



Ensuring Equal and Enduring Access to Asylum

Why 'Gender' Must be a Protected Ground

The Tahirih Justice Center is a national, nonprofit organization that serves immigrant survivors of gender-based violence.

Our interdisciplinary, trauma-informed model of service combines free legal services and social services case management with bridge-building policy advocacy and research-based training and education.

Our programs efficiently and effectively leverage donated professional services from a vast network of attorneys, medical professionals, and other experts to serve as many immigrant survivors as possible.

By amplifying the experiences of survivors in communities, courts, and Congress, Tahirih's mission is to create a world where all people share equal rights and live in safety and with dignity.

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Please note that client names and countries throughout this report may have been changed for privacy.

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Introduction

Gender inequality and gender-based violence remain pervasive worldwide. Survivors of gender-based violence such as rape, human trafficking, female genital mutilation/cutting (FGM/C), forced marriage, and domestic violence often find themselves trapped in abusive and exploitative situations with nowhere to turn. Perpetrators inflict harm with impunity, the state offers little or no safe harbor, and gender-based violence is seen as inevitable — even as it causes social and economic inequality, as well as severe, life-long consequences for mental and physical health.

Gender-based violence leads to migration as some survivors face few options for safety at home. They flee their countries to protect their dignity and

preserve their lives, and in the hopes of shielding their children from ongoing and future harm. If they do not find safe harbor within the laws of the destination country, they can be vulnerable to further exploitation and violence.

If humanitarian protection laws do not recognize the needs of survivors of gender-based violence and explicitly safeguard their human rights, then they too contribute to the global pandemic of misogyny and gender-based violence.

U.S. law has been evolving over the last century to better protect the rights of those who experience discrimination, violence, and hate crimes on account of their sex and gender. For example,

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, and national origin.¹ In more and more contexts, the law treats sex and gender like other identities that have historically been used to justify mistreatment and violations of human rights.

Just as systemic racism fuels mistreatment on account of race, and nativism breeds persecution on account of national origin, systemic misogyny gives rise to mistreatment on account of gender. By ignoring the perniciousness of misogyny, U.S. asylum law fails survivors of gender-based persecution who continue to face inconsistent and unequal protection even though they are eligible for relief under international treaties. For this country to reckon with harm that continues to be perpetrated against women, survivors of gender-based violence must have equal access to justice.² Changes must be made to asylum law, policy, and practice, including by clarifying and expanding existing regulations, adjudicator and border official guidelines, and training curricula.

As described in detail below, to begin to evolve the nation's response to gender-based violence and to improve

efficiency for applicants and the system alike, these changes should include naming gender as a sixth protected ground of asylum under U.S. law. This change is bold, necessary, and long overdue.

BACKGROUND ON U.S. ASYLUM LAW

U.S. asylum law is derived directly from the United Nations 1951 Convention and 1967 Protocol Relating to the Status of Refugees (the Refugee Convention). According to this treaty, a refugee is “someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a *particular social group*, or political opinion.”³ U.S. law adopts this definition when considering who qualifies for asylum if they are already in the U.S. or at a border seeking protection.

When the Refugee Convention was written over seventy years ago, gender inequality—and the manifestation of that inequality as violence—was not widely recognized as a serious human rights abuse. It is notably absent from the list of protected grounds as a result. Since then, the United Nations High Commissioner for Refugees (UNHCR) has

interpreted the Refugee Convention to extend asylum protection to those fleeing gender-based violence. According to UNHCR, survivors of persecution such as forced marriage, domestic violence, sexual assault, female genital mutilation/cutting, and so-called “honor” crimes are eligible for asylum primarily as members of a “*particular social group*.”⁴

In 1980, the U.S. adopted the international refugee definition as its own in its domestic asylum laws, and in 1985 began to explain what might qualify as a *particular social group*.⁵ Not until 1996, however, did the U.S. begin to extend protections to women facing gender-based violence as members of *particular social groups* in strictly limited circumstances.⁶

Despite international guidelines, the U.S. has struggled for decades to **consistently and equitably** protect individuals fleeing gender-based persecution. Litigation has only achieved limited progress. Courts inconsistently apply standards, leaving many open to denial based on geography alone. Some decisionmakers categorically deny gender-based claims regardless of which protected ground is asserted, dismissing violence against women as merely a private dispute. Then

since legal counsel is not appointed by the government, individuals who cannot afford or find free attorneys face impossible hurdles when trying to explain how they qualify for asylum under the current *particular social group* framework.

Protection is also dependent on the way the political winds blow. Successive administrations have used their executive authority to try to expand or restrict how the current framework is interpreted, so that protections are regularly subject to change. The consequences have been a series of back-and-forth decisions that place gender-based asylum under constant threat and that have denied countless survivors the vital protection they should be afforded under the Refugee Convention and U.S. laws.

GENDER MUST BE PROTECTED

No one should experience violence because of their sex or gender, and if they do, they should have the right to seek safety.

Gender is a fundamental, intrinsic aspect of an individual’s identity—just like the existing Refugee Convention grounds. Those who are targeted systemically for

violence and discrimination because of their identity should be protected. As our asylum law is currently written and implemented, however, we deny gender its rightful place alongside the other grounds— like race and religion— as an attribute equally worthy of protection.

Recognizing the need to update and clarify their laws, other countries around the world such as Sweden, France, the Czech Republic, and Spain have started adding gender as an independent basis for asylum.⁷ **To ensure equal and enduring access to asylum for survivors, the U.S. now must follow suit.**

"Amending the Immigration & Nationality Act to add gender as a protected ground is an urgent priority. It is absurd how the immigration courts have flip-flopped back and forth on recognizing gender-based persecution as a basis for asylum. Just like race or religion, gender has always been used to categorize people in society— and unfortunately to justify persecution against them in many cases."

**HONORABLE DENISE N. SLAVIN,
RETIRED IMMIGRATION JUDGE AND
FORMER PRESIDENT OF THE NATIONAL
ASSOCIATION OF IMMIGRATION JUDGES**



Why Gender Must be a Protected Ground

1. OUR LAWS DO NOT ADEQUATELY PROTECT SURVIVORS OF GENDER-BASED VIOLENCE WHO QUALIFY FOR ASYLUM UNDER THE REFUGEE CONVENTION.

Under international law, the U.S. is obligated to comply with the Refugee Convention. In practice though, the U.S. does not adequately protect individuals as the Refugee Convention intended. Although it was written at a time when gender-based violence was not well understood, its intent was to protect anyone who was persecuted on account of their identity.⁸ In fact, in its updated guidance, UNHCR deemed it unnecessary to add an additional ground for gender

based on the incorrect assumption that Refugee Convention countries widely accept gender as a basis for asylum. Accordingly, UNHCR noted, a properly interpreted refugee definition includes gender-related claims.⁹ Unfortunately, this assumption does not hold true for the United States. Claims from women and girls who experience violence specifically because of their gender, in acts such as forced marriage and domestic violence, are not widely accepted here.

While guidance from UNHCR clearly extends protection from the Refugee Convention to gender-based claims, U.S. asylum law continues to use the original, outdated Convention language rather than this international guidance. Survivors' ability to pursue asylum has

therefore hinged on the whims of presidential administrations and decisionmakers who resist recognizing misogyny as a global human rights abuse. As a result, after decades of shifting policies, survivors who face gender-based persecution still do not have a clear, consistent pathway to the protections for which they are eligible.

The absence of a gender ground in U.S. asylum law has caused us to deny protection to many survivors who qualify under the Refugee Convention. Updating the language of U.S. asylum law to include a gender ground is therefore necessary to help ensure full compliance with the Convention and to afford survivors the same access to relief as those targeted because of race, religion, political opinion, and/or nationality.

"The category of 'Sex/Gender' should be added as a sixth basis for asylum to properly ensure the protection of women fleeing from gender violence and persecution. Adding 'Sex/Gender' would not conflict with the Refugee Protocol or international law. On the contrary, the amendment would further UNHCR's mandate to protect women. The Refugee Protocol sets the floor for protection and not the ceiling, and therefore, expanding protections is permissible."

CHURCH WORLD SERVICE



2. SURVIVORS OF GENDER-BASED VIOLENCE NEED MORE THAN THE PARTICULAR SOCIAL GROUP GROUND IN ORDER TO FAIRLY ACCESS ASYLUM.

Most gender-based claims are brought under the *particular social group* ground of asylum. As a result, survivors of gender-based violence face higher burdens to establishing eligibility, which is especially challenging and near impossible for those who are unrepresented. Although some survivors have received asylum as members of *particular social groups*, continuing to use this as their primary basis for protection in the U.S. is not enough.

The *particular social group* ground was first helpfully defined in *Matter of Acosta*, a case decided in 1985.¹⁰ In the decision, sex was listed as an example of an acceptable *particular social group*. Nonetheless, the holding has been confused and narrowed over decades of litigation, making a return to that definition unrealistic through further litigation.

Particular social group claims are further disadvantaged compared to claims brought under other grounds because of the multiple, complicated layers of the

definition that must be satisfied. To bring a claim as a member of a *particular social group*, an applicant must first prove that they belong to a recognizable group that shares a fundamental identity trait, which is large enough to be distinct, but still not too large, to remain particular. Some courts have imposed additional restrictions on gender-based social groups, such as prohibiting recognition of groups defined primarily by the persecution at issue itself.

Over the years, what is considered a viable *particular social group* for gender-related claims has continuously shifted, making it arbitrary, confusing, and unpredictable to ascertain which claims will be accepted, and which others will not.

In 1996, Fauziya Kassindja fled her native Togo, escaping a forced marriage and threat of female genital mutilation/cutting. In her case, she was granted asylum after proving that she was a member of the *particular social group*: “young women of the Tchamba-Kunsuntu Tribe who have not had FGM as practiced by that tribe, and who oppose the practice.”¹¹

The precedent set in Ms. Kassindja’s case seemed to pave the way for those fleeing other types of gender-based

violence to assert membership in *particular social groups*. But in 1999, Rodi Alvarado, a Guatemalan woman who suffered atrocious and life-threatening domestic abuse at the hands of her husband, a former soldier, was initially denied asylum because she could not prove that she was part of a *particular social group*. It took 14 years for Ms. Alvarado and other survivors of domestic violence to be recognized as eligible for asylum as members of the *particular social group*: "married women who are unable to leave their relationship."¹² Other legal decisions followed that affirmed and expanded the definition until 2018, when a decision by then-Attorney General Jeff Sessions sought to reverse decades of progress.¹³ In the case *Matter of A-B-*, Sessions revoked asylum protections for most survivors of domestic violence. That decision, and other related decisions that came after it, caused a cascade of asylum denials for people fleeing domestic violence, female genital mutilation/cutting, and other harm. The decision was revoked on June 16, 2021, but by then it had already denied thousands of survivors access to safety.

The *particular social group* ground has offered many women protection, while

at the same time leaving other asylum seekers with similar circumstances out in the cold, simply because they have an officer or judge who interprets the long trail of legal decisions differently. In addition, the cobbled-together framework of protection has proven itself too weak to withstand attacks from an administration prepared to issue decisions and regulations that specifically slam the door on women and girls who have survived abuse.

A woman's profile is shown in silhouette on the left side of the page, looking towards the right. The background is a solid light pink color. The woman has dark, curly hair and is wearing a dark top.

SURVIVOR'S STORY

Sara

Sara sought asylum in the U.S. in order to flee her abusive partner. While testifying in her case, Sara recounted how he kept her as his property for 11 years. He referred to her as his dog ("mi perra") and whistled at her rather than calling her by name. He told Sara she was registered to him like a car, and abused, controlled, and humiliated her at every opportunity. Sara reported him to the authorities twice, to no avail. He said he would kill her if she reported him again. He sharpened his machete in front of her, warning that he wanted a clean edge when he cut her head off. Sara had a lawyer's help preparing her application, but still did not succeed. While the immigration judge agreed that the abuse Sara suffered was persecution, he ruled that the law of particular social group prevented him from granting her case.

Sara's asylum claim was denied in 2019.


3. PROVIDING NECESSARY EVIDENCE FOR AN INDIVIDUAL'S ASYLUM CLAIM, SUCH AS THEIR PERSECUTOR'S MOTIVE FOR VIOLENCE, IS UNNECESSARILY HARDER WITH GENDER-BASED CLAIMS.

In all asylum cases, applicants must also prove that their persecutors seek to harm them *on account of* one or more of the five protected grounds. The standard for proving a persecutor's motive, also called the "nexus", is the same regardless of the type of asylum claim. Yet, decisionmakers who do not see violence against women as a legitimate basis for protection under the statute apply the existing standard very differently and more stringently in gender-based cases.

Typically, adjudicators should first assess if an applicant has demonstrated that they experienced persecution, then whether the persecution happened "on account of" a protected ground such as race or religion. In cases where survivors are seeking asylum because of gender-based harm, however, once it has been established that the applicant suffered persecution, the analysis becomes more complex.

Everyone in the room may know – importantly the survivor herself – that the reason for the persecution is her gender. She may know that she was abused or raped because she is a woman: like many abusers, her perpetrator knew he could be violent and get away with it because he is a man and she is a woman. Instead of naming that, however, the dance begins: did the abuse occur because you were a woman that he was married to or because he knew that you could not escape? Was it because nobody would believe you or help you, and there was nowhere in the country you could go to because women cannot live alone? Did he hurt you because you made him angry? Could you have left him? Why didn't you? These classic victim-blaming questions are often at the center of the analysis conducted by asylum officers and judges who hold the fate of survivors in their hands.

In other words, rather than analyzing the persecutor's motive as a standalone part of the asylum claim, judges readily — even unwittingly — examine additional questions that are irrelevant to the persecutor's motive. These include: 1) whether a *particular social group* exists; 2) whether the applicant is a member of



"My cases have involved women who were indisputably targeted because of their gender— they were raped and beaten, their families and children threatened, their educations denied, and their economic agency stunted— all because of their gender. Almost invariably, their home countries had laws that recognized violence against women as a problem, and without exception those laws were routinely ignored and their 'enforcement' limited to lip service at best.

If my clients had been treated that way because of their race, religion, or political view, the entire dispute would collapse into a relatively straightforward application of laws and regulations. But because the applicants are women, we have to engage costly experts, conduct hundreds of hours of extensive country conditions research, and painstakingly craft complicated and sometimes convoluted arguments to fit these victims into an acceptable particular social group. Every effort is fraught not just with expense, but also uncertainty: Will the immigration judge recognize the particular social group? Or will someone who has undeniably been persecuted— and who would undeniably be granted asylum if she had been persecuted on the basis of race, religion, or her political view— be forced to return to the hands of her rapists and abusers because the particular social group arguments were rejected?

The exclusion of gender is a form of built-in tolerance and acceptance of gender-based violence, and a harsh and disappointing reminder of the hoops we make women jump through and the suffering we make them endure. We should amend the statute to include gender as an independent basis for asylum."

BEN KLEINMAN, VOLUNTEER IMMIGRATION ATTORNEY

it; 3) whether the harm is considered persecution at all; and 4) whether the applicant's government protected her or even had a duty to do so. By contrast, in cases involving race-based, religious, or political persecution, judges tend to evaluate the persecutor's motive according to a much simpler standard.

As a result, survivors targeted for abuses such as domestic violence or forced marriage cannot simply cite well-documented, deeply entrenched systemic misogyny as evidence of their persecutor's motive. Rather, each case a survivor brings is a referendum on her basic right to protection from violence because of her gender. More precise legal definitions to clarify and expand what constitutes a *particular social group* are certainly needed to help ease this burden for all individuals who are fleeing persecution, but these changes are not enough. Instead, solutions are needed to simplify the gender-based asylum analysis, and signal to all applicants and adjudicators what the Convention, as originally drafted, lacks: the essential premise that violence on account of gender is a human rights abuse that must be prevented, and its victims protected, too.

4. THE PROCESS OF PROVING PERSECUTION DUE TO MEMBERSHIP IN A PARTICULAR SOCIAL GROUP NEEDLESSLY RETRAUMATIZES SURVIVORS OF GENDER-BASED VIOLENCE.

Questions that Stigmatize

Asylum seekers commonly experience post-traumatic stress disorder because of the persecution they faced, and unfortunately for many, testifying about persecution can be retraumatizing. The process for seeking asylum under the *particular social group* category is very complex and unnecessarily exacerbates trauma among survivors of gender-based violence. Survivors field deeply invasive and dehumanizing questions from officers, judges, and attorneys for the government with likely little or no training in interviewing techniques geared towards trauma survivors.

To establish membership in a *particular social group*, a survivor seeking asylum must address: why they were raped or abused by her partner; why they did not 'choose' to leave the relationship, resist

or express opposition to abuse; why they did not report the abuse to anyone immediately, if at all; and whether their own conduct caused or justified their victimization. Though some of these questions may apply to other elements of the asylum definition, such as a persecutor's motive within nexus, in gender-based violence cases brought under a *particular social group* claim, establishing a *particular social group* is often conflated with identifying an abuser's motive for violence. The result is that proving that a person was persecuted on account of her gender becomes unnecessarily complex.

The impact of these questions is to stigmatize, blame, and shame the victim, even though such violence is inflicted by force and for reasons far out of her control. In no other context do we reflexively presume that an asylum seeker was complicit in their own victimization. The nature of the questions posed also reinforces harmful judgments about survivors. These judgments both prolong the healing process for those who internalize them and perpetuate society's tolerance of gender-based violence on a broader scale.

Unfortunately, service providers must also ask these questions of survivors to help them prepare their cases. This can inhibit trust building between even the most skilled or well-intentioned providers and the survivors they serve, inadvertently reinforcing stigmas and victim-blaming yet again. The complexity of the *particular social group* analysis can additionally deter survivors from taking a more active role in their cases. This can reinforce their lack of agency as victims, now experienced on a systemic level as they navigate the asylum system. The process is even more retraumatizing for those who do not have the luxury of highly trained counsel and mental health experts to buffer the impact of an adversarial court setting.

Gaslighting Survivors


Every person internalizes some measure of sexism, and for those who are caught in gendered, abusive situations, the internalized misogyny can become a loud, internal voice saying that this treatment must be tolerated and accepted. Survivors of sexual and domestic violence who are able to fight back against that voice can sometimes attempt to get away. It can take many attempts to break free from violent situations since

the words and actions of the abuser are reinforced by society and the internal voice. The small percentage of survivors who are able to finally get away and also find passage to freedom have had to move mountains in order to let go of the idea that they must accept the trampling of their rights and minimization of their agency because of their gender.

When they arrive in the U.S. and ask for protection, however, they find out that asserting that they experienced violence as a woman in a misogynistic society cannot be the reason for their protection. They must once again push through a series of gates constructed to minimize, ignore, and delegitimize the reality they have fought hard to name: that they have been harmed because of their gender. When adjudicators reject gender-based asylum claims outright, they negate what women know of their own lives and experiences. Because abuse often involves the distortion of the truth, this further traumatizes survivors. It is harmful to survivors who are trying to heal from trauma, and it is devastating and shameful that the U.S. system allows this gaslighting and retraumatization to take place.

By contrast, a trauma-informed, survivor-centered approach to the asylum

process seeks to minimize retraumatization to survivors in their search for safety. The intricacy and outsized role of testimony as to a survivor's *particular social group*, and her persecutor's motivation to harm her for her membership in it, would be unnecessary if gender were clearly and explicitly named, including as an independent ground of asylum. As with evidence of racism in race-based claims – evidence of misogyny to establish a persecutor's motive for inflicting gender-based harm should suffice. That we continue to sideline gender by failing to name it as an independently protected ground is both a manifestation and perpetuation of how we treat survivors as a society.



"As a clinician, I routinely hear stories of women seeking asylum who have survived unspeakable acts of violence solely on account of their gender. They will give detailed accounts of how violence against women is the norm in their communities. In some cases, a survivor will describe how she herself did not realize at first that the violence she suffered shouldn't be considered 'normal,' and that she should have the right to seek safety. When these women are asked to try and explain why their persecutors targeted them, beyond the fact that they are women, they frequently don't understand the question.

It is nonsensical and ignores their reality, undermining the work they have done to understand their abuse as wrong and to fight for their lives. Beyond that, it inappropriately puts the responsibility on a survivor to justify her need for safety beyond the simple fact that she is a woman. This can make it seem that those who are there to help her do not understand or believe her reality. This additional, unnecessary trauma for women is created by our legal system and could be avoided with the addition of gender as a sixth ground for asylum. If women are persecuted solely on account of their gender, why is that not enough of a reason for us to offer them protection like we do for others?"

ELEANOR EMERY, MD; MEMBER OF THE PHYSICIANS FOR HUMAN RIGHTS ASYLUM NETWORK AND CO-FOUNDER OF CLINICS IN FOUR STATES THAT CONDUCT FORENSIC MEDICAL EVALUATIONS FOR ASYLUM SEEKERS


5. WITHOUT A SIXTH GROUND FOR GENDER, SURVIVORS WITHOUT LEGAL REPRESENTATION ARE FURTHER DISADVANTAGED—WITH MANY FLEEING VIOLENCE AND IN NEED OF SAFETY EXCLUDED.

Because the *particular social group* ground is an extremely complex area of asylum law, survivors must find an affordable attorney with specialized knowledge in this area if they hope to have any kind of success. The immigration system does not appoint counsel for asylum applicants or others facing deportation. Only about a third of individuals facing deportation in immigration court have representation, and much fewer if they are being jailed by Immigration and Customs Enforcement.¹⁴ It is already financially burdensome to pay an attorney, and particularly vulnerable survivors who are indigenous, detained, or arriving at the border are further disadvantaged in their ability to find counsel due to language barriers and physical lack of access to attorneys.

Without legal counsel, survivors are left alone to navigate a daunting system, in which effective representation can make all the difference. According to the

National Immigration Forum, an individual is five times more likely to secure asylum with legal representation.¹⁵ And for *particular social group* claims, immigration counsel may not be enough since the constantly evolving and highly complex legal framework requires specialized knowledge and training. In addition, many *particular social group* claims involving gender-based violence now experience delays and multiple levels of appeals given the lack of clarity of the law, leaving survivors unable to retain or continue to pay attorneys who can make the long-term commitment such cases require.

Survivors of gender-based violence are also at heightened risk of failure in their cases since unscrupulous attorneys or other practitioners might promise favorable results yet lack the necessary expertise to manage *particular social group* claims and are unprepared for the long legal fight that has become standard in these cases. At the same time, because *particular social group* claims are more complicated and take more time than other asylum claims, lawyers who do have the needed skills may have to take on relatively fewer clients, worsening the lack of access to qualified counsel for survivors.



"I am afraid of returning home to India. My family will force me to marry someone of their choosing or kill me if I refuse. They want to punish me because I had a child out of wedlock, and the father is a man from a lower caste. I know of other women who have suffered this way in my country.

I paid a lawyer to help me apply for asylum. He did not advise or prepare me at all before my interview. The officer asked me why I was afraid to return home, and whether it was because I was part of a group. I didn't understand the questions and how they related to my case. I answered 'no' to all of them and my case was denied. The asylum application said nothing about being afraid of violence because I am a woman and I had no idea that I could or should talk about that. If it had, my lawyer could have been more helpful. And maybe the officer would have asked me about it. I could have had the chance to explain how women are treated at home – because they are women."

MAYA*, A SURVIVOR OF GENDER-BASED VIOLENCE SEEKING ASYLUM

"So much variance exists in the likelihood of success from court to court that filing a claim can feel like playing Russian roulette. This is especially true if applicants do not have lawyers. Proving that one qualifies for asylum is already a heavy burden and one that most applicants do not meet; making nuanced arguments that applicants fit into the social-group category has become an art form. Most asylum seekers cannot afford immigration attorneys, and free lawyers who specialize in gender-based asylum are rare. The result is that women in life-or-death situations who might legally qualify for asylum are instead deported to face their fates."²¹

JAMIE GORELICK, PARTNER AT WILMER AND HALE AND FORMER DEPUTY ATTORNEY GENERAL, AND LAYLI MILLER-MURO, FOUNDER OF THE TAHIRIH JUSTICE CENTER

If gender were explicitly named as a protected ground, survivors of gender-based violence seeking asylum would have fairer access to the asylum system, more on par with individuals experiencing persecution due to the other protected grounds.


6. THE OVERLY COMPLICATED PARTICULAR SOCIAL GROUP FRAMEWORK FOR GENDER-BASED CLAIMS REQUIRES MORE TIME FROM ATTORNEYS, LEADS TO REGULAR APPEALS, AND WASTES RESOURCES.

Requiring survivors to bring their claims under the *particular social group* category leads to serious inefficiencies and wasted resources. During screenings at the border, officers are likely to refuse applicants who otherwise could qualify from the start because they simply don't realize that they may qualify as a member of a *particular social group*. Individuals fleeing for safety are then forced to try to reenter and go through the screening process multiple times. Eventually, if border officers finally give them a chance to apply, their legal options are limited and they are likely to be detained—causing

them additional mental and physical health burdens and costing taxpayer dollars. Lawsuits have been brought to challenge border screenings, including in cases where border officers improperly rejected women who could have qualified for asylum. Every time the government defends against one of those cases, taxpayers pay.

For each case that is mishandled by an asylum officer because the applicant, her representative, or the adjudicator did not properly understand or state the *particular social group*, there is a person who is rejected unnecessarily – causing fear, trauma, pain, poverty, and other social consequences. Each of those cases will be referred to immigration court, where judges and lawyers for the government spend taxpayer resources to push a case through as many as seven or more years of hearings.

Since many attorneys and immigration judges get the *particular social group* analysis wrong, gender-based asylum cases often needlessly move through to the Board of Immigration Appeals and even the federal appeals courts. Once again, dockets become unnecessarily crowded leading to wasted time and energy by advocates and applicants alike.



Because they are unduly complex, *particular social group* claims require a great

"As a retired immigration judge, I can say that no one wants to waste time and money debating hair-splitting legal arguments to prove what we all know— that gender is a distinct element of our identity by which we classify and perceive people. Our limited time in court is much better spent on real issues in dispute and on the facts of the case— for example, whether there was persecution, why the applicant was targeted, and whether the government could or would not control the persecutor. Without a clear, distinct ground for gender, we either waste the time and resources of an incredibly overburdened immigration court or deny asylum to people who don't have the resources to marshal the evidence and expertise to prove unnecessarily complicated cases."

**HONORABLE DENISE N. SLAVIN,
RETIRED IMMIGRATION JUDGE AND
FORMER PRESIDENT OF THE NATIONAL
ASSOCIATION OF IMMIGRATION JUDGES**

deal of attention and time from immigration judges who must stay up to date on ever shifting standards and who already face a backlog of almost 1.3 million cases.¹⁶ More generally, every taxpayer dollar spent on deciding drawn out *particular social group* cases is a taxpayer dollar not devoted to naturalizing long-term U.S. resident taxpayers or reducing crushing case backlogs. A gender ground will make the asylum

process more efficient and effective, as well as more equitable.

Recommendations

For decades, survivors fleeing gender-based violence have faced arbitrary denials of asylum under our current laws and regulations. We must clarify and amend existing law to ensure that survivors of violence are able to consistently and equitably access protection from persecution.


New regulations and legislation should be issued to clarify both the definition of a *particular social group* and the standards for proving a persecutor's motive.

These regulations and legislation should adopt language and framing provided by those with relevant expertise. Any regulations and legislation must do no harm to applicants who currently receive fairly

consistent protection under the *particular social group* analysis.

Gender should be named as a sixth ground in the asylum statute.

Adding a sixth ground provides an additional and important practical measure of protection for gender-based asylum that the *status quo* simply cannot. With a sixth ground, survivors could bring claims on account of gender alone or in combination with other grounds, as is currently common practice with survivors' claims. A structural paradigm shift to add a sixth ground signals an important evolution in our understanding of sexism, misogyny, and gender-based violence and puts the harm that women



"I have written affidavits for two women who suffered female genital mutilation/cutting (FGM/C) as children. Both were denied asylum. These denials were extremely disheartening, especially since I have evaluated several others who experienced physical and psychological trauma on grounds unrelated to gender and whose cases were granted.

The first asylum seeker filed multiple appeals unsuccessfully and was exploited by lawyers who were neither prepared for nor invested in engaging in lengthy, complex legal proceedings. In the second case, the Immigration Judge denied asylum saying that FGM/C was not a legitimate basis for asylum, despite many decisions holding that it is. I remember wondering why our system was structured to devalue these women's claims. Was it because these harms were inflicted by women and occurred out of sight of men? Was the pain and bleeding these women suffered at the age of six and eight, respectively, and the devastating long-term physical and psychological consequences they endured thereafter not comparable to the physical and mental health sequelae of trauma that other asylum seekers experienced?

I truly believe this amendment is imperative to ensure, from a federal standpoint, the protection of women and girls who have experienced sexual, physical, and psychological trauma in public or in private because they are female. Codifying gender as an independent statutory basis for asylum would make such a difference for survivors of trauma in years to come!"

**ELENA JIMÉNEZ GUTIÉRREZ, MD, ASSISTANT PROFESSOR,
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and girls face around the world on par with harm inflicted on account of other protected grounds.

Legislation like this is needed to avoid attacks on gender-based asylum from future administrations. Regulations, rules, immigration legal decisions, practice manuals, and guidelines can be easily issued or revoked based on the will of the White House, as witnessed many times in recent history.¹⁷ A comprehensive rule issued in late 2020 targeted gender-based asylum and the idea that there could ever be persecution on account of gender specifically, underscoring the need for an articulated sixth ground. Furthermore, improving the *particular social group* analysis is not enough to ensure equal and lasting protection for survivors. Even a well-crafted *particular social group* framework by its nature marginalizes violence against women. It imposes higher, inequitable burdens of proof for survivors to the detriment of all stakeholders and to the benefit of perpetrators.

All legislation – old and new – is subject to interpretation and reinterpretation by the courts through caselaw. Adding a sixth ground would be no exception. Yet, legal cases that interpret our statute in its current form can be highly

problematic. Most notable was *Matter of A-B-*, which was instituted in 2018 and then revoked in June 2021. This case imposed sweeping restrictions on many gender-based asylum claims, and a future administration now has a roadmap for similar action. This is precisely why new legislation to add the sixth ground is urgently needed. The risk of future restrictive caselaw would be much lower with a sixth ground than the risks survivors currently face in court without it.

Like any legislation, adding a sixth ground will not address all problems for all asylum seekers. There are many reforms that are needed. Yet survivors of gender-based violence cannot wait for comprehensive reform. Today, there are women who remain separated from their children for years while their cases languish, waiting for clarity in the law to minimize drawn-out appeals. Adding a sixth ground of gender would help to more quickly resolve their cases and allow them peace of mind and the ability to move forward with their lives.

Adding a sixth ground will not cause harm to other *particular social group* claims going forward. Rather, such claims will benefit tremendously from proposed reforms designed to address

problems, including the *particular social group* definition as it currently stands. If the definition of a *particular social group* has become muddy, clarifying it will help everyone who currently receives protection because they belong to *particular social groups*, while *also* providing a clear pathway to protection for survivors of violence that occurs because of their gender.

International law and guidance interpreting the refugee definition also permit and in fact encourage development of expansive legislation to improve

upon what was written in 1951. Making changes that benefit survivors would not repudiate the Convention but seek to improve upon it, treating the international standard as a floor and not a ceiling for our own laws. The U.S. does not have a robust history of following its international legal obligations; while some courts have cited and given deference to the Convention and UNHCR guidance, the majority of adjudicative officers, border

guards, and immigration judges who have the power to make life or death decisions for survivors of violence do not. They are asked to follow their training, which is based in domestic policy, interpreting domestic law, derived from precedential cases, regulations, and statute. Adopting a sixth ground of gender would allow the U.S. to finally be in compliance with UNHCR guidance and therefore to

provide survivors of violence with the protection they should have under the Convention.

The addition of a sixth ground of gender is critical for ensuring,

once and for all, that asylum is unequivocally available to women, girls, and other survivors of gender-based persecution.

"[It] is time for Congress to add persecution on account of gender identity and sexual orientation as a ground for asylum."²²

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Debunking Myths of an Asylum "Free Pass"

Opponents of adding gender as a sixth ground argue that it would amount to a "free pass" for all women anywhere in the world to gain asylum in the U.S. However, these fears have never materialized even in the wake of favorable decisions expanding protections for survivors over the years. To even begin the process of fleeing persecution to seek safety elsewhere, survivors face tremendous obstacles.¹⁸ They must escape persecution itself, which often includes intra-family violence and is accompanied by extreme social and economic isolation due to social stigmas. Women often have diminished access to family resources due to discriminatory property, business ownership, or inheritance laws and policies which, along with primary childcare

responsibilities, inhibits their mobility. And survivors face extraordinary risks of sexual abuse and exploitation when traveling alone or without a male relative while trying to flee.¹⁹ In short, survivors are so disenfranchised by pervasive violence and systemic discrimination that they are among the groups least able to flee, reach another country, and readily ask for help.²⁰

Moreover, merely asking for asylum is a far cry from receiving it. All people seeking asylum endure an exceptionally rigorous process of producing credible evidence to prove every element of their claim and to fully show a well-founded fear of persecution on account of a protected ground.

Conclusion

The United States must commit to dismantling the structural misogyny that allows violence against women to proliferate around the world. Meanwhile, our laws must stop relying on a 1950s-era human rights framework and explicitly offer safe harbor to women and others seeking protection from gender-based violence. Anything short of that willfully ignores the central role that societal beliefs about gender directly play in motivating and perpetuating violence.

No solution is perfect, but maintaining the current framework is not an option for protecting the greatest number of survivors, with or without counsel, and regardless of which judge they must face and who is in the White House. The absence of a sixth ground also leaves

survivors' claims—brought under any of the existing grounds—vulnerable to skepticism by decisionmakers who maintain the outdated view that violence against women is an inevitable feature of all societies best kept behind closed doors. Rather, we must follow the example of other nations and update our statute to include gender as an independent ground of asylum.

Just like a person's race or religion, a **person's gender can be the reason that they are persecuted.** And, we must see gender-based violence in its broader context rather than dismiss it as a private dispute. A private actor's motive in harming someone on account of their gender is no more "personal" than their motive in targeting someone because of their race.

If we recognize that racism causes race-based persecution, then we must also recognize that misogyny causes gender-based persecution, name it as such, and offer asylum protection on that basis. Gender, like race, is already a protected characteristic under our federal anti-discrimination laws considered on its own merit without more. Survivors of gender-based violence deserve the same under our asylum laws.



Endnotes

1 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e

2 Most countries that have added a sixth ground of asylum in legislation use the term “gender.” UNHCR generally uses “gender” to denote concepts including sexual orientation and gender identity (“SOGI”), for example in numerous guidelines issued on international protection within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees including: No. 1: Gender Related Persecution; No. 2: Membership in a Particular Social Group; and No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity. A new ground for gender would likewise encompass all aspects of sex, gender, sexual orientation, gender identity, gender expression, and sex characteristics. Nonetheless, it is important to note that persecution on account of SOGI has long been accepted in the U.S. as constituting persecution on account of a particular social group, including for example in *Matter of Toboso-Alfonso*; *Avendano-Hernandez v. Lynch*; and *Bostock v. Clayton County*. By contrast, non-SOGI gender-based claims, for example those brought by women and girls involving forced marriage, domestic violence, or honor crimes, have not. Use of the term “gender-based persecution” in this report is therefore meant to refer primarily to non-SOGI gender-based claims. At the same time, we acknowledge that some LGBTQ+ people may bring non-SOGI gender-based claims. For example, if a persecutor did not know that a woman identified as a lesbian, but targeted her because she was a woman, the claim would be a non-SOGI gender-based claim. We further note that codifying inclusion of all gender-based claims in the sixth ground, both SOGI and non-SOGI, does not and should not preclude any gender-based claim from separately being recognized as a particular social group claim, or any other type of claim. We therefore encourage lawmakers to affirmatively acknowledge the particular social group avenue for all gender-based claims even while they confirm their parallel inclusion in the “gender” ground as well.

3 “What Is a Refugee?” UN High Commissioner for Refugees (UNHCR), accessed May 26, 2021, <https://www.unhcr.org/en-us/what-is-a-refugee.html>.

4 “Guidelines on International Protection No. 1: 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,” UN High Commissioner for Refugees (UNHCR), May 7, 2002: 3-4, <https://www.unhcr.org/3d58de2da.pdf>.

5 *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

6 *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

7 “Countries with Asylum/Refugee Laws That Explicitly Protect those Fleeing Gender-Based Persecution,” Tahirih Justice Center, 2021, <https://1t1s613brjl37btxk4eg60v-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Appendix-1-List-of-other-countries-with-gender-listed-in-asylum-laws.pdf>.

8 See note 4 above, 7.

9 *Ibid.*, 2.

10 *Matter of A-R-C-G-*, 26 I & N Dec. 388 (BIA 2014).

11 See note 6 above.

12 “Guidelines on the Protection of Refugee Women,” UN High Commissioner for Refugees (UNHCR), July 1991, <https://www.unhcr.org/en-us/publications/legal/3d4f915e4/guidelines-protection-refugee-women.html>.

13 “Brief Analysis of Attorney General’s Decision in *Matter of A-B-*,” Tahirih Justice Center, June 11, 2018, <https://1t1s613brjl37btxk4eg60v-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Updated-Brief-Analysis-Matter-of-AB.pdf>.

14 Eagly, Ingrid and Steven Shafer, “Access to Counsel in Immigration Court,” American Immigration Counsel, September 2016: 5, <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

15 “Fact Sheet: U.S. Asylum Process,” National Immigration Forum, January 10, 2019, <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/>.

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17 Department of Homeland Security and Department of Justice, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” (85 Fed. Reg., Dec. 11, 2020), 80,274 and 80,385. The rule was to go into effect on January 11, 2021, however, the Northern District of California issued a preliminary injunction blocking its implementation in *Pangea Legal Servs. v. U.S. Department of Homeland Security*. The fate of the rule is now in the hands of the Biden Administration and the courts.

18 Smoot, Jeanne, and Heather Heiman. Rep. “Precarious Protection,” Tahirih Justice Center, October 2009, https://www.tahirih.org/wp-content/uploads/2009/10/Precarious-Protection_Tahirih-Justice-Center.pdf.

19 Strindberg, Anna, “5 Reasons Why the Majority of Refugees Reaching Europe Are Men,” Global Citizen, September 19, 2015, <https://www.globalcitizen.org/en/content/five-explanations-to-why-the-majority-of-refugees/>.

20 See note 12 above.

21 Miller-Muro, Layli and Jamie Gorelick. “Letter to the Editor” *The Washington Post*, April 7, 2021, <https://www.washingtonpost.com/opinions/2021/04/07/us-asylum-law-must-protect-women/>.

22 Schoenholtz, Andrew Ian, Jaya Ramji-Nogales, and Philip G. Schrag. “The Biden Administration, Congress, and a New Beginning,” in *The End of Asylum*, (Washington, DC: Georgetown University Press, 2021), 125.

