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**EVERYTHING IN MODERATION:  
WHY ANY GENDER NEXUS UNDER U.S. ASYLUM  
LAW MUST BE STRICTLY LIMITED IN SCOPE**

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ABSTRACT

Despite attempts to create a uniform standard for adjudicating asylum claims, the United States still neither adequately nor appropriately assesses its gender-based asylum claims. In their adjudication of asylum claims, judges and asylum officers remain split over how to decide claims that, either partly or wholly, are specifically based on gender. Part of this judicial conflict stems from a long-standing gap in U.S. asylum law that

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fails to address clearly how courts should analyze these gender-based asylum claims.

One solution that would correct this deficiency is to create a gender nexus within the existing refugee definition under U.S. asylum law. A gender nexus would effectively require that an asylum-seeker's fear of persecution be based on gender. This proposal possesses certain advantages over the status quo that inaccurately and confusingly assesses gender-based asylum claims.

The gender nexus, however, must notably be strictly limited in scope to prevent an inadvertent overexpansion of U.S. asylum law. A strictly limited gender nexus would offer an intermediate, and more balanced, approach to the adjudication of gender-based asylum claims by purposely including some gender-based claims while excluding others.

This note will therefore first contend that Congress must amend the existing refugee definition to include a gender nexus under U.S. asylum law. Second, this note will uniquely argue that Congress must carefully define and limit the scope of its gender nexus to accommodate only some, and not all, gender-based asylum claims.

## I. INTRODUCTION

International refugee law first developed during the early 20th century, but more particularly after World War II, to address the increasing population of displaced people fleeing persecution in the wake of the war.<sup>1</sup> States wanted to provide some measure of legal protection to individuals who feared persecution in their home countries.<sup>2</sup> Some consensus among states about the basic principles of international refugee law, the definition of a "refugee," and the fundamental elements of a refugee claim, was thus clearly needed.<sup>3</sup>

The result was the 1951 United Nations Convention relating to the Status of Refugees.<sup>4</sup> The subsequent 1967 Protocol relating to the Status of Refugees removed a temporal limitation in the original 1951 Convention and made other changes to the original Convention to incorporate "new

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<sup>1</sup> United Nations High Commissioner for Refugees [UNHCR], *The 1951 Refugee Convention: Questions & Answers* 4, 5 (2007), available at <http://www.unhcr.org/3c0f495f4.html>.

<sup>2</sup> See UNHCR, *Convention and Protocol Relating to the Status of Refugees* 5-6 (2007), available at <http://www.unhcr.org/3b66c2aa10.html>; 156 CONG. REC. S1518, S1518-1528 (daily ed. Mar. 15, 2010) (statement of Sen. Leahy) (introducing the Refugee Protection Act of 2010 in Senate Bill 3113) ("The Convention Relating to the Status of Refugees was negotiated in 1951 to protect those who suffered persecution in war-torn Europe prior to 1951.").

<sup>3</sup> UNHCR, *Convention and Protocol Relating to the Status of Refugees* 5 (2007), available at <http://www.unhcr.org/3b66c2aa10.html>.

<sup>4</sup> 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

refugee situations” in the international community.<sup>5</sup> As of October 2008, 147 states have ratified, acceded or succeeded to either or both the 1951 Convention and the 1967 Protocol.<sup>6</sup> Although the United States is not a signatory to the 1951 Convention, the U.S. acceded to the 1967 Protocol on November 1, 1968.<sup>7</sup> The United States later incorporated the principles of both the 1951 Convention and the 1967 Protocol<sup>8</sup> into domestic law through Congress’ Refugee Act of 1980.<sup>9</sup> Despite some differences between international refugee law and U.S. asylum law,<sup>10</sup> the United

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<sup>5</sup> 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. The original 1951 Convention restricted refugee recognition to those who became refugees due to events occurring in Europe before January 1, 1951—a not-so-subtle reference to World War II. The 1967 Protocol removed this temporal restriction and further acknowledged that refugees may be found not just in Europe, but all over the world. See UNHCR, *Convention and Protocol relating to the Status of Refugees* 6 & n.2, 48 (2007), available at <http://www.unhcr.org/3b66c2aa10.html>.

<sup>6</sup> UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol* 1 (2008), available at <http://www.unhcr.org/3b73b0d63.html>.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> This note will hereinafter refer to the 1951 Convention and the 1967 Protocol collectively as the “Convention,” except when they are purposely addressed separately in parts of the Introduction and in Part II(A).

<sup>9</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); see 156 CONG. REC. S1518, S1518-1528 (daily ed. Mar. 15, 2010) (statement of Sen. Leahy) (“It was not until 1980, however, that Congress enacted implementing legislation to bring our laws into compliance with the Convention and Protocol.”).

The U.S. defines a *refugee* as:

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

8 U.S.C. § 1101 (2009) (emphasis added).

By comparison, an *asylum-seeker* is “[a]ny alien who is *physically present* in the United States or who arrives in the United States (whether or not at a designated *port of arrival* and including an alien who is brought to the United States after having been interdicted in *international or United States waters*) . . .” who applies for asylum. 8 U.S.C. § 1158 (2009) (emphasis added).

Finally, an *asylum-seeker becomes a refugee* when “within the meaning of section 1101(a)(42)(A) of this title . . . the [asylum-seeker] establish[es] that race, religion, nationality, membership in a particular social group, or political opinion *was or will be* at least one *central reason* for persecuting the [asylum-seeker].” *Id.* (emphasis added).

<sup>10</sup> For instance, compared to the U.S. refugee definition, *supra* note 9, the Convention defines a *refugee* as a person who “owing to well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to

States essentially adopted international law's definition of who qualifies as a refugee (the "refugee definition") into the Refugee Act.

Yet in the decades since the passage of the Refugee Act,<sup>11</sup> U.S. asylum law has significantly changed. Specifically, the Immigration and Naturalization Service's 1995 Gender Guidelines ("INS Guidelines") transformed how federal judges, immigration judges, and asylum officers evaluate *gender-based* asylum claims.<sup>12</sup> Although the INS Guidelines are not binding precedent by which judges must abide, some judges nevertheless rely heavily on the INS Guidelines as a reflection of the INS' official position on gender-based claims.<sup>13</sup> Some examples of gender-based claims include cases of sexual abuse, rape, and domestic violence.<sup>14</sup> Female asylum-seekers, compared to male asylum-seekers, overwhelmingly present these gender-based asylum claims as a basis for relief before immigration officials.<sup>15</sup> The INS Guidelines modernized U.S. asylum law by specifically addressing these gender-based claims for the first time.<sup>16</sup>

Despite its ground-breaking nature, however, the INS Guidelines failed to achieve consistency among immigration officials over how to adjudicate these gender-based claims.<sup>17</sup> Prior to 1995, in the absence of any concrete INS policy on gender-based claims, federal and immigration

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or, owing to such fear, is unwilling to avail himself of the protection of that country . . . ." 1951 Convention, *supra* note 4, art. 1(A)(2) (emphasis added); 1967 Protocol, *supra* note 5, art. I(2) (emphasis added).

In addition, U.S. refugee law notably and liberally recognizes *past* persecution as a basis for granting asylum in contrast to the more restrictive Convention. Diana Saso, *The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines*, 8 HASTINGS WOMEN'S L.J. 263, 267 n.23 (1997); Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN'S L.J. 221, 224 (2000). This note does not focus on this element of past persecution.

Finally, U.S. asylum law, stated in 8 U.S.C. § 1101 and 8 U.S.C. § 1158, and the Convention differ in their language establishing a nexus requirement. The Convention uses the language "for reasons of," while U.S. asylum law uses the term "on account of" to define the nexus requirement. These two phrases possess slightly different meanings. DEBORAH E. ANKER, REFUGEE LAW CTR., LAW OF ASYLUM IN THE UNITED STATES 268 & n.9 (3d ed. 1999). This note, however, will not generally address these variations between international refugee law and domestic asylum law.

<sup>11</sup> See generally LAWYERS COMM. FOR HUMAN RIGHTS, THE IMPLEMENTATION OF THE REFUGEE ACT OF 1980: A DECADE OF EXPERIENCE 18 (1990).

<sup>12</sup> Memorandum from Phyllis Coven, INS Office of Int'l Affairs, Department of Justice, on Considerations For Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995), available at <http://www.state.gov/s/l/65633.htm> [hereinafter INS Guidelines]; see also ANKER, *supra* note 10, at 9.

<sup>13</sup> ANKER, *supra* note 10, at 9.

<sup>14</sup> INS Guidelines, *supra* note 12.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> Saso, *supra* note 10, at 291-92.

courts possessed significant freedom over how to decide these claims.<sup>18</sup> Their discretionary authority resulted in circuit splits and rarely produced any concrete principles on which asylum-seekers could rely while asserting their claims.<sup>19</sup> Even after the publication of the INS Guidelines, confusion among the courts persisted.<sup>20</sup> As a result, U.S. asylum law lacked any one, consistent approach on how to treat gender-based claims.

In particular, courts disagreed over how gender-based claims could be based on any of the five grounds for asylum listed in the Convention and U.S. law.<sup>21</sup> These five grounds are race, religion, nationality, membership of a particular social group (PSG), and religion.<sup>22</sup> An asylum-seeker presenting a gender-based claim must therefore show, among other requirements, how actual or feared persecution in his or her country of origin is “on account of” one or more of these five grounds.<sup>23</sup> This mandatory link to at least one of the five grounds is known as the nexus requirement. Courts will therefore deny any asylum claim that does not satisfy this nexus requirement, regardless of whether the claim is based on gender.

Some gender-based claims habitually fail this nexus requirement, because of the rigid formulation of the U.N. refugee definition upon which U.S. asylum law is based.<sup>24</sup> Specifically, the U.N. refugee definition tends to focus on the kinds of claims that male asylum-seekers typically assert, to the detriment of female asylum-seekers.<sup>25</sup> This favorable male bias in the U.N. refugee definition has since entered U.S. asylum

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<sup>18</sup> ANKER, *supra* note 10, at 4-5.

<sup>19</sup> *Id.* at 8-9.

<sup>20</sup> For example, the INS Guidelines specifically stated that “‘sex’ might be the sort of shared characteristic that could define a particular social group. . . . [This] is also consistent with the view taken by the UNHCR Executive Committee, of which the United States is a member.” INS Guidelines, *supra* note 12. Nevertheless, the *Fisher* court held in 1996 that sexual discrimination does not satisfy the nexus requirement of the refugee definition. *Fisher v. I.N.S.*, 79 F.3d 955, 961-963 (9th Cir. 1996) (en banc).

<sup>21</sup> 1951 Convention, *supra* note 4; 8 U.S.C. § 1101 (2009).

<sup>22</sup> 8 U.S.C. § 1101.

<sup>23</sup> *Id.*; *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481-82 (1992).

<sup>24</sup> See LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 11, at 15, 18.

<sup>25</sup> Danette Gómez, Notes and Comments, *Last in Line—The United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 975 (2004); Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y & L. 119, 130 (2007); Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 780 (2002); see Tanya Domenica Bosi, Note, *Yadegar-Sargis v. INS: Unveiling the Discriminatory World of U.S. Asylum Laws: The Necessity to Recognize a Gender Category*, 48 N.Y.L. SCH. L. REV. 777, 813 (2003-04).

law<sup>26</sup> and caused the rejection of a significant number of gender-based claims.<sup>27</sup>

This note therefore first argues that Congress should amend the refugee definition to include a gender nexus as a way of acknowledging the legitimacy of certain gender-based asylum claims. The gender nexus would allow asylum-seekers espousing claims based on gender to receive more accurate, unbiased adjudications under U.S. law. Similar to what other scholars have argued,<sup>28</sup> this note will establish the basic necessity of creating a gender nexus within U.S. asylum law.

Significantly, this note further argues that the gender nexus must be *strictly limited* and cannot be as open-ended as the aforementioned scholars have suggested.<sup>29</sup> A limited gender nexus would create a more consistent judicial evaluation of gender-based claims and lead to the subsequent recognition of valid claims that may be otherwise denied. The limited gender nexus would also sidestep the problem of over-inclusivity in U.S. asylum law by proscribing claims that are not directly related to gender.

This note thus recommends that Congress amend the definition of a refugee to read as follows:

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, political opinion, *or gender that directly results in a well-founded fear of physical harm amounting to persecution*.<sup>30</sup>

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<sup>26</sup> Bosi, *supra* note 25, at 813; LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 11, at 18.

<sup>27</sup> See, e.g., LYNN HECHT SCHAFFRAN & ELIZABETH J. VRATO, GENDER, JUSTICE & LAW: FROM ASYLUM TO ZYGOTES 171 (2003) (discussing the *Campos-Guardado* case).

<sup>28</sup> See, e.g., Bosi, *supra* note 25, at 813; Marian Kennady, Note, *Gender-Related Persecution and the Adjudication of Asylum Claims: is a Sixth Category Needed?*, 12 FLA. J. INT'L L. 317 (1998); Todd Stewart Schenk, Note, *A Proposal to Improve the Treatment of Women in Asylum Law: Adding a "Gender" Category to the International Definition of "Refugee,"* 2 IND. J. GLOBAL LEGAL STUD. 301 (1994); Thiele, *supra* note 10, at 221. See generally Gómez, *supra* note 25, at 959 (arguing that the United States must do more to recognize gender-based asylum claims).

<sup>29</sup> See sources cited *supra* note 28 (arguing for the creation of a gender nexus, but not discussing any need to impose limits on the proposed gender nexus).

<sup>30</sup> This proposed amendment is based on the existing refugee definition in 8 U.S.C. § 1101 (2009).

The phrase “physical harm amounting to persecution” that modifies *only* the gender nexus, and none of the other five grounds, should be further interpreted as:

*Physical* harm that includes, but is not limited to, the following illustrative cases that an asylum-seeker must establish on a *case-by-case basis*: sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, forced abortion, and honor killings.<sup>31</sup>

This proposed amendment to the refugee definition thus includes three elements: 1) a list of asylum claims that courts may *presume* to be *gender-based*, 2) a requirement that the gender-based, *physical* harm rise to the level of persecution, and 3) an emphasis that despite the strict definition of the gender nexus, asylum-seekers presenting gender-based claims remain subject to *individualized* assessments of their claims. These three factors that collectively form a *limited* gender nexus would critically clarify U.S. asylum law and lead to a more consistent judicial analysis of gender-based claims.

This note continues in Part II by offering a general background on how international refugee law has shaped current U.S. asylum law. Part III examines how U.S. asylum law improperly characterizes gender-based claims now, with courts either failing to apply any nexus at all, or inaccurately applying a PSG or political opinion nexus, to gender-based claims. Part IV discusses the advantages of adding a limited gender nexus to the refugee definition and addresses some of the criticisms commonly aimed at an open-ended gender nexus. Part V then presents the theory and feasibility of adding a limited gender nexus to U.S. asylum law. Finally, a conclusion explains the reasons for, and provides an overview of, why Congress must amend U.S. asylum law to include a limited gender nexus.

## II. BACKGROUND

### A. Definitions

An asylum-seeker, compared to a refugee, is someone who has left his country and is either within, or on the borders of, the country in which he is seeking asylum.<sup>32</sup> An asylum-seeker does not become a refugee until the country in which he is seeking asylum has legally recognized him as a refugee.<sup>33</sup>

The Convention defines a refugee as someone, who “owing to well-founded fear of being persecuted *for reasons of* race, religion, nationality,

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<sup>31</sup> This list of harms, other than honor killings, is based on the INS Guidelines that state that these harms are “unique to or more commonly befall women . . . .” INS Guidelines, *supra* note 12. See SCHAFFAN & VRATO, *supra* note 27, at 171 (stating that honor killings are “related” to other “female-specific human rights violations”).

<sup>32</sup> 8 U.S.C. § 1158 (2009).

<sup>33</sup> See *id.* §§ 1101, 1158.

membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>34</sup> The U.S. definition is similar, except that it substitutes the phrase “on account of” for the Convention’s “for reasons of” language.<sup>35</sup> The United States defines a refugee as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution *on account of* race, religion, nationality, membership in a particular social group, or political opinion.<sup>36</sup>

Although not a party to the original 1951 Convention, the United States acceded as a party to the 1967 Protocol in November 1968.<sup>37</sup> Years later, through the Refugee Act of 1980, Congress effectively incorporated both the 1951 Convention and 1967 Protocol’s international law into U.S. domestic law.<sup>38</sup> Although minor differences exist between the international and American definition of a refugee,<sup>39</sup> both refugee definitions require asylum-seekers to show certain elements in their claims.

For the U.S. to recognize an asylum-seeker as a refugee, the asylum-seeker must satisfy the following requirements in the refugee definition. In addition to being outside his or her country of origin, an asylum-seeker must also show that he or she would be unable or unwilling to return to the country of origin where state protection would also be unavailable.<sup>40</sup> The asylum-seeker must further show that his or her actual persecution or well-founded fear of persecution satisfies the nexus requirement; the asylum-seeker’s persecution or fear of persecution must be caused by, “because of,” “related to,” or a “result” of, race, religion, nationality, PSG, or an actual or imputed political opinion.<sup>41</sup> Ultimately, if the U.S. recognizes an asylum-seeker as a refugee, that refugee becomes entitled to certain legal protections, among them and most importantly, *non-*

<sup>34</sup> 1951 Convention, *supra* note 4 (emphasis added).

<sup>35</sup> There are some minor differences between these two phrases, ANKER, *supra* note 10, at 268 & n.9, but for the purposes of this note, the two terms are treated synonymously.

<sup>36</sup> 8 U.S.C. § 1101 (emphasis added).

<sup>37</sup> UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, *supra* note 6.

<sup>38</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 11, at 15, 18.

<sup>39</sup> See *supra* notes 10, 35.

<sup>40</sup> 8 U.S.C. § 1101.

<sup>41</sup> See 8 U.S.C. § 1101; ANKER, *supra* note 10, at 268-69.



*refoulement* or protection from deportation to any country where the refugee may be subject to persecution.<sup>42</sup>

## B. History

International refugee law first arose in the wake of World War II that had produced millions of predominately European refugees.<sup>43</sup> Although women and children constituted the majority of these asylum-seekers, women often had significant difficulty leaving their countries of origin due to a lack of financial means and other resources.<sup>44</sup> Thus faced with a predominantly male asylum-seeker population, international refugee law consequently developed with a primary focus on these male asylum-seekers.<sup>45</sup> Specifically, international law focused on the fear of certain types of persecution that were more commonly asserted by male asylum-seekers than female asylum-seekers.<sup>46</sup> For instance, more male asylum-seekers than female asylum-seekers, ever assert a political opinion claim.<sup>47</sup> The creation of a political opinion nexus thus tended to benefit men instead of women and serves as just one example of international refugee law's emphasis on male asylum-seekers.

Female asylum-seekers usually present a different kind of asylum claim.<sup>48</sup> Their claims generally revolve around what has previously been termed the "private" or domestic sphere and include harms such as sexual abuse and domestic violence.<sup>49</sup> U.S. asylum law presently fails to address adequately this kind of gender-based persecution that female asylum-seekers overwhelmingly face.<sup>50</sup> Congress should therefore amend U.S. asylum law to acknowledge these gender-based acts of persecution that so many asylum-seekers experience.

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<sup>42</sup> See 1951 Convention, *supra* note 4.

<sup>43</sup> UNHCR, *The 1951 Refugee Convention – Questions & Answers* 4, 5 (2007); Musalo, *supra* note 25, at 121.

<sup>44</sup> ANKER, *supra* note 10, at 254 n.405, 369-70.

<sup>45</sup> Gómez, *supra* note 25, at 975; Musalo, *supra* note 25, at 780.

<sup>46</sup> Bosi, *supra* note 25, at 795-96, 813 (recommending that gender be added as a sixth nexus requirement "to eliminate the gender bias that exists in asylum law"); Gómez, *supra* note 25, at 975.

<sup>47</sup> See Gómez, *supra* note 25, at 975; Musalo, *supra* note 25, at 121.

<sup>48</sup> INS Guidelines, *supra* note 12; Bosi, *supra* note 25, at 793; Thiele, *supra* note 10, at 222.

<sup>49</sup> Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: the Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391, 391-92 (2001) ("Forms of harm that are unique to or disproportionately affect women (for example, women may be especially vulnerable to rape and other sexual assaults) are no longer routinely dismissed as 'private.'").

<sup>50</sup> Saso, *supra* note 10, at 273.

### III. HOW U.S. ASYLUM LAW CURRENTLY TREATS ASYLUM CLAIMS

Federal judges, immigration judges, and asylum officers have not adopted a uniform approach for analyzing gender-based claims.<sup>51</sup> For instance, while the Second Circuit held that gender cannot independently constitute a PSG,<sup>52</sup> the Third Circuit disagreed. The Third Circuit held that gender, either standing alone or in combination with other factors, may form a PSG.<sup>53</sup> Thus, despite the INS Guidelines that were intended to clarify how gender-based claims should be adjudicated, varying judicial approaches to assessing gender-based asylum claims still abound.

Courts generally adopt one of three different approaches when considering gender-based claims. They have alternatively held that gender-based claims: (1) are “private” disputes that do not fall under any nexus, (2) fall under the PSG nexus, or (3) fall under the political opinion nexus. The first option necessarily results in the automatic denial of the asylum claim. Among the latter two options—the PSG and political opinion nexus—courts may still deny a gender-based claim for failure to establish any of the other elements of the refugee definition. For instance, courts have held that while gender alone may constitute a PSG, a certain gender-based harm may not necessarily rise to the level of persecution.<sup>54</sup>

#### A. No Nexus

By refusing to acknowledge the validity of gender-based claims within the existing nexus framework, courts subscribe to the misguided, traditional concept of a male refugee.<sup>55</sup> By applying a formalist interpretation of the nexus requirement, these courts limit the ability of female asylum-

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<sup>51</sup> *Id.* at 274.

<sup>52</sup> *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991).

<sup>53</sup> *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993); *see also Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994) (citing *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993)) (suggesting that the court would reach a similar holding as *Fatin*, but ultimately deciding to leave the issue open).

Alternatively, *Safaie* contends that the relevant “particular social group” may be defined as those Iranian women who advocate women’s rights or who oppose Iranian customs relating to dress and behavior. We agree with the Third Circuit that a group of women, who refuse to conform and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance, may well satisfy the definition.

*Safaie*, 25 F.3d at 640.

<sup>54</sup> *See, e.g., Fatin*, 12 F.3d at 1240.

<sup>55</sup> *See Musalo, supra* note 25, at 130; *see also ANKER, supra* note 10, at 392 (“Not to acknowledge that women constitute a [PSG] creates analytical confusion, treats women fundamentally differently and holds them to a higher standard—treatment specifically rejected by the *INS Gender Guidelines* . . . . The reluctance to define the social group as women misunderstands the special requirements of refugee protection.”).

seekers to prove their claims.<sup>56</sup> Courts also hold steadfast to the anachronistic view that the harms female asylum-seekers face are usually “private.”<sup>57</sup> These courts then deny asylum to female asylum-seekers on the ground that the “private” dispute does not fall within any nexus.<sup>58</sup>

Although they still exist, courts that apply this restrictive interpretation of the nexus requirement are no longer common.<sup>59</sup> Many courts today recognize the legitimacy of a certain category of gender-based claims.<sup>60</sup> These progressive courts, rather than rejecting a gender-based claim for failure to establish a nexus, instead recognize the claim as being more than a “private” or domestic dispute.<sup>61</sup> These courts typically proceed to analyze the gender-based claim under either a PSG or political opinion nexus.<sup>62</sup>

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<sup>56</sup> See Saso, *supra* note 10, at 300-01; see also ANKER, *supra* note 10, at 392 (“Not to acknowledge that women constitute a [PSG] creates analytical confusion, treats women fundamentally differently and holds them to a higher standard—treatment specifically rejected by the *INS Gender Guidelines*.”).

<sup>57</sup> See, e.g., Lazo-Majano v. I.N.S., 813 F.2d 1432, 1434-36 (9th Cir. 1987) (holding the physical abuse of a woman who was “singled out to be bullied, beaten, injured, raped, and enslaved” by a Salvadoran military officer remained a personal act until the officer falsely and publicly accused the woman of political subversion); *In re Pierre*, 15 I. & N. Dec. 461, 462-63 (BIA 1975) (holding domestic violence by a Haitian deputy officer remained a case of “strictly personal” violence despite the Haitian government’s unwillingness to intervene); *Klawitter v. I.N.S.*, 970 F.2d 149, 152 (6th Cir. 1992) (holding unwanted sexual advances by a Polish officer was a “personal” dispute that did not rise to the level of persecution under a political opinion nexus). The INS Guidelines specifically highlights these three cases as examples of “public officials who commit what is commonly seen as a *private act*.” INS Guidelines, *supra* note 12 (emphasis added).

<sup>58</sup> See Saso, *supra* note 10, at 301.

<sup>59</sup> See Anker, *supra* note 49, at 391; see, e.g., Julia Preston, *U.S. May be Open to Asylum for Spousal Abuse*, N.Y. TIMES, Oct. 30, 2009, at A14 (reporting that *In re R-A-*, President Obama’s administration has recommended that courts grant asylum to Rodi Alvarado Peña, a Guatemalan survivor of domestic abuse. The administration’s recommendation effectively overturns the Board of Immigration Appeals’s (BIA) original, 10-5 decision in 1996 that Ms. Peña did not qualify for asylum, because her domestic abuse claim was merely an example of a “private act[ ] of violence.”); see *BIA Sends Mixed Messages on Gender Persecution Cases*, 21 REFUGEE REPORTS (U.S. Comm. for Refugees, Washington, D.C.), Aug./Sept. 2000, at 1-2, 5-6. Scholars and refugee advocates strongly criticized *In re R-A-* after the BIA’s decision in 1996. Musalo, *supra* note 25, at 798, 804. *In re R-A-* was subsequently vacated by *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

<sup>60</sup> Anker, *supra* note 49, at 391; see, e.g., Department of Homeland Security Response to the Respondent’s Supplemental Filing of August 18, 2009, *In re Rodi Alvarado-Pena* [sic] in Deportation Proceedings (Oct. 28, 2009), available at [http://graphics8.nytimes.com/packages/pdf/national/20091030asylum\\_brief.pdf](http://graphics8.nytimes.com/packages/pdf/national/20091030asylum_brief.pdf).

<sup>61</sup> Anker, *supra* note 49, at 391; see, e.g., *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

<sup>62</sup> Anker, *supra* note 49, at 391-92.

### B. *Particular Social Group Nexus*

There are several difficulties to analyzing a gender-based asylum claim under a PSG nexus—difficulties that, incidentally, would not arise if gender were its own, free-standing nexus.<sup>63</sup> Nevertheless, there are three main challenges to assessing gender-based claims within a PSG nexus.

First, the definition of a PSG is ambiguous, narrow, and contrived.<sup>64</sup> There is no widely-accepted standard for determining what factual circumstances can create a PSG.<sup>65</sup> Various courts have held, for example, that “‘married women in Tanzania’, ‘educated women’, ‘young Somali women’, ‘women in Albania without the protection of male relatives’ and ‘westernized young women’” may all comprise a PSG.<sup>66</sup> There is significant disagreement among courts over what common characteristics the members of a PSG must all possess.<sup>67</sup> Standardization among the courts over what defines a PSG, and whether gender can ever independently constitute a PSG, remains elusive.<sup>68</sup> An asylum-seeker asserting a gender-based claim may therefore fall under the PSG nexus in one jurisdiction, but not in another. When a court assesses a gender-based asylum claim under the PSG nexus, the fate of the asylum-seeker may consequently turn on the arbitrary discretion and decision-making authority of a single judge.

Second, in certain instances, courts must resort to manipulating the definition of a PSG to accommodate a claim that is essentially based on gender.<sup>69</sup> *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996), serves as a classic example of this judicial manipulation.<sup>70</sup> In *Kasinga*, a Togolese woman fearing female genital mutilation was seeking asylum.<sup>71</sup> The BIA created an extremely limited definition of a PSG into which the woman fell.<sup>72</sup> The BIA stated that the woman belonged to the PSG of “young

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<sup>63</sup> See generally MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 324 n.145 (2007) (offering a list of key scholarly articles on the relationship between gender-based asylum claims and the PSG nexus).

<sup>64</sup> *Fatin v. I.N.S.*, 12 F.3d 1233, 1238 (3d Cir. 1993) (stating that courts have “struggled” with the definition of membership in a particular social group); FOSTER, *supra* note 63, at 335-36; see INS Guidelines, *supra* note 12.

<sup>65</sup> See INS Guidelines, *supra* note 12; see, e.g., *Fatin*, 12 F.3d 1233; FOSTER, *supra* note 63, at 325-26.

<sup>66</sup> FOSTER, *supra* note 63, at 326.

<sup>67</sup> See *id.* at 328.

<sup>68</sup> See *id.*; Bosi, *supra* note 25, at 792.

<sup>69</sup> Bosi, *supra* note 25, at 791-92 (“In the absence of a separate and distinct gender category, the courts are encouraged to accommodate women’s claims of persecution with the theoretically and empirically vexing category of membership in a particular social group.”).

<sup>70</sup> *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 358.

women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>73</sup> Based on this artful crafting of the PSG nexus, the BIA then granted the woman asylum.<sup>74</sup> If U.S. asylum law had included an independent gender nexus, Kasinga’s gender-based fear of female genital mutilation could have relied more heavily on her sex than on her membership in a group of like-minded individuals.

Third, courts still cannot decide which of two different approaches to defining a PSG should apply in gender-based claims. The United Nations High Commissioner for Refugees (“UNHCR”) has proposed two tests for defining a PSG: a “protected characteristics” test and a “social perception” test.<sup>75</sup> Under the “protected characteristics” test, members of the group must possess an “innate and immutable characteristic[ ].”<sup>76</sup> Alternatively, under the “social perception” test, members must be “identif[ied] . . . as a group in society, subjecting them to different treatment and standards” from the rest of the population.<sup>77</sup> The members must also engage in a “voluntary association” with one another.<sup>78</sup> The broader “social perception” test would therefore *encompass* and *extend beyond* the narrower “protected characteristics” test.<sup>79</sup>

The implication of these two tests is that various gender-based claims may qualify as a PSG under only one approach and not the other. The “social perception” interpretation of a PSG could include some gender-based asylum claims that the “protected characteristics” interpretation would exclude.<sup>80</sup>

The social perception approach could . . . reach claims advanced by persons who believe in values at odds with the social mores of the societies in which they live. For example, women who object to FGM [like *Kasinga*] or who refuse to wear traditional dress [like *Fatin v. I.N.S.*, 12 F.3d 1233 (3d Cir. 1993),] are likely to be perceived

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 30, U.N. Doc. HCR/GIP/02/01 (May 7, 2002), available at <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf> [hereinafter UNHCR, *Guidelines on International Protection*]; UNHCR, REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 294-301 (Erika Feller et al. eds., 2003) [hereinafter UNHCR, REFUGEE PROTECTION IN INTERNATIONAL LAW].

<sup>76</sup> UNHCR, *Guidelines on International Protection*, *supra* note 75.

<sup>77</sup> *Id.*

<sup>78</sup> GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 366 (2d ed. 1996).

<sup>79</sup> UNHCR, REFUGEE PROTECTION IN INTERNATIONAL LAW, *supra* note 75, at 298.

<sup>80</sup> *Id.*

as constituting a social group because they have set themselves against the cultural, religious, or political practices of the society. By contrast, it may be more difficult to recognize some of these claims—for instance, one based on attire—under the protected characteristics approach.<sup>81</sup>

A court's decision between these two interpretive approaches defining a PSG may thus yield directly opposing results and severe consequences for gender-based claims. By placing gender under the PSG nexus, a court therefore liberally increases its own judicial authority in the absence of any specific asylum guidelines. This unnecessary increase in judicial discretion raises both the possibility of further circuit splits and the level of uncertainty asylum-seekers must face.

Finally, while some courts have held that gender may independently constitute a PSG, other courts have ruled that gender must be present with some additional element to establish a PSG.<sup>82</sup> For instance, in *Fatin*, the Third Circuit acknowledged that Fatin, an Iranian feminist who advocated for women's rights, had presented a subjective fear of harm.<sup>83</sup> The court decided, however, that Fatin had failed to show to a reasonable degree of likelihood that Iran persecutes feminists.<sup>84</sup> Furthermore, the court ruled that Fatin's opinion on women's rights was not sufficiently fundamental to her personal beliefs so as to cause Fatin to continue her advocacy in Iran.<sup>85</sup> Absent such advocacy, Fatin would not raise herself to the attention of the Iranian authorities and thus could not possess an objective fear of persecution.<sup>86</sup> The court then rejected Fatin's claim on the ground that Fatin could not demonstrate her membership in the specific subgroup of women "who *refuse to conform* to the government's gender-specific laws and social norms."<sup>87</sup> Yet despite its holding that Fatin lacked a sufficient political opinion on women's rights that would create an objective fear of persecution, the *Fatin* case still remains notable for the court's general recognition that sex may independently constitute a PSG.

On the other hand, in *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc), a similar case involving Iranian laws that disproportionately

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<sup>81</sup> *Id.*

<sup>82</sup> See ANKER, *supra* note 10, at 389 & n.711, 713. Compare *Fatin v. I.N.S.*, 12 F.3d 1233 (3d Cir. 1993) (holding that gender can independently constitute a particular social group), with *Safaie v. I.N.S.*, 25 F.3d 636 (8th Cir. 1994) (holding Iranian women, standing alone, cannot comprise such an overbroad particular social group), and *Fisher v. I.N.S.*, 79 F.3d 955 (9th Cir. 1996) (en banc) (holding alleged sexual discrimination does not create a nexus requirement).

<sup>83</sup> *Fatin*, 12 F.3d at 1240.

<sup>84</sup> *Id.* at 1241-42.

<sup>85</sup> *Id.* at 1241.

<sup>86</sup> *Id.* at 1241-42.

<sup>87</sup> *Id.* at 1241.

impacted women, the Ninth Circuit stated in dicta that women could not independently constitute a PSG.<sup>88</sup> By rejecting the fundamental, gender-based nature of Fisher's claim, the court left Fisher with no option but to assert a political opinion claim. Similar to *Fatin*, the court then held that Fisher's political opinion was not sufficiently strong to create an objective fear of persecution and denied Fisher's claim.<sup>89</sup> By holding that women, standing alone, cannot constitute a PSG, the *Fisher* court effectively required Fisher to show the existence of some other element in addition to her gender to satisfy the PSG nexus. Under *Fisher*, an asylum-seeker who wants to assert a gender-based claim under the PSG nexus must therefore implicitly establish two elements: her gender and some additional criterion. Compared to other asylum-seekers asserting a religious or political opinion claim, who must demonstrate only their personal religion or political opinion, respectively, asylum-seekers with gender-based claims must therefore prove twice as much to meet the nexus requirement.

### C. Political Opinion Nexus

Inaccurately classifying gender-based asylum claims within the political opinion nexus is equally problematic for a few reasons. The political opinion nexus categorically excludes certain types of gender-based claims. In addition, the political opinion nexus incorrectly characterizes the cause of the persecution that many asylum-seekers face.

First, the political opinion nexus effectively excludes many gender-based claims.<sup>90</sup> While some gender-based claims could potentially meet the nexus requirement under the guise of a political opinion (such as in *Fatin* and *Fisher*), many gender-based claims cannot.<sup>91</sup> Furthermore, the political opinion nexus fails to recognize certain categories of gender-based claims, such as domestic violence, forced marriages, and honor killings.<sup>92</sup> The political opinion nexus thus is an inadequate substitute for a

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<sup>88</sup> *Fisher*, 79 F.3d at 963.

<sup>89</sup> *Id.* at 964-65.

<sup>90</sup> See, e.g., *Campos-Guardado v. I.N.S.*, 809 F.2d 285 (5th Cir. 1987) (holding Campos-Guardado, a family member of a political reformer, was raped after having to watch the murders of her male family members not because of her own political beliefs, but rather due to the political opinions of her family. The court subsequently rejected her asylum claim for failure to show either a political opinion or PSG nexus.).

<sup>91</sup> See, e.g., *Campos-Guardado*, 809 F.2d 285; see LYNN HECHT SCHAFFRAN & ELIZABETH J. VRATO, *GENDER, JUSTICE & LAW: FROM ASYLUM TO ZYGOTES* 171 (2003).

<sup>92</sup> See ANKER, *supra* note 10, at 372 & n.625, 391 (citing one scholar, Audrey Macklin, who has contended that "the use of the political opinion ground in the domestic violence context . . . places inappropriate emphasis on the women's reasons for resisting, when what is really at issue is the attitude of male dominance and entitlement to violence, which is better understood in the context of the role gender plays as a defining characteristic within the particular social group category.").

free-standing gender nexus due to the political opinion nexus's narrow scope.

Analyzing gender-based claims under the political opinion nexus also fundamentally misconstrues the underlying purpose of the Convention, and by extension, U.S. asylum law.<sup>93</sup> The original humanitarian purpose of the Convention was to prevent the deportation of refugees to their countries of origin in which they possessed a legitimate fear of persecution.<sup>94</sup> The test of whether someone qualifies for asylum should thus focus on elements like an asylum-seeker's credibility and fear of persecution, rather than whether the persecution is sufficiently related to any one of five rigid, pre-set factors.

For instance, the Convention should theoretically protect Eastern Congolese women who face a high possibility of being raped during a time of war or widespread violence.<sup>95</sup> In assessing the cause of this persecution, however, courts should recognize that these Congolese women are being targeted because they are women caught in a conflict that is unrelated to their politics.<sup>96</sup> The alternative conclusion—that these women possess an imputed political opinion of neutrality in a highly politicized war—obfus-

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<sup>93</sup> LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 11, at 15, 18-19.

<sup>94</sup> LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 11, at 19 ("The legislative history of the [Refugee] Act makes it clear that the amendments to the withholding of deportation statute were intended to bring that statute into compliance with the prohibition in Article 33 of the 1967 Refugee Protocol against the *refoulement* of refugees."); David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 227 n.132 (1988), *citing* GARY E. RUBIN, U.S. COMM. FOR REFUGEES, *THE ASYLUM CHALLENGE TO WESTERN NATIONS* 7, 18 (1984). The U.S. Committee for Refugees states:

Formulas developed more than 30 years ago will not meet all conditions in the contemporary world. Furthermore, the language of the Convention and Protocol . . . admits of several interpretations: participants have read the refugee definition to include other migrants or to so restrict its scope as to rob the system of its ability to rescue and aid forced migrants. A real commitment based on the original intent of the 1951 Convention is needed to protect populations at risk for reasons of persecution.

GARY E. RUBIN, U.S. COMM. FOR REFUGEES, *THE ASYLUM CHALLENGE TO WESTERN NATIONS* 7, 18 (1984).

<sup>95</sup> See Melanie Randall, Article, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281, 285-86 (2002) (stating that "the use of mass rapes as a weapon of war" is a form of gender-specific persecution).

<sup>96</sup> See Thiele, *supra* note 10, at 222 ("[W]omen suffer from *gender-specific* persecution such as . . . systematic rape as a weapon of war. Although persecution on account of *gender* is now being recognized by human rights advocates, the ability to seek *refuge* from persecution on account of *gender* has failed to develop accordingly.") (emphasis added).



cates the inherent, gender-based harms that these women face.<sup>97</sup> These fundamental harms of rape and sexual violence are far from the political opinions that the Convention originally envisioned in the form of political dissidents,<sup>98</sup> but rather much more closely tied to gender.<sup>99</sup> To define the persecution that these Congolese women face as being rooted in some form of political opinion implicitly denies the real cause of their persecution: their gender.

The political opinion nexus is consequently a poor substitute for an independent gender nexus. The political opinion nexus does not encompass a wide range of mainstream gender-based claims and fundamentally mischaracterizes the harms many asylum-seekers experience.

#### IV. CURRENT PROPOSALS TO ADD A GENDER NEXUS TO THE REFUGEE DEFINITION

There have been numerous proposals to add gender as a sixth nexus to the refugee definition.<sup>100</sup> These proposals have generally contended that the addition of a gender nexus would correctly reframe the refugee definition to incorporate gender-based claims. The proposals also address common counterarguments against the creation of a gender nexus. The proposals, however, uniformly raise new problems of their own by advocating for an *unrestricted* gender nexus. The current proposals for the addition of a gender nexus thus contain both advantages and drawbacks.

##### A. *Advantages*

There are several advantages to creating a gender nexus within U.S. asylum law. A gender nexus allows courts to identify claims properly within the context of gender instead of employing an ill-fitted PSG or political opinion nexus. The term “gender” also markedly includes both men and women, such that everyone—and not only women—could benefit from the new ground for asylum. Finally, gender as a free-standing nexus resolves issues with the burden of proof that asylum-seekers asserting gender-based claims currently have trouble satisfying.

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<sup>97</sup> GOODWIN-GILL, *supra* note 78, at 364 (“For women suffer particular forms of persecution *as women*, and not just or specifically because of political opinion or ethnicity.”).

<sup>98</sup> Musalo, *supra* note 25, at 777, 780 n.28.

<sup>99</sup> GOODWIN-GILL, *supra* note 78, at 364; Kennady, *supra* note 28, at 326-27 (criticizing *Lazo-Majano v. I.N.S.*, 813 F.2d 1432 (9th Cir. 1987), where the Ninth Circuit granted asylum to an El Salvadorian woman who had been raped and otherwise continually persecuted by a state officer, on grounds that the woman’s inability to access State protection constituted a political opinion. The author argues that the woman’s claim of persecution was based more closely on her gender than any conceivable political opinion.).

<sup>100</sup> See sources cited *supra* note 28.

First, as previously discussed, the forced classification of gender-based claims into one of three categories frequently misrepresents the critical gender component of many claims. For instance, assuming that Afghan widows qualify for asylum,<sup>101</sup> the persecution that these women endure is likely due to their being both: 1) Afghan citizens whose spouses have passed away, and 2) their female sex. If Afghanistan does not similarly persecute its male widowers, then these female widows can present a two-pronged asylum claim. Specifically, they can assert that their present condition is based on both their PSG of “people whose spouses have passed away” and their female sex. As discussed earlier, subsuming gender within the PSG nexus to create a PSG of “*women* whose spouses have passed away,” however, may be problematic in implicitly rejecting the validity of gender as a free-standing claim. An independent gender nexus would resolve this dilemma by allowing asylum-seekers such as these Afghan widows to present their asylum claims as being equally based on both their PSG and their gender.

Second, a gender nexus would include asylum claims presented by both male and female asylum-seekers and would not be limited to women’s claims alone. For example, both men and women could present a credible fear of persecution in the form of honor killings. A gender nexus would thus apply equally to both sexes. Furthermore, although women would presumably compose a majority of those asserting a gender-based claim, the gender nexus’s disproportionate impact on women should not be worrisome. Indeed, the gender nexus’s disproportionate impact would simply be analogous to the political opinion nexus’s overwhelming application to men.<sup>102</sup> The gender nexus’s impact on women therefore should not disqualify it from becoming a legitimate ground upon which to grant asylum.

Finally, a gender nexus would mitigate the high burden of proof that many asylum-seekers currently face. Female asylum-seekers alleging persecution in the “private” sphere within the home, in particular, often-times have difficulty obtaining objective evidence of persecution to support their asylum claims. For instance, courts have historically rejected domestic violence claims that amounted to persecution on grounds that the dispute was a personal matter lacking a nexus.<sup>103</sup> This rejection then fuels a perpetuating cycle in asylum law, where an initial

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<sup>101</sup> Somini Sengupta, *A Nation Challenged: Immigration; Refugees at America’s Door Find It Closed After Attacks*, N.Y. TIMES, Oct. 29, 2001, at B6 (reporting the U.S. has temporarily suspended the relocation of many refugees including Afghan widows, whom the United States had *already recognized as refugees* living abroad in Pakistan, in the wake of the Sept. 11, 2001 terrorist attacks).

<sup>102</sup> Danette Gómez, Notes and Comments, *Last in Line—The United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 975 (2004); Musalo, *supra* note 25, at 121.

<sup>103</sup> See *supra* notes 57, 58.

lack of objective evidence leads to the denial of valid asylum claims that, in turn, become their own form of objective evidence that courts use to deny similar claims in the future.

Domestic violence claims often fall into this trap. Domestic violence asylum claims are notoriously difficult to support with objective evidence of the widespread nature of domestic violence in any given country. Any corroborating evidence is unlikely to be produced when domestic violence claims are routinely rejected on grounds of the dispute being a personal matter rather than a pervasive social problem.<sup>104</sup> Absent corroborating evidence, these “private” asylum claims are denied and automatically reinforce the lack of objective evidence on the prevalence of domestic violence in a particular country.<sup>105</sup> An independent gender nexus would halt this self-destructing cycle in asylum law. A gender nexus would shift the focus from a search for objective evidence that may not necessarily exist to a specific analysis of an asylum-seeker’s individual claim of persecution.

### B. *Common Criticisms*

There are two main criticisms against the creation of an open-ended gender nexus in U.S. asylum law. Opponents first contend that the PSG nexus sufficiently encompasses any gender-based claim such that a separate gender nexus would be redundant and unnecessary.<sup>106</sup> Critics further argue that the creation of a gender nexus would “open the floodgates” to an increasing and unmanageable number of asylum claims.<sup>107</sup> Both of these arguments are flawed.

The first criticism asserts that a gender nexus is unnecessary, because an independent gender nexus would either overlap with, or be fully subsumed under, the existing PSG nexus.<sup>108</sup> U.S. and international refugee law, however, has never treated the five nexus as being mutually exclusive.<sup>109</sup> A successful asylum claim may easily fall under more than one nexus, such as when a political dissident advocates for independence along racial lines or a religious minority seeks political representation in government.

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<sup>104</sup> See Gómez, *supra* note 102, at 982.

<sup>105</sup> *Id.*

<sup>106</sup> See GOODWIN-GILL, *supra* note 78, at 364-66 (introducing the debate over whether defining a PSG by gender sufficiently addresses the kinds of gender-based harms that women face).

<sup>107</sup> See ANKER, *supra* note 10, at 254.

<sup>108</sup> GOODWIN-GILL, *supra* note 78, at 364-66.

<sup>109</sup> INS Guidelines, *supra* note 12; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1978 Protocol relating to the Status of Refugees*, ¶ 77, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979), available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> [hereinafter UNHCR, *Handbook*].

Moreover, as some courts have already held that gender may independently constitute a PSG, the likelihood of some overlap between the gender and PSG nexus seems high.<sup>110</sup> Yet the possibility of this overlap should not preclude the creation of an independent gender nexus because, as previously explained, a separate gender nexus incorporates certain gender-based asylum claims that the PSG nexus does not. Courts have also failed to reach a consensus on the definition of a PSG, or more particularly, the specific role of gender in defining a PSG. In the midst of this judicial ambiguity, an independent gender nexus would prevent courts from denying certain gender-based claims on grounds that the claims do not possess a nexus.

Furthermore, a gender nexus retains significance even in those courts that have already recognized gender, standing alone, as a PSG.<sup>111</sup> A gender nexus accurately reframes the debate to focus on how an asylum-seeker's gender, and not his or her membership in a particular social group of similar individuals, was the cause of his or her persecution. The conceptual shift also has practical consequences in terms of the burden of proof that an asylum-seeker must satisfy<sup>112</sup> and the corresponding feasibility of meeting that evidentiary burden. As discussed above, an asylum-seeker may oftentimes more easily demonstrate a nexus to gender than to his or her membership in a particular social group, especially in cases where statistics and objective information are necessarily sparse.

Second, critics claim that an independent gender nexus would cause a mass influx of asylum-seekers to the United States.<sup>113</sup> This hypothesis, however, ignores the realities of seeking asylum. One of the foremost criteria of an asylum-seeker is that her or she must be outside his or her country of origin and be either at the border of, or within, the country in which he or she is seeking asylum.<sup>114</sup> Most people who would otherwise claim a fear of persecution, however, are unable to leave their countries

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<sup>110</sup> See, e.g., *Fatin v. I.N.S.*, 12 F.3d 1233 (3d Cir. 1993) (suggesting gender alone may be sufficient to establish a PSG); cf. *Gomez v. I.N.S.*, 947 F.2d 660 (2d Cir. 1991) (holding gender may be a part of, but cannot solely constitute, a PSG).

<sup>111</sup> See *Fatin*, 12 F.3d 1233.

<sup>112</sup> See, e.g., Thiele, *supra* note 10, at 225 (stating that “[b]ecause a woman seeking asylum must show that she will be persecuted to a greater degree than the general female population, an asylum claimant faces a *much higher evidentiary burden* if she comes from a country that persecutes or allows persecution of all or most women. Thus, the particular social group theory, when pertaining to women, is flawed in that it accepts the universal persecution of women as status quo, and requires the female claimant to *distinguish her persecution as greater than that of the average woman*.”) (emphasis added).

<sup>113</sup> See, e.g., ANKER, *supra* note 10, at 254 & n.406 (citing *In re Kasinga*, 21 I. & N. Dec. 357, 368 (BIA 1996) (Filppu, Bd. Mem., concurring)).

<sup>114</sup> ANKER, *supra* note 10, at 4.

of origin due to a lack of financial resources.<sup>115</sup> The creation of a gender nexus therefore would not lead to a sudden increase of asylum claims, as many individuals who would otherwise seek asylum would remain unable to leave their countries of origin in the first place.<sup>116</sup>

In addition, the Canadian Immigration and Refugee Board's ("IRB") Guidelines on a gender nexus under Canadian law serves as a useful guide to predicting the implications of a similar gender nexus within U.S. asylum law.<sup>117</sup> In March 1993, Canada enacted a gender nexus within its national refugee laws.<sup>118</sup> During the following three years, Canada received only 1,134 gender-based asylum claims of which it recognized only 624.<sup>119</sup> On average, Canada therefore granted only 178 gender-based asylum claims per year—hardly a “flood.” Moreover, the number of gender-based claims actually *decreased* in the seven years after Canada's propagation of its IRB Guidelines.<sup>120</sup> The IRB attributed the relatively steady and low number of claims to female asylum-seekers' perpetual difficulty in acquiring sufficient resources to exit their countries of origin.<sup>121</sup> This case study of Canada's asylum policies debunks the myth that the addition of a gender nexus will lead to a significant and unmanageable increase in the number of asylum-seekers in the United States.

In addition to drawing insight from Canada, the United States may also look inwards at the aftermath of the propagation of its own INS Guidelines. After the INS issued its Guidelines in 1995, gender-based asylum claims remained rare.<sup>122</sup> For instance, by late 1996 or approximately one-and-a-half years after the issuance of the INS Guidelines, the INS had received only 75 gender-based asylum claims.<sup>123</sup> These statistics on the number of gender-based asylum claims in the aftermath of the INS Guidelines and the IRB Guidelines strongly suggest that the creation of a gender nexus would not reasonably lead to a mass influx of asylum claims.

Finally, in the improbable event that a slight increase in asylum claims occurs after the initial creation of an independent gender nexus, the

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<sup>115</sup> *Id.* at 254 n.405, citing Judith Ramirez, *The Canadian Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*, REFUGEE, Dec. 1994, at 3.

<sup>116</sup> *Id.* at 254 n.405.

<sup>117</sup> Immigration and Refugee Board, *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Mar. 9, 1993) [hereinafter IRB Guidelines], reproduced in 1 LAURA BLACK ET AL., REFUGEE LAW CTR., GENDER ASYLUM LAW IN DIFFERENT COUNTRIES: DECISIONS AND GUIDELINES 87 (1st ed. 1999).

<sup>118</sup> *Id.* at 69.

<sup>119</sup> ANKER, *supra* note 10, at 254 n.405.

<sup>120</sup> Musalo, *supra* note 25, at 133.

<sup>121</sup> ANKER, *supra* note 10, at 254 n.405; Gómez, *supra* note 102, at 959, 985.

<sup>122</sup> ANKER, *supra* note 10, at 254.

<sup>123</sup> *Id.* at 254 n.405.

increase would still not refute any of the aforementioned substantive arguments in support of a gender nexus. The number of asylum claims is a policy (and perhaps political) concern that is distinguishable from all the substantive arguments that support a gender nexus. The two criticisms that a gender nexus would both overlap with the PSG nexus and cause a substantial increase in the number of asylum claims are therefore invalid arguments against the creation of a gender nexus within U.S. asylum law.

### C. *A Valid Problem*

There is, however, one legitimate concern over whether a gender nexus should be added to U.S. asylum law: a potential gender nexus may be over-inclusive. For instance, severe economic discrimination against women or the economic coercion of women may, under certain circumstances, constitute persecution<sup>124</sup> and fulfill all the other elements of the refugee definition. Congress did not originally intend for U.S. asylum law to cover these forms of economic persecution.<sup>125</sup> If gender-based economic persecution satisfied the gender nexus, then the scope of U.S. asylum law may unintentionally increase, and courts may have to grant asylum to any asylum-seeker claiming gender-based economic persecution. Many impoverished asylum-seekers may fall within this category and thereby suddenly qualify for asylum.<sup>126</sup> Under these circumstances, a gender nexus may inadvertently cause a broad expansion of U.S. asylum law.

Congress must therefore narrowly define any gender nexus. Specifically, the gender nexus must exclude economic and other forms of non-physical persecution that Congress did not originally intend to include within the refugee definition.

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<sup>124</sup> INS, U.S. DEP'T OF JUSTICE, THE BASIC LAW MANUAL 25 (1994) (“[D]iscriminatory practices and experiences can accumulate over time and increase in intensity so that they rise to the level of persecution.”) (emphasis omitted), citing UNHCR, *Handbook*, at ¶¶ 54-55; *In re T-Z-*, 24 I. & N. Dec. 163 (BIA 2007) (holding that “[n]onphysical forms of harm, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution”).

<sup>125</sup> See LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 11, at 15 (“In 1952, Congress authorized the Attorney General to withhold deportation of any alien within the United States to any country in which, in the opinion of the Attorney General, the alien would be subject to ‘physical persecution.’”) (emphasis added).

<sup>126</sup> Note, however, that these asylum-seekers would still first have to depart their countries of origin, and secondly, satisfy all the other elements of the refugee definition, before they could be granted asylum.

## V. THE SOLUTION: A LIMITED GENDER NEXUS

### A. *Defining the Scope of the Limited Gender Nexus*

Any gender nexus that is added to the outdated refugee definition must be strictly limited in scope. The limited gender nexus should, at the very least, cover asylum claims of direct, physical, and arguably per se persecution, such as sexual abuse, rape, female genital mutilation, slavery, and honor killings. These particular asylum claims typically satisfy all the elements of the refugee definition other than the nexus requirement. For example, in *Campos-Guardado v. I.N.S.*, 809 F.2d 285 (5th Cir. 1987), the court held that Campos-Guardado's claim of rape did not meet the refugee definition, because Campos-Guardado could not show how the persecutory sexual abuse related to a nexus.<sup>127</sup> Where the previous gender-based asylum claims satisfy all the elements of the refugee definition besides a nexus, courts should recognize the claims under a limited gender nexus. The limited gender nexus would bring these otherwise-valid, gender-based asylum claims under the umbrella of U.S. asylum law and thereby provide legal protection to the asylum-seekers asserting those claims by recognizing them as refugees.

Under certain circumstances, the limited gender nexus may also include gender-based asylum claims with a more tenuous relationship to the other elements of the refugee definition, such as domestic violence claims. Courts must carefully assess these gender-based claims, however, to ensure that the claim satisfies all the components of the refugee definition in addition to gender. For example, while domestic violence claims are typically gender-based, some of these claims may rise to the level of persecution while others, depending on the level of abuse involved, do not. Where the level of domestic violence does not constitute persecution, courts should still assess the asylum claim under a gender nexus, but must ultimately deny the claim for an inability to satisfy the overall refugee definition.

Furthermore, survivors of domestic violence may not actually be unwilling or unable to return to their *country* of origin, but rather just to their *locality*. For instance, compared to forced marriage claims that may involve persecution by an asylum-seeker's entire family or village,<sup>128</sup> domestic violence claims typically involve relatively fewer perpetrators. Female survivors of domestic violence usually do not fear any perpetrator other than their spouses. In many cases, these female asylum-seekers alleging domestic violence may therefore reasonably escape from their perpetrators by leaving their home and living elsewhere in their countries

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<sup>127</sup> *Campos-Guardado v. I.N.S.*, 809 F.2d 285 (5th Cir. 1987) (holding that Campos-Guardado, who was raped after political dissidents came to her home and murdered her politically active, male family members, did not satisfy the political opinion or PSG nexus requirement).

<sup>128</sup> Anker, *supra* note 49, at 392.

of origin. In contrast, forced marriage survivors may encounter more difficulty accessing this internal relocation alternative due to the multiple agents of persecution that they are likely to face in the form of their entire families or villages. As a result, in spite of a new gender nexus, not all gender-based asylum claims will meet the refugee definition.

On the other hand, there may also be certain gender-based asylum claims that satisfy the refugee definition, but which U.S. asylum law may purposely want to exclude. For instance, severe economic discrimination on the basis of gender may rise to the level of persecution and fulfill all the other requirements of the refugee definition. Congress, however, originally only intended for U.S. asylum law to protect refugees from *physical* persecution.<sup>129</sup> Any gender nexus must therefore be carefully limited in scope to exclude these *economic*, gender-based harms.

Moreover, some gender-based asylum claims may not actually be gender-based at all. For instance, the persecution of a female shopkeeper whose store is located in the center of town may not actually be based on gender, but rather a simple desire to secure that prime economic real estate for the perpetrator's own shop. Under those circumstances, the persecution may not be based on the asylum-seeker's gender, but on economic considerations that do not meet the nexus requirement. Faced with this kind of economic asylum claim that indirectly implicates gender, courts must carefully assess whether the claim is actually gender-based or only masquerading as one.

A limited gender nexus should therefore apply to relatively straightforward, gender-based claims of direct, physical persecution like rape or female genital mutilation. The limited gender nexus may also apply to other gender-based claims that may be more tangentially related to the other elements of the refugee definition, such as domestic violence claims. Courts, however, must pay particular attention to these less straightforward cases. In some instances, the gender-based asylum claim may be unable to fulfill another element of the refugee definition, such as persecution or an inability to remain in the country of origin. In other cases, the asylum claim may seem to be gender-based upon first glance, but may actually be a type of economic or otherwise-impermissible asylum claim. Finally, given the original legislative intent of Congress to restrict asylum law to cover only cases of physical persecution, a limited gender nexus should purposely exclude certain kinds of non-physical, gender-based persecution.

The incorporation of a limited gender nexus into U.S. asylum law would therefore achieve a balanced result of both *including* some gender-based claims previously excluded under U.S. asylum law, and *excluding*

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<sup>129</sup> LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 11, at 15 ("In 1952, Congress authorized the Attorney General to withhold deportation of any alien within the United States to any country in which, in the opinion of the Attorney General, the alien would be subject to '*physical* persecution.'") (emphasis added).



other gender-based claims that Congress did not intend for U.S. asylum law to cover.

### B. *Drafting the Text of the Limited Gender Nexus*

To achieve this balanced result, U.S. asylum law must clearly define the boundaries of the limited gender nexus. The language describing the limited gender nexus notably cannot simply add gender to the existing refugee definition without further elaboration; the nexus requirement cannot simply read as follows: “on account of race, religion, nationality, membership of a particular social group, political opinion, *or gender*.” That broad language in the nexus requirement would result in the ambiguous and unlimited scope of gender claims prone to many of the criticisms and problems previously discussed.

A carefully-worded, *strictly limited* gender nexus, on the other hand, would effectively avoid the criticisms of an unlimited gender nexus while still incorporating certain gender-based claims. One recommendation would be for Congress to amend the definition of a refugee to read as follows:

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, political opinion, *or gender that directly results in a well-founded fear of physical harm amounting to persecution*.<sup>130</sup>

The phrase “physical harm amounting to persecution” that modifies *only* the gender nexus, and none of the other five grounds, should be further interpreted as:

*Physical* harm that includes, but is not limited to, the following illustrative cases that an asylum-seeker must show on a *case-by-case basis*: sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, forced abortion, and honor killings.<sup>131</sup>

This limited gender nexus effectively demarcates the strict boundaries of the gender nexus under U.S. asylum law. The limited gender nexus would permanently clarify the INS Guidelines on what constitutes a gen-

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<sup>130</sup> This proposed amendment is based on the existing refugee definition in 8 U.S.C. § 1101 (2009).

<sup>131</sup> This list of harms, other than honor killings, is based on the INS Guidelines that state that these harms are “unique to or more commonly befall women . . . .” INS Guidelines, *supra* note 12. See SCHAFFAN & VRATO, *supra* note 27, at 171 (stating that honor killings are “related” to other “female-specific human rights violations”).

der-based claim in three ways: 1) by including a list of common asylum claims that courts may *presume* to be *gender-based*, 2) by requiring the persecution to be a type of *physical* harm, and 3) by stipulating that any gender-based claim remains subject to an *individualized* determination of asylum. By delineating the bounds of gender-based claims in this way, the limited gender nexus would bypass many of the criticisms directed at an unlimited gender nexus while still incurring the advantages of adding a gender nexus to existing U.S. law.

Federal courts, immigration courts, and asylum officers would also derive practical guidance from this limited gender nexus in their adjudication of asylum claims. Judges and asylum officers could use the examples of physical harm as a *flexible, non-exclusive checklist* of presumptive gender-based claims that fulfill the nexus requirement. Courts could also view the examples *collectively* as an informal *baseline* of whether a gender-based claim meets the standards of the limited gender nexus. Courts could therefore reasonably conclude that while a specific incident of economic persecution may be related to gender, the feared economic persecution neither results in a fear of *physical* harm nor falls in the same *category* of gender-based harms such as sexual abuse and rape. While the asylum claim may be gender-based, courts could therefore nevertheless deny asylum using the specific language of this limited gender nexus.

As a result, this limited gender nexus would be both appropriately inclusive and adequately exclusive of a wide variety of gender-based asylum claims.

## VI. CONCLUSION

The addition of a limited gender nexus to U.S. asylum law is both necessary and long overdue. The current refugee definition does not adequately incorporate many gender-based asylum claims. Some courts have consequently excluded certain gender-based asylum claims from the refugee definition altogether. Other courts have attempted to rectify this deficiency in U.S. asylum law by assessing gender-based asylum claims under either a PSG or political opinion nexus.

This classification of gender-based claims under a PSG or political opinion nexus, however, does not cover all applicable gender-based claims and furthermore, raises troubling issues regarding the burden of proof that these asylum-seekers must meet. Moreover, this temporary judicial accommodation of gender-based claims within the PSG or political opinion nexus misconstrues the fundamental nature of these asylum claims that are based on gender.

A gender nexus would resolve this current problematic classification of gender-based asylum claims. Any gender nexus, however, must be sufficiently limited in scope to prevent an unintentional overexpansion of U.S. asylum law. Careful legislative drafting of a strictly limited gender nexus would properly avoid this potential legislative overreaching.

The strictly limited gender nexus would bring certain gender-based claims within the refugee definition and would also appropriately exclude many other asylum claims that are only indirectly related to gender. The limited gender nexus would also provide a much-needed, balanced approach to assessing gender-based asylum claims and thereby diminish the possibility of ongoing circuit splits in this area of asylum law. Congress should therefore amend the existing refugee definition to include a limited gender nexus.

