Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims

Marisa S. Cianciarulo
Batters as Agents of the State: 
Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims

© 2010 Marisa Silenzi Cianciarulo

Abstract:

Intimate partner violence has been recognized by asylum-providing countries as a form of persecution. Nevertheless, it has often been difficult for battered women to establish their eligibility for asylum. Frustratingly, it is often the public/private distinction that is the culprit in the failure of survivors of intimate partner violence to prove their asylum claims. Adjudicators of asylum claims often view intimate partner violence as a private matter: a husband harming his wife on account of personal reasons. This scenario stands in stark contrast to the more traditional asylum claim: an agent of the state harming a citizen on account of that citizen’s race, religion, nationality, political opinion, or membership in a particular social group.

This paper asserts that intimate partner violence, when it occurs in countries that fail or refuse to protect women from it, is a form of state action. The goal of such a state is to oppress women in order to maintain the legal and societal dominance of men. The dominant members of society have articulated that goal by legislating female subordination and/or failing to legislate against female subordination. Intimate partner violence is one of the most brutal and obvious forms of relegating women to a subordinate status; abusive partners are thus agents of the state-sponsored subordination of women. Intimate partner violence is also a form of persecution as that term has been defined by various courts and other legal entities. Because abusive partners are acting as agents of state-sponsored persecution, women who flee abusive relationships and who are nationals of countries that tolerate or promote the subordination of women, are entitled to refugee protection as a matter of law.

The paper examines the societal and legal mores of two countries – Guatemala and Pakistan – that have a high rate of intimate partner violence and a legal system that places women in a subordinate status relative to men. Based on the assertion that the representative legal systems are specifically designed to maintain male dominance and the subordination of women, the paper argues that intimate partner violence is a state-sponsored form of persecution. Abusive partners thus act in much the same way as government officials who persecute minority groups that do not enjoy state protection. This article does not seek to minimize the effectiveness or viability of claims based on membership in a particular social group. Rather, it argues that in order for intimate partner violence-based claims to continue to succeed irrespective of who is currently serving as Attorney General, adjudicators must understand and accept the political nature of intimate partner violence. In countries where the dominant approach to intimate partner violence is to ignore and trivialize it, those who perpetrate the violence are supporting and advancing a state goal to maintain the dominance of men and the subordination

---

1 Associate Professor, Chapman University School of Law. The author thanks Sarah Brenes, Bridgette Carr, Nora Demleitner, Elizabeth Frankel, Tracie Hall, Jennifer Lee Koh, Fatma Marouf, Karen Musalo, Michele Pistone, Larry Rosenthal, Ronald Rotunda and Robin Wellford Slocum for their comments during various stages of this article; Patricia Eulloqui and Kristy Jones for outstanding research assistance; library liaison Tanya Cao; and Dean Scott Howe and Associate Dean Richard Redding for generous research support.
of women. Thus, every woman who defies a man by attempting to leave the relationship that legitimizes his abuse makes a political statement that must be recognized as a political opinion, namely, that men do not have the right to maintain their legal and societal dominance through violence.

Table of Contents

I. Introduction............................................................................................................................. 3
II. Intimate Partner Violence as a Form of Persecution: Guatemala and Pakistan..................... 5
   A. Guatemala ........................................................................................................................... 6
      1. Laws that Subjugate Women .................................................................................. 7
      2. Intimate Partner Violence and Other Crimes against Women ................................... 8
   B. Pakistan ............................................................................................................................. 10
      1. Intimate Partner Violence and Other Crimes against Women ...................................... 11
      2. Laws that Subjugate Women ................................................................................ 12
III. The United States and the Politics of Gender ................................................................... 14
   A. Protecting the Private Sphere ............................................................................................ 15
   B. Moving Beyond the Private Sphere .................................................................................. 17
IV. Gender-Based Violence as Persecution under the Refugee Convention .......................... 18
   A. Persecution on Account of Membership in a Particular Social Group ......................... 20
      1. Female Genital Mutilation as Persecution on Account of Membership in a Particular Social Group ........................................... 22
      2. Intimate Partner Violence as Persecution on Account of Membership in a Particular Social Group ........................................... 23
         a. *Islam v. Regina v. IAT ex parte Shah* ........................................................................ 23
         b. *Matter of R-A-* ...................................................................................................... 24
         c. *Matter of L-R-* ...................................................................................................... 25
   B. Persecution on Account of Political Opinion ................................................................. 26
      1. The Standard: *Matter of Acosta* .............................................................................. 27
      2. Rape as Persecution on Account of Political Opinion ............................................... 28
      3. Intimate Partner Violence as Persecution on Account of Political Opinion ............... 30
V. Battered Women Must be Recognized as Political Entities Persecuted by Agents of State-Sponsored Subordination of Women ................................................................. 31
   A. Application of the “Political Opinion” Analysis to Intimate Partner Violence ............ 31
      1. State-sponsored subordination of women in the country of origin ......................... 32
      2. The applicant’s political opinion ............................................................................. 33
   B. Integrity Considerations: Security and Capacity ....................................................... 34
      1. Security Concerns ..................................................................................................... 34
      2. Capacity Concerns ................................................................................................. 35
VI. Conclusion ....................................................................................................................... 36
I. Introduction

A man in Africa grew up in a country where he has been raised to believe – through social traditions, tribal rules, and everyday practice – that members of his tribe are inferior to and dependent on a dominant tribe. The man believes that he is no less a human being than members of the dominant tribe and that he deserves to live free of fear. He joins a dissident group and hands out pamphlets advocating equality. Shortly thereafter, a group of thugs who are members of the dominant tribe beat him and threaten to kill him. “You seem to think that you are in a position to defy us,” they say. “You seem to think that you are equal to us. We shall remind you of your place in this society.” The beatings and threats continue and the man eventually seeks help from the police. The police, most of whom are members of the dominant tribe, are unwilling to help. “You are in a bad situation but we cannot do anything to interfere. Our laws and our culture prohibit it. Just keep your mouth shut from now on and try to avoid these people.” Other members of the man’s tribe are intimidated upon seeing how their fellow tribe member has been treated for his behavior, and some of them stop their dissident activities. After another particularly bad beating, the man finally escapes. He makes his way to the United States and applies for asylum on the basis of two grounds: (1) his political opinion opposing the domination of the elite tribe and (2) his membership in the particular social group of the subjugated tribe.

A woman in Latin America grew up in a family where domestic violence was common, in a country where the laws and culture place women in an inferior economic and social position to men. The woman is married to a man who is physically abusive. The woman believes that this is wrong; that she is no less a human being than a man; and that she deserves to live free of fear. She leaves her husband, though she must leave her children and survive on very little money. Shortly thereafter, her husband finds her and says, “You seem to think that you are in a position to defy me. You seem to think that you are equal to me. I shall remind you of your place in this society.” The husband forces her to return with him and beats her. Over the next few months, the beatings continue. The woman makes several attempts to leave, but her husband’s friends and relatives always help him locate her. He inevitably finds her, beats her and threatens to kill her. The woman eventually seeks help from the police. The police, most of whom are men, are unwilling to help. “You are in a bad situation but we cannot do anything to interfere. Our laws and our culture prohibit it. Just keep your mouth shut from now on and try not to upset your husband.” Other women in abusive relationships are intimidated upon seeing how this woman has been treated for standing up to her husband, and decide not to leave their abusive men. After another particularly bad beating, the woman finally escapes. She makes her way to the United States and applies for asylum on the basis of two grounds: (1) her political opinion opposing the domination of men and (2) her membership in the particular social group of female nationals of her country.

These scenarios describe fundamentally similar albeit distinguishable situations. In both scenarios, the individual claiming asylum has had a personal interaction with a member of the
dominant elite that led to persecution. Both individuals hold an opinion that is political in nature; that is, that the dominant group’s subjugation is wrong and must be defied. The African man stated his political opinion by joining a dissident group and acting in a public manner, whereas the Latin American woman expressed hers by leaving her relationship. When they expressed their political opinions and challenged the authority of the dominant group, private actors as well as state officials engaged in persecution in an effort to protect the elite group’s dominance and deter other acts of defiance. Private actors attacked the individuals for expressing their political opinions, and agents working directly for the state – namely, the police – refused to protect the individuals from the private actors’ persecution.

The most relevant distinction between the two scenarios is that the man from the marginalized tribe will have a much greater likelihood of success if he applies for refugee protection than the woman escaping an abusive husband. In order to prove their eligibility for refugee protection, they must prove that they are unwilling or unable to return to their country because of past persecution and/or a well-founded fear of persecution on account of one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion. Despite the fundamental similarities of the situations these individuals have presented, their claims for asylum in the United States face very different odds. U.S. asylum law favors claims such as the African man’s, where the political opinion is stated in the classic form of joining a political group and engaging in public activities of a political nature, and where the persecution occurs by strangers with a clearly articulated political goal. The woman’s claim suffers from the perceived flaw of being personal rather than political in nature, and the persecution occurs at the hands of an intimate partner who may not know or care that he is responding to a political statement.

Most gender-based asylum claims tend to focus on the woman’s membership in a particular social group, principally because U.S. courts have frequently rejected political opinion as a basis for gender-based claims. Social group formulations, however, are widely disparate; they are therefore vulnerable to being perceived as self-serving legal theories tailored to fit the case at hand. The acceptance of a proposed social group often depends on the subjective determination of the adjudicator, which in turn often depends on whether another protected ground – race, religion, nationality, or political opinion – is implicated. The political implications of gender-based violence, particularly intimate partner violence, are left ignored.

4 8 USC § 1101(a)(42)(A).
5 See, e.g., Matter of O-Z- and I-Z-, 22 I. & N. Dec. 23 (BIA 1998) (granting asylum to Jewish Ukrainians who had been persecuted by a group of Ukrainian nationalists…)
6 See e.g., Fatin v. INS, 12 F.3d 1233 (3d. Cir. 1993) (finding that an Iranian feminist has not proven that she would be persecuted on account of political opinion because the treatment she would experience upon return (i.e., being forced to conform to Iranian proscriptions regarding women’s dress and being treated as a second-class citizen) is similar to that which occurs against all women in Iran); Matter of R-A-, 22 I. & N. Dec. 906, 928 (BIA 1999), vacated, 22 I. & N. Dec. 906 (A.G. 2001), remanded, 23 I. & N. Dec. 694 (A.G. 2005), remanded, 24 I. & N. Dec. 629 (A.G. 2008)) (finding that a woman abused by her husband did not suffer persecution on account of her imputed political opinion that women should not be controlled or dominated by men); Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987) (finding that the niece of the head of a Salvadoran agrarian land reform cooperative was not persecuted on account of her political opinion when opponents of agrarian land reform raped her and killed her uncle while chanting political slogans).
7 See, e.g., Matter of R-A-, supra note 6 (finding that the particular social group of “Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination” is not a valid social group and suggesting that it “may amount to a legally crafted description of some attributes of her tragic personal circumstances”).
unnoticed, or unexplored. Ultimately, the perceived weakness of the political opinion claim will in turn weaken the social group claim. This article seeks to reinforce asylum claims based on intimate partner violence-related social group formulations by demonstrating that they are viable on the basis of the applicant’s political opinion opposing the dominance of men. This article argues that abusive partners are de facto agents of the state who are responding to a political act: challenging unquestioned, unrestrained male dominance. This argument stems from the assertion that intimate partner violence, when it occurs in countries that fail or refuse to protect women from it, is a form of state action. The goal of that state is to oppress women in order to maintain the legal and societal dominance of men. The dominant members of society have articulated that goal by legislating female subordination and/or failing to legislate against female subordination. Intimate partner violence is one of the most brutal and obvious forms of relegating women to a subordinate status; abusive partners are thus agents of the state-sponsored subordination of women.

Part II examines intimate partner violence and the legal subjugation of women in Guatemala and Pakistan, two countries whose nationals have applied for asylum in high-profile cases on the basis of intimate partner violence. Part III explores the history of U.S. legal approaches to intimate partner violence, providing a background for why U.S. asylum jurisprudence towards intimate partner violence has developed as it has. Part IV analyzes and compares the legal grounds for granting and denying asylum claims based on various forms of gender-based violence, particularly intimate partner violence. Part V argues that women who leave abusive relationships are taking a political – not merely personal – action in which they unequivocally challenge the dominance of the male head of the family. When this action takes place in countries whose laws demonstrate a commitment to preserving a male-dominated society, the political nature of the action is even more profound. Finally, the article concludes that because abusive partners are acting as agents of state-sponsored persecution, women who defy male authority by fleeing abusive relationships and who are nationals of countries that tolerate or promote the subordination of women, are entitled to refugee protection because the persecution is on account of their political opinion opposing the absolute dominance of men.

II. Intimate Partner Violence as a Form of Persecution: Guatemala and Pakistan

Violence against women and discrimination against women occur in every country and every socioeconomic sector. This Article does not attempt to catalogue the various forms it
takes, or to critique individual countries or cultures for the role they might play in its proliferation. The following sections instead focus on two countries whose nationals have applied for refugee protection on the basis of intimate partner violence, and whose cases have resulted in influential decisions discussed later in the Article: Guatemala and Pakistan.

Guatemala and Pakistan share other similarities as well. They are both democracies with histories of civil unrest; they both have deeply ingrained social mores that place men in a dominant position compared to women; they both have laws that purposefully subjugate women (although both have sought to pass laws and take other measures designed to equalize the status of women of men); and they both have high levels of intimate partner violence and other forms of violence against women. As the discussion below illustrates, the subjugation of women in both countries has been state-sponsored and carried out not only by legislators and other state actors, but also by private actors – namely intimate partners – whose actions the state declines to control effectively.

A. Guatemala

The Republic of Guatemala emerged in 1996 from years of civil warfare between leftist guerrillas and a right-wing government thanks to a peace accord that was several years in the making. After decades of unrest, coups and dictatorships, Guatemala is now a presidential representative democratic republic with a multiparty system and three independent branches of government. The President, who serves as head of state and head of government, is elected directly by the voting population, and the legislature is elected through a modified proportional representation system.

Despite its relative political stability, Guatemala continues to suffer the effects of a long history of unrest, including poverty and lingering violence. The World Bank reports that “inequality and poverty – especially in rural and indigenous areas – are among the highest in the region. Stark disparities are embedded in access to health, basic education, social services and opportunities. Chronic malnutrition and infant and maternal mortality rates still remain intolerably high.”

According to the U.S. State Department:


See Amnesty International, No protection, no justice: killings of women in Guatemala (2005), at 6, available at http://www.amnesty.org/en/library/info/AMR34/017/2005, (acknowledging that Guatemalan authorities “have taken some positive steps to prevent violence against women…including the ratification of human rights treaties, the introduction of laws and creation of state institutions to promote and protect the rights women”). Amnesty International notes, however, that “these measures have frequently not been effectively implemented, monitored or reviewed and have therefore seldom prevented women from suffering violence.” Id.


Id. [U.S. Department of State, Background Note]

Id. [U.S. Department of State, Background Note]

Common and violent crime, aggravated by a legacy of violence and vigilante justice, presents a serious challenge. Impunity remained a major problem, primarily because democratic institutions, including those responsible for the administration of justice, have developed only a limited capacity to cope with this legacy. Guatemala’s judiciary is independent; however, it suffers from inefficiency, corruption, and intimidation.\textsuperscript{18}

Guatemala’s inundation with crime is most starkly evident in crimes perpetrated against women. As discussed in subsection 2, \textit{infra}, intimate partner violence rates are extremely high and there is a disturbing trend of unsolved femicides. Such violence is attributable in part to the economic, social and political issues described in this section. Those issues do not, however, explain the gendered nature that characterizes much of the violence. An exploration of the country’s gendered laws and prevalent attitudes towards women sheds light on the nature of violence against women in Guatemala.

1. Laws that Subjugate Women

Guatemala has historically relegated women to a subordinate status.\textsuperscript{19} Guatemala’s Civil Code is an example of state-sponsored subordination of women. Several provisions interfere with women’s ability to achieve economic independence and personal autonomy. Article 110 states:

The husband owes protection and support to his wife, and is obligated to provide her with all that is necessary for the sustenance of the home in accordance with his economic options. The woman especially has the right and the obligation to attend to and care for their children during their minority and to direct domestic tasks.\textsuperscript{20}

Article 113 states that “[t]he wife may perform a job or engage in a profession, industry, office or business, when it does not negatively affect the interests and care of the children or the upkeep of the home.”\textsuperscript{21} Moreover, Article 114 states that “[t]he husband may oppose the wife’s working

---

\textsuperscript{18} U.S. Dept. of State, \textit{Background Note: Guatemala}, supra note 14.

\textsuperscript{19} Amnesty International, \textit{No protection, no justice: killings of women in Guatemala}, supra note 13, at 5, (stating that “[t]he prevalence of violence against women in Guatemala today has its roots in historical and cultural values which have maintained women’s subordination”).

\textsuperscript{20} Guatemala Civil Code, art. 110 (“El marido debe protección y asistencia a su mujer, y está obligado a suministrarle lo necesario para el sostenimiento del hogar de acuerdo con sus posibilidades económicas. La mujer tiene especialmente el derecho y la obligación de atender y cuidar a sus hijos durante la menor edad y dirigir los quehaceres domésticos”).

\textsuperscript{21} Id. at art. 113 [Guatemala Civil Code] (“La mujer podrá desempeñar un empleo, ejercer una profesión, industria, oficio o comercio, cuando ello no perjudique el interés y cuidado de los hijos ni las demás atenciones del hogar”).
outside the home, so long as he provides for the household sufficiently and his objection has sufficiently justifiable reasons.”

The Guatemalan citizenry, through its elected government officials, has thus sanctioned the dominance of the male head of the family by enshrining patriarchal notions of gender roles and familial authority in its civil code. These laws alone, however, do not entrench male dominance over women in Guatemala; widespread intimate partner violence has contributed significantly to the situation. The dominance of male heads of households in Guatemala has been enforced and reinforced by de jure agents of the state – law enforcement officials and courts – refusing to prosecute or punish effectively crimes of domestic violence. As discussed below, private actors act as de facto agents of the state by enforcing state-sanctioned male dominance in the home through physical violence.

2. Intimate Partner Violence and Other Crimes against Women

Guatemala has a high rate of intimate partner violence. The United National Special Rapporteur on violence against women reported that approximately “36 per cent of all Guatemalan women who live with a male partner suffer domestic abuse.” A report prepared by the Immigration and Refugee Board of Canada cites to a survey conducted in Guatemala in which only 17 percent of women surveyed reported that they had not been victims of violence in the home. Some reports put the incidence of domestic violence as high as 90 percent.

The laxity of the laws against domestic violence may actually contribute to the high rate of intimate partner violence. The U.S. Department of State reports that although Guatemalan law prohibits domestic violence, abusers may only be charged with the crime if bruises remain visible on the victim for ten days. Not surprisingly, the conviction rate is extremely low: out of more than 13,700 complaints of domestic violence in 2005, prosecutors pursued only 3,096

---

22 Id. at art. 114 [Guatemala Civl Code] (“El marido puede oponerse a que la mujer se dedique a actividades fuera del hogar, siempre que suministre lo necesario para el sostenimiento del mismo y su oposición tenga motivos suficientemente justificados”).


cases and secured convictions in only 105. 28 Until as recently as 2008, the law did not provide for prison sentences for convicted perpetrators. 29

Guatemala also has an extraordinarily high rate of femicide. Since 2000, nearly 5,000 women have been murdered in Guatemala. 30 Although femicide rates are also high in neighboring countries, 31 human rights organizations are particularly concerned about the murders in Guatemala due to the brutality and sexual violence present in many of them. 32 Also troubling are the poor investigative techniques, 33 low conviction rate, 34 law enforcement attitudes towards victims 35 and towards crimes against women, 36 and the steady yearly increase in femicides. 37

28 Id. [U.S. Dept. of State, 2005 Human Rights Report: Guatemala]
29 See U.S. Dept. of State, 2007 Human Rights Report: Guatemala (reporting that the law did not provide for prison sentences for perpetrators of domestic violence). See also, Law Against Femicide and Other Forms of Violence Against Women, Decree No. 22-2008 (providing prison sentences for physical, psychological and economic violence against women).
31 See Mario Cordero, Central America: Common Territory for Femicide, LA HORA (Jan. 19, 2010) (citing the following femicide rates: 10 women per 100,000 people in Guatemala, 13 women per 100,000 people in El Salvador, 7 women per 100,000 people in Honduras, and 5 women per 100,000 people in the Dominican Republic), available at http://www.ghrc-usa.org/Resources/2009/femicide_CA.htm (available in the original Spanish at http://www.lahora.com.gt/notas.php?key=61290). See also, GHRC/USA, For Women’s Right to Live, supra note 30 (noting that “More women have been killed in one year in Guatemala than were murdered in the past decade in Ciudad Juarez, Mexico”).
32 Amnesty International, No protection, no justice, supra note 30, at 10-12. Many bodies have been found mutilated and many of the victims had been raped. Id. at 3, 4-5.
33 See Amnesty International, No protection, no justice, supra note 30, at 15:
Amnesty International has found serious and persistent shortcomings in the way the authorities have responded to many cases of killings of women at every stage of the investigative process. These deficiencies have included delays and insufficient efforts by police to locate women who have been reported missing; failure to protect the crime scene once a body has been discovered or gather necessary forensic or other evidence; failure to follow up on possible crucial evidence; and failure to act on arrest warrants. In many cases, investigations have been partial, while in others they have been totally absent…. A lack of training in investigative techniques, lack of technical resources and lack of coordination and cooperation between state institutions particularly between police investigation units and the offices of the Public Ministry has meant that many cases have not gone beyond the initial investigation stage.
See also, id. at 16-18 (detailing the deficiencies pervading the Guatemalan law enforcement system) [Amnesty International, No protection, no justice].
34 Id. at 22-23 (reporting that the Office of the Special Prosecutor for Crimes Against Women had obtained only one conviction out of the 150 cases it was handling) [Amnesty International, No protection, no justice].
35 See id. at 18 (noting that Guatemalan law enforcement officials tend to categorize the murders as “crimes of passion” or due to “personal problems” such as relationship issues). Law enforcement officials also tend to blame the victims, attributing their victimization to gang membership, going to nightclubs, wearing short skirts, declining to pray or attend church, and other behavior deemed suspect. Id. at 21-22. [Amnesty International, No protection].
36 See id. at 9, citing Inter-American Commission on Human Rights Special Rapporteur on the Rights of Women, Press Release 20/04, Sep. 18, 2004 (noting that in Guatemala, “[v]iolence in the family and domestic violence affect women in particular but are not considered a public security issue”). The Special Rapporteur goes on to criticize the “absence of studies or statistics on the prevalence of violence in the family or domestic violence, as well as…the lack of information on sexual crimes that mainly affect women. Id. [Amnesty International, No protection, no justice]
These high rates of domestic violence and unsolved femicides suggest legal and cultural norms specifically designed to devalue women, marginalize them economically and socially, and preserve male dominance of society. As discuss below, there are some striking similarities in Pakistan’s laws and culture.

B. Pakistan

The Islamic Republic of Pakistan has a long history of political unrest characterized by corruption, periods of martial law and occasional coups. After nine years under the military dictatorship and subsequent presidency of Pervez Musharraf, Pakistan reverted to a parliamentary democracy in 2008. The presidency is now a more ceremonial position, while the prime minister acts as head of the government. The parliament consists of a 100-seat indirectly-elected Senate and a 342-seat National Assembly, which has 60 seats reserved for women. The judiciary consists of a Supreme Court, provincial courts, and shari’a (Islamic) courts.

In addition to its political challenges, Pakistan faces enormous social and economic challenges. Human Rights Watch reported that in 2009, “the security situation significantly worsened, with bombings and targeted killings becoming a daily fact of life even in the country’s biggest cities.” The U.S. Department of State reports that “low levels of spending in the social services and high population growth have contributed to persistent poverty and unequal income distribution,” and that “Pakistan’s extreme poverty and underdevelopment are key concerns.” Sectarian violence resulted in hundreds of deaths in 2009 alone, and hundreds of cases of politically motivated killings and disappearances were reported between 2007 and 2009.

A particular area of concern with respect to the high level of violence is that which occurs against women. The U.S. Department of State reported in 2009 that “[r]ape, domestic violence,

38 U.S. Dept. of State, Background Note: Pakistan (July 21, 2010), available at http://www.state.gov/r/pa/ei/bgn/3453.htm#gov.
39 Id. [U.S. Dept. of State, Background Note: Pakistan]
40 Id. [U.S. Dept. of State, Background Note: Pakistan]
41 Id. [U.S. Dept. of State, Background Note: Pakistan]
42 Id. [U.S. Dept. of State, Background Note: Pakistan]
44 U.S. Dept. of State, Background Note: Pakistan, supra note 38.
sexual harassment, and abuse against women remained serious problems. As discussed below, violence against women in Pakistan is widespread, and law enforcement attitudes and practices tend to re-victimize rather than empower victims.

1. Intimate Partner Violence and Other Crimes against Women

The most common crimes against women in Pakistan include rape, domestic violence, forced marriage, burning in kitchen stoves, disfigurement, and “honor killings.” Rape is significantly underreported due to the stigma attached to rape victims. Domestic violence is also believed to be significantly underreported, but the Human Rights Commission of Pakistan reported in 1998 that at least fifty-two percent of urban women and a higher percentage of rural women suffer violence at the hands of their husbands. Family-perpetrated murder of women in Pakistan is also on the rise as a convenient method of disposing of domestic disputes and dowry-related matters.

Women are also vulnerable to disfigurement and murder by their husbands, fathers or brothers for suspected or actual acts perceived to have wounded their husbands’ or families’ honor. So-called “honor killings” occur as retribution for offenses such as choosing a marriage partner against the wishes of the family, seeking divorce, having a sexual relationship outside marriage, being raped, or defying the authority of a husband or family. The Aurat

---

46 Id. [U.S. Dept. of State, 2009 Human Rights Report: Pakistan]
51 See Perveen, Violence Against Women in Pakistan, supra note 50, at 21 (describing the practice of acid throwing: Perpetrators throw acid at women, usually on their faces with the intent to mutilate their faces forever. The attack leads to severe burning and badly damages skin tissues often exposing and sometimes even dissolving the underlying bones. The consequences of these attacks include blindness and permanent scarring of the face and body).
52 UNICEF, Innocenti Digest, supra note 50, at 6, 7; Amnesty International, 2009 Report on Pakistan, supra note 47.
53 Perveen, Violence Against Women in Pakistan, supra note 50, at xxi.
55 UNICEF, Innocenti Digest, supra note 50, at 7.
57 Id. at 7-8. [Amnesty International, Honour Killings]
58 Id. at 4. [Amnesty International, Honour Killings]
59 Id. at 8. [Amnesty International, Honour Killings]
60 Id. at 5. [Amnesty International, Honour Killings]
Foundation, a Pakistani human rights organization, reported that 604 “honor” killings took place in Pakistan in 2009.61 Pakistan has made some attempts to protect women from violence.62 For example, the ordinance that placed rape within the jurisdiction of Islamic courts and required a rape victim to produce four corroborating male witnesses was supplanted by the Women’s Protection Act of 2006, which removed the crime of rape from Islamic courts.63 In another promising development, the Pakistani National Assembly passed the Domestic Violence (Prevention and Protection) Bill in August 2009.64 However, the Senate allowed the bill to lapse, reportedly because of the objections of a conservative senator and who argued that the bill was not “male-friendly” and that it was contrary to Islamic law.65

Despite some attempts on the part of the state to empower women, the Pakistani government, law enforcement officers and judges continue to refuse to protect women who flee intimate partner violence. According to the U.S. Department of State:

Women who tried to report abuse faced serious challenges. Police and judges were reluctant to take action in domestic violence cases, viewing them as family problems. Police, instead of filing charges, usually responded by encouraging the parties to reconcile. Abused women usually were returned to their abusive family members. Women were reluctant to pursue charges because of the stigma attached to divorce and their economic and psychological dependence on relatives. Relatives were hesitant to report abuse for fear of dishonoring the family.66

The Aurat Foundation concurs that “[v]ictims are always in a quandary: if they dare report violence, they invariably face police obstruction and societal pressure.”67 Thus, despite efforts on the part of some government officials and bodies to eliminate violence against women, the state seems to be reluctant to upset the status quo in the face of societal pressure.68 Thus, the deeply embedded cultural beliefs that commodify women, render them subject to male heads of households, and discourage law enforcement and judicial officers from adequately addressing domestic violence continue to be reflected in Pakistan’s laws.

2. Laws that Subjugate Women

---

61 Perveen, Violence Against Women in Pakistan, supra note 50, at 9.
62 See Perveen, Violence Against Women in Pakistan, supra note 50, at 2 (stating that “[t]he elimination of [violence against women] is a priority for the Pakistani government”).
64 Human Rights Watch, World Report 2010: Pakistan, supra note 47. According to Human Rights Watch, “[t]he law seeks to prevent violence against women and children through quick criminal trials and a chain of protection committees and protection officers.” Id.
65 Aroosa Masroor, Two Women Abused Every Hour in Pakistan, EXPRESS TRIB., Aug. 2, 2010 [hereinafter Masroor, Two Women Abused Every Hour].
67 Perveen, Violence Against Women in Pakistan, supra note 50, at xx.
68 See id. at 11 [Perveen, Violence Against Women in Pakistan]

Social endorsement to [violence against women] reflects in the callous responses many provincial assemblies and our national legislative bodies have adopted over shocking cases of [violence against women]….[A] few men legislators tried to justify burying women alive in the name of tradition in 2008; and a majority of men and women legislators remained silent on the issues….

---
Pakistan has historically relegated women to second-class status. Pakistani shari’a courts, which operate alongside civil and criminal courts, apply shari’a law in ways that discriminate against women, and in some parts of the country shari’a courts and tribal councils comprise the entirety of the legal system. Even where the law provides for women’s rights, “the Government of Pakistan has failed to ensure that women are aware of their legal and constitutional rights and to ensure that these rights and freedoms take precedence over norms which deny women equality.”

Several laws – particularly those which fall under the category of shari’a law – either directly discriminate against women or are interpreted in a manner that has a disproportionate negative impact on women. As an example of the former, Pakistani shari’a courts require witnesses to be male. The 1979 “Zina Law” proscribes adultery and fornication; courts have interpreted it to allow fathers to bring zina charges against daughters who seek to marry someone of their own choosing. The 1990 Qisas and Diyat Ordinance, codified in 1997 by the Qisas and Diyat Act, amended the Pakistani penal code to limit state involvement in physical injury, manslaughter and murder cases, sending the message “that murders of family members are a family affair and that prosecution and judicial redress are not inevitable but may be negotiated.” One of the sentencing provisions of this law allows a man who has murdered his wife to serve only fourteen years imprisonment if they have a child in common.

The Pakistani citizenry, through its elected government officials, has thus sanctioned the dominance of the male head of the family by refusing to pass legislation that would protect women from intimate partner violence. De jure agents of the state – law enforcement officials and courts – have enforced and reinforced this dominance by refusing to prosecute or effectively

---

69 See, id. at xxi [Perveen, Violence Against Women in Pakistan]:

The worrying trend of increase in incidents [of violence against women] is a clear proof of the low status of women in the Pakistani society. Women are considered the property of their households owned by the men. Minor girls are suffering the most. Traditions treat them like merchandise and many are traded as peace offerings in arranged marriages (swara) or in resolution of a dispute, ordered by a Jirga [tribal council]....

70 U.S. Dept. of State, 2009 Human Rights Report: Pakistan, supra note 45. The Department of States reports: The Provincially Administered Tribal Areas (PATA) of the NWFP, which include parts of the former princely states of Swat, Dir, and Chitral, fall under Shari’a law. Under its provisions, judges, known as qazis, are assisted by religious scholars. On February 15, the government extended this provision to the entire Malakand Division.

Id. In the Federally Administered Tribal Areas of Pakistan, tribal leaders operate under a completely separate system of justice in which they “conduct[] hearings according to Islamic law and tribal custom.” Id.

71 Amnesty International, Honour Killings, supra note 54, at 12.

72 See e.g., Hudood Ordinance No. VII of 1979 § 8(b) (requiring four male witnesses to prove adultery).


74 See id. at § 4 (defining “zina” as “a man and woman...willfully hav[ing] sexual intercourse without being married to each other”). [Hudood Ordinance No. VII of 1979]. The punishment is stoning to death and/or one hundred lashes. Id. at § 6(3).


76 “Qisas” means “punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim....” Qisas and Diyat Act § 299(k) (1997), reprinted in Tahir Wasti, The Application of Islamic Criminal Law in Pakistan: Sharia in Practice 331 (2009). “Diyat” is compensation paid to the heirs of the victim pursuant to Islamic law. (Qisas and Diyat Act § 299(e) (1997), id. at 330, 338. See also, Amnesty International, Executions under the Qisas and Diyat Ordinance (1995), available at http://www.unhcr.org/refworld/country_.AMNESTY_.PAK_.3aef6a9a10.0.html.

77 Amnesty International, Honour Killings, supra note 54, at 12.

78 Qisas and Diyat Act § 306(c) (1997).

79 Masroor, Two Women Abused Every Hour, supra note 65.
punish crimes of domestic violence. Batterers act as de facto agents of the state by enforcing state-sanctioned notions of male dominance in the home through physical violence.

III. The United States and the Politics of Gender

In the United States, intimate partner violence has traditionally been relegated to the dark corners of the “private sphere,” shut off from public acknowledgment, discussion and redress. Only in the latter half of the twentieth century did intimate partner violence begin to receive societal and legal recognition in the United States, in large part due to political battles waged by women and their supporters against the overwhelmingly male power structure. Thus, as women asserted their humanity and insisted upon equal rights and equal treatment under the law, legislators and law enforcement began to take intimate partner violence more seriously.

Today, intimate partner violence in the United States may not be as common as it is in Guatemala and Pakistan, but it does occur at a significant rate. According to data collected in 2005 by the Centers for Disease Control and Prevention, approximately twenty-five percent of women in the United States experience intimate partner violence. The Department of Justice reports that women are still at a significantly higher risk of being killed by an intimate partner than men are, but the rate of intimate partner violence fatalities dropped considerably between 1993 and 2007.

---

80 Feudal landlords and tribal leaders in the semi-autonomous tribal regions have also enforced and reinforced male dominance by dispensing penalties, such as bride exchanges, that disproportionately affect women. U.S. Dept. of State, 2009 Human Rights Report: Pakistan, supra note 45. See also, Perveen, Violence Against Women in Pakistan, supra note 50, at xxi (stating that “[m]inor girls are suffering the most. Traditions treat them like merchandise and many are traded as peace offerings in arranged marriages (swara) or in resolution of a dispute, ordered by a Jirga [tribal council]…”).

81 This term refers to a feminist critique that “much conduct that would be considered criminal if it occurred between strangers is considered acceptable if it occurs between intimates.” BARTLETT & RHODE, GENDER AND LAW: THEORY, DOCTRINE AND COMMENTARY 536 (3d ed. 2006) [hereinafter BARTLETT & RHODE, GENDER AND LAW].

82 See generally, id. at 490-493 (providing a history of efforts in the nineteenth and twentieth centuries to “make ‘private’ violence a public issue”). Id. at 491. [Bartlett & Rhode]

83 See Catalano et al., Female Victims of Violence, supra note 9, at 1 (reporting that intimate partner violence occurs in the United States at a rate of 4.3 victimizations per 1,000 females age 12 and over); World Health Organization, World Report on Violence and Health (2002) at 89 (reporting that worldwide, “between 10% and 69% of women reported being physically assaulted by an intimate male partner at some point in their lives”). According to WHO surveys, “the percentage was 3% or less for women in Australia, Canada and the United States,” 27% in Nicaragua, 38% in South Korea and 52% among Palestinian women in the West Bank and Gaza Strip. Id. UN Development Fund for Women, Not a Minute More, supra note 10, at 8 (citing Heise, L., M. Ellsberg and M. Gottemoeller. 1999. Ending Violence Against Women. Population Reports, Series L, No. 11. Baltimore: Johns Hopkins University School of Public Health, Population Information Program) (reporting that one in three women throughout the world will experience at least one form of gender-based violence). See also, id. at 15 (stating that violence against women “is the most universal and unpunished crime of all.” [UN Development Fund for Women, Not a Minute More]


85 See Catalano et al., Female Victims of Violence, supra note 9, at 3 (reporting that in 2007, “24% of female homicide victims were killed by a spouse or ex-spouse,” whereas only 2% of male homicide victims were killed by a spouse or ex-spouse).

86 Id. at 3 (reporting that between 1993 and 2007, “[h]omicide victims killed by intimate partners fell 29%, with a greater decline for males (-36%) than females (-26%).” [Catalano et al., Female Victims of Violence]
As discussed below, the politics of gender heavily influenced social and legal attitudes towards intimate partner violence in the United States.

A. Protecting the Private Sphere

The English common law principle known as “coverture” was perhaps the most effective legal and social regime designed to entrench men’s domination of women. According to the principles of coverture, a woman literally ceased to exist as a legal entity upon her marriage, and came almost entirely under the control of her husband. He spoke and contracted on her behalf, was responsible for her material support, and was accountable for her misdeeds. With this significant responsibility came the right, also considered an obligation, to chastise his wife as he saw fit.

The law enforced the principles of coverture, and thus of female subjugation, in various ways. Women were unable to retain their own names upon marriage. Women were not granted

---


By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything…[and is therefore] said to be…under the protection and influence of her husband, her baron, or lord….

89 See id. [Blackstone 430-432, Gender & Law 314]:

The husband is bound to provide his wife with necessaries by law…and, if she contracts debts for them, he is obliged to pay them….If the wife be indebted before marriage, the husband is bound afterwards to pay the debt….But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion.


[A wife] can own nothing, sell nothing. She has no right even to the wages she earns; her person, her time, her services are the property of another. She can not testify, in many cases, against her husband. She can get no redress for wrongs in her own name in any court of justice. She can neither sue nor be sued. She is not held morally responsible for any crime committed in the presence of her husband so completely is her very existence supposed by the law to be merged in that of another.

90 See Blackstone, supra note 88, at 432-433, reprinted in Bartlett & Rhode, *Gender and Law*, supra note 81, at 479:

The husband….by the old law, might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allow to correct his apprentices or children….[T]he courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior.


For several centuries, by the Common law among all English speaking people, a woman, upon her marriage, takes her husband’s surname. That becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby.

See also, Forbush v. Wallace, 341 F.Supp. 217 (D.C. Ala. 1971) (upholding a law requiring a married woman to use her husband’s surname when applying for a driver’s license); Application of Lawrence, 319 A.2d 793 (N.J. Co. 1974) (denying the petition of a married woman to resume the use of her “maiden” name as her sole legal name, and commenting that even after a divorce a court may refuse to permit a woman to resume her “maiden” name).
custody of children in the event of divorce. Married women could not own property. The law thus ensured that women had to give up their identities, be docile and obedient, and remain married under any circumstances in order to have a roof over their heads and a life with their children.

Coverture was an integral part of a legal and social structure that divided society into two separate spheres: the private and the public. The public sphere was that of commerce and government. The private sphere was that of home and family. Legal and social norms operated to ban women from the public sphere, and to emphasize their essential role within the private sphere. But even though the law provided men with the ability to wield absolute power over women, it did nothing to protect women from the abuse of that power.

Coverture contributed to the longevity of intimate partner violence in two ways: it provided a legal basis for men’s dominance over women within the family, and it placed the family in the private sphere, isolated from the reaches of the courts. The notion of the private sphere, consisting of a man’s home and family, was a sacred one – even if that man treated his family and dependents in ways that would be punishable had the victims been strangers. Consistent with this principal of male domination of the family, intimate partner violence was considered a private matter for most of U.S. history, not fit for examination by the courts. Even once society evolved to the point where such violence was generally (though by no means entirely) frowned upon, courts and lawmakers refused to interfere in that impenetrable construct.

---

92 See Elizabeth Cady Stanton, Address to the Legislature of the State of New York (Feb. 14, 1854), in HISTORY OF WOMAN SUFFRAGE, VOL. I, 1848-1861, 595, 595-599, 602-605 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage, eds., reprint ed. 1985) reprinted in BARTLETT & RHODE, GENDER AND LAW, supra note 81, at 9:

In case of separation, the law gives the children to the father; no matter what his character or condition. At this very time we can point you to noble, virtuous, well-educated mothers in this State, who have abandoned their husbands for their profligacy and confirmed drunkenness. All these have been robbed of their children, who are in the custody of the husband, under the case of his relatives, whilst the mothers are permitted to see them but at stated intervals. This began to change in the latter part of the nineteenth century, with the advent of the “tender years” doctrine. See Rena K. Uviller, Father’s Rights and Feminism: The Maternal Presumption Revisited, 1 HARV. WOMEN’S L.J. 107, 108-109 (1978):

By the late nineteenth century, nascent theories about the importance of the mother-infant bond occasionally made an inroad on the father’s rights. The so-called “tender years doctrine” for the first time gave mothers a slim chance against the father. Yet that inroad was tentative indeed, in light of the father’s consequent relief from child support duties upon award of children to the mother and because the “tender years” preference was valid only during the child’s infancy.

93 Richard H. Chused, Married Women’s Property Law: 1800-1850, 71 GEO. L.J. 1359, 1366 (1983). This began to change in the mid-nineteenth century with the passage of married women’s property acts, such as that passed in New York in 1848. See Married Women’s Property Act, 307 New York Laws ch. 200 (1848):

The real property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the sole disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.

94 See ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING x [hereinafter SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING] (asserting that “[p]rivacy says that battering is an individual problem, not a systematic one. Privacy operates as a mask for inequality, protecting male violence against women”).

95 See Joanna L. Grossman, Separated Spouses (Book Review), 53 STAN. L. REV. 1613, 1628 n. 75 (2001) (noting the argument that “although the right of chastisement was repudiated under marital status law, it was ultimately sustained by the doctrine of marital privacy. Thus…although nineteenth-century courts did not articulate wife-beating as a ‘right,’ they gave effect to it as such by refusing to interfere in the relationship between husband and wife) (citing Reva Siegel, “The Rule of Love”: Wife-Beating as Prerogative and Privacy, 105 YALE L.J. 2117 (1996)).
known as the private sphere.  Thus, as Louisa May Alcott remonstrated about the queens of hearth and home, “the kingdom given them isn’t worth ruling.”

In order to overcome the confines of coverture and achieve protection from the tyranny of men in the home, women had first to convince the ruling class of men to recognize women as autonomous human beings. For men to accept such a concept, however, meant giving up significant power: the power to control and dominate half of the human race. No matter how lowly the lowliest man was, he was always above his woman. That was a difficult political battle to win, and one that continues to be fought on various levels.

B. Moving Beyond the Private Sphere

By the 1920’s, women in the United States and other industrialized countries had won some freedom from the confines of the private sphere. They had gained the right to participate in public civic life through voting, holding public office and serving on juries. But even as women were increasingly permitted to function on equal footing in some very important areas of the public sphere, the home remained a dangerous place for women in abusive marriages until the latter part of the twentieth century.

In affirming the conviction and sentence of a man found guilty of inflicting corporal injury upon his wife, Justice Thompson of the California Supreme Court stated the reality for victims of intimate partner violence in 1975:

When a husband assaults his wife it is usually late at night and frequently out of the presence of witnesses except, as in this case, in front of a helpless and disturbed child. The officer responding to the call for help, as in this case, must determine whether a felony or a misdemeanor has been committed. If he determines that a misdemeanor has been committed he is powerless to effect an arrest, inasmuch as it was not committed in his presence, unless the wife makes a citizen’s arrest, a most unlikely course of action. He must therefore leave the wife in the home wherein the beating took place. The wife’s options are not very satisfactory. She is almost forced to remain at home since her opportunities to flee are usually severely limited. The husband may have the car; there may be children in the home to be considered; and the unaccompanied female at night is greeted with suspicion if not refusal of admission by hotel and motel clerks who fear not only her possible profession but if convinced of her true plight are fearful of her being followed by a vengeful husband who would create a scene….Even the infliction upon a wife of considerable traumatic injury would tend to be treated by the arresting officer as a misdemeanor which would produce the consequences of the wife’s being left in the home to face possible further aggregation.

Despite the historical condemnation of intimate partner violence and the growing willingness to recognize it as a crime, “the underenforcement of crimes involving family

96 See State v. Rhodes, 61 N.C. 453 (1868) (affirming the not guilty verdict of a man who had beaten his wife). The court reasoned that “however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber.”
97 LOUISA MAY ALCOTT, AN OLD-FASHIONED GIRL (1870).
98 People v. Cameron, 53 Cal.App.3d 786, 792-793 (Cal. 1975).
members was notorious.” It was therefore considered a significant victory of the feminist movement when in 1994 Congress passed the Violence Against Women Act, legislation that made significant progress in recognizing and combating intimate partner violence. Provisions included, *inter alia*: a reduction in “unwarranted disparities between the sentences for sex offenders who are known to the victim and sentences for sex offenders who are not know to the victim”; the authorization of grants to encourage “mandatory arrest programs and policies for protection order violations”; the authorization of grants “to establish projects in local communities involving many sectors of each community to coordinate intervention and prevention of domestic violence”; and special immigration provisions for battered immigrants.

Despite the significant progress that has been made since the 1980s in combating intimate partner violence, it continues to be a pervasive problem in the United States. Nevertheless, the Violence Against Women Act, which continues to be reauthorized periodically, and other initiatives demonstrate a sincere commitment on the part of the U.S. government to address the problem of intimate partner violence and other crimes that primarily affect women. This commitment represents a victory in the ongoing struggle for the recognition that women are just as fully human as men, and thus must enjoy the same level of respect for their human rights.

In the area of refugee protection, however, such a victory has proven more elusive. Although intimate partner violence is condemned as a legal and social wrong, the political aspects continue to be obscured. U.S. courts responsible for adjudicating asylum claims continue to view intimate partner violence primarily as an aberration that occurs due to various psychological and social factors rather than a problem inherently political in nature. This has had a dramatic impact on refugee protection for battered women.

IV. Gender-Based Violence as Persecution under the Refugee Convention

The United States’ adjudication of claims from people seeking asylum is governed by the 1951 Convention Related to the Status of Refugees as updated by the 1967 Protocol to the Convention. The 1951 Convention’s official definition of a refugee reflects a worldview in which political acts occur in the public sphere among public actors, not among family members –

---

99 BARTLETT & RHODE, GENDER AND LAW, *supra* note 81, at 491.
101 Id. [VAWA 1994]
102 Id. [VAWA 1994].
103 Id. [VAWA 1994].
104 The most recent U.S. Department of Justice statistics estimate that there were 552,000 nonfatal incidents of intimate partner violence against females age 12 or older, a rate of 4.3 victimizations per one thousand. Catalano et al., *Female Victims of Violence, supra* note 9, at 1.
105 The most recent reauthorization was the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 (2006).
the political activist handing out leaflets, the government agent torturing a suspected opposition sympathizer, the mob burning the homes of members of religious minorities.\textsuperscript{110}

any person who…owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his [or her] nationality, and is unable to or, owing to such fear, is unwilling to avail [herself or] himself of the protection of that country.\textsuperscript{111}

The conspicuous absence of gender from the list of protected grounds may merely reflect a pre-1970’s unawareness of gender issues, but it has frequently been interpreted to indicate a deliberate unwillingness to extend the definition of a classic refugee to include gender-based violence, the perpetrators of which tend to be family members and other persons known to the victim.\textsuperscript{112}

Although the 1951 Convention and 1967 Protocol do not specifically provide protection for victims of gender-based violence, neither do they specifically exclude gender-based violence from protection.\textsuperscript{113} States are free to interpret and apply the principles of the 1951 Convention and 1967 Protocol as they see fit. Thus, despite the absence of gender from the list of protected grounds, some courts charged with interpreting and applying the 1967 Protocol have found gender-based violence to be a basis for refugee protection.\textsuperscript{114} For example, refugee law as applied in the United States and abroad has expanded to protect victims of female genital mutilation and domestic violence. As discussed below, successful claims tend to be based on the applicant’s membership in a particular social group; political opinion, on the other hand, tends to be disfavored as a basis for gender-based asylum claims.

The United States signed the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees in 1968\textsuperscript{115} and adopted almost verbatim the Convention definition of a refugee with the passage of the Refugee Act of 1980.\textsuperscript{116} Over the years, U.S. federal and administrative courts

---

\textsuperscript{110} See Maya Raghu, Sex Trafficking of Thai Women and the United States Asylum Law Response, 12 GEO. IMMIG. L.J. 145, 168 (1997) [hereinafter Raghu, Sex Trafficking and Asylum Law]:

Human rights law in general, and U.S. asylum law in particular, privileges male-dominated public activities over the activities of women which take place in the private sphere. The UN Refugee Convention and the U.S. Refugee Act, among others, view sexual violence and oppression in particular as perpetrated in the private sphere, and not as “political” or public oppression by the state.

\textsuperscript{111} 19 U.S.T. 6259 at 6261, 189 U.N.T.S. at 152. The 1951 Convention also permitted signatories to restrict protection to people who were refugees as a result of “events occurring in Europe before 1 January 1951.” Id. at 6262, 189 U.N.T.S. at 154.

\textsuperscript{112} See Raghu, Sex Trafficking and Asylum Law, supra note 110, at 168 (stating that the “distinction between the public and private has proved harmful to women, for U.S. courts have often granted asylum to male applicants while denying asylum to female applicants in similar situations”).

\textsuperscript{113} The United Nations High Commissioner for Refugees promulgated guidelines in 2002 to “ensure that proper consideration is given to women claimants in refugee status determination procedures and that the range of gender-related claims are recognised as such.” UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (2002) at ¶ 1 [hereinafter UNHCR Gender Guidelines].

\textsuperscript{114} The forms of gender-based violence discussed in this section are not meant to be an exhaustive list, but rather a representation of the most common forms of violence inflicted primarily upon women.

\textsuperscript{115} 19 U.S.T. at 6223. The Senate ratified the Protocol on October 4, 1968, and it was signed into law on October 15, 1968. Id.

have interpreted the 1967 Protocol and Refugee Act of 1980 and set forth guidelines for determining whether an applicant for asylum is eligible for such relief under U.S. law. A substantial collection of asylum case law, regulations and memoranda address various aspects of the Convention definition, including what constitutes persecution, whether a fear is well-founded, whether a person is unable or unwilling to avail themselves of the protection of their country, and how to evaluate whether an applicant is being persecuted on account of protected ground. For purposes of this Article, the most relevant interpretations involve whether an applicant has been persecuted on account of membership in a particular social group and whether an applicant has been persecuted on account of political opinion. In the 1985 watershed case Matter of Acosta, the Board of Immigration Appeals addressed both issues.

A. Persecution on Account of Membership in a Particular Social Group

Neither the 1951 Convention nor the 1967 Protocol provide a definition of the term “membership in a particular social group.” Guy Goodwin-Gill, a leading expert in the field of refugee law, warns that a “fully comprehensive definition is impracticable, if not impossible” and then goes on to state that “the essential element in any description would be the factor of shared interests, values, or background – a combination of matters of choice with other matters over which members of the group have no control.” As prominent refugee law scholars Karen Musalo, Jennifer Moore and Richard Boswell have explained:

The inclusion of the social group ground in the refugee definition reflects an appreciation on the part of the international community that persecution may be animated by a multiplicity of factors in addition to political opinion, religion, race or nationality. Essential to the concept of “particular social group” is the perception that its members threaten or frustrate the status, interests, policies, or goals of powerful sectors and individuals within a society.

In Matter of Acosta, the Board of Immigration Appeals how to identify whether a group is a “particular social group” as contemplated by the Convention. The Board held that a particular social group must consist of persons who:

- share a common, immutable characteristic. The characteristic might be one such as sex, color or kinship ties…or a shared past experience…. [T]he common characteristic that defines the group…must be one that the members of the group either cannot change, or

---

117 See Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996), quoting Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995) (defining persecution as “an extreme concept, which ordinarily does not include ‘[d]iscrimination on the basis of race or religion, as morally reprehensible as it may be’”).
119 Id. at 235-236. [Matter of Acosta]
120 Id. [Matter of Acosta]
123 Id. [Goodwin-Gill at 47-48]
124 KAREN MUSALO, JENNIFER MOORE AND RICHARD BOSWELL, REFUGEE LAW AND POLICY 619 (3d Ed. 2007).
should not be required to change because it is fundamental to their individual identities or consciences.\textsuperscript{125}

The \textit{Acosta} test has become a widely accepted and oft-cited principle of refugee law, both in the United States and abroad.\textsuperscript{126} Some U.S. federal courts of appeals have modified the test, requiring that social group claimants prove more than the elements in the Acosta test. Drawing from these decisions, the Board of Immigration Appeals adopted additional parameters for the test in 2007, requiring that a particular social group “have particular and well-defined boundaries, and that it possess a recognized level of social visibility.”\textsuperscript{127}

Despite the many restrictions on what constitutes a particular social group, the social group category remains the “ugly stepsibling” of the other four protected grounds: the last resort,\textsuperscript{128} the key to the floodgates, the weakest link to refugee protection.\textsuperscript{129} As the Department of Justice noted in the preamble to the proposed regulations governing gender-based asylum claims, “the legislative history behind the term…is uninformative, and judicial and agency interpretations are vague and sometimes divergent. As a result, court have applied the term reluctantly and inconsistently.”\textsuperscript{130} It is therefore common to see social group claims combined with one of the other, more favored grounds such as political opinion. The United States’ attitude

\begin{footnotesize}
\textsuperscript{125} \textit{Matter of Acosta}, supra note 118, at 233. The Board found that a member of a coalition of taxi drivers did not warrant refugee protection under this test. Being a taxi driver is not immutable, because the individual can leave the profession. \textit{Id.} at 234. Neither is being a taxi driver or a member of a taxi driver coalition a characteristic so fundamental to the identity or conscience of an individual that s/he should not be required to change it. \textit{Id.}

\textsuperscript{126} \textit{See, e.g., Islam v. Home Department, supra} note 12; Refugee Appeal No 71427/99, RA 71427/99, Refugee Status Appeals Authority, [2000] NZAR 545 (New Zealand); DaSilva v. Ashcroft, 394 F.3d 1 (1st Cir. 2005); Vumi v. Gonzales, 502 F.3d 150 (2nd Cir. 2007); Ghebrehiwot v. Attorney General, 467 F.3d 344 (3d Cir. 2006); Mwembie v. Gonzales, 443 F.3d 405 (5th Cir. 2006); Al-Ghorbani v. Holder, 585 F.3d 980 (6th Cir. 2009); Sepulveda v. Gonzales, 464 F.3d 770 (7th Cir. 2006); Malonga v. Mukasey, 546 F.3d 546 (8th Cir. 2008); Lesly Yajayra Perdomo v. Holder, 2010 U.S. App. LEXIS 14171 (9th Cir. 2010); Nkonta v. Mukasey, 295 Fed. Appx. 279 (10th Cir. 2008); Castillo-Arias v. Attorney General, 446 F.3d 1190 (11th Cir. 2006).


\textsuperscript{128} \textit{See, e.g., Matter of R-A-}, supra note 6, at 928 (admonishing that “Congress did not intend the ‘social group’ category to be an all-encompassing residual category for persons facing genuine social ills that governments do not remedy”). \textit{See also}, Department of Homeland Security’s Position on Respondent’s Eligibility for Relief at 6, \textit{Matter of R-A-}, (2004) [hereinafter DHS 2004 Brief in \textit{Matter of R-A-}]: “Of the five statutory grounds for asylum, the meaning of membership in a particular social group is perhaps the least well defined and most robustly debated.”

\textsuperscript{129} \textit{See United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee States under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees} (1992) at ¶ 79 (stating that “[m]ere membership of a particular social group will not normally be enough to substantiate a claim to refugee status”). The UNHCR Handbook admonishes that “[t]here may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.” The UNHCR Gender Guidelines, supra note 113, promulgated ten years after the UNHCR Handbook, seem to have a more favorable disposition towards gender-based claims brought under the rubric of membership in a particular social group:

[S]ex 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 than men. Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.”

\textit{Id.} at ¶ 30.

\textsuperscript{130} Department of Justice, Immigration and Naturalization Service, 85 Fed. Reg. 76588, 76589 (2000)\end{footnotesize}
towards gender-based social group claims has been most permissive with respect to female genital mutilation, somewhat less so with respect to rape, and more restrictive than that of other countries with respect to intimate partner violence.

1. Female Genital Mutilation as Persecution on Account of Membership in a Particular Social Group

Female genital mutilation is the alteration of external female genitalia, often in a manner and to a degree that is traumatic, painful, and with severe health consequences. Female genital mutilation is a widespread practice in approximately twenty-eight countries, and is inflicted on approximately three million women and girls every year. The World Health Organization describes four levels of female genital mutilation, ranging from ritual cutting of the genital that does not usually have long-term negative effects, to the practice known as infibulation, in which the labia majora and clitoris are excised and the labia minora stitched together to narrow the vaginal opening.

In 1995, Fauziya Kassinja, a young woman from the West African country of Togo, applied for asylum on the basis that her family and tribe were going to force her to undergo female genital mutilation involving removal of the clitoris. Although the immigration judge denied her claim on credibility grounds, the Board of Immigration Appeals dismissed the credibility issue and instead focused on the main issue presented by the INS: whether female genital mutilation could be a basis for asylum. Eleven out of the twelve Board members who considered the appeal decided in the affirmative, and Ms. Kassinja was granted asylum.

The Board’s decision rested on Ms. Kassinja’s membership in a particular social group. The Board held that “FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM.” Consequently, the Board found that Ms. Kassinja would be persecuted on account of her membership in the particular social group of “young women of the Tchamba-Kunsuntu tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”

The Board’s decision in Ms. Kassinja’s case thus recognized a form of violence directed uniquely against women as persecution on account of a Convention ground. In fact, both

---

131 The practice of female genital mutilation is also known by the terms “female genital cutting” and “female circumcision.” This author believes that the term “female genital mutilation” most accurately describes and thoroughly encompasses the disfigurement and long-term severe medical effects of the practice. See World Health Organization, Eliminating Female Genital Mutilation: An Interagency Statement (2008) at 22 [hereinafter WHO FGM Statement]:

The word mutilation establishes a clear linguistic distinction from male circumcision, and emphasizes the gravity and harm of the act. Use of the word “mutilation” reinforces the fact that the practice is a violation of girls’ and women’s rights, and thereby helps to promote national and international advocacy for its abandonment.

132 Id. at 1.[WHO FGM]
133 Id. at 1, 29. [WHO FGM]
134 Id. at 24. [WHO FGM]
136 Id. at 364-65. [Matter of Kasinga]
137 Id. at 358. [Matter of Kasinga]
138 Id. at 367. [Matter of Kasinga]
139 Id. at 365, 367. [Matter of Kasinga]
parties in the case supported the concept of female genital mutilation as a basis for asylum. In cases involving intimate partner violence, immigration authorities have been more conflicted about whether and under what circumstances victims may qualify for refugee protection.

2. Intimate Partner Violence as Persecution on Account of Membership in a Particular Social Group

a. Islam v. Regina v. IAT ex parte Shah

Shahanna Islam and Syeda Shah applied for asylum in the United Kingdom in 1991 and 1993, respectively. Although they came from different socioeconomic backgrounds, they had a common ground for seeking refugee protection: intimate partner violence. The Court of Appeal denied their consolidated claims and the women appealed to the House of Lords.

The basis for the denial of asylum in each case was failure to show that the persecution occurred on account of membership in a particular social group or any other protected ground. In Ms. Shah’s case, the asylum adjudicator found that “she was simply a battered wife,” and that she was not persecuted on account of her membership in any particular social group. Ms. Islam’s purported social group, “Pakistani women subject to domestic violence, namely wife abuse” was rejected because it defined the group by the persecution suffered. The lower courts relied heavily on Matter of Acosta as well as the Ninth Circuit Court of Appeals case Sanchez Trujillo v. INS, in which the Ninth Circuit rejected the social group “young Salvadoran males who refused to perform military service” on two grounds: (1) the applicant had not proven that the social group was comprised of closely affiliated individuals and (2) the Salvadoran government had not singled out the group for persecution.

The House of Lords approved the lower courts’ reliance on Matter of Acosta but rejected the adoption of the Ninth Circuit’s more restrictive approach. More significantly, however, the House of Lords recognized “women in Pakistan” as a particular social group. In explaining his reasoning, Lord Steyn emphasized the political aspect of the persecution and rejected the notion that the abuse was purely personal in nature, stating that “[g]iven the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the applicants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic.”

141 The opinion describes Syeda Shah as “simple and uneducated.” Id. at 12 [Islam v. Home Dept.] Shahanna Islam was a “graduate school teacher.” Id. [Islam v. Home Dept at 12.]
142 Id. at 13. [Islam v. Home Dept]
143 Persecution cannot define the social group because of the circular nature of such a claim. As Lord Hoffman explained, “if one belonged to a group because one shared a common fear of persecution, one could not be said to be persecuted because one belonged to that group.” Id. at 14. [Islam v. Home Dept]
144 See id. at 6-8 (citing Matter of Acosta, supra note 118).
145 See id. at 6-9 (citing Sanchez Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986)).
146 Id. at 9. [Islam v. Home Dept]
147 Id. at 9-10. [Islam v. Home Dept]. The applicants had narrowed their social group to “women in Pakistan accused of transgressing social mores who are unprotected by their husbands or other male relatives.” Id. at 14. [Islam v. Home Dept]
148 Id. at 11. [Islam v. Home Dept]
What is the reason for the persecution which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is the threat of violence to Mrs. Islam by her husband and his political friends and to Mrs. Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. There is nothing personal about this. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the Convention.149

Notably, the House of Lords cursorily dismissed the political opinion claim that Ms. Islam raised.150 Nevertheless, a majority of the court found that both applicants were entitled to refugee protection on the basis of their membership in the particular social group of “women in Pakistan.” As discussed below, asylum applicants fleeing intimate partner violence have had a different experience in U.S. courts.

b. Matter of R-A-

In 1996, an immigration judge granted asylum to Rody Alvarado Peña, a Guatemalan woman who had been severely abused by her husband. The Immigration and Naturalization Service appealed. There was no dispute that the abuse she suffered was severe enough to constitute persecution if found to have occurred on account of race, religion, nationality, membership in a particular social group, or political opinion.151 The applicant claimed that the abuse occurred on account of two protected grounds: (1) a political opinion imputed to her by her husband, namely that “women should not be dominated by men”152 and (2) her membership in the particular social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”153 The Service argued that the claimed social group does not qualify as a social group under refugee law, and that Ms. Alvarado was not persecuted on account of her political opinion.154 In a controversial opinion with a vehement dissent, the Board of Immigration Appeals agreed with the Service on both points and overturned the grant of asylum.155

149 Id. at 17. [Islam v. Home Dept]
150 Id. at 11-12. [Islam v. Home Dept] (stating that “[i]n the Islam case there was also a discrete issue as to whether the appellant can rely on the Convention ground of political opinion….I must make clear that I was not attracted by this argument.”)
151 Matter of R-A-, supra note 6, at 914.
152 Id. at 911. [Matter of R-A-]
153 Id. [Matter of R-A- at 911]
154 Id. [Matter of R-A- at 911]
155 Id. at 907. [Matter of R-A-] Attorney General Janet Reno certified the case to herself and stayed the Board’s decision as well as its order that Ms. Alvarado voluntarily leave the United States within thirty days or be deported. In re R-A-, 22 I. & N. Dec. 906 (A.G. 2001). Ms. Alvarado’s attorney, Professor Karen Musalo, filed a petition for review in the Ninth Circuit Court of Appeals. Center for Gender and Refugee Studies, Documents and Information on Rody Alvarado’s Claim for Asylum, Current Update, available at http://cgrs.uchastings.edu/campaigns/alvarado.php#legal [hereinafter CGRS, Rody Alvarado]. While the petition was pending, the Department of Justice drafted proposed regulations governing the adjudication of gender-based asylum claims. 65 Fed. Reg. 76588 (Dec. 7, 2000). The Department of Justice has yet to promulgate final
The Board also rejected membership in a particular social group as a basis for the persecution. The Board found that the proposed social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” failed for two reasons: (1) it was not a “group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala” and (2) there was no evidence “that the characteristic of being abused is one that is important within Guatemalan society.” That is, there was no showing that “women are expected by society to be abused, or that there are any adverse societal consequences to women or their husbands if the women are not abused.” The Board characterized the proposed social group as merely “a legally crafted description of her tragic personal circumstances.”

The Board also found that even if the proposed social group was legitimate, there was no evidence that the abuser persecuted Ms. Alvarado because she was a member of that group. The principle reason for this finding was that the abuser limited his persecution to one member of the group: his own wife. The Board also found that there was no evidence that Guatemala, despite its failure to protect Ms. Alvarado, desired or encouraged persecution of members of the group. The Board added that if they were to find that such private action constituted persecution on account of a protected ground, such a formulation would not be confined to cases of intimate partner violence but could apply to various forms of harm perpetrated by private individuals.

c. Matter of L-R-

The applicant in the recently decided case of Matter of L-R- presented facts similar to those in Matter of R-A-. The applicant, a citizen of Mexico, fled repeated abuse at the hands of her male domestic partner. On the multiple occasions that she reported the abuse to police, they dismissed it as a private problem and refused to take action. Country condition information in the record showed that attitudes in Mexico towards intimate partner violence were permissive, characterized by reluctance on the part of police and prosecutors to enforce the law against domestic violence, lenient sentencing in domestic violence cases, the absence of regulations, and in the nine years since the proposed regulations were published, Ms. Alvarado’s case continued to languish. Finally, pursuant to an agreement between Ms. Alvarado’s attorneys and the Department of Homeland security, the Board remanded the case to an immigration judge on December 4, 2008. CGRS, Rody Alvarado. The Center for Gender and Refugee Studies, directed by Professor Musalo, announced that on December 9, 2009, an immigration judge granted asylum to Ms. Alvarado pursuant to the agreement of the parties. Id. The immigration judge found that “there is no binding authority on the legal issues raised in this case….” Id.
domestic violence laws in seven of Mexico’s states, and laws in fifteen states that only criminalize repeat offenses.\textsuperscript{166} The applicant applied for asylum on the basis of her membership in the particular social group of “Mexican women in an abusive domestic relationship who are unable to leave.”\textsuperscript{167} The immigration judge initially denied asylum in October 2007, at which point the case went before the Board of Immigration Appeals. On August 4, 2010, on remand from the Board, the immigration judge granted asylum.\textsuperscript{168}

In its supplemental brief to the Board, the Department of Homeland Security departed from the usual practice of focusing its arguments solely on the claims raised by the applicant. Instead, in an effort “to contribute to a process leading to the creation of better guidance to both adjudicators and litigants,”\textsuperscript{169} the Department articulated its own legal theories under which the applicant and others similarly situated might be eligible for asylum. The Department first rejected the applicant’s proposed social group as circular (that is, the persecution was included in the definition of the social group)\textsuperscript{170} and then proposed two alternative social groups: (1) “Mexican women in domestic relationships who are unable to leave”\textsuperscript{171} and (2) “Mexican women who are viewed as property by virtue of their positions within a domestic relationship.”\textsuperscript{172}

The social groups that the Department of Homeland Security proposed may be viable for the particular case in which they have been advanced, but it is not clear that they would withstand the same faulty review that the social group in Matter of R-A- received. Substantively, there is little difference between a woman whose partner believes that she should live under male domination, and a woman whose partner views her as property. Thus, the same flaws can be attributed to the Department’s proposed groups that the Board attributed to “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.” First, the persecutor has limited his persecution to one person – his domestic partner – thereby indicating that his motivations stem not from her membership in a particular group of people but from the fact that she is his partner. Second, it is unlikely to be any more or less clear that Mexican society expects women to be abused than Guatemalan society expects women to be abused.

Despite the flaws inherent in the social group formulations advanced in favor of granting asylum to battered women, social group has been a far more successful approach than political opinion. As discussed below, U.S. courts have been reluctant to attribute political motives to gender-related persecution – even when committed in a politically-charged setting. When the persecution occurs in the context of a personal relationship, recognition of political opinion as an appropriate ground for a grant of asylum has been even more elusive.

B. Persecution on Account of Political Opinion

The concept of persecution on account of political opinion has developed in the jurisprudence of refugee protection in a manner that renders it inhospitable for gender-based

\textsuperscript{166} Id. at 17-18. [DHS Matter of LR]
\textsuperscript{167} Id. at 5. [DHS Matter of LR]
\textsuperscript{169} DHS Brief in Matter of LR, supra note 164, at 4-5.
\textsuperscript{170} Id. at 6, 10-11. [DHS Matter of LR]
\textsuperscript{171} Id. at 14. [DHS Matter of LR]
\textsuperscript{172} Id. [DHS Matter of LR at 14]
claims. Even persecution that has occurred in highly charged political environments, against individuals conforming to their political beliefs, has been held not be persecution on account of political opinion. As discussed below, the Board of Immigration Appeals set out a standard in 1985 that courts have faithfully followed. Since then courts have declined to find persecution on account of political opinion in cases where rape was perpetrated by guerrillas against a perceived enemy, where a woman faced persecution for failing to conform to gender-based religious requirements, and where women have been persecuted by intimate partners in countries that legislate the dominance of men.

1. The Standard: Matter of Acosta

In Matter of Acosta, the applicant claimed that Salvadoran guerrillas had persecuted him because he was a founder and member of a taxi cooperative that had refused to engage in guerrilla-sponsored work stoppages. The persecution consisted of guerrillas beating him in his cab, confiscating his cab, and threatening his life.\(^{173}\) The applicant also received notes threatening his life and calling him a “traitor.”\(^{174}\) In addition to claiming that persecution occurred on account of his membership in the particular social group of a taxi cooperative and persons engaged in the Salvadoran transportation industry,\(^{175}\) the applicant claimed that the persecution occurred on account of his political opinion.\(^{176}\)

The Board of Immigration Appeals articulated a formula for determining whether persecution occurred on account of political opinion: the Board distinguished between acts that achieve general political goals and acts that target individuals for their political beliefs; only the latter constitutes persecution on account of political opinion.\(^{177}\) Evaluated according to this formula, Acosta failed to show that he had suffered persecution on account of political opinion. The Board found that even though Acosta had received personalized death threats referring to him as a traitor, “there [were] no facts showing that the guerrillas were aware or sought to punish [Acosta] for his political opinion.”\(^{178}\) The Board also found that there were no facts showing that Acosta’s “refusal to participate in the work stoppages was motivated by his political opinion.”\(^{179}\) Rather, he had been a casualty of “harm with political implications [arising out of] civil strife in a country.”\(^{180}\)

Although it is widely accepted that harm arising out of general civil strife is not a basis for asylum,\(^{181}\) other courts have applied a broader concept of political opinion than the Acosta court. For example, in Osorio v. INS,\(^{182}\) the Second Circuit found that a Guatemalan union organizer who faced persecution similar to Acosta’s had been persecuted on account of his

\(^{173}\) Matter of Acosta, supra note 6, at 217.

\(^{174}\) Id. [Acosta at 217]

\(^{175}\) See supra notes 125-127 and accompanying text (discussing the Acosta test for persecution on account of membership in a particular social group).

\(^{176}\) Matter of Acosta, supra note 6, at 232.

\(^{177}\) Id. at 234-235. [Matter of Acosta] See also, INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992) (holding that “the mere existence of a generalized ‘political’ motive underlying the [persecution] is inadequate to establish (and, indeed, goes far to refute) the proposition that [the applicant] fears persecution on account of political opinion….”).

\(^{178}\) Matter of Acosta, Matter of Acosta, supra note 6, at 235.

\(^{179}\) Id. [Acosta at 235]

\(^{180}\) Id. [Acosta at 235]


\(^{182}\) 18 F.3d 1017 (2d Cir. 1994).
political opinion. The court found that some activities, even if not strictly political in nature, can imply a political opinion.  

Courts have also identified persecution on account of political opinion in cases where the applicant was neutral, and where the persecutor imputed a political opinion onto the applicant. In Bolanos-Hernandez v. INS, the Ninth Circuit held that neutrality can constitute a political opinion. The court stated that “[c]hoosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction.” In Argueta v. INS, the applicant possessed an actual political opinion of neutrality, but was persecuted by a right-wing death squad for an erroneously attributed pro-guerrilla political opinion. The Ninth Circuit found that Argueta faced persecution on account of the imputed pro-guerrilla political opinion.

2. Rape as Persecution on Account of Political Opinion

Rape is one of the most common forms of brutality inflicted upon civilians during times of war or civil unrest, and it occurs predominantly against women. As with all forms of gender-based violence, there exists the tendency to view such violence as a private albeit unfortunate result of living in a conflict area. It has also been viewed as a purely personal act, motivated by lust and the need for domination.

U.S. courts and immigration authorities have struggled with the adjudication of asylum claims in which the persecution consisted of rape, in whole or in part. As with all asylum claims, the rape must have occurred on account of a Convention ground (race, religion, nationality, membership in a particular social group, or political opinion), and the protected ground must have been at least one central reason for the persecution. The perception of sexual violence as a private act, however, can often obscure or call into question the motivation of the rapist.

In 1984, an immigration judge denied the asylum claim of Olimpia Lazo-Majano, a Salvadoran woman who was the victim of rape as well as beatings, public humiliation and threats of torture and death. The Board of Immigration Appeals sustained the denial on the basis that the rapes and other mistreatment, committed by a sergeant in the Salvadoran military for whom Lazo-Majano performed domestic labor, were ”strictly personal” and thus not persecution.

---

183 Osorio v. INS, 18 F.3d at 1030. Specifically, the Second Circuit rejected the proposition that if a government persecutes a national or resident on account of such person’s political beliefs, but the individual is a union organizer whose fame and mode of communication comes through the organization of a labor movement, the individual is not eligible for political asylum because such activity is predominantly economic, not political.

Id. at 1031.

184 Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984).

185 Id. at 1286. [Bolanos-Hernandez]

186 759 F.2d 1395 (9th Cir. 1985).

187 Id. at 1397. [Argueta]


Women…experience armed conflicts as sexual objects, as presumed emblems of national and ethnic identity, and as female members of ethnic, racial, religious, or national groups. In Rwanda, up to half a million women were raped during the 1994 genocide. The numbers were as high as 60,000 in the war in Croatia and Bosnia-Herzegovina. In Sierra Leone, the number of war-related sexual violence against women was as high as 64,000.

8 USC § 1158(b)(1)(B)(i), INA § 208(b)(1)(B)(i).

190 Lazo-Majano v. INS, 813 F.2d 1432, 1433-34 (9th Cir. 1987).

191 Id. at 1434. [Lazo-Majano]
Lazo-Majano appealed the case to the Ninth Circuit. One of the Ninth Circuit judges agreed with the immigration judge and Board, stating:

[s]he may indeed have suffered emotional and physical abuse in the course of her personal relationship with Sergeant Zuniga, but such mistreatment is clearly personal in nature and does not constitute political persecution within the meaning of the immigration laws…. Lazo-Majano…was abused and dominated by an individual purely for sexual, and clearly ego reasons.\(^\text{192}\)

The two judges who formed the majority, however, disagreed. They found that the sergeant’s categorization of Lazo-Majano as subversive rendered his actions political because he was seeking to overcome a political opinion contrary to his own that he believed she held.\(^\text{193}\)

The same year, another Salvadoran applicant in similar circumstances faced a much different outcome in the Court of Appeals for the Fifth Circuit.\(^\text{194}\) Sofia Campos-Guardado was raped after being forced to watch her male relatives hacked with machetes and then shot to death.\(^\text{195}\) Campos-Guardado believed that these attacks took place because of her uncle’s perceived support of controversial land reform policies.\(^\text{196}\) The fact that one of the assailants chanted political slogans during the rapes also supported her belief that the attacks were politically motivated.\(^\text{197}\) A unanimous panel of the Fifth Circuit disagreed, holding that the rape did not occur on account of political opinion or any other protected ground.\(^\text{198}\)

The Board of Immigration Appeals took a different approach when it decided an asylum claim involving rape in another country embroiled in civil war. In 1993, the Board reviewed an immigration judge’s decision denying asylum to a Haitian woman, known by the initials “D-V-,” who had been gang-raped after expressing political opinions in favor of the Aristide regime.\(^\text{199}\) The immigration judge attributed the attack to generalized violence, despite the fact that D-V- had received specific threats relating to her pro-Aristide political opinion.\(^\text{200}\) In its opinion reversing the denial of asylum, the Board stated that “she has suffered grievous harm in direct retaliation for her support of and activities on behalf of Aristide.”\(^\text{201}\)

Two years later, the INS issued a memorandum entitled “Considerations for Asylum Officers Adjudicating Asylum Claims from Women.”\(^\text{202}\) The memorandum reminded asylum

\(^{192}\) Id. at 1436-37. [Lazo-Majano]

\(^{193}\) Id. at 1435. [Lazo-Majano]

\(^{194}\) Campos-Guardado v. INS, supra note 6.

\(^{195}\) Id. at 287. [Campos-Guardado]

\(^{196}\) Id. at 288. [Campos-Guardado]

\(^{197}\) Id. at 287. [Campos-Guardado]

\(^{198}\) Id. at 286-287. [Campos-Guardado] See Raghu, Sex Trafficking and Asylum Law, supra note 110, at 169 (comparing the Campos-Guardado decision to the decision in Arteaga v. INS, 836 F.2d 1227 (9th Cir. 1988):

The decisions of the courts in Arteaga and Campos-Guardado demonstrate the gender bias inherent in U.S. asylum law, which is premised upon a public-private distinction. Campos-Guardado was raped because she was a woman; but because rape is often viewed as a personal act in the private sphere, she was denied asylum because she did not meet the criteria. Arteaga, conversely, was granted asylum because he refused to join a revolutionary army, considered a political act in the public sphere.


\(^{200}\) Id. at 79-80. [In re D-V-]

\(^{201}\) Id. at 79. [In re D-V-]

\(^{202}\) Memorandum from Phyllis Coven, Office HQASM Coordinators of Int’l Affairs, Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995) available at http://www.state.gov/s/l/65633.htm [hereinafter Coven Memo].
adjudicators that “rape and other forms of severe sexual violence clearly can fall within” the definition of persecution, and that “the appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm.” The memorandum is also careful to remind asylum adjudicators that the sexual violence “must be inflicted in order to punish the victim for having one or more of the characteristics protected under the statute.”

3. Intimate Partner Violence as Persecution on Account of Political Opinion

The Board’s opinion in Matter of R-A- provides a window into how U.S. asylum adjudication has approached intimate partner violence as persecution on account of political opinion:

Nowhere in the record does the respondent recount her husband saying anything relating to what he thought her political views to be, or that the violence towards her was attributable to her actual or imputed beliefs. Moreover, this is not a case where there is meaningful evidence that this respondent held or evinced a political opinion, unless one assumes that the common human desire not to be harmed or abused is in itself a “political opinion.” The record before us simply does not indicate that the harm arose in response to any objections made by the respondent to her husband’s domination over her. Nor does it suggest that his abusive behavior was dependent in any way on the views held by the respondent.

The Board instead found that the abuse was a series of random incidents not motivated by the desire to overcome a political belief offensive to the persecutor, but rather caused by his “personal or psychological makeup coupled with his troubled perception of her actions at the time.” The Board acknowledged that Guatemala did little to protect women from spousal abuse, but did not connect the failure of state protection to a political motive. The same attitude towards political opinion appears in the Department of Homeland Security’s briefs in Matter of R-A- and Matter of L-R-:

[T]here is no record evidence to reflect that, even if [name redacted from brief] was aware of the female respondent’s feminist views and opposition to dominance, his abuse was related to her opinions on the matter. Rather, it appears he continued to abuse her regardless of what she said or did….There is no record evidence that the female respondent was politically active or made feminist/anti-male domination political statements….The Department’s position in this regard is also consistent with the Board’s longstanding approach that harm is not on account of political opinion when it is inflicted regardless of the victim’s opinion rather than because of that opinion.

---

203 Id. at 9. [Coven Memo]
204 Id. at 10. [Coven Memo]
205 Matter of R-A-, supra note 6, at 915.
206 Id. at 916. [Matter of R-A-]
In light of (1) the reluctance to attribute intimate partner violence to the victim’s political opinion and (2) the Department of Homeland Security’s willingness to agree to asylum on the basis of membership in a particular social group, membership in a particular social group emerges as a clearly safer alternative for intimate partner violence-based claims. This begs the question of why political opinion should be put forward at all as a basis for such claims. The answer is that intimate partner violence-based claims are still vulnerable to a finding that the abuse did not occur on account of the victim’s membership in a particular social group but because of personal reasons that have no place in a refugee protection system. Intimate partner violence-based claims are therefore at risk of erroneous denial unless adjudicators recognize the political origins of the violence. Recognizing the political nature of intimate partner violence will therefore serve to strengthen social group claims.

V. Battered Women Must be Recognized as Political Entities Persecuted by Agents of State-Sponsored Subordination of Women

The failure of courts to recognize political opinion as a legitimate basis for claims based on intimate partner violence is a failure (or refusal) to acknowledge the political underpinnings of intimate partner violence. Intimate partner violence is only partly personal. In many ways, it is a vestige of the feudal patriarchal system that has only recently begun to disintegrate in the United States and other “western” societies. Thus, it is political in nature because it is part of a social construct meant to keep one group dominant over another. When it occurs in countries whose societies wish to preserve the patriarchal system of men’s dominance over women, a desire evidenced by the legal and cultural norms in those societies, its political significance is even more pronounced. It occurs on account of a political opinion that must be presumed to be held by a woman who seeks refugee protection: that women are as human as men, and thus are entitled to the same human rights afforded men.

A. Application of the “Political Opinion” Analysis to Intimate Partner Violence

An applicant for asylum who claims that she suffered intimate partner violence on account of her political opinion might put forward the following legal theory: The applicant is seeking asylum on account of her political opinion that women are as fully human as and equal to men, and thus entitled to bodily integrity, including freedom from physical violence inflicted by male partners. The applicant’s country of origin maintains a culture of dominance of men over women, and as a result, refuses to provide adequate protection to women fleeing intimate partner violence. The persecutor is aware that the applicant possesses this political opinion because she has defied his presumed authority and left the relationship. The persecutor, acting as

208 See Schneider, Battered Women and Feminist Lawmaking, supra note 94, at 90 (cautioning that “[b]y seeing woman abuse as private, we affirm it as a problem that is individual and involves only a particular intimate relationship, for which there is no social responsibility to remedy”).

209 See id. at 12-13 (quoting Donna Coker) [Schneider, Battered Women and Feminist Lawmaking]: Battering may be experienced as a personal violation, but it is an act facilitated and made possible by societal gender inequalities. The batterer does not, indeed could not, act alone. Social supports for battering include widespread denial of its frequency or harm, economic structures that render women vulnerable, and sexist ideology that holds women accountable for male violence and for the emotional lives of families, and that fosters deference to male familial control....
an agent of state-sponsored subordination, is capable of punishing the applicant and inclined to
punish the applicant for holding the political opinion, as evidenced by his past abuse (inflicted in
order to maintain his state-supported dominance and control).

The two primary components of the legal theory – state-sponsored subordination of
women and the applicant’s possession of a political opinion – are discussed below.

1. State-sponsored subordination of women in the country of origin

State-sponsored subordination of women in the country of origin is essential to the legal
theory advanced in this article. It is critical that adjudicators realize that intimate partner
violence does not occur in a vacuum, free from political implications. It occurs because men
who crave dominance and control over the women in their lives have traditionally been permitted
to inflict violence on women to achieve that goal. In the context of the age-old history of male
dominance over women, the illegalization of battering is an extremely new phenomenon, and
one that has not been fully developed, let alone perfected.

_Matter of R-A-_ provides an illustrative example of a record replete with evidence of state-
sponsored subordination of women:

- “On three occasions, the police issued summons for her husband to appear, but he
  ignored them, and the police did not take further action.”

- “Twice, [Alvarado] called police, but they never responded.”

- “When [Alvarado] appeared before a judge, he told her that he would not interfere in
domestic disputes.”

- An expert on country conditions testified that “spouse abuse is common in Latin
  America and that she was not aware of social or legal resources for battered women in
  Guatemala.”

- An article prepared by Canada’s Immigration and Refugee Board “indicat[ed]  that
  Guatemalan society still tends to view domestic violence as a family matter, that
  women are often not aware of available legal avenues, and that the pursuit of legal
  remedies can often prove ineffective.”

The Board also made the following statement: “There is little doubt that the respondent’s
spouse believed that married women should be subservient to their own husbands. But beyond
this, we have scant information on how he personally viewed other married women in
Guatemala, let alone women in general.” On the contrary, however, there is abundant
evidence of how he viewed women. The evidence in the record demonstrates that he viewed
women as possessions of their husbands and partners, as subservient to their husbands and
partners, and as inferior beings to be treated as their husbands and partners see fit, even if that
includes beating and torturing them.

There is also abundant evidence of how Guatemalan society perceives women.
Guatemalan society agrees with Alvarado’s perception of women: that they are inferior beings

---

210 _Matter of R-A-,_ supra note 6, at 909.
211 _Id._ [Matter of R-A- at 909]
212 _Id._ [Matter of R-A- at 909]
213 _Id._ at 910. [Matter of R-A-]
214 _Id._ at 911. [Matter of R-A-]
215 _Id._ at 921. [Matter of R-A-]
who must defer to the authority of their husbands. Fortunately, most men do not seem to assert that authority by engaging in the level of violence that Alvarado’s husband inflicted on her. Those who do, however, find that the legal system and law enforcement agencies are reluctant to intervene.

Women who challenge their male partners’ state-sponsored dominance are thus asserting a political opinion that men are not entitled to view women as possessions, that women are not required to be subservient to men, and that women are fully equal to and thus entitled to the same human rights as men.

2. The applicant’s political opinion

Generally, a person seeking asylum on the basis of political opinion must show that the persecutor engaged in the persecution in an attempt to punish the applicant for holding or expressing a particular political opinion. As discussed in section X above, the opinion may be the applicant’s actual opinion or it may be an opinion that the persecutor has imputed to the applicant.

A woman who takes the drastic step of leaving an abusive relationship maintained in a country that subjugates women makes a clear political statement. She rejects the subordination that relegates her to a status less than fully human. She defies the cultural norms and concomitant legal inefficacies that make her subject to the whims of her male partner. Although she may not march at the front of a demonstration or hold a sign protesting male dominance, her actions are just as effective and even more likely to result in severe physical harm.

That she may not recognize such an action as political is irrelevant. In fact, there is well-established precedent for recognizing political opinion in situations where the refugee may not have clearly intended to express one. In 1996, Congress declared through a statutory amendment to the law governing asylum that retaliation for opposition to coercive population control constitutes persecution on account of political opinion. Congress passed this law in response to denials of asylum claims brought by Chinese nationals who had become pregnant in violation of China’s one-child policy. The basis for such denials was twofold: population control policies were politically neutral, and enforcement of such policies was uniform and thus not politically motivated. The amended law specifically addressed the dual basis for denial:

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to

216 See supra notes 19-23 and accompanying text.
217 See supra notes 24-37 and accompanying text.
220 Matter of Chang, supra note 219, at 43-44.
persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.\textsuperscript{221}

Thus, recognizing the political nature of leaving an abusive relationship in a country whose government and society are complicit in the subjugation and oppression of women is not a departure from U.S. asylum policy.

B. Integrity Considerations: Security and Capacity

A policy consideration that often arises with respect to immigration matters is how a particular statute, regulation, or ruling may affect the integrity of the U.S. immigration system. In the context of battered women, the question is whether acknowledging the political nature of intimate partner violence will result in a flood of battered women applying for asylum in the United States.\textsuperscript{222} The issue of “opening the floodgates”\textsuperscript{223} to an overwhelming number of refugees reflects concerns about security and capacity.

1. Security Concerns\textsuperscript{224}

Individuals seeking asylum in the United States must undergo identity verification and background checks before being eligible for asylum.\textsuperscript{225} The government issues each asylum applicant a file number, or “alien number,” which is entered into the Refugees, Asylum and Parole System (“RAPS”) database.\textsuperscript{226} RAPS interfaces with the Computer Linked Applicant Information System (“CLAIMS”) to identify and update asylum applicants’ address changes, and with the Receipt and Alien File Accountability Control System (“RAFACS”) to keep track of asylum applicants’ files.\textsuperscript{227} The asylum office must check the identity of the applicant against all appropriate government databases, including the State Department’s Consular Lookout and Support System (“CLASS”)\textsuperscript{228} and the DHS biometric identification system known as “IDENT.”\textsuperscript{229}

\textsuperscript{221} 8 U.S.C. § 1101(a)(42)(B).
\textsuperscript{222} There is no provision in the Refugee Convention or U.S. asylum law that limits the number of asylum seekers who may receive asylum status in the United States.
\textsuperscript{223} See generally, Karen Musalo, Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?, 14 VA. J. SOC. POL’Y & L. 119 (2007) [hereinafter Musalo, Floodgates]. See also, Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005) (stating that “[t]here may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation’s residents to obtain asylum on the ground that women are persecuted there); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994): Safaie asserts that Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group. We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.
\textsuperscript{224} The author previously addressed this issue in Counterproductive and Counterintuitive Counterterrorism: The Post-September 11 Treatment of Refugees and Asylum-Seekers, 84 DENVER L. REV. 1121 (2007).
\textsuperscript{225} 8 C.F.R. §§ 208.9(b), 208.10, 240.67, 1240.67.
\textsuperscript{227} Id. [U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL]
\textsuperscript{228} IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 383 (9th Ed. 2004).
\textsuperscript{229} Id. at 100. [IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK]
Other characteristics of the U.S. asylum system also make it inhospitable for those seeking to do harm to the United States. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”)\textsuperscript{230} effectuated a number of measures designed to curtail abuse of the asylum system. The most significant limitations are a one-year deadline on applying for asylum,\textsuperscript{231} delay in work authorization eligibility,\textsuperscript{232} prompt adjudication of asylum applications,\textsuperscript{233} expedited removal,\textsuperscript{234} and detention of asylum seekers.\textsuperscript{235} With these provisions in place, the hurdles to obtaining asylum are so great that asylum has become an unlikely choice for an would-be terrorists seeking an easy, low-profile way to gain lawful immigration status.

2. Capacity Concerns\textsuperscript{236}

Although the rate of intimate partner violence is high and occurs in every country in the world, not every victim of intimate partner violence meets the definition of a refugee. Of those who do meet the definition of a refugee, only a small percentage of them are likely to seek asylum in the United States or elsewhere. Asylum protection will only be extended to applicants who prove that their country does not have the resources or willingness to protect them from the persecutor.\textsuperscript{237} A citizen of a country that does have the resources and willingness to protect her would not meet the definition of a refugee and thus would not qualify for asylum in the United States.

Even in cases involving battered women who meet the definition of a refugee, it is unlikely that such women will apply for asylum in the United States in record-high numbers.\textsuperscript{238} First, the unique dynamics of abusive relationships prevent many women from leaving.\textsuperscript{239} Second, even if a woman succeeds in breaking the cycle of violence and flees the abusive relationship, she may not necessarily desire to flee her country and family. Those who do wish to take the drastic step of fleeing to another country incur expense and risk to do so, and subsequently must endure the stress of an asylum adjudication, possibly while living in detention.\textsuperscript{240}

\textsuperscript{231} 8 USC § 1158(a)(2)(B).
\textsuperscript{232} 8 USC § 1158(d)(2).
\textsuperscript{233} 8 USC § 1158(d)(5)(A)(ii).
\textsuperscript{234} 8 USC § 1225(b)(1).
\textsuperscript{235} 8 USC § 1225(b)(1)(B)(iii)(IV).
\textsuperscript{237} \textit{See McMullen v. INS}, 658 F.2d 1312, 1315 (finding that one of the elements necessary to prove eligibility for refugee protection is “persecution by the government or by a group which the government is unable to control”).
\textsuperscript{238} \textit{See Musalo, Floodgates, supra} note 223, at 132-33:
The floodgates were evoked around the claim of Fauziya Kassindja; many who opposed a grant of asylum pointed to the fact that millions of women a year are subject to FGC [female genital cutting], and predicted that the U.S. would be overwhelmed with asylum seekers if it recognized fear of FGC as a basis of asylum. Fauziya Kassindja was granted asylum, but the dire predictions of a flood of women seeking asylum never materialized. In fact an INS publication explicitly noted that “[a]lthough genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on FGM” after the Kasinga decision. In this same publication, INS stated that it did not expect to see a large number of claims if the U.S. recognized domestic violence as a basis of asylum.
\textsuperscript{239} LENORE E. WALKER, \textit{THE BATTERED WOMAN} 55 (1979) (explaining how the cycle of violence coerces many women to remain in or return to abusive relationships).
\textsuperscript{240} Individuals who do not present valid entry documents at a port of entry may be detained and summarily deported. 8 USC §§ 1225 and1182. If an individual expresses a fear of returning to their home country, an asylum officer will
Finally, this formulation, because it is based on men’s domination of women, does not apply in situations involving child abuse, same-sex couples or relationships in which the woman batters the man. It is important to note that the exclusion of these situations does not in any way suggest that victims of child abuse, same-sex intimate partner violence, or intimate partner violence inflicted by women against men do not qualify for asylum. This formulation is merely designed to address a particular paradigm of dominance, not to exclude or diminish other paradigms of dominance.

VI. Conclusion

Subjugation of any group or person comes about because of a flawed perception on the part of the persecutor that s/he or her/his group is superior to the subjugated group. Because the perception is flawed, the dominant group must employ methods to proliferate the fiction of superiority. Hence, the dominant group passes discriminatory laws and establishes discriminatory social mores. When the subjugated group attempts to reject or rebel against these strictures, the dominant group responds with violence. The dominant group cannot employ reason to maintain their superiority because their domination is not reasonable. The dominant group turns to persecution not because the subjugated group is inferior, but because they are in fact equals. The persecution thus occurs to maintain the state-sponsored legal fiction of superior domination of an inferior group.

Under these circumstances, a woman who flees an abusive male partner makes a political statement. She defies the state-sponsored fiction of her inferiority. She challenges her abuser’s state-supported belief that she is entitled to fewer rights as a human due to her sex. She risks her life and well-being to preserve her life and well-being. If she also leaves behind her country and loved ones to seek asylum in the United States, she is entitled to refugee protection on account of her political opinion that she is as much a human being as any man.

This article does not seek to minimize the effectiveness or viability of claims based on membership in a particular social group. Rather, it argues that in order for intimate partner violence-based claims to continue to succeed irrespective of who is currently serving as Attorney General, adjudicators must understand and accept the political nature of intimate partner violence. In countries where the dominant approach to intimate partner violence is to ignore and trivialize it, those who perpetrate the violence are supporting and advancing a state goal to maintain the dominance of men and the subordination of women. Thus, every woman who defies a man by attempting to leave the relationship that legitimizes his abuse makes a political conduct a “credible fear interview” to determine whether the individual may apply for asylum before an immigration judge. 8 USC § 1225(b)(1)(A)(ii). The DHS usually detains credible fear interviewees in immigration detention facilities, or, more commonly, in county jails from which the DHS rents bed space. AMERICAN BAR ASSOC. COMM’N ON IMMIGRATION, IMMIGRATION DETAINEE PRO BONO OPPORTUNITIES GUIDE 1 (2004). Even a person who is determined to have a credible fear may be held in detention for the duration of their asylum proceedings, which could take several years depending on whether appeals are filed. HUMAN RIGHTS FIRST, IN LIBERTY’S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 14 (2004).

statement that must be recognized as a political opinion, namely, that men do not have the right to maintain their legal and societal dominance through violence.