

LAW JOURNAL
FOR SOCIAL JUSTICE
SANDRA DAY O’CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY

Volume 6 **Spring** **2016**

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Law Journal for Social Justice is supported by the Sandra Day O'Connor College of Law at Arizona State University. The *Law Journal for Social Justice* mailing address is: Law Journal for Social Justice, P.O. Box 877906, 1100 S. McAllister Ave., Tempe, AZ 85287. The *Law Journal for Social Justice* email address is: LawJSocJust@gmail.com.

Subscription: *Law Journal for Social Justice* is an online journal. Editions are accessible through the URL: <http://www.law.asu.edu/ljsj/>, and <http://www.ljsj.wordpress.com/journal>

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Cite as 6 LAW J. SOC. JUST. __ (2016).

LAW JOURNAL FOR SOCIAL JUSTICE

SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY

Volume 6

Spring

2016

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EDITOR INTRODUCTION

The 2016 Law Journal for Social Justice Symposium, “Promising Practices in Criminal Justice” focused on current programs regarding re-entry and rehabilitation. Discussions ranged from specialty court programs like the Veteran’s Court and Homeless Court, victim-oriented rehabilitation for trafficking victims, and re-entry programs. Panelists included judges, practicing attorneys, and community organizers.

Social justice is an evolving, broadening concept, finding new meaning throughout the academic community. This journal, and the articles found herein, is designed to present these emerging concepts in a manner that allows both the jurist and the layperson to engage them. The issue begins with *Zoning and Regulating for Obesity Prevention and Healthier Diets: What Does the South Los Angeles Fast Food Ban Mean for Future Regulation?*, written by Kim Weidenaar, an article commenting on local zoning ordinances as tools for preventing obesity in disproportionately affected populations. However, with the second article, *Eating Mascots for Breakfast: How Keeping Native Faces off Labels Can Grow Tribal Economies*, Leah K. Jurss concentrates on food sovereignty in tribal communities and labeling of Native food products. Alex D. Ivan then shifts the focus by studying how electronic monitoring may be used to empower victims while reducing burdens of imprisonment spending in *Utilizing Electronic Monitoring to Enhance Domestic Violence Victim Safety*. Next, in *Constitutional Protection of Domestic Violence Victims Reinforced by International Law* Marina Kovacevic argues ratification of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in the United States. Sara Movahed, in *Devastating Effects of the International Failure to Recognize Refugees of Gender Based Persecution*, then examines legal shortcomings resulting when asylum based solely on a history of gender-based persecution is not considered. Through *Kennedy’s Law: The Hidden Constitutionally-Protected Classification*, Nicole Fries explores the necessity of Supreme Court action to provide lower courts the ability “to apply a suspect class framework to non-marriage sexual orientation laws.” Next, Erin Iungerich, in *My Nurse is a Pornstar: Should Discrimination Law Protect Moonlighting in the Adult Industry?*, considers protections for at-will employees participating in adult industry activities after-hours. Finally, *Secrecy, Espionage, and Reasonable Efforts Under the Uniform Trade Secrets Act – An Unbalanced Mass* by Peter L. Krehbiel concludes the issue by analyzes concerns that shifting costs related to trade secrets may undermine public policy and society at large. Collectively, the unique perspectives of these articles present important domestic and international issues that must be examined in today’s changing landscape.

Special thanks to the Law Journal for Social Justice Editorial Board for their hard work and dedication.

Asha McManimon
2015-2016 Editor-in-Chief
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DEVASTATING EFFECTS OF THE INTERNATIONAL FAILURE TO RECOGNIZE REFUGEES OF GENDER BASED PERSECUTION

Sara Movahed*

INTRODUCTION

Rody Alvarado Peña married her husband in Guatemala when she was 16 years old.¹ Throughout their marriage, her husband physically and mentally abused her.² To ensure she remained faithful, Rody's husband followed her everywhere.³ On one occasion, when he discovered that Rody's menstrual period was fifteen days late, he reacted by dislocating her jawbone.⁴ When Rody refused her husband's demand that she abort her fetus, he kicked her violently in the spine.⁵ He raped and forcibly sodomized her on an almost daily basis, beating her before and after the unwanted sex.⁶ Rody ran away several times, to her brother's and parents' homes, but each time her husband tracked her down and forced her to come back to his home.⁷ One night, Rody's husband woke her up in the middle of the night, slapped her, whipped her with an electrical cord, and pulled out a machete, threatening to cut off her face, arms, and legs, and put her in a wheelchair if she ever tried to leave him again.⁸

Rody finally escaped her husband by fleeing to the United States in 1995.⁹ She immediately filed an application for asylum for the persecution her husband subjected her to for decades.¹⁰ Initially, an Immigration Judge (IJ) granted Rody asylum in 1995, at which point Rody was mistakenly lulled into believing her legal battle was over.¹¹ After the initial IJ

* Sara Movahed received her JD in 2016 from the University of Maryland Francis King Carey School of Law where she has enjoyed all of the law school's immigration courses, particularly the Immigration Clinic. The author would like to thank all of her immigration professors for their ever-lasting wisdom, and Calvin G. Fisher for his patience and compassion.

¹ *In Re R- A-*, 2001 BIA LEXIS 1, 4-5 (BIA 1999).

² *Id.* at 5.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *In Re R- A-*, 2001 BIA LEXIS at 6.

⁷ *Id.* at 6-7.

⁸ *Id.* at 7.

⁹ *Id.* at 9.

¹⁰ *Id.*

¹¹ *Matter of R- A-*, 2008 BIA LEXIS 29, 2 (BIA 2008).

decision, the government, and later Rody, filed consecutive appeals.¹² These administrative decisions were eventually interrupted on three separate occasions by the respective Attorneys General (Reno, Ashcroft, and Mukasey); each time the case was remanded to the IJ.¹³ Finally, in December of 2009, after the case had ping-ponged through the system for fourteen years, Rody Alvarado Peña was granted asylum.¹⁴

Unfortunately, this over a decade-long wait for a final status on Rody's asylum case is not unique. The reason behind this systematic delay in granting gender-based asylum claims, both internationally and in the United States, is the lack of recognition of gender as a valid basis for asylum.¹⁵ While there has been minimal recognition of gender-based domestic violence claims within the particular social group category, recent cases do not go far enough to extend the protection to women from other Central American countries (the leading case only involved married Guatemalan women), nor did it recognize this group as a ground *per se*.¹⁶

If gender-based persecution (GBP) was a recognized ground for asylum, in and of itself, the delay Rody faced, along with the uncertainty that accompanies constant changes in guidance, would be significantly reduced.¹⁷ Women would be granted asylum as long as they could show a well-founded fear of persecution proximately caused by their GBP.¹⁸ Due to the prevalence of gender specific crimes against woman,¹⁹ introducing

¹² *Id.*; *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005).

¹³ *Matter of R- A-*, 2008 BIA LEXIS 29, 2 (BIA 2008); *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005); *Matter of R- A-*, CENTER FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/our-work/matter-r> [hereinafter CENTER FOR GENDER].

¹⁴ CENTER FOR GENDER, *supra* note 13.

¹⁵ United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 137 (1951) [hereinafter UN Convention]; United Nations Protocol Relating to the Status of Refugees, 606 U.N.T.S. 137 (1967) [hereinafter UN Protocol].

¹⁶ In 2014, the Board of Immigration Appeals decided *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014) recognizing the social group of "married women in Guatemala who are unable to leave their relationship" to be sufficiently immutable, particular, and socially distinct. Each applicant will still likely need the assistance of a crafty lawyer, able to show that her particular facts fall comfortably within the confines of this somewhat narrow particular social group. Even other women from Guatemala in abusive relationships will still have to show that they possess a well-founded fear of persecution on account of being a member of this group.

¹⁷ *See infra* Part.IV.B.

¹⁸ *See infra* Part.IV.B.

¹⁹ Shanyn Gillespie, *Terror in the Home: The Failure of U.S. Asylum Law to Protect Battered Women and A Proposal to Right the Wrong of in Re R-A-*, 71 GEO. WASH. L. REV. 131, 134-35 (2003) ("It is clear that domestic abuse is neither random nor individual, rather it is systematic and group-based.... These gender stereotypes have been institutionalized in patriarchal legal systems and societies, and are undoubtedly one of the root causes of the domestic violence epidemic.") (internal quotation marks omitted).

gender as a sufficient basis for asylum would substantially alleviate the currently exhausting process of seeking asylum in the United States.²⁰ At a time when backlogs in adjudicating asylum claims are at an all time high, clear-cut contours in our asylum laws would also likely alleviate tension from the clogged system by expediting the adjudication process.²¹

This note argues that the five existing statutory grounds for asylum are insufficient and should be expanded to include GBP as a sufficient basis in and of itself for the grant of asylum. Part I introduces the historical background of the gender-based persecutions faced by women internationally.²² Part II discusses the law, internationally, in the United States, and in Canada, where the definition of refugee has been expanded to include GBP.²³ Next, through U.S. case law, which applies a statute that mirrors international asylum law, Part III illustrates that the five current international asylum grounds are too limited to account for the struggles of persecuted women.²⁴ Finally, Part IV discusses two proposed methods to remedy this problem.²⁵ One solution is to permanently recognize gender as a sub-category of particular social group, thereby eliminating one step in the gender-based asylum process.²⁶ A more viable solution is to consider GBP as a valid basis *per se* for asylum, thereby creating a sixth ground for asylum.²⁷

I. HISTORICAL BACKGROUND

First, and most importantly, both due to their fundamental importance and their significant role in shaping a discussion on legal remedies, are the *struggles* that prompt women to seek asylum in the first place.²⁸

²⁰ See 1978 IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, ANNUAL REPORT COMM'R IMMIGRATION & NATURALIZATION 9; Immigration and Nationality Act (INA) § 209(b), 8 U.S.C. § 1159(b) (1982).

²¹ See, e.g., *In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems*, HUMANRIGHTSFIRST.ORG (April 19, 2016), http://www.humanrightsfirst.org/resource/balance-backlogs-delay-protection-us-asylum-and-immigration-court-systems?utm_source=Recent%20Postings%20Alert&utm_medium=Email&utm_campaign=RP%20Daily; see also Molly Hennessy-Fiske, *Immigration: 445,000 awaiting a court date, which might not come for 4 years*, LOS ANGELES TIMES (May 16, 2015, 4:40 PM), <http://www.latimes.com/nation/la-na-immigration-court-delay-20150515-story.html>.

²² See *infra* Part.I.

²³ See *infra* Part.II.

²⁴ See *infra* Part.III.

²⁵ See *infra* Part.IV.

²⁶ See *infra* Part.IV.A.

²⁷ See *infra* Part.IV.B.

²⁸ See Berta Esperanza Hernandez-Truyol, *Women's Rights as Human Rights - Rules*,

Women all over the world suffer due to targeted persecution on account of their gender.²⁹ GBP manifests in many forms depending on the region, era, and particular circumstances surrounding each woman's life. Despite the variance in persecution, however, several forms of GBP occur frequently.³⁰ These gender specific persecutions include, but are by no means limited to: femicide, mass rape, sexual abuse, female genital mutilation, forced abortion, honor killings, bride burning, face hiding, foot binding, forced pregnancy, domestic violence, and domestic rape, like that faced by Rody Alvarado Peña.³¹

The occurrence of violence against women—such as the femicide, mass rape, and domestic violence mentioned above—prompting them to seek asylum in the first place, is a much-explored topic.³² However, generally ignored is the hardship women face while in the “protecting” nation where they seek refuge.³³ Despite the fact that women make up a majority of refugees, their claims are granted at disproportionately lower rates than those of their male counterparts.³⁴

Since the industrial revolution spurred an increase in the availability of international transit, travel from an oppressive home nation to a country purporting to provide heightened protection vastly expanded.³⁵ No group was more affected by this greater availability for flight than women.³⁶ Women, who are twice as likely as men to experience violence in

Realities, and the Role of Culture: A Formula for Reform, 21 BROOK. J. INT'L L. 605, 650–51 (1996).

²⁹ See Anjana Bahl, *Home Is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution*, 4 CARDOZO WOMEN'S L.J. 33, 34 (1997) (estimating that the number of global refugees is over 20 million with over 80% of that total being women and children).

³⁰ See generally Human Rights Watch, *The Human Rights Watch Global Report on Women's Human Rights*, xiii-xxi (1995), <https://www.hrw.org/legacy/about/projects/womrep/> (describing the numerous human rights violations against women, by country).

³¹ Esperanza Hernandez-Truyol, *supra* note 28 at 635–37.

³² Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981); Exec. Order 12,324, 46 Fed. Reg. 48,109 (1981); see U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984, 99TH CONG., 1ST SESS. 574 (Jt. Comm. Print 1985).

³³ See Bahl, *supra* note 29, at 37.

³⁴ Governments enforce gender-neutral laws in a discriminatory manner or neglect to ensure that constitutional and other guarantees of non-discrimination are applied. See Amnesty Int'l, *It's About Time! Human Rights are Women's Rights* 5 (1995).

³⁵ *Id.*

³⁶ United Nations-HABITAT, 3.8 *Urban Insecurity: New Threats, Old Fears*, 2007-08 State of the World's Cities Rep. 144 (citing F. Vanderschueren, *The Prevention of Urban Crime*, Paper presented at the Africities Summit, Windhoek, Namibia (2000)), file:///Users/nefries/Dropbox/Spring%202015/Orgs/LJSJ/2101_alt.pdf.

developing countries, comprise a majority of the world's population of persons seeking asylum.³⁷

While human rights protect both men and women, women continue to be targeted disproportionately by *gender specific* human rights violations.³⁸ As a result, the necessity broadening asylum categories to account for gender is obvious.³⁹

II. LEGAL BACKGROUND

A. Sources of International Refugee Law

The United Nations Protocol Relating to the Status of Refugees⁴⁰ (UN Protocol) and the United Nations Convention Relating to the Status of Refugees (UN Convention), which incorporates Articles 2 through 34 of the UN Protocol, detail international principles on granting asylum in signatory and voluntarily complicit nations.⁴¹ The UN Protocol and UN Convention require all ratifying nations to afford protection within their nation to any individual with a well-founded fear of persecution caused by one of the recognized statutory grounds.⁴²

Furthermore, the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UN Torture Convention) describes additional requirements nations must heed when adjudicating refugee claims.⁴³ The UN Torture Convention holds in part, “[n]o State party may expel or extradite a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁴⁴

³⁷ See Nancy Kelly, *Gender-related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 674, n.1 (1994).

³⁸ See Report of United Nations Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 at 122 (1995).

³⁹ *Id.*

⁴⁰ United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967) [hereinafter UN Protocol].

⁴¹ United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150 (July 28, 1951) [hereinafter UN Convention].

⁴² UN Protocol, *supra* note 40; UN Convention, *supra* note 41.

⁴³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988). 1465 U.N.T.S. 85 (Dec. 10, 1984) [hereinafter UN Torture Convention].

⁴⁴ *Id.* art 3, ¶ 1.

B. United States' Interpretation of International Law

An individual may be granted asylum in the United States (a common location for asylum seekers)⁴⁵ only if she is able to prove she has a well-founded fear of facing persecution in her home nation.⁴⁶ One of five recognized statutory grounds for asylum must be the cause of the fear: either the applicant's race, religion, nationality, political opinion, or political social group.⁴⁷ Despite the prevalence of gender specific harms, gender is *not* a separate ground for asylum, forcing women to try to fit their claims into one of the five existing grounds.⁴⁸

In response to the "urgent needs of persons subject to persecution in their homelands," the United States enacted the Refugee Act of 1980 (U.S. Refugee Act).⁴⁹ This act amended the Immigration and Nationality Act and Migration and Refugee Assistance Act of 1962 to ensure United States immigration law's compliance with binding international law.⁵⁰

To receive asylum in the United States the applicant must: (1) have a well-founded fear of persecution; (2) caused by one or more of five protected characteristics: race, religion, nationality, membership in a particular social group, or political opinion; and (3) have been or will be persecuted because of that characteristic.⁵¹ While the first and third elements also pose difficulties for women seeking asylum, in this note they are not explored independently, instead they are discussed in the context of the second element, the five statutory grounds for asylum.⁵²

The U.S. Refugee Act, to ensure its compliance with the UN Convention and UN Protocol, adopts the Convention's definition of "refugee" almost identically.⁵³ While there are slight variations in their definitions of refugee, both the UN Convention and U.S. Refugee Act require that the individual have a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," in order to be granted asylum.⁵⁴ United States

⁴⁵ See Mary McGee Light, *Note: The Well-Founded Fear Standard in Refugee Asylum: Will It Still Provide Hope for the Oppressed?*, 45 *DRAKE L. REV.* 789, 791 (1997).

⁴⁶ Light, *supra* note 45.

⁴⁷ *Id.*

⁴⁸ Light, *supra* note 45; see generally CENTER FOR GENDER, *supra* note 13.

⁴⁹ 8 U.S.C. § 1521, 94 Stat. 102, Pub. L. 96-212, § 101(a) (1980).

⁵⁰ *Id.*

⁵¹ See INA § 101(a)(42)(A), United States Refugee Act of 1980 § 201(a), 8 U.S.C. 1101(a)(42)(A).

⁵² *Id.*

⁵³ UN Convention, *supra* note 41, art. 1(a), 19 U.S.T. at 6261, 189 U.N.T.S. at 152; 8 U.S.C. 1101(a).

⁵⁴ The Convention's definition is only slightly different, reading, a refugee is an

asylum law and the UN Convention do not recognize any persecution claim that does not fall within these five statutory grounds.⁵⁵ Missing from these recognized grounds is the applicant's gender.⁵⁶ Several of the recognized grounds have indirectly incorporated gender into their consideration for asylum.⁵⁷ However, the absence of gender as a sufficient category has exacerbated the difficulties women face when applying for asylum.⁵⁸ Additionally, these categories are broad and open-ended and therefore afford adjudicators discretion in granting asylum claims; in fact, the adjudicator's discretion is built into the definition of asylum.⁵⁹ This discretion to determine whether a claim falls under one of the recognized grounds leaves asylum applicants uncertain of the outcome of their cases.

In May 1995, in an effort to address the inconsistencies that arose when applying asylum law to gender-based claims, the Immigration and Naturalization Service (INS) published the Considerations for Asylum Officers Adjudicating Asylum Claims from Women.⁶⁰ The Gender Guidelines, while attempting to homogenize gender-based claims, still maintains that gender-based persecution is insufficient on its own as a basis for asylum.⁶¹ Additionally, even as a form of a political opinion or particular social group, GBP must be "further supported" to ensure the crimes committed against the women are not "personal."⁶² The manual

individual who is "unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a *well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*" (emphasis added).

⁵⁵ If an individual is able to show she will "more likely than not," be subjected to torture if sent back, she may be granted protection under the Convention Against Torture, yet torture is a higher threshold to meet than persecution. *See* UN Torture Convention, *supra* note 43.

⁵⁶ 8 U.S.C. 1101(a)(42)(A).

⁵⁷ Comment, *Political Refugees and the United States Immigration Laws: Further Developments*, 66 AM. J. INT'L L. 571 (1972).

⁵⁸ *Id.*

⁵⁹ 8 U.S.C. § 1158, § 208 (1980).

⁶⁰ Gender Guidelines, 1991-99 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 1 § (D)(2)(e), U.S. DEP'T OF STATE, at 215 [hereinafter Gender Guidelines] (reprinting of Phyllis Coven, INS OFFICE OF INTERNATIONAL AFFAIRS, CONSIDERATIONS FOR ASYLUM

OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN (ASYLUM GENDER GUIDELINES),

MEMORANDUM TO INS ASYLUM OFFICERS, HQASM COORDINATORS (May 26, 1995)). <http://www.state.gov/documents/organization/139394.pdf>; *see*

also Nancy Kelly, *Guidelines for Women's*

Asylum Claims, 71 INTERPRETER RELEASES 813 (June 27, 1994).

⁶¹ *Id.* at 218.

⁶² *Id.*

that purported to simplify women's gender-based claims in fact further disturbed the quest to achieve a homogeneous and effective asylum law.⁶³

C. Gender-based Asylum Claims in Canada

Canada has surpassed its requirements under international law by consistently affording protection to individuals on the sole basis of GBP claims. In 1993, Canada became the first nation in the world with a specific policy to adjudicate gender-based asylum claims.⁶⁴ In enacting Guideline 4,⁶⁵ Canada gave its adjudicating officers a clear understanding of the political objectives to consider while evaluating gender-based claims.⁶⁶

Canada's immigration tribunal, the Immigration and Refugee Board (IRB), is an almost entirely unrestricted entity.⁶⁷ The Refugee Protection Division of the IRB is the exclusive adjudicator on all refugee status determinations.⁶⁸ Due to the centralized means of adjudicating asylum claims, guidelines regarding the specific adjudication of gender-based claims are efficiently interpreted in the case-by-case adjudications of the Refugee Protection Division.⁶⁹ In contrast, in the United States, asylum claims are adjudicated both by the affirmative branch of the Department of Homeland Security (the United States Citizenship and Immigration Services), and the immigration courts of the Department of Justice.⁷⁰ The simplicity of the centralized Canadian system, in contrast to the bifurcated

⁶³ *Id.*

⁶⁴ See, e.g., Judith Ramirez, *The Canadian Guidelines On Women Refugee Claimants Fearing Gender-Related Persecution*, 14 REFUGE 3, 3 (Dec. 1994).

⁶⁵ IMMIGRATION AND REFUGEE BOARD OF CANADA, GUIDELINE 4: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION - GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO § 65(3) OF THE IMMIGRATION ACT -UPDATE (1996).

⁶⁶ *Id.* ("Although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of Convention refugee may properly be interpreted as providing protection for women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds.")

⁶⁷ Rebecca Hamlin, *International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia*, 37 LAW & SOC. INQUIRY 933, 947 ("The bureaucrats who conduct RSD in Canada have high levels of discretion to make decisions without legislative tinkering or judicial oversight and the low level of court involvement is uncontroversial").

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See, e.g., Victoria Neilson, Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. CITY L. REV. 233, 235 (2005).

system in United States, has a tendency to produce far more consistent results.⁷¹

III. DIFFICULTIES OF FITTING GENDER INTO US ASYLUM LAW

While several channels exist within asylum law for women to escape the persecution experienced in their home countries, an individual assessment is given to all claims for asylum.⁷² As a result, every woman must experience this harm, or experience a well-founded fear of this harm, before her asylum case will be granted.⁷³

This current granting of gender-based claims on an individual basis has three ramifications.⁷⁴ First, it requires every woman who is potentially subject to GBP in her home nation to stay in the nation long enough to actually experience the persecution, or to get dangerously close experiencing the persecution.⁷⁵ Second, it requires the woman to undergo the traumatic experience of entering a foreign country, uncertain of what her ultimate status in that country will be, until she partakes in the exhausting asylum process, awaiting a *de novo* decision on her claim.⁷⁶ Third, because each claim is given an individual assessment, favorable verdicts in similar cases do not provide assurance.⁷⁷ This means that even if a woman experiences the same severe domestic violence Rody Alvarado Peña did, she nonetheless will *still* be uncertain of the ultimate outcome of her asylum claim.⁷⁸

A. Gender in Asylum Law – Broadly

⁷¹ See Hamlin, *supra* note 67, at 942. *But see New Research Examines Disparities in Asylum Adjudication by the Immigration and Refugee Board of Canada*, CENTER FOR MIGRATION STUDIES (December 5, 2013), <http://cmsny.org/new-research-examines-disparities-in-asylum-adjudication-by-the-immigration-and-refugee-board-of-canada/#ixzz46SsB2sej>.

⁷² See, Kelly, Guidelines, *supra* note 60, at 819 (“Because asylum is an individual remedy, an applicant whose claim is based on fear of future persecution must establish both her membership in the particular social group and that her fear of persecution based on group membership is well-founded”).

⁷³ *Id.* at 819.

⁷⁴ *Refugee Assistance: Hearings on H.R. 3195 Before the Subcomm. on Immigration, Refugees and International Law of the H. Comm. on the Judiciary*, 98th Cong., 1st Sess. 55-56 (1983) (statement of Elliot Abrams, Assistant Sec’y, Bureau of Human Rights and Humanitarian Affairs, Dep’t of State).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Christopher L. Avery, *Refugee Status Decision-Making: The Systems of Ten Countries*, 19 STAN. J. INT’L L. 235, 334 (1983).

⁷⁸ *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005).

Currently, women are required to fit their claims into one of the five recognized statutory grounds, typically doing so under (i) political opinion, and/or (ii) membership in a particular social group.⁷⁹ The following sections discuss the means of molding a gender-based asylum claim to fit within one of these categories.⁸⁰ Then, in Part III.B., foundational cases are surveyed to illustrate the difficulty of crafting gender-based claims to fall within the “political opinion” or “particular social group” categories.⁸¹

i. Gender as a “Political Opinion”

To be successful in an asylum claim based on political opinion, a woman must “(1) specify the political opinion on which [she] relies, (2) show that [she] holds that opinion, and (3) show that [she] would be persecuted or has a well-founded fear of persecution based on that opinion.”⁸² In evaluating gender-based political opinion claims, asylum officers must determine specifically whether a woman faces or fears persecution because of an “opinion regarding the treatment or status of women within her country, culture or social, religious or ethnic group.”⁸³ Although a broad range of “opinions” appear to be sufficiently “political,” in applying these standards, immigration adjudicators take a strict view on what constitutes a valid political opinion.⁸⁴

ii. Gender as a “Particular Social Group”

In order to succeed in an asylum claim based on membership to a “particular social group,” the applicant must “(1) identify a group that constitutes a “particular social group”.... (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.”⁸⁵ In *Matter of Acosta*,⁸⁶ the Board of Immigration Appeals interpreted a social group as a “shared characteristic” that is either “innate”, “such as sex,

⁷⁹ See generally, *Dieng v. Holder*, 698 F.3d 866 (6th Cir. 2012)

⁸⁰ See *infra* Part.III.A.i.–ii.

⁸¹ See *infra* Part.III.B.

⁸² *Fatin*, 12 F.3d 1233, 1239-40 (3rd Cir. 1993).

⁸³ See Kelly, Guidelines, *supra* note 60, at 817.

⁸⁴ See *infra* Part.III.B; see also, *Fatin*, 12 F.3d 1233 (finding that because the applicant did not refuse to wear the required headscarf, she was unable to validate a substantial enough “political opinion” to base her asylum claim on).

⁸⁵ *Fatin*, 12 F.3d at 1240.

⁸⁶ *In Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

color, or kinship ties,” or a “shared past experience” like “former military leadership”.⁸⁷

However, these larger innate categories do not satisfy the “particular social group” requirement alone.⁸⁸ Other characteristics that limit the number of individuals within the group must be paired with these larger innate categories.⁸⁹ Additionally, the specifics of the characteristics that meet the category of a social group must be assessed on a case-by-case basis.⁹⁰ Due to the vague and intentionally open-ended definition given for what sorts of claims actually fall within the category of a “particular social group,” this definition gives little guidance to subsequent adjudicators.⁹¹ As a result, women have little security in predicting whether their asylum claims will succeed.⁹²

B. Gender in Asylum Law – Specific Examples

Even when a woman is able to mold her claim into either of the two aforementioned categories, she is not always guaranteed success.⁹³ The differences in the success of cases resting on almost identical facts demonstrates the deficiencies of the present asylum system.⁹⁴ Specifically, the discrepancies in the success rate of cases involving (i) Iranian women with Shari’a based gender persecution claims, and (ii) Female Genital Mutilation claims, further illustrate the internal inconsistencies in US asylum law.

i. Iranian Women with Shari’a Based Gender Persecution Claims

The alternate outcomes reached by courts with respect to women fleeing repressive religious nations illustrates the lack of congruity between courts’ interpretations of what constitutes a well proven “political opinion” or membership to a “particular social group.”⁹⁵ If GBP was a

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Avery, *supra* note 77.

⁹¹ *Id.*

⁹² *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994) (narrowly overturning the lower court’s decision, illustrating the inconsistency in gender based asylum claims). Part III.B. illustrates the difficulty of molding gender specific claims into the particular social group ground.

⁹³ *See supra* Part.III.A.

⁹⁴ *Dieng v. Holder*, 698 F.3d 866 (6th Cir. 2012); *contra In Re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

⁹⁵ UN Convention, *supra* note 41. The Convention was adopted by the United

sufficient basis for asylum claims, much of the unresolved confusion that exists with respect to gender-based asylum claims, both for asylum applicants and granting officers, would be resolved.⁹⁶

A study of asylum claims by three similarly situated Iranian women, all decided within three years of one another (1994–1996) by the INS, but denied relying on different doctrines, leads to the conclusion that the discrepancy in granting asylum claims to women amounts to a concern.⁹⁷ The cases of *Safaie v. INS*,⁹⁸ *Fatin v. INS*,⁹⁹ and *Fisher v. INS*,¹⁰⁰ are all significant for they explain the legal hoops women must jump through to establish that they qualify for asylum within the existing framework.

In *Safaie*, the applicant claimed that “Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them,” constitute a particular social group.¹⁰¹ The court deemed the category to be overbroad, “because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.”¹⁰² This was the court’s determination, despite recognizing the fact that the widespread detention of women was “an attribute of the Khomeini regime.”¹⁰³ The court required *Safaie* to construct her group more narrowly, to which she proposed the group of: “Iranian women who advocate women’s rights or who oppose Iranian customs relating to dress and behavior.” The court found this group might share sufficient immutable characteristics to constitute a particular social group.¹⁰⁴ However, the court then held that because *Safaie* did not display “some missionary fever” in opposition to the customs and behavior requirements, she was not able to show that she was a member of the group, or that complying with the gender-discriminatory laws would be “so profoundly abhorrent that it could aptly be called persecution.”¹⁰⁵

Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held in Geneva from July 2 to July 25, 1951, and entered into force on April 22, 1954.

⁹⁶ See Marian Kennady, *Gender-Related Persecution and the Adjudication of Asylum Claims: is a Sixth Category Needed?*, 12 FLA. J. INT’L L. 317 (1998); see also Priscilla Warren, *Women Are Human: Gender-Based Persecution Is a Human Rights Violation Against Women*, 5 HASTINGS WOMEN’S L.J. 281, 290 (1994).

⁹⁷ Kennady, *supra* note 96.

⁹⁸ *Safaie*, 25 F.3d 636 (8th Cir. 1994) (overturned by statute on different grounds, related to the voluntary departure of the applicant from the receiving/granting nation).

⁹⁹ *Fatin*, 12 F.3d 1233.

¹⁰⁰ *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

¹⁰¹ *Safaie*, 25 F.3d at 640.

¹⁰² *Id.*

¹⁰³ *Id.* at 639.

¹⁰⁴ *Id.* at 640.

¹⁰⁵ *Id.*

Even when women in an entire nation might face detention if they advocate for women's rights and refuse to comport with the restrictive clothing and custom requirements of the regime, the court hesitates to deem this a sufficient ground for asylum, because the particular social group must be sufficiently narrow yet still result in the persecution.¹⁰⁶ In so holding, the *Safaie* court emphasizes the necessity of a case-by-case adjudication.¹⁰⁷ It also illustrated the paradoxically challenging task of an applicant to craft a sufficiently narrowly PSG yet still proving that she belongs to the group.¹⁰⁸

In *Fisher*, the court found that despite the applicant having already been subject to harsh interrogation and held in prison for several hours for violating the Shari'a headscarf requirement, she could not be granted asylum on account of her religious¹⁰⁹ and political¹¹⁰ beliefs.¹¹¹ The *Fisher* court explicitly stated that "because Fisher has demonstrated only persecution on account of her sex, not persecution on account of her religious or political beliefs, she has failed to carry her burden under *Ghaly*."¹¹² The court further noted that "Persecution on account of sex is not included as a category allowing relief under section 101(a)(42)(A) of the Act."¹¹³ Thus, the court recognizes that despite the fact that the applicant would have undoubtedly been successful under a positive gender-based asylum regime, her religious and political based claims were insufficient basis for asylum.¹¹⁴

It has often been noted, in opposition to expanding asylum law to include gender-based claims, that the current grounds for asylum are sufficient to account for gender-based claims.¹¹⁵ The *Fisher* court's rationale in dismissing Fisher's claim rebuts this argument in its assertion

¹⁰⁶ *Id.* at 640.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Fisher*, 79 F.3d at 962 (describing her religious belief as a disapproval for the way the Iranian government practiced and enforced the Islamic religion, which she claimed was contrary to how she intended to practicing the religion).

¹¹⁰ *Id.* at 960 (defining her political belief as the belief that women are entitled to freedom of political speech, particularly describing her anti-Khomeini regime political beliefs as evidence for this claim).

¹¹¹ *Id.*

¹¹² *Id.* at 963.

¹¹³ *Id.*

¹¹⁴ *Fisher*, 79 F.3d at 963.

¹¹⁵ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; see also *Welfare Reform-Treatment of Legal Immigrants-Congress Authorizes States to Deny Public Benefits to Noncitizens and Excludes Legal Immigrants from Federal Aid Programs.-Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 110 HARV. L. REV. 1191, 1191-92 (1997).

that the sole reason Fisher's claim was not granted was because GBP is not a recognized ground for asylum.¹¹⁶ In granting race and religious based claims but failing to recognize gender-based claims as a basis for asylum, the court effectively discriminates against gender despite conceding harmful effects of this discriminatory practice on women.¹¹⁷

Finally, in *Fatin v. INS*, the court chronicles the acrobatics Iranian women, and women in general, must perform in order to succeed in gender-based asylum claims.¹¹⁸ This case illustrates the dilemma women face when crafting their asylum claims on the basis of "political opinion."¹¹⁹

In *Fatin*, the court considered two possible "political opinions" that the applicant could have alleged, yet found both to be insufficient to validate her asylum claim.¹²⁰ First, the court determined that if Fatin *broadly* described her political opinion as "feminism," she would meet the first and second criteria for a showing of political opinion, yet a claim under such a broad political opinion would fail on the third criterion.¹²¹ The court found the political opinion lacking because it was impossible for Fatin to show that "Iranian feminists are generally subjected to treatment so harsh that it may accurately be described as 'persecution.'"¹²² The court dismissed Fatin's claim despite believing her statement that if she was deported back to Iran she would be "jailed or punished in public" by whipping or stoning because of her feminism.¹²³

The court then proposed a second political opinion Fatin could have alleged as her basis for asylum, yet also dismissed that opinion as insufficient to amount to a granting of asylum.¹²⁴ The court suggested Fatin could plead a more *narrow* political opinion, specifically, "the opinion that Iran's gender-specific laws and repressive social norms must be disobeyed on grounds of conscience."¹²⁵ However, here the court found that because of the narrowness of this political opinion, the applicant would not be able to establish element two—that she actually held that

¹¹⁶ *Fisher*, 79 F.3d 955.

¹¹⁷ *Id.*

¹¹⁸ *Fatin*, 12 F.3d 1233.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.* at 1242 (finding that first, she sufficiently categorized the political opinion she was alleging in this scenario as "feminism," and second, that she was able to show she held this political opinion).

¹²² *Id.* at 1237.

¹²³ *Fatin*, 12 F.3d at 1236.

¹²⁴ *Id.* at 1244.

¹²⁵ *Id.* at 1243.

opinion.¹²⁶ This was the case even though Fatin swore that if she were to go back, she would “try personally to avoid [wearing the headscarf] as much as [she] could do.”¹²⁷ This case establishes the drastic measures an asylum applicant is required to take to establish that she in fact possesses the political opinion alleged.¹²⁸ As evinced by the *Fatin* court’s reasoning, a woman is faced with two options.¹²⁹ She may broadly characterize her political opinion and face the likely possibility that she will be unable to establish persecution as a result of this opinion.¹³⁰ Conversely, she may narrowly define her political opinion, yet face the likely outcome that she will be unable to show that she has or will take sufficiently severe measures to establish that she meets this narrow definition.¹³¹

ii. *Female Genital Mutilation as a Basis for Asylum*

Female genital mutilation (hereinafter “FGM”) has been recognized by immigration courts as a cause of serious harm for women, particularly in countries like Ethiopia¹³² and Togo¹³³ with high rates of the practice.¹³⁴ However, in countries like Senegal, despite a relatively high rate of women subject to FGM (twenty percent), courts have generally been hesitant to find a “well-established” fear of persecution due to the threat of FGM.¹³⁵ To make matters worse for individuals seeking asylum to escape the practice of FGM in their home nations, the asylum applicant is generally an adult, and courts deem an adult female as less susceptible to

¹²⁶ *Id.* at 1244.

¹²⁷ *Fatin*, 12 F.3d at 1236.

¹²⁸ See generally *id.* (determining that Fatin’s claim – that she would attempt to avoid wearing the headscarf and avoid the other Islamic-imposed restrictions on a woman’s behavior – was insufficient to show she actually held the political opinion alleged in her claim. The court did not clarify the measures women were required to take in order to meet this requirement. One wonders whether a woman would be required to actually go back to her oppressive home nation, break that country’s laws, and face physical punishment (possibly including being “whipped” and having “stones” thrown at her) in order to prove she actually holds the political opinion she alleges, as was the case in *Fatin*.)

¹²⁹ *Id.* at 1242–43.

¹³⁰ *Id.* at 1242.

¹³¹ *Id.*

¹³² *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir.2004) (reporting rates of female genital mutilation (FGM) in over 90% of women in Ethiopia).

¹³³ *In Re Kasinga*, 21 I. & N. Dec. 357 (finding that “as many as 50% of Togolese females may have been mutilated” by FGM).

¹³⁴ *Niang v. Gonzales*, 492 F.3d 505, 509 (4th Cir. 2007).

¹³⁵ Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC), U.S. Dep’t of State (July 1, 2001); 2007 Country Reports on Human Rights Practices—Senegal, U.S. Dep’t of State (released on Mar. 11, 2008).

FGM than younger women, who are generally too young to seek asylum on their own.¹³⁶

As a result, the applicant generally seeks asylum due to a well-founded fear that her daughters will be subjected to FGM if the family is required to return.¹³⁷ Because the applicant is not the young daughter herself, but usually her mother or both parents, courts have generally raised prudential standing concerns when evaluating these claims.¹³⁸ Current asylum law requires the *applicant* herself to have a well-founded fear of persecution on account of the statutory ground (which tends to be “particular social group” in the case of FGM claims).¹³⁹ As a result, the applicant typically struggles to show that a fear of her daughter being subjected to FGM upon returning to the home nation stems from the *applicant’s* membership to a particular social group.¹⁴⁰

Therefore, despite the fact that on its face, FGM “involves the infliction of grave harm constituting persecution on account of membership in a particular social group that can form the basis of a successful claim for asylum,” women continue to experience difficulties in asylum claims on the basis of a well-grounded fear of FGM.¹⁴¹ The primary obstacle in these claims is not establishing the statutory basis, but establishing a well-grounded fear of persecution “on account of” that basis.¹⁴² The following cases illustrate the complexities of establishing a well-grounded fear on account of a social group that practices FGM, and in establishing membership in that group.¹⁴³

In *Dieng v. Holder*,¹⁴⁴ the court held that while membership to a social group practicing FGM can constitute a particular social group, the applicant in this case was unable to establish a well-founded fear of persecution on account of membership to this particular social group.¹⁴⁵ In *Dieng*, the particular social group alleged was the “Fulani ethnic group.”¹⁴⁶ Despite the fact that in Senegal (the applicant’s home nation), “approximately twenty percent of the female population” had undergone FGM, the applicant was deemed not to have a well-founded fear of FGM

¹³⁶ See e.g., *Dieng*, 698 F.3d 866.

¹³⁷ *Id.*

¹³⁸ Specifically, that of third-party standing.

¹³⁹ See generally, UN Convention, *supra* note 41.

¹⁴⁰ Generally, the particular social group claimed is that of a specific tribe with high rates of FGM.

¹⁴¹ *Abay*, 368 F.3d at 638.

¹⁴² *Id.* at 636.

¹⁴³ See *infra* Part.III.

¹⁴⁴ *Dieng*, 698 F.3d 866.

¹⁴⁵ *Id.* at 868.

¹⁴⁶ *Id.*

because she was twenty-five-years-old, which the court deemed too old to likely be subjected to FGM.¹⁴⁷ Additionally, even though the applicant's sister died at the age of three from an infection caused by FGM, the court ruled that the applicant's fears of persecution by FGM "were based on unsubstantiated conjecture and further ruled that they were not eligible for asylum on a derivative basis."¹⁴⁸

In response to the court's rejection of her claim based on her own fear of persecution, Dieng claimed that her family members in Senegal would subject her two young daughters to FGM if the court deported her family to Senegal.¹⁴⁹ The court addressed each of her daughters separately and stated that because one was a United States citizen, this daughter could stay in this country on her own or with a distant relative, despite the fact that this daughter was only one-year-old at the time they filed suit.¹⁵⁰ With respect to the second daughter, the court determined that because the family could locate to another area in Senegal with lower rates of FGM, the family's fear of persecution based on the risk of FGM was not sufficiently "well-founded."¹⁵¹

In ruling that Dieng and her husband could not be granted asylum to protect their daughters from FGM, the court failed to protect women from real threats of FGM, merely because there were other (very attenuated and difficult) means of escaping the looming threat of FGM.¹⁵²

In the case of *In re Kasinga*,¹⁵³ the court ruled contrarily to the *Dieng* court.¹⁵⁴ In this case, the court granted the applicant's asylum claim on the basis of a well-founded fear of persecution based on FGM.¹⁵⁵ Several factors distinguish the two cases, yet ultimately these cases with relatively similar facts came out differently.¹⁵⁶ First, the applicant in *Kasinga* was 19-years-old, which the court accepted as a reasonable age to potentially be subjected to FGM (while the twenty-five-year-old woman in *Dieng* was found to be too old to be subjected to FGM).¹⁵⁷ Assuming that this is a valid distinction, the courts also ruled differently due to the country of

¹⁴⁷ *Id.* at 870.

¹⁴⁸ See generally, ASYLUM CASE LAW SOURCEBOOK, § 2:82 (13th ed.).

¹⁴⁹ 698 F.3d 866 (6th Cir. 2012).

¹⁵⁰ *Id.* at 868.

¹⁵¹ *Id.* at 870.

¹⁵² See ASYLUM CASE LAW SOURCEBOOK, *supra* note 148; *Dieng*, 698 F.3d at 871.

¹⁵³ *In re Kasinga*, 21 I. & N. Dec. 357.

¹⁵⁴ See *id.* at 368 (granting the applicant's asylum claim on the basis of a well-founded fear of FGM).

¹⁵⁵ See *id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Dieng*, 698 F.3d at 869.

origins of the applicant.¹⁵⁸ While *Kasinga* was from Togo, a country where fifty percent of the women are subject to FGM, the rates of FGM in Dieng's home nation, Senegal, were twenty percent.¹⁵⁹

Arguably these minor distinctions are what accounted for opposite verdicts in these very similar cases.¹⁶⁰ However, because these distinctions are so minor, it is more likely that they reflect a larger pattern of inconsistency in granting women's gender-based asylum claims, particularly with respect to FGM claims.¹⁶¹

Currently, the convoluted understanding of the "particular social group" and "political opinion" definitions are stretched, warped, and ultimately misinterpreted by courts. If instead, GBP was a stand-alone ground, asylum adjudicators would have the benefit of understanding what makes a gender-based asylum claim viable.¹⁶²

First, because the statutory ground would be GBP, Iranian women would be able to more easily establish that the persecution they face is on account of their gender, a fact undisputed by the *Safaie* and *Fisher* courts. Women would no longer face the *Fatin* problem of walking the fine line between an opinion that is too broad to qualify or a narrowly defined opinion that makes it difficult to prove a sincere belief in. Instead, as long as the woman is able to show that in her home nation she faces a well-founded fear on account of her gender, she would qualify for asylum. In turn, the difficulty asylum adjudicators face in attempting to see the often fine, almost non-existent distinctions between successful and unsuccessful cases would no longer appear in the GBP context.

Second, because the statutory ground would be the GBP itself, the applicant (irrespective of whether she was applying on behalf of herself or of her daughter) would be able to show that she has a well-founded fear of harm on account of the GBP.¹⁶³ In the context of FGM, an applicant applying for herself could establish a well-founded fear of harm (here, being mutilated) on account of GBP generally.¹⁶⁴ Therefore, she would not have to face the difficulties (and inconsistencies) that arise from finding statistics from the country of origin and establishing that the country's rates are sufficiently high to meet the standard of "well-founded."¹⁶⁵ In the

¹⁵⁸ *Id.*

¹⁵⁹ *In re Kasinga* 21 I. & N. Dec. 357.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Meghan Casey, *Refugee Women As Cultural Others: Constructing Social Group and Nexus for FGM, Sex Trafficking, and Domestic Violence Asylum Claims in the United States*, 10 SEATTLE J. SOC. JUST. 981 (2012).

¹⁶³ *Id.*

¹⁶⁴ *Dieng*, 698 F.3d 866.

¹⁶⁵ *Id.* at 868.

case of an applicant filing for asylum to protect her daughter from FGM, she would similarly be able to show that her fear for her daughter's subjection to FGM is on account of the GBP that her daughter would face if the family were sent back to their home nation.¹⁶⁶

IV. EXPANDING INTERNATIONAL REFUGEE LAW TO INCLUDE GBP

Because of the international and national failure to recognize gender as a sufficient basis for asylum, women are required to carefully craft their asylum claims so as to meet, but not disturb, current asylum law.¹⁶⁷ Among the many proposed solutions to this problem, the following two are preferred.¹⁶⁸

A. Gender as a Social Group

The first proposal is to consider gender a recognized social group *per se*, thereby eliminating one step in the asylum process for a woman making a gender-based claim; yet she would still have to establish a *well-founded fear* of persecution *on account of* this ground.¹⁶⁹ This solution is less dismissive of existing case law, yet does not resolve the problem of uncertainty in the law.¹⁷⁰ Under this theory, the gender of an individual would be understood as a particular social group, and in that way, once a woman is able to establish that she has a well-founded fear due to her membership in a particular social group, i.e., her membership in the "women" social group, she could then receive asylum.¹⁷¹

However, this theory fails to account for the fact that United States courts have consistently required a social group to be exceedingly specific for it to meet the category of protected "particular social group."¹⁷² In the case of *Fatin v. INS*¹⁷³ for example, groups like "Iranian women," or "Iranian women who hold feminist views," or even a group as specific as "Iranian women who find the Iranian government's gender-specific laws

¹⁶⁶ *Id.* at 868-69.

¹⁶⁷ Molly Stark, *Derivative Asylum Claims in the FGM Context: Protecting Family Unity and Women's Rights in the New Millennium*, 83 U. DET. MERCY L. REV. 543 (2006).

¹⁶⁸ See *infra* Part.IV.A and Part.IV.B

¹⁶⁹ Lisa C. Chan, *Everything in Moderation: Why Any Gender Nexus Under U.S. Asylum Law Must Be Strictly Limited in Scope*, 29 B.U. INT'L L.J. 169, 172 (2011).

¹⁷⁰ See *id.* at n.162.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Fatin*, 12 F.3d 1233.

and repressive social norms objectionable or offensive” have all been found to be too broad.¹⁷⁴

Instead, an example of a “particular social group” that courts have found to be sufficiently specific is “Iranian women who find [the Iranian government’s] laws so abhorrent that they refuse to conform – even though . . . the routine penalty for noncompliance is 74 lashes, a year’s imprisonment, and in many cases brutal rapes and death.”¹⁷⁵ Clearly, the category “women” is far broader than what is deemed acceptable by courts as a sufficiently specific social group.¹⁷⁶

Additionally, even if gender were recognized as a “particular social group” *per se*, a woman seeking asylum under that theory would still have to establish a well-founded fear of persecution due to membership in that social group.¹⁷⁷ The more specific the social group, the easier it is to show a well-founded fear of persecution due to the membership in that group.¹⁷⁸ Conversely, the broader the social group, the more difficult it is to show a well-founded fear due to membership in that group.¹⁷⁹ Therefore, under current United States case law, even if “gender” were to be understood as a particular social group, establishing a well-founded fear due to a woman’s gender would be an arduous, and possibly impossible, task.

B. Gender-based Persecution as a Distinct Ground for Asylum

It has been proposed that instead of working within the five recognized statutory ground for asylum, a sixth category should be added to account for gender-based harms.¹⁸⁰ The second theory accounts for the dilemma caused by the first theory.¹⁸¹ Succinctly: GBP should be a sufficient ground for asylum *per se*.¹⁸²

By allowing GBP to stand on its own as a valid ground for asylum, a woman faced with gender specific violence in her original country (e.g., female genital mutilation, oppressive religious laws that devalue a woman’s status, femicide, mass-rape) could apply for asylum under a GBP theory.¹⁸³ The problem that arises from broadly defining a social group

¹⁷⁴ *Id.* at 1241.

¹⁷⁵ *Id.* (internal quotation marks omitted).

¹⁷⁶ *Id.*

¹⁷⁷ Gender Guidelines, *supra* note 60.

¹⁷⁸ *Id.*

¹⁷⁹ *See generally*, UN Convention, *supra* note 41.

¹⁸⁰ *Id.*

¹⁸¹ Kennady, *supra* note 96.

¹⁸² *Id.*

¹⁸³ Esperanza Hernandez-Truyol, *supra* note 28.

and being unable to show a well-founded fear of persecution due to that broad group does not exist under this theory.¹⁸⁴ With GBP as the recognized statutory ground, showing a well-founded fear of persecution is easy, in fact almost entirely accounted for after showing that the GBP exists.¹⁸⁵

C. Arguments Against Expanding Asylum Theory and Counterclaims

The two most common arguments raised against including GBP as a ground for asylum are the “floodgates” and “slippery slope” arguments.¹⁸⁶ The floodgates argument, which essentially holds that if GBP were recognized as a sufficient basis for asylum, applicants would “flood” into the United States to seek protection (and, as is generally proposed by individuals raising this argument, these applicants would then take jobs and resources away from United States citizens).¹⁸⁷

The most simple and valid refutation to this claim is the example of Canada.¹⁸⁸ Despite the fact that Canada included gender as a sufficient legal ground for asylum in March 1993, the nation has experienced only a nominal amount of applications, and even fewer acceptances.¹⁸⁹ In the three years after adding its gender ground, Canada received a mere 1,134 gender-based asylum claims and only recognized 624 of those claims.¹⁹⁰

Additionally, the ground proposed in this note is gender-based *persecution* as opposed to merely *gender*.¹⁹¹ Given that establishing GBP is necessarily more difficult than establishing “gender” claims for asylum in the United States will be restricted to a fewer number of women than those in Canada.¹⁹² Therefore, claiming that the “floodgates” would open

¹⁸⁴ UN Convention, *supra* note 41.

¹⁸⁵ *Id.*

¹⁸⁶ See 110 Stat. 2105; see also *Welfare Reform*, *supra* note 115.

¹⁸⁷ See generally 110 Stat. 2105.

¹⁸⁸ See Anne M. Gomez, *The New INS Guidelines on Gender Persecution: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Policies of the People's Republic of China*, 21 N.C. J. INT'L L. & COM. REG. 621, 638 (1996).

¹⁸⁹ Ramirez, *supra* note 64; see also DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 268, n.9 (Refugee Law Center, 3d ed. 1999).

¹⁹⁰ *Id.* at 254, n.405.

¹⁹¹ See *infra* Part.IV.A.

¹⁹² Bahl, *supra* note 29 (“to accept women or gender as a social group would not result in a dilution of the definition of refugee or the boundaries of the particular social group category. Asylum is an individual, not a group, remedy”).

if the basis for asylum were expanded to include gender-based persecution is not a well-founded argument.¹⁹³

It has also been alleged that including GBP as a basis for asylum would lead to a “slippery-slope” of including many other grounds for asylum.¹⁹⁴ This is not likely to happen for two reasons. First, gender is considered as a potential ground for asylum due to its breadth, which few other categories could reach.¹⁹⁵ Because gender affects every human being (or about fifty percent of the population if speaking directly about women’s gender-based claims), it is unlikely that any issue will reach the level of relevance that gender has reached in asylum claims.¹⁹⁶

Second, because the applicant would still have to establish the other requirements for a successful asylum claim, particularly, a well-founded fear due to that ground, it is highly unlikely for courts to be able to grant asylum claims based on “frivolous” categories.¹⁹⁷ The applicant still must be able to show that the ground on which she seeks asylum is in fact the cause of her well-founded fear.¹⁹⁸ Therefore, neither of these counter arguments carries merit.¹⁹⁹

CONCLUSION

Recent victories in gender-based asylum cases fall short of being substantial. In *Matter of A-R-C-G-* the Board of Immigration Appeals held “married women in Guatemala who are unable to leave their relationship” can constitute a valid particular social group (PSG).²⁰⁰ The court did not find that this class would receive asylum *per se*, nor did it find that this would be a valid PSG *per se*.²⁰¹ Instead, this case was a “victory” only in

¹⁹³ *Id.*

¹⁹⁴ *Campos-Guardado v. INS*, 809 F.2d. 285 (5th Cir. 1987).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Kelly, Guidelines, *supra* note 60, at 816, n.22.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (2014).

²⁰¹ *Id.* at 349–95 (On the question of social distinction, a trait each qualifying PSG must possess, the court emphasized the individual nature of the adjudication that must take place in each case. It stated “even within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information.”).

that it allowed for claims from this category of women to potentially be granted asylum.²⁰²

To mend the discrepancy in granting gender-based asylum claims, a sixth category should be added to the current five recognized statutory grounds for asylum.²⁰³ The current problem with international and United States asylum law is evinced by the difficulties Iranian women face escaping sexually discriminatory laws in creating successful asylum claims, due primarily to the inherent paradox claims based on political opinion and social group pose.²⁰⁴ The inadequacy of the current asylum system is further illustrated by the lack of congruity in the adjudication of female genital mutilation claims with similarly situated applicants.²⁰⁵ To resolve these problems, GBP should be included in international and United States law as a sufficient ground for asylum.²⁰⁶

²⁰² *Id.*

²⁰³ See Roberta O. Bresnick, Reproductive Ability as a Sixth Ground of Persecution Under the Domestic and International Definitions of Refugee, 21 SYRACUSE J. INT'L L. & COM. 121, 125 (1995); see also Kennady, *supra* note 96.

²⁰⁴ See *supra* Part.III.A.

²⁰⁵ See *supra* Part.III.B.

²⁰⁶ See *supra* Part.IV.

