

ROUTLEDGE RESEARCH IN ASYLUM, MIGRATION AND
REFUGEE LAW

Gender in Refugee Law

From the margins to the centre

Edited by
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2 Legal change from the bottom up

The development of gender asylum jurisprudence in the United States

*Deborah E. Anker*¹

Legal change is often thought of as change from the top down – change brought about by new legislation, regulations, precedent administrative, and federal court decisions, or changes resulting from major impact litigation. Gender asylum in the United States, however, tells an unusual story of legal change from the bottom up, grounded, at least in significant part, in direct representation of women refugees.

There is a long theoretical debate about progressive lawyering for social justice and legal change. Many critical theorists doubt the role of direct services and individual representation, while some argue more generally that instrumental uses of the law justify the status quo and are ineffective and even counter-productive, legitimizing the law in ways that in fact impede legal and social change (Alfieri 2008–09; Wexler 1970). This chapter, in telling at least part of the story of gender asylum in the United States, provides a counter-example of how direct representation can actually change the culture of decision-making and be an effective vehicle for meaningful legal change. At the same time, such representation, rather than disempowering clients (Quigley 1994), can create authentic and non-hierarchical relationships between lawyer and client as I hope the case examples provided in this chapter illustrate. In the narratives that accompany these asylum claims, lawyers, in partnership or ‘alliance’ with their clients (Bellow 1996), develop narratives that portray women refugees not as simple victims, or fitting only within the Refugee Convention’s particular social group ground, but rather, for example, as in cases involving domestic violence, as having feminist political opinions that led to them standing up to their abusers. This chapter, as well as other works, also describes the relationship between direct representation and coalition building for social change with lawyers engaged in such direct representation allying with client-based and other community organizations (Anker 2002; Sharpless 2012). From the enactment of the

¹ Special thanks to Sabi Ardalan for superb drafting and editing help and the use of examples of many of her clients, to Nancy Kelly and John Willshire Carrera for help in editing this chapter and for their maverick work over the past 30 years in helping to develop this area of law, and to Micah Stein for great research and editing help.

Refugee Act of 1980 until the 1990s, asylum seekers fleeing gender-based violence were routinely denied protection and status in the United States (Kelly 1993; Goldberg 1993; Goldberg and Kelly 1993). Serious harms faced by women, including domestic violence, female genital mutilation (FGM), psychological harm, and rape, went unrecognized in United States asylum law until advocacy organizations, including the Harvard Immigration and Refugee Clinic (HIRC), began representing women asylum seekers in increasing numbers and transforming underlying institutions and the law through this direct representation.

Today, HIRC and other legal services organizations and clinics regularly win cases involving domestic abuse and other gender-based persecution and gender-related grounds. In January 2013, for example, Isabella,² a strong and independent woman who fled violent abuse in Honduras, was granted asylum. Isabella was first attacked by Jorge, a suitor of her sister's, at age 13, when he kidnapped her, dragged her to a hotel room, and brutally raped her. Jorge continued to stalk her for years, kidnapping, beating, and raping her, because he considered her, in his words, 'my woman' and 'my property'. Isabella, however, refused to submit to Jorge. She went back to school, worked hard, and became a successful and well-respected manager at a local retail chain. She believed she deserved to be treated with respect, as an equal. When Jorge's violence escalated unbearably, Isabella fled her country. For years she lived in the United States in hiding, too traumatized to come forward. Finally, after confiding in a psychologist she trusted, she was able to open up, and, represented by attorneys at HIRC, Isabella was granted asylum on the basis of the abuse she had suffered. Such a result would have been unheard of 30 years ago.

Most gender asylum victories in the United States are won at lower levels of adjudication, either before the United States Citizenship and Immigration Service (USCIS) Asylum Office, as in Isabella's case, or in immigration courts under the jurisdiction of the Department of Justice. However, federal agency regulations addressing gender asylum have been pending for over 13 years without being finalized. The Board of Immigration Appeals (Board), the administrative appellate body charged with interpreting immigration and asylum law, has failed to issue a precedential decision on the key questions of whether domestic violence can serve as a basis for asylum³ and whether gender per se can define a particular social group (PSG).

Given this dearth of formal law, HIRC attorneys and other advocates representing individual clients have grounded arguments for recognition of gender asylum claims in persuasive, normative, but non-binding instruments, including United States and international gender asylum guidelines, agency guidance and training materials, legal briefs, decisions by low-level adjudica-

² Clinic client names changed throughout to protect confidentiality

³ Although on other issues involving gender, there has been some significant progress. See generally below and (Anker 2013, 4:25, 5:50–1).

tors, and international human rights law. Through direct representation of hundreds of women fleeing gender-based violence, the HIRC and other advocates have not only laid the foundation for changes at higher administrative and federal judicial levels, but have also changed the culture of the relevant immigration agencies, the perspective of judges and other decision-makers, in effect creating a body of jurisprudence at the administrative level, which, despite its non-precedential nature, has had enormous impact.

In a different context, the late Professor Gary Bellow, founder of the Harvard Law School's Clinical Program and a major force in progressive lawyering, also utilized a bottom-up legal strategy as a means of affecting institutional practice. Bellow's 'focused case' approach involved bringing targeted streams of individual cases in order to compel proper enforcement of the law and change the incentives of institutional players. Through bringing a substantial number of individual claims, he sought to close the 'enormous gap between existing law and the practices of most public and private institutions' (Bellow 1977).

HIRC, as well as many other direct legal service organizations and clinics, has adopted a similar emphasis on bottom-up representation to change the culture of asylum decision-making and create an expanded body of asylum law. Especially in an area of law with a shortage of 'hard' sources, the individual representation model is particularly salient, generating its own jurisprudence and creating an environment in which larger change can happen. Continuing to bring gender asylum claims founded on non-traditional sources of law has made novel legal arguments more familiar, compelling, and legitimate to asylum officers, immigration judges, as well as other higher level institutional and judicial decision-makers.

This chapter first provides a brief overview of refugee law, United States implementation of the United Nations 1951 Convention Relating to the Status of Refugees (Refugee Convention) and 1967 United Nations Protocol relating to the status of refugees (Protocol), and protections for women under the Convention. The chapter then addresses the development of gender asylum law in the United States over the past almost 20 years, examining institutional and legal changes brought about through, among other means, advocacy from the bottom up. The chapter brings to light the role of gender asylum in transforming United States refugee law as a whole, and, in particular, adjudicators' understanding of key elements of the refugee definition, including the failure of state protection and non-state agents of harm, the meaning of persecution, and the nexus, or causal linkage, requirement. The chapter includes throughout examples of recent victories in gender asylum cases brought by HIRC, although, as noted, many other direct legal services organizations and clinics have engaged in similar advocacy. Obviously, there have been many defeats and frustrations along the way (e.g. the failure to publish gender guidelines and the many gender asylum cases that have been lost), but there is reason as well for some optimism.

Overview of the Refugee Convention and its implementation in United States asylum law

Refugee status is governed by the 1951 United Nations Refugee Convention and the 1967 United Nations Protocol relating to the status of refugees. Articles 1 and 33 are centrepieces of the Convention. Article 1 defines a 'refugee' as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

(Refugee Convention, Art. 1A(2))

Article 33 of the Refugee Convention forbids a state from returning a refugee to a country where his or her life or freedom would be threatened on account of one of the grounds enumerated in the refugee definition (Refugee Convention, Art. 33).

Refugee law provides surrogate protection when a state has failed to protect the basic human rights of its inhabitants for a discriminatory reason, such as the person's race, religion, nationality, membership of a particular social group, and/or political opinion. Contemporary international refugee law arose out of the same post-Second World War context that produced the major instruments of international human rights law, most fundamentally the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights (Anker 2013, 4:1). International refugee law is an unusual area of international law and international human rights law in that many states, including the United States, fulfil their obligations through domestic legal systems. No international or specific treaty-based agency is formally responsible for the implementation and interpretation of refugee law. While this structure has been subject to a great deal of legitimate criticism, it is in many respects one of the system's strengths. Enforcement by states allows states to provide substantive remedies within their own borders to real people facing human rights abuses (Anker 2002, 135).

The United States ratified the Protocol in 1968 and, in 1980, enacted the Refugee Act, implementing Articles 1 and 33 of the Convention and replacing a former definition of 'refugee' dictated by Cold War geopolitics with a more neutral non-ideological definition from the Protocol and Refugee Convention (Refugee Act 1980 Pub. L. No. 96-212, 94 Stat. 102). The United States Supreme Court in the seminal 1987 case of *Immigration and Naturalization Service [I.N.S.] v Cardoza-Fonseca [Cardoza-Fonseca]* emphasized the international treaty roots of the Refugee Act, stating:

If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.

([1987] 480 US 421, [436–7])

Key provisions of the United States statute faithfully track the language of the international treaty, with some exceptions. The Convention’s Article 1 refugee definition is incorporated into United States law in s.1101(a)(42) of the Immigration and Nationality Act, which defines a ‘refugee’ as:

[A]ny person who is outside any country of such person’s nationality or ... who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

(INA §1101(a)(42); 8 U.S.C. §101(a)(42)(A))⁴

The *non-refoulement*, or non-return, protection of Article 33 of the Convention is incorporated into United States law in s.241(b)(3) of the Immigration and Nationality Act, the United States ‘withholding of removal’ provision (INA §241(b)(3) 8 U.S.C. §1231(b)(3)).⁵

4 It is noteworthy that in contrast to the definition of ‘refugee’ in the Refugee Convention, the refugee definition in the United States context is explicitly framed in terms of persecution or a well-founded fear of persecution. The United States statute thus adds past persecution as a separate basis for eligibility, distinct from well-founded fear. This statutory mandate is not, however, followed entirely under the regulations that establish past persecution as creating a rebuttable presumption of future persecution (not a separate basis for eligibility), which can be rebutted if the government can show either changed country conditions or that the applicant can relocate internally. A person can, however, still obtain asylum despite changed country conditions where an applicant suffered severe or atrocious past persecution or faces other serious harm if forced to return to the home country (8 C.F.R. §§208.13(b)(1)(iii), 1208.13(b)(1)(iii))

5 The United States is also unusual in that the standard of risk is different in withholding of removal versus asylum. To obtain withholding of removal, an applicant must show that the harm feared is more likely than not, whereas for asylum, the applicant must show a reasonable possibility or a one in ten chance that the harm feared will be inflicted. Asylum also allows for family reunification, leads to permanent residency, and creates a path to United States citizenship, while withholding does not. Withholding does not provide beneficiaries with any permanent status; rather it only prevents beneficiaries from being returned to a country where it is more likely than not that they will be persecuted. This differentiation between the standard of risk in asylum and withholding has been subject to much international criticism (Farbenblum 2011, 1122; Hathaway and Cusick 2000, 486). Withholding of removal is nonetheless important for asylum applicants in the United States, who may be subject to bars to asylum status, including the one-year filing deadline and certain criminal bars, but may still be eligible for withholding.

Gender-based asylum claims may implicate any of the five grounds in the refugee definition – race, religion, nationality, membership in a particular social group, and/or political opinion. While some contend that gender should be an explicit ground in the refugee definition, the obstacles to women’s eligibility for refugee status lie not in legal categories per se, but in the incomplete and gendered interpretation of refugee law – the failure of decision-makers ‘to acknowledge and respond to the gendering of politics and of women’s relationship to the state’ (Crowley 2000, 17). Adding gender or sex to the enumerated grounds of persecution would not solve this problem, nor would it address cases involving other elements of the refugee definition, where, for example, the harm feared was unique to, or disproportionately affected, women (United Nations High Commissioner for Refugees [UNHCR] 2002, [6]). Gender, properly understood, should pervade the interpretation of every element of the refugee definition.

Thirty years ago, United States asylum law, like international law, was so trapped within the public/private distinction – with harms disproportionately affecting women relegated to the ‘private sphere’ – that rape, for example, was generally understood as an act driven by personal motivations, such as lust or hate, not as a cognizable harm amounting to persecution.⁶ Today, rape, domestic violence, and other gender-based acts of violence are frequently recognized as persecutory harms encompassed within the refugee definition. Over the past two decades, advocates, including lawyers at HIRC, have successfully represented female asylum seekers fleeing such violence and, as described further below, this direct client representation has changed the institutional culture and norms, with adjudicators increasingly recognizing and granting gender-based asylum claims.

Advocacy from below: the context and history of women’s asylum claims

Formal changes in the law are slow to emerge. Gender asylum serves as an important reminder that formal law – typically set forth in statutes, in precedent-setting high court or administrative decisions, and in

⁶ For further discussion of adjudicators’ treatment of gender-based violence as ‘private’ harm not protected by the Convention, see Kelly 1993. See also *Campos-Guardado v I.N.S.*, 809 F.2d 285, 288 (5th Cir. 1987) (upholding denial of asylum to a Salvadoran woman who was gruesomely raped and forced to watch her uncle, the chairman of the local agrarian cooperative, hacked to death (while the attackers shouted political slogans), finding that the rape and trauma imposed on Ms. Campos was of a personal nature); *Klawitter v I.N.S.*, 970 F.2d 149, 152 (6th Cir. 1992) (affirming the Board’s denial of asylum to a woman subjected to sexual violence by a colonel in the Polish secret police because ‘it is clear that he was not “persecuting her”.... [H]e simply was reacting to her repeated refusals to become intimate with him’). But see *Lazo-Majano v I.N.S.*, 813 F.2d 1432, 1434 (9th Cir. 1987), overruled in part on other grounds by *Fisher v I.N.S.*, 79 F.3d 955 (9th Cir. 1996).

regulations – is not the sole source of legal authority. By bringing individual cases and presenting arguments grounded in informal, non-binding but persuasive law, the Clinic, along with other organizations, has helped shape the thinking of decision-makers, changed the culture of legal institutions, and in effect created a body of gender asylum law, developed in large part at the ground level.

Most successful gender asylum claims are won before the United States Citizenship and Immigration Service Asylum Office or in the immigration courts, and do not generally result in publicly available written opinions.⁷ Thus, these decisions are only formally determinative for the claim at issue, and are not binding on any other asylum applications or court cases (8 C.F.R. § 1003.1(g)). The Board of Immigration Appeals has issued precedential decisions in only a few gender-based asylum claims, primarily involving female genital mutilation (*Matter of Kasinga* [*Kasinga*], 21 I&N Dec. 357 (BIA 1996); *Matter of A-T*, 25 I&N Dec. 4 (BIA 2009)), although, as discussed below, there has been substantial general forward movement with respect to various gender asylum issues with the exception of whether domestic violence can serve as the basis for an asylum claim, an issue that has been pending at the Board for many years without a formal decision (Anker, Gilbert, and Kelly 1997; Torrey, Anker, Neale, Eby, Musalo, Casper, Manning, Koop, and Kelly 2011; Torrey, Anker, Ardalan, Marouf, Casper, Goldfaden, Kelly, and Wilshire Carrera 2012).

Federal circuit courts issue publicly available, precedent-setting decisions, but claims appealed to the federal courts have often been denied because they are based on poorly developed facts, or an incomplete record (Anker 2013, 1:10, 3:1). Federal courts are required to defer to administrative decision-makers where the decisions reached are supported by substantial evidence (*I.N.S. v Elias-Zacarias*, 502 US 478, 481 (1992)). As a result, the visible legal precedents set at the federal level are often based on weak and poorly developed claims.

Given this problematic formal legal context, the HIRC and other organizations have, through their advocacy efforts and especially through representation of individual women in asylum proceedings, worked to generate legal authority from sources that are not traditionally considered authoritative. These include unpublished Board decisions, immigration judge decisions, government briefs, national gender guidelines (United States Bureau of Citizenship and Immigration Services 1995), Citizenship and Immigration Service training materials that analyse the law and often take

⁷ The United States Citizenship and Immigration Service Asylum Office is under the Department of Homeland Security (DHS) and does not write publicly available decisions (Anker 2013, 1:3). Immigration courts are under the Executive Office for Immigration Review under the United States Department of Justice, and, while immigration judges may issue written decisions, they are, in some instances, circulated informally, but they are not issued officially or as precedent (Anker 2013, 1:3).

progressive positions, especially on gender asylum (United States Citizenship and Immigration Services – Asylum Division 2009a), children’s asylum,⁸ sexual orientation, and gender identity and related claims (Anker, Kelly, Willshire Carrera, and Ardalan 2012; UNHCR 2002). Attorneys have argued and won cases, drawing on these normative, but sub-regulatory sources, and these arguments have, in turn, led to greater formalization of these sources.

Gender asylum: the early years – 1980s to 1990s

The Board of Immigration Appeals’ 1985 decision in *Matter of Acosta* laid the formal foundation for gender asylum claims in the United States and internationally (*Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Islam and Shah v Home Department* [1999] 2 AC 629 (UK); *Regina v Immigration Appeal Tribunal and Another, ex parte Shah [R. v I.A.T.]* [1999] 2 All ER 545 (HL); *Canada (Attorney General) v Ward* [1993] 2 SCR 689; *Minister for Immigration and Multicultural Affairs v Khawar [Khawar]* [2002] HCA 14). In *Acosta*, the Board explored the ground of membership in a particular social group and reasoned that PSG is defined by a ‘common, immutable characteristic’ that ‘members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences’ (1985, [233]). The Board explained that a ‘shared characteristic might be an innate one such as *sex*, color, or kinship ties’ (*Acosta* 1985, [232–4], emphasis added). That same year, the UNHCR Executive Committee adopted Conclusion No. 39, recognizing that women asylum seekers who fear harsh or inhumane treatment for gender-based reasons may be considered a PSG under the Convention (UNHCR 2009;⁹ Edwards 2010).

In the late 1980s and early 1990s, collaboration across borders among women’s human rights activists, immigration rights advocates, and scholars led to positive changes (Anker 2013; Goodwin-Gill and McAdam 2007; Hathaway 1991).¹⁰ During this period, the Women’s Refugee Project was formed, growing out of a partnership among HIRC, Greater Boston Legal Services (GBLS, originally Cambridge and Somerville Legal Services), and the Harvard Human Rights Program, to advocate in various ways and before different bodies for a gender sensitive interpretation of refugee law.

8 HIRC has participated actively in the training of asylum officers and indirectly in the development of their training materials (United States Citizenship and Immigration Services – Asylum Division 2009b).

9 UNHCR Conclusions Adopted by the Executive Committee on the International Protection of Refugees, conclusion 39 specifically recognizes: ‘women asylum seekers who fear harsh or inhumane treatment due to their transgressions of societal mores in their home countries may be considered a particular social group under the convention’.

10 In the late 1980s and 1990s the women’s refugee rights movement started grounding itself in international human rights law, including the core human rights treaties and the platform for action developed at the 1995 Beijing Women’s Conference (United Nations 1996).

The international women's rights movement had shown gender asylum advocates the importance of challenging the public/private distinction, of recognizing that harms committed against women in the private sphere were of public concern and should be considered serious human rights violations embraced within the meaning of persecution under the Refugee Convention. The human rights paradigm,¹¹ the leadership of UNHCR, and its ongoing dialogue with non-governmental organizations and civil society generally provided a critical backdrop for the evolution of gender asylum law. During this period, asylum and refugee lawyers campaigned for United States and international tribunals and courts to recognize gender violence as persecution and feminism as a political opinion meriting protection. In 1993, Canada issued its historic Gender Guidelines, which served as a model for the United States and other countries around the world (Canadian Immigration and Refugee Board 1993).

That same year, a United States federal court in *Fatin v I.N.S.* denied asylum to an Iranian woman who refused to wear the *chador*, a traditional Islamic veil she considered a sign of support for the Khomeini government that she opposed (12 F.3d 1233, 1241 (3d Cir. 1993)). HIRC filed an amicus brief to support her claim and, when her claim was denied, seized upon language in the court's decision: that feminism could constitute a political opinion, that gender could define a PSG, and generally that women who were being subjected to serious abuse because of their gender deserve protection. Attorneys at HIRC highlighted this dictum and used it to support gender asylum claims, as did many other attorneys advocating in other cases.

The language of the *Fatin* decision created a basis for future cases, laying the groundwork for asylum for thousands of women based on political opinion, their feminist beliefs, as well as on other grounds. The court's reasoning in *Fatin* also set the stage for recognition of emotional and psychological harm as persecution, critical to the recognition of the claims of women, as well as children and other asylum seekers.

Around this same time, following the first coup against Haitian President Aristide in 1991, HIRC among other organizations began representing Haitians who had fled their country and were seeking asylum in the United States. Among the clients were a large number of Haitian

11 For example in the landmark 1993 case of *Canada v Ward*, the Supreme Court of Canada stated:

[u]nderlying the [Refugee] Convention is the international community's commitment to the assurance of basic human rights without discrimination.... Persecution, for example, undefined in the Convention, has been ascribed the meaning of 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.

(*Canada (Attorney General) v Ward* [Ward] [1993] 2 SCR 689, 70)

women who told stories that clearly revealed the gendered nature of the harm they had suffered in Haiti. The Board addressed the issue of gender-based violence in Haiti in *Matter of D-V*, granting asylum to a Haitian woman who had been gang raped and beaten by members of the Haitian military because of her support for Aristide (21 I&N Dec. 77 (BIA 1993)). The decision was, however, initially unpublished and as such was effectively hidden. It was only through the stalwart efforts of immigration professors and law clinics around the country that the Board agreed to establish the *D-V* decision as precedent (Anker 2002, 142). In 1995, HIRC joined with the Center for Constitutional Rights, New York University Law School, the international women's human rights organization MADRE (see MADRE 2013), and a coalition of women's groups within Haiti to gather affidavits from Haitian women who had been and were being systematically raped and beaten in retaliation for their actual and imputed political beliefs. The organizations submitted a lengthy report on these human rights abuses to the Inter-American Commission on Human Rights, which then reviewed the facts and recognized that rape constitutes torture, even outside the detention context (Anker 2002, 142; Inter-American Commission on Human Rights 1995). This was the first recognition of rape as torture by an international human rights body and it provided a basis from which to argue in the asylum context that rape is persecution.

Mid to late 1990s: gender guidelines, Kasinga, and decisions from around the world

Through collaboration across the border with advocates in Canada, as well as United States government officials, United States gender asylum guidelines were issued in 1995 (United States Bureau of Citizenship and Immigration Services 1995). The guidelines, which were initially drafted by HIRC, incorporated human rights standards and addressed both procedural and substantive aspects of adjudication of women's asylum claims. In order to build momentum for these guidelines before they were issued, HIRC attorneys worked with female journalists to highlight the fairness and equity issues at stake, and the *New York Times* and other major newspapers ran front-page articles highlighting the individual stories of women represented by HIRC seeking asylum because of gender-based persecution (Anker 2002).

Although these guidelines were sub-regulatory pronouncements by the United States government, the guidelines were cited and relied upon by the Board and federal courts in published decisions as well as by attorneys in various cases (*Matter of S-A*- [S-A], 22 I&N Dec. 1328, 1333 (BIA 2000); *Fisher v I.N.S.*, 79 F.3d 955 (9th Cir. 1996) (Noonan J, dissenting)). As a result, the guidelines became highly normative and influential. Following the example of Canada and the United States, many other state parties to

the Refugee Convention, including Australia and the United Kingdom, subsequently developed similar guidelines.¹²

The Board of Immigration Appeals in 1996 issued its second precedential ground-breaking gender asylum decision, *Matter of Kasinga*, which recognized female genital mutilation as a basis for an asylum claim (*Kasinga* 1996).¹³ The decision was ground-breaking in recognizing that gender could, at least in part, define a particular social group (*Kasinga* 1996; Musalo 1997). The applicant, represented by the American University College of Law Clinic, was a young woman from Togo who feared FGM, and the Board found that her fear of persecution was on account of her membership in the particular social group of young women of the Tchamba-Kusuntu Tribe who had not been subjected to FGM and who opposed the practice (*Kasinga* 1996, [358]; Musalo 1997).

Around the same time, high courts and tribunals in other countries, including New Zealand, the United Kingdom, and Australia, began issuing positive and ground-breaking gender asylum decisions (*Refugee Appeal No. 2039/93 Re MN*, RSAA (1996); *Regina v I.A.T.* 1999; *Minister for Immigration and Multicultural Affairs v Khawar* 2002). These decisions largely focused on the failure of countries to protect women from gender-based violence and highlighted the bifurcated nature of persecution, i.e. that persecution involves two prongs – serious harm and failure of state protection, whereby states can either cause the harm or fail to protect from harms caused by others.

Late 1990s to 2000s: R-A- and the changing landscape of gender asylum

Then in 1999, a lightning rod Board decision, *Matter of R-A-*, complicated the landscape. In a highly controversial published decision, the Board reversed the immigration judge's decision and denied asylum to Rody Alvarado, a Guatemalan woman fleeing a violently abusive relationship (*Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), see also discussion of this case in Musalo in this volume). The Board's decision called into question whether domestic violence could serve as the basis for an asylum claim, and the issue of whether gender could define a particular social group was also left in limbo. As a result, advocates increasingly began relying on

12 For a list of these international gender guidelines, see Center for Gender and Refugee Studies, *Gender Guidelines*. Online: http://cgrs.uchastings.edu/law/gender_guidelines.php (accessed 30 September 2013).

13 While the outcome and much of the reasoning of the case was highly positive, the Board's particular social group analysis in *Kasinga* was problematic; the particular social group presented by the Board improperly combined two other elements of the refugee definition – the political opinion ground (i.e. opposing the practice), as well as the risk factor or well-founded fear. In her concurrence, Board member Lory Rosenberg argued against this construction and for a PSG based on a single immutable characteristic – in this case, *Kasinga's* gender. See also the discussion of *Kasinga* in Musalo in this volume).

alternative legal theories and began winning claims brought under other grounds, including political opinion and religion. Shortly after denying Rody Alvarado's claim, the Board granted asylum in the precedential decision *Matter of S-A-* to a young Moroccan woman who was severely physically abused by her father (2000, [1332]). The Board (which also cited the gender guidelines) decided that case based on the religion ground; the daughter flouted the conservative Muslim rules her father imposed.

In 2001, in response to pressure from an advocacy group led by the Center for Gender and Refugee Studies which now represented Rody Alvarado, and scholarship in the area, Attorney General Janet Reno vacated the Board decision in *R-A-* on the last day of her term and remanded the case to the Board, ordering the Board to stay a decision in the case until issuance of final federal gender asylum regulations, which had been drafted by the Department of Justice and were pending at the time (*Matter of R-A-*, 22 I&N Dec. 906 (AG 2001) (vacating Board decision)). The proposed federal regulations, which have still not been finalized, reinforced that gender could form the basis for a particular social group and provided principles for the analysis of domestic violence claims (United States Department of Justice *Asylum and Withholding Definitions* 65 Fed. Reg. 76588-01 (proposed 7 December 2000)).

The *R-A-* case was re-briefed to the Board in 2004, and almost 200 groups, individuals, and organizations signed on to the amicus brief that HIRC and others drafted (Kelly, Anker, Willshire Carrera, Women Refugees Project, Harvard Immigration and Refugee Clinic, Greater Boston Legal Services, *et al.* 2004). In a critical development, the government shifted its position in the case, and, in its brief, the Department of Homeland Security (DHS) recommended an asylum grant based on a PSG of married women who are unable to leave their abusive relationships (Whitley, Cerda, and Carpenter 2004). For almost a decade, the case of *R-A-* remained pending at the Board with no decision as to whether domestic violence could form the basis of an asylum claim and with no recognition from the Board that gender itself defines a PSG in these cases.¹⁴ In 2008, Attorney General Michael Mukasey certified the case to himself, lifted the stay ordered by Attorney General Reno given that the more positive regulations had still not been finalized, and remanded the case to the Board for a decision (*Matter of R-A-*, 24 I&N Dec. 629 (AG 2008)). The Board then remanded the case to the immigration judge for further factual development and the submission of new evidence. In 2009, the immigration judge granted Rody Alvarado's case and she finally won asylum (Leahy 2009). Unfortunately, while the decision was a major

14 Attorney General John Ashcroft attempted to revive *Matter of R-A-* by reasserting jurisdiction over it, but he too remanded it to the Board for a decision following finalization and publication of the federal gender asylum regulations (*Matter of R-A-*, 23 I&N Dec. 694 (AG 2005)).

victory, it came with no explanation and only applied specifically to her, not to any of the other hundreds of women whose cases were still pending.

As a result of this vacuum in the formal law as it related to domestic violence claims, advocates increasingly turned to non-traditional sources of authority, including the United States and UNHCR gender guidelines, materials used by the Asylum Office to train its officers, and government briefs, including the DHS brief in *R-A*, to argue that gender should be recognized as a cognizable particular social group, that opposition to domestic violence could constitute a feminist political opinion, and that domestic violence can serve as a basis for an asylum claim. For ten years, while *R-A* was left undecided, HIRC and other lawyers and organizations continued winning many individual gender asylum cases, based on gender as a PSG, race, religion, and especially on feminism as a political opinion.

Through the use of creative legal arguments, advocates helped to shape the development of the law at the lower levels. Case by case, for example, HIRC attorneys and other advocates pieced together seemingly inconsequential language from court decisions, government briefs and memoranda, and international law, and created compelling legal arguments to persuade adjudicators that women asylum seekers met the requirements of the law. In response to these victories, the government's position has evolved in individual cases across the country, recognizing, in the context of those cases, that domestic violence can serve as the basis for an asylum claim.

2009 to the present

The same year that Rody Alvarado won asylum, a similar case involving domestic violence, *Matter of L-R*, hit the front page of prominent newspapers, including the *New York Times*, and, again, the DHS brief submitted in the case was critical (Preston 2009, A1; United States Department of Homeland Security 2009). The DHS brief in *Matter of L-R*,¹⁵ like the brief in *R-A*, recommended an asylum grant based on a PSG, this time defined in terms of 'Mexican women in domestic relationships who are unable to leave', and 'Mexican women who are viewed as property by virtue of their positions within a domestic relationship' (United States Department of Homeland Security 2009, 14). The case was remanded and the immigration judge granted asylum in 2010, but again did not issue a written or precedential decision.

Attorneys who had long cited and relied on the DHS brief in *Matter of R-A* as a de facto statement of agency policy, also started using the brief in *L-R* in court to argue for recognition of asylum claims based on domestic

15 Department of Homeland Security's Supplemental Brief 17–18 (13 April 2009), submitted in *Matter of L-R*.

violence. But certain government trial attorneys refused to accept the position set forth in those briefs and opposed their introduction into evidence. As a result, in 2010, HIRC gathered examples from across the country of government trial attorneys who opposed the *L-R* brief in immigration court, and submitted these examples to members of the United States House of Representatives Subcommittee on Immigration. Congressional staffers then met with Department of Homeland Security officials and pushed for recognition of the agency position set forth in *L-R*. In response, the government changed its position in many individual immigration court cases across the country, and began conceding that domestic violence could form the basis for an asylum claim. In one case, the DHS issued a written clarification, acknowledging that ‘the Department continues to maintain that victims of domestic violence can qualify for asylum’ (United States Department of Homeland Security 2010).¹⁶

While the DHS’s position on gender-based asylum claims evolved positively, the Board of Immigration Appeals remained silent on the issue of whether gender could define a particular social group and whether domestic violence could be the basis of asylum. In the autumn of 2011 and then again in 2012, the Board asked for amicus briefing on the question of whether domestic violence can serve as the basis of an asylum claim, and the American Immigration Lawyers Association along with others submitted briefs (Torrey, Anker, Neale, Eby, Musalo, Casper, Manning, Koop, and Kelly 2011; Torrey, Anker, Ardalán, Marouf, Casper, Goldfaden, Kelly, and Wilshire Carrera 2012), but to date no formal decision has been issued.¹⁷ Some advocates are optimistic that, at the very least, the Board will not issue another *R-A*-type decision given how much the discourse has shifted and especially the changes in ground-level jurisprudence on gender asylum since the Board’s vacated decision in that case. It is also entirely possible that the Board will continue to remain silent and evasive on the question of whether domestic violence may be a basis for asylum. The Department for Homeland Security and the Department of Justice are in the process of redrafting gender regulations, which may be forthcoming. It is worth noting that although the question of whether gender can define a particular social group, and in particular whether domestic violence may be a basis of an asylum claim remains unanswered at the formal level, over the past two decades some gender asylum issues have

16 HIRC sent this clarification out on the ‘Immigration Professor’ listserv so that advocates and scholars could use it to support their arguments in gender asylum cases, and this written clarification is now cited in a leading immigration law casebook as DHS recognition that domestic violence can be a basis for asylum (Aleinikoff, Martin, Motomura, and Fullerton 2012, 888).

17 Only the case of *K-C* is still pending; the other cases have all been remanded to the immigration judges for a grant of asylum. See *Matter of K-C*, I.J. Durling (York, PA Mar. 21, 2008) (unpublished) (on file with author) (pending before the Board of Immigration Appeals).

moved in positive directions; for example, in United States case law FGM claims are widely recognized, as are many gender claims based on family membership, forced marriage,¹⁸ and sexual orientation and identity, the latter due in significant measure to the work of the NGO Immigration Equality¹⁹ (Anker 2013, 5:44, 5:46, 5:50, 5:53, 5:54).

Gender asylum, a catalyst for change: the transformation of United States asylum law and legal institutions

Due in part to advocacy in the gender asylum context, refugee law has matured enormously over the past 20 years. Many United States adjudicators (in particular asylum officers and immigration judges) now accept that refugee law provides surrogate protection to those who have suffered or fear harm in the domestic context, including harm by private, non-governmental actors. Gender asylum cases have also led to a more nuanced understanding of the political opinion ground, as the questions of whether gender constitutes a PSG and whether domestic violence constitutes a basis for asylum continue to stymie the Board of Immigration Appeals. Gender asylum claims have also expanded adjudicators' understanding of the meaning of persecutory harm, leading to greater recognition of emotional and psychological harm, as well as a broader understanding of exceptions to the one-year filing deadline bar.

Agents of harm and non-state actors

Women asylum seekers often have suffered or fear harm at the hands of non-state agents, such as abusive spouses or parents. Through the work of dedicated attorneys around the country representing women and creatively framing these cases, many adjudicators now recognize that harm inflicted in the home or by private actors also constitutes persecution, where the applicant's home country is either unwilling or unable to protect the applicant.

It is well established in the jurisprudence of many states party to the Refugee Convention that, in this context, seeking state protection is futile

18 For example, Nancy Kelly, co-managing attorney at HIRC at Greater Boston Legal Services, reports that she regularly wins forced marriage cases before asylum officers and immigration judges, although by their nature, these decisions remain unreported. Conversation with Nancy Kelly, 7 July 2013.

19 Among other contributions, Immigration Equality, an organization fighting for equality under United States immigration law for lesbian, gay, bisexual, transgender, and HIV-positive individuals, played a major role in developing asylum officer training materials in this area, and generally in advancing LGBT asylum jurisprudence. See Immigration Equality 2010.

and, indeed, could result in further persecution (Anker 2013, 4:8–4:11).²⁰ Showing that a victim has tried to seek protection is not therefore required of applicants, especially where the state supports gender stereotypes, turns a blind eye to intimate partner violence as a ‘private’ or ‘family’ affair, or even where the state professes to address gender inequalities, but in reality does not have the power, resources, or, in some cases, even the political will to effect this change.²¹

In the case of Isabella, described earlier, for example, her mother called the police to report the horrific abuse suffered by her daughter and her family, but the police merely picked up Jorge, the abuser, and let him go just a few blocks away. The daughter herself never called the police because she knew it was useless and would only further anger Jorge, who was a police officer himself, and cause him to retaliate against her and her family.

Nexus or the causal link

Gender asylum cases have also transformed adjudicators’ approach to the nexus or causation element in asylum claims. The Board had, in its early years, defined persecution as ‘harm or suffering ... inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome’ (*Acosta* 1985, [222–3]). However, in *Matter of Kasinga*, a case involving a young Togolese girl who feared female genital mutilation, the Board changed its position and recognized explicitly that ‘subjective “punitive” or “malignant” intent is not required for harm to constitute persecution’ (*Kasinga* 1996, [365]).

The Board in *Kasinga* found that the FGM feared by the applicant constituted persecution, in spite of the fact that FGM was considered a beneficial cultural rite in Togo, not a form of punishment or harm

20 See e.g. *Sarhan v Holder*, 658 F.3d 649, 650–51 (7th Cir. 2011) (finding Jordanian government complicit in harm petitioner would suffer at the hands of her brother where ‘significant evidence’ revealed that the government failed to protect women against honour killings by family members); *Nabulwala v Gonzales*, 481 F.3d 1115, 1116–18 (8th Cir. 2007) (finding that the immigration judge erred in concluding that the family-arranged rape of Ugandan lesbian constituted ‘private family mistreatment’); *Ali v Ashcroft*, 394 F.3d 780, 785–87 (9th Cir. 2005) (noting that persecutory harm ‘need not be directly at the hands of the government; private individuals that the government is unable or unwilling to control can persecute someone’ (internal quotation marks omitted)).

21 As the United States Citizenship and Immigration Services Asylum Office training materials explain:

In some cases, an applicant may establish that state protection is unavailable even when she did not actually seek protection. For example, the evidence may indicate that the applicant would not have received assistance if she had sought it. Country conditions information may reveal that government officials in the applicant’s country view violence perpetrated by a family member, clan member, or tribal member as a ‘private’ dispute for which governmental intervention is inappropriate. Or, evidence may establish that seeking protection would have placed an applicant at even greater risk of persecution.

(United States Citizenship and Immigration Services – Asylum Division 2009a, 25)

(*Kasinga* 1996, [366, 371] (Filppu, Board Mem., concurring)). The Board's analysis in *Kasinga* thus focused on the *effect* of the practice on the *victim*, rather than on the subjective *intent* of the *persecutor*. Federal courts have reiterated this position in other cases involving FGM, emphasizing: '[p]ersecution simply requires that the perpetrator cause the victim suffering or harm and does not require that the perpetrator believe ... the victim has committed a crime or some wrong' (*Mohammed v Gonzales*, 400 F.3d 785, 796 n.15 (9th Cir. 2005); *Niang v Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005)). The Asylum Office has also adopted this position, and instructs its officers that 'there is no malignant intent required on the part of the persecutor, as long as the applicant experiences the abuse as harm' (United States Citizenship and Immigration Services 2011, 19).

As an example, in a recent case HIRC brought before the Asylum Office, a client named Miriam from Guinea had been subjected to FGM and forced into marriage with an older cousin against her will, because her family thought this was best for her. Miriam feared her daughters would be subjected to the same. The Asylum Office granted her case, without questioning the reasons why the harm was inflicted on her, focusing instead on the harm she suffered and other aspects of her claim. In her case, the asylum claim was also based in part on her fear of being attacked due to her involvement with an opposition political party and her tribal membership, owing to rising ethnic tensions in the country.

Grounds of persecution

While the Board has avoided formally deciding, in a precedential decision, the issue of whether domestic violence constitutes a basis for asylum, HIRC as well as other advocates have focused on bringing domestic violence claims under other grounds, including political opinion, race, and religion, as well as PSG. The difficulties with gender as a PSG have led to an expanded understanding of the political opinion ground as embracing women's belief in equal treatment and opposition to domestic violence. Attorneys built on the reasoning in *Fatin* that feminism can constitute a political opinion, and argued that feminism includes resistance to such practices as FGM and domestic violence.

HIRC attorneys have worked closely with clients to elicit their opinions about how they believe they should be treated, and to present information about how they expressed these opinions in their relationships, and the consequences they faced because of it.²² HIRC attorneys have described

22 Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged. This may include opinions about gender roles. It would also include non-conformist behavior which leads the persecutor to impute a political opinion to him or her. (UNHCR 2002, [32])

this as ‘the independent woman case theory’. As Isabella, the Honduran client described earlier, explained in her affidavit:

I am an independent and successful businesswoman, and I have always believed that women should be treated equally and with respect. . . . But [my abuser] hated my independence, my self-sufficiency, my success. He considered me his property and could not stand that I refused to submit to him. He attacked me for working hard, for educating and improving myself, and for standing up for myself. He demanded that I stop working . . . But I was proud of my work, and told him, over and over, that I would not quit. I told him that I had my own life – I could provide for myself and my family. . . . The greater success I had in my work, the angrier and more violent [my abuser] became.

Through hearing these types of claims, decision-makers at the lower levels have increasingly recognized that resistance to domestic violence – through refusal to follow the spouse’s orders, through attempts to escape, and ultimately through flight – constitutes expressions of a political opinion (Anker 2013, 5:28).

For example, two recent HIRC cases involved young Afghan women, Delbar and Fereshteh, who were active in educating other women, informing them about upcoming elections, and encouraging them to stand up for equal treatment. Because of their work and their beliefs, the young women were targeted, called infidels, and threatened with death. In the words of Delbar:

I have always spoken out against injustice and inequality, especially in how women are treated in Afghanistan. My father used to beat my mother and me for refusing to submit to him, but I learned from my mother to be strong and to assert myself. She stood up to my father and taught me to do the same.

The cases were successfully framed in terms of gender and political opinion, as well as religion, since the clients were Muslim women who resisted conservative Muslim values and attended a Christian college and who were, as a result, perceived to be Christian converts.

Similarly, in the case of Aneni, a violently abused Zimbabwean woman, HIRC worked carefully to understand the dynamics of her marriage and the reasons for the violence she suffered. Upon first being interviewed, like many women who have suffered domestic abuse, she denied having any political opinions. Through further interviews, however, her attorneys learned that she actually held very strong beliefs about how women should be treated, based on having seen her parents treat each other respectfully and also because equality and human rights were part of her church’s teachings. It also became clear that her husband Paul was a strong supporter of Zimbabwean President

Robert Mugabe, while she was against President Mugabe, especially his inhumane treatment of people and the lack of freedom throughout her country. She even secretly donated money to the main opposition party without her husband's knowledge, but was too scared to reveal this to her attorneys for many months, because of her fear of Mugabe's spies.

It is noteworthy, that while the Board's PSG analysis in gender cases has been on hold, federal courts have issued some positive decisions involving gender-based PSGs. In *Mohamed v Gonzales*, for example, the court found that gender was a 'prototypical immutable characteristic' under the PSG ground (400 F.3d 785, 797 (9th Cir. 2005)). However, PSGs in gender-based cases are typically constructed as gender in addition to some other factor such as victimization, the harm suffered, or another ground, i.e. political opinion, expressed as opposition to the harm. The reticence to rely on gender itself to define the PSG has been a clear problem and these convoluted PSGs have had a negative effect on the formulation of PSGs in other contexts (*Rreshpja v Gonzales*, 420 F.3d 551, 555–56 (6th Cir. 2005); *Lushaj v Holder*, 380 Fed. Appx. 41, 43 (2d Cir. 2010); *Gatimi v Holder*, 578 F.3d 611 (7th Cir. 2009)).

Gender-based violence and emotional and psychological harm

As noted, gender asylum claims have expanded adjudicators' understanding of the meaning of harm, including in the 'private' sphere. In part as a result of the previously described representation of Haitian women, it is now well established that rape constitutes persecution (United States Citizenship and Immigration Services – Asylum Division 2009a, 22). The United States Citizenship and Immigration Services Asylum Office training materials explain: '[i]n some countries a woman may experience severe discrimination and social ostracization because she was raped. The ostracism is further harm after the rape, and may itself be sufficiently serious to constitute persecution' (United States Citizenship and Immigration Services – Asylum Division 2009a, 22). The Citizenship and Immigration Services also emphasize the varied nature of harm that women may face, including 'forced female genital mutilation, forced abortion, involuntary marriage, societal stigma that prevents marriage, "honor" killings, and forced prostitution' (United States Citizenship and Immigration Services – Asylum Division 2009a, 6).

In addition, based in part on the use and reasoning of the *Fatin* decision (where the court recognized that gender alone could form the basis of a PSG), adjudicators now acknowledge that women may be subjected to harm solely by virtue of being women.²³ In many countries, including

23 For example, '[a] woman may be prevented from traveling, from obtaining an education or from pursuing a profession, or suffer other forms of institutionalized discrimination, because of her gender' (United States Citizenship and Immigration Services – Asylum Division 2009a).

Guatemala and Honduras, femicide and violence against women is widespread, and as female activists gain more ground in their fight to change the culture of machismo, they too have come under increasing attack. Marta, a recent HIRC client who was granted asylum, fled Honduras after she received death threats, calls threatening her children, and eventually had her house burned down, as a result of her outspoken support for women's rights and her efforts to establish protections for women in abusive relationships. As the USCIS Asylum Office training materials note, '[w]omen may be harmed for violating social norms or legal restrictions associated with gender' and for 'express[ing] opposition to, or violat[ing], social norms associated with gender' (United States Citizenship and Immigration Services – Asylum Division 2009a, 6).

Gender asylum claims have especially served to highlight the psychological and emotional harm suffered by women, in addition to sexual and physical abuse. For example, Fereshteh, one of the young Afghan women mentioned previously, suffered such severe psychological harm growing up in a repressive society and family from which she rebelled, that she became suicidal. As she explains in her affidavit,

[e]ven as a young girl, I was often defiant and challenged how my extended family, neighbours, and community expected me to behave. Still, it was very difficult for me growing up in a culture that was so against me being independent and outspoken; I was often depressed and tried to commit suicide twice when I was younger.

Living in an environment where she was expected to stay silent and where she could not express her views about women's rights and equal treatment of women severely threatened the core of her identity. HIRC argued that the Asylum Office should recognize this psychological harm as part of her past persecution in adjudicating her claim, and she was ultimately granted asylum.

Bars to asylum

Gender-based cases have also helped shape our understanding of the bars to asylum in United States law, promoting, for example, a more generous interpretation of exceptions to the one-year filing deadline. Under United States law, applicants who fail to apply for asylum within one year of their last arrival to the United States are precluded from obtaining asylum unless they fall under one of the exceptions to the filing deadline (INA §208(a)(2)(B), 8 U.S.C. §1158(a)(2)(B); Anker 2013, 6:31–7). Since many women are too terrified to reveal what they have suffered and live in hiding in the United States for years before coming forward, they are often disproportionately impacted by the one-year filing deadline bar,

unless they can prove they meet an exception (Massimino 2013; Schrag, Schoenholtz, Ramji-Nogales, and Dombach 2010). Exceptions to the one-year bar can include ‘serious illness or mental or physical disability’, such as post-traumatic stress disorder (PTSD) and other psychological conditions, which often prevent an applicant from coming forward earlier (INA §208(a)(2)(B), 8 U.S.C. §1158(a)(2)(B); 8 C.F.R. §§208.4(a)(4) to (5), 1208(a)(4) to (5); Anker 2013, 6: 31–7).

HIRC has brought and won gender cases involving an exception to the one-year filing deadline, even when the gap between arrival and filing spans several years or even decades, by demonstrating that the client suffered from severe trauma and/or depression that prevented the client from talking to anyone about the harm she suffered. One client, Patricia, a Guatemalan woman who suffered years of physical, sexual, and psychological harm, including witnessing her abuser’s horrific violence towards their young children and threatening phone calls even after fleeing to the United States, states in her affidavit:

Since coming to the U.S. in August 2007, I have been withdrawn, depressed, and scared because of my experiences in Guatemala. The humiliation and violence I suffered have made it extremely difficult to talk about the past and who I am. When I arrived here, I could not get help or talk about these experiences, including about my legal status. I was mentally and emotionally shut down. I just wanted to start over and forget the pain.

Another client, Isabella, the Honduran woman mentioned previously, lived underground for almost a decade here in the United States before she was able to talk about the extraordinary harm her abuser inflicted from the time she was 13 until her escape to the United States. She explains in her affidavit:

For years here in the United States, I could not sleep at night because of the terrible nightmares that made me relive the rapes, the beatings and the abuse over and over again. For a long time, I lived completely isolated and emotionally closed up. I could not trust anyone. I tried to have relationships and even got married, but I was so traumatized, it was very difficult for me to be in an intimate relationship. When I opened up a little to my now ex-husband . . . who I met and married here, he used what I told him against me and made me feel ugly and worthless. I felt like I had escaped from my country, but not from my past.

Aneni, the Zimbabwean woman described earlier, also lived in hiding in the United States for about eight years before she was able to come

forward. Throughout her time here in the United States, her abuser threatened her, sending angry letters and messages through her sisters and children, to try to find and hurt her. In Aneni's words:

Since coming to the U.S. in 2003, I have been depressed and scared because of my experiences in Zimbabwe. I have regular nightmares about [my abuser] attacking me. I have been very sick and suffered from paralysis in my face and numbness in my body from worrying too much. For a long time, I could not talk about these experiences or get help, including about my legal status. I didn't want to leave the house or meet people from my country. I was terrified that if I talked about what I had been through, [my abuser] would find out where I was and kill me.

In all of these cases, the one-year filing deadline was a significant challenge. But HIRC worked closely with psychologists who were able to evaluate these brave women and write reports describing how the severe trauma the clients experienced as a result of years of violence at the hands of their abusers had prevented them from coming forward. In this way, the women were able to overcome the bar, meet the extraordinary circumstances exception to the one-year filing deadline, and find safety in being granted asylum.

Conclusion

The development of United States gender asylum law tells a fascinating and unusual story of progressive legal change. The traditional story of legal change is one of litigation or major legislation first, that then opens the door for change at the ground level. But the history of gender asylum reveals a legal transformation that occurred from the ground up. Through persistent, extensive, individual case representation, there is now a long tradition of adjudicators recognizing gender-based persecution and gender-based asylum claims, including domestic violence claims; indeed there is now a ground-level jurisprudence that is having significant impact on other aspects of refugee law and decision-making institutions including at higher levels.

This evolution of the law was brought about in part by large-scale representation of individual clients, advocacy on the ground with NGOs, people in government, and women in the media, who highlighted the issues of fairness and equality central to proper understanding of the treatment of gender asylum claims. And based on this work, colleagues at our clinic working along with others, have forayed into new areas, for example, developing a new case law that comprehends the long-term and persecutory effects of the Guatemalan genocide targeted at indigenous

people,²⁴ as well as the special requirements and the need for a refocused asylum jurisprudence for children asylum claimants (Anker, Kelly, Willshire Carrera, and Ardalan 2012). In describing political lawyering and how social change could be realized. Gary Bellow criticized both ‘dogmatic optimism or disillusioned withdrawal’ and the need to be ‘less impatient with ambiguity’ (Bellow 1996). I hope this chapter provides an example of how strategic optimism and direct work with clients – extraordinary, inspiring survivors – can be a powerful means of legal and social change, even as we learn to tolerate all the ambiguities associated with our sometimes limited formal and ‘suspended’ victories.

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24 See e.g. *Mendoza-Pablo v Holder*, 667 F.3d 1308, 1314–15 (2012) (finding persecution and describing the effects of the Guatemalan genocide on a child and his family); *Mejillo-Romero v Holder*, 600 F.3d (1 St Cir. 2010).

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