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Female Flight:

Sex and Gender in International Asylum Law

by

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Female Flight: Sex and Gender in International Asylum Law

Thesis: The failure of international legal standards to ensure equal protection for refugee women, including sex or gender-specific forms of persecution, necessitates both explicit reforms to the Refugee Convention as well as acceptance of a gender-sensitive framework for asylum claim adjudication in all refugee-receiving countries.

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Introduction

While every culture is different, the subjugation of women appears to be nearly universal, and women worldwide are targets of varied forms of gender-based persecution. International refugee law, and the international principle of non-discriminate protection of human rights, are mutually supportive, each informing the other’s development (von Sternberg 2002, 192). Yet, the widespread social sub-status of women, reinforced by lawmakers’ and jurists’ patriarchal bias against women, has resulted in a lack of equal protection of women’s human rights (Bahl 1997, 39). Application of international law to decisions on refugee status is misguided by problematic distinctions between “public” and “private” as well as the impunity of patriarchal “culture” to outside criticism (Bahl 1997, 39), although the United Nations and some refugee-receiving countries have taken progressive steps to rectify this situation. Despite these efforts, however, the international legal standards do not adequately ensure equal protection of refugee women, including sex or gender-specific forms of persecution. The current situation calls for both explicit reforms to the UN Convention Relating to the Status of Refugees, as well as acceptance of a gender-sensitive framework for asylum claim adjudication in all refugee-receiving countries.

In principle, men may also seek asylum from male-specific forms of persecution or persecution due to their sex or gender, but such cases appear to be quite rare. One could argue that, in fact, gender-related persecution targeted at men is universalized and already covered by the male-biased Refugee Convention, and is therefore not regarded as “gender-related” per se;
only women, who bear the mark of difference as Other in many societies, demand special attention and legal protection.

Furthermore, protection of refugee women also carries significant implications for protection of lesbian, gay, bisexual, and transgender (LGBT) individuals, as sexism and misogyny are inextricably linked to heterosexism and homophobia. There are, however, relatively fewer asylum claims based on sexual orientation, and discussions of humanitarian refugee aid have yet to seriously address LGBT issues. As these issues are beyond this paper’s scope, the following analysis shall focus primarily on the particular issues of refugee and asylum-seeking women qua women.

**Relevant Standards**

The first and most obvious source of legal protection for refugees is the UN Convention Relating to the Status of Refugees ("the Convention"), which dictates the exercise of the “right to seek and enjoy in other countries asylum from persecution” granted by Article 14 of the Universal Declaration of Human Rights (UDHR). The 1951 Convention originally applied only to those who became refugees prior to 1951, that is, due to the events of World War II, generally in Europe. The 1967 Protocol eliminated the temporal and local restrictions of the refugee definition. The Refugee Convention shall hereinafter refer to the Convention together with the Protocol, which most Convention party states have also adopted.

Signatory states generally model their refugee laws, particularly the definition of a refugee, after the letter of the Convention. The Convention defines a refugee as someone who:

- owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is
unwilling to avail himself of the protection of that country; or who, not having a
nationality and being outside the country of his former habitual residence as a
result of such events, is unable or, owing to such fear, is unwilling to return to it.

(emphasis added)

This definition does not offer sex or gender as grounds for refugee status. Both the UDHR and
the International Covenant on Civil and Political Rights (ICCPR), however, provide for equal
protection and non-discrimination in the enjoyment of fundamental human rights, including
“sex…or other status” (Kelson 1997, 184). Intuitively women should be as eligible for
protection as men despite this conventional omission. Article 3 of the Convention ensures non-
discrimination based on race, religion, and country of origin, but not for gender (Epps 2001,
345). The treaty also fails to specify what exactly entails persecution (Kelson 1997, 184). In
addition to the treaty itself, UNHCR’s *Handbook on Procedures and Criteria for Determining
Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of
Refugees* is considered the authoritative (but legally non-binding) interpretation of the
Convention for adjudicating asylum claims (Cissé 1997, 438).

In addition to the authoritative Refugee Convention, the Organization of American States
and the Organization for African Unity both possess, for example, regional refugee laws
expanding the grounds for protection to situations of general political unrest or natural disasters
(Schafer 2002, 35). Like the UN Convention, however, neither treaty extends protection on
grounds of sex or gender.

The Convention on the Elimination of All Forms of Discrimination Against Women
(CEDAW), which enjoys near-universal ratification, may be considered the principle
international legal motivator for ensuring equal protection for women refugees. Article 2 binds
party states to undertake any necessary measures to eliminate discriminatory practice and systems. CEDAW also addresses issues such as equal opportunity, political participation, employment, education, health, family planning, marriage, child custody, and nationality. This flagship convention is augmented by the UN Declaration on the Elimination of Violence Against Women (DEVAW) and the Beijing Declaration and 1995 UN Platform for Action (Crawley 2001, 324). Together, these instruments embody the great and widespread international commitment (at least in word if not deed) to women’s rights and gender equality, and they call for the harmonization of refugee protection with these norms.

In addition to these fundamental international instruments, the UN, particularly UNHCR, has accumulated a significant body of soft law regarding gender and refugee status. UNHCR’s Executive Committee (EXCOM) has issued several conclusions addressing the particular vulnerability of women refugees and their need for effective assistance, and calls all member states to redefine, reorient, and create programs for such purpose (Crawley 2001, 227). In 1991, UNHCR issued its Guidelines on the Protection of Refugee Women, authoritative yet legally non-binding recommendations for protecting women refugees. The Guidelines lists various gender-specific forms of persecution, such as rape or female genital mutilation (FGM), gives special considerations for implementing protection programs for refugee women, and offers concrete suggestions on tracking and reporting the condition of refugee women (Kelson 1997, 207-08; Crawley 2001, 12-13). In 1995, UNHCR issued Sexual Violence Against Refugees: Guidelines on Prevention and Response, which specifically addresses sexual violence including FGM (Cissé 1997, 438). Taken together, these instruments make up a rich body of law for protecting refugee women; these standards, however, are subject to interpretive bias.

**Forms of Gendered Persecution**
In addition to general forms of persecution, women are subject to a number of particular forms of persecution. Perhaps the most common of these is rape, among other forms of sexual violence. UNHCR’s gender guidelines delineate a long list of modes of sexual violence, extending as far as “a general atmosphere of sexual aggression and threats of the loss of the ability to reproduce and enjoyment of sexual relations in the future,” among more direct methods (Macklin 1995, 225-26). Rape and sexual violence occur for various reasons. Captors may rape women in detention as a means of interrogation or of mere amusement. Rape is also used as a weapon of political or social intimidation against women’s families or communities, particularly politically active male relatives and associates (226). In Haiti after the 1991 coup d’état, women were raped as a means of suppressing democratic movements and civil society (Anker 2002, 141). Rape is unquestionably a powerful and damaging weapon of war. This was clearly demonstrated in a report by the European Community, accounting for the rape of 20,000 women and girls in Bosnia. According to the report, rape was used systematically to humiliate people and drive them from their homes (Stevens 1993, 198). Sexual violence against women is a varied and widely utilized tool of terror.

Every year, approximately two million girls undergo FGM, also known as excision, female circumcision, or female genital surgery (Cissé 1997, 430). The latter terms are more clinical and less graphic, reflecting many cultures’ understanding of it as similar to male circumcision. The former term is more appropriate, however, as “according to international public health experts, FGM is more analogous to castration performed under very unsanitary conditions…or to torture rather than to male circumcision” (432-33). In addition to physical pain, psychological trauma, and risk of death, FGM can also cause problems with fertility and
childbirth, and increase the chance of contracting sexually transmitted diseases including HIV/AIDS (433; Stevens 1993, 193-95).

While resembling sexual violence, FGM differs in that it is often a ritualized component of many cultures. FGM is practiced in various countries, primarily in the Horn of Africa, generally to uphold “some virtue such as chastity, piety, and cleanliness.” These virtues are directly linked to a woman’s marriage prospects, family status in the community, and thus overall social harmony. Given the high social significance and the often coercive means of imposing FGM, girls and their families have few realistic means of escape or opposition without seriously endangering their livelihood (432; Stevens 1993, 194-95).

Many women also seek asylum for fear of persecution due to their opposition to social norms in their home countries. This is most evident in the cases of women who flee from repressive Islamist regimes. For instance, many Iranian women have sought asylum based on their fear of persecution for opposing post-revolutionary Iran’s severe laws governing women’s dress and behavior (Thiele 2000, 226-27). Such overt opposition often stems from the claimant’s political beliefs, such as feminism, or from an interpretation of religious codes that differs from the social norm. Non-compliance with the requirements imposed on women can also be involuntary, as in the case of an Armenian woman and her daughter who resided in Turkey without the support of a male relative (von Sternberg 2002, 260-61). Opposition to social practices, such as forced marriage, also falls within this grouping (262).

In addition to the above described forms of persecution, women are also subject to domestic and family violence; bride burning; honor killing; forced marriage; sex trafficking; breaches of reproductive and family-planning rights including forced abortion, sterilization, and infanticide; and various types of discriminatory treatment (Crawley 1995, 225). Gender-based
persecution takes a myriad of forms and requires a flexible and comprehensive framework for adequate protection of its victims. Simultaneously, refugee law must also acknowledge that such forms of persecution are bound by the common factor of gender.

It is germane to note that the motivations for the above forms of persecution do not necessarily rest on characteristics or traits actually possessed by a woman. The persecutor’s perception of a woman’s characteristics, including race, religion, political group, and gender, may prove sufficient in giving rise to a serious harm and thus legitimate fear of persecution (von Sternberg 2001, 6). This must be considered in the fair evaluation of asylum claims, according to the humanitarian purpose of the Convention.

Forms of persecution experienced by women are divisible into two broad categories: gender-specific persecution (persecution as women) and gender-related persecution (persecution because they are women) (Macklin 1995, 259; Bahl 1997, 35). Gender-specific persecution includes abuses that generally only women experience such as “sexual violence, female genital mutilation, forced abortion and sterilization, and the denial of access to contraception” (Crawley 2001, 7). The motivation for such persecution may or may not relate to the victim’s gender. For instance, FGM is imposed on women because they are women prescribed with certain social roles and duties, whereas sexual violence against female relatives of male political dissidents, for example, is not primarily motivated by the victim’s gender, but by her association with a man. On the other hand, gender-related persecution involves forms of persecution that are not unique to women, but are inflicted on an individual because of her gender. Examples include harassment and discriminatory treatment against women who oppose repressive social norms, domestic violence, and women targeted by their persecutors as the reproductive capacity of an enemy group or tribe (Bahl 1997, 35-36). Considering the differences between these two types
of persecution is useful to analysis of international law’s efficacy in fairly receiving refugee women’s claims.

Application of Standards and Critique

In addition to international legal instruments, a few major refugee-receiving states have adopted national administrative guidelines for protecting refugee women. The most significant development in gender-consciousness is Canada’s adoption of *Guidelines Regarding Women Refugee Claimants Fearing Gender-Related Persecution* in 1993. These guidelines prescribe that women fearing gender-related persecution may be recognized as refugees under any one or combination of Convention grounds (RLC 1999, 88). Notably, the Canadian guidelines, which seek to link explicitly UNHCR’s gender guidelines to Canadian asylum law, are considered non-binding and do not expressly add gender as independent grounds for asylum (Thiele 2000, 231). These landmark guidelines have served as a model for subsequent policies in other countries.

The United States followed suit in 1995, when Immigration and Naturalization Services issued a memorandum regarding gender-based asylum claims. The memorandum, based on UNHCR’s and Canada’s preceding gender guidelines, was an attempt to raise asylum officers’ awareness of gender issues and to expressly enumerate general legal principles for adjudicating gender-based claims. Also in step with UNHCR and Canada, INS (now the Bureau for Citizenship and Immigration Services, or BCS, under the new Department of Homeland Security) expressly states that gender alone cannot constitute grounds for asylum, according to the widely cited definition in *In re Acosta* (Thiele 2000, 232, 238).

In 1996 Australia’s Department of Immigration and Multicultural Affairs (ADIMA) was next to implement explicit suggestions regarding gender-based claims in *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers*. Again, these
guidelines merely seek to promote awareness of gender-issues of refugees and to promote fair consideration of gender-related claims under the existing international framework; they do not add gender as a sixth ground (Crawley 2001, 14; RLC 2001, 7-27).

The European Parliament in 1984 urged member states to consider female asylum claimants as belonging to a “particular social group,” and in 1996 called for member states to designate concrete asylum guidelines for gender-related claims. Despite these progressive initiatives, treatment of gender-related claims varies greatly from country to country. While the United Kingdom currently has no set gender guidelines, the independent Refugee Women’s Legal Group (RWLG) has assembled *Gender Guidelines for the Determination of Asylum Claims in the UK* for consideration of concerned authorities (Crawley 2001, 14-15). Given the membership of the Refugee Convention, these few, limited guidelines can hardly be deemed sufficient for ensuring protection of refugee women worldwide. While these guidelines are indicators of progress and have boosted the protection of refugee women, all fall short of recognizing gender persecution as grounds for asylum in its own right. Gender-based claims must necessarily be tied to at least one of the Convention grounds.

International law, including human rights and women’s rights treaties, seems to indicate, and UNHCR guidelines expressly state that the Refugee Convention covers sexual violence (Cissé 1997, 439). Furthermore, international law, national gender guidelines for asylum, and established case law all acknowledge that rape and sexual violence constitute an egregious violation of one’s right to personal security (Anker 2002, 141). Nevertheless, claims involving sexual violence have been consistently denied, such as in the 1991 case *Gómez v. INS*. Carmen Gómez, a San Salvador national, sought asylum in the United States in 1979, testifying that she was beaten and raped by guerilla forces on five separate occasions because her family did not
support the guerilla faction. The Immigration Court, the Board of Immigration Appeals (BIA), and the Second Circuit U.S. Court of Appeals all dismissed her claim. The Second Circuit Court proclaimed the prior rulings correct, because Gómez was persecuted “because she [was] a youthful woman”, not due to any of the Convention grounds (Thiele 2000, 225). Given her family’s lack of political support as the motivation for persecution, claiming asylum on political opinion grounds would be entirely appropriate in this case, but the sexist ruling, which focuses on the form but not the motivation of persecution, fails to recognize the political nature of the crime against the claimant. Social group grounds may also be appropriate, as the claimant was targeted as a member of her family.

In *Campos-Guardado v. INS* (1987), the Fifth Circuit Court of Appeals upheld the BIA’s denial of asylum to Sofia Campos-Guardado, arguing that her claim was a personal affair and that rape was a private matter, failing to qualify for protection under political opinion grounds. Campos-Guardado was raped after witnessing Salvadorian guerillas hack with machetes and kill her uncle and cousin, who were involved in land reform movements opposed by the guerillas. Later on, the claimant’s mother introduced her to her cousin, who incidentally was one of the guerillas involved in her rape. He continued to threaten the claimant’s life if she identified him. The applicant fled El Salvador after her place of work was burnt down. The BIA argued that the claimant’s abuse was based on a “personal relationship,” failing to recognize that while the mode of persecution differed according to gender (the claimant was raped but her male relatives were beaten), the political motivation was the same (Bahl 1997, 54; von Sternberg 2002, 176-77).

In another similar case, a Salvadorian refugee’s claim was recognized upon appeal. Olimpia Lazo-Manojo fell subject to the rape, physical abuse, and life threats of her employer and long-time acquaintance Rene Zuniga, a sergeant in the Salvadorian military. Lazo-Manojo
also feared Zuniga’s impunity as a government official. The BIA originally argued that such persecution was strictly personal, barring eligibility for refugee status. The Ninth Circuit Court of Appeals later reversed this decision in a somewhat contrived ruling, saying the claimant feared serious harm based on her imputed political opinion that women should not be dominated by men, a view entirely at odds with that of her persecutor. The recognition of resistance to male domination as a legitimate political opinion is commendable, but the case failed to recognize the more obvious rationale, that the claimant was persecuted due to imputed political opinions attributed to her on account of her husband, who had fled the country for political reasons (Stevens 1993, 201).

While sexual violence is clearly a pernicious violation of one’s human right to personal security *inter alia*, as asserted by the Canadian court in 1977 (Anker 2002, 140), numerous obstacles prevent its recognition as a form of persecution meriting asylum. Rationales that sexual violence is purely personal or private, is endemic to a particular culture or religion, or is a “trivial, everyday occurrence” have all been invoked to place this form of persecution beyond the reach of refugee law. These sexist views fail to recognize that rape and other forms of sexual violence are often political acts (Bahl 1997, 39). Sexual violence can also be used as a means of intimidation and persecution against an entire family, community, or ethnic group (Stevens 1993, 198). Refugee women’s claims cannot fairly and adequately be considered unless the true nature and purpose of rape is taken into account.

Past victims of sexual violence and their claim adjudicators must also overcome the hurdles of trauma and social stigmatization. Victims of sexual violence typically exhibit symptoms of post-traumatic stress, including hesitancy to speak and aversion to eye contact. In the culture of many refugees, sexual violence is also highly stigmatized, and victims may be
hesitant to speak of their experiences for fear of ostracization or worse. Finally, cultural
differences, such as many women’s lack of concrete knowledge about their male relatives, also
pose difficulties. Such behaviors may be interpreted as a lack of credibility, resulting in negative
asylum decisions (UNHCR 1991, 19; Schafer 2002, 38). Adjudicators must pay special attention
to the specific needs and patterns of communication of refugee women in order to assess their
claims adequately. While a few states have administrative guidelines for dealing with such
women, the level of sensitivity is still insufficient.

UNHCR has also recognized that FGM can constitute the basis for valid claims, and
women seeking relief from FGM have enjoyed increasing recognition of asylum claims in recent
years (Crawley 2001, 181). Aminata Diop, a Malian refugee, was denied asylum twice by
France, but allowed to remain on humanitarian grounds (Stevens 1993, 192-93). The first case
of full recognition based on fear of FGM took place in Canada in 1994. In *Farah v. Canada*, the
claimant’s membership in two particular social groups, women and minors, was given as
grounds for asylum (Crawley 2001, 181). Perhaps the most recognized case is the landmark
decision in *Matter of Kasinga* (1996), where the US BIA granted asylum to the claimant,
overturning a previous immigration court ruling. Fauziya Kasinga, a national of Togo, fled to
the United States via Germany from an impending FGM ritual after a marriage arranged by her
aunt. In this case, the BIA granted asylum to Kasinga as a member of the social group of “young
women of the Tchamba-Kusuntu Tribe who had not had FGM, as practiced by their tribe, and
who opposed the practice.” In determining the grounds, BIA gave precedence to Kasinga’s fear
of harm based on immutable traits (gender, tribal affiliation, and unmutilated status), a test
established in the oft-cited *Acosta* case. The intent to persecute and the extent to which Kasinga
first sought internal remedies were downplayed in the case. The Board also declared FGM to be
“sexual oppression,” a sweeping departure from previous decisions which tended to bow to cultural, social, and religious norms (von Sternberg 2002, 274-76). In these cases, FGM itself as well as related abuses were recognized as serious harm to women (Crawley 2001, 185), and the Convention’s social-group grounds were effectively, if not somewhat forcedly, utilized.

FGM victims and opponents may appeal to any of the enumerated grounds for refugee status, depending on individual circumstances. Some claimants (e.g., ethnic Mandinka from Guinea-Bissau and Bedouins from Israel’s Negev region) may fear FGM because of their ethnic affiliation. Others (e.g., ethnic Tchamba-Kunsuntu Muslims from Togo) may seek relief from religious requirements for FGM. Nationality may be claimed in cases where FGM is practiced across ethnic groups within one’s country of origin, and feminists and women’s rights activists can seek protection on grounds of their political opinion opposing FGM. Even women fearing persecution for opposition to social norms can be considered members of a social group under the Refugee Convention (Cissé 1997, 447). This flexibility significantly benefits women refugees. While most FGM victims are eligible for asylum due to government failure to provide protection, adjudicators should also note that FGM is often executed or ordered by quasi-public religious or community authorities, who wield more power than de jure officials (Cissé 1997, 445). Because FGM is most often inflicted upon girls and young women, many claimants may also benefit from seeking protection of their rights under the Convention on the Rights of the Child. These considerations undoubtedly strengthen women’s asylum claims, increasing their chances for actual protection.

Despite the recent relative success of FGM claims, some commentators criticize the practice of sub-categorization in determining social group grounds. This view purports by striving to define the social group as specifically as possible, the reality of women’s oppression
and widespread persecution overall is conveniently ignored (Randall 2002, 290-91). This method also appears to be an attempt, at best poorly conceived and at worst misogynistic, to limit availability of asylum as narrowly as possible. In evaluating gender-based asylum claims, quantitative victories cannot come at the expense of truly gender-sensitive and egalitarian methodology.

UNHCR guidelines encourage states to consider women who oppose social mores (a ground which is not explicitly protected under the Convention) as members of a particular social group in order to ensure coverage under the Convention (Thiele 430). Nevertheless, such women have received mixed shows of support. One famous case is that of Nada, a national of Saudi Arabia, who sought asylum in Canada. Nada, a self-professing feminist, refused to wear the veil required by Saudi law; this political protest invited jeers and rock throwing, as well as discriminatory closure from the country’s best universities. Nada argued eligibility for asylum on grounds of both social group (as a woman) and political opinion (as a feminist), but the Immigration and Refugee Board (IRB) dismissed her claim. Adding insult to injury, two male panelists suggested that Nada return home, obey the laws of Saudi Arabia, and “show consideration for the feelings of her father.” The Immigration Minister later granted Nada permission to remain in Canada on humanitarian grounds in 1992 (Stevens 1993, 196). This case highlights the inadequacy of contemporary asylum standards; Nada’s claim was denied despite established past persecution and her claims on valid asylum grounds. The problem of sexist and paternalistic attitudes in adjudication is also evident: the proceedings essentially said to Nada that as a woman, her claim is invalid, but that she was still welcome to receive the paternalistic protection of the compassionate state.
In a series of U.S. cases, the claims of four Iranian women seeking asylum from repressive laws and social norms were all denied. In *Fatin v. INS*, the claimant argued eligibility on grounds of membership in the social group of Iranian women who oppose strict laws governing women’s behavior and dress. The applicant claimed that her refusal to wear the veil was a symbol of favoring the Ayatollah Khomeini and that as a feminist her rights are subject to systematic suppression (von Sternberg 2002, 264). Her claim was denied on the reasoning that such Iranian laws generally apply to all women and thus the persecution suffered from their defiance would not differ from any other woman. *Fisher v. INS* delivered a similar ruling, stating that what the claimant feared was prosecution for violating laws of general application and not persecution in the true sense. In *Safaie v. INS*, the claimant, who was detained, expelled from university, and threatened for refusing to follow the same Iranian laws, argued both social group and political opinion grounds, but these were denied. The BIA claimed her detention was not persecutory but merely symptomatic of a repressive regime, and the Eighth Circuit Court of Appeals further added that gender cannot be considered grounds for refugee status because not all Iranian women can reasonably be presumed to experience the laws as persecutory. A similar ruling was also delivered in *Sharif v. INS* (Thiele 2000, 226-27). In both *Fatin* and *Safaie*, claimants were asked to submit evidence of past opposition to the norms in question, and “lack of zeal” proved detrimental to the case (von Sternberg 2002, 270).

Canadian case law has been more receptive, such as in *Namitabar v. MEI* and *Fathi-Rad v. SSC*. In both cases, laws requiring donning the veil were ruled laws of general application, but for which the punishment of their violation was disproportionately severe (von Sternberg 2002, 261). *Pour v. MCI*, however, established that not all women who oppose such laws automatically qualify for asylum, and they may be called upon to supply evidence of active (not
merely passive) opposition in the past (263). Arguably, these rulings, requiring a non-specifically high degree of active opposition to repressive social norms and punishing claimants for a “lack of zeal,” fail to appreciate the precarious social situation of many women living in repressive regimes or societies and the very real possibility of dangerous or life-threatening consequences of resistance (272). Canadian case law also generally recognizes claims based on opposition to forced marriage (261-62). These cases highlight the insufficiency of existing Convention grounds, as they are still subject to discriminatory application, justified by doctrines such as that of “laws of general application.”

Case law also seems to be relatively more receptive of women in Muslim countries who lack the protection of a male relative. As early as 1987, Canada’s Immigration Appeal Board (IAB) recognized in *Incirciyian v. Minister of Employment and Discrimination* that “single women living in a Moslem country without the protection of a male relative (father, brother, husband, etc.)” represent a particular social group under the Convention definition. The interpretation rests upon the combination of immutable characteristics: an applicant’s gender (which she cannot change) and an applicant’s absence of a male relative (which she cannot control). This ruling was upheld by subsequent decisions (von Sternberg 2002, 260-61). Overall, the reception of claims based on women’s opposition to social norms is mixed at best, and the case law has imposed undue burdens of proof and zeal upon claimants.

While awareness and recognition of gender-based claims is rising, the above cases highlight current refugee law’s inherent dangers and failings in providing equal protection to refugee women.

**Conclusions**
While gender-related claims are meeting with increasing success, inconsistencies still exist. One may conclude from the above analysis that the Refugee Convention must be amended, but there are in fact several arguments against such extreme action. Widespread agreement exists that reopening the Convention for review may prove detrimental to all refugees, including women, under the currently restrictive international attitude towards immigrants (Macklin 1995, 256). The developed European powers (e.g., Germany, France, United Kingdom, and Sweden), previously considered welcoming of refugees, have recently increased measures to exclude refugees in response to greater and greater demands for asylum and to rising right-wing political forces. In specific regards to women, governments and opponents of high rates of refugee acceptance often cite the “floodgate” argument—offer women asylum, and women refugees will overwhelm the system, but this argument must be discredited. Due to “a variety of psychological, cultural, and financial impediments,” most women are unable to travel even to a neighboring country to seek asylum (Macklin 1995, 220-21).

One rationale against treaty amendment is that such revision is not, or at least should not be, necessary. If states make a genuine, “good faith” effort to implement the Refugee Convention according to its object and purpose, gender disparities in protection will not result (Kelson 1997). More generally, the failure of international law to protect refugee women is attributable to patriarchal ideologies in both refugee producing and receiving nations. The formulation and interpretation of law, even so-called laws of general application, are highly gendered, resulting in disproportionate benefits to men and women. In particular, refugee claim adjudicators have failed to recognize the socio-political dimensions of gender-specific persecution. This is based on problematic gendered conceptualizations of the public/private dichotomy, which value and thus protect men’s public activities while ignoring or devaluing
women’s private (i.e., domestic) activities (Crawley 2001, 18-21). Thus, feminist thinking implies that the states’ failure to adequately protect women refugees is both a massive failure to implement the Convention in good faith according to its object and purpose and a violation of the Treaty on Treaties. The most powerful, and difficult, means of empowering refugees and all women is to confront patriarchal thinking in all forms.

While this line of argument is sound, the conclusion against Convention amendment is flawed, as it expects refugee claim adjudicators to become gender-aware while the law remains “gender-blind,” when in fact it is not gender-blind, but conceived within a male-dominant paradigm. This paradigm incorporates a dual public/private dichotomy, which separates the international sphere from the national sphere, and the public sphere from the private or domestic sphere. In the first instance, happenings in the national sphere are generally guarded under claims of sovereignty. Before the advent of international human rights laws, states enjoyed near-absolute discretion regarding the treatment of their citizens, and states continue to resist the intervention via exercise of international human rights norms. Similarly, theories of cultural relativism propose that cultures ought to enjoy freedom from outside criticism and intervention, and some opponents of human rights utilize these arguments to justify the continued allowance of women’s systematic social oppression. In the second instance, interpersonal and domestic household affairs, typically conceived as the only natural domain of women, are considered beyond the reach of public arm. By contrast, men’s activities associated with the public sphere are afforded reverence and validity (but are also subject to scrutiny). Meanwhile, men enjoy impunity for abuses exercised within their own families or other private domains. The result is that grounds under the Refugee Convention undoubtedly privilege typically male spheres of activity, including politics, while ignoring female-specific experiences and forms of persecution.
such as implication in politics by association, egregious limitations on their freedom, and
domestic abuse (Stevens 1993, 206). This background presents a strong case for revising the
Refugee Convention.

Another pragmatic consideration is the current refugee definition, formulated with the
aftermath of World War II specifically in mind, is overly vague and outmoded, requiring
cumbersome and sometimes incredulous interpretation to provide adequate consideration of
gender-based claims. Refashioning the refugee definition, particularly grounds for asylum,
according to the realities of today’s refugees, as well as to highly-advanced international human
rights laws, would undoubtedly benefit refugees and ease the burden on adjudicators.

Fears of negative impacts on refugees, however, are not misplaced. Any attempt to
renegotiate the Refugee Convention must carefully consider the international political climate
and maintain focus on the necessarily humanitarian nature of refugee protection.

Despite pragmatic and principled objections to amending the Refugee Convention,
existing guidelines and Convention grounds for gender-based claims are still insufficient, and the
Convention would benefit from revision. Gender discrimination is an unfortunate reality that
must be addressed explicitly and aggressively. To ensure universal equal protection for refugee
women, refugee law reform must first occur on the international treaty level; binding all
signatory states equally. Ideally, this would entail three specific measures: add gender to the
Article 3 on non-discrimination; add gender as a sixth Convention ground; and combat
widespread sexism and male-bias in refugee law and adjudication, including promotion of
guidelines specifically recognizing gender-related forms of persecution.

In today’s paranoid, xenophobic international climate, growing numbers of refugees and
asylum seekers, men and women alike, are encountering increased resistance. But amidst
rampant debate about security with the heightened threat of terrorism, states must not forget their humanitarian duty. This duty unequivocally extends to refugee women, who long have been disenfranchised by refugee recognition systems tainted by sexism. Through recognition of women refugees and gender-related claims, states are offered additional incentive to take seriously women’s rights within their own borders. The challenge gender poses to asylum claims offers a unique opportunity to defend and promote equality that must seized.
Bibliography


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Ferguson v. City of Charleston: Protecting the Rights of Pregnant Women

In 1989, the rising number of pregnant cocaine users worried many medical professionals as well as the general public. The issue of crack babies “assumed a place in the political spotlight.”\(^1\) In order to prevent the number of pregnant users from increasing any further, the Medical University of South Carolina (MUSC) implemented a program that would provide for the prosecution of pregnant women testing positive for cocaine. This policy, and its implementation, is the basis for the United States Supreme Court case of Ferguson v. City of Charleston. The petitioners claimed that the policy was a violation of the Fourth Amendment. The Supreme Court decision, in finding for Ferguson, et al., further protected the doctor-patient privilege. By upholding the doctor-patient privilege, the Supreme Court ensured that medical tests will not be given to police in order to incriminate pregnant women for cocaine use during their pregnancy.

**Court Summary**

Crystal M. Ferguson, et al., Petitioners v. City of Charleston, et al. came to the United States Supreme Court October 4, 2000 after the United States District Court and the United States Court of Appeals for the Fourth Circuit found for the respondents. The petitioners filed their suit based on “inter alia, the theory that warrantless and nonconsensual drug tests conducted for criminal investigatory purposes were

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unconstitutional searches.”\(^2\) The Supreme Court granted certiorari on the issue of “special needs.” Because the previous court decisions were decided on the issue of consent and not special needs, the Supreme Court only decided the issue of special needs in reference to the Fourth Amendment. Due to the previous rulings that “viewed the case as one involving MUSC’s right to conduct searches without warrants or probable cause, [the Supreme] Court must assume for purposes of decision that the tests were performed without the patients’ informed consent.”\(^3\) Since the Supreme Court could not decide on the issue of consent, they referred the decision back to the U.S. Court of Appeals for the Fourth Circuit. On March 21, 2001, the U.S. Supreme Court found for the petitioners in a five-four opinion.

**Case Summary**

The case of *Ferguson v. Charleston* “was the first case in which the Supreme Court explicitly recognized Fourth Amendment rights in the context of pregnant women who are addicted to drugs.”\(^4\) When the case was first brought to the United States District Court, the petitioners based their suit on multiple theories, but they focused on “the claim that warrantless and nonconsensual drug tests conducted for criminal investigatory purposes were unconstitutional searches.”\(^5\) The U.S. District Court judge informed the jury that they should find for “petitioners unless the jury found consent. The jury found for respondents.”\(^6\) Because the petitioners felt that the jury did not have enough evidence to prove that there was consent, they appealed the verdict. When the case was heard, “the

\(^3\) Ferguson v. City of Charleston. (2001). 121 S. Ct. 1281. pg. 3.
Court of Appeals for the Fourth Circuit affirmed [the previous decision], but [did so] without reaching the question of consent.”

However, the Court of Appeals’ decision did disagree with part of the previous ruling, which stated that “the majority of the appellate panel held that the searches were reasonable as a matter of law under our line of cases recognizing that ‘special needs’ may, in certain exceptional circumstances, justify a search policy designed to serve non-law enforcement ends.” So when the U.S. Supreme Court granted certiorari, they did so only to “review the appellate court’s holding on the ‘special needs’ issue.”

After hearing the respondents’ testimony on the validity of “special needs,” the Supreme Court reversed and remanded the prior court decisions. Justice Stevens, who delivered the opinion of the court, stated that the “urine tests were ‘searches’ within meaning of Fourth Amendment, and […] reporting of positive test results to police […] were unreasonable searches absent patients’ consent, in view of policy’s law enforcement purpose.”

Because the police were so involved in the creation and implementation of the policy, the searches were not without a specific legal purpose. The policy was “aimed at punishing rather than empowering women who use drugs during their pregnancy.”

**Petitioners Argument**

The ten women who brought the suit against the City of Charleston, et al., did so because they felt their Fourth Amendment rights had been violated. The Fourth Amendment states that “the right of the people to be secure in their persons, houses,
papers and effects against unreasonable search and seizure, shall not be violated.”¹² The petitioners felt that their “persons” had been violated, since their medical tests had been given to the police without their consent. This violated “a realm of personal liberty which the government may not enter.”¹³

The petitioners claimed that because they had not given consent to their doctor and other medical professionals to release their medical results, their arrests were a violation of their Fourth Amendment right. When the case came before the Supreme Court, the issue of whether or not “special needs” applied was based on the health of the fetus. Many people, including the medical personnel at MUSC, believe that “punitive actions against pregnant women [are necessary] to protect the unborn child,” thereby making it acceptable to invoke the special needs doctrine.¹⁴ The petitioners believe that this was not the reason for the policy, because “the policy made no mention of any change in the prenatal care of such patients, nor did it prescribe any special treatment for the newborns.”¹⁵ Instead, the purpose of the policy “was indistinguishable from general interest in crime control and not a ‘special need’ which would overcome general prohibition against suspicionless, warrantless searches.”¹⁶ This decision has made clear that even when a pregnant woman is addicted to illegal substances, her status as a constitutionally protected individual is not to be compromised through drug testing without probable cause or her consent. According to Judge Michael McVey of the Superior Court of Maricopa County, “there is a distinction between taking blood or urine

for health purposes or for the police. If it is for the police, the taking of the urine as
evidence requires a search warrant and a reason for probable cause.”17 The government of
this country is not “permitted to police its pregnant citizens through their umbilical
cord.”18

**Respondents Argument**

In *Ferguson v. Charleston*, the respondents felt they were protecting the fetuses of
drug addicted pregnant women. While the petitioners felt that the searches were a
violation of the Fourth Amendment, the respondents felt that the searches were legal
under the special needs doctrine because they were trying to “get the women in question
into substance abuse treatment and off drugs.”19 Without the M-7 policy that was created
in conjunction with the police department, MUSC would not be able to reduce the
increasing number of pregnant cocaine addicts. According to Robert Hood, the attorney
for the City of Charleston and the hospital, “the ruling endangers laws requiring public
health care workers, as well as a whole spectrum of others such as social workers and
teachers, to report evidence of suspected crimes such as child abuse or domestic
violence.”20 The hospital and police felt that even though they were violating the doctor-
patient privacy privilege, they were doing so in order to protect the safety of the fetus,
designated as a “separate patient.”21 By separating the fetus from the mother, the hospital
claimed they were within legal boundaries because they were preventing child abuse.

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18 Samantha Weyrauch. (Summer 2002). Inside the womb: interpreting the Ferguson case. Retrieved
20 Gina Holland. (June 16, 2003). Supreme Court dodges second look at drug testing in pregnant women.
21 Katherine Beckett. (Winter 1995). Fetal rights and ‘crack moms’: pregnant women in the war on drugs.
Political and Moral Assumptions of Petitioners

Citizens of the United States expect to have their Constitutional rights upheld, so when the petitioners in this case went to MUSC they believed they would be treated in the same manner as the rest of the hospital’s patients. Instead of being treated like patients though, the petitioners were treated like criminals. Their privacy was violated and they had no opportunity to give consent to the police. Even though the women knew that their addiction could harm the fetus, they believed that their right to privacy would be upheld. If this had not been a common assumption, many women may not have sought medical treatment at all for fear of being arrested and prosecuted: “Representatives of a variety of well-respected medical, health, women’s, and children’s organizations have voiced their opposition to [legislation defining pregnant women’s use of drugs as a crime] on the grounds that it would harm both women and – by deterring pregnant women from seeking prenatal care and drug treatment – children. In the face of such opposition, conservative legislators have not successfully mobilized sufficient support for the criminalization of drug use while pregnant.”

It seemed to the petitioners that their lack of privacy with their doctor was unconstitutional.

Political and Moral Assumptions of Respondents

In the 1980’s, “images of small, undernourished infants described as ‘crack babies’ abounded. The impact of these depictions was intensified by media claims that the damage caused by fetal exposure to drugs was both extreme and permanent.” The social forces present during this time shaped the campaign to punish pregnant drug users:

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The recent campaign against pregnant women who use drugs, then, reflects the coincidence of the punitive orientation of the ‘War on Drugs’ and the fetal rights discourse: the construction of drug use as an immoral choice reinforces the emerging image of the negligent mother whose willingness to support her fetus must be enforced by medical and legal professionals. The punitive nature of the response to the problem of prenatal drug use and the exclusive focus on the danger that pregnant women pose to fetuses suggest that punishing those who deviate from idealized maternal norms is a crucial component of this campaign [...] and African-American women are particularly likely to be singled out for these violations.24

The assumption that pregnant drug users needed to be punished gave the M-7 policy political and moral support.

But the assumption was not based on facts, because:

the prevalence of illicit drug use did not increase during the 1980s (National Institute on Drug Abuse, 1990). However, it was during this period that the practice of smoking cocaine, formerly restricted to the middle and upper classes, spread into the inner city with the increased availability of a new, less expensive form of smokable cocaine called crack. The intensification of punitive anti-drug rhetoric coincided with this spread of cocaine smoking to the poor and working classes (Reinarman and Levine, 1989), as well as with the spread of the fetal rights ideology. These discourses have shaped the construction and representation of ‘crack babies’ as a social problem.25

Before cocaine spread to the lower class, the issue of pregnant cocaine addicts did not garner much attention. But once the “war on drugs” began, it became morally abhorrent to view pregnant addicts as fit mothers. Instead, their addiction began to be “defined as a criminal rather than a public-health or socio-economic problem.”26 Conservative individuals began to preach about how these pregnant drug addicts were the anti-mothers; they began to impose “unarticulated assumptions [that drew] upon a range of moral and social institutions about how mothers should behave and what they should sacrifice for

their children.” Instead of trying to help the pregnant women beat their addiction, prosecuting the women became the moral and noble thing to do.

**Policy Implications for Petitioners**

In many of the previous Supreme Court rulings dealing with the constitutionality of drug tests, the Supreme Court used a balancing test in order to “weigh the intrusion on the individual’s privacy interest against the ‘special needs’ that supported the program. [But] the invasion of privacy [in the Ferguson v. Charleston case] is far more substantial than in those cases.” When women go to the hospital for prenatal care, they do so thinking their medical records will be private; it is the foundation for the doctor-patient privilege. Drug testing has, and always will be, a “delicate [question] of personal liberty versus societal needs and the doctor-patient relationship [remains] difficult to deal with. A sensible person must conclude that they should be individualized with judgment and restraint on a case-by-case basis.” If the policy had been upheld as constitutional, it would have hindered the supposed goals of the medical profession. Instead of helping the cause, “the threat of prosecution or the loss of their child mainly functions to deter such women from seeking whatever medical care is available to them. Punishment after the fact does not prevent whatever harm is caused to a fetus by its mother’s use of drugs, and it appears to actually increase the likelihood of harm by channeling resources away from health care programs and by deterring women from seeking medical attention.”

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The policy has also been viewed by many critics to be discriminatory “on the basis of both gender and race.”[^31] Instead of focusing on the numerous other conditions affecting fetal health, the “prosecution of women for prenatal conduct [created] a gender-specific system of punishment [obscuring] the fact that male behavior, socio-economic conditions, and environmental pollutants [could also be attributed to] fetal health.”[^32] If the claim that the medical profession and law enforcement officers were only trying to protect the health of the fetus was true, then there would have been policies regarding the other conditions that typically affect the health of the fetus. This was not the case, because the “central feature of [the] policy was [the] threat of prosecution in order to coerce patients into treatment.”[^33] The policy was not only discriminating based on gender, but also on the race of the patient: “Although the Policy on its face applied to all hospital maternity patients, it was enforced only at the high-risk clinic in the obstetrics/gynecology department and not in the family practice department or other hospital clinics. (54) Of the thirty women ultimately arrested under the Policy, twenty-nine were African-American.”[^34]

This policy also minimized options available to drug-addicted pregnant women seeking prenatal care. There are:

public drug treatment programs [that] are an option for female addicts, but it is not uncommon for the programs to deny or expel the women once they are found to be pregnant. [In] the case of pregnant women drug addicts, the laws of our country aim to uncover substance abuse not for the purpose of prevention through

Drug addicts are not staying away from medical facilities because they do not care for the well-being of their fetus, but instead because they are worried about having their baby taken away once it is discovered they are addicts. This fear may be warranted. In some states, such as Arizona, “if the mom and baby have cocaine in their system after birth, the hospital has an obligation to tell the police. It is then routine practice to turn over the child to Child Protective Services.”

**Implications of Supreme Court ruling for Respondents and related groups**

When the U.S. Supreme Court reversed the previous court decisions, the ruling impacted the way that MUSC could handle “crack babies.” The previous rulings allowed for the perception that the searches done by the hospital were legal and they followed the guidelines set by the Constitution. It was no longer feasible for the hospital and police to “expand departmental involvement in referral of drug abusers to appropriate public and private treatment programs.” Now, instead of being able to claim special need in order to incriminate the pregnant women the hospital must wait until the birth of the child to involve Child Protective Services.

The ruling also brought “into focus the issue of drug screening in America […] It [forced] health care providers and those advising them to look behind the rhetoric and re-examine the laws governing performing drug tests and the inherent consent issues related to the tests.” Drug testing was no longer viewed as routine because the outcome had to

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undergo more intense scrutiny to make sure it passed the regulations set forth under the Fourth Amendment.

**The Privacy Issue**

*Ferguson v. Charleston* not only helped to determine the limits of the special need doctrine, it further examined the issue of privacy rights, an important part of client relationships in the medical and legal professions. According to attorney Richard Miller, “when a pregnant patient who is addicted to drugs visits her doctor, she should be able to tell the doctor without the fear of being arrested. The same is true with the attorney-client privilege. If a woman goes to her lawyer and tells him she abuses her child, the client has the right of privacy knowing her lawyer is not able to tell the police unless she gives him consent.”\(^{39}\) The policy in question in the *Ferguson v. Charleston* case did not follow these well known privacy rights. Instead, the medical professionals were obtaining “such evidence from their patients for the specific purpose of incriminating those patients.”\(^{40}\) In order to legally provide the police with the incriminating evidence, the doctors and nurses from MUSC needed consent from their patients.

**Impact on future rulings**

The decision in this case provides medical and legal professionals a guideline for future cases involving the Fourth Amendment. It has now been made clear that if police want to use medical tests as evidence, they need to receive consent from the patient in question. Even if police think their actions are warranted because of special need, it is quite likely that they need consent in order to proceed with their litigation. Now, if police “obtain evidence of maternity patients’ cocaine use, [it must be done with the patients’

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consent of the procedure. It is now evident that the doctor-patient privilege should be respected, or else there is legal reason to file suit.

The impact of this ruling is visible in today’s criminal court system. According to Judge McVey, he has “never known of a similar policy that was used solely to arrest pregnant drug addicts […] In fact, the ruling really has not affected [him] at all, because there were no prior instances similar to this case.” Very few instances of police involvement in the medical process of handling pregnant cocaine users have occurred prior to, and since, Ferguson v. Charleston. This is partially due to the strong force of women’s rights groups in protecting the rights of pregnant women. However, the involvement of women’s rights groups does not mean that “crack babies” are staying with their mothers. In fact, it is very common for babies born with cocaine in their system to be removed from their mothers. This indicates that child welfare is still of utmost importance even though the mothers now have some form of protection of their privacy with their doctor.

My views

I believe that the decision in Ferguson v. Charleston serves to protect the rights of both the mother and unborn child. Before the ruling, drug testing was based on whether or not a patient met “one or more of nine criteria [which were as follows:] 1. No prenatal care, 2. Late prenatal care after 24 weeks gestation, 3. Incomplete prenatal care, 4. Abruptio placentae, 5. Intrauterine fetal death, 6. Preterm labor ‘of no obvious cause’, 7. IUGR (intrauterine growth retardation) ‘of no obvious cause’, 8. Previously known drug

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or alcohol abuse, and 9. Unexplained congenital anomalies.\textsuperscript{43} The majority of these criteria are not necessarily caused by drug use, but it was considered by MUSC to be a reputable way to predict which patient was a drug addict. I do not understand how a medical facility could be so naïve about how its policy would affect patients. If a hospital continually arrests its pregnant patients for drug use, it would become clear to everyone that the hospital making the arrests does not respect the privacy of its patients. Many pregnant women with addictions would then not go to this hospital for care, thereby further jeopardizing the health of their fetus.

I agree with Keith Dugger in believing that this “outcome was not surprising, given the constitutional implications at issue.”\textsuperscript{44} After reading through the case, it was apparent that the searches done by the police and hospital went against the Fourth Amendment. In my belief, violating someone’s privacy in order to prosecute him or her should never be considered Constitutional. It is even clearer to me that this type of action is not permissible because when someone goes to the hospital or the doctor’s office, they are guaranteed complete privacy in their medical history. Even if the break of trust between doctor and patient helped the health of the fetus, it would still be violating that individual’s rights. There are reasons for warrants and search orders, but there is no excuse for unreasonable search and seizure.

**Summary**

Ferguson v. Charleston was the first case bringing to light the issue of pregnant drug addicts and the proper methods required for handling their pregnancies. The resulting Supreme Court decision provided that a woman would be protected from

\textsuperscript{43} Ferguson v. City of Charleston. (2001). 121 S. Ct. 1281. pg. 5.
unlawful search and seizure even if she was a pregnant cocaine user. This protection enabled all women the right to keep medical visits with their doctor private.

This Supreme Court decision provided that searches can only be undertaken if there is consent. Without consent, there must be a special need requiring the necessity of the search. This ruling showed that the police cannot become involved merely because they think their help will keep women from using drugs while pregnant. This point is especially valid because, as the Supreme Court found, their main goal in obtaining the urine results was to prosecute the women who tested positive.\(^{45}\) If the hospital and police really wanted to help increase the health of the patient and her fetus, they would have asked her permission in turning over the test results. Without asking for consent, the hospital and police were stealing private information and using it for public gain.

The opinion of the Supreme Court validates and secures the continuation of the doctor-patient privilege. Without this ruling, patients would never know if their doctor was using their medical records and history in order to incriminate and prosecute them. Now, doctors are required to keep their patient’s information confidential, or else they run the risk of being sued. Although the Supreme Court did not decide the issue of consent, they did find that MUSC violated the Fourth Amendment. This decision ensured pregnant women full protection of their Constitutional rights in the hospital.

Bibliography


Neubauer, David W. and Stephan S. Meinhold. Judicial Process: Law, Courts, and

