

# HOME IS WHERE THE BRUTE LIVES: ASYLUM LAW AND GENDER-BASED CLAIMS OF PERSECUTION

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## I. INTRODUCTION

Violence and discrimination against women are globally pervasive, transcending socioeconomic and cultural boundaries.<sup>1</sup> Such treatment constitutes a breach of women's fundamental human rights and freedoms.<sup>2</sup> The Report on the recent United Nations Fourth World Conference on Women<sup>3</sup> in Beijing acknowledged that there has been a "long-standing failure to protect and promote those rights and freedoms,"<sup>4</sup> and further, that violence against women impedes the achievement of "equality, development

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<sup>1</sup> See U.N. FOURTH WORLD CONFERENCE ON WOMEN, REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN, U.N. FOURTH WORLD CONFERENCE ON WOMEN, ¶ 112, U.N. Doc. A/CONF.177/20, U.N. Sales No. \_\_\_\_ (1995) [hereinafter BEIJING CONFERENCE REPORT]. The report used in writing this article was the preliminary version of the Report of the Fourth World Conference on Women. The final version will be issued as a sales publication. See *id.* at 1. See generally HUMAN RIGHTS WATCH, THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS xiii-xxi (1995) [hereinafter HUMAN RIGHTS WATCH REPORT] (providing an overview of the violations against women's human rights by governments, military regimes, police officers, and private actors; the fact that these abuses have traditionally been ignored and gone unpunished; and the steps that need to be taken to prevent women's rights abuses).

<sup>2</sup> BEIJING CONFERENCE REPORT, *supra* note 1, ¶ 112.

<sup>3</sup> For the text of the report, see U.N. FOURTH WORLD CONFERENCE ON WOMEN, REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN, U.N. FOURTH WORLD CONFERENCE ON WOMEN, ¶ 112, U.N. Doc. A/CONF.177/20, U.N. Sales No. \_\_\_\_ (1995). See also discussion of report *supra* note 1.

<sup>4</sup> *Id.* ¶ 112 (stating that there is world-wide evidence of discrimination and violence against females beginning at youth). Examples of violations of rights experienced by women of all ages include poor access to food, health care and education, in addition to subjection to sexual and economic exploitation, forced prostitution, incest, genital mutilation, and female infanticide. See *id.* Women face a "double jeopardy" situation: they are discriminated against as women, and are at least as likely, if not more likely, than men to be subjects of human rights violations. See AMNESTY INT'L, IT'S ABOUT TIME! HUMAN RIGHTS ARE WOMEN'S RIGHTS 5 (1995) [hereinafter IT'S ABOUT TIME!]. Governments enforce gender-neutral laws in a discriminatory manner or neglect to ensure that constitutional and other guarantees of non-discrimination are applied. See HUMAN RIGHTS WATCH REPORT, *supra* note 1, at xv; see also AMNESTY INT'L, WOMEN IN THE FRONT LINE 1-4, 8 (1991) [hereinafter WOMEN IN THE FRONT LINE] (detailing human rights abuses inflicted upon women only, and those violations that affect women, men, and children).

and peace.”<sup>5</sup> The Beijing Conference Report defines violence against women as: “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”<sup>6</sup>

In 1993, it was estimated that the number of refugees<sup>7</sup> was 20 million globally;<sup>8</sup> more than 80 percent of that number were women and children.<sup>9</sup> However, even though women comprise the majority of refugees, they are a minority of those whose claims for asylum are successful.<sup>10</sup> Under United States law, a woman is statutorily eligible for asylum if she is physically present in the United States, or at a port of entry in the United States, and can satisfy the definition of “refugee” under the INA.<sup>11</sup>

Although the definition of refugee is gender neutral, in practice women have greater difficulty than men in satisfying the legal requirements for refugee status, thereby implying certain built-in

<sup>5</sup> BEIJING CONFERENCE REPORT, *supra* note 1, ¶¶ 39, 112 (stating that violence against women and girls starting at youth hinders their skills, ideas, and development). “Violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms[, and] are incompatible with the dignity and the worth of the human person and must be combated and eliminated.” *Id.* ¶ 224.

<sup>6</sup> BEIJING CONFERENCE REPORT, *supra* note 1, ¶ 113. See also *Declaration on the Elimination of Violence Against Women*, U.N. GAOR 48th Sess., Agenda Item 111, at Article 1, U.N. Doc. A/RES/48/104 (1994) [hereinafter *UN Declaration on the Elimination of Violence Against Women*]. Examples of acts that are considered violence against women include physical, sexual and psychological violence in the home, such as battering, sexual abuse, genital mutilation, and marital rape; violence in the community, such as rape, sexual abuse, harassment, forced prostitution; discrimination in the workplace or educational institutions; and violence condoned by the state. See Beijing Conference Report, *supra* note 1, ¶ 113(a)-(c).

<sup>7</sup> A refugee is a person who, due to persecution or a “well-founded fear of persecution,” based on one of the five enumerated grounds (race, religion, nationality, membership in a particular social group, or political opinion), is unable or unwilling to return to her country of origin or habitual residence, or is unable to utilize the protection offered to her by that country. See Immigration and Nationality Act of 1952 § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42)(A) (West 1970 & Supp. 1988) (prior to 1997 amendment) [hereinafter INA]. The definition is premised on the United Nations 1951 Convention relating to the Status of Refugees and the 1967 Protocol. The Refugee Act of 1980, codified at 8 U.S.C.A. § 1101, incorporated a number of the United States’ obligations under the Protocol.

<sup>8</sup> See AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 4 (1995) [hereinafter AMNESTY INTERNATIONAL REPORT].

<sup>9</sup> See *id.*; see also BEIJING CONFERENCE REPORT, *supra* note 1, ¶ 136; U.N. DEP’T FOR ECONOMIC & SOCIAL INFORMATION & POLICY ANALYSIS, THE WORLD’S WOMEN 1995: TRENDS AND STATISTICS at 46-7, U.N. Doc. ST/ESA/STAT/SER.K/12, U.N. Sales No. E.95.XVII.2 (1995) [hereinafter THE WORLD’S WOMEN] (providing statistics on the ratio of male to female refugees in various countries and by continent).

<sup>10</sup> See IT’S ABOUT TIME!, *supra* note 4, at 27 (stating that this is a result of those hearing the complaints not “categoriz[ing] violations of women’s rights as persecution” and women are reluctant and ashamed to tell their stories of rape and abuse to strangers who are usually male).

<sup>11</sup> See INA § 208(a), 8 U.S.C.A. § 1158. For the definition of refugee, see *supra* note 7.

male prejudices in the law.<sup>12</sup> The activities in which women engage, and the treatment to which they are subjected, has commonly been viewed as private and relegated to that sphere.<sup>13</sup> Sexual crimes are not treated with the same gravity as other human rights abuses and are, therefore, not generally considered a violation of human rights.<sup>14</sup> "In this way, gender-specific persecution becomes masked as a seemingly random act of sexual violence"<sup>15</sup> and the political nature of these acts is ignored.<sup>16</sup>

The term gender-based persecution, in essence, refers to those asylum applications made by women which are premised on issues that pertain specifically to their gender.<sup>17</sup> These claim can be separated into two general categories. The first includes and focuses on persecution that, for the most part, is particular to women — namely sexual abuse, rape, genital mutilation, domestic violence, and bride burning.<sup>18</sup> "[W]omen are targets of violence because of their sex. This is not random violence; the risk factor is being fe-

<sup>12</sup> See IT'S ABOUT TIME!, *supra* note 4, at 27; see also Jacqueline R. Castel, *Rape, Sexual Assault and the Meaning of Persecution*, 4 INT'L J. REFUGEE L. 39, 40 (1992). The absence of specific recognition of gender-based persecution, and the political and social framework within which women's claims for asylum have been determined, explain, to some extent, the obstacles that women face. See *id.*

<sup>13</sup> See Gayle Kirshenbaum, *Why Aren't Human Rights Women's Rights?*, Ms., July/Aug. 1991, at 12, 12.

<sup>14</sup> See IT'S ABOUT TIME!, *supra* note 4, at 27.

<sup>15</sup> Kristine M. Fox, Comment, *Gender Persecution: Canadian Guidelines Offer A Model For Refugee Determination in the United States*, 11 ARIZ. J. INT'L COMP. L. 117, 126 (1994).

<sup>16</sup> See Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT'L J. REFUGEE L. 518, 518 (1989). Greatbatch argues that the public/private distinction should not be overemphasized. Instead, the relationship between a woman and the state should be understood, and a human rights approach to the definition of persecution should be adopted in addition to recognizing women as a particular social group. See *id.* at 518 nn.2-3 (citing Doreen Indra, *Gender: A Key Dimension of the Refugee Experience*, 6 REFUGEE, Feb. 1987, at 3).

<sup>17</sup> Gender-based issues include:

[S]tate-directed and state-approved violence against women; violence against women by private actors that is legally endorsed; violence against women by private actors that is illegal but is tolerated by the state through discriminatory enforcement of the law; . . . discriminatory laws and practices, . . . and abuses that are gender specific either in the form — such as forced pregnancy and forced virginity exams — or in that they target primarily women — such as rape and the forced trafficking of women for purposes of sexual servitude.

HUMAN RIGHTS WATCH REPORT, *supra* note 1, at xiii.

<sup>18</sup> The Beijing Conference Report delineates violence against women as including, but not being limited to "[p]hysical, sexual and psychological violence occurring in the family, including battering, . . . dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation." BEIJING CONFERENCE REPORT, *supra* note 1, ¶ 113(a); *UN Declaration on the Elimination of Violence Against Women*, *supra* note 6, at Article 2 (utilizing the same language as the *Beijing Conference Report*). See generally *The World's Women*, *supra* note 9, at 158-68 (discussing and providing statistics on gender-based violence against women, such as domestic violence, rape, sexual abuse, and prostitution).

male."<sup>19</sup> The second category includes those claims which constitute persecution because of the applicant's gender — persecution for disobeying repressive laws or for not conforming with social mores that are offensive to women.<sup>20</sup> This category also includes situations that discriminate against women and strictly prohibits them from engaging in certain activities.<sup>21</sup> Feminist advocates have recently presented gender-based claims of persecution where women seek asylum because the persecution feared or experienced is that of "intimate violence."<sup>22</sup>

It is submitted that the definition of refugee is dated, and that a reassessment of the term is long overdue.<sup>23</sup> The enumerated grounds defining persecutory treatment were appropriate for post-World War II conditions, but need to be expanded in light of the developments concerning women in the human rights arena.<sup>24</sup>

<sup>19</sup> Lori Heise, *Crimes of Gender*, WORLD WATCH, March/Apr. 1989, at 12. See also AMNESTY INT'L, *WOMEN IN PAKISTAN: DISADVANTAGED AND DENIED THEIR RIGHTS 1-2* (1995) [hereinafter *WOMEN IN PAKISTAN*]; AMNESTY INT'L, *WOMEN IN THE FRONT LINE*, *supra* note 4, at 18 (stating that "[s]ome types of human rights violations . . . are particularly directed against women, . . ." such as pregnant women who are tortured and sexually abused by government agents); HUMAN RIGHTS WATCH REPORT, *supra* note 4, at xiii.

<sup>20</sup> See NANCY KELLY, *WOMEN REFUGEES PROJECT OF CAMBRIDGE & SOMERVILLE LEGAL SERVICES & HARVARD IMMIGRATION & REFUGEE PROGRAM, GUIDELINES FOR WOMEN'S ASYLUM CLAIMS 2* (1995); see also Fox, *supra* note 15, at 128-29 (stating that women may be subjected to persecution when refusing to comply with religious or cultural norms).

<sup>21</sup> See KELLY, *supra* note 20, at 2; see also BEIJING CONFERENCE REPORT, *supra* note 1, ¶ 136 (stating that women refugees are deprived of property, goods, and services and are forbidden to return to their homes and are forced to leave their homes, because they are members of "particular ethnic, cultural or religious groups"). Although the 1991 *UNHCR Guidelines on the Protection of Refugee Women* primarily deal with issues concerning the treatment of women in refugee camps, the *UNHCR Guidelines* also address gender-based persecution. See *Guidelines on the Protection of Refugee Women*, Office of the U.N. High Commissioner for Refugees, ¶ 71, U.N. Doc. EC/SCP/67 (1991) [hereinafter *UNHCR Guidelines on the Protection of Refugee Women*].

<sup>22</sup> See Pamela Goldberg, *Anywhere but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565, 569 (1993) (adopting the definition of "intimate violence" from that of violence against women contained in the *Draft Declaration on the Elimination of Violence Against Women*, at 5, U.N. Doc. E/CN.6/WG.2/1992/L.3).

<sup>23</sup> It is also argued that the definition of refugee intrinsically operates against the claims of refugees from the Third World who may not be fleeing their countries because they are deprived of their individual rights, but rather are fleeing social violence or general policies that affect large sections of their society. See Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 627 n.9 (1993).

<sup>24</sup> See BEIJING CONFERENCE REPORT, *supra* note 1, ¶ 11; see also *Convention on the Elimination of All Forms of Discrimination Against Women 1979* ("CEDAW"), cited in BLACKSTONE'S INTERNATIONAL HUMAN RIGHT DOCUMENTS 83 (P.R. Ghandhi ed., 1995) (revising what constitutes discrimination against women to recognize "the great contribution of women . . . to the development of society, [which] so far [has] not [been] fully recognized. . ."). See *generally Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, U.N. Doc. A/CONF.116/28/Rev.1, U.N. Sales No. E.85.IV.10 (1985) (promoting the advancement of women); *Report of the World Conference on Human Rights*, U.N. GAOR at 20, U.N. Doc. A/CONF.157/24 (Part I) (1993) (acknowledging the need "to develop and encourage respect for human rights and fundamental freedoms for all, without distinctions as to . . . sex. . ."); *UN Declaration on the Elimination of Violence Against Women*, *supra* note 6 ("[r]ecognizing the urgent need

Nevertheless, the fact that persecution on account of one's gender is not listed as one of the eligible grounds does not mean that the person does not qualify for protection, or is meant to be excluded from the parameters of asylum law. Gender-based persecution claims may fit within the existing legal infrastructure,<sup>25</sup> specifically in the particular social group and political opinion categories, provided that violence against women is perceived as a human rights infringement and not dismissed as a private matter.

This Article will analyze the gender-based persecution claims of women and the present asylum laws in order to demonstrate the gender bias within the present system. In addition, this Article will propose that we need to change our understanding of the term persecution and to accept that discrimination and violence against women constitute an encroachment of their human rights which must be redressed. Victims of gender-based persecution should be protected and entitled to seek asylum. Further, it is submitted that, to the extent that states have consistently failed to prosecute violent acts and discriminatory behavior against women, and to guarantee women equal protection of the laws, states have violated their international obligations and neglected their responsibilities. As will be observed from the discussion of case law in the United States, there has been considerable confusion in this area of the law. In particular, the gender-based persecution claims of women have been ignored or misunderstood. The reasoning in the cases has not always been sound, and some of the decisions clearly reflect a manipulation of the law in an effort to fit the claim into one of the existing categories. This can be avoided if the present laws are interpreted consistently and in the furtherance of the spirit in

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for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings."). The U.N. has taken action to develop new policies concerning women's human rights, including the appointment of a Special Rapporteur on violence against women in March 1994. See IT'S ABOUT TIME!, *supra* note 4, at 13. Note the attention given to the women's human rights at the Beijing Conference; specifically, the section on "Human Rights of Women" in BEIJING CONFERENCE REPORT, *supra* note 1, ¶¶ 210-33. See also UNHCR Guidelines on the Protection of Refugee Women, *supra* note 20 (acknowledging that women need the same protection as men plus additional protection to reflect their gender). For additional discussion on the need for gender-specific protection for women in the human rights arena, see, e.g., Fox, *supra* note 15, at 131 (arguing that gender should be included as the sixth enumerated ground in the refugee definition, where an applicant's claim is premised on grounds exclusive to her gender); Mattie L. Stevens, Note, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179, 214-15 (1993) (stating that the definition of refugee does not accommodate persecution based on gender, and that the "immigration adjudicatory structure" does not understand the plight of women, and therefore, there is no framework in which to handle gender-based persecution).

<sup>25</sup> See Stevens, *supra* note 24, at 215 ("United States law could attempt to incorporate the claims of women into the Protocol's categories, but that would not recognize the fact that the type of persecution women face is different from that of men.").

which they were drafted. This reinterpretation will also accomplish the affirmative promotion of human rights as women's rights.

## II. PERSECUTION OR PERSONAL ENCOUNTERS?

The 1951 Convention,<sup>26</sup> 1967 Protocol Relating to the Status of Refugees,<sup>27</sup> and the Refugee Act of 1980,<sup>28</sup> do not define the term persecution. Commentators have often stated that the omission of a definition of persecution is intentional, so as to address the issue on a case-by-case basis.<sup>29</sup> Nevertheless, the term is generally accepted to be "a threat to life or freedom. . . ."<sup>30</sup> The Immigration and Naturalization Service ("INS") Manual notes that "[s]erious violations of basic human rights can constitute acts of persecution."<sup>31</sup> The INS Manual also states that alleged persecutory conduct must violate a basic human right that is protected by laws internationally.<sup>32</sup> Further, the INS Manual notes that less offensive forms of human rights violations may also amount to persecution.<sup>33</sup> Examples of such violations include "arbitrary interference with a person's privacy, family, home or correspondence; . . . enforced social or civil inactivity."<sup>34</sup> In *Matter of Acosta*,<sup>35</sup> the Board of Immigration Appeals ("B.I.A.") defined persecution

<sup>26</sup> See *supra* note 7.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 40 (1983).

There being no limits to the perverse side of human imagination, little purpose is served by attempting to list all known measures of persecution. Assessments must be made from case to case by taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured.

*Id.* See also ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 193 (1966) ("It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise. . . ."); David L. Neal, Note, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 226-27 (1988); OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES* ¶ 51 (1979) [hereinafter UNHCR HANDBOOK] (discussing that "[t]here is no universally accepted definition of 'persecution'. . . .").

<sup>30</sup> UNHCR HANDBOOK, *supra* note 29, ¶ 51 (stating that "[f]rom Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution.").

<sup>31</sup> U.S. IMMIGRATION AND NATURALIZATION SERV., OFFICE OF THE GENERAL COUNSEL, *ASYLUM BRANCH, BASIC LAW MANUAL: ASYLUM AND OVERVIEW CONCERNING ASYLUM LAW 1, 20* (1991) [hereinafter INS MANUAL]. This manual is drafted by the Department of Justice as a guideline for the INS to utilize in interpreting asylum law.

<sup>32</sup> *Id.*

<sup>33</sup> See *id.* at 21.

<sup>34</sup> *Id.*

<sup>35</sup> 19 I. & N. Dec. 211 (B.I.A. 1985).

as "the infliction of suffering or harm in order to punish an individual for possessing a particular belief or characteristic the persecutor seeks to overcome."<sup>36</sup>

Human rights laws have traditionally provided inadequate protection for women.<sup>37</sup> Violence against women has been (and still is) viewed as an issue that lies within the private domain and should not be disturbed.<sup>38</sup> Gender-based violence<sup>39</sup> has not been viewed as a human rights abuse.<sup>40</sup> Instead, the offending acts are seen as isolated incidents that may be culturally or religiously specific.<sup>41</sup> Issues such as domestic violence and rape have been excluded from the human rights discourse, because they are viewed as trivial, every day occurrences beyond the purview of state responsibility.<sup>42</sup> The male-dominated perspective from which human rights have developed "does not recognize the experiences of women as women."<sup>43</sup> It is imperative to recognize that sexual acts and sexual abuse in some circumstances are political in nature, and can be used as a tactic or strategy to coerce and intimidate in political situations. "While men are often killed or tortured in other ways, women are often raped or tortured sexually."<sup>44</sup> The Convention

<sup>36</sup> *Id.* at 234.

<sup>37</sup> See, e.g., Pamela Goldberg & Nancy Kelly, *International Human Rights and Violence Against Women*, 6 HARV. HUM. RTS. J. 195, 195 (1993).

<sup>38</sup> See *id.* at 196.

<sup>39</sup> Rape, for example, should be considered a gender-based crime: the victims are nearly always female, while the perpetrators, for the most part, are male. See Castel, *supra* note 12, at 47; see also HUMAN RIGHTS WATCH REPORT, *supra* note 1, at 2 (finding that rape is a gender-based crime, because women are "overwhelmingly the targets," although men are also raped).

<sup>40</sup> See Goldberg & Kelly, *supra* note 37, at 195.

<sup>41</sup> "No government has the right to hide human rights crimes behind a smokescreen of 'tradition,' 'culture,' or economic imperatives." AMNESTY INTERNATIONAL REPORT, *supra* note 8, at 8. See also Goldberg & Kelly, *supra* note 37, at 196. It is also argued that countries of refuge may be reluctant to grant asylum or to acknowledge certain practices as persecution for fear of offending other countries and being insensitive to their practices. See Fox, *supra* note 15, at 128. Others argue that we should not allow "cultural sensitivity" to diminish the evaluation and abuse of women's human rights. See Kirshenbaum, *supra* note 13, at 13 (quoting D. Thomas, *Human Rights Watch*).

<sup>42</sup> See HUMAN RIGHTS WATCH REPORT, *supra* note 1, at 342.

<sup>43</sup> Goldberg & Kelly, *supra* note 37, at 195 (citing Riane Eisler, *Toward an Integrated Theory of Action*, 9 HUM. RTS. Q. 287, 289 (1987)). Women constitute the majority of human rights abuse victims, but they are a minority in the national and international decision making bodies which formulate human rights policy. See IT'S ABOUT TIME!, *supra* note 4, at 5 ("An Inter-Parliamentary Union Survey of 96 national parliaments, published in 1991, found that just 11 percent of their members were women."); see also BEIJING CONFERENCE REPORT, *supra* note 1, ¶¶ 17, 28, 134, 181-95 (emphasizing the need for a radical change in the status accorded to women).

<sup>44</sup> Kelly, *supra* note 23, at 646-47. The atrocities in Bosnia-Herzegovina and the rape and sexual abuse of Muslim and Croat women by Serbian soldiers are examples of the treatment of women, which must be viewed in a political context. See IT'S ABOUT TIME!, *supra* note 4, at 18-20. For additional discussion of rape in Bosnia-Herzegovina, see HUMAN RIGHTS WATCH REPORT, *supra* note 1, at 8-25. It is further argued that the intentional violation of women's human rights has progressively become a key element of military strategy.

on the Elimination of All Forms of Discrimination Against Women ("CEDAW") states in Article 2 that discrimination against women in all forms is condemned. In Article 1, CEDAW affirms the equal enjoyment by women and men of human rights and fundamental freedoms in the political, economic, social, cultural, civic, and any other field.<sup>45</sup>

It may be argued that violence against women, especially in the domestic context, does not amount to a violation of human rights,<sup>46</sup> which are traditionally defined as genocide, slavery, torture, arbitrary arrest and detention. Nevertheless, to confine the term persecution to the above examples would be an unrealistic and narrow approach to this area of the law. Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . intimidating or coercing . . . or for any reason based on discrimination of any kind. . . ."<sup>47</sup> Conduct such as forcing a woman to perform sexual

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*See* AMNESTY INTERNATIONAL REPORT, *supra* note 8, at 3-4. "Rape is not an accident of war, or an incidental part of armed conflict. Its widespread use in times of conflict reflects the special terror it holds for women, the special contempt it displays for its victims." *Id.* at 4. *See also* WOMEN IN THE FRONT LINE, *supra* note 4, at 18-24 (providing examples in which women were raped or abused by government agents in order to keep them from pursuing particular activities); AMNESTY INT'L, WOMEN IN AFGHANISTAN: A HUMAN RIGHTS CATASTROPHE 6-9 (1995) ("Rape of women by armed guards belonging to the various warring factions [in Afghanistan] appears to be condoned by leaders as a method of intimidating vanquished populations and of rewarding soldiers."); AMNESTY INT'L, MEXICO: OVERCOMING FEAR: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN IN MEXICO 4-5, 10-15 (1996) [hereinafter MEXICO: OVERCOMING FEAR] (recording individual stories of Mexican women who have been raped by police officers and military officials); BEIJING CONFERENCE REPORT, *supra* note 1, ¶¶ 131, 135 (stating that armed forces often rape women, thereby violating human rights laws as a war tactic and as a form of terrorism with impunity from the government).

<sup>45</sup> *See supra* note 24. It is argued that CEDAW is flawed, because it fails to characterize violence against women as a human rights violation, and that the issues are incorrectly addressed solely in the context of discrimination. *See* Goldberg, *supra* note 22, at 580 n.75. CEDAW nevertheless reflects and addresses vital issues, and promotes the human rights of women in prohibiting sex-based distinctions against them. *See International Covenant on Civil and Political Rights*, Articles 2(1), 26 (Dec. 16, 1966), cited in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 377-98 (Louis Henkin ed., 1981) (mandating the equal protection of laws to all individuals).

<sup>46</sup> *See* HUMAN RIGHTS WATCH REPORT, *supra* note 1, at 342-409 (reviewing the propensity of domestic violence, the international law concerning the issue, and how it is covered in different countries); *see also* IT'S ABOUT TIME!, *supra* note 4, at 9-10 (arguing that domestic violence is an international problem that cuts across boundaries, cultures and classes, and even when prohibited by law goes unpunished). *See generally* Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. RTS. Q. 36 (1993) (discussing reasons why it has been difficult to conceive of domestic violence as a human rights abuse under international law).

<sup>47</sup> BLACKSTONE'S INTERNATIONAL HUMAN RIGHTS DOCUMENTS, *supra* note 24, at 93 (citing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)).



acts against her will, mental and physical abuse, continual verbal and physical assaults, genital mutilation, and forced prostitution must all constitute a violation of human rights that amount to persecution.<sup>48</sup>

### III. STATE INVOLVEMENT — DOES OMISSION MEAN COMMISSION?

For a human rights violation to amount to persecution, there must also be state involvement or complicity.<sup>49</sup> The persecution must, therefore, be at the hands of the state or a force that the state either will not or cannot control.<sup>50</sup> The I.N.S. Manual advises that, to be eligible for asylum, a person must establish that he or she has a well-founded fear of persecution on the basis of at least one of the five enumerated grounds, "because he or she is not adequately protected by his or her government."<sup>51</sup> Arguably, failure to respond to the needs of women by either not providing an infrastructure that protects them, or by neglecting enforcement of the existing system to provide them with effective redress, results in persecution by the state in its failure to control the perpetrators.

Thus, it is correct to state that, to the extent that a government does not make criminal or penalize gender-based violence, or take

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<sup>48</sup> In 1993, the Canadian Immigration and Refugee Board issued very comprehensive guidelines for reviewing the gender-based persecution applications of refugee women. The Canadian Guidelines reflect an understanding of claims that are gender-based, and recognize that a different, more sensitive approach may be necessary when assessing this type of asylum claim. The Guidelines indicate an acceptance of the fact that women *may experience a different type of persecution because of their gender*. See CANADIAN IMMIGRATION AND REFUGEE BOARD, GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (1993) [hereinafter CANADIAN GUIDELINES]. In July 1996, the Australian Department of Immigration and Multi-Cultural Affairs ("ADIMA") issued Guidelines on Gender Issues for Decision-Makers. See AUSTRALIAN DEPARTMENT OF IMMIGRATION AND MULTI-CULTURAL AFFAIRS, GUIDELINES ON GENDER ISSUES FOR DECISION-MAKERS (1996), reprinted in HEAVEN CRAWLEY, WOMEN AS ASYLUM SEEKERS: A LEGAL HANDBOOK 197-216 (1997). Arguably, these Guidelines are the most thorough and far reaching of the existing guidelines. See *Crawley, supra*, at 14-15.

<sup>49</sup> See Karen Bower, Note, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 183 (1993). International practice recognizes that both acts and omissions may give rise to liability under international law, depending on the concomitant duty imposed by international law. If liability is imposed for positive state action, a logical argument could encompass liability for inaction. See Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 FORDHAM INT'L L.J. 1 (1989-90).

<sup>50</sup> See Shelton, *supra* note 49, at 15.

[I]n principle, any violation of [human rights] carried out by an act of public authority or by persons who use their position of authority is imputable to the State. In addition, although the state may not bear initial responsibility for acts of private violence, responsibility for acts of private violence, responsibility may be imputed because of the lack of due diligence to prevent or remedy violations committed by non-state actors.

*Id.* (citations omitted).

<sup>51</sup> INS MANUAL, *supra* note 31, at 25.

steps to rigorously enforce existing laws that prohibit such violence, it has condoned the violence and in doing so must assume state responsibility for the offensive acts.<sup>52</sup> It is, therefore, essential to identify the relationship between the woman seeking protection and her state. Women suffer when there is insufficient police protection or other legal safeguards, as a result of either a gap the laws or the lack of enforcement of existing laws. Countries such as India,<sup>53</sup> Pakistan,<sup>54</sup> Haiti,<sup>55</sup> Bosnia-Herzegovina,<sup>56</sup> China,<sup>57</sup> and Mexico<sup>58</sup> provide obvious examples of abuses where women are raped by policemen or sexually assaulted while in custody.<sup>59</sup> In such cases, inaction by the state is clearly an omission, and translates into or amounts to a commission of the offending/persecutory act by the state.<sup>60</sup>

Undoubtedly, the state is responsible to the extent that it fails to provide or utilize the apparatus that could prevent or redress the wrongs. The state has an affirmative obligation to protect and prevent violence. It is therefore argued that persecution arises from nonfeasance, namely that "[l]iability is thus conferred on the state for the *commission* of those persecutory acts."<sup>61</sup> The state will undoubtedly be found to be in breach of the duties imposed on it by international law, which requires a state to punish those individuals — government agents or non-government actors — who commit human rights violations. Thus, the breach of such duties and

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<sup>52</sup> See Shelton, *supra* note 49, at 15. It is correctly argued that, when governments knowingly tolerate abuses such as female genital mutilation and domestic violence, the distinction between what is private and public narrows. See *IT'S ABOUT TIME!*, *supra* note 4, at 13; see also Bower, *supra* note 49, at 183 (1993). "Where a government offers no protection from gender-based violence, a woman's home and country become her prison and the violence is persecution." *Id.* at 188.

<sup>53</sup> See People's Union for Democratic Rights, *Custodial Rape and the Courts*, LAW. COLLECTIVE, July-Aug. 1994, at 49 (discussing the rape of Indian women by police officers while in police custody); see also *The Green of the Valley is Khaki*, LAW. COLLECTIVE, Sept. 1994, at 24 (discussing the rape of women by Indian military officials).

<sup>54</sup> See WOMEN IN PAKISTAN, *supra* note 19, at 7-10.

<sup>55</sup> See HUMAN RIGHTS WATCH REPORT, *supra* note 1, at 38-46 (concerning the sexual assault on women in Haiti by the military and police).

<sup>56</sup> See *IT'S ABOUT TIME!*, *supra* note 4, at 19 (stating that soldiers from all sides of this conflict have turned to rape, and that women from all backgrounds have become victims).

<sup>57</sup> See AMNESTY INT'L, WOMEN IN CHINA: IMPRISONED AND ABUSED FOR DISSENT 18-19, 25 (1995) [hereinafter WOMEN IN CHINA].

<sup>58</sup> See MEXICO: OVERCOMING FEAR, *supra* note 44, at 4-5, 10-11.

<sup>59</sup> Thus, women are often assaulted and raped by those who are meant to protect them. See AMNESTY INTERNATIONAL REPORT, *supra* note 8, at 4; see also *IT'S ABOUT TIME!*, *supra* note 4, at 18-22, 31, 86-92. See generally HUMAN RIGHTS WATCH REPORT, *supra* note 1, at 140-195 (dealing comprehensively and specifically with the systematic mistreatment by officials of women in custody, and delineating the plight and lack of protection of women in custody in Pakistan, the United States and Egypt).

<sup>60</sup> See Goldberg, *supra* note 22, at 574.

<sup>61</sup> *Id.* (emphasis added).

the deliberate indifference in protecting a woman's human rights thus that the state has persecuted her.<sup>62</sup>

The UNHCR Handbook states that acts of violence in the private sphere may be considered persecutory if the authorities condone them or if they refuse to, or are unable to, provide sufficient protection.<sup>63</sup> The Handbook also states that where an applicant's country has denied her this assurance, "[s]uch denial of protection may confirm or strengthen the applicant's fear of persecution and may indeed be an element of persecution."<sup>64</sup> The Canadian Guidelines also address gender-based persecution and state complicity in a very effective way.<sup>65</sup> The Guidelines state that women who are subjected to violence, domestic and otherwise, because they are physically vulnerable, culturally suppressed or for other reasons, "face violence amounting to persecution, because of their particular vulnerability as women in their societies and because they are so unprotected."<sup>66</sup> It is, therefore, submitted that the terms persecution and human rights violation must now necessarily include, and be redefined to encompass, violence against women. If the asylum laws in their inception only had the male refugee and male experiences of persecution in mind,<sup>67</sup> then a redefinition of some of the core terminology is long overdue.<sup>68</sup>

#### IV. PARTICULAR SOCIAL GROUPS AND POLITICAL OPINIONS

##### A. Introduction

There is no definition of the term "particular social group" either in the Refugee Act or its implementing regulations.<sup>69</sup> Sev-

<sup>62</sup> Ironically, governments that approve of prohibitions of human rights violations in international forums themselves commit or condone such violations at home. "Governments must be held to their obligations if this international standard is not to become one more double standard." *It's ABOUT TIME!*, *supra* note 4, at 11.

<sup>63</sup> See UNHCR Handbook, *supra* note 29, ¶ 65 (stating that persecution is "normally related to action by the authorities of a country[.]" but it "may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned."); see also Castel, *supra* note 12, at 49 (arguing that the absence of protective steps for women threatened with sexual violence may give rise to a well-founded fear of persecution).

<sup>64</sup> UNHCR HANDBOOK, *supra* note 29, ¶ 98.

<sup>65</sup> See CANADIAN GUIDELINES, *supra* note 48.

<sup>66</sup> *Id.* at 6.

<sup>67</sup> See Bower, *supra* note 49, at 184 n.61 (citing Anders B. Johnsson, *The International Protection of Women Refugees a Summary of Principal Problems and Issues*, 1 INT'L J. REFUGEE L. 221, 222 (1989)).

<sup>68</sup> See *id.* (stating that the "inclusion of women as a social group will not address 'the core issue of discrimination on grounds of sex as a violation of fundamental rights, or with the problems of violence specifically directed against women as women' without a change in the interpretation of persecution." (quoting Johnsson, *supra* note 64, at 221)).

<sup>69</sup> See INA § 101(42), 8 U.S.C.A. § 1101 (West 1988); 8 C.F.R. § 208.11(b)(1) (1993).

eral commentators have stated that this ground is meant to be a catch-all category that assists those applicants whose claims do not fall within the other listed grounds, but who genuinely fear persecution.<sup>70</sup>

Thus, it would seem that the open-endedness provides considerable potential for the courts to interpret this category in a generous manner, within the parameters of asylum laws. Yet the courts in the United States have been reluctant to be expansive in their definition, and have chosen, until quite recently, a fairly rigid approach. In effect, considerable confusion has resulted as the courts have struggled to come to terms with this area of the law. This inconsistency may have been compounded by the fact that decisions in the United States are delivered by different federal judicial circuit courts,<sup>71</sup> and by the INS and B.I.A., which follow their own internal guidelines.<sup>72</sup>

In the United States, although there are relatively few asylum applicants whose cases are based on persecution due to membership in a particular social group, there is considerable variety in the types of social groups that are presented. The political opinion category is often cited in conjunction with membership in a particular social group in asylum applications. An analysis of some of the decisions will illustrate an inconsistent approach, the missed opportunities for developing this category, and the distinct lack of clarity in the case law. In particular, the present analysis of some of the more recent decisions will ascertain that gender-based claims of women do not fit appropriately into the existing categories.

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<sup>70</sup> See GOODWIN-GILL, *supra* note 29, at 30 (stating that the imprecise definition of social group allows for expansion to include a variety of different classes susceptible to persecution); see also GRAHL-MADSEN, *supra* note 29, at 219 (arguing that the inclusion was an "afterthought" to prevent any possible gaps not covered by racial, ethnic, and religious groups); Neal, *supra* note 29, at 227-32 (asserting that women who experience gender-based persecution may be eligible for asylum under the social group category, even though persecution on the basis of sex is not included).

<sup>71</sup> See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 562 (1993) ("The U.S. approach to social group, because it is articulated in judicial decisions issued by different federal judicial circuits, is . . . variable.").

<sup>72</sup> See IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 161 (3d ed. 1992). The Immigration and Naturalization Service ("INS") and the Board of Immigration Appeals ("B.I.A.") are sub-divisions of the Department of Justice and make the relevant decisions concerning refugee status. Both the INS and the B.I.A. interpret immigration laws and regulations and follow their own internal guidelines. See *id.* An applicant for asylum, for example, may either present her case to an INS District Director, whose decision is reviewable by an Immigration Judge ("IJ"), or may apply directly to the IJ in the course of her deportation proceedings. See *id.* A denial by the IJ may be reviewed on appeal by the B.I.A., whose decisions may then be appealed to a federal circuit court and finally to the United States Supreme Court. See *id.*

*B. Immutable Characteristics*

In *Matter of Acosta*,<sup>73</sup> the B.I.A. considered the asylum relief sought by a Salvadoran taxi driver.<sup>74</sup> The alien Acosta assisted in the operation and management of a taxi drivers' cooperative, COTAXI.<sup>75</sup> The cooperative had antagonized the guerrillas in refusing to participate in work strikes that were aimed at destabilizing the government.<sup>76</sup> COTAXI and its drivers received anonymous calls and notes — allegedly from anti-government guerrillas — to stop work in an effort to damage El Salvador's economy by targeting small businesses.<sup>77</sup> The cooperative nevertheless continued its work and the guerrillas retaliated by seizing and burning their taxis.<sup>78</sup> Five members of COTAXI were killed, three of whom were co-founders and friends of Acosta.<sup>79</sup> Prior to the killings, each of the men had received a threatening anonymous note.<sup>80</sup> Over a two-month period, Acosta also received three anonymous notes threatening his life.<sup>81</sup> In fear of his life, Acosta fled El Salvador and sought refuge in the United States.<sup>82</sup>

Acosta based his asylum claim on membership in a particular social group and on his political opinion.<sup>83</sup> He stated that he feared persecution by the guerrillas on the basis of his membership in the social group that comprised COTAXI drivers and persons in El Salvador's transportation industry.<sup>84</sup> The B.I.A. refused to grant Acosta asylum.<sup>85</sup> Although the Board referred to international jurisprudence concerning this ground of persecution, they resorted to the principle of *ejusdem generis* in defining the phrase.<sup>86</sup> In essence, the principle states that when the general words, "particular social group," are used with more specific words, "race, religion,

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<sup>73</sup> 19 I. & N. Dec. 211 (B.I.A. 1985).

<sup>74</sup> *See id.* at 216.

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

<sup>80</sup> *See id.*

<sup>81</sup> *See id.* at 217.

<sup>82</sup> *See id.*

<sup>83</sup> *See id.* at 232.

<sup>84</sup> *See id.*

<sup>85</sup> *See id.* at 236. The B.I.A. found that there were no facts showing that the guerrillas wanted to punish the respondent for his political opinions, or that his refusal to participate in the strikes was motivated by political opinion. *See id.* at 235. The B.I.A. held that Acosta's fear of persecution by the government was not based on his own experiences, and therefore, was too subjective and insufficient to establish a well-founded fear of persecution by the government. *See id.* at 231-32. Acosta also did not prove that he was "unable to return to . . . El Salvador, as opposed to [one] particular place in that country, because of persecution." *See id.* at 236.

<sup>86</sup> *See id.* at 233.

nationality, or political opinion," they should be interpreted in line with the more specific words.

The Board's reasoning reflects the added approach taken in the United States when interpreting the term "particular social group." Their decision has been criticized as being "narrow" and "elitist," and as demonstrating a class bias in the interpretation of the term "particular social group."<sup>87</sup> The B.I.A. focused on the sharing of a "common immutable characteristic" by the individuals in the group, in that "whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."<sup>88</sup> This two-pronged interpretation has been criticized for "[i]naccurately labeling both alternatives as immutable characteristics,"<sup>89</sup> where immutable means "unchangeable; not subject to variation in different cases."<sup>90</sup>

The B.I.A. neglected to consider Acosta's case in a comprehensive and generous manner. In stating that "the internationally accepted concept of a refugee simply does not guarantee an individual the right to work in the job of his choice,"<sup>91</sup> and that Acosta could have changed his job since a taxi driver's work is not immutable,<sup>92</sup> the B.I.A. adopted a simplistic and narrow approach to his claim. The Board simply failed to consider the immutable nature of Acosta's past. Although the B.I.A. laid down a test for interpreting the particular social group, its analysis of Acosta's particular circumstances was, at best, superficial. The B.I.A. accepted Acosta's testimony and found him credible, yet they failed to apply the definition of a social group to the evidence presented. The fact that he was a founding member of COTAXI should have prompted the B.I.A. to analyze whether his membership of COTAXI was fundamental to his identity or conscience, in line with their test. Significantly, the B.I.A. listed specific examples of groups that are identifiable by immutable characteristics, and listed "sex" as one of them, amongst kinship ties, color, or shared past

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<sup>87</sup> See Fullerton, *supra* note 71, at 547.

<sup>88</sup> Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). It is argued that the "Acosta test" imposes no significant limits on the scope of the permitted social group. See Peter C. Godfrey, Note, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL'Y 257, 263 (1994) ("Acosta recognizes the existence of social groups defined by broadly based characteristics which may include those defined by the gender or sexual orientation of their members.").

<sup>89</sup> Fullerton, *supra* note 71, at 545.

<sup>90</sup> *Id.* at 545 n.242 (quoting OXFORD ILLUSTRATED DICTIONARY 421 (2d ed. 1975)).

<sup>91</sup> *Acosta*, 19 I. & N. Dec. at 234.

<sup>92</sup> See *id.*

experiences.<sup>93</sup> Arguably, "*Acosta* recognizes the existence of social groups defined by broadly based characteristics which may include those defined by the gender or sexual orientation of their members."<sup>94</sup>

The First Circuit in *Ananeh-Firempong v. Immigration & Naturalization Service*,<sup>95</sup> was far more progressive in its approach to the particular social group category. The applicant had stated that she was a member of three social groups persecuted by the Rawlings government in Ghana: those associated with the former government, the Ashanti tribe, and educated professionals in Ghana.<sup>96</sup> Without specifically stating which of the three constituted a social group for asylum purposes, the court held that she had established fear of persecution on the basis of her membership in a particular social group.<sup>97</sup> The decision clearly emphasized and utilized the "immutable" characteristic that had been expressed in *Matter of Acosta*,<sup>98</sup> in that her fear of persecution was premised on characteristics such as tribal background and social class that she was unable to change.<sup>99</sup> The court also utilized the UNHCR Handbook test of a particular social group whose members have "similar background, habits or social status."<sup>100</sup>

It has been questioned whether the applicant's case in *Ananeh-Firempong* was "a claim of persecution based on political opinion masquerading as persecution based on social group."<sup>101</sup> Although the observation is interesting, it should not come as a surprise as

<sup>93</sup> See *id.* at 233.

The shared characteristic [of a particular social group] 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. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.

*Id.* (emphasis added).

<sup>94</sup> Godfrey, *supra* note 88, at 263.

<sup>95</sup> 766 F.2d 621 (1st Cir. 1985).

<sup>96</sup> See *id.* at 623. Ananeh-Firempong's family fell within all three social groups, since her father had participated in the former government, her father was educated, and he was a member of the Ashanti tribe. See *id.* In addition, the family lived in a prosperous neighborhood assumed by the present regime to be inhabited by supporters of the previous government, the government had seized the bank accounts of the family, and the government had placed her parents under house arrest. See *id.*

<sup>97</sup> See *id.* at 626 (stating that the seizure of her parents' property, the beating of her nephew, and the persecution of the tribe, her social class and political ties proved that it was most likely that she was threatened due to her social group).

<sup>98</sup> 19 I. & N. Dec. 211, 234 (B.I.A. 1985).

<sup>99</sup> See *Ananeh-Firempong*, 766 F.2d at 626.

<sup>100</sup> UNHCR HANDBOOK, *supra* note 29, ¶ 77. It has been argued that the UNHCR Handbook test, like the *Acosta* test, does not confine the scope of the social group, "because it is possible that a group of any size could have the same background, habits, or social status." See Godfrey, *supra* note 88, at 264.

<sup>101</sup> Fullerton, *supra* note 71, at 550.

the two grounds — particular social group and political opinion — overlap, and are often presented together in asylum applications. In fact, the author herself states that the UNHCR Handbook, in its interpretation of the term particular social group, “gives a political cast to the social group term,” but correctly emphasizes that the two grounds are quite separate.<sup>102</sup>

### C. *Voluntary Association/Close Affiliation*

The Ninth Circuit Court of Appeals in *Sanchez-Trujillo v. Immigration & Naturalization Service*,<sup>103</sup> rejected “young, urban, working class males of military age who have never served in the military or otherwise expressed support of the government” as comprising a particular social group.<sup>104</sup> A practical approach had to be adopted when considering the scope of the term refugee, and the court stated that a particular social group must comprise more than a recognized demographic group.<sup>105</sup> The court set out a four-part test to ascertain when asylum may be granted on the basis of membership in a particular social group: (1) identification of a cognizable group;<sup>106</sup> (2) proof that the asylum applicant is a member of that particular group;<sup>107</sup> (3) proof that the group has been singled out for persecution on the basis of the group’s unifying characteristics;<sup>108</sup> and (4) the existence of “special circumstances” which permit membership of the group to suffice for asylum relief.<sup>109</sup>

The Ninth Circuit defined a particular social group as:

[A] collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.<sup>110</sup>

The First Circuit has also indicated that immediate family members would constitute a particular social group,<sup>111</sup> which seems to con-

<sup>102</sup> *Id.* at 551.

<sup>103</sup> 801 F.2d 1571 (9th Cir. 1986).

<sup>104</sup> *Id.* at 1576-77.

<sup>105</sup> *See id.* at 1576 (stating that “[t]he statutory words [particular social group] . . . indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance.”).

<sup>106</sup> *See id.* at 1574.

<sup>107</sup> *See id.* at 1574-75.

<sup>108</sup> *See id.* at 1575.

<sup>109</sup> *See id.*

<sup>110</sup> *Id.* at 1576.

<sup>111</sup> *See, e.g., Gebremichael v. INS*, 10 F.3d 28, 66 (1st Cir. 1993) (“[t]here can . . . be no plainer example of a social group based on common, identifiable and immutable charac-



tradict the voluntary association requirement of their definition, as family members are involuntarily related to each other, and may or may not associate with each other.

Thus, it is correctly argued that the "questionableness of the 'voluntary association' element of the Ninth Circuit's definition renders the definition itself suspect."<sup>112</sup> Rather than seize this opportunity to expand the definition of particular social group and to develop a workable test for recognizing a social group claim, the court narrowed the requirements, adopted an unduly restrictive approach, and even failed to carefully apply the principles it had set out to the facts of the case. Further, the court's insistence on emphasizing the word "particular" in the phrase "particular social group," considerably restricted the scope of a social group and the recognition of social groups by their broadly based traits.<sup>113</sup> The voluntary requirement would clearly be an obstacle for women in a social group that was defined solely by gender.

It should be noted that even though the Ninth Circuit's decision in *Sanchez-Trujillo*<sup>114</sup> concurs with *Matter of Acosta*<sup>115</sup> in requiring group members to have a common characteristic intrinsic or fundamental to their identity,<sup>116</sup> it is at odds with the B.I.A.'s interpretation of the phrase particular social group in *Acosta*, which requires an "immutable characteristic."<sup>117</sup> In addition, the court's decision in *Sanchez-Trujillo* is arbitrary, because it purports to offer relief from persecution to those who are members of social groups of their own volition, but not to those individuals who have no choice or control over the characteristic for which they are being

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teristics than that of the nuclear family."); *Ravindran v. INS*, 976 F.2d 754, 761 n.5 (1st Cir. 1992) (stating that "[p]erhaps a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people."). *But see Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (holding, without referring to *Sanchez-Trujillo*, that persecution on account of membership in a particular social group does not extend to the family).

<sup>112</sup> Fullerton, *supra* note 71, at 556. However, it is argued that the circuit court's example of family members might not be incredible as it is the conscious decision to associate with family members, and not the "involuntary characteristic of a biological relationship" among family members, that makes a family a social group. *See Godfrey, supra* note 88, at 267. Godfrey rightly states that the court's definition remains unclear. *See id.*

<sup>113</sup> *See Godfrey, supra* note 88, at 266 ("Broadly based groups, such as those defined by gender or sexual orientation, cannot realistically be considered closely affiliated because their members naturally have different lifestyles, varying interests, diverse cultures and contrary political leanings.").

<sup>114</sup> 801 F.2d 1571 (9th Cir. 1986).

<sup>115</sup> 19 I. & N. Dec. 211 (B.I.A. 1985).

<sup>116</sup> *See Sanchez-Trujillo*, 801 F.2d at 1576.

<sup>117</sup> *See Acosta*, 19 I. & N. Dec. at 234. The *Sanchez-Trujillo* court's emphasis on the voluntary association as intrinsic to the group's identity was an attempt to accommodate the immutable characteristic in *Acosta*. *See Godfrey, supra* note 86, at 268.

persecuted.<sup>118</sup> The court in *Sanchez-Trujillo* understandably stated that "the scope of the term cannot be without some outer limit,"<sup>119</sup> and in dicta stated that the social group category is flexible and is meant to include groups that do not satisfy the requirements of the other four categories.<sup>120</sup> Thus, despite the fact that the dicta provides encouragement for the proposition that the social group category offers protection to those who reasonably fear persecution but would not otherwise find refuge, the court's delineation of characteristics of a particular social group presents obstacles for broadly based social groups.

In *Matter of Toboso-Alfonso*,<sup>121</sup> the IJ accepted,<sup>122</sup> and the B.I.A. agreed, that homosexuality is an immutable characteristic.<sup>123</sup> In so concluding, the B.I.A. upheld the IJ's decision to withhold deportation of a homosexual Cuban.<sup>124</sup> The IJ had found a pattern of discrimination against homosexuals by the Cuban government, which had been directly experienced by the applicant.<sup>125</sup> Nevertheless, mere membership of a particular social group — in this case, homosexuals — would not be sufficient to obtain asylum relief.<sup>126</sup> The applicant would also need to establish that members of that particular social group are persecuted, have a well-founded fear of persecution, or that their freedom and/or lives are — or would be — in jeopardy as a result of their status.<sup>127</sup>

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<sup>118</sup> See Kelly, *supra* note 23, at 651.

<sup>119</sup> *Sanchez-Trujillo*, 801 F.2d at 1576.

<sup>120</sup> See *id.*

<sup>121</sup> 20 I. & N. Dec. 819 (B.I.A. 1990), available in 1990 WL 547189.

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*; see also *In re Tenorio*, No. A72 093 558, 14 (B.I.A. 1993), appeal pending (discussing the IJ's grant of asylum to a gay Brazilian male on the basis of membership in a particular social group of homosexuals, the IJ made note of the voluntary requirement of the Ninth Circuit in *Sanchez-Trujillo*, but focused on the immutable aspect of sexual orientation when granting him the relief sought). The IJ stated that "[s]exual orientation is arguably an immutable characteristic and one which an asylum applicant should not be compelled to change." *Id.*

<sup>124</sup> See *Toboso-Alfonso*, 20 I. & N. Dec. at 819.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *id.* In *Pitcherskaia v. Immigration and Naturalization Service*, 118 F.3d 641 (9th Cir. 1997), the court engaged in an extensive discussion of the term persecution, see *id.* at 646-48, and held that the B.I.A. had misdirected itself in the definition of the term by requiring the applicant to prove that her persecutor was motivated by the desire to punish or inflict harm. See *id.* at 646. The applicant, a Russian citizen, had applied for asylum on the grounds that she feared persecution on the basis of her own and her father's anti-Communist political opinions. See *id.* at 643. Further, she stated that "she was persecuted and feared future persecution on account of her political opinions in support of lesbian and gay civil rights in Russia, and on account of her membership in a particular social group: Russian lesbians." *Id.* See generally Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605 (1993) (arguing that being gay or lesbian is a fundamental characteristic of human identity which should not be required to be changed). In 1995, the Irish Parliament considered a

D. *Political Opinions and Personal Relationships*

In *Matter of Pierre*,<sup>128</sup> a pre-Refugee Act case, the B.I.A. denied relief to a Haitian woman whose claim for withholding of deportation was based on her fear of harm by her husband, a prominent official in the Haitian government.<sup>129</sup> She alleged that the government would not provide protection.<sup>130</sup> He had made threats on her life, and had tried to kill her by burning down her place of residence.<sup>131</sup> The B.I.A. viewed the matter as being purely personal in nature and wrongly denied the relief sought, because she was unable to prove that her persecution was based on one of the five listed grounds.<sup>132</sup> The facts of the case represented a clear example of gender-based persecution. However, the Board also stated that she had not provided any evidence to substantiate her allegation that the Haitian government would not support her by either intervening, punishing her husband, or preventing him from performing the alleged unlawful acts.<sup>133</sup> Nevertheless, the Board seemed to suggest that if an application is based on one of the five enumerated grounds and evidence is introduced confirming the inability or reluctance of the state to intervene, the claim might be successful.<sup>134</sup>

A noteworthy example of the manipulation of the law concerning particular social groups can be seen in *Lazo-Majano v. Immigration & Naturalization Service*.<sup>135</sup> Olimpia Lazo-Majano was a domestic worker who was repeatedly sexually abused and assaulted by her employer Zuniga, a junior member of the Salvadoran mili-

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Refugee Bill, which would permit persecution on grounds of sexual orientation as a legitimate basis for granting political asylum. See Kyla Skinner, *Sexuality Grounds for Asylum in Eire*, PINK PAPER, Dec. 1, 1995, at 6.

<sup>128</sup> 15 I. & N. Dec. 461 (B.I.A. 1975).

<sup>129</sup> See *id.* at 461.

<sup>130</sup> See *id.* at 462.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* at 463 ("The respondent does not allege that her husband seeks to persecute her on account of her race, religion, or political beliefs. The motivation behind his alleged actions appears to be strictly personal.").

<sup>133</sup> See *id.*

<sup>134</sup> See *id.* It is interesting to note that the Board stated that the person could qualify for relief, even though the persecution was at the hands of an individual not connected with the government, if the applicant demonstrated that the government could not or would not control the persecutors. See *id.* In an encouraging case, *Matter of A- and Z*, A72-190-893, A72-793-219 (IJ 1994), an IJ granted asylum to a Jordanian woman who had been continually abused by her husband for over 30 years. See *IJ Grants Asylum to Woman Based on Spousal Abuse*, INS Guidelines Imminent, 72 INTERPRETER RELEASES 521, 521 (April 17, 1995). Although the INS characterized her treatment as a personal, marital problem, the IJ held that the woman was persecuted on account of her political opinions and membership in a particular social group. See *id.* at 521. The former ground referred to the woman's belief in western values, including the emancipation of women. See *id.* at 522.

<sup>135</sup> 813 F.2d 1432 (9th Cir. 1987).

tary.<sup>136</sup> Lazo-Majano was first sexually accosted at gun-point,<sup>137</sup> and later bullied with hand grenades that were held to her forehead to coerce her into submission.<sup>138</sup> Zuniga threatened to physically torture her and kill her family if she ever disclosed this abusive treatment.<sup>139</sup> He also said he would denounce her as a subversive, and thus escape any punishment for his behavior towards her.<sup>140</sup> The IJ initially denied Lazo-Majano asylum relief.<sup>141</sup> Although they believed her testimony, the B.I.A. supported the IJ's decision and maintained that the attacks were personal in nature, were not the result of her political opinion or one ascribed to her, and did not amount to persecution under the Act.<sup>142</sup>

The Ninth Circuit, however, granted Lazo-Majano's appeal and stated that rape constitutes persecution.<sup>143</sup> In doing so, however, the court did not clearly state the circumstances in which rape would amount to persecution.<sup>144</sup> "Persecution is stamped on every page of this record. Olimpia has been singled out to be bullied, beaten, injured, raped, and enslaved."<sup>145</sup> The court granted her asylum on the basis of the "cynical imputation of political opinion to her," stating that a person does not have to be politically active or aware to suffer persecution on account of political opinion.<sup>146</sup> It is sufficient that the persecutor thinks that the person is guilty of a political opinion.<sup>147</sup>

The court further stated:

[I]f the situation is seen in its social context, Zuniga is asserting the political opinion that a man has a right to dominate and he has persecuted Olimpia to force her to accept this opinion without rebellion. Zuniga told Olimpia that in his treatment of her

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<sup>136</sup> See *id.* at 1433.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

<sup>141</sup> See *id.* at 1434.

<sup>142</sup> See *id.*

<sup>143</sup> See *id.* at 1436.

<sup>144</sup> See Castel, *supra* note 12, at 44; see also *supra* note 44 and accompanying text. In *Lopez-Galarza v. Immigration and Naturalization Service*, 99 F.3d 954 (9th Cir. 1996), the court stated that, although they do not often receive asylum applications based on rape or sexual assault, they have held that such abuse may amount to persecution. See *id.* at 959. The court further elaborated that "[r]ape at the hands of government authorities while imprisoned on account of one's political views can be an atrocious form of punishment indeed." See *id.* at 962. Further, the court referred to several studies and articles undertaken on the harmful effects of rape, see *id.* at 962-63, and to the INS Guidelines, see *infra* note 170, which direct immigration officials to recognize the specific gender-based claims of persecution made by women, such as rape and sexual abuse. See *Lopez-Galarza*, 99 F.3d at 963.

<sup>145</sup> *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987).

<sup>146</sup> See *id.* at 1435.

<sup>147</sup> See *id.*

he was seeking revenge. But Olympia knew of no injury she had ever done Zuniga. His statement reflects a much more generalized animosity to the opposite sex, an assertion of a political aspiration and the desire to suppress opposition to it. Olympia was not permitted by Zuniga to hold an opinion to the contrary. When by flight, she asserted one, she became exposed to persecution for her assertion. Persecution threatened her because of her political opinion.<sup>148</sup>

In coming to this conclusion, the court analyzed the acts of physical violence, and found that the cynical imputation of political opinion converted the personal act of rape into a type of political violence.<sup>149</sup> By fleeing her country, Olympia Lazo-Majano asserted a political opinion that she would no longer submit to overbearing male behavior and domination.<sup>150</sup>

Although asylum applications present both persecution on account of political opinion and in conjunction with a particular social group claim, Olympia Lazo-Majano's claim was not a case that fit well within both categories. Persecution on the basis of political opinion was not the most appropriate ground for which she should have been granted asylum. Instead, the court should have recognized gender as a particular social group and contained its analysis of her claim within that category.<sup>151</sup> The strong dissent in the case should be reviewed carefully. Judge Poole was at pains to distinguish and refute the political opinion ground supported by the majority from the interpersonal relationship between the petitioner and Zuniga, which he claimed was the reason for the alleged persecutory behavior. It seems, therefore, that sexual violence may be perceived as a possible method of persecution, but not necessarily conclusive proof of persecution.<sup>152</sup> If a similar case of repeated sexual abuse were to arise, it is arguable that another court might not be so persuaded by the political opinion argument. It is sub-

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<sup>148</sup> *Id.*

<sup>149</sup> See DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES: A GUIDE TO ADMINISTRATIVE PRACTICE AND CASE LAW* 137 (2d ed. 1991).

<sup>150</sup> See *Lazo-Majano*, 813 F.2d at 1436. The court found this circumstance to be analogous to a Yugoslav defector, who sought asylum in the United States, because he refused to work with the secret police. See *id.* (citing *Kovac v. INS*, 407 F.2d 102, 104 (9th Cir. 1969)). Although the defector had no political opinions beyond not wanting to be a police informer, the court found that the persecution he feared was punishment for defecting, and that this fear was on account of his political opinion. See *id.* (citing *Kovac*, 407 F.2d at 104).

<sup>151</sup> See *id.* at 1436 (Poole, J. dissenting). Nevertheless, the court's deliberations concerning the oppressive treatment that women often face was encouraging. The court's arguments were unique in that it was delineated that Zuniga held the political opinion that men were entitled to dominate women, and Olympia Lazo-Majano was viewed to have the political opinion of a subversive. Zuniga would, therefore, not tolerate any opposition to his opinion of women. See Castel, *supra* note 12, at 43.

<sup>152</sup> See Neal, *supra* note 29, at 251.

mitted that the particular social group category could accommodate this type of claim without manipulation or legal engineering and without including gender as a sixth ground for persecution.<sup>153</sup>

In *Campos-Guardado v. Immigration & Naturalization Service*,<sup>154</sup> the Fifth Circuit considered the offence of rape as a private matter, confirming the B.I.A.'s decision that the appellant had suffered persecution of a personal nature, and that her claim did not fall into the political opinion category.<sup>155</sup> Sofia Campos-Guardado was an eyewitness to the political assassination of her uncle and cousin by a group of guerrillas in El Salvador, who then proceeded to rape her while one of the attackers chanted political slogans.<sup>156</sup> One of her attackers later repeatedly harassed her and threatened to kill her if she revealed his identity.<sup>157</sup> In supporting the B.I.A.'s view that the persecutory acts were due to a "personal relationship," the court overlooked the fact that she was just visiting her uncle, a stranger to the guerrillas, who must have been ignorant of the fact that she was not a politically active participant in the agrarian reform movement.<sup>158</sup> It has been astutely perceived that, although the type of torture inflicted in this case was clearly delineated by gender, in that the men were physically assaulted but the women were sexually abused and raped, the reason for assaulting them was probably the same.<sup>159</sup> It is, therefore, imperative to recognize that the distinction was only in the *type* of torture meted out to the men and women. The political motive was probably indistinguishable, which casts a long shadow on the court's interpretation of the persecution as being personal.

The court also made no attempt to reconcile the case with the judgment in *Lazo-Majano v. Immigration & Naturalization Service*,<sup>160</sup> and unfortunately, did not use the opportunity to explore and define gender-specific persecution claims. Perhaps the ambivalent attitude is typical when the abuse is sexual, reflecting a reluctance to

<sup>153</sup> See *supra* note 24 and accompanying text.

<sup>154</sup> 809 F.2d 285 (5th Cir. 1987).

<sup>155</sup> See *id.* at 288, 290.

<sup>156</sup> See *id.* at 287.

<sup>157</sup> See *id.*

<sup>158</sup> See *id.* at 288-89 (discussing Campos' assertion that she was persecuted for political opinions attributed to her by the prosecutors due to her family ties and the ties between her family and the agrarian land reform movement).

<sup>159</sup> See Castel, *supra* note 12, at 43. For an excellent discussion on rape as a weapon of conflict, see Ir's ABOUT TIME!, *supra* note 4, at 18-22. "The use of rape in conflict reflects the inequalities women face in their everyday lives in peacetime. Until governments live up to their obligations to ensure equality, and end discrimination against women, rape will continue to be a favourite weapon of the aggressor." *Id.* at 22. See also *supra* note 41 and accompanying text.

<sup>160</sup> 813 F.2d 1432 (9th Cir. 1987).

consider rape and other sexual assaults as violent acts constituting persecution. It is indeed easier to consider such acts as being personally motivated, and confining them to the private domain.<sup>161</sup> The INS Manual nevertheless recognizes gender-based persecution on account of political opinion, although personal disputes, without more, will not be sufficient for an asylum claim.<sup>162</sup> The *Lazo-Majano* case also seems to indicate that if a woman demonstrates a resistance to male domination, or to the state's refusal or inability to protect victims from gender-based violence and/or repression, she expresses a political opinion and can provide the grounds for a claim to asylum and a well-founded fear of persecution.<sup>163</sup>

In *Klawitter v. Immigration & Naturalization Service*,<sup>164</sup> the Sixth Circuit Court of Appeals agreed with the B.I.A.'s conclusion that the alleged persecutor's treatment of the applicant was premised on his personal interest in her, rather than on his intention to persecute her.<sup>165</sup> The applicant stated that she feared the unwanted and offensive sexual behavior and propositions made to her by an officer in the Polish secret police.<sup>166</sup> The B.I.A. clearly stated, and the court agreed, that although he may have threatened and harmed her, "it is clear that he was not 'persecuting' her on account of a proscribed ground."<sup>167</sup> The B.I.A. stated, and the court concurred, that "[h]owever distasteful his apparent treatment of the respondent may have been, such harm or threats arising from a personal dispute of this nature, even one taking place with an individual in a high governmental position, is not a ground for asylum."<sup>168</sup> The court then concluded that even though the petitioner's testimony elucidated incidents that were unfortunate, threats of harm or harm that is premised solely on sexual attraction does not fall within the definition of persecution for statutory pur-

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<sup>161</sup> See Kelly, *supra* note 23, at 640-41 ("The disparity in outcomes . . . reflect two pervasive problems in evaluating the asylum cases of women: difficulty accepting rape and other forms of sexual abuse as violence, and the tendency to ascribe personal motivations to persecutors when the harm is sexual.").

<sup>162</sup> See INS MANUAL, *supra* note 31, at 41.

<sup>163</sup> See Pamela Goldberg, *Asylum Law and Gender-Based Persecution Claims*, IMMIGRATION BRIEFINGS, Sept. 1994, at 1, 11; see also *In re D-V*, Int. Dec. 3252 (B.I.A. 1993) (holding that the gang rape and beating of a Haitian woman by members of the Haitian military due to her participation in political activities and support of President Aristide constituted severe harm amounting to persecution). The B.I.A. held that extreme forms of sexual abuse are not analytically different from beatings, torture or other types of physical violence that are often held to amount to persecution. See *Summaries of Recent BIA Decisions*, 72 INTERPRETER RELEASES 1015, 1015 (July 31, 1995).

<sup>164</sup> 970 F.2d 149 (6th Cir. 1992).

<sup>165</sup> See *id.* at 152.

<sup>166</sup> See *id.*

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

<sup>168</sup> *Id.*

poses.<sup>169</sup> The court was content to consider this type of behavior as "sexual harassment," which did not amount to persecution for the purposes of asylum.<sup>170</sup>

### E. Gender as a Particular Social Group

#### (i) In the Eyes of a Persecutor

In some cases, the persecutor's perspective has also been considered when defining a particular social group. The members of the social group are seen as being different from others, "and it is this 'otherness' which is at the root of the persecution."<sup>171</sup> Although the court did not specify which of the three social groups it considered meritorious in *Ananeh-Firempong*,<sup>172</sup> it nevertheless considered the government's view of the social groups to which the applicant belonged.<sup>173</sup> Further, in *Gomez v. Immigration & Naturalization Service*,<sup>174</sup> where a court addressed a gender-based particular social group for the first time, in ascertaining the existence of a particular social group the court stressed the persecutor's view of the group.<sup>175</sup> The court stated that members of a group must have "some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor — or in the eyes of the outside world in general,"<sup>176</sup> thereby suggesting that, in defining

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<sup>169</sup> See *id.* In *Angoucheva v. Immigration and Naturalization Service*, 106 F.3d 781 (7th Cir. 1997), the court, in considering the asylum claim of a Bulgarian woman of Macedonian descent, see *id.* at 783, distinguished the case of *Klawitter* by stating that the claims of persecution alleged by the petitioner in *Klawitter* and the present case were different. See *id.* at 793. Angoucheva was sexually assaulted by a state security officer during an interrogation at their offices. See *id.* at 783. She was being questioned about her political activities on behalf of the United Macedonian Organization, which promoted the rights of Macedonians living in Bulgaria. See *id.* Thus, the court stated that her claim was similar to that of the petitioner in *Lazo-Majano*. See *Angoucheva*, 106 F.3d at 793. "Although Angoucheva suffered but one sexual assault, as opposed to the repeated rapes and abuse endured by Lazo-Majano, the link between that assault and Angoucheva's political opinions would seem more direct than the link found to exist in Lazo-Majano as a matter of law." *Id.*

<sup>170</sup> See *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992). On May 26, 1995, the INS Guidelines specifically addressed the asylum applications made by women. The Guidelines state that *Klawitter* does not suggest that sexual harassment could never constitute persecution, or that sexually abusive conduct by a government official could not be considered as a means of persecution on account of the delineated grounds. Instead, the INS Guidelines advise that the case reiterates the need to show that the harm inflicted is *on account of* the protected grounds, and that the perpetrator cannot or will not be controlled by the government. See Memorandum on Considerations for Asylum Officers Adjudicating Asylum Claims from Women from Phyllis Coven, U.S. Dep't of Justice Office of International Affairs, to INS Asylum Officers 17 n.5 (May 26, 1995) [hereinafter INS GUIDELINES] (on file with author and the *Cardozo Women's Law Journal*).

<sup>171</sup> Kelly, *supra* note 23, at 653.

<sup>172</sup> 766 F.2d 621 (1st Cir. 1985).

<sup>173</sup> See *id.*

<sup>174</sup> 947 F.2d 660 (2d Cir. 1991).

<sup>175</sup> See *id.*

<sup>176</sup> *Id.* at 664.



the group, the external view is just as important as an internal common trait.

The applicant, Carmen Gomez, stated that she belonged to the social group of women that had been beaten and raped by Salvadoran guerrillas, and that members of this group were targeted for persecution in El Salvador.<sup>177</sup> She was, however, unable to convince the court that she had a well-founded fear of persecution.<sup>178</sup> The court stated that “the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”<sup>179</sup> Carmen Gomez could not establish that women who had been assaulted by guerrillas shared any *other* characteristics that would identify them as members of the group.<sup>180</sup> Thus, in the court’s view, a particular social group based exclusively on gender would not satisfy the legal requirements.<sup>181</sup>

Nevertheless, the court found that persistent attacks on women could amount to a well-founded fear of persecution and stated that “[c]ertainly, we do not discount the physical and emotional pain that has been wantonly inflicted on these Salvadoran women. Moreover, we do not suggest that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well-founded fear of persecution.”<sup>182</sup> It is submitted that the court should have adopted a broader approach and used this opportunity to recognize women or gender as a particular social group.<sup>183</sup> Had that been the case, Carmen Gomez would have

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<sup>177</sup> *See id.*

<sup>178</sup> *See id.* (finding there was no evidence that she was more likely to be persecuted than any other young female). “Gomez failed to produce evidence that women who have been abused by the guerrillas possess common characteristics — other than gender and youth — such that would be persecutors could identify them as members of the purported group.” *Id.*

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

<sup>180</sup> *See id.* (stating that women who had been assaulted by guerrillas only had gender and youth in common, and that Gomez did not present evidence that she feared persecution due to her race, nationality, religion, political opinions, or membership in a particular social group).

<sup>181</sup> *See id.*; *see also infra* notes 240-45 and accompanying text.

<sup>182</sup> *Id.* *See also In re D-V*, Int. Dec. 3252 (B.I.A. 1993) (granting asylum to a Haitian woman who had been raped by soldiers due to her support of President Jean Bertrand Aristide, and reasoned that the women would be at risk if she returned to Haiti, as evidenced by multiple attacks on Aristide supporters, and by the fact that her attackers knew her name and knew of her membership).

<sup>183</sup> It is also argued that the case is nevertheless encouraging in that it considers the external perception — society’s view of a social group — and not just the persecutor’s view. By adopting this approach, a broader selection of groups could be considered in this category. *See Fullerton, supra* note 71, at 560.

been granted asylum.<sup>184</sup> The failure to recognize women as a social group persecuted on account of their gender either ends in the denial of otherwise valid claims, or results in the incorrect tailoring of a claim to fit into one of the other specified grounds of persecution.<sup>185</sup>

(ii) Steps in the Right Direction?

In *Fatin v. Immigration & Naturalization Service*,<sup>186</sup> the court provided considerable encouragement for the proposition that the gender-based asylum claims of women could be successful on the grounds that gender could fall within the particular social group category.<sup>187</sup> Thus, membership of that group could give rise to a well-founded fear of persecution, depending on the particular facts of the case.<sup>188</sup> It has been argued that the *Fatin* case, more than any other case in the United States, supports the claim that gender is a particular social group for the purposes of the statutory sections relating to asylum.<sup>189</sup>

The applicant in *Fatin* stated that she had a well-founded fear of being persecuted by the Iranian authorities on account of her feminist views and noncompliance with the sex stereotype roles in Iran.<sup>190</sup> She also stated that, if compelled to return, she would be forced to practice Islam against her will and would be made to wear a veil in public.<sup>191</sup> *Fatin* identified her particular social group and defined herself as an upper-class Iranian woman who was educated and westernized, supported the Shah of Iran, and asserted political opinions that demanded equal rights and freedom of choice.<sup>192</sup>

The B.I.A. dismissed her appeal.<sup>193</sup> They noted her argument of membership in a particular social group of educated, western thinking, upper-class Iranian women, but stated that there was no

<sup>184</sup> The court may have been influenced by the fact that there was a considerable lapse of time between the last assault and Gomez's application for asylum, and therefore considered her to be no longer in jeopardy.

<sup>185</sup> See Bower, *supra* note 49, at 190.

<sup>186</sup> 12 F.3d 1233 (3d Cir. 1993).

<sup>187</sup> See *id.* at 1239-40 (using language quoted from *Acosta*, see *supra* note 93, allowing sex as a shared characteristic, the court held that "to 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.").

<sup>188</sup> See *id.* ("The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.").

<sup>189</sup> See Goldberg, *supra* note 163, at 10.

<sup>190</sup> See *Fatin*, 12 F.3d at 1235.

<sup>191</sup> See *id.* at 1236.

<sup>192</sup> See *id.* at 1235-36.

<sup>193</sup> See *id.* at 1237.

evidence that she would be targeted for persecution.<sup>194</sup> Rather, the Board pointed out, Fatin would have to observe the same restrictions and requirements as the rest of the population.<sup>195</sup>

The Third Circuit in *Fatin* referred to the B.I.A.'s deliberations in *Matter of Acosta*,<sup>196</sup> and accepted the Board's conclusion that "sex" as an inherent characteristic could provide the connection for members of a particular social group.<sup>197</sup> The B.I.A. had also stated in *Acosta* that the common characteristic that defines the group is one that the members cannot change or should not be required to change, as it is inherent to their individuality or consciences.<sup>198</sup> The court in *Fatin* accepted this construction of the statute, and in the context of the petitioner's claim agreed that she had satisfied the requirements of identifying a social group and her membership of that group.<sup>199</sup> However, Fatin was unable to convince the court that she had a well-founded fear of persecution, or would be persecuted solely on the basis of that membership.<sup>200</sup> The court was not persuaded that she had a well-founded fear of persecution based solely on her gender.<sup>201</sup>

The court, however, recognized that a narrowly defined social group, which was comprised of Iranian women who rejected the social norms and the government's gender-specific laws, may indeed satisfy the B.I.A.'s definition in *Acosta* of a particular social group, as set forth in *Acosta*.<sup>202</sup> This is a confined, narrow group of women — it does not include all Iranian feminists and all women who find the government's gender-specific laws repressive.<sup>203</sup> Rather, it is those women who refuse to conform and are thereby penalized to an extent that would constitute persecution.<sup>204</sup> The court affirmatively stated that "if a woman's opposition to the Ira-

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<sup>194</sup> See *id.*; see also *Sharif v. INS*, 87 F.3d 392 (9th Cir. 1996) (affirming the B.I.A.'s decision to deny Sharif asylum). Sharif was unable to establish a reasonable fear of persecution on account of her membership in one of two social groups: her family and a group of "westernized women." See *id.* at 936. The court stated that "even assuming that 'westernized women' as defined by Sharif are a cognizable social group," it was "a proposition that is debatable at best[.] . . ." *Id.* Similarly, the court established that there was no evidence that Sharif would be subjected to persecution because of her family. See *id.*

<sup>195</sup> See *id.*

<sup>196</sup> 19 I. & N. Dec. 211 (B.I.A. 1985).

<sup>197</sup> See *id.* at 233. The court in *Fatin* did not consider the characteristics for a particular social group that were laid down by the Ninth Circuit in *Sanchez-Trujillo*, 801 F.2d 1571 (9th Cir. 1986).

<sup>198</sup> See *Acosta*, 19 I. & N. Dec. at 233-34.

<sup>199</sup> See *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

<sup>200</sup> See *id.*

<sup>201</sup> See *id.* at 1241.

<sup>202</sup> See *id.* at 1240.

<sup>203</sup> See *id.* at 1241.

<sup>204</sup> See *id.*

nian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as 'so fundamental to [her] identity and conscience that [they] ought not be required to be changed.'<sup>205</sup>

Fatin was unable to establish that she belonged to this latter narrowly defined group of women.<sup>206</sup> There was insufficient evidence to support her claim that she was significantly opposed to the relevant Iranian laws, and her objections lacked the requisite zeal.<sup>207</sup> She did not testify that she would refuse to wear the veil or disobey the other gender-specific restrictions and repressive social mores.<sup>208</sup> Fatin also did not prove that compliance with the restrictions and wearing the veil was so "deeply abhorrent" to her to amount to persecution.<sup>209</sup> The court thus concluded that persecution could arise as a result of (a) noncompliance with the laws and suffering the consequences of such disobedience; or (b) compliance with the laws which is so abhorrent as to amount to persecution.<sup>210</sup> Fatin failed to satisfy either category.

More recently, in *Safaie v. Immigration & Naturalization Service*,<sup>211</sup> the Eight Circuit denied Azar Safaie asylum and withholding of deportation.<sup>212</sup> She feared returning to Iran because of the treatment she would receive for her opposition to the Khomeini regime and its treatment of women.<sup>213</sup> The court rejected her assertion that Iranian women constitute a particular social group be-

<sup>205</sup> *Id.* (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 234 (B.I.A. 1985)).

<sup>206</sup> *See id.*

<sup>207</sup> *See id.* (demonstrating that *Fatin* would "seek to avoid" wearing a chador and veil, and would "seek to avoid Islamic practices as much as she could").

<sup>208</sup> *See id.*

<sup>209</sup> *See id.*

<sup>210</sup> *See id.* at 1242-43.

<sup>211</sup> 25 F.3d 636 (8th Cir. 1994).

<sup>212</sup> *See id.* at 641; *see also* *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996). The Court of Appeals denied *Fisher's* petition for review of the B.I.A.'s decision denying her application for asylum and withholding deportation. *See id.* at 958. The B.I.A. had concluded that, although "Iran's dress code and conduct rules may seem harsh by Western standards," it did not amount to persecution. *Id.* at 961. *Fisher* was unable to establish that Iran selectively punished her or enforced its regulations against her on account of one of the five enumerated grounds in the Act.

The mere existence of a law permitting the detention, arrest, or even imprisonment of a woman who does not wear the chador in Iran does not constitute persecution any more than it would if the same law existed in the United States. . . . It does not include mere discrimination, as offensive as it may be.

*Id.* at 962. The concurring judgment of Circuit Judge Canby (joined by Circuit Judge Thompson) should be noted. *See id.* at 965-66. Judge Canby was concerned that the majority judgment would be misread as excluding the possibility that a claim for asylum may be submitted by women who are persecuted on account of their gender. *See id.* The case simply did raise the issue "whether persecution of women because they are women is a ground for asylum under the Act." *Id.* at 966.

<sup>213</sup> *See Safaie*, 25 F.3d at 638.

cause of their innate characteristic — sex — and the rigorous restrictions that they face.<sup>214</sup> “We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.”<sup>215</sup>

Safaie also argued that the particular social group could be defined as comprising Iranian women who are opposed to Iranian customs concerning dress and conduct or those who promote women’s rights.<sup>216</sup> The *Safaie* court agreed with the *Fatin* court’s delineation of such a group,<sup>217</sup> but nevertheless found that Safaie’s conduct lacked the fervor and commitment required.<sup>218</sup> “[W]e cannot say that for Safaie, compliance with the gender-specific laws would be ‘so profoundly abhorrent that it could aptly be called persecution.’”<sup>219</sup> Further, with respect to her claim of persecution on account of her political opinion, where she publicly articulated her disagreement with the Islamic government, it was not enough that Safaie disagreed with the policies or found them repressive; she had to establish that she feared persecution that was directed at her due to her political opinion.<sup>220</sup>

In *Matter of M- K*,<sup>221</sup> the IJ granted asylum to a woman from Sierra Leone who based her claim, in part, on female genital mutilation that was forcibly imposed.<sup>222</sup> The other two grounds upon which relief was granted were persecution in the form of spousal abuse due to her refusal to act in a subservient manner, and persecution due to her membership in a political party.<sup>223</sup> What is encouraging about the decision is that the IJ recognized that, even if

<sup>214</sup> See *id.* at 640.

<sup>215</sup> *Id.* (citing *Fatin*, and referring to the requirements set out in both *Acosta* and *Sanchez-Trujillo*) (citations omitted).

<sup>216</sup> See *id.*

<sup>217</sup> See *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993).

<sup>218</sup> See *Safaie*, 25 F.3d at 640.

<sup>219</sup> *Id.* (quoting *Fatin*, 12 F.3d at 1242).

<sup>220</sup> See *id.*

<sup>221</sup> A72-374-558, cited in *IJ Grants Asylum on the Basis of Persecution Relating to Female Genital Mutilation*, 72 INTERPRETER RELEASES 1188, 1188 (1995) [hereinafter *IJ Grants Asylum*].

<sup>222</sup> See *id.* In a similar case, *Matter of J*, A72-370-565 (IJ 1995), the IJ refused to grant asylum to a woman from Sierra Leone who based her claim, in part, on female genital mutilation issues concerning herself and her daughters. In adopting a very narrow view, the IJ stated that the applicant’s fears concerning female genital mutilation were not of a political nature, and were inadequate to show a fear of political persecution. However, in *Matter of M- K*, the IJ specifically stated that the political opinion basis in asylum law included a woman’s opinion and attitude towards the status and treatment of women in her country and culture, and further included a woman’s opposition to a traditional custom or law. See *IJ Grants Asylum*, *supra* note 221, at 1190; see also Pamela Constable, *INS Debates Female Genital Mutilation as Basis for Asylum*, WASH. POST, Sept. 11, 1995, at D1; Linda Burstyn, *Asylum in America: Does Fear of Female Mutilation Qualify?*, WASH. POST, March 17, 1996, at C5.

<sup>223</sup> See *Matter of M- K*, cited in *IJ Grants Asylum*, *supra* note 221, at 1188.

the persecution is caused by non-governmental forces, the fact that the government is unable or unwilling to end the abuse results in the persecution being attributed to the government.<sup>224</sup>

The IJ further stated that it is not *all* women that constitute a particular social group, but rather a sub-group of women who are persecuted due to their membership in that smaller section.<sup>225</sup> The IJ concluded, therefore, that a particular social group may be comprised of a sub-group of women who were compelled to endure female genital mutilation, or by a sub-group of women who were subjected to physical spousal abuse for asserting their independence.<sup>226</sup>

Where a law or mandatory societal custom targets women (or a sub-group of women, such as wives) either on its face or by application and imposes restrictions or requirements on women but not on men, and the penalty for violation is serious, a claim of gender-based persecution will be recognized. . . . In addition, where serious offenses against women and wives — such as rape, serious assaults, and murder — are not punished or are lightly punished, or where women and wives are generally not granted protections accorded to the men, the abuse will constitute gender-based persecution.<sup>227</sup>

*In re Fauziya Kasinga*,<sup>228</sup> the B.I.A. stated that the particular social group in this case was comprised of young women of the Tchamba-Kunsuntu tribe who had not undergone female genital mutilation and who were opposed to the practice.<sup>229</sup> In referring to the requirements set out by *Matter of Acosta*,<sup>230</sup> the B.I.A. further stated that the particular social group is delineated by common traits which either cannot be changed by members of the group, or should not be required to be changed by members of the group.<sup>231</sup> “The characteristics of being a ‘young woman’ and a ‘member of the Tchamba-Kunsuntu Tribe’ cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.”<sup>232</sup> Thus, the B.I.A. granted asylum to the ap-

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<sup>224</sup> See *id.* at 1189 (“Where the persecution is caused by society rather than the government, but the government is unable or unwilling to stop the abuse, then the abuse can be attributable to the government.”); see also *supra* notes 49-65 and accompanying text.

<sup>225</sup> See *Matter of M-K*, cited in *IJ Grants Asylum*, *supra* note 221, at 1189.

<sup>226</sup> See *id.*

<sup>227</sup> *Id.* at 1189-90.

<sup>228</sup> Int. Dec. 3278 (B.I.A. 1996), available in 1996 WL 379826.

<sup>229</sup> See *id.*

<sup>230</sup> 19 I. & N. Dec. 211, 234 (B.I.A. 1985).

<sup>231</sup> See *In re Fauziya Kasinga*, Int. Dec. 3278 (B.I.A. 1996), available in 1996 WL 379826.

<sup>232</sup> *Id.*

plicant, a 19 year old woman from Togo, who had a well-founded fear of persecution in the form of female genital mutilation on account of her status as a member of the defined social group.<sup>233</sup>

The INS Guidelines that were issued for asylum officers adjudicating the asylum claims of women are aimed at identifying the specific forms of persecution experienced only by women, and at recognizing that gender-based persecution is a potential ground for granting asylum.<sup>234</sup> These Guidelines, along with some of the recent cases adjudicated constitute a move towards the long overdue practical implementation of the protection of women's human rights in the context of asylum law.

## V. GENDER-DEFINED PARTICULAR SOCIAL GROUPS

### A. Introduction

The following section analyzes the definition of, and perceived difficulties associated with, gender-based particular social groups. It is apparent from the foregoing discussion that the particular social group category's parameters are unclear, and that persecution on account of gender is an area that is still in its incipient stages of development. Asylum laws in the United States have, for the most part, developed through the adjudication of male applicant's cases, resulting in the analysis of traditional male-dominated activities. The definition of human rights violations have also followed that conventional pattern. It is imperative that the INS Guidelines,<sup>235</sup> which were issued for adjudicating women's asylum cases, are followed in order to end the restrictive approach that has long been used.

If a woman has a gender-based persecution claim and wishes to seek refuge and benefit from the existing asylum laws, she will need to establish that she is a member of a particular social group,

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<sup>233</sup> See *id.*

<sup>234</sup> See INS GUIDELINES, *supra* note 170, at 1 (stating that these guidelines "provide . . . guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender."); see also Ashley Dunn, *U.S. to Accept Asylum Pleas For Sex Abuse*, N.Y. TIMES, May 27, 1995, at 1 (stating that the INS Guidelines "formally recognized rape, domestic abuse and other forms of violence against women as potential ground for political asylum[,] changing a judicial trend where sexual violence had been viewed as a private act). In the United Kingdom, in October 1996, the government provided instruction to asylum caseworkers on those gender-specific practices which would amount to torture. Ann Widdicombe, the Minister of State for the Home Office at the time, stated: I utterly accept that forcible abortion, sterilisation, genital mutilation and allied practices would almost always constitute torture. In fact, they would probably always constitute torture. There is no doubt in my mind that anyone making a case to us on those grounds would have an extremely good case for asylum.

The Refugee Council, *Women Refugees*, April 1997, at 5.

<sup>235</sup> See INS GUIDELINES, *supra* note 170.

namely women, and that acts of violence are committed against her because she is a member of that group. She may also demonstrate that she is a member of a more narrowly-defined social group of battered women who are unable to obtain state protection. Alternatively, she may argue that her defiance of male domination and repression and her attempts to resist violence constitute a political opinion, on the basis of which she has been persecuted or has a well-founded fear of persecution.<sup>236</sup>

### B. *Is the Fear Well-Founded?*

In order for an applicant to establish that her fear is well-founded, she must also satisfy the B.I.A. test, which states that a reasonable person in a similar position would fear persecution.<sup>237</sup> The Supreme Court in *INS v. Cardoza-Fonseca*<sup>238</sup> stated that there are both subjective and objective elements in the well-founded fear test.<sup>239</sup> In fact, the very phrase, "well-founded," suggests an objective component to the test.<sup>240</sup> The applicant must, therefore, establish her subjective fear, which must be realistic when objectively perceived.<sup>241</sup> Thus the fear cannot be irrational; the apprehension must be grounded in reality.<sup>242</sup>

### C. *Women as a Particular Social Group*

"The nature of the term social group necessitates a case-by-case adjudication, and is appropriate for a category encompassing particular but unforeseen refugee groups."<sup>243</sup> Both courts and commentators have struggled in defining this term.<sup>244</sup> Some of the courts in the United States have rejected certain groups, because

<sup>236</sup> For a discussion of gender-specific types of persecution, that (a) analyzes the *type of treatment* that is persecutory, and (b) examines situations in which the persecution is *on account of* a basis rooted in the applicant's gender, see Kelly, *supra* note 23, at 643-73.

<sup>237</sup> See *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987).

<sup>238</sup> 480 U.S. 421 (1987).

<sup>239</sup> See *id.* at 431-32 (stating that the government wanted the court to interpret "well-founded fear of persecution" objectively as a "clear probability of persecution," instead of the subjective interpretation which takes into account whether "it is more likely than not that [the alien] will be subject to persecution upon deportation" basing the "eligibility determination . . . on the subjective mental state of an alien"); see also Goldberg, *supra* note 22, at 575 (asserting that the Supreme Court ruled in *Cardoza-Fonseca* that "well-foundedness encompasses a subjective and objective component").

<sup>240</sup> See *Cardoza-Fonseca*, 480 U.S. at 431.

<sup>241</sup> See *id.* at 430; see also Goldberg, *supra* note 22, at 575.

<sup>242</sup> The objective requirement has been criticized as being typical of our contemporary patriarchal system that is white, middle to upper-class male. It is also argued that persecution on account of gender is not one of the listed grounds for asylum, because the existing social, political, and legal structures are male dominated. See Goldberg, *supra* note 22, at 575 n.38.

<sup>243</sup> Neal, *supra* note 29, at 230.

<sup>244</sup> See *supra* note 69-72 and accompanying text.



they lack homogeneity and are not distinctive.<sup>245</sup> The courts do not definitively state the parameters of a social group, yet they identify traits that disqualify some groups. Further, group definitions that are imprecise will not successfully establish a social group claim, because there must be some distinction between the applicant's particular group and the general population.<sup>246</sup>

In order to distinguish a "particular" social group from just a social group, the former must have an immutable group characteristic, and the member must be targeted for persecution because of her group membership.<sup>247</sup> Thus, "[w]hen women are singled out within a particular society as a group and subjected to persecutory treatment, or denied protection from such treatment merely on the basis of their gender, the group of 'women' constitutes a particular social group within the refugee definition."<sup>248</sup> It is submitted that laws and customs which specifically target women just because they are women cannot be supported. If one considers that women who are persecuted on the basis of their sex have been identified by their persecutors for particular treatment, it is the isolating nature of that particularity which separates and distinguishes women from the general population. "This is identifiable persecution; and where there is identifiable persecution, the social group is distinctly defined."<sup>249</sup> Arguably in countries where a demographic group, such as women, is specifically targeted for persecution, that itself transforms the demographic group into a particular social group.<sup>250</sup> Mere membership in the group, therefore, should be sufficient for establishing a well-founded fear of persecution.<sup>251</sup>

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<sup>245</sup> See, e.g., *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (denying particular social group status to women who had been previously assaulted by Salvadoran guerrillas); *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986) (denying particular social group status to young, urban, working class males without military service or political involvement in government).

<sup>246</sup> See *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985) (holding that a particular social group cannot be defined by a job that can be changed, and that the group needs an immutable characteristic that identifies them from the rest of the population).

<sup>247</sup> The *Sanchez-Trujillo* requirements of voluntary associational relationships and common interests make it difficult for a broad-based group to establish eligibility for asylum. See *Sanchez-Trujillo*, 801 F.2d at 1571; see also *Godfrey*, *supra* note 88, at 264-74. It can, nevertheless, be argued that women do have common experiences and interests, are required to conform to sex stereotypical roles in certain societies, and have voluntary associational relationships, which serve to define their social group in terms other than gender.

<sup>248</sup> *Kelly*, *supra* note 23, at 655.

<sup>249</sup> *Neal*, *supra* note 29, at 239.

<sup>250</sup> See *id.* (stating that, when a society implements laws leading to the persecution of women, there is a social group provided by "the unconscionable laws and regulations promulgated by the government").

<sup>251</sup> See *Bower*, *supra* note 46, at 198 ("[T]he establishment of 'persecution' and 'social group' membership are closely related. The existence of gender persecution may itself be sufficient to transform what would otherwise be a mere statistical category or demographic group into a social group.").

Women who have violated social mores or religious customs of their society may try to utilize the particular social group category when applying for refuge. The women in this group include those who are unable to conform with the social, religious, and cultural expectations, or have made a conscious choice that they will not comply with the type of conduct that is expected of them.<sup>252</sup> The members of this particular social group are identified by traits that distinguish them from others — non-compliance with societal expectations — and on account of which the persecutor seeks to punish them.<sup>253</sup> These characteristics must be fundamental to the group's identity, and either cannot be changed or required to be changed given the inherent nature of the traits.<sup>254</sup>

The UNHCR Guidelines on the Protection of Refugee Women state that legal protection should be provided to those women who face punishment that is as draconian as death for violation of social customs.<sup>255</sup> The Guidelines address the violent treatment inflicted both by government agencies and non-government private actors, from whom the government does not provide relief.<sup>256</sup> In addition, the Guidelines recommend that claims of this nature be considered under the particular social group category to ensure their inclusion,<sup>257</sup> but leave it to the discretion of the individual states whether to follow the UNHCR Executive Committee's recommen-

<sup>252</sup> In cases of this nature, persecution on the basis of political opinion may also be argued in conjunction with membership of a particular social group. See *supra* text accompanying notes 101-02.

<sup>253</sup> See *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993); see also *supra* text accompanying notes 202-05.

<sup>254</sup> See, e.g., *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994); *Fatin*, 12 F.3d at 1233; *Matter of M-K*, cited in 72 INTERPRETER RELEASES, *supra* note 221, at 1188. See also discussion *supra* Part IV.B.

<sup>255</sup> See *UNHCR Guidelines on the Protection of Refugee Women*, *supra* note 21, ¶ 54.

The 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 this definition. As a UNHCR legal adviser has noted, "transgressing social mores is not reflected in the universal refugee definition." Yet, examples can be found of violence against women who are accused of violating social mores in a number of countries. The offence can range from adultery to wearing of lipstick. The penalty can be death.

*Id.* In *R v. Immigration Appeal Tribunal, ex parte Shah*, Judge Sedley stated that a Pakistani woman had a "credible fear" that, if she returned home, she would be accused of adultery by her husband, and would likely be stoned to death under Islamic Sharia law. See *Case Summaries*, INDEPENDENT, Dec. 2, 1996, at 16 (providing a short synopsis of the facts and holding of the case). Judge Sedley, therefore, stated that she "was capable of being a member of a particular social group with a well-founded fear of persecution." *Id.*

<sup>256</sup> *Id.* ¶ 71 (providing "refugee status where a government cannot or will not protect women who are subject to abuse for transgressing social standards[,] and acknowledging that "[t]he government need not itself have been the instigator of the abuse").

<sup>257</sup> See *id.* ("[W]omen fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status.").

ation.<sup>258</sup> The Canadian Guidelines also recognize the plight of women who violate customary laws, and state that “[s]uch laws and practices, by singling out women and placing them in a more vulnerable position than men, may create conditions precedent to a gender-defined social group.”<sup>259</sup>

Although the UNHCR has acknowledged that gender itself can define a particular social group in the context of severe discrimination,<sup>260</sup> there is concern about the delineation of gender as a particular social group on two counts: (i) the importance of the group size; and (ii) the implications of defining the group by the persecution which is feared.<sup>261</sup>

### (i) Is the Group Too Large?

The size of a group should not necessarily be a critical factor, without more, in determining eligibility as a particular social group. An applicant’s claim cannot be dismissed just because she belongs to a large group of similarly situated women who also face and fear persecution.<sup>262</sup> If the treatment a woman is subjected to amounts to persecution, it is irrelevant whether she alone is persecuted, or persecuted with others.<sup>263</sup> In fact, it is argued that the social group category, like the other enumerated categories, is simply a tool or a way of acknowledging and identifying the persecution. The category simply serves to indicate the premise and reasons for which the individual is being persecuted. Thus, the group’s size should not be a deterrent to recognizing it as a particular social group.<sup>264</sup>

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<sup>258</sup> See *id.* ¶ 54 (encouraging states to categorize women persecuted as a result of social mores “as a social group to ensure their coverage, but it is left to the discretion of countries to follow this recommendation”).

<sup>259</sup> CANADIAN GUIDELINES, *supra* note 48, at 3. The European Parliament has asked its member states to interpret the U.N. Treaty and the 1967 Protocol in a manner that would accommodate the claims of women who had faced harsh or inhuman treatment as a particular social group. See Resolution on the Application of the Geneva Convention relating to the Status of Refugees, 1984 O.J. 137; see also *Report of the Thirty-Sixth Session of the Executive Committee of the High Commissioner’s Programme*, U.N. GAOR 36th Sess., ¶¶ 95-99, 115(4), U.N. Doc. A/AC.96/673 (1985).

States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh 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.

*Id.* ¶ 115(4)(k).

<sup>260</sup> See *Role on Refugee Women and International Protection*, UNHCR Executive Committee, U.N. Doc. EC/SCP/50, 5 (1990).

<sup>261</sup> See *id.*

<sup>262</sup> See Neal, *supra* note 29, at 243-44.

<sup>263</sup> See CANADIAN GUIDELINES, *supra* note 48, at 6.

<sup>264</sup> See Neal, *supra* note 29, at 244.

The Canadian Guidelines state that "the fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant — race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people."<sup>265</sup> Moreover, if an applicant is able to establish that there are many other similarly situated persons who suffer at the hands of the persecutor, it will surely strengthen her case and claim for asylum.<sup>266</sup>

(ii) The Harm Feared As A Defining Trait

The integration of the harm feared into the definition of the group results in narrowing the size of the group, particularly in the context of gender-based particular social groups. The trend in the United States, however, is to keep the refugee group and the particular social group separate.<sup>267</sup> "While the refugee group must be defined in terms of the persecution, the particular social group should be viewed in other terms."<sup>268</sup> In *Immigration & Naturalization Service v. Elias-Zacarias*,<sup>269</sup> the Supreme Court greatly emphasized the importance of establishing the "on account of" aspect of the refugee definition.<sup>270</sup> Thus, the case law in the United States indicates that the actual persecution cannot be the defining characteristic of the group; those traits must be discrete. "The definitive characteristics of a particular social group are those which mark the group for persecution and not the actual persecution itself."<sup>271</sup> In the case of battered women, therefore, the battering would be the type of persecution, and the woman's gender would be the defining, immutable characteristic. "[T]he characteristic which identifies her for battering is her gender — not her past battering."<sup>272</sup>

In *Mayers v. Canada (M.E.I)*,<sup>273</sup> the court addressed the important issue of using the persecution feared when defining the particular social group.<sup>274</sup> The Federal Court of Appeal in Canada found that a woman fleeing wife abuse had established a credible basis for her case to be adjudicated on the merits, where the wo-

<sup>265</sup> CANADIAN GUIDELINES, *supra* note 48, at 6.

<sup>266</sup> See 8 C.F.R. § 208.13(b)(2)(i) (1993).

<sup>267</sup> See Kelly, *supra* note 23, at 657.

<sup>268</sup> *Id.*

<sup>269</sup> 502 U.S. 478 (1992).

<sup>270</sup> See *id.* at 478.

<sup>271</sup> Kelly, *supra* note 23, at 658. See also Gomez v. INS, 947 F.2d 660 (2d Cir. 1991).

<sup>272</sup> Kelly, *supra* note 23, at 658.

<sup>273</sup> 97 D.L.R.(4th) 729 (1992).

<sup>274</sup> See *id.*

men was abused on the basis of her membership in a particular social group of Trinidadian women.<sup>275</sup> The court stated:

A question may be posed for the future: since, in this context, persecution must be feared by reason of membership in a particular social group, can fear of that persecution be the sole distinguishing factor that results in what is at most merely a social group becoming a particular social group?<sup>276</sup>

The fact of gender persecution may suffice to convert what might otherwise be a statistical group into a social group.

In *Cheung v. Canada (M.E.I.)*,<sup>277</sup> the appellant fled China after giving birth to her second child in order to escape forced sterilization as she had violated China's one-child policy.<sup>278</sup> The Federal Court of Appeal in Canada granted Cheung the relief she sought<sup>279</sup> and referred to the decision in *Mayers v. Canada*<sup>280</sup> for guidance.<sup>281</sup> The court concluded that women in China who have more than one child and are faced with forced sterilization constitute a particular social group.<sup>282</sup> Nevertheless, the court emphasized that not all women in China who have more than one child qualify for refugee status: "[i]t is only those women who *also* have a well-founded fear of persecution as a result of that who can claim such status."<sup>283</sup>

<sup>275</sup> See *id.* at 739 (holding that the fear of spousal abuse along with the indifference of the authorities was equivalent to persecution).

<sup>276</sup> *Id.* at 739.

<sup>277</sup> 102 D.L.R.(4th) 214 (1993).

<sup>278</sup> See *id.* at 216-17. The INA has recently been amended the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-546-724 (1997). Section 601(a) amends the definition of refugee in INA § 101(a)(42), 8 U.S.C.A. § 1101(a)(42) (West 1988). See *supra* note 7. The amendment states:

For purposes of determination under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Illegal Immigration Reform and Immigrant Responsibility Act § 601(a)(1), 110 Stat. 3009-546, 689 (codified as amended at 8 U.S.C.A. 1101(a)(42)(B) (West Supp. 1997)). See also *In re CY-Z*, Int. Dec. 3319 (B.I.A. 1997), available in 1997 WL 353222, where the applicant's wife was forcibly sterilized against her will in China, and he claimed that "he was persecuted in China on account of his opposition to China's birth control policies." *Id.*

<sup>279</sup> See *id.* at 222-23 (granting Cheung an appeal on the basis that the court erred in not finding that Cheung had a well-founded fear of persecution due to membership in a particular social group).

<sup>280</sup> 97 D.L.R.(4th) 729 (1992).

<sup>281</sup> See *Cheung*, 102 D.L.R.(4th) at 219.

<sup>282</sup> See *id.* For a discussion of enforced birth control in China, see WOMEN IN CHINA, *supra* note 57, at 23-25.

<sup>283</sup> See *Cheung*, 102 D.L.R.(4th) at 220 (emphasis added).

D. *Floodgates? Slippery Slope?*

The floodgates and slippery slope arguments are often put forward in opposition to accepting women or gender as a particular social group in the context of asylum law.<sup>284</sup> These objections are incorrect, because the potential size of the group preempts considering the merits of such a claim and results in a negation of the spirit of the asylum laws. It is, therefore, correctly stated that the "[f]loodgate' arguments appeal more to fear than analysis."<sup>285</sup> The establishment of a particular social group of which one is a member is only one of the several requirements that need to be found when granting relief. The mere fact that a social group is established does not preclude inquiring whether the applicant was actually persecuted or has a well-founded fear of persecution. To be granted the discretionary relief of asylum, an applicant must establish that she has been persecuted in the past or has a well-founded fear of future persecution *on account of* her race, religion, nationality, or membership in a particular social group or political opinion.<sup>286</sup> The offensive nature of the persecutory acts, in and of themselves, do not establish statutory eligibility for asylum.

Thus, a woman fleeing gender-based persecution cannot simply point to oppressive, discriminatory laws and customs. She must establish that she reasonably fears persecution, and some courts require proof of being an identifiable target. For example, in *Gomez v. Immigration & Naturalization Service*,<sup>287</sup> the applicant had to demonstrate that she was more likely to be persecuted than any other young woman.<sup>288</sup> In *Sanchez-Trujillo v. Immigration & Naturalization Service*,<sup>289</sup> the court required that "the evidence . . . be specific enough to indicate that the alien's predicament is appreciably different from the dangers faced by the alien's fellow citizens."<sup>290</sup> It is submitted that requiring the applicant to prove that she is singled out for persecution is unreasonable and unsound.<sup>291</sup> Victims

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<sup>284</sup> Note the argument that there are comparatively few asylum claims based on gender or sexual orientation in other signatory countries that recognize social groups, compared to the other claims for asylum, thereby suggesting that the fear of floodgates is unfounded. See Godfrey, *supra* note 86, at 282-83.

<sup>285</sup> Neal, *supra* note 29, at 241 n.192.

<sup>286</sup> See *supra* notes 7, 11 and accompanying text.

<sup>287</sup> 947 F.2d 660 (2d Cir. 1991).

<sup>288</sup> See *id.* at 664.

<sup>289</sup> 801 F.2d 1571 (9th Cir. 1986).

<sup>290</sup> *Id.* at 1579 (quoting *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986)).

<sup>291</sup> See Bower, *supra* note 49, at 203

of genocide would have no recourse, because of their inability to show that they have been isolated or targeted for persecution.<sup>292</sup>

Further, under the statutory requirements of United States asylum law, an applicant will also need to establish that the acts of persecution or anticipated persecution have been — or will be — committed either by government officials or entities that the government either cannot or will not control.<sup>293</sup> The applicant must provide the bridging explanation in the form of evidence, either direct or circumstantial, of the persecutor's motive for harming her.<sup>294</sup> To accept women or gender as a social group would not result in a dilution of the definition of refugee or the boundaries of the particular social group category. Asylum is an individual, not a group, remedy. The discretionary grant may be denied even though the other criteria stated above are satisfied.

Moreover, it is submitted that granting asylum is an affirmation of a human rights violation in the country from which refuge is sought. In so granting this relief, it might bring pressure to bear on the offending country to either alter their laws and remedy the abuse, or, if applicable, to ensure the enforcement of existing laws that purportedly address and prevent the wrongs committed. It is argued that by granting asylum, the "real problem" is ignored by "condoning" the offensive acts in the country permitting the persecution.<sup>295</sup> The efforts should be aimed, therefore, at remedying the situation in the offending country.<sup>296</sup> Meritorious that might be, however, it is submitted that the focus must be to alleviate the condition of those persons who have been or will be persecuted. As a secondary measure, the focus must be on addressing the abuses in the persecuting country.<sup>297</sup> As stated above, granting asylum might be a subtle way of concurrently achieving the secondary objective.

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<sup>292</sup> See *id.* (explaining that "denial of asylum to those at risk on account of collective persecution allows despotic regimes to eliminate members of the collectively persecuted group one by one until none remain[, therefore] victims of genocide would . . . fall outside the scope of so restricted a definition of refugee." (quoting Theodore N. Cox, "Well-Founded Fear of Being Persecuted": *The Sources and Application of a Criterion of Refugee Status*, 2 BROOK. J. INT'L L. 333, 350 n.107 (1984))).

<sup>293</sup> See *supra* note 51 and accompanying text.

<sup>294</sup> See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

<sup>295</sup> See Godfrey, *supra* note 88, at 286-87.

<sup>296</sup> See *id.* at 287.

<sup>297</sup> See *id.* ("Although it may be equally important from a humanitarian perspective to direct relief toward the cause of the problem, this realization should not preclude aiding those who have already suffered from the effect of the problem.").

## VI. PRACTICAL CONSIDERATIONS

As a practical matter, there may be obstacles in establishing a gender-based claim of asylum. It is imperative to have knowledge of the human rights conditions in the country from which relief is being sought. In particular, advocates must be familiar with the laws, cultural, religious, and social mores that pertain to women.<sup>298</sup> If there are any statistical materials relating to rape, battery, murder, sexual assaults, and the failure of the legal system in the country to respond to such offenses, they should be introduced into evidence.<sup>299</sup> Victims of violence are often reluctant to narrate their experiences, or they may find great difficulty in doing so.<sup>300</sup> This may be combined with feelings of humiliation and a lack of trust.<sup>301</sup> It is essential for advocates to understand these feelings and provide other evidence to overcome any shortfalls in the applicant's written and/or oral testimony.<sup>302</sup>

In most asylum cases, corroborative evidence of the persecutory behavior and the harm suffered is often unavailable, and gender-based claims are no exception.<sup>303</sup> To the extent that there are medical reports, police reports, or other communications that support the claim, these must be submitted into evidence.<sup>304</sup> If the claim states that there is no state protection — or there is state complicity — from the feared acts, then documentation supporting the failure to protect, or the prevalence of laws/customs endorsing or condoning this type of behavior, must be obtained.<sup>305</sup> Although regulations recognize the difficulty that applicants face

<sup>298</sup> See *UNHCR Guidelines on the Protection of Refugee Women*, *supra* note 21, ¶ 73.

<sup>299</sup> See *id.*

<sup>300</sup> This may be attributed to Post Traumatic Stress Disorder ("PTSD"), Rape Trauma Syndrome, or Battered Spouse Syndrome. See Goldberg, *supra* note 163, at 14-15 (stating that women suffering from these syndromes may be reluctant to speak, and may display a lack of trust and an inability to recall details of traumatic experiences). For further discussion of the symptoms of Rape Trauma Syndrome, see *CANADIAN GUIDELINES*, *supra* note 48, at 16 n.16, and Castel, *supra* note 12, at 46-7. See also *UNHCR Guidelines for the Protection of Refugee Women*, *supra* note 29, ¶ 72 (providing "gender-sensitive techniques" helpful in obtaining "information from women during the status-determination process"). The *INS Guidelines on the asylum petitions submitted by women* also address these issues. See *INS GUIDELINES*, *supra* note 170, at 4-7.

<sup>301</sup> See Goldberg, *supra* note 163, at 14-15.

<sup>302</sup> See *id.* at 15 (stating that experts should be used to verify the psychological and physical condition of the client, and legal, medical, or other reports should be used to show the client attempted to obtain help, treatment, or protection).

<sup>303</sup> See *id.* (providing a list of the types of evidence that should be presented to show persecution and the harm).

<sup>304</sup> See *id.*

<sup>305</sup> See *id.* (advocating that human rights reports, experts, and sociological studies be presented in order to document the persecution experienced by the client (and women in general) in the home country, and arguing that any laws, reports, or studies from the home country also be presented in order to support the client's claim).



in obtaining proof of their feared persecution,<sup>306</sup> supporting corroborative evidence will be vital for success in an innovative, path-breaking claim.<sup>307</sup>

### VIII. CONCLUSION

It is in keeping with the essence and purpose of asylum law to recognize and accept women as a particular social group who face gender-based persecution. It is also critical to accept violence against women as persecution. To dismiss gender-based violence as a private matter or a mere personal conflict constitutes a rigid, unfounded approach, which results in the discriminatory application of asylum laws to women refugees. Further, a narrow perspective defeats the humanitarian spirit of those laws.

If violence against women is acknowledged as constituting gender-based persecution, women applicants who are persecuted and discriminated against will be more likely to satisfy the criteria for eligibility within the statutory framework. The present legislation, both in the United States and internationally, can accommodate these claims within the existing infrastructure. There must be, however, a concerted effort by governments, international organizations and institutions at all levels to positively promote the basic human rights of women, and to take definitive steps that will narrow the gap between rhetoric and reality in affirming human rights as women's right.

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<sup>306</sup> See CANADIAN GUIDELINES, *supra* note 48, at 8 (recognizing that "claimant[s] may have difficulties in substantiating . . . claim[s] with any 'statistical data' on the incidence of sexual violence in her country[.]" when the perpetrators are government officials, or private citizens who are not controllable by the state, and arguing that the weight and credibility of the evidence must be evaluated in the light of those circumstances).

<sup>307</sup> See 8 C.F.R. § 208.13(a) (1993) (stating that "[t]he testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration.").

