

PROTECTED GROUND

Defining the Asylum Statute
as applied to women fleeing oppression based on her gender

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*What scales do you use
to weigh the misfortunes of men
and judge their sorrows?*

--VOLTAIRE, Candide

...and women

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INTRODUCTION

On January 8, 2001, Mary Ann Wysz, then Acting Commissioner of the INS,¹ sent the much criticized Board of Immigration Appeals (BIA) decision in *Matter of R-A-* to the Attorney General asking that she “vacate the decision ‘immediately,’ and remand it to the Board for reconsideration.”² In one of her last official acts, U.S. Attorney General Janet Reno vacated the BIA decision denying asylum to a Guatemalan woman who had suffered long term unspeakable abuse at the hands of her husband.³ Additionally, the Service proposed a new rule under which domestic violence and gender based

¹ On March 1, 2003, the Immigration and Naturalization Service (INS) was disbanded and reorganized under the Department of Homeland Security (DHS). INS no longer exists. In this paper, INS or the Service refers to the now disbanded INS as well as the new reorganization.

² *Board Reissues Matter of R-A-*, 78 No. 6 Interpreter Releases 335 (Feb. 5, 2001).

³ *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999). The BIA, while acknowledging that Rodi Alvarado had been subjected to horrific abuse, nevertheless overturned the earlier decision of the Immigration Judge and denied her asylum, reasoning that the abuse she suffered was merely personal and not relevant to the protections offered by U. S. refugee law. As of this writing, the BIA is still reconsidering its decision. *See also*, 24 I&N Dec. 629 (AG 2008) Interim Decision #3624.

persecution claims could be analyzed.⁴ Nearly eight years later, the case is still pending—as is the proposed rule.

The Refugee Act of 1980

In order to qualify for asylum in the United States, an individual must have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion; and that persecution must involve government action.⁵ Additionally, nonrefoulement provides that an alien may not be returned to a country where they establish by clear probability that they will be persecuted. Although, judges may grant asylum at their discretion, the restriction on removal is granted to the qualified alien as a matter of right.⁶

Judges have broad discretion on asylum grants and individual judgments on what constitutes persecution, social group, political or religious beliefs as well as motivation and government culpability, vary widely from case to case and judge to judge.⁷

This formula discriminates against women in a number of ways. First, persecution based on gender is notably absent from these parameters. The Refugee Act of 1980 brings into U.S. domestic law, the 1951 Geneva Convention's definition of refugee, which identified the same five grounds.⁸ The exclusively male drafters did not

⁴ *Id.* The proposed rule is published at 65 Fed. Reg. 76588 (Dec. 7, 2000).

⁵ 8 U.S.C. § 1101(a)(42)(a) and 65 Fed. Reg. at 76597.

⁶ 8 U.S.C. § 1101(a)(42)(a) and 65 Fed. Reg. at 76597.

⁷ TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY, 2006 (ranking Immigration Judges and showing asylum denial rates of between 96.7% to 9.6% from 2000-05). *available at* http://trac.syr.edu/immigration/reports/160/include/judge_0005_name-r.html).

⁸ 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 137; *available at* www.unhcr.ch/1951convention.index.html.

deliberately exclude gender from this list; *it was not even considered*.⁹ While the immediate concern of the drafters was the European refugees displaced by the horrors of Nazi-Germany, their failure to include gender as a protected ground underscores the ongoing pervasive global failure to give importance to the fact that women have been persecuted and continue to be persecuted simply because they are women.¹⁰ Congress's failure to include gender as one of the protected grounds when they adopted the Refugee Act in 1980 furthers the continuing dismissive attitudes toward persecution based on gender.

Women's issues have historically not been considered serious political or religious issues, but merely "cultural differences." This perception continues today with the resistance by the United States to include a gender category in the law and leaves most female applicants persecuted because they are women, scrambling to artificially fit into one of the enumerated grounds. Broad based restrictions on women and their classification as second-class citizens in male dominated societies has rarely been recognized to rise to the level of persecution. Additionally, gender based persecution, regardless of how horrific, is usually categorized as a private matter, undeserving and irrelevant to society's loftier ideals.¹¹ These policies have not only precluded many women from receiving asylum but have also prevented them from seeking the protection of nonrefoulement laws which requires a higher burden of proof. Thus many of these

⁹ *Id.*

¹⁰ *Id.*

¹¹ Emily Love, *Equality in Political Asylum Law: For a Legislative Recognition of Gender –Based Persecution*, 17 HARV. WOMEN'S L.J. 133, 137 (1994).

women, having failed to prove persecution on a protected ground are returned to their tormentors to lead a “normal” life.

Throughout the world women continue to suffer harms which are unique to their gender. These include female genital mutilation (FGM)¹² and forcible abortion.¹³ Sexual violence, including rape, often accompanies war and attempts at ethnic cleansing.¹⁴ Additionally, women often suffer disproportionately from domestic violence and honor killings and are singled out for repressive treatment in male dominated societies.¹⁵

Social group, religion, political opinion, or combinations of these three, are typically the asylum avenues sought for relief by these women. None are sufficiently adequate to address the special needs of women,¹⁶ but until the law recognizes a specific category for gender, women persecuted because they are women must continue to argue these alternate grounds, much like fitting a square peg into a round hole.

¹² See U.S. Department of State. Kenya, Report on FGM. *available at* <http://www.asylumlaw.org/docs/kenya/usdos01-fmg-kenya.pdf>. There are four basic types of FGM. *Type I*, commonly referred to as clitoridectomy, involves removal of the clitoral hood, with or without removal of all or part of the clitoris. *Type II*, commonly referred to as excision, involves removal of the clitoris, together with part or all of the labia minora (inner vaginal lips) and is the most widely practiced form. *Type III*, commonly referred to as infibulation or pharaonic circumcision, involves removal of part or all of the external genitalia, clitoris, labia minora and labia majora, then stitching the vaginal opening, leaving a tiny matchstick size hole, allowing for the flow of urine and menstrual blood. Also known as pharaonic circumcision, this is the severest form and involves binding a woman's legs for approximately 40 days to allow for the formation of scar tissue. *Type IV*, also known as Introcision, involves pricking, piercing or incision of the clitoris and/or labia and may include: stretching the clitoris and/or labia, burning of the clitoris and surrounding tissues, scraping or cutting of the vagina, and introduction of substances into the vagina to cause bleeding, or to tighten or narrow it. Some largely symbolic variations are also practiced. See *Razor's Edge - The Controversy of Female Genital Mutilation*, IRIN News org, UN Office for the Coordination of Humanitarian Affairs, IRIN Web Special March 2005, *available at* www.irinnews.org/webspecials/FGM/default.asp.

¹³ See Amnesty International, *Women, violence and health*, 18 Feb 2005, Report ACT 77/001/2005.

¹⁴ See Human Rights Watch, *KOSOVO: Rape as a Weapon of Ethnic Cleansing*, *available at* <http://www.hrw.org/reports/2000/fry/kosovohigh.jpg>.

¹⁵ See *supra* note 13.

¹⁶ Amnesty International USA, *Stop Violence Against Women*, *available at* <http://www.amnestyusa.org/women/asylum.html>.

In the aftermath of the September 11, 2001 attacks on the United States, concerns were raised that terrorists would seep into the United States by seeking asylum and hiding among the hundreds of thousands of pending asylum cases. Arguments have been forwarded that a gender based protected ground category, would open new avenues for terrorists to sneak entry into the United States. They reason, that since asylum is a discretionary form of relief, national security risks should outweigh humanitarian concerns. These reformers argue that asylum relief should be restricted and judicial review of asylum cases curtailed.¹⁷

Countries of special concern include Saudi Arabia, Syria, Iran, Pakistan, Egypt, Lebanon, Jordan, Afghanistan, Yemen, and Somalia among others as potential security risks for the U.S.¹⁸ Note that these are countries which have shown particularized oppression of women. These concerns impose a new hurdle for women fleeing those countries based on gender persecution.

This paper will discuss the application of the three categories generally available to women fleeing oppression based on her gender: social group, religion and political opinion; as well as how concepts of persecution, “on account of” and government culpability fit into this equation. Examination of these further restrictions is important because they color the landscape of all asylum applications and pose particular burdens to women fleeing persecution based on her gender.

¹⁷ Congressional Research Service Report for Congress, U.S. Immigration Policy on Asylum Seekers, May 2005, CRS-18.

¹⁸ *Id.*

I. WHAT IS A SOCIAL GROUP?

Membership in a particular social group is perhaps the most complicated and difficult to understand of the five protected grounds. Since the government has not definitively identified exactly what a social group is, persons who do not easily fit into one of the other protected categories often try to use this category for their asylum claims. Groups which no reasonable person would perceive as “social” in common language, have been advanced with varying degrees of success.

The United Nations Handbook describes social group as comprised of individuals with similar backgrounds, habits, or social status.¹⁹ In *Matter of Acosta*, the BIA defined social group as “members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.”²⁰ A member of a social group is not required to make a showing that they be individually selected for persecution. All that is required is a showing that a pattern or practice of persecution against members of the identified group exists.

Finally recognizing the continuing brutalization of women throughout the world and the obstacles presented by the omission of gender as a protected class under the definition of refugee, the United Nations in 1979 passed the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW),²¹ and in 1991 proposed that “women who feared persecution or severe discrimination because of their gender should

¹⁹ UNHCR HANDBOOK at 77.

²⁰ *Matter of Acosta*, 19 I&N Dec 211, 233 (BIA 1985).

²¹ CEDAW, G.A. Res. 34/180, U.N. GOAR, 34th Sess., U.N. Doc. A/34/46 (1979); see www.un.org/womenwatch/daw/cedaw/index.html.

be considered as a member of a social group for asylum purposes.”²² The United States remains the only industrialized nation that has not ratified CEDAW.²³

During the past 10 years, a variety of U.S. courts have considered an increasingly varied number of gender based asylum claims. The issues considered in these cases include honor killings, female genital mutilation, domestic violence, repressive social norms, forced prostitution, forced marriage, and coercive family planning.²⁴ Most of these cases, argued as persecution based on the applicant’s inclusion in a particular social group have met with limited success.²⁵

In *Matter of Kasinga*, a woman from Togo was granted asylum based on her inclusion in the social group of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM as practiced by that tribe and who oppose the practice.”²⁶ In *Matter of Fatin*, now Supreme Court Judge Samuel Alito ruled that persecution based on gender could constitute the basis for an asylum claim if the applicant could fit in the narrow social group of women who *refused* to conform to gender specific laws.²⁷

Despite this limited progress, courts have been slow to recognize gender-related persecution claims based on social groups. Requirements for inclusion in a group

²² Guidelines on the Protection of Refugee Women: *Legal Procedures and Criteria for the Determination of Refugee Status*, UN Doc. ES/SCP/67 P 54 (1991).

²³ See CEDAW ratification by country, available at www.un.org/womenwatch/daw/cedaw/index.html.

²⁴ Stephen M. Knight, 79 No. 20 Interpreter Releases 689, *Seeking Asylum From Gender Persecution: Progress Amid Uncertainty* (May 2002). (stating that since *Matter of R-A-*, Immigration Judges (IJ’s) have granted asylum in 33 cases involving persecution based on gender, denying seven. In every case, attorneys made claims under the social group ground.)

²⁵ *Id.*

²⁶ *Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996).

²⁷ *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993) Inclusion in this group is limited to women who actively defy the law and has been widely criticized by advocates.

persecuted based on gender are difficult to meet. In fact, while there are those who point to *Fatin* as a significant step forward, the applicant in that case was denied asylum because she indicated that she would not refuse to conform since such a refusal would cost her grave physical harm or even her very life.²⁸

Then in *Matter of R-A-*, the BIA reversed a grant of asylum by an Immigration Judge (IJ) who had found the applicant eligible because of her inclusion in the group “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”²⁹ The BIA majority found that no such group existed but was invented by the IJ for this specific case saying: “We find it questionable that the social group adopted by the Immigration Judge appears to have been defined principally if not exclusively, for purposes of this asylum case, and without regard to the question of whether anyone in Guatemala perceives this group to exist in any form whatsoever.”³⁰

In direct response to the BIA’s decision of *Matter of R-A-* and in an effort to address the inconsistent rulings regarding what forms a social group for the purposes of asylum, the INS proposed a new definition of social group and provided guidelines to assist adjudicators with domestic violence claims.³¹

This definition requires two factors. First, it codifies the holding in *Matter of Acosta*.³² Secondly, it specifies that “the group must exist independently of the past

²⁸ *Id.*

²⁹ *Matter of R-A-*, 22 I&N Dec. 906, 911 (BIA 1999).

³⁰ *Id.* at 918.

³¹ 65 FR 76588; *see also, supra* note 2.

³² 65 FR 76597; *see also, supra* note 20.

persecution.”³³ In addition to these two required factors, the proposed rule identifies six other factors which, while not determinative, may be considered in determining whether a particular social group exists:

1. close affiliation between members of the proffered group
2. common motive or interest
3. voluntary associational relationship
4. the group is recognized in the country identified
5. members see themselves as members of that group
6. the members are distinguished for different treatment from others.³⁴

Although this new proposed rule was forwarded in an attempt to assist victims of domestic violence in qualifying for asylum, and clearly states that gender is an immutable trait, it falls short of this goal. Instead of clearly defining that gender alone may form a social group for purposes of asylum law, it continues to give unbridled discretion to adjudicators in considering what forms a social group. Additionally, the six additional factors to be considered may prove to be an especially difficult burden for women fleeing persecution based on gender. It is difficult to imagine, for example, that female victims of domestic violence would fit any of the additional factors most especially the voluntariness of the “group” association, the recognition of such a group by society or the victims, or the close affiliation between the members of that “group.” It is not clear that *Matter of R-A-* would have been decided differently if considered under the new proposed guidelines.

³³ *Id.*

³⁴ *Id.*

In fact, a recent decision denying asylum and withholding of removal in another case of domestic violence casts a dark shadow on the impact of the proposed rules in these types of claims. In *Matter of R-L-P-*, Miami IJ Hurwitz relied on the BIA's decision in *Matter of R-A-* and the new regulations to deny asylum and withholding of removal to a Honduran woman who had suffered heinous abuse at the hands of her husband including cigarette burns, rape and beatings. The identified group in that case was "Honduran women who have been intimately involved with abusive male companions (men who believe that women are to live under male domination)." Although this group was essentially the identical group identified in *Matter of R-A-*, the IJ refused to follow international law and recognize it as a group for asylum purposes instead reasoning that the woman's identified social group was not "a group that is recognized and understood to be a societal faction."³⁵

Thus the social group category remains a precarious avenue for women fleeing oppression based on gender. Additionally, hiding behind the banner of social group fails to recognize the harsh reality that women are being persecuted because they are women not because they belong to some kind of social group. If the U.S. is serious about protecting women persecuted because of their gender and including them in their own grouping as suggested by international law, then the issue of gender must be addressed squarely. If not, the proposed guidelines on what constitutes a protected social group falls short of including victims of domestic violence as well as other abused women because they may not be recognized by adjudicators as a "societal faction" and it is likely that they will have little else in common other than their gender and their bruises.

³⁵ *Matter of R-L-P-* [number withheld] (IJ Kenneth Hurewitz) (Jan 31, 2002) (Miami, FL).

II. WHAT IS RELIGION OR BELIEF?

The unfettered right to practice one's religion –or not, is one of our most jealously guarded and cherished freedoms. Many of our founding fathers were suspicious of religion and the separation of church and state is emblazoned in the First Amendment.³⁶ The definition of religion or belief continues to evolve for purposes of immigration law. Generally, a person's closely held religious views and membership in a religious community is protected, as is their right to freedom of thought, conscious and manifestations in public or private including teaching, worship, practice and observance.³⁷

In *Matter of S-A-*, the BIA granted asylum to a young Moroccan woman with liberal Muslim beliefs who had been persecuted at the hands of her father who held more extreme Muslim beliefs on the role of women. The BIA ruled that the woman had been persecuted on account of her religious beliefs.³⁸ While this plea was successful for that applicant, this ground has not generally been the preferred vehicle of relief for women fleeing persecution based on gender. This is true, even though ironically, religion, arguably more than anything else has been used as the justification for the broad

³⁶ “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof” U.S. Constitution, Amendment I; From Thomas Paine: “Persecution is not an original feature in any religion; but it is always the strongly marked feature of all religions established by law.” From Thomas Jefferson: “I have examined all the known superstitions of the World, and I do not find in our particular superstition of Christianity one redeeming feature. They are all alike, founded on fables and mythology. Millions of innocent men, women and children, since the introduction of Christianity, have been burnt, tortured, fined and imprisoned. What has been the effect of this coercion? To make one half the world fools and the other half hypocrites; to support roguery and error all over the world The clergy converted the simple teachings of Jesus into an engine for enslaving mankind . . . to filch wealth and power to themselves. [They], in fact, constitute the real Anti-Christ.” From George Washington: “[N]o one would be more zealous than myself to establish effectual barriers against the horrors of spiritual tyranny, and every species of religious persecution.” See www.chicora.org/founding_fathers_and_religion.htm.

³⁷ See generally: The Universal Declaration of Human Rights and the Human Rights Covenant; International Religious Freedom Act 1998 (IRFA) Pub.L. No. 105-292—See also, the IRFA annual report available at, www.state.gov/g/drl/rls/irf/2002 (reporting on the extent and nature of religious freedoms violations committed or tolerated by state governments.)

³⁸ *Matter of S-A-*, Interim Decision 3433 (BIA 2000).

oppression of women and their general delegation of second class status and inferiority to men.³⁹

The historical oppression of women grounded in religious fervor has a long and lurid history and is beyond the scope of this paper. However, it has been widely accepted that religion justifies the use of force and the upholding of unfair laws. It is the justification for most if not all gender oppressive laws. Moral concepts, which are

³⁹ **Witches:** Between 1450 and 1750, European society was consumed by a panic over the possibility of witches in their midst. Witch hunts, resulted in the trial, torture, and execution of thousands of victims, about three-quarters of whom were women. The panic carried over to the United States culminating in the Salem witch hunts of the 1600's. See <http://religiousovements.lib.virginia.edu/nrms/salem.html>. (For a fascinating account of persecution against women grounded in religious beliefs see, www.gendercide.org/case_witchhunts.html.) **Also consider:** Judeo Christian religions including the Muslim faith, are grounded in the story of Adam and Eve where Adam was created by God in his image. Eve was created from Adam to keep him company. Eve was seduced by the devil and she in turn seduced Adam. *Genesis*, First Book of The Old Testament, The Bible; **Catholic Church Law:** both Roman Catholic and Eastern Orthodox, prohibit women from becoming priests, bishops, cardinals or pope because Jesus was a man. In 1976, Pope Paul VI concerned that the Church of England was considering female ordination, wrote a letter to the (Anglican) Archbishop of Canterbury stating that the church: "...holds that it is not admissible to ordain women to the priesthood, for very fundamental reasons. These reasons include: the example recorded in the Sacred Scriptures of Christ choosing his Apostles only from among men; the constant practice of the Church, which has imitated Christ in choosing only men; and her living teaching authority which has consistently held that the exclusion of women from the priesthood is in accordance with God's plan for his Church." --Pope Paul VI, "Response to the Letter of His Grace the Most Reverend Dr. F. D. Coggan, Archbishop of Canterbury, concerning the Ordination of Women to the Priesthood," 1975-NOV-30: AAS 68 (1976), 599. (Note, it is curious that Judas is considered an apostle while Mary Magdalene is not.) If women choose to enter a religious order, they may only become nuns. Nuns are always subservient to male priests. In addition, not all orders of Catholic priests are required to take vows of poverty whereas all orders of Catholic nuns are. <http://www.dioceseoflincoln.org/purple/priesthood/index.htm>; <http://mb-soft.com/believe/txh/nun.htm>; **Jewish Law** requires a woman secure a "get" or permission from her husband to divorce him. Failure to do so will result in her becoming an "agunot" or chained woman unable to remarry in the Jewish faith. [http://en.wikipedia.org/wiki/Get_\(divorce_document\)](http://en.wikipedia.org/wiki/Get_(divorce_document)); **Hindu Law** which actually has female deities, declares that women whatever age must be subject to men: "*In childhood a female must be subject to her father, in youth to her husband, when her lord is dead to her sons; a woman must never be independent*". (*Laws of Manu*, V, 147-8); **Buddhist Law:** while both men and women may join religious orders, women in religious life continue to be subordinate to men and are subject to eight laws which establish the superiority of men. For Hindu and Buddhist Law. See www.enabling.org/ia/vipassana/Archive/D/DeSilvaWomenInBuddhism/womenInBuddhismSwarnaDeSilva.html.

grounded in religious beliefs not only influence the making of laws, but also provide the framework for what is considered “natural law.”⁴⁰

Morality laws exist for two reasons: to protect us from the deviants in society and to protect us from ourselves. In the United States, child predators are vilified as deviants who must be punished and excised from society. In Muslim countries, the covering of women stems from Muslim modesty laws.⁴¹ While modesty is expected of both men and women, the *hijab* or covering for women exists solely so that a woman’s inherent sexuality will not become a source of temptation for men.⁴² This is an example of a law that exists to protect us from ourselves—ourselves of course being the male default. In Arab countries, the law openly discriminates against women, denies them basic rights, and “treats them as though they contaminate purity, arouse temptation and immorality.”⁴³ In these countries, most Arabs, regardless of their social status, continue to see women’s issues as a religious issue, and insist that women’s concerns be dealt with religious interpretations.⁴⁴

⁴⁰ Harold J. Berman, *Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory*, in *LEGAL PERSPECTIVES* 286.

⁴¹ Saudi author Wajihah Al-Huweidar, *Covert Animosity and Open Discrimination Against Women Prevail in Arab Countries* available at www.worldpress.org/2550.cfm.

⁴² Saudi author Wajihah Al-Huweidar, *Covert Animosity and Open Discrimination Against Women Prevail in Arab Countries* available at www.worldpress.org/2550.cfm.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ In 2002, police in Saudi Arabia prevented schoolgirls from leaving a burning building because they were not wearing the proscribed head covering. The school guard refused to open a locked gate to let the girls out and witnesses said that the religious police stopped men from helping the girls because it was “sinful to approach them.” Fifteen girls thus perished in that fire. See news report at http://news.bbc.co.uk/2/hi/middle_east/1874471.stm.

While the wearing of *hijab* by Muslim women without more may be viewed as a cultural symbol, the forceful imposition of that dress code by religious extremists has led to unspeakable abuses.⁴⁵ Widespread persecution of women persists and is tangled in a web of religious, cultural and political norms designed to “keep a woman in her place.” While FMG for example is associated with mostly Muslim societies especially in Africa, it is a cultural practice that exists throughout the world. Different forms can be found in Christian and Muslim societies and predates both religions.⁴⁶ The undisputed function of this practice is to reduce a woman's sexual desire, and ultimately ensure her virginity until marriage.⁴⁷ Here again is a law designed to protect us from ourselves, us this time being the sexually voracious female. Additionally, the more extensive procedure, which involves stitching and reducing the size of the vagina, is also intended to increase the husband's enjoyment of the sexual act.⁴⁸ Women who survive the procedure are subjected to a certain future of pain and medical complications.⁴⁹

This abhorrent practice has finally begun to receive the overdue condemnation it deserves. Countries have increasingly passed laws criminalizing the practice and the more developed nations have refused to protect it on religious or cultural diversity

⁴⁶ See *supra* note 12. FMG Type I is associated with the Muslim faith because it is also known as *Sunna* which means “following the Prophet’s tradition.” Type I and Type II account for 85% of all FGM. Type III Type III was likely practiced in ancient Egypt, is common in Djibouti, Somalia, Sudan and parts of Egypt, Ethiopia, Kenya, Mali, Mauritania, Niger, Nigeria, and Senegal. FMG can also be found in Pakistan, Malasia, parts of Indonesia and has been reported among indigenous groups in Peru and Australia. Additionally the practice has increasingly been found in North America, Europe, New Zealand and Australia. See *Razor's Edge - The Controversy of Female Genital Mutilation*, *supra*, note 12.

⁴⁷ It is common practice for an “excisor” to be called on a girl's wedding night and open her up so she is able to consummate her marriage. See, *Razor's Edge - The Controversy of Female Genital Mutilation* *supra* note12.

⁴⁸ See *Razor's Edge - The Controversy of Female Genital Mutilation*, *supra* note12.

⁴⁹ *Id.*

grounds.⁵⁰ However, in countries where the practice remains entrenched, the laws have not offered much protection and flight remains a woman's only viable solution. Not all cultural and religious practices deserve our respect or tolerance and this is but one example. The horrors visited on women because they are women need to be recognized for the human rights violations that they are.

Since religion and politics are hopelessly intertwined,⁵¹ persecution based on both grounds more properly deserves the designation of political persecution because religious or deeply held beliefs have political consequences.

III. WHAT IS A POLITICAL OPINION?

Asylum is often thought of as "political asylum" but the issue of what constitutes a political opinion for asylum purposes is a political question which courts have been uniformly reluctant to decide. At least one federal court has deferred the presumption of correctness to the BIA.⁵² The definition of political opinion and indeed refugee status was originally limited to persons fleeing communism and encompassed thousands of individuals from Cuba, Vietnam and Hungary from the 1950's through the 1970's.⁵³ While those fleeing the dwindling communist regimes arguably continue to enjoy a preferred refugee status,⁵⁴ political opinion has since been interpreted to encompass a

⁵⁰ *Id.*

⁵¹ During the infamous witch trials in Salem, Mass. witchcraft was considered both a sin and a crime. *See* <http://religiousmovements.lib.virginia.edu/nrms/salem.html>; *See also supra* note 45.

⁵² *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990).

⁵³ IRA KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 285 (AILA 11th ed. 2008).

⁵⁴ The United States grants a priority status to persons fleeing from the former Soviet Union, Cuba and Vietnam. *Proposed Refugee Admissions for Fiscal Year 2005*, p. 6; available at: www.refugees.org/data/warehousing/docs/USDOSBPRM_FY2005_REPORT_040901.pdf

wide variety of views.⁵⁵ It includes any opinion regarding types of governments, laws and policies.⁵⁶ The UNHCR's *Handbook* states that political opinions are "opinions not tolerated by the authorities which are critical of their policies or methods."⁵⁷ A political opinion may be expressed in words or actions or may imputed to the individual where persons believed to hold such opinions may be persecuted for such erroneous belief.⁵⁸

Simply not identifying oneself as a dissident or failing to state that the opinion is political does not make the position any less political.⁵⁹ An unexpressed opinion may still constitute a political opinion.⁶⁰

The UNHCR's *Handbook* states that even when a person's political opinions are unexpressed, "it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion."⁶¹ Similarly, the BIA has stated that an applicant may have a well-founded fear of persecution on account of political opinion if her oppressor could become aware of those beliefs.⁶² However in *Sharif v. INS*, the BIA denied asylum to a woman based on her political beliefs because the judge found no

⁵⁵ REGINA GERMAIN, *AILA'S ASYLUM PRIMER* 41 (3d ed. 2003).

⁵⁶ *Id.*

⁵⁷ UNHCR HANDBOOK at 80.

⁵⁸ *See supra* note 55 at 45.

⁵⁹ *See Osorio v. INS*, 18 F.3d. 1017, 1029 (2d Cir. 1994).

⁶⁰ *Id.*

⁶¹ UNHCR HANDBOOK at 82.

⁶² *Matter of Mogharrabi*, 19 I&N Dec. 439, 448.

“evidence to suggest that she will voice her opposition to Iranian law when she returns to Iran.”⁶³

While not specified in the asylum statute, the Supreme Court and the BIA have stubbornly insisted that persecution on account of political opinion means persecution due to the *victim's* political opinion, not the persecutor's political opinion.⁶⁴ This narrow interpretation presents a particularly harsh burden for women because it is skewed in the oppressor's favor. Women need protection. And mostly women need protection from men. To this very hour, physical violence remains the driving force behind the superiority of men in all societies.⁶⁵ Men are simply just physically stronger. Additionally, in male dominant societies, laws are skewed to oppress women.⁶⁶ It is the propagation of these laws and the political opinions behind them that are the basis for persecution, not the views of the oppressed. The oppressed have no political standing. When women are oppressed, the opinion of the woman being oppressed is irrelevant. It is the opinion of the oppressor that causes the persecution. The oppressor persecutes because he believes he can. Common sense dictates that it is the opinion of the oppressor that causes the harm—and does so in *every* case. Thus the accepted interpretation should be rejected to include the oppressor's political opinion and not be limited to just the victim's political opinion.

⁶³ Sharif v. INS, 87 F.3d 932, 936 (1996).

⁶⁴ See especially, INS v. Elias-Zacarias, 502 U.S. 478(1992); Osorio v. INS, 18 F.3d 1017 (2d Cir. 1994); Matter of R-, 20 I&N Dec. 621(BIA 1992).

⁶⁵ See WAYNE EWING, *The Civic Advocacy of Violence*, in MICHAEL KIMMEL AND MICHAEL MESSNER, *MEN'S LIVES*, Second Edition, (New York: McMillan, 1992), pp. 466-479.

⁶⁶ In Pakistan, a woman was ordered gang raped as punishment for her 13 year old brother's affair with a woman belonging to a higher caste. *Reported in* The Miami Herald, Nov. 16, 2006, 16A, reporting that in reaction to the international outcry over this case, Pakistan had recently repealed a law that required a victim to produce four witness in order to prove a rape case; In Saudi Arabia, a young girl who went to the police to report she had been gang raped received more lashes than one of the men who raped her. *Reported by* Donna Abu-Nasr for ASSOCIATED PRESS, THE MIAMI HERALD, Nov. 24, 2006, 34A.

In the domestic violence case, *Matter of R-A-*, the BIA judge rejected political opinion as a basis for asylum. The judge noted that the applicant's husband hurt her "regardless of what she believed or what he thought she believed"⁶⁷ The record did not indicate that the husband ever said anything about her political views or that the abuse was a result of these views real or imputed. Her political views were irrelevant to her abuser's behavior and the judge noted that "nothing the respondent could have done or thought would have spared her" from his violent behavior.⁶⁸ Hence the judge reasoned that this was not a case where there was evidence of the victim's political opinion "unless one assumes that the common desire not to be harmed or abused is in itself a political opinion"⁶⁹ Furthermore, the judge noted that the abuser's behavior "may likely reflect his own view of women and, in particular, his view of the respondent as his property to do with as he pleased."⁷⁰

The sad fact of *R-A-* is that the man beat the woman because he thought he could. He was stronger than she was. He knew the government would not interfere. Certainly the government of Guatemala does not actively condone domestic violence.⁷¹ Officials there may well have thought *R-A-*'s husband was a good-for-nothing wife-beater. But the violence was dismissed as just a private matter. Domestic abuse is rampant in

⁶⁷ *Matter of R-A-*, *supra* note 3, at 914.

⁶⁸ *Id.*

⁶⁹ *Id.* at 915.

⁷⁰ *Id.*

⁷¹ See Department of State, Country Reports on Human Rights Practices, Guatemala, available at www.state.gov/g/drl/rls/hrrpt/2005/61729.htm.

Guatemala.⁷² The authorities can't be expected to jail every wife-beater. Besides, they have more important things to do.

But isn't this acquiescence determinative of a political opinion that fosters oppression? Are not gender issues by their very nature political issues regardless of the views held by the oppressed? The gender issue is in fact a subset of the political issue as is race, children's rights, elder law, and other civil rights issues. Civil rights issues are by their very nature political issues. While lip service has been paid to the issue of women's rights as deserving of political opinion, actual grants of asylum on that specific ground have been few.⁷³

Consider the landmark case of Parastoo Fatin.⁷⁴ In that case, an Iranian woman testified that she was a feminist with "deeply rooted" beliefs in the equal rights of women. The Iranian government had recently imposed a one-year prison sentence on any woman daring to venture out without the traditional head covering. Ms. Fatin feared that if she was returned to Iran, she would be forced to comply and thus her political beliefs would be compromised. Country reports indicated widespread abuse by government officials of women who did not or were perceived not to comply with the new law. The court found that her feminist beliefs could be the basis for a political asylum claim saying that, "we have little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes."⁷⁵ Broad hopes for reform were dashed however, when the court denied Ms. Fatin's political asylum claim, holding that she failed to prove that

⁷² *Id.* See also, Matter of R-A- *supra* note 3.

⁷³ For the most current update on these statistics see, THE CENTER FOR GENDER AND REFUGEE STUDIES CGRS, UNIV. OF CA. COLLEGE OF LAW at <http://cgrs.uchastings.edu/law/summaries.php>.

⁷⁴ Fatin v. INS, *See supra* note 27.

⁷⁵ *Id.* at 1241.

she would be singled out for persecution but would merely be subject to Iran’s general mistreatment of women—as if that were acceptable. Additionally the court held that her political opinion would be protected only if she *refused* to comply with the gender oppressive laws even though she testified that the “routine penalty” was “74 lashes, a year’s imprisonment and in many cases brutal rapes and death.”⁷⁶ The court noted that Ms. Fatin said she would try to avoid wearing the specified clothing but she never testified that she would refuse to comply with the gender specific laws. Thus the court determined that there was no evidence that her opposition to the gender specific laws was “of the depth and importance” required by law.⁷⁷

In 1997, U.S. passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the asylum amendments described therein are considered the most significant revisions to U.S. asylum law since the adoption of the original Refugee Act.⁷⁸ Regrettably, the framers did not at that time expand the definition of refugee to include a gender ground. The definition of refugee was expanded however to include persons who had been subjected to or feared being subjected to coercive population control programs including forced abortions and forced sterilizations.⁷⁹ Individuals who had been persecuted for their resistance to those measures or who fear being forced to undergo such measures will be deemed to have a well-founded fear of persecution on account of political opinion.”⁸⁰ Apparently fearing a mass influx of

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See commentary on IIRAIRA reform at www.ailapubs.org/selleghisofi.html.

⁷⁹ INA § 101(a)(42)(B), 8 USC § 1101 (a)(42)(B).

⁸⁰ *Id.*

refugees, the service limited grants of asylum under this provision to 1000 per year.⁸¹ This numerical limitation has since been lifted.⁸²

Let us be perfectly clear here. We are talking about Communist China.⁸³ Any law in China is necessarily sanctioned by the government of China and as such is a per se communist law. While this law specifically addresses the coercive population controls in Communist China, it nevertheless simply reiterates our repugnance to communism and continues to put ideological resistance to or disagreement with communist philosophy at the forefront of the political opinion category. Additionally, it is difficult to comprehend why a coercive population mechanism which arguably has a prophylactic rational basis, is more objectionable than blanket oppressions and relegation of inferior status from birth directed specifically towards women.

IV. WHAT IS PERSECUTION?

Persecution is not defined in any INA statute and attempts to define it continue to evolve. The UNHCR has acknowledged that attempts to define persecution have met with limited success and has set forth this broad definition: “[A] threat to life or freedom on account of race, religion nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights including torture, cruel, inhuman or degrading treatment for the same reasons—would also

⁸¹ INA § 207(a)(5), 8 USC § 1157 (a)(5).

⁸² *The Real ID ACT of 2005* eliminated the 1000 per annum cap on asylum approval based on coercive population control; *See also, Annual Flow Report*, May 2005, Office of Immigration Statistics, Homeland Security).

⁸³ CRS REPORT FOR CONGRESS, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS, May 5, 2005, CRS-17, (The report specifies that all recipients of asylum under this program have been from the People’s Republic of China.)

constitute persecution.”⁸⁴ While some measures alone would not constitute persecution, including for example certain forms of discrimination, their cumulative harm coupled with other adverse factors such as country conditions, may rise to the level of persecution.⁸⁵

Domestic violence cuts across all socio-economic and ethnic groups, and various societies have a number of ways in which they condone and perpetuate this violence.⁸⁶ Victims of domestic violence generally experience a pattern of abuse that includes physical, sexual and emotional abuse rather than individual incidents. Domestic violence centers on power and control issues and when a victim attempts to flee her tormentor asserting her independence, the abusers often pursue them and the violence escalates. These egregious forms of abuse have lately been found to rise to the level of persecution throughout immigration courts including in *Matter of R-A*.⁸⁷

Physical harm however, is not required for a determination of persecution.⁸⁸ But not all forms of discrimination shall rise to the level of persecution. In order to be persecution, the behavior must be extreme. The question then becomes, what is extreme?⁸⁹ Case law has limited what constitutes persecution and has noted that it does not encompass all behavior which our society finds objectionable, unjust or

⁸⁴ UNHCR HANDBOOK

⁸⁵ *Id.*; *See also*, *Korablina v. INS*, 158 F.3d 1008, 1045 (9th Cir. 1998). (finding that the harms suffered by the applicant coupled with the country conditions amounted to persecution.)

⁸⁶ *See eg.*, Lori J. Heise, *Violence Against Women: The Hidden Health Burden*, WORLD BANK DISCUSSION PAPERS (1994).

⁸⁷ *Matter of R-A*, *supra* note 3.

⁸⁸ *Matter of Acosta*, *supra* note 20.

⁸⁹ *See* AILA’S ASYLUM PRIMER *supra* note 55; *Fatin*, *supra* note 27.

unconstitutional.⁹⁰ The proposed rules once again attempt to define persecution, this time as “the infliction of objectively serious harm or suffering that is subjectively experienced as serious harm or suffering by the applicant.”⁹¹ The persecutor’s subjective intent is irrelevant to the determination of persecution.⁹² These new rules are not very helpful in determining what rises to the level of persecution because the judges still have broad discretion in determining what constitutes serious harm. Additionally, contrary to the asylum statute, current case law has held that in certain instances, there must not only be a well founded fear of persecution, but that the persecution, however horrible, must have actually been experienced by the applicant or that the applicant will take steps to insure her own persecution.⁹³

Consider the case of Nazani Sargis.⁹⁴ In that case, a 71 year-old Armenian Christian woman faced deportation to her native Iran. She testified that her troubles began when the Muslim extremists took power in Iran. Her husband was forced out of his job solely because he was Armenian. Armenian schools were closed and those that remained open were forced to teach Islam. Ms. Sargis and her husband sent their only child to study abroad so that he could continue studying in an Armenian school and not be required to study the Islamic Faith. The couple soon began to be watched by government officials. Iranian agents and soldiers interrogated her and her husband on several occasions. Ms. Sargis had trouble obtaining food. After waiting in line for hours,

⁹⁰ *Fatin*, *supra* note 27 at 1240.

⁹¹ Fed. Reg. 76588-98 (Dec 7, 2000).

⁹² 77 No 48 Interp. Rel. 1737.

⁹³ *Fatin*, *supra* at note 27.

⁹⁴ *Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002).

Armenians were regularly sent to the back of the line or told there was nothing for them because they were Armenian. When they complained of this treatment, they were beaten.

Ms. Sargis was also forced to follow the Islamic dress code. Her niece testified that women who dared venture out without the proper head covering were sprayed with acid. Women wearing lipstick would face having their lips rubbed with glass. Ms. Sargis testified that although she opposed the dress code, she complied with it because she feared for her safety.

After her husband died, and she no longer had any relatives there, Ms. Sargis fled Iran and applied for asylum in the U.S. based on her religion and gender. After reviewing the facts of the case, the IJ decided that Ms. Sargis experiences were not extreme enough to rise to the level of persecution and dismissed them merely as harassment.⁹⁵ The BIA affirmed noting that Ms. Sargis had “always complied with the dress code while living in Iran,”⁹⁶ and if forced to return she would continue to do so. The court concluded that since she did not or would not “willingly oppose the Islamic law by refusing to wear the required clothing” then they could not “accept” that her opposition to it was “fundamental to her identity or conscience.”⁹⁷ Relying on the *Fatin* standard, the Board denied Ms. Sargis asylum concluding that this lack of affirmative action precluded her from membership in a recognized social group.⁹⁸

Although the Board felt constrained by case law to uphold the decisions of the IJ and BIA based on the *Fatin* standard, it admonished the Service to reconsider its position

⁹⁵ *Id.*

⁹⁶ *Id. at* 601.

⁹⁷ *Id.*

⁹⁸ *Id. at* 604.

in this case and lamented the current state of the law by stating: “[I]t is unclear to us why the victims must be willing to suffer whatever consequence may be visited on them as a prerequisite to claiming persecution. The law does not impose an absolute requirement that one be willing to suffer martyrdom to be eligible for asylum.”⁹⁹

V. ON ACCOUNT OF

In *INS v. Elias Zacarias*, the Supreme Court established the requirement that an applicant must show that the persecution suffered was *on account of* a protected ground.¹⁰⁰ Under established law, it is not necessary that an applicant show that the protected ground was the sole reason for the persecution. Courts have recognized that persecution may be due to mixed motives and the required nexus is satisfied if the suffering is inflicted “at least in part” *on account of* a protected ground.¹⁰¹

In 1995, the Director of the INS Office of International Affairs issued a memorandum outlining guidelines for adjudicating asylum claims brought by women, identifying that gender based persecutions such as rape, including mass rape during wars, domestic violence, and FMG among others could be considered as evidence of past persecution *on account of* one or more of the five enumerated grounds for asylum.¹⁰² While this may be considered a forward step in recognizing women’s particularized gender claims, it is important to remember that the guidelines are not binding law and

⁹⁹ *Id.* at 603.

¹⁰⁰ *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

¹⁰¹ *See eg.*, *Borja v. INS*, 175 F.3d. 732 (9th Cir. 1999).

¹⁰² Memorandum from PHYLLIS COVEN, U.S. DEPT OF JUSTICE, *Considerations For Asylum Officers Adjudicating Claims From Women* (May 26 1995). available at <http://www.uchastings.edu/cgrs/law/guidlines/guidelinesus/pdf>.

they have been inconsistently applied. In one case a judge found that the victim of forced prostitution in China could constitute grounds for asylum *on account of* a protected ground,¹⁰³ while in a similar case another judge found that a victim of forced prostitution and rape in Russia could not.¹⁰⁴ Additionally the female applicant's perceived morality is often a factor in adjudications.¹⁰⁵

Persecution based on gender is often sexual in expression and in many instances, is inflicted by persons intimately known to the victim, including members of her own family.¹⁰⁶ These unique situations give rise to a highly complicated mixed motives analysis, which is usually not relevant in typical hate crimes against racial, religious or ethnic minorities where the crime is not usually sexual and the attacker is most likely a stranger.¹⁰⁷ While the proposed rule recognizes mixed motives, it also imposes a higher burden that applicants not only establish her tormentor's motives, but that the motivation *on account of* a protected ground be central to that persecution.¹⁰⁸ This adds an additional burden to women trying to establish persecution *on account of* a protected ground.

¹⁰³ Matter of J-M-, 1,16, (Immgr. Ct. Dec 3, 1996).

¹⁰⁴ CGRS *Gender Asylum Case Study 275*, <http://www.uchastings.edu/cgrs/summaries/200-299/summary275.htm>.

¹⁰⁵ See Elizabeth Rho-Ng, *The Conscripted of Sex Slaves: Causes and Effects of U.S. Military Sex Colonialism in Thailand and the Call to Expand U.S. Asylum Law*, 7 ASIAN L.J. 103 (2000) (arguing that victims of rape have had more success in their asylum claims than victims of forced prostitution presumably because the latter were "morally suspect.")

¹⁰⁶ See U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2003. *available at* www.state.gov/g/drl/rls/hrrpt/2003/27930.htm.

¹⁰⁷ U.S. DEPT. OF JUSTICE 2005 NATIONAL CRIME VICTIMIZATION STUDY 2005. *See also*, UCSC RAPE PREVENTION EDUCATION/RAPE STATISTICS, *available at* www.2ucsc.edu/rape-prevention/events.html.

¹⁰⁸ *See* proposed rule at 65 Fed. Reg. 76588 (Dec. 7, 2000).

Due to this greater likelihood of a gender-based asylum claim triggering a mixed motive inquiry, a woman's asylum claim may more often be analyzed with a focus on the new centrality requirement.¹⁰⁹ Thus, while seemingly gender neutral, this new centrality requirement will likely adversely affect more women than men. Since gender based crimes perpetuated against women disproportionately include sexual violence and are encountered in the private sphere, the central motive for these crimes may simply be attributed to sexual desire or unfortunate personal circumstances.¹¹⁰

Crimes against men however, even if they are sexual crimes including rape, are not usually attributed to sexual desire but are instead seen for what they are—crimes of violence and oppression.¹¹¹ Furthermore, crimes against men are not usually categorized as being private or personal even when the assailant is someone known to the victim.¹¹² Hence crimes against men will trigger this new centrality requirement less often than crimes against women denying them equal protection under the law.¹¹³

Even when the persecution is not sexual, a strong gender bias exists because judges can find other factors not relating to a protected ground as the central reason for abuse—he was a violent person, he was jealous.¹¹⁴ This is true even though a special U.N. report on violence against women found that “domestic violence is the result of a

¹⁰⁹ Jenny-Brooke Condon, *Asylum Law's Gender Paradox*, SETON HALL UNIVERSITY SCHOOL OF LAW, SETON HALL LAW REVIEW, 2002.

¹¹⁰ Musalo and Knight, *Asylum for Victims of Gender Violence: An Overview of the Law, and Analysis of 45 Unpublished Decisions*, 03-12 IMMIGRATION BRIEFINGS (December 2003).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Jenny-Brooke Condon, *Asylum Law's Gender Paradox*, *supra* at 12.

desire to punish, humiliate, and exercise power over the victim *on account of her gender*”¹¹⁵

In *Matter of R-A-* the BIA reasoned that the applicant had not been persecuted *on account of* a particular social group because it could not be shown that he would target any other members of the proffered group.¹¹⁶ In commentary preceding the proposed rules and specifically mentioning the ruling in *Matter of R-A-*, the INS rejected this reasoning, and noted that an applicant should not be required to establish that her tormentor would target other members of the group to establish motive as a matter of law.¹¹⁷ In a telling comparison of oppression suffered by women to slavery the INS noted that:

in a society in which members of one race hold members of another race in slavery, that society may expect that a slave owner who beats his own slave would not beat the slave of his neighbor. It would nevertheless be reasonable to conclude that the beating is centrally motivated by the victim’s race. Similarly, in some cases involving domestic violence, an applicant may be able to establish that the abuser is motivated to harm her because of her gender or because of her status in a domestic relationship.¹¹⁸

The proposed rules that follow indicate that evidence that a persecutor seeks to harm others similarly situated will not be required.¹¹⁹

¹¹⁵ Guidelines, *supra* at note 22; See also *Matter of R-A-*, *supra* at note 3.

¹¹⁶ Rules, *supra* at note 4.

¹¹⁷ *Id.* at 76593.

¹¹⁸ Rules, *supra* at note 4.

¹¹⁹ *Id.*

The proposed rule also notes that direct evidence as well as circumstantial evidence may be used in evaluating abuse. This evidence may include patterns of abuse or the inferior position of women in domestic relationships. While the INA assumes that direct evidence will always be considered,¹²⁰ it fails to recognize that *in Matter of R-A-* the BIA failed to find the required nexus although the record clearly showed that her husband beat her mercilessly to subdue and control her *on account of* the fact that she was his wife with the repeated assertions “you are my woman, you do what I say.”¹²¹ Assuming for purposes of asylum law that the proffered social group does exist, then it must be recognized that the victim in *Matter of R-A-* was certainly abused *on account of* her membership in that group. The record shows that the abuse started shortly after the couple married. The abuse included rapes and attacks to her genital area. The fact that the attacks increased in violence and frequency when the wife was pregnant and refused to abort her child is a powerful indication that her spouse beat her as a response to her possessing purely female attributes in an attempt to subdue and dominate her.¹²² The fact that the husband beat his wife, “when he was drunk and when he was sober,” and “for no reason at all” other than because she was “his woman” furthers the argument that he beat her *on account of* her being his wife and as such belonged to the identified group.

Furthermore, in an effort to protect women fleeing gender based persecution, some courts have ruled that illegitimate motives leading to persecution must raise an inference that the harm has occurred *on account of* a protected ground.¹²³ Thus advocates

¹²⁰ *Matter of R-A-*, at 914, *supra* at note 3.

¹²¹ *Id.*, *See also* dissent at 929.

¹²² *See Matter of Kasinga*, *supra* at note 26; *See also*, *Rodriguez-Roman v. INS*, 98 F.3d. 416, 419 (9th Cir. 1996).

must insist to adjudicators that the nexus *on account of* argument not be a bar to deserving asylees.

VI. GOVERNMENT ACTION

In all cases of persecution on account of a protected ground, government action must be implicated.¹²⁴ Courts have found that even when the *on account of* nexus fails, an applicant may still be granted asylum if it can be shown that the country has been unable to control the abuser, or prevent the abuse from happening.¹²⁵ The proposed new rule clarifies that government action may be implicated when the government is “unwilling or unable to control the conduct.”¹²⁶

While no government is able to control every person within its borders, country conditions are an important indicator of a country’s efforts in this area.¹²⁷ In determining a woman’s eligibility for asylum, the conditions for women in a particular country must be considered. This necessarily involves merging abuses found in the public and private spheres. Too often, women’s abuse is dismissed as a private matter not involving government action when in reality government’s acquiescence to these abuses makes them particularly culpable.¹²⁸ Lack of governmental protection for gender targeted abuses must be considered nothing less than state action protecting the proliferation of such

¹²³ Fed. Reg., *Supra* at note 5.

¹²⁴ Rules, *supra* at note 4.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See generally, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2003. available at www.state.gov/g/drl/rls/hrrpt/2003/27930.htm.

¹²⁸ 79 Interp. Rel. at 693.

abuses. When a government shows no interest in protecting its citizens against specific kinds of abuse, it must be considered to condone such abuses. Such is the plight of millions of women throughout the world who must endure unspeakable abuse and discrimination without the possibility of seeking protection from their governments.

In Jordan, for example, honor killings are common. In 1998, the State Department's Country Reports on Human Rights Practices estimated that 25% of murders in Jordan were the result of honor killings.¹²⁹ Today the practice persists. The penal code provides an honor defense for a man convicted of murdering a female member of his family.¹³⁰ Most perpetrators of the crime are not prosecuted and those who are usually serve less than two years in jail.¹³¹ While the practice has received international condemnation as a human rights abuse, the only protection offered to targeted victims by the government of Jordan is their own imprisonment inside a common jail.¹³²

Despite these statistics, an applicant who feared becoming the victim of an honor killing was denied asylum in the United States. In *Matter of A-*, a Jordanian woman fled her country with her now husband whom her father had forbade her from seeing. The woman learned that her father had become enraged upon learning that she defied him and that she was no longer a virgin. Declaring that she had brought dishonor on the family and that the shedding of her blood was the only way the shame she had brought on the family could be removed, her father ordered the male members of her family to kill her wherever she may be. Despite these facts, a U.S. IJ denied the applicant asylum and the

¹²⁹ *Id.*, See also, U.S. COUNTRY REPORTS ON HUMAN RIGHTS ABUSES, JORDAN 2004, available at www.state.gov/g/drl/rls/hrrpt/2004/41724.htm.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

BIA affirmed holding that being a victim of an honor killing could not “without more... be the basis of an asylum claim” but instead was merely “the unfortunate consequence of a personal family dispute.”¹³³ After an international outcry by CGRS, Amnesty International, and members of both houses of the U.S. Congress, the case was remanded to the BIA. Since then, asylum has been granted to women under similar circumstances where it can be shown that they would not receive adequate protection from their governments.¹³⁴

Judges continue to dismiss the gender specific crime of rape as personal and random violence not protected by asylum law. Sexual desire is still seen as a primary motivation for rape by some judges.¹³⁵ In Mexico, for example, the crime of rape is rarely recognized. One legislator wistfully quipped that abducting, raping then marrying a woman, was a situation one could view as romantic.¹³⁶

This separation of private and public spheres proves a substantial burden to the particular suffering of women whose persecution is so often dismissed as a private matter, not relevant to human rights abuses. This perceived distinction between the private forms of persecution typically suffered by women and the public forms typically suffered by men, is the type of archaic and perverse discrimination that recurring U.S. and international guidelines have been trying to overcome.

¹³³ See, *Matter of A-* [number withheld] (IJ Jan 8, 1998) (available at www.uchastings.edu/cgrs/law/ij/263.pdf and www.uchastings.edu/cgrs/law/bia/263.pdf see also 79 no. 20 Inter. Rel 689).

¹³⁴ Stephen M. Knight, *Seeking Asylum From Gender Persecution: Progress Amid Uncertainty*, May 2002; 79 No. 20 Interpreter Releases 689 (listing 33 cases where IJ's have granted asylum on gender related persecution claims in the 16 months following the vacation of *Matter of R-A-*. Of those cases, the BIA had appealed only two. It seems worth noting that both of those cases were from Mexico.)

¹³⁵ *Klawitter v. INS*, 970 F.2d. 149 (6th Cir. 1992). (The sixth circuit upheld a BIA decision denying asylum to a Polish woman who had been raped by a government official explaining that the abuse was really attraction and the continuous harassment was merely a desire to be a “paramour.”)

¹³⁶ Mary Jordan, *In Mexico, An Unpunished Crime*, WASH. POST, June 30, 2002 at A1.

VII. CONCLUSION

Persecution based on gender is not a recognized protected ground for the purposes of asylum law. Because of this, women have been forced to artificially fit into one of the other enumerated categories. The omission is significant because it has allowed judges to summarily deny asylum claims of women fearing horrible persecution.

Until the United States recognizes persecution based on gender as a basis for an asylum claim, the social group category stands to remain the most promising for women fleeing oppression based on her gender. Claims under social group may include harms inflicted *on account of* a woman's immutable characteristic of gender, where the woman is selected for violence for no other apparent reason than her gender. This ground is also relied on for claims where women are persecuted because of certain actions or beliefs, such as feminist activism or actively opposing social mores. While membership in a specific social group for persecution based on gender is recognized in international law and may sometimes be justified, most gender based asylum claims in which applicants have had to rely on artificial tortured groupings undermines and disguises the principle that persecuting women because they are women is a violation of human rights.

Although sometimes successful to those who could not otherwise establish asylum qualification, the suggestion that persecution based on gender is merely a "political belief" or belongs to part of some mysterious social group does little to forward the notion that broad persecution and violence against women exists and is a violation of human rights. The notion of political opinion needs expansion to properly protect women. While in a few narrow circumstances, a woman's belief in equality may be viewed as a political opinion, a woman's objection to torture and to the categorical denial of basic

human rights should be considered more than just another political opinion. The notions that these are merely her political opinions would seem to justify the acceptance of the opposite political opinion, all opinions of belief being equal. Nor should a woman's objections to torture and denial of human rights be considered extraordinary. Furthermore, it is the persecutor's opinion that should be held accountable and undeserving of protection, for it is always his opinion that causes the harm.

Fears that adding a gender category to the protected grounds will open the floodgates are groundless. The persecution hurdle remains a difficult burden for women to reach. Numerical limits have always been a fact and consideration in all aspects of immigration law and have not been limited to asylum applicants. If the floodgates did not collapse when the definition of refugee was expanded to include those fleeing persecution based on coercive population controls in China, neither will they burst if the definition is expanded to include persecution based on gender.

What inclusion of a gender category will do, is to definitively declare to the world that persecution based on gender is unacceptable, that United States will not tolerate it and to finally acknowledge and verify the sad reminder posed by the axiom "women's rights are human rights" that women are indeed human.