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## Isn't "Persecution" Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender- Based Persecution

Crystal Doyle

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# Isn't "Persecution" Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution

Crystal Doyle\*

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\* Washington and Lee University School of Law, J.D. Candidate, 2009; Johns Hopkins University, B.A. 2004. I would like to thank Professor Mark Drumbl for his insight and advice throughout the process of researching and writing this note and Saralyn Cohen for her friendship and guidance and for first introducing me to asylum law and setting off the initial sparks of inquiry into this area.

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### *I. Introduction*

Over the past two decades, human rights advocates, legal practitioners, and academic scholars have criticized roundly both American and foreign legal systems for their failure to provide sufficient asylum protection to victims of gender-based persecution. These criticisms have resulted in a variety of legislative and regulatory efforts in at least a dozen nations to make asylum available more readily to applicants claiming to have suffered gender-based persecution. As this Note will discuss in greater detail, most of these efforts have focused on incorporating gender-based persecution into the "particular social group" category of the widely-adopted "Refugee Definition," which appears in the Refugee Convention of 1951.

This Note will argue two main points. Firstly, that, though laudable, existing—and proposed—efforts to incorporate gender-based persecution

into the existing definitional framework are innately flawed and that alternative means are necessary to achieve consistent, straightforward asylum protection to victims of gender-based persecution.<sup>1</sup> Secondly, this Note will propose that the solution to this problem may be an amended definition of "refugee" that removes the requirement of a causal nexus between the alleged persecution and one of the five current bases of asylum: race, religion, nationality, membership in a particular social group, or political opinion.<sup>2</sup> The new definition would only require that persecution be proven, independent of any required reason for the persecution.<sup>3</sup> Furthermore, this Note will argue that such a definition would not be overly broad and open up the dreaded "floodgates" of immigration.<sup>4</sup>

Finally, it should be noted that this Note will consider the international context of developments in gender-based asylum, but when it speaks of a "solution," it is ultimately concerned with a solution suitable for implementation in the United States. It should also be noted that this Note is mainly concerned with persecution of biological females who live their lives as women and are persecuted because they are females/women.<sup>5</sup> Therefore, unless stated otherwise, all mentions of "women" and "females" should be understood to mean biological females who have adopted the gender role of women.

Part II of this Note will review briefly the development of asylum law and the definition of refugee, with a focus on Europe and the United States, up through the enactment of the Refugee Convention of 1951 and the amendments of the 1967 Protocol. Part III of this Note will discuss why the traditional framework must be changed to fit the underlying political purpose of asylum. Part IV then will discuss the international community's recognition of the need for change and the steps it has taken to provide greater recognition to gender-based asylum claims. Part V will review the history of American gender-based asylum law from the enactment of the

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1. See *infra* Part VII.

2. See *infra* Part VIII.

3. See *id.*

4. See *id.*

5. Females who live as women (in the sense of choosing to be women as opposed to choosing to abide by all aspects of traditional women's roles in their society) face more difficulty when applying for asylum because of gender-based persecution than females who choose to live as men or males who choose to live as women. A transgendered individual, such as a female choosing the gender role of a man, conceptually falls far more neatly into the "particular social group" category of asylum than a female living as a woman. Therefore, because the issues facing transgendered individuals and the issues facing those who adopt traditional gender roles are different, it should be noted that this Note will focus on the task of finding a solution for gender-based persecution of females living as women.

Refugee Act of 1980 to the present day. Part VI will cover notable developments in gender-based asylum law in various common law and civil law foreign nations. Part VII will critique the solutions that have been proposed—some implemented, some not—by various nations and the scholarly community. Part VIII will propose the elimination of the five grounds of asylum as a means of better protecting victims of gender-based persecution and, hence, fulfilling the political purpose of asylum. This Part will explain that, though the amended statute would not mention gender explicitly, it would eliminate the difficulties inherent in the current statute—and certain proposed solutions—that require an applicant for gender-based asylum to prove her persecutor's intent to persecute her "on account of" one of the five grounds. This section will discuss the pros and cons of such a solution, as well as the precise provisions that would need to be included in the new statutory scheme to make it workable. This Note then will conclude with a call for further discussion on rethinking our current asylum law framework.

## *II. The Development of Asylum Law and the Refugee Definition*

The concepts of "asylum" and "refugee" are ancient, global,<sup>6</sup> and seem to have grown and changed throughout history from a very general notion of a place of safety to a special legal status based on narrow criteria. Secular and non-secular literature of ancient India, Rome, Greece, and of the ancient Hebrews demonstrates that these peoples espoused the concept of asylum several thousand years ago.<sup>7</sup> Later, between 500 and 1500 C.E.,

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6. See UNHCR, *THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION* 33 (1993) (stating that the concept of asylum has been "in existence for at least 3,500 years and is found, in one form or another, in the texts and traditions of many different ancient societies").

7. See NAGENDRA SINGH, *INDIA AND INTERNATIONAL LAW: ANCIENT & MEDIEVAL*, VOL. 1, at 48 (1973) (describing that, in ancient India, "[b]oth secular and sacred literature abound in legends which establish that it was the sacred duty of the king whose shelter any individual took, to protect the refugee or *saranagat* at all times"); W. GUNTHER PLAUT, *ASYLUM: A MORAL DILEMMA* 11 (1995) (describing Greek, Roman, Hebrew, Egyptian and Aztec civilizations' recognition of the concept of asylum); *Numbers* 35:11 ("Then ye shall appoint you cities to be cities of refuge for you; that the slayer may flee thither, which killeth any person at unawares."); PLAUT, at 17 (1995) (discussing the frequent appearance of the command to protect the rights of strangers in the Torah); see also *Numbers* 35:14 ("Ye shall give three cities on this side Jordan, and three cities shall ye give in the land of Canaan, which shall be cities of refuge."); *Joshua* 20:2 ("Speak to the children of Israel, saying, Appoint out for you cities of refuge, whereof I spake unto you by the hand of Moses."); 1 *Chronicles* 6:67 ("And they gave unto them, of the cities of refuge, Shechem in mount

we see the inclusion of the concept of protecting strangers in the text of the Muslim Qur'an,<sup>8</sup> evidence of the notion of "refuge" during the height of the Aztec civilization,<sup>9</sup> and the development of "Church asylum" amongst followers of the Christian religious tradition.<sup>10</sup>

There is also some evidence of the path the ideas of "refugee" and "asylum" have taken in the history of the word "asylum" itself, which comes to us from Latin and Greek through Old French and Middle English.<sup>11</sup> Though we now often think of "asylum" in terms of individuals seeking safety from political persecution, the ancient languages that handed the term down to us defined it more generally as a place of protection and refuge.<sup>12</sup> Scholars have theorized that the transformation of "refugee" and "asylum" in the Western World into terms related to the official protection of foreigners did not arise until the sixteenth and seventeenth centuries when the words were used to describe French Huguenots seeking protection in England.<sup>13</sup> "Azilum," a precursor of today's "asylum," appears to have been used in the newly-created United States in 1793 by loyalists to the French Crown who fled a perceived risk of persecution in post-revolution France and sought refuge in northern Pennsylvania.<sup>14</sup> From this history, it seems that during the Early Modern Period, the idea of "asylum" transformed from a concept of general protection to a more narrow remedy

Ephraim with her suburbs; they gave also Gezer with her suburbs.").

8. See *Qur'an* 5:32 (emphasizing the duty to protect strangers and stating that "[w]hoever saves a life it is as though he had saved the lives of all human kind").

9. See PLAUT, *supra* note 7, at 11 (describing world civilizations, including the Aztec, that recognized the concept of asylum).

10. See *id.* at 19 (citing the CODEX JURIS CANONICI) (giving "[e]very Church . . . the privilege of being a place of asylum, so that the law breakers who flee thither may not be surrendered without the agreement of the priest or church authority unless there is overriding reason to do so"). Church asylum, though still officially recognized by the Roman Catholic Church, was most widely used from 400–1400 C.E. *Id.*

11. See ELECTRONIC MIDDLE ENGLISH DICTIONARY (2001), <http://quod.lib.umich.edu/m/med> (last visited Apr. 13, 2008) (explaining that the Old French term for asylum was derived from Latin and Greek words referring to a place of sanctuary); see also MERRIAM-WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/asylum> (last visited Apr. 13, 2008) (explaining that the Latin term "asylum" was derived from the Greek term "asylon," meaning an "inviolable place").

12. See *supra* note 11 and accompanying text.

13. ARISTIDE ZOLBERG ET AL., ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISES IN THE DEVELOPING WORLD 5–11 (1989); see also PLAUT, *supra* note 7, at 40–43 (describing the plight of the Huguenots).

14. ELSIE MURRAY AZILUM: FRENCH REFUGEE VILLAGE OF THE SUSQUEHANNA 1793, 6 n.1 (1940).

for individuals facing persecution based on mainly religious and political beliefs.<sup>15</sup>

The twentieth century brought with it a more expansive definition of "refugee." Before 1938, though refugees were often described according to nationality or ethnicity, this description was only shorthand for a category of persons who had been persecuted for traditionally-recognized political or religious reasons. For example, individuals fleeing the Bolshevik Revolution in Russia were at odds with their government for political reasons, but were described as "[a]ny person of Russian origin who does not enjoy or who no longer enjoys the protection of the USSR."<sup>16</sup> There was no language requiring persecution on account of political opinion because one's political opinion was assumed based on the national or ethnic category to which one belonged.

This blanket use of general categories ended in 1938 with the creation of the Intergovernmental Committee on Refugees (ICR) at the conclusion of the Evian Conference.<sup>17</sup> The ICR's main purpose was to aid Germans and Austrians in emigrating to other countries, but its mandate did not require it to aid all German and Austrian individuals. Rather, only "[p]ersons . . . who must emigrate on account of their political opinions, religious beliefs [or] racial origin" were eligible for aid.<sup>18</sup> After World War II, the ICR definition was echoed in the constitution of the International Refugee Organization (IRO), the first refugee aid organization to operate under the newly-formed United Nations.<sup>19</sup> Among other provisions, the IRO allowed for individuals to object to repatriation on the basis of "persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions."<sup>20</sup> This language closely mirrored the definition of refugee that would later appear in the Refugee

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15. See PLAUT, *supra* note 7, at 38–39 (describing importance of politics and religion in pre-twentieth century Europe and America).

16. Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 806 (1998) (citing Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 89 L.N.T.S. 47, 49 (1926)).

17. *Id.*

18. *Id.* (citing James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920–1950*, 33 INT'L & COMP. L.Q. 348, 370–71 (1984)).

19. See *id.* at 807 (stating the definition of "refugee" in the constitution of the International Refugee Organization).

20. *Id.* (citing Constitution of the International Refugee Organization, Annex I, pt. I, § C(1)(a)(i), 18 U.N.T.S. 283).

Convention of 1951, save for the absence of the "particular social group" ground.<sup>21</sup>

In the years after World War II leading up to the enactment of the Refugee Convention of 1951, member states of the United Nations were increasingly concerned by the mass population movements that had been set into effect by Nazi Germany, and the failure of those movements to disperse over time. In the summer of 1951, those nations voted to enact the United Nations Convention Relating to the Status of Refugees which provided a legal model for signatory nations wishing to provide asylum protection to individuals who faced persecution.<sup>22</sup> The Refugee Convention defined a refugee as someone who

owing to wellfounded 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.<sup>23</sup>

Within this definition, one easily recognizes the traditional Early Modern Period asylum grounds of religious and political persecution,<sup>24</sup> as well as the bases of race and nationality, which appeared in pre-World War II international texts.<sup>25</sup> As mentioned previously, though, most efforts to bring greater recognition to gender-based persecution claims involve some interpretation of the one new asylum ground that appears in the Refugee Convention's definition: membership in a particular social group.<sup>26</sup> Our

21. See generally Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150, 152 [hereinafter Refugee Convention].

22. In the original text of the Refugee Convention, Article 1(A)(2) also included a requirement that persecution arise "[a]s a result of events occurring before 1 January 1951" and Article 1(B)(1) allowed states to restrict the interpretation of "events" under Article 1(A)(2) to those events occurring in Europe, if they so desired. Refugee Convention, at art. 1. These temporal and geographic limitations on the refugee definition in the 1951 Convention were founded on a compromise based on some member nations' fear of the unknown. They were hesitant to "sign a blank check" when they did not know how many individuals would qualify for asylum. See Steinbock, *supra* note 16, at 810 n.340. These restrictions were eliminated, though, by the United Nations Protocol Relating to the Status of Refugees of 1967. See Protocol Relating to the Status of Refugees art. I(2), Jan. 31, 1967, 606 U.N.T.S. 267, 268 [hereinafter 1967 Protocol].

23. Refugee Convention, *supra* note 21, at art. 1(A)(2).

24. See *supra* notes 13–15 and accompanying text.

25. See *supra* notes 16–20 and accompanying text.

26. See *infra* Parts IV–VI.



search for an understanding of gender-based persecution's place within the convention framework should, therefore, begin with a look into the history of the drafting of the refugee definition and, especially, the particular social group ground.

The refugee definition received great attention during the drafting period. In 1949, the Ad Hoc Committee on Statelessness and Related Problems (The Committee), which was charged with considering the desirability of a Refugee Convention, suggested that the definition of refugee be based on a "well-founded fear of being a victim of persecution for reasons of race, religion, nationality or political opinion."<sup>27</sup> The Committee chose this definition in preference to broader definitions, such as France's proposal to define a refugee as one

who seeks asylum or has been granted asylum in any country under the conditions specified in Article 14 of the Universal Declaration of Human Rights; or, who has left his country of origin and refuses to return thereto owing to a justifiable fear of persecution or because he has been unable to obtain from that country permission to return.<sup>28</sup>

Such broad definitions were not in line with The Committee's intention that the definition "state unambiguously to whom the convention would apply."<sup>29</sup> The U.S. representative also called for "clearly enumerated"<sup>30</sup> categories, so as to avoid later disagreement among member

27. Steinbock, *supra* note 16, at 809 (citing Report of the Ad Hoc Committee on Statelessness and Related Problems II, U.N. ESCOR, 10th Sess., 1618th mtg. at 12, art. 1(A)(1), *reprinted in* 1 THE COLLECTED TRAVAUX PRÉPARATOIRES OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES 408 (Alex Takkenberg & Christopher L. Tahbaz eds., 1989)) [hereinafter COLLECTED TRAVAUX].

28. *Id.* at 810 (citing France: A Proposal for a Draft Convention, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems, art. 1(1), at 3, U.N. Doc. E/AC.32/L.3 (1950), *reprinted in* 1 COLLECTED TRAVAUX, at 148).

29. *Id.* at 811 (citing Report of the Ad Hoc Committee on Statelessness and Related Problems II, at 415).

30. *Id.* at 811 (citing Summary Record of the Third Meeting, U.N. ESCOR Ad Hoc Committee on Statelessness and Related Problems at 9, U.N. Doc. E/AC.32/SR.3 (1950), *reprinted in* 1 COLLECTED TRAVAUX, at 165). The U.S. representative also stated:

Since the responsibility of the United Nations would be committed with regard to refugees placed under its protection under that convention, the extent of that responsibility must be known in advance, and to that end, it must be known what categories of refugees would be admitted to that protection. Too vague a definition, which would amount, so to speak, to a blank check, would not be sufficient. As the representative of Turkey had rightly pointed out, any unduly inexact definition would be likely to lead subsequently to disagreement between the Governments concerned. Furthermore, it was perfectly reasonable for States signatory to the convention to wish to know precisely to whom it should apply.

states of the United Nations and to assuage fears that a "blank check" was being written.<sup>31</sup> The "membership in a particular social group" was not added until the last stage of drafting, when a representative of Sweden proposed the addition because "[s]uch cases exist[], and it would be as well to mention them explicitly."<sup>32</sup> The "particular social group" was, therefore, a bit of an afterthought, and the precise intentions of the drafters regarding the contours of this category, if, indeed, they gave it much thought, are not apparent from the legislative history.

As difficult as it may be to glean intent from the legislative history regarding "membership in a particular social group," it is even more difficult to discover how the drafters felt about gender-based persecution. The only time sex was ever discussed during the drafting of the Convention occurred when a delegate from Yugoslavia suggested that Article 3, which mandates that the Convention be applied "without discrimination as to race, religion or country of origin" be amended to include "sex."<sup>33</sup> The drafters rejected the proposal because "the equality of the sexes was a matter for national legislation."<sup>34</sup> Indeed, UN Reports show that the UN High Commissioner for Refugees and Chairman of the Drafting Conference understood

the original idea underlying article 3 to be that persons who had been persecuted on account of their race or religion, for example, should not be exposed to the same danger in the country of asylum [and that] [h]e doubted strongly whether there would be any cases of persecution on account of sex.<sup>35</sup>

Therefore, it appears that it never occurred to the drafters that gender and/or sex could form the basis of an asylum claim.

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*Id.*

31. *Id.* at 810 n.340.

32. *Id.* at 812 (citing Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, U.N. GAOR, 6th Sess., Agenda Item 6, U.N. Doc. A/Conf.2/19 (1951) at 13, *reprinted in* 3 COLLECTED TRAVAUX, at 377).

33. Thomas Spijkerboer, *Gender and Refugee Status 1* (2000) (citing UN Doc A/CONF.2/SR.5 at 9).

34. *Id.*

35. *Id.* (citing UN Doc A/CONF.2/SR.5 at 10).

### III. Why Does It Matter?

Much has changed since 1951, though, and it is important to revisit the concept of asylum to determine (1) what is the purpose of asylum protection, and does that purpose include protecting victims of gender-based persecution, and (2) does our current framework fit that purpose? This part argues that the purpose of asylum is to provide protection and membership to individuals who have been persecuted and, consequently, denied full membership in their home countries, including victims of gender-based persecution. This part will then argue that the current framework contains an inherent male bias and, consequently, fails to protect individuals who have been persecuted because of their gender.

#### A. Defining the "Point" of Providing Asylum Protection

According to scholar Matthew Price, there are two main ways to think about asylum: the "humanitarian conception of asylum"<sup>36</sup> and the "political conception of asylum."<sup>37</sup> The humanitarian approach, which has been adopted by many human rights activists, claims that the purpose of asylum is to provide protection to people in danger, no matter what the cause of their distress.<sup>38</sup> Under this view "persecution, civil war, famine, extreme poverty, or some other cause" all create an equal "moral claim for protection in the form of asylum."<sup>39</sup> The political conception of asylum, which Price advocates, is based on the idea that asylum has an innately political purpose, which is to

shelter[] foreigners from specifically political harms—that is, harm inflicted for illegitimate reasons by state actors or by nonstate actors with the acquiescence or approval of the state—by interfering with another state's claim to authority over its citizens; and . . . call[] that state to task by expressing condemnation.<sup>40</sup>

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36. Matthew Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 418 (2006).

37. *Id.*

38. *See id.* (defining the "humanitarian conception of asylum" as the view that "the Convention refugee definition should be widened to include not only persecuted people, but also those who need protection from serious harm more generally, regardless of the source of the harm").

39. *Id.* at 421.

40. *Id.* at 424.

This political conception finds its footing in the difference between individuals who only require "protection" and those who require both "protection" *and* "membership."<sup>41</sup> He posits that asylum should be reserved for those whose rights have been violated because the state refuses to recognize and protect those rights or, in other words, for those who have been denied full membership in their own society.<sup>42</sup> This denial of membership, or "social death" as scholar Mark Drumbl characterizes it, occurs when, for discriminatory reasons, an individual is "dehumanized" to the point that her society views her as inferior or an outsider.<sup>43</sup> When this social death occurs, it becomes easy for members of that society to persecute the dehumanized individual.<sup>44</sup> This is to be distinguished from situations in which an individual's entire society has been placed in danger due to civil war, natural disaster, famine, etc. In that case, the individual has only been robbed of a safe environment. In the case of the persecution victim, the individual has not only been robbed of a safe place to live, but also membership in her society.<sup>45</sup> It is because of this distinction that the proper remedy for individuals who only need protection is some type of temporary protection,<sup>46</sup> whereas persecution victims require both protection and societal membership, both of which are offered by asylum.<sup>47</sup>

Though Drumbl explicitly discusses social death in the context of mass atrocity<sup>48</sup> and Price mentions it in the context of

41. See *id.* at 418 ("Asylum is thus just one tool of many in the refugee policy toolkit, distinguished from the others in that it provides its recipients with a political good: *membership* in the state of refuge, and not merely *protection* of recipients' basic rights.").

42. See *id.* at 433–34 (employing the scholarship of Rawls and Arendt to discuss the difference between a situation where an individual's "burdened society recognizes their entitlement to rights, but is unable to deliver what it acknowledges is owed" as opposed to having "one's membership repudiated." which is to say that "one's rights go unprotected because they are unrecognized").

43. See MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 41 (2007) ("Once the discrimination takes root, it initially leads to the social deaths of the victims. Social death means ostracizing and dehumanizing the victim group.").

44. See *id.* ("It is much easier to kill that which already has been deformed by social death.").

45. See generally Price, *supra* note 36 (distinguishing asylum from other forms of aid to refugees, such as temporary protection, by noting that it "provides its recipients with a political good: *membership* in the state of refuge, and not merely *protection* of recipients' basic rights").

46. See *id.* at 431 (describing various aspects of temporary protected status regimes in the United States and Europe).

47. See *supra* notes 41–45 and accompanying text.

48. See DRUMBL, *supra* note 43, at 41 ("Victims are the vilified prey stalked by the perpetrators of mass atrocity.").

persecution, generally,<sup>49</sup> the concept of social death can be extended to the situation of gender-based persecution. It would seem, when a person is disdained, regarded as inferior, and then victimized because of her gender, that social death and a denial of full societal membership has occurred. Therefore, gender-based persecution falls within Price's political conception of asylum.

*B. The Traditional Framework Unjustly Focuses on an Overtly "Male" Conception of "Refugee"*

Even though victims of gender-based persecution would appear to qualify for asylum under Price's political conception of asylum, the Refugee Convention's asylum framework does not provide for the inclusion of gender-based persecution.<sup>50</sup> While there is certainly no evidence that this was an expression of the drafters' belief that it was acceptable to harm women, it would seem that such acts were not considered to rise to the level of persecution.<sup>51</sup> This understanding of the concept of "refugee" was probably rooted in the drafters' male-centric notion that persecution is something that only takes place in the public sphere and that acts in the private sphere, which has traditionally been the domain of women, are somehow of less concern.<sup>52</sup>

49. See *supra* note 36 and accompanying text.

50. See generally *infra* Part II.

51. While the drafters certainly left the equality of the sexes to the national legislatures, there was certainly no indication that the drafters meant to condone generally acts of violence against women. See generally *infra* Part II.

52. See Connie G. Oxford, *Protectors and Victims in the Gender Regime of Asylum*, 17(3) N.W.S.A.J. 18, 30 (Fall 2005) (citing Susan Moller Okin, *Feminism, Women's Human Rights and Cultural Difference*, in UMA NARAYAN ET AL., EDS., *in* DECENTERING THE CENTER: PHILOSOPHY FOR A MULTICULTURAL, POSTCOLONIAL, & FEMINIST WORLD (2000)). Oxford describes Okin's arguments:

Susan Moller Okin argues that the fundamental problem with incorporating women's human rights into an existing human rights framework is that theories, laws, and ideas of what constitutes human rights follow an androcentric model. Men's experiences provide the framework for human rights, and the types of persecution women face are rendered invisible as legitimate cases of harm.

*Id.* Oxford further states:

The types of persecution that female asylum seekers may flee . . . overwhelmingly take place in 'private' institutions such as the family. As many feminists contend, the harms women face often are erased, deemed unproblematic, and assumed natural when they occur in a sphere of privacy that renders such acts invisible.

Feminist theorists have long noted this public/private sphere dichotomy.<sup>53</sup> Indeed, it is widely argued that institutions, including legal institutions, view all matters in terms of gendered dichotomies, such as public/private, dominant/submissive, rational/emotional, etc., with "male" corresponding to the first, and more highly-valued, component of each pair, and "female" corresponding to the second, less-valued component.<sup>54</sup> The history of the development of the refugee definition clearly points to a male-dominated conception of a "refugee" as one who is persecuted in the public sphere for acts in the public sphere.<sup>55</sup> Indeed, the Chairman of the Drafting Conference expressed clear doubt as to the existence of sex-based persecution, and this might have reflected the long-held view of persecution as a "public" act.<sup>56</sup>

Because of cultural realities in many societies, though, the harms suffered by women often occur in the private sphere.<sup>57</sup> Many feminists have noted that because forms of persecution like domestic violence, female genital mutilation, forced marriage, and honor killings take place in the private, familial sphere, such persecution is "erased, deemed unproblematic, and assumed natural."<sup>58</sup> Because so many gender-based persecution claims are brought pursuant to acts that occur within the private, familial sphere, it has been discounted for decades as "private" violence that does not fall within the "public" sphere of persecution, and, therefore, does not constitute a basis for asylum protection.<sup>59</sup> Such a view is out of touch with evolving international norms,<sup>60</sup> and an asylum

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*Id.*

53. See Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 382 (1999) (asserting that "international legal discourse" is framed in terms of a long list of dichotomies).

54. See *id.* ("Feminist scholars have drawn attention to the gendered coding of these binary oppositions—the first term signifying 'male' characteristics and the second 'female.'").

55. See SPUJKERBOER, *supra* note 33, at 164 (pointing out that refugees are considered political, which requires existence in the public sphere, whereas "the oppression of women is seen as occurring in the private sphere," and is, therefore, non-political).

56. *Id.* ("Private sphere activities which are characteristically women's activities are denied the quality of 'political.'").

57. *Id.*

58. See Oxford, *supra* note 52, at 30 (summarizing the views of various feminists).

59. See SPUJKERBOER, *supra* note 33, at 163–65 (summarizing the arguments of the early feminist critiques of refugee law as viewing the superficially neutral refugee scheme as an inherently male paradigm that does not view women's private sphere activities as falling within the refugee definition).

60. See *infra* Parts IV, VI (discussing efforts by the international community and

framework built on such assumptions cannot serve nations that recognize the existence of gender-based persecution.

#### *IV. Developments in Gender-Based Asylum Law in the International Community*

The international community has played a major role in urging individual states to take steps to protect the rights of women in a variety of ways, including making reforms to recognize gender-based persecution as a basis for asylum.<sup>61</sup>

##### *A. The European Union*

In 1984, the European Parliament led the way by passing a resolution encouraging states to consider the possibility of defining women who defy social, religious, or cultural norms as a "particular social group."<sup>62</sup> Twenty years later, in 2004, the European Council took more decisive action in the form of Directive 2004/83/EC, which delineated asylum law standards.<sup>63</sup> Article 9(2)(f) of the Directive specifically defined "acts of persecution" to include "acts of a gender-specific . . . nature."<sup>64</sup> Article 2(e) of the Directive also defined the "international protection" states were required to provide as including some form of temporary "subsidiary protection" that would provide protection for individuals who, if returned home, "would face a real risk of suffering serious harm," and do not qualify under other grounds.<sup>65</sup>

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various countries to integrate gender-based persecution claims into the asylum framework, a phenomenon that clearly demonstrates a changing attitude toward violence against women).

61. See *infra* Parts V–VI.

62. Resolution of the European Parliament, O.J. 1984 C127/137.

63. Directive of the European Council, 2004/83/EC (delineating asylum law standards for Europe).

64. *Id.* at art. 9(2)(f).

65. *Id.* at art. 2(e).

*B. The United Nations*

In 1985, the Executive Committee of the United Nations High Commissioner for Refugees issued its first Conclusion on Refugee Women and International Protection that stated, among other things,

[s]tates, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harm or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.<sup>66</sup>

Similar Conclusions would follow in 1993,<sup>67</sup> 1995,<sup>68</sup> 1996,<sup>69</sup> 1997,<sup>70</sup> and 1999.<sup>71</sup> The 1985 conclusion was reiterated in 1988 at the UNHCR's first Consultation on Refugee Women, combined with added encouragement to nations to develop regulations governing the adjudication of women's asylum claims to aid in the determination of when a particular

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66. UNHCR Executive Committee Conclusion No. 39, 1985.

67. See UNHCR Executive Committee Conclusion No. 73, 1993 (recommending the development of "appropriate guidelines on women asylum-seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men").

68. See UNHCR Executive Committee Conclusion, No.77(g), 1995 (calling for guidelines "including persecution through sexual violence or other gender-related persecution," but also recommending "monitoring to ensure their fair and consistent application").

69. See UNHCR Executive Committee Conclusion, No. 79(o), 1996 (recalling "its request that UNHCR support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women" and calling "on States to adopt an approach that is sensitive to gender-related concerns and which ensures that women whose claims to refugee status are based upon a well-founded fear of persecution for reasons... including persecution through sexual violence or other gender-related persecution, are recognized as refugees").

70. See UNHCR Executive Committee Conclusion, No. 81(t), 1997 (urging "States, UNHCR, and other humanitarian organizations...to take all necessary steps to... recogniz[e] as refugees women whose claims to refugee status are based upon a well-founded fear of persecution for reasons enumerated in the 1951 Convention and the 1967 Protocol, including persecution through sexual violence or other gender-related persecution").

71. See UNHCR Executive Committee Conclusion, No. 87(n), 1999 (noting "with appreciation special efforts by States to incorporate gender perspectives into asylum policies, regulations and practices" and encouraging "States, UNHCR, and other concerned actors to promote wider acceptance, and inclusion in their protection criteria of the notion that persecution may be gender-related or effected through sexual violence" through the further development of "guidelines, codes of conduct, and training programmes on gender-related refugee issues").



action by a woman against or in contradiction to her "inferior place" would be interpreted by her government as resistance to a political system or state-sponsored religious views.<sup>72</sup>

In 1991, the UNHCR took an important step by issuing official "Guidelines on the Protection of Refugee Women."<sup>73</sup> The Guidelines, though not focused exclusively on gender-based asylum claims, made the important recognition that "[t]he claim to refugee status by women fearing harsh or inhumane treatment because of having transgressed their society's laws or customs regarding the role of women presents difficulties under the [Refugee Convention] definition."<sup>74</sup> This recognition prompted many countries, including Canada, the United States, and Australia, to examine their own laws regarding gender-based asylum and to issue domestic guidelines.<sup>75</sup> In 2002, the UNHCR issued revised guidelines with the goal of giving "legal interpretative guidance for governments."<sup>76</sup> These guidelines mirrored more closely the gender-based persecution focus of domestic guidelines, such as Canada's, by discussing how the Convention definition of refugee should properly be interpreted<sup>77</sup> to cover instances of gender-based persecution, including "acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals."<sup>78</sup>

72. UNHCR Executive Committee Conclusion, No. 54, 1988.

73. UNHCR Guidelines on the Protection of Refugee Women, 1991.

74. *Id.* at No. 54. The Fourth World Conference on Women in Beijing was also held in 1995. The Global Platform for Action adopted at that conference expanded the definition of violence against women and reiterated the state's responsibility to protect women by calling for the "promot[ion] [of] an active and visible policy of mainstreaming a gender perspective in all policies and programmes related to violence against women." Fourth World Conference on Women, Sept. 4–15, 1995, *Report of the Fourth World Conference on Women*, ¶ 124(g) U.N. Doc A/CONF.177/20 (Oct. 17, 1995). It also "encourag[ed] the dissemination and implementation of the UNHCR Guidelines on the Protection of Refugee Women." *Id.* ¶ 128.

75. *See infra* Parts V–VI.

76. U.N.H.C.R., *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

77. *See id.* ¶ 6 ("Even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims.")

78. *Id.* ¶ 3.

International efforts over the past twenty years have consistently moved toward incorporating gender-based persecution claims under the "membership in a particular social group" ground, but have stood firmly behind the Convention refugee definition in its current form and have rejected the necessity of any change to that definition.<sup>79</sup> As discussed below in Parts V and VI, the approaches of individual nations have often differed from that of the international community, with some nations forging a path beyond the stance of the UNHCR to secure a place for gender-based persecution claims by changing their domestic refugee definition, while other nations lag behind and have yet to even consistently rule that instances of gender-based persecution do fall under the Convention refugee definition. Indeed, one need not look beyond our own borders to find an example of a nation that has been slow to act.

#### *V. The Development of Gender-Based Asylum Law in the United States*

The United States acceded to the 1967 Protocol and ratified it in 1968, but, until 1980, American asylum policy operated on an *ad hoc* basis that operated mainly in relation to the country of origin of an asylum applicant, as opposed to an inquiry into the particular persecution the individual may have suffered.<sup>80</sup> Passed on March 17, 1980, the Refugee Act brought the United States into line with international law by amending the Immigration and Nationality Act and the Migration and Refugee Assistance Act of 1962 to include a more systematic statutory basis for asylum based on the Refugee Convention, as amended by the 1967 Protocol.<sup>81</sup> Specifically, the 1980 Refugee Act defined a refugee as

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 unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion,

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79. See *supra* note 77 and accompanying text.

80. See Deborah Anker & Michael Posner, *The Forty-Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 10-11 (1981) (describing how the Immigration and Nationality Act of 1952's strict ethnicity-based quotas and the Attorney General's parole authority under that Act became "a source of repeated conflict between" the executive and legislative branches of government).

81. See generally 8 U.S.C. § 1101(A)(42)(A).

nationality, membership in a particular social group, or political opinion.<sup>82</sup>

This language is similar to the UN Refugee Convention in that it enumerates the same five grounds for asylum—race, religion, nationality, membership in a particular social group, and political opinion—and provides protection for those who have a "well-founded fear of being persecuted" because of these five categories.<sup>83</sup> It does differ in a few ways, but these differences are not important for the purposes of this Note.<sup>84</sup>

Gender has never officially been codified as a basis for asylum in United Nations documents or American law, though the possibility of gender-based asylum has been mentioned in guidelines emanating from both bodies.<sup>85</sup> Certainly, women were never excluded from bringing their own asylum claims based on one of the five categories, but they have often had practical difficulties effectively supporting their asylum applications for a variety of reasons. These reasons include (1) cultural expectations that women act in a particular manner, often a modest manner that precludes them from discussing certain kinds of persecution, especially any kind of sexual abuse and (2) cultural expectations that the husband will "lead" the asylum claim, if there is a joint application, thereby silencing the woman's voice during the process.<sup>86</sup> Therefore, even when a woman has a legitimate asylum claim that clearly falls under even the narrowest interpretation of one of the five grounds, gender-related issues can still come into play. These kinds of difficulties can be alleviated through effective cultural

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82. *Id.*

83. *Id.*

84. The American Refugee Act and the UN Refugee Convention differ in that the American statute also offers protection for those who have only faced past persecution and in that persecution must be "on account of" one of the five grounds, instead of "for reasons of" one of those categories.

85. See *supra* Part IV.B; see also *infra* notes 95–96 and accompanying text (discussing "considerations" American asylum officers should take into account when adjudicating a female applicant's asylum claim).

86. See Lindsay A. Franke, *Not Meeting the Standard: U.S. Asylum Law and Gender-Related Claims*, 17 ARIZ. J. INT'L & COMP. L. 605, 611–12 (2000) (listing cultural obstacles inherent in the American gender-based asylum claim process, including "difficulty in describing past sexual abuse to a male interviewer," cultural notions of rape as "a failure on the part of the woman to preserve her virginity or marital dignity," dilution of testimony given through male interpreters, and manifestations of psychological trauma, such as memory loss, passivity, or numbness that may negatively affect credibility); John Linarelli, *Violence Against Women and the Asylum Process*, 60 ALB. L. REV. 977, 984 (1997) ("It is extremely difficult for women to discuss, in the detail necessary to prove their case, some of the physical, mental and emotional harms inflicted upon them.").

sensitivity training for asylum officers and administrative law judges. The Department of Homeland Security has undertaken efforts to minimize the negative effect of cultural misunderstandings on asylum adjudications through the development of training manuals and programs aimed at educating their adjudicators about cultural sensitivity.<sup>87</sup>

The problem becomes far more serious, though, when a woman's entire asylum claim hinges on gender-based persecution, as "gender" is not one of the five explicit grounds for asylum. Indeed, even when an instance of gender-based persecution might fall under one of the five grounds, the private nature of so many types of gender-based persecution can make it difficult to prove the persecutor's intent.<sup>88</sup> Even though the international community has recognized that gender-based persecution can form a basis for asylum, the mechanisms these various nations have developed to incorporate gender into the "particular social group" category have often been unsatisfactory.<sup>89</sup>

Looking first to the United States, the path toward recognition of gender-based asylum arguably began in 1985 with the landmark case of *In re Acosta*,<sup>90</sup> which held that a "particular social group" may include

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87. See generally AOBTC BASIC TRAINING MATERIALS, INTERVIEWING PART IV: INTER-CULTURAL COMMUNICATION AND OTHER FACTORS THAT MAY IMPEDE COMMUNICATION AT AN ASYLUM INTERVIEW; FEMALE ASYLUM APPLICANTS AND GENDER-RELATED CLAIMS AND ASYLUM MANUAL, available at <http://www.uscis.gov/files/nativedocuments/AffirmAsyMan FNL.pdf>.

88. See *supra* notes 57–60 and accompanying text.

89. See *infra* Part VII.

90. See 19 I. & N. Dec. 211, 237 (1985) (holding that respondent has not shown he is eligible either for asylum or withholding of deportation to El Salvador). In *Acosta*, the United States Department of Justice Board of Immigration Appeals considered whether the respondent met his burden of proof for relief from deportation through asylum or mandatory withholding of deportation. *Id.* at 213. The respondent was a 36-year-old male native and citizen of El Salvador. *Id.* at 213. In a deportation hearing held before an immigration judge in 1983, the respondent conceded his deportability for entering the United States without inspection and accordingly was found deportable as charged. *Id.* at 213. The immigration judge denied the respondent's applications for a grant of asylum and for mandatory withholding of deportation to El Salvador, and respondent appealed. The Court established the evidentiary burdens for the respondent to be eligible for withholding of deportation and for asylum. *Id.* at 213. The Court stated that in order to be eligible for withholding of deportation to any country, an alien must show that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* at 213. The Court also stated that in order to be eligible for a grant of asylum, an alien must show he or she is a "refugee" as defined in section 101(a)(42)(A) of the Act, § U.S.C. § 1101(a)(42)(A). After establishing both evidentiary burdens, the Court concluded that the respondent failed to meet the necessary burden for withholding of deportation because the respondent had not demonstrated a sufficient likelihood of persecution at the hands of either the government or the guerrillas to make his

individuals with shared, immutable characteristics, including sex.<sup>91</sup> The Board also held, though, that a case-by-case determination would be needed to determine what characteristic could be applied to the "particular social group" category.<sup>92</sup> In the course of the next ten years, courts split on whether gender alone could constitute membership in a particular social group.<sup>93</sup> Even those courts that found that gender alone constituted membership in a particular social group never actually granted asylum on that basis, as the factual assertion that persecution was based solely on the applicant's gender could never be satisfactorily proven.<sup>94</sup>

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fear "well-founded." *Id.* at 236. The Court also concluded that the respondent failed to meet the necessary burden for an asylum claim because he failed to show that (1) his present fear of persecution by the government and the guerrillas was "well-founded;" (2) the persecution he feared was on account of one of the five grounds specified in the Act; and (3) he was unable to return to the country of El Salvador, as opposed to a particular place in that country, because of persecution. *Id.* at 236.

91. *See id.* at 233. The Board wrote:

[W]e interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership."

*Id.*

92. *See id.* at 233 ("The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.").

93. *See, e.g.,* Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) ("Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."); Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) ("[T]o the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted.").

94. *See Fatin*, 12 F.3d at 1240. The Court stated:

[T]o the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted. She has not, however, satisfied the third element; that is, she has not shown that she would suffer or that she has a well-founded fear of suffering 'persecution' based solely on her gender.

*Id.*; *see* Memorandum from Phyllis Coven, Office of International Affairs, U.S. Dept. of Justice to All INS Asylum Officers RE Considerations for Asylum Officers Adjudicating Asylum Claims for Women 13 (May 26, 1995). Coven writes:

[W]hile some courts have concluded as a legal matter that gender can define a particular social group, no court has concluded as a factual matter that an applicant has demonstrated that the government (or a persecutor the government could not or would not control) would seek to harm her solely on account of her gender."

In 1995, the Immigration and Naturalization Service issued a memo containing "Considerations for Asylum Officers Adjudicating Asylum Claims for Women."<sup>95</sup> The "Considerations" outlined the state of gender-based asylum law in the United States and in international law, but did not allow for asylum protection solely for gender-based persecution.<sup>96</sup> Also, unlike the Canadian guidelines that will be discussed in Part VI, the American "Considerations" truly are just considerations. They are not succinct rules or guidelines that instruct judges how to rule in certain types of cases. Rather, they simply lay out domestic and international sources of law and guidance on the issue and leave it to the judge to decide. This is not inherently a bad idea, but, as discussed a bit later in this section, such an approach has led to frustrating inconsistencies in the adjudication of gender-based asylum claims.

Next came *In re Kasinga*<sup>97</sup> in 1996, in which the Board held that female genital mutilation (FGM) can form the basis of an asylum claim and explicitly recognized gender as part of the determination of one's membership in a "particular social group." Gender, however, was only part of that determination, which also included the characteristics of (1) not having been mutilated, (2) being a member of the Tchamba-Kunsuntu Tribe of northern Togo, and (3) opposing the practice of FGM.<sup>98</sup> Therefore, though *In re Kasinga* recognized gender as a partial ground for asylum, it was a narrow holding.<sup>99</sup>

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*Id.*

95. Memorandum from Phyllis Coven, *supra* note 94.

96. See *id.* at 13–15 (discussing the theoretical possibility that gender might form the basis of a "particular social group," but stating that no court has ever found that an individual was persecuted "solely on account of her gender").

97. See 21 I. & N. Dec. 357 (1996) (holding that female genital mutilation can be the basis for a claim of persecution). The United States Department of Justice, Board of Immigration Appeals, reviewed the issue of whether female genital mutilation can be the basis for a grant of asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158 (1994). *Id.* at 358. A 19-year-old citizen of Togo submitted an application for asylum based on fear of being subjected to female genital mutilation, as was the custom of the tribe to which she belonged. *Id.* at 358. The subjective intent to harm was rejected as a requirement for implicating persecution and it was held that female genital mutilation was consistent with "persecution" under the statute. *Id.* at 368.

98. See *id.* at 357 ("Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a 'particular social group.'").

99. For other narrow applications, see *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001) (holding a Mexican girl "subjected to extreme abuse by her father" was persecuted on account of membership in a particular social group); *Hernandez-Montiel v.*

One of the most difficult areas of gender-based asylum concerns how victims of domestic violence should be treated. The case of *In re R-A*<sup>100</sup> made clear just how difficult this issue could be. Asylum applicant Rodi Alvarado was a Guatemalan woman who sought asylum from her abusive husband.<sup>101</sup> The Guatemalan government had refused to protect her from the beatings and rapes she was regularly subjected to, and so she fled to the United States, fearing for her life.<sup>102</sup> In 1996, the Immigration Judge initially granted her asylum under the "particular social group" category, as a "Guatemalan wom[a]n who ha[d] been involved intimately with [a] Guatemalan male companion[. . .], who believe[d] that women are to live under male domination."<sup>103</sup> Three years later the Bureau of Immigration Appeals reversed the Immigration Judge's decision because it did not believe Ms. Alvarado had been persecuted "on account" of her membership in any "particular social group."<sup>104</sup> Rather, the BIA found that Ms. Alvarado had been persecuted because she was her persecutor's wife and not for any of the five reasons enumerated under the Refugee Act.<sup>105</sup> Therefore, her asylum application was denied, and she was ordered to voluntarily depart or be deported.<sup>106</sup> The case had received extensive national coverage, though, and many people were very unhappy with the outcome.<sup>107</sup> At the end of her time as U.S. Attorney General, Janet Reno

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INS, 225 F.3d 1084 (9th Cir. 2003) (focusing on the widespread abuse of homosexuals, as opposed to gender-based abuse).

100. See 22 I. & N. Dec. 906 (1999), *vacated* by Attorney General Reno (2001).

101. See *id.* at 908 (describing Alvarado's abusive marriage).

102. See *id.* at 909 (describing Alvarado's futile attempts to gain police help in Guatemala and her subsequent flight to the United States).

103. *Id.* at 911.

104. See *id.* at 920 ("On the record before us, we find that the respondent has not adequately established that we should recognize, under our law, the particular social group identified by the Immigration Judge.").

105. The Board stated:

We further find that her husband's motivation, to the extent it can be ascertained, has varied; some abuse occurred because of his warped perception of and reaction to her behavior, while some likely arose out of psychological disorder, pure meanness, or no apparent reason at all. . . . We are not persuaded that the abuse occurred because of her membership in a particular social group or because of an actual or imputed political opinion.

*Id.* at 927.

106. *Id.* at 928.

107. See generally Fredric N. Tulskey, *Abused Woman is Denied Asylum: Immigration Ruling Reflects Split Over Gender Persecution*, WASH. POST, June 20, 1999, at A1; *Women Seeking Asylum in US for Domestic Abuse Find It More Difficult To Be Approved by INS*,

vacated the removal order and proposed regulations that would officially state that gender can form the basis of a "particular social group."<sup>108</sup>

Unfortunately, it has been nine years since these regulations were proposed, and official approval does not seem forthcoming. Efforts by the press to penetrate the process and discover what is going on at the Department of Homeland Security have only resulted in assurances that the Department is "working diligently" on the regulations.<sup>109</sup> While DHS is taking its time, both asylum applicants and immigration judges are suffering. Without clear guidance, immigration judges have been issuing inconsistent decisions in gender-based asylum claims that have ranged from grants to denials to continuances until the regulations are approved.<sup>110</sup> Immigration judges are aware of the problem and, in 2007, immigration judges met with then-Attorney General Gonzales to ask, again, for clear regulations regarding gender-based asylum claims.<sup>111</sup> Two years later, they are still waiting, and the status of gender-based asylum law in the United States is uncertain at best.

## VI. *Developments in Foreign Nations*

Other countries have approached gender-based persecution asylum claims differently, and often more effectively, than the United States. Though there are some similarities in approach among some of the countries surveyed below, there generally appears to be disagreement as to the best way to approach gender-based asylum cases. This Part will review the laws of several common law and civil law nations, and the next Part will critique the various methods with an eye to the suitability of such schemes in the United States.

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NPR, MORNING EDITION, July 8, 1999.

108. Asylum & Withholding Regulations, 65 Fed Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

109. See generally Alex Kotlowitz, *Asylum for the World's Battered Women*, N.Y. TIMES, Feb. 11, 2007 (Magazine).

110. See *id.* at 3–4 ("Immigration judges have interpreted this logjam in conflicting ways. There have been grants as well as denials of asylum for domestic-violence victims, and there have been many cases that . . . have been placed in limbo until there's some clarity about our policy."). See generally Ming H. Chen, *Explaining Disparities in Asylum Claims*, 12 GEO. PUB. POL'Y REV. 29 (2006–2007); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 295 (2007).

111. See Kotlowitz, *supra* note 109, at 2 ("At a recent gathering with Attorney General Gonzales, immigration judges reiterated their longstanding request for clear regulations so that they'd have some guidance.").



### A. Common Law Nations

#### 1. Canada: Guidelines and "Innate Characteristic" Test

Canada has been a major leader among common law nations in providing for greater recognition of gender-based persecution asylum claims. In 1993, Canada became the first State Party to the Refugee Convention to issue guidelines for adjudicating gender-based asylum applications.<sup>112</sup> The current Canadian guidelines specifically provide for protection of

[w]omen who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence . . . (i.e. domestic violence and situations of civil war) . . . [or] as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin. (i.e. arranged marriage, wearing of make-up, visibility or length of hair, or type of clothing a woman chooses to wear).<sup>113</sup>

The same year, in *Ward v. Canada*,<sup>114</sup> the Supreme Court of Canada held that gender could form the basis of a "particular social group" category because gender is a group "defined by an innate or unchangeable characteristic."<sup>115</sup> Therefore, though Canada has shied away from any statutory changes, its guidelines and Supreme Court opinions have made positive steps toward recognition of gender-based persecution claims.

#### 2. United Kingdom: Guidelines and "Immutable Characteristic" Test

British courts took a similar view to that of the Canadian Supreme Court in the case of *Islam v. Secretary of State for the Home Department*.<sup>116</sup>

112. CAN. IMMIGRATION & REFUGEE BD., WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (Guidelines issued by the Chairperson of the Board in accordance with subsection 65(3) of the Immigration Act) (1993).

113. CAN. IMMIGRATION & REFUGEE BD., WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: UPDATE (Updated version of the Guidelines issued by the Chairperson of the Board in accordance with subsection 65(3) of the Immigration Act) 2 (2003) [hereinafter CANADIAN GUIDELINES].

114. See 2 S.C.R. 689 (1993) (providing background on Canada's approach to gender-based persecution claims).

115. *Id.* ¶ 78.

116. 2 A.C. 629 (1999). *Islam* concerned two Pakistani women who had "suffered violence in their country of origin after their husbands had falsely accused them of adultery"

This case also held that gender could form part of the "particular social group."<sup>117</sup> The Law Lords were divided, though, over whether the relevant "particular social group" should be characterized as "Pakistani Women" or "Pakistani Women Accused of Adultery."<sup>118</sup> Therefore, it is somewhat unclear from the holding whether gender alone can constitute a particular social group or whether gender must be combined with some other element to form a particular social group. Because there was no consensus, the value of the opinion is similar to that of the American case *In re Kasinga*, discussed above, which also held that gender could form part of a "particular social group."

In 2000, the United Kingdom's Immigration Appellate Authority followed Canada's lead and issued guidelines describing when gender-based acts of persecution constitute grounds for asylum under one of the five Refugee Convention bases.<sup>119</sup> The guidelines were updated in 2006.<sup>120</sup> Both versions contained the "immutable characteristic" language of *Islam* in their definitions of "membership in a particular social group."<sup>121</sup>

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and had applied for asylum in the U.K. for fear of receiving physical and emotional abuse if they returned. *Id.* at 629. The Home Office denied the applicants "on the ground that the applicants were not members of a 'particular social group' within the meaning of article 1A(2) of the Convention and Protocol relating to the Status of Refugees." *Id.* at 630. The court held that a "particular social group" "had to exist independently of the persecution so that persecution alone could not be relied on to prove the group's existence, but that cohesiveness was not an essential requirement." *Id.* Further, "because in Pakistan women were discriminated against as a group in matters of fundamental human rights, and the state gave them no protection . . . women in Pakistan constituted a 'particular social group' which was more narrowly defined by unifying characteristics of gender, of being suspected of adultery and of lacking protection from the state and public authorities." *Id.* Thus, "the applicants' well founded fear of persecution which was sanctioned or tolerated by the state was for reasons of membership of a particular social group; and that, accordingly, they were entitled to asylum under the Convention." *Id.*

117. *Id.* at 629.

118. *Id.*

119. NATHALIA BERKOWITZ & CATRIONA JARVIS, IMMIGRATION APPELLATE AUTHORITY, ASYLUM GENDER GUIDELINES (2005), available at [http://cgrs.uchastings.edu/documents/legal/gender\\_guidelines/UK\\_guidelines.pdf](http://cgrs.uchastings.edu/documents/legal/gender_guidelines/UK_guidelines.pdf).

120. U.K. BORDER AG., GENDER ISSUES IN THE ASYLUM CLAIM (2006), available at [http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylum\\_policyinstructions/apis/genderissueintheasylum.pdf](http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylum_policyinstructions/apis/genderissueintheasylum.pdf).

121. In its Report, the U.K. Border Agency sets out its reasoning:

In *Shah* and *Islam* it was found that women in Pakistan constituted a particular social group. This was because women shared the same immutable characteristic of gender, they formed a distinct group in society as evidenced by widespread discrimination in their fundamental rights and the state did not give them adequate protection as they were not seen as entitled to the same human rights as men.

### 3. Australia: Vague Guidelines

In 1996, Australia issued guidelines discussing gender-based persecution.<sup>122</sup> These guidelines recognized that there was no Australian precedent on the issue of "women" as a particular social group, under the Refugee Convention, but did not preclude the possibility.<sup>123</sup> Indeed, the guidelines went so far as to mention that the Refugee Review Tribunal had found that women had both immutable characteristics and shared common social characteristics that might make them eligible for status as a particular social group.

In 2002, in an opinion that did not cite the guidelines, an Australian court found that a Pakistani woman who sought asylum from her abusive husband could qualify as a refugee.<sup>124</sup> Unfortunately, soon after this opinion was issued, the Australian legislature chose to narrow the causal connection aspect of refugee law.<sup>125</sup>

### 4. New Zealand: "Protected Characteristic" Test

The New Zealand Refugee Status Appeals Authority (RSAA) generally follows the Canadian *Ward* "protected characteristic" test and has used it to grant asylum based on gender and sexual orientation. For example, in 2000, a New Zealand court granted asylum to an Iranian woman who had been physically and emotionally abused by her ex-husband and who was granted no protection by state authorities.<sup>126</sup> The court found

*Id.* at 9; *supra* note 119, at 41 ("Shared immutable characteristics: . . . Particular social groups can be identified by reference to innate or unchangeable characteristics or characteristics that a woman should not be expected to change.").

122. See AUS. DEPT. OF IMMIGRATION & MULTICULTURAL AFFAIRS, REFUGEE AND HUMANITARIAN VISA APPLICANTS: GUIDELINES ON GENDER ISSUES FOR DECISION-MAKERS ¶ 1.2 (1996) ("In recognising that women may experience persecution differently from men, the guidelines provide advice on how decisionmakers can best approach claims of gender-based persecution.").

123. See *id.* ¶ 2.15 ("It should be noted that these guidelines do not advocate gender as an additional ground in the Refugee Convention.").

124. Ministry for Immigration & Multicultural Affairs v. Khawar, 76 A.L.R.J. 667 (2002).

125. See Catherine Hunter, *Khawar & Migration Legislation Amendment Bill (No. 6): Why Narrowing the Definition of a Refugee Discriminates Against Gender-Related Claims*, 8 AUS. J. OF HUMAN RTS. 1 (2002) (describing the effects of Bill No. 6 on gender-based claims).

126. See Refugee Appeal No. 71427/99, N.Z.A.R. 545, ¶¶ 15–35 (1999) (describing the physical beatings, infidelity, and emotional abuse—including the selling of her child—

that the applicant was being persecuted because of her gender and that her gender qualified as a "particular social group" under the convention grounds.<sup>127</sup>

### 5. *South Africa & Ireland: Amendment of the Statutory Definition of "Refugee"*

Both South Africa and Ireland have taken a more direct approach to incorporation of gender into the "member of a particular social group" category. Ireland's Refugee Act of 1996 states that "membership of a particular social group' includes membership of a trade union and also includes membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation."<sup>128</sup> South Africa took a similar approach by defining "membership in a particular social group" to include "among others, a group of persons of particular gender, sexual orientation, disability, class or caste."<sup>129</sup>

## B. *Civil Law Nations*

### 1. *Germany, Sweden, & Spain: Amendment of the Statutory Definition of "Refugee"*

Like Ireland and South Africa, Germany, Sweden, and Spain have all recently amended their refugee statutes to include gender-based persecution in the definition of "refugee."

Germany's 2005 Immigration Act codified the definition of "particular social group" to include persecution "solely on account of sex."<sup>130</sup> The next year, Sweden enacted a new Aliens Act that also specifically included

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endured by appellant).

127. See *id.* ¶ 106 ("As can be seen from these principles it is indisputable that gender can be the defining characteristic of a social group and that 'women' may be a particular social group.")

128. Irish Refugee Act, 1996 (Act No. 17/1996) (Ir.), available at <http://www.irishstatutebook.ie/1996/en/act/pub/0017/sec0001.html>.

129. South Africa Refugees Act 130 of 1998 art. 1.xxxi.

130. Zuwanderungsgesetz [Immigration Act] Jan. 1, 2005, § 60(1) ("Eine Verfolgung wegen der Zugehörigkeit zu einer bestimmten sozialen Gruppe kann auch dann vorliegen, wenn die Bedrohung des Lebens, der körperlichen Unversehrtheit oder der Freiheit allein an das Geschlecht anknüpft.").

gender and sexual orientation as particular social groups within the definition of a "refugee":

In this Act "refugee" means an alien who is outside the country of the alien's nationality, because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group and is unable, or because of his or her fear is unwilling, to avail himself or herself of the protection of that country.<sup>131</sup>

Following suit, in 2007 Spain enacted the Amendment to the Organic Law for the Effective Equality of Women and Men,<sup>132</sup> which included an amendment to the asylum law that declared that refugee protection "applies to foreign women who have fled their countries on account of a well-founded fear of suffering gender-based persecution."<sup>133</sup>

## 2. *The Netherlands & Norway: Silent Legislation Supplemented by Gender-Based Persecution Guidelines*

Neither Dutch nor Norwegian legislation include any mention of gender-based persecution.<sup>134</sup> Both nations have adopted some form of guideline to deal with gender-based persecution issues. In the Netherlands, the implementation guidelines for the Dutch Aliens Act advocate a "gender-inclusive approach to asylum."<sup>135</sup> Furthermore, it has been the official policy of the Dutch government, in the form of the Dutch Refugee Council, that

persecution for reasons of membership of a particular social group, may also be taken to include persecution because of social position on the basis of sex. This may be especially true in situations where discrimination against women in society, contrary to the rulings of international law, has been institutionalized and where women who

131. 4 ch. 1 § Aliens Act (SFS 2006:220).

132. Ley Orgánica Para la Igualdad Efectiva de Mujeres y Hombres (B.O.E. 1984, 74).

133. *Id.* ("[S]erá de aplicación a las mujeres extranjeras que huyan de sus países de origen debido a un temor fundado a sufrir persecución por motivos de género.").

134. See SPIJKERBOER, *supra* note 33, at Annex 7 (citing Dutch legislation); 3 ch. §§ 15–22 Norwegian Immigration Act (2002) (failing to make any mention of gender-based persecution in its laws concerning refugees).

135. General Assembly WOM/1601/Rev.1\* Committee on Elimination of Discrimination against Women Chamber B, 767th & 768th Meetings (AM & PM) (Jan. 24, 2007) (discussing provisions of the Vreemdelingencirculaire [Aliens Act Implementation Guidelines]).

oppose this discrimination, or distance themselves from it, are faced with drastic sanctions, either from the authorities themselves, or from their social environment, where the authorities are unwilling or unable to offer protection.<sup>136</sup>

This policy is somewhat more limited than the Canadian guidelines, which highlight many situations in which gender can be the basis for persecution, as opposed to the single situation involving inferior social position mentioned in the Dutch directive.

Similarly, the Norwegian Ministry of Justice has issued guidelines for gender-based asylum applications that specify that when women are persecuted for transgressing social rules, such persecution falls under the Refugee Convention.<sup>137</sup> It is also expected that guidelines for a new draft of the Aliens Act will contain an expanded view of gender-based persecution.<sup>138</sup>

### 3. *Switzerland: Some Statutory Recognition of Gender-Based Persecution, But No Recognition of Persecution by Non-State Actors*

The Swiss courts still do not recognize actions by non-state actors as persecution under the refugee definition.<sup>139</sup> Because of this, most gender-based asylum applications are thrown out before the 1998 Swiss Asylum Law can be applied, resulting in very little case law in this area.<sup>140</sup> The 1998 Law does provide for consideration of "motives for flight specific to

136. SPIJKERBOER, *supra* note 33, at Annex 7.

137. See HEAVEN CRAWLEY & TRINE LESTER, COMPARATIVE ANALYSIS OF GENDER-RELATED PERSECUTION IN NATIONAL ASYLUM LEGISLATION AND PRACTICE IN EUROPE 26 (UNHCR 2004) ("In Norway, the 1998 Ministry of Justice guidelines introduced recognition of non-State agents, and the possibility of gender constituting a Convention ground for the granting of refugee status. They also introduced the principle of giving asylum applicants the benefit of the doubt.")

138. Press Release, UNHCR, *UNHCR Welcomes Norwegian Steps to Strengthen Refugee Protection* (Feb. 9, 2007), available at [http://www.unhcr.se/en/News/press07/press\\_070209.html](http://www.unhcr.se/en/News/press07/press_070209.html).

139. See CTR. FOR GENDER & REFUGEE STUDIES, GENDER GUIDELINES: SWITZERLAND, [http://cgrs.uchastings.edu/law/gender\\_guidelines.php#Switzerland](http://cgrs.uchastings.edu/law/gender_guidelines.php#Switzerland) (last visited Feb. 14, 2009) ("[A]s the European Council on Refugees and Exiles has observed, 'this provision has resulted in very limited case-law, as most gender related applications are rejected in accordance with current Swiss practice on this issue, on the grounds that persecution is not perpetrated by state or quasi state agents.'") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

140. *Id.*

women."<sup>141</sup> At this point, Switzerland has not issued any guidelines defining or discussing what these "motives" might be. It should be noted, though, that Swiss courts have granted asylum to women for what was arguably gender-based persecution.<sup>142</sup>

### VII. Critique of Solutions

The previous section discussed many current approaches to the gender-based asylum issue, all of which are grounded either in the addition of gender as a sixth ground for asylum or in an expansive definition of the "particular social group" category of the Refugee Convention, either through judicial opinions, guidelines, and/or legislation.<sup>143</sup> Indeed, advocates of the latter approach are essentially requesting that gender itself be considered a "particular social group."<sup>144</sup> Though such a conception may derive some legitimacy from the fact that gender is a social construct, gender-based persecution usually deals with individuals whose biological sex and gender role are either both feminine or both masculine.<sup>145</sup> An individual who had chosen a gender role distinct from his or her biological sex would clearly be part of a "particular" social group. However, defining a group of people who comprise about half of society (females who live as women) as a "particular social group" would seem to defy the addition of the modifier "particular."

Clearly, though, human rights advocates have fought to include gender-based persecution claims under the "particular social group" ground for practical reasons; it is simply the best way to shoe-horn asylum protection for victims of gender-based persecution into a framework that never considered gender.<sup>146</sup> The particular social group method has also been the most successful approach up until now and is to be applauded for

141. Loi sur L'Asile [Asylum Law] Jun. 26, 1998, RS 142.31, art. 3(2) (Switz.) ("Il y a lieu de tenir compte des motifs de fuite spécifiques aux femmes.")

142. See Schweizerische Asylrekurskommission (ARK Zollikofen), EMARK 2006 Nr. 32 available at (granting asylum application of Ethiopian woman claiming inadequate state protection from marital kidnapping—when kidnapper enjoyed national power and influence—and noting that this was a type of persecution inherently tied to gender), available at <http://edvgt.jura.uni-sb.de/www.iarlj.org/dboutput.php?id=233&download=1>.

143. See *supra* Part VI.

144. *Id.*

145. See *supra* note 5 (discussing the different matter of transgendered individuals in gender-based asylum issues).

146. See *supra* Part II.

its creativity and effect.<sup>147</sup> When one critically examines the situations of individuals seeking asylum from gender-based persecution, though, it becomes apparent that including gender-based persecution in the "particular social group" category is simply illogical. Though this approach has had some success,<sup>148</sup> the incongruity of the fit between gender-based persecution and the "particular social group" ground has caused serious jurisprudential problems in the United States and abroad that have limited the capacity of this method to provide asylum protection to all victims of gender-based persecution.<sup>149</sup> To illustrate this "misfit," this subsection will look at the use of the "particular social group" approach in three common categories of gender-based persecution: threatened honor killings, female genital mutilation, and domestic violence.

In the hypothetical case of a threatened honor killing of a woman who has been raped, an American administrative law judge could fairly easily construct a "particular social group" comprised of "women who have been raped" out of the applicant's situation, thereby contorting the refugee statute to produce the desired result. The refugee statute did not contemplate gender-based violence when it was enacted, though, and it was clearly not thinking of "women who have been raped" when it included the "particular social group" category.<sup>150</sup> Indeed, we have very little information regarding the drafters' understanding of the "particular social group" category.<sup>151</sup> Furthermore, the real reason this individual is being persecuted is because she is a woman. But for her sex, she would not have faced the threat of an honor killing,<sup>152</sup> and it is a stretch, at best, to maintain that her persecution is based on membership in a "particular social group."<sup>153</sup>

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147. See *supra* Part VI.

148. See *id.* (discussing statutes, cases, and guidelines in foreign countries that have had some success in securing asylum for women based on gender-based persecution claims).

149. See *supra* Parts V–VI.

150. See *supra* notes 33–34 and accompanying text.

151. See *supra* note 32 and accompanying text.

152. See generally U.S. STATE DEPT., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: PAKISTAN (2007).

153. This subsection is only concerned with demonstrating the incongruity of the "particular social group" category and gender-based asylum claims. This Note will later discuss the aptness of different solutions to accommodate gender-based claims, even if they do rely on the "particular social group." For example, the Note will discuss how even statutory definitions of a "particular social group" as including gender are insufficient, as the causal nexus (i.e. "on account of" language) is especially difficult to prove in gender-based persecution cases.



Female genital mutilation (FGM) cases pose an even greater logical difficulty for the "particular social group." Courts often try, with success, to shoe-horn asylum applicants fearing female genital mutilation into the "particular social group" of "women who oppose female genital mutilation."<sup>154</sup> Though we are to applaud these courts' efforts to protect women from deportation to a country where they will be subject to FGM, this is still a false characterization of the situation. Asylum applicants from regions where FGM is widespread are not targeted because they oppose mutilation.<sup>155</sup> Rather, they are targeted simply because they are women. Their political opinions and social affiliations do not matter. In such societies, all women must be mutilated because they are women.<sup>156</sup> Under the current framework, immigration judges have managed to concoct theories that allow women to avoid FGM under the "particular social group" theory, but it is an incongruous fit. Consistency and good jurisprudence would be served far better by a legal mechanism that would allow for the official granting of asylum based on proof of persecution, regardless of the ground. It would be an honest statement of what many administrative law judges are already doing.<sup>157</sup>

Finally, the situation becomes far more complex when dealing with the intersection of asylum law and domestic violence. As discussed above, in the case of Rodi Alvarado, the Guatemalan woman fleeing severe domestic abuse, the immigration judge attempted to create a "particular social group" for Ms. Alvarado, namely, "Guatemalan women who have been involved intimately with [a] Guatemalan male companion[. . .], who believes that

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154. See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357, 365 (1996) ("In the context of this case, we find the particular social group to be the following: young women of the Tchambakunsunto Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.").

155. See generally U.N.I.C.E.F., *FEMALE GENITAL MUTILATION/CUTTING* (2005), available at [http://www.unicef.org/publications/files/FGM-C\\_final\\_10\\_October.pdf](http://www.unicef.org/publications/files/FGM-C_final_10_October.pdf) (discussing various socio-economic variables affecting the rates of FGM in countries with high levels of practitioners).

156. The U.N.I.C.E.F Report states:

Female circumcision is practiced by people of many ethnicities and various religious backgrounds, including Muslims, Christians, and Jews, as well as followers of traditional African religions. For some it is a rite of passage. For others it is not. Some consider it aesthetically pleasing. For others, it is mostly related to morality or sexuality.

*Id.* at 17.

157. See, e.g., *In re R-A-*, 22 I. & N. Dec. 906 (1999), *vacated by* Attorney General Janet Reno (2001) (describing the ALJ's attempt in Rodi Alvarado's case to fashion a "particular social group" that would allow her to obtain asylum).

women are to live under male domination."<sup>158</sup> Unfortunately for Ms. Alvarado, the Bureau of Immigration Appeals was unwilling to go along with the immigration judge and ruled that Ms. Alvarado was not being persecuted on account of membership in a particular social group, but, rather, because she was her persecutor's wife.<sup>159</sup> Immigration judges continue to struggle with the tension between the desire to do what appears to be the just thing—i.e. to protect individuals like Ms. Alvarado—and what appears to be provided for by law—i.e. asylum is only available to individuals persecuted *on account of* one of the five grounds. The logical difficulty in incorporating gender-based persecution in the "particular social group" category may explain why it is taking the United States so long to approve Attorney General Janet Reno's regulations. With this tension in mind, let us now turn to an analysis of current and proposed solutions to the gender-based asylum problem.

#### A. European-Style Subsidiary Protection

The subsidiary protection provisions required by the European Council<sup>160</sup> may at first seem like an attractive alternative to an unwieldy refugee definition that has failed to address the needs of victims of gender-based persecution.<sup>161</sup> There are, however, two major problems with subsidiary protection models that render them inappropriate for women seeking asylum from gender-based persecution. Firstly, subsidiary protection remedies ignore the political purpose behind asylum, namely, to condemn the actions of another state by providing membership to persecuted individuals who have, by virtue of their persecution, been denied full membership in their own society. Because of the fundamentally temporary nature of subsidiary protection, it does not provide the full membership in a new society that asylees should be afforded.<sup>162</sup>

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158. *Id.* at 911.

159. *See id.* at 917 ("[T]he myriad situations in which the abuse occurred and the various unsuccessful responses adopted by the respondent point strongly away from it having a genesis in her husband's perception of the respondent's political opinion.").

160. *See* Directive of the European Council, *supra* note 63, at art. 2(e), ch. V-VI (defining "subsidiary protection" and the requirements for obtaining it).

161. *Id.*

162. *See id.* at art. 16(1) ("A third country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.").

Secondly, there are serious practical difficulties with the application of subsidiary protection as a remedy for the plight of a persecuted woman. Because refugee status carries with it many important rights that often do not accompany subsidiary protection status<sup>163</sup> and because subsidiary protection is conceptually temporary, though it can be renewed and endure an entire lifetime, it has the potential to create an underclass of asylum seekers who are stuck in a sort of social and legal limbo.<sup>164</sup> Generally, subsidiary protection is temporary in nature and will be revoked once the host country determines it is safe for the immigrant to return to her home country.<sup>165</sup> This may be an effective approach in times of civil war or political unrest, which are likely to end in a matter of months or years.<sup>166</sup> Gender-based persecution is unlikely to be solved within a lifetime, though, as it takes so long for societal attitudes to change. Therefore, it is possible that subsidiary protection would lead to the development of a group of individuals who would never actually return to their home country, but who are prevented from fully investing in their new home because of the artificial wall of "temporary" immigrant status.<sup>167</sup> This is already the *de facto* situation for many women asylum-seekers in the United States whose cases are pending approval of the proposed regulations.<sup>168</sup> This is obviously not a desirable situation for the immigrant, nor is it desirable for the host country, which might otherwise benefit from the contributions of these individuals, had they been given the opportunity to become full members of their new society.

### B. Guidelines

As discussed in Part VI, Canada, the United Kingdom, Australia, The Netherlands, and Norway have all issued guidelines advising that

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163. See Refugee Convention, *supra* note 21 (discussing the rights awarded to refugees).

164. See Steinbock, *supra* note 16, at 810 (discussing how the narrow definition of subsidiary protection can create ambiguities in practice for certain refugees).

165. See generally Susan M. Akram & Terry Rempel, *Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT'L L.J. 2 (2004) (defining temporary protection).

166. See *id.* at 10 (explaining that the "Refugee Convention was drafted to address the mass displacements caused by World War II in Europe").

167. *Id.*

168. For example, Rodi Alvarado's case is pending approval of the proposed regulations.

persecution based on gender may qualify an individual for refugee status. At first blush, these guidelines seem to alleviate the difficulties involved in otherwise shoe-horning gender into the category of a "particular social group" as discussed in the three hypothetical situations discussed previously. However, it must be remembered that these guidelines do not provide protection, per se, from gender-based persecution and that they still require an individual to prove the causal nexus between her persecution and her gender. The often private nature of gender-based persecution renders such proof especially troublesome, though, rendering such guidelines ineffective.<sup>169</sup> For example, if such guidelines were implemented in the United States, would Rodi Alvarado have been granted asylum under such guidelines? It is hard to know if a judge would rule that Ms. Alvarado was being persecuted on account of her gender, and award her asylum, or if a judge would find that she was persecuted because her aggressor-husband had a personal problem with her, as an individual, and not with all women, generally.<sup>170</sup>

### C. Common Law Tests

The "protected" or "innate" characteristic tests adopted in many common law nations suffer from the same causal nexus difficulty as the guidelines and are perhaps even less helpful because they leave it to judges, and the eventual development of precedent, which can always be overturned, to determine what qualifies as a "protected" or "innate" characteristic.<sup>171</sup> Though guidelines are not perfect, their clear statement that gender can be a basis of persecution is preferable to the "protected" or "innate" characteristic inquiry.

### D. Addition of a Sixth Ground

The addition of a sixth ground or the inclusion of statutory definitions that explicitly define the term "particular social group" to include "gender"

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169. See, e.g., Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim's Particular Social Group*, 49 LOY. L. REV. 287, 287 (2003) (discussing common issues that persecuted female refugees experience in bringing their asylum claims); see also *supra* Part III.B.

170. See *supra* notes 100–108 (discussing case of Rodi Alvarado).

171. See *supra* Part VI.A (discussing the use of the "protected," "innate," or "immutable" characteristic tests in common law nations).

would provide more clarity than the common law "innate characteristic" test and avoid the logical inconsistencies of the various guidelines. Even these statutory changes, though, are plagued by the "on account of," "based on," or "for reasons of" language that leaves women to face the often insurmountable barrier of proving their persecutor's intent to harm them based on their gender and not for some other private, more individual reason.

### *E. Proposed U.S. Regulations*

The proposed American regulations would define a particular social group as follows:

A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.<sup>172</sup>

This definition would have an effect similar to that of the statutory definitions of "particular social group" discussed above and adopted in countries such as Ireland, South Africa, Germany, and Spain. Obviously, these regulations would be an improvement over current American law, which appears to be woefully behind many other developed nations in this area, but they would nonetheless suffer from the same deficiencies that plague the solutions of those other nations: they still require an applicant to prove the intent of her persecutor.

### *VIII. Elimination of the Five Grounds*

Elimination of the requirement that persecution be "on account of" one of the five grounds may be the solution to the legal difficulties surrounding gender-based asylum claims. As discussed above, the political purpose of asylum is to shame another country by providing a persecuted individual with membership in the new country.<sup>173</sup> Given the posture of the United States and other nations on women's rights issues, it would seem that these countries would wish to shame countries that permit gender-based

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172. Asylum & Withholding Regulations, 65 Fed Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

173. See *supra* Part III.A (reiterating the purpose of asylum).

persecution by providing asylum to victims of such persecution. The problem we have seen, though, is that the current Refugee Definition and the various attempts to reform it still require a causal nexus between the persecution and the victim's gender.<sup>174</sup> This nexus is often difficult to prove, given the overwhelmingly private nature of gender-based persecution.<sup>175</sup> The solution, therefore, may be the elimination of this causal nexus requirement.

Victims of gender-based persecution rarely have difficulty proving they have been persecuted, but often face difficulty proving the intent of their persecutor(s).<sup>176</sup> Even in nations that explicitly recognize gender as a social group or a sixth ground, it is often hard to determine if persecution is based on, for example, one's status as a woman or on one's status as a particular person's wife. Many judges struggle with the need to find persecution that is clearly based on non-personal grounds, as in the case of Rodi Alvarado. In that case, the correct result was clear to the immigration judges, Janet Reno, the United States Department of Justice, and the American people, yet the requirement that persecution be "on account of" one of the five grounds almost sent Ms. Alvarado back to certain torture and possible death at the hands of her husband.<sup>177</sup> This section will argue that elimination of the five grounds and the "on account of" language will promote the political purpose behind asylum by making it easier for legitimate asylum applicants, especially victims of gender-based persecution, to gain asylum. This section will also discuss how the elimination of this causal nexus will not impede the government's ability to maintain a sufficiently narrow asylum program.

Once amended, the new statute would read

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 unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution.

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174. See *supra* Parts III.B, V, VI (noting that all refugee definitions still require a causal nexus).

175. See *supra* Part III.B (stating reasons why establishing a nexus can be difficult).

176. See, e.g., Irena Lieberman, *Women and Girls Facing Gender-Based Violence, and Asylum Jurisprudence*, HUMAN RIGHTS MAGAZINE, available at <http://www.abanet.org/irr/hr/summer02/lieberman.html> (last visited Apr. 11, 2009) (discussing proof issues faced by women seeking asylum from gender-based persecution) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

177. See *supra* Part V.

The only change would be the elimination of the causal nexus requirement, so the asylum framework would still remain quite narrow while providing greater protection for victims of gender-based persecution who often experience great difficulty in proving their persecution was "on account of" one of the grounds. This is because (1) the current five grounds are outdated creations of the mid-twentieth century, (2) applicants would still have to prove they could not safely relocate within their own country, (3) applicants would need to prove their home countries could not protect them, and (4) the maintenance of current statutory exclusions would ensure that "undesirables," such as *genocidaires*, are not allowed to claim asylum protection. This subsection will discuss each of these issues in greater detail.

Firstly, the current five grounds are no longer appropriate. As discussed earlier, these grounds were developed with refugees of World Wars I and II in mind. The drafters were, therefore, concerned with protecting the kinds of individuals who had been persecuted during those wars and were not necessarily concerned with developing criteria that would be applicable to all people in all places for all times. (It must be remembered that the Refugee Convention of 1951 contained geographical and time restrictions that limited protection to individuals in Europe who were persecuted during a specific time period that corresponded with the World Wars. When no longer deemed appropriate, those restrictions were lifted.<sup>178</sup>) Furthermore, the Refugee Convention grounds were penned in 1951. Notions of acceptable behavior toward women—and a variety of other groups, such as sexual minorities—are far different now than they were in 1951. For example, as discussed previously, violent acts in the "private" sphere, in which many of the world's women spend most of their lives, are now considered persecution, but in 1951, acts outside of the "public" sphere would never have been conceived of as persecution.<sup>179</sup> As such, the individuals that countries now wish to protect are not entirely covered by the existing grounds, and, therefore, these grounds do not correspond to the evolving needs of today's society.

Secondly, the requirement that an individual NOT be able to find safety through relocation in her country<sup>180</sup> is a powerful limitation on

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178. See *supra* note 22 and accompanying text.

179. See *supra* Part III.B (discussing how traditional views of persecution reflected an inherent pro-male bias).

180. See 8 C.F.R. § 208.13 (b)(i)(B) (requiring denial of asylum where "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country of nationality. . .").

potential asylum claims. Unless an individual is being persecuted by a powerful or wealthy individual or organization, a victim can often find safety by moving to another part of the country where the persecutor does not have ties or sufficient resources to find and further victimize the individual. This provision likely renders many persecuted individuals ineligible for asylum and ensures that only those who truly cannot regain full membership in society in their home country are granted asylum.

Thirdly, because an important aspect of the political purpose behind asylum is its shaming function,<sup>181</sup> when an individual's country takes meaningful<sup>182</sup> steps to protect an individual from violence, then there is no reason to shame that country. In such situations, the individual is a crime victim and not a victim of persecution that rises to the level necessary to obtain asylum. For example, victims of domestic violence will not be allowed to seek asylum abroad if their country actively prosecutes instances of abuse. In that situation, the domestic violence is a crime, punished by the home country. Such a situation is clearly distinguishable from that in which a government acquiesces in the domestic abuse by refusing to protect the victim. It is in this latter situation that actions in the private sphere take on a public quality and rise to the level of persecution necessary for a grant of asylum.

Fourthly, the current exclusions should be maintained, for example, so as not to protect a person fleeing "political persecution" based on his strong belief in Nazism. Our country does not espouse hateful politics, and, therefore, the political purpose of asylum is not served by protecting people that the United States finds morally repugnant. Some careful thought should be given to the breadth of such exclusions, however, as a blanket exclusion on "criminals" may exclude a person that would not be considered a criminal in the United States or someone who has committed a minor infraction, recognized in the United States, but who faces a disproportionate or cruel and inhuman punishment in his home country. Such harsh penalties may constitute the sort of behavior the United States wishes to condemn through the provision of asylum protection to such an individual. Therefore, much thought and discussion should be given to the issue before additional exclusions are created. The point remains, though, that it is possible for Congress to pass legislation that specifically excludes

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181. See *supra* Part III.A (describing the conferral of asylum status as necessarily condemning the nation of origin of the asylee).

182. It is important to distinguish between meaningful efforts to protect victims and superficial attempts to do so.



"extra," undesirable asylees who might otherwise slip through the definition, should such a situation arise.

For these reasons, eliminating the requirement that persecution be "on account of" one of the specified grounds for asylum might provide more protection and consistency to victims of gender-based persecution claiming asylum in the United States. There are, however, at least two potential downsides that should be considered: (1) the possibility of a massive increase in asylum applicants that could cripple the immigration system and (2) the possibility that opening up the refugee statute to revision may result in unexpected changes that could place victims of gender-based persecution at a disadvantage.

Firstly, one must consider the ever-present fear that such an amendment would open the "floodgates" to millions and millions of asylees. Such fears, after all, were the reason why the drafters of the Refugee Convention rejected broader definitions that did not require a causal nexus in favor of clearly enumerated categories.<sup>183</sup> Such fears are perhaps no longer legitimate, as nations have had decades to become accustomed to the asylum adjudication process and to develop other limitations on asylum applications, such as those mentioned in the paragraphs above. Furthermore, it should be remembered that even without those additional limitations, most people do not have the resources to travel to the United States and even apply for asylum in the first place, and no expansion of the refugee definition can change that economic reality. Therefore, though further study on this subject is needed, it is quite possible that an expansion of the refugee definition would not result in a huge increase of asylum applications.

Secondly, human rights advocates have voiced concern that opening up the refugee statute to debate might result in a severe narrowing of the definition that was not envisioned by those proposing that the statute be changed.<sup>184</sup> This concern may have some merit in this case, and such fears are always present whenever legislative change is sought. It will simply need to be determined whether the current injustice being done to gender-based persecution victims seeking asylum is great enough to justify the risk.

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183. See *supra* Part II (describing the U.S. representative to the Refugee Convention Drafting Committee's emphasis on producing a clear, narrow definition of refugee).

184. Cf. Oxford, *supra* note 52, at 21 (describing the 1996 Illegal Immigration Reform and Responsibility Act, which broadened access to asylum for those subject to coercive population controls as otherwise "generally restrictive legislation").

*IX. Conclusion*

Asylum is a time-honored concept that has evolved from a practice of offering general refuge to a very specific legal status that offers protection to specific people in specific situations. In the current era, in which asylum is an official form of state aid to foreigners, there has been some disagreement as to the purpose of asylum, whether it is humanitarian or political in nature. This Note finds the political conception of asylum most logically appealing and agrees that asylum's purpose is to provide both protection and societal membership to victims of persecution in order to condemn state or state-condoned human rights violations. Gender-based persecution clearly falls under this "political purpose" rubric as it robs victims of both safety and societal membership and involves acts that are clearly odious to American society and law. As gender-based persecution fulfills the political purpose of asylum, it should, therefore, be recognized within the legal framework governing asylum in the United States. Unfortunately, the current American framework, based on the Refugee Convention penned by the United Nations in 1951, contains an inherently male bias and does not reflect the full range of human rights violations the United States should be able to condemn through the use of asylum, including gender-based persecution.

The international community, as well as the United States and various other developed nations, has taken steps to integrate gender-based asylum claims into the current framework. These steps have included the issuance of guidelines meant to help adjudicators fit a gender-based persecution claim into one of the five asylum grounds, the amendment of statutes to define "particular social group" as including sex, and the addition of gender as a sixth basis for asylum. Unfortunately, none of these solutions has been entirely satisfactory, as even the best ones still require victims of gender-based persecution to prove the intent of their attacker(s). Because of the often personal nature of gender-based persecution claims, such intent can be difficult to prove, and, consequently, many valid asylum claims are denied.

The solution to this problem may be to eliminate the requirement that persecution be "on account of" particular grounds. It may be enough to simply require proof of persecution alone. At least in the United States, the standard for "persecution" is quite high and, coupled with all the other current restrictions and limitations on asylum claims, the elimination of the five grounds may provide relief to victims of gender-based persecution, while preventing an over-expansion of the refugee definition. This solution

is not without its difficulties, such as a possible fear of opening up "floodgates" of applications, but it may prove to be a more workable solution than the current American scheme or any of the other legal frameworks that have been implemented in other countries. Therefore, given the necessity of rethinking our current asylum system, the possibility of eliminating the five grounds of asylum is an idea that should be strongly considered.