

**BATTERERS AS AGENTS OF THE STATE:
CHALLENGING THE PUBLIC/PRIVATE
DISTINCTION IN INTIMATE PARTNER
VIOLENCE-BASED ASYLUM CLAIMS**

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INTRODUCTION

A man in Africa grew up in a country where he has been raised to believe—through social traditions, tribal rules, and everyday practice—that members of his tribe are inferior to and dependent on a dominant tribe. The man believes that he is no less a human being than members of the dominant tribe and that he deserves to live free of fear. He joins a dissident group and hands out pamphlets advocating equality. Shortly thereafter, a group of thugs who are members of the dominant tribe beat him and threaten to kill him. “You seem to think that you are in a position to defy us,” they say. “You seem to think that you are equal to us. We shall remind you of your place in this society.” The beatings and threats continue and the man even-

tually seeks help from the police. The police, most of whom are members of the dominant tribe, are unwilling to help. “You are in a bad situation but we cannot do anything to interfere. Our laws and our culture prohibit it. Just keep your mouth shut from now on and try to avoid these people.” Other members of the man’s tribe are intimidated upon seeing how their fellow tribe member has been treated for his behavior, and some of them stop their dissident activities.

After another particularly bad beating, the man finally escapes. He makes his way to the United States and applies for asylum on the basis of two grounds: (1) his political opinion opposing the domination of the elite tribe;¹ and (2) his membership in the particular social group of the subjugated tribe.²

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

After another particularly bad beating, the woman finally escapes. She makes her way to the United States and applies for asylum on the basis of two grounds: (1) her political opinion opposing the domination of men; and (2) her membership in the particular social group of female nationals of her country.

These scenarios describe fundamentally similar, albeit distinguishable, situations. In both scenarios, the individual claiming asylum has had a per-

¹ See 8 U.S.C. § 1101(a)(42)(A) (2010) (listing “political opinion” as a basis for asylum). See also *infra* notes 118–131 and accompanying text (explaining the legal elements of an asylum claim) and notes 193–207 (discussing the “political opinion” basis for asylum).

² See 8 U.S.C. § 1101(a)(42)(A) (2010) (listing “membership in a particular social group” as a basis for asylum). See also *infra* notes 132–144 (discussing the “membership in a particular social group” basis for asylum).

sonal interaction with a member of the dominant elite that led to persecution. Both individuals hold an opinion that is political in nature—that the dominant group's subjugation is wrong and must be defied. The African man stated his political opinion by joining a dissident group and acting in a public manner, whereas the Latin American woman expressed hers by leaving her relationship. When they expressed their political opinions and challenged the authority of the dominant group, private actors as well as state officials engaged in persecution in an effort to protect the elite group's dominance and deter other acts of defiance. Private actors attacked the individuals for expressing their political opinions, and agents working directly for the state—namely, the police—refused to protect the individuals from the private actors' persecution.

The most relevant distinction between the two scenarios is that the man from the marginalized tribe will have a much greater likelihood of success if he applies for refugee protection than the woman escaping an abusive husband. In order to prove their eligibility for refugee protection, they must prove that they are unwilling or unable to return to their country because of past persecution and/or a well-founded fear of persecution on account of one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.³

Despite the fundamental similarities of the situations that these individuals have presented, their claims for asylum in the United States face very different odds. U.S. asylum law favors claims such as the African man's, where the political opinion is stated in the classic form of joining a political group and engaging in public activities of a political nature, and where the persecution occurs by strangers with a clearly articulated political goal.⁴ The woman's claim suffers from the perceived flaw of being personal rather than political in nature, and the persecution occurs at the hands of an intimate partner who may not know or care that he is responding to a political statement. The abuse, therefore, is not a political act but merely an unfortunate situation that has occurred due to various psychological and social factors.

Most gender-based asylum claims tend to focus on the woman's membership in a particular social group, principally because U.S. courts have frequently rejected political opinion as a basis for gender-based claims.⁵ So-

³ See 8 U.S.C. § 1101(a)(42)(A) (2010).

⁴ See, e.g., *In re O-Z- and I-Z-*, 22 I&N Dec. 23, 27 (BIA 1998) (granting asylum to Jewish Ukrainians who had been persecuted by a group of Ukrainian nationalists with an overt anti-Semitic political agenda).

⁵ See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1242–43 (3d Cir. 1993) (finding that an Iranian feminist had not proven that she would be persecuted on account of political opinion because “the administrative record does not establish that Iranian feminists are generally subjected to treatment so harsh that it may accurately be described as ‘persecution’”); *Campos-Guardado v. INS*, 809 F.2d 285, 287–89 (5th Cir. 1987) (finding that the niece of the head of a Salvadoran agrarian land reform cooperative was not persecuted on account of her political opinion when opponents of agrarian land reform raped her and killed her uncle while chanting political slogans); *Matter of R-A-*, 22 I&N Dec. 906, 928 (BIA 1999), *vacated*, 22 I&N Dec. 906 (Op. Att’y Gen. 2001) (finding that a woman

cial group formulations, however, are widely disparate; they are therefore vulnerable to being perceived as self-serving legal theories tailored to fit the case at hand.⁶ The acceptance of a proposed social group may often depend on the subjective determination of the adjudicator, which in turn may often depend on whether another protected ground—race, religion, nationality, or political opinion—is implicated. The political implications of gender-based violence, particularly intimate partner violence, are left ignored, unnoticed, or unexplored. Ultimately, the perceived weakness of the political opinion claim will in turn weaken the social group claim.⁷

This Article seeks to strengthen asylum claims based on intimate partner violence-related social group formulations by demonstrating that they are viable on the basis of the applicant's political opinion opposing the dominance of men. This Article argues that abusive partners are *de facto* agents of the state who are responding to a political act: their abused partners' challenge of unquestioned, unrestrained male dominance. This argument stems from the assertion that intimate partner violence, when it occurs in countries that fail or refuse to protect women from it, is a form of state action.⁸ A state that fails or refuses to protect certain citizens from actions of other citizens encourages the persecution of such groups. This Article asserts that intimate partner violence is a similar form of state action. The goal of that state is to oppress women in order to maintain the legal and societal dominance of men. The dominant members of society have articulated that goal by legislating female subordination and/or failing to legislate against female subordination.⁹ Intimate partner violence is one of the most brutal and obvi-

abused by her husband did not suffer persecution on account of her imputed political opinion that women should not be controlled or dominated by men).

⁶ See, e.g., *Matter of R-A-*, 22 I&N Dec. at 917–19 (finding that the particular social group of “Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination” is not a valid social group and suggesting that it “may amount to a legally crafted description of some attributes of her tragic personal circumstances”).

⁷ See *infra* notes 132–144 (discussing viability of claims based solely on the applicant's membership in a particular social group).

⁸ See, e.g., *Pavlova v. INS*, 441 F.3d 82, 91–92 (2d Cir. 2006) (internal citations omitted) (noting the Russian government's unwillingness to protect the persecuted group from civilian attackers and explaining its ruling based on the idea that “private acts may be persecution if the government has proved unwilling to control such actions”); *Singh v. INS*, 94 F.3d. 1353, 1357 (9th Cir. 1996) (noting that the Fijian police department, primarily composed of members of the dominant group, did little or nothing to protect the persecuted group from “discrimination, harassment, and violence” committed by civilians); *In re O-Z- & I-Z-*, 22 I&N Dec. at 26 (finding that the Ukrainian government was “unwilling or unable” to protect the persecuted citizens from civilian attackers and that the police “took no action beyond writing a report” even after the respondent reported multiple incidents).

⁹ See CATHARINE A. MACKINNON, *SEX EQUALITY 2* (2d ed. 2007) (“[T]he second-class status of women as a group is widely documented to be socially and legally institutionalized, cumulatively and systematically shaping access to life chances on the basis of sex.”); see also *id.* (quoting Robert A. Dahl, *Equality Versus Inequality*, 29 PS: POL. SCI. & POL. 639, 643 (1996)) (“The subordination of women [is] institutionalized and enforced by an overwhelming array of the most powerful forces available [including] indi-

ous forms of relegating women to a subordinate status; abusive partners are thus agents of the state-sponsored subordination of women.

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

I. INTIMATE PARTNER VIOLENCE AS A FORM OF PERSECUTION: GUATEMALA AND PAKISTAN

Violence against women and discrimination against women occur in every country and in every socioeconomic sector.¹⁰ This Article does not attempt to catalogue the various forms this violence against women takes, or to critique individual countries or cultures for the role they might play in its proliferation. The following sections instead focus on two countries whose nationals have applied for refugee protection on the basis of intimate partner

vidual and collective terror and violence, official and unofficial; law, custom, and convention; and social and economic structures [and is] backed up by the state itself.”).

¹⁰ UNITED NATIONS DEV. FUND FOR WOMEN, NOT A MINUTE MORE: ENDING VIOLENCE AGAINST WOMEN 8 (2003), available at http://www.unifem.org/attachments/products/312_book_complete_eng.pdf [hereinafter UNIFEM, NOT A MINUTE MORE]; see also WORLD HEALTH ORG., SUMMARY REPORT: WHO MULTI-COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN (2005), available at http://www.who.int/gender/violence/who_multicountry_study/summary_report/summary_report_English2.pdf (providing information on rates of domestic violence in Bangladesh, Brazil, Ethiopia, Japan, Peru, Namibia, Samoa, Serbia and Montenegro, Thailand, and the United Republic of Tanzania).

violence, and whose cases have resulted in influential decisions discussed later in the Article: Guatemala¹¹ and Pakistan.¹²

Guatemala and Pakistan share other similarities as well. They are both democracies with histories of civil unrest; they both have deeply ingrained social mores that place men in a dominant position compared to women; they both have laws that purposefully subjugate women (although both have sought to pass laws and take other measures designed to equalize the status of women and men);¹³ and they both have high levels of intimate partner violence and other forms of violence against women.¹⁴ As the discussion below illustrates, the subjugation of women in both countries has been state-sponsored and carried out both by legislators and other state actors, as well as by private actors—namely, intimate partners—whose actions the state declines to control effectively.

A. Guatemala

The Republic of Guatemala emerged in 1996 from years of civil warfare between leftist guerrillas and a right-wing government on account of a peace accord that was several years in the making.¹⁵ After decades of unrest, coups, and dictatorships, Guatemala is now a constitutional democratic republic with a multiparty system and three independent branches of government.¹⁶ The President, who serves as head of state and head of government, is elected directly by the voting population, and the legislature is elected through a modified proportional representation system.¹⁷

¹¹ See *infra* notes 167–180 and accompanying text (discussing the U.S. asylum case, *Matter of R-A-*, 22 I&N Dec. 906, 928 (BIA 1999), *vacated*, 22 I&N Dec. 906 (Op. Att’y Gen. 2001)).

¹² See *infra* notes 156–165 and accompanying text (discussing the British asylum case *Islam v. Sec’y of State for the Home Dep’t*, [1999] 2 W.L.R. 1015 (H.L.) (appeal taken from Eng.)).

¹³ See AMNESTY INT’L, GUATEMALA: NO PROTECTION, NO JUSTICE: KILLINGS OF WOMEN IN GUATEMALA 6 (2005), available at <http://www.amnesty.org/en/library/info/AMR34/017/2005> [hereinafter AMNESTY INT’L, NO PROTECTION, NO JUSTICE] (“Some positive steps to prevent violence against women have been taken by the Guatemalan authorities including the ratification of international human rights treaties, the introduction of laws and creation of state institutions to promote and protect the rights of women.”). Amnesty International notes, however, that “these measures have frequently not been effectively implemented, monitored or reviewed and have therefore seldom prevented women from suffering violence.” *Id.* See also U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: PAKISTAN 1 (2011) (reporting that a “new law to increase protection against sexual harassment was passed, and more than 40 ministries and departments incorporated the new code of conduct into their policies”). Nevertheless, discrimination and violence against women—particularly domestic violence and “honor killings”—continued to be a significant problem in Pakistan. *Id.* at 52–61.

¹⁴ See *infra* Sections II.A.2 and II.B.1.

¹⁵ U.S. DEP’T OF STATE, BACKGROUND NOTE: GUATEMALA (July 27, 2011), available at <http://www.state.gov/r/pa/ei/bgn/2045.htm>.

¹⁶ *Id.*

¹⁷ *Id.*

Despite its relative political stability, Guatemala continues to suffer the effects of a long history of unrest, including poverty and lingering violence. The World Bank reports that “inequality and poverty—especially in rural and indigenous areas—are among the highest in the region. Stark disparities are embedded in access to health, basic education, social services, and opportunities. Chronic malnutrition and infant and maternal mortality rates still remain intolerably high.”¹⁸ According to the U.S. State Department, “Common and violent crime . . . presents a serious challenge. Impunity remains a major problem, primarily because democratic institutions . . . have developed only a limited capacity to cope with this legacy. Guatemala’s judiciary is independent; however, it suffers from inefficiency, corruption, and intimidation.”¹⁹

Guatemala’s inundation with crime is most starkly evident in crimes perpetrated against women. Intimate partner violence rates are extremely high and there is a disturbing trend of unsolved “femicides.”²⁰ Such violence is attributable, in part, to the economic, social, and political issues described in the instant section. Those issues do not, however, explain the gendered nature that characterizes much of the violence. An exploration of the country’s gendered laws and prevalent attitudes towards women sheds light on the nature of violence against women in Guatemala.

1. *Laws that Subjugate Women*

Guatemala has historically relegated women to a subordinate status.²¹ Guatemala’s Civil Code is an example of state-sponsored subordination of women. Several provisions, now repealed or modified, have historically interfered with women’s ability to achieve economic independence and personal autonomy. Article 110 stated, “The woman, for her part, [as] wife and mother, meets her natural mission, raising and caring for the children and leading domestic chores”²² Article 113 stated that “[t]he wife may

¹⁸ THE WORLD BANK, GUATEMALA: COUNTRY BRIEF (2010), available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/GUATEMALAEXTN/0,,contentMDK:22254443~pagePK:1497618~piPK:217854~theSitePK:328117,00.html>; see also U.S. DEP’T OF STATE, BACKGROUND NOTE: GUATEMALA, *supra* note 15:

According to the World Bank, Guatemala has one of the most unequal income distributions in the hemisphere. The wealthiest 20% of the population consumes 51% of Guatemala’s GDP. As a result, about 51% of the population lives on less than \$2 a day and 15% on less than \$1 a day. Guatemala’s social development indicators, such as infant mortality, chronic child malnutrition, and illiteracy, are among the worst in the hemisphere.

¹⁹ U.S. DEP’T. OF STATE, BACKGROUND NOTE: GUATEMALA, *supra* note 15.

²⁰ See *infra* Section II.A.2.

²¹ AMNESTY INT’L, NO PROTECTION, NO JUSTICE, *supra* note 13, at 5 (“[T]he prevalence of violence against women in Guatemala today has its roots in historical and cultural values which have maintained women’s subordination . . .”).

²² CODE CIVIL [C. CIV.] art. 110 (Guat.) (“La mujer, por su parte, esposa y made, cumple su misión natural, criando y cuidando a sus hijos y dirigiendo los quehaceres

perform a job or engage in a profession, industry, office or business, when it does not negatively affect the interests and care of the children or the upkeep of the home.”²³ Moreover, until 1998 Article 114 stated that “[t]he husband may oppose the wife’s working outside the home, so long as he provides for the household sufficiently and his objection has sufficiently justifiable reasons.”²⁴

The Guatemalan citizenry, through its elected government officials, has thus historically sanctioned the dominance of the male head of the family by enshrining patriarchal notions of gender roles and familial authority in its civil code.²⁵ These laws alone, however, have not entrenched male dominance over women in Guatemala. Widespread intimate partner violence has contributed significantly to the situation. The dominance of male heads of households in Guatemala has been enforced and reinforced by *de jure* agents of the state—law enforcement officials and courts—refusing to prosecute or punish effectively crimes of domestic violence.²⁶ As discussed below, private actors act as *de facto* agents of the state by enforcing state-sanctioned male dominance in the home through physical violence.

2. *Intimate Partner Violence and Other Crimes against Women*

Guatemala has a high rate of intimate partner violence. The United National Special Rapporteur on violence against women reported that approximately “36 per cent of all Guatemalan women who live with a male partner suffer domestic abuse.”²⁷ A report prepared by the Immigration and Refugee Board of Canada cites to a survey conducted in Guatemala in which only seventeen percent of women surveyed reported that they had *not* been

domésticos . . .”). This Article has since been reformed to make both parties equally responsible for the welfare of the children, although as of the time of this publication, Article 110 still includes the following phrase: “El marido debe protección y asistencia a su mujer y está obligado a suministrarle todo lo necesario para el sostenimiento del hogar de acuerdo con sus posibilidades económicas.” (translated as “The husband must provide protection and assistance to his wife and is obligated to supply everything needed to sustain the home according to their economic means.”). *Id.*

²³ *Id.* at art. 113 (La mujer podrá “desempeñar un empleo, ejercer una profesión, industria o comercio, cuando ello no perjudique el interés de los hijos ni las demás atenciones de su hogar.”). This Article of the Code has since been repealed.

²⁴ *Id.* at art. 114 (“El marido puede oponerse a que la mujer se dedique a actividades fuera del hogar, siempre que suministre lo necesario para el sostenimiento del mismo y su oposición tenga motivos suficientemente justificados.”). This Article of the Code has since been repealed.

²⁵ This is so despite women’s participation in government. According to 2009 statistics, 20 women serve in the 158-seat congress, 197 women serve as judges, and six of the country’s 332 mayors are women. U.S. DEP’T. OF STATE, 2009 HUMAN RIGHTS REPORTS: GUATEMALA (Mar. 11, 2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136114.htm>.

²⁶ See *infra* Section II.A.2.

²⁷ Comm’n on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Addendum: Mission to Guatemala, ¶ 33, U.N. Doc. E/CN.4/2005/72/Add.3 (Feb. 10, 2005) (internal citation omitted). The Commission’s report noted that this estimate was “conservative.” *Id.*

victims of mistreatment at home.²⁸ Some reports put the incidence of domestic violence at as high as ninety percent.²⁹

The laxity of the laws against domestic violence may actually contribute to the high rate of intimate partner violence. For instance, the U.S. Department of State reports that although Guatemalan law prohibits domestic violence, abusers may be charged with the crime only if bruises remain visible on the victim for ten days.³⁰ Not surprisingly, the conviction rate is extremely low: out of more than 13,700 complaints of domestic violence against women and children in 2005, prosecutors pursued only 3,096 cases and secured convictions in only 105 cases.³¹ Until as recently as 2007, the law did not provide for prison sentences for convicted perpetrators.³²

Guatemala also has an extraordinarily high rate of femicide.³³ Since 2000, nearly 5,000 women have been murdered in Guatemala.³⁴ Although femicide rates are also high in neighboring countries,³⁵ human rights organizations are particularly concerned about the murders in Guatemala due to the

²⁸ IMMIGRATION & REFUGEE BD. OF CAN., GUATEMALA: DOMESTIC VIOLENCE; RESOURSE AND SERVICES AVAILABLE TO VICTIMS (2005–SEPTEMBER 2006) (2006), available at <http://www.unhcr.org/refworld/docid/45f1473d2f.html>.

²⁹ AMNESTY INT'L, THE AMERICAS: IT'S TIME TO PUT AN END TO VIOLENCE AGAINST WOMEN: 25 NOVEMBER—INTERNATIONAL DAY FOR THE ELIMINATION OF VIOLENCE AGAINST WOMEN 3 (2003), available at <http://www.amnesty.org/en/library/asset/AMR01/013/2003/en/2411377b-d662-11dd-ab95-a13b602c0642/amr010132003en.pdf> (reporting that nine out of ten women in Guatemala have “been victims of violence within the home” according to the *Red No Violencia contra las Mujeres* (Network for Non-Violence against Women)).

³⁰ U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR: GUATEMALA (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61729.htm>.

³¹ *Id.*

³² See U.S. DEPT. OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR: GUATEMALA (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100641.htm> (reporting that the law did not provide for prison sentences for perpetrators of domestic violence); see also Decreto No. 22-2008, 28 April 2008, Ley contra el Femicidio y otras Formas de Violencia contra la Mujer [Law Against Femicide and Other Forms of Violence Against Women] art. 6–10, DIARIO DE CENTRAL AMERICA, May 7, 2008 (Guat.) (providing prison sentences for physical, psychological, and economic violence against women).

³³ See RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 708 (2d ed. 1997) (defining “femicide” as “the act of killing a woman”).

³⁴ *For Women's Right to Live Program*, GUAT. HUMAN RIGHTS COMM'N/USA, <http://www.ghrc-usa.org/Programs/ForWomensRighttoLive.htm> (last visited Oct. 30, 2011); see also AMNESTY INT'L, NO PROTECTION, NO JUSTICE, *supra* note 13, at 3 (internal citation omitted) (citing registered deaths of 1,188 women in Guatemala between 2001 and 2004).

³⁵ See Mario Cordero, *Territori común para los feminicidios*, LA HORA (Jan. 19, 2010), <http://www.lahora.com.gt/index.php/nacional/Guatemala/reportajes-y-entrevistas/122860-territorio-comun-para-los-feminicidios>, translation available at *Central America: Common Territory for Femicide*, GUAT. HUMAN RIGHTS COMM'N/USA, http://www.ghrc-usa.org/Resources/2009/femicide_CA.htm (last visited Oct. 30, 2011) (citing the following femicide rates in 2006: 10 women per 100,000 people in Guatemala, 13 women per 100,000 people in El Salvador, 13 women per 100,000 people in Honduras, and 5 women per 100,000 people in the Dominican Republic); see also *For Women's Right to Live Program*, *supra* note 34 (“More women have been killed in one year [2010] in Guatemala than were murdered in the past decade in Ciudad Juárez, Mexico.”).

brutality and sexual violence present in many of them.³⁶ Also troubling are the poor investigative techniques,³⁷ low conviction rate,³⁸ law enforcement attitudes towards victims³⁹ and towards crimes against women in general,⁴⁰ and the steady yearly increase in femicides.⁴¹

These high rates of domestic violence and unsolved femicides evince legal and cultural norms specifically designed to devalue women, marginalize them economically and socially, and preserve male dominance of soci-

³⁶ AMNESTY INT'L, NO PROTECTION, NO JUSTICE, *supra* note 13, at 10–12. Many women's bodies have been found mutilated and many of the victims had been raped. *Id.* at 10–11.

³⁷ *Id.* at 15–20;

Amnesty International has found serious and persistent shortcomings in the way the authorities have responded to many cases of killings of women at every stage of the investigative process. These deficiencies have included delays and insufficient efforts by police to locate women who have been reported missing; failure to protect the crime scene once a body has been discovered or gather necessary forensic or other evidence; failure to follow up on possible crucial evidence; and failure to act on arrest warrants. In many cases, investigations have been partial, while in others they have been totally absent. . . . A lack of training in investigative techniques, lack of technical resources and lack of coordination and cooperation between state institutions particularly between police investigation units and the offices of the Public Ministry has meant that many cases have not gone beyond the initial investigation stage.

Id. at 15.

³⁸ *Id.* at 22–23. In 2004, the Office of the Special Prosecutor for Crimes Against Women had obtained only one conviction out of the 150 cases it was handling. *Id.* at 22.

³⁹ *See id.* at 18 (noting that Guatemalan law enforcement officials tend to categorize the murders as the result of “passionate problems” or “personal problems”). Law enforcement officials also tend to blame the victims, attributing their victimization to gang membership, going to nightclubs, wearing short skirts, declining to pray or attend church, and other behavior deemed suspect. *Id.* at 21–22.

⁴⁰ *See id.* at 9 (citing Press Release, IACHR Special Rapporteur on the Rights of Women (Sept. 18, 2004) (noting that in Guatemala, “Violence in the family and domestic violence affect women in particular but are not considered a public security issue.”)). The Special Rapporteur goes on to criticize the “absence of studies or statistics on the prevalence of violence in the family or domestic violence, as well as . . . the lack of information on sexual crimes that mainly affect women.” *Id.*

⁴¹ *Id.* at 8–9. The Guatemalan National Civilian Police (Policía Nacional Civil, or PNC) reported 163 femicides in 2002, 383 in 2003, and 527 in 2004. *Id.* at 4, 8–9. The number rose to 665 in 2005 and 603 in 2006. JULIE SUAREZ & MARTY JORDAN, GUAT. HUMAN RIGHTS COMM'N/USA, THREE THOUSAND AND COUNTING: A REPORT ON VIOLENCE AGAINST WOMEN IN GUATEMALA 1 (2007), available at <http://www.ghrc-usa.org/Programs/ForWomensRighttoLive/ThreethousandandCounting,AReportonViolenceAgainstWomeninGuatemala.pdf>. In 2009, 708 women were killed; in 2010, 630 were killed. *For Women's Right to Live Program, supra* note 34. Researchers caution that “[t]he precise number of women killed in Guatemala is uncertain due to the lack of reliable statistics and differences among the criteria used by various agencies to compile data.” ADRIANA BELTRAN & LAURIE FREEMAN, WASHINGTON OFFICE ON LATIN AMERICA, HIDDEN IN PLAIN SIGHT: VIOLENCE AGAINST WOMEN IN MEXICO AND GUATEMALA 2 (2007), available at http://www.wola.org/publications/hidden_in_plain_sight_violence_against_women_in_mexico_and_guatemala. *See also* AMNESTY INT'L, NO PROTECTION, NO JUSTICE, *supra* note 13, at 3–5 (noting that reported numbers vary depending on the source, that the reported numbers may be conservative due to reluctance to report crimes, and that there is an “almost total absence of sex-disaggregated data in official documents”).

ety. As discussed below, there are striking similarities in Pakistan's laws and culture.

B. Pakistan

The Islamic Republic of Pakistan has a long history of political unrest characterized by corruption, periods of martial law, and occasional coups.⁴² After nine years under the military dictatorship and subsequent presidency of Pervez Musharraf, Pakistan reverted to a parliamentary democracy in 2008.⁴³ The presidency is now a more ceremonial position, while the prime minister acts as head of the government.⁴⁴ The parliament consists of a 100-seat indirectly-elected Senate and a 342-seat National Assembly, which has sixty seats reserved for women.⁴⁵ The judiciary consists of a Supreme Court, provincial courts, and Shari'a (Islamic) courts.⁴⁶

In addition to its political challenges, Pakistan faces enormous social and economic challenges. Human Rights Watch reported that in 2009, "[t]he security situation significantly worsened, with bombings and targeted killings becoming a daily fact of life even in the country's biggest cities."⁴⁷ The U.S. Department of State reports that "[l]ow levels of spending in the social services and high population growth have contributed to persistent poverty and unequal income distribution" and that "Pakistan's extreme poverty and underdevelopment are key concerns"⁴⁸ Sectarian violence resulted in hundreds of deaths in 2009 alone, and hundreds of cases of politically motivated killings and disappearances were reported between 2007 and 2009.⁴⁹

A particular area of concern with respect to the high level of violence is that which occurs against women. The U.S. Department of State reported in 2009 that "[r]ape, domestic violence, sexual harassment, and abuse against women remained serious problems."⁵⁰ As discussed below, violence against women in Pakistan is widespread, and law enforcement attitudes and practices tend to re-victimize rather than empower victims.

⁴² U.S. DEP'T. OF STATE, BACKGROUND NOTE: PAKISTAN (Oct. 6, 2010), available at <http://www.state.gov/r/pa/ei/bgn/3453.htm#gov>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ HUMAN RIGHTS WATCH, WORLD REPORT 2010: PAKISTAN (2010), available at <http://www.hrw.org/en/node/87399>.

⁴⁸ U.S. DEP'T. OF STATE, BACKGROUND NOTE: PAKISTAN, *supra* note 42.

⁴⁹ U.S. DEP'T. OF STATE, 2009 HUMAN RIGHTS REPORT: PAKISTAN (Mar. 11 2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136092.htm>.

⁵⁰ *Id.*

1. *Intimate Partner Violence and Other Crimes against Women*

Common crimes against women in Pakistan include rape,⁵¹ domestic violence,⁵² forced marriage,⁵³ burning in kitchen stoves,⁵⁴ disfigurement by acid-throwing attacks,⁵⁵ and “honor killings.”⁵⁶ Intimate partner violence is also believed to be significantly underreported,⁵⁷ but the Human Rights Commission of Pakistan reported in 1998 that at least fifty-two percent of urban women and a higher percentage of rural women suffer violence at the hands of their husbands.⁵⁸ Family-perpetrated murder of women in Pakistan is also on the rise.⁵⁹

Women are also vulnerable to disfigurement and murder by their husbands, fathers, or brothers for suspected or actual acts perceived to have wounded their husbands’ or families’ honor. So-called “honor killings” occur as retribution for offenses such as choosing a marriage partner against the wishes of the family,⁶⁰ seeking divorce,⁶¹ having a sexual relationship

⁵¹ HUMAN RIGHTS WATCH, *WORLD REPORT 2010: PAKISTAN*, *supra* note 47. *See also* AMNESTY INT’L, *HUMAN RIGHTS IN ISLAMIC REPUBLIC OF PAKISTAN: REPORT 2009* (2009), *available at* <http://www.amnesty.org/en/region/pakistan/report-2009> [hereinafter AMNESTY INT’L, 2009 REPORT ON PAKISTAN]; U.S. DEP’T. OF STATE, 2009 HUMAN RIGHTS REPORT: PAKISTAN, *supra* note 49.

⁵² HUMAN RIGHTS WATCH, *WORLD REPORT 2010: PAKISTAN*, *supra* note 47; AMNESTY INT’L, 2009 REPORT ON PAKISTAN, *supra* note 51; U.S. DEPT. OF STATE, 2009 HUMAN RIGHTS REPORT: PAKISTAN, *supra* note 49.

⁵³ HUMAN RIGHTS WATCH, *WORLD REPORT 2010: PAKISTAN*, *supra* note 47; AMNESTY INT’L, 2009 REPORT ON PAKISTAN, *supra* note 51.

⁵⁴ UNITED NATIONS CHILDREN’S FUND, *Domestic Violence Against Women and Girls*, 6 INNOCENT DIG. 1, 7 (June 2000) [hereinafter UNICEF, *Domestic Violence Against Women and Girls*]; U.S. DEP’T. OF STATE, 2009 HUMAN RIGHTS REPORT: PAKISTAN, *supra* note 49; DR. RAKSHINDA PERVEEN, AURAT FOUND., *VIOLENCE AGAINST WOMEN IN PAKISTAN: A QUALITATIVE REVIEW OF STATISTICS FOR 2009 22* (2010), *available at* <http://www.af.org.pk/PDF/VAW%20Reports%20AND%20PR/VAW%20Report%202009.pdf>.

⁵⁵ *See* PERVEEN, *supra* note 54, at 21 (describing the practice of acid throwing):

Perpetrators throw acid at women, usually on their faces with the intent to mutilate their faces forever. The attack leads to severe burning and badly damages skin tissues often exposing and sometimes even dissolving the underlying bones. The consequences of these attacks include blindness and permanent scarring of the face and body.

⁵⁶ UNICEF, *Domestic Violence Against Women and Girls*, *supra* note 54, at 6; AMNESTY INT’L, 2009 REPORT ON PAKISTAN, *supra* note 51.

⁵⁷ *See* PERVEEN, *supra* note 54, at 13 (discussing the underreporting of intimate partner violence in Pakistan).

⁵⁸ AMNESTY INT’L, *PAKISTAN: HONOUR KILLINGS OF GIRLS AND WOMEN 10* (1999), *available at* <http://www.amnesty.org/en/library/asset/ASA33/018/1999/en/9fe83c27-e0f1-11dd-be39-2d4003be4450/asa330181999en.pdf> [hereinafter AMNESTY INT’L, *HONOUR KILLINGS*].

⁵⁹ UNICEF, *Domestic Violence Against Women and Girls*, *supra* note 54, at 7 (“[D]eaths by kitchen fires are also on the rise” and that “at least four women are burned to death daily by husbands and family members as a result of domestic disputes.”).

⁶⁰ AMNESTY INT’L, *HONOUR KILLINGS*, *supra* note 58, at 6.

⁶¹ *Id.* at 7–8.

outside marriage,⁶² being raped,⁶³ or defying the authority of a husband or family.⁶⁴ The Aurat Foundation, a Pakistani human rights organization, reported that 604 “honor killings” took place in Pakistan in 2009.⁶⁵

Pakistan has made some attempts to protect women from violence.⁶⁶ For example, an ordinance that placed rape within the jurisdiction of Islamic courts and thus required a rape victim to produce four corroborating male witnesses was supplanted by the Protection of Women Act of 2006, which removed the crime of rape from Islamic courts, thereby eliminating the “four male witnesses” corroboration requirement.⁶⁷ In another promising development, the Pakistani National Assembly passed the Domestic Violence (Prevention and Protection) Bill in August 2009.⁶⁸ However, the Senate allowed the bill to lapse, reportedly because of the objections of a conservative senator, who argued that the bill was not “male-friendly” and that it was contrary to Islamic law.⁶⁹

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

Women who tried to report abuse faced serious challenges. Police and judges were reluctant to take action in domestic violence cases, viewing them as family problems. Police, instead of filing charges, usually responded by encouraging the parties to reconcile. Abused women usually were returned to their abusive family members. Women were reluctant to pursue charges because of the stigma attached to divorce and their economic and psychological dependence on relatives. Relatives were hesitant to report abuse for fear of dishonoring the family.⁷⁰

The Aurat Foundation concurs that “[v]ictims are always in a quandary: if they dare report violence, they invariably face police obstruction and societal pressure.”⁷¹ Thus, despite efforts on the part of some government officials

⁶² *Id.* at 5.

⁶³ *Id.* at 8.

⁶⁴ *Id.* at 5.

⁶⁵ PERVEEN, *supra* note 54, at 9.

⁶⁶ See PERVEEN, *supra* note 54, at 2 (stating that “[t]he elimination of [violence against women] is a priority of the Pakistani Government”).

⁶⁷ U.S. DEP’T OF STATE, 2009 HUMAN RIGHTS REPORT: PAKISTAN, *supra* note 49.

⁶⁸ HUMAN RIGHTS WATCH, WORLD REPORT 2010: PAKISTAN, *supra* note 47. According to Human Rights Watch, “[t]he law seeks to prevent violence against women and children through quick criminal trials and a chain of protection committees and protection officers.” *Id.*

⁶⁹ Aroosa Masroor, *Two Women Abused Every Hour in Pakistan*, EXPRESS TRIB. (Aug. 2, 2010), available at <http://tribune.com.pk/story/33509/two-women-abused-every-hour-in-pakistan/>.

⁷⁰ U.S. DEP’T OF STATE, 2009 HUMAN RIGHTS REPORT: PAKISTAN, *supra* note 49.

⁷¹ PERVEEN, *supra* note 54, at xx.

and bodies to eliminate violence against women, the state seems to be reluctant to upset the status quo in the face of societal pressure.⁷² The deeply embedded cultural beliefs that commodify women, render them subject to male heads of households, and discourage law enforcement and judicial officers from adequately addressing domestic violence thus continue to be reflected in Pakistan's laws.

2. *Laws that Subjugate Women*

Pakistan has historically relegated women to second-class status.⁷³ Pakistani Shari'a courts, which operate alongside civil and criminal courts, apply Shari'a law in ways that discriminate against women, and in some parts of the country, Shari'a courts and tribal councils comprise the entirety of the legal system.⁷⁴ Even where the law provides for women's rights, "[t]he Government of Pakistan has failed to ensure that women are aware of their legal and constitutional rights and to ensure that these rights and freedoms take precedence over norms which deny women equality."⁷⁵

Several laws—particularly those which fall under the category of Shari'a law—either directly discriminate against women or are interpreted in a manner that has a disproportionately negative impact on women. As an example of the former, Pakistani Shari'a courts require witnesses to be male.⁷⁶ The 1979 "Zina Law"⁷⁷ proscribes adultery and fornication,⁷⁸ and

⁷² See *id.* at 11 (noting that social endorsement of violence against women is reflected in the "callous responses many provincial assemblies" and "national legislative bodies have adopted . . . [in] shocking cases of [violence against women]. . . . [A] few men legislators tried to justify burying women alive in the name of tradition in 2008; and a majority of men and women legislators remained silent on the issues . . .").

⁷³ See *id.* at xxi:

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

⁷⁴ U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: PAKISTAN, *supra* note 49. The Department of State reports "The Provincially Administered Tribal Areas (PATA) of the NWFP, [including] parts of the former princely states of Swat, Dir, and Chitral, fall under Shari'a law. Under its provisions, judges . . . are assisted by religious scholars. On February 15, the government extended [it] to the entire Malakand Division." *Id.* In the Federally Administered Tribal Areas of Pakistan, tribal leaders operate under a completely separate system of justice in which they "conduct[] hearings according to Islamic law and tribal custom." *Id.*

⁷⁵ AMNESTY INT'L, HONOUR KILLINGS, *supra* note 58, at 12.

⁷⁶ See, e.g., The Offense of *Zina* (Enforcement of Hudood) Ordinance, No. 7 of 1979, PAK. CODE, v. 20, S. 8(b), Feb. 19, 1979 (requiring four male witnesses to prove adultery).

⁷⁷ *Id.*

⁷⁸ See *id.* at S. 4 (defining "zina" as "a man and woman . . . willfully hav[ing] sexual intercourse without being married to each other"). The punishment for *zina* is stoning to death in public for people who are *muhsan* [a free, sane, Muslim adult male or

has been used by fathers to bring *zina* charges against daughters who seek to marry someone of their own choosing.⁷⁹ The 1990 Qisas and Diyat Ordinance, codified in 1997 by the Qisas and Diyat Act,⁸⁰ amended the Pakistani penal code to limit state involvement in physical injury, manslaughter, and murder cases, sending the message “that murders of family members are a family affair and that prosecution and judicial redress are not inevitable but may be negotiated.”⁸¹ One of the sentencing provisions of this law allows a man who has murdered his wife to serve only fourteen years imprisonment if they have a child in common.⁸²

The Pakistani citizenry, through its elected government officials, has thus sanctioned the dominance of the male head of the family by failing to pass legislation that would protect women from intimate partner violence.⁸³ *De jure* agents of the state—law enforcement officials and courts—have enforced and reinforced this dominance by refusing to prosecute or effectively punish crimes of domestic violence.⁸⁴ Batterers act as *de facto* agents of the state by enforcing state-sanctioned notions of male dominance in the home through physical violence.

II. THE UNITED STATES AND THE POLITICS OF GENDER

Like Guatemala and Pakistan, the United States has also struggled with protecting women from intimate partner violence. In the United States, inti-

female who, while lawfully married, had sexual intercourse with his or her spouse], and one hundred lashes for those who are not *muhsan*. *Id.* at S. 5(2).

⁷⁹ AMNESTY INT’L, HONOUR KILLINGS, *supra* note 58, at 13.

⁸⁰ “Qisas” means “punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim” Criminal Law (Amendment) Act, No. 2 of 1997, THE GAZETTE OF PAKISTAN EXTRAORDINARY, S. 299(k), Apr. 11, 1997, *reprinted in* TAHIR WASTI, THE APPLICATION OF ISLAMIC CRIMINAL LAW IN PAKISTAN: SHARIA IN PRACTICE 331 (2009). “Diyat” is compensation paid to the heirs of the victim pursuant to Islamic law, also known as “blood money.” Criminal Law (Amendment) Act, No. 2 of 1997, THE GAZETTE OF PAKISTAN EXTRAORDINARY, S. 299(e), Apr. 11, 1997, *reprinted in* WASTI, *supra* at 330. This law is popularly known as the Qisas and Diyat Ordinance. *See generally* AMNESTY INT’L, EXECUTIONS UNDER THE QISAS AND DIYAT ORDINANCE (1995), *available at* <http://www.amnesty.org/en/library/info/ASA33/013/1995/en> (documenting death sentences handed down under the Qisas and Diyat Ordinance).

⁸¹ AMNESTY INT’L, HONOUR KILLINGS, *supra* note 58, at 12.

⁸² Criminal Law (Amendment) Act, No. 2 of 1997, THE GAZETTE OF PAKISTAN EXTRAORDINARY, S. 306(c), S. 308(2), Apr. 11, 1997, *reprinted in* WASTI, *supra* note 80, at 331. This punishment was later increased to twenty-five years. Criminal Law (Amendment) Act, No. 1 of 2005, THE GAZETTE OF PAKISTAN EXTRAORDINARY, S. 5(b), Jan. 11, 2005.

⁸³ *See* Masroor, *supra* note 69.

⁸⁴ Feudal landlords and tribal leaders in the semi-autonomous tribal regions have also enforced and reinforced male dominance by dispensing penalties, such as exchange of brides between clans and tribes, that disproportionately affect women. U.S. DEPT. OF STATE, 2009 HUMAN RIGHTS REPORT: PAKISTAN, *supra* note 49. *See also* PERVEEN, *supra* note 54, at xxi (stating that minor girls are often treated like merchandise by tribal councils in resolving disputes).

mate partner violence has traditionally been relegated to the dark corners of the “private sphere,” shut off from public acknowledgment, discussion, and redress.⁸⁵ Only in the latter half of the twentieth century did intimate partner violence begin to receive societal and legal recognition in the United States, in large part due to political battles waged by women and their supporters against the overwhelmingly male power structure.⁸⁶ Thus, as women asserted their humanity and insisted upon equal rights and equal treatment under the law, legislators and law enforcement began to take intimate partner violence more seriously.

Today, intimate partner violence in the United States may not be as common as it is in Guatemala and Pakistan, but it does occur at a significant rate.⁸⁷ According to data collected in 2005 by the Centers for Disease Control and Prevention, approximately twenty-five percent of women in the United States have experienced intimate partner violence.⁸⁸ The Department of Justice reports that women are still at a significantly higher risk of being killed by an intimate partner than men,⁸⁹ but the rate of intimate partner violence fatalities dropped considerably between 1993 and 2007.⁹⁰

⁸⁵ This notion of the “private sphere” refers to a feminist critique that “much conduct that would be considered criminal if it occurred between strangers is considered acceptable if it occurs between intimates.” GENDER AND LAW: THEORY, DOCTRINE AND COMMENTARY 536 (Katherine T. Bartlett & Deborah L. Rhode eds., 4th ed. 2006) [hereinafter GENDER AND LAW].

⁸⁶ See *id.* at 490–93 (providing a history of efforts in the nineteenth and twentieth centuries to “make ‘private’ violence a public issue”).

⁸⁷ See SHANNON CATALANO, HOWARD SNYDER & MICHAEL RAND, U.S. DEP’T OF JUSTICE, FEMALE VICTIMS OF VIOLENCE 1 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fvv.pdf> (reporting that intimate partner violence occurs in the United States at a rate of 4.3 victimizations per 1,000 females age 12 and over); WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 89 (2002), available at <http://whqlibdoc.who.int/hq/2002/9241545615.pdf> (reporting that worldwide, “between 10% and 69% of women reported being physically assaulted by an intimate male partner at some point in their lives”). According to WHO surveys, “[t]he percentage of women who had been assaulted by a partner in the previous 12 months varied from 3% or less for women in Australia, Canada and the United States,” whereas rates for women in other countries ranged from 27% in Nicaragua to 38% in South Korea and 52% among Palestinian women in the West Bank and Gaza Strip. *Id.* See also UNIFEM, NOT A MINUTE MORE, *supra* note 10, at 8 (internal citation omitted) (reporting that one in three women throughout the world will experience at least one form of gender-based violence); *id.* at 15 (stating that violence against women “is the most universal and unpunished crime of all”).

⁸⁸ CTRS. FOR DISEASE CONTROL & PREVENTION, *Adverse Health Conditions and Health Risk Behaviors Associated with Intimate Partner Violence—United States*, 2005, 57 *Morbidity & Mortality Wkly. Rep.* 113 (2008), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5705a1.htm>. According to an erratum published on March 7, 2008, the actual percentage is 26.4. CTRS. FOR DISEASE CONTROL & PREVENTION, *Errata*, 57 *MORBIDITY & MORTALITY WKLY. REP.* 237 (2008), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5709a7.htm>.

⁸⁹ See CATALANO ET AL., *supra* note 87, at 3 (reporting that in 2007, “24% of female homicide victims were killed by a spouse or ex-spouse,” whereas only 2% of male homicide victims were killed by a spouse or ex-spouse).

⁹⁰ *Id.* at 3 (reporting that between 1993 and 2007, “Homicide victims killed by intimate partners fell 29%, with a greater decline for males (-36%) than females (-26%).”).

As discussed below, the politics of gender heavily influenced social and legal attitudes towards intimate partner violence in the United States. As discussed further on in Part IV, vestiges of these attitudes persist in modern U.S. adjudication of gender-based asylum claims.

A. *Protecting the Private Sphere*

The English common law principle known as “coverture” was perhaps the most effective legal and social regime designed to entrench men’s domination of women.⁹¹ According to the principles of coverture, a woman literally ceased to exist as a legal entity upon her marriage and came almost entirely under the control of her husband.⁹² He spoke and contracted on her behalf, was responsible for her material support, and was accountable for her misdeeds.⁹³ With this significant responsibility came the right, also considered an obligation, to chastise his wife as he saw fit.⁹⁴

⁹¹ See Janet Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 596–600 (1991) (includes a brief discussion of the history and effects of coverture).

⁹² See WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 430–32 (1765–1769), reprinted in GENDER AND LAW, *supra* note 85, at 314 [hereinafter BLACKSTONE] (“By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything . . .”).

⁹³ See *id.* (“The husband is bound to provide his wife with necessaries by law . . . and, if she contracts debts for them, he is obliged to pay them. . . . If the wife be indebted before marriage, the husband is bound afterwards to pay the debt . . .”). Blackstone continues to state, “But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion.” *Id.* at 315. See also Elizabeth Cady Stanton, *Address to the Legislature of the State of New York (Feb. 14, 1854)*, in 1 HISTORY OF WOMAN SUFFRAGE, 1848–1861, 595–99, 602–05 (Elizabeth Cady Stanton et al. eds., reprint ed. 1985), reprinted in GENDER AND LAW, *supra* note 85, at 8–13.

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

Id. at 10.

⁹⁴ See BLACKSTONE, *supra* note 92, at 432–33, reprinted in GENDER AND LAW, *supra* note 85, at 479:

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

The law enforced the principles of coverture, and thus of female subjugation, in various ways. Women were unable to retain their own names upon marriage.⁹⁵ Women were not granted custody of children in the event of divorce.⁹⁶ Married women could not own property.⁹⁷ The law thus ensured that women had to give up their identities, be docile and obedient, and remain married under any circumstances in order to have a roof over their heads and a life with their children.

Coverture was an integral part of a legal and social structure that divided society into two separate spheres: the private and the public. The public sphere was that of commerce and government. The private sphere was that of home and family. Legal and social norms operated to ban women from the public sphere, and to emphasize their essential role within the pri-

⁹⁵ See *Chapman v. Phoenix Nat'l Bank*, 85 N.Y. 437, 449 (1881) (noting that under the common law, a woman, upon marriage, takes her husband's surname. His surname "becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby."); see also *Forbush v. Wallace*, 341 F. Supp. 217, 223 (M.D. Ala. 1971) (upholding a law requiring a married woman to use her husband's surname when applying for a driver's license); *In re Lawrence*, 319 A.2d 793, 801 (Bergen Cnty. Ct., N.J. 1974), *rev'd*, 337 A.2d 49 (N.J. Super. Ct. App. Div. 1975) (denying the petition of a married woman to resume the use of her "maiden" name as her sole legal name, and commenting that even after a divorce a court may refuse to permit a woman to resume her "maiden" name).

⁹⁶ See *Stanton*, *supra* note 93, at 602–03, *reprinted in GENDER AND LAW*, *supra* note 85, at 11:

In case of separation, the law gives the children to the father; no matter what his character or condition. At this very time we can point you to noble, virtuous, well-educated mothers in this State, who have abandoned their husbands for their profligacy and confirmed drunkenness. All these have been robbed of their children, who are in the custody of the husband, under the case of his relatives, whilst the mothers are permitted to see them but at stated intervals

This began to change in the latter part of the nineteenth century, with the advent of the "tender years" doctrine. See Rena K. Uviller, *Father's Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 113 (1978) (internal citation omitted):

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

⁹⁷ Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1366 (1983). This began to change in the mid-nineteenth century with the passage of Married Women's Property Acts, such as that which passed in New York in 1848. See *Married Women's Property Act*, 1848 N.Y. Laws 307–08:

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

vate sphere.⁹⁸ But even though the law provided men with the ability to wield absolute power over women, it did nothing to protect women from the abuse of that power.⁹⁹

Coverture contributed to the longevity of intimate partner violence in two ways: it provided a legal basis for men's dominance over women within the family, and it placed the family in the private sphere, isolated from the reaches of the courts. The notion of the private sphere, consisting of a man's home and family, was a sacred one—even if that man treated his family and dependents in ways that would be punishable had the victims been strangers.¹⁰⁰ Consistent with this principal of male domination of the family, intimate partner violence was considered a private matter for most of U.S. history, not fit for examination by the courts.¹⁰¹ Even once society evolved to the point where such violence was generally (though by no means entirely) frowned upon, courts and lawmakers refused to interfere in that impenetrable construct known as the private sphere.¹⁰² Thus, as Louisa May Alcott remonstrated about the queens of hearth and home, “the kingdom given them isn't worth ruling.”¹⁰³

In order to overcome the confines of coverture and achieve protection from the tyranny of men in the home, women first had to convince the ruling class of men to recognize women as autonomous human beings. For men to

⁹⁸ See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (upholding denial of admission to the Illinois bar to a woman on the basis that, “the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”)

⁹⁹ See Elizabeth Schneider, *The Violence of Privacy*, in D. KELLY WEISBERG, *APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION* 388, 391 (1996) (asserting that “[p]rivacy says that [a violent relationship] is an individual problem, not a systematic one. Privacy operates as a mask for inequality, protecting male violence against women.”).

¹⁰⁰ See Joanna L. Grossman, *Separated Spouses*, 53 *STAN. L. REV.* 1613, 1628 n.75 (2001) (reviewing HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000)) (citing Reva B. Siegel, “*The Rule of Love*”: *Wife-Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2157 (1996)) (“[A]lthough the right of chastisement was repudiated under marital status law, it was ultimately sustained by the doctrine of marital privacy. Thus . . . although nineteenth-century courts did not articulate wife-beating as a ‘right,’ they gave effect to it by refusing to interfere in the relationship between husband and wife.”).

¹⁰¹ See generally Siegel, *supra* note 100 (discussing the role of the privacy construct in battering relationships).

¹⁰² See *State v. Rhodes*, 61 N.C. 453, 460 (1868) (affirming the not guilty verdict of a man who had beaten his wife). The court reasoned that “however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber.” *Id.* at 457. In the next decade, the Court overruled this case and others standing for the proposition that a husband had a right to whip his wife with a switch no larger than his thumb. See, e.g., *State v. Oliver*, 70 N.C. 60 (1874).

¹⁰³ LOUISA MAY ALCOTT, *AN OLD-FASHIONED GIRL* 264 (Boston, Roberts Brothers 1872).

accept such a concept, however, meant giving up significant power: the power to control and dominate women. No matter how lowly the lowliest man was, he was always above his woman. That was a difficult political battle to win, and one that continues to be fought on various levels.

B. *Moving Beyond the Private Sphere*

By the 1920s, women in the United States and other industrialized countries had won some freedom from the confines of the private sphere. They had gained the right to participate in public civic life through voting, holding public office, and serving on juries.¹⁰⁴ But even as women were increasingly permitted to function on equal footing in some very important areas of the public sphere, the home remained a dangerous place for women in abusive marriages until the latter part of the twentieth century.¹⁰⁵

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

When a husband assaults his wife it is usually late at night and frequently out of the presence of witnesses except, as in this case, in front of a helpless and disturbed child. The officer responding to the call for help, as in this case, must determine whether a felony or a misdemeanor has been committed. If he determines that a misdemeanor has been committed he is powerless to effect an arrest, inasmuch as it was not committed in his presence, unless the wife makes a citizen's arrest, a most unlikely course of action. He must therefore leave the wife in the home wherein the beating took place. . . . Even the infliction upon a wife of considerable traumatic injury would tend to be treated by the arresting officer as a misdemeanor which would produce the consequences of the wife's being left in the home to face possible further aggression.¹⁰⁶

Despite the historical condemnation of intimate partner violence and the growing willingness to recognize it as a crime, "[t]hroughout the 1960s and 1970s, the underenforcement of crimes involving family members was notorious."¹⁰⁷ It was therefore considered a victory of the feminist move-

¹⁰⁴ See generally Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657 (1996) (giving a concise history of women's political and civic advancements in the United States).

¹⁰⁵ See Elizabeth Schneider, *supra* note 99, at 388 (noting that the privacy construct allowed intimate partner violence to be "untouched by law" until the advent of the battered women's movement in the latter part of the twentieth century).

¹⁰⁶ *People v. Cameron*, 53 Cal. App. 3d 786, 792-93 (1975).

¹⁰⁷ GENDER AND LAW, *supra* note 85, at 491.

ment when, in 1994, Congress passed the Violence Against Women Act,¹⁰⁸ legislation that made significant progress in recognizing and combating intimate partner violence. Provisions included, *inter alia*: a reduction in “unwarranted disparities between the sentences for sex offenders who are known to the victim and sentences for sex offenders who are not known to the victim”;¹⁰⁹ the authorization of grants to encourage “mandatory arrest programs and policies for protection order violations”;¹¹⁰ the authorization of grants “to establish projects in local communities involving many sectors of each community to coordinate intervention and prevention of domestic violence”;¹¹¹ and special immigration provisions for battered immigrants.¹¹²

Despite the significant progress that has been made since the 1980s in combating intimate partner violence, it continues to be a pervasive problem in the United States.¹¹³ Nevertheless, the Violence Against Women Act, which continues to be reauthorized periodically,¹¹⁴ and other initiatives demonstrate a sincere commitment on the part of the U.S. government to address the problem of crimes that primarily affect women.¹¹⁵ This commitment represents a victory in the ongoing struggle for the recognition that women are just as fully human as men, and thus must enjoy the same level of respect for their human rights.¹¹⁶

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

¹⁰⁸ Violence Against Women Act of 1994, Pub. L. No. 103–322, 108 Stat. 1941–42 (1994) [hereinafter VAWA 1994].

¹⁰⁹ *Id.* at § 40212(a)(1).

¹¹⁰ *Id.* at § 40231(c).

¹¹¹ *Id.* at § 40261.

¹¹² *Id.* at § 40701.

¹¹³ See CATALANO ET AL., *supra* note 87, at 1. The most recent U.S. Department of Justice statistics estimate that there were 552,000 nonfatal incidents of intimate partner violence against females age 12 or older, a rate of 4.3 victimizations per one thousand. *Id.*

¹¹⁴ The most recent reauthorization was the Violence Against Women and Department of Justice Reauthorization Act of 2005, 42 U.S.C. § 14043 (2006); the statute will be up for reauthorization again in 2011.

¹¹⁵ See, e.g., Trafficking Victims Protection Act, 22 U.S.C. 7104 §§ 103(8), 112, 107 (2000) (providing severe penalties for human traffickers and relief for trafficking victims, who tend to be primarily women and children).

¹¹⁶ *But see* Ana Clarissa Rojas Durazo, “We were never meant to survive”: *Fighting Violence Against Women and the Fourth World War*, in *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NONPROFIT INDUSTRIAL COMPLEX* 113, 119 (INCITE! Women of Color Against Violence ed., 2007) (critiquing law enforcement response to domestic violence and the inhibiting factors of federal funding).

political in nature.¹¹⁷ This has had a dramatic impact on refugee protection for battered women.

III. GENDER-BASED VIOLENCE AS PERSECUTION UNDER THE REFUGEE CONVENTION

The United States' adjudication of claims from people seeking asylum is governed by the 1951 Convention Relating to the Status of Refugees,¹¹⁸ as updated by the 1967 Protocol to the Convention.¹¹⁹ The 1951 Convention's official definition of a refugee reflects a worldview in which political acts occur in the public sphere among public actors, not among family members—the political activist handing out leaflets, the government agent torturing a suspected opposition sympathizer, the mob burning the homes of members of religious minorities.¹²⁰

Any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his [or her] nationality, and is unable to or, owing to such fear, is unwilling to avail [herself or] himself of the protection of that country.¹²¹

The conspicuous absence of gender from the list of protected grounds may merely reflect a pre-1970s unawareness of gender issues, but it has frequently been interpreted to indicate a deliberate unwillingness to extend the definition of a classic refugee to include gender-based violence, the perpetrators of which tend to be family members and other persons known to the victim.¹²²

¹¹⁷ See *Matter of R-A-*, 22 I&N Dec. 906, 916 (BIA 1999), *vacated*, 22 I&N Dec. 906 (Op. Att'y Gen. 2001).

¹¹⁸ Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].

¹¹⁹ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Refugee Protocol].

¹²⁰ See Maya Raghu, *Sex Trafficking of Thai Women and the United States Asylum Law Response*, 12 GEO. IMMIGR. L.J. 145, 168 (1997–1998) (internal citations omitted):

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

¹²¹ 1951 Refugee Convention, *supra* note 118, at art. 1(A)(2). The 1951 Convention also permitted signatories to restrict protection to people who were refugees as a result of “events occurring in Europe before 1 January 1951.” *Id.* at art. 1(B).

¹²² See Raghu, *supra* note 120, at 168 (“[T]his distinction between the public and private has proved harmful to women, for U.S. courts have often granted asylum to male applicants while denying asylum to female applicants in similar situations.”).

Although the 1951 Convention and 1967 Protocol do not specifically provide protection for victims of gender-based violence, neither do they specifically exclude gender-based violence from protection.¹²³ States are free to interpret and apply the principles of the 1951 Convention and 1967 Protocol as they see fit. Thus, despite the absence of gender from the list of protected grounds, some courts charged with interpreting and applying the 1967 Protocol have found gender-based violence to be a basis for refugee protection.¹²⁴ For example, refugee law as applied in the United States and abroad has been expanded to protect victims of female genital mutilation and domestic violence. As discussed below, successful claims tend to be based on the applicant's membership in a particular social group; political opinion, on the other hand, tends to be disfavored as a basis for gender-based asylum claims.

In 1968, the United States signed the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees¹²⁵ and adopted almost verbatim the Convention definition of a refugee with the passage of the Refugee Act of 1980.¹²⁶ Over the years, U.S. federal and administrative courts have interpreted the 1967 Protocol and Refugee Act of 1980 and set forth guidelines for determining whether an applicant for asylum is eligible for such relief under U.S. law. A substantial collection of asylum case law, regulations, and memoranda address various aspects of the Convention definition, in-

¹²³ UNITED NATIONS HIGH COMM'R FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶ 1, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR GENDER GUIDELINES]. The United Nations High Commissioner for Refugees promulgated guidelines in 2002 to "ensure that proper consideration is given to women claimants in refugee status determination procedures and that the range of gender-related claims are recognised as such." *Id.*

¹²⁴ See, e.g., *Lazo-Majano v. INS*, 813 F.2d 1432, 1435–36 (9th Cir. 1987), *overruled on other grounds* by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (finding that rape, when committed on account of political opinion, is a basis for asylum); *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (finding that fear of female genital mutilation is a basis for asylum); *In re D-V-*, 21 I&N Dec. 77, 79–80 (BIA 1993) (finding that rape, when committed on account of political opinion, is a basis for asylum); *Matter of A-T-*, 24 I&N Dec. 617, 619, 622 (Op. Att'y Gen. 2008) (finding that past infliction of female genital mutilation is a basis for asylum); *Islam v. Sec'y of State for the Home Dep't*, [1999] 2 W.L.R. 1015 (H.L.) [1027] (appeal taken from Eng.) (finding that domestic violence can be a basis for asylum); New Zealand Refugee Status Appeal Authority, *Refugee Appeal No. 73822/02* (2003), *excerpted in* KAREN MUSALO, JENNIFER MOORE & RICHARD BOSWELL, *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 242 (4th ed. 2011) (on file with author) (finding that a woman who was persecuted for opposing Iran's discriminatory laws and policies towards women qualified for asylum). The forms of gender-based violence discussed in this section are not meant to be an exhaustive list, but rather a representation of the most common forms of violence inflicted primarily upon women.

¹²⁵ 1967 Refugee Protocol, *supra* note 119. The Protocol was acceded to by the United States on November 1, 1968. *Id.* at 2.

¹²⁶ Refugee Act of 1980, 8 U.S.C. § 1101 (1980); see U.S.C. § 1101(a)(42) (2011) (defining the term "refugee"); see also 8 U.S.C. § 1158 (2009) (setting forth the criteria for eligibility for asylum status).

cluding what constitutes persecution,¹²⁷ whether a fear is well-founded,¹²⁸ whether a person is unable or unwilling to avail themselves of the protection of their country,¹²⁹ and how to evaluate whether an applicant is being persecuted on account of a protected ground.¹³⁰ For purposes of this Article, the most relevant interpretations involve whether an applicant has been persecuted on account of membership in a particular social group and whether an applicant has been persecuted on account of political opinion. In the 1985 watershed case *Matter of Acosta*,¹³¹ the Board of Immigration Appeals addressed both issues.

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

Neither the 1951 Refugee Convention nor the 1967 Protocol provide a definition of the term “membership in a particular social group.” Guy Goodwin-Gill, a leading expert in the field of refugee law, warns that a “fully comprehensive definition is impracticable, if not impossible,”¹³² and then goes on to state that “the essential element in any description would be the factor of shared interests, values, or background—a combination of matters of choice with other matters over which members of the group have no control.”¹³³ As prominent refugee law scholars Karen Musalo, Jennifer Moore, and Richard Boswell have explained:

The inclusion of the social group ground in the refugee definition reflects an appreciation on the part of the international community that persecution may be animated by a multiplicity of factors in addition to political opinion, religion, race or nationality. Essential to the concept of “particular social group” is the perception that its members threaten or frustrate the status, interests, policies or goals of powerful sectors and individuals within a society.¹³⁴

In *Matter of Acosta*, the Board of Immigration Appeals explains how to identify whether a group is a “particular social group” as contemplated by the Convention. The Board held that a particular social group must consist of persons who “share a common, immutable characteristic”:¹³⁵

¹²⁷ See *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (quoting *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995)) (defining persecution as “an extreme concept, which ordinarily does not include ‘[d]iscrimination on the basis of race or religion, as morally reprehensible as it may be’”).

¹²⁸ *Matter of Acosta*, 19 I&N Dec. 211, 224–32 (BIA 1985).

¹²⁹ *Id.* at 235–36.

¹³⁰ See, e.g., *id.*

¹³¹ *Id.* at 232–35.

¹³² GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 47 (2d ed. 1996).

¹³³ *Id.*

¹³⁴ KAREN MUSALO, JENNIFER MOORE & RICHARD BOSWELL, *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 619 (3d ed. 2007).

¹³⁵ *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

The shared characteristic might be an innate one such as sex, color, or kinship ties, or . . . a shared past experience [T]he common characteristic that defines the group . . . must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.¹³⁶

The *Acosta* test has become a widely accepted and oft-cited principle of refugee law, both in the United States and abroad.¹³⁷ The Second Circuit and, initially, the Ninth Circuit, modified the test, requiring that social group claimants prove more than the elements in the *Acosta* test.¹³⁸ Drawing from these decisions, the Board of Immigration Appeals adopted additional parameters for the test in 2007, requiring that a particular social group “have particular and well-defined boundaries, and that it possess a recognized level of social visibility.”¹³⁹

Despite the many restrictions on what constitutes a particular social group, the social group category remains the “ugly stepsibling” of the other four protected grounds—it is the last resort,¹⁴⁰ the key to the floodgates, the

¹³⁶ *Id.* at 233. The Board found that a member of a coalition of taxi drivers did not warrant refugee protection under this test. Being a taxi driver is not immutable because the individual can leave the profession. *Id.* at 234. Neither is being a taxi driver or a member of a taxi driver coalition a characteristic so fundamental to the identity or conscience of an individual that s/he should not be required to change it. *Id.*

¹³⁷ See, e.g., *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010); *Al-Ghorbani v. Holder*, 585 F.3d 980, 994 (6th Cir. 2009); *Malonga v. Mukasey*, 546 F.3d 546, 553 (8th Cir. 2008); *Nkwonta v. Mukasey*, 295 Fed. App'x 279, 285 (10th Cir. 2008); *Vumi v. Gonzales*, 502 F.3d 150, 154 (2d Cir. 2007); *Ghebrehiwot v. Att'y Gen.*, 467 F.3d 344 (3d Cir. 2006); *Mwembie v. Gonzales*, 443 F.3d 405, 415 (5th Cir. 2006); *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190, 1196–97 (11th Cir. 2006); *Sepulveda v. Gonzales*, 464 F.3d 770, 771 (7th Cir. 2006); *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190, 1196–97 (11th Cir. 2006); *DaSilva v. Ashcroft*, 394 F.3d 1, 5 (1st Cir. 2005); *Islam v. Sec'y of State for the Home Dep't*, [1999] 2 W.L.R. 1015 (H.L.) [1023] (appeal taken from Eng.); *Refugee Appeal No. 71427/99* (2000) NZAR 545 (N.Z. Refugee Status Appeals Auth.).

¹³⁸ See *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (requiring that members of a particular social group have a closely affiliated relationship and be “recognizable and discrete”); see also *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (requiring a “voluntary associational relationship” among members of a particular social group).

¹³⁹ *Matter of S-E-G-*, 24 I&N Dec. 579, 582 (BIA 2008) (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007)), *aff'd*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007); *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), *aff'd*, *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006).

¹⁴⁰ See, e.g., *Matter of R-A-*, 22 I&N Dec. 906, 928 (BIA 1999), *vacated*, 22 I&N Dec. 906 (Op. Att'y Gen. 2001) (admonishing that “Congress did not intend the ‘social group’ category to be an all-encompassing residual category for persons facing genuine social ills that governments do not remedy”); see also Department of Homeland Security’s Position on Respondent’s Eligibility for Relief at 6, *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) (2004) [hereinafter DHS 2004 Brief in *Matter of R-A-*] (“Of the five statutory grounds for asylum, the meaning of membership in a particular social group is perhaps the least well defined and the most robustly debated.”).

weakest link to refugee protection.¹⁴¹ As the Department of Justice noted in the preamble to the proposed regulations governing gender-based asylum claims, “the legislative history behind the term . . . is uninformative, and judicial and agency interpretations are vague and sometimes divergent. As a result, courts have applied the term reluctantly and inconsistently.”¹⁴² It is therefore common to see social group claims combined with one of the other, more favored grounds such as political opinion.¹⁴³ The attitude of the United States towards gender-based social group claims has been most permissive with respect to female genital mutilation,¹⁴⁴ somewhat less so with respect to rape,¹⁴⁵ and more restrictive than that of other countries with respect to intimate partner violence.¹⁴⁶

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

Female genital mutilation is the alteration of external female genitalia, often in a manner and to a degree that is traumatic, painful, and with severe

¹⁴¹ See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶ 79, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992), available at <http://www.unhcr.org/3d58e13b4.html> [hereinafter UNHCR REFUGEE HANDBOOK] (“Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status.”). The UNHCR Handbook admonishes that “[t]here may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.” *Id.* at ¶ 73. The UNHCR Gender Guidelines, *supra* note 123, promulgated ten years after the UNHCR Handbook, seem to have a more favorable disposition towards gender-based claims brought under the rubric of membership in a particular social group:

[S]ex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men. Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.

Id. at ¶ 30 (internal citations omitted).

¹⁴² Department of Justice, Immigration and Naturalization Service, 85 Fed. Reg. 76588, 76589 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

¹⁴³ See, e.g., *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986) (asylum claim based on membership in a particular social group and political opinion); *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), *vacated*, 22 I&N Dec. 906 (Op. Att’y Gen. 2001).

¹⁴⁴ The practice of female genital mutilation is also known by the terms “female genital cutting” and “female circumcision.” This Author believes that the term “female genital mutilation” most accurately describes and thoroughly encompasses the disfigurement and long-term severe medical effects of the practice. See WORLD HEALTH ORG., ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT 22 (2008), available at http://whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf [hereinafter WHO FGM STATEMENT] (“The word mutilation establishes a clear linguistic distinction from male circumcision, and emphasizes the [act’s] gravity and harm ‘[M]utilation’ reinforces the fact that the practice is a violation of girls’ and women’s rights, and thereby helps to promote national and international advocacy for its abandonment.”).

¹⁴⁵ See *infra* Part IV.B.2.

¹⁴⁶ See *infra* Part IV.B.3.

health consequences.¹⁴⁷ Female genital mutilation is a widespread practice in approximately twenty-eight countries, and is inflicted on approximately three million women and girls every year.¹⁴⁸ The World Health Organization describes four levels of female genital mutilation, ranging from ritual cutting of the genitals that does not usually have long-term negative effects, to the practice known as infibulation, in which the labia majora and clitoris are excised and the labia minora stitched together to narrow the vaginal opening.¹⁴⁹

In 1995, Fauziya Kasinga, a young woman from the West African country of Togo, applied for asylum on the basis that her family and tribe were going to force her to undergo female genital mutilation involving removal of the clitoris.¹⁵⁰ Although the immigration judge denied her claim on credibility grounds, the Board of Immigration Appeals dismissed the credibility issue,¹⁵¹ and instead focused on the main issue presented by the INS: whether female genital mutilation could be a basis for asylum.¹⁵² Eleven out of the twelve Board members who considered the appeal decided in the affirmative, and Ms. Kasinga was granted asylum.

The Board's decision rested on Ms. Kasinga's membership in a particular social group. The Board held that "FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM."¹⁵³ Consequently, the Board found that Ms. Kasinga would be persecuted on account of her membership in the particular social group of "young women of the Tchamba-Kunsuntu tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."¹⁵⁴

The Board's decision in Ms. Kasinga's case thus recognized a form of violence directed uniquely against women as persecution on account of a Convention ground.¹⁵⁵ In fact, both the asylum claimant and the government supported the concept of female genital mutilation as a basis for asylum. However, in cases involving intimate partner violence, U.S. immigration authorities have been more conflicted about whether and under what circumstances victims may qualify for refugee protection, particularly in comparison to U.K. authorities.

¹⁴⁷ WHO FGM STATEMENT, *supra* note 144, at 1.

¹⁴⁸ *Id.* at 1, 4, 28.

¹⁴⁹ *Id.* at 24.

¹⁵⁰ See *In re Fauziya Kasinga*, 21 I&N Dec. 357, 360 (BIA 1996).

¹⁵¹ *Id.* at 364-65.

¹⁵² *Id.* at 358.

¹⁵³ *Id.* at 367.

¹⁵⁴ *Id.* at 365.

¹⁵⁵ *In re Fauziya Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); see also *Matter of A-T-*, 24 I&N Dec. 617 (Op. Att'y Gen. 2008) (holding that past infliction of female genital mutilation can provide a basis for asylum).

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

a. *Islam v. Secretary of State for the Home Department*

Shahanna Islam and Syeda Shah applied for asylum in the United Kingdom in 1991 and 1993, respectively. Although they came from different socioeconomic backgrounds,¹⁵⁶ they had a common ground for seeking refugee protection: intimate partner violence. The Court of Appeal denied their consolidated claims, and the women appealed to the House of Lords.

The basis for the denial of asylum in each case was failure to show that the persecution occurred on account of membership in a particular social group or any other protected ground. In Ms. Shah's case, the asylum adjudicator found "she was simply a battered wife," and that she was not persecuted on account of her membership in any particular social group.¹⁵⁷ Ms. Islam's purported social group, "Pakistani women subject to domestic violence, namely wife abuse," was rejected because it defined the group by the persecution suffered.¹⁵⁸ The lower courts relied heavily on *Matter of Acosta*,¹⁵⁹ as well as the Ninth Circuit Court of Appeals case *Sanchez-Trujillo v. INS*, in which the Ninth Circuit rejected the social group "young Salvadoran males who refused to perform military service" on two grounds: (1) the applicant had not proven that the social group was comprised of closely affiliated individuals, and (2) the Salvadoran government had not singled out the group for persecution.¹⁶⁰

The House of Lords approved the lower courts' reliance on *Matter of Acosta* but rejected the adoption of the Ninth Circuit's more restrictive approach.¹⁶¹ More significantly, however, the House of Lords recognized "women in Pakistan" as a particular social group.¹⁶² In explaining his reasoning, Lord Steyn emphasized the political aspect of the persecution and rejected the notion that the abuse was purely personal in nature, stating that "[g]iven the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because

¹⁵⁶ The opinion describes Syeda Shah as "simple and uneducated" and Shahanna Islam as a "graduate school teacher." *Islam v. Sec'y of State for the Home Dep't*, [1999] 2 W.L.R. 1015 (H.L.) [1029] (appeal taken from Eng.).

¹⁵⁷ *Id.* at 1030.

¹⁵⁸ *Id.* at 1031. Persecution cannot define the social group because of the circular nature of such a claim. As Lord Hoffman explained, "if one belonged to a group because one shared a common fear of persecution, one could not be said to be persecuted because one belonged to that group." *Id.*

¹⁵⁹ *See id.* at 1023–27 (citing *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)).

¹⁶⁰ *See id.* at 1023–25 (citing *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986)).

¹⁶¹ *Id.* at 1025.

¹⁶² *Islam v. Sec'y of State for the Home Dep't*, [1999] 2 W.L.R. 1015 (H.L.) [1039] (appeal taken from Eng.). The applicants had narrowed their social group to "women in Pakistan accused of transgressing social mores who are unprotected by their husbands or other male relatives." *Id.* at 1037.

of membership of a social group but because of the hostility of their husbands is unrealistic.”¹⁶³ Lord Hoffman, in his portion of the majority opinion, also connected the public failure of the state to the personal nature of the abuse to find that persecution had occurred on account of membership in the particular social group of “women in Pakistan”:

What is the reason for the persecution which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is the threat of violence to Mrs. Islam by her husband and his political friends and to Mrs. Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. There is nothing personal about this. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the Convention.¹⁶⁴

Notably, the House of Lords cursorily dismissed the political opinion claim that Ms. Islam raised.¹⁶⁵ Nevertheless, a majority of the court found that both applicants were entitled to refugee protection on the basis of their membership in the particular social group of “women in Pakistan.”¹⁶⁶ As discussed below, asylum applicants fleeing intimate partner violence have had a different experience in U.S. courts.

b. Matter of R-A-

In 1996, an immigration judge in the U.S. granted asylum to Rody Alvarado Peña, a Guatemalan woman who had been severely abused by her husband. The Immigration and Naturalization Service appealed. There was no dispute that the abuse she suffered was severe enough to constitute persecution if found to have occurred on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁶⁷ The applicant claimed that the abuse occurred on account of two protected grounds: (1) a political opinion imputed to her by her husband, namely that “women should not be dominated by men”¹⁶⁸ and (2) her membership in the particular social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live

¹⁶³ *Id.* at 1028.

¹⁶⁴ *Id.* at 1034–35.

¹⁶⁵ *Id.* at 1028 (“In the *Islam* case there was also a discrete issue as to whether the appellant can rely on the Convention ground of political opinion I must make clear that I was not attracted by this argument.”).

¹⁶⁶ *Id.* at 1046.

¹⁶⁷ *Matter of R-A-*, 22 I&N Dec. 906, 914 (BIA 1999), *vacated*, 22 I&N Dec. 906 (Op. Att’y Gen. 2001).

¹⁶⁸ *Id.* at 911.

under male domination.”¹⁶⁹ The Service argued that the claimed social group does not qualify as a social group under refugee law, and that Ms. Alvarado was not persecuted on account of her political opinion.¹⁷⁰

In a controversial opinion with a vehement dissent,¹⁷¹ the Board of Immigration Appeals agreed with the Service on both points and overturned the grant of asylum.¹⁷²

The Board rejected the concept of membership in a particular social group as a basis for the persecution. The Board found that the proposed social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination”¹⁷³ failed for two reasons: (1) it was not a “group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala”¹⁷⁴ and (2) there was no evidence “that the characteristic of being abused is one that is important within Guatemalan society.”¹⁷⁵ That is, there was no showing that “women are expected by society to be abused, or that there are any adverse societal consequences to women or their husbands if the women are not abused.”¹⁷⁶ The Board characterized the proposed social group as merely “a

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Matter of R-A-, 22 I&N Dec. at 943 (Guendelsberger, dissenting):

The evidence in the record before us establishes, with chilling certainty, that the respondent’s husband was aware of, and imputed to the respondent, her beliefs in opposition to domestic violence. The record amply supports the conclusion that the abuse suffered by the respondent was on account of the abuser’s belief that, as her husband, he could dominate the respondent physically and emotionally, as well as socially and culturally.

¹⁷² Matter of R-A-, 22 I&N Dec. at 907. Attorney General Janet Reno certified the case to herself and stayed the Board’s decision as well as its order that Ms. Alvarado voluntarily leave the United States within thirty days or be deported. *Id.* at 906. Ms. Alvarado’s attorney, Professor Karen Musalo, filed a petition for review in the Ninth Circuit Court of Appeals. CTR. FOR GENDER & REFUGEE STUDIES, *Documents and Information on Rody Alvarado’s Claim for Asylum: Current Update*, <http://cgrs.uchastings.edu/campaigns/alvarado.php#legal> (last visited Nov. 13, 2011) [hereinafter CGRS, *Rody Alvarado*]. While the petition was pending, the Department of Justice drafted proposed regulations governing the adjudication of gender-based asylum claims. Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (Dec. 7, 2000). The Department of Justice has yet to promulgate final regulations, and in the nine years since the proposed regulations were published, Ms. Alvarado’s case continued to languish. Finally, pursuant to an agreement between Ms. Alvarado’s attorneys and the Department of Homeland Security, the Board remanded the case to an immigration judge on December 4, 2008. CGRS, *Rody Alvarado*, *supra*. The Center for Gender and Refugee Studies, directed by Professor Musalo, announced that on December 9, 2009, an immigration judge granted asylum to Ms. Alvarado pursuant to the agreement of the parties. *Id.* The immigration judge found that “there is no binding authority on the legal issues raised in this case . . .” *Id.*

¹⁷³ Matter of R-A-, 22 I&N Dec. 906, 911 (BIA 1999), *vacated*, 22 I&N Dec. 906 (Op. Att’y Gen. 2001).

¹⁷⁴ *Id.* at 918.

¹⁷⁵ *Id.* at 919.

¹⁷⁶ *Id.*

legally crafted description of some attributes of her tragic personal circumstances.”¹⁷⁷

The Board also found that even if the proposed social group was legitimate, there was no evidence that the abuser persecuted Ms. Alvarado because she was a member of that group. The principle reason for this finding was that the abuser limited his persecution to one member of the group: his own wife.¹⁷⁸ The Board also found that there was no evidence that Guatemala, despite its failure to protect Ms. Alvarado, desired or encouraged persecution of members of the group.¹⁷⁹ The Board added that if they were to find that such private action constituted persecution on account of a protected ground, such a formulation would not be confined to cases of intimate partner violence but could apply to various forms of harm perpetrated by private individuals.¹⁸⁰

c. Matter of L-R-

The applicant in the recently decided case of *Matter of L-R-* presented facts similar to those in *Matter of R-A-*. The applicant, a citizen of Mexico, fled repeated abuse at the hands of her male domestic partner.¹⁸¹ On the multiple occasions that she reported the abuse to police, they dismissed it as a private problem and refused to take action.¹⁸² Documentation in the record showed that attitudes in Mexico towards intimate partner violence were permissive, characterized by reluctance on the part of police and prosecutors to enforce the law against domestic violence, lenient sentencing in domestic violence cases, the absence of domestic violence laws in seven of Mexico’s states, and laws in fifteen states that only criminalize repeat offenses.¹⁸³ The applicant applied for asylum on the basis of her membership in the particular social group of “Mexican women in an abusive domestic relationship who are unable to leave.”¹⁸⁴ The immigration judge initially denied asylum in October 2007, at which point the case went before the Board of Immigration Appeals. On August 4, 2010, on remand from the Board, the immigration judge granted asylum.¹⁸⁵

In its supplemental brief to the Board, the Department of Homeland Security (“DHS”) decided to “depart[] from [its] normal practice”¹⁸⁶ of

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 920.

¹⁷⁹ *Id.* at 922–23.

¹⁸⁰ *Id.* at 919.

¹⁸¹ Department of Homeland Security’s Supplemental Brief at 16, *Matter of L-R-* (BIA 2009), available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf> [hereinafter DHS Brief in *Matter of L-R-*].

¹⁸² *Id.* at 17.

¹⁸³ *Id.* at 17–18.

¹⁸⁴ *Id.* at 5.

¹⁸⁵ Julia Preston, *Asylum Granted to Mexican Woman in Case Setting Standard on Domestic Abuse*, N.Y. TIMES, Aug. 12, 2010, at A14.

¹⁸⁶ DHS Brief in *Matter of L-R-*, *supra* note 181, at 4–5.

focusing its arguments solely on the claims raised by the applicant. Instead, in an effort “to contribute to a process leading to the creation of better guidance to both adjudicators and litigants,”¹⁸⁷ the Department articulated its own legal theories under which the applicant and others similarly situated might be eligible for asylum. The Department first rejected the applicant’s proposed social group—“Mexican women in an *abusive* domestic relationship who are unable to leave”¹⁸⁸—as circular (that is, the persecution was included in the definition of the social group)¹⁸⁹ and then proposed two alternative social groups: (1) “Mexican women in domestic relationships who are unable to leave”¹⁹⁰ and (2) “Mexican women who are viewed as property by virtue of their positions within a domestic relationship.”¹⁹¹

The social groups that the Department of Homeland Security proposed may be viable for the particular case in which they have been advanced, but the same flaws can be attributed to the Department’s proposed groups that the Board attributed to “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.” There is little difference between a woman whose partner believes that she should live under male domination, and a woman whose partner views her as property. In both situations, the persecutor has limited his persecution to one person—his domestic partner—thereby indicating that his motivations stem not from her membership in a particular group of people but from the fact that she is his partner. Also, it is unlikely to be any more or less clear that Mexican society expects women to be abused than Guatemalan society expects women to be abused.¹⁹²

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

B. *Persecution on Account of Political Opinion*

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

¹⁸⁷ *Id.* at 5.

¹⁸⁸ *Id.* at 10 (internal citation omitted) (emphasis added).

¹⁸⁹ *Id.* at 6, 10–11.

¹⁹⁰ *Id.* at 14.

¹⁹¹ *Id.*

¹⁹² See *supra* notes 174–176 and accompanying text (discussing the Board of Immigration Appeals’ requirement that the particular social group’s defining characteristic be one that is recognized and important in society).

inhospitable for gender-based claims. Even persecution that has occurred in highly-charged political environments against individuals conforming to their political beliefs has been held not to be persecution on account of political opinion. As discussed below, the Board of Immigration Appeals set out a standard in 1985 that courts have faithfully followed. Since then courts have declined to find persecution on account of political opinion in cases where rape was perpetrated by guerrillas against a perceived enemy, where a woman faced persecution for failing to conform to gender-based religious requirements, and where women have been persecuted by intimate partners in countries that legislate the dominance of men.

1. *The Standard: Matter of Acosta*

In *Matter of Acosta*, the applicant claimed that Salvadoran guerrillas had persecuted him because he was a founder and member of a taxi cooperative that had refused to engage in guerrilla-sponsored work stoppages. The persecution consisted of guerrillas beating him in his cab, confiscating his cab, and threatening his life.¹⁹³ The applicant also received notes threatening his life and calling him a “traitor.”¹⁹⁴ In addition to claiming that persecution occurred on account of his membership in the particular social group of a taxi cooperative and persons engaged in the Salvadoran transportation industry,¹⁹⁵ the applicant claimed that the persecution occurred on account of his political opinion.¹⁹⁶

The Board of Immigration Appeals articulated a formula for determining whether persecution occurred on account of political opinion—acts that achieve general political goals do not constitute this type of persecution, while acts that target individuals for their political beliefs do.¹⁹⁷ Evaluated according to this formula, Acosta failed to show that he had suffered persecution on account of political opinion. The Board found that even though Acosta had received personalized death threats referring to him as a traitor, “there [were] no facts showing that the guerrillas were aware or sought to punish [Acosta] for his political opinion”¹⁹⁸ The Board also found that there were no facts showing that Acosta’s “refusal to participate in the work stoppages was motivated by his political opinion.”¹⁹⁹ Rather, he had been a

¹⁹³ *Matter of Acosta*, 19 I&N Dec. 211, 216–18 (BIA 1985).

¹⁹⁴ *Id.* at 217.

¹⁹⁵ See *supra* notes 135–139 and accompanying text (discussing *Acosta* test for persecution on account of membership in a particular social group).

¹⁹⁶ *Matter of Acosta*, 19 I&N Dec. at 232.

¹⁹⁷ *Id.* at 234–35. See also *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (“[T]he mere existence of a generalized ‘political’ motive underlying the [persecution] is inadequate to establish (and, indeed, goes far to refute) the proposition that [the applicant] fears persecution *on account of* political opinion”).

¹⁹⁸ *Matter of Acosta*, 19 I&N Dec. at 235.

¹⁹⁹ *Id.*

casualty of “harm with political implications [arising out of] civil strife in a country.”²⁰⁰

Although it is widely accepted that harm arising out of general civil strife is not a basis for asylum,²⁰¹ other courts have applied a broader concept of political opinion than the *Acosta* court. For example, in *Osorio v. INS*, the Second Circuit found that a Guatemalan union organizer who faced persecution similar to *Acosta*’s had been persecuted on account of his political opinion.²⁰² The court found that some activities, even if not strictly political in nature, can imply a political opinion.²⁰³

Courts have also identified persecution on account of political opinion in cases where the applicant was neutral and where the persecutor imputed a political opinion onto the applicant. In *Bolanos-Hernandez v. INS*, the Ninth Circuit held that neutrality can constitute a political opinion.²⁰⁴ The court stated that “[c]hoosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction.”²⁰⁵ In *Argueta v. INS*, the applicant possessed an actual political opinion of neutrality but was persecuted by a right-wing death squad for an erroneously attributed pro-guerrilla political opinion.²⁰⁶ The Ninth Circuit found that *Argueta* faced persecution on account of the imputed pro-guerrilla political opinion.²⁰⁷

2. Rape as Persecution on Account of Political Opinion

Rape is one of the most common forms of brutality inflicted upon civilians during times of war or civil unrest, and it occurs predominantly against women.²⁰⁸ As with all forms of gender-based violence, there exists the tendency to view such violence as a private, albeit unfortunate, result of living

²⁰⁰ *Id.*

²⁰¹ See, e.g., *INS v. Stevic*, 467 U.S. 407, 411 (1984); *Matter of Diaz*, 10 I&N Dec. 199, 200 n.1 (BIA 1963).

²⁰² *Osorio v. INS*, 18 F.3d 1017, 1031 (2d Cir. 1994). The applicant, a Guatemalan sanitation worker involved with labor rights, had received a written death threat in the wake of severe violence against fellow activists. *Id.* at 1024.

²⁰³ *Id.* at 1031. Specifically, the Second Circuit rejected the proposition that:

[I]f a government persecutes a national or resident on account of such person’s political beliefs, but the individual is a union organizer whose fame and mode of communication comes through the organization of a labor movement, the individual is not eligible for political asylum because such activity is predominantly economic, not political.

²⁰⁴ *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1287 (9th Cir. 1984).

²⁰⁵ *Id.* at 1286.

²⁰⁶ *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985).

²⁰⁷ *Id.*

²⁰⁸ See AMNESTY INT’L, *VIOLENCE AGAINST WOMEN IN ARMED CONFLICT* 3–5 (2005), available at <http://www.amnesty.org/en/library/asset/ACT77/050/2005/en/df6e5231-d4d3-11dd-8a23-d58a49c0d652/act770502005en.pdf>.

in a conflict area. It has also been viewed as a purely personal act, motivated by lust and the need for domination.²⁰⁹

U.S. courts and immigration authorities have struggled with the adjudication of asylum claims in which the persecution consisted of rape, in whole or in part. As with all asylum claims, the rape must have occurred on account of a Convention ground (race, religion, nationality, membership in a particular social group, or political opinion), and the protected ground must have been at least one central reason for the persecution.²¹⁰ The perception of sexual violence as a private act, however, can often obscure or call into question the motivation of the rapist.

In 1984, an immigration judge denied the asylum claim of Olimpia Lazo-Majano, a Salvadoran woman who was the victim of rape as well as beatings, public humiliation, and threats of torture and death.²¹¹ The Board of Immigration Appeals sustained the denial on the basis that the rapes and other mistreatment, committed by a sergeant in the Salvadoran military for whom Lazo-Majano performed domestic labor, were “strictly personal” and thus not persecution.²¹² Lazo-Majano appealed the case to the Ninth Circuit. One of the Ninth Circuit judges agreed with the immigration judge and Board, stating:

She may indeed have suffered emotional and physical abuse in the course of her personal relationship with Sergeant Zuniga, but such mistreatment is clearly personal in nature and does not constitute political persecution within the meaning of the immigration laws Lazo-Majano . . . was abused and dominated by an individual purely for sexual, and clearly ego reasons.²¹³

The two judges who formed the majority disagreed. They found that the sergeant’s categorization of Lazo-Majano as subversive rendered his actions political because he was seeking to overcome a political opinion contrary to his own that he believed she held.²¹⁴

The same year, another Salvadoran applicant in similar circumstances faced a very different outcome in the Court of Appeals for the Fifth Circuit.²¹⁵ Sofia Campos-Guardado was raped after being forced to watch her male relatives hacked with machetes and then shot to death.²¹⁶ Campos-Guardado believed that these attacks took place because of her uncle’s per-

²⁰⁹ See *infra* note 213 and accompanying text (regarding the characterization of the rape of a certain political activist as motivated by sexual and ego reasons).

²¹⁰ See 8 U.S.C. § 1158(b)(1)(B)(i) (West Supp. 2010); I.N.A. § 208(b)(1)(B)(i) (West Supp. 2010).

²¹¹ *Lazo-Majano v. INS*, 813 F.2d 1432, 1433–34 (9th Cir. 1987), *overruled on other grounds* by *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996).

²¹² *Id.* at 1434.

²¹³ *Id.* at 1436–37.

²¹⁴ *Id.* at 1435.

²¹⁵ *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987).

²¹⁶ *Id.* at 287.

ceived support of controversial land reform policies.²¹⁷ The fact that one of the assailants chanted political slogans during the rape also supported her belief that the attacks were politically motivated.²¹⁸ A unanimous panel of the Fifth Circuit disagreed, holding that the rape did not occur on account of political opinion or any other protected ground.²¹⁹

The Board of Immigration Appeals took a different approach when it decided an asylum claim involving rape in another country embroiled in civil war. In 1993, the Board reviewed an immigration judge's decision denying asylum to a Haitian woman, known by the initials "D-V-," who had been gang-raped after expressing political opinions in favor of the Aristide regime.²²⁰ The immigration judge attributed the attack to generalized violence, despite the fact that D-V- had received specific threats relating to her pro-Aristide political opinion.²²¹ In its opinion reversing the denial of asylum, the Board stated, "she has suffered grievous harm in direct retaliation for her support of and activities on behalf of Aristide."²²²

Two years later, the INS issued a memorandum entitled "Considerations for Asylum Officers Adjudicating Asylum Claims from Women."²²³ The memorandum reminded asylum adjudicators that "rape and other forms of severe sexual violence clearly can fall within" the definition of persecution and that "[t]he appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm."²²⁴ The memorandum is also careful to remind asylum adjudicators that the sexual violence "must be inflicted in order to punish the victim for having one or more of the characteristics protected under the statute."²²⁵

²¹⁷ *Id.* at 288.

²¹⁸ *Id.* at 287.

²¹⁹ *Id.* at 286–87. See also Raghu, *supra* note 120, at 169 (comparing the *Campos-Guardado* decision to the decision in *Arteaga v. INS*, 836 F.2d 1227 (9th Cir. 1988)):

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

²²⁰ *In re D-V-*, 21 I&N Dec. 77 (BIA 1993).

²²¹ *Id.* at 79–80.

²²² *Id.* at 79.

²²³ Memorandum from Phyllis Coven, Office HQASM Coordinators of Int'l Affairs to all INS Asylum Officers/rs, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (May 26, 1995), available at <http://www.state.gov/s/l/65633.htm> [hereinafter Coven Memo] (on file with author).

²²⁴ *Id.* at 9.

²²⁵ *Id.* at 10.

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

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

Nowhere in the record does the respondent recount her husband saying anything relating to what he thought her political views to be, or that the violence towards her was attributable to her actual or imputed beliefs. Moreover, this is not a case where there is meaningful evidence that this respondent held or evinced a political opinion, unless one assumes that the common human desire not to be harmed or abused is in itself a "political opinion." The record before us simply does not indicate that the harm arose in response to any objections made by the respondent to her husband's domination over her. Nor does it suggest that his abusive behavior was dependent in any way on the views held by the respondent.²²⁶

The Board instead found that the abuse was a series of random incidents, not motivated by the desire to overcome a political belief offensive to the persecutor, but rather caused by his "personal or psychological makeup coupled with his troubled perception of her actions at times."²²⁷ The Board acknowledged that Guatemala did little to protect women from spousal abuse but did not connect the failure of state protection to a political motive.²²⁸

The same attitude towards political opinion appears in the Department of Homeland Security's briefs in *Matter of R-A-* and *Matter of L-R-*:

[T]here is no record evidence to reflect that, even if [name redacted from brief] was aware of the female respondent's feminist views and opposition to dominance, his abuse was related to her opinions on this matter. Rather, it appears he continued to abuse her regardless of what she said or did. . . . There is no record evidence that the female respondent was politically active or made feminist / anti-male domination political statements. . . . The Department's position in this regard is also consistent with the Board's long-standing approach that harm is not on account of political opinion when it is inflicted *regardless* of the victim's opinion rather than *because of* that opinion.²²⁹

²²⁶ *Matter of R-A-*, 22 I&N Dec. 906, 915 (BIA 1999), *vacated*, 22 I&N Dec. 906 (Op. Att'y Gen. 2001).

²²⁷ *Id.* at 916.

²²⁸ *Id.* at 922.

²²⁹ DHS Brief in *Matter of L-R-*, *supra* note 181, at 22. This language mirrors that of DHS 2004 Brief in *Matter of R-A-*, *supra* note 140, at 13–14.

In light of (1) the reluctance to attribute intimate partner violence to the victim's political opinion and (2) the Department of Homeland Security's willingness to agree to asylum on the basis of membership in a particular social group, membership in a particular social group emerges as a clearly safer alternative for intimate partner violence-based claims. This raises the question of why political opinion should be put forward at all as a basis for such claims. The answer is that intimate partner violence-based claims are still vulnerable to a finding that the abuse did not occur on account of the victim's membership in a particular social group but because of personal reasons that have no place in a refugee protection system. Intimate partner violence-based claims are therefore at risk of erroneous denial unless adjudicators recognize the political origins of the violence. Recognizing the political nature of intimate partner violence will therefore serve to strengthen social group claims.

IV. BATTERED WOMEN MUST BE RECOGNIZED AS POLITICAL ENTITIES PERSECUTED BY AGENTS OF STATE-SPONSORED SUBORDINATION OF WOMEN

The failure of courts to recognize political opinion as a legitimate basis for claims based on intimate partner violence is a failure (or refusal) to acknowledge the political underpinnings of intimate partner violence.²³⁰ Intimate partner violence is only partly personal. In many ways, it is a vestige of the feudal patriarchal system that has only recently begun to disintegrate in the United States and other "western" societies. Thus, it is political in nature because it is part of a social construct meant to keep one group dominant over another. When it occurs in countries whose societies wish to preserve the patriarchal system of men's dominance over women, a desire evidenced by the legal and cultural norms in those societies, its political significance is even more pronounced.²³¹ It occurs on account of a political opinion that must be presumed to be held by a woman who seeks refugee protection: women are as human as men and thus are entitled to the same human rights afforded men.

²³⁰ See Schneider, *supra* note 99, at 90 (cautioning that "by seeing woman abuse as private, we affirm it as a problem that is individual and involves only a particular intimate relationship, for which there is no social responsibility to remedy").

²³¹ See Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 39 (1999):

Battering may be experienced as a personal violation, but it is an act facilitated and made possible by societal gender inequalities. The batterer does not, indeed could not, act alone. Social supports for battering include widespread denial of its frequency or harm, economic structures that render women vulnerable, and sexist ideology that holds women accountable for male violence and for the emotional lives of families, and that fosters deference to male familial control.

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

An applicant for asylum who claims that she suffered intimate partner violence on account of her political opinion might put forward the following legal theory: the applicant is seeking asylum on account of her political opinion that women are fully human and equal to men, and thus entitled to bodily integrity, including freedom from physical violence inflicted by male partners. The applicant’s country of origin maintains a culture of dominance of men over women, and as a result refuses to provide adequate protection to women fleeing intimate partner violence. The persecutor is aware that the applicant possesses this political opinion because she has defied his presumed authority and left the relationship. The persecutor, acting as an agent of state-sponsored subordination, is capable of punishing the applicant and inclined to punish the applicant for holding the political opinion, as evidenced by his past abuse (inflicted in order to maintain his state-supported dominance and control).

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

1. *State-Sponsored Subordination of Women in the Country of Origin*

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

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

- “On three occasions, the police issued summons for her husband to appear, but he ignored them, and the police did not take further action.”²³²
- “Twice, [Alvarado] called police, but they never responded.”²³³

²³² *Matter of R-A-*, 22 I&N Dec. 906, 909 (BIA 1999), *vacated*, 22 I&N Dec. 906 (Op. Att’y Gen. 2001).

²³³ *Id.*

- “When [Alvarado] appeared before a judge, he told her that he would not interfere in domestic disputes.”²³⁴
- An expert on country conditions testified that “spouse abuse is common in Latin America and that she was not aware of social or legal resources for battered women in Guatemala.”²³⁵
- An article prepared by Canada’s Immigration and Refugee Board “indicat[ed] that Guatemalan society still tends to view domestic violence as a family matter, that women are often not aware of available legal avenues, and that the pursuit of legal remedies can often prove ineffective.”²³⁶

The Board also made the following statement: “There is little doubt that the respondent’s spouse believed that married women should be subservient to their own husbands. But beyond this, we have scant information on how he personally viewed other married women in Guatemala, let alone women in general.”²³⁷ On the contrary, however, there is abundant evidence of how he viewed women. The evidence in the record demonstrates that he viewed women as possessions of their husbands and partners, as subservient to their husbands and partners, and as inferior beings to be treated as their husbands and partners see fit, even if that includes beating and torturing them.²³⁸

There is also abundant evidence of how Guatemalan society perceives women. As evidenced by Guatemala’s historically discriminatory laws and high rates of violence against women, a significant portion of Guatemalan society arguably agrees with Alvarado’s husband’s perception of women—they are subordinate beings who must defer to the authority of their husbands.²³⁹ Fortunately, most men do not seem to assert that authority by engaging in the level of violence that Alvarado’s husband inflicted on her. Those who do, however, find that the legal system and law enforcement agencies are reluctant to intervene.²⁴⁰

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

²³⁴ *Id.*

²³⁵ *Id.* at 910.

²³⁶ *Id.* at 911.

²³⁷ *Id.* at 921.

²³⁸ *See id.* at 908–10 (describing the abuse the applicant’s husband inflicted on her and recounting the applicant’s testimony that the abuser stated, “You’re my woman, you do as I say” and “I can do it if I want to”).

²³⁹ *See supra* notes 22–26 and accompanying text.

²⁴⁰ *See supra* notes 27–41 and accompanying text.

2. *The Applicant's Political Opinion*

Generally, a person seeking asylum on the basis of political opinion must show that the persecutor engaged in the persecution in an attempt to punish the applicant for holding or expressing a particular political opinion.²⁴¹ As discussed in section IV.B above, the opinion may be the applicant's actual opinion or it may be an opinion that the persecutor has imputed to the applicant.

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

That she herself may not recognize such an action as political is irrelevant. In fact, there is well-established precedent for recognizing political opinion in situations where the refugee may not have clearly intended to express one: in 1996, Congress declared, through a statutory amendment to the law governing asylum, that retaliation for opposition to coercive population control constitutes persecution on account of political opinion.²⁴² Congress passed this law in response to denials of asylum claims brought by Chinese nationals who had become pregnant in violation of China's one-child policy.²⁴³ The basis for such denials was twofold: population control policies were politically neutral, and enforcement of such policies was uniform and thus not politically motivated.²⁴⁴ The amended law specifically addressed the dual basis for denial:

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

²⁴¹ See GOODWIN-GILL, *supra* note 132, at 49 (internal citation omitted) (“[P]olitical opinion’ should be understood in the broad sense, to incorporate . . . any opinion on any matter in which the machinery of State, government, and policy may be engaged”).

²⁴² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C § 601, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-689 (1996) (current version at 8 U.S.C. § 1101(a)(42)(B) (West Supp. 2010)) [hereinafter IIRIRA].

²⁴³ See *In re X-P-T-*, 21 I&N Dec. 634, 635 (BIA 1996) (acknowledging that Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 superseded the Board's decision in *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989), in which the Board found that China's coercive population control methods were not persecutory).

²⁴⁴ *Matter of Chang*, 20 I&N Dec. 38, 43-44. (BIA 1989).

dergo such a procedure or subject to persecution for such failure, refusal, or resistance *shall be deemed to have a well founded fear of persecution on account of political opinion.*²⁴⁵

The United States recognized the political nature of defying a coercive population control program without requiring applicants to make an affirmative statement about their political opinion. Thus, recognizing the political nature of leaving an abusive relationship in a country whose government and society are complicit in the subjugation and oppression of women, even if the woman does not make an actual statement regarding her political opinion, would not be a departure from U.S. asylum policy.

B. Effect of the Recognition of the Politics of Intimate Partner Violence

A policy consideration that often arises with respect to immigration matters in general, and in asylum cases in particular, is how a new interpretation of the law may affect the integrity of the U.S. immigration system.²⁴⁶ In the context of battered women, the question is whether acknowledging the political nature of intimate partner violence will result in a flood of battered women applying for asylum in the United States.²⁴⁷ A related question is whether other oppressed groups might fit within the rubric presented in this

²⁴⁵ 8 U.S.C. § 1101(a)(42)(B) (West Supp. 2010) (emphasis added).

²⁴⁶ National security is a primary integrity-related concern with immigration in general but is less so with respect to asylum. As the Author discussed in Marisa Silenzi Cianciarulo, *Counterproductive and Counterintuitive Counterterrorism: The Post-September 11 Treatment of Refugees and Asylum-Seekers*, 84 DENV. U. L. REV. 1121 (2007), asylum is an inhospitable immigration mechanism for would-be terrorists. Individuals seeking asylum in the United States must undergo identity verification and background checks before being eligible for asylum. See 8 C.F.R. §§ 208.9(b), 240.67 (2011); 8 C.F.R. § 1240.67 (2003); 8 C.F.R. § 208.10 (1998). Other characteristics of the U.S. asylum system also make it unappealing for those seeking to do harm to the United States, such as a one-year deadline on applying for asylum, delay in work authorization eligibility, prompt adjudication of asylum applications, expedited removal, and detention of asylum seekers. See 8 U.S.C. §§ 1158(a)(2)(B), 1158(d)(2), 1158(d)(5)(A)(iii) (2009); 8 U.S.C. § 1225(b)(1) (2009), *held unconstitutional on other grounds* by United States v. Barajas-Alvarado, 655 F.3d 1077 (9th Cir. 2011). With these provisions in place, the hurdles to obtaining asylum are so great that asylum has become an unlikely choice for would-be terrorists seeking an easy, low-profile way to gain lawful immigration status. See Cianciarulo, *supra* note 246.

²⁴⁷ There is no provision in the Refugee Convention or U.S. asylum law that limits the number of asylum seekers who may receive asylum status in the United States, thus prompting concerns about floods of asylum seekers. See 8 USC § 1101(a)(42) (defining who may qualify as a refugee but not imposing any numerical limits). See also Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005) (“There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation’s residents to obtain asylum on the ground that women are persecuted there.”); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994). In this case, petitioner asserted that “Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group.” *Id.* The Court stated that “[w]e believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.” *Id.*

Article. As discussed below, the proposed legal theory is not likely to increase the number of individuals seeking and being granted asylum in the United States. First, the number of battered women seeking asylum in the United States is not likely to increase with the adoption of the proposed legal theory. Second, groups that share certain characteristics with abused women either already qualify for asylum on other grounds or do not fit squarely within the proposed legal theory.

1. *A Flood of Battered Women?*²⁴⁸

Although the rate of intimate partner violence is high and occurs in every country in the world, not every victim of intimate partner violence meets the definition of a refugee. Of those who do meet the definition of a refugee, only a small percentage of them are likely to seek asylum in the United States or elsewhere. Asylum protection will only be extended to applicants who prove that their country does not have the resources or willingness to protect them from the persecutor.²⁴⁹ A citizen of a country that does have the resources and willingness to protect her would not meet the definition of a refugee and thus would not qualify for asylum in the United States.

Even in cases involving battered women who meet the definition of a refugee, it is unlikely that such women will apply for asylum in the United States in record-high numbers.²⁵⁰ First, the unique dynamics of abusive relationships prevent many women from leaving.²⁵¹ Second, even if a woman

²⁴⁸ The Author previously addressed this issue in Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 380–84 (2009) (explaining why recognizing battered women as refugees will not result in a flood of asylum applications from battered women around the world). See also Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119 (2007) [hereinafter Musalo, *Fear of Floodgates*] (criticizing the concern that acceptance of gender-based asylum grounds such as intimate partner violence will result in a flood of applications).

²⁴⁹ See *McMullen v. INS*, 658 F.2d 1312, 1315 (1981) (finding that one of the elements necessary to prove eligibility for refugee protection is “persecution by the government or by a group which the government is unable to control”).

²⁵⁰ See Musalo, *Fear of Floodgates*, *supra* note 248, at 132–33:

The floodgates were evoked around the claim of Fauziya [Kasinga]; many who opposed a grant of asylum pointed to the fact that millions of women a year are subject to FGC [female genital cutting], and predicted that the U.S. would be overwhelmed with asylum seekers if it recognized fear of FGC as a basis of asylum. Fauziya [Kasinga] was granted asylum, but the dire predictions of a flood of women seeking asylum never materialized. In fact an INS publication explicitly noted that “[a]lthough genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on FGM” after the Kasinga decision. In this same publication, INS stated that it did not expect to see a large number of claims if the U.S. recognized domestic violence as a basis of asylum.

²⁵¹ LENORE E. WALKER, *THE BATTERED WOMAN* 55 (1979) (explaining how the cycle of violence coerces many women to remain in or return to abusive relationships). See

succeeds in breaking the cycle of violence and flees the abusive relationship, she may not necessarily desire to flee her country and family. Those who do wish to take the drastic step of fleeing to another country incur expense and risk to do so, and subsequently must endure the stress of an asylum adjudication, possibly while living in detention.²⁵²

Finally, as this formulation is based on men's domination of women, it does not apply in situations involving child abuse, same-sex couples, or relationships in which the woman batters the man. It is important to note that the exclusion of these situations does not in any way suggest that victims of child abuse, same-sex intimate partner violence, or intimate partner violence inflicted by women against men do not qualify for asylum. As discussed below, this formulation is merely designed to address a particular paradigm of dominance, not to exclude or diminish other paradigms of dominance.

2. *Application of the Political Opinion Analysis to Other Oppressed Groups*

Violence against marginalized and oppressed groups—homosexuals and transgender individuals, children, physically and mentally disabled individuals, the materially poor—occurs with disheartening regularity throughout the world. The analysis set forth in this Article is tailored specifically to women because of the historical and political significance of intimate partner violence. Although other groups share with women the experience of entrenched oppression and systematic violence and may have other politically-based claims for asylum, the formula proposed herein either does not apply to those groups or is nonessential to refugee protection. It is beyond the scope of this Article to address each and every group that might be compared with battered women, but a brief examination of three similarly situated groups may shed light on the intended scope of the proposed analysis.

also id. at 183, 189 (noting that many battered women go back to their batterers as often as five times before they leave permanently).

²⁵² Individuals who do not present valid entry documents at a port of entry may be denied admissibility, detained, and summarily deported. See 8 U.S.C. § 1225 (2009); 8 U.S.C. § 1182 (2009); *but see supra* note 246. If an individual expresses a fear of returning to his or her home country, an asylum officer will conduct an interview to establish “credible fear” in order to determine whether the individual may apply for asylum before an immigration judge. 8 U.S.C. § 1225(b)(1)(A)(ii)(2009). The DHS usually detains credible fear interviewees in immigration detention facilities, or, more commonly, in county jails from which the DHS rents bed space. AM. BAR ASS'N. COMM'N ON IMMIGRATION, IMMIGRATION DETAINEE PRO BONO OPPORTUNITIES GUIDE 1 (2004), available at http://www.nlada.org/Training/Train_Civil/Equal_Justice/2005_Materials/71_2005_Pena_Handout1. Even a person who is determined to have a credible fear may be held in detention for the duration of their asylum proceedings, which could take several years depending on whether appeals are filed. HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 14 (2004), available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/Libertys_Shadow.pdf.

a. A Group that Fits Within the Proposed Theory but Whose Claims are Viable under Membership as a Particular Social Group: Lesbians, Gays, Bisexuals, Transgenders and Queer (“LGBTQ”) Individuals

LGBTQ individuals suffer violence for defying cultural norms similar to those that women fleeing abusive relationships defy. As a Human Rights Watch report states:

[LGBTQ individuals] face . . . a complex cultural system that controls people’s bodies and sexualities. Law, custom, economy, and family are all implicated as well. This means the crackdowns may connect to fears that norms for gender and sexuality are shifting or breaking down. Women who defy those norms and men who escape them are equally at risk. It is worth remembering that the law under which Egyptian men are tried for same-sex conduct was originally a law targeting women in prostitution.²⁵³

An asylum applicant fleeing persecution on account of his membership in the particular social group of LGBTQ individuals would fit within the parameters of the legal theory proposed in this Article. His political opinion may be that LGBTQ individuals are as fully human as and equal to heterosexual individuals and thus entitled to bodily integrity, including freedom from physical violence inflicted by nongovernmental actors. The applicant would have to “point to specific, objective facts that support an inference of . . . [a] risk of future persecution”²⁵⁴ on the basis that his country of origin maintains a culture of heterosexism and as a result refuses to provide adequate protection to individuals fleeing sexual identity-based violence. The applicant would also have to demonstrate that persecutors are aware that the applicant possesses this political opinion²⁵⁵ because he has defied the heterosexist culture by refusing to conceal his sexual identity. Finally, the applicant must demonstrate that the persecutor, a nongovernmental individual or group acting as an agent of state-sponsored subordination, is capable of punishing the applicant and inclined to punish the applicant for holding the political opinion,²⁵⁶ as evidenced by past abuse (inflicted in order to maintain state-supported heterosexism). If all of the elements are met, the LGBTQ applicant would have proven that he is entitled to asylum on account of his political opinion.

²⁵³ HUMAN RIGHTS WATCH, TOGETHER, APART: ORGANIZING AROUND SEXUAL ORIENTATION AND GENDER IDENTITY WORLDWIDE 16 (2009), available at <http://www.hrw.org/sites/default/files/reports/lgbt0509web.pdf>.

²⁵⁴ *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985).

²⁵⁵ *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987).

²⁵⁶ *Id.*

Unlike battered women, however, LGBTQ individuals enjoy more stable recognition as a particular social group.²⁵⁷ They are a group of individuals persecuted in the public sector by governments or by groups or individuals whom the government is unwilling or unable to control. Intimate partner violence, however, is viewed as purely private. Thus, although the proposed legal theory may certainly apply to LGBTQ applicants, it is not necessary to overcome a perception that the violence inflicted is personal rather than political in nature.

Discussed in the next section is a group that does not enjoy recognition as a particular social group because, similar to the violence experienced by battered women, the violence is not considered politically motivated.

b. A Narrowly Defined Group that Does Not Fit Within the Proposed Legal Theory: Youth Vulnerable to Gang Recruitment

Gang violence in Central America is widespread, brutal, and generally beyond the control of Central American governments.

The problem of gang violence has reached epidemic proportions in Central America. Gangs . . . operate with impunity throughout urban areas and rural areas alike. National governments are unable to stem the tide of gang violence. Local governmental officials are often unwilling to arrest the gangsters in their midst. In essence, the gangs, or *maras*, operate as the de facto government within their zones of control. . . . To publicly oppose the gangs, through refusal to join them or open confrontation, is to risk death, not only for oneself, but also for one's loved ones.²⁵⁸

Those resisting gang recruitment, however, do not enjoy asylum protection in the United States. In *Matter of S-E-G-*, the Board of Immigration Appeals found that "Salvadoran youths who have resisted gang recruit-

²⁵⁷ See, e.g., *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 949 (11th Cir. 2010) (citing *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822–23 (BIA 1990) (holding gay men in Cuba constitute a particular social group)); *Razkane v. Holder*, 562 F.3d 1283, 1287 (10th Cir. 2009) ("Neither party disputes that homosexuals constitute a particular social group under the INA."); *Moab v. Gonzales*, 500 F.3d 656, 662 n.2 (7th Cir. 2007) (citing *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822–23 (BIA 1990)); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1117 (8th Cir. 2007) (accepting the BIA's designation of homosexuals as a particular social group); *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 177 (2d Cir. 2006) (noting the immigration judge's acknowledgment that "homosexuality can be a qualifying factor for asylum based on 'persecution on account of [the applicant's] membership in a particular social group'"); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) ("[A]ll alien homosexuals are members of a 'particular social group.'") (emphasis omitted); *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003) (finding that an applicant for asylum may qualify as an imputed member of the particular social group of homosexuals if the persecutor believes he is gay); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000) ("[G]ay men with female sexual identities in Mexico constitute a 'particular social group' . . .").

²⁵⁸ Jeffrey D. Corsetti, Note, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 407 (2006).

ment”²⁵⁹ do not constitute a particular social group for asylum purposes.²⁶⁰ The Board also found that resisting gang recruitment neither constitutes a political opinion nor puts the applicant at risk for politically based persecution.²⁶¹

Although youth resisting gang recruitment share characteristics with women fleeing abusive relationships, the legal theory proposed in this Article fails with respect to gang-based asylum claims. In those cases, gangs are taking advantage of the vulnerability of their young, often poor victims,²⁶² but they are not seeking to maintain their own society-sanctioned, government-sanctioned dominance in society. In order for the formulation to apply, gangs would have to be supported by society and hold a dominant place in society. Though governments are often unable to control gang violence and recruitment, it would be difficult to make the case that governments actually support them.²⁶³ Even in cases where there are strong links between corrupt governments and gangs,²⁶⁴ the applicant would likely have difficulty proving that the links arise out of a desire to protect society’s interest in having a gang-dominated culture.

c. A Broad Particular Social Group that May Not Fit Within the Proposed Legal Theory: The Materially Poor

Poverty is inextricably linked with politics.²⁶⁵ Poverty has been called “powerlessness: being trapped, relegated to a status from which one cannot escape, impotent to change circumstances that affect one’s fate and unable to alter the conduct of others that impacts adversely on oneself, one’s family, one’s neighborhood. Poverty is ultimately economic, social, and civic disenfranchisement.”²⁶⁶

Refugee law nevertheless makes a clear distinction between the political refugee and the economic migrant.²⁶⁷ A materially poor person might flee economic conditions that make life unbearable, but she will find no

²⁵⁹ Matter of S-E-G-, 24 I&N Dec. 579, 582 (BIA 2008).

²⁶⁰ *Id.* at 583.

²⁶¹ *Id.* at 588–89.

²⁶² See Corsetti, *supra* note 258, at 413–14 (noting the lack of employment and education opportunities in the areas where gangs are most powerful).

²⁶³ See *id.* at 414 (noting that proving government support of gangs is a challenging task).

²⁶⁴ See *id.* at 414–15 (cataloguing numerous instances of government links to gangs and other violent crime organizations).

²⁶⁵ See Reginald Leamon Robinson, *Poverty, the Underclass, and the Role of Race Consciousness: A New Age Critique of Black Wealth/White Wealth and American Apartheid*, 34 IND. L. REV. 1377, 1385 (2001) (“Liberal poverty studies fault ‘external,’ objective forces (i.e., social structure). They premise that social structure robs citizens of equal opportunities . . . without equal opportunities, many citizens cannot attain access to material goods. By social structure, I mean the manner in which social systems distribute resources like wealth, income, and property.”)

²⁶⁶ Edgar S. Kahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133, 2135 (1994).

²⁶⁷ See UNHCR REFUGEE HANDBOOK, *supra* note 141, at ¶ 62.

asylum protection if that is the only basis for her claim; she must demonstrate that her political opinions, and not merely her objections to economic measures or conditions, place her at risk of harm.²⁶⁸ Similarly, the legal theory proposed in this Article will not apply to economic migrants except in situations where the applicant can show that the persecution occurs as a result of specific action taken or statements made by the applicant.

According to the proposed theory, the materially poor applicant may seek asylum on account of her political opinion that the poor are as fully human as and equal to persons with means and privilege and thus entitled to bodily integrity, including freedom from violence inflicted by the dominant class. The applicant may be able to show that her country of origin maintains a culture of dominance of the wealthy over the poor. The analysis will suffer, however, when the applicant must prove that her fear of persecution by wealthy individuals is well-founded. The wealthy persecutor would have to be aware that the applicant possesses a political opinion; there must therefore be some statement or action by the applicant that conveys the political opinion. The persecutor, acting as an agent of state-sponsored subordination of poor people, would have to be inclined to harm the applicant for holding the political opinion in order to maintain his state-supported dominance and control. Purely economic migrants will therefore not qualify for asylum under the proposed legal theory.

CONCLUSION

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

²⁶⁸ *Id.* at ¶ 64.

A migrant is a person who, for reasons other than those contained in the definition [of a refugee], voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.

Id. at ¶ 62.

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

This Article does not seek to minimize the effectiveness or viability of claims based on membership in a particular social group. Rather, it argues that in order for intimate partner violence-based claims to continue to succeed irrespective of who is currently serving as Attorney General, adjudicators must understand and accept the political nature of intimate partner violence. In countries where the dominant approach to intimate partner violence is to ignore and trivialize it, those who perpetrate the violence are supporting and advancing a state goal to maintain the dominance of men and the subordination of women. Thus, every woman who defies a man by attempting to leave the relationship that legitimizes his abuse makes a political statement that must be recognized as a political opinion, namely, that men do not have the right to maintain their legal and societal dominance through violence.