
COMMENT

HOPE FOR THE FUTURE? THE ASYLUM CLAIMS OF WOMEN
FLEEING SEXUAL VIOLENCE IN GUATEMALA

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INTRODUCTION

More than 3800 women in Guatemala have been murdered since 2001,¹ often following rape or sexual mutilation.² And while crime in

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Guatemala has generally been on the rise in recent years, the murder rate of women has gone up at a rate nearly twice that of men.³ These murders are often described as “femicides,” both due to the “misogynistic brutality” with which they are carried out and because the victims’ gender provides their only unifying characteristic.⁴ Though the gruesome circumstances and devastating results make it particularly alarming, femicide is only one of many types of violence facing women in Guatemala. In the first nine months of 2007, there were approximately 1800 reported complaints of domestic violence, although the actual number is likely higher due to significant underreporting.⁵ Reports of rape have also risen thirty percent over the last four years.⁶ Altogether, the pervasive problem of gender-based violence in Guatemala has created among its female citizens a “widespread perception of insecurity.”⁷

Femicide, domestic violence, and sexual assault in Guatemala are interrelated problems representing many faces along a “continuum of gender-based violence.”⁸ All arise from the same root problems: first, a culture that devalues and subordinates women, as manifested by anachronistic criminal laws and gender-based discrimination in the home and workplace; and, second, widespread impunity for crimes against women that traces from the country’s thirty-six-year civil war. Under the circumstances, it is far from surprising that many Guatemalan women have given up relying on the Guatemalan authorities for protection, but rather have fled their homes, seeking asylum in countries such as the United States.⁹

In the United States, an individual may be granted asylum if she qualifies as a “refugee,” which requires (1) a well-founded fear of persecution (2) by the government or an individual that the government

¹ See *infra* note 60 and accompanying text.

² See *infra* note 64 and accompanying text.

³ See *infra* note 62 and accompanying text.

⁴ Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y & L. 119, 137 (2007).

⁵ See *infra* notes 57-58 and accompanying text.

⁶ See *infra* note 70 and accompanying text.

⁷ Press Release, Inter-Am. Comm’n on Human Rights, The IACHR Special Rapporteur Evaluates the Effectiveness of the Right of Women in Guatemala to Live Free from Violence and Discrimination, No. 20/04, ¶ 30 (Sept. 18, 2004), available at <http://www.cidh.org/women/Press20.04.htm> [hereinafter IACHR].

⁸ ADRIANA BELTRÁN & LAURIE FREEMAN, WASH. OFFICE ON LATIN AM., HIDDEN IN PLAIN SIGHT: VIOLENCE AGAINST WOMEN IN MEXICO AND GUATEMALA 11 (2007).

⁹ See Musalo, *supra* note 4, at 139.

is unable or unwilling to control (3) on account of (4) race, religion, nationality, membership in a particular social group, or political opinion.¹⁰ In principle, women are eligible to receive asylum within this framework to the same extent as men.¹¹ However, a number of obstacles have confronted women who seek asylum from gender-based harm.¹² Most prominently, gender is not one of the characteristics included in the asylum statute as expressly warranting protection.¹³ Thus, applicants for asylum fleeing gender-based harm are forced to characterize their claims to fit into one of the five recognized categories—most often membership in a particular social group.¹⁴ Because of pervasive attitudes among United States decision makers that gender alone cannot constitute a particular social group—largely out of fear that such an allowance would make half of a country's population eligible for asylum—applicants have felt constrained to describe their

¹⁰ See Immigration and Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

¹¹ See *infra* note 110.

¹² The Office of the United Nations High Commissioner for Refugees (UNHCR) recognizes gender-based harm as including, but not limited to, “acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.” UN High Comm. For Refugees [UNCHR], *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 3, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR, *Gender Guidelines*].

¹³ The absence of this category has received considerable attention by commentators. See, e.g., Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN'S L.J. 221, 221 (2000) (arguing that it is “urgently necessary to add a gender category to the international and U.S. definitions of refugee” (emphasis omitted)); Jenny-Brooke Condon, Comment, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 208 (2002) (asserting that “without a category of asylum protection based on gender, women confront contradictory conceptions of their experiences as either too narrow or too broad to qualify them as refugees”); Marissa Farrone, Comment, *Opening the Doors to Women? An Examination of Recent Developments in Asylum and Refugee Law*, 50 ST. LOUIS U. L.J. 661, 689 (2006) (“The most straightforward way for the United States to demonstrate its commitment to women's human rights in refugee law would be to establish sex and sexual identity as independent bases for asylum.”). But see Deborah Anker, *Refugee Status and Violence Against Women in the “Domestic” Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391, 393 (2001) (rejecting the notion that a specific “gender” category should be added to the refugee definition and finding that the “appropriate analysis [of women's claims] fits within traditional refugee law”).

¹⁴ See, e.g., *In re R-A-*, 22 I. & N. Dec. 906, 911 (B.I.A. 1999) (illustrating respondent's claim of persecution through domestic violence on account of her membership in a particular social group), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008); *In re Kasinga*, 21 I. & N. Dec. 357, 365-66 (B.I.A. 1996) (claiming persecution through female genital mutilation (FGM) based on her membership in a particular social group).

claims in terms of extremely narrow subsets of women.¹⁵ Gender alone, however, is often the single factor linking the persecution to the protected ground, both motivating the persecutor to harm the victim and accounting for the failure of the victim's state to adequately protect her. Thus, these applicants face the paradox of defining their particular social group very narrowly only to render nearly impossible their ability to establish the required causal nexus between the persecution and their narrowly defined particular social group.¹⁶

Asylum claims of women fleeing gender-based violence in Guatemala are not new to United States immigration authorities. On June 11, 1999, the United States Board of Immigration Appeals (BIA) decided *In re R-A*,¹⁷ one of the most controversial gender-based asylum cases in United States history.¹⁸ The petitioner, Rodi Alvarado, fled Guatemala in 1995 after suffering years of physical and sexual abuse at the hands of her husband.¹⁹ He raped her repeatedly, beating her before and after; kicked her genitalia, causing her to bleed for eight days; forcefully sodomized her; pistol-whipped her; and violently kicked her in the spine when she refused to abort their fetus.²⁰ When she protested, he often responded, "You're my woman, you do what I say,"²¹ or "I can do it if I want to."²²

Despite her pleas, the Guatemalan police would not or could not help Alvarado.²³ On three occasions her husband was summoned, but he failed to appear and the police took no further action.²⁴ Twice the police did not respond at all to her calls for help, and a judge told Alvarado that he would not intervene in domestic disputes.²⁵ Her husband insisted that calling the police was futile because of his connec-

¹⁵ See, e.g., *In re R-A*, 22 I. & N. Dec. at 911 (defining the respondent's particular social group as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination"); *In re Kasinga*, 21 I. & N. Dec. at 365 (defining the applicant's particular social group as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice").

¹⁶ Condon, *supra* note 13, at 208.

¹⁷ 22 I. & N. Dec. at 906.

¹⁸ See *infra* note 40 and accompanying text.

¹⁹ *In re R-A*, 22 I. & N. Dec. at 908-09.

²⁰ *Id.*

²¹ *Id.* at 908.

²² *Id.* at 909.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

tions with them through military service.²⁶ Alvarado knew of no shelters or organizations that could help her, so she fled to the United States and sought asylum.²⁷

Alvarado based her asylum claim on the past persecution that she had suffered at the hands of her husband and on the failure of the Guatemalan government to protect her.²⁸ Alvarado claimed that she was persecuted as a member of a particular social group composed of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination,”²⁹ and for the related imputed political opinion that she was against control and domination by men.³⁰ An Immigration Judge (IJ) found her credible and agreed with the legal basis of her claim, granting her asylum.

On appeal by the government, however, the BIA reversed the IJ, finding that Alvarado was ineligible for asylum.³¹ The BIA agreed that Alvarado had a well-founded fear of persecution and that Guatemala was unable or unwilling to protect her from her husband.³² Nonetheless, it held that she failed to demonstrate any of the characteristics protected by the statute³³ or, even if she did, that her husband had persecuted her “on account of” these categories.³⁴ The BIA concluded that Alvarado’s husband had harmed her “regardless of what she actually believed or what he thought she believed,”³⁵ and that her claimed social group was neither visible nor important in Guatemalan society³⁶—much less the cause of her husband’s behavior.³⁷ Accordingly, Alvarado was ordered to return to Guatemala—a country that the Board recognized was unable and unwilling to meaningfully assist

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 911.

²⁹ *Id.*

³⁰ *Id.* at 916.

³¹ *Id.* at 927.

³² *Id.* at 914.

³³ *Id.* at 917, 920.

³⁴ *Id.* at 923.

³⁵ *Id.* at 914.

³⁶ *Id.* at 918-19.

³⁷ *Id.* at 923. The BIA found it significant that Alvarado had not shown that her husband targeted any other Guatemalan women—even those who also opposed male domination. *Id.* at 917.

her³⁸—to face her husband’s threat that he was “going to hunt her down and kill her if she [came] back.”³⁹

In re R-A- was immediately followed by a flurry of intense criticism for being inconsistent with BIA precedent and contrary to both United States and international guidelines on the evaluation of gender-based asylum claims.⁴⁰ In December 2000, following intensive advocacy by asylum advocates,⁴¹ the Immigration and Naturalization Service (INS)⁴² issued proposed amendments to the regulations governing asylum to provide “an analytical framework within which gender-related and other new kinds of claims should be considered”⁴³ that “remove[] certain barriers that the *In re R-A-* decision seems to pose.”⁴⁴ Soon after the *R-A-* rule was proposed, former Attorney Gen-

³⁸ *Id.* at 914.

³⁹ *Id.* at 910 (internal quotation marks omitted).

⁴⁰ See, e.g., Deborah E. Anker et al., *Defining “Particular Social Group” in Terms of Gender: The Shah Decision and U.S. Law*, 76 INTERPRETER RELEASES 1005, 1006 (1999) (arguing that in *In re R-A-* the BIA “failed to recognize the pervasiveness of gender discrimination and the ‘firmly entrenched’ and extreme patriarchal beliefs in Guatemala”); Karen Musalo, *Matter of R-A: An Analysis of the Decision and Its Implications*, 76 INTERPRETER RELEASES 1177, 1185 (1999) (“*Matter of R-A-* represents a substantial setback in gender-based asylum jurisprudence.”); Condon, *supra* note 13, at 230 (finding that “the BIA strikingly confused its analysis of the husband’s motivation with the analysis of whether Guatemala’s [sic] tolerated his conduct—treating the latter as a step in determining the former”); Lindsay A. Franke, Note, *Not Meeting the Standard: U.S. Asylum Law & Gender-Related Claims*, 17 ARIZ. J. INT’L & COMP. L. 605, 624-25 (2000) (arguing that the outcome of *In re R-A-* was inconsistent with United States guidelines for deciding gender-related asylum applications); see also Frederic N. Tulsky, *U.S. Rules Out Spouse Abuse as Grounds for Asylum*, PLAIN DEALER (Cleveland, OH), June 20, 1999, at 12A (reporting that *In re R-A-* drew protests from women’s groups and asylum advocates).

⁴¹ See, e.g., D.M. Osborne, *The Gender Gap: Women Seeking Asylum for Claims Based on Rape or Domestic Violence Still Get a Skeptical Hearing in the U.S.*, AM. LAW., Feb. 2006, at 74, 75 (reporting that advocacy efforts garnered the support of several dozen members of Congress and the submission of amicus briefs from close to one hundred law professors and asylum-advocacy groups).

⁴² The INS became part of the Department of Homeland Security on March 1, 2003. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2192 (codified at 6 U.S.C. § 251 (2006)).

⁴³ Press Release, U.S. Dep’t of Justice (INS), *Questions and Answers: The R-A-Rule* (Dec. 7, 2000), available at http://www.uscis.gov/files/pressrelease/R-A-Rule_120700.pdf; see also *Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588, 76,589 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (proposing amendments to the asylum regulations to address “novel issues . . . [that] the Department has encountered in recent years,” including persecution in the form of domestic violence and other gender-based harm).

⁴⁴ *Asylum and Withholding Definitions*, 65 Fed. Reg. at 76,589. The proposed rules were generally considered a step forward, but not without flaws. See, e.g., Anita

eral Janet Reno, in an unusual move, exercised her authority to review *In re R-A* and stayed Alvarado's case until the BIA could reconsider it under the finalized amendments.⁴⁵

In February 2003, former Attorney General John Ashcroft recertified the decision to himself, prompting fear that the BIA's decision in *In re R-A* would be reinstated and that more restrictive asylum regulations would subsequently be promulgated.⁴⁶ The advocacy efforts of women's rights groups, human rights groups, and refugee rights groups are credited with staying Ashcroft's hand.⁴⁷ Nonetheless, in September 2008—during the waning months of the Bush Administration—Attorney General Michael Mukasey referred the case back to the Office of the Attorney General, lifted the stay, and remanded the case to the BIA.⁴⁸ While not expressly repudiating the proposed amendments, former Attorney General Mukasey noted that the proposed rule “never has been made final” and ordered that, on remand, “[i]nsofar as a question involves interpretation of ambiguous statutory language, the [BIA] is free to exercise its own discretion and issue a precedent decision establishing a uniform standard nationwide.”⁴⁹ Thus, the future of asylum claims based upon domestic violence and other gender-based harm has become even more uncertain.⁵⁰

Sinha, Note, *Domestic Violence and U.S. Asylum Law: Eliminating the “Cultural Hook” for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1562, 1566-67 (2001) (concluding that the proposed rules “perpetuate the misconception that domestic violence is essentially an apolitical, private act”); Condon, *supra* note 13, at 243-48 (arguing that the proposed rule confounds the meaning of “particular social group” through the use of discretionary factors); *see also infra* Part III.

⁴⁵ See Musalo, *supra* note 4, at 125; *see also In re R-A*, 24 I. & N. Dec. 629, 630 (A.G. 2008) (explaining the steps taken by former Attorney General Reno).

⁴⁶ See Musalo, *supra* note 4, at 129-30 (providing a timeline of executive branch actions in Alvarado's case).

⁴⁷ See Angélica Cházaro & Jennifer Casey, *Getting Away with Murder: Guatemala's Failure to Protect Women and Rodi Alvarado's Quest for Safety*, 17 HASTINGS WOMEN'S L.J. 141, 145 (2006) (describing the “concerted campaign” to stop former Attorney General Ashcroft).

⁴⁸ See *In re R-A*, 24 I. & N. Dec. at 630-31.

⁴⁹ *Id.*

⁵⁰ Karen Musalo, Alvarado's attorney and an expert on gender-based asylum, has expressed concern about former Attorney General Mukasey's decision to remand *In re R-A* to the BIA, noting that Mukasey may have been “less sympathetic than his predecessors” to gender-based asylum claims. Press Release, Center for Gender & Refugee Studies, *New Ruling by Attorney General Mukasey May Endanger Rights of Women Asylum Seekers* (Oct. 2008), available at http://cgrs.uchastings.edu/documents/media/press%20release/R-A-Mukasey_press_release_oct_08.pdf; *see also* Julia Preston, *Woman's Asylum Case Sent Back to Review Board*, N.Y. TIMES, Sept. 30, 2008, at A19.

The case of Rodi Alvarado highlights the legal and political struggle over the availability of asylum for women persecuted on account of their gender, in the face of a statutory framework that neither explicitly permits nor excludes such claims. It also exemplifies the crisis faced by women living in countries that are unable or unwilling to protect them from gender-based violence. Guatemala has gained notoriety due to the prevalence of sexual assaults and murders that manifest animus towards women, as well as the impunity with which the perpetrators act.⁵¹ *In re R-A* invigorated a push to open asylum to survivors of domestic violence from countries such as Guatemala.⁵² Though a domestic violence case prompted the proposed *R-A* rule, the rule itself purported to go even further, setting out “generally applicable principles” designed to address some of the “novel issues”—including claims based on the applicant’s gender—that asylum adjudicators had encountered in recent years.⁵³ And, similarly, even if Alvarado’s case ultimately is decided under judge-made law rather than the proposed *R-A* rule, that judge-made law will have implications for other novel issues of gender-based asylum law beyond the domestic violence context.

This Comment addresses one such novel issue: the asylum claims of Guatemalan women fleeing sexual violence—not in the home, as Alvarado did, but in the community—within a society where the devaluation and subordination of women has allowed them to be sexually persecuted without sanction.⁵⁴ The claims at issue are at least as legally and politically tenuous as asylum claims based on domestic violence, because of the prevailing belief that rape is necessarily a private harm, unrelated to membership in a larger group of individuals.

⁵¹ See, e.g., *European Union Blasts Central America Femicides*, NOTICEN (Central Am. & Caribbean), Oct. 18, 2007, available at http://findarticles.com/p/articles/mi_go1655/is_ai_n29381743 [hereinafter *European Union*] (discussing the increase in the murders of women in Guatemala and the lack of sufficient investigation or prosecution); see also Musalo, *supra* note 4, at 137-38 (arguing that the root cause of Alvarado’s asylum claim is Guatemala’s culture of violence against women and the impunity with which it is committed).

⁵² See *supra* notes 41-44 and accompanying text.

⁵³ Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,589 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

⁵⁴ While Guatemala presents the most extreme case, other countries in the region, such as Honduras, El Salvador, and Mexico, also have very high rates of violence against women, including sexual violence. See Cházaro & Casey, *supra* note 47, at 146-47. For example, the brutal murders of over 400 women in Ciudad Juarez, Mexico, since 1993 have received considerable attention from the media and human rights groups. See, e.g., BELTRÁN & FREEMAN, *supra* note 8, at 2.

Rape, however, is widely recognized as a harm amounting to persecution, international norms provide that gender alone can form a particular social group, and the characteristic of being a woman both motivates the persecutor and makes Guatemala unable and unwilling to help the victim, perpetuating a culture of impunity. These claims are no less worthy of asylum than those brought by survivors of domestic violence such as Rodi Alvarado.

Part I of this Comment provides an overview of the many facets of violence against women in Guatemala and their shared root causes. Part II assesses the treatment of gender-based asylum claims under both United States law and international refugee norms. This Part concludes that, while international norms suggest that women fleeing sexual violence in Guatemala should be eligible for asylum, these claims are unlikely to succeed under current United States asylum law. Notwithstanding the recent remand of *In re R-A-* to the BIA, Part III argues that the *R-A-* rule should still be finalized, but with certain modifications. Part IV addresses the primary counterargument to expanding the availability of asylum for gender-based claims—the fear of opening the asylum floodgates—contending that such fears are unwarranted and unprincipled. Finally, this Comment concludes that women fleeing sexual violence in Guatemala should be eligible for asylum because they are persecuted on account of their membership in a particular social group composed of Guatemalan women. This Comment ultimately recognizes, however, that their hope for asylum will require a shift in United States asylum law that brings the United States into step with the international community.

I. VIOLENCE AGAINST WOMEN IN GUATEMALA

Rodi Alvarado's tragic circumstances are far from unique in Guatemala, where, as one commentator has described the situation, "someone has declared war on women."⁵⁵ Reports suggest that at least thirty-six percent of Guatemalan women living with a male partner are victims of domestic abuse, whether physical, sexual, or psychological.⁵⁶ Between January and September 2007 alone, the Guatemalan Public

⁵⁵ Christine Toomey, *Beasts of Prey*, SUNDAY TIMES (London), Aug. 28, 2005, at 42.

⁵⁶ BELTRÁN & FREEMAN, *supra* note 8, at 2.

Ministry handled nearly 1800 domestic-violence cases.⁵⁷ Local human-rights groups estimate that approximately ninety percent of domestic violence cases in Guatemala go unreported, however, so the actual incidence is likely much higher.⁵⁸ This projection may be no surprise, considering that only two convictions resulted from the 1800 cases reported in the first nine months of 2007.⁵⁹

Violence against women in Guatemala goes far beyond battering in the home. More than 3000 women were murdered in Guatemala between 2001 and 2007.⁶⁰ While Guatemala now has one of the highest murder rates in the world,⁶¹ the murders of women are not simply another face of out-of-control crime. The murder rate of women has increased much more quickly than that of men: between 2002 and 2004, murders of men increased thirty-six percent, while murders of women increased fifty-six percent.⁶² Further, two factors plainly unify the violent acts: the victims' gender and the brutality of the mur-

⁵⁷ See U.S. DEP'T OF STATE, GUATEMALA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2007 § 5 (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100641.htm>.

⁵⁸ See AMNESTY INT'L, GUATEMALA: NO PROTECTION, NO JUSTICE: KILLINGS OF WOMEN 10 n.23 (June 2005) (citing the 2004 Department of State Report on Human Rights Practices).

⁵⁹ See U.S. DEP'T OF STATE, *supra* note 57. The report also indicates that the Public Ministry received over 6228 reports of family violence against women and children in 2007, which resulted in 96 convictions. *Id.* While the discrepancy in these figures appears to be due at least in part to the inclusion of children in "family violence," both statistics show a conviction rate of at best 1.5%.

⁶⁰ See Musalo, *supra* note 4, at 137. As of the time of printing this Comment, the Center for Gender and Refugee Studies at the University of California Hastings College of the Law reported that a total of 3800 women had been murdered since 2000. Help End Violence Against Women in Guatemala, available at <http://cgrs.uchastings.edu/campaigns/femicide.php> (last visited Feb. 15, 2009). The rural departments of Chiquimula, Jalapa, Jutiapa, and Peten experienced a record number of murders in 2007, *European Union*, *supra* note 51, although one report indicates that the total number of women murdered in Guatemala dropped slightly from 2006 to 2007. See U.S. DEP'T OF STATE, *supra* note 57 (reporting 603 killings in 2006 and 559 killings in 2007). However, factors including relatives' fears of reporting murders and low confidence in the Guatemalan justice system suggest that these numbers may all be conservative. See AMNESTY INT'L, *supra* note 58, at 4.

⁶¹ *Guatemala: Impunity Rules*, ECONOMIST, Nov. 18, 2006, at 40.

⁶² See Cházaro & Casey, *supra* note 47, at 146. While the exact figures vary by report, several organizations have described the steady increase in the percentage of homicide victims who are women. See, e.g., AMNESTY INT'L, *supra* note 58, at 8 (reporting that women constituted 4.5% of all killings in 2002, 11.5% in 2003, and 12.1% in 2004); BELTRÁN & FREEMAN, *supra* note 8, at 10 (reporting that women accounted for 9% of victims in 2003, 11.7% in 2004, and 12.46% in 2005).

ders.⁶³ For example, a significant number of murdered women are also subjected to sexual violence or sexual mutilation.⁶⁴ Others have been found with “hands tied together with barbed wire, fingernails torn off, decapitation . . . and messages tattooed or written on their bodies, like ‘vengeance,’ ‘one less bitch,’ or ‘you have paid, bitch.’”⁶⁵ Thus, while the murder rate of Guatemalan men is also unacceptably high, a significant difference between these two populations is evidence that the murders of women are motivated by gender itself.⁶⁶ The Guatemalan Human Rights Ombudsman’s Office has observed that “[i]n the case of women, the brutality used in cases of mutilation is definitely unique by comparison to male victims.”⁶⁷ Even some of those who were not subjected to sexual violence before being murdered have been mutilated in ways that “demonstrate[] a particular type of cruelty” that is unique to women, such as disfiguring beauty and severing organs.⁶⁸ Due to such stark signs of gender animus, these murders frequently have been dubbed “femicides.”⁶⁹

⁶³ See Musalo, *supra* note 4, at 137.

⁶⁴ See AMNESTY INT’L, *supra* note 58, at 10. Between January and August of 2004, 28% of murdered women were reported to have been sexually assaulted. *Id.* However, because of shortcomings in data collection for such cases, it is likely that the correlation between sexual violence and murder is much higher. See *id.* at 10-11 (observing, for example, that authorities do not always note evidence of sexual violence where the cause of death is attributed to other factors, such as a gunshot wound).

⁶⁵ Adrian Reyes, *Guatemala: Killings of Women Recall Brutal Civil War Tactics*, INTER PRESS SERV., June 23, 2005, <http://www.ipsnews.org/news.asp?idnews=29187>. While not all of these violations on their own would indicate gender animus (for example, a man’s fingernails may be torn off as much as a woman’s), they take special significance in the context of Guatemala’s larger pattern of brutal violence against women. See also Indira A.R. Lakshmanan, *Brutal Slayings of Women Soaring in Guatemala*, HOUSTON CHRON., Apr. 16, 2006, at A27 (describing the discovery of a seventeen-year-old victim who not only had been raped and shot, but had had her throat cut and the word “Vengeance” carved into her leg).

⁶⁶ See AMNESTY INT’L, GUATEMALA: NO PROTECTION, NO JUSTICE: KILLINGS OF WOMEN (AN UPDATE) 3-4 (2006) [hereinafter AMNESTY INT’L, UPDATE]. In contrast with the killings of men, “in cases of women, the gender of the woman is a determining factor in the motive of the crime, the way women are killed (female victims often suffering exceptional brutality before being killed including rape, mutilation and dismemberment), and the way in which the authorities respond to the case.” *Id.* “[I]n the case of women [the perpetrators] make them suffer more before being killed.” *Id.* (quoting Interview with Sergio Morales, Guatemalan Human Rights Ombudsman, *Violencia se Enseña con Mujeres en Guatemala*, LA NACIÓN (Costa Rica), Apr. 4, 2006).

⁶⁷ AMNESTY INT’L, *supra* note 58, at 10 (quoting the Human Rights Ombudsman’s Office, Oct. 2004).

⁶⁸ *Id.*

⁶⁹ See *id.* at 4 (noting that the violence is linked to the victim’s gender, “influencing both the motive and the context, as well as the kind of violence suffered by the

Significantly, however, not all victims of sexual violence in Guatemala become murder victims. According to the 2007 State Department report on Guatemala, “[S]exual offenses remained a serious problem,” and reports of rape have increased thirty percent in the last four years.⁷⁰ Between January and September 2007, there were at least 2575 reported sexual crimes, with only 155 convictions.⁷¹ However, like in the case of domestic violence, there is reason to believe that incidents of sexual assault are widely underreported due to societal pressure not to report gender-based violence. As described by Amnesty International,

Some women subjected to attempted murder and rape have survived the ordeal only to be condemned to staying silent as a way of surviving the stigma attached to sexual violence. If they do speak out, they can be ostracized because of attitudes that associate women’s sexuality with honour and perceive the type of violence they have suffered as shameful. In some cases, survivors have been abandoned by relatives or by their community. They have also been abandoned by state institutions which often fail to provide judicial redress or adequate medical attention.⁷²

Thus, like Rodi Alvarado, these women may look outside of their country for protection.⁷³

Guatemala’s crisis of violence against women can be traced back to the country’s thirty-six-year civil war.⁷⁴ During that period, ap-

woman and the manner in which the authorities respond”). For a more detailed account of the problem of femicide in Guatemala, see Cházaro & Casey, *supra* note 47, at 146-47. See also Katharine Ruhl, *Guatemala’s Femicides and the Ongoing Struggle for Women’s Human Rights: Update to CGRS’s 2005 Report Getting Away with Murder*, 18 HASTINGS WOMEN’S L.J. 199 (2007) (detailing the increasing severity of the epidemic in Guatemala and the continued failure of the international community to address it); Natalie Jo Velasco, *The Guatemalan Femicide: An Epidemic of Impunity*, 14 L. & BUS. REV. AM. 397 (2008).

⁷⁰ U.S. DEP’T OF STATE, *supra* note 57. Better reporting, however, may have influenced these statistics. *Id.*

⁷¹ *Id.*

⁷² AMNESTY INT’L, *supra* note 58, at 12; see also U.S. DEP’T OF STATE, *supra* note 57 (indicating that “rape victims sometimes did not report the crime for lack of confidence in the prosecution system and fear of reprisals”); Toomey, *supra* note 55, at 49 (reporting that a twelve-year-old girl who survived evisceration after resisting an attempted rape subsequently was shunned by her community because of the stigma of sexual violence).

⁷³ See Musalo, *supra* note 4, at 139.

⁷⁴ See AMNESTY INT’L, *supra* note 58, at 6 (“[T]he brutality of the killings and signs of sexual violence on their mutilated bodies bear many of the hallmarks of the terrible atrocities committed during the conflict that went unpunished and reveal that extreme forms of sexual violence and discrimination remain prevalent in Guatemalan soci-

proximately 50,000 women “disappeared” or were executed, and sexual violence was systematically used as a weapon of war.⁷⁵ This sexual violence was marked by the brutality and mutilation paralleling today’s femicide crisis.⁷⁶ For example, “women were raped before being mutilated and killed[, and the] wombs of pregnant women were cut open and fetuses strung from trees.”⁷⁷ The vast majority of these acts are attributed to Guatemalan intelligence officials, few of whom have been brought to justice and many of whom are now even serving in law enforcement or private security forces.⁷⁸

The continuing culture of impunity for perpetrators of violence against women is sobering.⁷⁹ As one commentator described, “While the Peace Accords are long-since signed, the war against women seemingly continues, with the attitudes and practices of violence against

ety.”); Reyes, *supra* note 65 (discussing the similarities between the present femicide crisis and the mutilation and sexual violation of women during the civil war).

⁷⁵ See Cházaro & Casey, *supra* note 47, at 151; see also “For Women’s Right to Live”: DELEGATION REFLECTION, 9 Guatemala Human Rights Commission/USA, Washington, D.C. July 29–Aug. 6, 2006, at 4, available at http://cgrs.uchastings.edu/documents/advocacy/GHRC_delegation_2006.pdf [hereinafter *For Women’s Right to Live*] (“During the height of the violence, women were treated as war booty. They were raped, hung in town centers, and mutilated, all to generate terror in the community.”).

⁷⁶ See AMNESTY INT’L, *supra* note 58, at 29 (finding “that many of the killings of women in Guatemala were exceptionally brutal often bearing signs of mutilation and disfigurement associated with killings during the internal armed conflict”). As one Guatemalan human rights worker explained, “A key element in the history of Guatemala is the use of violence against women to terrorise the population.” Toomey, *supra* note 55, at 46 (quoting Eda Gaviola, Director of the Centre for Legal Action on Human Rights (CALDH)).

⁷⁷ Toomey, *supra* note 55, at 44.

⁷⁸ See Ruhl, *supra* note 69, at 200-01. One report indicated that government forces committed nearly ninety-four percent of human rights abuses and other violent acts during the civil war. See Melinda Leonard, *Post-Conflict Situation in Guatemala*, in IF NOT NOW, WHEN? ADDRESSING GENDER-BASED VIOLENCE IN REFUGEE, INTERNALLY DISPLACED, AND POST-CONFLICT SETTINGS 111, 111 (Jeanne Ward ed., 2002), available at <http://www.rhrc.org/resources/gbv/ifnotnow.html>.

⁷⁹ The UNHCR has observed that “[w]here impunity is the rule for past violations, it should come as no surprise that it also prevails for current crimes.” Press Release, UNHCR, Press Statement by the United Nations High Commissioner for Human Rights Following Her Official Visit to Guatemala (May 27, 2006). As described by a 2006 delegation of the Guatemala Human Rights Commission/USA, “[Guatemalan] women know that anything could happen to them at any time and that no one would be punished. ‘We wake up every morning wondering who will be next,’ said one woman. Men know that they can rape, torture, and murder a woman and that no one will investigate the crime and they will never be punished.” *For Women’s Right to Live*, *supra* note 75, at 2.

women persisting nearly ten years after the conflict.”⁸⁰ As of March 2007, the Washington Office on Latin America was aware of only twenty convictions in the 2500 femicides committed in the previous six years.⁸¹ The low conviction rate has been attributed to a multitude of shortcomings on the part of Guatemalan authorities. These shortcomings include delays in investigating missing persons reports; failures to secure and properly investigate crime scenes; failures to gather, preserve, and follow up on key evidence; and a lack of training and resources.⁸² The mother of one murder victim has lamented, “People say, ‘it’s only a woman who died,’ as if they were flies.”⁸³

The responses of Guatemalan authorities in cases of domestic violence and sexual violence in the community are similarly inadequate.⁸⁴ In domestic violence cases, police often fail to respond to

⁸⁰ Cházaro & Casey, *supra* note 47, at 151; *cf.* UNHCR, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Violence Against Women in the Family*, ¶ 31, U.N. Doc. E/CN.4/1999/68 (Mar. 10, 1999) [hereinafter UNCHR, *Violence Against Women in the Family*] (acknowledging the “male patriarchal ideology, which has as its ultimate expression male violence against women”).

⁸¹ See BELTRÁN & FREEMAN, *supra* note 8, at 13. While the number of prosecutions increased from 2006 to 2007, the conviction rate remained low. See U.S. DEP’T OF STATE, *supra* note 57 (reporting that authorities in Guatemala City prosecuted eighteen femicide cases in 2007, as compared to six in 2006, but that few of these prosecutions resulted in convictions). This dearth of convictions is in spite of newly established special police units and legal initiatives to address the murders of women. See BELTRÁN & FREEMAN, *supra* note 8, at 13 (recognizing steps taken by Guatemalan authorities in response to violence against women); see also IACHR, *supra* note 7, ¶ 13 (observing “that these institutions have scant resources with which to carry out their mission and lack sorely needed inter-institutional coordination”); Velasco, *supra* note 69, at 405 (reporting that, despite Guatemala’s recent creation of a National Commission to Address Femicide, the state “has devoted scant resources to existing law enforcement and investigative institutions, and has failed to effectively address the systemic shortcomings”); *id.* at 414-16 (discussing the shortcomings of other initiatives to combat gender-based violence). In March 2008, the Guatemalan legislature adopted a new law addressing the problems of violence against women. Interview with Jayne E. Fleming, Pro Bono Counsel, Reed Smith LLP, in Phila., Pa. (Oct. 7, 2008). As of yet, no significant changes have resulted. *Id.*

⁸² AMNESTY INT’L, *supra* note 58, at 15.

⁸³ Marion Lloyd, *Guatemala Activists Seek Justice as Women Die*, BOSTON GLOBE, June 14, 2004, at A1. One report indicates that it is often the fire department, not the police department, that picks up the bodies of murdered women. See José Eduardo Mora, *Guatemala: Women’s Lives Are Worth Nothing, Say Anti-Violence Activists*, INTER PRESS SERV., Dec. 23, 2004, http://www.ipsnews.net/new_notas.asp?idnews=26788.

⁸⁴ The Special Rapporteur for the Rights of Women of the Inter-American Commission on Human Rights has explained that “the failure to investigate, prosecute, and punish those responsible for . . . violence against women has contributed profoundly to an atmosphere of impunity that perpetuates the violence against women in Guatemala.” IACHR, *supra* note 7, ¶ 32. Nonetheless, the Eleventh Circuit, in *Castillo-*

emergency requests for assistance⁸⁵ and, even where women have obtained protective orders, judges often fail to ensure that they are carried out.⁸⁶ The United States Department of State recently reported that the Guatemalan authorities who intervene have minimal training or capacity for investigating or assisting victims of sexual crimes.⁸⁷ Rapes are only prosecuted upon initiation by victims, who may be pressured or coerced not to file complaints.⁸⁸ And even when complaints of sexual crimes are filed, justice officials often exercise their discretion not to prosecute first-time offenders, which both downplays the seriousness of the crime and places the victim at risk of reprisal for having brought the prosecution.⁸⁹ Where prosecutions go forward, key testimony is often retracted or abandoned at trial due to a lack of protection for victims and other witnesses.⁹⁰

Pervasive gender-based violence in Guatemala has also been attributed to the cultural devaluation and subordination of its women.⁹¹

Hernandez v. Attorney General, concluded that available response measures are adequate. 297 F. App'x 894 (11th Cir. 2008). While noting that "sexual violence against women of all social classes is a problem in Guatemala and that women often do not report rape because they lack confidence in prosecutions and fear of reprisals," the court found that this "[did] not compel a conclusion that the Guatemalan government would acquiesce in future attacks" on the applicant at issue. *Id.* at 902. Specifically, the court observed that "(1) rape is a crime in Guatemala carrying penalties between 5 and 50 years; (2) Guatemalan authorities do prosecute rape cases; (3) Guatemalan law provides for police protection and restraining orders for victims of sexual violence; and (4) there is an office of the Ombudsman for Indigenous Women that provides legal services for indigenous women who are victims of rape and domestic violence." *Id.* The court did *not* observe, however, that rape prosecutions are riddled with problems, *see infra* notes 87-90 and accompanying text, and that police protective measures and special offices to combat violence in practice have been quite ineffective.

⁸⁵ See U.S. DEP'T OF STATE, *supra* note 57.

⁸⁶ See AMNESTY INT'L, *supra* note 58, at 23.

⁸⁷ See U.S. DEP'T OF STATE, *supra* note 57. Instituting a Special Unit for Sex Crimes, an Office of Attention to Victims, and a Special Prosecutor for Crimes Against Women, Children, and Trafficking in Persons has not been particularly effective in reducing sexual violence. *Id.*

⁸⁸ See AMNESTY INT'L, *supra* note 58, at 24. Reports also may not be made because of the fact that "the people that commit crimes are often friends with the authorities or make friends with the authorities in order to guarantee their immunity." *For Women's Right to Live*, *supra* note 75, at 2 (recounting the case of a man in rural Quetzaltenango whose rape of two or three young girls never was reported).

⁸⁹ See BELTRÁN & FREEMAN, *supra* note 8, at 10. In such cases, the victim and alleged offender are redirected to a mediation process. *Id.*

⁹⁰ See AMNESTY INT'L (UPDATE), *supra* note 66, at 7-8.

⁹¹ See Lakshmanan, *supra* note 65 ("Guatemala's culture and laws may also encourage the devaluation of women's lives."). The United Nations Commission on the Elimination of Discrimination Against Women (CEDAW) has also voiced concern regarding

“Traditional systems of power and patriarchy remain largely unchallenged in Guatemala[,] . . . and stereotypes regarding the subordinate role of women in society are still firmly entrenched.”⁹² Guatemalan women continue to be significantly underrepresented in government institutions and face discrimination in the workplace and in educational and health-care institutions.⁹³ Further, a number of anachronistic criminal laws perpetuate these norms. For example, marital rape and sexual harassment are not criminalized,⁹⁴ and sexual relations with minors are criminalized only if the victim is “honest.”⁹⁵ Domestic violence is prosecuted only if signs of injury are still apparent ten days later, which ignores psychological harm and acts of violence that result in less visible forms of injury.⁹⁶ Until very recently, a man raping a minor could avoid punishment by marrying the victim, as long as he had consent from the victim’s father.⁹⁷ Police and other governmental authorities have further diminished the seriousness of the country’s problem of violence against women by making unsubstantiated allegations that victims were involved with gangs, drug trafficking, or the sex industry,⁹⁸ or by “blam[ing] them for their fates based on their clothing or lifestyles.”⁹⁹

the persistence and pervasiveness of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of [Guatemalan] women and men in the family and society, which constitute a significant impediment to the participation of women in decision-making at all levels and a root cause of women’s disadvantaged position in all spheres

U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Guatemala*, ¶ 27, U.N. Doc. CEDAW/C/GUA/CO/6/CRP.1 (June 2, 2006) (Advance Unedited Version) [hereinafter CEDAW].

⁹² AMNESTY INT’L, *supra* note 58, at 9-10.

⁹³ *Id.* at 15.

⁹⁴ *Id.* at 24.

⁹⁵ *Id.* at 25.

⁹⁶ *Id.* at 24-25.

⁹⁷ See Lakshmanan, *supra* note 65 (describing the practice); U.S. DEP’T OF STATE, *supra* note 57 (noting that the practice was recently abolished). Additionally, until 1998, the Guatemalan Civil Code permitted a husband to legally object to his wife working outside of the home and considered the husband the legal representative of the couple and their children. Cházaro & Casey, *supra* note 47, at 151.

⁹⁸ See AMNESTY INT’L, *supra* note 58, at 21 (describing how the President of Guatemala, Oscar Berger, stated that the murdered women were involved with gangs in a majority of cases); AMNESTY INT’L (UPDATE), *supra* note 66, at 10 (noting how Guatemala’s Chief of Police publicly stated that the way to prevent murder of women was to prevent them from getting involved with street gangs); Lakshmanan, *supra* note 65 (reporting that Guatemalan authorities blame the murders on gangs and prostitution); Lloyd, *supra* note 83 (indicating that officials frequently downplay the extent of the

In 2006, the U.N. Committee on the Elimination of Discrimination Against Women (CEDAW) condemned Guatemala's failure to protect its women from gender-based violence, noting that it was "deeply concerned about the continuing and increasing cases of disappearance, rape, torture and murders of women, the engrained culture of impunity for such crimes, and the gender-based nature of the crimes committed, which constitute grave and systematic violations of women's human rights."¹⁰⁰ CEDAW also voiced its concern regarding "the insufficient efforts to conduct thorough investigations, the absence of protection measures for witnesses, victims and victims' families and the lack of information and data regarding cases, the causes of violence and the profiles of the victims."¹⁰¹ This very culture of gender-based violence and the impunity with which it is committed were the root causes of Rodi Alvarado's need to seek asylum in the United States.¹⁰² These same root causes may prompt victims of other forms of gender-based violence in Guatemala to seek surrogate protection in the United States as well.¹⁰³ The purpose of this Comment is to address the asylum claims of Guatemalan survivors of sexual violence in the community who have fled their country because of these conditions.

II. UNITED STATES ASYLUM LAW AND SEXUAL VIOLENCE

Under United States law, an individual is eligible for asylum if, while present in the United States or arriving at the border, she quali-

problem, claiming that women are not actually being targeted, but instead are being killed simply for their ties to gangs or drugs). Some reports do indicate that women have been killed by gangs for a multitude of reasons, including refusing to join, trying to leave, punishing the woman's family, or attempting to intimidate the community. See AMNESTY INT'L, *supra* note 58, at 11-13. Nonetheless, there may be reason to doubt the preeminence of these factors considering how few murders are solved and the ease with which the government may scapegoat these segments of society. See Lakshmanan, *supra* note 65 (indicating many victims have no ties to gangs or the sex industry); Toomey, *supra* note 55, at 46 (indicating that some gang members believe that they are blamed to give the authorities justification to kill them indiscriminately).

⁹⁹ BELTRÁN & FREEMAN, *supra* note 8, at 4. There have also been reports that relatives of murdered women have had to prove that the victim was "respectable" before the complaint was taken seriously. AMNESTY INT'L (UPDATE), *supra* note 66, at 10.

¹⁰⁰ CEDAW, *supra* note 91, ¶ 23.

¹⁰¹ *Id.*

¹⁰² Musalo, *supra* note 4, at 137-38.

¹⁰³ See, e.g., *Castillo-Hernandez v. Att'y Gen.*, 297 F. App'x 894 (11th Cir. 2008) (affirming the denial of the asylum claim of a Guatemalan woman who had been raped by ex-Guerrillas in 2004).

fies as a “refugee.”¹⁰⁴ The definition of the term “refugee,” developed in the aftermath of World War II to ensure that future victims of categorical persecution would have a means for relief, derives from the 1951 Convention Relating to the Status of Refugees¹⁰⁵ and the Convention’s 1967 Protocol.¹⁰⁶ The definition was first introduced to United States law through the Refugee Act of 1980,¹⁰⁷ which was codified in the Immigration and Nationality Act (INA or “the Act”).¹⁰⁸ Pursuant to the Act, a refugee is defined, in pertinent part, as:

[A]ny person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion¹⁰⁹

Thus, asylum requires (1) persecution or a well-founded fear of persecution (2) by the government or an entity that the government is unable or unwilling to control (3) on account of (4) a protected characteristic.

In principle, women are granted asylum within the same framework of United States refugee law as men.¹¹⁰ Traditional conceptions of asylum, however, have imposed several barriers on women.¹¹¹ First, while the refugee definition is gender neutral, gender is not one of the enumerated characteristics expressly warranting protection.¹¹²

¹⁰⁴ 8 U.S.C. § 1158(b)(1)(A) (2006).

¹⁰⁵ United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention].

¹⁰⁶ United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

¹⁰⁷ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

¹⁰⁸ The INA was initially passed in 1952. *See* INA, Pub. L. No. 414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101–1537 (2006)). It has been amended a number of times since then, including by the Refugee Act of 1980.

¹⁰⁹ *Id.* at § 1101(a)(42)(A) (2006).

¹¹⁰ *Cf.* Deborah Anker, et al., *Women Whose Governments Are Unable or Unwilling To Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 712-13 (1997) (noting that women’s asylum claims based on domestic violence can be analyzed under the traditional United States refugee law framework).

¹¹¹ *See* UNHCR, *Gender Guidelines*, *supra* note 12, ¶ 5 (“Historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women . . . have gone unrecognized.”).

¹¹² *See, e.g.,* Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 782 (2003)

Perhaps as a consequence, asylum law traditionally has focused on the experience of the male applicant.¹¹³ Harms such as rape and domestic violence have often been viewed as “private,” not “public,” and thus are seen as categorically different than persecution of, for example, a (male) political leader.¹¹⁴ Further, these harms may not be considered persecution where they are condoned or required by the female victim’s culture or religion,¹¹⁵ inflicted disproportionately on women,¹¹⁶ or are “simply different from the harms suffered by men under similar circumstances.”¹¹⁷ In cases of sexual violence against women, these difficulties are compounded by the fact that, because of real or perceived social stigma, women may have significant difficulty communicating their experience in the presence of male relatives, interpreters, or adjudicators.¹¹⁸

In recognition of these barriers, in 1992, the Executive Committee of the UNHCR (ExCom) urged the parties to the 1951 Refugee Convention to develop guidelines for gender-based asylum claims.¹¹⁹ In

(“[W]omen are often persecuted because of their gender, and gender is not one of the five grounds in the Convention definition.”); *see also supra* note 13 and accompanying text.

¹¹³ *See* 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.”).

¹¹⁴ *See* Farrone, *supra* note 13, at 664 (“Rights such as a right to be free from domestic violence have been seen as falling into a ‘private’ sphere of unregulated conduct—where most women find themselves. These rights are deemed inferior to rights that operate in the public sphere, such as legal and political rights (the arena in which men are far more active).” (footnote omitted)).

¹¹⁵ *See* Musalo, *supra* note 112, at 781-82 (citing FGM as an example of violence against women that is condoned by culture or religion). For overviews of the practice of female genital mutilation, see *Mohammed v. Gonzales*, 400 F.3d 785, 795 n.12 (9th Cir. 2005) and *In re Kasinga*, 21 I. & N. Dec. 357, 361-62 (B.I.A. 1996).

¹¹⁶ *See* Musalo, *supra* note 112, at 781-82 (citing domestic violence as a harm inflicted disproportionately on women).

¹¹⁷ *See id.* Musalo explains that under similar circumstances, women may be raped, while men may be beaten.

¹¹⁸ Aubra Fletcher, Recent Development, *The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law*, 21 BERKELEY J. GENDER L. & JUST. 111, 113-14 (2006) (noting that women seeking asylum may become “less likely to divulge salient information” about their experiences when their case is being reviewed by male officials).

¹¹⁹ *See* UNHCR, Exec. Comm. of the High Commissioner’s Programme, *Report of the Forty-Fourth Session of the Executive Committee of the High Commissioner’s Programme*, ¶ 21(e), U.N. Doc. A/AC.96/821 (Oct. 12, 1993) [hereinafter *ExCom Conclusion No. 73*] (recommending “the development by States of appropriate guidelines on women asylum-seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men”).

1995, the United States became second only to Canada in taking up ExCom's call,¹²⁰ publishing guidelines for asylum officers considering the asylum claims of women.¹²¹ The U.S. Gender Guidelines are intended to provide asylum officers "with guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender," to "improve U.S. asylum adjudications while keeping pace with . . . international concerns."¹²² The Guidelines provide both procedural and substantive considerations that enable officers to conduct interviews and evaluate claims in a culturally sensitive manner that is cognizant of the unique difficulties associated with gender-based persecution, including claims based on sexual violence.¹²³

Notably, the U.S. Gender Guidelines specifically instruct that gender-based asylum claims "must be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations," whether or not the United States has ratified them.¹²⁴ These include declarations and conventions that apply to men and women equally, which affirm the rights to "life, liberty and the security of person,"¹²⁵ and the right to be free from torture and cruel, inhuman, or degrading treatment.¹²⁶ These also include many international human rights

¹²⁰ See Musalo, *supra* note 112, at 779 (noting that Canada adopted specific guidelines for gender-based claims in 1993, while the U.S. adopted the same in 1995).

¹²¹ See Memorandum from Phyllis Coven, Office of Int'l Affairs, U.S. Dep't of Justice, to All INS Asylum Officers and HQASM Coordinators, (May 26, 1995) at 1, *reprinted in*, 72 INTERPRETER RELEASES 781 (1995) [hereinafter *U.S. Gender Guidelines*] (describing these guidelines as the natural outgrowth of urgings by the UNHCR and Canada's guidelines, published in 1993).

¹²² *Id.* The Gender Guidelines were only directed at asylum officers—not IJs, the BIA, or the circuit courts—and they do not have the force of law. See, e.g., *In re RA-*, 22 I. & N. Dec. 906, 913 (B.I.A. 1999) (stating that the U.S. Gender Guidelines are not controlling on the Board), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008). However, decision makers above the level of asylum officers have found the U.S. Gender Guidelines persuasive in certain instances. See, e.g., *id.* (describing the U.S. Gender Guidelines as "instructive"); *In re Kasinga*, 21 I. & N. Dec. 357, 362 (B.I.A. 1996) (citing the U.S. Gender Guidelines for the proposition that FGM may constitute persecution).

¹²³ See generally *U.S. Gender Guidelines*, *supra* note 121 (providing reminders to officers evaluating these claims, such as the fact that women seeking asylum may be basing their claim on an experience particular to their gender).

¹²⁴ *Id.* at 2.

¹²⁵ See Universal Declaration of Human Rights, G.A. Res. 217A, art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); see also International Covenant on Civil and Political Rights art. 9, Mar. 23, 1976, 999 U.N.T.S. 171, 6 I.L.M. 368 ("Everyone has the right to liberty and security of person.").

¹²⁶ International Covenant on Civil and Political Rights, *supra* note 125, art. 7; Universal Declaration of Human Rights, *supra* note 125, art. 5.

instruments that directly implicate the unique needs of women. For example, the Convention on the Elimination of All Forms of Discrimination Against Women requires states to take steps to eliminate discriminatory treatment of women both by the government and by nonstate actors.¹²⁷ The U.N. Declaration on the Elimination of Violence Against Women recognizes that gender-based violence prevents women's enjoyment of basic human rights and fundamental freedoms.¹²⁸ The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, which Guatemala ratified in 1995,¹²⁹ declares that "every woman has the right to be free from violence in both the public and private spheres."¹³⁰ Several international instruments also acknowledge the particular problems faced by women seeking asylum because of gender-based persecution.¹³¹

¹²⁷ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, Annex, art. 2, U.N. Doc. A/RES/34/46/Annex (Dec. 18, 1979).

¹²⁸ Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

¹²⁹ Inter-Am. Comm'n of Women, Status of Signing and Ratification of the Convention of Belém do Pará, *available at* http://www.unicri.it/wwd/trafficking/legal_framework/docs/inter_american_convention_of_belem_do_para.pdf (last visited Feb. 15, 2009).

¹³⁰ Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belém do Pará" art. 3, June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63 [hereinafter *Convention of Belém do Pará*].

¹³¹ *See, e.g.*, Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, ¶ 6, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002) (calling upon signatories "to take or continue to take measures to strengthen asylum and render protection more effective . . . giving special attention to vulnerable groups and individuals with special needs, including women") (adopted by the General Assembly with G.A. Res A/RES/57/187 (Feb. 6, 2003)); *ExCom Conclusion No. 73*, *supra* note 119, at 21(e) (recognizing "that women refugees often experience persecution differently from refugee men"); UNHCR, Exec. Comm. of the High Commissioner's Programme, *Report of the Forty-First Session of the Executive Committee of the High Comm'r Programme*, ¶ 23, U.N. Doc. A/AC.96/760 (Oct. 10, 1990) [hereinafter *ExCom Conclusion No. 64*] (recognizing "that ensuring equal treatment of refugee women and men may require specific action in favour of the former . . ."); UNHCR, Exec. Comm. of the High Commissioner's Programme, *Report of the Fortieth Session of the Programme of the United Nations High Commissioner for Refugees*, ¶ 27, U.N. Doc. A/AC.96/737 (Oct. 19, 1989) [hereinafter *ExCom Conclusion No. 60*] ("[Noting] with serious concern that the basic rights of refugee women continue to be violated in a number of situations, including through threats to their physical safety and sexual exploitation . . ."); UNHCR, Exec. Comm. of the High Commissioner's Programme, *Report of the Thirty-Sixth Session of the Executive Committee of the High Commissioner's Programme*, ¶ 115(4)(c), U.N. Doc. A/AC.96/673 (Oct. 22, 1985) [hereinafter *ExCom Conclusion No. 39*] (noting that women and girls constitute "the majority of the world

The harm caused by sexual violence itself is addressed in many international instruments.¹³² For example, the UNHCR Gender Guidelines recognize that “[t]here is no doubt that rape and other forms of gender-related violence . . . are acts which inflict severe pain and suffering—both mental and physical—and which have been used as forms of persecution.”¹³³ The UNHCR Guidelines on the Protection of Refugee Women also acknowledge that “[p]ersecution of women often takes the form of sexual assault.”¹³⁴ ExCom Conclusion No. 73 describes sexual violence as a “gross violation of human rights,”¹³⁵ including “the fundamental right . . . to personal security.”¹³⁶ Accordingly, the UNHCR endorses recognition of claims to refugee status “based upon a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion.”¹³⁷

The publication of the U.S. Gender Guidelines was an important step forward in addressing the challenges of gender-based asylum claims, particularly in its recognition of the importance of international refugee norms. However, to varying degrees, all four parts of the refugee definition—persecution, a qualified persecutor, a protected characteristic, and a nexus between the persecution and that characteristic—have remained obstacles to gender-based asylum claims, including those based on sexual violence.¹³⁸ In that regard,

refugee population and that many of them are exposed to special problems in the international protection field”).

¹³² In addition to the instruments discussed in this paragraph, sexual violence implicates the Universal Declaration of Human Rights, *supra* note 125, the International Covenant on Civil and Political Rights, *supra* note 125, the Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 127, and the Declaration on the Elimination of Violence Against Women, *supra* note 128. See Anker et al., *supra* note 110, at 720 (providing a detailed overview of these and other international human rights instruments, and concluding that “[t]hey embrace a specific understanding that gender violence, including rape . . . occurring in the public or private sphere, may constitute violations of internationally protected human rights”).

¹³³ UNHCR, *Gender Guidelines*, *supra* note 12, ¶ 9.

¹³⁴ UNHCR, *Guidelines on the Protection of Refugee Women*, ¶ 59, U.N. Doc. EC/SCP/67 (1991) [hereinafter UNHCR, *Guidelines on Refugee Women*].

¹³⁵ *ExCom Conclusion No. 73*, *supra* note 119, ¶ 21(a).

¹³⁶ *Id.* ¶ 21(b).

¹³⁷ *Id.* ¶ 21(d).

¹³⁸ See, e.g., *Basova v. INS*, 185 F.3d 873, No. 98-9540, 1999 WL 495640, at *3 (10th Cir. July 14, 1999) (denying asylum to a Russian woman who claimed that she had been raped repeatedly by the Chechen mafia, because she had not shown she had been persecuted due to a protected characteristic); *Angoucheva v. INS*, 106 F.3d 781, 790 (7th Cir. 1997) (indicating that the IJ had “dismissed . . . in a single sentence” the

the United States continues to fall behind the rest of the international community. This Part describes each of these requirements in turn and analyzes their application to an asylum claim of a woman fleeing sexual violence in Guatemala.

A. *A Well-Founded Fear of Persecution:
Sexual Violence as Egregious Harm*

To qualify as a refugee, an applicant for asylum must show that the harm she experienced rises to the level of persecution.¹³⁹ While persecution is not defined in the 1951 Refugee Convention or the INA, the BIA has described it as the “infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim.”¹⁴⁰ The term connotes “an extreme concept that does not include every sort of treatment our society regards as offensive.”¹⁴¹ Under United States law, persecution has included threats to life or freedom, confinement, torture, and economic restrictions that are so severe that they threaten life or freedom.¹⁴²

International human rights bodies recognize rape as a human rights violation amounting to torture,¹⁴³ with well-documented physi-

claim that an attempted rape by a state official rose to the level of state action, having concluded that the asylum applicant had failed to “establish a pattern or practice of government inspired or condoned persecution” (internal quotation marks omitted); *In re R-A*, 22 I. & N. Dec. 906, 927 (B.I.A. 1999) (denying an asylum claim based on domestic violence for failing to show either a protected characteristic or the required nexus), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008).

¹³⁹ See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1241-42 (3d Cir. 1993) (denying asylum because compliance with oppressive social mores did not rise to the level of persecution).

¹⁴⁰ *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

¹⁴¹ *Fatin*, 12 F.3d at 1243.

¹⁴² *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439, 441 (B.I.A. 1987).

¹⁴³ See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 18, U.N. Doc. E/CN.4/1995/34 (Jan. 12, 1995) (prepared by Nigel S. Rodley) (noting that rape may be used to torture); see also Org. of Am. States, Inter-Am. Comm’n on Human Rights, *Report on the Situation of Human Rights in Haiti*, ¶ 133, OEA/Ser. L/V/II.88, Doc. 10 rev. (Feb. 9, 1995) (“The Commission considers that rape represents not only inhumane treatment that infringes upon physical and moral integrity . . . but also a form of torture . . .”). One commentator comparing the psychological distress of rape survivors and survivors of abuse more traditionally considered torture observed that the two are “strikingly similar in intensity and duration,” but, if anything, rape “inflicts a unique sort of pain not experienced by survivors of

cal and psychological consequences.¹⁴⁴ Thus, the U.S. Gender Guidelines appropriately make clear that rape is a sufficiently egregious harm to constitute persecution.¹⁴⁵ The Guidelines specifically state that “[s]evere sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution.”¹⁴⁶ Since the publication of the U.S. Gender Guidelines, several asylum cases in the circuit courts have further demonstrated that “rape can support a finding of persecution.”¹⁴⁷ For example, in *Lopez-Galarza v. INS*, the Ninth Circuit held that the repeated rape of a detained Nicaraguan woman by military officers amounted to persecution,¹⁴⁸ and in *Angoucheva v. INS*, the Seventh

other forms of torture,” putting rape in a category of “torture plus.” Evelyn Mary Aswad, Note, *Torture by Means of Rape*, 84 GEO. L.J. 1913, 1931 (1996). The additional harms of rape include isolation from the community due to stigma and isolation in intimate relationships through the brutalization of sex. *Id.* at 1939-42.

¹⁴⁴ The physical consequences of rape potentially include sexually transmitted diseases such as HIV, pregnancy, miscarriage of an existing fetus, physical injury including mutilation of the genitalia, and severe abdominal pain. UNHCR, *Sexual Violence Against Refugees: Guidelines on Prevention and Response*, ch. 1.5 (1995) [hereinafter UNHCR, *Sexual Violence Against Refugees*]. Psychological consequences—collectively known as Rape Trauma Syndrome—include short-term symptoms such as shock, disbelief, dismay, agitation, incoherent and volatile behavior, reliving the rape, nightmares, emotional deadness, startling, terror, and avoidance. See Jacqueline R. Castel, *Rape, Sexual Assault and the Meaning of Persecution*, 4 INT’L J. REFUGEE L. 39, 46-47 (1992). Psychological consequences also include long-term symptoms such as changing residences, nightmares, fear of associated circumstances, and sexual fears. *Id.*; see also *Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996) (describing the “severity of the harm of rape,” as recognized by several medical studies); Kathryn M. Carney, Note, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN’S L. REV. 315, 344-45 (2001) (describing the long-lasting emotional harm of rape); UNHCR, *Sexual Violence Against Refugees*, *supra*, ch. 1.5 (describing psychological trauma including feelings of terror, physical and emotional pain, self-disgust, powerlessness and worthlessness, apathy and denial, and the potential for deep depression, abandonment of babies, or infanticide).

¹⁴⁵ See U.S. Gender Guidelines, *supra* note 121, at 9 (“Serious physical harm consistently has been held to constitute persecution. Rape and other forms of severe sexual violence clearly can fall within this rule.”); see also UNHCR, *Sexual Violence Against Refugees*, *supra* note 144, ch. 4.3(a) (“A well-founded fear of sexual violence . . . can . . . provide the basis for a claim to refugee status.”).

¹⁴⁶ U.S. Gender Guidelines, *supra* note 121, at 9.

¹⁴⁷ See Deborah Anker et al., *Rape in the Community as a Basis for Asylum: The Treatment of Women Refugees’ Claims to Protection in Canada and the United States (Part II)*, in 2 BENDER’S IMMIGR. BULL. 608, 609 (1997) (attributing the U.S. Gender Guidelines to progressive attitudes towards sexual violence in subsequent cases).

¹⁴⁸ 99 F.3d 954, 960 (9th Cir. 1996); see also *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1075 (9th Cir. 2004) (holding, in the case of a Guatemalan woman raped by soldiers, that rape is a harm amounting to persecution).

Circuit suggested that an attempted rape of a Bulgarian woman of Macedonian descent could constitute persecution.¹⁴⁹

Nonetheless, an asylum applicant must do more than show that the harm she suffered or fears is sufficiently harmful to amount to persecution; she also must demonstrate that her fear of the harm in the future is “well-founded.”¹⁵⁰ She may do so either by providing evidence that she has a subjective and objective fear of experiencing sufficiently severe harm in the future or by demonstrating that she suffered such harm in the past.¹⁵¹ However, a finding of past persecution simply creates the presumption of a well-founded fear of future persecution, which may be rebutted by the government, rendering the applicant ineligible for asylum.¹⁵²

Given that the act of rape is amply egregious to rise to the level of persecution, a Guatemalan woman seeking asylum on the basis of past sexual violence, who otherwise qualifies as a refugee, should be able to establish past persecution, particularly if it can be described as “[s]evere sexual abuse.”¹⁵³ *Angoucheva* also suggests that an attempted sexual assault could similarly qualify.¹⁵⁴ Thus, in these cases, the burden would shift to the government to rebut the presumption of a well-founded fear of future persecution.¹⁵⁵

Certain Guatemalan women also may be able to establish a well-founded fear of future persecution even without showing past persecution through actual or attempted sexual violence. To make this showing, the applicant must demonstrate that “[t]here is a reasonable possibility of suffering such persecution if . . . she were to return to [her] country,” and that “she is unable or unwilling to return to, or avail . . . herself of the protection of, that country because of such fear.”¹⁵⁶ It is not necessary to show that the persecution certainly will occur or even that it is more likely than not to occur; it generally is

¹⁴⁹ See 106 F.3d 781, 790 (7th Cir. 1997) (remanding the asylum claim of a woman who had suffered an attempted rape by a state official to determine whether it had been motivated by a protected characteristic).

¹⁵⁰ 8 C.F.R. § 208.13(b)(1)(i)(A) (2008). Further, to be eligible for asylum, any applicant must satisfy the other elements of the refugee definition. See *infra* Sections III.B, (a qualified actor), III.C. (a protected characteristic), and III.D (a nexus between the persecution and the protected characteristic).

¹⁵¹ 8 C.F.R. § 208.13(b)(1)(i)(A) (2008).

¹⁵² *Id.* § 208.13(b)(1) (2008).

¹⁵³ *U.S. Gender Guidelines*, *supra* note 121, at 9.

¹⁵⁴ See *supra* note 149 and accompanying text.

¹⁵⁵ 8 C.F.R. § 208.13(b)(1) (2008).

¹⁵⁶ *Id.* § 208.13(b)(2)(i)(B)(C).

sufficient to show that the probability of future persecution is at least one in ten.¹⁵⁷ The applicant, however, must demonstrate subjective fear¹⁵⁸ that is objectively reasonable.¹⁵⁹ Further, “mere membership” in a particular group that may be persecuted normally is insufficient to claim refugee status.¹⁶⁰ Unless she can show a “pattern or practice” of persecution of similarly situated individuals, an asylum applicant must show why she as an individual fears persecution in the form of sexual violence.¹⁶¹

An applicant may demonstrate that her fear of persecution is well founded through documentary, testimonial, or expert evidence.¹⁶² The courts and the BIA have been particularly receptive to proof that (1) demonstrates that the applicant is targeted for future persecution; (2) shows that others similarly situated are targeted for future persecution; or (3) shows past harm that, while not persecution, under the totality of the circumstances suggests a well-founded fear of future persecution.¹⁶³ Given present conditions in Guatemala, any of these factors potentially could demonstrate that a female applicant’s subjective fear is objectively reasonable: she may show that she was specifically threatened by a particular individual; she may live in an area where gender-based violence in the community is particularly widespread; or she personally may have suffered a pattern of sexual harassment and taunting that, combined with other factors, amounts to a well-founded fear of persecution.

This does not imply, however, that any individual claiming persecution based on sexual violence would be automatically entitled to asylum. First, the applicant must satisfy the remaining elements of the refugee definition by demonstrating that she was victimized on account of her possession of a protected characteristic. Second, the ap-

¹⁵⁷ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

¹⁵⁸ *See In re Acosta*, 19 I. & N. Dec. 211, 221 (B.I.A. 1985) (defining “fear” as “a genuine apprehension or awareness of danger in another country”), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439, 441 (B.I.A. 1987).

¹⁵⁹ *See id.* at 225 (“[A]n individual’s fear of persecution must have its basis in external, or objective, facts that show there is a realistic likelihood he will be persecuted upon his return to a particular country.”).

¹⁶⁰ UNHCR, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 16, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR, *Particular Social Group Guidelines*].

¹⁶¹ 8 C.F.R. § 208.13(2)(iii)(A) (2008).

¹⁶² *Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 346 (3d Cir. 2008).

¹⁶³ DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 33-35 (3d ed. 1999).

plicant must provide a credible account of her past persecution or the factors suggesting that her fear of future persecution is well founded.¹⁶⁴ This task has become particularly formidable since passage of the REAL ID Act in May 2005,¹⁶⁵ which allows asylum adjudicators to discount credibility based on the applicant's demeanor and any inconsistencies, inaccuracies, or falsehoods in the applicant's prior statements, regardless of their relevance to her claim.¹⁶⁶

Additionally, an applicant seeking asylum based on past persecution may be ineligible for asylum if the government can establish that there has been a change in conditions in Guatemala that would suggest that the government is now willing and able to protect her.¹⁶⁷ It would likely be difficult for the United States government to prove that the Guatemalan government now would be willing and able to help the applicant, given that femicide and sexual violence are committed at increasingly high rates and with continued impunity.¹⁶⁸ Yet the latest State Department report on country conditions in Guatemala indicates certain positive steps forward, at least for victims of domestic violence.¹⁶⁹ In 2007, the Guatemalan government instituted an emergency hotline for battered women and children, eight shelters for victims of domestic violence, and a pilot program offering "free legal, medical, and psychological assistance to victims of domestic violence."¹⁷⁰ Thus, if Guatemala implements significant reforms to respond to the problems of femicide and sexual violence outside of the home, perhaps in response to mounting external pressures to do so,¹⁷¹

¹⁶⁴ Cf. *Juarez-Lopez v. Gonzales*, 235 F. App'x 361, 365-69 (7th Cir. 2007) (reversing the adverse credibility determination of an IJ who suggested that the asylum applicant had consented to sexual relations and then changed her mind and called it rape).

¹⁶⁵ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified in scattered sections of 8 U.S.C.).

¹⁶⁶ *Id.* § 101(a)(3)(B)(iii). For a thorough overview of these issues, see Fletcher, *supra* note 118, at 121-26. See also Lindsay Peterson, Note, *Shared Dilemmas: Justice for Rape Victims Under International Law and Protection for Rape Victims Seeking Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 509, 526-27 (2008) (describing the many evidentiary hurdles that rape victims face in seeking asylum).

¹⁶⁷ 8 C.F.R. § 208.13(b)(1)(i)(A) (2008).

¹⁶⁸ See *supra* Part I.

¹⁶⁹ See U.S. DEP'T OF STATE, *supra* note 57 (discussing a new law providing women shelter, although noting that the facilities were insufficient).

¹⁷⁰ *Id.*

¹⁷¹ See Musalo, *supra* note 4, at 139-43 (urging the United States, as a major donor to Guatemala, to require accountability, transparency, and results in Guatemala's response to femicide); *European Union*, *supra* note 51 (reporting that a European Parliament resolution "sets the stage for women's murders to be an item for negotiation in any future trade accord between the EU and Central America," including Guatemala).

the United States government may be able to rebut the presumption of a well-founded fear of future persecution through a showing of changed country conditions.¹⁷²

The United States government also may be able to rebut the presumption of future persecution by showing that country conditions have changed such that there is little likelihood of future abuse.¹⁷³ Significantly, however, “[n]othing in the regulation suggests that the future threats to life or freedom must come in the same *form* or be the same *act* as the past persecution.”¹⁷⁴ In other words, to carry its burden, the government must show more than a low likelihood that the victim will be *sexually assaulted* again in the future; it must “show that changed conditions obviate the risk to life or freedom related to the original claim—e.g., persecution on account of membership in her particular social group.”¹⁷⁵ In determining whether the government has carried this burden, decision makers may consider broader patterns of persecution in various forms perpetrated upon particular groups of women. For example, in *Bah v. Mukasey*, the Second Circuit observed that Guinean women not only may be subjected to FGM, as the applicant previously had been in that case, but they also “are rou-

In the United States, both the House of Representatives and the Senate also have condemned the violence and urged the Guatemalan government to take further action. See S. Res. 178, 110th Cong. (2007) (enacted); H.R. Res. 100, 110th Cong. (2007) (enacted).

¹⁷² The most recent U.S. State Department report on country conditions in Guatemala also indicates that the government opened “a new women’s shelter in Guatemala City for victims of violence,” which “had the capacity to house 20 victims and their families for six months at a time.” U.S. DEP’T OF STATE, *supra* note 57. While this may apply to victims of sexual violence in the community as well as survivors of domestic violence, a short-term shelter for twenty victims should be insufficient to rebut the presumption of a well-founded fear of persecution for such survivors, particularly outside of Guatemala City. Additionally, although Guatemala nominally has established special agencies and police units to combat gender-based violence, these largely have been ineffective. See *supra* notes 81, 87.

¹⁷³ 8 C.F.R. § 208.13(b)(1)(i)(A) (2008).

¹⁷⁴ *Bah v. Mukasey*, 529 F.3d 99, 115 (2d Cir. 2008).

¹⁷⁵ *Id.* The BIA used to hold that women who had been subjected to FGM in the past were unable to establish a well-founded fear of future persecution because the procedure allegedly could not be repeated. See *In re A-T*, 24 I. & N. Dec. 296, 296, 299 (B.I.A. 2007) (denying asylum to a Malian woman who had experienced FGM as a young girl). Subsequently, the Second Circuit in *Bah* rejected the proposition that FGM could not be repeated. See 529 F.3d at 114. *Bah* also held that even if FGM could not be repeated, the applicant still could show a well-founded fear of future persecution if the record revealed that she was at risk for *other* forms of persecution because of her membership in the same group that accounted for her having been subjected to FGM. *Id.* at 115 n.21. On September 22, 2008, Attorney General Mukasey vacated the *A-T*-decision for the reasons detailed in *Bah*. *In re A-T*, 24 I. & N. Dec. 617 (A.G. 2008).

tinely subjected to various forms of persecution” including crimes such as domestic violence, rape and sex trafficking.¹⁷⁶ Thus, a Guatemalan woman who has experienced sexual violence in the past may prove a well-founded fear of future persecution based on the whole spectrum of documented gender-based harms that she may face,¹⁷⁷ not simply her fear of the exact harm she suffered in the past.

An applicant also may be ineligible for asylum if she reasonably could relocate to another part of Guatemala.¹⁷⁸ As the U.S. Gender Guidelines explain, this requirement arose because “[t]he principle that international protection becomes appropriate where national protection is unavailable also means that, to be eligible for international protection, an applicant must generally demonstrate that the danger of persecution exists nationwide.”¹⁷⁹ This is particularly likely to be an issue in cases where the persecutor is a nonstate actor, who may not have the means of nationwide persecution that a government potentially could have.

The standard for relocation is whether “under all the circumstances, it would be reasonable,” which depends on the facts of a specific case.¹⁸⁰ The asylum regulations instruct adjudicators making this determination to consider a nonexhaustive list of factors including “whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.”¹⁸¹ Other factors that may illuminate the reasonableness of internal relocation for a woman fleeing sexual violence in Guatemala include the accessibility and effectiveness of assistance programs such as shelters, the availability of meaningful police protection, and the likelihood that a specific persecutor will follow the applicant.¹⁸²

¹⁷⁶ 529 F.3d at 116.

¹⁷⁷ See generally *supra* Part I.

¹⁷⁸ 8 C.F.R. § 208.13(b)(1)(i)(B) (2008). For applicants who have demonstrated past persecution, the burden is on the government to show that requiring relocation would be reasonable, rebutting the presumption of a well-founded fear of future persecution. *Id.* § 208.13(b)(1)(ii). Applicants arguing that they have a well-founded fear of persecution without reliance on past persecution normally bear the burden of proving that relocation would *not* be reasonable. *Id.* § 208.13(b)(3)(i).

¹⁷⁹ *U.S. Gender Guidelines, supra* note 121, at 18.

¹⁸⁰ 8 C.F.R. § 208.13(b)(2)(ii) (2008).

¹⁸¹ *Id.* § 208.13(b)(3).

¹⁸² Anker et al., *supra* note 110, at 738-40.

Accordingly, in some cases it is possible that a victim of past sexual violence or a Guatemalan woman fearing sexual violence in the future reasonably could take advantage of the few available shelters, seek refuge with friends or family in other parts of the country, or use family power to realize adequate police response. For most such women, however, it is unlikely that they would receive meaningful assistance or police protection given current country conditions.¹⁸³ Furthermore, while it is more likely in cases of domestic violence than in cases of sexual violence in the community that the persecutor would pursue the relocated victim,¹⁸⁴ internal relocation by the latter simply may make her an easy target for further gender-based abuse, both because she may lack her prior support system and because street gangs in the new community may assume that she has previous ties to gangs in her prior community.¹⁸⁵ Thus, while the reasonableness of internal relocation may vary by applicant, internal relocation would not be a realistic prospect for many Guatemalan women fleeing sexual violence in their country.

If the government does in fact rebut the presumption of a well-founded fear of persecution, however, the best hope for an applicant who has been persecuted in the past would be “humanitarian asylum,” where a decision maker is accorded the discretion to grant asylum solely due to the severity of the past persecution.¹⁸⁶ Asylum is granted in such cases because when an individual has suffered “atrocious forms of persecution,” even changed country conditions “may not always produce a complete change in the attitude of the population, nor, in view of [the petitioner’s] past experiences, in the mind of the refugee.”¹⁸⁷ Rape has supported a grant of humanitarian asylum, at least in particularly egregious cases.¹⁸⁸

¹⁸³ See *supra* Part I.

¹⁸⁴ See, e.g., *In re R-A-*, 22 I. & N. Dec. 906, 909 (B.I.A. 1999) (reporting that Alvarado’s husband warned her that “he would be able to find her wherever she was”), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008).

¹⁸⁵ Interview with Jayne E. Fleming, Pro Bono Counsel, Reed Smith LLP, in Phila., Pa. (Mar. 3, 2008).

¹⁸⁶ 8 C.F.R. § 208.13(b)(1)(iii)(A) (2008).

¹⁸⁷ *Lopez-Galarza v. INS*, 99 F.3d 954, 960-61 (9th Cir. 1996) (quoting UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng/REV.1 (reedited Jan. 1992) [hereinafter UNHCR, *Refugee Handbook*]).

¹⁸⁸ See, e.g., *Brucaj v. Ashcroft*, 381 F.3d 602, 608-10 (7th Cir. 2004) (suggesting that the brutal gang rape, beating, and abandonment of the applicant could qualify for humanitarian asylum); *Lopez-Galarza*, 99 F.3d at 963 (finding humanitarian asylum ap-

Nonetheless, whether the applicant establishes a well-founded fear of future harm or she seeks a grant of humanitarian asylum based on the egregiousness of the past harm that she has suffered, the concept of persecution also requires that she demonstrate that the act was or would be carried out by the right actor and for the right reasons. These remaining components of the “refugee” definition are the focus of the following three subsections.

B. *An Actor the Government Is Unable or Unwilling to Control*

In addition to showing a well-founded fear of persecution, an asylum applicant must show that the persecution was committed either by the government or a person or group that the government is unwilling or unable to control.¹⁸⁹ While some Guatemalan women may present claims of persecution by individuals affiliated with the government,¹⁹⁰ for most such applicants, the persecutor will be a nonstate actor. Thus, in many cases, it will be necessary to assess whether the state is unable and unwilling to control that actor.

The principle that a qualified persecutor may either be the government or a person or organization that the government is unable or unwilling to control derives from international human rights law. States must do more than simply refrain from directly harming their citizens, but also, without discrimination, respond to violations committed by nonstate actors.¹⁹¹ In other words, states must “demonstrate

appropriate where the applicant had been raped repeatedly and physically abused by her military captors).

¹⁸⁹ See, e.g., *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439, 441 (B.I.A. 1987); UNHCR, *Refugee Handbook*, *supra* note 187, ¶ 65 (“Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”). For an example of a grant of asylum for gender-based persecution committed by a nonstate actor, see *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996), which concerned a Togolese woman who feared FGM by the women of her tribe.

¹⁹⁰ In the femicide context, government actors have been accused of committing some of the atrocities. See, e.g., Ruhl, *supra* note 69, at 214-15 (reporting that clandestine security operations, private security officers, and the national police allegedly were associated with the murders of Guatemalan women); AMNESTY INT’L, *supra* note 58, at 13-14 (reporting allegations of murder by police officers); AMNESTY INT’L (UPDATE), *supra* note 66, at 6 (reporting that two plain-clothes policemen murdered a sex worker and then covered up the crime with the assistance of other police agents).

¹⁹¹ UNHCR, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Further Promotion and Encouragement of Human Rights and Fundamental Free-*

due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses.”¹⁹²

A government may be regarded as “unable or unwilling to control” a nonstate actor where the applicant shows a pattern of government unresponsiveness¹⁹³ or complicity.¹⁹⁴ Factors suggestive of whether a state has taken seriously its duties to protect its citizens from nonstate actors include the availability of effective legal measures, such as penal sanctions, and the existence of meaningful preventative and protective measures.¹⁹⁵ It also is necessary to consider the “political, social and cultural context” of the country at issue,¹⁹⁶ and whether “the criminal justice system [is] sensitive to the issues of violence against women.”¹⁹⁷ This may include relative rates of investigation and prosecution, whether victims of gender-based violence have access to adequate shelters and support services, and whether measures have been taken in the society at hand to ensure that the issue of violence against women is not invisible.¹⁹⁸ Further, while decision makers find relevant any attempts by the applicant to obtain government protec-

doms, ¶ 30, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996) (*prepared by Radhika Coomaraswamy*) [hereinafter UNCHR, *Further Promotion*].

¹⁹² Anker et al., *supra* note 110, at 733 (quoting UNHCR, *Further Promotion, supra* note 191, ¶ 33); *see also* UNHCR, *supra* note 80, ¶ 6 (“No longer are human rights guarantees restricted solely to the public sphere. They likewise apply to the private realm, including within the family, and oblige the State to act with due diligence to prevent, investigate and punish violations therein.”).

¹⁹³ *See, e.g.,* Valdiviezo-Galdamez v. Att’y Gen., 502 F.3d 285, 289 (3d Cir. 2007) (suggesting that the fact that the applicant had filed five police reports and received no response indicated that El Salvador was unwilling or unable to protect the applicant from street gangs); Mgoian v. INS, 184 F.3d 1029, 1036-37 (9th Cir. 1999), *overruled on other grounds by* Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005) (concluding that the Armenian government was “unable and unwilling to control those elements of its society responsible for targeting the [asylum applicants],” in part because of reports that it was “unresponsive to violence and persecution aimed at other members of the country’s religious minorities”). While “a single violation of human rights or just one investigation with an ineffective result does not establish a lack of due diligence by a State,” such a showing may be made where a state has failed to take its duties seriously. UNHCR, *Further Promotion, supra* note 191, ¶ 37.

¹⁹⁴ *See, e.g.,* Korablina v. INS, 158 F.3d 1038, 1045 (9th Cir. 1998) (contrasting the applicant’s evidence that Ukrainian authorities engaged in a “pattern of anti-Semitic violence and negligence” with the government’s failure to provide “any authoritative evidence . . . disputing . . . the government’s complicity”).

¹⁹⁵ Anker et al., *supra* note 110, at 734-35 (citing CEDAW, *General Recommendation No. 19*, § 2, ¶ 1, U.N. Doc. CEDAW/C/1992/L.1/Add.15 (Jan. 29, 1992)).

¹⁹⁶ *Id.* at 735.

¹⁹⁷ *See* UNHCR, *supra* note 80, ¶ 25(v).

¹⁹⁸ *Id.*

tion,¹⁹⁹ they also have acknowledged that in some cases attempting to seek such help would be futile or dangerous.²⁰⁰

Applying these considerations, it is clear that, like Rodi Alvarado, Guatemalan women claiming asylum based on sexual violence have a strong case that the Guatemalan government is unable and unwilling to protect them.²⁰¹ The culture of impunity in Guatemala for perpetrators of gender-based violence—in the context of domestic violence as well as femicide and sexual violence in the community—has been widely reported²⁰² and is a relevant factor in determining whether the government is unable or unwilling to protect its citizens.²⁰³ At the very least, the government has been unresponsive, and in some cases, it may have even been complicit.²⁰⁴ Further, preventative measures such as a special prosecutor for crimes against women have not significantly deterred or reigned in these crimes,²⁰⁵ and there are few social services provided to Guatemalan women that could provide alternate assistance.²⁰⁶ The failure of state protection is so severe that, in the United States, both the House of Representatives and the Senate have

¹⁹⁹ See, e.g., *Surita v. INS*, 95 F.3d 814, 819-20 (9th Cir. 1996) (finding that police were “unwilling or unable” where they refused to respond to the applicant’s requests for help and provided no explanation for failing to do so).

²⁰⁰ See, e.g., *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006) (holding that in the withholding-of-removal context, an applicant “need not have reported that persecution to the authorities if he can convincingly establish that doing so would have been futile or have subjected him to further abuse”); *In re S-A-*, 22 I. & N. 1328, 1335 (B.I.A. 2000) (concluding that although the asylum applicant had not requested protection from her government, evidence indicated that even if she had done so, the authorities would not have assisted her and possibly would have made her situation worse); see also *U.S. Gender Guidelines*, *supra* note 121, at 17 (“It will be important . . . though not conclusive, to determine whether the applicant has actually sought help from government authorities. Evidence that such an effort would be futile would also be relevant.” (citations omitted)).

²⁰¹ See *In re R-A-*, 22 I. & N. Dec. 906, 914 (B.I.A. 1999) (crediting Rodi Alvarado’s account of her inability to obtain “meaningful assistance from the authorities in Guatemala”), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008).

²⁰² See *supra* Part I.

²⁰³ The Eighth Circuit in *Ngengwe v. Mukasey* found that United States Department of State and United Nations reports suggested that the government of Cameroon was unable or unwilling to protect Cameroonian widows. 543 F.3d 1029, 1035-36 (8th Cir. 2008). The BIA in *In re S-A-*, a domestic violence case, found particularly relevant United States Department of State reports that indicated that “‘few women report abuse to authorities’ because the judicial procedure is skewed against them” and that “domestic violence is commonplace and legal remedies are generally unavailable to women.” 22 I. & N. Dec. at 1333.

²⁰⁴ See *supra* note 190 and accompanying text.

²⁰⁵ See *supra* notes 81, 87.

²⁰⁶ See *supra* note 172.

passed resolutions condemning the violence and urging the Guatemalan government to take action.²⁰⁷ Additionally, while it may help a woman's claim to show that, like Rodi Alvarado,²⁰⁸ she attempted to receive assistance from Guatemalan authorities, given their record of ineffective and gender-biased response, her failure to do so should not be fatal to her claim. Thus, under United States law, showing persecution in the form of sexual violence, even by a nonstate actor, should be a manageable task for a Guatemalan woman. The remaining requirements to establish refugee status, however, prove more difficult.

C. Possession of a Protected Characteristic

To qualify as a "refugee," an asylum applicant must show that she was persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion."²⁰⁹ Conceivably, the claims of women fleeing sexual violence in Guatemala could fall under any of these protected categories. In particular, case law of the BIA and circuit courts provides several examples of women who were sexually assaulted on account of their race²¹⁰ or political opinion.²¹¹ Many women fleeing sexual violence in Guatemala, however, will not be able to claim that the harm that they suffered was attributable either to these categories or to their nationality or religion. Instead, to gain asylum, they will have to rely on the "particular social group" category.²¹²

²⁰⁷ See S. Res. 178, 110th Cong. (2007) (enacted); H.R. Res. 100, 110th Cong. (2007) (enacted).

²⁰⁸ 22 I. & N. Dec. at 909.

²⁰⁹ 8 U.S.C. § 1101(a)(42)(A) (2006).

²¹⁰ See, e.g., *Shoafera v. INS*, 228 F.3d 1070, 1076 (9th Cir. 2000) (concluding that an Ethiopian woman was raped by a government official on account of her Amhara ethnicity); *Surita v. INS*, 95 F.3d 814, 819-20 (9th Cir. 1996) (holding that an Indo-Fijian woman who had been robbed several times and threatened with rape had suffered past persecution on account of her race).

²¹¹ See, e.g., *Lopez-Galarza v. INS*, 99 F.3d 954, 959-60 (9th Cir. 1996) (concluding that the applicant's sexual assault was motivated by her political opinion); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (concluding that an El Salvadoran woman was repeatedly raped, beaten, taunted, and threatened by a member of the military on account of her actual or imputed political opinion), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996); *In re D-V-*, 21 I. & N. Dec. 77, 79 (B.I.A. 1993) (granting asylum to a Haitian woman who was threatened and then gang-raped by soldiers who disapproved of her support of former president Aristide).

²¹² In the domestic violence context, it has been argued that gender-based persecution may occur on account of political opinion, such as the opinion that a woman has the right to be free from violence. See Anker et al., *supra* note 110, at 741 ("In

In developing the definition of a refugee, the framers of the 1951 Refugee Convention had in mind the victims of persecution of World War II.²¹³ The particular social group category was added as “an afterthought,” to “stop a possible gap in the coverage” of the other four categories.²¹⁴ The meaning of the term is not clear from the 1951 Refugee Convention, its 1967 Protocol, or the legislative history of the INA.²¹⁵ As a result, “judicial and agency interpretations are vague and sometimes divergent[, and] courts have applied the term reluctantly and inconsistently.”²¹⁶

many instances, a woman may be battered or have a well-founded fear of persecution *because* she has expressed the political opinion that she has the right to be free from violence, either by opposing the violence, leaving her abuser or seeking state protection.”); *see also In re R-A*, 22 I. & N. Dec. 906, 916 (B.I.A. 1999) (“[Alvarado] argues that, given the nature of domestic violence and sexual assaults, her husband necessarily imputed to her the view that she believed women should not be controlled and dominated by men.”), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008).

The use of the political-opinion category in the claims at issue may be problematic for two reasons. First, classifying objection to gender-based violence simply as a political belief arguably does not accord well with the international community’s condemnation of violence against women as a human rights violation. *See, e.g., Condon, supra* note 13, at 251 (“While a woman’s belief in equality may in a few circumstances appropriately be viewed as a political opinion, a woman’s general objection to torture and to the denial of basic human rights should not be considered political, nor extraordinary.”). Second, to gain asylum under prevailing conceptions of United States asylum law, the applicant also must demonstrate that the persecutor targeted her *because* she held this political opinion or he believed that she did. *See* 8 U.S.C. § 1101(a)(42)(A) (2006) (requiring that the persecution have occurred “on account of” the protected characteristic). This burden may be plausible in the domestic violence context, where the persecutor may have an intimate knowledge of the victim’s opinions. *But see In re R-A*, 22 I. & N. Dec. at 914-15 (finding that Rodi Alvarado failed to show that her husband knew of her opposition to male dominance or cared about her beliefs on that issue). This theory is considerably more tenuous in cases of sexual violence in the community, where the persecutor is likely to have even less knowledge of the victim’s political opinions. Further, while this Comment advocates for an expansion of a conception of “on account of” to include not just the persecutor’s motivation, but also a failure of state protection that is attributable to possession of a protected characteristic, *see infra* Part III, it appears even more difficult to show that Guatemala fails to protect women due to a collectively held political opinion than to show that women are not protected simply because of their low status as a group in Guatemalan society.

²¹³ Thiele, *supra* note 13, at 223 (citing 1951 Refugee Convention, *supra* note 105, ch. I, art. 1(A)(2)).

²¹⁴ *In re Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985) (quoting 1 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 219 (1966)), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

²¹⁵ *Id.*

²¹⁶ *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998).

Nonetheless, the BIA, applying the canon of *eiusdem generis*,²¹⁷ concluded in 1985 that the unifying characteristic of the other four refugee categories—race, religion, nationality, and political opinion—was possession of “an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”²¹⁸ Accordingly, the BIA held that possession of an immutable characteristic also would define a “particular social group.”²¹⁹ And, significantly, the BIA in *Acosta* indicated that gender alone may form a particular social group, stating that “[t]he shared characteristic might be an innate one such as *sex*, color, or kinship ties.”²²⁰

Despite this recognition that a particular social group may be defined by sex, a number of cases reflect the reluctance of the federal courts and the BIA to recognize a particular social group identified exclusively by gender or of gender combined with nationality. For example, in *Gomez v. INS*, the Second Circuit rejected the asylum claim of a woman who had been battered, raped, and threatened by Salvadoran guerillas on five occasions.²²¹ In response to Gomez’s claim that she had been persecuted because of her membership in a particular social group, which she argued was defined in part by gender,²²² the court stated that

Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group. . . .

²¹⁷ In Latin, this phrase means “of the same kind or class.” See BLACK’S LAW DICTIONARY 556 (8th ed. 2004) (defining the term as “[a] canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed”).

²¹⁸ *In re Acosta*, 19 I. & N. Dec. at 233.

²¹⁹ *Id.* This is the majority view of the meaning of the term “particular social group.” The Ninth Circuit, however, defines “particular social group” as “one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (emphasis added). In addition to requiring immutability, the Second Circuit requires that the group be externally distinguishable. See, e.g., *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

²²⁰ *In re Acosta*, 19 I. & N. Dec. at 233 (emphasis added). While “sex” and “gender” are not always synonymous, it is assumed that either “sex” or “gender” could provide the basis for a particular social group under *Acosta*.

²²¹ 947 F.2d at 662.

²²² *Id.* at 663-64.

... Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics—*other than gender and youth*—such that would-be persecutors could identify them as members of the purported group. . . . We cannot . . . find that Gomez has demonstrated that she is more likely to be persecuted than any other young woman.²²³

Additionally, the Eighth Circuit in *Safaie v. INS* concluded that a particular social group composed of Iranian women would be “overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.”²²⁴ More recently, the Sixth Circuit in *Rreshpja v. Gonzales* voiced its skepticism that all of the women in a particular country could be entitled to asylum in the United States.²²⁵

Perhaps reflecting this sentiment, many asylum applicants claiming gender-based harm have resorted to defining their particular social group in terms of very narrow subgroups of women.²²⁶ For example, in *In re Kasinga*, which considered the claim of a young Togolese woman fearing FGM by her tribe, the BIA defined the applicant’s particular social group as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”²²⁷ In light of *Kasinga*, Rodi Alvarado argued that she belonged to the narrow social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”²²⁸ Similarly,

²²³ *Id.* at 664 (emphasis added).

²²⁴ 25 F.3d 636, 640 (8th Cir. 1994), *superseded by statute on other grounds*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.).

²²⁵ 420 F.3d 551, 555 (6th Cir. 2005).

²²⁶ See Anker et. al, *supra* note 40, at 1013 (describing the “twisting of gender claims into inappropriate and narrowly circumscribed particular social groups”). One recent example that is particularly extreme was proposed by a Cameroonian woman who claimed that she belonged to the particular social group composed of any “widowed Cameroonian female member of the Bamileke tribe in the Southern region that belongs to a family or has in-laws from a different tribe and region, the Bikom tribe in the Northwest province, who have falsely accused her of causing her husband’s death.” *Ngengwe v. Mukasey*, 543 F.3d 1029, 1033 (8th Cir. 2008). In the alternative, she claimed that she belonged to the particular social group of Cameroonian widows. *Id.* The Eighth Circuit accepted the latter group because they “share the past experience of losing a husband,” but rejected the former because “people with those characteristics are not perceived by society as a particular social group.” *Id.* at 1034.

²²⁷ 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

²²⁸ *In re R-A-*, 22 I. & N. Dec. 906, 911 (B.I.A. 1999), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008).

some advocates bringing asylum claims based on sexual violence in Guatemala have felt obligated to define the particular social group quite narrowly, such as “young, poor Guatemalan women.”²²⁹

The BIA, however, declined to recognize Rodi Alvarado’s particular social group, finding that, unlike the particular social group in *Kasinga*, nobody in Guatemala would perceive this group to exist.²³⁰ Likewise, while young, poor Guatemalan women may be most at risk for sexual and physical violence,²³¹ the BIA recently held that a particular social group cannot be defined by characteristics so indeterminate as wealth²³² or youth.²³³ Instead, it has required that particular social groups be socially visible and have particular, well-defined boundaries.²³⁴ Moreover, defining the particular social group quite narrowly may make showing the required causal nexus between the persecution and the particular social group quite difficult, given that gender-based harm often occurs because the victim is a woman, not because she is a member of a specific subset of women.²³⁵

Despite tendencies to the contrary, there has been a slow progression towards recognizing that a particular social group can be defined by gender, either alone or combined with nationality or ethnicity.

²²⁹ Interview with Jayne E. Fleming, Pro Bono Counsel, Reed Smith LLP, in Phila., Pa. (Mar. 3, 2008). For a case that proposed this particular social group, see *Juarez-Lopez v. Gonzales*, 235 F. App’x 361, 365 (7th Cir. 2007).

²³⁰ *In re R-A-*, 22 I. & N. Dec. at 918-19.

²³¹ See *supra* note 65 and accompanying text (noting that while victims of femicide include women from all age groups, occupations, and socioeconomic standing, most femicide victims are “young, urban, and poor”).

²³² See *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 73-74 (B.I.A. 2007) (rejecting the contention that “affluent Guatemalans” could form a particular social group, because wealth is not an immutable characteristic and such a group lacks the required degree of social visibility and particularity), *aff’d sub nom* *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 74 (2d Cir. 2007).

²³³ See *In re S-E-G-*, 24 I. & N. Dec. 579, 583 (B.I.A. 2008) (“We agree with the Immigration Judge that ‘youth’ is not an entirely immutable characteristic but is, instead, by its very nature, a temporary state that changes over time.”).

²³⁴ See, e.g., *In re A-M-E-*, 24 I. & N. Dec. at 74-76. Thus, not only is it relevant whether “members of a society perceive those with the characteristic in question as members of a social group,” *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008), but it is also important that the applicant’s group “can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.” *In re S-E-G-*, 24 I. & N. Dec. at 584. But see UNHCR, *Particular Social Group Guidelines*, *supra* note 160, ¶ 11 (providing that a particular social group may be defined *either* as “a group of persons who share a common characteristic other than their risk of being persecuted,” *or* as “[a group of persons] who are perceived as a group by society,” indicating that social visibility should not be an absolute requirement).

²³⁵ See *infra* Section II.D.

Even before the U.S. Gender Guidelines were published, the Third Circuit acknowledged that sex, as an innate characteristic, could provide the basis for a particular social group, at least in cases concerning women who transgress oppressive social mores.²³⁶ After the Guidelines' publication,²³⁷ BIA member Lory Rosenberg, concurring in *Kas- inga*, noted that "[t]here is nothing about a social group definition based upon gender that requires us to treat it as either an aberration, or as an unanticipated development requiring a new standard."²³⁸ More recently, the Eighth,²³⁹ Ninth,²⁴⁰ and Tenth Circuits²⁴¹ have recognized that all of the women of a particular nationality or ethnicity may comprise a particular social group, at least for claims based on FGM.²⁴² In so doing, the Eighth Circuit in *Hassan v. Gonzales* held that the applicant at issue "was persecuted on account of her membership in a particular social group, Somali females."²⁴³ According to the Ninth Circuit in *Mohammed v. Gonzales*, such a construction of particular social group "not only reflects a plausible construction of our asylum law, but the only plausible construction."²⁴⁴ The Tenth Circuit, in *Niang v. Gonzales*, emphasized that the focus should not be on whether women as a gender comprise a social group—which the court acknowledged that they do—but rather "whether the members of that

²³⁶ See *Fatin v. INS*, 12 F.3d 1233, 1240-42 (3d Cir. 1993) (holding that the Iranian petitioner had shown that she would be harmed on account of her gender, but that she failed to establish that complying with oppressive social mores in her country amounted to persecution).

²³⁷ While the U.S. Gender Guidelines contemplate the possibility of gender alone defining a particular social group, recognizing that "an applicant may assert that she has suffered persecution on account of her gender or because of her membership in a social group constituted by women," *U.S. Gender Guidelines*, *supra* note 121, at 8, the Guidelines do not take a position on this issue.

²³⁸ 21 I. & N. Dec. 357, 375 (B.I.A. 1996) (Rosenberg concurring).

²³⁹ *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

²⁴⁰ *Mohammed v. Gonzales*, 400 F.3d 785, 797-98 (9th Cir. 2005).

²⁴¹ *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005).

²⁴² The Second Circuit also recently suggested in dicta its agreement with *Hassan*, *Mohammed*, and *Niang*, stating, "it appears to us that petitioners' gender—combined with their ethnicity, nationality, or tribal membership—satisfies the social group requirement." *Bah v. Mukasey*, 529 F.3d 99, 112-13 (2d Cir. 2008). *But see* *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005) ("The BIA . . . has never held that an entire gender can constitute a social group under the INA. . . . We do not necessarily agree with the Ninth Circuit's determination that virtually all of the women in Somalia are entitled to asylum in the United States.").

²⁴³ 484 F.3d at 518.

²⁴⁴ 400 F.3d at 798.

group are sufficiently likely to be persecuted that one could say that they are persecuted ‘on account of’ their membership.”²⁴⁵

There are several reasons for recognizing that Guatemalan women form a particular social group for asylum claims based on sexual violence in the community. First, such a conception is sound under the definition of “particular social group” established in *Acosta* and later BIA cases. Gender is an immutable characteristic that is “so fundamental to individual identity or conscience that it ought not be required to be changed,”²⁴⁶ so much so that *Acosta* expressly acknowledged that sex may form a particular social group.²⁴⁷ Further, defining a social group as “Guatemalan women,” as opposed to a narrow subset such as “young, poor Guatemalan women,” provides a particular social group that is both visible and sufficiently particular to “provide an adequate benchmark for determining group membership.”²⁴⁸

Additionally, if women can form a particular social group in FGM cases, there is no reason why this should not apply to women persecuted in other manners. The question of whether the harm suffered rises to the level of persecution is an entirely separate issue from whether the victim possesses a protected characteristic.²⁴⁹ Moreover, as observed in *Niang*, the question of whether an individual possesses a protected characteristic is decided separately from whether that characteristic motivated the persecution.²⁵⁰ Thus, the fact that the women in *Niang*, *Mohammed*, and *Hassan* had a credible fear of FGM rather than another form of gender-based harm should not prevent the characterization of women as a particular social group in other contexts. It also should be irrelevant that the rates of FGM in certain countries are higher than the rates of sexual violence in Guatemala, a factor that is better considered in determining whether the applicant’s fear of future persecution is well founded or as circumstantial

²⁴⁵ 422 F.3d at 1199-1200.

²⁴⁶ *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

²⁴⁷ *Id.*

²⁴⁸ *In re A-M-E*, 24 I. & N. Dec. at 76.

²⁴⁹ *See, e.g., In re Acosta*, 19 I. & N. Dec. at 211 (addressing the requirements that “the alien must have a ‘fear’ of ‘persecution’” and that “the fear must be ‘well-founded’” separately from the requirement that “the persecution feared must be ‘on account of race, religion, nationality, membership in a particular social group, or political opinion’”).

²⁵⁰ 422 F.3d at 1199-1200.

evidence of the causal nexus between the persecution and the particular social group.²⁵¹

Furthermore, recognizing gender as the defining characteristic of a particular social group comports well with international refugee norms.²⁵² In 1985, ExCom acknowledged that signatories to the 1951 Refugee Convention “are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed social mores of the society in which they live may be considered as a ‘particular social group.’”²⁵³ In 1991, the UNHCR advocated an even broader position, seeking to “[p]romote acceptance in the asylum adjudication process of the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status.”²⁵⁴ The 2002 UNHCR Gender Guidelines explain that “[e]ven though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment.”²⁵⁵ Thus, the Guidelines conclude that gender alone may compose a particular social group, stating that

sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently

²⁵¹ The BIA in *S-E-G-* considered whether the particular social group described in *Hassan*, Somali females, had satisfied the particularity requirement, concluding that while in other contexts the group might be considered too “broad and diffuse” to satisfy the particularity requirement, “the defining characteristics of the group—being female and subject to FGM—are sufficiently distinct in the context of Somali culture to meet the requirement of particularity.” 24 I. & N. Dec. 579, 586 (B.I.A. 2008). The cases at issue in this Comment arguably are distinguishable from *Hassan*, given that Guatemalan women as a discrete group are not subject to sexual violence at the same rate as Somali females are subjected to FGM. Compare *Hassan*, 484 F.3d at 515 (noting that 98% of women in Somalia undergo FGM) with U.S. DEP’T OF STATE, *supra* note 57 (noting 2575 reported sexual crimes in Guatemala in the first nine months of 2007). However, the BIA and circuit courts repeatedly have emphasized that a particular social group cannot be defined by the persecution. See, e.g., *In re S-E-G-*, 24 I. & N. Dec. at 584 (concluding that shared past harm does not suffice to define a social group). Therefore, dicta in *S-E-G-* notwithstanding, relative rates of persecution should not make a difference in assessing a group’s particularity.

²⁵² For a detailed overview, see Thiele, *supra* note 13, at 227-32.

²⁵³ *ExCom Conclusion No. 39*, *supra* note 131, ¶ 115(4)(k).

²⁵⁴ UNHCR, *Guidelines on Refugee Women*, *supra* note 134, ¶ 71.

²⁵⁵ UNHCR, *Gender Guidelines*, *supra* note 12, ¶ 6. For this reason, the Guidelines take the position that “there is no need to add an additional ground [of gender] to the 1951 Convention definition.” *Id.*

than men. Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.²⁵⁶

Accordingly, it is hardly surprising that several other signatories to the 1951 Refugee Convention, including Canada, New Zealand, the United Kingdom, and a number of other European nations, have recognized that gender alone can define a particular social group.²⁵⁷

Defining a particular social group as “women” or “Guatemalan women” is analytically sound under existing United States law and international refugee norms. It is only in the contexts of FGM and the transgression of oppressive social mores, however, that decision makers have concluded that gender alone or women of a particular nationality may form a particular social group, and those steps forward have been slow.²⁵⁸ The outcome of *In re R-A-* also casts a shadow of uncertainty on the viability of a particular social group composed entirely of Guatemalan women, which may extend from the domestic violence context to claims based on sexual violence in the community. In some circuits, women fleeing sexual violence in Guatemala may have a hope of successfully claiming that they are persecuted as members of a particular social group composed of Guatemalan women, but such an outcome is unlikely without a provision in the asylum regulations expressly allowing that result, bringing the United States into step with the international community.

D. *Nexus Between the Persecution and the Protected Characteristic*

A Guatemalan woman fleeing sexual violence in her community must establish not only a well-founded fear of persecution and possession of a protected characteristic, but also a causal nexus between the two.²⁵⁹ Under current United States law, the applicant must provide

²⁵⁶ *Id.* ¶ 30. “An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group.” UNHCR, *Particular Social Group Guidelines*, *supra* note 160, ¶ 17. Thus, even if there are some Guatemalan women who are at relatively low risk for sexual violence, this on its own should not prevent a woman who has actually experienced or has a well-founded fear of experiencing sexual violence from asserting that she was persecuted on account of her membership in a particular social group composed of Guatemalan women.

²⁵⁷ See Helen P. Grant, *The Floodgates Are Not Going to Open, But Will the U.S. Border?*, 29 HOUS. J. INT’L L. 1, 28-29 (2006).

²⁵⁸ See *supra* note 242 (noting courts’ disagreement on whether gender can constitute a social group).

²⁵⁹ See 8 U.S.C. § 1101(a)(42)(A) (2006) (requiring that a refugee be persecuted “on account of” a protected characteristic).

evidence that her persecutor was aware of or could become aware of her protected characteristic and that the persecutor had the ability and predilection to persecute her for this reason.²⁶⁰ While the applicant does not have to show “direct proof” of the persecutor’s motive, because “the statute makes motive critical, [she] must provide *some* evidence of it, direct or circumstantial.”²⁶¹ Nonetheless, decision makers generally have recognized claims where motivation is not absolutely clear, such as when there are mixed motives: “[A]n applicant does not bear the unreasonable burden of establishing the exact motivation of a ‘persecutor’ where different reasons for actions are possible.”²⁶² Since the enactment of the REAL ID Act of 2005, however, the applicant must show that her protected characteristic is “at least one central reason” motivating the persecution.²⁶³

While characterizing sexual violence as persecution is relatively uncontroversial,²⁶⁴ decision makers have been more reluctant to acknowledge a causal connection between such violence and a protected characteristic. The primary difficulty has been the perception that sexual violence such as rape is attributable to personal reasons or sexual attraction, rather than being inflicted on the victim *because* she possessed a protected characteristic.²⁶⁵ For example, in *Klawitter v. INS*, the Sixth Circuit affirmed the BIA’s denial of asylum to a Polish

²⁶⁰ Anker et al., *supra* note 110, at 740.

²⁶¹ *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *see also In re Mogharrabi*, 19 I. & N. Dec. 439, 445-46 (B.I.A. 1987) (discussing various types of evidence that may be used to establish a well-founded fear of persecution).

²⁶² *Shoafra v. INS*, 228 F.3d 1070, 1076 (9th Cir. 2000) (quoting *In re Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988)); *see also In re S-P-*, 21 I. & N. Dec. 486, 489 (B.I.A. 1996) (“Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. . . . An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur.”).

²⁶³ 8 U.S.C. § 1158(b)(1)(B)(i). In construing the meaning of this provision, the Ninth Circuit held that “a motive is a ‘central reason’ if the persecutor would not have harmed the applicant if such motive did not exist.” *Parussimova v. Mukasey*, 533 F.3d 1128, 1135 (9th Cir. 2008). In other words, “an applicant must prove that such ground was a cause of the persecutors’ acts.” *Id.* The *Parussimova* court concluded that the applicant had *not* shown the required nexus between her attempted rape and her ethnicity, because her assailants’ “utterance of an ethnic slur, standing alone, [does not] compel[] the conclusion that her ethnicity was a central motivating reason for the attack.” *Id.* at 1136.

²⁶⁴ *See supra* notes 143-149 and accompanying text (discussing courts’ acceptance of rape as persecution).

²⁶⁵ This perception continues despite the fact that the U.S. Gender Guidelines instruct that “[t]he appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm.” *U.S. Gender Guidelines*, *supra* note 121, at 9.

woman who alleged that a member of the secret police had “forced himself on her” after a series of interrogations, finding that “[w]hile he may have threatened and harmed her on occasion[,] . . . it is clear that he was not ‘persecuting’ her on account of a proscribed ground. On the contrary, he simply was reacting to her repeated refusals to become intimate with him.”²⁶⁶ Similarly, in the case of Guatemalan Reina Izabel Garcia-Martinez, who was brutally raped by soldiers who believed her village was aligned with guerillas, an immigration judge decided in the first instance that her rape was just “a criminal act” and that there was no evidence of connection to the Guatemalan government.²⁶⁷ Further, in *Castillo-Hernandez v. Attorney General*, the Eleventh Circuit concluded that a Guatemalan woman who had been raped by a group of uniformed men simply was a “victim[] of general criminal violence by a roving gang of ex-guerillas.”²⁶⁸

Another difficulty flows from the tendency to define particular social groups so narrowly that it is implausible that the perpetrator actually was motivated to harm that specific subset of the population. A good example is the particular social group proposed in *In re R-A*, “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”²⁶⁹ In that case, the BIA held that even if it were to accept Alvarado’s particular social group, the proposed group was

²⁶⁶ 970 F.2d 149, 151, 152 (6th Cir. 1992). *But see* *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (granting asylum to a rape victim based on imputed political opinion, noting that “if the situation is seen in its social context, [the perpetrator] is asserting the political opinion that a man has a right to dominate and he has persecuted Olimpia to force her to accept this opinion without rebellion. . . . His statement reflects a much more generalized animosity to the opposite sex . . .”), *overruled on other grounds* by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996). Government lawyers continue to perpetuate notions that rape is a personal harm. *See, e.g.*, *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (indicating that the government focused only on one potential motive for the assault at issue, “‘to be with a woman’ and thus satisfy their ‘unlawful, violent, carnal desire’”); *Angoucheva v. INS*, 106 F.3d 781, 790 (7th Cir. 1997) (finding “insensitive” the government’s suggestion that the attempted rape at issue resulted “simply from the fact that [the perpetrator] found Angoucheva sexually attractive”).

²⁶⁷ *See* *Garcia-Martinez*, 371 F.3d at 1071-72, 1077 (reversing the IJ’s decision, having concluded she had established past persecution on account of her imputed political opinion).

²⁶⁸ 297 F. App’x 894, 900 (11th Cir. 2008). The court noted the well-documented problem of violence against women in Guatemala but concluded that such violence “is not directed at, or inflicted solely on, a particular group of women.” *Id.* at *4.

²⁶⁹ 22 I. & N. Dec. 906, 911 (B.I.A. 1999), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008).

both too broad and too narrow to establish eligibility for asylum.²⁷⁰ First, the BIA held that the group was too broad because Alvarado was unable to show that her husband was motivated to harm other women with the same characteristics.²⁷¹ The BIA also concluded that Alvarado's group was too narrow because it was likely that her husband "would have abused any woman, regardless of nationality, to whom he was married."²⁷²

Defining the particular social group in terms of gender, however, provides one solution to these causation difficulties. First, social science theories of why men rape women—as well as circumstantial evidence—suggest that, at least in the case of Guatemala, "[w]omen are sexually assaulted because they are women—not individually or at random, but on the basis of sex, because of their membership in a group defined by gender."²⁷³ Despite the tendency to view rape as a crime motivated by sexual attraction, psychologists, legal scholars, and international human rights organizations increasingly have recognized that the rape of women²⁷⁴ is instead motivated by the desire to dominate both the victim and women generally.²⁷⁵ The UNHCR has ob-

²⁷⁰ Condon, *supra* note 13, at 208.

²⁷¹ See *In re R-A-*, 22 I. & N. Dec. at 920 ("If group membership were the motivation behind his abuse, one would expect to see some evidence of it manifested in actions towards other members of the same group.")

²⁷² *Id.* at 921. While the BIA did not directly address the possibility that Alvarado was part of a broader particular social group composed of "Guatemalan women" or simply "women," it appears likely that her claim still would have failed. The BIA noted,

[W]e have scant information on how [Alvarado's husband] personally viewed other married women in Guatemala, let alone women in general. On the basis of this record, we perceive that the husband's focus was on the respondent because she was his wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm.

Id.

²⁷³ Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1301 (1991).

²⁷⁴ The rape of men may implicate many of the same concerns, but it is outside of the scope of this Comment.

²⁷⁵ For example, Catharine MacKinnon argues that

[s]exual violation symbolizes and actualizes women's subordinate social status to men. It is both an indication and a practice of inequality between the sexes, specifically of the low status of women relative to men. . . . In social reality, rape and the fear of rape operate cross-culturally as a mechanism of terror to control women. . . . Rape is an act of dominance over women that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression.

served more generally that “gender-based violence . . . is directed primarily at women with the intention of depriving them of a range of rights and maintaining their subordination as a group.”²⁷⁶ This understanding has gained some traction in the United States courts: the Ninth Circuit in *Garcia-Martinez* expressly recognized that “rape is not about sex; it is about power and control.”²⁷⁷

Further, the motivation to subordinate and dominate women may be apparent through circumstantial evidence such as the manner in which the sexual assault is carried out.²⁷⁸ This may include gang rape or “mutilation of the face, breasts or genitals; scalping; or insertion of inanimate objects . . . into the woman’s vagina.”²⁷⁹ Such disfigurement and sexual mutilation has been reported in an alarming number of Guatemalan victims, at least in the femicide context.²⁸⁰ Other manifestations of the subordination and domination of Guatemalan women as a group—such as anachronistic criminal laws and the government’s failure to adequately investigate and prosecute gender-based crimes²⁸¹—may provide additional circumstantial evidence for the assertion that individual perpetrators of sexual violence are them-

MacKinnon, *supra* note 273, at 1302; *see also* Katharine K. Baker, *What Rape Is and What It Ought Not To Be*, 39 JURIMETRICS J. 233, 239-40 (1999) (“Rape is used to demonstrate power over women, power over other men, and connection to other men.”); Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, 81 (1987) (“Rape is an act of violence similar to other crimes of physical assault, but the meaning of this violence is unmistakably the demonstration of power over women.”).

²⁷⁶ UNHCR, *Further Promotion*, *supra* note 191, ¶ 53; *cf.* UNHCR, *Violence Against Women in the Family*, *supra* note 80, ¶ 9 (observing that the demonization of women who take on nontraditional roles “fuels and legitimates violence against women” in a multitude of forms, including rape). The UNHCR also has described rape as an “abuse of power and control in which the rapist seeks to humiliate, shame, degrade and terrify the victim.” UNCHR, *Situation of Human Rights in the Territory of the Former Yugoslavia*, ¶ 85, U.N. Doc. E/CN.4/1993/50 (Feb. 10, 1993) (*prepared by* Tadeusz Mazowiecki, Special Rapporteur of the Comm’n on Human Rights); *see also* UNHCR, *Sexual Violence Against Refugees*, *supra* note 144, ¶ 1.1 (“Perpetrators of sexual violence are often motivated by a desire for power and domination. . . . Like other forms of torture, it is often meant to hurt, control and humiliate, violating a person’s innermost physical and mental integrity.”).

²⁷⁷ *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (quoting Margaret A. Cain, *The Civil Rights Provision of the Violence Against Women Act*, 34 TULSA L.J. 367, 407 n.32 (1999)) (internal quotations and brackets omitted).

²⁷⁸ Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape as a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231, 265-66 (1993) (footnotes omitted).

²⁷⁹ *Id.* at 266 (footnotes omitted).

²⁸⁰ *See supra* notes 63-68 and accompanying text.

²⁸¹ *See supra* notes 91-99 and accompanying text.

selves motivated by the victim's membership in a class consisting of Guatemalan women.²⁸²

Thus, defining the particular social group simply as "Guatemalan women" may accurately reflect the motivation of the persecutors, in that these rapes are not simply particular instances of sexual attraction, but rather expressions of the subordination of Guatemalan women as a group.²⁸³ Nonetheless, without a presumption that perpetrators of sexual violence are motivated by the desire to harm individual women because of their status as women, it may be difficult to provide sufficient evidence in any particular case that the persecutor had such a motivation—as opposed to the "personal" reasons often cited by decision makers. Such a presumption may not be necessary, however, because it is not the only manner of connecting sexual violence in Guatemala with membership in a particular social group composed of Guatemalan women. The causal nexus also may be established by the relationship between the victim's gender and Guatemala's failure to protect her adequately. This latter nexus, however, will require reconsideration of the meaning of "on account of" under United States law.

While the term "on account of" implies a causal connection between the persecution and the protected characteristic, the nature of that causation is vague and may imply either that the persecutor has intent to persecute due to a protected characteristic or simply that the victim was persecuted as a result of her protected characteristic, regardless of her persecutor's intentions.²⁸⁴ In other words, the plain

²⁸² See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (allowing asylum applicants to establish the causal nexus through circumstantial evidence); cf. *In re R-A-*, 22 I. & N. Dec. 906, 939 (B.I.A. 1999) (Guendelsberger dissenting) (concluding that "domestic violence [in Guatemala] exist[s] as a means by which men may systematically destroy the power of women, a form of violence rooted in the economic, social, and cultural subordination of women," citing in part the well-established record that "Guatemalan society is especially oppressive of women generally" and that "extreme patriarchal notions are firmly entrenched in Guatemalan society"), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008).

²⁸³ While it is difficult to argue that sexual desire forms no part of the motivation to rape, see, e.g., Lee Ellis, *A Synthesized (Biosocial) Theory of Rape*, 59 J. CONSULTING & CLINICAL PSYCHOL. 631, 632 (1991) (suggesting that sexual desire plays an important motivational role for rapists), when a rapist recognizes or disregards the lack of consent, "he is in pursuit only of outlawed sex . . . knowingly hurting and humiliating a woman in a manner which occurs precisely because she is a woman." Rothschild, *supra* note 278, at 274.

²⁸⁴ As explained by asylum scholar Karen Musalo,

An intent-based analysis of the phrase "on account of" would require a showing that the persecutor was motivated to harm the victim because of the victim's status or beliefs[, while an] effects-based analysis would allow the victim

meaning of “on account of” may encompass more than just the persecutor’s motivation. In evaluating the meaning of “on account of,” however, the Supreme Court in *INS v. Elias-Zacarias* held, with minimal discussion,²⁸⁵ that an applicant for asylum must provide some evidence, either direct or circumstantial, that the persecutor was motivated to inflict the harm because the victim possessed one of the protected characteristics.²⁸⁶ *Elias-Zacarias* thus requires that an applicant show more than just *some* link between the persecution and the protected characteristic, but rather requires proof that the *persecutor* was motivated to harm the applicant because of her possession of a protected characteristic.²⁸⁷

Because of the continuing legacy of *Elias-Zacarias*, United States decision makers have been reluctant to adopt other interpretations of the phrase “on account of” that are relevant to the claims of women fleeing sexual violence in Guatemala.²⁸⁸ Courts in the United Kingdom,²⁸⁹ Australia,²⁹⁰ and New Zealand,²⁹¹ as well as the UNHCR guide-

to prevail upon a showing that he or she suffered because of his or her status or beliefs, *whether or not he or she could prove the persecutor’s motivation.*

Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT’L L. 1179, 1186 (1994).

²⁸⁵ See *id.* at 1191 (“The *Zacarias* decision is devoid of any rationale other than the questionable assertion that its ruling is premised on the plain meaning of the statute.”).

²⁸⁶ 502 U.S. at 483 (1992).

²⁸⁷ United States law currently requires the protected characteristic to be central to the persecutor’s motivation. See *supra* note 263 and accompanying text. Further, some cases have suggested that the persecutor actually must be motivated to *punish* the victim for possessing that characteristic. See, e.g., *In re S-E-G*, 24 I. & N. Dec. 579, 585 (B.I.A. 2008) (finding “no evidence . . . to show that gang members limit recruitment efforts to male children who fit the [proposed particular social group], *or do so in order to punish them for these characteristics*”) (emphasis added); *In re Acosta*, 19 I. & N. Dec. 211, 223 (B.I.A. 1985) (“As was the case prior to enactment of the Refugee Act, ‘persecution’ as used in section 101(a)(42)(A) clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). But see *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (concluding that FGM can constitute persecution, even if the individuals seeking to carry out the procedure do not have the subjective motivation to harm the victim).

²⁸⁸ See *infra* notes 304-306 and accompanying text.

²⁸⁹ See *Ex Parte Shah*, 2 Eng. Rep. 546, 558 (1999) (concluding that while the perpetrators of domestic violence were not motivated by the applicants’ membership in a particular social group defined by gender, the required nexus had been shown by the failure of the Pakistani government to protect women from their husbands).

²⁹⁰ See *Minister for Immigration and Multicultural Affairs v. Khawar*, (2002) 210 C.L.R. 1 (ruling that asylum could be granted based on a gender-defined particular

lines on gender-related asylum claims,²⁹² all have endorsed a “bifurcated” nexus analysis, whereby an applicant may show the required nexus between persecution and a particular social group either by demonstrating that the *persecutor* was motivated to harm the victim because of her membership in that group or that her *government* failed to protect her because of her membership in that group.²⁹³ For example, in the United Kingdom case of *Ex Parte Shah*, the House of Lords held that, in the case of two Pakistani women who had left their abusive husbands, the causal nexus between the persecution and their membership in a social group composed of Pakistani women was established by the combination of the Pakistani government’s condoning domestic violence and relevant laws that discriminated on the basis of gender.²⁹⁴

Correspondingly, a woman fleeing sexual violence in Guatemala could show that she was persecuted on account of her membership in a particular social group composed of Guatemalan women based on circumstantial evidence that her government failed to protect her because of her status as a Guatemalan woman. Guatemalan women live in “a culture that embraces the subjugation of women and celebrates

social group where there is both gender-based discrimination and a failure of State protection).

²⁹¹ See Refugee Appeal No. 71427/99 (2000), available at http://www.nzrefugeeappeals.govt.nz/PDFs/ref_20000816_71427.pdf (reaching a similar conclusion to that in *Ex Parte Shah*, *supra* note 289).

²⁹² UNHCR, *Particular Social Group Guidelines*, *supra* note 160, ¶ 23 (“The causal link may be satisfied . . . where the risk of being persecuted at the hands of a nonstate actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is a Convention reason.”).

²⁹³ For a thorough explanation of the bifurcated nexus theory and the cases cited *supra* notes 289-291, see Musalo, *supra* note 112.

²⁹⁴ 2 Eng. Rep. at 558, 564. One member of the House of Lords explained the relationship between tacit state support and nonstate actor persecution with the following analogy:

[S]uppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash [sic] his shop, beat [sic] him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is.

Id. at 565.

the man's right to dominate,"²⁹⁵ evidenced in laws that fail to criminalize marital rape and sexual harassment,²⁹⁶ require prosecution of domestic violence only if signs of injury are still apparent ten days later,²⁹⁷ and, until very recently, allowed a man to rape a minor provided that he married her.²⁹⁸ Gender-based crime of all types, from domestic violence, to sexual violence, to femicide, has been perpetrated with impunity for decades.²⁹⁹ The government's unwillingness or inability to respond adequately to domestic and sexual violence effectively "send[s] a message that such attacks are justified and will not be punished."³⁰⁰ Whether the harm is domestic violence or sexual violence in the community, Guatemalan women have a powerful argument that their government's inability or unwillingness to protect them is in fact attributable to their gender, establishing the required causal connection.

The BIA in *Kasinga* arguably subscribed to a form of this theory by granting asylum to Fauziya Kasinga in part because of pervasive discrimination against women in her culture, the "patriarchal underpinnings" of FGM, and the fact that the government of Togo would not protect her from FGM.³⁰¹ Nonetheless, the older women in the tribe who sought to carry out the procedure were motivated by the fact that Kasinga was a member of the particular social group "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by the tribe, and who oppose the practice."³⁰² Thus, given that the nexus in *Kasinga* arguably was established through the persecutors' motivation, the BIA did not go as far as the courts in the United Kingdom, Australia, and New Zealand, which found the nexus entirely through repressive government policies toward women.³⁰³

²⁹⁵ Musalo, *supra* note 4, at 145 (affidavit of Hilda Morales Trujillo).

²⁹⁶ See *supra* note 94 and accompanying text.

²⁹⁷ See *supra* note 96 and accompanying text.

²⁹⁸ See *supra* notes 94-97 and accompanying text.

²⁹⁹ See *supra* Part I.

³⁰⁰ Anker et al., *supra* note 110, at 735 (quoting UNHCR, *Further Promotion*, *supra* note 191, ¶ 33).

³⁰¹ See Musalo, *supra* note 112, at 800-01 (citing *In re Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996), and arguing that it expanded the "nexus analysis in U.S. jurisprudence" to include "the role and motivations of the State or society").

³⁰² *In re Kasinga*, 21 I. & N. Dec. at 368.

³⁰³ See Musalo, *supra* note 112, at 789, 793, 796 (noting cases in the three countries where a "failure of state protection" was sufficient to provide a nexus). Musalo convincingly argues, however, that these courts were shortsighted in failing to acknowledge that the perpetrators in these cases were in fact motivated to harm the victims be-

Additionally, despite *Kasinga*, the BIA explicitly rejected the bifurcated nexus theory in *In re R-A*. The BIA conceded that “[s]ocietal attitudes and the concomitant effectiveness (or lack thereof) of governmental intervention very well may have contributed to the ability of the respondent’s husband to carry out his abusive actions over a period of many years.”³⁰⁴ The BIA, however, decided that the issue of state action simply distracted from the focus on the husband’s motivation.³⁰⁵ The Board concluded that

construing private acts of violence to be qualifying governmental persecution, by virtue of the inadequacy of protection, would obviate, perhaps entirely, the “on account of” requirement in the statute. We understand the “on account of” test to direct an inquiry into the motives of the entity actually inflicting the harm.³⁰⁶

Thus, in Rodi Alvarado’s case, the causal nexus between her persecution and her membership in a particular social group failed because she could not show that her husband had the requisite motivation.³⁰⁷

Given that former Attorney General Janet Reno vacated and stayed *In re R-A* in 2001 and that the case remains pending since former Attorney General Michael Mukasey lifted the stay in 2008, *Kasinga* arguably represents the state of the BIA’s jurisprudence on the interpretation of the phrase “on account of.”³⁰⁸ The outcome in *Kasinga*, however, was based on the persecutors’ motivation as much as the failure of the applicant’s country to protect her from FGM, and no United States decision maker has found the required nexus between persecution and a protected characteristic solely based on a state’s failure to protect victims of persecution because of their protected characteristic. Change is needed to put the United States in step with other signatories to the 1951 Refugee Convention and with the guidance of the UNHCR itself.

cause of their gender, given the strong connection between domestic violence and the subjugation of women. *Id.* at 790-91; *see also supra* notes 273-282 and accompanying text.

³⁰⁴ *In re R-A*, 22 I. & N. Dec. 906, 921-22 (B.I.A. 1999), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008).

³⁰⁵ *See id.* at 922-23 (“[G]overnmental inaction is not a reliable indicator of the motivation behind the actions of private parties.”).

³⁰⁶ *Id.* at 923.

³⁰⁷ *Id.* at 914.

³⁰⁸ *See* Musalo, *supra* note 112, at 804 (“*Matter of Kasinga* is the controlling authority for defining social group and determining nexus.”).

III. REGULATORY CHANGE IS NEEDED

“All asylum claims must be analyzed against the background of the fundamental purpose of refugee law: to provide surrogate international protection when there is a fundamental breakdown in state protection in the form of serious human rights violations tied to civil and political status.”³⁰⁹ In the case of Guatemala, a long legacy of violence against women, continuing patriarchal attitudes regarding the role of women in society, and an ineffective criminal justice system permit gender-based crimes to be committed with impunity at an astonishing rate.³¹⁰ These conditions enable not only the domestic violence suffered by Rodi Alvarado, but also sexual violence in the community, and, for the most unfortunate, femicide.³¹¹ Guatemalan women have experienced a long-term breakdown in state protection simply because they are women, warranting their international protection.

In theory, Guatemalan women fleeing sexual violence in their country should meet the definition of a refugee and thus be eligible for asylum. International human rights organizations, the U.S. Gender Guidelines, and United States courts recognize that rape inflicts harm amounting to persecution.³¹² Further, longstanding BIA precedent, recent circuit court decisions, the U.S. Gender Guidelines, the UNHCR, and case law from other signatories to the 1951 Refugee Convention suggest that Guatemalan women may constitute a particular social group.³¹³ The required causal nexus between the persecution and the social group may be established by demonstrating either that (1) perpetrators of sexual violence are motivated by the desire to subordinate women as a class, or (2) Guatemala fails to provide adequate protective and preventative measures to the applicants because they are women.³¹⁴

³⁰⁹ Anker et al., *supra* note 110, at 715-16; *see also* UNHCR, *Guidelines on Refugee Women*, *supra* note 134, ¶ 1 (“Protection is at the heart of the responsibility that the international community bears towards refugees. . . . International protection entails taking all necessary measures to ensure that refugees are adequately protected and effectively benefit from their rights.”).

³¹⁰ *See generally supra* Part I (identifying the root causes of violence against Guatemalan women).

³¹¹ *See* BELTRÁN & FREEMAN, *supra* note 8, at 11 (describing Guatemala’s “continuum of gender-based violence”).

³¹² *See supra* notes 143-149 and accompanying text.

³¹³ *See supra* notes 236-245, 253-257 and accompanying text.

³¹⁴ *See supra* notes 273-282, 295-300 and accompanying text.

Nonetheless, because of the continuing reluctance of some decision makers to recognize all of the women of a specific nationality as a particular social group, lingering conceptions of rape as a personal harm unrelated to membership in that group, and a lack of recognition that the failure of state protection may provide a causal nexus between status as a woman and rape, these claims are unlikely to succeed under present United States law. To provide clarity in the jurisprudence of gender-based asylum claims—both for those applicants who have been subjected to sexual violence, and those who have faced other gender-motivated crimes such as domestic violence or FGM—and bring the United States into step with international refugee norms, the asylum regulations should be amended.

In December 2000, following the outcry over the BIA's disposition of *In re R-A*, the INS proposed amendments to the asylum regulations that were to provide "generally applicable principles that will allow for case-by-case adjudication of claims based on domestic violence or other serious harm inflicted by individual nonstate actors."³¹⁵ As explained in a Department of Justice question-and-answer document, "[t]hough applicable to all asylum . . . cases, these principles take into account our understanding of the circumstances surrounding persecution against women and clarify interpretive issues that could impose barriers to gender-related and domestic violence claims."³¹⁶ Thus, while inspired by a case of domestic violence, the *R-A* rule was not limited to a single form of persecution.

These amendments were proposed at the end of the Clinton administration, and Rodi Alvarado's case before the BIA was vacated and stayed pending their resolution.³¹⁷ The *R-A* rule then remained in limbo for much of the tenure of the Bush administration.³¹⁸ However,

³¹⁵ Asylum and Withholding Definitions, 65 Fed. Reg. 76,588–89 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (providing guidance on the definition of words such as "persecution" and phrases such as "on account of").

³¹⁶ U.S. DEP'T OF JUSTICE, *supra* note 43.

³¹⁷ See Musalo, *supra* note 4, at 125 (describing the "unusual" action taken by former Attorney General Janet Reno in vacating the case).

³¹⁸ See *id.* ("Although more than five years have passed, the ongoing contradictory tendencies on this issue have prevented any resolution."). In 2004, the Department of Homeland Security (DHS) submitted a brief to the Attorney General's office arguing that Alvarado's case should be remanded to the BIA for a grant of asylum, because she was persecuted on account of her membership in a particular social group composed of "married women in Guatemala who are unable to leave the relationship." Department of Homeland Security's Position on Respondent's Eligibility for Relief, *In re Alvarado-Pena*, No. A73753922, at 36 (A.G. Feb. 19, 2004), available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf. The DHS indicated its intention

in a surprise move, on September 25, 2008, just a few months before President Bush left office, Attorney General Michael Mukasey lifted the stay on Alvarado's case and remanded it to the BIA.³¹⁹ Noting that "the proposed rule . . . never has been made final,"³²⁰ the Attorney General instructed the BIA to "exercise its own discretion" in interpreting ambiguous statutory language and "issue a precedent decision establishing a uniform standard nationwide."³²¹ The Attorney General noted that, since staying Alvarado's case, "both the [BIA] and courts of appeals have issued numerous decisions relating to various aspects of asylum law under the existing statutory and regulatory provisions[,] . . . for example, the terms 'persecution,' 'on account of,' and 'particular social group.'"³²² The BIA was instructed to consider such decisions in reviewing Alvarado's case.³²³

While former Attorney General Mukasey did not expressly repudiate the *R-A* rule in remanding Alvarado's case to the BIA, the move suggested the Bush administration's preference for establishing a framework for gender-based asylum claims through the judicial rather than regulatory process.³²⁴ Piecemeal development of such a framework in the BIA and circuit courts, however, has proven tentative and inconsistent.³²⁵ It is possible that a new precedential opinion in Alvarado's case by the BIA could create nationwide uniformity on certain

at that time to finalize the *R-A* rule "promptly," and it sought a grant of asylum without opinion "so as not to prejudice the rulemaking process." *Id.* at 3, 5.

³¹⁹ *In re R-A*, 24 I. & N. Dec. 629, 630, 632 (A.G. 2008).

³²⁰ *Id.* at 630.

³²¹ *Id.* at 631.

³²² *Id.* at 630.

³²³ *Id.* at 631.

³²⁴ Notably, the Executive Office for Immigration Review, charged with administering and interpreting federal immigration laws, *see* EOIR Responsibilities, *available at* <http://www.usdoj.gov/eoir/responsibilities.htm> (last visited Feb. 15, 2008), is part of the Department of Justice, which is overseen by the Attorney General. *See* Dept. of Justice Organization Chart, *available at* <http://www.usdoj.gov/dojorg.htm> (last visited Feb. 15, 2009). Thus, Attorney General Mukasey's remand suggests a lack of will on the part of the Bush administration to finalize the *R-A* rule.

³²⁵ For example, compare *In re Kasinga*, 21 I. & N. Dec. 357, 367-68 (B.I.A. 1996), where the BIA granted asylum in part because the applicant's country failed to protect her from gender-related harm, with *In re R-A*, 22 I. & N. Dec. at 923, where the BIA rejected the proposition that Guatemala's failure to protect Rodi Alvarado provided the required causal nexus. In 2004, the DHS also took the position that piecemeal development in this area of the law was inadequate. *See* Department of Homeland Security's Position on Respondent's Eligibility for Relief, *supra* note 318, at 4-5 ("Rather than allowing further piecemeal development of this area, the proposed rule announced a uniform administrative interpretation of the law on key issues that often arise in social group cases.").

aspects of asylum law that currently is lacking.³²⁶ But it is far from clear that the Board would reinterpret the current asylum regulations to go even as far as the proposed *R-A*-rule, much less as far as would be needed to bring the United States into step with the international community. Further, if either party appeals the outcome of Alvarado's rehearing before the BIA to the Ninth Circuit, it could be years before these principles are settled. Therefore, it is far more preferable for the new administration to establish a framework for gender-related asylum claims through regulation, using the *R-A*-rule as a starting point.³²⁷

In many respects, the proposed *R-A*-rule is a step in the right direction, while in other ways it veers off course. First, the proposed rule clarifies that for harm to constitute persecution it must be "objectively serious harm . . . that is subjectively experienced as serious harm or suffering by the applicant."³²⁸ The proposed amendments also provide that an applicant need not show that the persecutor was subjectively motivated to harm the victim.³²⁹ Thus, the rule goes farther than present case law, which continues to require, at least in some cases, that the persecutor intend to "punish" the victim for possessing a protected characteristic.³³⁰ While this change does not directly affect the claims of Guatemalan women fleeing sexual violence in the community—where the persecutor would in most circumstances act with intent to harm—this recognition is a positive step forward in recognizing the unique nature of gender-based harm, and it is more than the BIA has been consistently willing to provide on its own accord.

The *R-A*-rule also provides a framework for determining whether a government is "unable or unwilling" to control a nonstate actor, instructing decision makers to evaluate "whether the government takes

³²⁶ See 8 C.F.R. § 1003.1(d)(1) (2008) ("[T]he Board, through precedent decisions, shall provide clear and uniform guidance to [the DHS], the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations.").

³²⁷ Just as former Attorney General Reno stayed Alvarado's case in 2000 upon proposal of the *R-A*-rule, the new administration could reinstate a stay on her case pending finalization of those rules or a newly proposed version thereof.

³²⁸ See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,590, 76,597 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. § 208.15(a)) ("Generally, an applicant's own testimony would be the best evidence in determining whether that applicant subjectively experienced or would experience the treatment as harm.").

³²⁹ See *id.* at 76,597 ("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.") (emphasis added).

³³⁰ See *supra* note 287.

reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the state protection that exists.”³³¹

The rule provides several evidentiary considerations including government complicity in the persecution, perfunctory official action or a pattern of unresponsiveness, and any steps taken by the government to prevent the persecution.³³² While this provision effectively codifies nonstate-actor law as it has developed in the BIA and the circuit courts, its inclusion in the proposed amendments to the regulations also highlights the increased recognition of nontraditional asylum claims, such as those committed by nonstate actors against women.

Nonetheless, the *R-A*-rule’s treatment of “particular social group” in part falls short. The proposed amendment essentially affirms the definition of “particular social group” that was developed in *In re Acosta*:

A particular social group is composed of members who share a common, immutable characteristic, such as *sex*, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.³³³

While it is commendable to expressly provide that sex (and gender)³³⁴ may form a particular social group, the BIA and circuit courts have cited this definition since *Acosta* established it in 1985, but very few decision makers have taken this statement to mean that gender—without combination with other narrowing factors—can form a particular social group.³³⁵ Accordingly, to send a more powerful message

³³¹ Asylum and Withholding Definitions, 65 Fed. Reg. at 76,597.

³³² *Id.*

³³³ *See id.* at 76,598 (to be codified at 8 C.F.R. § 208.15(c)) (emphasis added); *see also In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (emphasizing the immutability of a group characteristic), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

³³⁴ *See* Asylum and Withholding Definitions, 65 Fed. Reg. at 76,593 (“Gender is clearly such an immutable trait, is listed as such in *Matter of Acosta*, and is incorporated in this rule.”).

³³⁵ *See, e.g., Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005) (doubting that every woman of a particular nationality could form a particular social group); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (stating that gender alone cannot form a particular social group). *But see Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (defining a particular social group as “Somali females”); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (suggesting that allowing a particular social group to be defined by gender alone is “the only plausible construction” of the statute); *Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005) (indicating that the focus should not be on whether gender alone can form a particular social group, but whether the

to decision makers that gender alone may form a particular social group, the final regulation should be phrased with stronger language, such as:

A particular social group is composed of members who share a common, immutable characteristic. This includes, but is not limited to, sex, color, kinship ties, or past experience, *either alone or in combination with other factors*. The characteristic must be one that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.³³⁶

Enacting this change through regulation will codify the holdings of *Hassan, Mohammed*, and *Niang*, and it will obviate the potential for the BIA to cut short this growing trend.

The *R-A* rule also defines “on account of” in a manner that takes a step in the right direction but fails in its follow-through. A positive development is the proposed definition’s acknowledgment that the applicant need not show that the persecutor will act against other victims who share the protected characteristic.³³⁷ The rule’s preamble recognizes that “[i]n some cases, a persecutor may in fact target an individual victim because of a shared characteristic, even though the persecutor does not act against others who possess the same characteristic.”³³⁸ Thus, to the extent that decision makers require an asylum applicant to prove that the persecutor was motivated to harm her because she possesses a protected characteristic, this amendment eliminates the need to show that he also would harm others who are simi-

required nexus has been shown); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (concluding that gender alone could form a particular social group).

³³⁶ Such a change is particularly necessary considering that the *R-A* rule provides a list of factors that may be considered to determine whether an applicant is part of a recognized particular social group, such as whether the group members are “closely affiliated,” “driven by a common motive or interest,” or possess “a voluntary associational relationship.” *Asylum and Withholding Definitions*, 65 Fed. Reg. at 76,598 (to be codified at 8 C.F.R. § 208.15(c)(3)). While these factors are optional and may be helpful in defining other novel social groups, without explicit recognition that gender alone may comprise a particular social group, the factors simply may lead decision makers to the conclusion that gender alone cannot define a particular social group. *See Condon, supra* note 13, at 246-48 (“The discretionary factors that allow immigration judges to consider whether a group defined by gender has sufficient societal significance can easily negate the impact of the INS’s declaration that gender is an immutable trait which *may* constitute a particular social group.”).

³³⁷ *See Asylum and Withholding Definitions*, 65 Fed. Reg. at 76,598 (to be codified at 8 C.F.R. § 208.15(b)) (establishing that while “[e]vidence that the persecutor seeks to act against other individuals who share the applicant’s protected characteristic is relevant and may be considered[, it] shall not be required”).

³³⁸ *Id.* at 76,592-93.

larly situated, a requirement imposed by the BIA in *In re R-A* that has no basis in the definition of the term “refugee.”³³⁹

Further, the proposed amendment takes a step towards recognizing that the persecutor’s motivation may be inferred from societal norms and circumstances. The preamble states that the perpetrator’s motivation may be shown using “evidence about patterns of violence in the society against individuals similarly situated to the applicant.”³⁴⁰ Thus, in the domestic violence context, the preamble suggests that the causal nexus may be established either by “any direct evidence about the abuser’s own actions” or by “any circumstantial evidence that such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society, that cannot be deduced simply by evidence of random acts within that society.”³⁴¹ Allowing such evidence to be used moves United States gender-based-asylum jurisprudence back to *Kasinga* and closer to norms adopted by the international community.³⁴²

The proposed definition of “on account of,” however, fails to recognize one of the most important shortcomings of *In re R-A* and in United States asylum law generally: the *R-A* majority’s refusal to consider the nexus between Guatemala’s failure to protect Rodi Alvarado and her membership in a particular social group of Guatemalan women. As the *R-A* dissent recognized, “It is well established in the record before us that Guatemalan society is especially oppressive of women generally. The materials submitted reveal that extreme patriarchal notions are firmly entrenched in Guatemalan society.”³⁴³ These root causes, plus the corresponding culture of impunity for gender-based harm, extend far from the domestic violence context to other forms of gender-based harm, including rape and femicide. It is because the victims are women that they are subjected to this abuse, in part because the government has abdicated its responsibility to pro-

³³⁹ The refugee definition simply requires that the *applicant* have a well-founded fear of persecution on account of a protected characteristic. 8 U.S.C. § 1101(a)(42)(A) (2006).

³⁴⁰ Asylum and Withholding Definitions, 65 Fed. Reg. at 76,593.

³⁴¹ *Id.*

³⁴² See *supra* notes 289-294, 301-303 and accompanying text.

³⁴³ *In re R-A*, 22 I. & N. Dec. 906, 939 (B.I.A. 1999) (Guendelsberger dissenting), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008).

tect its citizens without discrimination.³⁴⁴ But while the *R-A*-rule's treatment of the use of circumstantial evidence hints of the relevance of social conditions in establishing the causal nexus, the proposed definition of "on account of" still requires "[a]n asylum applicant [to] establish that the *persecutor* acted . . . against the applicant on account of the applicant's race, religion, nationality, membership in a particular social group, or political opinion."³⁴⁵ The proposed amendment does not provide that a government's gender-motivated failure to provide protection can constitute the requisite nexus, and the BIA is quite unlikely to take this step on its own.

To bring United States asylum jurisprudence in step with the international community,³⁴⁶ the finalized regulations should be amended to adopt a "bifurcated" nexus analysis, allowing an applicant to establish a causal connection between the persecution and the protected characteristic either through the motivation of the persecutor *or* through government inaction that is itself attributable to a protected characteristic.³⁴⁷ In other words, the causal link would be established either

- (1) where there is a real risk of being persecuted at the hands of a non-state actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or
- (2) where the risk of being persecuted at the hands of a nonstate actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.³⁴⁸

Such a framework is consistent with the INA's definition of "refugee,"³⁴⁹ is in line with the interpretation of the term "refugee" used both by several other signatories to the 1951 Refugee Convention and

³⁴⁴ See, e.g., Anker et al., *supra* note 110, at 730-31 ("Under international law, a state's duties embrace more than an obligation to refrain from direct harm or predatory actions towards their peoples; states must, without discrimination, respect those rights and respond to violations by non-state actors.").

³⁴⁵ Asylum and Withholding Definitions, 65 Fed. Reg. at 76,597 (emphasis added).

³⁴⁶ See Grant, *supra* note 257, at 28-34 (discussing the asylum jurisprudence of Canada, the United Kingdom, Australia, and New Zealand); Musalo, *supra* note 112, at 787-97 (discussing the asylum jurisprudence of the United Kingdom, Australia, and New Zealand); see also *supra* notes 289-291 and accompanying text.

³⁴⁷ See Musalo, *supra* note 112, at 778-79 (advocating for adoption of a "bifurcated" nexus analysis, which "does not limit the nexus consideration to an analysis of the motives of the individual perpetrator of the persecution, but includes societal and State factors in the equation").

³⁴⁸ UNHCR, *Particular Social Group Guidelines*, *supra* note 160, ¶ 23.

³⁴⁹ See *supra* note 284 and accompanying text.

the UNHCR itself,³⁵⁰ and will satisfy the United States's duty to provide surrogate protection in the face of the failure of states such as Guatemala to protect its female citizens from the harms caused by nonstate actors.³⁵¹

IV. FEAR OF OPENING THE ASYLUM FLOODGATES IS UNWARRANTED AND UNPRINCIPLED

Those who resist reforming the asylum framework to accommodate gender-based asylum claims primarily point to the fear of "opening the floodgates," given the prevalence of sexual violence and other forms of discrimination against women throughout the world.³⁵² Women around the world face the threat of rape, and the prevalence of femicide is not limited to Guatemala, but also has been well documented in Mexico, Honduras, Nicaragua, and El Salvador.³⁵³ Further, the "floodgates" argument may be coupled with a related concern that it would be only too easy to claim eligibility for asylum by fraudulently asserting past sexual abuse.³⁵⁴ However, a number of commentators have convincingly refuted such fears.³⁵⁵

First, the asylum framework itself provides assurances against this scenario.³⁵⁶ While past sexual assault may be considered a harm

³⁵⁰ See *supra* notes 289-294 and accompanying text.

³⁵¹ See *supra* note 309 and accompanying text.

³⁵² See, e.g., George Lardner, Jr., *Ashcroft Reconsiders Asylum Granted to Abused Guatemalan*, WASH. POST, Mar. 3, 2003, at A2 (quoting David Ray of the Federation for American Immigration Reform as stating, that "[y]ou can't just say, 'I'm in a bad situation and therefore I'm a member of some new social group.' . . . If the categories grow so large as to include millions of people, asylum policy is going to crumble"); Anna Quindlen, *Torture Based on Sex Alone*, NEWSWEEK, Sept. 10, 2001, at 76 (quoting an anti-immigration activist as saying, with regards to asylum claims based on domestic violence, "You get a punch in the mouth, and you're home free"); see also *In re R-A-*, 22 I. & N. Dec. 906, 923 (B.I.A. 1999) (voicing concern that if the BIA were to accept that the "on account of" requirement were satisfied by the failure of government protection, there would be "no principled basis for restricting such an approach to cases involving violence against women" and that the approach "should equally translate into refugee status for other categories of persons unable to protect themselves"), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008).

³⁵³ See Cházaro & Casey, *supra* note 47, at 146-47; *European Union*, *supra* note 51.

³⁵⁴ See Grant, *supra* note 257, at 5.

³⁵⁵ For an excellent analysis of this issue, see Grant, *supra* note 257.

³⁵⁶ See, e.g., UNHCR, *Gender Guidelines*, *supra* note 12, ¶ 4 ("Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."); Anker et al.,

amounting to persecution,³⁵⁷ the U.S. Gender Guidelines equate only “[s]evere sexual abuse” with the kind of “[s]erious physical harm” that rises to the level of persecution.³⁵⁸ Thus, although rape would generally qualify as persecution, lesser forms of sexual assault, such as unwanted touching, would not. Further, a woman fleeing sexual violence in her home country still bears the burden of convincing asylum adjudicators that she either in fact experienced the past harm or has a well-founded fear of future harm and that her country failed to protect her from that harm.³⁵⁹ It is likely that the applicant will have left her country with “little if any documentary or physical evidence to support her case,” and she may have difficulty convincing any friends or family also present in the United States to cooperate with the authorities, particularly if they are undocumented.³⁶⁰ Therefore, cases will turn largely on the credibility of the victim’s account of the harm that she experienced to the decision makers.³⁶¹ Additionally, while present conditions in Guatemala strongly support allegations of sexual violence and the failure of state protection,³⁶² asylum decisions require case-by-case adjudication; the limited protections available in Guatemala may vary based on geography or class. The failure of state protection also will vary with the conditions in other countries, so even if certain Guatemalan women present a strong case for asylum relief, it does not imply that every woman in the world who has been raped also would be eligible for asylum.

Moreover, liberalizing asylum law to encompass gender-based asylum claims in other contexts, such as when Canada developed permissive guidelines for gender-based claims or when *Kasinga* was decided, has not led to a flood of refugee women.³⁶³ The United States government itself has acknowledged that promulgation of the *R-A* rule as

supra note 110, at 715 (“Women victims of domestic violence, like all other applicants for political asylum, must meet all of the statutory elements of the refugee definition.”); *see also* Grant, *supra* note 257, at 6 (“The safeguards that the United Nations built into the 1951 Convention and the 1967 Protocol still can and do provide the required balance and protection for signatory countries, even in these modern day [gender-persecution] situations.”).

³⁵⁷ *See supra* Section III.A.

³⁵⁸ *See U.S. Gender Guidelines, supra* note 121, at 9 (comparing severe sexual abuse with beatings and torture).

³⁵⁹ 8 U.S.C. § 1101(a)(42)(A) (2006).

³⁶⁰ Grant, *supra* note 257, at 22-23.

³⁶¹ *Id.* at 23.

³⁶² *See supra* Part I.

³⁶³ Musalo, *supra* note 4, at 132-33.

proposed is unlikely to lead to an excess of domestic violence claims.³⁶⁴ Even if many women theoretically were eligible for asylum in the United States, there are several reasons why they are unlikely to arrive in a flood: the limited rights of women in their home country may make it difficult for them to leave; women are often the primary or only caretakers of children and may not wish to leave their families behind or endanger them by taking them along; and women may not have sufficient control over family resources to enable the trip.³⁶⁵

Finally, even if the asylum regulations were amended to facilitate the acceptance of gender-based asylum claims, including the recognition of a particular social group defined entirely by gender or all members of a gender of a particular nationality, the potential size of the applicant pool should not bar otherwise deserving candidates for asylum.³⁶⁶ The 1951 Refugee Convention was developed to address persecution in the context of failed state protection; claims of persecution on account of the broad categories of race and religion are granted where all statutory requirements are met, even if the same concerns of a flood of refugees are present.³⁶⁷ Indeed, other signatories to the 1951 Refugee Convention have rejected a bar based on size of a particular group, recognizing, for example, that “[t]here are instances where the victims of persecution in a country have been a majority. It is power, not number, that creates the conditions in which persecution may occur.”³⁶⁸ Denying gender-based asylum claims out of fear of opening the floodgates would be “unprincipled, because the response to [such a fear] should not be to return victims to situations where their rights will be violated.”³⁶⁹ A more appropriate response by asylum decision makers would be to decide these claims in accordance with principles of international refugee law, while allowing policy-

³⁶⁴ See U.S. DEP’T OF JUSTICE, *supra* note 43 (analogizing to the lack of an increase in claims following recognition of FGM as a basis for asylum).

³⁶⁵ Musalo, *supra* note 4, at 133.

³⁶⁶ The opposite conclusion was reached by *In re R-A* where the court found that “the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown.” *In re R-A*, 22 I. & N. Dec. 906, 919 (B.I.A. 1999), *vacated*, 24 I. & N. Dec. 629 (A.G. 2008).

³⁶⁷ Grant, *supra* note 257, at 43-44.

³⁶⁸ See *Minister for Immigration and Multicultural Affairs v. Khawar* (2002) 210 C.L.R. 1, 13; see also UNHCR, *Gender Guidelines*, *supra* note 12, ¶ 31 (“The size of the group has sometimes been used as a basis for refusing to recognise ‘women’ generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size.”).

³⁶⁹ Musalo, *supra* note 4, at 120.

makers to work with offending countries such as Guatemala to address the root causes of the violation of their female citizens' human rights.³⁷⁰

CONCLUSION

In April 2007, the Seventh Circuit vacated the BIA's summary affirmation of an IJ's order of removal of Guatemalan Sonia Maribel Juarez-Lopez.³⁷¹ Juarez-Lopez had been raped at least eight times by a neighbor who was fifteen to seventeen years her senior, beginning when Juarez-Lopez was twelve or thirteen years old.³⁷² She did not report the abuse to her parents or the police because her abuser had threatened to kill her family if she did.³⁷³ At one point Juarez-Lopez's abuser forced her to live with him, where she faced abuse at both his hands and those of another woman with whom he was involved.³⁷⁴ Before she left to return to her parent's house, her abuser beat her and "threatened to kill her if she was ever with another man."³⁷⁵

The IJ who evaluated Juarez-Lopez's asylum claim did not even reach the question of whether these events constituted persecution or if she met the definition of a refugee, basing the decision entirely on his perception that Juarez-Lopez lacked credibility.³⁷⁶ At one point the IJ had challenged how he was to know that the relationship was not consensual and whether the incidents happened at all:

[N]evertheless, unfortunately on occasion people lie. And even in this country young ladies who had arrangements with other boyfriends later charged them with rape. And in some cases innocent boys are sent to jail because the lady changed her mind. How do I know that this is not the incident in your case?³⁷⁷

On appeal, Juarez-Lopez argued that she was persecuted on account of her membership in a particular social group consisting of

³⁷⁰ See Grant, *supra* note 257, at 52-53 (suggesting that the United States can address the risk of the floodgates opening "by working with its neighboring countries to reform their human rights records with respect to the treatment of women"); Musalo *supra* note 4, at 134-43 (addressing the root causes of violence against women in Guatemala and advocating for U.S. pressure on Guatemala to influence human rights reform).

³⁷¹ Juarez-Lopez v. Gonzales, 235 F. App'x 361, 362-63, 369 (7th Cir. 2007).

³⁷² *Id.* at 363.

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 364.

³⁷⁷ *Id.*

young, poor Guatemalan women.³⁷⁸ She asserted that because of her membership in this group, she was particularly vulnerable to rape and that Guatemalan authorities were unwilling and unable to protect young women like her.³⁷⁹ Acknowledging that “immigration statutes and regulations do not currently include gender as a possible basis for asylum relief,” Juarez-Lopez requested that the Seventh Circuit “re-mand her case with instructions to adjudicate her claim under the [*R-A*-rule], when [it is] published.”³⁸⁰ The Seventh Circuit ultimately found the IJ’s credibility determinations unsupported by the record, but, because it could not make an asylum decision in the first instance, the court remanded Juarez-Lopez’s case for further proceedings. The Seventh Circuit acknowledged that it was for the BIA to decide whether to hold Juarez-Lopez’s case for decision under a finalized *R-A*-rule.³⁸¹

Juarez-Lopez’s case illustrates the prejudices and uncertainties that survivors of sexual violence face in the asylum process and acknowledges the structural difficulties they face in establishing refugee status. Nonetheless, international refugee norms suggest Juarez-Lopez’s claim is viable. Her repeated rapes clearly constitute harm rising to the level of persecution. She is a member of a particular social group composed not only of “young poor women in Guatemala,” but Guatemalan women as a whole. Her persecution and her particular social group are causally linked by longstanding discrimination against women in Guatemala and a corresponding culture of unpunished gender-based violence. The future of the *R-A*-rule remains ever more uncertain and, as written, provides Juarez-Lopez only limited hope for the future. However, by implementing regulatory changes that allow gender alone to define a particular social group and permit an applicant to show a nexus between persecution and the applicant’s characteristic based on government inaction, Juarez-Lopez and women like her may be afforded the protection they deserve.

³⁷⁸ *Id.* at 365.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.* at 362-63, 365, 369.