

# MEMBERSHIP IN A PARTICULAR SOCIAL GROUP: ALL APPROACHES OPEN DOORS FOR WOMEN TO QUALIFY

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*For decades, U.S. refugee law has restricted women's access to protection. To qualify as a refugee, a person must have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group (PSG), or political opinion. Because women often suffer persecution that is not clearly on account of the four other enumerated grounds, the only ground that offers hope is PSG. However, the ambiguity of the term PSG, as well as the various approaches taken by courts to analyze whether women should constitute a PSG, have led to inconsistent outcomes. This Note argues that women should qualify as a PSG. It advocates for the adoption of a "bifurcated nexus approach," which will allow women persecuted by state and non-state actors to claim asylum if their state denies protection "on account" of their gender. Further, it argues that case law can be harmonized to include women as a PSG.*

## INTRODUCTION

A person seeking to qualify as a refugee under U.S. law must be someone who is "outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided."<sup>1</sup> The person must be "unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country" and must be able to show persecution or have "a well-founded fear of persecution" if forced to return to the country of origin.<sup>2</sup> Lastly, and most importantly, the persecution or fear of persecution must be "on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>3</sup>

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1. INS v. Cardoza-Fonseca, 480 U.S. 421, 428 (1987).  
2. *Id.*  
3. *Id.*

Of these five categories, particular social group (PSG), despite its importance, remains largely undefined.<sup>4</sup> Congress chose not to define the term in the United States Code. Similarly, the executive branch immigration agencies did not define it in the Code of Federal Regulations.<sup>5</sup> United States courts have struggled to define the term,<sup>6</sup> but some judges have attempted to outline its parameters.<sup>7</sup> Due to the ambiguity surrounding the definition of a PSG in the Refugee Act of 1980 and the lack of legislative history to denote Congress' intent, the "membership in a PSG" category is the least utilized category.<sup>8</sup> The asylum seekers that do apply under the PSG category "tend to litigate claims of persecution based solely or predominantly on gender."<sup>9</sup> The lack of legislative intent and vagueness of the term PSG has produced wide-ranging and inconsistent rulings among the courts.<sup>10</sup>

In particular, women have fallen victim to the ambiguity of the term PSG.<sup>11</sup> Because women often suffer persecution that is not clearly on account of the four other enumerated grounds (race, religion, nationality, or political opinion), the only ground that offers hope is the PSG.<sup>12</sup> Specifically, women suffering persecution from domestic abuse or other traditional, culturally approved practices often do not qualify under any of the categories.<sup>13</sup> Qualifying under PSG, however, has proven difficult for many female asylum seekers because both courts and the Department of Homeland Security are reluctant to recognize such a broad-based claim.<sup>14</sup>

In many instances, persecution suffered by women is very similar to persecution suffered by men.<sup>15</sup> Women, like men, are victims of persecution by reason of race, religion, nationality, political opinions, or membership in a PSG.<sup>16</sup> In addition, however, women may suffer abuse because of the gender division in social roles or because of a particular relationship that exists between women and the State.<sup>17</sup> Both the method of persecution and the reasons for it can differ with

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4. Edward L. Carter & Brad Clark, "Membership in a Particular Social Group": *International Journalists and U.S. Asylum Law*, 12 COMM. L. & POL'Y 279, 292 (2007).

5. *Id.*

6. *Id.*; see also T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 939 (1992).

7. Carter & Clark, *supra* note 4, at 292.

8. Cara Goeller, Note, *Forced Marriage and the Granting of Asylum: A Reason to Hope After Gao v. Gonzales*, 14 WM. & MARY J. WOMEN & L. 173, 174 (2007).

9. *Id.*

10. *Id.*

11. *Id.* at 175.

12. *Id.* at 193-95.

13. *Id.* at 175, 178.

14. *Id.*

15. Nicole LaViolette, *Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines*, 19 INT'L J. REFUGEE L. 169, 172 (2007).

16. *Id.*

17. *Id.*

respect to men and women.<sup>18</sup> Genital mutilation, infanticide, forced marriage, spousal abuse, involuntary abortion, mandatory sterilization, sexual assault, dowry-related murders, honor crimes, widow burning, mandatory dress codes, and trafficking are all abuses inflicted upon women specifically because of their gender.<sup>19</sup>

Even though the treatment of women in many societies clearly offends global human rights norms, U.S. courts have denied these and other gender-based persecution claims without inquiring as to whether the law in question is contrary to accepted principles of international human rights.<sup>20</sup> Additionally, courts hesitate to recognize women as a PSG due to fears of opening the floodgates, raising an inconsistent numerosity issue.<sup>21</sup> Denying asylum to women facing society-wide persecution for this reason is paradoxical in that “[c]oncern over the size of the group sharing the protected characteristic has generally not been a barrier for persons persecuted on account of their race or religion.”<sup>22</sup>

This Note addresses the question of whether women should be considered a PSG. Part I of this Note provides an overview of PSG and explains how it applies to refugee and asylum law. Part II lays out the various approaches courts have adopted in analyzing gender-based claims brought under the PSG category and argues for the uniform adoption of a “bifurcated nexus approach,” which will allow women persecuted by state and non-state actors to claim asylum if their state does not provide them protection “on account” of their gender. Part III analyzes how and why women qualify as a PSG and argues that case law can be harmonized to include women as a PSG. Finally, Part IV of this Note provides other proposed solutions to the gender-based PSG problem, including incorporating gender as one of the enumerated grounds of the refugee definition.

## I. OVERVIEW OF “PARTICULAR SOCIAL GROUP”

### A. Definitions: Refugee and Asylum

Each year, thousands of individuals fleeing persecution in their home countries seek to enter or remain in the United States.<sup>23</sup> For refugees, those individuals not yet in the United States, federal law states that they may qualify for refugee status if they can meet the requirements of the refugee definition pertaining to refugee status.<sup>24</sup> For asylum-seekers, persons inside the United States unwilling or unable to return to their home country because of persecution or a legitimate fear of persecution, there are two avenues of relief—withholding of

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18. *Id.* at 173.

19. *Id.*

20. Michael English, Comment, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109, 170–71 (2007).

21. Jenny-Brooke Condon, Comment, *Asylum Law’s Gender Paradox*, 33 SETON HALL L. REV. 207, 252–254 (2002).

22. *Id.* at 252.

23. The Refugee Influx – Seeking Asylum, <http://www.libraryindex.com/pages/2436/Refugee-Influx-SEEKING-ASYLUM.html> (last visited Feb. 19, 2010).

24. 8 U.S.C § 1158(b)(1) (2006).

deportation<sup>25</sup> or a grant of asylum.<sup>26</sup> Individuals at the U.S. border or at a port of entry may also apply for asylum.<sup>27</sup>

The Immigration and Nationality Act (INA) section 208(b) gives the Secretary of Homeland Security discretion to grant asylum to an alien who qualifies as a “refugee” under INA section 101(a)(42)(A). The INA defines a refugee as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>28</sup>

Generally speaking, persecution means a threat to the life or freedom of those who differ from the persecutor in a way regarded as offensive or the infliction of suffering or harm on such persons.<sup>29</sup> Identical to the INA’s definition of a refugee, the regulations also delineate that an applicant has a “well-founded fear of persecution” if he has a fear of persecution in his country of nationality on account of race, religion, nationality, membership in a PSG, or political opinion.<sup>30</sup> Additionally, the regulations provide that the applicant must show that there is a realistic possibility of suffering the feared persecution if he is returned to that country and that he is “unable or unwilling” to receive the protection of that country because of such fear.<sup>31</sup> In many instances, an applicant’s well-founded fear of persecution is brought about by the state itself.<sup>32</sup> However, it is the individual’s vulnerability, rather than the source of the persecution, that triggers international protection.<sup>33</sup> An individual seeking asylum must show that the feared persecution is reasonable, has some basis in the reality of the circumstances, and is validated with specific, concrete facts.<sup>34</sup>

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25. *Id.* § 1231(b)(3).

26. *Id.* § 1158(a).

27. *Id.*

28. *Id.* § 1101(a)(42)(A).

29. Michael A. Rosenhouse, Annotation, *Sufficiency of Evidence to Establish Alien’s Well-Founded Fear of Persecution Entitling Alien to Status of Refugee Under § 101(a)(42)(A) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. § 1101(a)(42)(A))—Alleged Persecution in European and Asian Nations*, 182 A.L.R. FED. 147, § 2[a] (2002).

30. 8 C.F.R. § 208.13(b)(2)(i) (2003).

31. *Id.*

32. Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 772 (2003).

33. *Id.*

34. 8 C.F.R. § 208.13(b)(2)(i).

### B. Particular Social Group

An individual petitioning for asylum in the United States must show that persecution occurred or will occur “on account of” at least one of the five protected grounds: race, religion, nationality, political opinion, or membership in a PSG.<sup>35</sup> Furthermore, the petitioner must show that the protected ground constitutes “at least one central reason for persecuting the applicant.”<sup>36</sup> Of the five statutory grounds for asylum, the meaning of “membership in a particular social group” is the least defined and the most debated.<sup>37</sup> Membership in a PSG is the only ground that can evolve with the motivations for persecution.<sup>38</sup> The flexibility of this ground for protection has made it a favorite for asylum applicants.<sup>39</sup> Because this term provides potentially endless protection, the United States and the international community have struggled to define its scope.<sup>40</sup>

The term PSG normally comprises persons of similar background, habits, or social status.<sup>41</sup> Membership in such a PSG may be at the root of persecution for many reasons. It may occur because there is no confidence in the group’s loyalty to the government or because of the group’s political outlook; economic activity of its members; or the very existence of the social group itself is considered a barrier to the government’s policies.<sup>42</sup> Additionally, a claim of fear of persecution under the PSG category may frequently overlap with a claim of fear of persecution on other grounds, such as race, religion, or nationality.<sup>43</sup> Usually, mere membership in a PSG will not be enough to substantiate a claim of refugee status.<sup>44</sup> However, there may be special circumstances where mere membership can be a sufficient ground to fear persecution.<sup>45</sup>

The refugee definition requires proof of (1) a reasonable fear of harm that is objectively serious enough to be considered “persecution” and (2) provides a “nexus” or is causally linked or to race, religion, nationality, membership in a PSG, or political opinion.<sup>46</sup> In order for an applicant to be at risk “on account” of

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35. 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

36. *Id.*

37. *Fatin v. INS*, 12 F.3d 1233, 1238–39 (3d Cir. 1993).

38. Bradley B. Baniyas, *Membership in a Particular Social Group: Does America Comply with Its International Obligation?*, 1 CHARLESTON L. REV. 123, 125 (2007).

39. *Id.*

40. *Id.*

41. 13 AM. JUR. 3D *Proof of Facts* § 9 (2008).

42. *Id.*

43. *Id.*

44. Office of the U.N. High Comm’r 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 [www.unhcr.org](http://www.unhcr.org) (search “Search UNHCR Online” for “Handbook Protocol”); follow “Handbook on Procedures” hyperlink [hereinafter U.N. High Comm’r, *Handbook*].

45. *Id.*

46. Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781 (2003) [hereinafter Musalo, *Revisiting Social Group*].

one of these characteristics, evidence must show that the persecutor seeks to harm the victim because of the victim's possession of the characteristic at issue.<sup>47</sup> However, women are often persecuted because of their gender, and gender is not one of the five protected grounds in the international definition, as stated in the Convention Relating to the Status of Refugees ("Convention").<sup>48</sup>

To bridge this interpretive barrier, the United Nations High Commissioner for Refugees (UNHCR)<sup>49</sup> issued its recommendations and guidelines focusing on the key issues: persecution, non-State actors, and nexus to an enumerated ground in the Convention.<sup>50</sup> The UNHCR 2002 Guidelines provided "legal interpretative guidance" for governments, legal practitioners, decisionmakers, and the judiciary by (1) proposing usage of a human rights framework comprehensive of women's rights to determine if a harm constitutes persecution, including harms inflicted in the private sphere by non-State actors, and (2) advocating that women may constitute a PSG and may be able to fulfill the nexus requirement between the persecution and their social group membership.<sup>51</sup>

In the introduction to its 2002 Guidelines, the UNHCR denounced the idea that "membership in a particular social group" may be used as a "catch all" safety net.<sup>52</sup> It defined PSG as a "group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society."<sup>53</sup> The characteristic will frequently be one that is intrinsic, unalterable, or "otherwise fundamental to identity, conscience or the exercise of

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47. *Id.* at 783.

48. *Id.* at 782. The Convention Relating to the Status of Refugees is the body of law upon which asylum jurisprudence is based. Convention Relating to the Status of Refugees, July 28, 1951, 94 Stat. 103, 189 U.N.T.S. 150 [hereinafter "Convention"]. It created an international definition of refugee that "was binding upon the world community." Heyman, *supra* note 32, at 768. Its scope was enlarged by the Protocol of 1967 Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223. The United States adopted these standards when it became a party to the Protocol and enacted the Refugee Act of 1980, which incorporates the essential provision of the Convention. Pub. L. No. 96-212, 94 Stat. 103 (1980).

49. The Office of the United Nations High Commissioner for Refugees (UNHCR) was established on December 14, 1950 by the United Nations General Assembly. UNHCR, About Us, <http://www.unhcr.org/pages/49c3646c2.html> (last visited Mar. 5, 2010). "The agency is mandated to lead and coordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country." *Id.*; U.N. 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*, ¶ 2, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter U.N. High Comm'r, *Guidelines*].

50. Conclusion on Refugee Women and International Protection, Executive Committee of the High Commissioner's Programme, 36th Sess., No. 39, U.N. Doc. A/40/12/Add.1 (1985), available at <http://www.unhcr.org/publ/PUBL/41b041534.pdf>.

51. Musalo, *Revisiting Social Group*, *supra* note 46, at 782-83.

52. U.N. High Comm'r, *Guidelines*, *supra* note 49, ¶ 2.

53. *Id.* ¶ 11.

one's human rights."<sup>54</sup> The UNHCR recognized that the term needs delimiting, but instead of articulating the scope of the term, it combined the two predominant international definitions to create an expansive ground of protection: immutable characteristics and the voluntary association test.<sup>55</sup> The definition explicitly recognized women as a PSG when it stated that "[i]t follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men."<sup>56</sup>

## II. APPROACHES TO THE GENDER-BASED ANALYSIS FOR CLAIMS BROUGHT UNDER PSG

Despite important advances in U.S. case law, it appears that gender-related claims in U.S. courts continue to suffer from inconsistent judicial interpretation, even when the claim is granted.<sup>57</sup> This inconsistency results from the ambiguousness of the term. The Second Circuit recognized this problem in *Gao v. Gonzales* when it stated that the category of "particular social group" is "the least well defined on its face, and the diplomatic and legislative histories shed no light on how it was understood by the parties to the Protocol or by Congress."<sup>58</sup> This uncertainty has led the circuits to employ different tests for the PSG analysis.

### A. *Acosta* Definition: Social Groups Defined by Immutable or Fundamental Characteristics

The immutable or fundamental standard originated in *Acosta*, in which the BIA ruled that in order for the term "particular social group" to be "of the same kind as the other four grounds, it should be limited to characteristics that are immutable or fundamental."<sup>59</sup> This precedential case articulated an approach to PSGs that is still alive today. The BIA interpreted the phrase "persecution on account of membership in a particular social group" to mean:

[P]ersecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group

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54. *Id.*

55. See discussion *infra* Part II.A–B.

56. U.N. High Comm'r, *Guidelines*, *supra* note 49, ¶ 12.

57. See KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY* 725 (3d ed. 2007).

58. 440 F.3d 62, 67 (2d Cir. 2006), *vacated sub nom.* *Keisler v. Gao*, 552 U.S. 801 (2007).

59. Musalo, *Revisiting Social Group*, *supra* note 46, at 784 (analyzing *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985)).

either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.<sup>60</sup>

The court then applied this definition and found that being a taxi driver was not fundamental to Acosta's identity, since he had the power to change his vocation.<sup>61</sup>

Notably, the BIA explicitly acknowledged that sex may qualify as a PSG because of its innate character.<sup>62</sup> The "Acosta definition" approaches "social refugees" as members of interest groups perceived to threaten powerful interests, such as the State and majority groups, by virtue of some shared characteristic that is either unchangeable or fundamental.<sup>63</sup>

The immutability test has since been adopted as the majority test among the federal circuits and is limited by what each judge envisions as characteristics fundamental to an individual's identity on a case-by-case basis.<sup>64</sup> Several circuits have interpreted the holding in *Acosta* as recognizing family as a PSG, confirming that an individual's status within a domestic relationship is within the realm of characteristics that define a social group.<sup>65</sup>

The Third Circuit applied *Acosta*'s immutability test in *Fatin v. INS*,<sup>66</sup> where it rejected a petition by an Iranian woman who had lived in Iran during the Islamic revolution and claimed that, if she were removed to Iran, she would be forced to conform to fundamentalist Islamic norms.<sup>67</sup> The court said that "in the excerpt from *Acosta* . . . the Board specifically mentioned 'sex' as an innate characteristic that could link the members of a 'particular social group.'"<sup>68</sup> The court reasoned that the petitioner was successful in identifying a PSG, namely, women in Iran.<sup>69</sup> Nonetheless, the court concluded that *Fatin* had not shown that she would suffer or that she had a well-founded fear of suffering "persecution" based solely on her gender.<sup>70</sup> Additionally, the court stated that there was no recorded evidence that women in Iran were systematically persecuted for being women.<sup>71</sup>

Attempting to reconcile the seemingly broad definition of PSG by the *Acosta* court and the *Fatin* court's stricter nexus analysis, the Second Circuit explained that the holding in *Fatin* could be construed to suggest that achieving the

60. *Acosta*, 19 I. & N. Dec. at 233.

61. *Id.* at 234.

62. *Id.* at 233.

63. MUSALO ET AL., *supra* note 57, at 671–72.

64. *See, e.g.*, *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); *Thomas v. Gonzales*, 409 F.3d 1177, 1185 (9th Cir. 2005), *vacated*, 547 U.S. 183 (2006); *Castellano-Chacon v. INS*, 341 F.3d 533, 546–547 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); *Alvarez-Flores v. INS*, 909 F.2d 1, 7 (1st Cir. 1990).

65. *See Gebremichael v. INS*, 10 F.3d 28, 35–36 (1st Cir. 1993).

66. 12 F.3d 1233.

67. *Id.* at 1235–36.

68. *Id.* at 1240.

69. *Id.*

70. *Id.*

71. *Id.* at 1241.



proper balance in the asylum analysis requires interpreting PSG broadly, “requiring only one or more shared characteristics that are either immutable or fundamental.”<sup>72</sup> Simultaneously, the Second Circuit added that a stricter reading of “on account of” would be needed “such that an applicant must prove that these characteristics are a central reason why she has been, or may be, targeted for persecution.”<sup>73</sup> Similarly, the court in *Niang v. Gonzales* echoed that “the focus with respect to [gender-related] claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ‘on account of’ their membership.”<sup>74</sup>

### ***B. External Perception Test***

The Second and Eleventh Circuits created a definition for “membership in a particular social group” focusing on the specific society’s external perception of the group. For example, in *Gomez v. INS*, the petitioner presented herself as a member of a social group made up of “women who have been previously battered and raped by Salvadoran guerillas.”<sup>75</sup> The Second Circuit defined a social group as a group of “individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.”<sup>76</sup> The court required that the common attributes of the social group be “recognizable and discrete,” but not “broadly-based.”<sup>77</sup> Applying this test, the court denied the existence of the alleged social group because Gomez failed to produce evidence that “would-be persecutors could identify them as members of the purported group.”<sup>78</sup>

The BIA, in *In re C-A*,<sup>79</sup> indicated that the “social visibility of the members of a claimed social group is an important consideration in identifying the existence of a [PSG] for the purpose of determining whether a person qualifies as a refugee.”<sup>80</sup> The “social group” analysis must focus on fundamental characteristics and social visibility within the country in question.<sup>81</sup> The focus is not on statistical or actuarial groups or on artificial group definitions.<sup>82</sup> Rather, the focus is on the existence and visibility of the group in the society in question and on the importance of the pertinent shared characteristic of the group members.<sup>83</sup>

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72. *Gao v. Gonzales*, 440 F.3d 62, 68 (2d Cir. 2006), *vacated sub nom.* Keisler v. Gao, 552 U.S. 801 (2007).

73. *Id.*

74. 422 F.3d 1187, 1199–1200 (10th Cir. 2005).

75. 947 F.2d 660, 663 (2d Cir. 1991).

76. *Id.* at 664.

77. *Id.*

78. *Id.*

79. 23 I. & N. Dec. 951 (B.I.A. 2006).

80. *Id.* at 951.

81. *Id.* at 960.

82. *See id.* at 959–60.

83. *Id.* at 960.

*C. Sanchez-Trujillo, Hernandez-Montiel, and the Voluntary Association Test*

The voluntary association test requires the existence of a voluntary associational relationship among the purported members of the group, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group. In *Sanchez-Trujillo v. INS*, the court decided that “young, urban, working class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador” could not constitute a PSG.<sup>84</sup> The court held that a PSG is one united by a voluntary association, including former association or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it. In keeping with the voluntary association requirement the court then found that the social group Sanchez-Trujillo asserted was too broad and that it would include people with “different lifestyles, varying interests, diverse cultures, and contrary political leanings.”<sup>85</sup> Thus, the court ruled that the necessary voluntary association was not present.<sup>86</sup>

In *Hernandez-Montiel v. INS*, the Ninth Circuit responded to other circuits noting that the “voluntary association test” was contradictory to *Acosta*’s immutability test.<sup>87</sup> In *Hernandez-Montiel*, a Mexican man alleged that he was persecuted on account of his membership in a PSG comprising “gay men with female sexual identities in Mexico.”<sup>88</sup> In *Hernandez-Montiel*, the court attempted to harmonize *Sanchez-Trujillo* with *Acosta* and cited voluntary association as a “central concern”; then it immediately described a family as a “prototypical example” of a social group.<sup>89</sup> The Ninth Circuit then noted that “biological family relationships are far from ‘voluntary.’”<sup>90</sup> This observation led the court to modify the voluntary association requirement.<sup>91</sup> The court held that a PSG “is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it,”<sup>92</sup> reasoning that this harmonizes *Sanchez-Trujillo* with *Acosta*.<sup>93</sup> The Ninth Circuit initially utilized a voluntary association requirement to limit membership in a PSG, but after *Hernandez-Montiel*, it broadened membership in a PSG by categorizing reliance on the voluntary association test as an additional factor and potential safety net.<sup>94</sup>

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84. 801 F.2d 1571, 1573 (9th Cir. 1986).

85. *Id.* at 1577.

86. *Id.*

87. 225 F.3d 1084, 1087 (9th Cir. 2005), *overruled by* Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005).

88. *Id.* at 1094–95.

89. *Id.* at 1092.

90. *Id.*

91. *Id.* at 1092–93.

92. *Id.* at 1093.

93. *Id.* at 1093 n.6.

94. *Id.* at 1093.

*D. Femaleness as Immutable or Fundamental—Still in Limbo*

Courts have been hesitant to recognize femaleness, on its own, as a fundamental or immutable characteristic. However, in *Mohammed v. Gonzales*, the Ninth Circuit found “Somalian women” to qualify as a PSG.<sup>95</sup> In analyzing a Somali’s asylum claim based on fear of female genital mutilation (FGM), the court noted that although it had not previously recognized females as a social group, “the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is ‘simply a logical application of our law.’ Few would argue that sex or gender, combined with clan membership or nationality, is not an ‘innate characteristic fundamental to individual identity.’”<sup>96</sup>

Similarly, UNHCR has made clear that “women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.”<sup>97</sup> Its analysis provides significant guidance for issues of refugee law.<sup>98</sup>

Despite *Acosta*’s liberal reading of the definition of a PSG and some courts’ adherence to it, other courts have implied that women applicants have to demonstrate not only that a practice discriminates against women but also that they do not agree with that practice or discrimination. In *In re Kasinga*,<sup>99</sup> the first case where the BIA decided that FGM “can constitute persecution,”<sup>100</sup> the BIA defined the PSG as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>101</sup> This construction of the PSG signaled the court’s desire to recognize stricter and narrower groups than the *Acosta* court had recognized under its more permissive construction of the term under the statute.<sup>102</sup>

*Gao v. Gonzales* is notable for its recognition of a particular gender-specific form of persecution—the forced contractual matrimony of women.<sup>103</sup> This case was decided ten years after the BIA made its precedential decision in *Kasinga*. Gao was a Chinese national who claimed a fear of forced entry into an arranged marriage procured through her parents’ receipt of 18,800 yen from the

95. 400 F.3d 785, 797 (9th Cir. 2005).

96. *Id.*; see also *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (“[S]exual orientation and sexual identity can be the basis for establishing a ‘particular social group.’”); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir.1993) (holding that persecution based on gender may constitute persecution based on membership in a particular social group).

97. U.N. High Comm’r, *Guidelines*, *supra* note 49, ¶ 4.

98. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987).

99. 21 I. & N. Dec. 357 (B.I.A. 1996).

100. *Id.* at 365.

101. *Id.* at 358 (emphasis added).

102. *Id.* at 365–66.

103. 440 F.3d 62 (2d Cir. 2006), *vacated sub nom.* *Keisler v. Gao*, 552 U.S. 801 (2007).

prospective groom.<sup>104</sup> The court recognized women as a PSG when it stated “the statutory term ‘particular social group’ is broad enough to encompass groups whose main shared trait is a common one, such as gender, at least so long as the group shares a further characteristic that is identifiable to would-be persecutors and is immutable or fundamental.”<sup>105</sup> Because Gao’s social group consisted of women who had been sold into marriage and who lived in a part of China where forced marriages were considered valid and enforceable, she belonged to a PSG that shared more than just a common gender.<sup>106</sup>

Conversely, the Second Circuit in *Gomez v. INS* rejected Gomez’s argument that because she had been raped and beaten by guerilla forces on five different occasions, she belonged to a PSG (“women who have been previously battered and raped by Salvadoran guerillas”) that was likely to be singled out for further persecution.<sup>107</sup> The court went on to say that “[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”<sup>108</sup> The court said there was no real proof that Gomez would be singled out for further brutalization on the basis of her past victimization.<sup>109</sup>

### *E. The Conflict: Obstacles to Granting Asylum*

The myriad approaches taken by courts to define membership in a PSG have led to inconsistent outcomes, further frustrating the quest to recognize women as a PSG.<sup>110</sup> In order to address this incoherence, there must be a consensus among judicial and administrative bodies regarding the framework of the relevant PSG analysis. Notwithstanding language by the BIA supporting the recognition of women as a PSG, lower immigration courts continue to issue inconsistent rulings on this issue, leaving female asylum seekers without strong precedent on which to base their claims.<sup>111</sup>

The current majority analysis of PSG mirrors *Acosta*, the first case to define membership in a PSG.<sup>112</sup> *Acosta*’s analysis, although commonly referred to as the “immutability framework,” defines a PSG by an “immutable, unchangeable characteristic *or* a past or present voluntary association entered into for reasons protected by basic human rights principles that are considered ‘fundamental to human dignity.’”<sup>113</sup> There is no agreement among the courts as to whether gender

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104. *Id.* at 64.

105. *Id.*

106. *Id.* at 70.

107. 947 F.2d 660, 663–64 (2d Cir. 1991).

108. *Id.* at 664.

109. *Id.*

110. See discussion *infra* Part II.E.1-3..

111. Lindsay Peterson, Note, *Shared Dilemmas: Justice for Rape Victims Under International Law and Protection for Rape Victims Seeking Asylum*, 31 HASTINGS INT’L & COMP. L. REV. 509, 525 (2008).

112. *In re Acosta*, 19 I & N. Dec. 211 (B.I.A. 1985).

113. Deborah Anker, *Membership in a Particular Social Group: Developments in U.S. Law*, 1566 PLI/Corp 195, 198–99 (2006).

falls within this definition, regardless of the approach taken.<sup>114</sup> Additionally, there is no consensus among the circuits as to what should be required to establish a nexus where the actions of the state or non-state actor are related to a Convention reason.<sup>115</sup>

One of the most damaging consequences of the disharmony in the courts' analysis has been the shrewd emergence of a "gender +" standard of proof. Some courts consider the broader societal context in which the abuse took place and require women to identify more narrowly as a particular subset of the female population. For example, female rape victims may be forced to identify not just as women but more specifically as women who have been raped by guerilla forces—a smaller "social group."<sup>116</sup> But these subset classifications create new hurdles for refugee applicants, who generally struggle to prove that this shared characteristic is identifiable by would-be persecutors or that their past persecution makes them a target for future persecution.<sup>117</sup> Therefore, until gender is recognized as a PSG in the context of asylum law, victimized women will continue to confront insurmountable hurdles in a system that simultaneously views their status in a group as too broad (requiring "gender +") and too narrow (requiring visibility).<sup>118</sup>

#### 1. "Gender +" Standard a Hurdle for Victims of Domestic Violence

*In re R-A*<sup>119</sup> involved a Guatemalan woman who faced horrific abuse and oppression at the hands of her husband.<sup>120</sup> The Department of Homeland Security

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114. See discussion *infra* Part II.E.2–3

115. *Id.*

116. Peterson, *supra* note 112, at 525.

117. Tanya Domenica Bosi, Note, *Yadegar-Sargis v. INS: Unveiling the Discriminatory World of U.S. Asylum Laws: The Necessity to Recognize a Gender Category*, 48 N.Y.L. SCH. L. REV. 777, 791 (2004).

118. Condon, *supra* note 21, at 208.

119. After fourteen years of legal uncertainty, this case has now been resolved—on October 29, 2009, the Obama administration recommended political asylum for Ms. Alvarado. It had been argued in front of an immigration judge, the Board of Immigration Appeals, and the Attorney General. To clarify the procedural posture of this case, the chronological background of the case is as follows: in 1996, a San Francisco immigration judge granted Ms. Alvarado asylum; in June 1999, the BIA reversed the decision of the immigration judge and ordered that Ms. Alvarado be deported to Guatemala; in January 2001, then-Attorney General Janet Reno responded to a nationwide campaign of outrage and concern by overturning the BIA's decision and ordered the BIA to issue a new decision in Ms. Alvarado's case after the issuance of proposed Department of Justice regulations on the subject of gender asylum; in January 2005, Attorney General Ashcroft remanded *In Re R-A* back to the BIA; in September 2008, Attorney General Mukasey certified *In re R-A* to himself and issued a decision ordering the BIA to reconsider it, removing the requirement that the BIA await the issuance of proposed regulations. Those regulations were never finalized by the Bush Administration. Center for Gender and Refugee Studies, Documents and Information on Rody Alvarado's Claim for Asylum in the U.S., <http://cgrs.uchastings.edu/campaigns/alvarado.php> (last visited Mar. 5, 2010). In October 2009, the Department of Homeland Security endorsed Ms. Alvarado's quest for asylum; an immigration judge must now formally rule. Although this a huge step forward for domestic violence asylum applicants, the Administration's decision applies only to Ms. Alvarado's case and does not officially grant license for all domestic violence applicants to

(DHS) accepted the idea of granting asylum, but its fear of opening the floodgates led it to construct the social group narrowly as married women in Guatemala who are unable to leave the relationship.<sup>121</sup> This ruling's implication is that gender does not have to be the only reason for the persecution, but it must be a central reason.<sup>122</sup> DHS acknowledged that her married status was connected to her gender.<sup>123</sup> Although the decision itself went against the recognition of gender as a PSG, the government's brief in the case and the subsequent reaction of the government to the BIA's decision showed a move to recognize gender-based persecution.<sup>124</sup>

The majority of today's refugees fear persecution at the hands of non-state actors.<sup>125</sup> A non-state actor presents an amorphous enemy for women seeking asylum.<sup>126</sup> Because his pattern of conduct and motive is usually less clear than that of state-based persecution, it is much harder to satisfy the "on account of" prong of the asylum analysis.<sup>127</sup> Though citizens have a right to protection from threats, when the cause of the persecution is not the state, it is uncertain when the state's failure to protect rises to an unacceptable level and warrants an asylum grant. For example, it is unclear how pervasive the abuses must be, how persistent they must remain, and how ineffective the government must be in combating them to justify the intervention of the asylum state.<sup>128</sup>

In *In re R-A-*, the majority of the BIA treated domestic violence as a private problem and declined to grant asylum based on a heinous form of domestic violence, stating that the respondent had "failed to show a sufficient nexus between her husband's abuse of her and the particular social group" she asserted.<sup>129</sup> This case involved a Guatemalan woman named Rodi Alvarado, who was married at age sixteen and suffered extreme violence, rape, sodomy, and social and economic subjugation at the hands of her husband.<sup>130</sup> As time went on, the "level and frequency of [her husband's] rage increased concomitantly with the seeming senselessness and irrationality of his motives."<sup>131</sup> Even though she

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qualify. Editorial, *Fleeing Abuse*, WASH. POST, Nov. 10, 2009, at A14, available at [http://www.washingtonpost.com/wp-dyn/content/article/2009/11/09/AR2009110903163\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/11/09/AR2009110903163_pf.html).

120. 24 I. & N. Dec. 629 (A.G. 2008).

121. *Id.* at 629–30.

122. *In re R-A-*, 22 I. & N. Dec. 906, 923 (B.I.A. 1999) (stating "[s]he must make a showing from which it is reasonable to conclude that her husband was motivated to harm her, at least in part, by her asserted group membership").

123. *Id.* at 932–33.

124. See generally Department of Homeland Security's Position on Respondent's Eligibility for Relief, *R-A-*, 22 I. & N. Dec. 906 (No. A 73 753 922)[hereinafter DHS Position], available at [http://cgrs.uchastings.edu/documents/legal/dhs\\_brief\\_ra.pdf](http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf).

125. Heyman, *supra* note 32, at 789.

126. *Id.* at 788.

127. *Id.*

128. *Id.*

129. 22 I. & N. Dec. 906, 906, 923 (B.I.A. 1999).

130. *Id.* at 908–09.

131. *Id.* at 908.

appealed to the Guatemalan police for protection, help was unavailable.<sup>132</sup> Summonses were issued for her husband, but he ignored them at no consequence.<sup>133</sup> When Alvarado appeared before a judge, “he told her that he would not interfere in domestic disputes.”<sup>134</sup> Additionally, Alvarado was unaware of any shelters or other organizations, so she fled Guatemala and sought asylum in the United States.<sup>135</sup>

The major focus of the Board in this case was on the question of social group membership. The Board agreed that Alvarado fell within a group of Guatemalan women “who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>136</sup> However, the Board concluded that she had not presented a cognizable asylum claim; instead, it concluded that her claim was simply a personal misfortune.<sup>137</sup> From the Board’s point of view, her claimed group membership seemed like a “legally crafted description of some attributes of her tragic personal circumstances.”<sup>138</sup>

The Board’s discussion of the non-state actor was similarly narrow-minded. Despite recognizing that the governmental failures in Guatemala led to the “appalling” level of official tolerance of abuse,<sup>139</sup> the Board stressed that the “independent” and “private” nature of his conduct was beyond the reach of asylum law.<sup>140</sup>

In *R-A-*, the BIA endorsed the view that the asylum analysis should consist of looking at the persecutor’s motives instead of the state’s lack of intervention.<sup>141</sup> The Board acknowledged that social attitudes and the “concomitant effectiveness (or lack thereof) of governmental intervention very well may have contributed to the ability of the respondent’s husband to carry out his abusive actions over a period of many years.”<sup>142</sup> However, the Board’s discussion of the nexus requirement continued to ask whether “her husband has targeted and harmed the respondent because he perceived her to be a member of [the purported] particular social group.”<sup>143</sup> The Board reasoned that because her husband’s abuse was arbitrary and many times for no reason at all, the abuse was indiscriminate since the acts of violence were not targeted acts of persecution.<sup>144</sup> The majority ruled that although the husband’s independent actions were tolerated,

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132. *Id.* at 909.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 911.

137. *Id.* at 918.

138. *Id.* at 919.

139. *Id.* at 922.

140. *Id.* at 923.

141. *Id.*

142. *Id.* at 922.

143. *Id.* at 920; *see also id.* at 926 (stating that “[o]ther factors, ranging from jealousy to growing frustration with his own life to simple unchecked violence tied to the inherent meanness of his personality” may account for his motivations).

144. *Id.* at 921.

his actions were not “desired” or “encouraged” within Guatemala and that the Guatemalan government did not encourage domestic violence.<sup>145</sup> Consequently, the Board concluded that Alvarado had to show more than a lack of protection or the existence of societal attitudes favoring male domination: she had to show that he was motivated to harm her, at least in part, by her asserted group membership.<sup>146</sup>

The dissent in *R-A-* emphasized the importance of considering the factual circumstances surrounding the violence.<sup>147</sup> In doing so, the dissent established that the factual record clearly exposed that the severe beatings and violence directed at Alvarado by her husband were motivated by his desire to dominate and suppress her because of her gender.<sup>148</sup> This was evidenced by the fact that he “inflicted his harm directly on her vagina, sought to abort her pregnancy, and raped her.”<sup>149</sup> According to the dissent, “the fundamental purpose of domestic violence is to punish, humiliate, and exercise power over the victim on account of her gender.”<sup>150</sup> Alvarado’s husband may not have been conscious of his motive in persecuting his wife, but he was given tacit permission to carry out acts of heinous and unimaginable violence and torture because the culture, government, and society made it a tolerable act to abuse women.<sup>151</sup> The level of impunity with which a persecutor acts is relevant to an “on account of” determination.<sup>152</sup> At a subconscious level, so to speak, the husband’s underlying motive to abuse Alvarado was rooted in his awareness of the complete freedom to do so with no consequences.<sup>153</sup> Here, Alvarado’s husband was not a “simple criminal, acting outside societal norms; rather, he knew that, as a woman subject to his subordination, [his wife] would receive no protection from the authorities if she resisted his abuse and persecution.”<sup>154</sup>

Domestic violence does not entail what a woman believes, but rather it is defined by her gender identity and the sexist beliefs of the man who abuses her.<sup>155</sup> When a woman is not afforded protection from her abuser, a refuge country must

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145. *Id.* at 923.

146. *Id.*

147. *Id.* at 938 (Guendelsberger, Bd. Member, dissenting).

148. *Id.*

149. *Id.*

150. *Id.* at 939.

151. *Id.*

152. *Islam v. Sec’y of State*, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.), available *at*

<http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm> (concluding that Pakistani women, as a group, were discriminated against for being women and applying international interpretation of particular social group to assist United States courts in reconsidering their interpretation of PSG).

153. *R-A-*, 22 I. & N. Dec. at 939 (Guendelsberger, Bd. Member, dissenting).

154. *Id.*

155. Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 59 (1998).



step in; the underlying principle of the refugee protection regime is to provide surrogate protection when the individual's country of nationality fails to do so.<sup>156</sup>

### 2. Social Circumstantial Evidence vs. Factual Circumstances

The BIA required that in order for Alvarado's asserted PSG to qualify, "the characteristic of being abused [must be] important within Guatemalan society."<sup>157</sup> This was the Board's way of imputing their view that the violence Alvarado endured lacked social significance.<sup>158</sup> Additionally, the majority was concerned that Guatemalan society did not perceive Alvarado's asserted group as a societal faction.<sup>159</sup>

As the dissent proposed, however, the BIA could have found a nexus between Alvarado's persecution and her membership in the asserted PSG without evaluating Guatemala's social culture relating to domestic abuse.<sup>160</sup> Instead, the dissent set forth four factors for evaluating the nexus between the abuse an applicant suffered and the persecutor's motivations: (1) the factual circumstances of the violence; (2) the incomprehensibility of the actions as an inference that the persecutor acted on account of the victim's possession of a protected characteristic; (3) the reason why such violence occurs; (4) and the extent to which the persecutor acted with impunity.<sup>161</sup> Since factual circumstances are most often the primary indicator of motive in asylum cases, it is important to consider them *in addition* to the societal context relating to the abuse at hand.<sup>162</sup> By not considering the factual circumstances in Alvarado's situation, the majority further perpetuated the public/private divide by disregarding the very circumstances that proved her husband's motive to abuse her based on her gender.<sup>163</sup> The husband's barbaric and brutal acts of violence manifested his desire to physically control his wife's body and decisions—"further evidence bearing on his wife's subordinate status."<sup>164</sup>

### 3. Limitations of the Nexus Analysis

The recognition of gender itself as defining a PSG has encountered opposition based on a misunderstanding that it is overbroad and, in effect, would recognize every woman in certain countries as a refugee.<sup>165</sup> To fulfill the requirements of the refugee definition, a nexus between one or more of the Convention grounds and the feared persecution is required.<sup>166</sup> The nexus analysis follows a two-step process that requires (1) the identification of the relevant Convention ground (race, religion, nationality, political opinion or membership of

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156. See JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 124 (1991).

157. *R-A-*, 22 I. & N. Dec. at 919.

158. Condon, *supra* note 21, at 228.

159. *R-A-*, 22 I. & N. Dec. at 918.

160. *Id.* at 938 (Guendelsberger, Bd. Member, dissenting).

161. Condon, *supra* note 21, at 228-29; see also *R-A-*, 22 I. & N. Dec. at 938-39 (Guendelsberger, Bd. Member, dissenting).

162. Condon, *supra* note 21, at 226.

163. *Id.* at 226-27.

164. *Id.* at 226.

165. Anker, *supra* note 114, at 201-02.

166. Musalo, *Revisiting Social Group*, *supra* note 46, at 783.

a particular social group), and (2) establishment of the causal connection between the Convention ground and an objectively reasonable fear of a harm which is serious enough to be considered “persecution.”<sup>167</sup> Even though there is consensus that nexus requires a showing of some relationship between the feared harm and Convention ground, there is disagreement as to the exact nature of that relationship.<sup>168</sup>

The nexus requirement has posed a burden on women seeking asylum based on their gender “because adjudicators [are] slow to accept a causal connection between an applicant’s gender and the harm inflicted upon her.”<sup>169</sup> The harms inflicted on women are often not considered to be persecution because they are ignored or required by the culture or religion (as in the case of FGM), disproportionately inflicted on women, or simply different from the harms suffered by men under similar circumstances.<sup>170</sup> This barrier is widened when the persecutor is a non-state actor because it is often presumed that the motivation for the harm is “personal” rather than associated with gender.<sup>171</sup> Additionally, “women are often persecuted because of their gender, and gender is not one of the five grounds in the Convention definition.”<sup>172</sup>

The two most vital cases in the United States pertaining to gender asylum claims are the BIA’s decisions in *In re Kasinga*<sup>173</sup> and *In re R-A-*.<sup>174</sup> In *Kasinga*, the BIA adopted a bifurcated nexus analysis by considering nexus in relation to both the non-state actors and the state.<sup>175</sup>

Before *Kasinga*, the nexus analysis in the United States was limited to the motivations of the doer of harm.<sup>176</sup> The analysis did not involve an assessment or critique of the position and motivations of the society or the state. Furthermore, the analysis was presumed to oblige a malignant motivation instead of a simple causal connection.<sup>177</sup> This additional requirement posed a heavy burden on applicants fearing persecution such as FGM where the “perpetrators” who performed the rite were midwives or elders who did not have intent to punish based on a Convention ground.<sup>178</sup> Conversely, “most of [them] presumably believe[d] that they [were] simply performing an important cultural rite that bonds the individual to the society.”<sup>179</sup>

Another obstacle that keeps some courts from embracing women as a PSG is the broadness of the term “women.”<sup>180</sup> This hesitancy stems from the

167. *Id.* at 783, 806.  
 168. *Id.* at 786.  
 169. *Id.*  
 170. *Id.* at 781–82.  
 171. *Id.* at 786.  
 172. *Id.* at 782.  
 173. See *supra* Part II.D for discussion of *In re Kasinga*.  
 174. See *supra* Part II.E.1 for discussion of *In re R-A-*.  
 175. Musalo, *Revisiting Social Group*, *supra* note 46, at 799.  
 176. *Id.* at 800.  
 177. *Id.*  
 178. *Id.*  
 179. *In re Kasinga*, 21 I. & N. Dec. 357, 371 (B.I.A. 1996).  
 180. Macklin, *supra* note 156, at 61.

criticism that “if a woman has a well-founded fear of persecution because she is a woman, the necessary implication is that all women have a well-founded fear of persecution simply because they are women and this simply cannot be.”<sup>181</sup> The analysis suggests that women are too broad a category to form a PSG while “women who are victims of domestic violence” is too narrow.<sup>182</sup> All the while, “women,” although a broad category, have both immutable characteristics and shared common social characteristics that make them a prominent group within the state and society which may attract persecution.<sup>183</sup>

### III. SHOULD “WOMEN” BE A PARTICULAR SOCIAL GROUP?

For women to qualify as a PSG without inconsistency, courts should adopt a bifurcated nexus approach.<sup>184</sup> Even if this approach is not adopted, women should still qualify as a PSG, notwithstanding the various ways courts have analyzed PSG, if courts apply their approaches consistent with the Board’s intent in *Acosta*.

#### A. Proffered Augmentation to PSG Analysis: Bifurcated Nexus

The PSG analysis should be altered so as to adopt a bifurcated nexus approach. Here, the causal link between persecution and a Convention ground may be satisfied:

- (1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons [that] are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related[,] or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.<sup>185</sup>

In other words, the Convention ground may be supplied either by the non-state persecutor coupled with a state that is unable or unwilling to afford protection or by the state when it is unwilling to afford protection for one of the Convention reasons.

This analysis will allow increased protection for women by establishing the causal link for persecution “on account of” their gender. For example, in a case where the applicant is in an abusive relationship with her husband, her PSG claim may be established either by (1) showing that her husband’s actions are predicated on her gender and the State is unable or unwilling to provide protection against

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181. *Id.*

182. *Id.*

183. *Id.* at 64–65 (quoting N93/00656 (1994) R.R.T.A. 1580 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/RRTA/1994/1580.html>).

184. This approach has been advocated for by various legal scholars but has not been adopted by United States law.

185. Musalo, *Revisiting Social Group*, *supra* note 46, at 806.

such conduct; or (2) that whatever the reasons for her husband's actions, the state is unwilling to protect her because of her gender.<sup>186</sup>

***B. Myriad Approaches Lead to the Same Answer—Women Should Be a PSG***

When properly applied to the facts of a case, the various approaches or tests adopted by courts, even though resulting in inconsistent outcomes and incoherent case law, all allow for the same inference—women should qualify as a PSG. In each of the decisions reaching an opposite conclusion, the analysis was misguided and the more feasible conclusions were either ignored or overlooked.<sup>187</sup> For example, in *In re R-A*,<sup>188</sup> the BIA could have found a nexus between Alvarado's persecution and her membership in the asserted PSG without evaluating Guatemala's social culture relating to domestic abuse.<sup>189</sup> In requiring a particular societal significance of the harm as one prong of the analysis, the majority failed to come to that conclusion.<sup>190</sup> The Board instead distinguished its prior decision in *Kasinga*<sup>191</sup> by stating that the petitioner there was able to show that female genital mutilation was a "practice encouraged and viewed as societally important," unlike domestic violence.<sup>192</sup> Further, it stated that in *Kasinga* it was "reasonable to believe that harm was inflicted, at least in part, because of a protected ground."<sup>193</sup> The only similarity the Board drew between *Kasinga* and *R-A* was that the cause of harm in both instances involved non-state actors.<sup>194</sup>

The dissent addressed the inconsistency of the Board granting asylum in one case and denying it in the other, stating that there were no real differences accounting for the disparity in the decisions.<sup>195</sup> In fact, the dissent compared the petitioners' situations and concluded that the two situations exhibited many common factors, such as the abuse they suffered, which was considered culturally normal and was accepted by law enforcement.<sup>196</sup> Furthermore, the persecution suffered by each of the petitioners took place with little or no hope for any state protection.<sup>197</sup> The dissent also pointed out that the Board's opinion failed to show a concern regarding the lack of state protection because it was clear that the violence inflicted upon Alvarado occurred as a result of deplorable governmental acceptance.<sup>198</sup>

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186. DAVID A. MARTIN ET. AL, FORCED MIGRATION LAW AND POLICY 349–50 (2007).

187. See *supra* Part II.A-C for discussion of approaches taken by courts.

188. See *supra* Part II.E.1 and accompanying text for discussion of *In re R-A*.

189. *In re R-A*, 22 I. & N. Dec. 906, 938 (B.I.A. 1999) (Guendelsberger, Bd. Member, dissenting).

190. *Id.* at 919 (majority opinion).

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

192. *R-A*, 22 I. & N. Dec. at 924.

193. *Id.* at 925.

194. *Id.*

195. *Id.* at 933 (Guendelsberger, Bd. Member, dissenting).

196. *Id.* at 932.

197. *Id.* at 932–33.

198. *Id.* at 944.

The majority's focus on the societal significance of spousal abuse was misguided. The social significance of the abuse at hand should not outweigh protection based on a concern for fundamental freedom.<sup>199</sup> Women have a "fundamental right to protection from abuse based on gender. When [this abuse] . . . occurs . . . with state acquiescence, [women] should be afforded the protection of asylum law."<sup>200</sup> And even if the harm is not socially significant, the abhorrent violence should not be excused as a socially accepted crime. If courts were allowed to do so, they would be in direct contradiction to the basis of refugee law, which is to provide protection when the individual's country of nationality does so unsuccessfully.<sup>201</sup> The harm—whether it is exclusive to women, such as female genital mutilation, or suffered by women more often, such as domestic violence—is a violent act suffered by women, which rises to the level of persecution and should be afforded protection pursuant to asylum law.<sup>202</sup>

The fundamental issue is that asylum decision-making is problematic because of the particular nature of the decision task.<sup>203</sup> Asylum adjudication does not involve a "conventional lawyer's exercise of applying a litmus test to ascertained facts but 'a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.'"<sup>204</sup> The U.S.'s definition of PSG relies on American customs and standards to find the plain and ordinary meaning of the words.<sup>205</sup> Each judge, guided by his own biases, dictates what does and does not constitute a fundamental freedom.<sup>206</sup>

Whether it be the immutability, visibility, voluntary association, external perception, or "gender +" test, U.S. courts all take an approach that applies to women and yields outcomes that should be favorable to female asylum-seekers.<sup>207</sup> The decisions that are not favorable are not consistent with the Board's intent in *Acosta*.<sup>208</sup> These decisions do not comport with history, and their misguided analyses lead to artificial constructions of social groups that are both unreasonable and silly.<sup>209</sup> Additionally, courts' reasons for rejecting women as a PSG are

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199. Baniyas, *supra* note 38, at 141 (noting that "Canada, England, and Australia provide protection for members of particular social groups who are the victims of discrimination based on a concern for fundamental freedom").

200. *R-A-*, 22 I. & N. Dec. at 931 (Guendelsberger, Bd. Member, dissenting).

201. Musalo, *Revisiting Social Group*, *supra* note 46, at 807.

202. Danette Gomez, *Last in Line—The United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 975 (2004).

203. Robert Thomas, *Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom*, 20 INT'L J. REFUGEE L. 489, 491 (2008).

204. *Id.* (quoting *R. v. Immigr. Appeal Tribunal & Sec'y of State for the Home Dep't*, *ex parte Shah*, [1997] Imm. AR 145 at 153 (HC)).

205. Baniyas, *supra* note 38, at 142.

206. *Id.*

207. See *supra* Part II for discussion of varying, inconsistent approaches adopted among the circuits.

208. See *supra* Part II.A.

209. See, e.g., *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1573 (9th Cir. 1986) (deciding that "young, urban, working class males of military age who had never served in

unconvincing. If the court is concerned with the numerosity issue (that there would be an influx of women from around the world claiming asylum under the PSG category), then two other issues arise: (1) the purpose of allowing this category to exist in the first place is defeated,<sup>210</sup> and (2) courts would be making inappropriate policy decisions based on apprehension over the number of potential asylum applicants.<sup>211</sup>

Women also clearly satisfy the meaning of the word “particular” in the PSG definition. *In re S-E-G* exhibited that the PSG analysis requires a particular and clearly delineated group, holding that membership in a purported social group requires that the group have “particular and well-defined boundaries, and that it possess a recognized level of social visibility.”<sup>212</sup> The purported visibility requirement does not hurt women since they are “identifiable,” and the group “women” is sufficiently defined to meet the requirements of a PSG within the meaning of the refugee definition.<sup>213</sup> Similarly, the BIA requires visibility and immutability.<sup>214</sup> Again, women as a PSG fulfill this requirement.

“Women” are a PSG, and despite being a broad group, they are a cognizable group in that they share common fundamental and social characteristics.<sup>215</sup> While there are many differences among women—including different lifestyles, values, and political opinions—they still share a defined social status and consequently are viewed as and dealt with by society as a group.<sup>216</sup> Women can face harm based on who they are and therefore should qualify as a PSG.<sup>217</sup> It is women’s social status that often leads to the failure of state protection, and this is particularly true with regard to those cases dealing with “private sphere” persecution such as domestic violence.<sup>218</sup> Regardless of the approach being utilized

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the military or otherwise expressed support for the government of El Salvador” could not constitute a particular social group); *In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) (defining PSG as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice”). *But see In re R-A-*, 22 I. & N. Dec. 906, 918 (B.I.A. 1999) (rejecting “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” as a PSG due to the abstractness of its construction).

210. Baniyas, *supra* note 38, at 129.

211. U.N. High Comm’r, *Handbook*, *supra* note 44, at 3–4.

212. 24 I. & N. Dec. 579, 582 (B.I.A. 2008). In July 2009 the BIA, on the request of a joint motion, reopened respondent’s asylum cases. Order, Board of Immigration Appeals, A098 122 614 (July 28, 2009). *See also In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 73–74, 76 (B.I.A. 2007) (holding that the respondents’ proposed group of “wealthy” Guatemalans was not so readily “identifiable” or sufficiently defined to meet the requirements of a particular social group within the meaning of the refugee definition since their status as affluent Guatemalans did not give them sufficient social visibility to be perceived as a group by society and the group was not defined with adequate particularity to constitute a particular social group).

213. *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

214. *Id.*

215. *See generally Macklin*, *supra* note 156, at 64–65.

216. *Id.* at 65.

217. *See Condon*, *supra* note 21, at 248–56.

218. Macklin, *supra* note 156, at 65 (quoting N93/00656 (1994) R.R.T.A. 1580 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/RRTA/1994/1580.html>).

by the court, and notwithstanding the various reasons they put forth for refusing to recognize women as a PSG, courts cannot overlook the clear fact that women can and do qualify as a PSG unless they are turning a blind eye to the fundamentals of refugee law.

### *C. Concerns: Floodgates Argument*

The recognition of gender itself as defining a PSG has encountered opposition based on a misunderstanding that it is overbroad and, in effect, would recognize every woman in certain countries as a refugee.<sup>219</sup> This view surfaced in the case *In re R-A-*, a domestic violence asylum case stretching over twelve years. Though the Department of Homeland Security finally accepted the idea of granting asylum in some similar cases, its fear of opening the floodgates apparently led it to construct the social group in that case much more narrowly as “married women in Guatemala who are unable to leave the relationship.”<sup>220</sup>

#### *1. Undermining Floodgates Argument*

Opponents of gender-based asylum claims suggest that authorizing these claims will result in a national outpouring of refugee women from across the globe.<sup>221</sup> This is known as the floodgate theory.<sup>222</sup> However, this belief—that adopting the international guidelines and case law as models will result in a substantial rise in the number of female asylum applicants—is unfounded.<sup>223</sup> History reveals that the acceptance of gender asylum does not give rise to a deluge of claims.<sup>224</sup> For example, Canada’s experience corroborates the conclusion that countries that recognize gender asylum claims do not experience floods of women refugees. Canada was the first country in the world to issue more expansive guidelines on gender-based asylum claims and to accept that women fleeing gender-related persecution qualified for protection.<sup>225</sup> It reported no explosion of gender claims following the adoption of those guidelines.<sup>226</sup>

The response to a fear of floodgates should not be to “return victims to situations where their rights will be violated but rather to address the human rights violations that are the root cause for the refugees’ claims.”<sup>227</sup>

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219. Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y & L. 119, 119–20 (2007) [hereinafter Musalo, *Protecting Victims*].

220. DHS Position, *supra* note 125, at 15.

221. Musalo, *Protecting Victims*, *supra* note 220, at 120.

222. *Id.*

223. See Hannah R. Shapiro, Notes & Comments, *The Future of Spousal Abuse as a Gender-Based Asylum Claim: The Implications of the Recent Case of Matter of R-A-*, 14 TEMP. INT’L & COMP. L.J. 463, 486 (2000).

224. Musalo, *Protecting Victims*, *supra* note 220, at 120. See *infra* Part II.C.2 for discussion of historical examples.

225. Condon, *supra* note 21, at 215.

226. *Id.*

227. Musalo, *Protecting Victims*, *supra* note 220, at 120.

## 2. Refugee Law as a Filter to Subvert Fear of Floodgates

The fears of “opening the floodgates” are further undermined by the requirements of refugee law. In addition to establishing membership in a PSG, the applicant must show that they: (1) face a well-founded fear, (2) of being persecuted, (3) on account of their, (4) membership in a PSG.<sup>228</sup> Thus, the refugee definition performs a filtering function.<sup>229</sup> The burden of presenting sufficient evidence of a persecutor’s motive and the requirement that a country be unable or unwilling to protect an applicant from persecution remain substantial hurdles for any asylum applicant.

Addressing potential “floodgates” concerns arising from recognizing gender as constituting a PSG, the Tenth Circuit commented that

[t]here may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation’s residents to obtain asylum on the ground that women are persecuted there. . . . But the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted “on account of” their membership.<sup>230</sup>

Preceding the decision in *Kasinga*, where the BIA recognized female genital mutilation as a gender-based persecution, opponents of the decision pointed to the fact that millions of women a year are subject to FGM, predicting that the United States would be inundated with asylum seekers.<sup>231</sup> *Kasinga* was granted asylum, but the predicted risk of floodgates never materialized.<sup>232</sup> Similarly, the INS stated that it did not expect a big increase in the number of asylum claims if the United States recognized domestic violence as a basis for asylum.<sup>233</sup>

Several explanations undermine the argument that the number of female asylum seekers will dramatically rise with the recognition of gender-based persecution. Women who would have legitimate claims for gender asylum often come from countries where they have few rights, which confines their ability to leave their home countries in the quest for protection.<sup>234</sup> Additionally, women are usually the primary caretakers for their family and children. Many times, they must

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228. Anker, *supra* note 114, at 201; *see also* Gao v. Gonzales, 440 F.3d 62 (2nd Cir. 2006), *vacated sub nom.* Keisler v. Gao, 552 U.S. 801 (2007) (explaining that this fear was far exaggerated because refugees seeking asylum still have to meet the other parts of the definition of refugee).

229. Macklin, *supra* note 156, at 63.

230. Niang v. Gonzales, 422 F.3d 1187, 1199–1200 (10th Cir. 2005).

231. Musalo, *Protecting Victims*, *supra* note 220, at 132.

232. Press Release, U.S. Dep’t of Justice, Immigration & Naturalization Servs., Questions and Answers: The R-A- Rule (Dec. 7, 2000), *available at* [http://www.uscis.gov/files/pressrelease/R-A-Rule\\_120700.pdf](http://www.uscis.gov/files/pressrelease/R-A-Rule_120700.pdf) (noting that “although 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).

233. Musalo, *Protecting Victims*, *supra* note 220, at 132–33.

234. *Id.* at 133.



choose between leaving their family behind or exposing it to the risks of travel to the refugee country.<sup>235</sup> Also, women asylum seekers usually have no control over family resources, making it extremely arduous to get the finances required to travel to another country for asylum.<sup>236</sup>

A more principled and effective response to the “prevalence of gender-related persecution is not to restrict asylum laws but to address the root causes of the persecution itself.”<sup>237</sup> For example, advocates at the Center for Gender and Refugee Studies made public a report on the high rate of femicides in Guatemala; the report draws public attention to the U.S. government’s financial support of a Guatemalan justice system that does very little to address the femicide problem.<sup>238</sup> The United States should require “transparency and accountability, as well as appreciable results on the part of the Guatemalan government. . . . U.S. funding to improve law enforcement and judicial functions in Guatemala shows very little in the way of positive results, especially in the context of the protection of women’s rights.”<sup>239</sup>

#### *D. Practical Barriers Facing Women Asylum Seekers*

There are numerous practical factors that trigger the resistance to extending protection to victims of gender persecution. First, there is an overall decrease in enthusiasm for welcoming people fleeing persecution.<sup>240</sup> This feeling is exacerbated by an anti-immigrant climate that rose considerably after the September 11, 2001 terrorist attacks, resulting in increased xenophobia within the country.<sup>241</sup> This has transformed into measures for increased militarization of the border and expanded authority to deport or remove undocumented immigrants while affording them only minimal procedural rights.<sup>242</sup> Additionally, women’s fears of persecution are often intertwined with cultural and religious norms and practices that have led some opponents of gender asylum to conclude that the harms these women suffer are not really serious.<sup>243</sup> These assertions seem to neglect the fact that the harms at issue in gender cases are grave human rights

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235. *Id.*

236. *Id.*

237. Aubra Fletcher, *The Real ID Act: Furthering Gender Bias in U.S. Asylum*, 21 BERKELEY J. GENDER L. & JUST. 111, 130 (2006).

238. ANGÉLICA CHÁZARO & JENNIFER CASEY, GETTING AWAY WITH MURDER: GUATEMALA’S FAILURE TO PROTECT WOMEN AND RODI ALVARADO’S QUEST FOR SAFETY 14 (2005), *available at* [http://cgrs.uchastings.edu/documents/cgrs/cgrs\\_guatemala\\_femicides.pdf](http://cgrs.uchastings.edu/documents/cgrs/cgrs_guatemala_femicides.pdf).

239. Musalo, *Protecting Victims*, *supra* note 220, at 140.

240. *Id.* at 130.

241. *Id.*

242. For example, the REAL ID Act included measures that increased the burden of proof for asylum seekers by making it more difficult to establish a nexus with one of the five enumerated grounds and making it easier for adjudicators to deny cases on the basis of credibility. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 303 (codified in part in 8 U.S.C. § 1252 (2006)).

243. Musalo, *Protecting Victims*, *supra* note 220, at 131.

violations such as rape, sexual enslavement, mutilations, acid burning, brutal domestic battering, and “honor” killings.<sup>244</sup>

Furthermore, the REAL ID Act broadens the gender gap in asylum law.<sup>245</sup> Congress passed the REAL ID Act in May 2005 in the name of anti-terrorism and homeland security.<sup>246</sup> The Act implements rules that exacerbate the obstacles gender-related asylum claimants already confronted, such as establishing motive, defining “social group,” and the immigration judges’ discretion in the context of institutional and individual misconceptions about the harms women disproportionately suffer.<sup>247</sup> Specifically, the REAL ID Act imposes a centrality of motive requirement: applicants must establish that one or more of the five enumerated grounds “was or will be at least one central reason for persecuting the applicant.”<sup>248</sup> This standard can be read to alter U.S. case law, which typically permits a grant of asylum even where an enumerated ground was only one of a perpetrator’s many motives, not necessarily a central motive.<sup>249</sup> The biggest obstacle with the “centrality” requirement is that, in general, motive is difficult to prove and usually must be established through circumstantial evidence.<sup>250</sup> It is especially difficult to establish motive in gender-related cases where the persecutor is rarely a state actor.<sup>251</sup>

#### IV. OTHER PROPOSED SOLUTIONS

Regardless of their approach, few courts have satisfactorily defined the groups that face persecution. Without a category of asylum protection based on gender, women confront contradictory conceptions of their experiences; definitions are either too broad or overly narrow, leading to artificial and frivolous PSG constructions.<sup>252</sup> Many times the definitions seemed tailored for litigation purposes in that the social group construction is crafted to fit within the particular approach adopted by the court in the case.<sup>253</sup> Addressing this issue, Stephen Legomsky commented that instead of diving into the maelstrom of inconsistency by trying to construct precise “groups,” decisionmakers should recognize that the

244. *Id.* at 131–32.

245. Fletcher, *supra* note 238, at 130.

246. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

247. *See* Fletcher, *supra* note 238, at 119–25.

248. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 303 (codified at 8 U.S.C. 1158(b)(1)(B)(i)).

249. *See* INS v. Elias-Zacharias, 502 U.S. 478 (1992).

250. *Id.* at 483.

251. *See* Fletcher, *supra* note 238, at 120.

252. Eve McCabe, Comment, *The Inadequacy of International Human Rights Laws to Protect Rights of Women as Illustrated by the Crisis in Afghanistan*, 5 UCLA J. INT’L L. & FOREIGN AFF. 419, 445 (2000-2001).

253. *See, e.g., In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) (“[Y]oung women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice”); *Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006), *vacated sub nom. Keisler v. Gao*, 552 U.S. 801 (2007) (“women who had been sold into marriage and who lived in a part of China where forced marriages were considered valid and enforceable”); *In re R-A-*, 24 I. & N. Dec. 629, 629–30 (A.G. 2008) (involving married women in Guatemala who are unable to leave the relationship).

“on account of” requirement only suggests a causal connection between membership and persecution.<sup>254</sup>

Another approach recognizes that societal perception makes people “stand out” and, thus, become targets for persecution.<sup>255</sup> This perspective advocates that social perception identifies and creates social groups—people become targets of persecution on account of this social perception which then legitimately affords them protection.<sup>256</sup> This approach to social groups advances the pragmatic concerns of asylum law, as group membership using this interpretation easily lends itself to empirical verification unconfined by the limits of abstract tests.<sup>257</sup> When people “stand out” and deviate from the norms of those in power, they may become the targets of persecutors.<sup>258</sup>

If immigration judges cannot interpret PSG to include women, then perhaps gender needs to be included as a one of the enumerated grounds as a part of the refugee definition. The contradictory conception of gender persecution claims by asylum adjudicators as either too broad or too narrow to warrant refugee status exacerbates the burden on women to fit distinct types of claims within the available grounds for asylum.<sup>259</sup> Looking at the analysis of gender-based PSG cases on a spectrum, on one end are cases like *Fatin* and *Safie v. INS*, which denied asylum to applicants based on a conception of “social groups” as unconnectedly defined<sup>260</sup> and gender oppression as too widespread for the purposes of asylum.<sup>261</sup> On the other end are cases like *In re R-A-*, where judges view gender violence as too private and particularized to constitute persecution based on the characteristics of a social group in that the persecution does not go beyond the individual victim.<sup>262</sup> Because of this inconsistency and the realization that women are linked by the common reason for their persecution—their sex—perhaps gender should constitute its own category in the asylum statute. Doing so would “achieve an overdue recognition that women do

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254. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 964-67 (3d ed. 2002). Commenting on *In re Kasinga*, Professor Legomsky wrote:

Since the Board’s own case law (*Acosta*) and the law of the circuit in which the case was decided both make it easy to hold that women are a social group . . . the only possible reason for the Board in *Kasinga* to flail around in search of all those qualifiers is its unstated assumption that, without such qualifiers, “on account of” would have been an obstacle to relief.

*Id.* at 964.

255. Heyman, *supra* note 32, at 784.

256. *Id.* at 786.

257. *Id.*

258. *Id.*

259. Condon, *supra* note 21, at 252.

260. *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

261. *Safie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (rejecting as overbroad the claim that “Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them” had suffered persecution on account of a protected characteristic).

262. See *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999).

have a legitimate claim to human rights and fundamental freedom due them as women.”<sup>263</sup>

### CONCLUSION

It is said that “[we] live[] in a world of women, but not a woman’s world.”<sup>264</sup> This statement holds true for women seeking asylum in the United States. For decades, U.S. asylum law has restricted women’s access to protection. As outlined in this Note, the ambiguity of the term PSG as well as the various approaches taken by courts to analyze whether women should constitute a PSG have led to inconsistent and unsubstantiated outcomes. Every minute that the courts take to answer this question, women all over the world, in dire need of protection, are denied one of their basic human rights: safety from persecution.

Unless U.S. courts interpret refugee law to include women as a PSG by altering the asylum law analysis so that it comports with the BIA’s intent in *Acosta*, hopes for a more consistent application of the law will most likely fail. The analysis should allow women to qualify as a PSG. It should allow women who are persecuted by non-state actors, who may not be persecuting them “on account” of their gender, to claim asylum if the state is not providing protection to them “on account” of their gender. However, even if this step is not taken, following a guided and proper application of each of the various approaches adopted by the U.S. courts considering whether women may qualify as a PSG, asylum adjudicators should come to the conclusion that women can qualify as a PSG. If they do not, their analysis is lacking, their reasoning is unsound, and they have forgotten the basic principle of refugee law: protection of basic human rights.

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263. Condon, *supra* note 21, at 254 (quoting Florence Butegwa, *International Human Rights Law and Practice: Implications for Women*, in FROM BASIC NEEDS TO BASIC RIGHTS? 31 (Margaret A. Schuler ed., 1995)).

264. Ilka Tanay Payan, *Women’s Human Rights in the United States: An Immigrant’s Perspective*, in WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVE 82, 83 (Julie Peters & Andrea Wolper eds., 1995).