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## Securing Gender-Based Persecution Claims: A Proposed Amendment to Asylum Law

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SECURING GENDER-BASED PERSECUTION CLAIMS:  
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INTRODUCTION

Every year, the United States grants political asylum to refugees who have fled their countries because of persecution.<sup>1</sup> Women and children make up the majority of the world’s refugees.<sup>2</sup> Often the first victims of political and social turmoil, women are forced to flee their homes to escape gender-related abuses such as rape, beatings, torture, and sexual harassment.<sup>3</sup> Furthermore, in societies fueled by social and political instability, victims of gender-persecution are often left with little recourse.<sup>4</sup>

Until recently, women’s asylum claims relating to such abuses have been largely ignored under both the United States Immigration and Nationality Act (INA) and the 1951 United Nations Convention Relating to the Status of Refugees.<sup>5</sup> In an attempt to extend “more

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1. *Asylum*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow “Humanitarian” hyperlink; then follow “Refugees & Asylum” hyperlink; then follow “Asylum” hyperlink) (last visited Mar. 29, 2011).

2. Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L.J. 625, 626 & n.1 (1993) (noting that “75 percent of refugees and displaced persons are women and young children” (citing Susan Forbes Martin, *Issues in Refugee and Displaced Women and Children, Division for the Advancement of Women/UNOV*, 1, U.N. Doc. EGM/RDWC/1990/WP.1 (1990))).

3. *Id.* at 626.

4. *Id.* at 626-27.

5. *Id.* The INA is the statutory mechanism under which the Attorney General may grant political asylum to applicants that satisfy the INA’s definition of “refugee.” INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).

meaningful protection” to women refugees,<sup>6</sup> the United Nations High Commissioner for Refugees published its *Guidelines on the Protection of Refugee Women*, which emphasized the need for states to recognize gender-based asylum claims.<sup>7</sup>

In recent years, “[n]ew paths have been forged in the recognition of women’s asylum claims based on forms of persecution that are gender-based.”<sup>8</sup> In 1995, the United States Immigration & Naturalization Services (INS) issued new guidelines that formally recognized “gender-based persecution” as a valid ground for relief under U.S. asylum law.<sup>9</sup> To qualify for asylum, women filing gender-based asylum claims must show that they cannot return to their 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>10</sup>

Although the INS issued these guidelines for evaluating women’s asylum claims, there remains no “bright line” test to determine whether a petitioner qualifies as a refugee under the INA.<sup>11</sup> More notably, by failing to make a distinction between male and female applicants, the statutory definition of “refugee” under the INA purports to remain gender-neutral.<sup>12</sup> This Note will argue that the failure to enumerate gender-specific provisions under the INA, deprives bona fide female asylum applicants of the “special protection needs” reflective of gender-persecution.<sup>13</sup>

Part I of this Note will discuss the basic asylum claim: what must be proven to qualify as a “refugee” under the INA statutory definition.

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6. Kelly, *supra* note 2, at 659.

7. See U.N. High Comm’r for Refugees, *Guidelines on the Protection of Refugee Women*, ¶ 55, U.N. Doc. ES/SCP/67 (July 1991) [hereinafter *Guidelines*] (“Protection from sexual discrimination is a basic right of all women and is enshrined in a number of international declarations and conventions. While the universal right to freedom from discrimination on grounds of sex is recognized, and discrimination can constitute persecution under certain circumstances, the dividing line between discrimination and persecution is not a clear one.”).

8. SANA LOUE, IMMIGRATION LAW AND HEALTH: PATIENTS AND PROVIDERS § 10:46 (1993).

9. *INS Publishes Gender Persecution Guidelines*, 72 no. 22 INTERPRETER RELEASES 771, 771 (1995) [hereinafter *Persecution Guidelines*].

10. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). Note that gender-based asylum claims do not only apply to women. See LOUE, *supra* note 8, § 10:46 (noting that asylum was granted to a Jordanian man who feared he would become the victim of an “honor killing” due to his sexual, “non-marital” relationship with a Jordanian female).

11. Memorandum from Phyllis Coven, Office of International Affairs, Immigration and Naturalization Service, to Immigration and Naturalization Service Asylum Officers, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* 8 (May 26, 1995) [hereinafter *INS Memorandum*] (on file with the U.S. Department of State).

12. Kelly, *supra* note 2, at 627.

13. *Guidelines, supra* note 7, ¶ 3 (“In addition to these basic needs shared with all refugees, refugee women and girls have special protection needs that reflect their gender: they need, for example, protection against manipulation, sexual and physical abuse and exploitation, and protection against sexual discrimination in the delivery of goods and services.”).

Part II will discuss the framework for evaluating gender-based asylum cases, including the standards set by the 1995 INS Guidelines. Part III will explore how these standards have been applied by the Board of Immigration Appeals (BIA) and the United States federal courts.

Part IV will argue that a successful asylum case turns on how the adjudicating body interprets the term “persecution.” To qualify for asylum, an applicant must prove that they have been “persecuted” or face “persecution” as defined under the INA. Although the INS has recognized that forms of “severe sexual violence” such as rape, sexual abuse, and genital mutilation may constitute persecution, case law has shown that the BIA and federal courts have interpreted these harms disparately.<sup>14</sup> A finding of persecution in the context of gender-based claims is determinant on the specific facts of the case, which court hears the claim, and even in some cases, what judge hears the case.<sup>15</sup> This Note will argue that to foster more consistency and predictability in the adjudication of women’s asylum claims, there must be an amendment to the INA definition of “refugee.”

Part V will propose an amendment to the definition of “refugee” under INA § 101(a)(42), whereby gender-based persecution in the form of rape, torture, and sexual assault will be identified in the statute as a form of persecution. The proposed amendment will mirror a recent amendment to the INA, which recognizes forced sterilization or forced abortion as a form of persecution.<sup>16</sup>

## I. THE ASYLUM CLAIM

Under the INA, the term “refugee” means:

[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>17</sup>

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14. INS Memorandum, *supra* note 11, at 9.

15. *See infra* Part IV (discussing the idea of asylum as “Refugee Roulette”).

16. *See* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006) (“For purposes of determinations under this chapter, 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 . . . .”).

17. *Id.*

To qualify as a “refugee” under the statutory definition, an applicant must establish that they have a “well-founded fear of persecution.”<sup>18</sup> An applicant may meet this burden by showing that they have been persecuted in the past, or have a “well-founded fear of future persecution,”<sup>19</sup> and that the persecution is “on account of” one of the five statutory grounds enumerated in the INA.<sup>20</sup> Furthermore, “an alien must establish . . . that he personally would be singled out for persecution on account of one of these statutory factors, or that there is a reasonable possibility of such persecution.”<sup>21</sup>

An applicant must also demonstrate that there is “no recourse to state protection.”<sup>22</sup> Asylum will not be granted where the applicant has been given refuge elsewhere or may avoid harm by relocating to another part of the country.<sup>23</sup> Ordinarily, the applicant must also show that the “feared persecution” will be carried out by the government or by a party the government is “unwilling or unable to control.”<sup>24</sup>

#### A. What is “Persecution”?

In all asylum cases, the adjudicating officer or court must determine whether the harm suffered or feared is “serious enough” to be considered “persecution.”<sup>25</sup> The more important question then becomes: what is “persecution”? Although there is no universally accepted definition of the term, and attempts to formulate such a definition have not proven successful,<sup>26</sup> the UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* states that “a threat to life” or “[o]ther serious violations of human rights” always constitute persecution.<sup>27</sup>

The BIA has interpreted persecution to include “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who

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18. *Id.*

19. 8 C.F.R. § 208.13(b) (2010). The regulations also state that a finding of past persecution creates a rebuttal presumption that the petitioner also has a “well-founded” fear of future persecution. *Id.*

20. Kelly, *supra* note 2, at 635-36.

21. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1574 (9th Cir. 1986).

22. LOUE, *supra* note 8, § 10:46.

23. 8 C.F.R. § 208.13(b)(2)(ii); see also Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 534 (1993) (“The refugees’ inability to receive protection from their own government differentiates refugees from ordinary aliens.” (citation omitted)).

24. Kelly, *supra* note 2, at 635 (citation omitted).

25. INS Memorandum, *supra* note 11, at 8.

26. 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*, ¶ 51, U.N. Doc. HCR/1P/4/Eng/Rev.1 (Jan. 1992), available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html> [hereinafter *Handbook*].

27. *Id.*

differ in a way regarded as offensive.”<sup>28</sup> The harm or suffering inflicted includes confinement, torture, and “economic deprivation or restrictions so severe that they constitute a threat to an individual’s life or freedom.”<sup>29</sup> Persecution is also found “when there is a difference between the persecutor’s views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate.”<sup>30</sup>

### *B. The “On Account” Requirement*

In order to qualify as a “refugee,” an applicant must also demonstrate that the past persecution or “well-founded” fear of persecution has, or will be imposed “*on account* of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>31</sup> The phrase “membership in a particular social group,” however, has not been specifically defined by the INA.<sup>32</sup> Some commentators have pushed for a broad interpretation of the term, arguing that “[t]he ‘social group’ category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up.”<sup>33</sup>

The UNHCR Handbook considers persons with “similar background[s], habits or social status” to constitute a “‘particular social group.’”<sup>34</sup> The BIA, however, has taken a more restrictive approach:

“[P]ersecution on account of membership in a particular social group” . . . [encompasses] persecution 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 either cannot change,

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28. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985).

29. *Id.*

30. *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985). In determining whether threats or violence constitute “political persecution,” one may look to the motivation, views, and political opinion of the persecutor. *Id.*

31. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006) (emphasis added).

32. *Id.*

33. Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 45 (1983); Kelly, *supra* note 2, at 647-48 (citation omitted).

34. *Handbook*, *supra* note 26, ¶ 77.

or should not be required to change because it is fundamental to their individual identities or consciences.<sup>35</sup>

In *Sanchez-Trujillo v. INS*,<sup>36</sup> the Ninth Circuit enunciated a four-part test to evaluate whether an applicant qualifies as a “refugee” under the particular social group category.<sup>37</sup> An adjudicator must determine: 1) whether the group identified by the applicant is cognizable as a particular social group; 2) whether the applicant is a member of that cognizable group; 3) whether the “social group” has in fact been targeted for persecution; and 4) whether special circumstances exist to create per se eligibility for asylum on the basis of mere membership in that social group.<sup>38</sup>

In summary, to make a successful claim for asylum, the applicant must prove persecution “on account” of one of the five statutory grounds.

## II. FRAMEWORK FOR EVALUATING GENDER-BASED ASYLUM CLAIMS AND THE 1995 INS GUIDELINES

In 1995, the INS issued new guidelines for evaluating women’s asylum claims based “wholly or in part on their gender.”<sup>39</sup> The guidelines, which formally recognized gender-based persecution as a potential ground for asylum,<sup>40</sup> expanded the definition of “refugee” to include those fleeing “gender-based persecution.”<sup>41</sup> The Guidelines also

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35. Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

36. 801 F.2d 1572 (9th Cir. 1986).

37. *Id.* at 1574-75.

38. *Id.*; see also Linda A. Malone, *Beyond Bosnia and In Re Kasinga: A Feminist Perspective on Recent Developments in Protecting Women from Sexual Violence*, 14 B.U. INT’L L.J. 319, 329-33 (1996) (discussing *In re Kasinga*). Fauziya Kasinga, a nineteen-year-old native of Togo and a member of the Tchamba-Kunsuntu Tribe sought asylum in the U.S. to escape forced female genital mutilation (FGM). Malone, *supra* note 38, at 329. In evaluating her claim, the BIA relied heavily on the 1995 INS gender guidelines. *Id.* 331-32. “[T]he opinion address[ed]: (1) female genital mutilation as persecution; (2) definition of the ‘social group;’ and (3) the applicant’s fear of persecution ‘on account of’ membership in that group.” *Id.* at 332. The court found that Kasinga belonged to a cognizable social group: “[y]oung women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.” *Id.* at 333 (quoting Matter of Kasinga, 21 I. & N. Dec. 13-14 (B.I.A. 1996)).

39. INS Memorandum, *supra* note 11, at 1. The guidelines were addressed to all INS asylum officers. *Id.*

40. *Persecution Guidelines*, *supra* note 9, at 771. Through the INS Memorandum, the United States became the second country after Canada to adopt “formal guidelines” recognizing gender-persecution as a legitimate ground for asylum relief. *Id.*

41. See Cipriani, *supra* note 23, at 535 (“Governments should recognize as forms of persecution, leading to the granting of refugee status, social and institutionalized forms of oppression of women which contravene international judicial standards and constitute violation of human rights, and should take measures to bring this to public attention.”)

sought to address the need for more accurate and consistent decisions in asylum cases brought by women:<sup>42</sup> “[t]his guidance will serve as a useful tool for new Asylum Officers, and will help to ensure uniformity and consistency in procedures and decisions.”<sup>43</sup> Following the adoption of the guidelines, the BIA and federal courts have relied heavily on its provisions to adjudicate asylum claims brought by women.<sup>44</sup>

The guidelines: “(1) review the historical and human rights context in which guidance on gender-related adjudications has evolved internationally; (2) emphasize the importance of creating a ‘customer-friendly’ asylum interview environment . . . and (3) describe how such claims should be analyzed within the framework of U.S. law.”<sup>45</sup>

They state that gender-based claims must be viewed within the framework of existing international human rights instruments that advocate the principle that “women’s rights are human rights.”<sup>46</sup> The guidelines cite to relevant authority such as the 1993 U.N. *Declaration on the Elimination of Violence Against Women*, which recognizes such violence as “a per se violation of human rights,”<sup>47</sup> and the UNHCR-adopted Conclusion No. 73 on Refugee Protection and Sexual Violence, which emphasizes that “asylum seekers who may have suffered sexual violence be treated with particular sensitivity.”<sup>48</sup>

The guidelines also propose several procedural considerations for asylum officers. The INS states, “[a]lthough women applicants frequently present asylum claims for reasons similar to male applicants, they may also have had experiences that are particular to their gender,” which may be analyzed under one or more grounds.<sup>49</sup> They

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(quoting NANCY IRIS, REFUGEE WOMEN: IN 1985, NO LONGER THE ‘FORGOTTEN MAJORITY,’ 1986 WORLD REFUGEE SURVEY 32, 33)).

42. Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT’L L.J. 565, 568-69 (1993); see also *Persecution Guidelines*, *supra* note 9, at 771 (“[T]he guidelines represent a ‘huge shift in the commitment of the INS to gender-based cases’ and that they will result in more accurate decisions in asylum cases brought by women.” (quoting Michelle Beasley)).

43. INS Memorandum, *supra* note 11, at 1.

44. See Malone, *supra* note 38, at 329-34 (discussing *In re Kasinga*, wherein the BIA relied on the gender guidelines found in the INS Memorandum to evaluate the petitioner’s claim on whether she had established persecution on account of membership in a particular social group).

45. *Persecution Guidelines*, *supra* note 9, at 771.

46. INS Memorandum, *supra* note 11, at 2.

47. *Id.* (citing World Conference on Human Rights, June 14-25, 1993, *Declaration on the Elimination of Violence Against Women*, ¶ 2, U.N. Doc. A/CONF.157/DC/1/Add.1 (June 24, 1993)).

48. *Id.* at 3 (citing U.N. High Comm’r for Refugees [UNHCR], Exec. Comm. Conclusion No. 73 Refugee Protection and Sexual Violence, *Report of the 44th Session*, U.N. Doc. A/AC.96/821 (1993)). The Guidelines also cite to the Canadian Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution, the first formal recognition of gender-based persecution claims. *Id.*

49. *Id.* at 4.



further state that “rape . . . sexual abuse . . . domestic violence . . . and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds.”<sup>50</sup>

A. “Persecution” as Defined by the INS Guidelines

The guidelines also attempt the formidable task of defining the term “persecution.”<sup>51</sup> The INS adheres to the INA requirement that an applicant must prove “persecution or a well-founded fear of persecution” on account of one of the five statutory grounds.<sup>52</sup> The asylum officer must also make a finding of “‘persecution’ as [the] term is understood under the relevant international and domestic law.”<sup>53</sup> In making such a determination, “[s]erious physical harm consistently has been held to constitute persecution. Rape and other forms of severe sexual violence clearly can fall within this rule.”<sup>54</sup> Forms of “severe sexual violence” such as “sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, and forced abortion” are also explicitly recognized as possible forms of persecution.<sup>55</sup> The INS, however, states that although such harms may be imposed because of the victim’s gender, the asylum officer must assess “whether the specific harm amounts to persecution on the basis of the *general principles*” of asylum law.<sup>56</sup>

In determining whether sexual violence constitutes persecution, a claim involving “severe sexual violence does not differ analytically from beatings, torture and other forms of physical violence” associated with asylum petitions.<sup>57</sup> The guidelines state, “[a] determination that sexual abuse may be serious enough to amount to persecution does not by itself make out a claim to asylum.”<sup>58</sup> The applicant must still demonstrate that she has been persecuted or has a well-founded fear of persecution on account of a “protected ground.”<sup>59</sup>

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50. *Id.*

51. *Id.* at 8-10.

52. INS Memorandum, *supra* note 11, at 8 (quoting INA § 101(a)(42)).

53. *Id.* Domestic law being the INA, and the reference to international law suggests relevant U.N. Declarations and Conventions regarding human rights and the status of refugees.

54. *See id.* at 9 (“Salvadoran woman raped and brutalized by an army sergeant who denounced her as subversive had been ‘persecuted’ within the terms of the Act.” (citing *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987))).

55. *Id.*

56. *Id.* (emphasis added) (“[P]ersecution . . . include[s] threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.”); *see also* *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (“Generally harsh conditions shared by many other persons [do] not amount to persecution.”).

57. INS Memorandum, *supra* note 11, at 9.

58. *Id.*

59. *Id.*

### B. Private Acts as “Persecution”

To establish “persecution,” the petitioner must generally prove that the harm was inflicted by the government or a non-government entity that the government is “unable or unwilling to control.”<sup>60</sup> Numerous claims involving instances of rape and sexual abuse, however, tend to lack a “readily identifiable state actor or group.”<sup>61</sup> Furthermore, petitioners must also establish the motive of their persecutors.<sup>62</sup> This is particularly difficult to prove in asylum claims where petitioners lack access to direct evidence.<sup>63</sup> This burden becomes even more difficult when a persecutor is a “private actor.”<sup>64</sup> Some critics argue that rape and similar acts have traditionally been viewed as “private acts” that are inflicted by “private actors.”<sup>65</sup> Linda Cipriani argues that, “[i]nternational law has allowed the particular concerns of women to be ignored because of its structural distinction between public and private spheres.”<sup>66</sup> Furthermore, immigration law has tended to extend more protection to harms that are “publicly oriented,” and discounted harms within the “private sphere.”<sup>67</sup>

The INS guidelines attempt to clarify this disconnect between “public versus private acts”: “[i]n the usual case, the government will be the alleged persecutor. The question may arise, however, whether an act committed or threatened by a government official was nevertheless a purely private one.”<sup>68</sup> Such cases often “involve public officials

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60. *Artega v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988) (“The threat of persecution need not come from the government, but may also come from groups, including anti-government guerrillas, which the government is ‘unwilling or unable to control.’” (citation omitted)); *Matter of Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990).

61. Kathryn Fanlund, *Our Safety or Their Lives? Legislative Changes Impacting Immigration and the Risks Posed to Immigrant Women*, 23 WIS. J. L. GENDER & SOC’Y 135, 153 (2008) (citation omitted).

62. *Id.* at 152.

63. *See id.* (citation omitted) (explaining that most petitioners who have fled their countries consequently do not have access to direct evidence that could be used to demonstrate the motive of their persecutors).

64. *Id.* (citation omitted); *see also* *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) (discussing that Fisher, an Iranian woman, was denied asylum for failing to establish persecution on account of her religious or political beliefs). “Persecution requires the government actor to inflict suffering *on account of* an individual’s religious or political beliefs, race, nationality, or membership in a particular social group. . . Fisher [the applicant] has the burden of showing the requisite connection between the Iranian government’s acts and her religious or political beliefs.” *Id.* at 962 (emphasis added).

65. *See* Cipriani, *supra* note 23, at 539-40 (discussing the effects of the public/private distinction).

66. *Id.* at 539 (citation omitted); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 625-34 (1991) (noting the concerns with the public/private distinction).

67. Kristin E. Kandt, *United States Asylum Law: Recognizing Persecution Based Gender Using Canada as a Comparison*, 9 GEO. IMMIGR. L.J. 137, 146 (1995).

68. INS Memorandum, *supra* note 11, at 16.

who commit what is commonly seen as a private act.”<sup>69</sup> The guidelines state that “[i]n such situations adjudicators must determine whether a reasonable basis exists for regarding the act as a ‘public’ one that can be attributed to the government or an agent the government is unable or unwilling to control.”<sup>70</sup> Consequently, petitioners must frame “private acts” such as rape or sexual abuse in the language of the “public” sphere.

However, the guidelines recognize that in some cases a persecutor will not be a state or government actor.<sup>71</sup> In this case, “the applicant must [still] show that the government is unwilling or unable to protect its citizens” from such harm.<sup>72</sup>

### III. GENDER-BASED PERSECUTION: THE CASE LAW

In all asylum cases, an adjudicator must make a finding of “persecution or a well-founded fear of persecution.”<sup>73</sup> Thus, relevant case law turns on how the immigration courts, the BIA, and the federal courts have interpreted the term. Although the INS has recognized forms of severe gender-violence as persecution,<sup>74</sup> the BIA and federal courts have produced inconsistent judgments that have fostered a lack of predictability and efficiency in administering these claims. While adjudicators have extended protections to women asserting gender-based persecution, they have denied similar protections to others.<sup>75</sup>

The Ninth Circuit’s interpretation of persecution in the context of gender-based asylum claims stands in contrast to the decisions of the Second, Fifth and Sixth Circuits.<sup>76</sup>

In *Lazo-Majano v. INS*,<sup>77</sup> the Ninth Circuit granted asylum to a Salvadoran woman who had been sexually abused by an army officer

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69. *Id.* at 17.

70. *Id.*

71. *Id.*

72. *Id.*

73. INA § 101(a)(42), 8 U.S.C. 1101(a)(42) (2006).

74. See *supra* Part II.A. (discussing the INS Guidelines).

75. See *In re D-V-*, 21 I. & N. Dec. 77, 78 (B.I.A. 1993) (showing the case of a twenty-seven year-old female and native of Haiti whose application for asylum was approved). The applicant had worked as a secretary in the government of Haitian President Jean-Bertrand Aristide and was also the member of a church group that had been formed by President Aristide. *Id.* The applicant was gang raped and severely beaten by members of the Haitian military and claimed that she was targeted for her political opinion and religion. *Id.* The BIA found that the applicant had established a well-founded fear of persecution “based on her political opinion and religion if she were returned to Haiti.” *Id.* at 79. *But see* *Ochave v. INS*, 254 F.3d 859, 860 (9th Cir. 2001) (concluding “that there was no nexus between [the] rape of a Filipino asylum applicant by Marxist guerillas and her imputed political opinion”).

76. Kelly, *supra* note 2, at 638.

77. 813 F.2d 1432 (9th Cir. 1987).

over a period of years.<sup>78</sup> The applicant, a domestic worker, had been subjected to rape, beatings, and threats by the man she worked for, Sergeant Zuniga, an officer in the Salvadoran armed forces.<sup>79</sup> Lazo-Majano also testified that Zuniga threatened to denounce her to the military as a “subversive” if she resisted him.<sup>80</sup> Lazo-Majano then fled El Salvador with the hopes of seeking asylum in the United States.<sup>81</sup> After an immigration judge denied her asylum claim on grounds that “the harm she feared was strictly personal and did not constitute persecution within the Act,”<sup>82</sup> the Ninth Circuit reversed the decision, holding that the applicant had been persecuted on account of a political opinion attributed to her by her persecutor.<sup>83</sup> The court stated:

Persecution is stamped on every page of this record. Olimpia has been singled out to be bullied, beaten, injured, raped, and enslaved. . . . The persecution has been conducted by a member of the Armed Force, a military power that exercises domination over much of El Salvador despite the staunchest efforts of the Duarte government to restrain it.<sup>84</sup>

Conversely, in *Gomez v. INS*,<sup>85</sup> the Second Circuit upheld a denial of asylum to Carmen Gomez, a Salvadoran native, on grounds that she did not present the evidence necessary to establish that she possessed a well-founded fear of persecution “on account of her race, religion, nationality, political opinion or membership in a particular social group . . . .”<sup>86</sup> The petitioner testified that “[b]etween the ages of twelve and fourteen, [she] . . . was raped and beaten by [Salvadoran] guerilla forces on five separate occasions.”<sup>87</sup> Gomez stated “that on each of the five occasions, the guerillas threatened her life and vandalized her home.”<sup>88</sup> Gomez contended that “by virtue of these prior attacks she became a member of a social group, *i.e.*, women who have been previously battered and raped by Salvadoran guerillas.”<sup>89</sup> She thus claimed to possess a well-founded fear of

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78. *Id.* at 1433-34, 1436.

79. *Id.* at 1433.

80. *Id.*

81. *Id.* at 1433-34.

82. Kelly, *supra* note 2, at 637 (citation omitted).

83. *Lazo-Majano*, 813 F.2d at 1435; *see also* Kelly, *supra* note 2, at 638 (“[T]he Court also found that Sergeant Zuniga expressed an opinion regarding the nature of power between men and women in his treatment of Ms. Lazo-Majano. Through her flight, Ms. Lazo-Majano expressed the political opinion that men do not have the right to dominate women.” (citation omitted)).

84. *Lazo-Majano*, 813 F.2d at 1434.

85. 947 F.2d 660 (2d Cir. 1991).

86. *Id.* at 664.

87. *Id.* at 662.

88. *Id.*; Kandt, *supra* note 67, at 145 (citation omitted).

89. *Gomez*, 947 F.2d at 663-64.

persecution based on her membership in this “discrete group.”<sup>90</sup> In reaching its holding, the court reasoned that:

A particular social group is comprised 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. . . . Like the traits which distinguish the other four enumerated categories—race, religion, nationality and political opinion—the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.<sup>91</sup>

The court found that Gomez had failed to show that future persecutors would be able to identify members of this purported social group and, thus, would not be capable of singling out individuals such as Gomez.<sup>92</sup> The court stated, “[w]e cannot . . . find that Gomez has demonstrated that she is more likely to be persecuted than any other young woman.”<sup>93</sup> Accordingly, the court found that because she could not establish that guerilla forces were inclined to target her based on her membership in this social group, she had not proven her case for asylum.<sup>94</sup>

Although both petitioners from El Salvador, Lazo-Majano and Gomez, complained of past instances of rape and sexual abuse by authoritarian figures, the court in *Gomez* found that the petitioner had failed to show that she had been persecuted within the terms of the Act.<sup>95</sup> The court in *Lazo-Majano*, however, found that the petitioner had been individually targeted on account of a political opinion attributed to her by her persecutor.<sup>96</sup>

Similarly, in *Campos-Guardado v. INS*,<sup>97</sup> the Fifth Circuit upheld a denial of asylum to Sofia Campos-Guardado, a Salvadoran woman

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90. *Id.* at 664.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 663, 664.

[A w]ell-founded fear consists of both a subjective and an objective component. . . . To satisfy the objective component, the applicant for asylum must submit documentary evidence or testimony alleging specific facts from which it can be inferred that he or she may be singled out for persecution on the basis [of one of the five statutory grounds].

*Id.* at 664.

95. *Gomez*, 947 F.2d at 662, 664 (“[T]he INS argues that regardless of Gomez’ tragic encounters in El Salvador, she has failed to prove that she is a refugee, *i.e.*, that her fear of future persecution is based on her race, religion, nationality, political opinion or membership in a particular social group, and thus she failed to qualify for political asylum or withholding of deportation.”).

96. *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987).

97. 809 F.2d 285 (5th Cir. 1987) (en banc).

who had been violently raped after witnessing the politically motivated murders of her family members.<sup>98</sup> Campos-Guardado testified that her family members, who were active in the agrarian land reform movement in El Salvador, were attacked by armed locals.<sup>99</sup> The applicant was forced to watch while her uncle and male cousins were hacked to death with machetes.<sup>100</sup> The applicant and her female cousins were then raped while a woman who was with the attackers chanted political slogans.<sup>101</sup>

Campos-Guardado sought asylum on grounds that the rape was inflicted on account of the political opinion of her family members that was imputed to her.<sup>102</sup> The court upheld the denial of her asylum on grounds that the applicant “failed to establish that the rape was motivated by a desire to harm her because of a political opinion that she possessed or was believed to possess, and that subsequent threats by her rapist were personal rather than political.”<sup>103</sup>

In *Klawitter v. INS*,<sup>104</sup> the Sixth Circuit denied political asylum to a Polish woman who had been blacklisted for refusing to join the Communist Party and was subsequently sexually assaulted by a colonel in the Polish secret police.<sup>105</sup> Klawitter testified that upon returning from a five month visit to the United States, she was called on several occasions to appear before the Polish secret police and was harshly interrogated and threatened by the colonel.<sup>106</sup> The court, however, found that the colonel’s actions were a result of his “personal interest” in the applicant, rather than “any interest on his part to ‘persecute’ her.”<sup>107</sup> Consequently, such acts did not constitute “persecution” within the meaning of the INA.<sup>108</sup> The court reasoned that:

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98. *Id.* at 286, 291.

99. *Id.* at 287.

100. *Id.*

101. *Id.*

102. *Id.* at 288.

103. Kelly, *supra* note 2, at 639 (internal citation omitted). *But see* *Arteaga v. INS*, 836 F.2d 1227, 1227-31 (9th Cir. 1988) (granting asylum to a Salvadoran man who had a “well-founded fear” of persecution). In *Arteaga*, the Ninth Circuit granted asylum to a Salvadoran man following a visit by several of his old friends to his house a few years earlier. *Id.* at 1228. *Arteaga* claimed that his friends, who were now part of the guerilla insurgency that sought to start a civil war against the government, threatened that if the petitioner remained neutral, they would be out to get him. *Id.* The court found that this threat established a “well-founded fear” of persecution supported by the fact that the verbal threat was directed at *Arteaga*, and his identity and residence were known by the guerillas. *Id.* at 1233.

104. 970 F.2d 149 (6th Cir. 1992).

105. *Id.* at 150-51. Petitioner alleged that the Polish secret police colonel forced himself on her and used violence against her while threatening to destroy her career. *Id.* She feared his position of authority and power in Poland. *Id.*

106. *Id.* at 150.

107. *Id.* at 152.

108. *Id.* (finding that Niedzwiecki “persistently sought her out” because he found her attractive and that he “simply was reacting to her repeated refusals to become intimate

However distasteful his apparent treatment of the respondent may have been, such harm or threats arising from a personal dispute of this nature, even one taking place with an individual in a high governmental position, is not a ground for asylum. . . . [A]lthough petitioner's testimony recounts an unfortunate situation, harm or threats of harm based solely on sexual attraction do not constitute "persecution" under the Act.<sup>109</sup>

Despite the fact that the petitioner's initial contact with the colonel arose from her refusal to join the Communist Party (a political act), the court failed to find a nexus between her political opinion and the resulting harm.<sup>110</sup> Furthermore, although the petitioner was sexually assaulted by a high ranking official, the court concluded that these acts merely manifested the official's personal sexual desires and did not stem from any political conflict.<sup>111</sup>

The *Klawitter* decision highlights the distinction courts place between acts that are perceived as "public" and those perceived as "private."<sup>112</sup> Consequently, acts found to be within the private sphere," such as sexual offenses are often not seen as "persecution."<sup>113</sup> Nancy Kelly argues that such "cases reflect the lack of a cohesive framework within which to evaluate the gender-related claims of women."<sup>114</sup> Although "[e]ach case raised a claim based on political opinion or imputed opinion," the courts made disparate determinations of when "persecution" existed.<sup>115</sup>

#### IV. "REFUGEE ROULETTE"<sup>116</sup>

On May 21, 2009, a San Francisco immigration judge granted political asylum to Philip Belarmino, a forty-three-year-old English Professor from the Philippines, who claimed that he feared persecution

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with him").

109. *Id.*

110. *Klawitter*, 970 F.2d at 152.

111. *Id.*

112. INS Memorandum, *supra* note 11, at 17.

113. *Kandt*, *supra* note 67, at 151.

114. *See Kelly*, *supra* note 2, at 640 ("While arriving at contradictory results, neither the *Campos-Guardado* court nor the *Klawitter* court attempted to reconcile their decisions with the *Lazo-Majano* decision or to elaborate principles for determining when gender-specific persecution will be considered politically-motivated." (internal citations omitted)).

115. *Id.* (citation omitted).

116. *See Jaya Ramji-Nogales et al., Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (discussing the chance of being granted asylum as a game of "Refugee Roulette"). The term "refugee roulette" refers to the concept that one's chance of being granted asylum is just as random as a game of Russian roulette—a game of probability and luck. *Id.* at 296.

in his home country because of his sexual orientation.<sup>117</sup> Belarmino, who was repeatedly subjected to rape and sexual abuse, fled the Philippines to seek refuge in the United States.<sup>118</sup> Belarmino testified that due to the corrupt nature of the Philippine police, the State would be unable to protect him from such harms.<sup>119</sup> In this momentous case, the immigration judge found that Belarmino possessed a “well-founded fear” of persecution based on his “membership in a particular social group”: a homosexual in the Philippines.<sup>120</sup>

Eight years before Belarmino’s case, however, a San Francisco immigration court rejected Jose Patricio Boer-Sedano’s (a Mexican national) petition for asylum on grounds that “he failed to establish past persecution on account of a protected basis.”<sup>121</sup> Although the petitioner testified that he was sexually assaulted at gun point by a “high-ranking police officer” on nine separate occasions,<sup>122</sup> the immigration judge concluded that “the sex acts that Boer-Sedano was forced to perform by the police officer were simply ‘a personal problem’ he had with this officer.”<sup>123</sup> The language used by the immigration judge in this case reflects the tension between acts that are deemed “public” and those that are held to be “private.”<sup>124</sup>

After appealing this decision to the BIA, the Ninth Circuit in *Boer-Sedano v. Gonzales* held that the immigration judge erred in ruling that the petitioner failed to establish that he had been persecuted within the terms of the Act.<sup>125</sup> The court stated, “[w]hether

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117. Rodel Rodis, *Gay Filipino Gets Asylum in Historic US Case*, GLOBAL NATION, June 4, 2009, <http://globalnation.inquirer.net/mindfeeds/mindfeeds/view/20090604-208817/Gay-Filipino-gets-asylum-in-historic-US-case>.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1085-87 (9th Cir. 2005) (noting that the immigration judge denied Boer-Sedano’s petition for asylum, withholding of removal, and protection under the Convention Against Torture).

122. *Id.* at 1086. Boer-Sedano testified that after his first encounter with the police officer, over the next three months, the police officer targeted him on nine separate occasions, ordering the petitioner into his official police car and forcing him to perform oral sex on him. *Id.* On one occasion, the police officer put a gun to his head with a single bullet in the chamber and began to play a game of Russian Roulette. *Id.*

123. *Id.* at 1087. The immigration judge “further concluded that the petitioner had not established a well-founded fear of persecution because ‘he was not subject to systematic persecution which prevented him from living his chosen life style . . . .’” *Id.*

124. *See supra* Part III (discussing *Klawitter v. INS* and noting that gender crimes such as rape and sexual assault are often viewed as consequences of an attacker’s personal sexual desires). In this case, despite the fact that Boer-Sedano was abused by a state official, the immigration judge found that these acts were “simply a personal problem” that could not be attributed to his membership in a particular social group. *Boer-Sedano*, 418 F.3d at 1087.

125. *Boer-Sedano*, 418 F.3d at 1088 (holding that the immigration judge “erred as a matter of law by concluding that Boer-Sedano had not been persecuted”). The court found



*particular acts constitute persecution for asylum* purposes is a legal question . . . . We have held that sexual assault, including forced oral sex, may constitute persecution. Therefore, there can be no doubt that the nine sex acts that Boer-Sedano was forced to perform rise to the level of persecution.”<sup>126</sup>

The court further stated, “[w]e have [also] consistently held that death threats alone can constitute persecution.’ The IJ’s [immigration judge’s] minimization of the death threat Boer-Sedano received from the police officer may account for her failure to recognize that he suffered persecution.”<sup>127</sup> The court also found that because the petitioner had “established past persecution, he [was] presumed to have a well-founded fear of future persecution.”<sup>128</sup>

Although both petitioners complained of similar instances of sexual assault, their presiding immigration judges came to disparate conclusions as to whether these acts amounted to “persecution.”<sup>129</sup> Immigration attorney Rodel Rodis argues, “[t]he difference in the immigration judges’ contrasting decision in the cases of Belarmino and Boer-Sedano also show that applying for political asylum is like playing Russian roulette—land the right judge and you win, land the wrong judge and you lose.”<sup>130</sup>

The concept that asylum adjudication operates like a game of Russian Roulette can be attributed to an influential article entitled, *Refugee Roulette: Disparities in Asylum Adjudication*.<sup>131</sup> According to the U.S. Bureau of Citizenship and Immigration Services, the United States received about 49,000 applications for asylum in 2008 alone.<sup>132</sup> Of those applications, 22,930 petitions for asylum were granted.<sup>133</sup> The authors of *Refugee Roulette* argue that “in asylum cases . . . the outcome apparently depends in large measure on which government official decides the claim.”<sup>134</sup> They argue that “[i]n many cases, the most important moment in an asylum case is the instant in which

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that the immigration judge further erred by rejecting petitioner’s claim that he was persecuted on account of his membership in a particular social group by concluding that “homosexual men in Mexico could not form the basis of a social group.” *Id.*

126. *Id.* at 1088 (internal citations omitted).

127. *Id.* (internal citations omitted).

128. *Id.* at 1089 (citation omitted).

129. *Id.* (citation omitted).

130. Rodis, *supra* note 117.

131. Ramji-Nogales et al., *supra* note 116, at 296.

132. Krista Gesaman, *Desperately Seeking Freedom: Are the Number of Immigrants Seeking Asylum Over Sexual-Orientation Discrimination Increasing?*, NEWSWEEK, Nov. 30, 2009, <http://www.newsweek.com/2009/11/29/desperately-seeking-freedom.html>.

133. *Id.*

134. Ramji-Nogales et al., *supra* note 116, at 296.

a clerk randomly assigns an application to a particular asylum officer or immigration judge.”<sup>135</sup>

The 2007 study analyzed databases of asylum decisions from four levels of the adjudication process, including decisions administered by 884 asylum officers over a period of 7 years, 225 immigration judges over a period of 4.5 years, 126,000 decisions of the BIA over a period of 6 years, and 4215 decisions by the U.S. Courts of Appeals in 2004 and 2005.<sup>136</sup>

The authors contend that their analysis of these figures reveals discerning disparities in asylum grant rates:

Given our national desire for equal treatment in adjudication, one would expect to find in this system for the mass production of justice many indicators demonstrating a strong degree of uniformity of decision making over place and time. Yet in the very large volume of adjudications involving foreign nationals' applications for protection from persecution . . . we see a great deal of statistical variation in the outcomes pronounced by decision makers. The statistics that we have collected and analyzed . . . suggest that in the world of asylum adjudication, there is remarkable variation in decision making from one official to the next, from one office to the next, from one region to the next, from one Court of Appeals to the next, and from one year to the next, even during periods where there has been no intervening change in the law.<sup>137</sup>

They argue that the decision whether to grant a petitioner asylum relief may be determined by which court or official presides over the matter, as much as it is by the facts and law of the case.<sup>138</sup> The study revealed for example, that “Colombian asylum applicants whose cases

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135. *Id.*; see also Rodis, *supra* note 117 (discussing a case involving two Egyptian male lovers who filed for asylum in 2001). Because the two men were not married they could not file their applications jointly. *Id.* In filing separately, they were ordered to appear before two different judges in the same court. *Id.* The immigration judge for the first petitioner, known for denying ninety percent of asylum claims that came before him, denied the petitioner's application for withholding of removal. *Id.* However, the second petitioner who was assigned to a more “liberal” judge was granted discretionary relief for withholding of removal. *Id.* Although both men filed almost identical claims alleging harassment, beatings, hospitalization, and the lack of police response, they received different fates. *Id.*

136. Ramji-Nogales et al., *supra* note 116, at 296.

137. *Id.* at 302. The authors argue that “[t]he very essence of the rule of law, embodied in the Due Process Clause of the Fifth Amendment, is that individual cases should be disposed of by reference to standardized norms rather than by arbitrary factors, particularly the personal biases, attitudes, policies, or ideologies of government adjudicators.” *Id.* at 299-300.

138. See *id.* at 302 (arguing that the fact that the outcome of an asylum case is heavily influenced by the identity of the adjudicator is “particularly discomfiting [sic] in asylum cases,” where such a decision will ultimately lead to the deportation of an individual who may face grave danger upon returning to their home country).

were adjudicated in the federal immigration court in Miami had a 5% chance of prevailing with one of that court's judges and an 88% chance of prevailing before another judge in the same building."<sup>139</sup> Similarly, "a Chinese asylum seeker unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of success on her claim, as compared to 47% nationwide."<sup>140</sup>

The authors argue that a petitioner's potential for success on an asylum claim is affected not only by one's assignment to a particular immigration judge, but also by the gender of the immigration judge, and his or her past work experience.<sup>141</sup> In conclusion, they suggest several solutions to this problem, such as "more comprehensive training, more effective and independent appellate review, and other reforms that would further professionalize the adjudication system."<sup>142</sup>

Although the authors make a strong argument about the apparent discrepancies in asylum grant rates, this Note argues that in the context of asylum law, there lies a larger issue. Illustrated by cases like *Lazo-Majano v. INS* and *Campos-Guardado v. INS*,<sup>143</sup> a decision whether to grant asylum often centers around a finding of "persecution." Such a finding typically turns on whether a specific act is identified as "persecution" by the adjudicating body.

In *Lazo-Majano*, the Ninth Circuit held that instances of rape and sexual abuse by an army official constituted "persecution" on account of a political opinion attributed to the petitioner by her persecutor.<sup>144</sup> However, in *Campos-Guardado*, the Fifth Circuit found that the rape of and subsequent threats to the petitioner by politically motivated actors did not constitute "persecution," and were merely personal acts instituted against her.<sup>145</sup>

These decisions demonstrate that the standards employed to evaluate asylum claims have been applied inconsistently, and have thus created a system that lacks cohesion and predictability. In the context of gender-based persecution claims, the lack of guidance as to what definitively constitutes "persecution" has left the term open to different levels of interpretation. One would hope that in the context of criminal law, experienced judges would not need "more comprehensive training" in order to make consistent determinations of the law.

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139. *Id.* at 296 (citation omitted).

140. *Id.* at 329 (citation omitted).

141. *Id.* at 296.

142. Ramji-Nogales et al., *supra* note 116, at 296.

143. *See supra* Part III (discussing both cases).

144. *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987).

145. *Campos-Guardado v. INS*, 809 F.2d 285, 288, 290 (5th Cir. 1987) (en banc).

V. A PROPOSED AMENDMENT TO INA § 101(A)(42): QUALIFYING THE TERM “REFUGEE”

The United Nations High Commissioner on Refugees has recognized the importance of extending greater protection to victims of gender-based persecution.<sup>146</sup> The 1991 UNHCR Guidelines state: “[i]n addition to these basic needs shared with all refugees, refugee women and girls have special protection needs that reflect their gender: they need, for example, protection against manipulation, sexual and physical abuse and exploitation . . . .”<sup>147</sup> The United States Citizenship and Immigration Services (USCIS), formerly known as the INS,<sup>148</sup> has also recognized these special protection needs of women refugees through the 1995 INS Guidelines.<sup>149</sup>

From the case law, however, it is palpable that asylum adjudicators have an unrestrained freedom to interpret whether gender-based harms satisfy the INA definition of “persecution.” These guidelines are only guidelines. They are yet to be integrated into the immigration law or federal regulations. Therefore, adjudicators may look to these guidelines when evaluating gender-based persecution claims, but they are not bound by them.

Furthermore, the statutory definition of “refugee” under the INA remains gender neutral. This Note argues that in order to realize these “special protection needs” of women and girls, there must be an amendment to the INA definition of “refugee,” whereby gender-based harms such as rape, and sexual and physical abuse are formally identified in the statute as a form of persecution. Through such an amendment, adjudicators will be increasingly bound to interpret these crimes against women as persecution and not merely private sexual acts.<sup>150</sup>

Such an amendment, as applied, should however be limited to bona fide asylum petitioners and be evaluated according to the general principles of asylum law. An asylum applicant must still make a showing that they have been persecuted in the past or have a “well-founded” fear of future persecution “on account of” one of the five statutory grounds: “race, religion, nationality, membership in a particular social group, or political opinion.”<sup>151</sup> An applicant must also still show

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146. *Guidelines*, *supra* note 7, ¶ 4.

147. *Id.* ¶ 3.

148. *Our History*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis> (follow “About Us” hyperlink; then follow “Our History” hyperlink) (last visited Mar. 29, 2011).

149. See INS Memorandum, *supra* note 11, at 1 (declaring that the purpose of the 1995 Guidelines was to enhance the understanding of and sensitivity to gender-related asylum issues).

150. See *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992) (holding that the rape of the applicant was a “private” act not subject to asylum protection).

151. INA § 101(a)(42), 8 U.S.C. 1101(a)(42) (2006).

that the gender-persecution was or will be carried out by a government actor or by a party that the government is “unwilling or unable to control.”<sup>152</sup>

#### A. *The 1996 Amendment*

In 1996, Congress passed an amendment to the definition of “refugee” under INA § 101(a)(42).<sup>153</sup> This amendment formally recognized that a threat of forced abortion or involuntary sterilization constituted a per se form of persecution.<sup>154</sup> The amendment, which was driven by domestic outrage against China’s One-Child Policy, sought to target the abuses that resulted from the enforcement of this population control program.<sup>155</sup> In an effort to control the country’s expanding population, China’s One-Child Policy “encourages” couples to limit child-bearing to one child.<sup>156</sup>

In *Matter of Chang*,<sup>157</sup> the BIA denied asylum to an applicant who claimed that he would be forced to undergo involuntary sterilization as a result of China’s repressive policy.<sup>158</sup> The BIA found that the “one couple, one child” policy was not “on its face persecutive” and thus the applicant could not establish a well-founded fear of persecution as defined by the statute.<sup>159</sup>

However, in *Guo Chun Di v. Carroll*,<sup>160</sup> a federal judge reversed the denial of asylum to a Chinese petitioner who had fled the country to avoid imprisonment and involuntary sterilization.<sup>161</sup> The court held that “[i]nvoluntary sterilization, in particular, has been viewed as an egregious infringement on the fundamental right to procreate,” and that the petitioner’s refusal to comply with the One-Child Policy “constitute[d] a ‘political opinion.’”<sup>162</sup>

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152. *Artega v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988) (citation omitted).

153. Michelle Chen, *Leaving One-Child Behind: Chinese Immigrants Seek Asylum in America from China’s One-Child Policy*, LEGAL AFF., Nov. 2005, available at [http://www.legalaffairs.org/issues/November-December-2005/scene\\_chen\\_novdec05.msp](http://www.legalaffairs.org/issues/November-December-2005/scene_chen_novdec05.msp).

154. *Id.*

155. *Id.*

156. Laura Fitzpatrick, *A Brief History of China’s One-Child Policy*, TIME, July 27, 2009, available at <http://www.time.com/time/world/article/0,8599,1912861,00.html>. The One-Child Policy relies on a policy of “sticks and carrots,” where couples are rewarded for limiting childbearing. *Id.* Couples, however, are fined for having a “supernumerary” child without a permit from the Chinese government. *Id.* Reports of forced abortions and sterilization of women by officials are, however, commonplace. *Id.*

157. 20 I. & N. Dec. 38 (B.I.A. 1989).

158. *Id.* at 39.

159. *Id.* at 43.

160. 842 F. Supp. 858 (E.D. Va. 1994).

161. *Id.* at 873-74.

162. *Id.* at 872 (citation omitted).

The 1996 Amendment thus sought to create consistency in the adjudication of asylum claims involving forced abortion and sterilization. Michelle Chen states, “[c]larifying a longstanding legal gray area, the statute granted asylum status to women who had been forced to have an abortion or had been sterilized . . . .”<sup>163</sup> In further qualifying the definition of “refugee,” the Amendment states:

For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.<sup>164</sup>

The language of the statute specifically enumerates that a person who is forced to abort a pregnancy or undergo involuntary sterilization, or fears that they will be forced to undergo such a procedure, has established *per se* persecution or a well founded fear of persecution on account of their political opinion.<sup>165</sup> It follows that this amendment has facilitated more consistent decision-making, which in turn has afforded greater protection to Chinese asylum claimants.<sup>166</sup>

### *B. A New Amendment: Qualifying Gender-Based Harms*

This Note proposes a similar amendment to the current definition of “refugee” found in INA § 101(a)(2). The proposed amendment should state that persons who have suffered severe sexual or physical harm or have a well-founded fear of suffering such harm at the hands of the government or an actor the government is unable to control, have established *per se* persecution or a well-founded fear of persecution. The petitioner must nevertheless show that the resulting persecution can be imputed to one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.

Although this Note argues for an amendment similar to the 1996 Amendment, the concerns regarding immeasurable access to asylum relief posed by China’s One-Child Policy are not applicable in this

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163. Chen, *supra* note 153.

164. INA § 101(a)(42), 8 U.S.C. 1101(a)(42) (2006).

165. *Id.*

166. Chen, *supra* note 153 (“[P]ersecution under Chinese family-planning laws is a uniquely convenient basis for an asylum claim.”).

context. Critics argue that because China's One-Child Policy is "universally" applied, the amendment has "opened the flood gates," so to speak, to "any Chinese citizen who has faced the legal consequences of having or trying to have more than one child."<sup>167</sup> In 2003, USCIS received more than 14,000 new Chinese asylum claims.<sup>168</sup> The State Department estimated that about half of the Chinese asylum petitions involved China's family-planning laws.<sup>169</sup>

China's family-planning laws, however, are advocated as a uniformly applied policy that applies to all men and women in China. Gender-based sexual harms such as rape and sexual assault on the other hand are inflicted on *individuals* by their persecutors. To make a successful claim for asylum, a petitioner must show that they were individually targeted by their persecutor on account of one of the five statutory bases.<sup>170</sup> Thus, the threat of extending too much protection to women and girls who suffer sexual and physical abuse is lacking.

#### CONCLUSION

In recent years, domestic and international bodies have recognized the compelling need to extend more meaningful protection to women refugees and victims of gender-based persecution. As previously mentioned, women and children represent the majority of the world's displaced refugees.<sup>171</sup> The United Nations High Commissioner for Refugees has declared that women and children need special protection from harms that are reflective of their gender.<sup>172</sup> Often left with little recourse to the state, these victims are unable to protect themselves from gender-based sexual and physical abuse harms.<sup>173</sup>

The Rome Statute, the treaty which formally established the International Criminal Court (ICC) in 2002, declares that sexual slavery, forced prostitution, rape, and other forms of grave sexual violence constitute crimes against humanity.<sup>174</sup> These acts have also

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167. *Id.* (emphasis added).

168. *Id.*

169. *Id.*

170. *See Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (noting the petitioner did not present evidence of persecution on account of one of the five bases).

171. Kelly, *supra* note 2, at 625.

172. *Guidelines*, *supra* note 7, ¶ 3.

173. Persecutors often represent members of the police, armed forces, and authoritarian figures. Many victims are also citizens of countries that lack the capability or enthusiasm to pursue complaints of such abuse. *See supra* Part III (discussing asylum cases where persecution was claimed).

174. WOMEN'S INITIATIVES FOR GENDER JUSTICE, SEXUAL VIOLENCE AND INTERNATIONAL CRIMINAL LAW: AN ANALYSIS OF THE AD DOC TRIBUNAL'S JURISPRUDENCE & THE INTERNATIONAL CRIMINAL COURT'S ELEMENTS OF CRIMES 8 (2005), [http://www.iccwomen.org/publications/resources/docs/Overview\\_Sexual\\_Violence\\_and\\_International\\_Criminal\\_Law.pdf](http://www.iccwomen.org/publications/resources/docs/Overview_Sexual_Violence_and_International_Criminal_Law.pdf) (prepared by Angela M. Banks).

been prosecuted by the ICC as war crimes.<sup>175</sup> It is evident that these are serious harms that warrant protection from the international community.

Although the 1995 INS Guidelines and relevant case law have achieved some greater protection for women refugees, there remains a lack of consistency and predictability in the adjudication of gender-based asylum claims. By specifically recognizing these harms as forms of persecution, adjudicators would no longer have the unrestrained power to determine whether one act of rape is sufficiently “persecution” and another similar instance lacks the muster. As previously discussed, a successful asylum claim turns on how the term “persecution” is interpreted.<sup>176</sup>

In cases like *Klawitter v. INS*, the Sixth Circuit interpreted such harms within the context of the “private sphere,” where sexual crimes do not warrant protection from international governments.<sup>177</sup> However, in *Lazo-Majano v. INS*, the Ninth Circuit rejected the view that rape conducted by an army officer was a “strictly personal” harm that did “not constitute persecution within the meaning of the Act.”<sup>178</sup>

By formally identifying such instances of rape and sexual violence as forms of “persecution,” the proposed amendment would likely facilitate more uniformity in the adjudication of these claims. This amendment would hopefully create greater protection to the women and children that are victims of these atrocities.

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175. *Id.* (citation omitted).

176. *See supra* Part III (discussing how different courts have interpreted “persecution”).

177. *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992).

178. *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987) (citation omitted).

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