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The REAL ID Act: 

Furthering Gender Bias in U.S. Asylum Law 

Aubra Fletcher†

I. INTRODUCTION

This article examines the specific and disproportionate effects of recent changes in U.S. asylum law on individuals fleeing gender-related persecution. Even prior to such changes, these asylum seekers faced greater legal obstacles than most others due to an institutionally biased interpretation and application of refugee law. The REAL ID Act of 2005 will very likely perpetuate this bias and widen the gap between access to protection of asylum seekers in general and that of asylum seekers escaping gender-related persecution in particular. This article will also discuss legal strategies for minimizing the negative consequences of the REAL ID Act through both strategic representation of asylum seekers and broader advocacy efforts.

In May 2005, Congress passed the REAL ID Act ("REAL ID") in the name of anti-terrorism and homeland security. REAL ID establishes uniform standards for state identification cards, enhances the building and monitoring of barriers at national borders, amends and defines terrorism-related grounds of inadmissibility to and removal from the United States, substantially limits judicial review of orders of removal and increases the number of asylees who

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can receive permanent resident status each year.\(^4\) REAL ID also contains numerous provisions specific to the asylum process.\(^5\)

Proponents of REAL ID argue that the asylum provisions are necessary to prevent terrorists from taking advantage of the immigration system.\(^6\) However, preexisting asylum law already barred applicants posing security risks from obtaining asylum and required rigorous security checks of all applicants.\(^7\) REAL ID's asylum provisions neither enhance these security precautions nor fortify background check measures; instead, they serve to limit all applicants' access to asylum protection by imposing more difficult, unpredictable and unreasonable obstacles to establishing the requisite well-founded fear of persecution.

**II. BACKGROUND: ASYLUM LAW AND GENDER**

With the passage of the 1980 Refugee Act, the United States adopted most provisions of the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention" or "Convention"). The U.S. Refugee Act defines a "refugee" as a person with a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."\(^8\) Common examples of gender-specific asylum claims include female genital cutting ("FGC"), sexual slavery, repressive social norms, human trafficking and forced prostitution.\(^9\)

A. **Institutional obstacles faced by asylum seekers fleeing gender-related harm**

The language of the Refugee Convention and the U.S. Refugee Act is gender-neutral.\(^10\) Historically, however, the language has been applied with the "traditional" male political refugee in mind.\(^11\) The United Nations High Commission on Refugees ("UNHCR") has acknowledged the gender-biased

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4. See generally, id.
5. Id. § 101
interpretable framework applied to the Refugee Convention that causes the claims of many women to go unrecognized.\textsuperscript{12} It has been observed that the types of harm suffered by women are often not considered persecution “because they [are] condoned or required by culture or religion (e.g., female genital [cutting], repressive social norms), [are] disproportionately inflicted on women (e.g., domestic violence), or [are] simply different from the harms suffered by men under similar circumstances (i.e., men may be beaten while women may be raped).”\textsuperscript{13} For example, the U.S. Citizenship and Immigration Services (“USCIS,” formerly the Immigration and Naturalization Service) has argued before at least one Federal Court of Appeals that FGC is not a basis for a claim of past persecution because it is “widely-accepted and widely-practiced.”\textsuperscript{14} A further barrier in gender-related asylum claims is that the perpetrator is often a non-state actor. This poses special difficulties in documenting claims where there is a personal relationship with the perpetrator.\textsuperscript{15} The applicant must establish a connection or “nexus” between the persecution and an enumerated ground; however, this is especially difficult where the persecutor is a non-state actor, because there is rarely documentation of the harm or the perpetrator’s motives.\textsuperscript{16}

Women asylum applicants must thus overcome the institutional tendency to dismiss the harms they suffer as private and personal, rather than to examine the underlying societal context at play and link it to a ground enumerated in the Refugee Convention.\textsuperscript{17} \textit{Matter of Kasinga} represents a departure from this tendency; in its consideration of the nexus issue, the Board of Immigration Appeals (“BIA”) considered both non-state actors (those who performed the FGC) and the broader governmental and societal context.\textsuperscript{18} \textit{In re R-A-}, however, rejected this analysis; here, the BIA essentially ruled against its own precedent by viewing more narrowly the nexus between persecution and motive.\textsuperscript{19} But after the Attorney General vacated the \textit{R-A-} decision, \textit{Kasinga} is again the controlling authority.\textsuperscript{20}

In addition to institutional barriers, asylum seekers fleeing gender-related persecution also face unique procedural difficulties. Women often apply for asylum jointly with male family members, who may control communication with

\textsuperscript{12} UNHCR, 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, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).
\textsuperscript{14} See Mohamed v. Gonzales, 400 F.3d 785, 796 n.15 (9th Cir. 2005).
\textsuperscript{15} Symposium, supra note 13, at 783.
\textsuperscript{16} Id. at 786.
\textsuperscript{17} Sinha, supra note 10; Symposium, supra note 13, at 786.
\textsuperscript{18} In re Kasinga, 21 I. & N. Dec. 357 (BIA 1996).
\textsuperscript{19} In re R-A-, 1. & N. Dec. 3403 (BIA 2001).
\textsuperscript{20} See discussion of these two cases, infra.
the family's attorney or prepare the application themselves without input from female relatives. Due to social stigma, these women may be reluctant to disclose to male relatives certain harms they have experienced, such as rape. Women who apply for asylum without male relatives sometimes receive intensive guidance from male community members who accompany them to the attorney's office and (directly or indirectly) influence the development of the claim. A female asylum seeker who has little or no choice but to use a male interpreter at her attorney's office, in her asylum interview or in a hearing, may be less likely to divulge salient information relating to her claim because of stigma or trauma. The same problem may arise where asylum officers and immigration judges ("IJs") are male.

B. Addressing barriers to gender asylum: guidelines, case law and proposed regulations

In recent decades, the UNHCR has issued guidelines to governments relating to gender-related asylum claims and called upon governments to promulgate their own guidelines. Canada was the first to produce national guidelines, issued in 1993 and amended in 1996. In 1995, the U.S. issued guidelines, but they are only binding on USCIS asylum officers. The U.S. Guidelines acknowledge that female refugees experience harms particular to their gender. They make clear that sexual violence is a form of persecution and instruct adjudicators not to dismiss automatically such violence as "purely personal harm." The guidelines further direct adjudicators to consider gender-

21. Author’s professional experience assisting numerous asylum seekers with a variety of claims.
24. U.S. Guidelines, supra note 22, at 5. It is also possible her attorney will fail to ask the applicant about gender-related harm she has experienced. For an example of such problems, see Mohamed v. Gonzales, 400 F.3d 785, 790 (9th Cir. 2005).
26. See, e.g., Conclusion on Refugee Women and International Protection, UNHCR Executive Committee, 36th Sess., No. 39 ¶ 1 (1985); Conclusion on Refugee Women, UNHCR Executive Committee, 39th Sess., No. 54 (1988); Conclusion on Refugee Women and International Protection, UNHCR Executive Committee, 41st Sess., No. 64 (1990); Conclusion on Refugee Protection and Sexual Violence, 44th Sess., No. 73 (1993). [collectively, hereinafter UN Guidelines]
27. Immigration and Refugee Board of Canada, Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (March 1993); see also Immigration and Refugee Board of Canada, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update (Nov. 25, 1996).
29. Id. at 4.
30. Id. at 9.
related claims in light of U.S. and international refugee law. However, the guidelines are not binding on IJs or appellate court judges, who adjudicate many asylum applications and have the power to overturn asylum officers' determinations. Consequently, many gender-related asylum applicants therefore never benefit from these guidelines.

The U.S. Guidelines signaled a change in USCIS' analysis of gender-related claims; a particularly noteworthy example is the Guidelines' instruction to asylum officers evaluating the connection between political opinion and gender-related harm. Prior to the issuance of the U.S. Guidelines, the Fifth Circuit affirmed the BIA's denial of asylum to a woman who was forced to watch the murder of her family members and was raped while her attackers shouted political slogans. The court reasoned that the applicant failed to establish that she was attacked on account of a political opinion imputed to her. The Guidelines essentially condemn this decision and provide a framework to prevent such reasoning by asylum officers.

The U.S. Guidelines also address the social group membership ground and acknowledge that it is not clearly defined or well understood by courts. In Matter of Acosta, the BIA held that a particular social group refers to a "group of persons all of whom share a common, immutable characteristic," which might be an "innate" characteristic "such as sex," or a "shared past experience." The common characteristic must be one that group members "either cannot change or should not be required to change because it is fundamental to their individual identities or consciences." Although the UNHCR Guidelines recommend that

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31. Id. at 8. For all asylum applications, adjudicators must determine whether the feared harm rises to the level of persecution and whether the harm was or would be on account of a ground enumerated by the Refugee Convention. Id. at 8, 10. The guidelines focus in particular on the grounds of political opinion and social group membership, which form the basis of many gender-related asylum claims. Id. at 11-16; see also Musalo and Knight, supra note 9. For example, domestic violence survivors often frame claims in terms of social group, defined by gender in combination with another factor, such as beliefs, opposition to abuse, or the fact that the applicant had been in a relationship with the abuser. Id.

32. U.S. Guidelines, supra note 22.

33. Campos-Guardado v. INS, 809 F.2d 285, 289 (5th Cir. 1987).

34. Id. A claimant may qualify for asylum if she has a well founded fear of persecution on account of either her actual or imputed political opinion. See, e.g., In re R-A-, Int. Dec. 3195 (BIA 1992). In the context of domestic violence, at least one claimant has argued that resisting her partner's abuse is an expression of a political opinion, and that his subsequently increased abuse signaled his imputation of that political opinion to her. In re R-A-, Int. Dec. 3402 (Att'y Gen. Jan. 19, 2001) vacating (B.I.A. June 11, 1999); see also Karen Musalo, Matter of R-A-: An Analysis of the Decision and its Implications, 76 Interpreter Releases 1177 (August 9, 1999); see also In re R-A-, Int. Dec. 3403 (B.I.A. June 11, 1999) (en banc), vacated (A.G. Jan. 19, 2001). On January 19, 2001, Attorney General Janet Reno vacated the In re R-A- decision and remanded it to the BIA for reconsideration after the proposed amendments to the federal regulations pertaining to asylum adjudication are finalized. See below for fuller discussion of subsequent history.


36. Id. at 12.


38. Id.
"women" may at times constitute a particular social group, and Acosta explicitly mentions "sex" as a unifying social group characteristic, the prospect of defining a social group solely in terms of sex or gender meets with much political and judicial resistance in the U.S. The primary objection is that such a broad definition would "open the floodgates" to a vast influx of women seeking asylum from all over the world. Fatin v. INS represents an exception: in this decision the Third Circuit stated that an Iranian applicant fleeing gender-related persecution would qualify as a member of a particular social group. Unfortunately, many courts, IJs and the U.S. Guidelines have rejected this formulation as overly broad. A recent Ninth Circuit decision is promising in this regard, however: in a Somalian FGC case, the court held that gender plus nationality may constitute a particular social group; moreover, the court went on to suggest that gender alone may qualify as a particular social group in some cases.

In 1996, the BIA in Matter of Kasinga overturned an IJ's decision that held that FGC did not rise to the level of persecution under the Refugee Act. The decision explicitly referred to the (non-binding) U.S. Guidelines. In addition to recognizing FGC as a form of persecution, the BIA ruled that the practice was imposed on the claimant on account of her membership in a particular social group defined, in part, by gender: the group consisted of "[y]oung women of the Tchamba-Kusuntu Tribe, who ha[d] not had FGM [sic] ["female genital mutilation"], as required by the tribe, and who oppose[d] the practice." The opinion considered societal factors in establishing a nexus between the persecution and claimant's membership in a social group rather than focusing solely on the perpetrators' individual motives. Although the midwives and elders who practiced FGC may have had good intentions, the BIA also deemed the societal purposes of the practice "sexual oppression" and furtherance of "male dominance and exploitation." This was a landmark case as it signaled to advocates a broadening of women's access to asylum. Based on Kasinga,

39. Id. at 13; see, e.g., Gomez v. INS, 947 F.2d 660 (2d Cir. 1991).
40. See Condon, supra note 10; see also Symposium, Gender and Migration, 22 BERKELEY J. GENDER L. JUST. (forthcoming 2007).
41. 12 F.3d 1233, 1240 (3d Cir. 1993). The court in Fatin denied asylum because it found that claimant failed to show that she would risk sufficiently severe punishment for her political opinion, but the opinion made clear that if an applicant could demonstrate a well-founded fear of persecution based on her political opinion regarding the status of women, she could qualify for asylum.
42. See, e.g., Safaie v. INS., 25 F.3d 636, 640 (8th Cir. 1994); Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991); Condon, supra note 10 at 252; Bret Thiele, Persecution on Account of Gender: A Need for Refugee Law Reform, 11 HASTINGS WOMEN’S L.J. 221, 238 (2000).
43. See Mohamed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005).
45. Id. at 362.
46. Id. at 365.
47. See id.; see also Musalo and Knight, supra note 9.
adjudicators began granting asylum in a wide range of gender-related cases, including domestic violence cases.  

However, in 1999, the BIA significantly limited *Kasinga*'s relatively wide precedential reach. *In re R-A*- reversed an IJ's decision granting asylum to a Guatemalan woman on the basis of the severe domestic violence she suffered at the hands of her husband.  

Despite the BIA's determination that the domestic violence rose to the level of persecution, it also found the claimant had failed to establish: 1) her membership in a particular social group, 2) any nexus between her social group and the persecution, 3) any actual or imputed political opinion, and 4) any nexus between the harm and the actual or imputed opinion. The BIA characterized the domestic violence suffered by the claimant as "private acts of violence," and therefore denied her asylum protection. Effectively restricting the social group ground, the BIA held that *Acosta*’s immutability criterion was only a threshold requirement. Under *R-A*-, an applicant must do more than meet the *Acosta* test by establishing that the members of the group “understand their own affiliation with the grouping as do other persons in the particular society,” and that the persecution—here, domestic violence—"is itself an important societal attribute." The decision generated a great deal of criticism from scholars and advocates, but also mobilized and strengthened ongoing advocacy efforts.

The following year INS issued proposed regulations that would apply to gender-related asylum claims. In early 2001, Attorney General Janet Reno vacated the *R-A*- decision and remanded it to the BIA with instructions to rehear it based on the proposed regulations once they became final. In February 2003, Attorney General John Ashcroft certified to himself the prospective re-decision of *R-A*-. Ashcroft, however, lost exclusive jurisdiction over immigration regulations with the incorporation of the former INS into the Department of Homeland Security ("DHS") on March 1, 2003. In early 2004 DHS filed a brief with the Attorney General largely in support of the claimant in *R-A*-. Ashcroft remanded the case back to the BIA just before Attorney General Gonzales replaced him in January 2005. At present, the proposed regulations have yet to

49. Musalo & Knight, supra note 9.
51. See id.; see also, Musalo and Knight, supra note 9.
52. *In re R-A*, Int. Dec. 3403 at 923.
53. *Id.* at 931.
54. *Id.* at 31.
55. See, e.g., Musalo & Knight, supra note 9; Sinha, supra note 10.
58. Musalo, supra note 34, at n.157.
be finalized, and the judicial status of R-A- remains uncertain.

C. The Aftermath of R-A-

At the time REAL ID was passed, U.S. gender asylum law was in a state of flux. Acosta and Kasinga remain controlling precedent regarding the social group ground, but some IJs continue to base decisions on R-A- even after Attorney General Reno vacated it. Many claimants address the uncertainty of this area of law by crafting a “gender-plus” social group theory, defining social groups by gender in combination with other characteristics, such as beliefs, relationship to the persecutor, or attempted escape. The gender-plus approach seems the most likely to result in an asylum grant, but it may present some problems. One scholar notes that the conflicting decisions in Kasinga and R-A- illuminate a systemic practice of granting asylum “only when gender-related violence can be linked to practices attributable to non-Western, ‘foreign’ cultures.” Because of racial and gender stereotypes, adjudicators “are reluctant to grant asylum in cases where the alleged gender-related violence appears similar to forms of gender-related violence that are pervasive in the United States.”

III. CHANGES TO ASYLUM LAW UNDER THE REAL ID ACT

The REAL ID Act of 2005 has reshaped crucial aspects of U.S. asylum law. Since the Act’s regulations have not yet been implemented, it remains difficult to predict how broadly or narrowly asylum officers, IJs, the BIA or federal courts will apply the statutory language. Based on its language alone, however, it is clear that REAL ID’s asylum provisions abrogate both case law and established agency policy, thereby imposing increased hardships on asylum applicants. Moreover, the Act does nothing to address preexisting gender inequalities in U.S. asylum law. Instead, given the traditional bias against
gender-related claims, the REAL ID Act will likely perpetuate this bias and exacerbate the problems women asylum seekers already confront.\textsuperscript{68} The extent to which REAL ID will reduce access to asylum will depend on how legislators implement it and immigration judges interpret it.

A. Centrality of motive

With respect to the “nexus” issue, REAL ID imposes a centrality of motive requirement: applicants must establish that one or more of the five enumerated grounds “was or will be at least one central reason for persecuting the applicant.”\textsuperscript{69} This standard may be read to alter U.S. case law, which permits a grant of asylum even where an enumerated ground was only one of a perpetrator’s various motives, and not necessarily a central motive.\textsuperscript{70} The UNHCR and U.S. Guidelines also recognize that an enumerated ground may constitute any one of various motives, regardless of centrality.\textsuperscript{71} A strict centrality requirement also appeared in the proposed gender asylum regulations,\textsuperscript{72} and both scholars and the UNHCR criticized it as too restrictive.\textsuperscript{73} In fact, the UNHCR recommended that the regulatory language read instead: “So long as the persecutor is motivated, in part, on account of a protected characteristic, the requisite nexus is established.”\textsuperscript{74}

Conversely, REAL ID’s centrality language may be interpreted as simply a restatement of existing asylum law, which permits a grant of asylum in cases where persecutors act from “mixed motives.”\textsuperscript{75} The bill’s original language

\begin{itemize}
\item \textsuperscript{70} See, e.g., Annigje J. Buwalda, Critical Analysis of Section 101 of The REAL ID Act of 2005, March 15, 2005, http://www.jubileecampaign.org/home/jubilee/FINAL-RIDA.pdf; INS v. Elias-Zacharias, 502 U.S. 478 (1992); Borja v. INS, 139 F.3d 1251, op. withdrawn, reh. en banc granted 150 F.3d 1223 (9th Cir. 1998) (holding the persecution must be “at least in part because of protected harm”); Ratnam v. INS, 154 F.3d 990 (9th Cir. 1998) (establishing that “mixed motive” is sufficient); Deloso v. Ashcroft, 378 F.3d 907, reprinted as amd 2004 US App LEXIS 27347 (9th Cir. 2004) (holding persecution “at least partly on account of” an enumerated ground is sufficient).
\item \textsuperscript{71} U.S. Guidelines, supra note 22; UN Guidelines, supra note 26.
\item \textsuperscript{72} Asylum and Withholding Definitions, 65 Fed. Reg. at 76591 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208); see also, Condon, supra note 10, at 235-37; Sinha, supra note 10, at 1595; Letter from Guenet Guebre-Christos, Reg’l Representative, United Nations High Comm’r for Refugees, to Dir., Policy Directives and Instructions Branch, Immigration and Naturalization Serv. 6-8 (Jan. 22, 2001) (on file with author); Letter from Karen Musalo, Dir., and Stephen Knight, Coordinating Attorney, Ctr. for Gender and Refugee Studies, to Dir., Policy Directives and Instructions Branch, Immigration and Naturalization Serv. 6-7 (Jan. 18, 2001) (on file with author).
\item \textsuperscript{73} Letter from Guenet Guebre-Christos, Reg’l Representative, United Nations High Comm’r for Refugees, to Dir., Policy Directives and Instructions Branch, Immigration and Naturalization Serv. 6-8 (Jan. 22, 2001) (on file with author).
\item \textsuperscript{74} Lory Rosenberg, Asylum and Protection from Removal After the “‘Real ID’—Newly Articulated Standards and a Reservoir of Law, 10-13 BENDER’S IMMIG. BULL. 1 (2005).
required that one of the enumerated grounds be "a central reason" for the persecution.\textsuperscript{75} The phrase "at least one" was added during the conference following the Senate's adoption of the bill.\textsuperscript{76} The change in language arguably "underscores the natural meaning of the words 'one central reason,' reflecting Congress' intent to cover asylum claims in which there is evidence that a protected ground is a central reason—but not necessarily the exclusive reason—for persecution."\textsuperscript{77} Former BIA judge Lory Rosenberg has noted that she was "not aware of a glut of cases—or even a small number of cases—in which either the BIA or the federal courts had granted, upheld, or supported a grant of asylum" in which one of the enumerated grounds was not one of the reasons for the persecution.\textsuperscript{78}

An overly strict interpretation of the REAL ID Act's centrality language, one that views it as a significant alteration of preexisting asylum law, could have a devastating effect on gender-related asylum claims. In general, motive is difficult to prove and usually must be established through circumstantial evidence.\textsuperscript{79} It is especially difficult to establish motive in gender-related cases where the persecutor is rarely a state actor.\textsuperscript{80} Before \textit{Kasinga}, the nexus analysis required a malignant motivation on the part of the perpetrator.\textsuperscript{81} In the FGC context, perpetrators are typically the midwives or elders who perform the procedure. Yet they do not usually intend the procedure as a punishment on account of an enumerated ground; instead, "presumably most of... [them] believe that they are simply performing an important cultural rite that bonds the individual to society."\textsuperscript{82} In \textit{Kasinga}, the BIA examined motive in light of societal and governmental contexts.\textsuperscript{83} However, strict application of the centrality requirement would prevent an asylum grant for such FGC claims.

The extent to which the centrality requirement will restrict access to asylum will depend on implementing regulations and interpretation by adjudicators. A reading of the language as a mere restatement of preexisting asylum jurisprudence will be the interpretation most beneficial to asylum seekers. A stricter approach, one informed by the language of the original REAL ID bill, will potentially present great difficulties to asylum applicants, especially those fleeing gender-related persecution. Regardless, the analytical model employed in \textit{Kasinga} will remain crucial. Nexus determinations must encompass a thorough and nuanced examination of the salient societal and governmental

\textsuperscript{77} Rosenberg, \textit{supra} note 74.
\textsuperscript{78} \textit{Id.} at n.23.
\textsuperscript{79} \textit{Id.} v. Elias-Zacarias, 502 U.S. 478, 483; see also, Condon, \textit{supra} note 10, at 225.
\textsuperscript{80} CENTER FOR GENDER AND REFUGEE STUDIES, "REAL ID" BILL HARMFUL TO TRAFFICKING VICTIMS AND OTHER WOMEN REFUGEES 2 (2005).
\textsuperscript{81} Symposium, \textit{supra} note 13, at 800.
B. The role of "demeanor" in credibility determinations

The REAL ID Act provides that "a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness." These factors inevitably play a role in existing credibility determinations, but REAL ID heightens their importance. Yet when IJs base negative credibility determinations solely on demeanor, they ultimately privilege their individual ideas of how refugees should psychologically respond to persecution over evidentiary considerations. Not all people react the same way to experiences of rape, domestic violence, torture or any other harm, and responses can vary widely according to gender, culture, age, class, and other factors.

Asylum cases often present unique combinations of cultural elements and post-trauma symptoms.

In light of this, the UNHCR Guidelines state: "The type and level of emotion displayed during the recounting of her experiences should not affect a woman’s credibility." Likewise, the U.S. Guidelines instruct asylum officers not to consider demeanor alone in assessing credibility. The instructions reference In re Lugo-Guadiana, in which the BIA stated: "Credibility involves more than demeanor. It apprehends the overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." The U.S. Guidelines offer insight into the difficulty of evaluating "demeanor" in gender-related claims and the way demeanor may fluctuate over the course of an interview, as applicants "may appear numb or show emotional passivity. . . . may give matter-of-fact recitations of serious instances of mistreatment."

Unfortunately, IJs have made negative credibility determinations based on their ideas of how a woman should respond to gender-related persecution; in a particularly troubling example, Paramasamy v. Ashcroft, the Ninth Circuit reversed an IJ’s negative credibility finding which was based primarily on the applicant’s demeanor. The applicant in this case was a Sri Lankan woman who

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85. See, e.g., U.S. Guidelines, supra note 22, at 6-7; CENTER FOR GENDER AND REFUGEE STUDIES, supra note 80, at 4.
86. See, e.g., id.; UNHCR, 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, at 10.
87. UNHCR, 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 at 10.
88. U.S. Guidelines, supra note 22, at 6-7, citing BASIC LAW MANUAL (2d ed.) at 104.
91. 295 F.3d 1047, 1049 (9th Cir. 2002).
was detained and sexually assaulted by members of the Sri Lankan military on account of her Tamil ethnicity and her imputed political opinion and association. Assessing the applicant’s demeanor, the IJ reasoned: “[T]here was an unnatural manner in her delivery of her testimony without the occasional pauses one would expect while she stopped to remember the details of terrible experiences. There was no visible change in her countenance or signs of emotional upheaval except at one point later in the proceedings.” This finding relies on the individual IJ’s subjective and inexpert beliefs regarding how a traumatized person should act and converse. By allowing IJs to make such determinations based on demeanor, REAL ID is likely to increase such flawed outcomes.

C. Consistency of statements regardless of circumstances or oath

REAL ID provides that “a trier of fact may base a credibility determination on the . . . consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made).” For example, airport interview notes can be used against an applicant if her responses to questions at that vulnerable moment differ from her subsequent written or oral testimony. Human Rights First, a U.S. human rights advocacy organization, has furnished a compelling illustration of what this means for some asylum seekers: “An immigration judge can deny protection in the United States to a woman who was raped by soldiers as punishment for her religious beliefs if she is unable to tell armed male airport inspectors about the rape, but later tells the judge.” This scenario is very similar to the facts in Paramasamy, in which the Ninth Circuit reversed a finding by the IJ that failure to disclose physically intimate details to a male officer at the airport was an inconsistency sufficient for a negative credibility finding.

Other refugees, because of past negative experiences with government authorities, or immeasurable fears of being forced to return to their countries, perceive a need to provide false information upon apprehension at the border or airport or upon any initial contact with the U.S. government. For example, a

92. Id. at 1048.
93. Id. at 1049.
94. More outrageous still is the fact that the IJ had cut and pasted boilerplate language regarding demeanor and credibility from two previous cases and applied it to this case as if an individualized analysis. Id. at 1048, 1050.
96. Id.
97. Human Rights First, supra note 6.
98. 295 F.3d at 1053.
99. See Buwalda, supra note 70; UN Guidelines, supra note 26; U.S. Guidelines, supra note 22; Dia v. Ashcroft, 353 F.3d 228, 257 (3d Cir. 2003); Keller, Rasmussen, Reeves & Rosenfeld, Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United
woman entering the U.S. to escape domestic violence is likely unaware that she may apply for asylum on that basis, and therefore may not mention the abuse in an airport interview or even a credible fear interview, especially if she feels ashamed or afraid to do so. Moreover, a woman whose experience with local law enforcement has left her without protection from domestic violence or other gender-related harm may understandably withhold or even alter information out of fear of being returned to face abuse in her own country. Her initial or other unsworn statements are unreliable indicators of the validity of her claim, yet REAL ID permits an IJ to rely on them to swiftly reject her claim for asylum.

D. Credibility determinations based on any inaccuracies or false statements

REAL ID also allows a trier of fact to base credibility determinations on "any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim." This section overturns precedential case law. The court in Vilorio-Lopez v. INS held that "[g]enerally, minor inconsistencies and minor admissions that 'reveal nothing about an asylum applicant’s fear for his safety are not an adequate basis for an adverse credibility finding.' Similarly, Akinmade v. INS held that an adverse credibility finding cannot be based on the fact that the asylum seeker used a false passport to enter the U.S. or lied about his citizenship to INS officials. In another case, the Ninth Circuit overturned the BIA’s adverse credibility finding by holding that three purported inconsistencies in the applicant’s testimony at seven hearings over the course of four years were either not truly inconsistent and/or were minor inconsistencies not involving the substance of the claim. Beyond existing case law, the U.S. Guidelines make clear that the effects of past trauma can make it difficult for claimants to recall all the facts and to maintain consistency as to every aspect of testimony.

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100. The expedited removal process allows USCIS to remove an immigrant with false documents or no documents without a hearing before an IJ. USCIS officers are required to ask all such immigrants if they fear return to their countries. Those who indicate such a fear attend a "credible fear interview" with an asylum officer. If the officer finds that the immigrant has a credible fear, the individual is placed in removal proceedings, and his or her asylum claim is heard by an IJ. See 8 U.S.C. § 1225(b)(1)(A)-(B).
101. See Galicia v. Gonzales, 422 F.3d 529 (7th Cir. 2005), discussed infra.
102. CENTER FOR GENDER AND REFUGEE STUDIES, supra note 80, at 4-5.
104. 852 F.2d 1137, 1142 (9th Cir.1988) (citing Damaize-Job v. INS, 787 F.2d 1332, 1337-38 (9th Cir. 1986)).
105. 196 F.3d 951, 954-56 (9th Cir. 1999) (citing Turcios v. INS, 821 F.2d 1396, 1399, 1400-01 (9th Cir. 1987)).
106. Singh v. Ashcroft, 362 F.3d 1164 (9th Cir. 2004).
107. U.S. Guidelines, supra note 22, at 7; see also, Amnesty International USA, supra note 1, at 2 (discussing Paramasamy v. Ashcroft, 295 F.3d 1047 (9th Cir. 2002)).
REAL ID nevertheless authorizes the IJ to disregard this logic and deny asylum to an otherwise credible applicant who presents inaccurate information immaterial to her well-founded fear of persecution.

In the absence of published decisions applying REAL ID's credibility standards, a pre-REAL ID case, Galicia v. Gonzales, illustrates the errors and injustices that arise when asylum decisions turn on minor inconsistencies. In this case, an IJ, based in large part on a negative credibility finding, issued an order of removal for a Guatemalan woman fleeing persecution on account of imputed political opinion. The applicant's use of a false name and false passport to enter the U.S. was a significant factor in the IJ's determination. The applicant testified that she lied to the immigration officials in her first interview because she thought her information would be used to return her to Guatemala; she was afraid to return under her true name out of fear of persecution. She also testified that she did not understand the United States' asylum process at the time of her entry.

The IJ further relied on inconsistencies between the information the applicant provided during her credible fear interview and her testimony at the hearing, but the Seventh Circuit later deemed these inconsistencies irrelevant because they did not go to the heart of the applicant's claim. As the reviewing court observed, "[i]ndeed, testimony that an applicant gave false information to immigration authorities for fear of deportation to a persecuting country can be entirely consistent with a fear of persecution." The court's decision notes that the REAL ID credibility standard does not apply in this case because the application was filed prior to REAL ID's passage.

Because the court's rationale as to the credibility determination rests substantially on the irrelevance of the false information and inconsistencies the applicant presented, the application of the REAL ID Act to this case would likely have resulted in the removal of the applicant to Guatemala, where she feared she would be killed upon return.

E. Increased discretion for Immigration Judges

The language of the REAL ID Act expands the IJ's discretionary power in assessing asylum claims and thereby threatens the uniformity of asylum determinations. First, REAL ID baldly states that "[t]here is no presumption of

108. 422 F.3d 529 (7th Cir. 2005).
109. Id.
110. Id. at 537.
111. Id. at 532, 537.
112. Id. at 532.
113. Id. at 537.
114. Id.
115. Id. at 536, n.5.
116. See id. at 537-40. Although other issues were present in this case, a different conclusion regarding the credibility issue would have been dispositive.
credibility.” 117 This new rule abrogates precedent, as case law requires the BIA to give claimants “the benefit of the doubt.” 118 REAL ID does, however, create a rebuttable presumption of credibility on appeal. 119 It also provides that “[i]n determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record.” 120 This gives the IJ wide latitude to ignore any evidence other than the applicant's “credible testimony” or ignore the testimony in preference for “other evidence of record.” 121 The effect of these changes remains unclear pending adjudication by IJs pursuant to The REAL ID Act.

REAL ID also permits the trier of fact to determine that “the applicant should provide evidence which corroborates otherwise credible testimony,” and the applicant must then produce such evidence unless she “cannot reasonably obtain” it. 122 Established case law allows an IJ to grant asylum based on an applicant's testimony alone where the testimony is believable, consistent, and sufficiently detailed. 123 The REAL ID provisions operate to undercut that rule by allowing IJs to heighten the traditionally low evidentiary burden. 124 Raising the bar could easily result in long delays in adjudication that would especially burden those asylum seekers in detention and those separated from spouses or children. 125 Requiring documents from applicants' home countries could also endanger family and friends still living there. 126

Moreover, REAL ID also limits the federal review standard as to this issue: “No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence...unless the court finds...that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.” 127 REAL ID further provides that “a trier of fact may base a credibility determination on the... inherent plausibility of the applicant's or

118. Zavala-Bonilla v. INS, 730 F.2d 562, 567 (9th Cir. 1984).
121. Buwalda, supra note 70, at 4.
123. In re Fuentes, 19 1. & N. Dec. 658, 660 (BIA 1988); see also Senathirajah v. INS, 157 F.3d 210, 215-16 (3d Cir. 1998) (“[O]ne who escapes prosecution in his or her own land will rarely be in a position to bring documentary evidence or other kinds of corroboration. . .Accordingly, corroboration is not required to establish credibility. . .The law allows one seeking refugee status to 'prove his persecution claim with his own testimony if credible.' ”) (citing Mosa v. Rogers, 89 F.3d 601, 604 (9th Cir. 1996)).
124. See Amnesty International USA, supra note 1, at 2.
125. Id.
126. Id.
witness’s account.” Although “inherent plausibility” is already an established factor in credibility determinations, this section enhances the role of the IJ’s (mis)conceptions regarding the reality of many asylum seekers’ experiences.

Finally, the “trier of fact” language in this section may lead the BIA and federal courts to defer to IJ findings in this regard. The IJ may also base a credibility determination on the consistency of testimony “with other evidence of record (including the reports of the Department of State on country conditions).” IJs already conduct such an inquiry, but this section allows the IJ to base a determination on any inconsistency between the applicant’s testimony and other evidence of record, regardless of context or other supporting evidence. It permits a finding of “inconsistency” where there is a lack of country conditions documentation, even though some governments fail to document certain human rights abuses and restrict freedom of press and international human rights monitors. Gender-related harms often receive less public attention than other types of harms, especially where a society deems harms such as domestic violence to be private matters. REAL ID’s explicit mention of the State Department reports poses an additional problem because these reports are not always accurate, complete, or up to date. As a result, REAL ID implicitly encourages the IJ to give greater weight to these reports than may be appropriate.

F. Concluding concerns

As discussed above, gender-related claims are already seen through a male-centered lens, and rather than offering greater guidance for adjudicators of gender-related claims, REAL ID expands the discretion of IJs, affording greater

129. Buwalda, supra note 70, at 9-10.
131. Buwalda, supra note 70, at 18.
132. Country conditions documentation normally includes evidentiary documents, such as country reports, news articles and official documents, which demonstrate the existence of alleged conditions in the country in question.
133. The UNHCR Guidelines recognize this problem: “It is important to recognise that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.” Supra note 26, at 10. Unfortunately, this instruction is not binding on IJs. Id.
influence to individual biases and hindering the consistency and precedential value of asylum decisions. These effects contravene the stated purpose of the U.S. Guidelines “to ensure uniformity and consistency in procedures and decisions.”

Although these Guidelines are only binding on USCIS asylum officers, they reflect government policy and are based on international gender asylum policies. Enhanced IJ discretion is particularly troubling in light of Attorney General Alberto Gonzales’s own acknowledgement that a significant number of IJs do not treat immigrants before them with respect and fail to produce an acceptable quality of work. On January 9, 2006, Gonzales issued a memo to all IJs nationwide in which he described the conduct of some IJs as “intemperate or even abusive.” In it, he called on the Deputy Attorney General and the Associate Attorney General to review the immigration courts, including the BIA.

REAL ID has substantially obscured what is already a complex and shifting area of the law. To successfully obtain relief amidst this elevated complexity, gender-related asylum claimants must retain sophisticated lawyers. But many women applying for asylum cannot find or afford such representation. And many of those with means to do so may not choose their own attorney; instead, male relatives or community members may select the woman’s attorney for her, which may limit access to attorneys who take her individual, gender-based claims into account. Furthermore, REAL ID compounds the already tortuous process of navigating a gender-related claim through the asylum system. The greater difficulty and new legal standards will lead to more time-consuming and expensive appeals which many women deserving of asylum cannot afford.

IV. ADVOCACY STRATEGIES

A. Individual case strategies

To overcome REAL ID’s substantial negative implications for gender-based asylum seekers, advocates should pursue a two-pronged approach: 1) seek change at the level of individual cases, and 2) engage in broader advocacy efforts. As noted above, advocates should harness Kasinga’s integrated nexus analysis in cases where centrality of motive is at issue. In domestic violence claims, for instance, the legal theory of relief must include a well-documented analysis of the interplay between the abusers’ motives and societal and governmental contexts. Within the governmental context, the state’s
unwillingness to control or address domestic violence is a crucial factor to emphasize in asylum claims. Expert testimony is often an important tool to establish motive and nexus. Given the thrust of REAL ID's changes to asylum claims, it is more vital than before to focus the inquiry on whether the government condoned the abuse or other harm because of the victim's identity—her race, religion, nationality, political opinion and/or membership in a particular social group.

Beyond motive, the rationale employed in the recent Niang v. Gonzales opinion may be helpful in some cases to mitigate REAL ID's emphasis on credibility. Here, a Senegalese woman applied for asylum on the basis of past persecution, namely FGC, on account of her gender plus her membership in the Tukulor Fulani tribe. Despite a finding that the applicant had indeed undergone FGC, the IJ denied her asylum application because he did not find her account of the actual FGC procedure credible. The BIA affirmed. On appeal, the Tenth Circuit deemed her credibility on this point irrelevant because she had otherwise established her subjection to FGC on account of her membership in a social group (gender plus tribal affiliation). The Court reasoned, "whether Ms. Niang suffered the mutilation when she was 25 in an attack by her family, or at about the age of 10 as is customary for other members of her tribe, appears to be irrelevant in deciding whether her mutilation constituted persecution." The Court went on to assert that “[e]ven if her embellishments are disbelieved, she may be entitled to relief if females in the Tukulor Fulani tribe constitute a social group within the meaning of the INA and she suffered FGM [sic] because she is a female in that group." REAL ID would arguably not permit the Court to set aside the credibility issue in this manner, since IJs may deny claims based on a negative credibility finding that is, in turn, based on any inconsistency or implausibility. However, advocates might apply the Tenth Circuit’s logic creatively to cases with certain fact patterns. In some cases, this reasoning may persuade an IJ not to base a negative credibility finding on irrelevant inconsistencies or implausibilities. The Niang rationale might also convince an IJ to exercise his or her discretion to grant asylum despite a negative credibility finding where the underlying facts are undisputed.

Because an IJ may exercise his or her discretion to deny an otherwise eligible applicant asylum, advocates should also consider alternate forms of relief. For example, withholding of removal, unlike asylum, is a mandatory form

140. 422 F.3d 1187 (10th Cir. 2005).
141. Id. at 1191.
142. Id. at 1193.
143. Id.
144. Id. at 1197, 1200-01.
145. Id. at 1197.
146. Id. at 1198. Because Ms. Niang established that she had suffered past persecution on account of an enumerated ground, a rebuttable presumption of future persecution arose as a matter of law. 8 C.F.R. § 1208.16 (b)(1). The Court therefore remanded Ms. Niang’s case to the BIA to determine whether this presumption had been overcome. 422 F.3d at 1201-02.
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of relief. Relief under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is also mandatory, yet also confers a lesser status than a grant of asylum. Relief under the Torture Convention is theoretically a viable option for some women fleeing gender-related persecution, especially because it does not require applicants to establish a nexus between the harm and one of the five enumerated grounds.

B. Broader advocacy strategies

In addition to individual cases, any comprehensive advocacy strategy for improved gender asylum provisions must address the myth that doing so will “open the floodgates” to an unmanageable, and politically undesirable, influx of new immigrants. The inaccuracy of this notion has been well documented. For example, although Canadian gender asylum policies are much broader than those of the U.S., Canada has not experienced such an influx.

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147. A person qualifies for withholding of removal if she establishes that upon return to her country, she will more likely than not experience a threat to her life or freedom on account of one of the five grounds enumerated by the Refugee Convention. 8 U.S.C. § 1231(b)(3) (2005); see also, INS v. Stevic, 467 U.S. 407 (1984). If no statutory bars apply, relief is mandatory. 8 U.S.C. § 1231(b)(3)(A).


151. JENNIFER CASEY & ANGÉLICA CHÁZARO, GETTING AWAY WITH MURDER: GUATEMALA’S FAILURE TO PROTECT WOMEN AND RODI ALVARADO’S QUEST FOR SAFETY 1 (2005).

152. See, e.g., Condon, supra note 10, at 229 n.159, 230-32; CASEY & CHÁZARO, supra note 151, at 20 n.9.

153. See Immigration and Refugee Board of Canada, supra note 27; Musalo, supra note 34; CASEY & CHÁZARO, supra note 151, at 20 n.9.
employing the "floodgates" rhetoric, opponents of broader asylum policies actually acknowledge the rampant and widespread nature of gender-related persecution. An appropriate response to the prevalence of gender-related persecution is not to restrict asylum laws but to address the root causes of the persecution itself. For example, advocates at the Center for Gender and Refugee Studies made public a report on the high rate of femicides in Guatemala; the report draws public attention to the U.S. financial support of a Guatemalan justice system that does extremely little to address the femicide problem. The report calls on the U.S. government to pressure the Guatemalan government by means of a Congressional resolution, a Congressional delegation, and through the administration of USAID projects in Guatemala. The report also makes specific recommendations to the Guatemalan government to address the issue.

Gender asylum advocates are forging creative alliances with conservative groups in order to pressure conservative lawmakers regarding gender-related asylum policy. This strategy should include a focused effort to minimize the harmful effects of the REAL ID Act through the implementation of regulations that will limit REAL ID's reach in the context of gender-based asylum claims. All such advocacy efforts should be undertaken with the long-term goal of passing improved and superseding legislation, which may not be possible until the current Congressional configuration changes.

V. Conclusion

For decades, asylum law has restricted women's access to protection. Important progress occurred in the 1990s following the Kasinga decision, although these gains were hindered by the unique handling of the R-A- case. Since Attorney General Reno vacated the BIA's decision in R-A-, advocates have struggled for and awaited clearer and improved guidance on gender asylum policy. While proposed regulations remained indefinitely on hold, instead of passing legislation to equalize access to asylum, Congress passed the REAL ID Act. By failing to address the well-documented problems facing many female asylum seekers, and by increasing the difficulty of obtaining asylum for all applicants, REAL ID serves to widen the gender gap in asylum law. The Act implements rules that exacerbate the obstacles gender-related asylum claimants already confronted, such as establishing motive, defining "political opinion" and "social group," and contending with the caprices of IJ discretion in the context of institutional and individual misconceptions about the harms women disproportionately suffer.

154. Casey & Chávarro, supra note 151, at 1.
155. See id.
156. Id. at 14-17.
157. Id. at 17-19.
158. Symposium, supra note 40.
It is important that advocates work together to address the problems REAL ID poses through representing individual clients, so as to avoid unfavorable precedent. Advocates must also continue to address the policy problem itself by forging creative alliances, dispelling rhetorical myths, lobbying for sound gender asylum regulations and, ultimately, implementing superseding legislation.