ASYLUM LAW'S GENDER PARADOX

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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 her repeatedly, attempted to abort their second child by kicking her in the spine, dislocated her jaw, tried to cut off her hands with a machete, kicked her in the vagina and used her head to break windows. He terrified her by bragging about his power to kill innocent civilians with impunity. Even though many of the attacks took place in public, police failed to help her in any way. After she made out a complaint, her husband ignored three citations without consequence.[1]

In 1999, the United States denied asylum to the Guatemalan woman who survived these torturous acts and escaped to the North seeking refuge.[2] The panel of asylum judges in *In re R-A-*[3] reasoned that Rodi Alvarado was ineligible for refugee protection because the abuse she suffered resulted from personal circumstances that lacked larger societal relevance.[4]

Six years earlier, the United States denied asylum in the case of an Iranian woman fearing persecution for her opposition to the government's restrictions on women.[5] A court ruled that the woman did not present a particularized asylum claim because it could not distinguish her circumstances from Iran's general mistreatment of

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[1] AMNESTY INTERNATIONAL, BROKEN BODIES, SHATTERED MINDS: TORTURE AND ILL-TREATMENT OF WOMEN 23 (Mar. 2001), *available at http://www.stoptorture.org.* (last visited Aug. 16, 2002).

[2] *In re* R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999); *see also infra* notes 103-07 and accompanying text.

[3] 22 I. & N. Dec. 906 (B.I.A. 1999).

[4] *See id.* at 915-920.

[5] Fatin v. INS, 12 F.3d 1233, 1243 (3d Cir. 1993).

women.[6]

These stories illustrate the paradox faced by victims of gender persecution[7] who seek refuge in the United States: without a category of asylum protection based on gender, women confront contradictory conceptions of their experiences as either too narrow or too broad to qualify them as refugees. This Comment analyzes the unique burden imposed on female asylum applicants to fit their claims within this circumscribed notion of a refugee. The focus of this analysis is the "R-A- rule,"[8] an Immigration and Naturalization Service ("INS") proposal, promulgated in direct response to the Alvarado case which epitomizes asylum law's paradoxical treatment of gender-based asylum claims.

At the time of this Comment's publication, the "R-A- rule" remains a proposal, more than a year and a half after its initial proposition.[9] In fact, it is possible that the INS may never adopt this proposed rule.[10] Regardless of its ultimate fate, however, a critique of the "R-A- rule's" underlying assumptions and of its contradictory demands on female asylum applicants serves as an important gauge of the INS's perception of gender-based asylum claims at a critical moment. While gender-based human rights abuses continue world-wide,[11] the United Nations, in its most definitive terms to date, has

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[6] *Id.* at 1243 n.12 (reasoning that "the petitioner had not shown that she and the other members of her group would be persecuted but only that they would be subjected to 'the same restrictions and regulations applicable to the Iranian population in general'") (citation omitted).

[7] This Comment considers gender persecution, acts of violence against women perpetrated because of the persecutor's bias or animus toward women. While a persecutor's motivation is a legal conclusion to be proven by an asylum applicant, this Comment considers rape, forced prostitution, domestic violence, female genital mutilation, dowry deaths, and honor killing to be prime examples of gender persecution. For an enumeration and discussion of the common physical, sexual, and psychological forms of gender-based violence, see United Nations High Commissioner for Refugees, *Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations* 1, 5 U.N. Doc. EC/SCP/67 (Mar. 2001), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home [hereinafter "UNHCR, Sexual and Gender-Based Violence"].

[8] In accordance with administrative procedure for implementing new regulations, the INS published the proposed rule in the Federal Register along with commentary explaining its purpose and reasoning. *See* Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). In press materials announcing the proposed rule, the INS termed the proposal the "R-A- rule." *See* Questions and Answers, The R-A- Rule (Dec. 7, 2000), *at http://www.ins.usdoj.gov/graphics/publicaffairs/questsans/RARule.htm* (last visited Aug. 16, 2002) (on file with author).

[9] *See* 65 Fed. Reg. at 76,597-76,598.

[10] *See* Morgan, *infra* note 110.

[11] *See generally* AMNESTY INTERNATIONAL, *supra* note 1.

made clear that states should consider gender-based persecution a basis for asylum.[12] Because of its lack of a guarantee that women persecuted because of their gender have equal access to refuge, the proposed rule exposes an enduring gender paradox in U.S. asylum law.

The promulgation of the INS proposal followed two conflicting decisions by asylum adjudicators in the Alvarado case. An immigration judge first agreed with Alvarado that she had been persecuted on account of her "membership in a particular social group," specifically, "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[13] The Board of Immigration Appeals ("BIA") in *In re R-A-*,[14] however, reversed the judge's decision and held that Alvarado failed to establish persecution based on her membership in a cognizable "social group" under the asylum statute.[15] Alvarado appealed the decision to the United States Court of Appeals for the Ninth Circuit, which stayed the decision to allow for review by the United States Attorney General.[16] A month before the Attorney General's eleventh-hour ruling, the INS proposed the "R-A- rule" in direct response to the BIA's decision in the Alvarado case.[17] The INS explained its proposal as an attempt to clarify the interpretation of asylum cases "with more varied bases . . . [such as] an applicant's gender or sexual orientation."[18] In one of her final acts in office, in January 2001, Attorney General Janet Reno vacated the BIA decision and remanded

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[12] The United Nations High Commissioner for Refugees recently published new guidelines on the protection of refugee women that state, "[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." United Nations High Commissioner for Refugees, *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 6, U.N. Doc. HCR/GIP/02/01 (2002) [hereinafter "2002 UN Gender Guidelines"].

[13] Matter of Rodi Alvarado Pena (Immgr. Ct. Sept. 20, 1996), *available at http://www.uchastings.edu/cgrs/caselaw/ij/alvarado-ij.html* (on file with author).

[14] 22 I. & N. Dec. 906 (B.I.A. 1999).

[15] *Id.* at 914.

[16] Order of Stay in Rodi Alvarado Pena v. INS, No. 99-70823 (9th Cir. June 8, 2000), *available at* http://www.uchastings.edu (last visited Aug. 30, 2002) (on file with author).

[17] Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). The INS explicitly noted that the proposed definitions are "intended to address analytical issues that have arisen in the context of some claims based on domestic violence, and in particular in the Board's decision in *In re R-A-*." *Id.* (citation omitted).

[18] *Id.* at 76,589.

the case for determination in accordance with the finalized version of the proposed INS rule.[19]

The requirements for qualifying as a refugee consist of three essential elements:[20] (1) an applicant must have a well-founded fear of persecution, which requires state action;[21] (2) the applicant must possess one or more of five protected characteristics: race, religion, nationality, membership in a particular social group, or political opinion; and (3) the applicant must have been or will be persecuted on account of that characteristic.[22] The proposed rule addresses the meaning of three particular components of the refugee definition: "persecution," "on account of," and "membership in a particular social group."[23]

With respect to "persecution," the proposed rule reaffirms that the relevant government must be responsible for the applicant's past harm and suffering, or fear of future harm or suffering.[24] The proposed language, however, makes clear that persecution may also be imputed to a government when an individual or group persecutes an applicant and the relevant government "is unwilling or unable to

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[19] Matter of Rodi Alvarado Pena, Att'y Gen. Order 2379-2001 (Jan. 19, 2001), *available at* http://www.uchastings.edu/cgrs/documents/legal/ag_ra_order.pdf (last visited Aug. 30, 2002) (on file with author); *see also* Susan Sachs, *Reno Voids Denial of Asylum for Guatemalan Battered Wife*, N.Y. TIMES, Jan. 20, 2001, at B4.

[20] The Refugee Act defines a refugee as:

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

8 U.S.C. § 1101(a)(42)(A).

[21] 65 Fed. Reg. at 76,597 ("Inherent in the meaning of the term persecution is that the serious harm or suffering that an applicant experienced or fears must be inflicted by the government of the country of persecution or by a person or group that the government is unwilling or unable to control.").

[22] *See* INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

[23] *See* 65 Fed. Reg. 76,597-76,598 (2000). The current INS regulations do not provide definitions nor explanations for these terms. *See* 8 C.F.R. § 208.15.

[24] 65 Fed. Reg. at 76,597. In addition, the proposed rule sets forth considerations for asylum judges to evaluate in determining whether a government is unable to control the persecution or whether it is unwilling to intervene. *Id.* In interpreting whether the government has taken any reasonable steps to control the conduct and whether reasonable access to state protection exists, the proposed rule states that judges "may" consider a list of seven sources of evidence, which include "government complicity" in relation to the harm, "a pattern of government unresponsiveness," and "general country conditions." *Id.*

control" the conduct.[25] With respect to the meaning of the term "on account of," the rule would impose a new, higher burden, requiring not only that an applicant establish her persecutor's motivation, but also that this motivation be *central* to the persecutor's motivation to act.[26] In addition, the rule clarifies that, although relevant, the "on account of" inquiry does not require evidence that a persecutor seeks to harm other individuals with the applicant's protected characteristic.[27] Ironically, the rule contradicts this clarification by suggesting that motive may not be ascertainable without evidence related to the societal significance of the abuse.[28] Finally, the regulation proposes a two-step test for determining the meaning of "membership in a particular social group."[29] First, a "social group" must consist of members with a common, immutable characteristic.[30] Having found an immutable trait, a judge may then consider the extent to which the group is cohesive and societally-recognized.[31]

Persecution based on one's "membership in a particular social group" is the least clearly defined of the five categories of refugee protection.[32] In spite of its ambiguity, the "social group" category is vital for female asylum applicants persecuted on account of their gender.[33] Because the asylum statute does not include gender as a category of cognizable persecution,[34] victims of gender-based persecution must frequently rely on the "social group" ground when seeking asylum.[35] Thus, the contribution of the proposed INS rule to the analysis of gender-based claims hinges on the scope and meaning of persecution on account of "membership in a particular social

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[25] *Id.*

[26] *Id.*

[27] *Id.* at 76,597-76,598.

[28] *See infra* notes 143-52 and accompanying text.

[29] *See* 65 Fed. Reg. at 76,598; *see also* discussion *infra* PART III.F.

[30] 65 Fed. Reg. at 76,598.

[31] *See infra* notes 252-58.

[32] Memorandum from Phyllis Coven, U.S. Dep't of Justice, Considerations For Asylum Officers Adjudicating Claims From Women 1 (May 26, 1995), *available at* http://www.uchastings.edu/cgrs/law/guidelines/guidelines_us.pdf (on file with author) [hereinafter "INS Guidelines"]; s*ee also* Fatin v. INS, 12 F.3d at 1239 (3d Cir. 1993) (discussing the sparse legislative history with respect to the meaning and scope of the "social group" category).

[33] *See* Lydia Brashear Tiede, *Battered Immigrant Women and Immigration Remedies: Are the Standards Too High?*, 28 HUM. RTS. 21 (2001) (noting the absence of a gender-specific category in the refugee definition and the resulting tendency of women to rely on the "membership in particular social group" and "political opinion" theories in gender-based asylum claims).

[34] *See* INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

[35] *See* Brashear Tiede, *supra* note 33.

group."[36]

Although the proposed rule attempts to clarify the meaning of "refugee" and to improve asylum analysis for victims of domestic violence,[37] the rule falls short of these objectives. First, by inserting the new centrality requirement into the "on account of" analysis, the proposal adds a new hurdle into women's difficult task of proving their persecutors' motives.[38] Second, rather than refining the interpretation of "social group," the rule confounds its meaning by providing discretionary factors for judges to consider even when women establish persecution on account of the immutable trait of gender.[39] In short, by failing to ensure that asylum adjudicators consider the persecution of women based on their gender a sufficient basis for asylum,[40] the rule does little to improve persecuted women's access to refuge. In fact, the rule promotes the gender paradox, by requiring that a "social group" be more particularized than gender alone,[41] but still possess societally significant breadth and cohesion.[42]

Part I of this Comment discusses the history of gender-based asylum analysis in the United States, leading up to Attorney General Reno's final day in office in January 2001. Part II summarizes the proposed "R-A- rule" and Part III critiques it, addressing its creation of a more demanding standard for establishing "persecution on account of membership in a particular social group." Part IV evaluates the asylum paradox faced by female claimants. This section argues that the United States must end the disparate treatment of victims of gender persecution by eliminating the contradictory view of women's persecutory experiences as either too pandemic or too personal or domestic in nature to warrant refugee protection. This Comment concludes that the most effective and appropriate manner of preventing the paradoxical treatment of gender-based asylum

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[36] For a discussion of the INS's treatment of "social group" within the proposed "R-A- rule," see *infra* PART III.F.

[37] INS News Release, Proposed Rule Issued for Gender-Based Asylum Claims (Dec. 7, 2002), *available at http://www.ins.usdoj.gov* (on file with author).

[38] *See infra* PART III.D & III.E.

[39] *See infra* PART III.F.

[40] In the Federal Register summary, the INS proposal "restates that gender can form the basis of a particular social group." Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). However, because the rule's proposed two-step analysis of "social group" claims allows judges to deny asylum in situations where a woman establishes persecution based on her immutable trait of gender, the Federal Register statement is merely aspirational. For a discussion of the two-pronged "social group" analysis proposed by the INS, see *infra* PART III.F.

[41] *See infra* notes 276-77 and accompanying text.

[42] *See infra* notes 279-82 and accompanying text.

claims is an amendment to the refugee statute that recognizes persecution on account of gender as an independent ground for asylum.

I. THE HISTORY OF GENDER PERSECUTION AS A BASIS FOR ASYLUM

A. The Refugee Treaty

July 2001 marked the 50th Anniversary of the most important document promoting the welfare of refugees around the world:[43] the 1951 Geneva Convention on the Status of Refugees.[44] As of August 8, 2002, 141 countries have become parties to this treaty[45] and have accepted its obligations to protect refugees whose "freedom would be threatened on account of [their] race, religion, nationality, membership in a particular social group, or political opinion."[46] Although not a party to the original treaty, the United States is among 139 countries that have signed on to the 1967 Protocol on the Status of Refugees ("Protocol").[47] The Protocol incorporated the Refugee Convention, eliminated its temporal limitations, and extended its geographic coverage beyond Europe.[48] It was not until Congress enacted the Refugee Act of 1980,[49] which codified the Convention's definition of refugee and nearly all of its other provisions,[50] that the United States formalized a process by which persons could seek protection under the Protocol within the United States.[51] Because the Refugee Convention provides the framework for whether foreigners seeking asylum in this country will be granted

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[43] *See, e.g.*, Thomas David Jones, *A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited*, 9 GEO. IMMIGR. L.J. 479, 480 (1995).

[44] 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 137 (adopted July 28, 1951), *available at http://www.unhcr.ch/1951convention/index.html* [hereinafter "Refugee Convention"].

[45] UNHCR, State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home [hereinafter "State Parties to the 1951 Convention"] (on file with author).

[46] Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, art. 33 (1967), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home [hereinafter "1967 Protocol"].

[47] State Parties to the 1951 Convention, *supra* note 45.

[48] *See* 1967 Protocol, *supra* note 46, at arts. I(2), (3).

[49] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107 (1980) (codified in scattered sections of 8 U.S.C.).

[50] *Id.* The Convention's definition of refugee is now a part of the INA and has been implemented by the regulations of the INS. *See* 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.15.

[51] RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 8:1 (2d ed. 2001).

refuge,[52] to examine the treatment of women under U.S. asylum law, one must first look to the treaty.

When the drafters of the Refugee Convention formulated the definition of refugee, they carved out five grounds under which a claimant could establish asylum — race, religion, nationality, political opinion, and membership in a particular social group — with gender noticeably absent.[53] According to the office of the United Nations High Commissioner for Refugees ("UNHCR"), the drafters "did not deliberately omit persecution based on gender—it was not even considered."[54] While the exclusively male drafters may have overlooked gender primarily because the treaty's immediate focus was the hundreds of thousands of European refugees displaced by World War II,[55] the exclusion of gender has also been attributed to the drafters' failure to recognize the experiences of women as internationally relevant.[56] Specifically, the drafters failed to recognize that persecutors have harmed and would continue to harm women because of their status as women.[57] After the recent horror of genocide in Nazi-Germany, the foremost concern of the Convention drafters in 1951 was the protection of persons persecuted for racial and religious reasons.[58]

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[52] *See generally* Binder, *infra* note 58.

[53] Refugee Convention, art. 1(A)(2), *supra* note 44.

[54] Judith Kumin, *Gender: Persecution in the Spotlight, in* 2 REFUGEES 12 (2001), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/ (last visited on Aug. 30, 2002).

[55] *See* UNHCR, *The Refugee Convention at 50, at http://www.unhcr.ch/cgi-bin/texis/vtx/home/* (last visited July 23, 2002) (on file with author).

[56] *See* Kumin, *supra* note 54, at 12 ("Little thought was given to forms of persecution which might only affect women.").

[57] The fact that the male treaty drafters did not contemplate gender persecution in 1951 does not mean that this form of persecution was unfamiliar to the world. For example, in the decade before the drafting of the Convention, Japan forced over 200,000 Korean women into sexual slavery as euphemistically labeled "comfort women" during World War II. *See generally* Etsuro Totsuka, *Commentary on a Victory for "Comfort Women:" Japan's Judicial Recognition of Military Sexual Slavery*, 8 PAC. RIM L. & POL'Y J. 47 (1999). Furthermore, throughout history, men have perpetrated mass rapes of women during times of war. *See* Christopher Scott Maravilla, *Rape as a War Crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia's Decision in* Prosecutor v. Kunarac, Kovac, & Vukovic *on International Humanitarian Law*, 13 FLA. J. INT'L L. 321 (2001); *see also* Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 88 (1999) (calling rape during war "the accepted rule . . . in virtually all wars, by virtually all military forces").

[58] *See* Daniel J. Steinbock, *Refuge and Resistance: Casablanca's Lessons for Refugee Law*, 7 GEO. IMMIGR. L.J. 649, 686 (1993); *see also* 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) (noting that "ideologically-based concerns

Thirty years after the document's creation, however, gender-based human rights abuses gained publicity, provoking an international response.[59] In 1979, the United Nations ("UN") enacted the Convention to Eliminate All Forms of Discrimination Against Women ("CEDAW") in an effort to address the experiences of women in a growing body of international human rights law, which had largely ignored women.[60]

A decade after the UN's passage of CEDAW, however, the systematic use of rape and forced impregnation during the war in Bosnia,[61] the continuing occurrence of female genital mutilation,[62] and the brutal oppression of women under the Taliban rule of Afghanistan[63] evidenced the unyielding prevalence of gender persecution in the world. In 1991, UNHCR issued Guidelines On The Protection Of Refugee Women[64] to ensure that victims of gender-persecution would be included within the protection of the Refugee Convention.[65] Acknowledging the refugee definition as a potential hurdle for women seeking asylum,[66] UNHCR urged state parties to "[p]romote acceptance in the asylum adjudication process of the principle that women fearing persecution or severe

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by the West about the international protection of political dissidents from Eastern European communist regimes" prompted the political opinion category).

[59] Kumin, *supra* at 54 ("[T]he real turning point came in the 1990s . . . [when] the movement to recognize the universality of human rights gained credibility.").

[60] *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1979) (entered into force Sep. 3, 1981), *available at* http://www.un.org/womenwatch/daw/cedaw/index.html [hereinafter "CEDAW"]. The introduction to CEDAW states that "among the international human rights treaties, the Convention take an important place in bringing the female half of humanity into the focus of human rights concerns." *Id.*

[61] For a discussion of the use of rape in war, specifically in Bosnia, and the importance of medically documenting mass rape, see Shana Swiss, *Rape as a Crime of War: A Medical Perspective*, 5 JAMA 612 (Aug. 4, 1993). For an argument that rape during war is a form of genocide against women as a class, see Rumna Chowdhury, Kadic v. Karadzic — *Rape as a Crime Against Women as a Class,* 20 LAW & INEQ. 91 (2002).

[62] Jaimee K. Wellerstein, Comment, *In The Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation*, 22 LOY. L.A. INT'L & COMP. L. REV. 99, 100 (1999) (citing World Health Organization statistics showing that at the end of the 1990s between 100 and 180 million women had undergone FGM).

[63] *See generally* Amnesty International, *Women in Afghanistan, Pawns in Men's Power Struggles* (Nov. 1999), *available at* http://www.feminst.org/afghan/sdreports.html (last visited Aug. 16, 2002) (on file with author).

[64] *Guidelines on the Protection of Refugee Women: Legal Procedures and Criteria for the Determination of Refugee Status*, UN Doc. ES/SCP/67 ¶ 57 (1991) [hereinafter "1991 UN Gender Guidelines"].

[65] *Id.* at ¶¶ 6, 16.

[66] *Id.* at ¶ 54.

discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status."[67]

In 1992, the United Nations Committee on the Elimination of Discrimination against Women also addressed the growing number of gender-based human rights abuses by urging state parties to take deliberate steps in order to study, identify, prevent, and remedy violence against women.[68] One of the committee's General Recommendations classified gender-based violence as a unique category of discrimination, noting that it "seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."[69]

Canada was the first country to respond to UNHCR's call, adopting guidelines to facilitate the adjudication of gender-based asylum claims in 1993.[70] Through these guidelines, Canada made clear that "women" may qualify as a "particular social group" under the Refugee Convention's definition of refugee, which it had adopted as the standard for its domestic asylum laws.[71] Unlike Canada, the United States did not readily acknowledge that gender alone may form the basis of a "particular social group"—a gap that endures under the proposed INS rule.[72]

B. Delimiting Gender & "Social Groups" in the United States

Prompted by the efforts of the United Nations and

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[67] *Id.* The Guidelines noted that the refugee definition does not protect women who face severe punishment and even death for defying cultural and social norms that severely restrict women's freedom, mobility, and autonomy. *Id.* at ¶ 54. In May 2002, UNHCR went a step further, releasing updated guidelines on the 1951 Refugee Convention's application to gender-related persecution, which delineate a substantive analysis of gender-based asylum claims within existing asylum grounds and directly address historical barriers to specific forms of gender-based persecution. *See 2002 UN Gender Guidelines*, *supra* note 12.

[68] General Recommendation 19: Violence Against Women, Committee on the Elimination of Discrimination Against Women, 11th Sess., U.N. Doc. A/47/38, at ¶ 1 (1992), *available at* http://www.un.org/womenwatch/daw/cedaw/recomm.htm (last visited Aug. 10, 2002).

[69] *Id.* The Committee acknowledged that traditional views of women have led to the perpetration of widespread violence and coercion including, "family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision." *Id.* at ¶ 11.

[70] Canadian Immigration and Refugee Board, Guidelines for Women Refugee Claimants Fearing Gender-Related Persecution (Nov. 13, 1996), *available at* http://www.uchastings.edu/cgrs/law/guidelines.html#Canada (on file with author); *see also* Kumin, *supra* note 54.

[71] *See* Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391, 392 (2001).

[72] *See infra* note 272 and accompanying text.

commentators to draw attention to the plight of persecuted women, in 1995 the Director of the INS Office of International Affairs addressed a memorandum to all Asylum Officers setting forth guidelines for officers to follow when adjudicating women's asylum claims.[73] The guidelines state that "although women applicants frequently present asylum claims for reasons similar to male applicants, they may also have had experiences that are particular to their gender."[74] The Guidelines declare that gender-specific abuse such as, "rape (including mass rape in, for example, Bosnia), sexual abuse and domestic violence, infanticide, and genital mutilation" could serve "as evidence of past persecution on account of one or more of the five grounds" for asylum under U.S. law.[75] In spite of this declaration, the Guidelines do not provide substantive guidance on how asylum adjudicators should interpret gender-specific violence as a demonstration of persecution on account of one of the five other categories, nor on how judges could avoid stereotypes that frequently emerge in gender-based claims.[76]

In addition, the INS carefully pointed out — both within the memorandum announcing the Guidelines and in subsequent statements — that that the Guidelines do not expand or alter the legal requirements of asylum eligibility under current law.[77] While some commentators commended the INS's efforts for recognizing women's rights to protection under refugee law,[78] others criticized the agency for not going far enough.[79] Critics noted in particular

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[73] *See* INS Guidelines, *supra* note 32, at 1.

[74] *Id.* at 4.

[75] *Id.*

[76] *See id.*; s*ee also* Diana Saso, *The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines*, 8 HASTINGS WOMEN'S L.J. 263, 282 (1997) (arguing that the INS's warning to officers not to jump to the conclusion that sexual violence against women is personally motivated is ineffectual because it fails to give guidance on why women's gender-based claims are susceptible to this assumption and why the assumption is wrong).

[77] *Victims of Torture: Hearing Before the House Comm. on Int'l. Relation, Subcomm. on Int'l. Operations and Human Rights,* 104th Cong., *available at* 1996 WL 10164383 (May 8, 1996) (Testimony of Phyllis A. Coven, Director of International Affairs Immigration and Naturalization Service). Coven stated: "The Gender Guidelines provide Asylum officers with substantive guidance on the cardinal principles of American asylum law that bear on gender-related asylum cases . . . [but] do not enlarge or expand the grounds for asylum that were specified by Congress and the understanding the courts have reached about those grounds." *Id.*

[78] *See, e.g.*, Deborah Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771, 778 (1995) (stating that the INS guidelines "establish the rights of women asylum claimants within the framework of current law and hopefully end a tradition of interpretation by which women have been excluded").

[79] *See, e.g.*, An Mai Nguyen, Comment, *The Torture Convention: A Gap Filler for the*

that the subsequent impact of the guidelines, which are required reading for immigration judges but are not binding law,[80] has been inconsistent as applied to certain forms of gender-based persecution.[81]

As commentators have argued and the *R-A-* decision illustrates, a remaining hurdle to gaining asylum faced by victims of domestic violence is the continued conception of this abuse as a private wrong incapable of governmental redress.[82] The reasoning of asylum judges in the cases of women who have been raped also frequently exhibits this view of gender-violence.[83] In several cases, judges have determined that the sexual assault was merely an act of random violence, reasoning that sexual desire or some factor other than one of the five protected characteristics motivated the rape.[84] While there is no one answer to the question of why men rape—a problem which

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Holes in U.S. Asylum Policy Towards Victims of Domestic Violence, 30 Sw. U. L. REV. 171, 180-81 (2000) (arguing that the Guidelines have been ineffective at improving adjudication of gender-based asylum claims because of the simplicity of their primary goal to increase sensitivity within the process, and because of the inconsistent application of the law in light of the guidelines' non-binding nature); Saso, *supra* note 76, at 311 (arguing that although a positive step, "the Guidelines adopted a circumspect rather than an expansive approach to gender-based asylum claims").

[80] *See* 72 INTERPRETER RELEASES 771 (June 5, 1996).

[81] *See, e.g.*, Elizabeth Rho-Ng, *The Conscription of Asian 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 INS Guidelines, which recognize rape and other forms of sexual persecution, have been applied inconsistently—victims claiming rape as grounds for asylum have had success, while victims of "morally suspect" forced prostitution have not).

[82] For a critique of how the conception of domestic violence as private conduct has led immigration judges to deny asylum claims based on a finding of a lack of state action, see Anker, *supra* note 71, at 391.

[83] *See* Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J., 625, 640-41 (1993) (discussing cases that "reflect two pervasive problems in evaluating the asylum cases of women: difficulty accepting rape and other forms of sexual abuse as violence, and the tendency to ascribe personal motivations to persecutors when the harm is sexual").

[84] *See, e.g.*, Melgar de Torres v. Reno, 191 F.3d 307 (2d Cir. 1999) (finding the rape of the niece of an assassinated guerilla sympathizer did not constitute persecution on account of political opinion but was an "act of random violence"); Campos-Guardado v. INS, 809 F.2d 285, 287 (5th Cir. 1987) (affirming the denial of asylum to a woman from El Salvador who had been violently raped and forced to watch the brutal murder of her cousins and uncle with machetes); Klawitter v. INS, 970 F.2d 149 (6th Cir. 1992). In *Klawitter* the Sixth Circuit upheld the BIA's denial of asylum to a Polish woman who claimed that a government official "forced himself on her and used violence against her while threatening to destroy her career." *Id.* at 151. In archaic language that equates alleged abuse with attraction, and the perpetration of constant harassment and fear as a desire to be a "paramour," the court explained that the officer's "interest" was merely personal. *Id.* at 152.

has produced extensive study and disagreement[85]—many asylum judges have been quick to view rape as personal and random in nature and therefore outside the boundaries of asylum protection.[86]

In light of these barriers to gender-based asylum claims, the 1996 BIA decision in *In re Kasinga*,[87] which granted asylum to a woman from Togo by reasoning that women fearing forced female genital mutilation ("FGM")[88] may constitute "a particular social group," elicited much enthusiasm from refugee activists and scholars.[89] Commentators hoped that in addition to setting a precedent for FGM cases the decision would expand protection for women seeking asylum based on other forms of gender-persecution.[90] Other commentators, however, criticized *Kasinga's* fact-specific explanation[91] and questioned its potential impact on future asylum cases.[92]

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[85] For an argument that biology motivates rape, see Randy Thornhill, *Symposium on Biology and Sexual Aggression: Part I The Biology of Human Rape*, 39 JURIMETRICS J. 137 (1999). For an argument that rape is inherently motivated by gender animus, see Bonner, *infra* note 178 and Carney, *infra* note 178.

[86] *See, e.g.*, *Klawitter*, 970 F.2d at 152; *see also* Kelly, *supra* note 83.

[87] *In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996). The BIA described the FGM procedure that Kasinga would be forced to endure as an extreme form in which portions of the female genitalia would be cut away with knives causing extensive bleeding, severe pain, several weeks of incapacitation, and serious risk of life-threatening complications. *Id.* at 361.

[88] FGM is a "medically unnecessary" procedure, which is endured by 80 to 110 million women worldwide and practiced in parts of Africa, the Middle East, and Muslim parts of Asia. *Female Genital Mutilation*, JAMA (Dec. 6, 1995). FGM is considered a right of passage within some cultures and typically occurs at the age of seven, but causes women severe medical complications for the rest of their lives. *Id.*

[89] *See, e.g.*, Connie M. Ericson, *In re* Kasinga*: An Expansion of the Grounds for Asylum for Women*, 20 HOUS. J. INT'L L. 671 (1998); Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of* In Re Fauziya Kasinga *and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375 (1997); Tiajuana Jones-Bibbs, *United States Follows Canadian Lead and Takes an Unequivocal Position Against Female Genital Mutilation: In re* Fauziya Kasinga*,* 4 TULSA J. COMP. & INT'L L. 275 (1997) (calling the decision a "courageous position" which will serve as "precedent [to] guide 179 immigration judges in adjudicating like claims by women fleeing FGM"); Karen Musalo, *In re* Kasinga*: A Big Step Forward for Gender-Based Asylum Claims*, 73 INTERPRETER RELEASES 853 (July 1, 1996); Mary M. Sheridan, Comment, *In re* Fauziya Kasinga*: The United States Has Opened Its Doors to Victims of Female Genital Mutilation*, 71 ST. JOHN'S L. REV. 433 (1997).

[90] *See, e.g.*, Helton & Nicoll, *supra* note 89; Musalo, *supra* note 89.

[91] The BIA reasoned that *Kasinga* had a well-founded fear of persecution as a "member of social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM as practiced by that tribe, and who oppose the practice." *Kasinga*, 21 I. & N. Dec. at 365.

[92] *See, e.g.*, James A. Lazarus, *In Through the Side Door: Analyzing In Re Anikwata Under U.S. Asylum Law and the Torture Convention*, 32 CASE W. RES. J. INT'L L. 101, 114 (2000) (Kasinga "did not reach much beyond the facts of that particular case");

Two recent and inconsistent immigration decisions may illustrate a basis for this criticism. In the context of the trafficking of women, an immigration judge relied on *Kasinga* to grant asylum to a woman facing forced prostitution in China.[93] Another immigration judge, however, found the "social group" argument unpersuasive in the case of a Russian woman who was sold into sexual slavery and endured daily rape and severe abuse by her captor.[94] Even after *Kasinga*'s recognition that women may be persecuted as members of social groups at least partly defined by gender, some immigration judges continued to demonstrate an unwillingness to build upon *Kasinga's* reasoning and to extend protection to other persecuted women.[95] Three years after this important decision, however, in the views of many refugee activists and scholars, gender-based asylum law took an abrupt step backward.[96] On June 11, 1999, the BIA issued its decision in one of the most extreme cases of domestic violence imaginable:[97] *In re R-A-*.[98]

Linda A. Malone, *Beyond Bosnia and In Re Kasinga: A Feminist Perspective on Recent Developments in Protecting Women from Sexual Violence*, 14 B.U. INT'L L.J. 319, 336-37 (1996) (arguing that the "door to asylum may remain closed to many applicants without the representation, documentation, and extraordinarily compelling facts available to [Kasinga]").

[93] *Matter of J-M-*, 1, 16 (Immgr. Ct. Dec. 3, 1996) (reasoning that the applicant's objection to forced prostitution put her in "the same situation as the applicant in *Kasinga*, who was in a society where she was being forced to undergo a procedure of which she was a not in agreement"), *at http://www.uchastings.edu/cgrs/law/ij/364.*

[94] Gender Asylum Case Study 275, provided by the University of California, Hastings College of Law Center for Gender and Refugee Studies, *at http://www.uchastings.edu/cgrs/summaries/200-299/summary275.html* (on file with author). The immigration judge rejected all of the applicant's asserted social group theories, including one that described her membership in a particular social group as "young women who refuse to consent to sex." *Id.*

[95] *See, e.g.*, Gender Asylum Case Study 216, provided by the University of California, Hastings College of Law Center for Gender and Refugee Studies, *at http://www.uchastings.edu/cgrs/summaries/200-299/summary216.html* (denying asylum to a young woman kidnapped, raped, beaten and forced to work in a brothel on grounds that sexual slavery is not a form of persecution addressed by asylum law); Matter of G-R-, (Immgr. Ct. Jan. 26, 1995), *at http://www.uchastings.edu* (on file with author).

[96] *See infra* note 107.

[97] The BIA decision recounts almost three pages of horrific abuse suffered by Alvarado at the hands of her husband. *In re* R-A-, 22 I. & N. Dec. 906, 908-10 (B.I.A. 1999); *see also* Hannah R. Shapiro, *The Future of Spousal Abuse as a Gender-Based Asylum Claim: The Implications of the Recent Case of* Matter of R-A-, 14 TEMP. INT'L & COMP. L.J. 463, 487 (2000) (quoting a National Public Radio interview, in which Karen Musalo, Director of the Center for Gender and Refugee Studies stated that if asylum "can't be granted in a case where a woman is basically tortured by her husband over a ten-year period—if in a case like this, there's no protection, my God, in what cases would a woman be protected?").

[98] 22 I. & N. Dec. 906, 908-10 (B.I.A. 1999).

In her asylum application, Rodi Alvarado presented two theories to establish her status as a refugee.[99] First, Alvarado reasoned that her husband persecuted her on account of her political opinion, defined as her opposition to male domination.[100] Alternatively, Alvarado argued that he persecuted her on account of her membership in a particular social group, specifically "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[101] The immigration judge who initially heard the case agreed that Alvarado's husband persecuted her both on account of her membership in the asserted social group and because of her imputed political opinion, and accordingly granted asylum.[102] On appeal by the INS, the BIA rejected this reasoning, stating that "the group identified by the immigration judge has not adequately been shown to be a 'particular social group' for asylum purposes."[103] According to the BIA, Alvarado "failed to show that her husband was motivated to harm her, even in part, because of her membership in a particular social group or because of an actual or imputed political opinion."[104] In fact, the BIA seemed to suggest that Alvarado suffered violence that had no purpose or motivation whatsoever,[105] and that she was simply cursed by marrying an evil man.[106] The decision engendered widespread criticism and sparked renewed attention to the lack of protection afforded to persecuted women under U.S. asylum law.[107]

When Attorney General Janet Reno vacated the decision on January 18, 2001, she remanded the case to the BIA for

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[99] *Id.* at 911.

[100] *Id.*

[101] *Id.*

[102] *See* Matter of Rodi Alvarado Pena (Immgr. Ct. Sept. 20, 1996), *available at* http://www.uchastings.edu/cgrs/caselaw/ij/alvarado-ij.html.

[103] *R-A-*, 22 I. & N. Dec. at 917.

[104] *Id.*

[105] *Id.* at 915 ("As their marriage proceeded, the level and frequency of his rage increased concomitantly with the seeming senselessness and irrationality of his motives.").

[106] *See id.* The BIA explained that "once having entered into this marriage, there was nothing the respondent could have done or thought that would have spared her (or indeed would have spared any other woman unfortunate enough to have married him) from the violence he inflicted." *Id.*

[107] *See, e.g.*, Lindsay A. Franke, Note, *Not Meeting the Standard: U.S. Asylum Law and Gender-Related Claims*, 17 ARIZ. J. INT'L & COMP. L. 605 (2000); Shapiro, *supra* note 97; Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN'S L.J. 221, 238 (2000); Frederic Tulsky, *Abused Woman is Denied Asylum*, WASH. POST, June 20, 1999, at A1.

reconsideration in accordance with the proposed INS rule, stating that the case should not be decided until the new regulations were in final form.[108] Although the proposal received an answer and comment period, under the Bush Administration, the INS has not finalized any changes to the asylum regulations,[109] and Rodi Alvarado waits.[110]

II. THE INS PROPOSAL

The proposed rule provides guidance on the interpretation of three critical terms embodied in the definition of refugee: "persecution," "on account of," and "membership in a particular social group."[111] These three terms have each produced analytical barriers in asylum claims brought by women, particularly in cases in which the persecutor is a non-state actor or in which the persecution is deemed to occur in the "private sphere, outside both the realm of recognized civil and political activity and the reach of the state"[112]

The rule first explains that "persecution" is "serious harm or suffering" measured by both the applicant's subjective experience and by an objective standard.[113] In addition, the "persecution" must be inflicted by the government from which a refugee has fled or by a

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[108] *See In re*: Matter of Rodi Avlarado Pena, Att'y Gen. Order 2379-2001 (Jan. 19, 2001).

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

[110] At least one refugee activist has expressed concern that the new rules may never appear under the Bush Administration. *See* Fiona Morgan, *The Politics of Protection*, *at* http://archive.salon.com/news/feature/2001/01/09/asylum/ (Jan. 9, 2001) (quoting Alvarado's lawyer and refugee activist Karen Musalo's statement that "[i]t is not unusual at all for the incoming new administration to yank all of the regulations or other pending matters that have not been finalized") (last visited Sept. 1, 2002) (on file with author). Even if the Bush administration does adopt the proposed rule, it could be some time before the rule is finalized and binding. In the case of INS regulations implementing the Illegal Immigration Reform and Immigrant Responsibility Act, although more comprehensive, it took four years from the time the INS proposed the rules in January 1997 until the agency finalized them in December 2000. Phillip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 3 (2001).

[111] 65 Fed. Reg. at 76,597-76,598.

[112] Dorothy A. Thomas, *Acting Unnaturally: In Defense of the Civil and Political Rights of Women*, *in* FROM BASIC NEEDS TO BASIC RIGHTS 41, 42 (Margaret A. Schuler ed., 1995) (noting that women have been excluded from human rights protection because of the "relegation [of women] to the private sphere"); *see also* Emily Love, *Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution*, 17 HARV. WOMEN'S L.J. 133, 137 (1994) (noting that "distinctions between the predominantly male-dominated public sphere and the female-dominated domestic sphere can lead to the denial of [women's] asylum claims").

[113] 65 Fed. Reg. at 76,597.

"person or group that that government is unwilling or unable to control."[114]

Turning to the "on account of" definition, the rule states that when a persecutor has "mixed motivations," an applicant must prove that her "protected characteristic is central to the persecutor's motive to act against [her]."[115] Although all asylum applicants have the burden of proving motive to satisfy the asylum statute's "on account of" requirement,[116] the proposal would alter the current analysis by adding an inquiry into the centrality of the motive.

With respect to the "on account of" analysis, the INS rule attempts to limit a principal aspect of the "on account of" reasoning in the *R-A-* case: the BIA's determination that Alvarado's husband could not have harmed her on account of her "membership in a particular social group" because he did not target other women sharing his wife's "social group" characteristic.[117] Rejecting the BIA's reasoning, the INS clarifies that evidence that a person acts against other members of an asserted social group is relevant, but not required to establish motive.[118] In the rule's summary, the INS recognizes that a persecutor could potentially target an individual precisely because of a specific characteristic, yet not attempt to harm others possessing the same characteristic.[119] According to the INS, this may be the case in the context of domestic violence, in which social structures, such as a woman's inferior status in a relationship, can enable a persecutor to harm only one woman, the woman in a domestic relationship with the abuser.[120]

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[114] *Id.* The proposed rule sets forth considerations for asylum judges to evaluate in determining whether a government is unable to control the persecution or whether it is unwilling to intervene. *Id.* In interpreting whether the government has taken any reasonable steps to control the conduct, and whether reasonable access to state protection exists, the rule states that judges "may" consider a list of seven sources of evidence, which include "government complicity" in relation to the harm, "a pattern of government unresponsiveness," and "general country conditions." *Id.*

[115] *Id.*

[116] *See* INS v. Elias-Zacarias, 502 U.S. 478 (1992).

[117] 65 Fed. Reg. at 76,592. The INS explained that an "important factor in the Board's decision" was the fact that "there was no evidence that [Alvarado's husband] would seek to harm other women who live with other abusive partners." *Id.*

[118] *Id.* at 76,598.

[119] *Id.* at 76,592-76,593. The INS offered the example of a society in which members of one race hold members of another race in slavery. *Id.* at 76,593. Noting that if a slave owner beats his own slave but does not beat his neighbor's slave, it would still be reasonable to conclude that the victim's race was the primary impetus for the persecution. *Id.*

[120] 65 Fed. Reg. at 76,592-76,593. The INS noted that some of the other women in society who share this characteristic for which the victim is being harmed may be at risk of harm from their own partners on account of the same reasons. *Id.*

In fact, the proposed rule stresses that applicants may rely on circumstantial evidence demonstrating "patterns of violence in the society against individuals similarly situated to the applicant" in order to establish motive.[121] The INS reasons that this evidence may reflect a country's societal norms and demonstrate the relevant legal system's support for the persecutory conduct.[122] According to the INS, this societal context may help reveal an abuser's belief that he possesses the authority to batter and control his victim "on account of" her inferior position in the relationship.[123]

Finally, the rule attempts to clarify the divergent interpretations of "membership in a particular social group" articulated by the various circuit courts.[124] In the summary to the proposed rule, the drafters first acknowledge the scant judicial and administrative interpretation defining what "is perhaps the most complex and difficult to understand" of the five categories of asylum.[125] The INS notes that under the *Matter of Acosta* analysis, the primary BIA decision interpreting this term, "membership in a particular social group," requires that group members share a "common, immutable" trait.[126] According to the INS, the proposed rule codifies the *Acosta* approach by requiring that a social group consist of "members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it."[127] Although the INS acknowledges that gender clearly meets this requirement,[128] the agency's proposed analysis does not end there. In addition to an immutable characteristic, the rule enumerates several factors that may be considered in determining whether a "particular social group" exists:

> (i) the members of the group are closely affiliated with each other; (ii) the members are driven by a common motive or interest; (iii) a voluntary associational relationship exists among the members; (iv) the group is recognized to be a societal faction

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[121] *Id.*

[122] *Id.*

[123] *Id.* at 76,593.

[124] For a discussion of the different interpretations of "social group" employed by the various circuit courts, as well as the BIA, see B.J. Chisholm, Comment, *Credible Definitions: A Critique of U.S. Asylum Law's Treatment of Gender-Related Claims*, 44 HOW. L.J. 427, 439-43 (2001).

[125] 65 Fed. Reg. at 76,593-76,595.

[126] *Id.* at 76,589.

[127] *Id.* at 76,598.

[128] *Id.*

> or is otherwise a recognized segment of the population in the country in question; (v) members view themselves as members of the group; and (vi) the society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of society.[129]

Part III.E addresses how consideration of these additional factors after an applicant has already established persecution based on an immutable characteristic allows judges to continue the paradoxical treatment of gender-based claims.

III. THE "R-A- RULE" OLD AND NEW HURDLES FOR WOMEN SEEKING ASYLUM

A. Constructing a Societal Focus in the Nexus Analysis

When the United States Supreme Court made clear in *INS v. Elias-Zacarias*[130] that an asylum applicant must demonstrate persecution on account of her protected characteristic, it set a baseline requirement that she proffer some evidence — whether in direct or circumstantial form — showing that the characteristic motivated the persecution.[131] The Court, however, did not quantify the extent of the evidence required, nor did it explain how the evidence might vary when applied to the various forms of persecution.[132] The proposed rule and its commentary are consistent with *Elias-Zacarias* in recognizing that in some instances circumstantial evidence, such as patterns of abuse in the relevant community or the inferior status of women in domestic relationships, may meet the baseline requirement of proof.[133] In addition, however, to discussing the evidentiary role of societal information in "social

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[129] *Id.*

[130] 502 U.S. 478 (1992).

[131] *Id.* at 482.

[132] *Id.* at 483. In fact, the Court directly stated that a claimant need not provide "direct proof of his persecutors' motives." *Id.* Several scholars have convincingly criticized *Elias-Zacarias* and the overemphasis and misinterpretation of the nexus requirement in asylum jurisprudence. *Id.* at 483. In fact, the Court directly stated that a claimant need not provide "direct proof of his persecutors' motives." *Id.* Several scholars have convincingly criticized *Elias-Zacarias* and the overemphasis and misinterpretation of the nexus requirement in asylum jurisprudence. *See, e.g.*, Karen Musalo, *Irreconcilable Differences?: Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179 (1994). Musalo argues that "the overarching objective of the domestic and international refugee regime is protection of potential victims of persecution, not punishment of persecutors." "In this context," Musalo argues, "the inquiry should be on the effect of persecution on the victim and not on the intent of the persecutor." *Id.* at 1181-82.

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

group" claims, the INS should have followed the reasoning of the dissent in the *R-A-* case and emphasized that factual circumstances relating to the nature and context of the persecution may be the primary indicator of motive in asylum cases.[134] By not discussing the importance of this evidence in establishing motive, the INS failed to fully resolve the flaws of the *R-A-* analysis, specifically, the BIA's egregious disregard of the nature and circumstances of the domestic violence in the "on account of" inquiry.[135]

Contrary to the INS's assumption that direct evidence of persecution is always considered,[136] in the *R-A-* case, the BIA failed to appreciate the husband's stated desire to perpetuate his wife's submissive role, his use of violence when Alvarado was pregnant, and the severe abuse directed at his wife's genitalia[137]—all powerfully indicative of motive.[138] The nature of the abuse when Alvarado was

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[134] *See In re* R-A-, 22 I. & N. Dec. 906, 938 (B.I.A. 1999) (dissenting opinion) ("First, to assess motivation, it is appropriate to consider the factual circumstances surrounding the violence.").

[135] Within the BIA's discussion of nexus there is a noticeably absent consideration of the sexual and gender-specific nature of the abuse, including the husband's sexist statements. *See id.* at 920-23.

[136] *See* Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (2000) (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) ("As in any asylum or withholding case, evidence about the persecutor's statements and actions will be considered.").

[137] *See R-A-*, 22 I. & N. Dec. at 908.

> The respondent's husband raped her repeatedly. He would beat her before and during the unwanted sex. When the respondent resisted, he would accuse her of seeing other men and threaten her with death. The rapes occurred "almost daily," and they caused her severe pain. He passed on a sexually transmitted disease to the respondent from his sexual relations outside their marriage. Once, he kicked the respondent in her genitalia, apparently for no reason, causing the respondent to bleed severely for 8 days. The respondent experienced the most severe pain, when he forcefully sodomized her. When she protested, he responded, as he often did, "You're my woman, you do what I say.

Id.

[138] *Compare with Ziegler v. Ziegler*, 28 F. Supp. 2d 601 (1998), a Washington federal district court case discussed in Julie Goldscheid & Risa E. Kaufman, *Seeking Redress for Gender-Based Bias Crimes – Charting New Ground in Familiar Legal Territory*, 6 MICH. J. RACE & L. 265, 273 (2000). In *Ziegler*, the court found evidence of gender bias, based on allegations of rape, gender-specific epithets, and acts promoting stereotypes of women's submissive roles. *Id.* Although *Ziegler* was a VAWA Civil Rights Remedy claim and not an asylum case, in determining that the persecutor was motivated by gender bias, the court looked to similar forms of evidence available in the *R-A-* record, but which the BIA ignored. *R-A-*, 22 I. & N. Dec. at 908. "The [Ziegler] court relied on evidence of severe and excessive attacks on the plaintiff, especially during her pregnancy, and allegations that the violence was often without provocation and specifically at times when the plaintiff asserted her independence."

pregnant is particularly revealing of motive because it occurred in reaction to Alvarado's possession of reproductive attributes shared by women. For example, her husband dislocated Alvarado's jaw when her menstrual period was late and kicked her "violently" in the spine "when she refused to abort her 3- to 4- month old fetus."[139] One could conceivably construe the husband's motivation narrowly as his anger over the conception of an unwanted child and thereby — in the words of one commentator — "privilege the viewpoint of the immediate oppressor."[140] That argument, however, does not mitigate the fact that Rodi Alvarado was attacked because she was pregnant, something largely beyond her control and innate to her status as a woman.[141] The husband's brutal actions also manifest his desire to physically control his wife's body and decisions—further evidence bearing on his view of his wife's subordinate status.[142]

In its failure to respond to the BIA's blatant dismissal of evidence related to the nature and circumstances of the abuse in the *R-A-* case, the rule makes a subtle endorsement of the omission. In less subtle terms, the rule suggests that without evidence of societal patterns of abuse, an abuser's motive may not be ascertainable.[143] Judges, however, have explicitly rejected this notion in other asylum contexts.[144] To satisfy the "on account of" burden of an asylum claim, applicants only have to establish facts related to their own persecution, not the persecution of others.[145] Ironically, the INS attempted to avoid this suggestion in a slightly different context

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Goldscheid & Kaufman, *supra*, at 273.

[139] *R-A-*, 22 I. & N. Dec. at 908.

[140] Chisholm, *supra* note 124, at 430 (criticizing asylum law's tendency to construe an applicant's experience solely from the persecutor's perspective and for "imposing its understanding of the applicant's experience" in the asylum analysis).

[141] *Compare Ziegler*, 28 F. Supp. 2d at 606-07 (finding the severity of a husband's attacks on his wife during her pregnancy revealing of gender motivation). For a clinical discussion of the problem of abuse during pregnancy, see Andrew J. Satin et al., *Sexual Assault in Pregnancy*, *in* 77 OBSTETRICS AND GYNECOLOGY 710 (noting that "[t]he frequency and severity of domestic violence against pregnant women have been shown to be increased, and the pregnant abdomen tends to be the primary site of physical attack against this group").

[142] *See supra* notes 137 & 139 and accompanying text.

[143] Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (stating that societal patterns of abuse may be helpful to establishing a "prevalent belief within society . . . that cannot be deduced simply by evidence of random acts").

[144] *See, e.g.*, Makonnen v. INS, 44 F.3d 1378, 1383 (8th Cir. 1995) (noting in an asylum case based on a "political opinion" claim that an applicant only has the burden of proving his own persecution and does not have to establish that other members of society were persecuted as well).

[145] *See Makonnen*, 44 F.3d at 1378.

within the proposed "R-A- rule." It rejected the BIA's interpretation of the "on account of" analysis to require a showing that Alvarado's husband persecuted women in addition to his wife.[146] In spite of this rejection of a societal focus with respect to an individual actor's victims, the "R-A- rule" adopts the BIA's reasoning in the Alvarado case to the extent it insists that a private actor's motive be evaluated in a societal context.[147]

In *R-A-*, the BIA repeatedly focused on what the Board considered the violence's lack of societal relevance.[148] For example, in the discussion of social group, the BIA gave weight to the unfounded conclusion that in order for Alvarado's social group theory to work "the characteristic of being abused [must be] important within Guatemalan society."[149] The BIA was also troubled by its belief that Guatemalan society did not perceive the asserted group as a societal faction.[150] The "R-A- rule" properly refused to impose a legal requirement that an asylum applicant show that her persecutor seeks to harm other members of her asserted social group.[151] The proposed rule's inapposite statement, however, that societal patterns of abuse may be necessary to establish a "prevalent belief within society . . . that cannot be deduced simply by random acts"[152] undermines this limitation. The suggestion that domestic violence may be a random act or crime perpetuates a view of non-state actor violence as societally insignificant and beyond the reach of asylum.[153] In this respect alone, the proposed "R-A- rule" is a sizeable step backward.

As the dissenting opinion in the *R-A-* decision suggests, the BIA could have found a nexus between the persecution Alvarado suffered and her membership in the asserted group without evaluating the patriarchal social structure and patterns of domestic abuse in Guatemala.[154] The dissent set forth four factors — largely focusing

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[146] *See* 65 Fed. Reg. at 76,592-76,593.

[147] *See supra* note 143.

[148] *See* Chisholm, *supra* note 124.

[149] *In re* R-A-, 22 I. & N. Dec. 906, 919 (B.I.A. 1999).

[150] *Id.* at 918.

[151] Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,592 (2000) (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

[152] *Id.* at 76,593.

[153] For a critique of the legal view of women's persecution as occurring in the domestic sphere, see Thomas, *supra* 112.

[154] Addressing the factual record alone, the *R-A-* dissent noted that the facts "reflect quite clearly that the severe beatings were directed at the respondent by her husband to dominate and subdue her, precisely because of her gender." *R-A-*, 22 I. & N. Dec. at 938.

on the nature and circumstances of the violence — for evaluating the nexus between an applicant's suffered abuse and the persecutor's motivations: (1) the factual circumstances of the violence, (2) the incomprehensibleness of the actions as an inference that the persecutor acted on account of the victim's possession of a protected characteristic, (3) the reason why such violence occurs, (4) and the extent to which the persecutor acted with impunity.[155] One commentator, echoing the approach of the *R-A-* dissent noted,

> [T]he record plainly shows that Alvarado-Pena's husband beat her in order to subdue and control her, and further that he did so because of her gender, as is evidenced by the repeated abuse directed at her vagina, his attempt to abort her pregnancy, and the rapes. Additionally it is clear that he harmed her on account of her gender because of his repeated reminder "[y]ou are my woman, you do what I say."[156]

By failing to take issue with the BIA's refusal to value this direct evidence, the INS contradicts its assertion that "[a]s in any asylum or withholding case, evidence about the persecutor's statements and actions will be considered."[157] In the context of gender-persecution, the INS tacitly rejects the primacy of evidence relating to the factual circumstances of the persecution in the "on account of" inquiry.[158]

B. The Floodgates Are Strong

The INS and asylum adjudicators must not ignore the value of direct evidence in the motive inquiry out of fear it will create an asylum regime that allows every victim of rape or domestic violence to qualify as a refugee.[159] The asylum framework already provides an assurance against this slippery slope scenario because the asylum statute only provides refuge to victims of rape or domestic violence when the abuse rises to the level of "persecution"—meaning severe harm or suffering occurring because of state action or by a private-

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[155] *Id.*

[156] *See* Franke, *supra* note 107, at 619 (citing *In re* R-A-, Interim Dec. 3403 at 938-39 (B.I.A. 1999)).

[157] *See* Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (2000) (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

[158] *See In re* R-A-, 22 I. & N. Dec. 906; *see also* Goldscheid, *infra* note 181 (discussing how evidence of the nature and circumstances of violence can reveal gender-bias).

[159] *See* John Linarelli, *Violence Against Women and the Asylum Process*, 60 ALB. L. REV. 977, 984-85 (1997) (refuting the floodgates argument by noting other stringent practical and legal barriers facing women seeking asylum); *see also* Helton & Nicoll, *supra* note 89, at 387 (noting that the experience of Canada, which recognizes persecution based on gender as sufficient for membership in a particular social group undermines the floodgates argument).

actor that a "government is unwilling or unable to control."[160] In addition to showing motive, establishing "persecution" is a separate burden that every asylum applicant must meet.[161] When Congress enacted the Refugee Act, it set the requirements for obtaining asylum and with them the safeguards against a flood of refugees.[162] Asylum judges thus exceed their adjudicatory role and undermine Congressional intent when they ignore evidence bearing on an element of asylum because of presuppositions about potential surges in the refugee stream.

Asylum adjudicators also contravene the Refugee Act by conflating the requirements of several asylum elements into a single analysis. For example, in *R-A-*, the BIA strikingly confused its analysis of the husband's motivation with the analysis of whether Guatemala's tolerated his conduct—treating the latter as a step in determining the former.[163] Instead of treating the inquiry into the private actor's motive and whether the conduct rose to the level of persecution because of the state's conduct as separate elements, the BIA fused the two inquiries into one.[164] As a result, the BIA refused to find that Alvarado's husband had persecutory motives because it did not find Guatemala culpable for failing to protect Alvarado.[165] Guatemala's alleged remedial efforts to address spousal abuse fueled the BIA's hesitancy to find that the husband had persecutory motives.[166]

This analysis is problematic because a private actor's motive often has nothing to do with what a country is doing at large. Furthermore, Guatemala's failure to protect Alvarado, although sufficient for a finding of "persecution," may seem less culpable when analyzed under the motive inquiry—which necessarily focuses on deliberate actions, and in the asylum context, animus. Guatemala's failure to protect Alvarado, however, can be a basis for finding

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[160] *See* Avetova-Elisseva v. INS, 213 F.3d 1192, 1196 (9th Cir. 2000) (noting that state action or a showing that a country is unwilling or unable to control persecution by a private individual satisfies the Refugee Act).

[161] *Id.*

[162] P.L. 96-212, Refugee Act of 1980 Senate Report No. 96-256 (July 23, 1979) (stating that the Refugee Act "provides for the first time the statutory requirements . . . and defines and exerts congressional control over the process").

[163] *See In re R-A-*, 22 I. & N. Dec. at 922. The BIA noted that because "some measures [had] been pursued in an attempt to respond" to domestic violence in Guatemala, it was "not convinced that the absence of an effective governmental reaction to the respondent's abuse translates into a finding that her husband inflicted the abuse because she was a member of a particular social group." *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

"persecution" if either the state acted — or failed to act — because of gender animus or if it was simply impotent to protect women.[167] As the R-A- rule emphasizes, "[i]nherent in the meaning of the term persecution is that the serious harm or suffering that an applicant experienced or fears must be inflicted by the government of the country of persecution or by a person or group that the government is *unwilling* or *unable* to control."[168] Not only is this manipulation of the asylum framework analytically problematic, but it allows for unfair results. It encourages judges to ignore private-actor persecution if it finds a lack of state-animus or some evidence of a country's remedial measures.[169]

While an ultimate determination about a person's eligibility for asylum may necessarily reflect conditions for women in a particular country by virtue of a lack of state protection or the frequency of a particular practice,[170] the asylum framework must not conflate this information with the evaluation of motive at the expense of direct evidence of a private actor's gender animus.[171] By putting state conduct in the spotlight while evaluating private motive, the BIA pushes private actor persecution back into the "domestic sphere." In doing so, the opinion reinforces a perspective rejected by international law: that domestic and intimate abuses suffered by women are irrelevant to human rights norms.[172]

In addition to statutory safeguards that exist against a flood of refugees, not every domestic violence case will present strong direct evidence bearing on a persecutor's motive; the availability and quality of evidence will vary in every case.[173] Therefore, unlike a *per se* rule governing the motive inquiry in gender-specific abuse cases,[174] evaluating direct evidence will not automatically equal a find of

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[167] 65 Fed. Reg. 76,597.

[168] *Id.*

[169] *See, e.g.*, *R-A-*, 22 I. & N. Dec. at 922.

[170] *See, e.g.*, *In re* Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) (finding that applicant had well-founded fear of persecution based on her membership in a particular social group, and that her fear of persecution was country-wide).

[171] *See* Khan, *infra* note 175.

[172] *See* Setareh, *infra* note 293

[173] *See* Malone, *supra* note 92 (noting that the "door to asylum may remain closed to many applicants without the representation, documentation, and extraordinarily compelling facts available to [Kasinga].").

[174] While a *per se* rule governing the motive inquiry for certain forms of gender-persecution is analytically sound, see *infra* note 178, because it is unfeasible that the INS would ever accept this standard given its well-established concern about opening the door too widely to gender-based claims, see *supra* note 77, this comment addresses the practical and does not evaluate the debate at length.

persecution on account of gender.

On the other hand, if a fair evaluation of the evidence in the cases of all victims of domestic violence seeking asylum from a particular country results in a determination that the persecutor in each case acted on account of the person's gender, then that conclusion should be honored, not avoided. To ignore this evidence would create an asylum adjudication regime that inappropriately worries more about the number and types of refugees entering the country rather than accurate and fair interpretation of its governing statute.[175] Moreover, even if this hypothetical were a reality, because of the practical barriers facing female asylum-seekers, such as economic factors and the physical inability to escape repressive conditions,[176] a wave of refugees is unlikely.[177]

While these barriers to gaining asylum may provide some reinforcement to the floodgates and assuage the INS's apparent weariness about allowing direct evidence of persecution to prove too much,[178] the number and quality of the safeguards limiting the amount of successful asylum applications should be irrelevant to the question of motive. To preserve the integrity of the asylum process and fair interpretation of the Refugee Act, the INS should ensure that full weight be given to direct evidence of motive. The INS should require asylum adjudicators to look squarely at available evidence that demonstrates gender-targeted and specific abuse, gender-permeated invectives, and persecutors' stated desires to oppress or control women.[179]

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[175] For an argument that the United States justifies the number of refugees it admits based on national interest as opposed to humanitarian concerns, see Rex D. Khan, *Why Refugee Status Should be Beyond Judicial Review*, 35 U.S.F. L. REV. 57, 72-73 (2000).

[176] *See infra* notes 328-29 and accompanying text.

[177] *See* commentary refuting the floodgates argument, *supra* note 159.

[178] The INS' erection of new barriers in the asylum process may reveal its weariness of the idea that some forms of gender-based violence would create a slippery slope because they are inherently gender-motivated, a position persuasively articulated by several scholars. *See, e.g.*, Rebekka S. Bonner, Note, *Reconceptualizing Vawa's "Animus" for Rape in States' Emerging Post- Vawa Civil Rights Legislation*, 111 Yale L.J. 1417, 1421 (2002) (stating that "[a]ll rapes necessarily contain an inherent gender animus"); Kathryn Carney, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315, 319-20 (2001) (arguing that "the rape victim is selected because she possesses an immutable characteristic — her gender. . . . [r]ape is not an act of violence that simply happens to women — it is an act of hate that happens to women because they are women"); *see also* Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape As a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231, 262-85 (1993).

[179] *See generally* Goldscheid, *infra* note 181 (evaluating the sources of evidence available to determine gender bias in hate crimes). To evaluate this evidence would

Should, however, an increase in the number of refugees pose a realistic concern, the legislature, not asylum judges, should respond with measures that impact all categories of asylum applicants equally. Currently, in asylum cases brought on other grounds, such as persecution on account of a person's race, the question of motive focuses primarily around the direct actions and words of the abuser, while societal information often serves only to provide additional context.[180] The words of a persecutor are not more ambiguous merely because they contain gender slurs as opposed to racial slurs and because they are directed at a woman.[181] The actions of an abuser that degrade or humiliate a person racially are not more instructive of motive than acts aimed to degrade a woman sexually.[182] In short, asylum adjudicators should not transform gender-based violence into a form of persecution that can only be understood and established if an applicant demonstrates a larger societal pattern of abuse and inequality.[183] Allowing judges to turn a blind eye to valuable evidence of motive is not a fair solution to fears of opening the refugee floodgates and would deny women with significant

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make accurate the INS's otherwise unsupported statement that "[a]s in any asylum or withholding case, evidence about the persecutor's statements and actions will be considered." *See* Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

[180] For example, in evaluating cases involving the persecution of Indo-Fijian people by ethnic Fijans the Ninth Circuit has found persecution on account of race in part by evaluating persecutors' racially intolerant statements made during persecutory acts. *See, e.g.*, Gafoor v. I.N.S., 231 F.3d 645 (9th Cir. 2000) (noting that the persecutor's statement that the applicant "should go back to India" compels the conclusion that he was persecuted at least in part because of race); Surita v. I.N.S., 95 F.3d 814, 819 (9th Cir. 1996) (finding racial motive where soldiers threatened applicant of Indian descent and robbed her more than a dozen times telling her they were looting her house because she was Indian and that she should return to India). The courts, however, viewed these statements against the backdrop of the tumultuous ethnic tension in Fiji documented by State Department country reports describing a recent coup by ethnic Fijans and their fierce discrimination against persons of Indian descent. *Surita*, 95 F.3d at 817-18.

[181] *See generally* Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123, 132 (1999) (arguing prior to the Supreme Court's invalidation of the VAWA civil rights remedy that "courts can rely on the same types of evidence to assess gender-motivation in analyzing the presence of bias underlying violent crimes committed against women" as they routinely do to analyze bias in other harassment and violence cases).

[182] *See id.* at 158. Goldscheid, argues that "[a]n analysis of cases of domestic violence and sexual assault, as well as an analysis of other bias crime cases, reveals the circumstantial evidence of the bias that animates violent crimes committed against women just as it does in other types of bias crime cases."

[183] *See generally* Chisholm, *supra* note 124, at 452 (criticizing the emphasis in asylum law on whether the persecution is "societally important" for vesting oppressors with the power to define social groups).

motive evidence equal access to refuge.[184]

C. The Role of Societal Evidence

It is important to note, however, that focusing on the nature of abuse in interpreting motive does not undercut the importance of understanding systemic power structures and societal norms in determining why abuse occurs.[185] As *Kasinga* makes clear, societal evidence may be instrumental for asylum applicants when demonstrating both motive and a lack of state protection.[186] In *Kasinga,* the BIA evaluated the motive of the would-be persecutors by considering the gender-specific nature of the FGM procedure, as well as its gender-specific purpose "to suppress and control the victim on account of her gender."[187] Thus, the INS rule properly notes that asylum judges may consider societal information when relevant, but ultimately fails by allowing it to supplant direct evidence within the discussion of the "on account of" requirement.

Although the asylum analysis requires an evaluation of the protections from persecution available in a country from which a person seeks to escape,[188] the question of whether an act rises to the level of persecution should not focus exclusively on legal measures condoning certain persecutory acts.[189] As UNHCR has recently noted, "[e]ven though a particular state may have prohibited a persecutory practice . . . the state may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice."[190] Therefore, an evaluation of a state's unwillingness or inability to protect a individual should consider not only a country's

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[184] *See, e.g.*, *In re* R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999), and discussion *supra* notes 136-45.

[185] *See* Chisholm, *supra* note 124, at 429-30 (arguing that "gender-based violence and persecution are supported by social institutions, which deliberately deny the voice of authority and credibility to oppressed groups").

[186] *See, e.g.*, Aguirre-Cervantes v. I.N.S., 242 F.3d 1169 (9th Cir. 2001) (finding the prevalence of domestic and sexual violence in Mexico and its vastly underreported nature persuasive evidence of the Mexican government's inability or unwillingness to control a father's abusive behavior). The court confronted evidence that over 13,000 children living on Mexican streets were victimized by family members, that Mexican women are extremely reluctant to report abuse, and that police officials are reluctant to intervene in what society deems private matters. *Id.*

[187] *In re* Kasinga, 21 I. & N. Dec. 357, 366 (B.I.A. 1996).

[188] *See* INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

[189] *See 2002 UN Gender Guidelines*, *supra* note 12, at ¶ 11 (stating "that the fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual's claim to refugee status is not valid").

[190] *Id.*

legal provisions, but also the reality of social practice.[191]

D. A Higher Burden to Establish Motive

The question of whether rape and other forms of gender persecution are always persecution on account of one's gender, as some scholars have argued[192] and others have rejected,[193] is beyond the scope of this Comment. However, having discussed the appropriate sources of information to determine gender-based motive, this section addresses the circumstances in which an applicant can successfully present evidence of gender bias, but nevertheless would be unable to establish asylum under the proposed rule's motive inquiry.

In contravention of established BIA precedent and circuit court decisions,[194] the proposed rule raises the evidentiary burden in the "on account of" analysis by requiring not only that an applicant establishes her persecutor's motive, but also that she demonstrates, where a persecutor has mixed motivations, that her "protected characteristic is central to her persecutor's motivation to act."[195] With respect to this heightened burden, commentary has convincingly noted a contradiction.[196] First, the INS acknowledges that under BIA and federal court decisions, a persecutor acting "at least in part" because of a protected characteristic satisfies the "on account of" requirement.[197] Then the rule proposes the "central" motivation analysis, a much tougher standard than the "at least in part" inquiry.[198] While the INS offers no explanation for the contradiction, the context of the rule's proposal may illuminate the INS's decision

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[191] *See supra* notes 188-90.

[192] *See* Bonner, *supra* note 178; Carney *supra* note 178.

[193] *See generally* Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827 (1999).

[194] *See, e.g.*, Matter of T-M-B-, 21 I. & N. Dec. 775, 777 (B.I.A. 1997) (stating "that an applicant for asylum need not show conclusively why persecution occurred in the past or is likely to occur in the future, [but must] produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or imputed protected ground"); Borja v. INS, 175 F.3d 732 (9th Cir. 1999) (holding that a Philippine asylum applicant demonstrated that a revolutionary group persecuted her at least in part on account of her political opinion while finding that economic extortion also motivated their actions).

[195] Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,598 (2000) (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

[196] *See* Anita Sinha, *Domestic Violence and U.S. Asylum Law: Eliminating the "Cultural Hook" For Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1562, 1594-95 (2001).

[197] *Id.*

[198] *Id.*

to heighten the motive inquiry.

The INS proposed the mixed-motivation burden as part of the "R-A- rule," a proposal touted by the INS as resolving issues prevalent in gender-based asylum claims.[199] Technically, the proposed "R-A-rule's" interpretation of the term "on account of" could apply equally to the motive inquiry in all kinds of asylum claims.[200] However, because of the gendered context in which the INS has submitted its proposal,[201] the higher burden has particular significance for women persecuted because they are women. The central motive requirement indicates the INS's skepticism of gender-bias as the primary motivation for abuse in gender persecution claims[202] and thus necessitating additional safeguards in the asylum framework.[203]

Whether, however, a person is persecuted because of his or her religion, race, or gender, asylum law does not protect victims of random crimes.[204] The requirement that the injury be more significant than a random crime is already subsumed in the "persecution" element of the asylum statute, which must be established by all asylum applicants.[205] By inserting the "central motivation" burden into the "on account of" discussion of the "R-A-rule," the INS implies that gender persecution requires additional asylum safeguards because, in comparison to other forms of persecution, violence against women is harder to distinguish from

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[199] 65 Fed. Reg. at 76,588 (noting that the rule "establishes principles for interpretation and application of various components of the statutory definition of 'refugee' . . . and, in particular will aid in the assessment of claims made by applicants who have suffered or fear domestic violence").

[200] The proposed rule merely provides a general definition for "on account of," without limiting its application to gender-based claims. *See id.* at 76,597.

[201] *See id.* at 76,588.

[202] Commentators have pointed out that the idea that gender-based asylum claims can be held to a higher standard than claims based on other grounds has been expressly rejected by the INS. *See, e.g.*, Caroline J. O'Neill, Comment, *Health Is a Human Right: Why the U.S. Immigration Law Response to Gender-Based Asylum Claims Requires More Attention to International Human Rights Norms*, 17 J. CONTEMP. HEALTH L. & POL'Y 241, 272 (2000) (noting that the INS Guidelines reject the notion that gender-based claims are less valid than other asylum claims).

[203] In the summary to the proposed rule the INS draws the distinction between patterns of abuse in a society and random acts of violence. *See* 65 Fed. Reg. at 76,593.

[204] *Id.* at 76,590.

[205] As the INS states in the summary to the proposed rule, "[i]nherent in the meaning of persecution is the long-standing principle that the harm or suffering that an applicant experienced or fears must be inflicted by either the government of the country where the applicant fears persecution, or a person or group that government is unable to control." *Id.* (citing Matter of Villalta, 20 I & N. Dec. 142, 147 (B.I.A. 1990)).

ordinary crimes outside the scope of asylum protection.[206] Thus, the INS proposal again perpetuates a view of gender violence as occurring in the domestic sphere and lacking societal significance.[207]

Even though domestic violence and rape may be rampant throughout the world, if the abuse rises to the level of harm required by the asylum statute and a state is unable or unwilling to protect the woman, then this abuse constitutes persecution, and should not be regarded as an ordinary crime.[208] This does not mean that every woman who is the victim of rape or domestic violence and whose government fails to prevent the crime should gain asylum.[209] It should mean, however, that a woman will meet the definition of a refugee if she establishes a well-founded fear of persecution by means of rape in a country where rape is socially acceptable and the government does nothing, or is impotent, to prevent and punish it.[210] For example, in Mexico, where the penalties for stealing a cow are harsher than the penalties for rape, the authorities rarely investigate rape.[211] In fact, a legislator there has referred to the practice of abducting, raping, and then marrying women as "romantic."[212]

As noted earlier, the fact that state perpetrated violence against women should readily produce a finding of persecution should not conversely prevent the same finding for women from countries where laws may condemn certain practices in words, but unfettered abuse occurs as a matter of course.[213] In Guatemala, for example, as noted by the BIA, "spouse abuse is recognized as a problem, and . . . some

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[206] Commentators expressed this same fear in the context of the debate over the enactment of the VAWA civil rights remedy and over amending the federal hate crimes legislation to include gender bias. See the discussion of objections in Goldscheid, *supra* note 181, at 126 n.15. Goldscheid notes the ample evidentiary sources present in typical cases for determining gender bias and argues that the fact that women are often victimized by persons they know does not justify treating gender bias differently from other bias-motivated crimes. *Id.* at 156.

[207] *See* Thomas, *supra* note 112 and accompanying text; *see also* Love, *supra* note 112.

[208] See the discussion of FGM as persecution in *In re* Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

[209] The proposed rule recognizes this limitation of asylum within the context of its discussion of persecution. *See* 65 Fed. Reg. at 76,592 (noting that "[o]f course, no government is able to guarantee the safety of each of its citizens at all times . . . this is not the standard for determining that a government is 'unable or unwilling to control' the infliction of harm or suffering").

[210] *Compare with* the racial persecution cases cited *supra* note 180, in which the courts correctly factored in evidence that the police flatly ignored applicants' complaints of persecution.

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

[212] *Id.*

[213] *See supra* notes 188-89 and accompanying text.

measures have been pursued in an attempt to respond to this acknowledged problem."[214] In spite of these measures, however, the Guatemalan authorities "did not take further action" when Alvarado's husband ignored three police citations and continued to abuse his wife.[215] Acknowledging the complete failure of Guatemala to protect Alvarado, the BIA nevertheless denied her asylum claim, unwilling to find persecution in light of the country's alleged remedial efforts.[216] Unfortunately, the BIA's reasoning adopts form over reality in the analysis of persecution. Regardless of affirmative measures to address spousal abuse in Guatemala, because of the unwillingness of the authorities to protect Alvarado, her chances of leading a life free of abuse were arguably no better in Guatemala than if she had lived in Nigeria, a country with certain regional laws that expressly permit husbands to abuse their wives.[217] Therefore, in sorting out whether asylum applicants have a well-founded fear of persecution as opposed to fear of random crime, the focus of asylum adjudication should be the reality of country conditions as opposed to legal formality.[218]

E. Inviting Disparate Treatment of Sexual Violence Claims

Even in an obvious case of state sanctioned abuse, under the central motivation standard proposed by the rule, a judge could deny asylum to a woman victimized by sexual violence, who otherwise meets the requirements of asylum based on the "on account of" element of her case. Under the INS proposal, a judge could potentially find that sexual desire was the primary motive, looking past a persecutor's attitudes about women supported by the country's archaic laws or sexist culture.[219] This threatens to create a different standard of treatment for women's persecution, a possibility previously rejected by scholars and the INS itself.[220]

Unlike persecution inflicted against persons because of their

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[214] *In re* R-A-, 22 I. & N. Dec. 906, 922 (B.I.A. 1999)

[215] *Id.* at 909.

[216] *Id.* at 922.

[217] *See Words and Deeds: Holding Governments Accountable in the Beijing +5 Review Process*, EQUALITY NOW 28 (Jul. 1999) (citing the Penal Code of Northern Nigeria, Section 55. Correction of Child, Pupil, Servant or Wife) (on file with author).

[218] *See supra* notes 188-89 and accompanying text.

[219] For a criticism of the skepticism or differential treatment of gender bias as opposed to racial or religious bias, see Goldscheid, *supra* note 181.

[220] *See* O'Neill, *supra* note 202; *see also* U.S. Guidelines *supra* note 32, at 9 (stating that the analysis for gender-based claims should be the same as other claims under the current framework and that the "appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm").

race or religion, gender-based persecution is often sexual in nature[221] and inflicted by persons known to the victim.[222] As one scholar has noted in a critique of state hate crimes legislation, "this fact necessarily gives rise to highly complicated mixed-motive inquiries that are largely absent from typical hate crimes directed against blacks, Jews, or other targeted groups where the attacker is often unknown to the defendant."[223] Because of the greater opportunity for gender-based asylum claims to elicit a mixed-motive inquiry,[224] women's claims may more frequently trigger the proposed "central" motivation requirement. Thus, the rule increases the potential for differing treatment of women's claims: In the context of gender-persecution the central motive may habitually be attributed to sexual desire or personal circumstances, rather than gender-animus, due to the fact that violence against women is frequently sexual in nature and is often deemed to occur in the domestic sphere.[225] In comparison, because men's claims do not fall disproportionately in the realm of sexual and personal violence, their claims will not trigger the higher burden as frequently. This disparity is problematic on two levels. First, conceptually, it reveals the INS's skeptical view of gender-based violence as animus toward a group, thus perpetuating stereotypes of women's experiences as personal and irrelevant.[226] Second, pragmatically, it gives judges a tool, indeed a veritable signal, to continue to discount women's gender-based claims.[227]

When the abuse at issue is not sexual in nature, the rule still poses troubling barriers for women. The added "central motivation" limitation gives judges substantial discretion to interpret motivation even when the nature of abuse indicates a strong gender bias.[228] For example, a judge could find that the persecutor acted violently not

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[221] *See generally* Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission On Human Rights Resolution 1995/85, UN Doc. E/CN.4/1996/53 (Feb. 5, 1996) [hereinafter "Special Rapporteur's Violence Against Women Report"].

[222] *See* Bonner, *supra* note 178, at 1439.

[223] *See id.*

[224] *See id.*

[225] *See id; see also* Thomas, *supra* note 112.

[226] *See supra* note 178 and accompanying text.

[227] For a discussion of the historical view of domestic violence as personal and unworthy of asylum protection, see Anker, *supra* note 82.

[228] Essentially, the modification allows for a repeat of the BIA's superficial and rigid interpretation of motive. *See In re* R-A-, 22 I. & N. Dec. 906, 921 (B.I.A. 1999) (stating that Alvarado's husband harmed her "for not getting an abortion, for his belief that she was seeing other men, for not having her family get money for him, for not being able to find something in the house, for leaving a cantina before him, for reasons related to his mistreatment in the army, and 'for no reason at all'").

because of an animus toward a particular group but primarily because he is a generally violent person.[229] Moreover, a judge could easily find that any ephemeral stimulus, such as jealousy[230] or revenge,[231] motivated the act. In contrast to the approach advocated by the proposed rule, courts have previously found persecution on account of a protected characteristic even in cases where the facts suggested that a generic emotion or stimulus was a primary motivation.[232] As the INS has noted previously, gender-based claims are entitled to comparable treatment in the asylum analysis.[233]

In the absence of an "at least in part" motive analysis, the heightened requirement of proving motivation encourages more erroneous decisions in domestic violence cases, such as *In re G-R-*.[234] In this case, the judge denied asylum to a woman from El Salvador based on his determination that her husband did not harm her because of her "membership in a particular social group," defined as "women who refuse to submit to and leave their batterers."[235] According to the judge, the abuse, which involved severe beatings, strangulation, and sexual assault that occurred in front of her daughter, "was a personal problem."[236] Calling the husband paranoid, the judge stated the following:

> [H]er ex-husband . . . is not after her because she is an abused woman or because she shares some characteristic with any other women, but simply because she is the respondent, the woman he believed to be his woman, and that he feels he has the right to abuse, and the right to punish because she left him.[237]

Deeming this motivation beyond the reach of asylum protection, the immigration judge in this case failed to recognize, or even to

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[229] *See id.* at 926 (crediting the husband's motivation as "simple unchecked violence tied to the inherent meanness of his personality"); *see also* Melgar de Torres, 191 F.3d 307, 313 (2d Cir. 1999) (finding rape by Salvadoran guerillas was a random act of violence).

[230] *See R-A-*, 22 I. & N. Dec. at 926.

[231] *See, e.g.*, Lim v. I.N.S., 224 F.3d 929 (9th Cir. 2000) (awarding asylum based on a finding that the New People's Army ("NPA") in the Philippines was motivated to persecute the applicant by both revenge and her political opinion, in other words, "revenge plus," essentially "revenge partly motivated by, and thus on account of, imputed adverse political opinion").

[232] *See id.*

[233] *See* U.S. Guidelines, *supra* note 220 and accompanying text; *see also* O'Neill, *supra* note 220.

[234] Matter of G-R-, (Immgr. Ct. Jan. 26, 1995) at *http://www.uchastings.edu* (on file with author).

[235] *Id.*

[236] *Id.*

[237] *Id.*

consider, how the husband's view of women formed the basis for his treatment and attitude toward his wife.[238]

Similarly, the BIA in *In re R-A-* failed to consider how the husband's view of women affected his actions. Although the BIA noted in its discussion of Alvarado's political opinion claim that "the respondent's account of what her husband told her may well reflect his own view of women and, in particular his view of the respondent as his property to do with as he pleased," the BIA shockingly did not find this conclusion relevant to the "on account of" discussion of Alvarado's "particular social group" claim.[239] Both judges' failure to evaluate this connection in *In re G-R-* and in *In re R-A-*abrogated the fundamental charge of the asylum adjudicator in applying the "on account of'" analysis: to evaluate whether the persecutor inflicts harm on the victim in order to punish her for having a protected characteristic.[240]

The proposed rule facilitates more superficial motive analyses by giving judges room to credit paranoia or a controlling personality as the primary motivation for an abuser's acts instead of acknowledging the underlying reasons for why gender persecution occurs. The UN Special Rapporteur on Violence Against Women has found that domestic violence is the result of a desire "to punish, humiliate, and exercise power over the victim on account of her gender."[241] Following the proposed rule, however, judges would fail to scrutinize this information and its applicability to a given case. Unlike the analysis of other traditional asylum claims, such as torture based on political opinion which may have both a specific purpose (to elicit information through harm) and a broader purpose (to intimidate or punish a group), the rule encourages judges not to take account of the deeper impulses at work.[242] Against the backdrop of the historical

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[238] *Id.*

[239] *In re* R-A-, 22 I. & N. Dec. 906, 914-15 (B.I.A. 1999).

[240] *See* INS Guidelines, *supra* note 32, at 10 (citing *Matter of Acosta*, 19 I. & N. Dec. at 226, for the proposition that an asylum applicant satisfies the "on account of" analysis by showing that she was persecuted because of her possession of a protected characteristic).

[241] *See* Anker, *supra* note 78, at 741 (citing Special Rapporteur's Violence Against Women Report, 1995/85, at 7 ¶¶ 23, 14, 53 UN Doc. E/CN.4/1996/53).

[242] The potential for the unjustified unequal treatment of the motive inquiry with respect to gender persecution claims is illustrated by the UN Special Rapporteur's discussion of the similarities between torture and domestic violence. *See* Special Rapporteur's Violence Against Women Report, *supra* note 221, at ¶¶ 42-44. Urging states to abandon views of domestic violence as occurring for personal reasons, the report states that like torture, domestic violence may be committed for specific purposes such as "eliciting information, punishment, [and] intimidation" but also like torture, the persecutor has broader motives. *Id.* at ¶ 44. He acts "to obliterate

view of gender violence as private acts,[243] the "central motivation" standard invites asylum adjudicators to continue to skim the surface in the analysis of motive.

Furthermore, the change increases the already nebulous burden on asylum claimants to prove their persecutor's motive.[244] It requires her to delve further into her persecutor's psyche, sort out, and prove what is and is not central to his motivation to act against her.[245] In the absence of a sound legal justification for this higher evidentiary burden, which the rule's commentary does not provide,[246] the proposed rule arbitrarily makes it more difficult for women who are victims of gender persecution to establish a nexus between the persecution they suffered and a protected characteristic.[247] Thus, the rule fails to transform the asylum process for gender-based claims and continues to disregard the experience of women in refugee law.[248]

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the personality and diminish the capacities of the woman . . . . As in torture, battering may involve a humiliating interrogation whose purpose is more the assertion of supremacy and possession over the victim than the acquisition of information." *Id.*

[243] *See generally* Anker, *supra* note 71.

[244] For a discussion of the difficult burden placed on asylum applicants to demonstrate why their persecutor acted against them, see Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413, 465, 468 (1993) (characterizing the burden on asylum applicants to establish their persecutors' intent after *Elias-Zacarias*, 502 U.S. 478 (1992), as near impossible); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1182 (1994) (criticizing the *Elias-Zacarias* decision for placing "an unrealistic evidentiary burden on the applicant, who must divine the motivation of her persecutor and then carry the burden of proof on this issue").

[245] *See* Sinha, *supra* note 196, at 1594 (stating that the proposed "nexus requirement renders the evidentiary burden even more onerous").

[246] *See id.* at 1595 (discussing the INS's strange explanation that requiring a central purpose was necessary to allow for claims when a persecutor has mixed motivations, which the author notes, was a concept already recognized by the asylum framework under the "at least in part" inquiry).

[247] *See* Musalo, *supra* note 244, at 1202-03 (noting that establishing a persecutor's motivation is already exceedingly difficult because knowledge of intent usually lies with the persecutor and the applicant does not have the opportunity to put the persecutor on the stand and elicit this information).

[248] Several scholars have discussed and criticized the exclusion of women's experiences from the development of international human rights law. *See, e.g.*, 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) (arguing that that international law's creation of a hierarchy among human rights has left women without adequate protection); *see also* Berta Esperanza Hernández-Truyol, *Sex, Culture, and Rights: A Re-Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 610-11 (1997) (arguing that the exclusion of women from the creation of international human rights law has resulted in gender-based abuses being largely overlooked).

F. Membership In A Particular Social Group

In attempting to resolve the conflicting interpretations of "membership in a particular social group,"[249] the proposed rule requires the presence of a "common, immutable" trait as a threshold element of a social group.[250] Although the INS commentary to the proposed rule states, "gender is clearly such an immutable trait . . . and is incorporated in this rule,"[251] the INS proposal suggests that an applicant who establishes that she has been persecuted based on an immutable trait, such as gender, may nevertheless fail to meet the definition of a refugee.

Establishing persecution based on the immutable trait of gender may not be enough under the proposed rule because the INS sets forth six additional factors, which "may be considered in determining whether a particular social group exists."[252] As one scholar has pointed out, the presence of these additional factors creates a two-tiered analysis.[253] First, a "social group" must consist of members with a common, immutable characteristic.[254] Having found an immutable trait, a judge may then consider the extent to which the group is a cohesive and societally-recognized group.[255]

The rule proposes that asylum adjudicators evaluate this second prong by considering six flexible factors.[256] According to the rule's commentary, the first three factors essentially constitute a "voluntary associational test" which incorporates the definition of "social group" established by the Ninth Circuit Court of Appeals in *Hernandez-Montiel v. INS.* [257] The commentary asserts that *Hernandez-Montiel* restated the Ninth Circuit's formulation of a social group as "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest."[258]

In contrast, however, to the INS's conjunctive interpretation of the Ninth Circuit's approach, the *Hernandez-Montiel* decision can be

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[249] For a discussion of the different circuit courts' interpretations of social group, see Chisholm, *supra* note 124, at 433-44.

[250] *See id.* (noting that the immutability test is a "threshold or baseline requirement").

[251] Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (2000) (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

[252] *Id.* at 76,594.

[253] *See* Chisholm, *supra* note 124, at 448.

[254] 65 Fed. Reg. at 76,598.

[255] *Id.*

[256] *Id.*

[257] *Id.* at 76,594 (quoting *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000)).

[258] *Id.*

logically read as setting forth the immutability requirement and the voluntary associational inquiry as disjunctive tests.[259] The court's use of the word "or" in the plain language of the decision supports this interpretation.[260] The Ninth Circuit stated that "'a particular social group' is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it."[261]

In addition, the UN's refugee agency has endorsed the Ninth Circuit approach. In recently released guidelines on the interpretation of the "membership in a particular social group" category, UNHCR has suggested that under the Refugee Convention, social groups may consist of persons sharing an immutable trait or of persons sharing mutable, but societally recognized characteristics.[262] Acknowledging that "analyses under the two approaches may frequently converge" when persons targeted because of an immutable trait are also perceived as social groups within their particular societies, the guidelines suggest that the Refugee Convention does not require that the analysis be conflated.[263] In fact, the guidelines explain that "at times the approaches may reach different results"[264] and a social group may exist even if its members do not share an immutable characteristic.[265]

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[259] *See, e.g.*, Chisholm, *supra* note 124, at 442 (noting that the "court presented a compromise definition of particular social group"); James H. Martin, *The Ninth Circuit's Review of Administrative Questions of Law in the Immigration Context: How the Court in* Hernandez-Montiel v. INS *Ignored* Chevron *and Failed to Bring Harmony to "Particular Social Group" Analysis*, 10 GEO. MASON L. REV. 159, 180 (2001) (stating that "under the new Ninth Circuit definition of 'particular social group,' whether homosexuality is found volitional or immutable, a group that has been defined in terms of the sexual orientation or identity of its members will likely be a legally cognizable 'particular social group'").

[260] *See Hernandez-Montiel*, 225 F.3d at 1084.

[261] *Id.* at 1093.

[262] UNHCR, 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, UN doc. HCR/GIP/02/02 ¶¶ 10-12 (2002) [hereinafter "2002 UN Social Group Guidelines"]. UNHCR proposes the following definition:

> A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience of the exercise of one's human rights.

Id. at ¶ 11.

[263] *Id.* at ¶¶ 9, 11.

[264] *Id.*

[265] *Id.* at ¶ 13.

Unlike the approach advocated by UNHCR, the INS's proposed convergence of the Ninth Circuit's disjunctive tests into a two-prong analysis makes the "membership in a particular social group" category the most difficult of the five grounds for which a person can seek asylum.[266] As renowned international refugee law scholar Atle Grahl-Madsen has noted, the categories of persecution in the Refugee Convention's definition of refugee can be divided into two groups—those that represent characteristics beyond a person's control and those that represent voluntary characteristics.[267] In other words, an applicant can establish asylum based on persecution because of an immutable characteristic (as in the case of race, nationality, and "in certain respects" religion[268]), or based on persecution because of a voluntary, defining characteristic akin to the voluntary associational test discussed in *Hernandez-Montiel* (as in the case of political opinion).[269] Grahl-Madsen considered "membership in a particular social group" to belong in the former "immutable" category;[270] while some jurisdictions have suggested that "social groups" may reflect only voluntary conduct or associational status.[271] Because of its proposed conjunctive test, the rule suggests that to establish "membership in a particular social group," an applicant must establish both. Thus, persecution on account of an immutable characteristic, particularly when that characteristic is gender, may not qualify a persecuted person as a refugee under either classification of protected status identified by Grahl-Madsen.[272] Consistent with the

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[266] The higher burden enacted by the rule is contrary to the INS's earlier position that improving the analysis of gender-based claims did not warrant altering the current framework. *See* INS Guidelines, *supra* note 32, at 9.

[267] ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 217 (1966).

[268] *Id.*

[269] Although the BIA in *In re Acosta*, 19 I. & N. Dec. 211, 232-33 (B.I.A. 1985), interpreted race, nationality, religion, and political opinion as immutable characteristics, this Comment regards political activity as more appropriately evaluated under the voluntary associational test. For the purpose of this argument, however, the distinction is irrelevant because, unlike the social group category test proposed by the rule, in any of the other four categories, the applicant only has to establish persecution based on an immutable characteristic or based on a voluntary association, not both.

[270] GRAHL-MADSEN, *supra* note 267

[271] *See* Chisholm, *supra* note 124, at 440 (describing the approach of the First and Second Circuits).

[272] *See* Chisholm, *supra* note 124, at 450 (characterizing as uncertain whether "a group defined solely by 'sex' or 'gender' will be cognizable (for example, women in Afghanistan)"); *see also* Thiele, *supra* note 107, at 229 (noting that "[t]o date there has been no case in which sex or gender on its own has been sufficient to establish membership in a particular social group").

paradox faced by victims of gender-persecution, the conjunctive approach leaves women stranded, their claims incompatible with any of the categories of protection afforded to persons by refugee law.[273]

For example, because of the discretion vested in judges to consider the other factors, it is questionable whether the outcome of Rodi Alvarado's case before the BIA would be any different under the proposed rule.[274] Even if Rodi Alvarado's claimed group, "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination,"[275] could meet the immutability requirement, the additional factors could provide a basis for an immigration judge to reach the same appalling result. In fact, a judge could find that Rodi Alvarado's claimed social group does not meet several of the listed factors.

First, a judge could find that members of the group are not closely affiliated with each other because women experience the persecution individually and may not view their opposition to abuse by their male companions as placing them in a larger societal group.[276] Second, the BIA could view the group as not driven by a common motive or interest if it deems each member's objection to the violence as a concern for her personal autonomy and safety, rather than as an interest in the larger social problem of male domination and abuse. The "common motive or interest" thus comes close to requiring that members of a social group espouse a shared political opinion—a suggestion that not only imposes a double burden on certain applicants to meet standards embodied in more

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[273] UNHCR specifically rejects this possibility, noting that "sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men." 2002 UN Social Group Guidelines, *supra* note 262, at ¶ 12.

[274] It may not be too cynical to suggest, however, that the extensive media and scholarly attention criticizing the *R-A-* outcome and anticipating its rehearing under the new rule, see *supra* note 107, may contribute to a different outcome if the case is finally reevaluated after publication of the finalized rule.

[275] *In re* R-A-, 22 I. & N. Dec. 906, 911 (B.I.A. 1999).

[276] *See, e.g.*, *id.* at 918 ("The respondent has neither shown that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group."). In the context of rape, Rumna Chowdhury, has argued "[t]he consequence of rape is to make a woman feel as if she is deviant, her experience is anomalous, and she is alone when, in fact, millions of women are raped. The private character of rape contributes to the division of women, so that they do not recognize themselves as a class and the effects of 'individual' crimes are minimized." Chowdhury, *supra* note 61, at 120.

than one asylum ground, but also unfairly suggests that women's objection to their personal domination at the hands of men is inconsequential unless they champion the rights of all women.[277] Third, a judge could find that the group is not viewed as a societal faction or otherwise recognized segment of the population if the persecution of women is so rampant in a society that a judge deems abused women too numerous to constitute a discrete group.[278] Similarly, a judge could find that oppressed women are not set apart for distinct treatment from other members of society because the violence directed at women as a class may be viewed from a culturally elitist perspective as a collateral consequence of generally poor country conditions rather than as human rights violations worthy of an international response.[279] This is a substantial possibility considering the emphasis on discretely defined social groups that transcend country-wide strife in asylum law precedents.[280]

For example, in *Fatin v. INS*,[281] the Third Circuit stated that an Iranian woman did not establish persecution on account of a particular social group because, in the court's view, her persecution

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[277] This notion governed the BIA's rejection of Alvarado's political opinion claim in the *R-A-* case, in which the BIA reasoned that Alvarado's objection to her husband's domination must fail "unless one assumes the common human desire not to be harmed or abused is itself a political opinion." *In re R-A-*, 22 I. & N. Dec. at 915. For a criticism of society's conception of women's human rights as something extraordinary and therefore requiring deliberate recognition within the human rights paradigm, *see* Wolf, *infra* note 308.

[278] *See* Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (noting that "the attributes of a particular social group must be recognizable and discrete" and "broadly-based characteristics such as youth and gender" are not particularized enough).

[279] *See, e.g.*, the cases rejecting Iranian women's asylum claims based on the pandemic nature of the country's general mistreatment of women. Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993) (denying asylum based on the fact that the applicant's objection to repressive social norms was made applicable to all women in Iran); Fisher v. INS, 79 F.3d 955, 962 (9th Cir. 1996) (stating that applicant objecting to Iran's repressive dress codes for women was ineligible for asylum because she "merely has established that [she] faces a possibility of prosecution for an act deemed criminal in Iranian society, which is made applicable to all [women] in that country.") (citation omitted); *see also* Lata v. INS, 204 F.3d 1241, 1245 (9th Cir. 2000) (rejecting an asylum claim in the case of a woman of Indian descent raped by ethnic Fijians by reasoning that "general claims of broader ethnic tension across Fijian society also do not establish statutory persecution"); Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (stating that while the court could not "discount the physical and emotional pain that has been wantonly inflicted" on the numerous Salvadoran women raped by Guerillas, the applicant failed to "demonstrate[ ] that she is more likely to be persecuted than any other young woman").

[280] For a discussion of the Second, Third, and Ninth Circuits' restrictive interpretations of social groups defined by gender, see Thiele, *supra* note 107, at 224-32.

[281] 12 F.3d 1233 (3d Cir. 1993).

was indistinguishable from the generalized restrictions imposed on the entire population of Iranian women.[282] Particularly in an anti-immigration climate, which arguably describes the United States after September 11th,[283] asylum judges may follow the reasoning of *Fatin* and view social groups reflective of broad oppression in foreign countries skeptically even if claimants otherwise meet the elements required for refugee status.[284]

In conclusion, under the proposed INS rule, whether gender by itself may actually be considered a "social group" without reference to the group's other defining characteristics remains unfortunately unclear.[285] The discretionary factors that allow immigration judges to consider whether a group defined by gender has sufficient societal significance can easily negate the impact of the INS's declaration that gender is an immutable trait which *may* constitute a particular social group.[286] This is extremely problematic in light of the continued breadth of human rights abuses perpetrated against entire societies of women[287] and by the UN's position that persecution based on gender warrants refugee protection.[288] Not only does the rule insert new hurdles into the asylum process for victims of gender persecution, it adds to a history of piecemeal efforts, such as the 1995 INS Guidelines and the *Kasinga* decision, which have failed to revolutionize the treatment of gender-persecution under the statute.[289] In short, the rule's flaws indicate a problem larger than the *R-A-* decision: they demonstrate a fundamental gap in the asylum law framework.

IV. THE GENDER PARADOX – A SIXTH CATEGORY IS NEEDED

Throughout the past decade, refugee activists and immigration lawyers have advocated for greater protection for victims of gender

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[282] *See* Thiele, *supra* note 107, at 225 (citing *Fatin*, 12 F.3d at 1243 n.12).

[283] *See generally* Carolyn S. Walker, *Global Backlash of Afghan Refugees: When is Enough, Enough?*, 18 N.Y.L. SCH. J. HUM. RTS. 535 (2002); Tsiwen Law, *Enrique Rosario Special Reports: A Changing America – The Immigration Backlash*, 23 PA. LAW. 50 (Nov./Dec. 2001).

[284] For a discussion of how U.S. immigration policy changes in response to shifts in political opinion, see Michael J. McBride, *The Evolution of US Immigration and Refugee Policy: Public Opinion, Domestic Politics and UNHCR*, (Working Paper No. 3), *at* http://www.unhcr.org.

[285] *See* Chisholm, *supra* note 124, at 450.

[286] *See supra* notes 276-82 and accompanying text.

[287] *See* Swiss, *supra* note 61; Chowdhury, *supra* note 61; *see also* Amnesty International, *supra* note 63.

[288] *See* 2002 UN Social Group Guidelines, *supra* note 262, at ¶ 12.

[289] *See supra* notes 91-98.

persecution in asylum law largely through litigation and arguments for regulatory reform—not through legislation.[290] Because of the lack of a gender category in the Refugee Convention's definition of a refugee, advocates representing the immediate interests of persecuted women have had no other option but to frame their asylum cases within one of the current categories.[291] However, in fighting the necessary battle to ensure women's protection within the current framework, the focus of advocates may have eclipsed the asylum system's bigger flaw—the unjustified exclusion of victims of gender-persecution from the Refugee Act's categorical grounds for asylum.

The patriarchal system firmly in place at the time of the Refugee Convention's enactment is largely responsible for women's definitional exclusion from the protection afforded to refugees by the international community.[292] The inconsistent applications and restrictive interpretations of the current asylum categories, however, are a product of more than a limited definition; they may also be attributable to society's enduring patriarchal views of women and their experiences.[293] Amending the refugee definition to include gender persecution as an independent ground of asylum would not only provide victims of gender-persecution a better legal framework, it would send a definitive message to asylum adjudicators that violence against women is internationally relevant.

Noted refugee scholar Deborah Anker has argued that adding a separate category of gender-based persecution to the asylum framework would be futile because the historical exclusion of women from asylum protection is the result of "incomplete and gendered interpretation of refugee law."[294] According to Anker, "[s]imply

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[290] *See* Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23, 48 (1997) (noting that "advances in gender-based asylum doctrine have come from approaching a presidential administration that is sensitive to 'gender-gap' politics and adjudicators who can reasonably be expected to respond favorably to evolving international refugee standards").

[291] *See* Brashear Tiede, *supra* note 33, at 21 ("generally, gender-based asylum claims rely on the theories of membership in a social group or political opinion").

[292] For discussions of how women have been excluded from participation in the development of human rights law, see Butegwa, *supra* note 248 and Hernández-Truyol, *supra* note 248.

[293] *See* Daliah Setareh, *Women Escaping Genital Mutilation — Seeking Asylum in the United States*, 6 UCLA WOMEN'S L.J. 123 (1995) (arguing that the failure to incorporate gender-related claims within the current definitions can be attributed to "human rights law and discourse—that privileges male-dominated public activities over the activities of women which take place largely in the private sphere").

[294] Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 139 (2002).

adding gender or sex to the enumerated grounds of persecution would not solve this problem."[295] In spite of this prediction, Anker has an optimistic view of modern refugee law,[296] specifically of its capacity to "take an integrative perspective on women's rights" within the current framework.[297]

While some strides have been made in recognizing women's rights within asylum law,[298] Anker's analysis underestimates the effect an amendment to the Refugee Act could have in combating the gender paradox that remains. A category of gender-persecution would afford persecuted women an opportunity to avoid traditional definitional barriers, such as the conception of "social group" as discretely defined, which in spite of Anker's optimism, persists as a barrier for women.[299] In addition, amending the definition would likely have a psychological impact on asylum adjudicators as well; it would communicate the seriousness of their obligation to look beneath the surface and analyze the motive for persecution in women's claims.[300] Most importantly, a separate category would resolve the forced reliance on the "social group" category for the assertion of two distinct kinds of gender-based claims, which poses both substantive and conceptual problems.

The "social group" category must encompass claims in which the persecution at issue "is on account of" the woman's immutable characteristic of gender, essentially gender-motivated crimes, such as FGM and rape where the woman is selected for violence precisely because of her gender.[301] In addition, this ground must also serve as the basis for claims where women are persecuted because of particular actions or beliefs, such as feminist activism or transgressing

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[295] *Id.*

[296] *See id.* at 133 (noting "[i]nternational refugee law is coming of age").

[297] *See id.* at 139.

[298] *See, e.g.*, 2002 UN Gender Guidelines, *supra* note 12.

[299] *See* Thiele, *supra* note 107, at 224-32.

[300] Courts' thorough analysis of VAWA claims exemplifies the impact that statutory recognition of gender-bias can have on the motive analysis. For a discussion of gender-bias determinations in VAWA cases, see Goldscheid & Kaufman, *supra* note 138, at 273-274, 276. The authors note that nearly all courts evaluating VAWA claims, prior to the Supreme Court's dissolution of the private right of action, reasoned that rape, domestic violence, sexual assault, or other unwanted sexual conduct revealed gender-motivation. *Id.*

[301] *See In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996). Although the BIA decided the case based on a social group theory, the decision's analysis suggested that there was no need to consider Kasinga's tribe as a social group because the primary motivation for FGM is to suppress the victim because she is a woman. *See supra* note 187 and accompanying text. Thus, Kasinga's membership in the tribe was merely the context in which her persecution as a woman took place.

social mores.[302] The "membership in a particular social group" and "political opinion" categories may appropriately apply to women's claims when the motivation for persecution is specific to the woman's conduct, not status, and may therefore meet adjudicators' requirements that the social group be discretely defined.[303] However, to treat women's claims asserting persecution on account of their gender under the same "social group" ground minimizes the difference — as Andrea Binder puts it — between women being persecuted "as women" and women suffering human rights abuses "because they are women."[304] While certain fortunate female asylum applicants and their lawyers may continue to fit or creatively squeeze claims into the current categories, Anker's description of refugee law as "integrative" will never be fully realized until gender-motivated persecution is no longer an asylum paradox requiring refugee lawyers to proceed with the utmost imagination.

Furthermore, the many gender-based asylum cases in which applicants have had to rely on the "political opinion" ground to establish cognizable persecution undermines the principle that victimizing women on account of their gender is a violation of human rights.[305] Although this ground of seeking asylum has proved successful for some victims of gender persecution who could not otherwise establish asylum, its suggestion that objection to this treatment is merely a "political belief" shared by a faction is not in accordance with the international community's condemnation of violence against women as a violation of human rights.[306] While a woman's belief in equality may in a few narrow circumstances appropriately be viewed as a political opinion,[307] a woman's general objection to torture and to the denial of basic human rights should not be considered political, nor extraordinary.[308]

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[302] *See* 1991 UN Gender Guidelines, *supra* note 64, at 16.

[303] *See* Sanchez-Trujillo, 801 F.2d 1571, 1576 (9th Cir. 1986) (noting that social group "does not encompass every broadly defined segment of a population").

[304] Binder, *supra* note 58, at 167-68.

[305] The BIA's rejection of Alvarado's political opinion claim in *R-A-* reveals a larger theoretical weakness of this theory of asylum for victims of gender persecution. The BIA rejected Alvarado's asserted political opinion as essentially a belief that men should not dominate women, noting, "unless one assumes that the common human desire not to be harmed or abused is itself a political opinion." *In re* R-A-, 22 I. & N. Dec. 906, 915 (B.I.A. 1999).

[306] *See* CEDAW, *supra* note 68.

[307] For examples of women transgressing social mores, see 1991 UN Gender Guidelines, *supra* note 64 and accompanying text.

[308] *See generally* Naomi Wolf, "*Women Are Like Cold Mutton": Power, Humiliation, and a New Definition of Human Rights*, WOMEN'S VOICES, WOMEN'S RIGHTS 93, 98-100 (Alison Jefries ed., 1996) (discussing human rights activists' use of the axiom

The contradictory conception of gender persecution claims by asylum adjudicators as either too broad or too narrow to warrant refugee status, complicates the burden on women to squeeze distinct types of claims within the available grounds of asylum. On one end of the spectrum are cases like *Fatin*,[309] and *Safie v. INS*,[310] which denied asylum to applicants based on a conception of "social groups" as discretely defined and of the gender oppression in Iran as too widespread for the purposes of asylum.[311] In contrast, in cases like *R-A-*, judges have viewed gender violence as too private and particularized to constitute persecution based on the characteristics of a social group that transcend the individual victim.[312] The "R-A-rule" fits within the latter vision of gender persecution because of its requirement that the abuse be societally relevant.[313] These conflicting restrictions on gender-based asylum claims have created a troubling paradox: a tension between competing demands on gender-based claims which leaves women with only narrow opportunities to gain refuge.[314]

Furthermore, the paradox faced by women is unique.[315] Concern over the size of the group sharing the protected characteristic has generally not been a barrier for persons persecuted on account of their race or religion.[316] In fact, widespread oppression

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"women's rights are human rights" as a sad commentary on the necessity of reminding the world that women are human).

[309] Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993).

[310] 25 F.3d 636, 640 (8th Cir. 1994) (rejecting as overbroad the claim that "Iranian women, by virtue of their innate characteristics (their sex) and the harsh restrictions placed upon them" had suffered persecution on account of a protected characteristic).

[311] *See id; see also* Sanchez-Trujillo, 801 F.2d 1575.

> The statutory words 'particular' and 'social' which modify 'group,' indicate that the term does not encompass every broadly defined segment of a population . . . [i]nstead, the phrase 'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.

Id.

[312] *See supra* notes 149 and accompanying text.

[313] *See supra* notes 149-97.

[314] *See supra* notes 310-13.

[315] *See* Thiele, *supra* note 107, at 227 (arguing that the rejection of women's asylum claims when oppression is widespread "places a greater burden on women than on claimants seeking asylum on account of the other categories").

[316] *See id; see also* Anjana Bahl, *Home is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution*, 4 CARDOZO WOMEN'S L.J. 33 (1997) (arguing that the size

— specifically the genocide perpetrated against Jews — was precisely the kind of persecution that compelled the creation of the Refugee Convention.[317] It is true that persecution based on race and religion has generally tended to affect discrete religious and ethnic minorities, groups that are significantly smaller in scale than the general category of women.[318] The asylum statute, however, does not include the specific names of each ethnic or religious group as a protected class in the asylum statute.[319] Instead, it protects all of these groups as a whole, linking them through the general reason for their persecution, for example, their race or religion, without regard to the number of persons afflicted collectively within each category of persecution.[320]

Similarly, while women from different cultures may experience gender-persecution differently, they are linked by the common reason for their persecution: their sex. The frequency of a motivation — that occurs globally and cross-culturally — for persecuting certain refugees should not exclude an applicant from gaining asylum.[321] While women collectively constitute a broad category of persons, gender as a descriptive characteristic of motive is no broader than race or religion.[322] Accordingly, Congress should act to honor the United States' international obligation[323] to protect all

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of a social group should not be a barrier to asylum because "like the other enumerated categories, [the social group category] is simply a tool . . . to indicate the premise and reasons for which the individual is being persecuted").

[317] *See* Binder, *supra* note 58.

[318] Walter Kälin, *Non-State Agents of Persecution and The Inability Of the State to Protect*, 15 GEO. IMMIGR. L.J. 415 (2000) (arguing that "[t]he nature of persecution is changing, as evidenced by the increasing frequency of persecution of minorities by their neighbors belonging to the majority, ethnic cleansing or even genocide carried out by militias, terrorist attacks and killings by groups claiming to fight in the name of a religious creed, or attacks on the civilian population by insurgent groups fighting for independence").

[319] *See* INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

[320] *See* GRAHL-MADSEN, *supra* note 267, at 213. In dated language, Grahl-Madsen noted:

> The origin of the phrase makes it quite clear that the word 'race' in the present context denotes not only the major ethnic groups, such as Europeans ('the white race'), Africans ('the black race'), Mongols ('the yellow race'), Red Indians, &c., [sic] but also, groups which are less easily differentiated, such as Jews, gypsies, &c. [sic] In the present context the word 'race' is therefore referring to social prejudice rather than to a more or less scientific division of mankind.

Id.

[321] *See id.*

[322] *See generally* Goldscheid, *supra* note 181.

[323] Anker, *supra* note 294, at 135-36 (noting that "refugee law is international law, grounded in an international treaty").

refugees by amending the asylum statute.[324]

Congress did not hesitate to expand the refugee definition through legislation when it conflicted with values important to Congress in the past. For example, reproductive politics galvanized conservative members of Congress to amend the Refugee Act in 1996 to include forced sterilization and coercive family planning within the definition of persecution.[325] Having recognized the occurrence of gender apartheid in Afghanistan — a country to whom the United States has pledged support for women rebuilding their lives[326] — it is a fitting moment for Congress to fully integrate women's experiences within refugee law. To amend the Refugee Act would not only signal a shift in the paradoxical history of women's gender-based asylum claims, it would achieve an overdue recognition that "women do have a legitimate claim to human rights and fundamental freedoms due them as women."[327]

The primary argument raised against amending the Refugee Act to add a gender category is the concern that it would open the floodgates to asylum claims and inundate the United States with refugees.[328] The historical and present reality of women's limited

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[324] For scholarly work in favor of amending the definition of refugee to include gender as an independent category, see Marian Kennady, Note, *Gender-Related Persecution and the Adjudication of Asylum Claims: Is a Sixth Category Needed?*, 12 FLA. J. INT'L L. 317 (1998); Todd Stewart Schenk, Note, *A Proposal to Improve the Treatment of Women in Asylum Law: Adding a "Gender" Category to the International Definition of "Refugee"*, 2 IND. J. GLOBAL LEGAL STUD. 301 (1994).

[325] *See* Fitzpatrick, *supra* note 290, at 48 (criticizing the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 in response to China's coercive reproductive practices for its male-centric motives). The author notes that this lone recent "legislative expansion" of the Refugee definition was the product "of anti-abortion politics." *Id.* Fitzpatrick argues that "[w]hile forced abortion is clearly a form of gender-specific violence, forced sterilization is not and men are likely to predominate among asylum claimants relying upon this expanded definition." *Id.*

[326] In the fall of 2001, the Bush Administration gave $600,000 to a fund for Afghan women and the President later said in his State of the Union Address that "'America will always stand firm for the nonnegotiable demands of human dignity,' including 'respect for women.'" Derrick Z. Jackson, *Bush Shaky on Women's Rights*, BOSTON GLOBE, Feb. 6, 2002, at A17.

[327] *See* Butegwa, *supra* note 248, at 31 (discussing international law's failure to perceive women as having human rights "unique to their gender").

[328] Many scholars have already addressed and rejected this unsubstantiated fear. *See* Binder, *supra* note 58, at 192 (calling the floodgates argument "unpersuasive and misplaced"); David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 241 n.192 (1988) (stating the floodgate arguments is more about fear than reality); *see also* Peter C. Godfrey, Note, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL'Y 257 (1994).

means to escape from persecution, however, does not support this fear.[329] The experience of countries such as Canada are instructive; it did not experience a surge in refugees after recognizing persecution based on gender without regard to other social group characteristics.[330] In addition, as this critique of the "R-A- rule" has addressed, the asylum framework already provides substantial safeguards against a potential flood of refugees.[331] The burden of presenting sufficient evidence of a persecutor's motive and the requirement that a country be unable or unwilling to protect an applicant from persecution, remain substantial hurdles for any asylum applicant.[332]

V. CONCLUSION

Asylum law's gender paradox evolved out of a 50-year-old treaty that ignored the needs of women and the realities of their experience. [333] The paradox has grown under adjudication reflecting enduring stereotypes about why women are tortured and abused. The assumptions underlying the proposed "R-A- rule" are a product of the paradox as well.[334] Until a fundamental change is made to the asylum framework, a change that will send a definitive message to asylum adjudicators that they must treat gender bias as they do other forms of persecution, the inconsistencies will likely continue without restraint. While Anker is right that it may be impossible to completely prevent stereotypes of women's experiences from permeating asylum claims,[335] under an amended Refugee Act, the paradoxical treatment of women's persecution would no longer be exacerbated by limited definitions and their concomitant messages about the relevancy of women's experiences.

Until then, the essence of the gender paradox may be larger than competing legal demands placed on gender-based claims. The

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[329] *See* Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 904 (2000) (noting that women often "lack the economic independence to escape oppressive conditions").

[330] *See* Audrey Macklin, *Cross Border Shopping for Ideas: A Critical Review of United States, Canadian, and Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 34 (1998) (arguing that "it appears safe to assert" that Canada's recognition of persecution on account of gender without regard to other social group characteristics "did not lead to a 'flood' of women seeking asylum in Canada in terms of absolute numbers").

[331] *See supra* PART III.B.

[332] *See id.*

[333] *See supra* notes 54-55 and accompanying text.

[334] *See supra* note 203 and accompanying text.

[335] *See* Anker, *supra* notes 294-97.

true irony may be that refugees who are some of the most tortured and the most in need of protection may be turned away. While the "R-A- rule" awaits action by the Bush Administration, Rodi Alvarado continues to wait, as well.[336] She has now been in the United States for seven years, cleaning houses, thinking about her two children whom she was forced to leave with relatives in Guatemala, and waiting to hear if she can remain within the safety of the country to which she bravely escaped.[337]

[336] Anna Quindlen, *Torture Based on Sex Alone; Do Women Have Special Asylum Claims? They Do, and They Ought to Be Recognized*, NEWSWEEK, Sept. 10, 2001.

[337] *See id.*