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# ASYLUM, SOCIAL GROUP MEMBERSHIP AND THE NON-STATE ACTOR: THE CHALLENGE OF DOMESTIC VIOLENCE

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Michael G. Heyman\*

*This Article argues that the current approaches to asylum claims based on “social group” membership under the U.N. convention Relation to the Status of Refugees are deeply flawed. The Refugee Convention confers asylum on persons persecuted for their membership in a particular social group. Courts have struggled with the boundaries of the social group definition, and there appears to be no coherent way to reconcile all of the court decisions on what groups qualify as social groups under the Refugee Convention.*

*This Article suggests that courts adopt a consistent definition of what constitutes a social group. The definition proposed in this Article focuses on social perception in the home country of the asylum applicant, and would modestly expand the number of individuals who could successfully claim they were persecuted because of membership in a social group. The Article argues this response is particularly appropriate in light of a major trend in immigration law: asylum applicants increasingly seek protection from persecution not directly from the government, but from non-state actors who are able to persecute their victims because of government indifference to the plight of members of a social group.*

*Part I of this Article introduces the general objectives and structure of asylum law, and its embodiment in the Geneva convention. Part II explains the current law concerning the social group category, and suggests that courts have failed to provide a consistent standard for social group membership, instead relying on ad hoc decisions about particular claims. Part II goes on to suggest that one major reason for this incoherence is that courts paid insufficient attention to claims of persecution by non-state actors. Part III addresses the problems the non-state actor poses for asylum law. Part IV addresses the particular issue of asylum claims arising out of domestic abuse. It reviews international cases on the subject and the Board of Immigration Appeals' decision in R-A-. Part IV argues R-A-'s defines social groups too narrowly, and that courts should allow some claims of asylum based on domestic abuse.*

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## INTRODUCTION

2001 marked the fiftieth anniversary of the Refugee Convention.<sup>1</sup> Enacted in the troubled aftermath of World War II, it crafted an international definition of “refugee” that was binding upon the world community.<sup>2</sup> Prior compacts had consisted of reactions to local crises or discrete ethnic groups, thus constituting situational responses to refugee needs.<sup>3</sup> Transcending those limitations, the Convention created universal norms for protection.

The initial draft of the refugee definition protected those who feared persecution because of race, religion, nationality or political opinion. Thereafter, perceiving a troubling gap in coverage, the Swedish representative to the Conference of Plenipotentiaries amended the definition to include membership in a particular social group.<sup>4</sup> Coming as a virtual afterthought and receiving little attention, this amendment expanded the refugee definition in ways unimaginable at that time.

As refugee law developed in the first few decades of the Refugee Convention, social group membership received little attention. It remained, as Professor Maryellen Fullerton pointed out, a “little used term of art” within refugee law.<sup>5</sup> During a turbulent period of

1. Convention Relating to the Status of Refugees, *opened for signature* July 28, 2001, 189 U.N.T.S. 127 [hereinafter *Convention*]. The Refugee Convention applied to events occurring prior to January 1, 1951. Its scope was enlarged by the Protocol of 1967 Relating to the Status of Refugees, *opened for signature* January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 8791 [hereinafter *Protocol*]. It applied to those who suffered as a result of events occurring after January 1, 1951. The United States adopted these standards when it became a party to the Protocol. Thereafter, it enacted the Refugee Act of 1980, which incorporated the essential provisions of the Convention. Pub. L. No. 96-212, 94 Stat. 102.

2. Article 1(A)(2) of the Refugee Convention applies only to those who have a well-founded fear of persecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion. . . .” Though the terms “refugee” and “asylum” are both used in this Article, they are not distinct concepts. A person seeking asylum must meet the requirements for “refugee” status. She is simply applying in the country in which she seeks refuge, rather than being admitted under an overseas refugee program.

3. See generally NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION (1953).

4. The Swedish representative, Sture Petren, said, “[e]xperience has shown that certain refugees had been persecuted because they belonged to a particular social group.” The amendment was adopted without dissent. See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L. J. 509–10 (1993). See also 1 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 219 (1966).

5. Maryellen Fullerton, *Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany*, 4 GEO. IMMIGR. L.J. 381, 444 (1990).

civil wars and crises, claims based on political opinion dominated.<sup>6</sup> Though still central, it now shares center stage with group membership, as claims based on membership have “increased dramatically . . . pushing the boundaries of refugee law. . . .”<sup>7</sup> Cases have dealt with an exceptional range of matters, including domestic violence,<sup>8</sup> persecution based on disabilities,<sup>9</sup> and various forms of persecution based on sexual orientation.<sup>10</sup> But as the body of law has grown, covering many different kinds of social groups, so too has confusion surrounding this notion of group membership. With each new decision, the task of rationalizing a coherent approach to social group has become increasingly difficult.

These difficulties are particularly apparent when the persecution is by the non-state actor.<sup>11</sup> Straining core doctrine, claims alleging persecution by the non-state actor produced several distinct problems. First, despite the need to define carefully the relevant social groups, courts largely reacted situationally, adopting unhelpful, ad hoc responses to these challenges.<sup>12</sup> Unfortunately, this approach

6. Indeed, the burgeoning law in the area spawned debates and divides within the US Courts of Appeal, often centering on matters such as whether “imputed political opinion” satisfied the refugee definition. See Michael G. Heyman, *Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife*, 24 SAN DIEGO L. REV. 449, 456–461 (1987).

7. See generally T. Alexander Aleinikoff, ‘Membership in a Particular Social Group’: Analysis and Proposed Conclusions, Background Paper for “Track Two” of the Global Consultations for the United Nations High Commissioner for Refugees, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (E. Feller et al. eds., forthcoming 2003).

8. See, e.g., *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (2001) (Mexican child abused by her father granted asylum based on nuclear family membership), *vacated and remanded to Board of Immigration Appeals*, 273 F.3d 1220 (Dec. 7, 2001).

9. For example, the INS granted asylum to an autistic Pakistani boy whose mother feared that he would be persecuted because “relatives and neighbors in Pakistan said the boy was cursed by Allah and possessed by demons.” 78 Interpreter Releases 604 (April 2, 2001).

10. See *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) (Russian lesbian underwent electroshock therapy, forced sedation and institutionalization to “cure” her).

11. Although the Refugee Convention generally contemplates persecution by governments, the UNHCR Handbook acknowledges the possibility of persecution by a non-state actor: “Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.” OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 17 (1979) [hereinafter *Handbook*].

12. See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. June 13, 1996) (female genital mutilation (“FGM”) to be performed on an adolescent, tribal member). There, though the Board generally agreed that the claim should be granted, it hardly settled on its approach to the issue. The majority viewed the group as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe and who oppose the practice.” *Id.* at 367. Member Rosenberg instead preferred to define the group based on gender, finding it

virtually abdicates responsibility for developing a principled, consistent methodology.<sup>13</sup> As a result, these often-elaborate attempts at group definition seem tailored to particular cases, scarcely capturing the characteristics of truly cognizable groups.<sup>14</sup>

These flawed efforts are understandable, however, because of a second requirement of the refugee definition: the need to establish a nexus between group membership and persecution. The Refugee Convention requires persecution because of group membership.<sup>15</sup> Because this provision has been interpreted to require proof of the persecutor's motive,<sup>16</sup> courts have, often agonizingly, sought to discern the motives of people far away and far-removed. It is here that domestic law has taken a particularly wrong turn, as these efforts were frequently unsuccessful, only producing enormously difficult, unnecessary burdens for the asylum seeker. This Article will analyze the deep flaws in current approaches to claims based on social group membership and will propose a conceptual framework for better addressing these issues.

Part I of this Article will address the general objectives of asylum law, and their embodiment in the Geneva Convention. Part II will examine the difficulties created by the social group category, and the varying efforts to cabin that concept, both in the United States and abroad. Some advocate that groups be defined by innate

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"surplusage to define the social group in this case by including as an element the applicant's opposition to the practice of female genital mutilation." *Id.* at 375.

13. Commenting on the opinion of Justice McHugh in *Applicant A*, Rodger Haines, Deputy Chairperson of the New Zealand Refugee Status Appeals Authority, said that "Neither the text of the convention nor its objects and purposes can be surrendered to an 'intuitive' approach or to a complete re-writing of the text of the definition to make the social group category embracing of all circumstances of persecution. The solution may be difficult, but must nevertheless be attempted on a principled approach." Inter-Conference Working Party on Membership of a Particular Social Group, Int'l Ass'n of Refugee Law Judges Ottawa Conference, *Interim Report on Membership of a Particular Social Group* (Oct. 1998), available at <http://www.refugee.org.nz/larjpaper.htm>.

14. See, e.g., *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (2001). There, the applicant offered a variety of group definitions, including "female children who are victims of child abuse and witnesses of domestic violence and who believe that they should not have to conform to norms of patriarchal abuse." *Id.* at 1174. Although the court seemed to focus on the nuclear family, it made frequent reference to this nuclear family as the protected group. The case awaits final disposition in the Board of Immigration Appeals.

15. See *supra* note 2 (requiring that the persecution be "for reasons of" one of the five bases listed).

16. See *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). There, in a case about political opinion, the Court required not only proof that the applicant's persecution was politically motivated, but also that the would-be persecutor was in some way driven to persecution because of that political opinion. *Id.* at 482-483.

traits,<sup>17</sup> others by associational ties,<sup>18</sup> and still others by some combination of these factors.<sup>19</sup> Unless consensus is reached on this issue, asylum law cannot address claims effectively based on social group membership. But consensus is pointless unless the phenomenon of the non-state actor is properly understood, as many now claim asylum alleging persecution by the non-state actor. Part III of the Article will address the problems created by the non-state actor.

The Board of Immigration Appeals' decision in R-A<sup>20</sup> deals with many of these issues, and will be the focus of Part IV of this article. It reveals the indissoluble link between the how social group is defined, and the manner in which the nexus requirement is treated, especially in the case of the non-state actor. Finally, this Article will examine the topic of domestic violence itself, with particular focus on how international bodies have dealt with domestic violence and asylum.

## I. THE PURPOSE OF ASYLUM

Asylum affords safety to those left unprotected by their home countries. Though citizenship carries with it notions of membership and basic humanitarian protections, the "refugee" is one for whom these do not exist; he is a virtual non-citizen, because of a "factual breach of the bond between him and his

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17. See *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. Mar. 1, 1985). "We interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *Id.* at 233.

18. See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (finding that the phrase "'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest" who have a "voluntary associational relationship").

19. As will be explained, *infra*, the proposed regulations are bottomed on the notion of a shared "common, immutable characteristic," but include factors such as a "voluntary associational relationship." *Asylum and Withholding Definitions*, 65 Fed. Reg. 76,598 (Dec. 7, 2000) (hereinafter *Proposed Regulations*).

20. *In re R-A*, 22 I. & N. Dec. 906 (B.I.A. June 11, 1999), vacated by Attorney General Reno on January 19, 2001, originally to have been reconsidered after the passage of pending asylum rules published at 65 Fed. Reg. 76,588 (Dec. 7, 2000). However, on February 21, 2003, by Order No. 2661-2003, Attorney General Ashcroft directed the Board to 'refer to me for review' its decision in R-A (on file with the University of Michigan Journal of Law Reform).

country of origin."<sup>21</sup> Not displaced persons,<sup>22</sup> refugees are those who are nonetheless compelled to leave their homes because of legitimate fears of persecution. The persecutor is frequently the state itself, but it is the individual's vulnerability, rather than the source of the persecution, that triggers international protection.<sup>23</sup> Asylum offers protection when that of the home state, for whatever reason, has failed.

Asylum may not, however, be based on a mere fear of persecution, no matter how well founded. Rather, the persecution must be for one of the Convention reasons: race, religion, nationality, social group membership or political opinion.<sup>24</sup> International protection is warranted only when the bonds of trust between the individual and the state have frayed terribly in one of those areas.<sup>25</sup> Yet whereas race, religion, nationality and even political opinion are rather easily understood in the context of persecution, social groups are different. It is unclear why this category was included in the refugee definition and just what constitutes a social group for Convention purposes.<sup>26</sup>

Despite the lack of clear, unifying elements among these five bases for Convention protection,<sup>27</sup> together, they strike at persecution reflective of gross intolerance of differences between some groups and the dominant elements in society. Numerous government and privately sponsored reports discuss this intolerance. For example, in its recent report on human rights violations in Iraq,

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21. Atle Grahl-Madsen, *The Emergent International Law Relating to Refugees: Past-Present-Future*, in 13 *THESAURUS ACROASIMUM* 163, 192 (1987).

22. See T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of Refugee*, 92 *COLUM. LAW REVIEW* 923, 932 (1992) (distinguishing the legal concept of displaced person from that of refugee).

23. The Handbook clearly reflects this. Paragraph 65 notes that persecution is "normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned." *Handbook*, *supra* note 11, at 17.

24. See *supra* note 2.

25. The asylum regulations proposed in late 2000 reflect these standards. See *supra* note 19. There, the commentary noted that "[I]nherent in the concept of refugee status is the principle that an individual requires international protection because his country of origin or of habitual residence is not safe for him, or cannot protect him, because of persecution on account of one of the five grounds specified in the definition of "refugee" (citing *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. Mar. 1, 1985), and 1 *ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 97, 100 (1966)).

26. See *supra* notes 18-20. Maryellen Fullerton has carefully examined the scholarly treatises and the divides among and even within them on the constitutive factors of a social group. See Fullerton, *supra* note 5.

27. That is, some are innate, such as status at birth, while others are associational in nature.

the Home Office of the United Kingdom (“Home Office”) commented on abuses in all areas covered by the Convention.<sup>28</sup> Covering a troubling array of matters, it recounted the summary executions of political opponents and leaders in the Shi’a religious community, discrimination against religious minorities and ethnic groups, and even the government’s “Arabization” policy of forcibly relocating the non-Arab population, including Kurds, Turkomans, and Assyrians from the Government controlled northern parts of Iraq, into northern Iraq.<sup>29</sup>

Professor Martha Minow has focused closely on how societies deal with perceived differences and has set out several theories to explain this phenomenon. Examining the various approaches to the treatment of differences in society, she has given particular emphasis to what she calls the “social relations approach.”<sup>30</sup> By that view, statements about differences should be understood as “statements of relationships,”<sup>31</sup> whereby subjugation is justified through attributions of difference and the invidious consequences that flow therefrom.<sup>32</sup>

Whether the differences are religious, political, racial or ethnic, the potential exists for control and discrimination. As Professor Minow has illustrated, for example, gender-based discrimination has been consistently recapitulated in human history.<sup>33</sup> Social groups would seem to be a particularly apt candidates for this social relations analysis, as that analysis emphasizes the social and legal domination of vulnerable classes of people.<sup>34</sup> However, asylum

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28. See Country Information and Policy Unit, *Country Assessment—Iraq* (Oct. 2002), available at <http://www.ind.homeoffice.gov.uk/default.asp?pageid=179>.

29. *Id.* Given this extraordinary degree of abuse, it is little wonder that for the period from 1991 through September of 2001, of all the asylum claims filed with asylum officers in the United States, applicants from Iraq were granted asylum at the highest rate, 84.2%. 22 Refugee Reports No. 12, at 6 (2001).

30. MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 110 (1990).

31. *Id.* at 111.

32. *Id.*

33. Martha Minow, *Between Intimates and Between Nations: Can Law Stop the Violence?*, 50 CASE W. RES. L. REV. 851 (2000). “But the gender analysis resonates for many people and supports the political movement to name and respond to intimate violence. The gender analysis locates domestic violence as a feature of a patriarchal society. Such a society makes control and ownership the aspirations for men, including control and ownership of women and children.” *Id.* at 863.

34. Indeed, Krista Daley and Ninette Kelley emphasized the importance of protecting groups from discrimination in their exercise of basic human rights: “The appropriate interpretative approach to the meaning of ‘particular social group’ should therefore ‘take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.” Krista



law, both here and internationally, has often stumbled when attempting to provide a coherent concept of the social group category. Perhaps limited by the spare, unexplained language of the refugee definition, it has taken several, often conflicting approaches to clarifying that concept. In so doing, it has frequently confused the characteristics of those groups with what has propelled oppressors to persecute their members. It has ignored the verifiable data about patterns of persecution, instead looking for some internal, defining characteristics that provide the basis for definitions of social groups. These misplaced efforts have resulted in the muddle in which the law currently finds itself.

## II. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Social group scholarship is replete with attempts at categorization. Because of the indeterminacy of the definition and the lack of contextual guidance, all serious commentators have sought to capture the essence of this concept and then to apply it to concrete cases.<sup>35</sup> Despite the diversity of approaches, all have, at least, rejected the notion that the group exists by reason of the persecution itself, for were that so, the group category might render the others superfluous.<sup>36</sup>

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Daley & Ninette Kelley, *A Human Rights Based Approach to Particular Social Group: The Canadian Experience*, 12 INT'L J. REFUGEE L. 148 (2000).

35. For example, examining the five grounds of persecution, Grahl-Madsen classified them into those involving matters over which people had no control, and those over which they had control. GRAHL-MADSEN, *supra* note 25, at 217. However, though he characterized group membership as something over which people had control, he nonetheless included some matters over which people had no control, such as social rank and minority status. *Id.* at 219. By contrast, Goodwin-Gill emphasized the "shared interests, values, or background" of people in arriving at his notion of group membership. Thus, by his thinking, group membership could be either a product of accident or choice. GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 47 (2nd. ed. 1996). Indeed, Goodwin-Gill acknowledged the "open-endedness" of this concept, reflecting that it can develop, based on the "notice taken of it by others." *Id.*

36. "Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the 'particular social group' ground to take on the character of a safety net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of 'fear of persecution', 'for reasons of' and 'membership of a particular social group' in the definition of 'refugee.' It would also effectively make the other four grounds of persecution superfluous." Applicant A v. Minister for Immigration and Multicultural Affairs (1997) 190 CLR 225, 263 (Austl.) (McHugh, J., concurring).

*A. Judicial Doctrinal Development: Associational  
Ties and Protected Characteristics*

Early attempts at developing the concept of social group membership focused on the associational nature of groups, and that seemed sensible. Whereas race, religion and nationality seem to center on matters beyond the applicant's control, political choices and social group membership may represent personal choices that warrant protection. And, at least until recently, the two forms of claims were frequently tied together. Certainly, *Sanchez-Trujillo v. INS*<sup>37</sup> represents that type of claim, wherein the applicants sought to avoid being returned to war-torn El Salvador. They asserted that their political affiliations and activities placed them at risk, citing various run-ins with the government and police. However, their claim based on group membership was cast differently. They sought protection on the basis of their status as "young, urban, working class" males without military service.<sup>38</sup> The critical question was, then, the cognoscibility of that group within the notion of "social group."<sup>39</sup>

Addressing that issue, the Ninth Circuit first constructed the essential distinction between a broad, statistical group and social group for Convention purposes.<sup>40</sup> By its view, the mere existence of distinguishing characteristics did not lead to the conclusion that those with such characteristics belonged to a particular social group. Thus, even were "a group of males taller than six feet" at greater risk in a society than others, they would not, in and of themselves, constitute a social group.<sup>41</sup> That sort of "demographic division" did not represent the kind of "cohesive, homogeneous group" to which the term should apply.<sup>42</sup> Unfortunately, the court took less care in what it constructed than it did in what it rejected.

Concluding that groups must show distinctive characteristics, it also reasoned that membership must be a matter of choice:

Of central concern is the existence of a voluntary associational relationship among the purported members, which

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37. 801 F.2d 1571 (9th Cir. 1986).

38. *Id.* at 1573.

39. *Id.* at 1575.

40. *Id.* at 1577.

41. *Id.* at 1576.

42. *Id.* at 1577.

imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.<sup>43</sup>

Surely, this policy choice does not logically follow. A group could be cohesive, yet membership could be innate. Indeed, the “prototypical example”<sup>44</sup> offered by the court, the immediate family, could be as easily characterized as the product of biology as of choice.

The view promulgated by the *Sanchez-Trujillo* Court conflicted with administrative practice, the view of other circuits and state practice abroad. Yet, only recently did that court retreat from it. In *Hernandez-Montiel v. INS*,<sup>45</sup> the court considered the claim of a gay man from Mexico that he faced persecution because of his sexual orientation. In an apparent about-face, the court found the claimant worthy of asylum, finding that “sexual identity is inherent to one’s very identity as a person.”<sup>46</sup>

Acknowledging the tension thus created with *Sanchez-Trujillo*, the court ostensibly built on that case instead of overruling it. By its new formulation, a particular social group is “one united by a voluntary association, including a former association, *or* by an innate characteristic that is fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”<sup>47</sup> It did, to its satisfaction, harmonize its standard with that used by the Board of Immigration Appeals as well as significant international opinions.<sup>48</sup> In so doing, it also aligned itself more closely with established practice in this country.

In contrast to the Ninth Circuit’s idiosyncratic view, the Board of Immigration Appeals’ decision in *Matter of Acosta*,<sup>49</sup> reflects the dominant approach to group definition, both here and internationally. Again, a Salvadoran filed an unsuccessful claim. Again, it was unsuccessful.<sup>50</sup> Yet the Board’s construction of “social group” differed greatly from that of the Ninth Circuit.

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43. *Id.* at 1576 (footnote omitted).

44. *Id.*

45. 225 F.3d. 1084 (9th Cir. 2000).

46. *Id.* at 1093.

47. *Id.* (footnote omitted).

48. “This formulation recognizes the holding of *Sanchez-Trujillo* and harmonizes it with *Acosta*’s immutability requirement. It is similar to the Supreme Court of Canada’s definition of the term” *Id.* (citing *Canada (Attorney General) v. Ward*, [1993] S.C.R. 689). *Id.*

49. 191 I. & N. Dec. 211 (B.I.A. Mar. 1, 1985).

50. *Id.*

Acosta feared persecution at the hands of both the guerillas and the government.<sup>51</sup> Basing his claim on both his political views and his group membership, he asserted that COTAXI drivers<sup>52</sup> and others in the transportation industry were subject to persecution.<sup>53</sup> Though the Board readily dismissed his assertions about the government's persecution, it was hospitable to his claims of susceptibility to guerilla persecution. The guerillas had a well-established practice of harming those who, like Acosta, refused to join in work stoppages in San Salvador.<sup>54</sup> However willing the Board was to acknowledge the legitimacy of these fears, it didn't accede to the claim that he therefore belonged to a cognizable social group. Thus, though he faced "punishment"<sup>55</sup> for his refusal to join in the work stoppages, he could avoid it "either by changing jobs or by cooperating in work stoppages."<sup>56</sup>

The Board's test stood in stark contrast to that of *Sanchez-Trujillo*. Decidedly rejecting the defining factor of associational ties, it relied instead on one of protected characteristics:

[W]e interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.<sup>57</sup>

The Board clearly focused on matters that people are either powerless to change or should not be compelled to change. Surely

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51. *Id.* at 231.

52. Acosta formed a cooperative organization of taxi drivers known as COTAXI in 1976. *Id.* at 216.

53. *Id.* at 232.

54. *Id.* at 234.

55. *Id.*

56. *Id.*

57. *Id.* at 233.

social groups can be defined that way, but it is unclear whether that should be the exclusive definition. Persecution due to one's innate traits cannot be countenanced. Why should that immutability provide a necessary condition to humanitarian protection? To so limit it would exclude groups "defined by factors that may involve a good deal of individual choice such as economic activity, education, and shared aspirations."<sup>58</sup> *Acosta* and *Sanchez-Trujillo* take diametrically opposed positions to group definition, but it is unclear just why group membership must submit itself to this form of either/or definition.

### B. The INS's Approach

However, other bodies have sought to clarify the concept of "social group." The UNCHR Handbook is surprisingly spare on these issues, delineating only the most rudimentary features of group membership.<sup>59</sup> Yet, though it barely adumbrates a theory of social groups, its almost passing reference to both associational ties and innate characteristics hints at more inclusive treatment.

But the Immigration and Naturalization Service ("INS"), or "the Service" has also played a role here, finally suggesting its own, somewhat eclectic, approach. Reacting to the various formulations, the regulations proposed by the Immigration and Naturalization Service at the end of 2000 incorporate much from these seemingly disparate tests for group definition.<sup>60</sup>

Though designed to address a variety of issues in the asylum area, those proposed regulations were also meant to correct the

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58. See generally Fullerton, *supra* note 5. Professor Aleinikoff has lodged a similar criticism, noting the exclusion by *Acosta* of groups such as "students, union members, professionals, refugee camp workers, or street children." Aleinikoff, *supra* note 7, at 42. As Professor Aleinikoff also points out, to subsume groups such as students within the *Acosta* formulation by talking of their pursuits as something they should not be compelled to change strains that category "for the sake of reaching an appropriate result without throwing over the protected characteristics approach." *Id.*

59. *Handbook*, *supra* note 11. In paragraph 77, it simply notes that the term social group "comprises persons of similar background, habits or social status." In paragraph 78, the *Handbook* notes that people can be at risk because "there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or [because] the very existence of the social group as such, is held to be an obstacle to the Government's policies."

60. See *supra* note 19.

problems created by *R-A*.<sup>61</sup> Drawing from both “administrative and judicial precedent,” the Service set out to provide a “non-exclusive list of additional factors that may be considered in determining whether a particular social group exists.”<sup>62</sup> Recognizing that the precedents frequently conflicted, it rejected the disjunctive, mutually exclusive approaches generally used until that time and instead sought to provide factors for judicial consideration that were relevant, but are “not requirements for the existence of a particular social group.”<sup>63</sup>

The INS’s approach was built on, but not limited to, *Acosta*. Though animated by the notion that “protected characteristics”<sup>64</sup> represent the touchstone for group membership, it expanded the *Acosta* view that groups consist only of those who share common, immutable characteristics. Thus, though proceeding from the core notions from *Acosta*, it provided factors that may be considered in addition to those “required factors.”<sup>65</sup> Those factors include whether:

- 1) The members of the group are closely affiliated with each other;
- 2) The members are driven by a common motive or interest;
- 3) A voluntary associational relationship exists among the members;
- 4) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
- 5) Members view themselves as members of the group; and
- 6) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.<sup>66</sup>

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61. See *supra* note 20. “This proposed rule removes certain barriers that the *In re R-A* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group.” 65 Fed. Reg. 76,589.

62. *Id.* at 76,594.

63. *Id.*

64. *Id.* at 76,598.

65. *Id.*

66. *Id.*

These factors are remarkable for both their internal inconsistency and expansiveness. Though affiliation, common interests and voluntary association may be characteristics of those who share immutable traits, they are more commonly associated with those who come together for a common purpose; those features strike more at the *Sanchez-Trujillo* vision of groups, than that of *Acosta*. However, the last three factors may often partake of neither. Rather, they reflect a new, developing approach to group definition, one emphasizing “cultural resonance” or “social difference,” rather than looking at the internal properties of groups.<sup>67</sup> Thus, the proposed regulations suggest a third approach to group membership, which, emphasizing the social perception of groups within particular cultures, recognizes that protection should be extended to those from societies dramatically intolerant of differences.

This approach differs fundamentally from those of its predecessors. Rather than seeking some property of groups that is consistent with Convention purposes, it inverts the perspective by focusing on how cultures perceive groups. The *Acosta* and *Sanchez-Trujillo* views may converge, because cultures may condemn people either for what they are or what they do; this hybrid view is grounded in empirical phenomena rather than abstract definition. And, this latter view is particularly useful, as group definitions can be validated by observable patterns of persecution, such as the types of conduct discussed by the UK Home Office<sup>68</sup> and virtually all human rights reports.<sup>69</sup>

This shift in perspective is critical since, as the cases demonstrate, the approach taken to defining groups determines the coverage of humanitarian protection. The *Acosta* and *Sanchez-Trujillo* approaches tacitly posit a neutral onlooker reacting to characteristics of those persecuted. But that’s just the point: those who persecute are not neutral, as their conduct reveals deep antipathy toward those they persecute. The hybrid approach of the

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67. Parish, *supra* note 22, at 945–946.

68. See *supra* note 28 and accompanying discussion.

69. Naturally, resort to empirical data can both prove and disprove the existence of claimed groups. “How the persecutors themselves or the general public perceive the group is far more likely to help prove whether a group is a target for persecution. Conversely, if the purported group is not perceived as a social group by outsiders, then those alleging persecution could not have been persecuted based on their membership in the purported social group. Therefore, the absence of an outside perception that a particular social group exists is a much more accurate indication of the non-existence of a social group, and of whether the social group was a target for persecution, than is the absence of a voluntary associational relationship among purported members.” Siobhan M. Kelly, *Social Group-Based Asylum Claims Under the Refugee Act of 1980*, 68 U. CIN. L. REV. 895, 914 (2000).

INS implicitly recognizes this, suggesting that social groups are more naturally recognized by seeing the persecuted through the eyes of the persecutor. That approach, focusing as it does on the persecutor's perspective, also more readily reveals the motive for the persecution. The Australian High Court's decision in *Applicant A* represents the best-developed judicial embodiment of this approach to social groups.<sup>70</sup>

### C. Applicant A: A Natural Perspective

Chinese efforts to control population growth have produced myriad legal and political reactions, both in the United States and abroad.<sup>71</sup> Though the specter of forced sterilization may seem clearly persecutory, it challenges conventional doctrine on several fronts. Though extreme, it may simply represent a sovereign's attempt to address a serious population crisis. Moreover, even if sterilization is regarded as persecution, it is unclear whether it has a causal nexus to Convention grounds.

The case of *Applicant A* addressed these concerns, and has received a great deal of critical attention for its detailed, probing analysis of critical asylum issues. A Chinese husband and wife filed applications for asylum under the Australian Migration Act of 1958.<sup>72</sup> They left the People's Republic of China when the wife was eight months pregnant, and soon thereafter the child was born in

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70. *Applicant A v. Minister for Immigration and Multicultural Affairs* (1997) 190 CLR 225 (Austl.).

71. The American experience is particularly rich. A flurry of activity followed the killings at Tiananmen Square from June 1989. Following the Board's decision in *Matter of Chang*, 20 I. & N. Dec. 38 (B.I.A. May 12, 1989) (finding that Chinese population controls did not constitute persecution), Congress passed a statute, the Emergency Chinese Relief Act of 1989, H.R. 2712, § 3(a), 101st Cong., 1st Sess. (1989) (providing for "careful consideration" to asylum applicants from the People's Republic of China who indicate a "fear of persecution upon return to China related to China's 'one couple, one child' family planning policy"). President George H.W. Bush vetoed the bill, but embraced its spirit, as expressed in Executive Orders and memoranda. See generally 66 Interpreter Releases 1331 (Dec. 4, 1989). The Department of Justice promulgated new asylum regulations following that spirit, but they did not take effect because of the change in administration in 1992. Eventually, Congress changed national policy in the 1996 amendments to the Immigration and Nationality Act, expressly declaring that resistance to a "coercive population control program" constituted resistance to persecution on account of political opinion. 8 U.S.C. § 1101(a), amended by 8 U.S.C. § 1101(a)(42) (1997).

72. As is the case with most countries, Australia passed a domestic statute embracing the Convention definition of refugee. Migration Act (1958), § 4(1) (definition of refugee) and pt. 2, div. 1AA (refugees).



Australia.<sup>73</sup> By the husband's account, he feared sterilization as he insisted that forced abortion and sterilization were the primary means used to enforce the one child policy. He had, for example, seen the "Family Planning Police come to a neighbour's home in his village and forcibly attempt to take a male neighbour away for sterilisation."<sup>74</sup> After traversing a tortuous legal path, the couple appealed to the High Court of Australia.<sup>75</sup>

Though the justices' opinions ranged broadly, they centered on two critical features of asylum law: the interaction of the elements of the refugee definition and the approach to defining a social group. All conceded that asylum required proof of legitimate fears of persecution because of group membership. However, the justices diverged over the precise relationship that must exist between the identity and conduct of asylum seekers.

Chief Justice Brennan had an easy time with this case. Envisioning the social group category as a "‘safety net’ for those who fell within it,"<sup>76</sup> he saw this category as providing protection for those who deserve it, but who are not otherwise covered by the refugee definition. Thus, he simply required that group members possess a characteristic "that is not common to the members of the society at large."<sup>77</sup> Implicitly rejecting *Acosta*, he did not require that the characteristic be "‘innate or unchangeable’ before it can distinguish a social group."<sup>78</sup> Accordingly, he concluded that "[t]he characteristic of being the parent of a child and not having voluntarily adopted an approved birth-preventing mechanism distinguishes the appellants as members of a social group that shares that characteristic."<sup>79</sup> Other Justices found things much more complex.

Justices Dawson and McHugh chafed at the notion that the existence of persecution in itself would define a group.<sup>80</sup> They required a more principled elaboration of the social group category than was afforded by Chief Justice Brennan's proposed "safety net."

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73. The facts of the case were not in dispute. Though the justices individually recited the facts, this account is from Justice Kirby's opinion. 190 CLR at 288–289.

74. *Id.* at 288.

75. *Id.* at 226 (procedural history).

76. *Id.* at 236.

77. *Id.*

78. *Id.*

79. *Id.*

80. "There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution." *Id.* at 242.

Stressing the “interaction” of the components of the refugee definition, Justice McHugh determined that the particular applicants’ fears of persecution were based on their refusal to submit to national policy, rather than from group membership.<sup>81</sup> He thus created a subtle distinction between consequences that result from conduct and those flowing from group identity.<sup>82</sup> Though he may have overlooked the social resonance that flowed from active opposition to population control, his conception of “social group” itself casts a broad net for protection, exceeding that of extant models.

McHugh regarded “social group” as a malleable concept, driven by social perceptions within particular societies.<sup>83</sup> Tracing the category to the social upheaval following World War II, he agreed with Goodwin-Gill that the category was “‘intended to cover those groups persecuted because of the ‘restructuring’ of society then being undertaken in the socialist States and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families.’”<sup>84</sup> But he would hardly limit its coverage to those groups. Indeed, he repeatedly, almost relentlessly, stressed that “public perception,” rather than any internal characteristic, was the key to group existence.<sup>85</sup>

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81. 190 CLR at 257.

82. Like his fellow justices, McHugh resisted the conventional tests for group membership, expressly rejecting *Sanchez-Trujillo. Id.* at 266.

83. This notion is hardly peculiar to the Australian High Court. In *Regina v. Immigration Appeal Tribunal, ex parte Shah*, 2 A.C. 629 (H.L. 1999), Lord Hope of Craighead made much the same point:

In general terms a social group may be said to exist when a group of people with a particular characteristic is recognized as a distinct group by society. The concept of a group means that we are dealing here with people who are grouped together because they share a characteristic not shared by others, not with individuals. The word ‘social’ means that we are being asked to identify a group of people which is recognized as a particular group by society. As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person’s nationality. The phrase can thus accommodate particular social groups which may be recognizable as such in one country but not in others or which, in any given country, have not previously been recognized.

84. Applicant A, 190 CLR at 265, quoting GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 46 (2nd ed. 1996).

85. “If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group.” *Id.* at 264. Though McHugh recognized the need for some “internal linking” lest persecution alone define the group, he saw societal perception as fundamental. *Id.*

This “societal perception” made people “stand out,” and thus become targets for persecution.<sup>86</sup>

Societal perception, then, both identifies and creates social groups. They become the targets of persecution precisely because of this perception and, in turn, are identifiable as groups warranting protection by looking through those social optics. As McHugh explained:

The fact that actions of the persecutors can serve to identify or even create ‘a particular social group’ emphasises the point that the existence of such a group depends in most, perhaps all cases on external perceptions of the group. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit.<sup>87</sup>

If followed, this social perception approach running through McHugh’s opinion and those of other court members frees the decision-maker from the constraints of either simplistic tests or cultural parochialism. Justice Kirby acknowledged the universality of the Convention definition, but resisted a Western application of the concept of social groups. For him, “in other societies, and in modern times, different cultural norms and social imperatives may give rise to different sources of persecution.”<sup>88</sup> And, perhaps ironically, this approach to social groups advances the pragmatic concerns of asylum law, as group membership using that as a vehicle easily lends itself to empirical verification unconfined by the limits of abstract tests.<sup>89</sup>

#### *D. The Aftermath of Applicant A*

The approach of the *Applicant A* Court has not gone unnoticed. The Office of the United Nations High Commissioner for Refugees recently issued a set of guidelines on the social group component. Designed to “provide legal interpretative guidance for govern-

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86. *Id.* at 266.

87. *Id.* at 264.

88. *Id.* at 293.

89. Naturally, this is also the case under the proposed asylum regulations, in that they direct the decision-maker to look to the societal perception of groups.

ments, legal practitioners, decision-makers and the judiciary,”<sup>90</sup> they provide an approach that dovetails with that of the High Court of Australia. State practice may now be evolving into a universal norm to guide the world community.<sup>91</sup>

But though groups are a product of social perception, courts and others must still be able to identify and describe them. McHugh may have been wrong on the facts of the Chinese dynamic, but he was still right to insist on a group existence independent of the persecution. Unfortunately, regardless of the approach to group determinations, few courts have satisfactorily defined the groups that face persecution. The definitions have either been terribly broad, or outlandishly narrow. Often, they’ve even seemed tailored for litigation purposes.

As discussed above, for example, Justice Brennan elaborated on the possibilities for group definition. Discussing the evolution of Chinese policy, he noted the sub-categories of people produced by that evolving policy. They consisted of “‘people with one child,’ ‘people with more than one child,’ ‘the floating population who are parents,’ ‘rural people with children,’ [and] ‘minority nationality couples with children.’”<sup>92</sup> Thus, though he settled on the characteristic of “being a parent of a child and not having voluntarily adopted an approved birth-preventing mechanism,”<sup>93</sup> the other possibilities illustrate the elaborate, unconvincing group definitions populating asylum case law.<sup>94</sup>

90. UNHCR, *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, U.N. Doc. HCR/GIP/02/02 (2002) [hereinafter *Guidelines on International Protection*].

91. The guidelines deal with social group definition in two ways. First, UNHCR adopts what it calls the “protected characteristics” approach, essentially tracking *Acosta*. However, recognizing that exclusive use of that approach might be under-inclusive, it recommended the adoption of the social perception test. It said:

If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a ship or participating in a certain occupation in a particular society is neither unchangeable nor fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group *if in the society they are recognized as a group which sets them apart*.

*Id.* at paragraph 13 (emphasis added).

92. *Matter of Acosta*, 19 I. & N. Dec. 211, 237 (B.I.A. Mar. 1, 1985).

93. *Id.* at 238.

94. See *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (2001). There, the formulations consisted of “a family in which her father is a perpetrator of domestic violence, a family of

Commenting on the wildly elaborate group definitions, Stephen Legomsky suggests a way out of this quagmire. He suggests that instead of flailing about to construct terribly precise qualifiers, decision-makers should recognize that the “on account of” requirement only suggests a causal connection between membership and persecution. Thus, he suggests vastly simpler group definitions, reasoning that the evidence need only show that “but for” the characteristic of the applicant, the persecution would not occur.<sup>95</sup> Then, any fear of a floodgate of claims would be quelled by the additional evidentiary requirement that the applicant demonstrate that the abuse would rise to the level of persecution, which would greatly aid the decisional process.<sup>96</sup>

The High Court in *Applicant A* concluded, by a 3–2 vote, that the claim was inadequate. Though we may quibble with that outcome, the court substantially advanced thinking on asylum issues. Asylum exists to protect those for whom the state has failed, and the social perception approach best identifies those groups that face persecution. Those who “stand out” and deviate from the norms of those in power may thus become the targets of persecutors. In *Applicant A*, the state itself was the purported source of persecution, but asylum law has grown to recognize that persecution may come from a variety of sources in society.

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domestic violence, female children who are victims of child abuse and witnesses of domestic violence and who believe that they should not have to conform to norms of patriarchal abuse and children who have become targets of domestic violence by trying to protect their mothers from domestic violence.” *Id.* at 1174.

95. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 964–67 (3d ed. 2002). Commenting on *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. June 13, 1996), Professor Legomsky wrote: “Since the Board’s own case law (*Acosta*) and the law of the circuit in which the case was decided both make it easy to hold that women are a social group (period, the only possible reason for the Board in *Kasinga* to flail around in search of all those qualifiers is its unstated assumption that, without such qualifiers, ‘on account of’ would have been an obstacle to relief.” LEGOMSKY, *supra*, at 964.

96. This is not to suggest that the issue of causation is quite that simple, but the “but for” approach is sensible. More extensive analysis is beyond the scope of this Article. For a more detailed analysis of the nexus requirement, see the University of Michigan’s Program in Refugee and Asylum Law’s fine set of guidelines. *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT’L L. 207, 213 (2002). In that same issue, Michelle Foster exhaustively analyzed the causation issue, ultimately supporting the “contributing cause” position embodied in those guidelines. Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Definition*, 23 MICH. J. INT’L L. 265, 338 (2002).

## III. PERSECUTION AND THE NON-STATE ACTOR

People enter into political communities to satisfy a variety of needs. Whether these communities are clans, tribes or larger political entities, they address fundamental human needs, such as that for protection from internal as well as external threats. Communities enact codes designating standards for internal conduct and may provide mechanisms for protection from external forces. It's intolerable, then, when the government itself breaches that covenant with the people. It represents the breakdown of communal life, and thus presents the clearest case for asylum protection.

State violations of the rights of citizens, though abhorrent, frequently present clear-cut cases of proof. The government conduct itself may be highly visible, and the patterns of persecution demonstrable. Chief Justice Brennan easily traced the development of Chinese policy on population control through its laws and regulations enacted in the 1970s and 1980s.<sup>97</sup> However we regard these Chinese efforts, they are clearly traceable to an evolving central policy, and the agencies of enforcement are likewise evident. However, non-state actors present more ambiguous agents of persecution.

A non-state actor attenuates the components of the refugee definition. Not acting at the behest of the state, he presents a more amorphous enemy, whose patterns of conduct and motives may be less clear. Indeed, his very identity is murkier than that of the governmental persecutor.<sup>98</sup> Commenting on the frightening variety of non-state actors, Professor Jennifer Moore traced the emergence of the non-state actor in part to the devolutionary trends that created sub-national entities, consisting of "new states, aspiring states, or conflicted states."<sup>99</sup> Because of these and other global developments, we've witnessed increasing threats to both individual and group rights from various sources, such as "death

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97. *Applicant A v. Minister for Immigration and Multicultural Affairs* (1997) 190 CLR 225, 237 (Austl.).

98. See Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 240 (1996) ("In today's chaotic world, the identity and the motivations of the persecutor are more elusive. . . . Repression comes at the hands of shadowy organizations whose links to state authority are deliberately obscured or who portray themselves as antagonists of the formal state.").

99. Jennifer Moore, *From Nation State to Failed State: International Protection From Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 83 (1999).

squads, paramilitary forces, insurgent armies, organized criminal entities, family-based political cliques, clans, or sub-clans.”<sup>100</sup>

The non-state actor, particularly because of his myriad shapes, presents unique analytical challenges to asylum law. Though citizens have a right to protection from threats, when the agent of persecution is not the state, it is uncertain when the state’s failure rises to an unacceptable level and warrants an asylum grant. It is uncertain how rampant the abuses must be, how persistent they must remain, how ineffective the government must be in combating them, to justify the dramatic intervention of the asylum state.

Complicating matters further, though governmental persecution may well extend throughout the state, the actions of the non-state actor may be more confined, affording an internal flight alternative (“IFA”) to some.<sup>101</sup> This outcome is vexing, for it seemingly affords the asylum-seeker the alternative of avoiding the persecutory conduct in his country, obviating the need for asylum. Indeed, in *Acosta*, the Board noted that Acosta “could avoid the threats of the guerillas either by changing jobs or by cooperating in work stoppages.”<sup>102</sup> Requiring someone to change jobs to prevent persecution avoids the proper question: whether he legitimately fears persecution.<sup>103</sup>

Despite these complexities, it is clear that asylum need not be given only to those facing state persecution. Focusing on the failure of state protection as the touchstone for asylum, Roger Haines

100. *Id.*

101. In a background paper for a UNHCR conference, James Hathaway and Michelle Foster presented a detailed analysis of the IFA. They set out four criteria to determine the feasibility of internal flight and protection: 1. the accessibility of the alternative; 2. whether the alternative offers an “antidote” to the feared persecution; 3. whether the alternative does not entail new risks; and 4. whether at least a minimum level of affirmative state protection is available at the place of flight. James C. Hathaway and Michelle Foster, *Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination* (2001), available at <http://www.unhcr.ch/cgi-bin/teaxis/vtx/home/+fwwBm+expvldwwwwwwwwwwwwwhFqA72ZR0gRfZNtFqrpGdBnqBAFqA72ZR0gRfZNcFqBhd5BnGawDmarwBrwiwODzmxwwwwww/opendoc.pdf>. In the Summary Conclusions that followed the roundtable discussion of this issue, UNHCR expressed concerns about internal flight and the non-state actor. “Where the risk of being persecuted emanates from a non-state actor, IPA/IRA/IFA may more often be a relevant consideration which has though to be determined on the particular circumstances of each individual case.” See INHCR/IOM/08/2002, UNHCR/FOM/08/2002 1 (2002) (on file with the University of Michigan Journal of Law Reform).

102. *Acosta*, 19 I. & N. Dec. at 234.

103. Hathaway and Foster also rejected this alternative, asserting that “refugee status may not be refused simply because an applicant could live in safety by declining to exercise his or her fundamental beliefs.” See Hathaway & Foster, *supra* note 101, at 23. For them, the notion of “safety as a duty to hide” represented a complete abnegation of the principles of the Convention. *Id.*

noted, "the refugee definition does not require that the state itself be the agent of harm. Persecution at the hands of 'private' or non-state agents of persecution equally falls within the definition."<sup>104</sup> As "it is highly likely that the majority of today's refugees are fleeing dangers emanating from non-state agents,"<sup>105</sup> the claims of their victims appeal to us with particular urgency, calling for clear standards for relief.

### *A. Persecution and Gender: The International Response*

Over the last few decades, the international community has increasingly recognized the threats posed by gender-based discrimination and persecution.<sup>106</sup> Its enactment of various conventions as well as the promulgation of state-based positions on gender-based persecution illustrates the pernicious, widespread nature of these problems. The Convention on the Elimination of All Forms of Discrimination Against Women denounces discrimination and requires states to attempt to deracinate it.<sup>107</sup> The 1993 Declaration on the Elimination of Violence Against Women even more specifically condemns domestic violence as one of the

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104. ROGER HAINES, GENDER-RELATED PERSECUTION 12 (2001). This paper was also commissioned by UNHCR. UNHCR adopted this view in its *Guidelines on International Protection*, *supra* note 90. In those guidelines, it stated that when "offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection". *Id.* at 5 (footnote omitted).

105. Walter Kälin, *Non-State Agents of Persecution and the Inability of the State to Protect*, 15 GEO. IMMIGR. L.J. 415 (2001).

106. UNHCR distinguished between sex and gender-based persecution in its 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 (May 7, 2002), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+PwwBmeU+Di8wwwnwwwwwwFqhT0yfEtFqnp1xcAFqhT0yfEcFqewzno1omncoDn5adDafDBnGDwBodDwca7GdBnqBodDeuGmondMnGe2RqxcwBnma7nG5nq1BodDDzmxwwwwww1FqmRbZ/opedoc.pdf>. Whereas sex is a 'biological determination,' '[g]ender 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." *Id.* at 2. This concept strikes at the power relations between men and women, and gender-related claims include "acts of sexual violence family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals." *Id.* See *supra* note 83.

107. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 24 U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979) [hereinafter *CEDAW*].



“crucial social mechanisms by which women are forced into a subordinate position compared with men.”<sup>108</sup>

State practice has followed suit, providing gender-based guidelines for asylum claims. Canada became the first nation to recognize gender as a basis for an asylum grant.<sup>109</sup> Many countries have followed, and the United States Department of Justice has issued guidelines to its asylum officers to sensitize them to the particular issues related to gender-based claims.<sup>110</sup> The UNHCR has recently addressed these issues,<sup>111</sup> and these notions have even filtered down to municipal police throughout the world through the enactment of United Nations guidelines for law enforcement.<sup>112</sup>

But state practice has faltered in the judicial arena. Broad principles of protection have not consistently provided humanitarian relief for the victims of gender-based persecution. Professor Moore has identified the “protection vacuum created by implicit intolerance or calculated neglect on the part of the state” as one source of this failure in the judiciary. She was particularly troubled by the plight of victims of domestic violence in the United States.<sup>113</sup> Each “barrier”<sup>114</sup> to effective protection she has identified is present in *R-A*. There, the majority of the Board misconstrued the notion of social groups, failed to deal intelligibly with the notion of the non-state actor and, because of its construction of the nexus requirement, interposed virtually insurmountable barriers to relief for the victims of domestic violence.

108. Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993).

109. CANADIAN IMMIGRATION AND REFUGEE BD., GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (Mar. 9, 1993).

110. *Memorandum from Phyllis Coven, Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, available at* [http://www.uchastings.edu/cgrs/law/guidelines/guidelines\\_us.pdf](http://www.uchastings.edu/cgrs/law/guidelines/guidelines_us.pdf) (last modified May 26, 1995).

111. See *supra* notes 101, 103–04, 106 and accompanying text.

112. United Nations High Commissioner for Human Rights, Centre for Human Rights, *International Human Rights Standards for Law Enforcement* (Geneva, 1996). Those guidelines explicitly proscribe domestic violence, and require police to “take rigorous official action to prevent the victimization of women.” *Id.* at 20.

113. Moore, *supra* note 99, at 83, n.5.

114. *Id.*

## IV. THE FAILURES OF IN RE R-A-

R-A- created a remarkable tension between the law and the poignant facts of one woman's suffering. Both sides of the Board felt enormous compassion for Rodi Alvarado, but the majority felt that her situation, however compelling, had no answer in asylum law. This case, and these opinions, represent the failure of asylum law to perform its function: providing surrogate protection where the applicant's home country has provided none. Treating domestic violence as a kind of private problem, the case fails to redress this insidious form of persecution. Worse, though some acts of persecution may be episodic, and thus passing, victims of domestic violence are particularly at risk, as they often suffer regular, persistent persecution extending over long periods of time.<sup>115</sup>

The majority characterized Alvarado's claims as reflecting "heinous abuse" repeatedly inflicted upon her.<sup>116</sup> Married at age 16, she was victimized by her husband from the beginning. As her marriage proceeded, "the level and frequency of his rage increased concomitantly with the seeming senselessness and irrationality of his motives."<sup>117</sup> Consisting of extreme violence, rape, sodomy and social and economic subjugation, her marriage was a virtual nightmare from which there was no escape. Though she appealed to the Guatemalan police, help was unavailable. On three occasions summons were issued for her husband's appearance, but he ignored them without consequence. Indeed, on the one occasion on which she appeared before a judge, "he told her that he could not interfere in domestic disputes."<sup>118</sup> Having no shelters or other organizations to turn to, she fled Guatemala in May 1995, and eventually sought asylum in the United States.<sup>119</sup>

She appeared before an Immigration judge who found her credible, concluded that the abuse rose to the level of persecution, and found further that Alvarado had suffered the persecution both because of her membership in a particular social group and her

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115. As Deborah Anker pointed out, "'matrimonial violence' . . . can be the most extreme form of torture because there is no respite." Deborah Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 141 (2002) (footnote omitted).

116. *In re R-A-*, 22 I. & N. Dec. 906, 907 (B.I.A. June 11, 1999). Indeed, the majority concluded, "we struggle to describe how deplorable we find the husband's conduct to have been." *Id.* at 910.

117. *Id.* at 908.

118. *Id.* at 909.

119. *Id.*

political opinions.<sup>120</sup> The judge also found that the Guatemalan government was “unwilling or unable” to control her husband’s behavior, satisfying a further requirement for asylum.<sup>121</sup>

Despite the imputed finding regarding political opinion, the major focus of the Board was on the question of social group membership. There, the judge concluded that she fell within a group of Guatemalan women “‘who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.’”<sup>122</sup> The Board easily agreed with the judge’s findings of fact. The abuse was “more than sufficient”<sup>123</sup> to constitute persecution, the testimony credible and the record convincing on her inability to achieve state protection. The only issue was whether hers was simply a personal tragedy or whether it also constituted a legitimate asylum claim. Despite its obvious compassion for Alvarado, the Board concluded that she had not presented a cognizable claim.

From the Board’s view, the major impediment to relief was the absence of a cognizable group. Envisioning her plight as a personal, domestic tragedy, it couldn’t justify international intervention. Since its analysis proceeded from the conventional approaches to group membership, she failed to satisfy either the *Sanchez-Trujillo* or *Acosta* approach to group definition. She had neither entered into a “voluntary associational relationship”<sup>124</sup> sufficient for *Sanchez-Trujillo*, nor did her status partake of the immutable characteristics required by *Acosta*. Satisfying neither approach, her claimed group membership seemed rather like a “legally crafted description of some attributes of her tragic personal circumstances.”<sup>125</sup> The group was “defined largely in the abstract,”<sup>126</sup> thus lacking the properties necessary for legal recognition.

The Board was limited by existing paradigms. The elaborate, terribly specific group definition that it rejected was very much like those discussed earlier in this Article.<sup>127</sup> The Immigration Judge accepted that group characterization, which formed the basis for

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120. The judge found that, because of her resistance to her husband’s act of violence, he imputed to her the political opinion “that women should not be dominated by men.” *Id.* at 911.

121. *Id.*

122. *Id.* (quoting the opinion of the Immigration Judge).

123. *Id.* at 914.

124. *Id.* at 918.

125. *Id.* at 919.

126. *Id.* at 918.

127. *See supra* note 95 and accompanying text.

appeal. Naturally, had the case been framed differently, for instance, as suggested by the High Court in *Applicant A*, the Board would have been forced to deal with notions of gender-based persecution in a full, cultural context. As it was, the discussion took on the hollow sound of much previous litigation.

The discussion of the non-state actor seemed similarly parochial. Conceding that governmental failures in Guatemala resulted in an “appalling” level of official tolerance of abuse,<sup>128</sup> the Board nonetheless concluded that since the husband’s actions were neither “desired” nor “encouraged,”<sup>129</sup> the case was beyond the reach of asylum law. Stressing the “independent” and “private” nature of his conduct, it lost sight of the reason for asylum protection: to provide safety to those effectively abandoned by the failed states from which they’ve come. Instead of asking whether the applicant was a woman who had been persecuted in, at best, a disinterested country, the Board asked whether the persecution was the product of persecutory motive.<sup>130</sup> That misguided approach led the Board profoundly astray. Even setting aside the obvious difficulties of demonstrating the motives of the persecutor, it is unclear whether an application for asylum must demonstrate more than a but-for relationship between the characteristic and the persecution.<sup>131</sup> The Board clearly required much more.

The Board’s discussion of this nexus requirement flowed inexorably from its notion of the asserted group: “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>132</sup> It continued to ask whether “her husband has targeted and harmed the respondent because he perceived her to be a member of this particular social group.”<sup>133</sup> Through its language, it is evident that it saw this as a private problem between Alvarado and her husband. Because he had “targeted only the respondent,”<sup>134</sup> because she similarly “suffered and feared intimate violence only from her husband,”<sup>135</sup> and because it had “scant

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128. *In re R-A*, 22 I. & N. Dec. at 922.

129. *Id.* at 923.

130. The Board stated, “We understand the ‘on account of’ test to direct an inquiry into the motives of the entity actually inflicting the harm.” *Id.*

131. Recall Professor Legomsky’s discussion of this nexus requirement, *supra* note 95, at 966, where he recognized that there are frequently “two or more elements that jointly define the persecuted group.”

132. *In re R-A*, 22 I. & N. Dec. at 920. See *supra* note 116 and accompanying text.

133. *Id.*

134. *Id.*

135. *Id.* at 921.

information on how he personally viewed other married women in Guatemala,"<sup>136</sup> it concluded that she was "in a 'group' by herself of women presently married to that particular man."<sup>137</sup> Since he confined his abuse to her, the Board apparently felt his behavior was only that of a belligerent husband.

The Board similarly found his motivation wanting, finding that the conduct was not the product of her group membership, but simply of a dreadful marriage:

He harmed her, when he was drunk and when he was sober, for not getting an abortion, for his belief that she was seeing other men, for not having her family get money for him, for not being able to find something in the house, for leaving a cantina before him, for leaving him, for reasons related to his mistreatment in the army, and 'for no reason at all.' Of all these apparent reasons for abuse, none was 'on account of' a protected ground, and the arbitrary nature of the attacks further suggests it was not the respondent's claimed social group characteristics that he sought to overcome.<sup>138</sup>

Presumably, then, because he tortured her indiscriminately, these were random, and not targeted acts of persecution.<sup>139</sup> This approach calls into question what *would* satisfy asylum requirements. *R-A*'s dissenting opinion provides an answer.

Guided by the fundamental principle that asylum provides "surrogate international protection where there is a fundamental breakdown in state protection,"<sup>140</sup> the dissent's focus was clearly on the failed state.<sup>141</sup> Thus, though the dissenters might have broadened the group to include all Guatemalan women or all married Guatemalan women,<sup>142</sup> they nonetheless found the social group cognizable.

The dissent also found ample evidence to satisfy the nexus requirement. Its analysis of the nexus proceeded from the specific, palpable facts of this case to larger notions of male domination. First, it detected a clear pattern of male domination exhibited by

136. *Id.*

137. *Id.*

138. *Id.*

139. From the majority's view, "other factors, ranging from jealousy to growing frustration with his own life to simple unchecked violence tied to the inherent meanness of his personality" may account for his motivation. *Id.* at 926.

140. *Id.* at 936 (Member Guendelsberger, dissenting).

141. *Id.* at 929.

142. *Id.* at 935.

the husband's atrocities. His infliction of harm to Alvarado's genitals, his attempt to abort her pregnancy and his rapes of her, all provided vivid examples of his attempts to "dominate or subdue her."<sup>143</sup>

Next, it found the majority's treatment of his indiscriminate violence ironic. Rather than bespeaking the absence of any gender-based motivation, it demonstrated precisely that he chose to deal with her "merely as his property."<sup>144</sup> Thus, turning the majority's reasoning on its head, it saw his seemingly senseless violence as a disturbing manifestation of culturally condoned persecution.

Domestic violence is no haphazard, private phenomenon, but is a social ill "rooted in the economic, social, and cultural subordination of women."<sup>145</sup> The dissent placed the husband's conduct in a larger cultural context: "[V]iolence against women not only derives from but also sustains the dominant gender stereotypes and is used to control women in the one space traditionally dominated by women, the home."<sup>146</sup> It saw a tragic irony in the majority's treatment of the non-state actor. It saw in her husband's very arrogant sense of impunity, the ultimate proof that the persecution indeed was "on account of" her group membership. Repeatedly telling her that it would be "useless" to contact the police, he recognized that she "would receive no protection from the authorities if she resisted his abuse and persecution."<sup>147</sup> She was helpless and he knew it.

But this analysis, though convincing, seems overwrought and unnecessary. Intuitively, we would think claims from women such as Rodi Alvarado would be easily granted. It would seem unnecessary to specify the gender-specific forms of injury she suffered. Yet, read together, the majority and dissenting opinions reveal an enormous communication divide.

The majority saw Alvarado's suffering as personal; the dissent saw it as a cultural manifestation. The majority inquired very closely into the husband's specific motives. It apparently required a showing that he was aware of the group, was aware of her membership in that group and persecuted her in light of those perceptions. The dissent only asked whether hers was the kind of

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143. *Id.* at 938.

144. *Id.*

145. *Id.* at 939.

146. *Id.* (quoting U.N. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women*, 47 Sess., Supp. No. 38, para. 26, at 8, U.N. Doc. A/47/38 (1992)).

147. *In re R-A*, 22 I. & N. Dec. at 939.

suffering typical of someone locked into such a dreadful relationship, in which the state did not protect her. The two sides of the Board placed different demands on asylum law. Both, however, were trying to follow the U.S. Supreme Court's decision in *INS v. Elias-Zacarias* in dealing with the nexus requirement.<sup>148</sup> That case, central to American asylum law for over a decade, is unclear and it has been widely misconstrued. As construed, though, it has proved a major impediment to asylum claims, especially for the victims of non-state actors.<sup>149</sup>

### B. *Elias-Zacarias and its Aftermath*

Jairo Jonathan Elias-Zacarias fled war-torn Guatemala for the United States in 1987, was apprehended by the INS and faced deportation.<sup>150</sup> At his deportation hearing, he sought asylum and withholding of deportation.<sup>151</sup> The Immigration Judge and the Board denied him relief. After a Ninth Circuit reversal,<sup>152</sup> the case came before a sharply divided Supreme Court, which reversed the Court of Appeals.

Elias-Zacarias sought asylum based on his fear of both the guerrillas and government in Guatemala. In January 1987, when he was 18, two armed, uniformed guerrillas came to his home, asking that he and his parents join their cause.<sup>153</sup> When he and his family refused, the guerrillas told them to think it over, as they would be back. Apparently, his refusal to join was based on his fear of government retaliation. Thus, shortly after that visit, he left for the United States.

The Court focused on two aspects of the refugee definition in forming its opinion. First, it noted that Elias-Zacarias' claimed fear of persecution on account of political opinion was baseless, as he might have resisted recruitment for a variety of non-political

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148. 502 U.S. 478 (1992).

149. See Moore, *supra* note 99, at 111.

150. 502 U.S. at 479.

151. The term "withholding" was used until 1996, at which time Congress changed it to "restriction on removal." The current section is captioned "Restriction on removal to a country where alien's life or freedom would be threatened." 8 U.S.C. § 1231(b)(3)(A) (1996). This section prohibits the Attorney General from removing an alien to a place where her life or freedom would be threatened because of reasons set forth in the Convention.

152. *Elias-Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990).

153. 502 U.S. at 480-81.

reasons.<sup>154</sup> Moreover, the Court noted that even if the guerrillas construed his refusal as a political rebuff, the persecution must be on account of the “*victim’s* political opinion, not the persecutor’s.”<sup>155</sup> The majority opinion could have ended at that point, because its requirement of politically animated resistance had not been met.

Conceding politically motivated actions for discussion purposes, however, the Court further rejected his claim for lack of evidence that the guerillas would have persecuted him for his political opinions. Thus, construing the “on account of” language to mean “because,” it required evidence linking the feared persecution to the asylum seeker’s political views, transforming a mere victim of widespread violence into a refugee worthy of international recognition.

That evidentiary requirement is not unreasonable. The Court recognized that an applicant “cannot be required to provide direct proof of his persecutors’ motives.”<sup>156</sup> Rather, “since the statute makes motive critical,”<sup>157</sup> some proof is necessary, whether direct or circumstantial. Elias-Zacarias was making a very personal claim; he maintained that the guerrillas might kill him because of his perceived opposition to them. The Court simply required that he distinguish himself from the multitude of other would-be victims of civil strife by showing that he was perceived as a political opponent, not as a mere unfortunate caught in the crossfire.<sup>158</sup> Without any evidence of his political activity or statements, however, he had failed to show he feared reprisal for Convention reasons.

However, the majority opinion dealt with the issue of motive in an almost cursory fashion, which may have been satisfactory, due to the bareness of Elias-Zacarias’ claim. But the Court’s opinion has, unfortunately, led to a spate of litigation, while providing little direction to the courts facing those issues.<sup>159</sup> Though much of this

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154. The Court recited possibilities, including “fear of combat, a desire to remain with one’s family and friends, a desire to earn a better living in civilian life, to mention only a few.” *Id.* at 482.

155. *Id.* (emphasis in original).

156. *Id.* at 483.

157. *Id.*

158. Elsewhere, I recommended the expansion of the refugee definition to protect the unwitting victims of civil strife. See Heyman, *supra* note 6. Congress thereafter created “temporary protected status” to provide humanitarian protection for those who do not fit the Convention definition. It now covers those, like Elias-Zacarias, from countries engaged in “ongoing armed conflict within the state. . . .” 8 U.S.C. § 1254(a) (1996).

159. “*Elias-Zacarias* was a narrow opinion based on its facts. . . . The brevity of the opinion—only six pages—and the Court’s constrained approach to legal interpretation results in significant ambiguity, with major issues left unresolved. The opinion does not provide—nor



litigation has dealt with the formidable evidentiary problems facing applicants, the substantive concerns have focused on unraveling motives in ambiguous contexts.

*Borja v. INS*<sup>160</sup> exemplifies these problems. Teresita Moral Borja worked for her parents' business in the Philippines and was admittedly "pro-government."<sup>161</sup> She had a series of hostile encounters with members of the New People's Army (NPA),<sup>162</sup> as they sought her support and she resisted them. In addition, the NPA extracted "revolutionary taxes" from her because of her refusal.<sup>163</sup> She was the victim of extortion and physical violence because of her political sympathies.<sup>164</sup>

The Board of Immigration Appeals discerned a pattern of "economic extortion" in this persecution, but concluded that the extortion was exclusively "non-political."<sup>165</sup> The Ninth Circuit disagreed. Quoting from the dissenting opinion of Board Member Rosenberg, it concluded that the case represented "'extortion plus.'"<sup>166</sup> Though the NPA acted with "mixed motives,"<sup>167</sup> the presence of a political component brought it within *Elias-Zacarias* and Convention protection. Expanding on the spare language of *Elias-Zacarias*, it recognized the need to protect those facing persecution, if only in part, because of Convention reasons.<sup>168</sup>

Though many of these cases are factually complex and have produced strong opinions on both sides,<sup>169</sup> it is clear that

is it clear that Justice Scalia intended to provide—much guidance for future adjudications by the administrative agencies, or for review of similar questions of law by the courts." Deborah Anker et al., *The Supreme Court's Decision in INS v. Elias-Zacarias: Is There Any 'There' There?*, 69 Interpreter Releases 285–286 (1992).

160. 175 F.3d 732 (9th Cir. 1999) (en banc).

161. *Id.* at 734.

162. As the court pointed out, the New People's Army had a "well-documented history of political violence," according to the State Department's 1995 Country Profile. *Id.*

163. *Id.*

164. Borja's testimony before the Immigration Judge recounted stories of their violence, including beatings, threats with guns and knife slashings. All seemed animated by both political hostility and economic opportunism.

165. *Id.* at 736.

166. *Id.*

167. *Id.*

168. See Legomsky, *supra* note 95. Arguing for the "but for" test for nexus, Legomsky posited a circumstance under which a despot singled out university students of Asian ancestry for persecution. Thus, though they were being persecuted on account of race, only the subset of university students was being subjected to persecution. Yet, since they would not have been persecuted "but for" their race, the persecution was "on account of" race. As he continued, "there can be, and typically are, two or more elements that jointly define the persecuted group." *Id.* See also authorities cited *supra* note 96.

169. The Ninth Circuit has experienced internal difficulties applying *Borja*. See, e.g., Gafoor v. INS, 231 F.3d 645 (9th Cir. 2000), which vividly demonstrates the difficulty of

*Elias-Zacarias* does not require proof of a unitary motive. The Court did not reach the issues at that level of sophistication.<sup>170</sup> Writing for the Court, Justice Scalia only required that the asylum seeker show he fears persecution because of a protected characteristic.

Yet political opinion stands on a different footing from social group membership, as political opinion is discernible only if affirmatively expressed. *Elias-Zacarias* should not be read as a prescription for how to treat motive in all contexts as that goes beyond the scope of that rather limited opinion.

People are identified as members of particular social groups in a variety of ways. The Chinese couple in *Applicant A* may have overtly opposed Chinese population controls. Their conduct could have set them apart as opponents of government policy.<sup>171</sup> Nevertheless, to demonstrate the required nexus between group membership and the feared persecution, they needed to have outwardly opposed that policy. Mere private behavior would not do.

By contrast, in *Hernandez-Montiel*, Geovanni Hernandez-Montiel was granted asylum because he was a gay man with a female sexual identity in Mexico.<sup>172</sup> Throughout much of his life, he had been derided and tortured because of his manner and dress.<sup>173</sup> Though the Ninth Circuit was particularly concerned with social group definition in that case, it also confronted the government argument that the persecution was not solely "on account of" group membership. Using the mixed motive analysis, it readily concluded, "gay men with female sexual identities are recognized in Mexico as a distinct and readily identifiable group and are persecuted for their membership in that group."<sup>174</sup> His appearance made him stand apart, thus subjecting him to persecution.

Finally, Rodi Alvarado faced persecution simply because she was a married woman in a country rife with unchecked domestic

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determining just why persecution took place, and thus whether a Convention motive was present (considering persecution of Indo-Fijian after his arrest of a native officer for rape of a 13-year-old girl). For an excellent discussion of this mixed motive analysis, see *Girma v. INS*, 283 F.3d 664 (5th Cir. 2002) (affirming the Board's denial of the asylum claim).

170. The court simply required that one like *Elia-Zacarias* demonstrate that "the guerrillas will persecute him *because of* that political opinion, rather than because of his refusal to fight with them." 502 U.S. at 483 (emphasis in original).

171. Though they lost their case, recall that Congress broadened the American definition of refugee to expressly include those who opposed coercive population controls. See *supra* note 71. Moreover, Chief Justice Brennan expressly referred to the couple's failure to accede to voluntary birth control as "distinguishing" them as members of a particular social group. See note 80 *supra* and accompanying text.

172. 225 F.3d. 1084 (9th Cir. 2000).

173. *Id.* at 1099.

174. *Id.* at 1096.

violence. Her claim was based on her very identity. Her daily trials resulted from neither her conduct nor choice, but from her existence as the wife of a vicious batterer. Each victim can justly claim the feared persecution on account of group membership, yet the very basis for the perception of that membership differs from one to the other.

Just as group membership is based on different factors,<sup>175</sup> so too is persecution. Dissent is quelled by stringent government policies that brook no disagreement. The *personally unconventional* such as Hernandez-Montiel may suffer official separation and mistreatment as well as myriad forms of personal abuse by private, non-state actors.<sup>176</sup> Others, such as Rodi Alvarado, may suffer an unending cycle of abuse and state inaction. In each, motive is revealed differently, as the persecutors differ as much as do their forms of persecution.

Though these nuances seemingly complicate the search for a nexus, recognizing the symmetrical relationship between persecution and victim simplifies matters. Motives express themselves differently, depending upon whether the persecution is produced by the victim's conduct, identity or, as with domestic violence, very existence. Though express motives are unclear, recognition of these different types of persecutors and types of persecution eases this evidentiary requirement, as motives are uniquely linked to the varying forms of persecution.<sup>177</sup> And, since the non-state actor may take on many forms, and asylum law protects victims of each, it must recognize equally the claims of all.

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175. David Parish formulated a theory of group membership based on "social resonance." In that pre-*Elias* piece, he recognized that membership can be based on factors such as shared past experience, association with particular acts (gay men and lesbians) as well as other factors that set people apart in particular cultures. See Parish, *supra* note 22, at 946-53.

176. For example, at one point the school he was attending asked his mother to consent to his expulsion because of his behavior. Worse, he was prevented from attending another school because his school refused to transfer the paperwork elsewhere unless he changed his orientation. His parents threw him out of his own home after his expulsion. *Hernandez-Montiel*, 225 F.3d at 1088.

177. Professor Moore noted that *In re R-A* exemplifies the difficulty in discerning motives of the non-state actor, seeing it as a "painful example of the inappropriateness of the *Elias-Zacarias* Court's conception of persecution as flowing from a symmetrical causal relationship between the victim and the persecutor." Moore, *supra* note 99, at 83 n.94. However, that failure was not the inevitable product of *Elias-Zacarias*, but represented the failure to properly understand the concept of social group in the setting of domestic violence. Since motive is uniquely linked to persecution, it varies with the form the persecution takes.

## V. THE CHALLENGE OF DOMESTIC VIOLENCE

The majority in *R-A* misunderstood the broad cultural implications of domestic violence and thus perpetuated many longstanding myths. Falling prey to the notion that domestic violence is a private matter, that opinion furthered the false dichotomy between public and private that pervades so much discussion of domestic violence.<sup>178</sup> As Professor Deborah Rhode noted:

Women have been battered for centuries, but it was not until the 1970s that their private experience became a public concern. Like sexual harassment, domestic violence has been an area where the force of law meddled little with the law of force.<sup>179</sup>

As she explained, law's inadequate responses to domestic violence stem from its misconceptions of just what it represents. Thus, so long as "domestic disturbances" are regarded as private, family matters, legal intervention is ineffective.<sup>180</sup> In failing to see Rodi Alvarado's predicament as anything beyond a domestic problem, the *R-A* majority treated her situation as her unique problem, rather than as a tragic manifestation of a troubled culture.

Despite mounting evidence of the seriousness of domestic violence, legal systems frequently reinforce those boundaries between private and public, trivializing the plight of the victims.<sup>181</sup> Fortunately, these notions are eroding, as evidence depicts relationships of profound inequality. Thus, though the explanations for domestic violence are "complex and certainly multifactorial" we increasingly recognize that the "structures of society—be they economic, political or legal—act to confirm this inequality" between men and women.<sup>182</sup>

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178. See Deborah Anker, *Refugee Status and Violence Against Women in the 'Domestic' Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391, 401 (2001).

179. DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 237 (1989).

180. *Id.* at 239. As one commentator noted, "far from being individual, random acts, violence against women at the hands of their partners is a pervasive and systemic exercise of patriarchal power." Anita Sinha, *Domestic Violence and U.S. Asylum Law: Eliminating the 'Cultural Hook' for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1563, 1588 (2001).

181. See RHODE, *supra* note 179, at 241. Professor Rhode recounted a chilling story in which a judge "castigated a battered wife for wasting his time with her request for a protective order." That woman died and her husband faced murder charges. *Id.*

182. *Violence Against Women in the Family*, U.N. Sales No. E.89.IV.5 (1989).

*Elias-Zacarias* became the vehicle for bringing these challenges into asylum law. Previously, few sources had focused so closely on the “on account of” provision of the refugee definition. Following *Elias*, hundreds of cases focused on the nexus issue, thus bringing it to exceptional prominence. Yet, in the myriad discussions that followed *Elias*, few commentators either paid serious attention to the context-sensitive nature of nexus inquiries or openly examined the various notions of causation that enjoy legal currency.

*A. Doctrinal Developments in Causation  
and Persecutory Motive*

In her analysis of the nexus clause, Michelle Foster discussed the various legal formulations of cause.<sup>183</sup> Warning against the dangers of “transplanting” a notion of cause from an unrelated area of law,<sup>184</sup> she properly focused on its role in asylum cases. In tort law and criminal law, for example, causation helps “ascertain legal responsibility for a wrong.”<sup>185</sup> However, asylum law is forward-looking. It focuses on “protecting those who are persecuted and not on apportioning liability and blame for wrongful acts.”<sup>186</sup> A test for causation based on sole cause or even the “but for” notion might impose too great a burden on the asylum seeker.

Transplanting civil or criminal law notions of causation is particularly problematic in the setting of the non-state actor. Because of the “diverse and complex” aims of the non-state actor, the goals of protection would be frustrated by the imposition of a stringent test for causation.<sup>187</sup> Those causation models simply don’t fit, as they fail to capture the “complexity of the factual situations and the interlinked matrix of factors that often lead to a person’s need for international surrogate protection. . . .”<sup>188</sup>

Accordingly, Foster rejected causation tests that would disadvantage the asylum seeker, ultimately endorsing the notion of “contributing cause.”<sup>189</sup> Adoption of that view would best fulfill “the aims and objectives of the Convention.”<sup>190</sup> The applicant would

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183. See Foster, *supra* note 96.

184. *Id.* at 298.

185. *Id.* at 294.

186. *Id.*

187. *Id.* at 296.

188. *Id.* at 273.

189. See *supra* note 96 and accompanying text.

190. See Foster, *supra* note 96, at 298.

enjoy the protection that is the touchstone of asylum, yet would only do so were the persecution feared for Convention reasons.

The nexus element is context-sensitive, and in domestic violence cases plays out in terribly intimate, often longstanding relationships. As previously discussed,<sup>191</sup> since persecution obviously takes on different forms in varying settings, the nexus analysis must vary as the facts demand. The *R-A*-majority apparently sought some sort of showing of punitive intent on the part of Alvarado's husband. Although it ostensibly recognized that she had been persecuted,<sup>192</sup> its examination of the persecutory behavior misconceived the relationship between his conduct and the nexus requirement, seeming to require some sort of conscious intent on his part to punish her for Convention reasons. Asylum law does not require that.

For some time, it has been clear that persecution exists in the absence of punitive intent. For example, in *Pitcherskaia v. INS*<sup>193</sup> the applicant feared persecution on account of her support of gay and lesbian causes in Russia and her status as a Russian lesbian.<sup>194</sup> Diagnosed with a "slow-going schizophrenia,"<sup>195</sup> she was forced to undergo a number of therapy sessions that included drug injections and electroshock treatments, and was involuntarily confined on several occasions. The Board nonetheless denied her relief, since the treatments were "intended to cure the supposed illness, not to punish."<sup>196</sup>

The Ninth Circuit reversed emphatically. Refining *Elias-Zacarias*, it properly separated the element of persecution from that of nexus. For that court, persecution is an objective concept, satisfied if the harm inflicted is "offensive,"<sup>197</sup> from the perspective of the reasonable person. Then, so long as that harm was inflicted upon the victim because of a Convention reason, it is entirely irrelevant whether the persecutor intended "to inflict harm and suffering in an effort to punish."<sup>198</sup> The intent to act in a manner that is objectively persecutory is satisfactory, and there would be no need for the persecutor to regard himself as one.

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191. See *supra* notes 168–71 and accompanying text.

192. See *supra* note 116 and accompanying text.

193. 118 F.3d 641 (9th Cir. 1997). See also *In Re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. June 13, 1996) (holding that "'punitive' or 'malignant' intent is not required").

194. *Pitcherskaia*, 118 F.3d at 643.

195. *Id.* at 644.

196. *Id.* at 646.

197. *Id.* at 647.

198. *Id.* As the court said: "The fact that a persecutor believes the harm he is inflicting is 'good for' his victim does not make it any less painful to the victim, or, indeed remove the conduct from the statutory definition of persecution." *Id.* at 648.

The “contributing cause” test for causation obviously eases the burden on the asylum seeker. However, by introducing the notion of motivation into the nexus analysis, the *Elias-Zacarias* Court added additional complications. Even assuming that an applicant can meet this appropriate standard, it is unclear just what must be proved. Motive is a puzzling legal concept,<sup>199</sup> and its use here is particularly troubling. Yet, since it speaks to the mental state of the persecutor, it is useful to borrow from analogous areas of law.

When we say that the persecutor acted for Convention reasons, we may mean one of two things. We may mean that he acted in response to a Convention characteristic that he chose to suppress. In the setting of domestic violence, that would presumably mean that he meant to persecute his wife or another because he wished to assert that sort of repressive power over women in intimate relationships. Thus, recognizing the symmetry of persecution and victim, that would be demonstrated by proof of a regular, discernible pattern of abuse over some period of time. The very pattern of conduct would establish the nexus between being a woman and being persecuted.

However, criminal law recognizes a useful distinction between motive and intent, and sheds some light on the relationship between these concepts in the asylum context. Inquiry into motive might yield a variety of factors that, in concert, led to the abusive conduct. Were that evidence even available, it might reveal exactly the kind of mixed motives situations envisioned by *Borja*.<sup>200</sup> Yet, the criminal law inquiry into intent asks another question, whether the actor intended to cause the social harm prohibited by the relevant statute.<sup>201</sup> That inquiry produces more tangible, less elusive answers. Rodi Alvarado’s husband clearly intended to injure and brutalize her.

But the criminal law model isn’t wholly satisfactory, and its distinctions between motive and intent are only partially useful. Criminal law examines discrete events, asking questions about the actor’s conduct and mental state. Domestic violence, as a pathological syndrome, represents a continuing phenomenon, a dynamic, ongoing feature of a relationship. Thus, with each criminal act, the batterer demonstrates his criminal intent. But the pattern of conduct over the course of the relationship, reveals a

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199. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 121 (3rd ed. 2001); WAYNE R. LAFAYE, CRIMINAL LAW 241 (3rd ed. 2000).

200. *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc).

201. See DRESSLER, *supra* note 199, at 121.

pattern from which the "motive" to persecute can not only be discerned, but unavoidably must be.

Theoretically, these two forms of inquiry converge, as those actuated by the need to control and dominate also intend the disastrous results produced. Yet the very talk of "motive" infuses a factor into the discussion that might sidetrack decision-makers. It might lead to the kind of particularized inquiry into psychology requiring a showing that Alvarado's husband conceived of women as a protected social group, saw them as warranting Convention protection, yet persecuted her to deny her the basic human right to be free from such abuse. That approach places absurd demands on the asylum seeker. To continue the analogy to criminal law, not only requires proof of the intent to persecute, but requires proof of knowledge that the victim is a member of a protected group for Convention purposes. That approach vastly exceeds the Court's requirements in *Elias-Zacarias* and makes a shambles of common notions of what actuates human behavior.

Inquiry into intent alone, then, is entirely consonant with the protective purpose of asylum. Just as the forward-looking notion of causation espoused by Ms. Foster furthers this objective, so too does that of only requiring that a member of a protected group face intentional acts of persecution. So long as the relationship reveals this pattern of abuse, characteristic of domestic violence, it satisfies Convention requirements. Regardless of the thicket of factors that produced the violence, the results *remain* and command recognition.

### *B. The International Response*

The world community increasingly recognizes domestic violence as a problem of enormous public concern.<sup>202</sup> Addressing the asylum issues associated with such claims, state, regional and international bodies are creating mechanisms to cope with these claims, thus moving toward the acceptance of universal norms in asylum practice. Recent UNHCR initiatives obviously further this objective,<sup>203</sup> but it does not stand alone. The European Commission

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202. This is so, despite the assertions of some that recognition of gender-based persecution amounts to "cultural imperialism." See, e.g., Dan Stein, *Gender Asylum Reflects Mistaken Priorities*, available at <http://www.wcl.american.edu/pub/humanright/brief/v3i3/stein33.htm> (on file with the University of Michigan Journal of Law Reform).

203. See, e.g., *Guidelines on International Protection*, *supra* notes 90–91.



recently proposed a directive for the creation of a Common European Asylum System.<sup>204</sup> Though massive in scope, the directive focuses on some of the chief concerns discussed in this Article. Proceeding from the principle that asylum provides surrogate protection, the Commission sought to define social group in a “broad and inclusive manner.”<sup>205</sup> By its thinking, social group encompasses those sharing fundamental characteristics, yet also includes groups who are “treated as ‘inferior’ or as ‘second class’ in the eyes of the law.”<sup>206</sup> It explicitly places women victimized by domestic violence into that group.<sup>207</sup>

That inclusion depends on the unavailability of state protection. The Commission elaborated substantially on the phenomenon of the non-state actor, providing asylum only when the state was “*unwilling* or effectively *unable*” to protect the individual.<sup>208</sup> Because its touchstone was effective protection, it would deny asylum only when there is “no significant risk of persecution or other serious harm being realized.”<sup>209</sup> The Commission then provided eleven factors to be used in deciding whether state protection is lacking, including general country conditions and state officials’ responses to individual requests for protection.<sup>210</sup> Their use can help determine whether the applicant’s human rights were afforded true and tangible protection.

State practice in the United Kingdom, Australia and New Zealand mirror this approach. These notions reach particular maturity in the case law of Australia and New Zealand. *Refugee Appeal No. 71427/99* confronted a dreadful situation: an Iranian woman sought asylum in New Zealand after having been regularly beaten by her husband, cast out of the family home, denied custody of her son and tortured and harassed in her second marriage.<sup>211</sup> She claimed refugee status based on the grounds of religion, political opinion and membership in a particular social group. In an opinion by Rodger Haines,

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204. Commission of the European Communities, Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection (Sept. 9, 2001) (final version), available at [http://www.statewatch.org/news/2002/dec/com2001\\_0510en01.pdf](http://www.statewatch.org/news/2002/dec/com2001_0510en01.pdf) [hereinafter *European Commission*].

205. *Id.* at art. 12, ¶ 4.

206. *Id.*

207. *Id.*

208. *Id.* at art. 9, ¶ 1 (emphasis in original).

209. *Id.*

210. *Id.* at ¶ 2.

211. *Refugee Appeal No 71427/99*, 2000 NZAR 545, 2000 NZAR LEXIS 9 (Refugee Status Appeals Auth. Aug. 16, 2000).

the Refugee Authority focused particularly on her social group, characterizing it simply as “women in Iran.”<sup>212</sup> But the simplicity of his social group characterization contrasts with his treatment of the nexus requirement.

Proceeding from the virtual formula that “Persecution = Serious harm + The failure of state protection,”<sup>213</sup> Haines bifurcated the nexus analysis. That is, persecution exists if either the persecution is inflicted for Convention reasons or “the failure of state protection is for reason of a Convention ground.”<sup>214</sup> Thus, he found that though the husband’s behavior did not satisfy the nexus requirement, she was entitled to refugee status because “the failure by the state to protect her from that harm is for the Convention reasons. . . .”<sup>215</sup> The nexus was between the state and the victim. Though this ignores the social significance of domestic violence by envisioning the *persecutor’s* conduct as unrelated to Convention reasons, it nevertheless provides an avenue for relief for those, such as Rodi Alvarado, whom their countries have failed.

Indeed, Haines rejected any requirement for state complicity in the persecution. Drawing from the Canadian decision of *Ward*,<sup>216</sup> the Refugee Authority concluded that the Convention does not require state complicity in the persecution, but simply its inability to afford protection. Thus, four situations may satisfy Convention requirements:

1. Persecution committed by the state concerned,
2. Persecution condoned by the state concerned,
3. Persecution tolerated by the state concerned,
4. Persecution not condoned or tolerated by the state concerned, but nevertheless present because the state either refuses or is unable to offer adequate protection.<sup>217</sup>

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212. 2000 NZAR LEXIS at \*88–89. (“[T]he evidence relating to Iran establishes that the overarching characteristic of those fundamentally disenfranchised and marginalized by the state is the fact that they are women.”)

213. *Id.* at \*90. This “formula” came from Refugee Women’s Legal Group, Gender Guidelines for the Determination of Asylum Claims in the UK 1.17 (1998). *See also*, IMMIGRATION APPELLATE AUTHORITY, ASYLUM GENDER CLAIMS (2000).

214. 2000 NZAR LEXIS at \*88, 90.

215. *Id.* at \*95–96.

216. *Canada v. Ward*, [1993] 2 S.C.R. 289.

217. Refugee Appeal No. 71427/99, 2000 NZAR LEXIS 9, at \*57–58.

The unwavering focus on the need for state protection thus led the Authority to require only a finding that the state was aware of the need for aid, yet failed to provide it effectively.<sup>218</sup>

However, the failure to recognize the significance of domestic violence can skew the analysis, potentially denying protection to deserving victims. The failure to recognize that, in the paradigmatic case of domestic violence, the persecutor does indeed satisfy the nexus requirement may lead to improper analysis and incorrect decisions. The High Court of Australia recently confronted a gender-based claim, and while reaching the correct conclusion, showed some methodological confusion.<sup>219</sup>

Ms. Khawar, a citizen of Pakistan, recounted a striking tale of abuse. She had been repeatedly slapped, beaten so severely as to require hospitalization, threatened with acid and, on one occasion, doused with petrol, which her husband threatened to ignite. On four occasions she went to the local police, yet never received a satisfactory response. In fact, when she went to the police after the petrol incident, she was told by the officer that women always tried to blame their husbands for misfortunes of their own making, and that they should “sort out their ‘own work.’”<sup>220</sup>

Although approving the legal basis for her claim, the Federal Court of Australia’s two opinions differed dramatically. Justice Hill felt Mrs. Khawar was at risk of harm “because her husband was an alcoholic who, when drunk, abused her.”<sup>221</sup> Accordingly, he would have denied relief, seeing this as a purely personal matter.

Justice Lindren saw the matter as more complex. Seeking a bridge “between the state and privately motivated harassment,”<sup>222</sup> he felt that the mere failure to receive police protection did not, itself, bridge this gap. Rather, he required “something more.”<sup>223</sup> He wanted at least a showing of “a sustained or systemic absence of state protection” for women because the state did not regard them as deserving equal treatment under the laws as members of society.<sup>224</sup>

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218. In fact, Haines expressly considered the majority and minority opinions in *In Re R-A*, concluding that, on the nexus issue, “neither of the opinions meaningfully grapple with the issues.” *Id.* at 91.

219. Minister for Immigration and Multicultural Affairs v. Khawar, [2002] HCA 14, available at <http://scaleplus.law.gov.au/html/highcourt/0/2002/0/2002141114.htm> (on file with the University of Michigan Law Reform).

220. *Id.* at ¶ 95.

221. *Id.* at ¶ 81.

222. *Id.* at ¶ 54.

223. *Id.*

224. *Id.*

On appeal, the Justices of the High Court were equally divided. Each Justice confronted the issue of whether women may be afforded asylum protection “where the motivation of the perpetrators of the violence is private.”<sup>225</sup> The opinions, taken together, proceed along a continuum from a position identical to that of Haines in *Refugee Appeal*, to one rather like that of the majority in *R-A*.

Of the Justices writing, only Callinan saw no cognizable claim. Balking at finding that she belonged to a meaningful social group, he saw her claims as a private matter. Though conceding that the police may have failed her because of “her vulnerability as a woman in an abusive relationship,”<sup>226</sup> his comments about the “personal characteristics of her relationship” illustrate the misconception that domestic violence is a private matter.

By contrast, Justice Kirby’s opinion echoed that of Haines. Recognizing that the role of state agents may vary from active persecution to a simple inability to offer adequate protection,<sup>227</sup> Kirby saw compelling reasons to allow the claim throughout that spectrum. For him, “it is sufficient that there is both a risk of serious harm to the applicant from human sources and a failure on the part of the state to afford protection that is adequate to uphold the basic human rights and dignity of the person.”<sup>228</sup> Unmoved by the claim that the definition of the social group was too wide and the nexus unclear,<sup>229</sup> he focused on the denial of human rights by a state that has “withdrawn the protection of the law and its agencies.”<sup>230</sup>

Chief Justice Gleeson’s opinion fell perplexingly between these extremes. As did Callinan, he leaned toward a persecution model in which the state must play an active role as persecutor. For him, it would not suffice to show mere “misadministration, incompetence, or ineptitude” by the police.<sup>231</sup> Only a showing of “tolerance or condonation” of domestic violence would do, one demonstrating a “systematic discriminatory implementation of the law.”<sup>232</sup> Thus, straying from a simple protection model, he would grant her claim

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225. *Id.* at ¶ 5.

226. *Id.* at ¶ 152.

227. *Id.* at ¶¶ 91–132.

228. *Id.* at ¶ 115.

229. *Id.* at ¶ 126 (refuting the argument of the Minister that because of the “width” of the group, the nexus could not exist).

230. *Id.*

231. *Id.* at ¶ 26.

232. *Id.*

only if the state were actually blameworthy. Given his attribution of “private reasons”<sup>233</sup> to her husband and his relatives, she could only satisfy the Convention definition by showing the state’s “motivation” to persecute her.<sup>234</sup> This squares the circle, for since he sought accountability, the basis for it only lay in either active wrongdoing or knowing tolerance of reparable abuse by the state. Though lacking a common approach to the claim, the High Court found it cognizable, declining to settle the issue of whether or not the relief depends on the blameworthiness of the state, or its simple failure to provide protection.

Deborah Anker has long urged the adoption of a human rights paradigm for the analysis of asylum claims.<sup>235</sup> The question is not whether the state is blameworthy, but whether, for whatever reasons, it has failed to protect its citizens. If it has, and if that failure is not aberrational, then asylum must be granted.

The issues have shifted, then. State practice as well as regional and international materials support gender as a basis for group membership. The nexus requirement clearly does not require proof that group membership was the sole or even chief reason for persecution. Yet two features of domestic violence claims still require development.

First, virtually all judges who have addressed these claims see the problem as one of providing standards for protecting people from purely personal acts of violence. This mischaracterizes and risks inadvertently trivializing domestic violence. As Anker suggests, the husband provides the link between the Convention and the victim, not the state.<sup>236</sup> He is the persecutor and, as has been explained here, persecutes on account of Convention reasons. However, since asylum provides surrogate protection when one’s home state has failed, it is still necessary to develop standards to determine the adequacy of state protection, and thus the availability of asylum.<sup>237</sup>

That’s where Judge Lindgren’s “something more” becomes intriguing, as he focused on the second inquiry of when the state has failed its citizens. Lindgren was troubled by the possibility that the state failure might not reflect its true pattern of justice. The failure

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233. *Id.* at ¶ 31.

234. *Id.*

235. Anker, *supra* note 115.

236. After discussing the social significance of domestic violence, Anker went on to write that “the linkage to a Convention reason, be it to ‘women’ as a particular social group or political opinion, can be the non-state actor husband, not [just] the enabling state.” Anker, *supra* note 178, at 401.

237. See Anker, *supra* note 115, at 148.

could have been “atypical,” due to a particular officer’s “attitude or ineptitude,” “systemic inefficiency” or an officer’s simple reluctance to become involved in a particular dispute.<sup>238</sup> Seeking a failure truly reflective of endemic discrimination, he sought that ineffable “something more.”<sup>239</sup>

The risk of unfairly branding a state as discriminatory recedes if it is recognized that the actor himself is the persecutor, not the state. It is both more accurate and more palatable to find that the state has met the European Commission standard of being “unwilling or effectively unable” to protect its citizens.<sup>240</sup> Whereas an accountability theory for the state might require that the state is directly responsible for the persecution, or at least supports it, a *protection theory* does not.<sup>241</sup> It only remains, then, to develop standards to determine when the state has, however innocently, breached this lesser standard.

Although the European Commission’s test of “unwilling or effectively unable” does not readily lend itself to bright line decision-making, it is not necessarily precluded. On the contrary, in propounding this test, it created a standard, not a rule of easy application. Thus, the Commission recommended that its implementation depends on successfully answering two questions: whether the state has taken or may take adequate steps to prevent harm and whether the applicant has reasonable access to state protection.<sup>242</sup> The answers may reveal a rich, perhaps bewildering array of facts, but that is to be expected. Over time, they will form familiar patterns, as the law matures and becomes increasingly aware of distinctive patterns of persecution.

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238. *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14, at ¶ 54.

239. Chief Justice Gleeson was also evidently worried about this kind of rebuff, warning about the need to learn well country conditions before “reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitude of the authorities to the behavior of private individuals.” *Id.* at ¶ 26.

240. See *supra* note 204 and accompanying text.

241. See Catherine Phuong, *Persecution by Third Parties and European Harmonization of Asylum Policies*, 16 GEO. IMMIGR. L.J. 81, 83 (2001). Phuong urged the adoption of the protection model since “[a] human rights approach to refugee protection, and particularly to the meaning of persecution, leads to an extension of that system of protection to those fearing persecution by non-state agents where there is a failure of state protection.” *Id.* at 88.

242. *European Commission*, *supra* note 204, at art. 9.

### C. Applying the European Commission Standard

The social perception theory of group membership easily identifies the beset. Those perceived as different are vulnerable, so long as discrimination is culturally supported and access to redress is unrealistic. Guatemala, for example and many other countries, are rife with domestic violence. Some estimate that as many as nine of ten women in Guatemala suffer domestic abuse.<sup>243</sup> Indeed, as the State Department indicated, domestic violence “remained common among all social classes,” yet few convictions have been reported.<sup>244</sup>

Yet, as the State Department Report indicates, that pattern of violence is not only self-perpetuating, but is even reinforced in the law. Article 114 of the Guatemalan Civil Code, for example, gives the husband the right to prohibit his wife from working outside the home.<sup>245</sup>

That provision does not stand in isolation. Numerous provisions of that code represent the legislative enshrinement of gender-based discrimination. They were challenged recently in Guatemala, but the Guatemalan Court of Constitutionality upheld them, reasoning that they provided “juridical certainty” about the allocations of roles in marriage.<sup>246</sup> The Center for Justice and International Law and Maria Eugenia Morales de Sierra subsequently filed a claim seeking relief with the Inter-American Commission on Human Rights.

Petitioners claimed that nine provisions of the Guatemalan Code foundered on both the American Convention on Human Rights and the Convention on the Elimination of All Forms of Discrimination against Women.<sup>247</sup> That latter Convention defined discrimination against women to include any gender-based distinction that has the effect of denying to women “human rights and

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243. The Guatemalan Women’s Human Rights Defense Committee, *reprinted in* 16 GUAT. HUM. RTS. UPDATE 5 (August 18, 2000).

244. S. PRT. No. 107-32, at 2606 (2001). Indeed, as of that date, only two convictions had occurred in the country’s history. *Id.*

245. Under that provision, “the husband may object to his wife pursuing activities outside the home, so long as he provides adequately for maintenance of the home and has sufficiently justified grounds for objection.” Inter-American Commission on Human Rights, Report No 4/01\* (Jan. 19, 2001) (Case 11.625, Maria Eugenia Morales de Sierra), available at <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Guatemala11.625.htm> [hereinafter *Report*].

246. *Id.*

247. *Id.* See also, CEDAW, *supra* note 107.

fundamental freedoms in the political, social, cultural, civil or any other field.”<sup>248</sup>

The Commission granted relief on all counts. Rejecting the Guatemalan court’s view that the provisions achieved juridical certainty, it found that the “cited provisions institutionalize imbalances in the rights and duties of the spouses,” thus creating an “insurmountable disequilibrium” within marriage.<sup>249</sup> Not only had the Code failed its people, but through it, so had the state of Guatemala. The Commission found those provisions not only represented distorted, discriminatory views of women, but worse, they undermined the “duty of the State “ to assure all citizens equal participation in society.”<sup>250</sup>

Rodi Alvarado did not participate equally in Guatemalan society. She was victimized by the combined effect of a law that divided a people and practices that reinforced that law. When she sought protection, both the police and court system effectively abandoned her.<sup>251</sup> Strikingly, though the Board found that the views of Guatemalan society and government resulted in “tolerance of spouse abuse at levels we find appalling,”<sup>252</sup> it denied her claim because domestic violence was only tolerated, not “desired.”<sup>253</sup> The European Commission standard was violated.

The European Commission called for an analysis of the formal structures for protection, as well as the feasibility of gaining access to that protection. Law enforcement agencies in Guatemala were clearly unwilling to “detect, prosecute and punish offenders.”<sup>254</sup> Moreover, not only did her husband boast that he was beyond state control,<sup>255</sup> but her efforts to obtain protection were completely futile.<sup>256</sup> As a member of a protected group, she was persecuted, sought help from the state and found none. The claim for asylum was complete.

248. *CEDAW*, *supra* note 107, art. 1.

249. *See Report*, *supra* note 246, at ¶ 44.

250. *Id.* at ¶ 45.

251. *See supra* notes 120–22 and accompanying text.

252. *In re R-A-*, 22 I. & N. Dec. 906, 922 (B.I.A. June 11, 1999).

253. *Id.*

254. *See European Commission*, *supra* note 204, at art. 9(2)(e).

255. Alvarado’s husband claimed that “because of his military service, calling the police would be futile as he was familiar with law enforcement officials.” *In re R-A-*, 22 I. & N. Dec. at 909. *See also European Commission*, *supra* note 204, at art. 9(2)(i) (“[E]vidence by the applicant that the alleged persecutors are not subject to the State’s control.”).

256. The *European Commission* also considers the “qualitative nature of the access” to protection and the state’s response to steps taken by the applicant to obtain protection. *European Commission*, at art. 9(2)(j)–(k).



## CONCLUSION

Lamenting the plight of those from failed states, Jennifer Moore envisioned a human rights law that protects all victims of persecution.<sup>257</sup> But failed states are not just those whose governing institutions have collapsed, but also those that have failed to provide surrogate protection for those victimized elsewhere.<sup>258</sup> As recounted above, those victims suffer twice, both through the betrayal of their citizenship rights and in the failure of third countries to provide surrogate protection.

These failures are not inevitable. Though the Convention does not explicitly deal with these victims of domestic violence, it easily affords them protection. Here, we should learn from the efforts of the world community, as its lessons are remarkably simple. The touchstone is whether the applicants' home countries have failed, in being unable or unwilling to ensure them safe lives as citizens, free from abuse. The "social group" is simply women. The persecutors are their husbands, as non-state actors. So long as the pattern of abuse can rightly be called domestic violence, the nexus requirement is met, as this repeated infliction of harm unmistakably reveals the intent to inflict the kind of cruelty contemplated by the Convention. In a tragic irony, this confluence of factors not only meets the Convention requirements, but presents the clearest, most urgent case for surrogate protection.

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257. Moore, *supra* note 99, at 120. "Modern Human rights law must embrace the full range of human experience and provide remedies for violations of human dignity by non-state actor and state actor alike." *Id.*

258. *Id.* at 121.