

## Article

# Gender-Based Religious Persecution

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### INTRODUCTION

Asylum law fails to protect women and girls fleeing gender-based violence that occurs in the home or the private sphere.<sup>1</sup> Gender-based violence survivors who are persecuted in the private sphere currently must undertake legal gymnastics to fit

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1. Although this Article focuses on women and girls, gender-based violence affects others, including members of the LGBTQ+ community, gender non-conforming individuals, and men. One reason for this Article's focus on women and girls is because asylum claims involving LGBTQ+ identity have had more success due to LGBTQ+ identity being recognized as a cognizable social group. See, e.g., *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017); *Razkane v. Holder*, 562 F.3d 1283 (10th Cir. 2009). See generally Bijal Shah, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. L. REV. 100, 146–52 (2013) (discussing asylum law's treatment of LGBTQ+ asylum seekers as a social group); Hollis V. Pfitsch, *Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity*, 15 L. & SEXUALITY 59, 64–70 (2006) (same).

their claims within the purview of U.S. asylum law.<sup>2</sup> This Article reframes gender-based violence as gender-based religious persecution in order to bolster the use of the religion ground for asylum to provide an alternative avenue for relief for asylum seekers fleeing gender-based violence in the private sphere.

Religion is nuanced. Whereas one person may believe a religion justifies the subordination of women, another may view the same religion as promoting dignity and equality for all people. Acknowledging these differences in beliefs, this Article advocates for a more expansive conception of religious expression that encompasses resistance to patriarchal practices justified by religion. Interpreting religious expression to include opposition in the private sphere to the subordination of women justified by religion will allow asylum law to move closer to equalizing protection for men and women.

Gender-based violence is violence that is motivated at least in part by a person's gender.<sup>3</sup> Women's bodies are battlegrounds. Men and society aim to control women's sexuality through patriarchal practices and gender-based violence. Women face violence in the home for their refusals to submit to patriarchal practices, such as control over their actions, denial of birth control, forced marriage, female genital mutilation, restricted movement, dress codes, and polygamy.

Under U.S. asylum law, individuals seeking protection must show that they fear persecution on account of a protected ground—race, religion, nationality, membership in a particular social group, or political opinion—by the government or by a person the government is unable or unwilling to control.<sup>4</sup> A woman

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2. “Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination.” U.N. High Comm’r for Refugees, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, para. 3, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR, *Gender*].

3. See Reply Brief for Respondent at 8, *In re A-B- (A-B- I)*, 27 I. & N. Dec. 316 (Att’y Gen. 2018) (explaining that “gender is one of the main motivating factors, if not the primary factor, for domestic violence” (quoting Nancy K.D. Lemon, Expert Declaration at paras. 2, 81)), *vacated by In re A-B- (A-B- III)*, 28 I. & N. Dec. 307 (Att’y Gen. 2021); UNHCR, *Gender*, *supra* note 2, at para. 1 (explaining that the term “[g]ender-related persecution’ . . . encompass[es] the range of different claims in which gender is a relevant consideration in the determination of refugee status”).

4. INA § 208(b), 8 U.S.C. § 1158(b); *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975).

is not entitled to asylum based on harm she suffers solely as a result of being a woman because gender is not a protected ground.<sup>5</sup> Nevertheless, the asylum statute has the capacity to protect gender-based violence survivors. However, many adjudicators have interpreted it narrowly through the lens of the heterosexual male experience.<sup>6</sup> The result is the privileging of claims involving persecution in the public sphere and the concomitant failure to view harm within the private sphere, where most gender-based violence occurs, as persecution that merits protection.

Starting in the 1990s, there has been increased recognition, albeit slow and inconsistent, of gender-based violence in the private sphere as harm that merits protection under asylum law.<sup>7</sup> However, the Trump administration, guided by anti-immigrant and misogynistic ideology, significantly restricted asylum for gender-based violence survivors harmed in the private sphere.<sup>8</sup> In particular, the Trump administration walked back hard-fought gains recognizing domestic violence as a basis for asylum under the particular social group ground.<sup>9</sup> The Biden administration reversed some of these changes.<sup>10</sup> Nonetheless, gender-

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5. See *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (“Persecution on account of sex is not included as a category allowing relief under [the Immigration and Nationality Act].”). *But see infra* note 64 (discussing appellate cases that demonstrate a willingness to recognize females from a particular country as a particular social group).

6. See, e.g., *infra* notes 75–94 and accompanying text.

7. See *infra* notes 114–121 and accompanying text (analyzing Board of Immigration Appeals precedent that recognized some forms of gender-based violence as meriting protection under asylum law).

8. See Laura Finley & Luigi Esposito, *The Immigrant as Bogeyman: Examining Donald Trump and the Right’s Anti-Immigrant, Anti-PC Rhetoric*, 44 HUMAN. & SOC’Y 179, 182–83, 187–89 (2019) (examining Donald Trump’s anti-immigrant rhetoric and policies); Abbas Degan Darweesh & Nesaem Mehdi Abdullah, *A Critical Discourse Analysis of Donald Trump’s Sexist Ideology*, 7 J. EDUC. & PRAC. 87, 91–94 (2016) (analyzing Donald Trump’s misogynistic comments); *infra* notes 122–25 and accompanying text (discussing the Trump administration’s constriction of asylum for gender-based violence survivors).

9. See *In re A-B- (A-B- I)*, 27 I. & N. Dec. 316 (Att’y Gen. 2018) (overruling precedent that accepted a domestic violence-based particular social group and significantly constricting asylum for gender-based claims), *vacated by In re A-B- (A-B- III)*, 28 I. & N. Dec. 307 (Att’y Gen. 2021). This Article uses the term “domestic violence” to include both intimate partner violence and family violence.

10. See *A-B- III*, 28 I. & N. Dec. 307.

based violence claims arising in the private sphere remain challenging to win under the particular social group ground and are ripe for attack in the future given the ease with which the executive branch can change asylum law.<sup>11</sup>

This Article focuses on the religion ground because religion is an underutilized, yet viable, avenue for relief from gender-based persecution in the private sphere and because many patriarchal practices are justified by religion. Successful cases under the religion ground traditionally involve individuals who are persecuted for their “public expressions” of religion—religious activities or expression occurring outside of the home, such as proselytizing and communal worship.<sup>12</sup> However, the religion ground is not limited to cases involving public expressions of religion.

Religion and gender-based violence in the private sphere are often intimately intertwined. Many persecutors justify patriarchal practices and gender-based violence in the private sphere using religion, even if differing interpretations of the religion do not condone their actions. Religious expression should include an asylum seeker’s opposition in the private sphere to gender-based violence and patriarchal practices that are justified by the persecutor in religious terms. This Article terms such opposition a “private expression” of religion because it challenges the persecutor’s view of religion in the private sphere. It advocates for private expressions of religion to be protected to the same extent as public expressions of religion.

This Article calls for the expansion of the religion ground to encompass gender-based violence in the private sphere, but at the same time, it also cautions against attributing subordination

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11. See Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 152–53 (2017) (demonstrating “the ease with which Attorneys General may vacate the decisions of their predecessors”); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 464 (2009) (“[T]he inauguration of a new President can bring with it remarkable changes in immigration policy.”).

12. Individuals are sometimes forced to worship underground in others’ homes rather than in public places of worship due to feared persecution. Although such religious expression can straddle the line between the public and private spheres, this Article labels such actions as public expressions of religion when they involve individuals outside of the family. This Article also identifies people who are persecuted for being part of a religious group as persecuted for public expressions of religion since they generally are persecuted outside the home.

of women wholesale to any religion, particularly Islam. It critiques the quick attribution of patriarchal practices to Islam and the concomitant disregard of the connections between other religions and violence against women, despite the fact that all five major world religions are linked to the subordination of women.

This Article contributes to the gender-based critique of asylum law by approaching it from the religion ground.<sup>13</sup> It adds to the research on the relationship between public and private spaces and asylum law by exploring the religion ground through the lens of public and private spaces.<sup>14</sup> This Article also interrogates the role of asylum law in essentializing Islam and perpetuating animus towards Islam and Muslims, building upon the rich literature on Orientalism and Islamophobia in the law.<sup>15</sup>

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13. Scholarship on gender and asylum focuses on other grounds for asylum, namely particular social group and political opinion. See, e.g., Marisa Silenzi Cianciarulo, *Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims*, 35 HARV. J.L. & GENDER 117 (2012); Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 782–83 (2003).

14. See Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, 2014 HARV. INT'L L. REV. 45, 46 (“[T]here persisted a perceived delineation between violations by governments committed against its citizens in the public sphere and violations by non-state actors of women in the so-called ‘private sphere.’”); Amy Shuman & Carol Bohmer, *Gender and Cultural Silences in the Political Asylum Process*, 17 SEXUALITIES 939, 940 (2014) (contrasting, in the context of sexual orientation claims, the “paradigmatic claim of asylum” of someone persecuted for engaging in public activities in a public space, and persecution that happens in the private sphere); Cianciarulo, *supra* note 13; Rodger Haines, *Gender-Related Persecution*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 319, 348 (Erika Feller, Volker Türk & Frances Nicholson eds., 2009) (“‘Private’ issues commonly associated with women are not inherently less political than those taking place in the ‘public’ sphere.”).

15. See Sahar Aziz, *Orientalism, Empire, and the Racial Muslim*, in OVERCOMING ORIENTALISM: ESSAYS IN HONOR OF JOHN L. ESPOSITO 221, 221 (Tamara Sonn ed., 2021) (examining the ideological underpinnings of American anti-Muslim bias); Cyra Akila Choudhury & Khaled A. Beydoun, *Introduction to ISLAMOPHOBIA AND THE LAW* 5, 7 (Cyra Akila Choudhury & Khaled A. Beydoun eds., 2020) (defining “Islamophobia” as “the presumption that Islam is inherently violent, alien, and inassimilable, combined with the belief that expressions of Muslim identity are correlative with a propensity for violence and terrorism”); Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUM. L. REV. 108, 111 (2016) (“Islamophobia [i]s the presumption that Islam is inherently violent, alien, and inassimilable.”); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575 (2002) (examining “the relationship between citizenship, nation, and identity” following

Part I of this Article traces the evolution of gender-based claims in asylum law through the lens of public and private spaces. It analyzes asylum law's privileging of claims arising out of the public sphere and the resulting disadvantages to female asylum seekers. Part II analyzes how gender-based claims are typically litigated under asylum law—under the particular social group and the political opinion grounds—and the challenges facing applicants when using these grounds. Part III analyzes the general doctrine supporting religion-based claims and how the religion ground has been used thus far for claims involving gender-based violence. Part IV reframes gender-based violence as religious persecution and explains how the concept of religious expression should encompass actions in the private sphere opposing patriarchal practices that are justified by religion. This Part concludes with a caution against essentializing religion when framing claims involving private expressions of religion.

#### I. PUBLIC AND PRIVATE SPACES IN ASYLUM LAW

Using the lens of public and private spaces, this Part analyzes the evolution of gender-based claims under asylum law as well as state responses to gender-based violence, both generally and in the context of refugee law. The concept of public and private spaces influenced the development of refugee law because state regulation largely ignored the private sphere, which is where women are most often harmed. The drafters of modern refugee law focused on protecting individuals from persecution in the public sphere, to which men have greater access, leading to the contemporary failure of asylum law to adequately protect women.

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the 9/11 terrorist attacks); Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT'L J. REFUGEE L. 7, 7 (2000) (examining “the stereotyping of Islam both by advocates and academics in refugee rights advocacy”); see also LILA ABU-LUGHOD, DO MUSLIM WOMEN NEED SAVING? 6–7 (2013) (examining how the United States leveraged stereotypes of oppressed Muslim women to justify military action abroad post-9/11); Taylor Markey, Comment, *Westernized Women?: The Construction of Muslim Women's Dissent in U.S. Asylum Law*, 64 UCLA L. REV. 1302, 1307 (2017) (critiquing “the idea that feminism is Western and the idea that Muslim culture is inherently or inevitably patriarchal”).

## A. ORIGINS OF THE CONCEPT OF PUBLIC AND PRIVATE SPHERES

Law and social norms divide the world into private and public spaces in societies across the world.<sup>16</sup> The application of the concept of private and public spaces in political and legal theory is nuanced and varied.<sup>17</sup> This Article generally defines the private sphere as the home and the family, and the public sphere as encompassing spaces outside of the home, including government, public institutions, and paid employment.<sup>18</sup> The public and private spheres are not necessarily mutually exclusive. They can be fluid and may interact and overlap in various ways, especially in community-oriented societies.<sup>19</sup>

The general concept of the public and private spheres emerged in Western political and legal theory in the sixteenth and seventeenth centuries with the rise of the nation-state.<sup>20</sup> In response to power exercised by monarchs and governments, the

16. See generally ALI MADANIPOUR, PUBLIC AND PRIVATE SPACES OF THE CITY 2–3 (2003) (examining “the constitution of the public and private spheres of society and the relationship between the two spheres . . . [which] has overlapping economic, social, cultural, and political dimensions”).

17. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 4–10 (1992) (exploring different definitions of the public and private).

18. Cianciarulo, *supra* note 13, at 8. The nuances of the definitions of “public” and “private” spaces are beyond the scope of this Article. See generally Lawrence E. Klein, *Gender and the Public/Private Distinction in the Eighteenth Century: Some Questions About Evidence and Analytic Procedure*, 29 EIGHTEENTH-CENTURY STUD. 97, 103–07 (1995) (providing various usages of the terms “public” and “private” in the eighteenth century); Gavison, *supra* note 17 (examining more modern facets of the public/private distinction).

19. See Janaki Abraham, *Veiling and the Production of Gender and Space in a Town in North India: A Critique of the Public/Private Dichotomy*, 17 INDIAN J. GENDER STUD. 191, 198–200, 205, 214–15 (2010) (analyzing the “fluidity” of public and private spaces based on a woman’s relationship with the people in those spaces in the Indian town of Bikaner); see also Mary B. Walsh, *Locke and Feminism on Private and Public Realms of Activities*, 57 REV. POL. 251, 252–53 (1995) (“What some feminists represent as a dichotomy between public and private is actually for [John] Locke a multitude of interacting and partially integrated spheres in which individuals live.”). For example, the front rooms of a house in India, from which individuals within the home can interact with people outside, can constitute a public space. Abraham, *supra*, at 200 (“Being at the window is like being on the street, while being in the house.”). These front rooms are “associated with men,” and women’s access to these front rooms was restricted in the recent past. *Id.*

20. See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423 (1982) (“[W]ith the emergence of the nation-state and theories of sovereignty in the sixteenth and seventeenth centuries, ideas of a distinctly public realm began to crystallize.”).

idea of the private sphere developed to set some limits on state power.<sup>21</sup> Natural rights theory, which espouses that individuals have certain rights inherent to being human and independent of the laws of any society, helped propel the idea that there should be restrictions on state power, especially pertaining to private relations and within the private sphere.<sup>22</sup> The state largely was not welcome in the private sphere in order to protect individuals' intimate, personal, and family lives.<sup>23</sup> As a result, domestic and international law developed to largely exclude state regulation of conduct in the private sphere.<sup>24</sup>

#### B. THE GENDERED DIMENSIONS OF PUBLIC AND PRIVATE SPACES

Public and private spaces have a gendered dimension, which has long persisted in society and the law. While it is not the case that men only act in the public sphere and women only act in the private sphere, women in societies across history and across the world generally have had less access to the public sphere than men. The restricted access of women to the public sphere has made them more vulnerable to abuse in the private sphere.

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21. *See id.* (“[I]n reaction to the claims of monarchs and, later, parliaments to the unrestrained power to make law, there developed a countervailing effort to stake out distinctively private spheres free from the encroaching power of the state.”).

22. *Id.* at 1424, 1426 (explaining that the “origins of the idea of a distinctively private realm [are] in the natural-rights liberalism of Locke and his successors”). *See generally* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 5 (1690) (“The state of nature has a law of nature to govern it, which obliges every one; And reason, which is that law, teaches all mankind, who will but consult it, that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.”).

23. *See* Frances Raday, *Religion and Patriarchal Politics: The Israeli Experience*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN 155 (Courtney W. Howland ed., 1999) (describing the “sociolegal reticence in interfering with patriarchal rule within the family, often under the guise of protecting the privacy of the family”); Alice M. Miller & Meghan Faux, *Reconceiving Responses to Private Violence and State Accountability: Using an International Human Rights Framework in the United States*, 1 GEO. J. GENDER & L. 67, 71 (1999) (“As under domestic law, international standards have given the private sphere and family life a significant degree of protection from interference.”); Horwitz, *supra* note 20, at 1423.

24. Miller & Faux, *supra* note 23, at 71 (“[H]uman rights standards have created a sphere of protection around certain aspects of the individual’s intimate, personal, or interior life, free from arbitrary (and in some cases any) government invasion.”).



In Western political thought, John Locke in his *Two Treatises of Government* differentiated the public sphere of politics from the private sphere of the family.<sup>25</sup> This separation of public and private spaces mirrored the division of roles between the sexes in many segments of society, especially in the United States.<sup>26</sup> Alexis de Tocqueville in 1840 described how some “women of the United States [were] confined within the narrow circle of domestic life” and how they “never manage[d] the outward concerns of the family[,] conduct[ed] a business[,] or [took] a part in political life . . . .”<sup>27</sup> He explained that the relegation of women to the private sphere resulted in their “social inferiority” relative to men.<sup>28</sup> Although women in the United States now enjoy greater access to public spaces, they still face barriers in many realms of the public sphere including employment and political office, and still shoulder more burdens in the private sphere.<sup>29</sup>

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25. See LOCKE, *supra* note 22, at 5.

26. See generally Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988) (analyzing historical accounts of the separation of men and women in the public and private spheres). European women in the nineteenth century enjoyed greater access to the public sphere than American women. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 259, 262 (Francis Bowen, ed., Henry Reeve, trans., 1840).

27. DE TOCQUEVILLE, *supra* note 26, at 259 (“In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes . . . in two pathways which are always different.”). *But see infra* note 39 (explaining how Black women in the United States were forced to work in the public sphere).

28. DE TOCQUEVILLE, *supra* note 26, at 259, 262. De Tocqueville did not lament the “social inferiority” of women. To the contrary, he lauded the relegation of American women to the private sphere as contributing to their higher status as compared to European women, who had greater access to the public sphere. *Id.* at 262 (“I do not hesitate to avow, that, although the women of the United States are confined within the narrow circle of domestic life, and their situation is, in some respects, one of extreme dependence, I have nowhere seen woman occupying a loftier position.”).

29. See, e.g., Carrie Blazina & Drew DeSilver, *A Record Number of Women Are Serving in the 117th Congress*, PEW RSCH. CTR. (Jan. 15, 2021), <https://www.pewresearch.org/fact-tank/2021/01/15/a-record-number-of-women-are-serving-in-the-117th-congress> [<https://perma.cc/Q9M9-KAWD>] (“Women make up just over a quarter of all members of the 117th Congress—the highest percentage in U.S. history and a considerable increase from where things stood even a decade ago.”); David G. Smith & W. Brad Johnson, *Gender Equity Starts in the Home*, HARV. BUS. REV. (May 4, 2020), <https://hbr.org/2020/05/gender-equity-starts-in-the-home> [<https://perma.cc/M93M-5QCZ>] (“Despite the fact that women outnumber men in the paid workforce, women still do more of the domestic work

The notion of public and private spaces as gendered extends beyond Western political thought to other political and social traditions. Confucian traditions, for example, distinguished between the concepts of public and private, and principles of *nei/wai* (inside/outside) classified spaces by sex in China.<sup>30</sup> These principles entrenched the patriarchy to regularly exclude women from the public sphere in ancient China.<sup>31</sup> Although women gained more access to the public sphere in the twentieth century, especially under Chinese Communist Party rule, government regulations in the 1980s limited women's participation in the workplace.<sup>32</sup> The Hindu caste system too creates distinctions between the public and private spheres and can limit women's access to public spaces. Women may face restrictions in the public sphere if their families rigidly subscribe to the caste system's tenet that women must be protected from "pollution," which can be caused by contact with men outside the family.<sup>33</sup> Some Hindu women wear a veil or *gunghat* while in the public sphere to maintain modesty,<sup>34</sup> and some are discouraged from working in the public sphere to minimize their interactions with

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and childcare—almost twice as much as their male partners."); *American Experiences Versus American Expectations*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 2015), <https://www.eeoc.gov/special-report/american-experiences-versus-american-expectations> [<https://perma.cc/2YTH-NP5N>] (discussing women's barriers to obtaining managerial positions, pay and pregnancy discrimination faced by women workers, and workplace harassment against women).

30. Lee Sangwha, *The Patriarchy in China: An Investigation of Public and Private Spheres*, 5 *ASIAN J. WOMEN'S STUD.* 9, 9 (1999) (exploring "how the division of public and private spheres is significant in the development of Chinese patriarchy" and explaining that "the principle of *nei/wai* (inside/outside) is a rule that rigorously classified people's everyday activities, roles, and living space according to sex" in pre-revolution China).

31. *See id.* at 9, 11, 19–28.

32. *See id.* at 28–41 ("The state policy thereby universalized a traditional view of women by prohibiting them from working in particular periods, for instance, of menstruation, pregnancy, childbirth, child-rearing and menopause and led to limited women's employment in general.")

33. *See* Seema Jayachandran, *The Roots of Gender Inequality in Developing Countries*, 7 *ANN. REV. ECON.* 63, 78 (2015). How strictly families adhere to these restrictions can depend on their caste, education levels, and geographic location and origin in India. *See id.*; *see also* Abraham, *supra* note 19, at 203, 209 (noting that dress expectations for married women vary across caste groups, and explaining that a woman's ability to negotiate these rules depends on factors like "the social environment she lives in, the bargaining power she feels she has, her level of education, [etc.]").

34. Abraham, *supra* note 19, at 204–07 (explaining that some married Hindu women wear a veil when in public spaces near their in-laws' homes).

unrelated men in order to maintain their sexual purity.<sup>35</sup> Some interpretations of the tenets of Islam similarly restrict women to the private sphere. *Purdah* encourages female seclusion in the private sphere, and conservative interpretations of *hejab* require the segregation of women and men as well as the veiling of women in the public sphere.<sup>36</sup>

From these examples, one commonality that arises across political and social traditions is that the sexes have and have had unequal access to the public sphere.<sup>37</sup> This is not to say that women have completely lacked access to the public sphere and civil society.<sup>38</sup> Some women, depending on their race and socio-economic status, have been forced or have needed to participate in the public sphere to ensure their livelihoods.<sup>39</sup> Women now generally have more access to the public sphere.<sup>40</sup> Nevertheless, men tend to have greater access to the public sphere than women

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35. See Jayachandran, *supra* note 33, at 78 (“Disallowing [Hindu] women from working outside the home is one way of maintaining their purity.”) (citation omitted); see also Martha Chen, *A Matter of Survival: Women’s Right to Employment in India and Bangladesh*, in *WOMEN, CULTURE, AND DEVELOPMENT* 37, 37–57 (Martha C. Nussbaum & Jonathan Glover eds., 1995) (exploring how poor women in poor economies are forced to “break with [the] tradition” that women are secluded and should not work outside the home).

36. See Asma M. Abdel Halim, *Reconciling the Opposites: Equal but Subordinate*, in *RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN*, *supra* note 23, at 203, 204 (“*Hejab* (as interpreted by traditionalists and fundamentalists) . . . requires segregation of women and men and dictates that if women go outside their homes, they should be fully covered, often including veiling the face, in order not to attract men’s attention.”); Jayachandran, *supra* note 33 (“Female seclusion (*purdah*) is . . . an important tenet of Islam, and Muslim women resemble Hindu women in their low labor force participation and low self-reported freedom of choice.”).

37. Danaya C. Wright, *Theorizing History: Separate Spheres, the Public/Private Binary and a New Analytic for Family Law History*, 2012 *Austl. & N.Z. L. & Hist. E-J.* 44, 46–47, 49–53.

38. See Klein, *supra* note 18, at 102 (“[W]omen in the eighteenth century had public dimensions to their lives.”).

39. See, e.g., Chen, *supra* note 35, at 37–57 (exploring how poor women in poor economies must work outside the home). Even though many white women in the United States were confined to the private sphere, Black women, on the other hand, generally have had to work outside the home and did not have the “privilege” of staying in the “private” sphere. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 2 (2000).

40. See *supra* note 29 and accompanying text.

due to law and social norms that continue to deny many women equal access.<sup>41</sup>

Due to their limited access to the public sphere as well as the unequal distribution of power within the home, women are more likely than men to face violence in the private sphere and are most commonly abused by male intimate partners or former partners.<sup>42</sup> Men, on the other hand, are more likely to experience violence at the hands of strangers or acquaintances.<sup>43</sup>

Despite the fact that abuse happens in both spheres, the state has lagged in regulating violence in the private sphere due to its historic lack of interference in that sphere.<sup>44</sup> Furthermore, feminist critique explains that the assignment of women to the private sphere renders women “invisible, while their experiences, interests, forms of organization, and action are excluded as not worthy of politics.”<sup>45</sup> This invisibility of women, in addition to men’s desire to preserve their power in the home, also explains in part the government’s historic lack of regulation of violence in the private sphere and family relations.<sup>46</sup>

Thus, whether the same violent acts were criminalized or not depended on the site of the violence and its target. Violence

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41. See *supra* notes 29, 33–36 and accompanying text; see, e.g., G.A. Res. 66/130, at 2 (Dec. 19, 2011) (expressing concern that “women in every part of the world continue to be largely marginalized from the political sphere, often as a result of discriminatory laws, practices, attitudes and gender stereotypes . . .”).

42. Claudia Garcia-Moreno, Alessandra Guedes & Wendy Knerr, *Understanding and Addressing Violence Against Women: Intimate Partner Violence*, WORLD HEALTH ORG. 1 (2012), [https://apps.who.int/iris/bitstream/handle/10665/77432/WHO\\_RHR\\_12.36\\_eng.pdf;jsessionid=3FF352FB994F14A90CF2EAC430D92382?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=3FF352FB994F14A90CF2EAC430D92382?sequence=1) [<https://perma.cc/8GGD-RW2X>] (“[T]he most common perpetrators of violence against women are male intimate partners or ex-partners.”) (citation omitted); see also Wright, *supra* note 37, at 50 (discussing “men’s overriding dominance over the domestic sphere to the exclusion of women’s interests”).

43. *Id.* at 1 (“[M]en are far more likely [than women] to experience violent acts by strangers or acquaintances than by someone close to them.”) (citation omitted).

44. See *supra* notes 22–24 and accompanying text.

45. Ulla Wischermann & Ilze Klavina Mueller, *Feminist Theories on the Separation of the Private and the Public: Looking Back, Looking Forward*, 20 WOMEN GERMAN Y.B. 184, 185 (2004).

46. See Cianciarulo, *supra* note 13, at 132–33 (discussing how, in the United States, intimate partner violence was “relegated to the dark corners of the ‘private sphere,’ shut off from public acknowledgment, discussion, and redress”).

within the private sphere was tacitly condoned, even though the same violence was criminalized if committed against a stranger in the public sphere.<sup>47</sup> As a result, the law enabled violence in the private sphere, such as intimate partner violence and marital rape, to remain virtually hidden until the late twentieth century.<sup>48</sup>

It was only after concerted activism in the 1970s by second wave feminists, who pushed for full equality between men and women, that intimate partner violence started to receive more recognition in the United States as a human rights violation and a crime.<sup>49</sup> This idea gained widespread traction in the mid-

47. See *id.* at 136 (“The notion of the private sphere, consisting of a man’s home and family, was a sacred one—even if that man treated his family and dependents in ways that would be punishable had the victims been strangers.”); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L.J. 625, 627–30 (1993) (critiquing human rights law insofar as it “privileges male-dominated public activities over the activities of women which take place largely in the private sphere”).

48. See generally JEFFREY FAGAN, *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* 6–9 (1996) (providing a historical overview of legal interventions, or lack thereof, in family violence). Marital rape is still legal in many countries and only was criminalized in all U.S. states in 1993. See generally Raquel Kennedy Bergen, *An Overview of Marital Rape Research in the United States*, in *MARITAL RAPE: CONSENT, MARRIAGE, AND SOCIAL CHANGE IN GLOBAL CONTEXT* 20–21 (Kersti Yllö & M. Gabriela Torres eds., 2016) (explaining the marital rape exemption and noting that “[t]he understanding that forced sex in marriage could legally be rape is a relatively new concept globally”).

Not only has the law facilitated the concealment of the private sphere, it actively relegated women to the private sphere. For example, coverture, under English common law, subsumed a married woman’s legal personality under her husband. *Coverture*, BLACK’S LAW DICTIONARY (11th ed. 2019). Under principles of coverture, women were forced to rely on their husbands to vindicate their legal rights, being unable to access the courts themselves. Cianciarulo, *supra* note 13, at 134–37; see also Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 596–600 (1991) (explaining how coverture prevented married women from accessing the law and “gave all the power to the male spouse”). Coverture isolated women in the private sphere and entrenched male dominance over women. See Cianciarulo, *supra* note 13, at 135–36 (“[E]ven though the law provided men with the ability to wield absolute power over women, it did nothing to protect women from the abuse of that power.”).

49. See Cianciarulo, *supra* note 13, at 133 (“Only in the latter half of the twentieth century did intimate partner violence begin to receive societal and legal recognition in the United States, in large part due to political battles waged by women and their supporters against the overwhelmingly male power structure.”); see also Miller & Faux, *supra* note 23, at 71–73, 78 (highlighting how “the work around race discrimination, economic and social rights, and global feminist critiques” united to challenge international law’s avoidance of

1990s, evidenced by the United Nations Declaration on the Elimination of Violence Against Women as well as Hillary Clinton's declaration at a United Nations conference that "women's rights are human rights."<sup>50</sup> The Declaration on the Elimination of Violence Against Women called for violence against women to be subject to criminal sanction by the state and for victims to receive protection from the state.<sup>51</sup>

With the recognition that states should protect women from violence in the home, there has been increased acknowledgment that domestic violence does not exist in the vacuum of a private relationship. Rather, as Professor Nancy Lemon explains, domestic violence is motivated "by bias against women and the belief that men are entitled to beat and control women."<sup>52</sup> This bias stems from social and cultural constructs of gender, which give men "the power . . . to assign proper roles and duties to a woman, dictate her behavior, and punish her when she deviates from the proper norms."<sup>53</sup> These engrained patriarchal attitudes enable widespread domestic violence to continue with impunity despite some recognition of domestic violence as a human rights violation.<sup>54</sup>

### C. REFUGEE LAW'S DIFFERENTIAL PROTECTION IN PUBLIC AND PRIVATE SPACES

Despite these strides in recognizing domestic violence as a human rights abuse, refugee and asylum law lag in protecting women from persecution in the private sphere. At the inception

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"treating domestic violence as a human rights violation," and also discussing evolving international legal standards which now more clearly define "the positive role and responsibility of the state in preventing abuses perpetrated by . . . private actors").

50. G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993), <https://www.ohchr.org/Documents/ProfessionalInterest/eliminationvaw.pdf> [<https://perma.cc/JJ34-MFDA>] ("Recognizing the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings . . ."); Hillary Rodham Clinton, First Lady, Remarks for the United Nations Fourth World Conference on Women (Sept. 5, 1995).

51. See G.A. Res. 48/104, *supra* note 50, at art. 4 ("States should condemn violence against women . . . [and] should pursue by all appropriate means and without delay a policy of eliminating violence against women . . .").

52. Nancy K.D. Lemon, Expert Declaration, at para. 16 (Jan. 21, 2022) (on file with the author) (provided by the Center for Gender and Refugee Studies).

53. *Id.* at para. 24.

54. See *id.* at paras. 25, 27 (explaining how male entitlement/superiority and male privilege motivate male batterers).

of the modern refugee regime after World War II, states did not protect women from violence in the private sphere as a general matter.<sup>55</sup> This general failure to protect women in the private sphere is reflected in modern U.S. asylum law, which stemmed from the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and the 1967 Protocol Relating to the Status of Refugees (Protocol).<sup>56</sup> The United States codified its international obligations related to refugees in the Refugee Act of 1980, which adopted a definition of “refugee” that is nearly identical to that in the Refugee Convention.<sup>57</sup>

Asylum seekers must demonstrate that they meet the definition of “refugee” to receive protection in the United States.<sup>58</sup> The Refugee Convention and the Refugee Act both define a refugee as someone who is outside of their country of nationality and who is unable or unwilling to return to that country, owing to a fear of persecution on account of a protected ground: race, religion, nationality, political opinion, or membership in a particular social group.<sup>59</sup> Under this definition, asylum seekers must demonstrate nexus, which requires the persecution to be on account of at least one of the five protected grounds.<sup>60</sup> Asylum seekers also must show that the severity of the harm they fear rises to the level of persecution.<sup>61</sup> Finally, the persecution must be at the hands of government actors or private actors the government is unable or unwilling to control.<sup>62</sup>

The lack of reference to gender in the refugee definition is a product of the times when the Refugee Convention was drafted. At the time of the drafting, states did not perceive violence against women within the private sphere at the hands of family

55. See *supra* notes 44–51 and accompanying text (discussing the United States’ failure to protect women from violence in the private sphere until the 1970s).

56. Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. The United States is a party to only the Protocol, which incorporates the operative provisions of the Refugee Convention. See Protocol Relating to the Status of Refugees, *supra*, at art. 1, para. 1, 19 U.S.T. at 6625 (incorporating the Convention Relating to the Status of Refugees, arts. 2–34).

57. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

58. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).

59. Convention Relating to the Status of Refugees, *supra* note 56, at art. 1, 189 U.N.T.S. at 152; INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).

60. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

61. *Id.*

62. *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975).

members or domestic partners as violence that necessitated state intervention.<sup>63</sup> As a result, the drafters of the Refugee Convention did not include protections for women fleeing gender-based violence, and instead focused on protecting people from the types of atrocities that occurred during and after World War II at the hands of government actors.<sup>64</sup>

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63. See *supra* notes 44–48 and accompanying text (examining how separate spheres ideology shielded domestic abusers from the law); see also Cianciarulo, *supra* note 13, at 136 (“Consistent with this principal of male domination of the family, intimate partner violence was considered a private matter for most of U.S. history, not fit for examination by the courts.”).

64. See Terje Einarsen, *Drafting History of the 1951 Convention and the 1967 Protocol*, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 37, 53–56 (Andreas Zimmermann ed., 2011) (“It was thus obvious that the proposed 1951 Convention would be applicable from day one both to the old war refugees and victims of racial and fascist persecution, and to new refugees fleeing to the West from persecution behind the Eastern Iron Curtain.”).

Some scholars and policymakers advocate for interpreting the existing definition of refugee to encompass gender-based claims, whereas others call for an addition of a sixth ground for gender. Compare UNHCR, *Gender*, *supra* note 2, at para. 6 (“The refugee definition, properly interpreted . . . covers gender-related claims.”), and Haines, *supra* note 14, at 326–27 (“[T]he argument in favour of a sixth ground may have the unintended effect of further marginalizing women if misinterpreted as an implicit concession that sex and gender have no place in refugee law at the present.”), with Mattie L. Stevens, *Reorganizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL’Y 179 (1993) (“The addition of gender as a sixth category under the refugee definition would . . . also recognize the unique problems that women face, as opposed to trying to fit them into pre-existing categories that do not consider women’s needs and often work against them.”). Other countries, including Costa Rica and Mexico, recognize gender or sex as a sixth ground for asylum. See *Countries with Asylum/Refugee Laws That Explicitly Protect Those Fleeing Gender-Based Persecution*, TAHIRIH JUST. CTR. (2021), <https://www.tahirih.org/wp-content/uploads/2021/03/Appendix-1-List-of-other-countries-with-gender-listed-in-asylum-laws.pdf> [https://perma.cc/24NG-XLL2].

Although gender and sex are not specific grounds for asylum in the United States, some courts of appeals in the United States have expressed willingness to recognize females as a social group. See *De Pena-Paniagua v. Barr*, 957 F.3d 88, 95–98 (1st Cir. 2020) (explaining that a broader social group defined as “women” or “women in country X” may qualify as a cognizable particular social group); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (concluding that the applicant was persecuted on account of her membership in the particular social group of “Somali females”); *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (“Although we have not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law.”). *But see* *Perdomo v.*



The Refugee Convention was a response to the international community's failure to protect people fleeing Nazi persecution as well as emerging concerns surrounding refugees fleeing the Soviet bloc.<sup>65</sup> The Refugee Convention addressed past events, rather than looking forward and anticipating future causes of forced migration.<sup>66</sup> The scope of the Refugee Convention, which was limited to individuals fleeing events in Europe prior to January 1, 1951, keenly reflects this backwards focus.<sup>67</sup> The Protocol later removed this temporal and geographic restriction, but otherwise left unchanged the definition of refugee from the Refugee Convention.<sup>68</sup>

The focus of the drafters of the Refugee Convention on Nazi and Soviet persecution led to the privileging of asylum claims arising in the public sphere. Thus, the prototypical asylum claim for the drafters and subsequently under U.S. asylum law was by a person who fears persecution at the hands of government actors for their identity or conduct in the public sphere.<sup>69</sup> Women, who are increasingly seeking asylum for gender-based violence in the private sphere, do not fit this mold in part because of restricted access to the public sphere and the nature of violence

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Holder, 611 F.3d 662, 668–69 (9th Cir. 2010) (holding that “all women in Guatemala” is not a cognizable particular social group).

65. See Erin Corcoran, *The Construction of the Ultimate Other: Nationalism and Manifestations of Misogyny and Patriarchy in U.S. Immigration Law and Policy*, 20 GEO. J. GENDER & L. 541, 551–52 (2019) (“The modern refugee-protection regime was a response by the international community to address the collective failure of nation states during World War II to adequately protect millions of individuals fleeing Nazi persecution and execution, many due to their religious and ethnic Jewish identities.”); Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 232–33, 239–240 (1996) (“The drafters of the Convention were primarily from Western European and North American States facing the need to assimilate persons displaced in Europe by the Second World War and the ensuing regime changes in Eastern Europe, for whom repatriation was unrealistic.”).

66. See Fitzpatrick, *supra* note 65, at 232–33 (arguing the original Convention's temporal limitations reflected a “reluctance to accept an open-ended obligation”).

67. Convention Relating to the Status of Refugees, *supra* note 56, 189 U.N.T.S. at 152–54. The Refugee Convention permitted, but did not require, states to adopt this geographic restriction. See *id.* at 180.

68. Protocol Relating to the Status of Refugees, *supra* note 56, at art. I, para. 3, 19 U.S.T. at 6625.

69. See Cianciarulo, *supra* note 13, at 120 (explaining that asylum law favors claims involving “engaging in public activities of a political nature, and where the persecution occurs by strangers with a clearly articulated political goal”).

against women as predominantly occurring in the home.<sup>70</sup> “Both the nature of the persecutor and the situs of persecution of those now seeking asylum in the West are often quite different than the Convention’s drafters anticipated.”<sup>71</sup>

The Convention’s lack of reference to gender may, at least in some part, explain—but does not excuse—the U.S. asylum system’s continued ambivalence towards protecting women from gender-based violence in the private sphere. The omission of gender in the definition of refugee has allowed adjudicators in the United States to adhere fairly rigidly to the post-World War II conception of refugee, despite changing norms around violence against women.<sup>72</sup> As a result, asylum seekers fleeing gender-based violence in the private sphere have to exercise legal creativity to fit their claims into one of the five enumerated protected grounds and to surmount other hurdles to protection.<sup>73</sup>

## II. GENDER-BASED CLAIMS IN ASYLUM LAW

This Part analyzes the challenges asylum seekers in the United States face when attempting to bring asylum claims involving gender-based violence. This Part identifies general obstacles related to adjudicators’ perceptions of gender-based violence as private in nature. It also analyzes specific impediments related to bringing claims under the particular social group and political opinion grounds, which are typically the grounds used by asylum seekers fleeing gender-based violence in the private sphere.

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70. See *supra* notes 44–48 and accompanying text (discussing how law enabled domestic violence to continue in the private sphere); see also Garcia-Moreno et al., *supra* note 42, at 1 (explaining how male intimate partners (or former partners) are the likely perpetrators of violence against women, while men more often experience violence by “strangers or acquaintances”).

71. Fitzpatrick, *supra* note 65, at 239.

72. See *id.* (“The vagueness of the refugee definition is unsatisfactory because it permits a kind of local option for asylum adjudicators either to permit adaptation to new realities or to deny asylum claims that fail to follow an archaic scenario.”).

73. See UNHCR, *Gender*, *supra* note 2, at para. 5 (explaining that adjudicators have interpreted the term “through a framework of male experiences, which has meant that many claims of women . . . have gone unrecognized.”); see also *Practice Advisory: Applying for Asylum After Matter of A-B-*, NAT’L IMMIGRANT JUST. CTR. (Jan. 2019), <https://immigrantjustice.org/media/173/download> [<https://perma.cc/3XT3-G33G>] (providing “practice tips for attorneys representing asylum seekers with non-state actor claims after [*In re*] *A-B-*,” and arguing “asylum matters involving domestic violence . . . remain winnable with proper case preparation and adept lawyering”).

## A. GENDER-BASED VIOLENCE AS PRIVATE VIOLENCE

Asylum seekers fleeing gender-based violence in both the public and private spheres have had to contend with adjudicators summarily casting the violence as “private violence” and ignoring its “political nature.”<sup>74</sup> Even where gender-based violence occurs outside the home in the public sphere, adjudicators characterize it as “personal.” This characterization takes it out of the purview of asylum protection, and reflects a deep-seated reluctance towards state intervention in response to violence against women.<sup>75</sup>

For example, immigration adjudicators did not recognize rape, even in the public sphere, as a form of persecution until the 1990s.<sup>76</sup> Some adjudicators have characterized rape as personal in nature, despite well-established research on rape as a tool of coercive control.<sup>77</sup> In 2004, the Ninth Circuit criticized adminis-

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74. See Haines, *supra* note 14, at 327 (“The main problem facing women as asylum seekers is the failure of decision makers to incorporate the gender-related claims of women into their interpretation of the existing enumerated grounds and their failure to recognize the political nature of seemingly private acts of harm to women.”); Cianciarulo, *supra* note 13, at 120 (“The abuse, therefore, is not a political act but merely an unfortunate situation that has occurred due to various psychological and social factors.”); see also *infra* notes 90–94 and accompanying text (discussing adjudicators’ characterization of domestic violence as “private violence” not warranting asylum protection).

75. See Deborah E. Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771, 783 (1995) (“Because the violence was sexual, its perceived aspect of sexual pleasure overwhelmed its political character as an act of violence and as a political weapon so that the original adjudicator denied [the] claim.”); Walter C. Long, *Escape from Wonderland: Implementing Canada’s Rational Procedures to Evaluate Women’s Gender-Related Asylum Claims*, 4 UCLA WOMEN’S L.J. 179, 210 (1994) (“The . . . decisionmakers somehow believed the persecutors were overcome by a moment of ‘private’ sexual instinct in the midst of their manifestly political crime.”).

76. See, e.g., *In re D-V-*, 21 I. & N. Dec. 77, 79–80 (B.I.A. 1993) (concluding that a Haitian applicant who was gang-raped by soldiers had a well-founded fear of persecution on account of her political opinion and religion). *D-V-*, which was decided in 1993 and issued as precedential in 1995, is the first precedential asylum decision involving gender-based violence. See Anker, *supra* note 75, at 775–76 (“In the United States, immigration authorities had not reported a single precedential gender-based asylum decision until April of 1995, when they issued their first.”).

77. See Liz Kelly, *Wars Against Women: Sexual Violence, Sexual Politics and the Militarised State*, in STATES OF CONFLICT: GENDER, VIOLENCE AND RESISTANCE 45, 45 (Susie Jacobs, Ruth Jacobson & Jen Marchbank eds., 2000) (“Sexual violence is one of the most extreme and effective forms of patriarchal

trative adjudicators within the Department of Justice for promoting the idea that “rape is just forceful sex by men who cannot control themselves” and obscuring the fact that “it is about power and control.”<sup>78</sup> This was not an isolated occurrence. In 2005, an immigration judge concluded that the persecutors’ motivation for gang raping a woman was “gratification” despite the persecutors’ contemporaneous statements concerning the woman’s clan status and political opinion.<sup>79</sup> In 1992, the Sixth Circuit concluded that a colonel of the secret police raped an asylum seeker because of “her repeated refusals to become intimate with him” and not on account of a protected ground.<sup>80</sup> In the mid-1990s, an immigration judge doubted the validity of an asylum seeker’s assertions that she was raped because she was forty-five-years old at the time of the incident.<sup>81</sup> He questioned whether “somebody [would] be interested in [her] in a carnal nature and in a political nature” because she “passed [her] prime a long time ago,” demonstrating his complete lack of understanding of the nature of sexual violence as a tool of control.<sup>82</sup>

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control, which simultaneously damages and constrains women’s lives . . . .”); U.N. High Comm’r for Refugees, *Note on Certain Aspects of Sexual Violence Against Refugee Women*, para. 12, U.N. Doc. A/AC.96/822 (Oct. 12, 1993), <https://www.unhcr.org/en-us/excom/excomrep/3ae68d5cc/note-certain-aspects-sexual-violence-against-refugee-women.html> [<https://perma.cc/3RC5-ZDFL>] (“[S]exual violence has . . . been used by armed forces . . . as a means of intimidating a civilian population perceived to be in political opposition to the armed force in question.”); *Uwais v. U.S. Att’y Gen.*, 478 F.3d 513, 518 (2d Cir. 2007) (recognizing that “sexual violence in the context of civil strife is often not about sex, but instead about domination, intimidation, and control”).

78. *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (quoting Margaret A. Cain, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*, 34 TULSA L.J. 367, 371 n.32 (1999)).

79. *Ali v. Ashcroft*, 394 F.3d 780, 786–87 (9th Cir. 2005) (criticizing the immigration judge for characterizing the persecutors’ gang rape of the applicant as “tak[ing] gratification from the helpless condition of the [applicant]”).

80. *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992) (concluding that a colonel in the secret police did not “‘persecut[e]’ [the applicant] on account of a proscribed ground . . . [but that] he simply was reacting to her repeated refusals to become intimate with him”); *cf.* *Campos-Guardado v. INS*, 809 F.2d 285, 288 (5th Cir. 1987) (affirming a Board of Immigration Appeals decision to deport a noncitizen who had suffered a sexual assault in her home country after concluding that any threats of reprisal by her attacker were personally motivated rather than “because of her political opinion or any grounds specified in the Act”).

81. *Grajo v. INS*, No. 96-3894, 1997 WL 464095, at \*2 (7th Cir. Aug. 4, 1997).

82. *Id.* The Seventh Circuit quoted the immigration judge’s statement in its opinion. The immigration judge stated:

Even where the same type of harm occurs to women and heterosexual men, adjudicators are more willing to look at the reasons why a man was harmed, whereas they often assume a woman was harmed for personal reasons, which typically does not qualify for asylum.<sup>83</sup> Adjudicators generally do not assume that sexual violence directed towards heterosexual men is for “personal” reasons in the same way they do for women.<sup>84</sup>

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You are now a 45 year old woman—now you’re 50. And excuse me, but you passed your prime a long time ago. At 45 you lost the loom and the—and [sic] your beauty that you once had when you were younger. Now, why would somebody be interested in you in a carnal nature and in a political nature? What do you have that would excite this person to do what he did or is this merely a figment of you [sic] imagination in order for you to remain here in the United States.

*Id.*

83. See Anker, *supra* note 75, at 783 (“Yet a man tortured or physically harmed under the same circumstances [as a woman who was gang raped in retaliation for her political activities] would be found eligible [for asylum].”); Long, *supra* note 75, at 210 (“If Campos-Guardado had been a man, and nothing about the persecutory event were changed, she would have surely been granted asylum.”); see also Anker, *supra* note 75, at 775 (“[I]nternational human rights doctrines and discourse—including those related to refugees—traditionally have excluded any specific discussion of the rights of women and generally have failed to recognize sexual and related violence as serious violations, even when committed or directed by a state or an agent of the state.”).

84. The vast majority of asylum decisions by immigration judges and the Board of Immigration Appeals are not publicly available unless the Board chooses to publish its decisions. A recent settlement will make some Board decisions available in the future. See *infra* note 151. However, information about administrative decisions is available in the opinions of the federal courts of appeals when they summarize the procedural history of the appeal. Because the Department of Homeland Security is not permitted to appeal to the federal courts of appeals, the courts of appeals do not hear appeals involving successful asylum applications. *Fact Sheet: Executive Office for Immigration Review: An Agency Guide*, U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV. 7 (Dec. 2017), [https://www.justice.gov/eoir/page/file/eoir\\_an\\_agency\\_guide/download](https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download) [<https://perma.cc/WKJ5-ML6P>]. Therefore, it is challenging to ascertain the number of men who have been granted asylum after facing sexual violence. Compared to the numerous examples of courts of appeals decisions reviewing administrative decisions that attribute sexual violence against women to personal motivations—see, e.g., cases cited *supra* notes 78–81—there are comparatively fewer courts of appeals decisions reviewing asylum denials to men for failing to connect sexual violence to a protected ground. See, e.g., *Arutiunian v. Gonzales*, 203 F. App’x 112, 113 (9th Cir. 2006) (concluding that the immigration judge erred in finding that the male asylum seeker’s rape was not on account of his ethnicity). One potential inference is that administrative adjudicators more readily connect sexual violence against men to the protected grounds and grant them asylum.

This assumption that persecutors are motivated by personal reasons has led to immigration adjudicators overlooking or failing to credit significant facts linking sexual violence against women to political or other protected ground-related motivations.<sup>85</sup> For example, the Board of Immigration Appeals characterized the sexual assault of a Tamil woman in Sri Lanka by a police officer as motivated by “personal aggression” and “not motivated, even in part, by a protected ground.”<sup>86</sup> The Second Circuit reversed and concluded that the Board’s decision was “based on significant errors” because it ignored clear evidence linking the assault to protected grounds.<sup>87</sup> For example, the Board failed

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85. See, e.g., *Uwais v. Att’y Gen.*, 478 F.3d 513, 518 (2d Cir. 2007) (criticizing the Board of Immigration Appeals for “improperly omitt[ing] potentially significant facts” and “perfunctorily conclud[ing] that the officer was solely motivated by personal aggression”) (internal quotations omitted); *Basova v. INS*, No. 98-9540, 1999 WL 495640, at \*1, 3 (10th Cir. July 14, 1999) (affirming the immigration judge’s conclusion that the applicant was raped “on a personal level” and not on account of her political opinion, even though she testified that the Chechen mafia “want to show people how much they control the society”); *Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004) (reversing the immigration judge’s finding that soldiers did not rape the applicant “because of” her family background” where the immigration judge “ignore[ed] evidence that the soldiers linked their assault on [the applicant] with her family’s authority and position in the [previous] regime”).

Immigration decisions are also rife with examples of adjudicators viewing sexual violence against gay men as personal in nature. See, e.g., *Feitosa v. Lynch*, 651 F. App’x 19, 21 (2d Cir. 2016) (holding that substantial evidence supported the Board of Immigration Appeals’ decision that the rapes of a gay man were not on account of a protected ground); *Maldonado v. Att’y Gen.*, 188 F. App’x 101, 102, 105 (3d Cir. July 18, 2006) (reversing an immigration judge’s denial of asylum where the immigration judge found that the applicant’s persecution was on account of his “social preferences” (a desire to go to gay discos and leave early in the morning), rather than his membership in a particular social group (gay men in Argentina)); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1087 (9th Cir. 2005) (reversing an immigration judge’s denial of asylum to a gay man after the immigration judge concluded that a police officer forcing the applicant to perform sex acts was “a personal problem” he had with the officer); see also *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzalez*, 409 F.3d 1177 (9th Cir. 2005) (criticizing the Board of Immigration Appeals for suggesting that the asylum applicant’s “effeminate dress” and sexual orientation were justifications for police officers raping him, and explaining that “[t]he ‘you asked for it’ excuse for rape is offensive to this court”).

86. *Uwais*, 478 F.3d at 518.

87. *Id.* at 515, 518 (explaining that the police detained the asylum applicant after they found guns and Tamil Tiger materials in the apartment of her family’s tenants, and subsequently interrogated her about her connections with the tenants).

to credit the fact that the assault occurred while the asylum applicant was detained on suspicion of having connections to the Tamil Tigers.<sup>88</sup> The Board also overlooked evidence that the assault was motivated by the applicant's Tamil ethnicity and the fact that Tamil women in similar situations were often sexually assaulted with impunity.<sup>89</sup>

Women facing violence in the private sphere face even greater hurdles to protection than women facing violence in the public sphere. Adjudicators routinely deny protection to women fleeing domestic violence and other family violence, characterizing it as “private violence” inflicted by “private actors . . . based on a personal relationship with a victim.”<sup>90</sup> They refuse to situate domestic violence within the broader political and societal contexts of coercive control of women.<sup>91</sup> For example, the Board of Immigration Appeals rejected a domestic violence survivor's political opinion-based asylum claim on the ground that the motivation behind each instance of violence was a “personal relationship.”<sup>92</sup> The Ninth Circuit subsequently held that the Board erred in concluding that the record lacked evidence connecting the persecution to the applicant's feminist political opinion.<sup>93</sup> The Ninth Circuit explained that the record contained “episode after episode of men stating, quite plainly, that they were beating, burning, raping, and strangling [the applicant] *because* she

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88. *Id.*

89. *Id.* at 515–16, 518.

90. *In re* A-B- (A-B- I), 27 I. & N. Dec. 316, 319, 322, 338 (Att’y Gen. 2018), *vacated by In re* A-B- (A-B- III), 28 I. & N. Dec. 307 (Att’y Gen. 2021); *see, e.g.*, *Rodriguez Tornes v. Garland*, 993 F.3d 743, 755 (9th Cir. 2021) (Paez, J., concurring) (criticizing the Board of Immigration Appeals for “suggest[ing] . . . the presence of a ‘personal relationship’ motivation for intimate partner violence [and] impl[y]ing that there were no intersectional or additional bases for the violence [the applicant] experienced”); *Pojoy-De Leon v. Barr*, 984 F.3d 11, 17 (1st Cir. 2020) (characterizing an applicant's persecution by her father as a “personal vendetta”).

91. *See supra* notes 52–54 and accompanying text (discussing Professor Nancy Lemon's conclusion that domestic violence and the control of women are motivated by bias against women that stems from “social and cultural constructs of gender”). *See generally* EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 36–38 (2007) (discussing the criminal justice system's reluctant response to complaints of domestic violence in the mid-to-late 1900s).

92. *Rodriguez Tornes*, 993 F.3d at 755 (Paez, J., concurring).

93. *Id.* at 752.

sought an equal perch in the social hierarchy.”<sup>94</sup> Overcoming immigration adjudicators’ tendency to characterize gender-based violence as “private violence” is only one hurdle to bringing gender-based asylum claims. Connecting the violence to a protected ground presents another obstacle for asylum seekers fleeing gender-based violence.

#### B. GENDER-BASED CLAIMS UNDER PARTICULAR SOCIAL GROUP

Asylum seekers with claims involving gender-based violence in the private sphere historically have had the most success invoking the particular social group protected ground.<sup>95</sup> The flexibility of the particular social group ground makes it well-equipped to keep pace with evolving standards of violence and of who merits protection from such violence.<sup>96</sup> The term “particular social group” lacks an independent meaning outside of the law and is undefined in the Refugee Convention, both of which contribute to its adaptability.<sup>97</sup> However, recent developments in asylum doctrine, including under the Obama and Trump administrations, have constricted particular social group claims, especially those involving gender-based violence.<sup>98</sup>

The term “particular social group” first appeared in refugee law in 1951 in the Refugee Convention.<sup>99</sup> Its addition to the text

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94. *Id.* at 753.

95. See Kate Jastram & Sayoni Maitra, *Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*, 18 SANTA CLARA J. INT’L L. 48, 53 (2020) (“Though some early cases analyzed gender-related claims under the grounds of religion or political opinion, domestic violence claims in the United States have most often been analyzed in terms of the particular social group ground.”); Fatma Marouf, *Becoming Unconventional: Constricting the ‘Particular Social Group’ Ground for Asylum*, 44 N.C. J. INT’L L. 487, 488 (2019) (describing how “women and children asylum seekers fleeing violence by private actors . . . tend to rely on the [particular social group] ground”); Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN’S L.J. 107, 122 (2013) (“[Particular social group] is the stated rationale in most of the grants . . . captured by the [Center for Gender and Refugee Studies] database [between 1994 and 2012].”).

96. See *infra* note 107 and accompanying text.

97. See *infra* notes 103, 107 and accompanying text.

98. See *infra* notes 122–25 and accompanying text (discussing restrictions on asylum for gender-based violence survivors during the Trump administration).

99. Convention Relating to the Status of Refugees, *supra* note 56, at art. 1, § A, para. 2, 189 U.N.T.S. at 152. Prior international instruments did not protect individuals fearing persecution on account of membership in a particular



of the treaty was an “afterthought.”<sup>100</sup> The Swedish representative at the Conference of Plenipotentiaries, where state representatives crafted the Refugee Convention, orally proposed the addition of this language with little explanation.<sup>101</sup> The Swedish representative only stated that “experience had shown that certain refugees had been persecuted because they belonged to particular social groups.”<sup>102</sup> Ultimately, neither the representative nor the Refugee Convention defined the term “particular social

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social group. The first international treaty to enumerate grounds for refugee status, the International Refugee Organization Constitution in 1946, defined refugees as individuals who were victims of the Nazi or fascist regimes in World War II; Spanish Republicans and other victims of the Falangist regime in Spain; and “persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion.” Constitution of the International Refugee Organization, annex I, pt. 1, § A, para. 1, Dec. 15, 1946, 18 U.N.T.S. 3, 18. Subsequently in 1950, the founding instrument of the United Nations High Commissioner for Refugees gave this body jurisdiction to work with individuals outside their home countries “owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion.” G.A. Res. 428(V), at para. 6(A)(ii), Statute of the Office of the United Nations High Commissioner for Refugees (Dec. 14, 1950).

Treaties prior to the Refugee Convention generally defined refugees by category in reference to particular crises, ethnic groups, location, or historical events. For example, one League of Nations treaty defined refugees to include “[a]ny person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality.” Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 89 L.N.T.S. 47, 49. The International Refugee Organization Constitution also defined several categories of refugees in terms of specific crises, including Spanish Republicans and other victims of the Falangist regime in Spain and victims of the Nazi regime. Constitution of the International Refugee Organization, *supra*, 18 U.N.T.S. at 18.

100. *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (quoting 1 ATLE GRAHLMADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219 (1966)).

101. See Einarsen, *supra* note 64, at 62 (“The more specific rationale for the inclusion of an additional category of persecution [based on social group] was . . . quite brief, according to the meeting records . . .”).

102. *Fatin*, 12 F.3d at 1239 (quoting Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Rec. of the 3d Mtg., U.N. Doc. A/CONF.2/SR.3 at 14 (Nov. 19, 1951)). The “particular social group” ground may have been intended to cover Nazi persecution of additional groups of people, including the Sinti, the Roma, members of the LGBTQ+ community, and “so called ‘hereditarily ill’ and ‘asocial’ persons . . . .” Einarsen, *supra* note 64, at 63–64.

group.”<sup>103</sup> The guidelines to the Protocol only explain that particular social group is not “a ‘catch all’ that applies to all persons fearing persecution.”<sup>104</sup>

The term remained undefined in the Refugee Act of 1980, which was the U.S. legislation implementing the Protocol and Refugee Convention.<sup>105</sup> The legislative history of the Refugee Act does not provide any insights into the definition of particular social group.<sup>106</sup> Thus, it was left to federal judges and administrative adjudicators to craft its contours.

Because the term does not have an easily ascertainable meaning like the other protected grounds, adjudicators have been able to both expand and constrict its boundaries.<sup>107</sup> The flexibility built into the particular social group category due to its lack of a fixed definition allowed adjudicators to interpret it expansively to adapt to changing conceptions of persecution and violence, especially gender-based violence. The same flexibility also allowed them to restrict the doctrine once the political will to protect refugees began to wane.

Particular social group doctrine in the United States has evolved over the past several decades. Initially, an applicant only needed to demonstrate that the group is defined by a shared immutable characteristic to constitute a particular social group under the standard articulated by the Board of Immigration Appeals in *In re Acosta*.<sup>108</sup> However, administrative decisions and

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103. See Einarsen, *supra* note 64, at 62 (“What ‘cases’ of persecution of ‘social groups’ [the Swedish representative] actually referred to, and the intended meaning he communicated to his fellow representatives, was surprisingly not much elaborated at the Conference of Plenipotentiaries.”); see also Convention Relating to the Status of Refugees, *supra* note 56, at art. 1, § A, para. 2, 189 U.N.T.S. at 152 (failing to define “particular social group”).

104. U.N. High Comm’r for Refugees, Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, para. 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002).

105. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

106. See *Fatin*, 12 F.3d at 1239 (“[N]either the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase ‘particular social group’”).

107. See GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 30 (1983) (“A fully comprehensive definition [of particular social group] is impracticable, if not impossible . . .”).

108. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). The Board of Immigration Appeals in *Acosta* expounded, for the first time, upon the requirements for a particular social group. Evaluating the other four grounds for asylum, the

case law now require applicants to satisfy three stringent requirements:<sup>109</sup> (1) the social group consists of members who share a common immutable characteristic; (2) the group is defined with particularity;<sup>110</sup> and (3) the group is socially distinct within the society in question.<sup>111</sup> Applicants also must show that the proposed social group exists independently of the persecution and that it is not defined by the harm the asylum applicant suffered.<sup>112</sup> The additional requirements, creating higher evidentiary burdens, have made it increasingly difficult for all asylum applicants, but especially gender-based violence survivors, to use the particular social group ground.<sup>113</sup>

It was not until the 1990s that adjudicators began to grant asylum to survivors of gender-based violence under the less

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Board noted that they involved an immutable characteristic. The Board extrapolated that a particular social group also needs to be defined by an immutable characteristic, drawing upon the principles of *ejusdem generis*. *Id.*

109. See, e.g., *In re W-G-R-*, 26 I. & N. Dec. 208, 213–17 (B.I.A. 2014) (explaining and applying each requirement), *vacated in part on other grounds*, *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016); *In re M-E-V-G-*, 26 I. & N. Dec. 227, 231–32 (B.I.A. 2014); *In re E-A-G-*, 24 I. & N. Dec. 591, 593–94 (B.I.A. 2008); *In re S-E-G-*, 24 I. & N. Dec. 579, 582–83 (B.I.A. 2008); *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 73–74 (B.I.A. 2007); *In re C-A-*, 23 I. & N. Dec. 951, 957–60 (B.I.A. 2006). See generally *Marouf*, *supra* note 95, at 489–92 (explaining the Board’s addition of extra requirements to the particular social group ground).

110. Particularity requires a group to have clear boundaries such that it is easily ascertainable whether a person is a member of the group. *M-E-V-G-*, 26 I. & N. Dec. at 239.

111. Social distinction requires the society in question to view the group as distinct. *Id.* at 237–39.

112. See *id.* at 242. Social groups that are defined by the persecution are impermissibly “circular” and are invalid. See *id.* For example, an asylum applicant who suffered domestic violence at the hands of a domestic partner cannot define her particular social group as “women who were abused by domestic partners.” The applicant was not persecuted on account of being a member of the group “women who were abused by domestic partners.” Rather, she was harmed for other reasons. See *In re A-B- (A-B- I)*, 27 I. & N. Dec. 316, 334–35 (Att’y Gen. 2018) (“To be cognizable, a particular social group *must* ‘exist independently’ of the harm asserted in an application for asylum . . . .” (quoting *M-E-V-G-*, 26 I. & N. Dec. at 236 n.11)), *vacated by In re A-B- (A-B- III)*, 28 I. & N. Dec. 307 (Att’y Gen. 2021).

113. See *A-B- I*, 27 I. & N. Dec. 316; see also *Marouf*, *supra* note 95, at 490–91 (“Despite the BIA’s efforts to clarify the meanings of social distinction and particularity, they remain confusing even for attorneys and are almost impossible for unrepresented asylum seekers to understand.”).

stringent *Acosta* standard for particular social group.<sup>114</sup> *In re Kasinga*, involving an asylum applicant fleeing female genital mutilation at the hands of family members, was one of the first successful published cases articulating a particular social group that included gender as a characteristic.<sup>115</sup> The Board of Immigration Appeals granted asylum to the applicant, recognizing the particular social group, “young women of the Tchamba-Kuntuntu Tribe who have not been subjected to female genital mutilation . . . and who oppose[d] the practice.”<sup>116</sup> Since *Kasinga* in 1996, adjudicators generally have continued to be receptive to asylum claims involving female genital mutilation.<sup>117</sup>

Despite a willingness to safeguard asylum seekers from female genital mutilation, adjudicators have seesawed on protections for individuals fleeing domestic violence.<sup>118</sup> The Board of Immigration Appeals initially was reluctant to extend asylum protection to domestic violence survivors. The Board concluded in 1999 that an asylum applicant who suffered over a decade of domestic violence did not merit protection, characterizing the violence as “private acts of violence” that were not on account of a protected ground.<sup>119</sup>

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114. As early as 1985, the Board of Immigration Appeals recognized sex as an immutable characteristic that could be the basis of a particular social group. *In re Acosta*, 19 I. & N. Dec. 211, 233–24 (B.I.A. 1985). Although *Acosta* did not involve gender-based violence, it paved the way for future claims. *See, e.g., Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (explaining that under *Acosta*, “women in Iran” is a particular social group, but ultimately denying asylum). Since *Acosta* and *Fatin*, however, the Board of Immigration Appeals added two additional requirements beyond immutability to constitute a particular social group. *See supra* notes 110–11 and accompanying text (discussing the particularity and social distinction requirements).

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

116. *Id.* at 358.

117. *See, e.g., Bah v. Mukasey*, 529 F.3d 99, 114 (2d Cir. 2008); *Hassan v. Gonzales*, 484 F.3d 512 (8th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785, 795–96 (9th Cir. 2005); *Niang v. Gonzales*, 422 F.3d 1187, 1189 (10th Cir. 2005); *Abay v. Ashcroft*, 368 F.3d 634, 641 (6th Cir. 2004).

118. *See Gregor Noll, Asylum Claims and the Translation of Culture into Politics*, 41 TEX. INT’L L.J. 491, 495–96 (2006) (analyzing from a critical perspective the willingness of states in the North to protect asylum applicants from female genital mutilation, a harm that typically occurs in states in the South, but not from domestic violence due to the pervasiveness of domestic violence in states in the North).

119. *In re R-A*, 22 I. & N. Dec. 906 (B.I.A. 1999). In *R-A*, the Board of Immigration Appeals reversed an immigration judge’s grant of asylum to a Guatemalan woman, Rody Alvarado, who suffered over a decade of horrific abuse at the hands of her spouse, a former soldier in the Guatemalan military. After ten

It was only in 2014 that the Board of Immigration Appeals issued a precedential decision in *In re A-R-C-G-* recognizing domestic violence as a basis for asylum.<sup>120</sup> Using the modern three-element formulation of particular social group, the Board granted asylum to a woman who was persecuted by her spouse on account of membership in the group “married women in Guatemala who are unable to leave their relationship.”<sup>121</sup>

*A-R-C-G-* was short-lived. The Trump administration clawed back protection for domestic violence survivors in *In re A-B-* in 2018, which overruled *A-R-C-G-*.<sup>122</sup> The Attorney General in broad strokes stated that *A-R-C-G-* was “wrongly decided” and that “claims . . . pertaining to domestic violence . . . perpetrated by non-governmental actors will not qualify for asylum.”<sup>123</sup> More specifically, he concluded that the particular social

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years of winding through the immigration appeals process following the Board’s decision, an immigration judge granted asylum to Ms. Alvarado in 2009 after the Attorney General and the Department of Homeland Security conceded her eligibility for asylum. Ms. Alvarado therefore eventually obtained protection in the United States, but the decision was not precedential, and advocates and adjudicators cannot rely on it. See *Matter of R-A-*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/our-work/matter-r-a-> [https://perma.cc/K5QL-82KW].

120. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 391 (B.I.A. 2014), *overruled by In re A-B-* (A-B- I), 27 I. & N. Dec. 316 (Att’y Gen. 2018), and *In re A-B-* (A-B- II), 28 I. & N. Dec. 199 (Att’y Gen. 2021), *vacated by In re A-B-* (A-B- III), 28 I. & N. Dec. 307 (Att’y Gen. 2021).

121. *A-R-C-G-*, 26 I. & N. Dec. at 389.

122. *A-B- I*, 27 I. & N. Dec. at 316 (citing *A-R-C-G-*, 26 I. & N. Dec. 388). Another Trump administration decision, *In re L-E-A-*, impacted gender-based violence claims in a more indirect but still significant way when it held that families generally no longer qualify as particular social groups, overturning decades of precedent. 27 I. & N. Dec. 40, 42–43 (B.I.A. 2017). Many gender-based violence survivors relied on family as their particular social group since membership in their family was the reason they were targeted. See *Particular Social Group Practice Advisory: Applying for Asylum Based on Membership in a Particular Social Group*, NAT’L IMMIGRANT JUST. CTR. 20 (July 2021), <https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-applying-asylum-based-membership-particular> [https://perma.cc/E7WG-ZVC9]. The Biden administration vacated *L-E-A-* in 2021. *In re L-E-A-*, 28 I. & N. Dec. 304 (Att’y Gen. 2021).

123. *A-B- I*, 27 I. & N. Dec. at 320, 333. The Attorney General may direct the BIA to refer a decision to them for review, and the Attorney General has the power to overrule Board of Immigration Appeals precedent. 8 C.F.R. § 1003.1(h)(1)(i) (2021).

group in *A-R-C-G* did not satisfy the three requirements to constitute a cognizable particular social group.<sup>124</sup> The Attorney General resurrected the Board's reasoning in *In re R-A*, which characterized domestic violence as private violence based on personal relationships that does not warrant asylum protection.<sup>125</sup> The Biden administration has since vacated *A-B*, reinstating *A-R-C-G* as precedent.<sup>126</sup>

Despite the vacatur of *A-B*, challenges remain. First, courts of appeals have relied on *A-B* to deny asylum to applicants fleeing gender-based violence in the private sphere.<sup>127</sup> Even after its vacatur, the Fifth Circuit in particular continues to rely on the reasoning in *A-B* to reject proposed particular social groups and deny asylum to domestic violence survivors.<sup>128</sup> Second, some adjudicators apply *A-R-C-G* narrowly and only accept social

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124. *A-B-I*, 27 I. & N. Dec. at 334–36 (citing *A-R-C-G*, 26 I. & N. Dec. 388).

125. *Id.* at 336–39 (citing *In re R-A*, 22 I. & N. Dec. 906, 918 (B.I.A. 1999)).

126. *In re A-B* (A-B-III), 28 I. & N. Dec. 307 (Att'y Gen. 2021). The administration has expressed an intention to promulgate regulations, although it is unclear how and to what extent they will protect individuals fleeing gender-based violence. *Id.* at 308.

127. See, e.g., *Gonzales-Veliz v. Barr*, 938 F.3d 219 (5th Cir. 2019) (rejecting the proposed social group of “Honduran women unable to leave their relationship” under *A-B-I* as impermissibly circular and for failing to satisfy the social distinction and particularity requirements); *Amezcu-Preciado v. U.S. Att’y Gen.*, 943 F.3d 1337 (11th Cir. 2019) (rejecting the proposed social group of “women in Mexico who are unable to leave their domestic relationships” under *A-B-I* as impermissibly circular, not socially distinct, and not defined with sufficient particularity); *S.E.R.L. v. Att’y Gen.*, 894 F.3d 535 (3d Cir. 2018) (rejecting the proposed social group of “immediate family members of Honduran women unable to leave a domestic relationship” because it is not socially distinct).

128. See *Lopez-Perez v. Garland*, 35 F.4th 953, 954 (5th Cir. 2022) (rejecting the proposed social groups of “Salvadoran women in domestic relationships who are unable to leave” and “Salvadoran women who are viewed as property by virtue of [their] position in a domestic relationship”); *Jaco v. Garland*, 24 F.4th 395 (5th Cir. 2021) (rejecting the proposed social group of “women in Honduras unable to leave their domestic relationships”). The Fifth Circuit in *Jaco* acknowledged the vacatur of *A-B-I* and *II* and the reinstatement of *A-R-C-G*. *Jaco*, 24 F.4th at 403–05. However, it ultimately concluded that its decision in *Gonzales-Veliz*, 938 F.3d at 219, which rejected the proposed social group of “Honduran women unable to leave their relationship” and which was issued while *A-B-I* and *II* were good law, was correctly decided and remained the law of the circuit. *Jaco*, 24 F.4th at 404–05. The Fifth Circuit explained that its decision in *Gonzales-Veliz* “relied on *A-B-I* not out of deference to it but based on the quality of its reasoning” that the proposed social group was defined by reference to the persecution and thus impermissibly circular, which remained

groups involving married women, thus excluding women who are abused in other types of intimate and familial relationships.<sup>129</sup> Third, the requirements of particular social group claims remain difficult to satisfy for all applicants relying on this protected ground, but particularly for those applicants fleeing gender-based violence.<sup>130</sup> Many adjudicators rigidly apply the requirements to exclude claims involving domestic violence.<sup>131</sup> Finally, the executive branch retains the ability to meddle in asylum doctrine.<sup>132</sup> The Biden administration's efforts to return asylum doctrine to the 2014 status quo easily could be undone by a subsequent administration bent on closing the doors of the United States to asylum seekers. The seesaw of asylum doctrine over the past two decades demonstrates the fragility of pegging

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valid even after *A-B- III* vacated *A-B- I*. *Id.* at 405 (spacing added for readability). The Fifth Circuit also concluded that the Board's interpretation of particular social group in *A-R-C-G-* was unreasonable, and thus declined to afford it *Chevron* deference. *Id.* at 405. In *Lopez-Perez*, the Fifth Circuit confirmed that *Jaco* and *Gonzales-Veliz* remained the law of the circuit. 35 F.4th at 958.

129. See, e.g., *Jaco*, 24 F.4th at 399 (explaining that the immigration judge had rejected the proposed social group of "women in Honduras unable to leave their domestic relationships" in part because "Jaco and her former partner were never married"). In one asylum case involving domestic violence that the author litigated in 2016, the immigration judge confirmed that the asylum seeker was married to her abusive partner before granting asylum. The immigration judge explained on the record that he did not agree with *A-R-C-G-*'s reasoning and thus would not extend it to unmarried women.

130. See *In re A-B- (A-B- I)*, 27 I. & N. Dec. 316, 334–36 (Att'y Gen. 2018) (explaining the challenges of satisfying the three elements in the context of social groups proposed by individuals fleeing domestic violence), vacated by *In re A-B- (A-B- III)*, 28 I. & N. Dec. 307 (Att'y Gen. 2021).

131. See, e.g., *Del Carmen Amaya-De Sicaran v. Barr*, 979 F.3d 210 (4th Cir. 2020) (rejecting the proposed social group of "married El Salvadoran women in a controlling and abusive domestic relationship" as impermissibly circular); *Gonzales-Veliz*, 938 F.3d at 230–32 (rejecting a proposed social group involving women who are unable to leave relationships for failing to satisfy the particularity requirement because they encompass "broad swaths of society" (quoting *A-B- I*, 27 I. & N. Dec. at 335)); *Rivas-Durán v. Barr*, 927 F.3d 26 (1st Cir. 2019) (rejecting a proposed social group based on a domestic relationship where the applicant did not live with the persecutor).

132. See *Cox & Rodríguez*, *supra* note 11, at 462–64 (explaining that "the admission of refugees and asylum claimants is managed primarily by the Executive [branch]" and that the president "has the power to overhaul the immigration screening system even in the absence of congressional action"); see also *Shah*, *supra* note 1, at 176 (critiquing the Obama administration for not exercising its "great discretionary power" to reverse the history of anti-LGBTQ+ discrimination in immigration law).

gender-based violence claims to the particular social group ground.

### C. GENDER-BASED CLAIMS UNDER POLITICAL OPINION

Some gender-based violence survivors utilize the political opinion ground in their asylum claims. Using this ground for gender-based violence is challenging because many adjudicators interpret it narrowly, focusing on traditional public speech about the government, political entities, and public officials. Some adjudicators are reluctant to broaden the scope of political opinion claims to encompass resistance within the home to the patriarchy and societal norms.

Political opinion claims require an asylum seeker to have a political opinion and to fear persecution on account of that opinion.<sup>133</sup> A political opinion need not be verbally expressed. An asylum seeker's actions may be sufficient to show a political opinion.<sup>134</sup> Asylum law also recognizes imputed political opinion claims, whereby the persecutor attributes a political opinion to the asylum seeker, regardless of the asylum seeker's actual views.<sup>135</sup> An asylum seeker must show a nexus or connection between their political opinion or a political opinion imputed to them and the persecution they fear.<sup>136</sup> Persecution as a result of the *persecutor's* political opinion does not give rise to a cognizable asylum claim.<sup>137</sup>

Common political opinion claims involve statements or actions in the public sphere against a government or against political bodies and officials.<sup>138</sup> However, political opinion claims can extend beyond words and actions that are political in the traditional sense. The United Nations High Commissioner for Refugees supports an expansive interpretation, explaining that political opinion is “understood in the broad sense, to incorporate any

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133. *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

134. *See Saldarriaga v. Gonzales*, 402 F.3d 461, 466 (4th Cir. 2005) (explaining that “[l]ess overtly symbolic acts may also reflect a political opinion” if “motivated by an ideal or conviction of sorts”).

135. *See, e.g., Uwais v. U.S. Att’y Gen.*, 478 F.3d 513, 517 (2d Cir. 2007); *In re S-P-*, 21 I. & N. Dec. 486, 497 (B.I.A. 1996).

136. *See, e.g., Guerrero v. Holder*, 667 F.3d 74, 77 (1st Cir. 2012).

137. *Elias-Zacarias*, 502 U.S. at 482.

138. *See, e.g., Xinbing Song v. Sessions*, 882 F.3d 837 (9th Cir. 2018); *Vincent v. Holder*, 632 F.3d 351 (6th Cir. 2011); *Tarubac v. INS*, 182 F.3d 1114 (9th Cir. 1999).



opinion on any matter in which the machinery of State, government, *society*, or policy may be engaged.”<sup>139</sup> Similarly, the Ninth Circuit has long recognized that an asylum applicant need not “espouse political theory” to have a political opinion.<sup>140</sup>

In the context of gender-based violence, the most successful political opinion cases in the federal courts deal with persecution in the public sphere. More specifically, these cases involve women who refuse to participate in political activities or hold, or are perceived to hold, views contrary to those espoused by political groups. The persecutors generally are strangers and are not in a domestic relationship with the asylum seekers.<sup>141</sup>

Where the persecution happens in the private sphere at the hands of a domestic partner or former domestic partner, courts have been more reluctant to grant asylum under political opinion. Establishing nexus is a challenge in these cases. Courts routinely have held that the harm in such cases is not politically motivated, but rather driven by the “personal” behavior of the abuser.<sup>142</sup> For example, the Sixth Circuit denied asylum to an

139. UNHCR, *Gender*, *supra* note 2, at para. 32.

140. *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000).

141. *Lopez-Galarza v. INS.*, 99 F.3d 954 (9th Cir. 1996) (holding that a Nicaraguan woman who was accused of supporting the contras, detained, and raped by Sandinista military members was persecuted on account of political opinion); *In re D-V.*, 21 I. & N. Dec. 77 (B.I.A. 1993) (holding that a Haitian woman who was gang raped by soldiers after expressing political views in favor of the former president suffered persecution on account of political opinion). *But see Hernandez-Rodriguez v. INS*, No. 95-70012, 1996 U.S. App. LEXIS 4796 (9th Cir. Mar. 5, 1996) (granting asylum to a woman who had previously been romantically involved with her persecutor where he beat, raped, and threatened her after she ceased involvement in a Sandinista youth group and Sandinista activities).

142. *See Cruz-Burgos v. INS*, No. 92-70772, 1994 WL 192402, at \*1 (9th Cir. May 13, 1994) (“[T]he Lieutenant’s affronts to Cruz-Burgos were sexual, not political in their motivation.”); *see also Aldana-Ramirez v. Garland*, No. 20-60871, 2022 WL 458386, at \*1 (5th Cir. Feb. 15, 2022) (concluding that substantial evidence supported the Board’s decision that the applicant was “a victim of domestic violence” and was not persecuted on account of her political opinion of “opposition to unchallenged male dominance and aggression . . . .”); *Y.V.Z. v. Att’y Gen.*, 492 F. App’x 291, 296 (3d Cir. 2012) (upholding the Board of Immigration Appeals’ decision concluding that the Peruvian applicant was not persecuted on account of her political opinion but rather because of “purely personal reasons,” which included the abuser’s “personal, aberrant desire to become [the applicant]’s boyfriend”); *Campos-Guardado v. INS*, 809 F.2d 285, 288 (5th Cir. 1987) (affirming the Board’s conclusion that the persecutor’s “threats of reprisal were personally motivated—to prevent her from exposing his identity—and that there was no indication he maintained an interest in her

applicant fleeing physical and sexual violence as well as forced confinement by a domestic partner.<sup>143</sup> The Sixth Circuit concluded that the applicant failed to connect the abuse to her anti-machismo political opinion despite the fact that her partner beat her after she confronted him about his infidelity.<sup>144</sup> It characterized the abuse as happening “whenever he felt irritated,” reflecting its view of the violence as driven by the personal characteristics of the abusive partner.<sup>145</sup> The Sixth Circuit even doubted whether the applicant held a political opinion because she “only spoke out against machismo to [her domestic partner], and never expressed any type of political opinion to anyone else in that country.”<sup>146</sup> This narrow view of nexus and political opinion fails to consider the expressive nature of the applicant’s confrontation of her partner and the broader context of domestic violence as a means of asserting dominance and maintaining coercive control.

On the other hand, some adjudicators have slowly begun to recognize feminism as a political opinion, especially in the public sphere. As early as the 1990s, the Third and Ninth Circuits accepted the expression of feminist beliefs in the public sphere in defiance of government policy as a political opinion.<sup>147</sup> Success-

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because of her political opinion . . .”) (internal quotation marks omitted).

143. *Zometa-Orellana v. Garland*, 19 F.4th 970, 974, 977–78 (6th Cir. 2021).

144. *Id.* (concluding that because the applicant did not point to evidence that her abuser attacked her after she expressed her political opinion and how her actions were connected to her anti-machismo beliefs, “it is not clear whether [she] ever asserted her rights as a woman in a way that would demonstrate a nexus between her political opinion and her persecution”).

145. *Id.* at 974.

146. *Id.* at 977.

147. *See Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (“[I]f the petitioner’s political opinion is defined simply as ‘feminism,’ . . . we have little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes.”); *see also Moghaddam v. INS*, No. 93-70854, 1996 WL 341965, at \*2 (9th Cir. June 19, 1996) (“We note . . . that ‘feminism’ more appropriately refers to a political opinion . . .”). In *Lazo-Majano v. INS*, the Ninth Circuit granted asylum in 1987 under the political opinion ground to a woman who faced sexual violence for months at the hands of her employer who was a member of the armed forces. 813 F.2d 1432 (9th Cir. 1987). Although not explicitly naming it a “feminist” political opinion, the majority rejected the Board of Immigration Appeals’ determination that the violence was “strictly personal.” *Id.* at 1434. The majority concluded that the applicant faced persecution because she asserted an opinion contrary to the persecutor’s opinion that “a man has a right to dominate” the opposite sex when she fled from him and because the persecutor viewed her as politically subversive. *Id.* at 1435; *see also John T. Noonan, Jr., Lazo-Majano: Alive, Well, and Thriving at Twenty-Seven*, 28 HARV. HUM.

ful cases involving feminism in the private sphere are more recent but published cases are rare. The Ninth Circuit reaffirmed that feminism is a political opinion in a 2021 precedential decision involving an applicant who suffered domestic abuse at the hands of two partners after “assert[ing] her rights as a woman” and her “autonomy.”<sup>148</sup> The Court stated that the asylum seeker’s testimony that “there should be equality in opinions[] and in worth” between the sexes, in combination with her actions such as working outside the home was sufficient to constitute a political opinion.<sup>149</sup> She did not need to engage in “feminist ‘electoral’ activities” to have a feminist political opinion.<sup>150</sup>

Some unpublished decisions also have recognized feminism as a political opinion and granted asylum in the context of resistance to male dominance in the private sphere.<sup>151</sup> The Center for Gender and Refugee Studies surveyed gender-based asylum cases, including unpublished immigration judge decisions, from December 1994 to May 2012.<sup>152</sup> Out of 140 decisions where immigration judges and the Board of Immigration Appeals granted relief, five percent were based on political opinion or imputed political opinion related to resistance to domestic violence.<sup>153</sup>

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RTS. J. 1, 6 (2015) (recounting the Ninth Circuit’s decision concluding that Olimpia Lazo-Majano suffered persecution on account of political opinion when she was sexually abused by a sergeant in the Salvadoran military).

148. *Rodriguez Tornes v. Garland*, 993 F.3d 743, 752–53 (2021) (alteration in citation).

149. *Id.*

150. *Id.* (quoting *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007)).

151. Immigration judge decisions are not published, and immigration judges typically render nonpublic oral decisions in asylum cases. Most Board of Immigration Appeals decisions also are not published. Although previously unavailable to the public, a recent settlement will make Board decisions available online in the future. See *Historic FOIA Settlement Levels Legal Playing Field for Immigrant Advocates*, N.Y. LEGAL ASSISTANCE GRP. (Feb. 10, 2022), <https://nylag.org/historic-foia-settlement-levels-legal-playing-field-for-immigrant-advocates> [https://perma.cc/SV6Z-JJRS]. See generally Faiza W. Sayed, *The Immigration Shadow Docket*, 117 NW. U. L. REV. 893, 909–15 (2023) (discussing public access to unpublished Board of Immigration Appeals decisions).

152. Bookey, *supra* note 95, at 107. The Center for Gender and Refugee Studies collects outcomes for gender-based asylum cases from attorneys who participate in its technical assistance program. See Jastram & Maitra, *supra* note 95, at 66–67 & n.81 (describing the Center for Gender and Refugee Studies’ extensive database of gender-based violence-related asylum case outcomes).

153. Bookey, *supra* note 95, at 119–21. Women showed their political opinion by “engaging in physical resistance of abuse, filing for protective orders, and seeking help . . .” *Id.* at 131.

More recent data from the Center show that in the two years after *In re A-B* significantly restricted particular social group-based domestic violence claims, some women successfully won asylum before immigration judges for “feminism-related” political opinions.<sup>154</sup>

Although the political opinion ground shows some promise for gender-based claims, especially those arising in the public sphere, asylum applicants generally do not rely on political opinion for gender-based violence.<sup>155</sup> Due to the lack of precedential decisions, many adjudicators fail to properly credit the political nature of resisting patriarchal societal attitudes in both the private and public spheres.<sup>156</sup> These adjudicators instead view gender-based claims, especially those that arise in the private sphere, as personal in nature and deny asylum for failure to connect the harm to a political opinion.<sup>157</sup> Asylum law continues to

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154. *Two Years After Matter of A-B: Litigation Update*, CTR. FOR GENDER & REFUGEE STUD. 11 (Sept. 2020) (on file with the author); *see also* Jastram & Maitra, *supra* note 95, at 78–79 & n.136 (“In some of these cases [grants in domestic violence cases based on political opinion as reported to the Center for Gender and Refugee Studies], the immigration judges reportedly cited to favorable case law on feminist beliefs.”). For example, one immigration judge granted asylum to a Salvadoran woman for her “political opinion related to women’s rights and equality” when she was threatened with sexual violence while living independently. *Two Years After Matter of A-B: Litigation Update, supra*.

155. *See* DREE K. COLLOPY, *ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* 390 (8th ed. 2019) (“Typically, in gender-based asylum claims the persecutory acts are alleged to be motivated by the applicant’s membership in a [particular social group] . . .”).

156. *See, e.g.,* *Ortez-Lopez v. U.S. Att’y Gen.*, 288 F. App’x 565, 570 (11th Cir. 2008) (concluding that a Nicaraguan woman, who reported a robbery of her home by a Poxis member and subsequently was attacked by six Poxis members, failed to demonstrate that the attack was on account of her political opinion); *Castillo-Hernandez v. U.S. Att’y Gen.*, 297 F. App’x 894 (11th Cir. 2008) (concluding that a Mayan woman from Guatemala failed to connect her rape by an ex-guerrilla to an imputed political opinion); *Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2001) (concluding that “[t]here is no evidence that the rapists imputed a political opinion to [the asylum seeker]”); *Basova v. INS*, No. 98-9540, 1999 WL 495640, at \*3 (10th Cir. July 14, 1999) (holding that the asylum seeker did not connect her rapes to her political opinion); *Villanueva v. INS*, No. 98-70225, 1999 WL 594818, at \*1 (9th Cir. Aug. 6, 1999) (holding that the asylum seeker did not connect her sexual assault at the hands of men associated with a political party with her political beliefs); *Grajo v. INS*, No. 96-3894, 1997 WL 464095, at \*4 (7th Cir. Aug. 4, 1997) (“[T]he [asylum seekers] do not point to any facts supporting an inference that she was attacked because of her political opinions or viewpoints.”).

157. Many adjudicators view claims arising in the private sphere as “personal rather than political in nature . . . . The abuse, therefore, is not a political

“favor[] claims . . . where the political opinion is stated in the classic form of joining a political group and engaging in public activities of a political nature, and where the persecution occurs by strangers with a clearly articulated political goal.”<sup>158</sup> In light of the limitations of the political opinion and particular social group grounds, religion is an alternative basis for asylum when the persecutor’s views stem from their interpretation of a religion.

### III. RELIGION-BASED ASYLUM CLAIMS

Freedom of religion is a fundamental and universal human right as well as a key civil right in the United States.<sup>159</sup> The religion ground for asylum holds special importance in the United States, as highlighted by case law and targeted legislation for religion-based claims.<sup>160</sup> This ground has rich potential for asylum claims involving gender-based violence. This Part introduces the religion ground for asylum, beginning with a general overview of the doctrine. This ground is most frequently raised for persecution in the public sphere. This Part then proceeds to analyze the current use of religion for asylum claims involving gender-based violence in the private sphere.

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act but merely an unfortunate situation that has occurred due to various psychological and social factors.” Cianciarulo, *supra* note 13, at 120 (collecting cases where adjudicators concluded that gender-based violence in the private sphere was not on account of political opinion).

158. *Id.*

159. G.A. Res. 217 (III), Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 18, Dec. 16, 1966, 999 U.N.T.S. 171; U.S. CONST. amend. I. *See generally* Karen Musalo, *Claims for Protection Based on Religion or Belief: Analysis and Proposed Conclusions*, 16 INT’L J. REFUGEE L. 165, 171–74 (2004) (discussing international law relating to religious freedom).

160. *See, e.g.*, International Religious Freedom Act of 1998, Pub. L. No. 105-292, § 605, 112 Stat. 2787, 2814–15 (codified as amended at 22 U.S.C. § 6474) (creating an independent Commission on International Religious Freedom that trains asylum officers and immigration judges on religious persecution); Act of Nov. 21, 1989, Pub. L. No. 101-167, §§ 599D, 599E, 103 Stat. 1261–64 (creating pathways to citizenship for refugees fleeing Vietnam and the Soviet Union, among other countries, on account of religious or political persecution); *see also* *Shi v. U.S. Att’y Gen.*, 707 F.3d 1231, 1236 (11th Cir. 2013) (“[S]uppression of religious practice is precisely the kind of persecution from which Congress sought to protect refugees.”); *see also* Michael J. Churgin, *Is Religion Different? Is There a Thumb on the Scale in Refugee Convention Appellate Court Adjudication in the United States? Some Preliminary Thoughts*, 51 TEX. INT’L L.J. 213, 228 (2016) (“[C]ourt of appeals judges seem somewhat sympathetic to asylum and withholding religious persecution claims . . . but more research is needed.”).

## A. OVERVIEW

The concept of religion in refugee and asylum law is broad. Guidelines promulgated by the United Nations High Commissioner for Refugees state that religion includes “freedom of thought, conscience or belief.”<sup>161</sup> The guidelines also explain that religion “broadly covers acts of failing or refusing to observe a religion or to hold any particular religious belief.”<sup>162</sup> The guidelines recognize three distinct types of religion-based claims: religion as a belief; religion as an identity; and religion as a way of life.<sup>163</sup>

The guidelines define “belief” as “theistic, non-theistic, and atheistic beliefs [that] may take the form of convictions or values about the divine.”<sup>164</sup> Asylum claims based on persecution for religious beliefs may involve people who are harmed for converting to another religion or practicing their religion as well as individuals who are prevented from practicing their religion.<sup>165</sup>

Religion as an identity “can refer to one’s membership in a community that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry.”<sup>166</sup> In these types of cases, persecutors may not target a person for their “religious practices per se” but rather for simply identifying with a particular religion.<sup>167</sup> In certain situations, religion as identity is tied to ethnicity, and individuals may be targeted even if they personally do not identify as religious. Persecutors often target people for their religious identities because they view them as a threat to their own identities.<sup>168</sup>

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161. U.N. High Comm’r for Refugees, *Guidelines on International Protection: Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, para. 4, U.N. Doc. HCR/GIP/04/06 (Apr. 28, 2004) [hereinafter UNHCR, *Religion*].

162. *Id.*

163. *Id.* at para. 5; see also T. Jeremy Gunn, *The Complexity of Religion and the Definition of “Religion” in International Law*, 16 HARV. HUM. RTS. J. 189, 200–05 (2003) (expounding upon the three types of religion claims).

164. UNHCR, *Religion*, *supra* note 161, at para. 6.

165. Gunn, *supra* note 163, at 200–01.

166. UNHCR, *Religion*, *supra* note 161, at para. 7.

167. *Id.*

168. Gunn, *supra* note 163, at 203.

Religion as a way of life can include clothing, rituals, and customs that are associated with religion.<sup>169</sup> An individual's beliefs in this context can differ from the beliefs of adherents of other religions and from the laws of a state. Additionally, adherents of the same religion may have different interpretations of religion as a way of life. Persecution related to differences in practicing the same religion can be persecution on account of religion.<sup>170</sup> Persecution related to religion as a way of life is most applicable to asylum claims based on gender-based violence for failing to adhere to patriarchal practices justified by religion.

To succeed on a religion-based claim, applicants must demonstrate that they possess a religious belief or characteristic.<sup>171</sup> Some adjudicators probe in detail an applicant's beliefs to determine whether they are genuine.<sup>172</sup> Alternatively, the persecutor may impute a religious belief or characteristic on the applicant, even if the applicant does not hold that belief or possess that characteristic.<sup>173</sup>

Asylum seekers also must show that the harm they suffered rises to the level of persecution.<sup>174</sup> Religion-based asylum cases

169. UNHCR, *Religion*, *supra* note 161, at para. 8; *see also* Gunn, *supra* note 163, at 204.

170. *See* Maini v. INS, 212 F.3d 1167, 1174–75 (9th Cir. 2000) (“[W]e have previously recognized that a person can be persecuted by members of the same group. . . . If an applicant can establish that others in his group persecuted him because they found him insufficiently loyal or authentic to the religious . . . ideal they espouse, he has shown persecution on account of a protected ground.”); *In re S-A-*, 22 I. & N. Dec. 1328, 1330–31 (B.I.A. 2000) (granting asylum to a Muslim woman whose father persecuted her for acting in violation of his religious beliefs).

171. *See* Fisher v. INS, 79 F.3d 955, 962 (9th Cir. 1996) (explaining that asylum applicants must show that the persecution “stemmed from [the persecutor’s] desire to single [them] out for unique punishment because of [their] actually-held or perceived-to-be-held . . . religious beliefs” (quoting *Abedini v. INS*, 971 F.2d 188, 192 n.1 (9th Cir. 1992))).

172. *See* Musalo, *supra* note 159, at 220–22 & n.314 (discussing how adjudicators “attempt to evaluate the credibility of religion-based claims by assessing the applicant’s knowledge of religion and consistency of actions with the religion”).

173. *See* Rizal v. Gonzales, 442 F.3d 84, 90 n.7 (2d Cir. 2006) (“[A]n individual who does not subscribe to a certain religion, but is nonetheless being persecuted on account of others’ perception that he does, may well be able to establish a religious persecution claim under a theory of ‘imputed religion’ . . .”) (emphasis omitted).

174. *Shi v. U.S. Att’y Gen.*, 707 F.3d 1231, 1235 (11th Cir. 2013) (explaining that persecution is an “extreme concept that does not include every sort of treatment that our society regards as offensive”).

can involve physical harm and threats of physical harm due to an asylum seeker's religious beliefs, identity, or expression.<sup>175</sup> Unlike the other protected grounds, which typically require physical harm or threats of physical harm, religious persecution also includes other forms of harm.<sup>176</sup> Prohibitions on worship and on membership in a religious community can rise to the level of persecution, even if an individual can still practice their religion in secret.<sup>177</sup> Disruption of religious services, prohibition of religious education, attempts to force someone to abandon their religion, and confiscating religious materials also can constitute persecution.<sup>178</sup>

Finally, asylum seekers must prove a nexus between the persecution and religion.<sup>179</sup> More specifically, an asylum seeker must show that the persecutor is aware of their religious beliefs or characteristics and that the persecutor harmed or will harm them because of those characteristics.<sup>180</sup> That a person who holds a religious belief is persecuted, on its own, does not merit asylum under U.S. law.<sup>181</sup> Nor does persecution as a result of the

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175. See, e.g., *Korablina v. INS*, 158 F.3d 1038, 1041 (9th Cir. 1998) (holding that a death threat to a Jewish applicant from Ukraine constituted persecution).

176. *Min Yong Huang v. Holder*, 774 F.3d 1342, 1347 (11th Cir. 2014) (explaining that some “persecutory activities . . . are unique to religious persecution”).

177. See U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, para. 72, UN. Doc. HCR/1P/4/ENG/REV.1 (Feb. 2019).

178. See *id.*; see also *Guo v. Sessions*, 897 F.3d 1208, 1215–17 (9th Cir. 2018) (holding that physical harm and forced abandonment of religious worship constituted past persecution); *Min Yong Huang*, 774 F.3d at 1347–48 (concluding that the destruction of an asylum seeker’s church, the confiscation of his bibles, and forcing him to vow not to attend church again are “forms of abuse [that are] highly relevant in determining whether a person has suffered religious persecution”); *Shi*, 707 F.3d at 1239 (concluding that “interruption of a private church service, arrest, interrogation, detention, confiscation of property [bibles], and a severe act of physical abuse” constitute religious persecution).

179. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (requiring that the persecution be on account of a protected ground); see also *Balachova v. Mukasey*, 547 F.3d 374, 384 (2d Cir. 2008) (“[A] nexus must be shown between the persecution and the victim’s race, religion, nationality, membership in a particular social group, or political opinion.”).

180. *Abedini v. INS*, 971 F.2d 188, 192 (9th Cir. 1992) (explaining that the applicant must show the persecutor was aware of their beliefs); *Alonzo v. INS*, 915 F.2d 546, 548 (9th Cir. 1990) (“[T]he [asylum applicant] must demonstrate that the government knew of his political or religious beliefs.”).

181. See *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (“This



persecutor's imposition of their own religious beliefs on the asylum seeker on its own merit protection.<sup>182</sup>

Courts have interpreted the nexus requirement fairly stringently, requiring evidence of the persecutor's specific intent to target the asylum seeker based on the asylum seeker's religion.<sup>183</sup> For example, the Ninth Circuit in *Canas-Segovia v. INS* held that a Jehovah's Witness did not qualify for asylum under the religion ground when he refused mandatory military conscription in El Salvador because of his religious beliefs.<sup>184</sup> The Ninth Circuit reasoned that the government's actions were motivated by the asylum applicant's refusal to serve, rather than his religious beliefs.<sup>185</sup>

The religion ground for asylum typically is used for claims that arise in the public sphere for what this Article terms "public expressions" of religion. Public expressions of religion involve religious activities outside the home. Common religion-based claims in the United States pertain to prohibitions on the practice of a religion,<sup>186</sup> communal worship,<sup>187</sup> and proselytizing.<sup>188</sup> Other common claims involve persecution in the public sphere

leaves a difficult question: is it a sufficient showing of a persecutor's motive to tie the activity to the persecution, when the activity may or may not be religious? In light of *Elias-Zacarias*, we must answer 'no.'").

182. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (explaining that "persecution on account of . . . political opinion . . . is persecution on account of the victim's political opinion, not the persecutor's") (internal quotation omitted).

183. See *Fisher v. INS*, 79 F.3d 955, 962 (9th Cir. 1996) ("[The asylum applicant] has the burden of showing the requisite connection between the Iranian government's acts and her religious . . . beliefs.").

184. 970 F.2d at 601.

185. *Id.* See generally Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1213–40 (1994) (providing an in-depth analysis of *Canas-Segovia*).

186. See, e.g., *Ali v. U.S. Att'y Gen.*, 931 F.3d 1327 (11th Cir. 2019) (involving a Pakistani applicant who practiced Ahmadiyya Islam and sought asylum after being forced to worship in secret to avoid violence and criminal charges); *Rusak v. Holder*, 734 F.3d 894 (9th Cir. 2013) (involving a Seventh Day Adventist Church member from Belarus who sought asylum after his parents were targeted for being church members).

187. See, e.g., *He v. Garland*, 24 F.4th 1220 (8th Cir. 2022) (involving a Chinese Christian who sought asylum after police interrupted house-church meetings, detained him, and beat him); *Shi v. U.S. Att'y Gen.*, 707 F.3d 1231 (11th Cir. 2013) (involving a Chinese Christian who sought asylum after police raided a church service in his father's home and arrested him).

188. See, e.g., *Liu v. Holder*, 718 F.3d 706 (7th Cir. 2013) (involving a Chinese Christian who sought asylum because the government did not permit her to proselytize).

for religion as an identity.<sup>189</sup> Although the religion ground is not limited to public expressions of religion, it typically is not raised in cases involving what this Article terms “private expressions” of religion, or persecution on account of religious expression in the private sphere.

#### B. CURRENT USE OF RELIGION FOR GENDER-BASED HARM

The United Nations High Commissioner for Refugees guidelines recognize that when the subordination and persecution of women stem from religion, asylum claims related to such persecution may be analyzed under the religion ground.<sup>190</sup> The guidelines stated that a woman’s resistance to social norms derived from religion “may be perceived as evidence that [she] holds unacceptable religious opinions regardless of what she actually believes.”<sup>191</sup> Despite this guidance, religion is seldom used as the primary ground for asylum in gender-based claims, especially those arising in the private sphere, and very few adjudicators focus on this ground in their decisions.

The author’s survey of nearly 180 asylum decisions involving gender-based violence in the federal courts of appeals and the Board of Immigration Appeals reveals that asylum seekers rely primarily on the particular social group ground.<sup>192</sup> The next most frequently invoked ground is political opinion. The religion ground is discussed in less than a handful of decisions.

The author’s finding that religion is not commonly used in gender-based claims is consistent with the results of the Center for Gender and Refugee Studies’ evaluation of outcomes of 206 domestic violence cases in their database, largely consisting of

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189. See, e.g., *Singh v. Holder*, 720 F.3d 635 (7th Cir. 2013) (involving an Indian Sikh seeking asylum after being targeted by police for identifying as Sikh). See generally Musalo, *supra* note 159, at 202–05 (providing various examples of religion-based asylum claims).

190. UNHCR, *Gender*, *supra* note 2, at para. 25.

191. *Id.*

192. In order to determine which grounds an asylum seeker raised, the author relied on the facts presented in the federal and administrative decisions, which frequently listed the grounds the asylum seeker raised. Sometimes, asylum seekers may list additional grounds on their asylum applications that they later abandon during proceedings. Because the actual applications filed by asylum seekers are not publicly available, it is impossible to determine with certainty which grounds an asylum seeker raised in their application. Nevertheless, the federal and administrative decisions provide useful information concerning the grounds upon which the asylum seeker actually relied.

oral and unpublished administrative decisions.<sup>193</sup> The Center found that between December 1994 and May 2012, immigration judges and the Board of Immigration Appeals granted asylum under the religion ground in only five percent of the 140 successful asylum or withholding of removal cases in their database.<sup>194</sup> Two of these cases involved “women from Muslim countries, Uganda and Indonesia, whose partners held fundamentalist beliefs regarding the role of women.”<sup>195</sup> The Center found that an immigration judge denied one case based on a “lack of religion.”<sup>196</sup>

Between 2018 and 2020, the Center found that some immigration judges in San Francisco granted asylum under the religion ground to applicants fleeing domestic violence.<sup>197</sup> For example, “a few” cases involved an applicant who faced domestic violence after refusing to attend their partner’s church or attended church despite the disapproval of their father or partner.<sup>198</sup> In another case, an immigration judge granted asylum under the religion ground to a woman whose partner and in-laws abused her because of her belief in her right to contraception, which was contrary to their religious beliefs.<sup>199</sup>

There are very few published decisions involving religion and gender-based violence. Some precedential cases involving gender-based violence and the religion ground arise in the public sphere and involve resistance to Iran’s laws requiring women to conform to a strict moral code derived from the government’s interpretation of Islam.<sup>200</sup> These cases generally raise multiple grounds for asylum and largely have been unsuccessful for a variety of reasons.<sup>201</sup> One of the most prominent decisions raising religion is *Fisher v. INS*, which denied relief to an applicant who feared persecution for violating Iranian dress and conduct

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193. See Bookey, *supra* note 95, at 119–21 (explaining the Center for Gender and Refugee Studies’ database of asylum case outcomes).

194. *Id.*

195. *Id.* at 131.

196. *Id.* at 121.

197. *Two Years After Matter of A-B: Litigation Update*, *supra* note 154.

198. *Id.*

199. *Id.*

200. See, e.g., *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

201. See, e.g., *id.* (raising political opinion and religion); see also Musalo, *supra* note 159, at 214–15 & n.277 (dissecting court opinions denying asylum under the religion and particular social group grounds to Iranian women for claims related to “repressive social norms”).

rules.<sup>202</sup> The Ninth Circuit ultimately concluded that there was no evidence that the Iranian government persecuted the applicant because of her religious beliefs.<sup>203</sup>

Precedential religion-based claims involving persecution in the private sphere are even rarer than those that arise in the public sphere. *In re S-A-* is the only published Board of Immigration Appeals case to grant asylum under the religion ground to an individual fleeing gender-based persecution in the private sphere. This case lays the groundwork and provides the starting point for this Article's analytical framework for private expressions of religion. The asylum seeker in *S-A-* was abused by her father at least once per week, including being burned for wearing a "somewhat short skirt," hit in the face for speaking with a young man in public, and beaten for sneaking out of the house.<sup>204</sup> The asylum seeker attributed the abuse to "religious differences between her and her father, i.e., the father's orthodox Muslim beliefs . . . and her liberal Muslim views."<sup>205</sup>

The Board relied on the religion ground in granting asylum, but its discussion of the facts and its analysis are thin. The Board explained that the asylum seeker's father abused her "because of his orthodox Muslim beliefs regarding women and [the applicant]'s refusal to share or submit to his religion-inspired restrictions and demands."<sup>206</sup> In its decision, the Board did not expound further upon the religious beliefs of the asylum seeker or the father. The Board's only discussion of the asylum seeker's religious beliefs was that they "differed from those of her father concerning the proper role of women in Moroccan society."<sup>207</sup> The Board also did not reference any direct statements by the father that his beliefs concerning the proper role of women came from religion. However, the asylum seeker and a witness ascribed his

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202. *Fisher*, 79 F.3d at 973.

203. *Id.* at 962–63 (holding that the applicant "failed to show that Iran punished her because of her religious . . . beliefs, or that, if she returned to Iran, she would violate the [dress and conduct] regulations because of her beliefs").

204. *In re S-A-*, 22 I. & N. Dec. 1328, 1329 (B.I.A. 2000). *S-A-* is a domestic violence case—although it does not involve intimate partner violence, it involves abuse of a family member.

205. *Id.*

206. *Id.* at 1336.

207. *Id.*

conduct to his religious beliefs, which the Board seemed to accept.<sup>208</sup>

Additionally, the Board's discussion of nexus is sparse. The Board did not deeply probe the nexus between the persecution and the asylum seeker's religious views. What is clear from the opinion is that the father abused the asylum seeker to express his disapproval for her actions and that the asylum seeker believed his views on the role of women stemmed from his religious beliefs. The links to the asylum seeker's religious beliefs are less clear: there is no evidence in the decision that the father knew the asylum seeker's actions reflected her differing views of religion. It is not clear whether the father harmed the asylum seeker for disobeying his religious views, which on its own would not satisfy nexus, or for her own religious views, which would.

This is not to say that *S-A-* was wrongly decided. Rather, it is to point out that although *S-A-* provides a useful starting point for analyzing gender-based claims arising in the private sphere under the religion ground, there are gaps in the analysis which would benefit from a coherent framework for private expressions of religion.

#### IV. GENDER-BASED VIOLENCE AS RELIGIOUS PERSECUTION

This Part provides a framework for understanding and analyzing asylum claims involving gender-based violence in the private sector under the religion ground. It begins by examining the general links between patriarchy and religion and exploring the differences in beliefs among religious adherents concerning religion and the status of women. Given these differing religious views, this Article advocates for resistance to patriarchal practices justified by religion to constitute religious expression. This Part ends with a caution against essentializing religions, namely Islam, when exploring the use of religion in gender-based claims involving patriarchal practices.

##### A. RELIGION AND PATRIARCHY

No religion is a monolith. Adherents of a religion, religious leaders, and scholars of religion frequently disagree about both the fundamentals and nuances of a religion. This is especially

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208. *Id.* at 1329–30; see *infra* notes 247–50 and accompanying text (analyzing adjudicators' willingness to unquestioningly attribute patriarchal practices to Islam).

true concerning the contemporary role of religion in upholding or challenging patriarchal practices and the subordination of women in both public and private spaces.

A general feminist critique of religion explains how certain religious beliefs and practices can reaffirm the patriarchy and subordinate women.<sup>209</sup> Feminist critique explains that gender, religion, and patriarchy are social constructs that work in conjunction to organize society.<sup>210</sup> Religion and patriarchy can interact to empower or subordinate a person, depending on their gender.<sup>211</sup> Gender-based violence and gender-based restrictions in both the public and private spheres are patriarchal tools of social control that can be bolstered by religion.

Each of the five major world religions—Buddhism, Christianity, Hinduism, Islam, and Judaism—is connected to patriarchy.<sup>212</sup> Professor Courtney Howland explains that “[t]he major religions emerged and developed in patriarchally structured societies, and their texts and traditions are imbued with patriarchy and with treating women unequally in various contexts.”<sup>213</sup> Many scholars of religion have discussed in depth how some interpretations of the major religions scaffold the patriarchy and

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209. See, e.g., KOCHURANI ABRAHAM, PERSISTING PATRIARCHY: INTERSECTIONALITIES, NEGOTIATIONS, SUBVERSIONS 143–65 (2019) (discussing how the religious beliefs of the Catholic Syrian Christian community reinforce a gendered hierarchy); Vanaja Dhruvarajan, *Religion, Spirituality, and Feminism*, in GENDER, RACE, AND NATION: A GLOBAL PERSPECTIVE 273, 274 (Vanaja Dhruvarajan & Jill Vickers eds., 2002) (“All of the major world religions are patriarchal and accord women a subordinate status in the gender hierarchy. Women are believed to be biologically and spiritually inferior to men.”).

210. Franca Attoh, *Gender, Religion and Patriarchy: A Sociological Analysis of Catholicism and Pentecostalism in Nigeria*, 4 ADVANCES SOC. SCI. RSCH. J. 158, 158 (2017) (“Gender, religion and patriarchy are foundational social constructs operating at the basis of social organization of society.”).

211. See, e.g., Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT’L L. 271, 282–324 (1997) (discussing the “obedience rule,” which is a religious norm that requires wives to submit to their husbands).

212. Religion alone cannot be blamed for patriarchal practices, subordination of women, and gender-based violence—property rights, politics, and other non-religious societal and legal norms also play a role. See generally GERDA LERNER, THE CREATION OF PATRIARCHY 212 (1986) (“Patriarchy is a historic creation formed by men and women in a process which took nearly 2500 years to its completion. . . . The roles and behavior deemed appropriate to the sexes were expressed in values, customs, laws and social roles.”).

213. Howland, *supra* note 211, at 280.

thereby promote the continued subordination of women and violence against women.<sup>214</sup> Segments within the major religions, especially conservative and fundamentalist groups, espouse strict gender roles and support religious rules that subordinate women, requiring them to submit to the authority of men.<sup>215</sup> These rules, which operate in both public and private spaces, almost always give women fewer rights than men, allowing men to control women and entrenching the patriarchy.

Examples of patriarchal rules justified by religion include those surrounding marriage, divorce, and modesty. The aim of many of these religious rules is to “serve as enforcement mechanisms to maintain women’s chastity and control their sexuality.”<sup>216</sup> Taken to extremes, attempts to control women’s sexuality can lead to domestic violence, early and forced marriage, lack of

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214. See e.g., Abdel Halim, *supra* note 36, at 203, 210–11 (“Women’s challenges to patriarchal interpretations of the Qur’an, the Sunnah, and the shari’ah have been, and are, based on the awareness of their humanity—a humanity that is, and should be, confirmed in Islam.”); Nira Yuval-Davis, *Jewish Fundamentalism and Women’s Empowerment*, in REFUSING HOLY ORDERS: WOMEN AND FUNDAMENTALISM IN BRITAIN 198, 211–14 (Gita Sahgal & Nira Yuval-Davis eds., 1992) (discussing inequalities women face when compared to men in certain traditions and interpretations of Judaism); Rosemary Radford Ruether, *Catholicism, Women, Body and Sexuality: A Response*, in WOMEN, RELIGION AND SEXUALITY: STUDIES ON THE IMPACT OF RELIGIOUS TEACHINGS ON WOMEN 221, 221 (Jeanne Becher ed., 1990) (“Roman Catholic tradition has been . . . ambivalent about women’s equivalent dignity or status in nature or creation.”).

215. See Howland, *supra* note 211, at 271 (“[A] core feature of religious fundamentalism (extending through fundamentalism in the five major religions of Buddhism, Christianity, Hinduism, Islam, and Judaism) [is] the vigorous political promotion, and legal enforcement, of gender roles whose explicit intent entails the subordination of women.”). Howland identifies the following shared criteria among fundamentalist religious groups:

[B]elieves that the group and society need to be rescued from the secular state; rejects Enlightenment norms, particularly individual rights and secularism; is committed to the authority of ancient scripture; holds a total worldview such that religious beliefs are inseparable from politics, law and culture; relies on an idealized past; is selective in drawing from the past for religious traditions and orthodox practice; centers that idealized past in a patriarchal framework mandating separate gender spheres and a “pristine morality”; rejects outsiders and the concept of pluralism; and is committed to activism and fighting for changed social, political and legal order.

*Id.* at 277–78 (citations omitted).

216. *Id.* at 283.

access to contraception, restrictions on movement and dress, female genital mutilation, and femicide, each of which has been justified by religion.<sup>217</sup>

Although each of the major world religions is linked to patriarchal practices and the subordination of women, not all adherents of a religion ascribe to patriarchal interpretations of religion. Many adherents believe that people in power, in both the public and private spheres, manipulate religious texts and doctrines to justify patriarchal practices in order to consolidate and maintain their own power and control.<sup>218</sup> Many adherents in-

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217. See generally Abdel Halim, *supra* note 36, at 206–07 (“Despite there being no foundation in Islam, a number of Muslim religious leaders have stated that [female genital mutilation] is mandatory in Islam. . . . Realizing that [female genital mutilation] serves as a means of control of women, fundamentalists quickly imported Islam into the debate to silence the voices against [it].”); Kathleen McPhillips & Sarah-Jane Page, *Religion, Gender and Violence*, 11 RELIGION & GENDER 151, 159 (2021) (“Religions play a role in upholding violent norms, whether through the disciplining of the body or through discursive control that may lead to women being harmed physically[,] sexually[,] psychologically[,] and spiritually.” (citations omitted)); Howland, *supra* note 211, at 282–324 (explaining that religious fundamentalists in multiple religious traditions believe that women’s obedience to their husbands is religious doctrine and that this belief justifies domestic violence, marital rape, child marriage, male control of reproductive decisions, isolation of women in the home, restrictive dress codes, and femicide); Mary Nyangweso & Mansi Trivedi, *Religion, Gender-Based Violence, and the Rights of the Girl Child in Kenya*, in RELIGION IN GENDER-BASED VIOLENCE, IMMIGRATION, AND HUMAN RIGHTS 129 (Mary Nyangweso & Jacob K. Olupona eds., 2020) (explaining the religious justifications for female genital mutilation); John Simister & Grazyna Kowalewska, *Gender-Based Violence and Christianity: Catholic Prevention of Divorce Traps Women in an Abusive Marriage*, 7 PSYCH. 1624, 1625 (2016) (“In particular, Catholic women may be more likely than Protestant women, to accept [gender-based violence]. Acceptance of [gender-based violence] may be related to the Catholic Church banning divorce.”); Raffi Bilek, *Violence Against Women in the Orthodox Jewish Community*, in RELIGION AND MEN’S VIOLENCE AGAINST WOMEN 105–09 (Andy J. Johnson ed., 2015) (discussing teachings in Orthodox Judaism that may contribute to violence against women).

218. See, e.g., Akram, *supra* note 15, at 15 (“As so many Muslim writers and thinkers have attested, the ideas supporting the current unequal and oppressive treatment of women in much of the Muslim world is not based on the Qur’an or Qur’anic framework, but on misinterpretations of the Qur’an by . . . patriarchal interpreters working in male-dominated systems for whom such religious interpretations serve political ends.”).



stead support the view that religion promotes equality and dignity for all people.<sup>219</sup> It is this disagreement about whether religion justifies patriarchal practices that forms the heart of this Article’s analytical framework for gender-based asylum claim under the religion ground.

#### B. RESISTING PATRIARCHAL PRACTICES JUSTIFIED BY RELIGION AS RELIGIOUS EXPRESSION

Precisely because adherents of a religion disagree about the connections between religion and patriarchal practices, opinions on either side of the debate constitute religious beliefs. An approach to asylum that is more inclusive of gender-based claims would recognize that religious expression encompasses resistance in the private sphere to patriarchal practices that are propped up by religion.<sup>220</sup> Courts should accept this resistance—a private expression of religion—as a religious belief, even if the asylum seeker does not frame it in religious terms.

Viewing disagreements about religion in the private sphere as protectable under asylum law is in line with treating the “personal as the political” as encouraged by Professor Catharine MacKinnon.<sup>221</sup> Professor MacKinnon advocates for the abolition of the differentiation between the public and private, explaining that “[t]he private is public for those for whom the personal is political.”<sup>222</sup> Applying this concept to religious beliefs, what may

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219. See, e.g., Frances Kissling, *Roman Catholic Fundamentalism: What’s Sex (and Power) Got to Do with It?*, in RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF Women, *supra* note 23, at 198 (explaining many Catholics’ rejection of the Church’s “policy and moral positions . . . on matters related to women’s rights, sexuality, and reproduction”); Abdel Halim, *supra* note 36, at 211 (“Muslim women challenging patriarchal rules . . . are seeking to invoke the best that there is in Islam and that supports them as full human beings.”); Riffat Hassan, *The Issue of Woman-Man Equality in the Islamic Tradition*, in WOMEN’S AND MEN’S LIBERATION—TESTIMONIES OF SPIRIT 80 (Leonard Grob, Riffat Hassan & Haim Gordon eds., 1991) (explaining that “according to the Qur’an, Allah created woman and man equal.”); Constance F. Parvey, in WOMEN’S AND MEN’S LIBERATION, *supra*, at 54–58 (critiquing interpretations of the Bible that justify the contemporary subordination of women and restrictions on women in church leadership).

220. This Article focuses on religious expression in the private sphere because women fleeing persecution in the private sphere face more hurdles to asylum protection than people fleeing violence in the public sphere. See *supra* notes 63–73, 90–94, 122–31, 142–46 and accompanying text.

221. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191 (1989).

222. *Id.*

seem like personal, familial disputes in the private sphere—which is how gender-based violence is often characterized—may at its core be fundamental disagreements about religious beliefs.<sup>223</sup>

Women who resist patriarchal practices that are justified using religion may not express their resistance in religious terms, however. Nevertheless, the failure to explicitly reference religion does not negate the religious nature of the opposition, which is a private expression of religion. However, adjudicators may fail to credit this opposition as a religious belief due to their views that resistance to patriarchy in the private sphere is a personal dispute that does not merit asylum protection.<sup>224</sup> With the exception of *In re S-A-*, there is a dearth of case law on what constitutes a private expression of religion.<sup>225</sup> Due to this lack of precedent, it is necessary to formalize asylum protection for private expressions of religion through case law or regulations.

The starting point for formalizing protection for private expressions of religion is the persecutor. Where a persecutor justifies a patriarchal practice using religion, that justification should constitute a religious belief under asylum law. Case law is murky as to the contours of religious beliefs, and whether it is sufficient that someone genuinely believes that a practice stems from religion.<sup>226</sup> However, United Nations High Commissioner for Refugees guidance and case law counsels that what constitutes religion should be interpreted broadly.<sup>227</sup> Additionally, the Department of Homeland Security training materials recognize that a person can hold a sincere religious belief even with imperfect knowledge of religious doctrine.<sup>228</sup> Therefore, it should be

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223. See *supra* Part II.A (critiquing adjudicators' characterization of domestic violence and other gender-based violence as personal in nature and therefore not protected under asylum law).

224. See *supra* Part II.A.

225. *In re S-A-*, 22 I. & N. Dec. 1328, 1328 (B.I.A. 2000).

226. See generally Musalo, *supra* note 159, at 169 (“To date, there has been very little interpretive guidance on religion-based claims.”).

227. See *supra* notes 161–70 and accompanying text. Moreover, people have different levels of religious education, and education more generally, and may not be able to explicitly connect their beliefs to specific religious doctrine. See *International Religious Freedom Act (IRFA) and Religious Persecution: Training Module*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC. 19–22 (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/document/foia/IRFA\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/IRFA_LP_RAIO.pdf) [<https://perma.cc/J947-52KW>].

228. See *International Religious Freedom Act (IRFA) and Religious Persecution: Training Module*, *supra* note 227, at 19 (“An individual’s lack of knowledge

sufficient that someone believes their views stem from religion to constitute a religious belief. However, a persecutor harming an asylum applicant because of the persecutor's religious beliefs is not sufficient to satisfy the nexus requirement. Nexus requires the abuse to be on account of the *asylum seeker's* religious beliefs.<sup>229</sup>

Therefore, the next step is determining whether the asylum applicant expressed a religious belief. When a person resists or opposes another person's religious beliefs, that resistance or opposition should constitute religious expression, regardless of whether they vocalize a religious justification. That person is expressing a religious opinion by countering the religious opinion of another person. This resistance to a religious practice should be sufficient to constitute religious expression to the same extent as a person's affirmative statements about religion.<sup>230</sup> Nothing more should be required.

Such resistance as religious expression is consistent with other areas of asylum doctrine which do not require asylum applicants to present formulaic recitations of the elements of asylum claims. For example, under the political opinion ground, individuals need not explicitly state that their actions reflect their "political opinion."<sup>231</sup> There are no magic words. Rather, it is the nature and context of their actions that is relevant to the determination.<sup>232</sup> The same should be true for religion-based claims. This is especially important in the private sphere, where women may not be in a position to explicitly vocalize religious resistance.

*In re S-A-* can be read through this lens of recognizing resistance to religiously-motivated patriarchal practices as private expressions of religion.<sup>233</sup> This lens supplies the missing links in

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of religious tenets does not necessarily mean the individual does not hold the belief or religious identity in question.”).

229. See *supra* notes 179, 182 and accompanying text.

230. Of course, if a person expressly states that their opposition to a practice justified by religion does not stem from their religious beliefs, such resistance is not religious expression. Nevertheless, the person may be eligible for asylum for imputed religion if the persecutor believes the resistance to stem from the person's religious beliefs. See, *supra* note 173 and accompanying text (discussing imputed religion claims).

231. See *supra* note 134 and accompanying text (explaining the nature of political opinion claims under asylum law).

232. See *id.*

233. *In re S-A-*, 22 I. & N. Dec. 1328, 1333–34 (B.I.A. 2000) (granting asylum to a Moroccan woman fleeing persecution at the hands of her father, who re-

the Board's analysis and explains its grant of asylum more fully.<sup>234</sup> In *S-A*, the persecutor's interpretation of religion required women to be confined to the private sphere and to dress in a particular way.<sup>235</sup> He abused the asylum seeker as a result of her failure to abide by his rules.<sup>236</sup> She did not explicitly state to her father that her interpretation of religion allowed her to choose what to wear and where to go.<sup>237</sup> Her defiance of his rules is nevertheless a private expression of religion.

Although the Board granted asylum in *S-A*, future cases with similar facts could run afoul of the stringent nexus requirement without a broad understanding of private expressions of religion. An adjudicator could deny asylum, relying on cases like *Canas-Segovia*, where the Ninth Circuit concluded there was no nexus to religion because the government's actions were the result of the applicant's failure to serve in the military, regardless of the reasons for his refusal.<sup>238</sup> An adjudicator could narrowly conclude on facts similar to those of *S-A* that the abuse was to punish the asylum seeker's failure to obey the father's rules and to force conformity in the future, rather than to punish the asylum seeker for her religious views.

A broader understanding of private expressions of religion would classify the asylum seeker's actions as her interpretation of their religion.<sup>239</sup> Under this lens, the abuse would be due to her actions contrary to her father's religious views, and these actions constitute an expression of her religious views. Therefore, the abuse would be to punish her for holding and acting on her contrary views of religion and would be protectible under asylum

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stricted her movements and imposed a strict dress code on her under his religious views).

234. See *supra* notes 204–08 and accompanying text (discussing shortcomings in the Board's analysis in *S-A*).

235. *S-A*, 22 I. & N. Dec. at 1329 (“The respondent stated that her father believes that ‘a girl should stay at home and should be covered or veiled all the time.’”).

236. *Id.*

237. See *supra* notes 204–08 and accompanying text.

238. *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992); see also *supra* notes 184–85 and accompanying text.

239. This reasoning assumes that the asylum seeker and persecutor are adherents of the same religion. This assumption typically will hold in cases involving private expression of religion since they primarily arise within a family, extended family, or community. See, e.g., *S-A*, 22 I. & N. Dec. at 1329 (involving an asylum seeker, a daughter, and a persecutor, her father, who both identified as Muslim).

law.<sup>240</sup> This reasoning could extend to any case involving any religion where an asylum seeker acted contrary to a persecutor's religious beliefs and faced persecution as a result.

Not only will providing protection for private expressions of religion overcome nexus-related hurdles, but it will also acknowledge and validate women's religious beliefs and agency. Women fleeing violence in the private sphere may not have been in a position to explicitly express their opinions on religion at that time. It is especially important for the asylum system and advocates to not reproduce the same "silenc[ing]" and subordination from which women are fleeing by ignoring the religious nature of their actions.<sup>241</sup>

### C. CAUTION AGAINST ESSENTIALIZING ISLAM

While encouraging exploration of religious justifications for patriarchal practices across all religions, this Article urges caution especially when asylum claims involve Muslims.<sup>242</sup> There is a tendency to unquestioningly attribute patriarchal practices involving Muslims to Islam, even if they may be wholly unrelated to the religion or may be the result of one person's interpretation or misinterpretation of the religion.<sup>243</sup> No religion is a monolith, and adjudicators and advocates should take care to distinguish between attributing a practice to the religion as a whole versus one interpretation of the religion. In addition to carefully scrutinizing the narratives they craft in advocacy and decisions involving Muslims and patriarchal practices, advocates and adjudicators should at the same time reflect on connections between other religions and patriarchal practices.

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240. This Article advocates for resistance to a practice justified by religion to constitute religious expression by the applicant, rather than relying on imputed religion. *See supra* note 173 and accompanying text (discussing the requirements of imputed religion claims). Imputed religion claims would require evidence of a persecutor's perceptions of the asylum seeker's actions, which may be unavailable.

241. *See, e.g.,* Akram, *supra* note 15, at 18 (criticizing monolithic portrayals of Islam by asylum advocates as "silenc[ing] the voice of the refugee" by "repeat[ing] in the country of refuge the very denial of self-expression that women in particular are fleeing").

242. *See supra* notes 212–17 and accompanying text (discussing the linkages of all major world religions to the patriarchy).

243. *See* Leti Volpp, *Framing Cultural Difference: Immigrant Women and Discourses of Tradition*, 22 DIFFERENCES: J. FEMINIST CULTURAL STUD. 90, 91 (2011) ("Certain narratives have traction because of already existing scripts about gender, culture, immigration, and Islam.").

Professor Edward Said in his seminal work *Orientalism* critiques the Western portrayal of Islam using “reductive, negative generalizations” and as a “unitary phenomenon, unlike any other religion or civilization, . . . that is antihuman, incapable of development, . . . and authoritarian.”<sup>244</sup> This portrayal leads to a tendency to explain all aspects of Muslim societies using a monolithic conception of Islam.<sup>245</sup> Not only is this tendency prevalent in popular discourse but also in asylum cases involving Muslims.<sup>246</sup> Islam problematically features as a monolith in decisions as well as advocates’ framing of cases, which attribute the subordination of women to the religion wholesale.

One representative example from case law involves a grant of relief to a Yemeni asylum seeker who married a woman from a higher social class without her father’s consent.<sup>247</sup> Ultimately, the Sixth Circuit acknowledged that the persecutor’s opposition to the marriage was not religious, but instead based on social

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244. EDWARD W. SAID, *ORIENTALISM* 296 (1979).

245. See Akram, *supra* note 15, at 8 (explaining that Professor Said critiques “the acute tendency of Westerners to explain every facet of Eastern/Muslim societies in light of the Muslim religion—as if there were no other reality or influence on these societies but Islam, and as if there were no complexity or diversity in the philosophies or practices of Muslim societies” (citing SAID, *supra* note 244, at 31–49)).

246. Leti Volpp, *Saving Muslim Women*, BERKELEY L. (Aug. 1, 2015), <https://www.law.berkeley.edu/article/saving-muslim-women> [<https://perma.cc/9LLZ-88AU>] (providing statements from Western media linking Islam to the subordination of women).

247. *Al-Ghorbani v. Holder*, 585 F.3d 980, 996 (6th Cir. 2009). In addition to *Al-Ghorbani*, there are other examples of adjudicators and lawyers equating Islam with patriarchal practices. See, e.g., *Kamar v. Sessions*, 875 F.3d 811, 814 (6th Cir. 2017) (“In her application, [the asylum seeker] alleged that if she returned to Jordan, under Islamic tradition, she would be subject to an honor killing . . . for bringing shame to her family by getting pregnant out of wedlock.”); *El-Moussa v. Holder*, 569 F.3d 250, 253 (6th Cir. 2009) (paraphrasing the asylum seeker’s testimony that “she has breached Islamic tradition by marrying a Christian man”); *Yadegar-Sargis v. INS*, 297 F.3d 596, 599 (7th Cir. 2002) (referencing “the Islamic dress code”); *Suhardy v. Ashcroft*, No. 00-60644, 2001 WL 803648, at \*1 (5th Cir. June 12, 2001) (describing *sirik* as “the Indonesian Islamic tradition of ritual honor killing wherein a person or family who has been shamed may remove the shame by killing the purveyor of the shame”); *Bastanipour v. INS*, 980 F.2d 1129, 1131 (7th Cir. 1992) (referencing the asylum seeker’s (or his attorney’s) characterization of conversion from Islam to Christianity as “a capital offense under Islamic religious law”); see also Akram, *supra* note 15, at 20–39 (providing examples of language in case law that essentializes Islam).

standing.<sup>248</sup> Despite the irrelevance of religion to the holding, language in the decision connected patriarchal marriage practices to Islam. More specifically, the Sixth Circuit used the phrasing “traditional, paternalistic, Islamic marriage traditions” to describe the requirement of paternal consent and the prohibition on mixed-class marriages.<sup>249</sup> It is unclear from the opinion whether the references to Islam primarily came from the asylum seeker’s lawyers, the asylum seeker himself, or the adjudicators.<sup>250</sup>

This decision problematically assumes the marriage practices stem from Islam. It also does not differentiate between the religion and interpretations of the religion. As Professor Susan Akram explains, in many cases involving Muslims,

the sources of persecution are portrayed as ‘Islamic law’ and ‘Muslim mores’ . . . . More accurately, [however], the sources of persecution are the singular interpretations of Islam enforced by patriarchal, male-dominated societies in a way that reinforces male power structures and the political hegemony of the dominant political/religious elite.<sup>251</sup>

Assuming that patriarchal practices come from religion and conflating a religion with interpretations of a religion are problematic for a number of reasons, chiefly that they stereotype an entire group of people.<sup>252</sup> Monolithic portrayals of religion can

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248. *Al-Ghorbani*, 585 F.3d at 998 (“[T]he underlying cause of the General’s wrath was his class prejudice.”). The Sixth Circuit summarized some of the relevant facts as follows: “The [persecutor] took his membership in the Hashimid class very seriously and would not accept the courtship of his daughter by someone from the meat-cutting class.” *Id.* at 984. The persecutor berated the applicant “about the superiority of [the persecutor’s] family” when rejecting his offer of marriage for his daughter. *Id.* at 985.

249. *Id.* at 996. In another part of the opinion, the Sixth Circuit describes parent-controlled marriages as a “Yemeni social norm” and “Yemeni cultural traditions.” *Id.* at 995, 998.

250. At one point in the decision, the Sixth Circuit references “Islamic marriage traditions.” *Id.* at 996. At another point, it states that the asylum applicant offered the following characteristics of the proposed social group: “people who have flaunted traditional Islamic values by marrying despite the disapproval of traditional families . . . .” *Id.* at 995; *see also* Akram, *supra* note 15, at 19–39 (providing examples of asylum advocates stereotyping or misrepresenting Islam). The other four social groups proposed by the applicant did not mention religion. *Al-Ghorbani*, 585 F.3d at 995.

251. Akram, *supra* note 15, at 18.

252. *See* Khaled A. Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1, 6 (2018) (explaining that “prevailing counterterrorism law and policy” “hold[s] Muslim identity to be presumptive of terror threat”).

silence and alienate asylum seekers who may identify as religious but hold different views of that religion.<sup>253</sup> Professor Akram explains that an advocate who ascribes the subordination of women to the religion wholesale may “close off any opportunity for the [asylum seeker] to express a dissenting belief of her own except the categorical rejection of Islam altogether, or acceptance of ‘Islam’ but with some trivial personal objection to details of how it is practiced.”<sup>254</sup> Moreover, this stereotyping artificially erects a seemingly irreconcilable divide between Muslims and the “West,” even though violence against women is endemic worldwide.<sup>255</sup>

Advocates and adjudicators should interrogate their own unconscious cognitive biases that lead them to equate Islam with the subordination of women in a way that they do not for other religions.<sup>256</sup> They must also explore their propensity to ignore or downplay the connections of patriarchal practices to other religions, especially “Western” religions.<sup>257</sup> As Professor Leti Volpp explains, there is a tendency to “equat[e] racialized immigrant culture with sex-subordination, and deny[] the reality of gendered subordination prevalent in mainstream white America.”<sup>258</sup> Focusing on the connections between patriarchy and Islam de-

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253. In the context of critiquing advocates’ representation of Muslim asylum seekers, Professor Akram explains that monolithic portrayals of Islam “repeat in the country of intended refuge the very denial of self-expression that women in particular are fleeing.” Akram, *supra* note 15, at 18.

254. *Id.*

255. See SAID, *supra* note 244, at 31–49; see also Volpp, *supra* note 243, at 91–92 (“[T]he vision underlying [some academic and popular discourse about the cultural difference of immigrants] presumes . . . the West . . . is progressive, democratic, civilized, and feminist, in contrast to immigrants— . . . most especially Muslim immigrants—as backward, barbaric, primitive, and misogynist.”).

256. See generally Caroline Mala Corbin, *Essay: Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455, 455 (2017) (using critical race theory to analyze “narratives about terrorists who attack America”).

257. See Volpp, *supra* note 243, at 91 (“[H]ow individual cases are categorized both reflects and further fuels already existing perceptions about ‘illiberal minorities’ and ‘liberal us.’”) (internal citation omitted).

258. Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMANS. 89, 115 (2000).



flects attention from the use of other religions to justify the subordination of women.<sup>259</sup> Adjudicators and advocates should explore religious justifications for patriarchal practices in other religions besides Islam.

While investigating linkages between religion and the subordination of women, adjudicators and advocates should avoid the pitfalls of essentializing and demonizing a religion by being aware of how they frame their narratives. It is important to differentiate between a religion mandating a practice and a persecutor using or misusing religion to justify a practice. The latter still constitutes a religious belief under asylum law, and also avoids the reductionist approach that leads to the stereotyping of a religion and its adherents.

### CONCLUSION

Examining asylum law through the lens of the public and private spheres shows that it falls short of equality in protecting the sexes. Asylum law favors claims arising in the public sphere, to which men have greater access, and disfavors claims arising in the private sphere, to which women are often relegated. The religion ground for asylum is no exception, where the bulk of the case law involves public expressions of religion. The religion ground has the potential to protect individuals facing violence in the private sphere for resistance to patriarchal practices justified by religion, which this Article terms gender-based religious persecution. An individual's opposition in the private sphere to a patriarchal practice justified by religion should constitute religious expression that is protectible under asylum law. The Preamble to the 1951 Refugee Convention is "based on the principle that all human beings shall enjoy fundamental rights and freedoms without discrimination."<sup>260</sup> Protecting private expressions of religion to the same extent as public expressions of religion will bring asylum law one step closer to providing equal access to protection for all people, regardless of their gender and where they face persecution.

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259. See Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1181 (2001) ("This assumption [that minority women are victims of their cultures] is achieved by a discursive strategy that constructs gender subordination as integral only to certain cultures."). See generally ABU-LUGHOD, *supra* note 15, at 4–9 (addressing misperceptions about Muslim women and their rights).

260. Einarsen, *supra* note 64, at 40.