

**Because I'm a Woman:
The Dilemma of Establishing a Causal Nexus
in Asylum Claims Brought by Victims of Domestic Violence**

I. Introduction

The U.S. Board of Immigration Appeals (“BIA”), in *In re S-A*,¹ granted asylum to a Moroccan woman who was a victim of severe domestic abuse at the hands of her father. The BIA reached the correct result in determining that the applicant was a refugee and thereby eligible for asylum; however, the BIA’s finding that the applicant had a well-founded fear of persecution on account of her religion, and not her gender, merits further consideration. Although the applicant’s refusal to adopt her father’s extremely conservative Muslim beliefs certainly was a factor in her persecution, it cannot reasonably be regarded as the sole factor. None of the applicant’s four brothers was abused by her father, the restrictions that the applicant was punished for transgressing did not apply to men, and the Moroccan authorities were unwilling to protect the applicant from her father’s abuse because she was a woman. Nonetheless, the BIA explicitly decided the case as persecution on account of religion, and not membership in a gender-based particular social group.

This paper will investigate why the BIA determined that applicant was at risk of persecution on account her religion and not her gender, and will explore some alternatives to and consequences of that determination. Part II will briefly present the factual and legal background of the BIA decision in the present case. Part III will then explain alternative ways, under international refugee law, that the case could have reached the same correct result without denying the role of gender discrimination in applicant’s persecution, focusing primarily on the issue of causal nexus. Part IV will conclude by arguing that, as this case demonstrates, the U.S.

¹ *In re S-A*, 3433, 2000 BIA Lexis 12 (BIA June 27, 2000).

legal approach to claims of refugee status by victims of domestic violence is harmfully incorrect in light of the policy goals of both international refugee law and gender equality advocacy.

II. *In re S-A-*

The applicant in *In re S-A-* was a twenty or twenty-one year old native citizen of Morocco.² She testified that her father had, for years, emotionally and physically abused her on a regular basis, beating her at least once a week using his hands, his feet, or a belt.³ He also forbid her to attend school or leave her house.⁴ The applicant's four brothers were not mistreated by her father. The applicant attributed her father's abuse to his orthodox Muslim beliefs pertaining to women; beliefs with which she, a more liberal Muslim, refused to conform.⁵ For example, when she was about fourteen years old, the applicant received a "somewhat short skirt" as a gift from her aunt, a U.S. citizen living in the United States. When the applicant returned home after having worn the skirt outside, her father burned her thighs with a heated straight razor, scarring her thighs so that "in the future, she would not be tempted to wear what he considered improper attire."⁶ The testimony of the applicant's aunt, who had visited the applicant's family in Morocco on multiple occasions, corroborated the applicant's testimony.

The applicant also testified that after incidents of abuse, she and her mother were afraid to go to the hospital or to seek police help, in part because her mother's previous efforts to do so had been unsuccessful.⁷ Her aunt's testimony corroborated that "going to the police would have been futile, because under Muslim law, particularly in Morocco, a father's power over his

² *Id.* at *2.

³ *Id.* at *3.

⁴ *Id.* at *4.

⁵ *Id.* at *2–3.

⁶ *Id.* at *3.

⁷ *Id.* at *5.

daughter is unfettered.”⁸ The BIA also relied on a report by the Department of State as confirmation that in Morocco, “domestic violence is commonplace and legal remedies are generally unavailable to women”; Moroccan women therefore rarely report abuse to the authorities “because the judicial procedure is skewed against them . . . and women who do not prevail in court are returned to the abusive home.”⁹ Finally, the applicant’s aunt testified that because the applicant had “left her country to come to the United States and traveled without the approval or supervision of a male family member, she violated the edicts of the father’s orthodox Muslim beliefs and he would kill her if she were to be returned to Morocco.”¹⁰

The BIA found that the applicant was credible,¹¹ and that the evidence of record satisfied the applicant’s burden of establishing that she met the definition of a refugee, which the Immigration and Nationality Act defines, in part, as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and 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 opinion¹²

The BIA summarily found that the applicant’s evidence of her father’s past abuse and likely future abuse should she be returned to Morocco established the elements of “well-founded fear”

⁸ *Id.* at *7.

⁹ *Id.* at *13 (citing Comm. on Int’l Relations and For. Relations, 105th Cong., 2d Sess., Country Reports on Human Rights Practices for 1997, at 1538 (Joint Comm. Print 1998)).

¹⁰ *Id.* at *7.

¹¹ The Immigration Judge had denied asylum and withholding of removal based primarily on her finding that the applicant lacked credibility. *Id.* at *10. The BIA reversed the decision, explaining that “the discrepancies identified by Immigration Judge are not actually present [in the record],” and “the Immigration Judge’s credibility finding is not supported by specific and cogent reasons. *Id.*

¹² 8 U.S.C. § 1101(a)(42)(A) (2005).

and “persecution.”¹³ The BIA then went on to discuss the “on account of,” or nexus, element, explaining that the applicant’s feared persecution was on account of religion:

We find that the persecution suffered by the [applicant] was on account of her religious beliefs, as they differed from those of her father concerning the proper role of women in Moroccan society. The record clearly establishes that, because of his orthodox Muslim beliefs regarding women and his daughter’s refusal to share or submit to his religion-inspired restrictions and demands, the [applicant’s] father treated her differently from her brothers. . . .

. . . We also find that because of the religious element in this case, the domestic abuse suffered by the respondent is different from that described in *Matter of R-A-* [in which the claim of a victim of extreme spousal abuse was found to have failed on the nexus requirement].¹⁴

The significance of this decision is not that the case was decided based on the nexus to religion. This element of the decision was legally sound, as both international and domestic guidelines recognize that claims involving gender often involve overlapping bases of persecution, and that a claimant need only show a nexus to one Convention ground.¹⁵ Rather, this paper will focus on why the BIA, despite noticing that gender was not irrelevant to the applicant’s persecution (“religious beliefs . . . concerning the proper role of women in Moroccan

¹³ *Id.* at *17–20.

¹⁴ *Id.* at *21–22 (citations omitted). The BIA also distinguished a Second Circuit dictum that gender alone does not constitute membership in a particular social group. *Id.* at *22 (citing *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991) (“Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”)).

¹⁵ See UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) ¶ 23 (2002) (“It is also important to be aware that in many gender-related claims, the persecution feared could be for one, or more, of the Convention grounds. For example, a claim for refugee status based on transgression of social or religious norms may be analysed in terms of religion, political opinion or membership of a particular social group.”); Memorandum from Phyllis Coven, Considerations for Asylum Officers Adjudicating Asylum Claims from Women, section II(a) (May 26, 1995) (A woman may present a claim that may be analyzed and approved under one or more grounds. For example, rape (including mass rape in, for example, Bosnia), sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds”).

society”; “orthodox Muslim beliefs regarding women”), was careful to emphasize that the gender element did not provide the basis for decision of the case.

III. Domestic Violence Against Women in International Refugee Law

The BIA’s rejection of the gender aspect present in *In re S-A-* is largely explainable as a result of the differences between international refugee law, as governed by the Convention Relating to the Status of Refugees (the “Convention”),¹⁶ and the domestic enactment of the Convention in U.S. immigration law. This Part will focus on two of those differences: the lack of a protection-based theory of persecution in U.S. law as it relates to the requirement of a causal nexus, and the U.S. interpretation of the nexus requirement as turning upon the motive of the persecutor, rather than on a broader, predicament-based analysis.¹⁷

A. The Protection-Based Theory of Persecution

In *In re S-A-*, the BIA implicitly accepted that the persecution which the applicant feared and had suffered was the domestic abuse inflicted by her father.¹⁸ While the finding that the abuse was severe enough to amount to persecution is sound,¹⁹ the U.S. jurisprudence that

¹⁶ Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

¹⁷ Although the issue of gender as a particular social group is clearly relevant to my topic, the length of this paper does not permit a thorough discussion of that issue. For the purposes of this paper, I will adopt the optimistic position that all courts accept that “women” may be a particular social group.

¹⁸ *In re S-A-*, 3433, 2000 BIA Lexis 12, at *18–20 (BIA June 27, 2000).

¹⁹ See *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (defining persecution as “an extreme concept, marked by the infliction of suffering or harm . . . in a way regarded as offensive” (internal quotations and citations omitted) (omission in original)); *Begzatowski v. I.N.S.*, 278 F.3d 665, 669 (7th Cir. 2002) (defining persecution as “punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate. . . . [The

required the BIA to consider only the directly inflicted harm as possible persecution is not only extremely problematic, but also, as discussed below, a likely reason why the BIA ignored the role of gender in causing the applicant's persecution.

Other than in the United States, the courts of major common law countries have recognized a protection-based theory of persecution.²⁰ The protection-based theory follows from upon the intent of the drafters of the Convention "to intervene only where the maltreatment anticipated was demonstrative of a breakdown of national protection";²¹ that is, to provide surrogate protection when the state of nationality is unable or unwilling to do so. Three varieties of persecution may meet this criterion: first, when state actors directly inflict the harm; second, when the state condones or supports privately inflicted harms; and third, when the state is unable to provide meaningful protection against privately inflicted harms.²² Thus, persecution may be understood as either a state-inflicted harm or a privately inflicted harm combined with a lack of state protection. The significance of the protection-based theory of persecution lies in the recognition that, in the latter situation, persecution consists not just of the privately inflicted harm, but of the *combination* of the privately inflicted harm and the failure of state protection.²³

Courts in the United States, however, have not adopted the protection-based theory of persecution. According to the U.S. interpretation, persecution refers *only* to the inflicted harm, regardless of whether a state agent or private actor inflicts the harm. The question of the state's

harm] must rise above mere harassment" (internal quotations and citations omitted)). The problems inherent to the subjectivity of these definitions are not within the scope of this paper.

²⁰ See, e.g., *MIMA v. Khawar*, (2002) 210 C.L.R. 1 (Austl. 2002); *Ward v. Canada*, [1993] 2 S.C.R. 689; *Islam v. Sec'y of State*, [1999] 2 A.C. 629, 653 (House of Lords 1999).

²¹ JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 104 (1991); *id.* at 124–25.

²² *Id.* at 125–27.

²³ See *MIMA v. Khawar*, (2002) 210 C.L.R. 1 (Austl. 2002) (Kirby, J.) ("Persecution = Serious Harm + The Failure of State Protection."); *Islam v. Sec'y of State*, [1999] 2 A.C. 629, 653 (House of Lords 1999) (Lord Hoffman) (same).

ability and willingness to protect its citizens against the privately inflicted harm is still relevant to the determination of refugee status, but as a separate inquiry, not a part of the definition of persecution.²⁴ Thus, a U.S. court may determine that the applicant has demonstrated a risk of persecution inflicted by a private actor, but if the court then finds that the state of nationality can and will effectively protect the applicant from the persecution, the applicant will not receive refugee status.

The most important ramification of the U.S. courts' rejection of the protection-based theory is that only a harm that is actively inflicted upon the applicant may be sufficient to establish a valid causal nexus to a Convention ground. In contrast, in jurisdictions that recognize the theory, when the persecution consists of a privately inflicted harm combined with a failure of state protection, the applicant can demonstrate that either the harm or the failure to protect was for reasons of one of the Convention grounds.²⁵

The vast implications of the different theories of persecution can be seen by comparing *In re S-A-* with the U.K. case of *Shah & Islam*.²⁶ The applicants in *Shah & Islam* were both Pakistani women who had suffered domestic abuse inflicted by their husbands, and who risked severe, possibly fatal, punishment because of false accusations of adultery.²⁷ The House of Lords relied on a great deal of evidence establishing that the Pakistani government condones domestic violence against women, some Pakistani laws explicitly discriminate against women, the Pakistani judicial system is biased against women, and that women are particularly vulnerable to

²⁴ See *Singh v. I.N.S.*, 94 F.3d 1353, 1360 (9th Cir. 1996) (“Persecution meted out by groups that the government is unable or unwilling to control constitutes persecution under the Act.”)

²⁵ E.g., *MIMA v. Khawar*, (2002) 210 C.L.R. 1 (Austl. 2002); *Ward v. Canada*, [1993] 2 S.C.R. 689; see also UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) ¶ 21 (2002).

²⁶ *Islam v. Sec’y of State*, [1999] 2 A.C. 629 (House of Lords 1999).

²⁷ *Id.* at 635 (Lord Steyn).

being falsely convicted of extramarital sexual intercourse.²⁸ Lord Hoffman, having first found that women constitute a particular social group,²⁹ then addressed the issue of whether a causal nexus existed between the applicants' persecution and their membership of the particular social group:

What is the reason for the persecution which the [applicants] fear? Here it is important to notice that it is made up of two elements. First there is the threat of violence to Mrs. Islam by her husband and his political friends and to Mrs. Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the state to do anything to protect them. There is nothing personal about this. The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the convention.

...
The distinguishing feature of the present case is the evidence of institutionalised discrimination against women by the police, the courts and the legal system, the central organs of the state.³⁰

Thus, although Lord Hoffman considered the husbands' abuse to be a harm not tied to a Convention ground, he still found a causal nexus to exist, since the Pakistani government would not protect the applicants from the abuse because they were women.

The ability to meet the nexus requirement by tying a failure of state protection to a Convention ground can be a significant tool in domestic violence cases, because many adjudicators unfortunately continue to view domestic violence against women as a personal harm, caused by the particular personalities and circumstances of a given couple or family. One example of the pernicious effects of such an attitude is *In re R-A*,³¹ the case which the BIA took care to distinguish *In re S-A* from. In that case, the applicant was a citizen of Guatemala, whose husband severely beat her, raped her, and threatened her life on a regular basis, including telling

²⁸ *Id.* at 635–36 (Lord Steyn); *id.* at 648 (Lord Hoffman).

²⁹ *Id.* at 652 (Lord Hoffman).

³⁰ *Id.* at 653–55 (Lord Hoffman).

³¹ *In re R-A*, Interim Decision 3403, 1999 BIA Lexis 31 (BIA 1999).

the applicant's sister at the time the applicant was in the United States applying for asylum that he would hunt down the applicant and kill her if she ever returned to Guatemala.³² The Guatemalan authorities did not protect the applicant from her husband; the police sometimes did not come when she called them, when they did they simply issued summons that were never pursued when her husband ignored them, and once, when the applicant appeared before a judge, he told her that he would not interfere in domestic disputes.³³ The BIA found that the applicant had suffered past persecution and had a well-founded fear of future persecution, but nonetheless, her application failed for lack of a causal nexus between her persecution and a Convention ground:

In sum, we find that the [applicant] has been the victim of tragic and severe spouse abuse. We further find that her husband's motivation, to the extent it can be ascertained, has varied; some abuse occurred because of his warped perception of and reaction to her behavior, while some likely arose out of psychological disorder, pure meanness, or no apparent reason at all. . . . We are not persuaded that the abuse occurred because of her membership in a particular social group We therefore do not find the [applicant] eligible for asylum³⁴

The BIA majority in *In re R-A-* thus refused to see the abuse as caused by anything other than the husband's temperament.³⁵ In such cases, the ability to establish a nexus to the state's failure to protect women from their abusive husbands would be one way to get around this unfortunate mindset.³⁶

³² *Id.* at *8.

³³ *Id.*

³⁴ *Id.* at *51.

³⁵ The majority rejected the dissent's argument that "the respondent's husband abused her, at least in part, because . . . of her membership in a social group. It draws this conclusion from the cultural and societal context in which the abuse occurred, from literature indicating that domestic violence represents an exercise of power and domination over women, [and] from her husband's view of her as his property." *Id.* at *46.

³⁶ The protection-based theory of persecution was advanced in *In re R-A-*, and explicitly rejected by the BIA majority. *See id.* at *39–41, 49–50.

The finding in *In re S-A-* of a nexus between the abuse and religion both results from and perpetuates decisions like *In re R-A-*. It results from it because *In re R-A-* holds that domestic violence against women is not a crime of gender discrimination. Essentially, the BIA majority held that a gender-based particular social group nexus cannot be established short of evidence that the abuser announced “I beat you because you are a woman”—the announcement “I beat you because you are *my* woman” is insufficient because personal,³⁷ despite the fact that domestic abuse is primarily a manifestation of the long-existing social belief that men can control women because they are women.³⁸ Constrained by such a mindset and by the inability to argue a state-failure-based nexus, S-A- was forced to find a way to distinguish her abuse and to establish that its cause was not purely personal, which she did by arguing that her father abused her on account of her religion.³⁹ This strategy obtained a favorable result for S-A- herself, but an unfavorable one for the broader group of women domestic abuse victims seeking refugee status in the United States, because it now may be easier for adjudicators to hold up *In re S-A-* as an example of domestic abuse that the refugee definition recognizes, and to hold that domestic abuse without an additional convention ground is personally motivated, without deeply engaging the arguments of why nearly all domestic violence against women is actually within the scope of the refugee definition (provided that the other requirements of the definition are met) because it is inflicted for reasons of membership in the particular social group of women.⁴⁰

³⁷ The applicant in *In re R-A-* did, in fact, testify that her husband offered the following explanation for his abuse: “You’re my woman and I can do whatever I want.” *Id.* at *20.

³⁸ For more on the theory that domestic violence against women is gender discrimination, see CATHARINE A. MACKINNON, *SEX EQUALITY* 715–71 (2001).

³⁹ I use the phrase “she argued” and other similar phrases as shorthand. It is unclear whether this reasoning was first advanced by the applicant, her counsel, or the BIA itself.

⁴⁰ See *infra* Part IV for further elaboration of how *In re S-A-* may work to the disadvantage of future refugee claimants.

Is there a way out of this vicious cycle? One feasible option may be for advocates to advance arguments based on the reasoning of Justices McHugh and Gummow in the Australian case of *Khawar*.⁴¹ The applicant in *Khawar* was a Pakistani woman whose situation was essentially the same as the applicants in *Shah & Islam*. The High Court of Australia decided the case in favor of Ms. Khawar, but with three different bases of decision among the majority justices. Justices McHugh and Gummow found that the harm suffered by Ms. Khawar was not her husband's abuse, but the "significant detriment or disadvantage she suffers from the alleged failure by the Pakistani police authorities to enforce the criminal law . . . against those who inflict domestic violence upon her."⁴² Thus, they found the state's failure to protect to be active discrimination that amounted to persecution. This argument opens the door to find a nexus between the state's failure to protect and a Convention ground, without adopting the protection-based theory of persecution.

B. The Predicament-Based Theory of Causal Nexus

In order to determine whether the applicant's fear of persecution was on account of a Convention ground, the BIA in *In re S-A-* asked what motivated the applicant's father to abuse her, and determined that he abused her because she refused to adopt his conservative Muslim beliefs concerning the proper role of women.⁴³ This inquiry is representative of the U.S. jurisprudential position that the existence of a causal nexus turns on the motive of the persecutor, more than the characteristics of the victim that put her in harm's way. Like the U.S. position on where a nexus may exist, this understanding of the nature of the nexus, when combined with the

⁴¹ *MIMA v. Khawar*, (2002) 210 C.L.R. 1 (Austl. 2002).

⁴² *Id.* at 27 (McHugh & Gummow, JJ.)

⁴³ *In re S-A-*, 3433, 2000 BIA Lexis 12, at *21 (BIA June 27, 2000).

prevalent belief that husbands and fathers inflict domestic violence for personal reasons, leads to dire results for women refugee claimants fleeing domestic violence.

The Convention language on nexus, which was altered when incorporated into U.S. domestic law, speaks of “being persecuted *for reasons of* race, religion, nationality, membership of a particular social group or political opinion.”⁴⁴ The preferred interpretation of the “for reasons of” clause requires only that “the Convention ground contributes to the applicant’s exposure to the risk of being persecuted.”⁴⁵ As explained by the High Court of Australia:

Where discriminatory conduct is motivated by “enmity” or “malignity” towards people of a particular race, religion, nationality, political opinion or people of a particular social group, that will usually facilitate its identification as persecution for a Convention reason. But that does not mean that, in the absence of “enmity” or “malignity”, that conduct does not amount to persecution for a Convention reason. It is enough that the reason for the persecution is found in one or more of the five attributes listed in the Convention.⁴⁶

Thus, the preferred “predicament-based” approach asks whether a characteristic that put the victim in harm’s way is a protected Convention ground.⁴⁷

In contrast, the U.S. Supreme Court has interpreted the domestic language of “persecution *on account of* race, religion, nationality, membership in a particular social group, or political opinion”⁴⁸ to “make[] motive critical.”⁴⁹ Thus, refugee applicants in the United States

⁴⁴ Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (emphasis added).

⁴⁵ *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT’L L. 210, 215 (2002).

⁴⁶ *Chen Shi Hai v. Min. for Immig.*, 201 C.L.R. 293, 304 (Aust. 2000) (Gleeson, C.J., Gaudron, Gummow, & Hayne, JJ.).

⁴⁷ “[T]he Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor the risk of being persecuted.” *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT’L L. 210, 217 (2002).

⁴⁸ 8 U.S.C. § 101(a)(42) (2005).

⁴⁹ *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

are required to provide direct or circumstantial evidence of their persecutors' motives.⁵⁰ The motive-based approach is problematic not only because it has imposed a high evidentiary burden in practice,⁵¹ but also because it usually results in a finding that no nexus exists when the protected characteristic indirectly brings about the victim's persecution. For example, the English Court of Appeal relied on a motive-based analysis in the case of an applicant who refused to turn the body of his deceased father over to the cult to which his father had belonged, because as a Christian, he refused to participate in devil worship.⁵² As a result of his refusal, the applicant had a well-founded fear of being persecuted by the cult; however, the court found that his claim failed on the element of causal nexus, because the cult was persecuting him for having refused their demand, and not because he was a Christian.⁵³ A predicament-based analysis, on the other hand, would have recognized that the reason the applicant was "being persecuted," the reason he was in harm's way, was because of his Christianity; if not for his religious beliefs, he would not have refused the cult, and would not be the target of their persecution.

Had the BIA in *In re S-A-* adopted a predicament-based approach, rather than a motive-based one, the outcome of the nexus analysis might have been vastly different. The BIA could have noted that the applicant's father abused her whenever she violated one of his religious restrictions. However, the reason that she was subject to such restrictions in the first place—the characteristic that put her in her current predicament—was because she was a woman. Her father's beliefs did not restrict her brothers from leaving the house; he only believed that women

⁵⁰ *Id.*

⁵¹ *See, e.g.* *Tecun-Florian v. I.N.S.*, 207 F.3d 1107 (9th Cir. 2000); *Cruz de Iraheta v. I.N.S.*, 199 F.3d 1331 (Table), 1999 WL 824648 (9th Cir. 1999).

⁵² *Omoruyi v. Sec'y of State for the Home Dep't*, [2001] Imm. A.R. 175, 2000 WL 1480010 (Eng. Ct. App. (Civ.) 2000).

⁵³ *Id.*

must stay indoors. She was treated differently because she was a woman; the fact that her father may not harbor animus towards women is irrelevant.

This analysis is preferable to the nexus inquiry that the BIA actually undertook because it is consistent with the Convention's basis in international human rights law (it recognizes discriminatory impact as well as intent) and with the drafters' intent to limit refugee remedies to people who became human rights victims because of who they are or what they believe.⁵⁴ It also has the practical benefit, critical to future refugee applicants, of being capable of extension to claims of applicants whose abusers' beliefs are not so clearly rooted in their religion. For example, returning to the facts of *In re R-A-*,⁵⁵ the evidence was that applicant's husband sometimes abused her when she did do as he wished,⁵⁶ and other times abused her for apparently no reason other than that he could.⁵⁷ In brief, he believed that he controlled her and could punish her for not complying with his demands of her. The same can be said of the applicant's father in *In re S-A-*; the only difference between the two cases is that the demands of the father clearly stemmed from his religion, while the source of the husband's beliefs was a less identifiable general social attitude.⁵⁸ When a man believes that a woman should not leave her house or talk to other men, and he physically harms her for violating his commands that stem from these beliefs, the source of his beliefs—his motive—should not be relevant to the nexus inquiry. She is in

⁵⁴ See HATHAWAY, *supra* note 21, at 136–37.

⁵⁵ See *supra* text accompanying notes 31–36.

⁵⁶ *In re R-A-*, Interim Decision 3403, 1999 BIA Lexis 31, at *36 (BIA 1999) (“He harmed her . . . for not getting an abortion, for his belief that she was seeing other men, for not having her family get money for him, for not being able to find something in the house, . . . [and] for leaving him . . .”).

⁵⁷ *Id.* at *20 (“‘You’re my woman and I can do whatever I want,’ . . . ‘You’re my woman, you do what I say.’”).

⁵⁸ See *id.* at *9 (“[S]pouse abuse was a problem in many countries throughout the world, but she said it was a particular problem in Latin America, especially in Guatemala and Nicaragua. . . . [I]ts root lie in such things as the Latin American patriarchal culture, the militaristic and violent nature of societies undergoing civil war, alcoholism, and sexual abuse in general.”).

harm's way because she is a woman, and if the other requirements of the refugee definition are met, then she is deserving of refugee status.

IV. Conclusion

The BIA decision in *In re S-A-* is an example of how unfortunate jurisprudence can be self-perpetuating. Constrained by aspects of U.S. refugee jurisprudence such as the lack of a protection-based theory of persecution, the motive-based concept of causal nexus, and prior case law that treated domestic violence against women as a personal harm, the strategy of treating the abuse in *In re S-A-* as on account of religion alone was the most likely way to achieve success for the applicant. Unfortunately, this victory for S-A- may have the collateral consequence of making it even more difficult for future victims of domestic violence against women to gain refugee status in the United States.

As explained above, there is nothing wrong with the holding, in of itself, that S-A- suffered persecution on account of religion.⁵⁹ My argument, rather, is that substantial harm may come from actively ignoring or minimizing the causal role of gender. By reducing gender to merely a descriptive label of which religious restrictions S-A- violated (those relating to women), rather than an additional independent ground of the discriminatory treatment that amounted to persecution, the decision in *In re S-A-* subtly undermines years of advocacy efforts that have worked to highlight the pervasiveness of gender discrimination in refugee claims.⁶⁰ Visibility is key to the worldwide fight for gender equality—when one woman reports abuse by her husband,

⁵⁹ See *supra* note 15.

⁶⁰ E.g., UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) ¶ 23 (2002); Memorandum from Phyllis Coven, Considerations for Asylum Officers Adjudicating Asylum Claims from Women, section II(a) (May 26, 1995).

it is easy enough to blame it on his temper or their marital disagreements; when hundreds of thousands of women report abuse by their husbands, it is much more difficult to deny the social acceptance of male dominance, and thus of gender discrimination. From this perspective, a decision like *In re S-A-*, which treats gender as a non-issue, may be even more harmful than a decision like *In re R-A-*, which at least engages the argument that domestic violence is a form of gender discrimination, though ultimately coming out on the wrong side.

Furthermore, when the causal role of gender is denied, legal doctrine is apt to become distorted and unprincipled. The effect of *In re S-A-* is to draw a line: being abused by her husband for disobeying his demands will not entitle a wife to refugee protection; being abused by her husband for disobeying his demands *that can be tied to a Convention ground* may entitle her to refugee protection. Problems arising from this line-drawing include: it makes it easier for future adjudicators to categorize refugee claimants on one side of the line or the other, thus obviating a need to engage the arguments that domestic abuse is gender discrimination; it draws a critical distinction, one that may literally make the difference of life or death, between instances of abuse that are essentially the same;⁶¹ and it encourages claimants to search for contrived ways to argue that their domestic abuse is based on something other than gender discrimination, thus leading to distortions and moving away from the principled inquiries that best serve the Convention's purposes.

These problems, however, are not without remedy. Until the day when domestic violence against women is widely understood as gender discrimination, U.S. courts could vastly improve the position of domestic violence victims seeking protection in the United States by adopting well-established refugee law doctrines already in use in other major common law nations.

⁶¹ See *supra* text accompanying notes 55–58.