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The Development of Gender-Based Asylum Law: 
A Critique of the 1995 INS Guidelines

Diana Saso*

Olimpia

Olimpia was raped, beaten and continuously abused for months by a sergeant in the Armed Forces of the Salvadoran military. He raped her at gunpoint, held grenades to her head, and pummeled her face, causing a blood clot to form in one eye. The sergeant threatened that if Olimpia ever told on him he would declare she was a subversive and subject her to having her tongue cut off, her nails removed one by one, her eyes pulled out, and then she would be killed.

Sofia

While visiting her uncle who was involved in the controversial agrarian land reform movement, Sofia, along with her uncle, male cousin and three female cousins, was attacked by armed assailants. They were dragged to the edge of the farm’s waste pit where their hands and feet were bound and the women were gagged. Forcing the women to watch, the assailants hacked the flesh from the men’s bodies with machetes and then shot the men to death. While a woman who accompanied the attackers shouted political slogans in the background, the attackers subsequently raped the women, and then cut them loose, threatening to kill them unless they fled immediately. Sofia suffered a nervous breakdown and had to remain in the hospital for fifteen days. While visiting her parents, Sofia’s mother introduced her to two of her cousins who recently had fled from the guerrillas and moved into the neighborhood. Sofia immediately recog-


1. The facts described are based on Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987). The Ninth Circuit granted Olimpia’s request for asylum after she had received denials from the Immigration Judge and the Board of Immigration Appeals (BIA).

2. The facts described are based on Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987). The Fifth Circuit affirmed the denial of her asylum application by the Immigration Judge and the BIA.
nized one of them as one of her attackers. On several occasions, he sought her out and threatened to kill her and her family if she revealed his identity.

“Mary”

Despite being pressured for years by her mother, Mary adamantly refused to undergo female genital mutilation, which is a common traditional practice in Sierra Leone. At the age of twenty-three, Mary was no longer given a choice. While asleep in her parents’ home, Mary was abducted, blindfolded, and her hands and legs were bound to prevent her escape. Against her will, she was taken to a place in the jungle where female genital mutilation is performed as part of an initiation ritual. Using an unsterilized razor, a woman elder performed the mutilation late at night without giving Mary any anesthesia or medication. Mary’s clothes were removed but she remained bound and was held down while the elder cut away her clitoris and her labia minora. Other women sang to disguise her screams. Following her mutilation, Mary was required to take an oath of secrecy and was threatened with death if she were to reveal information about the ceremony and her mutilation.

“Debra”

At the age of thirteen, Debra was abducted, gagged, and bound in Sierra Leone. While her female relatives held her down, her clitoris was cut off with a knife. Women partaking in the ritual beat drums during the mutilation so no one could hear the screaming. Under the threat of death, Debra was forced to swear that she would never reveal the details of what had been done to her. Debra claims that she would rather speak out and face the threat of death by witchcraft than remain silent and allow her daughters to be subjected to the same fate.


4. Immigration Judge Paul A. Nejelski granted her asylum claim, which was also based on spousal abuse and her political activism. The INS appealed the decision, but later withdrew its appeal. See id.

5. The facts described are based on a case decided by an Immigration Judge in Baltimore, MD. The case is reported in More on IJ Decision Granting Asylum Based on Genital Mutilation, 72 INTERPRETER RELEASES 1265 (1995) and Pamela Constable, INS Debates Female Mutilation as Basis for Asylum, WASH. POST, Sept. 11, 1995, at D1. Debra is not the applicant’s actual name.

6. Immigration Judge John F. Gossart, Jr. denied her asylum application, asserting that female genital mutilation was an “important ritual” that “binds the tribe” in many African countries. The applicant’s concerns about retribution against her or the forced mutilation of her daughters did not constitute fear of persecution for asylum purposes. According to Immigration Judge Gossart, a woman “cannot change the fact that she’s a female, but she
INTRODUCTION

The cases discussed above exemplify the evolving and often erratic nature of the law surrounding gender-based asylum claims. For years, asylum advocates have exposed the plight of refugee women by highlighting the inconsistencies in the case law and the uncertainty inherent in presenting asylum claims based on gender-related persecution. Asylum advocates, scholars, and international and domestic organizations have emphasized the need to ameliorate the persecution of refugee women by increasing awareness and devising more efficient procedures for the adjudication of gender-based asylum claims. On May 26, 1995, the Immigration and Nationality Service (INS) published an acknowledgment of this need.7

In response to the recent and still developing U.S. case law and other compelling factors, the INS Office of International Affairs issued a memorandum which was written to "provide the INS Asylum Officer Corps with guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender."8 These guidelines were intended to ameliorate the multiple problems that women refugees face when presenting claims of gender-based persecution. By educating Asylum Officers as to the procedural considerations unique to gender-based asylum claims, as well as the legal framework in which these claims should be analyzed, the INS Guidelines represent a significant step toward providing fair adjudications of claims presented by women fleeing persecution. However, despite this progress, the Guidelines are inherently deficient, providing only limited analyses of issues in many areas and wholly failing to discuss others. Ultimately, the case law in the United States must evolve to create a legal environment in which women can prevail on valid gender-based asylum claims.

This Comment takes a critical, in-depth look at the INS Guidelines, discussing their strengths, weaknesses, and limitations which affect the adjudication of asylum claims based on gender related persecution. Part I provides a brief overview of asylum law in the United States. Part II looks at the multiple influences which engendered the issuance of the INS Guidelines, discussing both international and national initiatives. Part III explores the procedural considerations specific to gender-based asylum claims which should be employed by Asylum Officers in their adjudications. Part IV analyzes the legal framework the INS Guidelines provide for the evaluation of gender-based asylum claims. Part V discusses gender-based asylum case law since the issuance of the INS Guidelines. Finally, this Comment con-

8. Id. at 1.
cludes that although the issuance of the INS Guidelines represents a significant step towards creating a more receptive legal environment for women refugees, ultimately the case law and statutory framework must develop to a level which compels uniform treatment of gender-based asylum applicants, and the INS must adhere to the guidelines it promulgated.

I. OVERVIEW OF U.S. ASYLUM LAW

In the pre-World War II era, the immigration laws of the United States did not recognize a right to asylum. Following World War II, up until 1980, the United States responded to refugee problems by enacting legislation to address refugee crises as they arose. In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees. Despite this accession, the U.S. did not incorporate the provisions of the 1967 Protocol into U.S. immigration law until the Refugee Act of 1980. With this enactment, Congress intended to bring U.S. law into compliance with the 1967 Protocol, and to improve the existing asylum procedures. Regulations setting forth a formal asylum application process were not codified until 1990. These regulations were recently reformed and the new regulations were published in December 1994.

Under the current asylum application process, an immigrant can apply...
for asylum in one of two ways: affirmatively or defensively. Affirmative claims are made when aliens file directly with the INS. Approximately ninety percent of asylum claims are made affirmatively. Immigrants may also raise a claim of asylum defensively as a form of relief in exclusion or deportation proceedings before an Immigration Judge. Under the Refugee Act, which is codified within the Immigration and Nationality Act (INA), asylum is available to aliens who are in the United States, or at a U.S. land border or port of entry when they request refuge. The Attorney General has the discretion to grant asylum to any person who meets the statutory definition of “refugee.”

The INA’s definition adopted the language of the 1951 United Nations Convention which defines a refugee as:

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.

Thus, to prevail on an asylum claim, the applicant must establish that she has been persecuted in the past or has a well-founded fear of persecution in the future, that the feared persecution will be by the government or by someone the government is unwilling or unable to control, that the perse-

17. Id.
18. Id.
19. Id.
20. Id.
23. Id. According to at least one commentator, “[t]he only substantive difference between the refugee definition contained in the Convention and that adopted by the United States through the Refugee Act was the inclusion in the Refugee Act of past persecution as a basis for determination of refugee status.” Kelly, supra note 12, at 634 n.42.
24. In Matter of Chen, Int. Dec. 3104 (BIA 1989), the BIA held that an applicant can establish eligibility for asylum based on past persecution even when he or she does not have a well-founded fear of future persecution. The regulations provide that an applicant’s proof of past persecution creates a rebuttable presumption of a well-founded fear of future persecution. See 8 C.F.R. § 108.13(b)(1) (1996). For a recent analysis of the past persecution standard, see In re H—, Int. Dec. 3276 (BIA 1996). See also Deborah Anker et al., The BIA’s New Asylum Jurisprudence and Its Relevance for Women’s Claims, 73 INTERPRETER RELEASES 1173, 1177-78 (1996) (discussing analysis of past persecution standard in In re H— and its relevance to gender-based asylum claims).
25. See, e.g., Matter of McMullen, 658 F.2d 1312 (9th Cir. 1981) (claiming Irish gov-
cution is on account of one of the five enumerated grounds, and that her asylum application should be granted in the exercise of discretion.

II. BACKGROUND TO THE GUIDELINES AND INTERNATIONAL GUIDANCE

As the asylum application process continued to evolve, developments in both the international and North American spheres contributed to the formulation and issuance of the INS Guidelines. Common to both spheres was the growing recognition that women’s rights are human rights and its corollary, violations of women’s rights are violations of human rights. Existing international human rights instruments and the interpretation of these instruments by international organizations provide an appropriate and instructive framework in which gender-based claims can be evaluated.

A. INTERNATIONAL DEVELOPMENTS

For the past two decades, the United Nations has promoted the principle that women’s rights are human rights and that women’s rights are universal. In 1979, the United Nations’ General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women. The government was unable to prevent persecution of the applicant by the Provisional Irish Republican Army. Gender-based asylum applicants often face persecution at the hands of non-governmental persons. See, e.g., Gomez v. INS, 947 F.2d 660 (2d Cir. 1991) (applicant was repeatedly beaten and raped by guerrillas in El Salvador); Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987) (applicant was raped and forced to watch the murder of her relatives by armed assailants in El Salvador); Matter of A— and Z—, A72-190-893, A72-793-219 (U Arlington, Va. Dec. 20, 1994), reported in IJ Grants Asylum to Woman Based on Spousal Abuse, INS Guidelines Imminent, 72 INTERPRETER RELEASES 521 (1995) (applicant exposed to ongoing physical and verbal abuse by her husband); Matter of M— K—, A72-374-558 (U Arlington, Va. Aug. 9, 1995), reported in IJ Grants Asylum on the Basis of Persecution Relating to Female Genital Mutilation, supra note 3, at 1188 (applicant subjected to female genital mutilation by tribal women elders).

26. In cases based on political opinion, the persecution may be based on an opinion imputed to the applicant by the persecutor in addition to persecution on account of her own political opinion. See, e.g., Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987) (holding applicant was eligible for political asylum based on her own political opinion and on the political opinion imputed to her by her persecutor). The Supreme Court’s decision in INS v. Elias-Zacarias, 502 U.S. 478 (1992), placed the viability of the imputed political opinion basis in question. But see Kelly, supra note 12, at 636 n.47 (citing GROVER J. REES III, GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE, LEGAL OPINION: CONTINUED VIABILITY OF THE DOCTRINE OF IMPUTED POLITICAL OPINION (JAN. 19, 1993)) (stating that “persecution inflicted because the persecutor erroneously imputes to the victim one of the protected characteristics set forth in Section 101(a)(42) can constitute persecution ‘on account of’ that characteristic for the purpose of asylum or refugee analysis”).

27. See Butterfield, supra note 14, at 3; Kelly, supra note 12, at 635-36.

28. INS Guidelines, supra note 7, at 1-2 ("Spurred by the United Nations and a handful of commentators, notably in Canada and the United States, understanding of gender-related violence in general is increasing.").

29. "These instruments need not be ratified by the United States to provide guidance as a source of human rights norms." INS Guidelines, supra note 7, at 2 n.2 (citing INS BASIC LAW MANUAL 11-12 (2d. ed)).
CEDAW, the most comprehensive international human rights instrument for women, seeks to eliminate the obstacles which prevent the equal participation of women in political, social, economic, and cultural life. Signatory States are prohibited from engaging in discriminatory acts and are required to take affirmative steps to eradicate discriminatory treatment towards women.

The comprehensive nature of CEDAW set the stage for the United Nations High Commissioner for Refugees (UNHCR) Executive Committee's adoption of Conclusion No. 39 in 1985, the first UNHCR statement of its kind. This "Conclusion on Refugee Women" noted that refugee women and girls constitute the majority of the world refugee population with many being exposed to special problems due to their gender. The 1985 Conclusion encouraged countries to recognize women asylum-seekers who face harsh and inhuman treatment due to their transgression of social mores as a "particular social group" within the meaning of Article 1A(2) of the 1951 Convention. Because the UNHCR's interpretations of the 1951 Convention are widely respected and often followed, the 1985 Conclusion initiated greater recognition of gender-related persecution claims.

The 1985 Conclusion was followed by the UNHCR's issuance of its "Guidelines on the Protection of Refugee Women" in 1991. Although the UNHCR Guidelines primarily focus on issues pertaining to women in refugee camps, they also highlight the need to address gender-based persecution. The UNHCR Guidelines mark a turning point in the international awareness of the plight of women fleeing persecution on account of their gender. In particular, they represent international recognition that immigration laws need to accept gender-based persecution as a valid basis for acquiring asylum or refugee status. Thus, the UNHCR Guidelines encourage states to adopt procedures which make the refugee adjudication process

31. Id.
32. Id. at 18. See also INS Guidelines, supra note 7, at 2.
34. Pamela Goldberg, Asylum Law and Gender-Based Persecution Claims, IMMIGR. BRIEFINGS, Sept. 1994, at 3.
35. The 1985 Conclusion was preceded by a resolution adopted by the European Parliament which called upon member states to accord refugee status within the particular social group category of the refugee definition to women who suffer cruel and inhuman treatment because they have violated the moral or ethical rules of their society. See Kelly, supra note 12, at 659 nn.163, 165; Goldberg, supra note 34, at 3 n.22.
36. Goldberg, supra note 34, at 3.
37. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN (1991) [hereinafter UNHCR GUIDELINES].
38. Goldberg, supra note 34, at 3. See also INS Guidelines, supra note 7, at 3.
39. Goldberg, supra note 34, at 3.
40. Id.
more accessible to women.\(^{41}\)

In response to the UNHCR Guidelines, the United Nations Conference on Human Rights emphasized the need to incorporate the rights of women as part of universal human rights,\(^{42}\) and called upon the General Assembly to adopt the Declaration on the Elimination of Violence Against Women in June 1993.\(^{43}\) The 1993 Declaration, adopted by the General Assembly on December 20, 1993, recognized violence against women as both a \textit{per se} violation of human rights and as an impediment to the enjoyment by women of other human rights.\(^{44}\) Additionally, in October 1993, the UNHCR Executive Committee adopted Conclusion No. 73 on Refugee Protection and Sexual Violence (1993 Conclusion), which recognized that refugee women who are victims of sexual violence should be treated with particular sensitivity.\(^{45}\) Thus, under the 1993 Conclusion, nations should establish training programs designed to sensitize those involved in the refugee status determination process to issues of gender and culture.

B. NORTH AMERICAN DEVELOPMENTS

While United Nations initiatives between 1979 and 1993 brought attention to gender-based persecution in the international sphere, two recent developments in Canada and the United States increased awareness in the North American sphere about the plight of refugee women, presenting effective frameworks in which gender-based asylum claims can be determined. In March 1993, the Canadian Immigration and Refugee Board (IRB) issued a comprehensive set of guidelines for adjudicating the asylum claims of refugee women fleeing persecution.\(^{46}\) The \textit{Canadian Guidelines} were the first national guidelines to formally recognize that women fleeing gender-related persecution can be refugees under the 1951 Convention.\(^{47}\) Even more ex-

\(^{41}\) \textit{INS Guidelines}, supra note 7, at 3.


\(^{46}\) \textit{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} (1993) [hereinafter \textit{Canadian Guidelines}].

\(^{47}\) \textit{See INS Guidelines}, supra note 7, at 3.
pansive than the UNHCR Guidelines, the Canadian Guidelines remain a model for gender-based asylum adjudications more than 3 years after their release.

In April 1994, asylum advocates in the United States presented proposed Guidelines for Women's Asylum Claims to the INS. The Proposed Guidelines responded to the increasing number of women filing gender-based asylum applications, and the expressed concerns of observers that the asylum adjudication system was not as open to women as it should be. By highlighting these concerns to the INS, these advocates were instrumental in the development of the INS Guidelines.

In April 1994, the INS convened a meeting to discuss the Proposed Guidelines and issues relating to women asylum seekers. One year and one month later, the INS Guidelines were issued as a "natural and multi-faceted outgrowth" of these multiple influences and the recent and still developing case law in the United States. Although the INS Guidelines reflect many of the recommendations in the Proposed Guidelines, they are not nearly as permissive in their approach to adjudicating gender-based asylum claims nor as liberal in their analysis of the case law.

The INS Guidelines are intended to improve the asylum adjudication process in several ways. First, by addressing issues specific to gender-related asylum claims, the INS Guidelines permit the United States to keep pace with gender-related human rights concerns. Second, the INS Guidelines provide a useful tool which Asylum Officers can employ to ensure uniformity and consistency in procedures and decisions relating to gender-based asylum adjudications. Finally, the Guidelines seek to improve the ability of Asylum Officers to deal more sensitively with procedural and substantive aspects of gender-related claims, irrespective of the applicant's country of origin.

48. In contrast to the UNHCR Guidelines which primarily focus on issues pertaining to women in refugee camps, the Canadian Guidelines provide "a systematic method for the evaluation of gender-based persecution claims based on any of the applicable five grounds: race, religion, nationality, membership in a particular social group, and political opinion." Goldberg, supra note 34, at 4.
49. INS Guidelines, supra note 7, at 3.
50. Nancy Kelly, Women Refugees Project of Cambridge and Somerville Legal Services and Clinical Instructor at the Harvard Immigration and Refugee Program, drafted the guidelines with the assistance of Deborah Anker, Women Refugees Project and Lecturer on Law and Coordinator at the Harvard Immigration and Refugee Program, and Michele Beasley, Member of the Women's Commission for Refugee Women and Children and Associate at Chadbourne & Parke.
52. Id. at 813.
53. INS Guidelines, supra note 7, at 4.
54. Goldberg, supra note 34, at 4 n.36; INS Guidelines, supra note 7, at 4.
55. See infra notes 148-55 and accompanying text.
III. PROCEDURAL CONSIDERATIONS IN GENDER-BASED ASYLUM CLAIMS

After discussing the background to the INS Guidelines, the memorandum proceeds to delineate "Procedural Considerations for U.S. Asylum Officers." The purpose of this section is to educate the Asylum Officer Corps (AOC) about issues which are particularly relevant to gender-based asylum applications. This section of the INS Guidelines touches on many important factors of which the AOC should be aware. However, the Guidelines are notably sparse in their discussion of some factors and entirely fail to mention others.

The INS Guidelines acknowledge two types of persecution women may face: 1) gender-specific persecution, and 2) gender-related persecution. Mistreatment that is primarily directed at the female population constitutes gender-specific persecution. The INS Guidelines specify rape, sexual abuse, domestic violence, infanticide, and genital mutilation as forms of persecution which are particular to women.

In contrast, gender-related persecution is often associated with women from countries that maintain laws and customs which discriminate on the basis of gender. When women breach these laws, they may be subjected to harsh punishments and abuse that are not meted out to the general population. The persons who "enforce" these laws can be government authorities, or private individuals who the government is unwilling or unable to control. Due to these discriminatory laws and norms, women are severely hindered from exercising their social, political, civil, and economic rights.

The INS Guidelines attempt to alert the AOC to scenarios of gender-related persecution that women may face. For example, the Guidelines note that women may face harm as a result of "marrying outside of an arranged marriage, wearing lipstick, or failing to comply with other cultural or religious norms." However, although this list is illustrative rather than exhaustive, the INS failed to provide additional examples to adequately educate the

56. Gender-specific persecution includes acts that are specific to women such as rape, infanticide, genital mutilation, bride burning, forced sterilization, and domestic violence. Goldberg, supra note 34, at 5.

57. Gender-related persecution encompasses situations where harm is imposed or threatened because of gender. This category includes cultural, social and religious norms which restrict the activities and choices of women (such as requiring women to dress in a particular way) and situations which subject women to extreme discrimination (such as being denied access to higher education). See id.

58. INS Guidelines, supra note 7, at 4. The INS Guidelines also recognize that women who have been sexually abused or raped may face stigmatism and ostracism from their societies and families. Because they may be viewed as shaming or dishonoring themselves, their families and communities, these women may be vulnerable to discrimination, abuse or further violence. Id. at 5.

59. See supra note 25.

60. INS Guidelines, supra note 7, at 4.
Asylum Officers. Specifically, the INS could have at least mentioned refusal to wear the “chador” or veil which can subject women to considerable abuse in Iran as noted in four gender-based asylum cases.61

Despite this oversight, the INS Guidelines do acknowledge that women may present asylum claims based on gender-specific or gender-related persecution that can be analyzed and approved under one or more of the five enumerated grounds for asylum.62 For example, an applicant who was raped may have suffered persecution on account of her political opinion and her membership in a particular social group.63 However, although the INS Guidelines explain that gender-specific or gender-related persecution may fall under more than one of the five categories, they do not specify which of these categories or why. This failure to provide enough guidance is prevalent throughout the INS Guidelines, illustrating its deficiencies and emphasizing the limited effect it can have on the adjudication of women’s asylum claims.

In addition to identifying types of persecution women particularly may face, the INS Guidelines also provide the AOC with guidance on how to effectively and sensitively interview women fleeing persecution. The Guidelines acknowledge that women may be reluctant to reveal “the very delicate and personal issues arising from sexual abuse.”64 The INS states that by reading the asylum application before the interview, the Asylum Officer may learn that the applicant is a victim of sexual abuse.65 In such a situation, the INS Guidelines intimate66 that in response to this “warning,” Asylum Of-
fices should have women Officers interview gender-based asylum applicants, but only to the extent that personnel resources will permit. However, the interview should not be canceled because a female Officer is not available; all Asylum Officers will be expected to conduct interviews of women refugees. If the fact that the applicant has suffered sexual abuse is not revealed until the interview, Asylum Officers must exercise their “utmost care” to maintain an environment which is conducive to a full disclosure of the applicant’s past experiences.

The INS Guidelines also instruct Asylum Officers to be conscious of the effect that the presence of family members and the use of male interpreters may have on the interview process. In some countries, family members may alienate the victims of sexual violence, viewing such violence as the woman’s fault for failing to preserve her virginity or marital dignity. Thus, women applicants should be afforded the opportunity to relate their story outside the presence of family, especially male family members and children. The applicant’s testimony may be less traumatic if she can communicate freely without fearing the reaction of family members who may not be aware of the abuse she has suffered. For these reasons, the INS Guidelines suggest that family members or friends should not be employed as interpreters because they may hinder the full disclosure of persecution the applicant has experienced.

The INS Guidelines also note that the applicant’s testimony may be diluted or desensitized through the filter of a male interpreter especially regarding such issues as sexual abuse. However, if a gender-based asylum applicant arrives with a male interpreter, the interviews “should not generally be canceled and rescheduled.” The UNHCR and Proposed Guidelines recommend that women interpreters be employed to determine refugee status. However, the applicant is required to provide her own interpreter if needed. This requirement can place a considerable burden on an applicant who may have fled her native country with no contacts in the United States and no knowledge of United States immigration law.
According to the *INS Guidelines*, all asylum interviews should be non-adversarial, creating an atmosphere conducive to a comprehensive discussion of past experiences.\(^{79}\) Thus, Asylum Officers should attempt to develop a rapport with the applicant creating an environment in which the applicant feels comfortable recounting occurrences in the past and enabling the Asylum Officer to elicit possible claims.\(^{80}\) Acquiring the trust of the applicant, however, may prove difficult for the Asylum Officer because s/he is a government official in a position of authority.\(^{81}\) The applicant may be fleeing persecution inflicted by government officials or from a country in which she has reason to distrust authority figures.\(^{82}\) Thus, the *Guidelines* warn that Asylum Officers should be aware that the applicant's initial timidity is not necessarily indicative of a lack of credibility, but may be a result of her past experiences.\(^{83}\)

Despite the efforts of the INS to provide guidance to the AOC on interviewing women fleeing gender-based persecution, the *Guidelines* fail to mention an additional consideration which directly addresses credibility findings in gender-based asylum claims. Because many asylum claims are often denied due to an alleged lack of credibility, this oversight is significant.\(^{84}\) Also absent from the *Guidelines* is the acknowledgment that in many countries, men do not inform their spouses or female relatives of their political, military, or social affairs.\(^{85}\) Women, therefore, often do not possess specific information about the activities of male relatives.\(^{86}\) Thus, Asylum Officers should not attribute deficiencies in the applicant's knowledge to a lack of credibility unless the Officer can cite other evidence which substantiates a negative credibility finding.\(^{87}\)

The *INS Guidelines* do acknowledge that women applicants will often

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NGOs may be a source of female interpreters and that interpreters can be sure that the INS is now sensitized to the problems gender-persecuted applicants may face during the interview. *See INS Guidelines*, supra note 7, at 5.

79. *Id.* at 6.
80. *Id.*
81. *Id.*
82. *Id.*
83. The *INS Guidelines* cite to the *UNHCR Handbook* at ¶ 198 which states: "A person who, because of his [or her] experiences, was in fear of the authorities in his [or her] own country may still feel apprehensive vis-à-vis any authority. He [or she] may therefore be afraid to speak freely and give a full and accurate account of his [or her] case." *INS Guidelines*, supra note 7, at 6 n.10.
84. *See, e.g.*, *In re Kasinga*, Int. Dec. 3278 (BIA 1996) (overturning Immigration Judge's denial of asylum where denial was based in part on lack of credibility); *see also* Karen Musalo, *In Re Kasinga: A Big Step Forward for Gender-Based Asylum Claims*, 73 INTERPRETER RELEASES 853, 855, 857-58 (1996) (discussing credibility findings of IJ and BIA).
87. *Id.* at 824 (citing UNHCR Guidelines, *supra* note 37, at 40-43, ¶ 71-75).
have difficulty discussing past persecution or experiences which were "personally degrading, humiliating, or culturally unacceptable." The Guidelines instruct the Asylum Officers not to initiate the interview with questions about sensitive matters such as sexual abuse and violence. Rather, they should proceed to these issues as the interview progresses. The focus of the interview should be on establishing whether the requisite persecution has occurred and the apparent motive of the perpetrator, not the precise details of the abuse.

Furthermore, the INS Guidelines recognize that "[w]omen who have been subject to domestic or sexual abuse may be psychologically traumatized." This trauma may have a significant impact on the applicant's testimony and should be taken into consideration when evaluating her credibility and demeanor. The INS Guidelines notably emphasize that when evaluating credibility, Asylum Officers must recognize the effect of trauma and culture on an applicant's demeanor and that demeanor is not the sole criterion on which credibility should be judged. Ultimately, poor interview techniques and cross-cultural skills, and an ignorance of issues

88. INS Guidelines, supra note 7, at 6.
89. Id.
90. Id.
91. Id. The Proposed Guidelines, following the UNHCR Guidelines, instruct, "[d]o not ask for details of sexual abuse; the important thing in establishing a well-founded fear of persecution is to establish that some form of it has occurred." Proposed Guidelines, supra note 51, at 823 (citing UNHCR GUIDELINES, supra note 37, at 41, ¶ 72).
92. INS Guidelines, supra note 7, at 7.
93. The Proposed Guidelines explain that women applicants who are victims of violence, particularly sexual violence, may exhibit a "pattern of symptoms known as Post-Traumatic Stress Disorder or Rape Trauma Syndrome, that makes it extremely difficult for them to testify." Proposed Guidelines, supra note 51, at 823. The UNHCR Guidelines instruct that symptoms of Rape Trauma Syndrome include a loss of self-confidence, persistent fear, difficulty in concentration, a pervasive feeling of loss of control, an attitude of self-blame and memory loss or distortion. Proposed Guidelines, supra note 51, at 823-24 (citing UNHCR GUIDELINES, supra note 37, at 40-43, ¶¶ 71-75).
94. The Guidelines describe varying effects of trauma on an applicant's demeanor exemplified by emotional passivity and numbness when reciting past persecution, and loss, distortion or a complete mental block of memory. INS Guidelines, supra note 7, at 7.
95. The INS Guidelines note that cross-cultural sensitivity is required of all Asylum Officers irrespective of gender and that it is essential to the assessment of credibility and demeanor. Demeanor is defined as "how a person handles himself/herself physically," i.e. eye contact, body language, and hesitation in speech. Thus, the Officer should be aware that although people who avert their gaze from their interviewer in Western cultures are perceived as not credible, in certain Asian cultures, it is a sign of respect to avert their eyes when speaking to an authority figure. Id. at 6-7.
96. The INS Guidelines explain the issues of demeanor and credibility further in a footnote. The INS emphasizes that although demeanor is relevant to the evaluation of credibility, it should not be used as the exclusive method for this assessment. Rather, demeanor should be viewed in conjunction with the overall evaluation of the testimony and evidence submitted. See id. at 7 n.1.
97. See id. at 7.
specifically related to gender-based asylum claims, may produce faulty negative credibility findings which can ultimately result in sending women straight back into the hands of their persecutors. Thus, the AOC must make every effort to implement these procedural considerations into their adjudication process. Although the INS adopted a fairly liberal approach to interviewing techniques as evidenced above, unfortunately, it does not maintain the same progressive approach in its analysis of the case law.

IV. LEGAL ANALYSIS OF GENDER-BASED ASYLUM CLAIMS

Building on the “Procedural Considerations” section of the INS Guidelines, the “Legal Analysis of Claims” section is designed to instruct Asylum Officers on how gender-based asylum claims should be analyzed within the framework of United States case law. Due to the complexity of these types of asylum claims and the developing nature of the case law, this section appropriately constitutes the bulk of the INS Guidelines. However, despite its appearance of extensive coverage, there are some areas which the INS Guidelines do not address at all and others in which the analysis could be much more instructive regarding the extant case law.

In its overview of gender-based asylum case law in the United States, the Legal Analysis section states that asylum claims of women will often have nothing to do with their gender. However, the INS Guidelines also point out that an adjudicator should be aware of other cases in which the “applicant’s gender may bear on the claim in significant ways . . . .” These “other cases” often involve asylum claims which are either gender-specific or gender-related. Although the INS Guidelines do not explicitly categorize gender-based claims into these two categories, they note that gender-related claims can raise unique and complex issues. Furthermore, because gender-based asylum is a developing area, the INS

98. Part III of the INS Guidelines, “Legal Analysis of Claims,” is divided into three main sections: 1) “Persecution: How Serious Is the Harm?;” 2) “Nexus: The ‘On Account of’ Requirement;” and 3) “Public versus Private Acts.” INS Guidelines, supra note 7, at 8, 10, 16. The analysis of this comment will adhere to this framework, but will expand the subsections to include issues not mentioned in the INS Guidelines.

99. See id. at 8-18.

100. The author acknowledges that the INS Guidelines are intended to serve only as a “guidance” or “considerations” to Asylum Officers. However, as will be discussed in Part B of this section, certain areas could have been developed in much greater detail to provide a more accurate instruction as to the state of the law regarding gender-based claims.

101. Id. at 8.

102. See supra note 56 (providing examples of gender-specific persecution); supra note 57 (discussing forms of gender-related persecution).

103. "For example, the applicant may assert a particular kind of harm, like rape, that either is unique to women or befalls women more commonly than men. Or an applicant may assert that she has suffered persecution on account of her gender or because of her membership in a social group constituted by women. She might also assert that her alleged persecutors seek to harm her on account of a political or religious belief concerning gen-
Guidelines encourage adjudicators to “freely seek legal counsel regarding these issues as the decisional law evolves.” Nevertheless, the INS instructs that, ultimately, all applications must be “analyzed within the terms of United States law.”

A. PERSECUTION

To prevail on a request for asylum, the applicant must satisfy the first component under the refugee definition which requires her to establish past persecution or a well-founded fear of persecution. She can do this by demonstrating that the harm she fears or has suffered in the past, rises to the level of persecution as that term is defined under the relevant domestic and international law. Due to the absence of a definition of persecution in the Immigration and Nationality Act, it has been left up to the Board of Immigration Appeals and the courts to define the term. In Matter of Acosta, the BIA interpreted persecution to include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. However, “[g]enerally harsh conditions shared by many other persons” do not rise to the level of persecution. The Ninth Circuit has interpreted persecution to involve “the infliction of suffering or harm upon those who differ . . . in a manner regarded as offensive,” and where “there is a difference between the persecutor’s views or status and that of the victim; it is oppression which is inflicted because of a difference the persecutor will not tolerate.” Consistent with this interpretation, the INS Guidelines state that although “discriminatory practices and experiences are not generally regarded by themselves as persecution, they ‘can accumulate over...”

INS Guidelines, supra note 7, at 8.
104. Id.
105. Id. This statement by the INS further substantiates the conclusion that U.S. case law must evolve to a stage where precedents have been set which recognize gender-based asylum claims in the multiple contexts in which they arise.
106. Adjudicators may utilize human rights instruments as a source of human rights norms even though the instruments have not been ratified by the United States. Proposed Guidelines, supra note 51, at 816 n.21 (citing INS BASIC LAw MANUAL, supra note 29, at 11-12, 20). Unfortunately, although the INS claims the formulation of numerous human rights instruments influenced the issuance of the INS Guidelines, these instruments are rarely, if ever, cited in gender-based asylum determinations. In contrast, Canadian adjudications of gender-based asylum claims often refer to human rights instruments as a basis of granting asylum. See Anker et al., supra note 24, at 1182-84.
107. 191. & N. Dec. 211 (BIA 1985), overruled in part by Matter of Mogharrabi, 191. & N. Dec. 439 (BIA 1987). In Matter of Acosta, the BIA held that the same standard should apply when adjudicating withholding of deportation and asylum claims. However, in Matter of Mogharrabi, the BIA held that different standards should apply, thereby overruling that part of the Acosta decision.
108. Id. at 222.
109. Id.
110. Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1685 (1965)).
111. Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985).
time or increase in intensity so that they may rise to the level of persecution.\textsuperscript{112}

These definitions of persecution provide a general framework in which harm can be evaluated to determine if it rises to the requisite level of persecution.\textsuperscript{113} All instances of abuse or harm, whether gender-based or not, must be evaluated according to the general principles discussed in the preceding paragraph. If the applicant cannot demonstrate that the harm she fears or has suffered is commensurate with one of the general principles, her asylum claim may be denied.\textsuperscript{114} Therefore, the INS Guidelines note that although there are particular types of harm which are "unique to or commonly befall women," the analysis of abuse should not differ because of the victim's gender.\textsuperscript{115}

I. Non-Conformance with Moral Codes as Persecution

In the area of violations of fundamental beliefs as persecution, courts have taken significant steps towards developing gender-based asylum case law. The INS Guidelines acknowledge these steps by discussing two cases which were adjudicated in the Third and Ninth circuits. Both Fatin\textsuperscript{116} and Fisher\textsuperscript{117} involved Iranian women who feared persecution upon return to Iran because of their opposition to the restrictive Islamic laws imposed on women by the Khomeini government. In Fatin, the Third Circuit held that the punishment for non-compliance with the moral code constituted persecution for the purposes of any asylum claim.\textsuperscript{118} The court also found that "the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not phys-
cally painful or harmful but is abhorrent to that individual's deepest beliefs." The court further explained that such conduct could be exemplified by "requiring a person to renounce his or her religious beliefs or to desecrate an object of religious importance." 

Despite these findings, the Third Circuit determined that the record did not demonstrate that Ms. Fatin would risk persecution. Rather, she failed to demonstrate that she would risk the consequences of non-compliance, or that the imposition of the religious laws would be "so profoundly abhorrent" to her beliefs that it would constitute persecution. Although the court failed to specify what degree of "abhorrence" is required to constitute persecution, it did explain that the level of abhorrence cannot be based solely on the subjective reactions of the applicant, but must be objectively reasonable. The Third Circuit also asserted that "the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional." Because Ms. Fatin failed to establish that she had a valid fear of future persecution, her asylum claim was denied. However, Fatin's importance to gender-based asylum jurisprudence is undeniable because of the court's permissive definition of persecution.

In Fisher, the Ninth Circuit affirmed the Third Circuit's interpretations of persecution. The applicant in Fisher was an Iranian woman who feared persecution based on her refusal to comply with the fundamentalist religious and cultural norms. Although the Ninth Circuit distinguished the two cases by stating that Fisher "involves a claim of persecution based upon forced compliance of the moral codes, not a claim that voluntary compliance itself amounts to persecution," the court affirmed the Third Circuit's interpretation of persecution in Fatin. According to the Ninth Circuit:

when a person with religious views different from those espoused by a religious regime is required to conform to, or is punished for failing to comply with, laws that fundamentally are abhorrent to that person's deeply-held religious convictions, the resulting anguish should be considered in determining whether the authorities have engaged in "extreme conduct" that is "tantamount to perse-

119. Id. at 1242.
120. Id.
121. Id. See infra notes 176-85 and accompanying text for further discussion of the case and the author's criticism of this decision.
122. Id. at 1242 n.11. The INS Guidelines explain that the degree of abhorrence would have to be shared by a reasonable person in the circumstances of the applicant. INS Guidelines, supra note 7, at 10.
123. Fatin, 12 F.3d at 1240.
124. Fisher, 61 F.3d at 1375-76.
125. Id. at 1375.
The Fisher court also emphasized that persecution cannot be defined so narrowly as to be "evaluated solely on the basis of the physical sanction . . . imposed . . . ."127 By creating two new interpretations of persecution which can be utilized by other women applicants to formulate their gender-based asylum claims, these cases represent significant developments in the area of gender-based asylum law. The INS Guidelines' discussion of these two cases implies that persecution for non-compliance with moral codes constitutes a violation of fundamental beliefs, thereby satisfying the persecution element of asylum.

2. Severe Abuse as Persecution

Severe abuse which is generally specific to women, such as rape and other forms of sexual violence, will often be considered persecution under the general framework as well. In line with at least two major cases on the subject, the INS Guidelines assert that rape and severe sexual violence are commensurate with serious physical harm which has consistently been held to constitute persecution. In Lazo-Majano v. INS,128 the Ninth Circuit held that an army sergeant’s rape and brutalization of a Salvadoran woman who he denounced as a subversive constituted persecution within the terms of the Refugee Act. Similarly, in In re D-V-,129 the BIA held that the gang rape and beating of a Haitian women amounted to persecution. Severe sexual abuse can also be deemed equivalent to torture, beatings, and other forms of physical abuse which are commonly interpreted to be persecution.130 Despite these auspicious interpretations, it is generally not the persecution itself that the women applicants have difficulty proving in cases involving rape or sexual violence.

Demonstrating that sexual abuse amounts to persecution under the general principles does not by itself provide grounds for asylum. Asylum seekers must still establish that their fear is well-founded, on account of one of the enumerated grounds, and that the persecutor is the government or someone the government is unable or unwilling to control.131 If the persecution that a woman faces is deemed personal, then she generally fails to satisfy the requirement that her persecution be on account of a protected

126. Id.
127. Id. at 1374. The INS Guidelines failed to mention that the Fisher court also held that the likelihood of sanctions for inadvertent non-compliance with the moral codes is sufficient to establish a well-founded fear of persecution. Id. at 1376.
128. 813 F.2d 1432, 1434 (9th Cir. 1987).
129. In re D-V-, Int. Dec. 3252 (BIA 1993) was designated as a precedent the same month the INS Guidelines were issued.
130. INS Guidelines, supra note 7, at 9.
131. See supra notes 24-26 and accompanying text.
ground, and thus is not eligible for asylum.\textsuperscript{132}

Significantly, the \textit{INS Guidelines} instruct Asylum Officers not to automatically assume that sexual violence is a purely personal act.\textsuperscript{133} However, the \textit{Guidelines} fail to elaborate on this instruction. The \textit{Guidelines} do not explain why an adjudicator would automatically assume that sexual violence perpetrated against a woman is purely personal. For instance, when a man is beaten, is it automatically assumed that the beating was for purely personal reasons? Furthermore, the \textit{Guidelines} do not inform the Asylum Officers why they should not jump to this conclusion. If they are not provided with any context, how will Asylum Officers know when their assumptions are inappropriate. If the \textit{INS Guidelines} had delineated in what situations it is appropriate to find that the persecution was personal, and in what situations it was not, the instruction above would have been more useful.

3. \textit{Past Persecution}

While the \textit{INS Guidelines} outline several ways to establish asylum claims based upon a well-founded fear of future persecution, they fail to discuss the significance of an asylum claim based on past persecution. The \textit{Guidelines} should emphasize that past persecution alone does not constitute eligibility for asylum; other requirements must still be met. In addition to demonstrating that the abuse suffered amounts to persecution on account of one of the protected grounds, a female applicant for asylum based on past persecution must also establish that the persecutor was the government or someone the government was unable or unwilling to control.\textsuperscript{134} Once an applicant establishes that the harm she suffered in the past amounts to persecution, the \textit{INS} then bears the burden of showing by a preponderance of the evidence that conditions in the country from which the applicant fled have substantially changed.\textsuperscript{135} To establish fundamentally changed country conditions, the Asylum Officer should supply independent evidence.\textsuperscript{136}

4. \textit{The Case Law Defining/Recognizing Gender-Based Persecution}

The \textit{INS} is not entirely at fault for the absence of detailed guidance regarding evaluating what types of gender-based abuse constitutes persecution for purposes of satisfying the statute. Unfortunately, the extant case law often does not contain uniform precedents which can be employed by women refugees basing their asylum claims on gender persecution. Further development of the gender-based asylum case law is necessary for female appli-

\textsuperscript{132} See infra notes 270-91 and accompanying text.
\textsuperscript{133} See \textit{INS Guidelines}, supra note 7, at 9.
\textsuperscript{134} See, e.g., Lazo-Majano v. \textit{INS}, 813 F.2d 1432 (9th Cir. 1987); \textit{In re D-V-}, Int. Dec. 3252 (BIA 1993).
\textsuperscript{135} \textit{Proposed Guidelines}, supra note 51, at 821-22 nn.57-58. \textit{See also} Kelly, \textit{supra} note 12, at 636 n.45.
\textsuperscript{136} \textit{Proposed Guidelines}, supra note 51, at 822 n.57.
cants to succeed with claims submitted under this rubric. Applicants' ability to meet the refugee definition requirements is often hindered due to a dearth of precedential cases in the area of gender persecution. Although recent decisions have contributed towards a growing body of law, inconsistencies in that law are still pervasive.\textsuperscript{137} It was hoped that the \textit{INS Guidelines} would create a unifying force in the area of gender-based asylum. Rather than providing the guidance that was anticipated, the \textit{INS Guidelines}, merely emphasize the limitations in current case law.\textsuperscript{138} Although the Guidelines are an extremely positive development, the case law must evolve to further facilitate the fair adjudication of gender-based asylum claims.

\textbf{B. THE "ON ACCOUNT OF" REQUIREMENT}\textsuperscript{139}

Once an applicant demonstrates that the harm she fears or has suffered in the past rises to the requisite level of persecution, she must then establish that the persecution is on account of race, religion, nationality, membership in a particular social group, or political opinion. Applicants fleeing gender-based persecution often find this requirement of the refugee definition to be the most difficult to satisfy.\textsuperscript{140} Because the "key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men,"\textsuperscript{141} the activities of women in the private sphere have been historically ignored.\textsuperscript{142} Thus, state persecution of a religious or political minority is

\begin{itemize}
\item \textsuperscript{137} See, e.g., \textit{Matter of A-} and \textit{Z-}, A72-190-893, A72-793-219 (U. Arlington, Va. Dec. 20, 1994), reported in \textit{IJ Grants Asylum to Woman Based on Spousal Abuse, INS Guidelines Imminent, supra note 25, at 521 (recognizing spousal abuse as persecution for asylum purposes); Matter of M- K-, A72-374-558 (U. Arlington, Va. Aug. 9, 1995), reported in \textit{IJ Grants Asylum on the Basis of Persecution Relating to Female Genital Mutilation, supra note 3, at 1188 (recognizing female genital mutilation and spousal abuse as grounds for asylum eligibility). But see More on \textit{IJ Decision Granting Asylum Based on Genital Mutilation, supra note 5, at 1265 (discussing gender-based asylum case in which \textit{IJ denied asylum application holding female genital mutilation did not constitute persecution for purposes of asylum).}
\item \textsuperscript{138} See \textit{INS Publishes Gender Persecution Guidelines, 72 Interpreter Releases 771 (1995) ("Ms. Beasley cautioned that the INS guidelines to some extent emphasize the limitations in current case law, while the 1994 proposed guidelines supported an expansive reading of the case law.").}
\item \textsuperscript{139} The \textit{INS Guidelines} only discuss two of the five grounds of asylum, political opinion and membership in a particular social group. Although these are the two grounds under which most gender-based asylum claims will be presented, this comment will discuss all five grounds because gender-based claims can conceivably be brought under all of them. \textit{Proposed Guidelines, supra note 51, at 817-21.}
\item \textsuperscript{140} "[W]omen are much less likely than men to be found to meet the eligibility criteria for refugee status because of the absence of explicit recognition of gender based persecution, and because of the social and political context in which the claims of women are adjudicated." Kelly, \textit{supra} note 12, at 627. Some asylum advocates have called for the addition of a 6th category for gender in the refugee definition. \textit{See id. at 627 n.7; Kristin E. Kandt, Note, United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison, 9 Geo. Immigr. L.J. 137 (1995).}
\item \textsuperscript{141} Kelly, \textit{supra} note 12, at 628.
\item \textsuperscript{142} \textit{Id.} at 627-28.
grounds for asylum, whereas gender persecution at home is not. 143

The INS Guidelines acknowledge the difficulty of satisfying the “on account of” element when presenting gender-based claims, 144 but emphasize that this component is “a critical part of the analysis under U.S. law.” 145 Despite this emphasis, the Guidelines tend to discuss this element generally rather than specifically. For example, the INS Guidelines generally explain that satisfaction of the “on account of” element requires that the persecution must be “inflicted in order to punish the victim for having one or more of the characteristics protected under the statute.” 146 However, the Guidelines do not provide enough specific examples of persecution women may face on account of one or more of the protected categories which would satisfy the requirements of the statute.

1. Race, Nationality and Religion

The INS Guidelines fail to discuss or even mention claims presented by women applicants who face persecution on account of their race, nationality or religion. There is no case law known to this author specifically addressing gender-based persecution on account of race or nationality. However, there are several significant cases in the gender-based asylum area regarding persecution on account of religion that should have been discussed in the Guidelines. 147 The fact that the Proposed Guidelines, Canadian Guidelines, and the UNHCR Guidelines all specify possible gender-based asylum claims which can arise on account of race, religion, and nationality indicates that this is yet another oversight by the INS.

Unlike the INS Guidelines, the Proposed Guidelines and the Canadian Guidelines both recognize certain situations where a woman may allege fear of persecution or past persecution on account of her race and her gender. 148 For example, an indigenous woman may be persecuted for her race as well as her gender. 149 Additionally, in circumstances where a discriminatory law “causes a woman to lose her citizenship because of marriage to a foreign

143. Id. at 628.
144. Unlike the Canadian Guidelines, the INS Guidelines do not attempt to ameliorate this problem by creating a structure which enables female applicants to formulate a claim which fits within one of the 5 grounds. The Canadian Guidelines created an analytical framework for gender-based asylum claims which adjudicators can employ to determine if the applicant’s claim falls within one of the five enumerated categories. See CANADIAN GUIDELINES, supra note 46, at 2-6.
145. INS Guidelines, supra note 7, at 10.
146. Id. See also Acosta, 19 I. & N. Dec. at 226.
147. See supra notes 116-27 and accompanying text; see also infra notes 156-74 and accompanying text.
148. Proposed Guidelines, supra note 51, at 818 (citing CANADIAN GUIDELINES, supra note 46, at 4). The Canadian Guidelines provide the example of an Asian woman living in an African society who may be persecuted because of her race and her gender. CANADIAN GUIDELINES, supra note 46, at 4.
149. Proposed Guidelines, supra note 51, at 818.
national or other related actions," a gender-based asylum claim of persecu-
ction or fear of persecution on account of nationality may exist. 150

The Proposed Guidelines and the Canadian Guidelines also acknowledge that in some cultures, women may face persecution on account of their particular religious practices or beliefs. "In the context of the refugee definition, the concept of religion may encompass the freedom to hold a belief system of one's choice or not to hold a particular belief system, and the freedom to practice a religion of one's choice or not to practice a prescribed religion." 151 Women may be subjected to harm on account of their refusal to practice a prescribed religion, hold particular beliefs, or conform their behavior according to the teachings of the prescribed religion. 152

The Proposed Guidelines explain that in nations where there is no separation of church and state or where the government is a theocracy, women may face persecution on account of their religion because they choose not to follow the tenets of the prescribed religion. 153 A woman who fails to "fulfill her assigned role" and fears persecutory retaliation, may be able to establish a claim for asylum based on religious persecution. 154 As stated above in relation to race, women can also face persecution on account of their religion and their gender. For example, a woman may fear harm due to her religious beliefs, and the type of harm or punishment she fears may be gender-specific, such as rape. Similarly, a woman who does not comply with a religious law which is directed only at women, may face persecution on account of her gender and her religion. 155

The failure of the INS Guidelines to discuss the persecution of women on account of race, nationality, or religion should not be interpreted as an indication of an absence of case law on these issues. In fact, recent decisions in the United States have contributed significantly to the development of gender-based asylum law, specifically in relation to the enforcement of moral codes against women in Muslim Fundamentalist societies. 156 In Hartooni v. INS, 157 the applicant's claim was based on a well-founded fear of persecution on account of religion. Ms. Hartooni was a practicing Armenian Christian living in Iran. 158 Not only did she face persecution on account of her religion but also on account of her gender. The Ninth Circuit noted that at the time of Ms. Hartooni's application for political asylum, Christian

150. Id.
151. Id. See also CANADIAN GUIDELINES, supra note 46, at 4.
152. Proposed Guidelines, supra note 51, at 818.
153. Id.
154. Id.
155. In this example, the woman's religious beliefs may be contrary to the prescribed religion and thus compel her non-compliance. See infra notes 168-74 and accompanying text (discussing the three judge panel's decision in Fisher v. INS).
156. Notably, all three cases were adjudicated in the Ninth Circuit.
157. 21 F.3d 336 (9th Cir. 1994).
158. Id. at 339.
Armenians living in Iran were presumably eligible for asylum under State Department policy.\textsuperscript{159} The court required Ms. Hartooni to provide evidence of "general persecution of a protected group,"\textsuperscript{160} as well as to "demonstrate 'a specific inference of personal danger.'"\textsuperscript{161}

Ms. Hartooni not only faced attacks directed at her on account of her religion,\textsuperscript{162} but she also faced harm due to her gender. On two occasions the applicant was detained by soldiers because her hair was not properly bound according to the religious laws.\textsuperscript{163} On the first occasion, Ms. Hartooni was threatened with prison if she was caught with her hair improperly bound again.\textsuperscript{164} Although she managed to escape from the soldiers on the second occasion, some of her friends were "taken away for a few days."\textsuperscript{165} Thus as a person practicing a religion different from that prescribed by the government, Ms. Hartooni was singled out for persecution on account of her religion.

Furthermore, as a female forced to comply with laws directed only at her gender or suffer the consequences of non-compliance,\textsuperscript{166} Ms. Hartooni also faced gender-related persecution. However, the court did not designate these incidents as gender-related. Rather, the court stated "[w]e need not here decide whether these latter items were religious in character."\textsuperscript{167} The court's failure to define these "latter items" as gender-related exemplifies a consistent problem in developing gender-based asylum law. Courts often adhere to the traditional asylum constructs, which are based on male claimants rather than interpreting or clarifying the law to be more receptive to gender-persecuted claimants.

In yet another important case, the Ninth Circuit held in \textit{Fisher v. INS} that enforcement of moral codes upon Iranian women can constitute persecution on account of religion.\textsuperscript{168} Ms. Fisher argued "that the moral codes

\textsuperscript{159} Id. at 341. "By virtue of their faith alone, Christian Armenians in Iran demonstrated a well-founded fear of persecution within the meaning of the 1951 Convention and 1967 Protocol." Id.

\textsuperscript{160} Id.

\textsuperscript{161} Id. (citing Hernandez-Ortiz v. INS, 777 F.2d 509, 515-16 (9th Cir. 1985)).

\textsuperscript{162} For example, the Armenian Christian school that Ms. Hartooni attended was closed by the government; she was not allowed to celebrate Christmas; and Iranian soldiers stoned Ms. Hartooni's church while she was inside. Id. at 341.

\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} Id.

\textsuperscript{166} Failing to comply with the moral codes can result in punishment which includes "74 lashes, a year's imprisonment, and in many cases brutal rapes and death." Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993) (quoting applicant's brief). See supra notes 116-27 and accompanying text (discussing whether non-compliance with moral codes constitutes persecution).

\textsuperscript{167} Hartooni, 21 F.3d at 341.

\textsuperscript{168} Fisher v. INS, 61 F.3d 1366, 1376-77 (9th Cir. 1994), rev'd en banc, 79 F.3d 955 (9th Cir. 1996). For a discussion of the en banc panel's reversal of this decision, see infra notes 308-31 and accompanying text.
are persecutory because they represent a conception of Islam that she finds abhorrent and because the regime is attempting to suppress her beliefs through sanctioning her for noncompliance with the moral codes.”169 Contrary to previous asylum cases based on the enforcement of moral codes as persecution on account of membership in a particular social group,170 Ms. Fisher claimed her persecution was on account of her religion.171 Because her conception of Islam differed considerably from the government’s, Ms. Fisher argued that imposing a conception of Islam on her that she finds abhorrent constituted persecution on account of her religion.172 The court accepted her argument but instructed that to demonstrate persecution on account of religion, Ms. Fisher must show “that the moral codes are likely to be enforced against her because of the authorities’ intent to punish her for her actual or imputed beliefs.”173 Moreover, the court asserted that Ms. Fisher need not inform the Iranian regime of her opposing views to establish that she will purposely fail to comply with the moral codes.174

Despite these important case developments, the INS Guidelines do not even discuss these cases or the issues raised in them. The failure to acknowledge case law regarding persecution on account of religion and the possibility of persecution on account of race and nationality represents one of the many significant deficiencies inherent in the INS Guidelines.

2. Actual or Imputed Political Opinion

In addition to raising claims of persecution on account of race, nationality, or religion, gender-based asylum applicants also may raise claims of persecution on account of political opinion. The applicant’s political opinion may be one which is her own, such as feminism, or a persecutor may impute a political opinion to her that she does not in actuality possess. The Proposed Guidelines assert that “the term political opinion should be understood to include an opinion regarding the treatment or status of women

169. Id. at 1374.
170. Ms. Fisher, as well as the applicants in Safaie v. INS, 25 F.3d 636 (8th Cir. 1994) and Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993), based their claims on persecution on account of political opinion.
171. “Fisher does not maintain that her voluntary compliance with the moral codes would amount to persecution. . . . Rather, she contends that the moral codes are persecutory because they represent a conception of Islam that she finds abhorrent and because the regime is attempting to suppress her beliefs through sanctioning her for noncompliance with the moral codes.” Fisher, 61 F.3d at 1374.
172. Id.
173. Id. at 1377.
174. Id. “As the Fifth Circuit noted recently, to require 'martyrdom' is to 'ignore reality in general and reasonable human behavior in particular.'” Id. (citing Revis-Martinez v. INS, 997 F.2d 1143, 1147 (5th Cir. 1993)). Cf. Fatin, 12 F.3d at 1241 (finding that petitioner’s testimony did not bring petitioner within social group of Iranian women who refuse to conform with Islamic religious requirements).
within [their] country, culture or social, religious or ethnic group."\textsuperscript{175} In contrast to persecution on account of race, nationality, or religion, the \textit{INS Guidelines} do acknowledge and discuss persecution on account of both actual and imputed political opinion as a basis for asylum. However, their treatment of this basis for asylum is cursory at best and excludes case law which is particularly relevant to this area.

a. Political Opinion

In \textit{Fatin v. INS}, the Third Circuit had "little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes."\textsuperscript{176} The court also stated that political opinion could be given a narrower definition such as "the opinion that Iran’s ‘gender-specific laws and repressive social norms’ must be disobeyed on grounds of conscience."\textsuperscript{177} Despite these two progressive holdings, the court denied Ms. Fatin’s asylum claim. Although she demonstrated that she was a feminist, she failed to show that the harm a woman may face for being a feminist in Iran rose to the level of persecution.\textsuperscript{178} According to the court, Ms. Fatin also failed to demonstrate that she possessed the narrower political opinion that Iran’s repressive social norms and gender-specific laws must be disobeyed.\textsuperscript{179} The Third Circuit held that while Ms. Fatin did demonstrate that the punishment she would face for disobedience constituted persecution, she failed to show that she intended non-compliance.\textsuperscript{180}

The \textit{INS Guidelines} claim that regardless of the outcome, \textit{Fatin} "does make clear that an applicant who could demonstrate a well-founded fear of persecution on account of her (or his) beliefs about the role and status of women in society could be eligible for refugee status on account of political opinion."\textsuperscript{181} However, despite the veracity of this statement, it ignores the reality of the inherent difficulty in presenting gender-based asylum claims. The holding in \textit{Fatin} can be perceived as being purely arbitrary. Ultimately,
whether Ms. Fatin's asylum claim would be approved or denied was dependent solely on her statements regarding whether or not she would wear the veil. When asked by the Immigration Judge whether she would wear the veil or submit to arrest and punishment, Ms. Fatin stated "[i]f I go back, I would try personally to avoid it as much as I could." Because she was not definitive enough in her refusal to wear the veil, her asylum claim was denied. It appears from the court's holding that if Ms. Fatin had said, "I would rather submit to arrest and punishment than wear the veil," then her asylum claim would have been granted. Thus, a mere alteration in words could have resulted in a significantly different result.

Although the Fatin Court developed important dicta regarding gender-based claims, it ultimately sent a woman back to persecution because she was reluctant to become a martyr. The holding in this case further exemplifies the problems with current gender-based asylum law, which include many decisions that may provide important dicta, but not precedents which can be cited as authority by subsequent gender-based asylum claimants. By providing a cursory summary of these cases, the INS Guidelines only emphasize, rather than alleviate, such shortcomings.

b. Imputed Political Opinion

In addition to discussing political opinion, the INS Guidelines make an important concession by recognizing imputed political opinion as a basis for asylum. However, their discussion of imputed political opinion falls short of being truly effective by failing to mention notable holdings which specifically address this area of gender-based asylum law. Instead, the INS Guidelines merely instruct that "in addition to the question whether views on issues that relate to gender can constitute a 'political opinion' under the INA," Asylum Officers also must evaluate claims in which women assert that they have been persecuted on account of the political opinion that was imputed to them by their persecutor.

182. Fatin, 12 F.3d at 1236.
183. Cf. Fisher v. INS, 61 F.3d at 1377 ("Of course, just as Fisher need not show that she purposefully will fail to comply with moral codes, it is not necessary for her to intend to make her views known to the Iranian regime.").
184. Cf. Moghaddam v. INS, No. 93-70854, 1994 U.S. App. LEXIS 37066 (9th Cir. Dec. 16, 1994) (holding "enforcement of the moral codes to suppress either religious or political beliefs may be persecution;" applicants do not need to take conscious steps to violate the moral codes to meet burden of well-founded fear of persecution).
185. See Fisher, 61 F.3d at 1377 ("[T]o require 'martyrdom' is to 'ignore reality in general and reasonable human behavior in particular.'"); see also Pamela Goldberg, U.S. Law and Women Asylum Seekers: Where Are They and Where Are They Going?, 73 INTERPRETER RELEASES 889, 894 (1996) ("The fallacy in the Fatin . . . decision is that an individual must show that she would 'choose to suffer the severe consequences of noncompliance' in order to establish the depth of her conviction. Nowhere else in asylum law has an applicant been required to meet such a high standard.").
186. INS Guidelines, supra note 7, at 11.
The INS selected *Campos-Guardado v. INS*\(^{187}\) to illustrate the imputed political opinion doctrine to its Officers.\(^{188}\) The Fifth Circuit denied the applicant’s claim of persecution on account of imputed political opinion concluding that she failed to establish that her persecutors imputed a political opinion to her which motivated their attack. Notably, the *INS Guidelines* state “[r]easonable minds could differ over this record” considering the facts which indicated that the persecutors “believed the petitioner to have contrary political views and that they punished her because of [them].”\(^{189}\) The INS concedes that this case illustrates the need for Asylum Officers to “carefully ascertain all the facts surrounding an allegation of persecution in order to assess whether there are indicia that the act was committed or threatened on account of a protected characteristic.”\(^{190}\)

Although the INS provides a generous interpretation of *Campos-Guardado* in its Guidelines, it fails to discuss or even mention other relevant case law regarding imputed political opinion. For instance, there is no mention of *Lazo-Majano v. INS*,\(^{191}\) decided by the Ninth Circuit the same year the Fifth Circuit decided *Campos-Guardado*, but with remarkably different results. The decision issued by the Ninth Circuit in *Lazo-Majano* marked a significant development in gender-based asylum law. The court held that the persecutor’s “cynical” imputation of a subversive political opinion to the applicant constituted persecution on account of political opinion.\(^{192}\) By imputing his unsubstantiated belief that the applicant was a subversive, the persecutor subjected Ms. Lazo-Majano to severe abuse and caused her to fear further persecution in the future.\(^{193}\) The Ninth Circuit emphasized that “[o]ne cannot have a more compelling example of a political opinion generating political persecution than the opinion that is held by a subversive in opposition to the government.”\(^{194}\) Although the sergeant knew that Ms. Lazo-Majano was not a subversive, but only “a poor domestic and washerwoman,” he subjected her to constant persecution by imputing a political opinion to her.\(^{195}\) By leaving this case out of its discussion of imputed political opinion, the INS prevents information from reaching the Asylum Officers that may be crucial to women’s asylum claims.

Unlike the *INS Guidelines*, the *Proposed Guidelines* provide specific examples of women who may be persecuted on account of a political belief

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\(^{187}\) 809 F.2d 285 (5th Cir. 1987). *See supra* note 2 and accompanying text for a brief synopsis of the facts.

\(^{188}\)  *INS Guidelines*, supra note 7, at 11.

\(^{189}\) *Id.*

\(^{190}\) *Id.*

\(^{191}\) 813 F.2d 1432 (9th Cir. 1987). *See supra* note 1 and accompanying text for a brief synopsis of the facts.

\(^{192}\) *Id.* at 1435.

\(^{193}\) *Id.*

\(^{194}\) *Id.*

\(^{195}\) *Id.*
ascribed to them. A woman who refuses to subordinate herself to the cultural or social dominance of men in her society or who criticizes institutionalized discrimination against women may fear persecution on account of her actual or imputed political opinion. The Proposed Guidelines explain that the political opinion may be attributed to her if “she is perceived by the established political/social structure as expressing politically antagonistic views through her actions or her failure to act.” Furthermore, political opinions may be imposed “for any reason, including her refusal or inability to conform to religious or cultural norms or the roles assigned to women within her country or culture.”

The imputed political opinion claim presented by the applicant in Fisher v. INS would aptly fall under this definition provided in the Proposed Guidelines. In that case, the Ninth Circuit concluded that a “totality of the circumstances’ approach is a viable means of demonstrating persecution on account of an imputed political opinion.” Ms. Fisher argued that a “combination of factors” indicated that the government’s interest in her was politically motivated. These factors included her brother-in-law’s known opposition to the regime and her own record of noncompliance with the moral codes. The court acknowledged that because of the recorded violations of the moral code “the authorities are likely to impute to Fisher ‘enemy of the regime’ status.” Thus, if Ms. Fisher can show on remand that she would be viewed as an “enemy of the regime,” her asylum claim of persecution on account of imputed political persecution may be granted.

The INS Guidelines’ abbreviated discussion of imputed political opinion demonstrates again the inherent shortcomings of the Guidelines themselves and the gender-based asylum case law. The INS’ failure to include Lazo-Majano in its imputed political opinion analysis constitutes a disturbing deficiency. A comparison of Lazo-Majano and Campos-Guardado further illustrates the inconsistencies in the law. The Ninth Circuit appears to be consistent in its treatment of imputed political opinion, but this consistency will only benefit women applicants who file claims within the reach of this Circuit. Because the BIA and Immigration Judges are bound by the precedents in the Circuit in which they are located, this can result in BIA

197. Id.
198. Id. (citing CANADIAN GUIDELINES, supra note 46, at 4).
199. Id.
200. 61 F.3d 1366.
201. Id. at 1378.
202. Id.
203. Id.
204. Id.
205. Id.
206. 813 F.2d 1432.
207. 809 F.2d 285.
judges also issuing conflicting opinions. BIA precedents, United States Supreme Court decisions, or a change in the underlying law appear to provide the best means of creating a uniform body of gender-based asylum law.208

3. Membership in a Particular Social Group

The last basis of asylum, membership in a particular social group, is a difficult asylum claim on which to prevail because it is "the least clearly defined ground for eligibility as a refugee." A specific definition of the phrase does not exist in either the INA or the regulations. In Fatin, the Third Circuit cited to numerous courts and commentators that have struggled to define this category. Although commentators have advocated for a liberal reading of this asylum ground, the BIA adopted a more restrictive analysis in Matter of Acosta. In that case, the BIA defined membership in a particular group as "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." The shared characteristic can be either innate, such as sex, kinship ties, or color, or a shared past experience such as land ownership or military leadership. The BIA also instructed that the group characteristic that will qualify "remains to be determined on a case-by-case basis." The shared characteristic must be one that either the members cannot change or should not be required to change because it is fundamental to their identity or conscience.

The INS Guidelines adopt the definition of membership in a particular social group provided by the BIA in Matter of Acosta as well as the Ninth Circuit's test in Sanchez-Trujillo v. INS. In Sanchez-Trujillo, the Ninth Circuit developed a four-prong test to evaluate claims premised on membership in a particular social group. The adjudicator must determine:

208. For a discussion of recent decisions on gender-based asylum claims, see infra notes 307-72 and accompanying text.
209. INS Guidelines, supra note 7, at 12.
211. Fatin, 12 F.3d at 1238 nn.4-5.
212. "The intent of the framers of the Refugee Convention was not to redress prior persecution of social groups, but rather to save individuals from future injustice. The 'social group' category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up." Kelly, supra note 12, at 647-48 (citing Arthur C. Helton, Persecution on Account of Membership in a Social Group as a Basis for Refugee Status, 15 Colum. Hum. Rts. L. Rev. 39, 41-42, 45 (1983)).
215. Id. at 233. See also INS Guidelines, supra note 7, at 12.
217. Id.
218. Id.
219. 801 F.2d 1572 (9th Cir. 1986).
220. INS Guidelines, supra note 7, at 12-13.
1) whether the class of people identified by the asylum applicant is
cognizable as a particular social group under the applicable laws; 2)
whether the applicant qualifies as a member of the group; 3)
whether the group has in fact been targeted for persecution on ac-
count of the characteristics of the group members; and 4) whether
"special circumstances" are present that would justify regarding
mere membership in the group in itself as sufficient to recognize the
applicant as a refugee. 221

The INS Guidelines note that the special circumstances prong is appli-
cable only when the applicant alleges mere membership in the social group
as the basis for her well-founded fear of persecution. 222 In addition to pro-
viding the above definitions, the INS Guidelines also instruct Asylum Offi-
cers that the particular social group category can overlap with claims predi-
cated on the other categories, i.e. race, religion, political opinion, or
nationality. 223

However, the INS does not delineate the requirements for establishing a
well-founded fear of future persecution. The "well-founded fear" standard
consists of both objective and subjective components. An applicant can
satisfy the subjective component through her credible testimony that she
genuinely fears persecution. 224 The objective component may be satisfied by
showing specific and credible evidence of facts supporting a reasonable fear
of persecution on the enumerated ground. 225 The burden is on the applicant
to meet this standard. 226 An applicant is not required to demonstrate that she
has been singled out for persecution to establish a well-founded fear of fu-
ture persecution. 227 Rather, to prevail on her claim, she can show that "there
is a pattern or practice of persecuting similarly situated women on account
of their membership in the particular social group to which the applicant

221. Id. at 13 (citing Sanchez-Trujillo, 801 F.2d at 1574-75). Cf. Kelly, supra note 12, at
650 (defining the four criteria as: "1) a close affiliation between members of the group, 2) a
common impulse or interest upon which the affiliation is based, 3) a voluntary association,
and 4) the existence of a common trait by which group members are distinguishable from
the general population"). Once a discernible social group has been established, the adjudi-
cator must further consider "whether the applicant has demonstrated that she is a member of
the group . . . [and] that the group has, in fact, been targeted for persecution." Kelly, supra
note 12, at 650 n.120, (citing Sanchez-Trujillo, 801 F.2d at 1574-75).

222. INS Guidelines, supra note 7, at 13. See also Kelly, supra note 12, at 650 n.120
(discussing "special circumstances" requirement).

223. INS Guidelines, supra note 7, at 12. The INS Guidelines also cite to the UNHCR
Handbook's discussion of the particular social group category, explaining that the UNHCR
Handbook's example illustrates how a claim based on membership in a particular social
group could be construed as persecution on account of political opinion. Id. at 12 n.12.

224. Fisher, 61 F.3d at 1370 (citing Acewicz v. INS, 984 F.2d 1056, 1061 (9th Cir.
1993)).

225. Id.

226. Id. (citing 8 C.F.R. § 208.5 (1996)).

227. See Proposed Guidelines, supra note 51, at 816.
belongs."\(^{228}\)

a. Social Group Defined by Gender

After providing a general definition of "membership in a particular group," the *INS Guidelines* discuss gender and family membership as a basis of a social group. An increasing number of women refugees present asylum claims predicated on the membership in a particular social group. The applicants assert that "gender, alone or along with other characteristics,"\(^ {229}\) can define the particular social group of which they are a member and because of this membership, they have suffered or will suffer persecution.

The *INS Guidelines* note\(^ {230}\) that although the Second Circuit has held that gender alone cannot define a particular social group,\(^ {231}\) other circuits have taken a different view.\(^ {232}\) In *Gomez v. INS*, the Second Circuit considered the application of a woman who claimed that she had been persecuted on account of her membership in a particular social group of "women who have been previously battered and raped by Salvadoran guerrillas."\(^ {233}\) The court rejected this formulation stating, "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group."\(^ {234}\) The *INS Guidelines* fail to mention, however, that the Second Circuit limited its holding to the facts of the case. Despite its rejection of Ms. Gomez' claim, the Second Circuit stated, "we do not suggest that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well-founded fear of persecution."\(^ {235}\) This statement implies that the holding was based on the particular facts of the case and the applicant's failure to demonstrate a well-founded fear of persecution, rather than a categorical denial of social groups based on gender.\(^ {236}\)

Although the *INS Guidelines* fail to note the limited holding in *Gomez*, they do discuss other cases that differ from the Second Circuit's decision. For example, the Third Circuit in *Fatin* found that Iranian women who fear persecution because of their gender constitute a particular social group under the *INA*.\(^ {237}\) Ms. Fatin failed to show, however, that members of this

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228. *Id.* (citing 8 C.F.R. § 208.13(b)(2)(i)). *See also Brazilian, Iranian Gay Men Granted Asylum, 72 INTERPRETER RELEASES 1310 (1995) (two homosexual males were granted asylum on the basis of meeting the requirements of 8 C.F.R. § 208.13(b)(2)(i)).


230. *Id.*

231. *See Gomez v. INS, 947 F.2d 660 (2d Cir. 1991).*

232. *See, e.g., Fatin, 12 F.3d 1233; Safaie v. INS, 25 F.3d 636 (8th Cir. 1994).*

233. *Gomez, 947 F.2d at 663.*

234. *Id. at 664. See also INS Guidelines, supra note 7, at 13.*

235. *Gomez, 947 F.2d at 664.*


237. *Fatin, 12 F.3d at 1240. See also INS Guidelines, supra* note 7, at 13.
group faced the requisite level of persecution based solely on their gender. The INS Guidelines also note that in a factually similar case, Safaie v. INS, the Eighth Circuit appeared to hold that gender could not be a defining characteristic of a particular social group. The applicant argued that Iranian women are a particular social group by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them. In Safaie, the Eighth Circuit rejected her argument asserting that “this category is overbroad, because no fact-finder could reasonably conclude that all Iranian women [have] a well-founded fear of persecution based solely on their gender.”

The INS Guidelines contend, however, that although the court’s statement may appear to reject gender as a defining characteristic of a social group, that was not its actual intent. Despite its “imprecise language,” the Safaie Court cited to the portion of Fatin which recognized that gender is a viable “shared characteristic” under the INA.

Thus, as the INS Guidelines note, although some courts have recognized particular social groups based on gender as a legal matter, there has been no finding as a factual matter that membership in this group can result in harm which rises to the level of persecution. In contrast, the courts have recognized that gender combined with other characteristics can constitute a particular social group which meets the refugee definition. For example, in Fatin, the court held that a narrower group, limited to women who would rather risk persecution for noncompliance than conform to the moral codes, could be deemed an eligible social group. A woman possessing such beliefs that “might well be so fundamental to her identity or conscience” should not be forced to change them. The court also found that the punishment inflicted on members of this group is harsh enough to constitute persecution.

The INS Guidelines conclude that the Fatin court recognized three groups based solely on or in part on gender which could constitute a par-

238. Fatin, 12 F.3d at 1240.
239. Safaie, 25 F.3d 636.
240. Id. at 640.
241. Id.
242. INS Guidelines, supra note 7, at 13 n.13.
243. Id. As in Fatin, the applicant in Safaie failed to present evidence that demonstrated that Iranian women would be singled out for persecution based on their gender alone.
244. INS Guidelines, supra note 7, at 13. Cf. Acosta, 19 I. & N. Dec. at 233 (defining membership in a particular social group as a group of persons who share a common immutable characteristic such as sex).
245. Fatin, 12 F.3d at 1241, accord Safaie, 25 F.3d at 640.
246. INS Guidelines, supra note 7, at 14.
247. However, the applicants in Fatin and Safaie failed to demonstrate that they were members of this particular subgroup. Fatin, 12 F.3d at 1241; Safaie, 25 F.3d at 640.
248. The three groups include: a group based solely on gender; “a subgroup of Iranian women who find their country’s gender-specific laws offensive and do not wish to comply with them,” and “Iranian women whose opposition to Iran’s gender-specific laws is so profound that they would disobey at serious peril.” INS Guidelines, supra note 7, at 14.
ticular social group, but only one social group could satisfy all the require­ments of the refugee definition.249

The INS Guidelines further instruct the Asylum Officers to consider additional characteristics, likely to be recognized by persecutors, that might combine with gender to define a particular social group.250 In Gomez v. INS,251 the applicant combined the characteristic of gender with the shared past experience252 of rape and battering at the hands of Salvadoran guerrillas. Yet, the Second Circuit denied her claim, "finding that she had failed to produce evidence that persons in this group could be identified as members by would-be persecutors and would be targeted for further harm on the basis of their common characteristic—that is, having been harmed by the guerrillas in the past."253

After the analysis of Gomez, the INS Guidelines end their discussion of social groups defined by gender. There are no instructions as to which characteristics might combine with gender to create a viable claim of asylum. The INS Guidelines also fail to develop a framework which Asylum Officers can utilize when adjudicating claims under the 'least clearly defined' asylum ground. The INS Guidelines' truncated discussion is most likely due in part to the dearth of precedent setting cases in this area, further substantiating the conclusion that the case law must evolve to create a legal environment in which gender-based asylum claims can be adequately adjudicated.

b. Social Group Defined by Family Membership

The INS Guidelines note that in addition to social groups defined by gender, asylum seekers also allege claims of past or future persecution due to a family relationship.254 In Matter of Acosta, the BIA instructed that "kinship ties" can be a common characteristic creating a particular social group under the INA.255 In accordance with this holding, the First Circuit held in Gebremichael v. INS256 that "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of a nuclear family."257 The Gebremichael court points

249. That group was "the narrowest sub-group of Iranian women whose opposition to Iran's gender-specific laws is so profound that they would disobey at serious peril." Id.
250. INS Guidelines, supra note 7, at 15.
251. 947 F.2d 660.
252. See supra note 216 and accompanying text.
253. INS Guidelines, supra note 7, at 15 (citing Gomez, 947 F.2d at 664).
254. See INS Guidelines, supra note 7, at 15.
256. 10 F.3d 28 (1st Cir. 1993). The applicant in Gebremichael was an Ethiopian man who was imprisoned and tortured by the Dergue government seeking information about his brother.
257. Id. at 36.
to the "time honored theory of *cherchez la famille* ('look for the family')" employed by the applicant's persecutors which involves the "terrorization of one family member to extract information about the location of another family member or to force the family member to come forward."258 This theory creates a clear link between family membership and persecution that no reasonable fact-finder could fail to notice.259 In addition to discussing the theory set forth in *Gebremichael*, the *INS Guidelines* also instruct Asylum Officers to consider the holding in *Ravindran v. INS* which stated: "a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being the focus of fundamental affiliation concerns and common interests for most people."260

The *INS Guidelines* note that prior to these cases, the Ninth Circuit found that persecution on account of membership in a particular social group did not extend to the persecution of a family.261 These divergent holdings illustrate again the inconsistencies in the law. The First Circuit recognizes the family as a particular social group for asylum purposes, whereas the Ninth Circuit does not. However, the *INS Guidelines* state that although the law may be uncertain in the Ninth Circuit, the BIA and other federal courts have recognized family membership as a valid particular social group under the asylum laws.262 The *INS Guidelines* also direct that gender need not play any role in whether family membership can define a particular social group.263 Asylum Officers should be aware of the law in this area because female applicants from countries where men tend to be more politically active than women will often assert claims based on family membership.264

Throughout its discussion on social groups defined by family membership, surprisingly, the INS fails to discuss *Campos-Guardado*,265 in which the Fifth Circuit denied the applicant's asylum claim based on imputed political opinion and membership in a particular social group.266 The court did not consider the applicant's particular social group claim because it "relies

258. *Id.* (citations omitted).
259. *Id.*
260. *INS Guidelines*, supra note 7, at 15 (citing *Ravindran v. INS*, 976 F.2d 754, 761 n.5 (1st Cir. 1992) (quoting *Sanchez-Trujillo*, 801 F.2d at 1576)).
261. *See INS Guidelines*, supra note 7, at 15 (citing *Estrada-Pasadask v. INS*, 924 F.2d 916, 919 (9th Cir. 1991)). The Ninth Circuit did not mention *Sanchez-Trujillo* in its decision nor did it explore the issue of a social group based on family membership in depth. *INS Guidelines*, supra note 7, at 15.
262. *Id.* at 15-16.
263. However, although the persecution may not be gender-based, it may be gender-specific. For example, the type of persecution inflicted on female family members may be specific to their gender (i.e. rape). *See, e.g.*, *Campos-Guardado*, 809 F.2d 285 (after being forced to watch murder of relatives, applicant was raped).
265. 809 F.2d 285.
266. *Id.* at 288. *See supra* note 2 and accompanying text for a brief synopsis of the facts.
upon the attackers' alleged attribution of political opinions to the family group, [thus] we focus on the scope of the statutory term 'political opinion.'\textsuperscript{267} Despite the facts of the case which indicate a viable claim of persecution on account of the applicant's family membership, the court does not even review the issue.\textsuperscript{268} A comparison of \textit{Campos-Guardado} and \textit{Gebremichael} would have been useful to instruct the Asylum Officers that \textit{Campos-Guardado}, as the INS recognized previously, may not be a case on which Asylum Officers should rely because "reasonable minds could differ" over the record.

Although a large portion of the INS Guidelines are devoted to the category of membership in a particular social group, there are many deficiencies in its analysis. Relevant cases are not cited and a framework by which Asylum Officers could approach these claims is not provided. The INS Guidelines merely seem to point out the complexities of claims in this area and the inconsistencies in the case law. In contrast, both the Proposed Guidelines and the Canadian Guidelines provide a framework and considerations for adjudicators to utilize when evaluating claims based on membership in a particular social group.\textsuperscript{269} A more structured approach in the INS Guidelines would provide a useful mechanism which Asylum Officers could employ to perform more efficient and uniform adjudications.

C. PUBLIC VS. PRIVATE ACTS

After establishing that she has faced past persecution or has a well-founded fear of future persecution on account of one of the enumerated grounds, the applicant must still satisfy two further requirements. She must demonstrate that 1) the agent of persecution was either the government or someone the government is unwilling or unable to control; and 2) that government protection is not available in another part of the country. The INS Guidelines note that these two requirements are "based on the notion that international protection becomes appropriate where national protection is unavailable."\textsuperscript{270} Thus, if an applicant is not adequately protected by her government, then she has the right to seek protection elsewhere and be granted asylum if she satisfies the requirements of the refugee definition. Case law has interpreted inadequate protection to mean, in part, that the persecution is inflicted by the government or by someone the government is

\textsuperscript{267} Id.
\textsuperscript{268} Id. at 287.
\textsuperscript{269} See \textit{Canadian Guidelines}, supra note 46, at 5-7; \textit{Proposed Guidelines}, supra note 51, at 818-21. The Proposed Guidelines' extensive analysis of the membership in a particular social group asylum category is derived from an expansive reading of the case law. It provides a framework which is receptive to gender-based asylum claims and which supplies a more useful and instructive tool for Asylum Officers to utilize in their adjudications.
\textsuperscript{270} \textit{INS Guidelines}, supra note 7, at 16.
unwilling or unable to control. 271

The INS Guidelines state that in the “usual case” the persecutor will be the
government. 272 However, this “usual case” is using the male model of
asylum cases and is not necessarily reflective of asylum claims presented by
women refugees. Gender-based asylum claims often involve persecution by
non-governmental figures such as spouses, 273 family members, 274 and guer­
rillas. 275 If the persecutor is a non-governmental person or group, then the
applicant must show that the government is unwilling or unable to protect
her. The INS Guidelines instruct that “[i]t will be important in this regard,
though not conclusive, to determine whether the applicant has actually
sought help from government authorities.” 276 Furthermore, evidence that an
attempt to seek such protection would be futile is also relevant to the Asy­
lum Officers’ evaluation. 277

The INS Guidelines assert that although the persecutor may be the gov­
ernment, the question still may arise as to whether the harm inflicted or
threatened is “purely private.” 278 By implication it appears the INS is con­
tending that if the harm is purely private then it will render the applicant
ineligible for protection. The INS Guidelines cite to Lazo-Majano 279 as an
example of a claim in which the persecution was inflicted by a government
agent, but was a “private act.” As discussed previously, Ms. Lazo-Majano
was “singled out to be bullied, beaten, injured, raped, and enslaved” by a
sergeant in the Salvadoran Armed Forces who subjected her to his will by
constantly threatening that he would reveal her to be a subversive. 280 Eventu­
ally the sergeant carried out his threat, telling a friend of his in the police
that she was a subversive. 281 According to the INS Guidelines, “[b]ased on
evidence of severe treatment of subversives by Salvadoran authorities, the
court determined that the applicant was a refugee on account of the political

271. Id. (citing Matter of Villalta, Int. Dec. No. 3126 (BIA 1990)).
272. Id. at 16.
Dec. 20, 1994), reported in J.J Grants Asylum to Woman Based on Spousal Abuse, INS
Guidelines Imminent, supra note 25, at 521 (recognizing spousal abuse as persecution
reported in J.J Grants Asylum on the Basis of Persecution Relating to Female Genital Muti­
lation, supra note 3, at 1188 (recognizing female genital mutilation and spousal abuse as
grounds for asylum eligibility).
274. See, e.g., Constable, supra note 5, at D1 (discussing gender-based asylum case in
which female relatives kidnapped applicant and held her down while her clitoris was cut
off during female genital mutilation ritual). See also More on IJ Decision Granting Asy­
lum Based on Genital Mutilation, supra note 5, at 1265 (discussing the same case).
275. See, e.g., Gomez, 947 F.2d 660; Campos-Guardado, 809 F.2d 285.
276. INS Guidelines, supra note 7, at 17.
277. Id. at 17.
278. Id. at 16.
279. 813 F.2d 1432.
280. Id. at 1434.
281. Id. at 1433.
opinion that could be imputed to her because of the public accusation, even
without evidence that she actually held subversive views.282

The INS Guidelines conclude that although the act might have been in-
terpreted as “purely private” which is not covered by the INA, the persecu-
tion was held to be on account of a protected characteristic because of the
persecutor’s conduct.283 This conclusion implies that the sergeant’s public
declaration of her alleged subversion transformed her claim from a private to
a public claim. However, Ms. Lazo-Majano was granted asylum because
she met all the requirements of the refugee definition: she had suffered se-
vere abuse which constituted persecution; her persecution was inflicted by
an agent of the government; and the persecution was on account of the po-
litical opinion imputed to her by the sergeant. This is the crux of the claim,
that the persecution was on account of a protected ground. By implying that
Ms. Lazo-Majano’s asylum claim was not viable until the sergeant’s public
statement, the INS misinterprets the liberal holding of the case.

The INS Guidelines appropriately compare Lazo-Majano to Matter of Pierre284 to clarify the distinction between public and private acts. In Mat-
ter of Pierre, the applicant was abused by her husband and could not receive
protection from the government because her husband was a government of-
official.285 The applicant’s claim was denied because she did not have a claim
of persecution on account of one of the five enumerated grounds.286 The fact
that her husband was a legislator did not by itself establish a claim of perse-
cution on account of political opinion even though the Haitian government
would not restrain him.287 Similarly in Klawitter v. INS,288 the applicant’s
failure to predicate a claim on one of the five enumerated grounds resulted in
a denial of asylum. Again, harm (sexual harassment) inflicted by a govern-
ment official does not by itself constitute persecution on account of political
opinion. The INS Guidelines do note that sexual harassment could be seri-
ous enough to rise to the requisite level of persecution and an asylum claim
could be based on sexual abuse by a government official if the harm is in-
flicted on account of a protected ground.289 These cases starkly illuminate
the difficulty women refugees face in presenting gender-based asylum
claims. Not all persecution that women suffer falls into one of the protected
categories, resulting in a denial of gender-based claims because of the rigid-

282. INS Guidelines, supra note 7, at 16.
283. Id.
285. Id. at 462.
286. Id. at 462-63. Ms. Pierre sought withholding of deportation under INA § 243(h)
which provides that the Attorney General shall not deport or return an alien whose life or
freedom would be threatened on account of one of the five enumerated grounds. Proposed
Guidelines, supra note 51, at 814 n.8.
287. INS Guidelines, supra note 7, at 17.
288. 970 F.2d 149 (6th Cir. 1992).
289. INS Guidelines, supra note 7, at 17 n.15.
ity of the extant structure which favors male applicants over female.

The *INS Guidelines* further instruct the Asylum Officers that although acts of persecution may appear to be private, they “must determine whether a reasonable basis exists for regarding the act as a ‘public’ one that can be attributed to the government or an agent the government is unable or unwilling to control.”290 The adjudicators must also ascertain whether the asserted persecution is on account of a protected ground. However, as noted above, although the persecution may be private, if it is on account of a protected characteristic and is inflicted by the government or someone the government is unwilling or unable to control, then the applicant has met her burden of demonstrating eligibility for asylum under the INA’s refugee definition. The adjudicator should also thoroughly explore the motive of the persecutor, the level of the harm inflicted or threatened, the identity of the persecutor, and the role of the government in offering protection.291

The *INS Guidelines* state that international protection is appropriately provided when an asylum seeker can show that national protection is not available.292 Thus, after demonstrating that the persecutor is the government or someone the State is unwilling or unable to control, an applicant must further establish that the persecution exists nationwide.293 If the applicant fails to demonstrate the existence of both of these factors, her asylum claim will most likely be denied. Two potential remedies, relocation in the applicant’s country of origin and government protection in other parts of the country, may preclude her from proving the nationwide persecution requirement.294 The *INS Guidelines* assert that if there is evidence that either of these two remedies is available, then the applicant will not qualify for asylum.295

If the asylum seeker can avoid further or feared persecution by relocating to another part of the country, then she will not be eligible for asylum.296 Furthermore, the *Guidelines* instruct that if a government “would offer protection from otherwise private acts of harm elsewhere in the country than the locality where those acts take place, then normally the applicant will not

290. *Id.* at 17.
291. *Id.* at 17 n.15.
292. *Id.* at 18.
294. The *INS Guidelines* imply that this second requirement must be established only in claims which are based on “private” persecution, in contrast to persecution by the government which would inherently exist nationwide. *INS Guidelines, supra* note 7, at 18.
295. *Id.*
296. In *Lazo-Majano*, the court took notice of the small size of El Salvador and the applicant’s testimony that her persecutor threatened to look for her all over El Salvador if she ever left him, to conclude that the applicant would be “in serious jeopardy if forced to return to her native land.” 813 F.2d at 1435.
qualify for asylum." According to the INS Guidelines, these two potential remedies become crucial in the Asylum Officer’s evaluation especially when the asylum claim is based on “private actions” such as domestic violence from which the state does not offer protection.

Adjudicators are instructed to consider numerous factors in these evaluations. They must explore the extent to which the government provides redress for or protection against persecution and the degree to which the risk of harm exists nationwide. The INS Guidelines cite to the UNHCR Handbook for guidance regarding the reasonableness of requiring relocation. The UNHCR Handbook states “a person will not be excluded from refugee status merely because [she] could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect [her] to do so.” When evaluating whether it is “reasonable under all the circumstances” to expect a victim of domestic violence or other “private” acts to relocate, adjudicators must look to the facts of the particular case. Asylum Officers should carefully explore the availability of government protection in other parts of the country, as well as the circumstances which provoked the persecution or the fear of persecution. In addition to determining whether protection was obtainable as a factual matter, the adjudicator must also consider whether the law of the applicant’s country afforded protection. With these considerations in mind, the Asylum Officer can make a determination as to whether under all the circumstances, “it would be reasonable to expect a woman to seek residency elsewhere in her country.”

297. INS Guidelines, supra note 7, at 18 (citing Beltran-Zavala v. INS, 912 F.2d 1027 (9th Cir. 1990)).
298. Id. at 18.
299. Id.
300. Id.
301. Id.
302. Id. (citing UNHCR HANDBOOK 21-22, ¶ 91). The Proposed Guidelines assert that “an asylum applicant does not have to establish that the persecution she fears exists nationwide if, under all the circumstances, it would have been unreasonable for her to seek refuge in another part of the country.” Proposed Guidelines, supra note 51, at 817 (citing UNHCR HANDBOOK 21-22, ¶ 91 and Matter of R-, Int. Dec. No. 3195, slip op. at 8 (BIA 1992)).
303. INS Guidelines, supra note 7, at 18.
304. Id. The Proposed Guidelines instruct the adjudicator to consider “the ability of the persecutor to act nationwide, whether the woman could genuinely access protection in another part of her country, and whether the protection would have been meaningful.” See Proposed Guidelines, supra note 51, at 817 & nn.29, 30.
305. “Relevant factors to consider are financial, logistical and other barriers that may prevent the woman from reaching internal safety and whether the quality of internal protection meets basic norms of civil, political and socio-economic human rights.” Proposed Guidelines, supra note 51, at 817 (citing JAMES HATHAWAY, THE LAW OF REFUGEE STATUS 134 (1991)).
306. INS Guidelines, supra note 7, at 18. The INS Guidelines conclude by emphasizing that a determination such as the reasonableness of relocation “underscores the general
VI. RECENT DEVELOPMENTS AFFECTING GENDER-BASED ASYLUM JURISPRUDENCE

Subsequent to the issuance of the INS Guidelines, significant decisions in gender-based asylum cases have altered the face of gender-based asylum jurisprudence. Whether the INS Guidelines themselves produced these recent developments is not clear. However, apart from one aberrational decision in the Ninth Circuit, permissive decisions recently issued by the BIA and some Immigration Judges indicate that the INS Guidelines have made a positive impact on their intended recipients. The BIA, IJs and federal courts have finally started to create a uniform body of gender-based asylum case law which women refugees can utilize in presenting their asylum claims. 307

A. THE EN BANC DECISION IN FISHER v. INS 308

The en banc panel’s decision in Fisher represents the one regressive development in gender-based asylum jurisprudence following the issuance of the INS Guidelines. Fisher v. INS was first appealed to the Ninth Circuit by Ms. Fisher in 1993. 309 The Ninth Circuit’s first decision in the case was issued by a three-judge panel. That panel granted Ms. Fisher’s petition for review of the BIA’s decision, vacated that decision, and remanded for further consideration. The three-judge panel’s decision is the Fisher decision discussed in the INS Guidelines. On October 2, 1995, almost a year after the three-judge panel’s decision was issued, the INS’ request for a rehearing en banc was granted. A majority of the en banc panel reversed the three-judge panel, withdrew the Ninth Circuit’s earlier decision to remand to the

need to develop the record fully with respect to both the applicant’s particular circumstances and the conditions prevailing in the country of origin.” Id. Acknowledging that adjudicators “must be able to rely on objective and current information on the legal and cultural situation of women in their countries of origin, on the incidence of violence, including both sexual and domestic, and on the adequacy of state protection afforded to them,” the INS Guidelines state that the INS Resource Information Center (RIC) will “attempt to assure that information concerning violations of the rights of women are distributed regularly and systematically to all Asylum Offices.” See id. at 8.

307. In contrast to the progressive decisions of adjudicators at all levels, Congress has taken a much more regressive approach to immigration. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Both pieces of legislation revised the asylum application process, making it much more difficult to receive an award of asylum. A complete discussion of the statutory changes effected by AEDPA and IIRIRA is beyond the scope of this comment. For a discussion of the impact of these two laws on the asylum procedure, see generally FRAGOMEN, JR., ET AL., supra note 9, at 5-1-5-20.

308. 79 F.3d 955 (9th Cir. 1996).

309. The case was argued and submitted on April 13, 1996. See Fisher v. INS, 61 F.3d 1366, 1366 (9th Cir. 1994). Ms. Fisher is an Iranian woman who sought asylum based on her opposition to the Iranian dress and moral conduct code. In her asylum application and appeals, Ms. Fisher claimed she had a well-founded fear of future persecution on account of her religious and political beliefs—opposition to the Iranian theocratic government and its fundamentalist Moslem doctrines. For a more detailed discussion of the facts of the case, see 79 F.3d at 958-60; 61 F.3d at 1368-70.
BIA, and denied Ms. Fisher's asylum claim.

The majority found that Ms. Fisher had not suffered persecution and did not have a well-founded fear of future persecution. Rather, the majority stated that the applicant "merely has established that she faces a possibility of prosecution for an act deemed criminal in Iranian society, which is made applicable to all women in that country," and prosecution for general crimes does not amount to persecution unless the punishment is disproportionately severe or the prosecution is pretextual. According to the majority, Ms. Fisher failed to establish that either of these two exceptions were applicable. In addition to failing to demonstrate that she had suffered persecution or faced future persecution, the majority further held that Ms. Fisher did not satisfy the nexus requirement. The majority concluded that Ms. Fisher's claim should be denied because she received only routine punishment for violating generally applicable laws, and she failed to show that she had suffered persecution or had a well-founded fear of persecution on account of her political or religious beliefs.

Despite the fact that a majority of the panel overruled the earlier decision, the number of judges on the panel who expressed dissatisfaction with the majority's decision indicates that the precedential value of the en banc decision may be questionable. Judge Canby, joined by Judge Thompson, filed a concurring opinion "to emphasize a crucial aspect of this case." Judge Canby clarified that Ms. Fisher's asylum claim was not premised on gender-based persecution. Rather, she sought asylum from persecution on account of her religious and political beliefs. Thus, as Judge Canby stated:

There is no issue of gender discrimination before our en banc court. The majority opinion should not be read as establishing that enforcement of criminal laws against women, or the infliction of suffering upon women, because they are women cannot constitute persecution under the Act. All that properly can be said is that the enforcement of criminal laws against Fisher because she is a woman does not, on this record, constitute persecution on grounds of religion or political belief—the only two grounds urged by Fisher.

Judge Canby further explained that he did not join the majority opinion because it might be misinterpreted too easily as deciding an issue that was

310. 79 F.3d at 960-62.
311. Id. at 962 (citations omitted).
312. Id. at 961-62.
313. Id. at 962.
314. Id. at 963 ("Because Fisher has demonstrated only discrimination on account of her sex, not persecution on account of her religious or political beliefs, she has failed to carry her burden.").
315. Id. at 964.
316. Id. at 965 (Canby, J., concurring).
317. Id. at 965-66 (Canby, J., concurring).
not raised by Ms. Fisher—whether persecution of women because they are women represents a ground for asylum under the INA. Judge Canby pointed to statements in the majority opinion which may be construed as "foreclosing the possibility that persecution of women on account of their gender presents a ground of asylum under the Act." He concluded that although the majority's "gratuitous statements" only constitute dicta, he felt the court should not express a view on the subject until it has been briefed and argued in a case that turns on the point.

In addition to the reservations expressed by the concurring judges, Judge Noonan, joined by Judge Fletcher, filed a scathing dissent. He stated that the principal division on the en banc panel was caused by the issue of whether the panel should remand requiring reconsideration or whether a motion to reopen by Ms. Fisher should be left to the discretion of the INS and the BIA. The dissent would have affirmed the three-judge panel's decision, agreeing that the case should be remanded to the BIA for further consideration. Judge Noonan stated that his decision was based on "the sea-change in governmental policy" regarding gender-based asylum claims, specifically, the issuance of the INS Guidelines.

He noted that the INS Guidelines provide particular guidance on the issues presented in the case before the en banc panel: "The guidelines are an invitation to develop asylum law with special attention to the problems of women oppressed on account of their nonconformity with the moral codes of a rigorous regime." In fact, the INS Guidelines cite the three-judge panel's opinion "[w]ithout the slightest criticism of the analysis and conclusions reached by the panel." Ultimately, Judge Noonan emphasized that the majority's dicta regarding gender persecution reflect only the opinions of those judges making up the majority: "Its dicta do not constitute Ninth Circuit law.

Some commentators have similarly noted that the majority opinion in Fisher is not likely to be followed. The authors of one article noted that the internal inconsistencies in the majority opinion led the dissenters to suggest

318. Id. at 966 (Canby, J., concurring).
319. Id.
320. Id.
321. At one point in his dissenting opinion, Judge Noonan stated: "We are not very far from The Handmaid's tale when seven judges of this court are capable of expressing such a view." Fisher, 79 F.3d at 969 (Noonan, J., dissenting).
322. Id. at 967 (Noonan, J., dissenting).
323. Id. The majority left open the possibility that Ms. Fisher could move to reopen the proceedings before the BIA pursuant to 8 C.F.R. §§ 3.2, 208.19. Id.; see also Fisher, 79 F.3d at 963.
324. Fisher, 79 F.2d at 967 (Noonan, J., dissenting).
325. Id. at 968 (Noonan, J., dissenting).
326. Id.
327. Id. at 969 (Noonan, J., dissenting).
future judicial nullification.\textsuperscript{328} Another author criticized the \textit{Fisher} majority for reviewing the case “without regard to the then-recently promulgated INS gender guidelines and without so much as a mention of a the important developments in the law regarding gender-based asylum claims.”\textsuperscript{329} Ultimately, the majority opinion in \textit{Fisher} must be viewed in context. It was decided without any consideration given to the \textit{INS Guidelines} and before subsequent gender-based asylum decisions issued by the BIA. Furthermore, the \textit{Fisher} opinion reaffirmed the principle that federal courts must afford deference to BIA determinations.\textsuperscript{330} Thus, because \textit{Fisher} is inconsistent with subsequent BIA decisions, its authoritative weight is likely to be minimal.\textsuperscript{331}

\textbf{B. IN RE KASINGA\textsuperscript{332}}

\textit{In re Kasinga} represents one of the most highly publicized asylum claims granted by the BIA.\textsuperscript{333} It is also the second gender-based asylum precedent issued by the BIA and the first BIA decision granting asylum to a woman fleeing female genital mutilation (FGM). After being forced into a polygamous marriage and facing the imminent threat of being forced to undergo FGM, Ms. Kasinga fled Togo, her native country, with the assistance of her mother and sister.\textsuperscript{334} She took the first flight out of the country ending up in Germany where she spent the next two months.\textsuperscript{335} In December 1994, Ms. Kasinga arrived in the U.S. and immediately applied for asylum when she entered the country. She spent the next 16 months in INS detention until she was released in April 1996.\textsuperscript{336} An Immigration Judge (IJ) in Philadelphia denied Ms. Kasinga’s request for asylum, finding that she was not credible and that she would not qualify for asylum even if she was credible.\textsuperscript{337} Ms. Kasinga subsequently appealed the IJ’s decision to the BIA and retained new counsel.\textsuperscript{338} The main issues addressed on appeal were credibility and substantive eligibility for asylum.\textsuperscript{339}

\textsuperscript{328}. Anker et al., \textit{supra} note 24, at 1179.

\textsuperscript{329}. Goldberg, \textit{supra} note 185, at 894.

\textsuperscript{330}. Anker et al., \textit{supra} note 24, at 1179.

\textsuperscript{331}. \textit{id.} ("\textit{Fisher} is therefore arguably not a relevant opinion"); \textit{but see} Sharif \textit{v. INS}, 87 F.3d 932, 936 n.3 (9th Cir. 1996) ("The Ninth Circuit has concluded that persecution on account of gender is not included as a category allowing relief . . . .").

\textsuperscript{332}. \textit{In re Kasinga}, Int. Dec. 3278, 1996 BIA LEXIS 15 (BIA June 13, 1996). For an extensive discussion and analysis of the case by the attorney who represented Ms. Kasinga on her appeal before the BIA, see Musalo, \textit{supra} note 84, at 853.

\textsuperscript{333}. \textit{See} Goldberg, \textit{supra} note 185, at 895.

\textsuperscript{334}. Kasinga, Int. Dec. 3278, 1996 BIA LEXIS 15, at *4-5; \textit{see also} Musalo, \textit{supra} note 84, at 854.

\textsuperscript{335}. \textit{id.}

\textsuperscript{336}. \textit{id.}

\textsuperscript{337}. Musalo, \textit{supra} note 84, at 855.

\textsuperscript{338}. \textit{id.}

\textsuperscript{339}. \textit{id.}
The BIA reversed the IJ’s decision and granted Ms. Kasinga’s asylum application. In contrast to the IJ, the BIA found the applicant to be credible on the basis of her testimony in support of her application and the substantial background information she provided. The Board specifically rejected the IJ’s credibility determination, finding the applicant reasonably and adequately explained the issues raised by the IJ. The BIA also held that Ms. Kasinga faced persecution on account of membership in a particular social group. Her particular social group was comprised of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”

To support their social group formulation, the Board cited to Matter of Acosta, Matter of H—, and the Third Circuit’s decision in Fatin v. INS. The BIA stated that a particular social group is “defined by common characteristics that members of the group either cannot change or should not be required to change because such characteristics are fundamental to their individual identities.” The Board continued: “The characteristics of being a ‘young woman’ and a ‘member of the Tchamba-Kunsuntu Tribe’ cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.”

Although Kasinga represents an important step forward in the development of “membership in a particular social group” asylum law, the Board opted to take a more conservative approach by formulating a very specific and circumspect social group of which Ms. Kasinga was a member. Their formulation reflects the BIA’s and the federal courts’ reluctance to construct broad social groups which could accommodate “too many” asylum applicants. Although creating narrowly drawn social groups to prevent the hordes of women refugees fleeing gender-based persecution may allay the fears of anti-immigration proponents, the reality is that whether the social group is defined narrowly or broadly, that flood of women is not likely to inundate America’s ports of entry. Thus, by formulating such a specific

341. Id.
342. Id.
345. Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993) (stating that Iranian women who refuse to conform to the Iranian Government’s gender-specific laws and social norms may well satisfy the Acosta definition). This parenthetical was provided by the BIA. See Kasinga, Int. Dec. 3278, 1996 BIA LEXIS 15, at *21.
347. Id. at *22.
348. “It is often expensive, difficult, and traumatic to uproot oneself and flee the country of one’s birth. Women more than men are unlikely to have the resources, freedom, and the means to make such a journey.” Goldberg, supra note 185, at 896. Ms. Goldberg also
cally defined social group in Kasinga, the Board limited to some extent the favorable impact of its decision on the progression of gender-based asylum jurisprudence. 349

The issue of persecution constituted the most contentious issue before the BIA. The INS proposed a new framework for analyzing the persecution standard which would severely restrict the asylum eligibility of women who had suffered FGM in the past. The INS argued that for harm or suffering to rise to the level of persecution required by the INA, it must be inflicted with malignant or punitive intent. 350 In FGM cases, the INS noted that this standard would rarely be met because presumably practitioners of FGM "believe that they are simply performing an important cultural rite that bonds the individual to society." 351

To remedy this outcome, the INS suggested that the malignant or punitive intent requirement be waived when the type of harm "is so extreme as to shock the conscience of the society from which asylum is sought." 352 To satisfy the INS’ "shock the conscience test," an applicant must demonstrate that the harm is extreme, the harm is inflicted on an unconsenting or resisting individual, and the individual must be seized and subjected to the extreme harm, not merely suffer the consequences of refusal. 353 To add insult to injury, the INS further explained that "FGM victims who were mutilated as children are presumed to have consented to it," and thus have not experienced persecution which could constitute the basis for a claim of past persecution. 354

Clearly, the INS’ new framework was a poorly veiled attempt to limit the eligibility for asylum of women who had suffered FGM in the past. Ironically, the INS’ approach directly contradicts the policies, spirit, and directives found in the INS Guidelines. 355 Rather than seeking to harmonize existing case law, the INS attempted to create an exclusionary framework provides enlightening statistics from Canada which promulgated gender-based guidelines two years before the INS. During the two years after the issuance of the Canadian Guidelines, 40,000 refugee claims were filed in Canada; only 1,130 of those claims were gender-related. Out of the 1,130 gender-related claims filed, 483 were granted, 273 denied, 284 were still pending, and 126 had been withdrawn, terminated or abandoned. Id. at 896-97.

349. But see Kasinga, Int. Dec. 3278, 1996 BIA LEXIS 15, at *43-49 (Rosenberg, concurring) (criticizing majority’s narrow social group formulation and discussing significance of broader social group formulations).
350. Musalo, supra note 84, at 856.
351. Id. (quoting INS brief, at 16-17).
352. Id.
353. Id.
354. Id.
355. See, e.g., INS Guidelines, supra note 7, at 4 ("For example, rape . . . , sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds.") (emphasis added). See also Kasinga, Int. Dec. 3278, 1996 BIA LEXIS 15, at *50 (Rosenberg, concurring) (noting INS' failure to make reference to its own gender-based guidelines).
which would be much more restrictive in practice than the legal approaches it promulgated in its own guidelines. Despite the INS' efforts to create a restrictive gender-based asylum precedent, the BIA rejected the INS' proposed framework, finding that FGM constitutes persecution within the meaning of the INA. 356 Although the INS seems to be attempting to impede the progressive development of gender-based asylum case law, fortunately, adjudicators have not been hindered by these obstructions.

C. OTHER DEVELOPMENTS

In addition to the important precedent set by Kasinga, there are a growing number of decisions by Immigration Judges which have further developed gender-based asylum jurisprudence. In Matter of A— and Z—, 357 a Jordanian woman was granted asylum based on the severe, sustained domestic abuse she suffered at the hands of her husband for many years. 358 Despite the INS' argument that the harm she faced was the product of a personal marital dispute, the IJ held that she was eligible for asylum on account of her membership in a particular social group and her political opinion. 359 The IJ found that she was a member of a particular group of women who challenge the traditions of Jordanian society and government and that this opposition also constitutes her political opinion. 360

In Matter of M— K—, 361 a woman from Sierra Leone was granted asylum on account of past persecution and a well-founded fear of future persecution. The applicant had been forcibly subjected to FGM and severe domestic abuse which comprised her past persecution claims, and she feared future persecution on account of her political party activism. 362 Significantly, the IJ held that domestic violence constituted persecution under the INA. 363 Moreover, the IJ found that “based on the domestic abuse, the applicant could be granted asylum based on political opinion ‘for her resistance to mandated female subservience and complaints about physical spousal abuse, or membership in a particular social group that consists of women who have been punished with physical spousal abuse for attempting to assert their individual autonomy.’” 364 The IJ also concluded that the applicant had a well-founded fear of future persecution based on past political

358. Anker et al., supra note 24, at 1180.
359. Id.
360. Id.
362. Anker et al., supra note 24, at 1180.
363. Id.
activism, and that when measuring the past infliction of FGM in light of human rights norms, it rises to the level of persecution.365

In *Matter of D—M,—* 366 an IJ granted asylum to a woman from Liberia who had suffered at the hands of guerrilla forces. The applicant was taken captive by Liberian guerrilla forces and was held for more than six months.367 During her captivity, she was repeatedly raped by a number of soldiers and by a high-ranking officer who designated her as his "wife."368 Based on the Second Circuit's decision in *Gomez v. INS,*369 the IJ found that the applicant was "persecuted not merely because of her gender, but because of the personal and inviolate component of her gender, which was her sexual identity."370 The Immigration Judge determined that she was eligible for asylum based upon her membership in a particular social group of women who share the immutable characteristic of having had their sexual identity attacked and violated and who share a common interest in keeping their sexual identity inviolate and free from wanton terror.371

The cases discussed above represent just three among a wide variety of cases heard by Immigration Judges who have reached varying conclusions. There are currently a number of gender-based asylum claims pending before Immigration Judges throughout the country.372 Inevitably, for every grant of a gender-related asylum claim, there is likely to be a denial. However, these recent trend-setting decisions represent a grass-roots movement of sorts; a movement which is inclined to interpret asylum law in a much more permissive manner, a manner which creates more grants than denials of asylum. As the number of these decisions increase, the body of gender-based asylum jurisprudence likewise expands. If domestic violence becomes a more common basis for asylum and social group formulations become less circumspect and more inclusive, this growth can only bode well for women refugees seeking asylum in the future.

CONCLUSION

When the *INS Guidelines* were issued in May 1995, asylum advocates anticipated a subsequent evolution of the law of gender-based asylum. Unfortunately, that metamorphosis has yet to materialize. The *INS Guidelines*

365. Anker et al., supra note 24, at 1180.
366. A40 379 801 (IJ New York, N.Y. Nov. 22, 1993) reported in Anker et al., supra note 24, at 1181.
367. Anker et al., supra note 24, at 1181.
368. Id.
369. 947 F.2d 660 (2d Cir. 1991).
371. Id.
372. For a brief description of a sampling of these cases, see Anker et al., supra note 24, at 1181-82.
undoubtedly represent a very positive development in the area of asylum based on gender persecution. However, by emphasizing the current limitations in the case law, the Guidelines adopted a circumspect rather than an expansive approach to gender-based asylum claims. The inherent deficiencies which pervade the INS Guidelines and their mere advisory nature serve to significantly limit their impact on gender-based asylum adjudications. The combination of these factors compels this author to conclude that the case law, which constitutes the legal basis of the INS Guidelines, must develop to create a legal environment which facilitates uniform adjudications of gender-based asylum claims.

Under a body of law that is relatively uniform, the divergent holdings in the stories of the women mentioned at the beginning of this Comment can become more consistent. That body of gender-based asylum law is currently in its developmental stage, but it is steadily progressing. Recent decisions issued by Immigration Judges, the BIA, and federal courts have recognized the unique forms of abuse that women suffer and have found them to be persecution for asylum purposes. They exemplify a recent trend in immigration law in which the INS, administrative tribunals, and federal courts have become more willing to grant asylum claims predicated on gender-based persecution. If this trend continues, the submission of gender-based asylum claims will be far less precarious in the future. Until then, women refugees will continue to live in fear of being returned to a life of persecution.