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GRANTING ASYLUM TO PERSECUTED AFGHAN WESTERN WOMEN

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I. INTRODUCTION

This note argues that the U.S. can and ought to grant asylum to Afghan Western Women who suffer from and/or have a well-founded fear of persecution under the traditional religion, political opinion, or particular social group categories for granting asylum under 8 U.S.C. § 1101(a)(42)(A).¹ Afghan Western Women are those Afghan women who rely on the U.S.-led coalition's promise of improved human rights and who adopt Western practices, e.g., appearing in public unaccompanied by a male relative, electing not to wear the burqa, or refusing to enter into an arranged marriage.

Afghan Western Women typically suffer from and/or have a well-founded fear of four forms of persecution stemming from the adoption of Western practices in conflict with the tenets of Islam: (1) "economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom"² from restrictions on women's education and employment outside the home; (2) serious physical harm from beatings or other forms of physical violence;³ (3) sexual abuse⁴ and (4) coercion to engage in conduct that is abhorrent to their deepest beliefs.⁵

This note will address the derivation of U.S. asylum law from international asylum law (Part II.A), the definition of persecution as interpreted by the Board of Immigration Appeals and different Circuits (Part II.B), the plight of women asylum seekers (Part III.A), the Afghan country conditions relevant to Afghan Western

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¹ 8 U.S.C.A. § 1101(a)(42)(A) (West 2005).

² See *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

³ See PHYLLIS COVEN, OFFICE OF INTERNATIONAL AFFAIRS, MEMORANDUM: CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN 9 (May 26, 1995), reprinted in 7 Int'l J. Refugee L. 700-19 (1995), available at <http://www.jobelaw.com/articles/GenderMemo.pdf> (last visited Oct. 25, 2005) [hereinafter INS GENDER GUIDELINES] (beatings and other forms of physical violence are commonly held to amount to persecution); *Chen v. INS*, 359 F.3d 121, 128 (2d Cir. 2004) (citing *Begzatowski v. INS*, 278 F.3d 665, 669 (7th Cir. 2002)); *Ambati v. Reno*, 233 F.3d 1054, 1060 (7th Cir. 2000); *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988).

⁴ See *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987) (holding that rape and other forms of sexual abuse constitute persecution).

⁵ See *Fatin v. INS*, 12 F.3d 1233, 1241, 1242 n.11 (3d Cir. 1993) (noting that the degree of abhorrence an applicant claims to feel must be objectively reasonable—a degree of abhorrence that a reasonable person in the circumstances of the applicant would share).

Women (Part III.B), and the asylum applications of three hypothetical Afghan Western Women: (1) Mrs. Religion (“Mrs. R”), (2) Mrs. Political Opinion (“Mrs. P”), and (3) Mrs. Social Group (“Mrs. S”) (Part IV.C).

II. UNITED STATES ASYLUM LAW

A. Derivation of U.S. Asylum Law from International Asylum Law

“Asylum law is in a state of flux, constantly evolving to conform to changes in international, as well as national law.”⁶ Both international law and domestic law govern U.S. asylum law. Although U.S. asylum law is derived directly from international law,⁷ the adjudication of U.S. asylum cases is governed by U.S. statutes⁸ and domestic case law. The domestic case law is subject to the following hierarchy of domestic jurisdiction: Immigration Judges (“IJ”), the Board of Immigration Appeals (“BIA”),⁹ the Attorney General,¹⁰ and the U.S. Federal Courts.¹¹ The IJs and the BIA, as designees of the Attorney General, adjudicate

⁶ REGINA GERMAIN, *AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE I* (American Immigration Lawyers Association ed., 2003).

⁷ *See id.*

⁸ *See* 8 U.S.C.A. § 1101(a)(42) (West 2005) (definition of refugee); 8 U.S.C.A. § 1158 (West 2005) (asylum procedures and eligibility); GERMAIN, *supra* note 6, at 2.

⁹ The BIA is an appellate administrative body which reviews IJs' decisions and interprets immigration statutes and regulations. *See* GERMAIN, *supra* note 6, at 15. Only those decisions selected by the BIA as “precedent” are published in the Administrative Decisions under Immigration and Nationality Law and serve as precedent. *See* 8 CFR § 1003.1(g) (2003).

Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues. Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security to the extent authorized in paragraph (i) of this section, shall serve as precedents in all proceedings involving the same issue or issues.

Id.

Although unpublished BIA decisions do not serve as binding precedent upon the BIA and the IJs, at least one court has relied on an unpublished BIA decision as precedent. *See Davila-Bardales v. INS*, 27 F.3d 1, 5, 6 (1st Cir. 1994) (“[W]e see no earthly reason why the mere fact of nonpublication should permit an agency to take a view of law that is flatly contrary to the view it set out in earlier cases . . . without explaining why it is doing so.”).

¹⁰ The Attorney General has the authority to review BIA decisions. *See* 8 CFR § 1003.1(d)(7) (2005).

The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

Id.

¹¹ Historically, the BIA has followed the precedent of the Circuit Court in the circuit where it sits. *See Matter of Anselmo*, 20 I. & N. Dec. 25, 31-32 (BIA 1989); GERMAIN, *supra* note 6, at 16. In contrast, the BIA has not followed the precedent of the District Court in the district where it sits. *See Matter of K-S*, 20 I. & N. Dec. 715, 718-20 (BIA 1993).

individual asylum claims on a case-by-case factual basis.¹² In addition, through its adjudication process the BIA gives life to the asylum statutes and establishes U.S. asylum policy.¹³

International asylum law is governed by the 1951 United Nations Convention Relating to the Status of Refugees (“Refugee Convention”)¹⁴ and the 1967 United Nations Protocol Relating to the Status of Refugees (“Protocol”).¹⁵ In 1968, the U.S. acceded to the Protocol which incorporates the Refugee Convention’s Articles 2 through 34.¹⁶ U.S. law requires domestic courts to interpret domestic statutes such that they are consistent with international obligations like the Protocol.¹⁷

The Protocol defines a refugee as a person who:

owing to a *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 h[er] nationality and is unable or, owing to such fear, is unwilling to avail h[er]self of the protection of that country; or who not having a nationality and being outside the country of h[er]

¹² See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 456, 460 (1987) (Powell, J., dissenting). It is important to note that effective September 25, 2002, the BIA has limited fact-finding ability on appeal. Instead of *de novo* review, the BIA may only review IJs’ determinations of facts on a *clearly erroneous* standard. The BIA may still, however, review *de novo* questions of law, discretion, judgment, and all questions arising in appeals from cases decided by Service officers. See 8 C.F.R. § 1003.1(d)(3) (2002). “This regulatory change adds meaningful force to an Immigration Judge’s decision and heightens the need for Immigration Judges to include clear and complete findings of fact in their decisions.” S-H-, 23 I. & N. Dec. 462, 465 (BIA 2002).

¹³ See *Kasigna*, 21 I. & N. Dec. 357, 376 (BIA 1996) (The BIA, “[a]s the designee of the Attorney General, . . . serve[s] not only to adjudicate individual, unrelated cases on their facts, but also to give life to the provisions and terms of the law and establish agency policy through adjudication); *Rust v. Sullivan*, 500 U.S. 173 (1991) (“An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances.”) (citations omitted).

¹⁴ See United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, available at <http://www.unhcr.lk/Documents/Refugee%20Conventions/CONVEN-1.pdf> [hereinafter *Refugee Convention*].

¹⁵ See 1967 United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 660 U.N.T.S. 267, available at http://www.unhchr.ch/html/menu3/b/o_p_ref.htm [hereinafter *Protocol*].

¹⁶ See *Protocol*, art. I.

¹⁷ See *Weinberger v. Rossi*, 45 U.S. 25, 32 (1982); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 4, 118 (1804); see also *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that absent conflicting domestic law, customary international law is binding on the U.S.). Both the Refugee Convention and the Protocol serve as evidence of customary international law. See *Statute of the Int’l Court of Justice*, art. 38, available at <http://www.itcilo.it/english/actrav/telearn/global/ilo/law/justice.htm> (last visited Oct. 25, 2005).

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states*; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Id. (emphasis added).

former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.¹⁸

The U.S. Immigration and Nationality Act (INA)¹⁹ provides two methods, derived from the Protocol and the Refugee Convention, under which a deportable alien can remain in the U.S. absent a claim that she would be persecuted if she were returned to her country.²⁰ The first method falls under INA § 208(a), codified as 8 U.S.C. § 1101(a)(42), which provides the Attorney General with the discretion to grant asylum to those aliens who qualify as refugees under 8 U.S.C. § 1101(a)(42)(A).²¹ The second method falls under INA § 243(h), codified as 8 U.S.C. § 1253(h), which creates a statutory right for the Attorney General to withhold deportation.

“Asylum and withholding of deportation are two distinctive forms of relief.”²² Asylum provides broader benefits than withholding of deportation.²³ An alien who is granted asylum can become a lawful permanent resident,²⁴ while an alien granted withholding of deportation is only protected from deportation to the country from which she sought asylum and not from deportation to a “hospitable” country that is willing to accept her.²⁵ This Note addresses only the availability of asylum under 8 U.S.C. § 1101(a)(42).²⁶

The U.S. definition of a refugee contained in 8 U.S.C. § 1101(a)(42)(A) illustrates the derivation of U.S. asylum law from international asylum law.²⁷ The

¹⁸ Protocol, art. 1(2) (emphasis added).

¹⁹ Immigration and Nationality Act, 8 U.S.C.A. § 1101 et seq. (West 2005).

²⁰ See 8 U.S.C.A. § 1101(a)(42) (West 2005); 8 U.S.C.A. § 1253(h) (West 2005).

²¹ See *Cardoza-Fonseca*, 480 U.S. at 423 (1987) (stating that 8 U.S.C. § 1158(a) “authorizes the Attorney General, in his discretion, to grant asylum to an alien”).

²² *Id.* at 429 n.6.

²³ See *id.*

²⁴ See 8 U.S.C.A. § 1159 (West 2005); *Cardoza-Fonseca*, 480 U.S. at 429 n.6.

²⁵ See 8 U.S.C.A. § 1227(a) (West 2005); *Cardoza-Fonseca*, 480 U.S. at 429 n.6.

²⁶ This note will not address withholding of deportation via a grant of asylum under 8 U.S.C. § 1253(h). In line with Article 33.1 of the Refugee Convention, 8 U.S.C. § 1253(h) creates a statutory right to the withholding of deportation by requiring the Attorney General to withhold deportation of an alien who demonstrates that her “life or freedom would be threatened” on account of race, religion, nationality, membership in a particular social group, or political opinion if deported. Under 8 U.S.C. § 1253(h) an alien must prove that “it is more likely than not that the alien would be subject to persecution” if she were to return to the country from which she is seeking asylum. The standard of proof for persecution under 8 U.S.C. § 1253(h) is more onerous than that contained within 8 U.S.C. § 1101(a)(42). “8 U.S.C. § 1158(a)[] authorizes the Attorney General, in his discretion, to grant asylum to an alien” who is unable or unwilling to return to his home country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C.A. § 1101(a)(42) (West 2005); see also *Cardoza-Fonseca*, 480 U.S. at 423. The standard of proof for persecution under 8 U.S.C. § 1253(h) may serve as an obstacle to Western women seeking asylum in the U.S. Since it is not necessary for Western women seeking asylum in the U.S. to meet the more onerous standard of proof for persecution under 8 U.S.C. § 1253(h) will not be addressed in this note.

²⁷ See GERMAIN, *supra* note 6, at 3; *Cardoza-Fonseca*, 480 U.S. at 436-37.

If one thing is clear from the legislative history of the new definition of “refugee,” . . . it is that one of Congress’ primary purposes was to bring United States refugee law into

8 U.S.C. § 1101(a)(42)(A) definition of a refugee is effectively identical to the Protocol definition of a refugee:

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 to avail . . . herself of the protection of, that country *because of persecution or a well-founded fear of persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion . . .²⁸

Under 8 U.S.C. § 1101(a)(42)(A) it is within the discretion of the Attorney General²⁹ to determine whether an alien qualifies as a refugee.³⁰ Once the Attorney General determines that an alien qualifies as a refugee under 8 U.S.C. § 1101(a)(42)(A), the alien *may* be granted asylum.³¹

B. Persecution

The Attorney General will grant asylum to an alien who can prove either that she has experienced past persecution or that she possesses a well founded fear of future persecution if she were to return to the country from which she is seeking asylum.³² “[T]here is no rule requiring that persecution actually be directed by the state or by an organized political party.”³³ The asylum applicant need only show that the government either condoned the persecution or has demonstrated an inability to protect victims.³⁴ In *Sangha v. INS*,³⁵ the Ninth Circuit held that it is possible to find past persecution where the asylum petitioner was threatened by a “terrorist group the government is unable to control.”³⁶ It is important to note that the current definitions of persecution are mostly derived from the experience of male asylum claimants.

Persecution has been interpreted both narrowly and broadly by the BIA and various Circuit Courts. The Third Circuit and the BIA have set forth a narrow interpretation of persecution. In contrast, the Second, Seventh, and Ninth Circuits have set forth a more liberal and pro-alien interpretation of persecution. However,

conformance with the [Protocol] Indeed, the definition of “refugee” that Congress adopted . . . is virtually identical to the one prescribed by Article 1(2) of the [Protocol].

Id.

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

²⁹ The Attorney General delegates this responsibility to the IJs and the BIA. See *Cardoza-Fonseca*, 480 U.S. at 456, 460 (Powell, J., dissenting).

³⁰ See 8 U.S.C.A. § 1158(a) (West 2005).

³¹ See *Cardoza-Fonseca*, 480 U.S. at 423, 428, 443.

³² See *id.*

³³ *Bace v. Ashcroft*, 352 F.3d 1133, 1138 (7th Cir. 2004).

³⁴ See *Roman v. INS*, 233 F.3d, 1027, 1034 (7th Cir. 2000).

³⁵ *Sangha v. INS*, 103 F.3d 1482 (9th Cir. 1997).

³⁶ *Id.* at 1487. *Sangha* was threatened by a Sikh separatist group which the government of India was unable to control. *Id.*

the Third Circuit and BIA interpretations of persecution allow for a more expansive definition of persecution under certain circumstances.

Relying on the ordinary use definition of persecution and on the BIA's definition of persecution in *Matter of Acosta*,³⁷ the Third Circuit set forth its interpretation of persecution in *Fatin v. INS*.³⁸ According to *The Random House Dictionary of the English Language*, persecution is defined as "a program or campaign to exterminate, drive away, or subjugate a people because of their religion, race, or beliefs."³⁹ The *Fatin* court interpreted the BIA's definition of persecution in *Matter of Acosta* "as recognizing that the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional[, for i]f persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country."⁴⁰ Furthermore, the *Fatin* court interpreted congressional intent as consistent with both the ordinary use definition of persecution and the BIA's definition of persecution in *Matter of Acosta*.⁴¹

However, the BIA's definition of persecution in *Matter of Acosta* also includes two more expansive forms of persecution: (1) "economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom,"⁴² and (2) punishment resulting from an alien's violation of a country's laws of general applicability if these laws are administered for a nefarious purpose as within the ambit of persecution.⁴³ Furthermore, the *Fatin* court appeared willing to expand the definition of persecution to include "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 [such as requiring a woman to wear a burqa who finds this requirement to be abhorrent to her deepest beliefs]."⁴⁴

In *Chen v. INS*,⁴⁵ the Second Circuit followed Seventh Circuit case law and recognized that conduct must rise above the level of mere harassment to constitute persecution, but persecution includes "more than threats to life or freedom; non-life threatening violence and physical abuse also fall within this category."⁴⁶ In *Ambati v. Reno*,⁴⁷ the Seventh Circuit defined persecution as "punishment or infliction of harm,"⁴⁸ including "actions less severe than threats to life or freedom."⁴⁹ In *Desir*

³⁷ *Matter of Acosta*, 19 I. & N. Dec. 211.

³⁸ *Fatin*, 12 F.3d 1233.

³⁹ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1444 (2d ed. 1987); see also *Fatin*, 12 F.3d at 1240 n.10.

⁴⁰ *Fatin*, 12 F.3d at 1240.

⁴¹ See *id.*

⁴² *Matter of Acosta*, 19 I. & N. Dec. at 222.

⁴³ See *id.*

⁴⁴ *Fatin*, 12 F.3d at 1242 ("requiring some women to wear chadors may be so abhorrent to them that it would be tantamount to persecution").

⁴⁵ *Chen*, 359 F.3d 121.

⁴⁶ *Id.* at 128 (citing *Begzatowski*, 278 F.3d at 669).

⁴⁷ *Ambati*, 233 F.3d at 1060.

⁴⁸ *Id.*

v. Ilchert,⁵⁰ the Ninth Circuit held that an act need not be life-threatening to constitute persecution.⁵¹ One IJ went even further to argue that persecution should consist of harm that does not amount to physical violence such as verbal and emotional abuse, social isolation, house arrest, separation from family, travel restrictions, economic dependency, theft, attempted imprisonment, and fear resulting from the constant threat of violence.⁵²

Persecution does not require a subjective, malignant, or punitive intent to cause harm.⁵³ The BIA has recognized that it may be impossible to prove a persecutor's exact motive for persecution or the feared persecution of the asylum petitioner.⁵⁴ It follows that the BIA does not require asylum applicants to show conclusively why the persecution has occurred or may occur.

1. Past Persecution

For an alien to prove that she has experienced past persecution, she must demonstrate that either the government or an organization that the government is unable or unwilling to control has subjected her to persecution on account of her "race, religion, nationality, membership in a particular social group, or political opinion."⁵⁵

2. Well-Founded Fear of Persecution

For an alien to prove that she possesses a well-founded fear of persecution she must demonstrate to the IJ, by a preponderance of the evidence, the following three elements of a well-founded fear of persecution: (1) that she has a well-founded fear of persecution, (2) that the persecution is on account of race, religion, nationality, membership in a particular social group, or political opinion, and (3) that the persecution stems either from the government or from an organization that the government is unable or unwilling to control.⁵⁶ A well-founded fear can exist where there is less than a fifty percent chance of persecution; even a ten percent chance of death may give rise to a well-founded fear.⁵⁷

⁴⁹ *Id.* (involving loss of economic livelihood that stemmed from physical attacks, thievery, and economic sabotage upon a Christian by Hindu neighbors).

⁵⁰ *Desir*, 840 F.2d 723.

⁵¹ *See id.* at 724, 729 ("beatings, imprisonment, and assaults by government security forces for the purpose of extortion may constitute persecution on account of political opinion").

⁵² *See A- & Z-*, EOIR Immigr. Ct. Dec. 20, 1995, summary 72 I. & N. 521.

⁵³ *See Kasigna*, 21 I. & N. Dec. at 365.

⁵⁴ *See S-P-* at 5 (requiring proof of actual, exact motives would be improperly "rigorous" and "would largely render nugatory the decision in [*Cardoza-Fonseca*], and would be inconsistent with the 'well-founded' fear standard embodied in the 'refugee' definition"); Deborah Anker, Nancy Kelly & John Willshire-Carrera, *The BIA's New Asylum Jurisprudence and its Relevance for Women's Claims*, 73 No. 34 INTERPRETER RELEASES 1173, 1178 (1996).

⁵⁵ 8 U.S.C.A. § 1101(a)(42)(A) (West 2005) (emphasis added); *see Chen*, 359 F.3d 121.

⁵⁶ *See Lopez-Soto v. Ashcroft*, 383 F.3d 228, 234 (4th Cir. 2004).

⁵⁷ *See Elnager v. INS*, 930 F.2d 784, 788 (9th Cir. 1991) (citing *Cardoza-Fonseca*, 480 U.S. at 423).

While an alien's well-founded fear of persecution will undoubtedly have a subjective element,⁵⁸ her fear must "have its basis in external, or objective, facts that show there is a realistic likelihood [s]he will be persecuted upon h[er] return to a particular country; this requires an alien to show h[er] fear has a solid basis in objective facts or events and that it is likely [s]he will become the victim of persecution."⁵⁹ For an alien to prove that she possesses a well-founded fear of persecution she must show both the subjective element and the objective element; in other words, she must show that *her* fear is genuine and that *a reasonable person* in the same circumstances would fear persecution if returned to her native country.⁶⁰ An objective determination can be derived directly from an alien's testimony—often the only basis by which the IJ can determine whether the alien possesses a well-founded fear of persecution.⁶¹

Past persecution serves as presumptive proof of a well-founded fear of persecution.⁶² Therefore, if an asylum petitioner can establish that she has been subjected to past persecution, she may qualify for asylum under both the past persecution prong and the well-founded fear of persecution prong of 8 U.S.C. § 1101(a)(42)(A).⁶³ The presumption, however, may be rebutted from evidence of changed country conditions showing that the individual's fear of persecution is no longer well-founded.⁶⁴ Rebuttal of the presumption does not foreclose the applicant's eligibility for asylum. She may be granted asylum if she can provide a compelling reason as to why she should remain eligible. A compelling reason may arise from the severity of past persecution or from the establishment of a reasonable possibility that she may suffer other serious harm upon removal to the country from which she is seeking asylum.⁶⁵

III. THE PLIGHT OF THE "WESTERN WOMAN" AS AN ASYLUM SEEKER

A. *Women as Asylum Seekers*

Women may be singled out for persecution for reasons unique to their gender because the nature of the persecution varies from that of the persecution

⁵⁸ See *Cardoza-Fonseca*, 480 U.S. at 431-32.

⁵⁹ *Matter of Acosta*, 19 I. & N. Dec. at 212.

⁶⁰ See *Safaie v. INS*, 25 F.3d 636, 639 (8th Cir. 1994).

⁶¹ *Cardoza-Fonseca*, 408 U.S. at 457-58.

⁶² See *Anker et al.*, *supra* note 54, at 1177.

⁶³ See *In re H-*, 21 I. & N. Dec. at 337 Interim Decision (BIA) 3276 (1996), 1996 WL 291910 ("An alien who has demonstrated past persecution . . . is considered to have established eligibility for asylum both on account of the past persecution which has been demonstrated and the well-founded fear of future persecution which is presumed."); *Anker et al.*, *supra* note 54, at 1177.

⁶⁴ See *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 67 (2d Cir. 2002); 8 C.F.R. § 208.13(b)(1)(i) (2005).

⁶⁵ See *Liao*, 293 F.3d at 67; *In re H-*, 21 I. & N. Dec. at 338-39; *Anker et al.*, *supra* note 54, at 1177; 8 C.F.R. § 208.13(b)(1)(iii).

experienced and/or feared by typical non-gender-specific asylum claimants.⁶⁶ Therefore some asylum claims, such as Afghan Western Women asylum claims, may be unique to women. Nevertheless, the substantive analysis for gender-specific asylum claims should not differ from the substantive analysis applied to non-gender-specific asylum claims.⁶⁷

In 1995, the U.S. became the second country, after Canada,⁶⁸ to adopt formal guidelines that recognize female gender-based persecution as a basis for asylum.⁶⁹ The INS passed the INS Gender Guidelines to enhance understanding and sensitivity to gender-related asylum claims, to improve U.S. asylum adjudication, and to help the U.S. adequately address international human rights concerns.⁷⁰ The INS Gender Guidelines recognize that there are no “bright-line” tests for evaluating gender-based asylum claims, thus allowing for gender-based asylum to be construed as persecution based on a woman’s religion, her membership in a particular social group, or her political opinion.⁷¹

Prior to the adoption of the INS Gender Guidelines, gender-specific persecution, such as rape, was considered a private personal matter and not a basis for granting asylum.⁷² The INS Gender Guidelines recognize gender-specific persecution “as a form of serious harm and a mechanism of repression and domination” that qualifies as persecution.⁷³ In *Angoucheva v. INS*,⁷⁴ the concurring opinion of one judge explained that “[r]ape and sexual assault are generally understood today not as sexual acts borne of attraction, but as acts of violent aggression that stem from the perpetrator’s power over and desire to harm his victim.”⁷⁵

Furthermore, the INS Gender Guidelines recognize that the laws and customs of some countries, like Afghanistan, contain gender-discriminatory provisions.⁷⁶ According to the INS Gender Guidelines, breaching these social mores through the

⁶⁶ See *id.* (examples of female gender-specific persecution include sexual abuse, rape, infanticide, female genital mutilation, forced marriage, slavery, domestic violence, and forced abortion).

⁶⁷ See IMMIGRATION AND REFUGEE BOARD OF CANADA, GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT, GUIDELINE 4, WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: UPDATE (Nov. 13, 1996), at 3, available at http://www.irb-cisr.gc.ca/en/about/guidelines/women_e.htm#table [hereinafter CANADIAN GENDER GUIDELINES].

⁶⁸ THE CANADIAN GENDER GUIDELINES were issued in 1993.

⁶⁹ See *INS Publishes Gender Persecution Guidelines*, 72 No. 22 INTERPRETER RELEASES 771 (1995).

⁷⁰ See INS GENDER GUIDELINES, *supra* note 3, at 1.

⁷¹ See *id.* at 8.

⁷² See *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987), *cert. denied*, 484 U.S. 826 (1987) (holding that rape is of a personal nature and therefore does not constitute persecution); DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 256 (Paul T. Lufkin ed., Refugee Law Center 3d ed. 1999).

⁷³ ANKER, *supra* note 72, at 256-57.

⁷⁴ *Angoucheva v. INS*, 106 F.3d 781 (7th Cir. 1997).

⁷⁵ *Id.* at 793 (7th Cir. 1997) (Rovner, J., concurring) (citations omitted); see also *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995) (“rape, as much as any beating . . . is an act of violence”), *cert. denied*, 516 U.S. 1077 (1996); ANKER, *supra* note 72, at 257.

⁷⁶ See INS GENDER GUIDELINES, *supra* note 3, at 4.

adoption of Western practices (e.g. by appearing in public unaccompanied by a male relative, electing not to wear the burqa, or refusing to enter into an arranged marriage) may cause women to suffer from persecution that is distinguishable from that suffered by the general public due to the country's customs and laws.⁷⁷

The INS Gender Guidelines, much like 8 U.S.C. § 1101(a)(42), recognize that U.S. asylum law is derived from international asylum law.⁷⁸ The INS Gender Guidelines instruct that U.S. gender-based asylum claims “must be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations.”⁷⁹ The INS Gender Guidelines indicate that even international instruments which the U.S. has not ratified may serve as a source of human rights norms that should be incorporated into U.S. asylum law.⁸⁰

The INS Gender Guidelines rely primarily on four international instruments that recognize and promote the principle that “women’s rights are human rights, and that women’s rights are universal”: (1) the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which prohibits States from engaging in actions that are discriminatory against women and requires States to take affirmative actions towards the eradication of the discriminatory treatment of women; (2) the June 1993 U.N. World Conference of Human Rights which declared that violence against women is a per se violation of human rights and that violence against women serves as an obstacle to a woman’s enjoyment of other human rights; (3) the UNHCR Conclusions, specifically Conclusion No. 39, which recognizes that “women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered a ‘particular social group;’ ” and (4) the Canadian Gender Guidelines, which were the first national guidelines issued that formally recognize gender-based persecution as a basis for asylum.⁸¹ Furthermore, the Universal Declaration of Human Rights guarantees that “everyone has the right to life, liberty and security of person.”⁸²

B. Afghan Country Conditions Relevant to Afghan Western Women

The U.S.-led coalition invaded Afghanistan in October 2001 to improve, *inter alia*, the human rights situation of Afghan women by liberating them from the misogynistic rule of the Taliban.⁸³ Afghanistan is currently in its fourth year of

⁷⁷ See *id.*

⁷⁸ See *supra* Part II.A; INS GENDER GUIDELINES, *supra* note 3, at 2.

⁷⁹ See INS GENDER GUIDELINES, *supra* note 3, at 2.

⁸⁰ See *id.*

⁸¹ See *id.* at 2; CANADIAN GENDER GUIDELINES, *supra* note 67.

⁸² Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., UN Doc A/810 (Dec. 12, 1948), art. 3.

⁸³ See HUMAN RIGHTS WATCH, BETWEEN HOPE AND FEAR, INTIMIDATION AND ATTACKS AGAINST WOMEN IN PUBLIC LIFE IN AFGHANISTAN I (Oct. 2004), available at <http://www.hrw.org/backgrounder/asia/afghanistan1004/> [hereinafter HUMAN RIGHTS WATCH] (“When

reconstruction and recovery from twenty-three years of civil war.⁸⁴ Under President Karzai's government, the rule of law has yet to supersede the rule of the gun throughout Afghanistan, particularly outside of Kabul.⁸⁵ "The people with the guns are those ones who cause problems . . . especially for women."⁸⁶

1. Afghan Constitution of 2004

Afghan Western Women are those Afghan women who rely on the U.S.-led coalition's promise of improved human rights and adopt Western practices. Examples of such practices are: appearing in public without the burqa and/or without a male relative, refusing to enter into an arranged marriage, attending school, working outside of the home, and expressing a political opinion which embraces the advancement of women's rights in Afghanistan. Although the Afghan Constitution of 2004 provides for some women's rights, most Western practices are prohibited under Islam; consequently, such practices are still prohibited by the rule of the gun, which is facilitated by an ineffective judiciary throughout much of Afghanistan.⁸⁷

The notable women's rights provisions of the Afghan Constitution of 2004 are contained in Articles 22, 44, and 84.⁸⁸ Article 22 grants women equal rights and duties before the law.⁸⁹ Article 44 provides for the implementation of programs that promote education for women.⁹⁰ Article 84 guarantees seats for

a U.S.-led coalition invaded Afghanistan in October 2001, one of the justification for the war was that it would liberate women from the misogynistic rule of the Taliban.").

⁸⁴ See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: AFGHANISTAN 1 (2004), available at <http://www.state.gov/drl/rls/hrrpt/2004/41737.htm> [hereinafter COUNTRY REPORTS 2004] ("recognition of the rule of law, particularly outside of Kabul, was limited [in 2004]"); U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: AFGHANISTAN 1 (2003) available at <http://www.state.gov/drl/rls/hrrpt/2003/27943.htm> [hereinafter COUNTRY REPORTS 2003].

⁸⁵ The rule of the gun refers to the reality that the violence employed by insurgent forces, local and regional commanders trumps the laws being implemented by the central (Karzai) government which has yet to hold full authority over Afghanistan, especially outside of Kabul. See HUMAN RIGHTS WATCH, *supra* note 83, at 2, 12; see also COUNTRY REPORTS 2004, *supra* note 84, at 1 ("Some local and regional commanders maintain[] considerable power, as the [Karzai] Government was not in a position to exercise effective control nationwide."); COUNTRY REPORTS 2003, *supra* note 84, at 1.

⁸⁶ HUMAN RIGHTS WATCH, *supra* note 83, at 12 (quoting Safia Sidiqi, gender advisor, Ministry of Rehabilitation and Rural Development, Kabul, Aug. 23, 2004).

⁸⁷ See *id.*; *Afghanistan: A Burning Despair*, ECONOMIST, Mar. 20, 2004, at 11, available at 2004 WLNR 6555678 ("Afghanistan's new constitution affords equal rights to men and women. The warlords, however, do not seem to have noticed.");

Lawlessness is rife: most Afghans have no access to justice because the judiciary is largely ignorant of national law. Armed groups in effect rule most of the country. . . . As well as lacking basic legal skills, the judiciary is ineffective, corrupt and susceptible to intimidation from armed groups. The national army and police remain fledgling organizations and are suspected of committing human rights violations.

AMNESTY INT'L UK, *Afghanistan: 'Women Treated Worse Than Dogs' as Ignorant Judges Fail to Protect Victims and Punish Criminals*, Oct. 8, 2004, available at <http://www.amnesty.org.uk/news/press/15632.shtml>.

⁸⁸ See *id.* at 10.

⁸⁹ See AFGHAN CONST. art. 22 (2004) ("The citizens of Afghanistan, man and woman, have equal rights and duties before the law.").

⁹⁰ AFGHAN CONST. art. 44.

women in Afghanistan's bicameral National Assembly.⁹¹ In effect, however, the Afghan Constitution of 2004 provides for few women's rights because Article 3 of the Constitution provides that "[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan."⁹² Article 149 further provides that "[t]he principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism *shall not be amended*."⁹³ These articles effectively obstruct the creation and protection of women's rights where the adoption of Western practices by women is viewed as a rejection of Islam.⁹⁴

Moreover, it is likely that the women's rights provisions of the Afghan Constitution of 2004 will be construed narrowly and haphazardly by the novice and unreliable Afghan judiciary.⁹⁵

A large number of the Afghan judges have either left the country [or have been] imprisoned, killed or resigned. As a result, capable and decisive judges were not replaced by competent ones . . . [W]e are having problems with judges in Afghanistan. Most of the judges need to undergo training in order to improve their knowledge.⁹⁶

⁹¹ AFGHAN CONST. art. 84 (Fifty percent of one-third of the House of Elders shall be comprised of women appointed by the President.).

⁹² AFGHAN CONST. art. 3.

⁹³ AFGHAN CONST. art. 149 (emphasis added).

⁹⁴ See BBC NEWS, *Woman Singer Angers Afghan Judges*, Jan. 14, 2004, available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/3396283.stm (Afghan Deputy Chief Justice Judge Manawi announced that an Afghan state television broadcast of old footage of a song performed by a female is "totally against the decisions of the Supreme Court and it has to be stopped.").

⁹⁵ See BBC INTERNATIONAL REPORTS (SOUTH ASIA), *Afghan Official Says Institutions to Deal with Violations Long-Term Prospect*, Feb. 3, 2005 [hereinafter *Long-Term Prospect*] ("It is clear we do not have a reliable judicial system in Afghanistan. There is no mechanism or institution that can guarantee the safety of witnesses. And the Afghan prosecution offices still do not have a sound structure yet."); Madhavi Sunder, *The New Afghan Constitution: Will it Respect Women's Rights? Will its Mixture of Religion and Democracy Work?*, Jan. 15, 2004, available at http://writ.news.findlaw.com/commentary/20040115_sunder.html.

The answers to many . . . women's rights questions will turn in large part on who sits on the high court. The Afghan Constitution allows for judges to be trained in either civil or Islamic law. Either way, the way they may interpret the Constitution will be hard to predict. Judges trained in civil law might still offer fundamentalist interpretations, and judges trained in Islamic law may be progressive. Unfortunately, elsewhere in the world, similarly ambiguous Constitutions (or other mixed governmental systems) have not proven advantageous to women.

Id.

The administration and implementation of justice varied from area to area, as many judges were uneducated or poorly trained and based their judgments on a combination of their personal understanding of Islamic law and tribal codes of honor. Low pay was a factor in reports of widespread corruption. Insecurity and pressure from public officials and the family of the accused also threatened judicial impartiality.

COUNTRY REPORTS 2004, *supra* note 84, at 4.

⁹⁶ BBC INTERNATIONAL REPORTS (SOUTH ASIA), *Afghan Official Says Judges Need Training to Enforce Anti-narcotics Law* (text of Iranian radio broadcast Feb. 8, 2005).

The absence of a reliable judicial system will thwart the judiciary's ability to address the persecution of Afghan Western Women.⁹⁷

2. Security Issues

Since the Karzai government has yet to establish the rule of law throughout Afghanistan, security issues are rife and are severely hindering the advancement of Afghan women's rights and the adoption of Western practices. The lack of security stems from a combination of factors: an insufficient U.S.-led coalition; a resurgence of Taliban and al-Qa'ida activity, particularly in the South and Southeast; fighting amongst local warlords and military factions; the influence of religious conservatives; the absence of an effective judicial system; and municipal and provincial reliance on Islamic law and traditional tribal codes of justice.⁹⁸ "The Afghan government and international actors must fulfill the promise of disarmament and they must marginalize and hold accountable human rights abusers for their actions. If these conditions are not met, the [promise of] participation of women [in Afghan society] is in danger of being largely symbolic."⁹⁹

Security issues, lack of an effective police force, as well as poor infrastructure and communications make it difficult for the Karzai government to investigate unlawful killings, bombings, and death threats.¹⁰⁰ In 2003, the Karzai government unsuccessfully attempted to locate and "bring to justice" the most serious perpetrators of human rights from the twenty-three years of civil war.¹⁰¹ Furthermore, in 2004, the Karzai government itself had a poor human rights record.¹⁰² If the Karzai government lacks sufficient control over the country such that it can neither bring these grave human rights abusers to justice nor control the human rights abuses stemming from within its own government, it is highly unlikely that it can effectively prevent, control, or punish the various military

⁹⁷ See *Long-Term Prospect*, *supra* note 95. Afghan's novice judiciary plans to, in five years time, establish special courts dedicated to human rights abuses. *Id.* However, these courts will solely examine those human rights abuses that occurred prior to the establishment of the interim government in 2002, and therefore will not address the persecution of Afghan Western Women post-2002. *Id.*

⁹⁸ See COUNTRY REPORTS 2004, *supra* note 84, at 1.

Terrorist attacks and severe violence continued during [2004]. Taliban, local commanders, and other antigovernment forces threatened, robbed, attacked, and occasionally killed local villagers, political opponents, and prisoners Increased Taliban, al Qa'ida, and other antigovernment groups' activity, particularly in the south and southeast, added to security concerns In addition, [t]here were instances where local security forces and police committed extra-judicial killings.

Id., at 1, 6.

⁹⁹ HUMAN RIGHTS WATCH, *supra* note 83, at 4; *A Burning Despair—Women's Self-Immolation in Afghanistan*, *supra* note 87, at 1 ("Afghanistan's women have long had many causes to despair. In an impoverished rural society, pubescent girls are bought and sold like cattle, and often treated little better. The toppling of the Taliban two years ago has hardly improved their lot. Parts of the country are now ruled by a rabble of equally conservative or lawless warlords.")

¹⁰⁰ See COUNTRY REPORTS 2004, *supra* note 84, at 2.

¹⁰¹ See COUNTRY REPORTS 2003, *supra* note 84, at 3.

¹⁰² See COUNTRY REPORTS 2004, *supra* note 84, at 1 ("There were instances where local security forces and police committed extra-judicial killings.")

factions, religious conservatives, and private citizens who persecute Afghan women for their expression of Western practices.

Violence and societal discrimination against women was prevalent in 2004.¹⁰³ Women and girls were subjected to violence including, *inter alia*, beatings, rapes, forced marriages, and kidnappings.¹⁰⁴ Moreover, the government sanctions the persecution of women who reject Islam by adopting Western practices. In 2004, police “often placed women under detention in prison at the request of family members for defying the family’s wishes on the choice of a spouse, or for other moral offenses [that do not comply with Islam].”¹⁰⁵ In 2002, the Chief of Police of Kabul declared that “the police would continue to arrest women if their husbands or families brought a complaint to the authorities [indicating that the woman was rejecting Islam such as through a rejection of an arranged marriage].”¹⁰⁶

The U.S.-led coalition has neglected to place the warlords’ treatment of women as a priority. Instead, the U.S.-led coalition focused on maintaining an alliance with these warlords because they are viewed as key allies in the continued conflict with the Taliban and al-Qa’ida.¹⁰⁷ Regional military factions, religious conservatives, the Taliban, and other insurgent forces “limit [] Afghan women’s participation in society through death threats, harassment, and physical attacks. They threaten women active as government officials, journalists, potential political candidates, and humanitarian aid workers simply because they are women, and because they advocate for women’s human rights.”¹⁰⁸ By neglecting to place the warlords’ treatment of women as a priority, the U.S.-led coalition has facilitated the persecution of Afghan Western Women.

Although international non-governmental organizations (NGOs) commenced projects in Afghanistan to improve women’s rights and to promote Afghan women’s adoption of Western practices, these NGO projects face significant opposition from insurgent forces.¹⁰⁹ During 2003, NGO workers faced intimidation and suffered from increasing acts of violence that included threats, kidnapping, attacks, murder, armed robbery, and rape of family members.¹¹⁰ Attacks on U.N. agencies and NGOs increased during 2004.¹¹¹ This opposition

¹⁰³ See *id.* at 10-11.

¹⁰⁴ See *id.* at 10.

¹⁰⁵ See *id.* at 5.

¹⁰⁶ COUNTRY REPORTS 2003, *supra* note 84, at 7.

¹⁰⁷ See HUMAN RIGHTS WATCH, *supra* note 83, at 1.

¹⁰⁸ *Id.*

¹⁰⁹ See Maydan Shahr, *Biting the Hand that Feeds—Insecurity in Afghanistan’s South*, ECONOMIST, Oct. 4, 2003, at 1 (“Armed attacks on aid agencies in the south . . . are now daily If you are a foreigner you will be executed. If you are an Afghan working for a foreigner you will be hectorated, perhaps mutilated, and then executed. Afghan aid workers are the prime targets The United Nations thinks 16 of Afghanistan’s 32 provinces . . . too dangerous for its international staff to venture through.”).

¹¹⁰ COUNTRY REPORTS 2003, *supra* note 84, at 7.

¹¹¹ See COUNTRY REPORTS 2004, *supra* note 84, at 5 (“During [2004], suspected Taliban killed at least 31 aid workers, compared to approximately 13 during 2003.”).

has caused many NGO projects to end or to conform to the tenets of Islam.¹¹² “With large areas of the country off limits to the majority of aid programs because of poor security conditions, change for women and girls will remain confined to Kabul and other major urban centers.”¹¹³

3. Restrictions on Women’s Dress and Appearance in Public

In 2002, President Karzai decreed that women have the right to choose whether or not to wear the burqa.¹¹⁴ However, throughout much of Afghanistan, women are forced to wear the burqa and to live under the protection of *mahram* (close male relatives).¹¹⁵ In these regions women cannot even appear in public unaccompanied by a male family member.¹¹⁶ These restrictions stem from the Karzai government’s lack of effective control over the country. Consequently, the rule of the gun, the imposition of social barriers by religious leaders, and the entrenchment of warlords in both central and regional governments has combined to effectively eradicate the women’s rights nominally provided by the Karzai government.¹¹⁷

In 2003, credible sources reported that women and older girls, including Afghan women, NGO workers, and Afghan UN officials, could not venture outside of their homes alone, and they wore the burqa in fear of harassment and violence when they went out.¹¹⁸ “These decisions were made not out of choice, but compulsion due to the lack of safety guarantees [to avoid physical and sexual violence.]”¹¹⁹ Afghan women who appear in public without a male family member escort usually do so for two reasons: (1) the ongoing fighting in Afghanistan leaves some women without any male family members; and/or (2) male family members, out of fear for their own lives, may refuse to publicly accompany female family members who have elected to adopt Western practices. Afghan women who do not have male family members to accompany them in public are more vulnerable to persecution.¹²⁰ In 2003, the Religious Police in Herat subjected women who

¹¹² See HUMAN RIGHTS WATCH, *supra* note 83, at 2.

¹¹³ See *id.*

¹¹⁴ See COUNTRY REPORTS 2003, *supra* note 84, at 14.

¹¹⁵ See COUNTRY REPORTS 2004, *supra* note 84, at 8, 11. “In some areas of the country, women were forbidden by local custom or tradition to leave the home except in the company of a male relative. Many women continued to wear the burqa because of conservative traditions and fear of harassment or violence.” *Id.*

¹¹⁶ See COUNTRY REPORTS 2003, *supra* note 84, at 14.

¹¹⁷ See HUMAN RIGHTS WATCH, *supra* note 83, at 8.

¹¹⁸ See *id.* at 11 (“Women in Herat are still barred from riding taxis unaccompanied, or from learning how to drive.”); *A Burning Despair – Women’s Self-Immolation in Afghanistan*, *supra* note 87, at 2.

¹¹⁹ See HUMAN RIGHTS WATCH, *supra* note 83, at 8.

¹²⁰ See *id.*, *supra* note 83, at 8 (“[W]omen do not have choices about traveling with *mahram*” (close male relatives).) (emphasis in original).

appeared in public unaccompanied by a male relative to forced chastity examinations.¹²¹

4. Restrictions on Women's Education and Employment Outside of the Home

The Taliban destroyed most formal educational opportunities for girls and limited informal educational opportunities for girls in home schools.¹²² In 1998, the Taliban issued the following restrictions: education was limited to girls under eight years old, girls' schools had to be licensed by the Taliban, and girls' schools had to limit their curricula to the Koran.¹²³

Since the fall of the Taliban, security concerns and the lack of teachers and materials have continued to limit girls' education.¹²⁴ Insurgent attacks on schools further hindered access to education. In February and March of 2004, two girls' schools were partially destroyed in attacks in Badakhshan and Farah.¹²⁵ During 2003, there were over forty attacks on boys' and girls' schools; in 2002, a girls' school was set on fire, a bomb was detonated in one co-ed school, and rockets were fired at another.¹²⁶ Regulations that prohibit married women from attending school further limit young women's access to education.¹²⁷ During 2003, thousands of young married women were expelled from schools pursuant to instructions from the education ministry.¹²⁸ Restrictions on female education have led to widespread illiteracy. As of 2003, approximately eighty-five percent of all Afghan women were illiterate and nearly one hundred percent of rural Afghan women were illiterate.¹²⁹

Prior to the Taliban's rise to power, it is estimated that seventy percent of teachers were women, fifty percent of civil servants were women, and forty percent of doctors were women.¹³⁰ The Taliban came to power and prohibited women from working outside of the home except in agriculture, which was traditionally

¹²¹ See U.S. DEP'T OF STATE, INT'L RELIGIOUS FREEDOM REPORT 2003: AFGHANISTAN 2 (2003), available at <http://www.state.gov/g/drl/rls/irf/2003/24467pf.htm> [hereinafter INT'L RELIGIOUS FREEDOM].

¹²² See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: AFGHANISTAN 16 (2000), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/sa/721pf.htm> [hereinafter COUNTRY REPORTS 2000].

¹²³ See *id.* at 17.

¹²⁴ See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: AFGHANISTAN 14 (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18308pf.htm> [hereinafter COUNTRY REPORTS 2002].

¹²⁵ See COUNTRY REPORTS 2004, *supra* note 84, at 11.

¹²⁶ COUNTRY REPORTS 2003, *supra* note 84, at 15; Maydan Shahr, *supra* note 109, at 2 (stating "the neo-Taliban . . . have stepped up their campaign to burn down girls' schools").

¹²⁷ See *id.*; COUNTRY REPORTS 2002, *supra* note 124, at 14.

¹²⁸ See COUNTRY REPORTS 2003, *supra* note 84, at 15.

¹²⁹ See *id.*; *Not a Dress Rehearsal—Afghanistan's Future*, ECONOMIST, Aug. 16, 2003, at 4-5 (stating that Ghowr, one of Afghanistan's poorest and most isolated provinces which is located a four days' drive west of Kabul has approximately 750,000 residents and only 50 women who can read and write). Note that this regulation was changed during 2004, and now married women are supposedly allowed to attend high school classes. See COUNTRY REPORTS 2004, *supra* note 84, at 11.

¹³⁰ See HUMAN RIGHTS WATCH, *supra* note 83, at 6.

considered women's work.¹³¹ The Taliban forced women to quit their jobs as teachers, doctors, nurses, bank tellers, and aid workers.¹³² Women's inability to work outside the home has been particularly difficult for the large number of widows left behind by twenty-three years of civil war.¹³³ Many of these women have resorted to begging and selling their possessions to feed their families.¹³⁴ During 2004, some local authorities continued to exclude women from all employment except agricultural work outside the home.¹³⁵ Even if the restrictions on women's work outside the home were lifted, women's illiteracy and lack of education would prevent many women from securing work outside of the home.

5. Restrictions on Expression of Political Opinions that Embrace the Advancement of Women's Rights in Afghanistan

Security is an important issue. Everything is in the hands of a few people. If women feel secure, they can raise their voice . . . We feel danger in all ways, the gun is ruling here. It is difficult to speak the truth here, because it is not a secure and healthy environment here.¹³⁶

a. Women's Rights Activists and Journalists

As recent as October 2004, women's rights activists and journalists in Afghanistan refrained from discussing topics perceived as challenging women's rights under Islamic law.¹³⁷ This restraint resulted from fear of violent acts, such as death threats, visits to women's homes by gunmen, obstruction of work, and termination of employment¹³⁸ against those who publicly expressed a public opinion that embraced the advancement of women's right publicly instilled by violent acts against those who discussed women's rights publicly.¹³⁹ It is likely that such violent opposition has instilled fear in the average Afghan woman regarding her expression of a similar political opinion.

Journalists' expression of their political opinion is not only limited by fear of violence but also by Article 30 of the Afghan Press Law which prohibits publication of articles on "subjects that are contrary to the principles of Islam" or in other words, blasphemous.¹⁴⁰ Violations lead to the suspension of the publication

¹³¹ See COUNTRY REPORTS 2000, *supra* note 122, at 14.

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See COUNTRY REPORTS 2004, *supra* note 84, at 11.

¹³⁶ See HUMAN RIGHTS WATCH, *supra* note 83, at 20 (quoting K.K., a women's rights activist, Herat, Sept. 2, 2004).

¹³⁷ See *id.* at 2.

¹³⁸ See *id.*; COUNTRY REPORTS 2003, *supra* note 84, at 14 (In 2003 there were reports of death threats against women activists.).

¹³⁹ See HUMAN RIGHTS WATCH, *supra* note 83, at 2; COUNTRY REPORTS 2004, *supra* note 84, at 11.

¹⁴⁰ COUNTRY REPORTS 2004, *supra* note 84, at 6.

that contains the blasphemous ideas.¹⁴¹ In addition, in 2003, conservatives in the judiciary recommended that journalists who violated Article 30 should be charged with blasphemy, a crime punishable by death in Afghanistan.¹⁴² These restrictions have led journalists to engage in self-censorship of their writing,¹⁴³ which has made it difficult for the expression of political opinions that are adverse to the tenets of Islam, including those that embrace women's adoption of Western practices.

b. Female Participation in Government

It is more likely that female rather than male politicians will expand women's rights in Afghanistan; however, they will face three significant obstacles. First, political parties must pursue objectives that are aligned with the principles of Islam.¹⁴⁴ Politicians are therefore not free to lobby for the adoption of some Western practices, such as a woman's right to refuse to enter into an arranged marriage, a woman's right to divorce, and the right to convert from Islam to another religion and/or reject religion altogether. Second, women activists and politicians have experienced intimidation, including death threats, which deters them from entering the political arena.¹⁴⁵ Third, few women that enter the political arena can meaningfully participate in the political process. For example, female Emergency Loya Jirga delegates were unable to meaningfully participate in the Emergency Loya Jirga¹⁴⁶ because of intimidation, threats, the participation of powerful commanders accused of war crimes, and five minute speaking time limits.¹⁴⁷ Subsequently, in the Constitutional Loya Jirga,¹⁴⁸ women delegates continued to censor themselves for fear of violent retaliation upon their return home.¹⁴⁹

At the grassroots level, rarely are Afghan women able to exercise a fundamental Western right—suffrage,¹⁵⁰ as evidenced by the October 9, 2004

¹⁴¹ See COUNTRY REPORTS 2003, *supra* note 84, at 7.

¹⁴² See *id.* at 3.

¹⁴³ See *id.* at 7.

¹⁴⁴ See *id.* at 10; AFGHAN. CONST. art. 35.

¹⁴⁵ See HUMAN RIGHTS WATCH, *supra* note 83, at 2, 9; COUNTRY REPORTS 2003, *supra* note 84, at 14.

¹⁴⁶ An Emergency Loya Jirga (grand council) consisting of approximately 1,600 delegates, 1,400 male and 200 female, met in June 2002 to select a two-year transitional government for Afghanistan as required by the December 2001 Bonn Agreement. The Emergency Loya Jirga selected Hamid Karzai as the President of Afghanistan. See HUMAN RIGHTS WATCH, *supra* note 83, at 8-9.

¹⁴⁷ In comparison, male delegates were given thirty minute speaking time limits. See *id.* at 9.

¹⁴⁸ "The Constitutional Loya Jirga met in December 2003 to approve a new constitution and governmental structure." *Id.* at 8-9.

¹⁴⁹ See *id.* at 9.

¹⁵⁰ See U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); FRENCH CONST. art. 3 ("All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided by statute."); CANADIAN CONST. art 3 ("Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.")

elections.¹⁵¹ The average Afghan woman could not freely vote, much less vote for candidates that supported the expansion of women's rights. The root of this problem was three-fold. First, there was a dearth of candidates who were willing to fight for the expansion of women's rights. Second, women were threatened with violence if they attempted to vote.¹⁵² Only approximately twenty percent of women in the deeply conservative Pushtun south around Kandahar registered to vote.¹⁵³ An Asian Foundation pre-election survey found that almost twenty-five percent of men in the south forbid their wives from voting.¹⁵⁴ Third, it was difficult for those women who did vote to cast a meaningful vote. Many women were told how to vote by their husbands, thus allowing the husbands to procure two votes for themselves.¹⁵⁵

IV. THE U.S. OUGHT TO GRANT ASYLUM TO PERSECUTED AFGHAN WESTERN WOMEN

A. Hypothetical Afghan Western Women as U.S. Asylum Applicants

After describing three hypothetical Afghan Western Women, Mrs. Religion ("Mrs. R"), Mrs. Political Opinion ("Mrs. P"), and Mrs. Social Group ("Mrs. S"), it will be clear that Afghan Western Women should qualify for asylum under the traditional asylum categories of religion, political opinion, and membership in a particular social group.

Mrs. R is a 30 year-old widow who does not believe in Islam. Mrs. R went to the market last month unaccompanied by a male relative and without a burqa, and was raped and severely beaten by a male neighbor. After the market incident, Mrs. R's family thought it would be prudent for Mrs. R to re-marry so that her new husband could control her crazy thoughts about adopting Western practices and prevent her from further trying to take advantage of her human rights. Mrs. R, determined to protect her religious beliefs and escape the arranged marriage, snuck across the Afghanistan-Iran border and then fled to the U.S. Upon arrival in the United States, Mrs. R told the customs officials about the market incident and the arranged marriage and requested asylum.

Mrs. P is a 40 year-old widow whose husband was killed by the Taliban last year. Mrs. P tried to help her friend Mrs. Herat run for a position in the Loya Jirga.

¹⁵¹ See HUMAN RIGHTS WATCH, *supra* note 83, at 2-3; COUNTRY REPORTS 2004, *supra* note 84, at 5 (On June 26, 2004 two female election workers were killed by a Taliban bomb in Jalalabad.).

¹⁵² See *Afghanistan: A Little Good News*, ECONOMIST, July 24, 2004, at 7, available at 2004 WLNR 10888581 ("[T]he threat of attack is never far away. [In Gardez, t]ribal gunman with AK-47s were standing guard at the women's registration offices against Taliban and criminals seeking to undermine the government A couple of hours' drive towards the Pakistan border from Gardez, in areas where it is too dangerous for the UN staff to go, ex-South African soldiers from Global Security, a private company, will run the election. Beyond that are pockets of territory which are just too dangerous for anybody.").

¹⁵³ See *id.*

¹⁵⁴ See *id.* at 3.

¹⁵⁵ See *id.*

Mrs. P went to the market last month unaccompanied by a male relative and without a burqa, and was raped and severely beaten by a male friend of Mrs. Herat's political opponent. After the market incident, Mrs. P's family thought it would be prudent for Mrs. P to re-marry so that her new husband could control her unconventional thoughts about adopting Western practices and prevent her from further trying to take advantage of her human rights. Mrs. P does not believe in Islam. Mrs. P, determined to protect her political and religious beliefs and to escape her arranged marriage, snuck across the Afghanistan-Iran border. Once in Iran, Mrs. P used the leftover funds from Mrs. Herat's unsuccessful Loya Jirga campaign to purchase a plane ticket to the U.S. Upon arrival in the U.S., Mrs. P told the customs officials about the market incident and the arranged marriage and requested asylum.

Mrs. S is a 23 year-old widow who is illiterate. Mrs. S has never worked. Mrs. S has two male children. Mrs. S struggles daily to provide food and clothing for herself and her children. Mrs. S is often reduced to begging family members and friends for food. Mrs. S, determined to secure an education and a job and to escape poverty, snuck across the Afghanistan-Iran border and then fled to the U.S. Upon arrival in the U.S., Mrs. S told the customs officials about her illiteracy, poverty, and the lack of education and job opportunities for women in Afghanistan and requested asylum.

B. Hypothetical Afghan Western Women's Well-Founded Fear of Persecution

Afghanistan acceded to the Convention on the Elimination of All Forms of Discrimination against Women without reservation on March 5, 2003.¹⁵⁶ However, "[v]iolence against women and the absence of effective redress for victims, whether through informal or formal justice mechanisms, is a pervasive human rights problem in Afghanistan."¹⁵⁷

Afghan Western Women typically suffer from and/or have a well-founded fear of four forms of persecution: (1) "economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom,"¹⁵⁸ particularly from restrictions on women's education and employment outside the home; (2) serious physical harm from beatings or other forms of physical violence,¹⁵⁹ especially in response to women's adoption of Western practices in conflict with the tenets of Islam; (3) sexual abuse¹⁶⁰ to which women are also

¹⁵⁶ See Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, U.N. Doc. A/34/46, 1979 entered into force September 3, 1981 and acceded to by Afghanistan on March 5, 2003.

¹⁵⁷ See HUMAN RIGHTS WATCH, *supra* note 83, at 8.

¹⁵⁸ See *Matter of Acosta*, 19 I. & N. Dec. at 222 (holding that economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom constitute persecution).

¹⁵⁹ See INS GENDER GUIDELINES, *supra* note 3, at 9 (reporting that beatings and other forms of physical violence are commonly held to amount to persecution); *Chen*, 359 F.3d at 128 (citing *Begzatowski*, 278 F.3d at 669); *Ambati*, 233 F.3d at 1060; *Desir*, 840 F.2d at 729.

¹⁶⁰ See *Lazo-Majano*, 813 F.2d at 1434 (holding that rape and other forms of sexual abuse constitute persecution).

subjected in response to their adoption of Western practices that conflict with the tenets of Islam; and (4) coerced compliance with tenets of Islam that involve engaging in conduct abhorrent to their deepest beliefs.¹⁶¹

C. Afghan Western Women Ought to Qualify for Asylum Under a Combination of the Traditional Asylum Categories

1. Religion

Persecution on the basis of religion is one of the five protected asylum categories under 8 U.S.C. § 1101(a)(42)(A). Article 2 of the Afghan Constitution of 2004 states: “The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals.”¹⁶² As of 2003, the non-Muslim population of Afghanistan numbered only in the hundreds and consisted of Hindus, Sikhs, and Jews.¹⁶³ Although the Afghan Constitution of 2004 allows the limited number of non-Muslims to subscribe to and practice religions other than Islam, it does not allow Muslims to either convert from Islam or abandon faith altogether.¹⁶⁴ Apostasy, the renunciation of the Islamic faith, is punishable by death in Afghanistan under Shari’a (traditional Islamic law).¹⁶⁵ Similarly, blasphemy is punishable by death in Afghanistan under Shari’a.¹⁶⁶

As in Afghanistan, apostasy is a capital crime in Iran.¹⁶⁷ In *Najafi v. INS*, the Seventh Circuit addressed the religious asylum claim of Najafi, an Iranian-born Muslim who purported to have converted from Islam to Christianity during his time in the U.S.¹⁶⁸ The *Najafi* court held that the relevant inquiry for determining whether an asylum seeker is an apostate is “whether [s]he has turned away from Islam,”¹⁶⁹ and not whether she has formally converted to another religion.¹⁷⁰ The court is “not as concerned with the heart of the [apostate], but rather requires some bona fide indicia of apostasy which would matter to the [home country] authorities.”¹⁷¹ However, conversion to another religion is proof of apostasy in Iran and Afghanistan where conversion is a capital crime, and should therefore provide sufficient proof of a well-founded fear of persecution in countries such as

¹⁶¹ See *Fatin*, 12 F.3d at 1241, 1242 n.11 (noting that the degree of abhorrence an applicant feels about such forced behavior must be objectively reasonable, i.e., a degree of abhorrence that a reasonable person in the circumstances of the applicant could share).

¹⁶² See AFGHAN. CONST. art. 2.

¹⁶³ See INT’L RELIGIOUS FREEDOM, *supra* note 121, at 2.

¹⁶⁴ See *id.* at 10 (stating that custom and law require affiliation with some religion).

¹⁶⁵ See *id.* at 2; COUNTRY REPORTS 2003, *supra* note 84, at 10.

¹⁶⁶ See INT’L RELIGIOUS FREEDOM, *supra* note 122, at 2; COUNTRY REPORTS 2003, *supra* note 84, at 10.

¹⁶⁷ See *Najafi v. INS*, 104 F.3d 943, 948 (7th Cir. 1997).

¹⁶⁸ See *id.* at 944.

¹⁶⁹ *Id.* at 948.

¹⁷⁰ See *id.*

¹⁷¹ *Id.* at 949.

Iran and Afghanistan.¹⁷² Notably, the *Najafi* court did not require evidence that the Iranian government had previously recognized Najafi's apostasy, but emphasized that his petition for asylum would be strengthened by evidence showing that Najafi's Christian practices would likely draw censure from the Iranian government.¹⁷³ \

In *Bastanipour v. INS*,¹⁷⁴ another Iranian Muslim apostasy case, the Seventh Circuit held that an asylum applicant claiming a well-founded fear of persecution based on apostasy does not need to prove that he himself will be persecuted, but rather only that a reasonable person in his position would fear persecution.¹⁷⁵ The *Bastanipour* court further held that compliance with the formalities of a religion other than Islam is not necessary for apostasy.¹⁷⁶

The nature of apostasy as a capital crime, by itself, "carries weight in establishing a fear of persecution,"¹⁷⁷ even absent hard evidence that the country has executed people for apostasy.¹⁷⁸ Furthermore, the pattern and practice of abusing women who appear in public either without the burqa or unaccompanied by a male relative, like the fear of persecution that arises from apostasy, establishes both past persecution and a well-founded fear of persecution.¹⁷⁹

Religious observance can take the form of openly sharing one's belief.¹⁸⁰ Mrs. R openly shared her belief that she does not believe in Islam when she went to the market unaccompanied by a male relative and without a burqa, and when she fled Afghanistan to avoid an arranged marriage. These acts are perceived as bona fide indicia of apostasy. Mrs. R was raped and severely beaten for going to the market unaccompanied by a male relative and without a burqa. These acts of violence should enable Mrs. R to show that she has been subjected to past persecution by an organization that the government is unable or unwilling to control¹⁸¹ on account of her religion.¹⁸² Past persecution based on religion alone allows Mrs. R to qualify for asylum under 8 U.S.C. § 1101(a)(42).

¹⁷² See *Najafi*, 104 F.3d at 948.

¹⁷³ See *id.* at 949.

¹⁷⁴ *Bastanipour v. INS*, 980 F.2d 1129, 1133 (7th Cir. 1992).

¹⁷⁵ See *id.* at 1133.

¹⁷⁶ See *id.* at 1132.

¹⁷⁷ *Najafi*, 104 F.3d at 948 n.5 ("However, an alien's claim would be strengthened by evidence that proved apostates are actively persecuted.")

¹⁷⁸ See *Bastanipour*, 980 F.2d at 1132.

¹⁷⁹ See *Chen*, 359 F.3d at 128.

¹⁸⁰ See *Najafi*, 104 F.3d at 949 ("Religious adherence could take the form of . . . openly sharing one's belief.")

¹⁸¹ The rule of law has yet to supersede the rule of the gun in Afghanistan and therefore the Karzai government is unable to control private actors, such as Mrs. R's neighbor, who take the enforcement of Shari'a into their own hands. See *supra* Part III.B.2.

¹⁸² See INS GENDER GUIDELINES, *supra* note 3, at 9 (Beatings and other forms of physical violence are commonly held to amount to persecution.); *Chen*, 359 F.3d at 128 (2d Cir. 2004) (citing *Begzatowski*, 278 F.3d at 669); *Ambati*, 233 F.3d at 1060; *Desir*, 840 F.2d at 729; see also *Lazo-Majano*, 813 F.2d at 1434 (holding that rape and other forms of sexual abuse constitute persecution).

Additionally, Mrs. R's past persecution serves as presumptive proof of a well-founded fear of persecution.¹⁸³ It is likely that the government will try to rebut this presumption by presenting evidence of changed country conditions showing that women in Afghanistan no longer fear subjection to sexual and physical violence for appearing in public unaccompanied by a male relative and/or without a burqa. Unfortunately, such a change in country conditions has yet to actually occur for the women of Afghanistan.¹⁸⁴ Moreover, Mrs. R's refusal to enter into an arranged marriage is considered a rejection of Islam,¹⁸⁵ for which similarly-situated women¹⁸⁶ have been imprisoned. Therefore, Mrs. R's refusal to enter into an arranged marriage alone may serve as a basis for a well-founded fear of persecution.¹⁸⁷

Mrs. R qualifies for asylum under 8 U.S.C. § 1101(a)(42) because she has a well-founded fear of persecution, the persecution is on account of her religion, and the persecution stems from an organization that the government is unable or unwilling to control.¹⁸⁸ Furthermore, Mrs. R's well-founded fear of persecution satisfies both the subjective and objective reasonableness requirements.¹⁸⁹ Her well-founded fear of persecution is subjectively reasonable because Mrs. R has already been persecuted.¹⁹⁰ Her well-founded fear of persecution is objectively reasonable because apostasy is punishable by death in Afghanistan and therefore a reasonable person in the same circumstances as Mrs. R would fear persecution if returned to Afghanistan.¹⁹¹

2. Political Opinion

Political opinions deserving asylum are "opinions not tolerated by authorities, which are critical of their policies or methods."¹⁹² For an alien to qualify for asylum based on her political opinion she must: "(1) specify the political opinion on which . . . she relies, (2) show that . . . she holds that opinion, and (3) show that . . . she would be persecuted or has a well-founded fear of persecution based on

¹⁸³ See Anker et al., *supra* note 54, at 1177.

¹⁸⁴ See *supra* Part III.B.

¹⁸⁵ See COUNTRY REPORTS 2004, *supra* note 84, at 5; COUNTRY REPORTS 2003, *supra* note 84, at 7, 14; see also *supra* Section III.B.2.

¹⁸⁶ In recent cases, the BIA has noted that "the number of similarly situated people potentially harmed does not detract from the individual claim of the applicant" and that "other courts have long recognized the fact that a number of similarly situated individuals might be likely to be targeted for or suffer from harm does not weaken but rather strengthens its political character." Anker et al., *supra* note 54.

¹⁸⁷ See *Najafi*, 104 F.3d. at 948 n.5; *Bastanipour*, 980 F.2d at 1132.

¹⁸⁸ See *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 234 (4th Cir. 2004) (detailing the three requirements for asylum under the well-founded fear of persecution prong of 8 U.S.C. § 1101(a)(42)).

¹⁸⁹ See *Safaie*, 25 F.3d at 639.

¹⁹⁰ See *id.*

¹⁹¹ See *Cardoza-Fonseca*, 480 U.S. at 457-58.

¹⁹² UNHCR HANDBOOK at ¶ 80.

that opinion.”¹⁹³ The asylum applicant’s political opinion can be expressed through actions, rather than words.¹⁹⁴

Most political asylum cases involve male refugees.¹⁹⁵ To determine whether Mrs. P meets the political opinion asylum criteria, the U.S. ought to rely on the Canadian Gender Guidelines, which recognize the difficulties women face when expressing political opinions in countries where women have subordinate status to men, such as Afghanistan.¹⁹⁶ According to the Canadian Gender Guidelines, in countries like Afghanistan, women’s

political protest and activism do not always manifest themselves in the same way as those of men. The political nature of oppression of women in the context of religious laws and rituals should be recognized. Where tenets of the governing religion in a given country require certain kinds of behavior exclusively from women, contrary behavior may be perceived by the authorities as evidence of an unacceptable political opinion that threatens the basic structure from which their political power flows.¹⁹⁷

In *Safaie v. INS*,¹⁹⁸ Safaie, a female asylum applicant from Iran, alleged that she feared that she would be imprisoned and possibly killed for her opposition to the Khomeini regime’s treatment of women if she were to return to Iran.¹⁹⁹ Safaie testified that she was “discharged from her job as a secretary to an Iranian official in 1981 because she demonstrated her opposition to the government’s rules relating to women by refusing to wear traditional clothing. She refused to give up Western dress, makeup, and perfume.”²⁰⁰ Safaie claimed to be a member of the pro-Shah party and that she was constantly followed by members of the Hezbollah party.²⁰¹ Safaie asserted that she participated in several demonstrations against the Khomeini regime, and that she was consequently subjected to an interrogation for eight hours during which her interrogator threatened to kill her.²⁰² Although Safaie started to comply with the Islamic dress code in 1982, she lacked a Muslim mentality and was told by members of the Guard that her dress was unsatisfactory.²⁰³

The court denied Safaie’s application for asylum based on political opinion because the alleged facts failed to establish either past persecution or a well-founded fear of persecution based on Safaie’s political opposition to the Khomeini

¹⁹³ *Fatin*, 12 F.3d at 1242.

¹⁹⁴ For an example of where an asylum applicant manifested his political opinion via his defiance of Chinese government orders, see *Chang v. INS*, 119 F.3d 1055, 1063 (3d Cir. 1997) (stating that even though the asylum applicant “did not call himself a dissident or couch his resistance in terms of a particular ideology his opposition [is not rendered any] less political”).

¹⁹⁵ *INS Publishes Gender Persecution Guidelines*, *supra* note 69.

¹⁹⁶ See CANADIAN GENDER GUIDELINES, *supra* note 67, at 4-5.

¹⁹⁷ *Id.*

¹⁹⁸ *Safaie*, 25 F.3d 636.

¹⁹⁹ See *id.* at 638.

²⁰⁰ *Id.* at 638.

²⁰¹ See *id.* at 639.

²⁰² See *id.* at 638.

²⁰³ See *Safaie*, 25 F.3d at 639.

regime's treatment of women.²⁰⁴ The court indicated that such a claim could lead to a grant of asylum if the asylum applicant were able to establish either past persecution or a well-founded fear of persecution based on her political opinion.²⁰⁵

In contrast to the facts of Safaie's political asylum claim, the facts of Mrs. P's political asylum claim can establish both past persecution and a well-founded fear of persecution. The facts of her political asylum claim also satisfy the other two political asylum criteria: (1) Mrs. P relies on the fact that she does not believe in Islam as her political opinion; and (2) Mrs. P has demonstrated that she holds such political opinion by going to the market unaccompanied by a male relative and without a burqa and by rejecting an arranged marriage. Therefore, Mrs. P has shown that she has a well-founded fear of persecution based on her political opinion.²⁰⁶

3. Social Group

In 1985, the United Nations High Commission for Refugees ("UNHCR") Executive Committee, of which the U.S is a member,

recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women-asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.²⁰⁷

The Canadian Gender Guidelines instruct that a gender-defined social group may arise where women fear persecution from the failure to conform to, or the transgression of, their country's gender-discriminating religious customary laws and practices.²⁰⁸ The INS Gender Guidelines followed the example of the UNHCR Executive Committee and the Canadian Gender Guidelines by recognizing that a woman's opposition to customary traditions, such as wearing a veil, can be grounds for asylum.²⁰⁹

²⁰⁴ See *id.* at 640.

To prevail on an asylum claim on account of her political opinion based on her public expression of general opposition to the Islamic government, Safaie cannot merely contend that the government's policies are repressive or that she disagrees with the policies; she must demonstrate that she fears particularized persecution directed at her personally on the basis of her political opinion.

Id.

²⁰⁵ See *id.* at 640.

²⁰⁶ See *supra* Part IV.C.1.

²⁰⁷ INS GENDER GUIDELINES, *supra* note 3, at 14 (quoting Conclusion no. 39 Refugee Women and International Protection).

²⁰⁸ See CANADIAN GENDER GUIDELINES, *supra* note 67, at 3.

²⁰⁹ INS Publishes Gender Persecution Guidelines, *supra* note 69.

The BIA outlined the prevailing definition of a “particular social group” in *Matter of Acosta*.²¹⁰ A particular social group consists of:

[A] group of persons all of whom share a common immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. *The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.*²¹¹

The BIA qualified its definition by requiring that “the common characteristic that defines the group . . . 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.”²¹² The BIA held that such individuals ought not to be required to change their common characteristic to evade persecution.²¹³ The fact that many people may assert membership in the particular social group upon which an asylum claimant relies in her application does not detract from her individual claim.²¹⁴

For an alien to qualify for asylum based on her membership in a particular social group she must: “(1) identify a group that constitutes a ‘particular social group’ . . .;”²¹⁵ (2) establish that . . . she is a member of that group; and (3) show that . . . she would be persecuted or has a well-founded fear of persecution based on that membership.”²¹⁶

There is a dearth of information regarding the congressional legislative history of the inclusion of “particular social group” as one of the five bases for granting refugee status enumerated in the Refugee Act of 1980.²¹⁷ However, there is some evidence that Congress intended the enactment of the Refugee Act of 1980 to bring U.S. refugee law into conformance with the Protocol.²¹⁸ At least one commentator, Atle Grahl-Madsen, believes that the “particular social group” basis was included in the Protocol as a broad catchall “precisely to protect against

²¹⁰ *Matter of Acosta*, 19 I. & N. Dec. at 233, *modified on other grounds*.

²¹¹ *Id.* (emphasis added).

²¹² *Id.* at 233-34.

²¹³ *See id.* at 234; *Kasigna*, 21 I. & N. Dec. at 366.

²¹⁴ *See In re H-*, 21 I. & N. Dec. at 343, *available at* 1996 WL 291910 (“[T]he fact that almost all Somalis can claim clan membership and that interclan conflict is prevalent should not create undue concern that virtually all Somalis would qualify for refugee status, as an applicant must establish he is being persecuted on account of that membership.”); *see also* CANADIAN GENDER GUIDELINES, *supra* note 67, at 6 (“The fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant—race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.”)

²¹⁵ *Fatin*, 12 F.3d at 1240 (stating that the identified particular social group must satisfy the *Matter of Acosta* definition of a “particular social group”).

²¹⁶ *Id.*; *see also*, *Shari v. INS*, 87 F.3d 932, 936 (7th Cir. 1996).

²¹⁷ *See Fatin*, 12 F.3d at 1239.

²¹⁸ *See id.*

persecution that would arise from unforeseeable circumstances,”²¹⁹ such as the persecution of Afghan Western Women. Another commentator, Guy Goodwin Gil, notes that the “particular social group” basis can be expanded “to various classes susceptible to persecution.”²²⁰ Furthermore, the UNHCR has indicated that the “particular social group” basis should be enlarged to include women asylum seekers who otherwise satisfy the refugee definition.²²¹

a. Membership in a Particular Social Group: Afghan Women who Refuse to Conform to Gender-Specific Laws and Social Norms Derived from Islam

In *Fatin*, the Third Circuit recognized that a particular social group comprised of Iranian women who “refuse to conform to the government’s gender-specific laws and social norms” could potentially be eligible for asylum.²²² When a woman in Iran refuses to conform to the government’s gender specific laws the typical penalty for noncompliance is seventy-four lashes, one-year imprisonment, and in many cases, brutal rape or death.²²³ The court noted that if a woman’s opposition to the gender-based Iranian laws 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 change.’”²²⁴ In *Safaie*, the Eighth Circuit expressed its acceptance of the Third Circuit’s statement in *Fatin* that “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, may well satisfy the definition [of a particular social group].”²²⁵ The Eighth Circuit further indicated that a particular social group may be defined “as those Iranian women who advocate women’s rights or oppose Iranian customs relating to dress and behavior.”²²⁶

Fatin failed to show in her case that she was a member of the particular social group of Iranian women who refused to conform to the government’s gender-specific laws and social norms. However, Mrs. R and Mrs. P can establish that they are members of such a particular social group and that they have a well-

²¹⁹ *Kasigna*, 21 I. & N. Dec. at 375 (Lory D. Rosenberg, Board Member concurring).

²²⁰ *Id.*

²²¹ *See id.* at 377.

²²² *Fatin*, 12 F.3d at 1241. The court did not hold that Iranian women who “refuse to conform to the government’s gender-specific laws and social norms” definitively comprise a particular social group that is eligible for asylum because the facts of the asylum petitioner’s case did not support her position as a member of such a particular social group. The asylum petitioner merely stated that she would “try personally to avoid” wearing a veil or practicing Islam as much as she could, and that if she did not, she “would be jailed or punished in public. Public mean by whipped or thrown stones and I would be going back to barbaric years.” *Id.* at 1236. “[Fatin] never testified that she would refuse to comply with the law regarding the chador [Moslem woman’s headdress] or any of the other [Iranian] 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.” *Id.* at 1241.

²²³ *See id.* at 1241.

²²⁴ *Fatin*, 12 F.3d at 1240.

²²⁵ *Safaie*, 25 F.3d at 640.

²²⁶ *Id.*

founded fear of persecution based on their membership in this particular social group and therefore ought to qualify for asylum pursuant to the particular social group basis under 8 U.S.C. § 1101(a)(4).

Mrs. R and Mrs. P satisfy the requirements for receiving asylum based on membership in a particular social group. (1) Mrs. R and Mrs. P can identify a particular social group of Afghan women who refuse to conform to Afghanistan's gender-specific laws and social norms which are derived from Islam, specifically the laws which require women to accept arranged marriages, to cover themselves with a burqa, and to appear in public only with a male relative. (2) Mrs. R and Mrs. P have established that they are members of this particular social group by rejecting arranged marriages, and by going to the market unaccompanied by male relatives and without a burqa. (3) Mrs. R and Mrs. P have been persecuted and have a well-founded fear of persecution based on their membership in this particular social group.²²⁷

It is unimportant that Mrs. R's membership in a particular social group overlaps with her religious asylum claim, and that Mrs. P's membership in a particular social group overlaps with her political opinion asylum claim. Regardless of the overlap, Mrs. R's and Mrs. P's membership in a particular social group serves as an independent status-based ground for asylum protected under 8 U.S.C. § 1101(a)(42).²²⁸

b. Membership in a Particular Social Group:

Afghan Women who Refuse to Accept the Government's Inability to Provide Women with Education and Work Outside the Home

Mrs. S satisfies the requirements for receiving asylum based on her membership in a different particular social group. Mrs. S claims membership in the particular social group of Afghan women who refuse to accept the government's inability to provide women with education and work outside the home. Mrs. S has established that she is a member of this particular social group by fleeing Afghanistan in hopes of becoming educated so that she can secure a job that will allow her to provide for herself and her two sons, rather than beg for food to ensure their survival. Mrs. S can also show that she has a well-founded fear of persecution based on her membership in this particular social group.

Persecution can consist of "economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom"²²⁹ Mrs. S can show that she has a well-founded fear of persecution. If she were to return to Afghanistan she would be subjected to the restrictions that the Karzai government have been unable to lift that prevent women from obtaining both an education and

²²⁷ See *supra* Part IV.C.1.

²²⁸ See *Kasigna*, 21 I. & N. Dec. at 376 (Lory D. Rosenberg, Board Member concurring).

²²⁹ *Matter of Acosta*, 19 I&N Dec. at 222.

work outside the home.²³⁰ Mrs. S can meet the well-founded fear of persecution requirements²³¹ by showing that: (1) her well-founded fear of persecution is on account of her membership in the particular social group of Afghan women who refuse to accept the government's inability to provide women with education and work outside the home; (2) this economic persecution stems from the Karzai government's inability to provide the requisite infrastructure for the expansion of women's education and creation of job opportunities for women outside the home.²³² The development of such programs is further stymied by the Karzai government's inability to control insurgents who strive to prevent women from securing an education and from working outside the home.²³³ Mrs. S's well-founded fear of persecution satisfies the subjective requirement in that she would not have fled Afghanistan to escape this economic persecution if her fear were not genuine.²³⁴ Mrs. S's well-founded fear of persecution satisfies the objective requirement because the current country conditions in Afghanistan indicate that a reasonable Afghan woman in the same circumstances would fear persecution if returned to Afghanistan.²³⁵

V. CONCLUSION

*"One rarely rushes into a single error. Rushing into the first one, one always does too much. So one usually perpetrates another one – and now one does too little."*²³⁶

- Nietzsche

The U.S.-led coalition invaded Afghanistan in October 2001 to, *inter alia*, improve the human rights situation of Afghan women by liberating them from the misogynistic rule of the Taliban.²³⁷ Afghanistan is currently in its fourth year of reconstruction and recovery from twenty-three years of civil war.²³⁸ However, under the Karzai government, the rule of law has yet to supersede the rule of the gun throughout the country, particularly outside of Kabul.²³⁹ The Karzai government's lack of control over Afghanistan, the ineffectiveness of the novice

²³⁰ See *supra* Part III.B.4.

²³¹ See *Lopez-Soto*, 383 F.3d at 234.

²³² See *supra* Part III.B.4.

²³³ See *supra* Part III.B.2.

²³⁴ See *Safaie*, 25 F.3d at 639; see also, *supra* Part IV.B.

²³⁵ See *Safaie*, 25 F.3d at 639; see also, *supra* Section III.B.4.

²³⁶ FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS, IN THE PORTABLE NIETZSCHE, 470 (Walter Kaufmann ed. 1982).

²³⁷ See HUMAN RIGHTS WATCH, *supra* note 84, at 1.

²³⁸ See COUNTRY REPORTS 2004, *supra* note 85, at 1 ("recognition of the rule of law, particularly outside of Kabul, was limited [in 2004]"); COUNTRY REPORTS 2003, *supra* note 85, at 1.

²³⁹ The rule of the gun refers to the reality that the violence employed by insurgent forces and local and regional commanders trumps the laws being implemented by the central (Karzai) government which does not have full authority over Afghanistan, especially outside of Kabul. See HUMAN RIGHTS WATCH, *supra* note 84, at 2, 12; see also COUNTRY REPORTS 2004, *supra* note 85, at 1 ("Some local and regional commanders maintain[] considerable power, as the [Karzai] Government was not in a position to exercise effective control nationwide."); COUNTRY REPORTS 2003, *supra* note 85, at 1.

Afghan judiciary, and decreasing foreign interest and provision of aid for the rebuilding of Afghanistan will likely prevent Afghan women from freely adopting Western practices absent persecution and the fear of persecution for years to come. The U.S. can and ought to grant asylum to Afghan Western Women who suffer from and/or have a well-founded fear of persecution under the traditional religion, political opinion, and particular social group categories for granting asylum of 8 U.S.C. § 1101(a)(42)(A)—for otherwise, the U.S. *is doing too little*.