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WELL-FOUNDED FEAR OF PERSECUTION AMONG WOMEN SEEKING ASYLUM: LESSONS LEARNED FROM THE LAW OF RAPE

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INTRODUCTION

The criminal justice and asylum adjudication systems are clearly different facets of the U.S. legal framework. One system is criminal, the other is civil. Cases that reach each system are tried by different judicial bodies, through different processes, and by different sets of rules and policies. Initially, it appears unlikely that any meaningful parallels can be drawn between the two systems or that any lessons of one would translate readily into the other. However, upon closer examination, certain conceptual aspects in the two systems emerge as strikingly similar.

This comment examines the conceptual similarities between the criminal justice system's treatment of rape and the asylum adjudication system's treatment of gender-based claims. It posits that both the criminal justice and asylum adjudication systems share victim protection as a primary goal.[1] How the two systems operate to protect victims varies greatly; the criminal justice system punishes the perpetrators of crimes and protects victims through successful prosecution, while the asylum system remains neutral toward the distant perpetrator and instead seeks to protect the victim outside of her country of origin.[2]

In addition to the shared aim of victim protection, a victim's resistance or opposition often determined the success and failure of claims made under criminal law in early rape cases, and continues to determine the outcome of asylum claims in gender-based cases.[3] Particularly, the manner in which asylum cases are adjudicated places a de facto focus on the asylum-seeker's demonstrated opposition to persecution, much like early U.S. rape laws emphasized the victim's resistance to the assault.[4] In the context of rape law, resistance arose in the courts' interpretation of the crime through both the "force" and "lack of consent" elements.[5] In the context of asylum law, resistance has arisen as an implicit factor in political opinion and social group based claims with gender elements, often under references to opposition to particular practices against women.[6] As a result, an asylum-seeker's opposition to her persecution colors every element of her claim.[7] In addition, resistance is a statutory requisite for those who seek asylum to escape coercive family planning practices in countries such as China.[8]

Part I begins by examining the evolution of rape law in the United States. It posits that confusion surrounding "force" and "nonconsent" has little to do with actual differences between the two terms, and suggests that Peter Westen's ap-

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1. *See* discussion *infra* Part III.
2. *See* discussion *infra* Part III.
3. *See* discussion *infra* Part III.
4. *See* discussion *infra* Part III.
5. *See* discussion *infra* Part I.
6. *See* discussion *infra* Part II.
7. *See* discussion *infra* Part II.
8. *See* discussion *infra* Part II.

proach in *The Logic of Consent* may help clarify that confusion in a constructive way.

Part II examines the U.S. asylum system as applied in claims involving gender dimensions. It elaborates on the founding principles of asylum law, both in the international and domestic realms, and the ways in which claims with gender dimensions are classified, including the extent to which resistance to persecution is a critical factor in particular cases.

Part III seeks to apply the lessons learned during the United States' rape reform movement in the 1980s and 1990s for modifying the focus in the current asylum adjudication system away from resistance. This comment concludes that, in both systems, victim protection is best served when courts focus their consideration on the act that brought the matter before them, instead of merely considering the victim's reaction to it.

I. RAPE LAW IN THE UNITED STATES

A. Evolution of U.S. Rape Laws

The United States inherited its first legal definition of rape from the English common law. Under the historic English common law rule, rape "is the carnal knowledge of a woman forcibly and against her will."[9] Early U.S. courts manifested their acceptance of this rule through adopting the "force"[10] or "against her will"[11] portions of the English rule as elements of the crime.

Historically, rape was an atypical crime with regard to how it could be proven. For many crimes, the prosecution can only obtain a criminal conviction if both the *actus reus* and *mens rea* elements of the crime are established beyond a reasonable doubt.[12] However, for the entire first century that courts in the United States tried rape cases, they were generally unwilling to inquire into the *mens rea* of a rape defendant, thereby precluding analysis of what is typically a crucial element of a criminal case.[13]

Perhaps because of this unwillingness to consider a defendant's *mens rea*, the focus on proving the "force" and "nonconsent" shifted from a defendant's mental state when he committed the act to the victim's response to the act. Accordingly, a victim's physical resistance was an element that needed to be proved in order to obtain a rape conviction.[14] The rationale for such a requirement emphasized that the victim's physical resistance or lack thereof was "evidence of her lack of consent, [and] the defendant's use of force."[15] Under traditional common law, a victim's strong physical resistance meant that she "did not consent, that the defendant needed to use force to overcome her resistance, and that her resistance informed

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9. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 210 (1769). The word "rape" is historically rooted in an archaic term which means "to seize and carry off by force." *See* BLACK'S LAW DICTIONARY 1375 (9th ed. 2009).

10. *See, e.g.*, Commonwealth v. Burke, 105 Mass. 376 (1870).

11. *See, e.g.*, Baxter v. State, 115 N.W. 534 (Neb. 1908).

12. The *actus reus* is the criminal act, *see* BLACK'S LAW DICTIONARY 41 (9th ed. 2009), and the *mens rea* is the corresponding mental state of the defendant when he committed the act, *see id.* at 1075.

13. *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1094–99 (1986).

14. Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2692 (1991).

15. *Id.* at 2691.

him of her lack of consent."[16] Various courts throughout U.S. history have used a victim's physical resistance to establish one or more of these elements.[17] Conversely, if a victim submitted to the attack or did not physically resist it, courts have interpreted this to mean that the victim consented and that the defendant had not forced her to engage in the sexual act.[18] In short, physical resistance served as a benchmark for proving or disproving both the *actus reus* and *mens rea* of the crime and its possible defenses of consent or lack of force.[19]

In addition, initially, the courts' requirement for the level of resistance was extraordinarily high. Under traditional rape statutes, a victim was required to demonstrate her nonconsent "by engaging in resistance that [left] no doubt as to nonconsent."[20] Accordingly, many courts through the 1950s required proof of the victim's "utmost resistance."[21] The test for "utmost resistance" was composed of two requirements: first, "that the intensity of the struggle must reflect the victim's physical capacity to oppose sexual aggression," and, second, "that her efforts must not have abated during the encounter."[22] In short, in order to obtain a rape conviction, a victim was required to prove that she fought—literally tooth and nail—throughout the entire duration of her attack.[23]

The Draconian nature of the "utmost resistance" requirement lent itself to increasing criticism throughout the mid-twentieth century.[24] However, even as the standard engendered criticism, it also found support. Matthew Hale, Lord Chief Justice to the Court of Kings Bench, articulated the rationale for requiring such strong proof of resistance in a statement he made three centuries ago: "Rape is . . . an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho [sic] never so innocent."[25] As Hale alluded, the "utmost resistance" requirement reflected a fear of convicting innocent men at the whims of women who were complicit in the sexual act, but who had afterward changed their minds. Strong physical resistance on behalf of a victim was tangible proof of nonconsent, and was thought to minimize the risk of wrongful conviction.

Ironically, the "utmost resistance" requirement reigned when the social paradigm of a proper woman's behavior was marked by her submissiveness and domestication.[26] The double standard the "utmost resistance" requirement created was that when a woman's honor and bodily integrity were threatened, the criminal law compelled her to act in a manner that social paradigm prohibited in her daily life.

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16. *Id.* at 2692.

17. *See, e.g.*, Commonwealth v. Burke, 105 Mass. 376 (1870); Baxter v. State, 115 N.W. 534 (Neb. 1908).

18. *Id.*

19. Note that "no similar effort [has been required] of victims of other crimes for which consent is a defense." Estrich, *supra* note 13, at 1125.

20. *See* Estrich, *supra* note 13, at 1099.

21. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 17.4, at 639 (2d ed. 2003).

22. *See id.*

23. For an example of how "utmost resistance" was applied in the courts, see Brown v. State, 106 N.W. 536 (Wis. 1906). The court in that case defined resistance as "opposing force to force . . . not retreating from force." *Id.* at 539. For further discussion of *Brown v. State*, see Estrich, *supra* note 13, at 1122–23.

24. See 2 LAFAVE, *supra* note 21, § 17.4(a).

25. Estrich, *supra* note 13, at 1094–95 (quoting 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1778)). As Estrich notes, Hale's statement is the basis for the "cautionary" instructions traditionally given in sexual assault cases. Estrich, *supra* note 13, at 1095 n.15.

26. *See, e.g.*, MARILYN COLEMAN, LAWRENCE H. GANONG & KELLY WARZINIK, FAMILY LIFE IN 20TH-CENTURY AMERICA 20 (2007).

In order to obtain a conviction against her rapist, the victim must not have merely submitted to force; she must have opposed force with force.[27] In early rape law, the level of injury a woman wore on her skin through the cuts and bruises she suffered from fighting back had the power to determine the outcome of the perpetrator's criminal case.

Several legal articles written during the 1950s and 1960s further compounded the double standard of passivity and resistance.[28] These articles supported the "utmost resistance" standard by reflecting typified male notions of female sexuality. These articles:

> provided detailed explanations of why women could not be relied upon to know what they wanted or mean what they said; how it was that many women enjoyed physical struggle as a sexual stimulant; and how unfair it would be to punish men who realized that 'no' means 'yes' only to have their ambivalent partners lie after the fact.[29]

Articles such as these stripped women of sexual and legal autonomy in several ways. First, they denied women agency to define what sexual behavior was desirable, acceptable, or legal. Second, they legitimized the need for a strong physical resistance standard by focusing on the unreliability of women to express what they want.[30] Third, they fetishized non-physical forms of resistance by enfolding them into a typified fantasy. Finally, they placed victims into a hierarchy whose levels reflected a judgment on what types of people deserved the protection of the law, by protecting those women who physically resisted and not protecting those who did not.[31] These articles fueled the double standard of passivity and resistance by arguing for women to be strong when resisting a sexual assault, while simultaneously subjecting them to the notion that they could not be trusted to say what they "really want."

Ultimately, critics of the "utmost resistance" requirement prevailed. Beginning in the 1970s, some states began to require that women respond to sexual assault with "earnest resistance,"[32] while others required "reasonable resistance."[33] These reforms changed the extent to which physical resistance was required, signaling an increased value on the lives of the victims.[34] However, physical resistance "remained the norm for manifesting non-consent."[35] In addition, critics of the lowered

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27. *See Brown*, 106 N.W. at 539.

28. *See, e.g.*, Roger B. Dworkin, Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680 (1966); Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55 (1952).

29. Estrich, *supra* note 13, at 1127–28.

30. *See id.* at 1130.

31. *Id.*

32. 2 LAFAVE, *supra* note 21, § 17.4; *see also, e.g.*, State v. Jones, 617 P.2d 1214 (Haw. 1980).

33. *See, e.g.*, State v. Powell, 438 So. 2d 1306 (La. Ct. App. 1983).

34. Several studies conducted during the 1970s and 1980s helped the cause of reformers. These studies looked at the rate and severity of injury for women who physically resisted rape versus those who did not. They largely found that both incidence and severity of injury were higher for women who unsuccessfully resisted their attackers. *See, e.g.*, Marchbank et al., *Risk of Injury from Resisting Rape*, 132 AMERICAN JOURNAL OF EPIDEMIOLOGY 540–49 (1990).

35. 2 LAFAVE, *supra* note 21, § 17.4.

standards looked to how the courts applied them, and found that the difference failed to render satisfactory results.

State v. Rusk is an example of how cases played out under the "reasonable resistance" standard.[36] In that case, the 21-year-old victim, Pat, testified that she had met defendant Rusk at a bar, that they had talked briefly,[37] and that she gave him a ride home.[38] When she declined to go upstairs with him, he took away her car keys, opened Pat's door, and told her again to go up with him.[39] Uncertain of the neighborhood at that late night hour, she followed Rusk up to his apartment.[40] When he asked Pat to undress,[41] she did so, but, as she explained to the court:

> I was really scared, because I can't describe . . . what was said. It was more the look in his eyes; and I said, at that point . . . "If I do what you want, will you let me go without killing me?" Because I didn't know, at that point, what he was going to do . . . I started to cry; and when I did, he put his hands on my throat, and started lightly to choke me; and I said, "If I do what you want, will you let me go?" And he said, yes.[42]

At that point, Pat performed oral sex on Rusk and then had intercourse with him.[43] Afterwards, Rusk walked her to her car and asked if he could see her again.[44]

From beginning to end of *State v. Rusk*, twenty-one judges considered the sufficiency of the evidence.[45] Of these, ten concluded that what had happened was rape.[46] Eleven concluded that it was not.[47] One reason that helps explain this result is that "prohibited force," an element of rape in Maryland's sexual assault statute, was still defined by a victim's resistance: "the defendant's words or actions must create in the mind of a victim a reasonable fear that if she resisted, he would have harmed her, or that faced with such resistance, he would have used force to overcome her."[48] For the judges on the Maryland Court of Appeals who dissented from confirming Rusk's conviction, this meant that the victim must "follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person. . . . She must resist unless the defendant has objectively manifested his intent to use physical force to accomplish his purpose."[49] For over half of the judges who heard the case, Pat was not a victim or a reasonable woman, because "[i]nstead of fighting, she cried. Instead of protecting her virtue, she acquiesced."[50]

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36. 424 A.2d 720 (Md. 1981).
37. *Id.*; *see also* Estrich, *supra* note 13, at 1112.
38. *Rusk v. State*, 406 A.2d 624, 625 (Md. Ct. Spec. App. 1979) (en banc), *rev'd*, 424 A.2d 720 (Md. 1981).
39. *Id.*
40. *Id.*
41. *Id*. at 626.
42. *Id.*
43. *Id.*
44. *See* Estrich, *supra* note 13, at 1112.
45. *See id.* at 1113.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

Rusk's conviction was ultimately upheld.[51] However, the trajectory the case took led critics to comment on the inefficacy of the "reasonable resistance" standard in protecting rape victims. Although lowering the standard for the resistance requirement was a first step, completely eliminating the physical resistance requirement was one of the foremost aims of rape law reform.[52]

In terms of statutory reforms eliminating the requirement for physical resistance, this goal has largely been realized. Now, only a few states explicitly mention a resistance requirement in their rape statutes.[53] Conversely, only a few states explicitly note in their criminal codes that physical resistance is *not* required to substantiate a rape charge.[54] This calls into question whether physical resistance still remains an unarticulated element of the crime, or at least whether it remains as a factor that juries consider when weighing the evidence in a rape case.

In one highly publicized case in 1992, the answer to these questions appeared to be yes. On September 30, 1992, a Travis County, Texas, grand jury refused to indict Joel Rene Valdez after he broke into Elizabeth Wilson's apartment and raped her at knife point.[55] According to the uncontested evidence of the prosecution's case, Valdez entered the twenty-five-year-old artist's apartment at around 3:00 a.m. on September 17, 1992.[56] Once inside, Valdez picked up a knife from the kitchen counter and went upstairs to Wilson's bedroom.[57] When Wilson woke up and turned on the light, Valdez was approaching her with the knife.[58] Wilson ran into the bathroom and locked the door.[59] She was "dialing 911 when Valdez broke down the door, knocked the phone from her hand, and . . . ordered her to take off his pants."[60] He still had the knife in his hand.[61] Wilson, "fearing that Valdez would stab her if she resisted and that he would infect her with HIV if she submitted, agreed to submit to sexual intercourse with Valdez if he put on a condom."[62] Wilson gave Valdez a condom,[63] and he raped her until she was able to flee "naked from the apartment and [seek] help from a neighbor."[64]

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51. *State v. Rusk*, 424 A.2d 720, 728 (Md. 1981).

52. Berliner, *supra* note 14, at 2692.

53. States that still include a resistance requirement in their statutory language include: Alabama, Delaware, Idaho, Nebraska, Virginia, and Washington. ALA. CODE § 13A-6-60 (2010); DEL. CODE ANN. tit. 11, § 761 (2009); IDAHO CODE ANN. § 18-6101 (2010); NEB. REV. STAT. § 28-318 (2009); WASH. REV. CODE § 9A.44.010 (West 2007). See 2 LAFAVE, *supra* note 21, § 17.4 at 639–40 n.20, for descriptions of the statutory language regarding resistance in these states.

54. States that explicitly clarify that physical resistance is not required include: Alaska, Florida, Illinois, Iowa, Kentucky, New Jersey, Virginia, and Ohio. ALASKA STAT. § 11.41.470 (2010); FLA. STAT. ANN. § 794.011 (West 2002); 720 ILL. COMP. STAT. ANN. § 5/12-17 (West 2003); IOWA CODE ANN. § 709.5 (West 2010); KY. REV. STAT. ANN. § 510.010 (West 2009); N.J. STAT. ANN. § 2C:14-5 (West 2010); VA. CODE ANN. § 18.2-67.6 (West 1981); OHIO REV. CODE. ANN. § 2907.02 (West 2007); *see also* 2 LAFAVE, *supra* note 21, § 17.4 at 641 n.21.

55. *See* PETER WESTEN, THE LOGIC OF CONSENT 1–2 (2004).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See* Carla M. da Luz & Pamela C. Weckerly, *The Texas 'Condom-Rape' Case: Caution Construed as Consent*, 3 UCLA WOMEN'S L.J. 95, 96 (1993).

64. WESTEN, *supra* note 55, at 1.

At the close of the prosecution's case in the proceeding, the grand jury was instructed that "under Texas law, rape is a crime of sexual intercourse for which consent is a defense."[65] After deliberating in secret, the grand jury returned with its decision: *not* to indict Valdez.[66] The grand jury was composed of five men and seven women, and, as is customary in grand jury proceedings, no explanation accompanied their ruling.[67] However, after the fact, an unnamed participant in the proceeding explained that several of the grand jury members believed that Wilson's willingness to submit to sex if Valdez wore a condom "constituted 'consent' on her part."[68]

This was not the first or only time that an accused rapist depended upon his wearing a condom to demonstrate consent.[69] However, this time the media took heed, chastising the grand jury for refusing to indict, and commenting more broadly on the misconceptions that fueled their decision. *USA Today* remarked: "Blaming the victim in a rape case is insulting, illogical, and, unfortunately, all too common. People persist in labeling this act of violence as an act of sex. They cling to the notion that unless a woman has been beaten bloody by a rapist, she must have consented."[70] The public reacted to the grand jury ruling by organizing protests.[71] The prosecutor sought to overturn the ruling.[72] Women's rights groups condemned the jury for a decision that "they regarded as morally and legally perverse."[73] The pressure to hold another grand jury proceeding eventually turned the tides; public outcry led to a second grand jury hearing, and Valdez was indicted.[74] Later, he was convicted.[75]

What happened during and between the two grand jury proceedings highlights both positive and negative aspects of how far social paradigm had shifted and rape reform had gone. On one hand, the case reflected how much social mores had changed: the public outcry when Valdez was not indicted the first time proved that, at least largely, people in the United States saw the fallacies in requiring a victim to physically resist her attack. On the other hand, it was from the public that Wilson's protection first came, and not from the legal proceeding that was intended to protect her. In this sense, what happened in *Valdez* highlights entrenched, antiquated mores of the criminal justice system, as well as the need to clarify what the terms in rape statutes mean.

If anything, this need to clarify has become more difficult since rape reform eliminated the normatively simple physical resistance requirement. A plethora of questions have emerged regarding the meaning of the terms used in state rape statutes.[76] Different jurisdictions require different proofs for nonconsent.[77] The re-

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65. *Id.* at 2.
66. *Id.*
67. *See id.*
68. *Id.*
69. *See* da Luz & Weckerly, *supra* note 63, at 97 (discussing previous cases in different jurisdictions in which use of a condom was used as a defense, sometimes successfully).
70. *Doing the Right Thing*, USA TODAY, Oct. 21, 1992, at 14A.
71. WESTEN, *supra* note 55, at 2.
72. *Id.*
73. *Id.*
74. *Id.* at 2 n.3.
75. *Id.*
76. *Id.* at 2–3.

cent yet antiquated notion of "no means yes" has met its demise, and in some jurisdictions, verbal resistance is sufficient to constitute nonconsent.[78] Generally, the line is drawn there: the law has not gone so far as to require affirmative consent.[79]

Eliminating the physical resistance requirement has also led many states to add a *mens rea* component to their rape statutes.[80] This is a positive step away from using the victim's reaction to her attack as the sole basis for establishing the elements of the crime. In addition, adding a *mens rea* component to rape statutes holds a rape defendant more accountable for what the defendant was thinking and how the defendant regarded the woman's state of mind during the attack.

Although state statutes vary in their definition of the crime, in order to obtain a rape conviction the prosecution must prove each of the elements of the crime beyond a reasonable doubt.[81] Generally, in post-reform rape statutes, the prosecution must prove "that there was sexual activity, that the victim did not consent to this activity, that the defendant used force or threat of force as a means to the sexual activity, and that the defendant intended to rape the victim."[82] Some statutes use force, but not consent, as an element of rape, or vise versa.[83] However, in statutes that explicitly state or are interpreted as meaning that rape has both force and lack of consent elements, "these are cumulative rather than alternative requirements."[84] Therefore, it is possible that the force element be proven beyond a reasonable doubt, while at the same time lack of consent has not been established.[85]

Even when nonconsent is not an explicit part of the statutory definition of rape, consent continues to be the single-most important concept in rape cases. How courts interpret consent is undeniably important, because consent is the pivot point by which the same act is defined. With consent, sexual intercourse is a private matter held to be beyond the appropriate bounds of judicial purview.[86] Without consent, the same act is rape. While forceful sex can be coined as sadomasochism, there is no other word for nonconsensual sex.

During the rape reform movement of the 1970s and 1980s, some advocates disagreed about the relationship between "force" and "consent," and their respective roles within rape statutes.[87] Some reformers, like Susan Estrich, believed that the best way to enhance women's autonomy through rape reform was "to base reform

77. *Cf.* 2 LaFave, *supra* note 21, § 17.4, at 638.
78. *Id.* at 640.
79. *Id.* at 639–41.
80. *Id.*
81. Berliner, *supra* note 14, at 2689.
82. *Id.*
83. For example, in New Mexico, only force is required for criminal sexual penetration, *see* NMSA 1978, § 30-9-11 (2009), while both force and nonconsent are required for criminal sexual contact. *See* NMSA 1978, § 30-9-12 (1993).
84. 2 LaFave, *supra* note 21, § 17.4, at 638.
85. *See id.*
86. This is particularly true since *Lawrence v. Texas*, the U.S. Supreme Court case in which the Court held that intimate consensual sexual conduct between two adults is part of the liberty interest protected by the Fourteenth Amendment of the U.S. Constitution. *See* Lawrence v. Texas, 539 U.S. 588 (2003); *but see, e.g.*, Seegmiller v. LaVerkin City, 528 F.3d 762 (10th Cir. 2008) (construing *Lawrence* narrowly and rejecting a finding of such liberty interest in certain situations).
87. *See* Westen, *supra* note 55, at 3.

upon revitalized standards of consent."[88] Others, like Catherine MacKinnon, rejected this idea and instead argued that rape reform should be "based on prohibitions of force."[89] Due to the fervor with which these reformers argued their respective views, it would seem that how one framed the issue would determine the scope of the prohibited conduct.[90] Years later, the differences seem more rhetorical than substantive.[91] As Peter Westen suggests in *The Logic of Consent*: "[t]here is no form of sexual conduct that MacKinnon would prohibit that is incapable of being proscribed in terms of nonconsent; by the same token, there is no form of sexual conduct that Estrich would prohibit that is incapable of being proscribed in terminology of 'force.'"[92]

Estrich and MacKinnon's different approaches to rape reform can be reconciled if one considers the normative confusion surrounding the concepts underlying their debate.[93] As Westen suggests, perhaps the "substantive differences between Estrich and MacKinnon are differences between competing *conceptions* of consent (and competing conceptions of force), rather than differences between consent and something other than consent."[94] Westen explains that the "conceptual apparatus" of consent causes the impression of normative disagreement because consent is not well understood.[95]

Transposed into the current state of rape law, Westen's argument resonates. Within rape law, the notion of consent or lack of consent has been categorically defined for certain types of rape cases.[96] However, for cases that do not fit into these categorical definitions, the lack of consent element has posed problems of interpretation for courts and juries alike. This normative confusion helps explain, though not excuse, results like those reached by the first grand jury in *Valdez*,[97] as well as the normative confusion that has arisen in asylum adjudication.[98]

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88. *Id.*; *see also* Estrich, *supra* note 13, at 1095–96, 1132–33; SUSAN ESTRICH, REAL RAPE 63 (1987). For other scholars who take the same approach, see, for example, STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND FAILURE OF LAW 11, 32–33 (1998); John H. Bogart, *Commodification and Phenomenology: Evading Consent in Theory Regarding Rape*, 2 LEGAL THEORY 253, 258 (1996); Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 158–60 (1993).

89. WESTEN, *supra* note 55, at 3; *see also*; CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 245 (1989). For another scholar who takes the same approach, see, e.g., Robin L. West, *Legitimating the Illegitimate: A Comment on Rape*, 93 COLUM. L. REV. 1442, 1458–59 (1993).

90. WESTEN, *supra* note 55, at 3.

91. *Id.*

92. *Id.*

93. *See id.*

94. *Id.*

95. *Id.*

96. For example, sometimes nonconsent is presumed due to the victim's age (as in statutory rape cases), or because of the victim's incapacity (due to a physical or mental disability or altered mental state caused by factors such as intoxication). 2 LAFAVE, *supra* note 21, § 17.4, at 637. On the other side of the coin, consent can be presumed due to factors such as the victim being married to the perpetrator (as is the case with the traditional "marital exemption"). *Id.* These categories of consent/nonconsent are not within the scope of this comment. For more information, see 2 LAFAVE, *supra* note 21, § 17.4.

97. *See* WESTEN, *supra* note 55, at 2.

98. *See supra* Part I.A.

B. Consent

Westen separates the concept of consent into two parts: factual consent[99] and legal consent.[100] Each of these parts divides further into subparts: factual consent consists of attitudinal consent[101] and expressive consent,[102] and legal consent consists of prescriptive consent[103] and imputed consent.[104]

1. Factual Consent

a. Factual Attitudinal Consent

Westen posits that at the core of our conceptual apparatus of consent is factual attitudinal consent.[105] Factual attitudinal consent is the subjective feeling of acquiescence one experiences internally.[106] It is "a felt willingness to agree with—or to choose—what another person seeks or proposes."[107] Factual attitudinal consent is an *internal* state of mind experienced on a first-person basis.[108] Attitudinal consent is a reflection, though not an expression, of a person's voluntary and free will. In addition to being internal, the core conception of consent is also factual. The core conception of consent "embraces an empirical experience . . . without itself constituting a moral or legal judgment about [a person's] relationship to others."[109] Westen asserts that all remaining conceptions of consent are "derivative" of this core conception, because they "incorporate, or refer to, or construct fictions, of the core concept."[110]

b. Factual Expressive Consent

Factual expressive consent, as its name suggests, is an expression of consent rather than a state of mind.[111] In this sense, consent is the objective manifestation of a choice a person makes. Although different than factual attitudinal consent, factual expressive consent references the former: an expression of consent is an expression of something.[112] It inherently follows that an expression of consent is an expression of a subjective attitude of acquiescence, whether the subjective state is genuine or not.[113] This does not preclude a person from expressing a mental state that she does not subjectively feel, or from possessing a subjective attitude that she does not express.[114] Factual expressive consent is factual because it does not create a change in a person's legal relationships to others.[115]

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99. *See* WESTEN, *supra* note 55, at 15–103.
100. *See id.* at 107–303.
101. *See id.* at 25–65.
102. *See id.* at 65–103.
103. *See id.* at 139–269.
104. *See id.* at 269–303.
105. *Id.* at 4.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 4–5.
110. *Id.* at 5.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 6.

2. Legal Consent

Unlike factual consent, legal consent embodies legal judgments about people's relationships with one another.[116] Legal conceptions of consent derive their content from legal norms that change a person's legal relationship with those around her.[117]

a. Prescriptive Consent

Prescriptive legal consent functions by incorporating elements of factual consent.[118] Prescriptive consent to conduct consists of actual acquiescence to the conduct—whether attitudinal or expressive—under such conditions as jurisdictions prescribe as necessary to give the acquiescence legal effect.[119]

Westen notes that the legal function of attitudinal acquiescence is "to determine whether, *S* (a victim), suffered the primary harm that offenses of nonconsent are designed to prevent, namely, the harm of subjecting *S* to conduct without her having chosen the conduct for herself under circumstances that are consistent with her well-being."[120] In order to meet this standard, a person's (in this case Westen's "*S*") subjective choice must be voluntary.[121] Voluntariness is generally determined by the standards of the jurisdiction regarding what constitutes freedom, knowledge, and competence.[122] A choice is voluntary if the jurisdiction deems the choice to be a product of sufficient competence, freedom, and knowledge to allow a person to "assume responsibility for her choice."[123]

In turn, the legal function of expressive acquiescence "is to determine whether an actor . . . deserves to be blamed for an offense of non-consent."[124] Westen elaborates that in order for *S*'s expressive acquiescence to release a criminal defendant from blame, *S*'s expression must occur under certain conditions, which are determined by the jurisdiction in which the case is tried.[125] In order to relieve a criminal defendant of blame, conditions must be sufficient to "cause a conscientious person in [a criminal defendant's] position to believe that *S* is subjectively choosing . . . conduct and that she is choosing it voluntarily."[126]

b. Imputed Consent

Imputed consent "consists of attributing prescriptive consent on persons that do not possess it."[127] For example, the first grand jury in *Valdez* imputed consent on Elizabeth Wilson when it refused to indict Juan Valdez. Unlike prescriptive consent, imputed consent does not derive its legal effect from elements of factual atti-

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 177. Westen describes the legal function of attitudinal acquiescence using "S" as a hypothetical subject to whom it is applied. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 177.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 271.

tudinal or expressive consent.[128] Rather, imputed consent uses legal fictions in order to impute consent on a particular subject.[129] Imputed consent is necessarily legal by nature, because if a person is imputed to have consented, a criminal defendant is legally authorized to engage in conduct that would otherwise be considered a crime against the person.[130]

II. U.S. ASYLUM LAW

After describing the international and domestic forces that created our current asylum system, this Part focuses on gender-based asylum claims. It highlights that resistance to persecution in its conventional form appears as a de facto way of measuring whether or not an asylum-seeker deserves to avail herself of refuge within the United States. Ultimately, the way the U.S. asylum system adjudicates gender-based claims unduly emphasizes the way that the victim has responded to her persecution, and therefore fails to protect the victim.

A. International Refugee Law

The tradition of extending shelter and protection for those fleeing persecution has long and varied roots throughout the history of individual nations and cultures.[131] However, it was not until after World War II when members of the international community formally gathered to codify the rights of refugees.[132] The 1951 United Nations Convention Relating to the Status of Refugees (the Convention)[133] was the fruit of the international community's efforts, and it continues to be regarded as the seminal international instrument relating to the rights of refugees. In 1967, the United Nations Protocol Relating to the Status of Refugees (the Protocol)[134] broadened the scope of the Convention considerably, specifically by eliminating the time and place requirements in the Convention's definition of a "refugee."[135]

The consistency with which states have adhered to the Convention and subsequent Protocol, as well as widespread *opinio juris*,[136] have led some of the ideals espoused in the Convention to become customary international law. Particularly, *nonrefoulement* has been widely accepted as a *jus cogens* norm, meaning a nonderogable human rights norm.[137]

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128. *See id.*

129. *Id.*

130. *Id.* at 271.

131. For a general history of the international tradition of extending protection to the persecuted, see KAREN MUSALO, JENNIFER MOORE, & RICHARD A. BOSWELL, REFUGEE LAW AND POLICY 3–64 (3d ed. 2007).

132. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 5 (2007), http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf [hereinafter UNHCR].

133. *Id.*

134. Protocol Relating to the Status of Refugees, Nov. 1, 1968, 606 U.N.T.S. 267, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en (last visited Dec. 8, 2010).

135. *Id.* at 16.

136. *Opinio juris* is: "[t]he principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice." *See* BLACK'S LAW DICTIONARY 1201 (9th ed. 2009).

137. *Nonrefoulement* is defined in Article 33 of the Convention relating to the Status of Refugees: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of

B. The U.S. Legal History Regarding Refugees and Asylum-Seekers

The United States helped draft the Convention.[138] Although the United States never became a party to the Convention, it both signed and ratified the Protocol in 1968,[139] signifying its assent to the international norms espoused in the treaty and its protocol.

Around the same time as states parties were signing the Convention, Congress enacted its first broad statutory scheme to comprehensively treat immigration issues: the Immigration and Nationality Act of 1952 (INA).[140] The INA codified many existing provisions and statutes governing immigration law, and reorganized the structure of immigration law.[141]

At the time of its formation, the INA's treatment of refugees reflected the U.S. ideological and foreign policy view of who deserved to be granted asylum in the United States. Particularly, the INA defined a "refugee" as someone fleeing Communism or certain areas of the Middle East.[142] For nearly three decades, the U.S. domestic definition of a refugee remained intact within the INA, in spite of the United States ratifying the Protocol in 1968.[143]

However, the tides did change toward the more protective tendencies espoused in international law. In 1979, the late Senator Edward M. Kennedy was appointed as the Chairman of the full Judiciary Committee, and began the effort to shape a new national policy on refugees and asylum-seekers.[144] The policy's seeds were planted a decade earlier: the Senate Judiciary Subcommittee on Refugees had held hearings from 1965 to 1968, which culminated in a bill and report in 1969 that was disseminated to the Senate, but did not result in the adoption of pending legislation.[145] By 1979, however, the effort had gathered steam; the United States ultimately passed the Refugee Act of 1980 (Refugee Act),[146] incorporating the 1967 UN Convention's definition of a refugee and the principle of *nonrefoulement* into U.S. law.[147] Kennedy highlighted the goals of the Refugee Act:

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territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.* at 32. *Nonrefoulement* has been widely classed by international legal scholars as a *jus cogens* norm. *See* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 117–21 (1996).

138. UNHCR, *supra* note 132, at 8.

139. The United States became a party to the Protocol on November 1, 1968. *See* Status of Protocol Relating to the Status of Refugees, art. 5, Nov. 1, 1968, 606 U.N.T.S. 267, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en (last visited Dec. 8, 2010).

140. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 173 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

141. U.S. Citizenship and Immigration Services, Immigration and Nationality Act, http://www.uscis.gov (follow Laws; then Immigration and Nationality Act) (last visited Nov. 11, 2010).

142. Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 143 (1981).

143. *See id.* at 142–43.

144. *See id.* at 144. Senator Kennedy wrote to the Secretary of State, the Secretary of Health, Education and Welfare, the Attorney General and the Chairman of the American Council of Voluntary Agencies' Committee on Migration and Refugees. The "[t]ext of Senator Kennedy's letter appears in Senate Report 96-256, The Refugee Act of 1979, July 23, 1979, pp. 2–3." *Id.* at 144 n.6.

145. *Id.* at 143–44.

146. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

147. *Id.* The U.S. definition of "refugee" is codified at 8 U.S.C. § 1101(a)(42) (2006). The U.S. statutes term *nonrefoulement* as "withholding of deportation/removal," and the principle is codified at 8 U.S.C. § 1231(b)(3)(A) ("The Attorney General may not remove an alien to a country if the Attorney General de-

> In the Refugee Act of 1980, Congress gave new statutory authority to the United States' longstanding commitment to human rights and its traditional humanitarian concern for the plight of refugees around the world. But it was also attempting to assure greater equity in the treatment of refugees and more effective procedures in dealing with them.[148]

In addition, the U.S. Supreme Court confirmed that one of the primary purposes of enacting the Refugee Act "was to bring United States refugee law into conformance with the 1967 United Nations Protocol."[149] Therefore, the Refugee Act became the United States' first great attempt to align its own laws and policies with those of the Convention and Protocol, and to create a standardized, coherent, and equitable set of laws and procedures for those seeking asylum. In short, the Refugee Act codified the United States' assent to the notion that the asylum system was intended to reflect a human rights-based and humanitarian aim by protecting victims of persecution, not merely U.S. foreign policy interests.

Since the Refugee Act, there has been no piece of U.S. legislation that solely treats the issue of refugees and asylum-seekers. Rather, legislation has been more generalized to encompass immigration or national security issues more broadly, with specific provisions embedded in the text to ensure that U.S. laws do not run afoul of the principle of *nonrefoulement*.[150] As a result, the doctrine of asylum law has largely unfolded through judicial interpretation of the terms embedded in the Refugee Act.

C. Definition of a Refugee

Generally, in order to qualify for a discretionary grant of asylum, an applicant must meet the statutory definition of a refugee.[151] The Convention defines a "refugee" as someone who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[152] The United States added the proviso, in the INA, that persecution, as well as a well-founded fear of persecution, may qualify an individual for asylum.[153] In 1996, under the

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cides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

148. Kennedy, *supra* note 142, at 142.

149. INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987); *see also* INS v. Stevic, 467 U.S. 407, 416–24 (1984).

150. *See, e.g.*, REAL ID Act of 2005, Pub. L. 109-13, div. B, 119 Stat. 231, 302 (2005); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638 (2004); Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135 (2002); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001); Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104-208, div. C, 110 Stat. 3009, 3546 (1996).

151. *See* 8 U.S.C. § 1158(b)(1).

152. UNHCR, *supra* note 132, at 16.

153. Under the INA,

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of

Illegal Immigration and Immigrant Responsibility Act (IIRIRA),[154] the United States amended the definition by adding the provision that:

> [A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.[155]

This additional provision, although fairly long and detailed, simply gives express statutory validity to a particular type of claim. It also eliminates the nexus requirement for such claims.[156] However, although seemingly loosening the asylum standard, the provision adds an element of resistance to the statutory definition of a refugee for coercive population control grounds.[157] The presence of resistance within the statutory definition of a refugee in coercive population control cases mirrors the presence of resistance in previous statutory definitions of rape, as it uses the response of the victim to determine the legal outcome of her case.

1. Well-Founded Fear

In order to qualify for asylum, an individual must prove that she has a well-founded fear of persecution in her home country.[158] While the U.S. Supreme Court has declined to elaborate on a detailed definition of well-founded fear,[159] it is generally thought to require a petitioner's subjectively genuine fear, which must be objectively reasonable.[160]

Although the Supreme Court declined to exactly define well-founded fear, it did provide some clarification on the flexibility of the term:

> persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A).

154. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996).

155. 8 U.S.C. § 1101(a)(42)(B). This text was added by § 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

156. For a description of nexus, which is generally thought of as the "on account of" portion of the statutory definition, see discussion *infra* Part II.C.3. Note that § 1101(a)(42)(B) creates a presumption of nexus by stating that anyone who establishes persecution in the form of coercive family planning is deemed to have been persecuted or deemed to have a well founded fear of persecution *on account of* political opinion, thereby eliminating the requirement that the asylum-seeker prove that her persecutor was motivated by the asylum-seeker's political opinion.

157. Note the statutory language in the second clause of § 1101(a)(42)(B): "[A] person . . . who has been persecuted for *failure* or *refusal to undergo such a procedure* or for *other resistance* to a coercive population control program. . . ." (emphasis added). It therefore appears from the statute that both failure and refusal to undergo a procedure are classed within the category of "resistance," along with other forms of resistance.

158. 8 U.S.C. § 1101(a)(42).

159. INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987). The Court left the process of further defining "well-founded fear" to case-by-case adjudication. *Id.*

160. *See, e.g.*, Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1986).

> There is simply no room in the United Nations' definition for concluding that because an applicant only has a ten percent chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening . . . "[S]o long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."[161]

Similarly, the Code of Federal Regulations (CFR) section on well-founded fear describes it as being met if there is a "reasonable possibility" of persecution.[162] The CFR also notes that asylum adjudicators "shall not require" that the applicant provide evidence that there is a reasonable possibility she will "be singled out individually for persecution,"[163] so long as the applicant establishes: (1) a "pattern or practice . . . of persecution of a group of persons similarly situated to the applicant"[164] on account of one of the enumerated grounds,[165] and (2) the applicant establishes her inclusion in and identification with that group of persons "such that . . . her fear of persecution upon return is reasonable."[166]

The Board of Immigration Appeals (BIA) has likewise utilized the CFR's standard in its adjudication of asylum cases. In the dicta of *Matter of Mogharrabi*, the BIA stated:

> Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claims. A well-founded fear, in other words, can be based on what has happened to others who are similarly situated. The situation of each person, however, must be assessed on its own merits.[167]

Well-founded fear, therefore, is assessed by examining whether the asylum-seeker has a subjective fear of returning to her home country, as well as whether her fear is objectively reasonable. In determining these factors, courts consider the history and context of persecution in the asylum-seeker's home country, as well as how similarly situated people are treated.[168] The legal construct used to define "well-founded fear" is similar to the "reasonable resistance" standard in rape law, in that it combines the subjective mental state of the victim/asylum-seeker with an objective reasonability standard.[169]

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161. *Cardoza-Fonseca*, 480 U.S. at 440 (citing INS v. Stevic, 467 U.S. 407, 424–25 (1984)).
162. 8 C.F.R. § 208.13(b)(2)(i)(B) (2010).
163. 8 C.F.R. § 208.13(b)(2)(iii).
164. 8 C.F.R. § 208.13(b)(2)(iii)(A).
165. *Id.*
166. 8 C.F.R. § 208.13(b)(2)(iii)(B).
167. Matter of Mogharrabi, 19 I. & N. Dec. 439, 446 (BIA 1987) (citation omitted), *overruled on other grounds by* Pitcherskaia v. INS, 118 F.3d 641, 647–48 (9th Cir. 1996).
168. 8 C.F.R. § 208.13(b)(2)(iii)(A).
169. *See* discussion *supra* Part I.

2. Persecution: Forms and Sources

There is no universally accepted definition of persecution.[170] Persecution is not defined in the Convention, or any other international instrument.[171] Likewise, the INA does not define persecution, and does not articulate what acts constitute persecution.[172] As such, defining what persecution is has occurred through case-by-case and jurisdiction-by-jurisdiction adjudication.[173]

Generally, persecution is composed of two facets: the nature of the harm that qualifies an individual for protection, and the source of that harm.[174] Persecution has been held to take many forms, from torture and physical beatings, to rape and female genital cutting, to severe discrimination that restricts an individual's political and civil rights, to extreme economic deprivation, to inappropriate prosecution and punishment.[175] Likewise, the sources of persecution may vary. Traditionally, persecution is directly inflicted by the government or by state actors. However, persecution may also be perpetuated by parties who are not official agents of the government, "but who act with explicit or implicit government complicity."[176] In still other instances, persecution can stem from sources that are entirely independent of the government, such as opposition groups or "private individuals motivated by hatred or bigotry."[177] In the latter case, the objects of persecution may be members of a certain race, religion, political affiliation, or socially marginalized group, including gay men, lesbians, transgendered persons, and women.[178] The United States recognizes that persecution can occur through the acts of non-state actors, so long as the government cannot or will not control these private actors.[179]

In addition, U.S. jurisprudence factors past persecution into its determination of whether an asylum-seeker qualifies for asylum.[180] The statutory definition accounts for individuals who are outside of their countries of origin because of "persecution *or* a well-founded fear of persecution."[181] In spite of past persecution creating a presumption of future persecution, however, the pertinent question in asylum law remains about the individual's fear of future persecution.[182]

Due to the fact that there is no uniform definition of persecution, arguments about persecution during asylum adjudication often revolve around "whether a particular action, on account of a particular characteristic, amounts to the level of

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170. HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 51 (1992), http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf [hereinafter UNHCR HANDBOOK].

171. *See* Goodwin-Gill, *supra* note 137, at 38.

172. Korablina v. INS, 158 F.3d 1038, 1043 (9th Cir. 1998).

173. *See id.*

174. MUSALO, MOORE & BOSWELL, *supra* note 131, at 229.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. MUSALO, MOORE & BOSWELL, *supra* note 131, at 283. This recognition by the federal government is called the "protection" approach. *See* UNHCR HANDBOOK, *supra* note 170, at ¶ 65.

180. Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 GEO. IMMIGR. L.J. 589, 612–13 (2000).

181. 8 U.S.C. § 1101(a)(42)(A) (2006) (emphasis added).

182. Martin & Schoenholtz, *supra* note 180, at 612.

harm that demands protection."[183] Therefore, within the context of gendered claims, the salient question becomes "how fundamental a particular characteristic is to a woman's identity or how profoundly abhorrent to one's belief the forced behavior must be to constitute persecution."[184] Interestingly, in ethnicity claims, asylum-seekers do not need to prove that racism is abhorrent to their belief systems.

3. Nexus

The next, and arguably most stringent, requirement for establishing eligibility for asylum is the "nexus" requirement. The nexus requirement links the persecution suffered by the asylum-seeker to the enumerated ground under which she seeks protection.[185] U.S. law has a particularly high standard for nexus: it requires specific proof of motivation on the part of the persecutor.[186] That is, in order to meet the nexus requirement, the asylum-seeker must show that the persecutor is motivated, at least in part, to harm her "*on account of*" one of the enumerated grounds.[187] In the REAL ID Act of 2005, Congress elaborated on the nexus requirement.[188] It stated that in "mixed motive" cases, an applicant must establish that her race, religion, nationality, political opinion, or membership in a particular social group "was or will be at least one central reason for persecuting the applicant."[189]

In this sense, the nexus requirement in the United States tends to mirror a version of the *mens rea* component of criminal law, as it requires proof of the persecutor's intent. However, the nexus requirement goes farther than *mens rea* requirements for many crimes, as it goes beyond the persecutor's mere intent to harm the victim. Nexus requires that the victim show that the persecutor intended to harm her *because* she belongs to a particular subset of people within her country that is protected by the refugee statute.[190] In the analogy to the law of rape, this requirement resembles a specific intent more than a general intent *mens rea*.

4. Enumerated Grounds and Gender

The enumerated grounds of protection in U.S. asylum law are race, religion, nationality, political opinion, and membership in a particular social group.[191] Gender is not an enumerated ground, but gender-related claims have been brought since the Refugee Act was passed.[192] In spite of this, it was not until the 1990s that

183. Arthur C. Helton & Allison Nicoll, *Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of* In Re Fauziya Kasinga *and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375, 378 (1997).

184. *Id.* at 379.

185. *See* MUSALO, MOORE & BOSWELL, *supra* note 131, at 291.

186. *See* INS v. Elias-Zacarias, 502 U.S. 478, 482–83 (1992).

187. *See id.* at 482.

188. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (2005).

189. *Id.* § 101(a)(3)(B)(i). "Mixed motive" cases are cases where the persecutor was motivated by a combination of factors.

190. *See Elias-Zacarias*, 502 U.S. at 482 ("The ordinary meaning of the phrase 'persecution on account of . . . political opinion' in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's.").

191. *See* 8 U.S.C. § 1101(a)(42) (2006).

192. *See* MUSALO, MOORE & BOSWELL, *supra* note 131, at 724.

the BIA and federal circuit courts began to regularly and explicitly address the gender aspects of asylum claims.[193]

Gender issues arise in asylum claims in different ways, and commonly manifest through both the form a woman's persecution had taken as well as the extent to which the persecutor had an anti-woman animus. For example, in some cases, a gender issue arises where an asylum-seeker "fears a form of persecution to which she is particularly vulnerable because of her physical and cultural attributes as a girl or woman."[194] These cases surface when the type of harm suffered is something that is either unique to or more common among women, such as rape, female genital cutting (FGC), and domestic violence.

In other cases, a gender issue arises where an asylum-seeker fears persecution "*on account of* the way she is deemed to conduct or define herself as a woman or girl child."[195] These cases manifest when a woman is a social or cultural dissident because she chooses to act or define herself in ways that do not match what is expected of her as a woman in her home country. Often, the fact that the asylum-seeker is a woman affects both the form and basis of an asylum-seeker's persecution.[196] These cases arise when women are punished in gender-specific ways for noncompliance with social norms in their home country, for example by being raped in prison for refusal to wear a veil in public.

Since gender is not an enumerated ground for protection under U.S. statute, women asylum-seekers have brought gender-based claims through a variety of grounds, often in combination.[197] This comment will focus on claims made primarily under the "membership in a particular social group" ground of protection.

D. Gender-Based Claims on Social Group Grounds

The social group ground of protection is seemingly the most widely used ground for gender-based claims. In addition, the social group ground allows for a broader margin of gender claims than the political opinion ground. Perhaps this is because, at least as much as political opinion, membership in a particular social group can be interpreted more broadly as "the perception that [the group's] members threaten or frustrate the status, interests, policies or goals of powerful sectors and individuals within a society."[198] Taking into account that persecution is used as a "tool to maintain or transform power relationships,"[199] the politics of social and cultural gender domination can come into play in the realm of social group claims. In addition, social group claims are an avenue by which more privatized forms of persecution—such as pervasive domestic violence—may be addressed.

The BIA interpreted the phrase "particular social group" in its 1985 decision of *Matter of Acosta*.[200] In that case, the BIA reasoned that a particular social group

193. *Id.*
194. *Id.* at 723.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 619.
199. *Id.*
200. Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985).

refers to "a group of persons all of whom share a common, immutable characteristic."[201] The BIA explained:

> The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience. . . . The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group *either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences*.[202]

The Ninth Circuit, in *Sanchez-Trujillo v. INS*, refused to interpret a "social group" in terms of individuals who possess broad-based characteristics such as youth and gender.[203] Since the statute has not defined social group, different jurisdictions interpret the term differently.

For example, in *Fatin v. INS*, the Third Circuit applied the concept articulated in *Acosta* that social groups can arise from fundamental or immutable characteristics.[204] This articulation of a social group would seem to encompass women who are social or cultural dissidents in their home countries. In spite of the liberal interpretation of a social group, however, many petitions for asylum on social group grounds are denied; three examples of such petitions are discussed below.

1. *Fatin v. INS*

In the first case this comment discusses, the petitioner, Parastoo Fatin, is a native and citizen of Iran who left Iran at the start of the Islamic Revolution in 1978, and entered the United States on a student visa.[205] Fatin spent her last year of high school and all four years of college in the United States.[206] In 1984, when Fatin was still attending college, she applied for asylum.[207] When asked what she thought would happen to her should she return to Iran, Fatin replied that she "would be interrogated . . . forced to attend religious sessions against [her] will . . . publicly admonished and even jailed."[208] In her initial interview, she explained that she was part of a student group that favored the Shah and refused to demonstrate with the supporters of Khomeini; that she "refused to wear a veil which was a sign or badge that [she favors] Khomeni;" that "[t]he present Iranian Government now looks with greater suspicion at famil[ies] having education and some wealth;" that her father, a physician, had been harassed until war broke out between Iran and Iraq and doctors were desperately needed; and that two of her cousins had been jailed for approximately one year.[209]

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201. *Id.* at 233.
202. *Id.* (emphasis added).
203. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576–77 (9th Cir. 1986).
204. Fatin v. INS, 12 F.3d 1233, 1239–40 (3d Cir. 1993).
205. *Id.* at 1235.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* (alterations in original).

Fatin's petition was denied in January 1986.[210] When deportation proceedings commenced against her, Fatin renewed her application for asylum, and also applied for withholding of deportation.[211] In a 1987 hearing, Fatin elaborated on the reasons for her fear of returning to Iran.[212] Regarding the treatment of her relatives in Iran, Fatin updated her application by explaining that one of her cousins had recently been killed in a demonstration and that her brother was in hiding to avoid the draft.[213] In addition, Fatin elaborated about her own political activities prior to entering the United States, including that she had been part of a student political group and a women's rights group that was associated with the Shah's sister.[214]

During the hearing, Fatin testified that she feared going back to Iran.[215] Under the ruling government, all Muslims were required to practice Islam or "be punished in public or . . . jailed."[216] In addition, Fatin would be required to comport herself according to government standards of what was acceptable for women, and she would be required to "'to do things that [she] never had to do,' such as wear a veil."[217] When asked whether she would wear a veil, she replied:

> A. I would have to, sir.
> Q. And if you didn't?
> A. I would be jailed or punished in public. Public mean by whipped or thrown stones [sic] and I would be going back to barbaric years.[218]

Later, when the Immigration Judge asked her whether she would wear a veil or submit to arrest and punishment, she stated: "If I go back, I would try personally to avoid it as much as I could do. . . . I will start trying to avoid it as much as I could."[219] Fatin also testified that she considered herself a "feminist."[220] She testified that this meant "that [she] believe[s] in equal rights for women."[221] She believes "a woman as a human being can do and should be able to do what they want to do [sic]. And over there in . . . Iran at the time being a woman is a second class citizen, doesn't have any right to herself [sic]. . . ."[222]

The Immigration Judge denied Fatin's petition.[223] Fatin appealed to the BIA, which likewise dismissed her appeal.[224] Fatin then filed a petition for review by the

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210. *Id.*
211. *Id.* at 1236.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* The veil is known as a "chador" in Iran. A "chador" is "a large cloth worn as a combination hair covering, veil, and shawl, usu. by Muslim women esp. in Iran." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 204 (11th ed. 2010).
218. *Fatin*, 12 F.3d 1236.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 1237.

Court of Appeals for the Third Circuit.[225] The Third Circuit also held that Fatin was not eligible for asylum.[226]

In rejecting Fatin's petition, the Third Circuit elaborated on what would be required for a person in Fatin's circumstances to qualify for asylum, and why she did not meet these requirements.[227] The court explained that Fatin's primary argument was not that "she face[d] persecution simply because she is a woman. Rather, she maintain[ed] that she face[d] persecution because she is a member of 'a very visible and specific subgroup: Iranian women who *refuse to conform* to the government's gender-specific laws and social norms.'"[228] The court closely considered this definition, noting that it did not include all feminist Iranian women, or all Iranian women who found the Iranian government's "gender-specific laws and repressive social norms" objectionable or offensive.[229] Instead, the court reasoned, the social group Fatin described was "limited to those Iranian women who find those laws so abhorrent that they '*refuse to conform*'—*even though*, according to the petitioner's brief, '*the routine penalty' for noncompliance is '74 lashes, a year's imprisonment, and in many cases brutal rapes and death*.'"[230]

Limiting the particular social group in this way, the court found that it could meet the BIA's definition of a "social group" set out in *Acosta*:

> [I]f a woman's opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as "so fundamental to [her] identity or conscience that [they] ought not be required to be changed.[231]

Having classified the "particular social group" in such a way, the court held that Fatin was not a member of the social group, "for there is no evidence in that record showing that her opposition to the Iranian laws at issue is of the depth and importance required."[232]

The Third Circuit pointed to several reasons for holding that Fatin was not included within the particular social group that the court was willing to recognize. The court reasoned:

> [Fatin] never testified that she would refuse to comply with the law regarding the chador or any of the other gender-specific laws or social norms. Nor did she testify that wearing the chador or complying with any of the other restrictions was so deeply abhorrent to her that it would be tantamount to persecution. Instead, the most that emerges from her testimony is that she would find these requirements objectionable and would not observe them if she could avoid doing so. This testimony does not bring her within the particular social group that she has defined—Iranian women who *refuse to conform* with those requirements *even if the consequences may be severe*.[233]

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225. *Id.*
226. *Id.* at 1244.
227. *See id.* at 1237–44.
228. *Id.* at 1241.
229. *Id.*
230. *Id.* (emphasis added).
231. *Id.* (quoting Matter of Acosta, 19 I. & N. Dec. 211, 234 (BIA 1985)) (alterations in orginal).
232. *Id.*
233. *Id.* (second emphasis added).

Instead, the court held that Fatin was part of a larger social group that consisted of "Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them."[234] The court then explained that the consequences that would befall Fatin as a member of the larger group would not constitute "persecution."[235] Although the court agreed that "the indicated consequences of noncompliance would constitute persecution," the court held that Fatin's "other option—compliance" did not constitute persecution.[236] In spite of noting that the concept of persecution was broad enough to embrace "governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs," the court held that Fatin did not fall under this rubric.[237] As such, her petition was denied.

In dicta, the court noted several examples of conduct it considered "abhorrent" enough to constitute "torture" or "persecution." These examples included requiring a person to renounce his or her religious beliefs or to desecrate a religious object.[238] The court noted that such a requirement could constitute "torture" or "persecution" only if directed against a person who possessed the religious beliefs or attached religious importance to the object in question. "Requiring an adherent of an entirely different religion or a non-believer to engage in the same conduct would not constitute persecution."[239] This statement highlights that the court felt constrained by the trial court's finding that since Fatin would not refuse to comply with the laws in Iran, she would not find it profoundly abhorrent to abstain from conducting herself as she chose, and that she did not place enough importance on her beliefs. Because the Third Circuit held that the trial court's holding was supported by substantial evidence, Fatin did not qualify for asylum.

The reasoning of the Third Circuit judges mirrors that of the Maryland Court of Appeals dissenters who would not have affirmed Rusk's conviction in *State v. Rusk*.[240] Those judges did not find rape because the victim did not "follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person."[241] Likewise, since *Fatin* did not testify that she would resist being forced to dress and act a certain way, the trial court found her unworthy of asylum, and, perhaps constrained by the standard of review, the Third Circuit upheld the trial court's holding.

2. *Safaie v. INS*

One year after *Fatin* was decided, the Court of Appeals for the Eighth Circuit considered a similar gender-based claim in *Safaie v. INS*.[242] Like *Fatin*, *Safaie* considered the failed asylum petition of an Iranian woman who suffered persecution

234. *Id.*
235. *Id.* at 1242.
236. *Id.*
237. *Id.* at 1242.
238. *Id*.
239. *Id*.
240. 424 A.2d 720 (Md. 1981).
241. *Id.* at 733.
242. 25 F.3d 636 (8th Cir. 1994), *superseded by statute on other grounds recognized by* Rife v. Ashcroft, 374 F.3d 606, 614 (8th Cir. 2004).

because of her beliefs as an Iranian woman and her opposition to the way her government required women to comport themselves.

At her hearing in May 1988, Safaie testified: (1) that in 1981 she was discharged from her job "because she demonstrated her opposition to the government's rules relating to women by refusing to wear traditional clothing;" (2) that when she was enrolled in university, "members of the Revolutionary Guard confronted her over her western clothes and smoking . . . [and] a member of Hezbollah told her she would be caught alone and punished;" and (3) that one day while the university was closed, she was detained and interrogated for almost eight hours, during which the interrogator threatened to kill her.[243] Safaie also testified that she was expelled from the university in 1984 for "not accepting Islamic rules and for not attending the funeral of a university official," when the official was the man who had interrogated her for eight hours and who had threatened to kill her.[244]

In addition, Safaie stated that she objected to the lack of freedom in Iran.[245] She testified that the authorities had arrested her for smoking, that she had participated in several demonstrations, that she belonged to a pro-Shah party, and that Hezbollah members frequently followed her.[246] She testified that she started wearing Islamic dress in 1982 when it became mandatory, but that she "did not have the mentality of a Moslem and members of the Guard told her her dress was not satisfactory."[247] Safaie also testified that she was engaged to an Air Force pilot in the Shah's regime, that he and others had met at her house to plan a coup d'état, and that when the authorities discovered the plan, members of the group were either killed or fled the country.[248] Safaie "received permission to go to Pakistan after a friend intervened to get her passport back from the authorities who had taken it in 1983, and then she received a tourist visa to visit the United States with her parents."[249]

Safaie also claimed that she suffered from post-traumatic stress disorder (PTSD) based on what she had experienced in Iran.[250] A psychologist at the Center for Treatment of Torture Victims confirmed that she had treated Safaie for PTSD since June 1987.[251] The psychologist stated that: "Safaie told her about personal threats she received during several detentions, and that Safaie exhibited symptoms consistent with physical torture."[252] In spite of this testimony, the Immigration Judge, BIA, and Eighth Circuit all found Safaie ineligible for asylum.[253]

Unlike the petitioner in *Fatin*, Safaie first asserted that there was a broader definition of "particular social group" under which she should be able to obtain asylum.[254] Safaie asserted that: "Iranian women, by virtue of their innate character-

243. *Id.* at 638–39.
244. *Id.*
245. *Id.* at 639.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 639, 641.
254. *See id.* at 640.

istic (their sex) and the harsh restrictions placed upon them, are a particular social group."[255] The Eighth Circuit found this category to be overbroad.[256]

Alternatively, Safaie contended that the relevant "particular social group" may be defined as "Iranian women who advocate women's rights or who oppose Iranian customs relating to dress and behavior."[257] The Eighth Circuit defined this group following the Third Circuit's elaboration in *Fatin* as "a group of women, who refuse to conform and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance."[258] The court then held that, like Fatin, Safaie was not a member of this group.[259] The court held that, although Safaie had taken some affirmative steps to articulate her opposition, for Safaie, complying with the gender-specific laws would not be "so profoundly abhorrent that it could aptly be called persecution."[260]

In so finding, the Eighth Circuit reasoned that:

> Safaie wore the mandatory garb beginning in 1982, that she was not harmed or mistreated for smoking or wearing makeup, that she did not assert "*some missionary fever*" to defy the law, and that [she] would be able to avoid further demonstration of her opposition to the restrictions.[261]

In addition, the court claimed that the following factors undercut Safaie's claim of a well-founded fear of persecution:

> [Her] readmission to the university after she was interrogated about her political views, her ability to get a visa to leave Iran, the lack of harm to herself or her family after the coup attempt was discovered, her remaining in Iran after her discharge from the university without incident, and her lack of corroboration of harm. . . .[262]

As such, the Eighth Circuit upheld the Immigration Judge's and BIA's findings that Safaie was ineligible for asylum.[263]

Like in *Fatin*, the court in *Safaie* linked a woman's refusal to oppose the laws in Iran to the level of abhorrence she felt for those laws, which in turn the court used to identify conduct that rose to the level of persecution for the particular victim. If compliance with gendered laws was not sufficiently abhorrent to the asylum-seeker, as evidenced by her defiance of those laws, then the court, as it did in *Safaie*, indicated it would find no persecution. In addition, the language the court adopted from the BIA suggests that the level of opposition it would require to find persecution is extraordinarily high: "some missionary fever" to defy the offensive law. This standard evokes an even earlier state of rape law than that evoked in *Fatin*. The court's approval of the BIA's requirement that the asylum-seeker assert "some missionary fever" to defy the law strongly reflects the language of the ut-

255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 640.
259. *Id.*
260. *Id.*
261. *Id.* (emphasis added).
262. *Id.*
263. *Id.*

most resistance requirement in that it evokes a higher level of opposition or resistance than even a reasonable resistance standard.

3. *Fisher v. INS*[264]

Three years after *Fatin* and two years after *Safaie*, the Court of Appeals for the Ninth Circuit decided a similar case on similar grounds. Like *Fatin* and *Safaie*, *Fisher v. INS* was a gender-based claim for asylum on behalf of an Iranian woman fleeing the oppression she experienced in her country.[265]

In *Fisher*, the petitioner, Saideh Hassib-Tehrani,[266] testified that she left Iran in 1984 following three events: (1) "she [had been] detained and questioned by Khomeini government officials because she attended a party at a male friend's home where she observed her host in a bathing suit;" (2) "four government officials [had] stopped her on the street and ordered her into their car at gunpoint" because she "had a few pieces of hair hanging out [of her chador (veil)] by mistake;" and (3) "shortly after the 'veil incident,' . . . government officials [had come] to her father's home, where [Hassib-Tehrani] lived, to search for political dissidents."[267]

Hassib-Tehrani testified that these three events "so traumatized her that she became ill, missed several months of work, and eventually left Iran."[268] She "testified that she did not believe in the way [the Khomeini government] treat[s] people, the covering of the face, and the way of life dictated by the government."[269] When asked what could happen to her if she returned to Iran, she responded that she "presume[d] she would be 'in a worse situation' than before she left."[270]

The court held that Hassib-Tehrani failed to show that "Iran punished her because of her religious or political beliefs, or that, if she returned to Iran, she would violate the regulations because of her beliefs, thereby triggering government action."[271] The court pointed to the fact that Hassib-Tehrani never "spoke out against the government's political or religious practices or even publicly articulated any political or religious opinions."[272] Even though Hassib-Tehrani testified that she is "against the Khomeini regime and disagrees with its theory of Islam, she introduced no evidence suggesting that the three incidents she described were related to these beliefs."[273] In upholding the denial of Hassib-Tehrani's claim, the Ninth Circuit also found it significant that Hassib-Tehrani did not state whether she

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264. Although this case was decided on political opinion and religious group grounds, the author has included it because of its factual similarity to the other cases in this comment.

265. *See generally* 79 F.3d 955 (9th Cir. 1996).

266. The case is titled "Fisher" because Hassib-Tehrani had married a U.S. citizen several months after she entered the United States on a fiancé visa in 1984. Charles Fisher had originally filed a petition for legal permanent resident status on behalf of Hassib-Tehrani, but withdrew the petition when the two were divorced in 1987. Upon the commencement of deportation proceedings, Hassib-Tehrani conceded deportability and filed for asylum and withholding of deportation on behalf of her and her son. *See id.* at 958–60. Although the majority calls Hassib-Tehrani "Fisher" in its opinion, this comment refers to her by her maiden name.

267. *Id.* at 959 (alteration in original).

268. *Id.* at 960.

269. *Id.* (alterations in original).

270. *Id.*

271. *Id.* at 962.

272. *Id.* at 963.

273. *Id.*

would comply with the government's requirements if she returned to Iran.[274] The court construed her silence on the matter as a lack of evidence to suggest that if returned, Hassib-Tehrani would refuse to conform to the government regulations.[275] In so reasoning, the court highlighted that the "veil incident occurred because [Hassib-Tehrani] *mistakenly* left several strands of hair outside her veil, not because she intended to make a political or religious statement."[276] In addition, the court noted that Hassib-Tehrani mentioned that searching people's homes is "a normal thing that [the government does]," and that, as such, there was no connection to her religious or political beliefs.[277]

In addition to applying the arguments made in *Fatin* and *Safaie*, Hassib-Tehrani contended that Iran's human rights record made enforcement of the laws against her more than mere harassment. The Ninth Circuit rejected the argument that a country's human rights record could "transform[ ] common harassment into persecution."[278] In addition, when Hassib-Tehrani attempted to cite the U.S. State Department's *Country Reports on Human Rights Practices for 1990*, the court noted that it was unable to consider these reports because they were not part of the administrative record.[279] Like the Third Circuit in *Fatin* and the Eighth Circuit in *Safaie*, the Ninth Circuit, hearing *Fisher* en banc, denied Hassib-Tehrani's claim.[280]

A powerful dissent in *Fisher* highlighted some of the fallacies of the majority's decision.[281] First, the dissent broke down well-founded fear into its subjective and objective components. As the dissent observed, "the dichotomy is easy to state but not so easy to grasp."[282] The dissent elaborated:

> Fear is an emotion. As an emotion it must be subjective. Our requirement of an "objective" component reflects the judicial desire to have some way of checking on whether a fear is imaginary or fantastic. We have spoken in terms of evidence showing a credible, direct and specific basis for the fear. We still must integrate that credible, direct and specific basis with the subjective reaction of the person who says that she is scared.[283]

The dissent classified Hassib-Tehrani's claim as one based on a fear of persecution, as opposed to past persecution.[284] The dissent then applied the framework of the subjective and objective elements of the well-founded fear definition to Hassib-Tehrani's circumstances.[285] After finding no doubt about Hassib-Tehrani's subjective fear, the dissent examined whether Hassib-Tehrani had a credible, direct, and specific basis for her fear.[286] Unlike the majority, the dissent framed Hassib-Tehrani's circumstances in light of the fear they caused her:

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274. *Id.*
275. *See id.*
276. *Id.*
277. *Id.* (alteration in original).
278. *Id.* at 962.
279. *See id.* at 963.
280. *Id.* at 958.
281. *Id.* at 967 (Noonan, J., dissenting).
282. *Id.* at 969.
283. *Id.* (citation omitted).
284. *Id.* at 970.
285. *See id.* at 970–71.
286. *Id.* at 970.

> She cite[d] three bad things that happened to her before she left her native country. Found in mixed company where the host wore his swimsuit she was arrested, handcuffed, taken to a government center, and held for four hours; her name and address were taken. The experience was traumatic . . . and she became depressed, ill and unable to continue with her valued job as a teacher. Subsequently, caught with strands of hair outside her chador, she was seized upon the street by government agents or government-approved vigilantes, put into a car at gunpoint, lectured on her clothing, and driven to her home. Later in the year her home was actually invaded by government agents searching for suspected enemies of the government.[287]

The dissent found that, while none of the incidents in themselves constituted persecution, they served as credible, direct, specific facts that made Hassib-Tehrani's fear well-founded.[288] As the dissent articulated, these facts "indicate[d] to her that the authorities know about her, know that she has been a nonconformist on points of great importance to the authorities and foretell that she will suffer more serious harm if she is returned to the country."[289]

The dissent believed the BIA's reasoning was flawed in two ways: (1) it focused only on Hassib-Tehrani's opinions as she had expressed them in Iran; and (2) it only analyzed Hassib-Tehrani's past persecution, not her fear of future persecution.[290]

Second, the dissent deconstructed the nexus element of Hassib-Tehrani's asylum claim. In determining whether persecution was "on account of" an enumerated ground, the dissent noted that this includes the view that the persecutors have of the victim.[291] As an example, the dissent borrowed commentary from the U.S. Supreme Court case *INS v. Elias-Zacarias*.[292] The dissent noted that in that case, the victims "did not need to raise a finger against their persecutors, or whisper a criticism, in order to be the maligned objects of hatred."[293] The dissent stated:

> Similarly, what befell Saideh Hassib-Tehrani was not because she had demonstrated a sympathy for feminism or voiced a more tolerant interpretation of Islam than the Ayatollah's or expressed in Iran any dissent from the rigorist regime . . . *[t]he way in which she led her daily life was enough to invite repression*.[294]

Hassib-Tehrani testified that she is opposed to the regime's fundamentalist beliefs and, as a result, invites persecution.[295] According to her testimony, the dissent

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287. *Id.* at 969–70.
288. *Id.* at 970.
289. *Id.*
290. *Id.*
291. *See id.* (citing Mendoza Perez v. INS, 902 F.2d 760, 762 (9th Cir. 1990)).
292. 502 U.S. 478 (1992).
293. *Fisher*, 79 F.3d at 970 (Noonan, J., dissenting). Although the court denied the petitioner's claim in *Elias-Zacarias*, the dissent in *Fisher* used the analogy from that case to support its reasoning that Hassib-Tehrani should be granted asylum.
294. *Id.* at 970 (emphasis added).
295. *Id.*

found that Hassib-Tehrani had a political opinion and religious beliefs on account of which she reasonably feared persecution.[296]

After finding nexus, the dissent examined what Hassib-Tehrani was scared of should she be forced to return to Iran. According to the 1986 State Department *Country Report* that was not before the Ninth Circuit:[297]

> Iran was not a country without laws and procedures. It was a country in the grip of righteous religious revolutionaries, intolerant of even the slightest departure from the norms that they believed required by the Koran. It was a country in which vigilantes, with government approval, enforced the dress code and other matters of gender decorum. It was a country where, once in the hands of police or prison officials, there was no effective restraint on arbitrary infliction of suffering . . . a person in Saideh Hassib-Tehrani's position faced arrest by revolutionary guards, prolonged detention, interrogation under torture, imprisonment, and arbitrary beatings on the soles of her feet.[298]

Ultimately, the dissent summarized that the role of the court was to integrate the objective evidence with Hassib-Tehrani's subjective emotions. This task required asking "whether a person with her experiences, who fell ill after being handcuffed and detained for four hours, would be scared of suffering on account of her now openly expressed opposition to the regime if she were sent back."[299] The dissent then brought the claim from the hypothetical realm back to the personal considerations of Hassib-Tehrani's claim. The dissent exhorted: "[W]e should ask ourselves: If we had the beliefs and the experience and the gender of Saideh Hassib-Tehrani, would we reasonably fear that we had a one-in-ten chance of suffering seriously on account of our beliefs if we returned to Iran?"[300] To the dissent, the answer was obvious. As such, it found that the BIA erred in denying Hassib-Tehrani asylum.[301]

Much like in *Fatin* and *Safaie*, the majority in *Fisher* used Hassib-Tehrani's lack of opposition to find that she did not meet one or more of the elements required to perfect her asylum claim. In *Fisher*, the particular element that the majority did not find was nexus.[302] The *Fisher* court found that, since Hassib-Tehrani did not appear to actively articulate her opposition to the Iranian government, there could be no

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296. *Id.* at 970–71. Note that although the dissent found the requisite animus of the persecutor, it was not on account of Hassib-Tehrani's social group, but rather for her religious beliefs and political views, which are presumably linked, since Iran is a theocracy, *see Iran Country Specific Information*, U.S. DEP'T OF STATE, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1142.html#country (last visited Mar. 31, 2011).

297. The majority in *Fisher* refused to use the 1986 *Country Report* because it did not form part of the administrative record. *See id.* at 963. However, the regulations suggest that the Immigration Judge's use of part of the report in his decision makes it part of the record. *Cf.* 8 C.F.R. § 208.9(f) (2010) ("The asylum application, all supporting information provided by the applicant, any comments submitted by the Department of State, or by the Service, *and any other information considered by the Asylum Officer* shall comprise the record." (emphasis added)).

298. *See Fisher*, 79 F.3d at 971 (Noonan, J., dissenting) (citing U.S. Dep't of State to the Committee on Foreign Relations, U.S. Senate, and the Committee on Foreign Affairs, U.S. House of Representatives, *Country Reports on Human Rights Practices for 1986* (1987)).

299. *Id.*

300. *Id.* at 972.

301. *Id.*

302. *See id.* at 962.

nexus.[303] In addition, the court found it significant that there was no evidence that Hassib-Tehrani would resist the government upon her return.[304] Although the court did not articulate why this was significant, it appears that the reason may be that the court thought it evidenced a lack of well-founded fear. This makes sense in light of the dissent's lengthy discussion of well-founded fear in its consideration of Hassib-Tehrani's claim. In addition, the dissent highlighted how imputed political opinion can be used to find nexus in cases such as *Fisher* as a way to avoid using resistance as evidence of nexus.[305] The dissent's use of imputed political opinion for asylum-seekers who suffer persecution, simply for the way they lead their daily lives, suggests that resistance is not necessary for a finding of nexus. Moreover, the dissent's use of imputed political opinion for asylum-seekers who suffer persecution serves as a feasible suggestion for how courts can treat nexus in gender-based claims.

4. *In re R-A-*

In re R-A- is one of the highest-profile gender-based asylum cases of the past two decades.[306] The petitioner was Rody Alvarado, a Guatemalan woman whose ex-husband repeatedly brutalized her for a decade.[307] Among other forms of abuse, Alvarado's ex-husband, a former soldier, had whipped her with an electrical cord, dislocated her jaw, attempted to abort her fetus, threatened her with death, violently sodomized her on several occasions, and raped her "almost daily."[308] After a fourteen-year legal battle within the United States, Rody Alvarado was granted asylum on December 10, 2009.[309]

The consequences of the grant of asylum in *In re R-A-* on other asylum-seekers have yet to be seen and will prove particularly important for subsequent gender-based claims. Likewise, the methods by which the BIA has deemed that *In re R-A-* should be decided are important to how future gender-based claims will be brought.

Like in *Fisher*, the 1999 BIA decision in *In re R-A-* contained a powerful dissent.[310] However, although the dissent advocated for Alvarado to be granted asylum, it relied heavily on Alvarado's "resistance" to persecution as the basis for asylum—the same basis on which Fatin and Safaie's claims were denied. The dissent mentioned some form of the word "resist" twenty-two times in seventeen

303. *See id.* at 963.

304. *See id.*

305. *See supra* text accompanying notes 291–96.

306. *See In re* R-A-, 22 I. & N. Dec. 906 (BIA 1999), remanded, 22 I. & N. Dec. 906 (Att'y Gen. 2001). The case's reputation became clear through the interviews the author conducted while preparing her research for this comment.

307. Center for Gender & Refugee Studies, Documents and Information on Rody Alvarado's Claim for Asylum in the U.S., http://cgrs.uchastings.edu/campaigns/alvarado.php (last visited Nov. 13, 2010) [hereinafter Center for Gender & Refugee Studies].

308. MUSALO, MOORE & BOSWELL, *supra* note 131, at 813; *see also In re R-A-*, 22 I. & N. Dec. at 908.

309. Center for Gender & Refugee Studies, *supra* note 307.

310. *In re R-A-*, 22 I. & N. Dec. at 929 (Guendelsberger, Board Member, dissenting). Notably, the dissent took a human rights–based approach to interpreting gender-based claims, citing to international and domestic instruments that recognize women's rights as human rights. *See id.* at 930–31. In addition, the dissent noted that although the persecution occurred at the hands of a private actor, it likewise occurred in a context in which the government was blatantly unwilling to help or protect Alvarado. *See id.* at 929–30. In these senses, the dissent made positive steps toward adjudicating gender-based claims.

pages.[311] In addition, the dissent attempted to mirror its classification of Alvarado's social group with that of the petitioner in *In re Fauziya Kasinga*.[312] In *Kasinga*, a female genital cutting (FGC) case, the petitioner's definition of a "particular social group" succeeded.[313] The social group in *Kasinga* was defined as "gender, ethnic affiliation, and *opposition* to female genital cutting (FGC)."[314] Similarly, in *In re R-A-* the dissent characterized the social group as "based on gender, relationship to an abusive partner, and *opposition* to domestic violence."[315] In addition, the dissent highlighted that "[i]n both cases, the victims *opposed and resisted* a practice which was ingrained in the culture, broadly sanctioned by the community, and unprotected by the state."[316]

The dissent in *In re R-A-* also mentioned "resistance" or "opposition" in its consideration of the nexus between the persecution and the "particular social group" under which Alvarado sought protection. The dissent stated that is was reasonable to believe that Alvarado's husband "was motivated, at least in part, 'on account of' the respondent's membership in a particular social group that is defined by her gender, her relationship to him, and her opposition to domestic violence."[317]

The dissent's interpretation of "nexus" is problematic, as it relates specifically to Alvarado's opposition to domestic violence. Alvarado "opposed her husband's abuse, challenged his dominance, attempted to leave him, and sought relief from the government."[318] Moreover, the dissent noted that Alvarado's husband was aware of, and imputed to Alvarado, "her beliefs in opposition to domestic violence."[319] In addition, the dissent noted that the record supported that the abuse Alvarado suffered "was on account of the abuser's belief that, as her husband, he could dominate the respondent physically and emotionally, as well as socially and culturally."[320] The dissent noted that the victim's opposition to the abuse was known or could have been known to her ex-husband.[321] Moreover, the dissent found that Alvarado's ex-husband was "motivated to continue and even escalate his abuse in order to stifle and overcome his victim's opposition to it."[322]

In summarizing why Alvarado merited the protection of asylum law, the dissent in *In re R-A-* again analogized her case to *Kasinga*. The dissent stated that Alvarado's claim was similar to Kasinga's in that it related "to persecution motivated by membership in a social group, in which a woman . . . opposed male domination and the infliction of violence and abuse due to her gender. . . ."[323] In so stating, the dissent explicitly highlighted the opposition aspect of the asylum-seeker's claim in

311. *See id.* at 929–46.
312. *Id.* at 932–33 (discussing *In re* Fauziya Kasinga, 21 I. & N. Dec. 357 (BIA 1996)).
313. *See Kasinga*, 21 I. & N. Dec. at 358.
314. *In re R-A-*, 22 I. & N. at 932 (Guendelsberger, Board Member, dissenting).
315. *Id.* (emphasis added).
316. *Id.* (emphasis added).
317. *Id.* at 939.
318. *Id.*
319. *Id.* at 943.
320. *Id.*
321. *See id.*
322. *Id.* at 944.
323. *Id.* at 945.

both cases. It thereby linked the merits of Alvarado's claim to her resistance to persecution.

In spite of its emphasis on Alvarado's opposition and resistance to her ex-husband's abuse, the dissent emphasized the importance of the perspective of the persecutor. "In deciding whether anyone has a well-founded fear of persecution or is in danger of losing life or liberty because of a political opinion, one must continue to look at the person from the perspective of the persecutor."[324] The dissent noted, much like in *Fisher*, that if the persecutor believes the person to possess a political opinion, then the person is at risk.[325] This idea, termed as "imputed political opinion" in asylum law, simulates the concept of *mens rea* in criminal law, as it goes to the persecutor's state of mind as opposed to any act of the victim. In this sense, it reflects a positive step in the direction of rape law reform.

The dissent powerfully advocated for Alvarado to be granted asylum, and in doing so, it highlighted some of the flaws of both the majority's reasoning and the asylum system's narrow definition of "social group" with regard to gendered claims. However, the manner in which the dissent reasoned Alvarado was entitled to asylum may have unintentionally adverse consequences for future asylum-seekers. Much like in post-reform rape law, the dissent may have suffered a type of normative confusion. Although it attempted to frame Alvarado's claim from the perspective of her persecutor, the dissent still used Alvarado's resistance to her abuse as a gauge in determining both the social group and political opinion grounds of protection.

III. RAPE LAW PRINCIPLES APPLIED TO GENDER-BASED ASYLUM CLAIMS

While the protection of rape victims has become an important concern in the modern process of criminal prosecutors, victim protection is an even more directly articulated goal of the U.S. asylum system. The 1995 U.S. Department of Justice Guidelines advise that all claims to asylum should be analyzed against the background of the fundamental purpose of refugee law: to provide surrogate international protection where there is a fundamental breakdown in state protection.[326] How gender-based asylum claims are analyzed is especially crucial in light of the fact that, even where positive outcomes are reached in particular cases, U.S. courts continue to "suffer from unprincipled or inconsistent judicial interpretation."[327]

The United States' statutory definition of a refugee describes a person who has a well-founded fear of persecution on account of her race, nationality, religion, political opinion, or membership in a particular social group.[328] In theory, courts have recognized the idea that a well-founded fear is enough to satisfy the definition, and that past persecution, while a factor, is not decisive.[329] However, in the

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324. *Id.* (citing Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987)).

325. *Id.*

326. *See* Memorandum from Phyllis Coven, Office of International Affairs, U.S. Immigration and Naturalization Service, to all I.N.S. Office/rs HQASM Coordinators § I (May 26, 1995).

327. MUSALO, MOORE & BOSWELL, *supra* note 131, at 725.

328. *See* 8 U.S.C. § 1101(a)(42) (2006).

329. *See, e.g*, INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (citing INS v. Stevic, 467 U.S. 407, 424–25 (1984)).

context of gender-based claims in which a woman is persecuted for her social or cultural dissidence, the courts have seemed to require an additional factor: that the woman be willing to resist her persecution to prove how fundamental the trait of self-definition is to her.

It is a dangerous proposition to expect an asylum-seeker to continue to resist if her petition is not granted, while simultaneously using her will to resist as a criterion in considering whether she merits this country's legal protection. Such a setup creates the expectation that asylum-seekers assert "some missionary fever" to defy their persecutors, regardless of the cost to themselves or their families. Further, the standard implies that if an asylum-seeker returns to her home country, she would need to resist unequivocally in order to allow her claim to succeed in the United States.

Much like post-reform rape law, which has focused on the act of rape and deemphasized the victim's response to the act, asylum law should center its analysis on the act of persecution, and not the individual's response to persecution. Regardless of the asylum-seeker's response, *the act* that led her to seek the protection of the U.S. legal system—oppression and persecution in her home country—remains.

Moreover, if an asylum-seeker says that she will choose to live a repressed life rather than suffer for her resistance, neither her honesty nor her choice should be grounds for denying asylum. An asylum-seeker's natural tendency of self-preservation if forced to return to her home country does not make her fear of being persecuted any less well-founded. To the contrary, it appears to suggest that the asylum-seeker fears the persecution she faces enough that she is willing to sacrifice her right to self-determination in order to avoid it. Depending on the degree of persecution to which the asylum-seeker would be subjected, this willingness is, of course, a matter of degree. *Fatin*, *Safaie*, and *Fisher* serve as nuanced examples of the ways in which this idea plays out.

The idea of consent is complicated in both rape cases and asylum claims because true consent would render the sexual act or persecution in question voluntary. Similarly, it is conceptually difficult to fathom that an act may be nonconsensual without a degree of resistance. Normative confusion about what constitutes consent, therefore, has fed into recurring judgments of who deserves the protection of the legal system in both the rape and asylum contexts. Particularly in the asylum context, normative confusion like that found in *Safaie* may continue to lead courts to find that without proof of resistance, the harm an asylum-seeker suffers does not qualify as persecution. As such, it is crucial to elaborate on the terms and concepts used to define the notions of what is "fundamental," or "consensual," and what constitutes "resistance" or "opposition." Reform in rape law has shown that clarifying these terms by referencing the act in question, rather than the victim in question, is possible.[330]

In cases such as *Fatin*, *Safaie*, and *Fisher*, the fact that the petitioner has sought the protection of another country demonstrates an affirmative choice that reflects her nonconsent to comply with the conditions imposed in her home country. This fits into Peter Westen's idea of the differing conceptions of consent, most obvi-

330. *See* discussion *supra* Part I.

ously because it demonstrates the petitioners' lack of factual expressive consent.[331] In addition, if the petitioner's testimony is to be believed, her choice to leave her home country also highlights the absence of factual attitudinal consent, by reflecting the asylum-seeker's lack of subjective and internal acquiescence to the conditions in her home country. On the other hand, how the asylum system adjudicates gender-based claims reflects Westen's notions of prescriptive and imputed legal consent. This is because the process of adjudication is embedded with judgments about people's relationships to one another.[332] Furthermore, the adjudication process derives its content from legal norms that, in their presence or absence, change a person's legal relationship with those around her.[333]

A genuine asylum-seeker, by necessity, lacks factual attitudinal consent; she has no felt willingness to agree with or to choose what her persecutor seeks to inflict on her. An asylum-seeker's internal state of mind as a result of her persecution reflects the first-person experience of lacking consent. The subjective feeling of fear and the internal revolt against acquiescence that an asylum-seeker experiences both reflect this state of mind.

Similarly, an asylum-seeker's act of leaving her home country and seeking the protection of the U.S. asylum system suggests her lack of factual expressive consent to live under the conditions in her home country.[334] When she chooses to subject herself to revealing the most intimate details of her persecution in an adversarial system that she likely does not understand, an asylum seeker is making an affirmative choice. This choice is often an expression of the subjective fear and internal revolt she feels. The expression demonstrates externally the asylum-seeker's lack of consent to continue to live under the conditions she previously lived under and would continue to live under should she be forced to return to her home country. To seek asylum is to forsake one's home country because it has failed to provide her with protection. Seeking asylum in another country is a last recourse for those who can find no protection in their home countries. As such, it is a particularly strong expression of nonconsent.

Although confusion arises in the realm of factual consent, it is especially the notions of legal consent that are at issue in the context of asylum adjudication. Prescriptive legal consent to conduct consists of actual acquiescence to the conduct under such conditions as jurisdictions prescribe as necessary to give the acquiescence legal effect.[335] In the asylum context, an individual prescriptively consents to living in her home country when she chooses to do so under such conditions of communication and such apparent conditions of competence, knowledge, freedom, and motivation as the jurisdiction deems sufficient to cause observers reasonably to believe that her legitimate interests are satisfied.[336] An example of prescriptive legal consent in the asylum context would be a Muslim woman living in Iran who wears the chador because she freely and voluntarily chooses to do so.

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331. *See* discussion *supra* Part I.B.
332. *See* WESTEN, *supra* note 55, at 6.
333. *See id.*
334. *See* discussion *supra* Part I.B.1.b.
335. *See* WESTEN, *supra* note 55, at 7.
336. *Id.* at 139.

Much of the normative confusion about consent in asylum cases occurs when the courts impute consent upon an asylum-seeker, i.e., attribute prescriptive consent on persons that do not possess it.[337] The type of imputed consent that occurs within the asylum context is constructive consent, in which consent to X equals consent to Y. In the case of asylum, the courts have construed consent to not resist the forces of oppression in one's home country to equal consent to live in one's home country. In particular, courts have examined a victim's willingness to resist the persecution in her home country to determine how fundamental a trait is to her under *Acosta*'s "particular social group" test. Cases like *Fatin*, *Safaie*, and *Fisher* demonstrate instances where a woman's desire to live as she chose was considered insufficiently fundamental because the woman in each case did not demonstrate that she was willing to resist her persecutors.[338] In these cases, the legal fiction the courts used to impute consent was to measure how "fundamental" a trait is to an asylum-seeker by whether and how much she is willing to resist in order to preserve it. Similarly, but reaching the opposite result, the dissent in *In re R-A-*, although advocating for Alvarado's asylum, relied upon the fact that Alvarado resisted her ex-husband's abuse in order to determine that she deserved the legal protection of the United States.[339]

The asylum cases discussed in this comment also reflect a similar normative confusion as of the first grand jury in the *Valdez* condom-rape case, in which the jurors mistook Wilson's factual expression of consent—allowing Valdez to have sexual intercourse with her so long as he wore a condom—for legal consent.[340] In that case, the jurors failed to consider the contextual background of the scene in Wilson's bathroom. They failed to see that her choice was not made under the requisite conditions of competence, knowledge, freedom, and motivation in order to make it an actual choice. They failed to see how, for a woman alone with a knife-wielding stranger in her home during the middle of the night, there was no option that preserved Wilson's integrity. Public outcry in Wilson's case corrected this harm; however, no similar remedy was reached in *Fatin*, *Safaie*, or *Fisher*, and the ultimate grant of asylum to *In re R-A-* did not reach these issues.

The courts in *Fatin*, *Safaie*, and *Fisher* mistook the women's statements that they might not resist persecution if forced to return as evidence that the women would be consenting to their country conditions or that they did not find such conditions profoundly abhorrent.[341] What the courts in these cases failed to take into account is that there was not a competent, knowing, and free choice involved in the women's decisions. The words the women in *Fatin*, *Safaie*, and *Fisher* uttered about the choices they would make should they be forced to return were not a reflection of consent. Rather, they were an acknowledgement that, if forced to return, they faced no real choice that preserved their integrity. In fact, the choice the women faced was either to suffer silently under conditions they abhorred to avoid punishment, or to resist persecution, face punishment, and attempt, somehow, to make it

337. *Id.* at 271.
338. *See* discussion *supra* Part II.D.
339. *See* discussion *supra* Part II.D.4.
340. *Compare* discussion *supra* Part II.D, *with* discussion *supra* Part I.A.
341. *See* discussion *supra* Part II.D.

back to the United States alive, wearing their scars to show they deserved protection this time.

Furthermore, the reasoning of the courts in *Fatin*, *Safaie*, and *Fisher* highlight how pervasive the use of resistance is to establishing each element of an asylum claim. The court in *Fatin* held lack of resistance to indicate that Fatin was not a member of the social group to which she claimed to belong, and that the harm she suffered did not rise to the level of persecution. The court in *Safaie* held that absent "some missionary fever" to defy the laws, conduct suffered by Safaie could not rise to the level of persecution. Finally, the court in *Fisher* held Hassib-Tehrani's lack of opposition to the Iranian government to be evidence that there was no nexus between the harm she suffered and her religious or political beliefs.[342] Resistance, therefore, has served as a predictive factor for asylum claims with regard to each of their elements.

Furthermore, the heightened suffering of resisting persecution seems to mirror the reality of rape, where empirical data shows that victims who unsuccessfully resist often suffer more severe physical injury.[343] In asylum cases, heightened harm through resistance rears itself through the denial of claims in which a person has not resisted, but where there is evidence that the conditions in that country lead similarly situated persons who resist to increased harm. Therefore, in *Fatin*, *Safaie*, and *Fisher*, the petitioners' claims were rejected, in spite of the fact that there was evidence that similarly-situated women in Iran were subjected to punishment for their resistance.

Not only is using resistance in this way inapposite to the aims of the protective system, but it also runs counter to how the statutory definition of a "well-founded fear" has been interpreted within the INA's refugee definition:

> Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claims. A well-founded fear, in other words, can be based on what has happened to others who are similarly situated. The situation of each person, however, must be assessed on its own merits.[344]

By not considering similarly situated persons from the same country in their decisions, the judges in *Fatin*, *Safaie*, and *Fisher* neglected what has been a pertinent source of consideration in asylum claims: what happens to those who resist. Where U.S. State Department reports describe a country in a manner that makes clear that those who resist face harsh consequences for their noncompliance,[345] re-

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342. *See* discussion *supra* Part II.D.

343. *See* Marchbank et al., *supra* note 34, at 540–49.

344. *See* Matter of Mogharrabi, 19 I. & N. Dec. 439, 446 (BIA 1987)), *overruled on other grounds by* Pitcherskaia v. INS, 118 F.3d 641, 647–48 (9th Cir. 1996).

345. A salient example of a country description from an opinion discussed in this comment is the description of Iran's country conditions as described in *Fisher*:

> [I]n the grip of righteous religious revolutionaries, intolerant of even the slightest departure from the norms that they believed required by the Koran . . . in which vigilantes, with government approval, enforced the dress code and other matters of gender decorum . . . where, once in the hands of police or prison officials, there was no effective restraint on arbitrary infliction of suffering . . . [where] a person [similarly situated to the petitioner]

quiring resistance from the individual is ineffective protection for those who have managed to arrive in the United States seeking asylum.

Although the BIA's interpretation of well-founded fear considers the context from which an asylum-seeker came, the standard will not embrace every person who faces a poor set of country circumstances. Credibility determinations of individual asylum-seekers in every case would continue to serve as a protective shield from granting asylum to those whose fear of persecution is not real or well-founded. This should ameliorate some of the fear surrounding abuse of the system.[346]

CONCLUSION

Ultimately, the way the asylum system adjudicates claims involves something far more dangerous to the integrity of the system than allowing more claims to succeed: adjudications strip agency from women asylum-seekers to say how fundamental something is to them and to be supported in their agency by the legal system. One of the most crucial facets of the rape reform movement was that it cracked the mentality of "no means yes" within the United States. Denying foreign women the agency that has been granted to women within this country creates a double standard. In addition, forcing female asylum-seekers to subject themselves to more harm in order to merit the protection of this country's legal system is a distortion of the intended goals of the asylum system. The approach taken by the rape reform movement offers valuable lessons for the asylum claims system, since rape reform laws de-emphasized victim resistance and instead chose to focus on the act of rape itself. Although the two systems function differently, the success of the rape reform movement provides a strong argument for eliminating the implicit resistance requirement in gender-based asylum claims.

> . . . faced arrest by revolutionary guards, prolonged detention, interrogation under torture, imprisonment, and arbitrary beatings on the soles of her feet.

See Fisher v. INS, 79 F.3d 955, 971 (9th Cir. 1996) (Noonan, J., dissenting) (citing U.S. Dep't of State to the Committee on Foreign Relations, U.S. Senate, and the Committee on Foreign Affairs, U.S. House of Representatives, *Country Reports on Human Rights Practices for 1986* (1987)).

346. This comment references the policy fears surrounding abuse of the asylum system without discussion, as such an issue goes beyond the intended scope of this comment. However, for those interested in this topic, or in different countries' approaches to gender-based claims and the practical consequences of a gender-based ground for asylum, see Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25 (1998–99).