

# OBTAINING POLITICAL ASYLUM: CLASSIFYING RAPE AS A WELL-FOUNDED FEAR OF PERSECUTION ON ACCOUNT OF POLITICAL OPINION

## I. INTRODUCTION

In early 1984 Sofia Campos-Guardado, a Salvadoran woman, took a bus trip to the home of her uncle, the chairman of a local agricultural cooperative.<sup>1</sup> The cooperative was formed as part of the controversial land reform movement in El Salvador.<sup>2</sup> The purpose of Campos-Guardado's visit was to repay a debt her father owed to her uncle.<sup>3</sup> While Campos-Guardado was visiting her uncle's home, a group of guerrilla fighters, an older woman, and two men broke into the house.<sup>4</sup> The intruders dragged Campos-Guardado, her three female cousins, one male cousin, and her uncle to a farm pit near the house.<sup>5</sup> The attackers tied and gagged the women. Then, with machetes, the attackers cut the flesh from the men's bodies and finally shot them to death.<sup>6</sup> The perpetrators forced the gagged and bound women to watch their actions.<sup>7</sup> After killing the men, the male attackers raped Campos-Guardado and her cousins while the older woman who was part of the attacking group shouted political slogans.<sup>8</sup> After raping the women, the men untied the women, and threatened to kill them unless they fled.<sup>9</sup>

After this attack, Campos-Guardado suffered a nervous breakdown and was hospitalized for fifteen days.<sup>10</sup> She was afraid to go

---

<sup>1</sup> Sofia Campos-Guardado v. Immigration and Naturalization Service, 809 F.2d 285, 287 (5th Cir. 1987).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; Campos-Guardado introduced evidence to show that both guerrillas and military personnel extort monies from agricultural cooperatives. At the time of the rape, Campos-Guardado had no knowledge to which group her attackers belonged. Respondent's Brief in Opposition to Certiorari at 2, Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987) (No. 86-1969) [hereinafter Respondent's Brief] (On file with the Boston College Third World Law Journal).

<sup>5</sup> Campos-Guardado, 809 F.2d at 287.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*; Campos-Guardado's original claim did not specify exactly what slogans were being shouted. Respondent's Brief at 2, Campos-Guardado (No. 86-1969).

<sup>9</sup> Campos-Guardado, 809 F.2d at 287.

<sup>10</sup> *Id.*

back to her home and found work in a new city, San Salvador.<sup>11</sup> Later, on her first visit home to her parents, Campos-Guardado was introduced to two cousins whom her mother claimed had just escaped from the guerrillas.<sup>12</sup> Campos-Guardado recognized one of the cousins as one of her assailants.<sup>13</sup> During her visit, whenever she left the house, the assailant followed Campos-Guardado, stole her money, and on numerous occasions threatened to kill her and her family if she were ever to reveal his identity as her rapist.<sup>14</sup> After this incident Campos-Guardado was afraid to return to her hometown.<sup>15</sup> Fearing retribution, Campos-Guardado left El Salvador and fled to the United States.<sup>16</sup> Upon her arrival in the United States she applied for political asylum.<sup>17</sup>

Sofia Campos-Guardado's experience is not unique. Olimpia Lazo-Majano was also repeatedly tortured through rape in El Salvador.<sup>18</sup> Her persecutor was a sergeant with the *Fuerza Armada*, the army of El Salvador.<sup>19</sup> Lazo-Majano had worked washing clothes and doing other domestic work for five years. In April of 1982 Rene Zuniga, a sergeant with the *Fuerza Armada* and a man Lazo-Majano had known since childhood, asked her to wash his clothes.<sup>20</sup> Lazo-Majano agreed and on her days off worked for Zuniga.<sup>21</sup> During the six weeks that Lazo-Majano worked for Zuniga he brutally tortured her through rape and beatings.<sup>22</sup> Zuniga first raped Lazo-Majano at gunpoint; other times he held hand grenades to her forehead threatening to explode them if she resisted his advances.<sup>23</sup> Zuniga threatened to "have [Lazo-Majano's] tongue cut off, her nails removed one by one, her eyes pulled out" and then

---

<sup>11</sup> Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 4, *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987) (No. 86-1969) [hereinafter *Petition for Certiorari*].

<sup>12</sup> *Campos-Guardado*, 809 F.2d at 287.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; Brief for Respondent at 3, *Campos-Guardado* (No. 86-1969).

<sup>15</sup> *Campos-Guardado*, 809 F.2d at 287.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Olimpia Lazo-Majano v. Immigration and Naturalization Service*, 813 F.2d 1432, 1433 (9th Cir. 1987).

<sup>19</sup> *Id.* The *Fuerza Armada* is the armed force which is the Salvadoran Military. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

kill her and her children if she told anyone of his actions.<sup>24</sup> He also threatened to denounce her as a subversive.<sup>25</sup> Lazo-Majano was unable to escape this brutalization while she remained in El Salvador. She believed that the power of the armed forces was so strong, that they would support Zuniga's actions of rape and allow him to carry out his threats of killing her for exposing him.<sup>26</sup> Lazo-Majano left El Salvador, came to the United States and applied for political asylum.<sup>27</sup>

Both Campos-Guardado and Lazo-Majano were denied asylum by an Immigration Judge and the Board of Immigration Appeals (BIA).<sup>28</sup> Lazo-Majano ultimately won an appeal in the Ninth Circuit;<sup>29</sup> the Fifth Circuit, however, affirmed Campos-Guardado's denial of asylum.<sup>30</sup> The Ninth Circuit denied a Petition for Rehearing in the *Lazo-Majano* case and the Supreme Court denied certiorari in the *Campos-Guardado* matter.<sup>31</sup> This leaves a conflict in the circuit courts as to whether rape may be considered a "well founded fear of persecution on account of political opinion."<sup>32</sup>

This Note will address the conflict in the circuit courts by examining whether there is supporting case law for claiming rape as a well founded fear of persecution on account of political opinion. To begin, this Note in Part II will examine the legislative history and judicial interpretation of the statutory language governing asy-

---

<sup>24</sup> *Id.*; Response to Petition for Rehearing and Suggestion for Rehearing en banc at 4, *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987) (No. 85-7384) [hereinafter Response to Petition for Rehearing].

<sup>25</sup> *Lazo-Majano*, 813 F.2d at 1433.

<sup>26</sup> *Id.*; Response to Petition for Rehearing at 4-5, *Lazo-Majano* (No. 85-7384). This was not just Lazo-Majano's belief. In reality, no military officer in El Salvador had ever been convicted of a human rights abuse against another Salvadoran at this time. *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1492 (C.D. Cal. 1988).

<sup>27</sup> *Lazo-Majano*, 813 F.2d at 1433, 1434.

<sup>28</sup> See Appendix C to Petition for Certiorari, *Campos-Guardado* (86-1969); *Lazo-Majano*, 813 F.2d at 1433-34. In the United States when a claim for political asylum is first heard it is brought before an Immigration Judge. The decision of the Immigration Judge may be appealed and reviewed de novo by the Board of Immigration Appeals (BIA). Cases are appealed from the BIA to the circuit courts.

<sup>29</sup> *Lazo-Majano*, 813 F.2d at 1432.

<sup>30</sup> *Campos-Guardado*, 809 F.2d at 285.

<sup>31</sup> Response to Petition for Rehearing, *Lazo-Majano* (No. 85-7384); *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987), *cert. denied*, 484 U.S. 826 (1987).

<sup>32</sup> The Refugee Act contains guidelines for withholding of deportation and granting of asylum. To be granted asylum an applicant must be a refugee who has a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. 8 U.S.C. §§ 1101(a)(42), 1253(h)(1982).

lum claims. Part III will then discuss the BIA and the Fifth and Ninth Circuit Courts' analyses in the *Campos-Guardado* and *Lazo-Majano* cases. That examination will show that there is sufficient statutory and case law support for rape in particular circumstances to be considered a fear of persecution on account of political opinion. Once it has been established that a legal argument can be made for granting political asylum when persecution is in the form of rape, the second part of this Note examines why the BIA in its decisions may not be coming to that conclusion. Part IV is a critique of the policies of the BIA and brings to light the cultural biases, including the latent sexism, that bind the BIA opinions.

## II. THE REFUGEE ACT OF 1980

### A. Background

The immigration policy of the United States is directed through the Immigration and Nationality Act (INA).<sup>33</sup> Under this legislation, there are three classes of applicants allowed to immigrate permanently to the United States: people with family ties, people needed to fulfill labor needs, and those with refugee status.<sup>34</sup> The Refugee Act of 1980 (Refugee Act) is an amendment to the Immigration and Nationality Act that specifically addresses the treatment of refugees.<sup>35</sup> Although the Refugee Act establishes the law for action with both "overseas refugees"<sup>36</sup> and "political asylees,"<sup>37</sup> this discussion of the Refugee Act will focus on the segments which address refugees seeking political asylum.<sup>38</sup>

---

<sup>33</sup> The Act was originally passed in 1952, with subsequent amendments in 1962, 1965, and 1980.

<sup>34</sup> ALEINIKOFF & MARTIN, IMMIGRATION PROCESS AND POLICY 642 (1985). There are numerical quotas for the number of people allowed to settle permanently in the United States each year. At this time the number is 270,000. Eighty percent of the positions are for those with family ties, twenty percent are allocated to those who fulfill labor needs. *Id.* at 101. The determination for refugees is a separate process. Refugees are divided into two categories. The first, "refugees," are people in refugee camps who apply for asylum from outside of the United States. These applications are reviewed and decided on before the applicant comes to the United States. This is the Overseas Refugee Program. *Id.* at 618. The second, "asylees," are applicants who have entered the United States, and subsequently try to prevent involuntary return by applying for political asylum. *Id.* at 619, 638.

<sup>35</sup> The Refugee Act of 1980, 8 U.S.C. §§ 1101(a)(42), 1157-59, 1253(h), 1521-1524 (1982). For definition that applicant must comply with to be granted asylum see *supra* note 32.

<sup>36</sup> See *supra* note 34.

<sup>37</sup> *Id.*

<sup>38</sup> Refugees seeking political asylum are defined by 8 U.S.C. § 1101(a)(42).

### B. Legislative History

In 1952, the INA<sup>39</sup> contained no definite provisions regarding admission of refugees.<sup>40</sup> Refugees were admitted by "special enactments" that were not a codified part of the admissions procedure.<sup>41</sup> Refugees were admitted through the discretionary power of the Attorney General, who could, in emergency situations, allow temporary entry to applicants for humanitarian reasons.<sup>42</sup> After the danger had passed for the alien, however, she was put back into the same situation as before the grant and once again entered the queue with all the other applicants for admission to the United States.<sup>43</sup> These special enactments tended to be highly discriminatory favoring refugees fleeing from a communist dominated or Middle Eastern country.<sup>44</sup>

The first movement toward defining a nondiscriminatory policy came in 1962 with the enactment of the Migration and Refugee Assistance Act.<sup>45</sup> This act omitted the dominant requirement that the refugee must be fleeing a communist-dominated country.<sup>46</sup> In 1965, for the first time in a statute, amendments to the INA provided an outline for the admission of refugees.<sup>47</sup> The amendments were the most expansive yet, but were still limited by geography and ideology.<sup>48</sup> From 1976 to 1980, various bills aimed at immigration reform appeared in Congress. These bills focused on a new definition of refugee and on how the admission of refugees was to

<sup>39</sup> Immigration and Nationality Act, Pub. L. No. 82-414, § 101-407, 66 Stat. 163 (1952), (codified as amended, at 8 U.S.C. §§ 1101(a)(42), 1253(h)(1982)).

<sup>40</sup> A refugee is a victim of war, persecution or natural disaster. ALEINIKOFF & MARTIN, *see supra* note 34. This is not the definition of refugee as codified in the Refugee Act of 1980. *See infra* note 61.

<sup>41</sup> Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 14 (1981).

<sup>42</sup> 8 U.S.C. § 1182(d)(5)(1952) (Amended 1980).

<sup>43</sup> *Id.*

<sup>44</sup> In 1953 the Refugee Relief Act was passed codifying parts of the "special enactments." This act allowed victims of natural disaster and refugees from communist-dominated countries to enter the United States. The Act was amended in 1957 to read that relief would be extended to "victims of racial, religious, or political persecution who were from communist or communist-dominated countries or a country in the Middle East." Pub. L. No. 85-316, 71 Stat. 639 (1957), *cited in* Anker & Posner, *supra* note 41, at 14.

<sup>45</sup> Anker & Posner, *supra* note 41, at 16, n.32.

<sup>46</sup> *Id.* at 17. "[T]he statute also broadened our national perspective on the origin and cause of refugee movements, and implied our willingness to assist all who had fled their homes." *Id.*

<sup>47</sup> *See* Anker & Posner, *supra* note 41, at 10, n.4 and accompanying text.

<sup>48</sup> *Id.* at 18.

be controlled.<sup>49</sup> The debate on the treatment of refugees between 1976 and the enactment of the Refugee Act of 1980 emphasized a reform of refugee law, based on a humanitarian foundation, as opposed to one made up of ideological preferences.<sup>50</sup>

In 1968, the United States signed the United Nations Protocol Relating to the Status of Refugees (Protocol).<sup>51</sup> The Protocol requires the United States to implement laws and decrees issued by the United Nations regarding refugees.<sup>52</sup> By signing the Protocol, the United States bound itself to follow the decree of the United Nations Convention Relating to the Status of Refugees.<sup>53</sup> There was pressure in Congress for the United States to align itself with this international Protocol.<sup>54</sup> The resulting bill, the Refugee Act of 1980, includes a definition of refugee that closely conforms with the United Nations Convention definition.<sup>55</sup>

In passing the Refugee Act of 1980, Congress established a codified procedure for enabling a humanitarian response to the problem of refugees.<sup>56</sup> The Refugee Act, the result of thirty years

<sup>49</sup> *Id.* at 20.

<sup>50</sup> *Id.* at 20–30.

<sup>51</sup> ALEINIKOFF & MARTIN, *supra* note 34, at 639.

<sup>52</sup> Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 19 U.S.T. 6223 T.I.A.S. No. 6577. Cited in Anker and Posner, *supra* note 41.

<sup>53</sup> *Id.*

<sup>54</sup> See discussion related to debate on House and Senate floors in Anker & Posner, *supra* note 41, at 22–23, 25. Note that during the final House debates on the 1980 bill, Congressman Rodino described the bill as “one of the most important pieces of humanitarian legislation ever enacted by a United States Congress.” S. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980), as quoted in Anker & Posner, *supra* note 41, at 63.

<sup>55</sup> Anker & Posner, *supra* note 41, at 43. The United Nations Convention determined that a refugee was a person with a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. U.N. Protocol Relating to the Status of Refugees (1967), 19 U.S.T. 6223, T.I.A.S. No. 6577. For a discussion of the definition of refugee in the Refugee Act of 1980 see note 61.

<sup>56</sup> For a detailed summary of the legislative history and a review of the debates surrounding the humanitarian importance of the Act see generally Anker & Posner, *supra* note 41. Note also that during debates previous to the adoption of the Refugee Act of 1980, Congress heard testimony from human rights groups regarding crafting the wording of the bill. See, e.g., *Hearings on H.R. 2816 before the Subcommittee on Immigration, Refugees and International Law of the House Committee of the Judiciary*, 96th Cong., 1st Sess. (1979) at 24–25. Amnesty International testified that it was important to determine if refugees were from “a country wherein there exists a pattern of gross violations of internationally recognized human rights.” *Id.* at 174. Initially, the phrasing proposed was that allocations were to be made for refugees with “special concerns.” Anker & Posner, *supra* note 41, at 47. The House Committee changed this to read “special humanitarian concerns,” thereby emphasizing the “plight of the refugees themselves as opposed to national origins or political considerations . . . .” *Id.* at 54. See also Gibney, *A “Well-Founded Fear” of Persecution*, 10 HUM. RTS. Q. 109, 111 (1988).

of negotiating, compromising, and periodic interim legislation,<sup>57</sup> gives the United States a tool for responding to a refugee's request for relief from human rights violations.<sup>58</sup>

### C. *The Language of the Statute*

Under the Refugee Act the standard for granting asylum is a discretionary function of the Attorney General.<sup>59</sup> The Attorney General may grant asylum to any alien within the borders of the United States if the Attorney General determines that the alien is a refugee.<sup>60</sup>

A refugee is defined as a person with a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.<sup>61</sup> What becomes important in this definition is determining what defines a "well-founded fear of persecution" and for the cases discussed in this Note, what is a "political opinion."

---

<sup>57</sup> See generally Anker & Posner, *supra* note 41, at 11–42.

<sup>58</sup> This may not guarantee that the Act is always implemented fairly, but it does provide a structural design that allows for humanitarian issues to be considered in a refugee's application.

<sup>59</sup> 8 U.S.C. § 1253(h)(1). An applicant who has been granted asylum can apply for permanent residency in the United States after one year. 8 U.S.C. § 1159(b).

<sup>60</sup> INA § 208, 8 U.S.C. § 1158(a); 8 U.S.C. § 1101(a)(42)(A). In applying for asylum, the petitioner files an application with the District Director of the INS for the District she is in. ALEINIKOFF & MARTIN, *supra* note 34, at 642. If exclusion or deportation proceedings have not been initiated, the request is first heard by the district office. The district office interviews the applicant and then requests an opinion from the State Department on the matter. *Id.* After the advice from the State Department is received, the District Officer makes a decision. The decision cannot be appealed. *Id.* at 642–643. If the request is denied, the applicant can reintroduce her claim to the Immigration Judge once exclusion or deportation proceedings have commenced. The Judge then reviews the matter *de novo*. *Id.* at 643. If exclusion or deportation hearings have begun before the claim for asylum is filed, then the claim is heard first by the Immigration Judge, not the District Office. The decision of the Immigration Judge can be appealed to the Board of Immigration Appeals. The decision of the BIA is appealable to either the federal district court, if an exclusion proceeding took place, or the appeals court if the hearing was for withholding of deportation. *Id.* In 96% of the cases examined, the Immigration Judge's decision and the State Department Advisory opinions were the same. 65 INTERPRETER RELEASES at 370 (1988).

<sup>61</sup> The full text of the definition is as follows: "any 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 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." 8 U.S.C. § 1101(a)(42)(A).

### D. Judicial Interpretation of the Statute

#### 1. Defining A Well-Founded Fear of Persecution

The Supreme Court, in *Cardoza-Fonseca*,<sup>62</sup> held that the interpretation of "well-founded fear" should parallel the interpretation in the United Nations Protocol.<sup>63</sup> The United Nations Convention Relating to the Status of Refugees,<sup>64</sup> states that "the expression well founded fear of being the victim of persecution . . . means that a person either has been actually a victim of persecution or can show good reason why he fears persecution."<sup>65</sup> The *Cardoza-Fonseca* Court states that fear can be well-founded with a less than fifty percent chance of the event taking place.<sup>66</sup> The Court determined that well-founded fear is a subjective standard and did not set out a substantive definition.<sup>67</sup> Although the Supreme Court did not specifically define fear and left its interpretation to "the process of case by case adjudication by the INS,"<sup>68</sup> it did set some guidelines. The Court stated that the "reference to fear makes the asylum eligibility determination turn to some extent on the alien's subjective mental state . . . ."<sup>69</sup>

In response to the Supreme Court's decision in *Cardoza-Fonseca*, the BIA in *Matter of Mogharrabi*<sup>70</sup> adopted an interpretation of well-founded fear of persecution that paralleled the Fifth Circuit's definition.<sup>71</sup> The Fifth Circuit, in *Guevara v. Flores*, held that the well-founded fear standard has subjective and objective components and that "an alien possesses a well founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country."<sup>72</sup> The BIA, in

---

<sup>62</sup> *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987).

<sup>63</sup> *Id.* at 1216.

<sup>64</sup> 189 U.N.T.S. 150 (July 28, 1951), *cited in Cardoza-Fonseca*, 107 S. Ct. at 1216.

<sup>65</sup> *Cardoza-Fonseca*, 107 S. Ct. at 1216.

<sup>66</sup> *Id.* at 1213. This standard is different than the standard used to determine whether an alien's life or freedom would be threatened in their home country in determining a withholding of deportation claim. In deportation claims the applicant must have a "clear probability of persecution" showing it is "more likely than not that the alien would suffer persecution." *INS v. Stevic*, 467 U.S. 407, 429-30 (1984). The deportation standard imposes a greater burden on the applicant than the asylum standard.

<sup>67</sup> *Cardoza-Fonseca*, 107 S. Ct. at 1223.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1208.

<sup>70</sup> Interim Decision 3028 (BIA 1987).

<sup>71</sup> *Id.* at 7.

<sup>72</sup> *Guevara v. Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986).



*Mogharrabi*, stated its definition of well-founded fear would be that "an applicant for asylum has established a well founded fear of persecution if he shows that a *reasonable person* in his circumstances would fear persecution."<sup>73</sup>

Determining when an applicant has "fear" of persecution is one step. Defining "persecution," however, is a separate step within the process.<sup>74</sup> The Ninth Circuit in *Kovac v. INS*,<sup>75</sup> defines persecution as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive."<sup>76</sup> Reviewing the legislative history, the *Kovac* court determined that neither physical harm nor threatened bodily harm is necessary to determine that an applicant suffers from a fear of persecution.<sup>77</sup>

Even if an asylum applicant demonstrates that she has a well-founded fear of persecution, she then must demonstrate that it is "on account of" one of the five factors enumerated in the Act.<sup>78</sup> The factor that this Note examines is political opinion.

---

<sup>73</sup> *Matter of Mogharrabi*, Interim Decision 3028 (BIA 1987), effectively overruled *Matter of Acosta* where the BIA held that the *clear probability* and *well-founded fear* standards were not meaningfully different, and were to be treated the same. See *Matter of Acosta*, Interim Decision 2986 (BIA 1985), at 25 (emphasis added).

<sup>74</sup> See *In re: Mohammed Osman Mohibi*, unpublished BIA decision, July 27, 1987. An Afghani citizen applied for asylum asserting that his father and brother had been arrested and imprisoned in Afghanistan. *Id.* at 3. The applicant claimed that his father and brother were imprisoned because they were members of the Hizbeh Islami, a group resisting the Soviet-dominated Afghanistan government. The applicant feared for his own safety and was also a member of the Hizbeh Islami. He stated that he was asked to join the communist party once or twice a month. *Id.* The BIA granted asylum to Mohibi, stating that their criteria for establishing well-founded fear of persecution is to show that "a reasonable person in his circumstances would fear persecution." *Id.* at 2. The BIA states that it must consider the "totality of circumstances." *Id.* at 6; contrast with *In re: Juan Angel Maldonado-Cruz*, Interim Decision (BIA 1988). Maldonado-Cruz, a Salvadoran citizen applied for asylum because he was kidnapped by and forced to join a guerrilla group, then participate in an operation against his village. *Id.* at 3. A friend was killed trying to escape from the guerrilla forces. Maldonado-Cruz escaped, and soon after heard that guerrilla members were looking for him. He feared they would kill him for deserting them. *Id.* The BIA states that in the kidnapping of the applicant, "It does not appear that there were any elements of persecution in this encounter . . . the guerrillas wanted him to be a member of their group." *Id.* at 5-6. The BIA goes on to state that punishment of deserters is an "essential element of control" in preventing people from leaving the group. *Id.* at 8. The applicant was denied asylum. *Id.* at 12.

<sup>75</sup> 407 F.2d 102 (9th Cir. 1969).

<sup>76</sup> *Kovac*, 407 F.2d at 107.

<sup>77</sup> *Id.* at 106. See also 111 Cong. Rec., pt. 16 at 21804 (August 25, 1965), where Congressman Hoff in discussing the proposed clause "physical persecution" deemed it too narrow of a phrase.

<sup>78</sup> Refugee Act of 1980, *supra* note 35.

## 2. Defining Political Opinion

"Political opinion" has been clearly defined in the Ninth Circuit by two cases.<sup>79</sup> In *Hernandez-Ortiz v. INS*, Adela Hernandez-Ortiz fled to the United States from El Salvador.<sup>80</sup> In 1982, the BIA denied her request for withholding of deportation. A petition for review was filed which stayed the deportation order, but Hernandez-Ortiz was deported back to El Salvador by mistake.<sup>81</sup> Although the United States made arrangements for Hernandez-Ortiz to leave El Salvador and return to the United States until her request for rehearing occurred, she had difficulty getting out of El Salvador. Hernandez-Ortiz had to pay a Salvadoran immigration official \$200 in order to leave.<sup>82</sup> While Hernandez-Ortiz was in El Salvador, her grandparents' store was robbed at gunpoint by Salvadoran soldiers, her brother and sister-in-law were murdered by Salvadoran security forces, and her brother-in-law's wife was kidnapped by members of the Salvadoran National Guard.<sup>83</sup> Due to her return to El Salvador by the United States and these events involving her family, Hernandez-Ortiz felt she was a target of the Salvadoran government.<sup>84</sup> In 1983, Hernandez-Ortiz submitted a motion to reopen her deportation proceeding and at the same time filed an application for asylum.<sup>85</sup> Upon review, the BIA denied Hernandez-Ortiz's appeal stating that her fears only concerned "the political upheaval and random violence" in El Salvador and that "her claim had nothing to do with her political opinion."<sup>86</sup> On appeal, the Ninth Circuit Court of Appeals reversed the BIA decision.<sup>87</sup> The court ruled that where a government is inflicting the harm, the activities are taking place in a political context.<sup>88</sup> The decision stated:

In this case it is the forces of the government that are inflicting the threats and violence. When a government exerts its military strength against an individual or a group within its population and there is no reason to believe that the individual or group

---

<sup>79</sup> *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516-17 (9th Cir. 1985); *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1324-26 (9th Cir. 1984).

<sup>80</sup> *Hernandez-Ortiz*, 777 F.2d at 512.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 513.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 519.

<sup>88</sup> *Id.* at 516.

has engaged in any criminal activity or other conduct that would provide a legitimate basis for governmental action, the most reasonable presumption is that the government's actions are politically motivated.<sup>89</sup>

The *Hernandez-Ortiz* court stressed that a government does not persecute those who share in its ideologies,<sup>90</sup> and that "it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does."<sup>91</sup> Thus, the determination of what is "political" need not focus solely on the actions of the applicant. *Argueta v. INS*<sup>92</sup> holds that in determining what is political, courts can focus on the actions of the government,<sup>93</sup> or, as conceded by the government in *McMullen v. INS*, on a group that the government cannot or is unwilling to control.<sup>94</sup> In *McMullen*, the court notes the government's concession "that persecution within the meaning of § 243(h) [an asylum claim] includes persecution by non-governmental groups . . . where it is shown that the government of the proposed country of deportation is unwilling or unable to control that group."<sup>95</sup>

In an earlier case, *Bolanos-Hernandez v. INS*,<sup>96</sup> the petitioner entered the United States illegally and during his deportation hearing filed an application for asylum. Bolanos-Hernandez had been a member of the Partido Nacional de Reconciliacion, a right wing party in El Salvador, for two years. He had also been in the army and a member of the Escolta Militar, a voluntary civilian police squad that guards against guerrilla infiltration for the government.<sup>97</sup> After Bolanos-Hernandez left the army, he was approached by a guerrilla group to act as an informant. He refused. When Bolanos-Hernandez refused to join the guerrillas they threatened to kill him. Bolanos-Hernandez took their threat seriously, having known the group to kill others who did not comply with their wishes.<sup>98</sup> He based his claim for asylum in the United States on his desire to remain neutral in his country's civil war, that he did not want to

---

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 517.

<sup>91</sup> *Id.*, citing *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985).

<sup>92</sup> *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985).

<sup>93</sup> *Id.* at 1397. This proposition is also supported in *Hernandez-Ortiz*, 777 F.2d 509, 517 (9th Cir. 1985).

<sup>94</sup> *McMullen v. INS*, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981) (rev'd on other grounds).

<sup>95</sup> *Id.*

<sup>96</sup> *Bolanos-Hernandez v. INS*, 749 F.2d 1316 (9th Cir. 1984).

<sup>97</sup> *Id.* at 1318.

<sup>98</sup> *Id.*

join the Escolta Militar or the guerrilla forces. In this case, the circuit court ruled that a government may not look at the reasoning behind a person's political motivation.<sup>99</sup>

[a] rule that one must identify with one of two dominant warring political factions in order to possess a political opinion, when many persons may in fact, be opposed to views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980—to provide protection to all victims of persecution regardless of ideology.<sup>100</sup>

*Hernandez-Ortiz* and *Bolanos-Hernandez* demonstrate that “political opinion” does not focus solely on the vocal public expressions of the applicant. The wider definition is that political opinion encompasses actions of the government as well, particularly whether the government restricts a person's privilege to hold a certain opinion. Whether an opinion is an expression of the dogma of a political party or not, should not be controlling in fulfilling the definition. More specifically, the *Bolanos-Hernandez* decision states that “the reasons underlying an individual's political choice are of no significance for purposes of [asylum and deportation claims] and the [U.S.] government may not inquire into them.”<sup>101</sup>

In *Desir v. Ilchert, District Director of INS*,<sup>102</sup> also a Ninth Circuit case, the petitioner, a Haitian citizen, refused to yield to extortion forced upon fishermen by Haitian security forces (the Ton Ton Macoutes) in order to fish in certain waters.<sup>103</sup> From 1979 to 1981, Desir was arrested and tortured by the Ton Ton Macoutes on a number of occasions for failure to pay bribes to the group.<sup>104</sup> While Desir was selling tables he had made at the waterfront, one of the Macoutes fired at him and threatened to shoot him if he was seen

<sup>99</sup> *Id.* at 1325.

<sup>100</sup> *Id.* “[R]egardless of ideology” is a key phrase that must continue to be stressed in looking at what is considered political opinion. The BIA denied an applicant, who was an active member of a labor union in El Salvador, her appeal for asylum on the grounds that she had not supported her fear of persecution with objective evidence. *Zavala-Bonilla v. INS*, 730 F.2d 562, 563 (9th Cir. 1984). This was overturned by the circuit court. *Id.* at 568. The BIA has denied that remaining neutral in a country engaged in civil war is political. *Bolanos-Hernandez*, 749 F.2d at 1319. This view has been rejected by the circuit court. *Id.* at 1326. Yet, the BIA determined that a Czech citizen who left Czechoslovakia because he disagreed with the communist system, but never publicly announced his opposition, was expressing a political opinion. See *Matter of Janus and Janek*, 12 I & N Dec. 866 (BIA 1968).

<sup>101</sup> *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1325 (1984).

<sup>102</sup> 840 F.2d 723 (9th Cir. 1988).

<sup>103</sup> *Id.* at 724.

<sup>104</sup> *Id.* at 724–25.

there again.<sup>105</sup> Desir moved to another county, only to find that he had to deal with the Ton Ton Macoutes there as well. In 1981 he came to the United States and applied for asylum.<sup>106</sup> The Immigration Judge determined that Desir's testimony as to these events was credible and true, yet denied his request for asylum.<sup>107</sup> The BIA ruled that the actions of the Ton Ton Macoutes were not political, but were arbitrary personal actions undertaken independent of the Duvalier regime.<sup>108</sup> The BIA also stated that Desir did not belong to any group which spoke out against the extortion carried on by the Macoutes and that therefore the Macoutes action against Desir was not on account of any political activity in which he had participated.<sup>109</sup>

The Ninth Circuit overturned the BIA and ruled that "such actions were tactics whereby the Duvalier regime systematically exercised its authority by way of terror and intimidation. Although the results of extortion may have directly benefited the Macoutes as individuals, the intimidation and fear thereby engendered accrued to the benefit of the Duvalier regime."<sup>110</sup> Under this language, even if an event is deemed personally beneficial to its actor, if the ability to carry out the act comes from the power he receives from the existing government, or power gained through the government's inability to stop its actions, the act is considered political. *Desir v. Ilchert* cites *Lazo-Majano* as support for the view that the treatment Desir received was motivated by political and not personal interests.<sup>111</sup>

The line of logic developing in these two cases brightens what has been a blurred line between what is considered to be personal and what is considered to be political. In *Desir*, the extortion benefited not only the Ton Ton Macoutes, the "extortioners," but also the government that sanctions their activity. The government did not stop the Macoutes from forcing their bribes upon citizens, or from injuring them if they did not pay. This failure on the part of a government to protect its citizens, brings an event into the political realm.

---

<sup>105</sup> *Id.* at 725.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 728.

<sup>111</sup> *Id.*

The Fifth Circuit, in *Coriolan v. Immigration and Naturalization Service*,<sup>112</sup> overruled the opinion of the BIA which held that people without overt political activity are unlikely to be victims of persecution.<sup>113</sup> The court, in overruling the BIA held that "citizens can be the focus of government persecution without ever taking any conventionally 'political' action at all."<sup>114</sup>

In *Coriolan*, petitioners Coriolan and Bonannee were citizens of Haiti.<sup>115</sup> Both feared death upon return to Haiti because of their illegal departure.<sup>116</sup> Coriolan left Haiti in fear of the Ton Ton Macoutes.<sup>117</sup> He had a relative who had been murdered by the Macoutes for failing to give them a piece of cloth.<sup>118</sup> Coriolan, in his statement of facts, emphasized that in Haiti one does not have to actually do anything to the Macoutes to be afraid of them.<sup>119</sup> Bonannee, though himself not politically active, had been arrested and held by the Ton Ton Macoutes.<sup>120</sup> Bonannee's father was suspected of involvement in an anti-Duvalier movement.<sup>121</sup> As his son, Bonannee was also suspected.<sup>122</sup>

The Immigration Judge denied both men's petitions but the Fifth Circuit overruled.<sup>123</sup> The court, in an opinion by Judge Tuttle, held that:

It could be argued that although Bonannee and Coriolan are likely victims of government persecution, what they face is not persecution for their 'political opinion' as the statute requires. We cannot believe, however, that Congress would have refused sanctuary to people whose misfortune it was to be the victims of a government which did not require political activity or opinion to trigger its oppression.<sup>124</sup>

This case is evidence that the Fifth Circuit also has established precedent entitling refugees to political asylum as the result of actions against them by their government. The holding does not

---

<sup>112</sup> *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977).

<sup>113</sup> *Id.* at 944.

<sup>114</sup> *Id.* at 1001.

<sup>115</sup> *Id.* at 995.

<sup>116</sup> *Id.* at 996.

<sup>117</sup> *Id.* at 995.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 996.

<sup>121</sup> *Id.* at 995.

<sup>122</sup> *Id.* at 996.

<sup>123</sup> *Id.* at 995.

<sup>124</sup> *Id.* at 1004.

state, and actually denies, the need for overt political action by the refugee.<sup>125</sup> Having established the above standards, the next section of this Note reviews the BIA and circuit court decisions in *Lazo-Majano* and *Campos-Guardado* in light of these standards.

### III. BOARD OF IMMIGRATION APPEALS AND CIRCUIT COURT ANALYSIS IN *Lazo-Majano* AND *Campos-Guardado*

The Immigration Judge denied Campos-Guardado's claim of a well-founded fear of persecution on account of political opinion. The BIA believed that Campos-Guardado had been raped, and believed her account of the attack on the cooperative by the guerrillas, but denied her claim for asylum.<sup>126</sup> The Court of Appeals for the Fifth Circuit, concurred with the Board of Immigration Appeals' administrative decision, that Campos-Guardado was "statutorily ineligible for a discretionary grant of asylum."<sup>127</sup> The BIA stated that the rapes were not the result of Campos-Guardado's political opinion or a political opinion attributed to her by her attacker.<sup>128</sup> The BIA concluded that:

[W]hile attackers may have been motivated by their own political goals, such as, for example, the intimidation of other peasants involved in land reform, the record does not establish that [Ms. Campos] was persecuted on account of any political opinion she herself possessed or was believed by the attackers to possess.<sup>129</sup>

The Circuit Court in its affirmation reasoned that the guerrillas could not have expected Campos-Guardado to be present at the cooperative, therefore, they could not have targeted her as a victim.<sup>130</sup>

Although the Board of Immigration Appeals believed the truth of Campos-Guardado's story, it concluded that the threats Campos-Guardado faced from her attacker were "personally-motivated to prevent her from exposing his identity—and that there was 'no indication he maintained an interest in her because of her political opinion or any other grounds specified in the Act.'"<sup>131</sup> The Circuit

<sup>125</sup> *Id.*

<sup>126</sup> *Campos-Guardado v. INS*, 809 F.2d 285, 288 (5th Cir. 1987).

<sup>127</sup> *Id.* at 290.

<sup>128</sup> *Id.* See *supra* section D(2). A "political opinion" can be an opinion attributed to the victim by the persecutor.

<sup>129</sup> *Campos-Guardado*, 809 F.2d at 288.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

Court supported the Board of Immigration Appeal's reasoning, and concluded that the persecution of Campos-Guardado was not on account of a political opinion which she possessed or "was believed by the attacker to possess."<sup>132</sup> The court dismissed the appeal by categorizing the incident as one of general violence for a country in civil strife.<sup>133</sup>

In her appeal, Campos-Guardado argued that her family's association with the reform movement and her position as an eyewitness to the political assassination of her uncle and cousin would subject her to future persecution in El Salvador.<sup>134</sup> Campos-Guardado argued that it was "unreasonable for the Board to assume that the persecutor's reasons for victimizing her were different from their political motivations behind the torture, execution and rape of her family members."<sup>135</sup> Campos-Guardado also claimed that because of her presence at her uncle's house, a political opinion was being imputed to her and that this was the same as if she had held the opinion herself.<sup>136</sup>

In the *Lazo-Majano* case, the BIA again found that "the evidence attests to mistreatment of an individual, not persecution."<sup>137</sup> The BIA stated that it was not unsympathetic with Lazo-Majano's situation but that, "as already discussed, the respondent's terrible personal mistreatment at the hands of this one individual does not constitute 'persecution' or 'a threat to life or freedom' for reasons enumerated in this Act."<sup>138</sup> The BIA went on to say that "such personal abuse does not constitute persecution."<sup>139</sup> The Court of Appeals for the Ninth Circuit overruled the BIA. The Ninth Circuit acknowledged that rape is a form of persecution.<sup>140</sup> The court stated

---

<sup>132</sup> *Id.* at 289.

<sup>133</sup> *Id.* at 290. Yet, even though the court in *Campos-Guardado* stated that Campos-Guardado's situation was not political, it cited *Young v. United States Department of Justice*, INS, 759 F.2d 450, 456 (1985) as implying that a "father's showing that he would be subject to harm because of his son's political activities is relevant evidence to show a well-founded fear of persecution"; and *Bahramnia v. INS*, 782 F.2d 1243, 1248 (5th Cir. 1986), to show that "membership in a group that is singled out for persecution because of political beliefs is relevant to showing likelihood of persecution . . . should the alien be deported." *Campos-Guardado v. INS*, 809 F.2d 285, 289 (5th Cir. 1987).

<sup>134</sup> *Id.* at 288.

<sup>135</sup> *Id.* at 289.

<sup>136</sup> *Id.* at 288.

<sup>137</sup> *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987). The Board of Immigration Appeals is referring to the Refugee Act of 1980.

<sup>138</sup> *In re: Olimpia Lazo-Majano*, Board of Immigration Appeals. Unpublished Decision at 2 (5/9/85).

<sup>139</sup> *Id.* at 3.

<sup>140</sup> *Cited in Lazo-Majano*, 813 F.2d at 1434.



that the political opinion of the victim can be the political opinion as seen by the persecutor.<sup>141</sup> In other words, for a victim to fear persecution on account of political opinion, the political opinion does not have to be her own, it can be imputed to her by the persecutor. The court stated that victims of persecution can be people who are nonparticipants in the persecutor's goals, and that their silence to the persecutors represents hostility.<sup>142</sup> The reasoning in *Lazo-Majano* for the determination that persecution had occurred on account of political opinion is unique to the case law. The court determined that:

Zuniga is asserting the political opinion that a man has a right to dominate and he has persecuted Olimpia through force to accept this opinion without rebellion. Zuniga told Olimpia that in his treatment of her he was seeking revenge. But Olimpia knew of no injury she had ever done Zuniga. His statement reflects a much more generalized animosity to the opposite sex, an assertion of a political aspiration and the desire to suppress opposition to it. Olimpia was not permitted by Zuniga to hold an opinion to the contrary. When by flight, she asserted one, she became exposed to persecution for her assertion.<sup>143</sup>

The *Lazo-Majano* decision notes that had Olimpia Lazo-Majano stayed in El Salvador and reported the rape, it is likely that Zuniga would have been allowed to carry out his threats of killing her.<sup>144</sup> The decision concludes that as a matter of law, the abuses suffered by Lazo-Majano constitute a political opinion.<sup>145</sup>

#### IV. ANALYSIS

##### A. *When is an Action "Political"*

In the *Desir* case, the Haitian government was unable to control (or chose not to control) the extortion by the Ton Ton Macoutes of

---

<sup>141</sup> *Id.* at 1435.

<sup>142</sup> *Id.* at 1435, citing *Bolanos-Hernandez v. Immigration and Naturalization Service*, 749 F.2d 1316, 1324 (9th Cir. 1985).

<sup>143</sup> *Id.* at 1435.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1436; The dissent in *Lazo-Majano* strongly disagreed with the majority opinion that Lazo-Majano's claim was a fear of persecution based on political opinion. The dissent claimed that "[q]uite simply, the majority has outdone Lewis Carroll in its application of the term political opinion and in finding that male domination in such a personal relationship constitutes political persecution." *Id.* at 1437. Judge Poole in the dissent goes on to say that Lazo-Majano's "peril lay in Zuniga's unrestrained carnal appetites and his total conception of her as an available sexual object" and of her beliefs that he might be able to make trouble for her. *Id.* at 1439. This, he concluded, has no political connection. *Id.*

its citizens.<sup>146</sup> The *Desir* court cites the government's concession in *McMullen* for the proposition that the persecution of the asylum applicant does not necessarily have to be done by the government to be considered political, but can be done by a group which the government cannot control.<sup>147</sup> *Hernandez-Ortiz* supports *McMullen* by stating that "'persecution' occurs only when there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate."<sup>148</sup> The *Hernandez-Ortiz* court stated that in considering this, it is important to look at the motivation of the persecutor to determine whether the situation is political.<sup>149</sup> It is the relationship between the persecutor and the victim which determines whether threats or violence constitute political persecution, not just whether the court, or adjudicating body, thinks that the victim has been "politically active" in a public sense.<sup>150</sup>

Furthermore, the Fifth Circuit has stated in *Coriolan* that a person can be a "victim of a government which did not require political activity or opinion to trigger its oppression."<sup>151</sup> The above illustrates that case law precedent establishes that a victim of persecution need not be "politically active" to suffer persecution on account of political opinion and that persecution by the government includes groups the government is unable to control.<sup>152</sup>

In *Lazo-Majano* and *Campos-Guardado* the BIA found that the two women were not expressing political opinions of their own and

<sup>146</sup> *Id.* *Desir v. Ilchert*, 840 F.2d 723, 728 (9th Cir. 1988).

<sup>147</sup> *Id.* at 728 n.5 (citing *McMullen v. INS* 658 F.2d 1312, 1315 n.2 (9th Cir. 1981)).

<sup>148</sup> *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* Note that in the following cases the victim's desire to remain neutral in a country of political upheaval, the desire not to be politically outspoken, was enough for a grant of asylum "on account of" political opinion. In *Del Valle v. INS*, 776 F.2d 1407 (1985), the petitioner's decision to remain neutral in El Salvadoran political conflict constituted expression of a political opinion for purposes of determining whether he was entitled to political asylum. In *Turcios v. INS*, 821 F.2d 1396, 1401 (9th Cir. 1987), Turcios was arrested by police and accused of being involved in leftist politics. He was tortured and released two months later. *Id.* at 1399. He disclaimed any involvement with politics or "guerrilla insurgency". *Id.* at 1401. The Ninth Circuit granted asylum citing his desire to remain neutral as political opinion. *Id.* In *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1988), the petitioner was threatened by four men who accused him of being a member of the guerrilla organization FPL. *Id.* at 1395-96. The court determined that death squads have the ability to carry out threats and that petitioner wanted to remain neutral. Asylum was granted. In *Arteaga v. INS*, 836 F.2d 1227, 1231, 1233 (9th Cir. 1988), Arteaga was threatened with conscription and kidnapping by the guerrillas if he did not agree to join them voluntarily. He chose to remain neutral. Asylum was granted.

<sup>151</sup> *Coriolan v. INS*, 559 F.2d 993, 1004 (5th Cir. 1977).

<sup>152</sup> *McMullen*, 658 F.2d at 1315 n.2; *Desir*, 840 F.2d at 728.

therefore were not eligible for asylum.<sup>153</sup> Accepting the above case law, one may argue that rape is analogous to the situation in a case such as *Desir*. What is being extorted in a case such as *Campos-Guardado* or *Lazo-Majano* is not money, as in *Desir*, but sex.<sup>154</sup> Campos-Guardado, who was raped by members of a Guerrilla group, was not a "politically active" woman. But, she need not be, according to the doctrine expressed in *Coriolan*, to meet the requirements of the Refugee Act.

Fear is instilled by torturing people in many different ways. In the *Campos-Guardado* case, all the people present in the household at the agrarian cooperative were taken out to the farm pit.<sup>155</sup> The men were killed and the women were raped.<sup>156</sup> The BIA, and hence the Fifth Circuit in its compliance, determined that the rapist's threats to Campos-Guardado were personal to keep her from revealing his identity.<sup>157</sup> In doing so they have refused to acknowledge the deliberateness in the form of torture chosen for each group. The guerrillas chopped the men's bodies with machetes. They did not do this to the women. They chose to rape them. In El Salvador, guerrilla groups and the military threaten citizens to reinforce their power and control.

A key point made in *Hernandez-Ortiz v. INS* is that in determining whether an action is one of political persecution, the issue is "the relationship between the two,"<sup>158</sup> the victim and the persecutor. The issue of rape is one of power and control. In the context of life in El Salvador, Lazo-Majano or Campos-Guardado's decision not to speak out against their persecutors did constitute a political choice.<sup>159</sup> Their decision to "turn in" their rapists, thereby speaking

---

<sup>153</sup> See Appendix C to Petition for Certiorari, *Campos-Guardado* (86-1969); *Lazo-Majano*, 813 F.2d at 1433-44.

<sup>154</sup> *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988).

<sup>155</sup> *Campos-Guardado v. INS*, 809 F.2d 285, 287 (5th Cir. 1987).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 288.

<sup>158</sup> *Hernandez-Ortiz*, 777 F.2d at 516.

<sup>159</sup> The Ninth Circuit opinion in *Lazo-Majano* discusses the inequitable power relationship between Zuniga and Lazo-Majano, but it does not fully discuss the implications of this situation or why it is important to recognize this imbalance. *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987). The Ninth Circuit states that the rapist is asserting a political opinion that a man has a right to dominate a woman. *Id.* The court then constructs its decision around case law showing that for an opinion to be political it does not necessarily have to be the true political opinion of the victim, it can be an opinion that the victim is perceived to have. *Id.* at 1434-36. The court stated that the rapist's political opinion is domination of women, and that the political opinion Lazo-Majano is perceived to have is that of a subversive. *Id.* at 1435. This perception comes from Zuniga's public denunciation of

out against the rape, would not have been accepted in El Salvador. If the women chose to expose their rapists both would probably have had no protection against the threats of murder given by their persecutors. The women could have been killed for speaking out against the structure of power.<sup>160</sup>

### B. Critique of the Board of Immigration Appeals

The BIA fails to adequately recognize the humanitarian foundation underlying the Refugee Act of 1980. The Immigration Judges and the Board of Immigration Appeals have not reasoned consistently in cases before them.<sup>161</sup> There is severe discrimination among applicants, many more applications are accepted from communist countries, and less so from countries whose governments are supported by the United States.<sup>162</sup> The total approval rate for

---

Lazo-Majano as a subversive. *Id.* The missing link in this argument is that Lazo-Majano held a political opinion when she did not want to accept Zuniga's view that a man has a right to dominate a woman through rape. Although the Ninth Circuit states the assertion, it does not make a clear connection between Lazo-Majano's attempt to stop the rape and a political opinion of her own, the opinion that she refuses to accept the sexual control Zuniga is forcing on her.

<sup>160</sup> For example, in El Salvador, a woman was captured and raped by a member of the military. The man told her family that if they reported the incident or did not cooperate, he would denounce the family as subversives. The family reported the incident to the authorities. The authorities laughed and gave them no protection. Comments by panelist, *Immigrant Rape: Promoting Threat or Fear of Sexual Repression as a Reason for Granting Asylum*, Women and the Law Conference, March 1989 [hereinafter Conference] (tape on file at the offices of the Boston College Third World Law Journal).

<sup>161</sup> See *supra* note 74 contrasting Board of Immigration Appeals Decisions.

<sup>162</sup> Several articles reviewing the implementation of the Refugee Act of 1980 say that it has not totally cured the ideological analysis given to asylum applications. See, e.g., Gibney, *supra* note 56, at 114-117. Gibney suggests that one would expect a connection between the level of human rights violations in a country and the number of applicants from that country granted asylum. He states that there is still an ideological bias in the United States asylum policy despite the Refugee Act of 1980 and instead, "assistance should first be provided to those facing the most serious human rights abuses." *Id.* at 114. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243 (1984). Helton comments that the Immigration Judges need to be recruited from outside as well as inside the ranks of the Immigration and Naturalization Service. "Traditionally, immigration judges have come from the ranks of the INS." *Id.* at 262. He also states that Immigration Judges should be "instructed in the law and history of human rights and refugees." *Id.* His final suggestion is that the State Department should not be involved in deciding whether the alien has a well founded fear of persecution. *Id.* at 263. To make the implementation of the Refugee Act more effective Helton states that "the Refugee Act requires the depoliticization of the asylum process [and] the recognition of the uniform protocol standard . . ." *Id.* at 264 (referring to the United Nations standards which acted as the background for the Refugee Act). Heyman, *Redefining Refugee: A Proposal for Relief For the Victims of Civil Strife*, 24 SAN DIEGO L. REV. 449 (1987). Heyman suggests that relief for victims of civil strife is not included in the statute. The contrived definition of refugee, that a person must have a

asylum cases filed with District Directors between June, 1983, and September, 1986, was 23.3%.<sup>163</sup> The five countries at the top of the list had approvals at a rate much higher than the average. Citizens of Iran had 60.4% of their applications accepted, Romania 51.0%, Czechoslovakia 45.4%, Afghanistan 37.7% and Poland 34.0%. The three countries at the lowest end of the scale were El Salvador, Haiti, and Guatemala with 2.6%, 1.8%, and 0.9% respectively.<sup>164</sup>

In more general terms, the INS does what it can to discourage certain classes of people from applying for asylum, and takes measures to see that particular nationals are kept ignorant of asylum possibilities and availability of counsel to help obtain those rights.<sup>165</sup> Courts have stepped in to set rulings for discriminatory practices of the INS and Immigration Judges.<sup>166</sup> In *Orantes-Hernandez v. Meese*, a class of El Salvadorans taken into custody by the INS challenged INS policies regarding their treatment.<sup>167</sup> Salvadorans were not being told of the possibility of applying for asylum, were forced into signing voluntary statements of departure, and were kept in confinement without access to attorneys.<sup>168</sup> The district court ruled that the INS practices discriminate against El Salvadoran asylum applicants by denying them due process and imposing a higher burden of proof for establishing fear of persecution.<sup>169</sup>

In 1982, a group of Haitian refugees filed a class action suit because not one asylum grant had been made in their district.<sup>170</sup> In

---

well founded fear of persecution on account of their race, religion, nationality, membership in a social group or political opinion, prohibits including these victims. *Id.* at 449–50. He suggests that the role politics plays in asylum adjudications, can cause humanitarian concerns to be frequently overlooked. *Id.* at 456. Heyman proposes that under an amendment the definition of refugee in the Refugee Act of 1980 should be expanded to explicitly include victims of civil strife. *Id.* at 451. Note, *The Need For A Codified Definition of "Persecution" in United States Refugee Law*, 39 STAN. L. REV. 187 (1986) (authored by Sophie Pirie). Pirie focuses on the varying ways officials define (or do not define) persecution. "[U]ncertainty concerning the definition of persecution induces INS and judicial uncertainty about asylum and deportation withholding requirements and disparate treatment of similar aliens." *Id.* at 190.

<sup>163</sup> *Asylum Cases Filed with INS District Directors Approved and Denied, By Selected Nationalities*, REFUGEE REPORTS, December 16, 1988.

<sup>164</sup> *Id.*

<sup>165</sup> *Orantes-Hernandez v. Meese et al.*, 685 F. Supp. 1488, 1494–98 (C.D. Cal 1988).

<sup>166</sup> See *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 451 (1980) *aff'd as modified sub nom.* *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982); *Orantes-Hernandez v. Meese et al.*, 685 F. Supp. 1488 (C.D. Cal. 1988).

<sup>167</sup> *Id.* at 1490.

<sup>168</sup> *Id.* at 1494–95.

<sup>169</sup> *Id.* at 1506–1508.

<sup>170</sup> See *Haitian Refugee Center*, 676 F.2d at 1026.

this case, the court set guidelines for the Immigration Judges to follow.

Highlighting the humanitarian aspects of the Refugee Act itself is not enough to convince the BIA to accept an argument for why rape is a well-founded fear of persecution on account of political opinion. The language in the case law discussed above and the legislative history favor depicting rape as a form of persecution. It is hard to understand how the father of a politically active son to whom no specific threats have even been made can be said to have a well-founded fear of persecution on account of his son's opinion,<sup>171</sup> while the BIA can claim that repeated rape of an individual is not "persecution within the meaning of the Act."<sup>172</sup> The Immigration Judges and BIA as a group, are not objective bodies of adjudication.<sup>173</sup> Acknowledging that the Board of Immigration Appeals is inconsistent in applying the principles of the Refugee Act in accordance with the humanitarian guidelines is one step, but there is more going on in the BIA's analysis of sexual abuse cases than these general inconsistencies.

It appears from the decision in *Lazo-Majano* and *Campos-Guardado* that the Board of Immigration Appeals is unable to place rape in the same category as persecution and political opinion because they are unable to see and understand the situation of women.<sup>174</sup>

---

<sup>171</sup> *Young v. INS*, 759 F.2d 450 (5th Cir. 1985).

<sup>172</sup> *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987).

<sup>173</sup> A recent study by Deborah Anker discusses an empirical investigation of asylum procedures. Anker, Executive Summary: *Determining Asylum Claims in the United States, An Empirical Study of the Adjudication of Asylum Claims before the Immigration Court*, January 1990 (unpublished) (on file at the offices of the Boston College Third World Law Journal). Anker states that "the principal conclusion of this study is that the current adjudicatory system remains one of ad hoc rules and standards." *Id.* at 2. The study suggests that the "ideologically blind determination process mandated by Congress" has not been achieved. *Id.* at 4. Furthermore it was shown that immigration judges as a group do not consider "evidence of human rights and persecutory practices in the home country in determining merits of an asylum claim." *Id.* at 4. The study also concluded that immigration judges often inappropriately impose their own cultural and political assumptions in assessing an applicant's credibility. *Id.*

<sup>174</sup> A project in El Paso Texas set up by American Friends Service Committee (AFSC) to monitor the sexual abuse of women by border officials shows that women crossing the border are met by agents and asked their phone numbers, marital status and if they have children. The agents ask the women to go out with them. A refusal can deny entry for these women, most of whom perform domestic work in the United States. Sometimes the women are raped. U.S. Mexico Report, Vol 7, No. 4, April 1988, and from a conversation with an AFSC staff member in El Paso, Tx. The INS (the information giving body) and the Immigration Judge and Board of Immigration Appeals (the adjudicatory bodies) are intertwined. All three are part of the United States Department of Justice. The Immigration Judge and the Board of Immigration Appeals are under the Executive Office for Immigration Review.

Legal doctrines as we have learned them, are ill equipped to deal with the issues concerning the domination and disempowerment of women. The domination of women has been perpetuated by the legal rules, but the rules are not the "source of society's subjection of women."<sup>175</sup> The rule, the Refugee Act of 1980, sets the standard for granting asylum to refugees whose human rights have been violated. Rape is a violation of a woman's human right in any social and political context. To recognize the humanitarian purpose of the Refugee Act as a legal argument will not eliminate the bias in the adjudicating body. Attempting to use the humanitarian basis of the Refugee Act to get the BIA beyond its sexist decisions will not work because using legal rules, to disengage sexism, "would [only be helpful] if sexism were a legal error."<sup>176</sup>

Inequalities in the law do not exist because of a mistake in a legal process sense of analyzing the principles of law. The roots of sexism are deeper.

[M]ale dominance is perhaps the most pervasive and tenacious system of power in history . . . it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy.<sup>177</sup>

Laws and their interpretations have not escaped being defined through the male lens. "[T]he state, in part through law, institutionalizes male power."<sup>178</sup> The male epistemological stance is objectivity, and sexual objectivity is the "primary process of the subjection of women."<sup>179</sup>

We live in a world where sexuality organizes culture, and sexuality is a form of power.<sup>180</sup> In a world where speaking out against

---

It is the INS that is the defendant in claims for asylum, therefore the Department of Justice is the defendant in the same claims it is attempting to adjudicate. To further complicate matters, the Immigration Judges are often appointed from the ranks of the INS. Helton, *supra* note 162, at 243. The judges receive no special training in human rights concerns. This means that decisions as to whether rape is persecution are being made by the same agency which apparently has done nothing about alleged sexual harassment of aliens within its own agency.

<sup>175</sup> A. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1382 (1986).

<sup>176</sup> *Id.*

<sup>177</sup> MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635, 638-39 (1983).

<sup>178</sup> *Id.* at 645.

<sup>179</sup> *Id.*

<sup>180</sup> MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515, 533 (1983).

a rapist can mean death, women are left with little choice but to endure the persecution of the rapist. This acquiescence leads the Immigration Judge to label the incident a personal relationship. Rejecting the definition of women as a thing to be objectified through sexual torture, is rejecting a theory of the state that allows that power and control.<sup>181</sup> Legal scholar Catherine MacKinnon states that: "Women's acceptance of their condition does not contradict its fundamental unacceptability if women have little choice but to become persons who freely choose women's roles."<sup>182</sup> For this reason, the reality of women's oppression is, finally, neither demonstrable nor refutable empirically.<sup>183</sup>

Lazo-Majano's acquiescence to Zuniga does not mean that she accepted what was happening to her, nor that she was involved in a personal relationship with him as is suggested by the Board of Immigration Appeals.<sup>184</sup> Her "acceptance of [her] condition" was an effort to keep herself alive while fighting for a way to change the situation. It is necessary to "uncover and claim as valid the experience of women, the major content of which is the devaluation of women's experience."<sup>185</sup> The Immigration Judges, through their own cultural biases, are devaluing women's experience of being raped. This point of view is encouraged by the way rape is perceived in the United States.

In the United States, laws are fashioned to make it difficult for a woman to prove that she has been raped. For example, the statutory laws in the United States regarding rape focus on the woman's consent to the interaction and how much force she used to resist.<sup>186</sup> Thus, the laws focus on the victim, not the actions of the rapist.<sup>187</sup> Legally in the situation of rape, "no" does not mean "no" unless some other type of rejection, i.e. force, is also present.<sup>188</sup> Often, judges in the United States are predisposed to place "blame" on a victim of rape: she asked for it, she was provocatively dressed,

<sup>181</sup> Note that in the Campos-Guardado case the men who were at the agricultural co-op were killed by guerillas opposing their work. The women were raped, not killed, for being part of the same agricultural cooperative. To exert control over men, the men were killed. To exert control over women, the women were raped. See Campos-Guardado, 809 F.2d at 287.

<sup>182</sup> Women's roles being defined as the traditional view of women as being submissive.

<sup>183</sup> MacKinnon, *supra* note 180, at 542.

<sup>184</sup> Lazo-Majano v. INS, 813 F.2d 432 (9th Cir. 1987).

<sup>185</sup> MacKinnon, *supra* note 177, at 638.

<sup>186</sup> See generally Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

<sup>187</sup> *Id.* at 1099.

<sup>188</sup> *Id.* at 1105-1121.



or she knew the man. The perception that rape is a woman's fault is well documented in contemporary writings.<sup>189</sup> This perception of negating the horror of and unwillingness on the part of the women in rape, carries itself into the law. It is this same perception that Immigration and Board of Immigration Appeals Judges are bringing to their analysis of human rights violations involving rape. They place blame on the women involved and cannot conceive of women rejecting rape and the control it represents. Yet in analogous or lesser situations of torture asylum is granted.<sup>190</sup>

Women are injured by rape. In a country where the abuse is systemic, there is no relief. Whether or not the BIA agrees with the "political choice" of an applicant should not affect the outcome of the case.<sup>191</sup> The reasoning behind an individual's political choices should not be inquired into by the government in response to an asylum claim.<sup>192</sup> The court states that it is improper to "look behind the manifestation of an alien's political opinion . . . motives frequently will be both complex and difficult to ascertain; it may not be possible to separate the political from the non-political aspects."<sup>193</sup> People's politics are formed by what affects them personally. What the Immigration Judge is considering personal, is political to women.

The consciousness of the Immigration Judges needs to be raised to recognize the deliberateness in using rape as a form of control which in itself is political. No country in the world is free from rape whether vast human rights violations are occurring in it or not. A woman is not necessarily safe from rape even if she comes to the United States. Nevertheless, in a country where human rights violations have been documented, rape is often used as a conscious

---

<sup>189</sup> See, e.g., S. BROWN MILLER, *AGAINST OUR WILL, MEN, WOMEN AND RAPE*, (1975); Estrich, *supra* note 186; MacKinnon, *supra* note 177. These are just a sampling of sources. As an example of the types of statements giving women the responsibility for being raped, a modern day physician said, "There is one type of woman I would have a hard time believing was raped: a woman between 16 and 25 on the pill and no longer a virgin." Mills, *One Hundred Years of Fear, Rape and the Medical Profession*, JUDGE LAWYER, VICTIM, THIEF, WOMEN GENDER ROLES AND THE CRIMINAL JUSTICE SYSTEM (Raftner & Stanko, eds. 1982).

<sup>190</sup> *In re: Mohammed Osman Mohibi*, Unpublished BIA Decision (7/27/87) (card-carrying member of the Hizbeh Islami in Afghanistan feared persecution because his father and brother had been arrested and imprisoned.) *Id.* at 3. *In re: Mejia Flores*, Unpublished BIA Decision (6/21/88) (conscientious objector who did not want to serve in the military and feared for his safety was granted asylum). *Id.* at 7-8.

<sup>191</sup> *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1325 (9th Cir. 1984).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

form of persecution.<sup>194</sup> Thus, if there is no effective prosecutorial system available to a woman in the country where the rape has occurred,<sup>195</sup> or if her life is endangered by bringing the issue to the attention of the authorities, then the applicant has a well founded fear of persecution on account of political opinion.

## V. CONCLUSION

The task in reviewing the Board of Immigration Appeals' decisions is to articulate what the "on account of" phrase means and to establish guidelines for the Board of Immigration Appeals and Immigration Judges to follow in reviewing asylum claims involving sexual abuse. Because the Attorney General's ability to grant asylum is discretionary, it is difficult to overrule. But guidelines can be set. There are two simple guidelines that the reviewing agency adjudicators could follow to help reduce bias in their decisions.

1. Accept that rape is a form of persecution, and thus a violation of human rights.
2. To determine if a victim has a well-founded fear of persecution on account of political opinion, consider if there is a system for redress against her attacker, just as if a victim had been beaten up and threatened with death. If there is no system for a woman to prosecute in her country where the rape has occurred or if she did prosecute or bring the issue to the authorities her life would be in danger, then the woman should be granted asylum.

The precedent for determining that rape enstills a well-founded fear of persecution is in the case law and within the meaning of the statute. The problem at the agency level is the inability of the adjudicators to get beyond their own biased definitions. It is important for guidelines to be implemented so that women who are tortured through rape receive the same type of consideration in their asylum claims as those suffering from other forms of persecution.

*Maureen Mulligan*

---

<sup>194</sup> An expert witness testifying at an asylum hearing for an El Salvadoran applicant stated that she has interviewed a number of security members and former security police in El Salvador. The information she received in her interviews included information that one of the patterns of the death squad activities is to seek out young women and then rape and kill them. Conference, *supra* note 160.

<sup>195</sup> For example, the fact that there has "never been a successful prosecution and conviction of any member of the Salvadoran security forces for political violence and human rights abuses against civilians," *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1492 (C.D. Cal. 1988), is an example of the lack of a system available for prosecution.