

Gender-Based Persecution as a Basis for Asylum: An Annotated Bibliography, 1993–2002*

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Seeking to provide scholars and practitioners with a useful guide to the substantial body of literature that is available on the subject, Ms. Neacsu presents an annotated bibliography of articles published in the past decade that address gender-based persecution as a basis for asylum in the United States.

¶1 Asylum is an imperfect tool by which to improve one's living condition when life is threatened by various types of persecution. Nevertheless, asylum is the only way for an alien physically present in the United States (or at a port of entry) who is "unable or unwilling to return to his or her country of nationality because of persecution or a well-founded fear of persecution" to obtain legal status in the United States.¹

¶2 Asylum may be requested in the United States on the following grounds: race, religion, national origin, membership in a social group, or political opinion. More recently, as Western values have extended across the non-Western world, certain types of previously tolerated violence have become less acceptable, and gender-based treatment, such as female genital mutilation (FGM), has begun to be viewed as persecution justifying the granting of asylum. Nonetheless, FGM became a basis for asylum only when American society found it so outrageous as to criminalize it domestically.

¶3 From 1995 when the Immigration and Nationality Service first adopted guidelines² that articulated when an asylum seeker may qualify for asylum on grounds of gender-based violence, to the publication in 2000 of draft regulations addressing membership in a particular social group,³ U.S. asylum law has undeniably

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1. IMMIGRATION & NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 77 (1997), available at <http://www.immigration.gov/graphics/aboutus/statistics/statyrbook96/chapter3.pdf>.
2. PHYLLIS COVEN, U.S. DEP'T OF JUSTICE, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN (May 26, 1995) [hereinafter INS ASYLUM GENDER GUIDELINES], reprinted in IRS Publishes Gender Persecution Guidelines, 72 Interpreter Releases 771 app. (June 5, 1995). See Bernadette Passade Cisse, *International Law Sources Applicable to Female Genital Mutilation: A Guide to Adjudicators of Refugee Claims Based on a Fear of Female Genital Mutilation*, 35 COLUM. J. OF TRANSNAT'L L. 429, 438 (1997) ("This unpublished memorandum is required reading for all interviewing and supervising Asylum Officers, but it is not binding on asylum adjudicators.").
3. Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

progressed toward “the recognition that violations of the human rights of women are a deserving basis for asylum protection.”⁴ Gender-based persecution, at least in the form of FGM, increasingly has been accepted as a basis for asylum. And with Attorney General Janet Reno’s vacation of the Board of Immigration Appeals’ (BIA) 1999 decision in *Matter of R-A*,⁵ domestic violence also has become more accepted as a justification for granting asylum. However, while the Center for Gender and Refugee Studies has documented more than two hundred-twenty asylum cases involving claims based on gender-based persecution,⁶ many of them have been unsuccessful, demonstrating that gender-based persecution is still evolving as a ground for asylum. One of the goals of documenting the existing literature in this annotated bibliography is to provide a basis for determining whether it is possible under existing U.S. law for gender-based persecution to be used successfully as a ground for asylum, or whether the law will need to be altered before that can occur.

Background

¶4 There is a large body of legal literature criticizing asylum case law for ignoring issues specific to women. The criticism mostly focuses on the perception that courts either were reluctant to view women as a social group that may be persecuted or that they refused to recognize specific types of persecution that women experience.

¶5 Women have long suffered forms of persecution that are only now being acknowledged. Asylum cases have developed on the basis of the male experience and perception. Many cases demonstrate that “it is extremely difficult for women to discuss, in the detail necessary to prove their case, some of the physical, mental and emotional harms inflicted upon them. This is true particularly when they must do so in a foreign country and in a foreign culture before male interpreters, male INS officers, male lawyers and male family members, often in the cold setting of an administrative courtroom.”⁷

¶6 Contrary to misperceptions about asylum, one cannot simply walk into the INS and say, “I want asylum.” Those seeking asylum must prove, among other things, a well-founded fear of persecution, or severe past persecution, due to membership in a particular social group or because of political opinion, race, nationality, or religion.⁸

4. Stephen Knight, Seeking Asylum from Gender Persecution: Progress amid Uncertainty, 79 Interpreter Releases 689, 689 (May 13, 2002).

5. 22 I. & N. Dec. 906 (B.I.A. June 11, 1999, Att’y Gen. Jan. 19, 2001).

6. See CTR. FOR GENDER & REFUGEE STUDIES, SUMMARIES OF GENDER ASYLUM CASES, at <http://www.uchastings.edu/cgrs/summaries/summaries.html> (last visited Feb. 23, 2003).

7. John Linarelli, *Violence Against Women and the Asylum Process*, 60 ALB. L. REV. 977, 984 (1997) (citations omitted).

8. Amy Stern, *Female Genital Mutilation: United States Asylum Laws Are in Need of Reform*, 6 AM. U. J. GENDER & L. 89, 96 (1997).

Statutory Requirements for Political Asylum

¶7 The Refugee Act of 1980⁹ amended the Immigration and Nationality Act to bring the United States into compliance with obligations under the United Nations Protocol Relating to the Status of Refugees¹⁰ and the United Nations Convention Relating to the Status of Refugees.¹¹ Both the Protocol and the Convention, their substance having been substantially incorporated into the Refugee Act, provide a working blueprint for U.S. asylum law. However, while the Protocol and the Convention address human rights issues and prevent deportation to a country where an individual's freedom or life is threatened due to religion, nationality, race, membership in a particular social group, or political opinion, neither incorporates gender as a basis for persecution.

¶8 In order to obtain asylum within the United States, an alien must first be able to establish that he or she fits within the Act's definition of a "refugee":

any 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.¹²

To summarize, an alien must satisfy each of the following elements to meet the statutory definition of a refugee: (1) the alien must have a "fear of persecution"; (2) the fear must be "well-founded"; (3) the persecution feared must be "on account of race, religion, nationality, membership in a particular social group, or political opinion"; and (4) the alien must be unable or unwilling to return to . . . [her] country of nationality or to the country . . . [where she last] resided because of persecution or . . . [her] well-founded fear of persecution.

¶9 Since persecution is not defined in U.S. law, and as there are no definitions in international law either, "arguments . . . are often centered on whether a particular action, on account of a particular characteristic, amounts to the level of harm that demands protection."¹³ Thus, the question becomes "how fundamental a particular characteristic is to a woman's identity or how profoundly abhorrent to one's beliefs the forced behavior must be to constitute persecution."¹⁴

9. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.). See generally Arthur C. Helton, *Criteria and Procedures for Refugee Protection in the United States*, in 28TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 413 (PLI Litig. & Admin. Practice Course Handbook Series No. 535, 1995) (discussing the qualifications for asylum in the United States).

10. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

11. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

12. 8 U.S.C. § 1101(a)(43) (2000).

13. Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In Re Fauziya Kasinga and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375, 378 (1997).

14. *Id.* at 379.

¶10 The United States Supreme Court determined that the element of a “well-founded fear of persecution” means a reasonable possibility that an individual will be persecuted.¹⁵ Once a female asylum seeker establishes the existence of persecution, she next must establish membership in a “social group.”

¶11 The phrase “social group,” included in the definition of refugee, is of particular importance to gender-based persecution cases.¹⁶ The *UNHCR Handbook* states that:

A “particular social group” normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.

Membership of such a particular group may be at the root of persecution because there is no confidence in the group’s loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government’s policies.

Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be sufficient ground to fear persecution.¹⁷

¶12 For example, in *Acosta*¹⁸ the Board of Immigration Appeals defined “social group” as individuals who either share an immutable characteristic or a characteristic that, though not immutable, is so fundamental to the individual’s identity that the individual should not have to change this characteristic. On the other hand, the United States Court of Appeals for the Ninth Circuit, in *Sanchez-Trujillo v. INS*,¹⁹ refused to define a “social class” in terms of individuals who merely possess broadly based characteristics, such as youth or gender. These diverse interpretations are possible because Congress did not define what it meant by “membership in a particular social group” in the Refugee Act.

¶13 In *In re Kasinga*,²⁰ the BIA again defined the legal term “social group.” It held that FGM, as practiced by the Tchamba-Kunsuntu tribe, constituted persecution; that Kasinga was a member of a particular social group that consisted of young women in her tribe who were both opposed to FGM and who had not yet

15. *INS v. Cardoza-Fonesca*, 480 U.S. 421, 428 (1987) (citing *INS v. Stevic*, 467 U.S. 407, 424–25 (1984)).

16. See Peter C. Godfrey, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL’Y 257, 262–69 (1994) (examining the role and the characteristics of “social group” in gender-based immigration cases); Shannon A. Middleton, *Women’s Rights Unveiled: Taliban’s Treatment of Women in Afghanistan*, 11 IND. INT’L & COMP. L. REV. 421, 465–68 (2001) (discussing the definition of “social group” and the ways courts have construed its meaning).

17. OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶¶ 77–79 (1979).

18. 19 I. & N. Dec. 211, 232 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

19. 801 F.2d 1571, 1576–77 (9th Cir. 1986).

20. 21 I. & N. Dec. 357 (B.I.A. June 13, 1996).

undergone the procedure; that Kasinga had a well-founded fear of persecution; that the persecution Kasinga feared was “on account of” the social group to which she belonged; that Kasinga’s fear of persecution was countrywide; and consequently that she qualified for and should be granted political asylum.

¶14 The most significant progress to date in defining gender as a social group occurred in the context of a rule proposed by the INS²¹ that would revise the regulations that govern establishing asylum and withholding eligibility. According to the draft regulations, applicants fleeing gender persecution can be granted asylum, including on the basis of a particular social group defined in part by gender. However, as many authors have pointed out, the regulations would require the applicant to establish that the “protected characteristic is central to the persecutor’s motivation to act against the applicant.”²² Furthermore, some critics are concerned that by setting out six criteria for consideration in the definition of the particular social group category, the revised regulations would lead “some judges [to] use the factors as a checklist or test, and [thus] . . . deny those cases in which all of the factors are not established.”²³

¶15 Since Attorney General Reno overturned the BIA’s decision in *Matter of R-A-*,²⁴ a small but significant number of women fleeing harms such as domestic violence, honor killing, trafficking, and forced marriage also have been granted asylum across the United States.²⁵ However, the ongoing delay in finalizing the social group regulations—despite the publication of the draft regulations more than two years ago—indicates resistance to recognizing gender-based human rights violations as a basis for asylum.

The Bibliography

¶16 The following annotated bibliography includes eighty-eight law review articles published between 1993 and 2002 that address gender-based persecution as a basis for asylum in the United States. The bibliography is designed to provide scholars

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21. 65 Fed. Reg. 76588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).
 22. 65 Fed. Reg. at 76598 (to be codified at 8 CFR § 208.15(b)).
 23. Knight, *supra* note 4, at 689 n.4 (citing Karen Musalo & Stephen Knight, *Steps Forward and Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the U.S.*, 13 INT’L J. REFUGEE L. 51 (2001)).
 24. R-A- (Rodi Alvarado Peña) is a Guatemalan woman who suffered ten years of brutal violence at the hands of her husband, and whom, despite repeated attempts to obtain government protection, the police and the courts refused to protect. They viewed her plight as a mere “domestic” matter. She finally fled to the United States and after many legal battles was granted political asylum. *In Re R-A*, 22 I. & N. Dec. 906, 908–10 (B.I.A. June 11, 1999, Att’y Gen. Jan. 19, 2001). For a discussion of the board’s ruling in the case, see Karen Musalo, *Matter of R-A-: An Analysis of the Decision and its Implications*, 76 Interpreter Releases 1177 (Aug. 9, 1999).
 25. See Ctr. for Gender & Refugee Studies, Univ. of Calif., Hastings Coll. of Law, at <http://www.uchastings.edu/cgrs/> (last visited Feb. 23, 2003). A project of the College of Law’s Center for Human Rights and International Justice, the center maintains a database on its Web site that represents the best available information on the issue because the INS does not track these decisions.

and practitioners with a useful guide to the substantial body of literature that is available to them.²⁶

¶17 LexisNexis was used to identify the articles included in the bibliography. A search in the “Law Review Combined” library on January 3, 2003, using the query “asylum /p gender,” retrieved ninety-nine articles. Those selected for inclusion focused on domestic asylum law and gender-based persecution. Thirty-seven present a general view of the issue; the others focus on a particular action or behavior as a form of gender-based persecution—domestic violence (eight articles), female genital mutilation (thirty-two), rape and battery (six), refusal to conform with government-imposed policies (two), sexual slavery (one), and forced sterilization and abortion (two). Excluded from the scope of coverage of this bibliography are articles addressing foreign and international law issues, sexual orientation, procedural aspects related to expedited removal, reproductive rights, gender identity, and inconsistencies in asylum and political asylum.

¶18 A review of the nearly one hundred law review articles that have appeared on the subject of gender-based persecution and asylum in the last decade suggests that current U.S. asylum law may successfully support a gender-based claim of asylum. Under U.S. law, an asylum seeker must satisfy the following conditions: persecution or “a well-founded fear of persecution,” and a basis for that persecution premised on one of five enumerated grounds (race, religion, national origin, and membership in a social or political group). It seems likely that in non-Western fundamentalist societies fear of social persecution based on being a woman may satisfy the requirement of a “well-founded fear of persecution.” Nevertheless, legislative action still would benefit asylum law by ensuring a unitary treatment of various forms of gender-based persecution.

Gender-Based Persecution as Grounds for U.S. Asylum

In General

Anderson, Kathleen. “Expanding and Redefining ‘Membership within a Particular Social Group’: Gender and Sexual Orientation Based Asylum.” *New England International and Comparative Law Annual* 7 (2001): 243–47.

Anderson explores the grounds for asylum based on gender persecution, especially claims rooted on membership within a particular social group.

Anker, Deborah E. “Women Refugees: Forgotten No Longer?” *San Diego Law Review* 32 (1995): 771–816.

Anker notes that although women represent the majority of the world’s refugees, their asylum claims went largely unaddressed before 1995. For example, the first U.S. gender-based asylum decision was not issued by immigration officials until

26. Although there is no similar annotated bibliography, for an unannotated list of journal and newspaper articles on this issue, see CTR. FOR GENDER & REFUGEE STUDIES, GENDER ASYLUM SCHOLARSHIP & NEWS, at <http://www.uchastings.edu/cgrs/law/articles.html> (last visited Feb. 23, 2003).

April 1995. By that time, only two United States federal court decisions had addressed similar claims. Additionally, she explains the rationale, as statutorily based, of denying asylum requests of women when the harm they fear is rape or sexual violence, and emphasizes the substantive and procedural progress which the Gender Guidelines²⁷ developed by the Immigration and Naturalization Service represent in this area.

Anker, Deborah, Joan Fitzpatrick, and Andrew Shacknove. "Crisis and Cure: A Reply to Hathaway/Neve and Schuck." *Harvard Human Rights Journal* 11 (1998): 295–310.

In responding to two recent articles that "propose[d] a radical reconfiguration of the international refugee regime" (p.295), the authors summarize jurisdictional barriers to asylum claimants. They also support the current asylum adjudication system, even though gender-based asylum claims, for example, have encountered extreme resistance. The authors believe that such claims have finally started to be recognized as valid asylum grounds.

Bahl, Anjana. "Home Is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution." *Cardozo Women's Law Journal* 4 (1997): 33–73.

The gist of Bahl's article is that "violence and discrimination against women are globally pervasive, transcending socioeconomic and cultural boundaries" (p.33). Bahl points out that "[i]n 1993, it was estimated that the number of refugees was 20 million globally; more than 80 percent of that number were women and children. However, even though women comprise the majority of refugees, they are a minority of those whose claims for asylum are successful" (p.34). Despite gender-based persecution claims, within the existing legal infrastructure, women may be granted asylum only if their claims are connected in the categories of particular social groups (based on gender) and political opinions (based on feminist views). Thus, gender-based persecution will constitute independent grounds for asylum only if violence against women comes to be viewed as a human rights infringement instead of as a private matter.

Ciampa, Nancy C. "United States Asylum Law: The Failure of the United States to Accommodate Women's Gender-Based Asylum Claims." *ILSA Journal of International and Comparative Law* 2 (1996): 493–515.

While the Immigration and Naturalization Service issued new procedural guidelines recognizing rape and other sexual persecution as a potential justification for asylum claims, it does not acknowledge gender-based persecution alone as a basis for asylum. Ciampa defines gender-based persecution as "violence directed at women specifically because they are women" (p.494).

Chisholm, B.J. "Credible Definitions: A Critique of U.S. Asylum Law's Treatment of Gender-Related Claims." *Howard Law Journal* 44 (2001): 427–41.

Based on asylum seekers' personal stories, Chisholm depicts the evidentiary burdens applicants with gender-based claims encounter in the United States.

Condon, Jenny-Brooke. "Asylum Law's Gender Paradox." *Seton Hall Law Review* 33 (2002): 207–25.

27. INS ASYLUM GENDER GUIDELINES, *supra* note 2.

Condon analyzes the “social group” requirement under the asylum statute and underscores that gender is noticeably absent. This situation translates into extreme burdens imposed on female asylum applicants to fit their claims within the existing statutory categories.

Fitzpatrick, Joan. “The Gender Dimension of U.S. Immigration Policy.” *Yale Journal of Law and Feminism* 9 (1997): 23–49.

Fitzpatrick roots her article in the reality that the “migration experience is deeply gendered” (p.48), and that female asylum seekers have suffered significantly from changes in immigration policies. In the United States, for example, the gender impact of the Immigration Reform and Control Act of 1986²⁸ and the Immigration Marriage Fraud Amendments of 1986²⁹ “operated to the disadvantage of women” (p.48). Another aspect of migration and gender is the lack of proper legal frames to deal with gender-based persecution. Fitzpatrick explains that because of the “ordinariness of this violence and discrimination,” immigration officials did not recognize it as a form of persecution. “Yet the tolerance of gender-specific harm by foreign authorities provides the rationale for applying refugee law in this context” (p.49).

Franke, Lindsay A. “Not Meeting the Standard: U.S. Asylum Law and Gender-Related Claims.” *Arizona Journal of International and Comparative Law* 17 (2000): 605–26.

Franke analyzes U.S. asylum law and the “particular social group” category as it applies to gender-related claims.

Godfrey, Peter C. “Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees.” *Journal of Law and Policy* 3 (1994): 257–88.

Godfrey’s article points out one of the lacunae in U.S. asylum law: “individuals who are persecuted as a result of gender or sexual orientation may not have standing to assert a successful asylum claim, while persons persecuted merely because they espouse a certain political opinion could successfully allege such a claim” (p.257). Within this context he decries the failure to define social group broadly enough so as to include those groups defined specifically by gender or sexual orientation.

Goldberg, Pamela. “Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law Context.” *Brooklyn Law Review* 66 (2000): 309–60.

Goldberg provides the practitioner with an essential understanding of the Second Circuit’s views on gender in the asylum law context, and especially with the cases that show the court’s recognition and understanding of gender-based persecution.

Hall, Shelley M. “Quixotic Attempt? The Ninth Circuit, the BIA, and the Search for a Human Rights Framework to Asylum Law.” *Washington Law Review* 73 (1998): 105–34.

28. Pub. L. No. 99-603, 100 Stat. 3359.

29. Pub. L. No. 99-639, 100 Stat. 3537.

Hall examines the Ninth Circuit's position on issues of persecution and the fact that, in gender-based claims of asylum, it often raises the fact that the applicant's persecution was limited to one part of her home country but not found in other regions. Hall shows that decision makers are split over the weight given to this fact and the relief it requires. It appears that, in granting asylum, judges still examine whether a refugee should have found safe domestic areas rather than fled the country.

Hueben, Elizabeth A. "Domestic Violence and Asylum Law: The United States Takes Several Remedial Steps in Recognizing Gender-Based Persecution." *University of Missouri at Kansas City Law Review* 70 (2001): 453–68.

Hueben presents an overview of the grounds for asylum under U.S. law. She underscores the fact that gender does not have its own enumerated ground but notes that there has been some progress on this issue, especially through case law, such as the case of *In re R-A*,³⁰ and through the adoption of the gender guidelines for asylum officers.³¹

Ignatius, Sarah. "Recent Development: Restricting the Rights of Asylum Seekers: The New Legislative and Administrative Proposals." *Harvard Human Rights Journal* 7 (1994): 225–49.

Ignatius articulates the reasons against airport screening of asylum seekers. "In a brief screening interview, an INS official may be unreceptive to developing legal theories, such as claims of persecution based on gender or sexual orientation. Asylum seekers may be afraid or reluctant to discuss the persecution they experienced. For example, it is understandable that a woman raped by a man in uniform may have difficulty in explaining the details to a U.S. government official, particularly if she has not had time to talk with a sympathetic attorney about her experience and about the INS interview process" (p.236).

Kelly, Nancy. "Gender-Related Persecution: Assessing the Asylum Claims of Women." *Cornell International Law Journal* 26 (1993): 625–74.

Kelly evaluates the current status of U.S. asylum law with regard to the gender-related claims of women. She proposes a framework, informed by developments in other countries and by the United Nations, for assessing the cases of women seeking the protection of political asylum and withholding of deportation. This framework recognizes asylum claims when the type of persecution is tied to the applicant's gender and when the persecution is imposed for a reason related to the applicant's gender. Under this framework, the gender-related claims of women will largely be formulated within the particular social group category of the refugee definition.

Kelson, Gregory A. "Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins." *Texas Journal of Women and the Law* 6 (1997): 181–213.

Kelson examines various types of gender-based persecution that seem to beg for acceptance as a specific asylum ground, and the current status of domestic asylum laws (including U.S. law). He also offers recommendations on how to improve them and better solve the plight of female asylees.

30. 22 I. & N. Dec. 906 (B.I.A. June 11, 1999, Att'y Gen. Jan. 19, 2001).

31. INS ASYLUM GENDER GUIDELINES, *supra* note 2.

Kennady, Marian. "Gender-related Persecution and the Adjudication of Asylum Claims: Is a Sixth Category Needed?" *Florida Journal of International Law* 12 (1998): 317–40.

Kennady summarizes U.S. asylum law. She concludes that the United States government has often refused protection to refugees and those seeking asylum on grounds of gender-based persecution.

Love, Emily. "Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution." *Harvard Women's Law Journal* 17 (1994): 133–55.

Love suggests that Congress should amend the Refugee Act of 1980 to include gender-based abuses as a category of persecution qualifying an applicant for asylum in the United States. She reasons that in light of recent asylum decisions, which do not show that women are likely to be treated as a specific social group in the near future, that goal can be reached only by statute.

Macklin, Audrey. "Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims." *Georgetown Immigration Law Journal* 13 (1998): 25–71.

Macklin describes both the common and the distinctive features of the gender guidelines in three countries.

McCabe, Eve. "The Inadequacy of International Human Rights Law to Protect the Rights of Women as Illustrated by the Crisis in Afganistan." *UCLA Journal of International Law and Foreign Affairs* 5 (2001): 419–60.

McCabe shows that with all its imperfections, asylum law might be the only viable tool for protecting women from gender-based abuse.

McLaughlin, Daniel. "Recognizing Gender-Based Persecution as Grounds for Asylum." *Wisconsin International Law Journal* 13 (1994): 217–44.

McLaughlin summarizes immigration cases in which both INS officials and U.S. courts denied asylum relief to victims of gender persecution. He suggests that the situation is due to the failure to acknowledge "the political dimensions prevalent in many acts of gender-related abuse. Instead . . . abuse of women, even at the hands of high ranking government officials," continues to be viewed as "a personal affair between the perpetrator and his victim" (p.219). Accordingly, McLaughlin concludes that only legislation can improve the plight of female victims of gender-based persecution who seek asylum in the United States.

Margulies, Peter. "Democratic Transitions and the Future of Asylum Law." *Colorado Law Review* 71 (2000): 3–49.

Margulies supports a dynamic legal approach in the area of asylum law and gender issues, urging that not only legal changes but also real changes within a country should be taken into account. For example, asylum claims of fear of male violence or cultural practices such as FGM should be examined not only on the basis of "the official changes," but also based on conditions "on the ground." He quotes favorably the argument that "legislative and constitutional changes . . . are irrelevant unless they are adhered to and legitimated by people in their day-to-day practices" (p.45).³² Finally, he suggests that courts "should apply the changed conditions doctrine very gingerly in gender-based cases" (p.46).

32. Quoting Aili Mari Tripp, *Expanding "Civil Society": Women and Political Space in Contemporary Uganda*, COMMONWEALTH & COMP. POL., July 1998, at 84, 105.

Margulies, Peter. "Review: Asylum in a New Era." *Georgetown Immigration Law Journal* 14 (2000): 843–46.

This review of Deborah E. Anker's *Law of Asylum in the United States*³³ discusses social group arguments that are used as a vehicle for claims of persecution based on gender.

Martin, Susan F., and Andrew I. Schoenholtz. "Asylum in Practice: Successes, Failures, and the Challenges Ahead." *Georgetown Immigration Law Journal* 14 (2000): 589–708.

Martin and Schoenholtz summarize recent developments in gender-related claims under U.S. asylum law. They start by observing that the Office of International Affairs of the INS produced the Gender Guidelines³⁴ as a memorandum for distribution to asylum officers, and explain that the Guidelines examine the elements of the definition of a refugee with respect to women's claims. The Guidelines include sexual violence and violation of fundamental beliefs as legally cognizable persecution.

Mason, Elisa. "The Protection Concerns of Refugee Women: A Bibliography." *Texas Journal of Women and the Law* 9 (1999): 95–115.

Mason explains the reasons for including gender among the other grounds (race, religion, nationality, political opinion, and membership in a particular social group) for asylum recognized at the international and domestic level. In a final part, sources on women as asylum seekers are organized into four categories: "Membership in a Particular Social Group," "Domestic Violence," "Female Genital Mutilation," and "Rape."

O'Neill, Caroline J. "Health is a Human Right: Why the U.S. Immigration Law Response to Gender-Based Asylum Claims Requires More Attention to International Human Rights Norms." *Journal of Contemporary Health Law and Policy* 17 (2000): 241–74.

O'Neill analyzes the Gender Guidelines promulgated by the Immigration and Naturalization Service in 1995,³⁵ and the ways in which U.S. asylum law accommodates gender-based asylum claims.

Pell, Stephanie Kaye. "Adjudication of Gender Persecution Cases Under the Canada Guidelines: The United States Has No Reason to Fear an Onslaught of Asylum Claims." *North Carolina Journal of International Law and Commercial Regulation* 2 (1995): 655–84.

Pell decries the lack of legal protection under U.S. asylum law for victims of spousal abuse, rape, or FGM. Such claims found little or no relief in 1995 when the article was written.

Peters, Teresa L. "International Refugee Law and the Treatment of Gender-Based Persecution: International Initiatives as a Model and Mandate for National Reform." *Transnational Law and Contemporary Problems* 6 (1996): 225–50.

33. DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* (3d. ed. 1999).

34. INS ASYLUM GENDER GUIDELINES, *supra* note 2.

35. *Id.*

Peters analyzes the Refugee Act and its accompanying INS regulations, arguing that on their face, these laws “make no reference to gender issues as they pertain to refugee status” (p.245). Despite this, however, she notes that U.S. courts have “begun to recognize the existence of gender-based groups as comprising social groups, and [have] begun to broaden the range of acts which may be considered persecution” (p.246). She concludes with the hope that “[t]his trend could eventually lead to recognition of gender as both a social group and a basis upon which persecution may be found” (p.246).

Root, Nancy Ann, and Sharyn A. Tejani. “Undocumented: The Roles of Women in Immigration Law.” *Georgetown Law Journal* 83 (1994): 605–34.

Root and Tejani consider the issue of gender bias in asylum claims by examining two court decisions as examples of the problems. *Fatin v. INS* concerned a member of an “upper class of Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals” who, if they returned, feared persecution for their “political beliefs, including [their] refusal to wear the chador,” facing “up to one year in prison, or, more likely, abuse at the hands of the Revolutionary Guard” (p.617).³⁶ The authors complain that although the court recognized as a social group for purposes of asylum those women “who refuse to conform to the government’s gender-specific laws and social norms,” including women whose “opposition to the Iranian laws in question is so profound that [they] would choose to suffer the severe consequences of noncompliance” (p.617–18),³⁷ it nevertheless refused to grant asylum by refusing to admit the petitioner into that group. They criticize *Fatin* as a “reluctance to condemn a society that forces women to wear the chador, that does not allow them to work, and that denies them the opportunity to become educated” (p.618). The second decision examined by the authors is *Canas-Segovia v. INS*,³⁸ involving a Jehovah’s Witness who feared conscription into the Salvadoran army against his religious beliefs, and whose claim for asylum was granted. Equating men’s forced participation in the army to forcing women to wear a chador, they conclude that such different results in asylum cases is a matter of gender bias.

Schaffer, Haley. “Domestic Violence and Asylum in the United States: *In Re R-A*.” *Northwestern University Law Review* 95 (2001): 779–809.

Schaffer explains the U.S. Board of Immigration Appeal’s regressive decision in *In re R-A*³⁹ from a comparative point of view: the administrative body vacated the judge’s decision to grant asylum even though several other nations have laws that grant asylum to victims of domestic abuse.

Setareh, Daliah. “Women Escaping Genital Mutilation—Seeking Asylum in the United States.” *UCLA Women’s Law Journal* 6 (1995): 123–59.

Setareh advocates a U.S. immigration policy that recognizes “the unique violations” inflicted upon women. She suggests that only such a policy could provide asylum as an “adequate remedy” (p.124). She also explains how a statutory definition of “refugee” encompassing those violations “is essential to achieving true gender equality before the law” (p.125).

36. Quoting *Fatin v. INS*, 12 F.3d 1233, 1237 (3d Cir. 1993) (citing Petitioner’s Brief at 8).

37. Quoting *id.* at 1241 (citing Petitioner’s Brief at 12).

38. 902 F.2d 717 (9th Cir. 1990).

39. 22 I. & N. Dec. 906 (B.I.A. June 11, 1999, Att’y Gen. Jan. 19, 2001).

Smiley, Susannah. "Taking the 'Force' out of Enforcement: Giving Effect to International Human Rights Law Using Domestic Immigration Law." *California Western International Law Journal* 29 (1999): 339–56.

Smiley notes that "[m]ost American courts have been unwilling to create a blanket rule acknowledging that women comprise a particular social group. The courts, maintaining a relativist stance, agree that for purposes of asylum law, mere social or legal discrimination does not rise to the level of persecution" (p.344–45). She surmises that "because most cultures around the world treat women as second-class citizens" (p.345), U.S. courts fear that, if they adopted a different position, the United States could face an intolerable flood of potential female asylum seekers.

Smiley then explains that certain human rights violations are particular to women, or at least are experienced far more frequently by women than by men, such as rape, sexual abuse, genital mutilation, forced abortion, and domestic violence. Accordingly, courts should take note of this specific element when they decide what constitutes persecution. Finally, she notes that although gender discrimination is not yet recognized as grounds for asylum, some American and Canadian courts often hold particularly egregious gender-based violence as forms of persecution.

Thiele, Bret. "Persecution on Account of Gender: A Need for Refugee Law Reform." *Hastings Women's Law Journal* 11 (2000): 221–40.

Thiele examines U.S. law and its idiosyncrasies regarding gender-based asylum claims. For example, even when their claims are based on gender-related persecution, women are required to use another variable besides sex or gender to demarcate their social group.

Vasquez, Laura. "Hope for the Future Recognition of Women's Rights in Asylum Decision." *CIRCLES: The Buffalo Women's Journal of Law and Social Policy* 3 (1995): 45–46.

Vasquez describes the conditions an asylum-seeker must satisfy in order to receive this discretionary relief. She also emphasizes the injustice women's gender asylum claims face. "Throughout the world, women are victimized in ways that men are not. Such gender-based violence against women can take on very dramatic and horrific forms. . . . Nonetheless, women who have experienced these extreme forms of violence are not eligible for asylum in the United States. Violence that is directed at a person because she is a woman does not satisfy the criteria of persecution based on race, religion, nationality, or membership in a particular social group or political opinion which is necessary for a discretionary grant of asylum. Much of the time, violence against women is perceived as a private transgression with no political or governmental involvement and, therefore, no recourse or remedy is available in international or domestic asylum law" (p.45).

Volpp, Leti. "Talking 'Culture': Gender, Race, Nation, and the Politics of Multiculturalism." *Columbia Law Review* 96 (1996): 1573–1617.

Although not the main focus of her article, Volpp does discuss the INS Asylum Gender Guidelines.⁴⁰ She suggests that instead of focusing on narratives of "cultural" gender-based violence as is currently done, asylum seekers should focus on the

40. INS ASYLUM GENDER GUIDELINES, *supra* note 2.

role of the state in sponsoring gender-based violence. She suggests that this might avoid “the more pernicious stereotypes about ‘national traditions’ or ‘cultures’ that can result” (p.1616).

Wei, Timothy, and Margaret Satterthwaite. “Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation.” *Columbia Human Rights Law Review* 29 (1998): 467–531.

Wei and Satterthwaite emphasize the political aspect of immigration law, pointing out that although the case of Fauziya Kasinga⁴¹ “did a lot for establishing gender-based violence as a basis for asylum, not just for women, but for all people who are individually oppressed by private means” (p.480), the United States is extremely inconsistent in its treatment of similar claims.

Weisblat, Caryn L. “Gender-Based Persecution: Does United States Law Provide Women Refugees with a Fair Chance?” *Tulane Journal of International and Comparative Law* 7 (1999): 407–30.

Weisblat argues that “women refugees do not get a fair chance at asylum eligibility” (p.416) and identifies two causes. The first is that despite the INS Asylum Gender Guidelines,⁴² there is no clear definition of “what acts rise to the level of persecution”; the second is the lack of guidance on “when a nongovernmental actor in the domestic setting is acting in the private sphere or committing a public act” (p.416).

Specific Grounds for U.S. Asylum Domestic Violence

Alexander, Barbara Cochrane. “Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims.” *American University International Law Review* 15 (2000): 895–939.

Alexander asks whether the United Nations Convention Against Torture⁴³ is a viable alternative legal remedy for domestic violence victims, and whether the United States government is willing to recognize that particularly egregious domestic violence constitutes torture, cognizable under the immigration law. She uses the case of Rodi Alvarado-Peña⁴⁴ as the factual background for this analysis.

Annitto, Megan. “Asylum for Victims of Domestic Violence: Is Protection Possible After *In Re R-A*-?” *Catholic University Law Review* 49 (2000): 789–822.

As the international community begins to recognize violence against women in the home as a serious violation of human rights, U.S. immigration and federal courts have begun to pay greater attention to allegations of domestic violence when considering claims of asylum. However, there is no clear indication that battered women will be granted asylum in a society that condones such abusive treatment.

41. 21 I. & N. Dec. 357 (B.I.A. June 13, 1996).

42. INS ASYLUM GENDER GUIDELINES, *supra* note 2.

43. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113 (entered into force June 26, 1987) [hereinafter Convention Against Torture].

44. 22 I. & N. Dec. 906 (B.I.A. June 11, 1999, Att’y Gen. Jan. 19, 2001).

- Blanck, Amanda. "Domestic Violence as a Basis for Asylum Status: A Human Rights Based Approach." *Women's Rights Law Reporter* 22 (2000): 47–75. Blanck analyzes the decision in *In re R-A*.⁴⁵
- Goldberg, Pamela. "Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence." *Cornell International Law Journal* 26 (1993): 565–604. Goldberg discusses the theoretical framework for asylum eligibility on gender-based grounds, noting that "[o]ne of the newest developments in asylum law theories is fashioning a claim for asylum where the actual or feared persecution is intimate violence" (p.569).
- Nguyen, An Mai. "The Torture Convention: A Gap Filler for the Holes in U.S. Asylum Policy Towards Victims of Domestic Violence." *Southwestern University Law Review* 30 (2000): 171–95. Nguyen summarizes current U.S. asylum law and the inconsistent immigration case law with respect to gender-based asylum claims. She presents a compelling analysis of the United Nations Convention Against Torture⁴⁶ as an alternative entry door to the United States for aliens with gender-related persecution claims.
- Seith, Patricia A. "Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women." *Columbia Law Review* 97 (1997): 1804–43. Seith sets forth a framework for women with claims of domestic violence which incorporates the INS Asylum Gender Guidelines⁴⁷ which have been used successfully in gender-related asylum claims based on rape and FGM. She describes the precedential value of these cases for claims of domestic violence.
- Shapiro, Hannah R. "The Future of Spousal Abuse as a Gender-Based Asylum Claim: The Implications of the Recent Case of *Matter of R-A*." *Temple International and Comparative Law Journal* 14 (2000): 463–91. Shapiro demonstrates the relevance of the "social group" category to any discussion of gender-based asylum, especially in light of the BIA's decision in *In re R-A*.⁴⁸
- Sinha, Anita. "Domestic Violence and U.S. Asylum Law: Eliminating the 'Cultural Hook' for Claims Involving Gender-Related Persecution." *New York University Law Review* 76 (2001): 1562–98. Sinha focuses on victims of gender-related persecution who have been unable to overcome the cultural stereotypes and gender inequities that pervade U.S. asylum law, pointing out that notions of culture that animate asylum jurisprudence are deeply rooted in racial and gender stereotypes. Additionally, by analyzing the published decisions focusing on gender-related violence, she shows that adjudicators have underprotected women who have sought asylum from domestic violence.

45. *Id.*

46. Convention Against Torture, *supra* note 43.

47. INS ASYLUM GENDER GUIDELINES, *supra* note 2.

48. 22 I. & N. Dec. 906 (B.I.A. June 11, 1999, Att'y Gen. Jan. 19, 2001).

Thompson, Sakina. "Developments in the Executive Branch: BIA Decisions: Asylum Claim Based upon Domestic Violence." *Georgetown Immigration Law Journal* 14 (1999): 244–47.

In a brief case note, Thompson discusses the case of *In re R-A*⁴⁹ and considers "whether and when past spouse abuse may qualify a female applicant as a 'refugee' under U.S. asylum law" (p.245).⁵⁰ She concludes that U.S. law does not recognize a social group characterized by "common and immutable characteristics of gender and the experience of having been intimately involved with men who practice male domination through violence" (p.245–46).

Female Genital Mutilation

Armstrong, Patricia A. "Female Genital Mutilation: The Move toward the Recognition of Violence against Women as a Basis for Asylum in the United States." *Maryland Journal of International Law and Trade* 21 (1997): 95–122.

Armstrong summarizes the slow progress made by the United States judiciary since 1995 in recognizing violence against women as a ground for asylum. With the recognition of female gender mutilation, other types of gender-based persecution claims are now considered as possible grounds for asylum.

Bashir, Layli Miller. "Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law." *American University Journal of Gender and the Law* 4 (1996): 415–54.

Bashir advocates a change in U.S. asylum law—which presents a three-prong test including that of a well-founded fear of persecution based on membership in a legally cognizable social group—to include a woman's fear of FGM so that being female qualifies as a cognizable "social group." She points to a Canadian case in which asylum was granted by the Canadian Immigration and Refugee Board "to a Somali woman who fled her country with her ten-year-old daughter because she feared that the daughter would face genital mutilation" (p.453). This case recognizes gender-based claims as qualifying for membership in a particular social group, and Bashir suggests that U.S. courts might expand the "social group" category in this way as well.

Coello, Isabel. "Female Genital Mutilation: Marked by Tradition." *Cardozo Journal of International and Comparative Law* 7 (1999): 213–26.

Coello notes that although the issue of FGM has finally entered the agendas of the international human rights movement, political asylum should not be the only solution. "Women should be able to live in their own countries without being condemned to suffer a life of pains and illness, with no one depriving them of their freedom to have a healthy sex life" (p.225).

Davar, Binaifer A. "Rethinking Gender-Related Persecution, Sexual Violence, and Women's Rights: A New Conceptual Framework for Political Asylum and International Human Rights Law." *Texas Journal of Women and the Law* 6 (1997): 241–56.

49. *Id.*

50. *Quoting* INS ASYLUM GENDER GUIDELINES, *supra* note 2, at 9.

Davar discusses the impact of *In re Kasinga*,⁵¹ a decision in which FGM was recognized as a form of sexual violence and persecution, and as such, grounds for asylum under U.S. law, on other gender-related asylum claims based on harmful traditional practices.

Ericson, Connie M. “*In Re Kasinga: An Expansion of the Grounds for Asylum for Women.*” *Houston Journal of International Law* 20 (1998): 671–93.

Ericson reviews the decision granting asylum to Fauziya Kasinga,⁵² who fled Togo on the basis of her fear of FGM. The U.S. Board of Immigration Appeals recognized a segment of the Tchamba-Kunsuntu Tribe of northern Togo as a “particular social group” within the definition of the term “refugee” for purposes of U.S. asylum law. She concludes that although *Kasinga* shows that BIA has expanded the reach of asylum law for women by defining extreme FGM as persecution, it still has declined to set a general standard.

Gillia, Beth Ann. “Female Genital Mutilation: A Form of Persecution.” *New Mexico Law Review* 27 (1997): 579–614.

Gillia explains that granting asylum on FGM grounds should not be viewed as a politically unfriendly act. To the contrary, treating FGM as persecution in the context of asylum law is only a manifestation of U.S. culture and jurisdiction and not an attempt to eradicate it abroad.

Groseilliers, Jennifer A. des. “*In re Kasinga: ‘When the Axe Came into the Forest, the Trees Said the Handle Is One of Us.’*” *New England Journal on Criminal and Civil Confinement* 24 (1998): 89–130.

Groseilliers examines the decision in *Kasinga*,⁵³ showing that despite the Board of Immigration Appeal’s failure to recognize gender as a social group, the case represents progress toward a less gender-biased system of adjudicating asylum claims.

Gunning, Isabelle R. “Global Feminism at the Local Level: Criminal and Asylum Laws Regarding Female Genital Surgeries.” *Journal of Gender, Race and Justice* 3 (1999): 45–62.

Gunning enumerates the reasons *In re Kasinga* constitutes a “landmark case in terms of progress in American asylum law towards the recognition of gender-based asylum claims” (p.55). Despite international activity against FGM and activity within the United States for state and federal legislation criminalizing these surgeries, the United States had been reluctant to use FGM as a ground for granting asylum before the *Kasinga* decision.

Guy, Blake M. “Female Genital Excision and the Implications of Federal Prohibition.” *William and Mary Journal of Women and the Law* 2 (1995): 125–69.

In considering the issue of gender persecution, Guy first examines the “nature, extent and consequences of [female genital excision] as it is currently practiced,” and then reviews “the societal, cultural and religious forces that

51. 21 I. & N. Dec. 357 (B.I.A. June 13, 1996).

52. *Id.*

53. *Id.*

underlie both the resistance to indigenous education and Western attitudes that advocate eradication of FGE” (p.128). He describes various federal attempts to prohibit the practice, including legislative efforts, and characterizes a 1994 ruling by an immigration judge to grant asylum to a female Nigerian living illegally in the United States on the grounds that deportation would likely subject her American-born daughters to the ritual of genital excision as unprecedented. In so doing, gender persecution was recognized for the first time as a basis for asylum.

Helton, Arthur C., and Alison Nicoll. “Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of *In Re Fauziya Kasinga* and Prospects for More Gender Sensitive Approaches.” *Columbia Human Rights Law Review* 28 (1997): 375–92.

Helton and Nicoll offer factual support for the claim that although women represent the majority of the world’s refugees, the current asylum law is either inherently discriminatory or implemented in a discriminatory manner. They conclude that U.S. asylum laws “fail to offer women the same level of protection it offers male asylum seekers” (p.375).

Hughes, Karen. “The Criminalization of Female Genital Mutilation in the United States.” *Journal of Law and Policy* 4 (1995): 321–70.

Hughes explains the role played by the criminalization of FGM in enlarging the spectrum of grounds for asylum.

Jones-Bibbs, TiaJuana. “United States Follows Canadian Lead and Takes an Unequivocal Position Against Female Genital Mutilation: *In Re Fauziya Kasinga*.” *Tulane Journal of International and Comparative Law* 4 (1997): 275–304.

In a case note, Jones-Bibbs presents the legal and factual background of *In re Kasinga*,⁵⁴ in which the Board of Immigration Appeals ruled for the first time that FGM is “a form of persecution that could be a basis for a discretionary grant of political asylum” (p.275).

Juncker, Eva N. “A Juxtaposition of U.S. Asylum Grants to Women Fleeing Female Genital Mutilation and to Gays and Lesbians Fleeing Physical Harm: The Need to Promulgate an INS Regulation for Women Fleeing Female Genital Mutilation.” *Journal of International Legal Studies* 4 (1998): 253–89.

Juncker praises the precedential value of the *Kasinga* decision⁵⁵ at a time when there were no INS-approved grounds for asylum in cases of women fleeing FGM.

Kelly, Linda. “Republican Mothers, Bastards’ Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images.” *Hastings Law Review* 51 (2000): 557–97.

Kelly raises the issue of heightened asylum standards for women. For example, women seeking asylum on account of gender violence have to meet the “gender-plus” test explained in the case of the young Togolese woman, *Kasinga*, who fled

54. *Id.*

55. *Id.*

her country in fear of FGM. In that case, the particular social group at issue was “defined as ‘young women . . . [of Kasinga’s tribe] who have not been, and do not wish to be, subjected to FGM’” (p.591).⁵⁶ However, Kelly points out, “by ignoring the traditional ‘immutable characteristic’ test and conflating social group with political opinion conditions, the BIA heightened the asylum standard for women” (p.591).⁵⁷ She concludes that “[t]here seems to be no acceptable explanation for the BIA’s failure to simply define Kasinga’s social group as ‘women.’ Kasinga had already established the prong of ‘well-founded fear’ by choosing to flee rather than undergo FGM. To require her to show an opposition to the practice within the social group criteria was unnecessary” (p.591).

Kelson, Gregory A. “Female Circumcision in the Modern Age: Should Female Circumcision Now Be Considered Grounds for Asylum in the United States?” *Buffalo Human Rights Law Review* 4 (1998): 185–209.

Kelson articulates his position in favor of granting political asylum premised on gender-based persecutions such as female circumcision. He also decries the fact that, although the BIA ruled that female circumcision is a form of persecution, it did not establish women as a social group upon which a basis for asylum could be premised. The article concludes that “[f]emale circumcision is a form of persecution that, along with other forms of gender-based persecution, should stand on its own” (p.200).

Kelson, Gregory A. “Granting Political Asylum to Potential Victims of Female Circumcision.” *Michigan Journal of Gender and Law* 3 (1995): 257–82.

Kelson analyzes two cases, *Oluloro*,⁵⁸ in which a U.S. immigration court allowed female circumcision as a defense to deportation, and *Farah*,⁵⁹ in which the Canadian Immigration and Refugee Board granted political asylum after recognizing female circumcision as a form of persecution. He highlights the need to protect women and girls from involuntary female circumcision.

Lazarus, James A. “In Through the Side Door: Analyzing *In Re Anikwata* Under U.S. Asylum Law and the Torture Convention.” *Case Western Reserve Journal of International Law* 32 (2000): 101–28.

Lazarus recommends that the Board of Immigration Appeals use the United Nations Torture Convention⁶⁰ to protect an asylum seeker who, although faced with extreme hardship such as exposing her child to FGM if deported, would not satisfy one of the five categories under the Refugee Act test.

Lewis, Hope, and Isabelle R. Gunning. “Cleaning Our Own House: ‘Exotic’ and Familial Human Rights Violations.” *Buffalo Human Rights Law Review* 4 (1998): 123–40.

Lewis and Gunning use their essay as a critical race feminist exposé of the events surrounding the U.S. gender asylum case⁶¹ involving Fauziya

56. Quoting *id.* at 367.

57. Citing *id.* at 373–78 (Rosenberg, J., concurring) (criticizing majority for imposing a dual requirement on female claims based on gender).

58. *In re Oluloro*, A72-147-491 (U.S. Immigration Ct. Mar. 23, 1994) (unpublished oral opinion).

59. *In re Farah* (Can. Immigration and Refugee Bd. (Refugee Div.) May 10, 1994) (unpublished opinion).

60. Convention Against Torture, *supra* note 43.

61. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. June 13, 1996).

Kassindja,⁶² a young asylee from Togo. They deplore the judicial treatment she received, concluding that her case “illustrates the irony of American complacency about the status of the United States as a haven for the protection of human rights” (p.124).

Lewis, Hope, and Between Irva. “‘Female Genital Mutilation’: Feminist Human Rights Discourse and the Cultural Divide.” *Harvard Human Rights Journal* 8 (1995): 1–31.

Lewis and Irva examine the controversy surrounding Western feminists’ interpretation of FGM: while many Western feminists seek to eliminate FGM as a form of patriarchal domination, there are many women in Africa who do not wish to end it.

Linarelli, John. “Violence against Women and the Asylum Process.” *Albany Law Review* 60 (1997): 977–87.

Linarelli summarizes the significant developments in women’s claims for asylum since March 1994. He includes the case of *In re Oluloro*,⁶³ in which an immigration judge granted an order suspending the deportation of a Nigerian woman, holding that the likely imposition of FGM on the petitioner’s children, U.S. citizens, would have represented extreme hardship; the INS Asylum Gender Guidelines⁶⁴ that recognize international norms condemning persecution of women, such as those of the Universal Declaration of Human Rights,⁶⁵ the Convention on the Elimination of All Forms of Discrimination Against Women,⁶⁶ and the United Nations Declaration on the Elimination of Violence Against Women;⁶⁷ the case of *In re Kasinga*,⁶⁸ in which the Board of Immigration Appeals decided that fear of FGM is grounds for asylum; and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁶⁹ which made it a crime to practice FGM on minors.

Malone, Linda A. “Beyond Bosnia and *In Re Kasinga*: A Feminist Perspective on Recent Developments in Protecting Women from Sexual Violence.” *Boston University International Law Journal* 14 (1996): 319–40.

Malone focuses on violence against women in general, and mass rape and FGM in particular, as potential grounds for asylum in the United States. She additionally argues that feminism should be recognized as “political opinion” and thus being persecuted for it also should constitute a basis for asylum. She examines

62. “The correct spelling of Fauziya’s last name is ‘Kassindja.’ When Ms. Kassindja arrived in the United States on December 17, 1994, the Immigration & Naturalization Service (INS) erroneously recorded her name as ‘Kasinga.’ This misspelling was carried through to INS documents, briefs and the court decision in the case. It was not corrected until September of 1996 when *New York Times* reporter Celia Dugger traveled to Togo to do an extensive story on the refugee’s family and reported the correct spelling as ‘Kassindja.’” Karen Musalo, *Ruminations on In re Kasinga: The Decision’s Legacy*, 7 S. CAL. REV. L. & WOMEN’S STUD. 357, 357 n.1 (1998) (citation omitted).

63. *In re Oluloro*, A72-147-491 (U.S. Immigration Ct. Mar. 23, 1994) (unpublished oral opinion).

64. INS ASYLUM GENDER GUIDELINES, *supra* note 2.

65. G.A. Res. 217A, U.N. GAOR, 3d Sess., pt.1, at 71, U.N. Doc. A/810 (1948).

66. 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) (entered into force Sept. 3, 1981).

67. G.A. Res. 104, U.N. GAOR, 48th Sess., U.N. Doc. 1/49/104 (1993); U.N. GAOR, 48th Sess. 85th plen. mtg. at 5, U.N. Doc. A/48/PV.85 (1994) (adopting resolution).

68. 21 I. & N. Dec. 357 (B.I.A. June 13, 1996).

69. Pub. L. No. 104-208, 110 Stat. 3009.

the 1995 Gender Guidelines,⁷⁰ which implicitly recognize violence against women as potential grounds for asylum; the 1996 interim guidelines,⁷¹ which allow battered spouses and children to “self-petition” for immigrant status; and the INS in *In re Kasinga*,⁷² which recognizes FGM as grounds for political asylum.

Malone, Linda A., and Gillian Wood. “Immigration—Refugee Act of 1980—Resistance to Female Circumcision as Grounds for Political Asylum in the United States.” *American Journal International Law* 91 (1997): 140–47.

Malone and Wood articulate the reasons behind the *Kasinga* asylum case,⁷³ explaining that the most difficult part of the case was to persuade U.S. authorities that fear of FGM rises to the level of persecution by the Togolese government (based on the argument that the Togolese government is unable or unwilling to control the agents of persecution), and that FGM, as a form of persecution, is thus exercised upon a protected group under U.S. law.

Musalo, Karen. “Ruminations on *In re Kasinga*: The Decision’s Legacy.” *Southern California Review of Law and Women’s Studies* 7 (1998): 357–72.

Musalo explains the role of *In re Kasinga*,⁷⁴ a groundbreaking decision within the gender-based asylum jurisprudence, in holding accepted cultural practices—such as FGM—as a basis for the persecution necessary to qualify for asylum, due to their inherent harm and irrespective of their lack of “malignant or punitive” intent. Musalo, Kassindja’s lawyer, has identified several ways in which *Kasinga* has been positive for American asylum jurisprudence and public policy discourse. The case had precedential value for three different concepts in asylum law: (1) “persecution” does not require the punitive intent the INS had favored; (2) “persecution” need not rise to the level of a “shock the conscience” standard (again, the INS had advocated this more restrictive standard); and (3) social group membership is a legitimate asylum category in gender cases.

Nichols, Shannon. “American Mutilation: The Effects of Gender-Biased Asylum Laws on the World’s Women.” *Kansas Journal of Law and Public Policy* 6 (1997): 42–61.

Nichols decries the U.S. position, held at the time of the article, which dismissed the political aspects of FGM as merely cultural or personal.

Obiora, L. Amede. “Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision.” *Case Western Reserve University* 47 (1997): 275–300.

Obiora summarizes various domestic regimes, including U.S. asylum statutory and case law, pertaining to gender issues. She describes both *Fatin v. INS*,⁷⁵ in which the court recognized the validity of “a claim based on gender” even though

70. INS ASYLUM GENDER GUIDELINES, *supra* note 2.

71. Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,061 (Mar. 26, 1996) (codified at 8 C.F.R. pts. 103, 204, 205 & 216).

72. 21 I. & N. Dec. 357 (B.I.A. June 13, 1996).

73. *Id.*

74. *Id.*

75. 12 F.3d 1233 (3d Cir. 1993).

it denied the request of an Iranian woman who feared persecution if she disobeyed her government's gender-biased rules, and *In re Oluloro*,⁷⁶ in which "a federal immigration court, ruling on humanitarian grounds, suspended the deportation of a thirty-two-year old Nigerian woman, and her two daughters, whom the mother wanted to shield from genital mutilation" (p.334).

Passade Cisse, Bernadette. "International Law Sources Applicable to Female Genital Mutilation: A Guide to Adjudicators of Refugee Claims Based on a Fear of Female Genital Mutilation." *Columbia Journal of Transnational Law* 35 (1997): 429–51.

Passade emphasizes that gender-based asylum claims have increasingly been viewed more favorably. Under the INS Asylum Gender Guidelines,⁷⁷ asylum officers can evaluate gender-based claims, including claims involving FGM, within the framework provided by existing international instruments regarding refugee protection, such as the documents of the UN High Commissioner for Refugees.

Rubin, Glennys E. Ortega. "Women and the Law in Africa: A Call for United States Courts to Reevaluate Policy Considerations Regarding Female Genital Mutilation as a Justifiable Reason for Asylum: *Abankwah v. Immigration and Naturalization Service*." *University of Miami International and Comparative Law Review* 10 (2001): 145–54.

In reviewing *Abankwah v. INS*,⁷⁸ Rubin presents an overview of the U.S. asylum law as it is applied to FGM.

Rudloff, Patricia Dysart. "*In Re Oluloro*: Risk of Female Genital Mutilation as 'Extreme Hardship' in Immigration Proceedings." *St. Mary's Law Journal* 26 (1995): 877–903.

Rudloff analyzes the case of Lydia Oluloro who did not believe that her own Nigerian government would help her protect her daughters from FGM, a Yoruba tribal custom. She also explains how had she not received deportation relief, her asylum claim would have been difficult to prove, because FGM is not clearly a form of persecution based on the recognized grounds for asylum (a woman's race, religion, nationality, membership in a social group, or political opinion). To the contrary, FGM is directed at a woman because of her gender, and Rudloff argues that it should be recognized as a form of persecution under U.S. law and, as such, independent grounds for asylum.

Salamat, Kathy M. "*In re Fauziya Kasinga*: Expanding the Judicial Interpretation of 'Persecution,' 'Well-Founded Fear,' and 'Social Group' to Include Anyone Fleeing 'General Civil Violence'?" *Howard Law Journal* 40 (1996): 225–89.

Salamat summarizes the impact the BIA's decision in *In re Kasinga*⁷⁹ is bound to have on women's claims of political asylum when fleeing countries in which FGM is practiced.

76. A72-147-491 (U.S. Immigration Ct. Mar. 23, 1994) (unpublished oral opinion).

77. INS ASYLUM GENDER GUIDELINES, *supra* note 2.

78. 185 F.3d 18, 20 (2d Cir. 1999).

79. 21 I. & N. Dec. 357 (B.I.A. June 13, 1996).

Sheridan, Mary M. "In Re Fauziya Kasinga: The United States Has Opened Its Doors to Victims of Female Genital Mutilation." *St. John's Law Review* 71 (1997): 433–63.

Author Sheridan, a victim of FGM, emphasizes the positive impact the *Kasinga* decision⁸⁰ has had on the cause of women who suffer gender-based forms of persecution, including FGM.

Stern, Amy. "Female Genital Mutilation: United States Asylum Laws Are in Need of Reform." *American University Journal of Gender and the Law* 6 (1997): 89–111.

Stern supports a change in one of the three elements of the U.S. asylum test: persecution. She suggests that the definition of persecution should include "maintaining and perpetuating the subordination of women" (p.97), asserting that this will protect women who, having suffered FGM, flee their country in search of asylum because they fear "contributing to the preservation of patriarchal structures if forced to return to their homelands" (p.97).

Tarpley, Joan R. "Bad Witches: A Cut on the Clitoris with the Instruments of Institutional Power and Politics." *West Virginia Law Review* 100 (1997): 297–352.

Tarpley presents a revelatory piece on FGM, showing how difficult it is to rely on one's own cultural milieu when judging another's claim of discrimination deserving asylum relief. Also revelatory are the sources used; for example, the following statement is quoted:

Knowledge that FGM is practiced by some black people on girls provokes racist remarks or paternalism towards the people who practice it. Many black people have confused FGM as gender oppression with the rich African culture, and because they look to their African heritage with pride, racist remarks on FGM can evoke strong sentiments of cultural nationalism. Racist remarks have the effect of putting many black people on the defensive about FGM. Racists remarks also trigger guilt feelings in liberal whites who may mean well but confuse the whole issue by condoning FGM within a naive concept of multi-culturalism. Specifically, African women campaigning against FGM in the West have the triple burden of having to confront gender oppression, white liberal guilt and racism within the community. . . . (p.300).⁸¹

Rape

Curran, Michael R. "Flickering Lamp Beside the Golden Door: Immigration, the Constitution, and Undocumented Aliens in the 1990s." *Case Western Reserve Journal of International Law* 30 (1998): 58–142.

Curran points out the fact that the Refugee Act of 1980⁸² did not mention persecution on the basis of gender. He decries that situation by describing the case of Sofia Campos-Guardado, "a Salvadoran refugee, who sought asylum on the basis

80. *Id.*

81. *Quoting* EFUA DORKENOO, CUTTING THE ROSE 134–35 (1994).

82. Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

of her gender: She had been forced to watch male attackers hack flesh from workers on a farm before they were shot, and then she and other female witnesses were raped while male attackers shouted political slogans. . . . Despite her brutalization, the [Fifth Circuit U.S. Court of Appeals] concluded that she 'had not shown that the attackers harmed her in order to overcome any of her own political opinions.' Her rape, which occurred at her uncle's farm, was instead viewed as a consequence of his involvement in a land-reform movement" (p.67-68).

Goldberg, Suzanne B. "Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men." *Cornell International Law Journal* 26 (1993): 605-23.

Goldberg discusses the *Gomez* court's rejection of "women who have been previously battered and raped by Salvadorian guerrillas" (p.610)⁸³ as a social group. The court rejected that definition of a particular social group on multiple grounds. It held that the characteristics were too broad to enable membership in a group and that there was no indication of further brutalization on the basis of gender and age.

Lusby, Katherine. "Hearing the Invisible Women of Political Rape: Using Oppositional Narrative to Tell a New War Story." *Toledo Law Review* 25 (1995): 911-54.

Lusby discusses the lack of legal grounds for victims of rape to immigrate to the United States on grounds that rape was used as a political tool to further male power in war. She summarizes the three bases for legal immigration status available in the United States: family members' current legal residence, ability to fill labor needs, and refugee status. She then reviews the grounds for refugee status: based on seeking permanent asylum (premised upon a well-founded fear of persecution), and temporary "withholding of deportation" (sought as long as necessary where life or freedom are threatened or would be threatened by returning to her home country). She then concludes that rape victims have little to rely on among those categories.

Patel, Krishna R. "Recognizing the Rape of Bosnian Women as Gender-Based Persecution." *Brooklyn Law Review* 66 (1994): 929-58.

Patel notes that the key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men. Women receive less protection because the persecution they suffer usually occurs in the private sphere. Patel concludes that the current definition of persecution should be redefined: "women" should constitute a social group that is sufficient for purposes of asylum claims. Such a redefinition would effectively address, for instance, the rape suffered by Bosnian women.

Phipps, Joyce Antila. "Immigration and the Latin Community." *Women's Rights Law Reporter* 17 (1996): 279-83.

Phipps uses her own experiences as an attorney to illustrate the role gender and race play in asylum cases based on claims of rape. "In one of my cases, the INS investigating officer took particular interest in the details of the rape of a woman from Haiti. The investigator was a man. His questions crossed the line from those

83. Quoting *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991).

of a person seeking the truth. His questions displayed a prurient interest in the details. My client was so affected by his questions that she could not continue with her story. Her claim was then denied” (p.281).

Villiers, Janice D. “Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States.” *Brooklyn Law Review* 60 (1994): 841–928.

Villiers discusses the issue of Haitians seeking asylum in the United States. In particular, she addresses the plight of female Haitian applicants, including those who claimed that rape was used as a means of persecution in Haiti.

Refusal to Conform to Government’s Gender-Specific Laws

Graves, Alison E. “Women in Iran: Obstacles to Human Rights and Possible Solutions.” *American University Journal of Gender, Social Policy and the Law* 5 (1996): 57–92.

Graves discusses *Fatin v. INS*,⁸⁴ in which the asylum seeker’s request was denied even though she testified that if she returned to Iran, she might not accept a veil and thus would be subject to whipping and stoning. However, the case’s dicta might be useful in the future to Iranian women since the court stated that activist women in Iran were a persecuted group who could find asylum in the United States if they could prove their membership in the class. “In addition, Judge Alito defined persecution in the case as ‘Iranian women who refuse to conform to the government’s gender-specific laws and social norms’” (p.84).

Gray, Lindsay M. “Hanging Asylum Law for Afghan Women under the Taliban: Desperate Times, Moderate Measures.” *Brandeis Law Journal* 40 (2001): 557–73.

Gray examines the potential elements of an asylum claim of an Afghan woman who feared persecution from Taliban rulers within the framework of current asylum law in the United States.

Sexual Slavery

Raghu, Maya. “Sex Trafficking of Thai Women and the United States Asylum Law Response.” *Georgetown Immigration Law Journal* 12 (1997): 145–86.

Raghu explains that although American courts have not decided whether a trafficked woman satisfies the conditions for asylum, nevertheless a specific subset of trafficked women should receive asylum relief because they meet the pertinent statutory and regulatory requirements. She shows that sexual slavery is a form of gender persecution on account of the women’s membership in a particular social group.

Sterilization

Brown, Thomas A., II. “Forced Abortions and Involuntary Sterilization in China: Are the Victims of Coercive Population Control Measures Eligible for Asylum in the United States?” *San Diego Law Review* 32 (1995): 745–70.

84. 12 F.3d 1233 (3d Cir. 1993).

Brown claims that the Chinese government involuntarily sterilizes or forces abortions on persons who attempt to have more than one child. He maintains that this constitutes government persecution. Accordingly, he concludes that female Chinese aliens, and perhaps males as well, who flee coercive population control policies should be eligible for U.S. asylum.

Gomez, Anne M. "The New INS Guidelines on Gender Persecution: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Policies of the People's Republic of China." *North Carolina Journal of International Law and Commercial Regulation* 21 (1996): 621-48.

Gomez describes reproductive control practices that are currently used in the People's Republic of China, including forced abortion, sterilization, and mandatory use of an intrauterine device, as gender-based persecution. She then urges appropriate treatment under the INS Asylum Gender Guidelines.⁸⁵

85. INS ASYLUM GENDER GUIDELINES, *supra* note 2.