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# DOMESTIC VIOLENCE AND U.S. ASYLUM LAW: ELIMINATING THE “CULTURAL HOOK” FOR CLAIMS INVOLVING GENDER-RELATED PERSECUTION

ANITA SINHA\*

*In this Note, Anita Sinha examines the treatment of asylum claims involving gender-related persecution. Analyzing the three most recent decisions published by the Board of Immigration Appeals, Sinha illustrates that these cases have turned on whether the gender-related violence can be linked to practices attributable to non-Western, “foreign” cultures. Sinha argues that cases involving gender-related persecution can be given full consideration of asylum law only when their adjudication is based on an understanding of the political and institutional character of violence against women, rather than on “cultural” culpability. In making this argument, Sinha examines recent amendments to the regulations governing asylum law that have been proposed to improve the adjudication of gender-related claims. Identifying their shortcomings, Sinha offers suggestions to improve the proposed regulations so that they would truly mandate equal treatment of asylum claims involving gender-related persecution vis-à-vis more traditional asylum claims.*

## INTRODUCTION

In 1996, a young Togolese woman of the Tchamba-Kunsuntu Tribe applied to the United States for asylum on the ground that she faced a painful and potentially life-threatening procedure known as female genital mutilation (FGM).<sup>1</sup> The Board of Immigration Ap-

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<sup>1</sup> In re Kasinga, 21 I. & N. Dec. 357 (B.I.A. June 11, 1996). Female genital mutilation (FGM), also called female genital surgery (FGS), involves cutting or removing part or all of the clitoris, and sometimes also removing the labia minora and wounding the labia majora. See Semra Asefa, *Female Genital Mutilation: Violence in the Name of Tradition, Religion, and Social Imperative*, in *Violence Against Women: Philosophical Perspectives* 92, 93-97 (Stanley G. French et al. eds., 1998) (discussing history and types of FGM, and damage to health resulting from FGM); see also Shannon Nichols, *American Mutilation*:

peals (BIA)<sup>2</sup> granted the asylum petition, recognizing fear of undergoing FGM as a ground for asylum.<sup>3</sup> *In re Kasinga* was the BIA's first decision in a case involving gender-related persecution<sup>4</sup> since the Immigration and Naturalization Services (INS) issued guidelines (Guidelines) for such cases in 1995.<sup>5</sup>

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The Effects of Gender-Biased Asylum Laws on the World's Women, Kan. J.L. & Pub. Pol'y, Summer/Fall 1997, at 42, 42-44 (1997) (outlining procedure, history, social consequences, and reasons given for FGM).

<sup>2</sup> It is important to note that several aspects of the campaign against FGM—the coining of the term, the way in which race and gender are discussed, and the exoticization of FGM vis-à-vis other forms of domestic violence—have been criticized sharply by many commentators. See *infra* notes 116-19 and accompanying text.

The BIA is the administrative judicial body within the Executive Office of Immigration Review (EOIR) that hears appeals of asylum decisions made by immigration judges. See Stephen H. Legomsky, *Immigration and Refugee Law and Policy* 894-95 (2d ed. 1997). While judicial review may not be available for denials of other forms of discretionary relief, Congress has explicitly preserved review of asylum decisions. Thomas Alexander Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 1028-29 (4th ed. 1998). The members of the BIA are appointed by the attorney general and, in fact, the BIA "has never been recognized by statute; it is entirely a creature of the Attorney General's regulations." *Id.* at 257. Although the BIA makes a large number of appellate determinations, its decisions constitute precedent only if published. *Id.* at 259. Even if published, however, BIA decisions are not binding on immigration judges; only federal regulations are binding on all asylum adjudicators. Eva N. Juncker, Comment, A Juxtaposition of U.S. Asylum Grants to Women Fleeing Female Genital Mutilation and to Gays and Lesbians Fleeing Physical Harm: The Need to Promulgate an INS Regulation for Women Fleeing Female Genital Mutilation, 4 J. Int'l Legal Stud. 253, 260 (1998).

<sup>3</sup> *In re Kasinga*, 21 I. & N. Dec. at 368 ("The applicant has a well-founded fear of persecution in the form of FGM if returned to Togo.").

<sup>4</sup> This Note uses the term "gender-related persecution" to mean acts against women that cause physical and psychological harm—e.g., rape, sexual assault, domestic violence, forced abortions, punishment for breaching social norms—and that are inflicted at least in part because of a woman's gender. This Note primarily uses "gender-related persecution" instead of "domestic violence" only because asylum law requires applicants to seek protection from "persecution." See *infra* text accompanying notes 28-29. This Note avoids the term "gender-based" persecution in order to recognize those cases where the persecution is inflicted *in part* because of a woman's gender, and not "solely due to [her] gender." Lydia Brashear Tiede, Battered Immigrant Women and Immigration Remedies: Are the Standards Too High?, 28 Hum. Rts. 21, 21 (2001) (defining "gender-based persecution").

<sup>5</sup> Memorandum from Phyllis Coven, Off. of Int'l Aff., to All INS Asylum Officers and HQASM Coordinators (May 26, 1995) [hereinafter Guidelines], [http://www.uchastings.edu/cgrs/law/guidelines/guidelines\\_us.pdf](http://www.uchastings.edu/cgrs/law/guidelines/guidelines_us.pdf). For an overview of the suggestions proffered in the Guidelines, see *infra* notes 90-94 and accompanying text.

Other countries also have taken official action to improve the adjudication of asylum claims involving domestic violence. Canada, in 1993, was the first country to issue national guidelines "formally recogniz[ing] that women fleeing persecution because of their gender can be found to be refugees." Guidelines, *supra*, at 3. For an update on how such claims have fared in Canada, see Immigration and Refugee Bd. of Can., Women Refugee Claimants Fearing Gender-Related Persecution: Update (1996), [http://www.irb.gc.ca/legal/guideline/index\\_e.stm](http://www.irb.gc.ca/legal/guideline/index_e.stm). Since the United States issued the Guidelines, Australia and, more recently, the United Kingdom have followed suit. See Dep't of Immigr. and Multicultural Aff. (Austl.), Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers (1996), <http://www.uchastings.edu/cgrs/law/guidelines/guide->

The INS published these nonbinding Guidelines<sup>6</sup> in an effort to improve the asylum adjudication of cases involving gender-related persecution, and the BIA in *In re Kasinga* explicitly referred to its suggestions.<sup>7</sup> Advocates were optimistic that the *In re Kasinga* decision and the Guidelines together symbolized development toward an enlightened understanding of violence against women in asylum law.<sup>8</sup>

Unfortunately, after *In re Kasinga*, claims involving gender-related persecution before immigration judges across the United States continued to face difficulty before immigration tribunals.<sup>9</sup> Victims of gender-related persecution have been unable to overcome the cultural stereotypes and gender inequities that pervade asylum law.<sup>10</sup> On June 11, 1999, the BIA decided *In re R-A*,<sup>11</sup> making its first statement on gender-related persecutions since *In re Kasinga*. In this case, a Guatemalan woman applied for asylum, seeking refuge from ten years of severe and potentially life-threatening abuse at the hands of her hus-

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lines\_aust.pdf; Immigr. App. Auth. (U.K.), Asylum Gender Guidelines § 2A.16 (2000), <http://www.iaa.gov.uk/GenInfo/Gender.pdf>.

<sup>6</sup> See Mahsa Aliaskari, U.S. Asylum Law Applied to Battered Women Fleeing Islamic Countries, 8 Am. U. J. Gender Soc. Pol'y & L. 231, 235 n.19 (2000) (explaining that guidelines "are only recommendations"). One commentator suggests, however, that there are nevertheless "institutional incentives" for adjudicators to abide by agency guidelines. Audrey Macklin, Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims, 13 Geo. Immigr. L.J. 25, 33 (1998).

<sup>7</sup> *In re Kasinga*, 21 I. & N. Dec. at 362.

<sup>8</sup> See, e.g., Karen Musalo, *In re Kasinga*: A Big Step Forward for Gender-Based Asylum Claims, 73 Interpreter Releases 853, 854 (1996) (characterizing *In re Kasinga* as "a milestone in recognizing the special circumstances faced by female asylum-seekers").

<sup>9</sup> See, e.g., *In re M- S- M-* (Immigr. Ct. July 1999), at <http://www.uchastings.edu/cgrs/summaries/100-199/summary126.html> (ruling that "domestic abuse does not constitute persecution because the abuser has no connection with the Mexican government or local law enforcement"); *In re D- K-* (Immigr. Ct. Dec. 8, 1998), at <http://www.uchastings.edu/cgrs/law/ij/117.html> (denying asylum to battered woman because she "has simply not shown that the violence against her is related to anything more than evil in the heart of her husband"); *In re F- L-*, at 31 (Immigr. Ct. July 24, 1998), at <http://www.uchastings.edu/cgrs/law/ij/216.pdf> (denying asylum because "forced prostitution is not persecution"); *In re A-*, at 13 (Immigr. Ct. Jan. 8, 1998), at <http://www.uchastings.edu/cgrs/law/ij/263.pdf> (finding that case where petitioner fears "a violent attack by the male members of her family based on her defiance of their wishes that she not marry her husband" is merely "a personal family dispute"); *In re G- R-* (Immigr. Ct. Oct. 20, 1997), at <http://www.uchastings.edu/cgrs/summaries/1-50/summary37.html> (finding lack of nexus between domestic abuse and enumerated ground for asylum).

<sup>10</sup> See *infra* Parts I.C and I.D.

<sup>11</sup> *In re R-A*, Int. Dec. 3403 (B.I.A. June 11, 1999) (en banc), vacated (A.G. Jan. 19, 2001), at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3403.pdf>. On January 19, 2001, Attorney General Janet Reno issued an order vacating the *In re R-A* decision and remanding the matter to the BIA for reconsideration. *Id.* at 1-2. The Attorney General directed the BIA to stay its reconsideration of *In re R-A* until after the proposed amendments to the federal regulations pertaining to asylum adjudication, see *infra* Part III, are published in its final form. *Id.*

band. In a widely criticized decision, which included a strong dissenting opinion, the *In re R-A-* court denied the application for asylum. The BIA characterized the spousal abuse inflicted upon the applicant as "private acts of violence"<sup>12</sup> that did not warrant political asylum protection.

The conflicting determinations in *In re Kasinga* and *In re R-A-* represent the systemic problem of granting asylum only when gender-related violence can be linked to practices attributable to non-Western, "foreign" cultures. This Note will demonstrate that the notions of culture that animate asylum jurisprudence are deeply rooted in racial and gender stereotypes.<sup>13</sup> Decisionmakers, as a result, are reluctant to grant asylum in cases where the alleged gender-related violence appears similar to forms of gender-related violence that are pervasive in the United States.<sup>14</sup> This conclusion is further supported by the BIA's most recent published decision, *In re S-A-*,<sup>15</sup> where the court granted asylum to a domestic violence victim because of what the court char-

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<sup>12</sup> *In re R-A-*, Int. Dec. 3403, at 23. For a fuller discussion of the decision, see *infra* Part II.B.

Since the court published *In re R-A-*, both the BIA, in unpublished decisions, and immigration judges have denied several asylum petitions involving domestic violence. See, e.g., *In re D- K-*, at 3 (B.I.A. Jan. 20, 2000), at <http://www.uchastings.edu/cgrs/law/bia/117-bia.pdf> (denying asylum under *In re R-A-* precedent); *In re -* (Immigr. Ct. Apr. 2000), at <http://www.uchastings.edu/cgrs/summaries/100-199/summary144.html> (same).

<sup>13</sup> See *infra* Parts I.C and I.D.

<sup>14</sup> Domestic violence indeed is a grave problem in the United States:

Every 15 seconds a woman is assaulted by a current or former domestic partner; every year 1500 women are killed by domestic violence, representing roughly one third of all women murdered each year; and hospital studies indicate that 30 percent of emergency room visits are the result of domestic assaults against women.

Elizabeth Shor, Note, Domestic Abuse and Alien Women in Immigration Law: Response and Responsibility, 9 Cornell J.L. & Pub. Pol'y 697, 697 (2000). It is only in the last decade that feminist legal advocacy and lawmaking have succeeded in bringing "legal recognition" to the harm caused by domestic violence in the United States. Elizabeth M. Schneider, Battered Women and Feminist Lawmaking 3 (2000). Nonetheless, condemnation of violence against women seems to focus on abuse that occurs outside U.S. borders. See, e.g., Rhonda Copelon, Recognizing the Egregious in the Everyday: Domestic Violence as Torture, 25 Colum. Hum. Rts. L. Rev. 291, 296 n.12 (1994) (explaining that "pointing the finger at other culture-specific forms of gender violence . . . undermines taking seriously comparable wrong in [U.S.] society"). In the asylum context, the decisionmakers' cultural prism may help explain the differential treatment of FGM and domestic violence. See *infra* Part II.B.3.

<sup>15</sup> [Binder 2] Int. Dec. (Hein) 3433 (B.I.A. June 27, 2000). Published BIA decisions constitute precedent, but determinations made by immigration judges or by the BIA in unpublished decisions do not. *Supra* note 2; see also Nichols, *supra* note 1, at 48-49. In light of this distinction, this Note will focus on published BIA decisions, specifically those that came after the Guidelines were promulgated.

acterized as the pivotal role of religious fundamentalism in the persecution.<sup>16</sup>

A comparison between the *In re Kasinga*, *In re R-A-*, and *In re S-A-* decisions tells an important story about how violence against women abroad is perceived by American asylum adjudicators.<sup>17</sup> Specifically, the opinions highlight how the convergence of race and gender plays out in the treatment of non-Western women in U.S. asylum law.<sup>18</sup> By insisting upon a cultural or religious practice on which to blame the abuse, asylum adjudicators have underprotected women who seek asylum from domestic violence.

In order to offer the full consideration of U.S. asylum law to all claims involving domestic violence, determinations must be made with a sophisticated understanding of the political and institutional character of violence against women. The INS, by recently publishing proposed amendments to the regulations governing asylum law, may help to move the law in this direction.<sup>19</sup> These proposed amendments seek to clarify how asylum claims based on domestic violence fit within the pertinent statutory framework.<sup>20</sup> The proposed amended regulations, in their present form,<sup>21</sup> however, continue to perpetuate the miscon-

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<sup>16</sup> Id. at 12 (citing father's "orthodox Muslim beliefs regarding women and his daughter's refusal to share or submit to his religion-inspired restrictions and demands"). For a complete discussion of the decision, see *infra* Part II.C.

<sup>17</sup> In a recent article, Professor Pamela Goldberg embarks on a similar endeavor by comparing the three decisions issued by the Second Circuit that explicitly address gender-related persecution in asylum law. Pamela Goldberg, *Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law Context*, 66 Brook. L. Rev. 309, 310 (2000). The Second Circuit granted asylum in the case involving FGM, *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999), but denied asylum in the two cases involving rape, *Melgar de Torres v. Reno*, 191 F.3d 307 (2d Cir. 1999); *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991). As Professor Goldberg explains, "[c]ontrasting *Abankwah* with *Gomez* and *Melgar* surfaces important issues relating to culture and gender." Id. at 351.

<sup>18</sup> See *infra* Part I.D.

<sup>19</sup> *Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588 (Proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). The proposed regulations were issued by the INS to amend the regulations pertaining to claims involving gender-related persecution. See *infra* Part III.

<sup>20</sup> There is an important distinction between the authority of the Guidelines and federal regulations:

Guidelines (which are typically issued in the form of a memo) are not binding; however, asylum officers are expected to follow them unless there are compelling reasons to follow a different approach. Regulations, which are binding, are part of the Federal Code (Title 8 of the Code of Federal Regulations) and are created through a quasi-legislative process involving posting, notice, and comment through the administrative agency.

Juncker, *supra* note 2, at 256 n.22.

<sup>21</sup> It is not certain when or if (given the change in administration) the amended regulations will be published in their final form. E-mail from Stephen Knight, Coordinating At-

ception that domestic violence is essentially an apolitical, private act.<sup>22</sup> As a result, the proposed regulations fail to fully secure gender-related persecution within the ambit of asylum law.<sup>23</sup>

Part I of this Note outlines the statutory framework of U.S. asylum law and shows how the general, abstract statutory provisions allow asylum adjudicators much discretionary power. It also explores the historic treatment of gender and race in immigration and asylum law in order to help explain the present treatment of women of color seeking asylum. Part II analyzes the three most recent BIA published decisions focusing on gender-related violence in order to show their reliance on gender and cultural stereotypes and assesses their combined effect for domestic violence claims. Part III examines the INS's proposed amended regulations to improve asylum adjudication of domestic violence cases, identifies the specific shortcomings of the proposed amendments, and suggests changes that should be made before the final publication of the amended regulations. The Note concludes by acknowledging that the amended regulations have the potential to mandate equal treatment of gender-related persecution cases, vis-à-vis

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torney, Center for Gender and Refugee Studies, to Anita Sinha (Mar. 12, 2001, 0:43 EST) (on file with the *New York University Law Review*).

<sup>22</sup> See Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence, Boston 1880-1960*, at 4 (1988) (advancing view of family violence as "political problem"); Deborah L. Rhode, *Justice and Gender: Sex Discrimination and the Law* 239-41 (1989) (explaining how past and present "inadequacies in legal responses" reflect "misconceptions" about nature of domestic violence).

Feminist scholars have argued that the subordination of women, through violence or other means, must not be recognized merely as a "private" problem but instead must be addressed as a public concern. See, e.g., Schneider, *supra* note 14, at 6 ("[T]he impulse behind feminist legal arguments was to redefine the relationship between the personal and the political, to definitively link violence and gender."); Copelon, *supra* note 14, at 296 (arguing that "[w]hen stripped of privatization, sexism and sentimentality, private gender-based violence is no less grave than other forms of inhumane and subordinating official violence that have been prohibited by treaty and customary law").

Subverting the public/private dichotomy is critical to confronting violence against women; it allows for moving beyond individualized assessments and toward "local[ing] domestic violence as a feature of a patriarchal society." Martha Minow, *Between Intimates and Between Nations: Can Law Stop the Violence?*, Case W. Res. L. Rev. 851, 863 (2000); see also Lenore Davidoff, *Regarding Some 'Old Husbands' Tales': Public and Private in Feminist History*, in *Feminism, the Public and the Private* 164, 165 (Joan B. Landes ed., 1998) ("[T]he public/private divide has played a dual role as both an *explanation* of women's subordinate position and as an *ideology* that constructed that position.").

<sup>23</sup> Observing how the *In re Kasinga* decision seemed to have little effect on asylum claims involving gender-related persecution, one commentator states:

The INS needs to broaden its standards for what constitutes gender persecution and get away from the idea that domestic violence [cases] . . . are [about] personal matters. It needs to put them in the category where they belong. They are human rights abuses based on gender, and these women deserve asylum as much as anyone.

Judy Mann, *A Desperate Woman Is Denied Asylum*, Wash. Post, Feb. 2, 2000, at C15.

more traditional asylum claims, so as to advance gender equality while avoiding gender and cultural stereotypes.

## I

### ASYLUM LAW AND APPLICATION

#### *A. United States Asylum Law: Inception and Discretionary Power*

United States asylum law, as it exists today, was established by the Refugee Act of 1980 (Refugee Act),<sup>24</sup> codified as part of the Immigration and Nationality Act (INA).<sup>25</sup> The Refugee Act created a permanent and systematic procedure for addressing asylum claims<sup>26</sup> in order to effectively advance the United States's "commitment to human rights and humanitarian concerns."<sup>27</sup>

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<sup>24</sup> Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1157-1159 (1994 & Supp. V 1999)). By adding § 208 to the Immigration and Nationality Act (INA), 8 U.S.C. § 1158, the Refugee Act of 1980 (Refugee Act) created the new immigration status of "asylum." See Aleinikoff et al., *supra* note 2, at 1022. The Refugee Act has been described as "the most comprehensive United States law ever enacted concerning refugee admissions and resettlement." Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 11 (1981).

Prior to the enactment of the Refugee Act, there were a number of legislative attempts to address refugee claims in the United States. Congress enacted the first refugee legislation of the postwar era when it passed the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009. In 1962, Congress passed the Migration and Refugee Assistance Act, Pub. L. No. 87-510, 76 Stat. 121 (1962). The first permanent statutory basis for the admission of refugees was established by the Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911, 913. See Anker & Posner, *supra*, at 13-20 (discussing pre-1980 legislation). The impetus for drafting the Refugee Act was the Indochinese crisis of 1976. See *id.* at 30-42 (discussing legislative history of the Refugee Act).

<sup>25</sup> 8 U.S.C. §§ 1101-1537 (1994 & Supp. V 1999).

<sup>26</sup> The INA provides two different statutory forms of relief: asylum (§ 208), and non-return (§ 241(b)(3)). An applicant who is granted asylum is permitted to remain in the United States, usually permanently through an adjustment of status, whereas an applicant who is only granted the more limited relief known as nonreturn is only entitled to "avoid[ ] removal to the country of persecution but not necessarily to other countries." Legomsky, *supra* note 2, at 751. Discussion of nonreturn relief, insofar as it differs from asylum relief, is beyond the scope of this Note.

<sup>27</sup> S. Rep. No. 96-256, at 1 (1979), reprinted in 1980 U.S.C.C.A.N. 141, 141. Congress's intent to have admission under the Refugee Act guided by humanitarian, rather than political, concerns is evident in the language of the Refugee Act, which defines its intended beneficiaries as refugees of "special humanitarian concern to the United States." Pub. L. No. 96-212, 94 Stat. 102 (1980). Deborah Anker and Michael Posner conclude that the legislative history of asylum law shows "the evolution of a consensus for the humanitarian, nondiscriminatory policy finally embodied in the Refugee Act." Anker & Posner, *supra* note 24, at 12; see also Emily Love, *Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution*, 17 Harv. Women's L.J. 133, 135 (1994) (finding that U.S. refugee policy prior to the Refugee Act had developed "on an *ad hoc* basis in response to specific humanitarian crises"). But see James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int'l L.J. 129, 133 (1990) ("Current refugee law[s] . . . purpose is not specifically to meet the needs of the refugees



To fit the statutory requirements for asylum,<sup>28</sup> an applicant must establish that she seeks protection outside her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>29</sup> Thus, an asylum applicant must show that: (1) she suffered, or has a well-founded fear of, persecution;<sup>30</sup> (2) the characteristics for which she was persecuted fit into one of the five protected categories; and (3) the persecution was on account of the protected characteristic.<sup>31</sup>

In determining whether an asylum applicant has met these statutory requirements, the INA grants considerable discretionary power to the decisionmaker.<sup>32</sup> This power is especially significant given that

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themselves . . . , but rather is to govern disruptions of regulated international migration in accordance with the interests of states.").

<sup>28</sup> Although the statutory scheme mandates a preliminary finding that the asylum applicant fits the definition of a "refugee," Professor Legomsky points out that "under the statutory definition, every asylee is also a refugee." Legomsky, *supra* note 2, at 750. The common understanding of the terms may be different: a "refugee" is one who is outside the United States and, because of forced displacement, seeks to enter; an "asylee" is one who has reached the United States and seeks to remain. But the statutory definition of refugee, as established by 8 U.S.C. § 1101(a)(42)(A), does not require that the applicant be outside the United States. The statutes pertaining to asylum applicants similarly do not make such a distinction. See Legomsky, *supra* note 2, at 749-50.

<sup>29</sup> 8 U.S.C. § 1101(a)(42)(A). Applicants who seek asylum upon entering the United States would file an "affirmative application," whereas those applicants against whom the INS has initiated removal proceedings would file a "defensive application." Aleinikoff et al., *supra* note 2, at 1024-25.

<sup>30</sup> An element of statutory persecution involves an inquiry into "state action"—whether the harm an asylum applicant experienced or fears was inflicted by either the government of the country where the applicant fears persecution, or a person or group that the government is unable or unwilling to control. See, e.g., *In re H-*, 21 I. & N. Dec. 337, 343 (B.I.A. May 30, 1996) ("[W]hile interclan violence may fall within the general category of civil strife, that does not preclude certain acts from being persecutory and does not change the fact that certain types of harm may constitute persecution."); *In re Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. Feb. 14, 1990) (finding that government "appears, at a minimum, to have been unable to control the paramilitary 'Death Squads,' whose mission was to annihilate suspected political opponents"). Courts early on recognized that persecution by nongovernmental actors can still satisfy the statutory definition: "[P]ersecution within the meaning of [INA] § 243(h) includes persecution by non-governmental groups . . . where it is shown that the government of the proposed country of deportation is unwilling or unable to control that group." *McMullen v. INS*, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981).

<sup>31</sup> The courts have explicitly established that the "on account of" language of the INA is a separate requirement of the definition of refugee. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (discussing requirement in context of political opinion claim and emphasizing that prosecution must be threatened or inflicted "on account of the victim's political opinion"); *In re Acosta*, 19 I. & N. Dec. 211, 232-35 (B.I.A. Mar. 1, 1985) (holding that even if applicant had well-founded fear of persecution, it would not be on account of either political opinion or membership in particular social group).

<sup>32</sup> See INA § 208(b)(1), 8 U.S.C. § 1158(b)(1) (1994 & Supp. V 1999) ("The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the

the statutory provisions do not define the elements of an asylum claim. A decisionmaker must determine whether an applicant has suffered or has a well-founded fear of persecution. The law, however, does not define "persecution."<sup>33</sup> Similarly, there are no set standards to determine whether an applicant has satisfied the "on account of" requirement, which involves a fact-specific inquiry into the causal nexus between the persecution and the persecutor's grounds for punishing her.<sup>34</sup> Finally, the law is ambiguous as to the scope of the statutorily protected grounds of "political opinion"<sup>35</sup> and "membership in a particular social group."<sup>36</sup>

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Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A)." (emphasis added)).

The discretion of asylum decisionmakers has been criticized by several commentators as excessive and is a concern that is compounded by the fact that decisions made by immigration judges set no legal precedent for other courts or agencies. See Love, *supra* note 27, at 151; Nichols, *supra* note 1, at 48-49.

<sup>33</sup> International instruments, on which U.S. asylum law draws, also fail to elaborate on the precise meaning of "persecution." See Guy S. Goodwin-Gill, *The Refugee in International Law* 66 (2d ed. 1996) ("'Persecution' is not defined in the 1951 Convention or in any other international instrument."). Some commentators propose that the definition of persecution was left undefined to permit case-by-case determinations of whether a given conduct constitutes persecutory acts. See, e.g., James C. Hathaway, *The Law of Refugee Status* 102 (1991) (suggesting that persecution was intentionally left undefined because drafters "realized the impossibility of enumerating in advance all of the forms of maltreatment which might legitimately entitle persons to benefit from the protection of a foreign state"). But see Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 *Cornell Int'l L.J.* 565, 573 n.22 (1993) (stating that there is body of case law and interpretive documents that provides guidance for meaning of persecution).

<sup>34</sup> Proving the persecutor's motive is difficult in some cases because "no particular motive is readily ascertainable," or because the "evidence arguably suggests multiple motives." *In re S-P*, 21 I. & N. Dec. 486, 492 (B.I.A. June 18, 1996). Adjudicators differ as to the level of proof that is required. See *infra* notes 152-53 and accompanying text.

<sup>35</sup> As discussed *infra* in Part I.C, what constitutes "political" is a subjective inquiry that may exclude certain categories of claims.

<sup>36</sup> The Third Circuit has stated that, "[r]ead in its broadest literal sense, the phrase [particular social group] is almost completely open-ended." *Fatin v. INS*, 12 F.3d 1233, 1238 (3d Cir. 1993). The *Fatin* court ultimately found that "neither the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase 'particular social group.'" *Id.* at 1239. Commentators similarly struggle to define the contours of this term. See, e.g., Goodwin-Gill, *supra* note 33, at 47 (acknowledging that "fully comprehensible definition is impracticable, if not impossible, but [that] the essential element in any description would be a factor of shared interests, values, or background . . ."); Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 *San Diego L. Rev.* 740, 742 (1989) (arguing that "literal, consistent reading of 'social group'" is what Congress intended); Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 *Colum. Hum. Rts. L. Rev.* 39, 51-52 (1983) (arguing that framers of Refugee Convention intended term "social group" to encompass "statistical, societal, social, or associational" groups).

The significant discretionary power held by the asylum officers, immigration judges, and courts that hear and decide asylum claims runs counter to the legislative intent of the Refugee Act to ensure a more uniform application of the law, as well as to the humanitarian concerns underlying the Act.<sup>37</sup> Applicants whose claims involve gender-related persecution represent one stark example of a group for whom the application of asylum law has led to discriminatory results.<sup>38</sup> The next section examines the application of the statutory scheme of asylum to cases involving gender-related persecution, and argues that the problems identified are attributable to the interpretation, rather than the language, of asylum law.

*B. Dominant Interpretations of Asylum Law as Applied to Applicants Claiming Gender-Related Persecution*

To fit within the statutory requirements discussed above, an asylum applicant who claims to have suffered or who fears gender-related persecution first must establish that the violence she experienced rose to the level of persecution. Adjudicators have looked to international legal documents and case law that has developed under the Refugee Act for guidance in interpreting the term "persecution."<sup>39</sup> These

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Recently there have been significant victories for nontraditional asylum claims on the ground of membership in a particular social group. See, e.g., *Aguirre-Cervantes v. INS*, 242 F.3d 1169, 1176 (9th Cir. 2001) (finding that members of immediate family may constitute particular social group); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094-95 (9th Cir. 2000) (finding that "gay men with female sexual identities in Mexico" constitute particular social group).

<sup>37</sup> See *supra* note 27. As one immigration attorney has noted, "[w]hile there are now systematic procedures in place, the variable application of the Refugee Act does not conform to the Act's stated humanitarian purposes." Love, *supra* note 27, at 136.

<sup>38</sup> See cases cited *supra* note 9. Another notable example is persecution based on sexual orientation. For challenges to discrimination against lesbian and gay men in immigration and asylum laws, see generally Robert J. Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 *Harv. C.R.-C.L. L. Rev.* 439 (1994); Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 *Cornell Int'l L.J.* 605 (1993); Denise C. Hammond, *Immigration and Sexual Orientation: Developing Standards, Options, and Obstacles*, 77 *Interpreter Releases* 113 (2000).

There have been signs of improvement recently in the treatment of gay and lesbian immigrants in the asylum context. See, e.g., *Hernandez-Montiel*, 225 F.3d at 1094-95 (finding that "female sexual identities" of some gay men in Mexico "are so fundamental to their human identities that they should not be required to change them"); *Pitcherskaia v. INS*, 118 F.3d 641, 646-48 (9th Cir. 1997) (finding that lesbian applicant who was forced to undergo psychiatric treatment to "cure" her suffered persecution on account of her membership in particular social group).

<sup>39</sup> The international legal community has offered the following definition: "[A] threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights . . . would also constitute persecution." U.N. High Comm'r for Refugees, *Handbook*

sources tend to define persecution as an unjustified threat of serious physical harm, including a threat to life or freedom, on the basis of a difference found to be offensive.<sup>40</sup> While "deprivation of life or physical freedom" is the most consistently recognized form of persecution,<sup>41</sup> discrimination,<sup>42</sup> and punishment for failure to comply with laws or policies that conflict with an individual's convictions<sup>43</sup> also have been recognized as acts of persecution.

The growing awareness in the legal community that violence against women is a human rights violation<sup>44</sup> has impacted the manner

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on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, at ¶ 51, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992), available at <http://www.unhcr.ch/refworld/legal/handbook/handeng/hbtoc.htm> [hereinafter UNHCR Handbook]. American immigration tribunals often have relied upon the definition set forth by the UNHCR. See, e.g., *McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir. 1981) (defining persecution as "a threat to life or freedom"); *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. Mar. 1, 1985) (defining persecution as "threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive").

<sup>40</sup> UNHCR Handbook, *supra* note 39; see also *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) (finding persecution "when there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate").

<sup>41</sup> Goodwin-Gill, *supra* note 33, at 68.

<sup>42</sup> Discrimination is not *per se* persecution, but can rise to the level of persecution if a government has imposed restrictions "of a substantially prejudicial nature." UNHCR Handbook, *supra* note 39, at ¶ 54. However, because refugee law distinguishes between persecution and prosecution for breach of a legitimate law, courts have hesitated to find persecution in "a situation where a woman objects to laws or policies which discriminate against, impose burdens upon, or otherwise disadvantage women." Macklin, *supra* note 6, at 42.

<sup>43</sup> See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) ("[T]he concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs."); *In re Kasinga*, 21 I. & N. Dec. 357, 365, 367 (B.I.A. June 13, 1996) (emphasizing petitioner's opposition to practice of FGM).

<sup>44</sup> See Guidelines, *supra* note 5, at 2-3 (citing Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), 1993 United Nations Declaration, United Nations High Commission for Refugee Guidelines (UNHCR Guidelines), and Canadian Guidelines for proposition that violence against women is both *per se* human rights violation and impediment to other human rights for women).

While some scholars invoke international human rights law to guide U.S. asylum law toward more inclusive protection against gender-based persecution, see, for example, Goldberg, *supra* note 33, at 573 n.22, others stress the shortcomings inherent in international law to argue that international documents do not sufficiently value women's experience of violence. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 Am. J. Int'l L. 613, 625-34 (1991) (arguing that public/private dichotomy that contributes to male dominance in western liberal tradition informs many U.N. instruments); Catherine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 Harv. Women's L.J. 5, 15 (1994) (noting that structure of international human rights is statist, and therefore "each state's lack of protection of women's human rights is internationally protected, and that is called protecting state sovereignty"); Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*,

in which gender-related persecution has been characterized in asylum cases. Within asylum discourse, this has meant recognizing this specific form of violence as an act of persecution.<sup>45</sup> Establishing that the violence rises to the level of persecution, however, is just the first step.

After an applicant proves that she has suffered persecution, she must then satisfy the statutory requirement that the persecution was on account of one of five enumerated grounds.<sup>46</sup> Meeting this requirement has presented the greatest challenge to battered women applicants. Decisionmakers have determined either that the applicant does not fall within the statutorily protected category claimed, or that the violence was not inflicted on account of the protected ground.<sup>47</sup> Underlying such decisions is the misconception that gender-related violence is a private issue, unconnected to the political and social structures that serve to perpetuate the subjugation of women.<sup>48</sup>

In response to the way in which asylum's statutory requirements have been interpreted against claims involving gender-related persecution, some advocates have suggested a statutory amendment to include a sixth protected category of "gender-based persecution," or

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6 Harv. Hum. Rts. J. 87, 88 (1993) (arguing for "reconstruction of human rights discourse" that will "recognize that violence against women is committed within a structure of social and economic subordination").

<sup>45</sup> See, e.g., *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996) (acknowledging that rape and sexual abuse may constitute persecution); *In re D-V-*, 21 I. & N. Dec. 77, 79 (B.I.A. May 25, 1993) (recognizing rape as form of persecution); *In re M-K-* (Immigr. Ct. Aug. 9, 1995), at [http://www.uchastings.edu/cgrs/case law/ijf/m-k.html](http://www.uchastings.edu/cgrs/case%20law/ijf/m-k.html) (finding that spousal abuse is persecution). The Guidelines establish how gender-related persecution fits within asylum's statutory scheme. See *infra* notes 90-94 and accompanying text. Nevertheless, some courts continue to reject the argument that acts involving violence against women constitute persecution as defined by asylum law. See cases cited *supra* note 9; see also *Basova v. INS*, No. 98-9540, 1999 WL 495640, at \*3 (10th Cir. July 14, 1999) (stating that petitioner, who suffered repeated rapes by Chechen mafia, "was treated inhumanely and has shown persecution and a fear of future persecution in the general sense . . . [and] has not shown persecution due to any of the statutory categories").

<sup>46</sup> See *supra* notes 28-29 and accompanying text. The categories that typically are used to capture gender-related persecution are "political opinion" and "membership in a particular social group." John Linarelli, *Violence Against Women and the Asylum Process*, 60 Alb. L. Rev. 977, 979 (1997).

<sup>47</sup> See, e.g., *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992) (finding that applicant's rape by government official was not motivated by "any interest on his part to 'persecute' her"); *Campos-Guardado v. INS*, 809 F.2d 285, 288 (5th Cir. 1987) (affirming BIA's determination that rapes suffered by petitioner were "personally motivated" and therefore were not on account of her political opinion); *In re R-A-*, Int. Dec. 3403, at 24 (B.I.A. June 11, 1999) (en banc), vacated (A.G. Jan. 19, 2001), at <http://www.usdoj.gov/eoir/eoia/bia/Decisions/Revdec/pdfDEC/3403.pdf> (holding that "the respondent has failed to show a sufficient nexus between her husband's abuse of her and the particular social group [asserted], or any of the other proffered groups").

<sup>48</sup> See *supra* note 22 and accompanying text.

more generally, "gender."<sup>49</sup> However, since the current statutory language of refugee law does not preclude these claims,<sup>50</sup> an amendment is not necessary to initiate change in the adjudication of cases concerning violence against women. The problem for gender-related asylum claims is not the statutory language of asylum law, but how it is interpreted. Why would asylum adjudicators interpret the law to turn away women whom they acknowledge have faced persecution in their home countries? More systemic than possible prejudice harbored by individual decisionmakers, a more comprehensive answer lies within the legacy of gender and race discrimination in both immigration and asylum law.

### *C. Gender Discrimination in Immigration and Asylum Law*

Recent feminist scholarship provides valuable insight into the historic, and often hidden, gender biases in U.S. immigration law. It suggests that the stereotypes and misperceptions that have plagued asylum claims involving gender-related persecution can be traced to discriminatory assumptions within immigration and asylum law generally. For example, the doctrine of coverture, under which a wife is legally positioned as subordinate to her husband, has been an important background principle in immigration law.<sup>51</sup> In early immigration law, this guiding supposition meant that female immigration applicants who were married to U.S. citizens or residents were automatically allowed to enter the country.<sup>52</sup> However, not only was there no similar grant extended to foreign-born husbands of female citizens, but also a U.S. female who married a noncitizen male was subject to

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<sup>49</sup> See, e.g., Love, *supra* note 27, at 135 ("Congress should amend the Refugee Act of 1980 to include the category of 'gender-based persecution' as a basis for asylum."); Nichols, *supra* note 1, at 45 ("Without a clear 'gender' category or a complete transformation of the law, women fleeing their countries due to gender-specific crimes have no protection.").

<sup>50</sup> The language of asylum law is general and abstract, reflecting the broad humanitarian principles that animated the Refugee Act. See *supra* note 27 and accompanying text. Rather than presenting problems, the generalized language allows for adjudication of various types of persecution, including gender-related persecution. See Linarelli, *supra* note 46, at 979 (asserting that plain reading of asylum law illustrates that recognizing gender-based persecution does not expand scope of statute); Macklin, *supra* note 6, at 28 (arguing that "it require[s] a special effort of will *not* to apply existing principles to the situation of women").

<sup>51</sup> See Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 San Diego L. Rev. 593, 595 (1991) (analyzing legacy of coverture doctrine in modern immigration law); Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 Nw. U. L. Rev. 665, 667 (1998) ("By incorporating the doctrines of coverture and chastisement, immigration law has been recognized to perpetuate the no longer viable assumption that a wife belongs to her husband.").

<sup>52</sup> Kelly, *supra* note 51, at 667.

expatriation.<sup>53</sup> As one commentator has noted, "the law presumed [a woman] would follow her husband to his country."<sup>54</sup>

The tendency of immigration law to view women in terms of their familial role as wives continues to be a problem, even when laws are crafted to be gender neutral. As one study found, "the effect of immigration law," when combined with the social and economic disadvantages facing women, "is to reduce a woman's chance of legally immigrating unless she asserts her marital or familial status."<sup>55</sup> The Immigration Marriage Fraud Amendments of 1986 (IMFA) were a notorious example of how a facially neutral law had a disproportionate negative impact on women.<sup>56</sup> Until recently,<sup>57</sup> the IMFA created a perverse bind for immigrant women facing domestic violence by forcing them either to remain with their batterers or risk losing lawful immigration status.<sup>58</sup> Immigrant women suffer disproportionately

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<sup>53</sup> *Id.* at 667-68; Aleinikoff et al., *supra* note 2, at 28 n.7. As a corollary, until the 1930s, citizenship "by blood" could be transmitted only by U.S. citizen fathers, not mothers. Aleinikoff et al., *supra* note 2, at 28.

<sup>54</sup> Kelly, *supra* note 51, at 668. The provisions relating to naturalization contained elements that similarly had a disparate impact on female petitioners. For example, the requirement that citizenship applicants demonstrate "good moral character" was often used to castigate women for having sexual relationships outside marriage. See Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 *Berkeley Women's L.J.* 142, 162 (1996) (book review).

<sup>55</sup> Nancy Ann Root & Sharyn A. Tejani, *Undocumented: The Roles of Women in Immigration Law*, 83 *Geo. L.J.* 605, 613 (1994). The study also observed the practices of immigration courtrooms, and concluded that power differences, which included the difference between applicants based upon gender, "are a source of bias in U.S. immigration law and courts." *Id.* at 607.

<sup>56</sup> IMFA, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.). The IMFA is characterized by one scholar as a "much-maligned example" of how legislators fail to consider the impact of immigration laws on women. Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 *UCLA L. Rev.* 1509, 1550 (1995). The IMFA mandated a two-year period of conditional permanent resident status for a spouse of a citizen or permanent resident wishing to immigrate to the U.S. After this period, both husband and wife were required to petition for permanent status for the immigrant spouse. *Id.* at 1551. This provision created a situation where "many immigrant women were reluctant to leave even the most abusive of partners for fear of being deported." *Id.*

<sup>57</sup> In 1994, Congress passed the Violence Against Women Act (VAWA) and exempted battered immigrant spouses from the IMFA by creating a right to "self-petition." See VAWA of 1994, *subtit. G*, Pub. L. No. 103-322, 108 Stat. 1902, 1953; Shor, *supra* note 14, at 701-02. It took another two years before the first VAWA self-petitioning cases could be adjudicated. Kelly, *supra* note 51, at 671.

<sup>58</sup> See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1246-50 (1991) (analyzing impact of IMFA on immigrant women of color); Kelly, *supra* note 51, at 670 ("Caught in limbo, many battered women were reluctant to leave their abusive spouses, as without their husband's legal assistance the women risked losing permanent residency and facing deportation.").

from other laws as well.<sup>59</sup> Immigrant battered women, moreover, are not fully protected under current domestic violence laws.<sup>60</sup>

Asylum law, a subset of immigration law, demonstrates a similar tendency to marginalize women and their claims. Scholars argue that the application of asylum law remains constrained by its founding interest—to protect educated male elite applicants who fled communism.<sup>61</sup> More generally, others characterize asylum law as centered around the male applicant, the male situation, and the male experience.<sup>62</sup> Both interpretations suggest that the “political” persecution that asylum was designed to protect against is perceived through the prototypical male experience of “public,” and not “private,” abuse. One result of this male-centered conception of political persecution is that gender-related persecution has been downplayed in asylum decisions as “private wrongs.”<sup>63</sup> This privatized view of gender-related persecution has been articulated by Dan Stein of the Federation for American Immigration Reform:<sup>64</sup> “A criminal offense, rape, for example, does not become political merely because the local political system fails to prosecute the offense—even for political reasons.”<sup>65</sup> Such a statement represents the view that sexual violence is intrinsically “private,” and is, in fact, an act that can only be *made* political.

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<sup>59</sup> For example, they have shouldered a disproportionate burden of welfare reform, which excludes even permanent residents from welfare benefits. See Johnson, *supra* note 56, at 1551.

<sup>60</sup> See generally Cecelia M. Espenosa, *No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections*, 83 Marq. L. Rev. 163 (1999) (analyzing how conflicting VAWA provisions fail to fully protect women immigrants); Kelly, *supra* note 51, at 678-79 (exploring problems VAWA causes for women trapped at “the intersection of domestic violence and immigration”).

<sup>61</sup> See Harold Hongju Koh, *Who Are the Archetypal “Good” Aliens?*, 88 Am. Soc’y Int’l L. 450, 451 (1994); see also Legomsky, *supra* note 2, at 749 (discussing how battle against communism continues to drive refugee selection); Anker & Posner, *supra* note 24, at 69-70 (providing evidence of geographically discriminatory refugee policy in Cold War United States). But see Linarelli, *supra* note 46, at 980 (stating that one principle reason for amending asylum laws in 1980 was to eliminate historical biases).

<sup>62</sup> See, e.g., Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 Cornell Int’l L.J. 625, 636 (1993) (“For the most part, asylum law has developed through the adjudication of the cases of male applicants and has therefore involved an examination of traditionally male-dominated activities.”).

<sup>63</sup> See Love, *supra* note 27, at 141 (“This perceived discrepancy between ‘private wrongs’ and political persecution is seen most dramatically in [asylum] claims of women fleeing rape and sexual abuse.”).

<sup>64</sup> The Federation for American Immigration Reform is a national organization “of concerned citizens who share a common belief that the unforeseen mass immigration that has occurred over the last 30 years should not continue.” See <http://www.fairus.org/html/aboutus.html> (last visited Sept. 25, 2001).

<sup>65</sup> Dan Stein, *Gender Asylum Reflects Mistaken Priorities*, at <http://www.wcl.american.edu/pub/humanright/brief/v3i3/stein33.htm> (last visited Feb. 12, 2000).



Several asylum decisions explicitly have posited sexual violence as being outside the political sphere. In *Campos-Guardado v. INS*,<sup>66</sup> for example, the Fifth Circuit heard a case involving an applicant who claimed that she was raped and forced to watch the brutal murder of family members because of the political position of her family in El Salvador.<sup>67</sup> The court rejected the applicant's claim that the persecution she suffered was on account of the statutorily protected grounds she alleged.<sup>68</sup> Instead, it affirmed the BIA's finding that the rape was motivated by the personal feelings of her attackers.<sup>69</sup>

Decisions such as *Campos-Guardado*<sup>70</sup> reflect the view that gender-related violence is a purely "private issue" rather than a problem of social injustice.<sup>71</sup> The myth that the "private" is not political, while successfully contested in other areas of the law,<sup>72</sup> remains central in the application of refugee law.

Examining the sexist perceptions of, and practices against, women in asylum and immigration law is an important step toward understanding why the exclusion of gender-related persecution is one of the most discernible gaps in the application of the Refugee Act. Pervasive gender bias is not, however, a complete explanation. Race and racism also play a significant role in how asylum claims involving gender-related persecution get heard and decided. In almost all of these cases, the applicant is a woman of color fleeing from a non-

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<sup>66</sup> 809 F.2d 285 (5th Cir. 1987).

<sup>67</sup> Id. at 287.

<sup>68</sup> The Fifth Circuit affirmed the BIA's finding that the persecution suffered by applicant was neither on account of her political opinion nor membership in a particular social group. Id. at 288-90.

<sup>69</sup> Id. at 288. The Guidelines specifically criticized the *Campos-Guardado* decision. See Guidelines, supra note 5, at 11 ("*Campos-Guardado* illustrates the need for an adjudicator to carefully ascertain all the facts surrounding an allegation of persecution in order to assess whether there are indicia that the act was committed or threatened on account of a protected characteristic.").

<sup>70</sup> See, e.g., *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992) (finding that rape of applicant by government official was motivated by personal interest rather than "any interest on his part to persecute her" (internal quotation marks omitted)).

<sup>71</sup> See supra note 22.

<sup>72</sup> Largely through the efforts of feminist scholars and activists, areas once understood as private, such as "[h]arassment, domestic violence, rape, prostitution, and pornography," have become subjects of political activism and public concern. Rhode, supra note 22, at 230. As a result, boundaries between public and private, political and personal, are being challenged and reconceptualized. See, e.g., Nicola Lacey, *Theory into Practice?: Pornography and the Public/Private Dichotomy*, in *Feminist Theory and Legal Strategy* 93, 104 (Anne Bottomley & Joanne Conaghan eds., 1993) (evaluating "contribution which critique of the public/private dichotomy has made to feminist analyses of pornography"); Jenny Morgan, *Sexual Harassment and the Public/Private Dichotomy: Equality, Morality and Manners*, in *Public and Private: Feminist Legal Debates* 89, 105 (Margaret Thornton ed., 1995) (suggesting that sexual harassment "cause of action itself explodes the public/private dichotomy").

Western country. As the next Section illustrates, this convergence of racial and gender stereotypes, playing out in the language of "culture," creates a serious obstacle for these asylum cases.

*D. The Interplay of Gender and Race in Immigration and Asylum Laws*

Asylum applicants who flee from non-Western countries because of gender-related violence find that their cases often turn on whether they can show that the persecution they suffered is attributable to the cultural "backwardness" of their home countries. In fact, it seems as if "[t]he successful asylum seeker must cast herself as a cultural Other, that is, as someone fleeing from a more primitive culture."<sup>73</sup> In an effort to explain why asylum adjudicators engage in such an analysis, this Section argues that distinctions drawn between gender-related asylum claims are rooted in racialized discourse.

Exploring narratives of culturally defined deviance, Professor Leti Volpp states: "[T]he terrain on which we articulate and understand racialized difference is frequently that of gendered treatment."<sup>74</sup> Volpp's insight that conversations about women and gender often are actually conversations of racial difference is illuminating in the immigration and asylum context.<sup>75</sup>

In an arena in which racism historically has informed policy,<sup>76</sup> early immigration laws provide stark examples of how racial discrimi-

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<sup>73</sup> Sherene H. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* 92 (1998), quoted in Leti Volpp, *Gazing Back*, 14 *Berkeley Women's L.J.* 149, 160 (1999) (book review). Although Razack writes about the Canadian context, this Note argues that her observations are as accurate when applied to asylum adjudication in the United States.

<sup>74</sup> Leti Volpp, *Blaming Culture for Bad Behavior*, 12 *Yale J.L. & Human.* 89, 90 (2000).

<sup>75</sup> This interplay of sexism and racism was the basis of a movement by women of color in the United States during the late 1970s and early 1980s criticizing mainstream feminism as "white female racism." bell hooks, *Feminism is for Everyone: Passionate Politics* 57 (2000). These feminists of color demanded that white feminists acknowledge the reality of race and racism in the struggle for American women's liberation. Cultural critic bell hooks, while acknowledging that "[o]verall feminist thinking and feminist theory [in the U.S.] has benefited from all critical interventions on the issue of race," *id.* at 58-59, nonetheless views this progress as only a "foundation for the building of a mass-based anti-racist feminist movement." *Id.* at 60.

<sup>76</sup> A classic example of overt racism in U.S. immigration law is the treatment of Chinese immigrants at the turn of the nineteenth century. See *Fong Yue Ting v. United States*, 149 U.S. 698, 729-30 (1893) (holding that Congress's plenary power permits requirement that white witness attest to Chinese aliens' residence); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (upholding constitutionality of law suspending all future immigration of Chinese laborers because "power of exclusion" is "an incident of sovereignty"). Chinese immigrants were by no means the only target of racist immigration laws. See *United States v. Thind*, 261 U.S. 204, 213-15 (1923) (finding that immigrant from India was not "white" and therefore ineligible for naturalization); *Ozawa*

nation affected the treatment of gender. In the early twentieth century, for example, U.S. citizenship laws contained an antiscegenation provision directed specifically at women.<sup>77</sup> A century after these laws were revoked, the gendered treatment of racialized difference continues to impact the treatment of immigrant women. For example, the welfare "reform" movement in the 1990s ultimately had a disproportionately negative impact on immigrant women. As this initiative was infamous for the gendered rhetoric of the "welfare queen"<sup>78</sup> and racialized images of the undeserving,<sup>79</sup> it is hardly surprising that "the political debate over the reduction of public assistance to immigrants generally fail[ed] to weigh the disproportionate impact of such measures on immigrant women."<sup>80</sup>

The discursive treatment of asylum claims involving violence against women of color is reminiscent of the way in which race and gender discrimination have played out in immigration law generally. In particular, cultural stereotypes of non-Western societies have informed the way in which these claims of gender-related violence in non-Western countries are perceived and discussed. These conversations perpetuate problematic notions attributable to colonialist femi-

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v. United States, 260 U.S. 178, 196-98 (1922) (holding same for Japanese immigrant). For an overview of the history of racial exclusion in U.S. immigration policy, see Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 Ind. L.J. 1111, 1119-47 (1998), and see Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 Stan. L. & Pol'y Rev. 111, 112 (1996), for a demonstration of how recurring features of the immigration debate "facilitate the growth of anti-immigrant sentiment."

<sup>77</sup> Ian F. Haney Lopez, *White By Law: The Legal Construction of Race* 46-47 (1996) (discussing discriminatory impact of different citizenship laws on women).

<sup>78</sup> See A. Mechele Dickerson, *America's Uneasy Relationship With the Working Poor*, 51 Hastings L.J. 17 (1999); Steven V. Roberts, *Food Stamps Program: How It Grew and How Reagan Wants to Cut It Back*, N.Y. Times, Apr. 4, 1981, §1, at 11 (discussing "legend of the so-called 'welfare queen'").

<sup>79</sup> See Lucie E. White, *On the "Consensus" to End Welfare: Where Are the Women's Voices?*, 26 Conn. L. Rev. 843, 854 (1994) (noting that, after World War II, "[t]he counterfactual racist stereotypes of the . . . 'welfare queen' . . . began to take hold among the white, middle class public, including women"); Risa E. Kaufman, Note, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. Rev. L. & Soc. Change 301, 301 (1997) ("The stereotype of the lazy, black welfare mother . . . informs and justifies the ongoing welfare debate."). For a historical discussion of how gender and race informed the creation and administration of the welfare state, see Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 Vill. L. Rev. 415, 417-25 (1999).

<sup>80</sup> Johnson, *supra* note 56, at 1551. Although the racialized rhetoric of the welfare "reform" movement predominantly targeted African American women, the subsequent effect it had on immigrant women illustrates the impact that gendered treatment of racialized difference continues to have on this latter group.

nism,<sup>81</sup> which is predicated upon exoticizing notions of “the Other”<sup>82</sup> and “alien”<sup>83</sup> culture. By “fighting sexism with racism,”<sup>84</sup> colonialist feminism defined its mission as saving their Third World sisters from their uncivilized cultures.

Although colonialist feminism adheres to a perspective that is over a century old, its roots continue to underlie the way that violence against women abroad is characterized. Present-day media depictions of gender-related violence abroad are one example of this legacy. In one article, an author enumerates examples of violence against women outside the United States—genital mutilation in Africa, bride burning in India, honor killing in the Middle East, rape as a weapon of ethnic genocide in Bosnia—and admits that “[i]n certain hands, these [experiences] are the topics of tabloid television.”<sup>85</sup> Images of “women in exotic dress, with their backs to the camera, telling lurid tales of abuse” become spectacles for Western audiences.<sup>86</sup> Another article began with the story of a Muslim woman from West Africa who was seeking asylum in the U.S. because she would be forced to marry an abusive polygamist upon returning to her home country.<sup>87</sup> In what

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<sup>81</sup> Colonialist or imperial feminism serves as shorthand for “the operations of cultural imperialism in Western feminist ideologies and practices.” Antoinette Burton, *Burdens of History: British Feminists, Indian Women, and Imperial Culture, 1865-1915*, at 22 (1994); see also Vron Ware, *Beyond the Pale: White Women, Racism and History*, at xvi, 117-66 (1992) (exploring “how feminism was incorporated into [the imperial] project to bring civilization to the outer reaches of the globe”). Specifically, colonialist feminism refers to the “secular work of emancipation,” historical and contemporary, undertaken in the name of non-Western “sisters.” Burton, *supra*, at 1-2; see also Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *Marxism and the Interpretation of Culture* 271, 299 (Cary Nelson & Lawrence Grossberg eds., 1988) (“Imperialism’s image as the establisher of the good society is marked by the woman as *object* of protection from her own kind.”). The “rhetoric about ‘global sisterhood,’” Burton explains, “has continued to be unproblematically reproduced by some.” Burton, *supra*, at 3-4.

<sup>82</sup> See Burton, *supra* note 81, at 17 (examining process whereby British feminists “created a colonized female Other on whose passivity and disenfranchisement their claims for imperial representation largely relied”). For a theoretical discussion and critique of the “heterogeneous project to constitute the colonial subject as Other,” see generally Spivak, *supra* note 81, at 271.

<sup>83</sup> Immigration law scholar Kevin Johnson highlights how the term “alien” both symbolizes and influences how the immigrant community is thought about in the United States. “The concept of the alien,” he argues, “helps to reinforce and strengthen nativist sentiment toward members of new immigrant groups, which in turn influences U.S. responses to immigration and human rights issues.” Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 *U. Miami Inter-Am. L. Rev.* 263, 265 (1996-1997).

<sup>84</sup> Razack, *supra* note 73, at 113 (internal quotation marks and footnote omitted).

<sup>85</sup> Jane Gross, *Uniting World Against Violence to Women*, *N.Y. Times*, May 31, 2000, at B2.

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

<sup>87</sup> Jennifer Bingham Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, *L.A. Times Mag.*, Nov. 20, 1994, at 26, 26-28.

appears to be an attempt at compassionate commentary, the author stated: "Aminah's story is incredible, difficult for a westerner to fully comprehend."<sup>88</sup>

One does not have to look hard to find remnants of the colonialist paradigm running through these accounts—men steeped in a backwards culture subjugating helpless women in ways that cannot even be grasped by the Western imagination.<sup>89</sup> Such depictions are drawn from racialized concepts of the non-Western (couched as "culture"). They also rely on the idea of a primitive collective pathology (manifesting itself in unimaginable stories of violence against women at the hands of barbaric men).

Asylum claims that relate stories of gender-related persecution have suffered similar treatment. The next Part will compare three recent asylum decisions that were published by the BIA to examine how the convergence of racial and gender stereotypes in the law affects the manner in which the BIA has handled asylum claims concerning gender-related persecution.

## II

### BIA DECISIONS ON GENDER-RELATED PERSECUTION CLAIMS

On May 26, 1995, the INS set forth suggestions to facilitate a more informed and fair adjudication of cases involving gender-related violence in what became the Guidelines.<sup>90</sup> The Guidelines stated that their purpose was "to enhance the ability of U.S. Asylum Officers to more sensitively deal with substantive and procedural aspects of gender-related claims, irrespective of country of origin."<sup>91</sup> To meet this objective, the Guidelines urged a more political understanding of domestic violence by citing several international legal documents that have acknowledged violence against women both as a *per se* human rights violation and as an impediment to the enjoyment by women of other human rights.<sup>92</sup> The Guidelines explain how persecutory acts aimed specifically at women may constitute "persecution" within the

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<sup>88</sup> *Id.*

<sup>89</sup> See Volpp, *supra* note 74, at 111 ("In the colonialist paradigm, native women were completely passive subjects of a native male subordination that grossly exceeded that experience by women in the West.").

<sup>90</sup> Guidelines, *supra* note 5.

<sup>91</sup> *Id.* at 1.

<sup>92</sup> *Id.* at 1-4 (citing international instruments).

meaning of asylum law<sup>93</sup> and how claims involving domestic violence may fit within one of the statutorily protected categories.<sup>94</sup>

The suggestions made in the Guidelines, however, are not binding on the BIA.<sup>95</sup> And in the five years since the INS published the Guidelines, the BIA's published decisions in three such cases—*In re Kasinga*,<sup>96</sup> *In re R-A*,<sup>97</sup> and *In re S-A*,<sup>98</sup>—illustrate that the BIA has failed to implement the INS's suggestions. While the applicants in two of the cases, *In re Kasinga* and *In re S-A*, were given asylum, the BIA based all three decisions on an examination of the cultural significance of the persecution alleged, rather than on whether the specific claims of gender-related persecution fell within the ambit of U.S. asylum law.

After the first BIA decision, *In re Kasinga*, several commentators celebrated the recognition of FGM as persecution as an opening to gender-related asylum claims.<sup>99</sup> The BIA's subsequent decision in *In re R-A*, however, significantly deflated this optimism.<sup>100</sup> The court's latest decision in *In re S-A*, while granting the asylum claim of a Moroccan girl who was abused by her father, nonetheless fails to represent a general victory for cases involving violence against women. Instead, the *In re S-A* decision prompted immigration and refugee law professor Deborah Anker to question whether the BIA only "feels safe [to grant asylum] when there is this religion hook to hang it on . . . [even though] the case is about gender."<sup>101</sup>

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<sup>93</sup> Id. at 4, 8-10 (establishing that sexual violence or punishment for breaching social norms may rise to level of persecution).

<sup>94</sup> Id. at 11-16 (outlining how gender-related claims can fall within the "political opinion" and "social group" statutory categories).

<sup>95</sup> See *supra* note 6.

<sup>96</sup> 21 I. & N. Dec. 357 (B.I.A. June 13, 1996).

<sup>97</sup> Int. Dec. 3403 (B.I.A. June 11, 1999) (en banc), vacated (A.G. Jan. 19, 2001), at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3403.pdf>.

<sup>98</sup> [Binder 2] Int. Dec. (Hein) 3433 (B.I.A. June 27, 2000).

<sup>99</sup> See, e.g., Megan Annitto, Asylum for Victims of Domestic Violence: Is Protection Possible After *In re R-A*?, 49 Cath. U. L. Rev. 785, 789 (2000) ("[The BIA] gave hope to advocates for women attempting to escape gender-based violence when it recognized FGM as extreme persecution in *In re Kasinga*."); see also *supra* note 8 and accompanying text.

<sup>100</sup> See generally Annitto, *supra* note 99, at 789 (describing *In re R-A* as "profound setback," and arguing that "United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) may open a new door for such cases"); Barbara Cochrane Alexander, Note, Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims, 15 Am. U. Int'l L. Rev. 895, 897-900 (2000) (explaining that *In re R-A* reversed positive progress of gender-based persecution claims, but Convention Against Torture is new and important alternative legal remedy for domestic violence victims); see also Karen Musalo, *Matter of R-A*: An Analysis of the Decision and Its Implications, 76 Interpreter Releases 1177, 1185-86 (1999) (assessing negative impact of *In re R-A* decision on asylum jurisprudence).

<sup>101</sup> Judy Mann, A Dangerous Precedent for Abuse Victims, Wash. Post, Feb. 9, 2000, at C15 (quoting Deborah Anker, head of Immigration and Refugee Clinic at Harvard Law School).

This Part examines the BIA's three published decisions on gender-related persecution since the Guidelines were published. The analysis suggests that the decisions to grant asylum in *In re Kasinga* and *In re S-A-* are largely due to the vilification of non-Western culture rather than an acknowledgement that claims involving gender-related persecution indeed fit within asylum jurisprudence. The decision to deny asylum in *In re R-A-*, which is based upon troubling misconceptions about domestic violence, may be explained by the fact that the applicant could not give the court any "cultural" explanation for the persecution she suffered.

A. *In re Kasinga and the Outrage Against FGM*

On June 13, 1996, the BIA decided the case of *In re Kasinga*,<sup>102</sup> recognizing for the first time that FGM may be a legitimate ground for asylum in the United States. To fit its finding within asylum's statutory scheme,<sup>103</sup> the court first found that FGM, as practiced in Togo, constituted persecution.<sup>104</sup> In making this finding, the court relied on extensive documentation of the procedures involved in FGM<sup>105</sup> as well as the prevalence of FGM in Togo.<sup>106</sup>

After deciding that the applicant did have a well-founded fear of persecution, the *In re Kasinga* court then looked to whether she fit into one of the protected categories described in INA § 101(a)(42).<sup>107</sup> The BIA found that the applicant was a member of a particular social group that consists of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."<sup>108</sup> Finally, the BIA found that the applicant met the nexus requirement of INA § 101(a)(42) because her well-founded fear of persecution was on account of her membership in this social

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<sup>102</sup> *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. June 13, 1996).

<sup>103</sup> See *supra* Part I.A.

<sup>104</sup> *In re Kasinga*, 21 I. & N. Dec. at 365.

<sup>105</sup> The decision relied upon the applicant's testimony and secondary sources to describe FGM, as practiced by the Tchamba-Kunsuntu Tribe, as "an extreme type [of FGM,] involving cutting the genitalia with knives, extensive bleeding, and a 40-day recovery period." *Id.* at 361. The court also relied upon secondary sources to establish the serious physical and psychological trauma of FGM. *Id.*

<sup>106</sup> The *In re Kasinga* decision cited two reports compiled by the U.S. Department of State in its discussion of the conditions in Togo. *Id.* at 362.

<sup>107</sup> *Id.* at 365. See *supra* notes 28-29 and accompanying text.

<sup>108</sup> *Id.* The court applied the test set forth in *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. Mar. 1, 1995), which established that a particular social group is defined by characteristics members of the group possess that either cannot be changed, or that should not be required to be altered because they are central to their identities. *In re Kasinga*, 21 I. & N. Dec. at 365-66. The *In re Kasinga* court found that "[t]he characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it." *Id.* at 366.

group.<sup>109</sup> The court made this last connection by finding that "FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe."<sup>110</sup>

The condemnation of FGM by the BIA was followed by a legislative initiative supporting the court's decision. Three months after the *In re Kasinga* decision, in September of 1996, Congress passed a law making it illegal to "knowingly circumcise[ ], excise[ ], or infibulate[ ]" any part of the female genitals of another person who is under the age of eighteen, explicitly denying any defense on grounds of "custom or ritual."<sup>111</sup>

Why the outrage specifically against FGM? The answer lies in part in the ideological assumptions about non-Western "cultures" that direct the gaze towards particularized cultural practices instead of the overall problem of violence against women. The *In re Kasinga* opinion hardly ever refers to FGM without associating it with the term "practice" or "tribal custom."<sup>112</sup> By characterizing FGM as a cultural ritual, the BIA failed to recognize that "[u]ltimately, FGM is a generalized form of violence aimed at controlling female sexuality."<sup>113</sup> Some scholars commending the *In re Kasinga* decision have fallen into the same rhetorical trap as the BIA, privileging culture-based explanations of gender-related persecution. For example, one scholar, while acknowledging that "the third world is not alone in failing to accord women sufficient protections," nonetheless urges asylum recognition for gender-related persecution because "the social relations of many third-world nations are still dominated by religious, tribal, or societal customs which accommodate, if not sanction, the persecution of women."<sup>114</sup>

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<sup>109</sup> *In re Kasinga*, 21 I. & N. Dec. at 367.

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

<sup>111</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, § 645, 110 Stat. 3009, 3709 (codified as amended at 18 U.S.C. § 116 (Supp. IV 1998)); see also Aleinikoff et al., *supra* note 2, at 1141 (outlining relevant provisions of 1996 Act). One commentator cites IIRAIRA to argue that because the U.S. has criminalized FGM, women fleeing the procedure should be granted automatic asylum status (i.e., INS regulated-approved status). See Juncker, *supra* note 2, at 256.

<sup>112</sup> In Part I of the *In re Kasinga* opinion, the BIA uses the terms "tribal custom" and "practice" twelve times. *In re Kasinga*, 21 I. & N. Dec. at 358-64. The cultural stereotypes motivating the characterization of FGM as "tribal" are obvious. The reference to FGM as a "practice" is arguably less obviously based on notions of cultural backwardness, but it is important to recognize that domestic violence generally is not referred to as a "practice."

<sup>113</sup> Asefa, *supra* note 1, at 100.

<sup>114</sup> David L. Neal, Women as a Social Group: Recognizing Sex-Based Persecutions as Grounds for Asylum, 20 Colum. Hum. Rts. L. Rev. 203, 206-07 (1988) (taking as example women in post-revolution Iran), quoted in Arthur C. Helton & Alison Nicoll, Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of *In re*



The narrative strategy used to condemn FGM is reminiscent of anthropological constructions of nonwhite immigrant cultures as bound by regressive customs and native practices.<sup>115</sup> The relegation of FGM to a static concept of "culture" prompted one advocate to exclaim: "[W]hy is it that when it comes to women's genitals the discourse shifts to culturalism?"<sup>116</sup>

The treatment of FGM by the courts, Congress, and commentators exemplifies a manifestation of "Western discourse . . . direct[ing] a 'horrificed gaze' towards its colonial and postcolonial subjects, rather than looking at the complexities surrounding the issue of FGS."<sup>117</sup> The dialogue on FGM utilizes the "here versus there"<sup>118</sup> parlance, creating the illusion that the persecutory act as claimed in *In re Kasinga* is wholly unlike domestic violence that women in the West suffer.<sup>119</sup> Far from being merely a point about semantics, perceiving specific forms of gender-related violence as "foreign" has serious consequences for asylum applicants whose claims involve persecution that cannot be blamed on a cultural practice. A vivid example is the next gender-related case involving gender-related persecution heard by the BIA after *In re Kasinga*: *In re R-A-*.

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*Fauziya Kasinga* and Prospects for More Gender Sensitive Approaches, 28 Colum. Hum. Rts. L. Rev. 375, 384 & n.39 (1997).

<sup>115</sup> See Leti Volpp, Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism, 96 Colum. L. Rev. 1573, 1588 (1996) ("The freezing of non-European culture in such forms as 'custom' or 'practice' emerges from colonialist and imperialist discourse which opposes tradition (East) and modernity (West) . . .").

<sup>116</sup> Symposium, Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation, 29 Colum. Hum. Rts. L. Rev. 467, 478 (1998) (remarks of panelist Nahid Toubia); see also Leti Volpp, Feminism Versus Multiculturalism, 101 Colum. L. Rev. 1181, 1186 n.17 (2001) ("African women seem to be the object of concern primarily when the subject is 'female genital mutilation.'").

<sup>117</sup> Volpp, *supra* note 115, at 1579; see also Situating a Critic in Her Discourse: A Conversation, 4 Buff. Women's J.L. & Soc. Pol'y 73, 74 (participant Leslye Obiora characterizing campaign against FGM as "vanguardist intervention").

<sup>118</sup> Volpp, *supra* note 116, at 1186.

<sup>119</sup> Some commentators have challenged the rhetorical treatment of FGM as compared to domestic violence. See, e.g., Hope Lewis & Isabelle R. Gunning, Essay, Cleaning Our Own House: "Exotic" and Familial Human Rights Violations, 4 Buff. Hum. Rts. L. Rev. 123, 132 (1998) ("[FGM] stands alongside such American practices as domestic violence, sterilization and contraceptive abuse, unnecessary cosmetic surgeries, and the genital 'mutilation' routinely performed on intersexed or hermaphroditic children. It is but one form of patriarchal violence intended to enforce strict gender lines and behavior.").

B. *In re R-A-: When Domestic Violence is not Enough for Asylum*

1. *The Decision*

On June 11, 1999, the BIA published its decision on *In re R-A-*,<sup>120</sup> breaking its three-year silence on asylum claims involving gender-related persecution. In a sharply divided ten-to-five vote, the BIA reversed the Immigration Judge's grant of asylum to the applicant,<sup>121</sup> a Guatemalan woman who had been severely beaten and psychologically tormented by her husband for many years. The BIA acknowledged that the abuse rose to the level of persecution<sup>122</sup> and that the state had failed to protect the applicant.<sup>123</sup> The BIA nonetheless denied asylum, on the ground that petitioner failed to show that the persecution was on account either of her membership in a social group or her political opinion. In making the determination that the persecution was not linked to the applicant's gender, the BIA revealed a disturbing viewpoint on domestic violence. The statement of facts conveyed the applicant's experience of abuse, which included incidents of life-threatening beatings, rape, sodomy, and an attempt to induce a miscarriage.<sup>124</sup> The opinion prefaced these horrific acts, however, by emphasizing the "senselessness and irrationality" of the husband's motives.<sup>125</sup> The court cited the applicant's own testimony to suggest that her husband's actions stemmed from "his own personal or psychological makeup."<sup>126</sup> In fact, the majority went so far as to say that the husband's violence was due to "his warped perception of and reaction to her behavior, . . . psychological disorder, pure meanness, or no apparent reason at all."<sup>127</sup>

The characterization of the persecution suffered by the applicant as unfortunate, but ultimately random, acts of violence, laid the groundwork for the majority to reject her argument that resistance

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<sup>120</sup> Int. Dec. 3403 (B.I.A. June 11, 1999) (en banc), vacated (A.G. Jan. 19, 2001), at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3403.pdf>. For the current procedural posture of *In re R-A-*, see *supra* note 11.

<sup>121</sup> *Id.* at 3.

<sup>122</sup> *Id.* at 11 ("[T]he severe injuries sustained by the respondent rise to the level of harm sufficient (and more than sufficient) to constitute 'persecution.'").

<sup>123</sup> *Id.* ("[The applicant] adequately established . . . that she was unable to avail herself of the protection of the Government of Guatemala in connection with the abuse inflicted by her husband.").

<sup>124</sup> *Id.* at 3-6.

<sup>125</sup> *Id.* at 4.

<sup>126</sup> *Id.* at 14. The applicant testified that her husband "was a repugnant man without any education[,] and that he may have abused her because he had been mistreated in the army. *Id.* at 5.

<sup>127</sup> *Id.* at 29.

against the abuse constituted a political opinion.<sup>128</sup> This depiction also moved the BIA to deny that the applicant was a member of a social group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."<sup>129</sup> The court's decision to reject the applicant's petition, however, was based more upon a misinformed characterization of domestic violence than on the applicant's failure to meet the technical statutory requirements for asylum claims.<sup>130</sup>

## 2. *Mischaracterizing Domestic Violence*

The majority in *In re R-A-* determined that the applicant's failure to present specific evidence as to what motivated her husband to beat her undermined her claim that she was battered on account of her political opinion or membership in a particular social group. The court rejected both claims by finding that the applicant did not show that her husband did or would harm another woman in Guatemala.<sup>131</sup>

The majority's insistence on specific evidence of what motivated the persecutor blatantly ignores widely accepted understandings of what motivates domestic battering. Feminist activists and lawmakers, beginning in the 1970s, drew attention to the crisis of domestic abuse—women being threatened, beaten, and killed in their own homes.<sup>132</sup> The battered women's movement, and recent studies docu-

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<sup>128</sup> Id. at 13 ("The record . . . simply does not indicate that the harm arose in response to any objections made by the respondent to her husband's domination over her. Nor does it suggest that his abusive behavior was dependent in any way on the views held by the [applicant].").

<sup>129</sup> Id. at 16. The majority agreed that the applicant "fits within the proposed group," but found the abstractly defined group "to bear little or no relation to the way in which Guatemalans might identify subdivisions within their own society." Id. The BIA also questioned whether domestic violence victims self-identify with this group, or whether their male oppressors see their victimized companions as part of this group. Id. at 17.

Other "social group" definitions potentially covering petitioner were presented, such as "Guatemalan women" and "battered spouses," but the majority rejected each of them, in a footnote, for failing under the "on account of" requirement. Id. at 19 n.2.

<sup>130</sup> In fact, the dissenting opinion in the case stated that there is "persuasive evidence that [U.S.] asylum laws, as they are currently formulated, provide a sound basis for providing protection to this respondent." Id. at 41.

<sup>131</sup> In rejecting the view that the applicant's husband beat her on account of her political opinion to be free from violence, the court stated that "there has been no showing that the respondent's husband targeted any other women in Guatemala, even though we may reasonably presume that they, too, did not all share his view of male domination." Id. at 15. Similarly, the court denied the applicant's claim that she was beaten by her husband on account of her membership in a particular social group, asserting that she "fail[ed] to show how other members of the group may be at risk of harm from him." Id. at 20.

<sup>132</sup> Studies during the 1970s showed that "[domestic] disturbances' accounted for approximately one-third of the calls for public assistance, and a comparable percentage of police injuries." Rhode, *supra* note 22, at 239. For accounts of how feminists brought domestic violence to public attention, see generally Gordon, *supra* note 22, at 4. See also

menting the problem, have made domestic violence a matter of public concern in the United States<sup>133</sup> and have helped shape the current understanding of domestic violence as rooted in both power structures of inequality and gender-biased social norms.<sup>134</sup> Far from being individual, random acts, violence against women at the hands of their partners is a pervasive and systemic exercise of patriarchal power.<sup>135</sup> The record in *In re R-A-* contained facts that vividly illustrate how state action and inaction perpetuates this subordination—facts that should have been given serious weight in deciding the applicant's asylum claim.<sup>136</sup>

### 3. "Tribal" Rituals Only?

When compared to the strong position the BIA took against FGM, *In re R-A-* reveals how the different interplay of racial and gender stereotypes obstructed the court's comprehension of violence against women in that case.<sup>137</sup> In a newspaper editorial that charac-

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Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence From Colonial Times to the Present* 183 (1987) ("The women's movement put pressure on the police, social agencies, and the state and federal government to respond adequately to the problem.").

<sup>133</sup> See, e.g., Barbara Allen Babcock et al., *Sex Discrimination and the Law: History, Practice, and Theory* 1306 (2d ed. 1996) (explaining that "abuse of women by male partners is recognized as the leading cause of injury to women in the United States" and has been labeled a "serious health issue" by the American Medical Association); Rhode, *supra* note 22, at 237 (describing that, beginning in 1970s, abuse of women became public concern and that studies of 1970s and 1980s sketched dimensions of domestic brutality); see also *supra* note 14.

<sup>134</sup> See Rhode, *supra* note 22, at 237 ("The conflicts that give rise to domestic violence are rooted in broader power relations and social norms.").

<sup>135</sup> See *supra* note 22 and accompanying text.

<sup>136</sup> The majority did not even mention such critical facts as the petitioner's inability to get a divorce in Guatemala without her husband's permission or the total lack of shelters and resources available to battered women. See Brief of Amici Curiae Refugee Law Center and International Human Rights/Migration Project at 6-7, *In re R-A-*, Int. Dec. 3403 (B.I.A. June 11, 1999) (en banc), vacated (A.G. Jan. 19, 2001) [hereinafter *Refugee Law Center Brief*] (on file with the *New York University Law Review*); see also *In re R-A-*, Int. Dec. 3403, at 32 (Guendelsberger, Board Member, dissenting) (underscoring restrictions on divorce).

The BIA nonetheless acknowledged that the applicant had "shown official tolerance of her husband's cruelty toward her." *Id.* at 18. Moreover, by recognizing that petitioner did suffer persecution, see *id.* at 11, the BIA, in effect, already determined that state action or inaction was implicated in causing the harm alleged. See *supra* note 30.

<sup>137</sup> The similarities between *In re Kasinga* and *In re R-A-* were presented in an amicus brief filed on behalf of the applicant in *In re R-A-*:

[Both cases] involved a form of persecution which is inflicted by individual private parties upon individual victims—FGM in Ms. Kasinga's case and domestic violence in Ms. Alvarado's [R-A-'s] case. In both claims the persecution is a cultural norm, broadly sanctioned by the community, without the possibility of state protection. Furthermore, in both cases the overarching so-

terized the *In re R-A-* decision as "a tough-to-swallow but necessary ruling,"<sup>138</sup> the author placed particular emphasis on the fact that the petitioner "was unable to prove that domestic violence was an intrinsic part of marriage in her country."<sup>139</sup> The article continued by distinguishing the case from *In re Kasinga*: "[I]n Kasinga's case, the gruesome ritual [of FGM] was a cultural imperative in her tribal society, universally practiced to discourage women from sexual promiscuity."<sup>140</sup> Similarly, the majority in *In re R-A-* distinguished the two cases by finding that the applicant had "not shown that spouse abuse is itself an important societal attribute" within Guatemalan society.<sup>141</sup>

Terms such as "ritual," "tribal," and "attribute" convey a restricted conception of "culture" that is informed by a static, homogeneous understanding of social structures.<sup>142</sup> Recognizing FGM but not spousal abuse requires reducing to stereotypes the social context from which asylum applicants flee. Driving this myopic outlook is what one scholar calls "epistemic violence"—a discursive technique used to demarcate difference and marginalize those who are seen as outside a dominant culture.<sup>143</sup> FGM is different because it can be ascribed to African tribal ritual. Domestic violence cannot be coined a "practice" or "custom" attributable to a particular nonwhite race because it frequently happens within the United States's own borders. Granting asylum in *In re Kasinga* but not in *In re R-A-* is consistent with the colonialist feminist agenda of "saving women from primitive cultures."<sup>144</sup> However, as illustrated by the BIA's next decision in *In re S-A-*,<sup>145</sup> issued only two months after *In re R-A-*, domestic violence

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cietal objective underlying the cultural norm is the assurance of male domination.

Refugee Law Center Brief, *supra* note 136, at 36. The dissent in *In re R-A-* agreed, see Int. Dec. 3403, at 35-36, expressly noting that the underlying motive of both domestic violence and FGM is identical—to control and subordinate women. *Id.* at 43-44.

<sup>138</sup> Editorial, A Harsh Reality of Immigration, St. Petersburg Times, July 13, 1999, at 10A.

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

<sup>140</sup> *Id.*

<sup>141</sup> *In re R-A-*, Int. Dec. 3403, at 18. The majority, referencing *In re Kasinga*, sought evidence of an affirmative social practice, like FGM, showing "that women are expected by society to be abused" or that there are "adverse societal consequences to women or their husbands if the women are not abused." *Id.* The BIA, in short, required a cultural explanation for spousal abuse in Guatemala.

<sup>142</sup> See *supra* note 115.

<sup>143</sup> Spivak, *supra* note 81, at 280-81.

<sup>144</sup> See Volpp, *supra* note 115, at 1614 (ascribing this imperative to "cultural feminist agenda").

<sup>145</sup> [Binder 2] Int. Dec. (Hein) 3433 (B.I.A. June 27, 2000). S-A- originally was granted asylum on August 6, 1999; however, that original order was amended in June 2000 for "editorial changes consistent with [the BIA's] designation of the case as a precedent." *Id.* at 1 n.1.

may be held a legitimate ground for asylum if the court can rely upon another stereotype of “primitive cultures”—religious fundamentalism.

C. *In re S-A-: Primitive Religious Orthodoxy*

On August 6, 1999, the BIA granted asylum to a young Moroccan woman on the ground that she had suffered past persecution by her father on account of her religious beliefs. The abuse recounted included severe beatings when the father perceived the applicant to have acted inappropriately vis-à-vis the proper behavior of a Muslim girl.<sup>146</sup> The court relied upon testimonial evidence characterizing the father as “very strict, he’s Muslim.”<sup>147</sup> The court deemed the father’s abusive behavior towards his daughter to be “[i]n conformity with his fundamentalist Muslim beliefs.”<sup>148</sup>

The different outcomes in *In re R-A-* and *In re S-A-* may be attributed to the fact that the claim in *In re S-A-* was based upon religious persecution. This distinction is significant only because religion is one of the five enumerated grounds for asylum that historically has been perceived as less ambiguous than political opinion or membership in a particular social group.<sup>149</sup> However, the manner in which the *In re S-A-* tribunal defined the religious difference between the applicant and her father—“the father’s orthodox Muslim beliefs, *particularly pertaining to women*, and [the applicant’s] liberal Muslim views”<sup>150</sup>—suggests that the abuse was more about gender subordination than religious difference. This point is supported by the applicant’s testimony that “her father did not mistreat her two brothers.”<sup>151</sup> The religious element of the case appears to be merely a stand-in for patriarchal norms and social arrangements concerning the status of women.

The BIA’s inquiry into what motivated the persecutory acts supports this claim. The BIA, in *In re R-A-*, decided that, despite the applicant’s testimony about her husband’s misogynist remarks, it could not determine a motive for the husband’s abuse that could satisfy the “on account of” requirement.<sup>152</sup> In contrast, the BIA in *In re S-A-* opened its discussion of the nexus requirement by stating that

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<sup>146</sup> The applicant testified that on one occasion, her father burned her thighs with a heated straight razor to punish her for wearing a short skirt. *Id.* at 2. On another occasion, the applicant’s father beat her after he saw her speaking to a man in public. *Id.* at 3.

<sup>147</sup> *Id.* at 4.

<sup>148</sup> *Id.*

<sup>149</sup> See text accompanying *supra* note 29.

<sup>150</sup> *In re S-A-*, [Binder 2] Int. Dec. (Hein), at 2 (emphasis added).

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

<sup>152</sup> *In re R-A-*, Int. Dec. 3403, at 19-24 (B.I.A. June 11, 1999) (en banc), vacated (A.G. Jan 19, 2001), at <http://www.usdoj/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3403.pdf>.

"[a]n asylum applicant is not obliged . . . to show conclusively why persecution has occurred or may occur."<sup>153</sup> Even though testimonial evidence in *In re S-A-* concerning the father's conduct included an observation that sometimes he would start beating the applicant "for no excuse,"<sup>154</sup> the court substituted its own motivation—non-Western religious orthodoxy.

The issue of the persecutor's motivation in both *In re R-A-* and *In re S-A-* brings to view the larger societal context of gender subordination. Only in the latter case, however, could the court pin blame on what it perceived as a non-Western, collective pathology much like a "tribal custom"—fundamentalist Islam.<sup>155</sup> In fact, the BIA's decision in *In re S-A-* candidly concluded: "We . . . find that because of the religious element in this case, the domestic abuse suffered by the respondent is different from that described in *Matter of R-A-*."<sup>156</sup>

As this Note has suggested, the problem for asylum claims involving gender-related persecution is in the interpretation and not the letter of the law.<sup>157</sup> This Note also has suggested that gender and racial stereotypes that imbue present asylum adjudication are deep-rooted.<sup>158</sup> How then can advocates initiate change? One possible answer is to improve the agency regulations that govern the interpretation of asylum law. The last Part will examine proposed amendments to these regulations that the INS recently published to determine whether they adequately remove the obstacles faced by asylum applicants seeking protection from gender-related persecution.

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<sup>153</sup> *In re S-A-*, [Binder 2] Int. Dec. (Hein), at 11 (citing *In re S-P-*, 21 I. & N. Dec. 486 (B.I.A. June 18, 1996)).

<sup>154</sup> *Id.* at 4.

<sup>155</sup> The Islamic world has been targeted as "the font of patriarchal oppression" by feminists in the United States. Volpp, *supra* note 115, at 1207. Professor Volpp forcefully argues that, rather than "abstractly condemning Islam," U.S. feminists should "think critically about the relationship of . . . [governmental] aid to states with policies inimical to women's concerns." *Id.*; see also Edward W. Said, *Covering Islam: How the Media and the Experts Determine How We See the World*, at lv (2d ed. 1997) (explaining how Western media distorts "Islam" into "a kind of scapegoat for everything we do not happen to like about the world's new political, social, and economic patterns").

<sup>156</sup> *In re S-A-*, [Binder 2] Int. Dec. (Hein), at 12.

<sup>157</sup> See *supra* Part I.B.

<sup>158</sup> See *supra* Part I.C and I.D.

## III

THE PROPOSED AMENDMENTS TO ASYLUM REGULATIONS:  
A PROBLEMATIC PANACEA

On December 7, 2000, the INS proposed amendments to the federal regulations that govern asylum eligibility.<sup>159</sup> The proposed regulations are designed to "aid in the assessment of claims made by applicants who have suffered or fear domestic violence."<sup>160</sup> In fact, the INS notes that the amendments' purpose is to "remove[ ] certain barriers that the *In re R-A*- decision seems to pose to claims . . . [involving] domestic violence."<sup>161</sup> Consequently, the proposed federal regulations represent a possible first step in responding to the critique of asylum law articulated in this Note.<sup>162</sup>

The amendments proposed in their present form, however, do not go far enough, and cannot provide full consideration of domestic violence asylum claims. Despite the INS's statement of purpose, the proposed regulations consolidate some of the same misconceptions about domestic violence that underlay the *In re R-A*- decision. Namely, they still assume that violence in the home is a matter of private, not public, concern. By failing to regulate the adjudication of claims involving gender-related persecution in a manner that offers the full protection of asylum law, the amendments effectively encourage decisionmakers to continue their reliance on gender and cultural stereotypes.

This Part will explore some of the inadequacies of the proposed regulations<sup>163</sup> by analyzing their treatment of the protected statutory category of "political opinion"<sup>164</sup> and its treatment of the "on account

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<sup>159</sup> Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 76,589. For an outline of the specific amendments proposed, see *infra* note 163.

<sup>162</sup> Unlike the Guidelines, any amendments made to the federal regulations are binding on asylum officers and judges. See Juncker, *supra* note 2, at 273-75.

<sup>163</sup> The amendments proposed by the INS are, in fact, quite comprehensive. The first matter they address is the definition of persecution, and the proposed change is to make room for both objective and subjective characterizations of a persecutory act. 65 Fed. Reg. at 76,590. The revised 8 C.F.R. § 208.15(a) would read as follows: "Persecution is the infliction of objectively serious harm or suffering that is subjectively experienced as serious harm or suffering by the applicant, regardless of whether the persecutor intends to cause harm." *Id.* at 76,597. The proposed regulations also attempt to clarify the state action requirement within the persecution inquiry, *id.* at 76,590-91, the nexus requirement, *id.* at 76,591-92, and the meaning of "membership in a particular social group." *Id.* at 76,593-95.

<sup>164</sup> This Part will limit its focus to the INS's treatment of political opinion, membership in a particular social group, and the presumption of a well-founded fear of future persecution when the persecution is inflicted by a nonstate actor.

Political opinion is one of the five protected categories enumerated by asylum law. See *supra* note 29 and accompanying text.



of" requirement.<sup>165</sup> It will conclude by criticizing the proposal to remove the presumption of well-founded fear of future persecution<sup>166</sup> when the alleged persecutor is a nongovernmental actor. The discussion ultimately illustrates that the proposed amendments fall far short of responding to the problems this Note highlights, and offers suggestions for improvement.

### A. *Nontraditional Political Opinions*

In order to place domestic violence claims on surer footing, the INS amendments have clarified how these claims can fit within the protected "social group" category.<sup>167</sup> They do not, however, address case adjudication for those asylum applicants claiming persecution on account of "political opinion." Omitting analysis of "political opinion" claims reflects a judgment on the part of the INS that domestic violence is not a political matter.

The preamble to the amendments makes this judgment clear: It confirms the *In re R-A-* finding that the persecution was not on account of the applicant's political opinion against male domination and domestic violence.<sup>168</sup> The preamble states that "there was no evidence that the applicant's husband was aware of the applicant's opposition to male dominance, or even that he cared what her opinions on the matter were."<sup>169</sup> In short, the INS, like the BIA in *In re R-A-*,<sup>170</sup> ignores the public and political character of domestic violence.<sup>171</sup> As the strong dissenting opinion in *In re R-A-* pointed out, "[o]pposition to male domination and violence against women, and support for gender equity, constitutes a political opinion."<sup>172</sup> The INS, by affirming

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<sup>165</sup> See *supra* note 31 and accompanying text.

<sup>166</sup> See text accompanying *supra* note 29.

<sup>167</sup> 65 Fed. Reg. at 76,588 (stating in preamble that proposed amendment "restates that gender can form the basis of a particular social group").

<sup>168</sup> The preamble devotes only one paragraph to the issue of how the protected category of political opinion relates to claims involving gender-related persecution. It opens this paragraph by stating that "[t]he Board's analysis of the political opinion claim [in *In re R-A-*] is consistent with long-standing principles of asylum law." 65 Fed. Reg. at 76,592.

<sup>169</sup> *Id.*

<sup>170</sup> See *supra* note 128 and accompanying text.

<sup>171</sup> See *supra* note 22.

<sup>172</sup> *In re R-A-*, Int. Dec. 3403, at 45 (B.I.A. June 11, 1999) (en banc) (Guendelsberger, J., dissenting), vacated (A.G. Jan. 19, 2001), at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3403.pdf>. To support this point, the dissent cited *Fatin v. INS*, where the Third Circuit acknowledged that there is "little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes." *Id.* (citing *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993)). The dissent also referred to the VAWA as establishing that "crimes of violence 'due, at least in part, to an animus based on the victim's gender,' reflects a political point of view that finds domestic violence abhorrent and intolerable." *Id.* (citing 42 U.S.C. § 13981(d)(1) (1994)).

*In re R-A-*, effectively denies that the right to be free of gender-related violence is a political, not merely a personal, right that is worthy of asylum law's protection.

By rejecting the idea that resistance to domestic violence can be political (at the very least, because of the political context in which it is inflicted), the INS and the BIA decontextualize and render ahistorical the applicant's opposition to gender-related persecution. When the BIA found that the applicant in *In re R-A-* merely possessed an apolitical "common human desire not to be harmed or abused,"<sup>173</sup> it failed to consider both the social and institutional context of the violence—"the context of a relationship between a man and a woman, in a patriarchal culture."<sup>174</sup> The *In re R-A-* decision failed to acknowledge the possibility that the applicant's decision to take flight and seek asylum may constitute a form of political resistance, demonstrating her belief "that a man has no right to . . . [beat] his wife."<sup>175</sup> The INS aversion to nontraditional political opinion runs counter to the growing recognition that domestic violence is a product of patriarchal political and social arrangements. The position marked out by the INS, moreover, undermines its own efforts to improve the adjudication of asylum claims involving gender-related persecution. A broader interpretation of the protected category of "political opinion" would work toward this purpose.<sup>176</sup>

### B. *The Amendment Proposed for the Nexus Requirement*

Similar to its treatment of protected categories, the INS's treatment of the nexus requirement demonstrates a paradoxical tendency to mount obstacles in its effort to enable successful adjudication of asylum claims for gender-related persecution. The proposed amendment concerning the nexus requirement renders the evidentiary burden even more onerous.<sup>177</sup> Presently, an asylum applicant, after proving that she has suffered persecution, must show that the persecu-

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<sup>173</sup> Id. at 13.

<sup>174</sup> Letter from Karen Musalo & Stephen Knight, Center for Gender and Refugee Studies, to Director of Policy Directives and Instructions Branch, INS, at 8 (Jan. 18, 2001) [hereinafter CGRS Comments] (on file with the *New York University Law Review*).

<sup>175</sup> Id. The dissenting Board members in *In re R-A-* found that the applicant established that the persecution she endured was on account of her political opinion to be free from such abuse, given that her husband "persisted in subjecting her to persecution that would affirm his dominance over her, she resisted him, tried to flee, sought governmental intervention, and filed legal actions against him." *In re R-A-*, Int. Dec. 3403, at 29.

<sup>176</sup> CGRS Comments, *supra* note 174, at 9 (suggesting that proposed regulations include statement that "opinions concerning treatment or rights based on gender, such as feminism, will be considered a political opinion").

<sup>177</sup> See id. at 7. This augmented evidentiary burden is detrimental particularly to claims involving gender-related persecution, because decisionmakers must acknowledge that do-

tion was inflicted "on account of" one of the five protected categories.<sup>178</sup> To prove a nexus between the persecution and a protected category, an asylum applicant must establish the persecutor's frame of mind. Current case law requires that the applicant establish that a protected characteristic was one of the motivations when it appears that a persecutor has mixed motives for inflicting the harm alleged.<sup>179</sup>

The proposed amendments raise the evidentiary bar. An applicant, under the amendments, "must" show that the protected characteristic is "central to" the persecutor's motivation to act.<sup>180</sup> This proposal appears inconsistent with the INS's statement in its preamble acknowledging that "[u]nder long-standing principles of U.S. refugee law, it is not necessary for an applicant to show that his or her possession of a protected characteristic is the sole reason that the persecutor seeks to harm him or her."<sup>181</sup> Oddly, the proposed amendment is characterized as adhering to this principle, by purportedly allowing for the possibility that a persecutor may have mixed motives.<sup>182</sup> Inserting the word "central," however, seems to threaten rather than permit such acknowledgement.

If the INS seeks to help decisionmakers recognize that a battered woman applicant has made the requisite nexus showing, it must retract its current proposal. The INS instead should amend the regulations to reflect current case law establishing that a protected characteristic need only be one of the motivations. Regulatory language that might facilitate such determinations may read as follows: In cases involving a persecutor who has mixed motivations, the applicant has proven persecution on account of a protected characteristic if the applicant has shown that one motive relates to a statutorily enumerated ground.<sup>183</sup>

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mestic violence is not merely a random, individual act of violence in order to make the link between the persecution and the motivation.

<sup>178</sup> See *supra* note 29 and accompanying text.

<sup>179</sup> CGRS Comments, *supra* note 174, at 6 ("[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." (citing *Tagaga v. INS*, 228 F.3d 1030, 1035 (9th Cir. 2000)); *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>180</sup> Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, at 76,598 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

<sup>181</sup> *Id.* at 76,591.

<sup>182</sup> *Id.*

<sup>183</sup> In their comments to the proposed federal regulations, the United Nations High Commission for Refugees (UNHCR) propose that the amended statute read: "[S]o long as the persecutor is motivated, in part, on account of a protected characteristic, the requisite

*C. Fear of a Nonstate Actor May Not Be Well-Founded Enough*

The INS proposed amendments also are problematic in their willingness to reconsider an established principle of asylum law that has afforded protection to gender-related asylum claims: the presumption of future persecution. An applicant, under the statute, must establish that she seeks asylum "because of persecution or a well-founded fear of persecution."<sup>184</sup> Under the existing INS regulations, there is a presumption of well-founded fear of future persecution when an asylum applicant has shown that she has suffered persecution in the past.<sup>185</sup>

The INS questions and invites suggestions on whether the presumption of fear of future persecution should continue to be applied in cases when the persecutor is an "individual, non-state actor,"<sup>186</sup> while reaffirming the validity of the presumption when the persecutor is a governmental actor. The INS at this time does not propose amendments establishing different evidentiary burdens based upon the agent of the persecution. Its willingness to consider eliminating the presumption of fear of future persecution when the persecutor is a nonstate actor, however, suggests that the INS remains unconvinced that claims involving gender-related persecution should be afforded the full protection of political asylum law.<sup>187</sup>

Ironically, it is amidst this consideration that the preamble to the proposed regulations cites a statement by the Violence Against Women Office (VAWO) of the Department of Justice, for the proposition that "in relationships involving domestic violence, past behavior is a strong predictor of future behavior by the abuser."<sup>188</sup> The VAWO statement expressly acknowledges that the presumption of future per-

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nexus is established." Letter from Guenet Guebre-Christos, Regional Representative, United Nations High Commissioner for Refugees, to Director of Policy Directives & Instructions Branch 7 (Jan. 22, 2001) [hereinafter UNHCR Comments] (on file with the *New York University Law Review*). The language proposed in the text above differs in that it explicitly recognizes the possibility of a persecutor harboring mixed motives.

<sup>184</sup> See *supra* note 29 and accompanying text.

<sup>185</sup> 65 Fed. Reg. at 76,595.

<sup>186</sup> *Id.*

<sup>187</sup> One advocate group asserts that "[t]here is no basis whatsoever for eliminating this presumption, a well-established principle of current law, and creating this artificial distinction between cases based on the nature of the persecutor." CGRS Comments, *supra* note 174, at 12.

The UNHCR has responded to the INS's proposal by reiterating the point made in its Handbook that "[i]t may be assumed that a person has a well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention [relating to the Status of Refugees]." UNHCR Comments, *supra* note 183, at 13 (citing UNHCR Handbook, *supra* note 39, at ¶ 45).

<sup>188</sup> 65 Fed. Reg. at 76,595. The Violence Against Women Office statement goes on to assert that "[v]ictims report patterns of abuse—rather than single, isolated incidents—that tend to include the repeated use of physical, sexual and emotional abuse, threats, intimidat-

secution is at least equally applicable when the persecutor is a battering spouse. It further recognizes that domestic violence "centers on power and control over the victim."<sup>189</sup> As the VAWO statement aptly points out, even when a persecutor is a private citizen, he is not acting in a vacuum—societal and state complicity facilitates gender subordination, and is a significant element of domestic violence.<sup>190</sup>

The INS proposed regulations, if enacted, would reinforce the exclusion of nontraditional political opinion in asylum law and would increase the evidentiary burden for victims of gender-related persecution in meeting the nexus requirement. The present proposed regulations also raise the possibility of drawing a distinction between "governmental" and "individual" persecutors when establishing fear of future persecution, rendering the adjudication of domestic violence claims far more difficult. These particular proposals seriously undercut the regulations' potential to provide asylum claims involving gender-related persecution the full protection of asylum law. They continue to leave room for the irrelevant, and highly problematic, reliance on gender and cultural stereotypes in the adjudication of these cases.

## CONCLUSION

Asylum decisions on claims involving gender-related persecution reveal how American asylum adjudicators rely upon cultural stereotypes rather than an informed understanding of domestic violence. As illustrated by the cases discussed in this Note, the inquiry becomes a troubling inquest for a cultural explanation on which to base the determination. This inquest results in badly reasoned decisions that perpetuate problematic stereotypes such as "tribal rituals" and religious fundamentalism. But, in such cases, asylum is ultimately granted.<sup>191</sup> Graver ramifications emerge when the "culture hook" comes up empty, and domestic violence alone is not enough to allow the appli-

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tion, isolation and economic coercion." U.S. Dep't of Justice, *Understanding Domestic Violence: A Handbook for Victims and Professionals*, quoted in 65 Fed. Reg. at 76,595.

<sup>189</sup> 65 Fed. Reg. at 76,595; see also *supra* note 134 and accompanying text.

<sup>190</sup> See Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 *Willamette L. Rev.* 773, 775-76 (1997) ("The legal system is complicit in domestic violence against women, as evidenced by a husband's legal right of physical chastisement and restrictive divorce laws."); Romany, *supra* note 44, at 110 ("By defining the realm of government to exclude relations within the family that harms women, states become complicit in the violence against women in the 'private' sphere."). The record in *In re R-A-*, Int. Dec. 3402 (B.I.A. June 11, 1999), conveys the precise problem of a government unable or unwilling to protect battered women such as the applicant. See *supra* note 136 and accompanying text.

<sup>191</sup> See *supra* notes 102-04 & 145-46 and accompanying text.

cant to remain in the United States and free from persecution.<sup>192</sup> The INS's proposed amendments to the asylum regulations present a way to develop asylum jurisprudence and practice towards a more sophisticated grasp of gender-related violence. The present proposals, however, must be improved in order for this goal to be achieved. If the humanitarian spirit and rule of asylum law is to be advanced, an applicant's life and safety should not have to depend upon whether the persecution she has suffered is foreign enough.

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<sup>192</sup> See *supra* notes 120-21 and accompanying text.