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## Refugee Women as Cultural Others: Constructing Social Group and Nexus for FGM, Sex Trafficking, and Domestic Violence Asylum Claims in the United States

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Meghan Casey\*

### I. INTRODUCTION

*The safari van jolted to a halt on the mud and ditch-covered road—if it may be called even that—amidst an expanse of land and sky. Clouds hung low after a morning of rain, and the sun timidly shined light upon the greenery interspersed in the Maasai village largely composed of rounded mud huts. Men vested in crimson-colored warrior garments greeted our group of Americans with proud nods and kind words, while women and children lingered in the small doorways of nearby huts and weakly constructed fence posts. Young girls with infants strapped onto their small backs timidly approached, prowling sheepishly behind nearby trees. After a demonstration of a traditional warrior-jumping dance, our foreign group was led through the grass- and dirt-strewn grounds, into low-ceilinged mud huts that, while only a few feet in length, housed large families.*

*At one point, our tour guide, a young and muscular Maasai warrior, stopped our group at the village center to explain a central cultural practice—one, he explained, that was often misunderstood by Westerners such as ourselves. Female circumcision, he told us matter-of-factly, was an important practice and essential to Maasai culture because girls could not be inducted*

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\* I would like to especially thank Professor Won Kidane for his guidance in the creation of this piece. I also deeply appreciate the support of the *SJSJ* editing staff and board, as well as my many friends, family members, and colleagues who share in a passion for global justice. Most importantly, I am grateful for the inspiration of refugee women, who continue to inspire me with their perseverance, faith, and hope.

*into the fullness of their womanhood without it. He further explained, almost in an attempt to justify the practice, that unlike men, who had to undergo circumcision publicly without any showing of pain, women had an easier time because the ceremony was conducted in secret. A woman could not be accepted as a part of the community—nor could she marry—unless she had been circumcised.*

*In the remote isolation of that African savanna, with little more than goats and cows for sustenance, minute huts as abodes, and an ingrained tradition of male-warrior protection—it was not so difficult to believe his words. How, I mused, could a Maasai woman not submit to such a practice without risking her own survival through community banishment? In that afternoon, I saw a mere glimmer of the vulnerability that pervades the lives of Maasai women. Social forces—ones that I could not even begin to articulate or comprehend—had instilled in them a sense of subordination that seemed inescapable.<sup>1</sup>*

And yet some women *do* escape—whether by willful choice or by force. Today, women constitute the majority of refugees worldwide.<sup>2</sup> In addition to facing the challenges of war, poverty, and natural disasters that so often plague developing countries, women encounter particularized persecution on the basis of their gender.<sup>3</sup> These violent, gender-based atrocities permeate every part of the globe, ranging from honor killing in Middle Eastern countries to female

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<sup>1</sup> This anecdote details the author's experience visiting a Maasai village in rural Kenya in May 2007.

<sup>2</sup> Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281, 286 (2002).

<sup>3</sup> STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 946 (5th ed. Foundation Press 2009) ("International law ignores the persecution that girls and women endure, even die under, for stepping out of the closed circle of social norms. . . . Women are also abandoned or persecuted for being rape victims, bearing illegitimate children, or marrying men of different races. . . . There is no recognition that they need legal *protection and refugee status both as individuals in their own right and as women.*") (emphasis in original).

genital mutilation (FGM) predominantly in Africa to femicide<sup>4</sup> in Central America to the domestic violence that pervades every society. Beyond these specific forms of persecution are culturally ingrained notions of female subordination. Because women possess few resources and are allowed far less financial or educational independence than the men in their societies, they easily become entrapped in cycles of emotional and physical violence.

International recognition of the particular challenges faced by refugee women has expanded over the past several decades. Since the United Nations Convention on Refugees in 1951, many countries, including the United Kingdom, Australia, Sweden, Canada, and the United States, have adjusted their policies to better address the needs of refugee women.<sup>5</sup> The development of asylum law over the past sixty years reflects these efforts, as countries have taken steps to construct gender-specific guidelines for adjudicators as well as legal formations that address gender-related challenges. Such changes have provided legal language and redress for refugee women who would otherwise struggle to communicate the subtle nuances of their particularized challenges. While imperfect, these strategies help to ameliorate dormant but severe forms of gender discrimination that saturate a male-dominated world. In light of the 1951 Convention's lack of specificity in using gender-neutral language for the definition of "refugee," these international efforts are especially necessary in

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<sup>4</sup> Femicide, or the violent killing of women, is a growing phenomenon in Central America. It is characterized by the following characteristics: savagery (mutilation, dismembering, etc.), rape or sexual abuse, politically significant messages (e.g., messages left on the body itself or nearby), identity destruction (such as damage to the face), massacres (killing both a woman and her children), and ritualization of the crime scene. CENTRAL AMERICAN WOMEN'S NETWORK (CAWN), FEMICIDE AND OTHER FORMS OF VIOLENCE AGAINST WOMEN, CONTEXT AND REALITIES 2 (2009), available at <http://www.cawn.org/html/spring09%20version%20website.pdf> [hereinafter CAWN Femicide]. See generally HEINRICH BOLL STIFTUNG, UNION EUROPA, CENTRAL AMERICAN WOMEN'S NETWORK, FEMINICIDIO: UN FENOMINO GLOBAL DE LIMA A MADRID [FEMICIDE: A GLOBAL PHENOMENON FROM LIMA TO MADRID] (Apr. 2010), available at <http://www.cawn.org/assets/Feminicidio%20de%20Lima%20a%20Madrid.pdf>.

<sup>5</sup>See Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: a Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 779–80 (2003) [hereinafter Musalo, *Revisiting Social Group and Nexus*].

order to secure equal protection for refugee women who were not present, either practically or conceptually, for the original construction of these refugee protections.<sup>6</sup>

Still, the United States has struggled to follow suit. In the extremely convoluted realm of asylum law, which theoretically provides micro-level solutions to macro-level global problems, American courts have tried unsuccessfully to formulate legal theories that address the specific needs of refugee women. Due largely to the arbitrariness that characterizes US immigration law, there is no consistent, cognizable legal framework for gender-based asylum claims. Instead, judges are left to force factors of gender and cultural concern into the male-centered legal constructions of asylum law. Thus, the lack of jurisprudential consensus for gender-based asylum claims has resulted in widespread misapplication of basic human rights principles and counterintuitive asylum denials of viable claims. To be granted asylum in the United States, an applicant must show that she fits into one of five statutorily defined categories, and that there is a connection, or “nexus,” between the alleged persecution and one of these groups.<sup>7</sup> Of primary concern in this article is the “social group” category, from which most gender-based claims are construed.

Specifically, it is problematic that US courts give undue weight to relativist notions of the cultural Other<sup>8</sup> in their construction of “social group” and

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<sup>6</sup> Although international human rights law has, from the outset, applied to men and women equally, women have long experienced gross inequalities in the enjoyment of fundamental rights. HENKIN ET AL., *HUMAN RIGHTS* 248 (2d ed. 2009). Also, in the aftermath of World War II, the primary focus of the negotiating states was ending the atrocities committed during the war. Protections that focus on civil and political harms (as opposed to those encompassing private, domestic affairs) have traditionally been the focus of refugee protection and human rights in general. Martina Pomeroy, *Left out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement*, 16 MICH. J. GENDER & L. 453, 470–71 (2010).

<sup>7</sup> See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

<sup>8</sup> The philosophical notion of women as Others was first developed by Simone de Beauvoir. In her work *The Second Sex*, she bases the construct of the Other on Hegel's account of a master-slave relationship: “The situation of women is comparable to the condition of the

“nexus” within the definition of a “refugee.” Their focus narrows in on the intent of the persecutor and the division of public and private spheres, which prevents an accurate understanding of the subtle forces that subordinate refugee women. In addition, courts impute gender-related motives to other grounds for asylum, such as political opinion or religion, thereby clouding any real recognition of gender-based persecution. They fail to consider the unique societal role of refugee women in their reluctance to consider common past experience as an immutable characteristic for the purposes of constructing a social group. Furthermore, courts ironically require a showing of social visibility for groups that are in fact relegated to the invisible shadows of society.

These interpretive failures indicate judicial and legal biases—whether conscious or subconscious—that view refugee women as cultural Others who, to some extent, *should* be the products of their own respective cultures. As discussed below, some cultures are accepting of practices that violate internationally recognized women’s rights. Yet, in a multicultural American society defined by the acceptance and preservation of individual identity, people can often justify abhorrent acts or practices out of respect for cultural difference.<sup>9</sup> Thus, deep-rooted notions of American individualism make it likely that application of asylum law—while entrenched in notions of

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Hegelian Other in that men . . . identify themselves as the Subject, the absolute human type, and measuring women by this standard, identify women as inferior.” Debra Bergoffen, *Simone de Beauvoir*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2010), available at <http://plato.stanford.edu/entries/beauvoir/#SecSexWomOth>. This article uses the concept of the Other as a vehicle not only to explore gender oppression, but also to analyze the influence of culture on gender socialization. In its exploration of cross-cultural gender issues in the context of international human rights, it elucidates Beauvoir’s proposition that, globally, women “lack the solidarity and resources of the Hegelian Other for organizing themselves into a ‘we’ that demands recognition.” *Id.*

<sup>9</sup> See Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STANFORD L. REV. 1311, 1317 (1991) (discussing cases where sentences were mitigated for domestic abuse and rape in criminal prosecution of Pacific Asian men based on rationales of cultural relativism) (“The urge to protect culture can function as a sanction for violence. . . . American culture . . . perceives the individual as separate from the physical world and others.”).

international human rights—would also try to respect the nuances of cultural differences. However, this article proposes that US asylum jurisprudence should strive to eradicate such biases because they contravene fundamental concepts of human rights. The construction of social group and nexus for female asylum-seekers should be formulated in a way that (1) recognizes common past experience as an immutable characteristic, (2) does not misconstrue gender issues under other grounds for asylum relief, (3) does not barricade the private sphere from state protection, and (4) places less emphasis on the subjective intent of the persecutor. This formulation, by refusing to portray refugee women as cultural Others, would apply to situations of persecution across the globe because it recognizes inherent, transcultural concepts of human dignity. Ultimately, this less rigid jurisprudential solution would lead to more consistent, just outcomes in evaluations of refugee status.

This article will analyze three specific types of gender-based asylum claims to demonstrate global application of this proposed construction: (1) female genital mutilation (which takes place primarily in various countries in Africa); (2) sex trafficking (which takes place worldwide, but primarily in Eastern Europe and Asia); and (3) domestic violence (a global phenomenon, though in light of recent developments in US jurisprudence, the focus here will be Central America). This analysis will first provide a global overview of refugee women, including background on these three specific types of persecution, as well as an explanation of various international actors' constructions of gender-based asylum claims. Next, a description of current US asylum jurisprudence will explain how victims of the three types of persecution are typically treated in American immigration law. Finally, a jurisprudential construction will be proposed, tackling the specific categories of social group and nexus devoid of notions of cultural Otherness.

The personal narratives that preface each subsection of this article stem from my experiences traveling in Kenya and Nicaragua during the summers of 2007 and 2010. They also include my perspective garnered from working in an immigration legal clinic for a nonprofit agency in Boston, Massachusetts, and

an agency advocating for unrepresented immigrant detainees at the Northwest Detention Center in Tacoma, Washington. These reflections are especially informed by my work as a legal advocate for refugee women and domestic violence survivors from Africa, Europe, Asia, Latin America, and Middle Eastern countries. The narratives are also bolstered by my studies of gender disparities in Africa and Latin America, international human rights, and volunteer work with immigrant communities in the United States and Italy.

To begin, the terminology used in this article must be discussed. First of all, I use the phrase “gender-based asylum claims” to refer solely to claims of persecution related to a refugee’s identity as a woman and the forms of violence derived from that identity. However, this language choice was made merely for the purpose of narrowing the scope of this topic. Gender identity encompasses much more than basic distinctions between the masculine and feminine. The severe forms of persecution faced by the lesbian, gay, bisexual, and transgender (LGBT) community throughout the world should not be overlooked, and that population likewise encounters many of the same challenges in US asylum law as refugee women. Within the limits of this article, however, their plight cannot be adequately addressed.<sup>10</sup>

In addition, this article assumes a non-relativist position and therefore chooses to use the term “Female Genital Mutilation,” or FGM, in lieu of the term, “Female Genital Cutting,” or FGC.<sup>11</sup> Proceeding from the assumption that there are fundamentally shared human rights that transcend borders and

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<sup>10</sup> For further information on gender-based claims by the LGBT community, *see generally* Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475, 501–12 (2002) (arguing against asylum in cases where claimed persecution is based on conduct rather than status); William Branigan, *Gays’ Cases Help to Expand Immigrants’ Rights*, WASH. POST, Dec. 17, 1996, at A1; *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990); *Cornejo v. Ashcroft*, 116 Fed. Appx. 900, 903 (9th Cir. 2004) (unpublished memorandum) (acknowledging “overt discrimination against gays” in Peru but affirming BIA denial of asylum); *Karouni v. Gonzales*, 399 F. 3d 1163 (9th Cir. 2005) (recognizing asylum claim for a Lebanese gay man).

<sup>11</sup> LEGOMSKY & RODRIGUEZ, *supra* note 3, at 971 (“Those who see FGM as a cultural norm that the United States should tolerate object to the word ‘mutilation,’ preferring to call it female genital ‘surgery’ or ‘cutting.’”).

cultures, use of the word “mutilation” conveys the message that this practice is an act that should be condemned, while the word “cutting” is a more objective description of what the ritual in fact entails. Even despite its cultural importance, the international community considers FGM to be a human rights violation, and the United States has outlawed the practice.<sup>12</sup>

Next, the term “alien,” though widely used as a term of art in the realm of immigration law, has a facially negative connotation. It implies an inherent “otherness” in the person to whom it refers and it presumes that such a person—though perhaps foreign-born—does not belong in the United States.<sup>13</sup> This article thus avoids use of this term, and instead chooses the less condemning term, “noncitizen,” to refer to individuals who have uncertain legal status in the United States.

## II. A GLOBAL OVERVIEW OF REFUGEE WOMEN

### *A Congolese Woman, a Weapon of War*<sup>14</sup>

*After fleeing the Democratic Republic of the Congo in fear for her life, Mariam arrived in Boston merely weeks before our first meeting in early*

<sup>12</sup> The Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the United Nations Declaration on the Elimination of Violence against Women recognize that practices harmful to women such as [FGM] [*sic*] are violations of human rights. Lisa Frydman & Kim Thuy Seelinger, *Kasinga's Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence*, in 13 BENDER'S IMMIGR. BULL. 1074 (Sept. 1, 2008). Also, in IIRIRA § 645, Congress made FGM a federal criminal offense, punishable by up to five years in prison. Legomsky, *supra* note 3, at 973.

<sup>13</sup> See LEGOMSKY & RODRIGUEZ, *supra* note 3, at 1. (“[T]he word “alien,” even when not adorned with the modifier “illegal,” has always struck a disturbing chord. Many feel that the term connotes dehumanizing qualities of either strangeness or inferiority (space aliens come readily to mind) and that its use builds walls, strips human beings of their essential dignity, and needlessly reinforces an ‘outsider’ status.”).

<sup>14</sup> For more information on the horrific incidents of mass rape in the Congo, see Laura Smith-Spark, *How did rape become a weapon of war?* BBC NEWS (Dec. 8, 2004, 4:39 PM), <http://news.bbc.co.uk/2/hi/4078677.stm>. See generally REBECCA FEELY, CTR. FOR AMERICAN PROGRESS, GETTING SERIOUS ABOUT ENDING CONFLICT AND SEXUAL VIOLENCE IN THE CONGO (Mar. 2008), available at <http://www.enoughproject.org/files/CongoSerious.pdf>.

September 2008. Her story was not unlike others that passed through the confines of our office, and yet in a most real way, she represented for me the epitome of suffering experienced by all refugee women.

Speaking rather awkwardly through an interpreter, Mariam spun out her story in bits and pieces as I coaxed her with questions. Her husband had been targeted by Congolese forces as a result of his Rwandese nationality—having received threats and beatings, he was eventually detained and killed. Throughout the course of his persecution, Mariam was likewise targeted, and—as is common in such war-torn countries today<sup>15</sup>—her persecution manifested itself in a very gender-specific way. On several occasions, Mariam was raped and beaten by the same men that eventually killed her husband. Though she was able to narrowly escape her country with the assistance of a friend, she left behind five children. Days after she arrived in the United States, she gave birth to a baby girl, the result of one of the rapes that had taken place. As Mariam spoke, she asked at one point if she could breast-feed her baby. With this child in her arms, she tried to recall the last time that she had heard of her other children's whereabouts. That image—of Mariam nurturing her US citizen child as she told me the gruesome details of her persecution—dramatized the particular burdens that refugee women carry with them across the globe.

Eighty percent of refugees and displaced persons worldwide are women and children.<sup>16</sup> Although all refugees—regardless of gender—are driven from their home countries by war, political strife, and natural disaster, women encounter particularized forms of persecution on the basis of their gender identities even during times of peace and relative stability.<sup>17</sup>

In addition to the forms of persecution discussed in this article (FGM, sex trafficking, and domestic violence), women are subjected to dowry deaths, coerced or forced adherence to religious dress codes, and are the victims of

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<sup>15</sup> Smith-Spark, *supra* note 14.

<sup>16</sup> Randall, *supra* note 2, at 286.

<sup>17</sup> LEGOMSKY & RODRIGUEZ, *supra* note 3, at 946.

mass rape used as a weapon of war. Gender inequality is present in virtually all societies: women are often excluded or underrepresented in state and social institutions; they receive unequal pay and inadequate reproductive health care; and they have less access to general health services, education, and other resources. Often, women are left in the exclusive role of child caretaker and domestic worker.<sup>18</sup> The specific manifestations of persecution discussed below are therefore part of a wider pattern of female discrimination.<sup>19</sup>

Given that the majority of refugee women come from developing nations with oppressive societal norms for women, the reception of these refugees into nations of the liberal democratic West can result in constructions of them as cultural Others.<sup>20</sup> The concept of Otherness is a human experience of “difference, of not belonging, of the unknown,” and is particularly dramatized for groups who have experienced forced exile, such as refugee women.<sup>21</sup> In the context of asylum law, these undertones of foreignness and strangeness are further complicated by the “power relations inherent in the encounter between the receiving country and its migrants.”<sup>22</sup>

Social and theoretical constructions of the Other inform relativist thinking. For example, in their home countries, women can be viewed as “legitimate victims,” who are seen as having little or no reason to complain about their

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<sup>18</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 285–86.

<sup>19</sup> ANDREJ ZERNOVSKI, COUNCIL OF EUROPE COMMITTEE ON MIGRATION, REFUGEES, AND POPULATION, GENDER-RELATED CLAIMS TO ASYLUM 8 (2010), *available at* <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12350.pdf> [hereinafter Council of Europe Report].

<sup>20</sup> Randall, *supra* note 2, at 281.

<sup>21</sup> Diana Wong, *Asylum as a Relationship of Otherness: A Study of Asylum Holders in Nuremberg, Germany*, 4 J. REF. STUD. 150, 153 (1991). “[T]he biography of the political refugee is marked by the trauma of persecution, the trauma of flight and—last but not least—the trauma of arrival all of which are sources of additional emotional stress which have to be given careful consideration.” *Id.* at 161. This also relates to Beauvoir’s theory of the Other because, as she explores, they “cannot call on a bond of shared history to reestablish their lost status . . . dispersed among the world of men, they identify themselves in terms of the differences of their oppressors . . . rather than with each other.” Bergoffen, *supra* note 8.

<sup>22</sup> Wong, *supra* note 21, at 152.

victimization because they belong to an inferior social class.<sup>23</sup> Yet, through the reasoning of cultural relativism, there is no need to force the particularities of one culture to conform to the values of another.<sup>24</sup> Undertones of cultural relativism within the asylum system would therefore permit justification of such “legitimate victims” even though US societal norms would not.<sup>25</sup> Rationalizing the idiosyncrasies of world cultures, however, allows for limitless methods of subjugation and violence under an illusory guise of cultural respect. Though they are often not recognized as such, the three forms of persecution discussed in this article are mere symptoms of an underlying disease of global female subordination often perpetuated by relativist thinking.

#### A. Three Types of Persecution

##### 1. Female Genital Mutilation (FGM)

An estimated 130 million women worldwide have been affected by some form of FGM, with over three million girls at risk of undergoing the practice every year.<sup>26</sup> Performed predominantly in numerous African tribes, FGM has special cultural significance because it signifies a girl’s transition into adulthood. Usually, the procedure is performed by female members of a tribe upon girls of a young age—and especially before marriage.<sup>27</sup> There is immense

<sup>23</sup> Rimonte, *supra* note 9, at 1315.

<sup>24</sup> *Id.* at 1321 (“[T]hose who advocate use of the cultural defense . . . are respectful of the idiosyncratic cultures of ethnic minorities, and, by accepting cultural explanations of an individual’s behavior, they affirm the validity and dignity of all cultures. This is cultural relativism at its best, sending a message that cultures are equal to one another, and cannot, and should not, be comparatively valued.”).

<sup>25</sup> *See id.*

<sup>26</sup> Council of Europe Report, *supra* note 19, at 8. *See also* Mary Nyangweso Wagila, *Beyond Facts to Reality: Confronting the Situation of Women in “Female Circumcising” Communities*, in J. HUM. RTS. 6, 393, 400 (2007) (“Reports indicate that out of every one thousand females who undergo female circumcision, seventy women die as a result.”).

<sup>27</sup> Wagila, *supra* note 26, at 406 (“No woman is allowed to get married without being circumcised. Uncircumcised girls are warned about the possibility of ostracization [sic] and rebuke by the whole family. They are threatened that they will not get husbands. If married, they are threatened with the possibilities of misfortunes such as barrenness, still births, deaths of husbands, and even their own death.”).

social pressure to have the procedure performed, as the procedure often centers around traditions of elaborate ceremonies as well as the cultural emphasis on fertility and the production of children.<sup>28</sup> Although the practice is integral to many social and cultural systems of indigenous communities, it is also directly associated with oppressive societal norms such as early marriage and limited educational opportunities.<sup>29</sup> The actual physical procedure of FGM is extremely invasive, poses substantial health risks, and results in deprivation of sexual pleasure as a means of female subordination. It can range from “partial removal of the clitoris and/or prepuce (Type I, clitoridectomy) or clitoris and inner or outer labia (Type II, excision), to partial closure of the vaginal opening created by cutting and healing of the labia (Type III, infibulation), to other vaginal pricking, scraping, or cauterization (Type IV).”<sup>30</sup> Often, FGM is performed under unsanitary ritual conditions with broken glass or unclean blades.<sup>31</sup> The short-term consequences of FGM include severe pain and bleeding, infection (septicemia, tetanus, HIV, etc.), immobility, and urinary retention.<sup>32</sup> Long-term physical consequences include “formation of abscesses, keloid scarring, infertility, accumulation of menstrual fluid, and serious complications during pregnancy and childbirth, such as postpartum hemorrhage, stillbirth, and low birth weight.”<sup>33</sup> Psychological impacts of FGM can “include eating and sleeping disorders, recurring nightmares, panic attacks, difficulty concentrating and learning, and permanent loss of erotic and sexual sensation.”<sup>34</sup> Often, such health risks arise from the fact that FGM is usually performed under unhygienic conditions with limited or no access to sufficient medical care.<sup>35</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 399.

<sup>30</sup> Frydman & Seelinger, *supra* note 12, at 1074.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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

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

<sup>35</sup> Wagila, *supra* note 26, at 400 (“Most often, unsterilized instruments are used, including knives, razorblades, scissors, thorns, and pieces of glass. Because circumcision takes place in

Although rates of FGM have decreased in some areas as a result of international efforts over the past decades to eliminate it, many countries are still unable or unwilling to provide the necessary protections.<sup>36</sup> The inability of governments to eradicate the practice can be attributed to their lack of commitment and failure to construct sensitive, practical strategies.<sup>37</sup> Despite international efforts to condemn the practice, often countries do not—or cannot—respond sufficiently to such external pressure.<sup>38</sup>

## 2. Sex Trafficking

Trafficking in persons has been referred to as modern-day slavery.<sup>39</sup> Under the Palermo Protocol adopted by the United Nations in 2000, this term is defined as:

the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or deception or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>40</sup>

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a group setting, these instruments are used on more than one person, increasing the risk of infection.”)

<sup>36</sup> Council of Europe Report, *supra* note 19, at 8.

<sup>37</sup> Wagila, *supra* note 26, at 406.

<sup>38</sup> In the case of Kenya, for example, laws enacted to criminalize the practice were solely the products of external pressure but did not reflect the intent of local communities to eradicate the practice. FGM has been recognized as a violation of the rights of women and children, including bodily integrity, self-determination, freedom of choice, and sexual fulfillment. It is also considered a form of torture and violation of the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CATCID). *Id.* at 402.

<sup>39</sup> CLARE M. RIBANDO, CONGRESSIONAL RESEARCH SERVICE, *TRAFFICKING IN PERSONS IN LATIN AMERICA AND THE CARRIBBEAN* 1 (2007).

<sup>40</sup> Stephen Knight, *Asylum from Trafficking: A Failure of Protection*, in IMMIGR. BRIEFINGS 2 (July 2007), available at

[http://www.childtrafficking.com/Docs/knight\\_immigration\\_tra\\_0708.pdf](http://www.childtrafficking.com/Docs/knight_immigration_tra_0708.pdf). See also Pomeroy, *supra* note 6, at 454 (quoting Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, art. 3(a), G.A. Res. 25, annex II, U.N. GAOR, 55th

The severe exploitation that characterizes sex trafficking can include abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labor, physical beatings, starvation, and the deprivation of medical treatment.<sup>41</sup> Many trafficking victims originate from South and Southeast Asia or the former Soviet Union, but human trafficking is also a growing problem in Latin America and the Caribbean.<sup>42</sup> In fact, it is one of the most lucrative and fast-growing types of organized crime.<sup>43</sup> According to US State Department estimates, between 600,000 and 800,000 people are trafficked across international borders for forced labor or domestic servitude on a yearly basis, including 17,500 that are trafficked annually into the United States.<sup>44</sup> About 80 percent of those trafficking victims are women and girls, frequently between the ages of eighteen and thirty; at times, these women and girls become trafficking victims with the consent of their husbands or other family members.<sup>45</sup>

Risk factors such as poverty, unemployment, illiteracy, history of physical or sexual abuse, homelessness, and drug use make women most susceptible to exploitation.<sup>46</sup> In addition, chauvinistic attitudes lead to practices that discriminate against women, leaving them with limited economic opportunities and making them prime targets as victims. Restrictive immigration policies in destination countries create limited opportunity for legal migration and contribute to an environment ripe for trafficking to occur.<sup>47</sup> In fact, trafficking is arguably a side effect of the recent trend in migration from the global

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Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force* Dec. 25, 2003, *available at* [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf).

<sup>41</sup> Knight, *supra* note 40, at 1.

<sup>42</sup> RIBANDO, *supra* note 39, at summary.

<sup>43</sup> *Id.* at 3–4.

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.* at 8.

<sup>47</sup> *Id.*

“south” to the global “north,” which is generally motivated by the severe inequalities and lack of basic human rights that plague most of the world’s population.<sup>48</sup> In light of the breadth and complexity of the global trafficking problem, the international community agrees that this severe form of persecution merits action.<sup>49</sup>

### 3. Domestic Violence

Domestic violence is defined as “purposeful behavior intended to control and dominate an intimate female partner,” which serves a “historical, culturally sanctioned purpose, which was and is for men to keep their wives ‘in their place.’”<sup>50</sup> Studies demonstrate that batterers use violence to meet needs for power and control over others, and that batterers’ actions are often fueled by stereotypical sex-role expectations for “their” women.<sup>51</sup> Women thus become targets of men, whose goal is to maintain power by subordinating women.<sup>52</sup>

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<sup>48</sup> Pomeroy, *supra* note 6, at 455–56. The global “south” can be generally defined as the collection of developing nations generally located in the Southern Hemisphere and that are generally dependent economically on the global “north.” The global “north” includes economically developed and technologically advanced nations that are generally situated in the Northern Hemisphere. See Lemuel Ekedegwa Odeh, *A Comparative Analysis of Global North and Global South Economies*, 12 J. SUSTAINABLE DEV. AFR. 520 (2010), available at [http://www.jsd-africa.com/Jsda/V12No3\\_Summer2010\\_A/PDF/A%20Comparative%20Analysis%20of%20Global%20North%20and%20Global%20South%20Economies%20\(Odeh\).pdf](http://www.jsd-africa.com/Jsda/V12No3_Summer2010_A/PDF/A%20Comparative%20Analysis%20of%20Global%20North%20and%20Global%20South%20Economies%20(Odeh).pdf).

<sup>49</sup> Pomeroy, *supra* note 6, at 457 (“In 2000, the United Nations introduced the Palermo Protocol as an effort to address universally, for the first time, ‘all aspects of trafficking in persons.’”). Also, the United States has established a T-visa program which allows the Department of Homeland Security to grant status and other benefits so some victims of severe forms of trafficking. However, though the US Department of Justice estimates that approximately 50,000 women and children are trafficked into the United States each year, the statute caps the number of T-visas that can be distributed annually at 5,000. *Id.* at 459, 460. The UNHCR’s Guidelines on International Protection for Victims of Trafficking also reiterate that trafficking victims may meet the definition of a refugee. *Id.* at 463.

<sup>50</sup> Deborah Anker, *Refugee Status and the Violence Against Women in the “Domestic” Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391, 400 (2001).

<sup>51</sup> Anker, *supra* note 50.

<sup>52</sup> Sharon Donovan, *No Where to Run . . . No Where to Hide: Battered Women Seeking Asylum in the United States Find Protection Hard to Come by: Matter of R-A*, 11 GEO. MASON U. CIV. RTS. L.J. 301, 320 (2001).

For the purpose of demonstrating the societal role and effects of domestic violence, it is helpful to look at the specific example of Guatemala, a country from which recent and significant US asylum cases have originated.<sup>53</sup> In Guatemala, society generally treats domestic violence as a private family matter, so it is difficult for women to seek the protection of local governments even if they are aware of that possibility.<sup>54</sup> Although Guatemala passed a law in 1996 on intra-familial violence that required public agencies and actors to receive domestic violence complaints, very few women have brought claims for protection under its provisions.<sup>55</sup> Spousal abuse is a particular problem within strongly patriarchal cultures, one which is exacerbated when alcoholism and sexual abuse are prevalent.<sup>56</sup> Many women commit suicide when they can no longer cope with the abuse—the “shortcut” to escape unbearable situations.<sup>57</sup> Even beyond battering in the home, women are frequently murdered by their intimate partners—and ‘femicide’ has been termed an out-of-control crime within Guatemala.<sup>58</sup>

The domestic violence that pervades every country across the globe manifests itself similarly, and often to an especially severe degree, in developing countries such as Guatemala. In fact, worldwide, one in three women has been beaten, coerced into unwanted sexual relations, or abused—

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<sup>53</sup> See *Matter of R-A*, 22 I. & N. Dec. 906 (BIA 1999) (en banc), *vacated*, 22 I. & N. Dec. 906 (Att’y Gen. 2001); *Perdomo v. Holder*, 611 F. 3d 662 (9th Cir. 2010).

<sup>54</sup> Donovan, *supra* note 52, at 306–09.

<sup>55</sup> *Id.* See also Allison M. Reimann, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1212–13 (2009) (“In domestic violence cases, police often fail to respond to emergency requests for assistance. . . . Even when complaints of sexual crimes are filed, justice officials often exercise their discretion not to prosecute first-time offenders.”).

<sup>56</sup> Donovan, *supra* note 52, at 306–09.

<sup>57</sup> *Id.*

<sup>58</sup> More than 3,000 women were murdered in Guatemala between 2001 and 2007. Murder rates of women have increased much more quickly than that of men and are characterized by particular brutality, including sexual abuse and genital mutilation. Reimann, *supra* note 55, at 1208. “The mother of one murder victim has lamented, ‘People say, it’s only a woman who died, as if they were flies.’” *Id.* at 1212. See also CAWN Femicide, *supra* note 4, at 3.

often by a family member or acquaintance.<sup>59</sup> Women in Afghanistan face brutal beatings and rape from their husbands—and subsequent persecution if they try to escape; those in Asia and the Middle East are killed in the name of honor; migrant and refugee women in Eastern Europe are brutalized for not conforming to the accepted social mores of their new communities; even women in rich, industrialized countries are beaten to death by their partners.<sup>60</sup> Like other forms of gender-directed violence, it is a discrete manifestation of a social mentality towards female subordination that states are all too often unable or unwilling to eradicate.

### III. INTERNATIONAL POSITIONS ON GENDER-BASED ASYLUM CLAIMS

Because this article proposes that uniformity in notions of international human rights is essential to effectuate just US asylum jurisprudence, it is helpful to consult international perspectives on the nuances of gender in asylum law. Although articulation of such universal standards is by no means easily reached in a world where competing ideologies reflect different political and social priorities, international actors have nonetheless taken steps towards achieving this end.<sup>61</sup> The enactment of the United Nations' Universal Declaration of Human Rights in 1948 was the first pivotal step, indicating a historic consensus on the perception of a "common humanity."<sup>62</sup> Additionally, following the Universal Declaration, many states have accepted legally binding obligations through formal conventions that include concepts from the Universal Declaration.<sup>63</sup>

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<sup>59</sup> HENKIN, *supra* note 6, at 249.

<sup>60</sup> See generally AMNESTY INT'L, IT'S IN OUR HANDS: STOP VIOLENCE AGAINST WOMEN (2004), available at <http://www.amnesty.org/en/library/asset/ACT77/001/2004/en/d711a5d1-f7a7-11dd-8fd7-f57af21896e1/act770012004en.pdf>.

<sup>61</sup> LYNN H. MILLER, GLOBAL ORDER 189 (4th ed. 1998).

<sup>62</sup> *Id.* at 190.

<sup>63</sup> *Id.*

The foundations of refugee law are premised upon these shared notions of basic rights, guaranteed to all persons regardless of race, ethnicity, nationality, or any other artificial social construction.<sup>64</sup> The principle of non-refoulement—the notion that no party shall return a person to a country where they will be persecuted—is the central principal of refugee and human rights law.<sup>65</sup> While the claims of refugee women raise challenging and distinct issues, there is an appropriate analysis that fits within these principles. As refugee law has evolved over the past decade, gender has been a part of—and perhaps even the key impetus of—that development.<sup>66</sup>

*A. The United Nations High Commissioner for Refugees (UNHCR) and Other International Tribunals*

The 1951 Convention Relating to the Status of Refugees, the key international refugee instrument, uses gender-neutral terminology that has, in part, contributed to the historical failure of protection for women refugees. The Convention defines a refugee as any person with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group, or political opinion.”<sup>67</sup> The absence of *gender* as a Convention ground has created a historically masculine slant to the refugee definition that falls in line with an already male-dominated world. Because the definition of “refugee” arose during the Cold War, “persecution” came to be understood from an overwhelmingly male paradigm—one of political dissidence thwarted by beatings, torture, and imprisonment.<sup>68</sup> Growing recognition of this historical

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<sup>64</sup> *Id.* at 209.

<sup>65</sup> Knight, *supra* note 40, at 3.

<sup>66</sup> Anker, *supra* note 50, at 391, 393.

<sup>67</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 780 (citing Protocol Relating to Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 167 art. 1.A(2)).

<sup>68</sup> *Id.* at 781 n.28.

failure to protect women has instigated international action to remedy gender disparities in asylum law.<sup>69</sup>

Receiving countries of female asylum-seekers have made attempts to address the particular needs of such female asylum-seekers by issuing gender-specific guidelines and modifying jurisprudence to better incorporate gender issues.<sup>70</sup> The goal of these international initiatives is to include gendered perspectives into substantive and procedural aspects of the refugee determination process. Currently, five countries have guidelines for gender claims: Canada (1993), the United States (1995),<sup>71</sup> Australia (1996), the United Kingdom (2000), and Sweden (2001).<sup>72</sup> Since 1999, the tribunals of three countries—the United Kingdom, New Zealand, and Australia—have issued decisions addressing social group and nexus with interpretations that are the most favorable to the claims of refugee women.<sup>73</sup> Additionally, in May 2002, the United Nations High Commissioner for Refugees (UNHCR) published guidelines on both social group and gender claims.<sup>74</sup> UNHCR also issued guidelines in 2006 relating to treatment of trafficking victims that explicitly recognized gender as an important factor in construing asylum claims for that

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<sup>69</sup> *Id.* at 779–80. In 1985, the Executive Committee of UNHCR issued EXCOM conclusion No. 39, which first recognized that gender-based claims could fall under the “particular social group” category of the Refugee Convention. *Id.* at 779 n.14. Also, in 1991, UNHCR issued *Guidelines on the Protection of Refugee Women*. Karen Musalo, *A Short History of Gender Asylum in the United States*, 29 REFUGEE SURV. Q. 49 (2010), available at [http://cgrs.uchastings.edu/pdfs/Ref%20Sur%20Quarterly%20Musalo\\_Short%20History%20of%20Gender%20Asylum.pdf](http://cgrs.uchastings.edu/pdfs/Ref%20Sur%20Quarterly%20Musalo_Short%20History%20of%20Gender%20Asylum.pdf) [hereinafter Musalo, *A Short History of Gender Asylum*].

<sup>70</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 780–81.

<sup>71</sup> Although the Guidelines’ stated purpose was “to enhance the ability of US Asylum Officers to more sensitively deal with substantive and procedural aspects of gender-related claims,” the Guidelines are not binding on the BIA. 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, 1581 (2001). Furthermore, subsequent cases indicate that the BIA has failed to implement the suggestions. *Id.* at 1582.

<sup>72</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 779–80.

<sup>73</sup> *Id.* at 777.

<sup>74</sup> *Id.* at 804. The Guidelines “unequivocally state that proper interpretation of the refugee definition ‘covers gender-related claims.’” Musalo, *A Short History of Gender Asylum*, *supra* note 69, at 51.

group.<sup>75</sup> By contrast, commentators have characterized the US position on gender claims as lacking alignment with this evolving international jurisprudence.<sup>76</sup>

*B. The Council of Europe: A Parliamentary Assembly on Gender-Related Claims for Asylum*

In July 2010, the Council of Europe<sup>77</sup> recognized the importance of incorporating the nuances of gender-based violence into asylum determination and procedure.<sup>78</sup> Noting explicitly the vast differences in the persecution experiences of men and women, the Council of Europe's Committee on Migration, Refugees, and Population issued a report that called upon its member states to set up asylum systems in ways that reflect gender sensitivity.<sup>79</sup> As a preface to their report, which was based upon fact-finding missions by the Committee's special rapporteurs, Council members articulated the specific aspects of gender-related claims that present challenges for legal systems worldwide.<sup>80</sup> The Council recognized that persecution experienced by

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<sup>75</sup> U.N. High Comm'r for Refugees, Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, HCR/GIP/06/07 (Apr. 7, 2006), available at <http://www.unhcr.org/refworld/docid/443679fa4.html>.

<sup>76</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 778.

<sup>77</sup> HENKIN, *supra* note 6, at 334, 623. The Council of Europe was created in 1950 to promote democracy and human rights in the non-Eastern Bloc states of Europe. The European Convention has been renowned as the most advanced and effective human rights treaty system ever created, having reviewed hundreds of thousands of individual applications. Compliance with the Convention is supervised by the European Commission of Human Rights. *Id.*

<sup>78</sup> Council of Europe Report, *supra* note 19, at 1.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 6–7 (“The present report enters into the framework of a set of adopted and forthcoming reports prepared by the committee with the objective of improving the quality and consistency of the asylum system in Council of Europe member states . . . As part of the preparation for the present report, the rapporteur conducted a fact-finding mission to Geneva on 9 April 2010 [*sic*] where he met with representatives of the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), the International Committee of the Red Cross, the United Nations Office for the High

women often differs from that experienced by men, but that asylum systems still tend to evaluate such persecution from a male-centered perspective.<sup>81</sup> According to NGOs and international organizations, states do not always consider the added dimension of gender when processing asylum applications.<sup>82</sup>

The Council also articulated similar reflections on the definition of “gender-related persecution” as those expressed in this article<sup>83</sup>—specifically, gender-related persecution means that a causal relationship exists between the persecution and the victim’s identity as a woman. In recognizing this causal link, however, it is important to construct that identity in societal and cultural contexts that often impute additional dimensions to the notion of *being a woman*. The social and cultural demands, which arise as a result of biological femaleness, are therefore directly connected to female identity. Thus, gender-related persecution is not necessarily the same as persecution on the basis of biological sex.<sup>84</sup> It does not solely refer to an individual being persecuted due to biological identity as a female, but also because she fails or refuses to comply with the “social requirements” of being a woman within a certain society or culture.<sup>85</sup>

In addition, the Council’s report made an important distinction between the relationship between gender and the *form* of persecution and the *motivation* for persecution.<sup>86</sup> For example, a female asylum-seeker may be persecuted in a gender-specific manner for reasons unrelated to gender (rape as a result of her membership in a political party); she may be persecuted in a non-gender-specific manner because of her gender (flogging for a refusal to wear a veil);

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Commissioner for Human Rights (UNHCHR) and the World Organisation Against Torture.”).

<sup>81</sup> *Id.* at 2.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 8.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

and she may be persecuted in a gender-specific manner because of her gender (FGM due to her biological identity as a woman).<sup>87</sup> Awareness of this distinction is likewise applicable to formulations of gender-based asylum claims in the United States, and it should be considered in constructions of social group and nexus.

#### IV. ASYLUM JURISPRUDENCE IN THE UNITED STATES

##### A. Sanctuary for a Malian Victim

*The ice and snow of Boston winters were an abrupt awakening for Kara, who arrived mid-December from her home country of Mali. The hustle and bustle of city streets, combined with the strangeness of foreign clothing and accents, contrasted sharply with the isolated, rural life she had known. As a woman in the Bambara Tribe, she knew the very distinct social role of being homemaker, obedient daughter, and future wife. Her world was one of stark divisions between male and female, power and subordination. Having undergone the practice of FGM as a child, she was ushered into an arranged marriage in her early adulthood as the third wife of a powerful local man.*

*Yet, Kara resisted these culturally restrictive pressures and attempted to flee the confines of her forced marriage by escaping to Mali's capital city, Bamako. After she had been tracked down by her husband and beaten for leaving, Kara decided to leave the country. In a fortuitous series of events, and after several months of hiding in Bamako, Kara managed to board a plane to the United States. During her time in Boston, she kept in communication with her younger sister, whom she had mothered and cared for since she was an infant. Kara was constantly in fear that her sister would be subjected to the same fate—having not yet undergone FGM, Kara's sister faced this procedure as well as an arranged marriage with one of her cousins.*

*By the time Kara met with me to tell her story, eight years had passed since Kara had first entered the United States. Uneducated, unable to speak English,*

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<sup>87</sup> *Id.*

and wary of primarily male authorities, Kara never thought to seek help. I was faced with the difficult task of explaining to her that her chances of finding asylum in the United States were slim to none. Numerous obstacles—the one-year statutory bar<sup>88</sup> among others—would prevent her from making her case as a victim of persecution.

#### B. Current US Asylum Law: An Overview

Building a successful asylum case in the United States involves a complex series of substantive and procedural hurdles. Within the Immigration and Nationality Act (INA), a refugee is defined as a person with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”<sup>89</sup> This definition requires “proof of (1) an objectively reasonable fear of harm which is serious enough to be considered ‘persecution,’ (2) which is causally linked or bears a ‘nexus’ to race, religion, nationality, membership of a particular social group, or political opinion.”<sup>90</sup> The Attorney General may, at his or her discretion, grant asylum to a noncitizen who qualifies as a refugee within the meaning of the INA.<sup>91</sup> But overall, the applicant bears the burden of proving his or her refugee status.<sup>92</sup>

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<sup>88</sup> “As a result of IIRIRA § 604(a), asylum (but not withholding of removal) requires ‘clear and convincing evidence’ that the application is being filed within one year of the applicant’s arrival in the United States.” LEGOMSKY & RODRIGUEZ, *supra* note 3, at 1045. Legal professionals have significantly contested this requirement as the immediate priorities of refugees upon reaching the United States usually include locating friends, family members, food, and lodging. Furthermore, many refugees do not speak English and are not able to locate a lawyer to help them with the labor-intensive process of filing an asylum claim within this limited time frame. *Id.* at 1045.

<sup>89</sup> *Id.* at 892.

<sup>90</sup> *Id.* at 781.

<sup>91</sup> *Perdomo v. Holder*, 611 F.3d 662, 665 (9th Cir. 2010).

<sup>92</sup> *Id.* The United States provides three possible remedies to refugees in accordance with the 1951 Convention: withholding of removal, asylum, and relief under the Convention Against Torture (CAT). LEGOMSKY & RODRIGUEZ, *supra* note 3, at 893, 1095. Because the application process for the former two remedies is exactly the same, this article will address only the requirements for asylum. A primary difference between asylum and withholding is that the latter is not subject to the one-year bar. LEGOMSKY & RODRIGUEZ, *supra* note 3, at 1045.

Procedurally, an asylum application is first reviewed by an Immigration Judge (IJ) during an interview with the applicant.<sup>93</sup> The IJ questions the applicant about the intricacies of her claim, and determines the applicant's credibility—arguably the most important factor for the success of a claim.<sup>94</sup> Fair and accurate determinations of credibility are often complicated by psychological symptoms of trauma and/or differing cultural perceptions of asylum-seekers.<sup>95</sup> Indeed, failure to consider cultural or psychological factors in credibility determinations has led to skewed results.<sup>96</sup> If an appeal is filed, an applicant's case is reviewed by a panel of three judges on the Board of Immigration Appeals (BIA).<sup>97</sup> A decision by the BIA can be appealed all the way to the United States Supreme Court.<sup>98</sup>

Although in March 1995 the Immigration and Naturalization Services (INS) issued "Gender Considerations"<sup>99</sup> in an effort to recognize the unique circumstances of female asylum-seekers, these guidelines are not binding on

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<sup>93</sup> LEGOMSKY & RODRIGUEZ, *supra* note 3, at 894.

<sup>94</sup> *See id.* at 1005. In all applications for asylum, the Court must make a threshold determination of a respondent's credibility. *See* Matter of O-D, 21 I. & N. Dec. 1079, 1081 (BIA 1998).

<sup>95</sup> Stuart L. Lustig, *Symptoms of Trauma Among Political Asylum Applicants: Don't Be Fooled*, 31 HASTINGS INT'L & COMP. L. REV. 725, 729 (2008) ("Ironically, the dissociation caused by the trauma can adversely affect asylum applicants' credibility as they attempt, with difficulty, to describe the trauma. Immigration Judges and Asylum Officers are understandably suspicious of factual accounts with conflicting, inaccurate, or missing data, but need to take into account the possibility that the very experience itself of severe trauma could be interfering with its description in an affidavit, an interview, or a courtroom.").

<sup>96</sup> *See id.* Examples include "the case of the Guatemalan domestic violence victim whose PTSD was not recognized as a valid diagnosis because she was able to pay her bills on time, nor was the case of the Kenyan woman whose PTSD supposedly could not have contributed to her delay in filing for asylum because she was still able to attend church. Both cases demonstrate a fundamental misunderstanding of what PTSD is and is not. Traumatized people often avoid people, places, and activities that are unwelcome reminders of the original traumatic event or events." *Id.* at 731.

<sup>97</sup> LEGOMSKY & RODRIGUEZ, *supra* note 3, at 894.

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

<sup>99</sup> *Id.* at 957 ("The INS Gender Guidelines review various relevant international human rights instruments. . . . The main goal was to emphasize to asylum adjudicators that gender-related asylum claims are to be taken seriously.").

the BIA and subsequent cases indicate that the BIA has failed to implement these suggestions.<sup>100</sup> The discretion afforded to IJs and asylum officers is not to be underestimated. Statistical studies show vast and arbitrary disparities in grants of asylum depending on the background, experience, and gender of adjudicators.<sup>101</sup> Such unnerving statistics make it all the more essential to have reliable, concrete formulations of gender-based claims.

### 1. Social Group

Of the enumerated grounds for the definition of “refugee,” the classification that is often interpreted to encompass gender-based claims is “a particular social group.”<sup>102</sup> Under *In re Acosta*, US case law has interpreted social group to include “a group of persons, all of whom share a common, immutable characteristic.”<sup>103</sup> This shared characteristic might be innate, such as sex, color, or kinship ties; in some circumstances, it might be a shared past experience, including former association.<sup>104</sup> Particular group characteristics that qualify under this construction are determined on a case-by-case basis.<sup>105</sup> Whatever the common characteristic that defines the group, it must be one that the “members of the group cannot change, or should not be required to change, because it is fundamental to their individual identities or consciences.”<sup>106</sup> This shared

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<sup>100</sup> Karen Musalo & Steven Knight, Gender-Based Asylum: An Analysis of Recent Trends, 77 INTERPRETER RELEASES 1533, 1542-43 [hereinafter Gender-Based Asylum]. See also Sinha, *supra* note 71, at 1582 (referencing *In re Kasinga*, 21 I. & N. Dec. 357 (BIA Jun. 13, 1996); *In re R-A*, 22 I. & N. Dec. 906 (BIA 1999) (en banc), *vacated* (AG Jan. 19, 2001); and *In re S-A*, Int. Dec. 3433 (BIA Jun. 27, 2000)).

<sup>101</sup> See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 372 (2007). See also LEGOMSKY & RODRIGUEZ, *supra* note 3, at 1039 (“In many cases, the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge.”).

<sup>102</sup> See generally Randall, *supra* note 2, at 294.

<sup>103</sup> Donovan, *supra* note 52, at 321 (citing *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)).

<sup>104</sup> *Id.* at 321–22 (citing *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)).

<sup>105</sup> *Id.* at 322 (citing *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)).

<sup>106</sup> *Id.* at 322 (citing *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)).

characteristic must make membership comparable to the other four grounds of persecution.<sup>107</sup> Additionally, courts have considered the factors of “social visibility” and “particularity.”<sup>108</sup>

Although many circuits have adopted the *Acosta* test for social group, the Ninth Circuit has defined social group slightly differently as, “a group of people closely affiliated with each other, who are actuated by some common impulse or interest.”<sup>109</sup> Ninth Circuit courts at one point required that a “voluntary associational relationship” exist among the group’s purported members, imparting “some characteristic that is fundamental to their identity as a member of that discrete social group.”<sup>110</sup> Since the Circuit’s 2000 holding in *Hernandez-Montiel v. INS*, however, the test has evolved to permit an applicant to demonstrate group membership either by a showing of voluntary association or “an innate characteristic that is so fundamental to the identities or consciences of its members that members cannot or should not be required to change it.”<sup>111</sup>

## 2. Nexus

Intricately related to the problems regarding courts’ constructions of social group is that of nexus—or the causal relationship between the asylum ground and the persecution. Asylum law’s nexus analysis involves a two-step process: first, a relevant category must be identified; second, a causal connection must be established between that ground and the applicant’s persecution.<sup>112</sup> Yet, nexus cannot be entirely analyzed independently of the particular ground for persecution because the initial step requires an examination of against whom the harm is directed *before* the persecutor’s motivation for the harm is

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<sup>107</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 784.

<sup>108</sup> *See, e.g.*, Matter of A-M-E & J-G-U, 24 I. & N. Dec. 579 (BIA 2008); Matter of S-E-G, 24 I. & N. Dec. 579 (BIA 2008); Santos-Lemus v. Mukaskey, 542 F.3d 738 (9th Cir. 2008).

<sup>109</sup> Donovan, *supra* note 52, at 323 (citing *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991)).

<sup>110</sup> *Id.* at 323.

<sup>111</sup> *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

<sup>112</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 783.

examined.<sup>113</sup> Nexus requires a showing of some relationship between the feared harm and the Convention ground (for the purposes of this analysis, social group), and one of the most demanding tests has been adopted by the United States.<sup>114</sup> This test requires proof that the persecutor was motivated by a Convention ground, meaning that the applicant must show the persecutor's state of mind.<sup>115</sup> The REAL ID Act § 101(a)(3) requires that one of the five protected grounds "was or will be at least one central reason for persecuting the applicant."<sup>116</sup> Other nations have not explicitly defined its meaning or concede that meaning may differ based upon the context of a particular claim.<sup>117</sup>

### C. Formulation of Select Gender-Based Claims

#### 1. FGM-Based Claims

US courts have a scattered history of jurisprudence for FGM-related asylum claims. Although courts generally recognize FGM as persecution, the lack of theoretical clarity in recent precedential decisions has led to inconsistency and confusion in constructing such claims.<sup>118</sup> Where a personal history shows

<sup>113</sup> Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim's Particular Social Group*, 49 LOY. L. REV. 287, 291 (2003).

<sup>114</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 786.

<sup>115</sup> Sinha, *supra* note 71, at 1595 n.179 (citing *Tagaga v. INS*, 228 F.3d 1030, 1035 (9th Cir. 2000) ("[S]o long as one of the motives for the feared persecutory conduct relates to a protected ground, the petitioner is entitled to that status."); *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (en banc) (holding that applicant "must produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground"); *Singh v. Ilchert*, 63 F.3d 1501, 1509–10 (9th Cir. 1995) ("[P]ersecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied.").

<sup>116</sup> LEGOMSKY & RODRIGUEZ, *supra* note 3, at 997 (citing INA § 208(b)(1)(B)(I); *Matter of J-B-N & S-M-*, 24 I. & N. Dec. 208 (BIA 2007)).

<sup>117</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 786. *See, e.g., id.* at 787 (citing *Islam v. Secretary of State for the Home Dept.*, [1999] 2 A.C. 629 (U.K. House of Lords) (1999) (adopting a but-for causation test for the nexus requirement)). *See also* Council of Europe Report, *supra* note 19.

<sup>118</sup> *See, e.g., Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (recognizing the FGM claim based on membership in the social group, "young women of the Tchamba-Kunsuntu Tribe

individualized risk or intent of a third party to force FGM upon an asylum applicant, she should be able to establish “both a subjectively genuine and objectively reasonable fear of future [FGM].”<sup>119</sup>

In the landmark 1996 case *Matter of Kasinga*, a nearly unanimous panel of BIA judges recognized that the gender-specific practice of FGM is a form of persecution, and that gender can constitute a social group in combination with other characteristics.<sup>120</sup> However, although the *Kasinga* court arrived at a desirable practical result, it did so using an extremely narrow legal construction.<sup>121</sup> Even though FGM is a gender-specific practice imposed on all girls because they are female, the BIA did not find that this persecuted group was comprised of the tribe’s female members.<sup>122</sup> Instead, the court found that Kasinga had a legitimate fear of future persecution because she was a member of the particular social group, “young women of the Tchamba-Kunsuntu Tribe who had not had [FGM], as practiced by that tribe, and who oppose the practice.”<sup>123</sup> Additionally, the BIA found that the practice of FGM was a country-wide problem in Togo, yet the nation had done nothing to prevent its forced infliction on women.<sup>124</sup> The BIA further focused on the fact that the applicant had escaped the practice, placing her within a far more restrictive

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who have not had FGM, as practiced by that tribe, and who oppose the practice.”); *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007); *Mohammed v. Gonzalez*, 400 F.3d 785 (9th Cir. 2005); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004); *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999); *Matter of A-T*, 24 I. & N. Dec. 617 (AG 2008) (reversing BIA finding that the presumption of future persecution was rebutted because FGM could not be performed twice on the same individual).

<sup>119</sup> Frydman & Seelinger, *supra* note 12, at 1075.

<sup>120</sup> *Gender-Based Asylum*, *supra* note 100, at 1543; LEGOMSKY & RODRIGUEZ, *supra* note 3, at 968 (“The former INS detained Kasinga for 16 months despite repeated requests for parole pending the disposition of her case. Nine days after a front page New York Times article triggered widespread criticism of the INS, the agency released Kasinga from detention.”).

<sup>121</sup> *See* *Gender-Based Asylum*, *supra* note 100, at 1542. *See also* Karen Musalo, *In re Kasinga: A Big Step forward for Gender-Based Asylum Claims*, 73 INTERPRETER RELEASES 853 (Jul. 1, 1996).

<sup>122</sup> *Randall*, *supra* note 2, at 295.

<sup>123</sup> *Id.* (quoting *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996)).

<sup>124</sup> Frydman & Seelinger, *supra* note 12, at 1076.

social group of women “having intact genitalia” who oppose the imposition of FGM.<sup>125</sup> Analyzing FGM in its social context, the BIA found that it is a form of “sexual oppression” that is “based on a manipulation of women’s sexuality in order to assure male dominance and exploitation.”<sup>126</sup> Thus, because the tribe targeted women who had not suffered FGM in order to subordinate them, the BIA found Kasinga’s persecution was “on account of” her membership in a “particular social group.”<sup>127</sup>

However, *Kasinga* has since been followed by such cases as *Matter of A-T* and *Mohammed v. Gonzales*, both of which reflect opposing viewpoints as to whether FGM can constitute an ongoing harm.<sup>128</sup> In *Matter of A-T*, the BIA faced the question of whether a woman who had already been subjected to FGM could still qualify for asylum on that basis.<sup>129</sup> Generally, women who have already had FGM performed can assert a claim for asylum based on past persecution (the infliction of FGM), which entitles them to a presumption of having a well-founded fear of future persecution.<sup>130</sup> However, in *Matter of A-T*, the BIA found that FGM is generally a one-time harm and that women who have already been cut ordinarily have no fear for cutting again.<sup>131</sup> It “rejected the notion that past FGM constitutes ongoing harm to a woman as well as the presumption that well-founded fear remains unrebutted by the continuing harms of the ritual.”<sup>132</sup> Similarly, the BIA rejected Ms. A-T’s forced marriage claims, saying that such an arrangement did not rise to the statutory level of persecution, and instead required an independent showing of clear probability of persecution, which she had failed to make.<sup>133</sup> However, the Attorney

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<sup>125</sup> Randall, *supra* note 2, at 295.

<sup>126</sup> Donovan, *supra* note 52, at 325.

<sup>127</sup> *Id.*

<sup>128</sup> See *Mohammed v. Gonzalez*, 400 F.3d 785 (9th Cir. 2005); *Matter of A-T*, 24 I. & N. Dec. 617 (AG 2008).

<sup>129</sup> Frydman & Seelinger, *supra* note 12, at 1078.

<sup>130</sup> *Id.* at 1075.

<sup>131</sup> *Id.* at 1073.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1078.

General reversed the BIA decision, finding that FGM can in fact be performed more than once on the same individual.<sup>134</sup> Also, despite the fact that some cases continue to be granted, the *A-T* decision has been mistakenly applied to women who have already been subjected to FGM.<sup>135</sup>

Despite this troubling trend, in the Ninth Circuit case *Mohammed v. Gonzales*, the BIA recognized past FGM as a viable claim to asylum given the nature of the past persecution and its ongoing effects.<sup>136</sup> It concluded that “genital mutilation, like forced sterilization, is a ‘permanent and continuing’ act of persecution, which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear.”<sup>137</sup> The BIA found that Ms. Mohammed was targeted for persecution on account of two possible social groups: “Somali females” or “young girls of the Benadiri clan.”<sup>138</sup> These three cases alone indicate the struggle of courts to construe claims of this particularized gender-based violence, at the heart of which are misconstructions of social group and nexus.

## 2. Sex Trafficking-Based Claims

Women seeking asylum based on a fear of sex trafficking in their home countries are frequently denied sanctuary.<sup>139</sup> While there has yet to be any BIA or Circuit decision of precedential weight relating to such claims,<sup>140</sup> a review of existing unpublished decisions indicates a fundamental resistance to

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<sup>134</sup> *Matter of A-T*, 24 I. & N. Dec. 617, 621 (AG 2008). The Attorney General cited *Mohammed* in its analysis and also found that the future harm need not take the same form; A-T’s forced marriage claim merited consideration as long as that alleged persecution was based on the same social group. *Id.* at 622.

<sup>135</sup> Frydman & Seelinger, *supra* note 12, at 1083.

<sup>136</sup> *Id.* at 1083–84.

<sup>137</sup> *See Mohammed v. Gonzalez*, 400 F.3d 785, 800 (9th Cir. 2005).

<sup>138</sup> Frydman & Seelinger, *supra* note 12, at 1076.

<sup>139</sup> *See Knight*, *supra* note 40. In a study done by the Center for Gender and Refugee Studies at University of California, Hastings, the frequency of grants was found to be 64 percent of affirmative sex-trafficking asylum cases at the lowest level, 35 percent at the immigration court level, and 25 percent at the BIA. *See id.* at 5.

<sup>140</sup> *See Knight*, *supra* note 40, at 5. In many of the 93 cases studied by CGRS, there was no agency decision to review or no written decision to review. *See id.*

acknowledging that even the most severe levels of harm linked to trafficking might provide the basis for asylum.<sup>141</sup>

Although the vast majority of trafficking victims are targeted because they are females, courts neglect to recognize persecution on the basis of gender.<sup>142</sup> Most frequently, IJs and the BIA treat trafficked women as victims of personal, criminal problems, thus finding them ineligible for asylum for failure to demonstrate a nexus between their forced prostitution and the five categories of persecution.<sup>143</sup> For example, seventeen-year-old Ann, who was sent to the United States on a student exchange program after being kidnapped by a local trafficker, beaten, and repeatedly raped, was denied asylum.<sup>144</sup> She had heard the local trafficker making plans over the phone to traffic her, but was eventually able to escape.<sup>145</sup> Although she was found to be a credible applicant, she was nonetheless denied asylum because the IJ determined that “no connection existed between her kidnap, rape, and threatened trafficking and any of the asylum grounds.”<sup>146</sup> Instead, the IJ referred to her persecutor as a “spurned suitor,” and found that his actions “were personal and criminal toward the respondent.”<sup>147</sup> The IJ’s ruling ignored the overwhelming evidence that Ann’s treatment by her persecutor was very similar to the way in which young women are forced into trafficking.<sup>148</sup> Specifically, “traffickers are documented to have used offers of marriage to recruit women for the sex trade and for forced labor,” just as Ann’s trafficker had repeatedly approached her on the street with marriage proposals.<sup>149</sup> The BIA affirmed the IJ’s denial in a mere few sentences, noting, “the respondent has failed to carry her burden of

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<sup>141</sup> *Id.*

<sup>142</sup> Pomeroy, *supra* note 6, at 454.

<sup>143</sup> Knight, *supra* note 40, at 6.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (“The Department of Justice’s ‘Introduction to Human Trafficking’ repeatedly makes reference to the use of ‘sham’ and ‘false’ marriages.”).

<sup>149</sup> *Id.*

proof . . . that she should be persecuted on a protected ground to include [*sic*] her political opinion or membership in a particular social group.”<sup>150</sup>

Other cases similarly illustrate courts’ refusal to include victims of sex trafficking as a cognizable social group, which precludes a finding of a nexus between the gender-related group and persecution. Courts have held that defining a group solely by the group’s persecution entails impermissible, circular reasoning.<sup>151</sup> For example, one case involved a Thai woman who was smuggled into the United States and forced into prostitution in a number of cities.<sup>152</sup> Entrusted to deliver a few hundred dollars to her captors, she bought a plane ticket and was able to escape, but her mother had since received threats in Thailand regarding an outstanding debt related to her trafficking.<sup>153</sup> The BIA rejected her proposed social group of “sex slaves from foreign countries who are brought to the [United States] under false pretenses and forced at the threat of death and destruction to participate in sexual activities” by stating that the persons who were in contact with her family, “seemed more interested in having the debt repaid than in finding the respondent herself.”<sup>154</sup>

Similarly, in the case of Sophie, a young Russian woman who was held in captivity and repeatedly gang-raped, the IJ denied asylum based on her proposed social group that included women of her country, “forced into prostitution by the mafia who escape from sexual bondage.”<sup>155</sup> The fact that the IJ granted Sophie relief under the Convention Against Torture (CAT)

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<sup>150</sup> *Id.* at 7. The BIA also affirmed the IJ’s finding that Ann was also barred from asylum based on the one-year filing deadline even though she arrived as an unaccompanied minor at the age of sixteen and was suffering from post-traumatic stress disorder (PTSD). The IJ further noted that she could have “easily . . . rectified” her feelings of shame and humiliation “by going to an attorney.” *Id.*

<sup>151</sup> Pomeroy, *supra* note 6, at 466. Instead, trafficking victims must construct a narrower category based on a distinctive quality that unites them such as being single, attractive, educated, or orphaned as a child. Still, these cases are not guaranteed to be successful. *Id.*

<sup>152</sup> Knight, *supra* note 40, at 7 (citing CGRS Case # 3695).

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

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 9. The IJ relied on the BIA’s recent decision of *Matter of R-A* in the construction of social group.

implies that the primary issues had been those of social group and nexus, which are not required under CAT.<sup>156</sup> Additionally, in the small number of cases resulting in positive grants of asylum, courts are reluctant to recognize social groups constructed in principal part by gender, and rather focus on forced prostitution and international trafficking.<sup>157</sup>

### 3. Domestic Violence-Based Claims

Survivors of domestic violence who seek asylum repeatedly encounter courts that refuse to recognize either a cognizable social group or a nexus between the alleged ground of abuse and the persecution. Even when courts have sparingly recognized the existence of a social group, they have not acknowledged that the women were targeted on this basis, but rather often have imputed other grounds for asylum in lieu of finding a gender-based group.<sup>158</sup>

In *Matter of R-A*, one of the most recent and influential BIA decisions on this issue, asylum was originally denied to Rodi Alvarado, a Guatemalan woman fleeing an abusive domestic relationship, because she failed to show that she was a member of a particular social group.<sup>159</sup> Ms. Alvarado had been

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 12–13 nn. 138, 142, 146 (citing *Matter of Anon*, A79-607-478 (Oakdale, LA, Immigration Court, Dec. 20, 2005) at 4; *Matter of S-A*, A# redacted (Chicago, IL, Immigration Court, Jun. 18, 2001); *Matter of F-L*, A# redacted (Anchorage, AK, Immigration Court, Jul. 24, 1998)).

<sup>158</sup> See *Matter of R-A*, 22 I. & N. Dec. 906 (BIA 1999) (vacated for review of “social group” analysis, and finding that there was no nexus based on an imputed political opinion claim that the applicant was harmed due to her resistance to overcome male domination); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (granting asylum to applicant subjected to beatings and rapes based on a cynically imputed political opinion); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993) (denying asylum to an Iranian woman because the government-mandated practice of wearing a chador was not so abhorrent to her so as to constitute persecution, but recognizing that women constitute a social group).

<sup>159</sup> Gender-Based Asylum, *supra* note 100, at 1533. On December 10, 2009, Rodi Alvarado was finally granted asylum, ending her fourteen year-long legal battle. See *Domestic Violence Victim Granted Asylum in the US*, ASSOCIATED PRESS, Dec. 18, 2009, available at <http://cgrs.uchastings.edu/pdfs/photos%20->

the victim of extreme spousal violence for over ten years.<sup>160</sup> Her husband, a former soldier, “broke windows and mirrors with her head, whipped her with electrical cords, pistol-whipped her, raped and sodomized her, and kicked her in the genitalia, causing severe bleeding.”<sup>161</sup> Her efforts to seek protection from the police were fruitless.<sup>162</sup> Despite her requests for help, authorities refused to be involved, and the judge who handled her complaints informed her that he “would not interfere in domestic disputes.”<sup>163</sup> The BIA found that her proposed social group was not satisfactory because its members were not “recognized and understood to be a societal faction.”<sup>164</sup>

Also, the BIA determined that “the husband/persecutor’s motivation was unrelated to Ms. Alvarado’s membership in the designated social group.”<sup>165</sup> The BIA found that “although her husband might have beaten her because of his own views on men and women, the evidence did not show that he beat her because of what she believed.”<sup>166</sup> Furthermore, the BIA indicated that Ms. Alvarado had to make an additional showing that people in Guatemala perceived the existence of her particular group and that women were expected by society to be abused.<sup>167</sup> In 2004, the Department of Homeland Security (DHS) filed a brief to then-Attorney General (AG) John Ashcroft arguing that Ms. Alvarado should be granted asylum.<sup>168</sup> Though the AG remanded the case

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%20Domestic%20Violence%20Victim%20Granted%20Asylum%20In%20US%20\_%20NP R.pdf.

<sup>160</sup> *Domestic Violence Victim Granted Asylum in the US*, *supra* note 159.

<sup>161</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 802.

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

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

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 803.

<sup>166</sup> Donovan, *supra* note 52, at 317.

<sup>167</sup> LEGOMSKY & RODRIGUEZ, *supra* note 3, at 975 (quoting *Matter of R-A*, 22 I. & N. Dec. 918, 919) (BIA 1999).

<sup>168</sup> Lisa Frydman, *Key US cases relating to women asylum seekers*, Women’s Asylum News (Asylum Aid, London, U.K.), Sept. 2009, at 1, 2, *available at* <http://cgrs.uchastings.edu/pdfs/LF,%20Key%20Cases%20Relating%20to%20Women,%20Women's%20Asylum%20News,%202009-2009.pdf>.

to the BIA in 2008 after vacating the decision,<sup>169</sup> *Matter of R-A* has been cited by Immigration and Customs Enforcement (ICE) attorneys and IJs alike to deny other gender-based claims of asylum for forced prostitution, gang rape, and honor killing.<sup>170</sup> In his order for remand, the AG imposed the additional requirements that had developed in asylum jurisprudence: social visibility and particularity.<sup>171</sup> Moreover, despite the filing of its 2004 brief, DHS has repeatedly opposed asylum grants based upon domestic violence. Still, under the Obama administration in 2009, DHS filed another brief conceding that women who have suffered domestic violence may be able to establish eligibility for asylum.<sup>172</sup>

While the trend of US jurisprudence appears to weigh against them, survivors of domestic violence may find hope in the Ninth Circuit's 2010 decision, *Perdomo v. Holder*.<sup>173</sup> Although asylum was denied by both the IJ and BIA, the Ninth Circuit chose to remand to the immigration court the case of another Guatemalan woman seeking asylum, Ms. Lesly Perdomo, in order to determine (1) whether "Guatemalan women" could constitute a particular social group and (2) whether the applicant had demonstrated a fear of

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<sup>169</sup> LEGOMSKY & RODRIGUEZ, *supra* note 3, at 975 ("Attorney General Janet Reno vacated the Board's decision in R.A., and ordered the Board to reconsider the case in light of the then pending asylum regulations . . . Attorney General John Ashcroft 'recertified' the case to himself for a decision. . . . Finally, in 2008, Michael Mukasey became the third attorney general to certify the case to himself. He too remanded the case to the BIA.").

<sup>170</sup> Gender-Based Asylum, *supra* note 100, at 1535.

<sup>171</sup> Frydman, *supra* note 168, at 3 ("The BIA has tried to justify these requirements by saying that they are consistent with UNHCR guidelines on social group claims. However, UNHCR has repeatedly stated that this is not correct.").

<sup>172</sup> Frydman, *supra* note 168, at 3 (referencing Brief of Dep't of Homeland Security, *Matter of L-R-* (BIA Apr. 2009) (redacted), available at <http://cgis.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>). In that case, Ms. L.R. was tormented by her common law husband, who raped and battered her for nearly two decades. Her attempts to seek protection from the police went unheeded. Her asylum claim was denied by an IJ in 2007, and DHS initially filed a brief supporting the IJ's position in 2008. It changed course under the Obama administration in 2009. Musalo, *A Short History of Gender Asylum*, *supra* note 70, at 60.

<sup>173</sup> *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010).

persecution.<sup>174</sup> The social group prescribed by the applicant was “all women in Guatemala.”<sup>175</sup> Ms. Perdomo alleged that her fear was based on the high incidence of murder of women in Guatemala as well as the nonresponsiveness of the government in addressing such atrocities.<sup>176</sup> The Ninth Circuit found that the IJ and BIA had erred in finding that this description could not constitute a social group.<sup>177</sup> In reaching this conclusion, the court noted that it had previously recognized that women, or young girls, of a particular clan could constitute a particular social group.<sup>178</sup> It also referenced the INS (now United States Citizenship and Naturalization Services, or USCIS) Guidelines, as well as other international authorities that recognize that the “common characteristic of sex” may constitute a particular social group “under certain circumstances.”<sup>179</sup> Furthermore, the court rejected the BIA’s finding that “all women in Guatemala” is “overly broad and internally diverse,” and instead concluded “size and breadth alone does not preclude a group from qualifying as such a group.”<sup>180</sup>

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<sup>174</sup> *Id.* at 669.

<sup>175</sup> *Id.* at 665.

<sup>176</sup> *Id.* at 664.

<sup>177</sup> *Id.* at 669.

<sup>178</sup> *Id.* at 667 (citing *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005)).

<sup>179</sup> *Perdomo*, 611 F.3d at n.5 (“One of our sister circuits has recognized gender as the basis for a particular social group. *See Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). We also note that Australia, Canada, and the United Kingdom have recognized gender as the basis for a particular social group.”).

<sup>180</sup> *Perdomo*, 611 F.3d at 668. The court also noted that it has rejected groups as overly broad only where “there is no unifying relationship or characteristic to narrow the diverse and disconnected group.” (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1177 (9th Cir. 2005)). Another recent IJ asylum grant to a Honduran woman in January 2011 indicates an encouraging trend towards more widespread recognition of domestic violence-based claims. *See Matter of Anon*, A# redacted (San Antonio, TX Immigration Court, Jan. 19, 2011) (on file with author). In its decision, that court rightly considered social and cultural factors without imputing notions of Otherness: “Respondent indicates that women in Honduras are widely seen as less deserving of basic human rights than men, that domestic violence is common and largely accepted by society, and that the Honduran government has made little effort to rectify this problem.” *Id.* at 14.

Thus, even a cursory glance at US asylum case law related to gender-based claims indicates that courts are lacking in legal constructions to consistently address the particular nature of the persecution suffered by refugee women subjected to FGM, sex trafficking, and domestic violence.

## V. PROPOSED CONSTRUCTION OF US ASYLUM JURISPRUDENCE

### A. *The Invisible of Nicaragua*

*The air was thick with humidity as our jeep pulled to an abrupt stop on the ditch-ridden dirt road. Curious faces appeared from the darkened interiors of nearby tin-roofed homes, and we smiled, greeting them in Spanish. The church across the street stood proudly amidst other thinly constructed buildings on the one street that composed almost the entirety of this Nicaraguan pueblo. A meeting with a handful of local community members was to take place inside the church. Our small delegation was a part of an initiative to establish mediation centers in rural communities to provide campesinos<sup>181</sup> with access to the far-removed features of their justice system.*

*Inside the church, we set plastic cups, soda, and crackers for the people who wandered in, taking their seats to begin the meeting. Eventually, a group of about ten men and four women gathered, and the mediators began the meeting with a series of icebreakers and introductions. Then, the mediators assigned to community members the task of drawing a haphazard map—with markers and construction paper—of their pueblo, identifying all “conflict zones.” Over the course of the next two hours, the mediators lead a discussion of various problems facing the community—pigs crossing onto neighbors’ property, armed soldiers stationed arbitrarily inside the town, drunken debauchery outside the local bars.*

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<sup>181</sup> Country-people. See translation at Wordreference.com, <http://www.wordreference.com/es/en/translation.asp?spen=campesino> (last visited Feb. 11, 2012).

*As the conversation appeared to be nearing a close, one of the mediators asked the group, “And what about intra-familial violence?” The initial response to this question was met with silence. “Is it a problem?” he persisted. I noticed that the four women sitting at the edge of the congregation were nodding while the men muttered to one another. Finally, one of the men spoke up, “Well, you see—it is normal, it is just the way things are. It is not really the business of another man, how he treats his wife.” There was a grumble of approval amongst the other men.*

*Later, as I watched rolling, green mountains sweep by my window on our ride out from the countryside, I asked one of the Nicaraguan mediators if the response we heard with regards to domestic violence was one she saw in many other communities. Heavily, she told me that, unfortunately, it was—and that even when a woman wanted to try to resolve a domestic dispute through mediation, it nearly always ended badly, with further beatings from her husband at home. It is so ingrained in the culture, she explained. There were efforts to build shelters in some of the less remote towns for women fleeing domestic violence, but they were very few and did not have many resources. I was struck by the helplessness of the whole situation—of women unable to save themselves from lives of violence, of a government equally as helpless.*

#### *B. New Legal Theories for Gender-Based Claims*

US asylum law does not recognize the complexity of social pressures that create such situations. Instead, courts have constructed refugee women as cultural Others in their evaluation of gender-based asylum claims, thereby allowing for relativist rationalizations of global female persecution.<sup>182</sup> This

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<sup>182</sup> Sinha, *supra* note 71, at 1578 (“It seems as though the successful asylum-seeker must cast herself as a cultural Other, that is, someone fleeing from a more primitive culture.”) (quoting SHERENE H. RAZACK, LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS 92 (1998)); Sinha, *supra* note 71, at 1580 (“By fighting ‘sexism with racism,’ colonialist feminism defined its mission as saving their Third World Sisters from their uncivilized cultures” (quoting RAZACK, LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS 113)).

construct must be overcome so that new legal theories of social group and nexus that better incorporate gender sensitivities can be accepted. A separate Convention ground of “gender,” which incorporates gender sensitivities into asylum law’s persecution requirement, is favorable because it allows for a more comprehensive restructuring of judicial viewpoints on gender-based claims.

To illustrate that this remedial theory can be applied to a variety of gender-based claims throughout the world, this section’s analysis will continue to focus on the three types of persecution that have been previously discussed (FGM, sex trafficking, and domestic violence), but it will include geographical diversity in the analysis of such claims so as to emphasize the universality of fundamental human rights.

First, courts should construe “social group” to include common past experience, avoid imputing gender-related persecution to other asylum grounds, and place less emphasis on social visibility. Second, courts should formulate “nexus” using a modified bifurcated approach that better incorporates the cultural meaning of the private sphere and places less emphasis on the intent of the persecutor. In addition, these jurisprudential modifications can only be realized if asylum procedure provides a safe and practical environment for refugee women to fully develop gender-sensitive claims. Last, this section will address the primary concern by skeptics of gender-based claims—that to liberalize jurisprudential standards in this area would “open the floodgates” to an excessive number of female asylum-seekers.

### *C. Gender as a Separate Ground*

Some legal scholars have argued that the best solution to judicial misconstructions of gender-based asylum claims would be to simply add the category of “gender” to the existing five grounds for which a refugee might be

persecuted.<sup>183</sup> Yet, for several reasons this is an insufficient remedy. While adding “gender” as a Convention ground may signal to asylum adjudicators that this group merits special consideration, this addition does not remedy the substantive confusion that continues to exist with gender-based claims.

Generally, the malleability of the “social group” category would better serve gender-based claims because it allows a broader framework with which to conceive gender persecution. Judges who might be reluctant to recognize persecution based strictly on a separate “gender” ground may be more persuaded by developed legal principles, though still gender-related. For example, the court in *Kasinga*, which constructed a very narrow social group for which Kasinga was persecuted, may not have been persuaded that she was sought out for maltreatment for being a *woman* but rather on that very specific basis.<sup>184</sup> Gender *combined* with social group allows for that analysis, which may be more persuasive to certain judges or adjudicators, whose discretion is especially determinative in asylum claim outcomes.<sup>185</sup>

Similarly, solely providing a separate ground would not necessarily alleviate judicial confusion surrounding the notion that “women being persecuted *as* women” is not the same as “women being persecuted *because* they are women.”<sup>186</sup> In the context of civil war, for example, rape may be used as a means of persecuting a woman on account of her membership in an opposing political party or ethnic minority.<sup>187</sup> By contrast, a public flogging may be used

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<sup>183</sup> See Randall, *supra* note 2, at 302 (citing Mattie Stevens, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL’Y 179 (1993)).

<sup>184</sup> The court constructed Kasinga’s social group to be, “young women of the Tchamba-Kunsuntu Tribe who have not had FGM as practiced by that tribe, and who oppose the practice.” Matter of Kasinga, 21 I. & N. Dec. 357, 358 (BIA Jun. 13, 1996).

<sup>185</sup> See LEGOMSKY & RODRIGUEZ, *supra* note 3, at 1039 (referencing Ramji-Nogales, *supra* note 101) (“A massive, recently completed empirical study also confirms what practitioners have long recognized as a serious problem—sharp disparities in the asylum approval rates from one adjudicator to another.”).

<sup>186</sup> Randall, *supra* note 2, at 303 (citing Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213, 259 (1995)).

<sup>187</sup> *Id.*

to punish a woman for refusing to conform to oppressive religious practices.<sup>188</sup> If a judge were to construe the former scenario of rape as gender-directed persecution, such a construction might limit the woman's asylum claim if other evidence in the record does not show that she was targeted due to her identity as a woman. Such a scenario would demand an analysis based on political opinion or race as opposed to gender. Yet, in the absence of substantive constructions surrounding the terms "gender" and "social group," judges would still be left without the proper legal tools to formulate claims that incorporate gender nuances. The potential expansiveness of the "social group" category allows it to accommodate claims of women belonging to a number of different social subsets.<sup>189</sup> Thus, adding "gender" as a separate ground for persecution does not easily solve problems within American asylum law. In addition to that added ground, it is necessary to create better formulated constructions of "social group" and "nexus" to more effectively address the complex needs of refugee women.

#### *D. Formulations of Social Group*

##### **1. Common Past Experience**

Courts should consider refugee women who have had a common past experience of persecution to be members of a particular social group. The social and psychological implications of having undergone violence and subordination are unifying factors central to their identities as women. The identifying feature of having had the experience itself is paired with sexual identity, a quality already recognized by courts as an immutable characteristic.<sup>190</sup>

Instead of construing claims of FGM to include common past experience, courts—such as that of *Matter of A-T*—downplay the significant violence of

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 302.

<sup>190</sup> *Perdomo v. Holder*, 611 F. 3d 662, 667 (9th Cir. 2010) (citing *Fatin v. INS*, 12 F. 3d 1233 (3d Cir. 1993)).

the practice. They rationalize that because the practice had already been performed, there is no fear of future persecution.<sup>191</sup> This reasoning ignores the societal role of FGM that was recognized in *Matter of Kasinga*, which characterized the practice as a “form of sexual oppression” that is “based on the manipulation of women’s sexuality in order to assure male dominance and exploitation.”<sup>192</sup> By evading this social function of the practice, courts equate FGM to an act of violence such as the removal of a limb and refuse to acknowledge that it is a mere symptom of a greater malignancy. To do so places refugee victims of FGM in a culturally neutral sphere outside the comprehension of male-reasoned legal theories.

Placing greater emphasis on—or at least recognizing the significance of—the effect on a woman’s life from a past FGM experience would allow courts to face the deeper, more widespread reality of female subordination. The court in *Mohammed v. Gonzales* exemplifies the product of such reasoning. In that case, the Ninth Circuit employed a variation of this emphasis on past experience when it characterized FGM as a “permanent and continuing” act of persecution.<sup>193</sup> The court was able to reach this conclusion only by considering the deep social and psychological implications of the practice, stating that “the extremely painful, physically invasive, psychologically damaging, and permanently disfiguring process of genital mutilation undoubtedly rises to the level of persecution.”<sup>194</sup> By recognizing Ms. Mohammed’s possible social group membership as one of “Somalian females” or “young girls in the Bendari clan,” the court implicitly defined her group by common past experience. In defining these two groups, the court noted that “genital mutilation is not clan-specific, but rather is deeply imbedded in the culture throughout the nation and performed on approximately 98 percent of females,”

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<sup>191</sup> Frydman & Seelinger, *supra* note 12, at 1073.

<sup>192</sup> Donovan, *supra* note 52, at 325 (quoting *In re Kasinga*, 21 I. & N. Dec. 357, at 3).

<sup>193</sup> Frydman & Seelinger, *supra* note 12, at 1076.

<sup>194</sup> *Mohammed v. Gonzales*, 400 F. 3d 785, 796 (9th Cir. 2005).

thereby constructing those two groups on the basis of the common past experience of FGM.<sup>195</sup>

Both sex trafficking and domestic violence-based asylum claims have encountered resistance from courts on the basis that circular reasoning precludes recognition of that particular social group. In other words, courts have reasoned that a group cannot be defined by the fact that it suffers persecution.<sup>196</sup> This rationale is flawed because the unifying past experience of persecution is only one factor in defining that social group; the persecution was inflicted in the first place *because of the immutable characteristic of being a woman*, as recognized by the *Mohammed* court.<sup>197</sup> The woman has additional, unchanging, psychological, and social characteristics as a result of her being a victim of that persecution.<sup>198</sup>

In the case of sex trafficking claims, former victims may be considered a social group based on their common characteristic of having been trafficked. On account of shared past experience, they could face differing types of persecution such as ostracism, punishment, reprisals, or re-trafficking.<sup>199</sup> Such reasoning could have been applied to the case of Sophie, introduced above,<sup>200</sup>

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<sup>195</sup> *Id.* at 796.

<sup>196</sup> Knight, *supra* note 40, at 10.

<sup>197</sup> *Mohammed*, 400 F.3d at 798 (“Moreover, there is little question that genital mutilation occurs to a particular individual *because* she is a female.”).

<sup>198</sup> In one study of asylum-seekers seeking mental health services, instances of PTSD and depressive disorders occurred in frequencies of 82 and 96 percent, respectively. Survivors of trauma experience symptoms such as flashbacks, intrusive thoughts, nightmares, and dissociation from normal emotional responses. They may also experience memory problems, which can lead to unintentional omissions of particularly traumatic facts when attempting to tell their stories in a courtroom setting. Lustig, *supra* note 95, at 726.

<sup>199</sup> Knight, *supra* note 40, at 4 (referencing U.N. High Comm’r for Refugees, Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, HCR/GIP/06/07 P39 (Apr. 7, 2006)). *See also* Lukwago v. Ashcroft, 329 F.3d 157, 178-79 (3d Cir. 2003) (granting refugee status to a former child soldier who had “shared past experience of abduction, torture, and escape with other former child soldiers.”).

<sup>200</sup> Knight, *supra* note 40, at 8 (citing Matter of Anon, A# redacted (Seattle, WA Immigration Court, Feb. 7, 2000) at 5).

in which the IJ refused to recognize her proposed group: women from her country, “forced into prostitution by the mafia who escape bondage.”<sup>201</sup> Even though the judge accepted as true all of the facts of her case, including Sophie’s assertion that “she would either be abducted again and again subjected to prostitution, . . . or, more likely, be targeted for ritualized execution,” the IJ failed to see Sophie’s past experience of being trafficked as an immutably defining characteristic.<sup>202</sup>

In another rare case, *Matter of F-L*,<sup>203</sup> where asylum was granted to a Honduran trafficking victim, the court skirted the notion of gender but implicitly recognized common past experience in its analysis.<sup>204</sup> After being beaten unconscious while at work one day, Laura was held captive in a brothel, where she was forced to have sex with police officers and soldiers, among others. When she was finally able to escape to the United States, Laura appealed her denial of asylum by the IJ on the basis of a social group composed of gender, plus nationality, age, and inability to escape forced prostitution.<sup>205</sup> Yet, instead of recognizing this group, the BIA constructed its own, composed of “children who have been abandoned by their parents and who have not received surrogate protection,” noting that Laura’s “extreme vulnerability” was a critical characteristic.<sup>206</sup> Though this reasoning is blatantly problematic because it completely excludes gender from the social group construction, it does recognize the vulnerability of victims such as Laura by virtue of their common experience of being trafficked. This case law thus

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<sup>201</sup> *Id.* at 9.

<sup>202</sup> *Id.* (Notably, the IJ relied on the then-recent opinion in *Matter of R-A*, finding that Sophie’s proposed social group “failed to pass muster under the Board’s analysis under *Matter of R-A*.”).

<sup>203</sup> Knight, *supra* note 40 n.146 (citing *Matter of Anon*, A# redacted (Anchorage, AK, Immigration Court, Jul. 24, 1998)).

<sup>204</sup> *Id.* at 14.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

supports non-consensual, common past experiences as valid social group characteristics.<sup>207</sup>

Victims of domestic violence similarly share a past experience of persecution coupled with gender identity. In *Matter of R-A*, Rodi Alvarado's experience of mental and physical abuse at the hands of her husband was unique—and immutable—to her position as a woman in Guatemalan society. Yet, the court held that the *Acosta* immutability test was “merely a necessary but not sufficient condition to the construction of that group.”<sup>208</sup> Instead, it found that Ms. Alvarado had failed to show a “voluntary associational relationship” among group members.<sup>209</sup> Yet, it is noteworthy that *Perdomo v. Holder* recognized the significance of a common past experience of abuse when it invoked the two-prong test under *Hernandez-Montiel*.<sup>210</sup> This test permits consideration of “an innate characteristic [,which] is so fundamental to the identities or consciences that its members either cannot or should not be required to change it,” as an alternative to the “voluntary associational” requirement.<sup>211</sup> Finding that the BIA had failed to apply this second prong (just as the BIA had failed to do in the pre-*Hernandez-Montiel* case, *Matter of R-A*), the *Perdomo* court remanded for determination of whether “Guatemalan women” could constitute a social group.<sup>212</sup> Arguably, the common experience of being victimized *women* of that society should constitute sufficient innate characteristics for this latter prong of analysis.

By emphasizing this theory of circular reasoning, courts alienate refugee women by characterizing their experiences of persecution as isolated incidents that have no impact on their social or psychological well being. To recognize

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<sup>207</sup> *Id.* at 11.

<sup>208</sup> LEGOMSKY & RODRIGUEZ, *supra* note 3, at 975.

<sup>209</sup> LEGOMSKY & RODRIGUEZ, *supra* note 3, at 975 (quoting *Matter of R-A*, 22 I. & N. at 917–18) (BIA 1999).

<sup>210</sup> *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) followed the BIA's holding in *Matter of R-A*.

<sup>211</sup> *Hernandez-Montiel*, 225 F.3d, at 1093.

<sup>212</sup> *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010).

common past experience as an immutable factor in gender-based claims offers protection against the intricacies of female subordination.

## 2. Imputing “Gender” to Other Asylum Grounds

In constructing gender-based asylum claims, courts have often completely skirted the issue of “social group” by imputing gender issues to other grounds for asylum, most commonly political opinion and religion.<sup>213</sup> This strategy is problematic because it further clouds judicial understanding of gender issues by attempting to fit them into rigid, male-oriented categories. Although some individual women have succeeded on their asylum claims for these separate grounds, fitting gender claims into categories where they do not belong merely perpetuates a fundamental problem of immigration courts: their failure to recognize gender-specific persecution.<sup>214</sup>

Among FGM claims, courts have construed gender-based claims in ways that impute political opinion, even if that is not the ground on which asylum is being sought. Underscoring the language of *Kasinga*, which in fact recognized a gender-based claim, is also an implied ground of political opinion.<sup>215</sup> The court considered the fact that Kasinga did “not wish to be subjected to FGM,” thus implying that it was her belief—and not her identity as a victimized woman—that was relevant for formulating her claim.<sup>216</sup> This mistaken construction also affects the way that courts construe nexus, because where they fail to examine the proper gender-based social group, courts cannot acknowledge persecution “on account of” gender.<sup>217</sup> This focus on macro-level difficulties of an individual’s resistance to oppressive gender practices neglects

<sup>213</sup> See, e.g., *Fatin v. INS*, 12 F. 3d 1233 (3d Cir. 1993); *Matter of R-A*, 22 I. & N. Dec. 906 (BIA 1999); *Matter of D-V-*, 21 I. & N. Dec. 77 (BIA 1993); *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); *Matter of S-A*, 22 I. & N. Dec. 906 (BIA 1999).

<sup>214</sup> Randall, *supra* note 2, at 298.

<sup>215</sup> Donovan, *supra* note 52, at 324 (citing *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (recognizing social group of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, performed, and who oppose the practice.”).

<sup>216</sup> *Matter of Kasinga*, 21 I. & N. Dec. 357, 367 (BIA 1996).

<sup>217</sup> Donovan, *supra* note 52, at 324.

gender as the basis of the particular social group. Furthermore, to suggest that a woman's belief that she should be free from beatings and violence is a "political belief" is inappropriate—it implies that a woman's entitlement to be treated as a human being is just a particularized opinion, not a fundamental right.<sup>218</sup> That reasoning relegates refugee women to a distant, non-universal sphere of individual human rights.<sup>219</sup>

Victims of sex trafficking have likewise employed this tactic of claiming asylum based on an imputed gender-based political opinion or religious inference. This conceptual separation—between political opinion and victimization based on sex trafficking—allowed for an unfavorable result in the case of Ann, who was denied on both of these grounds.<sup>220</sup> Ann had been approached by her trafficker several times on the street with requests that she marry him, and at one point he yelled at her mother, making a threat in reference to her membership in the Democratic Party in Albania.<sup>221</sup> Yet, the IJ did not find a connection between her persecution and any of the Convention grounds (she had argued on the basis of political opinion and a gender-defined social group).<sup>222</sup> Not only was Ann's claim dismissed as one of personal, criminal intent, but it may be inferred that the IJ's nexus analysis was further clouded by the political opinion claim—for which there was no clear connection.<sup>223</sup> Thus, the trend of imputing political opinion to claims of gender-based persecution adds to the confusion of adjudicators in identifying the underlying motivation for such persecution.

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<sup>218</sup> Randall, *supra* note 2, at 298 ("Consider that it would be odd to argue that South African whites oppressed blacks because blacks held the opinion that they were entitled to be treated as human beings (though they presumably did hold that belief). Indeed, apartheid existed because of the racist beliefs of whites—in other words, blacks were persecuted because of their racialized identity, not because of what they believed.").

<sup>219</sup> See generally Sinha, *supra* note 71, at 1578 (noting that concepts of cultural Otherness may inform asylum decision-making); MILLER, *supra* note 61, at 189 (describing progression in the last several decades of recognition of international human rights).

<sup>220</sup> Knight, *supra* note 40, at 6.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

Similarly, courts impute political opinion and religious beliefs to asylum claims based on domestic violence, thereby further convoluting theories of gender-persecution. For example, in *Matter of R-A*, Ms. Alvarado argued in part on the basis of imputed political opinion, claiming that her husband was harming her in order to overcome her resistance to his male domination.<sup>224</sup> Yet, the court rejected this argument, stating that there was no evidence that her husband cared what her political opinions were.<sup>225</sup> Thus, by attempting to adapt the male-oriented ground of political opinion to Ms. Alvarado's gender-specific manifestation of persecution, the court lost sight of the most significant, gendered aspects of her claim.<sup>226</sup>

In another domestic violence-related claim, *Matter of S-A*,<sup>227</sup> the BIA completely avoided the social group category and granted asylum based on religion, saying that "the record clearly establishes that because of his orthodox Muslim beliefs regarding women and his daughter's refusal to submit to such religiously-inspired demands, the respondent's father treated her differently from her brothers, her male counter parts."<sup>228</sup> In that case, a Moroccan woman sought asylum due to the extreme and escalating abuse of her father.<sup>229</sup> Her father had burned her legs with a hot razor for wearing a skirt that was too short, did not let her stay in school past the third grade, and permanently

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<sup>224</sup> LEGOMSKY & RODRIGUEZ, *supra* note 3, at 924.

<sup>225</sup> The BIA also had to distinguish *Matter of R-A* from the previous Ninth Circuit case, *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987), which treated the persecutor as seeking to overcome the applicant's actual political opinion that men should not be permitted to dominate women. However, the BIA held that Lazo-Majano only stood for the "proposition that cynically imputed political opinion can suffice." LEGOMSKY & RODRIGUEZ, *supra* note 3, at 924.

<sup>226</sup> However, imputing a political opinion ground has also been used by courts to grant asylum claims. For example, in a 2001 case in New York, the court granted asylum based on a social group of "women in Guatemalan society who resist male domination by living independently and self-sufficiently." *Matter of Octavia*, A# redacted (New York, NY, Immigration Court, Mar. 10, 2001), 18, 20 (on file with author).

<sup>227</sup> 22 I. & N. Dec. 1328, 1336 (BIA 2000).

<sup>228</sup> Gender-Based Asylum, *supra* note 100, at 1534 (citing *Matter of S-A*, 22 I. & N. Dec. 1328 (BIA 2000)).

<sup>229</sup> *Id.*

confined her to the house after she spoke to a man asking for directions.<sup>230</sup> The court characterized the actions of her father as “ultra orthodox Muslim views” that conflicted with her “liberal Muslim views.”<sup>231</sup> Again, the court chose to evade constructions of gender persecution in favor of using a gender-neutral “religion” analysis. In another domestic violence-based case, DHS negated the applicant’s assertion that she was persecuted based on her “feminist” political opinion.<sup>232</sup> DHS argued that “harm is not on account of political opinion when it is inflicted *regardless* of the victim’s opinion rather than *because* of that opinion.”<sup>233</sup> Imputing gender in this instance would not provide a court with the proper tools to recognize such a claim.

In all of these situations, courts’ attempts to fit gender issues into pre-constructed, male-oriented categories of asylum circumvent the fundamental problem of raising gender as a surface issue. While courts should factor gender into their evaluation of existing asylum grounds where appropriate, they should not go out of their way to misconstrue gender-based issues. Instead, they should name it for what it is: gender-based persecution. This can only be done by incorporating cultural context into “social group” constructions so as to not force courts into this limiting type of analysis.<sup>234</sup>

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Brief of Dep’t of Homeland Security, Matter of Alvarado (Apr. 2009) at 22, *available at* <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf> [hereinafter Alvarado DHS Brief].

<sup>233</sup> *Id.*

<sup>234</sup> The IJ grant of asylum in January 2011 gave significant deference to the societal and cultural context of female subordination: “The prevalence of violence against women has caused some scholars to apply the term ‘femicide’ to murders of women in the country. In Honduras, ‘the murder of women is set in a culture of impunity supported by gender stereotypes that blame and stigmatize victims . . . as jealous, mad, or libertine.’ It thus found that the asylum applicant had ‘proven that abused women in male-dominated intimate relationships often face domestic violence in Honduras and that women who face domestic violence are known and socially visible to society.’” *See* Matter of Anon, A# redacted (San Antonio, TX Immigration Court, Jan. 19, 2011) (on file with author).

### 3. Social Visibility

Women seeking asylum based on FGM, sex trafficking, or domestic violence frequently encounter judicial biases that employ “visibility” criteria that preclude formation of a social group.<sup>235</sup> The BIA’s 2006 decision in *Matter of C-A* explicitly set forth this “visibility” criteria in order to establish a cognizable social group, even though such criteria contravenes UNHCR’s guidance.<sup>236</sup> Requiring “visibility” in order to define a persecuted group seems counter-intuitive because, in all likelihood, that very persecution has caused the group to be socially invisible. To require politically voiceless and disenfranchised groups to show recognition by the same forces that may be subjecting them to persecution is impractical. This is especially true in the realm of gender-based persecution, as women are often relegated to the private sphere of the home, where their suffering cannot be viewed by society at large.<sup>237</sup> Placing emphasis on “visibility” as a factor alienates refugee women because to do so presumes that they have a role in the public sphere, although in many cultures, this often remains a strictly male-accessible arena.

Numerous examples illustrate the implications of this flawed reasoning. For example, in *Matter of A-C*, a young Mexican girl was frequently beaten by her father—such beatings included weekly whippings—because of her attempts to protect her mother.<sup>238</sup> Though the IJ found a viable social group of “Mexican children subjected to domestic violence,” the BIA reversed, stating that she had not shown that the group was recognized and determined to be a societal

<sup>235</sup> See, e.g., *Matter of A-M-E & J-G-U*, 24 I. & N. Dec. 579 (BIA 2008); *Matter of S-E-G*, 24 I. & N. Dec. 579 (BIA 2008); *Santos-Lemus v. Mukaskey*, 542 F.3d 738 (9th Cir. 2008).

<sup>236</sup> Musalo, *A Short History of Gender Asylum*, *supra* note 69, at 61. In a recent amicus brief, the UNHCR made an important distinction between social visibility and social perception. The latter is more appropriate because it does not require that the “common attribute be visible to the naked eye.” *Id.* (citing Brief of the UNHCR as Amicus Curiae in Support of the Petitioner, *Valdiviezo-Galdamez v. Att’y Gen.*, 14 Apr. 2009, available at <http://unhcr.org/refworld/docid/49ef25102.html>).

<sup>237</sup> Randall, *supra* note 2, at 284. See also *Benitez-Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009); *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (calling into question the appropriateness of the social visibility test).

<sup>238</sup> *Gender-Based Asylum*, *supra* note 100, at 1536.

faction in Mexico.<sup>239</sup> The court in *Matter of R-A* employed similar reasoning when it distinguished Ms. Alvarado’s case from FGM in the following ways: (1) the evidence did not show that “domestic violence is . . . [a] socially important practice,” (2) failure to commit or suffer domestic violence “does not cause social ostracism—non-abusive husbands and non-abused wives are not socially ostracized because they are not abusive or abused,” and (3) Rodi Alvarado did not show that “domestic violence was so pervasive that Guatemalan society targets women who have not been abused.”<sup>240</sup>

The fact that the court distinguished these “visibility” factors from an FGM claim, where presumably such visibility *does* exist, demonstrates the way that courts have placed undue emphasis on social consciousness of a given group. *Matter of Kasinga* emphasized a public display of resistance to the practice of FGM and downplayed Kasinga’s identity as a woman. By formulating the claim in this male-oriented way, that court created a model of social visibility for future courts to follow, allowing them to ignore the essence of Kasinga’s *actual* claim to persecution as a *woman*. Thus, in *Matter of R-A*, the court failed to see that the lack of social visibility is in fact a symptom of deeply pervasive persecution—and that unlike FGM, punishment for non-compliance with the “practice” of domestic violence was one and the same. In another case, DHS argued that based upon the principles of social visibility, a domestic violence victim and asylum applicant had failed to establish that “there exists in Mexican society a sufficient consensus as to what constitutes an ‘abusive’ domestic relationship, a term which is subjective and thus amorphous.”<sup>241</sup>

As in the cases of victims of FGM and domestic violence, factors that would distinguish women as targets for sex trafficking are connected to their vulnerability—and, therefore, lack of visibility in certain social settings. Examples of “invisible” social subsets that are likely to be targeted for sex

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<sup>239</sup> *Id.*

<sup>240</sup> Donovan, *supra* note 52, at 326.

<sup>241</sup> Supplemental Brief, Board of Immigration Appeals (Dep’t of Homeland Security Apr. 13, 2009) (in removal proceedings) (on file with author).

trafficking include “single women, widows, divorced women, illiterate women, separated or unaccompanied children, orphans, or street children.”<sup>242</sup> Thus, using the visibility requirement from *Matter of Kasinga* and *Matter of R-A*, courts could easily misconstrue “social group” to preclude such disenfranchised populations from forming a claim.<sup>243</sup> For example, a court could reason that illiterate women would not be ostracized or abused because they oppose sex trafficking. Yet, this reasoning does not account for the reality that women are not exploited for sex trafficking because they oppose it, but rather *because* of their disadvantaged and unseen social status as women. Furthermore, where visibility is attached as a requirement, societal misconstructions about the role of *consent* in cases of forced prostitution or trafficking are likely to be given undue weight. Though it can hardly be argued that women of disadvantaged social status would have *chosen* a life of prostitution for themselves, it is possible that such assumptions can easily infiltrate considerations of sex trafficking claims.<sup>244</sup>

By eradicating a requirement for “social visibility” from social group, courts will be better able to identify persecution on the basis of gender, which is often hidden from the public eye. Moreover, it will place the United States in alliance with international human rights instruments.<sup>245</sup> This strategy will avoid alienation of refugee women because it does not downplay their roles in the private sphere, but rather acknowledges that persecution manifests itself ways that are often invisible to the public eye.

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<sup>242</sup> Knight, *supra* note 40, at 4.

<sup>243</sup> In fact, the court in *Matter of Anon* explicitly cited *R-A* in its analysis and denied the sex trafficking claim to asylum. *Id.* at 8.

<sup>244</sup> Pomeroy, *supra* note 6, at 473–74 (“[T]he word ‘consent’ has a hollow ring. Even the U.S. State Department has acknowledged that ‘it is a vicious myth that women and children who work as prostitutes have voluntarily chosen such a life for themselves.’”).

<sup>245</sup> Musalo, *A Short History of Gender Asylum*, *supra* note 69, at 62.

#### D. Formulations of Nexus

Asylum law's construction of "nexus" fails to see individual instances of persecution as stemming from a deep-seated societal persecution on the basis of gender. Such judicial reasoning is—perhaps most importantly—related to an understanding of how fundamental principles of refugee law should be applied to the public and private sphere.

##### 1. Cultural Meaning of the Private Sphere

Aligned with international human rights principles, US asylum law considers that a state must be held to an affirmative duty to eradicate social and economic structures that perpetuate female subordination.<sup>246</sup> In other words, "where a state fails to take affirmative steps to protect battered women from intra-familial violence and other forms of gender-based violence, it is complicit in creating the harm."<sup>247</sup> States that are "unable or unwilling" to offer protection for a particular group are seen as perpetuating such persecution *on account of* that particular group membership.<sup>248</sup> Despite recognition of this principle, US courts have implicitly—and perhaps at times unconsciously—created improper dividing lines between the public and private spheres. This division relegates refugee women to the latter and precludes them from soliciting their state's duty to offer them protection against systemic, cultural female subordination.

When constructing gender-based asylum claims, courts have repeatedly condemned the actions of the persecutor, but limited that condemnation to the particularity of the individual situation. For example, in *Matter of A-T*, the court flippantly dismissed Ms. A-T's claim of forced marriage to her first cousin by recasting it as an "arranged marriage" and her fear as a "mere reluctance to uphold family tradition" over "personal preference."<sup>249</sup> In another

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<sup>246</sup> Randall, *supra* note 2, at 307.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 287.

<sup>249</sup> Frydman & Seelinger, *supra* note 12, at 1079.

sex trafficking case, *Matter of H-H*, the court denied asylum, explaining that the kidnapers, “did not target her for any purpose other than for their own criminal enrichment.”<sup>250</sup> Furthermore, the IJ explained that Ms. H-H had been “randomly targeted” by men she had never seen before “for no other reason than her location at that particular moment, her gender, and her age, not because the kidnapers bore any personal animus against her on account of one of the Act’s enumerated grounds.”<sup>251</sup> Though this reasoning in fact *acknowledges* that she was targeted in part *on account of her gender*, it refuses to place a duty on the state to protect women who may be systematically sought out for sex trafficking *because of their societal position* in the private sphere.

Courts especially relegate issues of domestic violence to private spheres, implicitly conceding that such locations are beyond the scope of legal redress. In *Matter of D-K*, for example, the BIA found that a domestic violence survivor’s claim was not viable because she was not persecuted on account of group membership, but merely because her husband was a “despicable person.”<sup>252</sup> In that case, Ms. Kuna had been beaten, raped, and sustained serious injuries during her lengthy marriage to one of President Mobutu’s military officers in the former Zaire.<sup>253</sup> Even after recognizing the state’s lack of protection for survivors of domestic violence, as well as a gender-based social group, the IJ denied asylum.<sup>254</sup> Notably, the BIA in *Matter of D-K* applied the reasoning of *Matter of R-A* in its analysis, concluding that the persecution could not be linked to either Ms. D-K’s political opinions or to any social group. In both cases, the “social visibility” requirement for the social group analysis affects the reasoning for nexus because it requires that the *motivation* for the persecution be evident in the public sphere. In *Matter of R-*

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<sup>250</sup> Knight, *supra* note 40, at 7 (citing case from Chicago, IL Immigration Court, May 29, 2003).

<sup>251</sup> *Id.*

<sup>252</sup> Gender-Based Asylum, *supra* note 100, at 1535.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

A, the BIA determined that Ms. Alvarado's claim failed because "she has not shown that women are expected by society to be abused, or that there are any adverse societal consequences to women or their husbands if the women are not abused."<sup>255</sup> Thus, the court not only required that the group be defined in a socially visible manner, but also that the motivation of the persecutor be derived from public pressure. Such reasoning fails to consider the inherent nature of intimate violence as far removed from the public eye.<sup>256</sup>

To a certain extent, this failure by US courts to recognize the duty of a state as extending to the private sphere stems from imbedded biases regarding cultural differences. Indeed, it has been recognized that "the case of gender-based persecution appears to go more smoothly when the cultural context can be 'anthropologized'—that is, presented as non-Western, inferior, and usually barbaric towards women."<sup>257</sup> The refugee system possesses an ingrained notion that "we" of the receiving country have dealt with problems of gender violence, and that "they" are very different from us in that regard.<sup>258</sup> This presumption is ill-founded, especially in light of the United States' failure to protect victims of domestic violence,<sup>259</sup> and it leads to the conclusion that

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<sup>255</sup> Matter of R-A, 22 I. & N. Dec. 906, 919 (BIA 1999) (en banc), *vacated*, 22 I. & N. Dec. 906 (AG 2001).

<sup>256</sup> Nevertheless, common rhetoric justifies such reasoning: "How are asylum authorities going to substantiate these claims when we know that domestic violence in this country can be a complicated thing," said Ira Mehlman, a spokesman for the advocacy group Federation for American Immigration Reform. "This is getting us into personal relationships, and that's not where asylum law ought to go." *Domestic Violence Victim Granted Asylum in the US*, *supra* note 159, at 2.

<sup>257</sup> Randall, *supra* note 2, at 307–08.

<sup>258</sup> *Id.*

<sup>259</sup> In 1996, nearly 2,000 murders in the United States were attributable to intimates and women suffered around 840,000 rapes, sexual assaults, robbery, aggravated assaults and simple assault victimizations by their intimates. Also, women only report half of violence incidents to the police. Reasons for not informing the police include the victims' belief that their victimization was a private or personal matter, fear of retaliation, and feeling that the police would not be able to help them. Donovan, *supra* note 52, at 332–33.

refugee law should assume that most states are not able to protect women from “private” violence.<sup>260</sup>

Based on the above considerations, courts should give wider deference to circumstantial evidence when considering gender-based claims in order to minimize the manifestation of imbedded cultural biases. This would include a consideration of patterns of violence “that are (1) supported by the legal system or social norms in the country and (2) reflect a prevalent belief within society, or within relevant segments of society, that cannot be deduced by evidence of random acts within that society.”<sup>261</sup> Furthermore, the sources of this information should be scrutinized for accuracy, as country conditions often ignore gender issues or have little gender relevance.<sup>262</sup> While country of origin information may establish that a certain country has adequate legislation in place, it rarely provides sufficient detail on whether the legislation is implemented or not and is formulated with regard to the adult male experience.<sup>263</sup> Domestic violence survivors, for example, frequently lack corroborating evidence of abuse because police in their home countries simply will not respond to their pleas for help.<sup>264</sup>

By giving greater weight to circumstantial evidence—and ensuring the accuracy of that information—courts can better address the persecution of refugee women relegated to the private sphere. Giving greater weight to

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<sup>260</sup> Randall, *supra* note 2, at 310. See also *Gonzales v. United States*, Petition No. 1490-05, Inter-am. C.H.R., Report No. 52/07, OER/Ser.L/V/II.128, doc. 19 (2007). The Inter-American Commission accepted a petition by Jessica Gonzales, a domestic violence survivor from Colorado whose children were killed when local police failed to enforce a restraining order against her estranged husband. The Commission’s decision to admit the petition indicated its recognition of “an affirmative duty on States to actually prevent the commission of individual crimes by private parties.” *Id.* at para. 55.

<sup>261</sup> Knight, *supra* note 40, at 8. Notably, in its brief in *Matter of R-A*, DHS argued that these two specific criteria should be considered in the domestic violence context. See Musalo, *A Short History of Gender Asylum*, *supra* note 69, at 59.

<sup>262</sup> Council of Europe Report, *supra* note 19, at 2, 16.

<sup>263</sup> *Id.*

<sup>264</sup> See, e.g., *Matter of R-A*, 22 I. & N. Dec. 906, 919 (BIA 1999) (en banc), *vacated*, 22 I. & N. Dec. 906 (AG 2001) (noting that police failed to intervene or respond to Ms. Alvarado’s pleas for help).

considerations of cultural context will help offset any imbedded biases that would construct refugee women as Others meriting different outcomes.

## 2. Bifurcated Approach

In addressing the problem of finding a causal relationship between a gender-based ground for persecution and the motivation behind that persecution, international tribunals and asylum law scholars have advocated for a bifurcated approach to the nexus analysis.<sup>265</sup> This provides that the causal link may be satisfied: (1) where there is a real risk of being persecuted at the hands of a non-state actor for reasons related to one of the Convention grounds, whether or not the failure of the state to protect the claimant is Convention-related; or (2) where the risk of being persecuted at the hands of a non-state actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.<sup>266</sup> Although courts in countries such as England, New Zealand, Australia, and even the United States have adopted this approach to find a viable nexus for gender-based claims, the bifurcated analysis should still be supplemented by culturally sensitive constructions of the private sphere with less emphasis on the persecutor's intent.

In *Islam v. Secretary of State for the Home Department*,<sup>267</sup> a domestic violence-based claim in England, the Lords' majority found that the claimant had been unable to prove nexus for the first prong of the analysis (being persecuted by a non-state actor on the basis of one of the Convention grounds), but that the second prong (the inability of the state to protect) was satisfied.<sup>268</sup> The court concluded that the "serious harm" of spousal violence was a "personal affair, directed against the applicants as individuals" and therefore not causally related to their gender-defined social group status.<sup>269</sup> Yet, the

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<sup>265</sup> *See id.*

<sup>266</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 806.

<sup>267</sup> *Id.* at 787.

<sup>268</sup> *Id.* at 789.

<sup>269</sup> *Id.* .

court also noted that the persecution was the result of separate and combined efforts of the husband's violence and the failure of state protection. This latter recognition allowed the court to conclude that although the husband's actions were not linked to gender, the state's failure to protect was—and on this basis, a nexus to the particular social group could be established.<sup>270</sup> The bifurcated approach thus allows courts that fail to see the link between the individual persecutor and social group to nonetheless find a nexus based on recognition of the state's obligation to protect victimized women.<sup>271</sup>

In employing this formulaic approach, courts still run the risk of ignoring cultural context in determining the reasons for which a woman is being persecuted, either by an individual aggressor or through the negligence of the state. For example, in *Islam*, it is unclear what evidence the Lords had before them regarding the dynamic of domestic violence and its clear gender component.<sup>272</sup> If the record had reflected a current, more comprehensive understanding of domestic violence, it is possible that it would have found a Convention reason “inherent in both elements of the persecution,” and thus both prongs of the bifurcated analysis.<sup>273</sup>

Applying this reasoning to a hypothetical case of sex trafficking, it would seemingly be possible for a court to find that a viable asylum claim fails both prongs of the bifurcated analysis if cultural and societal context is not considered. For example, if an Albanian woman seeks asylum based on her membership in the social group “young Albanian woman forced at the threat of death to become sex slaves,” a court may likely—as they have done frequently in sex trafficking cases<sup>274</sup>—find that she suffers from mere individualized persecution. After failing to find nexus in the first prong of the analysis, the

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<sup>270</sup> *Id.*

<sup>271</sup> DHS's brief in *Matter of L-R* implicitly advocates for a bifurcated approach even though this construction has yet to be officially adopted by US regulation or legislation. Musalo, *A Short History of Gender Asylum*, *supra* note 69, at 62–63.

<sup>272</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 791.

<sup>273</sup> *Id.*

<sup>274</sup> Knight, *supra* note 40, at 1.

court could likewise find that the state did not have a duty to protect members of that particular group because there were safe places within the country for such victims. Indeed, one court facing a similar case found that since Albania is “in flux and is being modernized,” the applicant could easily avoid being trafficked by relocating to another region of Albania.<sup>275</sup> This reasoning assumes that the state has provided safe pockets within the country for victims of sex trafficking and ignores the reality that trafficking is an international phenomenon, facilitated by secret and complex networks of traffickers. It also does not recognize that in some countries women may experience severe discrimination and social ostracism because they were raped. In fact, DHS has noted that this treatment alone may amount to persecution, and UNHCR also recognizes that such victims may experience punishment by their family and/or the local community.<sup>276</sup> Thus, failure to consider the specific social dangers faced by victims of trafficking when applying the bifurcated approach would create anomalous results.<sup>277</sup>

As demonstrated in these case examples, without consideration of the social reactions and cultural significance of having been sex-trafficked and domestically abused, a court could fail to find nexus by using the bifurcated analysis. Thus, while the bifurcated analysis is a helpful step towards proper judicial construction of nexus for gender-based claims, its success can only be guaranteed with greater emphasis on the role of culture and the nuances of a specific society.<sup>278</sup>

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<sup>275</sup> *Id.* at 11.

<sup>276</sup> *Id.* at 4.

<sup>277</sup> It is also worth noting that social perceptions of consensual prostitution—and the blurred lines between this and that of forced prostitution—further complicate views on sex trafficking asylum claims. It is important to recognize the social forces that make prostitution the sole opportunity for a woman’s survival, as opposed to a voluntary commitment. See Pomeroy, *supra* note 6, at 474.

<sup>278</sup> Contextualizing the social and psychological impact of trauma and abuse must be distinguished from rationalizing or justifying mistreatment due to cultural beliefs. The latter involves relativistic thinking to perpetuate victimization, while the former allows for consideration of cultural factors to equalize humane treatment.

### 3. Intent of the Persecutor

To establish nexus, courts must essentially look at the *motivation* of the persecutor—a subjective yet crucial determination for any asylum claim. Courts, such as the one in *Matter of R-A*, have explicitly rejected the bifurcated approach in favor of an inquiry into the motives of the entity actually inflicting the harm.<sup>279</sup> This approach is flawed for two primary reasons. First, it places the entire focus of the nexus analysis on the relationship between the private actor and the victim.<sup>280</sup> In doing so, it clouds one of the central purposes of refugee law—to provide protection where the state has failed to do so. Second, a focus on the intent of the persecutor opens the door for relativist judgments on the social norms and practices of other cultures. Again, this is problematic because it contravenes a fundamental premise of refugee law—the existence of universal human rights.

In *Matter of Kasinga*, the court implied that a punitive or malignant intent was required by the perpetrator; such an intent was nonexistent in that case. Given that the actual perpetrators of violence were the midwives or elders who performed FGM, these actors had no intent to punish the victim and presumably believed that they were performing an important cultural rite. However, the court resolved the case by finding that the societal objectives achieved by FGM—gender subordination and an attempt to control female sexuality—were not harmless.<sup>281</sup> Although the *Kasinga* court reached a positive result for the applicant, it achieved this through a convoluted, roundabout analysis that initially emphasized the relationship of the private actor to the victim as well as the persecutor's intent. The latter consideration—intent—introduces undertones of cultural relativism into the analysis because it assumes that the persecutor may have a unique cultural perspective that would justify the act.

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<sup>279</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 803.

<sup>280</sup> Adams, *supra* note 114, at 293–94.

<sup>281</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 801.

Other courts facing different gender-based claims have followed suit in their analysis of intent. Specifically, in many cases of sex trafficking, courts deny claims because they construct the persecutor's motive as economic as opposed to a Convention ground for asylum.<sup>282</sup> Such a construction ignores the fact that women are economically disadvantaged *because they are women*, and therefore that merely considering a persecutor's facially apparent intent fails to address the complexities of women's social reality. For example, in the case of one sex trafficking victim, the court considered that there was no evidence that the "kidnappers bore any personal animus against her on one of the Act's enumerated grounds."<sup>283</sup> Also, a domestic violence case, *Matter of S-A*, resulted in a grant of asylum after the court considered, with regards to an abusive father, that "the record clearly establishes that because of his orthodox Muslim beliefs regarding women and his daughter's refusal to submit . . . the respondent's father treated her different from . . . her male counter-parts [*sic*]."<sup>284</sup>

Placing focus on the intent of the persecutor in gender-based asylum claims is counterproductive to the basic goals of refugee law. It introduces subjectivity into a realm of law that is premised on recognition of objective, universal human rights. To avoid anomalous results, courts should not consider the intent of the persecutor but should instead engage in a bifurcated analysis that properly considers cultural context.

#### *E. Procedural Safeguards*

This article proposes several jurisprudential constructions for gender-based asylum claims that consider the cultural and social sensitivities affecting refugee women and that would better facilitate refugee women's ability to obtain asylum. However, in order for these formulations to be properly

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<sup>282</sup> Pomeroy, *supra* note 6, at 477.

<sup>283</sup> Knight, *supra* note 40, at 7 (citing *Matter of H-H*, A # redacted (Chicago, IL, Immigration Court, May 29, 2003)).

<sup>284</sup> Frydman & Seelinger, *supra* note 12, at 1084.

implemented, the procedures for bringing forth these claims must likewise provide a manner for all of the relevant information and evidence to be heard. The substance of a gender-based claim contains extremely sensitive material that a refugee woman may be reluctant to fully disclose under any circumstances, much less within the context of an intimidating legal situation. This section gives a brief overview of various considerations regarding training, interviewing, and the overall court process that are necessary to ensure that a female asylum-seeker is given sufficient procedural protections.

The asylum interview can be an extremely intimidating experience, but it is of utmost importance for the applicant to tell the truth and establish credibility.<sup>285</sup> For example, because refugee women may face a male interviewer or interpreter, these circumstances are often not conducive to bringing forth gender-related claims.<sup>286</sup> In such a situation, a woman may not be able to convey her whole story due to a reluctance to speak freely and give a full account of the violence she has experienced. Specifically, female applicants may fail to respond to questions concerning the type of harm they fear, such as sexual abuse.<sup>287</sup> Interviewers also may not understand that a lack of displayed emotion does not necessarily imply that the woman is not deeply affected by the harm she has suffered. The interviewer must consider that cultural differences and trauma play important, complex roles in determining behavior.<sup>288</sup>

One solution to this problem would be to guarantee that interviewers and interpreters dealing with female asylum-seekers are women.<sup>289</sup> This would allow for a more comfortable and safe environment for story sharing, and would ultimately lead to better-developed cases. Additionally, both open-ended and specific questions that may help to reveal gender issues should be

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<sup>285</sup> Council of Europe Report, *supra* note 19, at 16.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* See also Lustig, *supra* note 95.

<sup>289</sup> Council of Europe Report, *supra* note 19, at 2.

used in asylum interviews. For example, women who have been indirectly involved in political activity or to whom political opinions have been attributed often do not provide relevant information in their interviews due to the male-oriented nature of the questioning.<sup>290</sup>

Another recurring problem is that officials involved in the asylum procedure often lack adequate training on gender issues and thus fail to ask the right questions or analyze the evidence before them properly.<sup>291</sup> This lack of understanding necessitates adequate and ongoing training for immigration and refugee decision makers.<sup>292</sup> Especially in light of the arbitrariness and variance in asylum grants depending on the gender of the adjudicator, proper education regarding sensitivity towards gender-based claims is essential.<sup>293</sup> Also, requiring that national asylum precedents concerning gender-based violence be published would help to raise awareness and ensure greater quality and consistency within the US system.<sup>294</sup>

Ultimately, revising current jurisprudence with gender-sensitive formulations of “social group” and “nexus” is only a first step. In order to effectuate the goals implicit in such a revision, comprehensive reform of the asylum process and its procedures is necessary to sufficiently protect refugee women.

#### *F. Opening the Floodgates*

*It is an early morning at the detention center, and I have accompanied one of my colleagues, an immigration attorney, to give a workshop to a group of Central American women detainees applying for asylum in the United*

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<sup>290</sup> *Id.* at 2, 16.

<sup>291</sup> *Id.* at 2.

<sup>292</sup> Randall, *supra* note 2, at 304.

<sup>293</sup> In a recent, lengthy study on disparities in asylum grants, the authors highlighted the apparent arbitrariness in decision-making by asylum officers and immigration judges. Several regional offices have grant rates that deviate from the regional norm by more than 50%. See Ramji-Nogales, *supra* note 101, at 372. Notably, female judges grant asylum at a rate that is 44 percent higher than that of their male colleagues. *Id.* at 342.

<sup>294</sup> Council of Europe Report, *supra* note 19, at 4.

*States.*<sup>295</sup> *After leading us through a maze of locked doors and rather ominous corridors, the guard signals the end of our journey. We will conduct our presentation (in Spanish) in the middle of the large, open space at the center of an unoccupied unit of individual cells. The group of women—clad in yellow jumpsuit prison garb—files into the room. After a few moments of shuffling chairs, my colleague launches into an explanation of the asylum process and allows for a never-ending stream of questions from the women. Somehow, a group of nearly thirty Central American women have recently ended up detained here, and almost all of them seek asylum based on domestic or gang violence in their home countries.*

*As the workshop discussion continues, the insurmountable challenges faced by these women become all the more apparent. For one, none of them speak English and everything submitted to the court must be translated from Spanish to English. One woman explains that she has newspaper articles to include with her application, and several others express concerns about translating their declarations. Apparently, there is a female detainee (not present) who happens to speak English. She has been helping the women write and translate their declarations, but she is too afraid to certify the translations with her signature (as required by the court) for fear of adverse consequences. Other women explain that they do not have any evidence to corroborate their declarations: no police records, medical records, news reports. All of these challenges are exacerbated by the fact that these women must remain detained, constantly working under the shadow of mistrust and fear of the detention center staff. None of them have attorneys, and our over-burdened staff (of four attorneys, with nearly 1,500 detainees to serve) has little time and resources to dedicate to their specific cases.*

*Having entered in a state of fear and post-traumatic stress, they had been required to disclose the details of their persecution to an immigration officer,*

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<sup>295</sup> This anecdote is based upon my experience as an intern in Tacoma, Washington with the Northwest Immigrant Rights Project (NWIRP) that conducts a Legal Orientation Program (LOP) for unrepresented detained immigrants at the Northwest Detention Center.

*who makes preliminary determinations about the credibility of their fear. Most of the women remain detained while fighting their cases. They do not have the language skills or knowledge to tell their stories to the court. And they have no one to advocate for them.*

The increased recognition of gender-based asylum claims advocated by this article spurs controversy among critics. More specifically, many argue that a fair interpretation of the Refugee Convention, or domestic refugee law of the United States, does not encompass such claims.<sup>296</sup> At the core of such criticism is the concern that liberalizing standards for gender-based claims will “open the floodgates” to a group of female asylum-seekers too large for the United States to practically accommodate.<sup>297</sup> As the narrative above exemplifies, refugee women face significant procedural barriers in even making their cases *heard*—perhaps a task even more daunting than surpassing the additional hurdles of unsympathetic legal frameworks. The fear that floods of refugee women will suddenly be granted asylum is therefore unfounded.

Although US asylum jurisprudence has explicitly recognized that the innate characteristics defining a particular social group may be diverse, courts have repeatedly denied asylum to women with gender-based claims for reasons of broadness.<sup>298</sup> In such cases, courts often base their reasoning on the *Sanchez-Trujillo* opinion, which stated that a group could not be defined by a “sweeping demographic division” where its members “naturally manifest diverse cultures, and contrary political leanings.”<sup>299</sup> For example, in the case of a sex trafficking claim, the IJ ruled that “to accept respondent’s argument would mean that all young women in Albania who believe they have been similarly harassed would

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<sup>296</sup> Musalo, *Revisiting Social Group and Nexus*, *supra* note 5, at 807.

<sup>297</sup> This fear is evident in the public’s response even to some of the most recent asylum cases, such as *Perdomo v. Holder*, 611 F. 3d 662 (9th Cir. 2010) in July of 2010. See ASSOCIATED PRESS, *Ruling on Women may Spur Asylum Claims*, N.Y. TIMES, Jul. 16, 2010, at A10.

<sup>298</sup> *Perdomo*, 611 F.3d at 668 (“Indeed, we have focused on the innate characteristics of such broad and internally diverse social groups as homosexuals and Gypsies to conclude that they constituted particular social groups for purposes of asylum.”).

<sup>299</sup> *Id.* (citing *Sanchez-Trujillo v. INS*, 801 F.2d at 1571, 156–77 (9th Cir. 1986)).

merit asylum, clearly this is not the intent of Congress.”<sup>300</sup> In another case, a federal court rejected the applicant’s claim in part because “then virtually any young Albanian woman who possesses the subjective criterion of being ‘attractive’ would be eligible for asylum in the United States.”<sup>301</sup>

The concern that recognition of gender-based asylum claims will open US borders to all refugee women is also contrary to basic principles of refugee law. To recognize large social groups situated in structured relationships of inequality (no social group being larger than gender) is “antithetical to the liberal political tradition that sees the individual as the fundamental unit of analysis.”<sup>302</sup> However, the assumption that asylum law functions to provide categorical relief simply based on group membership is completely erroneous.<sup>303</sup> In fact, it misses the fundamental goal of this area of refugee law, which provides for a case-by-case analysis. Though there may be vast numbers of people in the world who suffer oppression and persecution, each individual claimant must make her case—after surpassing whatever hurdles are necessary to even enter US borders.<sup>304</sup> Each applicant must then fit her asylum petition into a rigid legal framework, often without the assistance of legal counsel. In theory, asylum law provides a “micro-level solution” on a case-by-case basis to the “macro-level social, economic, and political problems of the world.”<sup>305</sup>

The holistic approach proposed in this article will not result in the granting of all gender-based claims. Refugee women must still gather evidence and substantiate all of the requirements for an asylum application. For example, in the instance of a potential domestic violence claim, harm by a husband may not be sufficiently serious to meet the definition of persecution. In other claims, there may not be a particularized failure of state protection.<sup>306</sup> Even

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<sup>300</sup> Knight, *supra* note 40, at 10.

<sup>301</sup> *Id.*

<sup>302</sup> Randall, *supra* note 2, at 299.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> Anker, *supra* note 50, at 398.

with comprehensive reforms to accommodate gender-based claims, refugee women still face many challenges in making their cases that will prevent an influx of asylum-seekers.<sup>307</sup> The most basic of these challenges, of course, is their ability to escape their situation in their country of origin at all.<sup>308</sup>

Also, it should be noted that Canada, which began offering protection to battered women seeking asylum in 1993, has not yet experienced an upsurge in new asylum claims. In the first two years after Canada adopted its guidelines recognizing gender-based persecution as a ground for asylum, “approximately 195 gender-related claims for asylum were granted—about two percent of all Canadian asylum claims filed since the guidelines went into effect.”<sup>309</sup> Similarly, the United States has seen no significant increase in FGM-related claims since the *Matter of Kasinga* decision in 1996, nor since the DHS brief in *Matter of R-A* was filed advocating for recognition of domestic violence-based claims.<sup>310</sup>

In addition to these considerations, the excuse that recognition of gender-based asylum claims will “open the floodgates” to deny asylum claims is contrary to the principles of refugee law. Not only do such principles emphasize offering protection in individual cases for asylum-seekers, but they underscore the ethical need to provide sanctuary to the world’s victimized migrants. The stories from Africa and Central America chronicled in this article are mere vignettes in a larger portrait of global challenges faced by

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<sup>307</sup> See Julia Preston, *Asylum Granted to Mexican Woman in Case Setting Standard on Domestic Abuse*, N.Y. TIMES, Aug. 13, 2010, at A14. Homeland Security officials conceded that they would continue to consider claims of domestic violence as a possible basis for asylum, but an agency spokesman cautioned that each case “requires scrutiny of the specific threat the applicant faces.” *Id.*

<sup>308</sup> DHS has, in fact, conceded this point in briefing for at least one domestic violence-based asylum claim. Noting that “most domestic violence victims abroad would not have the resources or [*sic*] the ability to leave their situations and come to the United States.” Alvarado DHS Brief, *supra* note 232, at 13 n.10.

<sup>309</sup> Donovan, *supra* note 52, at 332.

<sup>310</sup> Karen Musalo, *Matter of R-A: An Analysis of the Decision and its Implications*, 76 INTERPRETER RELEASES 1186 (1999). See also Alvarado DHS Brief, *supra* note 232, at 13 n.10.

refugee women. Ultimately, the law should be shaped by the humanity of refugee women's struggles.

## VI. CONCLUSION

Asylum law is a vehicle through which the United States may define its understanding of fundamental human rights. Perhaps for this reason, asylum is an extremely convoluted and nuanced realm through which officials, judges, and advocates struggle to incorporate a uniform understanding of these rights into a rigid legal framework. Refugee women are often cast by the wayside in the course of this struggle. In a historically male-dominated world and with a male-oriented understanding of human rights, these most vulnerable victims cannot make their suffering known unless steps are taken to recognize their plight. Yet, current formulations of "social group" and "nexus" within US asylum law portray refugee women as cultural Others who are deserving of different levels of protection. Both implicitly and explicitly, courts relegate the struggles of these women to untouchable private spheres or use relativist reasoning to reach anomalous results for gender-based asylum claims.

Proceeding from a non-relativist understanding of fundamental human rights, this article has focused on gender-based claims of FGM, sex trafficking, and domestic violence to illustrate both the universality of these rights as well as the diversity of gender-based persecution. Despite international recognition of the need to protect refugee women and the particularized challenges they face, the United States does not reflect this understanding of refugee law in its implementation of asylum jurisprudence. In order to eradicate imputed notions of cultural Otherness and misunderstanding in asylum jurisprudence, courts must restructure their formulations of "social group" and "nexus" to better suit the needs of refugee women. "Social group" should be construed to include common past experience as an immutable characteristic, and courts should not misconstrue gender-related claims to fit under other Convention grounds, thereby perpetuating judicial evasion of gender issues. Visibility should not be weighted for constructions of "social group" in gender-based claims because

this fails to recognize the societal roles of refugee women in the private sphere. Furthermore, nexus should be formulated through a bifurcated approach that includes a deep cultural understanding of the private sphere and does not emphasize the intent of the persecutor. These constructions allow for consideration of cultural and social sensitivities that affect gender-based claims while avoiding relativist undertones of cultural Otherness.

Yet, these jurisprudential modifications can only be effectuated with proper procedural modifications that likewise recognize the plight of refugee women. Providing gender-sensitive safeguards through the interview process and offering training for asylum officials are both reasonable solutions to procedural challenges. Finally, widespread criticism that recognition of gender-based claims will open the floodgates to an influx of female asylum-seekers is not only unfounded, but it contravenes fundamental principles of refugee law that emphasize individualized protections for victims of persecution.

As a part of an increasingly globalized society—and especially as a nation of immigrants—the United States has a special obligation to uphold fundamental concepts of human rights. Refugee women constitute one of the world's most vulnerable populations because they can so easily become socially invisible through oppressive societal norms. It is therefore all the more important that asylum law—which has the purpose of protecting such victims—does not further relegate women by creating conceptual hurdles in rigid legal frameworks. Instead of constructing box-like analytical formulations that treat refugee women as vastly different cultural products, US asylum law must better translate the universality of human rights into more fluid formulations embracing cultural differences.