AN “I DO” I CHOOSE: HOW THE FIGHT FOR MARRIAGE ACCESS SUPPORTS A PER SE FINDING OF PERSECUTION FOR ASYLUM CASES BASED ON FORCED MARRIAGE

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Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition. ~Goodridge v. Department of Public Health

Natalie Nanasi*

INTRODUCTION

In the summer of 2013, the country waited anxiously for the Supreme Court to issue rulings in two landmark gay marriage cases that had the potential to fundamentally alter the institution of marriage in the United States. Advocates and opponents of same-sex unions fiercely debated the issue, but although the two sides’ positions were widely divergent, each emphasized the unique role of marriage in the social, personal, and legal fabric of life. Edie Windsor, the named plaintiff in the lawsuit1 seeking to strike down the Defense of Marriage Act (DOMA), 2 agreed. Ms. Windsor had been in a committed relationship with her partner for forty years prior to their marriage in 2007. Yet she stated that the transformation after entering into the legal union “was profound” and that she has “asked everybody since who gets married after long-term relationships, ‘Did it feel different the next day?’ and the answer is always ‘Yes,  

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2 PL 104–199, September 21, 1996, 110 Stat 2419. The Defense of Marriage Act contains two operative sections. Section 2 allows states to refuse to recognize same-sex marriages performed under the laws of other states. Section 3, which was at issue in U.S. v. Windsor, defines the term marriage as a legal union between one man and one woman and the word spouse as “a person of the opposite sex who is a husband or a wife.”
Ms. Windsor’s words were moving but far from novel. Her sentiments echoed decades of Supreme Court decisions that have recognized marriage as not merely a “constitutionally protected relationship” but an institution that is “fundamental to our very existence and survival” and “intimate to the degree of being sacred.”

The consistent reverence for the marital relationship expressed by the Supreme Court in the domestic sphere, however, stands in stark contrast to the treatment of marriage by courts interpreting asylum law, specifically, in the context of cases involving women seeking protection in the United States from forced marriage abroad. Although the underlying law and administrative agency interpretations support a finding that forced marriage is a persecutory act, courts analyzing whether entry into marriage against one’s will can be a basis for asylum have rejected the notion of forced marriage as a harm rising to the level of persecution.

In general, a woman fleeing a forced marriage will likely obtain asylum protection only if her narrative fits one of two accepted frameworks – what I will call here the “Violent Honor Crime Story” and the “Abusive Elderly Polygamist Story” – both of which focus not on the harm of forced marriage itself but on associated persecutory acts. If her claim is structured around the former narrative, the retaliation she will face at the hands of her family if she resists the marriage

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5 Loving v. Virginia, 388 U.S. 1, 12 (1967).
7 Female pronouns are used throughout this article because of the greater frequency (and often the greater harm) of forced marriage inflicted upon women, but it is noteworthy that males, too, may be victims of forced marriage. See, Yunas Samad, *Forced Marriage Among Men: An Unrecognized Problem*, 30 CRITICAL SOCIAL POLICY 189-207 (2010).
(a so-called “honor crime”\textsuperscript{8}), she can make a relatively straightforward application for relief based on her fear of future physical harm. Alternatively, in the latter framework, if she is able to provide certain details about the nature of the marriage that she will be forced into – for example, that she will be entering into a polygamous union with a distant relative who is significantly older than she and is known in her community as being physically abusive to his existing wives – asylum may be granted based on these “component parts” of the forced marriage.\textsuperscript{9}

But what about women who cannot provide such information or do not fit neatly into these existing legal categories? Can U.S. asylum law provide a safe haven for a woman who is being forced to marry a man about whom she knows little or nothing, when she cannot prove that attendant forms of persecution such as domestic violence, marital rape, or deprivations of liberty will occur? Put another way, can forced marriage standing alone be a \textit{per se} basis for a finding of persecution sufficient to merit asylum protection? An analysis of the current state of asylum law suggests that under prevailing judicial interpretations, such a case would be doomed to failure, as U.S. courts interpreting asylum law would refuse to recognize the persecutory nature of the forced marriage itself. U.S. courts regularly reject the notion that forcing a woman to enter into


what is arguably life’s most important relationship against her will, and thereby also inflicting
the related harm of preventing her from choosing a spouse to spend her life with, is a significant
deprivation rising to the level of persecution, even without the presence of ancillary harms.

Building on existing scholarship that analyzes issues at the intersection of gender,
familial relationships, and immigration and family law, and more specifically, the literature that
challenges the disparate treatment of gender-based claims in asylum law, this article explores
the disconnect that exists between domestic constitutional jurisprudence and immigration case
law when evaluating the importance of marriage. Drawing on both international law and the
evolution of U.S. constitutional law regarding marriage equality that unequivocally recognize the
right to marry the person of one’s choice as a fundamental right, this paper argues that U.S.
asylum law can, and should, recognize forced marriage itself as a persecutory act and provide
protection to those seeking refuge from this obvious harm.

Part I assesses the limitations of U.S. asylum law as it relates to forced marriage. First
focusing on the definition of persecution, it explains how the broadly-defined term – which has
been held to include physical harm as well as abuses such as those that are economic or

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10 See, e.g., NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 132-155 (2000); Kerry
Abrams, Immigration Law and the Regulation of Marriage, 91 MINN. L. REV. 1625 (2007); Jennifer M. Chacón,
Citizenship and Family: Revisiting Dred Scott, 27 WASH. U. J.L. & POL’Y 45, 66 (2008); Jennifer M. Chacón,
Collins, When Fathers’ Rights Are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright, 109
YALE L.J. 1669 (2000); Hiroshi Motomura, We Asked for Workers, but Families Came: Time, Law, and the Family
in Immigration and Citizenship, 14 VA. J. SOC. POL’Y & L. 103 (2006); Hiroshi Motomura, The Family and
Immigration: A Roadmap for the Rutinanian Lawmaker, 43 AM. J. COMP. L. 511 (1995); Rose Cuisson Villazor, The
Other Loving: Uncovering the Federal Government’s Racial Regulation of Marriage, 86 N.Y.U. L. REV. 1361, 1363
(2011); Leti Volpp, Divesting Citizenship: On Asian American History and the Loss of Citizenship Through

11 See, e.g., Pamela Goldberg, Analytical Approaches in Search of Consistent Application: A Comparative Analysis
of the Second Circuit Decisions Addressing Gender in the Asylum Law Context, 66 BROOK. L. REV. 309 (2000);
Sunny Kim, Gender-Related Persecution: A Legal Analysis of Gender Bias in Asylum Law, 2 AM. U. J. GENDER &
L. 107 (1994); Karen Musalo and Stephen Knight, Unequal Protection: When Women Are Persecuted, It’s Often
Described as a Cultural Norm Rather than a Reason to Grant Asylum, 58 BULL. ATOMIC SCIENTISTS 56 (Nov./Dec.
2002); Melanie Randall, Refugee Law and State Accountability for Violence Against Women: A Comparative
Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Presecution, 25 HARV. WOMEN’S
emotional or that constitute violations of fundamental beliefs or human rights – is incorrectly applied in the forced marriage context. Both immigration and federal courts routinely erroneously conflate forced and arranged marriage or categorize applicants’ valid claims of persecution as mere harassment. This section also demonstrates that because the problem of forced marriage occurs in the context of family, inconsistency in the analysis of both persecution and the related concept of “nexus” has emerged. Courts regularly ignore well-established legal theories such as mixed-motives for persecution and inappropriately characterize persecutors’ motives as aberrational or private acts. Finally, Part I provides an overview of *Gao v. Gonzales*, the only published federal case granting asylum to a victim of forced marriage, and argues that although the case is a positive step in courts’ recognition of forced marriage-based asylum claims, its impact has been limited by its procedural history.

Part II focuses on the legal concepts of choice and consent, explaining their fundamental import to marriage under both domestic and international law. This section also reveals how the treatment of forced marriage in international law diverges significantly from that of U.S. courts interpreting asylum law. It describes how numerous international instruments – including the Universal Declaration of Human Rights, the International Convention of Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women – consider free and full consent to be an essential element of a valid marriage, and therefore, unlike U.S. courts adjudicating asylum petitions, consider forced marriage to be a violation of human rights.

The overview of the development of U.S. law surrounding the institution of marriage provided in Part III demonstrates that domestic constitutional law unequivocally considers the

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right to marry the person of one’s choice to be a fundamental right worthy of significant protection. It describes how progress in law and society since the eighteenth century has led to the recognition of marriage as a sacred union and a relationship based on emotion that forms the foundation of modern society. This understanding of marriage was the basis of the U.S. Supreme Court’s support of the right to marry for disadvantaged populations such as prisoners and the poor and its proclamation that “marriage is one of the ‘basic civil rights of man.’” in striking down an anti-miscegenation statute and affirming the constitutional right to enter into marriage with the person of one’s choosing in Loving v. Virginia. In the years after Loving, judicial support for access to marriage continued, as state courts began to grant same-sex couples the right to marry, holding that restricting access to marriage was unconstitutional because it both prevented entry into a uniquely meaningful relationship and denied access to a host of associated legal rights. Most recently, the U.S. Supreme Court reaffirmed its view of the inherent dignity in the marital relationship by striking down the Defense of Marriage Act’s discriminatory treatment of legally wed same-sex couples.

With this foundation for reverence of marriage in U.S. law established, Part IV returns to an analysis of asylum law and argues that international law and the advances in U.S. constitutional law described above should guide courts’ decision-making in asylum cases based on forced marriage. International law’s insistence on consent in marriage clearly establishes that a forced marriage is a violation of international human rights norms. Domestic law’s increasing recognition of the unique significance of the marital relationship and protection for the right to marry a person of one’s choosing also highlight flaws in courts’ reasoning in the asylum context, where forced marriage is not considered a sufficiently harmful act to merit protection. As forced

13 Loving, 388 U.S. 1, 12 (1967).
14 Windsor, 570 U.S. ____.
marriage both devalues marriage and prevents an individual from exercising choice in whom they do and do not marry, this article concludes by contending that immigration and federal courts interpreting asylum law should adhere to international and constitutional law standards and adopt a per se rule that forced marriage constitutes persecution.

I. FORCED MARRIAGE AS A BASIS FOR ASYLUM

A. Distinguishing Between Forced Marriage and Arranged Marriage

Any examination of the issue of forced marriage first requires a preliminary discussion about terminology in order to differentiate between the interrelated but often wrongly undistinguished concepts of forced marriage and arranged marriage. The U.S. State Department provides a helpful starting point in its Foreign Affairs Manual, which makes

a very clear distinction between a forced marriage and an arranged marriage. In arranged marriages, the families of both spouses take a leading role in arranging the marriage but the choice whether to accept the arrangement remains with the individuals. In a forced marriage, at least one party does not consent or is unable to give informed consent to the marriage, and some element of duress is generally present.\(^{15}\)

The distinction made by the U.S. government is echoed by the British government’s U.K. Border Agency,\(^{16}\) which explains that “a forced marriage is a marriage that takes place without the full and free consent of both parties” unlike an arranged marriage where “families take the lead in selecting a marriage partner but the couple have the free will and choice to accept or decline the arrangement.”\(^{17}\)

Of course, these issues are rarely black-and-white, and whether a marriage is considered forced or arranged often involves an element of subjectivity in which the complex issues of

\(^{15}\) 7 FAM 1459 (b-c).

\(^{16}\) The Border Agency in the United Kingdom is charged with functions similar to those of the immigration agencies within the United States’ Department of Homeland Security, namely the U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE).

\(^{17}\) Forced Marriage, UK BORDER AGENCY, http://www.ukba.homeoffice.gov.uk/visas-immigration/partners-families/forced-marriage/.
culture and family dynamics take center stage. As a leading anti-forced marriage advocacy organization, Karma Nirvana, recognizes, “there can be a very thin line between arranged marriage and forced marriage.”

Perhaps the most accurate way to conceive of the distinction is not with a bright line between the two forms of marriage but rather as a continuum, with arranged and forced marriage on either end and a vast area of gray in between. Karma Nirvana describes the “slippery slope” between arranged and forced marriage, explaining that a marriage can even “start out as ‘arranged’ but, if the person changes his/her mind at any time during the preparations … even on the wedding day … they have the right to pull out. If the person is made to ‘keep their word’ to go ahead with the marriage, the marriage ceases to be a free choice and becomes ‘forced’.”

The key element in the analysis, however, remains the presence or absence of choice. Put most succinctly, “there is no compulsion in an arranged marriage.”

Although a precise definition of forced marriage may ultimately be difficult to determine, the factors leading to forced marriage and the devastating effects of the practice on its victims is clear. According to the Asylum Division of the U.S. Citizenship and Immigration Services (USCIS), “forced marriage takes place throughout the world and occurs for a variety of reasons stemming from issues such as poverty, gender discrimination, and lack of security.” The British Government’s Forced Marriage Unit elaborates by identifying several potential motives of

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19 Id.
20 In considering whether “choice” exists, it is important to remember that the freedom of one’s choice can be impacted by familial and cultural influences, ranging in severity from psychological (e.g., emotional blackmail) and financial pressure to threats and physical abuse or other violence. See Forced Marriage, UK BORDER AGENCY, http://www.ukba.homeoffice.gov.uk/visas-immigration/partners-families/forced-marriage/ (“In a forced marriage, you are coerced into marrying someone against your will. You may be physically threatened or emotionally blackmailed to do so, or you may be a victim of psychological abuse.”).
families forcing their daughters into marriage, including strengthening family ties, achieving financial gain (e.g., selling a daughter to alleviate financial burden or settle a debt), ensuring that land and property remain within a family, responding to family pressure, and protecting religious and cultural ideals.\(^{23}\) Forced marriage is also often perpetrated in order to enforce gender roles, including marrying daughters to maintain control over their sexuality, protect them from rape, or even in a perverse attempt to exonerate rapists.\(^{24}\)

Regardless of the underlying reason, when a marriage is entered into without mutual consent or under duress, severe and significant violations of human rights frequently follow. Forced marriage “provides an arena in which sexual abuse, sexual exploitation, domestic violence, forced labor, and slavery often go unnoticed. Women in forced marriages may have fewer educational and work opportunities and their freedom of movement may be restricted.”\(^ {25}\)

As addressed in the Introduction and as will be discussed in detail in Section IV below, eligibility for asylum protection in the United States for individuals facing these attendant harms of forced marriage can be relatively straightforward. However, courts considering asylum claims have not yet recognized what international law, domestic constitutional law, and even administrative agencies have long understood – that marriage is a fundamental human right and the inability to choose one’s spouse, or forced marriage, is \textit{itself} a violation constituting persecution.


\(^{24}\) See Morgan McDaniel, \textit{From Morocco to Denmark: Rape survivors around the world are forced to marry attackers, WOMEN’S MEDIA CENTER} (May 2, 2013), \textit{available at http://www.womenundersiegeproject.org/blog/entry/from-morocco-to-denmark-rape-survivors-around-the-world-are-forced-to-marry}.

\(^{25}\) AOBTC, Lesson 26 at 14. \textit{See also} Multi-Agency Guidelines at 13 (“Women trapped in a forced marriage often suffer violence, rape, forced pregnancy and forced childbearing. Many girls and young women are withdrawn from education early … Their interrupted education limits their career choices. Even if the woman manages to find work, however basic, they may be prevented from taking the job or their earnings may be taken from them. This leads to economic dependence, which makes the possibility of leaving the situation even more difficult. Some may be unable to leave the house unescorted – living virtually under “house arrest.”).
B. Forced Marriage as a Basis for Asylum: Persecution and Nexus

To be eligible for asylum, an applicant must meet the definition of a refugee set forth in Section 101(a)(42) of the Immigration and Nationality Act (INA):

any person who is outside any country of such person’s nationality … who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.26

Whether an individual qualifies as a refugee requires a complex legal analysis. The paragraph-long definition above is the subject of countless court decisions, scholarly articles, and law school courses. This article will therefore focus only on two discrete areas of asylum law that are central to the examination of forced marriage cases – the question of what constitutes “persecution” and the related requirement to establish “nexus,” or that the applicant’s past or feared persecution is “on account of” one of the five protected characteristics enumerated in the refugee definition.

The Board of Immigration Appeals (BIA), the highest administrative body that interprets immigration laws, has not issued any precedential decisions specifically on the issue of forced marriage as a basis for asylum. Most U.S. circuit courts have also not substantively addressed the issue, declining to reach the merits based on procedural, jurisdictional, evidentiary, or credibility grounds.27 Others have dismissed cases based on a lack of evidence that the governments of the applicants’ home countries were “unable or unwilling”28 to protect them.29 Often, the issue of

27 See, e.g., Pu lei v. Holder, 392 F. App’x 586 (9th Cir. 2010) (denied on credibility grounds); Yuexian Liu v. U.S. Atty. Gen., 271 F. App’x 947 (11th Cir. 2008) (denied due to lack of jurisdiction and on procedural grounds); Dieng v. Mukasey, 284 F. App’x 2, (4th Cir. 2008) (denied on credibility grounds); Keita v. Gonzales, 175 F. App’x 21 (6th Cir. 2006)(denied due to lack of corroborating evidence); Pan v. Gonzales, 445 F.3d 60 (1st Cir. 2006)(denial based on insufficient evidence).
28 An individual seeking asylum in the United States must demonstrate that the government of her home country is either the persecutory actor, or in the cases of non-governmental actors, that the government “unable or unwilling” to protect her from persecution. INA §101(a)(42); 8 U.S.C.A. §1101(a)(42)(2006).
forced marriage is sidelined in favor of addressing more easily justiciable gender-based claims. For example, in the landmark case of Matter of Kasinga – which was the first to recognize female genital mutilation (FGM) as a basis for asylum in the United States and served as a precedent for acceptance of gender-based claims generally – the forced marriage that was central to Ms. Kasinga’s story and claim was dismissed in one sentence as an “alternate claim,” listed under the heading “Ancillary Matters.”30 On the few occasions that the issue of forced marriage has been substantively addressed, nearly all courts have denied asylum based on one of the two issues noted above – an inability to demonstrate that the harm experienced or feared rises to the level of persecution or the related concept of nexus. Each of these issues will be addressed in turn below.

1. Persecution

An individual seeking asylum protection in the United States must demonstrate that she has been persecuted in the past or that she fears persecution in the future. The term “persecution” is a broad one that is not defined in the Immigration and Nationality Act; the BIA has also not provided a precise definition. The most widely accepted understanding of the term comes from Matter of Acosta, which defines persecution as “harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”31 Acosta was later modified to make clear that punitive or malignant intent is not

29 See, e.g., Berishaj v. Gonzales, 238 F. App’x 57 (6th Cir. 2007) (denying asylum because the perpetrator was jailed, demonstrating that the government was able to provide protection); Keita v. Gonzales, 175 F. App’x 711 (6th Cir. 2006) (denying asylum because, in part, the applicant did not attempt to seek protection from the police).
30 In Re: Kasinga, 21 I. & N. Dec. 357, 368 (BIA 1996)(the full “Ancillary Matters” section reads as follows: “[i]n view of our disposition of the applicant’s case, we will deny the INS’s request to remand. We find it unnecessary to consider the new evidentiary materials submitted by the applicant on appeal. We also do not reach the applicant’s alternate claim that she has a well-founded fear of persecution on the basis of a forced polygamous marriage. Moreover, it is unnecessary for us to adjudicate the applicant’s application for withholding of deportation.”)(emphasis added).
required; in other words, persecution can exist whether or not the persecutor intends the victim to experience harm.32

Lacking clear guidance, most federal circuit courts have created their own definitions of persecution. As a threshold matter, all jurisdictions agree on what persecution is not. “To qualify as persecution, a person’s experience must rise above unpleasantness, harassment, and even basic suffering.”33 Similarly, “low-level intimidation and harassment,” is insufficient to merit protection.34 Discrimination also does not constitute persecution, except in extraordinary circumstances.35 Courts also generally find agreement at the other end of the spectrum, in that the standard for what constitutes persecution is undeniably met by extreme acts such as “the infliction or threat of death, torture, or injury to one’s person or freedom.”36

The middle ground – the vast expanse between harassment and torture – is where most litigated cases fall. To begin to narrow the definition, it is undisputed that physical harm is not required for a court to find persecution, as demonstrated most clearly by the legislative history of the INA. Prior to 1965, U.S. law required an asylum applicant to demonstrate past physical

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32 Kasinga, 21 I. & N. Dec. at 365. For example, the family members who sought have Ms. Kasinga undergo female genital mutilation likely did not intended to harm her. To the contrary, they probably believed that subjecting Ms. Kasinga to the practice would be a benefit to her, as it would “purify” her, prepare her for marriage, and make her a better wife and mother. See, e.g., World Health Organization, Female Genital Mutilation Information Kit (1999) at 8, available at http://apps.who.int/iris/bitstream/10665/65858/1/WHO_CHS_WMH_99.11.pdf (“The reasons given to justify FGM are … purification; family honour; hygiene (cleanliness); prevention of promiscuity; increasing sexual pleasure for the husband; … enhancing fertility; and increasing matrimonial opportunities.”).
33 Jorgji v. Mukasey, 514 F.3d 57 (1st Cir. 2008). See also, Guam Shan Liao v. U.S. Dep’t of Justice, 293 F.3d 258, 263 (1st Cir. 2000); Mikhailevitch v. INS, 146 F.3d 384, 390 (6th Cir. 1998) (persecution…requires more than a few isolated incidents of verbal harassment or intimidation); Bastanipour v. INS, 980 F.2d 1129, 1133 (7th Cir. 1992) (distinguishing persecution “from mere discrimination or harassment”).
34 Zakirov v. Ashcroft, 384 F.3d 541, 546 (8th Cir. 2004).
35 See, e.g. Borovsky v. Holder, 612 F.2d 917 (7th Cir. 2010); Wakkary v. Holder, 558 F.3d 1049 (9th Cir. 2009); Sompotan v. Mukasey, 533 F.3d 63 (1st Cir. 2008); Berte v. Ashcroft, 396 F.3d 993 (8th Cir. 2005).
36 Rife v. Ashcroft, 374 F.3d 606, 612 (8th Cir. 2004). See also, Bace v. Ashcroft, 352 F.3d 1133, 1137 (7th Cir. 2003) (defining persecution as the “infliction or threat of death, torture, or injury to one’s person or freedom on account of a statutory ground”); Shoaira v. Ashcroft, 377 F.3d 837, 844 (quoting Regalado-Garcia v. INS, 305 F.3d 784, 787 (8th Cir. 2002)) (persecution is “the infliction or threat of death, torture, or injury to one’s person or freedom”).
persecution in order to qualify for protection. But the INA was amended in 1965 to remove the qualifier of “physical” from the term.\footnote{INA, Pub.L. No. 89-236 §11(f), 79 Stat. 918 (Oct. 3, 1965).} Courts affirmed this change by rejecting a requirement to demonstrate physical harm, and more generally, finding that persecution is a “broader concept than threats to life or freedom.”\footnote{INS v. Stevic, 467 U.S. 407, 428 n. 22 (1984).} In the case of \textit{In re T-Z-}, the BIA found that to constitute persecution, “the harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.”\footnote{\textit{In re T-Z-}, 24 I. & N. Dec. 163, 171 (BIA 2007)(emphasis added). \textit{See also}, Chen v. Gonzales, 470 F.3d 1131, 1135 (5th Cir. 2006).} In fact, even psychological harm and emotional trauma have been held to constitute persecution in certain cases.\footnote{\textit{See} In Re A-K-, 24 I. & N. Dec. 275, 278 (BIA 2007)(“We recognize that there may also be cases where a person persecutes someone close to an applicant, such as a spouse, parent, child or other relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself.”); Mashiri v. Ashcroft, 383 F.3d 1112 (9th Cir. 2004).}

Violation of an individual’s human rights or fundamental beliefs can also constitute persecution. In \textit{Fatin v. INS}, the Third Circuit considered the case of an Iranian woman whose feminist beliefs led her to refuse to conform to gender-specific laws (specifically, refusing to wear the Chador, a traditional Islamic veil). The court concluded that “persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs” and that “such conduct might be regarded as a form of ‘torture’ … falling within the Board’s description of persecution in \textit{Acosta}.”\footnote{12 F.3d 1233, 1242 (3d Cir. 1993).} The materials used in USCIS’s Asylum Officer Basic Training Course echo the \textit{Fatin} ruling, stating that “certain violations of ‘core’ or ‘fundamental’ human
rights, as prohibited by customary international law, may constitute harm amounting to persecution.”42

When addressing forced marriage, U.S. federal agencies charged with immigration functions and duties have interpreted cases such as In re T-Z- and Fatin to arrive at the conclusion that the practice is a harm that “is serious enough to be regarded as persecution.”43 The 2001 Gender Guidelines for Overseas Refugee Processing44 recognize that forced marriage and other forms of gender-based violence are not distinct from other, more traditional, forms of persecution and instruct that an evaluation of whether such harms constitute persecution should be made using “the same factors and guidance that an Immigration Officer uses to assess the level of harm in any refugee case.”45 Similarly, the Asylum Officer Basic Training Course materials state that “where marriage is actually forced on an applicant against the applicant’s will, it may constitute persecution.”46 In its foundational document – the Foreign Affairs Manual – the U.S. Department of State plainly asserts that “[t]he Department considers a forced marriage to be a violation of basic human rights.”47 Yet despite these agencies’ acceptance of forced marriage as a persecutory act, courts adjudicating claims nearly universally refuse to recognize forced marriage to be persecution.

An analysis of courts treatment of persecution in the context of forced marriage reveals several troubling patterns. Certain aspects of the law are clear, such as the fact that arranged marriage – one in which neither party is compelled to enter into the union – does not constitute

42 AOBTC, Lesson 1 at 22.
43 Immigration and Naturalization Services [INS], Gender Guidelines for Overseas Refugee Processing 5 (2001).
44 The 2001 Gender Guidelines were the product of a Congressionally mandated inter-agency task force that included representatives from the U.S. Department of State, U.S. Department of Justice and other federal agencies. The Guidelines detail eligibility criteria for women seeking refugee status, including both substantive and procedural aspects of gender-related refugee issues.
45 Id.
46 AOBTC, Lesson 26 at 23.
47 7 FAM 1459(a).
persecution.\textsuperscript{48} However, a court’s refusal to recognize that \textit{forced} marriage is persecution frequently occurs as a result of its improper conflation of forced and arranged marriage. For example, in \textit{Matter of A-T-}, in a section of its opinion entitled “Arranged Marriage,” the BIA dismissed the applicant’s fear of forced marriage, stating:

\begin{quote}
It is understandable that the respondent, an educated young woman, would prefer to choose her own spouse rather than acquiesce to pressure from her family to marry someone she does not love and with whom she expects to be unhappy. The respondent has also expressed valid concerns about possible birth defects resulting from a union with her first cousin. While we do not discount the respondent’s concerns, we do not see how the reluctant acceptance of family tradition over personal preference can form the basis for a withholding of removal\textsuperscript{49} claim.
\end{quote}

Citing \textit{Mansour v. Ashcroft}\textsuperscript{51} to support the proposition that arranged marriage does not constitute persecution and noting that A-T- and the man her family chose for her to marry were of similar ages and backgrounds, the Board concluded that the “arranged marriage” would not constitute persecution. The BIA’s labeling of A-T-’s marriage as arranged, rather than as forced, is puzzling, in part because the Court acknowledges the presence of family compulsion for A-T- to marry against her will. The categorization is also strange because the Court seemingly ignores its own list of valid reasons A-T- objected to her impending marriage and dismisses as a “personal preference” the obvious harm of a lifetime of unhappiness created by a loveless marriage entered into under duress.

\textsuperscript{48} Mansour v. Ashcroft, 390 F.3d 667, 680 (9th Cir. 2004) (arranged marriage, “while unfortunate and deplorable, may not constitute persecution if imposed on an adult”).
\textsuperscript{49} Because A-T- did not file her application for asylum within one year of entering the United States and the lower court determined that she did not qualify for any of the exceptions to this one-year filing deadline, the Board of Immigration Appeals found that she was ineligible for asylum and considered her case for withholding of removal (where the one year filing deadline does not apply). Withholding of removal is mandatory if an applicant can show that her “life or freedom would be threatened because of [her] race, religion, nationality, membership in a particular social group, or political opinion” in her home country. INA 241(b)(3)(A). Although the standard for withholding of removal – a clear probability of persecution – is more stringent than asylum’s “well-founded fear,” a grant of withholding does not confer the same level of benefits as asylum, most significantly, the right to apply for lawful permanent resident status and petition for qualifying family members.
\textsuperscript{51} See supra note 48.
However, even when courts recognize that a case is clearly situated in the forced marriage context, the harms are regularly found to not be sufficiently serious to constitute persecution. Despite administrative agencies’ ability to recognize that forced marriage constitutes persecution and the existence of clear jurisprudence to support that proposition, courts have routinely found that efforts to marry a woman against her will constituted harassment rather than persecution, even when accompanied by acts such as threats, detention and beatings of family members and property destruction.52

For example, in Li Rong Zhang v. Att’y Gen. of U.S., the court held that “a marriage proposal, even by someone you detest, does not rise to the level of persecution,” ignoring the fact that the proposals were made by the head of the applicant’s village – someone who exercised great power in her community – and accompanied by threats to jail her if she did not comply.53 Similarly, in Shao Lan Yan v. Holder, the applicant’s rejection of the village chief’s nephew’s proposal resulted in her home being vandalized and her brother being physically assaulted; the court found that these actions did not constitute persecution.54 Finally, and perhaps most strikingly, in Xiu Xia Huang v. Att’y Gen. of U.S., the detention of the applicant’s father, the destruction of the family’s crops, and the beating of the applicant’s boyfriend were considered “mere harassment.”55 The court appeared to rely on the absence of physical harm to the applicant herself in making its determination that persecution did not exist, misapplying the law56 as well

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52 See, e.g., Li Rong Zhang v. Att’y Gen. of U.S., 494 F. App’x 255 (3d Cir. 2012); Shao Lan Yan v. Holder, 489 F. App’x 733 (4th Cir. 2012); Xiu Xia Huang v. Att’y Gen. of U.S., 286 F. App’x 604 (11th Cir. 2008). See also, Yan Hua Lin v. Gonzales, 246 F. App’x 746, 748 (2d Cir. 2007).
53 494 F.App’x at 256.
54 489 F.App’x 733.
55 286 F.App’x at 604.
56 See supra Section I.B.1.
as the facts when it stated that “there is no evidence that anyone in China is interested in harming her ...”\(^{57}\)

One of the most concerning aspects of these cases is that harms that would likely be deemed to rise to the level of persecution in a non-forced marriage context are categorically dismissed because they occurred in a family setting.\(^ {58}\) But even if the courts recognized that these ancillary harms constituted persecution, the fact that the focus of their analysis rests solely on the harms surrounding forced marriage as opposed to the persecution inherent in forced marriage itself remains problematic. For example, in *Shao Lan Yan*, the court noted that the applicant “feared that she would be ‘forced to marry a person [she] do[es] not love and do[es] not wish to marry’” but said nothing more about this critical fact. Like the BIA in *Matter of A-T-*, the Fourth Circuit seems to discount the harm of Ms. Yan being forced to spend her life with a man she did not care for or choose to marry, indicating that the court does not consider the act of a forced marriage itself to be persecution, or even problematic.\(^ {59}\)

Admittedly, “the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.”\(^ {60}\) Similarly, not everything that is prohibited by domestic or international law does, or should, constitute persecution in the asylum context. But as will be discussed in detail in Sections II and III below, when considering the history and reverential treatment of marriage by courts in the international and domestic constitutional context – the recognition that marriage is a uniquely special, even sacred, constitutional context – the recognition that marriage is a uniquely special, even sacred,

\(^{57}\) 286 F.App’x at 605-06.

\(^{58}\) This result may be due in part to what is described by international law scholars as the public-private distinction, wherein, for example, a violation such as rape that occurs in the public sphere of “politics, government and the state” is considered a human rights violation, unlike a rape that occurs in the privacy of one’s home or within one’s family. Hilary Charlesworth, *Feminist Methods in International Law*, 93 Am. J. Int’l L. 379, 382 (1999); see also, Jaya Ramji-Nogales, *Questioning Hierarchies of Harm: Women, Forced Migration, and International Criminal Law*, 11 Int’l Crim. L. Rev. 463 (2011).

\(^{59}\) 489 F.App’x at 734.

\(^{60}\) Camara v. Att’y Gen. of U.S., 580 F.3d 196, 202 (3d Cir. 2009). *See also*, Kho v. Keisler, 505 F.3d 50, 58 (1st Cir. 2007); Lumaj v. Gonzales, 462 F.3d 574, 577 (6th Cir. 2006).
relationship that should never be entered into absent free and full consent – federal courts and the BIA have erred in not treating forced marriage as a persecutory act under asylum law.

2. Nexus

Even if the core question of whether forced marriage constitutes persecution is resolved, a discussion of the issue would be incomplete without also addressing “nexus,” an area of asylum law that is inextricably related to persecution. Nexus is a complex concept, and as will be demonstrated below, courts have struggled with both identifying and defining nexus in forced marriage cases, often conflating their analysis of nexus with their inquiry into persecution and even whether the feared persecution was perpetrated by a governmental or private actor.

Although this article contains a separate and discrete discussion of nexus, it must be noted that courts’ examinations of the issue are not as readily isolated.

As a brief introduction to this complex topic, “nexus” is the requirement that an asylum seeker demonstrate that the persecution she suffered or fears is “on account of” one of five grounds enumerated in the refugee definition – race, religion, nationality, membership in a particular social group, 61 or political opinion. 62 To establish nexus, the applicant must provide evidence that the persecutor was or is motivated to act because the victim possesses or is believed to possess the protected characteristic. 63 An enumerated ground must be “at least one

61 A “particular social group” has been defined in Matter of Acosta as comprising individuals who share “common immutable characteristics” that either cannot be changed or are so fundamental to the individuals’ identities or consciences that they should not be required to change them. 19 I. & N. Dec. at 212. This shared characteristic “might be an innate one such as sex, color, or kinship ties or in some circumstances it might be a shared past experience such as former military leadership or land ownership.” Id. Recent changes to social group jurisprudence also require the defined group possess “social visibility” (Matter of C-A, 23 I. & N. Dec. 951 (BIA 2006) (social visibility requires the defined group to be recognizable in the society in which it exists)) and be sufficiently “particular” (Matter of A-M-E- & J-G-U-, 24 I. & N. Dec. 69 (BIA 2007); Matter of S-E-G-, 24 I. & N. Dec. 579 (BIA 2008) (defining particularity as “whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”)).
62 INA § 208(b)(1)(B)(i).
central reason”\textsuperscript{64} for the persecutor’s actions; however, it does not have to be the sole reason for the persecution, as persecutors may have “mixed-motives” for perpetrating harms.\textsuperscript{65}

Lack of nexus has proven a systematic basis for courts to deny asylum to victims of forced marriage. Even when applicants argued that the persecutors had mixed-motives for persecution, many courts denied claims by classifying the harm as being perpetrated for “personal” reasons as opposed to punishing the victims for possessing a protected characteristic. An archetypal example is the case of \textit{Ying Lin v. U.S. Attorney General},\textsuperscript{66} where the court considered the case of a young woman from China whose parents sold her to a man named Brother Nine in order to have their debts forgiven. After Brother Nine, a casino owner and police officer, attempted to rape Ms. Lin prior to their wedding, she reported his actions to the authorities. They not only refused to assist her, but advised her that Brother Nine would be a good person to marry because he was “important and wealthy.”\textsuperscript{67} The BIA, in upholding the Immigration Judge’s denial, rejected the argument that Ms. Lin was targeted for harm due to her membership in the particular social group of “unmarried women in a lower social class or in a rural area.”\textsuperscript{68} Instead, the court held that she was being forced into marriage “for no reason other than repayment of her mother’s gambling debt … [an] ‘entirely a personal matter between her, her family and ... Brother Nine.’”\textsuperscript{69} Although the persecutor may have targeted Ms. Lin both because of his personal desire to secure money from her family and because he recognized Ms.

\textsuperscript{64}INA §208(b)(1)(B)(i); 8 U.S.C. §1158(b)(1)(B)(i).
\textsuperscript{65}The mixed-motive theory posits that a persecutor may be motivated to harm a victim for more than one reason – some related to a protected ground but perhaps others unrelated – and that there is no requirement that only the former exist. In \textit{Matter of J-B-N- & S-M-}, the BIA examined the legislative history surrounding motivation and found that the fact that the law’s requirement that the protected characteristic must be “at least one central reason” for persecution rather than “\textit{the} central reason” for persecution logically necessitates adoption and acceptance of mixed-motive cases. 24 I. & N. Dec. 208, 213 (BIA 2007)(emphasis added).
\textsuperscript{66}319 F.App’x 777 (11th Cir. 2009).
\textsuperscript{67}\textit{Id.} at 779.
\textsuperscript{68}\textit{Id.} at 779-81.
\textsuperscript{69}\textit{Id.} at 779.
Lin as vulnerable due to her poverty, marital status, and isolation – which would make this case fall squarely in the mixed-motive category – the court focused only on the former explanation and declined to consider that nexus was established due to her membership in a particular social group.

Other courts found attempts to forcibly marry women to be “the aberrational act of a corrupt official”\textsuperscript{70} (and therefore not “on account of” their membership in a particular social group) or denied relief on religious grounds because objections to forced marriage were seen as based on “personal preference” rather than religious conviction.\textsuperscript{71} Still others simply asserted that nexus did not exist without much explanation or analysis.\textsuperscript{72}

Like their analysis of persecution, courts’ treatment of nexus in the forced marriage context is troubling. The United States grants asylum to women whose home countries are unwilling to protect them from gender-based harms such as domestic violence or female genital mutilation because these problems are considered to be “private family matter[s].”\textsuperscript{73} Immigration and federal courts’ assertions that the problem of forced marriage is of a personal nature that cannot be remedied by U.S. law is ironically similar to the claims of these foreign law enforcement officials who refuse to intervene and are therefore considered by the United States to have failed in their duty to protect their own citizens.

\textsuperscript{70} Lizhu Chen v. Bureau of Citizenship & Immigration Servs., 238 F. App’x 669, 670 (2d Cir. 2007). See also, Xuefang He v. Holder, 502 F. App’x 430, 435 (6th Cir. 2012)(denying asylum because the motives of the police chief who agreed to release a Christian woman from detention only if she married his son “were entirely personal; the director used the force of his office to make martial arrangements because his son could not find a spouse on his own.”).

\textsuperscript{71} Syed v. Mukasey, 288 F. App’x 273, 275 (7th Cir. 2008).

\textsuperscript{72} See, e.g., Mei Y. Liu v. Holder, 492 F. App’x 196, 198 (2d Cir. 2012); Feng Ming Lin v. Holder, 339 F. App’x 102, 103 (2d Cir. 2009); Lin v. Gonzales, 148 F. App’x 38, 39 (2d Cir. 2005).

Moreover, the notion that a family’s participation in persecution somehow vitiates nexus has no basis in asylum law. Especially when one considers the fact that a persecutor may have mixed-motives for his actions, a family’s sale of a daughter to satisfy a debt (to use a common example in forced marriage cases that turn on nexus) does not diminish the existence of a coexisting basis for the “purchaser’s” imposition of harm. A man may in fact be receiving a bride as payment, but he is often able to force her to marry him on account of other characteristics she possesses – ranging from her gender, age, level of education, financial standing and even the lack of protection from her family, all of which can be “common immutable characteristics” that comprise a particular social group. In such cases, family participation does not destroy nexus, it creates it.

Denial of claims because persecution occurred at the hands of public officials who acted outside of their official capacities similarly demonstrates the disparity of treatment of forced marriage-based asylum claims. Imagine the case of a police chief who, acting outside his sanctioned authority, used his status to cause harm to a religious minority that he found personally objectionable. Would that fact pattern not raise a classic – and categorically viable – asylum claim? In fact, courts have recognized precisely such claims, noting that “a public official who uses his office for personal motivations can nonetheless be acting in his official capacity.”

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74 Acosta, 19 I. & N. Dec. at 212.
75 For example, the particular social group of “unmarried women in a lower social class or in a rural area” proposed in Ying Lin v. U.S. Attorney General, 319 F. App’x at 779.
76 Marmorato v. Holder, 376 F. App’x. 380, 385 (5th Cir. 2010). Marmorato is a case involving a claim for relief under the Convention Against Torture (CAT). To qualify for CAT protection, the torture feared must be carried out by the applicant’s government or by someone acting with the acquiescence of the government – a “state action” requirement – and the court in Marmorato addressed whether the public officials in question would be acting in their personal or official capacities in persecuting the applicant. The analysis in Marmorato remains relevant here, however, as it highlights the persistent confusion surrounding the nexus requirement in asylum cases, which is often conflated with the requirement to demonstrate that the government either perpetrated or was unwilling or unable to protect the applicant from harm. See supra fn 28. The court in Lijiu Chen used the lack of state action, the stated “aberrational act of a corrupt official,” to conclude that nexus did not exist in that forced marriage case. 238 F. App’x at 670. Similarly, in Xuefang He v. Holder, under a section entitled “The IJ’s Finding that the Level of Harm Did Not Rise to an Extreme Level of Persecution,” the court conflated its analysis of persecution, nexus and mixed-
Yet it appears that when officers misuse their power in an effort to procure wives for themselves or other family members, the gendered nature of the persecution destroys nexus in the eyes of the court.\textsuperscript{77}

\textbf{C. The Impact of Gao v. Gonzales}

Only one published federal case directly addresses the question of whether forced marriage constitutes persecution and ultimately grants asylum protection to a victim of the practice – Gao v. Gonzales.\textsuperscript{78} Ms. Gao, a young woman from China, was sold into marriage by her parents in order to satisfy family debts. Initially assenting to the marriage under significant pressure, she later attempted to break off the engagement. As in many of the cases discussed above, the Immigration Judge denied her claim due to lack of nexus, finding that Ms. Gao’s predicament was “simply ‘a dispute between two families.’”\textsuperscript{79} On appeal, the Second Circuit rejected this reasoning, stating that the Immigration Judge’s finding that a financial arrangement between families precluded a discriminatory motive was “antithetical to the very notion of individual rights on which asylum law is based.”\textsuperscript{80} Ultimately, the court held that “lifelong involuntary marriage” constitutes persecution (a fact that it stated the government “appeare[ed] to concede”\textsuperscript{81}) and granted Ms. Gao asylum based on her membership in the particular social group of “women who have been sold into marriage and who live in a part of China where forced marriages are considered valid and enforceable.”

Although the pronouncements regarding asylum protection for victims of forced marriage in \textit{Gao} were clear, the case was overruled in 2007 by the Supreme Court on procedural motive theory with its inquiry as to whether the police chief who was forcing a woman to marry his son was acting in his personal or official capacity. 502 F. App’x at 435.

\textsuperscript{77} See e.g., Lizhu Chen v. Bureau of Citizenship & Immigration Servs., 238 F. App’x at 670; Xuefang He v. Holder, 502 F. App’x at 435.
\textsuperscript{78} 440 F.3d 62.
\textsuperscript{79} Id. at 64.
\textsuperscript{80} Id. at 70.
\textsuperscript{81} Id. at 66.
grounds,\textsuperscript{82} leaving a jurisprudential vacuum and ensuing uncertainty for applicants and their advocates.\textsuperscript{83} In the years after \textit{Gao}, there have been no published decisions recognizing forced marriage itself as a form of persecution that can be a basis for asylum. In 2008, the Eighth Circuit heard \textit{Ngengwe v. Mukasey}, in which a widow from Cameroon sought asylum after her deceased husband’s family threatened to kill her and take away her children if she did not marry her brother-in-law.\textsuperscript{84} The court conducted a thorough social group analysis and determined that the BIA erred in rejecting the particular social group of “Cameroonian widows” posited by Ms. Ngengwe. In doing so, and in evaluating whether the harm suffered rose to the level of persecution, the court referenced \textit{Gao} and stated that “the question of whether forced marriage constitutes persecution is an open issue.”\textsuperscript{85}

At least one court has expressed support for forced marriage as a basis for asylum in the post-\textit{Gao} world. The Sixth Circuit in \textit{Bi Xia Qu v. Holder} found nexus between persecution and the applicant’s membership in the particular social group of “women in China who have been subjected to forced marriage and involuntary servitude.”\textsuperscript{86} In remanding the case to the Board of Immigration Appeals after the BIA’s initial denial of the claim, the federal appeals court criticized the fact that the “BIA seemed to view the entire matter as simply a debt collection dispute.”\textsuperscript{87} The Sixth Circuit also asserted that a mixed-motive likely existed because it was “clear that [the man who kidnapped, attempted to rape, threatened, and sought to marry Qu] 

\textsuperscript{82} Keisler v. Gao, 552 U.S. 801 (2007).
\textsuperscript{83} For example, in Shao Lan Yan v. Holder, the applicant sought an appeal of the denial of her asylum claim based on forced marriage and the Board of Immigration Appeals remanded her case to the Immigration Judge for reconsideration in light of the ruling in \textit{Gao}. However, after \textit{Gao} was vacated, the Immigration Judge declined to reconsider its earlier ruling and adopted and reissued in whole its prior denial. In considering and upholding the validity of this procedural history, the Fourth Circuit Court of Appeals noted that while the applicant “quibble[d]” over the basis of the Supreme Court’s actions, “the fact remains that \textit{Gao} has been vacated.” 489 F.App’x. at 738 (emphasis in original).
\textsuperscript{84} 543 F.3d 1029, 1033 (8th Cir. 2008).
\textsuperscript{85} \textit{Id.} at 1036.
\textsuperscript{86} 618 F.3d 602 (6th Cir. 2010).
\textsuperscript{87} \textit{Id.} at 609.
targeted [her] both to secure the repayment of his loan from Qu’s father and because she was a woman whom he could force into marriage in a place where forced marriages are accepted.”88 “If there is a nexus between the persecution and the membership in a particular social group,” the court reasoned, “the simultaneous existence of a personal dispute does not eliminate that nexus.”89

Although the Sixth Circuit rendered the correct decision with respect to nexus in Bi Xia Qu, its approach to persecution remained narrow, as it considered Ms. Qu’s forced marriage a persecutory act only because she suffered what the court considered “a severe form of the practice”90 as opposed to “cases in which women fear being forced in to marriage … because they have been threatened by potential perpetrators and it is a common practice in their country.”91 In making this determination, the court not only misapplies the facts – as the “severity” of the forced marriage in Bi Xia Qu does not differ significantly from many of the cases described elsewhere in this article where asylum was denied due to lack of persecution – but once again seems to disregard any harm inherent in forced marriage itself.

Although the Sixth Circuit has demonstrated some potential progress, other courts have strictly interpreted Gao. For example, the Seventh Circuit held in Xiu Yun Chen v. Gonzales that a young women who fled to the United States to avoid a forced marriage to the son of a local official “cannot belong to the social group defined in Gao, which explicitly limited its social-group definition to the facts of the case, because she was not sold into marriage.”92

88 Id. at 608 (emphasis in original).
89 Id.
90 Id. at 607 (“[S]he was kidnapped for two weeks until she escaped, her perpetrator attempted to rape her, and he threatened to send her to prison if she did not marry him.”).
91 Id. at 607.
92 Xiu Yun Chen v. Gonzales, 229 F. App’x 413, 415 (7th Cir. 2007). This statement is of particular concern because the court in Gao specifically stated that the fact that its “definition of Gao’s social group is tailored to the facts of this case … does not reflect any outer limit of cognizable social groups.” 440 F.3d at 70.
Ultimately courts’ treatment of forced marriage in asylum cases is wrong, both in the judges’ inconsistency and their disparate treatment of claims involving this form of gender-based violence. Whether denied due to a lack of differentiation between forced marriage and arranged marriage, a dismissive attitude towards the injury involved in marrying against one’s will, or the inability to acknowledge the existence of persecution in a familial context, women making these types of claims are unduly, summarily, and unjustly denied relief.

This outcome is improper not only because it results from a flawed analysis of courts’ own asylum jurisprudence, but also because it diverges from countless other legal interpretations that recognize marriage as an institution worthy of great reverence and protection, and accordingly, forced marriage as a violation of human rights. As will be shown in Parts II and III below, the courts’ analyses of persecution in the asylum context are at odds with the interpretations of administrative agencies such as USCIS and the Department of State as well as both international and domestic jurisprudence regarding marriage and its essential element of consent.

II. BOTH U.S. LAW AND INTERNATIONAL TREATIES CONSIDER CHOICE AND CONSENT TO BE REQUIREMENTS OF A VALID MARRIAGE

As stated above, in addition to the harm that arises from being forced to marry – and thereby spend a lifetime connected to – a person one does not love, a forced marriage also prevents a woman from entering into a mutually-agreeable union with someone she in fact does love. These dual harms both ultimately rest on the concept of choice.93 All U.S. states deem non-consensual marriages invalid and treat such marriages as either void or voidable.94 Mutual

93 See, e.g., Goodridge, 798 N.E.2d at 958 (“the right to marry means little if it does not include the right to marry the person of one’s choice.”).
94 See 55 C.J.S. Marriage § 19 (citing case law in a variety of states, including Florida, Kentucky, New York, Connecticut, Oklahoma, South Carolina, Texas, and Vermont). See also, U.S. Fid. & Guar. Co. v. Dowdle, 269 S.W. 119, 124 (Tex. Civ. App. 1924) (“In the absence of consent, the status of marriage is never created by any
consent is a necessary element of the marital contract, in fact, “so fundamental is the principle that there can be no marriage without the consent of the parties,” that in its absence “a part of the general common law [states] that in such a situation as this no marriage ever came into existence.”

Courts have also routinely found that coercive entry into marriage vitiates consent. In a 1939 case before the Supreme Court of South Carolina, a young man attempted to dissolve his marriage claiming that he entered into the union “under duress and upon certain threats made against him” by family members of his pregnant girlfriend and arguing that he married her because he “anticipated violence in the event [that he] refused.” In its “Conclusions of Law,” the court reiterated that “free consent of the parties … is essential to a valid marriage contract, and a marriage contract is void where either party refuses to give his or her consent and does not acquiesce in the marriage.” The court further found that true consent cannot be influenced by duress.

Unlike courts evaluating asylum claims, those interpreting family or matrimonial law have unequivocally recognized the essential nature of consent to marriage. A vast body of international law requiring consent as a basis for a valid marriage exists as well. The Universal Declaration of Human Rights (UDHR), a foundational document that was considered at the inaugural session of the United Nations General Assembly in 1946 and adopted unanimously in 1948, states in Article 16 that: “(1) men and women … have the right to marry and found a family;” and “(2) marriage shall be entered into only with the free and full consent of the government. The law compels no one to assume the matrimonial status. Without assent, no statute or constitution can create this relation … Consent is the essence of marriage, without which it cannot exist.”

95 Davis v. Davis, 119 Conn. 194, 175 A. 574, 577 (1934).
96 Campbell v. Moore, 189 S.C. 497, 1 S.E.2d 784, 786 (1939).
97 Id. at 787.
98 Id. at 790.
intending spouses.” According to experts, the UDHR not only affirms the human right to marriage but makes clear that the presence of consent is an essential and indispensable condition, or “a *sine qua non* for the validity of the marriage.” In fact, scholars have argued that “the prohibition of marriage without free and full consent of the intending spouses rules out all forced marriage” under international law.

Subsequent treaties adopted the language on marriage found in the UDHR and addressed the issue of consent and forced marriage in a variety of different contexts. The U.N. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, a treaty to which the United States acceded in 1967, includes forced marriage in the section that defines “institutions and practices similar to slavery.” Article 1(c)(i) of the Convention describes as enslaved “a woman, [who] without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group.” Underscoring the necessity of eradicating forced marriage, Article 2 codifies that “the State Parties undertake to … encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority …”

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99 Universal Declaration of Human Rights, G.A. Res. 217A. at 74, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc. A/810 (Dec. 12, 1948). Similar language is replicated in regional instruments, e.g., the European Convention on Human Rights (“Men and women of marriageable age have the right to marry and to found a family”), art. 12, Nov. 4, 1950, 213 U.N.T.S. 221; the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: a) no marriage shall take place without the free and full consent of both parties...”), art. 6, CAB/LEG/66.6 (Sept. 13, 2000); and the American Convention on Human Rights (“No marriage shall be entered into without the full and free consent of the intending spouses.”), art 17.3, Series No. 36, at 1, OAS Official Record, OEA/Ser. L/V/II.23 Document Revision 2.

100 **GUDMUNDUR ALFREDDSON AND ASBJORN EIDE, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 333 (1999).**

101 **MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 414-15 (1993).**

102 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3. The United States’ accession to this treaty in 1967 has the same legal effect as ratification.

103 *Id.*
The UDHR’s focus on “free and full consent” as a requisite to marriage was also echoed in later treaties. The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages “recalls” Article 16 of the UDHR and “reaffirms” that all states should ensure “complete freedom in the choice of a spouse” by stating in Article 1 that “no marriage shall be legally entered into without the full and free consent of both parties.”104 This language was reproduced almost identically in two other treaties modeled on the UDHR – the International Convention on Civil and Political Rights (ICCPR)105 and the International Convention on Economic, Social and Cultural Rights (ICESCR).106 All three instruments base their proclamations regarding the essential nature of consent on the notion that marriage is a singularly significant institution and the basis of the family unit, which in turn is “the natural and fundamental group unit of society.”107

The most recent restatement of the importance of consent to marriage can be found in the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 16(1) of that treaty asserts that “States Parties shall … ensure, on a basis of equality of men and women: (a) the same right to enter into marriage; [and] (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent.”108 By the time the treaty came into force in 1981, the message enshrined in Section (b) was so widely

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104 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Nov. 8, 1962, 521 U.N.T.S. 231, art. 16. The United States signed the Convention in 1962 but has not yet ratified it.  
107 Id. (this language is identical to that used in the UDHR and ICCPR).  
accepted that the Section was adopted by consensus with no suggested changes or amendments noted.  

What is notable in the aforementioned international instruments is not only their unequivocal pronouncements that free and full consent is essential for lawfully recognized entry into a marital union, but that nothing more than the lack of this consent is required to invalidate a marriage. The international instruments do not speak of physical or sexual violence or any other exacerbating factors that would nullify a marriage in the eyes of international law – the lack of choice, or the forced marriage itself, is a per se harm.

U.S. immigration authorities recognize the importance of international law and treaties such as those discussed above as guides to human rights norms across the world, specifically stating that “the evaluation of … [asylum] claims must be viewed within the framework provided by existing international human rights instruments …”110 However, despite the international community’s near unanimous and explicit support of the necessity of choice and consent in marriage and its resulting condemnation of forced marriage, as demonstrated above, U.S. immigration and federal courts’ interpretations of asylum law have routinely deviated from this international consensus by declining to recognized forced marriage as a persecutory act.

III. THE EVOLUTION OF U.S. LAW REGARDING ACCESS TO THE INSTITUTION OF MARRIAGE

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110 Phyllis Coven, Considerations for Asylum Officers Adjudicating Asylum Claims From Women (Asylum Gender Guidelines), Memorandum to INS Asylum Officers, HQASM Coordinators, INS OFFICE OF INTERNATIONAL AFFAIRS, (May 26, 1995), available at http://www.state.gov/s/l/65633.htm. In fact, even the U.S. Supreme Court has expressed support for the idea that international interpretations such as those contained in the United Nations High Commissioner for Refugees’ (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status can provide “significant guidance” to analysis of U.S. asylum law because, as the Court stated, “[i]f one thing is clear from the legislative history of the new definition of “refugee,” and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees…” I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436-40 (1987).
Part II addressed U.S. and international perspectives on the role of consent in marriage, but courts in the U.S. have issued many rulings on the subject of marriage that extend beyond the limited areas of choice and consent. And while international law may only be moderately persuasive to U.S. courts, the application of domestic law regarding marriage should arguably be considered more relevant to courts adjudicating asylum claims. As will be shown below, advances in U.S. courts’ understanding the nature and significance of the institution of marriage in the domestic realm far outpaces the level of analysis in the immigration context, a deficiency that directly led to the problematic decisions detailed in Part I.

A. Advancing from the Common Law Doctrine of Coverture, Marriage Became a More Egalitarian and Emotionally-Focused Institution

The common law doctrine of coverture regulated marital relationships in the American colonial period. Coverture codified the subordination of women in marriage, as they effectively became the property of their husbands. As the law stated:

[b]y 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 … The husband also … might give his wife moderate correction.111

Through the law of coverture, “a woman’s legal identity all but evaporated into that of her husband”112 and men were even explicitly given the right to commit spousal violence with impunity.

Women’s inequality in marriage also extended to the area of immigration and naturalization. For example, the Expatriation Act of 1907 divested women of their U.S.

citizenship if they married noncitizens. The Act was predicated on the reasoning that a wife automatically assumed the nationality of her husband, and in affirming its legality, the U.S. Supreme Court expressed its support for the idea that marriage served “to merge [the] identit[ies of a man and his wife], and give dominance to the husband.” Other immigration policies based on coverture, including those relating to quotas and the level of control exercised by a petitioning fiancé or spouse in the family-based immigration system, perpetuated the notion of women’s subservience to their husbands.

As law and culture advanced, coverture slowly began to unravel, signaling an important shift in societal conceptions of marriage. In a case affirming the conviction of a husband who attempted to murder his wife, a Kentucky appellate court described a husband’s ability to “compel his wife to obey his wishes, by force if necessary” as “a relic of barbarism that has no place in an enlightened civilization.” Other advances such as the women’s suffrage movement, the rise in women’s employment, and women’s sexual liberation all led to the dismantling of coverture and a move towards the modern view of women as equals both to men and within the marital relationship. No fault divorce, first adopted in California in 1969 and in all states by 1985, ensured that women could no longer be forced to remain married against their will. Other divorce reforms that followed – including changes in “child custody, child support, alimony, and the division of marital assets” – infused gender-neutrality and equality into the

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117 A no-fault divorce is one in which the parties are not required to prove fault or grounds beyond a showing of the irretrievable breakdown of the marriage or irreconcilable differences. DIVORCE, Black’s Law Dictionary (9th ed. 2009).
119 DIVORCE, Black’s Law Dictionary (9th ed. 2009).
institution of marriage.\textsuperscript{120} And within the intact marriage, eradication of the marital rape exemption signaled the end of the concept of a wife as legal property of her husband.\textsuperscript{121}

These vast expansions of rights led to a shift from the idea of marriage as an inequitable and pragmatic institution, one based on notions of ownership and contract, to “the rise of companionate marriage,” in which women contribute equally to the union and “spouses are expected to satisfy each others’ emotional needs.”\textsuperscript{122} The institution of marriage began to be understood not as a means for men to control women, but as a way for a man and a woman to each select a partner with whom to achieve happiness and self-fulfillment.\textsuperscript{123}

\textbf{B. The U.S. Supreme Court Unequivocally Declares Marriage to be a Fundamental Right}

With this backdrop, as early as the 19th century, the U.S. Supreme Court began to opine about the importance of marriage in American life. In \textit{Maynard v. Hill}, a case analyzing the legality of a legislative divorce,\textsuperscript{124} the Court stated that marriage is “the foundation of the family and society, without which there would be neither civilization nor progress.”\textsuperscript{125} The Supreme Court validated the notion of the marital union as a deeply personal association, opining that marriage created “the most important relation in life,” as it had “more to do with the morals and civilization of a people than any other institution.”\textsuperscript{126}

\textsuperscript{120} NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 205-6 (2000).
\textsuperscript{121} See People v. Liberta, 64 N.Y.2d 152 (1984).
\textsuperscript{122} Kerry Abrams and Peter Brooks, \textit{Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation}, 21 YALE J.L. & HUMAN. 1, 10 (2009).
\textsuperscript{123} See, e.g. Vicki Howard, \textit{A ‘Real Man’s Ring’: Gender and the Invention of Tradition}, 36 Journal of Social History (2003) at 843 (suggesting that the growth in popularity of engagement rings for men was a “symbol of commitment and fidelity [that] might have resonated among those dedicated to the new ideal of companionate marriage.”)
\textsuperscript{124} A legislative divorce is one in which a marriage is terminated by a statute enacted by the legislature rather than by a court’s decree. DIVORCE, Black’s Law Dictionary (9th ed. 2009).
\textsuperscript{125} 125 U.S. 190, 211 (1888).
\textsuperscript{126} \textit{Id.} at 204.
The Court continued to consider the nature and significance of marriage when it decided *Meyer v. Nebraska*, a case not involving marriage or family relationships, but rather a school teacher who was charged with instructing a student in the German language, an unlawful act under a state statute.\(^{127}\) In *Meyer*, marriage was listed among several other liberty rights the court considered to be “fundamental” – freedom of religion, the ability to obtain an education, and childrearing – its inclusion so casual as to demonstrate the obviousness of its presence among other well-established vital personal freedoms.\(^{128}\) Significantly, *Meyer* was the first time the Court introduced the concept of liberty into an analysis of marriage; in applying this framework, the Court reinforced the concept that central to marriage is the ability to enter into the relationship freely and voluntarily (a concept that would be echoed in the UDHR and subsequent treaties as well as in non-asylum domestic jurisprudence for years to come).

Several years after *Meyer*, the Supreme Court was once again called on to consider the right to marriage, as challenges to the institution arose in multiple contexts. In a series of cases involving the rights of prisoners, the Court affirmed that “prison walls do not form a barrier separating prison inmates from the protections of the Constitution,” namely, the right to enter into the same forms of relationships as those who are not incarcerated.\(^{129}\) In *Skinner v. Oklahoma*, the Court struck down the Habitual Criminal Sterilization Act as violative of the Equal Protection Clause. In so doing, it stated: “we are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the

\(^{127}\) 262 U.S. 390 (1923).

\(^{128}\) *Id. at* 396 (1923)(Liberty “denotes not merely freedom from bodily restraint but also the right of the individual … to engage in any of the common occupations of life, to acquire useful knowledge, *to marry*, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”)(emphasis added).

\(^{129}\) *Turner*, 482 U.S. at 84.
very existence and survival of the race.”\textsuperscript{130} In Turner v. Safley, prisoners were held to have a “constitutionally protected right to marry” because the court recognized marriage as both a fundamental right and a “constitutionally protected relationship.”\textsuperscript{131} These cases continued to evolve the Court’s conception of marriage, introducing theories of civil rights and equal protection to the existing liberty analysis. However, regardless of the underlying legal reasoning, what became evident in the decisions was that marriage was considered to be a basic constitutional right and occupied a “fundamental” and central role in American life.

In another set of cases, the Court undertook a Due Process analysis in considering whether financial restrictions could be placed on the ability to marry or divorce. The first case, Boddie v. Connecticut, held that filing fees for divorce actions violated the due process rights of indigent individuals who were unable to pay the fees.\textsuperscript{132} The Court based its decision on what was rapidly becoming a truism – that “marriage involves interests of basic importance in our society.”\textsuperscript{133} In Zablocki v. Redhail, the Court also relied on the Due Process Clause to declare unconstitutional a statute requiring court approval for those under child support obligations to marry.\textsuperscript{134} Because the Court considered “the right to marry [as being] of fundamental importance,” it could not be restricted to those with financial means.\textsuperscript{135}

The significance of marriage to U.S. jurisprudence and society became further evident when the Court considered the constitutionality of restrictions on birth control and abortion. In striking down a state statute criminalizing individual use and doctors’ prescription of

\begin{footnotesize}
\begin{enumerate}
\item[130] 316 U.S. 535, 541 (1942).
\item[133] Id. at 376.
\item[134] 434 U.S. 374 (1978).
\item[135] Id. at 383.
\end{enumerate}
\end{footnotesize}
contraception in *Griswold v. Connecticut*, the Court made an uncharacteristically poetic statement about the nature of the institution:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”

This effusive description demonstrated the court’s reverential attitude towards the marital relationship – language that revealed such respect for marriage was perhaps not surprising given prior statements and holdings by the high Court, yet it is worth highlighting how drastically these statements and general attitudes about marriage differ from those articulated by courts in the asylum context. Marriage is venerated by the U.S. Supreme Court, labeled as “sacred” and “noble,” yet when immigration and federal courts evaluate the institution, efforts to force a woman into a marriage against her will are not deemed to be harmful or persecutory acts.

*Griswold’s* holding also provided yet another analytical framework for marriage – privacy. As the Court stated, “would we allow the police to search the sacred precincts of marital bedrooms of telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marital relationship.” The concept of privacy was echoed by the *Zablocki* Court, when it discussed not only marriage itself but the significance of the choice involved in entering into the union and held that “it would make little sense to recognize a right to privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”

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136 *Griswold*, 381 U.S. at 486.
137 *Id.* at 485-6.
138 *Zablocki*, 434 U.S. at 386.
regarding the privacy and liberty inherent in the marital relationship was also used in *Planned Parenthood of Se. Pennsylvania v. Casey*, in invalidating restrictions on abortion.\(^\text{139}\)

The Court issued its perhaps most well-known decision regarding access to marriage in *Loving v. Virginia*,\(^\text{140}\) a case that invalidated anti-miscegenation laws and provided the foundation for decades of rulings on marriage equality issues to follow. In the relatively brief *Loving* decision, the Court opined that “marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”\(^\text{141}\) Because “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,” the restriction of the “fundamental freedom” to marry based on racial classifications was found to be “subversive of the principle of equality at the heart of the Fourteenth Amendment.”\(^\text{142}\)

Whether on Due Process, privacy, Equal Protection or liberty grounds, by the time the Court issued its decision in *Loving*, the idea that the ability to freely choose a spouse is central to one’s being was beyond question or reproach. Standing in stark contrast – the outlier – was asylum law, where despite case law affirming that violations of one’s “deepest beliefs” constituted persecution,\(^\text{143}\) federal and immigration courts declined to consider forcible entry into marriage a persecutory act.

**C. State Supreme Court Cases Granting Same-Sex Couples the Right to Marry**

**Characterize Marriage as a Fundamental Civil and Human Right and Note the Institution’s Significance to Self-Fulfillment and Personal Identity.**

\(^{139}\) 505 U.S. 833, 851 (1992) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”).

\(^{140}\) 388 U.S. 1 (1967).

\(^{141}\) *Id.* at 12.

\(^{142}\) *Id.*

\(^{143}\) *Fatin*, 12 F.3d at 1242.
The next area in which the right to choose one’s spouse emerged as a sacrosanct and foundational principle was in courts’ support for access to marriage for same-sex couples. The first U.S. Supreme Court case to consider marriage in the context of homosexual relationships was not actually a case about marriage; instead, Lawrence v. Texas analyzed the constitutionality of an anti-sodomy statute.\textsuperscript{144} Although the Court did not rule on the validity of same-sex marriage in Lawrence, it did once again list marriage among other protected aspects of life – based on both liberty and privacy interests. Citing Casey, and in syntax strikingly similar to the “laundry list” utilized in the Meyer decision eighty years earlier, the Court stated that the “Due Process Clause protects personal decisions relating to marriage, procreation, contraception, family relationships child rearing, and education” – regardless of one’s sexual orientation.\textsuperscript{145}

Lawrence was considered a landmark ruling by the LGBTQ\textsuperscript{146} community, referred to by one prominent legal scholar as “the Brown v. Board of Education of gay and lesbian America.”\textsuperscript{147} The sweeping language about fundamental rights – including, notably, the right to marry – was widely recognized as laying the groundwork for later rulings on the issue of same-sex marriage.\textsuperscript{148} In fact, only a few months after the Lawrence decision, the Massachusetts Supreme Court issued its ruling in Goodridge v. Department of Public Health, quoting Lawrence in the second paragraph of its decision granting same-sex couples the right to marry.\textsuperscript{149}

\textsuperscript{144} 539 U.S. 558 (2003).
\textsuperscript{145} Id. at 559 (emphasis added).
\textsuperscript{146} Lesbian, Gay, Bisexual, Transgender and Questioning
\textsuperscript{148} Linda Greenhouse, Supreme Court Paved Way for Marriage Ruling With Sodomy Law Decision, N.Y. TIMES, November 19, 2003. In fact, in his dissent in Lawrence, Justice Scalia expressed concern about the future constitutionality of laws against same-sex marriage, stating that the majority opinion in Lawrence “dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual union, insofar as formal recognition in marriage is concerned.” Lawrence, 539 U.S. at 590 (J. Scalia, dissenting).
\textsuperscript{149} Goodridge, 798 N.E.2d at 948.
Massachusetts was the first state in which the judiciary legalized gay marriage, and in the extensive Goodridge decision, the Court repeatedly emphasized the profoundly important nature of the marital relationship. Referring to marriage as “one of our community’s most rewarding and cherished institutions”\(^{150}\) and a “social institution of the highest importance,”\(^{151}\) the court focused on both the personal and community aspects of marriage, stating that “civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.”\(^{152}\)

Notably, the Goodridge court devoted significant attention to the concept of choice, reiterating in numerous ways throughout its opinion that “the right to marry means little if it does not include the right to marry the person of one’s choice.”\(^{153}\) This consideration was only infrequently present in earlier U.S. Supreme Court decisions regarding marriage, and its inclusion in Goodridge highlights the evolution of judicial thinking, as well as adherence to international human rights norms regarding the essential nature of choice in the marital relationship.

After Goodridge, several other state courts followed suit in holding that the denial of marriage to same-sex couples violated state constitutions, including California,\(^{154}\) Connecticut,\(^{155}\) Iowa,\(^{156}\) and New Mexico\(^{157}\).\(^{158}\) These cases all proceeded from a baseline understanding that

\(^{150}\) Id. at 949.
\(^{151}\) Id. at 954 (citing French v. McAnarney, 290 Mass. 544, 546 (1935)).
\(^{152}\) Id.
\(^{153}\) Id. at 958. See also, id. at 970, (Greeley, J.,concurring)(stating that the right to marry “is essentially vitiated if one is denied the right to marry a person of one’s choice.”).
\(^{154}\) In re Marriage Cases, 43 Cal. 4th 757 (2008).
\(^{156}\) Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).
\(^{157}\) Griego v. Oliver, --- P.3d --- (N.M. 2013).
\(^{158}\) Although Massachusetts and the four states listed above are the only states in which the highest courts affirmed the right to same-sex marriage, several other state courts have ruled on the subject. Some courts, such as the Hawaii Supreme Court and the Alaska Superior Court issued decisions that were rendered moot by legislative action. In other states, the issue before the court was not the institution of marriage itself but the benefits of marriage that were unavailable to same-sex couples. Thus, in states like Vermont (Baker v. State, 170 Vt. 194 (1999)) and New Jersey...
marriage is a fundamental civil and human right. Justices such as those on the Supreme Court of California spoke about the profound impact marriage can have on an individual, asserting that marriage is “the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime” and that “the ability of an individual to join in a committed, long-term, officially recognized family relationship with the person of his or her choice is often of crucial significance to the individual’s happiness and well-being.”

Unlike federal and immigration courts, these statute judicial bodies easily recognized that marriage is one of the “essentials of life,” an institution that has a profound impact on innumerable aspects of a person’s existence.

The idea that the marital relationship is an expression of one’s identity and the root of personal fulfillment became a more prominent feature in decisions concerning marriage and as the debate surrounding same-sex unions evolved. As the Supreme Court of California stated in In Re Marriage Cases, “the opportunity to publicly and officially express one’s love for and long-term commitment to another person by establishing a family together with that person also is an important element of self-expression that can give special meaning to one’s life.”

The notions of marriage as fundamental to one’s public and private identity and the ability to enter into the bond with a person of one’s choice as essential to human freedom is evidenced by the words of the countless individuals who swear marriage vows each day. In describing how she felt the day after she married her partner of forty years, Edie Windsor stated:

(Lewis v. Harris, 188 N.J. 415 (2006)), the courts focused on both marriage and alternatives such as civil unions. Finally, challenges to constitutional amendments prohibiting same-sex marriage in Utah (Kitchen v. Herbert, --- F.Supp.2d --- (D. Utah Dec. 20, 2013)) and Oklahoma (Bishop v. U.S. ex rel. Holder, --- F.Supp.2d --- (N.D. Okla. Jan. 14, 2014)) have been heard by U.S. District Courts in those jurisdictions, and as of the date of this article, both are on appeal to the 10th Circuit Court of Appeals.

159 In re Marriage Cases, 43 Cal. 4th at 816.

160 Fatin, 12 F.3d at 1242.

161 See, e.g., Goodridge, 798 N.E. 2d at 948 (stating that Lawrence “reaffirmed the central role that decisions whether to marry or have children bear in shaping one’s identity.”).

162 43 Cal. 4th at 817.
The fact is, marriage is this magic thing ... I mean forget all the financial stuff – marriage ... symbolizes commitment and love like nothing else in the world. And it’s known all over the world. I mean, wherever you go, if you’re married, that means something to people, and it meant a difference in feeling the next day.  

Other same-sex couples who were permitted to exchange marriage vows after years of cohabitation echoed Ms. Windsor’s views upon being legally married. “Going through the ceremony, it really hit me. When he said ‘therefore, by the powers vested in me by the state of California,’ I blubbered. We weren’t any different than we had been for the previous 55 years, but yet we were.” Another recently married woman stated: “[t]ruth is, it changed our lives completely.” The intensity of feeling was surprising to one newlywed, who declared, “things have felt different between us in the past four or five months since we’ve been married. Things have felt deeper and more loving in a way that I didn’t anticipate at all.”

Although the emotions are unquestionably profound – in fact research by scientists at Michigan State University has shown that married people are happier than those who are single – marriage is of course about more than just feelings. Other studies have concluded that married couples live longer and that married men make more money. As courts have

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168 See Marriage linked to better survival in middle age: Study highlights importance of social ties during midlife, SCIENCE DAILY (January 10, 2013), http://www.sciencedaily.com/releases/2013/01/130110102342.htm. See also, Marriage, FOCUS ON THE FAMILY, http://www.focusonthefamily.com/socialissues/social-issues/marriage.aspx (“In general, married people live longer, spend less time in the hospital, have higher incomes and enjoy greater emotional support.”); Why Marriage Should be Privileged in Public Policy, FAMILY RESEARCH COUNCIL, http://www.frc.org/insight/why-marriage-should-be-privileged-in-public-policy (“Marriage also positively affects adults, as married people are more likely to be healthy, productive, and engaged citizens. They have better emotional and physical health and live longer than do unmarried people.”).
recognized, marriage is also instrumental in the expression of one’s identity. Novelist Elizabeth Gilbert explains it well:

in the modern industrialized Western world … the person whom you choose to marry is perhaps the single most vivid representation of your own personality. Your spouse becomes the most gleaming possible mirror through which your emotional individualism is reflected back to the world. There is no choice more intensely personal, after all, than whom you choose to marry; that choice tells us, to a large extent, who you are.\(^{170}\)

In addition to its deeply personal and emotionally significant aspects, marriage is also a state-regulated institution, one that implicates both legal rights and responsibilities. As the Supreme Court of Vermont stated in *Baker v. State of Vermont*, “while many have noted the symbolic or spiritual significant of the marital relation, it is plaintiffs’ claim to the secular benefits and protections of a singularly human relationship that, in our view, characterizes this case.”\(^ {171}\) Access to these benefits is therefore another critically important aspect of the marital relationship that courts take into account when considering or attempting to value marriage. In *U.S. v. Windsor*, the U.S. Supreme Court noted that DOMA affects more than “1,000 federal statutes and the whole realm of federal regulations.”\(^ {172}\)

Similarly, in *Goodridge*, the Massachusetts Supreme Court stated that “the benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death,” and delineated several of “hundreds of statutes” implicating marital benefits such as inheritance; medical insurance, access and decision-making; veterans’ benefits; and evidentiary rights.\(^ {173}\) In *Varnum*, The Supreme Court of Iowa also considered the “disadvantages and fears [same-sex couples] face each day due to the inability to obtain a civil marriage in Iowa,”

\(^{171}\) 744 A.2d 864, 888-9 (Vt. 1999). See also *Goodridge*, 798 N.E. 2d at 948 (“Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits.”).
\(^{172}\) 570 U.S. ___, ___ (2013).
\(^{173}\) *Goodridge*, 798 N.E. 2d at 955.
including issues ranging from the serious – healthcare and health insurance, pension and tax benefits, and adoption rights – to the relatively trivial, such as health club memberships.\textsuperscript{174} Access (or the lack thereof) to this panoply of benefits was an indicator for courts that the marital relationship was not only meaningful on an emotional level but a practical necessity when navigating modern life.

\textit{D. In Striking Down the Defense of Marriage Act, the Supreme Court Affirms the Inherent Dignity of the Marital Relationship}

In June of 2013, the Supreme Court issued a major ruling concerning the right to marriage. The Court had two related cases before it. The first was \textit{Hollingsworth v. Perry},\textsuperscript{175} which challenged the legality of Proposition 8, a California ballot initiative amending the state constitution to define marriage as a union between a man and a woman (following the California Supreme Court’s holding in \textit{In Re Marriage Cases} that limiting marriage to opposite-sex couples violated the state constitution). The second was \textit{United States v. Windsor},\textsuperscript{176} a case that sought to invalidate the federal Defense of Marriage Act,\textsuperscript{177} which excludes same-sex spouses from the definition of marriage, and therefore, as detailed above, denies them access to a vast number of federal benefits.

In a historic ruling in \textit{Windsor}, the Court invalidated the Defense of Marriage Act, finding that it violated the liberty protections inherent in the Fifth Amendment. The Court stated that “DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.” The institution of marriage “is more than a routine classification for purposes of certain statutory benefits,” opined Justice

\textsuperscript{174} \textit{Varnum}, 763 N.W.2d at 873.
\textsuperscript{175} 570 U.S. \_\_ (2013).
\textsuperscript{176} 570 U.S. \_\_ (2013).
\textsuperscript{177} \textit{See supra} note 2.
Kennedy, “the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import … [which] enhanced the recognition, dignity, and protection of the class in their own community.” Much of the Court’s decision in Windsor focused on these concepts – the dignity conferred by the marital relationship and the relationship between marriage and concepts of “personhood” – once again reinforcing the now well-established view that marriage is central to one’s happiness, fulfillment and identity.

The Court did not address the merits in Hollingsworth due to its finding that the petitioners did not have standing to appeal the lower court’s judgment. Nevertheless, the opening sentence in the Respondent’s brief in the case demonstrates that the meaning and significance of marriage also played a pivotal role in considerations of the case:

This case is about marriage, ‘the most important relation in life,’ a relationship and intimate decision that this Court has variously described at least 14 times as a right protected by the Due Process Clause that is central for all individuals’ liberty, privacy, spirituality, personal autonomy, sexuality and dignity; a matter fundamental to one’s place in society; and an expression of love, emotional support, public commitment and social status.178

And the lack of a substantive decision in Hollingsworth certainly does not signal an end to the debate. In fact, in his scathing dissent in Windsor, Justice Scalia predicted that the language in the majority opinion in that case will inevitably be used to invalidate state laws denying same-sex couples the right to marry and that this “second, state-law shoe to be dropped later” may occur as early as “next Term.”179

Justice Scalia’s projection may not be too farfetched, particularly because public opinion in the United States regarding the right to marriage continues to evolve at a rapid pace. Support

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179 Windsor, 570 U.S. at ___ (Scalia, J., dissenting). Justice Scalia’s assessment is likely correct, for as indicated in footnote 158 supra, at least one U.S. Court of Appeals is considering the validity of bans on same-sex marriage in state constitutions, and challenges to similar bans in other states appear to be headed for the high court. See, e.g., Steve Helber, Race on Same-Sex Marriage Cases Runs Through Virginia, THE WASHINGTON POST (Feb. 3, 2014), available at http://www.washingtonpost.com/politics/race-on-same-sex-marriage-cases-runs-through-virginia/2014/02/03/934d9306-8c50-11e3-95dd-36ff657a4dae_story.html.
for same-sex marriage has been rising steadily since 2004, a year after the Massachusetts Supreme Court issued its decision in Goodridge. A Fox News poll taken three months prior to the rulings in Windsor and Hollingsworth found that fifty-three percent of registered voters believed that same-sex couples have a constitutional right to marry. This growing acceptance of marriage as a fundamental constitutional, civil and human right acknowledges the significance of both the institution itself and the element of choice that defines it.

The evolution of societal views on the issue appears to have been considered by the Supreme Court in a number of cases in this context. In Lawrence, Justice Kennedy undertook pages of historical analysis of the criminalization of sodomy and changing concepts of morality, remarking that only a minority of states enforced laws against sodomy at that time in defense of his invalidation of the statute prohibiting the act. Similarly, in Windsor, the Court noted that twelve states and the District of Columbia “decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.”

The Court’s attention to public opinion regarding marriage allowed it to rest its holdings on solid sociological footing. At this point in history, the debate over and fight for marriage equality is far from concluded. However, what is certain is that both sides of the divide believe marriage to be an sacred union; whether that view is the basis of arguments for restriction or

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181 Lawrence, 539 U.S. at 573 (“The 25 States of with laws prohibiting the relevant conduct reference in the Bowers decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.”).
182 Windsor, 570 U.S. at __. In addition to the states that allow same-sex marriage, four states allow gay couples to enter into civil unions and four additional states have domestic partnership statutes.
183 DR. JAMES DOBSON, MARRIAGE UNDER FIRE: WHY WE MUST WIN THIS BATTLE (2004) (“Given this unbroken continuity, one might begin to suspect that something mystical within human nature must be drawing the sexes
expansion of the right to access the institution, the law’s recognition of marriage as fundamental
to civil and human rights is indisputable.

IV. THE DISCONNECT BETWEEN FORCED MARRIAGE ASYLUM LAW AND DOMESTIC
INTERPRETATIONS OF THE RIGHT TO MARRY

As demonstrated in Parts II and III above, the right to marry the person of one’s choosing
is well established in both U.S. Constitutional and international law. Marriage has been held to
be a sacred institution, and freedom of choice in marriage has been repeatedly and unequivocally
acknowledged as central to human dignity by U.S. courts and international bodies. Unlike federal
and immigration courts, treaties and administrative agency interpretations have established the
basic tenet that forced marriage is persecutory because it breaches the fundamental right to full
and free consent in marriage. From all these sources, it is clear that even without considering the
harms that typically accompany a forced marriage (such as domestic violence, marital rape,
FGM, loss of liberty, etc.), the act of entering into a presumably lifelong relationship against
one’s will is itself a significant violation because marriage is such an important part of life. And
the persecution becomes more profound when considering the associated denial of the ability to
engage in the fundamental right to marry a person one does love and therefore enter willingly
into a marriage – a social institution, which as discussed above, is widely understood as being
vital to one’s identity, dignity, autonomy and well-being.

together – not just for purposes of reproduction as with animals – but to satisfy an inexpressible longing for
companionship, intimacy and spiritual bonding.”); Donna Brazile, What the Sanctity of Marriage Means, CNN
important enough institution that it should apply to humans equally, regardless of gender”); Ryan T. Anderson,
Marriage: What It Is, Why It Matters, and the Consequences of Redefining It, THE HERITAGE FOUNDATION
Backgrounder No. 2775 (March 11, 2013), available at http://www.heritage.org/research/reports/2013/03/marriage-
what-it-is-why-it-matters-and-the-consequences-of-redefining-it (“Marriage is a uniquely comprehensive union. It
involves a union of hearts and minds, but also - and distinctively - a bodily union made possible by sexual
complementarity.”) (“Marriage as the union of man and woman is true across cultures, religions, and time. The
government recognizes but does not create marriage. Marriage is the fundamental building block of all human
civilization.”).
Turning to U.S. courts’ interpretation of immigration law, the legal picture appears dramatically different. Courts analyzing asylum claims are dismissive of the notion of forced marriage as persecution, despite support in domestic, international, and even general immigration law for the proposition. They routinely characterize forced marriage as mere harassment or culturally-accepted arranged marriage, ignoring the fact that the U.S. Supreme Court created a constitutionally-protected right to marry the person of one’s choosing due to its reverence for the institution and recognition of the impact of the decision of who to marry on a person’s life. The right to marry is, as the Court stated in *Loving*, a “vital personal right essential to the orderly pursuit of happiness.”

Marriage has also been held to be “one of our community’s most rewarding and cherished institutions” and a “social institution of the highest importance.” Federal and state courts have also opined on the dignity, identity and status inherent in marriage. Yet asylum jurisprudence has failed to recognize the harm of forcing women to enter into marriage.

Persecution, as detailed in Section I.B.1, is a broad concept that includes not just physical harm but acts that are harmful to an individual’s deepest beliefs or deprive one of an “essential of life.” Under that definition, forcing someone to enter into the uniquely profound and impactful relationship of marriage against her will – and preventing her from exercising her “fundamental freedom” to marry the person of her choice – must be a persecutory act.

Immigration and federal courts’ lack of conformity to their own definitions of persecution as well as the prevailing jurisprudence on marriage is plainly incorrect and courts should take steps

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185 *Loving*, 388 U.S. at 12.
186 *Goodridge*, 798 N.E.2d at 949.
187 Id. at 954 (citing French v. McAnarney, 290 Mass. 544, 546 (1935)).
188 *Fatin*, 12 F.3d at 1242.
190 *Loving*, 388 U.S. at 12. See also, *Goodridge* at 958 (“the right to marry means little if it does not include the right to marry the person of one’s choice.”).
to rectify this wrong by recognizing forced marriage as a harm rising to the level of persecution and thereby meriting asylum protection.

Courts’ dismissive labeling of applicants’ objections to forced marriage as “personal preferences” also flies in the face of a body of asylum jurisprudence that aims to protect from persecution individuals who are expressing deeply held, personal opinions. As the Supreme Court and others have noted, the choice of a spouse is one of the most significant and meaningful decisions one makes in a lifetime. That this expression is not seen as deserving of serious consideration, much less protection, stands as a substantial gap in asylum law’s protection.

Given courts’ denials of legally viable forced marriage claims, the lack of clarity surrounding Gao, and more generally, the uncertainty regarding availability of asylum protection in the courts for individuals fleeing forced marriage, practitioners litigating cases often rely on alternative bases for relief in order to avoid directly confronting the issue of whether forced marriage, standing alone, constitutes per se persecution.

As stated in the Introduction, one common strategy to avoid the question of whether forced marriage is itself persecution is to tell the “Abusive Elderly Polygamist” story and focus on “component parts,” or the forms of persecution that often exist within a forced marriage. This allows an adjudicator to find persecution on a more commonly-accepted ground such as rape,\(^\text{191}\) domestic violence,\(^\text{192}\) kidnapping or deprivation of liberty,\(^\text{193}\) lack of reproductive control,\(^\text{194}\)


\(^{193}\) Gomez-Zuluaga v. U.S. Atty. Gen., 527 F.3d 330 (9th Cir. 2008); Delgado v. Mukasey, 508 F.3d 702 (2d Cir. 2007); Phommasoukha v. Gonzales, 408 F.3d 1011 (8th Cir. 2005).

forced labor; severe economic deprivation; female genital mutilation; or emotional or psychological abuse. Alternatively, attorneys can also make claims based on the consequences faced by women who refuse and/or flee from forced marriages. This type of persecution – set up in the “Violent Honor Crimes Story” – takes a more traditional form, including threats of death or other bodily harm, beatings, and confinement.

Even when membership in a particular social group that makes one vulnerable to forced marriage is the root cause of an individual seeking refuge in the United States, when considering nexus, attorneys often attempt to shoehorn their clients’ claims into more traditional grounds such as political opinion or religion. A political claim based on forced marriage can be made by arguing that a woman is expressing either an actual or imputed “feminist” political opinion by speaking out against male domination, expressing her belief that women should exercise control over their own bodies or destinies, or behaving in a way that is at odds with cultural norms. A religion-based claim typically consists of an argument that a woman is being persecuted for expressing religious beliefs that differ from those of her father or male relatives, for example,

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195 Lhanzom v. Gonzales, 430 F.3d 833 (7th Cir. 2005); Phommasoukha v. Gonzales, 408 F.3d 1011 (8th Cir. 2005); Jhup v. Ashcroft, 376 F.3d 898 (9th Cir. 2004).
196 Acosta, 19 I. & N. at 222 (economic deprivation can be persecution if the deprivation is “so severe that [it] constitute[s] a threat to an individual’s life or freedom.”). See also, Vicente-Elias v. Mukasey, 532 F.3d 1086 (10th Cir. 2008) (economic hardships may qualify for persecution in two ways: 1) when the government imposes penalties so severe that it jeopardizes the petitioners life or freedom, 2) when the government deliberately places the petitioner at a severe economic disadvantage even though he or she is spared the bare essentials of life); Matter of T-Z-, 24 I. & N. Dec. 163 (BIA 2007).
197 Kasinga, 21 I. & N. at 357.
198 Mashiri v. Ashcroft, 383 F.3d 1112 (9th Cir. 2004); Kovac v. INS, 407 F.2d 102, 106-7 (9th Cir. 1969)(noting that by deleting the qualifier “physical” from the definition of persecution, Congress intended to include mental suffering).
199 See, supra, note 8.
200 A political opinion can either be openly expressed or can be imputed upon an individual based on his or her actions. See, Elias-Zacarias, 502 U.S. 478.
that her interpretation of the Quran does not require women to submit to their families’ wishes regarding the choice of a spouse.201

While it is of course a great solace to individual clients (and their attorneys) that protection from forced marriage can be obtained on these alternative bases, the limitations imposed by existing case law and practice are troubling in two fundamental respects. First, reliance on component parts of forced marriage to prove persecution requires that an applicant’s narrative adhere to a certain “stock story”202 and promotes reliance on certain factual premises that may ultimately be difficult to prove for many women who fear forced marriage.

For example, the current legal regime would almost certainly be inadequate to provide asylum protection to a woman who opposed her forced marriage to a man that she did not know or someone she knew but could not provide evidence of being potentially abusive, despite the fact that in the domestic context, the non-consensual union itself would certainly be understood as a violation of her fundamental rights. Advocates therefore feel compelled to rely on the component bases described above and focus their claim on this “parade of horribles” that may occur in a forced marriage. While it is certainly reprehensible for a young girl to be married against her will to a man who has a known history of violence, this does not diminish the inherent harm of a forced marriage itself, nor should it suggest that a woman who cannot demonstrate that she will face such physical abuse is not entitled to the protection the law provides. Indeed, as articulated above, even if a potential husband is known to be a kind man, the

201 See, e.g., Matter of S-A-, 22 I. & N. Dec. 1328 (BIA 2000)(granting asylum on religion grounds to a young woman from Morocco who refused to submit to her father’s restrictions because she did not share his orthodox Muslim beliefs.).
202 Stock stories are standard narratives that reflect “normal” or typical accounts of how the world works. They allow us to interpret and understand events based on limited facts and information, and with minimal analysis, by relying on assumptions about how events usually proceed and therefore how things should proceed in the current instance. See Anthony G. Amsterdam & Jerome Bruner, Minding the Law: How Courts Rely on Storytelling, and How Their Stories Change the Ways We Understand the Law--and Ourselves 121 (2000); Stephen Ellmann, et. al., Lawyers and Clients: Critical Issues in Interviewing and Counseling 176-80 (2009); Gerald P. Lopez, Lay Lawyering, 32 UCLA L. Rev. 1 (1984).
fact remains that marriage is so crucially significant to one’s identity, life and being that the inability to choose whom to enter into the relationship with is a violation constituting persecution.

The troubling aspects of the “woman as victim” narrative or stock story have been well-documented and analyzed in the scholarly literature. The effective requirement to portray women as victims by emphasizing their vulnerabilities to rape, domestic violence and other gender-based subjugation would be eliminated by shifting the focus of asylum claims based on forced marriage to the applicant’s inability to choose. Gender neutrality would be infused into the analysis because notions of choice impact men equally, and advocates would no longer feel compelled to emphasize the most pitiable aspects of their female clients’ lives and experiences.

Moving beyond the individual claim, the fact that political opinion or religion-based claims and arguments of persecution based on traditionally accepted component harms may currently be the only way to obtain asylum for a victim of forced marriage is a significant limitation on the advancement of asylum jurisprudence. By not recognizing forced marriage itself as the harm and deprivation that it unquestionably is, asylum law not only ignores prevailing legal and societal norms regarding marriage but severely constrains the natural evolution of what it means to be persecuted under asylum law.

To cite a relevant and topical example, although it is now well-accepted that female genital mutilation constitutes persecution, this was certainly not the case before the BIA’s decision in Matter of Kasinga. The Immigration Judge who initially denied Ms. Kasinga’s

petition for asylum found that her claim did not meet the definition of persecution because FGM “is a part of the tribal culture for a few ethnic groups.” Presumably to demonstrate a lack of nexus, he added that “all members of her ethnic tribal group are being pressured into being circumcised.” The reasoning in the original Kasinga opinion is strikingly similar to that utilized by modern-day courts in the forced marriage context when they find that the practice does not rise to the level of persecution because it is a common and culturally-accepted practice. But as long as claims continue to be made based on the “safer” component parts of forced marriage, courts – as well as clients and their advocates – will be denied the opportunity for their own “Kasinga moment” where forced marriage standing alone is finally recognized as per se persecution.

V. CONCLUSION

Asylum law exists to provide a safe haven in the United States for individuals fleeing persecution. But in addition to providing this protection, asylum law is also a declaration of our nation’s values, an area of law where we proclaim that certain acts and actions are contrary to our collective belief system. We as a nation are unmistakably moving towards a broad and liberal understanding of marriage, where the freedom to choose one’s spouse is recognized as a fundamental civil and human right. Marriage is a sacred and revered institution in both international law and domestic constitutional law; isn’t it time for courts interpreting our asylum laws to follow suit?

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205 Id.