Asylum Claims in the United States by Afghan Women

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From the moment in 1996 that the Taliban took power, it sought to make women not just obedient, but nonexistent. Not just submissive but invisible.¹

I. INTRODUCTION

With the Taliban’s rise to power in Afghanistan and with the implementation of their version of Islam, Afghan women began being persecuted because of their gender and were stripped of many of their fundamental human rights. These women were subjected to this degrading treatment solely because they belonged to a social group that consisted of women living in Afghanistan under the Taliban government. These actions by the Taliban qualifies Afghan women to asylum under United States refugee law on the basis that they were persecuted on account of their membership in this particular social group.² The ultimate success of an asylum claim by an Afghan woman rests on whether she meets the requirements of INA § 101(a)(42) and particularly on her ability to show that she was persecuted by the Taliban on account of her membership in the social group of Afghan women.

Part II of this paper examines Afghanistan’s long history of unstable politics and civil war. The Taliban’s rise to power will also be discussed. While this paper briefly addresses the recent fall of the Taliban and the impact of the ongoing United States actions against terrorism, women’s status in Afghan society during Taliban rule as a potential basis for refugee status will be the focus of the historical analysis.

The United States' law regarding refugees is based on the United Nations (UN) 1951 Convention Relating to the Status of Refugees definition. Part III explores how the five enumerated elements of the United States' definition of a refugee, encompassed in INA § 101(a)(42), have been interpreted by the Immigration and Nationalization Service (INS) and by the federal court system. Membership in a particular social group will be analyzed separately from the other enumerated grounds because of its specific applicability to Afghan women seeking asylum in the United States.

There are very few existing cases involving Afghan women who have fled the Taliban and who have subsequently sought asylum in the United States by claiming membership in a particular social group. Part IV will examine the few existing cases as well as examining several asylum cases in which the claimants were women from other Islamic theocracies whose claims were based on membership in a particular social group.

Part V will discuss a hypothetical Afghan woman who is claiming asylum in the United States. This theoretical claimant's asylum petition will be analyzed according to case law with particular attention given to the framing of her particular social group argument. Part VI will summarize the analysis in Part V and offer the most successful framing of a particular social group that an Afghan woman could make based on existing United States' case law.

II. BACKGROUND: THE HISTORY OF AFGHANISTAN

Afghanistan's history is a tale of wars, invasions and riots. Afghanistan has a recorded history stretching back into the 6th century B.C.E., but it was not until modern times that the territory formed a coherent political unit. Islam was introduced to the region of Afghanistan in

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the late seventh century, and currently about 90% of the population are Sunni Muslims with the other 10% being mainly Shi’a Muslims. The people of Afghanistan belong to many ethnic groups with the Pushtuns being the dominant ethnic group, accounting for approximately 38% of the population. Other less dominant ethnic groups are the Tajik (25%), the Hazara (19%), the Uzbek (6%), the Aimaq, the Turkmen, and the Baluch.

A. PRE-TWENTIETH CENTURY HISTORY

Throughout its long history, Afghanistan has been consistently plagued with war and political instability. Because of Afghanistan’s “coveted location as a trade route, there have been constant struggles for power and control of the country.”

Alexander the Great entered the territory of present-day Afghanistan in 327 B.C.E., which at the time was part of the Persian Empire. Multiple invasions by various peoples followed in the succeeding centuries, and in C.E. 642, Arabs invaded the entire region of Afghanistan and introduced Islam. The conversion to Islam “was followed by a devastating invasion led by Genghis Khan in the thirteenth century and an exceptionally brutal Mogul invasion in the seventeenth century.”

The modern state of Afghanistan was established by Ahmad Khan Durani, a member of the Pushtun tribe, in 1747. British imperialism extended into the country when British troops

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8 Background Note: Afghanistan, at http://www.state.gov/r/af/ (Last visited Mar. 16, 2002).
9 Id.
10 Id.
13 Id. at 3.
14 See supra note 4.
15 Matiuddin, Kamal, The Taliban Phenomenon: Afghanistan 1994-1997 1 (1999). All of Afghanistan’s rulers until the 1978 Communist coup were from Durani’s Pushtun tribal confederation, and all were members of
occupied parts of Afghanistan beginning in the nineteenth century. The Russian Empire also had an interest in Afghanistan, and there were several wars fought between the British and the Russians over which country was to control the region. The second of these wars, the Second Anglo-Afghan war (1878-80), and the confusion that followed, helped the Pushtun Amir Abdur Rahman secure the Afghan throne. During Rahman’s reign, “the British and Russians officially established the boundaries of what would become modern Afghanistan.”

Afghanistan entered the twentieth century being familiar with conflict caused by internal forces as well as with being familiar with playing the part of a pawn in the struggle for power in the international realm.

B. TWENTIETH CENTURY HISTORY LEADING UP TO THE TALIBAN’S SEIZURE OF POWER

For most of the twentieth century Afghanistan was continually embroiled in conflict and plagued by political instability. Many of the conflicts arose because of various parties wanting control of Afghanistan’s desirable location on the lucrative trade route between Asia and Europe. In some way, all of Afghanistan’s centuries of history affect its current turmoil, but the events of the last 100 years have arguably had the largest impact on its current standing in the international arena.

After managing to keep his country neutral during World War I, Habibullah, Rahman’s son and successor, “was assassinated in 1919, possibly by family members opposed to British
influence." His third son, Amanullah, ascended to the throne and moved to end his country's traditional of isolation from world events. After a trip to Europe and Turkey, Amanullah introduced several reforms intended to modernize Afghanistan. Some of these reforms, "such as the abolition of the tradition Muslim veil for women and the opening of a number of co-educational schools, quickly alienated many tribal and religious leaders." Confronted "with overwhelming armed opposition, Amanullah was forced to abdicate in January 1929" after Kabul fell to Tajik rebel forces. With considerable Pashtun tribal support, Amanullah's cousin, Nadir Khan, was able to regain Kabul from the rebels in October of the same year and was shortly after crowned king. Four years later, however, Nadir was assassinated, and his 19-year-old son, Mohammad Zahir Shah, secured the throne and reigned from 1933 to 1973.

In 1973, Zahir, "the last representative of the Durani Dynasty which had ruled for hundreds of years, was ousted in a coup mounted by his cousin, Mohammed Daoud." Daoud, a self-proclaimed modernist who unsuccessfully attempted to carry out much needed economic and social reforms, was subsequently killed in an April 1978 coup when communist sympathizers seized the capital of Kabul and created a new government to rule the country.

This new government was lead by Noor Mohammad Taraki. The new regime quickly moved towards closer ties with the Soviet Union, and it implemented anti-Islam based laws in its efforts to become a secular state. These actions caused resistance to surface, which quickly turned

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21 See supra note 19.
22 See supra note 12 at 6.
23 See supra note 19.
24 Id.
25 See supra note 5.
26 See supra note 4.
27 MATINUDDIN, supra note 15 at 4-5.
29 See supra note 20.
“into a rebellion, inspired by Islam and its religious teachers.” The ruling government went to
the Soviet Union for assistance to “crush the widespread rebellion of the Mujahidin, but the
Soviet presence” in Afghanistan further inflamed Muslim opposition. “To avert a likely defeat
of communism, in late 1979 a Soviet invasion force suddenly seized control of the country,”
killed President Taraki, and installed Babrak Karmel, the leader of a splinter communist group,
as both President and Prime Minster.

From 1979 until 1989, when the Soviet Union withdrew the last of its troops, “[a] loose
alliance of Islamic rebel groups...[fought] Soviet troops with the help of U.S. weapons and
training.” After the withdrawal of the Soviets, Afghan communist forces and the mujahidin
forces continued to fight until the Afghan communist government, which was financially
sustained by the Soviet Union until 1991, collapsed early in 1992. With the collapse of the
communist government in Kabul, the mujahidin forces faced the difficulty of uniting to form a
stable government. This task proved to be impossible for them to master. “Due to the tribal
nature of Afghan society,” which includes ethnic and religious differences, the mujahidin could
not come up with a leader who could be both a political figure and head the national military.
The result was that when the common objective was achieved, they began fighting among
themselves.”

C. HISTORY SINCE THE TALIBAN CAME TO POWER

30 See supra note 5 at 36.
31 Id. “Mujahidin” means those who undertake the holy war.
32 Id.
33 See supra note 6. “[T]he United States and a number of Arab nations substantially increased their aid to the
mujahidin [beginning in 1985], reaching a combined total exceeding $500 million per year. Moreover, the United
States... provided the resistance with Stinger anti-aircraft missiles and other modern weapons.” See supra note 5 at
37.
34 See supra note 5 at 37.
35 MATINUDDIN, supra note 15 at 5.
36 Id.
In September of 1994, the "previously unknown Taliban rebels, an army of former Islamic seminarians, enter[ed] the fray." While the exact origins of the Taliban are in some dispute, most agree that the Taliban originated in Afghan refugee camps in Pakistan where they attended religious schools. The Taliban are reported to be primarily members of the Pushtun tribe, which is a tribe that has traditionally had strict codes of conduct that govern social relations, marriage and divorce. Supposedly "a group of religious scholars, [the] Taliban (‘students’) emerged in... [southern Afghanistan] as a protest movement against the” immorality of the local mujahidin. "Desiring to end the civil wars and establish [an] Islamic government, Taliban fighters ended thievery on the roads and established order. As their fame spread, so did” their power and their conquests. Their successful rise “undoubtedly reflected a popular disgust with the factional fighting by mujahidin groups.” The Taliban were, for the most part, successful in their military campaigns, and by late 1996 they had gathered adequate strength to capture the capital city of Kabul.

The Taliban at one time was able to control almost 95% of Afghanistan. The world was generally optimistic about the Taliban when they first seized power. This optimism was furthered when, with their “published demands, Taliban [showed strong support for]... an Afghan government chosen by the people.” However, the world was disappointed and disturbed “when

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37 See supra note 6.
38 RASID, AHMED, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA 1 (2000). “When the Taliban seized Afghanistan, these schools were funded by some western countries, including the USA.” Rise of the Taliban, at http://www.uweb.ucsb.edu/~dmirchev/history/ (Last visited Nov. 3, 2001).
40 See supra note 5 at 39 (emphasis in original).
41 Id.
42 Id.
44 See supra note 5 at 39.
the social consequences of... [Taliban] rule became apparent.” The Taliban “preached a medieval faith the often employed Islamic terminology to foster the most archaic customs of tribal Afghanistan.” The Taliban’s rules were very severe and were far stricter for women than for men. Not only did the Taliban have strict laws, but also the punishments for breaking the laws were harsh. “The Taliban maintain[ed] order in the areas that it control[ed] by issuing extreme, and sometimes barbaric, penalties for violations of its self-declared law.”

The threat of a common enemy helped the previously warring factions of mujahidin to form an anti-Taliban alliance (now commonly referred to as the Northern Alliance), which mainly consists of Sunni Muslim groups of Tajik and Uzbek ethnicity from the central and northern mountains of Afghanistan. These anti-Taliban groups began fighting the Taliban and, beginning in September 2001, received support from the United States in its anti-terrorism efforts in Afghanistan.

Beginning with the United States military campaign in Afghanistan, the Taliban, under pressure from both the Northern Alliance and the United States, slowly surrendered the territory that it held. By the end of 2001, the Taliban was essentially confined to the mountainous region surrounding Kandahar in the southwestern part of the country. By early 2002, the Taliban was limited to a few hideouts in the mountains, and they were even being forced out of those last places of refuge.

With the Taliban no longer in control of the Afghan government, Hamid Karzai was chosen to head an interim government for six months. He began his role as president on

45 Id.
47 See supra note 1 at 575. The Taliban police have been described as being “Orwellian” in nature. See supra note 1 at 44.
48 See supra note 5 at 39.
49 See supra note 20.
December 22, 2001 and has since worked with Western governments in readying Afghanistan for a democratically elected government. However, there are some fears that because Karzai’s government appears to be sustained only by his charisma and by Western money, that once those run low, his government will disintegrate and the country will once again slip into civil war.\(^{50}\)

The years of civil war have caused over five million Afghan citizens to flee the fighting and become refugees in the countries surrounding Afghanistan.\(^{51}\) The bulk of these refugees are in Iran and Pakistan.\(^{52}\) The living conditions in Afghanistan after more than 20 years of civil war are deplorable.\(^{53}\) “Homes, irrigation systems, roads and government buildings often lie demolished.”\(^{54}\) Afghanistan has the highest rate of child mortality in the world, and “survival is uncertain for many adults as well.”\(^{55}\) Because of the destruction of the country’s infrastructure, food is scarce and “starvation threatens many Afghans.”\(^{56}\) On top of the years of fighting:

severe drought, human rights abuses and... the U.S.-led military campaign in Afghanistan have left millions of civilians, especially women and children, with a fragile grip on survival. Many have fled their homes to neighboring countries... The deteriorating security situation in the region threatens to create a humanitarian crisis of enormous proportions.\(^{57}\)

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\(^{50}\) See supra note 50.

\(^{51}\) Stop the Gender Apartheid in Afghanistan, at [www.helpafghanwomen.com](http://www.helpafghanwomen.com) (Last visited Nov. 4, 2001). About 75% of the refugees who have fled Afghanistan are women and girls. \textit{Id.}

\(^{52}\) \textit{Id.}

\(^{53}\) “Cruelty and inhumanity accompanied much of the fighting, The UN Human Rights Commission condemned the polices of ‘foreign’ (i.e. Soviet) troops, especially the bombarding of villages and the dropping of explosive disguised as toys in rebel areas. Amnesty International in 1988 claimed that Soviet and Afghan troops killed hundred of civilians in reprisals, raids, and that mujahidin taken... [prisoners] had been tortured and [executed]. Other international groups decried massacres and executions of civilians, as well as the deportation of Afghan children to the Soviet Union.” See supra note 5 at 39.

\(^{54}\) \textit{Id.} This account of the conditions of Afghanistan was from before the United States began its bombing campaign in Afghanistan in October 2001. It seems safe to assume that these conditions are now even worse because of these bombings.

\(^{55}\) \textit{Id.}


In recent months the conditions in the larger cities, such as Kabul, appear to be getting better, but life in the rural areas of Afghanistan are reported to be unchanged.58

D. IMPACT OF THE UNITED STATES’ COUNTER-TERRORISM OPERATION ON AFGHANISTAN

Prior to September 11, 2001, the United States government had taken no openly active role in Afghan politics. However, after the events of September 11, the United States government and its military became immersed in Afghan politics. It is difficult to accurately determine what the long term impacts of the United States’ military actions in Afghanistan will be.59 It does appear, however, that the United States has succeeded in its goal of separating the Taliban from its position of power.

The United States’ military action has also had an impact on Afghanistan’s refugee situation. In the first three months of 2002, approximately 250,000 Afghan refugees (mostly from Pakistan) returned to their country, and it is estimated that a total of one million Afghan refugees will return to Afghanistan in 2002.60

E. CONDITIONS FOR AFGHAN WOMEN PRIOR TO THE TALIBAN’S SEIZURE OF POWER

Prior to the Taliban’s rise to power, Afghan women had constitutionally based rights and “engaged in all aspects of life including the social, economic and political arenas.”61 Under the communists “there were substantial changes to the woman’s role in society.”62 Because of the communist influence, Afghan women enjoyed a degree of rights and freedom that were almost

60 UNHCR News Stories: Afghan Refugees Surge Past 200,000 Mark, at http://www.unhcr.ch/cgi-bin/texts/vco/home/%2bwwwBme5JrswwwwwwwwwwwwfhFqN0b1fFqNdDm5AFqN0bIDzmwwwwww/opendoc.html (Last visited April 14, 2002).
unheard of in the Islamic world.62 Statistics indicate that in 1992 women made up about 50% of the workforce of Afghanistan.64 Prior to the Taliban’s capture of Kabul, “70 percent of the teachers were women, 40 percent of the doctors were women... and women were employed in all areas of the workforce. Women worked in the medical field, as deans of universities, judges, officers in the army, foreign diplomats, and helicopter pilots.”65 But the rights and opportunities that Afghan women had come to enjoy were not to last.

F. CONDITIONS FOR AFGHAN WOMEN UNDER THE TALIBAN

Under the Taliban, women’s rights returned to the archaic because the structures “imposed by the Taliban strip[ped] away the most fundamental rights necessary for sane and productive existence.”66 The Taliban “made Afghanistan a laboratory for the systematic oppression of women.”67 Afghan women and girls were subjected daily to human rights violations by the Taliban.68 Women who lived under the Taliban essentially had no rights.69 The Taliban’s restrictions on women prohibited them:

from working, going to school, wearing colorful clothes, or speaking where they can be heard by a male who is not a relative. They... [had to] wear a head to toe covering called a burqa, which looks like a huge bag except for the small mesh grid in front of the eyes, which allows women to see. Women... [had to] be accompanied by a male relative when outside of the home.70

62 See supra note 11 at 569.
63 See supra note 1 at 44.
64 See supra note 11 at 569.
65 See supra note 61.
66 Brief for Respondent, In the Matter of N.Q., at http://www.uchastings.edu/cgra/documents/legal/129_amicus.pdf (Last visited Oct. 5, 2001). “The Taliban’s abuses are by no means limited to women. Thousands of men have been taken prisoner, arbitrarily detained, tortured, and many killed and disappeared. Men are beaten and jailed for wearing beards of insufficient length (that of a clenched fist beneath the chin), are subjected to cruel and degrading conditions in jail, and suffer such punishments as amputation and stoning.” The Taliban’s War on Women: A Health and Human Rights Crisis in Afghanistan Executive Summary, at http://www.phrusa.org/research/health_effects/exec.html (Last visited Nov. 1, 2001).
67 See supra note 1.
68 See supra note 4.
69 See supra note 11 at 569.
The Taliban also “require[d] that windows in houses that have female occupants be painted over.”71 These social restrictions were worsened by the fact that a large number of Afghan women, because of the decades of civil war that have enveloped Afghanistan, were without male relatives to provide for them or escort them in public. While Taliban law affected all Afghan women, they had the greatest impact on women in urban areas “because enforcement of the Taliban’s law... [was] not as consistent in Afghanistan’s rural areas because the Taliban presence... [was] not as substantial.”72 Also, the terrible impact “of Taliban imposed restrictions... [were] most acutely felt in the cities where women had enjoyed relatively greater freedoms.... Hardest hit... [were] over 30,000 widows in Kabul and others elsewhere in the country, who... [were] the sole providers for their families.”73

The punishment for the failure to comply with Taliban rules was met with severe and, in most situations, excessive punishment.

Taliban militia mete[d] out punishment for violations of... rules on the spot. For example, women... [were] beaten on the street if an inch of ankle... [showed] under their burqa. They... [were] beaten if they... [were] found to move about without an explanation acceptable to the Taliban. They... [were] beaten if they... [made] noise when they walk[ed].74

“Taliban policies that restrict[ed] women’s rights and... [denied] basic needs... [were] often brutally and arbitrary enforced by the ‘religious police’ (Department for the Propagation of Virtue and the Suppression of Vice) usually in the form of... public beatings.”75 Religious


72 See supra note 11 at 568.

73 See supra note 71. With their husbands dead and no way of legally making money, many women have turned to prostitution in order to feed themselves and their children. Prostitution Under the Rule of the Taliban, at http://rawa.hackmare.com/rospi.htm (Last visited Nov. 1, 2001).

74 See supra note 71.

75 See supra note 66.
zealots who roamed the streets on the lookout for women who violated Taliban law also administered the punishments.76

Beatings were not the only punishments that people who violated Taliban law suffered, and the Taliban often carried out these punishments in public forums.

It... [was] reported that some executions have taken place before crowds of up to 30,000 people. Executions... [were] sometimes carried out in such barbaric methods as throat slitting, stoning, beheadings, collapsing walls, and hangings... Afghan citizens... [were] called to the country's stadiums to witness executions for alleged crimes that would not even merit a citation in most other countries in the world. For example, adulterers... [were] stoned to death or publicly whipped, and homosexuals... [were] crushed to death by having walls toppled on them.77

There was a court system under the Taliban, but the judges made swift decisions, according to Taliban law, and punishment quickly followed the decisions.78

In addition to the Taliban's other restrictions on women, Afghan women suffered under the Taliban because they were unable to receive adequate medical care. The Taliban:

[denied] the access of women to professional health care since only males... [were] allowed to work in hospitals but they... [could not] look at or touch uncovered women's bodies. Physical and mental health problems... [were] rising among Afghan women and girls. In September 1997, the fanatic government closed all medical facilities for women and forced them to leave, even in most severe condition—in a life or death situation. One hospital under primitive conditions, "without running water, electricity, medicine, surgical equipment or any kind of sterile facilities," later re-opened and accepted women.79

Even "if a woman... [was] fortunate enough to convince a male physician to treat her, he... [was] not allowed to examine the woman or speak to her directly. All communication... [was] done by and through her male chaperone."80 The lack of reproductive care has been particularly

77 See supra note 11 at 574.
78 See supra note 7.
80 See supra note 11 at 574.
hazardous for women, and approximately 16,000 Afghan women die in childbirth every year. Physical health is not the only area in which Afghan women have suffered; their mental health has suffered as well. A medical doctor who visited Afghanistan in 1998 reported "98% of women showed symptoms of major depression while 80% reported mental health problems and anxiety." The Taliban’s requirement that women must wear a burqa when they were outside of the house was a particularly oppressive one. A burqa is a head to toe fabric garment that completely covers the head and body of its wearer. "A three inch square opening covered with mesh provides the only means for vision. Although the burqa was worn in Kabul before the Taliban took control, it was not an enforced dress code and many women wore only scarves that cover the head." The Taliban required women to wear the burqa because of their fundamentalist interpretation of Islam and their belief that women are temptations which must be hidden from the eyes of men.

Being forced to wear burqas has aggravated women’s health problems. Many women have developed eye problems from looking through the small screen and skin diseases from being entirely covered with heavy fabric. A medical doctor reported to the Physicians for Human Rights that "the garment may cause eye problems and poor vision, poor hearing, skin rash, headaches, increased cardiac problems and asthma, itching of the scalp, alopecia (hair loss), and depression." The heavy cloth of the burqa can also induce panic and claustrophobia in its wearer. A female Western who was filming a documentary in Afghanistan, and who hid herself

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82 See supra note 79.
83 Id.
84 See supra note 66.
85 See supra note 1.
under a *burqa*, reported that “the veil was so thick that it was difficult to breath [sic], and the little crocheted grill for her eyes made it difficult to cross roads” because she could not see traffic.86 “Another problem created by the requirement that all women wear a burqa is that not all women can afford” to purchase one because a *burqa* costs about two months wages.87 Being unable to buy a *burqa* meant that some woman could not leave their homes at all because doing so would be risking being beaten.

The arrival of the Taliban greatly increased “the economical problems of Afghan women.”88 The Taliban’s prohibition on women working created a huge unemployment problem, which led to extreme poverty for many women and their families.

[U]nemployed women face[d] serious financial problems and as a natural consequence their children suffer[ed] from hunger, malnutrition, different illnesses and a chronic state of poverty. Most of them... [have] lost their last resorts of income and have sold most of their possession[s] to buy food. Those who could afford leaving the country have done so, and those who could not are making the bulk of beggars in... [the] country. A large number of these beggars are ex [-I teachers and civil servants. Bad state of economy especially in Kabul has hit hard the pity income of these beggars.89

These problems were greatly aggravated by the fact that the decades of civil war in Afghanistan caused many women to be without male relatives who could provide for them or even accompany them outside of the house so that they could acquire necessities such as food and medicine.

In order to present a comprehensive account of what life was like for women living under the Taliban, it is important to acknowledge what the Taliban said about Afghan women and their situation. “Justifications given by the Taliban for their strict restrictions on women have ranged from the need to... [end] civil unrest in the country, to the theory that Western women are not...

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87 See supra note 11 at 571.
88 See supra note 71.
truly respected in their culture[s].” The Taliban declared that they restricted women’s rights in accordance with Islamic values and that the lives that Afghan women led before the Taliban came to power was based on secular, communist values. Thus, the Taliban claimed to be cleansing Afghanistan of atheist ways of thinking and installing in its place Islamic values and ways of life. The Taliban claimed that:

it is a lie that women are denied healthcare in Afghanistan and that they are confined to their homes. Anyone can travel through the major cities in Afghanistan and they will see women freely roaming the streets and markets, accompanied and unaccompanied by male relatives. They are, however, covered Islamically, as would be required in an Islamic country anyway.

They further claimed that requiring women to be veiled in public “is a measure that is undertaken for the simple reason of protecting the honor, dignity, and personal safety of the women in Afghanistan.” The Taliban maintained that they would “provide educational and employment opportunities for the women of Afghanistan, as soon as the security and financial circumstances under which the... [Taliban] operates allow such a step to be taken.”

The Taliban “committed massive human rights violations, particularly directed against women and girls.” Taliban law was so extreme and severe that it impacted every aspect of Afghan women’s lives. “The Taliban rules violate[d] human rights doctrines, to which Afghanistan is a party.” Afghanistan is a party to multiple human rights treaties including the

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89 See supra note 79.
90 See supra note 11 at 570.
92 Id. It should be noted that there is no evidence offered to back up these claims.
94 Id.
95 See supra note 20.
96 See supra note 61 at 468. Shannon Middleton’s note is an excellent source of information on how the Taliban violated Afghan women’s fundamental human rights.
International Covenant on Economic, Social and Cultural Rights (ICESCR),\textsuperscript{97} the International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{98} and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).\textsuperscript{99} ICESCR promotes equality for men and women, the right to work, and the right to an education among other rights and freedoms.\textsuperscript{100} ICCPR provides, among several other rights and freedoms, for equality between the sexes, political rights, and the right to liberty and security.\textsuperscript{101} Parties to the CEDAW “pledge to abolish discriminatory laws, take all appropriate steps to promote essential human rights freedoms for women, and abstain from engaging in discriminatory acts.”\textsuperscript{102} Not only did the Taliban have a duty to “respect international human rights law,” but also, because Afghanistan is a party to these treaties, the Taliban was bound by them and could not contradict the objectives of these documents.\textsuperscript{103}

The centuries of religious, ethnic, political and social strife that has haunted Afghanistan has created a huge number of Afghan refugees who leave their homes, their possessions and their culture to seek refuge in other countries. Because of the atrocious conditions they suffered in their country, Afghan women are likely to seek asylum in other countries if they were able to successfully flee Afghanistan. Part III of this paper will analyze the potential claims of refugee women from Afghanistan beginning with an international law perspective.

III. UNITED STATES COURTS' APPROACH TO REFUGEE LAW

A. UNITED NATIONS APPROACH TO THE DEFINITION OF “REFUGEE”


\textsuperscript{100} See supra note 61 at 435-436.

\textsuperscript{101} Id. at 437-438.

\textsuperscript{102} Id. at 432.
The first comprehensive UN definition of a refugee arose from the 1951 Convention Relating to the Status of Refugees. This Convention defines a refugee as any person who

As a result of events occurring before 1 January 1951 and owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The 1951 Convention is the first time that "particular social group" was included in the enumerated list of grounds on which persecution can be based. The 1951 Convention's definition was limiting, however, because the people it focused on were those displaced in Europe because of the events of World War II while ignoring the other possible groups of refugees in the world.

While the primary standard of refugee status today is derived from the 1951 Convention, it was not until the 1967 Protocol that "the scope of the Convention definition [was expanded] to include refugees from all over the world."

In addition to defining the refugee, the 1951 Convention also codified "a state party's obligation towards refugees once" the asylum seekers have been recognized and granted status as refugees. This aspect of the Convention is important, because it not only encourages states to

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103 Id. at 440.
105 See supra note 3 at art. 1, § 2.
107 See supra note 104. Thus, the 1967 Protocol eliminated the requirement that refugee status was limited to people who were displaced as "a result of events occurring before 1 January 1951." See supra note 3 at art. 1, § 2. Even though refugee status was now less Eurocentric, "only persons whose migration is prompted by a fear of persecution on the ground of civil or political status came within the scope of the Convention-based protection system. This means that most Third World refugees remain de facto excluded, as their flight is more often promoted by natural disaster, war, or broadly based political and economic turmoil than by 'persecution', at least as the term is understood in the Western context." James C. Hathaway, The Development of the Refugee Definition in International Law, THE LAW OF REFUGEE STATUS 6 (1991).
108 See supra note 104.
recognize refugees, but it also creates a source from which states can draw their refugee laws.\textsuperscript{109}

Having a single source from which refugee laws can be drawn makes it possible for there to be some uniformity in refugee law worldwide. It is important to note that states do not have a responsibility to grant asylum to every claimant who meets the requirements of the 1951 Convention or its 1967 Protocol.\textsuperscript{110} The only obligation that states have to refugees is that of non-refoullement.\textsuperscript{111}

B. UNITED STATES’ APPROACH TO THE DEFINITION OF “REFUGEE” IN INA § 101(A)(42)

The United States’ current refugee laws, enacted in 1980, are based on the 1967 UN Protocol Relating to the Status of Refugees, which the United States ratified in 1968.\textsuperscript{112} “The United States’ Refugee Act of 1980 amended the Immigration and Nationality Act (INA) to bring United States immigration law into compliance with the 1967 UN Protocol.”\textsuperscript{113} In fact, some “aspects of the 1967 Protocol have been directly incorporated into federal statute.”\textsuperscript{114} The United States’ Refugee Act of 1980 defines a refugee as:

\begin{quote}
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 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.\textsuperscript{115}
\end{quote}

\textsuperscript{109} See supra note 3 at art. 34.
\textsuperscript{110} See supra note 106.
\textsuperscript{111} Non-refoullement, as defined by the 1951 Convention, means that “[n]o Contracting State shall expel or return (“refoul”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened....” See supra note 3 at art. 33, § 1. Because the United States ratified the 1967 Protocol it “owes certain obligations to refugees under international law.” See supra note 104 at 58. The United States Supreme Court created law that allows the United States to turn Haitian boats away from the United States thus arguably violating the duty of non-refoulment. Sale v. Haitian Centers Council, 509 U.S. 155 (1993).
\textsuperscript{112} See supra note 104 at 58.
\textsuperscript{114} See supra note 104 at 58.
\textsuperscript{115} See supra note 2.
Thus, there are five separate elements that must be satisfied for an alien to qualify as a refugee under United States' law: 1) the claimant must be outside of her country of origin, 2) she must have a fear of persecution, 3) that fear must be well-founded, 4) the persecution feared must be on account of race, religion, nationality, membership in a particular social group, or political opinion, and 5) she must be unable or unwilling to avail herself of the protection of her country of nationality or to the country in which she last habitually resided because of persecution or her well-founded fear of persecution.

i. OUTSIDE OF COUNTRY OF ORIGIN

The first provision of INA §101(a)(42) is usually not a difficult barrier for applicants to overcome. If the applicant is applying for asylum in the United States, then she is obviously outside of her country of origin.\textsuperscript{116}

ii. LIKELIHOOD OF PERSECUTION

The standard of proof for future persecution is an issue that the United State Supreme Court addressed in both INS v. Stevic\textsuperscript{117} and INS v. Cardoza-Fonseca.\textsuperscript{118} In Stevic, the Supreme Court held that for a refugee to qualify for withholding of deportation, he must prove that there would be a clear probability of persecution in his country of origin if he were returned.\textsuperscript{119} The Supreme Court in Cardoza-Fonseca held that the standard of proof for persecution for a refugee seeking asylum is a "well-founded fear" which means that she does not need to prove that it is more likely than not that she will be persecuted in her home country.\textsuperscript{120} These two cases illustrate the different standards of proof required for withholding of deportation and for

\textsuperscript{116}There are a small group of asylum claimants who begin the asylum process in their countries of origin, but these people will probably meet this requirement because they must be in the United States by the time their asylum claim is heard.


\textsuperscript{118}480 U.S. 421 (1987). Stevic and Cardoza-Fonseca are the first two times that the United States Supreme Court commented on the 1980 Refugee Act.

\textsuperscript{119}See supra note 117 at 429-430.
asylum. For withholding of deportation, the claimant must prove that the chances of her being persecuted if she were returned are 51% or greater, while with an asylum claim, a claimant could arguably show just a 10% chance of being persecuted upon her return to make a successful claim. Thus, the court in Cardoza-Fonseca promotes a more generous standard because it has a standard of proof that is at least theoretically less difficult for the claimant to reach.

iii. NATURE OF PERSECUTION

The general consensus regarding what constitutes persecution is that prosecution or discrimination does not equal persecution. However, there are two exceptions to this rule: if the prosecution is disproportionately severe or if the prosecution inflicted is “especially unconscionable or... [is] merely a pretext to persecute... [a person] for his beliefs or characteristics.” Persecution can, according to the Board in In re Kasinga, consist of the infliction of harm or suffering in response to a characteristic of the victim. Either a government or persons a government is unwilling or unable to control can inflict these acts on the victim for the harm to constitute persecution. The Kasinga Board also found that there does not need to be a punitive or malignant intent “required for harm to constitute persecution.”

iv. “ON ACCOUNT OF” REQUIREMENT

Nexus, “the requirement that the persecution feared by the refugee... be linked to one or more of the five enumerated grounds,” was explored by the Supreme Court in Elias-Zacarias

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120 See supra note 118.
121 A critical problem with both Stevic and Cardoza-Fonseca is that the Court commits an error by “insisting that Convention refugees are not per se entitled to non-refoulement under Article 33.” Joan Fitzpatrick, The International Dimension of U.S. Refugee Law, 15 BERK. J. INT’L LAW 1, 7 (1997). With these two cases, the Court created a qualification for refugees that results in some claimants being returned to countries where their lives or freedom will be threatened, which is an action that directly goes against the 1951 Convention.
122 Abedini v. INS, 971 F.2d 188, 191 (9th Cir. 1992).
124 Id. Also see Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997).
125 See supra note 123.
v. INS in the context of a political opinion based claim. The court in this case "imposed a clear proof of persecutor's intent requirement." The court held that the persecution the asylum claimant suffers must be on account of her political opinion, not the persecutors' political opinion. Therefore, the claimant must show that the persecutor's act of persecution came from the desire to single the claimant out for unique punishment because of her actual or imputed beliefs; if claimant's persecution is not on account of her political opinion, her asylum claim fails. Zacarias creates a:

framework which focuses exclusively on the persecutors' motivation and intent. Persecution is on account of applicant's status or belief, only if the persecutor is motivated to harm applicant because of the victim's actually or imputed status of belief.... the proof of intent requirement impacts cases in two significant respects. First, it poses a significant evidentiary challenge because it requires the asylum seeker to prove what was in her persecutor's mind.... Second, the motivation requirement can result in a failure of protection where there may be no intent to persecute for a Convention reason, but the effect is persecution for a Convention reason nonetheless.

The Court did, however, leave open the ability for a claimant to have been persecuted on account of an imputed, rather than an actual, linkage to one of the enumerated grounds.

The five enumerated grounds (race, religion, nationality, membership in a particular social group, and political opinion), which persecution must be on account of membership in, are equally complex. These grounds, while separate in the statute, often overlap in reality, so it is possible for a claimant to frame her claim so that it meets more than one of the grounds. Because the scope of this paper is limited to analyzing the

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127 See supra note 104 at 300.
128 Id. at 306 (emphasis in original).
129 The court indicates this by saying that there was no indication that the guerrillas erroneously believed that Elias-Zacarias' refusal to join them was politically based. See supra note 126 at 482.
particular social group grounds, the other four grounds will not be analyzed. Particular social group will be analyzed in detail later in this paper.

v. UNABLE OR UNWILLING TO SEEK PROTECTION

An asylum claimant must show that she was unable or unwilling to rely on the state to protect her from persecution. The Board in Kasinga found that the claimant met this requirement because she was unable to rely on the police to protect her from her abusive father.130 A claimant might be unwilling to allow the state to protect her if she thinks that the state itself is or might be the party persecuting her.

To be granted asylum in the United States, a claimant must successful argue that she meets the five separate elements of INA § 101(a)(42).131 Thus, she has to prove that she is outside of her country of origin, that she has a fear of persecution, that her fear of persecution is well-founded, that the persecution is on account of race, religion, nationality, membership in a particular social group, or political opinion, and that she is unable or unwilling to avail herself of the protection of her country of origin because of past persecution or fear of future persecution.

C. BACKGROUND ON “PARTICULAR SOCIAL GROUP”

Particular social group is the most flexible of the five enumerated grounds in INA § 101(a)(42) because of the vagueness surrounding exactly what can constitute a social group and the elasticity of this ground’s outer limits. Because of its malleability, this ground is particularly well suited to claims that would not fall under the other four enumerated grounds. For these reasons, gender-related claims are often brought on the particular social group ground.

130 See supra note 123.
131 It is important to note that asylum can be applied for defensively or affirmatively. A defensive asylum claim is applied for when the claimant is already in the country and is in removal proceedings, while an affirmative asylum claim is made to an asylum officer when the claimant has just arrived in the United States.
The social group ground has become an important mechanism through which the refugee “definition is asked to respond to the myriad ways in which persecution manifests itself, particularly when the basis for the persecution does not fit neatly into one of the other four enumerated grounds.” The incorporation of “the social group ground [into the Act] reflects an understanding that individuals who are not manifestly targeted for persecution due to their political opinion, religion or ethnicity may nonetheless be deserving of refugee protection because they belong to a sector of society perceived to threaten the status quo.” This point of view raises the question: what constitutes a social group? Because of the vagueness regarding the boundaries of who is included in and excluded from an INA § 101(a)(42) social group, this ground has become a catchall for refugees whose claims do not clearly fit into one of the other four grounds. This catchall use of social group by applicants has resulted in a cautious view of social group claims by INS and United States courts.

The Board of Immigration Appeals in Matter of Acosta articulated a comprehensive concept of social group while at the same time setting limitations on those social groups to which a person can claim to belong. The Board found that to successfully claim persecution on grounds of social group, the persecution must be directed towards an individual who belongs to a group of persons all of whom share a common, immutable characteristic. This characteristic must either be “beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.” Refugee status on social

132 See supra note 104 at 547.
133 Id.
135 Id. at 53.
group grounds was thus limited “to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.”

In Kasinga, the Board found that the claimant belonged to the social group of female cultural dissidents, and they were thus able to grant her asylum on this basis. The Board went on to say that the person claiming membership in a particular social group not only had to meet the requirements set out in INA § 101(a)(42), but that she also had to be opposed to the persecution that she suffered. This appears to add an extra requirement for the refugee to meet because she must now also prove how she opposed the persecution to which she was subjected. It is an open question regarding the extent to which the refugee must oppose an action or a practice. The Board found in Kasinga’s situation that leaving her native country was enough to constitute her opposition. This is nonsensical. In order to meet the refugee definition in INA § 101(a)(42) the alien must be outside of her country of origin, implying that she had to leave her country just to apply for asylum. According to the Kasinga Board, anyone who has left her country, which is every refugee who applies for asylum, has shown that she opposed the persecution to which she was being subjected.

The Court in Sanchez-Trujillo limited particular social group membership to voluntary associations. The Court in Hernandez-Montiel v. INS expanded the Sanchez-Trujillo holding and found that membership in a particular social group can be accomplished in two ways: by being united by a voluntary association, including a former association, or by sharing an innate characteristic that is so fundamental to the identities or consciences of its members that the

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136 See supra note 104 at 47.
137 See supra note 123.
138 Id.
139 See argument in footnote 116.
140 801 F.2d 1571 (9th Cir. 1986).
members either cannot or should not be required to change the characteristic. Thus, with this court’s holding, particular social group was expanded. It now includes people who voluntarily choose to belong to a certain group and who are then persecuted because of their membership in this elective group. Social group now also includes people who share characteristics that are so fundamental to their identities that they cannot or should not be required to change them.

Because *Hernandez-Montiel* was decided in 2000, there has not yet been time for other courts to explore its holding to any great extent.

Particular social group’s malleable disposition makes it open to encompassing new and previously unclaimed human characteristics. There has been a slow but steady evolution in the law towards the acknowledgment of gender-based claims as a subset of the particular social group ground. In 1995, the INS created guidelines for its asylum officers on how to handle these types of refugee cases. Asylum officers are instructed that the “evaluation of gender-based claims must be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations.” A 1985 Conclusion on the International Protection of Refugees adopted by the Executive Committee of the United Nations High Commissioner for Refugees Programme cited in the INS guidelines asserts that states may adopt the interpretation “that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered a ‘particular social group’ for asylum purposes.” The dissent in *Fisher v. INS* states that because of these guidelines a “whole class of women is eligible for asylum

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141 225 F.3d 1084, 1093 (9th Cir. 2000). This expansion of social group is actually based on the Canadian Supreme Court’s definition of “particular social group.”

142 The holding in *Hernandez-Montiel* has only been discussed in two cases to date: *Aguirre-Cervantes v. INS*, 242 F.3d 1169, 1175 (9th Cir. 2001) and *Noguiera v. Reno*, 2001 WL 58972, *4* (N.D.Cal. Jan. 12, 2001).

143 Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 39(k) (36th Session 1985).

144 Id.
consideration as perhaps persecuted on account of their membership in the social group of nonconforming and therefore harshly treated women.\textsuperscript{146}

To create a successful claim under United States law, an asylum claimant would need to frame her particular social group as one whose members share a common, immutable characteristic. Membership in this group, however, can be by voluntary association or by the immutable characteristic being so fundamental to the identities of the members of the social group that they cannot or should not be required to change it.

D. AN AFGHAN WOMAN'S "PARTICULAR SOCIAL GROUP" CLAIM

While an Afghan woman could claim asylum on any one of the five enumerated grounds in INA § 101(a)(42), the strongest ground that she could claim would be membership in a particular social group.\textsuperscript{147} This ground is a particularly strong one for Afghan women because the Taliban's laws regarding the restriction of women appear to have been applied to women simply because they belong to the group of humans of the female gender who lived in areas of Afghanistan controlled by the Taliban.

A female asylum claimant from Afghanistan could frame her social group to meet the \textit{Acosta} definition because she belongs to the social group of Afghan women all of whom share the immutable, common characteristic of being female.\textsuperscript{148} This characteristic is common to all Afghan women, and being female is a characteristic that is unchangeable. However, this might not be the best social group for an Afghan woman to claim membership in because it embodies all Afghan women including those who never lived under Taliban control. In the past,

\textsuperscript{145} Id.
\textsuperscript{146} 79 F.3d 955, 968 (9th Cir. 1996). The majority opinion of the case will be explored later in this paper.
\textsuperscript{147} These five enumerated grounds are by no means mutually exclusive. In reality, an asylum claimant would try to claim as many of the enumerated grounds as possible because that would increase the chance that she would be granted asylum. For the purposes of this paper, however, only the particular social group ground will be analyzed.
\textsuperscript{148} See supra note 134.
immigration officials and judges have tended to shy away from granting asylum to applicants claiming membership in such a group that would have so many members out of a fear of the floodgates opening causing the United States to be overwhelmed with people from the same social group claiming asylum.¹⁴⁹

A claimant framing her social group can considerably narrow the social group to which she belongs by framing the group as Afghan women who oppose the Taliban’s laws regarding women. This, however, might not actually be very narrowing because the Board in Kasinga essentiality found that leaving one’s home country constitutes a showing of opposition, and any Afghan women who is able to qualify for asylum in the United States has already met this requirement by leaving Afghanistan. Alternatively, a woman could frame her social group as Afghan women who actively opposed the Taliban’s laws if she has evidence that she purposefully acted against Taliban law.¹⁵⁰ The holding of Hernandez-Montiel would allow a woman to claim that she voluntarily belonged to the social group of women who actively oppose Taliban law and still have this group constitute a valid one under INA § 101(a)(42).¹⁵¹ The Hernandez-Montiel holding would also allow the claimant to create a valid argument by framing the social group as one whose members belong to the group because they share the characteristic of being female and having lived under the Taliban, which is something that they cannot or should not be required to change.¹⁵²

There are many facets to making an argument that convinces the United States to grant asylum or withholding of deportation (now known as restriction on removal) to a claimant. There

¹⁴⁹ The Court in Sanchez-Trujillo discussed their reluctance to create such a broad definition of social group. See supra note 140.
¹⁵⁰ An example of going against Taliban law would be going outside the home without a burqa. Others could be running a school for girls, going outside the home unaccompanied by a male relative, continuing to work outside of the home, or seeking medical care from a male doctor without being accompanied by a male relative.
¹⁵¹ See supra note 141 at 1093.
¹⁵² Id.
have been several such cases already argued in the United States that would be helpful to an
Afghan woman seeking asylum in the United States.

IV. UNITED STATES’ REFUGEE CASE LAW REGARDING WOMEN FROM
AFGHANISTAN AND FROM OTHER ISLAMIC THEOCRACIES

There is a general deficiency of United States refugee case law regarding refugees
because of the procedures that INS uses when deciding cases. All applicants’ cases are initially
heard by the Asylum Office, which is not required to make public its rationale for cases that it
approves; rationale is only published for cases that are denied. Therefore, a serious deficiency in
case law exists because the Asylum Office is able to keep the reasoning of some of the most
important successful asylum cases from being used by future applicants.

There are several cases regarding women from Afghanistan who have applied for asylum
in the United States. Many of these cases, though, deal with women who have fled Afghanistan
because of the war with the Soviets or because they were aligned with the communists during the
war in the 1980s and then suffered persecution after the war because of their former alliances.
There are a few cases regarding women who have fled Afghanistan because of the Taliban. At
this point in time, however, there are not many of these cases probably because the Taliban did
not exist long enough to create mass numbers of female refugees who were able to travel to the
United States to claim asylum. Also, the very nature of the laws the Taliban inflicted on women
(especially not allowing women to travel without a male relative) and the distance from
Afghanistan to the United States makes it particularly difficult for Afghan women to reach to the
United States. These factors contribute to the United States’ refugee case law being very limited
regarding Afghan women who have come to the United States since the Taliban came to power.
There are, however, several analogous cases from other Islamic theocracies that have existed
longer than the Taliban, and these cases will also be examined. These analogous cases involved
women who have sought asylum in the United States and claimed that they suffered persecution or feared future persecution because of their gender.

Section A will explore the existing United States cases of female asylum applicants from Afghanistan, while Section B will examine cases of women from other Islamic theocracies who have sought asylum in the United States.

A. EXISTING CASES OF AFGHAN WOMEN SEEKING ASYLUM IN THE UNITED STATES

Most of the existing asylum cases involving Afghan women contain various social groups, but many are also subsets of the group of women living in Afghanistan under the Taliban. Many of these cases involve women who have fled Afghanistan and who did not want to return because they hold a view of Islam, women’s rights, or human rights that went against the extremist views of the Taliban.

In a case involving an anonymous Afghan Muslim woman, the Asylum Office\textsuperscript{153} found that she qualified for asylum although she had not openly opposed the Taliban.\textsuperscript{154} It was found that she had a valid claim because six armed Taliban members from the neighborhood in which she lived broke into her home and insulted “her husband and son for being weak and unable to control the women in their family.”\textsuperscript{155} The armed men knocked the claimant unconscious, and when she regained consciousness, the attackers were gone as were her husband, her son and her daughter; she never heard from or about these members of her family again.\textsuperscript{156} The claimant and

\textsuperscript{153} As previously mentioned, these decisions from the Asylum Office are difficult to work with because there is no evidence of reasoning that can be applied to other claimants’ cases. The rationale from all the cases from http://www.uchastings.edu/cgrs/ are taken from how the applicant and her attorney framed the case.

\textsuperscript{154} “The family was opposed to the Taliban, but [they were] afraid to express their opposition, and people warned them not to do so.” Gender Asylum Case Summary #46, at http://www.uchastings.edu/cgrs/summaries/1-50/summary46.html (Last visited Oct. 5, 2001).

\textsuperscript{155} Id.

\textsuperscript{156} The claimant asserted that she was spared the attackers “because she was unconscious and it is against the Taliban’s rules to touch a women other than one’s wife.” Thus, it was only because she was unconscious that she was spared the fate that the rest of her immediate family suffered. Id.
her attorney probably framed her claim as a membership in the social group of women who
oppose the Taliban's extremist rules regarding women's rights.\footnote{157}

The unnamed applicant in another case was also granted asylum, but she had actively
opposed Taliban rules in public by walking to work by herself, thus breaking two Taliban rules:
that women cannot work and that women cannot go outside of their houses unattended.\footnote{158}
Because of her infractions of Taliban law, she was imprisoned and tortured.\footnote{159} Her affirmative
asylum application was originally denied, but was later granted by an immigration judge. As in
the previous case, the rationale for the decision was not published.

The asylum claimant in \textit{In the Matter of N.Q.} was an Afghan Muslim woman who fled
Afghanistan in 1990 because her husband and close male relatives were all killed by a splinter
militia group.\footnote{160} Even though this woman had already fled Afghanistan when the Taliban came
to power, she feared “that if she and her daughters are forced to return to Afghanistan, the
Taliban will strip them of their basic human rights.”\footnote{161} Because the claimant was a widow and
had no male relatives, she would be subjected to the harshest extent of the Taliban's rules. “She
or her daughters would not have been able to work to earn money to support themselves, leave
their home to buy daily essentials such as food and/or obtain any medical care.”\footnote{162} Thus, a social
group was created that encompassed Afghan women who have female children but who have no

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\footnote{157} It is possible that the applicant's attorney made her claim even narrower by framing the applicant's social group
as being a member of a family that opposes the Taliban's extreme view of Islam.
\footnote{158} \textit{Gender Asylum Case Summary} \#455, at \url{http://www.uchastings.edu/cgrs/summaries/400+/summary455.html}
\footnote{159} \textit{Id.}
\footnote{160} \textit{Gender Asylum Case Summary} \#129, at \url{http://www.uchastings.edu/cgrs/summaries/100-199/summary129.html}
(Last visited Oct. 5, 2001). Asylum was originally denied to this claimant, so she appealed to the Board. Asylum
was granted without opinion after the INS received a brief on appeal and an amicus brief and then withdrew its
opposition.
\footnote{161} \textit{Id.}
\footnote{162} \textit{Id.}
living male family members who have lived or would be living under the Taliban.\textsuperscript{163} This social group is very narrow because it essentially just covers single women who would be so restricted under Taliban law that they would not even have the means of acquiring food or medicine.\textsuperscript{164} This is an important social group claim though because it covers women who have not experienced the Taliban's harsh rule but who fear having to live under it.

What appears to be a successful group for many Afghan women is membership in the social group of Muslim women who oppose the Taliban's fundamentalist approach to Islam. The Asylum Office, in a case involving an anonymous Afghan women who had lived in Europe and the United States for 15 years prior to the Taliban’s rise to power, found that because the applicant had actively participated in anti-Taliban demonstrations in the United States, she had a valid claim to asylum.\textsuperscript{165} The hearing officer probably found that the applicant belonged to the social group of Afghan women who hold moderate Muslim views and who are “opposed to the Taliban’s interpretation which distort[s] the religion.”\textsuperscript{166} In two other cases, where the applicants framed social groups similar to the one above, an asylum hearing officer\textsuperscript{167} and an immigration judge\textsuperscript{168} each granted asylum.

The existing United States cases regarding women who fled the Taliban appear to have granted asylum based on the women’s membership in the social group of Muslim women who

\textsuperscript{163} Id.
\textsuperscript{164} The application of this particular social group would probably be limited to women who had actually lived under the Taliban.
\textsuperscript{165} Gender Asylum Case Summary #27, at \url{http://www.uchastings.edu/cgrs/summaries/1-50/summary27.html} (Last visited Oct. 5, 2001). The demonstrations in the United States that the applicant participated in were specifically against the mistreatment of women by the Taliban.
\textsuperscript{166} Id.
\textsuperscript{167} A woman who feared that the Taliban would “impute a dissident opinion to her because of her more moderate views” was granted asylum. Gender Asylum Case Summary #32, at \url{http://www.uchastings.edu/cgrs/summaries/1-50/summary32.html} (Last visited Oct. 5, 2001).
\textsuperscript{168} This social group was used to grant asylum to an Afghan woman who found “compliance with strict Islamic regulations governing women to be offensive.” Gender Asylum Case Summary #9, at \url{http://www.uchastings.edu/cgrs/summaries/1-50/summary9.html} (Last visited Oct. 5, 2001).
oppose or disagree with the Taliban’s extremist approach to Islam. Thus, a woman who complied with the Taliban rules but was subjected to persecution under the Taliban because of former involvement in a communist political party would not fit into this social group.

It appears that an Afghan female asylum seeker does not need to prove actual persecution on account of membership in this social group if she has a fear of being persecuted in the future. However, changed conditions in Afghanistan might make Afghan women’s claims to future persecution vulnerable. An assessment of the actual conditions that the applicant would face if she were returned would be critical to the asylum decision-maker. These conditions continue to include even the most basic condition of being able to obtain food and medical care. These conditions are arguably alleviated with the United States’ recent intervention in Afghan politics, but it is probable that many of the positive affects of these interventions will have little affect on many Afghan women. An alternative approach would be to focus on past persecution. Afghan women’s claims based on severe past persecution under the Taliban would be unaffected by changed country conditions.

The existing United States case law shows that a female Afghan refugee claimant can form a social group claim and that the outcome of trying this claim will most likely result in a positive ruling for the claimant. The claimant would be wise to frame her social group more narrowly than just Afghan women who have lived under the Taliban in order to better her claim’s chance.

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169 I was unable to find any cases involving an Afghan woman who was not Muslim but who still disagreed with the Taliban’s rules for women. Since almost all of the Afghan people are Muslim (an estimated 99%), it is likely that there will never be an asylum case involving a woman who is not Muslim but claiming membership in a social group of women who oppose the Taliban’s laws on women.

170 This woman could claim that she belongs to the social group of women who hold communist and not Islamic beliefs, but the fact that she complied with Taliban rules might cause her difficulty in her claim that she does not share the Taliban’s beliefs. She would have much better chance of being granted asylum if she framed her claim based on the political opinion ground.

171 See supra note 154.
of being found valid. She could narrow her social group by using facts or events that were specific to her life.

B. CASES OF WOMEN FROM ISLAMIC THEOCRACIES WHO HAVE SOUGHT ASYLUM IN THE UNITED STATES

Because of the scarcity of case law regarding Afghan women, it is helpful to look at United States asylum case decisions regarding women from other Islamic theocracies who have made social group claims. These cases help to round out the existing Afghan social group cases.

The applicant in Fatin v. INS, a Westernized and educated Iranian woman, opposed the Iranian law that required her to wear a chador (a head covering that leaves the face uncovered) outside of the home.\textsuperscript{172} The court found that, although she belonged to a valid social group under the \textit{Acosta} definition (she was a member of the social group of Iranians who shared the innate characteristic of being female), she had “not shown that she would suffer or that she has a well-founded fear of suffering ‘persecution’ based solely on her gender.”\textsuperscript{173} The court indicated that the applicant’s social group claim would have warranted more attention if she had furnished evidence of her membership in a more restricted group of Iranian women.\textsuperscript{174} The applicant, however, did not argue that she refused to conform to Iranian law or that conformity to such laws would be profoundly abhorrent for her.\textsuperscript{175} The claimant acknowledged that her two choices were to “comply with the Iranian laws or suffer severe consequences.”\textsuperscript{176} Thus, it appears that this court felt that while being forced to wear a veil in public did not constitute persecution for this applicant, if she was prosecuted for her refusal to conform to the laws requiring her to wear a veil this would constitute persecution. This court seems to have created the additional

\textsuperscript{172} 12 F.3d 1233 (3d Cir. 1993).
\textsuperscript{173} \textit{Id.} at 1240.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.} at 1242.
\textsuperscript{176} \textit{Id.}
prerequisite that the claimant has to have disobeyed or profoundly abhorred the law to meet the requirements for asylum.

The claimant in Safaie v. INS, another Iranian women, claimed that while she did begin “wearing Islamic dress when it became mandatory in 1982... she did not have the mentality of a Muslim,” so she should have a valid social group claim. She had been threatened multiple times for her failure to conform to dress standards, for smoking cigarettes, and for demonstrating against the Khomeini regime. The court found that while Safaie belonged to the social group of Iranian women, her claim of persecution on account of membership in that social group made the group too broadly defined. The Court did not find from the evidence that “all Iranian women... [have] a well-founded fear of persecution based solely on their gender.” Safaie failed to show that the actions against her by the Iranian government were any different that those applied to any other female Iranian citizen; she essentially just showed that she had been prosecuted not persecuted. She also failed to show that she had “assert[ed] ‘some missionary fever’ to defy the law.” This court thus affirmed the Fatin court’s refusal to extend social group to include all people of a specific gender in a country, but it also refused to define some types of prosecution as persecution as the Fatin court appears to have been willing to do.

In Fisher, an Iranian woman sought refuge and based her claim on her arrest for wearing a swimming suit at a party where men were present, her arrest when she let some hair escape from her veil in public, and the invasion of her home in a search by government agents after the veil incident. The court found that the Iranian government’s prosecution of “her for violating the dress and conduct rules does not alone amount to persecution” because she had only

177 25 F.3d 636, 639 (8th Cir. 1994).
178 Id. at 638.
179 Id. at 640.
180 Id.
established that she had been prosecuted for acts deemed illegal in Iran. She had only been prosecuted under laws that are applicable to all Iranian women and that she had not been singled out for persecution. The court found that regardless of Fisher's opposition to Iranian law, she had been prosecuted under general laws, so her prosecution did not amount to persecution because of the lack of disproportionately severe or pretextual punishment. The court also found that the punishment that she received was not "merely a pretext to persecute [her] for [her] beliefs or characteristics."  

The Board in *In re S-A-* granted asylum to the Moroccan applicant by finding that "the persecution... [that she suffered] was on account of her religious beliefs, as they differed greatly from those of her [orthodox Muslim] father concerning the proper role of women." The applicant had never gone to the police after being abused by her father because "going to the police would have been futile, because under Muslim law, particularly in Morocco, a father's power over his daughter is unfettered." The Board held that persecution on gender grounds alone does not "constitute persecution on account of membership in a particular social group," but this case was unique because of her father's fanatical religious beliefs and "the domestic abuse suffered by the respondent" because of those beliefs. The Board held that if the persecution is based on the persecutor's religious beliefs about a group who shares the same gender, then people of that gender constitute a valid social group. Thus, the Board found that the applicant was eligible for asylum because her religious views differed from her father's and she was persecuted by him for her differing beliefs.

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181 See supra note 146 at 959-960.
182 Id. at 962.
183 Id. at 964. (quoting *Abedini*, see supra note 1 at 44). 
184 Interim Dec. 3433 (BIA 2000).
185 Id.
186 Id.
The analysis of a female Afghan applicant's social group claim must be made analogous to some of the above mentioned asylum cases and distinguished from the others in order for the applicant to put forward a social group claim that the asylum officer, the immigration judge, the Board members or the circuit judges will find valid. The formation of a hypothetical Afghan woman’s claim for asylum will aid in the analysis of a feasible approach.

V. HYPOTHETICAL CASE OF AN AFGHAN WOMAN APPLYING FOR ASYLUM IN THE UNITED STATES

The current high public awareness in the United States of the conditions that Afghan women suffered under the Taliban could help any Afghan woman's case. To qualify for asylum, the applicant must successfully meet the five elements of INA § 101(a)(42). Thus, the elements that she has to meet are that 1) she is outside of her country of origin, 2) she has a fear of persecution, 3) that her fear must be well-founded, 4) the persecution she fears is on account of her membership in a particular social group, and 5) she is unable or unwilling to avail herself of state protection. To better understand how a female Afghan’s asylum claim might be analyzed in the United States, a hypothetical woman’s claim will be examined with the case law previously discussed.

A. THE HYPOTHETICAL WOMAN’S STORY

Imagine that the applicant is a relatively well-educated 38-year old Afghan woman who had been a schoolteacher at a girls' school in Kabul. She is a moderate Muslim who had originally been apathetic about the Taliban when they took over Kabul in 1996. She has seen many Afghan regimes rise and fall during her life and each one is honestly not very different.

\[187\] It should be noted that all of the agencies or organizations that have reported the appalling conditions in Afghanistan are either from Western countries or international organizations. However, these reports are probably relatively accurate because the only country that has even slightly positive reports regarding Afghan women’s conditions is Afghanistan itself thus calling into question the objectivity of those reports. For positive reports regarding Afghanistan see http://www.azzam.com/html/talibanwomen.htm.
from those that preceded it. Early in 1997, she began having some reservations about the
Taliban’s interpretation of Islamic law when they closed the girls’ school at which she was
teaching; this was a bit after the Taliban began strictly enforcing the laws restricting women’s
dress. She operated a small private school for girls out of her home for about a year after the
Taliban closed the school, but she stopped giving lessons when she heard that one of her
neighbors had reported her to the local Taliban law enforcer. She was never visited by the
enforcer (whom she had known since she had moved to the neighborhood in 1990), but she never
reopened the school. One of the main reasons that she did not open the school again after the
scare of being reported was because a female friend of hers, who had lost her job as a teacher
when the Taliban began prohibiting women from working, was taken from her home,
imprisoned, interrogated and tortured by Taliban officers for several weeks after they discovered
that she had continued to work outside the home.

She has not seen her husband since 1988 when he left Kabul to fight against the Soviet
army; he is presumed dead. She has a 15 year-old son whom she had been able to support on her
salary from teaching. Making a living has become substantially more difficult since she stopped
teaching, but with the money that her son makes as an errand boy and messenger for several
local businesses, they have managed to keep themselves fed.

One day in late 1998, she wanted to visit an ill friend who lived a few blocks away. She
wore her burqa, but, because she thinks that the law requiring women to be attended by a male
relative in public is absurd and because her son was working, she went out of the house
unattended. She was not far from her front door when Taliban agents arrested her for violating
Taliban law. She was taken to a local prison, where she was imprisoned and interrogated several
times; she was not physically tortured, but the experience of being in prison was terrifying for
her. She truthfully answered the questions that they asked her during interrogation (she had no information about the Northern Alliance), but she did not volunteer information about the school in her home (if the enforcer who she thought knew about her school had purposefully not reported her, she did not want to cause him trouble by saying anything). After two days, she was released from prison and allowed to go home. A few days after her release, she noticed that two men, one of whom had interrogated her in prison, walked by her house periodically during the day. These men scared her, so one night she and her son sneak out of the house with a few belongings and fled across the border into Pakistan. In Pakistan, she was able to obtain Afghan passports and plane tickets to the United States for both herself and her son. She immediately requested asylum upon her arrival in the United States.

B. METHODS OF FRAMING THE HYPOTHETICAL WOMAN’S SOCIAL GROUP

The hypothetical women (and her attorney) will need to analyze each of the previous asylum cases in which Afghan women argued membership in a social group in order to determine what affect these cases might have on her asylum claim. It would also be helpful for her to present INS’s “Considerations for Asylum Officers” to bolster her claim.188

Being a woman from Afghanistan who has lived under the Taliban has certain sympathetic implications attached to it in the minds of Americans at the moment. The United States’ current public opinion of the Taliban is so unfavorable and the plight of Afghan women is so sympathetic and highly publicized that the person or persons deciding this woman’s claim would most likely take the facts she presents and help her in carving out a successful social group. The hypothetical woman also could possibly use the media to make her asylum case known. However, there are some definite legal arguments that the hypothetical woman should make to strengthen her claim.
The *Acosta* rule is helpful for this woman because she belongs to a group with an immutable characteristic: she is a member of the social group of Afghans who are female. The Taliban recognition of membership in this group is evidenced by the Taliban law that automatically put women into a group solely because of their gender and then treated them in a particular way based on their membership in this group. However, based on the holdings of *Fatin* and *Safaie*, this social group is probably going to be too broad to meet the current interpretation of INA § 101(a)(42).

The woman could claim that she was been subjected to harsh and inhuman treatment due to her two violations of Taliban social mores. She could use the progressive “Considerations for Asylum Officers” in making this gender-based argument. Specifically, she could use the argument that she is like the female “asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society.” For this claim to be successful, she has to prove that her imprisonment and the interrogation she underwent while imprisoned were harsh or inhuman. She would also have to prove that running a girls’ school and going into public without her veil were acts that transgressed social mores. For two main reasons it will be an uphill battle for her to argue that Taliban law equals social mores. First, the Taliban was only in power for a short amount of time, and it is arguable that their laws, because of the short time they were in effect, do not equal social mores because they did not meld with Afghan society to create mores; this is a valid argument even though religious vigilantes publicly enforced such rules. Second, it is also arguable that Taliban law did not equal social mores because of the

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188 *See supra* note 145.
189 *Id.*
190 *Id.*
191 She could argue against this point by holding that while the Taliban’s laws are new, they are social mores because they are based on Islam, which has been part of Afghan society for close to 1400 years. This is a dangerous argument to promote because by making it, she might be admitting that all Afghan women have always been part of the social group that she is claiming to belong to and that they have always been subjected to these laws. Making
limited number of Afghan people who readily accepted it as part of their lives and society. While there are obviously people who strongly adhered to Taliban law, it appears that most Afghans adherence to Taliban law was achieved with terror, violence, and death. It is debatable that laws do not equal social mores when a majority of the society only complies with the laws out of fear rather than because of a belief that the laws are a necessary component of society.

Successfully arguing that her interrogation by the Taliban agents was harsh and inhuman might be difficult. While interrogation is generally a terrifying act, it might be hard for her to prove that the two days she spent in prison being interrogated were harsh or inhuman; this might be especially hard because she was not physically tortured during the interrogation and she was imprisoned for a relatively short amount of time. For a successful claim, it would be helpful if she were able to analogize her experience in prison with how the claimant in *Gender Asylum Case #455* had been poorly treated while she was imprisoned.192

She could make two claims using *Hernandez-Montiel*. First, she could claim that she was being persecuted because of her voluntary association with the social group of Afghan women who think some of the Taliban’s laws regarding women were absurd. She can prove her membership in this group by showing how she ran a school for girls and that she left her house unescorted. However, to successfully make this argument she will have to overcome the uncertainty regarding whether the men who imprisoned her and who interrogated her knew about her school. They did know about her leaving her house unattended so she could stress this occurrence in making her case. She was only caught and imprisoned for one infraction of the law, but imprisonment for this one rather minor violation seems severe, so she could argue that

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this argument would most likely get her claim denied by INS because they would be reluctant to grant her asylum on membership in a social group that has always been subjected to the treatment that caused her to leave Afghanistan. 192 See supra note 158.
her imprisonment was because the Taliban officials knew or suspected her of breaking Taliban law on other occasions.

Second, she could use the holding in *Hernandez-Montiel* to argue that she belongs to a social group that shares the innate characteristic of being female. She can contend that being female is fundamental to the identity of this social group’s members because the women who belong to this group cannot change the characteristic of being female. This is a strong argument for her to make because gender is fundamental to identity and it is something that is very difficult to change. Because gender is so fundamental to one’s identity, she can argue her gender is something that she cannot or should not be required to change. Still, because of the reluctance by the United States to create large social groups, it would be helpful if she were able to narrow this group.

Her claim regarding opposition is analogous to the Afghan women who opposed the Taliban but did not make their opinions publicly known. These cases are analogous because of the similarities between those cases and the private opposition that the hypothetical woman engaged in by running the school in her home. She could also analogize her case to *In the Matter of N.Q.* in which the claimant openly opposed Taliban laws by frequently going out of the house unattended. She would have to prove that the times she broke Taliban laws were comparable with the daily law breaking of the woman in that case. The fact that she ran a private school for nearly one year supports this analogy because she engaged in daily infractions of Taliban law during that time.

If she is able to frame a valid social group, she can use as reinforcement for her argument the *Kasinga* Board’s requirement of opposition to the persecution suffered. She could use her

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193 See *supra* note 154.
194 See *supra* note 160.
school and her venture out of the house without her son as evidence of her opposition. This argument may not be acceptable, however, because her evidence is not strong. She kept her school a secret thus arguably showing that her opposition to Taliban law was not great; although in light of the harshness of the penalty, even covert opposition might be deemed adequate. A counter argument is that she kept her school a secret because she did not want to be punished for teaching, not because she was not in opposition to Taliban law. This interpretation might be plausible because although the hypothetical woman thought Taliban law ridiculous, she always complied with it save running her school (which could be seen as a major infraction) and leaving her house unattended.

This raises an important question regarding opposition to persecution: if general compliance with a law is done out of fear, does the smallest deviation from that compliance equal opposition? The applicant in this case will definitely argue that her small deviations from Taliban law are enough to show her strong opposition to the persecution that she suffered. Her argument might be viable in light of the high risks of extreme punishment for minor infractions.

She could also argue that her situation is analogous to the three moderate Muslim Afghan women who were granted asylum. All of these women held moderate Muslim views and opposed the Taliban’s distorted interpretation of the faith. Her evidence for this claim includes the fact that she was a practicing Muslim, she raised her son in the Islamic religion, and that she always wore her burqa when she went out of the house (a veil that Afghan women traditionally wear). Her strongest evidence of her disagreement with the Taliban’s version of Islam is that she continued to teach girls even after women were forbidden to work and female children were forbidden to attend school once they reached the age of eight.

195 See supra notes 165, 168, and 160.
196 See supra notes 172, 177, and 146.
She will have a struggle to distinguish her situation from *Fatin, Safaie, and Fisher* in which the social group of women from a certain Islamic country was either found to be too large or the claimant was not found to be within the smaller group of women who found compliance profoundly abhorrent.\(^{197}\) One way that she can begin to distinguish these cases from her own is by stressing that all three of these cases involved Iranian, not Afghan, women. She can assert that Afghanistan's laws under the Taliban were far more repressive and persecutory in nature than Iran's laws have ever been. While Iranian law regarding women could be seen as severe, it arguably does not reach the high level of total oppression that Taliban law reached. This difference in severity might be sufficient to distinguish the holdings in these cases which find that the social group of females from a certain country is too broad. The high level of persecution in Afghanistan under the Taliban would help her distinguish between Iranian laws regarding women, which, while arguably being oppressive, are nothing compared to the extremely strict Taliban laws. Good information on the country conditions for both Afghanistan and Iran would be necessary to successfully make the distinctions between these cases.\(^{198}\)

C. HOW THE HYPOTHETICAL WOMAN'S CLAIM MIGHT BE ANALYZED BY THE COURT

The applicant, having successfully framed membership in a social group, must meet the other four elements of INA § 101(a)(42) to be granted asylum in the United States. These four remaining elements are that she is outside of her country of origin, she has a well-founded fear of persecution, that her persecution is on account of her social group, and that she was unable or unwilling to avail herself of the state's protection.

i. OUTSIDE OF COUNTRY OF ORIGIN

\(^{197}\) See *supra* notes 172, 177, and 146.

\(^{198}\) For information on country conditions, see Amnesty International reports at http://www.amnesty.org/ and Human Rights Watch reports at http://www.hrw.org/.
For the hypothetical woman, the first requirement of INA § 101(a)(42) is not difficult to meet. The applicant is applying for asylum in the United States, so she is obviously outside of her country of origin.

ii. NATURE OF PERSECUTION

Proving a well-founded fear of persecution for the hypothetical woman should not be difficult because of Afghanistan’s recent social and political condition under the Taliban. If she can prove that she was persecuted in the past that would greatly strengthen her claim. She can also claim that the torture of her schoolteacher friend caused her to be fearful because the Taliban might do the same to her if they discover that she ran a school. She would have a strong claim if she provided evidence of the oppressive social conditions for people in her social group. The applicant has to prove that she meets the Cardoza-Fonseca well-founded fear requirement which would probably not be overly difficult to prove with the negative information currently coming out of Afghanistan about the treatment of women under the Taliban. The media in the United States could be of great help to her in this argument as well as country reports from Amnesty International and Human Rights Watch.

iii. “ON ACCOUNT OF” REQUIREMENT

The nexus requirement could turn out to be just as difficult to prove as the valid social group. The hypothetical woman must prove that her persecution by the Taliban is on account of her membership in the social group that she has created. This could prove to be particularly difficult for her because, as an Afghan woman who fled the Taliban, she might need to distinguish between the Taliban’s laws imposing general restrictions on women and the excessive punishments the Taliban used when these laws were broken. The importance of the

199 See supra note 117.
200 See supra note 198.
differences between these was that the laws are applied to all Afghan women, but the excessive punishment is only applied to those Afghan women who broke the law. The Elias-Zacarias rule further complicates this because it requires that the persecution that the woman suffered be because of the persecutor’s desire to single her out for unique punishment because of her actual or imputed beliefs. Thus, unless the hypothetical woman can persuade the court to find that she belongs to the overarching social group of women from Afghanistan, she will be unable to claim that she has a well-founded fear of persecution because of her membership in that social group. It will be much easier for the applicant to prove that her well-founded fear is based on her membership in the social group of women who disagree with Taliban law, who have broken those laws, and who have been punished for breaking these laws.

iv. UNABLE OR UNWILLING TO SEEK PROTECTION

The issue of this applicant being unable or unwilling to avail herself of the state’s protection is rather ironic because the state is the party who is actually engaging in the persecution. Thus, it is arguable that the Taliban was unwilling to protect her because they were the entity persecuting her. The severity of Taliban laws, and the often brutal method by which punishment for breaking these laws was carried out, take the Taliban far away from simply being unwilling to protect the applicant; the Taliban held an active role in the persecution. They held a much more active role than the Moroccan police did in In re S-A-, because the Taliban were actively engaged in enforcing the laws they created, whereas in Morocco the police simply refused to interfere in the lives of female citizens.201 It is also debatable whether the Taliban was ever able to meet the requirements to be a state. The five criteria for statehood are a permanent population, a defined territory, a government, a capacity to conduct international relations, and a

201 See supra note 184.
legal capacity. The Taliban arguably failed all of these requirements because of the methods by which they came to power and because only Pakistan and Saudi Arabia ever recognized them as the legitimate government of Afghanistan. Thus, the Taliban might not have even been a “state” within the meaning of INA § 101(a)(42).

While the hypothetical woman has to meet all five of the requirements in INA § 101(a)(42), given the current sympathy that the United States has for Afghan women who have lived under the Taliban, it is probable that she will not have great difficulty in meeting the requirements to the satisfaction of the hearing officer.

While there are numerous ways to frame a successful social group claim, there is arguably one method that will yield the best chance of a successful outcome for the claimant.

V. MOST SUCCESSFUL FRAMING OF PARTICULAR SOCIAL GROUP ARGUMENT THAT COULD BE MADE BY AN AFGHAN WOMAN

Based on the meager case law that exists regarding Afghan women who have both fled the Taliban and who have applied for asylum in the United States, the most successful framing of a particular social group for an Afghan woman would be the group of moderate Muslim Afghan women who oppose the Taliban’s radical interpretation of Islam. This social group would be even stronger if it were framed as the group of moderate Muslim Afghan women who oppose the Taliban’s radical interpretation of Islam, who have refused to comply with Taliban law, and who had actually been persecuted for their refusal. Because the United States often shies away from social groups that are defined too broadly, the narrowness of this group would probably be accepted because of the relatively small number of Afghan women who fit into it.

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203 At the time of the writing of this paper, neither of these governments continues to recognize the Taliban as the government of Afghanistan.
VII. CONCLUSION

Even though Afghan women were persecuted by the Taliban regime based solely on their gender, it could be extremely difficult to frame a successful social group claim on that alone. A female Afghan applicant would have a better chance of getting asylum if she were able to create a narrower social group. There are a number of ways in which she could do this, but because proving membership in a particular social group relies heavily on evidence, it might work best to analyze her specific evidence and then create a social group based on that analysis. However, given the United States government's current anti-Taliban stance, it is likely that an Afghan woman would be granted asylum even if she were unable to create an invulnerable social group.

204 See supra note 134.