the correct approach to defining a particular social group, La Forest J. draws on the *Canadian Charter of Rights and Freedoms*<sup>217</sup> jurisprudence and identifies three possible categories that may constitute a "particular social group."<sup>218</sup> Of particular importance is that La Forest J. mentions, "gender may in itself be an independent ground on which a claim of persecution can be found."<sup>219</sup> The *Ward* decision further reinforces "state complicity is not necessarily a pre-requisite in determining whether there is a well-founded fear of persecution."<sup>220</sup>

Over the last few decades, Canadian courts have held that the following situations constitute fear of persecution and membership within a particular social group: (1) a single woman living alone in a Muslim country, where the rule of law required single Muslim women live under the protection of a male family

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<sup>212</sup> *See id.*

<sup>213</sup> *See id.*

<sup>214</sup> *See id.*

<sup>215</sup> *See Macklin, supra* note 210.

<sup>216</sup> *See Macklin, supra* note 210 (stating on the facts of the case, the court found Mr. Ward had failed to establish that he was persecuted because of his membership in a particular social group. However, Mr. Ward was successful on his alternative claim of on the basis of his political opinion).

<sup>217</sup> Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, §1 (U.K.).

<sup>218</sup> Randall, *supra* note 204, at 293 (These are: groups defined by an innate or unchangeable characteristic; groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and groups associated by a former voluntary status, unalterable due to its historical permanence).

<sup>219</sup> Randall, *supra* note 204, at 293.

<sup>220</sup> *See Macklin, supra* note 210, at 362.

member;<sup>221</sup> (2) a Trinidadian women subject to repeated spousal abuse and the government fails to intervene;<sup>222</sup> (3) a Zimbabwe women who had been forced to marry as child, and is subjected to repeated spousal abuse rape;<sup>223</sup> and (4) a Chinese women who was forced into sterilization because of Chinese law that requires such procedure after the birth of one child.<sup>224</sup> The women in all these cases share a common basic characteristic in their gender, have viewpoints different from their local government, society, and culture, and share a fundamental right in human dignity to be free to marry whom they so choose, procreate , or even live and cloth themselves in the garments of their choice.

Canada's guidelines recognize the predicament of women who violate customary law, and realize that "such laws and practices, by singling out women and placing them in a more vulnerable position than men, may create conditions precedent to a gender-defined social group."<sup>225</sup> Canada's Guideline 4 is in alignment with UNHCR standards on the law and policy of asylum seekers.<sup>226</sup> By establishing Guideline 4, Canada set the international precedent for the handling of gender-based asylum claims.<sup>227</sup>

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<sup>221</sup>Nancy C. Ciampa, *US Asylum Law: The Failure of the US to Accommodate Women's Gender-Based Asylum Claims*, 2 ILSA J. INT'L & COMP. L. 493, 508 (1995-1996)(quoting *Incirciyan v. Minister of Employment and Immigration*, Immigration Appeal Board Decision M87-1541X (Aug. 10 1987)).

<sup>222</sup>Ciampa, *supra* note 221, at 508 (referring to *Ministry of Employment and Immigration v. Marcel Mayers*, Federal Court of Appeals, No. A544-92, Toronto (Nov. 8, 1992)).

<sup>223</sup>Ciampa, *supra* note 221, at 508 (citing Canadian Immigration and Refugee Board (Refugee Division) Canadian Immigration and Refugee Board (Refugee Division), Decision U92-06668, heard Nov. 13, 1992 (Can.)).

<sup>224</sup>Ciampa, *supra* note 221, at 508 (referring to *Cheung v. M.E.I.*, No. A-785-91, Linden, Mahony, Stone (Apr. 1, 1993)).

<sup>225</sup>IMMIGR. & REFUGEE BD., *supra* at 200.

<sup>226</sup>Canada's guidelines are in alignment with UNHCR standards on the law and policy of asylum seekers. By establishing Guideline 4, Canada set the international precedent for the handling of gender-based asylum claims.

<sup>227</sup>*Gender-Based Asylum Law in Canada*, THE ADVO. FOR HUM. RTS., [http://www.stopvaw.org/canada\\_2](http://www.stopvaw.org/canada_2). (last visited Apr. 27, 2016).

## V. FUTURE DECISIONS IN LIGHTS OF CHANGED AND CHANGING CONDITIONING FACTORS

Currently there is an active campaign “to have the U.N. definition of refugee changed to include persecution by sex as a criterion for refugee consideration.”<sup>228</sup> More than 20,000 people worldwide have signed the petition urging the U.N. to consider women’s rights equally.<sup>229</sup> Furthermore, the UNHCR has moved away from requiring persecution to fit within one of the five enumerated categories.<sup>230</sup> In an attempt to offer greater protection to women refugees, the UNHCR published its *Guidelines on the Protection of Refugee Women*, which emphasized the need for states to recognize gender based asylum claims.<sup>231</sup> Furthermore, the UNHCR published guidelines on the protection of refugee women stating “[e]ven though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence or dictate the type of persecution or harms suffered and the reasons for this treatment.”<sup>232</sup>

A sixth enumerated category based on gender has been proposed to address the inadequacy of traditional enumerate grounds.<sup>233</sup> Throughout the last decade, refugee activists and immigration lawyers have advocated for greater protection for victims of gender-based persecution in asylum law, largely through litigation and arguments for regulatory reform.<sup>234</sup> Indeed in Canada, proponents succeeded in making female asylum

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<sup>228</sup> Kim, *supra* note 7, at 108.

<sup>229</sup> Kim, *supra* note 7, at 108.

<sup>230</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101 (1988) (stating the five categories are race, religion, nationality, membership in a particular social group or political opinion. The United States however has continued their strict interpretation of persecution).

<sup>231</sup> U.N. High Comm’r for Refugees, *Guidelines on the Protection of Refugee Women*, ¶55, U.N. Doc. ES/SCP/67 (July 1991) (“Protection from sexual discrimination is a basic right of all women and is enshrined in a number of international declarations and conventions. While the universal right to freedom from discrimination on grounds of sex is recognized, and discrimination can constitute persecution under certain circumstances, the dividing line between discrimination and persecution is not a clear one.”). [hereinafter *UNHCR Guidelines*].

<sup>232</sup> See *UNHCR Guidelines*, *supra* note 231.

<sup>233</sup> Kim, *supra* note 7, at 132.

<sup>234</sup> See Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration policy*, 9 YALE J.L. & FEMINISM 23, 48 (1997).

seekers a national issue, forcing the Canadian “government to reconsider its position on gender based refugee claims.”<sup>235</sup>

Further strides in recognizing gender-based persecution is evidenced in the UNHCR annual report of 2013, which indicates that not only have specialized courts been established in Guatemala to handle cases of gender-based persecution such as femicide, but such courts have been successful.<sup>236</sup> While such specialized courts are relatively new and subject to the challenges of establishing uniform guidelines, their establishment has proven influential and has encouraged the opening of similar courts in Escuintla and Izabal.<sup>237</sup>

While some strides have been made in recognizing gender-based persecution under U.S. asylum law, the historical exclusion of women from asylum protection is the result of “incomplete and gendered interpretation of refugee law”<sup>238</sup> and would take a substantial change to advance the protection of female asylum applicants.

## VI. RECOMMENDATION

Female asylum claims related to gender-based persecution may manifest in numerous ways: domestic violence, rape, female genital mutilation, forced prostitution and honor crimes etc. Many cultures have beliefs, norms, and social institutions that legitimize, and therefore perpetuate, gender-based violence. As mentioned previously in this essay, honor crimes occur as a result of socio-sexual norms, which permit male family members to murder female family members whose actions are perceived to bring dishonor upon the family.<sup>239</sup> Likewise, FGM endures in many parts of the world because of

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<sup>235</sup> Kim, *supra* note 7, at 132.

<sup>236</sup> See U.N. Gen. Assembly, *Annual Report of the United Nations High Commissioner for Human Rights*, U.N. High Comm’r for Refugees, ¶52, U.N. Doc. A/HRC/25/19/ADD.1 (Jan 13, 2014).

<sup>237</sup> See *id.*

<sup>238</sup> Deborah E. Anker, *Refuge Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 139 (2002).

<sup>239</sup> See Plant, *supra* note 10.

the belief that strict adherence to cultural traditions is necessary to preserve cultural identity.<sup>240</sup>

The phenomenon of gender-based persecution is “so foreign to the American way of life,”<sup>241</sup> that the United States asylum system reflects gender-neutral laws, which hinder rather than help female victims of gender-based persecution. To be eligible for asylum, a woman claiming persecution must fit her claim within five enumerated categories.<sup>242</sup> Of these categories, none specifically accommodate the unique nature of gender-based persecution. Therefore, women seeking asylum are forced to fit their claim into the ambiguous category of “membership within a particular social group.”<sup>243</sup> Further compounding the problem is the lack of universal definition of what constitutes “membership within a viable PSG.”<sup>244</sup> The lack of uniform definition of a PSG has led to great inconsistencies in the application of asylum law. This is clearly depicted in the juxtaposition of *Lazo-Majano*<sup>245</sup> and *Gomez*.<sup>246</sup> In both cases, Salvadorian women were repeatedly beaten and raped by an authoritarian figure, and eventually fled to the United States. The Ninth Circuit granted *Lazo-Majano* asylum, whereas the Second Circuit denied *Gomez*’ claim for asylum. In the context of gender-based prosecution, the lack of guidance as to what definitively constitutes “persecution” has left the term open to different levels of interpretation. As a result, the core of viability of membership in a PSG depends on which of the five methods of interpretation is applied by the courts.<sup>247</sup> While some Circuits apply a “gender-plus” approach when interpreting what constitutes a viable PSG, gender alone is considered too

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<sup>240</sup> See Nichols, *supra* note 37, at 43.

<sup>241</sup> Steinke, *supra* note 18, at 242.

<sup>242</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101 (1988) (stating the five enumerated categories as persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The United States however has continued their strict interpretation of persecution).

<sup>243</sup> See Plant, *supra* note 10, at 118.

<sup>244</sup> See Prochazka, *supra* note 21.

<sup>245</sup> Jenny-Brooke Condon, *Asylum Law’s Gender Paradox*, 33 SETON HALL L. REV. 207, 250 (2002).

<sup>246</sup> See *Gomez*, 947 F.2d at 663.

<sup>247</sup> See Prochazka, *supra* note 21, at 463. The five methods of interpretation utilized by courts are: (i.) the immutable characteristic approach; (ii.) the voluntary association approach; (iii.) the social perception approach; (iv.) the social viability approach; and (v) the “gender-plus” approach.

broad.<sup>248</sup> Gender must be accompanied by another characteristic such as clan membership or nationality to *possibly* constitute a viable PSG.<sup>249</sup> While such an interpretation is a step in the right direction in recognizing gender-based persecution in United States asylum law, it is insufficient to truly address the lack of recognition of gender-based persecution.

While there are recognizable problems when addressing gender based persecution claims, Canada has demonstrated that such problems can be overcome. By establishing solid guidelines in the adjudication of gender based asylum claims, and the introduction of flexible criteria for assessing the unique claims of women, Canada set the international precedent on handling gender-based asylum claims.

The INA has issued guidelines formally recognizing gender-based persecution as a valid ground for relief under U.S. Asylum law, but there remains no “bright line test” to determine whether an applicant qualifies as a refugee under the INA.<sup>250</sup> However, the Refugee Act itself has not been modified to recognize this adjustment.<sup>251</sup> Furthermore, the UNHCR has issued guidelines supporting the view that gender can influence or dictate the type of persecution or harms suffered and the reasons for this treatment.<sup>252</sup> As such the UNHCR has moved away from requiring persecution to fit within one of the five enumerated categories.<sup>253</sup>

For these reasons, this essay proposes the creation of a sixth enumerated category, that of gender or sexual

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<sup>248</sup> See Prochazka, *supra* note 21, at 469.

<sup>249</sup> See *Gonzales*, 400 F.3d at 797.

<sup>250</sup> See INA § 101(a)(42)(A), 8 U.S.C. § 1101 (1988) (stating women’s asylum claims must show they cannot return to the 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.” However, it makes no distinction between male and female applicants).

<sup>251</sup> See INA § 101(a)(42)(A), 8 U.S.C. § 1101 (1988).

<sup>252</sup> See *UNHCR Guidelines*, *supra* note 231.

<sup>253</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101 (1988) (stating the five categories are race, religion, nationality, membership in a particular social group or political opinion).

persecution.<sup>254</sup> Such a category will not only afford persecuted women “an opportunity to avoid traditional definitional barriers, such as the conception of ‘social group,’”<sup>255</sup> but will also send a definitive message to the asylum adjudicators and the international community, violence against women will not be tolerated. Further, “while concern for the respect warranted by other societies’ traditions and cultures should definitely be a consideration,”<sup>256</sup> there are some situations when respect for human life and dignity outweigh diplomatic protocol.

This new enumerated category will not only encompass claims in which persecution is on account of a woman’s immutable characteristic of gender, such as FGM and rape, where women are selected for violence precisely because of gender; but it will also encompass female persecution because of particular actions or beliefs, such as honor crimes, where women are selected for violence because they transgress social mores.

Understanding the ways in which women are violated as women is critical to naming as persecution those forms of harm that only or mostly affect women. Under current U.S. asylum law, there is the possibility a woman fleeing the threat of persecution would be granted asylum as a member of a protected social group in one jurisdiction but not in another. This lack of a uniform standard of a PSG and the resulting conflicting interpretations negatively affects the adjudication of gender-based persecution, resulting in inconsistent judgments and unjust disparities. The enumeration of a sixth category relating to gender-specific persecution will remedy the inconsistencies victims of persecution endure during the asylum process.

Congress should not hesitate to amend the Refugee Act to include a sixth enumerated category of gender or sexual persecution. Doing so would not only signal “a shift in the paradoxical history of women’s gender based asylum claims,”<sup>257</sup> but would also achieve an “overdue recognition that women do

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<sup>254</sup> This new category should be broad enough to include not only gender-specific crimes against women but also persecution against those with alternative sexual orientations.

<sup>255</sup> Condon, *supra* note 245, at 249.

<sup>256</sup> Ciampa, *supra* note 221, at 509.

<sup>257</sup> Condon, *supra* note 245.

have a legitimate claim to human rights and fundamental freedoms due them as women.”<sup>258</sup>

The primary argument against amending the Refugee Act to add a gender or sexual persecution category is the concern it “would open the floodgates to asylum claims and inundate the United States with refugees.”<sup>259</sup> However, the reality is, women often “lack the economic independence to escape oppressive conditions.”<sup>260</sup> Canada who recognized persecution based on gender did not experience “a surge in refugees.”<sup>261</sup>

While it may be impossible to completely prevent stereotypes of women’s experiences from penetrating asylum claims under an amended Refugee Act, the inconsistent treatment of women’s persecution would no longer be compounded by limited definitions and their associated messages about the relevancy of women’s experiences. Gender bias is not a women’s problem, it is a problem that affects everyone. “If governments ignore their responsibilities to any sector of society- whether to women, to men, to young, or to members of ethnic or religious minorities- then no-ones human rights are safe.”<sup>262</sup>

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<sup>258</sup> Florence Butegwa, *International Human Rights Law and Practice: Implications for Women*, in FROM BASIC NEEDS TO BASIC RIGHTS 41, 43 (Margaret A. Schuler ed., 1995).

<sup>259</sup> Andrea Binder, *Gender and the “Membership in a Particular Social Group” Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 169-70 (2001) (calling the floodgates argument “unpersuasive and misplaced”).

<sup>260</sup> Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 904 (2000).

<sup>261</sup> Butegwa, *supra* note 258.

<sup>262</sup> See generally Amnesty International, *Women in the Front Line: Human Rights Violation Against Women*, a Amnesty International Report, 13 HUMAN RTS. Q. 432.