



Give me your tired, your poor, your battered

How does asylum for abused women actually work?

Lynn Harris

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As you may have [read](#), the Obama administration has opened a "clear, although narrow, pathway" for battered [women seeking asylum](#) in the United States.

What's "clear," in contrast to years of legal muddling -- and "outright resistance from the Bush administration" to recognize claims filed by such women -- is a new conclusion by senior lawyers at the Department of Homeland Security that a Mexican woman repeatedly brutalized by her husband, along with other applicants who have experienced domestic violence, "could qualify for asylum."

"This really opens the door to the protection of women who have suffered these kinds of violations," Karen Musalo, director of the [Center for Gender and Refugee Studies](#) at the University of California Hastings College of the Law in San Francisco, told the New York Times. (She recently took up the now-invigorated case of that Mexican woman, known as "L.R.")

Broadsheet spoke with Musalo to help answer some of the questions that news reports and bloggers have raised about this development.

Why do abused women seeking asylum need to show that they are (as the Times paraphrased it) "treated by their abuser as subordinates and little better than property" and that domestic violence is widely tolerated in their countries? Why is evidence of the abuse itself not sufficient?

As Musalo explains, it's because in order to receive asylum, they must show not only that they were abused, but also that they're members in some way of a "particular social group" as defined in the law. Per the 1951 Geneva Conventions, a refugee is defined as a person "outside of his or her country of nationality who is unable or unwilling to return 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." Since gender is not a category unto itself, victims of gender-based violence may be shown to fit into the "social group" category. (The U.N.'s Guidelines on the Protection of Refugee Women promote "acceptance of the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status.")

Therefore, says Musalo, "The way the law's been interpreted is that you need to show that women are perceived in that society as having lesser rights and that it's seen as acceptable for them to be abused or persecuted because of their gender."

It's been reported that this legal development does not involve cases of female genital mutilation. Why not?

"It's the opposite of what people are inferring," says Musalo; this is not an oversight or an affront. This development does not bring to bear on FGM because cases involving FGM have actually been accepted under asylum law since the 1996 case of [Fauziya Kasinga](#) of Togo, which Musalo litigated. That case did not establish FGM as a specific ground for asylum, but it did establish that those fleeing FGM do belong to a particular "social group." (~~Trivia: after the Board of Immigration Appeals initially denied Kasinga's petition Kasinga, a 3-judge panel on the 2nd circuit disagreed with its application of the relevant law and sent it back for reconsideration. One member of that panel was a certain Wise Latina.~~) [*Correction: Broadsheet conflated two cases here. In the Kasinga case, the Board of Immigration Appeals (BIA) found that fear of future FGM was a basis for asylum. The case was not appealed. It was another case, Bah v. Mukasey, in which the issue of past FGM as a basis was raised. It was that case that was denied by the BIA; then the BIA was reversed by the 2nd Circuit in a panel on which Judge Sotomayor sat.*]

There are a lot of battered women in the world. (According to [some](#) reports, between one-quarter and one-half of all women worldwide have been abused by intimate partners.) According to the Times, immigration officials had been "reluctant to open a floodgate of asylum petitions from battered women across the globe." What about the concern that the U.S. won't be able to accommodate so many more asylum seekers?

"Ah, the shibboleth of the 'floodgates,'" says Musalo. Canada (for one) has accepted gender-based asylum petitions, including those related to domestic violence, since 1993, yet there's been "no perceptible skyrocketing of claims." The same is true of FGM-based petitions in the US, post-Kasinga. "The reality is that it's not easy for women to get out of their own countries, and it certainly isn't easy for them to enter other countries -- which they have to do illegally -- to apply for asylum," says Musalo, who adds that in fact, the number of asylum-seekers in the U.S. has significantly decreased. The [UN's refugee agency \(UNHCR\)](#) has even expressed concern about plummeting numbers worldwide.

Why did the government make this move now?

"This has been a hotly contested issue for 15 years," says Musalo. "But now we have a new administration and the case in question was probably at a place where the Department of Homeland Security could use it to make their position known. Yet there was still enough controversy that they did it in the form of a brief and not something broader [like a regulation] that would be binding in a different way."

Why *is* this issue so controversial?

For immigration "restrictionists," says Musalo, anything that has the potential to broaden the definition of asylum is anathema," says Musalo. But of course, this one's

also about women. "Some people really can't get past the male paradigm of what a refugee is: a male dissident who puts his body in front of a tank in Tiananmen Square or writes literary tracts defying his regime," she says. "They can't get their heads around the fact that refugee protection is also for women -- and that women's rights are human rights. This is not some really adventurous claim; the UNHCR is already there, and many countries already offer gender-based asylum. The U.S. has really been quite tardy in addressing this issue in a way that's consistent with a recognition of the need to protect women's rights." This is in part, she says, because the agencies with joint jurisdiction (Homeland Security and the DOJ) have not managed to find enough consensus to move forward on regulations that were proposed nine years ago.

"This is a great development and the Obama administration should get credit for it. But the agencies have had a change to put forth regulations and they haven't," she says. All of the principles of gender-based asylum law, she says, need to be clear and binding. And where regulations haven't come from agencies, laws need to come from Congress.

As Musalo and [Esta Soler](#) argued in Saturday's Washington Post, "The filing of one brief is no substitute for clear national policy. It's time we put our regulatory house in order and assured victims of gender-based violence that they can count on justice in the United States ... If federal agencies don't do it through regulation, it's time for Congress to do it through legislation. We need Obama administration officials to do the job and do it right. Unless they do, [women] fleeing brutal gender-based violence will spend more years -- or even decades -- in limbo. We can do better."

-- Lynn Harris