

# NOTE

## WOMEN *QUA* WOMEN: USING FEMINIST THEORY TO CATALYZE THE GENDER IMMIGRATION DEBATE

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*Protection gaps necessarily result when refugee definitions become divorced from events—the social and political reality—which actually produces refugees.* — Guy S. Goodwin-Gill<sup>1</sup>

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## I. INTRODUCTION

The world faces an unprecedented refugee crisis. There are almost sixty-six million forcibly displaced people worldwide; about 34% of those displaced are refugees; less than 1% of *those* people have been resettled.<sup>2</sup> Reporting requirements vary worldwide, making it difficult to identify precisely how many displaced persons are women.<sup>3</sup> According to a 1995 report

2. UNHCR, FIGURES AT A GLANCE, <http://www.unhcr.org/en-us/figures-at-a-glance.html>.

3. According to one estimate, over 72% of refugees resettled in the United States are women and children; however, this takes into account both women and children. The calculations become difficult. According to UNHCR, half of all refugees are children. The proportion is, therefore, unclear. Based on this data, as well as data noted subsequently, I will move forward on the assumption that the number is significant. Catherine Powell, *New Travel & Refugee Restrictions, Same Bad Impact for Women*, COUNCIL ON FOREIGN RELATIONS (Dec. 12, 2017), <https://www.cfr.org/blog/new-travel-refugee-restrictions-same-bad-impact-women>; see also Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L. J. 511, 512 (1993).

by the Brookings Institution, between 75-80% of refugees are women.<sup>4</sup> More recent estimates are closer to 50%.<sup>5</sup> Regardless, in recent years the United States has consistently accepted fewer female refugees than male refugees.<sup>6</sup> And while the ceiling on total refugees admitted increased steadily during the Obama administration,<sup>7</sup> that number has significantly decreased in the first year of the Trump administration.<sup>8</sup>

Even though women make up half of the world's displaced persons, the law does not serve them as faithfully as it serves men. The reason for this deficiency: gender harm is discrete from those harms traditionally recognized in gender immigration law. This disparity is only exacerbated by the current political environment. This Note suggests that to better serve displaced women, it is necessary to recognize and address the specific nature of gender-motivated harm.

The heart of this discussion is the refugee definition: a displaced person who is unable or unwilling to return to their country of origin because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion."<sup>9</sup> How domestic courts apply this definition remains in flux. In the U.S., early claims of gender-based persecution pried open the definition's conceptual flaws,<sup>10</sup> and the consequent jurisprudence has grown into the field of gender immigration law.<sup>11</sup> In the last three decades, discourse on this area of law has revealed pockets of legal no-woman's-land where the law leaves otherwise qualified displaced women vulnerable to gaps in legal protection. This discourse has popularized, among immigrant advocates, a liberalized application of the refugee definition to accommodate gender-motivated harm.<sup>12</sup> But these efforts are not enough.

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4. Roberta Cohen, *Refugee and Internally Displaced Women: A Development Prospective*, BROOKINGS INSTITUTE (Nov. 1, 1995), <https://www.brookings.edu/research/refugee-and-internally-displaced-women-a-development-perspective>.

5. *Women Refugees and Migrants*, UN WOMEN (last visited Apr. 18, 2018), <http://www.unwomen.org/en/news/in-focus/women-refugees-and-migrants>.

6. According to data published by the Department of Homeland Security, approximately 5-9% fewer female refugees have been accepted each year since 2011. This number translates to a range of about 3,000-5,000 women. Refugee & Asylee Data Tables, 2013-15, DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/immigration-statistics/refugees-asylees>.

7. Philip Connor & Jens M. Krogstad, *U.S. on Track to Reach Obama Administration's Goals of Resettling 110,000 Refugees This Year*, THE PEW RESEARCH CENTER (Jan. 20, 2017), <http://www.pewresearch.org/fact-tank/2017/01/20/u-s-on-track-to-reach-obama-administrations-goal-of-resettling-110000-refugees-this-year/>.

8. Memorandum from President Donald Trump to Sec. of State Rex Tillerson, (Sept. 29, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-secretary-treasury-director-national-intelligence/>.

9. 8 U.S.C. 1001(a)(42)

10. See *infra* part II(ii).

11. Generally, LAW OF ASYLUM IN THE UNITED STATES § 5:45 (Westlaw) (2017 ed.).

12. See *In re Kasinga*, 21 I. & N. Dec. 357 (finding that women subjected to female genital mutilation constitute a particular social group); *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) ("women in a particular country, regardless of ethnicity or clan membership, could form a particular social group" (citing *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005))); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (finding that Somali females constitute a particular social group).

To establish parity for displaced women seeking asylum and refugee status, this Note articulates the current role of gender in immigration law, identifies deficiencies within that body of law, and devises a solution to effectively address gender-motivated harm. Part II of this Note highlights how the refugee definition was established absent any consideration of gender on the international stage and subsequently in the U.S. Part III examines gender immigration jurisprudence in the U.S. to illustrate the current legal protection gap between men and women and to illuminate why repeated efforts to include gender within the five conventional grounds, specifically the particular social group (PSG), is problematic. Part IV constructs a parallel between the evolution of feminist theory and that of gender immigration law to re-conceptualize the role that gender-motivated harm plays in immigration law. Specifically, Part IV argues that persecution—the gauge by which refugee and asylum claims are judged—is a concept that hinders legitimate claims by women who have suffered gender-motivated harm. To remedy this protection gap, this Note proposes a statutory amendment that establishes a new ground specific to gender-motivated harm and disposes completely of the term persecution.

## II. HISTORICAL BACKGROUND

### A. *International Origins of the Modern Refugee*

It was unnecessary to define, for legal purposes, who qualified as a refugee until the League of Nations established the High Commissioner for Russian refugees in 1921.<sup>13</sup> Only after the creation of this intergovernmental system did the international community recognize its responsibility “to provide protection and find solutions for refugees.”<sup>14</sup> Subsequent treaties and informal arrangements established under the League of Nations developed a definition of refugee that was broad and inclusive.<sup>15</sup> However, in the years leading up to World War II, this language was restricted, mirroring the national and ethnic crises erupting across Eastern Europe at that time.<sup>16</sup>

During the 1930s and 1940s, the European legal community formed the International Refugee Organization (IRO) to address the mass exodus from

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13. Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J. L. & POL'Y 129, 130 (2001). Dr. Fridtjof Nansen was the first High Commissioner, appointed in 1921.

14. *Id.*

15. GUY S. GOODWIN & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 16 (3rd. ed. 2007). Goodwin summarizes many of these treaties as consisting of two basic requirements: “[t]hat someone was (a) outside their country of origin and (b) without the protection of the government of that State . . . .”; Feller, *supra* note 13, at 130 (“The League of Nations defined refugees by categories, specifically in relation to their country of origin.”).

16. GOODWIN & MCADAM, *supra* note 15, at 16 (“Even when social and political upheaval was accepted as giving content and meaning to the refugee definitions, these remained circumscribed by particular crises and linked to ethnic or national origin.”); *see also* Feller, *supra* note 13, at 130 (“[A protection] mandate was subsequently extended to other groups of refugees, including Armenians in 1924, as well as Assyrian, Assyro-Chaldean, and Turkish Refugees in 1928.”).

Axis-controlled territories.<sup>17</sup> The organization served as a temporary mechanism for addressing the humanitarian crises before and after World War II.<sup>18</sup> And from the IRO emerged the first four modern conventional grounds on which to claim asylum: race, religion, nationality, and political opinion.<sup>19</sup>

The fifth conventional ground, PSG, is the focus of this note. PSG appeared shortly after the IRO dissolved and the United Nations (UN) established the High Commissioner for Refugees (UNHCR) to secure protections for qualified displaced persons.<sup>20</sup> Article 1(A) of the Convention Relating to the Status of Refugees, UNHCR's animating convention, protects displaced persons who:

... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, *membership of a political social group* or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . .<sup>21</sup>

Fifteen years later, the UN adopted the 1967 Protocol Relating to the Status of Refugees, which did not substantially alter this definition.<sup>22</sup> Together, the 1951 Convention and the 1967 Protocol establish the modern international framework for gender immigration law.

The refugee definition controls the refugee selection process, making it critical to understand the political forces governing how this definition evolved. That gender was originally “left off the list”<sup>23</sup> of conventional grounds, plus longstanding reluctance to consider gender as constituting membership in a PSG, explains why displaced women are disadvantaged in the refugee and asylum-seeking process.

## B. *Statutory Development in the U.S.*

Immigration advocates in the U.S. have perennially maneuvered around both legislative and executive restrictions on immigration status.<sup>24</sup> Born out

17. Constitution of the Int'l Refugee Org., Adopted by the United States of Am. & Other Governments., Aug. 20, 1948, 62 Stat. 3037, T.I.A.S. No. 1846.

18. Feller, *supra* note 13, at 130.

19. Constitution of the Int'l Refugee Org., Annex I, pt. 1, § 1(a)-(c), Adopted by the United States of Am. & Other Governments., Aug. 20, 1948, 62 Stat. 3037, T.I.A.S. No. 1846.

20. G.A. Res. 428(V), Annex, ch. 1, ¶ 1 (1950), <http://www.unhcr.org/3b66c39e1.pdf>.

21. Convention Relating to the Status of Refugees art. 1(A), July 28, 1951, 189 U.N.T.S. 137, [https://treaties.un.org/doc/Treaties/1954/04/19540422%2000-23%20AM/Ch\\_V\\_2p.pdf](https://treaties.un.org/doc/Treaties/1954/04/19540422%2000-23%20AM/Ch_V_2p.pdf) (emphasis added).

22. Protocol Relating to the Status of Refugees art. 1(2), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, <http://www.unhcr.org/4d944e589.pdf>. The most significant evolutionary aspect of the Protocol was its revocation of the temporal limitation on Art. 1(A)(2) requiring a refugee to have been persecuted “[a]s a result of events occurring before 1 January 1951 . . . .”

23. EFRAT ARBEL, *Gender in refugee law—from the margins to the centre*, in GENDER AND REFUGEE LAW: FROM THE MARGINS TO THE CENTRE 3 (Efrat Arbel et. al. eds., 2014).

24. RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 1:1, Westlaw (database updated October 2017) (“The history of the immigration laws of the United States is an evolution from no restriction to extremely narrow qualitative restrictions to additional qualitative restrictions . . .”).

of a perceived need to protect against a flood of immigrants,<sup>25</sup> the U.S. passed the Immigration and Nationality Act (INA) in 1952.<sup>26</sup> The INA implemented both qualitative and quantitative limits on immigrant entry and expanded the government's ability to deport immigrants.<sup>27</sup> The INA neither mentioned nor defined "refugee." But fifteen years later, the U.S. ratified the UN Protocol Relating to the Status of Refugees, which undertook to provide certain rights and obligations to qualified displaced persons.<sup>28</sup> Then, in 1980, Congress passed the Refugee Act<sup>29</sup> to execute the 1967 Protocol<sup>30</sup> and "bring U.S. refugee law into conformance with the [protocol] . . . ."<sup>31</sup> Congress changed the definition of refugee in the Refugee Act by adding "persecution" as a concept distinct from "well-founded fear of persecution."<sup>32</sup> Yet again, gender had "been left off the list."<sup>33</sup>

### III. THE JURISPRUDENCE OF GENDER IMMIGRATION LAW

U.S. courts take a conservative view on gender as a PSG. To qualify as a refugee, displaced women must demonstrate harm that: 1) satisfies the standard of persecution; 2) on account of one of the five conventional grounds of the refugee definition; with 3) a causal nexus between the persecution and that ground. Working within the limited confines of the refugee definition, immigration advocates have tried, and failed, to establish that gender-motivated harm qualifies women as refugees or asylees under the conventional PSG ground.

#### A. *Jurisprudential Development of PSG in the U.S.*

Perhaps created as a "catch-all" term, the PSG category is vague and leaves the exact contours of its definition to a court's discretion.<sup>34</sup> A

25. John Woolley and Gerhard Peters, *Harry S. Truman—Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality*, THE AMERICAN PRESIDENCY PROJECT (retrieved Dec. 13, 2017), <http://www.presidency.ucsb.edu/ws/?pid=14175>.

26. Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163 (June 27, 1952) [hereinafter INA] (also known as the McCarran-Walter Act).

27. STEEL, *supra* note 24, § 1:2 ("Briefly, the Act expanded the quota system, provided preferences for persons with certain skills or relatives, expanded the grounds of exclusion, provided for the duplicitous procedure of visa issuance and inspection upon entry, expanded the grounds of deportation, and provided for the deportation procedure and for relief from deportation under limited circumstances.")

28. Such obligations include: freedom to practice religion (art. 4), the right to gainful employment (ch. III), welfare support (ch. IV), and non-refoulement (Art. 33).

29. United States Refugee Act of 1980, Pub. L. No. 96-212 (S 643), 94 Stat. 102 (1980).

30. Without express language directly integrating treaty obligations into law, international agreements must be "executed" before having full effect in U.S. courts. *See Medellín v. Texas*, 552 U.S. 491, 527-28 (2008).

31. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

32. 8 U.S.C. § 1101(a)(42)(A); *see also* DEBORAH E. ANKER, *Legal Change From the Bottom Up*, in *GENDER IN REFUGEE LAW* 50, n. 4 (Efrat Arbel et. al. eds., 2014) (asserting that "the refugee definition in the United States is explicitly framed in terms of persecution or a well-founded fear of persecution . . . thus [adding] past persecution as a separate basis for eligibility, distinct from well-founded fear.")

33. ARBEL, *supra* note 23, at 3.

34. Andrea Binder, *Gender and "Membership in a Particular Social Group Category of the 1951 Refugee Convention"*, 10 COLUM. J. GENDER & L. 167, 171 (2001).

conservative reading, as is the norm in U.S. jurisprudence, limits the refugee definition's applicability to women. Gender immigration law has therefore primarily focused on establishing gender as a qualifying PSG. Moreover, advocates have worked "from the bottom up"<sup>35</sup> to expose gender disparities within immigration law generally and to establish a gender-inclusive framework for interpreting the PSG ground. This framework uses a lens sensitive to problems unique to gender and seeks to fold gender harm into the PSG definition for asylum and refugee claims. The following four seminal cases illustrate the trajectory of gender immigration law and the PSG ground over the last four decades. While immigration advocates have made great strides, these cases make clear the challenges women face when seeking asylum and refugee status.

### 1. *Matter of Acosta*

*Matter of Acosta*<sup>36</sup> is a fundamental case that articulated an initial definition of PSG in the U.S. The Board of Immigration Appeals (BIA) dismissed a Salvadoran man's claim because he did not properly establish PSG membership. The court stated that to qualify as a member of a PSG, the applicant must suffer persecution on account of "a common, immutable characteristic."<sup>37</sup> In dicta, the court noted that sex could qualify as an immutable characteristic.<sup>38</sup> However, the court selectively defined persecution by adopting a "pre-Refugee Act"<sup>39</sup> understanding of the standard. This understanding required that "harm or suffering. . .be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome."<sup>40</sup> *Acosta's* construction of persecution is evidence that the concept cannot be neatly squared with gender harm because gender is not perceived by courts to be "a belief or characteristic a persecutor seeks to overcome."<sup>41</sup>

### 2. *Sanchez-Trujillo v. INS*

A year after *Acosta*, the Ninth Circuit decided *Sanchez-Trujillo*, which elaborated on what constitutes a PSG:

The phrase "PSG" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of

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35. ANKER, *supra* note 32.

36. 19 I. & N. Dec. 211 (B.I.A. 1985).

37. *Id.* at 233 (describing an immutable characteristic as one that is "either beyond the powers of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not to be required to be changed.").

38. *Id.* ("The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.").

39. *Id.* at 222.

40. *Id.* at 223.

41. *See generally infra* Part IV.

central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.<sup>42</sup>

This definition, though perhaps more cogent than *Acosta*'s pithy "immutable characteristic" standard, is more restrictive than *Acosta* and the international UNHCR's definition of PSG.<sup>43</sup> Of particular concern for displaced women is the requirement of "voluntary association": Are women voluntarily associated with each other? If not, do they *become* so associated by choosing to live in a particular country, region, or community?

Although some courts have applied the Ninth Circuit's already restrictive definition directly,<sup>44</sup> other courts have been even more stringent and employed a narrower construction of the refugee definition. For example, in *Gomez v. INS*, the Second Circuit denied asylum to a refugee who suffered extreme abuse at the hands of Salvadoran guerrillas.<sup>45</sup> The court refused to accept that any common characteristic linked Gomez to a cognizable group—"other than gender."<sup>46</sup> *Gomez*'s clear rejection of gender as a PSG, as juxtaposed to the Ninth Circuit's more flexible reading, reveals a lack of uniformity in the application of the refugee definition. Both interpretations could go further in helping displaced women.

### 3. *Matter of Kasinga*

A celebrated win for gender immigration advocates, *Matter of Kasinga* seemed to herald acceptance of a gender-sensitive conception of persecution and membership in a PSG.<sup>47</sup> A Togolese teenager was forced into a polyamorous relationship and fled her country to escape her husband's threat of female genital mutilation (FGM).<sup>48</sup> She first traveled to Ghana and Germany, and eventually sought asylum in the U.S. The BIA accepted FGM as a basis for persecution, but required it be narrowly tailored to "young women of the

42. 801 F.2d 1571, 1576 (9th Cir. 1986); see also Cipriani, *supra* note 6, at 537.

43. Binder, *supra* note 34, at 180; UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), <http://www.unhcr.org/3d58de2da.pdf> [hereinafter 2002 Guidelines] (noting the PSG category requires evidence of either a 'protected characteristic' or 'social visibility.');

see also MICHELLE FOSTER, *Why We Are Not There Yet: The Particular Challenge of 'Particular Social Group,' in GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTER* 18–25 (Efrat Arbel et. al. eds., 2014).

44. *In re Acosta*, 19 I. & N. Dec. 211, 223 (B.I.A. 1985); *Fatin v. INS*, 12 F.3d 1233, 1239–40 (3rd Cir. 1993).

45. *Gomez v. I.N.S.*, 947 F.2d 660 (2nd Cir. 1991); see also Cipriani, *supra* note 3, at 537.

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

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

48. FGM, sometimes referred to as female circumcision, has been described as a harmful, dangerous cultural practice from which many women have no protection. Celia Dugger, *Week In Review: 9-15*, NEW YORK TIMES (June 16, 1996), <http://www.nytimes.com/1996/06/16/weekinreview/june-9-15-asylum-from-mutilation.html>; *The Cut: Exploring FGM*, AL JAZEERA (Oct. 5, 2017, 12:49 GMT), <http://www.aljazeera.com/programmes/aljazeera correspondent/2017/10/cut-exploring-fgm-171002112108882.html>.



Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>49</sup> In its reluctance to recognize this harm as a direct and singular result of *Kasinga*’s gender, the court limited this case to its facts.<sup>50</sup> Regardless, *Kasinga* seemed to forecast a new, perhaps enlightened, framing of gender harm as persecution and gender as a PSG. That women who suffered FGM could possibly qualify for asylum was a notable achievement for feminist advocates. However, *Kasinga* failed to meet such optimistic expectations as subsequent courts have not uniformly applied its precedent, often to the detriment of displaced women.

#### 4. *Matter of R-A-*

In 2009, after a 14-year legal battle, an immigration judge granted asylum to Rody Alverado, a Guatemalan woman who fled her home country to escape “heinous” domestic abuse.<sup>51</sup> She was repeatedly beaten and raped, her husband threatened to torture her, and he once attempted to abort their infant fetus by “kicking her violently in the spine.”<sup>52</sup> The claimant argued that “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” qualified as a PSG.<sup>53</sup> Although the immigration judge originally recognized the proposed PSG, the BIA reversed, finding it insufficient to demonstrate “a voluntary associational relationship.”<sup>54</sup> The BIA made clear its disapproval of creating PSG categories to fit the specific facts of a case.<sup>55</sup> Furthermore, it emphasized that a proposed group must be socially cognizable, or recognized, *within Guatemala* and that this claim lacked a tight causal connection between the persecution and the particular group.<sup>56</sup> Simply put, the BIA refused to recognize Alverado’s harm as persecution.<sup>57</sup>

In 2001, then Attorney General Janet Reno remanded the case to the BIA to await further guidance from the Department of Justice. Over the next decade, two other Attorneys General certified the case and urged the BIA to

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49. *Kasinga*, 21 I. & N. Dec. at 365.

50. KAREN MUSALO, *A Tale of Two Women*, in *GENDER IN REFUGEE LAW* 81 (Efrat Arbel et. al. eds., 2014) (“The Convention ground proposed, which the Board accepted, was a PSG defined by gender, ethnicity, and being uncut and opposed to the practice. The Board ruled that these characteristics met the requirement in US law that a PSG be defined by immutable or fundamental characteristics . . .”). Despite this, *Kasinga* has remained a pivotal victory for feminist refugee advocates in persuading courts to recognize FGM, from broad perspective, as gender-based violence constituting circumstances of membership in a PSG.

51. *Id.* at 907.

52. *Id.* at 908.

53. *Id.* at 907.

54. *Id.* at 918.

55. *Id.* (“We find it questionable that the social group adopted by the Immigration Judge appears to have been defined principally, if not exclusively, for purposes of this asylum case, and without regard to the question of whether anyone in Guatemala perceives this group to exist in any form whatsoever.”).

56. *Id.*

57. *Id.* at 920.

make a decision until an immigration judge finally granted asylum.<sup>58</sup> While this decision provided some relief for displaced women, its scope is limited and it supports legal standards that (1) narrow the interpretation of membership in a PSG to avoid easy wins; and (2) reiterate the necessity of a nexus between persecution and the conventional ground to grant asylum.<sup>59</sup> Although domestic violence has been considered persecution by some courts,<sup>60</sup> this result is by no means certain or standard. Moreover, at the time of publication, Attorney General Jeff Sessions is reviewing women's asylum cases and, some commentators fear,<sup>61</sup> he will reverse what little positive BIA precedent exists on this issue.<sup>62</sup>

### B. *A Closer Look: Sixth Circuit Jurisprudence*

Given this Byzantine jurisprudential history, gender immigration's path forward remains unclear. What is certain, however, is that this jurisprudence significantly affects women's access to refugee status or asylum, and those effects are no more acutely felt than in the Sixth Circuit. An analysis of the following cases, each within the Sixth Circuit and each the product of a narrow reading of the refugee definition, reveals that persecution and PSG are inadequate gauges by which to adjudicate women's refugee status or asylum claims. Therefore, these cases demonstrate that the attempt to establish persecution on account of gender as a PSG is a losing proposition.

#### 1. *Kante v. Holder*

In *Kante v. Holder*,<sup>63</sup> the court reviewed an appeal by Fatima Kante, a native Guinean who claimed she was abused and raped by men of unknown affiliation.<sup>64</sup> According to Kante, the persecution had been imputed to her because of her father's political activity. Kante also emphasized that her status as a woman was a motivating factor.<sup>65</sup> She was forced out of her town, lost contact with her family, and eventually, with the help of a family friend, reached the U.S. as a stowaway.<sup>66</sup> Kante argued that she belonged to a

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58. CENTER FOR GENDER AND REFUGEE STUDIES, *Matter of R-A-* (last visited Dec. 13, 2017), <https://cgrs.uchastings.edu/our-work/matter-r#overlay-context=press>; see also *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 391 (B.I.A. 2014).

59. MUSALSO, *supra* note 50 at 92-93.

60. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 392 (2014) (holding that depending on the facts and circumstances of the case, "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable PSG).

61. Sophia Genovese, *Sessions Likely to End Asylum Eligibility for Victims of Domestic Violence*, THE INSIGHTFUL IMMIGRATION BLOG (Mar. 20, 2018), <http://blog.cyrusmehta.com/2018/03/sessions-likely-to-end-asylum-eligibility-for-victims-of-domestic-violence-how-courts-can-resist.html>.

62. Jess Braving, *Jeff Sessions to Rule on Asylum for Battered Women*, WALL ST. J. (Mar. 12, 2018, 7:31 PM), <https://www.wsj.com/articles/jeff-sessions-to-rule-on-asylum-for-battered-woman-1520897494>.

63. 634 F.3d 321 (6th Cir. 2011).

64. The record was inconsistent on whether the attackers were insurgent rebels or government security forces. *Id.* at 323.

65. *Id.* (claiming Kante's brother and father supported opposition forces and that she was subject to abuse as an extension of retaliatory government action).

66. *Id.*

PSG—the membership of which was women who were “subjected to rape as a method of government control”<sup>67</sup>—but the BIA denied her claim, finding this argument to require an overbroad expansion of the PSG ground.<sup>68</sup> The court further opined that Kante’s argument was circular<sup>69</sup> because her proposed group did “not share any narrowing characteristic other than the fact of being persecuted.”<sup>70</sup> Kante’s classification was, according to the court, too “generalized” and “far-reaching” to constitute a cognizable PSG.<sup>71</sup>

## 2. *Marikasi v. Lynch*

In *Marikasi v. Lynch*,<sup>72</sup> the Six Circuit similarly refused to grant asylum to a Zimbabwean woman who suffered domestic abuse. The court stressed that she did not fit within the “marital status” PSG—defined in this context as those who are unable to leave an abusive relationship.<sup>73</sup> That Marikasi could “move freely through the country” and remain out of contact with her husband was probative in her asylum denial.<sup>74</sup> The BIA determination, affirmed by the Sixth Circuit, states that even though victims of domestic violence may qualify as a PSG, some other commonality must exist to link those victims together.<sup>75</sup> The court concluded that domestic violence is too general a harm to qualify for membership in a PSG. It distinguished this case from other similar domestic abuse cases<sup>76</sup> primarily because “Marikasi failed to substantiate any religious, cultural, or legal constraints that prevented her from separating from the relationship in Zimbabwe or moving to a different part of that country.”<sup>77</sup> It is important to note the court’s double-speak here: that domestic violence both is and is not a sufficient immutable characteristic.<sup>78</sup>

## 3. *Sene v. U.S. Attorney General*

Finally, in *Sene v. U.S. Attorney General*, a woman filed for asylum to escape mistreatment and torture in Mauritania.<sup>79</sup> Sene had been beaten,

67. *Id.* at 326-27.

68. *Mohammad v. Gonzales*, 400 F.3d 785, 801 (9th Cir. 2005).

69. *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005) (“[A] social group may not be circularly defined by the fact that it suffers persecution. The individuals in the group must share a narrowing characteristic other than their risk of being persecuted.”).

70. *Kante*, 634 F.3d at 327.

71. *Id.*

72. 840 F.3d 281 (6th Cir. 2016).

73. *Id.* at 290; *see generally* *Matter of A-R-C-G-*, 26 I.&N. Dec. 388 (Aug. 2014).

74. *Marikasi*, 840 F.3d at 291.

75. *Id.* at 290.

76. *Matter of A-R-C-G-* provides some precedent granting asylum to women fleeing abusive marriages 26 I.&N. Dec. 388, 392-93 (Aug. 2014); *see also supra* note 82.

77. *Marikasi*, 840 F.3d at 291.

78. The Sixth Circuit supports the BIA’s dicta that domestic violence qualifies as a particular social group while simultaneously requiring some other immutable characteristic. In essence, then, domestic violence really is not enough.

79. 679 Fed. App’x. 463 (6th Cir. 2017).

raped, and “cut”<sup>80</sup> as a child. She eventually moved to Senegal, where she resided for eleven years before coming to the U.S. During removal proceedings, Sene claimed to have received a letter stating that her daughter would be subjected to FGM upon returning to Senegal, “as required by African tradition.”<sup>81</sup> However, because the Senegalese government had ruled FGM unlawful, the court decided no threat existed. On this basis, the court declined to recognize a connection to an immutable characteristic that would qualify Sene’s daughter as part of a PSG. In doing so, the Sixth Circuit rejected the Ninth Circuit’s characterization of FGM as a “permanent and continuing act of persecution”<sup>82</sup> and again blocked gender as a qualifying PSG.

The preceding decisions suggest that women fleeing gender-motivated harm will not uniformly find redress in the federal court system without some additional qualification that tailors their experience to a distinct, cognizable group. Despite the proliferation of national guidelines aimed at making the refugee definition more flexible and its application toward women more liberal,<sup>83</sup> the Sixth Circuit patently rejects the notion that harm against women because they are women is persecution. According to the court, this reasoning is circular, a legal distinction that is fatal in immigration proceedings. But this rule ignores cultural realities that engender sexual violence in the first place,<sup>84</sup> and proves that even today, women *qua* women is not enough.<sup>85</sup>

### C. *Discourse on Gender Immigration Law*

One of the most fundamental criticisms of gender immigration law is that gender should be a ground distinct from the five conventional grounds of race, religion, nationality, PSG, and political opinion.<sup>86</sup> Immigration advocates claim that this distinction would provide the necessary nexus between persecution and women, which, in turn, would eliminate the need to claim that gender qualifies as a PSG. But of course, a gender ground has not, in any formal sense, been included in the refugee definition. What has gained more traction is that gender should qualify as a PSG, an idea demonstrated in cases like *Matter of Acosta* and *Kasinga*. Fundamental to this idea is that gender claims must be analyzed using a culturally-sensitive framework,<sup>87</sup> one recognizing that systemic gender oppression exists and is often a primary reason

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80. Colloquial term meaning subjected to FGM.

81. *Sene*, 679 Fed. App’x at 464.

82. *Mohammad v. Gonzales*, 400 F.3d 785, 801 (9th Cir. 2005).

83. Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORN. INT’L L. J. 625 (1993); Nancy Kelly, *Guidelines for Women’s Asylum Claims*, Vol. 4 No.6 INT’L J. REFUGEE L. 517 (1994).

84. U.S. Citizenship and Immigration Services, *Membership in a Particular Social Group*, ¶ 3 (last visited Dec. 13, 2017), <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-62325/0-0-0-64099/0-0-0-64242/0-0-0-64298.html>.

85. FOSTER, *supra* note 43.

86. Cipriani, *supra* note 3, at 538-46; Binder, *supra* note 38; Jenny-Brooke Condon, *Asylum Law’s Gender Paradox*, 33 SETON HALL L. REV. 207, 248-56 (2002).

87. Cipriani, *supra* note 3, at 514-33.

why women leave their countries. However, cultural sensitivity is not, and is unlikely to become, a cornerstone of federal judicial analysis, making gender as a PSG impracticable. *Matter of R-A-*, the Guatemalan domestic abuse case, exemplifies this problem in the context of gender sensitivity: the applicant sought redress from domestic violence, not from persecution from the government or an intractable insurgent group. Certainly, it is the role of a judge to adjudicate in an unbiased manner and adhere to precedent. But the issue is what exactly constitutes persecution and whether, if at all, harm against women creates a connected, cognizable group. The prevalent conservative reading of the refugee definition denies women asylum for harm that is equally as damaging as persecution on account of race, religion, ethnicity, or political opinion. This need not be the case.

Just as feminism has evolved, so too must gender immigration law move beyond the idea that gender as a PSG will remedy the legal protection gap between the sexes. Advocates' efforts to alter the immigration landscape have succeeded to some degree, but the refugee definition does not, in its current state, properly account for gender harm. The preceding cases demonstrate that gender immigration law is in need of radical change, a change that this Note posits can be effectuated using an equally radical feminist theory.

#### IV. IS PERSECUTION ENOUGH?

One gender immigration law academic has asked: Isn't persecution enough?<sup>88</sup> She argues that yes, refugee jurisprudence should recognize women's experiences, where appropriate, as persecution *per se*.<sup>89</sup> This Note, however, asks the exact opposite: is persecution enough? More specifically, what is the relationship between persecution and gender harm? Does our current conception of persecution limit displaced women's ability to attain much-needed relief? This Note posits that how courts define persecution is inapposite to the objectives of gender immigration law. To understand why, dominance feminism—a theory that radicalized the feminist conversation generally—is applied to current discourse to advance the debate on how to approach the legal protection gap. The proposed result is a statutory change to the refugee definition that disposes of the term persecution and adds gender-motivated harm as a discrete ground for asylum and refugee status.

This radical shift relies on three well-established assumptions. First, the harm that women suffer is cultural, structural, systemic, and widespread. Second, judges adjudicating asylum cases conceptualize persecution in a static way, making the concept discrete, recognizable, and uniformly applicable by courts. Yet, the opposite is true: persecution is abstract, relative, and

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88. Crystal Doyle, *Isn't Persecution Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 519 (2009).

89. *Id.* at 554-56.

cannot be applied effectively to women if conceptualized in a traditional fashion. There is no universal legal definition of this word.<sup>90</sup> This is especially true in the U.S.; unlike the Tax Code, one cannot simply flip to the next subsection and find an enumerated explanation. Third, there is disharmony between the historical concept of a refugee and the reality of modern refugee women. The harm contemplated by a panel composed exclusively of men during post-war Europe and the oppression to which women are subjected today are worlds apart.

### A. *The Theory: Foundations and Development*

The foundational theories of feminism provide distinct ways to approach women's issues and solve social problems using a systematic approach.<sup>91</sup> The evolution of gender immigration law, in many ways, parallels the evolution of feminist theory. However, where feminism evolved to become radical and revolutionary, the theory behind gender immigration law has become stagnant. For example, two fundamental feminist theories, formal and substantive equality, track with gender immigration jurisprudence and can be applied to earlier cases like *Sanchez-Trujillo* and *Kasinga*. But, gender immigration law has not evolved. This Note posits that a more radical feminist theory like dominance feminism can shift the instrumental objectives of this field. This evolution is necessary to move away from the static, traditional, and conservative notion of persecution toward recognizing gender-motivated harm as a distinct ground necessary to bridge the protection gap.

#### 1. *The Evolution from Formal to Substantive Equality in Gender Asylum Law*

Formal equality is the "gender-blind" approach to applying the law. Proponents of this theory posit that formal equality should eliminate sex-based differences and subject any one person or group of persons to the same rules, rights, and privileges as any other similarly situated person or group of persons.<sup>92</sup> Inherent in this framework is a sense of empiricist justice.<sup>93</sup>

Formal equality feminists would consider the facial neutrality of the refugee statute as a net positive. An example: a woman persecuted for her dissident political beliefs (a different conventional ground than PSG) is just as likely as a man to be granted asylum, provided that she is displaced and has the requisite well-founded fear. Formal equality is most similar to the court's disposition in *Sanchez-Trujillo*. But the decision, like the theory, disserves

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90. Cipriani, *supra* note 3, at 538; David Neal, *Women As A Social Group: Recognizing Sex-Based Persecution As Grounds For Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 226, n.128 (1988).

91. See generally Katherine Bartlett, *Gender Law*, 1 DUKE J. L. & POL'Y 1 (1994).

92. Wendy Williams, *The Equality Crisis*, 7 WOMEN'S RTS. L. REP. 175 (1982) (exploring the boundaries of gender difference and the ramifications of cultural assumptions on law and equality).

93. Arguments that female law firm partners should receive equal pay is a basic example of this approach. Bartlett, *supra* note 91, at 2-4.

women attempting to establish membership in a PSG because women, unlike men, suffer harm solely because they are women.<sup>94</sup> Neither formal equality nor the conventional grounds account for inherent differences between the harms that men and women suffer. Thus, the gender immigration landscape must evolve in the same way that feminism has evolved, past the rigid constraints of formal equality.

Substantive equality, by contrast, takes a more nuanced approach to achieving equality.<sup>95</sup> Proponents of this theory argue that because women and men are not similarly situated (e.g., certain biological and psychological differences) the law should, at times, treat them differently.<sup>96</sup> In the context of gender immigration law, substantive equality theorists would argue that to the extent strict, equal treatment would disadvantage women, the law should correct for that imbalance.<sup>97</sup>

If the evolution of gender immigration law and feminist theory track one another, as this Note argues, then decisions like *Kasinga* represent a subtle shift away from a formal equality framework toward a substantive equality framework.<sup>98</sup> In *Kasinga*, the Ninth Circuit recognized that in some African countries, female circumcision is considered an appropriate precondition to become eligible for marriage. The court further acknowledged that in many cases women have no choice in the matter,<sup>99</sup> that FGM is a problem specific to women, and that the PSG definition must be flexible enough to include this harm. Generally, the court in *Kasinga* recognized that issues specific to gender underlie the facial neutrality of the refugee definition.

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94. Binder, *supra* note 34, at 168-71. This argument illustrates a blend of cultural and substantive feminist theories. Binder explains that facial neutrality is “facial gender-deficiency” because it fails to take into account that women suffer from harms that are gender-specific (liberal feminist point) and that are imposed *because* they are not men (non-subordination feminism point); *see also* CATHERINE MACKINNON, *Difference and Dominance: On Sex Discrimination*, in *THEORIZING FEMINISMS: A READER* (Elizabeth Hackett & Sally Haslanger eds., 2005) [hereinafter *Difference and Dominance*] (“... the sameness standard [or formalism] has mostly gotten men the benefit of those few things women have historically had . . .”).

95. Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000).

96. One scholar argues that certain laws should intentionally discriminate in favor of men, if the net result will inure to the benefit of women. *See* Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends On Discrimination*, 109 NW. U. L. REV. 1 (2015).

97. Affirmative action programs are a relevant analogy.

98. Melanie Randall, *Refugee Law and State Accountability For Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender*, 25 HARV. WOMEN'S L. J. 281, 281-82 (2002); Neal, *supra* note 90; Gregory A. Kelson, *Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins*, 6 TEX. J. WOMEN & L. 181 (1997); Anjana Bahl, *Home is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution*, 4 CARDOZO WOMEN'S L.J. 32 (1997); Stephanie Pell, *Adjudication of Gender Persecution Cases Under the Canada Guidelines: The United States Has No Reason to Fear an Onslaught of Asylum Claims*, 20 N.C. J. INT'L L. & COM. REG. 655 (1995).

99. There are few—if any—opportunities to learn about the detrimental effects of female circumcision (or female genital mutilation); indeed, women are sometimes excited to undergo the procedures. This raises complicated issues of cultural respect and relativism, whether one cultural is in a position to question another's practices. However, this does not change the issue that women who may not want to undergo the procedure are subjected to it anyway, a condition that courts recognize can, in specific ways, create a gender-based PSG.

*Kasinga* and its progeny<sup>100</sup> are a nod toward cultural relativism and a de facto adoption of the substantive equality framework. These cases recognize and accommodate for gender differences in the refugee definition, but are limited to the facts of the case. *Kasinga*, for instance, may have recognized that persecution against women qualifies gender as a PSG, but it narrowly tailored the definition to “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.” Limiting a case to its facts necessarily limits its application. And, thus, *Kasinga* and its progeny did not achieve the objective of substantive equality: normalizing the qualification of gender as a PSG in recognition of issues specific to gender.<sup>101</sup>

Because the theoretical foundations of gender asylum law have stagnated, the field must evolve to meet the needs of displaced women. This evolution requires a radical departure from the formal and substantive theories. Using dominance feminism to catalyze a shift in the conversation is progressive and will effectuate greater inclusivity.

## 2. *The Move Toward Dominance Feminism as a Statutory Lens*

Dominance feminism, as described by its most prominent proponent, Catherine MacKinnon, recognizes the sociological phenomenon of cultural male dominance.<sup>102</sup> In her seminal work,<sup>103</sup> MacKinnon describes a theory of power and how it permeates sex via gender.<sup>104</sup> She describes feminism as a response to an epistemological crisis, which reveals that gender is not an ingredient of womanhood, but a product of culture.<sup>105</sup> If it is true, as MacKinnon posits, that gender is an expression of power and that power is demonstrated by violence, then sexual violence and gender oppression represent a system of control.<sup>106</sup> Dominance feminism, therefore, engages directly with patriarchal forces in a way that formal and substantive equality feminism do not. MacKinnon’s ideas require a shift in perspective that considers how the “male point of view forces itself upon the world,”<sup>107</sup> an invasion of particular relevance to persecution against displaced women, as well as gender immigration law in general.

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100. *Bah v. Mukasey*, 529 F.3d 99 (2nd Cir. 2008); *Matter of A-T-*, 25 I. & N. Dec. 4 (BIA 2009).

101. The PSG accepted by the court and affirmed by the Ninth Circuit was heavily circumscribed by the facts of that case. Additionally, as is evident from the Sixth Circuit decisions, the “equal nature” of the PSG category presents unequal standards.

102. Catherine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983) [hereinafter *Feminism, Marxism*].

103. *Feminism, Marxism*, *supra* note 102, at 635.

104. *Id.* at 636 (“If the sexes are unequal, and perspective participates in situation, there is no ungendered reality or ungendered perspective.”).

105. *Id.* at 644 (“... the state is male in the feminist sense. The law sees and treats women the way men see and treat women.”).

106. *Bartlett*, *supra* note 91, at 7 (“... [sexual harassment] systematically demeans women as sexual objects, thereby reinforcing male control and power over women.”). This Note extends this assumption to mean that *sexual violence* is a similar expression of male dominance and control.

107. *Feminism, Marxism*, *supra* note 102, at 636.



Dominance feminism as applied to gender immigration law re-conceptualizes gender-motivated harm from a displaced woman's perspective (instead of from the majoritarian perspective). MacKinnon criticizes feminism for its inability to step outside the system that created it<sup>108</sup> and posits that historically it has been impossible for women to secure a perspective divorced from that of men. Similarly, work to expand the refugee definition through qualification of gender as a PSG is limited by the sociological confines of this structure. How we typify, relate to, and ultimately rule on gender harm is informed by a system that fails to conceptualize this harm as persecution. The effectiveness of the refugee definition depends on the understanding that gender violence is woven into the fabric of women's reality. Absent this understanding, gender immigration law will remain stagnant.

If gender as a PSG is no longer the objective, then dominance feminism dictates that gender-motivated harm must be established as a new ground, distinct from the other conventional grounds, because it is overwhelmingly a "woman's" problem.<sup>109</sup> Gender harm is not racist, ageist, homophobic, transphobic, or even anti-Western. Rather, it is a tool, the very purpose of which is to perpetuate an established system of dominance and subordination. Dominance feminism recognizes this phenomenon, and, therefore, when applied to gender immigration law allows for the paradigm shift necessary to better include women in the immigration regime.

If the primary instrumental objective of gender immigration law is to better serve displaced women, then understanding gender harm's place in immigration law is necessary. Formal and substantive equality theories have, thus far, tracked the evolution of the refugee definition as applied to displaced women. Dominance feminism supplies the necessary tools to further this evolution and better accommodate for the reality of displaced women's experience.

### B. *The Policy: A Statutory Proposal*

Dominance theory illuminates the conceptual flaw within gender immigration jurisprudence: gender violence is inherently circular. Women are harmed because of their gender, and they are gendered for the purpose of inflicting harm.<sup>110</sup> Yet, persecution and gender harm are incompatible in the eyes of the court. And simply including gender in the refugee definition will not remedy this issue.<sup>111</sup>

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108. *Id.* at 639.

109. That sexual violence disproportionately affects women is not a controversial statement. Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 *FORDHAM L. REV.* at 249, 252 (1999) (stating that sexual violence is "experienced almost exclusively by women . . ."); Binder, *supra* note 34, at 172; Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 *HASTING WOMEN'S L. J.* 221, 222 (2000).

110. Feminism and Marxism, *supra* note 102, at 650-51, 651 n.36 (explaining the intricate relationship among sex, gender, and sexual violence).

111. This is more than mere semantics; it reveals an underdeveloped understanding of how to grapple with the public/private domain; it ignores the question of cultural relativity; it weakens the process by which harm against women is understood. Surely the greatest evidence of this is that courts still struggle

The Sixth Circuit provides that “persecuted individuals are those who are specifically targeted by the government for abuse based on a statutorily protected ground and . . . are not merely a victim of indiscriminate mistreatment.”<sup>112</sup> Moreover, the court insists that societally unfair or even unconstitutional harm cannot amount to persecution.<sup>113</sup> Under this interpretation, gender harm can only be grounds for persecution in exceptional circumstances.<sup>114</sup> Because the systematic oppression of women, *the specific harm from which they suffer*, is not conceived of as exceptional, women must find alternative routes to remedy their harm. This burden is both too great to bare and a superficial abstraction that produced unbalanced results between men and women in immigration law.

That gender-motivated harm is systemic and does not amount to persecution in the eyes of the court should not render it invisible to the justice system. For this reason, this Note proposes that a statutory clause be inserted into the current refugee definition. This amendment would define refugee to include displaced persons who are:

... persecuted or who have a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion, *or who have a well-founded fear of gender-motivated harm.*

The proposed amendment creates a separate ground for harms particular to women, specifies the harm with sufficient clarity to be useful while remaining flexible, and eliminates the conceptual problem of linking persecution to gender. Importantly, the new language provides a clear avenue for gender-based claims<sup>115</sup> by replacing persecution with well-founded fear. This specific change solves the paradox of women persecuted both as women and because they are women.<sup>116</sup>

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to adapt to gender asylum needs. Despite a global shift liberalizing the definition of a refugee, including U.S. and UNHCR guidelines, courts are still reluctant to allow membership in a PSG to subsume these claims. That this phenomenon is a result of conservative textual analysis does not fully address the problem. The answer must be more profound: it is not the relationship between the words that creates the obstacle, but what the words represent.

112. *Marikasi v. Lynch*, 840 F.3d 281, 288 (6th Cir. 2016); *see also Gilaj v. Gonzales*, 408 F.3d 275, 285 (6th Cir. 2005).

113. *Lumaj v. Gonzales*, 462 F.3d 574, 577 (6th Cir. 2006).

114. *See Escobar-Batres v. Holder*, 385 Fed. App'x 445, 447 (6th Cir. 2010) (“Escobar’s proposed social group is simply too broad, as it consists of any female teenage citizen who refuses to join the *Maras* and could include all Salvadoran teenage girls who are currently not in the *Maras*. Although Escobar attempts to narrow her proposed group by emphasizing that its members are harassed, beaten, tortured, and even killed for not joining the *Maras*, we have held that a social group may not be circularly defined by the fact that it suffers persecution.”) (internal citation omitted); *see also In Re Kasinga*, 21 I. & N. Dec. 357, 368 (BIA 1996) (“The applicant has a well-founded fear of persecution in the form of FGM if returned to Togo. The persecution she fears is on account of her membership in a particular social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. Her fear of persecution is country-wide.”).

115. By itself, this change is not meaningfully distinct from that proposed by advocates for gender as an additional ground or for gender to be read into the PSG category.

116. *Condon*, *supra* note 86, at 250-54.

Consider again *Kante v. Holder*. The primary obstacles to Kante's asylum claim were the "broad, sweeping" nature of her proposed PSG and the circularity of establishing group membership based on persecution. This is arguably a logical reading of the law as it has developed, but it is unfair.<sup>117</sup> The proposed addition to the statute re-centers the court's attention on the gravity of the harm suffered (i.e., rape and physical abuse) and the subjective nature of the fear (i.e., its "well-founded"<sup>118</sup>-ness), which results in a clearer, more just outcome. Just as dominance feminism shed new light on the gender dynamic from a sociological perspective, so too can it justify a statutory amendment that circumvents the conceptual problem of the persecution prong and disposes of the PSG qualification issue.

Some argue that if language inured to the benefit of women is too generous, it would lead to an unmanageable influx of displaced women whom the U.S. does not have the resources to accommodate. However, this fear is wholly chimerical.<sup>119</sup> Disposing of the term persecution does not allow all women a straightforward grant of asylum or refugee status. Rather, the proposed statute only contemplates women *displaced* because they are fleeing from severe gender-motivated harm. While they would no longer be required to satisfy the persecution prong, they must still establish the element of well-founded fear. Because this clause would be integrated directly into the statute, Kante's claim, for example, would still be limited by the remaining elements of the refugee definition. Furthermore, refugee inflow is discretionary and will necessarily be limited by Executive Branch determinations.<sup>120</sup> Given these limitations, floodgate concerns are illusory and should not inhibit progressive changes in and application of refugee law.

Consider also *Marikasi v. Lynch*, where the Sixth Circuit denied an asylee's attempts to establish membership in the "marital status" PSG. The court criticized Marikasi's attempt to fit within this extant category because she had not demonstrated an inability to escape her abusive husband. The court concluded that she could have fled to another part of the country.<sup>121</sup> This decision reinforces two previously identified conceptual fault lines. First, that domestic abuse—which the court conceded as the relevant harm in this

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117. Interestingly, this theoretical problem can be thought about with a grammatical analysis of the statute. The subject is persecution, or more precisely, a persecutor; the object is an individual or group of individuals; the nature of the ground for persecution is relevant as a connector, in that it establishes something *against which persecution may occur*. So, the framework creates a linear process that emphasizes objectification of the reason one is subject to persecution. As noted, gender asylum scholars have focused on the 'back end' of this process, i.e. the reason for persecution. But even if gender is a fully recognized ground, it does not address the more nebulous issue of how courts regard gender harm and whether that qualifies as persecution.

118. See *supra*, pg. 25 (the new statutory proposal).

119. Condon, *supra* note 86, at 243.

120. See Neal, *supra* note 90, at 241-45; see also Trump, *supra* note 8.

121. See *Marikasi v. Lynch*, 840 F.3d 281, 291 (6th Cir. 2016).

case<sup>122</sup>—is not necessarily persecution. And second, that when particular social categories are created, they should be strictly limited to the facts of the cases from which they were created. These notions are incompatible with women's realities.

The proposed refugee definition would resolve this incompatibility by removing the determination of whether and how gender fits within the PSG requirement from the court's purview altogether. Dominance feminism inspires inclusion of the unique harms faced by women—rape, domestic violence, FGM, etc.—into to the instrumental objective of immigration law's protections. It is important to reiterate, however, that this new definition does not, and should not, dispose of the additional elements to achieve refugee and asylum status. Rather, the proposed statutory amendment takes a step toward recognizing gender-motivated harm for what it is: a pervasive intrusion in women's everyday lives, especially those most in need.

## V. CONCLUSION

In a time of feminist turmoil and unrest,<sup>123</sup> it would behoove Congress to take action to protect displaced women. The need for protection is all the more stark given Congress' unwillingness to ratify gender-protective international law.<sup>124</sup> Congress has not hesitated to amend to refugee law in the past,<sup>125</sup> and the most persistent objection to doing so now is the dreaded "fear of floodgates."<sup>126</sup> But this illusory concern should no longer encumber feminist advocates' efforts to bridge the gender protection gaps in gender immigration law. While fruitful, these efforts are necessarily limited by male-centric statutory language and case law developed in a time when international women's rights were a fringe concern. To ensure that gender immigration law remains "dynamic and action-oriented,"<sup>127</sup> a demand for radical statutory change patterned on radical feminist theory is imperative. Bold change is needed, and that change must come from the top.

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122. *Id.* at 290 ("In this case, the BIA determined that, while victims of an abusive domestic relationship can qualify as a particular social group, Marikasi did not prove that she was part of a group with the requisite common, immutable characteristic. We agree.").

123. Stephanie Zacharek et. al., *The Silence Breakers*, TIME, <http://time.com/time-person-of-the-year-2017-silence-breakers/> (detailing the '#MeToo' campaign, its roots and international persuasion).

124. In particular, Congress has refused to ratify the Convention on the Elimination of All Forms of Discrimination Against Women 1249 U.N.T.S. 13, G.A. Res. 180 (XXXIV 1979), 19 I.L.M. 33 (1980).

125. Condon, *supra* note 86, at 254.

126. Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119 (2007).

127. Feller, *supra* note 13, at 139.