

CURRENT DEVELOPMENTS

AN INTERSECTIONAL ARGUMENT FOR THE ABOLITION OF THE “PROTECTED GROUND” FRAMEWORK

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TABLE OF CONTENTS

INTRODUCTION	519
I. BACKGROUND ON INTERSECTIONALITY AND CRITICAL RACE FEMINISM	520
II. CRITIQUE OF THE “PROTECTED GROUND” FRAMEWORK	521
III. A SOLUTION: ELIMINATION OF “PROTECTED GROUNDS”	524
CONCLUSION	527

INTRODUCTION

Few would argue that the American immigration system, in its present form, adequately addresses the concerns of interested parties. One facet of the immigration complex warrants nuanced consideration: the persistent failure of the system to protect immigrant women. Structural and systemic oppression ingrained in the American asylum system work to the disadvantage of these women. To better understand the issues women endure in the context of asylum law, it is helpful to utilize an intersectional framework.

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Intersectionality, as informed by Critical Race Feminism, will provide the basis for analysis of asylum law as it regulates immigrant women of multiple identities while simultaneously codifying the oppression it seeks to exert. In particular, this analytical tool will be utilized to critique the statutory “protected ground” framework of asylum law. Failure to utilize an intersectional approach in this context obscures the impacts on women who navigate the system and impedes the development of solutions that can mitigate harm. As discussed in this Paper, eliminating the “protected ground” structure is one solution, and arguably a necessary step in remedying the systemic harm thrust upon multiply identified women.

I. BACKGROUND ON INTERSECTIONALITY AND CRITICAL RACE FEMINISM

Though something of a pop-culture buzzword, the term “intersectionality” originated in the context of feminist theory.¹ The goal of this framework is to shift our analysis from a categorical understanding of identity, in which aspects of self are viewed as discrete classes that may be added together to represent the full extent of oppression. The categorical approach is typified by the “tendency to treat race and gender as mutually exclusive categories of experience and analysis.”² In so doing, those who are “multiply-burdened” are effectively erased.³ The “intersectional experience is more than the sum” of an individual’s race (and the racism that they suffer), gender (and the sexism they endure), socioeconomic status (and its resulting oppression), and other various aspects of identity.⁴ Thus, an intersectional understanding recognizes that oppression is determined by the entire identity of a person: the oppression faced by a Mexican immigrant woman is because she is a “Mexican immigrant woman.” The sexism she faces is not the same as that felt by a white non-immigrant woman, white immigrant woman, or any other conceivable identity, because “properties [of identity] cannot be physically separated, neither from the whole they constitute nor from each other.”⁵ Rodó-Zárate and Jorba ask: “can one, for instance, imagine a woman without an age?”⁶ Of course this is not possible.⁷ So understood, an intersectional

1. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989). Crenshaw coined the term “intersectionality” in 1989. *Id.*

2. *Id.* at 139.

3. *Id.* at 139–40.

4. *Id.* at 140. A crucial takeaway from Crenshaw’s analysis is that the oppression thrust upon Black women is not simply sexism plus racism: the sexism endured by a white woman, and the racism endured by a Black man, when combined, are not equivalent to the oppression endured by a Black woman because she is a “Black woman.” *Id.*

5. Maria Rodó-Zárate & Marta Jorba, *Metaphors of Intersectionality: Reframing the Debate with a New Proposal*, EUR. J. WOMEN’S STUD. (forthcoming).

6. *Id.*

7. Rodó-Zárate and Jorba propose the metaphor of a “basket of apples” to explain intersectional analysis: in picturing a basket of apples, one can imagine apples of various shapes, sizes, colors, textures and tastes. *Id.* A particular apple, perhaps one that is red, large, and sweet, is the sum of its properties—each descriptor cannot be viewed in isolation, for “they are already simultaneously present and configuring the

framework offers an understanding of the oppression an individual actually endures, as a complete person of inseparable identities. In the context of immigration law, this framework has particular value, as the true extent of systemic disadvantage can be obscured if one fails to recognize the different, and oftentimes magnified, oppressions imposed upon multiply identified women.

Critical Race Feminism (CRF), a feminist iteration of Critical Race Theory (CRT), examines the law’s disparate treatment of multiply identified women.⁸ The theory incorporates aspects of Critical Legal Studies, CRT, and feminist jurisprudence to craft an inclusive, legally focused framework.⁹ Scholarship has analyzed how “existing legal paradigms,” despite their purported neutrality towards race, are often insufficient to address the legal needs and concerns of women of color.¹⁰ To combat oppressive structures, legal reforms have been embraced “as a tool of necessity.”¹¹ The CRF/intersectional framework is utilized to analyze the impacts of asylum law, and ultimately offer a law-based reform that aims to destabilize the internalized oppression of the legal system in this context.¹²

II. CRITIQUE OF THE “PROTECTED GROUND” FRAMEWORK

The asylum system is flawed in various respects, each of which substantially burdens female applicants. First, the statutory requirements for asylum fail to officially recognize a claim to asylum on the basis of gender. Gender is not included in the list of “protected grounds” upon which an applicant must have faced, or will face, persecution.¹³ The only avenue for obtaining a

apple from the start.” *Id.* The culmination of these properties is determinative of the value placed on them by society. *Id.* Returning to the practical application of this metaphor, each of the aforementioned descriptors, color, size, etc., can be analogized to aspects of human identity, such as gender, or immigration status.

8. Adriën K. Wing, *Critical Race Feminism*, SAGE ENCYCLOPEDIA OF HIGHER EDUCATION, 319–21 (Miriam E. David & Marilyn J. Amey, eds., 2020) The core principles of CRF include: intersectional analysis of women “on the margins”, the oftentimes “overlapping and intertwined” oppression endured by these women, and recognition that systems of oppression are ingrained in legal structures and societal institutions in general. Johonna Turner, *Unitive Justice And Re-Entry Culture Change: Race, Gender And Restorative Justice*, 23 RICH. PUB. INT. L. REV. 267, 272–74 (2019).

9. ADRIEN K. WING, *CRITICAL RACE FEMINISM* 4 (2nd ed. 2003). For an explanation of the tenets of Critical Legal Studies and CRT see Wing, *supra* note 8, at 4–8.

10. WING, *supra* note 9, at 2. Legalist reforms offer a pathway for the realities of oppression, gleaned from an intersectional consideration of identity, to be translated into a legal structure responsive to these concerns, as opposed to the current system founded on the unattainable “ideal of neutrality.” Mari J. Matsuda, *When The First Quail Calls: Multiple Consciousness As Jurisprudential Method*, 14 WOMEN’S RTS. L. REPORTER 213 (1989).

11. Matsuda, *supra* note 10. Offshoots of CRF, including “Latina/o critical legal theory” or “LatCrit theory” have been applied by scholarship in the immigration context. Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory, and Gender at the U.S.- Mexico Border*, 49 DEPAUL L. REV. 729, 732 (2000).

12. It has been argued that CRF works, despite the centrality of its attendant intersectional framework, have failed to meaningfully discuss the “repercussions of conceptualizing identity as . . . ‘interconnectedly’ formed.” Jennifer C Nash, *Re-Thinking Intersectionality*, 89 FEMINIST REV. 1, 11 (2008). While this overarching critique may not lack merit, potential solutions that do not arise out of an intersectional framework do not go far enough to truly reform the legal asylum system.

13. 8 U.S.C. § 1101(a)(42).

gender-based grant of asylum is through the assertion of persecution on account of membership in a “particular social group” (PSG).¹⁴ However, it is not enough for an applicant to state that they have suffered persecution on account of their status as a woman. Courts have failed to recognize such a “group” as cognizable. Under the judicially developed requirements of immutability, particularity, and social distinction, the elements required to establish a cognizable PSG,¹⁵ the grouping of “women” satisfies only the immutability requirement.¹⁶

A woman seeking asylum on account of gender-based persecution thus must insert qualifiers to limit the reach of her asserted PSG. The Ninth Circuit has recognized “women in a particular country. . . could form a particular social group.”¹⁷ Four other circuits recognize the cognizability of PSGs consisting of gender plus nationality.¹⁸ However, the fact that a circuit has recognized the potential viability of such a PSG does not ensure that an applicant will obtain relief, as the satisfaction of the requirements of a valid PSG depends on the unique facts of a claim. Regardless of the few circuits that have declined to reject a gender and nationality PSG *per se*, the majority of circuits have not adopted this approach. As such, women who seek a grant of asylum must limit their asserted PSG to the furthest extent possible. PSGs recognized as cognizable by the Board of Immigration Appeals include “young women of the Tchamba-Kunsuntu Tribe who have not had FGM [female genital mutilation], as practiced by that tribe, and who oppose the practice,”¹⁹ and “married women in Guatemala who are unable to leave the relationship.”²⁰ These PSGs, and others recognized by the BIA, share a highly particularized grouping, one which scarcely includes the applicant herself. This feature of the American asylum system functions to exclude women immigrants at the institutional level. To obtain relief, a woman seeking asylum on account of gender-based persecution must either fall into one of the highly specific PSGs recognized in her jurisdiction or by the BIA, or she must herself set forth a restrictive PSG. This requirement unduly burdens

14. Despite the limited path to asylum through the assertion of a gender-based PSG “it is still the case that the closer one’s application conforms to the traditional model of the male political activist fleeing an oppressive regime, the more likely one is able to obtain asylum.” Rachel Lewis, *Deportable Subjects: Lesbians and Political Asylum*, 25 FEMINIST FORMATIONS 174, 178 (2013).

15. *In re W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *in re Acosta*, 19 I&N Dec. 211 (BIA 1985).

16. See *Acosta*, 19 I&N Dec. at 233. Immutability requires that the characteristic asserted be something that group members “cannot change, or should not be required to change.” *Id.*

17. *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010).

18. *Id.* (citing *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007)); Brief for American Immigration Lawyers Association, Asylum Seekers Advocacy Project, et al. as Amici Curie Supporting Petitioner, — v. Garland, 15–19 (4th Cir. 2021) (No. 20-2193) (noting that the First, Third, Eighth, and Tenth circuits recognize similar PSGs).

19. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996). While this decision was seen by some as a victory for gender-based asylum claims, its impact was dampened by the failure of other courts to consistently apply its principles. See Jared Allen, *Women Qua Women: Using Feminist Theory To Catalyze The Gender Immigration Debate*, 32 GEO. IMMIGR. L.J. 217, 225 (2018).

20. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).

women seeking asylum, and the resulting caselaw perpetuates this effect, as “[l]imiting a case to its facts necessarily limits its application.”²¹

Superficially, it could appear that the use of PSGs in the adjudicative process of asylum claims is a win for intersectionality; it is, after all, recognizing a woman’s identity in the most specified form possible. However, the system fails to legally recognize a woman’s identity from the outset; only after pursuing a complex claim necessitating the satisfaction of numerous legal requirements, unrelated to the gender-based persecution suffered by the applicant, can relief potentially be granted. This onerous process is a far cry from legal recognition, and if one is not recognized legally, relief is not possible.²² Moreover, asylum law is perhaps even more underinclusive than the laws addressed by Kimberle Crenshaw in her 1989 intersectional analysis of anti-discrimination laws.²³ Asylum law has not even taken the menial step of statutorily recognizing sex-based claims. The PSG framework instead requires an applicant to stack categorical identifiers. This requirement ignores reality, for there can be no woman without other properties of identity, just as there can be no apple without a size.²⁴ Any applicant seeking asylum on account of gender-based persecution necessarily possesses a nationality, an age, and all other facets of identity courts have sometimes found relevant in approving a PSG.

The inadequacy of the protected ground/PSG framework is exemplified by the system’s persistent failure to adequately conceptualize the identities of non-heterosexual women and transgender (trans) women. Sexuality, specifically “homosexuality,” was recognized as a cognizable PSG by the BIA in 1990.²⁵ Since then, gay and lesbian applicants have had more success in alleging sexuality-based persecution. However, receiving a grant of asylum pursuant to a sexuality-based claim has hinged on an applicant’s ability to “legibly prove, perform, and narrate their queerness.”²⁶ Notably, almost all precedential homosexual asylum claims have involved gay men.²⁷ As such, lesbian and trans women must contend with a judicial system premised on the male experience. Jurisprudence extending PSG recognition to trans women continues to fall behind. The Ninth Circuit recognized the PSG of “gay men with female sexual identities” as cognizable in 2000.²⁸ This holding has been utilized in the Ninth Circuit and as a persuasive authority in

21. Allen, *supra* note 19, at 232.

22. Crenshaw, *supra* note 1, at 141–48.

23. *Id.* Discussed *infra*. Crenshaw employed an intersectional framework to critique discrimination laws. Unlike in the context of asylum, such laws recognize discrimination on the basis of gender. *Id.*

24. See discussion *supra* note 7.

25. See *In re Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990).

26. Suad Jabr, *Testimonies, True Selves, and Time: The Making of Queer Middle Eastern Refugee Narratives* 6 (2021) (M.A. thesis, University North Carolina at Chapel Hill) (UNC Carolina Digital Repository).

27. NAT’L CENTER FOR LESBIAN RTS., *THE CHALLENGES TO SUCCESSFUL LESBIAN ASYLUM CLAIMS* 3 (2014), <https://perma.cc/5V2S-6RV7>.

28. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000).

other circuits to support transgender applicants' asylum claims. Yet, PSGs of "transgender persons," "trans women," or "trans men" have not been adopted. Notably, there is no evidence that the plaintiff in the Ninth Circuit case actually identified as trans.²⁹ The treatment of trans applicants by the asylum system provides one of the most glaring critiques of the protected ground framework: trans women have been forced to make their claims under a category that does not represent even part of their identity. A trans woman is neither a "gay man" nor a "man with female sexual identities." And yet, the most precedential case on the topic requires a trans woman to fit herself into this box. The PSG framework, at its best, forces an applicant to pick and choose unrepresentative aspects of identity to seek relief; at worst, it requires an applicant to claim an identity entirely removed from her own.

III. A SOLUTION: ELIMINATION OF "PROTECTED GROUNDS"

Several solutions have been offered to correct the underinclusive nature of the asylum system. Advocates have argued that the PSG of "women" should be universally recognized as cognizable.³⁰ The BIA's recognition of "homosexuals" as a valid PSG bolsters the argument for a similar gender-based PSG.³¹ Alternatively, the argument has been made that gender should be added to the list of "protected grounds" upon which past or future persecution must be based to obtain relief.³² At first blush, these proposed solutions are not without merit. Given the incremental steps taken in a few circuits to expand the acceptable forms of gender-based PSGs, recognition of a gender-based PSG seems feasible "through existing laws and instruments."³³

However, solutions in this vein are "innately flawed"³⁴ for two reasons. First, the asylum framework was developed pursuant to a "male-dominated conception" of who should qualify for asylum.³⁵ The centrality of "[w]estern, straight, white, male standards" in asylum law is hardly a surprise when considering that "asylum law was created with male political dissidents in mind during the Cold War."³⁶ This conception is clearly reflected in the lack of

29. Stefan Vogler, *Determining Transgender*, 33 GENDER & SOC'Y 439, 449 (2019). It is argued that this may, in part, be due to the fact that conceptions of gender identity are different in Latin America. *Id.*

30. Allen, *supra* note 19, at 228–29.

31. *In re Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990); Shebani Bhargava & Shreenandini Mukhopadhyay, *The Quest For Gender Based Asylum: Exploring 'Women' as a Particular Social Group*, INTLAWGRRLS (Aug. 13, 2020), <https://perma.cc/5ALW-GH39>.

32. Allen, *supra* note 19, at 228.

33. Priscilla F. Warren, *Women are Human: Gender-Based Persecution Is a Human Rights Violation Against Women*, 5 HASTINGS WOMEN'S L.J. 281, 315 (1994).

34. 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, 520–21 (2009).

35. *Id.* at 531. Doyle further asserts that "the Chairman of the Drafting Conference [for the legislation which serves as the basis for claims of asylum] expressed clear doubt as to the existence of sex-based persecution." *Id.*

36. Roxana Akbari & Stefan Vogler, *Intersectional Invisibility: Race, Gender, Sexuality, and the Erasure of Sexual Minority Women in US Asylum Law*, 46 L. & SOC. INQUIRY 1062, 1087 (2021).

gender as an enumerated basis for asylum, as well as asylum law’s overall focus on targeting public-facing persecution.³⁷ Women continue to be viewed as private-facing, with many typical gender-based persecutions, such as domestic violence, occurring out of the public eye.³⁸ Second, elucidated through intersectional analysis, are the inefficiencies of categories to accurately encompass identity, and, thus the true nature or threat of persecution exacted upon an individual. This phenomenon is not limited to women who seek asylum on account of gender-based persecution. As argued by Suad Jabr in their intersectional analysis of the failings of the American asylum system in contemplating persecution of queer immigrants: “[r]ather than tell simply the truth, the system requires queer refugees to reconfigure their lives in a way that is familiar to the system they are trying to seek access to—that checks off certain highly variable, differently-interpreted, and contingent boxes that have changed across history.”³⁹ Simply put, while the recognition of a cognizable PSG of “women” or the addition of gender as a protected ground may help immigrant women seeking asylum, such “solutions” do not go far enough to truly recognize the identities of multiply identified women. Instead, it would simply reinforce the notion that, to qualify for asylum, one must fit within a particular box. In the case of a PSG of “women,” an applicant would only be able to assert evidence of persecution that pertains to her gender. She would have to show that she was targeted because she is a woman, and only because she is a woman. It would not be permissible to assert that she was targeted as a Black woman, or a poor woman. Thus, we return to the key flaw in the protected ground framework: an applicant’s identity, and her life experiences that are a direct result of her *entire* identity must be contorted to fit into a predetermined box. The experiences of an individual cannot be filtered by simple categorical identifiers. As such, the solutions thus far discussed are insufficient.

To facilitate a more complete and accurate analysis of an applicant’s claim, it is necessary to abandon the “protected ground” aspect of asylum and the related PSG structure. Crystal Doyle, a proponent of redefining the global approach to refugee law, questions: “isn’t persecution enough?”⁴⁰ In an equitable asylum system, it is. Abandoning the labeling system, which limits

37. *Id.* To be eligible for asylum an applicant must demonstrate that the persecution they have suffered was perpetrated by the government, or by a private actor that the government is “unable or unwilling to control” 8 U.S.C. §1101(42)(A). Thus, an applicant can only obtain relief on the basis of private-facing persecution if they can demonstrate that they made efforts to involve the government, or that such efforts would be futile. *See id.*; *In re S-A-*, 22 I&N Dec. 1328, 1333–35 (BIA 2000). Where persecution is perpetrated behind closed doors, as opposed to by the government, or by an actor in clear view of the government, this is an additional burden on applicants. *See* Susan Moller Okin, *Feminism, Women’s Human Rights, and Cultural Differences*, 13 HYPATIA 32 (1998) (arguing that adequate protection of women’s human rights cannot be achieved via the existing institutions and frameworks).

38. *See* Akbari & Vogler, *supra* note 36, at 1069.

39. Jabr, *supra* note 26, at 24.

40. Doyle, *supra* note 34. Doyle’s Note offers a critique of the asylum system, particularly as it harms victims of gender-based persecution. *Id.* One solution Doyle proposes is requiring that an applicant prove only that she has suffered persecution, regardless of the reason she has been targeted. *Id.* at 559–60.

access to relief and fails to accurately characterize a female applicant in her totality, is not a particularly revolutionary reform. The protected ground framework acts as a legal formality, incapable of accurately encompassing identity, and thus designed to block otherwise meritorious claims. The formal nature of the structure becomes clear when one examines the following standard process. When an applicant submits her claim for asylum before the immigration court, she offers evidence and a narrative of her experience. As with most legal claims, she will assert multiple arguments for why she is entitled to relief, oftentimes including multiple conceivable PSGs for the court to choose from in evaluating her claim.⁴¹ An immigration judge will typically select one or more preferred PSGs to analyze.⁴² The label a judge chooses to assign to an applicant's identity does not change the gender-based persecution she has suffered; in fact, it changes very little other than a legal formality. This legal formality has stopped numerous otherwise meritorious claims in their tracks, regardless of the constant underlying threat of persecution. By evaluating a claim on the basis of an applicant's entire identity, the legal system may better recognize the unique persecution suffered by a woman and offer appropriate relief. The applicant will be free to present her claim; to tell her full story. While the wholesale elimination of all identifiers might seem antithetical to the concept of intersectionality, the opposite is true in this instance.

Eliminating the protected ground framework would provide for a truly intersectional approach, whereby a woman can bring her whole self to an asylum proceeding—not just the parts of her that fit into a PSG box. It is this box that restricts access to necessary relief, and forces applicants to cabin their experiences. Crenshaw noted this phenomenon in discrimination laws that operated across similar binaries: relief was available via a sex discrimination suit, or a race discrimination suit, but never for a Black woman asserting discrimination on account of her whole identity.⁴³ Such binaries are ingrained in American legal systems, and asylum law is no exception. Eliminating the protected ground framework is a key step in countering the ineffectual binaries that bar women from appropriate relief.

This is not to say that every woman will automatically be granted asylum. The “opening the floodgates” argument is frequently invoked to promote state actors' fear that immigrant women will “flood into the United States.”⁴⁴ Rather, eliminating the protected ground framework allows applicants to state their claims without limiting their arguments to fit neat boxes of

41. See *BIA Requires Asylum Seekers to Identify Particular Social Group*, CATH. LEGAL IMMIGR. NETWORK, <https://perma.cc/P3BY-BPKA> (last visited Dec. 12, 2022) (noting that it is “important to present all proposed social groups” that can be substantiated, sometimes requiring “briefing any and all proposed social groups”).

42. See *Zuniga-Martinez v. Garland*, No. 21-3312, 2022 U.S. App. LEXIS 16682 (6th Cir. June 15, 2022) (offering an example of judicial analysis of multiple particular social groups for cognizability).

43. Crenshaw, *supra* note 1, at 141–43.

44. Akbari & Vogler, *supra* note 36, at 1068.

identity. As previously stated, the persecution feared or endured by an applicant is not altered by the particular label affixed to her case file. What is changed is the ability of an adjudicator to consider, and an applicant to present, a claim in its entirety.

CONCLUSION

The American asylum system has failed to adequately protect the interests of immigrant women. Analyzed through an intersectional lens, the protected ground framework cannot encompass the true identities, and thus legal claims, of multiply identified immigrant women. The only avenue currently available for relief mandates women force their identities into predetermined boxes that prevent them from accurately expressing their legal claims. Such inauthentic claims necessarily fail to encapsulate the full extent of persecution endured by an applicant. Intersectional analysis counsels that eliminating the protected ground framework would allow applicants to express claims in their entirety, unrestrained by the strictures of legal formalism.